

TP Alert

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Thai Government Cabinet approves revised draft Transfer Pricing law

The Cabinet approved a revised draft of the transfer pricing law aimed at preventing abusive transfer pricing between related companies or partnerships on 3 January 2018. This revised draft follows the public hearing process conducted by the Thai Revenue Department (“TRD”) in July 2017 (please refer to the specific comments on this below).

Important objectives of the draft law are as follows:

- To impose a penalty in the case where related entities fail to prepare or submit reports, documents, or evidence to the assessment officers within the specified time period or submit reports, documents, or evidence containing insufficient information without a reasonable justification;
- To enable the tax assessment officers with authority to adjust income and expenses for the purpose of corporate income tax calculations to arrive at the income and expenses as if the companies or partnerships had operated independently;
- To regulate the related entities to prepare a report demonstrating the relationship amongst each other and the value of intercompany transactions in each accounting period, following the requirement of the Director-General of the TRD. The report must be submitted to the tax assessment officers, together with the tax return form within the specified time period;
- To enable the tax assessment officers, upon approval from the Director-General of the TRD, with authority to demand a company or juristic entity to submit documentation providing information needed for the analysis of intercompany transactions, following the Director-General's notification, within five years from the date the report was submitted;
- To exclude companies or juristic entities with income in each accounting period, which is less than the amount specified by the Ministerial Regulation but must not be less than thirty million baht, from preparation of the report demonstrating the relationship between each other and the value of intercompany transactions in each accounting period;
- With regard to the effective date of the transfer pricing law, the Ministry of Finance, together with the Council of State, will discuss further since the initial accounting period was indicated as starting on or after 1 January 2017, but this accounting period has now passed and the law should not have retroactive effect.

Once the effective start date for the law is determined, the draft transfer pricing law will be submitted to the National Legislation Assembly for law enactment.

The draft law is not available to the public at this time

Thai Revenue Department's responses to results of public consultation on the draft Transfer Pricing law

After the TRD welcomed comments and suggestions on the draft transfer pricing law, the TRD published its summary of the public comments on the draft of the transfer pricing law, together with its comments, on the Revenue Department's website in late 2017.

After the commentary hearing period from 20 June 2017 to 7 July 2017, a total of 49 private organizations provided comments. Out of the total, 44 companies agreed that the law could promote clarity of tax assessment, eliminate transfer pricing dispute, prevent profit shifting from high tax rate country to lower tax rate country through the use of transfer prices, prevent double taxation, etc.

Key TRD clarifications on the public comments are summarized below.

- **Draft Section 71 bis, paragraph 1: Transfer pricing adjustment**

Where the tax assessment officers make adjustment to the income and expenses of related companies or partnerships according to draft Section 71 bis and both parties to the transaction are in Thailand, the adjustment to income and expenses of the parties would happen at the same time. However, it is important to note that the legislation does not allow taxpayers to perform self-adjustment as the law only authorizes the Revenue officers to do so.

In addition to this primary adjustment, the TRD also confirmed that the draft transfer pricing law also covers secondary adjustment.

This transfer pricing adjustment will have no impact on VAT positions of the taxpayers.

- **Draft Section 71 bis, paragraph 2: Definition of the "related entity"**

Several comments were made on the appropriateness of the use of shareholding percentage in determining whether the parties are considered related. The TRD clarified that shareholding percentage is one of the criteria for indicating relationship similar to that applied by other countries. However, the shareholding percentage is not the only criterion used by the TRD. The proposed draft law has room for adding other criteria which can be defined as appropriate. When considering relationship criteria, actual controlling power will also be considered; and it has to be generally accepted condition. Further guidance on how to consider the indirect shareholding ratios will be provided later.

- **Draft Section 71 bis, paragraph 3: Tax refund**

To address taxpayers' concern on the extension prescription period for tax refund, the TRD clarified that the law, which specifically defines the period of 60 days, is for the benefit of taxpayers. Generally, the prescription period for tax refund is within 3 years from the tax return filing due date; but in this case, even if the normal refund period has passed, the taxpayer can still request a tax refund within 60 days from the date on which a written notification of transfer pricing adjustments by the tax assessment officers was received. This is basically a special extension of the tax refund period for taxpayers.

- **Draft Section 71 ter, paragraph 1: Annual transfer pricing disclosure**
The TRD commented that the information in the report to be submitted together with the tax return form, i.e. P.N.D. 50, is straightforward and should not pose any burden for taxpayers. The information to be included in the report is basic/general information that taxpayers must already have. This annual report will provide the Revenue Department with an important primary detail to assess the risk of tax evasion through transfer pricing.
- **Draft Section 71 ter, paragraph 2: Transfer Pricing Documentation**
In general, the transfer pricing documentation should be prepared prior to, or at the time taxpayers are entering into related party transactions. This is in order to demonstrate that the transfer prices of the transactions are not different from what independent parties would agree.

Nevertheless, to ease the taxpayers' burden in documentation preparation, taxpayers with revenue more than the minimum revenue threshold(s) as will be defined in the Ministerial Regulation are allowed to only have the documents and evidence for performing transfer pricing analysis gathered at the time of the transactions; and not yet in the full format as specified by the Director-General Notification. However, if the tax assessment officers request transfer pricing documentation, taxpayers will be given 60 days to prepare and deliver the documentation in the form to be announced by Director-General.

Therefore, the TRD viewed that the 60-day submission period should be sufficient.

- **Draft Section 35 ter: Penalty**
In case where a taxpayer fails to submit the "reports", "documents", or "evidence" according to Section 71 ter or submit incomplete/incorrect "reports", "documents", or "evidence" without any justifiable reason, the taxpayer shall be subject to the fine of no more than 200,000 baht per time.
Such criminal fine is only in monetary form with the statutory limitation of one year. The fine applied to each case is not the same depending on the basis of the case. The fine will be appropriate to each case and will be defined in further detail like other criminal fines under other Sections of the Revenue Code.

Similar to other countries, the TRD may consider reducing or exempting penalty for the taxpayers who have prepared and submitted the required information/document within the period specified by the law.

Deloitte's observations

Based on the draft law, more transfer pricing audits are expected as the TRD can assess transfer pricing risks through the annual report required to be submitted with the annual tax return. More importantly, in the case where transfer pricing adjustments take place due to transfer pricing non-compliance, taxpayers in Thailand would also be subject to the secondary adjustment. That is, in addition to the primary adjustment, the non-compliant taxpayer may be subject to withholding tax on deemed dividends or deemed loan as the case may be. Surcharges will also be applied on both adjustments.

To manage transfer pricing risks, taxpayers should ensure transfer pricing compliance. Taxpayers should review their transfer pricing practice on an annual basis. Well-prepared, contemporaneous transfer pricing documentation not only serves as an efficient tool in preparing an annual report to be submitted with the annual tax return, but it could also put taxpayers in the better position to defend with the Revenue officers if and when the transfer pricing audit takes place; hence, reducing potential exposures and penalties.

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