

# BDO ADVISORY LIMITED

Investing into Thailand - Investment and Taxation Considerations  
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# PRESENTATION OUTLINE

## Introduction

### Foreign investment guidelines

- Alien Business Act
- Land Code
- Exchange Control

### Corporate income tax

- Overview
- Basis of tax
- Exempt income and Deductions
- Anti-avoidance rules
- Tax rates
- Withholding taxes
- Double Tax Agreements
- Planning Opportunities

## VAT

## Customs Duty



# INTRODUCTION

Does Thailand want foreign investment or not?

- Current position
  - Action by the Prime Minister and Board of Investment to encourage foreign investment.
  - Announcement of revised Regional Operating Headquarters tax incentive package to stimulate investment into Thailand.
  - Draft regulations issued by National Telecommunications Commission re 3G mobile broadband licences on 5 August 2010 may affect foreign investment if enacted. Seek to disqualify companies that are “foreign dominated” defined as “direct and indirect control or influence on a company in setting policy and engaging in management beyond that permitted by their share ownership.” Also to be taken into account is the nationality of senior management in deciding whether companies can bid.
  - Unlikely that these regulations will be approved in their current form. Public forum on 20 August 2010.

Political stability

- Recent upheavals
- Current position
- Business confidence up (recent survey by Synovate Business Consulting)

# THE REPORT: THAILAND 2009



# FOREIGN INVESTMENT GUIDELINES

## Alien Business Act

- The Alien Business Act prohibits aliens from participating in specified business activities and requires licenses to be obtained before engaging in others.
- A Thai company which is 50% or more foreign owned is considered alien.

# FOREIGN INVESTMENT GUIDELINES (Cont)

## Alien Business Act

Business activities that are subject to regulation are divided into three categories and are listed in Schedules 1, 2 and 3 of the Act. The three categories of business are:

- Businesses closed to aliens because of special reasons eg media, certain farming activities, forestry and trading in land;
- Businesses related to national safety or security; businesses affecting cultural arts, traditional customs and folk handicrafts; and businesses affecting natural resources or the environment. Thai participation must be at least 40% of the capital which can be reduced to 25% by the Minister of Commerce with the approval of the Cabinet and Thai directors must comprise at least 40% of total directors; and
- Businesses in which Thai nationals are not yet ready to compete with aliens, which includes retail and wholesale businesses, subject to certain capital conditions and various services. Additionally, the sale of some products are restricted. Majority of capital of company must be held by Thais.

# FOREIGN INVESTMENT GUIDELINES (Cont)

## Definition of “Capital”

Public company: paid up capital

Limited company: registered capital (authorised capital)

Minimum capital: Greater of Baht 3 million or 25% of the average annual expenditure for a 3 year period: Debt to equity ratio cannot exceed 7:1

# FOREIGN INVESTMENT GUIDELINES (Cont)

## Penalties

- Foreign company or Thai incorporated company treated as an “Alien” under ABA carrying on business without a licence commits an offence. Punishment is:
  - imprisonment for a term of up to 3 years for officers or agents (including employees) or a fine of between Baht 100,000 and 1,000,000, or both;
  - Court will order the termination of the business. If Court order not complied with, fine of between Baht 10,000 and 50,000 per day can be imposed for each day the Court order is not complied with.

# FOREIGN INVESTMENT GUIDELINES (Cont)

## Ownership of Land

- Under the Thailand's Land Code a foreigner is not allowed to own land unless the privilege to do so has been obtained from an authorised authority e.g. Board of Investment.
- A company registered in Thailand will be considered as a foreigner for the purposes of the Land Code if more than 49% of its share capital is owned by foreigners or half its number of shareholders are foreigners.
- Land transfers are reviewed by the Land Department before being registered and will be refused where foreigners are involved eg if foreigners were promoters of the company acquiring the land, foreigners are shareholders of the company acquiring the land or the company acquiring the land has foreign directors.
- There is no restriction on foreigners leasing land in Thailand.
  - Land officers are now trying to disallow land leasing transactions.

# FOREIGN INVESTMENT GUIDELINES (Cont)

## Import of Foreign Currency

- There are no controls or limits on the amount of foreign currency that may be brought into Thailand.
  - Documentary evidence from the receiving bank in Thailand should be retained for the receipt of share capital and loans to facilitate repatriation in the future.
- However, individuals and juristic persons residing in Thailand are required to sell any foreign currency received to an authorised bank or authorised person or to deposit the money into a foreign currency account within 7 days from the date of receipt.
- Thai individuals and juristic persons in Thailand are allowed to maintain foreign currency accounts under certain conditions.

# FOREIGN INVESTMENT GUIDELINES (Cont)



## Export of foreign currency

- The amount of foreign currency that may be remitted abroad for business expenses including the payment of goods, services, interest, profits and dividends is unlimited but must be accompanied with the required supporting documentation.
- Remittances from Thailand must be carried out through a licenced financial institution. Changes over the last year have included:
  - Investors under the control of the Thai SEC (mutual funds) now allowed to have portfolio investment up to US\$ 50 billion (previously US\$ 30 billion);
  - Importers and exporters now allowed to unwind foreign exchange hedging transactions for goods and services without permission from the Bank of Thailand; and
  - Relaxation of regulations on corporate treasury centres ("CTC") to allow an existing company to conduct treasury centre business and permit transfer of foreign currency funds between the CTC and its affiliated companies in Thailand.
- Other proposals (approved by Cabinet but not implemented as yet):
  - Allow Thai companies to invest directly overseas without limit (presently limited to US\$100 million per annum to affiliated companies overseas without the permission of the Bank of Thailand; and
  - Allow Thai companies to lend to non-affiliated companies overseas up to US\$ 50 million (currently requires approval of Bank of Thailand); and
  - Increase limit for purchase of immovable property overseas from US\$ 5 million per annum to US\$ 10 million per annum.

# FOREIGN INVESTMENT GUIDELINES (Cont)

## Board of Investment

- The Board of Investment (“BOI”) is the principal government agency responsible for providing incentives to stimulate investment in Thailand.
- Tax-related relief and other incentives are granted to Thai and foreign companies investing in BOI-promoted projects. Non tax incentives include:
  - majority foreign ownership; and
  - right to own land for business premises.
- Activities eligible for promotion are set out in guidelines issued by the BOI.

# CORPORATE INCOME TAX

## Overview

- The principal taxation law of Thailand is the Revenue Code BE 2481 (1938).
- The Minister of Finance has responsibility for implementing the Revenue Code. The Director-General of Revenue carries out the necessary administrative and enforcement functions of the Code

# CORPORATE INCOME TAX (Cont)

## Overview

- Royal Decrees, Ministerial Regulations, Ministerial Notifications and Board of Taxation Directives and Rulings supplement the working of the Code.
- Thailand operates a self-assessment system for filing income tax returns.

# CORPORATE INCOME TAX (Cont)

## Overview

- Companies and other legal entities, whether organised under Thai or foreign law, are referred to as 'juristic companies or partnerships' in Thai tax legislation.
- Thai juristic companies or partnerships are subject to corporate income tax on their worldwide income.

# CORPORATE INCOME TAX (Cont)

## Overview

- Entities incorporated under foreign law and carrying on business in Thailand are taxed on the net profits arising from their business activities in Thailand.
- The tax year is deemed to be the accounting year.

# CORPORATE INCOME TAX (Cont)

## Overview

- Companies that receive Board of Investment promotion may obtain special taxation incentives for a number of years from the commencement of operations.
- Thailand operates an extensive withholding tax regime that is not only limited to remittances abroad.

# CORPORATE INCOME TAX (Cont)

## Liability to Tax

- Thai incorporated companies are subject to corporate income tax on net profit from business carried on in Thailand as well as outside Thailand.
- Foreign incorporated companies are subject to corporate income tax on net profits arising from the business carried on in Thailand. Foreign companies are deemed to be carrying on business in Thailand if it derives income through an employee, a representative or a go-between in Thailand. Exception: sales through independent agents.

# CORPORATE INCOME TAX (Cont)

## Calculation of Net Profit for Tax Purposes

Revenue from business carried on in the year less allowable expenses

Revenue and expenses are to be calculated on an accruals basis.

Capital gains are treated as ordinary income - no special capital gains tax regime.

# CORPORATE INCOME TAX (Cont)

## Exempt Income

Dividends received by Thai companies from either another Thai company or from a foreign company may qualify for tax exemption provided certain conditions are met.

# CORPORATE INCOME TAX (Cont)

## Domestic Dividends

- Dividends received by a juristic corporation are fully taxable unless the recipient has held the shares, in respect of which the dividends have been paid, for at least three months before and three months after the dividend is paid.
- If this condition is met, the following treatment will apply:
  - A company listed on the Stock Exchange of Thailand or MAI is exempt from income tax on all dividends received from other Thai-listed companies

# CORPORATE INCOME TAX (Cont)

## Domestic Dividends (cont)

- Non-listed Thai limited companies organised under Thai law are not required to include as revenue, any dividends received from another resident company, if the recipient company has held at least 25% of the total shares with voting rights, without any cross-shareholding by the paying company. If the condition is not met, the recipient must include half of the dividends as revenue.

# CORPORATE INCOME TAX (Cont)

## Foreign Dividends

Dividends from foreign companies exempt from corporate income tax if:

- the Thai company receiving the dividend must hold not less than 25% of the voting shares in the foreign company paying the dividend, and must have held the shares on which the dividend is paid for not less than 6 months before receiving the dividend;
  - the dividend must be paid out of net profits on which income tax has been paid in the foreign country at a rate normally not less than 15%; and
  - the tax exemption would be granted in the case that the foreign country has a special law that reduces or exempts the tax payable on the net profits out of which the dividend is paid.
- Revenue Department Ruling no GorKor 0708.Gor3/4274: dividend from UK company qualified for exemption eventhough no UK tax was paid on profits out of which dividend was paid.



# CORPORATE INCOME TAX (Cont)

## Deductible Expenses

Expenses incurred for the purpose of acquiring profits or for the purpose of the business are deductible.

Certain expenses are either specifically not deductible or are subject to certain conditions.

# CORPORATE INCOME TAX (Cont)

## Deductible Expenses (cont)

Depreciation is required to be calculated in accordance with the rates prescribed in the Revenue Code eg

Machinery and equipment: 20%

Rights: 10% (if for an indefinite period) or over the period the rights can be used if for a specific period.

Accelerated rates of depreciation and capital write offs apply for certain assets eg computers, software

# CORPORATE INCOME TAX (Cont)

## Deductible Expenses (cont)

Bad debts: generally Court action needs to be undertaken except for debts under Baht 100,000 (Baht 200,000 for financial institutions)

Provisions and reserves: not deductible except for financial institutions where provision is calculated in accordance with Bank of Thailand provisioning rules.

# CORPORATE INCOME TAX (Cont)

## Deductible Expenses (cont)

Interest: must be capitalised until asset becomes ready for use.

Entertainment expenses: deduction limited to the lesser of 0.3% of revenues or Baht 10 million

Staff entertainment: not deductible

Training expenses: if provided by qualifying institutions, a double deduction may be available.

# CORPORATE INCOME TAX (Cont)

## Losses

- Tax losses incurred may be carried forward for a maximum of five years from the end of the year the loss is incurred.
- There is no provision for the carry-back of tax losses in Thailand

# CORPORATE INCOME TAX (Cont)

## Losses (cont)

- There is no provision for corporate group relief for losses.
- Tax losses are not foregone upon a change in the ownership of the company or a change in the company's business.
- Tax losses incurred by a company during a tax holiday period can be brought forward and claimed as a deduction for a period of up to 5 years from the end of the tax holiday period.

# CORPORATE INCOME TAX (Cont)

## Anti-Avoidance Rules etc

Limited anti-avoidance provision: Revenue Department has the power to disallow artificial or fictitious expenses

## Thin Capitalisation

- Thailand has no thin capitalisation rules in the Revenue Code. However, bear in mind investment law restriction of 7 debt to 1 equity.

## Controlled Foreign Company ('CFC') Provisions

- Thailand has no CFC provisions.

# CORPORATE INCOME TAX (Cont)

- Transfer Pricing

- Market price must apply to the sale of goods or the provision of services or the lending of money unless there are justifiable grounds.
- A deduction can be denied for expenses which are not wholly incurred for the purpose of acquiring profits or for the purpose of the business.
- Revenue Department has issued a guideline for determining market price for cross border and domestic related party transactions. The guideline's definition of "market price" is consistent with the arm's length principle used in the OECD's transfer pricing guidelines.
- Guideline also sets out a list of documents that Revenue Department officers may request in an audit eg group structure, functional analysis, basis of method selection, benchmarking analysis.
- Revenue Department is increasingly focusing on transfer pricing issues when reviewing tax affairs of companies.

# CORPORATE INCOME TAX (Cont)

## Tax Credits

Available for:

domestic withholding tax; and

foreign tax paid on income subject to Thai tax (for Thai companies only).

Credit for foreign tax limited to Thai tax payable on foreign income subject to tax.

# CORPORATE INCOME TAX (Cont)

## Filing of Returns, Payment of Tax and Refunds

Annual return: must be filed within 150 days of the end of the accounting year and any tax due must be paid on filing of return

Mid-year return: must be filed with 2 months of the end of the first six months of the accounting year together with tax on half of the estimated profit for the year (actual profit for the six months for financial institutions).

Mid-year tax available as a credit in the annual tax return.

# CORPORATE INCOME TAX (Cont)

## Tax Audits

Revenue Department is increasing the number of audits it is conducting.

Refund requests will trigger a tax audit. Not claiming a refund does not guarantee that an audit will not be conducted.

Companies should carefully plan for tax audits by conducting reviews to ensure there are no gaps in their documentation and to identify areas of exposure prior to the audit and implement any required remedial action to the extent possible.

# CORPORATE INCOME TAX (Cont)

## Tax Rates

Standard rate: 30%

Companies with paid up capital not exceeding Baht 5 million: marginal rates from 0% to 30%.

Listed companies: Standard rate of 30% except for SET 25% (on first Baht 300 million of net profit) and MAI 20% (on first Baht 20 million of net profit) for 3 consecutive years from 2008 (expires 2010). Reports indicate that it is unlikely concessionary rates will be extended.

Regional Operating Headquarters: 10% on qualifying service income (0% on overseas qualifying income from associated companies and branches under proposed alternative package)

# CORPORATE INCOME TAX (Cont)

## Domestic Withholding Tax

Domestic withholding tax applies to certain payments made eg

Hire of work service fees: 3% (5% if paid to foreign company carrying on business in Thailand without a permanent office)

Royalties: 3%

Hire or rent of property: 5%

# CORPORATE INCOME TAX (Cont)

## Cross Border Withholding Tax

Companies paying income falling within Sections 40(2) to (6) of the Revenue Code to foreign companies not carrying on business in Thailand are required to deduct withholding tax eg

Dividends: 10%

Interest: 15%

Royalties: 15%

Hire of work service fees: 15%

Gains from the Sale of shares: 15%

Reduced rates may apply under a relevant tax treaty.

# CORPORATE INCOME TAX (Cont)

## Double Tax Agreements

Thailand has entered into DTAs with 54 countries. New DTA's in the last year:

Russia - effective from 1 January 2010

Chile - effective from 1 January 2011

Thailand's right to tax business profits overridden if the business profits are not attributable to a permanent establishment ("PE") in Thailand.

No DTA reduces the rate of withholding tax on dividends to less than 10% or on interest below 15% (except for interest paid to financial institutions, 10%).

Certain DTAs reduce tax on certain royalties to rates below 15% eg US DTA - copyright 5%

Certain DTAs eg Singapore override Thailand's right to tax capital gains on the sale of shares.

Thailand's DTA with Hong Kong results in Thailand's 10% branch profits remittance tax not being applicable to Thai permanent establishment's of Hong Kong companies remitting profits from Thailand.

# CORPORATE INCOME TAX (Cont)

The use of DTAs provide opportunities to reduce the incidence of Thai tax.

Investors etc should seek to utilise Thailand's DTA network to reduce the Thai tax payable on income they receive from Thailand.

# CORPORATE INCOME TAX (Cont)

- Planning Opportunities

- Consider where to hold shares from to avoid tax on gains on disposal eg Singapore, Mauritius
- Charge in management fees. DTA may apply to avoid Thai tax unless fees are royalties under the applicable DTA.
- Equipment leases. Route through a DTA country such as Singapore as lease rentals are not royalties under the DTA.
- Investigate where IP should be licenced from into Thailand to take into account reduced withholding tax rates eg 5% rate of royalty payments for copyright under Mauritius DTA

# CORPORATE INCOME TAX (Cont)

- Planning Opportunities (cont)
  - Reorganise group structure where losses are incurred in one company which cannot be offset against profits in another
    - Can be achieved inter alia through an amalgamation in a tax free manner
  - Dividends payments out of BOI tax holiday profits: ensure dividend payment is maximised during the tax holiday period as tax exemption on dividends will not apply to dividends paid after the end of the tax holiday period



# VALUE ADDED TAX

Standard rate of VAT is 7%

Cabinet recently approved the 7% rate through to 30 September 2012

# CUSTOMS DUTY

Thailand has adopted the GATT 1994 valuation methodology.

Customs value: “the price actually paid or payable for goods when sold for export to the country of importation.”

Price actually paid or payable: “all payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller.”

Royalties and licence fees should only be included in customs base if paid as a condition of sale. Customs Department is aggressive in trying to take the position royalties etc form part of the customs value.

# Q & A

# BDO THAILAND

## Tax & Legal Contacts



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### Qualifications

Bachelor of Commerce, University of Melbourne Fellow -  
Australian Society of Certified Practicing Accountants

### Experience

Andrew has over 33 years experience providing tax advisory services, including more than 13 years in Thailand. Andrew's specialities include corporate taxation, international taxation and tax structuring of cross-border and financing transactions and he was previously the Chairman of BDO's Asia Pacific Tax Committee.