

# How to benefit from the Cambodia- Malaysia Double Tax Agreement (DTA)

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## Introduction

If you are a Malaysian businessman in Cambodia or you intend to invest in Cambodia, we have good news for you! Malaysia entered into a double tax agreement (DTA) with Cambodia (CAMMAL DTA) which came into force on 1 January 2021.

With this DTA, Malaysian businessmen will need to pay less Cambodian withholding taxes when repatriating their profits to Malaysia, in addition to enjoying other taxation benefits. Have a read of the commentary below and see how you can benefit. For the sake of easy reading, this article has simplified some of the technical terms in the DTA.



### 1. Lower withholding tax rates

#### Previously

Payments of dividends, interest, royalties and technical fees by a Cambodian company to a Malaysian company are subject to Cambodian withholding taxes at the rate of 14% of the gross payment, based on Cambodian tax law.

#### With CAMMAL DTA in force:

With the coming into force of the CAMMAL DTA, the withholding tax rates on dividends, interest, royalties and technical fees will be reduced to 10%.

Technical fees are defined as fees for services of a technical, managerial or consultancy nature but exclude fees for independent personal services (i.e. services carried out by an individual as an independent professional as opposed to services carried out on behalf of his employer). This definition should cover payments for architect fees, engineering fees, accounting fees and legal fees charged by Malaysian businesses. However, fees which are not for services of a technical, managerial or consultancy nature (e.g. administrative charges) will not enjoy this favourable withholding tax rate.



## 1. Lower withholding tax rates (cont.)

### Implications

This DTA treatment will give a significant saving of Cambodian withholding taxes of 29%  $[(14-10)/14 = 29\%]$  for Malaysian investors when they repatriate profits back from Cambodia to Malaysia. Malaysian investors can do their own calculations as to which route is best to repatriate profits e.g. dividends, interest, royalties and/or technical fees.

For some investors, the routes are limited. Although the tax exposure in Cambodia is reduced, the said profits repatriated to Malaysia may be taxable in Malaysia. The exposure to taxation in Malaysia is generally as follows:

Dividends	Not taxable in Malaysia.
Interest income	Not taxable in Malaysia if the interest was paid in respect of a loan used in Cambodia.
Royalties	May not be taxable in Malaysia if certain conditions are met.
Technical fees	Taxable in Malaysia if the technical fees are considered to be sourced from Malaysia.

If any of the above income is subject to Malaysian income tax, the Cambodian withholding tax paid will be allowed to be set off against the Malaysian income tax as a double taxation relief against the Malaysian tax payable. The amount of setoff will be limited to the Malaysian income tax suffered on the said income.

Due to the intricacies of the computation of double tax relief in Malaysia, Malaysian investors may not get the full relief for the Cambodian withholding tax deducted in certain circumstances.



## 2. Easier not to be taxable when doing business in Cambodia

### Previously

Previously, the following types of income of a Malaysian party are taxable in Cambodia:

#### Income from services performed in Cambodia

Under Article 33 of the Law on Taxation of Cambodia (LOT Cambodia), if a Malaysian party derives income from services performed in Cambodia, the Malaysian party is taxable on this income even if he does not have a fixed place of business in Cambodia. The tax is usually collected via Cambodian withholding tax which the Cambodian payer has to pay to the Cambodian tax authorities when the Cambodian payer remits the income to the Malaysian party.



#### Income from business activities

Under Article 33 of the LOT Cambodia, the income from business activities carried on by a Malaysian party (who is a Cambodian non-resident for tax purposes) through a permanent establishment (PE) in Cambodia is treated as sourced in Cambodia and therefore is taxable in Cambodia. A PE is defined as a fixed place of business in Cambodia, the branch of a foreign company or an agent resident in Cambodia, through which the non-resident person carries on his business in Cambodia. A PE also includes any other association or connection through which the Malaysian party engages in economic activity in Cambodia. This means for non-service income, the Malaysian business must have a PE in Cambodia in order to be taxable in Cambodia on its income.





## 2. Easier not to be taxable when doing business in Cambodia (cont.)

### Previously

The Prakas on Profit Tax (a Ministerial Declaration) further defined a PE to include the following:

- i) a place of management in Cambodia;
- ii) a building site, a construction project or an assembly project in Cambodia, or supervisory activities connected to such site or project, where such site or project or activities continue for a period of more than 6 months;
- iii) the furnishing of services including consultancy services by the employees or other personnel of a Malaysian business where such activities continue within Cambodia for period(s) exceeding 6 months in any 12 month period;
- iv) The use of an agent in Cambodia if the Malaysian person satisfies one or more of the conditions below:



- The agent has and regularly exercises the authority to conclude contracts in Cambodia on behalf of a Malaysian business;

- The agent regularly maintains in Cambodia a stock of goods or merchandise from which he regularly delivers or supplies such goods or merchandise on behalf of a Malaysian business.

### With CAMMAL DTA in force:

With the CAMMAL DTA in force, a Malaysian party will only be taxable on its profits from its Cambodian business activities in the circumstances described below.

#### a) A Malaysian party is only taxable if he has a PE in Cambodia

With the CAMMAL DTA in force, a Malaysian businessman or a Malaysian company will only be taxable in Cambodia on his profits if he does business in Cambodia through a PE in Cambodia. A PE is a fixed place of business and includes a place of management, branch, office, factory, workshop, warehouse, mine, gas well, oil well, quarry, farm and plantation.



## 2. Easier not to be taxable when doing business in Cambodia (cont.)

### With CAMMAL DTA in force:

#### b) Grey areas

If the Malaysian party does not have a PE in Cambodia, he cannot be taxed on his income from Cambodia even though the income is clearly derived from Cambodia. There are, however, some grey areas as to whether the Malaysian party is liable to Cambodian tax on his income. Examples would include situations where a Malaysian person sends his staff to Cambodia on an irregular basis or who only has minimal business presence in Cambodia such as renting a warehouse for a short period for his business activities.

For these grey areas, the CAMMAL DTA has stated that the following activities are also considered to be a PE in Cambodia:

##### i. Presence of more than 9 months

If the Malaysian party has certain activities (i.e. a building site, a construction, installation or assembly project or supervisory activities in connection with these projects) which last for more than 9 months, his presence would constitute a PE. In the existing Cambodian local law, the applicable period is only 6 months. Compared to the existing Cambodian tax law, the DTA specifies a longer period before a Malaysian business is considered to have a PE in Cambodia (i.e. 9 months versus 6 months).

##### ii. 183 days in any 12-month period

The activities below are considered to be PEs if the Malaysian party spends more than 183 days in any 12 month period in Cambodia:

- the furnishing of services by a business through employees or other personnel of the business if the services continue in aggregate for more than 183 days in a 12 month period, would constitute a PE. In the existing Cambodian tax law, a Malaysian party is considered to have a PE in Cambodia if the Malaysian party furnishes services in similar manner for period(s) exceeding 6 months in any 12 month period. There is therefore no difference between the Cambodian tax law and the DTA.
- the carrying on of exploration or exploitation activities (including the operation of substantial equipment) in Cambodia for more than 183 days in a 12 month period, would constitute a PE. Under Cambodian tax law, a mine of whatever duration can be considered as a PE.
- the operation of substantial equipment within Cambodia e.g. tractors for more than 183 days in a 12 month period would constitute a PE. The Cambodian tax law is silent on this.



## 2. Easier not to be taxable when doing business in Cambodia (cont.)

### With CAMMAL DTA in force:

#### c) Not PE

The following activities are not considered to be a PE in Cambodia according to the CAMMAL DTA:

- i. Use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the business in Cambodia. This means that no sales are being undertaken in Cambodia. Instead, the Cambodian facilities are used mainly as a store or a showroom.
- ii. Maintenance of a stock of goods belonging to the Malaysian business solely for the purpose of storage or display. This means that no sales are being undertaken in Cambodia. Instead, the Malaysian party merely stores his goods in a Cambodian premise or displays his goods in a showroom.
- iii. Maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise. This means that the goods are not for sale in Cambodia but will be sent back to Malaysia or to other countries after processing by an independent party in Cambodia.
- iv. Maintenance of a fixed place of business solely for the purpose of purchasing goods or of collecting information, for the business. This means that the Cambodian premises are merely used as a procurement office or information collection office.
- v. Maintenance of a fixed place of business solely for the purpose of carrying on any other activity of a preparatory or auxiliary character. This means that the activities are preliminary activities prior to full-fledged business activities in Cambodia.
- vi. Maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (i) to (v), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character. This means that the Malaysian party can carry out any combination of the above activities, but such activities are preliminary activities prior to full-fledged business activities in Cambodia.



#### Implications

With the implementation of the CAMMAL DTA, it will be more difficult for Malaysian businesses to be treated as doing business in Cambodia if their activities are within the parameters mentioned above.



### 3. No significant change in exposure to tax in Cambodia when a Malaysian does business in Cambodia through an agent

A Malaysian business can sell goods to Cambodia in the following ways:

- (i) Sells goods directly to Cambodian consumers without the use of any agents or distributors. The orders are taken in Malaysia and the goods are delivered via courier from Malaysia or via a warehouse in Cambodia.
- (ii) Sells goods to distributors in Cambodia and the Cambodian distributors in turn sell the goods to final consumers. The Cambodian distributors are not related to the Malaysian business.
- (iii) Sells goods to a single distributor in Cambodia and this single distributor in turn sells the goods to other distributors or to final consumers. This single distributor may be a distributor for other products besides those of the Malaysian business.
- (iv) Sells goods to a single distributor in Cambodia who represents the Malaysian business exclusively in Cambodia.



The agents or distributors in (ii) and (iii) above are usually considered as non-dependent agents for tax purposes whereas the agent or distributor in (iv) can be considered to be a dependent agent if certain conditions are met (see next page).

#### Previously

##### a) Agent

Previously, the income of a Malaysian business is taxable in Cambodia if the Malaysian business does business through an agent who is resident in Cambodia. The reason for the tax exposure is because the Cambodian tax law stated that the following income is taxable in Cambodia:

*Income from business activities carried on by a Malaysian person or business provided that the business is carried out through a permanent establishment (PE) in Cambodia. A PE is defined as a fixed place of business in Cambodia, the branch of a foreign company or **an agent resident in Cambodia**, through which the non-resident person carries on his business.*



### 3. No significant change in exposure to tax in Cambodia when a Malaysian does business in Cambodia through an agent (cont.)

#### Previously

The Prakas on Profit Tax (a Ministerial Declaration) further states that a Malaysian person is considered to have a PE in Cambodia if the agent satisfies one or more of the conditions below:

- (i) The agent has and regularly exercises the authority to conclude contracts in Cambodia on behalf of a Malaysian business;
- (ii) The agent regularly maintains in Cambodia a stock of goods or merchandise from which he regularly delivers or supplies such goods or merchandise on behalf of a Malaysian business.

This type of agent is usually referred to as a “dependent agent” for double tax treaty purposes. Hence, a Malaysian party which does business by using a “dependent agent” will be treated as having a PE in Cambodia and therefore taxable on his profits derived from Cambodia.

#### b) Dependent agent

The above dependent agent provisions refer to situations where a Malaysian party sells goods to Cambodian customers with the help of a dependent agent in Cambodia. The sales are recorded by the Malaysian party in Malaysia whilst the agent receives a commission for his services.

Alternatively, the Malaysian party will record its sales to the Cambodian agent and declare the income to tax in Malaysia. Correspondingly, the Cambodian agent will record its sales to Cambodian customers in Cambodia and declare the income to tax in Cambodia.

Through this sales model, the Malaysian party does not appear to have a business presence in Cambodia. Instead, it uses the agent as its arms and legs in Cambodia. However, Cambodian tax law states that this type of business arrangement will constitute a PE and thereby exposes the Malaysian party to tax in Cambodia if the agent is a dependent agent.





### 3. No significant change in exposure to tax in Cambodia when a Malaysian does business in Cambodia through an agent (cont.)

#### With CAMMAL DTA in force:

The CAMMAL DTA has not changed the provisions relating to PE laid out in the Cambodian tax law substantially. For example, a Malaysian party will not be treated as having a PE in Cambodia and therefore is not taxable on its profits in Cambodia if the agent is an independent agent. An independent agent is one who does not fulfill the conditions of being a dependent agent. He is likely to be an agent who does not act exclusively for the Malaysian party but acts as an agent for many parties.

However, the CAMMAL DTA states that if an agent meets any of the conditions below, the Malaysian party who engages that agent will be considered to have a PE in Cambodia and therefore is taxable on his Cambodian profits. The conditions are:

- The agent has and habitually exercises in Cambodia an authority to conclude contracts in the name of the Malaysian party; or
- The agent has no such authority, but habitually maintains in Cambodia a stock of goods from which he regularly delivers goods on behalf of the Malaysian party; or
- The agent manufactures or processes goods belonging to the Malaysian party in Cambodia.

From the above, one will note that the provisions relating to “dependent agent” in the Cambodian tax law and the DTA appear to be similar. In fact, one will note that 3.2 (a) and 3.2 (b) above in the DTA are identical to the Cambodian tax law.

The only difference is that an agent (i.e. other than an independent agent) who manufactures or processes goods belonging to a Malaysian party in Cambodia can be treated as a PE too, in which case, the Malaysian party will be taxable on its profits in Cambodia. This last provision may be a minefield for Malaysian investors and is a potential risk that they need to be careful about.



#### Implications

With this DTA, a Malaysian business selling goods to Cambodian customers may be more likely to be caught under Cambodian tax if the Malaysian business engages a Cambodian agent exclusively to manufacture or to process goods belonging to the Malaysian party in Cambodia. Otherwise, Malaysian businesses are not affected by the coming into force of the CAMMAL DTA.



## 4. Some capital gains made by Malaysian investors may not be subject to tax

### Previously

Previously, when a Malaysian person disposes of assets in Cambodia, his exposure to Cambodian tax is as follows:

Malaysian party	Exposure of capital gains to Cambodian tax
The Malaysian person sells shares in a Cambodian company	If a Malaysian individual or company sells shares in a Cambodian company, the gains are not taxable in Cambodia. However, if the Cambodian company has retained profits, the retained profit that relates to the shares transferred is considered to be a distribution of dividend. This distribution of dividend is subject to withholding tax of 14% for non-resident shareholders. In addition, the Cambodian government has proposed a capital gains tax law in 2020 to tax capital gains but the law will only be implemented on 1 January 2022.
The Malaysian person sells landed property e.g. a factory situated in Cambodia	Taxable in Cambodia if the property is situated in Cambodia.
The Malaysian person sells movable property situated in Cambodia e.g. motor vehicles	Taxable in Cambodia if the movable property forms part of the business assets of a business that he carries on in Cambodia.





#### 4. Some capital gains made by Malaysian investors may not be subject to tax (cont.)

##### With CAMMAL DTA in force:

The CAMMAL DTA will not change the taxability position of a Malaysian person mentioned above except if the Malaysian person sells shares in a Cambodian company.

Under this scenario, the DTA provides that the capital gains on disposal will only be taxable if the shares derive more than 50% of their value directly or indirectly from immovable property situated in Cambodia. At present, such capital gains on disposal are not taxable and hence, this DTA provision does not change the tax position of the Malaysian person.

However, when the capital gains tax law in Cambodia is introduced on 1 January 2022, the Malaysian person should only be taxable on the capital gains if the shares that he disposed of derive more than 50% of their value from immovable property situated in Cambodia. Otherwise, the capital gains should not be subject to Cambodian tax.

At this juncture, it is not certain whether the deemed distribution of retained profits as dividends that are subject to Cambodian withholding tax of 14% will still apply when the DTA comes into force.



##### Implications

The DTA will be positive for Malaysian investors because they will be shielded from tax on capital gains from disposal of shares in Cambodian companies unless the shares derive more than 50% of their value from immovable property situated in Cambodia.



#### 5. Other issues

Due to limitation of space, there are provisions in the DTA that are not covered here. These provisions may conflict with domestic Cambodian tax law in which event, the DTA provisions will override domestic law according to international rules of interpretation. Should users need assistance on these provisions, please contact Crowe Cambodia or Crowe Malaysia directly.



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