

Ministerial Regulations issued under the Transfer Pricing Laws

TP Alert

The Minister of Finance has issued two Ministerial Regulations (“MR”) under the Thai Revenue Code to provide rules and guidance on the application of certain aspects of the transfer pricing laws as follows:

- MR 369: Adjustments to income and expenses where profits have been transferred due to non-arm’s length commercial or financial arrangements between related parties.
- MR 370: To confirm the revenue threshold for exemption from the requirement to prepare the TP disclosure form and TP documentation

Adjustments for non-arm’s length pricing

Section 71 bis of the Thai Revenue Code provides Revenue Department officers with the power to adjust income or expenses of related party transactions where the related parties have commercial or financial arrangements which differ from those between independent parties and a transfer of profits is apparent. This provision is consistent with the OECD Transfer Pricing Guidelines, which use the arm’s length principle as the guiding determinant for pricing of related party transactions. In short, under the arm’s length principle, transactions between related parties should be priced as if the parties are acting independently.

MR 369 provides guidance on determining whether there has been a non-arm’s length transfer of profits between related parties for the purposes of Section 71 bis.

The MR defines “commercial or financial arrangements” as:

“any condition, agreement or a contract that is related to purchase or sale of products or services, marketing, advertising or other commercial activities or activities related to borrowing, financial support or financial collaboration or other financial related activities regardless of whether there is any written evidence.”

A non-arm’s length transfer of profits between related parties for the purposes of Section 71 bis will be apparent if the following characteristics are evident:

- There is a commercial or financial arrangement between the parties, which differs from that which would have been agreed to between independent parties; and
- Such arrangement results in the transfer of profits through one of the following mechanisms:
 - Prices of products or services, including conditions or methods of payment for products or services, which differ from the prices of the same products or same services charged by independent companies or juristic partnerships under the same circumstances.

- Interest, financial service fees, other financial charges received or paid which differ from those received or paid between independent companies or juristic partnerships.
- Other income received or expenses paid which differ from those received or paid between independent companies or juristic partnerships.

In determining the amount of the adjustment to income or expenses of the related party transactions, which are regarded as non-arm's length, the officers will have regard to the following benchmarks:

- Information from the same transactions entered into between the related companies or juristic partnerships and independent entities (usually referred to as "internal comparables"); and,
- If an internal comparable is not available, information from same transactions between independent entities (usually referred to as "external comparables"). Such transactions may be conducted inside or outside of Thailand or between companies or juristic partnerships, which are established under Thai or foreign laws. This provision suggests that the Thai Revenue Department may allow foreign comparables in certain situations, but we expect further guidance to be issued on this matter.

Importantly, the MR specifically provides that the Director-General of the Revenue Department will issue further guidance on the application of the MR.

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.

Revenue threshold exemption

Under Section 71 ter of the Revenue Code, companies or juristic partnerships with related parties are required to prepare and lodge an annual TP disclosure form. Thereafter, these companies may be requested to provide TP documentation by the Revenue Department officers within a stipulated period.

MR 370 provides that companies or juristic partnerships with annual revenues not exceeding Thai Baht 200 million will be exempt from the requirement to lodge the annual TP disclosure form and TP documentation under Section 71 ter.

Unofficial English translations of MRs 369 and 370 are attached for your information.

We expect that there will be additional guidance issued in relation to the transfer pricing laws, including required contents for the TP documentation and acceptable TP methods. We will keep you updated on any further guidance issued.

Contact

- **Stuart Simons, Partner, Transfer Pricing**
Tel: +66(0) 2034 0135
Email: ssimons@deloitte.com
- **Dr. Kancharat Thaidamri, Partner, Transfer Pricing**
Tel: +66(0) 2034 0118
Email: kthaidamri@deloitte.com
- **Chairak Trakhulmontri, Partner, Transfer Pricing**
Tel: +66(0) 2034 0157
Email: ctrakhulmontri@deloitte.com



Get in touch



**MAKING AN
IMPACT THAT
MATTERS**
since 1845

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms, and their related entities (collectively, the “Deloitte organization”). DTTL (also referred to as “Deloitte Global”) and each of its member firms and related entities are legally separate and independent entities, which cannot obligate or bind each other in respect of third parties. DTTL and each DTTL member firm and related entity is liable only for its own acts and omissions, and not those of each other. DTTL does not provide services to clients. Please see www.deloitte.com/about to learn more.

Deloitte Asia Pacific Limited is a company limited by guarantee and a member firm of DTTL. Members of Deloitte Asia Pacific Limited and their related entities, each of which are separate and independent legal entities, provide services from more than 100 cities across the region, including Auckland, Bangkok, Beijing, Hanoi, Hong Kong, Jakarta, Kuala Lumpur, Manila, Melbourne, Osaka, Seoul, Shanghai, Singapore, Sydney, Taipei and Tokyo.

About Deloitte Thailand

In Thailand, services are provided by Deloitte Touche Tohmatsu Jaiyos Co., Ltd. and its subsidiaries and affiliates.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms or their related entities (collectively, the “Deloitte organization”) is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser.

No representations, warranties or undertakings (express or implied) are given as to the accuracy or completeness of the information in this communication, and none of DTTL, its member firms, related entities, employees or agents shall be liable or responsible for any loss or damage whatsoever arising directly or indirectly in connection with any person relying on this communication. DTTL and each of its member firms, and their related entities, are legally separate and independent entities.

© 2020 Deloitte Touche Tohmatsu Jaiyos Advisory Co., Ltd.

To no longer receive emails about this topic please send a return email to the sender with the word “Unsubscribe” in the subject line.

- Unofficial Translation -

Ministerial Regulation

No. 369 (B.E. 2563) (2020)

Issued under the Thai Revenue Code

Regarding the adjustment of income and expenses

of related companies or partnerships

By virtue of Section 4 (2) of the Thai Revenue Code, amended by the Act on the Amendment of the Thai Revenue Code (No. 20) B.E. 2563 (2020), and Section 71 bis, paragraph 1, amended by the Act on the Amendment of the Thai Revenue Code (No. 47) B.E. 2561 (2018), the Minister of Finance hereby issues the Ministerial Regulation as follows:

Article 1. Under this Ministerial Regulation, related companies or juristic partnerships mean related companies or juristic partnerships according to Section 71 bis paragraph 2.

“Commercial or financial arrangements” means any condition, agreement or a contract that relates to purchase or sale of products or services, marketing, advertising or other commercial activities or activities related to borrowing, financial support or financial collaboration or other financial related activities regardless of whether there is any written evidence.

Article 2. Related companies or juristic partnerships with commercial or financial arrangements that are different from those that would be required if the related companies or juristic partnerships operated independently in a manner that a transfer of profit is apparent must have the following characteristics:

- (1) Having commercial or financial arrangements between each other;
- (2) Having such commercial or financial arrangements differ from the arrangements that would have been agreed if the companies or juristic partnerships operated independently;
- (3) Such commercial or financial arrangements result in a transfer of profits between each other through one of the following mechanisms:
 - (A) Prices for purchase or sale of products or services, including conditions or methods of payment for products or services, which differ from the prices of the same purchase or sale of products or same services charged by independent companies or juristic partnerships under the same circumstances.
 - (B) Interest, financial service fees, other financial charges received or paid which differ from those received or paid between independent companies or juristic partnerships.

(C) Other income received or expenses paid which differ from those received or paid between independent companies or juristic partnerships.

Article 3. Tax assessment officers shall comply with the following rules and methods when adjusting income and expenses of related companies or juristic partnerships to determine the income and expenses as if the companies or juristic partnerships operated independently:

(1) Where the related companies or partnerships have the same transactions with independent companies or juristic partnerships in the ordinary course of business an assessment of income or expense received or paid from the transaction shall be determined based on the information of the aforementioned transactions; and

(2) Where the related companies or juristic partnerships do not have the transactions mentioned in (1), an assessment of income or expense received or paid shall be determined based on the information of the same transactions between independent companies or juristic partnerships, whether the transactions are conducted in Thailand or outside of Thailand or made by companies or juristic partnerships incorporated under Thai laws or foreign laws.

Article 4. The Director-General of the Revenue Department shall determine rules, methods and conditions for applying Article 2 and Article 3.

Article 5. The adjusted income or expenses assessed by tax assessment officers according to Article 3 will be used to calculate the net profit which is subject to taxation in accordance with Section 65 or assessable income which is subject to taxation in accordance with Section 70 or Section 70 bis.

Given on this 6th day of November 2020

Arkhom Termpittayapaisith
(Mr. Arkhom Termpittayapaisith)
The Minister of Finance

Note on Principle and Rationale

Draft Ministerial Regulation No. 369 (B.E. 2563) (2020)

Issued under the Thai Revenue Code on the adjustment of income and expenses
of related companies or partnerships

Principle

Determination of rules, methods and conditions for the adjustment of income and expenses
of related companies or juristic partnerships

Rationale

Since Section 71 bis of the Thai Revenue Code prescribes that the tax assessment officer has the right to adjust income and expenses of related companies or juristic partnerships where the companies or juristic partnerships have commercial or financial arrangements that are different from those that would be required if the related companies or juristic partnerships operated independently in a manner that a transfer of profit is apparent, following the rules, methods and conditions determined in Ministerial Regulation, it is necessary to issue this Ministerial Regulation.

- Unofficial Translation -

Ministerial Regulation

No. 370 (B.E. 2563) (2020)

Issued under the Thai Revenue Code

Regarding the revenue threshold of companies or juristic partnerships

According to Section 71 ter paragraph 3

By virtue of Section 4 (2) of the Thai Revenue Code, amended by the Act on the Amendment of the Thai Revenue Code (No. 20), 1970 and Section 71 ter paragraph 3 of the Thai Revenue Code, amended by the Act on the Amendment of the Thai Revenue Code (No. 47), 2018, the Minister of Finance hereby issues the Ministerial Regulation as follows:

Article 1. The amount of revenue of companies or juristic partnerships from business or arising from business carried on in an accounting period according to Section 71 ter paragraph 3 shall not exceed Thai Baht 200 million.

Article 2. This Ministerial Regulation will come into force for the revenue of companies or juristic partnerships for financial years starting on or after the 1st January B.E. 2562 (2019) onwards.

Given on this 6th day of November 2020

Arkhom Termpittayapaisith
(Mr. Arkhom Termpittayapaisith)
The Minister of Finance

Note of Principle and Rationale

To support Ministerial Regulation No. 370 (B.E. 2563) (2020)

Issued under the Thai Revenue Code

Regarding revenue threshold of companies or juristic partnerships

According to Section 71 ter paragraph 3

Principle

To determine the revenue threshold of companies or juristic partnerships which are exempt from and will not be required to prepare and file the report in relation to the related party information.

Rationale

Section 71 ter of the Thai Revenue Code requires company(ies) or juristic partnership(s) which have related company(ies) or juristic partnership(s) under the definition in Section 71 bis paragraph 2 of the Thai Revenue Code to prepare and file a report with information about related party(ies) and the value of the intercompany transactions as well as documents or evidence necessary for transfer pricing analysis of the intercompany transactions between related companies or juristic partnerships. The Section allows for the determination of the amount of income or any other characteristics of a company or juristic partnership that does not have to comply with such requirements. Such that the company or juristic partnership with the specified income does not have to prepare and submit reports, documents or evidence, it was necessary to issue this Ministerial Regulation.