

## 2016 Thailand Tax Updates

### Thailand

#### 1. Tax rate

##### 1.1 Corporate tax

The corporate income tax rate was temporarily reduced from the statutory rate of 30% to 20% since 2013. Currently, the Revenue Code Amendment Act (No. 42), B.E. 2559 (2016) was published in the Thai Royal Government Gazette on March 4, 2016, to permanently reduce the corporate income tax rate to 20% of net profits from 2016 onwards.

##### 1.2 Personal income tax

The following reduced progressive tax rates from 5% to 35% are applicable to personal income tax due for the calendar year 2016.

Net Income (Baht)	Rate (%)
1 – 150,000	exempt
150,001 – 300,000	5
300,001 – 500,000	10
500,001 – 750,000	15
750,001 – 1,000,000	20
1,000,001 – 2,000,000	25
2,000,001 – 4,000,000	30
over 4,000,000	35

[www.bakermckenzie.com](http://www.bakermckenzie.com)

For further information please contact

Panya Sittisakonsin

Tel: +66 2636 2000 p 3904

[Panya.Sittisakonsin@bakermckenzie.com](mailto:Panya.Sittisakonsin@bakermckenzie.com)

##### 1.3 Value added tax

Statutory rate of VAT is 10% but the government has continued to temporarily reduce Thai VAT rate to 7% on an annual basis. In order to support the recovery of Thai economy, the Notification of National Council for Peace and Order No. 65/2559 was issued in November 2016, to extend the temporary reduction of VAT rate to 7% VAT until September 2017. The VAT rate will return to 10% from 1 October 2017 onwards, unless the VAT rate reduction is further extended.

## 2. Significant Tax Reform Scheme in Thailand: Inheritance Tax

The Inheritance Tax Act, B.E. 2558 (2015) (the "**Inheritance Tax Act**") was published in the Thai Royal Government Gazette on 5 August 2015, and enforced as of 1 February 2016. Under this act, inheritance tax is levied on recipients of certain types of assets from one decedent valued aggregately at more than Baht 100 million. A summary of the Inheritance Tax Act is set out below.

### 2.1 Exclusions from the Inheritance Tax Act

The following inherited assets are not subject to the provisions of the Inheritance Tax Act:

1. Assets inherited from a decedent who passes way before 1 February 2016; and
2. Assets inherited by a legal spouse of the decedent upon his or her death (whether inherited as a legatee or heir).

### 2.2 Taxpayers

The following persons who inherit certain assets are liable to pay inheritance tax upon the receipt of these assets.

#### 2.2.1 Persons with Thai nationality

The assets of Thai nationals and juristic persons are taxable regardless of their location. Thai juristic persons are defined as those registered or established under Thai law, or registered or established under foreign law if Thai nationals hold shares representing more than 50 percent of the paid-up capital; or more than half of the members of the board or commission having management power of the juristic person are Thai nationals.

#### 2.2.2 Persons with non-Thai nationality

All assets of individuals holding Thai residency pursuant to Thai immigration laws<sup>1</sup> are taxable. For any individual without residency in Thailand under Thai immigration laws, but receiving taxable assets in Thailand, these assets are taxable. Furthermore, the inherited assets situated in Thailand of foreign juristic persons receiving those assets situated are taxable.

Any of the above taxpayers may be exempt from the inheritance tax in certain situations. For instance, a person who inherits assets which the decedent intends to donate for the benefit of religion, education, or the public interest via government organizations or juristic persons organized for the purpose of religion, education, or public interest, being individuals or international organizations which Thailand has a binding commitment, will be exempted from the inheritance tax.

---

<sup>1</sup> Individuals approved by the Immigration Commission who have received a certificate of residence are considered to have residency in Thailand for inheritance tax purposes (section 41 of the Immigration Act B.E. 2522 (1979)).

### 2.2.3 Taxable assets

Assets subject to inheritance tax must be part of a decedent's estate, and must be one of the following types:

- (i) immovable property (real estate);
- (ii) securities as defined under the Securities and Exchange Act;
- (iii) bank deposits or other monies of a similar nature;
- (iv) registered vehicles; and
- (v) financial assets as prescribed by royal decree.

Inherited assets under items (i)- (iv) which are situated in Thailand are subject to inheritance tax according to the Ministerial Regulations re: the Assets Situated in Thailand and Subject to Inheritance Tax, B.E. 2559 (2016). Other assets are not subject to inheritance tax. Please note that a royal decree defining taxable financial assets has not been issued. It is unclear how "financial assets" will be defined, and whether the definition could be broad enough to include items such as non-deposited cash, gold, jewelry, luxury watches, collectible antiques, or other similar items.

### 2.2.4 Exemptions or thresholds

The law provides each inheritor or legatee with a Baht 100 million<sup>2</sup> (approximately USD 3.3 million) exemption from taxation for taxable assets received from a decedent. The assets are valued at net, taking into consideration any debts inherited along with a particular asset. Only amounts received in excess of the exempt amount are subject to taxation.

### 2.2.5 Valuation of the taxable assets

The valuation is appraised on the date of receipt of taxable assets. Certain valuation methods on the following taxable assets are prescribed in the ministerial regulation<sup>3</sup>:

(i) *Immovable property situated in Thailand*

Official appraisal value reduced by restrictive rights, certain valuation prescribed in the ministerial regulation<sup>4</sup>

(ii) *Immovable property situated in overseas*

- Official appraisal value depends on the rights and juristic act registration in such country.
- The value which is certified by an authorized organization in such country will be applicable if the official appraisal value is not available.

<sup>2</sup> The exemption level may be adjusted every five years with reference to the consumer price index, as determined by the Ministry of Commerce

<sup>3</sup> The Ministerial Regulations Re: the Valuation of Taxable Assets B.E. 2559 (2016)

<sup>4</sup> The Ministerial Regulations Re: the Restrictive Rights Deduction for the Valuation of Immovable Taxable Assets B.E. 2559 (2016)

- Market price as of the date taxable assets are received.

(iii) *Shares in non-listed company*

Book value of the accounting year prior receive the ownership of the shares (“latest accounting year”)

(iv) *Shares in holding company*

The greater value between the following:

- Book value of the latest accounting year of the holding company;
- Book value of the latest accounting of the underlying company (for non-listed Thai and overseas company) OR Closing price on the Stock Exchange (for Thai and overseas listed company)

(v) *Securities listed on the Stock Exchange in overseas*

Closing price on the Stock Exchange as of the taxable assets are received.

(vi) *Other assets*

Certain valuation methods prescribed in the ministerial regulation.

## 2.2.6 Tax rates

Inheritance tax is imposed at 5 percent if the inheritor or legatee is an ascendant or descendant of the decedent, and 10 percent otherwise.

## 2.2.7 Tax return filing

A taxpayer must file a tax return and pay inheritance tax within 150 days from the date of receipt of the taxable assets. A taxpayer may ask to pay any inheritance taxes due in installments.<sup>5</sup> Certain penalties, surcharges (interest), and fines may apply. If a person liable for inheritance tax dies **before** the filing deadline but without having filed a tax return, the estate administrator has to file the return within 150 days from the date of appointment, and no penalty will apply. If they die **after** the filing deadline without having filed a tax return, the estate administrator has to file within 150 days from the date of appointment, and a penalty and surcharge will apply.

## 3. Another Significant Tax Reform Scheme in Thailand: Gift Tax

The Revenue Code Amendment Act (No. 40), B.E. 2558 (2015) (the "**Amendment Act**") regarding the personal income tax treatment of income derived from gifts received and gratuitous transfers ("**Gift Tax**") was also published in the Thai Royal Government Gazette on the same day as the Inheritance Tax Act, and enforced as of 1 February 2016.

<sup>5</sup> Certain conditions are prescribed in the Royal Decree re: the Rules, Procedures and Conditions for the Inheritance Tax Installment, B.E. 2559 (2016).

Gift Tax is part of the personal income tax under the Revenue Code. In general, an individual who receives movable-asset gifts is a recipient of income, and is subject to personal income tax on the amount equal to the market value of the gifts upon actual receipt. This stands in contrast to gratuitous transfers of immovable property, whereby an individual transferor is deemed to be a recipient of income, and is subject to personal income tax on the amount equal to the official appraisal value. Pursuant to the Amendment Act, from 1 February 2016 onwards, an individual who receives gifts, or who gratuitously transfers immovable property, can elect to be taxed at a flat rate of 5 percent (rather than the progressive rates of 5 percent to 35 percent of personal income tax) of the aggregate value of receipts or transfers that exceeds Baht 10 million, or Baht 20 million for ascendants, descendants and spouse, per calendar year, unless exemptions apply.

Below is a comparison of the tax treatment of gratuitous gifts and transfers under the old law and the Amendment Act.

Type of Transfer	Personal income tax exemption under old law	Personal income tax exemption under the Amendment Act
<b>Immovable Property</b>		
Gratuitous transfers to a legitimate child ( <b>excluding</b> adopted children)	Exempt without ceiling	Exempt up to Baht 20 million per calendar year
Gratuitous transfers to others	Subject to personal income tax at progressive rate ranging from 5 percent to 35 percent	Subject to personal income tax at progressive rate ranging from 5 percent to 35 percent
<b>Movable Property</b>		
Gifts	Exempt without ceiling if: <ul style="list-style-type: none"> <li>the gift is received as maintenance or support pursuant to a moral obligation; or</li> <li>the gift is made gratuitously as part of a ceremony or on a traditional occasion.</li> </ul>	<ol style="list-style-type: none"> <li>Exempt only up to <b>Baht 20 million</b> per calendar year for gifts received from <b>ascendant, descendant, or spouse</b>, provided that: <ul style="list-style-type: none"> <li>the gift is received as maintenance and support; or</li> <li>the gift is made gratuitously.</li> </ul> </li> <li>Exempt up to <b>Baht 10 million</b> per calendar year for gifts from <b>other persons</b>, provided that:</li> </ol>

Type of Transfer	Personal income tax exemption under old law	Personal income tax exemption under the Amendment Act
		<ul style="list-style-type: none"> <li>• the gift is received as maintenance and support pursuant to a moral obligation; or</li> <li>• the gift is made gratuitously as part of a ceremony or on a traditional occasion.</li> </ul>

Persons who receive gratuitous gifts or gratuitous transfers of immovable property can elect to pay personal income tax at the rate of 5 percent on the excess over the abovementioned ceiling (taxable portion) as the final tax, of which the taxable amount is not included in the personal income tax return.

#### 4. Tax Amnesty Programme 2016

Recently, the Thai tax authority issued a new law which provides tax amnesty and tax benefits for SMEs. The program is a part of the government’s policy of improving the tax collection system to be more efficient and to strengthen SMEs to prepare a single account and the financial statements that reflects the accurate business operation.

Government hopes that this measure will bring more taxpayers into the system and encourage tax compliance. Additionally, the National E-Payment Master Plan has already been approved by the Cabinet, which would make it easier for the authorities to audit the tax payment (cross check), since every transaction will be recorded electronically in the near future.

Even though a taxpayer who aims to apply this program would deal with care and ensure that it would not fail to comply with the conditions (please refer to the summary below), this program may be particularly advantageous to taxpayers with a history of tax non-compliance, tax exposures, or taxpayers planning to expand their business.

Considering that the Thai tax authority is empowered to conduct a tax audit, this tax amnesty program would be an opportunity to clear up any past tax exposure. In addition, the obligations of the company under this program, e.g. preparing a single account and financial statements to clearly reflect the income of the company, are obligations that apply to all taxpayers.

##### 4.1 Benefits

1. Corporate income tax (“CIT”), value added tax, specific business tax, stamp duty will not be audited, and criminal sanctions under the Revenue Code which incurred in any accounting period ending on or before 31 December 2015 will be exempted.

2. For the accounting period of 2016, SMEs are exempted from CIT.
3. For the accounting period of 2017, the first Baht 300,000 of net taxable profit will be exempt from CIT, and 10 percent CIT will be levied on income exceeding Baht 300,000.

The above benefits would not apply if the entity:

- (i) is already subject to a tax audit, with a tax summons issued prior to 1 January 2016;
- (ii) is already subject to a tax audit under section 88/3 of the Revenue Code which commenced before 1 January 2016;
- (iii) has issued or used fake tax invoices, or evaded tax payment by submitting incorrect expenditures;
- (iv) is already subject to a case brought by an investigative officer, prosecutor, or court; or
- (v) is already subject to a tax audit for claiming a tax refund.

#### 4.2 Criteria

1. A company with revenue not exceeding Baht 500 million for any accounting period ending on or before 31 December 2015 qualifies.
2. SMEs which are companies with paid-up capital not exceeding Baht 5 million and with income not exceeding Baht 30 million from the sale of goods and the provision of services for the 2015 accounting period also qualify.
3. The entity must notify and register with the Revenue Department between 15 January and 15 March 2016.

#### 4.3 Conditions to maintain the eligible company or SMEs status

1. A single account and financial statements to reflect the accurate business transactions of the company for the accounting periods from 1 January 2016 onwards must be prepared.
2. All tax obligations (i.e. relevant tax return filing and stamp duty payment) must be complied with for the accounting periods from 1 January 2016 onwards.

### 5. New Scheme for Venture Capital Investment

#### 5.1 Background

Certain tax benefits have previously been granted under Section 5 octodecies of the Royal Decree No. 10 (the "Old Scheme") issued in 2002, as amended, to qualifying venture capital companies, to support the venture capital investment in small and medium-sized enterprises ("SMEs") having fixed assets (excluding land) not exceeding THB 200 million and employees not

exceeding 200 persons. Key prerequisites of the qualifying venture capital companies under the Old Scheme include:

1. Having paid-up registered capital of at least THB 200 million.
2. Holding shares in SMEs at not less than 80 percent of paid-up registered capital.
3. Holding shares in SMEs for not less than five consecutive accounting periods, except in certain cases.
4. Registered as a venture capital business with the Securities and Exchange Commission (the "SEC") by 31 December 2011.

## 5.2 New scheme

Due to several burdensome criteria under the Old Scheme, the new tax scheme, which came into effect on 25 February 2016, was granted under the Royal Decree No. 597 (the "**New Scheme**") to support venture capital investment in non-listed companies engaging in certain industries (the "**Target Company**") certified by National Science and Technology Development Agency (NSTDA) (the "**Qualifying Businesses**"), as follows:

- (i) food and agriculture;
- (ii) energy savings, renewable energy, and clean energy;
- (iii) biotechnology;
- (iv) the medical and public health industry;
- (v) tourism, services, and the creative economy;
- (vi) advanced materials;
- (vii) textiles, garments, and jewelry;
- (viii) the automotive and parts industry;
- (ix) electronic, computer, software, and information services;
- (x) industry for research, development, and innovation, or new industries.

The New Scheme grants tax benefits for venture capital investment undertaken through either a Thai company (the "**Qualifying Venture Capital Company**") or a trust (the "**Qualifying Trust**") with the following qualifications:

- (i) Having paid-up capital of at least THB 20 million on the last day of each accounting period;
- (ii) Holding shares only in the Target Company, or holding shares in both the Target Company and other Thai company not carrying on Qualifying Businesses;
- (iii) Registered as a venture capital business with the SEC by 31 December 2016 under the criteria set out by the SEC; and



- (iv) Only in the case of a Qualifying Venture Capital Company, not exercising rights to corporate income tax exemption under the Old Scheme.

### 5.3 Comparison of tax benefits under the New Scheme and Old Scheme

#### 5.3.1 Qualifying Venture Capital Company

- (i) *Tax benefits for the Qualifying Venture Capital Company*

Old Scheme	New Scheme
<p>The Qualifying Venture Capital Company will be entitled to a corporate income tax exemption on the following income:</p> <ul style="list-style-type: none"> <li>(i) dividends received from the SMEs; and</li> <li>(ii) gains from the transfer of shares in the SMEs.</li> </ul>	<p>The Qualifying Venture Capital Company will be entitled to a corporate income tax exemption for 10 accounting periods beginning from the date of registration as a venture capital business with the SEC on the following income:</p> <ul style="list-style-type: none"> <li>(i) dividends received from the Target Company, only on the portion calculated from the Qualifying Businesses; and</li> <li>(ii) gains from the transfer of shares in the Target Company, provided that the Target Company continuously carried on Qualifying Businesses generating at least 80 percent of all income in the accounting period preceding that in which the Qualifying Venture Capital Company receives income from the transfer of shares.</li> </ul>

(ii) *Tax benefits for the shareholders of the Qualifying Venture Capital Company*

Old Scheme	New Scheme
None	<p>Shareholders of the Qualifying Venture Capital Company, whether Thai or foreign individuals, or corporate entities, will be entitled to income tax exemption on the following income:</p> <p>(i) dividends received from the Qualifying Venture Capital Company, only on the portion paid from the income exempted from tax;</p> <p>(ii) gains from the transfer of shares in the Qualifying Venture Capital Company (certain conditions will be provided in the regulation, but have not been announced yet); and</p> <p>(iii) proceeds from the dissolution of the Qualifying Venture Capital Company that are distributed and attributable to income exempted from tax.</p>

5.3.2 Qualifying Trust

Old Scheme	New Scheme
None	Trust certificate (TC) holders of the Qualifying Trust, whether Thai or foreign individuals or corporate entities, will be entitled to income tax exemption for 10 accounting periods beginning from the date of registration as a venture capital business with the

Old Scheme	New Scheme
	<p>SEC on the following income:</p> <ul style="list-style-type: none"> <li>(i) dividends that are distributed and attributable to earnings and profits that the Qualifying Trust earns or derives from Qualifying Businesses carried on by the Target Company;</li> <li>(ii) gains from the transfer of TCs (certain conditions will be provided in the regulation, but have not been announced yet); and</li> <li>(iii) proceeds from dissolution of the Qualifying Trust that are distributed and attributable to earnings and profits that the Qualifying Trust earns or derives from Target Company.</li> </ul> <p>Even though the New Scheme does not provide a tax exemption at the trust level, the Qualifying Trust (i.e. trustee) would be entitled to corporate income tax exemption with respect to income from the investment portfolio by virtue of the Royal Decree No. 533. However, service fees derived by the trustee as consideration for being a trustee in accordance with the trust deed will be subject to taxes as normal.</p>

#### 5.4 New scheme at a glance

The New Scheme is aimed at supporting and promoting investment in the non-listed Target Companies through venture capital channels, until they are

ready to be listed in the stock market and raise funds from the public. However, it is surprising that tax benefits may be terminated once the Target Company is listed in the stock market and therefore loses its status as a Target Company. This is because one of the key conditions of the Qualifying Venture Capital Company and the Qualifying Trust, is to hold shares only in a non-listed Target Company, or holding shares in both the Target Company and other Thai company not carrying on Qualifying Businesses.

Alternatively, the Qualifying Venture Capital Company or the Qualifying Trust may consider selling shares in the Target Company before the Target Company becomes a listed company. This may be inconsistent with the objectives of this scheme and may have unwanted consequences.

We anticipate that there will be an amendment on this issue in the future. As the Royal Decree No. 597 does not allow the amendment on this issue by subordinated legislations, the amendment can only be done by an issuance of a royal decree. We will continue to monitor this closely and will keep you updated of any progress.

## 6. New Double Taxation Agreement between Thailand and Singapore

### 6.1 Background

A new Double Taxation Agreement (DTA) between Thailand and Singapore was ratified in February, and was due to come into force on 15 February 2016 for taxable year, 1 January 2017 onwards. The previous agreement between the two countries dated from 1975 and had not been revised for more than 40 years.

### 6.2 What are the Key Changes?

Highlights of the new DTA include extending the time threshold for creating a construction permanent establishment (PE) from six months to a year, reducing the withholding tax on dividends, interest and royalties, and the removal of the limitation of relief clause.

The table below summarizes the key changes in the new DTA compared to the current DTA:

Key provisions	Current	New
<b>Permanent Establishment (Article 5)</b> <ul style="list-style-type: none"> <li>the time it takes for a building site, or a construction, assembly or installation project to become a PE</li> <li>classes long-term provision of services as a PE</li> </ul>	<ul style="list-style-type: none"> <li>more than six months</li> <li>n/a</li> </ul>	<ul style="list-style-type: none"> <li>more than 12 months</li> <li>the furnishing of services, including consultancy services, by an enterprise of a</li> </ul>

Key provisions	Current	New
<ul style="list-style-type: none"> <li>regarding a person, other than the agent of an independent status, who habitually secures orders wholly or almost wholly for the enterprise itself or for the enterprise and others which are controlled by it or have a controlling interest in it.</li> </ul>	<ul style="list-style-type: none"> <li>person is deemed to be a PE</li> </ul>	<p>Contracting State through employees or other personnel engaged for that purpose, will create a PE if the service activities continue (for the same project or a connected one) in the other Contracting State for a period or periods aggregating more than 183 days within any 12 month period.</p> <ul style="list-style-type: none"> <li>provision removed</li> </ul>
<p><b>Dividends (Article 10)</b></p>	<p><b>20 percent</b> withholding tax if the recipient is a company that owns at least 25 percent of the voting shares of the company paying dividends</p>	<p><b>Reduced to 10 percent</b> withholding tax if the beneficial owner of the dividends is a resident of the other Contracting State<sup>6</sup></p>
<p><b>Branch remittance (Article 10A)</b></p>	<p>n/a</p>	<p>Thailand has the right to impose a 10 percent branch remittance tax on the gross amount</p>
<p><b>Interest (Article 11)</b></p>	<ul style="list-style-type: none"> <li>10 percent withholding tax if the interest is beneficially owned by a financial institution or</li> </ul>	<ul style="list-style-type: none"> <li>10 percent withholding tax if the interest is beneficially owned by a financial institution or</li> </ul>

<sup>6</sup> Singapore does not currently impose any withholding tax on dividends.

Key provisions	Current	New
	insurance company <ul style="list-style-type: none"> <li>• 25 percent withholding tax for other cases</li> </ul>	insurance company <ul style="list-style-type: none"> <li>• <b>Reduced to 10 percent</b> withholding tax if the interest is paid with respect to indebtedness arising as a consequence of a sale on credit of any equipment, merchandise or services, except where the sale was between persons not dealing with each other at arm's length</li> <li>• <b>Reduced to 15 percent</b> withholding tax for other cases</li> </ul>
<b>Royalties (Article 12)</b>	15 percent withholding tax of the gross amount of the royalties	<ul style="list-style-type: none"> <li>• <b>Reduced to 5 percent</b> withholding tax for the use or the right to use any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television broadcasting</li> <li>• <b>Reduced to 8 percent</b> withholding tax for the use of, or the right to use, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial, or scientific equipment</li> <li>• <b>Reduced to 10 percent</b> withholding tax in all other cases.</li> </ul>
<b>Capital gains from the transfer or sale of</b>	Exempt	Exempt if the gains are derived from the

Key provisions	Current	New
<b>shares (Article 13)</b>		alienation of shares in a non-listed company which derives less than 75 percent of its value directly or indirectly from immovable property in Thailand or Singapore
<b>Elimination of double taxation (Article 22)</b>	If a company resident in Singapore owns <b>at least 25 percent</b> of the voting rights of a dividend paying company resident in Thailand, the tax credit will take into account the Thai tax paid on the portion of its profits out of which the dividend is paid	If a company resident in Singapore owns directly or indirectly <b>at least 10 percent</b> of the share capital of a dividend paying company resident in Thailand, the credit will take into account the Thai tax paid on the portion of its profits out of which the dividend is paid

### 6.3 Removal of limitation of relief clause

The article limiting relief has been removed, so any exemption from tax or a reduced tax rate under the provisions of the treaty should apply regardless of the amount remitted to or received in the Contracting State where the recipient is a resident (subject to Singapore domestic tax law).

### 6.4 Other

Aside from the points raised in the summary above, it is worth noting that the new DTA uses the term "beneficial owner" in several articles, including those covering interest, dividends, and royalties except capital gains, instead of the term "recipient", as in the current DTA. The beneficial owner concept is a limiting factor designed to prevent the practice of 'treaty shopping', the practice where a national or resident of a third country seeks to obtain the benefit of a DTA between two other countries by basing a company or other entity in one or the other of them.

### 6.5 Conclusion

Overall, the withholding taxes on dividends remain largely unchanged. However, the new DTA extends the reduction rate on the interest paid on debt arising as a consequence of a sale on credit of any equipment, merchandise or services, except where the sale was between persons not dealing with each other at arm's length, to 10 percent withholding tax.

The new DTA significantly reduces taxes on income from royalties, giving Singapore, which has strong Intellectual Property (IP) protection laws, an advantage as a Global IP Hub in Asia.

The changes reflect the Organization for Economic Co-operation and Development's (OECD) attempts to counter Base Erosion and Profit Shifting (BEPS), which recommend that profits should be taxed where the substantive economic activities generating the profits are performed, and where value is created. As part of this DTA, Singapore also adopts the internationally-agreed arm's length principle for the determination of prices for transactions between related parties.

## 7. New Double Taxation Agreement between Thailand and India

### 7.1 Background

A new Double Taxation Agreement between Thailand and India ("DTA") was ratified and will be in force since 1 January 2017 in relation to Thai income taxes.

### 7.2 What are the Key Changes?

Highlights of the new DTA include a modification of PE exceptions, reducing the withholding tax on dividends, interest and royalties.

The table below summarizes the key changes in the new DTA compared to the current DTA:

Key provisions	Current	New
<p><b>Permanent Establishment (Article 5)</b></p> <ul style="list-style-type: none"> <li>clarification of 183 days threshold for service PE</li> <li>Anti-fragmentation rule</li> </ul>	<ul style="list-style-type: none"> <li>Furnishing of services, including consultancy services, by an enterprise of a Contracting State through employees or other personnel engaged for that purpose, will create a PE if the service activities continue (for the same project or a connected one) in the other Contracting State for a period or periods aggregating more than 183 days.</li> <li>n/a</li> </ul>	<ul style="list-style-type: none"> <li>Furnishing of services, including consultancy services, by an enterprise of a Contracting State through employees or other personnel engaged for that purpose, will create a PE if the service activities continue (for the same project or a connected one) in the other Contracting State for a period or periods aggregating more than 183 days <u>within any 12 month period.</u></li> <li>A combination of various activities (e.g., display of goods, storage, purchasing of goods, collecting</li> </ul>



Key provisions	Current	New
		information) will not create a PE provided that the overall activity resulting from such combination is of preparatory or auxiliary nature.
<b>Dividends (Article 10)</b>	<ul style="list-style-type: none"> <li>• <b>20 percent</b> withholding tax if the beneficial owner is a company that owns at least 25 percent of the voting shares of the company paying dividends</li> <li>• <b>15 percent</b> withholding tax if the beneficial owner is a company that owns at least 10 percent of the voting shares of the company paying dividends</li> </ul>	<b>Reduced to 10 percent</b> withholding tax if the beneficial owner of the dividends is a resident of the other Contracting State
<b>Interest (Article 11)</b>	<ul style="list-style-type: none"> <li>• <b>10 percent</b> withholding tax if the recipient is a financial institution or insurance company</li> <li>• <b>25 percent</b> withholding tax for other cases</li> </ul>	• <b>Reduced to 10 percent</b> withholding tax if the beneficial owner of the interests is a resident of the other Contracting State
<b>Royalties (Article 12)</b>	15 percent	• <b>Reduced to 10 percent</b>
<b>Capital gains from the transfer of shares (Article 13)</b>	Exempt	Exempt unless gains are derived from a transfer of shares in a company, the property of which consists directly or indirectly principally of immovable property situated in the source country.

## 8. Supreme Court's Decision on Minebea Case

### 8.1 Background

On 16 May 2016, the Supreme Court of Thailand interpreted the *Investment Promotion Act B.E. 2520* ("**IPA**") in a manner which was seen by many as breaching the reasonable expectations and reliance interest of many foreign as well as domestic investors. Reasoning that the IPA does not stipulate any specific method in the computation of net profit, the Supreme Court ruled that the Revenue Code's provisions must prevail with regard the computation method of net profit and loss deriving from BOI-promoted activities. The Revenue Department's position, in effect, prevails. However, certain legal practitioners and scholars were and have remained doubtful whether this interpretation of the IPA would prevail in future decisions.

Subsequent to the decision, BOI-promoted companies must now include its profit and loss from each and every one of its BOI-promoted projects to offset one another in order to be eligible to benefit from Sections 31 Paragraph 4 of the IPA (the "**Tax Loss Benefit**") and the 5% deduction from increased export income benefit under Section 36(4) of the IPA must be taken into consideration based on the total income of all promoted projects.

However, to normalize the investment landscape, on 16 June 2016, the Minister of Finance exercised his authority under Section 3 Octo Paragraph 2 of the Revenue Code and issued the *Ministerial Notification On the Time Extension for Corporate Income Tax Return Pursuant to the Revenue Code* (the "**Notification**") to help BOI-promoted investors who unwittingly found themselves to be in default of their tax liabilities as a result of the decision in May.

After the issuance of the Notification, it has been controversial among BOI-promoted companies that the Notification's limited scope was problematic. Some continually sought the justice, equalization and fairness from the Government. As such, on 29 July 2016, in his capacity as the Leader of the National Council for Peace and Order (the "**NCPO**"), Prime Minister and Commander in Chief Prayut Chan-o-cha has issued an order titled the *Order from the National Council for Peace and Order No. 45/2559* (the "**Order**"). This Order was issued under the executory authority under Section 44 of the 2014 Constitution of the Kingdom of Thailand (Interim).

### 8.2 The Order

The Prime Minister acknowledges the damages incurred by BOI-promoted companies as a result of the Supreme Court's judgment rendered on 16 May 2016. Section 44 of the 2014 Constitution of the Kingdom of Thailand (Interim) states, "[f]or the sake of the reforms in any field...or the prevention, abatement or suppression of any act detrimental to... national economy or public administration...the Leader of the National Council for Peace and Order, with the approval of the National Council for Peace and Order, may issue any order or direct any action to be done or not to be done, irrespective of whether the order or action would produce legislative, executive or judicial effect. Those orders or actions, as well as their observance, shall be deemed lawful, constitutional and final. After the exercise of such power, the President of the National Legislative Assembly and the Prime Minister shall be informed thereof without delay." (translated and paraphrased).

Through the exercise of this broad and powerful executory authority, the Prime Minister wishes to express his comprehension of the situation with regards to the diverging statutory interpretation between the two governmental institutions, which caused many BOI-investors to incur monetary damages in the forms of increased tax liabilities as well as penalty fees and surcharges. As such, the dominant purpose of the Order is to provide investors, domestic and foreign alike, with confidence and reassurance in their good faith reliance of Thailand's investment incentive law. The Prime Minister understands and appreciates the gravity of the conflicting interpretations between the Revenue Department and the BOI, and ramification that this may have on international investors' perception of the Thai economic climate. Furthermore, the Prime Minister is also cognizant of the shortcomings of the Notification by the Minister of Finance.

For the preservation of investors' good faith reliance on the now inoperable accounting method that had until recently been allowed by the BOI but was later nullified by the Supreme Court's decision, therefore, the Prime Minister has issued the Order with the objective to address the shortcomings and the patently narrow scope of redress provided under the Notification. Thus, the Order extends the deadline for filing both corporate income tax returns for affected companies as well as partnerships to 15 August 2016.

Under the Order, Section 2 of the Ministry of Finance's Notification, which grants an extension for affected businesses to file their income tax returns, shall, until 15 August 2016, apply with necessary adaptations to enable affected businesses to refile their income tax returns until the stated date. Furthermore, affected businesses may also apply for the refund of any surcharges or penalties that they may have already paid for as a result of having been rendered to be retrospectively in delinquency due to the accounting method that has been upheld by the Supreme Court.

Nonetheless, the Order is not without ambiguity. Section 2 of the Order leaves many practitioners and investors questioning whether or not all the shortcomings that the Ministry of Finance's Notification has sought to address have been remedied as well as what the roles and responsibilities of the BOI should be in the restitution process of the affected companies. Among other ramifications on the rights and benefits under the IPA in light of the Supreme Court's decision are Section 36 (4)'s right to deduction 5% from increased annual export income, Section 34's dividend withholding tax exemption, as well as Section 35 (1)'s corporate income tax reduction have not been restored to their former integrities. Section 2 of the Order states:

*"The extension under paragraph one of Section 2 of the Notification, which is authorized under Section 3 Octo Paragraph 2 of the Revenue Code, shall apply mutatis mutandis with regards to the affected companies with regards to the previously non-compliant computation method(s) employed in the filing of their corporate income tax returns, which, but for the divergent statutory interpretation between the government agencies of Thailand, have not been committed with the intention of avoiding their tax liabilities, as stipulated by Section 3 of the Notification."* (translated and paraphrased).

From the excerpt of Section 2 of the Order, practitioners as well as investors remain uncertain with regards to what other restitution remedies may be attained by this Order in addition to the refund of the penalty fees and surcharges. The question that remains, thus, is whether or not this Order has done enough to fully restore the rights and benefits under the IPA to their formal integrity.

Nonetheless, many practitioners believe that the wording of Section 2 of the Order, read in combination with the spirit and intention expressed therein, may be interpreted to be sufficiently comprehensive so as to address most of the shortcomings of the Notification. However, it has been widely suggested that the Revenue Department has interpreted the ambiguity of Section 2 of the Order as simply a deadline extension of the Ministry of Finance's Notification, which the Revenue Department contends, also covers the effects inflicted upon the original taxpayer involved in the Supreme Court's decision. This interpretation is seen to be the Revenue Department's stance on the accounting practice contention, notwithstanding the clearly worded intention and purpose of the Prime Minister's Order. Therefore, more intra-governmental statutory interpretation conflict may arise and BOI-promoted investors should take precautions before committing themselves to any accounting method for tax purposes.

As the Prime Minister has expressed his view that it would be incumbent on the BOI to provide support and to promote investments in Thailand through means of consultation and clarification of legal assumptions and understandings with regards to the practical application and implications of the laws relating to the BOI, perhaps, the BOI should take the initiative to address the damages inflicted upon many foreign and domestic investors who had relied on the BOI's accounting method in good faith. Ultimately, however, the implementation of the Order as well as its implications on each of the effected provisions of the IPA would depend on the NCPO's clarification. Lastly, the Order states that the Ministry of Finance and the BOI should also consult each other to clarify any ambiguities in the IPA as soon as possible. Nevertheless, although the IPA falls within the administrative purview of the BOI, as the Revenue Department and the BOI may once again enter into a dispute, investors are advised to consult with the BOI and the NCPO, respectively, for further confirmation prior to adopting a new tax computation method. In the absence of any clear agreement between the BOI and the Revenue Department, affirmation from the NCPO may at least have some evidentiary value in tax litigations.

## 9. New customs appeal process: Stay of duty payment and detention of goods

### 9.1 Background

Whenever an importer or exporter receives a notice of assessment from the Customs Department to pay additional tax and duty, the importer or exporter is liable to pay the assessed amount within 30 days from the date of receipt of the notice, unless such importer or exporter appeals the assessment of duty and tax to the Appeal Committee. The importer or exporter can request for approval from the Director-General to postpone payment until a decision has been made on the appeal, according to sections 112 *sex* and 112 *sedecim* of the Customs Act BE. 2496 (1926) (the "**Customs Act**").

In the event that the importer or exporter fails to pay the assessed duty, the customs authority is empowered by Section 112 *quinque* of the Customs Act to detain any goods belonging to the importer or exporter that are passing through customs or that are under the custom's supervision, and to sell them if the duties and tax have not been paid entirely within 30 days from the date of detention.

Even though the Customs Act states in principle that while importing or exporting goods into or out of Thailand, the taxpayer may postpone the

payment of the assessed duty and tax. However, the Customs Act also grants the authority to the Customs Department to execute its right to detain the goods. The necessary conditions for granting the approval to stay the payment have, however, never been mentioned, and the detention of goods that is contingent upon the failure to pay the owing duty and tax has thus only been a theoretical risk for importers and exporters.

It should be noted, however, the Customs Department recently issued a new Notification of the Customs Department No. 67/2559 (the "**Customs Notification**"), on 24 May 2016, to repeal Customs Notifications Nos. 73/2555 and 114/2555 to provide additional details on the appeal process, the stay of duty payment and the detention of goods. On the same day, the Director-General also issued Order of the Customs Department No. 10/2559 (the "**Customs Order**") to provide further guidelines on requests for a stay of duty payment, as well as on the detention of goods for the customs authorities in the Customs Code of Practice B.E. 2556 (2013).

## 9.2 Key Issues of the Announcement of the New Customs Notification and Customs Order

According to the new Customs Notification, an appellant<sup>7</sup> who intends to postpone payment of the assessed duty is required to prepare a request for a stay of the duty payment, and to arrange for security in an amount covering the duty shortfall and surcharge to be submitted to the authority issuing the notice of assessment, if it needs to wait for the decision from the Appeal Committee. In certain circumstances, the appellant may have to submit this request to the Legal Affairs Bureau ("**LAB**") of the Customs Department instead, if there is a wait for the court's judgment. Nonetheless, the submission must be done within 30 days from the date of filing of an appeal or a complaint. The qualified securities that are listed in the Customs Notification are cash, bank guarantees, government bonds, bank books for fixed deposit accounts, and other securities prescribed by the Director-General or his designated person.

After receipt of the request, the customs authority is required to make a decision within 30 days from the date of the receipt of the request, assuming sufficient documents have been provided. The relevant authority (issuer of the notice or LAB) who receives the request must then notify the requestor about the result within 30 days from the date of result's determination. If the request is denied, the appellant should pay the tax and duty shortfalls, plus surcharges, to the Customs Department within 30 days of being notified of the result. In addition, this Customs Notification further specifies that the Customs Department will detain the goods pursuant to Section 112 *quinque* of the Customs Act if such requestor fails to make the tax and duty payment in time.

Under this Customs Notification, there is no provision stating any conditions or restrictions on granting approval for a stay of payment. However, Customs Order No. 10/2559, which was issued to provide internal guidelines on determining this issue for the customs authorities in the Customs Code of Practice, states that **a submission of the request for the postponement of the duty payment will be rejected if the date of filing such request exceeds eight years from the date of import or export of goods, and the approved period of the stay of duty payment shall not exceed eight years from the date of import or export.**

---

<sup>7</sup> An appellant means an importer or exporter who files an appeal against the assessment to the Appeal Committee, or against the decision to the appeal to the Court

It should be highlighted that this new Customs Notification also regulates all appellants who have already filed an appeal against either the notice of assessment or the decision prior to the effective date of the Customs Notification, to submit a request for a stay of payment within 30 days from the effective date of Notification, i.e. 23 June 2016, if they intend to postpone the duty payment and avoid the detention of goods.

### 9.3 The Conflict between the New Customs Policy and the Current Practice of the Customs Authorities

Up until now, the customs authorities have been keen to prioritize the investigation of criminal offences, to uncover and finalize the immense amount of criminal penalty for which the importer or exporter will be fined liable, rather than to assess the duty payable. This is because customs officials who participate in an arrest or investigation will be entitled to a customs reward, sharing up to 25 percent of the criminal penalty, whereas a whistleblower responsible for helping the authorities with an arrest or investigation will be entitled to a customs reward sharing 30 percent of the criminal penalty. With this reward sharing, most customs authorities typically spend several years investigating and finalizing the criminal penalty to be imposed on the importer or exporter. If the customs authorities cannot settle a criminal offence with the importer or exporter, a notice of assessment of any duty shortfall and surcharge will be issued. As a consequence of this possibility that the customs officials may have vested personal interests, there is an institutional bias that may result in most notices of assessment being issued after eight years from the date of import or export.

Due to this practice in issuing assessment notices, the placement of the hidden conditions for granting approval of an appellant's request for a stay of payment in the guise of an internal guideline obligating the customs authorities to reject the submission of a request if it exceeds the eight-year period may cause the appellant to suffer a systemic administrative injustice. Moreover, these conditions also offer an opportunity for the customs authorities who have a conflict of interest in the criminal proceedings against an importer or exporter to prolong the issuance of the assessment notice, in order to restrict them from evoking their right to postpone the payment of the assessed duty. In light of this, we believe that this condition will be another major obstacle in filing an appeal against a customs authority assessment notice for the foreseeable future.

In addition to the issue relating to the stay of payment, the recent Customs Notification and Customs Order also specifies the details of the power to detain the goods under Section 112 quinque of the Customs Act, something that has hitherto been considered merely to be a theoretical risk. It is interesting to note that henceforth, the Customs Department may have a policy to execute its authority to detain goods and make the detention of goods become a practical risk.

### 9.4 Executive Summary

The recent Customs Notification No. 67/2559 and Customs Order No. 10/2559 provide the determination of granting an approval on a request for the stay of assessed duty payment by hiddenly regulating the customs authority to reject any request for a stay of payment that is filed after eight years from the date of import or export. Due to the fact that the customs authorities practically take several years to conduct an investigation to issue an assessment notice, most importers or exporters normally receive the notice of

assessment after eight years from the date of import. In light of this, this new Customs Policy may be a new mechanism to unfairly restrict a taxpayer from the right to a stay of payment under the law.

Apart from the unjust restriction on gaining approval for a request for a stay of payment, please also note that the recent regulations also signal that the Customs Department is henceforth likely to execute its authority to detain and sell the goods under its supervision upon failure to pay duty.

## **10. Change in Appeal System of Central Tax Court's Decisions**

In Thailand, there are three levels of courts for general cases, namely the Court of First Instance, Court of Appeal, and Supreme Court. The appeal system recognizes the rights of the parties, which mean parties who disagree with decisions of the Court of First Instance on both factual or legal issues can appeal to the Court of Appeal, and thereafter to the Supreme Court. Decisions of the Supreme are final with no further recourse to appeal. The appeal system is considered a right based system.

However, there are two appeal levels in civil tax cases, i.e., the Central Tax Court, and the Supreme Court. In particular, appealing against the decisions of the Central Tax Court will be made directly to the Supreme Court.

On 14 December 2015, the Specialized Court of Appeal was established under the Act for the Establishment of the Specialized Court of Appeal B.E. 2558 (2015). With effect on 1 October 2016, all decisions of the Central Tax Court must be appealed to the Specialized Court of Appeals, instead of to the Supreme Court. The parties who wish to appeal the judgments of the Specialized Court of Appeal to the Supreme Court will have to request for permission from the Supreme Court under criteria specified in the Act Amending the Civil Procedure Code (No. 27) B.E. 2558 (2015), for examples, the issues for appeal are relevant to public interest, conflicting judgments of the Court of Appeal, or such legal issues have no precedents of the Supreme Court.

## **11. Cabinet Approval on New Land and Buildings Tax Bill**

On 7 June 2016, the Cabinet passed a resolution approving in principle the draft land and buildings tax bill. This new land and buildings tax is aimed to replace the current house and land tax and municipal tax which have been used in Thailand for several decades. In brief, key features of the land and buildings tax bill include:

- (i) Persons liable to tax: Owner of land or property
- (ii) Properties subject to tax: Land, condominium, building as defined under the definition
- (iii) Tax base: Government appraisal value
- (iv) Tax rates: Depend on usage of land and buildings and the value of land and property subject to the following ceiling rates:

Agriculture: 0.2%

Residential: 0.5%

Commercial: 2%

Unused: 5%

The New Land and Buildings Tax Bill is expected to be enacted in 2017.