

New Notifications relating to the application of the Thai Transfer Pricing Laws

TP Alert

The Thai Revenue Department has issued two new notifications relating to the application of the Thai transfer pricing laws as follows:

- Notification of the Director-General of the Revenue Department on Income Tax (No. 400) - Rules, procedures, and conditions on the adjustment of income and expenses of related companies or juristic partnerships (“DGN 400”)
- Notification of the Director-General of the Revenue Department - Forms, rules, procedures and conditions for submission of the annual report for information of related companies or juristic partnerships and total value of intercompany transactions in each accounting period (“DGN – TP Disclosure Form”)

Transfer Pricing (“TP”) Adjustments

DGN 400 was issued under Ministerial Regulation 369 to provide rules for Revenue Department officers for assessing TP adjustments for transactions between related parties.

Adjustment for non-arm’s length pricing. The Notification reaffirms the power provided to Revenue Department officers under Section 71 bis of the Revenue Code to adjust income or expenses for transactions between related parties where such transactions are not priced on an arm’s length basis i.e. the pricing does not reflect the pricing which would have applied for transactions between independent parties. The income or expenses adjusted by the officers will be used for the purposes of calculating net profits for corporate tax purposes under Section 65 or calculating income for withholding tax purposes under Section 70 or profits for profit remittance tax purposes under Section 70 bis.

Acceptable Transfer Pricing Methods. The Notification lists the acceptable TP methods, together with the relevant financial indicator for each method, which should be considered in determining the most appropriate method for pricing for related party transactions as follows:

Transfer Pricing Method	Financial Indicator
Comparable Uncontrolled Price	Price
Resale Price Method	Resale margin
Cost plus method	Mark-up on costs
Transactional Net Margin Method	Net profit margin
Transactional profit split method	Division of operating profit

These methods are consistent with the recognized OECD TP methods. The Notification also allows for the adoption of other transfer pricing methods not listed above. However, it will be necessary to demonstrate that none of the above TP methods could be applied before adopting another method. Also, if a non-listed method is used, the company or partnership is required to notify the Revenue Department in writing with a preliminary explanation of the method in the year in which the transaction takes place.

Selection of Transfer Pricing Method. There is no specific hierarchy provided for consideration of the TP methods. In selecting the most appropriate TP method for a related party transaction, the company or partnership should consider the following factors:

- (1) Strengths and weaknesses of each TP method;
- (2) Appropriateness of the method based on the characteristic of the related party transaction and functional analysis of each party to the transaction;
- (3) Availability of reliable comparable information for transactions between independent parties
- (4) Level of comparability of the related party transaction and independent transactions/businesses

Comparability analysis. An independent transaction (referred to as an uncontrolled transaction) will be regarded as comparable to the related party transaction (referred to as a controlled transaction) under consideration if either:

- There are no differences between the independent transaction and related party transaction which have a material impact on the relevant financial indicator for the TP method under consideration
- Differences between the independent transaction and related party transaction give rise to a material impact on the relevant financial indicator for the TP method under consideration, but reliable adjustments can be made to account for such differences

The following factors should be considered in determining comparability between the related and independent transactions:

- (1) Contractual terms of the transaction;
- (2) Functions performed by each of the parties to the transaction, taking into account assets employed and risks assumed;
- (3) Characteristics of property transferred or services rendered;
- (4) Economic circumstances at the time when transaction takes place; and
- (5) Business strategies pursued by the related company or juristic partnership.

Aggregation of transactions. A company or partnership is allowed to aggregate related party transactions together where they are interrelated and it is not possible to reliably segregate them for the purposes of the selection and application of the most appropriate TP method. This recognizes the practical difficulties in analyzing each and every related party transaction separately.

Source of comparable data. MR 369 provides that the Thai Revenue Department will consider comparable information from transactions both within and outside Thailand, which suggests that

they accept foreign comparables in certain situations. The Notification does not provide further guidance on what situations foreign comparables will be accepted. Based on current Revenue Department practice, we expect that foreign comparables will be accepted where the tested party is a foreign entity e.g. where a foreign company is the provider of management services to its related Thai company.

Arm's length range. An arm's length range will be determined based on the relevant financial indicator for the selected TP method from the comparable independent transactions. The Notification does not specify what data points define the range (e.g. minimum to maximum or interquartile range). If the results for the related party transaction fall outside the arm's length range, the Thai Revenue Department has the power to adjust the related party transaction to the arm's length range. The Notification does not mention a specific point in the range, which the adjustment will be made to, but does recognize that the adjustment should be made to a point which best reflects the circumstances.

Services. Service fees will be regarded as arm's length if: 1) services are actually provided and provide a commercial or economic benefit to the recipient, 2) the service recipient would have paid for these services to independent parties or had the service provided by an internal department, and 3) the fee is consistent with what would have been paid to independent parties for similar services. Services which relate to shareholder activities will not be regarded as arm's length.

Intangible Property. In determining the comparability of related and independent party transactions in relation to the exploitation of intangible property, the functions performed by each contractual party regarding the development, enhancement, maintenance, protection, and exploitation ("DEMPE" functions) of such intangible property, as well as the assets employed and risks assumed, shall be taken into account. This is consistent with the most recent version of the OECD TP Guidelines, which introduced consideration of the control over DEMPE functions as a basis for determining which entity(ies) should receive returns from intangible property. For example, if a foreign company has only legal ownership over the intangible property, but the DEMPE functions are performed and controlled by another company in the group, then the returns from the intangible property should accrue to the second company. When considering the arm's length remuneration for grant of the rights to use intangible property, the expected benefits, geographical usage and uniqueness of the property should be considered.

Corresponding adjustments. If a TP adjustment has been assessed by tax officers and the tax paid either at the audit level or after finalization of an appeal or court judgement, then the tax assessment officers have the power to make a corresponding adjustment to the income or expenses of the counter-party to the related party transaction. For example, if a Thai company is receiving management services from its Thai parent company and the tax officers find that the management fee is higher than an arm's length amount and adjust the management fee expense downwards, then they may provide a corresponding downward adjustment to the management fee income recognized by the Thai parent company. If the corresponding adjustment is made to counter-party which is resident in a country with which Thailand has a double tax agreement, then the corresponding adjustment will need to be made under provisions of the agreement.

Advance Pricing Agreements. Companies or juristic partnerships may apply for bilateral/multilateral advance pricing agreements between Thailand and other countries for transactions with their related parties outside Thailand under Thailand's double tax agreements. Interestingly, there is no mention of whether it is possible for companies or juristic partnerships to obtain unilateral APAs with the Thai Revenue Department only.

Applicability. The Notification is applicable for accounting periods commencing on or after 1 January 2021. This, however, means that there is a gap between the first accounting period for application of Section 71 bis (i.e. accounting periods commencing on or after 1 January 2019) and

the guidelines issued under this Notification. Presumably, however, some of the general principles contained in this Notification will be applied in practice for 2019 and 2020 years.

Lodgement of TP Disclosure Form

DGN – TP Disclosure Form provides the process for lodgement of the TP Disclosure Form for accounting periods starting on or after 1 January 2020. This Notification cancels and replaces the two Notifications previously issued which will still apply for accounting periods starting on and between 1 January 2019 and 31 December 2019.

Electronic filing. The Notification provides that the TP Disclosure Form can be lodged electronically by either:

- using the username and password obtained from the registration to access the Revenue Department's system, or
- by using the username and password obtained from the registration to access the Tax Single Sign On service of the Ministry of Finance.

The TP Disclosure Form will be considered as lodged when the company or partnership has obtained the reference number from the system.

Manual filing. There is a clear preference from the Thai Revenue Department for companies or partnerships to lodge the TP Disclosure Form electronically. If, however, the company or partnership is not able to lodge electronically and has justifiable reasons, then the Form can be printed from the Revenue Department website, completed and lodged together with a letter providing the justifiable reasons for the inability to lodge electronically.

Successful manual lodgement of the Form will be evidenced by a receipt issued by the relevant Thai Revenue Department Area/District office.

Please find attached unofficial English translations of the Notifications.

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Notification of the Director-General of the Revenue Department

Subject: Forms, rules, procedures and conditions
for submission of the annual report for information of related companies or juristic
partnerships and total value of intercompany transactions in each accounting period

By virtue of Section 3 Sedecim of the Revenue Code, amended by the Act on the Amendment of the Revenue Code (No. 48) B.E. 2562 (2019), Section 11 of the Revenue Code, and Section 71 ter, paragraph 1 of the Revenue Code, amended by the Act on the Amendment of the Revenue Code (No. 47) B.E. 2561 (2018), the Director-General of the Revenue Department prescribes the forms, rules, procedures and conditions for submission of the annual report for information of related companies or juristic partnerships and total value of intercompany transactions in each accounting period as follows:

Article 1 To cancel:

- (1) Notification of the Director-General of the Revenue Department regarding the annual report for information of related companies or juristic partnerships and total value of intercompany transactions in each accounting period dated on 7 November 2019; and,
- (2) Notification of the Director-General of the Revenue Department on Income Tax (No. 372) regarding rules, procedures and conditions for submission of the annual report for information of related companies or juristic partnerships and total value of intercompany transactions in each accounting period dated on 20 May 2020.

Article 2 The annual report of related companies or juristic partnerships under Section 71 bis of the Revenue Code (Disclosure Form) shall be the report for information of related companies or juristic partnerships and total value of intercompany transactions in each accounting period under Section 71 ter, paragraph 1 of the Revenue Code.

Article 3 Companies or juristic partnerships that are liable to submit the annual report for related companies or juristic partnerships under Section 71 bis of the Revenue Code (Disclosure Form), must submit the report through the internet via the website of the Revenue Department (www.rd.go.th) by one of the following methods:

- (1) Login to the annual report filing system for related companies or juristic partnership under Section 71 bis of the Revenue Code (Disclosure Form) directly via the website of the Revenue Department (www.rd.go.th) by using the username and password obtained from the registration to access the Revenue Department's system.
- (2) Login to the annual report filing system for related companies or juristic partnership under Section 71 bis of the Revenue Code (Disclosure Form) via the website of the Revenue Department (www.rd.go.th) through the Tax Single Sign On service on the website of the Ministry of Finance (<https://etax.mof.go.th>) by using the username and password obtained from the registration to access the Tax Single Sign On service of the Ministry of Finance.

Article 4 Companies or juristic partnerships, which would like to submit the report according to Article 3, must file an application for registration to access annual report filing system for related companies or juristic partnerships under Section 71 bis of the Revenue Code (Disclosure Form) via the website of the Revenue Department according to Article 3(1) or via the Tax Single Sign On service of the Ministry of Finance according to Article 3(2) and only after receiving approval to access the systems, can the companies or juristic partnerships submit the annual report of related companies or juristic partnerships under Section 71 bis of the Revenue Code (Disclosure Form) via the website of the Revenue Department (www.rd.go.th).

Article 5 For the submission of the annual report for related companies or juristic partnerships under Section 71 bis of the Revenue Code (Disclosure Form) according to Article 3, companies or juristic partnerships will only be considered as having successfully submitted the report after they have received a reference number from the system for submission of the annual report for related companies or juristic partnership under Section 71 bis of the Revenue Code (Disclosure Form).

Article 6 In the case where there is a justifiable reason for not proceeding according to Article 3, companies or juristic partnerships can submit the annual report for related companies or juristic partnerships under Section 71 bis of the Revenue Code (Disclosure Form) printed from the internet via the website of the Revenue Department (www.rd.go.th) together with a notification letter to the Director-General of the Revenue Department providing such justifiable reason. The annual report and notification letter shall be lodged at the Revenue Department Area Office/Branch where the office of the companies or juristic partnerships is located.

Article 7 For the submission of the annual report for related companies or juristic partnerships under Section 71 bis of the Revenue Code (Disclosure Form) according to Article 6, companies or juristic partnerships will be considered as having successfully submitted the report after they have obtained a receipt from the Revenue Department.

Article 8 Notifications of the Director-General of the Revenue Department which were cancelled by this Notification shall still be effective for the submission of the annual report for information of related companies or juristic partnerships and total value of intercompany transactions for each accounting period under Section 71 ter, paragraph 1 of the Revenue Code for income of companies or juristic partnerships which have an accounting period starting on or after the 1 January 2019 until 31 December 2019.

Article 9 This Notification is effective for the submission of the annual report for information of related companies or juristic partnerships under Section 71 bis of the Revenue Code for income of companies or juristic partnerships for accounting periods starting on or after 1 January 2020.

Released on 18 January 2021

Ekni Nitithanprapas

(Mr. Ekni Nitithanprapas)

Director-General of the Revenue Department

Notification of the Director - General of Revenue Department

on Income Tax (No. 400)

Subject: Rules, procedures, and conditions on the adjustment of income and expenses of related companies or juristic partnerships

By virtue of Article 4 of the Ministerial Regulation No. 369 (B.E. 2563), the Director-General of the Revenue Department hereby announces rules, procedures and conditions to adjust income and expenses of related companies or juristic partnerships as follows:

Article 1 Under this Notification:

“Related companies or juristic partnerships” means related companies or juristic partnerships under Section 71 bis paragraph 2 of the Revenue Code.

“Controlled transactions” means transactions entered into between related companies or juristic partnerships

“Uncontrolled transactions” means transactions entered into between independent companies or a juristic partnerships

“Remuneration for transactions” includes financial indicators related to the selected transfer pricing methods as specified below or other appropriate financial indicators related to other transfer pricing methods, as the case may be.

- (1) Price for Comparable Uncontrolled Price Method
- (2) Resale margin for Resale Price Method
- (3) Mark-up on costs for Cost Plus Method
- (4) Net profit margin for Transactional Net Margin Method
- (5) Division of operating profit for Profit Split Method

Article 2 In the case where related companies or juristic partnerships have commercial or financial arrangements whereby the remuneration determined for a controlled transaction differs from that which would have been determined between independent parties in a manner that suggests that there is a transfer of profit which results in any of the companies or juristic partnerships not receiving or receiving less profit or assessable income than would have been received if the company or juristic partnership operated independently, tax assessment officers have the power to adjust income and expenses of the company or partnership to arrive at the income and expenses as if the company or partnership operated independently and to deem that the company or partnership has received or paid those for the purpose of calculation of net taxable profit according to Section 65 of the Revenue Code or assessable income according to section 70 or 70 bis of the Revenue Code.

The amount of profit or assessable income of the company or juristic partnership according to paragraph 1 above will be deemed as an amount that would be received if the company or juristic partnership operated independently only if the remuneration of such controlled transaction is not different from the remuneration for a comparable uncontrolled transaction.

Consideration of the adjustment of income and expenses under paragraph 1 and comparison of remuneration for the comparable transaction under paragraph 2 shall comply with the rules, procedures, and conditions as stated in Article 3 to Article 10.

Article 3 An uncontrolled transaction shall be treated as a comparable transaction to a controlled transaction in the following cases:

(1) if the transaction being compared has no differences that may materially affect the financial indicator(s) to be examined under the transfer pricing method(s) in Article 5 or;

(2) if the transaction being compared has differences that may materially affect the financial indicator(s) to be examined under the transfer pricing method(s) in Article 5 but adjustments for comparability have already been appropriately made to eliminate the effect of such differences.

Article 4 In consideration of comparability under Article 3, the following factors shall be taken into account to the extent that they economically relate to facts and circumstances:

(1) Contractual terms of the transaction;

(2) Functions performed by each contractual party responsible in relation to the transaction, taking into account the assets employed and risks assumed;

(3) Characteristics of property transferred or services rendered;

(4) Economic circumstances at the time the transaction takes place; and

(5) Business strategies used by the related company or juristic partnership for the transaction.

Article 5 In determining whether the remuneration derived from a controlled transaction is equivalent to the remuneration which would be derived if the transaction was conducted independently, the most appropriate transfer pricing method shall be applied for a particular circumstance by taking into account the factors outlined in Article 6.

The transfer pricing method under paragraph 1 shall be one of the acceptable transfer pricing methods as stated below: -

(1) Comparable Uncontrolled Price Method

The comparison of the price charged for property transferred or services rendered in a controlled transaction with the price charged for property transferred or services rendered in a comparable uncontrolled transaction.

(2) Resale Price Method

The comparison of the resale margin of a controlled transaction, in which the purchaser of property in a controlled transaction receives from reselling the property in an uncontrolled transaction, with the resale margin from a purchase and resale of property in a comparable uncontrolled transaction.

(3) Cost Plus Method

The comparison of the mark-up on costs, including direct and indirect costs, from a transfer of property and provision of services in a controlled transaction, with the mark-up on costs,

including direct and indirect costs, from a transfer of property and provision of services in a comparable uncontrolled transaction.

(4) Transactional Net Margin Method

The comparison of the net profit margin relative to an appropriate base (e.g. costs, sales, assets) of a controlled transaction with the net profit margin relative to the same base of a comparable uncontrolled transaction.

(5) Transactional Profit Split Method

The division of profit (or loss) realized from a controlled transaction shall be according to the proportion that each related company or juristic partnership contributes to such controlled transaction, so that the related company or juristic partnership receives a division relative to the portion that it would have been expected to realize if they participated in a comparable uncontrolled transaction, except where any of the transfer pricing methods in (1) to (4) can be applied to determine partial profit or assessable income that independent parties would receive for engaging in the functions related to the controlled transaction. In such a case, the profit split method shall only be applied to the remaining profit after deducting the profit or assessable income derived from the application of the transfer pricing methods in (1) to (4).

Selection of another transfer pricing method apart from one of the accepted methods stated in paragraph 2 above is only acceptable in the case where there is substantial proof that none of the accepted transfer pricing methods can be reasonably applied and there is another transfer pricing method that may be applied most appropriately to the case. If companies or juristic partnerships wish to apply such other transfer pricing method, they shall notify the Director-General of the Revenue Department in writing together with preliminary explanation of the use of such transfer pricing method within the accounting period in which such method is applied to a controlled transaction. In addition, the companies or juristic partnerships are required to prepare documentation or evidence substantiating the reason(s) why the accepted transfer pricing methods are not applicable to the controlled transaction, as well as a detailed explanation for the other transfer pricing method being applied, ready for tax assessment officers to examine.

Article 6 In determining the most appropriate transfer pricing method according to Article 5, the following factors shall be considered: -

- (1) Strengths and weaknesses of each transfer pricing method;
- (2) Appropriateness of the method according to the characteristics of the controlled transaction, by analyzing the functions performed by each contractual party in such controlled transaction, taking into account the assets employed and risks assumed;
- (3) Presence of reliable information required in applying the selected transfer pricing method;
- (4) Level of comparability of the controlled transaction and uncontrolled transaction, including the reliability of the adjustments for comparability according to Article 3, paragraph 1 (2).

Article 7 In the case that companies or juristic partnerships have entered into two or more controlled transactions under the same or similar circumstances and such transactions are interrelated and cannot be separately analysed in a reliable manner, these transactions shall be aggregated for the purpose of consideration in accordance with Articles 3 to 6.

Article 8 In the case that a range of remuneration which would be received from independent dealings can be determined, when the range is compared with the financial indicator of a controlled transaction or aggregate controlled transactions according to Article 7, which have been examined under a transfer pricing method specified in Article 5, and the financial indicator falls outside the range of remuneration received from independent dealings, tax assessment officers have the power to adjust income and expenses of the controlled transaction of the company or juristic partnership under examination in accordance with Article 2 in order to adjust the financial indicator to best reflect the circumstances and bring the financial indicator within the range of remuneration which would be received from independent dealings.

The range of remuneration which would be received from independent dealings under paragraph 1 above means a range of financial indicator derived from the application of the most appropriate transfer pricing method in accordance with Article 5 to a number of comparable uncontrolled transactions under Article 3.

Article 9 Subject to the provision of paragraph 2, in the case where the controlled transaction is a service transaction, the remuneration for the service rendered shall be considered as the remuneration received from independent dealings if:

- (1) It is the remuneration for the service that has actually been rendered;
- (2) The service provides benefits or is expected to provide economic and commercial benefits to the service recipient;
- (3) It is the service that independent companies or juristic partnerships under comparable circumstances would have paid remuneration to receive the service from other independent companies or juristic partnerships, or to have the service performed by their internal departments; and
- (4) The amount of remuneration is equivalent to the amount determined under independent dealings for a comparable service.

The remuneration of a service transaction for the ownership benefits of shareholders or partners of companies or juristic partnerships respectively shall not be regarded as remuneration that is determined under independent dealings.

Article 10 In consideration of comparability according to Article 3 for the controlled transaction related to intangible property, the following factors shall be considered:

- (1) For the exploitation of intangible property, the functions performed by each contractual party regarding the development, enhancement, maintenance, protection, and exploitation of such intangible property, as well as the assets employed and risks assumed, shall be taken into account; and
- (2) For granting of rights to use, distribute or transfer of intangible property, the expected benefits, geographical limitations, level of uniqueness or commonness of the characteristics, and the rights to contribute in research and development of the intangible property shall be taken into account.

Article 11 When tax assessment officers have adjusted income or expenses in relation to a controlled transaction of any company or juristic partnership according to Article 2, if it appears that the adjustment under Article 2 results in an increase in income from the controlled transaction, which the company or juristic partnership has not actually received from its counterparty in the controlled transaction, or a decrease in expenses in the controlled transaction, which the company or juristic partnership has already paid to its counterparty in the controlled transaction, the amount of income

that has not actually been received from the counterparty or the amount of expenses that has already been paid to the counterparty shall be deemed as assessable income of the company or juristic partnership under Section 40 of the Revenue Code, which the company or juristic partnership subject to the adjustment has paid to its counterparty. Additionally, tax assessment officers have the power to adjust income and expenses of the related company or juristic partnership as if the assessable income was received or paid for the purpose of calculation of net taxable profit according to Section 65 of the Revenue Code or assessable income according to Section 70 or Section 70 bis of the Revenue Code.

Article 12 Subject to the provision of paragraph 2, if tax assessment officers adjust income and expenses for a controlled transaction of any company or juristic partnership according to Article 2 and Article 11 and the below facts are apparent:

- (1) The company or juristic partnership subject to the adjustment according to Article 2 and Article 11 did not raise any objection and has paid tax in accordance with the adjustment, or the company or juristic partnership has raised objection but the appeal or court judgement has been finalized and the company or juristic partnership has paid tax in accordance with the results of the aforementioned appeal or judgement; and
- (2) The aforementioned amount of income or expenses of the company or juristic partnership subject to the adjustment by tax assessment officers according to Article 2 is the amount that was included in the calculation of net taxable profit or assessable income of the counterparty in the controlled transaction and such counterparty does not conceal or provide false information regarding the controlled transaction,

Then, tax assessment officers have the power to make a corresponding adjustment on income and expenses of the counterparty in the controlled transaction to be in line with the adjusted income and expenses of the examined party of the controlled transaction, for the purpose of calculation of net taxable profit under Section 65 of the Revenue Code or assessable income under Section 70 or Section 70 bis of the Revenue Code.

For the purpose of the avoidance of double taxation according to the Double Tax Agreement that the Government of Thailand made with the governments of other countries or the Trade and Economic Office and Foreign Trade of Thailand made with the Economic Office and Foreign Trade of other countries, consideration for the adjustment mentioned in paragraph 1 shall be in accordance with the agreement under the Double Tax Agreement that the Government of Thailand made with the governments of other countries or the Trade and Economic Office of Thailand made with the Trade and Economic Office of other countries.

Article 13 For the purpose of the avoidance of double taxation according to the Double Tax Agreement that the Government of Thailand made with the governments of other countries or the Trade and Economic Office of Thailand made with the Foreign Trade and Economic Office of other countries, and for the prevention of controversy on transfer pricing between related companies or juristic partnerships, the companies or juristic partnerships incorporated under Thai laws which have financial or commercial transactions with their related companies or juristic partnerships incorporated under foreign laws may request for advanced pricing agreements to determine appropriate criteria for determination of remuneration of controlled transactions made between related companies or juristic partnerships to be derived in the future within the agreed periods.

Article 14 This Notification will be effective for income of the companies or juristic partnerships which have the accounting period starting on or after 1 January 2021 onwards.

Released on 14 January 2021

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Unofficial Translation