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Introduction

While there is no detailed transfer pricing provisions under the Thai tax law, there is a general requirement that companies transact on an arm's-length basis. On 16 May 2002, the Revenue Department introduced its transfer pricing guidelines in the form of Departmental Instruction (DI) No. Paw. 113/2545. The purpose of the transfer pricing guidelines is to assist taxpayers in setting arm's-length prices for their transactions with related parties and also to assist revenue officers in reviewing taxpayers' transfer prices for compliance with the arm's-length principle.

Taxpayers are required to self-assess and file corporate income tax returns within 150 days of the last day of their accounting period. In order to ensure compliance, the Revenue Department regularly conducts business operation visits/tax investigations to review major issues and comprehensive tax audits. The burden of proof lies with the taxpayers.

During an operation visit/tax investigation, transfer prices may be reviewed. The Thai Transfer Pricing Guidelines set out the information/documents required to be reviewed by the revenue officers. Having well-prepared transfer pricing documentation in place reduces the risk of adjustments to prices under the general provisions of the Revenue Code based on what the revenue officer considers to be reasonable transfer prices. In the event that an adjustment is unavoidable, transfer pricing documentation can also help mitigate the size of the adjustment.

While the corporate income tax rate in Thailand has been reduced from 30% to 23% in 2012, and to 20% in 2013 and 2014, the Revenue Department's budget has significantly increased each year. In 2012, there has been the substantial increase in transfer pricing investigation activity by the Revenue Department. The transfer pricing group actively performs transfer pricing investigations. In addition to its normal selection of targets for transfer pricing investigation, its strategy is to investigate, simultaneously, competitors within the same industry sector and group companies within the supply chain. Domestic as well as cross-border related party transactions have been challenged by the Revenue Department during its tax investigations.

Statutory rules

There are only general provisions under the Revenue Code designed to guard against tax avoidance arising from transactions between related parties conducted at higher or lower than market price.

On the revenue side, the Revenue Code empowers revenue officers to:

- make pricing adjustments on the transfer of properties, rendering of services and lending of money without compensation or with compensation below the market price without justifiable reason, and
- make adjustments on the cost price of imported goods by comparison with the cost of the same type of goods imported into another country.

On the expense side, the Revenue Code empowers revenue officers to:

- disallow a purchase of goods at a price higher than market price without justifiable reason as a tax-deductible expense
- disallow an expense that is not expended for the purpose of acquiring profits or for the purpose of business in Thailand, and
- disallow an expense determined on and payable out of profits after the termination of an accounting period.

These tax provisions apply to domestic as well as cross-border transactions.

Components of the transfer pricing guidelines

DI No. Paw. 113/2545 has the following major components:

- Clause 1 states that a company established under Thai law or under a foreign law must calculate its net profit for the purposes of corporate income tax according to Section 65 of the Revenue Code.
- Clause 2 defines the term ‘market price’ as compensation for goods or services or interest that independent contracting parties determine in good faith in the case of a transfer of goods, provision of services or lending of money, respectively, which is of the same type as the related parties’ transaction on the same date. In this regard, the term ‘independent contracting parties’ is defined as parties without direct or indirect relationships in terms of management, control or shareholding.
- Clause 3 suggests pricing methods for determining market price, namely comparable uncontrolled price, resale price, cost plus and other methods (i.e. transactional net margin method and profit split method).
- Clause 4 lists the documentation that is required to be kept at the office of the taxpayer. This documentation includes ownership structure, budget, strategy and business plan, details of related party transactions, functional analysis, pricing policy, etc. Where taxpayers can prove through such documentation that the result of their price setting under the selected method is the market price, revenue officers are obliged to use the taxpayers’ methods for determining taxable income and expense for the purpose of calculating corporate income tax.
- Clause 5 allows taxpayers to enter into an advance pricing agreement (APA) with the Revenue Department. To apply for an APA, taxpayers must submit a letter requesting an APA together with relevant documents to the Director-General of the Revenue Department in order to set the criteria, methods and conditions with which the taxpayer must comply.

Legal cases

No legal cases concerning transfer pricing have been decided by the courts since the introduction of DI No. Paw. 113/2545. To date, cases involving transfer pricing issues have been settled during the investigation stage, and details are not made available to the public.

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Burden of proof

The burden of proof lies with the taxpayer to clear alleged transfer pricing abuses. The transfer pricing guidelines are designed to assist taxpayers in their efforts to determine arm's-length transfer prices.

In the event of a dispute, the taxpayer must be able to substantiate, with supporting documents, to the satisfaction of the revenue officers, the Board of Appeals, or the courts, as the case may be, that its transfer prices have been determined in accordance with the arm's-length principle.

Tax audit procedures

Taxpayers are not required to submit their transfer pricing documentation with their annual corporate income tax returns. They are, however, expected to submit it within two weeks to one month of a revenue officer's request.

There is no specific transfer pricing audit; it is undertaken as part of the normal tax audit process. However, the Revenue Department begins the investigation process by issuing a letter requesting taxpayers, under their supervision, to provide information and documents on the adopted transfer pricing practices. Targets are selected for investigation based on their analysis of the tax returns submitted, and information obtained from the 'business operation visit', whereby the revenue officers visit companies under their supervision at least once a year to understand the business and ensure tax compliance.

The criteria used by the Revenue Department to select targets for transfer pricing investigation include, but are not limited to:

- Low profits compared with competitors.
- No tax payment for an extended period of time.
- Decline in profits after a tax holiday expires/business restructuring.
- Profits in promoted business, but losses/lower profits in non-promoted business.
- Drastic fluctuations in profits from year to year.
- Varied profitability by product.
- Payment of royalties/management fees.
- Significant related party transactions.

The transfer pricing documentation is reviewed by the Revenue Department's transfer pricing team. Based on this review and analysis, the revenue officers typically raise questions and require more detailed explanations and related documents. Depending on how well the transfer pricing practices are documented and the completeness of the supporting documents, the request for additional information and documents can take many rounds.

The Revenue Department's tax investigation process is as follows:

- Collect and analyse accounting and tax information/documents.
- Challenge and invite the taxpayer's representative to discuss the transfer pricing (and any other tax) issues identified, and possibly request additional documents.
- Review additional documents and consider explanations.
- Inform the taxpayer's representative of the Revenue Department's opinion.

- The taxpayer is requested to file amended tax returns if in agreement with the Revenue Department's opinion.
- For transfer pricing issues, the Revenue Department issues a summons to audit all taxes if the taxpayer does not accept its opinion.
- Taxpayers may enter into the appeals process to resolve the dispute if they disagree with the tax assessment.

The Revenue Department generally requires six months to analyse the information/documents and reach a conclusion. After notifying the taxpayer of the outstanding issues, the clarification and negotiation process between the taxpayer and the Revenue Department may take an additional three to 12 months.

In a case where the revenue officers accept the taxpayer's explanations and supporting documents, the challenges will be dropped. However, the revenue officers will then generally redirect their focus to other tax issues, including corporate income tax, value added tax (VAT), withholding tax, specific business tax, etc.

In the event that the revenue officers do not accept the taxpayer's explanations and supporting documents, they will advise the taxpayer to voluntarily file amended tax returns to make the required tax adjustments and to pay a surcharge. If the taxpayer disagrees with the opinion of the revenue officers, a summons will be issued for a comprehensive tax audit. The comprehensive tax audit covers all taxes under the Revenue Code (i.e. corporate income tax, VAT, and stamp duty). After having completed the audit, the Revenue Department will issue the notification of a tax assessment.

Revised assessments and the appeals procedure

After receiving notification of a tax assessment from the Revenue Department, the taxpayer is required to make an adjustment to the tax return and pay the tax shortfall together with the related penalty and surcharge. In the event that the taxpayer disagrees with the Revenue Department, the taxpayer is allowed to appeal to the Appeals Division of the Revenue Department. The Por. Sor. 6 form must be completed and submitted to the Appeals Division within 30 days from the date of receipt of the notification of the tax assessment.

The Board of Appeals (BOA) will consider the taxpayer's argument and may invite or issue a warrant to the taxpayer or witnesses for questioning or to provide additional testimony or supporting evidence. The appeals process on average takes three months (not including the waiting period). Upon completion, the BOA's ruling will be mailed to taxpayers.

In the event that the taxpayer disagrees with the BOA's ruling, the taxpayer may bring the case to the Tax Court within 30 days from the date of receipt of the notice of the ruling. It should be noted that if a taxpayer fails to cooperate with the Revenue Department and does not comply with the summons, the taxpayer is not allowed an appeal with the Appeals Division. Furthermore, the Tax Court will not accept an appeal case if the taxpayer fails to file the appeal with the Appeals Division.

The Tax Court normally takes one to three years to reach a verdict (not including the waiting period). If the taxpayer disagrees with the ruling of the Tax Court, the taxpayer is allowed to appeal to the Supreme Court within one month from the date of the

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announcement of the Tax Court's judgment. The ruling process at the Supreme Court may take an additional one to three years (not including the waiting period).

Additional tax and penalties

In the case of a tax assessment resulting from a comprehensive tax audit, the taxpayer is liable to a penalty equal to the additional amount of tax payable. Revenue officers have the power to reduce the penalty 50% if they are of the opinion that the taxpayer had no intention of evading taxes and has cooperated fully during the tax audit.

The Director-General of Revenue Department has the power to waive the penalty if the taxpayer can demonstrate that it cooperated fully during the audit and had no intention of evading the tax.

In addition, the taxpayer is liable to a surcharge of 1.5% per month or fraction thereof of the tax payable or remittable exclusive of penalties. In a case where the Director-General of Revenue Department has granted an extension of the deadline for the remittance of the tax and the tax is paid or remitted within the extended deadline, the surcharge will be reduced to 0.75% per month or a fraction thereof. Unlike the penalty, the surcharge may not be waived.

There will be no penalty, only a surcharge, if there is tax payable in the case of voluntary filing of an amended tax return (i.e. no comprehensive tax audit).

Resources available to the tax authorities

The Revenue Department has all taxpayers' financial information. All taxpayers are required to file their audited financial statements together with their corporate income tax returns. The Revenue Department also has access to the Business-on-Line database, which contains key financial data of all companies registered under Thai law, as well as other databases.

Other sources of information include other government agencies, such as the Customs Department, the tax authorities from treaty partners through the Exchange of Information Article, disgruntled employees, etc.

Use and availability of comparable information

Comparable information may come from internal as well as external sources. The revenue officers use internal data, if and when available, to determine whether the taxpayer's transfer prices are at arm's length.

External comparable information is also used, especially if internal comparable information is not available. There is an abundance of potential comparable data, as all companies established under Thai law are required to file their audited financial statements with the Ministry of Commerce. This information is available to the public but can only be retrieved by photocopying the hard copy documents.

Risk transactions or industries

No particular industry is more at risk of being subject to tax investigation than any other. However, as Thailand is a manufacturing base for automotive makers and electronic goods manufacturers, a relatively greater number of taxpayers in the automotive and electronics industries have been investigated. Taxpayers in other industries, such as pharmaceuticals, consumer products, petrochemicals, computers, etc. also have been investigated.

The Revenue Department has begun to focus on the following related party transactions as part of its investigation:

- Sales and purchases of goods, assets and services.
- Transfer and use of know-how, copyrights and trademarks.
- Management and administrative fees.
- Loan and interest payments.
- Research and development expense allocation.
- Commission payments.

Limitation of double taxation and competent authority proceedings

Thailand has entered into conventions for the avoidance of double taxation and the prevention of fiscal evasion with respect to tax on income with 55 countries. The conventions include mutual agreement procedures (MAP), whereby if a taxpayer considers that the tax assessment of one or both of the contracting states results or will result for the taxpayer in taxation not in accordance with the provisions of the conventions, the taxpayer may present the case to the competent authority of the contracting state. The competent authorities shall endeavour to resolve any difficulties or doubts arising by mutual agreement.

It should, however, be noted that most of the treaties that Thailand has with other countries do not allow for correlative adjustment.

In the event that a taxpayer disagrees with a tax assessment of the Revenue Department, the taxpayer is entitled to seek a ruling from the Revenue Department. The ruling process, which normally takes six to 12 months, is expected to take longer in the immediate future due to the potential change in the process resulting from the recent political turmoil. The MAPs between competent authorities will also take much longer than in the past.

The Thai Revenue Department has completed the negotiation of a few transfer pricing MAP discussions with the National Tax Authority (NTA) of Japan in April 2012.

Advance pricing agreements (APAs)

Clause 5 of DI No. Paw. 113/2545 allows taxpayers to enter into an APA with the Revenue Department. To enter into an APA, the taxpayer must submit a letter requesting the APA together with the relevant documents to the Director-General of the Revenue Department in order to set the criteria, methods and conditions with which the taxpayer must comply.

Thailand has so far concluded six APAs. All are bilateral and with Japan. Since the issuance of the guidelines on APAs in April 2010, there has been a substantial increase in the number of APA applications in Thailand. A number of companies have requested for bilateral APAs with Japan and other countries. Currently, there are 14 bilateral APAs in the Revenue Department's pipeline.

Liaison with customs authorities

The current level of interaction between the Revenue Department and other government departments, such as the Customs Department, is low. However, taxpayers should ensure that information provided to the various government departments is consistent.

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OECD issues

Thailand is not a member of the Organisation for Economic Co-operation and Development (OECD). However, the tax authorities generally have adopted the arm's-length principle and authorise the use of transfer pricing methodologies (e.g. comparable uncontrolled price, resale price method, cost plus method, transactional net margin method, and profit split method) endorsed by the OECD Guidelines in order to determine the market price of a transaction.

The comparable uncontrolled price method, the resale price method, or the cost plus method are preferred over the transactional net margin method and the profit split method. However, there is no hierarchy of these three methods. Other methods may be used if the three traditional transaction methods were found to be inappropriate. There is also no hierarchy of these other methods.

Joint investigations

Cross-border cooperation is common in general tax areas. Such cooperation has tended to take the form of foreign tax authorities requesting information from the Thai Revenue Department. However, recently the Revenue Department has increasingly been requesting information support from foreign tax authorities in those countries that have entered into double taxation agreements with Thailand.

Thin capitalisation

Thailand currently has no thin capitalisation legislation.

Management services

The Thai Revenue Department is currently increasing its focus on management service fees. The point of concern is whether the management service fees that a taxpayer pays to a related party are for the direct purpose of acquiring profits for the company's business in Thailand and whether the fees paid are commensurate with the benefits received.

Service providers

All costs related to the services provided must be included in determining the service charge.

Service recipients

Generally, service recipients need to substantiate that:

- services are rendered
- services benefit the service recipient, and
- service fee paid was consistent with the arm's-length principle.

The service recipient must have documents to support the above. Contracts and documents showing the costs incurred by the service provider are not sufficient. The service recipient should keep proper documentation in respect of the services rendered, showing that the services were for the benefit of the service recipient. A benchmarking study should also be maintained to demonstrate that the service fee (as well as other transfer prices) was consistent with the arm's-length principle.