

LEGAL ARTICLE

Dear Taxpayers:
Good days! Be aware that the Government just recently introduced a Royal Decree that can make you an SBT exempt. So, save your money now! Here's is how your tax planning strategies can legally reduce your taxes and ultimately fatten your profit.

REDUCE TAXES WITH SPECIAL BUSINESS TAX EXEMPTION

By Narit Direkwattanachai, LLM (Cambridge)



In Thailand, taxes can be either direct or indirect. The direct taxes are the taxes that are levied on the income of individuals or companies. Thus, based on the calculated personal income tax or corporate income tax, the taxpayers pay directly to the government. For those who manage to avoid this direct tax system, either legally or illegally, the government imposes the so called indirect taxes. In this case, the taxes are levied on one entity, such as a seller, but paid by another entity, such as a buyer. For example, drug dealers or folks who take the kickback money in whatever sector but never report their income to avoid tax, when they go out to buy any goods or services in the market, they will be forced to pay the indirect taxes, either in form of VAT, excise tax or specific business tax (SBT), whichever is applicable. So, that is a brief background on Thailand taxation.

In this article, we will focus in more detail on the last mentioned type of indirect tax, i.e. specific business tax (SBT), in light of the recently enacted

Royal Decree that lays down the criteria on how to be an SBT exempt. As always, tax break is good for taxpayers.



Business with Regular Transactions Similar to Commercial Banking

One of a handful of categories of transactions subject to SBT is

the business with regular transactions similar to commercial banking.

Such transactions can be extending a loan, providing a guarantee, exchanging currencies, issuing, buying or selling bills or remitting the money to a foreign country.

As far as corporate Thailand is concerned, 3.3% SBT is applicable to any interest derived from a loan extended by one company to another company. Extending the loan in this case could be construed as the business with regular transactions similar to commercial banking and consequently the interest charged on the loan is subject to SBT at the rate of 3.3%.



Of course, when one company extends a loan to another company in the same affiliated group, there is an argument that this transaction is not similar to commercial banking because the lender in this circumstance does not necessarily seek a profit in a manner in which commercial banking operates. Arguably, SBT should not be applicable to this loan interest.

Initially, the Revenue Department has taken a position that any interest derived from any loan extended to an affiliated company is not subject to SBT provided that a specified shareholding is fulfilled. In other words, if a specified shareholding is not fulfilled then the SBT is applied to the interest derived from such loan.

Later, the Director-General of the Revenue Department also issued the Departmental Instruction No. Por 26/2534 Re Interest for Business with Regular Transactions Similar to Commercial Banking under Section 91/5(5) of the Revenue Code (the "Departmental Instruction") to instruct assessment officers not to impose SBT on an interest derived from a loan extended to another company in the same affiliated group insofar as the required shareholding is fulfilled.



However, a Departmental Instruction does not have a strong legal status in the eyes of tax law. To resolve Departmental Instruction's questionable status, the Royal Decree issued by virtue of the Revenue Code Regarding Specifying Business Exempt from Specific Business Tax (No. 571), B.E. 2556 (2013) (the "Royal Decree") was finally enacted on December 2013. The Royal Decree, which is legally binding, formally exempts SBT on the interest derived under the following three circumstances.

1. Loan to Affiliated Company

The interest derived from the loan extended by one company to another company in the affiliated group is exempt from SBT. The companies in the same affiliated group are defined as two or more companies or juristic partnerships related to one another because one of them holds not less than 25% of the total shares or the total partnership interest with voting rights in another for not less than six months prior to the date of loan. Any holding period of existing companies or partnerships that are merged (amalgamated) or any holding period of a transferor of an entire business shall be counted as well.

This means if a parent company wishes to extend a loan to its new subsidiary company in a tax free manner, the parent company must set up the new subsidiary and hold not less than 25% of the total shares in the new subsidiary company for at least six months prior to extending any loan.

2. Deposit at or Bill Issued by Financial Institution

Any interest derived by a company from a deposit at a financial institution (a commercial bank, a finance company or a credit foncier company) or a bill issued by a financial institution is also exempt from SBT.



Legality of Departmental Instruction

Strictly speaking, the legal status of the Departmental Instruction is not terribly solid. The Departmental Instruction is technically not law. It is not even considered a piece of subordinate legislation since the Revenue Code does not explicitly authorize the Director-General to issue the Departmental Instruction. The Departmental Instruction is only the instruction given to assessment officers by the Director-General.

The Director-General exercised the power under the administrative law to issue the Departmental Instruction. The assessment officers are obliged to comply with the Departmental Instruction issued by their superior under the administrative law, but it is not binding to taxpayers. Despite its non-binding status, the criteria laid down by the Departmental Instruction are persuasive and used by taxpayers to structure their loans to avoid specific business tax. Departmental Instruction's criteria are sometimes even cited by the Supreme Court in its decision.

3. Employee Savings Fund or Other Fund for Benefit of Employees

Any interest derived by a company from extending the money to the employees, either in an employee savings fund or any other fund for benefit of employees, is exempt from SBT provided that the company has the regulations for such fund.



Now that the Royal Decree has set the conditions for SBT exemption, it definitely gives an extra comfort to taxpayers who (plan to) avoid SBT without violating any law. With the proper tax planning, taxpayers can hope to reduce the overall tax bill and thus, to increase the company's bottom line.

This legal article was written by Narit Direkwattanachai, a corporate & tax attorney at NARIT & Associates with expertise in corporate tax and commercial dispute. He holds a bachelor of laws (1st class honors) from Chulalongkorn University, a master of law from the University of Cambridge, UK and an MBA in finance from the Georgia Institute of Technology, USA. He can be reached at narit@naritlaw.com

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