



Tax Alert

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The offsetting of tax losses for BOI-promoted companies

Thailand's Ministry of Finance issued guidance on 16 June 2016 that extends the deadline for filing the corporate income tax return and paying tax due for companies that have "promoted company" status granted by the Board of Investment (BOI). The extended deadline was granted to reduce the compliance burden on promoted companies as a result of a decision issued by the Supreme Court no. 15345/2558.

Promoted companies in Thailand are granted a corporate income tax exemption for "promoted" activities. However, such companies also may carry on non-promoted activities. Issues have arisen about how to calculate taxable profit (and losses) where a promoted company is carrying on both promoted and non-promoted activities because the BOI and the Thai tax authorities have adopted differing interpretations.

In the case before the Supreme Court, the company calculated the taxable profits of its non-promoted business by aggregating the profits/losses generated by all of its promoted activities and setting off any promoted net loss against the taxable profits generated by its non-promoted activities. The company later changed its method of calculating its taxable profits by simply setting off losses from promoted projects against its taxable profits from non-promoted activities, i.e. it did not set off its promoted losses against its promoted profits before setting off the net loss against its non-promoted profits. As a result, the company had more losses to set off against taxable profits from its non-promoted activities for corporate income tax purposes. The BOI accepted this method, but the tax authorities did not. The tax authorities took the position that a company first is required to set off losses incurred in promoted activities against the profits of all promoted activities and only then may the remaining net losses be set off against the taxable profits of the non-promoted activities.

In ruling against the taxpayer, the Supreme Court held that the provisions in the Investment Promotion Act do not contain any rules for calculating corporate income tax liability. Thus, the calculation of the tax liability of a promoted company must be made in accordance with the rules in the Revenue Code. Since the provisions in the Investment Promotion Act do not override those in the Revenue Code, the tax assessment made under the Revenue Code was valid.

The Supreme Court decision will affect many companies that used the above calculation method. The deadline extensions issued by the Ministry of Finance aim to ease the compliance burden on promoted companies engaging in both promoted and non-promoted activities. The following requirement must be met to benefit from the extended deadline:

- A company that is eligible for the extension must not be subject to a tax summons or a tax assessment and may not have filed an appeal with the Tax Appeal Commission or a court.
- The extension is available only to companies that do not include all income and expenses from both promoted and non-promoted activities in the same accounting period in calculating the net profits/losses of promoted activities as set out in the Tax Ruling Commission's ruling no. 38/2552.
- If a case is on appeal or proceeding through the judicial process, the company will be required to withdraw the appeal/case from the Tax Appeal Commission or the court. In such a case, only the issue relating to the calculation of income from promoted and non-promoted activities need be withdrawn provided that the Tax Appeal Commission or court have allowed such withdrawal.
- Affected companies must file their tax returns and pay any corporate income tax due from 15 June 2016 to 1 August 2016.
- If a company already has paid corporate income tax, and a penalty and surcharge, and the tax refund period has expired, the period for requesting a refund of the penalty/surcharge is extended to 1 August 2016.

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