

# Thailand

Country M&A Team

Country Leader ~ Paul B.A. Stitt – Thailand

Other Mekong Regions

Richard J Irwin – Vietnam and Laos

Jean Loi – Cambodia

Name	Designation	Office Tel	Email
<b>Thailand</b>			
Paul B.A. Stitt	Partner	+662 344 1119	paul.stitt@th.pwc.com
Sudarat Isarakul	Senior Manager	+662 344 1433	sudarat.isarakul@th.pwc.com
<b>Vietnam and Laos</b>			
Richard J Irwin	Partner	+84 (8) 8230796	r.j.irwin@th.pwc.com
Prema Rao	Director	+662 344 1012	prema.rao@th.pwc.com
Kim Chi Nguyen	Senior Manager	+84 (8) 8230 796	nguyen.kim.chi@vn.pwc.com
<b>Cambodia</b>			
Jean Loi	Partner	+855 23 218086	jean.loi@vn.pwc.com

PricewaterhouseCoopers

**Bangkok** – 15/F, Bangkok City Tower, 179/74-80, Sathorn Road, Bangkok, 10/20 Thailand

**Ho Chi Minh City** – 4/F, Saigon Tower, 29 Le Duan Street, District 1, Ho Chi Minh City, Vietnam

**Ha Noi** – Unit 701, 7/F, Pacific Place, 83B Ly Thuong Kiet Street, Hoan Kiem District, Ha Noi, Vietnam

**Lao** – Unit 1, 4/F, 33 Lane Xang Avenue Vientiane, Lao PDR

**Phnom Penh** – 124 Norodom Boulevard, Phnom Penh, Cambodia

## 1. Introduction

### 1.1 General Comments on M&A in Thailand

As with most countries, M&A transactions in Thailand can take the form of stock acquisition or asset acquisition. These transactions may give rise to liabilities to a number of taxes in Thailand, including corporate income tax, value added tax, specific business tax and stamp duties. However, exemptions from taxes are available in certain circumstances.

### 1.2. Corporate Tax

#### 1.2.1. General tax regime

A juristic company or partnership incorporated in Thailand is generally subject to corporate income tax at a rate of 30% on its worldwide income. The corporate income tax may be reduced in the following cases:

a. Regional Operating Headquarters (ROH) established in Thailand

Provided that certain conditions are met, a ROH is subject to corporate income tax at a rate of 10% on certain income streams. An exemption from tax is also granted for dividends received from its domestic and overseas affiliated companies.

b. Companies listed on the Stock Exchange of Thailand (SET) before 6 September 2001

Corporate income tax at the rate of 25% is imposed on the first Baht 300 million of net profits. The normal rate of 30% is imposed on the balance of the net profits. This reduced rate is only applicable to companies that were listed on the SET prior to 6 September 2001, and applies for the 5 accounting periods commencing on or after that date.

c. Juristic companies or partnerships applying for listing on the SET from 1 January 2007 to 31 December 2007 are eligible for a reduced tax rate of 25%. However, this reduced rate applies for no more than 3 accounting periods.

d. Companies listed on the Market for Alternative Investment (MAI) after 6 September 2001

Corporate income tax at the rate of 20% applies to all net profits.

Juristic companies or partnerships applying for listing on the MAI from 1 January 2007 to 31 December 2007 are eligible for a reduced tax rate of 20%. This reduced rate applies for no more than 3 accounting periods.

Exemptions/reductions of corporate income taxes may also be granted to enterprises promoted by the Board of Investment.

### 1.2.2. Taxation of dividends

Dividends derived by a Thai company from another Thai Company are exempt from tax if the recipient is either:

- a company listed on the SET; or
- a company that holds at least 25% of the voting shares in the company paying the dividends provided there is no direct or indirect cross shareholding.

If the dividend is not exempt from tax, it may nevertheless qualify for partial exemption, under which only 50% of the dividend is subject to tax. In order to qualify for either full or partial exemption, the recipient must hold the shares for at least 3 months before and after the dividend is paid. Where this holding period is not met, the full amount of the dividend received will be subject to tax.

Exemption from tax is also available for dividends received from companies which have been granted a tax holiday by the Board of Investment, provided the dividend is paid out of tax exempt profits during the period of the tax holiday.

Dividends received by a branch of a foreign company are fully taxable.

### 1.2.3 Tax losses

Tax losses may generally be carried forward for 5 accounting periods for offset against profits from all sources. There is no provision for loss carry-back. Extended loss carry-forward (effectively up to 13 years) is available under privileges granted by the Board of Investment.

Each company's losses are dealt with separately; there is no group relief.

## 1.3 Withholding Tax

A foreign company that does not carry on business in Thailand is subject to final withholding tax on the following categories of income derived from Thailand:

- dividends;
- brokerage, fees for provision of services;
- royalties;
- interest;
- rent from property; and
- capital gains.

Withholding tax is imposed at the rate of 15% on the remittance of all of the above types of income or profits, except dividends (which are subject to a withholding tax rate of 10%).

The rate of withholding tax may be reduced under a double taxation agreement as follows:

- Some double taxation agreements may exempt brokerage, service fees and capital gains from Thai tax.
- The rate of withholding tax on interest may be reduced to 10% if paid to a foreign financial institution.
- The rate of withholding tax on copyright royalties may be reduced to 5% under some double taxation agreements.

No double taxation agreement reduces the rate of withholding tax on dividends to below the domestic rate of 10%.

Dividends may be exempt from withholding tax if paid by:

- a ROH to a foreign company or partnership (provided the dividend is paid out of qualifying income); or
- a promoted businesses during tax holiday.

#### **1.4 Valued Added Tax (VAT)**

VAT is levied on the import and supply of most goods and services. VAT is levied at a current rate of 7% (from 1 October 2007 to 30 September 2008) on the total price of the goods delivered or services provided or imported.

The supply of certain goods and services, such as immovable property and educational services, is exempt from VAT.

Exports of goods and services are subject to VAT of 0%.

Input VAT on purchase of goods or services related to a VAT registered business may be credited against output VAT. Surplus input VAT may be carried forward against future output VAT liabilities or refunded in cash.

#### **1.5 Stamp Duty**

Certain types of documents and transactions are subject to stamp duty at various rates. Among the more significant instruments subject to stamp duty are lease contracts for immovable property, share transfers, hire purchase contracts, and contracts for the hire of work, all subject to duty of 0.1% (without limit) and loan documents, subject to duty of 0.05% (subject to a limit of Baht 10,000).

## 1.6 Specific Business Tax (SBT)

SBT is collected on certain types of gross revenue at fixed rates. Among the more significant types of revenue subject to SBT are interest and proceeds on transfers of immovable property, both subject to SBT of 3.3% (including municipal tax). SBT has been temporarily reduced to 0.1% under a Cabinet Resolution issued on 4 March 2008. The rate will apply for a 1 year period from the date the resolution becomes effective.

## 2. Acquisition

### 2.1. The Preference of Purchasers: Assets VS Stock Deal

Thailand does not have detailed legislation dealing with the tax treatment of acquisitions. Accordingly, general principles of taxation apply when structuring a deal and choosing between an acquisition of assets or stock. Whether a deal is structured as a stock deal or asset deal may largely depend on commercial considerations.

### 2.2. Stock Acquisition

Most share acquisitions are structured as direct investments from outside Thailand, except where foreign ownership restrictions necessitate the establishment of a holding vehicle in Thailand.

If it is intended that the whole, or part of, the investment in the Thai Target will ultimately be sold, it may be advantageous to hold the investment through a holding company located in a country which has entered into a double tax agreement with Thailand that exempts gains on subsequent sale of the stock of the Thai Target from Thai tax.

Recently, foreign investors have had the opportunity to invest through property or equity funds. Investment through such funds has been used both in order to take advantage of preferential tax treatment granted to such funds and as a mechanism for avoiding foreign ownership restrictions under the Foreign Business Act (FBA).

### 2.3. Asset Acquisition

In most asset acquisitions, the purchaser will form a new limited company in Thailand through which the assets would be acquired. Rarely, a foreign investor may directly acquire assets and thereby form a branch in Thailand.

In most circumstances, the capital of a limited company will consist only of ordinary shares. Where foreign ownership restrictions require the participation of local shareholders, such shareholders may hold preference shares, carrying diluted rights.

Preference share financing may also be used where the company acquiring the assets would not be able to utilise interest deductions, for example, where it has been granted a corporate income tax holiday under investment promotion privileges. In such circumstances, the preference shares will be used as quasi-debt, with mechanisms being put in place to effectively redeem the preference shares (through a capital reduction) on termination of the tax holiday.

In the case of acquisitions of real property assets, where foreign ownership restrictions apply, foreign investors may acquire ownership of the assets via a property fund.

## **2.4. Transaction Costs**

### *2.4.1. Valued Added Tax*

- **Stock Deal**

A transfer of shares is not subject to VAT.

- **Asset Deal**

A sale of movable assets will usually be subject to VAT, based on the value of the assets transferred. However, provided certain conditions are met, exemption from VAT is available for a statutory merger of companies (an amalgamation) and the transfer of a company's entire business.

If a transfer is not otherwise exempt from VAT, then, provided it is VAT registered at the time of the transaction, the purchaser should be entitled to recover (with certain exceptions) VAT paid on the acquisition of the assets. The recovery may be made either by offsetting the VAT paid against future liability to output VAT, or by claiming a cash refund.

### *2.4.2. Stamp Duty*

- **Stock Deal**

A document effecting a transfer of shares in a Thai company are subject to stamp duty, where such documents are executed in Thailand, or executed overseas and subsequently brought into Thailand. Stamp duty is calculated at 0.1% of the greater of the selling price, or the paid-up value, of the shares.

Unless otherwise agreed, stamp duty is payable by the seller of the shares.

- **Asset Deal**

In the case of an asset deal, stamp duty will usually only be payable if it is necessary to execute new documents subject to duty (for example, leases, hire purchase contracts etc).

#### *2.4.3. Specific Business Tax*

- Stock Deal

A transfer of shares is not subject to SBT.

- Asset Deal

Sales of immovable property are generally subject to SBT of 3.3% of the gross income received. Unless otherwise agreed, SBT is payable by the seller.

A sale may be fully exempt from tax if immovable property forms part of an entire business transfer or an amalgamation.

#### *2.4.4. Concessions relating to mergers and acquisitions*

Provided that certain conditions are fulfilled, an amalgamation and a transfer of entire business may be exempt from:

- Corporate income tax,
- VAT,
- Stamp duty, and
- SBT for the sale of an immovable property.

The main conditions for the exemption are:

- There must be an amalgamation (as per the Civil Code) or a transfer of an entire business.
- The merging companies or the transferor and transferee must both be VAT registrants (if VAT exemption is sought).
- In the case of a transfer of business, the transferor company must enter liquidation in the same accounting period as the transfer.

#### *2.4.5. Tax deductibility of Transaction Costs*

Acquisition expenses are typically non-deductible, but form part of the capital cost base for calculating profit on future disposals and for calculating depreciation on depreciable assets.



## 3. Basis of Taxation following Asset or Stock Acquisition

### 3.1. Stock Acquisition

The acquisition by a foreign investor of the shares of a domestic company has no tax consequences for the investor but, if the shares are subsequently sold and sale proceeds are paid from or in Thailand, the investor would be liable to tax on any gains realised on the sale. The Target would continue to be liable to corporate income tax on the same basis as before the sale (i.e. there is no step up of the cost base on the assets owned by the Target).

The utilisation of tax losses is not affected by a change in shareholding.

Interest charges incurred by the foreign investor on borrowings for the share acquisition are not deductible against the income of the Target.

### 3.2. Asset Acquisition

Unless the transfer of assets has taken place on a tax-free basis (e.g. through an amalgamation or entire business transfer), the purchaser is entitled to depreciate assets acquired based on the acquisition price. The purchaser may therefore obtain a step-up in the cost basis of the asset. The purchaser will depreciate the asset as if it was acquired new. The fact that the asset has previously been depreciated would not result in a reduction in the minimum depreciation periods to the purchaser.

Maximum tax depreciation rates are imposed by statute. The maximum rates for certain categories of asset are illustrated below.

#### *Asset depreciation rates*

Asset category	Maximum depreciation rate (%)
Durable buildings	5
Temporary buildings	100
Cost of acquisition of goodwill, patents, trademarks and other rights:	
• if period of use is not limited	10
• if period of use is limited	100 / Period of use
Other assets	20

- **Goodwill**

Goodwill purchased as a separately identifiable asset may be capitalised for tax purposes and depreciated over a period of not less than 10 years.

No goodwill may be recognized for tax purposes on a tax free amalgamation or an entire business transfer.

- **Tax free amalgamation or entire business transfer**

In the case of an amalgamation, the new company formed through the amalgamation continues to depreciate assets on the same basis as the original companies. However, any tax losses in the merging companies may not be transferred to the new company formed through the merger.

Under an entire business transfer, the transferee continues to depreciate assets on the same basis as the transferor company. As with a merger, the tax losses in the transferor may not be transferred to the transferee.

## 4. Financing of Acquisitions

### 4.1. Thin Capitalisation

Thai limited companies are permitted to issue only ordinary shares or preference shares. Neither category of share may be issued as redeemable. There are few restrictions on the rights that may be attached to preference shares. For example, preference shares may have diluted voting rights compared with ordinary shares.

Thailand currently has no thin capitalisation rules that restrict the amount of interest that may be deducted for tax purposes. Interest paid by a Thai company will usually be deductible provided the rate of interest is within the limits provided by transfer pricing rules and civil law.

Certain debt/equity ratios may be imposed on companies that are seeking tax concessions under the Investment Promotion Act.

### 4.2. Deductibility of Interest

#### 4.2.1. Stock Acquisition

Interest on loans taken out by a Thai company and used to fund investments is deductible from profits, if any, subject to corporate income tax. However, as Thailand has no group relief or consolidated filing, the use of a leveraged Thai acquisition vehicle is not tax effective. In addition, as dividends received by the holding vehicle should be fully exempt from tax, the holding vehicle would have no taxable income against which to offset interest costs.

#### 4.2.2. Asset Acquisition

Interest on loans used to acquire assets is generally fully deductible in calculating profits subject to corporate income tax. One exception is where the acquired asset is not immediately brought into use in the business. In such circumstances, interest should be capitalised as part of the cost of acquiring the asset, until such time as the asset is brought into use. The capitalised interest may be depreciated as part of the cost of the asset.

Interest is deductible when it falls due for payment. Where the acquiring company is unable to utilise interest deduction, such as where it benefits from a tax holiday, financing may be provided using discounted notes in order to defer interest deductions. If the debt is appropriately structured the discount on the note would only be deductible upon the redemption of the note. If this takes place after the tax holiday, deduction for interest payments may be deferred until tax relief may be obtained.

### 5. Merger

Under a statutory merger of companies (an amalgamation), the merging companies are dissolved and a new company is formed. For tax purposes, the merging companies recognise no gain or loss on the transfer of assets. The new company formed through the merger continues to depreciate assets on the same basis as the original companies. However, any tax losses in the merging companies may not be transferred to the new company formed through the merger.

### 6. Other Structuring and Post Deal Issues

#### 6.1. Repatriation of Profits

In addition to dividends, profit may be repatriated through the payments of royalties, service fees and interest, but each of these is subject to various limitations in terms of withholding taxes and/or the transfer pricing regime (see Section 1.4 for withholding tax implications relating to these payments).

#### 6.2. Losses carried forward and unutilised tax depreciation carried forward

- Stock Deal

A change in ownership of a company does not affect its carry-forward of tax losses.

- Asset Deal

Tax losses are not transferable on a sale of assets, even where the sale represents the transfer of an entire business.

### 6.3. Tax incentives

- Stock Deal

A change in ownership through a stock deal will generally not affect the availability of tax incentives, provided there is no breach of any ownership condition imposed by the Board of Investment.

- Asset Deal

Tax incentives would generally be lost when the business is transferred through an asset deal. However, they may be transferred at the discretion of the Board of Investment.

### 6.4. Group Relief

There is no form of group relief or consolidated filing in Thailand.

## 7. Disposal

### 7.1. Preference of Sellers: Asset VS Stock Deal

From a seller's point of view, it would be less complicated to sell a Target through a stock deal.

### 7.2. Stock Sale

#### 7.2.1. Profit on Sale of Stock

Capital gains derived by a Thai company from the sale of shares are included in income subject to corporate income tax. The gain is calculated as the difference between the sales proceeds and the cost of investment.

Gains derived by a foreign investor on the sale of shares in a Thai company are generally subject to withholding tax of 15% if the gain is paid "in or from" Thailand. If the sale is made between two offshore entities, the gain will not usually be paid "in or from" Thailand, and is not subject to Thai taxation. If the exit route is a sale to a Thai resident, or via the Thai exchange, tax on the gain may be mitigated either by:

- Holding the investment through a company located in a territory having a double tax agreement with Thailand that provides for exemption from Thai tax on gains from the sale of shares; or
- Stepping up the cost base of the shares via an offshore sale before the sale into Thailand so that no gain is generated on the exit sale.

### *7.2.2. Distribution of Profits*

If the seller is a Thai company, the distribution of sale proceeds to shareholders as a dividend will attract withholding tax at the rate of 10% unless the shareholder is a company listed on the SET; or a company that holds at least 25% of the voting shares in the dividends paying company (and subject to the other conditions noted in 1.1.2).

## **7.3. Asset Sale**

### *7.3.1. Profit on Sale of Assets*

A company that sells any assets, which may include its entire business, is liable to corporate income tax on any gain derived on the sale. The company may offset its tax losses, if any, against the gain. The gain is calculated as the difference between the proceeds received less the tax book value of the assets.

Various tax exemptions apply to a statutory merger of companies and the transfer of a company's entire business (see section 8 'Transaction Costs for Seller').

### *7.3.2. Distribution of Profits*

Profits including capital gains may be distributed to shareholders as a dividend (see Section 7.2.2 'Distribution of Profits'). Alternatively, the shareholder may consider liquidating the company, when all or a substantial part of the business is being sold off. Generally, liquidation proceeds in excess of the cost of investment paid to offshore shareholders are subject to a withholding tax of 15%. However, the liquidation proceeds received from an amalgamation or an entire business transfer may be exempt from tax, provided that certain conditions are met.

## **8. Transaction Costs for Seller**

### **8.1. Valued Added Tax**

See Section 2.4 'Transaction costs for Purchaser'.

### **8.2. Stamp Duty**

See Section 2.4 'Transaction costs for Purchaser'.

### **8.3. Specific Business Tax (SBT)**

See Section 2.4 'Transaction costs for Purchaser'.

#### **8.4. Concessions relating to mergers and acquisitions**

Exemption from income tax may be provided for the transfer of assets under an amalgamation and an entire business transfer where the transferor enters into liquidation in the same accounting period as the transfer.

See Section 2.4 'Transaction costs for Purchaser' for other concessions available for an amalgamation and an entire business transfer.

#### **8.5. Tax Deductibility of Transaction Costs**

Transaction costs are generally tax deductible to the seller in Thailand.

### **9. Preparation of Target for Sale**

In preparing for a deal, it would be expedient for the seller to identify tax costs arising from the stock or asset deal. Tax concessions relating to mergers and acquisitions should be taken into account in order to minimise the tax costs. Positive tax attributes and value of tax shelters, for example, the availability of carry-forward tax losses, could also be factored in and used as a bargaining tool when negotiating with the buyer.

### **10. De-mergers**

There are no specific provisions in relation to de-mergers. A de-merger usually takes place through the sale of assets or business. It is important to note that any brought forward losses may not be transferable. The implications for a de-merger would be the same as an asset deal as discussed in Section 2.3 'Asset acquisition' and Section 7.3 'Asset Sale'.

### **11. Listing / IPO**

After acquiring a target, a financial buyer generally looks for an exit route either through a sale or an IPO. There are no special tax laws or regulations applicable to capital gains derived by a corporate shareholder and arising from an IPO in Thailand. The implications for profits derived from an IPO would be the same as a stock deal as discussed in Section 7.2 'Profit on Sale of Stock'.