BDO

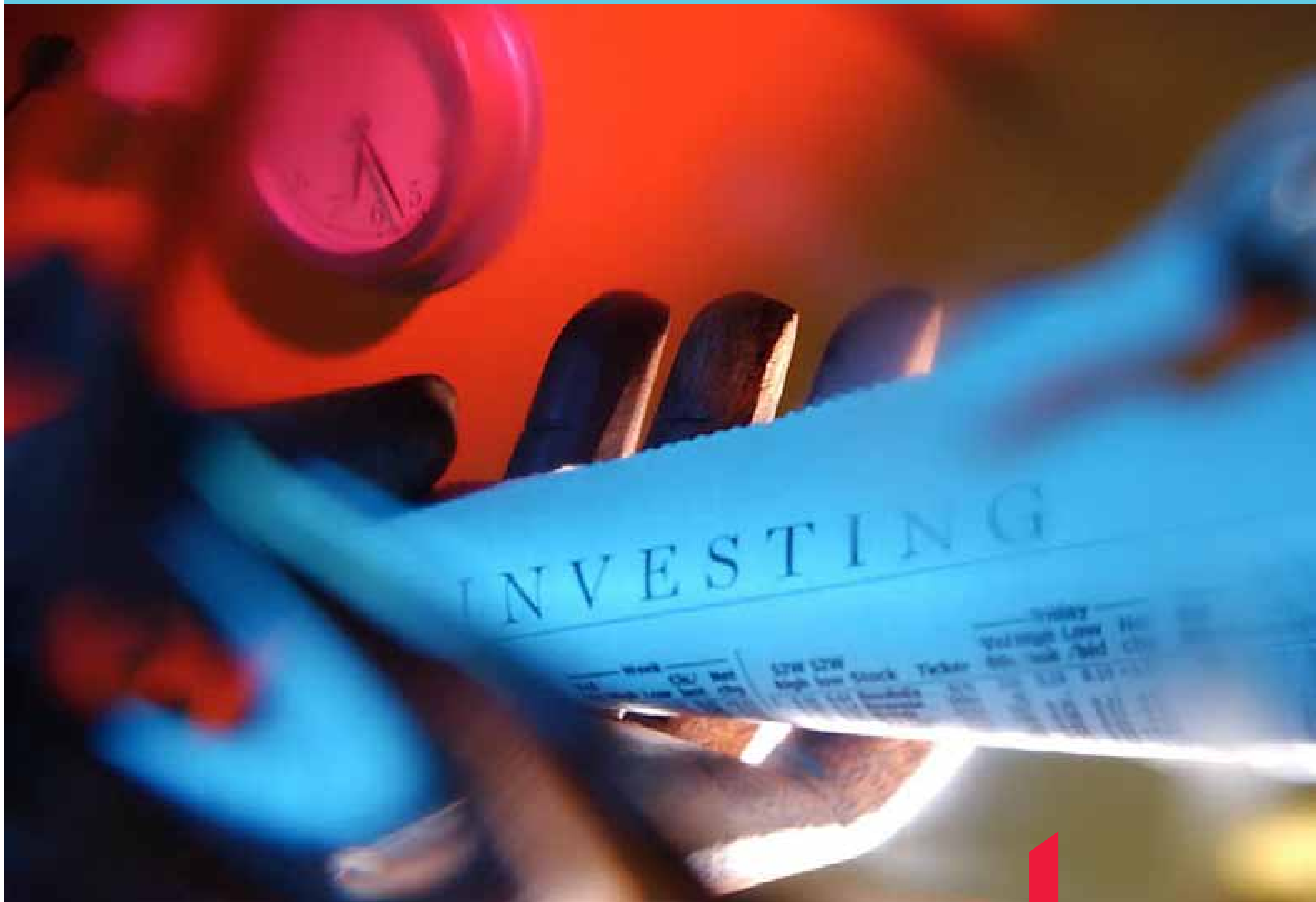
THAILAND PROPERTY

TAX & LEGAL NEWS

November 2013

In this Issue:

Harmful Tax Practices and Treaty Abuse



THAILAND PROPERTY

TAX & LEGAL NEWS

by BDO Thailand

About the Author

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Paul is a regular contributor to Property Report Southeast Asia on Thai tax issues for international property investors and is often invited to speak at international property conferences on Thai tax planning for real estate investment.

Paul has been included in Thailand's Real Estate Power 99, published by Ensign Media, profiling the individuals they consider to be the major players in Thai real estate today.

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BDO Thailand

BDO Advisory Limited is a member firm of the international BDO network of independent member firms. In the Asia Pacific Region we are supported by a network of over 80 offices.

BDO was established in Thailand in 1990 and today is one of Thailand's largest full service international accounting and advisory firms with over 160 Partners and staff. The firm's commitment to technical expertise enables it to service clients to a consistently high standard, synonymous with the BDO name.

Property Services

Whether buying, selling or leasing property in Thailand, you need sound tax and legal advice. Some of the points you will need to consider are listed below.

- Is it appropriate to establish a special purpose company (SPV) to undertake the acquisition? – this is often appropriate to ensure that the ownership structure of the property is clear and may in fact be necessary to comply with Thailand's land ownership laws.
- Which is the most advantageous location in which that company will be resident? – with an SPV this may not necessarily be your home country or the country where the property is located.
- What is the most tax efficient tax structure? – buying, selling or leasing real estate requires planning to develop an efficient tax structure.
- Will your ownership and financing structures stand up to scrutiny? – the tax authorities almost invariably examine these.
- Have you planned for taxation liabilities arising on exit? – in order to mitigate the taxation liabilities arising in Thailand on capital gains the full impact of this should be recognised and planned for on acquisition.

BDO is well placed to help companies, individuals, funds and institutions from any foreign jurisdiction wishing to invest in Thai real estate.

BDO Advisory Limited is promoted by the Thailand Board of Investment to provide advice and assistance on tax and legal matters and has been designated as the exclusive accountancy partner of Oxford Business Group (OBG) to provide specialist analysis for The Report: Thailand 2014.

BDO Global

As one of the world's largest networks, with over 1,200 offices in 138 countries and almost 55,000 professionals, the BDO network opens the door to expertise and technical resources around the world that can be drawn up locally in Thailand and the Asia Pacific region for the benefit of our clients.

All BDO member firms adhere to internationally agreed working procedures and quality controls, and the result is a uniform approach and focus worldwide that promotes cross-border understanding for people and markets.

Each BDO member firm forms an integral part of the provision of international tax and legal services to our clients. Our international tax specialists leverage from the close relationships among BDO member firm's personnel to provide seamless tax advice on property investment to international clients.

Tax Guide for Property Investors in Thailand

Corporate taxation

The standard corporate tax rate is currently 30% but lower rates apply in many cases. The standard rate will reduce to 23% in 2012 and to 20% in 2013.

Rental income paid to foreign companies not carrying on business in Thailand is subject to 15% withholding tax.

A capital gain or loss from the sale of Thai real estate by a company shall normally be included in the computation of its taxable net profit in the year of disposal.

Personal taxation

Personal tax rates range from 5-37%.

Individuals are normally taxed on rental income on a cash basis. A property owner may claim a standard deduction of thirty percent against rental income. If the property is sub-let, then the rents paid to the original letter or sub-letter may be deductible. A taxpayer has the option of claiming necessary and reasonable expenses incurred in deriving rental income supported by documentary evidence.

The sale of real estate is subject to personal income tax on the official appraised price of the property at the time of sale less deductions stipulated by law. Some sales may be tax exempt, including the sale of one's place of residence to purchase a new residence.

VAT

The standard VAT rate is 7%.

The sale or lease of immovable property is not liable to VAT. The lease of movable property and the provision of property related services are subject to VAT.

Transfer taxes and fees

Taxes and fees are collected when the transfer of immovable property is registered at the Land Department.

Immovable property sold in a commercial manner or for profit, irrespective of the manner in which the property is acquired, is subject to 3.3% specific business tax. Royal Decree No.342 issued under the Revenue Code specifies which sales of immovable property are subject to specific business tax. If the sale is not subject to specific business tax, stamp duty of 0.5 % may be payable instead.

A fee of 2% is payable on the official appraised price of the property transferred. These prices are reviewed every 4 years and new prices commence in 2012.

Withholding tax is also collected at the time of transfer. Companies are taxed at 1% and individuals are taxed at the personal tax rates.

Leases

A lease of commercial land or building space is subject to 0.1% stamp duty. The registration of leases at the land department is subject to a 1% fee.

House and land tax

House and Land Tax is collected annually on the annual rental value of commercial buildings at the rate of 12.5%. If land is not subject to the house and land tax it may be subject to local development tax. Reforms have been proposed that involve scrapping these two taxes and introducing a new property tax that would be imposed on the official appraised price of the property.

Tax exemptions and concessions

There are a number of exemptions and concessions provided under the law. Property funds are exempt from VAT, stamp duty and specific business tax and no tax is imposed on its net profit. Income tax exemptions for first home owners have also been announced.

Harmful Tax Practices and Treaty Abuse

SOUTHEAST ASIA PROPERTY REPORT
November 2013

When the ASEAN Economic Community (AEC) becomes a reality in the next few years, businesses in ASEAN operated by multinational enterprises will definitely increase.

One of the core elements in realising the AEC is to allow for virtually no restrictions on ASEAN service suppliers providing services and establishing companies across national borders within the region, subject to domestic regulations.

At the same time, the AEC blueprint does not contain action points to harmonise national tax policies. The ten member countries of ASEAN will continue as before to independently impose taxes on businesses trading within or across its borders.

The OECD says that a borderless world is good for trade and global development. It also leads however to opportunities to engage in international tax planning that can be considered abusive.

Globalisation of the economy and operating models adopted by businesses have opened up opportunities for multinational enterprises (MNEs) to greatly reduce their tax burden,

according to the OECD. They take the view that this is harmful to government revenues, uncompetitive to domestic taxpayers who cannot access these opportunities, and potentially damaging to MNEs themselves through reputational risk.

OECD Action Plan for international tax reform

The OECD published a report on Base Erosion and Profit Shifting in February 2013 at the request of the G20 against the backdrop of the debate on tax revenues. That report promised an action plan to address perceived weaknesses in the international tax rules. This Action Plan was published on 19 July 2013 with the support of G20 finance ministers and an invitation for non-OECD members to participate in discussions.

Key areas covered in the action plan included:

- Harmful tax practices and treaty abuse

Evaluating preferential tax regimes and tackling treaty abuse through anti-abuse provisions in treaties and addressing the practice of treaty shopping (i.e. interposing third countries into otherwise bilateral arrangements to reduce taxes).

- Transfer pricing

Developing rules to ensure that transactions reflect value in accordance with the arm's length standard, with particular focus on intangibles, contractually assigned risks and high risk transactions not or only rarely seen between third parties.

- Digital economy

Examining the difficulties of taxing activities in the digital economy under the current system and how corporate and indirect taxes might be better aligned with value creation through both sales activities and the collection and use of customer lists and data.

In addition to the OECD Action Plan, several new international proposals have been announced over the last few months.

These additional proposals and declarations highlight the increasing determination of governments to clamp down on tax evasion, aggressive tax planning and profit shifting, and to cooperate more effectively to help achieve this.

The OECD Action Plan and similar proposals could be an indication of how the region's taxing authorities may approach tax collections from foreign businesses in the future.

Co-operation by ASEAN nations on taxation

To support a core element of the AEC, that being the free flow of investment, the AEC blueprint provides that the ten member countries shall work towards establishing an effective network of bilateral agreements on avoidance of double taxation among ASEAN countries.

Such agreements will however also provide a mechanism for ASEAN tax authorities to collaborate on sharing information for the prevention of tax avoidance.

Likely AEC tax developments

ASEAN member nations may consider using tax policies to compete for investment and trade within ASEAN, as witnessed recently by Thailand and Vietnam cutting corporate tax rates to 20%.

At the same time, member nations will likely allocate more resources to the enforcement of their tax laws to protect and maintain their tax base. With regard to the expected increase in MNEs, ASEAN tax authorities are likely to consider strengthening their international tax laws in order to prevent abusive tax planning. Such measures include transfer pricing and thin capitalization rules, controlled foreign company legislation and general anti-avoidance rules.

Businesses looking to expand their footprint in ASEAN should review their current tax planning arrangements and transfer pricing policies to ensure that they are appropriately considered and sustainable in the longer term.

Risk Dynamics for the AEC

SOUTHEAST ASIA PROPERTY REPORT
June 2013

The latest BDO Global Ambition Survey of over 1,000 CFOs from medium sized companies currently planning foreign investment has revealed that international expansion is still a priority in order to drive revenues. At the same time, given the fractured state of the global economy, businesses are being more cautious and more focused about where they choose to invest.

The BDO Ambition Survey explored how ambitious companies can maximise the business opportunities abroad and how they navigate the regulatory, economic and management challenges of cross-border growth. With the ASEAN Economic Community (AEC) just around the corner, the survey provides some interesting insights for businesses in the region that are positioning themselves to gain a foothold in potential new markets.

Key findings

Currency fluctuations and geopolitical risks are cited as the top threats to successful foreign expansion in the survey. For ASEAN, a common currency like the euro will not be adopted by its members and therefore currency risks will need to be managed when expanding in the region. This year we have seen Asian currencies strengthen due to global developments, such as the crisis in Cyprus.

These threats to expansion have moved CFOs surveyed to focus investment in markets that are perceived to be safer investment bets.

As a result there is a boom in the BRICs - 45% of CFOs interviewed are focusing their expansion plans on the BRICs. BRICs can no longer be termed 'emerging' markets. They are now seen to be preferred -and known- investment entities.

Once businesses have moved into a market, they generally don't pull out. Having a deep local knowledge and the best people and distribution on the ground is a primary success factor.

More than two thirds of CFOs see customer service delivery as crucial for international growth, with Brazilian, British and South African companies ranking this most highly.

KEY POINTS

- **Mid-sized companies are investing for growth overseas but are more cautious and focused**
- **CFOs are focusing on BRICs - Brazil, Russia, India and China**
- **China leads the BDO Global Opportunity Index for the third year**
- **Local people, knowledge and on-the-ground execution make investments successful**

Appetite for risk

The survey shows that the risk-reward dynamic is changing as ambitious CFOs face greater risk for the same reward. CFOs from mid-sized companies are having to stick to what they know in their approach to overseas investment, rather than take bigger risks that could lead to greater returns.

Three of the four BRIC countries are considered amongst the top twenty risky markets; Russia ranks ninth, China thirteenth, and India twentieth (Brazil narrowly escapes, ranking twenty second). This shows that, while BRIC countries are seen as attractive markets for investment, as noted earlier, they also come with some inherent perceived risk. This risk-reward dynamic is echoed in many of the developing economies that will make up the AEC. Implementing appropriate strategies that address market risks will be an important element in the level of success realized from the benefits that will flow from the AEC.

Recommendations for expanding abroad

We asked CFOs to give their peers of similarly sized medium-sized companies some top recommendations for expanding internationally, based on lessons they had learnt so far. CFOs emphasised that local know-how is a key ingredient to a smooth and successful international expansion. It isn't enough just to send people out from the mother country: the people managing the set-up abroad need to have a really thorough understanding of the place they are working, either because they are local themselves or because they have invested significant time and effort learning about the new market.

CFOs think it is important to know the rules and regulations of the country you are expanding into. When turning to others for advice, CFOs reported that accountants and tax advisers are their most trusted sources of advice in relationship to international expansion.

Simply put, do your homework before making the jump into new markets. The AEC represents opportunities for ambitious businesses but it will be crucial not to discount the intricacies and local aspects of the many markets within the AEC when rolling out expansion plans.

AEC 2015 – planning ahead

SOUTHEAST ASIA PROPERTY REPORT
October 2012

Businesses in Asia are poised to take advantage of the ASEAN Economic Community (AEC) when it commences in 2015. Many businesses are positioning themselves now to gain a foothold in potential new markets or leverage from their existing regional interests.

As a business grows and starts setting up businesses in several countries, it will soon become apparent that the way it is legally organized can have an impact on its bottom line.

For example, a group might look to establishing some sort of holding company structure for its collection of businesses. Originally they might have started out with a holding company established in the same country where their head office is located.

However, if the business continues to grow, its legal structure will become more intricate, and to maintain competitiveness it may no longer make financial sense to maintain a holding company in the same place as the head office.

Locating a holding company in ASEAN

On the tax side, one major factor to consider when selection the location of the holding company is how the future disposal or transfer of shares will be taxed. When looking around the ten ASEAN countries for example, you will find some significant differences in tax treatments of capital gains made on the sale of non-listed shares.

Singapore and Malaysia do not tax capital gains. In the Philippines, the sale of shares that are not listed on the stock exchange are taxed as capital gains, with a 5% withholding tax on the first Php 100,000.00 and 10% on the remaining gain.

Vietnam, Indonesia and Thailand on the other hand adopt a different approach and tax such gains as ordinary income. Businesses based in these countries would likely be interested in reviewing whether a holding company structure incorporating a Singapore parent company for example would be a better option. Of course, options outside of the ASEAN countries could also be considered, including nearby Hong Kong, tax haven jurisdictions like the Cayman Islands or tax planning jurisdictions like Mauritius, that do not tax capital gains.

Profitable businesses will eventually be paying dividends back to their parent company. The tax treatment of dividend payments, by both the paying company and the receiving company, is also an important consideration when establishing a holding company. Again, the laws governing the tax treatment of dividends varies between the ASEAN countries. This is one area of tax law that ASEAN countries may be reviewing in the future to maintain their competiveness as a holding company jurisdiction.

Regional headquarters

The location of a business group's headquarters can often be considered separately from the location of its main holding company.

Again, by looking at the bigger picture and considering the choices available in ASEAN, it may lead to a business choosing to establish its headquarters in a country away from its original roots.

The role of the regional headquarters is primarily to serve its own businesses in the region, providing management and administrative services; technical services; and support services including procurement, product research and development and marketing and sales support.

Many ASEAN countries, including Malaysia, Philippines, Singapore and Thailand, offer tax incentives to attract international businesses to set up regional headquarters in their country.

The tax incentives will take a number of forms including corporate tax exemptions or reduced tax rates; personal income tax breaks for expatriates; dividend, interest and royalty tax incentives; and accelerated capital write offs.

It will pay for businesses planning to expand their operations in ASEAN to consider the various tax implications and incentives offered around the region and beyond when planning the legal framework of their international organisation.

AEC 2015 – borders still to cross

SOUTHEAST ASIA PROPERTY REPORT
July 2012

The creation of the ASEAN Economic Community (AEC) by 2015 is looming on the horizon and countries and businesses alike in the ASEAN region are preparing themselves for the new dawn.

ASEAN service suppliers will soon be able to take advantage of a relaxation of restrictions on providing services and establishing companies across national borders within the region.

Taxation and the flow of services

The ten member countries of ASEAN will continue as before to independently impose taxes on businesses trading within or across its borders.

The impact of member nations' tax policies on the flow of services within the ASEAN region will depend in part on how the services are supplied..

The flow of services may be broken down into four modes as follows:

Mode 1	Cross border supply
Mode 2	Consumer moves across border to receive the supply
Mode 3	Service provider moves across the border to provide the service through commercial establishment
Mode 4	Service provider moves across the border temporarily to provide the service

Modes 1 and 2 may be distinguished from modes 3 and 4 in that they do not involve the service provider moving across the border of their home country.

Services providers moving across borders as envisioned by the AEC blueprint will be naïve to assume that the tax laws in the other ASEAN countries will be similar to their own country.

Being aware of and seeking specific tax advice on how to structure business arrangements in neighbouring ASEAN countries will be a critical factor in successfully managing a business's bottom line in the highly competitive business environment envisaged by AEC 2015.

Cross border considerations

Providing services through a commercial establishment in another country will normally require consideration about whether to operate the business as a branch office of the parent company or to set up a new subsidiary company in that country.

Legal and other commercial considerations aside, tax issues can play an important part in making such a decision.

For example, if a branch office is established, distinguishing between the head office and the branch is blurred in that they are still part of one and the same legal entity. Normally this means that any costs incurred by the head office for the overseas branch, such as sales and marketing and back office support, will need to be properly captured and booked by the branch, which can be substantial in the early years as the business seeks to establish itself locally.

If a new subsidiary company is established instead of a branch office, because it is a separate legal entity, the parent company should instead charge a fee for its services. A service provider should expect to make a profit by charging a fee that is more than the cost of the services. This might then be an opportunity to repatriate some of the profits of the new business back to the parent tax effectively.

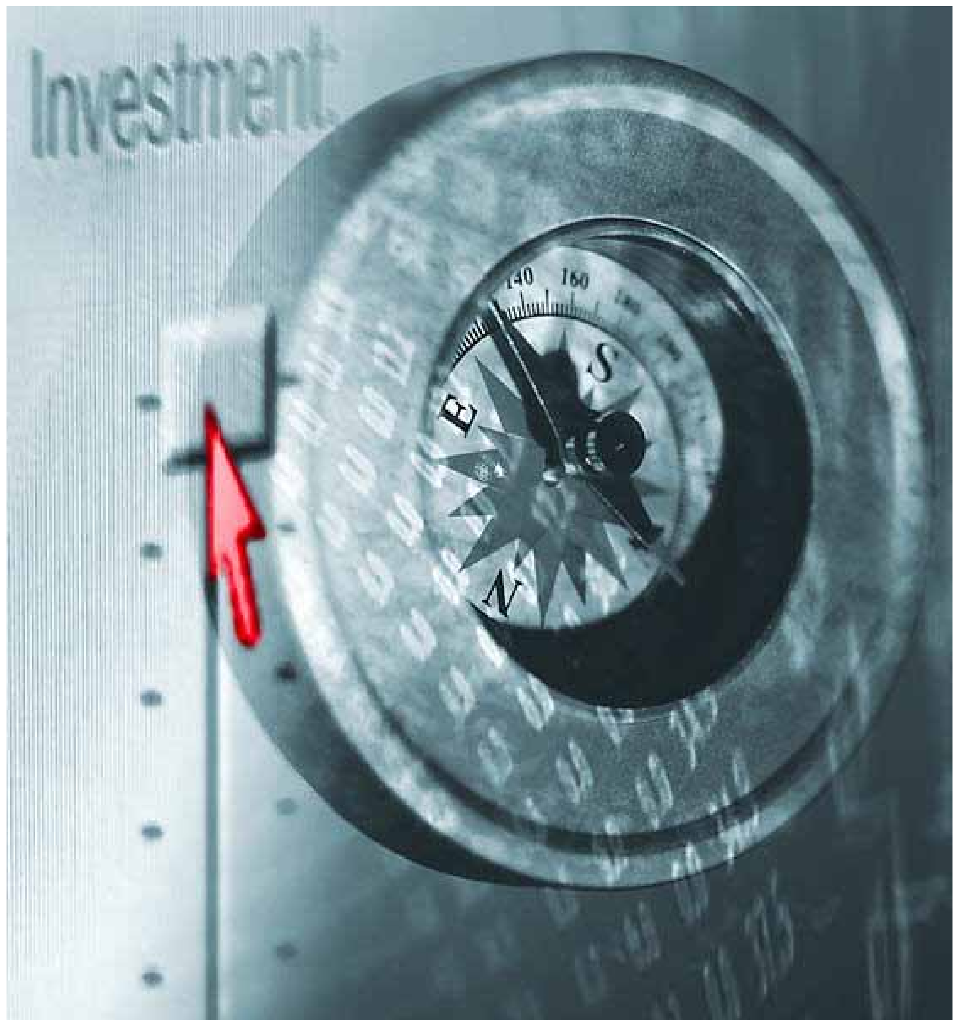
The pricing of transactions between related parties – referred to as transfer pricing - is a common tax issue faced by businesses venturing out of their home country. In practice, it can be a minefield for tax authorities to challenge. And carrying on business in another country will now mean there will be two tax authorities looking at the transactions, both aiming to maximize the tax paid in their respective country and with possibly differing viewpoints.

Businesses looking to expand their footprint in ASEAN will need to familiarize themselves with international transfer pricing rules if they are to avoid the wrath of the region's tax authorities.

International aspirations for AEC 2015

SOUTHEAST ASIA PROPERTY REPORT
May 2012

Companies with international aspirations need to be ambitious if their business is to succeed internationally in today's global markets.



The latest BDO Global Ambition Survey reveals that despite perceived increased difficulties in conducting business abroad, the CFOs in all the countries interviewed believe that a larger proportion of their revenues will be accounted for by sales outside their headquartered country by 2014.

Most companies surveyed were primarily looking to expand within their core sector, and with their existing products and services, 78 per cent of CFOs claim that "the challenges when expanding abroad are greater than at home".

Expanding services within ASEAN

The creation of the ASEAN Economic Community (AEC) by 2015 will be a catalyst for local businesses with international aspirations to expand in the ASEAN region. One of the core elements in realising the AEC is to allow for virtually no restrictions on ASEAN service suppliers providing services and establishing companies across national borders within the region, subject to domestic regulations. The ASEAN Framework Agreement on Services ("AFAS") signed on 15 December 1995 provides the legal framework for Member States to progressively improve market access and provide national treatment to service suppliers of Member States.

Who can claim benefits under AFAS?

Service suppliers that can claim benefits under AFAS are citizens of the ten member states of ASEAN and juridical persons e.g. companies owned or controlled by persons of a Member State established under the laws of a Member State or if controlled by persons of a non Member State, engaged in substantive business operations in a Member State(s).

Taxation

To support another core element of the AEC, that being the free flow of investment, the AEC blueprint provides that the ten member countries shall work towards establishing an effective network of bilateral agreements on avoidance of double taxation among ASEAN countries.

Such agreements serve to relieve double taxation of income that is earned in one country by a resident of the other country. It makes clear the taxing rights between the contracting parties on the different types of income arising from cross-border economic activities between the two countries and it also provides for reduction or exemption of tax on certain types of income.

Excluding the measures to eliminate tariffs on the flow of goods within the region, this is the only action point in the blueprint that concerns tax policies of the ten nation members. When it comes to taxation therefore, the AEC blueprint does not contain action points to harmonise national tax policies and so member nations may use tax policies to compete for investment and trade within ASEAN.

A good example of this is the recent reduction of corporate tax rates by Thailand to improve its competitiveness prior to the AEC in 2015. Thailand's headline corporate tax rate has been slashed from 30 per cent to 23 per cent for the 2012 year and will then be reduced further to 20 per cent. The rate reduction means that Thailand will now move from being a nation with one of the highest corporate tax rates in ASEAN to the lowest apart from Singapore's 17 per cent rate.

Thailand cuts tax rates preparing for AEC 2015

SOUTHEAST ASIA PROPERTY REPORT
January 2012

The Association of South East Nations (ASEAN) is moving towards a more integrated and interdependent future with creation of the ASEAN Economic Community (AEC) by 2015.

The group of 10 nations is focused on increasing interdependence of the ASEAN economies within the region as well as with the rest of the world.

According to the ASEAN Economic Community Blueprint, the AEC will establish ASEAN as a single market and production base, with the aim of making ASEAN more dynamic and competitive. An ASEAN single market and production base shall comprise five core elements:

1. free flow of goods
2. free flow of services
3. free flow of investment
4. freer flow of capital; and
5. free flow of skilled labour.

A recent example of ASEAN co-operation in trade is the ASEAN–China Free Trade Area that came into effect on 1 January 2010, creating the largest free trade area in terms of population and third largest in terms of nominal GDP.

Thailand and the AEC

The Thai government is focussed on implementing tax policies that will improve the country's competiveness in the lead up to the AEC in 2015.

International double tax agreements with Thailand's trading partners continue to grow, with a total of 55 such agreements in place - the latest one entering into force with fellow ASEAN member and neighbour Myanmar -helping to reduce tax costs and improving profitability for Thai and foreign companies engaged in international trade.

Another important development has been the introduction of new tax incentives for regional operating headquarters, making the incentives more attractive and comparable with other countries in the region.

Various tax incentives continue to be offered and refined for many industries by Thailand's Board of Investment (BOI). Foreign investors may also find themselves considering BOI promotion for reasons other than tax. Land ownership rights, visa and work permit privileges for foreign experts and securing majority ownership of their business are often also cited as important considerations when seeking BOI promotion.

Corporate tax rates cut

More recently, lower corporate tax rates have been introduced to improve the kingdom's competitiveness prior to the AEC in 2015.

Thailand's headline corporate tax rate has been slashed from 30% to 23% for the 2012 year and will then be reduced further to 20%. The reduced rates have been introduced initially for three consecutive accounting periods as follows:

Accounting Period	Tax Rate
First accounting period commencing on or after 1 January 2012	23%
The next two accounting periods commencing on or after 1 January 2013	20%

The new tax rates compare favourably with other ASEAN countries, including Malaysia and Vietnam's current standard corporate tax rate of 25% and the the island state of Singapore's 17% rate.

SME tax incentives

The economic development plan for ASEAN pays special attention to the development of small and medium enterprises (SMEs) in the region.

For several years now, SMEs based in Thailand have received preferential tax treatment, including lower corporate tax rates and accelerated depreciation benefits.

The first Baht 150,000 of net profit of an SME is exempt from income tax and the next Baht 850,000 is subject to only 15% tax. The new tax rate of 23% will apply to profits exceeding Baht 1 million for the accounting period commencing on or after 1 January 2012. The tax rate will then be reduced to 20% for accounting periods commencing on or after 1 January 2013.

To be eligible for the SME rates, the following conditions must be met:

1. The company's paid-up share capital must not exceed Baht 5 million on the last day of its accounting period; and

2. The income derived from the sale of goods or provision of services during the accounting period must not exceed Baht 30 million.

The tax rate cuts signal that Thailand is serious about improving its competitiveness with the AEC looming ahead in 2015.

The Foreign Ownership Maze

SOUTHEAST ASIA PROPERTY REPORT
November 2011

With the exception of condominiums, selling Thai real estate to foreigners faces a significant impediment due to the restrictions on foreigners owning land in Thailand.

A variety of ownership structures have evolved as a result. One structure used to overcome the Land Code restrictions involves the developer setting up a Thai company, with a majority Thai shareholding of course, to own the property. Instead of selling freehold title, the Thai company acts as a landlord and "sells" long term leasehold interests instead.

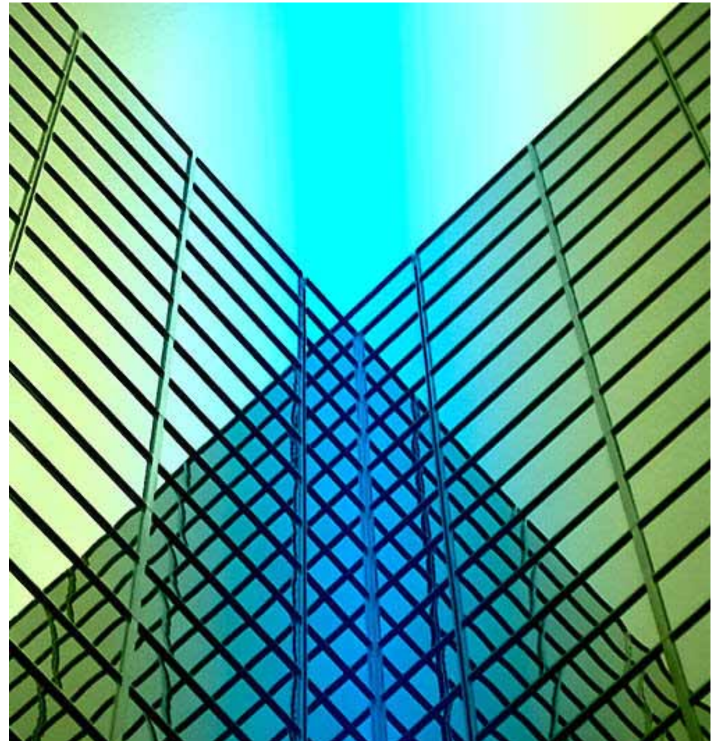
Long term leases

The advantage of leasing out the land is that there is no prohibition on foreign participation.

The form that long term leases take in Thailand is largely due to the laws concerning the hire of property under the Civil and Commercial Code ("CCC"). For example, a long term lease will typically be made for 30 years with an option to renew the lease – options are often given to renew for another two consecutive 30 year periods, such that the total lease period is effectively 90 years. This is because Section 540 of the CCC states that that the lease of immovable property cannot exceed thirty years. If it were made for a longer period, the period of the lease will be read down to 30 years. Section 540 also states that the period of the lease can be renewed, but it must not exceed thirty years from the date of renewal.

In some of these structures, the developer will exit the development by offering a shareholding interest in the Thai company owning the property.

A similar framework has been adopted for some apartment deals marketed to foreigners – rather than offering freehold e.g. as a condominium unit, a long term lease of an apartment is offered together with a shareholding interest in the company that owns the apartment complex and the land on which it is built. A leasing structure has also been adopted for "selling" condominium units in the Thai quota to foreigners.



Taxing long term leases

The long term lease is promoted as the safe way to "buy" property in Thailand. Offering the shareholding in the Thai landowning company is promoted as a way of securing the option to renew the lease.

Whilst it may be appear to largely overcome the freehold ownership impediment, it does throw up its own particular issues, especially when it comes to taxation.

Inherent to the structuring is that the land being "sold" is not actually sold. Normally, the developer would be taxed on the profit from the sale of the property i.e. the sales price less the cost of the property. When the land however is leased out, there is no land cost. So you quickly see the problem – the freehold price has been converted into lease revenue with no property costs available to offset the taxable revenues.

Compounding this issue, is that the lease rentals will be paid in advance – the developer still needs to receive the "sales price" upfront – with the result often being that the lease rentals for the first 30 years are equal to the freehold sales price.

Income recognition methods

The rental income received by the leasing company upfront should be recognized as income over the period of the lease, following the accrual basis of accounting. Such period will be the first term of the lease without taking into considering options to renew the lease.

The Revenue Department has however issued Departmental Instruction No.Por.73/2541 stating that rental income received in advance prior to commencement of a lease may be returned as income in the accounting period in which the lease commences – contrary to the accrual concept.

How the leasing company recognises leasing income for tax purposes will have a substantial impact on the taxes payable in the future. With apartments and condominiums, there is the advantage of being able to depreciate the apartment building/condominium units, thereby acting as a tax shelter against the lease revenues.

Lease renewals

With the lease rentals structured as a one off payment upfront for the first 30 years, there are a couple of ways that rentals for the subsequent lease renewal periods might be handled in the lease contract. For example, the lease may state that the lease rental for the 30 years is meant to cover the lease renewal periods as well. Alternatively it might state that the lease rentals payable on renewal of the lease will be equal to the lowest rental value acceptable in order to register the renewal at the land office.

A question then arises about the income tax treatment of the renewal period. Pursuant to Section 65 bis (4) of the Revenue Code, the Revenue Department can order the leasing company to pay tax on the market value of the rentals, if the rentals are less than market value without justifiable grounds.

With the lease rentals for the next 30 years possibly nil or a negligible amount compared to the first 30 years, the lease rentals for the renewal periods are clearly below market value. Obviously the rental for the first 30 years has been overstated and in fact reflects rentals for a longer period e.g. 90 years if there are two option renewals given.

The leasing company will need to be prepared to explain how the lease rentals for the renewal period are justifiably below market value in order to avoid the Revenue Department deeming lease rentals for the payment of income tax.

It is not certain yet what the Revenue Department's view is on long term lease structures and acceptable lease rentals for the renewal periods.

Minimising your exposure

Real estate deals incorporating a long term lease of property requires planning upfront to develop an efficient tax structure – for both developers and their clients.

A buyer may seek to obtain indemnities and warranties from the developer regarding future tax liabilities – the likelihood of being able to enforce them should be considered in weighing up their effectiveness.

Ideally buyers should position themselves so they are aware of the potential risks they assume when they take over the leasing company and thus have the opportunity to consider preventative action that may be taken to mitigate exposure to future tax liabilities and enjoy their property in Thailand without a visit from the taxman.

Property tax obligations in Thailand

SOUTHEAST ASIA PROPERTY REPORT
March 2011

There is a general consensus that Thailand's property tax regime is in need of reform but for years it has been a thorny issue for Thailand's governments to address.

A draft of a new property tax law has been mooted but progress to date has been slow and any change will require careful planning and implementation over the long term. The election planned for this year will see the law's introduction deferred until a new government is formed. In the meantime, property owners will this year once again need to consider their liability to file house and land tax returns.

Who needs to pay?

If you own real estate in Thailand that has been used in the last year for commercial purposes, including a holiday house or unit, you may be liable to file a return for house and land tax (HLT).

Villas owned by foreigners in Thailand may be structured with the land being leased on a long term basis. In this case the foreigner owns the villa building but not the land on which the villa is built. Where the owner of the building is not the same as the land owner, the law provides that the building owner shall be the person liable for HLT for both the land and the building.

Having an interest in Thai property by indirect means, such as fractional ownership or a leasehold condo unit, may also result in a liability to HLT. In this case, the liability would arise because of contractual terms agreed with the property owner, which allows him to pass on any HLT assessed against the property.

What property is exempt?

A number of exemptions are provided under the law. Where the property is used by the owner as their place of residence, then it shall be exempt from HLT under Section 10 of the HLT Act. An exemption is also provided under this Section if a representative of the owner resides in the building to take care of it and the building is not used for storing goods or for a commercial purpose.

It is conceivable that foreign owners may claim exemption for their holiday homes, if it is not used for a commercial purpose, such as short term lettings.

Foreign property owners might chose to invest in Thai real estate via an offshore holding company, typically in a tax haven jurisdiction, with a view to minimising taxes. Whether or not an offshore company is the right choice requires careful analysis of the costs and benefits, taking into account the particular circumstances of the owner. Buying a villa or condominium unit in Thailand using an offshore company opens up the buyer to a potential liability to HLT. In principle, a company cannot avail itself of the residency exemption. This principle was adhered to the Supreme Court when it ruled against a company that tried to avail itself of the residency exemption, on the grounds that the directors of the company resided in the building.

How much do I have to pay?

HLT shall be calculated on the yearly rent received for the property. If the property is not rented out e.g. the owner uses it in his business, an assessed rental value shall be determined instead. A reduction of the rental value may be requested in certain circumstances e.g. the property has been vacant, it has been damaged or is in a serious state of disrepair.

The real sting of HLT is the tax rate – 12.5% of the rental value of the property. The new property tax regime if introduced would calculate the tax on the official appraised value of the property instead. Land and buildings generally would be taxed at a rate of 0.5% under current proposals.

What are the filing requirements?

Persons liable to HLT shall submit Form Por. Ror.Dor.2 at the District office or Sub-district Administrative Organization where the property is located within the end of February. For new properties, supporting documents should also be provided, for example, title deed of the property, sale and purchase agreement, lease agreement, construction permit, house registration, map of the property etc.

A tax assessment shall then be issued and shall be payable within 30 days from the date of receiving the assessment. Surcharges apply for late payment.

What if I disagree with the assessment?

A taxpayer not satisfied with the assessment because the HLT is too high or the assessment is not made correctly, is entitled to appeal within 15 days from the date of receiving the assessment. If the taxpayer is not satisfied with the result of the appeal, he can bring the case to the court within 30 days from the date of receiving the verdict.

How are rental programmes taxed?

Some developments in Thailand, particularly those in resort areas, offer rental programmes as part of the package, including guaranteed rental returns. With HLT still likely to be around in the near future, property owners and managers will need to agree on how rental values should be declared and who will be responsible for filing the returns and making the tax payments.

Being part of a rental pool should make a property owner a soft target for a tax audit. Records of the rents received by owners are maintained in Thailand by the rental pool manager. It is important that owners and property managers alike understand and comply with Thailand's tax laws if they are to avoid nasty surprises when the taxman eventually pays a visit.

Thailand – an ideal location for business

SOUTHEAST ASIA PROPERTY REPORT
December 2010

The BDO Global Ambition Survey 2010, conducted for the world's fifth largest accountancy network, reveals that companies are in an optimistic mood, with 95% of them confident about international expansion and two-thirds of them planning to be more aggressive in their plans this year compared to last.

In the next one to two years the main reasons for this investment in international growth is likely to be related to people and channels of distribution.

Businesses planning to expand their operations in Asia's property markets have several attractive locations to choose from when considering where to establish their headquarters in Asia.

Many countries in Asia offering tax incentives to attract multinationals to their shores, and Thailand is no exception. Since 2002, tax incentives have been offered to attract businesses to establish their regional operating headquarters ("ROH") in Thailand.

Earlier in June this year, the Thai cabinet approved a new package of attractive tax incentives for ROHs that aim to improve Thailand's popularity in the region. The incentives play a pivotal role in the Thai government's plan to attract foreign investment.

What is an ROH?

An ROH is defined as a company incorporated under Thai law that provides the following services to its branches or associated enterprises located in Thailand or abroad: -

- Management and administrative services;
- Technical services; or
- Support services.

Support services include general administration, business planning and co-ordination; procurement; product research and development; marketing and sales support; and training and human resource management.

A company wishing to receive the ROH incentives must complete and file a registration form with the Thai Revenue Department.

Foreign businesses that establish a Thai company and obtain the ROH privileges from the Thai Revenue Department, will often consider obtaining promotion from Thailand's Board of Investment (BOI) to receive non-tax incentives, such as permission to own land and permission to bring in foreign experts and technicians. BOI promotion will also facilitate the registration of the ROH company under Thailand's foreign business laws.

What are the tax incentives?

The tax incentives include corporate and personal income tax breaks, dividend, interest and royalty tax incentives and accelerated capital write offs.

Among the new incentives offered is a 10-year corporate income tax exemption on income derived from overseas operations and a rate of 10% on income from domestic operations. A five-year extension of the corporate tax exemption is possible under certain conditions, meaning that the benefits can be granted for a total of 15 years under the expanded program.

Expats working in an ROH in Thailand will also be interested to know that they will be eligible for attractive personal tax breaks. Thailand's personal tax rates range from 5-37%. An expat working in an ROH in Thailand will be liable to personal income tax at a flat rate of 15% only. Under the existing privileges, the 15% flat rate could apply for only 4 years of consecutive employment. Expats working in an ROH under the new incentive package will be eligible for the 15% flat rate for 8 consecutive years if at least 50% of total revenue of the ROH is derived from service fees and royalties paid from or within foreign countries.

The BDO Global Ambition Survey reveals that BRIC nations – Brazil, Russia, India, China – and the Asia Pacific region generally have been and will remain focus regions for growth. Thailand's new offering of tax incentives for ROHs will make it even more competitive with the long-established regional headquarter locations of Singapore, Malaysia and Hong Kong in SE Asia in attracting new investors to the region.

Time to pay SBT again – or not?

SOUTHEAST ASIA PROPERTY REPORT
September 2010

Although Thailand imposes VAT on most goods and services, the sale of immovable property, such as land, buildings and condominium units does not attract VAT.

Instead of VAT, Thailand imposes specific business tax (SBT) on the sale of immovable properties. Unlike the VAT system, where the seller collects the VAT from the buyer and the VAT may be claimed as a tax credit by the buyer if they are a VAT registrant, the SBT is the sole liability of the seller.

As SBT ends up being a transaction cost, a seller may seek in the sales contract to make the buyer responsible for payment of the SBT in addition to the agreed sales price. Such a contract term does not shift the seller's liability under the tax law for the payment of the SBT, especially if a shortfall in the amount of SBT paid is found in a subsequent tax audit of the sale e.g. because the sales price is found to be under-declared.

SBT is imposed on the gross receipts from the sale before deduction of any expenses and is normally collected at the rate of 3.3%. It had been reduced to a negligible 0.11% to support economic conditions in the last few years but it has now started to be collected again at 3.3%. SBT is not imposed on every sale of immovable property and with the full rate now being collected it is important to understand the circumstances in which the tax will apply.

When will SBT apply?

Only sales that are made in a commercial manner or for profit are subject to SBT. A Royal Decree lists the circumstances in which a sale shall be considered made in a commercial manner or for profit.

An overriding condition is that taxable sales are confined to those requiring registration of rights and juristic acts. Therefore if the sale does not need to be registered at the land office in order to legally transfer ownership of the property, then no SBT is payable.

The sale of a new building under construction would fall out of scope for the payment of SBT on the basis that the transfer of ownership does not have to be registered at the land office. Likewise the transfer of a buyer's interest in a contract for the sale of immovable property would not be subject to SBT, albeit that it is a transaction that falls within the ambit of the SBT provisions rather than the VAT provisions.

The sale of immovable property used by a juristic person e.g. a company, in a business is by definition subject to SBT, so a company will almost always be subject to SBT on the sale of immovable property. As you would expect, sales made a property developer will be subject to SBT.

If the sale does not fall within the provisions that apply to property developers and juristic persons, a sale will otherwise be considered made within a commercial manner or for profit if it is sold within 5 years from the date of the acquisition of the property. This condition applies mainly to individuals selling real estate. A number of exceptions to this rule are contained in the Royal Decree.

Notable exceptions to the rule

Apart from the Royal Decree dealing with the imposition of SBT, there are a number of exemptions contained in various other pieces of legislation. They include exemptions for certain government banks and institutions and public organizations.

Property funds attract a number of tax exemptions including an exemption from SBT on the sale of immovable property. As a result, the sale of immovable property by a property fund will not be subject to SBT when registered at the land office. Debt restructuring cases can also access SBT exemptions for property transfers.

For companies in general, there are only limited circumstances in which they can access SBT exemptions. One situation that attracts tax exemptions is when a company transfers its entire business to another company in Thailand. A company can claim an exemption from SBT on the transfer of immovable property in this case. One of the conditions for exemption will be that the transferor company must register its dissolution and commence liquidation in the same accounting period as the transfer. There are a number of other conditions that must be satisfied to access the exemption and there will be other tax implications to be considered.

For companies holding real estate that find it necessary to arrange their affairs but missed out on taking advantage of the low SBT rate of the last few years, the tax concessions available for partial business transfers should be considered.

The concessions have been introduced to reduce the tax burden on companies in a group that are restructuring their business arrangements. The concessions apply in the case of business transfers between affiliated companies, so rather than having to undertake an entire business transfer in order to access concessions, a partial business transfer will also be eligible for exemption from SBT.

The conditions that must be satisfied in order to access the partial business transfer relief measures were released in July this year. Companies wishing to take advantage of these measures need to act quickly as they have only been introduced on a temporary basis and will expire at the end of this year.

Thai rental properties and personal income tax

SOUTHEAST ASIA PROPERTY REPORT
July 2010

Foreign investors looking to purchase rental properties in Thailand will often have the choice of purchasing the property in their own name or in an offshore company. The preferred ownership structure will require a careful analysis of the respective costs and benefits, taking into account the particular circumstances of the owner.

From a tax perspective, this will require consideration of the tax laws in Thailand as well as the tax laws in the owner's home jurisdiction and an analysis of the impact on the investment returns after tax if an offshore company is interposed between the owner and the property.

An important tax issue to consider is the taxes payable on rental income.

Taxes on rental income

Foreign individuals will be subject to Thai personal income tax on rental income generated from real estate situated in Thailand.

In most cases, 15% withholding tax will be deducted from rental receipts paid to foreign individuals that are not tax residents of Thailand. The tax withheld is not a final tax. On the other hand, if the property is held in a foreign company's name and the rents are similarly taxed at 15% at source, the withholding tax is considered a final non-refundable tax payment for the company.

How to pay less than 15% tax

A foreign property owner residing outside Thailand could actually end up paying much less than 15% tax in Thailand if he has purchased the property in his own name.

For a foreigner to pay less than 15% tax on rental income, the first step will be to file personal income tax returns with the Thai Revenue Department to declare the rental income. The withholding tax deducted from rents can then be used as a tax credit to offset the tax payable on the return. The reward for filing a tax return is that the taxpayer can then request a refund of surplus withholding tax credits from the Thai Revenue Department.

Preparing and filing a personal income tax return in Thailand is not a difficult exercise. Rental income is normally assessed on a cash basis and should be easily determined from the property manager's rental reports.

A property owner is allowed a standard deduction of 30% against rental income, no questions asked. A personal taxpayer does have the option of claiming the actual expenses incurred in deriving the rental income which are necessary and reasonable, but the expenses claimed must be supported by documentary evidence, which may very well need to be furnished for audit before the tax refund is approved.

Tax rates

A personal taxpayer can earn net income up to Baht 150,000 (approx. USD 4,500) in a tax year and not pay income tax in Thailand. Unlike some countries that seek to tax foreigners at higher rates or deny them the tax free threshold, the tax scales for residents and non-residents are the same in Thailand.

Individuals are liable to personal income tax in Thailand on their net income, after deduction of expenses and allowances, at the following rates:

Net taxable income (Baht)	Marginal rate
1 - 150,000	0%
150,001- 500,000	10%
500,001- 1,000,000	20%
1,000,001- 4,000,000	30%
More than 4,000,000	37%

As the rates of tax are greater than 15% for net income over Baht 500,000 (approx USD 15,000), there will come a point where the tax payable will be greater than the withholding tax credits.

By my reckoning, the property would need to be generating around USD 90,000 per annum in gross rentals before it came to the point where the withholding tax credits would not be enough to cover the income tax payable when the personal income tax return is filed.

The benefit of filing a tax return is best illustrated by an example. Let's take the case where a property generates gross rental income of Baht 1,000,000.00 (approx USD 30,000) for the tax year. The following tax calculation for a typical property owner illustrates the potential tax refundable in this case.

Taxable net income	Thai Baht
Gross rental income	1,000,000.00
Less: rental expenses (30% standard deduction)	(300,000.00)
Less: taxpayer allowance	(30,000.00)
Total deductions and allowances	(330,000.00)
Net income	**670,000.00**
Tax calculation	
Tax payable on net income	69,000.00
Less: withholding tax credits (15% of gross rental income)	(150,000.00)
Tax payable (refundable)	**(81,000.00)**

The tax payable in this case is equal to 6.9% of the gross rental income, resulting in more than half of the withholding tax deducted from rents during the year being refundable.

The figures speak for themselves and clearly demonstrate one distinct tax advantage for foreigners owning Thai rental properties in their own name.

The why, when and how of paying property transfer taxes

SOUTHEAST ASIA PROPERTY REPORT
May 2010

The tax holiday for homebuyers is set to end this month.

Home buyers and developers have enjoyed generous tax breaks on the transfer of properties over the last couple of years. Those tax breaks were supposed to come to an end in March this year, but just a few days prior to the expiry date the Royal Thai Government announced an extension of the tax breaks for homebuyers until May 31, 2010. The decision to extend the incentives was made because of complaints from homebuyers who said they were having problems completing transactions with financial institutions and the Land Department.

The extension does not apply to specific business tax, which is now imposed on transfers at the usual rate of 3.3 per cent. The end of the tax breaks will cause sellers and buyers alike to focus once again on ways to minimise the taxes and fees associated with the transfer of real estate.

When does specific business tax apply?

The sale of immovable property shall be subject to 3.3 per cent specific business tax if the property is sold in a commercial manner or for profit, and the sale falls within the scope of taxable sales listed in Royal Decrees issued the Revenue Code.

A taxable sale is firstly confined to sales requiring registration of rights and juristic acts e.g. the sale of land, buildings or condominium units whereby the transfer of ownership must be registered at the land office.

How is specific business tax paid?

Specific business tax is payable at the land office when registering the transfer of ownership. You need to pay the tax to complete the transfer. The tax is imposed on the gross receipts before deduction of expenses from the sale of the property, and market value rules apply for calculating the correct tax base.

In practice, the land office will collect tax on the higher of the official appraised price and the declared sales price. If you encounter a situation where the sales price declared will be lower than the official appraised price, and you believe your sales price is market value, then you may need to pay the tax first on the official appraised price at the land office and take your case up later with the Revenue Department.

What types of sales are exempted?

A taxable sale includes the sale of immovable property made within five years from the date of acquisition of the property, if the sale does not otherwise fall within other categories of taxable sales. A private sale will typically be taxed under this category.

The acquisition date is taken as the date of registering the transfer of ownership. In the case where the land and building were acquired at different times, the five year time limit shall be deemed to have commenced on the later of the acquisition dates.

Private home owners who sell their home after holding it for more than five years will not have to pay specific business tax on the sale of the property. This is the same as saying that if you hold the property for more than five years, the property is not considered sold in a commercial manner or for profit.

A number of exceptions are provided if the property is sold within five years of acquisition, two of which are explained below.

1) Principal place of residence of the seller

A seller will not be liable to specific business tax on the sale of his principal place of residence, if his name appears in the house registration book of the property for not less than one year from the date that the property was acquired. In the case where the name of the seller appears in the house registration book more than once but the period of registration in total adds up to a year, the seller shall be deemed to have been registered for at least one year.

In the case where the property sold is marital property, only one of the spouses must be recorded in the house registration book for not less than one year to qualify for exemption. In the case where a person transfers his ownership interest in a property to his spouse, the transferor's name must appear in the house registration book for not less than one year.

Special rules apply in the case of joint ownership of property. Where the joint owners will be taxed separately on the transfer of their ownership interests, the owner must have their name in the house registration book for not less than one year. In the case where the joint owners are liable to specific business tax as an ordinary partnership or ´body of persons´, rather than as separate taxpayers, the house registration exemption cannot be used.

2) Property sold acquired through inheritance

Property sold that is acquired through inheritance will not be subject to specific business tax. For example, take the case of a married couple that purchases a condominium unit as an investment property and the husband subsequently passes way and bequests the property to his wife. If the wife sells the unit within five years from the date of acquisition, the sale of the wife's ownership interest in the property prior to the husband's death shall be subject to specific business tax, whilst the portion inherited shall not be subject to specific business tax.

These two examples highlight the various circumstances that can determine whether or not a sale will be subject to specific business tax. If a sale is not subject to specific business tax it may instead be subject to stamp duty of 0.5 per cent.

What if the buyer pays the specific business tax for the seller?

In the case where the purchaser agrees to pay taxes or fees in registering the transfer of the property which the seller is liable to pay under the law, than such tax or fees shall be included in the tax base for computing specific business tax.

For example, a sales contract may provide that the buyer shall be liable to pay the specific business tax due on registration of the property. The specific business tax is the liability of the seller under the law so the tax base should be grossed up for paying specific business tax.

What if the sales price is under declared?

Parties may be tempted to under declare the sales price at the land office to reduce the tax payable. Paying the specific business tax at the land office may not be the end of the story however. The Revenue Department may still seek to examine that the correct amount of tax has been paid when it conducts a tax audit. If evidence is discovered that the real sales price is higher than that declared at the land office, resulting in a tax shortfall, then the Revenue has the power to collect the shortfall from the seller, plus penalties and surcharges for late payment.

Taxing issues of fractional ownership

THAILAND PROPERTY REPORT
March 2010

Fractional ownership of holiday homes is a relatively new concept in Thailand. Fractional ownership offers the benefits of owning a holiday home but for a fraction of the cost of the property. The tax considerations for fractional property owners are similar in many respects to traditional ownership of real estate in Thailand.

Tax considerations

In a nutshell, the points to consider are:

- The transfer taxes and fees imposed on entry and exit. Where joint ownership in a property occurs at the same time, personal income tax on the transfer shall be paid on a collective basis rather than in accordance with the purchaser's fractional ownership in the property.
- Tax planning for the purchase should consider the end game right from the start. In particular, what will be the tax on any capital gain made on exit and if so is there a way to minimize that tax.
- The taxes payable if the property will be used to derive rental income. Joint ownership of properties by individuals could be taxed collectively rather than on an individual basis.
- Property taxes – at the moment the property would be taxable at the rate of 12.5% per annum on its deemed rental value.
- For foreign owners, there will be a focus on not only the taxes payable in Thailand but also in their home country.

Models for fractional ownership

In its simplest form, the legal ownership of the property may be structured so that all owners end up being registered as the owners of the property on the ownership documents, such as the title deed. In Thailand, developers selling to primarily a foreign audience are likely to consider using a legal structure that sees indirect ownership of the property being offered instead.

The ability to structure real estate holdings tax effectively in Thailand is largely governed by the nature of the development i.e. landed villas, condos or apartments - which unlike condos are not deeded properties - and the legal structure that is being used to "sell" the property to the foreigner.

The basic ingredients of the legal structure for selling fractional ownership in Thai property to foreigners can often be similar – long term leases with renewal options if freehold is not permitted; a Thai SPV (special purpose vehicle) to hold land, condo units or apartment buildings that the foreign buyer cannot own in their own name; and offshore companies in tax haven jurisdictions to act as a collective ownership vehicle for foreign owners.

Sometimes the structuring stops there. How well the structure has then been fined tuned from both a financial and tax perspective, will influence the amount of tax paid by both the developer and future owners.

Offshore SPV tax planning

Effective tax planning for selling fractional ownership in Thai properties using an offshore vehicle as the collective owner involves financial modeling and an appreciation of the Revenue's approach if the whole structure comes under scrutiny.

For example, the use of offshore companies in tax havens to act as a collective owner of a Thai SPV is often one that is abused. At the outset it will have a real practical benefit – which is not tax related. The offshore company will have an advantage of operating under a legal framework that is more familiar to foreign owners and will allow greater flexibility to arrange the articles and rules of association between the owners. Of course being in a tax haven also allows the affairs of the company to be organized in a tax free manner so that the company acts as a conduit with no related tax leakage.

A developer may then perceive an opportunity to use the offshore structure to generate profit in the offshore company tax free. The Revenue would appear to be aware of such practices to a degree – asking in tax audits to see the sales brochures, checking the websites of the developer and sales agents etc to see how much they are advertising the property for sale and how much is finally being recorded in the tax returns filed in Thailand.

Where such structures are used, prospective buyers should consider the risks they might be assuming from the developer by becoming the owner of the offshore vehicle.

Thai SPVs in the fractional model

In fractional models where deeded ownership is not offered, a Thai SPV may be employed in the property holding structure. In general, Thai law does not provide for special entities to be created to hold properties – one exception is the ability to establish Thai REITs under the securities laws but these are subject to a number of qualifying conditions.

Thai limited companies are therefore used as SPVs in fractional models where deeded ownership is not offered. Achieving tax neutrality in the Thai SPV, or something close to it, should be an important goal.

Whose goal is this? Now this might not be the goal of the tax authorities at all. Their primary role is to simply administer the existing laws, which contain a number of obstacles to achieving tax neutrality. If the Thai SPV does not make a profit but continues to trade year on year, then the company will automatically move up the list as a target for tax audit.

Hence these two opposing goals must be balanced to avoid additional tax liabilities arising from the use of the Thai SPV but at the same time complying with Thailand's tax laws. And of course a developer will want to achieve a cash neutral result in the Thai SPV and avoid triggering taxes on the withdrawal of the cash from the Thai SPV.

Where a Thai SPV is used in the ownership structure, prospective buyers should try to evaluate how well the developer has structured the financial affairs of the company from a tax compliance perspective.

Selling fractional ownership to Thais

Given that Thais are free to own real estate in Thailand, you would think that a fractional ownership model targeting Thai buyers would likely be structured on the basis that their names will appear on the title deed.

But could the tax consequences of deeded ownership and the apparent tax advantages of indirect ownership via a foreign company win them over in the end?

Apart from the obvious advantage of legally avoiding the transfer taxes and fees that apply to transfers of immovable property registered in Thailand, there are also remittance rules that apply to foreign sourced income that may work to the advantage of a Thai fractional owner.

If the owner sells their fractional interest, there is no doubt that a gain made from the sale of shares in the offshore company would be assessable income for personal income tax purposes under the Revenue Code. The gain is only taxable in Thailand however if it is remitted into Thailand in the same year that the gain is made. Correctly structured, Thai tax residents can legally pay no Thai income tax on the disposal of their fractional interest.

It will be interesting to see how effective the legal structures used for fractional property ownership in Thailand will be in managing the tax issues for both the developer and buyers.

Tax pointers for the tempted

THAILAND PROPERTY REPORT
December 2009

Buyers need to be aware of the tax issues when buyer property abroad

The tourist high season will often see some visitors to the Kingdom tempted into making a more permanent connection with Thailand.

If you are considering the purchase of a holiday home in Thailand, here are some tax pointers to help you on your way.

Freehold condominiums

Probably the most straight forward type of purchase for foreigners: several taxes and fees apply when the transfer of ownership of a condominium is registered at the land department.

At the moment the transfer registration fee, normally 2 percent, and specific business tax rate, normally 3.3 percent, have been reduced to negligible amounts for condominium purchases in order to stimulate the real estate sector.

Buyers need to be aware that developments that will not be completed and transferred into their name by March 28, 2010, will not be eligible for the reduced rates unless the tax measures are extended.

Buyers should take into account the tax impact if the normal rates will apply. How much of an impact it will have will depend on whether the developer has included clauses in the sales contract that effectively shifts all or some of their tax liabilities to the buyer.

Buyers may wish to compare the terms of their sales contract regarding tax liabilities with the standard condominium sale and purchase contract drafted by the Consumer Protection Office.

Properties on lease

Foreigners may find that when they start looking into the legal details of purchasing a property in Thailand that they cannot become the owner of the property because of certain legal restrictions on foreign ownership.

In such situations a long-term lease of the property may be offered instead. The taxes payable on a long-term lease agreement are quite straightforward and less complicated than a direct sale. In most cases only stamp duty and lease registration fees totaling 1.1 percent will be payable at the Land Department. Leases of land and buildings do not attract VAT and so VAT should not be added to the rents charged. VAT may come into play, however, if the lease covers fixtures and fittings.

Under the law you will find that the lessor is liable for the stamp duty, whereas the registration fee should be borne by parties equally. The parties can agree otherwise and I have seen many contracts offered by lessors that make the lessee responsible for the duties and fees. Armed with a little knowledge of the law, the lessee may be able to negotiate this point to lower their acquisition costs.

Tax efficient ownership structure

Generally speaking, a foreign purchaser may consider purchasing the property in his own name or that of a foreign company.

On acquisition, the taxes payable are likely to be the same. If the property is rented out however, then the level of taxes payable on the rents received can differ depending on whether the property is owned by a foreign individual or company. Individual ownership may allow you to claim tax exemptions or claw back some of the taxes that apply whilst foreign company ownership generally does not.

Tax planning at the time of acquisition should take into account the exit strategy and the mitigation of taxes payable on the eventual sale of the property. Owning freehold property in your own name will allow you to take advantage of the special personal income tax treatment afforded to the sale of real estate.

For personal income taxpayers, the gain will be calculated based on the official appraised price of the property – the amount actually received on sale is not relevant in computing the tax payable on the gain. It is not unusual to find that the official appraised price of a property is lower than the current market value.

Individual ownership is the simplest way to hold the property and can have interesting Thai tax advantages for freehold owners. Foreign buyers should however also consider the tax laws in their home country when analysing the tax implications.

Rental returns

Some developments, particularly those in resort areas, offer rental schemes as part of the package, including guaranteed rental returns.

Some taxes to consider when working out how much of the rent goes to the taxman include:

- 7 percent VAT may need to be added to rentals, including short term rentals where the property is being operated as or similar to a hotel or serviced apartment.
- 12.5 percent of the rental value of a commercial property is required to be paid every year to the local authorities in the form of land and house tax.
- 15 percent withholding tax applies to rents paid to non-resident individuals and foreign companies not carrying on business in Thailand.

Being part of a rental pool should make a property owner a ´soft target´ for a tax audit. Records of the rents received by owners are maintained in Thailand by the rental pool manager. It is important that owners and property managers alike understand and comply with the tax laws if they are to avoid nasty surprises when the taxman eventually pays a visit.

Enforcing the law against foreigners

THAILAND PROPERTY REPORT
October 2009

Businesses thought to be controlled by foreigners in Phuket are currently under review.

The Phuket Governor has been reported as saying that foreign business operators in Phuket will be reviewed to establish if their businesses are abiding by the law and paying tax.

Real estate firms were specifically mentioned as coming under scrutiny. The prices quoted for apartments for sale on the Internet would be used as a basis for reviewing taxes paid by sellers.

The Revenue Department would also look into the real estate sector's earnings from the leasing of apartments to foreigners to see if they were avoiding tax, the Governor was reported as saying.

A lot of foreign money has been invested in Phuket in recent years and I have written before that it would only be a matter of time before we saw the Revenue Department stepping up their tax audit activity in Phuket.

I believe that there is scope for increasing tax collections if the authorities make a concerted effort to enforce the tax laws. The timing of the announcement however, coincides with a severe downturn in tourism and real estate activity on the island, when businesses are probably less likely to be under declaring income due to evasive tax practices.

Tax clearance certificates

One facet not to be discounted in all this is that foreigners may be considered more vulnerable to pressure to pay taxes than local investors. The Revenue Code contains a number of provisions to assist the Revenue Department to enforce the collection of taxes from foreigners.

Because foreigners can be considered a flight risk when it comes to paying taxes, foreigners wishing to depart Thailand are supposed to pay any tax liabilities before they depart or otherwise furnish a guarantee for the taxes before their departure.

In this regard, the law provides that foreigners departing Thailand must make an application for a tax clearance certificate within 15 days before their departure. A foreigner that departs or attempts to depart from Thailand without one shall, besides being guilty of an offence, be liable to pay a surcharge amounting to 20 percent of the total taxes and duties payable.

Thankfully, most foreigners are exempted from the tax clearance certificate provisions when departing from Thailand. Two exceptions are:

- A foreigner who is liable to pay or remit taxes which are due or which are payable in accordance with a tax assessment made by an assessment officer before or at the time of departure from Thailand.
- Foreigners who have the duty and responsibility to file a return and pay tax on behalf of a company or juristic partnership organised under a foreign law and carrying on business in Thailand.

Taxing rentals received by foreigners

In order to collect taxes from offshore landlords, the law contains provisions to deem persons in Thailand as their agents for paying tax.

In the case of foreign individuals residing abroad and deriving assessable income subject to Thai personal income tax, it shall be the obligation of the manager of the business which produced his assessable income to file tax returns on his behalf and to be his agent for payment of tax.

In the case of a foreign company that has carried on business in Thailand through an employee, a representative or a go-between and thereby derived taxable income or gains in Thailand, the employee, representative or go-between, whether a natural or juristic person, shall, in so far as the said income or gains are concerned be deemed to be the agent of the said company and shall have the duty and liability to file a return and pay tax.

On shore property agents or managers can therefore be deemed the agent of an offshore landlord for tax filings and payment of tax. Where such agencies are deemed to arise under the law, the Revenue cans simply go after the agent for unpaid taxes and does not need to try and collect taxes due from the landlord.

Income payments to foreigners residing abroad for property rentals, services etc., are often subject to withholding tax. If the person making the payment fails to withhold tax and remit it to the Revenue Department, he shall be liable jointly with the taxpayer to settle the tax not paid. Therefore where tax is not withheld from rents paid by a tenant to an offshore landlord, the landlord still has joint liability for the withholding tax. Property agents acting for foreign landlords could in turn be liable for the withholding tax not deducted.

For the purpose of collecting value added tax, where a person residing outside Thailand sells goods or provides services in the ordinary course of their business through an agent in Thailand, the agent shall also be liable to the tax. The term "agent" is defined very widely and means a person who concludes contracts or has the responsibility for maintaining a stock of goods, securing customers, or doing any act in connection with the carrying on of the business in Thailand for or on behalf of a person residing outside Thailand.

Aggressive tax planning

One of the bases for tax planning is that everyone has the right to arrange their affairs so they do not pay more tax than what the law requires. Aggressive tax planning tends to test the boundaries of the legal framework and is more likely to be challenged by the Revenue Department in a tax audit. Arrangements found to be ineffective may be faced with paying tax plus interest and very substantial penalties.

I get the impression that the real estate industry in Phuket has its fair share of players that push the limits of tax planning. It is not uncommon to see offshore companies incorporated in tax havens being used by developers when transacting business on the island.

The fact that the majority of the clientele is foreign would appear to be one factor driving this approach. Dealing with foreign clients may be perceived by some as an opportunity to receive money offshore with a view to avoiding Thai tax.

Often there can be a number of contracts involved in a property deal and so the prices put in the contracts may be influenced by what is received offshore (read not taxed) and what is onshore (read taxed). The Revenue Department may be able to detect such activity by reviewing the websites of developers to compare the sales prices advertised to the prices reported for tax purposes.

I believe we can expect the Revenue Department to continue mounting challenges to the taxes paid in some of the property structures used on the island. What will be interesting to see is whether the property developers are willing to take on the Revenue Department and defend their tax planning, and ultimately be prepared to take the matter to court.

Thai tax planning hints for foreign buyers

THAILAND PROPERTY REPORT
August 2009

Corporate structures play an important role in legal and tax planning for Thai property developments marketed to foreign property owners. This typically stems from the restrictions under Thai law on foreign ownership of land and condominiums. Buying into a new or existing development in Thailand might require more homework as a result, if you really want to understand the risks and benefits of ownership.

A property owner for example may very well end up owning shares in a Thai company as part of the deal – structures used for leasehold apartments and leasehold villa/condominiums are a prime example of this, especially those by private developers seeking an exit from the development. Likewise, offshore companies may play a role in the corporate structures employed by property developers and foreign owners alike to hold property interests in Thailand.

Thai companies

If you are buying a villa in a completed development and the villa is held in a Thai company, you need to consider carefully the tax consequences of the purchase. The same can be said for any property deal that requires the owner to take a shareholding in a company.

A proper analysis of the risks of ownership will requires a good understanding of the corporate structure that the owner will buy into and the tax risks that they may assume. For new developments, a fundamental issue will be the approach of the developer to tax planning and whether the pricing of the various contracts have been unduly influenced by tax considerations, which may create a risk for the owner in the future in the event of a tax audit by the Thai tax authorities.

When a buyer engages a lawyer to check the legal structure and documents required for the sale, some tax documents of the Thai company might be requested as a matter of course, such as copies of the tax returns filed with the Thai Revenue Department.

The Thai Revenue Department will accept the tax returns filed and will not check them thoroughly until they conduct a tax examination. Checking that tax returns have been filed is a simple procedure to perform and can give you a misleading level of comfort – such checks will not tell you whether all taxes have in fact been correctly paid.

A real assessment of the tax risks in a Thai company cannot be determined without undertaking an in-depth check of the tax records and supporting documents, typically referred to as a tax due diligence, which is best done by a tax specialist. A tax specialist is also best placed to advise on the tax planning for the purchase and the tax implications for the buyer going forward.

Offshore companies

Foreign property owners might consider investing in Thai real estate via an offshore holding company, typically in a tax haven jurisdiction, with a view to minimising taxes.

Whether or not an offshore company is the right choice requires careful analysis of the costs and benefits, taking into account the particular circumstances of the owner. From a tax perspective, this will require consideration of the tax laws in Thailand as well as the tax laws in the owner's home jurisdiction and an analysis of the impact on the investment returns after tax if an offshore company is interposed between the owner and the property.

One tax issue not often given due consideration is Thailand's house and land tax. Buying a villa or condominium unit in Thailand using an offshore company opens up the buyer to a potential liability to house and land tax of 12.5% on the rental value of the property.

The law grants an exemption to property owners if they use the property as their own residence – this exemption should not be available if the property is owned by an offshore company.

A new property tax law has been proposed and the current government appears determined to enact it. The current proposal is to make home owners pay property tax of 0.1%, compared to the proposed general rate of 0.5%, on the official appraised value of their home, but only if the value of their home exceeds a predetermined amount.

The introduction of the new law should also see better enforcement methods with less reliance on voluntary disclosure, one of the reasons why the house and land tax is being scrapped and why it is not often given due consideration in the structuring process. The tax payable will be based on readily available information in most cases, rather than relying on property owners to declare their rental income or requiring tax officials to assess rental values as is the case under the current law.

Whilst the offshore company route will still give rise to a property tax burden in the future if the proposed new property tax law comes into effect, owning a home in Thailand in your own name will still be advantageous for property tax purposes.

Tax incentives for buyers of Thai real estate

THAILAND PROPERTY REPORT
June 2009

The Thai tax system currently offers an array of attractive tax incentives for individuals purchasing Thai real estate.

Although many of the incentives have been introduced with Thai purchasers in mind, foreigners may also access the incentives in many cases.

Low transfer taxes and fees

The tax incentives offered start at the time the property is acquired with very low registration fees and taxes currently in place.

Currently effective until 28 March 2010, fees to register the transfer or mortgage of real estate in respect of condominium units and houses have been reduced to only 0.01%.

Similarly, specific business tax ("SBT") on the transfer of real estate has been reduced from 3.3% to a paltry 0.11% for sales registered by 28 March 2010.

Deduction for new home purchases

Buyers of new homes will receive a welcome tax break this year. Ministerial Regulation No.271 recently issued under the Revenue Code offers a personal income tax deduction of up to Baht 300,000 for payments made in 2009 towards the cost of purchase of your own residence.

The purchase of a house, house with land or a condominium unit is eligible for the tax deduction. The transfer of ownership of the property must be registered in 2009 and the taxpayer must be registered as the owner of the property for at least three consecutive years from the date the transfer of ownership is registered. A transfer of ownership of the property must never have been previously registered.

Foreigners can access this tax incentive if they purchase freehold property in their own name, such as a condominium unit or house excluding the land on which it is built, and earn taxable income in Thailand that could absorb the tax deduction.

Mortgage interest deductions

For those of us that live in the Kingdom, interest paid on a mortgage to acquire one's place of residence can be claimed as a tax deduction.

The deduction used to be limited to Baht 50,000 but from the 2008 year onwards the deduction allowed has doubled to Baht 100,000.

There are several conditions to satisfy to access the deduction – for most taxpayers the main condition to be satisfied is that the building or condominium unit is being used by the taxpayer as their place of residence. Foreigners should be particularly mindful of the various conditions prescribed, especially if they have arranged finance through special expat mortgage providers rather than a local bank.

The taxpayer must possess documentary evidence issued by the lender to prove the payment of interest – financial institutions will normally issue a certificate every year to confirm the amount of interest paid that can be claimed as a tax deduction, so this will be an important document to retain to support your interest deduction claim.

Incentives on sale

The main tax incentive on the sale of real estate would have to be simply the way the taxable gain on sale is assessed.

For personal income taxpayers, the gain will be calculated based on the official appraised price of the property – the amount actually received on sale is not relevant in computing the tax payable on the gain. The official appraised price of a property can often be much lower than the current market value.

People selling their homes and purchasing another one, may be able to do so without paying any income tax on the sale. As you might expect, a number of conditions apply to make a tax free gain on the sale of your own home, one of them being that you registered your name in the house's registration book – not normally something high on the list of priorities for a foreigner living in Thailand.

Overall the Thai tax system currently offers a number of attractive tax incentives to property owners, which may be accessed with little or no effort by foreign and Thai purchasers alike.

Property tax reform

THAILAND PROPERTY REPORT
April 2009

For more than a decade now, there has been talk of reforming Thailand's property tax laws. A few years ago the cause gained momentum, leading to the drafting of a new property tax law and the establishment of a formal committee to consider its introduction before the issue stalled again.

With the new government announcing plans to move forward with reforms, it is now time once again to consider what the reforms could hold in store for property owners in Thailand.

The existing tax system

There are currently two types of property tax imposed on owners of real estate in Thailand.

One is the House and Land Tax imposed on buildings and other structures and the land used in connection therewith. Generally speaking, the owner of a building that is used for commercial purposes is responsible for paying house and land tax every year at the rate of 12.5% of the annual rental value of the property. If the property is rented out, the rental received shall be the tax base for paying tax. If the property is not rented out, a deemed rental amount shall be used to collect the tax.

If land is not subject to the house and land tax it may be subject to local development tax.

Features of the new tax proposals

The tax reforms proposed involve scrapping these two taxes and introducing a new property tax law that would have a much wider scope of application and could lead to a marked increase in property tax collections.

To make the method of calculating tax more uniform, the tax would be imposed on the official appraised price of the property. The official appraised prices would be the same as those used for collecting registration fees under the Land Code on property transfers. These prices are currently reviewed every 4 years.

The taxable value of new buildings or condominium units would be progressively reduced every year by a rate of 1% for the first ten years and after that the deduction would be limited to 10%.

Much discussion in the past revolved around the rate of tax and the types of properties that would be exempted.

Type of property	Rate not exceeding
Land and buildings generally	0.5%
Principal place of residence not used for commercial purposes	0.1%
Land used for agricultural purposes	0.05%

At the maximum rate of 0.5 per cent, the owner of a property worth US$1 million would pay US$5,000 a year in tax.

The existing laws grant a wide range of exemptions to property owners, several of which will not be carried over to the new laws. Notably, home owners may for the first time have to pay property tax of 0.1% on the official appraised value of their home but only if the value of their home exceeds a predetermined amount.

In case of vacant or unutilised land, for the first 3 years the owner shall pay tax at a rate not exceeding 0.5%, according to the tax rate stipulated for land and buildings generally. After the first 3 years if the land is still not utilised, the tax payable shall double every three years subject to a capped rate of 2%.

As is the current practice, each local administration would be empowered to collect the tax, which will be the income of the local administration. A committee would be established to set and review tax rates every 4 years subject to the local administration being entitled to prescribe local legislation to raise the tax rate from the rate specified by the committee on a case by case basis.

If the new property tax law is enacted, a transitional period of 2 years has been suggested to introduce the new tax collection system around the Kingdom.

The points discussed above are based on past proposals to reform the property tax laws in Thailand. We could very well see further revisions to these proposals before a new law sees the light of day.

Investment and tax incentives

THAILAND PROPERTY REPORT
February 2009

In the past, political upheavals in Thailand have in general caused only a short-term impact on the economy.

Thailand's current political situation however coincides with a global economic slowdown, proposing a far greater challenge than in the past to attract foreign investors to Thailand.

The Board of Investment (BOI), the government agency responsible for providing incentives to stimulate investment in Thailand, has announced that its top priorities for 2009 will include new investment promotion measures, overseas road shows and the establishment of more overseas offices.

The Department of Export Promotion, the Office of the BOI, and the Tourism Authority of Thailand are planning to arrange road shows to the Middle East and Asia to restore confidence in the Thai economy and promote Thailand's tourism industry. The Prime Minister will be invited to lead the road shows, to be organized from January to April 2009.

Investment Promotion

Thailand's Investment Promotion Act, overseen by the BOI, provides investment incentives in the form of guarantees, protection measures, tax incentives and permissions.

Foreign investors typically establish a Thai company if they wish to seek BOI promotion for their business. Companies that receive BOI promotion may obtain special taxation incentives for a number of years from the commencement of operations.

Depending on a project's characteristics, eligible projects may obtain tax incentives that include the following:

- Exemption or reduction of import duties on imported machinery.
- Exemption or reduction of import duties on imported raw materials and components.
- Exemption from corporate income tax for three to eight years with permission to carry forward losses and deduct them as expenses for up to five years after expiry of the tax exemption period.
- Exclusion from taxable income of dividends received from promoted enterprises during the corporate income tax holiday.

- 50 percent reduction of corporate income tax for five years.
- Double deduction of transportation, electricity and water supply costs.
- 25 percent deduction from net profit for facility installation and construction costs in addition to normal depreciation.

For foreign investors, some of the attractive non-tax incentives include:

- The right to own land for the project which might otherwise be prevented by the foreign ownership restrictions under the Land Code.
- The ability to operate their business as a wholly foreign owned enterprise, which might otherwise be prevented by laws that prohibit foreigners from participating in specified business activities.
- Permission to employ foreigners and access to the One Stop Service Centre for Visas and Work Permits.

Tax incentives for tourism

The BOI has announced that it will introduce a special package to promote the tourism industry.

Currently, service activities promoted by the BOI include:

- Tourism promotion services such as ocean marinas and tour boat or yacht rental services.
- Activities to support tourism, including hotels.
- Long stay businesses that provide a variety of services, such as lodging, health care, travel services, etc.
- Hospitals including retirement homes and care centres.

Although real estate development for residential use is not an activity that currently attracts promotion (with the exception of medium or low income housing), it might be possible to access the privileges of existing promoted service activities under the right conditions.

For example, it might be possible to structure a residential development that is being developed for investment purposes rather than home ownership to operate as a hotel in order to access the investment privileges granted to hotels. Real estate developments targeting foreign retirees could consider the feasibility of accessing the incentives offered for retirement home and care centre projects.

Criteria for granting tax incentives

The criteria for granting tax and duty privileges for promoted projects are primarily based on the location of the project. The provinces in Thailand are
divided into three investment zones based on economic factors such as the level of income and the availability of infrastructure in each province.

Different tax and duty privileges are also specified for particular types of activities. It is therefore important to consider not only the location of the project but also the classification of the promoted activity.

For example, promoted tour boat or yacht rental service businesses will receive a 50 percent import duty reduction on machinery and a 5 year corporate income tax exemption, regardless of location.

The incentives offered to hotel operators on the other hand are more restrictive. Projects located in Zone 1 (the six central provinces), Zone 2 (including Chonburi, Rayong and Phuket), Hat Yai district or Muang district of Chiang Mai will receive only non-tax privileges.

Projects located in 18 selected provinces of Zone 3 will receive privileges according to the BOI Announcement No.1/2543, including tax privileges based on location.

Projects located in other provinces will receive only an exemption of import duty on machinery and non-tax privileges. These include provinces such as Chiang Rai, Mae Hong Son, Chiang Mai, Phangnga, Krabi and Surat Thani.

A new hotel development eligible for promotion must also have at least 100 rooms.

Foreign property developers looking to invest in tourist locations should consider how they might be able to structure their developments to access the incentives offered by the BOI.

It will be interesting to see what new measures the BOI decides to introduce to promote Thailand's tourism industry and how beneficial they will be to foreign investors.

Taxation of common area charges

THAILAND PROPERTY REPORT
December 2008

Residential developments in resort areas come in various forms, but they mostly have one thing in common – common areas.

The framework governing the management and use of common areas will depend in some part on how the development is structured under the law. For example, Thailand's Condominium Act contains provisions governing the framework for the use and management of common areas of condominiums. Housing estates developed in accordance with the Land Allocation Act will also have a statutory framework to follow.

Residential developments in Thailand's resort areas that are marketed to foreign buyers may not be structured in accordance with such laws, due mainly to the restrictions on foreign ownership of land and condominium units. Under the law, a condominium is a building that is registered under the Condominium Act, which then allows the building to be divided up into units and owned by separate persons. In resort areas, a building that looks and feels like a condominium could in fact just be an apartment building with one owner, with foreign tenants taking possession under long-term leases. Common area services and charges may then be established by contract instead, often mirroring the statutory framework to some extent.

Where the management and use of common areas is governed by contract rather than statute, a number of tax issues will come into play, which may translate into higher common area charges for owners.

Owners paying common area charges under a contract will typically pay their common area charges to a corporate entity that is liable to corporate income tax on its profit, which can be as high as 30 percent. Such charges will be considered assessable income of the company for income tax purposes.

Twice a year the company will have to file a corporate tax return and pay tax in respect of its taxable profit. Although the common area charges are being collected to meet on-going expenditures, the way that revenues and expenses are recognised for tax purposes could result in the company recording a profit upon which it has to pay tax.

This is particularly evident when sinking fund charges are collected at the start for meeting large repairs or capital expenditures in the future. Sinking fund charges will typically be recorded as revenues for tax purposes when they become due from owners. At the same time, as these funds are being collected to meet future expenditures, there will likely be little or no direct expenses to offset the revenues in the year that they are subject to income tax.

In addition, some outgoings might not be allowed as an expense in the year of purchase but instead may be considered capital in nature and so will have to be capitalised and depreciated over their effective life.

In the case of a condominium however, the juristic person formed under the Condominium Act tasked with the responsibility of managing the condominium and receiving common area charges, is not an entity subject to income tax under the Revenue Code. Funds can therefore be collected from owners without having to consider any income tax implications.

Another issue faced by providing common area services under contract is 7 percent VAT. Although the rental of immovable property is specifically exempt from VAT, service charges relating to the use of common areas will be subject to VAT. This means that 7 percent VAT must be added to the common area fees charged to owners.

The chance of making errors – and hence liability to tax penalties – normally increases once you enter the VAT system and are running VAT and non VAT businesses.

Small developments might be able to avail themselves of the small business exemption. Where the annual turnover from services chargeable to VAT does not exceed Bt1.8 million, the business does not have to register for VAT. This means the business could legally stay out of the VAT system and not add 7 percent VAT to any of the amounts charged to owners.

As you might have guessed, the treatment for a condominium is the exact opposite. The courts and a Board of Taxation Ruling have confirmed that the funds collected from owners to meet the costs of common area expenses and public utilities are not subject to VAT.

Where the use of common areas is provided under a service contract, such agreement may be a hire of work agreement as defined under Thailand's Civil and Commercial Code and subject to stamp duty under the Revenue Code.

It is evident that by establishing the framework for the management and use of common areas through contract, a number of tax issues will also have to be managed. Understanding and planning for these tax issues can reduce additional costs that owners might face as a result.

Re-sales: A taxing affair

THAILAND PROPERTY REPORT
October 2008

Re-sales taxes

Some investors in Thailand may choose to purchase a condominium unit off-plan when a development is first launched with little or no intention of taking title to the completed unit – a practise sometimes known as flipping. Such buyers are banking on the opportunity to resell the unit at a price higher than the original sales price struck with the developer. This can sometimes prove to be a lucrative investment, but it is important to first understand the fiscal implications of the operation.

Taxes on speculative gains

If a foreigner buys a condominium unit off plan and later transfers his sales contract to another buyer, he will, prima facie, be liable to personal income tax in Thailand on the gain made from the transfer.

This is because the Revenue Code, Thailand's income tax law, provides that an individual shall be liable to personal income tax on assessable income derived from property situated in Thailand.

Whether or not the foreigner is a tax resident of Thailand is not relevant. Where he receives the gain i.e. onshore or offshore and where he executed the contracts is not relevant.

The income derived from the transfer of the sales contract is assessable income under Section 40 (8) of the Revenue Code. Necessary and reasonable expenses may be deducted from the amount of income assessable under Section 40 (8) of the Revenue Code in accordance with Section 8 bis of Royal Decree No 11 issued under the Revenue Code. There are also a number of generous personal allowances that may be claimed to further reduce the amount of income subject to tax.

Thailand has made double tax agreements with over fifty countries that can reduce or exempt the Thai tax levied on certain types of income. A foreign investor should consider the impact of such agreements on their liability to pay tax in Thailand and in their home country.

Liability to file a return

A foreign individual that makes a taxable gain from the transfer of a condominium sales contract will in most cases have a duty to file a personal income tax return in Thailand and pay tax.

Individuals are liable to personal income tax on their net income after deduction of expenses and allowances at the following rates:

Net taxable income (Baht)	Marginal rate
1 - 150,000	Exempt
150,001- 500,000	10%
500,001- 1,000,000	20%
1,000,001- 4,000,000	30%
More than 4,000,000	37%

The tax rates for residents and non-residents are the same.

Transfer taxes

If you were to purchase a condominium unit from a developer and hold it until completion, there will be several taxes and fees payable at the Land Department in order to register the transfer of the unit into your name.

Generally speaking, there will be no Thai transfer taxes or fees payable if the purchaser transfers his sales contract with the developer to a new buyer. The sales contract will often however allow the developer to charge a fee when the sales contract is transferred over. Recent amendments to the standard condominium unit sale contract seek to curtail this practice.

Resales after taking title to the unit

Although transfer taxes and fees are payable if you transfer the unit after taking title, they are not likely to amount to much at the moment because of concessions introduced earlier in the year – the transfer registration fee for example is now only 0.01 percent, compared to the usual rate of two percent.

The way that the gain on sale is taxed changes significantly once you take title. As the registered owner of the unit, you will be liable to pay income tax on the sale by reference to the official appraised price of the condominium unit - the amount you actually receive upon sale is not relevant in computing the tax payable on the gain.

If you sell within one year of taking title to the unit, the taxable gain is currently calculated as eight percent of the official appraised price based on the standard deduction method. This method of imposing tax on an imputed gain means that the income tax payable once you take title could be less than the tax that is imposed on the actual gain made if you were to sell the unit before taking title.

Therefore if you do purchase a condominium unit off plan in Thailand and consider selling it before taking title, it would be wise to compare the tax payable on sale before and after taking title, especially if the condominium is nearing completion, as the tax payable could differ significantly.

Saving tax on property financing

THAILAND PROPERTY REPORT
August 2008

More opportunities are opening up for foreigners to obtain finance for their foray into Thai property, and developers have been quick to capitalise on these opportunities to increase sales.

If a property is being used to derive rental income, normally the property owner can expect that he will be allowed a deduction for the cost of financing the property, when calculating the amount of rental income subject to income tax. So what happens in Thailand?

Withholding tax system

Rather than relying on taxpayers to voluntarily file tax returns and declare their income, the Thai Revenue relies heavily on withholding taxes imposed at source to collect taxes on many forms of income and rents are no exception.

Rents paid to individual landlords that are non-residents of Thailand are subject to 15% withholding tax. A non- resident for income tax purposes is a person residing in Thailand for less than 180 days in a calendar year.

A 15% withholding tax also applies to rents paid from or within Thailand to a foreign company that is not carrying on business in Thailand.

Different sections of the law govern the taxation of individuals and companies. In the case of a foreign company not carrying on business in Thailand, the 15% withholding tax is clearly a final tax. The Revenue will take 15% of the gross income and ask no more questions but at the same time no deduction from the gross rental income can be claimed.

For individuals it is a different story. Foreign individuals residing abroad and earning rental income in Thailand will in most cases have a duty to file a personal income tax return in Thailand.

Personal income tax will be calculated on a person's net income after deduction of expenses and allowances at the following rates:

Net taxable income (Baht)	Marginal rate
1 - 150,000	Exempt
150,001- 500,000	10%
500,001- 1,000,000	20%
1,000,001- 4,000,000	30%
More than 4,000,000	37%

The tax rates for residents and non-residents are the same.

The 15% tax withheld from gross rental income is available as a credit against the personal income tax payable.

Tax deductions

Filing a personal income tax return allows a number of deductions to be claimed, thereby reducing the income subject to tax and possibly putting the taxpayer in a position whereby they can ask for a refund of their withholding tax.

A property owner can claim a standard deduction of thirty percent against rental income. If the property is sub-let, then the rents paid to the original letter or sub-letter may be deducted. However if the property is financed, the costs are most likely going to be much higher than those allowed under the standard deduction method.

Fortunately, a personal income taxpayer does have the option of claiming necessary and reasonable expenses incurred in deriving the rental income. In this case, documentation to support the expenses claimed must be retained. Actual financing costs such as interest charges could therefore be claimed as a deduction, significantly reducing the amount of rental income subject to income tax.

There are also a number of generous personal allowances that may be claimed to further reduce the rental income subject to tax.

Tax refund

Where the amount of withholding tax deducted exceeds the personal income tax payable, a taxpayer can ask for a refund of the tax overpaid when they file their tax return. To do this, it is important that the taxpayer receives and retains withholding tax certificates for the tax deducted.

So if you are considering financing for your property purchase and want to minimise your tax bill, and in turn maximise the net returns and cash flowing from your investment, give some thought to whose name you sign on the bottom line.

Property tax cuts

THAILAND PROPERTY REPORT
June 2008

It feels like a case of déjà vu. Here I am in 2008 writing an article again about new property tax cuts. It wasn't that long ago when the same tax cuts were in place to support the recovery of the real estate sector following the 1997 economic crisis.

The tax cuts

The tax cuts announced reduce the taxes and fees payable on the sale of real estate. Registration fees for mortgages have also have been granted relief.

A snapshot of the tax cuts in the case of real estate sold by a corporate developer is provided below:

Tax/Fee	Normal Rate	Reduced rate until 28 March 2009	Person liable under the law
Transfer registration fee	2.0%	0.01%	Shared 50/50 by buyer and seller
Specific business tax	3.3%	0.11%	Seller
Withholding tax	1.0%	No change	Seller

The cut in the transfer registration fee from two per cent to a negligible 0.01 per cent comes with some conditions attached. Thankfully, the fee cut was recently expanded to cover most residential buildings – the tax measure originally announced applied only to condominiums and houses in housing estates subject to the estate laws. In the case of eligible residential buildings sold with land that are located outside a housing estate, the land area must not exceed one rai to be eligible for the reduced rate.

The taxes saved amount to more than 5 per cent of the property's price. For a property selling for Bt10 million, where the transfer registration fee and specific business tax payable was previously Bt530,000 the amount payable now is only a paltry Bt12,000 in comparison.

The cut in rates should help developer's margins. It is not unusual however for developers to write contracts that shift their share of the liability for taxes and fees to the purchaser, so that the purchaser pays the sales price plus the transfer taxes and fees.

Buyers in this position should stand to benefit from the tax cuts, especially if the contract was made before developers revisited their pricing and contractual terms following the announced changes.

The specific business tax and transfer registration fee is payable at the time that the property is transferred into the name of the buyer at the Land Department office. Buyers should be aware that developments that will not be completed and transferred into their name by 28 March 2009 will not be eligible for the reduced rates unless the tax measures are extended.

Impact for foreign buyers

Despite some of the hype that came with the announced tax cuts, the impact for foreign buyers is somewhat muted.

The impact of the tax cuts will depend on the type of property purchased and the legal structure adopted to get around the restriction on foreign ownership of freehold land and the 49 per cent foreign freehold limit placed on condominiums.

The table below illustrates the tax impact on some of the properties commonly marketed to foreigners:

Property type	Affect of tax cuts
Freehold condominium	Benefits 100% from tax cuts
Apartment on long-term lease	No impact
House and land on long-term lease	No impact
Land only on long-term lease	No impact
Villa building (on land under lease) - construction contract - sale and purchase contract	 No impact Benefits 100% from tax cuts

Property tax cuts are a familiar tool used by the government to stimulate the economy and just like in the past it has only been introduced as a short-term measure, with the current tax measures set to end on the 28th of March, 2009. If the past is any guide we may very well see the tax measures extended into 2010 as well.

Capital gains and the Thai tax system

THAILAND PROPERTY REPORT
April 2008

Foreign property owners interested in maximising the financial returns from their foray into the Thai property market should take a moment or two to understand the impact taxes will have on their financial returns.

A savvy investor will often seek tax advice about tax planning that can be done - in compliance with the prevailing laws - to mitigate the taxes payable.

An important aspect of tax planning for property investment is the mitigation of tax liabilities arising upon disposal of the property. Tax planning to maximize the capital gain on exit normally requires planning at the start.

Depending on where you get your tax advice, you may think that Thailand does not have capital gains taxes. While that may be true, there are certainly taxes on capital gains, which may be as high as 37%! The point being that capital gains are taxed just like other forms of income from investment or trading.

Taxes on capital gains

Your liability to Thai income tax when you sell real estate in Thailand and the level of tax payable will depend on a a number of factors, including:

- Whether you have bought the property in your own name, through a Thai company or in the name of a foreign company – personal tax and corporate tax rules differ significantly.
- The legal form in which the property is held, which can vary due mainly to the restrictions on foreign ownership of land e.g. an apartment held on a long term lease, freehold land and villa owned via a Thai company or a lease over land combined with freehold ownership of the villa on the land, to name a few of the legal forms used.
- How you structure the deal on exit – there can be different aspects to the sale that may need the sales price to be apportioned, which can affect the liability to tax. Sometimes the deal ends up being structured as the sale of the corporate vehicle holding the real estate rather than the property itself.

- Whether the sale needs to be registered with the authorities in Thailand, and if so, whether there will be some form of withholding tax imposed.
- Whether or not a double tax agreement exists between Thailand and the seller's country of residence – this might be overlooked because double tax agreements often don't help when it comes to real estate. However if the deal involves a leasehold or sale of a corporate vehicle, then a double tax agreement may have a substantial impact.

So you can see that there are a number of factors that can affect whether or not you pay tax in Thailand on a capital gain and the level of tax payable.

Apartment lease

The best way to illustrate how the Thai tax system works is to run through an example. Let's consider the case where you take a long term lease over an apartment, which is a common structure used in resort areas catering exclusively to foreign buyers.

If you make the lease in your own name, Thailand's Revenue Code provides that an individual deriving assessable income from property situated in Thailand is liable to personal income tax, regardless of whether such income is paid within or outside Thailand and whether you are a tax resident of Thailand or not.

The Revenue Code does not prescribe under what circumstances property will be considered "situated in Thailand". It is a pretty safe bet though that the lease, which is a form of property distinct from the real estate under lease, would be considered property situated in Thailand for tax purposes.

Personal tax on transfer of a lease

The gain on transfer of the lease would be subject to personal income tax at the marginal tax rates ranging from 10% to 37%. There won't be any tax withheld when the lease transfer is registered, so it will be up to the seller to file a personal income tax return. Obviously the tax authorities may face difficulties collecting tax from a foreign seller if a return is not filed – there are provisions however that impose a duty on the agent appointed to manage the property to file tax returns on behalf of the property owner which could be enforced.

Double tax agreements

Thailand has a comprehensive collection of double tax agreements, with over 50 countries currently signed up to prevent double taxation of their residents.

These agreements normally prevent double taxation by either allowing one country only to tax the income or granting taxing rights to both, in which case the foreign taxpayer will only pay tax in his home country if the tax paid in Thailand is insufficient to offset his tax liability at home.

So how would the transfer of an apartment lease be taxed under a double tax agreement? Much depends on the terms of the particular agreement, because although the agreements generally follow a similar form on the whole, the taxation of capital gains is one area where the terms do vary from country to country. It will be important to properly characterize the lease to determine which provisions of the double tax agreement apply to the gain.

Where a double tax agreement does provide protection from Thai tax on capital gains made from the transfer of a lease, greater attention will be given to mitigating the taxes payable in the taxpayer's country of residence. Of course, this will not be an issue for those living in countries with no capital gains taxes!

Villa resales for foreigners in Thailand's resort areas

THAILAND PROPERTY REPORT
January 2008

Offering properties for "sale" to foreigners under a long term registered lease is becoming the norm for new developments in resort areas. Even condo developments limited to offering 51% of their freehold capacity to foreigners may offer the remaining units to foreigners on a long term leasehold.

If however you are considering purchasing a resale villa from another foreigner, you may very well find that it was purchased as a freehold property. As it is not possible for the foreigner to own the land, it would have been acquired in a Thai company in which he has a minority shareholding and Thai shareholders own at least 51% of the share capital and make up the majority of shareholders in number.

Sale structuring

In the current uncertain climate surrounding the interpretation and enforcement of Thailand's land ownership and foreign investment laws, resales of these types of properties will most likely be structured as a sale of the owner's Thai company. This way, transferring ownership of the company avoids the scrutiny of the authorities that a freehold sale of the property would otherwise attract which could prevent the sale going through.

The current owner will therefore end up selling his interests in the Thai company i.e. the company's shares and any debt financing, rather than the property itself. In the past, a buyer may have preferred to start with a fresh Thai company rather than buy into an existing company and its history but these days this is less of an option for many foreign buyers.

Tax considerations

It can end up being very tax effective for a foreign owner to sell his company on to the next foreign owner. A sale of real estate attract a number of transfer taxes when a transfer is registered at the Land Department office and the gain made from the sale will be subject to corporate income tax of up to 30% and the payment of any gains out of the company in the form

of a dividend will attract another 10% tax. It quickly becomes apparent to a seller that the sale of the corporate structure is the best exit strategy, as well as being probably the only viable route in most cases for foreign buyers.

One issue the new owner will face is that the Thai company will continue to record the value of the property in its books at the property's original cost price and not the value that the new owner has paid. As a result, when the new owner comes to sell the property in the future he too will likely prefer selling the company on as well, otherwise a sale of the property out of the company will mean he ends up making a taxable gain that is equal to the real gain made by him plus the gain made by the owner before him.

The tax on the unrealised capital gain inherited from the seller may not necessarily be a problem in the future, if the current legal environment concerning foreign ownership persists and the sale of the company remains the most practical option. It is an important issue to be aware of however when taking over a company, especially if the property has been held for some time and it has appreciated considerably since it was first purchased. It is of course possible to record a revaluation of the property in the accounting records to reflect the current price paid for the property but this has no affect on the cost base for tax purposes.

Price considerations

The taxes saved by the seller needs to be appreciated early on by the buyer in the sales negotiations. Knowledge of this should give the buyer the ability to negotiate a price that takes into account the Thai tax savings that the seller will achieve from the sale, potentially at the expense of the buyer because of the unrealised taxable gain in the company that he inherits, so that both parties effectively end up sharing in the tax benefits of the share sale.

Taking over the Thai company owning the property will require the usual legal, financial and tax due diligence to understand what exactly the new owner is buying into and whether or not there are any potential liabilities or material issues that might pass over to the new owner. On the tax side for example, if the property has been used as a holiday home by the current owner, he should have been paying some rent to the company – there may otherwise be under declared income for tax purposes. Also the payment of house and land tax of 12.5% on the rental value of the property – payable regardless of whether rents have in fact been paid - should also be reviewed.

Leasehold option

A new owner may consider registering a lease over the property for the maximum term of 30 years to secure his rights to possess the property in the long term. This does not mean he ends up paying for the property twice – the rental can be payable on an annual basis over the lease term and will in many ways be akin to paying rent to himself.

Holding a leasehold interest in the property can then put the new owner in a position similar to many of the leasehold developments on offer – bearing in mind that many of the new developments offered as leasehold may also face the same freehold land ownership issues in the end.

Rental contracts - when does VAT apply?

THAILAND PROPERTY REPORT
November 2007

It is a common practice in Thailand for landlords to propose several contracts when they engage a new tenant. Apart from the rental contract for the space, contracts may be proposed for the rental of any furnishings and for services relating to the use of the property e.g. the common area services in the case of a building.

The reason behind the split is taxation, often driven primarily by the 12.5% house and land tax that applies to the rental of buildings for commercial purposes.

VAT and leases

VAT may also be a prime reason to split the contracts, as the rental of space is one of the businesses under the Revenue Code that is specifically exempted from VAT. Landlords therefore do not have to add 7% VAT to space rentals.

The rental of furniture and the provision of property related services on the other hand fall outside the exemption. From a VAT perspective, a landlord may invariably end up carrying on two businesses, one that is exempted and another that is not. This normally makes record keeping and compliance with the laws more complicated, especially on the expenses side.

A VAT registrant is entitled to claim a credit for the VAT paid (referred to as "input VAT") on most types of expenditure relating to the VAT business. VAT paid on certain expenditure cannot be claimed, including the expenditure that relates to the use of the office space, because it is a VAT exempt business.

To be entitled to claim input VAT as a deduction, the registrant must posses a tax invoice prepared in accordance with the format prescribed by the Revenue Code.

The landlord will therefore have to keep track of his expenses, make sure he receives proper tax invoices so he can have a chance of claiming a credit for the VAT and then consider whether the VAT is actually creditable. The chance of making errors – and hence liability to tax penalties – normally increases once you enter the VAT system and are running VAT and non-VAT businesses.

Concessions for small landlords

It is advisable to stay out of the VAT system if you can do so legally – once you apply to become a VAT registrant it is not a simple matter to de-register, so it is not a decision to be taken lightly. Landlords operating a few properties only may be able to avail themselves of the small business exemption. Where the annual turnover from services chargeable to VAT does not exceed Baht 1.8 million, a landlord does not have to register for VAT.

This means a landlord could legally stay out of the VAT system and not add 7% VAT to any of the amounts charged to the tenant, including any furniture rental and service fees. However, It is still prudent to consider splitting the contracts for house and land tax purposes.

VAT planning

Where a landlord has a number of tenants, for example a landlord operating a multi storey office or residential block, then VAT registration is probably inevitable.

A recent supreme court case offers a reminder as to why landlords need to consider their liability to

VAT carefully when identifying and separating out the services offered to tenants. The case involved the lease of space in an office block. The landlord was also responsible for the provision of services, such as water, air conditioning, security, lifts and maintenance.

In some cases, the landlord had entered into a single rental contract with the tenant. The landlord did not charge VAT on the basis that the rental of the office space was VAT exempt.

In other cases, the landlord had entered into two contracts with the tenant: one for the rental of space and another for the provision of the aforementioned services. The landlord did add 7% VAT in this case to the service fee component.

The landlord was audited by the Revenue Department, which led to a tax assessment being raised for VAT in the cases where the landlord had entered into a single rental contract and did not collect any VAT from the tenant. The landlord argued that the form of the single contract did not allow him to charge VAT to tenants.

The court did not accept this argument but instead adopted a substance over form approach, because the same services were being provided to all tenants regardless of how the contracts were written. The landlord was not able to avoid his liability to charge VAT simply by writing a single rental contract.

This court case highlights the importance to landlords of identifying the rental services that are subject to VAT and charging their tenants accordingly, regardless of the form of the contractual arrangements made with the tenant.

Buying Thai real estate – is a BVI company really necessary?

THAILAND PROPERTY REPORT
September 2007

Buying, selling or leasing real estate requires planning to develop an efficient tax structure. It is not unusual for foreign investors to invest in Thai real estate via an offshore holding company in a tax haven jurisdiction rather than in their own names, with a view to minimising taxes.

A company incorporated in the British Virgin Islands ("BVI") seems to be the company of choice on many occasions. Well known as a tax haven because of the tax-free status enjoyed by business companies incorporated there, it is also easy to set up and administer.

Whether or not a BVI company is really necessary requires an analysis of the pros and cons, taking into account the particular circumstances of the investor. From a tax perspective, this will require consideration of the tax laws in Thailand as well as the tax laws in the investor's home jurisdiction and an analysis of the impact on the investment returns after tax if a BVI company is interposed between the investor and the property.

Investors for example that reside in countries with no or very low capital gains tax, will probably focus more on the taxation of the rental income and the Thai taxes on exit. For those coming from highly taxed jurisdictions, the ability to generate profit offshore and defer taxation at home may be a priority.

Thai tax planning considerations

So what are the taxes in Thailand that one might hope to save by using a corporate structure? One obvious tax reason for considering an offshore structure is to avoid the numerous Thai taxes that will be incurred on resale, by creating the possibility to sell the BVI company instead, without incurring a liability to Thai taxation.

If the property in question is a residential condominium or building, such as a villa built on leased land, then the sale may attract a number of taxes. Depending on the plans for the property, a number of Thai tax exemptions may however be available. The total tax payable in the end may not reach such a level that warrants incurring the upfront costs of setting up and maintaining an offshore vehicle, in the hope that the next buyer will buy into your structure.

One of the tax advantages of owning a condominium or building in your own name is that the income tax on the gain is calculated on the government's appraised value of the property, which will be the same value used to collect the 2% fee for registering the transfer at the land office.

The government's appraised values are only renewed every 4 years and in a buoyant market can often be much lower than the actual sales price. A lower tax base and an averaging method for calculating the tax means that the effective income tax rate may be relatively low.

Let's use an example to illustrate this. Say a condominium unit is bought for Baht 15 million held for 5 years and sold for Baht 20 million. The official appraised price at the time of sale is only Baht 16 million. Making some reasonable assumptions, the income tax payable in this case would equate to an effective tax rate of approximately 18% on the gain of Baht 5 million.

The actual sales price would be used however to collect the 3.3% specific business tax (SBT) on the sale if it is higher than the official appraised price. SBT does not apply however to every sale. For example, if the condo unit is held for at least 5 years from the date of purchase or the owner has been recorded in the housing registration book of the unit for at least a year then the sale is not subject to SBT. Where SBT does not apply, stamp duty at the rate of 0.5% could apply instead.

Tax incentives for home buyers

The Thai tax system now offers a number of incentives to taxpayers selling their homes as opposed to property bought for speculative gain or rental.

The tax incentives available to people selling their homes, on the basis that they have been recorded in the housing registration book for at least a year, are summarised below.

Tax/ Fee	Normal rates	Reduced rates	Conditions
Personal income tax	5-37%	Exempt	New home is bought within 1 year prior to or after the sale of the property. The exemption is limited to the value of the new home.
Specific business tax	3.3%	Exempt	If held for five years, evidence of housing registration is not required. Other grounds for exemption also exist.
Stamp duty	0.5%	Exempt	New home is bought within 1 year prior to or after the sale of the property.
Transfer registration fee	2%	0.01%	Currently effective until 31 December 2007 only.

Though the incentives are aimed at promoting the local secondary market, it is not inconceivable that foreign investors could take advantage of these exemptions if they owned the unit in their own name and were to resell and invest in another property in Thailand. An important issue will be qualifying for registration in the house registration book.

Evaluate your position

The use of BVI companies to avoid Thai tax has received a lot of attention lately from Thai authorities. Recently the Deputy Director-General of Thailand's Revenue Department spoke out against taxpayers using BVI companies in export-import businesses and the consulting firms that promote their use, where the tax savings arise from tax evasion rather than legal and legitimate tax planning.

I do not believe that a BVI company will be the answer to everybody's tax saving plan. Other considerations, such as estate planning and asset protection, may however still make it a worthwhile proposition. I believe some healthy scepticism helps when weighing up the pros and cons before you commit to setting up and maintaining a BVI company to hold your Thai property.

Investment Returns: How much of the rent ends up with the taxman?

THAILAND PROPERTY REPORT
July 2007

Some resort style developments marketed to foreigners in Thailand offer guaranteed rental returns as part of the package.

Other developments like to highlight the opportunity to receive exceptionally good rental returns. How much of that rent goes to the taxman should be understood when assessing the rental returns that will end up in your pocket.

Does the rent include 7% VAT?

The law is clear that a straight lease of immovable property is not subject to VAT. The way that a property is operated and used may mean however that this exemption will not apply and 7% VAT should be collected from tenants. This is likely to be the case if the property is being used for short term rentals, similar to a serviced apartment or holiday resort. The 7% VAT of course goes to the taxman.

How does 12.5% house and land tax sound?

12.5% of the rental value of a commercial property is required to be paid every year to the local authorities in the form of land and house tax.

Often the local authorities have trouble encouraging people to come forward and pay this tax and have limited resources available to them to enforce the law and increase compliance. You would imagine though that it shouldn't be too difficult though to target developments for foreigners, especially those operating rental pools.

How about 15% withholding tax?

Rather than relying on taxpayers to voluntarily file tax returns and declare their income, the Thai Revenue relies heavily on withholding taxes imposed at source to collect taxes on many forms of income and rents are no exception.

Rents paid to individual landlords that are non-residents of Thailand are subject to 15% withholding tax. A non- resident for tax purposes is a person residing in Thailand for less than 180 days in a tax year.

Similarly, 15% withholding tax applies to rents paid from or within Thailand to a foreign company that is not carrying on business in Thailand.

For landlords resident in Thailand or companies carrying on business in Thailand, income tax must be withheld at the rate of 5% in certain cases.

37% corporate income tax anyone?

Many people are encouraged to hold investment properties in Thailand through BVI companies. The income tax a foreign company has to pay on rental income will depend on whether or not the company is carrying on business in Thailand.

A foreign company carrying on business in Thailand has to pay 30 per cent corporate tax on its net profits. The remittance of the taxable profits out of Thailand shall also be subject to 10 per cent income tax, making the tax rate effectively 37%. In short, the foreign company ends up being taxed similar to a Thai company in many respects.

Being part of a rental pool should make a property owner a “soft target” for a tax audit. Records of the rents received by owners are maintained in Thailand by the rental pool manager. It is important that owners and property managers alike understand and comply with the tax laws if they are to avoid nasty surprises when the taxman eventually pays a visit.

Construction vs purchase of a villa: The tax difference

THAILAND PROPERTY REPORT
May 2007

If you are pondering buying into a villa development in Thailand, the deal offered will most likely be structured on a leasehold basis, relying on the basic principle that foreigners are allowed to take a lease over land in Thailand.

Although leasing deals are becoming the standard form for selling villas to foreigners, developers still have a number of options available to them when structuring such deals. What appears to be quite standard is offering the foreigner a lease over the land and a separate contract for the villa building itself, which in turn should result in the foreigner owning the villa on the land he has leased.

There are essentially two ways for the villa building contract to be drafted – either as a sale and purchase contract or a construction contract. Quite often you will find that a construction contract is proposed, with the foreigner being asked to engage the developer's construction company to construct his villa.

The tax difference

One of the reasons why the construction contract is preferred by the developer is taxation. Under a construction contract, the contractor should pay 7% VAT on the construction price, which he passes onto the buyer. There is also a relatively minor 0.1% stamp duty to be paid on the contract price, which would be the contractor's responsibility unless the developer shifts this burden to the customer under the contract.

If the developer however makes a contract to sell the villa, the sale should be registered at the Land Department, at which time several taxes and fees will be collected. The taxes and fees typically collected are summarised in the table below.

Tax/Fee	Rate	Tax base	Person liable
Transfer registration fee	2%	Official appraised price of the villa building	Shared 50/50
Specific business tax	3.3%	Higher of official appraised price and selling price	Seller
Withholding tax	1%	Higher of official appraised price and selling price	Seller

Taxes and fees on the sale of a villa building by a company

Although 7% VAT, is not imposed on the sale of the villa building, this does not necessarily translate into a 7% tax saving. The VAT paid by the developer on his building supplies will now end up being a cost for him, whereas under a construction contract he could claim them back as a tax credit. Hence the VAT costs incurred by the developer should translate into a higher sales price compared to the pre VAT construction price. There still may be a net VAT saving, depending on how the developer undertakes the construction e.g. if he hires his own workforce, then the labour costs are not subject to VAT.

Purchase v construction – who is the owner?

Putting the tax issues aside for a moment, a purchaser may feel more comfortable with a straight sale and purchase as opposed to a construction agreement, because then his ownership of the villa building has been registered at the land office.

With a construction agreement, you would normally expect the building owner to obtain the construction permit from the local authorities to construct the villa, not the developer. Foreigners are supposed to prove that they are domiciled in Thailand in order to obtain a construction permit and this may become an issue for a foreign purchaser that only visits Thailand occasionally. Having your name in the construction permit will be important if you wish to transfer the villa in the future.

If you do attempt to restructure the deal so that you buy the villa instead of constructing it, then you need to be aware that the tax treatment will be different and most likely the developer will try to shift any additional burden to you. In the developers case the way he recognises the profit from the sale may also differ depending on the contractual arrangements adopted.

Although the transfer taxes and fees in the table add up to 6.3%, on investigation you should find that the additional burden will be much lower. For example, the 2% transfer registration fee is based on the Land Department's own assessment of the building's value, which is often much lower than the actual sales price of the villa. The 3.3% specific business tax will certainly be an additional cost – to get this tax down it may be worth looking at how the pricing of the contracts have been determined and whether there is scope to shift more value to the lease instead which only attracts a 1.1% levy in registration fees and duties.

Finally, the 1% withholding tax can be used by the seller as a tax credit against his corporate income tax bill, so in theory the purchaser should be able to persuade the developer to accept this tax as his own.

In the long run any additional tax costs that the purchaser may end up having to bear to purchase rather than construct the villa may well be worth it.

Land tax developments

THAILAND PROPERTY REPORT
March 2007

The Revenue Department has revised its main regulation on the recording of revenues and expenses for the purpose of computing net profit subject to corporate income tax.

The changes are effective for accounting periods commencing from January 1, 2007 onwards and include specific rules for the recognition of leasing income.

Under the law, a company shall adopt the accrual basis for computing its net profits subject to corporate income tax, which means that revenue arising in an accounting period even though not paid and received in that period, shall be recognised as revenue of that period.

With regard to a company that rents out assets, the regulation states that this means recognizing rental income or instalments as taxable income according to the rental period.

Therefore if a company leasing land for example receives lease payments prior to the commencement of the lease, it shall recognise the lease payments as income over the lease period.

There is still the Revenue Department's Instruction (not law) which says that a lessor can recognize advance payments as income in the period that the lease commences, contrary to the accrual basis.

So if you are the rare person that is happy to pay tax in advance, and most likely pay more tax than if you were to adopt the accrual basis, then the Revenue is more than happy to accept your cheque!

Tax ruling on the transfer of a right to purchase land

The Revenue Department has published a private ruling given to a Thai company (company A) that transferred the right under a contract to purchase land to another company (company B).

The Revenue Department ruled as follows:

1. The income arising from the transfer of the right is assessable income under Section 40 (8) of the Revenue Code and Company A must include it in the computation of its net profits subject to corporate income tax.

2. Company B did not have to deduct withholding tax from the amount paid to Company A for the transfer of the right.

3. The right was of a type used in a business that was not subject to VAT, and hence the consideration paid for the transfer of the right was not subject to VAT.

The land was to be used by Company A for a factory for manufacturing sweets, which I would expect to be a business subject to VAT, although not mentioned in the ruling.

The fact that the company would have used the land in a VAT business is not relevant. The sale of land in a commercial manner or for profit, irrespective of the manner in which it is acquired, is considered to be a separate business undertaking that is subject to specific business tax (SBT), hence the reason why the Revenue Department ruled that the transfer of the right to purchase land was not subject to VAT. There was no SBT to pay because the transfer of the right did not have to be registered.

I don't believe the ruling covers any new ground or is controversial in its interpretation of the law. What it does do is clarify the Revenue Department's approach to taxing the transfer of land rights under the Revenue Code.

It is conceivable that a foreign company could acquire rights to acquire land in Thailand and later sell them for a profit and not be subject to any taxes in Thailand on the sale. I think the only issue to consider would be whether the transfer is transacted in a manner whereby the foreign company can be deemed carrying on business in Thailand and liable to corporate tax in Thailand on its profits, similar to a Thai company.

Under Section 76 bis of the Revenue Code, a company organized under a foreign law that has in Thailand an employee, a representative or a go-between to carry on its business and thereby derives income or gains in Thailand, shall be deemed carrying on business in Thailand. I do not believe that it would be difficult to avoid structuring the transaction to avoid falling under this section.

In fact the Revenue Department issued a private ruling not long ago that a foreign company that transferred its right under a lease – which had to be registered in Thailand - was not carrying on business in Thailand under Section 76 bis of the Revenue Code. So it is conceivable that the Revenue Department will also agree that it can't tax a foreign company selling rights to acquire land in Thailand.

A vision for Phuket

THAILAND PROPERTY REPORT
January 2007

I was recently invited to give a brief talk at a seminar in Phuket on a vision for Phuket from a tax practitioner's point of view. In this article I have summarised the main points covered in that talk.

Property tax reform – will it ever happen?

Currently, property owners in Thailand may either be liable to Local Development Tax on land only or House and Land Tax if they own buildings used for commercial purposes. For many years there has been talk about reforming the property tax laws but little in the way of concrete action to implement the proposed reforms.

A few years ago however it seemed things were set to change with the issuance of a draft law that would see the current laws repealed and replaced by a broader and more transparent tax system.

The draft law proposed that residential property owners pay tax on the official valuation of the property they own, at a rate that would not exceed 0.1% of the property's valuation. Many of the exemptions and concessions under the current laws would be dropped. Residential property owners exempted under the current laws could find themselves paying tax for the first time if the draft law was implemented.

The recent changes in government will probably see property tax reforms delayed again. In the meantime, the current tax system prevails. Part of the problem with the current system is that property owners are expected to voluntarily declare and pay tax every year. Enforcement of the law is clearly an issue for the local authorities responsible for collecting the tax.

In Phuket foreigners may set up Thai companies, but maybe less so these days, for freehold deals – being freehold land or freehold condominiums under the Thai quota. These companies are required to maintain proper accounts,

including records of rents received. Even if the foreigner is using the property as his own residence, the company is entitled to charge a rent.

It should be clear in these cases, that the building is being used for commercial purposes, and rent is being received. This rent should also be subject to 12.5% house and land tax. Foreign property owners in this situation should be careful not to ignore their liability to this tax, as part of the exit strategy may be to sell the company in the future, in which case a buyer will be advised to undertake a due diligence on the company to make sure it is clean and that he will not be inheriting any skeletons in the closets – like tax liabilities. Normally there will be a 10% penalty to pay as well for late payment of the tax.

Aggressive tax planning

A lot of foreign money continues to pour into Phuket and change hands. Tax collections in Phuket after the tsunami have bounced back but I do not believe that you should expect the Revenue to be complacent. I believe that there is greater scope for enforcement of tax collections – read tax audits – and that the Revenue will want their fair share of the action. Another facet not to be discounted is that foreigners may be more vulnerable to pressure to pay taxes than local investors.

One of the guiding principles behind tax planning is that everyone has the right to arrange their affairs so they do not pay more tax than what the law requires. Aggressive tax planning tends to test the boundaries of the legal framework and is more likely to be challenged by the Revenue in a tax audit. Arrangements found to be ineffective may be faced with paying back the tax plus interest and very substantial penalties.

I get the impression that the real estate industry in Phuket has its fair share of players that push the limits of tax planning. One of the factors that appear to drive it is the fact that the majority of the clientele is foreign and so this can translate into an opportunity to receive money offshore with a view to avoiding Thai tax. Often there can be a number of contracts involved in a property deal and so the prices put in the contracts may be influenced by what is received offshore (read not taxed) and what is onshore (read taxed).

I believe we can expect the Revenue to continue mounting challenges to the taxes paid in some of the property structures used on the island. What will be interesting to see is whether the property developers are willing to taken on the Revenue and defend their tax planning and ultimately be prepared to take the matter to court.

Leaseholds – the next target?

More and more foreigners these days are leaning towards leasehold interests over Thai residential property. Under the law, a gain made from the transfer of lease by a personal taxpayer will be taxed as ordinary income whilst a foreign corporate can also be taxed if the gain is derived from carrying on business in Thailand.

To pay tax on the capital gain, the foreigner must voluntarily file an income tax return with the Revenue Department. This of course raises enforcement issues if the taxpayer normally resides outside Thailand.

One possible solution is to introduce a withholding tax at source, similar to the withholding tax that applies to the transfer of freehold land and buildings. The issue of enforcement will probably still arise however because the transferee will often be a foreigner too.

One way to address the enforcement issue is to ask the Land Department to collect withholding tax when the transfer of a lease is registered at the Land Department. This was how the Revenue addressed the collection of specific business tax on real estate sales. In the past the seller was allowed to self assess his liability to specific business tax and pay it to the Revenue Department the month after the sale. These days you must pay it at the Land Department office at the time of registering the transfer of real estate.

I think we might see some developments in this area in the future, especially if we start to see more leased properties changing hands but very little tax being collected.

Hong Kong & Seychelles – the next big investors in Phuket?

Thailand is currently one of the few countries in the world that has a comprehensive double tax agreement (DTA) with Hong Kong. The DTA has only been effective since 2006. Thailand is also on a very short list of countries that have concluded a DTA with Seychelles, which came into effect on 1 January 2007.

These DTAs are interesting not only because of the Thai tax savings that they provide, but also because of the tax laws that prevail in Hong Kong and Seychelles which can make it quite favourable to conduct business with Thailand through these countries.

We could very well see more foreign investors in the future looking at these countries as a gateway for investment into Thailand or at the very least incorporating companies in these jurisdictions into their offshore structures for property developments in Thailand.

When freehold is not so free

THAILAND PROPERTY REPORT
November 2006

A new trend has emerged recently in the marketing of condominium developments to foreigners to focus on the freehold ownership aspect.

I have noticed a trend recently in the marketing of condominium developments to foreigners to focus on the freehold ownership aspect.

Now as most people learn when they first start reading up on the foreign ownership rules, foreigners can only own up to 49% of a condominium project.

So what about the other 51% that must be owned by Thais but is being marketed to foreigners as a freehold investment?

Thai corporate structure

To own a condominium freehold in the Thai quota, the foreigner investor will normally be told that he must set up a Thai company. A Thai company however does not automatically qualify as "Thai" under the Condominium Act.

If more than 49% of the registered capital of a Thai limited company is held by foreigners or foreigners constitute more than half of its shareholders, the company will be subject to the same ownership restrictions as a foreign investor. The Foreign Business Act should also be considered when structuring the shareholding. This Act has its own rules about deeming Thai companies with foreign shareholders as foreigners.

The Thai shareholders that will have to co-invest in the company owning the condominium unit cannot hold their shares as a nominee of the foreign shareholder. What constitutes a "nominee" under the law has never been entirely clear and it is currently a topic that is receiving considerable attention. The Land Department and Department of Business Development have also this year introduced "evidence of funds" rules for Thais that hold shares in companies with foreign shareholdings or directorships.

Foreign investors purchasing condominiums under the Thai quota via a Thai company should seek professional advice on the appropriate shareholding structure of the Thai company and the security of their title.

Tax planning

So how does the foreign ownership limit affect tax planning for the condominium purchase?

One of the major factors affecting the amount of tax a foreigner property owner must pay in Thailand will be whether the property owner is an individual or a company.

If buying under the foreign quota, generally speaking, a purchaser can normally choose between purchasing the unit in his own name or that of an offshore company – either as the beneficial owner or as the trustee of an offshore trust or fund.

Under the law, a foreign individual will be taxable in Thailand on all rental income derived from renting out a condominium unit in Thailand. The foreigner's nationality or residence status is not relevant nor does it matter whether the rent is received in or outside of Thailand.

If a foreign company registers instead as the owner, its liability to Thai income tax will depend on whether or not it is carrying on business in Thailand. Depending on how the property is managed, it is conceivable that a foreign company can receive rentals offshore free of Thai tax.

Under the Thai quota, with the Thai company route normally the only option to obtain freehold title, there will definitely be a number of taxes to consider and plan for.

Tax issues to consider if you use a Thai company

A reasonable level of administration comes with operating a Thai company. There are tax returns to be filed on a monthly basis and corporate tax returns must be filed twice a year. A qualified bookkeeper must be engaged to prepare the accounts and every year the company's financial statements must be audited by a registered auditor and filed with the relevant authorities.

Even if you buy the condominium unit in a Thai company to use as your own residence or holiday home, the tax authorities will expect you to pay the company a reasonable rent in return.

Under the tax law, if the rentals received by a company are below market value without reasonable grounds, the tax authorities have the power to assess the company on the amount which the property could reasonably expected to be let in ordinary circumstances. Therefore the rents charged should reflect market value to avoid a possible tax assessment on deemed income.

Being under the Thai quota does open up the possibility of selling on the Thai company rather than the property. Depending on the circumstances, this may translate into substantial tax savings on exit, by avoiding the transfer taxes, registration fee and corporate income tax on a capital gain that would arise if the unit was transferred instead. If the company is to be sold, the foreign shareholder should also consider the tax implications in his home country.

Leasehold option

Some developers have tried to address the problems associated with selling freehold condominiums to a predominately foreign audience. With the ownership rule based on the proportion of floor space held directly by foreigners, one obvious way is to try and put the larger units, such as penthouses, under the Thai quota, so more units can then be sold under the foreign quota.

Another way to deal with the foreign ownership limit is to offer a long-term leasehold interest instead for the units that can't be sold directly to foreigners – deliberately moving away from the freehold sales pitch!

This will normally be structured so that a Thai company meeting the requirements of the Condominium Act ends up holding all of the units under the Thai quota. Foreign investors will then enter into long term leases for their unit with the Thai company. A shareholding interest in the Thai company may also be offered to the lessees. This is similar to the lease structure used for land deals.

By taking a leasehold interest, the foreigner can "acquire" a unit under the Thai quota without being forced to set up and run his own Thai company in co-operation with Thai shareholders. Where he does use the unit as his personal residence or holiday home, he will not have to worry about paying income tax on rents he would otherwise be forced to pay if the unit was owned in a Thai company.

On exit, the stamp duty and registration fee payable on the transfer of a long-term leasehold interest are relatively low, and with a little planning, it would be possible to make a gain from the transfer of the lease exempt from Thai tax.

Therefore apart from the money saved by avoiding the Thai company structure, a lease can in fact make for a more attractive exit strategy than a freehold investment.

Tax pitfalls of leasing deals

THAILAND PROPERTY REPORT
September 2006

Don't end up paying someone else's tax

In my last article I wrote about tax planning for villa deals incorporating a long term lease of land to foreigners. Typically these deals have a Thai company established for the specific purpose of owning the land under lease, the improvements made to the land and any common areas of the development.

In some of these deals, the developer will exit the development by offering a shareholding interest in this Thai company, with the idea that the lessees end up collectively controlling the lessor.

A similar framework has been adopted for some apartment deals marketed to foreigners – rather than offering freehold e.g. as a condominium unit, a long-term lease of an apartment is offered together with a shareholding interest in the company that owns the apartment complex and the land on which it is built.

Taxes and share deals

When one sets out to acquire a business in Thailand, the acquisition may very well be structured as a share deal rather than an asset deal. This means that the buyer ends up acquiring the shares in the company that runs the business.

In this case, a prudent buyer will undertake a due diligence of the company before he purchases it.

One of the aims of the due diligence is to uncover potential risks and liabilities that the buyer may assume if he takes over the company.

I believe the same thinking should be adopted when entering into leasing structures with share deals attached. Potential buyers should consider investigating the leasing company and its history in order to identify any risks and liabilities they will be buying into if they become a shareholder.

On the tax side, a fundamental issue to investigate is whether the company has paid its taxes correctly or not. One of the main objectives of a tax due diligence therefore is to identify exposures and material issues that could arise if the company were audited by the tax authorities in the future.

I believe that there is an inherent risk of tax exposures existing in most share deals in Thailand. There are several reasons for this belief, including:

Companies in Thailand must self assess their liability to taxation in many cases - the Revenue Department may then come along later to audit the returns filed by the company. If the tax returns filed by the company prior to the sale have not been subject to a tax audit, any errors in the tax returns may go undetected until the tax authorities audit the company, which could be well after the deal is completed. The penalties for underpaying taxes can be severe.

Thai tax laws are not written in a prescriptive manner, so there are many issues that can be subject to interpretation and hence disputed in a tax audit.

The company's accountants/bookkeepers are making decisions on day-to-day tax treatments and may not be seeking appropriate advice or guidance.

So what are some of the matters that could be reviewed in a tax due diligence?

Contract pricing

Often leasing deals can involve several contracts with different contracting parties. The shares in the leasing company may often be offered for sale by an offshore entity, which often is an enticement for the developer to attempt to sell the shares offshore for a profit, free of Thai tax.

Care must to be taken to properly document the justification for the pricing of the different contracts. Pursuant to Section 65 bis (4) of the Revenue Code, the Revenue Department can order the leasing company to pay tax on the market value of the rentals, if the rentals are less than market value without justifiable grounds. This risk can exist if the lease rentals have been reduced and the pricing of offshore contracts inflated in an attempt to avoid Thai taxation.

Income recognition methods

The rental income received by the leasing company upfront should be recognized as income over the period of the lease, following the accrual basis of accounting. The Revenue Department has however issued Departmental Instruction No.Por.73/2541 stating that rental income received in advance prior to commencement of a lease may be returned as income in the accounting period in which the lease commences – contrary to the accrual concept.

How the leasing company has recognised leasing income for tax purposes will have a substantial impact on the taxes payable in the future.

Withholding taxes

Withholding taxes apply in many cases to payments made to both domestic and offshore suppliers. Often the domestic transactions that occur regularly can be handled competently but it is the irregular offshore transactions that are usually more problematic and it is here where many issues can be encountered and not just regarding withholding taxes.

Transfer pricing

Many developers in resort areas have foreign stakeholders and invariably the company will conduct transactions with offshore parties related to the developer. The tax laws require companies to demonstrate that the pricing of such transactions - referred to as transfer pricing - are comparable to those agreed between independent parties in the same or similar circumstances. To provide revenue officers with guidelines in the determination of transfer prices, the Revenue Department has issued Departmental Instruction No.Por.113/2545. The Instruction contains a list of documents the Revenue Department expects companies to maintain to support their transfer pricing. Without sufficient supporting documentation, the company's profits could be reassessed by the Revenue Department in a tax audit.

Tax audits

A tax due diligence will review whether or not the company has been audited by the Revenue Department and if so, the period reviewed, the issues raised in the audit and any matters pending that have not been provided for in the accounts of the company.

Correspondence with the company's tax advisors can also be requested for review, which can give an insight into the tax issues faced by the company and any controversial positions adopted.

A buyer may seek to obtain indemnities and warranties from the developer regarding future tax liabilities – the likelihood of being able to enforce them should be considered in weighing up their effectiveness. Ideally buyers should position themselves so they are aware of the potential risks they assume when they take over the leasing company and thus have the opportunity to consider preventative action that may be taken to mitigate exposure to future tax liabilities arising from the development.

Leasing deals for foreign property investors

THAILAND PROPERTY REPORT
July 2006

Real estate deals incorporating a long-term lease of land require planning upfront to develop an efficient tax structure – for both the developer and their clients.

The advantage of leasing land, of course, is that there is no prohibition on foreign participation, as is the case for freehold. Land lease deals offered by developers typically have one or more of the following features:

1. A long-term lease of land i.e. for the maximum legal term of 30 years with options to renew for another two consecutive 30 year periods, such that the total lease period is effectively 90 years.

2. Either a sales contract or construction contract for the villa, which may include the supply of fixtures, furniture and household equipment.

3. An agreement for consultancy services is sometimes part of the deal.

4. An agreement to acquire an interest in the land owning company - normally only if the developer proposes to transfer control of the land owning company to the lessees.

5. A leaseback agreement for the villa may be offered to manage and rent out the villa for absent owners.

So what is the most efficient tax structure?

Generally speaking, a purchaser will normally have to choose between making the lease in his own name or that of an offshore company – either as the beneficial owner or as the trustee of an offshore trust or fund.

Although it would be possible to establish a Thai company to enter into the lease, from a tax planning viewpoint this may not be an attractive option. A number of contributing factors see many private owners take out leases in high-end developments through offshore companies, such as a BVI company.

Separate ownership of the villa on the land under lease is possible. Note that developers may prefer to offer you a construction contract for the villa rather than a sales contract to avoid the transfer taxes otherwise payable if the transfer of the villa must be registered at the Land Department.

On acquisition, I believe it is fair to say that the taxes payable should be the same regardless of whether you make the contracts in your own name or that of an offshore company.

If the villa is rented out, then the level of taxes payable on the rents received may differ depending on whether the villa is owned by a foreign individual or company. The mere fact that a foreign company owns real estate in Thailand does not automatically mean that it will be liable to tax in Thailand on rents, as would be the case for property owned by an individual. If you purchase a villa with the intention of renting it out, it would be worthwhile considering the tax impact on rents when deciding the villa's ownership structure.

What tax planning can be done to mitigate tax liabilities arising on exit?

I think it would be fair to assume on exit that the next owner is likely to be a foreigner as well. Stamp duty and registration fees totalling 1.1% will be payable at the Land Department when the change of lessee is recorded at the Land Department.

In transferring a lease, the lease will normally be assigned. Individuals may be liable to personal income tax under the Revenue Code on a gain arising from the assignment in certain circumstances. If managed properly, a lease can be assigned by a foreign company to another foreigner without incurring a liability to tax on the gain, if we are to believe a private ruling by the Revenue Department published last year.

Taxes on the sale of the villa

The transfer of the villa will have to be registered at the Land Department to be effective so the normal transfer taxes will apply, similar to transferring land in Thailand. For individuals, a withholding tax will be payable at the Land Department, based on the number of years the villa has been held and calculated by reference to the official appraised price of the villa. This withholding tax is effectively a capital gains tax. The method used to calculate this tax means that the sales price and initial purchase price of the villa will not affect the amount of withholding tax payable.

A foreign company selling a villa in Thailand will be subject to corporate income tax at the rate of 30% on gains derived from the sale of the villa. The 1% withholding tax paid at the Land Department at the time of transfer is creditable against the tax on the gain.

So what tax planning can be done when you transfer a lease and villa? Careful consideration should be given to the manner in which the sale price is split between the various assets being sold, as this will often have a bearing on the taxes payable in Thailand. For example, if the seller is an offshore corporate, it may seek to assign a value to the villa comparable with the official appraised price in order to minimize transfer taxes and the gain made on the sale of the villa. Greater weighting would be then given to the value paid for the lease assignment, which could be structured so that any gain arising from the assignment was not subject to Thai tax.

Also consider what you are really selling. For example, is it just the villa or are there other valuable assets being sold i.e. furnishings and fittings which do not form part of the villa under the law and may possibly be sold tax free.

Advantage of an offshore vehicle on exit

Tax planning at the acquisition stage often involves planning for the exit strategy in order to mitigate tax liabilities arising on capital gains. If the lease and the villa are held in an offshore vehicle, such as a BVI company, it may be possible to negotiate a sale of the offshore vehicle instead. The offshore vehicle can be sold from one foreigner to another without incurring a liability to Thai taxation. The taxes that may be incurred on sale by the owner of the offshore vehicle in other jurisdictions e.g. the owner's place of residence, should then be considered and planned for.

Maintaining a complete and proper set of records of the offshore vehicle is strongly recommended for due diligence by the buyer, to allow them to assess any liabilities or risks they may be assuming by acquiring the offshore vehicle.

This recommendation would appear to conflict with one of the main advantages often cited for using a BVI company - its relaxed reporting requirements. For example there is no accounting, organizational or shareholder meeting requirements. Generally speaking, I think that it is fair to say that the sale of shares in a private BVI Company is not a frequent transaction and you might find many purchasers preferring a straight transfer of the lease and the villa in the end.

Personal tax and the sale of real estate

THAILAND PROPERTY REPORT
May 2006

The calculation of income tax on the sale of real estate in Thailand is not simple, especially for personal taxpayers. The law in this area is a mix of Revenue Code, Royal Decrees, Ministerial Regulations and Revenue Department Instructions.

In short, personal income tax is payable on the official appraised price of the property at the time of sale, less deductions stipulated by the law.

The actual sales price that the property fetches is not relevant. The actual cost of acquiring the property is not relevant in most cases.

It is a tax that assumes that after holding a property for eight years or more you have made a gain of 100 per cent. The result - the seller pays tax on a gain he has not made - is a tax on a fictitious gain. It is tax that may make you think twice about selling property.

Calculating tax on a fictitious gain

At the time of sale, income tax must be withheld and paid at the Land Department in order to register the transfer. The calculation of the withholding tax for personal taxpayers can be summarised as follows:

- Take the official appraised value of the property and deduct the expenses allowed under the law. The net amount is then divided by the number of years the property has been held, which is capped at 10 years for the purposes of this calculation.
- Take the final amount from above and calculate the tax on it at the marginal personal tax rates of 5-37 per cent. The tax so computed is then multiplied by the number of years the property is held, the result being the withholding tax payable. This method is akin to taxing the gain as if it were derived in equal annual instalments over the period the property was held.

In some cases the withholding tax calculated cannot exceed 20 per cent of the sales price.

Deductible expenses

The expenses allowed when calculating the gain subject to withholding tax will depend on how the property was acquired. If acquired by gift or bequest, the deduction is 50 per cent of the sales price. For other cases, a standard deduction shall be allowed in accordance with Royal Decree No. 165 issued under the Revenue Code.

The deduction decreases the longer that the property is held, as shown in the table below:

No. of years holding property	% of income	% gain
1 year	92	8.70
2 years	84	19.05
3 years	77	29.87
4 years	71	40.85
5 years	65	53.85
6 years	60	66.67
7 years	55	81.82
8 years or more	50	100.00

These standard deductions have been the same for the last 20 years. After eight years or more the deduction is limited to 50 per cent, which is the same as saying the seller has made a gain of 100 per cent. As you can see, the actual cost of the property is not relevant for calculating the withholding tax.

Withholding tax election

In many cases, the seller can pay the withholding tax and leave it at that – there is no need for the seller to include the gain in his personal income tax return at the end of the year. A taxpayer that includes the gain in his personal tax return may elect to claim a deduction for the actual cost of the property rather than the standard deduction.

Tax exemptions

There are only a few exemptions available. One is buried away in Ministerial Regulation No. 126 issued under the Revenue Code, and applies only if you were fortunate enough to have bought in 1997 during the economic crisis. Where the property is held for at least one year and sold before the end of 2007, then the income from sale is not taxable.

Since 2003, an exemption applies to income from the sale of one's place of residence in the case that a new residence is also purchased. There are however quite a few conditions that apply to take advantage of this exemption. For example, the income exempted, which will be based on the official appraised price and not the contract price, cannot exceed the value of the new property and the new home must be bought within one year prior to or after the sale of the old one.

Not all foreign property owners are taxed the same

THAILAND PROPERTY REPORT
March 2006

One of the major factors affecting the amount of tax a foreigner property owner must pay in Thailand will be whether the property owner is an individual or a company.

For foreign individuals owning real estate in Thailand - which can normally only be a condo or a building due to restrictions on foreign ownership of land under the Land Code - all rental income will be taxable. The foreigner's nationality or residence status is not relevant nor does it matter whether the rent is received in or outside of Thailand.

This is because the Revenue Code provides that every individual who derives rental income from property situated in Thailand shall pay personal income tax on such income, whether such income is paid within or outside Thailand. Personal tax rates are relatively high for the region, ranging from 10-37 per cent. Once you earn the equivalent of US$25,000 you will start paying 20 per cent tax. Above US$100,000 the rate is 37 per cent.

Foreign corporate property owners

For a foreign company owning real estate in Thailand – which will normally be limited by law to investments in condos or buildings similar to that owned by foreign individuals – the income taxes it has to pay in Thailand will depend on whether or not the company is carrying on business in Thailand. Unlike the personal income tax laws, the mere fact that a foreign company owns real estate in Thailand does not automatically mean that it will be liable to tax in Thailand on rents.

There are two main provisions of the law to consider:

1. Under Section 70 of the Revenue Code, rental income paid from or within Thailand to a foreign company not carrying on business in Thailand is subject to 15 per cent withholding tax.

2. This source rule means that a foreign company not carrying on business in Thailand can receive rental income from outside Thailand free of Thai tax. So when is a foreign company considered to be carrying on business in Thailand?

3. Under Section 76bis of the Revenue Code, if a company organized under a foreign law has an employee, a representative or a go-between to carry on business in Thailand and thereby derives income or gains in Thailand, such company shall be deemed carrying on business in Thailand.

In such a case, the employee, representative or go-between shall, insofar as income or gains derived in Thailand are concerned, be deemed the agent of the offshore company for filing corporate tax returns and paying 30 per cent corporate tax on net profits to the Revenue Department. The remittance of the taxable profits out of Thailand shall also be subject to 10 per cent income tax. In short, the foreign company ends up being taxed similar to a Thai company in many respects.

The appointment of a real estate agent in Thailand to find tenants for the property should clearly fall within the meaning of a representative or go-between. Rental income derived by the foreign company through the efforts of the agent should therefore result in the foreign company being deemed carrying on business in Thailand and liable to corporate taxes in Thailand on profits derived from the rental property.

Where agents of foreign companies are concerned, tax law sometimes distinguishes between a dependent agent and an independent agent. An independent agent may not have a duty and liability to file tax returns and pay tax on behalf of its foreign principal.

An independent agent is normally one that acts as an agent in the ordinary course of its business and does not act specifically or mainly for one customer. There is no law at the moment however that allows real estate agents in Thailand to be treated as independent agents for Thai tax purposes.

Thailand has an extensive network of double tax agreements that can reduce the amount of tax a foreigner has to pay in Thailand. These double tax agreements typically follow the same form when it comes to the taxation of income from real estate – that is, Thailand retains its right to tax income from the rental of real estate situated in Thailand. In short, a double tax agreement will not help to alleviate the liability to Thai income tax on rental income.

The tax treatment adopted in practice by foreign companies may of course be completely different to what I have described above. I do have a feeling that most foreign companies are not aware that they could be deemed carrying on business in Thailand for tax purposes, especially if they have an agent in Thailand to manage the property on their behalf. Foreign property owners would be well advised to check that they are paying income tax in accordance with the law.

Sound tax advice for property investors

THAILAND PROPERTY REPORT
January 2006

Whether buying, selling or leasing property in Thailand, investors will often want to know what tax planning can be done - in compliance with the prevailing laws - to mitigate the taxes payable.

Three issues that I often help potential investors address are:

- What is the most tax efficient tax structure? Buying, selling or leasing real estate requires planning to develop an efficient tax structure.
- Will the ownership and financing structures stand up to scrutiny? The tax authorities almost invariably examine these.
- What tax planning can be done to mitigate tax liabilities arising on exit? In order to mitigate the taxation liabilities arising on capital gains the full impact of this should be recognized and planned for on acquisition.

Some of the points to consider when purchasing property in a Thai company are discussed below.

Rental income

I get the impression that some people think that they can set up a company in Thailand to purchase their home and then treat the company as if it is dormant. They may be in for a surprise when the taxman visits.

A Thai company pays income tax on its net profits calculated on an accrual basis. This means that rents become taxable once they are derived – the timing of rental collection is not relevant.

People that buy property in a Thai company to use as their residence or holiday home should be particularly wary of the Revenue Department's power to assess rents to the company at their market value if no rents are received or they believe that the rents are too low without justifiable grounds.

In such circumstances, to avoid a tax assessment on deemed rents it is crucial to put a rental agreement in place and pay an appropriate rent to the company – a nominal rent will not suffice.

A simple way to keep the tax bill low is to keep the company's paid up capital at Bt5 million or less at the end of the accounting period. The corporate tax rate will then be 15 per cent for the first Bt1 million in net profit and 25 per cent for the next Bt2 million before becoming 30 per cent, the corporate tax rate that normally applies to private companies with more than Bt5 million in paid up capital.

Interest on loans

It is common for investors to make loans to their Thai company to fund the acquisition of the property.

If the lender is an individual or a foreign company that does not carry on business in Thailand, it is optional for Thai tax purposes to charge interest on the loan.

Charging interest is one way to extract profits out of the company and at the same time keep taxable profits low.

Interest is deductible on an accrual basis, which means it does not have to be paid in order to be deductible in an accounting period.

When the interest is paid, the company often has a liability to withhold tax. Interest paid to individuals or foreign companies not carrying on business in Thailand for example shall be subject to withholding tax at the rate of 15 per cent.

Interest charged to the company should not exceed an arm's length rate, which means calculating the rate by reference to market rates.

The exit strategy

One advantage of using a corporate structure to invest in real estate in Thailand is that it gives one the option to sell the company rather than the property.

On paper at least it will normally look more tax effective to sell your shares in the company rather than the property itself, thereby avoiding all the taxes and fees that real estate transfers attract.

A share deal can however contain tax pitfalls that need to be understood at the outset when you invest in the property.

A combination of factors, most importantly Thailand's self-assessment tax system which puts the onus on the taxpayer to self determine his liability to tax, means that the level of tax risk in a share deal is high in many cases. By tax risk, I mean the risk that the company is audited in the future by the tax authorities and found to have underpaid its taxes. A prudent purchaser will conduct a tax due diligence of the company to attempt to uncover potential tax exposures that he will inherit when he takes over the company.

If the company has not filed tax returns in accordance with the law, it will likely reduce the attractiveness of a share deal, as the purchaser will seek to obtain some assurances or reduction in the price to insure against tax liabilities related to the period of the seller's ownership.

Keeping a clean set of books and proper tax records as well as engaging a reputable tax advisor can therefore translate into significant savings in the long run.

Thai tax breaks for HK investors

THAILAND PROPERTY REPORT
November 2005

Hong Kong and foreign investors alike are expected to reap significant tax savings from the agreement for the avoidance of double taxation recently signed off between Thailand and Hong Kong.

The agreement is only the second comprehensive agreement for the avoidance of double taxation (DTA) that Hong Kong has concluded since it began to explore the possibilities of establishing a network of DTAs with its major trading partners in 1998. The DTA will take effect in 2006 if the procedures for it to enter into force are completed this year.

Who can access the benefits of the DTA?

Many of the Thai tax breaks granted under the DTA are only available to residents of Hong Kong. A resident of Hong Kong is defined in the DTA to include:

a. any individual who ordinarily resides in Hong Kong;

b. any individual who stays in Hong Kong for more than 180 days during a year of assessment or for more than 300 days in two consecutive years of assessment one of which is the relevant year of assessment;

c. a company incorporated in Hong Kong or, if incorporated outside Hong Kong, being normally managed or controlled in Hong Kong; or

d. any other person constituted under the laws of Hong Kong, or if constituted outside Hong Kong, being normally managed or controlled in Hong Kong.

As can be seen from the above, the nationality of a company or person does prevent one from being a resident of Hong Kong for the purposes of the DTA. A foreign company could qualify as a Hong Kong resident and access the tax benefits of the DTA.

Take for example the ever popular British Virgin Islands (BVI) international business company used by many Hong Kong investors. A BVI company whose directors hold their meetings in Hong Kong would be considered to be managed and controlled in Hong Kong, and would be a Hong Kong resident for the purposes of the DTA.

Impact on real estate investments

At first glance, it may not be obvious how HK property investors will benefit from the new DTA. Like all the other double tax agreements Thailand has negotiated, it retains its right under the DTA with Hong Kong to tax rental income and gains derived by a HK resident from real estate situated in Thailand. The DTA therefore will have no impact on how Thailand currently taxes property rents and capital gains.

The DTA will however provide relief from Thai taxes in many other cases such as the taxes imposed on capital gains, business profits, interest and royalties.

Share sales

Whilst capital gains are not taxable in Hong Kong, HK companies with no place of business in Thailand would normally face a 15% withholding tax on gains made from the sale of shares, if the gains are paid from or within Thailand. Gains made by HK individuals not resident in Thailand shall also be subject to 15% withholding tax.

Thailand has agreed under the DTA to give up its right to tax gains on share sales in many cases, so that a sale won't be taxable in either country, a curious result when one of the underlying principles of the DTA is to avoid double taxation - not taxation all together!

One major exception though is when a HK resident makes a gain from the sale of shares of a company deriving more than 50 per cent of its asset value directly or indirectly from real estate situated in Thailand. In this case Thailand retains its right to tax the gain. This provision is aimed squarely at property rich companies and is meant to defeat the tax benefit arising from selling the company's shares rather than the property it owns.

This provision however may have little impact, as a seller can often restructure his shareholding prior to selling to minimize the Thai tax payable.

15% withholding tax on services eradicated

Service firms based in Hong Kong such as architects, designers, marketing and sales agents, lawyers, accountants, regional offices etc working for Thai companies will no longer have to pay Thai tax on their income unless they carry on business in Thailand through a permanent establishment. The main impact of this move is that service fees paid from Thailand to HK residents will no longer be subject to 15% withholding tax.

HK resident companies can also perform services in Thailand for up to six months within any twelve-month period and not be subject to Thai tax on their profits. Likewise, a building site, a construction, assembly or installation project or supervisory activities in connection therewith will not create a taxable presence in Thailand if such site, project or activities last not more than six months.

Certain classes of income such as interest, dividends and royalties e.g. payments to use software or trademarks, arising in Thailand will still be taxable, but lower tax rates may now apply under the DTA

Future tax planning under the DTA

Hong Kong's territorial basis for taxing profits means that a person who carries on a business in Hong Kong but derives profits from Thailand is not required to pay tax in Hong Kong on those profits.

This could raise some interesting tax planning opportunities when the DTA comes into effect. For example, if a HK resident company were to undertake a six-month service contract in Thailand, under the DTA it should not be liable to Thai income tax on profits arising under the contract. The profits should not be taxable in Hong Kong either as the services which give rise to the payment of the fees are not performed in Hong Kong.

The Thai tax savings that will become available under the DTA, coupled with Hong Kong's territorial basis for taxing profits, is sure to create new and exciting tax planning opportunities for foreign investors.

Taxation and leasehold for property investors

THAILAND PROPERTY REPORT
July 2005

In my last article I discussed how foreigners may take a long term leasehold interest in Thai property, rather than a freehold interest because of the restrictions on foreigners owning land in Thailand.

The day may come when the lessee would like to exit the lease, in which case he will most probably seek to sell his rights in the lease to another person. A long term lease agreement will normally provide that the lessee will have the right to transfer his interest in the lease with the consent of the lessor. Assuming such consent will be forthcoming, the lessee is free to transfer his interest in the property to another person, the same as if he had a freehold interest. The form that the transfer takes and the taxes payable on disposal are, however, quite different.

The lessee will normally make a contract to assign his rights and obligations under the lease agreement to the new lessee. The new lessee then takes over the lease agreement. Where the lease has more than three years left to run, the change of lessee will normally be registered at the Land Department so that the lease is enforceable for the remaining lease term.

Fees and duties on assignment of a lease

As was the case when the lease was first registered, a 1 percent registration fee and stamp duty of 0.1 percent will be payable when the transfer of the lease is registered at the Land Department. The lease payments attributable to the period of the new lessee's tenure shall be the tax base for computing the registration fee and stamp duty in most cases.

Other taxes

The price that the new lessee pays to take over the lease does not figure in the calculation of the registration fee and stamp duty payable at the Land Department. The transfer price will, however, attract taxation in Thailand if other taxes, such as corporate tax and VAT, apply to the transfer. In this case, it will initially be up to the parties involved to determine their obligations and duties to pay any other taxes due under the law, which may then be audited in the future by the tax authorities.

Whether or not other taxes apply will depend largely on the particular circumstances of each party to the lease assignment. In this regard, I think that it would be fair to assume that where long term leases of residential properties in Thailand are concerned, both parties are likely to be foreigners.

Whilst the taxation of lease right payments between Thai taxpayers is generally quite clear, following several tax rulings and Revenue Department guidelines issued on the subject, the taxation of Thai lease transfers between foreigners is not. There is really not much in terms of tax rulings and precedent court cases in this case to fall back on when trying to interpret the broadly worded provisions of the Revenue Code, let alone the Revenue Department's view on the matter.

Corporate tax treatment

A case in point is Section 76 bis of the Revenue Code. Under this section, if a company organised under a foreign law, for example a BVI company, has an employee, a representative or a go-between to carry on business in Thailand and thereby derives income or gains in Thailand, such company shall be deemed carrying on business in Thailand.

In such a case, the employee, representative or go-between shall, in so far as income or gains derived in Thailand are concerned, be deemed the agent of the offshore company for filing corporate tax returns and paying 30 percent corporate tax on profits to the Revenue Department.

Now when the assignment of a lease is registered at the Land Department, a foreign company will typically appoint an attorney, such as its lawyer, to act on its behalf at the Land Department. The question then arises as to whether the foreign lessee's attorney can be deemed his representative or go-between in Thailand for corporate tax purposes under Section 76 bis of the Revenue Code.

Earlier this year the Revenue Department published a ruling it gave to a law office concerning the registration of a lease assignment. A lawyer of the law office had acted as attorney for the assignor of the lease, a foreign company, for the purpose of registering the lease assignment at the Land Department. According to the facts given in the ruling, there was a clause in the lease agreement that said it was effective and binding on the parties since the date of the agreement.

The Revenue Department ruled that the lawyer was not a representative or go-between of his client for carrying on business in Thailand under Section 76 bis of the Revenue Code. In making its ruling, the Revenue Department relied on the fact that the lease assignment was already effective prior to its registration. In contrast, I expect that many long term leases will be assigned on the condition that the assignment will only be effective once it is registered at the Land Department.

Tax rulings given by the Revenue Department are not law but are nevertheless a useful guide to the Revenue Department's interpretation of the Revenue Code. It remains to be seen to what extent the Revenue Department's ruling in this case turned on its facts and whether or not all lease assignments by offshore corporate lessees will be free of Thai corporate income tax.

Effective tax planning for property investors

THAILAND PROPERTY REPORT
June 2005

If you did a survey of the various property developments offered for sale to foreigners in Thailand you might be surprised at the variety of legal structures used. The structures have evolved for several reasons, one being tax planning, but probably the most significant factor has been the Land Code restrictions on foreigners owning land in Thailand.

Leasehold interests

One structure used to overcome the Land Code restrictions involves the developer setting up a Thai company, with a majority Thai shareholding of course, to own the property. Instead of selling freehold title, the Thai company acts as a landlord and "sells" long-term leasehold interests instead.

Now there is nothing in the law that restricts foreigners from leasing land or buildings in Thailand. A foreigner proposing to conduct a leasing business in Thailand should however consider whether or not he will need to apply for a business license under the Foreign Business Act.

The form that long-term leases take in Thailand is largely due to the laws concerning the hire of property under the Civil and Commercial Code (CCC). For example, a long-term lease will typically be made for 30 years with an option to renew the lease. This is because Section 540 of the CCC states that that the lease of immovable property cannot exceed thirty years. If it were made for a longer period, the period of the lease will be read down to 30 years. Section 540 also states that the period of the lease can be renewed, but it must not exceed thirty years from the date of renewal.

Pursuant to Section 538 of the CCC, leases of land or buildings exceeding three years are enforceable only for three years unless registered with the Land Department. A long-term lease will typically have a lease term commencing on the date of its registration.

Taxes on long-term leases

The taxes payable on a long-term lease agreement are quite straightforward and less complicated than a direct sale.

In most cases only stamp duty and the lease registration fee will be payable. Leases of land and buildings do not attract VAT and so VAT should not be added to the rents charged. VAT may come into play, however, if the lease covers fixtures and fittings.

Stamp duty on leases

A lease of land or buildings is subject to stamp duty under the Revenue Code at the rate of Baht or fraction thereof for every Baht 1,000 or fraction thereof of the rent or key money or both, for the entire lease period. In other words, the duty is approximately 0.1% of the lease value.

Lease registration fee

A fee of 1% of the entire rent for the lease's duration is payable upon registration of a lease.

Liability for duties and fees

Under the law you will find that the lessor is liable for the stamp duty, whereas the registration fee should be borne by parties equally. The parties can agree otherwise and I have seen many contracts offered by lessors that make the lessee responsible for the duties and fees. Armed with a little knowledge of the law, the lessee may be able to negotiate this point.

Withholding tax

Withholding tax applies to many services, and rents paid to a Thai company are no exception. The Revenue Department has issued a regulation on the matter requiring "every company or juristic partnership or any other juristic person who pays rents or any other benefits from letting out property on hire" to a company carrying on business in Thailand to deduct withholding tax of 5%. Individuals therefore do not have to worry about deducting withhold tax. However, if you use a company to make the lease, e.g. BVI companies are often a popular choice for investors not wishing to lease property in their own name, you should consider if the company has a liability to withhold tax.

There may come a time in the future when you decide to sell your property, in which case you will most likely end up assigning your interest in the lease to the buyer. This can be a particularly tricky area where taxes are concerned and will be the subject of my next article.

Thai rental properties and personal income tax

THAILAND PROPERTY REPORT
February 2005

If a foreigner receives rental income from real estate situated in Thailand, he will in many cases be liable to pay Thai personal income tax. This is because Section 40 of the Revenue Code provides that every person who derives assessable income from Thai property shall pay personal income tax on such income, whether such income is paid within or outside the country.

Assessable income

Money or any other benefits derived from letting out property are assessable income. Income is normally assessed on a cash basis. In some cases, rents received in advance may be returned as income over the period of the lease and tax must be paid accordingly.

Tax deductions

Royal Decree No.11 allows the property owner a standard deduction of thirty percent against rental income. If the property is sub-let, then the rents paid to the original letter or sub-letter may be deductible.

A taxpayer has the option of claiming the necessary and reasonable expenses incurred in deriving rental income. In this case the corporate tax provisions governing the deduction of expenses shall apply. If, however, the actual expenses deductible are found to be less than the standard deduction, a deduction will only be allowed to the extent to which it can be supported by documentary evidence.

There are also a number of personal allowances that may be claimed as a deduction in computing a taxpayer's net income.

Withholding tax

All persons, partnerships, companies, associations or body of persons that pay rental income to a person that is not resident in Thailand must deduct income tax at the rate of fifteen percent. If the recipient is resident in Thailand then income tax must be withheld at the rate of five percent, but only if the payer is a company, juristic partnership or any other type of juristic person.

A person residing in Thailand for 180 days or more in a tax year shall be deemed a resident of Thailand. The payer must issue a withholding tax certificate every time tax is deducted. The tax withheld is available as a credit against the taxpayer's year-end personal income tax liability.

Tax rates

In October 2004, the Thai Cabinet approved changes to the personal income tax rates applicable for the 2004 tax year onwards, as set out in the table.

Net taxable income (Baht)	Marginal rate
1 - 100,000	Exempt
100,001- 500,000	10%
500,001- 1,000,000	20%
1,000,001- 4,000,000	30%
More than 4,000,000	37%

The tax rates for residents and non-residents are the same.

Tax filings

Personal income tax returns must be filed on or before 31 March in respect of taxable income received during the preceding calendar year. Any tax payable on the return must also be paid on or before this date.

A person that derives rental income shall also file a mid-year return on or before the last day of September, disclosing the net rental income derived during the first six months of the year. Any tax payable on this income shall be paid at the time of filing the mid-year return and will be treated as a credit in the calculation of the tax payable on the annual return.

If the Revenue Department believes that the amount of rental income reported is too low, it has the power to assess it on the basis of the amount for which the property may reasonably be expected to be let. The amount assessed will be deemed assessable income, although the taxpayer will have the right to appeal against the assessment.

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