

The logo for BDO, featuring the letters 'BDO' in a bold, dark blue, serif font. The letters are set against a white background and are framed by a red L-shaped graphic element consisting of a vertical bar on the left and a horizontal bar at the bottom. The letters 'B' and 'D' have a slight shadow effect, giving them a three-dimensional appearance.

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International Tax Planning for Outbound Investment: Employee Tax Issues

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“It [income tax] has made more liars out of...people than golf.”

Will Roger, 1879-1935, The Illiterate Digest, ‘Warning to Jokers’ as cited in “The Penguin Thesaurus of Quotation”, 2000, by M.J. Cohen at p 519



Session Outline

1. Liability to Thai personal income tax: Residents and Non-Residents
2. Impact of Double Taxation Agreements
3. Case Studies
 - Supreme Court Case No 6054/2549 re employee sent to work in the Philippines
 - Thai employee sent to work outside Thailand and remits salary and investment income back to Thailand
 - Dual employment arrangements



Liability to Thai Personal Income Tax

Section 41 of the Revenue Code

First Paragraph – Thai Source Income

“Every person who... derived assessable income under Section 40 from a post or office held or business carried on in Thailand, or from the business of an employer in Thailand, or from property situated in Thailand shall pay tax... whether such income is paid within or outside Thailand.”



Liability to Thai Personal Income Tax (Cont)

Section 41 of the Revenue Code

Second Paragraph – Foreign Source Income

“A resident of Thailand who in the course of the preceding tax year derived assessable income under Section 40 from a post or office held or business carried on abroad or from property situated abroad shall, upon bringing such assessable income into Thailand, pay tax...”



Liability to Thai Personal Income Tax (Cont)

2nd Paragraph of Section 41

- Liability to tax on foreign source income arises if:
 - Taxpayer is a resident
 - Derives foreign source income in a tax year; and
 - Remits the foreign source income to Thailand in the same year as the income is derived.
- Income remitted to Thailand in a subsequent year by a resident is not subject to personal income tax.
 - Need to be able to prove income remitted is income of a prior year
 - Avoid tainting prior year income with current year income if a remittance will take place in the current year.



Liability to Thai Personal Income Tax (Cont)

Section 41 of the Revenue Code

Third Paragraph – Deemed Resident Provision

“A person residing in Thailand at one or more times for a period equal in the whole to 180 days in any tax year shall be deemed a resident of Thailand.”



Liability to Thai Personal Income Tax (Cont)

Resident

- Can a person who has been in Thailand less than 180 days in a tax year be a tax resident of Thailand for tax purposes?
- How is the 180 day period calculated?
 - Is part of a day a full day?
 - Is the first day counted?
 - Is the last day counted?



Liability to Thai Personal Income Tax (Cont)

Foreign tax credits

- Revenue Code does not provide for unilateral foreign tax credits (FTC) for tax paid outside Thailand on foreign source income that is subject to tax Thailand
 - Only foreign source income remitted to Thailand is potentially subject to Thai personal income tax
- FTC only available if an applicable DTA Thailand has entered into grants a FTC.



Liability to Thai Personal Income Tax (Cont)

Calculation of FTC

- FTC is limited to the Thai tax payable on the foreign source income subject to tax in accordance with DTAs.
- Evidence required to support FTC eg tax assessment and receipt for foreign tax paid issued by foreign tax authority.
- FTC would not be available if foreign tax is imposed contrary to the provisions of the DTA eg refer to the Thailand – Japan DTA.



Impact of Double Taxation Agreements

Employment Income

- General rule is that employment income is to be taxed in the employee's country of residence except where the employee works in the other country and other conditions are met.
 - Minimum period of time in the other country typically 183 days but some DTAs have different days test; and
 - Employer is a resident of the employee's country of residence or in some countries not a resident of the host country; and
 - Remuneration is not borne by a permanent establishment of the employer in the other country.



Impact of Double Taxation Agreements

183 day test

This is a physical presence test. OECD commentary states presence in a country for part of a day counts as a day as person is present in the country. Includes day of arrival, day of departure and all other days spent in the country such as holidays, weekends, sick days etc.



Impact of Double Taxation Agreements (cont)

Gains from the Sale of Shares

- Some DTAs provide for a tax exemption for gains from the disposal of shares



Case Study: Employee Sent to Work Outside Thailand

Supreme Court Case No 6054/2549 dated 11 September 2006

Facts

Thai employee (Mr X) working for a Thai company (ACo) was sent to work on a project ACo was undertaking in the Philippines through a Filipino company (PCo) it jointly owned with a Filipino partner. Mr X was sent to the Philippines in 1995.

Mr X was the Project Manager and was employed by PCo.



Case Study: Employee Sent to Work Outside Thailand (cont)

In the 1997, 1998 and 1999 Mr X worked in the Philippines for 310 days per year and visited Thailand in those years but was in Thailand for less than 180 days.

During those years, Mr X's salary was paid to him by ACo and ACo deducted Thai withholding tax and remitted such withholding tax to the Thai Revenue Department.

Mr X was also subjected to tax in the Philippines on the salary income that was paid to him by ACo.

Mr X requested a refund of the tax paid in Thailand. Although at first a refund was to be issued, the Revenue Department ultimately did not refund the tax in dispute and so, Mr X filed a notice of objection against the Revenue Department's failure to refund the tax to him.



Case Study: Employee Sent to Work Outside Thailand (cont)

Mr X objected on the following grounds:

- He worked solely in the Philippines, and therefore, the remuneration paid to him was income of his employer's (ACo's) business outside Thailand;
- He was in Thailand for less than 180 days in each year (presumably arguing that he was a non-resident of Thailand for each year), and therefore, his remuneration was not subject to Thai personal income tax as it was foreign source income.
- The case was heard by the Central Tax Court which decided in favour of the Revenue Department and so, Mr X appealed to the Supreme Court.



Case Study: Employee Sent to Work Outside Thailand (cont)

The Supreme Court referred to paragraph 1 of Section 41 of the Revenue Code and made the following comments:

Mr X was an employee of ACo which performed work both in Thailand and outside Thailand, and as such the remuneration paid by ACo to Mr X constituted remuneration for work performed for his employer in Thailand and as such was subject to Thai tax under Paragraph 1 of Section 41 of the Revenue Code.



Case Study: Employee Sent to Work Outside Thailand (cont)

Neither the lawyer appearing for Mr A nor the Supreme Court considered the impact of the Thailand – Philippines DTA on whether the remuneration derived by Mr X was subject to Thai personal income tax.

There also seemed to be confusion over who was the employer of Mr X. Was it ACo from which he received payment or was it PCo that was said to be his employer in the Philippines?



Case Study: Employee Sent to Work Outside Thailand (cont)

Thailand – Philippines DTA

Article 15 Paragraph 1

“... salaries, wages and similar remuneration or income for personal ... services derived by a resident of [the Philippines] shall be taxable only in the Philippines unless the services are performed in [Thailand]. If the services are so performed, such remuneration or income as is derived therefrom may be taxed in [Thailand].



Case Study: Employee Sent to Work Outside Thailand (cont)

Article 15 Paragraph 2

Notwithstanding ... paragraph 1, remuneration or income derived by a resident of [the Philippines] for personal ... services performed in [Thailand] shall be taxable only in [the Philippines] if:

- (a) the recipient is present in [Thailand] for ... 183 days ... in the calendar year concerned; and
- (b) the remuneration is paid by, or on behalf of, a person who is a resident of [the Philippines]; and
- (c) the remuneration or income is not borne by a permanent establishment which that person has in [Thailand].



Case Study: Employee Sent to Work Outside Thailand (cont)

Analysis

- Clear that Mr X was a tax resident of the Philippines for the years in question and was not a Thai tax resident for those years. No need to go to the tie breaker provisions of the DTA.
- Based on the facts stated in the Supreme Court's decision, Mr X worked only in the Philippines and not in Thailand



Case Study: Employee Sent to Work Outside Thailand (cont)

Debatable whether Paragraph 1 of Section 41 applied to make the income subject to tax as it would appear that ACo was not actually the employer of Mr X, but rather, only facilitated the payment for PCo which was the real employer.

Even if the income was taxable in Thailand under Section 41 Paragraph 1, would Article 15 Paragraph 1 apply to deny Thailand the right to tax the income?



Case Study: Employee Sent to Work Outside Thailand (cont)

Based on the facts stated in the Court's decision, Mr X performed all his services in the Philippines.

Therefore, Article 15 paragraph 1 would make the remuneration received by Mr X taxable only in the Philippines as he was a tax resident of the Philippines, and did not provide any services in Thailand.

In the worst case, if Mr X did perform some services in Thailand, only the income referable to the services performed in Thailand would be subject to Thai tax and not the full amount of the remuneration received by Mr X.



Case Study: Employee Sent to Work Outside Thailand (cont)

In my opinion, the Supreme Court's decision was wrong as they relied solely on Thai domestic tax law and did not consider the DTA which clearly, on the basis of the facts disclosed, would have exempted the income from tax in Thailand or at least would have only permitted Thailand to tax the portion of the remuneration referable to services performed in Thailand.



Case Study: Employee Sent to Work Outside Thailand (cont)

Adverse Impact to Mr X

Double taxation: taxed in full in the Philippines (correctly) and taxed in Thailand (incorrectly).

No FTC available to Mr X in the Philippines as the tax imposed in Thailand is not imposed in accordance with the provisions of the DTA as the income is Filipino source income (services rendered in the Philippines) and not Thai source income..



Case Study: Employee Sent to Work Outside Thailand (cont)

Lessons to be Learned

- Obtain appropriate tax advice from a knowledgeable tax adviser prior to assigning an employee to work outside Thailand
- Engage competent tax advisers and lawyers to draft the notice of objection and present the case in Court;
- Do not pay the remuneration from Thailand, but pay it directly from the employer company in the country in which the employee is working or by the branch of the Thai company in the host country.



Case Study: Employee Sent to Work Outside Thailand (cont)

Thai employee sent to work in the Thai employers subsidiary in Singapore. Employee works in Singapore for a number of years and is paid directly by his Singapore employer company.

Employee invests part of his remuneration in Singapore and remits part of his income back to his bank account in Thailand on a current basis.



Case Study: Employee Sent to Work Outside Thailand (cont)

Prior to returning to Thailand, employee remitted all his foreign source investment income to Thailand.

Employee left Thailand on 31 December 2004, began employment with Singapore company on 1 January 2005 and returned to Thailand on 31 December 2007. Employee spent more than 300 days in Singapore in each of 2005 to 2007.



Case Study: Employee Sent to Work Outside Thailand (cont)

Would any income derived by employee from the Singapore company and his investment income be subject to Thai tax?



Case Study: Employee Sent to Work Outside Thailand (cont)

Analysis

- Employee would be a non-resident of Thailand for each of the years 2005 to 2007 inclusive: not in Thailand for 180 days or more in any year
- Employment income and investment income is foreign source income and would not be subject to Thai tax under paragraph 2 of Section 41 of the Revenue Code.



Case Study: Employee Sent to Work Outside Thailand (cont)

Assume employee does not remit the investment income back to Thailand prior to returning to Thailand but rather remits his investment income to Thailand on 31 January 2009. Assume employee is a tax resident of Thailand for the 2008 and 2009 tax years.

What tax planning should he undertake to avoid Thai taxation on the foreign source investment income?



Case Study: Employee Sent to Work Outside Thailand (cont)

Employee Works in Thailand and Offshore

Possible to avoid Thai tax on remuneration re offshore work if properly structured and work can be performed wholly outside Thailand.

Need to have a dual contract arrangement.



Dual contracts

- Two employment contracts
 - One contract with the Thai employer for work performed in Thailand
 - One contract with an offshore employer for worked performed offshore



Dual contracts

- minimising Thai tax liability

- A purpose of the offshore contract is to minimise liability to Thai personal tax – only the Thai contract is recorded in the payroll of the Thai company
- Under Section 41, a resident of Thailand will be taxable on offshore employment income only if it is brought into Thailand in the same year that it is derived.



Dual Contracts (cont)

Mr Y is an employee of a Thai company with a Singapore subsidiary. The Singapore subsidiary requires the expertise of Mr Y for a project in Singapore. Mr Y would only be required to work on the project when he is in Singapore. Mr Y would be in Singapore less than 60 days in any year.



Dual Contracts (cont)

- Mr Y should be employed (have a contract with) and paid by the Singapore subsidiary directly.
- Provided salary income is not remitted to Thailand in the same year as it is derived, Mr Y should avoid Thai personal income tax on the income from Singapore subsidiary.
- Under Singapore tax law, Mr Y would not be subject to Singapore tax on the income as he is not present in Singapore for more than 60 days in the year. Singapore subsidiary would still be able to claim a tax deduction for the salary paid to Mr Y.
- Mr Y would therefore, not pay any tax on the Singapore source income.



Dual contracts

- problems in practice

- The dual contracts are artificial – there is really only one employment
- The Thai company is recharged the offshore employment costs from offshore e.g. in the form of a management fee
 - The offshore company is deemed to provide services to the Thai co. via its employee
 - The employee may be deemed to constitute a Permanent Establishment in Thailand of the foreign employer
 - The service fee paid to offshore co. is subject to CIT



Dual contracts

- problems in practice

- The remuneration is not apportioned on a reasonable basis – tax minimisation is factored into the allocation
- The expatriate does in fact work in Thailand on matters relating to the scope of work in his offshore employment contract
- The employee runs the risk of being punished for tax evasion e.g. jail term maximum 7 years - by not declaring his offshore employment income in his Thai personal tax return



Conclusions

- The Revenue Code and Thailand's DTAs with other countries provide opportunities for the avoidance of tax in Thailand on foreign source income.
- Care needs to be taken in structuring the arrangements for employees to avoid employment income for services performed outside Thailand from being subject to Thai tax. Avoid payment to employee from Thailand where employee is working outside Thailand and employed by a foreign company or a foreign branch of a Thai company.
- Employees can accumulate foreign source investment income offshore whilst they are based outside Thailand and can remit such income back to Thailand without Thai tax if they are non-residents of Thailand at the time of remittance or the timing of the remittance is deferred to a year subsequent to the derivation of the income if the employee becomes a Thai tax resident again. Take care to avoid tainting prior year income with current year income.
- Opportunities can arise where income could be non-taxable in Thailand and in the country of source so seek appropriate advice prior to assigning staff offshore.



Q & A



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Andrew is a Senior Tax Partner with BDO Richfield Advisory Limited and is based in Bangkok. He has 31 years of tax consulting experience of which 23 years have been in Asia (Hong Kong, Singapore and Thailand).

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Andrew has extensive experience in developing tax effective financing arrangements and in advising clients on cross border transactions, transfer pricing, corporate reorganisations and financial restructuring and mergers and acquisitions. In addition, he has advised numerous clients on establishing operations in Thailand as well as carrying out tax due diligence assignments for potential investors in a wide range of industries.



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