

Call in for a Coffee

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Introduction

Welcome to RSM's October 2008 edition of Call in for a Coffee. This edition focuses on the 2008 financial markets meltdown and the taxation of share buy-back transactions, legitimizing a loss on share transaction for writing-off related company loans/debts as well as a press release from RSM International with respect to its new German Partner.

2008 Financial Markets Meltdown Taxation of Share Buy-Back Transactions

As a result of the 2008 financial markets meltdown, you could experience some publicly listed companies offering to buy-back your shares.

The ability for publicly listed companies to do this was sanctioned in the Public Limited Companies Act No 2 of BE 2544 (2001), which made it possible for public companies to buy-back shares from shareholders in accordance with the following conditions:

- The buy-back of shares is from shareholders who are objecting to a proposed change in the articles of the company in relation to voting rights and/or dividends rights on the basis that the changes are unjust to them;
- The buy-back of shares is for "financial management" purposes in cases where there are sufficient amounts of retained earnings;
- The company must dispose of the shares that are bought-back within the time fixed by a Ministerial Regulation (generally 3 years); and,
- If there is a failure to dispose of the shares or the shares are not entirely disposed of within the time limit, the company shall decrease its capital by registering a capital decrease for the amount of the shares bought-back and not disposed of.

Capital reductions tax liability

A capital reduction by any company is prescribed as a taxable transaction in Thailand, but only in the case where the capital reduction is a disguised "dividend" or a quasi "income from investment" transaction.

This is spelled out in Section 40(4)(d) of the Revenue Code, which prescribes that "a payment received as a result of reduction of capital of a juristic company or partnership in so far as the payment does not exceed the sum of the profits and reserves of the company or partnership" shall constitute the assessable income of the recipient.

However, in the case of a share buy-back by a public limited company for "financial management" purposes resulting from the 2008 financial markets meltdown, you should not be considered to be liable for capital reductions tax.

This is because, at the time of your share sale back to a public company under the company's share buy-back program, the public company should not have decreased its paid-up capital through a registration of a capital decrease (which requires a public company to carry out a legal procedure).

Thus, if a publicly listed company offers to buy-back your shares, the taxman should not assess you under the provision in Section 40(4)(d).

Capital gains tax liability

What if the publicly listed company actually buys back your shares at a price that happens to be more than your purchase price?

A capital gain on a sale of shares is also a taxable transaction in Thailand. This is prescribed in Section 40(4)(g) of the Revenue Code, as follows:

"That part of the proceeds derived from a transfer of partnership holdings, shares, debentures, bonds, bills or debt instruments issued by a juristic company or partnership or by any other juristic person, which exceeds the cost of the investment" shall constitute the assessable income of the recipient.

But in relation to a public company's share buy-back program that is carried out on the stock exchange, the capital gain should be exempt from tax pursuant to Ministerial Regulation No 126.

Legitimizing a Loss on Share Transaction for Writing-off Related Company Loans/Debts

It is extremely rare for tax authorities anywhere in the world to sanction a tax-planning scheme, but this is what the Thailand Revenue Department has done for Thailand companies wanting to write-off a loan and/or a debt owing from a related company and claim a tax deduction for the write-off.

For a long time in Thailand, advisors have utilized a tax-planning scheme that converts a loan or a bad debt (which is owed by a related company) into share capital in the related company, and then disposing of the share capital to produce a tax loss.

This tax-planning scheme was utilized to circumvent the rather strict and difficult-to-comply-with rules that are prescribed in the tax law for writing-off bad debts. But whilst some advisors were advising their clients that the loss on the shares would be allowed as a tax deduction, the Thailand Revenue Department officers just about always saw it differently, and denied a tax deduction for the loss on the shares.

Typical tax rulings

Tax Rulings typically found in favor of the Revenue Department and denied the companies a tax expense for the loss incurred on the shares.

In almost every case, the Tax Rulings allowed a loss incurred on the original share investment made in the related company on the basis that the original share investment was made for the purpose of acquiring profit.

But for the loss incurred on the share investment that arose from a conversion of the loan or bad debt into equity, the Tax Rulings would typically determine that because there was no intention to acquire the shares for the purpose of profit, but that the company merely created a loss for tax purposes, a tax loss was denied to the companies.

The Revenue Department's sanction

In August this year, the Director-General of Revenue sanctioned the above tax-planning scheme in his new guideline (Instruction No Paw 135/2551) issued to the Thailand Revenue officers. Whilst this guideline is not law, you should note that Revenue Department officers are bound to observe it.

Paw 135 prescribes that a loss on share transaction that arises from a loan or bad debt that is owed by a related company, shall be permitted as a tax expense from and including the 2007 financial year, provided the following conditions are met:

- The company owed the debt must have held at least 25% of the voting shares in the company owing the debt from the date of its incorporation until the date of conversion of the debt into share capital;
- The company owing the debt must increase its share capital for the purpose of solving its debt problems;
- The debt that is converted into share capital must be the kind of debt prescribed in the Revenue Code that qualifies for write-off; and,
- The company increasing its share capital must commence its liquidation in the accounting period after the accounting period it increased its capital.

If all of the above conditions are met, Paw 135 says that the company owed the debt shall be allowed a tax loss on the amount of the capital increase arising from conversion of the loan or bad debt into equity, and the tax loss shall be allowed in the accounting period in which the company owing the loan or debt completes the liquidation process.

The information herein was contributed by Steven Herring, an experienced and Senior International Tax Consultant, for RSM Advisory (Thailand) Limited.

RSM Thailand

Press Release

EMBARGOED

0900 BST, 20 OCTOBER 2008

October 20th 2008

RSM international continues growth in Europe with addition of leading Firms In Germany

RSM International, of which RSM Advisory (Thailand) Limited is a member, has established RSM Germany. RSM Germany brings together 11 firms with a combined fee income of \$150 million, ranking it number seven in the country. AWT Audit Wirtschafts-Treuhand AG ('AWT'), and ALTAVIS GmbH ('ALTAVIS') are joined by eight former Moores Rowland Deutschland (MRD) firms and Dr Popkes Industrietreuhand AG ('DPIAG') to form the new RSM Germany network.

All firms will be shareholders in RSM Germany GmbH, consisting of over 1,000 people, offering full national coverage, and serving medium-sized and large national and international clients. RSM International is already one of the world's largest accounting, tax and consulting networks and the formation of RSM Germany GmbH continues its recent growth in Europe. It follows the admission earlier this year of firms in Italy that propelled RSM to the fifth largest provider in the country.

The eight MRD firms, with MDS Moehrle in Hamburg and Verhülsdonk and Partner in Düsseldorf, Köln and Koblenz as its leading members, comprise 75 partners and nearly 900 total staff and bring to RSM Germany vast expertise in audit and assurance, tax consulting, risk advisory and compliance, as well as corporate finance, transaction services, legal and management consulting services. These firms are located in Hamburg, Bremen, Cologne, Düsseldorf, Dortmund, Wuppertal, Koblenz, Krefeld, Dresden, München, Stuttgart, and Kempten.

AWT provides assurance, tax advisory, corporate finance, accounting and consulting services to medium sized businesses, as well as audit services for listed clients. AWT has been a correspondent member of RSM since 1984 and currently has six partners and offices in Bamberg, Stuttgart, Munich, Berlin and Nuremberg.

ALTAVIS was established more recently - in November 2007 - and has offices in Berlin, Dusseldorf, Hamburg and Munich. ALTAVIS represents more than 100 employees, including 25 partners, with its main service lines in assurance, tax consulting and compliance, transaction services, corporate finance, corporate recovery and risk assurance.

DPIAG, located in northwest Germany, with offices in Leer and Papenburg and major activities in Magdeburg, is primarily an audit firm with some tax and accounting services and has three partners and 35 staff.

Gareth Hughes, Managing Partner of RSM Advisory (Thailand) Limited said "It is a priority for us to have close relationships with all RSM International firms and we look forward to establishing a strong working relationship with RSM Germany. These relationships enable us to offer a truly international service to our clients, whose businesses are increasingly global."

Jean Stephens, CEO, RSM International, said: "RSM has been growing rapidly all over the world this year with expansion and appointments of market leading firms in China, Japan, Italy, Israel, Ukraine and Turkey. Through RSM Germany we now offer the very best representation for clients with business interests in Europe's largest economy. These firms joining RSM in Germany are a great fit with our culture and I am delighted to welcome them to our international network."

In addition to the German and Italian firms, RSM has recently appointed strong member firms in China, Japan, Israel, Ukraine, and the Philippines, and has announced development groups in Central and Eastern Europe and the Middle East. Further appointments are anticipated in the coming months.

RSM Thailand

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RSM is represented by affiliate independent members in 72 countries and brings together the talents of over 30,000 individuals in over 730 offices worldwide. The network's total fee income of US\$3.62bn places it amongst the top seven international accounting organisations worldwide. Affiliate member firms are driven by a common vision of providing high quality professional services, both in their domestic markets and in serving the international professional service needs of their client base.

RSM International is a member of the Forum of Firms. The objective of the Forum of Firms is to promote consistent and high quality standards of financial and auditing practices worldwide.

The RSM service line leaders in Thailand are:

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Taxation Consulting

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