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Thai Legal News Flash

Latest News on law, tax and business in Thailand

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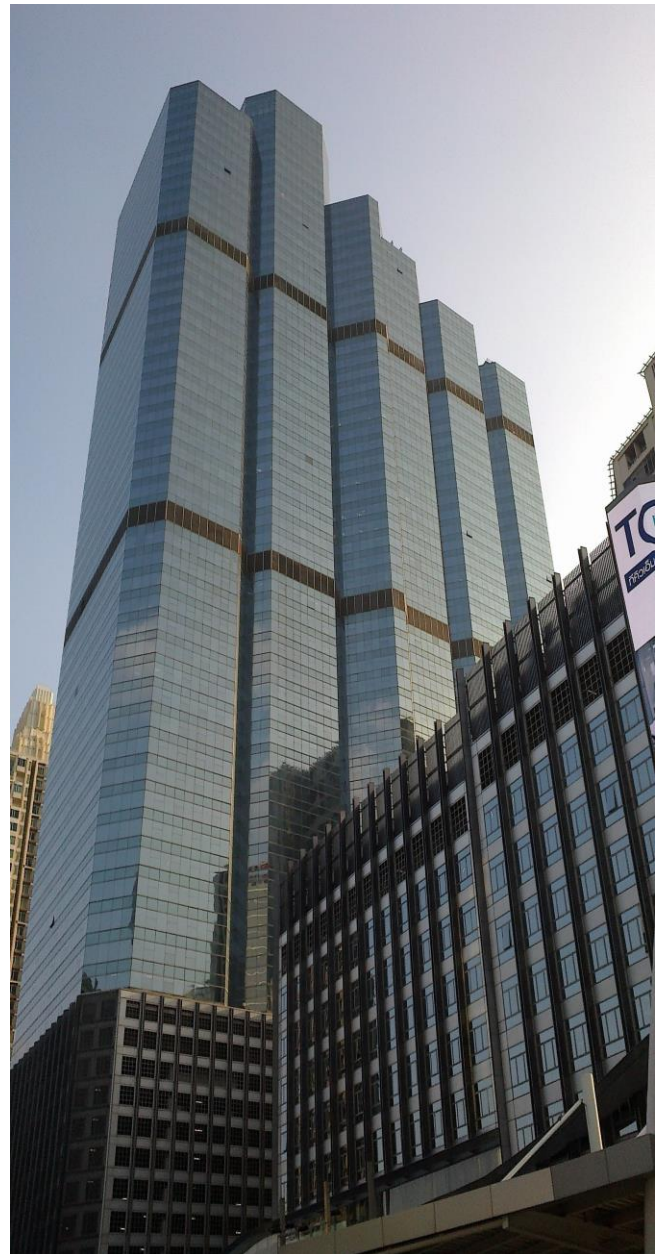
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> Cabinet Approves Draft Transfer Pricing Provisions

In January 2018, the Thai Cabinet approved a draft regarding new transfer pricing provisions. Notably, the draft, if enacted, might take retroactive effect, applying to accounting periods from 1 January 2017 onwards. However, the Ministry of Finance has announced that they are reconsidering this date.

Taxpayers will have the following obligations:

Transfer Pricing Disclosure Form: Depending on annual revenue, taxpayers will have to submit a transfer pricing disclosure form. The information will allow the Revenue Department to assess whether further investigation is necessary. The specifics and thresholds will be subject to ministerial regulations yet to be issued,



Empire Tower Building at South Sathorn Road, Bangkok

however such threshold cannot be lower than 30 million Baht per annum.

Transfer Pricing Report: Taxpayers will have to prepare a transfer pricing report. This report has to show all relevant information regarding transaction with affiliated companies. The exact extent of necessary information will be subject to further ministerial regulations. The Revenue Department can request the report within 5 years from the filing of the transfer pricing disclosure form.

If taxpayers' transactions do not comply with the arm's length principle, the Revenue Department will have the authority to adjust revenue and expenses to the market price. Taxpayers not complying with the above disclosure requirements will face penalties in addition to penalties on any under-paid taxes.

Taxpayers should start to keep records regarding the pricing of transactions with affiliates. The pricing should be done according to the departmental instructions No. Paw. 113/2545. According to the instructions, taxpayers may choose one of the following methods: Comparable Uncontrolled Price Method, Resale Price Method, Cost Plus Method and other methods accepted under the OECD standard.

> Smart Visa

Starting 1 February 2018, foreigners will be able to apply for the newly introduced Smart Visa. The Smart Visa will be an interesting option for skilled foreigners and is intended to facilitate further investment in Thailand.

The Smart Visa is divided into four categories, Talents (T-Visa), Investors (I-Visa), Executives (E-Visa) and Startups (S-Visa).

The Smart Visa will allow the foreigner to work in Thailand without the requirement of obtaining a work permit. It can also be valid up to 4 years (T, I and E). In addition, holders of the Smart Visa only have to report once per year to the immigration authorities instead of every 90 days and a re-entry permit will no longer be required.

Spouse and children will be granted the same privileges as the holder (especially the right to work in Thailand).

Applicants have to work in a targeted industry: automotive, intelligent electronics, tourism and health tourism, agriculture and biotechnology, food processing, robotics, aviation industry and logistics, biofuel and bio-chemical industries, digital industry and comprehensive medical industry.

Core Requirements:

1. Talents

- > Applicant has to be a scientist or expert
- > Applicant receives a salary of at least THB 200,000 per month
- > Applicant has an employment contract with a remaining validity of at least one year
- > Applicant will work in a targeted industry

2. Investors

- > Applicant makes a minimum direct investment of THB 20 million
- > Applicant invests in companies using technology in manufacturing or delivering services and is conducting business in the targeted industries

3. Executives

- > Applicant has a bachelor's degree or higher with work experience of at least 10 years
- > Applicant receives a salary of at least THB 200,000
- > Applicant works as a high level executive
- > Applicant holds an employment contract with a remaining validity of at least 1 year
- > Applicant will work for companies using technology in manufacturing or delivering services and is conducting business in the targeted industries

4. Startup

- > Applicant has a fixed deposit of at least THB 600,000 with a remaining maturity term of at least 1 year
- > Applicant has a health insurance
- > Applicant participates in an endorsed incubation or accelerator program or is in a joint venture with or being endorsed by a relevant government agency
- > Applicant must set up a company in the targeted industries in Thailand within 1 year with at least 25 percent of ownership or being a member of the Board of Directors.

It remains to be seen how the authorities will handle Smart Visa applications in practice. However, foreigners planning to do business in one of the targeted industries should assess whether they are eligible for a Smart Visa as there are clear benefits compared to the standard Visa and Work Permit schemes.

> Increase of Minimum Wages

Permanent Secretary of Labour and Chairman of the Wage Committee Jarin Chakkapak has announced a proposal regarding new daily minimum wages which have since been endorsed and will become effective on 1 April 2018.

The new daily minimum wages will range between THB 308 (approx. 7.90 Euro) for the three southern provinces and THB 330 (approx. 8.50 Euro) for the provinces

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Rayong, Chon Buri and Phuket. The minimum wage for Bangkok and surrounding provinces (Bangkok, Chachoengsao, Nakhon Pathom, Nonthaburi, Pathum Thani, Samut Prakan, Samut Sakhon) will be set to THB 325 (approx. 8.35 Euro). The average minimum wage will be approx. THB 316 (approx. 8.10 Euro).

Currently the minimum wages range from THB 300 (approx. 7.70 Euro) to THB 310 (approx. 7.95 Euro).

The Ministry of Labour proposed an exemption for promoted projects under the Eastern Economic Corridor scheme (promoted projects in the provinces: Chachoengsao, Chon Buri and Rayong), further relief measures for SMEs are also being discussed.

> Electronic Filing of Form D

The Department of Foreign Trade of Thailand announced electronic filing of Form D starting 1 January 2018. Form D is a certificate of origin necessary for preferential treatment of goods under the ASEAN Trade in Goods Agreement (ATIGA).

According to Article 26 of the ATIGA-Agreement, a good has origin in a member state if

- > the good is either wholly obtained or produced in the exporting member state; or
- > is not wholly obtained or produced in a member state but contains a certain regional value content; or
- > materials used in the production of the good were processed in a member state in a way that they have to be substantially re-classified regarding tariffs.

The electronic filing of Form D is part of a broader strategy to facilitate trade and regional integration in ASEAN. The goal is to create an ASEAN Single Window to speed up the cargo clearance process by exchanging relevant information electronically.

Countries initially taking part in the new e-Form Dare Indonesia, Malaysia, Singapore, Thailand and Vietnam. The remaining ASEAN States are expected to implement the Form after successful introduction by the initial countries.

> Public Hearing on New e-Commerce Tax

The Thai Government is planning to impose a tax on e-commerce businesses by amending the Revenue Code. The new law aims at collecting more foreign tax revenue as well as preventing monopolies in the booming e-commerce business. The Thai Revenue Department expects tax revenues to increase by 15 percent or THB 300 billion once the e-business tax is enforced. Under the new law foreign companies generating income or profits in Thailand through electronic methods could be

subjected to income tax in Thailand if the foreign company has either a Thai internet domain, created a payment system in Thai Baht or requires a money transfer from Thailand.

Furthermore, foreign companies receiving income from online advertising fees or web hosting fees are subject to a withholding tax at a rate of 15 percent which has to be remitted to the Revenue Department by the payer.

The draft also stipulates that foreign companies selling intangible goods or providing services by using electronic methods to a non-VAT registered person in Thailand are subject to VAT on their sales in Thailand and are required to register for VAT in Thailand if such income exceeds 1.8 million Baht per year. This VAT-registration however does not necessarily mean that a taxable presence for income tax purposes is created which is often the case today due to the practical requirements imposed for a VAT registration.

Frequently criticized, the draft also revokes the VAT-exemption for imports of products not exceeding 1,500 Baht as stated in the current law.

Further provisions about how to determine the place of supply are still to be made.

> Anti-Corruption Compliance in Thailand

The Office of the National Anti-Corruption Commission (NACC) has published "Guidelines on Appropriate Internal Control Measures for Juristic Persons to Prevent Bribery of State Officials, Foreign Public Officials, and Agents of Public International Organizations".

The guidelines offer helpful instructions to companies regarding the interpretation of Sec. 123/5 of the Act on Counter Corruption (ACC), especially the contents of an internal compliance system ensuring that employees do not engage in acts of bribery.

In a nutshell, a juristic person will be liable if its representatives or associated persons bribe public officials in any position (local or foreign) for corporate benefits, unless the juristic person does have an adequate internal control measures to prevent such acts of bribery.

Thus, the main question is: What establishes appropriate internal control measures? The new guidelines on the "liability of legal persons involved in the bribery of a public official" provide an answer to this question.

Juristic persons will have to establish an internal compliance system, containing the following elements:

- > clear and visible policy supported by top-level management;
- > risk assessment to identify exposure;
- > adoption of enhanced measures for high-risk areas;
- > application of anti-bribery measures to business partners;
- > keeping accurate books and accounting records;
- > policies of human resources should support anti-bribery measures;
- > providing whistleblowing measures to allow reporting of suspicions of bribery; and
- > review and evaluation of anti-bribery measures.

Thailand is adopting stricter anti-corruption measures since the ratification of the United Nations Convention against corruption in 2011.

Companies face criminal liability for bribery committed by employees since the introduction of Sec. 123/5 ACC. Therefore, companies are well advised to establish anti-corruption compliance systems, especially if they engage in areas where bribery is rather common. The system should include all aspects mentioned in the guidelines.

For further information please contact:



Philip Ende
M. Sc. Finance
Associate Partner
Tel.: +66 2 0263258
E-Mail: philip.ende@roedl.com

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Empire Tower 3, 25th Floor,
1 South Sathorn Road
Yannawa, Sathorn,
10120 Bangkok, Thailand

Contact: **Mr. Philip Ende**, philip.ende@roedl.com
Mr. Martin Chrometzka, martin.chrometzka@roedl.com

Layout: **Ms. Wiyakarn Meedee**, newsletter.thailand@roedl.com

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