# NEWSLETTER

## M&A Taxation in Thailand

Asia Newsletter

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### 1. Preface

The tax team at SCL Nishimura & Asahi Limited is preparing a series of tax newsletters outlining Thai taxation of M&A transactions. Currently, the number of tax articles focusing on M&A taxation in Thailand is very small, and almost no English language resources are available. We hope this project will provide our clients and business enterprises generally with a better understanding of the Thai M&A tax regime. This newsletter, the first in the series, will provide an overview of basic tax rules applicable to stock deals involving a Thai company.

### 2. Basic tax rules applicable to stock deal M&As

According to the Thai Revenue Code ("TRC"), which is the main tax legislation in Thailand, a domestic Thai company is subject to corporate income tax on any capital gains on sales of shares in other domestic Thai companies. In other words, if a Thai company sells shares of other Thai companies, 100% of the capital gains on the sale of those shares are included in the taxable income of the selling Thai company for corporate income tax purposes[1]. This is true even in the event of sales of shares of subsidiaries. Although the TRC excludes 50% of dividends paid by subsidiaries from the taxable income of their parent companies when specified shareholding requirements are met[2], no similar exclusion is available with respect to capital gains.

While Thailand does not have a capital gains tax or other types of special income tax that target capital gains on sales of shares in a company, apart from the corporate income tax discussed above, a stamp duty is payable on share transfer instruments to be executed by sellers and purchasers. A share transfer instrument is an essential document for a transfer of shares in a Thai company, because Thai corporate law requires that a purchaser of shares in a Thai company register its shareholding on the company registrar in Thailand, and a share transfer instrument is necessary to complete that registration. Without registration, the purchaser cannot assert its ownership of the shares against the issuing company or other third parties. The stamp duty tax rate is 0.1%, and the tax amount is 0.1% of the fair value of the shares transferred. No consumption tax is payable on a sale and purchase of shares.

1 The corporate income tax rate in Thailand is 20%.

2 This exclusion is available if a parent company continues to hold 25% or more of the total outstanding shares of its subsidiary for the three-month period prior to the dividend payment and the three-month period after the dividend payment. This tax benefit is only available to a Thai Company.

## 3. Taxation in international M&A transactions

The income tax implications of an international M&A transaction in the form of a stock deal involving a Thai company differ depending on whether or not the seller is a resident of Thailand for tax purposes ("Thai tax resident"). In addition, if the seller is not a Thai tax resident, the income tax treatment differs depending on whether or not the purchaser is a Thai tax resident. Again, separate from corporate income tax, taxpayers must pay stamp duty on share transfer instruments, and because a share transfer instrument is necessary to perfect a transfer of shares in a Thai company, this stamp duty must be paid on any kind of stock deal involving shares of a Thai company.

### (1) When the seller is a Thai tax resident

As discussed above, if a Thai tax resident, such as a company incorporated in Thailand, sells shares of another Thai company, the capital gains on those shares generally are subject to Thai income tax (corporate income tax, if the seller is a Thai company) after the sale. This is true regardless of the entity type or nature of the purchaser.

### (2) When the seller is not a Thai company

When the seller is not a Thai company, the income tax status of capital gains in Thailand depends on the nature of the purchaser. If the purchaser is a Thai tax resident, the purchaser must deduct withholding tax from the purchase price paid to the seller. The tax rate is 15%, subject to any reductions or exemptions available under a relevant tax treaty. It is important to note that no reductions of or exemptions from this tax exist in the tax treaty between Thailand and Japan. Therefore, if a Japanese company sells shares of its Thai subsidiary to a Thai tax resident, the Japanese seller generally will be subject to this 15% withholding tax. The withholding tax is not applicable if the seller is a Thai company, but a Thai company is subject to corporate income tax on the relevant portions of the sale proceeds.

One interesting aspect of Thai withholding tax is the manner in which a purchaser can calculate the amount of withholding tax due. In theory, the 15% rate applies to the capital gains enjoyed by the seller, which generally is equal to the amount by which the sale price of the shares exceeds the price paid at the time of acquisition. However, when the amount of capital gains is not clear to the purchaser (which generally is the case unless the seller discloses the price at which it acquired the relevant shares), the purchaser will calculate the withholding tax amount based solely on the sales price, without deducting the seller's original acquisition price. In this case, the 15% withholding tax can be enormous, compared with the actual capital gains. For this reason, sellers need to cooperate with purchasers, by disclosing and helping the purchaser to demonstrate the price at which the seller acquired the relevant shares.

By contrast, if both the purchaser and the seller are non-Thai companies, Thai tax law deems that capital gains realized on the sale of shares do not have a source in Thailand, regardless of the jurisdiction of the share issuing company. Therefore, the capital gains are not subject to Thai income tax, including withholding tax, even in the event of a sale of shares in a Thai company. This feature of Thai international taxation, together with the withholding tax, may cause non-Thai corporate sellers to prefer non-Thai purchasers over domestic Thai purchasers, especially when the seller cannot receive full credit for payment of the Thai withholding tax in the seller's home country. However, taxpayers should remember that the 0.1% stamp duty will apply to all share transfer instruments, regardless of the tax domicile(s) of the parties.

## 4. Some interesting precedents

As in many other jurisdictions, capital gains on shares must be measured on the basis of fair market value. The TRC expressly states that when a company sells its assets, disposes of its property, transfers its property/assets, or provides services to any person, the company should charge market price consideration. Therefore, if a company sells its assets or property, or provides services, but does not charge any consideration, or charges consideration at a rate lower than market price, without reasonable grounds, the Thai Revenue Department ("TRD"), which is the principal tax agency in Thailand, has the power to assess the consideration at market price, measured at the time of the transfer or disposal of property or provision of services.

When an M&A transaction proceeds in the form of a stock deal, if the target company is a listed Thai company, the seller and the purchaser will have little difficulty establishing the fair market value or market price of the shares, as long as the trading price on the stock exchange is reliable. However, if the target company is not a listed company, the seller and the purchaser could have issues persuading the TRD that the price of the shares is reasonable. The TRD has issued two interesting tax rulings that are helpful in this regard.

The first is a case referred to in TRD ruling letter No. GorKor 0811/04265 dated 7 May 1999. A Thai company ("X") held shares in another Thai company ("T"), which was a non-listed company with no publicly available share prices. X sold its shares of T to a Dutch company at a price not lower than the net asset value per share calculated on the basis of T's balance sheet. The TRD ruled that this share price calculation method was lawful, because it resulted in a reasonable price according to the TRC.

The TRD issued a similar ruling in 2006 (*TRD ruling letter No. GorKor 0706(GorMor.08)/843 dated 7 July 2006*). In that case, a Thai company ("S") held shares in another Thai company ("Y"), which was a non-listed company. S sold its shares of Y to a non-Thai investor ("P") by setting a price not lower than the net asset value per share calculated on the basis of Y's balance sheet. The TRD concluded that the price so determined was acceptable, and was a reasonable price under the TRC. In this case, although Y owned real property with a market value much higher than its book value on Y's balance sheet, the TRD did not require the parties to reevaluate the real property, or establish its market price, and allowed the parties to use the book value when determining the sale and purchase price of the shares of Y. The TRD justified its conclusion by referring to the argument that S sold the shares of Y but did not sell the relevant real property. The ruling also held that the TRD did not have competent power to assess the fair market price of certain assets.

Although the extent to which taxpayers can rely on these rulings is not crystal clear, we can say that reference to the net asset value of a target company should provide taxpayers with strong arguments to justify the sale price of shares of that company.

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