

Advantage

Tax and business law intelligence for international companies

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New Tax Regime Coming for JEWELRY MANUFACTURERS

As most foreign business managers in Thailand know only too well, VAT refunds are the “Achilles Heel” of the Thai VAT system. The system is burdensome with extra-ordinary administrative practices, and is a cause of never-ending tension between the Revenue Dept officers and the business sector, especially the export business sector.

Revenue Dept and Finance Ministry officials are very quick to point out that the burdensome administrative practices are required because of fraudulent scandals committed by companies exporting container loads of rubbish and purchasing fake input VAT invoices, etc.

But legitimate exporters point out that the Revenue’s time-consuming practice, which, in many cases takes years to pay VAT refunds, deprives their businesses of their working capital and adds considerable costs to their businesses.

After a long battle, jewelry manufacturers in Thailand will soon be relieved from the VAT refund system as a result of the Revenue Department’s agreement to exempt jewelry manufacturers from payment of VAT on their import of goods and equipment used for the production of jewelry.

As jewelry manufacturers will be permitted exemption from VAT on import of goods and equipment used for their manufacture of jewelry products, then since no VAT is paid on such imports, jewelry manufacturers shouldn’t therefore incur excess input VAT and thus, there shouldn’t be a requirement to submit a claim for refund of VAT from the Revenue Department.

It is important to note that the Revenue Department’s announcement is just that, an announcement, which will not be effective until completion of the legislative process, which, in this case, would ordinarily require the issue of a Royal Decree law under the Revenue Code.

But whilst it’s not difficult to predict a Royal Decree, it’s dangerous to pre-empt what the Revenue Dept officials will stipulate as the rules and regulations for manufacturers of jewelry under the Royal Decree law. Jewelry manufacturers should keep a vigilant lookout for the release of these rules and regulations.

If you are a BOI-promoted jewelry manufacturer, you should note that the above VAT changes should not impact your business, as your BOI-promotion should already provide you with exemption from VAT on your imported goods and equipment.

But beware, when a taxman give-eth, he also take-eth!

All jewelry manufacturers (both promoted and non-promoted) should take particular note of a change to the withholding tax rules that is due to happen at the same time as the above VAT change.

Revenue Department officials have announced that 1% withholding tax will apply to payments made to jewelry manufacturers, meaning that Thai corporate customers of jewelry manufacturers will be required to withhold 1% tax from their payments, and remit the withheld tax to the Revenue Department.

The imposition of this withholding tax on corporate customers of jewelry manufacturers is similar to the treatment that the Revenue Department stipulated for payments made by corporate customers to transport operators back in 2001, when they imposed the same rate of 1% withholding tax on those payments.

But whilst the Revenue officials’ reason for imposing the withholding tax is to bring evading manufacturers within the tax net, non-evading jewelry manufacturers need to be aware of the far-reaching effects of this change on their businesses.

Withholding tax is a tax on services (not a tax on sale of goods), and by imposing withholding tax on jewelry manufacturers, the Revenue Department officials are effectively prescribing that jewelry manufacturers are service providers, not sellers of manufactured goods, and as a service provider, jewelry manufacturers will therefore have a different "tax point" to what they had before.

The tax point for sellers of goods arises when goods are delivered to buyers, but for service providers, the tax point arises at the later time when the buyers pay the seller. Accordingly therefore, from the start of the withholding tax regime, jewelry manufacturers may be required to change the issue date of their tax invoices (to the date of receipt of payment from the customer) and also, change their PP30 VAT return filings.

Additionally, jewelry manufacturers, as manufacturing services providers, would be subject to 0.1% stamp duty tax on the value of their manufacturing services, because as service providers, they would be deemed to have entered into a "hire of work" contract with their customers.

Finally, BOI-promoted jewelry manufacturers would have to manage their withholding tax deductions very carefully. As such withholding tax deductions are an advance payment of corporate income tax liability, a BOI-promoted jewelry manufacturer (which is exempt from corporate income tax) could end up with excess corporate income tax payments, which could have to be claimed back from the Revenue Dept (in much the same way the VAT had to be claimed back from the Revenue Dept before the VAT change!).

FOREIGN PUBLIC ENTERTAINERS Need to Check Their Thai Tax Liabilities

And double-check and triple-check if they have to! In this article, RSM Advantage is sending a message to foreign public entertainers to make sure you know the tax laws in relation to your performances in Thailand, and insist that the rights under the laws are respected and observed in Thailand.

The basic premise of taxation for public entertainers is that income earned from performances in Thailand is subject to income tax in Thailand. The amount of tax payable in Thailand is determined by applying the personal income tax rates to the amount of the public entertainer's taxable income in Thailand (that is, the amount of income earned in Thailand less deductions allowed against the income as prescribed in the Thai tax laws).

This basic premise of taxation is clearly set out in the local Thailand tax laws, and also in the Double Tax Agreements, which give taxing rights to the Thailand Revenue Department to tax the income earned from performances in Thailand.

But a major problem arises in Thailand when foreign public entertainers do not earn the income from the performances in Thailand personally, but instead, the public entertainer's "star company" or rights-owning company earns the income for the performances in Thailand.

Most foreign public entertainers, due to a host of legal reasons, do not have legal title to their songs or their performances personally, and the public entertainer's "star company" (as the legal owner or rights-owner of the songs and/or performances) is the party that contracts with the promoter in Thailand for the public performance in Thailand. That is, the "star company" (as the legal owner) is both the contracting party for the performances and the receiver of the income paid by the promoter in Thailand.

But due to archaic practices in Thailand, modern-day legally structured public entertainers have a big battle with Thailand promoters and their Thai tax advisors over their tax liabilities.

The major countries, from where the big-name public entertainers come, have an additional clause in their Double Tax Agreements (i.e. the second paragraph under the Artistes and Sportsmen Article) specifically dealing with the legal structuring matter.

Those second paragraphs prescribe that in the case where the income from a public performance does not accrue to the public entertainer personally, but accrues to a public entertainer's "star company" (or another person), then the income that accrues to the "star company" (or other person) is taxed, provided that the public entertainer personally shares in or participates in the income or the profits of the "star company" (or other person).

A contract entered into between a Thailand promoter and a "star company" cannot (pursuant to Thailand's civil laws) be merely dismissed. It is a contract that is enforceable against the "star company", not against the public entertainer personally. Whilst performance under a "star company" contract is dependent upon a physically performance by the public entertainer, but the contract itself is a legally enforceable agreement between the promoter and the "star company" (not between the promoter and the public entertainer personally).

To RSM Advantage, the second paragraph under the Artistes and Sportsmen Articles clearly set out the tax rights of the Thailand Revenue Department (and one could also say, the obligations) in relation to taxation of "star company" contracts with Thailand promoters. That is, the "star company" should be taxed pursuant to the corporate income tax laws of Thailand, rather than the public entertainer personally pursuant to the personal income tax laws.

The Thai corporate income tax laws prescribe that for a Thai company paying services income to a foreign company that does not carry on business in Thailand or does not have a permanent establishment (fixed place of business) in Thailand, the services income paid shall be subject to tax in Thailand as withholding tax at the rate of 15%, which is notably less than the personal income tax rate of 37% under the personal income tax laws.

Cynically, this could be a reason why the promoters in Thailand, and their tax advisors, are ignoring the second paragraph of the Artistes & Sportsmen Article in the Double Tax Agreements.

RSM Advantage advises foreign public entertainers coming to Thailand from the countries that have the specific provision in their Double Tax Agreements to insist that their rights are respected and observed in Thailand.

From a professional standpoint, it is frustrating to see tax rights prescribed in the laws simply being ignored, especially when countries such as the United States of America and the United Kingdom etc go to great lengths to provide definitive clauses in their Double Tax Agreements.

Whilst Thailand is not an OECD Member, it is a UN Member, and the following paraphrased commentary (which is the commentary to the OECD Model Tax Convention and adopted as the UN's commentary as well) establishes the tax position, as follows:

"Paragraph 1 of the Artistes and Sportsmen Article deals with income derived by individual artistes and sportsmen from their personal activities. Paragraph 2 deals with situations where income from their activities accrues to other persons. If the income of an entertainer or sportsman accrues to another person, paragraph 2 provides that the income, which cannot be taxed in the hands of the performer, may be taxed in the hands of the person receiving the income, and the source country may tax that income even if the income is not attributable to a permanent establishment in the source country."

"In cases where the income for a performance of an artiste or sportsman is not paid to the artiste or sportsman himself but paid to another person, e.g. an artiste company, paragraph 2 permits a country to impose tax on the income that is paid to the artiste company."

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