



# Thailand: *Legal Developments*

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## TAX INCENTIVES FOR REGIONAL OPERATING HEADQUARTERS

by Sriwan Puapondh



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The Thai government is continuously looking for ways to promote and expedite the economic recovery of Thailand. The most recent one, which was approved by the Cabinet on December 11, 2001, is the new tax incentive scheme aimed at attracting foreign entities to establish their regional operating headquarters (ROH) in Thailand. The new scheme is more attractive than the one currently offered to ROH by the Board of Investment and is expected to be very competitive with the schemes of other countries in the region, such as Singapore and Malaysia.

The term "regional operating headquarters" means a juristic company or partnership incorporated under Thai law that renders qualifying services to affiliated juristic companies or partnerships or branches, whether situated in or outside Thailand.

The term "qualifying services" means services provided by the ROH which include management services, technical

services, and various support services in respect of general administration, business planning and coordinating, procurement of raw materials and components, research and development of products, technical support, marketing control and sales promotion planning, personnel management and training in the region, financial advisory services, economic or investment research and analysis, credit control and administration, etc.

The term "affiliated juristic companies or partnerships" under this tax scheme is defined as juristic companies or partnerships related to the ROH in any of the following ways:

- One juristic person is a shareholder or partner holding not less than 25% of the value of the entire capital of the ROH, or vice versa.
- One juristic person that is a shareholder or partner holding not less than 25% of the value of the entire capital of the ROH is also a shareholder or partner holding not

less than 25% of the value of the entire capital of another juristic person.

- One juristic person has the power to control the management and supervise the business operation and administration of the ROH, or vice versa.
- One juristic person that has the power to control the management and supervise the business operation and administration of the ROH also has the power to control the management and supervise the business operation and administration of another juristic person.

Under the new tax scheme, tax incentives are granted to both the ROH and its expatriate employees with conditions attached to such granting.

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## THAI ELECTRONIC TRANSACTIONS ACT

by Pascale Prud'homme



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On October 18, 2001 the Thai Parliament gave its final endorsement to the Electronic Transactions Act (the "Act"). The Act will come into effect on April 3, 2002, one hundred twenty days after its publication in the Government Gazette on December 4, 2001.

The Act shall govern both civil and commercial transactions made electronically with few exceptions, as shall be prescribed by a Royal Decree to be adopted pursuant to the Act, and provided that it shall not override laws and regulations intended for consumer protection.

Under the present system, electronic signatures are not yet recognized as valid and binding signatures. The Act takes care of that problem in addition to providing the legal framework necessary to support electronic transactions and documents.

The Act, which is based on the UN Model Law on Electronic Commerce (1996) and on Electronic Signatures (2001), is divided into six chapters.

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## **Chapters 1 and 2: Electronic Transactions and Electronic Signatures**

Chapters 1 and 2 were mainly inspired by the UN Models with a few substantial changes. Chapter 1 embodies the fundamental principle whereby data messages – i.e. information generated, sent, received, stored or processed electronically such as EDI, e-mail, telegram, telex or facsimile – shall be treated as paper documents. It also addresses the issues of electronic signatures and documents and provides for their legal effectiveness as well as their admissibility as evidence before Thai courts.

The Act is “technology neutral” in that it does not require signatures to be made or documents to be retained through the use of a specific technology.

Under the Act, a document shall be deemed signed if the method used can identify the originator and confirm that the originator approved the content of the document. The method used must be appropriately “reliable” with due regard for all circumstances, including any agreement between the originator and the addressee. Like the UN Model, the Act states that an electronic signature shall be deemed reliable if “. . . (1) the signature creation data are, within the context in which they are used, linked to the signatory and to no other person; (2) the signature creation data were, at the time of signing, under the control of the signatory and of no other person; (3) any alteration to the electronic signature made after the time of signing is detectable; and (4) where

*a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.”*

Similarly, electronic documents may be presented or retained as originals provided that a “reliable” method is used for assuring the integrity of the information and that such information can be subsequently displayed.

The Act allows for different methods of electronic signatures or storage provided that their reliability can be demonstrated. While such technological neutrality is important in order to keep the Act from being outdated by new technologies, it does bring some uncertainty as users must first assess the legal effectiveness of a specific method. With a view to bring security, the Thai legislature added a provision whereby electronic transactions made in accordance with such security procedure as shall be prescribed by a Royal Decree shall be deemed reliable. At the time of writing, the Royal Decree was still in the drafting stage.

Chapters 1 and 2 also contain sections on contract formation and validity; attribution of data messages; retention of documents; acknowledgment of receipt; time and place of dispatch/receipt of data messages; admissibility of data messages as evidence before Thai courts; rules of conduct for the signatory, the certification service provider, and the relying party; and the recognition of foreign signatures and certificates.

## **Chapter 3: Businesses Providing Services Related to Electronic Transactions**

Under the Act, there are no licensing requirements for electronic transactions-related service providers. A person has the right to provide any such services without having to notify or obtain a specific license from the authority concerned. However, a Royal Decree may be issued requiring a service provider to notify, register, or obtain a license before providing electronic transactions-related services.

## **Chapter 4: Electronic Transactions with the Public Sector**

Electronic transactions made with the public sector in accordance with such rules and procedures as shall be prescribed by a Royal Decree would fall under the application of the Act.

## **Chapter 5: Electronic Transactions Commission**

An electronic transactions commission is to be established pursuant to Chapter 5 of the Act with the duty, among others, to make recommendations to the Council of Ministers for the promotion and development of electronic transactions. The Commission shall also monitor the operations of businesses providing services related to electronic transactions and recommend the adoption of Royal Decrees under the Act.

The Commission shall be composed of 12 members and chaired by the Minister of Science, Technology, and Environment. The National Electronic and Computer Technology Center of the National Science and Technology Development Agency (NSTDA) shall act as secretariat.

## **Chapter 6: Penalties**

Businesses that provide services related to electronic transactions without notifying, registering or obtaining the required license, as shall be prescribed by a Royal Decree, are subject to imprisonment for a term not exceeding 1 or 2 years and/or a fine not exceeding Baht 100,000 or Baht 200,000 depending on the offense. Administrative fines not exceeding Baht 1 million or Baht 2 million, depending on the offense, can also be imposed by the Commission for failure to comply with rules prescribed by Royal Decrees or by the Commission. Such penalties may be applied not only to the enterprises but also to their managing directors, managing partners, or persons in charge of operations unless the offense was committed without their knowledge or connivance.

At the time of writing, four Royal Decrees were in the process of being drafted and expected to come into force before April 3, 2002. Their adoption before the Act takes effect is critical as they will not only prescribe those activities that fall outside the scope of the Act but also the security procedures, licensing requirements and guidelines for transactions made with the public sector. However, it is more likely that their adoption will be delayed as their contents will probably have to be approved by the Electronic Transactions Commission which has not yet been established.

Four other electronic commerce-related laws are on the agenda. The Universal Access Bill and Data Protection Bill are awaiting consideration by the Cabinet, while the Computer Crime law and Electronic Fund Transfer law are still in the drafting stage.

# THAI ASSET MANAGEMENT CORPORATION (TAMC)

by Cynthia M. Pornavalai



Cynthia Pornavalai heads the firm's Banking and Finance Group.

Declared as Thailand's last chance to clean up its non-performing loans (NPL) mess, the Emergency Decree on Thai Asset Management Corporation, or TAMC Decree, came into force on June 9, 2001. Full of good intention but crippled with hastily drafted and obscure provisions, the TAMC Act has been riddled with criticism and even a legal suit on its constitutionality. Finally clearing its constitutional hurdles in October 2001, the TAMC started accepting its first lot of asset transfers last October 15, 2001.

Essentially, what is the TAMC and what is it empowered under the Act?

## Rationale for Establishing the TAMC

The rationale for establishing a national asset management corporation was to allow the government to address the high level of NPLs in both state-controlled and private financial institutions and to set the environment right for banks to recommence lending.

## Structure

The TAMC is a government agency fully owned by the Financial Institutions Development Fund (FIDF). The TAMC will issue Baht 170 billion (approximately US\$3.7 billion) worth of 10-year notes guaranteed by the FIDF to

financial institutions as payment for TAMC's purchase of NPL assets from these financial institutions. The TAMC is managed by a Board of Directors consisting of 11 members appointed by the Minister of Finance and approved by the Council of Ministers.

## Objectives and Powers

Basically, the TAMC is tasked with the acceptance of transfers of sub-quality assets and their management. To realize such objectives, the TAMC has unprecedented encompassing powers, such as establishing limited companies, guaranteeing credit for debtors, and lending money to debtors.

## Mechanics

### 1. Transfer of Assets

#### a. NPLs that can be transferred

All state-owned financial institutions and asset management companies are required to transfer all NPLs falling under the following categories as at December 31, 2000:

- "loss" (required to be written off)
- "doubtful of loss" (requiring 100% provisioning)
- "doubtful" (requiring 50% provisioning)
- "sub-standard" (requiring 20% provisioning)

Private financial institutions and asset management companies may transfer NPLs

to the TAMC only under the following circumstances:

- The NPLs are secured by property.
- The debtor (which must be a juristic entity) is indebted to at least two Thai financial institutions.
- The total value of NPLs owed by a debtor is at least Baht 5 million.
- No restructuring agreement in writing has been entered for the NPL by July 9, 2001, and the NPL is not part of a rehabilitation plan approved by the Bankruptcy Court before June 9, 2001.

Trade creditors and non-Thai banks and their branches are not eligible to transfer their NPLs to the TAMC.

#### b. Pricing

The price of the assets payable by the TAMC to state banks is the value of the collateral excluding personal guarantees. The rules prescribed by the TAMC Board shall determine the price to be paid if there is no collateral.

The price payable to private banks that opt to transfer NPLs to the TAMC is the value of the collateral (excluding personal guarantees) or the book value of NPL less applicable reserve amount, whichever is lesser. Book value here means the total principal amount of the loan as at the date of transfer together with accrued interest for the three-month period prior to the transfer date.

If the collateral is land, its value is the assessment price used by the Land Department in the calculation of land transfer fees.

#### c. Profit and Loss Sharing

Profit and loss will be shared as follows:

##### Profit

- First 20% will be shared equally between the TAMC and the financial institution.
- Additional profit not exceeding the difference between the book value and transfer price will accrue to the financial institution.
- Any further profit will accrue to the TAMC.

##### Loss

- First 20% of transfer price will be absorbed solely by the financial institution.
- Second 20% will be shared equally by the TAMC and the financial institution.
- Remaining loss will be absorbed by the TAMC.

### 2. Debt Restructuring

One of the most interesting powers of the TAMC is its ability to restructure the debt by unilaterally amending loan terms, forcing a debt-equity conversion (despite the absence of a similar mechanism under present laws), taking

assignments of debts or assets from the debtor to settle debts, and taking transfer of shares or buying issued shares to increase the debtor's capital. For all these and other measures, only the approval of the TAMC Board is required. Certain procedures required under relevant laws are generally waived.

### 3. Business Reorganization

The TAMC Decree sets forth the rules and procedures of business reorganization separate from those provided under the Bankruptcy Act. The criteria for business reorganization under the TAMC Decree are as follows:

- The debtor must be a limited company, a public limited company, or a registered partnership.
- The TAMC is a creditor and is owed more than 50% of the debtor's total debt.
- There is evidence that the business can be carried on

and its rehabilitation will benefit the national economy.

- The debtor consents and agrees to be bound by the terms and conditions of business reorganization under the TAMC Decree.

The TAMC Executive Committee appoints the planner who is tasked to draft the plan within the time limit set by the TAMC. Once the Executive Committee and the TAMC Board approve the plan, the TAMC then files a petition with the Bankruptcy Court for it to consider the plan. From the date of court approval of the plan to the completion of business reorganization, the automatic stay similar to that under the Bankruptcy Act is applied.

The plan may require a merger of debtor's businesses, closure of part of the business, payment of other creditors participating in the business reorganization, and other measures approved by TAMC Board. In these circumstances, certain provisions

under the Civil and Commercial Code (CCC) and the Public Company Limited Act are waived.

### Assessment

It has recently been reported in the press that as of the end of January 2002, the TAMC had already restructured debts of more than Baht 43 billion. These completed cases account for 43% of the TAMC's target of Baht 100 billion by March 2002. For the entire year, the plan is to restructure Baht 500 billion out of the total Baht 700 billion received from state and private banks.

The Bank of Thailand, however, has commented that the TAMC cannot totally be credited for all such restructuring. It was argued that the terms and conditions for restructuring the loans had already been settled between the debtors and creditors under the CDRAC process. Be that as it may, in the backdrop of Baht 1.6 to 1.7 trillion of

NPLs, a transfer of Baht 700 billion into the TAMC would hardly make a dent. Of this Baht 700 billion, Baht 610 billion consists of assets transferred by state banks.

It is thus not surprising to note that bankers do not think of the TAMC as a panacea to the NPL problem. An academic fears that it will be a vehicle to "warehouse" the NPLs forever and sees its value as limited only to the state banks which must get the NPLs off their books.

It is unfortunate that the inherent problems which make NPLs thrive remain, i.e., Thailand's weak foreclosure and bankruptcy laws, limited security/collateral laws, weak corporate governance standards, deteriorating credit culture, and weak prospects for early economic recovery. Injecting more capital into the system, obviously, is not the answer. Thai banks are sitting on large surplus liquidity, but they have also learned their lesson.

## SOCIAL SECURITY AND WORKMEN'S COMPENSATION SCHEME

by Pimvimol (June) Vipamaneerut

The Ministry of Labor and Social Welfare has announced that effective April 1, 2002, employers with one or more employees in their payroll will be required to make contributions to the Social Security Fund and the Workmen's Compensation Fund. Prior to the new regulation, contributions were mandatory only for

employers with ten or more employees. The new social security scheme will not cover non-business enterprise workers, servants, or employees in temporary work places such as stalls.

Employers must register for the Social Security Fund and Workmen's Compensation Fund at the Social Security Office in

the district where the employers' premises are located by April 30, 2002. Upon registration, employees will become "insured persons" entitled to benefits provided under the Social Security Act. Employers who fail to



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*Regional Office Headquarters (from p. 1)*

## **Tax Incentives for the ROH**

**Business Income:** Reduction of corporate income tax rate from the normal rate of 30% of net profit to 10% for income derived from the provision of qualifying services to affiliated juristic companies or partnerships or branches.

**Royalties:** Reduction of corporate income tax rate from the normal rate of 30% of net profit to 10% for royalties derived from research and development work performed in Thailand for affiliated juristic companies or partnerships or branches. This reduced rate is also applicable to royalties received by the ROH from a juristic company or partnership applying the ROH's research and development work performed in Thailand to the production of goods or provision of services for the ROH or its affiliated juristic companies or partnerships or branches.

- **Interest:** Reduction of corporate income tax rate from the normal rate of 30% of net profit to 10% for interest on loans received from affiliated juristic companies or partnerships or branches. This reduced rate is applied only to loans borrowed from other parties to extend to affiliated juristic companies or partnerships or branches.

- **Dividends:** Exemption from 30% corporate income tax of dividends received from affiliated juristic companies. This includes an exemption

from 10% withholding tax of dividends paid by the ROH to companies incorporated under foreign law which do not carry on business in Thailand or parent company abroad.

- **Accelerated Depreciation:** An initial depreciation of 25% of ROH's building cost on the date of acquisition, with the residual cost value depreciated over a period of 20 years, provided that the building is purchased or acquired for carrying out its own operations.

## **Conditions**

In order to qualify for tax incentives, the following conditions must be met:

- ROH must be a juristic company or partnership incorporated under Thai law. This includes both Thai and foreign majority-owned companies.
- ROH must have a paid-up capital of not less than Baht 10 million as at the end of an accounting period.
- ROH must render services to affiliated juristic companies or partnerships and/or branches situated in at least three foreign countries.
- Income earned from rendering services to affiliated juristic companies or partnerships or branches outside Thailand must not be less than one-half of its total income, except for the first three years of operation where the requirement is one-third of total income.

## **Tax Incentives for ROH Expatriate Employees**

- **Employment Income Earned from Work Assignments Outside Thailand:** Exemption of employment income earned by expatriate employees for work performed for the ROH outside Thailand, provided that such income is not deducted as an expense of the ROH, its affiliated juristic companies or partnerships, or its branches carrying on business in Thailand, whether directly or indirectly.

- **Personal Income Tax at a Flat Rate of 15%:** Expatriates may choose to pay personal income tax at a flat rate of 15% instead of the usual progressive rate of 5% to 37%. In such a case, the ROH will withhold personal income tax at the rate of 15% instead of the usual progressive rate.

To qualify for the foregoing tax incentives, expatriates must work with the ROH for a period not exceeding two years counting from the first date of taking up employment in Thailand until the end of the employment, regardless of temporary departures from Thailand during the said period. However, if the expatriate leaves Thailand for more than 365 days after the end of the previous employment in Thailand, the counting of the two-year period will exclude the previous period of employment.

The Royal Decree concerning conditions and tax incentives for the ROH is expected to be issued soon.

*Social Security (from p. 4)*

register within the stipulated time will be subject to imprisonment not exceeding six months or a fine not exceeding Baht 20,000 (about US\$457), or both.

## **Social Security Fund**

The Social Security Act requires that the government, employers, and employees contribute to the Social Security Fund at rates prescribed by law. At present, both employers and employees each make monthly contributions at the rate of 3% of the employees' wages, while for the government, the rate is 2% of the wages.

The maximum wage to be used for calculating contributions is Baht 15,000 (about US\$343), hence the maximum monthly contribution is Baht 450 (about US\$10) each from the employer and the employee. Contributions must be made by the fifteenth day of the following month.

The Social Security Fund provides six types of benefits to an insured person.

1. Sickness or injury not suffered in the course of employment
2. Maternity
3. Disability not acquired in the course of employment

4. Death not occurring in the course of employment
5. Child welfare
6. Old age

The Social Security Act does not apply to:

1. government officials, permanent employees, daily temporary and hourly temporary employees of the central, provincial, and local administrations, except monthly temporary employees;
2. employees of foreign governments or international organizations;
3. employees stationed at overseas offices of employers;

4. teachers or headmasters of private schools under the Private School Law;
5. students, nursing students, undergraduates, or physician interns employed by schools, universities, or hospitals;
6. employees of the Red Cross;
7. employees of state enterprises;
8. employees of employers in the agriculture, fishery, forestry and livestock sectors that do not engage employees all year and do not have other businesses; and
9. employees hired on a casual or seasonal basis.

### **Workmen's Compensation Fund**

The Workmen's Compensation Fund was set up to replace employers' liability in the event of sickness, disability, or

death of an employee from a work-related injury. The Workmen's Compensation Act requires employers to register for and contribute annually to the Workmen's Compensation Fund. The contributions are assessed at between 0.2% to 1% of employees' annual earnings, depending on the risk classification of the employer. The maximum annual earning to be used for calculating contributions is Baht 240,000 (about US\$5,500) per employee.

Employees who suffer any injury or sickness in the course of employment are entitled to medical care and treatment, as well as cash compensation in the amount prescribed in the Ministerial Regulation. If rehabilitation is required, they are entitled to the actual rehabilitation costs as stipulated in the Ministerial Regulation. In case of death, the legal beneficiaries of

the employees shall be entitled to funeral expenses equal to one hundred times the maximum daily minimum wage and cash compensation.

The Workmen's Compensation Act does not apply to:

1. central, provincial, and local administrations;
2. state enterprises under the Public Enterprise Official Relationship Law;
3. employers operating private schools under the Private School Law, specifically with regard to teachers or headmasters;
4. employers undertaking non-profit activities; and
5. employers in the agriculture, fishery, forestry, and livestock sectors that do not engage employees all year and do not have other businesses.

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