L&P

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Transfer Pricing in Thailand

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I. Introduction

When independent parties contract with each other, the conditions, especially the pricing, will generally be determined by market forces. This is however not necessarily the case for affiliated companies.[1] Their conditions may differ for various reasons.[2]

If the (transfer) pricing of multinational enterprises ("**MNEs**") does not reflect the real free market conditions, the tax revenues of countries may be distorted. In extreme cases, fraudulent transfer pricing may be used to artificially generate profits in low tax countries or tax havens, thereby avoiding taxation in high(er) tax countries. As revenue departments in various countries try to minimize such practices (and might retroactively tax certain transactions), they require enterprises to comply with the "arm's length principle" ("**ALP**").

The ALP requires affiliated companies to model the pricing of internal transactions according to the pricing of independent companies. The application of the ALP therefore relies on the comparison of transactions.

The critics of the ALP raise the concern that transactions of affiliated companies are fundamentally different from those of independent companies. They regard the ALP therefore as fundamentally flawed. Nevertheless, the ALP has become a cornerstone of the transfer pricing discussion and – as far as the OECD can evaluate – has proven to be effective.

Therefore enterprises need to be familiar with the basic statements of said principle and also with the various methods of assessing transfer prices arising thereof.

II. Transfer Pricing in Thailand

By joining the Inclusive Framework on Base Erosion and Profit Shifting ("**BEPS**") on 2 June 2017, Thailand committed itself to the implementation of the BEPS minimum standards.

As a consequence, the Act Amending the Revenue Code on Transfer Pricing ("**Transfer Pricing Act**") was announced on 18 November 2018 and came into effect on 1 January 2019, requiring any company with annual revenue of over THB 200 million (approx. EUR 5.3 million) to submit a transfer pricing disclosure form[3] together with its annual tax return.

1. The Transfer Pricing Act

The Transfer Pricing Act stipulates the following:

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[1] Remark: Affiliated companies may also be referred to as "associated enterprises" or "related parties" in contrast to "independent parties". A transaction between such affiliated companies is commonly referred to as "controlled transaction" in contrast to "uncontrolled transaction" between independent parties.

[2] Apart from tax-related reasons, the OECD (Organization for Economic Co-operation and Development) names governmental pressure relating to customs valuations and cash flow requirements within multinational enterprises.

[3] On 18 November 2019, the Thai Revenue Department published its guidelines on what information has to be included in such transfer pricing documentation.

- The tax authorities are authorized to compute additional revenue and/or expenses on transactions between affiliated companies, for purposes of calculating corporate income tax.
- The term "affiliated companies" is defined.[4]
- Taxpayers whose annual revenue exceeds **THB 200 million** (approx. EUR 5.3 million) have to submit a transfer pricing documentation.
- Failure to file the required report and/or additional documents/evidence or to submit incomplete/incorrect documents or evidence without a reasonable cause is subject to a fine of up to THB 200,000 (approx. EUR 5,300).

2. Assessment

The Ministerial Regulation No. 369[5] helps assessment officials and enterprises in determining arm's length prices (also referred to as "market price"). It explicitly requires assessment officers to first consider similar transactions that the taxpayer has made with third parties (internal comparables) if they are available, or otherwise similar transactions between third parties (external comparables). This is known as the Comparable Uncontrolled Price Method ("**CUPM**"). If not such data is available, the following other methods may be used to determine arm's length prices, all of which are referred to by the OECD as "traditional transaction methods":

- Resale Price Method ("**RPM**")
- Cost Plus Method ("**CPM**")
- Transactional Net Margin Method ("**TNMM**")
- Transactional Profit Split Method

Additional guidelines for assessment officers were issued on 14 January 2021.[6] Amongst others, the terms "controlled transaction" and "uncontrolled transaction" were defined and the right for secondary adjustment introduced.[7]

III. Transfer Pricing Methods

1. Comparable Uncontrolled Price Method ("CUPM")[8]

The CUPM compares the pricing of associated parties (assessed transaction) with the pricing of a similar transaction of **independent parties** (similar transaction). Differences may indicate a deviation from the ALP.

a) Difficulties and Area of Application

Enterprises using the CUPM face the challenge of finding a transaction that is actually comparable with the assessed transaction.[9] Minor differences may have a big influence on the final pricing.

However, the OECD finds that in case a comparable transaction is found, the CUPM applies the ALP in the "most direct and reliable way". Therefore, "in such cases the CUPM method is preferable over all other methods."[10]

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4 "Affiliated companies" are defined as follows:
One company directly or indirectly holds at least 50% of the shares in the other company; or the shareholders of one company directly or indirectly hold at least 50% of the shares in the other company; or
The companies are linked to each other in terms of capital, management or control in such a way that they cannot be managed independently of each other. A ministerial regulation (yet to be enacted) is to determine the details.

5 Issued on 6 November 2020; available here (in Thai).

6 Notification of the Director-General of the Revenue Department No. 400 B.E. 2564, issued on 14 January 2021.

7 If the transfer prices of a company are audited by the Revenue officer and it is found that the price must be adjusted to meet the arm's-length principle (primary adjustment) and if the proposed adjustment resulting in higher profit to the company will be deemed payment of assessable income under Section 40 of the Revenue Code, the officer also has the power to ask the counterparty to adjust their income/expense (secondary adjustment) according to Section 65, 70, and 70 bis of the Revenue Code.

8 Clause 3 (1) Departmental Instructions No. Paw. 113/2545.

9 OECD, Transfer Pricing Guidelines, p. 24, No. 2.15.

10 OECD, Transfer Pricing Guidelines, p. 24, No. 2.15.

b) Example

Company A sells a good to the associated company B for USD 50 (assessed transaction).

Company A sells a similar good under similar circumstances to an independent company X for USD 70 (similar transaction – internal comparable).

or

Company C (not related) sells a similar good under similar circumstances to an independent company Z for USD 80 (similar transaction – external comparable).

The price of the assessed transaction differs from the price of the similar transaction(s). This may indicate that the transfer price of the assessed transaction (A to B) is not an arm's length price (please note that such conclusion is not compulsory).

Under Sec. 65 bis (4) RC tax officials have the authority to assess the price between A and B according to the arm's length price.

Under the new regulation, the sales price from A to X would be the correct one, since this is the preferred comparable.

2. Resale Price Method ("RPM")[11]

The RPM determines the arm's length price by assessing the resale price of a good. It compares the transfer price of an assessed transaction with the resale price of the same good.

First, the method notes the price of a sold product between two associated parties (Transaction 1 – Transfer Price A to B). Then, the RPM notes the resale price of the same good (Transaction 2 B to C **or** a totally different transaction with the same good, e.g. D to Z – Resale Price). An assumed profit margin is calculated by comparing the price B to C or D to Z. The result is the arm's length price which is compared to the transfer price A to B.

a) Proposed Area of Application

The OECD sees the RPM most useful when "applied to marketing operations".[12]

The Revenue Department does not offer a recommendation regarding the area of application for the RPM.

b) Example

Company A buys a good for 40 and sells it to the associated company B (Transaction 1). The price is USD 50 (Transfer Price). Company B resells the same good to the independent company C (Transaction 2). The price is USD 100 (Resale Price). The **gross profit margin is 100%, while the gross profit of the first transaction is only 25%.** The gross profit generated by Company A seems unreasonably low compared to the gross profit of Company B. The officer has the right to adjust the selling price of party A (probably to 70, so that the profit is equally shared) and thus generating more profit and higher corporate income tax for party A, unless there is a reasonable cause to explain the difference, Sec 65. bis (4) RC.

3. Cost Plus Method ("CPM")[13]

To determine the arm's length price, the CPM takes the costs of a good or service and adds an appropriate "cost plus mark up". The CPM is based on the idea that enterprises can only sustain themselves if they cover their costs and create a certain profit. (Usually, a profit margin between 3 to 10 % is accepted, depending on the industry and transaction).

[11] Clause 3 (2) Departmental Instructions No. Paw. 113/2545.

[12] OECD, Transfer Pricing Guidelines, p. 25. No. 2.21.

[13] Clause 3 (3) Departmental Instructions No. Paw. 113/2545.

a) Proposed Area of Application

According to the OECD, the CPM is suited best for the situation when associated parties trade "semi finished goods", or associated parties have concluded "joint facility agreements" / "long-term buy and supply arrangements", or where the controlled transaction is the provision of services.[14]

The Revenue Department does not offer a recommendation regarding the area of application for the CPM but has so far widely accepted the concept, particularly in case of servicing affiliates.

b) Calculating the Mark Up

Enterprises (and tax officials) using the CPM have to calculate an appropriate cost plus mark up. Therefore, the Revenue Department proposes to determine such mark up by referencing a comparable transaction of independent parties. The OECD guidelines name this approach "external comparable".[15]

In addition to this approach, the OECD proposes a method named "internal comparable" which references the mark up the "same [enterprise] earns in a comparable uncontrolled transaction".[16] The OECD finds this approach actually preferable over an external comparison. However, the approach "internal comparable" is not being mentioned by the Guidelines.

c) Calculating Costs

The OECD divides the costs of goods (or services) in three broad categories: the direct cost of production (e.g. raw material), the indirect costs of production (e.g. the repair department that services the production process) and the operating expenses of an enterprise as a whole, i.e. administration and such.[17]

d) Example[18]

Company A sells goods to the associated company B at a price of USD 100. The total all in costs of the goods are USD 80. Accordingly, it generates a profit of 20.

Company C sells a similar kind of goods to the independent company D (this transaction is "external comparable") for USD 120. The total all in costs for party C of the goods are USD 100. Therefore the net profit is USD 20, which is 20 percent of the selling price.

This profit margin (20%) is now used to assess the transaction between A and B. The costs of the sold goods are USD 80. The appropriate profit margin (as determined by the transaction C to D) is 20% of the costs of the goods, thus USD 16. Therefore, the arm's length price is the sum of the <u>costs</u> of the goods <u>plus</u> the appropriate profit. In our example USD 80 plus USD 16 equals USD 96 and <u>**not**</u> USD 100.

Therefore, the transfer price of the transaction A to B (USD 100) is higher than the arm's length price (USD 96). Under Sec. 65 bis (4) RC tax officials have the authority to assess the actual price according to the market price, but will probably not adjust it, since the price used in the intercompany transaction is higher than the arm's length price. However, this may raise problems in the jurisdiction of company B because it pays more than the arm's length price.

4. Other Methods

The Transactional Net Margin Method ("**TNMM**") compares the net profit margin of a taxpayer arising from a non-arm's length transaction with the net profit margins realized by arm's length parties from similar transactions. The TNMM differs from the RPM and CPM, as these compare gross profit

[14] OECD, Transfer Pricing Guidelines, p. 29, No. 2.39.
[15] OECD, Transfer Pricing Guidelines, No. 2.40.
[16] OECD, Transfer Pricing Guidelines, No. 2.40.
[17] OECD, Transfer Pricing Guidelines, No. 2.47.
[18] A more in depth example can be found in the OECD Transfer Pricing Guidelines, No. 2.53.

margins instead of net profit margins. However, the TNMM requires a level of comparability similar to that required for the application of the RPM and CPM. Where the relevant information exists at the gross margin level, taxpayers should therefore apply the RPM or CPM.

The Departmental Instruction allow to use other than the above described methods under the condition that

- the method is internationally accepted and
- the method is appropriate for the transaction.

Generally all methods described in the OECD guidelines are acceptable as long as they are an appropriate instrument given the circumstances of the transaction.[19]

5. Establishing the Arm's Length Price

The Revenue Department proposes a system of four steps to determine the arm's length price. Please note that this system is neither mandatory nor does it, if applied, limit taxpayers' liability. It remains the enterprises' duty to establish the arm's length prices.

- Step 1: Characterisation of the international dealings between the related parties
- Step 2: Selection of the most appropriate transfer pricing method
- Step 3: Application of such method
- Step 4: Review of the process.

IV. Documentation

To comply with the documentation obligations under Sec. 71 Ter Revenue Code, companies must fill out the following information in the transfer pricing disclosure form:

- Information on all affiliated companies (including the registration number if it is a Thai company or the country of domicile if it is a foreign company) and whether any transactions were carried out with these affiliated companies;
- If there have been transactions with affiliated companies, the amount of the transaction and its classification as operating income; other income; purchase of goods and raw materials; purchase of land, buildings and machinery; other expenditure (to be broken down into royalties, fees for management services, fees for technical services, commission, interest, or other); or loans;
- Indication whether a consolidated tax return must be filed; if so, the amount of consolidated income;
- Indication whether restructuring measures between affiliated companies have taken place during the tax year; if so, whether the restructuring has resulted in an increase or decrease in income, operating costs or gross margin;
- Information on whether intangible property has been transferred to affiliated companies;
- Confirmation by the managing director that all information is true and complete and can be supported by accounting documents.

The form must be submitted together with the tax return for all tax years commencing from 1 January 2019. Unless a different tax year has been determined, affected companies must submit their tax return including transfer pricing documentation by 31 May of the following year.

Companies whose income is below the threshold of THB 200 million (approx. EUR 5.3 million) do not have to prepare such a declaration.

The disclosure form must be filed electronically. Paper filing is only permitted in exceptional cases and must be accompanying by a

[19] Clause 3 (4) Departmental Instructions No. Paw. 113/2545.

clarification letter why electronic filing was not possible. The submission is only complete once the taxpayer received the confirmation and reference number from the Revenue Department.[20]

V. Advance Pricing Agreements (APA)

Taxpayers can enter into an advance pricing agreement (APA) with the Revenue Department for any transaction with its affiliated contracting parties. APAs aim to avoid any disputes or problems because of double taxation caused by transfer pricing re-assessment. The Revenue Department issued a guide for the APA process.[21]

Interested taxpayers have to submit a written document of intent (APA proposal) to the Director-General of the Revenue Department. The documents needed (the Revenue Department provides a list) have to be submitted in Thai and English language. Taxpayers may use translators or APA experts to submit the request.

After that, a pre-filing meeting[22] is held between the taxpayer and the Revenue Department. In general this meeting has to take place six months prior to the intended effective date of the APA (i.e. normally six months prior to the last day of the first accounting period for which the APA shall apply). Approval notice shall be issued within three months, but delays are common.

The Revenue Department remains the right to cancel or revoke the APA prior to its termination if the taxpayer is not fulfilling its duties with the Revenue Department (false information given, non-compliance with regulations of the APA etc.).

There is no filing fee for the APA and the Revenue Department will keep all the data strictly confidential.

VI. Compliance

Apart from the scrutiny of the Revenue Department itself, taxpayer should also be aware of increasing cooperation between domestic agencies.

In particular, it should be noted that the Revenue Department shares information provided in the transfer pricing disclosure form, amongst others, with the Customs Department. The Customs Department can then use the provided information on intercompany payments (such as royalties, license fees, technical service fees, commissions etc.) to determine whether such inter-company payments meet the conditions prescribed under the customs regulation for inclusion into the customs value of imports. Together with other available information, the Customs Department gains extensive insight into a company's operations. Thai customs officers are **highly incentivized** to audit or investigate companies for customs offences, because they are rewarded with substantial rewards for uncovering certain offences.

Furthermore, Thailand signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters on 03 June 2020, becoming its 137th signatory state. As a consequence, Thailand issued the Notification of the Director-General of the Revenue Department No. 408 on 30 September 2021 to implement and follow the automatic exchange of information requirements known as the Common Reporting Standard ("**CRS**") and Country-by-Country Reporting ("**CbCR**"). These enable automatic exchange and reporting of certain taxpayer information with other country revenue departments.

[20] Notification of the Director-General of the Revenue Department re: transfer pricing reporting guidelines, issued on 14 January 2021.

[21] Guidance on APA process (http://www.rd.go.th/publish/fileadmin/download/GUIDANCE-ON-APA-PROCESS-EN.pdf).

[22] Point 5.1 of the Guidance.

According to the Notification No. 408, any multinational enterprise (“**MNE**”) with consolidated group revenue of at least THB 28 billion (approx. EUR 750 million) is required to submit the CbCR. In general, this obligation lies with the Ultimate Parent Entity (“**UPE**”). However, in the following cases, the local Thai entity is required to submit the CbCR:

- The country of residence of the UPE does not require submission of the CbCR;
- The tax officers between the two countries have not agreed on an exchange of information;
- The information exchange system failed.

VII. Conclusion

The concretisation of the documentation obligations finally creates clarity about what information is expected from affected companies. Since this obligation only applies to large companies (annual turnover > THB 200 million (approx. EUR 5.3 million)), it is often possible to fall back on group-wide transfer pricing documentation that is already available.

With the enactment of these implementing provisions of the Transfer Pricing Act, Thailand has again made it clear that companies taxable in Thailand should structure their transfer pricing policy in such a way that it complies with international standards.

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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