“PRACTICAL INTERNATIONAL TAX PLANNING STRATEGIES”

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Practical International Tax Planning Strategies

- Taxation laws and regulations of a country must be considered.
- Double taxation agreements between counterparties are important for international tax planning.
- The Revenue Code of Thailand covers personal income tax, corporate income tax, value added tax, specific business tax and stamp duty.
- Calculation of revenue, expenses, profits and losses
- Expenses
  - Deductible expenses
  - Non-deductible expenses
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- Revenue expenses vs capital expenditure
- Depreciation rate and special depreciation rate
- Tax exemption or reduction under domestic law
- Rate of corporate income tax (“CIT”) of Thailand has been permanently reduced to 20% of net profits of a company.
- In 2016 profits of small and medium enterprises or companies are exempted and in 2017, exemption from CIT for profits of up to Baht 300,000, reduction of CIT to 10% for profits of more than Baht 300,000, and reduction to 15% for profits of more than Baht 3,000,000 provided that conditions have been fully and duly satisfied.
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• Profit Remittance Tax

• 10% withholding tax is levied on profit after corporate income tax of Thailand remitted by a branch to a head office of or another foreign branch a foreign company or by a company.
• Remittance of profits by way of a physical remittance or a book entry out of Thailand is subject to withholding tax of Thailand.
• Tax loss may be carried forwarded for 5 consecutive years but cannot be carried backward.
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- **Foreign-source income**
  - A resident of Thailand is taxed on foreign-source income to the extent that such income is brought into Thailand in the same tax year in which the income is derived.
  - International carriage is specified in a separate section of the Revenue Code.
  - 3% corporate income tax is imposed on gross freight charges or gross ticket receipts collected in Thailand.
Value added tax or VAT is chargeable on sale of goods, provision of service in Thailand and import of goods and services into Thailand but export of goods and services is exempted from VAT or at 0% of VAT.

Service rendered and used in Thailand is subject to VAT.

Lease of land and building is exempted from VAT.

Specific business tax or SBT is collected on gross revenue of interest on loan and proceeds from a sale of real property.
Stamp duty is chargeable for instruments including the following:

- lease of and building
- hire of work
- negotiable instrument
- Guarantee
- power of attorney.

- transfer of shares or bonds
- loan agreement
- receipt of transfer of real property
- pledge
Provisions of corporate income tax to be collected from companies doing business in Thailand are contained in The Revenue Code of Thailand. But, under the Investment Promotion Act, the Board of Investment of Thailand or the BOI grants tax incentives for a promoted investment project. Privileges of BOI include:
- Exemption of corporate income tax for up to 8 years;
- 50% reduction of corporate income tax for a period of 5 years after the end of the tax exemption period; and
- Exemption of import duty on raw material and machinery imported into Thailand.

BOI and Non-BOI issues are highly interesting in Thailand
Different opinions on taxes exist between government authorities of Thailand.
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- **International Headquarters (“IHQ”)**
  IHQ involves managerial services, technical services, supporting services and/or financial management among affiliated companies and branches of IHQ in Thailand.

Tax incentives for IHQ:
- Exemption of corporate income tax for 15 accounting years for service fees, royalties, dividends, capital gains and income for out-out transactions;
- Reduction of corporate income tax to 10% for service fees and royalties for transactions in Thailand;
- Reduction of personal income tax for foreigners to 15% of gross income for 15 years; and
- Exemption of specific business tax for gross receipts from loans to affiliated companies.
International Trading Center (“ITC”)

ITC relates to trading activities and trading-related services to overseas customers.

Purchases and sales of goods, materials and parts form trading activities.

Trading-related services include maintenance of goods in transit, packing of goods, delivery of goods, insurance of goods and advisory and technical support services and training on goods.
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- Tax incentives for ITC
  
  - Exemption of corporate income tax on profits from international trading of goods with foreign companies (out-out transactions);
  
  - Exemption of withholding tax on dividends paid to its corporate shareholders in a foreign country; and
  
  - Reduction of personal income tax to 15% of gross income for foreigners.
International Investment should take into consideration normal tax, exemption or reduction of taxes on matters including the following:

- Business profit
- Dividend
- Interest
- Royalties
- Capital gains
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- **Double taxation agreement ("DTA")**
  - Source country and resident country
  - Resident of an individual
  - Resident of legal entities
    - Place of incorporation
    - Place of central control and management
  - Tax distinction between resident tax and non-resident tax
  - Same or different treatment between resident and non-resident
  - Legal form and economic substance
  - Application of substance over form
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• Tax evasion, tax avoidance, aggressive tax avoidance, tax planning

• Harmful jurisdiction

• Strict interpretation of letter of law vs spirit of law

• Anti-Treaty Shopping rules

• Issue on indirect disposal of shares taxable or non-taxable
Treaty shopping is a kind of abuse of a tax treaty but is still used. Beneficial ownership may be used to prevent the use of treaty shopping. Beneficial ownership is applied in cases of dividends, interest and royalties.

Double non-taxation causes problems for relevant states.

A conduit company is interposed between a company in the source state and a company in the resident state.

Provisions of thin capitalization are not included into the Revenue Code of Thailand. However, provisions of a debt to equity ratio are specified in regulation issued under foreign business law and investment promotion law.
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• Double taxation agreements ("DTA")

• Each of DTA contains special tax provisions such as business profits, dividend, interest, royalties and capital for counterparties.

• 60 Double taxation agreements are effective between Thailand and its counterparties.

• New DTA between Singapore and Thailand was signed on 11 June 2015 and will be effective on 1 January 2016.

• Unilateral relief is provided under provisions of regulations of the Revenue Code.
• Issues on dividend and capital gains

• Issues on dividend and interest

• Issues on interest and service fee

• Issues on service fee and royalties

• Payment for lease of machinery may be royalty or business profit which depends upon provisions of a DTA between Thailand and its particular counter party.
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• Technical assistance agreement may result in payment of royalty or payment of service fee.

• Too many tax loopholes have been found in international transactions.

• Base erosion and profit shifting or BEPS was invented.
15 action plans on BEPS are prepared and intended to be implemented in December 2016 by members of OECD.

Source: The final reports of OECD’s action plans on Base Erosion and Profit Shifting
• To modify the list of exception to the definition of PE to ensure that each of the exception is activity with preparatory or auxiliary character, and to introduce a new anti-fragmentation rule to prevent benefiting from these exception through fragmentation of business activities among affiliates.

• To modify the definition of PE to include the situation where artificial arrangements related to sale of goods or services of affiliated company leads to conclusion of contracts, such sale should be treated as if they were made by the parent company itself.

• The right of return is not based solely on legal ownership. Rather, the group companies performing essential functions, contributing the important assets and controlling economically significant risks will be entitled to an appropriate return.

• To create effective CFC that would result in such income being subject to the ultimate parent company.

• To address broader tax challenges raised by the digital economy.
Action Plan 2 Neutralising the effects of hybrid mismatch arrangements

• This Action Plan consists of 2 parts: Part I recommendations for changes to domestic law and Part II recommended changes to the OECD Model Tax Convention.

• Part I sets out recommendations for rules to address mismatches in tax outcome where they arise in respect of payment made under a hybrid financial instrument or payment made to or by a hybrid entity.

• The recommended primary rule is that countries deny the tax payer’s deduction for a payment to the extent that it is not included in the taxable income of the recipient in the counterparty jurisdiction or it is also deductible in the counterparty jurisdiction. If the primary rule is not applied, then the counterparty jurisdiction can generally apply a defensive rule, requiring the deductible payment to be included in income or denying the duplicate deduction depending on the nature of the mismatch.

• Part II is to prevent use of hybrid instruments and entities, dual resident entities for unduly obtaining benefit of tax treaties and tax treaties support the application of changes to domestic law recommended in Part I.
Action Plan 3 Designing effective controlled foreign company rules

• This Action plan is to prevent taxpayers from shifting income into foreign subsidiaries by stripping the base of their country of residence or other countries by shifting income into controlled foreign company (CFC). The report sets out 6 principles for purpose of designing effective CFC rules:

  • **Definition of CFC**
    Recommendation on how to determine when shareholders have control over a foreign company to the extent that such company can be regarded as CFC.

  • **CFC exemptions and threshold requirements**
    Recommending that CFC rules only apply to controlled foreign companies that are subject to effective tax rates that are meaningfully lower than the rates in the parent jurisdiction.

  • **Definition of income**
    Although some countries’ existing CFC rules treat all the income of a CFC as CFC income, many CFC rules only apply to certain type of income. It is recommended that CFC rules include a definition of CFC income.
Action Plan 3 Designing effective controlled foreign company rules

• **Computation of income**
  It is recommended that CFC rules use the rules of parent jurisdiction to compute the CFC income for purpose of attribution to shareholders. It is also recommended that CFC losses should only be offset against the profits of the same CFC or other CFCs in the same jurisdiction.

• **Attribution of income**
  The attribution threshold should be tied to the control threshold and that the amount of income to be attributed should be calculated by referring to proportionate ownership or influence.

• **Prevention and elimination of double taxation**
  Recommendation on how to prevent double taxation when designing CFC rules
Given that multinational groups may use adjustment of debt in the group to achieve lower tax liability. Financial instruments can also be used to make payments which are economically equivalent to interest but have a different legal form, therefore escaping restrictions on the deductibility of interest. Base Erosion and Profit Shifting (BEPS) risks in this area may arise in three basic scenarios:

- Groups placing higher levels of third party debt in high tax countries.
- Groups using intragroup loans to generate interest deductions in excess of the group’s actual third party interest expense.
- Groups using third party or intragroup financing to fund the generation of tax exempt income.
The final report provides analysis on approaches to prevent the above risks. The recommended approach is setting a fixed ratio rule as corridor which limits an entity’s net deductions for interest and payments economically equivalent to interest to a percentage of its earnings before interest, taxes, depreciation and amortisation (EBITDA). Moreover, a group ratio rule is proposed to be used together with a fixed ratio rule in order for an entity with net interest expense above a country’s fixed ratio to deduct interest up to the level of the net interest/EBITDA ratio of its worldwide group.

The recommended approach also allows countries to supplement the fixed ratio rule and group ratio rule with other provisions that reduce the impact of the rules on entities or situations which pose less BEPS risk.
The following are proposed:

- Requiring substantial activity for preferential regimes
  
  The “nexus approach” was agreed to be used for strengthening substantial activity requirement in assessment of preferential regimes. This principle is used for other preferential regimes so that such regimes would be found to require substantial activities where they grant benefits to a taxpayer to the extent that the taxpayer undertook the core income-generating activities required to produce the type of income covered by the preferential regime.
Improving transparency

In the area of transparency, a framework covering all rulings that could give rise to BEPS concerns in the absence of compulsory spontaneous exchange has been agreed. The framework covers six categories of rulings: (i) rulings related to preferential regimes; (ii) cross border unilateral advance pricing arrangements (APAs) or other unilateral transfer pricing rulings; (iii) rulings giving a downward adjustment to profits; (iv) permanent establishment (PE) rulings; (v) conduit rulings; and (vi) any other type of ruling where the FHTP agrees in the future that the absence of exchange would give rise to BEPS concerns.
Action plan 6 Preventing the Granting of Treaty Benefits in Inappropriate Circumstances

• To prevent treaty shopping

• Section A of this report includes new treaty anti-abuse rules that provide safeguards against the abuse of treaty provisions and offer a certain degree of flexibility regarding how to do so
The following are proposed:

• Artificial avoidance of PE status through commissioneer arrangements and similar strategies

A commissioneer arrangement may be loosely defined as an arrangement through which a person sells products in a State in its own name but on behalf of a foreign enterprise that is the owner of these products. Since the person that concludes the sales does not own the products that it sells, that person cannot be taxed on the profits derived from such sales and may only be taxed on the remuneration that it receives for its services (usually a commission). A foreign enterprise that uses a commissioneer arrangement does not have a permanent establishment because it is able to avoid the application of Art. 5(5) of the OECD Model Tax Convention, to the extent that the contracts concluded by the person acting as a commissioneer are not binding on the foreign enterprise.
The changes to Art. 5(5) and 5(6) and the detailed Commentary thereon that are included in section A of the report address *commissionnaire* arrangements and similar strategies by ensuring that the wording of these provisions better reflect this underlying policy.

- Artificial avoidance of PE status through the specific exceptions in Art. 5(4)
  - In order to ensure that profits derived from core activities performed in a country can be taxed in that country, Article 5(4) is modified to ensure that each of the exceptions included therein is restricted to activities that are otherwise of a “preparatory or auxiliary” character. The modifications are found in section B of the report. The anti-fragmentation rule proposed in section B will address these BEPS concerns.
Other strategies for the artificial avoidance of PE status

The exception in Art. 5(3), which applies to construction sites, has given rise to abuses through the practice of splitting-up contracts between closely related enterprises. The Principal Purposes Test (PPT) rule that will be added to the OECD Model Tax Convention as a result of the adoption of the Report on Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances) will address the BEPS concerns related to such abuses.
• The arm’s length principle is widely used by many countries as the cornerstone of transfer pricing rules. The principle requires that transactions between associated enterprises are priced as if the enterprises were independent, operating at arm’s length and engaging in comparable transactions under similar conditions and economic circumstances. Where the conditions of the transaction are different to those between third parties in comparable circumstances, adjustments to the profits may be needed for tax purposes. 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. This manipulation can lead to outcomes which do not correspond to the value created through the underlying economic activity carried out by the members of an MNE group.
This work on transfer pricing under the BEPS Action Plan has focused on three key areas. Work under Action 8 looked at transfer pricing issues relating to transactions involving intangibles, since misallocation of the profits generated by valuable intangibles has contributed to base erosion and profit shifting. Work under Action 9 considered the contractual allocation of risks, and the resulting allocation of profits to those risks, which may not correspond with the activities actually carried out. Work under Action 9 also addressed the level of returns to funding provided by a capital-rich MNE group member, where those returns do not correspond to the level of activity undertaken by the funding company.

Work under Action 10 focused on other high-risk areas, including the scope for addressing profit allocations resulting from transactions which are not commercially rational for the individual enterprises concerned (re-characterisation), the scope for targeting the use of transfer pricing methods in a way which results in diverting profits from the most economically important activities of the MNE group, and neutralising the use of certain types of payments between members of the MNE group (such as management fees and head office expenses) to erode the tax base in the absence of alignment with value creation.
The report recommends that the OECD work with governments to report and analyse more corporate tax statistics and to present them in an internationally consistent way. For example, statistical analyses based upon Country-by-Country Reporting data have the potential to significantly enhance the economic analysis of BEPS. These improvements in the availability of data will ensure that governments and researchers will, in the future, be better able to measure and monitor BEPS and the actions taken to address BEPS.
The following are proposed:

- Design principles and key objectives of a mandatory disclosure regime
  - The main objective of mandatory disclosure regimes is to increase transparency by providing the tax administration with early information regarding potentially aggressive or abusive tax planning schemes and to identify the promoters and users of those schemes. Another objective of mandatory disclosure regimes is deterrence: taxpayers may think twice about entering into a scheme if it has to be disclosed. Pressure is also placed on the tax avoidance market as promoters and users only have a limited opportunity to implement schemes before they are closed down.
Action plan 12 Mandatory Disclosure Rules

- **Key design features of a mandatory disclosure regime**
  - The Report recommends that countries introducing mandatory disclosure regimes:
    - impose a disclosure obligation on both the promoter and the taxpayer, or impose the primary obligation to disclose on either the promoter or the taxpayer;
    - include a mixture of specific and generic hallmarks, the existence of each of them triggering a requirement for disclosure. Generic hallmarks target features that are common to promoted schemes, such as the requirement for confidentiality or the payment of a premium fee. Specific hallmarks target particular areas of concern such as losses;
Action plan 12 Mandatory Disclosure Rules

• establish a mechanism to track disclosures and link disclosures made by promoters and clients as identifying scheme users is also an essential part of any mandatory disclosure regime. Existing regimes identify these through the use of scheme reference numbers and/or by obliging the promoter to provide a list of clients. Where a country places the primary reporting obligation on a promoter, it is recommended that they also introduce scheme reference numbers and require, where domestic law allows, the production of client lists;

• link the timeframe for disclosure to the scheme being made available to taxpayers when the obligation to disclose is imposed on the promoter; link it to the implementation of the scheme when the obligation to disclose is imposed on the taxpayer;

• introduce penalties (including non-monetary penalties) to ensure compliance with mandatory disclosure regimes that are consistent with their general domestic law.
Coverage of international tax schemes

International schemes are more likely to be specifically designed for a particular taxpayer or transaction and may involve multiple parties and tax benefits in different jurisdictions, which can make these schemes more difficult to target with domestic hallmarks. In order to overcome these difficulties, the Report recommends that:

Countries develop hallmarks that focus on the type of cross-border BEPS outcomes that cause them concern. An arrangement or scheme that incorporates such a cross-border outcome would only be required to be disclosed, however, if that arrangement includes a transaction with a domestic taxpayer that has material tax consequences in the reporting country and the domestic taxpayer was aware or ought to have been aware of the cross-border outcome.

Taxpayers that enter into intra-group transactions with material tax consequences are obliged to make reasonable enquiries as to whether the transaction forms part of an arrangement that includes a cross-border outcome that is specifically identified as reportable under their home jurisdictions’ mandatory disclosure regime.
This report contains revised standards for transfer pricing documentation and a template for Country-by-Country Reporting of income, taxes paid and certain measures of economic activity.
Through the adoption of this Report, countries have agreed to important changes in their approach to dispute resolution, in particular by having developed a minimum standard with respect to the resolution of treaty-related disputes, committed to its rapid implementation and agreed to ensure its effective implementation through the establishment of a robust peer-based monitoring mechanism that will report regularly through the Committee on Fiscal Affairs to the G20. The minimum standard will:

• Ensure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that MAP cases are resolved in a timely manner;

• Ensure the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes; and

• Ensure that taxpayers can access the MAP when eligible.
The governments have agreed to explore the feasibility of a multilateral instrument that would have the same effects as a simultaneous renegotiation of thousands of bilateral tax treaties. Action 15 of the BEPS Action Plan is therefore created to facilitate this goal.

Action 15 of the BEPS Action Plan provides for an analysis of the tax and public international law issues related to the development of a multilateral instrument to enable countries that wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties. This is an innovative approach with no exact precedent in the tax world, but precedents for modifying bilateral treaties with a multilateral instrument exist in various other areas of public international law.
Case Study I

Current Tax Structure of Social Networking Service Company

Advertising Company in Country A

Social Networking Service Company in Country B

Holding Company in Country C

Advertising sale revenue

Royalty fees

Support fees

Social Networking Service Company in Country A

Low tax

Tax Administration of Country A
Case Study I

New Tax Structure of Social Networking Service Company

- Small Advertisers in Country A
  - Advertising sale revenue
  - Royalty fees

- Large Advertisers in Country A
  - Advertising sale revenue
  - Support fees

- Social Networking Service Company in Country A
  - Tax

- Tax Administration of Country A

- Social Networking Service Company in Country B
  - Royalty fees

- Holding Company in Country C
Case Study II

Coffee company in Country B

Sister company in Country C

Unjustified high prices for green beans

Green beans

Coffee company in Country B

Unusual royalty

Sister company in Country A

Tax Administration in Country B

Very low taxes
Thank you very much for your kind attention

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