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MR. MONCHAI VACHIRAYONSTIEN (PARTNER)

No. 157 : Ease of doing business

On 4 April 2017, the Head of the National Council for Peace and Order (“NCPO”), by virtue of Section 44, the Interim Constitutional of Thailand B.E. 2557, announced in the Government Gazette Order of NCPO No. 21/2560 Re: Amendment to Laws for the Ease of Doing Business. The new law had immediate effect on its publication date.

This Order was announced after the World Bank’s 2016 Ease of Doing Business Index ranked Thailand at 46th out of 190 countries. Higher rankings (a low numerical value) in the index indicate better, usually simpler, regulations for businesses and stronger protections of property rights. According to the ranking, Thailand is moderate in terms of ease of doing business.

This Order is intended to reduce the complexity and complications of procedures, conditions and requirements under certain laws that stymie doing business in the Kingdom. It is also believed that NCPO issued this Order hoping that better conditions will improve Thailand’s ranking in future editions of the World Bank’s index.

The Order amends several points under the following five laws:

1. Bankruptcy Act B.E.2483 (A.D. 1940);
2. Civil and Commercial Code;
3. Labor Protection Act B.E. 2541 (A.D. 1998);
4. Public Limited Companies Act B.E. 2535 (A.D. 1992); and
5. Social Security Act B.E. 2533 (A.D. 1990).

In this article, we focus on amended Sections 1128 and 1201 of the Civil and Commercial Code.

1. Section 1128: Share Certificates

If we closely observe the previous Section 1128 of the Civil and Commercial Code required that an entity’s company seal be affixed to each of its issued share certificates. NCPO, however, considers that a company seal is neither legally material nor necessary for the validation of share certificates. NCPO further reasoned that a company seal, limited in use, imposes significant cost on companies. As such, NCPO removed the need for a company seal from this Section.

As from 4 April 2017, share certificates can be validated by only one signature of a company director to the share certificate. After the effective date of this Order, a Company Affidavit may state that such authorization can be accomplished without the use of a company seal.

2. Section 1201: Distribution of Dividends

The previous Section 1201 of the Civil and Commercial Code did not provide a statutory period for distribution of dividends to shareholders. The period for dividend distribution was at the discretion of the Board of Directors. Shareholders did not have legal rights to claim such dividends from the company. Rather, they had to await the announcement of the Board of Directors. Shareholders sometimes had to wait 3-6 months for the dividend distribution.

Under the newly added Paragraph 4 of Section 1201, effective on 4 April 2017, dividends approved by the Board of Directors must be distributed to shareholders within 1 month from the date of director's resolution at the general meeting or the Board of Directors' meeting date. However, the Criminal Liabilities of Representatives of Corporate Entities B.E. 2560 (A.D. 2017) does not impose penalties against directors for failure to comply with this new Paragraph. Nonetheless, shareholders are still entitled to exercise their rights to file notice or sue the company where they do not receive their dividends within the period required by law.

As from 4 April 2017, the companies with an accounting period ending on 31 December 2016 must immediately comply with this new Paragraph. Dividend distribution for the year 2017 for companies with an accounting period ending on 31 March 2017 must also comply with this new Paragraph.

AUTHOR'S NOTE:

The author emphasizes that companies with an accounting period ending 31 December 2016 must distribute dividends to shareholders within 1 month from the resolution date or the Board of Directors' meeting date. Companies with an accounting period ending 31 March 2017 must also distribute dividends in accordance with this Paragraph 4 of Section 1201.

All amended provisions contained in this NCPO Order underscore its attempt to reduce the complexity and complications of criteria, procedures and conditions associated with doing business in Thailand. The author believes that this Order can potentially facilitate the ease of doing business in the Kingdom. Further, it also helps create the conditions essential for Thailand to become an investment hub. We look forward to more of such improvements in the future.



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No. 158 : Base Erosion and Profit Shifting (“BEPS”) in Action

This year there is a noticeable increase in the number of Japanese subsidiaries in Thailand being requested by their parent multinational companies to prepare local transfer pricing documentation reports. The information is needed to support preparation of new transfer pricing documentation reports required by Japanese tax authorities.

This article discusses the new transfer pricing documentation report required by the Japanese tax authorities, and preparing the local transfer pricing report to contain sufficient information to support the parent company in preparing the new Country-by-Country (“CbC”) Report.

Legal & Institutional Bases for the New Transfer Pricing Documentation

Japan and other countries participating in the OECD/G20 BEPS Project agreed to the implementation of transfer pricing documentation and Country-by-Country (“CbC”) Reporting. Enacted on 29 March 2016, Japan’s 2016 Tax Reform requires ultimate parent companies of Japanese multinational entity (“MNE”) groups, whose consolidated revenues are JPY 100 billion or more, to submit the CbC Report in the year following the fiscal year-end of that ultimate parent company. For instance, a Japanese ultimate parent company with a fiscal year-end of 31 March 2017 must submit the CbC Report by 31 March 2018.

The purpose of the CbC Report is to provide a high-level transfer pricing risk assessment. The tax authorities may use this CbC Report to evaluate other BEPS related risks and, where appropriate, for economic and statistical analysis.

The OCED emphasizes that the information in the CbC Report on its own does not constitute conclusive evidence as to whether transfer prices are or are not appropriate.

Guidelines to Preparing the Local Transfer Pricing Report

The content requirements of the CbC Report by the Japanese tax authorities are in line with the OECD Action 13 Final Report. Thai subsidiaries should make sure that the information provided in local transfer pricing document relates to the Thai entity. In doing so, the entity may use the following Model Template for the CbC Report as provided by the OECD:

- 1) Overview of allocation of income, taxes and business activities by tax jurisdiction:
 - a) Revenues from unrelated and related parties;
 - b) Profits (losses) before tax;
 - c) Income tax paid on a cash basis;
 - d) Income tax accrued – current year;
 - e) Stated capital;
 - f) Accumulated earnings;
 - g) Number of employees; and
 - h) Tangible assets other than cash and cash equivalents.

- 2) List of all the constituent entities of the MNE group included in each aggregation per tax jurisdiction:
 - Tick any of the main activities of constituent entities in the tax jurisdiction (based on the value chain from research & development, holding or managing intellectual properties, purchasing or procurement, manufacturing or production until regulated financial service, insurance, holding shares or other equity instruments as well as dormant.

- 3) Additional information:
 - Add any further brief information or explanations necessary to facilitate understanding of the compulsory information provided in the Country-by-Country Report.

Author's Note

In order to support the parent company in preparing the CbC Report, the Japanese subsidiary in Thailand should proactively prepare a local transfer pricing documentation report that contains necessary information to be filed to the Japanese tax authorities.

As mentioned, the information provided in the CbC Report would not constitute conclusive evidence as to whether group transfer prices are or are not appropriate. However, preparation of a local transfer pricing document report would be a good litmus test as to whether the Thai-Japan transfer pricing practices would pose any risks to the Thai subsidiary or the Japanese parent company. As the case may be, the preparation of local transfer pricing documentation could strengthen the group's tax position in preparation for a possible transfer pricing challenge, minimize the potential tax exposures or, in the worst case that a tax assessment is unavoidable, enhance the likelihood of penalties being reduced through the ability to demonstrate good co-operation.



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No. 159 : Update on Draft Transfer Pricing Act

The online public hearing session organized by the Revenue Department for the draft Transfer Pricing Act finished on 7 July 2017 and this new regulations are awaiting for approval by the National Assembly. This article discusses the three sections to be added to the Revenue Code and its implication on the transfer pricing practice in Thailand.

Section 71 bis paragraph 1 of the draft transfer pricing act empowers the Revenue officers to make tax assessment on the determination of transfer prices for all kinds of related-party transactions (such as the transfer or receipt of property, service or loan, etc.) based on the “*Arm’s Length Principle*” with the exact wording as paragraph 9 of the OECD Model Tax Convention, i.e., “[Where] conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises”.

This Section vaguely hints on the availability of the Advance Pricing Agreement (“APA”) mechanism by providing that tax assessment must take into consideration of elimination of double taxation for the contracting party according to generally accepted principles and Thailand’s commitment to the double taxation treaties.

The definition of “*Related Company*” given by **Section 71 bis paragraph 2** was narrowed down from the previously given by the Departmental Instruction No. Paw.113/2545, namely “juristic person with direct and indirect shareholding of *not less than 50% of the total capital*, or juristic persons that are related through capital, control and management in the way that one party is unable to operate independently from the other party according to the Ministerial Regulation to be enacted.

Section 71 bis paragraph 3 sets out the statutory limitation for tax refund in the case of transfer pricing assessment within 3 years from the last day of the submission of tax return (which is the same as Section 27 ter) or within 60 days after writing notification of tax adjustment by the Revenue officers.

Section 71 ter paragraph 1 requires the juristic persons with the total revenue exceeding the minimum level (to be determined) to prepare and submit the report on related companies and total amount of related party transactions within 120 days after the close of the accounting year (at the same time as annual tax return – Section 69).

Section 71 ter paragraph 2 provides that, within five years after submission of the transfer pricing report according to Section 71 ter paragraph 1, the Revenue officers may notify the juristic person with the total revenue exceeding the minimum level to submit document or evidence that are necessary to analyse the transfer prices of the related party transactions. Taxpayers have 60 days to prepare and submit such document/evidence. The submission period can be extended but must not exceed 120 days from the notification date by the Revenue Department.

Section 35 ter provides that failures to submit the reports or documents or evidences according to Section 71 ter, or submission of reports or documents or evidences that are incomplete and incorrect without justifiable reasons will be subjected to a criminal penalty of not exceeding Baht 200,000.

Author's Note

The submission of reports on related-party transactions on an annual basis would enable the Revenue officers to access to plenty of critical information on taxpayers' transfer pricing practice. Such reports would be enough to assist the Revenue in identifying audit targets. It is the right time right now for taxpayers with related party transactions to commence the transfer pricing risk assessment and identify sensible measures to control risk or contain possible damage through the preparation of the transfer pricing documentation reports.



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企業合併と買収	企業合併と買収における実務サポート
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No. 160 : Thailand's New Transfer Pricing Act - Too Little, Too Late?

Compared to other ASEAN members, especially Indonesia and Vietnam, Thailand's likely enactment of its transfer pricing regulations this year seems too little, too late. Nonetheless, the Thai taxpayers should be prepared for similar transfer pricing documentation required by OECD/G20 under BEPS Project because the regulations are a prerequisite for developing measures to monitor and prevent Base Erosion and Profit Shifting ("BEPS").

Draft Section 71 bis of the Transfer Pricing Act, currently being read in the National Legislative Assembly, would empower the Revenue Department to make tax assessments based on the ineffectual arm's length principle. According to OECD's article on BEPS Frequently Asked Questions, "The arm's length principle has proven useful as a practical and balanced standard for tax administrations and taxpayers to evaluate transfer prices between associated enterprises, and to prevent double taxation. However, with its perceived emphasis on contractual allocations of functions, assets and risks, the existing guidance on the application of the principle has also proven vulnerable to manipulation."

All OECD/G20 members have already agreed to strengthening guidelines for applying the arm's length principle to ensure outcomes where profits are aligned with the value created through underlying economic activities. After re-examining the transfer pricing documentation requirement, the OECD issued transfer pricing documentation guidelines that require the multinational enterprises ("MNEs") to provide tax administrations of each respective country with high-level global information regarding their global business operations and transfer pricing policies in a "Master File" that would be available to tax authorities among all relevant countries. The requirement of the "Country-by-Country Report" would allow tax authorities to perform high-level transfer pricing risk assessments, or to evaluate other BEPS-related risks.

Although draft Section 71 ter would require Thai taxpayers to submit transfer pricing reports and provide the Revenue Officers with documents or evidence they deem necessary to analyze transfer pricing practices, it is far from specific what kind of documents or evidence would be requested, not to mention whether the taxpayers would actually be required to submit the Master File or Country-by-Country Report.

Unlike Thailand, Indonesia, a member of G20, has been way ahead of Thailand in required BEPS transfer pricing documentation. But one should take note that the Ministry of Finance's Regulation, No. 213, effective on 30 December 2016, provides that the Master File, Local File and Country-by-Country Report will be part of the transfer pricing documentation required by the Indonesian tax authorities.

Author's Note

The slow promulgation of effective transfer pricing regulations does not mean that Thai MNEs or the subsidiaries of international MNEs in Thailand can be sanguine about the transfer pricing documentation requirement of the Thai Revenue Department. On 16 May 2017, Thailand's Cabinet endorsed the plan of the Ministry of Finance to accept the OECD's invitation to join the BEPS Project. In light of this development, the question is "when" rather than "if" Thailand will enact a requirement for the Country-by-Country Report or Master File.

Most of Thailand's key trading partners have already participated in the OECD/G20 BEPS Project and committed to BEPS Actions, including the requirement for transfer pricing documentation reports. The US, UK, France, India, Singapore and Malaysia require Country-by-Country Reports, while Germany, Australia, Japan, South Korea, Indonesia and Vietnam require Country-by-Country Reports, Master Files and local documents. Recently, several Thai subsidiaries of MNEs were requested by their respective parent companies to assist in preparing Country-by-Country Reports. At the same time, Thai MNEs are being required by BEPS Project countries to submit their transfer pricing Master Files and Country-by-Country reports. The time for action is now.



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