

# **CORPORATE INCOME TAXATION ON CROSS-BORDER LEASING\***

*Kornrapat Laosakulthai* \*\*

## **ABSTRACT**

Under the Thai Revenue Code, other relevant laws and regulations, cross-border leasing business can gain the tax benefits only in the form of tax depreciation. This tax depreciation is unable to attract and facilitate the export of cross-border leasing transaction. Thailand's corporate income taxation on cross-border leasing still does not provide the adequate provision for granting a tax incentive to the export of cross-border leasing to the lessee in ASEAN member countries as well as measures to control a use of corporate income tax incentive accurately.

Therefore, this article presents the study of the corporate income taxation on cross-border leasing to illustrate in two issues: 1) tax incentive for the export of cross-border leasing to the lessee in ASEAN member countries; and 2) measures to control the use of such tax incentive under Thai laws.

**Keywords:** cross-border leasing, corporate income tax, lease, leasing, net operating loss, tax incentive

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\*\* Graduate student of Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University, 2015.

## บทคัดย่อ

ภายใต้ประมวลรัษฎากร กฎหมายและกฎระเบียบที่เกี่ยวข้องอื่นๆ ธุรกิจลีสซิ่งระหว่างประเทศสามารถใช้ประโยชน์ทางภาษีจากการเฉพาะในรูปแบบของการหักค่าเสื่อมราคานั้น ซึ่งค่าเสื่อมราคานี้ไม่อาจดึงดูดและส่งเสริมการส่งออกของธุรกรรมลีสซิ่งระหว่างประเทศได้ การภาษีอากรในลีสซิ่งระหว่างประเทศของประเทศไทยจึงหันมาริบเดิมให้มีช่องบันยูบูติเพื่อเหมาะสมในการให้ ลิทธิประโยชน์ทางภาษีอากรสำหรับการส่งออกของลีสซิ่งระหว่างประเทศไปยังผู้เช่าในประเทศสมาชิกอาเซียน รวมทั้งมาตรการควบคุมการใช้ลิทธิประโยชน์ทางภาษีเงินได้อ้างอิงด้วย

บทความนี้จึงได้ศึกษาการภาษีอากรในลีสซิ่งระหว่างประเทศเพื่อแสดงให้เห็นถึงปัญหานี้ในสองประเด็น ได้แก่ 1) ลิทธิประโยชน์ทางภาษีอากรสำหรับการส่งออกของลีสซิ่งระหว่างประเทศไปยังผู้เช่าในประเทศสมาชิกอาเซียน และ 2) มาตรการควบคุมการใช้ลิทธิประโยชน์ทางภาษีอากรดังกล่าวภายใต้กฎหมายไทย

คำสำคัญ ลีสซิ่งระหว่างประเทศ ภาษีเงินได้นิติบุคคล ลิส ลีสซิ่ง ขาดทุนสุทธิจากการดำเนินงาน ลิทธิประโยชน์ทางภาษีอากร

## **CORPORATE INCOME TAXATION ON CROSS-BORDER LEASING**

Nowadays, domestic leasing market of Thailand has been growing up. There is a high competition among leasing companies, both the companies established under Thai laws, and the companies set up under the laws of foreign countries and carrying the leasing business in Thailand. The leased assets provided by these companies comprise of the vehicle (auto lease), machinery and equipment. Many major leasing companies still provide a domestic leasing as their services mainly focus on the auto lease which requires an ownership registration. In a case of cross-border leasing, equipment is a better option as most of them are moveable and do not require a registration. Moreover, the Association of Southeast Asian Nations (ASEAN) has established the ASEAN Economic Community (AEC) since December 31, 2015. The whole region is going to transform into a single market. Investment, service, and flow of capital move

more freely.<sup>1</sup> It is an excellent opportunity for leasing companies in Thailand to export this service to a lessee in the ASEAN member countries. The outbound income from the cross-border leasing will transfer to be a corporate income tax, which is the government's revenue for using as its expenditure and another purpose, such as distributing income, facilitating business growth, and maintaining economic stability.<sup>2</sup>

### **Definition of Cross-Border Leasing**

A lease or leasing is an agreement whereby the lessor leases out an asset to the lessee upon the lessee's desire. In a term of cross-border leasing, both the lessor and the lessee are located in different countries. The lessor will purchase an asset upon the lessee's request at his cost from a supplier or an exporter, then leases out the asset to the lessee. After that, the asset will be delivered to the lessee's place by the supplier or exporter. The lessor provides the lessee a right of possession and a right to use an asset for a particular term. In this regard, the lessee remunerates the lessor by installments of lease rents. The lessor will get the profits from the interest built into the calculation of the lease rents.<sup>3</sup> In addition, there is no any requirement of security since the asset itself is a security. Sometimes it is determined as a secured loan.<sup>4</sup> At the expiration of the lease term, the lessee will be entitled to purchase or return the leased asset to the lessor. The lessee can reserve his capital as he obtains one hundred percent financing from the lessor. Currently, there are two main types of leasing. One type is a finance lease, and another one type is an

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<sup>1</sup> "ASEAN Economic Community", available at <http://www.asean.org/communities/asean-economic-community>.

<sup>2</sup> Group of Tax Scholars, **Taxation According to Revenue Code 2014** 1 (2014).

<sup>3</sup> David Wainman, **Leasing** 16-17 (1991).

<sup>4</sup> David Wainman, *supra* note 3, at 2.

operating lease.<sup>5</sup> The classification of lease sometimes includes sale-type lease and leveraged lease.<sup>6</sup>

## **Corporate Income Taxation**

Corporate income taxation on cross-border leasing is similar to other businesses. Income derived from this transaction must be computed on a net profit basis. In details, there are some differences from other business as follows:

### **1) Lease Characterization**

According to the Revenue Department Ordinance No. Tor. Por. 4/2528,<sup>7</sup> and the Ministerial Regulation No.144,<sup>8</sup> ‘renting the asset by leasing’ means a rental agreement whereby the lessor who is the owner of the asset and rents out with a promise that the lessee has the right to purchase the leased asset or to return said asset to the lessor. This meaning reflects a concept of legal ownership that focuses on ownership holder. However, the term of cross-border leasing is not defined under the Thai Revenue Code or other relevant laws.

### **2) Lessor as Taxpayer**

The lessors as juristic persons are subject to the corporate income tax liability, according to Section 39 of the Thai Revenue Code. Some of

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<sup>5</sup> FLA, “*Types of Leasing*”, available at <http://www.flas.org.uk/business/types-of-leasing>.

<sup>6</sup> Comptroller of the Currency, **Lease Financing Comptroller’s Handbook January 1998** 10 (1998).

<sup>7</sup> Revenue Department Ordinance No. Tor. Por. 4/2528 (1985) for ordering the payer of assessable income under Section 40 who have to withhold tax by the virtue of Section 3 *tredecim* of the Revenue Code.

<sup>8</sup> Ministerial Regulation No.144 (B.E. 2522) Issued Pursuant to the Revenue Code regarding the Revenue Tax.

them are a company incorporated under Thai laws in a form of a limited company or a public limited company. Some other lessors are a company incorporated under foreign law that carrying a leasing business in Thailand. A limited partnership and a registered partnership can also be a lessor. Other lessors may include a company or juristic partnership incorporated under foreign law which has an employee or a representative or a contact person in carrying on its business in Thailand and receives the profits in Thailand, a business that a foreign government, organization of a foreign government or any other juristic person established under a law of foreign country operates commercially or profitably, and a joint venture.

### **3) Income Recognition**

The lessor is subject to a corporate income tax liability on a net profit basis, according to Section 65 paragraph 1 of the Thai Revenue Code. The computation applies an accrual basis under Section 65 paragraph 2 of the Thai Revenue Code. All lease rents and expenses related to such lease rents arising during accounting period of twelve months,<sup>9</sup> even the lessor has not received in such accounting period yet, must be deemed as income and expenses for that particular accounting period. Also, Article 3.4 of the Revenue Department Ordinance No. Tor. Por. 1/2528<sup>10</sup> provides that these incomes and expenses in each accounting period shall be calculated according to the portion of the lease term.

### **4) Net Profit Computation**

Under Section 65 of the Thai Revenue Code, the lessor shall pay a corporate income tax under the net profit basis calculated by

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<sup>9</sup> Except in the some cases where it may be less than twelve months, *see* Thai Revenue Code, Section 65 paragraph 1.

<sup>10</sup> Revenue Department Ordinance No. Tor. Por. 1/2528 (1985) Re: Application of Accrual Basis in Computation of Income and Expense of Company or Juristic Partnership.

deducting income arising from leasing business carried on in an accounting period with expenses. The lessor's computation must comply with the conditions under Section 65 *bis* regarding deductible expenses, and Section 65 *ter* which is related to the prohibited expenses. After computing the net profits, the lessor shall multiply such net profits by the tax rate for a corporate income tax to be paid and file a tax return for the accounting period.

This net profit computation has some exemptions in a case of outbound income. The lessor who has paid his income tax in another country can use such paid taxes as a tax exemption against the corporate income tax to be paid in Thailand. This includes a lease rent paid by the lessee in ASEAN member countries in Brunei Darussalam and Cambodia to the lessor in Thailand. In the case of remaining ASEAN member countries that Thailand has a double tax agreement (DTA) with, lease rents are determined as royalties. The royalties paid to Thai lessor shall be charged not exceeding 15 to 25 percent of the amount of the royalties. Both cases can use as a tax credit under the criteria and conditions of the Royal Decree No.300 and Proclamation of Director-General No.65, but up to the amount of tax that would have been payable from income derived in Thailand.<sup>11</sup>

## **5) Tax Depreciation on the Leased Equipment**

In the cross-border leasing, the lessor has a legal ownership over the leased equipment so that the lessor can deduct the depreciation and depletion on the leased equipment as other assets, according to Section 4 (5) of Royal Decree No.145<sup>12</sup> so that the allowable deduction rate is at 20% of the capital cost per one accounting period, totaling at rate of 100% for five accounting periods. It will be

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<sup>11</sup> See Royal Decree No.300 and Proclamation of Director-General No.65.

<sup>12</sup> Royal Decree Issued Pursuant to the Revenue Code regarding the Depletion and Depreciation of the Asset (No.145) B.E. 2527 (1984).

computed on an average of time in acquiring in each accounting period. The lessor can adopt both straight-line and the double-declining method, but the useful life of the asset shall not be less than 100 shared by the rates stipulated in Section 4 paragraph 1 of Royal Decree No.145.

#### **6) Net Operating Loss Treatment**

A net loss or net operating loss (NOL) is incurred when the expense exceeds the income. In a case that the lessor acquires hugh amount of equipment for cross-border leasing transaction and deducts the tax depreciation, it might result in a net loss. Thus, the lessor can carry such net loss forward for five years from the present accounting period, according to the exception of Section 65 *ter* (12).

#### **7) Withholding Tax of Lease Rent**

According to Article 6, Paragraph 1 of Revenue Department Ordinance No. Tor. Por. 4/2528, a juristic person who pays money or any other gain derived from a rent of property, an assessable income under the Thai Revenue Code, Section 40 (5) (a), to the juristic lessor carrying a leasing business in Thailand, shall deduct the withholding tax at a rate of 5.0%. Subject to Paragraph 2 of the Article 6, in case that the lessor having a paid-up capital of sixty million Baht upwards is a vat-registered business person,<sup>13</sup> and a lessee is a juristic person with the lease term exceeding three years, a lessee shall not deduct a withholding tax as imposed. Moreover, the term of ‘leasing’ shall be defined as prescribed in paragraph 3 of the Article 6. This exemption is not applied to the cross-border leasing transaction since this transaction is carried outside of Thailand.

Nevertheless, the provisions of Paragraph 2 and 3 of the Article 6 were repealed by Article 1 of the Revenue Department Ordinance

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<sup>13</sup> According to Thai Revenue Code, Section 82/3.

No. 259/2559 (2016).<sup>14</sup> Therefore, upon Article 2 of this Ordinance, the lessee shall deduct the withholding tax at the rate of 5% of every payment of the lease rent. It has come into force on the assessable income (lease rents) since June 1, 2016.

### **8) Penalties and Punishment**

After submitting a tax return, assessment by the Thai Revenue Department may be required. This assessment is a legal enforcement to control the lessors to comply with the Revenue Code and relevant regulations. In the case of intentionally attempting to evade or defeat tax, a person shall be either fined not exceeding 200,000 Baht or imprisoned not exceeding one year, or both, according to Section 37 of the Thai Revenue Code. In the case of intentional notifying, giving, or answering a false statement, or showing false evidence with a tax evasion purpose, a person shall be either imprisoned for three months to seven years and pay penalties from 2,000 to 200,000 Baht, according to Section 37 of the Thai Revenue Code. These imprisonments and penalties also apply to the attempt to evade tax by using false facts, fraudulent, artifice or other similar nature.

### **Conclusions**

In the computation of net profit, the leasing company can deduct the principal in the form of depreciation at the rate of 20% of capital equipment for an accounting period, as it is determined to be other assets. It affects the cash flow of leasing companies in financing other lessees. Because of a time value of money,<sup>15</sup> the faster a leased asset

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<sup>14</sup> Revenue Department Ordinance No. Tor. Por. 259/2559 (2016) Re: Order the Payer of Assessable Income under Section 40 of Revenue Code to have Withholding Tax Liability.

<sup>15</sup> Time value of money or in shortly TVM is a concept in respect of money. The money at present time has a greater value than the same amount in the future because of its potential earning capacity..

can be depreciated, the greater the tax advantage of the leasing company.<sup>16</sup> It results as money to invest new equipment since cross-border leasing requires a high amount of cash flow to invest in new equipment. Therefore, Thailand should improve existing Thai laws and regulations in respect of corporate income taxation to promote the export of cross-border leasing service by increasing the rate of tax depreciation. NOL carryforward period of five years should also be extended for the remaining NOL after such five years. Finally, Thailand should improve provisions to provide stronger measures in controlling of the use of tax incentive, such as higher penalties and punishment, investigation system, and exchange of information with other countries, and should provide a registration system for leasing business, both domestic and international leasing transactions to support the controlling measures effectively.

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<sup>16</sup> Eugene F. Brigham & Michael C. Ehrhardt, **Financial Management: Theory & Practice** 788 (14th ed. 2014).

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