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CHANDLER MHM

Newsletter

THAILAND: THAI REVENUE DEPARTMENT ISSUES NEW REGULATIONS ON TRANSFER PRICING

Introduction

The Revenue Department recently issued a notification related to transfer pricing. The Notification of the Director-General of the Revenue Department Regarding Income Tax (No.400) Re: Rules, Procedures, and Conditions for Adjustment of Income and Expense of Related Companies or Juristic Partnerships (the "**Notification**") was issued on 14 January 2021, and was published in the Royal Gazette on 6 May 2021.

The Notification applies the arm's length principle to transactions and sets forth criteria, accepted transfer pricing methods and conditions for the assessment officer of the Revenue Department to adjust income and expenses for transactions between related companies or related juristic partnerships. The Notification is in line with the Transfer Pricing Guidelines published by the Organization for Economic Co-operation and Development ("**OECD**"), and introduces several key definitions, as follows:

- "Controlled Transactions" means related party transactions or transactions between associated companies or associated juristic partnerships;
- "Uncontrolled Transactions" means non-related party transactions or transactions between non-associated companies or non-associated juristic partnerships; and
- "Remuneration for Transactions" encompasses financial indicators that are related to the selected transfer pricing methods or other appropriate financial indicators corresponding to other transfer pricing methods, as the case may be.

The definition of related party referred to in Section 71 bis of the Revenue Code can be found in our previous newsletter at this LINK.

Overview of the Notification

The Notification applies to adjustments of profits from transactions between related companies or related juristic partnerships ("**Associated Enterprises**") for the purpose of calculation of income tax by the Thai Revenue Department. The Notification applies to any transaction that establishes commercial or financial terms between Associated Enterprises that will likely lead to a transfer of profits between parties in a manner that one of the parties will not receive assessable income, and the terms of which include remuneration differences from similar transactions between independent companies or juristic partnerships ("**Independent Enterprises**"). In these cases, an assessment officer of the Revenue Department may adjust the income and expense of an Associated Enterprise for the purpose of calculation of net profit for computing corporate income tax imposed on the following:

(i) income subject to tax arising from or in consequence of business carried on in an accounting period after deduction of all expenses in accordance with conditions prescribed in Sections 65 bis and 65 ter of the Revenue Code according to Section 65 of the Revenue Code; or

(ii) assessable income of a company or juristic partnership organized under a foreign law not carrying on business in Thailand which has received assessable income under Section 40(2), (3), (4), (5) or (6) of the Revenue Code which is paid either from, or in Thailand according to Section 70 of the Revenue Code; or

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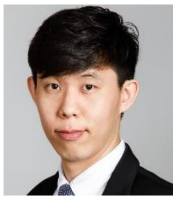

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(iii) a sum representing profits or any other sum which was set aside out of profits, or which may be regarded as profits of any company or juristic partnership which are disposed out of Thailand according to Section 70 bis of the Revenue Code.

Profits or assessable income of an Associated Enterprise will be deemed as a sum received under transactions engaged in independently if the remuneration for the Controlled Transactions is not different from the remuneration received in comparable Uncontrolled Transactions.

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Identifying the transaction

The Notification prescribes comparability factors that need to be identified in the commercial or financial relations between the Associated Enterprises in order to delineate the actual transaction, as follows:

1. Contractual terms of the transaction;
2. Functions to be performed and responsibilities of each of the parties to the transaction, taking into account assets used and risks assumed;
3. Nature of the properties transferred or services provided;
4. Economic circumstances; and
5. Business strategy pursued in the transaction by the Associated Enterprises.

Accepted Transfer Pricing Methods

To contemplate whether the remuneration of a Controlled Transaction is appropriate as if it had been agreed with an Independent Enterprise, selection of transfer pricing methods ("**Accepted Transfer Pricing Method**") should correspond with the circumstance in each case, as follows:

(i) Comparable Uncontrolled Price ("**CUP**") Method: compares the price demanded for the transfer of properties or provision of services for a Controlled Transaction with an Uncontrolled Transaction;

(ii) Resale Price Method: compares the profits from the sales of properties in a Controlled Transaction and resales of such properties in an Uncontrolled Transaction with the profits from the purchase and resales of properties in an comparable Uncontrolled Transaction;

(iii) Cost Plus Method: compares the profits incurred from (direct and indirect) cost plus markup for the transfer of properties or provision of services for a Controlled Transaction with the same characteristics of profits incurred in the same nature of transactions for comparable Uncontrolled Transaction;

(iv) Transactional Net Margin Method: compares net profits relative to an appropriate base (e.g., costs, sales, assets) received in a Controlled Transaction with the net profits received in an Uncontrolled Transaction; or

(v) Transactional Profit Split Method: determines the division of profits (or losses) of transactions engaged in a Controlled Transaction according to their involvement in the transactions as if the profits (or losses) were received in an Uncontrolled Transaction.

Under (i) above, the transfer pricing method compares the price for property or services transferred in a Controlled Transaction to the price charged for property or services transferred in a comparable Uncontrolled Transaction in comparable circumstances.

If the transfer pricing methods above can be applied to the profits or assessable income received by an Independent Enterprise from the work performed in a Controlled Transaction, the division of profits will only be applied to the profits remaining after the deduction of profits or assessable income received from the transfer pricing methods described in clauses (i) to (iv).

Determination of transfer pricing methods

To select the Accepted Transfer Pricing Methods, the following factors must be taken into consideration:

1. Strength and weakness of each transfer pricing method;
2. Appropriateness of transfer pricing methods according to the nature of controlled transactions by analyzing each party's function performed in relation to the controlled transaction by taking the assets used and risks assumed into consideration;
3. Existence of credible information necessary for applying the selected transfer pricing method; and
4. Comparability level between a controlled transaction and an uncontrolled transaction, including the reliability of an adjustment in the comparability.

Other transfer pricing methods

Other transfer pricing methods may be used for Controlled Transactions only if the five Accepted Transfer Pricing Methods are proven to be inappropriate regarding a transaction and there is another transfer pricing method that is more appropriate to that transaction. In addition, a company or juristic partnership that would like to use another transfer pricing method must notify the Revenue Department and provide a clear explanation about the other method to be used, including the documents to support the rationale that the Accepted Transfer Pricing Methods are not appropriate for a transaction. The rationale will be examined by the assessment officer of the Revenue Department.

Uncontrolled Transactions: Controlled Transactional status

Uncontrolled Transactions will be treated as transactions which may be equivalent to Controlled Transactions if:

1. The Uncontrolled Transaction does not differ in a way that may have a significant impact on the financial indicators which are examined by using the Accepted Transfer Pricing Methods; or
2. The Uncontrolled Transaction does differ in a way that may have a significant impact on the financial indicators which are examined by using the Accepted Transfer Pricing Methods but such impact(s) can be eliminated by applying an appropriate adjustment.

Miscellaneous requirements under the Notification

The Notification also provides wide concepts relating transfer pricing matters, such as analysis of multiple transactions in the same or similar circumstances, and transactions related to intangible properties or intragroup services.

Double tax treaties

Thailand is a signatory to numerous double tax treaties with other countries. Parties to an agreement that involve on and offshore parties in an Associated Enterprise may request a transfer pricing arrangement/agreement in advance to avoid possible disputes. The agreement should include appropriate guidelines on remuneration from transactions between the related companies or juristic partnerships that will incur in the future.

Conclusion

The Notification is applicable to the income of a company or juristic partnership derived from 1 January 2021 onwards. Therefore, any Associated Enterprises in Thailand should be aware of the new guidelines included in the Notification.

If you would like to discuss any of the legal implications of the matters discussed above, please contact the authors listed in the right-hand column.