

Advantage

Tax and business law intelligence for international companies

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2009 TAX INCENTIVES

Debt and Business Restructurings

As part of the Government's tax stimulus measures for the 2008 economic meltdown, it has approved the reintroduction of tax exemptions for companies that need to undertake a debt or business restructuring as a result of the recession.

The Government's reintroduced tax exemptions are as follows:

For debt restructurings:

- Exemption from income tax on income that arises from a discharge of debts ("haircuts") owing to a financial institution under the debt restructuring rules of the Bank of Thailand;
- Exemption from income tax, value added tax and specific business tax on income that arises from a transfer of property or a provision of services under the debt restructuring rules of the Bank of Thailand.

For business restructurings:

- Exemption from value added tax, stamp duty and specific business tax on income that arises from a transfer of assets to an affiliate company under the rules for partial business transfers.

The Government intends to grant the tax exemptions for companies undertaking debt restructurings in the two financial years, 2009 and 2010, and in the 2009 financial year for business restructurings.

Whilst the Government could ultimately find it to be necessary to extend the tax exemptions for another one or two more financial years (depending on how the economy picks up), there are no guarantees of this happening, and if your company's circumstances indicate that a debt or business restructuring may be required, you should plan for it within the announced exemption periods.

The Revenue Department's rules and regulations for the tax exemptions are expected to be very similar to, if not the same as, those that were previously in place for the few years following the 1997 economic crisis, and for companies that are currently contemplating a requirement for a debt or business restructuring, we indicate below what we believe will be the rules and the regulations.

RSM Advantage wishes to make it very clear that the following rules and regulations are not yet enacted and are therefore only indicative.

Debt Restructurings

For income that arises under a debt restructuring to be exempt from tax:

1. The restructuring of debts shall be in accordance with the guidelines of the Bank of Thailand; and
2. The debts that are restructured shall be between a financial institution creditor and a debtor or between another creditor and a debtor (another creditor being a non-financial institution creditor that participates in the debt restructuring with a financial institution).

When debts are restructured according to these two rules, the Revenue Department will deem a reduction of interest rate that results under a debt restructuring to be a "market price" interest rate for the purposes of Section 65 bis (4) of the Revenue Code.

In the case a debt restructuring requires a debtor to transfer assets and/or provide services to a financial institution or another creditor without compensation or with compensation that is lower than market price, the Revenue Department will deem the compensation amount to be the "market price" for the purposes of Section 65 bis (4) of the Revenue Code.

Additionally, in the case where a financial institution creditor or another creditor enters into a contract with the debtor allowing the debtor to repay the principal sum before the interest charge or free of interest, the Revenue Department will deem the contract as being acceptable for the purposes of the corporate tax rules under Section 65 of the Revenue Code.

Business Restructurings

The Thai Revenue Code permanently provides for tax exemptions for business restructurings undertaken as a transfer of entire business transaction, but for the tax exemptions to apply, the entire (whole) business of a transferor is required to be transferred to another company and the transferor company must enter into dissolution and liquidation in the same accounting period that the business is transferred.

The tax exemptions reintroduced by the Government are for a partial business transfer (i.e. a transfer of a portion or a segment of a transferor's business, rather than the entire transferor's business).

Again, the below rules and regulations are based on those that were in place for the 1997 economic crisis, and RSM Advantage stresses that these rules and regulations are only indicative:

1. A transfer of a partial business transaction shall be completed within the exemption period(s);
2. The transfer shall be between private limited or public limited companies established under the Thai laws;
3. The transfer is to an "affiliated" private limited or public limited company;
4. The transferor and transferee companies remain "affiliated" for not less than six months after the transfer;
5. The transferee company has registered capital of not less than the net value of the business assets transferred to it;
6. The assets that are transferred are relevant to the business that is transferred and the transfer of the assets is not a sale of assets in the normal or ordinary course of business;

7. The transferee company uses the assets to carry on the same or similar type business to that of the transferor company;
8. The transferee company does not claim any tax losses that were incurred prior to the transfer of partial business for the purposes of its corporate income tax liabilities; and
9. The transferee company uses the assets under a partial business transfer in its VAT business.

The Revenue Department must receive notice of the partial business transfer prior to the date of transfer of the assets. This notice details the restructuring plan and the assets to be transferred.

The Revenue Department will not permit a plan for a partial business transfer in the case where either a transferor or a transferee company has any arrears of tax owing to the Revenue Department. In the case a transferor or transferee company does have arrears of tax, a bank guarantee will be required to be filed with the Revenue Department for the amount of the tax arrears plus the costs of collection of the same.

Finally, for a partial business transfer transaction, an auditor is required to certify the performance of the companies as well as the "affiliated" relationship of the transferor and transferee companies.

You should note that whilst a partial business transfer is exempt from value added tax, specific business tax and stamp duty tax, the tax exemptions would not be extended to corporate income tax. Under a partial business transfer transaction, the transferor company survives the transaction and remains subject to the "market price" provision of Section 65 bis (4) of the Revenue Code in relation to the transfer price of the assets under the partial business transfer transaction as well all the other corporate income tax assessment provisions of the Revenue Code. This is different to the entire business transfer permanently embedded in the tax Code, which exempts a transferor company from corporate income tax.

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