L&P

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"Carrying on Business" and "Having a (taxable) Permanent Establishment" in Thailand

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I. Background

The terms "carrying on business in Thailand" and "having a permanent establishment in Thailand" are important to foreign companies regarding taxation. It might depend on these two terms whether income or profit tax has to be paid in Thailand.

In general, a foreign company is responsible to pay corporate income tax if it **carries on business** in Thailand.

In case the foreign company has its headquarters registered in a country that has entered into a Double Tax Agreement ("**DTA**") with Thailand, such company is liable to pay corporate income tax only if it has a permanent establishment in Thailand ("**PE**"), according to the conditions under DTAs between Thailand and the contracting states.

II. "Carrying on Business in Thailand"

1) General rules in Thai Law

A foreign company will be treated as carrying on business if it has a registered branch **or** its agent **or** employees conduct business in the Kingdom of Thailand.

a) Registered Branch

Whenever a foreign company has a branch in Thailand, the Revenue Department of Thailand usually states that the foreign company must pay corporate income tax (Section 66 para 2 of the Revenue Code ("**RC**").[1]

b) Agents or Employees

According to Section 76 bis of the RC, a foreign company is treated as carrying on business in Thailand if

a) It has an agent **or employee** in Thailand **and**

b) the actions of that agent or employee are an important factor to the foreign company in deriving income in Thailand. An important factor is usually given if:

- The agent or employee comes to sign a sale contract (even if just once) on behalf of the foreign company with a Thai company in Thailand, OR
- The agent or **employee just helps securing orders** on behalf of a foreign company with a Thai company in Thailand.

In this case, the agent or employee is the representative of the foreign company and is liable to file a tax return on behalf of that foreign company.

Therefore, if a foreign company sells the goods or provides its service without having any agent or employee in Thailand, that foreign company has no PE in Thailand under Section 76 bis of the RC.

[1] Exception: Representative Office and Regional Office. Please refer to our Newsletter No. 43 as well as our Brochure No. 1 for further details about setting up a company in Thailand and its advantages for corporate income tax.

On the other hand, an important factor can be assumed if employees or representatives come to provide services on behalf of a foreign company in Thailand and the nature of the services provided is related, e. g., to the installation of machines or the construction of buildings for the benefit of customers in Thailand. The performance of service as such can constitute PE in Thailand.

III. "Having a Permanent Establishment (PE) in Thailand according to various DTAs"

In general, PE is a fixed place where the business of the enterprise is done. The definitions and criteria of PE are stated in Article 5 of the DTAs between Thailand and the different contracting states.

However, there is another definition of PE under Article 5[2] of the Model Tax Convention 2017 of the Organisation for Economic Co-operation and Development ("**OECD**"), which is drafted as a direction for the amendment of the DTAs in the future.

The terms PE under DTAs can be divided into three categories:

1) "Asset PE"

According to the DTAs, an "Asset PE" is given if it matches the following specifications:

a) place of management
b) branch
c) an office
d) a factory
e) a workshop
f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources
g) a farm or plantation
h) a warehouse in relation to a person providing storage facilities for others.

However, the term PE shall be deemed **not** to include:

a) the use of facilities solely as storage or display of goods or merchandise belonging to the enterprise
b) the maintenance of a stock of goods or merchandise belonging to the enterprise **solely for the purpose of storage or display**
c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise
d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or collecting information, for the enterprise
e) the maintenance of a fixed place of business solely for the purpose of advertisement, providing information, science researching, carrying on, for the enterprise, any other activity of a preparatory or auxiliary character

According to the definition of "asset PE" above, a foreign company may establish numerous fixed places of business as storages or locations for maintaining auxiliary characters in a single country without constituting PE in that country (fragmentation). Therefore, the definition of PE under Article 5 of the OECD Model Tax Convention has included this

[2] Please see Article 5 Permanent Establishment of OECD The Model Tax Convention 2017 (pages 9 – 10)

kind of fragmentation of fixed places as a PE in that source country.

2) "Activity PE"

In general, DTAs state that a foreign company is treated as having an "Activity PE" in Thailand if it supports a building site, construction, installation or an assembly project and such specific activities exist for more than 6 months in Thailand. In some agreements the activity period of a building site or construction project is extended to more than 12 months, as stated e.g., in DTA between Thailand and Cyprus (effective since 1 January 2001).

3) "Agent PE"

a) a person that **habitually** has the authority to negotiate and conclude sales contracts on behalf of the foreign company in Thailand;
b) a person that does not have such authority, but habitually maintains a stock of goods or merchandise from which he regularly fills orders or makes deliveries on behalf of the foreign company;
c) a person habitually securing orders in Thailand wholly or almost wholly for the foreign company or other enterprises which are controlled by it or have a controlling interest in it.

However, a foreign company is not deemed to have an Agent PE in Thailand if business is done through a broker, general commission agent or any other agent of an independent status.

4) The definition of an independent agent

The Revenue Department defined the term "independent agent for sale of goods of a foreign company" under Board of Taxation Ruling No. 2/2526 (effective since 19 August 1983), as follows:

a) The person does not act as an agent specifically for 1 foreign company and
b) There are no clauses in the agency contract that restrict the person from providing agency service for other foreign companies; and
c) The person receives only a commission fee from those foreign companies, with no other benefits; and
d) The purchaser makes the payment directly to that foreign company.

If the agent does not fulfil the above criteria, the foreign company will be deemed to be carrying on business in Thailand and the agent will be deemed to be the representative of the company. As a result, he and the foreign company can be liable for corporate income tax in Thailand.

The status of an independent agent can be defined by the percentage of commissions receivable from one company in one tax year. For example, the DTA between Thailand and Sweden provides that an agent who receives commissions from one foreign company exceeding 75 percent of all commission fees received is a **dependent** agent.

If a definition of "independent agent" is given by the applicable DTA, it is also used by the Revenue

Department. If this is not the case, the independent or dependent status is determined by considering whether the agent is controlled by that foreign company.

IV. Conclusion

A foreign company is considered to be carrying on business and subject to corporate income tax in Thailand if it operates business through PE. This status is triggered by different trigger levels/definitions depending on the various DTAs.

In order to mitigate tax risks in Thailand, the foreign company must clarify with regard to the applicable DTA, whether its business activities in Thailand, including periods of carrying on business, are considered Asset PE, Activity PE, or Agent PE. If the business activities fall into any of the PE categories, establishing a business entity in Thailand, such as a branch or subsidiary, may be more advantageous for the foreign company because income derived from such entities in Thailand is taxable on net profit (Section 66 paras 2 of the Revenue Code).

Table 1 Types of activities of foreign company / PE in Thailand

Types of activities of foreign company in Thailand	Asset PE	Activity PE	Agent PE	No PE
Having office, factory or workshop in Thailand	X			
Having employees to do service activities in Thailand		X		X In case the activity is not indicated in DTA
Having person who usually exercises authority to conclude contracts in Thailand			X	
Having person who usually secures orders in Thailand			X	
Setting up subsidiary in Thailand to perform the work				X Except if a subsidiary acts as agent of the foreign company
Having independent agent in Thailand to help securing orders or signing sale contracts in Thailand				X
Fixed place in Thailand for sole purpose of a stock of goods				X

Table 2: Tax liability of foreign company in Thailand

Status of foreign company	Residents of DTA countries	Residents of non-DTA countries
Required conditions for foreign company to be subject to tax in Thailand	Must have a PE in Thailand	Needs only to carry on trade or business in Thailand
Tax base and tax rate	20% on net profits	20% on net profits
Withholding tax This withholding tax rate applies when the income paid to foreign company is service fee.	5%, 3%, 1% if having PE in Thailand* 0% if no PE in Thailand	5%, 3%, 1% if carrying on business in Thailand* 15% if not carrying on business in Thailand

*

a) 1% if paid by the Thai government, governmental organization etc.[3]
b) 3% if paid to foreign juristic company or partnership carrying on business in Thailand with a permanent office[4]
   A "permanent office" (not to be confused with "permanent establishment") exists if the foreign juristic company or partnership:
   - Is the owner of an office in Thailand; **or**
   - Is carrying on other business in Thailand besides engaging in contractual works[5], i.e. legally performing business on a permanent basis, e.g. trading business; **or**
   - Has a provident fund set up for its employees in Thailand in accordance with Sec. 65 ter Revenue Code.
c) 5% if paid to foreign juristic company or partnership carrying on business in Thailand without a permanent office[6]

[3] Sec. 69 bis Revenue Code.
[4] Departmental Regulation No. Taw. Paw. 4/2528 Sec. 8(3) and No. Paw. 8/2528 Sec. 1.
[5] "Contractual works" = works under contract with limited period, e.g. hire of work, hire of service, project work.
[6] Departmental Regulation No. Taw. Paw. 4/ 2528 Sec. 12.

ARTICLE 5
PERMANENT ESTABLISHMENT
ACCORDING TO OECD MODEL TAX CONVENTION 2017

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:
   a) a place of management;
   b) a branch;
   c) an office;
   d) a factory;
   e) a workshop, and
   f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.
3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:
   a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
   b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
   c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
   d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
   e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity;
   f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e),

   provided that such activity or, in the case of subparagraph f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.

   4.1 Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and
      a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or
      b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,

   provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.

5. Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where a person is acting in a Contracting State on behalf of an enterprise and, in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are

   a) in the name of the enterprise, or

   b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or

   c) for the provision of services by that enterprise,

   that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business (other than a fixed place of business to which paragraph 4.1 would apply), would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

6. Paragraph 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first mentioned State as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

8. For the purposes of this Article, a person or enterprise is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person or enterprise shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person or enterprise possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise or in the two enterprises.

We hope that the information provided in this newsletter was helpful for you.
If you have any further questions please do not hesitate to contact us.

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