

Advantage

Tax and business law intelligence for international companies



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VAT REFUNDS

Good and Registered Exporters

Foreign business managers know only too well that VAT refunds are the “Achilles Heel” of the Thai VAT system. The system is overly burdensome with the extra-ordinary audit investigation practices of the Thailand Revenue officers that cause a great deal of tension and anguish.

The premise on which VAT systems around the world is based is that businesses, which pay more VAT on their purchases (input VAT) than what they collect from their sales activities (output VAT), are able to receive the excess amount of input VAT back from their Revenue authority. This is particularly true for exporters, because their sales are zero-rated.

And because the excess input VAT is actually part of the working capital of the exporters, the excess input VAT should be refunded promptly by the Revenue authority upon receipt of the appropriate refund claim form, and the Thai VAT laws in fact prescribe for this.

But whilst most countries will pay VAT refund claims in 2 to 4 weeks of submission of the application form, the practice in Thailand is remarkably different, and it can take years to get a VAT refund from the Thailand Revenue Department.

The Thailand Revenue Department officials say that it is necessary for them investigate all refund requests due to the widespread use of the fraudulent schemes of Thailand companies filing requests for refunds of VAT resulting from the export of containers of rubbish and purchasing fake input VAT invoices, etc.

In an effort to alleviate the tensions and anguish of good tax-complying exporters, in January 2003 the Thailand Revenue Department introduced rules for “Good Exporters” and “Registered Exporters”, and for Thai companies with such registrations, the Revenue Department promised to refund their excess amounts of input VAT as follows:

- Within 45 days (15 days when filing by Internet) for Good Exporters; and
- Within 60 days (30 days when filing by Internet) for Registered Exporters.

From 2003, this seemed to work reasonably well for exporters. However, with the Revenue Department’s huge drop in tax collections after the 2008 economic meltdown, many Good and Registered Exporters saw their VAT refunds stop, and instead, became subject, once again, to the Revenue’s investigation process.

RSM Advantage has learned that Revenue officers are required to comply with a new internal regulation of the Revenue Department, which states that they shall not pay VAT refunds but shall instead refer the request for VAT refund to the Audit Division for tax investigation when a request for refund exceeds the following limits:

- When the VAT refund request exceeds 2 times the average amount refunded over the previous 6 months for Good Exporters; and
- When the VAT refund request exceeds 1.5 times the average amount refunded over the previous 6 months for Registered Exporters.

Tax investigation practices are very labor-intensive and time-consuming, and the backlogs of VAT refund claim requests deny Good Exporters and Registered Exporters their working capital, effectively changing the nature of VAT from a consumption tax to just another form of tax on their businesses. This forces the exporters to accept a higher cost structure, which in turn undermines Thailand’s competitiveness in the world economy.

It is hoped that this internal regulation of the Revenue Department is only for the short-term, so that Good Exporters and Registered Exporters can again obtain their VAT refunds promptly.

VAT AND WHT COMPLIANCE

Franchisee Advertising and Promotion Spending

Foreign franchisors enter into franchise agreements with Thailand franchisees in virtually the same way they enter into franchise agreements with franchisees in other countries around the world.

The framework of the agreement is that the foreign franchisor provides the franchisee with access to and a license to use the system and the trademarks of the business for a fee, commonly known as the franchise royalty fee. This franchise royalty fee is usually paid up front as well as by percentage of the franchisee's sales revenues.

The terms and conditions of the franchise agreement also requires the franchisee to spend, usually again, a percentage of the franchisee's sales revenues, on advertising and promotion. And before a franchisee can go ahead with any advertising and promotion, the franchisor usually requires the franchisee to present the advertising and promotion plans to the franchisor to ensure that it is in accordance with the franchisor's rules and conditions and that it will not harm the brand and the image of the business. In other words, the requirement for the franchisee to embark on advertising and promotion is a condition under the franchise agreement similar to the condition requiring the franchisee to pay royalty fees to the franchisor.

Pursuant to Thai law, virtually all amounts payable (other than payments for purchase of physical goods) by a Thailand franchisee to a foreign franchisor that is not carrying on business in Thailand are subject to withholding tax at source at the rate of 15%.

A Thailand franchisee is also required to pay 7% VAT on amounts payable to a foreign company franchisor under the reverse-charge rule in the Thai law, which prescribes that in the case of services provided by a foreign company and used in Thailand, the payer in Thailand shall remit the VAT to the Thailand Revenue Department.

For both withholding tax and VAT, the taxes apply on payment being made from the Thailand payer to the foreign company, and most Thailand franchisees pay the 15% WHT and the 7% VAT on the royalty fee that they pay to a foreign company franchisor, but do not do so on the advertising and promotion spending that is paid directly to advertising suppliers in Thailand.

A few years ago, the Thailand Revenue Department officers claimed that a Thailand franchisee's spending on advertising and promotion in Thailand is not only a condition under the franchise agreement, but also that the sums spent on advertising and promotion in Thailand were part of the consideration payable under the franchise agreement for the right to operate the business, and therefore, the advertising and promotion spending in Thailand was subject to 15% WHT and 7% VAT in the same manner as the royalty fee payment.

The Thailand franchisee didn't agree and referred the matter to the Tax Court, which ruled in favor of the Thailand franchisee, saying that the advertising and promotion spending by the franchisee in Thailand can not be considered as being paid to or received by the foreign company franchisor.

But the Revenue Department appealed the case to the Supreme Court, which just recently handed down its decision in favor of the Revenue Department.

Whilst Supreme Court tax cases are not binding as precedent under the civil laws of Thailand, franchisees of foreign company franchisors should take particular note that one day, you could possibly be called upon by the Thailand, Revenue officers to pay an additional 15% WHT and 7% VAT on your advertising and promotion spending in Thailand. Beware!

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