BAKER TILLY THAILAND

OECD's Base Erosion Profit Shifting (BEPS) and Thailand: Tax Structuring in Thailand under International Tax Law Changes – 13 July 2017

Executive Summary

Specific issues that may need reviewed under Thai and International Tax Law Change

The following issues are examples that may need to be reviewed to avoid increased taxation because of changes in law and interpretation:

- Increased taxation from denial of tax treaty benefits depending on the principal purpose and substance of the arrangement, E.g increased taxation of funding methods (debt/equity), royalties and capital gains,
- All cross border and Thai domestic related party transactions could be subject to taxation adjustments and it is prudent to document these as soon as possible,
- Disallowance of Capital Gains Tax Exemption in cross border investment in companies that derive more than 50% of their value, directly or indirectly from real property at any time in the 365 days before the divestment of the shares,
- Increased taxation of dividends from denial of tax treaty benefits if share ownership amounts (E.g. 25%) and periods including the dividend payment date (E.g. 365 continuous days) are not met,
- Increased taxation through agents, activities and the method of contracting in a country,
- Increased taxation of Thai Groups with Mauritius companies in holding structures,
- Increased taxation of digital transactions, and
- Transparent entities (E.g. Partnerships).

Thai and International Tax Law Update

- Base Erosion and Profit Shifting (BEPS) refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where is little or no economic activity. These tax law changes will also impact tax structures which do not have these strategies.

- Thailand has joined the OECD's BEPS inclusive framework with minimum standards of tax law change.
- The OECD's Multilateral Treaty Instrument will have an impact on Tax Treaties worldwide.
- Thailand has unilaterally implemented international tax law change which may require action.
- Transfer pricing documentation for related party cross-border transactions should be updated with the oncoming mandatory reporting of transfer pricing disclosures in Thailand as well as Country-by-Country reporting,
- Thailand has announced guidance on the introduction of a Digital tax which may tax foreign digital operators without a presence in Thailand to 20% Thai tax as well as impose 15% Withholding Tax and the current 7% VAT on digital transactions. The law also needs to be considered by corporates transacting with foreign digital operators.

Thailand joins the OECD's BEPS Inclusive Framework

On 2 June 2017, Thailand became the 98th jurisdiction to join the inclusive framework on BEPS and this will enable Thailand to collaborate on the implementation of the OECD's/ G20's BEPS fifteen Action plans. It also means that Thailand has committed to a minimum standard in implementing the following:

- Preventing abuse of the use of Tax Treaties,
- Country by Country Reporting which will affect Thai Multinationals which have consolidated revenues of greater than EUR 750 million. This will require such multinationals to file information with the Thai Revenue such as tax payments, activities and financial information which the Thai Revenue will share with other members of the inclusive framework,
- Improving taxpayer dispute resolution through mutual agreement procedures regarding disputes related to treaties, and
- Fighting harmful tax practices by focusing on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes and on requiring substantial activity for preferential regimes, such as IP regimes.

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OECD Multilateral Instrument

The Multilateral Instrument (MLI) is intended to implement some of the BEPS Actions plans at a much faster pace with a standard model which will require changes to tax treaties worldwide.
Whilst Thailand is not a signatory to the MLI, it is a member of the “ad hoc Group on the MLI” which means it is yet to commit to implementing the MLI in its treaty amendments (although it is committed to minimum standards through the inclusive framework above which are reflected in the MLI).

MLI Implementation

Other relevant jurisdictions to Thailand in terms of holding companies or trade such as Japan, China (including Hong Kong), Singapore, the United Kingdom, the Netherlands, Indonesia and Australia have elected to be covered by the MLI.

Ad Hoc Group

The “ad hoc Group” position has also been adopted by other countries such as the US, Vietnam, Philippines and Malaysia.

The intention is that with a standardized treaty allowing jurisdictions to select which treaties they wish to amend (with options for jurisdictions to choose from in amending these treaties) then the amendments under the MLI should also be more uniform in application and interpretation.
The expectation is that the amended treaties will come into force from 1 January 2019, however, this may be sooner or later. The main issues for review in Thailand under the Multilateral instrument are:

- Treaty abuse,
- Permanent establishments (that is creating a taxable presence without an actual corporate entity presence).

Conclusion

Finance and Tax Functions with cross border transactions need to continually assess current and prospective tax law changes given the lead time on taking any action required. This will ensure the taxation outcomes are as expected under various BEPS initiatives which are already being implemented globally as well as locally here in Thailand.

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