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No. 164 : Cabinet Endorses Draft Transfer Pricing Law

It is becoming real. Prudence, not haste, is warranted. But, tardiness is not an option.

On 3 January 2018 Cabinet endorsed the draft transfer pricing law. Key issues in the draft are summarised as follows:

1. Taxpayers and Their Duties

- a) Related companies are required to submit reports about the relationships between companies and the number of the related party transactions during the given accounting period. The transfer pricing forms must be submitted to the Revenue Officers within the period specified by the Director-General. [Section 71 ter, Paragraph 1]
- b) Failure to submit the required documents and evidence, or their incomplete or incorrect submission without justifiable cause, will constitute a criminal penalty punishable by a fine exceeding Baht 200,000. [Section 35 ter]
- c) Companies with related party transactions and total revenues during the given accounting period that are less than the minimum income threshold are exempt from filing transfer pricing forms. The threshold will be announced by Ministerial Regulation, but must not exceed Baht 30 million. [Section 71 ter Paragraph 1]

2. Power of the Revenue Department

- a) Revenue Officers are empowered to assess revenue or expenses to the levels that the companies should earn or expend in the case that their contracting parties were independent companies. Such tax assessments must take into account the elimination of double taxation. [Section 71 bis Paragraph 1]
- b) Within five years after submission of the transfer pricing form, Revenue Officers may notify the companies to submit documents or evidence necessary to analyze transfer prices of their related party transactions. Companies have 60 days to submit such documents/evidence. The submission period can be extended, but must not exceed 120 days from the notification date by the Revenue Department. [Section 71 ter Paragraph 2]

3. Next Steps

- a) The Office of the Council of State proposed that the new transfer pricing law will apply to the accounting period beginning 1 January 2017 in order that filings to the Revenue Department will commence from 31 May 2018. However, Cabinet concluded that the transfer pricing law should not have retroactive effect. Thus, Cabinet has assigned the Ministry of Finance and the Office of the Council of State to reconsider a new effective date.

- b) The draft transfer pricing law must be submitted to the National Legislation Assembly (NLA) for consideration and enactment.

Present Timeline for the Draft Transfer Pricing Law

Date	Actions
7 May 2015	Cabinet approved, in principle, a draft transfer pricing law as proposed by the Ministry of Finance, and then forwarded the draft for a review by the Office of the Council of State.
20 June – 7 July 2017	Revenue Department held a public hearing for the revised draft transfer pricing law.
31 October – 13 November 2017	Revenue Department analysed the impact of the transfer pricing law.
3 January 2018	Cabinet approved a draft transfer pricing law as proposed by the Office of the Council of State, and forwarded it to the National Legislation Assembly for consideration.

Author's Note:

i Compared to the two-year review by the Office of the Council of State, the five-month public hearing and analysis processes of the Revenue Department were swift. Impressively, Cabinet completed the approval process during the festive month of December. By this stage, it was predictable that this draft would be forwarded to the NLA. The legislative process at the NLA usually takes about a year. That being said, it would not be a surprise if enactment of this transfer pricing law came earlier.

The draft transfer pricing law determined the minimum income threshold at a mere Baht 30 million (USD 1.0 million) revenue per year. Hence, it is likely that not only will multinational enterprises with international dealings be required to submit transfer pricing reports, but a significant number of Thai corporates that have inter-company transactions with local related companies (no matter how tiny the transactions are) will also have to do so. If not, they will be subject to a fine of Baht 200,000.

With the current conditions, it is expected that the Revenue Department will be bombarded with transfer pricing reports every year. But, in light of these high volumes, Revenue Officers will have plenty of opportunities to identify transfer pricing audit targets.

Look before you leap – To prepare for the disclosure of information related to transfer pricing practices, it would be prudent for companies to review possible transfer pricing risks and, if necessary, map out a course of action to minimize such risks. The companies should review the characterisation of their businesses in light of the functional profile and industry circumstances, and subsequently validate the appropriateness of the transfer pricing methods compared to those of uncontrolled entities.



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No. 165 : Post Clearance Audit Regulation

Since enforcement of the Customs Act B.E. 2560 on 13 November 2017, the Thai Customs Department has been gradually issuing secondary legislations and/or regulations to be applicable under this new Customs Act. Customs Notification No. 171/2560, RE: Post Clearance Audit at Places of Business (“Notification,”) is one among such regulations.

The Customs Department never published any official regulations related to the post customs audit. We were then, familiar with the customs audit practices that there is no time limitation for their audit process and uncertainty what next steps could be. It is believed that Notification, effective 27 November 2017, will provide efficiency, transparency and fairness during the customs audit process.

This edition discusses interesting aspects of this Notification.

1. Customs Officer’s Authority

Customs Officers can enter into places of business of the following business operator:

- (1) importer or exporter;
- (2) courier of the goods acting for an importer or exporter;
- (3) representative of an importer or exporter of a courier; and
- (4) those related to importation or exportation

Moreover, Customs Officers can require the accounts, documents, evidences and other data related to goods that going through the Customs Clearance process or already get through the Customs Clearance process, including other things related to importation or exportation goods of a business operator for audition’s purpose.

2. Post Customs Audit

A business operator can expect a post customs audit at their commercial premises after receiving the relevant notification letter from the Customs Department.

According to the Notification, the Customs Department, under normal circumstances, would issue a notification letter no less than 10 days prior to the intended date of entry to the premises. At least three Customs Officers will enter the premises, one of whom will be a Customs academician from the Customs Department.

Customs Officers, according to the Notification, must finish the audit within 10 business days of their entry. This period may be extended only three times, for periods of no more than 10 business days per extension. The maximum total timeframe should not be more than 40 business days.


From the date of entry to the premises until the completion, if no Customs offence has been committed or where there is no evidence of the same, Customs Officers will make a memorandum for a business operator as an evidence. Customs Officers will then close the customs audit process.

However, if there are any suspicions or any evidences that a Customs offence may have been committed by a business operator, Customs Officers may audit the required documents, accounts, etc. within the timeframe of entering into a place of business's day.

If such audit cannot be completed within the day mentioned above, a Customs Officer may seal required data in a box with Gor Sor Gor's paper and sign together with a business operator, such box will be kept at Customs Office. A Customs Officer must open such box within 15 days, such timeframe may extend for another 15 days. If 30 days' timeframe is end, a Customs Officer may set a team and open such box in front of Police Officers.

After open a data's box, Customs Officers must audit all required documents, accounts, data etc. within 90 days, such timeframe may extend by the approval of a commander for not more than 2 times, provided 90 days for each time. The maximum timeframe on this process should not be more than 270 days (around 9 months). After a limited period is end, Customs Officers must issue an assessment letter within 7 days from the date of completion of a customs audit, if he or she discover any offence.

Author's Note:

 *This Notification provides us our rights, process and timeframe of a Customs Officers for a post clearance audit. A related entrepreneur on a business that related to importation or exportation shall learn the Notification, in order to know what should be happened during the audit process of a Customs Officer. Please note that, this Notification is exclusive from a Customs Investigation, the Customs Department issues the separate notification for a Customs Investigation.*



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No. 166 : Stamp Duty, a sometimes bitter pill

Business people are routinely unaware of Stamp Duty and the ways and means needed to comply. As a result, they find themselves not only owing Stamp Duty, but also a surcharge that can be considerably expensive. It does not have to be that way. In this edition, we provide an overview of Stamp Duty in Thailand. We also spotlight hire-of-work agreements, as these service instruments are notorious for snagging contract parties into considerable tax liability.

▪ Principle of Stamp Duty

Stamp Duty is taxed on an instrument, not on a transaction or on people. Section 103 of the Revenue Code defines "instrument" as any document chargeable with a duty. Thus, only instruments listed in the Stamp Duty Schedule are subject to Stamp Duty at their corresponding rates. For example, transfers of land are taxed at the rate of 0.5% of the transfer price; leases of land at the rate of 0.1% of the lease fee; transfers of shares at the rate of 0.1% of the transfer price; loan agreements at the rate of 0.1% (capped at Baht 10,000); and hire-of-work agreements at the rate of 0.1% of the fees, among others.

The Revenue Department and the Tax Court interpret "instrument" upon which Stamp Duty is levied as formal agreements to which two or more parties sign. According to these authorities, "instrument" includes correspondence documents that incorporate an agreement, such as purchase orders and invoices, but does not include unilateral documents, e.g. evidence of a loan signed only by the borrower.

Persons liable to pay Stamp Duty are commonly one of the parties associated with the particular instrument. The liable person can pay Stamp Duty in three ways: (1) affixing stamps to the document (2) using stamps impressed on a paper and (3) paying in cash by using Form Aor. Sor. 4. However, the Director-General of the Revenue Department requires that Stamp Duty for certain instruments be paid in cash, e.g. transfers of land, hire-of-work with fees at the rate of Baht 1 million or more.

Typically, Stamp Duty is owed upon instruments listed in the Stamp Duty Schedule at their time of execution. Where an instrument is executed in Thailand, Stamp Duty must be paid by the above procedures within, at most, 15 days from the execution date. Instruments executed outside of Thailand are not subject to Stamp Duty until being brought into Thailand. The first holder of the instrument in Thailand must pay the entire

required Stamp Duty within 30 days of receiving the instrument, under Section 111 of the Revenue Code.

Late payment of Stamp Duty can incur the following surcharges.

Late Payment	Maximum Surcharge
16 days to 90 days	Two times the amount of Stamp Duty owed
More than 90 days	Five times the amount of Stamp Duty owed

Apart from the taxpayers voluntarily pay Stamp Duty and surcharge mentioned above. During a tax investigation, Revenue Officers can impose a surcharge of up to six times the amount of Stamp Duty owed.

■ Stamp Duty on Hire-of-Work Agreement

Hire-of-Work agreements pose the greatest Stamp Duty tax risk. Even business people acutely aware of stamp duty obligations often find themselves in a quandary of Stamp Duty surcharges because they misunderstand the ambiguous nature of hire-of work agreements.

Theoretically, a hire-of-work agreement is defined under the Civil and Commercial Code but in practice, the Revenue Department broadly defines hire-of-work. As such most service agreements (e.g. warehousing service agreements and support services agreements) become considered as hire-of-work.

Stamp Duty payable on a hire-of-work agreement is 0.1% of a remuneration fee. If the remuneration is not known at the time of execution of the contract, the Stamp Duty must be paid on an estimate of the remuneration. Where a remuneration fee is valued at Baht 1 million and upward, Stamp Duty must be paid in cash at the Revenue Office by using Form Aor. Sor. 4.

Among other common misconceptions among taxpayers are the method by which fees are estimated for purposes of paying for Stamp Duty, and whether one can pay Stamp Duty upon each interval of fee payment.

Author's Note:

- i** *Business people and other liable persons need to understand the nature of the agreements into which they enter, for among other reasons, to know whether Stamp Duty is owed on the instrument. In this regard, the importance of knowing the exact of nature of the service agreement cannot be understated. Further, parties need to ensure that they correctly pay Stamp Duty in order to avoid surcharges of up to six times the duty owed, in addition to the Stamp Duty.*



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No. 167 : Thai SMART Visa – All That Glitters Is Not Gold

The Smart Visa immigration scheme went into effect on February 1 of this year. The Smart Visa option reflects government's effort to attract highly-skilled foreigners. The Smart Visa offer targets foreign entrepreneurs, high-level executives, highly skilled employees in science and technology, and investors to work and invest in 10 target industries- automotive, electronics, tourism, agriculture and biotechnology, among them. Government means well in its offer, as it often does. Though, one should consider whether the Smart Visa is a practical immigration scheme or just more "devil in the details."

Benefits Granted under the Smart Visa

According to the Board of Investment, the Smart Visa offers expatriates among the following benefits:

- 1) A maximum 4-year visa, as compared to a current 1 year, [certain conditions apply for Start-Ups];
- 2) No work permit required;
- 3) One annual report to Immigrations authorities, as opposed to the 90-day interval requirement;
- 4) Spouse and children of the Smart Visa holder are eligible to work in Thailand for the term of the Smart Visa granted.

Qualifying Applicants & Brief Overview of Application Procedure

To qualify for the Smart Visa, applicants must fall into one of the following four categories:

Categories	Conditions
1) Highly-Skilled Specialists	<ul style="list-style-type: none"> - Science and technology experts - Salary of at least Baht 200,000 per month - 1- year employment contract - Employer is in a targeted industry
2) Investors	<ul style="list-style-type: none"> - Minimum investment of at least Baht 20 million - Investment must be in companies engaged in manufacturing or provision of services in a targeted industry
3) Senior Executives	<ul style="list-style-type: none"> - Applicant must have a Bachelor's Degree or higher with at least 10 years' work experience - Salary of at least Baht 200,000 per month - 1- year employment contract


Categories	Conditions
	<ul style="list-style-type: none"> - High level executives - Employer is in a targeted industry
4) Start-Ups	<ul style="list-style-type: none"> - Minimum fixed deposit of Baht 600,000 with a remaining maturity of at least 1 year - Health insurance - Participate in endorsed incubation/ or a similar program or earn promotion by a similar relevant government agency - Company is set-up in a targeted industry with 25% of its shareholders being Thai nationals.

After applicants are vetted for the appropriate category, they must electronically upload required documents to an online system. After all support documents are uploaded, applicants must submit hard copies of all documents to the One Stop Services for Smart Visa. Thereafter, applicants can expect a screening process, performed by designated agencies. Where the applicant is an expert in science, for example, the Ministry of Science would conduct the screening.

Once the applicant passes the screening process and receives the endorsement letter from the relevant authority, he or she may get the Smart Visa.

The applicant who lives in Thailand may apply for the Smart Visa at the One Stop Service for Smart Visa. Overseas applicants may apply at a Thai Embassy or Consulate.

Author's Note:

 The Smart Visa seems well intended considering the benefits. However time consuming application process and bureaucratic morass may outweigh any of those benefits.

For example, the applicants must submit a Police Clearance Certificate and Criminal Record Certificate from authorities in their country of origin or from the Royal Thai Police in the case applicants are in Thailand. In the latter case, obtaining the needed clearance may take as long as 7 business days. Further, the official timeframe for screening by designated agencies is mandated to take around 30 working days. However, one can safely assume the process will take much longer. Bear in mind, no current law specifies screening procedures to be carried out by designated agencies. Any lack of regulation almost encourages the likelihood for mismanagement.

In light of the uncertainties, the BOI non-tax privilege regarding visas and work permits may begin to appear more desirable in comparison. The BOI visa application process only takes 2 weeks compared in case of Smart Visa, which possibly takes 6-7 weeks, and provides less paperwork for highly skilled specialist and senior executives. Those likely to benefit from the Smart Visa are investors and start-ups, as, currently, they are ineligible for the BOI's non-tax privilege.



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