

DOUBLE INCOME TAXATION ON THAI REIT*

*Malyn Saengchote***

ABSTRACT

Real Estate Investment Trust or REIT was introduced to the Thai capital market since 2009 by the SEC, with its aims to replace to property fund. The new REIT structure lifted up some limitations on foreign investment which was previously restricted under the Property Fund structure.

REIT in Thailand is established in form trust which is not taxable entity under the Revenue Code. Hence, when Thai REIT invests in foreign country, there will be tax suffered in foreign country. Such tax suffered from foreign investment cannot be relieved under the Revenue Code as there is no provision of law allowing the REIT or the beneficiary of the REIT to access to double income tax relief. This leads to the discrimination between domestic and foreign investment. Such discrimination is contradicted to the intention of the Securities Exchange Commission to promote investment REIT.

This thesis, thus, aims to study on the problems of Thai tax law on the double income taxation relief provision and compare to the principles and practices of foreign legislation such as Australia, Singapore and Malaysia so as to analyze and propose amendment to the Revenue Code.

Keywords: REIT, Double income tax

บทคัดย่อ

ทรัสต์เพื่อการลงทุนในอสังหาริมทรัพย์ หรือ กองทรัสต์ นำมาใช้โดยสำนักงานคณะกรรมการกำกับหลักทรัพย์และตลาดหลักทรัพย์ (ก.ล.ต.) ตั้งแต่ปี พ.ศ. 2552 เพื่อเป็นทางเลือกใหม่ในการลงทุนในตลาดทุนของประเทศไทย โดยกองทรัสต์จะถูกนำมาบังคับใช้แทนกองทุนรวมอสังหาริมทรัพย์ปัจจุบัน กองทรัสต์นั้นเมื่อนำมาบังคับใช้ได้เข้ามาจำกัดข้อจำกัดต่างๆที่เดิมกองทุนรวมอสังหาริมทรัพย์ไม่อนุญาตให้กระทำ เช่น การลงทุนในต่างประเทศ

กองทรัสต์ จัดตั้งขึ้นรูปแบบทรัสต์ ซึ่งทรัสต์ไม่ถือเป็นบุคคลที่ต้องเสียภาษีตามประมวลรัษฎากร ดังนั้นเมื่อกองทรัสต์ไปลงทุนในต่างประเทศ กองทรัสต์ต้องเสียภาษีบนเงินได้ที่ได้รับจากการลงทุนในต่างประเทศ ภาษีที่เสียไปในต่างประเทศไม่สามารถขจัดหรือบรรเทาได้ เนื่องจากประมวลรัษฎากรไม่มีบทบัญญัติใดให้สิทธิแก่กองทรัสต์หรือผู้รับประโยชน์สามารถใช้สิทธิบรรเทาภาระภาษีซ้ำซ้อนดังกล่าว ภาระภาษี

* The article is summarized and rearranged from the thesis “Double Income Taxation on Thai REIT” Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2014.

** Graduate Student of Master of Laws program in Business Laws (English Program), Faculty of Law, Thammasat University

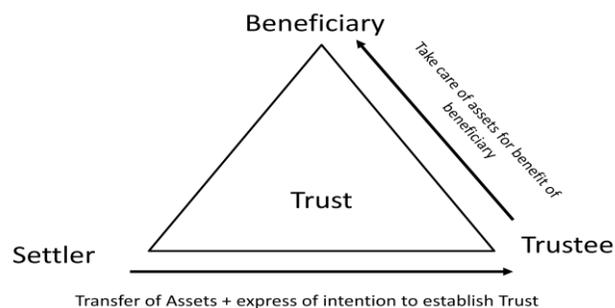
เข้าซื้อก่อนให้เกิดปัญหาความไม่เป็นกลางทางภาษีระหว่างลงทุนในประเทศและการลงทุนในต่างประเทศของกองทรัสต์ เนื่องจากการลงทุนต่างประเทศจะเกิดภาษีที่สูงกว่าการลงทุนภายในประเทศ อีกทั้งการภาษีเข้าซื้อขั้นต่ำต่อวัตถุประสงค์ของสำนักงานคณะกรรมการกำกับหลักทรัพย์และตลาดหลักทรัพย์ในการสนับสนุนการลงทุนผ่านกองทรัสต์

ดังนั้น วิทยานิพนธ์ฉบับนี้ จึงมุ่งศึกษาถึงปัญหาของกฎหมายภาษีของไทยในการบรรเทาภาษีเข้าซื้อที่เกิดขึ้นจากการลงทุนผ่านกองทรัสต์ และศึกษาเปรียบเทียบกับหลักกฎหมายต่างประเทศ อาทิ ออสเตรเลีย สิงคโปร์ และมาเลเซีย เพื่อนำมาวิเคราะห์และเสนอแนวทางแก้ไขประมวลรัษฎากรต่อไป

Introduction

“Trust” was first introduced by the Securities Exchange Commission (SEC) through the Trust for Transactions in Capital Market Act, B.E. 2550 (2007). Later, the SEC adopted trust structure as alternative investment vehicle for immovable property investment in capital market¹, called Real Estate Investment Trust (REIT). After years of implementing Property Fund structure, the SEC found some limitations to development in immovable property through the Property Fund i.e. the limitation on foreign investment, capability to the leverage and most importantly to promote the immovable property investment in Thai capital market². According to research by the SEC, they found that trust structure is widely used by most countries.

The REIT model which the SEC adopted and applied to Thai REIT is a trust structure. The trust are established from trust deed which identifies the relationship between trustee whose acts similar to agent of beneficiary appointed to manage and interest incurred in the REIT on beneficiary’s behalf and the custodian of the assets under REIT. REIT is subject to limitation on investment whereby it can only or majorly earn income from letting the immovable property³. Please see the illustration of trust structure below;



¹ The Securities and Exchange Commission, **SEC has approved to establish Real Estate Investment Trust**, available at http://www.sec.or.th/th/Pages/News/Detail_News.aspx?tg=NEWS&lg=th&news_no=72&news_yy=2553 (last visited Aug 2, 2015)

² Telephone Interview with the officer rank at the Deputy Director, Securities-Capital market registration Department, *The Securities Exchanges of Thailand*. (Jun. 24, 2015)

³ William A. Kelly, **Real Estate Investment Trust Handbook**, 72, (2nd, ALI-ABA, 1998).

With regard to the tax implications on REIT structure, the ideal concept of REIT is to achieve neutrality between direct investment in immovable property and indirect investment through REIT, which leads to tax collecting concept known as “pass-through”. Most countries apply “pass-through” or “single-tier tax system” concept to its REIT structure. According to the pass-through regime, it normally levies tax at investors’ level only. To attain such goal, the REIT may provide the tax exemption at REIT’s level. In Thailand, it also adopts the “pass through” or “single-tier system”.

As previously discussed, Thai REIT was introduced to eliminate certain limitations on property fund structure including the limitation to foreign investment. Thereby, Thai REIT is permitted to hold foreign assets and derive foreign income. To achieve tax neutrality policy, the tax treatment of REIT should not discriminate between foreign investments and domestic investment (i.e. foreign income is treated at a par with domestic income). However, double taxation issues generally arise in connection with source country taxing right over the REIT income derived from direct or indirect investment in situs state immovable property. Thus, relief for source country taxation becomes crucial for avoiding (or alleviating) double taxation, provided that if the income is not taxed at REIT level, relief in the REIT residence country may not be enjoyed. Then, there should be provision of law to remedy and obviate the double income taxation for foreign tax paid. The methods provided to relieve the double taxation are⁴:

- (1) Creditable on foreign source income; and
- (2) Exempt income on foreign source income

In summary, the double income taxation from foreign investment by the REIT may occur from the treatment that foreign taxes are dealt with in the REIT residence country creates a disincentive to invest in a foreign jurisdiction. In that foreign investments may be subject to a higher overall tax burden.

Problem

As discussed, the double income tax problem will be arisen where the REIT invest in foreign country. Under the Revenue Code, it does not provide a tax relief to juridical and economical double taxation to the investors of Thai REIT. Such tax discrimination results to higher and unfair tax cost compared to direct domestic investment is an obstacle to promote Thai REITs as per the SEC’s intention.

Please see below the illustration of tax cost summary of the investors of Thai REIT compared between domestic investment and foreign investment.

⁴ Wolters Kluwer Law and Business edited by Stefano Simontacchi and Uwe Stoschek, **Guide to Global Real Estate Investment Trusts**, General Report 7- 20, (Kluwer Law International, 2012).

	Domestic Investment	Foreign Investment
Rent	100	100
Tax on income in foreign country (WHT on rent is 25%)	-	25
Income received at REIT	100	100
Tax payable at REIT level	0	0
Tax on profit sharing	10	10
Net income received	90	65
Summary of tax cost	10	35

As illustrated above, when Thai REIT invests in assets located in foreign country and derives income from the investment in foreign country, such income will be taxed twice, firstly 25 percent tax in source country where the assets is located and tax in Thailand at the rate of 10 percent. The income which is so derived and repatriated to Thailand included the tax suffered in foreign country which will not able to relieve under the Revenue Code.

As a result, the tax cost from foreign investment through REIT received by the investors is higher compared to domestic investment. The investors in Thai REIT may discourage from an investment in Thai REIT if the REIT choose to invest in foreign immoveable property. Such discouragement contradicts to the intention of the SEC who aims to promote the investment in immoveable property in capital market through REIT.

Analysis of Legal Status of REIT

Thai REIT is established in form of Trust.⁵ In accordance with the Trust for Transactions in Capital Market Act, B.E. 2550 (2007), the trust shall be organized by trust deed. Trust deed refers to a contractual arrangement between settler and trustee where settler transfer assets or interest in assets to trust. Under the term of agreement, trustee shall have duty of care and fiduciary duty to manage benefits for the other person called beneficiary⁶.

From the interpretation of the law, REIT or Trust is not juristic entity as it is established from contractual relationship between settler, trustee and beneficiary based on fiduciary duty for a purpose of assets management. Trust is not personally liable to the third or any party due to lack of juristic status. However, the trustee who is basically a juristic person (licensed company), holds legal interest in trust on behalf of beneficiary, is generally directly liable to the third party according to the contract law while trustee is liable to the beneficiary to the beneficiary according to the breach of trust.

Regarding to the Civil and Commercial Code, the relationship between settler, trustee and beneficiary are similar to the agency law provided that “the agency are established from the contract whereby a person, called the agent, has authority to act for another person, called the

⁵ The Securities and Exchange Commission no. Kor Khor. 8/2552, Article 1 (1) (b).

⁶ The Trust for Transactions in Capital Market Act, Section 3 and 11, (2007)

principal, and agrees so to act.”⁷. Such contractual relationship between trustee and settler and beneficiary are established under the scope of authorization given in trust deed. The trustee shall act on behalf of the settler or beneficiary based on fiduciary duty. Under the fiduciary duty, the agent shall take it necessary care within the authority given by the principal to act as the principal and protect interest of the principal. This leads to the liabilities from the agent to the principal. This similar concept applies to the trustee and beneficiaries where the trustee may be deemed as agent of the beneficiary to protect and management interest of the beneficiary, arising from assets in trust. Thereby, the trustee shall then be liable to the beneficiary if in any how the trustee breaches of trust. The liabilities from the agent to the principal are stipulated in section 812 of the Civil and Commercial Code states that “The agent is liable for any injury resulting from his negligence or non-execution of agency, or from an act done without or in excess of authority”.

Furthermore, the Civil and Commercial Code stipulates the principal is bound to the third persons by the acts which the agent or the subagent has done within the scope of his authority by virtue of his agency⁸. Thereby the agent shall be personally liable to the third party only when the agent act outside scope of authority given by the principal. Such liabilities to the third party shall occur from 2 main causes which are⁹ 1) wrongful act; and 2) breach of contract.

This thesis studies on the liabilities of trustee under the Trust for Transactions in Capital Transaction Act B.E. 2550, the Act specified that “in cases where a trustee fails to manage the trust in accordance with the trust instrument or this Act, the trustee shall be liable to indemnify the trust”¹⁰. According to the law, it can be inferred that trustee is appointed under the trust deed and the trust deed gives authority to trustee therefore the trustee shall only be act within the scope specified under the trust deed, otherwise the trustee shall liable to the beneficiaries for any damages incurred thereto.

Trust arrangement seems to adopt the agency concept, thereby; the trustee shall have liabilities similar to agent. Trust arrangement has adopted the agency concept provided that the beneficiary who is the principal gives authority to trustee under the trust instrument to manage and its assets for a benefit of the beneficiary.

Moreover, the trust is not a partnership under the Civil and Commercial Code. Seeing that according to the Civil and Commercial Code, there are 2 main elements to constitute a “Partnership”, there are;

- 1) A contractual relationship between two or more persons;
- 2) The purpose is uniting for sharing the profits.

The same as joint venture, Thai Commercial law does not provide the definition of provided that the definition of “Joint Venture”. However, the term is usually refer to a

⁷ The Civil and Commercial Code. Section 797, (2008).

⁸ The Civil and Commercial Code. Section 820. (2008).

⁹ ศาสตราจารย์ ดร.ไพฑูริศ เอกจริยกรม, ตัวแทนหน้าหน้า, (Professor Phatai-chit **Akechariyakrom, Agency – Brokerage**, 185, (10th edition, 2010), Winyuchon Publication House Co., Ltd.

¹⁰ The Trust for Transactions in Capital Market Act. Section 43. (2007).

contractual relationship between 2 or more persons whereby agree to invest and operate business together, for a purpose of sharing benefits from such business¹¹.

Trust, though is constituted from a contractual arrangement but the purpose of trust is different from the purpose of partnership as the trust is a contractual arrangement between 3 parties whereby one party (Settler) transfer its assets to another person (Trustee) to hold for another person (Beneficiary)'s behalf. The purpose of the trust is a contract for the benefit of the third party.

In summary, trust is not a juristic person under Thai commercial law, thereby, trust, itself, shall not be personal liable. Furthermore, this thesis found that the juristic rationale of trust is similar to the law of Agency under the Thai Civil and Commercial Code as both agency law and trust is constituted form contractual arrangement between the parties whereby one party authorize the other party to act on its behalf. Any act performed under the scope of authorization shall be bound to such party; however, the agent or trustee shall have duty of care and fiduciary duty to the principal.

As per above legal analysis, trust which is not a juristic entity, shall not be a taxable entity under the Revenue Code. Hence, the trust or REIT is not subject to income tax and trust will not be entitled to the double income tax relief given by the Revenue Code. The investor of the REIT or the beneficiary shall then be a person who is liable to tax on the income received from the investment as the beneficiary has economical interest in such incomes. If there is tax suffered from foreign investment, the beneficiary shall be entitled to relief; however, the Revenue Code currently does not give such entitlement to the beneficiary of the REIT.

Double Income Tax Relief in Foreign Countries

1) Credit Method

In some countries like Australia gives the foreign tax credit to the REIT's investors. Australia REIT or A-REIT is established in form of trust and generally treated as tax transparent entity for Australian tax purposes¹². Australian tax law allows trust to apply for 'flow-through' status (subject to certain conditions i.e. annually distribute of its income and qualify as Managed Investment Schemes regulated under Corporation Law, Division 6 of the ITAA 1936). As a result of qualifying as flow-through regime, the beneficiary will be taxed on the REIT's taxable income according to the 'attribution system'*.

The trustee is not liable to tax on the trust's taxable income. The unit holders are presently entitled to the REIT's income at the end of the year. In the case where REIT earned

¹¹ ศาสตราจารย์พิเศษ โสภณ รัตนากร, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วย หุ้นส่วนและบริษัท, (Professor Sophon Rattanakorn, **The Explanation of Civil and Commercial Code on Partnership and Company**, 47, (12th edition, 2010), Nitibannagarn Publication House Co., Ltd.

¹² Australian Government, Australian Taxation Office, **Trust**, available at <https://www.ato.gov.au/General/Trusts/>, (last visited Aug 2, 2015)

* 'Attribution' system is system where the taxable income of the trust will not be taxable in the hands of the trustee provided that the trustee has allocated all of the taxable income of the trust to the unit holders on a 'fair and reasonable basis'.

foreign source income from investment in foreign country, the foreign source income shall be included into REIT's income. If the income had been suffered from tax paid in foreign country in relation to income, the beneficiary shall be allowed to utilize the foreign income tax offset in respect of tax paid in foreign country¹³. To be eligible to the foreign income tax offset, the following conditions must be satisfied;

- (1) The tax must have actually paid, or deemed to have paid;
- (2) The foreign tax imposed under a foreign law, regardless of whether it is imposed at a supranational, national or supranational level;
- (3) The foreign tax imposed on the taxpayer's income, profits or gains or be covered by one of Australia's double tax agreements;
- (4) The income or gain on which you paid foreign income tax must be included in taxpayer's assessable income for Australian income tax purposes.

To claim for foreign income tax offset, the taxpayer must record the actual amount of foreign income tax paid; however, such Foreign Income Tax Offset shall be limited to the Australian tax payable on taxable income for the year. As a result of tax limit, the tax payable in Australia will be reduced to limit. Any foreign income tax paid excess of the limit is not available to be carried forward to a later income tax year and cannot be refunded.

By giving foreign tax credit, it will consequently reduce the tax cost from foreign investment to the domestic rate or in at least to foreign tax paid, if the tax in foreign country is higher than domestic rate.

2) Tax Exemption

Other than the tax credit method, some countries such as Malaysia and Singapore adopt the exemption method to relieve the double income tax from foreign investment of the resident REIT. Malaysia and Singapore both impose tax on territorial basis provided that only the income attributable to the Malaysia and Singapore source is subject to tax in that country. The income derived outside Malaysia and Singapore is exempted from tax.

With regard to REIT characteristic on tax perspective, Malaysia and Singapore are similar provided that both countries have flow-through or tax transparency status is subject to certain conditions. By applying flow-through regime, the tax will not be levied at REIT level instead it will be levied at beneficiary's level.

Seeing that Malaysia and Singapore collect tax on territorial basis then income derived in or deemed in derived Malaysia and Singapore are subject to tax in such country. Foreign sourced income earned by a REIT is generally not taxable in Malaysia. Moreover, under Malaysian tax law, foreign source income earned by the REIT will retain its character when it is distributed to its unit holders and there is no withholding tax apply on such distributions whilst in Singapore, unit holders who receive distributions made by REIT from the exempted income (foreign source

¹³ The Income Tax Assessment Act, Section 6B. (1936) and the Income Tax Assessment Act, Section 770-130. (1997).

income) under Section 13(8) or one-tier tax exemption dividend under 13(12) of the Income Tax Act, the distributions shall also be exempt from tax at hand of the beneficiary.

Thanks to the generosity of both countries, they voluntarily provide tax exemption to foreign source to relief double taxation incurred from investment abroad. Thereby, the tax cost occurred in foreign country will only be the tax cost arising in country where M-REIT or S-REIT invest. This provision should encourage the investors to invest abroad. Unlike the foreign tax credit method which is ultimately neutral the tax burden between domestic investment and cross border investment.

Please see below comparison of summary tax cost from different approaches

	No relief	Tax Exemption	Foreign Tax Credit
Foreign Income received from investing in foreign country	100	100	100
Tax on income in source country (25%)*	25	25	25
Income received at REIT	75	75	75
Tax payable in REIT level	0	0	0
Net income received at unit holder	100	75	100
Tax payable at unit holder level (10%)	10	Exempt	10
Foreign tax credit	0	0	(10-25)
Net tax payable	10	0	0
Net cash received	65	75	75
Summary of tax cost	35	25	25

* Assuming that the withholding tax in foreign country is 25 percent

** There is no tax at REIT level.

*** Withholding tax at 10 percent on profit sharing from REIT

Conclusion and Recommendations

Based on this thesis analysis, this thesis found that Thailand should amend Thai tax law to allow the beneficiaries of Thai REIT to be entitled to foreign tax credit which suffered from foreign investment by adopting Australian tax regime as a model. This thesis choose Australia as it has similar legal framework and tax system to Thailand and effectively impose the foreign tax credit method to relief the double taxation. While Malaysia and Singapore both have different tax system to Thailand provided that and Thailand does not seek to collect tax territory basis. In addition, Malaysia and Singapore both have aggressive promotion on inbound and outbound investment by introducing a lot of tax incentives. However, if Thailand wishes to compete on

promoting investment on REIT with Malaysia and Singapore, the tax exemption method will be more preferred.

This thesis proposed to amend the Revenue Code. The amendment will allow the investors to utilize the foreign tax credit against income received from REIT. The Revenue Department may consider proposing an amendment to the Royal Decree 533 by including the provision to relieve the tax suffered in foreign country to beneficiary of Thai REIT.

Currently, the Royal Decree No. 533 issued for purpose to eliminate the double taxation occurred from the transactions in trust structure as well as provide Value Added Tax, Specific Business Tax and Stamp Duty exemption to settler, trustee and beneficiary. However, the double income taxation exemptions provided in the provision does not cover to foreign source income received by the beneficiary of Thai REIT. The Revenue Department may consider extend the scope of foreign tax credit to the beneficiary of the trust.

REFERENCES

Books

Kelly, William A. Real Estate Investment Trusts Handbook: ALI-ABA, 1998.

Wolters Kluwer Law and Business edited by Simontacchi, Stefano., and Stoschek, Uwe. **Guide to Global Real Estate Investment Trusts**: Kluwer Law International, 2012.

ศาสตราจารย์พิเศษ โสภณ รัตนากร. คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ว่าด้วย หุ้นส่วนและบริษัท.(Professor Sophon Rattanakorn, The Explanation of Civil and Commercial Code on Partnership and Company: Nitibannagarn Publication House Co., Ltd, 2010

ศาสตราจารย์ ดร.ไพฑูริศ เอกจริยกรม. ตัวแทนนายหน้า. (Professor Phatai-chit Akechariyakrom. Agency – Brokerage). Winyuchon Publication House Co., Ltd., 2010

Electronics Media

The Securities and Exchange Commission. “*SEC has approved to establish Real Estate Investment Trust*”,

<http://www.sec.or.th/th/Pages/News/Detail_News.aspx?tg=NEWS&lg=th&news_no=72&news_yy=2553> (accessed August 2, 2015)

Australian Taxation Office. “Trust,” <<https://www.ato.gov.au/General/Trusts/>> (accessed August 2, 2015)

Interviews

The SEC officer rank at the Deputy Director, Securities-Capital market registration Department, the Securities Exchanges of Thailand. Interviewed by Malyn Saengchote, Bangkok, Thailand. Jun. 24, 2015