



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

BY

MR. KORNRAPAT LAOSAKULTHAI

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF MASTER OF
LAWS IN BUSINESS LAWS (ENGLISH PROGRAM)**

FACULTY OF LAW

THAMMASAT UNIVERSITY

ACADEMIC YEAR 2015

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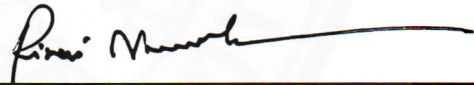
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CORPORATE INCOME TAXATION ON CROSS-BORDER LEASING

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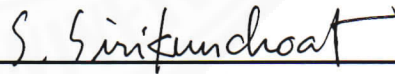
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ABSTRACT

This thesis aims to study the corporate income taxation on cross-border leasing 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 and laws of selected jurisdiction, consisting of the United States, the United Kingdom, Germany, and Malaysia.

From the study of each issue, there are conclusions that corporate income taxation on cross-border leasing under Thai laws does not encourage and promote the exports of this transaction. Tax depreciation on the leased equipment is merely allowed at 20% for an accounting period, totaling 100% in five accounting periods. It is difficult to attract and facilitate the export of cross-border leasing transaction. Moreover, measures to control the use of tax incentive are weak in comparison to some of the selected jurisdictions.

Therefore, Thailand's corporate income taxation on cross-border leasing does not provide the adequate provision of granting a tax incentive for 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. Thailand should improve existing Thai laws and regulations in relation to corporate income taxation for

(2)

promoting the export of cross-border leasing service and providing effective measures to control the use of such tax incentive.

Keywords: cross-border leasing, corporate income tax, first-year allowance, investment tax credit, lease, leasing, net operating loss, tax incentive



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LIST OF ABBREVIATIONS

Symbols/Abbreviations	Terms
ACCA	The Association of Chartered Certified Accountants
ADS	Alternative Depreciation System
AEC	ASEAN Economic Community
ARRA	American Recovery and Reinvestment Act of 2009
ASEAN	The Association of Southeast Asian Nations
BOI	The Board of Investment of Thailand
CAA 2001	The Capital Allowances Act 2001
DTA	Double tax agreement
DTA Indonesia-Thailand	Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Indonesia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income
DTA Thailand-Laos	Agreement between the Government of the Kingdom of Thailand and the Government of the Lao People's Democratic Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income
DTA Thailand-Malaysia	Agreement between the Government of the Kingdom of Thailand and the Government of Malaysia for the

	Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income
DTA Thailand-Myanmar	Agreement between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income
DTA Thailand-Philippines	Convention between the Government of the Kingdom of Thailand and the Government of the Republic of the Philippines for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income,
DTA Thailand-Singapore	Convention between the Royal Government of Thailand and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income
DTA Thailand-Vietnam	Agreement between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Vietnam for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income
EUR	The euro
FATCA	Foreign Account Tax Compliance Act
FLA	The Finance & Leasing Association, UK
FYA	First-year allowance

GAAP	Generally accepted accounting principles
GAAR	General Anti Abuse Rule
GDS	General Depreciation System
HMRC	HM Revenue and Customs
ICT	Information technology and communication
IRC	Internal Revenue Code
IRS	U.S. Internal Revenue Services
ITC	Investment tax credit
MACRS	Modified Accelerated Cost Recovery System
MOU	Memorandum of understanding
NOL	Net operating loss
OECD	The Organisation for Economic Co-operation and Development
SCM	Agreement on Subsidies and Countervailing Measures
SMEs	Small and medium-sized enterprises, also small and medium enterprises
TIEAs	Tax Information Exchange Agreements
TVM	Time value of money
UK	The United Kingdom
US	The United States
USC	The Code of Laws of the United States of America
WTO	The World Trade Organization

CHAPTER 1

INTRODUCTION

1.1 Backgrounds and Problems

Nowadays, domestic leasing market of Thailand has been growing up. As of January 2016, the total port of personal loan under supervision,¹ including a leasing, is 12,880,264 accounts, increasing from the same period in 2015 at approximately 8.94%, and growing from the same period in 2014 at approximately 12.25%. Details of the accounts are in Table 1.1 below.

Table 1.1 Personal Loan under Supervision²

Accounts	January 2016	January 2015	January 2014
Commercial Banks	2,676,080	2,849,086	2,900,451
Business Operator which is not financial institution	10,204,184	8,974,343	8,574,242
Total Accounts	12,880,264	11,823,429	11,474,693

There is a high competition among leasing companies, both the companies established under Thai laws, and the companies formed under the laws of foreign countries and carrying the leasing business in Thailand. The leased assets provided by these companies comprises of the vehicle (auto lease), machinery and equipment.

¹ Personal loan under supervision of the Bank of Thailand consists of uncollateralized personal loans, hire purchases, and leasing loans on goods. These exclude sale business of the licensed lenders, hire purchase, auto lease, leasing of motorcycles, education loan, oversea working loan, loan for medical care, loan regarding the employee benefits under an agreement between the employers and the lenders, and other loans as prescribed by the Bank of Thailand.

² From the Bank of Thailand's statistical data.

Regarding outside market, most leasing companies have not exported the leasing service yet. Many major leasing companies still provide a domestic leasing as their service mainly focuses on the auto lease which requires an ownership registration. On the other hand, equipment is a better option to provide the service outside Thailand as most of them are moveable, and such registration is not required.

Since December 31, 2015, the Association of Southeast Asian Nations³ has established the ASEAN Economic Community.⁴ The whole region is going to transform into a single market. Investment, service and flow of capital move more freely.⁵ This single market 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, maintaining economic stability.⁶ Nevertheless, Thailand does not have a law that characterizes the lease practically and does not set up a governing authority to promote and control this transaction systematically. These result in a lack of a specific provision of taxation law that supports and controls cross-border leasing.

Firstly, 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

³ The Association of Southeast Asian Nations consists of Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam, hereinafter *ASEAN*.

⁴ Hereinafter *AEC*.

⁵ “*ASEAN Economic Community*”, available at <http://www.asean.org/communities/asean-economic-community>.

⁶ Group of Tax Scholars, **Taxation According to Revenue Code 2014 1** (2014). (กลุ่มนักวิชาการภาษีอากร, **ภาษีอากรตามประมวลรัษฎากร 2557** (กรุงเทพมหานคร: เรือนแก้วการพิมพ์, 2556, หน้า 1.)

companies in financing other lessees. Because of a time value of money,⁷ the faster a leased asset can be depreciated, the greater the tax advantage of the leasing company.⁸ It results as money to invest new equipment.

Secondly, some of the foreign leasing companies in Thailand invest into neighbor country; even they can provide a cross-border leasing from Thailand. Such companies will be subject to a corporate income tax liability. It might result in none of the income to be taxed in Thailand. Compared to providing service from Thailand, the lease rent will merely subject to withholding tax.

Thirdly, some leasing companies in Thailand establish their branch in the neighbor country. As a permanent establishment, the branch's income is subject to each particular country's tax. If tax rate of such country is higher than Thailand, they can claim a foreign tax credit against the tax paid in such country, and there may be no any income for Thailand to tax on.

Finally, in term of granting a tax incentive, many companies may opt to provide this service to minimize their corporate income tax liability.

1.2 Hypothesis

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. The tax depreciation is unable to attract and facilitate the export of cross-border leasing

⁷ 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. For instance, assuming a 3% interest rate, THB 10,000 invested today will be worth THB 10,300 in one year (THB 10,000 multiplied by 1.03). In contrast, THB 10,000 received one year from now is merely worth THB 9,708.74 today (THB 10,000 divided by 1.03).

⁸ Eugene F. Brigham & Michael C. Ehrhardt, **Financial Management: Theory & Practice** 788 (14th ed. 2014).

transaction. Therefore, Thailand's corporate income taxation on cross-border leasing does not provide the adequate provision of granting a tax incentive for 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.

1.3 Objectives of Study

This thesis has goals to study as follows:

- 1) to explore the corporate income taxation on cross-border leasing of Thailand, including the existing relevant laws and regulation;
- 2) to examine the corporate income tax incentive for the export of cross-border leasing and measures to control the use of such tax incentive under foreign laws; and
- 3) to analyze Thai laws, foreign laws and international co-operation in providing the corporate income tax incentive for the export of cross-border leasing and measures to control the use of such tax incentive in Thailand.

1.4 Scope of Study

This thesis will study corporate income taxation on cross-border leasing in two aspects: 1) a corporate income tax incentive for leasing companies in exporting the cross-border leasing service to a lessee in ASEAN member countries; and 2) measures to control a use of such tax incentive accurately.

This thesis has a scope of study regarding corporate income taxation on cross-border leasing. The contents of the study comprise of each chapter as follows:

Chapter 2 will introduce the general ideas of cross-border leasing including the evolution of cross-border leasing, lease contracting and legal cases of cross-border leasing in Thailand.

Chapter 3 will present the corporate income taxation on cross-border leasing under the Thai Revenue Code, relevant laws and regulations;

Chapter 4 will explore the corporate income tax incentive for the export of cross-border leasing and measures to control the use of such tax incentive of selected jurisdictions consisting of the United States, the United Kingdom, Germany, and Malaysia which is a pilot study of all ASEAN legal systems.

Chapter 5 will show the analysis of Thai laws and the selected jurisdictions in respect of the corporate income tax incentive for the export of cross-border leasing and measures to control the use of such tax incentive; and

Chapter 6 will summarize problems and recommendations to improve the existing relevant laws and regulations.

1.5 Methodology

There are several methodologies used in this thesis. The documentary research both domestic and non-domestic materials are the main methodology, including articles, books, electronic database, newspaper, and thesis. Other methodologies are interviewing practitioners and persons who have experience in the real sector. After studying, the author has analyzed Thai laws and problems, investigated the laws of selected jurisdictions, and proposed the possible ways to improve the corporate income tax incentive for cross-border leasing and measures to control the use of such tax incentive in Thailand.

1.6 Expected Results

This thesis has the expected results as a proposal in improving Thai laws and regulations related to the corporate income taxation on cross-border leasing to promote the export of the cross-border leasing and to accurately control the use of such tax incentive.

CHAPTER 2

GENERAL IDEAS 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 return of the right to use an asset, the lessee pays series of lease rents for an agreed term which is normally 3-5 years. Also, there is no any requirement of security since the asset itself is a security. At the expiration of the lease term, the lessee will be entitled to purchase or return the leased asset to the lessor. This basic lease is a fundamental of a cross-border leasing utilized in the present. However, it has been evolved from time to time. To understand its general ideas, this Chapter will clarify the originality of this term through eras. This Chapter also identifies the concept of cross-border leasing and notifies the cross-border leasing in Thailand.

2.1 Evolution of Cross-Border Leasing

2.1.1 Ancient Era

Cross-border leasing has its origin from a leasing. The ancient Sumerians widely used the term 'leasing' by circa 5000 B.C. At that time, the lessee was allowed to acquire the possession of goods or land. They did not have to pay the full capital cost. The lessor received remuneration from its investment and was able to retain the title and security in the goods or land.⁹

2.1.2 Modern Era

In the 1700s, a lease of personal property was first recorded in the United States (US).¹⁰ In the 1870s, the modern equipment leasing had begun providing in the US. It

⁹ Iwan Davies, **Equipment and Motor Vehicle Leasing and Hiring Law and Practice 3** (1997).

¹⁰ Hereinafter *US*.

started with barges, railway cars, and locomotives.¹¹ Then, leasing had been developed for long time. In the 1960s, computer leasing became popular in the market as well as the office equipment leasing. In the 1970s, vendor leasing of all types of equipment was widely demanded by equipment users. At the same period, cross-border leasing market was firstly introduced in the US. US lessors were able to claim tax allowances on the leased equipment under US tax regulations, and pass on the benefits to lower financing costs, to the lessee operating in a country where the same tax benefits did not apply. Cross-border leasing now continues to develop in Europe.¹²

2.2 The Concepts of Cross-Border Leasing

Although a cross-border leasing is originated from a leasing; there is a slight distinctiveness in term of location. Cross-border leasing involves a lease agreement between a leasing company or lessor that locates in one country and a lessee who locates in another country.¹³ Otherwise, concepts are mostly the same as follows:

2.2.1 Lease Contracting

2.2.1.1 Lease Structure

The lessor provides the lessee a right of possession and a right to use an asset for a particular term while returning the lessor with lease rents. This term includes a sublease.¹⁴ In contracting the lease, a lessee orders an asset to a lessor. The lessor buys 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 lessee can reserve his capital as he obtains one hundred percent financing from the lessor. Moreover, the leased asset itself is the lessor's security. Sometimes it is determined as a secured loan even there is any

¹¹ Peter K. Nevitt, Frank J. Fabozzi, **Equipment Leasing** 22 (4ed. 2000).

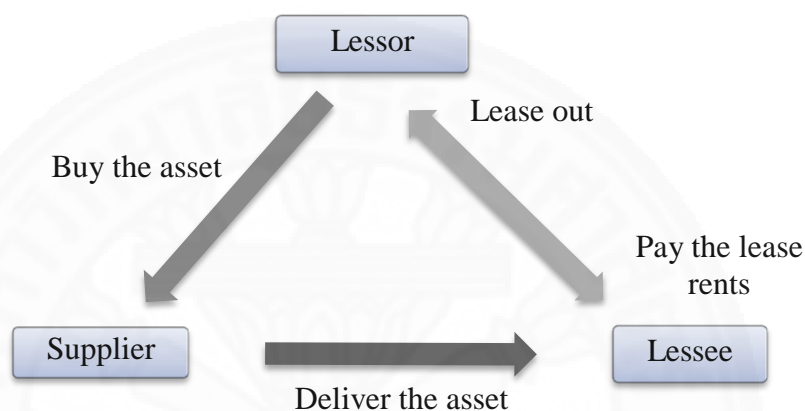
¹² Brian Coyle, **Leasing** 126-127 (2000).

¹³ Brian Coyle, *supra* note 12.

¹⁴ UNIDROIT Model Law on Leasing (2008), Article 2-Definitions.

mortgage or pledge or any other securities provided by the lessee in this transaction. Thus, the lessee does not require providing any security to the lessor.¹⁵ The lessor will get the profits from the interest built into the calculation of the lease rents.¹⁶

Figure 2.1 Lease Structure



2.2.1.2 Cross-Border Leasing Structure

In the cross-border leasing, both the lessor and the lessee are located in different countries. The lessor provides the lessee with the right in possessing and using a leased asset for a particular term while returning the lessor with lease rents. Lease contracting is similar to normal lease structure.

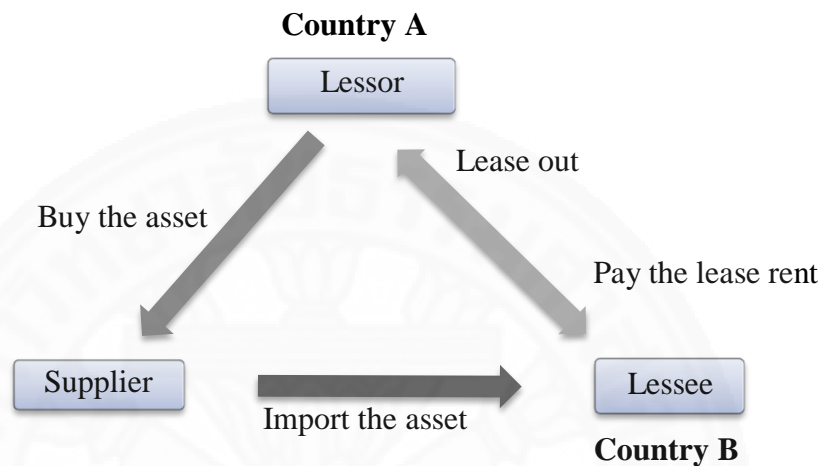
It commences when the lessee orders an asset to a lessor. Then, the lessor purchases an asset upon the lessee's request at his cost from a supplier or exporter who may locate in the same country as the lessor, then leases out the asset to the lessee. After that, the asset will be imported to the lessee's place by a supplier or an exporter. In

¹⁵ David Wainman, **Leasing 2** (1991).

¹⁶ David Wainman, *supra* note 15, at 16-17.

this sense, the supplier sometimes may consider as an importer of the asset to the country of the lessee.

Figure 2.2 Cross-Border Leasing Structure



2.2.2 Lease Categorization

There are main two types of the leasing. One type is a finance lease, and another one type is an operating lease.¹⁷ The classification of lease sometimes includes sale-type lease and leveraged lease.¹⁸ Moreover, many people are confused between the leasing itself and hire purchase. These two transactions have a different structure as shown in the Table 2.1 Comparison between Hire Purchase and Leasing.

¹⁷ FLA, “*Types of Leasing*”, available at <http://www.fla.org.uk/business/types-of-leasing>.

¹⁸ Comptroller of the Currency, *Lease Financing Comptroller’s Handbook January 1998* 10 (1998).

Table 2.1 Comparison between Hire Purchase and Leasing¹⁹

Structure	Hire Purchase	Leasing
Relevant Law	Provisions in Thai Civil and Commercial Code	No specific provisions
Hirer/Lessee	Individual or juristic person	Juristic person
Hired Asset/ Leased Asset	Mostly vehicle e.g. motorcycle	Mostly machines and computer, copy machine, office equipment
Objective of Lease	Ownership	Long-term usage
Term	Mostly 1-5 years	Three years upwards
Credit Amount (% of asset value)	Generally, 70-80%	Up to 100%
Interest Calculation	Flat rate	Effective rate
Ownership of the Asset at the Expiration	Automatically, the hirer	Upon term and condition in the agreement whether purchase or surrender the asset

¹⁹ Protection of Users of Financial Services Center, Bank of Thailand, “*Hire Purchase and Leasing*”, available at <https://www.1213.or.th/th/serviceunderbot/loans/loans/Pages/hireleasing.aspx>. ศูนย์คุ้มครองผู้ใช้บริการทางการเงิน ธนาคารแห่งประเทศไทย , เข้าชื่อและสืบชื่อ , <https://www.1213.or.th/th/serviceunderbot/loans/loans/Pages/hireleasing.aspx>.

Maintenance Obligation	The owner shall deliver the hire purchased asset in a perfect condition to the hire purchaser, and the hire purchaser shall repair the broken asset.	Depending on type of leasing ²⁰
Termination of the Agreement	The hire purchaser is entitled to terminate the agreement whenever by returning the hire purchased asset to the owner.	Depending on type of leasing ²¹

2.2.2.1 Finance Lease

Finance lease, sometimes called direct financing lease is referred to a lease which the only source of income of the lessor is an interest. Generally, the lessor is a bank or financial institution which enters into a sale and purchase transaction to buy an asset and lease that asset to the lessee. Some lessees use the finance lease as an alternative transaction of customary lending arrangement. The lessee who is now a borrower utilizes the loan proceeds to buy an asset. This type of lease is functionally equivalent to a loan transaction.²²

In a finance lease, the lessor has a legal ownership over the leased asset and throughout a set period or lease term. This lease term will cover the funding cost of acquisition of the property. During the term, the lessee cannot sell out the leased asset since they are not the owner. All property taxes, sale taxes, user taxes, fees, maintenance expense and insurance are borne by the lessee's cost.²³ The lessor is

²⁰ See Table 2.2 Comparison between Finance Lease and Operating Lease.

²¹ See Table 2.2 Comparison between Finance Lease and Operating Lease.

²² Comptroller of the Currency, *supra* note 18, at 11.

²³ James S. Schallheim, **Lease or buy?: principles for sound decision making** 19 (1994).

entitled to claim an allowance under the laws. These allowances will benefit the lessee in the way of reduced lease rents.

In addition, it always provides an option to purchase at fair value market or offers a purchase option at a fixed price. Sometimes, a renew option is also available.²⁴ At the expiration of the lease term, there is often an option to release the lease term at a reduced rate or a 'peppercorn rate'.²⁵ However, the ownership will transfer to the lessee who incurs total benefits, cost and expense, and risks incident to this ownership at the end.²⁶ Regarding these items, if the lease transfers all of them to the lessee substantially, a finance lease is qualified.²⁷

2.2.2.2 Operating Lease

Apart from a finance lease, other leases are qualified as an operating lease.²⁸ Under an operating lease, a residual value is a critical factor in determining the rate of the lease rents.²⁹ If the full economic life of the leased asset is longer than the lease term, a residual value will be higher and result in a higher lease rent. This concept is a common one in the most operating lease. The lessor bears the risks connected with the residual value of the leased asset at the expiration of the lease term while the lessee does not have any liability for the total value of the financing.³⁰

²⁴ James S. Schallheim, *supra* note 23, at 27.

²⁵ An insignificant rent reserved for the purpose of showing that a lease or tenancy is granted for valuable consideration.

²⁶ OECD, "*Financial leasing companies*", Nov 11, available at <http://stats.oecd.org/glossary/detail.asp?ID=977>.

²⁷ International Accounting Standard, 17.4.

²⁸ The term of 'operating lease' has a long story. Its name was derived from a time when a lessee routinely obtained an operator together with a leased equipment from a lessor.

²⁹ *Id.*

³⁰ *Id.*

Under this transaction, the lessee does not obtain the ownership of the leased asset because the risks and benefits of ownership remain at the lessor, who is a legal owner. By this legal ownership, the lessor can exercise any tax benefits in respect of the ownership, for example, a tax depreciation.

Table 2.2 Comparison between Finance Lease and Operating Lease³¹

	Finance Lease	Operating Lease
1. Leased Asset	High-price, long useful life, e.g. machine, aircraft, ship and vehicle	Fast changed or using of high technology, e.g. computer, copy machine, and office equipment
2. Lease Term	Certain and long, cover the asset's useful life. Most of the lessee tends to purchase the leased asset upon the expiration of the finance lease agreement.	Shorter than the asset's useful life
3. Maintenance Duty	The lessee	The lessor
4. Termination of Agreement	The lessee cannot early terminate.	Either the lessee or the lessor can early terminate by giving notice to another party in advance.

2.3 Cross-Border Leasing in Thailand

2.3.1 Leasing Market in Thailand

Leasing was introduced into Thailand in 1978 by Thai ORIX Leasing Co., Ltd., previously, Thai Orient Leasing Co., Ltd. The first service marketed in Thailand was

³¹ See *supra* note 19.

financial equipment leasing. In leasing market, there are four groups of leasing companies:

- finance company;
- leasing company for particular goods which supports a sale of its own group's product;
- standard leasing company without particular goods or supplier; and
- retail finance company for individual customers.

However, a complete database of all leasing businesses in Thailand is not now provided because of lack of main governing authority and a specific provision of law. Collecting the data of all leasing companies is difficult. At present, there is an association, namely the Leasing Association. This Association combines members from leasing industry in Thailand.³²

2.3.2 Business Section of Leasing

Referring to the Business Database Warehouse,³³ there are classifications of juristic persons by the business section shown in their latest financial statements. Under Class N, it covers all management and administration support a business which includes rental and leasing businesses. Rental and leasing business are classified into a several type of asset, including personal vehicle, recreation and sports product, and machinery

³² Secretary Bureau of Foreign Business Committee, Department of Business Development, Ministry of Commerce, *“Summary of Study and Analysis of Operating Leasing and Hire-Purchase Business Project”*, available at http://www.dbd.go.th/download/doc/total_01.doc. (สำนักงานเลขานุการคณะกรรมการประกอบธุรกิจของคนต่างด้าว กรมพัฒนาธุรกิจการค้า กระทรวงพาณิชย์ . สรุปผลการศึกษาโครงการศึกษาวิเคราะห์การประกอบธุรกิจลิสซิ่งและให้เช่าซื้อ, http://www.dbd.go.th/download/doc/total_01.doc.)

³³ Compiled and provided by Department of Business Development, Ministry of Commerce (Thailand), available at <http://datawarehouse.dbd.go.th/>.

and equipment. In term of machinery and equipment, it comprises of several types of equipment used for transportation, agricultural and forestry machine and equipment, construction and civil engineering machine and equipment, office machine and equipment, aa well as other machine and equipment.

Table 2.3 Rental and Leasing Activities³⁴

Code	Business Section
77100	Rent and leasing of vehicle
77101	Rent and leasing of private vehicle, pickup, van and similar small car
77109	Rent and leasing of truck-type vehicle and other heavy vehicles
77200	Rent and leasing of personal appliance and household utensil
77210	Rent and leasing of goods for recreation and sport
77290	Rent and leasing of other personal appliance and household utensil
77300	Rent and leasing of machinery equipment and other tangible goods
77301	Rent and leasing of land transportation equipment (except vehicle)
77302	Rent and leasing of water transportation equipment
77303	Rent and leasing of air transportation equipment
77304	Rent and leasing of agricultural and forestry machine and equipment
77305	Rent and leasing of machine and equipment used in construction and civil engineering work
77306	Rent and leasing of office machine and equipment

³⁴ From the Business Database Warehouse by Department of Business Development, Ministry of Commerce (Thailand).

77309	Rent and leasing of machinery equipment and other tangible goods not categorized in other places
77400	Leasing of a product which has an intellectual property and similar product, except copyrighted work

This database combines the rental business and leasing business together. Some of them do not provide the only type of leasing. While other juristic persons who are classified in the section of the auto finance lease contract, finance lease agreement for machinery and equipment for operating the business and other financial activity, also provide service in the leasing sections.

2.3.3 Current Status of Cross-Border Leasing in Thailand

In the Business Database Warehouse, there are no any leasing companies that provide a cross-border leasing service. Over 70% of leasing companies and limited partnership have a registered capital less than fifty million Thai Baht compared with the registered capital of small and medium-sized enterprises or SMEs. One reason may be a lack of sufficient fund and cash flows. Since transactions require an enormous amount of money for acquiring new equipment and competing with foreign leasing companies, some leasing companies in Thailand seek for a solution by establishing new company in neighbor countries. Cambodia is one country that leasing companies desire to set up new office. The reason of choosing this country may be that the country has a weak taxation system. It lacks of information sharing, none of the actual legal action against non-compliance and lack of information technology.³⁵ Additionally, this country does not enter into any double tax treaty with other countries, especially the ASEAN member states. One of the example is ORIX Corporation, the owner of Thai ORIX Leasing Co., Ltd. This company is preparing to

³⁵ Eng Ratana, **Enforcement Trends and Compliance Challenges in Cambodia** 22 (2013).

open a new corporation in Cambodia.³⁶ Another example is AEON Thana Sinsap (Thailand) PLC. This company has already established a leasing company, namely AEON Leasing Service (Lao) Co., Ltd. to provide leasing service in Lao PDR.³⁷ In this case, Lao PDR has entered into many DTAs. One possible reason may be that Lao PDR provides more attractive tax benefit than Thailand so that some companies desire to obtain such incentive.



³⁶ Japan's SMBC, "*Orix to raise stakes in Cambodia's Acleda*", available at <http://asia.nikkei.com/Business/Companies/JapansSMBCOrixtoraisestakesinCambodiasAcledaBank>.

³⁷ AEON Thana Sinsap (Thailand) PCL, "*Message from Executives*", available at <http://www.aeon.co.th/aeon/en/aeoninfo/board-managements>.

CHAPTER 3

CORPORATE INCOME TAXATION ON CROSS-BORDER LEASING UNDER THAI LAWS

Corporate income taxation on cross-border leasing is similar to other business. Income derived from this transaction must be computed on a net profit basis. In details, there are some differences from other business including income recognition and withholding tax exemption. As the revenue of this business comes from outside of Thailand, it also has double taxation issues. This Chapter will present the corporate income taxation on cross-border leasing as the lease rent from this service which is subject to corporate income tax liability.

3.1 Introduction to Taxation

3.1.1 Definition of Tax

The tax is defined to be a thing stipulated by the government to collect from the citizen to be used as public benefits, with on regard to a direct remuneration for the taxpayer,³⁸ even though the government may provide such public benefits in forms of goods or services to other entities, either individually or collectively, or to the society as a whole.³⁹

It can also be defined to be money or a resource moving from the private sector to the government sector, but not including lending or sale of goods or service provided by the government in a capital price.⁴⁰

³⁸ Group of Tax Scholars, *supra* note 6, at 1.

³⁹ OECD, “*Taxes*”, *available* at <https://stats.oecd.org/glossary/detail.asp?ID=2657>.

⁴⁰ Group of Tax Scholars, *supra* note 6, at 1.

3.1.2 Purpose of Taxation

Taxation is the government's method to earn the revenue used for its expenditure. Also, taxation is aimed at distributing income, facilitating business growth, maintaining economic stability, controlling people's consumption, as well as responding some government policies, such as education, social welfare, and public policy.⁴¹

In a public finance concerning the taxation, there is an idea that person with a similar ability in paying taxes should be subject to the payment of the same or similar amounts. This idea is called a horizontal equity which is related to the idea, namely a tax neutrality, that similar things or person, or unduly distort behavior should not be discriminated.⁴² Another idea is that individual who has more ability to pay taxes should be subject to higher payment so that the rich people must pay more proportion comparing to their revenue. This idea is named as a proportional tax. The increasing payment portion is under the term of a progressive tax. It is associated to the taxation's aim of the income distribution.⁴³

3.1.3 Characteristics of Good Tax

As tax payment is a duty of every person, taxation law has some principles to be considered to encourage the voluntariness among them and the effective enforcement. Thus, a good tax should consist of fairness, certainty and obviousness, convenience, efficiency, economic neutrality, facilitating government income, and flexibility.⁴⁴

⁴¹ Group of Tax Scholars, *supra* note 6, at 1.

⁴² Richard A. Musgrave, **The New Palgrave: A Dictionary of Economics** Vol.3 1057-58 (1987).

⁴³ Richard A. Musgrave, **The Theory of Public Finance: A Study in Political Economy** 20 (1959).

⁴⁴ Group of Tax Scholars, *supra* note 6, at 2.

3.1.4 Structure of Taxation Law

In every single taxation law, there are six items in its structure as follows:

- 1) A taxpayer or taxable person, an individual who has rights and duties under the laws. Normally, a taxpayer is an individual or a juristic person;
- 2) A tax base which is, in a broader meaning, a thing that causes a tax payment, for instance, income, asset or expense. In a narrow sense, it is a base of the tax rate;⁴⁵
- 3) A tax rate, mainly classified as a proportional rate, a progressive rate, and a regressive rate;
- 4) A taxation assessment which comprises of a self-assessment, authoritative assessment, withholding assessment, and prepayment;
- 5) A tax protest and appeals in a case that there is a dispute between a taxpayer and a tax collector in the issue of fact or law; and
- 6) A penalty, surcharge, and criminal punishment. If a taxpayer fails to pay tax partly or wholly, he will be liable for such remaining tax as well as penalty and/or surcharge. He may also have a criminal punishment such as fine and/or imprisonment.⁴⁶

3.1.5 Classification of Taxes

According to the laws granting the authorization on taxation and taxing authorities, taxes can be classified into several types. Refer to tax liability; taxes are divided into two main types: direct tax and indirect tax. The direct tax is paid directly by an individual or a juristic person stipulated under the law. Such person cannot shift this tax burden to someone else. This tax consists of a personal income tax and a corporate income tax. Indirect tax is a tax where that tax burden can be shifted from a taxpayer to another person, including value added tax, specific business tax, customs, and excise tax.

⁴⁵ Tax to be paid is equal to the tax base multiplied by tax rate.

⁴⁶ Group of Tax Scholars, *supra* note 6, at 2-4.

3.2 Overview of Corporate Income Tax

Even though a corporate income tax is the same direct tax as a personal income tax, personal income tax is imposed on a person or individual while corporate income tax is levied on a company or juristic partnership. Such company or juristic partnership being a resident corporation is taxed on a worldwide income basis.⁴⁷ The following items will present the overview of the corporate income tax under Thai Revenue Code

3.2.1 Taxpayer under Thai Revenue Code

The taxpayer who is subject to the corporate income tax liability is a company or juristic partnership. Under the Section 39 of Thai Revenue Code,⁴⁸ A company or juristic partnership means such entity which is established under the law of Thailand⁴⁹

⁴⁷ PWC, **Thai Tax 2015 Booklet** 13 (2015).

⁴⁸ “Section 39 In this Chapter, unless the context otherwise requires:

“Company or juristic partnership” means a company or juristic partnership established under a Thai or foreign law, and shall include:

- (1) A business operating in a commercial or profitable manner by a foreign government, organization of a foreign government or any other juristic person established under a foreign law;
- (2) A joint venture, operating in a commercial or profitable manner, between a company or juristic partnership on one hand and companies, juristic partnerships, individuals, non-juristic body of persons, ordinary partnerships on the other hand;
- (3) A foundation or association carrying on revenue generating business, but does not include the foundation or association as prescribed by the Minister in accordance with Section 47 (7) (b).
- (4) Any juristic person as prescribed by the Director-General with an approval of the Minister and published in the Government Gazette.”

⁴⁹ Limited company, public limited company, limited partnership, and registered partnership.

or established under laws of foreign countries.⁵⁰ Business operating in a commercial or profitable manner,⁵¹ joint venture,⁵² a foundation or association carrying on revenue generating business,⁵³ is also a company or juristic partnership under this law. It includes any juristic person as prescribed by the Director-General with an approval of the Minister and published in the Government Gazette.⁵⁴

However, some juristic persons do not have to pay a corporate income tax, such as other juristic persons, charity foundation or association. Also, some juristic persons may be exempted from the corporate income tax even it has a characteristic of corporate income taxpayer, for example, a company or a juristic partnership which carries its business in a country that Thailand has a double taxation agreement.⁵⁵

3.2.2 Tax Base under Thai Revenue Code

The company or juristic partnership is stipulated to pay the corporate income tax from different tax bases according to Revenue Code. These tax bases include net profit,⁵⁶ income before deducting any expense,⁵⁷ income paid from or in Thailand,⁵⁸ and disposal of profits outside of Thailand.⁵⁹

⁵⁰ See Thai Revenue Code, Section 66 paragraph 2, Section 67, Section 70 and Section 76 *bis*.

⁵¹ The business operated by a foreign government, organization of a foreign government or any other juristic person established under the law of foreign countries.

⁵² See Thai Revenue Code, Section 39.

⁵³ It excludes a foundation or association as stipulated by the Minister of Finance, according to Section 47 (7) (b) of Revenue Code.

⁵⁴ There is no any publication at the present.

⁵⁵ See Group of Tax Scholars, *supra* note 6, at 157.

⁵⁶ See Thai Revenue Code, Section 65.

⁵⁷ See Thai Revenue Code, Section 67.

⁵⁸ See Thai Revenue Code, Section 70.

⁵⁹ See Thai Revenue Code, Section 70 *bis*.

3.2.3 Accounting Period under Thai Revenue Code

Net profits or income before deducting any expense are levied at the end of each accounting period, generally twelve months, starting from the date of corporate registration. In some cases, the accounting period may be less than twelve months. For example, a new company or juristic partnership deems its starting date until any date as its first accounting period.⁶⁰

3.2.4 Tax Computation under Net Profit Basis

3.2.4.1 Taxpayer under Net Profit Basis

Taxpayer on a net profit basis includes a company or juristic partnership established under the law of Thailand,⁶¹ and a company or juristic partnership incorporated under the foreign law that carries on its business operation in Thailand.⁶² It also combines a company or juristic partnership incorporated under a foreign law which has an employee or a representative or a contact person in carrying on its business in Thailand and as a result of receiving profits in Thailand.⁶³ Finally, it expands to a business that a foreign government, organization of a foreign government or any other

⁶⁰ See Thai Revenue Code, Section 65 paragraph 1.

⁶¹ In a case that it has a branch, even inside or outside Thailand; it shall accumulate its branch's profit and its head office's profit for paying a corporate income tax in Thailand.

⁶² Only the net profit from a business carried on in Thailand is to pay corporate income tax. In a case that a foreign company holds shares in Thai company, it shall not be deemed as carrying a business in Thailand. Its branch that carries a business in Thailand shall not take a dividend from Thai company to calculate the net profit for paying tax in Thailand. However, Thai company shall be deducted for tax under Section 70.

⁶³ Such persons, either an individual or a juristic person, are deemed as a representative and shall have duties and responsibilities for submitting a list and income tax related to such income or profits.

juristic person established under a law of a foreign country operates commercially or profitably and a joint venture.

3.2.4.2 Net Profit Computation

According to Section 65,⁶⁴ a company or juristic partnership shall pay a corporate income tax based on a net profit basis. In the computation of this tax liability, the income from business or income arising from business carried on in an accounting period will be offset by the expenses of the business. The said computation must apply an accrual basis that revenues and all expenditures related to such income arising in an accounting period, even they have not received in such accounting period yet, shall be deemed as income and expenses for such accounting period, according to Section 65 paragraph 2.⁶⁵

⁶⁴ “**Section 65** Taxable income under this Part is net profit which is calculated by deducting income from business or income arising from business carried on in an accounting period with expenses in accordance with conditions prescribed in Sections 65 *bis* and 65 *ter*. An accounting period shall be twelve months except in the following cases where it may be less than twelve months:

1. a newly incorporated company or juristic partnership may elect to use the period from its incorporation date to any one date as the first accounting period.
2. a company or juristic partnership may file a request to the Director-General to change the last day of an accounting period. In such a case, the Director-General shall have the power to grant approval as he deems appropriate. Such an order shall be notified to the company or juristic partnership who files the request within a reasonable period of time and in the case where the Director-General grants the permission, the company or juristic partnership shall comply with the accounting period as prescribed by the Director-General.”

⁶⁵ “**Section 65 Paragraph 2** The calculation of income and expenses in paragraph 1 shall use an accrual basis. Income arising in an accounting period, even though it is not yet received in such accounting period, shall be included as income for that accounting period. All expenses relating to such income, even though they are not yet paid, shall be included as expenses for such accounting period.”

However, the accrual basis may cause a difficulty since some cases have not received the income or have no way of earning the income. Revenue Department has announced the Revenue Department Ordinance No. Tor. Por. 1/2528⁶⁶ for relieving such duty. For example, a company or juristic partnership operates a hire-purchase business, and a hire-purchase agreement has a term exceeding one accounting period. They can compute income and expenses by calculating wholesale profits as income in the accounting period which has such hire-purchase. A hire-purchase profit⁶⁷ shall be computed as income in each installment according to generally accepted accounting principles (GAAP).⁶⁸ Moreover, in computing net profits, there are further conditions by Section 65 *bis*, Section 65 *ter* and Section 70 *ter*.

3.2.4.3 Conditions under Section 65 *bis*

Section 65 *bis*⁶⁹ stipulates the expenses that a taxpayer can deduct from its income in a net profit computation. Such deductible expenses shall have conditions, according to

⁶⁶ Revenue Department Ordinance No. Tor Por 1/2528 (1985) Re: Application of Accrual Basis in Calculating of Income and Expense of Company or Juristic Partnership, hereinafter *Revenue Department Ordinance No. Tor Por 1/2528*.

⁶⁷ A difference between a total amount to be paid under the agreement and cash selling price.

⁶⁸ See Revenue Department Ordinance No. Tor Por 155/2549 (2006) Re: Application of Accrual Basis in Calculation of Income and Expense of Company or Juristic Partnership.

⁶⁹ “**Section 65 *bis*** The calculation of net profit and net loss under this Part shall follow the following conditions:

- (1) Items specified in Section 65 *ter* shall not be deductible as expense.
- (2) Depreciation and depletion of assets shall be deductible under the rules, procedures, conditions and rates specified by a Royal Decree.

The depreciation and depletion of assets shall be deductible in proportion to the period from the acquisition of such assets.

- (3) Value of assets other than (6) shall use the normal purchase price of such asset and in the case of appreciation in the value of the asset, such appreciation shall not be

this Section, for instances, the value of assets which shall apply a regular price of such asset,⁷⁰ provision of service or lending of money without remuneration, fee or interest,⁷¹ and writing off bad debts.⁷²

Depreciation and depletion of assets are also the expenses stipulated under Section 65 *bis* that shall be deductible as per the rules, procedures, conditions and rates specified by Royal Decree Issued Pursuant to Revenue Code on Deduction of Depreciation and Depletion on Assets (No.145) B.E. 2527 (1984).⁷³ The deduction shall not exceed a capital cost of each type of assets and shall remain the capital cost, at least, one

included in the calculation of net profit or net loss. If any item of assets is entitled to depreciation or depletion, depreciation and depletion shall be deductible in the calculation of net profit or net loss in accordance with the rules, procedures, conditions and previous rates applicable before the appreciation in the value of assets by deducting and only the remaining period and remaining cost of capital of the assets shall be deducted.

(4) In the case of transfer of assets, provision of service or lending of money without remuneration, fee or interest; or with remuneration, fee or interest that is lower than the market price without reasonable cause, an assessment official shall have the power to assess such remuneration, fee or interest in accordance with the market price on the date of transfer, provision or lending.

(9) Writing off bad debts from debtor's account shall be done only if it follows rules, procedures and conditions prescribed by a Ministerial Regulation, however, if debt payment is received in any accounting period, it shall be included as income for that accounting period..."

⁷⁰ Thai Revenue Code, Section 65 *bis* (3), *see supra* note 69.

⁷¹ Thai Revenue Code, Section 65 *bis* (4), *see supra* note 69.

⁷² Thai Revenue Code, Section 65 *bis* (9), *see supra* note 69, and the Ministerial Regulation No. 186 (B.E. 2534) (1991) Issued Pursuant to the Revenue Code regarding Writing Off Bad Debts from Debtor's Account.

⁷³ Hereinafter *Royal Decree No.145*.

Baht.⁷⁴ A company or juristic partnership shall deduct the depreciation and depletion by selecting a GAAP and rates, and continuously using such GAAP and rates.⁷⁵ It is calculated by average time of acquisition of that asset in each accounting period. In case that such accounting period is not twelve months, the calculation will be the average daily rate.⁷⁶

Table 3.1 Type of Assets and Depreciation Rates

Type of Assets	Rate (%) (not exceed)
1. Building 1.1 Durable building 1.2 Temporary building	5% 100%
2. Acquisition cost of depleted natural resources	100%
3. Acquisition cost of the right to lease 3.1 no written lease agreement 3.2 written lease agreement without a renewal clause or with a renewal clause and definitely renewal terms	10% 100% divided by the original and renewable terms
4. Acquisition cost of the right in a process, formula, goodwill, trademark, business license, patent, copyright or any other rights	

⁷⁴ Passenger vehicle or car with seats not exceeding ten seats with the capital cost not exceeding one million baht, shall remain a capital cost equivalent to a capital cost that exceeds one million baht.

⁷⁵ It can be changed upon an approval from the Director-General of Revenue Department.

⁷⁶ See Revenue Department Ordinance No. Por 3/2527 (1984) Re: Deduction of Depreciation and Depletion on Assets.

4.1 unlimited using period	10%
4.2 limited using period	100%
	Divided by number year used
5. Other depreciation, except land and goods	20%

According to GAAP, the straight-line method of depreciation is the most commonly adopted by the taxpayers. This deduction is charged uniformly over the life of an asset. To clarify the straight-line method of depreciation, the following Figure 3.1 and Table 3.2 will show the formula and example of calculation respectively.

Figure 3.1 Straight-Line Method Formula

$$\text{Depreciation/Year} = \frac{\text{Cost} - \text{Residue Value (if any)}}{\text{Useful life}}$$

Table 3.2 Calculation Example of Straight-Line Method of Depreciation

Calculation			Annual depreciation expense	End of Year	
Year	Cost x Depreciation Rate			Accumulated depreciation	Book value at end of year
2012	\$12,000	20%	\$2,400	\$2,400	\$10,600
2013	\$12,000	20%	\$2,400	\$4,800	\$8,200
2014	\$12,000	20%	\$2,400	\$7,200	\$5,800
2015	\$12,000	20%	\$2,400	\$9,600	\$3,400
2016	\$12,000	20%	\$2,400	\$12,000	\$1,000

The double-declining balance method of depreciation is also allowed for other depreciation except land and goods under Section 4 Paragraph 3 of the Royal Decree No.145.⁷⁷ It is a type of declining balance depreciation method in which depreciation rate is double the straight-line depreciation rate. For straight-line depreciation rate of 20%, double declining balance rate will be $2 \times 20\% = 40\%$. To clarify this method of depreciation, the following Figure 3.2 and Table 3.3 will show the formula and example of calculation respectively.

Figure 3.2 Double-Declining Balance Method Formula

$$\text{Depreciation/Year} = \frac{\text{Depreciation Rate} \times \text{Book Value of Asset}}{\text{Useful life}}$$

(Depreciation Rate = Accelerator x Straight-line Rate)

⁷⁷ “**Section 4 Paragraph 3.** Upon the deduction of depreciation and depletion on other assets under the provision of the first paragraph (5) which is not a passenger vehicle with the seat not exceeding ten seats, the company or juristic partnership shall apply a general accepted accounting principles having a deduction rate of depreciation and depletion in the first year as twice the rate stipulated in the first paragraph. For the next year, it can deduct as such double rate by a calculation of remaining capital cost in each accounting period, but the number of year of the useful life of asset for the depreciation and depletion shall not be less than 100 divided by a percentage rate as stipulated in the first paragraph. In the final accounting period of such useful life of assets, the company or juristic partnership can deduct the depreciation and depletion by including the total remaining capital cost.”

Table 3.3 Calculation Example of Double-Declining Balance Method of Depreciation

Calculation			Annual depreciation expense	End of Year	
Year	Cost x Depreciation Rate			Accumulated depreciation	Book value at end of year
2012	\$12,000	40%	\$4,800	\$4,800	\$7,200
2013	\$7,200	40%	\$2,880	\$7,680	\$4,320
2014	\$4,320	40%	\$1,728	\$9,408	\$2,592
2015	\$2,592	40%	\$1,036.8	\$10,444.8	\$1,555.2
2016	\$1,555.2	40%	\$622.08	\$11,066.88	\$933.12

In the case of unequal depreciation in each year between the useful life of the asset, it can be deducted by GAAP that exceeds the rates stipulated in Royal Decree No.145, but the useful life of property shall not be less than 100 shared by such stipulated rates.⁷⁸

3.2.4.4 Conditions under Section 65 *ter*

As Section 65 *bis* imposes deductible expenses, Section 65 *ter*⁷⁹ provides the unallowable expenses in net profit computation. For instances, reserves,⁸⁰ funds

⁷⁸ See Revenue Department Ordinance No. Por 3/2527 (1984) Re: Deduction of Depreciation and Depletion on Assets.

⁷⁹ “**Section 65 *ter*** The following items shall not be allowed as expenses in the calculation of net profits:

- (1) Reserves except:
- (5) Capital expense or expense for the addition, change, expansion or improvement of an asset but not for repair in order to maintain its present condition.
- (6) Fine and/or surcharge, criminal fine, income tax of a company or juristic partnership.

except a provident fund,⁸¹ capital expenditure or expense for the addition, change, an asset expansion or improvement but not including repair to maintain its present condition,⁸² penalty and/or surcharge, criminal fine, income tax of the taxpayer.⁸³

3.2.4.5 Exemptions of Corporate Income Tax

In the computation of net profit, there are exemptions in Thai Revenue Code as well as other laws, such as the Board of Investment of Thailand's Corporate Income Tax Exemption on Net Profits from Ocean Marina Services.⁸⁴ Under Thai Revenue Code, the exemptions are provided in many provisions, for examples, dividends according to Section 65 *bis* (10), money related to the investment promotion law,⁸⁵ loan interest for sale or acquisition of assets according to Royal Decree No.375.⁸⁶ The said loan shall

(6 *bis*) Value added tax paid or payable and input tax of a company or juristic partnership which is a VAT registrant except value added tax and input tax of a registrant paid under Section 82/16, input tax not deductible in the calculation of value added tax under Section 82/5(4) or other input tax as prescribed by a Royal Decree.

(12) Damages claimable from an insurance or other protection contracts or loss from previous accounting periods except net loss carried forward for five years up to the present accounting period..."

⁸⁰ Except the exempted reserves under Section 65 *ter* (1).

⁸¹ See the Ministerial Regulation No.183 (B.E. 2533) (1990) Issued Pursuant to Revenue Code regarding Provident Funds.

⁸² Thai Revenue Code, Section 65 *ter* (5), *see supra* note 79.

⁸³ Thai Revenue Code, Section 65 *ter* (6), *see supra* note 79.

⁸⁴ Office of the Board of Investment Announcement No. Por 2/2553 Corporate Income Tax Exemption on Net Profits from Ocean Marina Services, *see* other tax exemptions of BOI at http://www.boi.go.th/index.php?page=boi_announcements.

⁸⁵ See Investment Promotion Act B.E. 2520 (1977), full text *available at* http://www.boi.go.th/english/download/boi_forms/proact_eng.pdf.

⁸⁶ Royal Decree Issued Pursuant Revenue Code regarding Exemption of Revenue Taxes (No. 375) B.E. 2543 (2000), hereinafter *Royal Decree No. 375*.

be directly from operating a business or profession, or directly related to a performing asset.⁸⁷ If the said interest exists before the date that the asset is ready to use, it shall be deemed as capital or a capital expenditure. If the interest exists since such date, it will be granted the tax exemption according to Proclamation of Director-General No. 92.⁸⁸

The additional example is the income tax that a company or juristic partnership incorporated under Thai law has paid in abroad, but it shall not exceeding the tax to be paid in Thailand calculated by income from carrying on business in each foreign country or received from a company or juristic partnership incorporated under each foreign law.⁸⁹ Such income shall not be deemed as an expense in calculation a net profit according to Royal Decree No. 300⁹⁰ and Proclamation of Director-General No.65.⁹¹

3.2.4.6 Tax Rate of Corporate Income Tax

Normally, the tax rate for a company or juristic partnership is at 30% of net profit. However, a company or juristic partnership having a paid up capital not exceeding five million Baht at the end of accounting period and having income from sale of

⁸⁷ Performing asset means “an asset that provides a dependable annual financial return, for instance, a production machinery and plant”.

⁸⁸ Proclamation of Director-General of Revenue Department regarding Revenue Taxes (No. 92) Re: Regulation, Method, and Condition of Revenue Tax Exemption of Interest, Loan for Sale and Acquisition of Assets of Company or Juristic Partnership, hereinafter *Proclamation of Director-General No. 92*.

⁸⁹ See Royal Decree No. 300, Section 3.

⁹⁰ Royal Decree Issued Pursuant to Revenue Code regarding Exemption of Revenue Taxes (No. 300) B.E. 2539 (1996), hereinafter **Royal Decree No. 300**.

⁹¹ Proclamation of Director-General of Revenue Department (No. 65) regarding Regulation, Method and Condition of Income Tax Exemption for Company or Juristic Partnership incorporated under Thai Laws, hereinafter *Proclamation of Director-General No. 65*.

goods and service providing (small company) will be subject to corporate income tax at the rate of 15% of net profit from THB 300,000 not exceeding three millions Baht.

For other cases, as based on net profits basis, a company or juristic partnership must pay a corporate income tax at the rate of 20% of its net profits. This rate will come into force for income of a company or juristic partnership occurred in the accounting period in or after January 1, 2016, and onwards, according to the Amendment to the Revenue Code (No. 42) Act B.E. 2559 (2016), Section 3⁹² and Section 4⁹³

3.2.4.7 Method of Net Profit Computation

A company or juristic partnership that has a liability to pay the corporate income tax on a net profit basis shall calculate its corporate income tax and submit a tax return for the accounting period twice a year.

Firstly, it must pay the corporate income tax at a half-yearly accounting period from its one-half of the estimated net profits.⁹⁴ However, the stipulated juristic persons shall calculate and pay tax from a net profit of a six months from the first day of an accounting period under conditions stipulated in Section 65 *bis* and Section 65 *ter* such as a listed company, a commercial bank,⁹⁵ or a finance company.⁹⁶ The tax paid on behalf of both taxpayers can be treated as the credit of the taxpayer in tax

⁹² “**Section 3.** To repeal the content of (a) of (2) for company or juristic partnership of the Income Tax Rates Schedule attached to the Chapter 2 of the Title 2 of Revenue Code, as amended by the Royal Ordinance of Amendment to Revenue Code (No. 16) B.E. 2534 (1991) and to apply the following content:

“(a) Taxes from net profits of company or juristic partnership at rate of 20%”.

⁹³ “**Section 4.** The provision of Section 3 shall be come into force for the income of company or juristic partnership which an accounting period is occurred in or after January 1, 2016 onwards.”

⁹⁴ See Thai Revenue Code, Section 67 *bis*, paragraph 1(1), and paragraph 3.

⁹⁵ According to the laws governing commercial banks.

⁹⁶ See Thai Revenue Code, Section 67 *bis*, paragraph 1(2).

computation. If the tax paid from the estimated net profits is higher than the tax to be paid in the accounting period, such taxpayer can request for refunding the excessively paid tax.

Secondly, a company or juristic partnership which has already computed the net profits shall multiply such net profits by the tax rate so that it will show the corporate income tax to be paid. In case there are no net profits or net loss, it shall not compute the corporate income tax or simply not to pay the corporate income tax.⁹⁷ If there is net loss, such company or juristic partnership can carry such net loss forward for five years from the present accounting period, according to the exception of Section 65 *ter* (12).⁹⁸

3.2.5 Tax Computation under Other Tax Bases

Apart from the net profit basis, there are other tax bases stipulated to apply with some different incomes including income before deducting expense, income paid from or in Thailand, and disposal of profits outside of Thailand. Firstly, the income before deducting expense is a tax base that applies to the income from an international transport business, both carriage of goods and passengers,⁹⁹ and income of a

⁹⁷ See Group of Tax Scholars, *supra* note 6, at 215.

⁹⁸ “**Section 65 *ter* (12)**

Damages claimable from an insurance or other protection contracts or loss from previous accounting periods except net loss carried forward for five years up to the present accounting period”

⁹⁹ “**Section 67** The payment of tax under this Part shall be in accordance with the rates specified in the table of Income Tax rates attached to this Part. Except in the case of a company or juristic partnership under paragraph 2 of Section 66 carrying on international transportation business , it shall pay tax on the transportation business under the following rules:

(1) In case of carriage of passengers, it shall pay tax at the rate of 3% of fares, fees and other benefits chargeable in Thailand before deducting any expense from such carriage of passengers.

foundation or association carrying on revenue generating business, but not including the foundation or association as imposed by the Minister in accordance with Section 47 (7) (b)¹⁰⁰ and money under Section 65 *bis* (13).¹⁰¹

For the income paid from or in Thailand basis, a taxpayer is a company or juristic partnership incorporated under foreign law and not carrying a business in Thailand, but receiving the assessable incomes specified under Section 40 (2) (3) (4) (5) or (6) from or in Thailand.¹⁰² The assessable incomes under subsection (2) (3) (5) or (6) shall be computed to pay tax at the rate of 15% while the income under subsection (4) shall be calculated to pay tax at the rate of 10%.¹⁰³

(2) In case of carriage of goods, it shall pay tax at the rate of 3% of freight charges, fees and other benefits, whether chargeable in Thailand or not, before deducting any expense from such carriage of goods.”

¹⁰⁰ Money donated to charity organizations, hospitals or educational institutions as prescribed by the Minister and published in the Royal Gazette.

¹⁰¹ Registration fees or maintenance fees from members, or cash or assets received as donations or gifts.

¹⁰² “**Section 70** A company or juristic partnership incorporated under foreign laws and not carrying on business in Thailand but receiving assessable income under Section 40 (2)(3)(4)(5) or (6) which is paid from or in Thailand, shall be liable to pay tax. The payer of income shall deduct corporate income tax from such assessable income at the corporate income tax rate and remit it to the local Amphur office together with the filing of a tax return in the form prescribed by the Director General within 7 days from the last day of the month in which such income is paid. Section 54 shall also apply *mutatis mutandis*.

The provisions of Paragraph 1 shall not apply in the case where a company or juristic partnership incorporated under foreign laws receives assessable income being interest from the Government or a financial institution incorporated under the specific Thai laws for the purpose of lending to promote agriculture, commerce or industry.”

¹⁰³ See Group of Tax Scholars, *supra* note 6, at 246-249.

Finally, the disposal of profits outside of Thailand is a tax base imposed for a company or juristic partnership. The taxpayer disposes of the profits or another type of money set aside from profits or deemed to be the profit from Thailand. These profits or money at the rate of 10% shall be deducted to be taxed in Thailand.¹⁰⁴

3.2.6 Withholding Tax

The Revenue Code provides that a taxpayer shall withhold a tax from payment and remit it to the Revenue Department before paying to a company or juristic partnership. The tax withheld is credited against the computation of corporate income tax for filing a tax return at a half-yearly accounting period or at the end of accounting period as the case may be.¹⁰⁵ The withholding tax consists of three cases.

¹⁰⁴ “**Section 70 bis** A company or juristic partnership disposing its profits or other type of money that is set aside from profits or is deemed to be profits from Thailand shall pay income tax by deducting from such disposed amount of money in accordance with the corporate income tax rate for the company and juristic partnership and shall remit it to the local Amphur office together with the filing of a tax return in the form prescribed by the Director-General within 7 days from the date of disposal.

Disposal of profits under Paragraph 1 shall include:

- (1) Disposal of profits or other type of money that is set aside from profits or is deemed to be profits from profit and loss account or other book of account in order to settle debt or to set off against liability or to enter as a credit in an account of any person abroad; or
- (2) in the case where there does not appear the fact in (1) there is a request to purchase and transfer foreign currency which is profit or other money that is set aside from profits or is deemed to be profits disposed abroad; or
- (3) any other action which results in (1) or (2).”

¹⁰⁵ Group of Tax Scholars, *supra* note 6, at 250.

Firstly, in the event that a government sector pays money to a company or juristic partnership, such government sector shall deduct a withholding tax at the rate of 1% of total paid assessable income.¹⁰⁶

Secondly, in the case of sale of immovable property by a company or juristic partnership, a person who pays a buying price of the asset shall deduct a withholding tax at the rate of 1% of total paid assessable income.¹⁰⁷

Lastly, in the case of the assessable income under Section 40, a taxpayer who does not have to withhold tax shall withhold tax by rules, conditions and procedures prescribed by the Ministerial Regulations.¹⁰⁸ For examples, a company or juristic partnership which pays taxpayer an income from liberal professions¹⁰⁹ to a receiver which is a company or juristic person shall withhold tax at the rate of 3.0 according to Ministerial Regulation No.144.¹¹⁰

¹⁰⁶ See Thai Revenue Code, Section 69 *bis*.

¹⁰⁷ See Thai Revenue Code, Section 69 *ter*.

¹⁰⁸ “**Section 3 *tredecim*** For the purpose of tax collection, a Director-General shall be empowered to order the payer of assessable income under Section 40, who does not have to withhold tax under Title 2, to withhold tax at source in accordance with rules, conditions and procedures prescribed by the Ministerial Regulations. For this purpose, Section 52, Section 53, Section 54, Section 55, Section 58, Section 59, Section 60 and Section 63 shall apply.”

¹⁰⁹ Assessable income under Section 40 (6).

¹¹⁰ Ministerial Regulation No.144 (B.E. 2522) (1979) Issued Pursuant to Revenue Code regarding Revenue Taxes, hereinafter *Ministerial Regulation No.144*.

3.3 Corporate Income Tax of Cross-Border Leasing

3.3.1 Lease Characterization under Thai Revenue Code

According to the Revenue Department Ordinance No. Tor. Por. 4/2528,¹¹¹ and the Ministerial Regulation No.144, ‘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 lesser. 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 Revenue Code or other relevant laws.

3.3.2 Lessor as Taxpayer under Thai Revenue Code

In Thailand, according to Section 39 of Thai Revenue Code, the lessors are juristic persons. Some of them are a company incorporated under Thai laws in the 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 may also be a lessor.

Other taxpayers 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 as a result in receiving profits in Thailand,¹¹² a business that a foreign government, organization of a foreign government or any other

¹¹¹ 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 Revenue Code, hereinafter **Revenue Ordinance No. Tor. Por. 4/2528**.

¹¹² Such persons, even an individual or a juristic person, are deemed as a representative and shall have duties and responsibilities for submitting a list and income tax related to such income or profits.

juristic person established under a law of foreign country operates commercially or profitably, and a joint venture.

3.3.3 Income Recognition

The lessor is subject to a corporate income tax liability on a net profit basis, according to Section 65 paragraph 1 of Thai Revenue Code. The computation applies an accrual basis under Section 65 paragraph 2 of Thai Revenue Code. All lease rents and expenses related to such lease rents arising in accounting period (twelve months),¹¹³ 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 Revenue Department Ordinance No. Tor. Por. 1/2528¹¹⁴ states that these incomes and expenses in each accounting period shall be calculated according to the portion of the lease term.

3.3.4 Net Profit Computation under Section 65 of Thai Revenue Code

Under Section 65 of Thai Revenue Code, the lessor shall pay a corporate income tax under the net profit basis calculated by deducting income arising from leasing business carried on in an accounting period with expenses. The lessor's computation

¹¹³ Except in the some cases where it may be less than twelve months, *see* Revenue Code, Section 65 paragraph 1.

¹¹⁴ “**Article 3.4** Calculation of income and expense of company or juristic partnership operating asset renting shall use an accrual basis under Article 2. Such company or juristic partnership shall take relevant rental income or installment and expense to calculate as income and expense in each accounting period as per portion of period of asset renting.

Calculation of income and expense of company or juristic partnership being owner of the asset shall use an accrual basis under Article 2. Such company or juristic partnership shall take relevant rental income or installment and expense to calculate as income and expense in each accounting period as per portion of period of asset renting.”

must follow the conditions under Section 65 *bis* regarding deductible expenses, and Section 65 *ter* which is related to the prohibited expenses. For the depreciation and depletion of the assets, it presents the next item particularly.

This net profit computation has some exemptions in case of outbound income. The lessor who has paid his income tax in a border country can use such paid taxes as a tax exemption against the corporate income tax to be paid in Thailand as aforementioned in item 3.2.4.5.¹¹⁵ 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.

3.3.5 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 so that the allowable deduction rate is at 20% of the capital cost per one accounting period. It will be 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 1¹¹⁶ of Royal Decree No.145.¹¹⁷

¹¹⁵ See Royal Decree No. 300 and Proclamation of Director-General No. 65.

¹¹⁶ “**Section 4** Depreciation and depletion of asset shall be calculated by deducting the period of acquiring such asset in each accounting period. In case where any period is not total twelve months, it shall be an average on portion for such accounting period, but not exceeding a rate of capital value in accordance with type of asset as follows...”

¹¹⁷ Royal Decree No.145, Section 4 paragraph 3 as amended by Royal Decree (No.359) B.E. 2542 (1999), enforcement on October 23, 1999 onwards.

3.3.6 Net Operating Loss Treatment under Section 65 *ter* (12) of Thai Revenue Code

A net loss or net operating loss (NOL) is incurred when the expense exceeds the income. In this case, 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).¹¹⁸

3.3.7 Withholding Tax of Lease Rent

According to Article 6, Paragraph 1¹¹⁹ of Revenue Department Ordinance No. Tor. Por. 4/2528,¹²⁰ a juristic person who pays money or any other gain derived from a

¹¹⁸ See *supra* note 98.

¹¹⁹ “**Article 6** A company or juristic person who is a payer of rent or other benefits from the rent of asset in accordance with Section 40 (5) (a) of the Revenue Code, but not including cost of building or house of which the ownership is granted to a receiver who is:

(1) a person who has to pay a withholding personal tax income by deducting at a rate of 5.0;

....

“The first paragraph shall not come to force with a rental payment under leasing agreements that comply with the following rules:

(a) a lessor is a company or juristic partnership having its registered capital paid not less than 60 million Thai baht and being an entrepreneur who registers value-added tax to pay value-added tax in accordance with Section 82/3 of the Revenue Code;

(b) a lessee is a juristic person;

(c) lease term is 3 years upwards, except a leased asset is an asset that the lessor seizes from other lessee, the lease term may not be 3 year.

Term of “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 lesser.”

rent of property, an assessable income under the Revenue Code, Section 40 (5) (a),¹²¹ 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 6,¹²² in case that the lessor having a paid-up capital of sixty million Baht upwards is a VAT-registered business person,¹²³ and the lessee is a juristic person with the lease term exceeding three years,¹²⁴ a lessee shall not deduct a withholding tax as imposed. Moreover, the term of ‘leasing’ shall have the definition as stipulated in Paragraph 3 of the Article 6.¹²⁵ 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 1¹²⁶ of the Revenue Department Ordinance No. 259/2559 (2016).¹²⁷ Therefore,

¹²⁰ See Revenue Department Ordinance No. Tor. Por. 176/2552 (2009) Re: Order the Payer of Assessable Income under Section 40 of Revenue Code to Deduct the Withholding Tax.

¹²¹ “**Section 40 (5) (a)** Assessable income is income of the following categories including any amount of tax paid by the payer of income or by any other person on behalf of a taxpayer.

(5) Money or any other gain derived from:

(a) rent of property”

¹²² See *supra* note 119.

¹²³ According to Thai Revenue Code, Section 82/3.

¹²⁴ Except the leased asset is seized from other lessee, it can be applied with the lease term which is less than three years.

¹²⁵ See *supra* note 119.

¹²⁶ “**Article 1.** It shall repeal the content of Paragraph 2 and 3 of Article 6 of the Revenue Department Ordinance No. Tor. Por. 4/2528 Re: Order the Payer of Assessable Income under Section 40 of Revenue Code who has a withholding tax liability, dated September 26, 1985, as amended by Revenue Department Ordinance No. Tor. Por. 176/2552 (2009) Re: Order the Payer of Assessable Income under Section 40 of Revenue Code to have withholding tax liability, dated October 6, 2009.”

upon Article 2 of this Ordinance,¹²⁸ the lessee shall deduct the withholding tax at the rate of 5% every payment of the lease rent. It came into force on the assessable income (lease rents) from June 1, 2016, onwards.

3.3.8 Penalties and Punishment under Section 37 and 37 bis of Thai Revenue Code

After submitted a tax return, assessment by 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 *bis* of the Revenue Code.¹²⁹

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 Revenue Code.¹³⁰ These imprisonments and penalties also apply

¹²⁷ 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.

¹²⁸ “**Article 2.** This Ordinance shall be come into force for payment of assessable income from June 1, 2016 onwards.”

¹²⁹ “**Section 37 bis** A person intentionally fails to file tax returns prescribed under this Title in order to evade or in an attempt to evade tax, shall be subject to an imprisonment for a term not exceeding 1 year or a fine of not exceeding 200,000 Baht or both.”

¹³⁰ “**Section 37** A person acts the followings shall be subject to an imprisonment from 3 months to 7 years and penalty from 2,000 Baht to 200,000 Baht:

(1) intentionally notifies false statement or gives false statement or answers with a false statement or shows false evidence in order to evade taxes or file a tax refund under this Title, or

to the attempt to evade tax by using false facts, fraudulent, artifice or other similar nature.

3.3.9 International Double Taxation

In cross-border leasing, a lease rent paid by a lessee in Brunei Darussalam and Cambodia shall be taxed in these countries. In the case of remaining ASEAN member countries that Thailand has a double tax agreement (DTA) with, lease rent is determined as royalties. It is ‘a consideration for the use or the right to use of industrial, commercial or scientific equipment’. 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 foreign 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.¹³¹

There are two issues in the double taxation consisting of a unilateral double taxation relief and relief under double taxation agreement as follows:

3.3.9.1 Unilateral Double Taxation Relief

Thailand does not have a DTA with Brunei Darussalam and Cambodia. A lease rent paid by a lessee in Brunei Darussalam is subject to withholding tax at a rate of 10%.¹³² In a case that the lessee is Cambodian, The income (lease rent) derived from Cambodia shall be taxed in Cambodia as sourced income.¹³³ This foreign income tax is allowed to be deduction upon the certain criteria and conditions according to the Royal Decree No.300 and Proclamation of Director-General No.65. However, the tax

(2) with faulty facts, fraudulent, artifice or other similar nature, evades or attempts to evade tax or file a tax refund under this Title.”

¹³¹ See Royal Decree No.300 and Proclamation of Director-General No.65.

¹³² KPMG, **Brunei Darussalam Tax Profile 1** (2013).

¹³³ KPMG, **Cambodia Tax Profile 1** (2014).

credits are up to the amount of tax that would have been payable from income derived in Thailand.¹³⁴

3.3.9.2 Relief under Double Taxation Agreements

In the case of Laos, Malaysia and Myanmar, Thailand has DTAs with these border countries. Under such DTAs, the lease rent is deemed as royalties as it is a consideration for the use or the right to use of industrial, commercial or scientific equipment. The royalties arising in Contracting State and paid to a resident of Thailand (the lessor) may be taxed in Thailand. If the Thai recipient (the lessor) is the beneficial owner of the royalties, the tax shall be charged not exceeding the rate of the royalties as stipulated by each DTA.¹³⁵ The royalties taxed under the DTAs can be used as the foreign tax credits under the criteria and conditions of the Royal Decree No.300 and Proclamation of Director-General No.65. Thailand does not have the DTAs only with those three countries, but there are also DTAs signed between Thailand and ASEAN member countries, consisting of seven DTAs as follows:

- 1) “Agreement between the Government of the Kingdom of Thailand and the Government of the Republic of Indonesia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, enforced on October 21, 2003” (DTA Indonesia- Thailand):
 - Royalties shall be charged not exceeding fifteen percent of the gross amount of the royalties, according to Article 12: and
 - The method of elimination of double taxation provides a method of deduction under Article 23.

- 2) “Agreement between the Government of the Kingdom of Thailand and the Government of the Lao People’s Democratic Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, enforced on December 29, 1997” (DTA Thailand-Laos):

¹³⁴ See Royal Decree No.300 and Proclamation of Director-General No.65.

¹³⁵ Without regarding the permanent establishment terms.

- Royalties shall be charged not exceeding fifteen percent of the gross amount of the royalties, according to Article 12; and
 - Elimination of double taxation provides a method of deduction under Article 23.
- 3) “Agreement between the Government of the Kingdom of Thailand and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, enforced on February 2, 1983” (DTA Thailand-Malaysia):
- Royalties shall be charged not exceeding fifteen percent of the gross amount of the royalties, according to Article 12; and
 - Elimination of double taxation provides a method of credit against Thai tax payable in respect of income derived from Malaysia under Article 23.
- 4) “Agreement between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, enforced on August 15, 2011” (DTA Thailand-Myanmar):
- Royalties shall be charged not exceeding fifteen percent of the gross amount of the royalties, according to Article 12; and
 - Elimination of double taxation provides a method of credit against Thai tax payable in respect of income derived from Myanmar under Article 24.
- 5) “Convention between the Government of the Kingdom of Thailand and the Government of the Republic of the Philippines for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, enforced on April 11, 1983” (DTA Thailand-Philippines):
- Royalties shall be charged not exceeding twenty-five percent of the gross amount of the royalties, according to Article 13; and

- Elimination of double taxation provides a method of credit against Thai tax payable in respect of income derived from the Philippines under Article 23.
- 6) “Convention between the Royal Government of Thailand and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, enforced on April 27, 1976” (DTA Thailand-Singapore):
- Royalties shall be charged not exceeding fifteen percent of the gross amount of the royalties, according to Article 12; and
 - Elimination of double taxation provides a method of credit against Thai tax payable in respect of income derived from the Philippines under Article 23.
- 7) “Agreement between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Vietnam for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, enforced on December 31, 1992” (DTA Thailand-Vietnam):
- Royalties shall be charged not exceeding fifteen percent of the gross amount of the royalties, according to Article 12; and
 - Elimination of double taxation provides a method of deduction under Article 23.

3.3.9.3 Exchange of Information

According to DTAs between Thailand and counter-contracting ASEAN member States, the tax authorities shall exchange the information in respect of royalties, the taxes under the DTAs. Thai Revenue Department will be entitled to request such information from the Contracting State in case there is a suspicious transaction over the cross-border leasing transaction. Since this transaction is incurred in different tax jurisdictions, either the lessor who locates in Thailand or the lessee who situates in other ASEAN member countries may abuse a tax liability under the DTA. For

example, the Thai lessor claims a credit against the royalties paid in Myanmar at a rate of fifteen percent of the gross amount of royalties even they have paid the royalties in Myanmar only ten percent of the total royalties.

In this regard, the exchange of information is specified the provisions of DTAs as follow:

- 1) Article 26 of DTA Indonesia- Thailand
- 2) Article 26 of DTA Thailand-Laos
- 3) Article 26 of DTA Thailand-Malaysia
- 4) Article 27 of DTA Thailand-Myanmar
- 5) Article 26 of DTA Thailand-Philippines
- 6) Article 26 of DTA Thailand-Singapore
- 7) Article 26 of DTA Thailand-Vietnam

Besides DTA, Thailand entered into a negotiation with the US on “Agreement to Improve International Tax Compliance and to Implement Foreign Account Tax Compliance Act” (FATCA) since June 6, 2014.¹³⁶ On March 4, 2016, the Agreement has been signed by and between Thailand and the US. It will facilitate the exchange of information between the Thai Revenue Department and U.S. Internal Revenue Service (IRS).¹³⁷

¹³⁶ “Agree Minutes Negotiation between the Delegations of the Kingdom of Thailand and the United States of America on Agreement to improve International Tax Compliance and to implement FATCA, June 6, 2014.”

¹³⁷ Rangsan Sriworasart, **Report of Negotiation to improve International Tax Compliance and to implement FATCA between the Delegations of the Kingdom of Thailand and the United States of America, dated June 18, 2014**, 4 (2014). (รังสรรค์ ศรีวรศาสตร์, รายงานผลการเจรจาเพื่อจัดทำความตกลงเพื่อความร่วมมือด้านภาษีอากรระหว่างประเทศและการปฏิบัติตาม Foreign Account Tax Compliant Act (ความตกลง

3.3.9.4 OECD Tax Information Exchange Agreements

The Organization for Economic Co-operation and Development (OECD) has launched Tax Information Exchange Agreements (TIEAs) with the aim of encouraging the international cooperation for the exchange of information. This collaboration concentrates to tax matters. The OECD Global Forum Working Group on Effective Exchange of Information is a group who works on developing the cooperation.¹³⁸ These Agreements constitute a bilateral competent authority agreement to handle the harmful tax practices. As of May 25, 2011, there are 61 individual jurisdictions that join TIEAs, including the US, the UK, and Germany. Each jurisdiction can sign either bilateral or multilateral agreement between them. A party can request another party to provide the identity of leasing companies which is examined for the harmful tax practice in that country. It will help to prevent the tax shelter by using a method of cross-border leasing. The parties can share the information concerning the cross-border leasing transaction of their resident companies.

FATCA) ระหว่างรัฐบาลแห่งราชอาณาจักรไทยและรัฐบาลแห่งประเทศสหรัฐอเมริกา

(กรุงเทพมหานคร: กระทรวงการคลัง, 2557.)

¹³⁸ OECD, “*Tax Information Exchange Agreements (TIEAs)*”, available at <http://www.oecd.org/tax/transparency/taxinformationexchangeagreementstieas.htm>.

CHAPTER 4

CORPORATE INCOME TAXATION ON CROSS-BORDER LEASING UNDER FOREIGN LAWS

This Chapter will explore the corporate income tax incentive for the export of cross-border leasing service and measures to control the use of such tax incentive in the foreign law aspects. Because of the following reasons, the selected foreign laws consist of the legislation of the United States, and the United Kingdom (UK),¹³⁹ as well as other selected jurisdictions consisting of Germany, and Malaysia.

The US is one of the major countries, which has the strongest taxation system and efficient investigation process. The UK provides an interesting measure, and it has some similarities to Thai laws in this sense. For other selected jurisdictions, Germany is considered as one of the European countries that have a largest cross-border leasing market, and Malaysia, as one of ASEAN member countries, sharing the borderline with Thailand, there are competitions between Thailand and Malaysia in many industries. This Chapter will also present the international cooperation in exchange of information in respect of tax matters.

4.1 Corporate Income Taxation on Cross-Border Leasing under laws of the United States

4.1.1 Overview of the US Corporate Income Taxation System

For taxing a federal income, taxpayers are classified into two broad classes including domestic corporations incorporated in the US,¹⁴⁰ and foreign companies. Domestic corporations are subject to tax on their worldwide corporate profits or net income.¹⁴¹

¹³⁹ Hereinafter *UK*.

¹⁴⁰ Including the domestic corporations under the law of the US or of any State,

¹⁴¹ Corporate profits are total income minus the cost associated with generating that income. Business expenses that may be deducted from income, including employee compensation and the depreciation.

It includes foreign corporations owned by the domestic corporation even the foreign companies have no business or investment in the US. Foreign companies are subject to the federal income tax only on the net income from a US source.¹⁴²

Statutory corporate tax is mostly at the rates of 35%. For applying to the largest business, this tax rate is generated at varying rates from 15% on the first \$50,000 of income to 35% on income over \$18,333,333. In the case of above 35%, the taxable income shall be in the amount between \$100,000 and \$335,000 that will be subject to 39%, and corporations with income between \$15,000,000 and \$18,333,333 will be subject to 38%. These two rates are the effective tax rate for higher-income corporations by offsetting any tax savings which they would realize from having the first \$75,000 in income taxed at lower rates.¹⁴³

4.1.2 Lease Characterization

Under the US laws, a lease shall be qualified as a true lease under the Revenue Ruling 55-540 for the lessor to secure the tax benefits associated with the economic ownership of the leased asset where the risks and rewards of ownership transfer to the lessor. The lessor will be entitled to deduct the expense, according to 26 U.S. Code §168 - Accelerated cost recovery system. A transaction would be regarded as a purchase and sale if one or more of the following conditions are present:

- 1) if the portions of periodic payments are purposed to acquire the equity in an asset by the lease;
- 2) if the lessee acquires the property title upon the payment of a stated amount of lease rents that the lessee is required to make under the lease agreement;

¹⁴² Charles R. Irish, **US Taxation on International Business and Investment Transaction** 34-35 (2014).

¹⁴³ Mark P. Keightley & Molly F. Sherlock, *"The Corporate Income Tax System: Overview and Options for Reform"*, **CRS Reports** 1, 2 (2014), available at <https://www.fas.org/sgp/crs/misc/R42726.pdf>.

- 3) if the lessee pays an inordinately large proportion of the asset price to transfer a title;
- 4) if the lease rent payments materially exceed a current fair market rental value;
- 5) if the property is entitled to acquire under a purchase option at a price that is equal to the value of the property when the option is exercised or small amount as compared to the total amount payable by the lessee; and
- 6) the portions of payments are specifically designed to be interest or the equivalent of interest.

Moreover, the lease shall also be qualified under the Revenue Procedure 74-2, which is the advance ruling. For federal income tax purpose, IRS promulgated general guidelines in lease transaction that must be qualified by the following conditions:¹⁴⁴

- 1) minimum 20% equity investment requirement;¹⁴⁵
- 2) minimum 20% residual value and remaining useful life;
- 3) fixed-price purchase/sale option;
- 4) the lessee not to finance any part of the cost of the property;
- 5) the lessee not to provide any loan or guarantee; and
- 6) the lessor can demonstrate a pre-tax profits and total cash flow must be positive.

4.1.3 Income Recognition

The income recognition of cross-border leasing is controlled by the provisions of the Internal Revenue Code (IRC),¹⁴⁶ Section 467. This Section applies to the leases that constitute “Section 467 rental agreement”.¹⁴⁷ The aggregate amount of lease rents

¹⁴⁴ See IRS Revenue Procedure 74-21.

¹⁴⁵ See IRS Revenue Procedure 75-32, Section 4(1) (A).

¹⁴⁶ Hereinafter *IRC*.

¹⁴⁷ “**Section 467 (d) (1). IN GENERAL** Except as otherwise provided in this subsection, the term “section 467 rental agreements” means any rental agreement for the use of tangible property under which—

accruing during the relevant tax year and interest for the tax year is taken into account on an accrual basis.¹⁴⁸ The tax advantage of a rear-loading and front-loaded lease

(A) there is at least one amount allocable to the use of property during a calendar year which is to be paid after the close of the calendar year following the calendar year in which such use occurs, or

(B) there are increases in the amount to be paid as rent under the agreement.”

¹⁴⁸ “**Section 467 (b) Accrual of rental payments**

(1) Allocation follows agreement Except as provided in paragraph (2), the determination of the amount of the rent under any section 467 rental agreement which accrues during any taxable year shall be made—

(A) by allocating rents in accordance with the agreement, and

(B) by taking into account any rent to be paid after the close of the period in an amount determined under regulations which shall be based on present value concepts.

(2) Constant rental accrual in case of certain tax avoidance transactions, etc.

In the case of any section 467 rental agreement to which this paragraph applies, the portion of the rent which accrues during any taxable year shall be that portion of the constant rental amount with respect to such agreement which is allocable to such taxable year.

(3) Agreements to which paragraph (2) applies Paragraph (2) applies to any rental payment agreement if—

(A) such agreement is a disqualified leaseback or long-term agreement, or

(B) such agreement does not provide for the allocation referred to in paragraph (1)(A).

(4) Disqualified leaseback or long-term agreement For purposes of this subsection, the term “disqualified leaseback or long-term agreement” means any section 467 rental agreement if—

(A) such agreement is part of a leaseback transaction or such agreement is for a term in excess of 75 percent of the statutory recovery period for the property, and

arrangement are effectively nullified by the provisions of IRC Section 467 and the Final Section 467 Regulations.¹⁴⁹

(1) IRC Section 467

“Section 467 rental agreement” means any rental agreement for the use of tangible property under which there is at least one amount allocable to the use of property during a calendar year to be paid after the close of the calendar year following the calendar year in which such use occurs, or there are increases in the amount to be paid as rent under the agreement.¹⁵⁰ The aggregate amount of rent accruing during the relevant tax year and interest for the tax year is taken into account on an accrual basis.¹⁵¹

(2) The Final 467 Regulations: Safe-Harbor Provisions

The Final 467 Regulations stipulates the 90-110% test. The Section 467 lease agreement will not recalculate on the method of accrual basis if the lease rent is neither allocated to each calendar year not lower than 90% nor higher than 110% of the average lease rents per year. In the case of long-term leases of real property, the

(B) a principal purpose for providing increasing rents under the agreement is the avoidance of tax imposed by this subtitle.

(5) Exceptions to disqualification in certain cases The Secretary shall prescribe regulations setting forth circumstances under which agreements will not be treated as disqualified leaseback or long-term agreements, including circumstances relating to—

- (A) changes in amounts paid determined by reference to price indices,
- (B) rents based on a fixed percentage of lessee receipts or similar amounts,
- (C) reasonable rent holidays, or
- (D) changes in amounts paid to unrelated 3rd parties.”

¹⁴⁹ Amar Mehta, **International Taxation of Cross-Border Leasing Income** 56 (2005).

¹⁵⁰ IRC, Section 467 (d) (1), *see supra* note 146.

¹⁵¹ IRC, Section 467 (b), *see supra* note 147.

deviation is permitted by the average annual rent up to the rate of 15%. The test will be replaced by 85-115%.¹⁵²

4.1.4 Tax Depreciation on the Leased Equipment

In case the lease qualifies as a true lease, the lessor has the tax benefits in respect of the ownership of the leased asset. According to Section 167 of the IRC, the depreciation deduction on the leased equipment is allowed for exhaustion, wear and tear and obsolescence. The lessor can also select the depreciation systems, according to the Modified Accelerated Cost Recovery System (MACRS) consisting of the General Depreciation System (GDS) in Section 168(a)¹⁵³ and the Alternative Depreciation System (ADS)¹⁵⁴ in Section 168(g).¹⁵⁵ As per either depreciation system,

¹⁵² Amar Mehta, *supra* note 149, at 62.

¹⁵³ “**Section 168(a)** General rule Except as otherwise provided in this section, the depreciation deduction provided by section 167(a) for any tangible property shall be determined by using—

- (1) the applicable depreciation method,
- (2) the applicable recovery period, and
- (3) the applicable convention.”

¹⁵⁴ *Hereinafter ADS.*

¹⁵⁵ “**Section 168(g)** Alternative depreciation system for certain property

- (1) In general In the case of—

- (A) any tangible property which during the taxable year is used predominantly outside the United States,

- (B) any tax-exempt use property,

- (C) any tax-exempt bond financed property,

- (D) any imported property covered by an Executive order under paragraph (6), and

- (E) any property to which an election under paragraph (7) applies, the depreciation deduction provided by section 167(a) shall be determined under the alternative depreciation system.”

the deduction is calculated by using a prescribed depreciation method, recovery period, and convention.

For the applicable recovery period, it is determined by class life or by statute. For examples, under Section 168(e) (i), if a property has a class life of four or less, such property shall be treated as a three-year property, or if a property has a class life of more than four but less than ten years, such property will be treated as a five-year property.

From the above examples, the class life will be used for determining the applicable recovery period. For instances, a three-year property will have an applicable recovery period of three years or a five-year property will have an applicable recovery period of five years even this property has its class life of up to nine years.

However, as the leased equipment is used predominantly outside the US during the year, the lessor is required to use the ADS.¹⁵⁶ The recovery periods under ADS are varying types of property, for example, five years for computers and peripheral equipment, high technology telephone station equipment installed on customer premises and high technology medical equipment.¹⁵⁷

4.1.5 Net Operating Loss Treatment

Under the 26 U.S. Code § 172 (c), the NOL means the excess of allowable deduction over the gross income.¹⁵⁸ A leasing company can carry back to two taxable years prior the taxable year of such loss, and carry forwards over the twenty taxable year

¹⁵⁶ The lessor cannot claim any special depreciation allowance.

¹⁵⁷ See Table B-1. Table of Class Lives and Recovery Periods, *available at* <http://www.irs.gov/publications/p946/13081f31.html>.

¹⁵⁸ “**26 U.S. Code § 172 (c) NET OPERATING LOSS DEFINED**

For purposes of this section, the term “net operating loss” means the excess of the deductions allowed by this chapter over the gross income. Such excess shall be computed with the modifications specified in subsection (d).”

following the taxable year of such loss by the virtue of the 26 U.S. Code § 172 (b) (1) (A).¹⁵⁹ The amount of NOL shall be carried to the earliest of the taxable years. The remaining or excess losses are allowable to carry to each of the other years, according to the 26 U.S. Code § 172 (b) (2).¹⁶⁰

4.1.6 Corporate Income Tax Incentive for the Export of Cross-Border Leasing

The investment tax credit (ITC) was introduced by The Revenue Act of 1962 to permit an immediate reduction in corporate income tax liability with no offsetting

¹⁵⁹ **“26 U.S. Code § 172 (b) (1) YEARS TO WHICH LOSS MAY BE CARRIED**

(A) General rule Except as otherwise provided in this paragraph, a net operating loss for any taxable year—

- (i) shall be a net operating loss carryback to each of the 2 taxable years preceding the taxable year of such loss, and
- (ii) shall be a net operating loss carryover to each of the 20 taxable years following the taxable year of the loss.”

¹⁶⁰ **“26 U.S. Code § 172 (b) (2) AMOUNT OF CARRYBACKS AND CARRYOVERS** The entire amount of the net operating loss for any taxable year (hereinafter in this section referred to as the “loss year”) shall be carried to the earliest of the taxable years to which (by reason of paragraph (1)) such loss may be carried. The portion of such loss which shall be carried to each of the other taxable years shall be the excess, if any, of the amount of such loss over the sum of the taxable income for each of the prior taxable years to which such loss may be carried. For purposes of the preceding sentence, the taxable income for any such prior taxable year shall be computed—

- (A) with the modifications specified in subsection (d) other than paragraphs (1), (4), and (5) thereof, and
- (B) by determining the amount of the net operating loss deduction without regard to the net operating loss for the loss year or for any taxable year thereafter, and the taxable income so computed shall not be considered to be less than zero.”

increase in future taxes.¹⁶¹ This Act established 7% ITC. After repealed by Tax Reform Act 1969, ITC was reinstated by the Revenue Act of 1971. In 1975, ITC was increased to 10% until 1980, and then the rate was decreased to 7%.

ITC allowed a direct reduction of taxes that occurred when the lessor purchases new equipment. The lessor could use ITC to save their high tax.¹⁶² ITC would increase a cash flow, i.e., after-tax profits plus the annual depreciation deduction.¹⁶³

Since 1981, the US Government had faced deep deficits. The Government increased the tax rate and defended spending. Therefore, ITC was repealed in 1986 by the Tax Reform Act of 1986. ITC is now reintroduced by the American Recovery and Reinvestment Act of 2009 (ARRA) for energy-saving investment with the rate varying from 10% to 30% to support the domestic environment.¹⁶⁴ ARRA provides numerous tax incentives for businesses as follows:¹⁶⁵

- 1) new clean renewable energy bonds (e.g. wind and solar);¹⁶⁶
- 2) qualified energy conservation bonds;¹⁶⁷
- 3) extension of renewable energy production tax credit;¹⁶⁸
- 4) election of investment credit in lieu of production credit;¹⁶⁹

¹⁶¹ Paul Taubman, *"The Investment Tax Credit, Once More"*, 14 **B. C. L. Rev.** 871, 872-74 (1973).

¹⁶² Eugene F. Brigham & Michael C. Ehrhardt, *supra* note 8, at 788.

¹⁶³ Paul Taubman, *supra* note 160, at 875.

¹⁶⁴ It is not included investment in a property which is used predominantly outside of the US.

¹⁶⁵ IRS, *"Energy Incentives for Businesses in the American Recovery and Reinvestment Act"*, available at <https://www.irs.gov/uac/Energy-Incentives-for-Businesses-in-the-American-Recovery-and-Reinvestment-Act>.

¹⁶⁶ See ARRA, Section 1111.

¹⁶⁷ See ARRA, Section 1112.

¹⁶⁸ See ARRA, Section 1101.

¹⁶⁹ See ARRA, Section 1102.

- 5) repeal of certain limits on business credits for renewable energy property;¹⁷⁰
- 6) coordination with renewable energy grants;¹⁷¹ and
- 7) temporary increase in credit for alternative fuel vehicle refueling property.¹⁷²

In calculating the ITC For example, the solar investment is at a rate of 30%. If the solar installation is \$10,000, the investment tax credit will be \$3,000 (30% x \$10,000). This investment tax credit reduces the corporate tax liability by \$3,000.

4.1.7 Measures to Control the Use of Corporate Income Tax Incentive

4.1.7.1 General Fraud Investigation

General Fraud Investigation is one of Criminal Investigation program in respect of tax matters. This program investigates fraudulent activities.¹⁷³ In the case of a willful attempt to evade or defeat tax, a leasing company shall be either imprisoned not exceeding five years or fined not exceeding \$500,000 or both, together with the costs of prosecution, according to Title 26 USC §7201.¹⁷⁴ If a leasing company willfully declares a fraud and false tax return, statement, or other documents, they shall be

¹⁷⁰ See ARRA, Section 1103.

¹⁷¹ See ARRA, Section 1104.

¹⁷² See ARRA, Section 1123.

¹⁷³ See examples of General Tax Fraud Investigations - Fiscal Year 2016 at <https://www.irs.gov/uac/Examples-of-General-Tax-Fraud-Investigations-Fiscal-Year-2016>.

¹⁷⁴ “**Title 26 USC §7201** Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.”

either imprisoned not exceeding three years or fined not exceeding \$500,000 or both, together with the costs of prosecution, according to Title 26 USC §7206(1).¹⁷⁵

4.1.7.2 Foreign Account Tax Compliance Act (FATCA)

The US Government has enacted FATCA since March 2010. The target is a tax non-compliance of both US resident and non-resident taxpayers. Under this Act, the US Government has co-operated with foreign governments in exchange of information through the mean of signing an intergovernmental agreement. In this regard, IRS is the competent authority for doing so. Foreign financial institutions, including banks and credit unions, are entities that have the reporting obligation under the regulations.

The UK Government also signed the intergovernmental agreement with the US Government. All the Crown Dependencies and Overseas Territories have entered into automatic tax information exchange agreements with the UK. As same as other states that signed the intergovernmental agreements, the agreements are reciprocal. Financial institutions shall provide data on financial accounts held by residents of these territories.

¹⁷⁵ “**Title 26 USC §7201** Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

¹⁷⁵ **Title 26 USC §7206(1)** Any person who—

(1) Declaration under penalties of perjury

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

...shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.”

4.2 Corporate Income Taxation on Cross-Border Leasing under laws of the United Kingdom

4.2.1 Overview of the UK Corporate Income Taxation System

A lessor incorporated as a limited company consisting of a company limited by shares,¹⁷⁶ a private company limited by guarantee,¹⁷⁷ and a public limited company, an unincorporated association that trading and making profits,¹⁷⁸ and a foreign company with its branch or office in the UK,¹⁷⁹ is subject to pay corporate tax.

In case the lessor is based in the UK, it shall pay corporate tax on all its profits occurred in the UK and abroad while the foreign company which has its branch or office in the UK shall merely pay a corporate tax based on profits from its activities in the UK. Regarding tax rates, it is varying on the amount of taxable profits consisting of main rate (over £300,000) and small profits rate (£300,000 or less).¹⁸⁰ Both low rates apply to the whole year accounting periods. In a case that the accounting period is less than twelve months, these rates will be applied proportionally.¹⁸¹ However, the

¹⁷⁶ In case of the company's financial liabilities, shareholders' responsibilities are limited to the value of shares that they own but haven't paid for.

¹⁷⁷ Directors or shareholders financially back the organization up to a specific amount in case of problem.

¹⁷⁸ It is an organization set up through an agreement between groups of people who come together for a reason other than to make a profit. This association is not required to register. Individual members are personally responsible for any debts and contractual obligations.

¹⁷⁹ A permanent establishment of non-UK resident companies.

¹⁸⁰ See <https://www.gov.uk/government/publications/rates-and-allowances-corporation-tax>.

¹⁸¹ For example, if the accounting period is 6 months, the £300,000 small profits threshold is halved to £150,000.

lessor can deduct the costs of carrying the leasing business from his profits, particularly the capital allowances.

4.2.2 Lease Characterization

Section 219¹⁸² of the Capital Allowances Act 2001 (CAA 2001)¹⁸³ defines a meaning of a finance lease involving certain specific features. The finance lease is any arrangement that provides for plant or machinery to be leased or otherwise made available by the lessor to the lessee under the GAAP.

4.2.3 Income Recognition

For an operating lease, the gross rental income is regarded as taxable income on an accrual basis. The gross lease rent derived from finance lease is also based on an accrual basis. It will be subject to the deduction of capital allowance and income-relevant.¹⁸⁴

¹⁸² “Section 219 Meaning of “finance lease”

(1) In this Chapter “finance lease means any arrangement-

- (a) which provides for plant or machinery to be leased or otherwise made available by a person (“the lessor”) to another person (“the lessee”) and
- (b) which, under generally accepted accounting practice-
 - (i) falls (or would fall) to be treated, in the accounts of the lessor or a person connected with the lessor, as a finance lease or loan, or
 - (ii) are comprised in arrangement which falls (or would fall) to be so treated.”

¹⁸³ Hereinafter *CAA 2001*.

¹⁸⁴ However, it is also subject to the rules introduced by Schedule 12 of the Finance Act 1997, *see* Schedule 12 of the Finance Act 1997, Part I and Part II.

4.2.4 Capital Allowances on the Leased Equipment

Capital allowance is based on the concept of the legal ownership. The lesser shall be entitled to deduct the capital allowance with no regard to any financial or operational lease.¹⁸⁵ When the lessor buys a certain qualifying asset to lease out in his leasing business, as a legal owner of such asset, he can claim the capital allowances on that leased asset for an amount in equivalent to the net capital cost of ownership of the asset during such period.¹⁸⁶

The lessor can deduct the asset value partly or wholly from profits of a cross-border financial leasing business before paying tax. In the case of the leased equipment, it is also defined as ‘plant and machinery’.¹⁸⁷ According to Section 109 of the CAA 2001, plant and machinery are subject to the capital allowances at the rate of 10% on the writing-down allowances.

4.2.5 Net Operating Loss Treatment

Carryback and sideways reliefs are available for a particular source of income. Both carryforwards and carrybacks of losses permit unlimited periods. In details, these reliefs are provided for different types of income losses, including trading losses property losses, and non-trading deficits. There are also anti-avoidance rules regarding the utilization of these reliefs. Some companies try to make the income losses more flexible by denying the use of the carryforwards of losses when they can do. In March 2016, there were proposals to reform this NOL treatment from April

¹⁸⁵ Leasing World, “*Lease Taxation*”, available at <http://www.leasingworld.co.uk/subpages/leasetax.php>.

¹⁸⁶ HM Revenue and Customs (HMRC), General Anti Abuse Rule (GAAR) guidance (Approved by the Advisory Panel with effect from 30 January 2015) Part D – Examples 34.

¹⁸⁷ Plant or machinery means an asset used for carrying on the business, used or provided for use for the purposes of a rental business and is not stock in trade, the business premises or part of the business premises.

2017 by permitting more flexible losses for any company with its profits exceeding £5 million. The proposals will restrict the carryforwards of losses to 50% of the current year profits.¹⁸⁸

4.2.6 Corporate Income Tax Incentive for the Export of Cross-Border Leasing

First-year allowance (FYA) is a positive tax incentive allowed as depreciation. It was added to the tax legislation in 1945. At that time, it was equal to one-fifth of the expenditure made regarding the acquisition of a plant or machinery for a trade purpose coupled with an annual allowance in subsequent years equal to five-fourths of the amount that would be permitted for the depreciation.

In most of the 1970s and the beginning of the 1980s, according to the Finance Act 1971, 100% first year writing-down allowances were introduced. Due to the availability of generous first-year capital allowances for expenditure on plant and machinery, the UK leasing industry rapidly grew up, particularly in the area of cross-border leasing out of the UK.¹⁸⁹ However, the Finance Act 1982 limited this fiscal incentive and granted the general capital allowances. As a result, the amount of capital allowance available for UK lessors is eliminated when the property leased used by a non-UK lessee outside the UK.¹⁹⁰

¹⁸⁸ Losses can also be utilized by other group companies, *see* <http://taxsummaries.pwc.com/uk/taxsummaries/wwts.nsf/ID/United-Kingdom-Corporate-Group-taxation>.

¹⁸⁹ Shay Nisan Menuchin, “The dilemma of international tax arbitrage: A comparative analysis using the cases of hybrid financial instruments and cross-border leasing” (2005) 197 (unpublished Ph.D. thesis, University of London) (on file with ProQuest Digital Dissertations) *available at* <http://etheses.lse.ac.uk/2917/1/U615868.pdf>.

¹⁹⁰ *Id.*, at 198.

At present, the FYA is available for specific types of qualifying expenditure under Section 39 of the CAA 2001.¹⁹¹ According to Section 45A,¹⁹² 45D and 45E of CAA

¹⁹¹ “**Section 39.** First-year allowances available for certain types of qualifying expenditure only

A first-year allowance is not available unless the qualifying expenditure is first-year qualifying expenditure under—

section 40 expenditure incurred for Northern Ireland purposes by small or medium-sized enterprises,

section 44 expenditure incurred by small or medium-sized enterprises,

section 45 ICT expenditure incurred by small enterprises,

section 45A expenditure on energy-saving plant or machinery,

section 45D expenditure on cars with low CO₂ emissions,

section 45E expenditure on plant or machinery for gas refuelling station, or

section 45F expenditure on plant and machinery for use wholly in a ring fence trade.”

¹⁹² “**Section 45A** Expenditure on energy-saving plant or machinery

(1) Expenditure is first-year qualifying expenditure if—

- (a) it is expenditure on energy-saving plant or machinery that is unused and not second-hand,
- (b) it is incurred on or after 1st April 2001, and
- (c) it is not excluded by section 46 (general exclusions).

(2) Energy-saving plant or machinery means plant or machinery in relation to which the following conditions are met—

- (a) when the expenditure is incurred, or
- (b) when the contract for the provision of the plant or machinery is entered into.

(3) The conditions are that the plant or machinery—

- (a) is of a description specified by Treasury order, and
- (b) meets the energy-saving criteria specified by Treasury order for plant or machinery of that description.

2001 as amended by Section 62 of the Finance Act 2002, the lessor can claim FYA is for expenditure on green technologies in case of leasing from profits before tax. The FYA provides requesting a full expenditure deduction¹⁹³ from profits before tax if they buy a qualifying asset, including information and communications technology,¹⁹⁴ energy-saving plant or machinery,¹⁹⁵ and plant or machinery for the gas refueling station.¹⁹⁶ However, it excludes the provision of plant or machinery for cross-border leasing, according to the General exclusion 6 of Section 46 (2) of the CAA 2001.¹⁹⁷

FYA is only available if the asset belongs to the taxpayer at some time during the chargeable period for which the FYA is claimed. If FYA is available, it can be claimed on the part of the qualifying expenditure. If that happens, the part on which FYA is not claimed can be added to the pool for that year.¹⁹⁸ For example, Company

(4) Any such order may make provision by reference to any technology list, or product list, issued by the Secretary of State (whether before or after the coming into force of this section).”

¹⁹³ Taxpayer can claim on tax return. If the taxpayer cannot claim all the first year allowance, they claim part of the cost in the next accounting period using writing down allowances.

¹⁹⁴ See CAA 2001, Section 45(2).

¹⁹⁵ See CAA 2001, Section 45A, 45B and 45C.

¹⁹⁶ See CAA 2001, Section 45E.

¹⁹⁷ “**Section 46 (2)** The general exclusions are—

General exclusion 6

The expenditure is on the provision of plant or machinery for leasing (whether in the course of a trade or otherwise).

For this purpose, the letting of a ship on charter, or of any other asset on hire, is to be regarded as leasing (whether or not it would otherwise be so regarded).”

¹⁹⁸ HMRC, “CA23110 - Plant and Machinery Allowance (PMA): First Year Allowance (FYA): expenditure on which available and rates”, available at <http://www.hmrc.gov.uk/manuals/camanual/ca23110.htm>.

A bought energy-saving equipment on 1 January 2016 for £10,000. If such equipment qualifies for the FYA at the rate of 50%, Company A can claim the FYA of £5,000.

4.2.7 Measures to Control the Use of Corporate Income Tax Incentive

HM Revenue & Customs or HMRC (HMRC)¹⁹⁹ provides a tax compliance to diminish the tax gap, which is the difference between the amount of tax that should, in theory, be collected, against what is actually collected. HMRC runs numerous tax compliance activities. In talking tax evasion and avoidance, HMRC performs as follows:

- 1) providing voluntarily compliant opportunities regarding tax affairs for people through campaigns, including prosecutions for those who choose to remain non-compliant;
- 2) having task forces of specialist teams who concentrate on high-risk sectors in many places with strong evidence of tax evasion;
- 3) cooperating with tax authorities in other countries, for example, Switzerland;
- 4) deploying affluent teams in several locations across the UK to handle with avoidance and evasion made by wealthy taxpayers;
- 5) bringing technical experts, intelligence analysts and criminal investigators to build on the existing cyber counter-fraud capability to protect the public purse from attempted fraud;
- 6) connecting to cross-match a significant amount of data to disclose the hidden relationships between people and organizations that HMRC could not previously identify.²⁰⁰

¹⁹⁹ See <https://www.gov.uk/government/organisations/hm-revenue-customs>.

²⁰⁰ HM Revenue & Customs, “*Our approach to tax compliance*”, Issue briefing September 2012, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/89015/tax-compliance.pdf.

4.3 Corporate Income Taxation on Cross-Border Leasing under laws of Other Selected Jurisdictions

4.3.1 Germany

Germany is a federal republic. Taxes are levied by the federal government, the states, and the municipalities. For the corporation tax, it is charged on corporation, both public and private limited companies, cooperative associations, and foundations. The tax is based on the domicile of companies. Once a corporation is situated in Germany, it is deemed to subject to full corporation tax liability for both domestic and foreign income.

4.3.1.1 Lease Characterization

The German law applies the concept of the economic ownership to characterize the lease. If the lessor is determined as the economic owner of the leased equipment, that transaction is characterized as a lease. On the other hands, the lessee will be regarded as the economic owner in the case of sale of asset transaction by the lessor to the lessee.²⁰¹ It also qualifies that the economic owner can deduct the tax depreciation on the leased asset. The meaning of the economic owner can be found in the Fiscal Code of Germany Code, and its conditions are provided by the Federal Ministry of Finance's Circular, dated April 19, 1971.

(1) The Fiscal Code of Germany

According to Section 39 of the Fiscal Code of Germany, an economic owner is a person other than the holder of the legal title under the civil law. This person has the exclusive use of the asset for its normal useful life with no regard to the holder of legal title.²⁰²

²⁰¹ Amar Mehta, *supra* note 149, at 18.

²⁰² “**Section 39 Attribution**

(1) Economic goods shall be attributable to the owner.

(2) Federal Ministry of Finance's Circular dated April 19, 1971

The lessor is considered as the economic owner if the following conditions are satisfied:

- The minimum lease term is between 40% and 90% of the ordinary useful life, and the lessee has neither an option to acquire nor an option to renew the lease term; or
- The minimum lease term is between 40% and 90% of the ordinary useful life, and the lessee has only an option to acquire at the end of lease term provided the acquisition price is not less than the fair market value at the selling time or the book value of the leased asset.

4.3.1.2 Income Recognition

The taxpayer has to prepare a financial statement as per the Financial Accounting Law on an accrual basis, according to Section 140 of the Fiscal Code of Germany.²⁰³

(2) Notwithstanding the provisions of subsection (1) above, the following provisions shall apply:

1. Where a person other than the owner exercises effective control over an economic good in such a way that he can, as a rule, economically exclude the owner from affecting the economic good during the normal period of its useful life, the economic good shall be attributable to this person. In the case of fiduciary relationships, the economic goods shall be attributable to the beneficiary, in the case of transferred ownerships for security purposes to the security provider, and in the case of proprietary possessions to the proprietary possessor.
2. Economic goods to which several persons are jointly entitled shall be attributable proportionally to the participants insofar as taxation requires separate attribution.”

²⁰³ “**Section 140 Account-keeping and recording obligations deriving from, other laws**

In the case of uneven lease payments over the lease term, it shall be recognized on the accrual basis.²⁰⁴

4.3.1.3 Tax Depreciation on the Leased Equipment

The law allows a straight-line method, a declining-balance method and some other specific methods in certain cases. Changing of the depreciation method is permitted for declining-balance method to straight-line method.²⁰⁵ However, the tax depreciation must be based on the economic ownership as aforementioned in Item 4.3.1.1 Lease Characterization.²⁰⁶

4.3.1.4 Net Operating Loss Treatment

The leasing company may carry back the NOL for one year and carry forward indefinitely. This allowance is stipulated for offsetting against its profits up to EUR one million with no regard to any restriction. For the income exceeding EUR one million, the leasing company may deduct loss carry forward against only 60% of this income.²⁰⁷ NOL carryforwards is available for the loss leasing company having a tax liability in Germany.²⁰⁸

Whoever is obliged under laws other than tax laws to keep accounts and records of relevance for taxation shall be obliged to fulfill the obligations imposed by such other laws in the interests of taxation as well.”

²⁰⁴ Amar Mehta, *supra* note 149, at 66.

²⁰⁵ Amar Mehta, *supra* note 149, at 32.

²⁰⁶ Amar Mehta, *supra* note 149, at 53.

²⁰⁷ In a case of intragroup restructurings, a direct or indirect change in ownership of more than 25%/50% to one purchaser/related party results in a partial/complete forfeiture may be avoided.

²⁰⁸ Deloitte, “*Germany Highlights 2016*”, available at <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-germanyhighlights-2016.pdf>.

4.3.2 Malaysia

4.3.2.1 Overview of the Corporate Income Taxation System

As a member of ASEAN, Malaysia will also be a part of the AEC as same as Thailand. Taxation of Malaysia applies a territoriality basis. Income incurred from business or business income in Malaysia and the income accruing in or derived from outside Malaysia, such as a cross-border leasing shall be subject to tax liability in Malaysia.²⁰⁹ The term of ‘business income’ means gains from business, dividends, interest and rentals, royalties, premiums and other earnings and profits. Under this basis, any income of a permanent establishment or non-residents in the country must be taxed in the country only for the income accruing in or derived from the inbound source. Nevertheless, it does not include the foreign income derived inside or outside Malaysia.

4.3.2.2 Net Operating Loss Treatment

Malaysia does not provide any provisions of loss carrybacks, but it does provide loss carryforwards at current. The leasing company can carry forward the business losses and capital allowances for unlimited periods.²¹⁰ This carryforwards method is only available for the non-dormant leasing companies. These leasing companies may carry forwards their current-year business losses against all income, restrictively the income

²⁰⁹ The Office of SMEs Promotion, “*Taxation Systems of 10 ASEAN Member Countries*”, available at http://www.thaifita.com/trade/study/lawsme57_index6.pdf.

สำนักงานส่งเสริมวิสาหกิจขนาดกลางและขนาดย่อม , “ระบบการจัดเก็บภาษีของประเทศสมาชิกอาเซียนทั้ง 10 ประเทศ”, http://www.thaifita.com/trade/study/lawsme57_index6.pdf.

²¹⁰ The carryforward of business losses and capital allowances is not available for deduction in subsequent years of assessment if the company does not meet the conditions of a shareholders’ continuity test.

from business source. In a term of capital allowance, they can utilize only the income from the same underlying business source.²¹¹

4.3.2.3 Tax Incentive for the Export of Qualifying Service

In this sense, Malaysia has provided a tax incentive for the export of service. According to the Income Tax (Exemption) (No. 9) Order 2002 [P.U. (A) 57/2002] and Income Tax (Exemption) (Amendment) Order 2006 [P.U. (A) 275/2006], this tax incentive is an exemption of income for increasing of export of qualifying service. A company that exports service to a foreign client incorporated or registered outside the country will be exempted from the income tax liability. The exempted amount is 50% of the value of increased exports, but not exceeding 70% of the statutory income.²¹² The qualifying service shall be provided from Malaysia and shall be one of the following services:²¹³

- 1) legal;
- 2) accounting;
- 3) architecture;
- 4) marketing;
- 5) business consultancy;
- 6) office services;
- 7) construction management;
- 8) building management;
- 9) plantation management;
- 10) private healthcare;

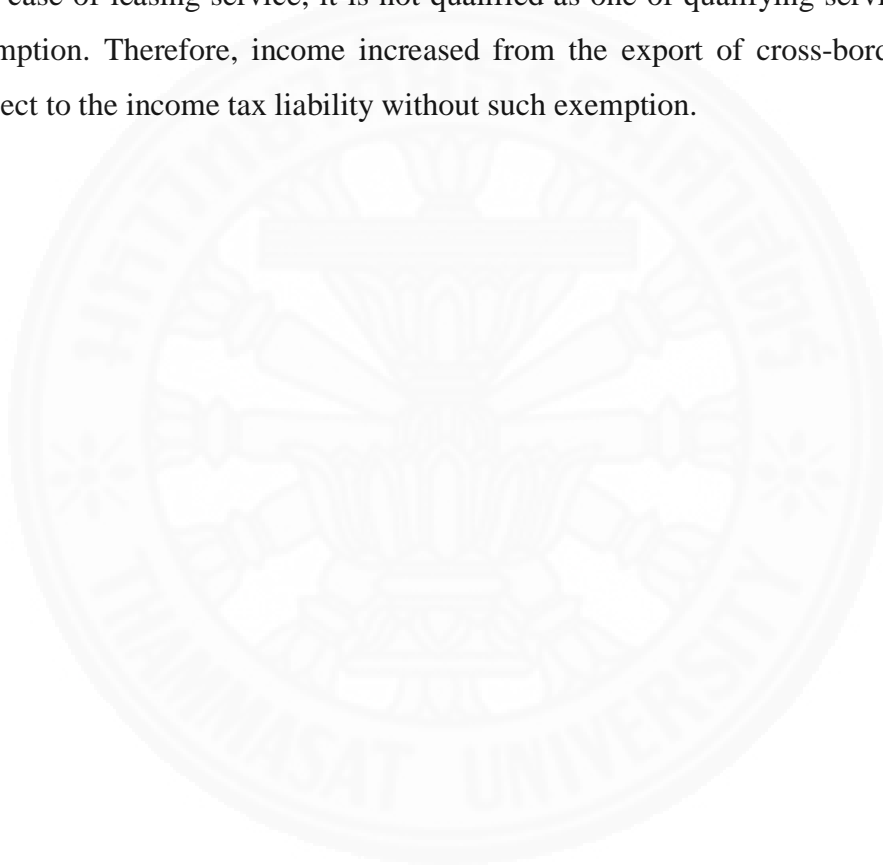
²¹¹ PWC, “*Malaysia Corporate – Deductions*”, available at <http://taxsummaries.pwc.com/uk/taxsummaries/wwts.nsf/ID/Malaysia-Corporate-Deductions>.

²¹² See definition of ‘statutory income’ at Malaysia’s Income Tax Act 1967, Section 42.

²¹³ ACCA, “*The export incentives regime in Malaysia*” 12 (2011), available at http://www.accaglobal.com/content/dam/acca/global/pdf/sa_may11_p6mys_incentives.pdf.

- 11) private education;
- 12) publishing services;
- 13) information technology and communication (ICT) services;
- 14) engineering services;
- 15) printing services; and
- 16) local franchise services.

In a case of leasing service, it is not qualified as one of qualifying service under this exemption. Therefore, income increased from the export of cross-border leasing is subject to the income tax liability without such exemption.



CHAPTER 5

ANALYSIS OF CORPORATE INCOME TAXATION PROBLEMS ON CROSS-BORDER LEASING UNDER THAI LAWS

As studied Thai laws and the laws of selected jurisdictions consisting of the United States, the United Kingdom, Germany, and Malaysia as well as international cooperation in exchange of information regarding tax matters in Chapter 3 and Chapter 4 respectively, this Chapter will illustrate the analysis of Thai laws and the selected jurisdictions regarding the corporate income tax incentive for the export of cross-border leasing and measures to control the use of such tax incentive.

5.1 Corporate Income Tax Incentive for the Export of Cross-Border Leasing

As studied in Chapter 3, concerning the legal ownership, the lessor can deduct tax depreciation on the leased equipment at a rate of 20% of the capital cost through an accounting period upon the Royal Decree No.145, Section 4 (5). In this case, the double-declining method is allowed under Section 4 paragraph 3 of this Royal Decree, but the useful life of the equipment still limits at 100% shared by the rates stipulated in Section 4 paragraph 1 of this Royal Decree. Tax depreciation is a basic deduction provided by most tax jurisdictions as a recovery method of the capital cost of a certain asset. The depreciation allows annually for wear and tear of the assets.²¹⁴ It is not promoting the export of leasing service.

5.1.1 Investment Tax Credit

From the study of the US laws, ITC facilitates the business growth, which is one of tax purpose. The lessor can reduce the corporate income tax liability directly at the time of purchasing new capital equipment. They can deduct ITC with the paid tax. Thus, they can save the high tax, and their cash flow will be higher. The lessor had

²¹⁴ IRS, “*A Brief Overview of Depreciation*”, available at <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/A-Brief-Overview-of-Depreciation>.

more money to invest in new equipment for cross-border leasing than without ITC. Regarding Thai law, this promotion measure does not exist. The Revenue Code permits only tax depreciation which is a deduction before tax.

However, ITC might be found as a subsidy under WTO's the Agreement on Subsidies and Countervailing Measures because it is a financial contribution by a government for cross-border leasing industry and in term of revenue, it is not collected, according to Article 1.1 (a) (1) (ii) of the Agreement on Subsidies and Countervailing Measures.²¹⁵

5.1.2 First-Year Allowance

Besides tax depreciation, the UK laws allow FYA as a positive tax incentive. When the lessor acquires a qualifying plant or machinery, they can deduct this expenditure. This deduction occurs in the net profit computation. It may be called a reduction method of a tax base. Once the lessor computes the net profits, their corporate income tax liability reduces.

In comparison with Thai laws, no provision grant FYA for leasing business. The lessor still applies tax depreciation as an allowable deduction to reduce their corporate income tax liability under Section 4 (5) and Section 4 paragraph 3 of Royal Decree No.145.

²¹⁵ “Article 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);”

5.1.3 Tax Exemption for Export of Service

Under the law of Malaysia, this tax incentive is not applicable to leasing service since the qualifying services are unique to sixteen services, consisting of sixteen services as aforementioned in item 4.3.2.2. Thailand also does not have any provision that provides a tax exemption for export of leasing service.

Table 5.1 Summary of Corporate Income Tax Incentives for the Export of Cross-Border Leasing

	Thai laws	US laws	UK laws	Malaysian laws
Corporate Income Tax Incentive for the Export of Cross-Border Leasing	Tax Depreciation under Royal Decree No.145	Investment Tax Credit	First-Year Allowance	Tax Exemption for Export of Service

5.1.4 Net Operating Loss Treatments

To operate a leasing business, losses may be incurred from one or more activities. Investment of acquisition of new leased equipment is one of these activities. More investments can result in more depreciation which is an allowable expense. If this expense offsets the taxable income from the leasing company, the taxpayer, it causes a negative taxable income or NOL.²¹⁶ In some tax jurisdictions, tax capital gains allow capital losses to deduct merely capital gains. Many countries permit a method

²¹⁶ Investopedia, “*Net Operating Loss – NOL*”, available at <http://www.investopedia.com/terms/n/netoperatingloss.asp>.

of carryback and carryforward of such losses for varying periods while some countries impose a limited period of these methods.²¹⁷

Under the US law, the lessor can to two taxable years prior the taxable year of such loss, and carry forwards over the twenty taxable years following the taxable year of such loss, while the UK law, German law, and Malaysian law provide carryforwards for unlimited periods. For the carryback treatment, these three laws have different provisions. The UK law also gives an indefinite period of carrybacks of NOL. German law allows only one year for the carryback of NOL and stipulates the carryforwards to offset against the profits up to EUR one million with no regard to any restriction. For the income exceeding EUR one million, the lessor may deduct the loss carryforwards against only 60% of this income. For the Malaysia, carryback of NOL is not now provided by the law and the carryforwards method is only available for the non-dormant leasing companies. For Thailand, the lessor can carry forward the NOL for five years from the current accounting periods under Section 65 *ter* (12) of the Thai Revenue Code. At present, the method of carryback is not provided by Thai laws.

Table 5.2 Summary of Net Operating Loss Treatments

NOL Treatment	Thai law	US law	UK law	German law	Malaysian law
Carryforwards of NOL	Five periods.	Twenty taxable years	Unlimited periods	Unlimited periods (EUR one million basis)	Unlimited periods (non-dormant company)

²¹⁷ Ingo Walter, and Tracy Murray, Handbook of International Management 24 (1988).

NOL Treatment	Thai law	US law	UK law	German law	Malaysian law
Carryback of NOL	N/A	Two taxable years.	Unlimited periods	One year	N/A

5.2 Measures to Control the Use of Corporate Income Tax Incentive

5.2.1 Lease Characterization

Cross-border leasing is different from a domestic leasing only in term of the parties' location. Domestic lease characterization can apply to cross-border leasing under the Revenue Ordinance No.4/2528 and the Ministerial Regulation No.144, '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 lesser." It does not qualify a person who can use a tax incentive under a lease. Thai law also applies a concept of the legal concept as it present in such meaning by using the term of 'the owner of the asset'.

This concept is similar to the Capital Allowances Act 2001 of UK. CAA2001 says that the lessor provides for plant or machinery to lease out to the lessee. The lessor is determined as the legal ownership of the asset. If the lessor does not have legal title, they could not provide so. Moreover, according to the capital allowance eligibility, only the legal owner or the lessor can deduct the capital allowance.

In the US the Revenue Ruling 55-540, it provides a concept of true lease and the advance rules under Revenue Procedure 74-2 by the following conditions:

- (1) minimum 20% equity investment requirement;
- (2) minimum 20% residual value and remaining useful life;

- (3) fixed-price purchase/sale option;
- (4) the lessee not to finance any part of the cost of the property;
- (5) the lessee not to provide any loan or guarantee; and
- (6) the lessor can demonstrate a pre-tax profits and aggregate cash flow must be positive.

If it is qualified as a lease transaction, the lessor will be able to deduct the depreciation. Under Thai law, it does not mention to the concept of the true lease and the advance rules. There is only a definition as above mentioned.

Under Section 39 of the Fiscal Code of Germany, lease characterization is based on the economic ownership eligibility that the economic owner will be able to deduct tax depreciation on the leased asset. It focuses on the actual user of the asset for its normal useful life without regards of the legal owner. Sometimes a legal owner is not an actual user as it can be seen in finance lease transaction. Also, the Federal Ministry of Finance's Circular dated April 19, 1971, provides the conditions of the economic ownership. It is different to Thai law as the above meaning which concerns merely the legal owner, with no regard to the actual user or economic ownership. Moreover, under the Circular, neither an option to acquire nor an option to renew the lease term, unless the acquisition price of the leased asset is higher than the fair market value at the selling time or the book value of the leased asset. Compared to the true lease concept of the US law, the leased asset will be able to acquire if the purchase price is equal to the asset value. It does not mention about the asset value. Practically, the asset value shall be based on the book value. Sometimes, the purchase option price rests on the fair market value. Thus, either value is acceptable for the acquisition of the leased asset.

5.2.2 Fraudulent Control Measure

Under Thai Revenue Code, tax return by self-assessment may be audited by the tax authority. In the enforcement of the law and control taxpayers, the penalties and punishment have been imposed in Section 37 and 37 *bis* of the Revenue Code.

Compared to the US laws, there is the ‘General Fraud Investigation’ to investigate fraudulent activities regarding tax matters.

In a case that a person willfully attempt to evade or defeat tax, such person must be either fined not exceeding 5,000 Baht or imprisoned not exceeding six months, or both, according to Section 37 *bis* of the Revenue Code while Title 26 USC §7206 imposes the imprisonment of not exceeding five years or a fine of not exceeding \$500,000 or both, together with the costs of prosecution.

In a case of declaration of a fraud as well as a false statement, Section 37 of the Thai Revenue Code imposes the imprisonment from three months to seven years and penalties from 2,000 to 200,000 Baht while Title 26 USC §7206(1) imposes the imprisonment of not exceeding three years or a fine of not exceeding \$500,000 or both, together with the costs of prosecution.

In the UK, HMRC launches a tax compliance to diminish the tax gap via several tax compliance activities to tackle a tax evasion and avoidance. One of the most important tax compliance is that HMRC provides a specialist team, cooperation with tax authorities of other countries as well as technical experts. Intelligence analysts and criminal investigators are also given to constitute the existing cyber counter-fraud capability. Comparing to Thailand, HMRC’s tax compliance tries to cover all risks of tax evasion and avoidance while Thai Revenue Department only randomizes the self-tax assessment.

5.2.3 Exchange of Information

As Thailand has concluded the DTAs with many ASEAN member countries, Thailand can exchange the information regarding tax with those countries under the DTAs. Thailand has also entered into a negotiation with the US under FATCA. It will result in an efficient information exchange between the Revenue Department of Thailand and the IRS.

However, Thailand does not have any DTA with Brunei Darussalam and Cambodia. The exchange of information with these countries might be difficult. There may be tax shelters under the cross-border leasing as it is difficult to control these problems. Thai Revenue Department can request the competent authorities of these countries for the information of tax shelters, but these authorities can deny doing so due to lack of the obligation enforced under the DTA.

In the case of the US, they co-operate with many countries under FATCA. The US also joins TIEAs as well as the UK and Germany. Under TIEAs, DTA is not required. Any tax jurisdiction can sign either bilateral or multilateral agreement to exchange the information. The parties can exchange the information in respect of tax matter to handle the harmful tax practices.

Table 5.3 Summary of Measures to Control the Use of Corporate Income Tax Incentive

Item	Thai laws	US laws	UK laws	German laws
Lease Characterization	- Revenue Ordinance No.4/2528 - Ministerial Regulation No.144	- Revenue Ruling 55-540 - Revenue Procedure 74-2	Capital Allowance Act 2001, Section 219	- Fiscal Code of Germany, Section 39 - Federal Ministry of Finance's Circular dated April 19, 1971
Fraudulent Control Measure	Thai Revenue Code, Section 37 and 37 bis	- General Fraud Investigation Title 26 USC§ 7206 and 7206(1)	HMRC's Tax Compliance	-

Item	Thai laws	US laws	UK laws	German laws
Exchange of Information	DTAs	- Foreign Account Tax Compliance (FATCA) - TIEAs	TIEAs	TIEAs



CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

Cross-border leasing is another opportunity for leasing companies in Thailand. It is one of financial service that will flow freer in ASEAN under the cooperative framework of AEC. Leasing companies can provide this service to the lessee in ASEAN member countries. Nevertheless, the corporate income taxation on cross-border leasing under Thai laws does not encourage and promote the exports of cross-border leasing. Since cross-border leasing requires a high amount of cash flow to invest in new equipment, this thesis has studied tax incentive in the US, the UK, and Malaysia to search for a possible tax incentive for Thailand. After studying all of the selected jurisdictions, Malaysia does not have a tax incentive for the export of cross-border leasing while other two jurisdictions provide two possible tax incentives as follows:

- (1) Investment tax credit or ITC is a possible tax incentive. It reduces a paid tax. This incentive is very attractive to persuade leasing companies in Thailand to provide cross-border leasing. At once they buy new equipment, a direct deduction is available. Their cash flow increases and they can invest in new equipment.
- (2) First-Year Allowance or FYA is another possible tax incentive. Leasing companies can use FYA as a deduction that reduces a tax basis. In case that they purchase much new qualifying equipment at the same accounting period, their expenses will be higher. They can save their corporate income tax liability and use remaining money to invest in new equipment, but it may result in a net loss. That means they can carry such this net loss forward for five years from that accounting period. After the end of five years, they cannot use the net loss. In such periods, cash flow of the leasing companies is increased. If the lessor invests more equipment, they can save

more tax liability for the year of acquisition. Moreover, the UK's FYA model supports the use of green technologies that will benefit the environment of the region.

This thesis also studies the net operating loss or NOL with the aim of extending the use of tax incentive. All of the selected jurisdictions provide the carryforwards of NOL. In a case of Malaysia, as a ASEAN member country, the carryforwards are allowed at unlimited period. Except Thailand, they all give this treatment for more than twenty years. Three of them, including the US, the UK, and Germany, also allow the carryback of NOL. This NOL may affect to the government revenue due to less corporate income tax paid to the Revenue Department. In allowing the NOL under Thai Revenue Code, the lessor can enjoy non-liability for the corporate income tax for five years. The government revenue may be decreased in this sense.

In addition to measures to control the use of tax incentive, this thesis has studied the selected jurisdictions to find a way to monitor and prevent a potential tax issue including the US and Germany. It is found that both countries have a concept of lease characterization to qualify eligibility of the lessor for tax benefits including tax depreciation. German law provides a concept of economic ownership without regard to legal ownership. As well as the US laws, a concept of a true lease and advance ruling concept are based on economic ownership. This ownership focuses on the substance of the transaction. Sometimes legal owners never use the leased asset. If the leasing companies qualify as an economic owner of the leased asset, they will have tax benefits. Also, the right to purchase the leased asset of both laws is similar, but the purchasing at the fair market value or the book value seems acceptable in practice.

This thesis has also studied other measures to control under the US laws comprising of an effectively fraudulent control measure. This measure will investigate the attempt to evade or defeat the tax. There are also high-rate punishments to prevent such action.

Finally, this thesis has studied the potential exchange of information for corporate income tax matters under cross-border leasing transaction. Now Thailand can exchange the information with the countries that Thailand has been entered the DTAs. FATCA is another option to exchange such information with the IRS. Nevertheless, Thailand does not have any DTAs with Brunei Darussalam and Cambodia.

6.2 Recommendations

As studied and mentioned above, this thesis would like to recommend that Thailand should improve existing Thai laws and regulations regarding corporate income taxation to promote the export of cross-border leasing service and to provide measures to control the use of such tax incentive as follows:

6.2.1 Corporate Income Tax Incentive for the Export of Cross-Border Leasing

Thailand should provide tax incentive by applying a concept of the UK's FYA. This tax incentive should first introduce with the green technology equipment. It is not only a promotion of the export of cross-border leasing of leasing companies in Thailand, but it also an environment support in the ASEAN region. The criteria shall qualify as follows:

- 1) The eligible lessor shall be a juristic person which has a corporate income tax liability in tax jurisdiction of Thailand;
- 2) The lessee shall be a juristic person that has a corporate income tax liability in tax jurisdiction of any ASEAN member countries;
- 3) The lease transaction shall be qualified under Item 6.2.2.1 Lease Characterization;
- 4) The lease term under the cross-border leasing agreement shall be five years, according to the numbers of accounting period allowed for tax depreciation of the leased equipment (the imposed rate of 20% for an accounting period, totaling five accounting period);

- 5) The leased equipment shall be a qualifying equipment under the cross-border leasing agreement, and used in a business place or location of the lessee in ASEAN member country as same as item (2); and
- 6) The lessor must submit the documentary evidence, including but not limited to, sale and purchase evidence, cross-border leasing agreement, and delivery acceptance.

In granting this incentive, a list of qualifying equipment must be provided. The rate of FYA can be up to 100% and vary by the growth of cross-border leasing market in Thailand. To the extent of the use of FYA, it is recommended to provide a longer period of NOL. The unlimited period is one of the option. When the lessor invests a fleet of equipment for leasing out at the same accounting period, the lessor might have the NOL over its income. The lessor needs to use the net loss from the investment to deduct the net income. If they invest more, it might result in more NOL. Thus, both FYA and unlimited period of NOL carryforwards will attract the leasing company to export more cross-border leasing transaction.

Nevertheless, this incentive should be considered to repeal since it will affect the taxation and the government revenue. After the cross-border leasing market of Thailand grows up and leasing companies in Thailand can compete with foreign leasing companies, Thai Revenue Department should consider repealing this incentive. Until such time, cross-border leasing business will gain more revenues and become stable. The government will also earn more taxes used for the public benefits.

6.2.2 Measures to Control the Use of Corporate Income Tax Incentive

6.2.2.1 Lease Characterization

It is recommended to characterize the lease transaction to eliminate the ambiguity. Thai laws should have a provision of lease characterization by applying a concept of economic ownership with no regard to using the holder of legal title. Lease transaction should also implement a concept of the true lease and advance ruling for detailed qualifications. Except for acquiring the leased asset by purchase option, the

leased asset should be purchased at the fair market value or the book value. Also, the definition of leasing under the Revenue Ordinance No.4/2528 and the Ministerial Regulation No.144 should be revised by the said lease characterization.

6.2.2.2 Fraudulent Control Measure

Penalties and punishments under Section 37 and 37 *bis* of the Revenue Code should be revised by increasing maximum fine and terms of imprisonment to prevent the fraud activities that attempt to evade or defeat the tax. In addition, Thailand should provide an efficient investigation system for tracking any fraud activity.

6.2.2.3 Exchange of Information

Thailand should join TIEAs to increase the cooperation in exchange of information with foreign countries. Since there is no any requirement for a DTA, Thailand should provide the cooperation in exchange of information with Brunei Darussalam and Cambodia through TIEAs to handle with potential harmful tax issues. Other intergovernmental agreement such as a memorandum of understanding (MOU) between Thai Revenue Department and their tax authority can be an alternative way for this cooperation with these countries.

6.2.2.4 Other Measures

Thailand should provide the registration system for leasing companies by the Department of Business Development. In collecting their business data, the database should separate the domestic leasing and cross-border leasing. It will facilitate the Revenue Department in providing tax incentive and controlling the use of such tax incentive under cross-border leasing.

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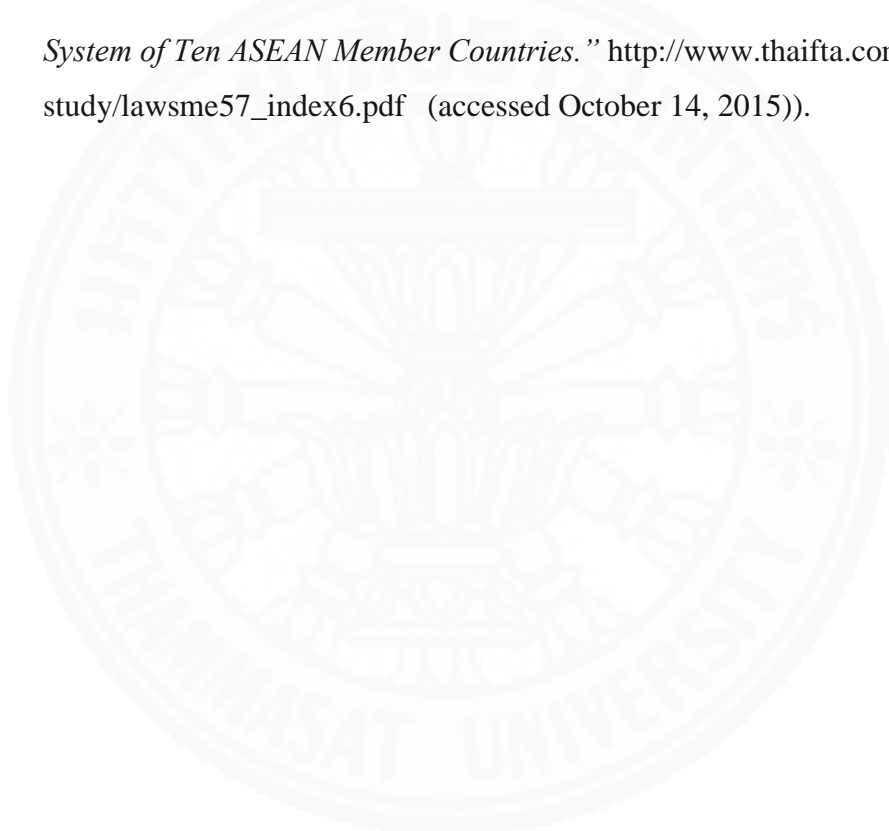
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