Analysis: China – Thailand Income Treaty

See treaty text

Type of treaty: Income

Based on the OECD Model Treaty

Thailand primarily uses the OECD Model but also integrates a portion of the UN Model that is not or no longer addressed in the OECD Model, eg Article 5 incorporates the services provision that is in the UN Model.

Signed: October 27, 1986

In force: December 29, 1986

Effective: January 1, 1987. See Article 26.

Status: In force.

This Analysis was written in February 2013 by **John Cifor**, Senior Advisor, Deloitte Tax & Legal Services, Thailand.

Article 1 Personal Scope

See treaty text

Convention applies to persons who are residents of one or both Contracting States.

Article 2 Taxes Covered

See treaty text

Convention is generally consistent with the OECD model.

Convention covers taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of movable or immovable property, as well as taxes on capital appreciation.

Thailand

The Convention for Thailand covers The Petroleum Income Tax Act that was introduced in 1971 to impose a tax on net profits that companies derive from an interest in a petroleum concession granted by the Thai government. Net profits from petroleum operations includes revenue from production, transport or sale of oil and gas, the value of has delivered to the government as a royalty and the proceeds of a transfer of interest in a concession less ordinary and necessary business expenses. There are specific expenses which are not allowed in determining the net taxable profits, e.g. interest expense. The tax rate for most operators is not less than 50%.

Thailand does not impose income taxes at a provincial level.

Article 3 General Definitions

See treaty text

Convention is generally consistent with the OECD model.

Convention does not define "enterprise" as the OECD model does.

Convention does not define "business" as the OECD model does.

In regards to "international traffic" the Convention means any transport by a ship or aircraft operated by an enterprise of a Contracting State, except where the ship or aircraft is operated solely between places in the other Contracting State and makes no reference as to where the effective management is based as stated in the OECD model.

Thailand

Under the Thailand legal system there is no specific definition of the concept of enterprise.

A registered partnership in Thailand is subject to income tax so is a body of persons that is considered as a body corporate for tax purposes.

Article 4 Resident

See treaty text

Convention is generally consistent with the OECD model.

Convention in paragraph 1 makes no reference to any political subdivision or local authority thereof as the OECD model does. Convention also does not include exception of any person who is liable to tax in that State in respect only of income from sources in that State which is contained in the OECD model.

Where a person other than an individual is a resident of both States the Convention has the competent authorities responsible for settling this matter whereas the OECD model cites where effective management is situated.

Article 5 Permanent Establishment

See treaty text

For a Permanent Establishment (PE) to exist there must be a fixed place of business where business wholly or partly is carried on.

Convention is generally consistent with the OECD model except as noted in the Expert Analysis.

In paragraph 2(f) of the Convention includes a farm or plantation. This is not included in the OECD model.
In paragraph 2(i) of the Convention a "warehouse" in relation to a person providing storage facilities for others" is included which is not included in the OECD model
In paragraph 2(h) the Convention makes reference to a building site or construction or assembly project or supervisory activities in connection therewith that lasts for a period of more than 6 months is a PE. The OECD model provides for a period over 12 months in this instance.
In paragraph 2(j) the Convention makes reference to the furnishing of services, including consultancy services, by an enterprise through employees or other personnel, for the same or connected projects, within a Contracting State that lasts for a period or periods of more than 183 days within any given 12 month period is a PE. This is not addressed in the OECD model but is contained in the UN model.
In paragraph 5 the Convention reiterates the exception for an agent not representing an independent status as contained in paragraph 4.
In paragraph 6 the Convention specifically cites an insurance enterprise of a Contracting State shall, except in regard to reinsurance, be deemed to have a permanent establishment in the other State if it collects premiums in the territory of that State or insures risks situated therein through an employee or through a representative who is not an agent of an independent status within the meaning in paragraph 5.

Thailand

Thailand tax law has no defined period of time where a person can carry on business in Thailand through an employee, agent or go-between where the net profits derived from such activity would not be subject to income tax. In effect, carrying on business for even one day can result in any net profits derived being taxable in Thailand.

Article 6 Income from Immovable Property

See treaty text

General rule in the Convention is that income derived by a resident of a Contracting State from immovable property in the other Contracting State may be taxed in that other State which is consistent with the OECD model.

Article 7 Business Profits

See treaty text

Convention rules that apply are generally consistent with the OECD model. The key exceptions are noted in the Expert Analysis
Paragraph 3 of this article allows for deductions of expenses that are incurred for the purposes of the PE including executive and administrative expense so incurred by the PE. This is in line with the UN model and not specifically so in the OECD model.
Paragraph 4 allows a PE to determine the profits attributable to the PE based on a percentage of gross revenues.
Paragraph 5 states that no profits are attributable to the PE for the mere purchase of goods or merchandise for use by the PE which is not contained in the OECD model.
Paragraph 6 applies the consistency of using the method in attributing the profits to the PE on a year by year basis unless there is good and sufficient reason to the contrary.
The Convention does not have a provision where one Contracting State makes an adjustment to the profits of an enterprise having a PE in that Contracting State whereby the other Contracting State would make a corresponding adjustment to avoid double taxation of that enterprise which is contained in the OECD model. This means that the enterprise pursuing a corresponding adjustment would have to follow the mutual agreement article of the Convention.

Thailand

A party that is considered to have a PE in Thailand must also be in a position to provide books and records for the applicable tax period which are used to produce Financial Statements that must be audited by an independent certified public accountant in Thailand. The audited Financial Statement must accompany the tax return being filed by the PE for the applicable tax period. If no books and records to substantiate the profits attributable to the PE are available then the representative of the PE can seek to apply a provision of the Thai tax law that allows the computation of tax for the PE based on 5% of the gross revenues attributable to the PE.

Article 8 Shipping and Air Transport

See treaty text

The Convention in regards to profits derived from aircraft in international traffic shall be taxable only by the Contracting State where the enterprise is resident and makes no reference to where the effective management is situated as does the OECD model.
The Convention allows the other Contracting State to tax the profits from the operation of ships in international waters but the tax imposed shall be reduced by an amount equal to 50% of the tax otherwise imposed. The OECD only allows the Contracting State where the effective management is situated to tax such profits in this instance.
The Convention makes no reference to a situation involving inland waterways as does the OECD model.

Thailand

Thailand tax law imposes income tax on gross revenues resulting from foreign enterprises operating ships in Thai territorial waters.

Article 9 Associated Enterprises

See treaty text

Convention is generally consistent with the OCED model.
Convention does not have paragraph 2 of the OECD Model, causing transfer pricing adjustments in one Contracting State not to be adjusted in the other Contracting State in order to avoid double taxation. Relief from double taxation would have to be sought under Article 25 (mutual agreement procedure).

Thailand

In compliance with the Arm's Length Principle, as defined under the OECD Guidelines and the principle of market value specified in the Thailand Revenue Code, the Thailand Revenue Department formerly launched Paw 113 in 2002 as a guideline for the enforcement of Transfer Pricing. Thailand has subsequently introduced an Advance Pricing Ruling process in 2011.

Article 10 Dividends

See treaty text

Treaty rates are 15% of the gross amount of the dividends if the recipient holds directly at least 25% of the shares of the company paying the dividends and 20% of the gross amount of the dividends in other cases.

China

A 10% withholding tax, which is lowered from a 20% statutory rate, is imposed on dividends paid to a non-resident company.

Thailand

Regardless of the withholding tax that applies in the Convention and the provisions in the OECD model, the distribution of dividends made by Thailand resident companies out of profits generated are subject to a withholding tax of 10% under Thai domestic tax law which is lower than the rates of tax indicated in the Convention.
Thailand company profits generated by a business activity promoted by the Thailand Board of Investment during the tax holiday period are exempt from any withholding tax if paid to the shareholder in the form of a dividend prior to the expiration of the tax holiday period. An exemption also applies in regards to designated profits generated by qualified Regional Operating Headquarters paid in the form of dividends to shareholders.
Profits paid by a PE in Thailand to the head office in the other Contracting State are subject to a profit remittance tax of 10%.

Article 11 Interest

See treaty text

Convention is generally consistent with the OECD model but the Convention has varying tax limits.
Treaty rate is 10% on gross interest income paid to when the resident of a Contracting State is a financial institution (including an insurance company) and taxed in the Contracting State in which it arises and according to the laws of that Contracting State in all other cases.
Convention provides for an exemption of tax on interest paid to the Government (as defined in the Convention) of the other Contracting State.
Convention in defining interest also makes specific reference to income arising from from money lent by the taxation law of the State in which the income arises. The OECD model only makes reference to income from “debt-claims of every kind”.
Convention in paragraphs 5 and 6 make reference to permanent establishment as in the OECD model but also includes independent personal services from a fixed base in connection with which the indebtedness on which the interest is paid was incurred.

China
A 10% withholding tax, which is lowered from a 20% statutory rate, applies to interest paid to a non-resident. Also, a 5% business tax is imposed.
Thailand
On the payment of the gross amount of interest paid from or in Thailand to a non-resident person is subject to a withholding tax of 15% under Thai domestic tax law.

Article 12 Royalties

See treaty text
Convention is generally consistent with the OECD model although it allows the other Contracting State where the payment of the royalties arises to tax such an amount.
Treaty rate is 15% on gross amount royalties paid from the other Contracting State.
Convention has a paragraph in reference to royalties owned by a Contracting State itself which is not referred to in the OECD model.
China
A 10% withholding tax, which is lowered from a 20% statutory rate, applies to royalties paid to a non-resident. Also, a 5% Business Tax is applicable,
Thailand
On the payment from or in Thailand of gross royalty income to a non-resident party a withholding tax of 15% applies under Thai domestic tax law.

Article 13 Gains From the Alienation of Property

See treaty text
Convention is generally consistent with OECD model with exceptions noted in Expert Analysis.
Convention in paragraph 2 also makes reference to gains on the alienation of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services which is not contained in the OECD model.
Convention taxes gains on alienation of ships or aircraft operated by an enterprise of a Contracting State in international traffic and movable property pertaining to the operation of such ships or aircraft, shall be taxable only in that Contracting State. The OECD model taxes the gain where the effective management is situated.
Convention does not include paragraph in regards to the taxability of the gain on alienation of shares deriving more than 50% of their value directly or indirectly from immovable property situated in the other Contracting State as set forth in the OECD model.
Thailand
On the payment from or in Thailand of capital gains to a non-resident party a withholding tax of 15% applies under Thai domestic tax law.

Article 14 Independent Personal Services

See treaty text
The remuneration derived by an individual resident of a Contracting State in respect to professional services or other independent activities are only taxable in that State unless the services were in fact rendered in the other Contracting State for more than 183 days (within any given 12 month period) or the recipient maintains a fixed base in the other Contracting State or the remuneration was paid by an enterprise or a PE in the other Contracting State.
The Convention specifically makes reference to only so much of the income as is attributable to the services performed or fixed base is taxable in the other Contracting State.
This Convention is based on former OECD model, i.e. still includes Article 14, in which independent personal services were not yet included in Article 7.
Thailand
The manner in which Thailand taxes the remuneration would likely depend on the actual profession of the individual providing the independent personal services considered taxable in Thailand since the allowed expenses may vary or have limitations and the tax will be imposed at the individual income tax rates.

Article 15 Dependent Personal Services

See treaty text
Convention is generally consistent OECD Model.
Reference to inland waterway transport and taxable where effective management is situated in paragraph 3 of the OECD Model is absent from paragraph 3 of the Convention.

Article 16 Directors' Fee

See treaty text
General rule applies whereby Directors' fee paid by a company resident in the Contracting State to a resident of the other Contracting State may be taxed by the Contracting State.
Convention is consistent with the OECD model but also has paragraph 2 that stipulates that if salaries, wages and other similar remuneration derived by a resident of a Contracting State in his capacity as an official in a top-level managerial position of a company which is a resident of the other Contracting State may be taxed in that other State.

Article 17 Artistes and Athletes

See treaty text
In the Convention income derived by entertainers or athlete from their personal activities or an enterprise that employs or contracts the entertainer or athlete may be taxed in the Contracting State where the activities are performed which is consistent with the OECD model.
The Convention exempts the income derived by the entertainer or athlete, the enterprise or Contracting State representing the entertainer or athlete from tax in the other Contracting State if the visit to that Contracting State is substantially supported by public funds of the other Contracting State, including any political subdivision, local authority or statutory body thereof, in connection with the provision of such activities.

Article 18 Pensions

See treaty text
Convention is consistent with the OECD model by allowing the Contracting State where the recipient is a resident to tax a pension or similar remuneration but also allows the other Contracting State where the enterprise or PE is based to tax the pension income amount if the income is borne by such an enterprise or PE.

Article 19 Government Service

See treaty text
Convention is generally consistent with the OECD model.

Article 20 Students and Trainees

See treaty text
Convention is consistent with the OECD model and covers students and business trainees and exempts from tax the remittances from outside the Contracting State and grant, allowance or award that are solely for the purpose of maintenance, education or training.
Convention also exempts from tax income from personal services rendered in that Contracting State provided that such income constitutes earnings reasonably necessary for his maintenance and education.

Article 21 Professors, Teachers and Researchers

See treaty text
Convention has specific exemption from tax in the other Contracting State remuneration derived solely for the purpose of teaching or engaging in research at a university, college or other educational institution, recognized by the competent authority of the other Contracting State, performed in the other Contracting State for a period not to exceed three years. No Article contained in the OECD model.
Convention in paragraph 2 confines the tax exemption from research only if such research is undertaken by the individual for the public interest and not primarily for the benefit of some other private person or persons.

Article 22 Income Not Expressly Mentioned

See treaty text
Convention allows the Contracting State where the other income arises the right to tax that other income whereas the OECD allows the Contracting State where the recipient is a resident to tax the other income.

Article 23 Elimination of Double Taxation

See treaty text
Convention provides each Contracting State the right of allowing for a tax credit for taxes paid on income also subject to tax in the other Contracting State. The credit is limited to the tax payable in the Contracting State on the same element of income subject to tax in the other Contracting State.
Article 23 of the OECD Model presents the two leading principles for elimination of double taxation by the State of which the taxpayer is a resident: the principle of exemption and the principle of credit. When negotiating their particular double taxation conventions, Contracting States may adopt one or the other principle, or even a hybrid system which applies in the case of this Convention.

Convention has adopted the principle of credit.
In the Convention paragraph 2 also allows Thailand to provide a tax credit for Chinese tax payable in the case of a profits deemed to include the amount of Chinese tax which would have been paid if the Chinese tax had not been exempted or reduced in accordance with the special incentive laws designed to promote economic development in China.
In the Convention paragraph 3 allows China to provide a tax credit for Thailand tax payable in the case of a profits deemed to include the amount of Thailand tax which would have been paid if the Thailand tax had not been exempted or reduced in accordance with the which are designed to promote economic development.

Article 24 Non-Discrimination

See treaty text

Convention has no express coverage for stateless persons.
Convention has no provision for deductibility of payment of interest, royalties and other disbursements by an enterprise of one State to a resident of the other State as if he were a resident of the first State.
Non-discrimination provision applies solely to taxes covered by the Convention.
Application of the non-discrimination provision of the Convention is not extended to persons who are not residents of one or both of the Contracting States (i.e. stateless persons) as it is in the OECD model.
The Convention does not contain a provision similar to paragraph 4 of the OECD Model, which determines that, with a few exceptions, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State, for the purpose of determining the taxable profits of such enterprise.
Finally, under the Convention, the non-discrimination provision applies solely with regard to taxes covered by the Convention, whereas under the OECD Model, the non-discrimination provision applies to taxes of every kind and description.

Article 25 Mutual Agreement Procedure

See treaty text

Convention is generally consistent with the OECD model.
Convention does not make reference to any agreement being reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.
Convention does not refer to how to deal with any unresolved issues between the competent authorities of the Contracting States as the OECD model does (i.e. arbitration) in paragraph 5.

Article 26 Exchange of Information

See treaty text

General rules apply.
The Convention is more restrictive that the OECD model covering only the taxes which are subject to the Convention, i.e. does not include taxes imposed by political subdivisions and local authorities as contained in the OECD model.

Article 27 Diplomatic Agents and Consular Officials

See treaty text

Convention is consistent with the OECD model.

Article 28 Entry into Force

See treaty text

This Article contains the rules for bringing the Convention into force and giving effect to its provisions.

Article 29 Termination

See treaty text

This Convention shall remain in force so long as it is not terminated by one of the two Contracting States.