

Global Transfer Pricing Landscape

Thailand



Highlights

While specific transfer pricing provisions did not exist in the Thailand's tax laws, general provisions however, existed in the Revenue Code of Thailand which dealt with the gratuitous transfer or transfer with unreasonably low consideration.

**May
2002**

The Thai Revenue Department (TRD) introduced transfer pricing guidelines through the Departmental Instruction No. Paw 113/2545 (DI 113) that served as a guidance to the revenue department officers while performing tax audits and did not carry force of law.

**April
2010**

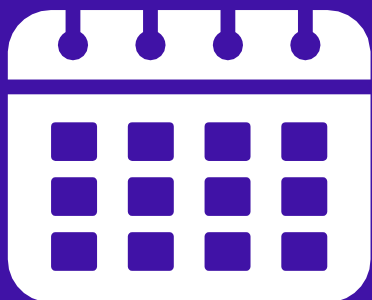
Guidance on Advance Pricing Agreement (APA) Process was issued.

**January
2018**

The Thai Cabinet approved a revised draft Transfer Pricing Act amending the Revenue Code that will introduce specific transfer pricing provisions into the Revenue Code.

**January
2019**

Introduced new provisions to Thailand's Transfer Pricing Act to stipulate annual compliance requirements pertaining to related party transactions.



Introduction

A company or a juristic partnership established under the Thai law or under a foreign law, must calculate its net profit for the purpose of corporate tax returns, as stated in section 65 of the Revenue Code.

Transfer pricing guidelines have been introduced for determining the market price of domestic as well as cross border-transactions between related parties. The revised draft transfer pricing act approved by the cabinet has become effective for accounting years beginning on or after 1 January 2017.

Regulations under Section 71 were issued requiring the disclosure of related party transactions in a form for the accounting year and Section 35 with regard to a penalty for failure to lodge the disclosure form or transfer pricing document commencing 1 January 2019.

Related Party

The term 'related parties' is defined as two or more legal entities with the following relationships:

- A juristic person who holds shares in another juristic person, directly or indirectly, with no less than 50% of the total equity;
- Two juristic persons with the same shareholder who directly or indirectly holds no less than 50% of the total equity in these entities; or,
- Juristic persons who are related by way of shareholding, management, or control whereby one juristic person is not able to act independently from one

other juristic person as defined in the Ministerial Regulation.

Arm's Length Principle

Arm's length price under Thai law is basically market price i.e. value of consideration, service fee or interest that independent contracting parties would charge in case of transfer of goods, provision of services or lending money, etc. which is of the same type as the related party transaction on the same date. The instruction's definition of market price is consistent with the 'arm's length principle' mentioned in the OECD's Guidelines. 'Independent contracting parties' are contracting parties with no direct or indirect relationship in management, control or capital between themselves.

Transfer Pricing Disclosure Form

With effect from 1 January 2019, the taxpayers with revenue of not less than 200 million Thai baht (THB) (approximately \$6.3 million) and that does not meet the other exemption conditions to be stipulated in the Ministerial Regulations is required to prepare a transfer pricing disclosure form for submission to the Thai tax authority when it files its annual corporate tax return 150 days after the accounting year-end. The form requires certain information, including:

- List of all of the taxpayer's related companies or partnerships located in and outside Thailand with an indication of whether they had transactions or not;
- Value of specified related party transactions between the taxpayer and its related parties located in and outside Thailand

- Indication of whether the taxpayer had a business restructuring involving related parties during the accounting period, and if so, the impact on its financials;
- Whether the intangible property has been transferred to affiliates.

It may be noted that the transfer pricing laws apply to both cross-border and domestic related party transactions.

Transfer Pricing Documentation

Contemporaneous documentation

The following details must be documented and kept at the office of the taxpayer:

- Ownership structure;
- Financial projections/budgets;
- Business plans/strategies;
- Financial results;
- Rationale for entering into international transactions;
- Pricing policies and product profitability;
- Market overview;
- Function, assets and risks analysis;
- Rationale for choosing a particular method.

Submission of documentation

Taxpayers are required to maintain transfer pricing documentation before the Tax or Transfer Pricing audits. Although, it is not required to be submitted on an annual basis. However, it is required to be submitted within 60 days of receiving a request from TRD.

TRD can request additional documents/evidence necessary within five years from the date of filing of the Transfer Pricing Disclosure Form. An extension up to 120 days (180 days in case of 1st request letter) may be granted to the taxpayer to respond to additional information requests.

Exemptions and thresholds

Taxpayers that have an annual income less than THB 200 million (USD 6 million) per year will be exempted from providing transfer pricing documentation within 60 days upon receiving a request letter from TRD.

Selection of method

Transaction methods such as comparable uncontrolled price method, resale price method and cost-plus method are preferred for determining the market price.

In case the aforesaid methods cannot be applied to arrive at the market price, taxpayers may choose any other internationally accepted method (i.e. profit split method or transactional net margin method) which is commercially appropriate/suitable to the facts and circumstances of the case.

Selection of comparables

Comparables may be selected from internal as well as external sources.

Internal comparables, if available, are preferred by the revenue officers. However, in the absence of internal comparables, external comparables can be used for determining the market price. Business Online is a well known local database used to extract data of external comparables.

As companies established under the Thai law are required to file their audited financial statements with the Ministry of Commerce, collating financial information of such companies is feasible.

TRD strongly prefers local comparables. However, in the absence of such local comparables, foreign comparables from similar markets may be accepted by the TRD.

Though contemporaneous documentation is required to be maintained, new benchmarking analysis every three years is also accepted.

Certain Specific Transactions

Intra-group services

Presently, intra-group service transactions are a matter of concern for the TRD. Taxpayers need to substantiate that the services have actually been received and the fees paid are commensurate with the benefits received.

Generally, fees paid for intra-group services are allowed as deductible expenses, if

it is demonstrated that these expenses are incurred for the purpose of business in Thailand.

Transfer pricing audit/assessment

Generally, there is no specific transfer pricing audit; it is undertaken as a part of the normal tax audit process. The TRD begins scrutiny by issuing a letter along with transfer pricing questionnaires requesting taxpayers to provide the requisite information/documents on the adopted transfer pricing practices under their supervision.

The scrutiny of transfer pricing during a tax audit or inquiry in Thailand is common and the probability of an audit of a multinational company is considerably high. Transfer pricing assessments can be carried out within five years from the date of filing the transfer pricing disclosure Form.

The risk areas that can trigger transfer pricing queries during general tax audits are:

- Payment of royalties/management fees,
- Interest income/expense on intra-group funding,
- Persistent losses,
- Inconsistent profit/loss patterns,
- Profit margin drops lower than the industry average,
- Different prices/mark-ups for similar transactions,

- Substantial related party transactions,
- Sudden drop in profits after expiration of tax holiday, etc.

In case of a disagreement at the documentation review stage, dispute can be settled by filing a tax appeal within 30 days after receiving the notice of assessment. In case of any failure at this level, an appeal may be filed before the Tax Court.

The Minister of Finance issued Ministerial Regulation No. 369 (published in the official bulletin 2556 on 6 November 2020) that outlines certain rules, conditions, and methods for tax officers of the Thai Revenue Department to assess or adjust the income and expenses of taxpayers that engage in related-party transactions but that do not comply with arm's length principles—in particular, for those that result in the undue transfer of profits between related parties.

Ministerial Regulation No. 369 identifies the following three commercial or financial conditions that are believed to induce a transfer of profits:

- Commercial or financial conditions between related parties;
- Commercial or financial conditions between related parties that differ from those that would otherwise be agreed between independent parties; and
- Commercial or financial conditions between related parties that result in a transfer of profits between related parties via:

- a difference in price, terms, or payment methods for the goods or services;
- a difference in interest rates or any other financial fees; and
- a difference in other income or expenses, as compared to comparable independent transactions under the same circumstances.

Penalties and other consequences of non-compliance

Currently, there is no explicit penalty for transfer pricing assessments or for not having transfer pricing documentation.

However, for tax shortfalls in general, a penalty of 100% or 200% of the tax shortfall and a 1.5% per month surcharge may be imposed, which is capped at 100% of the tax shortfall.

Failure to provide the required disclosure statement or the filing of incomplete or false statement in the disclosure statement will result in penalties of Bhat 2,00,000 (USD6,200).

The Thai Revenue Department announced a reduction of the penalty amount for late submissions of the transfer pricing disclosure form. The reduced penalty is a relief measure provided for taxpayers that have been economically affected by the coronavirus (COVID-19) pandemic. The penalty—reduced from THB 200,000 to THB 5,000—is available for disclosure forms that electronically filed (e-filed) by 30 December 2020.

APA and MAP Procedures

Taxpayers in Thailand, who enter into transactions with affiliates who are residents of Thailand's treaty partners may apply for a bilateral advance pricing agreement (APA) for a period of three to five years. Only bilateral agreements can be applied for under Thai regulations.

To apply for an APA, taxpayers shall submit a written document of intent along with the other relevant documents to the Director General of the Revenue Department. Further, no filing fees have been prescribed for filing an APA application.

Since April 2010, there has been a substantial increase in the number of APA applications in Thailand.

A taxpayer may also apply for the Mutual Agreement Procedure (MAP) within the applicable time limit as per the relevant tax treaty.

BEPS Applicability

Country by Country reporting

As a member of the OECD's Inclusive Framework on BEPS, Thailand is on the verge of implementing the four minimum standards, which includes Action Plan 13 and mandates a three-tiered transfer pricing documentation.

CbCR shall be applicable if the consolidated turnover exceeds the threshold of THB 28 billion per year, which would be required to be submitted within 12 months after each financial year end. However, CbCR requirements are still under the public hearing stage.

Master File and Local File

The specific contents of the Master File and Local File will be covered under the Ministerial Regulations. Currently, no specific guidance has been issued on the Local File and Master File. Taxpayers preparing the Local File should rely on the contents required in the original transfer pricing guidance issued by TRD in 2002. The revenue threshold for the Master File is expected to be higher than 200 million THB.

Summary of Transfer Pricing Requirements

Effective from

May 2002

Compliance Requirements

- Disclosure Form along with the tax return is required to be submitted with effect for tax years 1 January 2020, whose revenue is above the threshold limit of THB 200 million. It is required to be submitted within 150 days from the end of the accounting year;
- Contemporaneous documentation required in the event of an enquiry from the TRD within 60 days from the request from TRD.

Penalties

General penalties for tax shortfall, however once specific transfer pricing provisions are applicable, a penalty of a maximum of THB 200,000 shall be levied for failure to prepare/file transfer pricing documentation. Due to COVID-19, the penalty has been reduced from THB 200,000 to THB 5,000 for Transfer Pricing Disclosure Form electronically filed (e-filed) by 30 December 2020.

Method and Preference for Comparable

OECD has defined five methods, giving first preference to transaction-based methods.

Preference for internal comparables.

Peculiar Features

The New Revenue Code, once finalized, will introduce specific transfer pricing provisions under Thai Law and shall assume significance.

Safe harbour and APA

Bilateral APA available, however, safe harbour is not available.

BEPS/CbCR Applicability

Currently, not applicable. However, soon the provisions shall be enacted, including Action Plan 13 of OECD.



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