

**REVENUE DEPARTMENT VERSUS BOARD OF INVESTMENT:
THE CHALLENGES OF THE TAX INCENTIVE SYSTEM AND
FDI PROMOTION IN THAILAND**

A thesis submitted for the degree of Doctor of Philosophy

by

Sirinya Dusitnanond

School of Law, Brunel University

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ABSTRACT

This thesis examines the use of tax incentives to promote foreign direct investment (FDI) in Thailand and the issues arising out of the way in which the Thai revenue system has chosen to implement these incentives. Thailand experiences sporadic political unrest, and has been affected by regional and global economic crises. Since FDI appears to increase economic growth and help the host country to achieve sustainable development, the Thai government has a clear policy to encourage FDI. Tax incentives have become a significant weapon in the Thai government's arsenal for encouraging this aim. This thesis presents a detailed analysis of the tax incentives and the mechanisms used for their implantation. Analysis reveals that, unfortunately, the Thai government has also chosen to deliver the administration of tax incentives in to the hands of two separate bodies — the Revenue Department and the Board of Investment (BOI). This strategy is problematic because it creates unnecessary difficulties and uncertainty in the administration of incentives and promotes confusion among foreign investors. The jurisdictional problems inherent in the system of the dual allocation of tax incentive powers are highlighted in the landmark *Minebea* case, which involved conflicting interpretations by the Revenue Department and the BOI.

In addressing these jurisdictional problems, this thesis examines norm conflict resolution principles in general and the *lex specialis* in particular, and argues that the Investment Promotion Act of 2001 (IPA 2001), being a special law, and so overrides the more general provisions of the Revenue Code. Two solutions are suggested in order to tackle the current problem: 1) to amend the IPA 2001 to specify methods of tax calculation and clearly define problematic terms and 2) to incorporate the tax incentive provisions provided for BOI-promoted companies into the Revenue Code. This is based on the premise that all tax matters, including tax incentives provisions, should be administered only by the revenue authority, i.e. the Revenue Department.

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LIST OF ABBREVIATIONS AND ACRONYMS

ADB	Asian Development Bank
AEC	ASEAN Economic Community
AFTA	ASEAN Free Trade Area
ASEAN	Association of Southeast Asian Nations
B.E.	Buddhist calendar year
	There are 543 years difference between the Buddhist calendar and the Gregorian calendar e.g. year A.D. 2011 is year B.E. 2554 in Thailand.
BOI	Board of Investment of Thailand
CCC	Civil and Commercial Code
CIT	Corporate Income Tax
D.G.N.	Director-General's Notifications
D.G.N.I.T.	Director-General's Notifications on Income Tax
D.N.	Departmental Notification
DTA	Double Tax Agreement
ESC	Extra-Statutory Concessions
EU	European Union
FDI	Foreign Direct Investment
FPI	Foreign Portfolio Investment
FPO	Fiscal Policy Office
GATS	General Agreement on Trade in Services

GATT	General Agreement on Tariffs and Trade
GBP	Great Britain Pound Sterling
GDP	Gross Domestic Product
ICJ	International Court of Justice
ICT	Information and communication technologies
IEAT	Industrial Estate Authority of Thailand
IMF	International Monetary Fund
IPA	Investment Promotion Act
ITLOS	International Tribunal for the Law of the Sea
JFCCT	Joint Foreign Chambers of Commerce in Thailand
MI	Ministerial Instruction
MN	Ministerial Notification
MNE	Multinational Enterprise
MR	Ministerial Regulation
M&A	Merger and Acquisition
NEDP	National Economic Development Plan
OECD	Organisation for Economic Co-operation and Development
RC	Revenue Code
RD	Revenue Department
Rev.Dept.Rul	Revenue Department Ruling
ROH	Regional Operating Headquarter
R&D	Research and Development
R&E	Research and Experimentation

SET	Stock Exchange of Thailand
SBT	Specific Business Tax
SME	Small & Medium-Sized Enterprise
THB	Thai Baht
TDRI	Thailand Development Research Institute
UN	United Nations
UNEP	United Nations Environment Programme
UNCTAD	United Nations Conference on Trade and Development
USD	United States Dollar
VC	Venture Capital
VAT	Value Added Tax
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WTO	The World Trade Organisation

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1 Introduction

1.1 Background

Thailand's economic growth has been driven significantly by investment, and foreign investment is a particularly important factor for economic development. Foreign direct investment (FDI) contributes sources of capital to the host country and can have a long-term impact on Gross Domestic Product (GDP). Additionally, FDI has brought into Thailand a large amount of technology and knowledge transfer, creating the right conditions to achieve sustainable development.¹ Thailand has been affected by the current global economic crisis², and since 2006 its economic and investment situations have been worsened following domestic political unrest. On 19 September 2006, Prime Minister Thaksin Shinawatra was ousted in a military coup, as announced by General Sonthi Boonyaratglin, the leader of the Council for Democratic Reform³, and went into self-imposed exile after being indicted on corruption charges.⁴ His supporters went on to stage major protests against the new government, led by Prime Minister Abhisit Vejjajiva.⁵ The crisis has brought to the fore issues of media freedom, the role of the constitution in breaking political deadlock⁶, the problem of significant disparity between rich and poor and governmental abuses of power.

¹ Heike Baumüller, 'Sustainable Development Impacts of Investment Incentives in Southeast Asia' (International Institute for Sustainable Development 2009) 13-23
<www.iisd.org/tkn/pdf/competing_business_southeast_asia.pdf> accessed 10 November 2011.

² Krist Decharuk, Pornnapa Leelapornchai and Manop Udomkerdmongkol, 'Thailand Investment in the Post-Crisis Era: Issues and Challenges' (Bank of Thailand Discussion Paper April 2009) 24
<www.bot.or.th/English/EconomicConditions/.../dp042009_eng.pdf> accessed 10 November 2011.

³ Michael Nelson, Thaksin Overthrown: The 'Well-intentioned' Coup of September 19, 2006, *eastasia.at* Vol. 6, No. 1, 1 June 2007 <http://www.eastasia.at/vol6_1/article01.htm> accessed 10 November 2011.

⁴ Anis Chowdhury, *Handbook on the Northeast and Southeast Asian economies* (Edward Elgar Publishing 2007) 130-131.

⁵ For an overview of Thailand's political map, see Oxford Business Group, *The Report Thailand 2011*.

⁶ See Peter Leyland, 'The emergence of administrative justice in Thailand under the 1997 Constitution' in Tom Ginsburg and Hongyi Chen, *Administrative law and governance in Asia: comparative perspectives*, (Taylor & Francis 2008) 232.

Thailand's political unrest has greatly affected the local economy and weakened foreign investors' confidence in doing business in the country.⁷ A survey of American multinational companies showed that political risk is the single most significant negative factor influencing potential investors.⁸ In addition, a survey conducted in 2009 indicated that political risk is ranked the highest factor among major constraints on foreign investment in emerging markets.⁹ A perceived risk of war, terrorism or civil unrest will obviously have a hugely detrimental impact on FDI.¹⁰

As well as domestic political unrest and worldwide economic instability, the following specific factors, which will be described in more detail in Chapter 4, have also given foreign investors reasons to doubt Thailand as a suitable location. First, the Bank of Thailand decided to implement an unremunerated 30% reserve requirement on short-term capital inflows; second, the government plans to amend the Foreign Business Act 1999 (FBA) to prevent foreign investors from using nominee shareholders or preferential voting rights to take control of Thai companies in restricted sectors; third, the *Map Ta Put* legal entanglement over environmental issues has been criticised for lacking clarity where investment regulations are concerned and lastly, the damage caused to manufacturing production and plants by severe flooding in late 2011 has been huge.

The Thai government has initiated a number of policies to boost the confidence of foreign investors and to aid economic recovery. The Board of Investment (BOI) is a government agency responsible for granting and administering fiscal and non-fiscal

For a critique of the most significant changes introduced as part of the 2007 Thai Constitution, see Peter Leyland, 'Constitutional Design and the Quest for Good Governance in Thailand' in Tania Groppi, Valeria Piergigli and Angelo Rinella (eds), *Asian constitutionalism in transition. A comparative perspective* (Giuffrè Editore 2008) 69-104.

⁷ Euromonitor International, 'Political instability in Thailand affects ASEAN countries' 6 July 2010 <<http://blog.euromonitor.com/2010/07/political-instability-in-thailand-affects-asean-countries.html>> accessed 10 November 2011, Jon Fernquest, 'Long political crisis hurts investment' (Bangkok Post, 6 July 2011) <<http://www.bangkokpost.com/learning/learning-from-news/245778/long-political-conflict-hurts-investment>> accessed 10 November 2011.

⁸ Alex Easson, *Tax Incentives for Foreign Direct Investment*, (Kluwer Law International 2004) 29.

⁹ Multilateral Investment Guarantee Agency, 'World Investment and Political Risk 09', World Bank Group 29 <www.miga.org/documents/flagship09ebook_chap2.pdf> accessed 10 November 2011.

¹⁰ For opinions regarding Thai domestic political unrest and its effect on investment, see Newley Purnell, 'Thailand: Bangkok Dangerous' *Newly.com*, 3 May 2010 <http://newley.com/archive_thailand_bangkok_dangerous/> accessed 10 November 2011.

incentives to encourage both domestic and foreign private sector investment in priority activities and areas. The main focus of this thesis is the case of tax incentives, which constitute one of the means through which the BOI engages in investment promotion. Guidelines and criteria pertaining to businesses that are entitled to tax incentives are specified in the Investment Promotion Act of 2001 (IPA 2001). The responsibilities of the BOI and the problems raised by its involvement in tax administration are examined in Chapters 4, 5 and 6.

Tax incentives are allocated by the BOI according to the IPA 2001 but are implemented and administrated, and the revenue collected, by the Revenue Department. The overlapping jurisdiction of these two authorities creates problems when BOI-promoted companies¹¹ claim tax incentives from the BOI, but the Revenue Department seeks to collect tax as if no (or lesser) tax incentives exist. The provisions of the IPA 2001 regarding tax incentives do not specify methods of tax calculation nor clearly define important terms. Under the current system, investors are able to seek clarification on the matter from both the BOI and the Revenue Department who invariably offer conflicting opinions. Where the situation becomes too complex, or there are accusations of illegality, investors can proceed through litigation. The most remarkable incidence, however, is the *Minebea* case, which concerns the calculation of the net profit and loss of BOI-promoted businesses. The case demonstrated that legislation and legal administration regarding tax incentives are problematic and need to be reformed. The *Minebea* case features prominently throughout this thesis, since it is, to date, the only case of its kind that has been heard by the Thai Supreme Court.

This thesis argues that the current situation under which jurisdiction over tax incentives is split between the BOI and the Revenue Department creates unhelpful conflict that is both problematic and unsustainable and drastically increases compliance costs for both investors and the Thai authorities. As a consequence, these factors could lead to Thailand becoming an undesirable investment destination, to the detriment of its developing economy. This thesis argues that reform of the legislation is needed in order to remedy the defects in the current system. In essence, the contention is that the current

¹¹ Fiscal and non-fiscal incentives are granted to domestic or foreign companies, which meet the conditions required by the Board of Investment of Thailand, to undertake targeted activities in specific locations. These companies are referred to as 'BOI-promoted companies'.

tax incentive system for FDI, which is regulated by non-tax legislation but implemented by the revenue body, does not exemplify good tax administration. This system is broken and needs fixing.

1.2 Thesis Summary

The thesis is divided into eight chapters beginning with a description of the issue's background and contexts. It is then followed by a summary of the thesis and a description of its methodology and limitations.

Chapter 2 examines the mechanism of the Thai legal system by outlining its specific characteristics, since it is as a civil law system with elements of a common law system.

The chapter goes on to explain that Thailand adopted codified legislation following the pattern of continental European legal systems (civil law), before revealing the fact that Thailand is a constitutional monarchy whereby the constitution recognises the king as the head of state. The organs of state, consisting of the executive, legislative and judicial bodies, are also discussed. This chapter also examines the Thai judicial system. Unlike broad judicial power under the common law system, the Thai court cannot itself develop a body of law, and so judgments are not categorised as a source of law. In practice, however, the judgments and rulings of the Supreme Court have persuasive authority over both itself and lower courts when relevant issues are raised. The precedents set by Supreme Court rulings are used only as considerations and sources of information, and are not legally binding. This stands in contrast to common law systems, which are bound by the precedents of earlier judgments and are subject to a greater degree of interpretation by judges. Chapter 2 also examines the structure of laws, including the supreme law (the Constitution), primary legislation and secondary legislation. The chapter ends with important information regarding the legal opinion of the Council of State, which will be discussed further in Chapters 6 and 8.

The third chapter of this thesis deals with the Thai revenue system. It starts with a discussion of general purpose of taxation in Thailand, and then moves on to examine the sources of Thai tax law, which will be mentioned throughout the thesis. The chapter then discusses the principal taxes in Thailand, providing background information for the analysis of tax incentives in Chapter 5. The chapter's emphasis is given to Thailand's tax authorities, especially the Revenue Department and its roles. The Revenue

Department is one of the two main characters in the conflict of tax jurisdiction. The Thai tax court, its history and functions are also explained here to inform the reader of how tax matters are treated differently from normal cases. This chapter also examines the issue of statutory interpretation in Thailand and argues that where there is ambiguity in tax legislation, it should be interpreted in the taxpayer's favour.

Chapter 4 begins with a discussion of Thailand's economic and investment situation. This chapter lays out the data concerning FDI inflows in the country and emphasises the significance of FDI to the economy. The Thai government's policies on investment promotion, as well as major factors, which had or have affected investors' confidence in doing business in Thailand, are examined. This is followed by an investigation of the investment promotion authority, the Board of Investment (BOI) which is in charge of granting investment promotion and incentives. This chapter introduces the history, roles and responsibilities of the BOI, which is the other character playing a crucial role in the conflict examined in this thesis. Chapter 4 also demonstrates the history of the Investment Promotion Act, and the scope of this law, which is discussed further in the analysis part in Chapter 6.

In Chapter 5, the thesis moves on to an examination of the overall characteristics of tax incentives, both in general and in Thailand in particular. It also specifically examines the respective advantages and disadvantages of major tax incentive schemes. The main focus of this chapter is on the characteristics of those tax incentives available to foreign investors, but it also emphasises the discussion on the accounting rule that allows loss carry forward for tax purposes, which will be analysed in Chapter 6. Chapter 5 analyses the reasons for Thailand granting tax incentives and further discusses the links between tax incentives and FDI. Finally, an analytical account of tax incentives is presented in order to set the stage for future reform of the system.

Chapter 6 highlights existing potential ambiguity in the interpretation of tax incentive provisions under the IPA 2001. This chapter focuses on the *Minebea* case, which concerns the problem of overlapping tax jurisdictions, especially for the interpretation of net profit and loss calculations. Under the current system, the BOI, under Section 31 Paragraph 4 of the IPA 2001, allows BOI-promoted companies to deduct annual losses incurred during the period of corporate income tax exemption. The fundamental issue is the term 'annual losses' used in this provision. It could be construed to mean the annual

loss of each individual BOI-promoted project or the annual loss should be offset against the net profit of all other BOI-promoted projects within the same accounting period. The chapter demonstrates that the consequences of this problem can affect current BOI-promoted operations, as well as companies considering investing in Thailand. An analysis of this issue highlights the problems caused by unclear legislation and the overlapping jurisdictions dealing with tax incentives. In addition, the chapter thoroughly analyses the views of the BOI, BOI-promoted companies, the Revenue Department, the Council of State, and the Thai tax court, finding that the current situation entails the inclusion of tax incentive provisions in non-tax legislation; in this case, the IPA 2001 is unclear enough to create problems where it conflicts with the Revenue Code. The inclusion of tax provisions in non-tax legislation, especially in the IPA 2001, is argued to have adverse effects on Thailand's investment climate.

Chapter 7 raises two related questions. First, which laws should apply in the situations of conflict examined? Secondly, what the consequences are of applying the laws to the current problem? It examines norm conflict resolution principles, both generally and in Thailand's legal system in particular. The focus is on the principles of *lex superior*, *lex posterior* and *lex specialis*. This chapter evaluates how norm conflict resolution principles can be applied to the particular problem raised in Chapter 6. It also argues that the problem of conflict between the Revenue Code and the IPA 2001 should be solved according to the *lex specialis* rule, i.e. the IPA 2001 should override the Revenue Code in this case because the IPA 2001 is a specific law. This chapter suggests that the current overlapping of tax jurisdictions creates uncertainty among government officials and investors, and then goes on to posit a solution to this issue and the need to amend the IPA 2001's provisions on tax incentives.

Finally, Chapter 8 summarises this thesis' findings, suggesting that where unclear tax legislation is concerned, an interpreter of the law is required to exercise caution regarding statutory interpretation and to pay close attention to the drafting process. The chapter concludes the thesis with an examination of the proposal to amend tax incentive provisions under the IPA 2001, and the implications of the amendment. The recommendations of this thesis go beyond amendments to the IPA 2001 as they propose reform by incorporating tax incentive provisions in the Revenue Code. A number of potential difficulties are taken into account, and solutions are suggested in order to achieve the best possible benefits for Thailand and foreign investors.

The research methodology is based on textual analysis, adopted a doctrinal approach and examines primary and secondary sources from substantive laws, judgments and documents held by libraries in the United Kingdom and Thailand, relevant government authorities, and online sources. Secondary sources regarding investment, FDI and economic aspects are obtained from the Bank of Thailand, the Thailand Board of Investment, OECD, UNCTAD, the World Bank, the IMF, and the Asian Development Bank.

This thesis does not attempt to offer an in-depth analysis of the propriety of tax incentives in general or to discuss the possibility of their abolition, whether in Thailand or elsewhere. Instead, it merely engages with the policy as declared by the Thai government, and examines critically the policy as implemented. Details of customs and excise laws are excluded from this thesis, as it focuses only on income tax laws.

2 The Thai Legal System

Introduction

The Thai legal system is a civil law system, but it also incorporates aspects of common law systems. This chapter will present the development of Thai law as a combination of the two systems. It provides an essential background for the analysis that follows, since it discusses the sources of laws, and the infrastructure of the court, illuminating the issues of conflict resolution that will be discussed in Chapter 7. This chapter also explains the structures of Thai government and law-making, and the historical influences on the development of the Thai legal system as a constitutional monarchy. The legal procedures described in this chapter will also be revisited when considering the possibilities of reform in Chapter 8.

2.1 Thailand as a Civil Law Country with Common Law influences

Following the legal reforms of the reign of King Chulalongkorn (1868-1910), the Thai legal system was modernised along the same lines as some European countries, most notably France and Germany, whose jurists and legal consultants had an influence on Thailand's legal system.¹² This influence led to the drafting of various written codes of law based on a civil law system with fixed, codified laws, originating in Roman law (or civil codes). Simultaneously, however, many Thai legal specialists studied law in England, where the common law, based on a body of precedents, was used.¹³ Therefore, Thai lawyers and lawmakers could compare the advantages and disadvantages of the two legal systems and choose, from each one, the practices which they considered best for Thailand's situation. Although Thailand may be classified as a civil law country whereby a continental style of codification is the dominant system, the English common law system has also had much influence on its development, particularly in the fields of

¹²Douglas M. Johnston and Gerry A. Ferguson, *Asia-Pacific Legal Development* (UBC Press 1998) 299.

¹³ Thomas Hoffmann and Lucia Siebers (eds), *World Englishes--problems, properties and prospects: selected papers from the 13th IAWEL conference*, (John Benjamins Publishing Company 2007) 169.

commercial law, procedural law and the law of evidence.¹⁴ Some of the common law influences are the notion of proof beyond reasonable doubt in criminal cases, proof on the balance of probabilities in civil cases, and the adversarial system of procedure, whereby the judge acts as an umpire.¹⁵ Thailand, therefore, can be considered a mixed legal system¹⁶ in which the law in force is derived from more than one legal tradition.¹⁷ Thailand deliberated whether a common law or civil law system should be adopted as their model of law. There had been discussions about adopting a common law system, due to the fact that many Thai legal specialists, graduating in law from England, were familiar with the common law system. After considering the nature of the common law system, the specialists concluded that this system was not organised enough to be suitable for Thailand.¹⁸ By contrast, the civil law system was considered to be well organised into sections according to a code and this was deemed suitable to be a model for Thai law.¹⁹ Since the Thai legal system was influenced by continental European countries, this pattern of civil law continues to dominate.²⁰ Accordingly, following the civil law tradition, all laws are codified in statutes.²¹

¹⁴ Ibid.

¹⁵ See David Lyman, 'An Insight into the Functioning of the Thai Legal System' (1975) Jan-Feb, Thai-American Business Magazine.

¹⁶ Unlike a 'mixed jurisdiction' which is "a country or a political subdivision of a country in which a mixed legal system prevails. For example, Scotland may be said to be a mixed jurisdiction, because it has a mixed legal system, derived in part from the civil law tradition and in part from the common law tradition". William Tetley, 'Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)' (1999) *Unif.L. Rev. (N.S.)* 591-691 (Part I) <<http://www.mcgill.ca/files/maritimelaw/mixedjur.pdf>> accessed 10 November 2011.

¹⁷ Wen-Shing Tseng, Daryl B. Matthews and Todd S. Elwyn, *Cultural competence in forensic mental health: a guide for psychiatrists, psychologists, and attorneys* (Psychology Press 2004) 7.

¹⁸ The Central Intellectual Property and International Trade Court and the Institution of Developing Economies 'The Judicial System in Thailand: An Outlook for a New Century' (Japan External Trade Organisation, 2001) 64 referred to as 'The Judicial System in Thailand'.

¹⁹ Ibid.

²⁰ Dennis Campbell (ed), *International Agency and Distribution Law* (Yorkhill Law Publishing 2007) 385.

²¹ International Legal Counsellors Thailand Limited (Russin & Vecchi,), *Thailand Business Legal Handbook Prepared for the Board of Investment Royal Thai Government* (Millennium Edition 2000) 1 referred to as 'Thailand Business Legal Handbook'.

2.2 Thailand as a Constitutional Monarchy

The Thai constitution recognises the King as the head of state²², the head of the Thai armed forces²³ and the upholder of all religions.²⁴ He enjoys the highest status, which no one may hold in contempt. According to the Constitution of Thailand 2007, no person shall expose the King to any sort of accusation or action.²⁵ His symbolic power comes from the people of Thailand and is exercised through the three branches of government: the executive, the legislature, and the judiciary.²⁶ It is specified in the constitution that the National Assembly, the Council of Ministers, the courts and state agencies shall perform duties of office under the rule of law.²⁷ Thus, everyone within the jurisdiction, citizens and foreigners alike, can have confidence that their activities will be judged in accordance with established rules and principles of law. Their personal liberty and the liberty to conduct business affairs is subject to restraint only by virtue of legal powers clearly vested in persons acting, with the authority of the state, under the constitution or under legislation as interpreted by the judges in courts of justice.²⁸

2.3 Organs of State and Balance of Power

The Executive, Legislative and Judicial Branches constitute the main vehicles in driving economic, social, political, security, budget and legal development in Thailand. Each of the three branches of government has a degree of control over the actions of the other branches of government, as follows:

- 1) The Legislative Branch can approve, amend or reject proposed bills, thoroughly review the budget submitted to it, and can make changes to the budget within the limitations specified in the constitution.

²²Constitution of Thailand 2007, art 2.

²³ Constitution of Thailand 2007, art 10.

²⁴ Constitution of Thailand 2007, art 9.

²⁵ Constitution of Thailand 2007, art 8.

²⁶ Constitution of Thailand, 2007, art 3.

²⁷ Constitution of Thailand, 2007, art 3.

²⁸ Scott Veitch, Emiliios Christodoulidis and Lindsay Farmer, *Jurisprudence Themes and Concepts* (Routledge-Cavendish 2007) 7.

- 2) The courts have a degree of control over legislation approved by the Parliament, in interpreting the law (as does the Constitutional Court), and in determining whether the law is consistent with the constitution.
- 3) Any law found by the Constitutional Court to be inconsistent with the constitution is ineffective, and cannot be followed. The courts also review governmental actions, and can require changes or reconsideration in appropriate cases.
- 4) The Executive Branch, through the power of preparing the budget, has a degree of control over issues such as the functions of the courts, how many employees the courts may have, and any other matters related to the infrastructure of the courts.
- 5) The Executive Branch also has control over legislation passed by the Parliament, in that all bills must be submitted to the King through the Prime Minister, and if the Prime Minister is opposed to a particular bill, he or she can express those feelings to the King, who may refuse to approve it in the form in which it is submitted to him.

2.3.1 The Executive Branch

The Executive Branch is headed by the prime minister and consists of the prime minister, the ministers of the various ministries, deputy ministers, and the permanent officials of the various ministries.²⁹ The prime minister and the other ministers make up a body known as the Council of Ministers, often simply referred to as the Cabinet. The Cabinet is responsible for the administration of fourteen ministries and the Office of the Prime Minister and all of its activities, except those of the parliament and the courts. Each ministry is headed by a politically appointed minister, and in most cases, includes at least one deputy minister. The Cabinet sets governmental policy and goals, which are carried out by designated ministers and deputy ministers. The prime minister is assisted by deputy prime ministers as well as a number of ministers holding the portfolio of ‘Minister to the Prime Minister’s Office’. The individual ministers head up their respective departments. They give policy direction to the permanent officials who function as part of the civil service. The permanent officials of the agency then give direction to the various supervisors and other leaders within their department, and they in turn supervise the employees who perform the actual work of the agency under their

²⁹ Constitution of Thailand, 2007, art 171.

control. In addition, all ministers and deputy ministers sit as members of the Council of Ministries, which normally meets once a week to establish government policy on any and all issues which need governmental attention. The Council of Ministers makes annual plans for the administration of State affairs to illustrate the measures and details of the administration, which must adhere to State policies. In the administration of the state's affairs, the Council of Ministers must plan and enact any laws which are necessary for the implementation of the administrative policies and plans.³⁰

The Council of Ministers has the power to submit urgent legislation to the King for immediate implementation by Royal Decree, to be followed by consideration by the Parliament within one year. Once such a proposal has been adopted by Royal Decree, it is the law of Thailand unless overturned by action of the Parliament. The Council of Ministers also prepares a budget for consideration by the Parliament, and approves and submits to the Parliament bills desired by the prime minister or by individual ministers or ministries affecting governmental policy and procedures. Smaller cabinet committees have been set up to help screen proposals from the various ministries before submission to the full cabinet. This process enables the government to ensure that no conflicting policies are made. Additionally, in the words of a United Nations report on Thailand's public administration, 'The committee may also be assigned by the prime minister to examine the merits of each project or policy for the cabinet so that the latter will not have to go into detail before deciding on proposals, thus streamlining its work'.³¹

The Office of the Prime Minister is a central executive agency, which is responsible for assisting the prime minister in general administration and recommending economic, social, political, security, budget and legal development policies.³² Some of its primary subdivisions are the Budget Bureau, the National Security Council, the Juridical Council, the National Economic and Social Development Board, the Civil Service Commission, and several other organisations vital to the formulation of national

³⁰ Constitution of Thailand 2007, art 76.

³¹ Division for Public Administration and Development Management (DPADM), Department of Economic and Social Affairs (DESA, 'The Kingdom of Thailand Public Administration Country Profile' (2004) United Nations, 5 <<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan023244.pdf>> accessed 10 November 2011 referred to as 'DPADM Report'.

³²The Prime Minister's Office of Thailand <<http://www.opm.go.th/opminter/contentweb/powerContent.asp>> accessed 10 November 2011.

policy.³³ The prime minister must appoint a minister in charge, who is also a member of the Cabinet, to oversee its operations. It also houses the offices of the various deputy prime ministers of Thailand. The fourteen ministries are divided on a functional basis. The head of the civil servants in each ministry is the Permanent Secretary, who has administrative control over all the departments of the ministry, each of which is headed by a director-general.³⁴

2.3.2 The Legislative Branch

The legislative branch is the principal law-making arm of the government, charged with the primary responsibility of promulgating and approving new statutes.³⁵ The full legal name of the legislative branch of government is the National Assembly, which comprises the House of Representatives and the Senate.³⁶ The House of Representatives is charged with the duty of enactment of the constitution and is the first legislative body to consider most of the proposed legislation submitted by the Cabinet or by a member of parliament. If the house approves a proposed bill, it is sent to the Senate for consideration. If the Senate approves the bill as submitted, and each house approves the bill on the third reading, the bill is then submitted to the prime minister for forwarding to the King for his approval.³⁷ Aside from the House of Representatives, other bodies can introduce a bill. They include the Council of Ministers, and courts of independent agency under the constitution. The latter can pass only laws on organisation and laws in charge of the President of such court and the President of such organ. Additionally, a group of vote-holding citizens may present a bill for consideration, providing that they number more than ten thousand.³⁸

Under the present constitution, the House of Representatives consists of 480 members, 400 of whom are elected on a constituency basis, and 80 of whom are elected on a

³³Ibid

³⁴ DPADM Report (n 31).

³⁵ Constitution of Thailand, 2007, art 90.

³⁶ Constitution of Thailand 2007, art 88.

³⁷ Constitution of Thailand, 2007, art 90.

³⁸ Constitution of Thailand 2007, arts 142,163.

proportional basis.³⁹ The election of a member of the House of Representatives is by direct suffrage and secret ballot.⁴⁰ Seventy-six senators are directly elected; one from each province and one from Bangkok, while the other seventy-four are appointed from various sectors by the Senate Selection Committee.⁴¹ The Senate has the authority to approve the proposed laws passed by the House of Representatives,⁴² and to appoint and to remove persons to or from certain committees or tribunals.⁴³

Although legislation is extremely important, it cannot operate in isolation from the rest of the country's political infrastructure. It requires implementation. On a day-to-day basis, that is the function of a wide variety of officials, whose job is either to carry out Parliament's commands itself or to make sure that other organisations or private individuals are doing so. Although officials continually work on interpreting both primary and secondary legislation, on occasion they require a more authoritative statement of what the law means. That process of interpretation is usually undertaken by the courts.⁴⁴

2.3.3 The Judicial Branch

The Judicial branch is headed by the president of the Supreme Court⁴⁵, and is comprised of all the courts of Thailand. The courts are independent bodies, and also serve as a check and balance against both the executive and legislative branches of government.

2.4 The Thai Judicial System

The Thai judicial administration was initiated by King Chulalongkorn⁴⁶, also known as Rama V (1853-1910), who was the King of Thailand from 1868 to 1910. In 1882, he

³⁹ Constitution of Thailand 2007, art 93.

⁴⁰ Constitution of Thailand 2007, art 93.

⁴¹ Constitution of Thailand 2007, art 111.

⁴² Constitution of Thailand 2007, art 90.

⁴³ Constitution of Thailand 2007, art 91.

⁴⁴ James Holland and Julian Webb *Learning Legal Rules A Students' Guide to Legal Method and Reasoning* (6th edn Oxford University Press 2006) 9.

⁴⁵ The Organisation of Courts of Justice Act 2000, s 5.

⁴⁶ For more details regarding King Chulalongkorn's roles in Thailand's development, see Irene Stengs *Worshipping the great moderniser: King Chulalongkorn, patron saint of the Thai middle class* (NUS Press 2009).

ordered the building of the Courts of Justice. From 1885 he began reforming the government, establishing ministries structured on functional lines. The King set in motion the modernisation of the country's administration, stripping power from the old nobility, provincial elites, and hereditary court officials.⁴⁷ Before the reforms, Thailand was in the so-called 'Absolute Revolution', during which period it was a significant trading hub, with a large number of foreigners resident there and engaged in international trade. These foreigners were *de facto* outside the law; the treaties made between Thailand and the western countries were loosely interpreted to afford foreigners special rights not available under Thai law.⁴⁸ The law, at that time, could not be enforced to administer and protect peace in the country. King Chulalongkorn, as a result, initiated a plan to improve the Thai legal system and judiciary, including the education of lawyers, in order to bring back the sovereign right of the judiciary over western nationals living in Thailand.⁴⁹

King Chulalongkorn's major legal reforms of 1892 changed the role of the King from executor of 'moral precepts based on a higher fundamental law', to a law giver in his own right, issuing laws on his own authority.⁵⁰ In the same year, the Ministry of Justice was established and brought about the centralisation of all Courts of Justice. The main responsibilities of the Ministry of Justice were to reform and improve the Thai judiciary.⁵¹ In 1897, King Chulalongkorn visited many European countries⁵² and sent Thai scholars for legal study in Europe.⁵³ The specialists who returned to Thailand

⁴⁷ Clark D. Neher, *Modern Thai politics: from village to nation* (Transaction Publisher 1979) 9.

⁴⁸ Frank C. Darling 'The Evolution of Law in Thailand' (1970) 32 (2) *The Review of Politics* 205 <<http://www.jstor.org/stable/1406516>> accessed 10 November 2011. Tamara Lynn Loos, *Subject Siam: Family, law, and colonial modernity in Thailand* (Cornell University Press 2006) 45.

⁴⁹ Tamara Loos, *Subject Siam: family, law, and colonial modernity in Thailand* (Cornell University Press, 2006). 45.

⁵⁰ Darling (n 48) 208.

⁵¹ *The Judicial System in Thailand* (n 18) 63-64.

⁵² 'King Chulalongkorn was given a warm and cordial reception from the kings and rulers of many countries in Europe. He was acquainted with European heads of state, developing an invaluable understanding between Thailand and the great powers, resulting in Thailand remaining independent during a period of colonialism, most notably by Great Britain and France'. See <<http://www.braun-deutschland.de/chula/chula-en.htm>> accessed 10 November 2011.

⁵³ Loos (n 49) 47-48.

played a vital role in developing the Thai judicial and legal system, and replaced former advisors, many of whom were foreigners.⁵⁴

The founder of modern Thai law was Prince Rabi Bhadanasak, also known as Prince Rajburidireckrit, who played a leading role in introducing a modern system of judicial administration.⁵⁵ Prince Rajburidireckrit, born in 1874, was the son of King Chulalongkorn and was sent to study law at the Christ Church College, Oxford University, in England.⁵⁶ He founded the first law school in Thailand.⁵⁷ At the time, there were a number of judges and officials who graduated with law degrees from English universities.⁵⁸ In 1897, Prince Rajburidireckrit was promoted to Head Official of the Ministry of Justice.⁵⁹ One generation later, Pridi Phanomyong (1900-1983), came to prominence. A highly-respected politician, former prime minister and Thai statesman, he had studied law and economics in Paris.⁶⁰ He was also one of the leaders in 1932 Constitutional Revolution which significantly impacted the Thai legal and judicial system, changing the form of government from absolute monarchy to constitutional monarchy.⁶¹

2.4.1 The Role of Thai Judges and Non-Binding Precedents

The court decides cases brought before it based on an interpretation of the codified laws. Whereas the common law system gives a high level of importance to judicial precedent, the role of such precedent is downplayed in Thailand.⁶² The rule of legal

⁵⁴ Ibid.

⁵⁵ Darling (n 48) 209.

⁵⁶ Rabibhadanasak Judicial Research Institute (in Thai)
<http://www.coj.go.th/rabi/userfiles/file/Rabi_history.pdf> accessed 10 November 2011.

⁵⁷ Loos (n 49) 51.

⁵⁸ The Judicial System in Thailand (n 18) 65.

⁵⁹ Ibid.

⁶⁰ Darling (n 48) 207.

⁶¹ For an explanation of Thailand's constitutional monarchy, see Kobkua Suwannathat-Pian, *Kings, country and constitutions* (Routledge 2003) 69-142.

⁶² For more details on the comparisons of civil law and common law systems, see James G. Apple and Robert P. Deyling, 'A Primer on the Civil-Law System' (the Federal Judicial Center at the request of the International Judicial Relations Committee of the Judicial Conference of the United States) 34-38

interpretation stated in Section 4 of the Civil and Commercial Code (CCC) can also be used for criminal or other areas of law. Section 4 of the CCC provides:

the law must be applied in all cases which comes within the letter and spirit of any of its provisions; where no provision is applicable, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law.

Under the Thai constitution, judicial power rests with the Courts. Judges perform their duties in the name of the King and are assured of independence in adjudicating cases according to the law.⁶³ Thai laws follow the pattern of continental European civil law. When a dispute is brought before the court, the court will decide on the basis of an interpretation of the statutory provisions. The court's scope for interpretation is not as broad as that of a court in a common law country, and unlike a common law court in which interpretations by the Supreme Court become precedent under the doctrine of *stare decisis*⁶⁴, the civil court's decision will not develop a body of law. The judicial decisions are not law because no one is bound by the judge's order except the parties to the case. The court will normally adhere to precedent for subsequent cases with similar circumstances in order to achieve consistency and fairness. The Supreme Court is not legally bound to follow its own decisions, and lower courts are not bound to follow precedents set by higher courts. In practice, however, the decisions of the Supreme Court do have persuasive authority on the Supreme Court itself and influence when lower courts are ruling on similar issues. In this respect, the influence of the English common law system can be seen. English courts are not only important as interpreters of legislation. They are also the second major source of the world's legal systems through the development of the common law system.

<[http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf)> accessed 10 November 2011.

⁶³ The Thai Court of Justice, 'The Judiciary of Thailand' Section 1 <<http://www.coj.go.th/eng/thejudiciary.htm>> accessed 10 November 2011 referred to as 'The Judiciary of Thailand'.

⁶⁴ Russell Franklin Moore, *Stare decisis: some trends in British and American application of the doctrine* (Simmons-Boardman 1958).

2.4.2 The Thai Court System under the Constitution

According to the constitution, there are four main types of courts: the Constitutional Court, the Courts of Justice, the Administrative Court and the Military Court. With respect to the Courts of Justice, the Thai judiciary adopts a three-tier system: the Supreme Court, the Appeal Courts and the Courts of First Instance.⁶⁵ The Supreme Court (*Sarn Dika*) is at the top of the hierarchy, and is the final court of the realm. More divisions and branches of courts have emerged because of an increasing number of cases in the courts.

The Constitutional Court and the Administrative Court (see below) were recently established as a result of the provisions of the 2007 Constitution. Although this change decreases the scope of the jurisdiction of the Courts of Justice, most cases still fall under this jurisdiction. Before 20 August 2007, the Ministry of Justice was responsible for the administration of all courts. Its main role was to provide courts with support, including practicalities such as budget management, personnel and office equipment, and to enable them to operate efficiently. At present, the Office of the Judiciary, an independent organisation, is the only one responsible for the administration of the Courts of Justice.⁶⁶ This change is designed to ensure that the Thai judiciary is not subject to political interference or manipulation.

The following explanation of the first three courts is brief, since the activities and responsibilities of the Courts of Justice are of the most importance to this research and are discussed in more detail over the course of this thesis.

2.4.2.1 The Constitutional Court

The Constitutional Court has eight members, appointed by the King on the advice of the Senate.⁶⁷ The members of the Constitutional Court are three judges of the Supreme Court of Justice, two judges from the Supreme Administrative Court, and four individuals.⁶⁸ The Constitutional Court has the power to determine whether the

⁶⁵The Judiciary of Thailand (n 63) Section 3.

⁶⁶ Gerhard Robbers, *Encyclopedia of world constitutions* (Infobase Publishing 2007) 917.

⁶⁷ Constitution of Thailand, 2007, art 204.

⁶⁸ Constitution of Thailand, 2007, art 204.

provisions of any law, rule or regulation are contrary to or inconsistent with the constitution.⁶⁹ It has the power to declare a law void, or to declare any part of a law void and unenforceable. Decisions of the Constitutional Court are not subject to appeal.⁷⁰ However, the issue of whether or not a bill, or the existing law, is inconsistent with the constitution might not be an easy issue to decide. It is the duty, therefore, of the Constitutional Court to pass judgment or decision on whether or not the laws as well as rules and regulations are unconstitutional.⁷¹ The decisions of the Constitutional Court have a binding effect upon the cabinet, court, parliament and other organisations.⁷²

2.4.2.2 The Administrative Court

The Administrative Court was introduced by the 1997 Constitution (known as the ‘People’s Constitution’⁷³), which specified that the Administrative Court was to be established within two years from the introduction of the 1997 Constitution. According to the Act for the Establishment of and Procedure for Administrative Court B.E.2542 (1999), the Administrative Court has jurisdiction over cases as follows:

- (1) Disputes between a private sector organisation or individual and a state agency, state enterprise, local government organisation, or state official under the superintendence or supervision of the Government.
- (2) Disputes between a state agency, State enterprise, local government organisation, or State official under the superintendence or supervision of the Government. Administrative courts review how the government administers the law, and examine governmental policies.⁷⁴

⁶⁹Constitution of Thailand, 2007, art 211.

⁷⁰ Constitution of Thailand, 2007, art 216.

⁷¹ Constitution of Thailand, 2007, art 211.

⁷² Constitution of Thailand, 2007, art 216.

⁷³ The Constitution of Thailand 1997 received high praise, from within Thailand as well as internationally, for the participative nature of its drafting, support of human rights and advances in political reform. See Constitution Net ‘Constitutional History of Thailand’ <<http://www.constitutionnet.org/country/constitutional-history-thailand>> accessed 10 November 2011.

⁷⁴ Constitution of Thailand 2007, art 223.

There are three levels of Administrative Courts: lower, appeals, and higher. The number of judges for each level is assigned by the Administrative Court Judge Committee.⁷⁵ The committee consists of the president of the higher court, a committee of nine qualified judges selected by other judges of this court, two qualified committees who are selected by the Senate and one selected by the Council of Ministers.⁷⁶

2.4.2.3 The Military Courts

Military courts, for the most part, conduct criminal trials and sometimes hear other cases involving military officials who fall under the jurisdiction of military courts.⁷⁷ Military courts have independent power in their trials and other courts may not interfere with their procedures.

2.4.2.4 Courts of Justice

When the Ministry of Justice was established in 1891, there were several courts under the administration of various ministries. The Ministry of Justice was established with the aim to unify all of the different courts of the different ministries under its administration. All of the separate courts then became Courts of Justice.⁷⁸ Prior to the enactment of the 1997 Constitution, the Ministry of Justice had the power to appoint and promote judges without being held accountable to third parties, without a clearly defined selection procedure, and with only vague eligibility requirements.⁷⁹ Officials from other governmental bodies – the executive and legislative branches – generally refrained from relinquishing the influence that they held over the judiciary. After the 1997 Constitution⁸⁰ was introduced, the Court of Justice was separated from the

⁷⁵ Constitution of Thailand 2007, art 224.

⁷⁶ Constitution of Thailand 2007 art 226.

⁷⁷ Constitution of Thailand 2007, art 228.

⁷⁸ The Judicial System in Thailand (n 18) 9.

⁷⁹ Mary Noel Pepys, 'Corruption within the judiciary: causes and remedies' in Transparency International Global Corruption Report 2007 (Cambridge University Press 2007) 4.

⁸⁰ According to Klein, 'The Constitution of Thailand 1997 establishes the ground rules for transforming Thailand from a bureaucratic polity prone to abuse of citizen rights and corruption, to a participatory democracy in which citizens will have greater opportunities to chart their destiny', see James R. Klein 'The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy' (1998) The Asia Foundation Working Paper Series 8 March 1998. <http://www.constitutionnet.org/files/Paper_on_the_1997_constitution_2.pdf> accessed 10 November 2011.

Ministry of Justice, becoming an independent institution.⁸¹ This Constitution was considered a landmark in Thai constitutional reform.⁸²

The Courts of Justice have power to adjudicate on criminal, civil, and bankruptcy cases, and all cases which are not within the jurisdiction of other types of courts. When there is a problem of deciding the jurisdiction of any particular case, the Commission on Jurisdiction of Courts, chaired by the President of the Supreme Court, is authorised by the constitution to make a decision. The decision made by the Commission on Jurisdiction of Courts is final.⁸³ There are three levels of Courts of Justice: the Courts of First Instance, the Courts of Appeal and the Supreme Court.⁸⁴

2.4.2.4.1 The Courts of First Instance

The Courts of First Instance are further divided into general courts and specialised courts. The general Courts of First Instance are scattered around Thailand. The specialised courts, i.e. the Central Labour Court, the Children and Juvenile Courts, the Central Tax Court, the Central Intellectual Property and International Trade Court and the Central Bankruptcy Court, are situated mainly in Bangkok but have jurisdiction throughout the country. Upon judgment by the general Court of First Instance, the parties may appeal the judgment to the Court of Appeal and finally to the Supreme Court. As for the specialised courts, the parties may appeal directly to the Supreme Court. In appealing the case, the parties may appeal both issues of fact and issues of law. There shall follow an overview of the roles of the main courts, with the exception of the Child and Juvenile Court, which is not relevant to this thesis.

a) General Courts

In Bangkok Metropolis, there are Civil Courts, Criminal Courts, the Min Buri Provincial Court⁸⁵ and Municipal Courts^{86,87}. A civil case is brought by the plaintiff to the court where the cause of

⁸¹ Constitution of Thailand 1997, art 275.

⁸² For more information on the significance of the Constitution of Thailand 1997, see Kittipong Kittayarak 'The Constitution of Thailand 1997 and its Implication on Criminal Justice Reform' (2001) <http://www.unafei.or.jp/english/pdf/PDF_rms/no60/ch06.pdf> accessed 10 November 2011.

⁸³ The Judiciary of Thailand (n 63) 2.

⁸⁴ The Organisation of Courts of Justice Act 2000, s 1 and Constitution of Thailand, 2007, art 219.

⁸⁵ The Min Buri Provincial Court is the only provincial court in Bangkok and operates along the same lines as the general provincial courts in dealing with both civil and criminal cases.

action arises or where the defendant is domiciled. The Criminal Courts deal with cases in the area which the accused lives, is arrested, or is detained. The District Courts or Kwaeng Courts are the courts for 'quick' trials; they are limited to offences punishable with a maximum of three years imprisonment or a fine not exceeding THB 60,000⁸⁸ and to civil cases where the claims do not exceed THB 300,000.⁸⁹ Provincial Courts have, within their own districts, unlimited responsibility for all general civil and criminal matters.⁹⁰

A quorum is formed by at least two judges in general courts. This is not applied in District Courts. The Chief Judge of the region is regarded as a judge of any court in that region, holding power to adjudicate particular cases, such as those concerning offences against public security, serious criminal offences, high-amount claims and contempt of court. When it is necessary, the Chief Judge of the region has power to order a judge of any court in the region upon the latter's consent to work for not more than three months in another court. The Chief Judge, however, must immediately inform the President of the Supreme Court about such an order.⁹¹

b) Specialised Courts

Four specialised courts currently operate in Thailand: the Labour Court, the Tax Court, the Intellectual Property and International Trade Court, and the Bankruptcy Court. A judge with expertise in a specific field is appointed to each of these courts. It should be noted that each specialised court has only a central court in Bangkok. The exception is the Labour Court, which now has branches situated in the other provinces. The Central Tax Court will be discussed in detail in Chapter 3.

2.4.2.4.2 The Courts of Appeal

The Courts of Appeal include the central Court of Appeal and nine regional Courts of Appeal.⁹² The duty of the central Court of Appeal is to hear appeals against the

⁸⁶ Municipal Courts process small civil and criminal cases quickly, with a minimum formality and expense.

⁸⁷ The Organisation of Courts of Justice Act 2000, s 16.

⁸⁸ Approximately GBP 1,212 (Bank of Thailand: exchange rate as of 4 November)
<http://www.bot.or.th/English/Statistics/FinancialMarkets/ExchangeRate/_layouts/Application/ExchangeRate/ExchangeRate.aspx> accessed 4 November 2011.

⁸⁹ Approximately GBP 6064.

⁹⁰ The Judiciary of Thailand (n 63) 3.1.1.2.

⁹¹ Ibid 3.1.1.

⁹² The Organisation of Courts of Justice Act 2000, s 3.

judgments or orders of the Civil Courts and the Criminal Courts while the nine regional courts oversee appeals against the judgments or orders of the other Courts of First Instance.⁹³ Each Court of Appeal is headed by the President of the Court assisted by Vice Presidents. Appeals both on points of law, and, in certain cases, on points of fact “lie from the Courts of Appeal to the Supreme Court”.⁹⁴

The procedures of the Courts of Appeal more closely resemble reviews than re-trials. At least three judges are required to hear an appeal.⁹⁵ Each Court of Appeal has a Research Division consisting of research judges. Their primary functions are to assist judges of the Courts of Appeal by ‘examining all relevant factual and legal issues of the cases, conducting legal research and discussing with those judges to ensure uniformity and fair results’.⁹⁶ The judges will go over the details of the initial case and determine if there were any unfair factors or discrepancies in the proceedings. If the Court of Appeals affirms the lower court’s judgment the case ends, unless the losing party appeals to the Supreme Court. If the judgment is reversed, the Court of Appeals will usually send the case back to a lower court and order it to take further action. The appeals court can require various actions to take place. It may order that a new trial be held, that the trial court’s judgment be modified or corrected, or the trial court consider the facts, take additional evidence, or consider the case in light of a recent decision by the appellate court. A single judgment of the Court is delivered. When the judges’ opinions differ, the majority opinion prevails. The dissenting judge may still, however, attach a dissenting opinion to the judgment.⁹⁷ The Court may from time to time hold plenary sessions to determine cases of exceptional importance or cases of similar nature where conflicting conclusions have been reached by different divisions, or any cases as the Chief Justice thinks fit.⁹⁸

⁹³ The Organisation of Courts of Justice Act 2000, s 22.

⁹⁴ The Judiciary of Thailand (n 63) 3.2.

⁹⁵ The Organisation of Courts of Justice Act 2000, s 27.

⁹⁶ The Organisation of Courts of Justice Act 2000, s 27.

⁹⁷ Ministry of Justice, *Judicial System in Thailand* (Rung Rueng Tham Press, no year) 18 (in Thai).

⁹⁸ The Organisation of Courts of Justice Act 2000, s 27.

2.4.2.4.3 The Supreme Court

The Supreme Court is the final court of appeal in all civil, bankruptcy and criminal cases.⁹⁹ It has jurisdiction over all of Thailand. The Supreme Court's decisions and orders are final.¹⁰⁰ It can hear appeal cases, or petition against judgments or orders of the Courts of First Instance or the Courts of Appeal, except in the case where the Supreme Court believes that the appeal's questions of fact and law appearing are not essential enough for its consideration.¹⁰¹ In such situations, the Supreme Court can refuse to accept such a case for trial and adjudication.¹⁰² The Court consists of the President, Vice - Presidents, the Secretary and a number of justices.¹⁰³

Like the Courts of Appeal, the Supreme Court also has a Research Division, responsible for assisting judges by examining all relevant facts and legal issues of the cases, conducting legal research and discussing with the judges to ensure consistent and fair judgments.¹⁰⁴ Each specialised division also has research judges and associate research judges appointed as secretaries to the division.¹⁰⁵ The court's quorum must be made up of at least three Supreme Court justices.¹⁰⁶ When it is not possible, for any reason, to form a quorum, the court may sit in plenary session to discuss exceptionally important cases or ones which give reason for reconsideration or overruling of its own precedents.¹⁰⁷ The quorum for the full Court is not less than half of the total number of justices in the Supreme Court.¹⁰⁸ It consists of nine justices of the Supreme Court who hold a position not lower than justice of the Supreme Court, and are elected by a plenary

⁹⁹ The Organisation of Courts of Justice Act 2000, s 18.

¹⁰⁰ The Organisation of Courts of Justice Act 2000, s 23.

¹⁰¹ The Organisation of Courts of Justice Act 2000, s 23.

¹⁰² Constitution of Thailand 2007, art 219.

¹⁰³ The Organisation of Courts of Justice Act 2000, s 8.

¹⁰⁴ The Supreme Court of Thailand, 'Responsibilities of the Supreme Court of Thailand' <<http://www.supremecourt.or.th/webportal/supremecourt/content.php?content=component/content/view.php&id=61>> accessed 10 November 2011(in Thai).

¹⁰⁵ The Supreme Court of Thailand, 8 <http://www.supremecourt.or.th/file/dika_eng.pdf> accessed 10 November 2011.

¹⁰⁶ The Statute of the Court of Justice Act 2000, s 27.

¹⁰⁷ Civil Procedure Code, s 140 para 2.

¹⁰⁸ The Judiciary of Thailand (n 63) 3.3.

session of the Supreme Court justices on a case by case basis. A judgment will be made by a majority of votes, provided that each justice constituting the quorum prepares a written opinion and makes oral statements to the meeting before making a decision.¹⁰⁹

It is to be noted that Thailand's Supreme Court Decisions are published in numbered issues according to the series and the year in which the judgment was issued. The Supreme Court Decisions quoted in this thesis will follow this practice. For example, Supreme Court Decision No. 1238/2502 was made at sequence number 1238 in the year B.E.2502 (1959).

2.5 Thai Legislation and Sources of Law

2.5.1 History of the Thai Law Code

Treaties with Western countries, Western legal advisors and the Thai specialists who studied in Western countries have had a significant influence on the Thai legal system.¹¹⁰ Within a few decades the legal codes were altered to modernise concepts and practices.¹¹¹ King Chulalongkorn made significant changes to the administrative structure of the Thai government, which had an effect on the content of law and the legislative process.¹¹²

Codified law is a major part of the modern Thai legal system. It incorporates significant aspects of the French, German and Japanese legal systems due to the prominent role of advisors from these countries in drafting Thailand's first legal code, the Penal Law of 1908.¹¹³ British and other European systems, as well as those of India, China and the United States also influenced the early law codes of Thailand.¹¹⁴ Also incorporated were the country's traditional and customary laws.

¹⁰⁹ Ibid.

¹¹⁰ Loos (n 49) 47-48.

¹¹¹ Darling (n 48) 207.

¹¹² Neher (n 47) 9.

¹¹³ Siriphon Kusonsinwut, *A comparative study of confession law: The lesson for Thailand regarding the exclusionary rule and confession admissibility standard* (ProQuest 2008) 45.

¹¹⁴ Darling (n 48) 208.

All of the *ad hoc* committees which drew up the new law codes were chaired by Prince Rabi of Rajburi. Their members were lawyers from Britain and the United States which are common law countries, and Belgium, France and Germany, which used civil law. German and French laws had the most significant influence. The Japanese lawyer Toshiki Masao served on the committees and also incorporated elements of Japanese law into the new Thai system.¹¹⁵ The first legal code, dealing with criminal law, was developed in 1908, and underwent minor revisions in 1956.¹¹⁶ The drafting of the Civil and Commercial Code started in the reign of King Chulalongkorn and was finally adopted after the Revolution of 1932. Currently, the four basic codes are: the Civil and Commercial code, Civil Procedure Code, the Criminal Code, and the Criminal Procedure Code. Additionally, there are other special laws with regard to commercial activities, for example, the Land Code and the Revenue Code.

2.5.2 Structure of Laws

According to the civil law tradition, the simple statements of general principles stated in the laws allow scope for interpretation and flexibility. Because it uses a civil law system, Thailand has a complicated and time consuming process for enactment of laws. In order for a bill to be made law, the National Legislative Assembly comprising the Senate and the House of Representatives must first pass a bill¹¹⁷ to the King, then the King grants Royal Assent to the bill and the statute is formally promulgated in the name of the King.¹¹⁸

Thailand has a hierarchy of laws that places the Constitution as a supreme law, followed by the primary legislation and then the secondary legislation. Each of these levels of legislation, except for the Constitution, derives its authority from a higher authority in

¹¹⁵ Office of the Council of State, Foreign Law Bureau
'Factbook: Council of State (Kritsadika)', Office of the Council of State, Thailand (2008) 3
<http://www.lawreform.go.th/lawreform/index.php?option=com_content&task=downloadmedia&file=c468_3.pdf&filetemp=copy%20of%20ocs%20factbook%20as%20of%20october%202008.pdf&lang=th&id=468> accessed 10 November 2011 referred to as 'Fact book'.

¹¹⁶ Darling (n 48) 209.

¹¹⁷ See the introduction of a bill in The Parliament of Thailand.
<<http://www.parliament.go.th/files/library/b06.htm>> accessed 10 November 2011.

¹¹⁸ Thailand Business Legal Handbook (n 21) 1.

the hierarchical structure of legislation. The superior legislation prevails over the inferior law in the hierarchy.¹¹⁹

2.5.2.1 The Supreme Law

Thailand's judicial and legal system was transformed from absolute monarchy to a constitutional monarchy. In a bloodless coup of 1932, the first Constitution was established and granted by King Pra Pokklao Chaoyouhua (Rama XII).¹²⁰ All successive Constitutions have been developed and amended in order to be compatible with the changing situations of each period.¹²¹ The present Constitution was enacted and promulgated on 24 August 2007.

The Constitution is the highest law of the country. The provision of any law, rule, or regulation which is contrary to or inconsistent with the Constitution is considered void.¹²² The Constitution is a lengthy document and provides for the powers of the King. It also establishes the powers and duties as well as the structure of the Executive, the Legislative and the Judiciary bodies, other constitutional organisations and State agencies.¹²³ It also includes provisions outlining the rights, liberties and duties of the people¹²⁴, and enumerates directive principles of fundamental state policies relating to national security, social and cultural affairs, foreign affairs, the economy and the environment.¹²⁵ The constitution states that:

it itself may be amended by a motion proposed either by the Council of Ministers or members of the House of Representatives of not less than one-fifth of the total number of existing members of the House of Representatives or member of both Houses of not less than one-fifth of

¹¹⁹ This issue will be discussed in Chapter 7.

¹²⁰ He was the 7th King of the Chakri Dynasty. He was crowned on 26 November 1925 and abdicated the throne on 2 March 1934.

¹²¹ The Parliament of Thailand (in Thai) <<http://www.parliament.go.th/files/library/b05.htm>> accessed 10 November 2011.

¹²² Constitution of Thailand 2007, art 6.

¹²³ Constitution of Thailand 2007, Preamble.

¹²⁴ Constitution of Thailand 2007, ch III and IV.

¹²⁵ Constitution of Thailand 2007, ch V.

the total number of the existing members thereof, or voters of not less than fifty thousand on the lodge of proposal on law.¹²⁶

However, amendments changing the form of government are not permitted.

2.5.2.2 Primary Legislation

In Thailand, the primary or substantive legislation can be divided into Codes, Acts of Parliament and Emergency Decrees.

2.5.2.2.1 Codes

A system of laws that have been systematically arranged and comprehensively organised or codified by subject matter can collectively be considered a legal code. The Legislative Branch takes responsibility for promulgating codes. It is the duty of the House of Representatives to enact the statutes and of the Senate to approve the proposed laws passed by the House of Representatives.¹²⁷ At the time of writing, there are four important codes: the Civil and Commercial Code 1925; the Penal Code 1956 as amended by the Penal Code (No. 17) 2003; the Civil Procedure Code 1935 as amended by the Civil Procedure Code (No. 22) 2005; and the Criminal Procedure Code 1934 as amended by the Criminal Procedure Code (No. 2) 2005. In addition, there are codes dealing with specific areas, for instance, the Land Code and the Revenue Code. This thesis relates to the Civil and Commercial Code and the Revenue Code; other Codes will not be discussed in detail. The Revenue Code will be described in the next chapter, discussing the Thai revenue system.

The Civil and Commercial Code (CCC), which became effective on 1 January 1925, sets forth general principles and specific rules regarding civil law issues.¹²⁸ These issues specified under the CCC affect businesses and individuals. The topics under the CCC cover specific interest of businesses including company and partnership law, contracts, sales, obligations, wrongful acts (torts, such as liability for negligence or intentional harm), property, mortgage and other forms of loan security, leases and agency.¹²⁹ For

¹²⁶ Constitution of Thailand 2007, art 291.

¹²⁷ Constitution of Thailand, 2007, art 90.

¹²⁸The Civil and Commercial Code (CCC), s 2.

¹²⁹ See for example, CCC, ss 65-1297.

individuals, the CCC covers the subjects, namely, marriage, divorce, wills and estate administration, and parental rights and duties.¹³⁰ The provisions relating to general principles are particularly significant because they are regularly applied to laws outside the CCC.¹³¹ Despite frequent and sometimes dramatic changes of government and constitutions in Thailand, the CCC has endured, providing a consistent legal framework and structure during otherwise chaotic times.

2.5.2.2.2 Acts of Parliament

Acts are passed specially for specific matters or aims. Many important social and economic laws are embodied in Acts. They relate primarily to public matters, although some provisions may govern private relationships. They are passed by the Executive branch, and so they represent the government's policies in accordance with the current social economic situation. With regard to the passing of the Acts, a bill is introduced by the Council of Ministers. However, under the circumstances stated in Article 163 of the 2007 Constitution, a law may also be introduced by the people.¹³² A bill shall be first submitted to the House of Representatives and has to be accompanied by an analysed and summarised note of such bill. The bill submitted to the National Assembly must be disclosed to the people and the people are entitled to convenient access to the information and details of the bill.

When the House of Representatives has considered a bill and resolved to approve it, the House of Representatives submits it to the Senate. The Senate must finish the consideration of the bill within sixty days.¹³³ After a bill has already been approved by the National Assembly, the Prime Minister shall present it to the King to be approved and signed and it shall come into force after publication in the Government Gazette.¹³⁴ If the King refuses his assent to a bill he may return it to the National Assembly. Should this be the case, the Assembly must re-deliberate the bill. If it decides to pass the bill

¹³⁰ See for example, CCC, ss15-64 and 1298-1755.

¹³¹ CCC, ss 4-14.

¹³² Constitution of Thailand 2007, art 142.

¹³³ Constitution of Thailand 2007, art 146.

¹³⁴ Constitution of Thailand 2007, art 150.

with ‘the votes of not less than two-thirds of the total number of existing members of both Houses’, the Prime Minister shall present it to the King for signature once again. If the King does not sign and return the bill, ‘the Prime Minister shall cause the bill to be published in the Government Gazette and it shall have the force of law as if the King has signed it’.¹³⁵

2.5.2.2.3 Emergency Decrees

Emergency Decrees are laws promulgated by the Executive branch in an emergency situation. Such emergencies include those related to national security, public safety, natural disasters, economic security or urgent matters concerning tax and fiscal emergencies.¹³⁶ Emergency Decrees have to meet certain criteria in order to be passed and require ratification by the National Assembly thereafter. An example of the use of an Emergency Decree in Thailand was that on Public Administration in Emergency Situation which was issued on 7 April 2010 regarding the anti- government protests.¹³⁷ After violent protests by the United Front of Democracy against Dictatorship, Prime Minister Abhisit Vejjajiva declared states of emergency in Bangkok and elsewhere in the country.¹³⁸ He passed the Emergency Decree on Public Administration in Emergency Situation. This endowed an ad-hoc organisation of military personnel and pro-government civilians, known as the Centre for the Resolution of Emergency Situations with effective extra-judicial powers. It could detain suspects without charge and use makeshift or unofficial jails, was not checked against the abuse of detainees, and could impose censorship, detaining those who spoke against the government. Under the Emergency Decree, governmental officials had de facto immunity from prosecution for most acts committed.¹³⁹

¹³⁵ Constitution of Thailand 2007, art 151.

¹³⁶ Constitution of Thailand 2007, art 184.

¹³⁷ Unknown author, ‘Thailand Repeal Emergency Decree’ (Human Rights Watch 24 November 2010) <<http://www.hrw.org/en/news/2010/11/24/thailand-repeal-emergency-decree>> accessed 10 November 2011 referred to as ‘Thailand Repeal Emergency Decree’.

¹³⁸ Amnesty International, ‘Thailand must repeal or reform emergency legislation immediately’ (UNHCR The UN Refugee Agency 30 September 2010) <<http://www.unhcr.org/refworld/topic,4565c2252,4565c25f1d,4ca98980a,0.html>> accessed 10 November 2011.

¹³⁹ Thailand Repeal Emergency Decree (n 137).

2.5.2.3 Secondary or Subordinate Legislation

Secondary or subordinate legislation is issued by the executive branch under the authority granted to them by primary legislation in order to implement and administer the requirements of that primary legislation. Where primary legislation specifies any secondary legislation, administrative agencies together with their officials must comply with the procedural conditions as follows: Firstly, primary laws must specify the authorised administrative agencies which are in charge of issuing secondary laws. The rationale for this delegation of power to issue laws is that there are competent officials in such administrative agencies who can employ their skills, experience and expertise in drafting secondary laws. This ensures that the secondary laws can best serve the public interest, and least affect citizens' rights and liberty. Secondly, primary laws must specify procedures which need to be strictly followed. For example, authorised agencies may specify the date that a law becomes effective, or it may be necessary to have a public inquiry for such secondary laws. Lastly, the date that secondary laws become effective must be announced by the Government Gazettes.

Secondary laws must be issued by parliamentary acts or royal decrees. The contents of the secondary laws must not contradict the Constitution, the primary laws which gave power to such secondary laws, as well as, other primary laws. Moreover, the secondary laws must not specify criminal penalties punishing persons who do not comply with them. Any law which specifies criminal penalties must receive legislative consent. Secondary legislation ranks below primary legislation in the hierarchy of laws. In cases in which the primary legislation does not grant the authority to create secondary legislation, state officials have no authority to issue such legislation. In addition, secondary laws must comply with the principle of 'delegatus non protest delegare'. According to this principle, an executive agency to whom the primary law has delegated authority or decision-making power, cannot, in turn, re-delegate it to another agency, unless explicitly authorised by the primary law. Secondary legislation is considered as *ultra vires* (Latin for 'outside the powers', that is, invalid) if it is beyond the powers conferred by the primary legislation or the delegating Act.¹⁴⁰ Hence, when employing secondary law, the administrative bodies must use the delegated power in accordance with principles and policies as prescribed under the primary law. The secondary laws

¹⁴⁰ Yud Sanguthai, *Principle of Law* (Prakraipruk 2005) 80 (in Thai).

issued by the executive body cannot have effect before the issuing date, unless the primary law explicitly specifies so.

Examples of secondary legislation which are considered as another source of Thai law, are in the form of Royal Decrees, Ministerial Regulations, Notifications and Departmental Orders.

Royal Decrees are issued by the Executive Branch only where it is stated in the Constitution to issue a Royal Decree 'for convocation, the prolongation of session and the prorogation of the National Assembly'.¹⁴¹ Royal Decrees are also issued to dissolve the House of Representatives for new members to be elected.¹⁴² In addition, Royal Decrees are issued by virtue of the relevant Acts or Emergency Decrees. One example is the Act for the Establishment of and Procedure for Tax Court, B.E. 2528 (1985), under which the Provincial Tax court open day has to be declared by Royal Decree. In other necessary matters, Royal Decrees can be issued provided that they do not contradict or conflict with other laws.

Ministerial Regulations are issued by Ministers by virtue of primary legislation, such as Acts or Emergency Decrees, in order to comply with such laws. This is because Acts and Emergency Decrees only specify the general principles or rules and leave the Ministerial Regulations to specify specific details or procedures. Another type of subordinate legislation is an administrative agency order. Administrative agencies are empowered by the legislature to promulgate rules and regulations to carry out government functions. Administrative Agency Orders require the consent of the cabinet to be enforceable, and must be published in the Government Gazette in order to make them known to the people. Announcements of the Administrative Agency do not need the consent of the cabinet, and are issued by ministers.

With respect to legal interpretation, in order to obtain a complete perspective of any legislation on a particular legal issue, provisions of the Codes and the Acts should be considered together with the relevant secondary legislation.¹⁴³

¹⁴¹ Constitution of Thailand 2007, art128.

¹⁴² Constitution of Thailand 2007, art 108.

¹⁴³ Manit Jumpa, *Principle of La* (Chulalongkorn Press 2004) 55, 56 (in Thai).

2.6 Legal Opinion of the Council of State

2.6.1 History of the Council of State

King Chulalongkorn established the Council of State in 1874 on the model of the French Council of State (*Conseil d'Etat*)¹⁴⁴ to advise the King on the state's administrative affairs and legislative drafting. In 1923, the Legislative Redacting Department had been established in the Ministry of Justice by the Royal Proclamation of King Vajiravudth (Rama VI), to be directly responsible for the country's legislative drafting, in place of the *ad hoc* Committee. The year 1932 saw the so-called 'Constitutional Coup' which turned Thailand into a democratic constitutional monarchy with the King as head of state.¹⁴⁵ After this, the Legislative Redacting Department was transferred to the Office of the Prime Minister and was entrusted with adjudicating the administrative cases (both petition and adjudicatory functions) in addition to its legal advisory and law drafting functions in the manner of the French *Conseil d'Etat*.¹⁴⁶

The Legislative Redacting Department was consequently renamed the 'Council of State' by the Council of State Act B.E.2476 (1933).¹⁴⁷ However, under the Act of 1933, it was not granted the ability to administrate the petitions of the people. Thai citizens tried to use the Civil Court to pursue their petitions, but were deterred by technicalities and bureaucracy.¹⁴⁸ In 1979, the Council of State Act (B.E. 2522) enabled the Council of State to perform both consultative and petition functions.¹⁴⁹ Later in 1999, the Administrative Court was established by the Act on Establishment of the Administrative Court and Administrative Case Procedure B.E. 2542 (1999), with both Government and Parliament agreeing 'to transfer the petition function of the Council of State to the

¹⁴⁴ See Charles John Hamson, *Executive discretion and judicial control: an aspect of the French Conseil d'État* (Stevens 1954).

¹⁴⁵ Randall Peerenboom (ed) *Asian Discourses of rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and The U.S* (Routledge 2004) 340.

¹⁴⁶ Fact book (n 115) 3.

¹⁴⁷ Leyland (n 6) 234.

¹⁴⁸ Fact book (n 115) 3.

¹⁴⁹ *Ibid.*

Administrative Court. Since then, the Council of State attains only consultative function'.¹⁵⁰

2.6.2 Organisation and Functions

The Council of State comprises the Prime Minister as *ex officio* President¹⁵¹ along with 108 Law Councillors who are appointed by the King upon the recommendation of the Cabinet.¹⁵² They are well-qualified specialists with knowledge and experience in law, political science, economics, social science or public administration.¹⁵³ The Council of State (a) drafts laws, by-laws, rules, regulations or notifications upon the direction of the Prime Minister or resolution of the Cabinet; (b) gives legal advice to State agencies¹⁵⁴ or State enterprises upon direction of the Prime Minister or resolution of the Cabinet, and (c) submits opinions or remarks to the Cabinet on the need for new legislation, revision, amendment, or repeal of existing legislation.¹⁵⁵ In the performance of duties, the Law Councillors meet as a Committee.¹⁵⁶ There are 12 Committees, each of which deals with a different area of law.¹⁵⁷

The Council of State is served by the Office of the Council of State (OCS), a body which functions as its secretariat. The OCS is also responsible for drafting technical works of the Law Reform Commission, the Code Revision Committees and the Administrative Procedure Development Committee.¹⁵⁸ Under the provisions of the Council of State Act of 1979, the Secretary General of the Council of State oversees the running of the OCS.¹⁵⁹ He or she is recommended by the Cabinet, approved by the

¹⁵⁰ Ibid.

¹⁵¹ The Council of State Act B.E.2522 (1997), s 5.

¹⁵² The Council of State Act 1997, ss 11, 13/1.

¹⁵³ The Council of State Act 1997, s 13.

¹⁵⁴ The Council of State Act 1997, s 4 states 'In this Act, "State agency" means a Ministry, Sub-Ministry, Department, provincial administration, local administration, State enterprise and other agencies of the State'.

¹⁵⁵ The Council of State Act 1997, s 7.

¹⁵⁶ The Council of State Act 1997, s 15.

¹⁵⁷ Fact book (n 115) 4,5.

¹⁵⁸ The Council of State Act 1997, s 62.

¹⁵⁹ The Council of State Act 1997, s 63.

National Assembly, answers to the Prime Minister, and is officially appointed by the King.¹⁶⁰

The Thai Cabinet passed its resolution No. *Nor Ror* 0203/Wor.69 dated 22 April, stating that all state agencies are required to follow the opinions of the Council of State. There would be punishments for any governmental officials who do not follow the opinions of the Council of State as it is considered to be ‘disciplinary breach’.¹⁶¹ However, the Cabinet Resolutions generally are not legally binding on individuals who are not administrative agencies¹⁶² and government officials. Cabinet Resolutions establish policies for the administration of particular state agencies. The officials of such state agencies must follow them, although they are not legally binding on the general public.¹⁶³ This is supported by Supreme Court Decision No. 4431/2550 (2007), which held that Cabinet Resolutions are purely a form of guidance for governmental agencies to follow, are not law and that a person can own agricultural land only when he/she meets the conditions stipulated under Section 4 of the Agricultural Land Reform Act B.E. 2518 (1975).¹⁶⁴ The Supreme Court must rule in accordance with the applicable law in each case. In this case the defendant must comply with the Agricultural Land Reform Act of 1975, and not merely comply with conditions set up by the Cabinet Resolution. Applying the same reason, the Cabinet Resolution which requires state agencies to comply with opinions of the Council of State is only an order for those state agencies to follow. Individuals, in contrast, are not bound to follow the opinions. In theory, the Council of State is a central legal agency, officially holding the ability to

¹⁶⁰ The Council of State Act 1997, s 63.

¹⁶¹ The Civil Service Act 2008, s 85.

¹⁶² The Establishment of Administrative Courts and Administrative Court Procedure Act B.E. 2542 (1999), s 3 states ‘administrative agency’ means a Ministry, Sub-Ministry, Department, Government agency called by other name and ascribed the status as a Department, provincial administration, local administration, State enterprise established by an Act or Royal Decree or other State agency and shall include an agency entrusted to exercise the administrative power or carry out administrative acts’.

¹⁶³ Administrative Court Decision No. *For* 26/2546 (2003).

¹⁶⁴ Agricultural Land Reform Act 1975, s 4 states: ‘Improvements made in connection with rights and holdings in agricultural land, including housing arrangements by allocating state land or, land purchased or expropriated from the landowners who do not themselves cultivate or who own land in excess of their rights in accordance with the Agricultural Land Reform Act 1975 to farmers who are landless or do not have sufficient land for cultivation, and to farmers’ institutions on the bases of hire-purchases, renting or re-free utilisation. In so doing, the State will provide assistance in farming activities, improvements in resources and productive inputs as well as marketing facilities’.

draw up legal documents and legislation, offer legal opinion to government agencies, and reform and amend laws. Its practical function, however, is essentially consultative. The Council of State's opinions generally have no legally binding function.

Conclusion

This chapter examined the Thai legal system as a whole, notably its mixed character as a civil law system with common law traits, a result of the influences of various European systems during its first drafting in the late 19th Century. It outlined the various types of court procedures and the similarly varied roles of judges in interpreting the law. This chapter has demonstrated that non-binding precedents are used only as a consideration and source of information in the case of Thai judgments. This stands in contrast to common law systems, including Britain's, which are bound by the precedents of earlier judgments and are subject to a greater degree of interpretation by judges. The discussions on Thai legislation and sources of law presented in this chapter provide important context for the issues to be considered in the rest of this thesis. The Council of State and its functions will be referred to in Chapter 6 in relation to one of the current administrative problems. Chapter 7 discusses the conflict of norms, that is, cases in which two conflicting or contradictory laws can be applicable in the same situation. The discussion on the balance of power and legislative procedure in this chapter will feature again in Chapter 6 and 7, which will consider the problematic legislation and the role of courts. There follows a discussion of the Thai Revenue System.

3 The Thai Revenue System

Introduction

Economic development and its resulting benefits to a nation must involve gains in wealth. Government policies in many countries generally aim for continuous and sustained economic growth, so that their national economies expand and become more developed. Taxation and its policies play an essential role in the development of any country through the generation of revenue or public funds. In Thailand's case, taxation is the main source of government revenue.¹⁶⁵ It is generated by three agencies comprising the Revenue Department, the Excise Department and the Customs Department.¹⁶⁶ Out of these three agencies the Revenue Department is the highest revenue collector, accounting for more than half of the total of taxes collected nationally.¹⁶⁷ The Thai taxes can be divided into four areas: income taxes, customs duty, excise tax and value added tax. Before dealing with the problematic jurisdiction over tax incentives for companies which are promoted by the Thai Board of Investment, four main areas will be discussed. The first of these concerns the objectives of using taxation and the second covers sources of revenue law and the principal taxes in Thailand. Third, this chapter examines Thai tax administration, as well as, its tax Court system. The final part discusses statutory interpretation by the Thai tax court.

¹⁶⁵ The Thai Revenue Department, 'Overview' <<http://www.rd.go.th/publish/6001.0.html>> accessed 10 November 2011. Peter G. Warr and Bhanupong Nidhiprabha, *Thailand's macroeconomic miracle: stable adjustment and sustained growth* (World Bank Publications 1996) 69.

¹⁶⁶ Information and Communication Technology Centre, 'Ministry of Finance Thailand Government Revenue' (February 2011) <<http://dwfoc.mof.go.th/menu2.htm>> accessed 10 November 2011 referred to as the 'Ministry of Finance Thailand Government Revenue'.

¹⁶⁷ *Ibid.*

3.1 The Purpose of Taxation in Thailand

Taxation is one of the tools that every government, including the Thai government, adopts to achieve economic and political sustainability,¹⁶⁸ and it is used to achieve four main targets. Firstly, taxation ‘raises resources to finance government’¹⁶⁹ and supports, especially in developing countries, economic growth by increasing Gross Domestic Product (GDP).¹⁷⁰ Secondly, taxes on consumption can be used to encourage savings,¹⁷¹ which serves as a growth driver. Thirdly, unemployment and inflation, which result in a slowdown of the economy, can be mitigated by taxation.¹⁷² Lastly, taxation can facilitate in cases where national income and properties are not properly allocated.¹⁷³ This occurs when a minority of the population acquires the majority of the income and properties, while the majority of the population is poor, leading to a decrease in public interest, which could consequently cause social and political instability.¹⁷⁴

Thailand is currently reorienting its taxation policy from focusing on targeting revenue collection to meeting budget expenditure and protecting domestic industries. The Thai government now implements a more proactive policy, with the aim of enhancing the country’s competitiveness, broadening trade and investment opportunities for

¹⁶⁸ Paola Profeta and Simona Scabrosetti, *The political economy of taxation: lessons from developing countries* (Edward Elgar Publishing 2010) 1.

¹⁶⁹ Robin Burgess and Nicholas Stern, ‘Taxation and Development’ *Journal of Economic Literature* vol. XXXI June 1993, 762.

¹⁷⁰ Takatoshi Itō and Anne O. Krueger, *The political economy of tax reform* (University of Chicago Press 1992) 50. However, a research by OECD shows the possible harmful of tax to economic growth, see Organisation for Economic Co-operation and Development, *Tax Policy Reform and Economic Growth* No. 20 (OECD Publishing 2010) 17-141.

¹⁷¹ David N. Hyman, *Public Finance, A Contemporary Application of Theory to Policy* (9th edn, Thomson South-Western) 624.

¹⁷² See Christopher A. Pissarides, *The impact of employment tax cuts on unemployment and wages: the role of unemployment benefits and tax structure* (Centre for Economic Performance, London School of Economics and Political Science 1997); Richard Disney, ‘The impact of tax and welfare policies on employment and unemployment in OECD countries’ (2000) IMF Working Paper WP/00/164; Nicholas G. Mankiw, *Principles of Economics* (6th edn Cengage Learning 2011) 660.

¹⁷³ See William J. Baumol and Alan S. Blinder, *Microeconomics: Principles and Policy* (Cengage Learning 2007) 379-395.

¹⁷⁴ See for example tax measures in Ireland, Eithne Fitzgerald, ‘Redistribution Through Ireland’s Welfare and Tax Systems’ in Sara Cantillon, Carmel Corrigan, Peadar Kirby and Joan O’Flynn (eds), *Rich and Poor Perspectives on Tackling Inequality in Ireland* (Combat Poverty Agency 2001) 151-196. However, in the structural adjustment phase where ‘the basic structure of the economy is altered in an attempt to improve the long-term performance of the economy...’, the tax element of this policy has generally involved a movement towards ‘neutrality’, so that the tax system has a smaller effect on the allocation of resources in the economy. See Christopher Heady, ‘Taxation Policy in Low-Income Countries’ United Nations University Discussion Paper No. 2001/81 September 2001, 4.

businesses, and addressing social development and the conservation of the environment.¹⁷⁵ In Thailand the main source of government revenue is taxation, so all of these strategies for the progress of the country must be on the basis of tax equity, as well as the neutrality and efficiency of the taxation system.¹⁷⁶

3.2 Sources and Scope of the Thai Tax Law

3.2.1 Primary Legislation

In Thailand, two codes and four Acts cover tax law, which shall be discussed in the following subsections.

3.2.1.1 The Thai Revenue Code

Fundamental tax law in Thailand is found in the Thai Revenue Code of 1938, which includes provisions on Corporate Income Tax (CIT), Value Added Tax (VAT), Specific Business Tax (SBT), Personal Income Tax and Stamp Duty. The Minister of Finance is in charge of the Revenue Code,¹⁷⁷ which has been amended, since it was first adopted, in order to keep pace with the economy and the development of the country. There are two types of amendments, one of which involves inserting additional terms into or rewriting the provisions of particular sections. The other type involves adding new descriptions and marking with Thai numerals such as, *Bis*, *Tri*, *Jatawa*, and *Benja*. In order to avoid any confusion, the aforesaid Thai terms are substituted in this thesis with numbers, for instance, (2), (3), (4), and (5). In order to amend the Revenue Code to increase its efficiency, the ‘Revenue Code Study and Development Project’ was exclusively set up by the Law Development Foundation of Thailand. The project committee includes the Revenue Department, academia, courts, economists, lawyers, auditors, the Thai Chamber of Commerce and other relevant agencies.¹⁷⁸

¹⁷⁵ Organisation for Economic Co-operation and Development, *Asia and the global crisis: the industrial dimension* (OECD Publishing 1999) 47.

¹⁷⁶ ‘Fiscal Policy Office’, Thailand
<<http://www.fpo.go.th/FPO/index2.php?mod=Category&file=categoryview&categoryID=CAT0000708>>
accessed 10 November 2011.

¹⁷⁷ RC, s 4.

¹⁷⁸ Revenue Department of Thailand, ‘The Revenue Code Study and Development Project Translation’
<<http://www.rd.go.th/fileadmin/download/PramualProj/cont01.html>> accessed 10 November 2011.

3.2.1.2 The Thai Civil and Commercial Code

Along with the Revenue Code, the provisions of the Civil and Commercial Code (CCC), which specifies the fundamental principles to be applied by all Thai laws,¹⁷⁹ are also important because in any given case both of them are considered; if for a certain issue no provisions are given in the Revenue Code, then the authorities can refer to the provisions provided under the CCC. For example, Section 41 of the Revenue Code does not define precisely the term ‘person’ in the context of who will be obliged to pay personal income tax, so it must be made clear by including ‘natural person’ as defined by Section 15 of the CCC, i.e. ‘personality begins with the full completion of birth as a living child and ends with death’.¹⁸⁰

3.2.1.3 Acts

The following Acts cover taxation: The Customs Act B.E. 2469 (1926) as amended by the Customs Act (No. 17) B.E. 2543 (2000) regulates customs duties. The Excise Tax Act B.E. 2527 (1984), as amended by the Excise Tax Act (No.3) B.E. 2543 (2000) governs excise tax. The Petroleum Income Tax Act B.E. 2514 (1971), as amended by the Petroleum Income Tax Act (No. 6) B.E. 2550 (2007), governs petroleum income tax. This thesis does not significantly involve the aforementioned Acts. However, it should be noted that the Investment Promotion Act B.E. 2520 (1977), as amended by the Investment Promotion Act (No. 2) B.E. 2534 (1991) and the Investment Promotion Act (No.3) B.E. 2544 (2001) provide investment incentives including tax incentives. Details regarding tax incentives provided by this Act will be explained in the next chapter.

3.2.2 Secondary Legislation

3.2.2.1 Royal Decrees

It was explained in the previous chapter that Royal Decrees are generally considered as secondary legislation, which is inferior to primary legislation and therefore requires

¹⁷⁹ See CCC, Book I titled ‘General Principles’ containing many principles of law for the application of other Thai legislation.

¹⁸⁰ Individual taxpayers are: (1) natural person according to the CCC, s 15; (2) an ordinary partnership according to the RC, s 56; (3) a group of persons which is not a legal entity according to the RC, s 5; (4) a person who dies during a tax year according to the RC, s 57 (2); and (5) an undistributed estate according to the RC, s 57 (2).

authority from the latter. Royal Decrees provide further explanation to the Revenue Code since the Revenue Code specifies merely general principles, and they are issued to grant a reduction of rates or an exemption, whichever suits the circumstances, under specific or general conditions provided to a person or international organisation, the government and other types of governmental organisations.¹⁸¹ Royal Decrees aim to specify rules of practice, management or operation. One example of Royal Decrees is Royal Decree No. 480 Re: tax exemption on income other than from employment. Under this Royal Decree, the total amount of tax computed which does not exceed THB 5,000,¹⁸² will be exempt from personal income tax. Another is Royal Decree No. 473 B.E. 2551 (2008), which specifies circumstances regarding tax deduction for the amortisation of computer software within three accounting periods, the deductible initial depreciation of computer software, and a deductible depreciation of assets.

3.2.2.2 Ministerial Regulations, Ministerial Instructions and Ministerial Notifications

The Ministry of Finance issues legal documents such as Ministerial Regulations (M.R.s), Ministerial Instructions and Ministerial Notifications. M.R.s specify the conditions for exemptions and deductions from taxes, and they have the same effect as U.S. Treasury Regulations.¹⁸³ M.R.s lay down rules and conditions for provisions in the Revenue Code,¹⁸⁴ examples of M.R.s are: M.R. No. 266, in 2008, and M.R. 271. The former provides an increase in the tax exemption limit for income paid on saving funds, pension funds, private schools' contributions and payment used to purchase units of mutual funds. The income paid for life insurance premiums is also included in the provisions. This M.R. also states an exemption from income tax for a partnership and an unincorporated group of persons under the Community Enterprise Act B.E. 2548 (2005) earning an assessable income of no more than THB 1,200,000¹⁸⁵ per annum from 1

¹⁸¹ RC, s 3.

¹⁸² Approximately GBP 101.

¹⁸³ Albert Lyman, 'Income Tax in Thailand: A Comparison' (1954) (American Bar Association Journal, vol 40) 857.

¹⁸⁴ RC, s 4 (10) and M.R. No. 161 B.E. 2526 (1983) with respect to the rate of interest on the amount of the refunded tax. RC, s 65 (3) (2) and M.R. No.183 B.E. 2533 (1990) with respect to rules and conditions on the allowable expenses for computing net profits.

¹⁸⁵ Approximately GBP 24,257.

January 2008 to 31 December 2010. The latter example, M.R. No. 271, provides tax deduction for the purchase of immovable property, which specifies that individual taxpayers under certain conditions are allowed to deduct the actual amount paid up to a maximum of THB 300,000¹⁸⁶ for the purchase of a property or a condominium unit for use as a residence. Ministerial Instructions (M.I.) and Ministerial Notifications (M.N.) are generally issued for the purpose of internal reorganisation involving official appointments or promotions.¹⁸⁷

3.2.2.3 Director-General's Notifications, Director-General's Notifications on Income Tax, Departmental Notifications and Department Regulations

Instructions for procedures and conditions with respect to tax exemptions, reductions and incentives are provided by Director-General's Notifications (D.G.N.s) and Director-General's Notifications on Income Tax (D.G.N.I.T.s); for instance, D.G.N. dated 3 July 2009 re: bases, procedures and conditions respecting transfer of certain parts of businesses of public limited companies or limited companies for exemption of taxes and duties. This notification defines the conditions which need to be satisfied for a partial business transfer to qualify under Royal Decree No. 484¹⁸⁸. Another example is D.G.N.I.T. No. 190-191 dated 15 November 2010 regarding tax incentives for regional operating headquarters in Thailand. The function of a Departmental Notifications (D.N.) is to clarify the conditions of legal forms or documents for tax purposes.¹⁸⁹ Departmental Regulations (D.R.s) are used to identify terms under the provisions of other laws or relevant D.R.s, an example of which is D.R. No. *Taw Paw*¹⁹⁰ 176/2552 (2009), which clarifies the term 'leasing', which is not subject to withholding tax. The term 'leasing' is mentioned in Clause 6 of D.R. No. *Taw Paw*4/2528 (1985). This type of D.R is for taxpayers to follow. Another kind of D.R. is a D.R. *Paw*, which sets up rules to be followed by revenue officials and gives more recommendations to taxpayers;

¹⁸⁶ Approximately GBP 6,064.

¹⁸⁷ Ministerial Instruction No. 130/2546 on 21 April 2003 Re. Appointment of Minister's Consultant.

¹⁸⁸ This Royal Decree came into effect on 19 May 2009 and provides exemptions on VAT, SBT and Stamp Duty on qualifying partial business transfers for both private limited companies and public limited companies.

¹⁸⁹ Departmental Notification (D.N) on 20 April 2009 Re: Qualifications, Conditions for the Permit Approval and Extension for Auditor to Conduct Tax Return via Internet.

¹⁹⁰ These are Thai alphabets, *Taw* and *Paw*. Thai official documents are occasionally arranged by Thai alphabets.

for example, D.R. *Paw* 73/2541 specifies that the refund of a deposit, advance money, a down payment or rent guarantee payment, which have been booked as ‘income’, are deemed ‘expenses’ of the landlord or service provider for the accounting period during which these amounts have been returned.

3.2.3 Double Tax Agreements

To eliminate double taxation, whereby tax can potentially be levied from the same amount of income in two or more states, the Thai government has made special agreements with other countries, namely double tax agreements (DTAs), or double tax conventions.¹⁹¹ Different methods under each DTA are employed to eliminate the double taxation of a person by the resident country, including exemption and credit method.¹⁹² DTAs apply only to income taxes, specifically personal income tax, corporate income tax and petroleum income tax.¹⁹³ Currently, Thailand has 54 double tax agreements with other countries, all of which are in force¹⁹⁴

3.2.4 Legal Opinion

3.2.4.1 Revenue Department’s Rulings and the Board of Taxation’s Rulings

The Revenue Department produces guidelines and information which add up to a substantial body of published statements and also assist taxpayers or revenue administrators. However, in every case these views or rulings express only the Revenue Department’s view of the law.¹⁹⁵ The rulings are always general and do not relate to individual taxpayers. Although the Revenue Department’s rulings have no legally binding force on any party, they may be used by taxpayers and are in practice used by revenue administrators.

¹⁹¹ Kevin Holmes, *International tax policy and double tax treaties: an introduction to principles and application* (IBFD 2007) 54.

¹⁹² Daniel Sandler, *Tax treaties and controlled foreign company legislation: pushing the boundaries* (Kluwer Law International 1998) 16-17.

¹⁹³ Holmes (n 191) 54.

¹⁹⁴ Information as of 3 March 2011 from the Revenue Department of Thailand.

¹⁹⁵ Oxford Business Group, *The Report: Thailand 2009* (Oxford Business Group 2009) 193.

The Revenue Department has issued two main types of rulings, Advance Rulings and the Board of Taxation's rulings. Advance Rulings are simply legal advice provided by the Legal Bureau of the Revenue Department and are available to an individual taxpayer in relation to the tax consequences of a business or transactions that are the subject of enquiry. If rulings are found to be for the purpose of public interest, then they are published unofficially, but without revealing the identities of the taxpayers. Similarly, for the purpose of confidentiality, most Advance Rulings are issued privately to the taxpayer, and in order to maintain secrecy they are used for internal purposes only. The official format of the Advance Rulings is an abbreviation of the Thai alphabet 'Gor Kor'¹⁹⁶ followed by an official code, then a serial number of the Ruling and the issuing date; for example, *Gor Kor 0702/9578* issued on 1 December 2010.¹⁹⁷

Taxpayers can refer to the Revenue Department's advice through letters. Taxpayers can also meet with revenue officers to clarify and discuss their tax duties. In this regard, the Revenue Department's purpose is simply to observe the law by sufficiently resolving the enquiry of the taxpayer. These rulings help taxpayers to understand in advance the interpretation of particular laws and their application to particular cases by the tax authority.¹⁹⁸ Even though the views given by the Revenue Department are not always followed by every taxpayer, in many cases taxpayers, especially those who are directly involved, tend to take these views into consideration and follow them. Nonetheless, when it comes to the view of the court, the Advance Ruling is usually treated merely as a legal opinion and has no legal status.

Advance Rulings are considered essential, according to tax lawyers and academics, as a reference point for information related to the revenue of the country. In general, tax assessment practice follows the self-assessment system whereby taxpayers have a legal duty to declare their income and pay tax to the authorities. Declaration and tax payment are assumed to be correct; however, the Revenue Department can make assessments in cases of failure to file tax returns or the filing of false or inadequate tax returns. A tax assessment notice is deemed an administrative order under the Revenue Code, which

¹⁹⁶These are Thai alphabets, *Gor* and *Kor*.

¹⁹⁷Advance Ruling Re: Personal Income Tax and Specific Business Tax on the Sale of Property.

¹⁹⁸ Easson (n 8) 59.

specifies the tax obligations of persons who are subject to taxation. The Revenue Department issues a tax assessment notice without having to give any ruling, and as such is not a part of tax administration procedures but merely a request for advice from revenue officers.

The Board of Taxation¹⁹⁹ Ruling is the second type of Ruling made by the Revenue Department. Similar to the Advance Rulings, this Ruling serves as another source of the opinions of the Revenue Department. An officially appointed board, which comprises a group of tax specialists selected from heads of tax departments, economists and legal experts,²⁰⁰ expresses the views of the Revenue Department on particular contentious issues. Although the Revenue Department is statutorily bound by it²⁰¹, this Ruling has no legally binding force. A Ruling of the Board of Taxation is the view of selected tax specialists and is binding on the Revenue Department, but the courts do not accept them as conclusively authoritative and deem it to be the mere opinion of government departments. Two examples are: the Board of Taxation Ruling No. 28/2538 (1995), which sets out the guiding principles in determining the value of the shares for calculating personal income tax regardless of whether such shares are issued by the employer or its overseas parent, and the Board of Taxation's Ruling No. 37/2551, issued on 9 April 2008 regarding tax credit on dividends paid by a petroleum business. This ruling was issued by the Board of Taxation in order to clarify the situation regarding tax credits on dividends paid by a petroleum business.

When comparing an administrative order with the Revenue Department's rulings, one must consider Section 5 of the Administrative Procedure Act B.E. 2539 (1996), which defines an administrative order as:

[...] a use of lawful power by officers, which formulates a legal relationship between persons that would establish, change, transfer,

¹⁹⁹ 'The Board of Taxation' will be explained later in this chapter.

²⁰⁰ RC, s 13(2) provides: 'There shall be constituted a Board of Taxation composed of the Permanent Secretary of State of Finance, as chairman, Director-General of Revenue, Director-General of Customs, Director-General of Excise, Director of Fiscal Policy, Secretary General of the Juridical Council, and three technical qualified persons appointed by the minister, as members'.

²⁰¹ RC, s 13(7) (3) 'The rulings on questions regarding taxes as the Revenue Department may seek an opinion which is given by the Board of Taxation is final, unless it is subsequently altered by the Board of Taxation's ruling or by the decision of the courts'.

waive, withdraw or affect the persons through the status of obligations or rights of persons either permanently or temporarily.

Specific examples of administrative orders are an order, an appellate decision, an endorsement, permission, approval and registration. This does not include legislation. Hence, an administrative order is an order made by government officers and according to the law, which has a direct effect on a person. Other actions are also included in the administrative order as stated in Section 5²⁰² specified in Ministerial Regulations. When considering the Revenue Department's ruling in accordance with aforementioned administrative order criteria, the Revenue Department's ruling is only for the purpose of rendering a service to taxpayers by giving legal opinions and recommendations regarding tax obligations. Consequently, the Revenue Department's rulings do not legally obligate the taxpayer to pay, alter, transfer, waive or cease their duty to pay tax.

More specifically, only the facts that have already occurred are responded to by a ruling. The revenue officials are not obliged to look for facts for the purpose of making decisions or orders. Rulings issued by the Revenue Department do not imply any administrative force, which excludes taxpayers from standing by these rulings; nevertheless, taxpayers have to pay their taxes, since they must comply with the law and not the Rulings. As it is evident that Rulings are superseded by the law, they do not have any power over changing or overruling the provisions of the law. If a person refuses to pay the tax, which he is obliged to do by a Ruling, the option of not paying tax does in fact remain with the person. Furthermore, in a situation of non-compliance with Rulings, the Revenue Department is not allowed to confiscate the assets of the person for a public auction in order to pay the dues in account of his taxes, or to file the case with the court. In such an instance, the Revenue Department must refer to the provisions provided in the Revenue Code which suggests that an assessment has to be carried out prior to the confiscation.²⁰³ Similarly, where there is disagreement with the Ruling, the taxpayer cannot appeal the case to the court because the Ruling is not by any means a form of tax collection or an order to the taxpayer. Therefore, it does not itself endow the Revenue Department or the persons who request the Ruling to have any legal binding effect and so are the courts on account of binding by the Rulings. There have

²⁰²The Administrative Procedure Act B.E. 2539 (1996) (Thailand).

²⁰³ RC, s 71.

been instances where taxpayers have claimed that they have followed an opinion stated in the Rulings; however, the court may choose to rule differently.

3.2.4.2 Motif of Judgments

As explained previously in Chapter 2, Thailand generally operates a civil law system that does not use judicial precedent or binding case law. Thai courts do not have to follow their own previous decisions nor do the lower courts have to follow the precedents set by higher courts. However, the common law system has had an influence on Thai law, as it employs a process of using the earlier decisions of higher courts, especially the Supreme Court, which publishes its reasoning and decisions. A similar practice is adopted in tax cases where the opinions of the Supreme Court, (which are a legitimate source for providing specific interpretations of provisions under tax law), are largely accepted among legal specialists and academics to apply as a secondary authority, and which are believed to have influence over subsequent judgments.

3.3 Thai Principal Taxes

In order to consider the problematic jurisdiction in the field of tax incentives in the upcoming chapters, it is essential to comprehend the characteristics of each type of tax employed in Thailand.

3.3.1 Direct Taxes

3.3.1.1 Personal Income Tax

A person receiving an assessable income in Thailand is legally responsible for personal income tax as per the tax rate specified under the income tax schedule. A person can be defined as an individual,²⁰⁴ an ordinary partnership,²⁰⁵ a non-juristic body of persons,²⁰⁶ a deceased person²⁰⁷ or an undivided estate.²⁰⁸ Further, an individual residing in Thailand for a period, or periods, amounting to 180 days or more in a tax (calendar)

²⁰⁴ RC, s 56.

²⁰⁵ RC, s 56 (2).

²⁰⁶ RC, s 56 (2).

²⁰⁷ RC, s 57 (2) (1).

²⁰⁸ RC, s 57 (2) (2).

year, is considered a Thai resident for tax purposes.²⁰⁹ Any person residing in Thailand is required to pay tax on income drawn from sources available in Thailand on a cash basis, regardless of where the money is actually paid, as well as income drawn from sources outside of Thailand, i.e. foreign sources brought to Thailand are subject to personal income tax in the same year they were acquired.²¹⁰ However, any person who does not qualify as a resident of Thailand is only liable to pay income tax on the share he has earned within Thailand.²¹¹ Personal income tax returns are supposed to be filed by 31 March every year.²¹² Assessable income is segmented into eight categories.²¹³ For the purpose of calculating taxable income, certain deductions and allowances can be offset against assessable income.²¹⁴ Exemptions from personal income tax are granted to certain persons in accordance with Section 42 of the Revenue Code.

3.3.1.2 Corporate Income Tax

Corporate income tax (CIT) is a form of direct tax levied on a juristic company or partnership involved in any type of authorised business in Thailand, or which is not conducting business in Thailand, but is drawing certain types of income from the country.²¹⁵ For the purpose of CIT calculation, a juristic company or partnership includes a public company, a private company, a limited partnership or a registered partnership incorporated under Thai law or foreign law as well as an association or a foundation.²¹⁶ The bracket of a juristic company or partnership also entails any joint venture, any trading or profit-seeking activity, conducted by a foreign government or its agency deployed in Thailand, or by any other juristic body incorporated under foreign

²⁰⁹ RC, s 41(3).

²¹⁰ RC, s 41(1) (2).

²¹¹ RC, s 41(1).

²¹² RC, s 56 (1).

²¹³ RC, s 40(1).

²¹⁴ RC, ss 42 (2), 42 (3), 43, 44, 45, 46, and 47.

²¹⁵ RC, s 66.

²¹⁶ RC, s 66.

law.²¹⁷ Companies that are registered in Thailand have to pay tax on income earned from sources within and outside Thailand.²¹⁸

The rate specified for CIT is generally at the rate at 30% of net profits,²¹⁹ frequently known as net income or net earnings, and which are based on an accrual basis following generally accepted accounting principles (GAAP)²²⁰. According to the conditions prescribed by Section 65 of the Revenue Code,

[...] a company must take into account all revenue arising from, or in consequence of, the business carried on in an accounting period after deducting all the expenses incurred in that accounting period. The accounting period for companies which is their taxable year shall be of twelve months duration.²²¹

Revenue Code Sections 65 and 65 (2) set the principles for the determining the computation of the taxable net profit of resident juristic persons. In addition, it is essential for the taxpayer to understand that only those expenses incurred exclusively for the purpose of generating income or for the purpose of doing business are tax deductible.²²² Nonetheless, these deductible expenses do not take into account certain expenses specified under Section 65 (3) of the Revenue Code. Net losses can be carried forward up to a maximum number of five consecutive accounting periods but cannot be carried back.

A foreign company is defined as one incorporated under foreign law and engaged in activities for the purpose of doing business in Thailand, if it has a permanent

²¹⁷ D.I. No. *Paw.* 8/2528 (1985).

²¹⁸ RC, s 66 (1).

²¹⁹ RC, s 67 and Income Tax Schedule.

²²⁰ However, other method of computation can also be applied for certain types of income, e.g. income derived from businesses such as banking, finance, securities, insurance, hire-purchase, instalment sale, construction, liberal professions, etc.

²²¹ See exceptions in RC, s 65 (1).

However, it may be less than twelve months in the case of the first accounting period after incorporation or after granting approval of the General-Director of the Revenue Department.

²²² RC, s 65 (2).

establishment including an office, a branch or any other place of business in Thailand, or has an employee, an agent, a representative or a go-between for undertaking business deployed in the country.²²³ A foreign company carrying on business in Thailand is subject to tax, but only for net profit arising from, or as a result of, business carried on in Thailand at the end of each accounting period.²²⁴ Foreign companies engaged in international transport operations are liable to tax on gross receipts.²²⁵ When a foreign company remits its earnings out of Thailand, the amount of earnings transferred are subject to tax.²²⁶

A foreign company not involved in any specific business in Thailand but nevertheless drawing certain types of income from the country, such as service fees, interests, dividends, rents and professional fees, is subject to corporate income tax on the gross amount received.²²⁷ This corporate income tax is collected in the form of withholding tax, according to which the payer of the income must deduct the tax from particular rates depending on the category of income and the tax status of the recipient.²²⁸ Income tax is withheld from the amount being remitted abroad by a branch office in Thailand,²²⁹ and it is levied at the rate of 10% in total. Moreover, the rate of 15%, except for dividends, which are subject to 10% rate, is withheld from payments of income such as loan interest,²³⁰ royalties,²³¹ management fees or rentals paid to a foreign legal entity not

²²³ RC, s 76 (2).

²²⁴ RC, s 66.

²²⁵ RC, s 67.

²²⁶ RC, s 70 (2).

²²⁷ RC, s 70.

²²⁸ Allen H. Lerman, 'Withholding of Taxes' in Joseph J. Cordes, Robert D. Ebel and Jane Gravelle (eds), *Encyclopedia of taxation and tax policy* (2nd edn, The Urban Institute 2005) 472-476.

²²⁹ RC, s 70.

²³⁰ Interest paid to non-resident companies is subject to a 15% withholding tax. Interest paid on loans from a bank, financial institution or insurance agency is taxed at a 10% rate if the lender is resident in a country that has concluded a tax treaty with Thailand.

²³¹ Tax treaties may lower the withholding tax charged on royalties paid for the use of copyrighted literary, artistic or scientific works.

doing business in Thailand.²³² In the case of double tax agreements, withholding tax rates applied to foreign companies may be reduced or exempted.²³³

3.3.2 Indirect Taxes

3.3.2.1 Value Added Tax (VAT)

On 1 January 1992, VAT became effective because of an ineffective business tax.²³⁴ It is an indirect tax levied on the goods consumed at each stage of the production, distribution of goods, or provision of services. Value added at every phase of the production process is subject to tax, and is applied to all retailers, wholesalers, manufacturers, importers, producers and others providing direct services.²³⁵ All companies are required to register and adopt the VAT system,²³⁶ apart from firms with a turnover of less than THB 1.8 million²³⁷ a year and certain other business activities including the sale and import of raw agricultural products and related goods, the sale and import of newspapers and textbooks, and basic services such as health and educational services, domestic transport and the leasing of immovable property.²³⁸ Goods exempt from import duty and intended for export processing zones are included in this category, along with research and technical services, labour contracts and auditing and legal services.²³⁹ VAT is currently levied at a rate of 7%²⁴⁰ on gross receipts, which has two components: a standard 6.3% VAT rate and a municipal tax of 0.7%.²⁴¹

²³² RC, ss 70, 70 (2) and Double Tax Agreement.

²³³ See e.g., Withholding tax rates for interest under Thailand's DTAs, The Thai Revenue Department, 'Tax Treaties' <<http://www.rd.go.th/publish/29164.0.html>> accessed 10 November 2011.

²³⁴ Pakon Witchayanon, *Thailand's financial system: structure and liberalization* (Thailand Development Research Institute 1994) 30.

²³⁵ RC, s 77/2.

²³⁶ RC, s 77/4.

²³⁷ Approximately GBP 36,385.

²³⁸ RC, s 81.

²³⁹ RC, s 81.

²⁴⁰ RC, s 80.

²⁴¹ Royal Decree No. 507 on 1 October 2010.

3.3.2.2 Specific Business Tax (SBT)

For the purpose of replacing business tax, specific business tax (SBT) was introduced in Thailand in 1992 and is included in the category of indirect tax.²⁴² The difference between SBT and VAT is that any person or entity who engaged in certain businesses in Thailand is subject to SBT instead of VAT.²⁴³ Businesses that are subject to pay SBT include banking, finance, repurchasing and factoring organisation at the rate of 3.3%, and life insurance and pawn brokerages at 2.75%.²⁴⁴ Similar to VAT, SBT has a local tax element. A company that sells its factories and land to move to an industrial estate may be entitled to a waiver of the 3.3% SBT if the company relocates to the industrial estate within one year of selling its property.²⁴⁵ Any person or entity that is liable to SBT is required to register to become an SBT-registered person or entity within 30 days from the date of operation, and must file a monthly SBT return regardless of whether the business is generating income.²⁴⁶

3.3.2.3 Customs Duty

Customs duty is imposed primarily on import and certain export goods specified by the Customs Act B.E. 2469 (1926) and the Customs Tariff Decree B.E. 2530 (1987).²⁴⁷ Most tariffs are *ad valorem*. In certain situations, however, both *ad valorem* and *ad naturam* rates are given and the tariff that gives the most revenue will be applicable to it.²⁴⁸ Commonly, the invoice price acts as the basis for computing duty and is normally applied to the CIF (Cost, Insurance and Freight) value for imports and FOB (Free On Board) for exports.²⁴⁹ Customs duty is levied according to the Harmonized Commodity Description and Coding System or Harmonized System. Most imported goods are liable to customs duty rates of 0% to 100%, but exemptions are issued to promoted persons in

²⁴² The Thai Revenue Department, 'Specific Business Tax' <<http://www.rd.go.th/publish/6042.0.html>> accessed 10 November 2011.

²⁴³ RC, s 91/2.

²⁴⁴ RC, s 91/6.

²⁴⁵ D.G.N SBT No. 1.

²⁴⁶ RC, s 91/10.

²⁴⁷ The Customs Tariff Decree 1987, s 4.

²⁴⁸ The Customs Tariff Decree 1987, s 5.

²⁴⁹ The Thai Revenue Department, 'Value Added Tax' <<http://www.rd.go.th/publish/6043.0.html>> accessed 10 November 2011.

accordance with the Investment Promotion Act of 2001²⁵⁰ and to petroleum concessionaires under the Petroleum Act of 1971²⁵¹. As a member country of the Association of Southeast Asian Nations (ASEAN),²⁵² the ASEAN Free Trade Area (AFTA),²⁵³ the General Agreement on Tariffs and Trade (GATT)²⁵⁴ and the World Trade Organisation (WTO),²⁵⁵ Thailand is required to adopting the protocols of these organisations when determining customs prices with a reduction of or exemption from customs duties on imported goods.

3.3.2.4 Excise Tax

Adjustments to the excise tax system have been made in order to complement the VAT system. For products which are subject to both taxes, the Revenue Department collects the VAT and the Excise Department collects the excise.²⁵⁶ Both of the above taxes can be paid to the Excise Department, whereas for VAT can only be paid to the Revenue Department. Excise tax is levied on selected goods (mainly luxury goods) such as petroleum products, tobacco, liquor, beer, soft drinks, crystal glasses, perfume and cosmetic products, yachts, air conditioners (not over 72,000 BTU) and passenger cars with 10 seats or less. Excise tax is calculated on an *ad valorem* basis (a percentage of the price of the goods) or a particular rate depending on the quantity or weight of the goods, whichever is greater.²⁵⁷

²⁵⁰ IPA 2001, ss, 28, 29,30 and 36.

²⁵¹ The Petroleum Act 1971, s 71.

²⁵² Association of Southeast Asian Nations, 'Member Countries' <<http://www.aseansec.org/74.htm>> accessed 10 November 2011.

²⁵³ Association of Southeast Asian Nations, 'The ASEAN Free Trade Area' <<http://www.aseansec.org/12021.htm>> accessed 10 November 2011.

²⁵⁴ Thailand signed GATT on 20 November 1982. World Trade Organisation, 'The 128 countries that had signed GATT by 1994' <http://www.wto.org/english/thewto_e/gattmem_e.htm> accessed 10 November 2011.

²⁵⁵ Thailand has been a WTO member since 1 January 1995, World Trade Organisation 'Member Information: Thailand and WTO' <http://www.wto.org/english/thewto_e/countries_e/thailand_e.htm> accessed 10 November 2011.

²⁵⁶ The Thai Revenue Department, 'Value Added Tax' <http://www.rd.go.th/publish/6043.0.html> accessed 10 November 2011.

²⁵⁷ Excise Tariff Act 1984, as amended (No. 4) 2003, s 4 and Excise Tariff Schedule.

3.3.3 Local Administration Revenue

The local administration directly administers and collects the revenue from the local levied tax, which includes taxes on house rent, land development, signboards, slaughterhouses, hotels, petrol stations and retail tobacco taxes income.²⁵⁸

3.4 Tax Administration and the Revenue Department

3.4.1 Ministry of Finance: History, Powers and Responsibilities

The management of Thailand's national revenue began in the 15th Century following the establishment of the Royal Treasury Department in 1448. The four principal government agencies established in the reign of King Boromtrilokkanat of the Ayuthya Era were created with the purpose of collecting taxes and import duties, trading with foreign merchants and operating the Crown's warehouse business and merchant fleet.²⁵⁹ Nevertheless, the process of revenue collection was not organised well until the 19th Century, when, in 1873, King Chulalongkorn established the Royal Treasury to act as a central agency for revenue collection.²⁶⁰ The main duty of treasury officials was to manage the delivery of revenue collection through different agencies.²⁶¹

By virtue of the Royal Treasury Act of 1875, the Royal Treasury officially came into existence as the government agency charged with administering national finance for the purpose of collecting revenues, the management of Crown Property and the disbursement of royal funds. In addition, responsibilities were laid down by the Act for the ranks of civil servants and the revenue collection duties for tax and customs officers. The Royal Treasury developed in stages. The form of government was changed from absolute monarchy to constitutional monarchy in 1932, following which the Ministry of

²⁵⁸ For more information on fiscal strategies of Thai local government, see Weerasak Krueathep, 'Fiscal Strategies of Thai Local Government during the Decentralisation Movement: A Preliminary Exploration of Characteristics and Causes' (2006) Institute for Local Government Initiatives ILGI Working Paper 01/2549.

²⁵⁹ Ministry of Finance, 'History of Ministry of Finance' <http://www.mof.go.th/mofhistory_e/his_index.htm> accessed 10 November 2011.

²⁶⁰ Ibid.

²⁶¹ Ibid.

Finance (originally called the Treasury Ministry)²⁶² became independent by virtue of the Civil Service Reform Act of 1933.²⁶³

The Ministry of Finance is authorised to administer various matters related to public finance, taxation, treasury, government property, operations of government monopolies and revenue-generating enterprises, which can be legally operated only by the government, as well as other organisations to which the government has contractual obligations. In addition, it is also has the power to provide loan guarantees for government agencies, financial institutions and state enterprises. The Minister of Finance, as the top administrator, sets the overall policy directions with assistance from deputy ministers, for the purpose of discharging responsibilities. Furthermore, the Minister of Finance may notify in the *Thai Government Gazette* and issue ministerial regulations to appoint assessment officers and other officials.²⁶⁴ The Permanent Secretary for Finance is responsible for supervising the management and functioning of the ministry, whereas the Director-Generals deal with matters concerning their own individual departments. For administrative purposes, work is divided among eight main agencies, namely the Office of the Secretary to the Minister, the Office of the Permanent Secretary, the Fiscal Policy Office (FPO), the Treasury Department, the Comptroller General's Department, the Customs Department, the Excise Department and the Revenue Department.²⁶⁵

The Fiscal Policy Office was founded on 18 October 1961 under the instructions of the then Finance Minister, Mr. Sunthorn Hongladarom,²⁶⁶ who believed it necessary that Thailand should make use of the most up-to-date public finance expertise and formulate its fiscal policy accordingly. The FPO was established to facilitate the dissemination of expertise and to provide a focal point for the formulation of policy.²⁶⁷ It is engaged in

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ RC, s 4.

²⁶⁵ The Ministry of Finance, 'Organisation Info' <http://www2.mof.go.th/government_agencies.htm> accessed 10 November 2011.

²⁶⁶ Fiscal Policy Office, 'History of the Fiscal Policy Office' <<http://www.fpo.go.th/FPO/index2.php?mod=Category&file=categoryview&categoryID=CAT0000562>> accessed 10 November 2011.

²⁶⁷ Ibid.

studying and accordingly advising to the government agencies on economical, fiscal and tax policies domestically and internationally,²⁶⁸ and is also responsible for monitoring, supervising and evaluating implemented policies and measures on taxes, as well as suggesting and recommending improvements to these measures.²⁶⁹

3.4.2 The Board of Taxation

The Board of Taxation consists of the Permanent Secretary of State of Finance, a chairman, the Director-General of Fiscal Policy, the Secretary General of the Juridical Council and three technically qualified persons appointed by the minister.²⁷⁰ Officials in the Ministry of Finance must be appointed by the Board of Taxation to act as Secretary and Assistant Secretary.²⁷¹ The presence of at least 50% of the total number of members constitutes a quorum at a meeting of the Board of Taxation.²⁷² The Board is empowered with the following authorities: first, to prescribe the limit within which the power of the Assessment Officer and any competent official may be exercised; second, to prescribe rules and procedures for the purposes of auditing and assessing tax; third, to give rulings on questions regarding taxes, as the Revenue Department may seek its opinion and fourth, to give advice to the minister in connection with the administration and collection of taxes.²⁷³

3.4.3 Administrative Organisations

Administrative organisations comprise of the Provincial Administrative Organisation, Tambon (sub-district) Administrative Organisation, Municipality, Bangkok Metropolitan Administration and the City of Pattaya), which are responsible for the following: local tax, sign tax, slaughter house duty, swallow nest harvest duty, tobacco-based local tax, oil-based local tax and local tax from hotels.

²⁶⁸Fiscal Policy Office, 'Mission Statement' <<http://www.fpo.go.th/FPO/index2.php?mod=Category&file=categoryview&categoryID=CAT0000564>> accessed 10 November 2011.

²⁶⁹ Ibid.

²⁷⁰ RC, s 13(2).

²⁷¹ RC, s 13(2).

²⁷² RC, s 13(5).

²⁷³ RC, s 13(6).

3.4.4 The Customs Department

The Customs Department is responsible for the administration of import and export duties.

3.4.5 The Excise Department

The Excise Department is in charge of collecting excise tax.

3.4.6 The Revenue Department

The initial vision of King Chulalongkorn was to establish a country-wide infrastructure, and to provide a revenue collection platform, in order for Thailand to compete economically with the rest of the world. Following this idea, the Revenue Department was founded on 2 September 1915 by King Rama VI.²⁷⁴ The current Revenue Department, under the auspices of the Ministry of Finance, is responsible for the administration of the following taxes: personal income tax, corporate income tax, petroleum income tax, value added tax, specific business tax and stamp duties.²⁷⁵ The Revenue Department plans to establish a countrywide infrastructure and provide a revenue collection platform to bring Thailand into line with other developed countries. The Revenue Department is responsible for collecting taxes as provided under the Revenue Code and related laws. It is also in charge of reviewing and improving laws and regulations pertaining to the tax collection system in order to promote savings, investment and competitions as well as to equalise income distribution and ensure tax compliance. It can make suggestions on the use of tax policy as a tool for social and economic development to the Ministry of Finance and can negotiate with other countries to avoid double taxation and promote trade and investment.²⁷⁶

The revenue authorities' most important role is to ensure compliance with tax laws.²⁷⁷ The effectiveness of their tax collection depends, however, on a variety of external

²⁷⁴ The Thai Revenue Department, 'An Introduction to the Revenue Department of Thailand' <<http://www.rd.go.th/publish/6001.0.html>> accessed 10 November 2011.

²⁷⁵ RC, s 5.

²⁷⁶ The Thai Revenue Department 'Mission' <<http://www.rd.go.th/publish/29984.0.html>> accessed 10 November 2011.

²⁷⁷ The Thai Revenue Department 'Responsibilities' <<http://www.rd.go.th/publish/6016.0.html>> accessed 10 November 2011.

factors, such as the state of the economy, public support for government policies and the willingness of taxpayers to comply with tax rules. In an ever-changing environment, revenue authorities must be clear about and focused on their goals and continually review their operating approaches and procedures to ensure that they are making the most effective and efficient use of the available resources. By adapting and implementing appropriate technologies, as well as by being open to the benchmarking and testing of their operations to achieve 'best practice'. Good revenue authorities must seek to improve both their public image and the organisation of their work processes.²⁷⁸

The Revenue Department is headed by the Director-General, who is the highest authority of the Department, supported by other executives who are principal advisors on tax base management, performance improvement and information and communication technology. The four main department units are currently working under the responsibility of four Deputy Directors-Generals.²⁷⁹

3.5 Thai Tax Courts

3.5.1 History of the Thai Tax Courts

The foundation of the Central Tax Court complied with the Act for the Establishment of the Tax Courts and Procedure for Tax Cases B.E. 2529 (1986). This Act presents two types of tax courts, namely the Central Tax Court, and the Provincial Tax Court.²⁸⁰ It should be mentioned that the original draft law for establishing the tax courts was to set up Commercial and taxation courts. In the process of making this legislation the commercial jurisdiction was not included, allowing only jurisdiction over tax. As tax cases are considered to be different in nature from regular civil cases, the Act for the Establishment of and Procedure for Tax Court (AEPTC) B.E. 2528 (1985) was ratified on 20 August 1985 and has been active since 5 September 1985 for the purpose of providing special and accelerated procedures for tax litigation. Tax courts have the power to hear and judge appeals against the decision of the tax officers or committees,

²⁷⁸ OECD Committee of Fiscal Affairs Forum on Strategic Management, 'Principles of Good Tax Administration-Practice Note', Issued 25 June 1999 Amended 2 May 2001, Centre for Tax Policy and Administration, OECD, Tax guidance series, GAP001, 3
<<http://www.oecd.org/dataoecd/34/39/1907918.pdf>> accessed 10 November 2011.

²⁷⁹ The Thai Revenue Department, 'Administration and Organisation Structure of the Revenue Department' <<http://www.rd.go.th/publish/6015.0.html>> accessed 10 November 2011.

²⁸⁰ The Act for the Establishment of and Procedure for Tax Court (AEPTC) B.E. 2528 (1985) s 3.

disputes over the claims of the state on tax obligations, disputes over tax refunds, disputes over the rights or obligations related to tax collection obligations and other cases made subject to the Act and as recommended by other laws.²⁸¹

3.5.2 Structure, Functions and Jurisdiction of the Tax Courts

The territorial jurisdiction of the Central Tax Court includes Bangkok and five provinces, Samut Prakan, Samut Sakhon, Nakhon Prathom, Nonthaburi and Pathumthani.²⁸² As no provincial tax courts have yet been set up, the Central Tax Court, established in Bangkok,²⁸³ therefore, at present has jurisdiction over the whole of the territory. Cases that are brought to the tax court generally relate to disagreements between an individual and the Tax Department or the Custom and Excise Department. However, tax cases relate to disagreements between an individual and an administrative agency and hence should be considered as administrative cases. Nevertheless, a case within the jurisdiction of tax courts is not within the jurisdiction of administrative courts.²⁸⁴ In cases where there is a question as to whether a case arising is under the jurisdiction of the tax court or another court, the President of the Supreme Court is authorised to give a decision.²⁸⁵

Legislation states that there shall be provided a Chief Justice and Deputy Chief Justices in such a number to be determined by the Minister of Justice.²⁸⁶ However, judges in the tax courts are assigned by the king under the law on judicial service and chosen from the judicial officials who possess knowledge and proficiency in the law of taxation. Two judges form a quorum for trial and adjudication in the Central Tax Court.²⁸⁷ These judges, specialised in tax law, ensure fast and appropriate judgments.²⁸⁸ To ensure the

²⁸¹ AEPTC, s 7.

²⁸² AEPTC, s 5.

²⁸³ AEPTC, s 5.

²⁸⁴ The Act on Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999). s 9.

²⁸⁵ AEPTC 1985, s 10.

²⁸⁶ AEPTC 1985, s 13.

²⁸⁷ AEPTC 1985, s15.

²⁸⁸ Prasbook Boondech, Krirk Vanikkul and Somsakai Yampol, *Judicial System in Thailand* (Ministry of Justice no year) 17 (in Thai).

convenience, expediency and justice of the proceedings, the Chief Justice of the Central Tax Court, with the agreement of the President of the Supreme Court, is authorised to issue rules of the court on proceedings and the hearing of evidence in the tax cases.²⁸⁹ An expert can be summoned by the court upon special remuneration for the purpose of providing advice during the trial.²⁹⁰ However, this practice is not common in ordinary courts. The Tax Court was set up with the objective of shortening the previously lengthy procedures endured in the Civil Court. It seeks to avoid uncertainties in trial process, and interruption of business operations, which could affect the decision of investors to operate their businesses in Thailand.

3.5.3 Procedure of Tax Cases

Tax procedures are elaborated upon under the AEPTC of 1985²⁹¹ and the Regulations on Tax Cases of 2001. The process and procedure of the tax court differs to that of the normal civil courts. Nevertheless, any issue of proceedings not specifically provided for in this Act and its rules must comply with the provisions of the Civil Procedure Code *mutatis mutandis*.²⁹²

Unlike the normal civil court's procedure on appeals, decisions or judgments of the tax courts may be appealed to the Supreme Court²⁹³ within one month from the date on which the judgments or orders are pronounced.²⁹⁴ If the value of the asset or the amount in dispute does not exceed THB 50,000,²⁹⁵ no party is entitled to appeal against the judgment of the tax court on the questions of fact, unless the judge who sat in the case has made a dissenting opinion or has certified that there is a motive to appeal. In other situations, written approval of the Chief Justice of the Central Tax Court is required.²⁹⁶

²⁸⁹ AEPTC 1985, s 20.

²⁹⁰ AEPTC 1985, s 21.

²⁹¹ AEPTC 1985, s 17.

²⁹² An example can be seen from RC, s 12 regarding the procedures for seizure and sale at public auctions.

²⁹³ AEPTC 1985, s 24, the Tax Section is set up, by the President of the Supreme Court, in the Supreme Court.

²⁹⁴ AEPTC 1985, s 24.

²⁹⁵ Approximately GBP1,010.

²⁹⁶ AEPTC 1985, s 25.

In accordance with the appeal rules, tax cases are also governed by the provisions specified in Sections 225 (paragraph one) and 226 of the Civil Procedure Code. If the President of the Supreme Court considers it appropriate, questions of law surrounding tax cases can be decided in the general meeting of the judges.²⁹⁷ It should be noted that the provisions of the Civil Procedure Code are applied to an appeal against a specific court orders to imprison, detain or fine any person, or in regard to provisional measures before judgment, or to the execution of a judgment or order.²⁹⁸ Appeals against the orders of these courts are heard by the Court of Appeal and then to the Supreme Court.²⁹⁹

The provisions of the AEPTC of 1985 and of the Civil Procedure Code for the proceedings of cases in the Court of Appeal and the Supreme Court relate *mutatis mutandis* to the proceedings of tax cases in the Supreme Court.³⁰⁰

3.5.4 Statutory Interpretation by the Thai Tax Court

As far as civil law jurisdictions, including Thailand, are concerned, statutory interpretation is performed by the courts to determine the intent of the legislator by investigating the legislation as a whole.³⁰¹ Regarding tax cases, two principles of interpretation are utilised by the tax court: literal interpretation and purposive or intentional interpretation.³⁰² The courts often make an effort to determine the actual meaning of a statute. Neither literal interpretation nor intentional interpretation must lead to irrationality. The following six rules have been adopted by Thai tax courts to interpret tax laws.

²⁹⁷ AEPTC 1985, s 28.

²⁹⁸ AEPTC 1985, s 26.

²⁹⁹ AEPTC 1985, s 26.

³⁰⁰ AEPTC 1985, s 29.

³⁰¹ William Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)* Unif. L. Rev. (N.S.) 591-691 (Part I) and (1999-4) Unif. L. Ref (N.S.) 877-907 (Part II), and later reprinted with permission in (2000) 60 La. L. Rev. 677-738 and reprinted again in Chinese translation (Peking University Press 2003) 3 Private Law Review 99-175) 24.

³⁰² For detailed discussion regarding purposive interpretation of tax statutes, see Michael Livingston, 'Practical Reason, Purposivism and the Interpretation of Tax Statutes' (1995) (Tax Law Review 1995-1996 vol 51) 677-724.

3.5.4.1 Strict Construction

Tax is the government's main source of revenue, and it is a responsibility of the Thai people to pay taxes.³⁰³ However, taxation affects the rights and property of people, which may only be infringed upon by an Act of Parliament.³⁰⁴ A tax statute is categorised as public law, since failure to abide by the tax laws can result in criminal penalties including fines³⁰⁵ and imprisonment.³⁰⁶ Furthermore, other civil penalties such as surcharges,³⁰⁷ seizure,³⁰⁸ and the cost of prosecution can be assessed. Subsequently, revenue statutes must be construed strictly. In cases where a provision has many possible interpretations, or has more than one meaning, the court is obliged to interpret such a provision in favour of the taxpayer.³⁰⁹ Moreover, the court may not apply an extended interpretation based on the objective or spirit of the law in cases where there are clear statutory words.³¹⁰ Tax statutes should not be construed so as to increase the tax burden on taxpayers, although in a situation of necessity, tax law should be interpreted so as to result in the least tax burden upon the taxpayer. The same rule has

³⁰³ The Constitution of Thailand 2007, art 69.

³⁰⁴ Chaisit Trachutam, *A Guide to Tax Law* (7th edn, the Thai Bar 2010) 27 (in Thai).

³⁰⁵ RC, s 35 provides 'Whoever contravenes the provisions of Section 17, 50 (2), or 51, unless forces majeure is proved, shall be quilt and punished with a fine not exceeding THB 2000' (GBP40).

³⁰⁶ RC, s 35 (2) provides: 'Whoever contravenes Section 12 (2) shall be punished with imprisonment not exceeding two years and a fine not exceeding THB 2000 (GBP 40.42)'.

RC, s 36 provides: 'Whoever knowingly or wilfully fails to comply with the summons or order issued by the Director-General or his delegate or the Changvad (province) Revenue Officer, the assessment office, the Changvad Governor, or a Board member under ss 12 (3), 19, 23 or 32 or reduces to give answers when questioned, shall be punished with imprisonment not exceeding one month or a fine not exceeding THB 2000 (GBP 40.42)'.

RC, s 37 provides 'Whoever (1) knowing or wilfully furnishes false information, makes false statements, gives false answers or produces false evidences with a view to evading payment of the tax and duty under this Title, or (2) by falsehood, fraud, artifice or any other similar device whatever, evades or attempts to evade payment of the tax and duty under this Title shall be punished with imprisonment of three months to seven years and a fine of THB 2000 (GBP 40.42) to THB 200000 (GBP 4,042)'.

RC, s 37 (2) provides 'Whoever by wilful neglect fails to file a return required under this Title with a view to evading payment of tax and duty shall be punished with a fine not exceeding THB 5000 (GBP 101) or imprisonment not exceeding 6 months or both'.

³⁰⁷ RC, s 27.

³⁰⁸ RC, s 12.

³⁰⁹ Trachutam (n 304) 27.

³¹⁰ Sak Sanongchart 'Proceeding of the Seminar on Tax Court' (8 March 1986) organised by the Women Lawyer's Association of Thailand and SVITA Training Centre, SVITA Foundation, Thailand 12 (in Thai).

been applied in the United Kingdom since the House of Lords ruled in *Partington v Attorney General* that the wording of a tax provision must be as clear as possible. The taxpayer is not liable to pay tax if there are any ambiguities or lack of clarity in the wording of the applicable provision. In cases where there is doubt, the court should rule in favour of the taxpayer. In the *Partington* case, the court held that:

If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, whether you can simply adhere to the words of the statute.³¹¹

The strict construction of tax law can be seen in a number of cases decided by the Thai Supreme Court.³¹² One of these cases is Supreme Court (plenary meeting) Decision No. 4687/2540 (1997)³¹³, which held that with respect to Section 122 of the Revenue Code, ‘any person who overpaid the tax or the surcharge by two Baht or more in respect of an instrument of one transaction shall be entitled to enter a claim in writing to the official’. The intent of the provision in specifying the term ‘any person who overpaid the tax or surcharge’ is to cover only a person who has a duty to pay the duty or the surcharge which was ‘overpaid’. This should not be interpreted to cover a person who has no obligation to pay or is exempt from this tax; in such a case, the intended term ought to be defined clearly in law. As a consequence, the time limit for returning any overpaid tax in this case shall not be under the control of Section 122 of the Revenue Code.

³¹¹ (1869-70) L.R. 4 H.L. 100 at 122.

³¹² The Thai Supreme Court Decision Nos. 1724/2513 (1970), 2317/2519 (1976), 1271/2531 (1988), 1908/2538 (1995), and 5733/2544 (2001).

³¹³ This case overturned the Thai Supreme Court Decision No. 6090/2534 (1991).

Following the rule that the tax statutes should be construed strictly, tax exemption or deduction provisions should also be firmly construed. To enjoy any form of exemption, a taxpayer must fall clearly within specific criteria. The reason for strict interpretation is to achieve fairness treatment of both taxpayers and tax collectors. In addition, the court should be aware of the absurdity doctrine, where the strict interpretation of a statute may run entirely against common sense. One example can be seen in Supreme Court Decision No. 3110/2535 (1992), where a surcharge which is paid according to the Customs Act B.E. 2469 (1926), Section 112 (4) is not due only in the case where security is given in Section 112 (2). An interpretation which results in a surcharge only incurred in the case where security was given is considered absurd. In this regard, the charging provisions should be firmly construed.

It should be noted that where the law is unclear, or where it can be interpreted in several ways, the court shall consider the intention of the legal drafter or the spirit of the law. Nevertheless, the spirit of the law may alter with the passage of time, political incidents and opinions of the courts.

3.5.4.2 Literal Interpretation

Thailand, as a civil law system, adopts grammatically literal interpretation, whereby the objective of interpreting a statute is to ascertain the purpose of the legislature enacting it (legislative intention). The interpretation of tax statutes should be based on the intent of the law. In democratic countries, including Thailand, in accordance with the rule of separation of powers, the power to legislate statutes belongs to a legislative body, which in Thailand's case is the National Assembly. Citizens should be taxed only if that they give their approval through the House of Representatives. The legislative body utilises statutes to create social policy³¹⁴ and fiscal policy, so an interpretation of tax law should consider the intent of the legislature.

3.5.4.3 Consideration of an independent trait of tax law

The principle of an independent trait of tax law (*autonomic du droit fiscal*) is that the legislator is entitled to plan tax legislation so that the contents differ from basic norms in other fields of law, including the CCC. For example, the terms 'juristic company or

³¹⁴ Aharon Barak *Purposive Interpretation in Law* (Princeton University Press 2005) 339.

partnership’ and ‘sale’, as defined by Section 39 of the Revenue Code, vary from the definitions provided by the CCC³¹⁵. Meanings of the terms ‘juristic company and partnership’ and ‘sale’ in the Revenue Code are extended to cover more units in the case of ‘juristic company or partnership’ and more activities in the case of ‘sale’.³¹⁶ Another example of an independent trait of tax law can be observed in a case of double tax agreement, which exempts the imposition of two or more taxes on similar incomes, assets or financial transactions.

3.5.4.4 The interpretation of tax law does not rely on the principle of ‘the autonomy of the will’

The principle behind the autonomy of the will of the contractual parties, which is one of the principles of private law, stipulates that the contractual parties express their intention to enter into a contract.³¹⁷ The courts, in several cases, acknowledge this rule provided that the contract complies with section 150 of the CCC, which states that ‘an act (contract) is void if its object is expressly prohibited by law or is impossible, or is against to public order or good morals’. Furthermore, Section 368 of the CCC accepts an interpretation of contract according to the parties’ intentions with a consideration of good faith and ordinary usage.

In one Supreme Court case,³¹⁸ the court accepted the principle of the autonomy of the will in a tax case under public law. The case was between Bell Telephone Manufacturing Company (Bell) and the Revenue Department, concerning the issue of whether two contracts between Bell and the Telephone Organisation of Thailand (TOT) were valid. The court took the view that the two parties³¹⁹ in this case aimed to have two agreements, one of which was a telephone tool and equipment sale agreement, and the other a telephone network construction agreement. The plaintiff in this case did not have to pay tax on the amount of money under the sale agreement, since it was exempt

³¹⁵ See CCC, s 453 for definitions of the term ‘sale’.

³¹⁶ The Thai Supreme Court Decision No. 449/2546 (2003).

³¹⁷ Louis Marquis, *International uniform commercial law: towards a progressive consciousness* (Ashgate Publishing 2005) 26-27. Peter Benson, *The theory of contract law: new essays* (Cambridge University Press 2001) 227.

³¹⁸ The Thai Supreme Court Decision No. 124/2540 (1997).

³¹⁹ Between the plaintiff (Bell Telephone Ltd) and the Telephone Organisation of Thailand (currently is TOT Corporation Public Company).

under the double tax agreement between Thailand and Belgium³²⁰ regarding the permanent establishment rule³²¹. If Bell had not separated their agreements into two contracts, they would be deemed liable to pay full income tax, since only one agreement would be a hire of work agreement under the CCC's Section 587³²², and the company would be deemed as having a permanent establishment in Thailand.

This case was argued by a well-known academic, Trachutham, who stated that the court accepted the structuring of a construction contract by separating one contract into two dealing with the supply of goods and the provision of services, in order not to be bound by the permanent establishment rule. The rule of a permanent establishment is adopted when a foreign company derives income in Thailand through an employee, representative or intermediary, and may therefore be considered as carrying on business in Thailand. As a result, it creates a Thai tax liability on that income.³²³ Trachutham argued that structured contracts contained a factor of tax avoidance.³²⁴ In later cases, the autonomy of the will was challenged by the court on the basis that taxation in Thailand has to depend on the appropriate legal qualification of the legal acts and agreements of the taxpayer. The form or the name of the contract, and even the text thereof is not in itself determinative, so taxation must be based on the taxpayers' actual behaviour, which establishes their legal rights and obligations.

³²⁰ Agreement between the Kingdom of Thailand and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion (Double Tax Agreement between Thailand and Belgium).

³²¹ See art 5, Permanent Establishment in Double Tax Agreement between Thailand and Belgium. Generally, permanent establishment means a fixed place of business through which the business of an enterprise is wholly or partly carried on. It also includes a place of management, a branch, an office, a factory, a workshop, a warehouse, a mine, an oil or gas well, a quarry or any other place of extraction of natural resources. It is to be noted that a building site or construction or installation project constitutes a permanent establishment only if it lasts more than six months (currently 12 months).

For an explanation on 'permanent establishment', see OECD Commentary on the Model Convention with Respect to Taxes on Income and on Capital, art 5.

³²² CCC, s 587 states: 'The hire of work is a contract whereby a person, called contractor, agrees to accomplish a definite work for another person, called employer, who agrees to pay him a remuneration of the result of the work'.

³²³ RC, s 66.

³²⁴ Trachutam (n 304) 49-50.

3.5.4.5 Where there is no tax provision on a specific matter, interpretation shall be based on general law

Statutes are drafted with a consideration of fundamental jurisprudential viewpoints, legal concepts and general law. It is crucial for an interpreter to understand the importance of legislative harmony. For example, when phrases in private statutes are used in public statutes, including tax statutes, they should present the same meanings as they hold in private statutes.³²⁵ The main aim of the legislator is to harmonise all the statutes. However, it is not always possible, and occasionally statutes contradict each other.³²⁶ As a consequence, where a word is not specified in tax law, that word shall have a meaning as specified by general law or other relevant laws. According to Supreme Court Decision No. 7671/2546 (2003), the Revenue Code does not define the term 'dividend'. In this case, the court applied provisions in the CCC to consider whether taxable income, received by the shareholder after the closure of the company, is deemed as a dividend.³²⁷ According to provisions regarding dividends in the CCC³²⁸, the dividend which has been distributed among shareholders is part of the profits of the company within an accounting period and is deemed as a dividend for the purpose of taxation.

3.5.4.6 Where there is a specific provision on the matter, tax law shall be strictly interpreted in accordance with such provision

Tax statutes should be strictly construed where there is a specific or clear provision. For instance, Part I annexed to the Customs Tariff Decree B.E. 2530 (1987) specifies an interpretation of the customs tariff rate, so any interpretation of it has to comply with such provisions. In addition, Section 15 of this Decree states that the Director-General of the Customs Department is authorised to interpret provisions in the tariff schedule. However, any such interpretation is governed by the General Rules for Interpretation in Part I annexed to the Decree, and the Explanatory Notes to the Harmonised System of

³²⁵ Barak (n 314) 354.

³²⁶ Ibid.

³²⁷ CCC, ss 1200-1205.

³²⁸ CCC, s 1200.

the Customs Co-operation Council.³²⁹ In the case of excise tax, the Excise Tariff Act B.E. 2527 (1984) authorises the Director-General of the Excise Department to clarify the schedule attached in this Act, and the clarification must be according to the rules as published by the Minister of Finance in the *Thai Government Gazette*.³³⁰ Chapter 8 of this research discusses further to what extent the administrative body should have power to specify tax laws and to determine how much clarification the administrative body is able to make.

Conclusion

Taxes are the main source of revenue used to finance public sector spending. It is evident that taxation has played a crucial role in the economy of Thailand, including in economic growth support, resource management, the maintenance of economic stability and income allocation. This chapter discussed the sources and scope of Thai revenue law, along with its administration and authority responsible for tax collection. This chapter illustrated the hierarchy of tax legislation in Thailand, which will form a substantial discussion in the norm conflict resolutions examined in Chapter 7. A general consideration regarding the interpretation of tax law is that in the case of ambiguity, statutes are to be strictly interpreted, and must be for the benefit of the taxpayers. In cases of tax exemption or deduction, the provisions must be strictly construed, possibly raising a question as to whether the taxpayer or the state bears the burden of tax, because tax exemption or deduction may result in the loss of tax revenue. This issue will be discussed further with respect to authority and the law governing tax incentives in Chapters 7 and 8.

This chapter outlines Thailand's tax procedure, including the process of assessments and the possibility of taxpayers taking disagreements with the tax officer to the Board of Appeals. After this stage, a case against the order of the tax officer can be filed with the Central Tax Court. In addition, it determines that unclear tax law gives rise to

³²⁹ Which was established by the Convention Establishing a Customs Co-operation Council, made on 15 December 1950, to which Thailand has adhered since 4 February 1972.

³³⁰ The Excise Tariff Act B.E. 2527 (1984).

significant problems, requiring the interpreter to be cautious when interpreting statutes and to reflect as accurately as possible the spirit of the draft legislation.

4 Investment in Thailand and the Board of Investment of Thailand

Introduction

This chapter will deal with Thailand's economic and investment situation and its use of foreign direct investment (FDI). It will then examine the Thai government's policy on investment and the role which the Thai Board of Investment (BOI) plays in it. Received wisdom has it that FDI is beneficial to economically developing countries such as Thailand.³³¹ This chapter focuses on the benefits of FDI to the Thai economy, arguing that it is necessary to support the policy of granting incentives (including tax incentives). The 1997 Asian financial crises proved that FDI had a major role to play in providing foreign capital to help economic recovery in countries including Indonesia, Malaysia, the Philippines and Thailand.³³² This chapter will emphasise the importance of FDI to the development of Thailand's ongoing economic growth and future prosperity, and that the Thai government should encourage it through relevant schemes and incentives.

Domestic political instability in Thailand, the current global financial crisis and other events, which will be explained later in this chapter, have affected Thailand's appeal as a host for FDI. A number of foreign companies have lost confidence or experienced difficulties in either continuing or setting up their businesses in Thailand. As such, it is necessary for the government to regain investors' confidence by establishing effective policies, an appealing investment environment and strong financial organisation. Mathew Verghis, the World Bank's Lead Economist for Southeast Asia, has commented that 'investors normally want to see a stable political environment and clear

³³¹ Ishak Yussof and Rahmah Ismail 'Human Resource Competitiveness and Inflow of Foreign Direct Investment to the ASEAN Region' (2002) *Asia-Pacific Development Journal*, Vol.9, No.1, 94. <http://www.unescap.org/dpad/publication/journal_9_1/ishak.pdf> accessed 10 November 2011 and David Dollar, Mary Hallward-Driemeier, Giuseppe Iarossi and Mita Chakraborty, "Short-term and Long-term Competitiveness Issues in Thai Industry", in Johanna Witte and Stefan Koeberle (eds) *Competitiveness and Sustainable Economic Recovery in Thailand* (The World Bank 1998).

³³² Organisation for Economic Co-operation and Development, *Foreign Direct Investment and Recovery in Southeast Asia* (OECD Proceedings 1999).

policy direction before they gain enough confidence to start investing again'.³³³ With this in mind, this chapter will provide an overview of the Thai government's policies that aim to promote investment from abroad, under the auspices of the BOI. Tax incentives are one of the key factors taken into account by potential investors from overseas because they are considered effective in eliminating some of the problems that can face investors establishing a new business in a foreign country, such as bureaucracy and high outgoings in the first few years of business. This chapter will examine in detail the BOI, which is the key organisation (along with the Revenue Department) in the administration of tax incentives, and will discuss the implementation of its policies. It is important to clarify that, although the BOI is not one of the revenue authorities (which in Thailand are the Revenue Department, the Custom Department and the Excise Department), tax incentives offered to BOI-promoted companies are granted by the BOI through the Investment Promotion Act of 2001.

4.1 Overview of Thailand's Economic and Investment Situation

In the 1960s and 1970s, Thailand's wealth of natural resources, along with an entrepreneurial private sector and skilful economic management, meant that its economy grew quickly and became one of the most prosperous in the developing world.³³⁴ Since the 1970s, economic growth has been significantly driven by investment.³³⁵ Before the Asian financial crisis of 1997, economic development was perceived as a continuous success, with an average economic growth rate of 8% per year³³⁶, the second highest growth rate after China.³³⁷ Overall, economic growth in the

³³³ The World Bank, 'Global Slump and Political Uncertainty to Continue to Weigh on the Thai Economy in 2009' (2008) Bangkok
<<http://www.worldbank.or.th/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/THAILANDNEXTN/0,,contentMDK:22006157~menuPK:333302~pagePK:2865066~piPK:2865079~theSitePK:333296,00.html>> accessed 10 November 2011.

³³⁴ Federal Research Division Library of Congress, 'Thailand Economic and Financial Development' Countries Studies, September 1987 <<http://lcweb2.loc.gov/frd/cs/thtoc.html>> accessed 10 November 2011 referred to as 'Thailand Economic and Financial Development countries studies'.

³³⁵ The World Bank: Poverty Reduction and Economic Management Sector Unit East Asia and Pacific Region, 'Thailand Investment Climate, Firm Competitiveness and Growth Report' No. 36267-TH (2006) <http://www.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/08/11/000160016_20060811101441/Rendered/INDEX/362670TH.txt> accessed 10 November 2011.

³³⁶ Peter Brimble, 'Foreign Direct Investment: Performance and Attraction: The Case of Thailand' (The Brooker Group PLC 2002) 7
<<http://www.imf.org/external/pubs/ft/seminar/2002/fdi/eng/pdf/brimble.pdf>> accessed 10 November 2011. Penny Van Esterik, *Materialising Thailand* (Berg 2000) 10.

mid-1990s was driven by FDI inflows and exports with key competitors.³³⁸ The Asian financial crisis,³³⁹ which started in Thailand in 1997, was the key factor affecting Thai economic performance.³⁴⁰ It began when ‘large external deficits accompanied by tremendous external borrowings excessively exposed the country to foreign exchange risk in both the financial and corporate sectors.’³⁴¹ The Thai government reacted by converting the fixed exchange rate to a managed float system.³⁴² According to Lauridsen, ‘financial liberalisation in an uncontrolled financial sector resulted in misallocation and mismatching’.³⁴³ He also took the view that political instability, indecisiveness and mismanagement at the political and administrative levels also contributed to the financial meltdown in Thailand.³⁴⁴

As a result, the Thai economy lost the momentum it had been gathering over the previous few decades, and it failed to meet the targets set out in its ‘Fifth Economic Development Plan’, largely as a result of ‘serious macroeconomic imbalances’³⁴⁵

A number of factors contributed to the 1997 crisis. Crucially, corporations had taken on too much short-term, foreign currency debt, at a time when exchange rates had been pegged to the dollar, encouraging external borrowing. Economies in all parts of the region had been overheating, and property and stock market bubbles developed and burst.

For a more in-depth discussion on economic situation in Thailand before and during the 1997 crisis, see <<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFIC>> accessed 10 November 2011.

³³⁷ Kaspar Richter, ‘Thailand’s Growth Path: From Recovery to Prosperity’ (2006) World Bank Policy Research Working Paper 3912, May 2006, 62
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917483> accessed 10 November 2011.

³³⁸ Brimble (Foreign Direct Investment) (n 336) 7.

³³⁹ For an analysis of the causes of the crisis in Thailand at both national and international scales, see Jim Glassman ‘Economic Crisis in Asia: The Case of Thailand, Economic Geography’ (2011) (77) (2) 122-147 <<http://www.jstor.org/stable/3594061>> accessed 10 November 2011.

³⁴⁰ For more details regarding the Asian financial crisis and the factors, see Euamporn Tasarika, ‘A Recapitulation of Asian Financial Crisis and Institutional Factors’ (2004) Thammasat Economic Journal, Vol.22, No.1 <<http://econ.tu.ac.th/journal/Material/Previous/Y22n1p138.pdf>> accessed 10 November 2011.

³⁴¹ Ibid 140.

³⁴² Kaosa-ard Mingsarn, ‘Economic Development and Institutional Failures in Thailand’ (1998), TDRI Quarterly Review Vol.13, No. 1, March 1998, 3-11,
<http://www.info.tdri.or.th/library/quarterly/text/m98_1.htm> accessed 10 November 2011.

³⁴³ Laurids S. Lauridsen ‘The Financial Crisis in Thailand: Causes, Conduct and Consequences?’ (1998), Roskilde University, Denmark, World Development (26) (8) 1575.

³⁴⁴ Ibid 1575.

³⁴⁵ Thailand Economic and Financial Development countries studies (n 334).

including increasing budget deficits, decreased savings and investment rates and increased debts.

The Thai Baht depreciated against the US Dollar and reached a record low of THB 44 per USD 1, whereas it had been THB 25 per USD 1 in 1995.³⁴⁶ This crisis resulted in comparatively decreased levels of both private domestic and foreign investment.³⁴⁷ Furthermore, levels of investment fell dramatically, from 42% of GDP in 1996 to 20 % in 1998.³⁴⁸ A significant proportion of this remaining investment was in the non-traded sector, limiting its potential for enriching the economy.³⁴⁹ After the crisis, export performance worsened considerably, falling by 1.3% following earlier years of between 10 and 20% growth rates. The slowdown in world trade, the emergence of China in global markets, EU restrictions on certain Thai exports and fluctuations in global electronic markets all contributed to the rapid decline in exports.³⁵⁰ A USD17.2 billion loan had to be arranged through the International Monetary Fund (IMF),³⁵¹ and the government adopted a reform package for macroeconomic stabilisation and to tackle the crisis in financial institutions.³⁵² These methods, designed by the IMF, assured price stability, a viable balance of payments, and sustainable growth in Thailand.³⁵³

The Ninth National Economic and Social Development Plan (2002-2006) was formulated in response to the 1997 crisis, to articulate a strategy for the country's growth. It took into account political, social, administrative and external factors,³⁵⁴ and

³⁴⁶ Bangkok Bank, 'Thailand's key economic indicators: Exchange Rates', BBL Economic Research Department Monthly Report 1 December 1997 (in Thai).

³⁴⁷ For more details on Thailand financial crisis in 1997, see Chalongphob Sussangkarn, 'Thailand's Debt Crisis and Economic Outlook' (1998) Thailand Development Research Institute <<http://www.tdri.or.th/reports/publiced/m42.pdf>> accessed 10 November 2011.

³⁴⁸ Cavan Hogue (ed), *Thailand's Economic Recovery* (Institute of Southeast Asian Studies 2006) 4-5.

³⁴⁹ *Ibid* 5.

³⁵⁰ Srawooth Paitoonpong and Shigeyuki Abe, 'The Thai Economy: A Picture from the Past' (2004), TDRI Quarterly Review.

³⁵¹ *Ibid*

³⁵² *Ibid*.

³⁵³ *Ibid*.

³⁵⁴ USA International Business Publications, *Thailand Research & Development Policy Handbook* (Int' Business Publications 2007) 83-84.

adopted the philosophy of a ‘sufficiency economy’³⁵⁵ a theory developed by the current king.³⁵⁶ This theory stresses the middle path, moderation and due consideration in all manner of conduct as the guiding framework for national development.³⁵⁷ It is promoted as a framework by which the Thai people can live.

From 2002 to 2004, a slowdown in domestic demand caused a decrease in overall economic growth rate. The causes were domestic political uncertainty, high energy prices and increasing interest rates.³⁵⁸ The growth trend recovered in 2006, when the demand for exports from Thailand increased by 9% and 18% in volume and value respectively,³⁵⁹ however, in 2006, political upheaval in the country resulted in the end of Prime Minister Thaksin Shinawatra’s political career and the overthrowing of his party (Thai Rak Thai).³⁶⁰ The media, led by Sondhi Limthongkul, raised questions about the role of the constitution in breaking political deadlock, ongoing unrest in three provinces in the southern part of Thailand, the need for political stability and the considerable difference in political orientation between urban and rural groups, as well as the prime minister’s perceived conflicts of interest.³⁶¹ The coup was organised by a council for democratic reform led by Sonthi Boonyatglin.³⁶² The movement had its origins in a number of grievances against Thaksin, most notable of which were criticisms of his government’s creation of an unprecedented rift in society, privatisation plans, the claim that Thaksin showed no respect for the king, and the highly

³⁵⁵ See Sooksan Kantabutra ‘Development of the Sufficiency Economy Philosophy in the Thai Business Sector: Evidence, Future Research & Policy Implications’ (2006).
<<http://www.sufficiencyeconomy.org/old/en/files/26.pdf>> accessed 10 November 2011.

³⁵⁶ ‘The King has been known for his commitment to human development’. See Hakan Bjorkman, ‘Honouring the World’s ‘Development King’ (no year)
<<http://www.sufficiencyeconomy.org/old/en/files/27.pdf>> accessed 10 November 2011.

³⁵⁷ USA International Business Publications (n 354) 84.

³⁵⁸ Zsin WoonTeoh, Santitarn Sathirathai, David Lam, Chung Han Lai and Kriengsak Chareonwongsak, ‘Thailand Automotive Cluster, Microeconomics of Competitiveness (2007) Final Paper,
<http://www.isc.hbs.edu/pdf/Student_Projects/Thailand_AutomotiveCluster_2007.pdf> accessed 10 November 2011.

³⁵⁹ Ibid 4.

³⁶⁰ Ibid 2.

³⁶¹ John Funston, *Divided over Thaksin: Thailand coup and problematic transition* (Institute of Southeast Asian Studies, 2009) 172. Thak Chaloeontiarana, *Thailand: the politics of despotic paternalism* (SEAP Publication, 2007) xvii.

³⁶² Unknown, ‘Thai PM deposed in military coup’ *BBC News* (United Kingdom, 20 September 2006)
<<http://news.bbc.co.uk/1/hi/world/asia-pacific/5361512.stm>> accessed 10 November 2011.

controversial fact that Thaksin did not pay taxes on the sale of Shin Corporation to Temasek Holdings.³⁶³ When Thaksin eventually went into self-imposed exile, and the Council for National Security came into power, a military government led by Surayud Chulanont, took interim control.³⁶⁴ This government transpired to be indecisive, implementing policies inconsistently and unable to lead the country through a period of turmoil.³⁶⁵

Since 2006, Thailand has been experiencing an economic downturn due to political unrest.³⁶⁶ During the same period, global economic growth also continued to slow down as evidenced by the downward economic growth of the United States³⁶⁷, Japan and European countries.³⁶⁸ This trend also led to a slowdown in demand for exports from Thailand.³⁶⁹

Thailand has one of the fastest growing economic markets in the world.³⁷⁰ Consequently, many investors consider Thailand to be a gateway to Southeast Asia and

³⁶³ Chowdhury (n 4) 130-131. According to the editor of the website [thaiwebsites.com](http://www.thaiwebsites.com), 'In the months prior to the coup, the Shinawatra family sold their stake in Shin Corporation to Temasek Holdings. The Shinawatra and Damapong families netted about THB 73 billion (approximately GBP 1.47 billion) tax-free from the sale, using a regulation that made individuals who sell shares on the stock exchange exempt from capital gains tax. The deal made Thaksin the target of accusations of corruption and selling an asset of national importance to a foreign entity. Practically speaking, this turned an important part of public opinion against Thaksin Shinawatra.' <<http://www.thaiwebsites.com/political-history.asp>> accessed 10 November 2011.

³⁶⁴ Nelson (n 3). On the 19 September 2006, after a long period of political instability, Prime Minister Shinawatra's government was ousted by General Sonthi Boonyarataglin in a bloodless coup. The Prime Minister was, at the time, out of the country, and the Council of National Security formed an interim government. See <<http://www.thaiwebsites.com/political-history.asp>> accessed 10 November 2011.

³⁶⁵ Funston (n 361) 172.

³⁶⁶ See Andrew J. Barden and Yumi Kuramitsu, 'Thailand's Baht Rebounds as Coup May Break Political Deadlock' *Bloomberg* (New York 21 September 2006) <<http://www.bloomberg.com/apps/news?pid=20601080&sid=avixPFpb8eqs&refer=asia>> accessed 10 November 2011.

³⁶⁷ Organisation Economic Co-operation and Development, *Economic Outlook*, ISSN 0474-5574, 12/2008, 2008 (2) 93-102.

³⁶⁸ The World Bank Office –Bangkok, 'Thailand Economic Monitor, April 2007' 18 <http://siteresources.worldbank.org/INTTHAILAND/Resources/Economic-Monitor/2007april_tem_report.pdf> accessed 10 November 2011 referred to as 'Thailand Economic Monitor'. Mikhail Ershov, 'The Global Financial Crisis', *Problems of Economic Transition* (M.E. Sharpe, Inc Nov 2010, Vol. 53 No. 7) 37-60. Economist Intelligence Unit, 'EU: Shared pain' (*The Economist* 16-30 April 2009) 1-2.

³⁶⁹ Barden and Kuramitsu (n 366) 28.

³⁷⁰ The Board of Investment of Thailand <http://www.boi.go.th/thai/why/thailand_advantages.asp> accessed 10 November 2011 referred to as 'BOI: Advantages'.

the Greater Mekong sub-region, comprising Cambodia, China, Laos, Myanmar (Burma) and Vietnam.³⁷¹ Due to its location, setting up a business in Thailand allows foreign businesses opportunities to trade conveniently with much of Asia, including China, India and member countries of the Association of Southeast Asian Nations (ASEAN).³⁷²

Thailand appeals to foreign investment, as it enjoys abundant natural resources as well as a skilled and cheap labour force.³⁷³ The country's infrastructure has been improving, with standardised transportation facilities covering major routes.³⁷⁴ Furthermore, communications and information technology networks are well established to meet the requirements of business.³⁷⁵ The country's educational standards have been reformed since the 1999 National Education Act, which implemented new organisational structures, promoted the decentralisation of administration and called for innovative learner-centred teaching practices.³⁷⁶ The Thai education system provides nine years of compulsory education, with twelve years of free basic education guaranteed by the constitution.³⁷⁷ The literacy rate in 2007 was 92.6%,³⁷⁸ and a wide range of subjects are available in educational institutions to respond to the market's needs. Thailand also offers facilities and qualified medical personnel recognised throughout the world. They are funded in part by the increase in medical tourism by international patients due to Thailand's expertise and reasonable costs.³⁷⁹ Taking into account all of the above factors, as well as the fact that Thailand is ranked 19th out of 183 by Doing Business

³⁷¹ Oxford Business Group, *The Report: Thailand* (2011) 143.

³⁷² BOI: Advantages (n 370).

³⁷³ John Benson and Ying Zhu, *Unemployment in Asia*, (Routledge, 2005) 160 and Edward Barbier, *Natural resources and economic development* (Cambridge University Press 2005) 233.

³⁷⁴ Somphong Wanapha, 'The Shifting Paradigm of FDI Policy and Promotion in Thailand' (2002) (OECD Global Forum on International Investment: Attracting Foreign Direct Investment for Development, Shanghai, 5-6 December 2002). 2. The World Bank, 'Thailand Investment Climate Assessment Update' (Report No. 44248-TH, June 2008) 88 referred to as 'Thailand Investment Climate Assessment Update'. Richter (n 337) 30.

³⁷⁵ Thailand Board of Investment, 'Thai ICT Industry', Thailand Investment Review Vol. 20, No. 4 (April 2010).

³⁷⁶ Ministry of Education, 'Towards a Learning Society in Thailand: An Introduction to Education in Thailand' <http://www.bic.moe.go.th/fileadmin/BIC_Document/book/intro-ed08.pdf> accessed 10 November 2011.

³⁷⁷ Constitution of Thailand 2007, art 49.

³⁷⁸ Library of Congress, 'Thailand country profile' Federal Research Division (July 2007).

³⁷⁹ BOI: Advantages (n 370).

2011, it is apparent why Thailand has become one of the most attractive destinations in the world to set up a business.³⁸⁰

4.2 Foreign Direct Investment Inflows in Thailand

Foreign capital flows are usually divided into foreign portfolio investment (FPI) and foreign direct investment (FDI). FPIs are defined by Mooij and Ederveen as ‘foreign investments in cases where the investor controls less than some fixed proportion of the capital stock that is invested in’.³⁸¹ FPI refers to household investment in foreign securities. FDI, on the other hand, has been defined by various sources in a number of different ways at different times.³⁸² According to the Organisation for Economic Co-operation and Development (OECD),

Foreign direct investment reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise.³⁸³

³⁸⁰ The International Bank for Reconstruction and Development, ‘Doing Business 2011, Making a Difference for Entrepreneurs’ (2010) The World Bank, A co-publication of The World Bank and the International Finance Corporation
<<http://www.doingbusiness.org/~media/FPDKM/Doing%20Business/Documents/Annual-Reports/English/DB11-FullReport.pdf>> accessed 10 November 2011.

³⁸¹ Ruud A de Mooij and Sjeff Ederveen, ‘Taxation and Foreign Direct Investment: A Synthesis of Empirical Research’, Center for Economic Studies & Ifo Institute for Economic Research Working Paper No.588 (October 2001).3.

³⁸² See Imad A. Moosa, *Foreign direct investment: theory, evidence, and practice* (Palgrave Macmillan, 2002) 1-3 and United Nations Conference on Trade and Development, ‘Definitions of FDI’ <<http://www.unctad.org/Templates/Page.asp?intItemID=3147&lang=1>> accessed 10 November 2011. Neil K. Patterson, *Foreign direct investment: trends, data availability, concepts, and recording practices* (International Monetary Fund, 2004) 3-4.

³⁸³ OECD, ‘OECD Benchmark Definition of Foreign Direct Investment’ (2008), 4th edn, the Investment Committee's Working Group on International Investment Statistics Paris 48 <<http://www.oecd.org/dataoecd/26/50/40193734.pdf>> accessed 10 November 2011.

FDI occurs when an investor based in one country (the home country) acquires an asset in another country (the host country), with the intent to manage that asset.³⁸⁴ The management dimension is what distinguishes foreign direct investment from portfolio investment in foreign stocks, bonds and other financial instruments or FPI.³⁸⁵ According to Kasipillai, FDI comprises three components: first, new equity from the parent company in the home country to the subsidiary located in the host country; second, long- and short-term net loans from the parent to the subsidiary company and third, reinvested profits for the subsidiary.³⁸⁶ From these definitions of FDI, it becomes apparent that one of its main characteristics is to ‘control or participate in’ the running of a business enterprise. In this respect, the operations of FDI companies are closely related to those of MNEs (multinational enterprises),³⁸⁷ described broadly in this thesis as firms ‘which operate and control income creation activities in more than one country’.³⁸⁸

Prior to the Japanese yen’s appreciation in 1985, Thailand was considered a less attractive destination for foreign investors in Asia-Pacific countries.³⁸⁹ As such the country depended mostly on FDI inflows from the United States and Japan, which accounted for approximately 50% of all incoming FDI.³⁹⁰ Due to the relocation of investment from Japan, which was looking for overseas production bases to escape appreciating home currencies,³⁹¹ foreign investment in Thailand continued to increase,

³⁸⁴ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (2nd edn Cambridge University Press 2004) 7.

³⁸⁵ For distinctions between portfolio investment and foreign direct investment, see Sornarajah (n 383) 7-9.

³⁸⁶ See Jayapalan Kasipillai, ‘Malaysia: Linking FDI with Investment Incentives?’ (2001) *Asia-Pacific Tax Bulletin* Vol. 7, No.2.

³⁸⁷ Sarinthorn Sosukpaibul, *The relationship among foreign direct investment flows, government policy and investment strategy: the case of Thailand* (Doctor of Philosophy, Waseda University 2007) 16.

³⁸⁸ John H. Dunning, ‘The Determinant of International Production’ (1973) (*Oxford Economic Paper*, vol 25, no.3) 289-336.

³⁸⁹ Mingsarn Kaosa-ad. ‘Economic Development and Institutional Failures in Thailand’ (1998), *Thailand Development Research Institute Quarterly Review* Vol.13, No. 1 (March 1998) 239 <http://www.info.tdri.or.th/library/quarterly/text/m98_1.htm> accessed 10 November 2011.

³⁹⁰ Chanikarn Teresa Tosompark and Kevin Daly, ‘The Determinants of FDI Inflows – Recent Evidence from Thailand’ (June 25, 2010) 1 <<http://ssrn.com/abstract=1630642>> accessed 10 November 2011.

³⁹¹ *Ibid.*

particularly in the automobile parts and electronics industries.³⁹² Until 1996, Thailand had been one of the ASEAN 4 countries (along with the Philippines, Malaysia and Indonesia) which attracted a large number of foreign investors. FDI inflows in many ASEAN 4 countries decreased as a result of the 1997 crisis, although at the time Thailand's inflows were not significantly affected. Among the four countries, Thailand showed the highest FDI growth between 1996 and 1999.³⁹³ In 2006, investment from Singapore ranked the highest among foreign investors in Thailand. There has been an increased trend of intra-ASEAN investment, particularly for mergers and acquisitions, indicating cross-border integration.³⁹⁴ As explained by Santipitaksakul:

The increasing significance of Singaporean investment might be explained by the maturity of Singapore's sovereign wealth funds, such as the Government of Singapore Investment Corporation, and Temasek Holding.³⁹⁵

The Singaporean company Temasek Holding purchased Shin Corporation, owned by former Prime Minister Thaksin's family. This transaction raised the question as to whether it had breached Thai foreign ownership laws.³⁹⁶

Current sources of FDI will be discussed in Section 4.6 of this chapter.

4.3 The Importance of FDI on Thai Economic Growth

Foreign investment has played a significant role in economic development³⁹⁷ in both developed and developing countries.³⁹⁸ The positive effect of host country economic

³⁹² Kaosa-ad (n 389).

³⁹³ WoonTeoh et al (n 358) 7.

³⁹⁴ Daljit Singh and Tin Maung Maung Than, *Southeast Asian Affairs 2008* (Institute of Southeast Asian Studies 2008) 38.

³⁹⁵ Siriwan Santipitaksakul, 'The Effect of Liberalisation of Foreign Direct Investment on the Economic Development of Thailand: An Empirical and Political Economy Approach' (Doctor of Philosophy, University of Westminster 2010) 127.

³⁹⁶ Singh & Than (n 394) 24-25.

³⁹⁷ When considering economic development which contributes to one nation's growth, one should not overlook economic and social progress. The concept of economic development embraces a number of aspects including political freedom, social justice, and environmental soundness. Therefore, the economic growth of the country also depends on health and education standards, the political system, distribution of wealth, and environmental management. See Xiaolun Sun, 'Foreign Direct Investment and Economic Development What Do the States Need to Do?' (2002) Prepared by the Foreign Investment Advisory Service for the Capacity Development Workshops and Global Forum on Reinventing Government on

growth on FDI inflow has been confirmed by various empirical studies³⁹⁹ as it contributes an additional source of capital to the host country. As demonstrated by Yussof and Ismail, FDI capital inflow generates investment in production activities beyond the capacity of domestic savings.⁴⁰⁰ In addition, research by Nunnenkamp shows that, among other types of capital inflow, FDI has proved to be more stable.⁴⁰¹ In the context of developing countries, it is accepted as a major factor in achieving sustainable development.⁴⁰² At the time of the Asian financial crisis in 1997-1998, FDI proved its importance in developing countries, since it contributed capital inflow when it was most needed.⁴⁰³ In terms of GDP growth, statistical analyses by Hansen and Rand show that the level of GDP is positively affected by a higher ratio of FDI in gross capital formation.⁴⁰⁴ Their study argues that FDI has a significant long-term impact on

Globalization, Role of the State and Enabling Environment. Sponsored by the United Nations Marrakech, Morocco <<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006348.pdf>> accessed 10 November 2011.

³⁹⁸ Moosa (n 382) 68-101; Lou Anne Barclay, *Foreign direct investment in emerging economies: corporate strategy and investment behaviour in the Caribbean* (Routledge 2000) and Theodore H. Moran, *Foreign direct investment and development: the new policy agenda for developing countries and economies in transition* (Institute for International Economics 1999).

³⁹⁹ Reinhilde Veugelers, 'Locational determinants and rankings of host countries: An empirical assessment' (1991) (*Kyklos*, 44, 3) 363-382. Mark P. Taylor and Lucio Sarno, 'Capital flows to developing countries: Long and short-term determinants' (1999) (*World Bank Economic Review*, 11) 451-470. Len J. Trevino, John D. Daniels and Harvey Arbelaez, 'Market reform and foreign direct investment in Latin America: Evidence from an error correction model' (2002) (*International Trade Journal*, 16, 4) 367-392.

⁴⁰⁰ Yussof and Ismail (n 331) 93; see Robert E. Lipsey, 'The Role of Foreign Direct Investment in International Capital Flows' in Martin Feldstein (ed), *International Capital Flows* (University of Chicago Press 2000) 307-330.

⁴⁰¹ For a more detailed discussion, see Peter Nunnenkamp, 'Too Much, Too Little, or Too Volatile? International Capital Flows to Developing Countries in the 1990s' (2001) Kiel Working Papers 1036. Kiel Institute of World Economics <<http://www.econstor.eu/bitstream/10419/2571/1/kap1036.pdf>> accessed 10 November 2011.

⁴⁰² Ibid 14; see Jagdish Bhagwati, 'Why Multinationals Help Reduce Poverty?' (2006) *World Economy* 29(11), 211-228.

⁴⁰³ Prema-chandra Athukorala, 'FDI in Crisis and Recovery: Lessons from the 1997-98 Asian Crisis' (2003) *Australian Economic History Review*, 43(2), 197-213.

⁴⁰⁴ Henrik Hansen and John Rand, 'On the Causal Links between FDI and Growth in Developing Countries' (University of Copenhagen Discussion Paper December 2004) 16.

GDP in every region regardless of a country's level of development.⁴⁰⁵ There is, however, research arguing that it can cause disadvantages to developing countries.⁴⁰⁶

As stated by Brimble, FDI has long played an important role in economic development.⁴⁰⁷ Not only does the country benefit from FDI in foreign exchange inflow, but one study shows that foreign companies also manage capital around 50% more efficiently than Thai companies.⁴⁰⁸ The inflow of capital also 'improves the internal allocation of capital, particularly if the return on capital is higher in the host country than in the source country.'⁴⁰⁹ Secondly, foreign investments have brought into the host country a large amount of technology and knowledge transfer including production, employment and environmental standards, as well as having an indirect effect on the community.⁴¹⁰ A number of technological activities and innovative training programmes are derived from foreign enterprises,⁴¹¹ while Kasipillai and Nowicki also confirm that technological development provided by foreign investors has played a significant role in the economic growth of the country.⁴¹² Foreign businesses also generate government revenue through direct taxes on profits, local taxes and indirect tax, such as VAT.⁴¹³ The transfer of technology more than outweighs the value of exports, because FDI enhances the skills and capabilities of the local community,

⁴⁰⁵ Ibid.

⁴⁰⁶ See Theodore H. Moran, Edward M. Graham and Magnus Blomström, *Does foreign direct investment promote development?* (The Institute for International Economics 2005)

⁴⁰⁷ Brimble, 'Foreign Direct Investment' (n 336) 334.

⁴⁰⁸ These results were calculated from firm-level data of more than 1,000 firms from which a simple production function was estimated. More details are provided in Johanna White and Stefan Koeberle, *Building Thailand's Competitiveness: The Road to Economic Recovery* (World Bank 1998).

⁴⁰⁹ Yussof & Ismail (n 331) 94.

⁴¹⁰ Sanjaya Lall, Shūjirō Urata, *Competitiveness, FDI and technological activity in East Asia* (Edward Elgar Publishing 2003) 354-356.

⁴¹¹ See Peter Brimble, James Sherman, Atchaka Sibuntuang and Witit Rachatanun, 'The Broader Impacts of Foreign Direct Investment on Economic Development in Thailand: Corporate Responses' (1999) Paper Prepared for the High-Level Roundtable on Foreign Direct Investment and its Impact on Poverty Alleviation, Singapore, December 14-15, 1998; Revised April 1999.

⁴¹² Kasipillai (n 386).

⁴¹³ Pachyaporn Amoravej 'Investment Promotion' (2000) Parliament Publication, Thailand, No. 48, 90. (In Thai).

thereby contributing to sustainable development in the host country.⁴¹⁴ According to a report prepared by the Thailand Development Research Institute (TDRI) in 1999, the benefits of FDI are still significant because foreign firms provide long-term commitments to projects and, as a result, encourage local firms to fulfil their commitments.⁴¹⁵

Additionally, according to Kasipillai, foreign investment stimulates competition and innovation.⁴¹⁶ Since foreign investors establish their enterprises in a domestic market in the form of suppliers and joint ventures, knowledge in specific sectors is transferred to related local firms.⁴¹⁷ In addition, domestic firms may have to develop their products in order to compete with those foreign firms, thereby enhancing export capability to earn more profits.⁴¹⁸ Consequently, consumers benefit from good quality products at lower prices.⁴¹⁹ A further study shows that FDI, with its technology and management bases, when operated responsibly, can facilitate improvements in local environmental and social standards to a higher standard than domestic firms.⁴²⁰

⁴¹⁴ Stephen Thomsen, 'South-East Asia: The Role of Foreign Direct Investment Policies in Development' (1999) Working Papers on International Investment. OECD, Paris, 28 <<http://www.fatf-gafi.org/dataoecd/5/24/1897793.pdf>> accessed 10 November 2011.

⁴¹⁵ See Thailand Development Research Institute 'Forecast of the Twenty Most Important Thai Exported Items in the World market' (1998) Paper prepared for the Department of Business Economics, Ministry of Commerce, Thailand.

⁴¹⁶ Kasipillai (n 386) 22.

⁴¹⁷ Thomsen (n 414) 6.

⁴¹⁸ Mckinsey & Company, 'Mckinsey & Co Report: Thailand' 17-19 <<http://www.mckinsey.com/mgi/reports/pdfs/thailand/thiland.pdf>> accessed 10 November 2011.

However, research by Mansfield and Romero guaranteed that the transfer of technology by parent companies to subsidiaries in the host countries is faster than joint ventures or licensees. See Mansfield Edwin and Antony Romero (1980) 'Technology transfer to overseas subsidiaries by US-based firms' (1980), *Quarterly Journal of Economics* 95, No.4.

⁴¹⁹ Amoravej (n 413).

⁴²⁰ Sun (n 397) 12. For further discussion of the environmental implications of FDI, see Charles S. Pearson, *Multinational corporations, the environment and the third world* (Duke University Press 1987); Jeffrey H. Leonard, *Pollution and the struggle for the world product* (Cambridge University Press 1998); Bradford S. Gentry (ed.) *Private capital flows and the environment: lessons from Latin America* (Edward Elgar Publishing 1998); and David Wheeler, 'Racing to the bottom? Foreign investment and air pollution in developing countries' (2001) The World Bank <<http://ideas.repec.org/p/wbk/wbrwps/2524.html>> accessed 10 November 2011.

The significance of FDI to Thailand is clear from research conducted by the Joint Foreign Chambers of Commerce in Thailand (JFCCT),⁴²¹ which shows the benefits granted by MNEs in terms of advanced standards of employment practice.⁴²² US investors, for example, have created technology transfer in computers and parts, computer software, refineries, petrochemicals, gas and oil development. These also include service industries such as insurance and banking.⁴²³ Furthermore, a number of joint ventures with Japanese minority shareholders have proved beneficial to Thailand, since their Thai employees are provided with Japanese-style training in work quality, organisation and efficiency.⁴²⁴ Regarding technological spill overs,⁴²⁵ policymakers need to be aware of the policy in assisting domestic firms to accumulate and develop ownership-specific advantages, as explained by Santipitaksakul.⁴²⁶ FDI enhances the amount of exports and trading values. Past research by the IMF has shown that, in a correlation between export growth and FDI inflow, rapid increases in exports of the ASEAN 4 countries was due to foreign capital.⁴²⁷ Investors from other ASEAN countries have played an important role, too, as regional trading within ASEAN accounted for 18% of Thailand's total exports in 1998.⁴²⁸ Due to the creation of a regional trading group known as the ASEAN Free Trade Area (AFTA), an increasing

⁴²¹ Ministry of Foreign Affairs, 'Business Handbook: Section 4 Export Opportunities: Thailand in the global economy' 14 <http://www.mfa.go.th/internet/document/h_sec4fin.pdf > accessed 10 November 2011 referred to as 'Business Handbook'.

⁴²² Ibid.

⁴²³ Ibid.

⁴²⁴ Ibid 19.

However, the technologies transferred, especially on higher level design and development, from Japanese companies are protected due to their traditional practice. Another argument is that FDI merely generates a limited amount of technology transfer to ASEAN 4. Thomsen found that Thailand has benefited from transfer only in training of high-level staff, and not sufficiently in general skills. See Thomsen (n 414) 28.

⁴²⁵ Or an important channel through which domestic firms benefit from foreign direct investment. See Emma Xiaoqin Fan, 'Technological Spillovers from Foreign Direct Investment – A Survey' ERD Asian Development Bank December Working Paper Series no. 33, 2002 <www.adb.org/Documents/ERD/Working_Papers/wp033.pdf> accessed 10 November 2011.

⁴²⁶ Santipitaksakul (n 395) 134.

⁴²⁷ Yussuf & Ismail (n 331) 93.

⁴²⁸ Business Handbook (n 421) 20.

volume of intermediate goods began being traded within the region,⁴²⁹ the consequence of which was a recovery of export volumes in the second quarter of 1998.⁴³⁰

More specifically, FDI benefited Thailand and enabled it to recover from the 1997 Asian financial crisis.⁴³¹ The number of foreign investment projects approved by BOI fell from THB 326 billion in 1996 to THB 136 billion in 1999,⁴³² but after the 1997 economic crisis, FDI re-capitalised failing industries, introduced new technologies, generated income for employees and contributed towards social sustainability.⁴³³ As indicated by Yussof and Ismail, the ASEAN 4 need to develop a level of product quality, market efficiency and ability to enhance technology,⁴³⁴ and FDI is likely to contribute to these results. In this respect, Thailand should rely on FDI 'as an adjunct rather than as an alternative'.⁴³⁵

In 2001, the increase in foreign investment, especially in export-oriented projects, resulted in a total value of THB 210 billion in 2001.⁴³⁶ There has also been a movement from exporting mainly primary goods to exporting more manufactured goods, which meant a structural change from an agriculture-based to an industry-based export status.⁴³⁷ This change was mainly a result of the increased volume of export-oriented FDI. It can be concluded that FDI and private investment are crucial to the Thai economy,⁴³⁸ because it has helped to generate employment opportunities and has been proven to save many jobs by capitalising failing local industries.⁴³⁹

⁴²⁹ Ibid.

⁴³⁰ Ibid.

⁴³¹ Sosukpaibul (n 387) 6.

⁴³² Brimble *et al* (n 411) 17.

⁴³³ Ibid 9.

⁴³⁴ Yussof & Ismail (n 331).

⁴³⁵ Ibid.

⁴³⁶ Brimble *et al* (n 411) 17.

⁴³⁷ Yussof & Ismail (n 331) 93.

⁴³⁸ Woon Teoh *et al* (n 358) 7.

⁴³⁹ Lall and Urata (n 410) 356-357.

4.4 Thai Government Policy on Investment Promotion and the Board of Investment

The preceding discussion revealed the significance of FDI to Thailand. It is therefore not surprising that one of the key policies of the Thai government is to welcome and encourage foreign investment.⁴⁴⁰

Apart from measures adopted by the Thai government to encourage investment, plans for investment promotion are clearly set out by the BOI. Encouraging investment from abroad is one of the BOI's primary objectives major goal of the BOI and the Industrial Estate Authority of Thailand (IEAT). There are also other government agencies that play a role in creating an appropriate environment for investment notably the Revenue Department, which takes responsibility for the general tax system and specific tax incentives, which will be discussed in the following chapter. The next chapter will discuss tax incentives offered by the BOI and the Revenue Department in more detail. The BOI is responsible for investment projects in terms of locations, operations and other criteria.

Another authority which supports investment is the IEAT, which was established under the Industrial Estate Authority of Thailand Act B.E. 2522 (1979). Its roles and responsibilities of the IEAT are to develop industrial estates with an extensive infrastructure and range of facilities.⁴⁴¹ The IEAT maintains a policy of industrial development through the use of zoning, including allocating land for expansion, improving land conditions and assisting businesses by providing facilities and accommodation.⁴⁴²

For an analysis of the determinants of FDI inflows into Thailand from economic perspectives, see Sutana Thanyakhan, 'The Determinants of FDI and FPI in Thailand: A Gravity Model Analysis' (Doctor of Philosophy, Lincoln University 2008).

⁴⁴⁰ For discussions on host countries' policies on FDI in general, see Magnus Blomström, Ari Kokko and Mario Zejan, *Foreign direct investment: firm and host country strategies* (Palgrave Macmillan 2000).

⁴⁴¹ The Custom Department of Thailand, 'Investment Privileges from IEAT' <http://www.customsclinic.org/index.php?option=com_content&view=article&id=399&Itemid=367&lang=en> accessed 10 November 2011.

⁴⁴² See the Industrial Estate Authority of Thailand Act (No.4) B.E. 2550 (2007). More information is available at <http://thailandall.info/?page_id=78> accessed 10 November 2011.

This thesis is concerned primarily with the role of the BOI, so there follows a detailed discussion of its history and functions in order to set the context for further analysis.

The BOI was established on 21 July 1966 under the Promotion of Industrial Investment Act of 1965.⁴⁴³ The board, at that time, was a department under the office of the prime minister, with the secretary of the board acting as its head.⁴⁴⁴ However, the first investment promotion law was initiated in 1960 as the Promotion of Industrial Investment Act of 1960.⁴⁴⁵ During the 1960s and early 1970s, Thailand's industrial policies were oriented in favour of import substitution,⁴⁴⁶ although after the implementation of the 1972 Investment Promotion Act, industrial promotion policy instead began to favour exports.⁴⁴⁷

Currently, the BOI aims to provide investment incentives to foreign and local investors who invest in activities considered by the government as important and which could be beneficial to local residents, employment, knowledge transfer and long-term development. The two main objectives of the BOI are to decentralise the location of firms from the Bangkok area and to attract specific types of investment or priority activities. The main reasons for the policy on decentralisation were that Bangkok and the surrounding provinces had been the most popular locations for foreign investment, which led to pollution, congestion and shortages in skilled labour because the necessary supporting infrastructure could not be developed sufficiently and quickly enough.⁴⁴⁸ Furthermore, the problem led to an increase in the unequal distribution of wealth and prosperity between Bangkok residents and those living outside of the capital.⁴⁴⁹ The BOI regularly stipulates and revises investment promotion schemes in accordance with

⁴⁴³ Thailand Board of Investment, 'History of the Board of Investment' <<http://www.boi.go.th/clean/index.asp?mid=2>> accessed 10 November 2011 (in Thai) referred to as 'History of the Board of Investment'.

⁴⁴⁴ Ibid.

⁴⁴⁵ 'Investment promotion laws' will be described in detail in Section 4.5 of this thesis.

⁴⁴⁶ Peter G. Warr and Bhanupong Nidhiprabha, *Thailand's macroeconomic miracle: stable adjustment and sustained growth* (World Bank Publications 1996) 79.

⁴⁴⁷ Ibid.

⁴⁴⁸ T.G. McGee and Ira M. Robinson (eds), *The Mega-Urban Regions of Southeast Asia* (UBC Press 1995) 94.

⁴⁴⁹ Wanapha (n 374) 2.

the objectives of the government at the time,⁴⁵⁰ in order to encourage investment from potential business activities that can enhance Thailand's attractiveness as an investment destination.

Regarding its organisation, the BOI, under the Ministry of Industry, includes the prime minister as Chairman and the Minister of Industry as Vice Chairman.⁴⁵¹ The prime minister also appoints the Secretary General, the secretary to the board and advisors. At present, the members of the board are: the Minister of Finance, the Minister of Commerce, the Permanent Secretary of Ministry of Industry, the Secretary General of the National Economic and Social Development Board, the Chairman of the Thai Chamber of Commerce, the Chairman of the Federation of Thai Industries and the Chairman of the Thai Banker's Association, as well as advisors and a secretary⁴⁵²

The BOI defines priority areas for investment, identifies investment opportunities and ascertains the nature of incentives that are to be given to qualifying investors. The BOI also offers myriad investment-promotion services to businesses before, during and after the application process. In other words, the BOI assists companies in setting up their businesses and outlines investment promotion services such as its 'matchmaking programme', the so-called VMC (Vendors Meet Customers), which bring foreign and domestic investors together.⁴⁵³

Apart from granting incentives and facilitating promoted businesses, the BOI may 'make an announcement designating the types and sizes of investment activity eligible for promotion, stipulate the condition, amend or abolish those conditions at any time.'⁴⁵⁴ Furthermore, it may stipulate conditions with which the promoted person must

⁴⁵⁰ One of the objectives of the government in 1997 was to 'increase Thai-manufactured exports in order to generate much needed foreign currency earnings, as that would enable the country to build international reserves and strengthen the Thai Baht.' Wanapha (n 374) 3.

⁴⁵¹ IPA 2001 s.6.

⁴⁵² Thailand Board of Investment <<http://www.boi.go.th/english/about/BoardofInvestment.pdf>> accessed 10 November 2011.

⁴⁵³ Brimble 'Foreign Direct Investment' (n 336) 19.

⁴⁵⁴ IPA 2001, s 16.

comply,⁴⁵⁵ and has the discretion to grant a reduction of only one half of the rate of import duties or not to grant the exemption of import duties or business taxes. It also has the power to withdraw rights and benefits in the case where the promoted person fails to provide certain mandatory information, such as the amount and source of their capital, the number of shareholders and their nationalities, the level of employee training and distribution of products.⁴⁵⁶ The aforementioned actions by the BOI make clear its power to grant, amend and withdraw any promotion at its discretion. The incentives that the BOI offers do not last indefinitely, nor do they apply in every situation. It can exercise discretion to revoke the incentives under the conditions specified.

The board's areas of responsibility include developing engineering, supporting industries and promoting links between foreign investment and domestic industries. According to Lauridsen, the BOI performs two roles. In terms of microeconomics, the BOI Unit for Industrial Linkage Development (BUILD) aims to act as a 'matchmaker', facilitating links between individual projects and mediating or troubleshooting when difficulties or disagreements arise.⁴⁵⁷ At the macroeconomic level, the BOI as a whole should ideally act as a broker between Thailand's various bureaucracies, and promote a healthy investment environment, enabling links between businesses by holding a database of potential suppliers, and removing impediments to businesses forming links between themselves.⁴⁵⁸ It is noteworthy that the BUILD was set up in 1991 with its main roles (1) to act 'as an intermediary between the manufacturers of ready-made products and small- and medium-sized manufacturers of parts' and (2) to 'provide information on subcontracting opportunities and offers its support to buyer firms seeking sourcing networks in Thailand'.⁴⁵⁹ Furthermore, it has introduced a new scheme whereby a company's majority equity ownership is foreign-owned, because a number of

⁴⁵⁵ IPA 2001, s 20.

⁴⁵⁶ IPA 2001, s 54.

⁴⁵⁷ Laurid S. Lauridsen, 'Foreign Direct Investment, Linkage Formation and Supplier Development in Thailand during the 1990s: The Role of State Governance' (2004) (The European Journal of Development Research, 16, 3) 573.

⁴⁵⁸ Ibid.

⁴⁵⁹ Thailand Board of Investment, 'Business Support Services: About Us' <http://www.thinkasiainvestthailand.com/about_boi_services_business.htm> accessed 10 November 2011.

companies have changed their structure of ownership since 1997. Merger and acquisition (M&A) activities have been acknowledged since that time.

The impact of the crisis led to significant changes and further liberalisation in policy regarding FDI.⁴⁶⁰ Another factor which decreased FDI inflows and investors' confidence to invest in Thailand was the political unrest of the early 1990s,⁴⁶¹ after the 2005-2006 political crises, foreign investor confidence dipped even further.⁴⁶² The decline in applications by foreign companies shows the downward trend of FDI.⁴⁶³ As supported by Svensson,⁴⁶⁴ Gyimah-Brempong and Traynor⁴⁶⁵ and Dechruk et al, the effects of political instability on investment levels in developing countries are both significant and negative.⁴⁶⁶

Likewise, FDI in Thailand has been impacted by the global economic recession since late 2008, resulting in a decrease in turnover for foreign investors.⁴⁶⁷ There were signs of recovery from 2009 until early 2010, as shown in the confidence index of foreign investors, which exceeded 50% in terms of revenue, profitability, liquidity and investment,⁴⁶⁸ but investors became concerned and some decided to slow down investment or to suspend expansion plans in Thailand because of violent political rallies

⁴⁶⁰ Yussof & Ismail (n 331) 94.

⁴⁶¹ Brimble 'Foreign Direct Investment' (n 336) 12.

⁴⁶² For the links between political risk and FDI, see Multilateral Investment Guarantee Agency, 'World Investment and Political Risk 09', World Bank Group, 27-31
<www.miga.org/documents/flagship09ebook_chap2.pdf> accessed 10 November 2011.

⁴⁶³ Thailand Economic Monitor, April 2007, World Bank Office-Bangkok, 30
<http://siteresources.worldbank.org/INTTHAILAND/Resources/Economic-Monitor/2007april_tem_report.pdf> accessed 10 November 2011.

⁴⁶⁴ Jakob Svensson, 'Investment, property rights and political instability: Theory and evidence', *European Economic Review*, Vol. 42, 1317-1341.

⁴⁶⁵ Kwabena Gyimah-Brempong and Thomas L. Traynor, 'Political Instability, Investment and Economic Growth in Sub-Saharan Africa', *Journal of African Economies*, Vol. 8(1), 52-86.

⁴⁶⁶ Krist Decharuk, Pornnapa Leelapornchai and Manop Udomkerdmongkol, 'Thailand Investment in the Post-Crisis Era: Issues and Challenges', Bank of Thailand Discussion Paper (April 2009) 18
<www.bot.or.th/English/EconomicConditions/.../dp042009_eng.pdf> accessed 10 November 2011.

⁴⁶⁷ Thailand Board of Investment: BOI Investor Confidence Report (2010), Centre for International Research and Information, 15 January 2011, 35 <http://thaifinancialpost.com/wp-content/uploads/2011/01/Thailand_BOI_2010_ForeignInvestorConfidenceReport.pdf> accessed 10 November 2011 referred to as 'BOI: Investor Confidence Report'.

⁴⁶⁸ *Ibid.*

in April and May 2010.⁴⁶⁹ In the aftermath of the economic downturn, a World Bank report has made several recommendations for the Thai government to implement, including a reduction of the regulatory burden, enhancing working skills and clarifying the relaxation of the 30% reserve requirement on short-term capital inflow⁴⁷⁰ which was largely the result of the Bank of Thailand's decision to implement an unremunerated reserve requirement on short-term capital inflows. According to this system, financial institutions are required to withhold 30% of foreign currencies bought or exchanged against the Thai Baht, except those related to trades in goods and services or the repatriation of investments abroad by residents. The purposes of holding foreign reserves are: '(1) to fulfil the monetary and exchange rate policies; (2) to store of nation's wealth; (3) to give credibility to foreign investors; (4) to back the banknotes in use.'⁴⁷¹ The Governor of the Bank of Thailand presented the government's policy in a speech that continued to welcome genuine foreign capital flow,⁴⁷² which affirmed that capital inflow in the form of FDI was exempt from the restriction of the reserve requirement.⁴⁷³ Some foreign investors, however, opposed this policy and expressed their concerns in affected sectors.⁴⁷⁴

As well as domestic political unrest, worldwide economic instability and the previously mentioned reserve requirement, a further and more specific factor has given foreign investors reasons to doubt Thailand as a suitable destination. In January 2007, the

⁴⁶⁹ Ibid.

⁴⁷⁰ The World Bank Thailand, 'New World Bank Report Says Thai Economy to Slow in 2007, Grow Moderately in 2008, Development in Partnership' December 2007
<http://siteresources.worldbank.org/INTTHAILAND/Resources/newsletter_december2007_eng0.pdf> accessed 10 November 2011.

⁴⁷¹ Bank of Thailand, 'Foreign Exchange Reserves'
<<http://www.bot.or.th/ENGLISH/FINANCIALMARKETS/RESERVEMANAGEMENT/Pages/BOT%20Foreign%20Reserves.aspx>> accessed 10 November 2011.

⁴⁷² Tarisa Watanagase, 'The Prospects of the Thai Economy and Monetary Policy' at Japanese Chamber of Commerce (Bangkok) Dinner Talk 16 March 2007, 2-3
<[http://www.bot.or.th/Bothomepage/General/PressReleasesAndSpeeches/Speeches/english_version/Governor &Deputy Governor/16Mar2007_ThaiEconomy.pdf](http://www.bot.or.th/Bothomepage/General/PressReleasesAndSpeeches/Speeches/english_version/Governor%20&Deputy%20Governor/16Mar2007_ThaiEconomy.pdf)> accessed 10 November 2011.

⁴⁷³ Ibid 3.

See The Bank of Thailand, 'The Reserve Requirement on Short-Term Capital Inflows BOT News No. 51/2006' <<http://www.bot.or.th/Thai/PressAndSpeeches/Press/News2549/n5149e.pdf>> accessed 10 November 2011.

⁴⁷⁴ Stephen Frost, 'Protecting the Baht - Capital reserve requirements in Thailand' (Bangkok International Associates, January 2007) <www.bia.co.th/.../Capital%20Requirements%20Art%20080107.doc> accessed 10 November 2011.

government also approved plans to amend the Foreign Business Act 1999 (FBA)⁴⁷⁵ in order to prevent foreign investors from using nominee shareholders or preferential voting rights to take control of Thai companies in restricted sectors. It is to be noted that foreign investment in Thailand is governed by the FBA 1999, which became effective on 4 March 2000, which repealed and replaced the 1972 National Executive Council Announcement 281 (known as the Alien Business Law).⁴⁷⁶ Previously, foreign investors had been able to exploit loopholes in tax legislation by using complicated, opaque nominee shareholding structures to work around legal limits on foreign ownership. Former Prime Minister Thaksin's 2006 sale of Shin Corp to the Singaporean wealth fund Temasek brought the issue of nominee shareholding to the public attention,⁴⁷⁷ and as a consequence changes to the FBA were proposed, with the intention of making such shareholding structures more transparent and preventing the exploitation of loopholes.⁴⁷⁸ The Thai Ministry of Commerce believed that the amendment of the FBA would, 1) 'forbid the abuse of preferential voting rights for and by foreign shareholders in prohibited businesses', 2) 'impose heavier fines on nominee shareholding in restricted business, which is against the law' and 3) 'clarify what constitutes a foreign business'.⁴⁷⁹

The amendment of the FBA is a controversial topic.⁴⁸⁰ Kanissorn Navanugraha, a Commerce Ministry official observed that 'the laws were being drafted to create greater

⁴⁷⁵ The Foreign Business Act 1999 is the primary law regulating foreign business activities in Thailand. It makes three important definitions: (1) Who 'foreigners' are (2) Categories of businesses that foreigners must gain specific permission to operate, and (3) The procedures whereby foreigners can obtain such permission.

⁴⁷⁶ Foreign Business Act 1999, s 3 <www.mfa.nl/contents/pages/10651/foreignbusinessact.pdf> accessed 10 November 2011.

⁴⁷⁷ Jon Fernquest, 'M.R. Pridiyathorn critiques proposed changes to foreign investment policy' (Bangkok Post (Bangkok 23 August 2007) <http://www.readbangkokpost.com/business/foreign_business_act/will_unelected_nla_change_fore.php> accessed 10 November 2011.

⁴⁷⁸ Ibid.

⁴⁷⁹ For the full details of the legislation, see Thai Company Law: Foreign Business Act Amendments <http://www.thailandlawonline.com/article-blog/company-law-foreign-business-act-amendments.html> accessed 10 November 2011.

⁴⁸⁰ Douglas Mancill, 'foreign business act-Current Status and Risks' Thai Law and Policy, 29 November 2010 <<https://thailawandpolicy.wordpress.com/2010/11/29/foreign-business-act-current-status/>> accessed 10 November 2011 and Stephen Frost, 'Thailand to liberalise Foreign Business Act', Bangkok International Associates, 2009 <www.bia.co.th/.../Foreign%20business%20article%20270209.doc> accessed 10 November 2011. Fiscal Policy Office, Ministry of Finance of Thailand issued a study on the

transparency and accountability'. In the view of Pridiyathorn Devakula, former Finance Minister and Central Bank Governor, however, there is a possibility of 'fallout' from the amendment of the FBA. He suggested that a number of foreign investors may move to neighbouring countries such as China, India, Vietnam, Malaysia, and Indonesia, since these states 'have opened up recently and liberalised their investment law'.⁴⁸¹ One of the most prominent opponents of the law was Kittipong Urapeepatanapong, a lawyer, who argued that as a result of the amended law almost all of the companies listed on Thailand's Stock Exchange would need a degree of restructuring. No other country in the region, he commented, had such strict laws.⁴⁸² Another opposing view came from Peter van Haren, head of the Joint Foreign Chambers of Commerce in Bangkok, who stated that 'It's clear these moves are going to discourage new investors'.⁴⁸³ He also claimed that 'Our members have come to me and said this is essentially a forced divestiture'.⁴⁸⁴ Hence, the amendment of the FBA may affect foreign investment in Thailand.

The *Map Ta Phut* case is another critical factor that threatens transnational capital inflow, as it has been criticised for lacking clarity where investment regulations are concerned.⁴⁸⁵ On 29 September 2009, the Central Administrative Court ordered the suspension of operating permits for new investments in the country's largest industrial estate in Rayong province, after environmental groups and locals claimed that the permits violated Section 67⁴⁸⁶ of the 2007 Constitution. The *Map Ta Phut* case was

effects of the FBA amendment in 2007 (in Thai)

<<http://www.fpo.go.th/FPO/index2.php?mod=Content&file=contentview&contentID=CNT0002939&categoryID=CAT0000146>> accessed 10 November 2011.

⁴⁸¹ Fernquest (n 477).

⁴⁸² Ibid.

⁴⁸³ Hannah Beech, 'Land of Fading Smile' (Time, Bangkok 18 January 2007)

<<http://www.time.com/time/magazine/article/0,9171,1580046,00.html>> accessed 10 November 2011.

⁴⁸⁴ Ibid.

⁴⁸⁵ For a critique of the Map Ta Phut case, see Jean Dautrey, 'Foreign Direct Investment and Thailand's Color-Coded Politics: The Thai Paradox-Will it Endure?' <gsbejournal.au.edu/4V/Journals/1.pdf> accessed 10 November 2011.

⁴⁸⁶ The Constitution of Thailand 2007, art 67 provides 'for the right of a person to participate in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and conservation of the quality of the environment, which may concern his/her health, welfare or quality of life. It also stipulates, in paragraph 2, four criteria which shall be undertaken prior to the implementation of projects or activities which may have an impact on the environment and health of people in the concerned communities. There are 1) conducting and Environmental Impact Assessment, 2)

viewed to be more threatening than even political upheaval or global recession, making it a prime example of systematic political risk. As investors ostensibly seek a predictable and consistent legal environment, unexpected legal skirmishes potentially deter even the keenest of potential investors, so the above issues have significantly affected foreign investors' confidence in Thailand as a business destination. A means of regaining foreign investor confidence is to adopt effective tax incentives and improve tax administration. In addition, the sharp fall in export competitiveness has confirmed Thailand's need to move from traditional industries relying on low-cost labour, low capital and simple technology toward upgraded skills and a higher technological base. Long-term plans that have already been outlined include restructuring productivity and improving production fundamentals such as technology and management.

The damaging uncertainty created by the 2006 political events in Thailand caused concerns among investors.⁴⁸⁷ To counter potential damage to the Thai economy, the government, through the BOI, launched a policy to restore foreign investor confidence, and further promote foreign investment through both short- and long-term measures, as well as provide assistance to ensure an encouraging investment climate.⁴⁸⁸ Aside from domestic political unrest, the Minister of Industry stated that a number of negative factors may affect Thailand's attractiveness as an investment destination. These included the fragile global economic recovery, social conflict in the country, the Thai Baht appreciation and an increase in interest rates.⁴⁸⁹ The government plans to provide incentives and opportunities in capital investment aiming to increase investment, domestic consumption and international trade.⁴⁹⁰

conducting a Health impact Assessment; 3) consultation with the public and stakeholders; and 4) seeking opinions of an independent organisation, consisting of representatives from private environmental and health organisations and from higher education institutions providing studies in the field of environment, natural resources or health' (in Thai).

⁴⁸⁷ Purnell (n 10).

⁴⁸⁸ Thailand Board of Investment, 'Press Release No. 92/2010 (O 49)' on 27th May 2010. <http://www.boi.go.th/english/download/hot_topic/409/BOI_message_May_2010.pdf> accessed 10 November 2011 referred to as 'BOI Press Release 92/2010'.

⁴⁸⁹ Boris Sullivan, 'Thailand Business News, Foreign Investments drop 32% in Thailand' Thailand Business News on 21st January 2011 <<http://thailand-business-news.com/investment/28903-foreign-investments-drop-32-in-thailand>> accessed 10 November 2011.

⁴⁹⁰ Chodechai Suwanaporn, 'Thai Economy to improve in the second half of the year: Government stimulus measures to help the economy' (2007) Fiscal Policy Office (in Thai) <<http://www.fpo.go.th/content.php?Action=view§ion=3100000000&id=19167>> accessed 24

A number of projects are promoted by the BOI, which include strengthening Thailand's industrial and technological capability, making use of domestic resources, developing basic and support industries, developing infrastructure and a well-organised transport system and conserving natural resources.⁴⁹¹ There are also recommendations to contribute to the economic growth of regions outside Bangkok and to implement measures to reduce environmental problems.⁴⁹² In terms of public relations, the government is trying to restore the confidence of foreign investors by providing supportive measures for investment and clarifying the political situation. Research conducted by Sosukpaibul, using empirical evidence, analyses the Thai government's policies in detail, examining its investment strategies and the impact of government policies on FDI.⁴⁹³

Furthermore, Thai government policy on foreign investment is also facilitated by trade liberalisation through bilateral and multilateral investment treaties, such as the Agreement on Trade-Related Investment Measures (TRIMs) of 1993, the ASEAN Investment Agreement (adopted in 1998) and the agreement on Free Trade Areas (FTA).⁴⁹⁴

4.5 The Investment Promotion Act of 1977, amended by (No.2) 1991, amended by (No.3) 2001

Thailand was the first country in Asia to introduce an investment promotion law providing tax and non-tax incentives to potential investors. The initial need for investment came after World War II, when Thailand was facing a shortage of all types of industrial products including medicines and essential products. The first investment law was the Industrial Promotion Act B.E. 2497, which was enacted in 1954 but was not successful because the numbers of projects established and the capital generated

September 2011. For a related report in English, see Sompong Tancharoenphol, 'Country Report on Thailand (2007)
<<http://www.cacci.org.tw/Journal/2007%20Vol%202/THAI%20ECONOMIC%20PERFORMANCE%20IN%20Q3.pdf>> accessed 10 November 2011.

⁴⁹¹ Association of Southeast Asian Nations, 'Highlight on Thailand's Homepage'
<<http://www.asean.org/12390.htm>> accessed 10 November 2011.

⁴⁹² Ministry of Foreign Affairs, 'Business Handbook: Section 5 - Starting a business in Thailand' 28
<http://www.mfa.go.th/internet/document/h_sec5fin.pdf> accessed 10 November 2011.

⁴⁹³ See Sosukpaibul (n 387).

⁴⁹⁴ Ibid 11.

did not meet the targets established by the government at that time. In 1960, the Investment Promotion for Industry Act B.E. 2503 (1960) was published, with the intention to support private sector investment. This 1960 Act served as a model for the subsequent Investment Promotion Acts. To understand the objectives of investment law at that time, it is important to take the National Economic Development Plan (NEDP) into consideration.

The first NEDP, which encompassed the years 1961-1966 and was the first to express Thailand's objectives in a systematic way.⁴⁹⁵ Schneider points out that 'the Promotion of Industrial Investment Act of 1965 did not state for which purpose or objective the law was designed'.⁴⁹⁶ It is to be noted that its name, 'the Promotion of Industrial Investment Act' was the only indication of its objective.⁴⁹⁷ According to Kosin, the purposes of this Act were 'first, to give investors more privileges and benefits; and second, to alter legal procedure so that they will be more convenient and less complicated.'⁴⁹⁸ The first plan set out a 15% increase in gross capital formation as one of its primary targets, demonstrating that the investment laws did have an overall objective, although this was not particularly specific.⁴⁹⁹ It is not clear, however, whether companies and sectors promoted by the investment laws were chosen specifically as ones that could help to meet this target.⁵⁰⁰

The Thai government published a new investment promotion law, called the Notification of the Revolutionary Council No. 227, which expanded the scope of investment to cover exports and investment in regional areas, as well as deleting the words 'for industrial promotion' in order to cover agricultural, mining and service sectors in the plan for investment promotion.⁵⁰¹ Between the end of 1973 and 1977, political, economic and social situations within the country, as well as those of

⁴⁹⁵ Hartmut Schneider, *National objectives and project appraisal in developing countries* (OECD Publishing 1975) 39.

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid.

⁴⁹⁸ Osot Kosin, *Thailand's New Law to Promote Industrial Development* (Bangkok 1962) 3.

⁴⁹⁹ Schneider (n 495) 41.

⁵⁰⁰ Ibid.

⁵⁰¹ History of the Board of Investment (n 443).

neighbouring countries, changed dramatically. The Thai government therefore amended the investment promotion law (which at that time was the Notification of the Revolutionary Council No. 227) by publishing the Investment Promotion Act 1977.⁵⁰² The essence of this Act included enhancing measures to promote investment and export, protect domestic industries, develop infrastructure and to resolve any problems or difficulties concerning investment.⁵⁰³ The legislation was reviewed over the years to accommodate the changing business environment, to promote investment in priority projects and to gain more investors' confidence.⁵⁰⁴ The second amendment to this Act was made in 1991, while the third amendment, which came in 2001, is the one currently in use.⁵⁰⁵

The Act is administered by the BOI, which has a duty to promote domestic and foreign investments to develop society, the economy, the environment and the security of Thailand as a whole.⁵⁰⁶ The implementation of this Act is the responsibility of the prime minister, who has the power to appoint competent officials for its execution.⁵⁰⁷ According to this Act, foreign firms are granted incentives and income tax exemption for a period of time. The Act states that 'a company which seeks to be promoted may file to the Office of the Board of Investment an application for promotion in accordance with the rules, procedure and forms prescribed by the Secretary General, describing the investment project for which promotion is sought'.⁵⁰⁸

4.6 BOI Promotions and Investors

The Thai government's system of tax incentives is known as one of a number of 'BOI promotions', which aim to relieve the government's fiscal burden and to promote

⁵⁰² Ibid.

⁵⁰³ Ibid.

⁵⁰⁴ See Report of Committees of the Law Commission on Investment Promotion Act 1977, Library of The National Assembly, Thailand, 165-218 (in Thai).

⁵⁰⁵ For more detail on history and functions of the BOI, see Sasitorn Srilertchaipanich, 'The Board of Investment's Application of Legal Measures for Investment Promotion under Government's Economic Policy' (Master of Laws Dissertation, Chulalongkorn University 1995).

⁵⁰⁶ IPA 2001, s 16.

⁵⁰⁷ IPA 2001, s 5.

⁵⁰⁸ IPA 2001, s 17.

investment, both foreign and domestic.⁵⁰⁹ Firstly, tax incentives are granted to projects that actually benefit Thailand, and the application of tax incentives is conducted with good governance.⁵¹⁰ Currently, activities on the list attached to the BOI announcement No.10/2552 (2009) are eligible for investment promotion.⁵¹¹ Secondly, ‘a minimum level of investment capital (excluding cost of land and working capital) of one million baht shall be required for all types of activities eligible for promotion’.⁵¹² Thirdly, projects which are established in regions or areas with low income and inadequate investment facilities will be offered special investment promotions, i.e. maximum incentives on tax and duty.⁵¹³ Fourthly, promotions are given to small and medium industries which have a minimum level of investment capital of THB 500,000 (excluding the cost of land and working capital), and which conduct activities as specified under the BOI Announcement no. 1/2553 (2010). Finally, the BOI currently gives priority to ‘agricultural activities and agricultural products, projects related to technological and human resource development, public utilities, infrastructure and basic services, environmental protection and conservation and targeted industries’.⁵¹⁴

With regard to promoted sectors, electrical appliances had the highest value among foreign investment projects,⁵¹⁵ followed by the machinery and transport equipment sector.⁵¹⁶ Japanese FDI had always ranked first in terms of foreign companies receiving promotion certificates for both the number of projects and total investment capital. However, in 2010, it dropped to second place among major investors in Thailand⁵¹⁷

⁵⁰⁹ Thailand Board of Investment, ‘Policies for Investment Promotion’ <http://www.boi.go.th/index.php?page=policies_for_investment_promotion> accessed 10 November 2011 referred to as ‘Policies for Investment Promotion’.

⁵¹⁰ Ibid.

⁵¹¹ Thailand Board of Investment, ‘Eligible Activities’ <http://www.boi.go.th/index.php?page=eligible_activities> accessed 10 November 2011.

⁵¹² Ibid.

⁵¹³ Policies for Investment Promotion (n 509).

⁵¹⁴ Ibid.

⁵¹⁵ See Appendix 1.

⁵¹⁶ See Appendix 1.

⁵¹⁷ See Appendix 2.

while the European Union ranked first.⁵¹⁸ Among EU investor countries, the Netherlands had the highest total investment capital, followed by major investments from France.⁵¹⁹ There was a significant change in capital flow when Singapore generated the most significant amount of FDI among other ASEAN countries in 2009. In 2010, though, the investment from Singapore decreased to THB 7,454 million, from THB 19,740 million in 2009, because in 2006 the Singaporean company Temasek Holding purchased Shin Corporation, owned by the former Prime Minister of Thailand Thaksin's family as explained above. In 2010, first position went to Hong Kong, which started to increase its investment in Thailand through a total outlay of THB 13,975 million.⁵²⁰ Direct investment from the Newly Industrialised Economies such as South Korea, Malaysia and the Philippines also shows a continuous increase.⁵²¹ The total amount of FDI capital flow experienced a downward trend, from THB 248,329 million in 2008, to THB 154,014 million in 2009. There was a slight increase to THB 158,085 million in 2010.⁵²²

A future plan for investment promotion was thus initiated by the BOI Secretary General: 'The government's economic stimulus package, which includes investment in various mega infrastructure projects as well as aims to position Thailand as the connectivity hub for ASEAN. The BOI is moving confidently and quickly to invigorate the investment climate to fuel overall economic expansion'.⁵²³

4.7 Criteria and Incentives for BOI promotion

The BOI specifies and applies certain criteria in determining the suitability of a project for which investment promotion privileges are requested.⁵²⁴ Under the IPA 2001, the

⁵¹⁸ For more information regarding European FDI in Thailand, see Ratchanee Wattanawisitporn, *Foreign direct investment in Thailand: with special reference on European foreign direct investment in the Thai manufacturing sector* (Cuvillier Verlag 2005).

⁵¹⁹ See Appendix 2.

⁵²⁰ See Appendix 2.

⁵²¹ See Appendix 2.

⁵²² See Appendix 2.

⁵²³ Thailand Board of Investment, 'Foreign Investment from Major Countries' <http://www.boi.go.th/english/download/statistics_foreign_investment/249/FINV113.pdf> accessed 10 November 2011.

⁵²⁴ Thailand Board of Investment, 'Investment Policies and Criteria' <http://www.boi.go.th/english/about/investment_policies_criteria.asp> accessed 10 November 2011.

BOI authority can ‘make an announcement designing the types and sizes of investment activity eligible for promotion’.⁵²⁵ It may also stipulate in the announcement the conditions under which promotion is to be granted and may amend or abolish those conditions at any time in order to respond to the current economic and investment situation.⁵²⁶ Two kinds of incentives are available for promoted projects. The first type is tax-based incentives, which include the exemption or reduction of import duties on machinery⁵²⁷ and raw materials,⁵²⁸ double deduction of transportation, electricity and water supply costs,⁵²⁹ an additional 25% deduction in project infrastructure installation costs,⁵³⁰ corporate income tax exemptions up to 8 years,⁵³¹ fees for goodwill and copyright, the exemption of dividends from corporate income tax,⁵³² and an additional 50% reduction in the corporate income tax for another five years.⁵³³ The next chapter will explain the tax incentives provided by the BOI in more detail.

The second type of incentives outlined in the IPA 2001 are non-tax incentives, which include permission for entry into Thailand ‘for the purpose of studying investment opportunities or performing any other act benefiting investment’,⁵³⁴ permission to bring in foreign skilled workers, experts and their spouses and dependents,⁵³⁵ the granting of work permits,⁵³⁶ permission to own land,⁵³⁷ and permission to take out or remit money

⁵²⁵ IPA 2001, s 16 (2). The updated information of types, sizes, conditions, rights and benefits of activities eligible for promotion are assembled from various latest announcements, details of which a potential investor is encouraged to thoroughly review before applying for BOI promotion.

⁵²⁶ Board of Investment Announcement no. 10 / 2552 (2009) ‘Types, Sizes and Conditions of Activities Eligible for Promotion’ <http://www.boi.go.th/english/about/eligible_activities.asp> accessed 10 November 2011 referred to as ‘BOI Announcement 10/2552’.

⁵²⁷ IPA 2001, ss 28, 29.

⁵²⁸ IPA 2001, s 30.

⁵²⁹ IPA 2001, s 35 (2).

⁵³⁰ IPA 2001, s 35 (3).

⁵³¹ IPA 2001, s 31.

⁵³² IPA 2001, ss 33, 34.

⁵³³ IPA 2001, s 35 (1).

⁵³⁴ IPA 2001, s 24.

⁵³⁵ IPA 2001, s 25.

⁵³⁶ IPA 2001, s 26.

abroad in foreign currency.⁵³⁸ Moreover, the BOI gives the promoted businesses guarantees, including that the state shall not nationalise the promoted activity,⁵³⁹ undertake a new activity in competition with the promoted person,⁵⁴⁰ or impose price control on the products or commodities of the promoted activity.⁵⁴¹

In order to achieve the goal of decentralisation from the Bangkok metropolitan area, the BOI has identified three investment promotional zones based on economic factors: Zone 1: Bangkok and five surrounding provinces; Zone 2: the twelve provinces surrounding Zone 1; and Zone 3: the remaining fifty-eight provinces. Promoted projects located in Zone 1 receive the least generous tax privileges, while the most generous tax privileges are granted to projects in Zone 3, which are the least developed areas or are in special need of investment.⁵⁴²

Investment and tax measures used in developing countries are generally recognised as a positive influence on business and are shown to attract FDI inflows.⁵⁴³ According to a survey on factors influencing investment decisions,⁵⁴⁴ investment promotion privileges were the most important, followed by corporate income tax rates.⁵⁴⁵ Furthermore, a

⁵³⁷ IPA 2001, s 27.

⁵³⁸ IPA 2001, s 37.

⁵³⁹ IPA 2001, s 43.

⁵⁴⁰ IPA 2001, s 44.

⁵⁴¹ IPA 2001, s 46.

⁵⁴² For more details regarding incentives provided for BOI privileges by investment promotion zone, see the Board of Investment, 'BOI Privileges by Location' <http://www.boi.go.th/english/about/boi_privileges_by_location.asp> accessed 10 November 2011.

⁵⁴³ David Wheeler and Ashoka Mody, 'International Investment Location Decisions: The Case of US Firms' (1992) *Journal of International Economics*, 33, 57-76. Lynn K. Mytelka, *Globalisation, Investment and Sustainable Human Development A Learning and Innovative Approach*, UNCTAD (1999). A study by Oman argues, however, that 'the widespread use of investment incentives, in OECD and developing countries alike, tends to be bad for government transparency and accountability. This is highly detrimental both to economic policy making and to the construction of democratic institutions in developing countries'. See Charles P. Oman, *Policy Competition for Foreign Direct Investment: A Study of Competition among Governments to Attract FDI*, OECD Publishing, 2000.

⁵⁴⁴ The study of foreign investor confidence in Thailand in 2010 by the Centre for International Research and Information distributed questionnaires to 5,626 entrepreneurs of businesses with a proportion of foreign investment of 20% or more in February 2010.

⁵⁴⁵ See Factors influencing investment decisions (survey results for 2010), Thailand Board of Investment, 'BOI Investor Confidence Report 2010' on 15 January 2011, 8

number of favourable tax measures have been made available to influence the location decisions of investors,⁵⁴⁶ so it can be concluded that tax incentives are used for channelling investment for the development of particular areas or regions. The objectives include support for rural development and locating an industrial complex outside major or capital cities in order to reduce pollution and over-population.⁵⁴⁷ Not only based on location, tax incentives can also be granted based on targeted activities or industries. The purpose of such incentives is to promote sectors of industry or activities which the government considers as significant to development.⁵⁴⁸ In the case of Thailand, priority projects, such as basic transportation systems, public utilities, technology development and environmental protection, are granted special incentives by the BOI.⁵⁴⁹

As well as these incentives, some strategic industries have been offered customised incentives in order to promote clustering-based investment. Examples of these schemes are research and development collaboration between the industrial sector and academic institutions,⁵⁵⁰ skills, technology, innovation,⁵⁵¹ and environmental problem-solving measures.⁵⁵² According to a survey of the principal reasons influencing investment

<http://www.boi.go.th/english/download/news/1851/Summary_English.pdf> accessed 10 November 2011 referred to as 'BOI: Investor Confidence Report'.

⁵⁴⁶ Suwanaporn (n 490).

⁵⁴⁷ United Nations, 'Tax Incentives and Foreign Direct Investment A Global Survey, United Nations Conference on Trade and Development' (2000), ASIT Advisory Studies No.16, 12
<http://www.unctad.org/en/docs/iteipcmisc3_en.pdf> accessed 10 November 2011 referred to as 'UN: Tax Incentives'.

⁵⁴⁸ Ibid 13.

⁵⁴⁹ BOI: Announcement 10/2552 (n 526).

⁵⁵⁰ Board of Investment Announcements No.1/2550 (2007) Subject: Measure to Promote Research and Development Collaboration between the Industrial Sector and Academic Institutions, announced 9th April 2007, 96
<<http://www.thinkasiainvestthailand.com/download/A%20Guide%20to%20the%20Board%20of%20Investment.pdf>> accessed 10 November 2011.

⁵⁵¹ Board of Investment Announcements No. 3/2549 (2006) Subject: Additional Rights and Privileges for Investment to Develop Skill, Technology & Innovation-STI announced 20 March 2006, 99
<<http://www.thinkasiainvestthailand.com/download/A%20Guide%20to%20the%20Board%20of%20Investment.pdf>> accessed 10 November 2011.

⁵⁵² Board of Investment Announcements No. 3/2550 (2007) Subject: Environmental Problem-Solving Measures announced 14 September 2007, 98
<<http://www.thinkasiainvestthailand.com/download/A%20Guide%20to%20the%20Board%20of%20Investment.pdf>> accessed 10 November 2011.

expansion in Thailand, the top reason was BOI privileges together with other government support measures (63.8%).⁵⁵³ Therefore, there should be sufficient focus on these privileges and other government measures on investment especially foreign investment.

Conclusion

Thailand is one of Asia's most popular investment destinations. This chapter set out to examine the country's position on foreign investment, and its economic ramifications, in detail. It examined the laws regulating investment promotion and the governmental bodies responsible for implementing them. The gains derived from FDI have been proven to have aided Thailand's recovery from the 1997 financial crisis in Asia, and FDI is seen by the government as a major means of achieving sustainable development. After the 1997 crisis, the Thai government realised that the economy needed fresh injections of capital in order to grow and prosper, and that foreign investor confidence needed to be restored after a period of political unrest. This became even more apparent following the 2006 unrest and many other incidents, leading the BOI to introduce additional investment promotion schemes, including tax- and non-tax-oriented incentives, aimed primarily at eliminating avoidable burdens that might otherwise deter investors, such as bureaucracy and high taxes at the start-up stage. This issue will be discussed further in the next chapter, but for now we can conclude that FDI continues to be an important means of income generation in Thailand. This chapter also examined the role of the BOI as a 'one-stop' governmental body, dealing with and supporting all aspects of investment legislation – foreign and domestic. In addition, this chapter outlined the history, importance and responsibilities of the BOI, and its authority to grant and revoke tax incentives, as such providing a crucial context for the discussion in Chapter 6 of its jurisdiction alongside that of the Revenue Department over tax incentives. This information is also crucial for Chapter 8 regarding recommendations for changes in legislation and authority, and the administration of tax incentives in order to create a more friendly investment environment and efficient tax administration.

⁵⁵³ BOI: Investor Confidence Report (n 467) 23.

5 Tax Incentives in Thailand

Introduction

The preceding chapter examined the significance of FDI for Thailand, and also established that the system of tax incentives under the oversight of the Board of Investment (BOI) is significant part of the government's strategy for enhancing FDI. This chapter will examine the substance of tax incentives overseen by the BOI. It begins with a general discussion on 'tax incentives', which is followed by analyses of a selection of incentives and their characteristics. Subsequently, the discussion will focus on tax incentives provided by the Thai Revenue Code and the IPA 2001, and will also briefly examine Thailand's most significant industrial sectors and activities, along with the tax incentives offered to them. It will then proceed to identify the correlations between tax incentives and FDI, concluding that the tax environment is one of the key factors when deciding on an investment location. The last part of this chapter will outline considerations on tax incentives.

5.1 Definitions

The previous literature regarding the definition of 'tax incentives' can be compared with the definition of 'tax expenditure'. According to Surrey:

The term "tax expenditure" has been used to describe those special provisions of the federal income tax system which represent government expenditures made through that system to achieve various social and economic objectives. These special provisions provide deductions, credits, exclusions, exemptions, deferrals, and preferential rates, and serve ends similar in nature to those served by direct government expenditures or loan programs.⁵⁵⁴

⁵⁵⁴ Stanley S. Surrey, 'Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures' (1970) (Harvard Law Review, Vol. 83, No. 4) 706.

According to the United Nations, tax incentives are:

Any incentives that reduce the tax burden of enterprises in order to induce them to invest in particular projects or sectors. They are exceptions to the general tax regime.⁵⁵⁵

Since the focus of this thesis is on foreign investment, it is necessary to examine the definition of incentives for FDI, which the OECD defines as:

Measures designed to influence the size, location or industry of an FDI investment project by affecting its relative cost or by altering the risks attached to it through inducements that are not available to comparable domestic investors.⁵⁵⁶

From the above definitions, tax incentives can be defined as special provisions which allow exemption or deduction from a general tax regime, and which are offered by the government to encourage specific social or economic activities.⁵⁵⁷ Tax incentives and relief schemes are designed to encourage companies to invest in productive assets and capacity. They also enable start-up or growing companies to reinvest in capital assets and business development. There are two main types of tax incentives — general, and targeted. The former are offered to every business, i.e. domestic and foreign investors,⁵⁵⁸ whereas targeted incentives are created for particular groups, especially foreign investors. The objectives of tax incentives tend to be to boost regional investment and sectoral investment, performance enhancement and the transfer of technology. Many countries employ tax incentives with a view to aiding the economic development of particular regions, to support rural development, locating industrial centres outside the capital and reducing environmental problems and over-population.⁵⁵⁹ Tax incentives are also a tool for promoting crucial industries or activities, e.g. mining,

⁵⁵⁵ UN, Tax Incentives (n 547) 12.

⁵⁵⁶ Organisation for Economic Cooperation and Development, 'Checklist for Foreign Direct Investment Incentive Policies' (2003)12 <<http://www.oecd.org/dataoecd/45/21/2506900.pdf>> accessed 10 November 2011.

⁵⁵⁷ For an analysis of 'tax incentives for FDI in China', see Andrew Halkyard and Ren Lingh, 'China's Tax Incentive Regimes for Foreign Direct Investment: an Eassonian Analysis', 2 February 2008 [draft].

⁵⁵⁸ Nov Avi, 'Tax Incentives for Foreign Direct Investment: the Drawbacks' Tax Notes International Magazine, 263 (18 April 2005) 2.

⁵⁵⁹ UN, Tax Incentives (n 547) 12.

industrial parks, export-led activities, the film industry and businesses which use advanced technologies.⁵⁶⁰ The discussion that follows examines a selection of common forms of tax incentive.⁵⁶¹

5.2 Types of Tax Incentives

5.2.1 CIT Exemptions and Tax Holidays

A tax holiday entails a reduction of the corporate income tax (CIT) rate, ranging from complete exemption to a slightly lower rate than usual. It is the most popular form of tax incentive in developing countries and in those with economies in transition, which are aiming to attract FDI. Currently they are rarely found in economically developed countries.⁵⁶² According to UNCTAD's 2000 survey, approximately 85% of the countries surveyed used either full or partial tax holidays or a tax rate deduction for specific types of activities.⁵⁶³

Under a tax holiday regime, 'qualifying newly-established firms' are exempt from paying CIT for a specified time period. Tax holidays eliminate tax liability on net revenues from investment projects occurring over the holiday period, thereby encouraging investment.⁵⁶⁴ Their provisions impose certain tax-related obligations (e.g. withholding personal tax from wages or filing income tax returns); in particular, companies that invest in long-term projects are obliged to keep records of expenditure, as well as other expenses for periods before and during the tax exemption period, because after the holiday period, these companies have to comply with the regular tax duties.⁵⁶⁵

Both Morisset and Zee *et al*'s research indicate that tax holidays are among the most widely used incentives, especially in developing countries, since companies taking

⁵⁶⁰ Ibid 13.

⁵⁶¹ This thesis has not attempted to discuss minor incentives. For Investment Subsidies, refer to Howell H. Zee, Janet G. Tortsy and Eduardo Ley, 'Tax Incentives for Business Investment: A Primer for Policy Makers in Developing Countries' (2002) World Development Vol. 30, No. 9, 1505.

Deductions for qualifying expenses: U.N. Report, Tax Incentives (n 547) 22.

⁵⁶² Zee et al (n 561) 1503.

⁵⁶³ UN, Tax Incentives (n 547) 3.

⁵⁶⁴ For a succinct description of tax holidays, see UN, Tax Incentives (n 547) 20.

⁵⁶⁵ Ibid.

advantage of them can enjoy the benefits as soon as they start to earn income.⁵⁶⁶ Likewise, Holland & Vann have noted that ‘most of the beneficiaries of tax holidays have been small firms, for example, real estate businesses, restaurants, and firms designed for short-term market exploitation, such as trade and woodcutting’.⁵⁶⁷ Furthermore, tax holidays are favoured by export-oriented industries because low-cost assembly plants that are highly mobile have the most to gain from such incentives.⁵⁶⁸ In a number of countries, plants have been established to take advantage of tax holidays; when the holiday expires, the plant is disassembled and moved to an adjacent jurisdiction to take advantage of a holiday offered in another country.⁵⁶⁹ Hence, the factor that makes the project responsive to the incentive also limits the benefit to the country from the investment.⁵⁷⁰

Tax holidays are viewed as a simple incentive imposing a relatively low compliance burden on foreign investors,⁵⁷¹ e.g. there is no need to calculate income tax over the holiday period. Zee *et al* identify three main benefits of tax holidays.⁵⁷² First, they are simple to administer because businesses and governments do not have to worry about maintaining financial records to support tax returns over the holiday period.⁵⁷³ Second, they allow qualifying investors to avoid complex tax laws, onerous regulations and

⁵⁶⁶ Jacques Morisset, ‘Tax Incentives, Public Policy for the Private Sector’ (The World Bank Group Private Sector and Infrastructure Network, February 2003) 253, 2.
<<http://rru.worldbank.org/Documents/PublicPolicyJournal/253Moris-020603.pdf>> accessed 10 November 2011.

⁵⁶⁷ David Holland and Richard J. Vann, ‘Income Tax Incentives for Investment’ in Victor Thuronyi (ed), *Tax Law Design and Drafting* (Volume 2, International Monetary Fund 1998) ch 23,10.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Ibid.*

⁵⁷⁰ For more detail on governments’ policy, including tax holiday, on export industries, see Pitou van Dijk, Hans Linnemann and Harmen Verbruggen, *Export oriented industrialisation in developing countries* (NUS Press 1987) 244-407.

⁵⁷¹ Rishi Goyal and Jingqing Chai *Tax Concessions and Foreign Direct Investment in the Eastern Caribbean* (International Monetary Fund 2008) 23.

⁵⁷² Zee *et al* (n 561) 1503. See also Steven W. Clark, ‘Tax Policy for Investment’ (2007) *eJournal of Tax Research*, Atax, The University of New South Wales Vol. 5 No. 2, 258.

⁵⁷³ Robert C. Repetto and Malcolm Gillis, *Public policies and the misuse of forest resources* (Cambridge University Press 1988) 68.

corrupt administrations.⁵⁷⁴ Finally, they are neutral in their impact on the relative factor (capital and labour) intensities of qualified projects.⁵⁷⁵

However, as mentioned earlier, tax holidays primarily benefit short-term investments typical of ‘footloose’ industries. Companies which enjoy tax holidays tend to move quickly from one jurisdiction to another.⁵⁷⁶ Short-term investments do not have such a positive economic impact as longer-term ones. As Zee *et al* have observed, ‘long-term projects can make little use of such holidays even if losses can be carried forward beyond the holiday period’.⁵⁷⁷ If losses cannot be carried over beyond the end of the holiday, such incentives could paradoxically actually hinder investment,⁵⁷⁸ so they are not necessarily beneficial for long-term investors, since the tax treatment after the holiday’s end is the same as the treatment during the holiday in determining after-tax profit.⁵⁷⁹ In the interests of effective administration and the avoidance of corruption, it is also necessary to calculate any expenditure made before and during the holiday period, ‘so that appropriate records will be available for the calculation of depreciation when the holiday ends’.⁵⁸⁰

For large projects in particular, losses are usually generated in the early years of production, when the highest capital costs are incurred.⁵⁸¹ For such projects, a tax holiday that starts when production commences may actually increase the taxes paid

⁵⁷⁴ However, Sosa argued that tax incentives are less simple and less easy to administer than ‘an alternative incentive scheme consisting of a lower corporate income tax rate and an initial depreciation allowance with further allowance of the undepreciated asset according to the true depreciation’. Sebastian Sosa, *Tax Incentives and Investment in the Eastern Caribbean* (International Monetary Fund 2006) 14.

⁵⁷⁵ David Lim, *Explaining Economic Growth: a new analytical framework* (Edward Elgar Publishing 1996) 197.

⁵⁷⁶ Holland & Vann (n 567) 10.

⁵⁷⁷ Zee et al (n 561) 1504.

⁵⁷⁸ *Ibid.*

⁵⁷⁹ Jack M. Mintz, ‘Tax Holidays and Investment’ (1989) (World Bank Publication Working Paper WPS 178) 38.

⁵⁸⁰ Holland & Vann (n 567) 5.

⁵⁸¹ International Bureau of Fiscal Documentation, *Bulletin for international fiscal documentation*, Vol 50 (L.J. Venn 1996) 54.

over the life of the project, and so act as a disincentive to investment.⁵⁸² If losses are experienced during the holiday period, they may not be allowed to be carried forward beyond this time, so the holiday may occur when no taxes would have been paid in any event, and taxes may be increased following this period because no losses are available to offset profits.⁵⁸³

Tax holidays can impose a burden on tax authorities, as tax laws usually state that the exemption period starts when profits first accrue. One example from Thailand can be found in Section 31 Paragraph 1 of the IPA 2001. The term ‘when profits first accrue’ leave a degree of uncertainty as to whether this means ‘the first year that is in itself profitable’, or ‘the first year that the business records cumulative net profits’.⁵⁸⁴ As explained earlier, tax holidays and partial profit exemptions are typically targeted at newly-established companies, so as a result it is hard for tax administrators to determine if a company is actually financed by new capital or by capital already invested in the host country.⁵⁸⁵

Much of the new capital may, in fact, be previously existing capital that has been re-characterised as new (e.g. through liquidation of an existing company, then re-invested in the host country under the guise of new investment by an offshore company).⁵⁸⁶ It is perfectly possible for investors to establish entirely new companies in order to purchase an existing operation, thereby qualifying for the tax holiday despite no new activity taking place. Holland & Vann have described the prevalence of this practice in the construction industry, in which a new firm can be established for each project.⁵⁸⁷ In this respect, tax holidays are extremely open to manipulation through tax avoidance, thereby depleting public revenues.

⁵⁸² Goyal and Chai (n 571) 25.

⁵⁸³ Holland & Vann (n 567) 991.

⁵⁸⁴ Easson (n 8).

⁵⁸⁵ Organisation for Economic Co-operation and Development, *Policy Framework for Investment: A Review of Good Practices* (OECD Publishing 2006) 118.

⁵⁸⁶ Clark (n 572) 257.

⁵⁸⁷ Holland & Vann (n 567) 13.

Provisions providing for a partial or full profit exemption also open up opportunities to shift artificially the taxable income of non-qualifying businesses to qualifying ones. Aggressive transfer pricing techniques essentially involve the use of non-arm's length prices⁵⁸⁸ on intra-group transactions, and non-arm's length interest rates on intra-group loans to shift taxable income to low- or non-taxed entities.⁵⁸⁹ The shifting of the tax base in such cases is artificial in the sense that it simply manipulates prices to shift taxable income associated with business activities in order to obtain the most tax efficient outcome.⁵⁹⁰ Guarding against such abuse of the tax system is becoming increasingly difficult thanks to the increased trade in intangibles with no easily established arm's length price.⁵⁹¹ Likewise, it is becoming 'increasingly difficult to guard against excessive revenue losses stemming from incentives which provide a full or partial profit exemption'.⁵⁹²

The vulnerability of tax holidays to tax planning can lead to considerable revenue leakage, even exceeding the revenue foregone by offering incentives to legitimate activities.⁵⁹³ This outcome further reduces the cost-effectiveness of tax incentives.⁵⁹⁴ Tax avoidance strategies, which are often used in combination with tax planning, include fictive foreign investment. Tax holidays in a number of countries have been directed at firms with a high percentage of foreign ownership. Considerable tax revenue

⁵⁸⁸ 'Arm's length range', according to OECD, Centre for Tax Policy and Administration, Annex 3 Glossary, means 'a range of figures that are acceptable for establishing whether the conditions of a controlled transaction are arm's length and that are derived either from applying the same transfer pricing method to multiple comparable data or from applying different transfer pricing methods.' <http://www.oecd.org/document/41/0,3746,en_2649_33753_37685737_1_1_1_1,00.html> accessed 10 November 2011.

⁵⁸⁹ Easson (n 8) 141.

⁵⁹⁰ See Phyllis Lai Lan Mo *Tax avoidance and anti-avoidance measures in major developing economies* (Greenwood Publishing Group 2003) 81-82.

⁵⁹¹ United States General Accounting Office, *International Taxation: Problems Persist In Determining Tax Effects Of Intercompany Transfer Prices* (DIANE Publishing 1992) 63.

⁵⁹² Clark (n 572) 258.

⁵⁹³ Organisation for Economic Co-operation and Development, *Corporate tax incentives for foreign direct investment* (OECD Publishing 2001) 26.

⁵⁹⁴ For 'cost-effective of tax incentives' in general, see Alexander Klemm *Causes, Benefits, and Risks of Business Tax Incentives* (International Monetary Fund 2009).

seems to have been lost from the creation of fictive foreign-owned companies that conduct what is, in fact, a domestically owned business.⁵⁹⁵ A company may transfer funds for a domestic enterprise to a company incorporated offshore, which in turn reinvests in the home country as if it were a foreign-owned company; consequently, the investment qualifies for the incentive, which depending on the country's legal terminology, is considered either tax 'avoidance' or 'evasion'.⁵⁹⁶ As observed by Holland & Vann, the use of audits to detect such activity is difficult, since many of the investments are relayed through tax havens with strict secrecy laws.⁵⁹⁷ Therefore, tax holidays provide strong incentives for tax avoidance, as taxed enterprises could enter into economic relationships with exempt ones to shift their profits to the latter through transfer pricing.⁵⁹⁸

Where countries in a state of economic transition have introduced tax holidays to stimulate growth, many have actually experienced a shortfall as tax revenue decreases and tax holidays are administered.⁵⁹⁹ Tax holidays can also have detrimental effects on the revenues of neighbouring jurisdictions; for instance, exporting firms would ordinarily pay tax in the country where they are based. However, the phenomenon of transshipment makes even overseas tax holidays liable to exploitation.⁶⁰⁰ This scenario is described succinctly by Holland & Vann, who state that, essentially, it involves a company establishing a base in a country that offers tax holidays, 'selling' their goods to it at cost price and then exporting them on to the intended destination.⁶⁰¹ The revenue costs are seldom transparent, unless enterprises enjoying the holidays are still required to file proper tax returns, in which case administrative resources must be devoted to

⁵⁹⁵ David Holland and Jeffrey Owens 'Taxation and Foreign Direct Investment: The Experiences of the Economies in Transition' in Mario I. Bléjer and Teresa Ter-Minassian (eds), *Fiscal policy and economic reform: essays in honour of Vito Tanzi* (Routledge 1997) 270.

⁵⁹⁶ See Subhajit Basu, *Global perspectives on e-commerce taxation law* (Ashgate Publishing, Ltd 2007) 104-105.

⁵⁹⁷ Holland & Vann (n 567) 12.

⁵⁹⁸ Lai Lan Mo (n 590) 12.

⁵⁹⁹ *Ibid.*

⁶⁰⁰ Alex Knauer, *Impact of International Taxation on FDI Location Choice*, Seminar Paper (GRIN Verlag 2008) 17.

⁶⁰¹ Holland & Vann (n 567) 13.

activities that yield no revenue, and the alleged benefit of CIT holidays allowing investors to dispense with their dealings with tax authorities is rendered redundant.

In fact, a tax holiday may actually work against its intended function as a simplifying measure and add to administration costs and complexity. Clarke observes that ‘in order for firms to claim tax deductions (e.g. business loss carryovers) following the holiday period, a full record of revenues and costs over the holiday period would normally be required’.⁶⁰² Once the tax holiday is over, processing this data may actually prove more complicated than if ongoing records had been maintained. Because separate accounting is susceptible to corruption, a formula approach provides an alternative method of ascertaining how much of a company’s profit qualifies for a tax holiday. According to Holland & Vann, ‘this proportion can be based on some overall figure, such as wages and salaries employed, total revenues, or assets’.⁶⁰³ Likewise, tax holidays are open to manipulation by investors, particularly large-scale and powerful ones, who can petition for holidays that most suit their interests.⁶⁰⁴ The system of tax holidays is therefore particularly open to corruption and exploitation.⁶⁰⁵

The benefits of investment in terms of regional development, employment creation, technology transfer and export promotion are questionable. As noted above, many of the enterprises attracted tend to move on to a new destination as soon as tax holidays expire, meaning that there tend to be few links to domestic firms created, little transfer of technology and little sourcing of local raw materials.⁶⁰⁶ Moreover, the success of such operations depends to a large extent on the reaction of the countries that provide the sources of capital and the markets for the exports.

The value of tax holidays is contingent upon the amount of profit accrued by the promoted company. It is possible to argue that the highest-earning companies that benefit the most are, in fact, those that need it the least.⁶⁰⁷ Thus, the bulk of the revenue

⁶⁰² Clark (n 572) 258.

⁶⁰³ Holland & Vann (n 567) 16.

⁶⁰⁴ Raghbendra Jha, *Modern Public Economics* (2nd edn Routledge 2010) 473.

⁶⁰⁵ Holland & Vann (n 567) 16.

⁶⁰⁶ Geoffrey Jones, *The evolution of international business: an introduction* (Routledge 1996) 250.

⁶⁰⁷ Holland and Vann (n 567) 996.

foregone is likely to have had no beneficial impact on investment, and so the ratio of benefits to costs is likely to be low.

The following information will describe CIT exemptions and tax holidays in Thailand. As described in Chapter 4, the BOI is a primary authority which is responsible for granting BOI-promoted persons tax and non-tax incentives such as guarantees,⁶⁰⁸ permission,⁶⁰⁹ and support services. In addition, it sets the number of incentives granted according to the level of development of particular regions.⁶¹⁰ Seven types of activities are given priority: agriculture and agricultural products; mining, ceramics and basic metals; light industry; metal products, machinery and transport equipment; electronic industry and electric appliances; chemicals, paper and plastics and services and public utilities.⁶¹¹ Projects within these fields will receive CIT exemptions for eight years, regardless of location. In addition to the privileges available to each zone, research and development projects are identified as priority activities entitled to full privileges. Furthermore, a prioritised company is entitled to a tax holiday on the net profit derived from its activity, excluding the cost of land and working capital, for a period of not more than eight years from the date that income is first derived from such activity.⁶¹²

5.2.2 Reduced Corporate Income Tax Rates

Governments may seek to attract FDI into specific sectors or regions, by lowering the CIT rate. Countries such as Hong Kong,⁶¹³ Ireland,⁶¹⁴ Laos,⁶¹⁵ Cambodia⁶¹⁶ and

⁶⁰⁸ IPA 2001, ss 43-48.

⁶⁰⁹ IPA 2001, ss 24-27 and 37.

⁶¹⁰ The Board of Investment of Thailand, 'Investment Promotion Policies and Criteria' <http://www.boi.go.th/english/about/boi_policies.asp> accessed 10 November 2011.

⁶¹¹ Board of Investment Announcement No. 10 / 2552 (2009) Types, Sizes and Conditions of Activities Eligible for Promotion <http://www.boi.go.th/english/about/eligible_activities.asp> accessed 10 November 2011.

⁶¹² IPA 2001, s 31 <http://www.boi.go.th/english/download/boi_forms/proact_eng.pdf> accessed 10 November 2011.

⁶¹³ CCH Hong Kong Limited, *Tax compliance in Greater China: China, Hong Kong and Taiwan* (2nd edn CCH Hong Kong Limited 2008) 297-298

⁶¹⁴ For corporation tax, including reduced rate, in Northern Ireland, see House of Commons Northern Ireland Affairs Committee, *Corporation Tax in Northern Ireland* 1st report of session 2010-2012 Vol.2 (The Stationery Office 2010).

Estonia⁶¹⁷ have all used this incentive. As UNCTAD's 2000 report observed, 'It may be targeted at the income of foreign investors who meet specified criteria, or it may be used to attract additional FDI'.⁶¹⁸ Indeed, Malaysia introduced reduced CIT in the mid-1980s to attract extra overseas investment.⁶¹⁹

Tax rates generally have a greater effect on the investment decisions of export-oriented companies than those seeking domestic market or location-specific advantage, because such firms are not only mobile, but also operate in competitive markets with very slim margins.⁶²⁰ It is often possible to offer a general reduction in CIT to firms satisfying certain criteria, for example small-scale manufacturing or agriculture, and a low CIT rate can have a positive psychological effect on the markets – it indicates to possible investors that the government wishes to give the market freedom to determine the most profitable investments. As Morisset has noted, this approach can, in the short-term, reduce tax revenue. Over the long-term, however, 'the simplicity of the tax system may attract more investors, increasing the tax base, and thus compensating for the initial reduction'.⁶²¹ The benefits of a lower corporate tax rate accrue slowly and over a long time.

Unlike tax holidays, according to this system the firms remain liable for tax and the benefit is applied to both new and existing investments. According to Holland & Vann, the key issue at stake here is the identification of qualifying income. Regulations defining eligible taxpayers are needed if the benefit is to achieve its aim of promoting

⁶¹⁵World Bank, International Monetary Fund, *Lao People's Democratic Republic: Second Poverty Reduction Strategy Paper* (International Monetary Fund 2008) 24.

⁶¹⁶Suiwah Leung, Benedict F. W. Bingham and Matt Davies (eds), *Globalization and development in the Mekong economies* (Edward Elgar Publishing 2010) 66.

⁶¹⁷Organisation for Economic Co-operation and Development, *Fundamental reform of corporate income tax* (OECD Publishing, 2007) 117.

⁶¹⁸UN, Tax Incentives (n 547) 19.

⁶¹⁹Ibid.

⁶²⁰Louis T. Wells, *Using tax incentives to compete for foreign investment: are they worth the costs?* (World Bank Publications 2001) 102.

⁶²¹Morisset (n 566) 2.

only certain types of project, such as manufacturing or small businesses.⁶²² As incomes from both new and existing operations are eligible for the incentive, rate reductions are less likely to be as cost-effective as incentives related to the amount of new investment.⁶²³ States with corporate tax systems that differ significantly from those of other countries may experience difficulty in bringing their systems more in line with prevailing international trends,⁶²⁴ but multinational corporations can exploit differences in tax bases and rates, and have the resources and expertise to do so for maximum gain.⁶²⁵ A company could, for example, issue debt in a country with high tax rates in order to finance investment in one where rates are lower.

The other disadvantage of tax rate reduction is that unlike the revenue impact of tax holidays, which grows over time as more firms become eligible, a general tax rate reduction has significant up-front revenue costs because it applies to income from existing operations as well.⁶²⁶ Also, if only certain types of income are to qualify, then rules must be defined to measure the income, which inevitably bring with them loopholes ripe for exploitation. The alternative is to use a formula approach, which will be less accurate in directing the benefit. With either approach, the rules are often ‘complex and subject to manipulation’.⁶²⁷ Therefore, regimes applying reduced tax rates to certain activities or enterprises require a number of rules to minimise tax avoidance. Furthermore, under some circumstances, a reduction in the CIT rate could be a disincentive if the project is already enjoying other preferential tax treatments, such as accelerated depreciation⁶²⁸.

With respect to CIT reduction in Thailand, the Thai government has launched a tax incentives programme to encourage individuals and businesses to pursue commercial

⁶²² Holland & Vann (n 567) 9.

⁶²³ Ibid 11.

⁶²⁴ Jack M. Mintz and Thomas Tsiopoulos, *Corporate income taxation and foreign direct investment in Central and Eastern Europe* (World Bank Publications 1992) 10.

⁶²⁵ Ibid.

⁶²⁶ Holland & Vann (n 567) 11.

⁶²⁷ Ibid 9.

⁶²⁸ Zee et al (n 561) 1499.

activity, and to stimulate the economy, the growth of which through FDI is promoted by a series of corporate tax reductions.

The first example of a CIT incentive is tax exemption for research and development (R&D) projects as stipulated in Royal Decree B.E. 2539 (1996) No. 297. Under this regulation, companies are 100% exempt from CIT for the costs they pay for research and development to government and private authorities. The aim of this regulation is to encourage private sectors to support research and development programmes, and it is believed to increase expenditure on R&D by international groups and to improve Thailand's integration into R&D value chains.

The second CIT incentive concerns tax incentives for regional operating headquarters (ROH). Thailand's strategic location in South-East Asia means that it serves as an administrative centre for many multinational businesses. However, they typically do not utilise Thailand as a regional profit centre, largely because of its relatively high corporate income tax and withholding tax rates.⁶²⁹ The Thai government hopes to change this situation with its implementation of the ROH scheme. Essentially, an ROH is 'a company incorporated under Thai law in order to provide managerial, technical or supporting services to its associated enterprise or its domestic or foreign branches'.⁶³⁰ On 16 August 2002, the Thai government established regulations covering ROHs as stated in the Royal Decree issued under the Revenue Code regarding Reduction and Exemption from Revenue Taxes No. 405 B.E. 2545 (2002). By giving tax exemptions, the Thai government intended to encourage multinationals to perform specific activities including business management and administration, the sourcing of raw materials, parts and finished products and research and development work. Additionally, technical assistance, marketing and sales promotion, human resources training, business advisory services, investment feasibility studies and analyses and credit management are believed to be transferred to Thailand through ROH operation.

⁶²⁹ Seri Manop & Doyle 'Regional Operating Headquarters' GTCC Magazine No. 1/2003
<http://www.serimanop.com/index.php?option=com_content&view=article&id=127:regional-operating-headquarters&catid=40:articles&Itemid=92> accessed 10 November 2011.

⁶³⁰ Royal Decree No. 405, s 3
<http://download.rd.go.th/fileadmin/images/pdf_roh/Krisadeeka_Section1_3.pdf> accessed 10 November 2011.

Tax incentives included in the ROH scheme are available to both Thai and foreign-held companies, and they extend to companies qualifying as an ROH, as well as their expatriate employees. Under this scheme, ROHs must be incorporated under Thai law and have paid-up minimum capital of at least THB 10 million⁶³¹ on the last day of any accounting period. They must also provide services to branches or affiliates located in three or more countries. Income must come from managerial, administrative, technical or other prescribed supporting services for branches/associated companies. In addition, income from services provided must form at least 50% of ROH income (reduced to one-third for the first three years).⁶³² Businesses in Thailand which receive a substantial portion of their total income as service fees and/or royalties received from specific kinds of parties offshore may qualify to receive these ROH tax incentives. The tax advantages of companies with their headquarters in Thailand include a flat 30% tax rate for active business profits; a tax-efficient holding company regime; effective exemption on foreign dividends and branch profits through a foreign tax credit regime; the availability of various tax-efficient investment platforms; an attractive R&D tax credit regime; access to an extensive tax treaty network; generally, no outbound withholding taxes under domestic (as opposed to treaty) provisions and typically no exit costs on the disposal or restructuring of Thai investments.⁶³³ The Thai government expects an increase in ROH establishments, as a result of both tax and non-tax incentives, to bring increased capital flows into the country. It is believed that these measures will not cause a decline in the government's revenue as a result of a decrease in tax collections; on the

⁶³¹ GBP201,491.

⁶³² Royal Decree No. 405, s 10 (1) - (3)
<http://download.rd.go.th/fileadmin/images/pdf_roh/Krisadeeka_Section8_12.pdf> accessed 10 November 2011.

⁶³³ It is important, however to be aware that FDI affects corporate tax revenue most significantly through transfer pricing. The Thai Revenue Department issued transfer pricing guidelines in Departmental Instruction No. *Paw* 113/2545 in 2002 re: Corporate Income Tax – The Determination of Transfer Price based on the Market Price. The Thai Revenue Department has had the power under the Thai Revenue Code to adjust pricing where it was not based on market rates and the taxpayer could not provide a justifiable reason. These transfer pricing provisions are included in the Revenue Code, ss 65 (2) (4), 65 (2) (7), 65 (3) (13) - (15), and 70 (3), as well as, Double Taxation Agreements between Thailand and other countries <<http://www.rd.go.th/publish/6008.0.html>> accessed 10 November 2011.

contrary, they will help to increase long-term tax collections as more ROHs are established in the country.⁶³⁴

According to Royal Decree No.471 B.E.2551 (2008), the third example of a CIT incentive is given to a company which has a fixed asset value (excluding land) of less than THB 200 million⁶³⁵ and has fewer than 200 employees, or is known as a small and medium-sized enterprise (SME). Moreover, a Thai company with paid-up capital of THB 5 million⁶³⁶ and below is entitled to a reduced CIT rate of 15% on net profit over THB 150,001⁶³⁷ up to THB 1 million⁶³⁸, a CIT rate of 25% on net profit over THB 1 million up to THB 3 million⁶³⁹ and a CIT rate of 30% on net profit over THB 3 million.⁶⁴⁰ Furthermore, a full corporate income tax exemption is granted to a qualified venture capital (VC) company on a dividend income and capital gain from the sale of stock received from investing in Thai SMEs. A dividend or income from sales of securities received from the VC's exempt income is also tax exempt.⁶⁴¹

Furthermore, following Royal Decree No. 467 B.E. 2550 (2007), as amended by Royal Decree No. 475 B.E. 2551 (2008), a reduction of the tax rate to 20% is granted to a company listed on the Market for Alternative Investment (MAI) and 25% to a company listed on the Stock Exchange of Thailand (SET). Finally, Royal Decree No. 426 B.E. 2547 (2004) provides incentives to petroleum companies. Companies engaged in the petroleum business, which are licensed for the purchase and sale of petroleum products in duty exempt areas shall be liable for 10% of CIT, provided that their income is more than THB 2,000 million⁶⁴² per year. Companies engaged in the petroleum business that

⁶³⁴ News from the Ministry of Finance (unofficial translation by the Board of Investment of Thailand), No. 86/2544 on 11 December 2001 <http://www.boi.go.th/english/download/law_regulations/60/roh.pdf> accessed 10 November 2011.

⁶³⁵ GBP 4,029,820.

⁶³⁶ GBP 100745.

⁶³⁷ GBP 3061.

⁶³⁸ GBP 20,149.10.

⁶³⁹ GBP 60,447.31.

⁶⁴⁰ Profit exceeding THB 3 million is subject to CIT ordinary rate of 30%.

⁶⁴¹ Royal Decree 396 B.E.2545 (2002), Ministerial Regulation no.126 clause 2(58).

⁶⁴² GBP 40,298,206.

hold concessions from the Department of Mineral Resources are subject to the Petroleum Income Tax Act B.E. 2514 (1971) rather than to the provisions of the Revenue Code. Currently, the rate of taxation under the Petroleum Income Tax Act is 50%, and is not higher than 60% of the net profit.⁶⁴³

5.2.3 Accounting Rules that Allow Accelerated Depreciation and Loss Carry-Forwards for Tax Purposes

The timing of recognising income and expenses is crucial to the calculation of taxable income.⁶⁴⁴ Burns and Krever specify the distinction between cash and accrual based accounting systems,⁶⁴⁵ Under which, the rules specifying when receipts and expenses are recognised have major effects on how taxable income is measured. When establishing a business in a host country, FDIs tend to consider such factors as the applicable accounting method, inclusions in income, allowable deductions, depreciation rules and treatment of losses. As Easson argues:

Foreign investors may find, for example, that the host country rules governing the deduction of interest on loans are more restrictive than usual, especially where the interest is paid to a foreign parent company. Rules permitting the carry-forward of losses are especially important, since most new FDI ventures take several years to show a profit.⁶⁴⁶

Governments that employ a low corporate profit tax rate often use two other mechanisms to lower the effective tax rate. One allows investors to carry losses forward (or backward) for a specified number of years (usually three to five), for tax accounting purposes. In most cases, only a fixed ratio of the loss with an upper limit is allowed to

⁶⁴³ Petroleum Tax Act (No.4) B.E. 2532 (1989), s 20.

⁶⁴⁴ See Moshe Shekel, *The Timing of Income Recognition in Tax Law and the Time Value of Money* (Routledge-Cavendish 2009).

⁶⁴⁵ Lee Burns and Richard Krever, 'Taxation of Income from Business and Investment, Tax Law Design and Drafting' (1998) International Monetary Fund vol 2; Victor Thuronyi (ed), 'Taxation of Income from Business and Investment' ch 16, 23 <<http://www.imf.org/external/pubs/nft/1998/tlaw/eng/ch16.pdf>> accessed 10 November 2011.

⁶⁴⁶ Easson, (n 8) 39.

be carried forward (or backward).⁶⁴⁷ This measure is popular with investors who expect to make losses in their first few years of business.⁶⁴⁸

Accelerated depreciation offers another means of introducing tax incentives to stimulate economic growth,⁶⁴⁹ although the pattern of revenue costs of accelerated depreciation can prove more complicated than those of tax holidays. The government actually incurs a higher level of initial expenditure to achieve the same effect. The revenue costs also actually fall over time, as the tax benefits offered to new investments are offset by the increased revenue from tax on the old investments.⁶⁵⁰ As a tax incentive, accelerated depreciation does not encourage the potentially detrimental creation of short-lived businesses, as do tax holidays, since ‘merely accelerating the depreciation of an asset does not increase [its] total allowable nominal depreciation beyond its original cost.’⁶⁵¹

Accelerated depreciation also allows investment costs to be deducted quickly, reducing the distortion that an income-based tax would typically produce against investment.⁶⁵² Furthermore, the main benefit to the investor of accelerated depreciation is the time value of delayed tax payments. In such a case, investment expenses would be nothing more than an interest subsidy on the investment’s full cost.⁶⁵³ Lastly, it is proven to be more cost-effective than the reducing the CIT rate.⁶⁵⁴ However, its sole pitfall is the fact that its revenue cost is not as readily ascertainable, since it requires present value comparisons between the stream of depreciation allowances under accelerated depreciation rates and under regular depreciation rates.⁶⁵⁵

⁶⁴⁷ Knauer (n 600) 11.

⁶⁴⁸ UN, Tax Incentives (n 547)19.

⁶⁴⁹ See UN, Tax Incentives (n 547) 19 for a brief definition of ‘accelerated depreciation’.

⁶⁵⁰ Holland & Vann (n 567) 11.

⁶⁵¹ Zee et al (n 561) 1505. They also specify that ‘acceleration of depreciation would result in the full write-off of investment costs in the current year, so that the CIT becomes simply a tax on the net cash flow over time associated with the investment. The initial investment outlay is a cash outflow and is fully deductible, whereas subsequent returns from the investment are cash inflows and fully taxable. Hence, accelerated depreciation is called ‘cash flow tax’

⁶⁵² Ibid 1505.

⁶⁵³ Ibid.

⁶⁵⁴ Ibid 1510.

⁶⁵⁵ Ibid 1503.

In Thailand, accelerated depreciation is available under the Royal Decree regarding Reduction and Exemption from Revenue Taxes No. 405 B.E. 2545 (2002), an ‘ROH scheme’. Under this scheme, a company is provided with ‘an initial depreciation rate of 25% of asset value for the acquisition and installation of buildings and offices which the ROH purchases for its own commercial activities’. With respect to the loss carry forward benefit, this is available to those BOI-promoted companies that have been granted a tax holiday. General companies benefits from section 65 (3) (12) of the Revenue Code, which allows losses to be carried forward for five accounting periods and to be offset against future profits from all sources. Net losses can be deducted against net profits on a year-by-year basis. The Board of Taxation Ruling No. 35/2540 (1997) and the Departmental Notification dated 5 February B.E. 2535 (1987) specified the tax treatment of the use of a BOI company tax losses carried forward. The use of losses carried forward will be discussed by examining two scenarios: a company operating BOI-promoted business only and one operating both BOI and non-BOI-promoted businesses.

Where a BOI-promoted company carries on only BOI-promoted businesses, under Clause 4.1 of the Notification:⁶⁵⁶

It is entitled to deduct annual net losses arising during the tax holiday period from net profits arising within 5 years from the end of tax holiday period, without having to offset such losses against net profits generated from BOI-promoted business during the tax holiday period. Moreover, the company may select the year in which the deduction of net losses from net profits will occur.

Where a company carries on both BOI and non-BOI-promoted business, Clause 4.2 of the Notification⁶⁵⁷ provides:

The company can offset an annual net loss of the BOI-promoted business against the net profit of the non-BOI-promoted business arising during the tax holiday period. However, if the BOI-promoted company has also accumulated losses from the non-BOI-promoted business brought

⁶⁵⁶ The Revenue Departmental Notification dated 5 February B.E. 2535 (1987).

⁶⁵⁷ Ibid.

forward from previous years, the annual profit of the non-BOI-promoted business must prior be deducted using the accumulated loss brought forward from the non-BOI-promoted business. If there remains a balance of net profit from the non-BOI-promoted business, the annual net loss incurred by the BOI-promoted business can be deducted in the tax calculation. The remaining loss of the BOI-promoted business incurred during the promotion period can be carried forward to offset against the net profit within 5 years, after the end of the promotion period and the remaining loss of the BOI-promoted business can be applied to offset against the net profit of any one or more years similar to the earlier scenario.

However, according to Section 31 of the IPA 1977, as amended by the IPA 2001 (No.3), promoted persons are entitled to offset 'annual losses' incurred during a tax exemption period from net profits after the end of the tax exemption period. The BOI set up the calculation method in cases where promoted companies operate more than one promoted project. The promoted companies do not have to offset losses against profits among the BOI-promoted projects. However, the Revenue Department disagreed with this rule and instead relied on the Departmental Notification dated 5 February B.E. 2535 (1987), which states that the net profit and loss of BOI and non-BOI business shall be calculated separately.

It can be noticed that tax holidays offered by the BOI can lead to uncertain interpretations which require clarification of, for example, the time at which the revenue was first derived, or the profit/loss calculation. These problems will be analysed in the next chapter

5.2.4 Investment Tax Allowances

Klemm defines an investment allowance as the 'deduction of a certain fraction of an investment from taxable profits (in addition to depreciation)'.⁶⁵⁸ Such allowances tend to lower the effective price of acquiring capital. They are given as a specified percentage of qualifying investment expenditures and are deducted against the tax

⁶⁵⁸ Klemm (n594).

base.⁶⁵⁹ Their value, however, also depends on the value of the CIT rate applicable to the tax base. The amount of tax relief on a given amount of investment allowance is variable according to the tax rate.⁶⁶⁰

UNCTAD's report observes that:

Under an investment allowance scheme, firms are provided with faster or more generous write-offs for qualifying capital costs. Two types of investment allowances can be distinguished. With accelerated depreciation, firms are allowed to write off capital costs in a shorter time period than is dictated by the capital's useful economic life, which generally is the accounting basis for depreciating capital costs.⁶⁶¹

Although such a policy does not alter the total amount of capital cost to be depreciated, it does increase the claim's value, which is greatest when the full cost of the capital asset can be deducted in the year in which the expenditure is made. In the case of enhanced deduction, firms can claim deductions for a multiple of the actual cost of the qualifying capital (UNCTAD's report specifies one-and-a-half times or twice the price).

Investment allowances generally specify certain percentages of a business's start-up costs, such as those incurred by purchasing plant and equipment. Such expenses can also 'be written off immediately as expenses in the current period, in addition to the normal allowable depreciation on the full costs of such investments'.⁶⁶² The value of investment allowances will differ depending on whether or not they must be claimed in the year they were earned. In most countries, unused depreciable capital costs can be carried forward, in some cases indefinitely, to offset future tax liabilities.⁶⁶³ As is often the case during the early stages of an investment project involving high capital expenditure, deductions provide benefits only if they can be carried forward to offset future tax liabilities.⁶⁶⁴ Provided that a carry-forward of the incentive is allowed, an

⁶⁵⁹ UN, Tax Incentives (n 547) 3.

⁶⁶⁰ Ibid 20.

⁶⁶¹ Ibid 20-21.

⁶⁶² Zee et al (n 561) 1504.

⁶⁶³ Easson (n 8) 138.

⁶⁶⁴ UN, Tax Incentives (n 547) 21.

investment allowance can operate in a manner similar to a tax holiday, in that it can eliminate the tax liability of the firm in the early years of operation. The key difference is that a tax holiday is usually time-limited. In addition, existing firms, rather than start-up firms, that stand to gain the most from tax allowances, as the latter cannot actually benefit from the allowances until they start to turn a profit and are paying taxes.⁶⁶⁵

Furthermore, investment tax allowances ‘promote new investment rather than giving windfall gains to owners of old capital, as a reduction in the corporate tax rates does’.⁶⁶⁶ The so-called ‘accelerated allowances’ are generally directed towards investment, industrial buildings or equipment, training or research and development.⁶⁶⁷ Ideally, they ‘enhance the capacity of the community and the business environment’⁶⁶⁸ and tend to be less costly than an outright tax holiday. Zee *et al* make the important point that, investment allowances facilitate both transparency in administration and the effective targeting of incentives.⁶⁶⁹ The drawbacks of investment tax allowances become most apparent when investment projects have long gestation periods or are located in areas of political and/or macroeconomic instability.⁶⁷⁰ They also tend to distort the choice of capital assets in favour of short-lived ones, and require a well-developed accounting system with potentially high administrative costs. Furthermore, the carry-forward of deductions by firms that cannot fully use them can considerably raise the revenue cost over time.

Because investment allowances are aimed primarily at capital investment, their impact on public revenue is limited by the amount of capital that the firm is willing to risk, placing them in contrast to tax holidays, which appeal primarily to quick-profit, short-term investments.⁶⁷¹ There is also an issue of tax avoidance at stake where investment allowances are concerned. Attempts to target the incentives either too specifically or too

⁶⁶⁵For a more detailed discussion on tax allowances, see Holland & Vann (n 567) 11.

⁶⁶⁶Morisset (n 566) 2.

⁶⁶⁷ International Bureau of Fiscal Documentation, International Fiscal Association, *Bulletin for international fiscal documentation*, Volume 50 (L. J. Veen. 1996) 111.

⁶⁶⁸ UN, Tax Incentives (n 547) 3.

⁶⁶⁹ Zee *et al* (n 561) 1505.

⁶⁷⁰ Morisset (n 566) 2.

⁶⁷¹ Holland & Vann (n 567) 10.

vaguely are counterproductive because they introduce complexity and uncertainty for both the company and the administrator, and therefore if the company cannot 'be certain of the eligibility of expenditure for the incentive, its effect on behaviour is reduced significantly or even eliminated'.⁶⁷²

5.2.5 Investment Tax Credits

As outlined by Clark, investment tax credits may be flat or incremental. A flat investment tax credit is a fixed percentage of investment expenditure, whereas an incremental investment tax credit amounts to a fixed percentage of qualifying expenditures and applies to yearly expenditure in excess of a (usually) moving-average base, i.e. the taxpayer's average investment expenditure over the previous three years.⁶⁷³ Incremental tax credits aim to better target tax relief towards companies' incremental expenditures.

As Zee *et al* have observed, investment tax credits provide stipulated percentages of investment costs that can be deducted from CIT liabilities. If the CIT rate is uniform, investment tax credits function in essentially the same way as investment allowances, sharing their positive and negative implications.⁶⁷⁴ In comparison to CIT reduction, investment tax credits benefit only new investment.⁶⁷⁵ They provide a larger reduction in the effective tax rate on investment at a lower cost, taking into account the impact of taxation on both marginal revenues and costs.⁶⁷⁶ Investment tax credits, as well as investment allowances are more cost-effective than those involving reduction of or exemption from the CIT rate.⁶⁷⁷ In addition, investment allowances are far more effective than CIT holidays in promoting specific investments, as noted earlier, and

⁶⁷²Ibid 14.

⁶⁷³ Steven W. Clark, 'The Design and Assessment of Corporate Tax Incentives for Foreign Direct Investment' Global Forum on International Investment Attracting Foreign Direct Investment for Development, Shanghai, 5-6 December 2002, 18 <<http://www.oecd.org/dataoecd/54/58/2764532.pdf>> accessed 10 November 2011.

⁶⁷⁴ Zee et al (n 561) 1504.

⁶⁷⁵ Anwar Shah, 'Fiscal Incentives for Investment and Innovation' (2006) World Bank Working Paper Series, 28 available at SSRN: <http://ssrn.com/abstract=896144>.

⁶⁷⁶ Clark, 'The Design and Assessment of Corporate Tax Incentives for Foreign Direct Investment' (n 673) 4.

⁶⁷⁷ Goyal and Chai (n 571) 23.

their revenue costs are both more transparent and, if shared with CIT rate reductions, easier to administer and control.⁶⁷⁸

An example of a tax credit can be seen in the United States Research and Experimentation (R&E) Tax Credit which is codified in Section 41 of the Internal Revenue Code. Atkinson summarises that essentially it is ‘an important tool for boosting innovation and competitiveness and creating higher wage jobs’.⁶⁷⁹ Companies can choose from three versions of the credit, although Atkinson describes only one, in which a taxpayer’s current-year qualified research expenses in excess of a specified base amount are eligible for a 20% tax credit. In practice, however, the effective rate is 13%.⁶⁸⁰ The research and experimentation tax credit has long been a subject of criticism. The early research, along with anecdotal evidence, suggested that the credit is not effective, since it simply rewards companies for what they would have done even without the incentive.⁶⁸¹ A survey conducted in 1996 cited that 55% of responding companies deemed the tax credit ‘not at all influential’ on their investment.⁶⁸² However, a number of scholars including Hall,⁶⁸³ Bloom & Griffith,⁶⁸⁴ and Coopers & Lybrand⁶⁸⁵ have found that a tax credit is an effective tool and on average produces USD 1.10 of research for every tax dollar forgone.⁶⁸⁶ Research from Australia,⁶⁸⁷ France⁶⁸⁸ and

⁶⁷⁸ Zee et al (n 561) 1504.

⁶⁷⁹ Robert D. Atkinson, ‘Expanding the R&E tax credit to drive innovation, competitiveness and prosperity’ (2007), *Journal of Technology Transfer* 32, 618
<<http://www.itif.org/files/AtkinsonRETaxCreditJTT.pdf>> accessed 10 November 2011.

⁶⁸⁰ *Ibid.*

⁶⁸¹ *Ibid* 619.

⁶⁸² *Ibid.*

⁶⁸³ See Bronwyn H. Hall, ‘The effectiveness of research and experimental tax credits: Critical literature review and research design’ (1995) U.S. Congress, Office of Technology Assessment
<<http://emlab.berkeley.edu/~bhhall/papers/BHH95%20OTArtax.pdf>> accessed 10 November 2011.

⁶⁸⁴ See Nicholas Bloom and Rachel Griffith, ‘The internationalisation of R&D’ (2001), *Fiscal Studies*, 22 (3), 337-355 <<http://www.ifs.org.uk/fs/articles/0045a.pdf>> accessed 10 November 2011.

⁶⁸⁵ Coopers & Lybrand, ‘Economic Benefits of the R&D Tax Credit’ (January 1998).

⁶⁸⁶ Atkinson (n 679) 619.

⁶⁸⁷ Australian Bureau of Industry Economics, cited in Bronwyn Hughes Hall and John Michael van Reenen, ‘How effective are fiscal incentives for R&D? A review of the evidence’ (2000) *Research Policy*, 29, 466.

Canada⁶⁸⁹ has also found that a similar result and proved that a tax credit has a positive impact on sales and the number of product innovations.

5.2.6 Personal Income Tax Reduction

Personal income tax can involve expatriate employees of foreign companies. When expatriates do not become resident in the country to which they are sent, are taxed only on the portion of their income that has a source in that country. Usually, that means only income derived from employment performed in the country. They may even escape tax on that income by virtue of a tax treaty, i.e. if they are present in Thailand for fewer than 183 days and their salary is paid by their original employer, it is exempted from Thailand's tax by virtue of treaty provision.⁶⁹⁰ Nonetheless, if employees become resident in Thailand whether temporarily or ordinarily they are liable to personal income tax on their worldwide income.⁶⁹¹

ROH expatriate workers can claim a 15% reduction in the rate of personal income tax for up to eight years.⁶⁹² Under the ROH scheme, foreign employees usually based in Thailand, who are assigned to work outside of the country for a certain period are entitled to tax exemption on income earned during their time away. This is under the condition that their employers do not claim the expenses paid to the absent employee for tax purposes in Thailand.⁶⁹³ This ROH scheme with a personal income tax incentive is considered by tax professionals as 'very attractive'.⁶⁹⁴

⁶⁸⁸ Benoit Mulkay and Jacques Mairesse, 'The Effect of the R&D Tax Credit in France' (2003) EEA-ESEM Conference, Stockholm, Sweden <<http://www.eea-esem.com/papers/eea-esem/2003/2250/RD%20Tax%20Credit%20in%20France.pdf>> accessed 10 November 2011.

⁶⁸⁹ Marcel Dagenais, Pierre Mohnen, and Pierre Therrien, 'Do Canadian firms respond to fiscal incentives to research and development?' (1997) CIRANO Working Papers, 97s-34 <<http://www.cirano.qc.ca/pdf/publication/97s-34.pdf>> accessed 10 November 2011.

⁶⁹⁰ Based on Article 15 of the OECD Model.

⁶⁹¹ United Nations, 'Taxation and Technology Transfer: Key Issues' (2005) (UNCTAD/ITE/IPC/2005/9) 24 referred to as 'Taxation and Technology Transfer'.

⁶⁹² Royal Decree regarding Reduction and Exemption from Revenue Taxes No. 405 B.E. 2545 (2002), s 4.

⁶⁹³ Ibid.

⁶⁹⁴ Law Alliance, 'Thai Regional Operating Headquarters: A better alternative to oversee business interests in Asia' <<http://www.lawalliance.co.th/update01.htm>> accessed 10 November 2011.

Apart from the incentive provided under the ROH scheme, other tax allowances, deductions and exemptions are granted to individuals, with the main purpose of encouraging private consumption. They include, first, a personal income tax exemption⁶⁹⁵ for an income base from THB 100,000⁶⁹⁶ to THB 150,000⁶⁹⁷ per year,⁶⁹⁸ which aims to support low income earners and the aged; second, a deductible allowance for life insurance premiums paid from THB 50,000⁶⁹⁹ to 100,000⁷⁰⁰ per year;⁷⁰¹ third, a deductible allowance for the contributions to provident funds, government pension funds, welfare funds under the private school provision and retirement mutual funds (RMF) from THB 300,000⁷⁰² to 500,000⁷⁰³ per year;⁷⁰⁴ and lastly, a deductible allowance for personal investment in long-term equity (LTE) from THB 300,000 to 500,000 per year.⁷⁰⁵

5.2.7 Value Added Tax Reduction

Exemptions from VAT are specified under Section 81 of the Revenue Code. In addition, which effect from 1 April 2005 onwards, the value of the tax base of a small business under Section 81/1 of the Revenue Code is increased from THB 1.2 million⁷⁰⁶ to THB 1.8 million⁷⁰⁷ per year. This was pursuant to the Royal Decree issued under the Revenue

⁶⁹⁵ An exemption from ordinary personal income tax on the net income from the computation of income tax under RC, s 48(1).

⁶⁹⁶ Approximately GBP 2,021.

⁶⁹⁷ Approximately GBP 3,032.

⁶⁹⁸ Royal Decree No. 470 B.E. 2551 (2008).

⁶⁹⁹ Approximately GBP 1,010.

⁷⁰⁰ Approximately GBP 2,021.

⁷⁰¹ Ministerial Regulation No. 266 B.E. 2551 (2008).

⁷⁰² Approximately GBP 6,064.

⁷⁰³ Approximately GBP 10,107.

⁷⁰⁴ Ministerial Regulation No. 266 B.E. 2551 (2008).

⁷⁰⁵ Ministerial Regulation No. 266 B.E. 2551 (2008).

⁷⁰⁶ Approximately GBP 24,257.

⁷⁰⁷ Approximately GBP 36,385.

Code regarding the prescription for the value of the tax base of a small business exempted from value added tax (No. 432) B.E. 2548 (2005). This is the government's attempt to implement a tax measure supporting its policy of enhancing economic growth by relieving the tax burden of small-scale businesses. The small business operator who is not VAT registered has the advantage of not having to shift the tax burden to his customers and, as a result, is able to charge a cheaper price for the goods, competing with other business operators. Moreover, the VAT rate reduction period was extended to comply with the economic recovery plan, which relies on domestic spending, so the VAT rate was reduced to 6.3% for the sale of goods, services and imports from 1 October 2008 to 30 September 2010, and changed to 9% for the sales and imports incurred from 1 October 2010.⁷⁰⁸ Consumption taxes such as VAT are generally irrelevant to FDI, because their burden is passed on to consumers via retailers rather than being borne by producers.⁷⁰⁹

5.2.8 Specific Business Tax Reduction

A number of businesses are exempt from SBT, as stated in Section 91/3 of the Revenue Code. In addition, a reduction of the SBT rate from 3% to 0.01% on gross receipts is granted to banking business, finance business, securities business and credit foncier⁷¹⁰ business.⁷¹¹ Moreover, a reduction in the SBT rate for the sale of immovable property from 3% to 0.1% on gross receipts was applied to transactions occurring between 29 March 2008 and 30 March 2009.⁷¹² In accordance with the Thai government's aim to support the growth of the property market, there was an SBT reduction of 0.1% (or 0.11% inclusive of the 10% municipality tax) provided for property transfer fees and mortgage fees provided for land, buildings (including single houses, townhouses, terraced houses and commercial buildings) or land with buildings under the Land

⁷⁰⁸ Royal Decree No. 479 B.E. 2551 (2008) (Thailand).

⁷⁰⁹ Taxation and Technology Transfer (n 691) 20.

⁷¹⁰ A company licensed for the purpose of carrying out improvements, by means of loans and advances upon real securities. Chapter IV of the Undertaking of Finance Business, Securities Business and Credit Foncier Business Act B.E. 2522 (1979) (Thailand).

⁷¹¹ Royal Decree No. 469 B.E. 2551 (2008).

⁷¹² Royal Decree No. 472 B.E. 2551 (2008).

Allocation law and condominium units under the Condominium Act (No.4) 2008.⁷¹³ This reduction period was extended to 28 March 2010, as prescribed by Royal Decree No. 488 dated 17 May 2009.

5.2.9 Stamp Duty

An example of stamp duty exemption can be seen in Royal Decree No. 516, B.E. 2554 (2011), under which a limited or public limited company is entitled to an exemption from stamp duty, VAT and SBT, on partial business transfers (PBTs), if the PBT is made to an associated company.⁷¹⁴ This exemption is granted to support business restructuring and to enhance performance and business competitiveness, with the aim of creating a more sustainable economy.⁷¹⁵

5.2.10 Withholding Tax Relief

Dividends derived from a promoted activity are exempt from income tax in the hands of the recipient for a period equal to the period for which a promoted person is exempt from CIT.⁷¹⁶

5.2.11 Import Duties Exemption

Initial outlays of capital for machinery and equipment required to start up a business can be high. In addition, high import taxes and customs duties on the import of such equipment can prove a disincentive to FDI.⁷¹⁷ An exemption from paying import duties on machinery is granted to an approved project, provided that machinery of the same quality is not already being made in Thailand, at least in the same quantity.⁷¹⁸ The BOI may, at its discretion, grant a reduction of only one-half of the rate of import duties, or not grant the exemption of import duties on the machinery to such activity provided that

⁷¹³ Notification of the Ministry of Interior, March 2007, effective from 29 March 2007 to 28 March 2008 (Thailand).

⁷¹⁴ Royal Decree No. 516, B.E. 2554 (2011) (Thailand). An Associated Company is one with common shareholding, voting rights, or managerial control of at least 50%.

⁷¹⁵ Royal Decree No. 516, B.E. 2554 (2011).

⁷¹⁶ IPA 2001, s 34.

⁷¹⁷ Taxation and Technology Transfer (n 691) 20.

⁷¹⁸ IPA 2001, s 28.

it follows the condition.⁷¹⁹ They may also grant a promoted person a reduction of import duties not exceeding 90% of the normal rates imposed on raw or essential materials which are imported into Thailand for producing, mixing or assembling in the promoted activity, each time for a period of not more than one year from the date stated by the BOI.⁷²⁰

The conditions set by the BOI regarding import duties exemption are as follows. Any project in Zone 1 receives an exemption of import duty on machinery to be used in a new project, provided that the project exports more than 80% of its total sales and locates its factories in industrial estates or promoted industrial zones. In addition, it can receive an exemption of import duty on raw materials used in the export products for a period of one year, provided that 30% of sales are exported.

5.2.12 Deduction of Transportation, Electricity and Water Costs, Deduction of the Project Infrastructure Installation Construction Costs

Apart from the rights and benefits which are offered by the BOI, the BOI also has the power to grant companies operating promoted activities one or more special benefits. BOI-promoted companies can receive a double tax deduction on the costs of transportation, electricity and water supply incurred in the course of their operation. There is also an additional 25% deduction for costs associated with developing certain infrastructure facilities. The BOI-promoted companies can choose to make deductions from the net profit of any one year or several years from the date income is first derived from the promoted activity.⁷²¹ The procedures and periods of time are at the board's discretion.

5.2.13 Relief from Double Taxation

Double taxation occurs when the income tax equation (taxable income \times tax rate = tax results) is applied twice to the same income.⁷²² Double taxation relief must apply to at

⁷¹⁹ IPA 2001, s 29.

⁷²⁰ IPA 2001 s 30.

⁷²¹ IPA 2001, s 35.

⁷²² Peter Harris, 'An Historic View of the Principle and Options for Double Tax Relief' (1999) British Tax Review 469.

least one element of the equation.⁷²³ Where international double taxation is concerned, there are two equations, one from the residence and one from the source country. Either country may provide relief, or can between them come to an agreement to share the burden.⁷²⁴

Various double tax agreements apply to income created in one country but wholly or partially exempt from taxation there.⁷²⁵ The relief from double taxation applies to the incomes earned from or by pensions, temporary employment, students and trainees, teachers, transport, shipping, athletes and entertainers supported by a governmental entity and directors' fees. Another benefit of a double tax agreement is a 'tax credit', whereby treaties make provisions for cases where taxation on one income is due to more than one country. In this case, the second country must usually provide a tax credit for taxes paid in the first country.⁷²⁶ For instance, if a company from Malaysia owns shares in a Thai company and receives dividends, the Malaysian company would have to pay Malaysian income taxes on the dividend but would receive a credit for the 10% withholding tax paid to Thailand. If the Malaysian company owns not less than 25% of the Thai company, then the credit includes income taxes paid by the Thai company on its income in addition to the taxes paid on the dividend. However, in any event, the credit may not exceed the Malaysian tax rate.

5.3 The Link between Tax Incentives and FDI

There is evidence of the link between tax incentives and FDI.⁷²⁷ Both have been proven to be an integral part of a government's strategy to attract overseas investors. The recent

⁷²³ Ibid.

⁷²⁴ For more detailed discussion on 'double tax relief', see Philip Baker, 'Some Aspects of United Kingdom Double Taxation Relief' (1998) 52 Bulletin for International Fiscal Documentation 445. John F. Avery Jones et al, 'Credit and exemption under tax treaties in cases of differing income characterisation' (1996) (International Bureau of Fiscal Documentation) 118-146.

⁷²⁵ Frank Stockmann, 'Should the Exemption Method have Priority over the Credit Method in International Tax Law?' (1995) International Bureau of Fiscal Documentation June 1995) 285.

⁷²⁶ Ernest R. Larkins, Double Tax Relief for Foreign Income: A Comparative Study of Advanced Economies' (2001) (ATA Discussion Paper Series No. 4 ISSN 1444-4283) 6.

⁷²⁷ For the link between taxes and FDI, see Reint Gropp and Kristina Kostial, 'FDI and Corporate Tax Revenue: Tax Harmonisation or Competition?' International Monetary Fund, Finance & Development, Vol 38, No. 2, June 2001 <<http://www.imf.org/external/pubs/ft/fandd/2001/06/gropp.htm>> accessed 10 November 2011. See also OECD, 'Tax Effects on Foreign Direct Investment-Recent Evidence and Policy Analysis', OECD Tax Policy Studies No. 17, ISBN 978-92-64-03337-0.

evidence of the effect of tax incentives can be seen from the influence of the tax rate on investors within regional economic groupings, i.e. the North American Free Trade Area, the European Union and the Association of Southeast Asian Nations. Foreign companies' initial capital outlay and operating costs can be reduced through tax incentive provisions.⁷²⁸ Foreign firms often seek to maximise their global profits by saving most of their costs, while governments aim to achieve economic development and to acquire the maximum possible revenue. The challenge is to find effective incentives in a compromise between the government and foreign investors.

Early literature by the Ruding Committee Report,⁷²⁹ based mostly on cases from the United States, suggests that a company's tax burdens highly influence its decision to invest abroad.⁷³⁰ High taxation is considered a significant barrier for foreign businesses.⁷³¹ An empirical analysis by Onyeiwu and Shrestha⁷³² indicates that low corporate income tax rates have a positive effect on FDI flow, because such rates attract new investment or even encourage reinvestment by the existing investors.⁷³³

Furthermore, there are proposals in European countries to amend tax rates in order to attract foreign investment,⁷³⁴ the European Union has itself suggested tax reform and

⁷²⁸ Kasipillai (n 386) 24.

⁷²⁹ A Committee of experts under the chairmanship of Dr Onno Ruding was appointed by the European Commission to consider three principal questions: (a) Do differences in taxation among Member States cause major distortions in the internal market, particularly as respects investment decisions and competition? (b) If distortions arise, can they be eliminated by market forces and tax competition or is Community action necessary? (c) If community action is necessary, what specific measures are required? See Malcolm Gammie, 'The Ruding Committee report: An initial response' (1992), Institute for Fiscal Studies for an analysis. <<http://www.ifs.org.uk/comms/comm30.pdf>> accessed 10 November 2011.

⁷³⁰ See Commission of the European Communities (CEC), Report of the Committee of independent experts on company taxation (Ruding report), Brussels, March 1992, 11.

⁷³¹ Richard Hess., 'Constraints on Foreign Direct Investment in Africa', in Carolyn Jenkins, Jonathan Leape and Lynne Thomas, *Gaining from Trade in Southern Africa: Complementary Policies to Underpin the SADC Free Trade Area* (St, Martin's Press 2000)

⁷³² The analysis uses the concept of the 'Optimal Investment Duration' to explain how a reduction in the corporate income tax rate could encourage foreign investors to reinvest their earnings – a decision that not only boosts the stock of FDI, but also prevents the 'recapitalisation' of the host country.

⁷³³ Steve Onyeiwu and Hemanta Shrestha, 'Tax Incentives and Foreign Direct Investment in the MENA Region' Economic Research Forum 12th Annual Conference, 19-21 December 2005, Cairo 18 <http://www.erf.org.eg/cms.php?id=download_document&file_id=501> accessed 10 November 2011.

⁷³⁴ Mooij and Ederveen (381) 1.

harmonisation.⁷³⁵ Likewise, in Hines's report, a higher tax rate leads to decreased FDI.⁷³⁶ Further support on this point can be seen from Gorter and De Mooij whose study, based primarily on European countries, concludes that 'tax rate differentials are more influential on European investment flows than continental flows'.⁷³⁷ The next relationship between tax and FDI can be seen in double taxation, particularly in the case of foreign subsidiaries, which are liable to pay CIT in both the host and home countries. Credit and exemption systems are therefore necessary to avoid this problem.

Tax credits for research and development have come under significant criticism, particularly with reference to FDI. Atkinson argues that the credit is ineffective, particularly because of its incremental nature and that a neutral tax code is preferable.⁷³⁸ He also believes that indirect incentives are the most effective way to promote innovation and competition in the global market. It has been proven that different types of investment have diverse effects on taxes.⁷³⁹ Investors' strategic decisions, once they have selected a country as a possible location for investment, rely in a large part on tax consequences. However, Morisset has argued that the factors influencing initial location selection tend to be more fundamental, with infrastructure, political stability and labour costs the main considerations.⁷⁴⁰

The fact that specific businesses such as banks, insurance companies and internet-related businesses can make the most of tax incentives across countries⁷⁴¹ proves the success of these incentives in attracting foreign subsidiaries of major global businesses. In terms of politics, tax incentives are popular measures amongst many politicians in

⁷³⁵ Ibid.

⁷³⁶ See James R. Hines, Jr., 'Lessons from behavioral responses to international taxation' (1999) *National Tax Journal* 54, 305-23.

⁷³⁷ See Joeri Gorter and de Ruud Aloysius de Mooij, 'Capital income taxation in Europe: trends and trade-offs' (2001) CPB Netherlands Bureau for Economic Policy Analysis, The Hague <<http://www.cpb.nl/sites/default/files/publicaties/download/capital-income-taxation-europe-trends-and-trade-offs.pdf>> accessed 10 November 2011.

⁷³⁸ See Atkinson (n 679).

⁷³⁹ See Aland J. Auerbach and Kevin Hassett, 'Taxation and foreign direct investment in the United States: a reconsideration of the evidence', in: Alberto Giovannini, R. Glenn Hubbard and Joel Slemrod (eds.), *Studies in International Taxation* (University of Chicago Press 1993) 119-148.

⁷⁴⁰ Morisset (n 566) 1; and Organisation for Economic Co-operation and Development, 'Tax Effects on Foreign Direct Investment, OECD, Recent Evidence and Policy Analysis No. 17, 2007.

⁷⁴¹ Ibid 3.

developing countries, which may simply be attributable to the fact that they face tremendous pressure to increase investment and create jobs through FDI, and tax incentives are a highly visible and relatively flexible means of concrete action toward achieving these goals.⁷⁴² According to Heady, ‘tax incentives can have a noticeable effect on the location of investment, especially between locations that are similar in other respects’.⁷⁴³ Despite the many proven benefits, though, there is some evidence that the effects of tax incentives on FDI can be small and relatively redundant.⁷⁴⁴

Regarding the links between tax incentives and FDI in Thailand, one can consider a series of World Bank⁷⁴⁵ (an international financial institution which provides financial and technical assistance to developing countries) surveys recording subjective investment climate. Thai firms were asked to rank (on a scale of 1-5) the perceived severity of 22 obstacles to doing business. ‘tax rates’ were perceived as a major or severe obstacle by 28% of firms in 2004 and by 19% in 2007.⁷⁴⁶ They were the fifth highest obstacle both in 2004 and 2007, and ‘tax administration’ came sixth and eight in 2004 and 2007, respectively.⁷⁴⁷ Companies, notably electronics and textile manufacturers,⁷⁴⁸ expressed their concern over bureaucratic burden including tax regulations. The research also found that business sectors such as garment, machinery and equipment and auto-parts industries expressed concerns about tax regulations and

⁷⁴² Elisabeth Gugl and George R. Zodrow, ‘International Tax Competition and Tax Incentives in Developing Countries’ International Studies Program Public Finance Conference: The Challenges of Tax Reform in a Global Economy, 4 <aysps.gsu.edu/isp/files/0440_Guglzodrow.pdf> accessed 10 November 2011.

⁷⁴³ Heady (n 174) 13.

⁷⁴⁴ Dan Usher ‘The Economics of Tax Incentives to Encourage Investment in Less Developed Countries’ (1977) *Journal of Development Economics* 4, 119-148. Anwar Shah, ‘Fiscal Incentives for Investment and Innovation’ (2006) World Bank Working Paper Series, available at SSRN: <http://ssrn.com/abstract=896144>.

⁷⁴⁵ The World Bank, ‘About Us’ <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html>> accessed 10 November 2011.

⁷⁴⁶ The World Bank, ‘Thailand Investment Climate Assessment Update, Report No. 44248-TH’, June 2008, 10 <<http://www.worldbank.or.th/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/THAILANDNEXTN/0,,contentMDK:22272367~pagePK:1497618~piPK:217854~theSitePK:333296,00.html>> accessed 10 November 2011.

⁷⁴⁷ *Ibid* 15.

⁷⁴⁸ *Ibid* 75.

high taxes.⁷⁴⁹ Clearly, the policy on general taxation, tax incentives and tax administration should be taken into consideration if the Thai government wishes to boost FDI. Moreover, tax administration issues in Thailand as a host country are relevant for FDI because in many cases they affect investors' decisions more than high rates of tax. Currently, there is a problem with the overlapping of tax jurisdictions between the BOI and the Revenue Department, a central tax authority, creating a variety of administrative problems.⁷⁵⁰

5.4 General Comments on Tax Incentives

As explained in this chapter, tax incentives are a means of improving social progress and encouraging economic activity, leading to greater prosperity. This thesis focuses on the latter factor, the encouragement of economic activity, particularly investment. Tax incentives have been used in both developed and developing countries with the aim of encouraging certain types of activities, which are, at the time, essential for the nation's economic growth. This is also a result of globalisation-induced change. Dunning and Kokko identified a number of factors related to globalisation, including the integration of markets, liberal economic policies, and lower transportation and communication costs.⁷⁵¹ Under the influence of these factors, FDI in developing countries could move away from being focused around market- and research-seeking, and move towards an efficiency-seeking model.⁷⁵² Investment incentives would, they argue, thrive as a result,

⁷⁴⁹ The World Bank, 'Thailand Investment Climate, Firm Competitiveness and Growth, Report No.36267-TH', 2006, 10.
<http://siteresources.worldbank.org/INTTHAILAND/Resources/Final_ThaiICA.doc> accessed 10 November 2011.

⁷⁵⁰ Satoshi Watanabe, 'FDI and Taxation in Asia - from a Japanese Point of View' (2006), paper presented at International symposium on FDI and Corporate Taxation: Experience of Asian Countries and Issues in the Global Economy, hosted by Centre of Excellence/Research on Economic Systems, Public Economic Program and ASIAN Public Policy Program, School of International and Public Policy, Hitotsubashi university < <http://www.econ.hit-u.ac.jp/~ap3/apppfdi6/papers.html>> accessed 10 November 2011.

⁷⁵¹ John H. Dunning, 'Determinants of Foreign Direct Investment: Globalisation Induced Changes and the Role of FDI Policies' (2002) Paper presented at the Annual Bank conference on Development Economics in Europe, Oslo, 25-26 June, 12. Ari Kokko, 'Globalisation and Foreign Direct Investment Incentives' (2002) Paper presented at the Annual Bank Conference on Development Economics in Europe, Oslo, 25-26 June, 2.

⁷⁵² Dunning, 2002 (n 751) 2.

so tax incentives and administration would be of key importance in improving an investment destination's attractiveness.⁷⁵³

However, research has shown a number of drawbacks to these tax incentives,⁷⁵⁴ as they erode the tax base because they can be misused by subjectively ineligible investments through the exploitation of legal loopholes by officials and/or investors.⁷⁵⁵ Furthermore, many investments, especially highly profitable ones, would have taken place even without tax incentives. Also, these investments can distort resource allocation, since they encourage certain activities at the expense of others, not necessarily because they generate more revenue, but only because they have been granted a tax advantage. Tax incentives also tend to attract opacity, corruption and 'socially unproductive rent-seeking activities'.⁷⁵⁶

Zee *et al* identify four specific costs involved in the allocation of tax incentives, which can further illuminate the analysis in this thesis. The first is the fact of distortions between investments granted incentives and those without incentives; secondly, there is a problem with forgone revenue on the assumption that the government operates under a revenue constraint, so that any lost revenue would have to be compensated from alternative distortive taxes; thirdly, they require necessary administrative resources and fourthly, there can be significant social costs from corruption or rent-seeking activities connected with the abuse of tax incentive provisions. As a result of these, the cost-effectiveness of tax incentives is 'often questionable'.⁷⁵⁷

FDI investment incentives can only be justified if foreign firms can actually benefit local companies by sharing skills or creating new markets. As Blomstrom has argued, 'In that case, the foreign investor's private benefits are lower than the social benefits, and total foreign investment will fall short of the optimal amount unless various

⁷⁵³ Susanne Kern, 'Competition for Foreign Investment in Developing Countries-the Role and Impact of Investment Incentives' (2005), Universitat zu Koln, Wirtschaftspolitisches Seminar, 31.

⁷⁵⁴ For an empirical research on benefits and disadvantages of tax incentives and FDI, see Klemm (n 594) Section III).

⁷⁵⁵ Zee *et al* (n 561) 1498.

⁷⁵⁶ *Ibid* 1498.

⁷⁵⁷ *Ibid* 1501.

investment incentives compensate the foreign investor'.⁷⁵⁸ Furthermore, competition among governments, at both national and local levels, to attract FDI may create problems because when governments go through this process, there is a tendency to overbid and the subsidies may very well surpass the level of the spill-over benefits, with welfare losses as a result.⁷⁵⁹ Spill-over is not automatic, but depends crucially on the conditions for local firms. Its potential is unlikely to be realised unless local firms have the ability and motivation to learn from foreign multinational companies (MNCs) and to invest in new technology, which implies that investment incentives aiming to increase the potential for spill over may be inefficient unless they are complemented with measures to improve local learning capability and to maintain a competitive local business environment.⁷⁶⁰

There is no guarantee that tax incentives will actually achieve their stated aims, and in some cases they may even contravene WTO obligations, which happened in the case of the New Zealand and Spanish film industries, in which tax incentives were offered to domestic production companies to encourage competition with their foreign counterparts. These incentives were actually considered by the national reporters of both countries to be potential breaches of the GATS obligations,⁷⁶¹ as they enabled the domestic companies to claim more favourable tax treatments than the foreign ones through the deductibility of costs (in New Zealand) or investment deductions (in Spain).⁷⁶² Both of these incentives could be seen to violate the national treatment provision of GATT, art III, as well as, infringe on the provisions of GATS, art XVII.⁷⁶³

Furthermore, there is little evidence that discriminatory tax incentives do a better job of promoting investment than simple, uniform regimes with low to moderate rates of

⁷⁵⁸ Magnus Blomstrom, 'The Economics of International Investment Incentives' (2002) NBER and CEPR, OECD 176 <<http://www.oecd.org/dataoecd/55/1/2487874.pdf>> accessed 10 November 2011.

⁷⁵⁹ Ibid.

⁷⁶⁰ Ibid.

⁷⁶¹ Michael Lang, Judith Herdin and Ines Hofbauer, *WTO and Direct Taxation*, (Kluwer 2005) 42.

⁷⁶² Ibid.

⁷⁶³ For more examples on tax incentives measures which could breach WTO obligation, see Lang et al (n 761) 42-44.

taxation; indeed, the evidence indicates that the latter is preferable.⁷⁶⁴ The benefits of tax incentive measures as indicated in this chapter are on occasion questionable and can increase the disposable income of both individuals and companies. As pointed out by Bird, ‘anyone trying to discern the effects of incentives on investment must feel as though he has wandered into the Tower of Babel,⁷⁶⁵ because some academics argue that incentives significantly increase investment, while others believe that they have a slight or zero effect.’⁷⁶⁶ This chapter has pulled together many of the diverse advantages and disadvantages of using tax incentives, but it should be noted that most of the studies have not been carried out in Thailand. Additionally, the methods and times of these studies can affect the link between tax incentives and FDI.

This chapter examined the link between tax incentives and FDI in the case of Thailand and concludes that the Thai government should still adopt tax incentive schemes to promote foreign investment. The regulating authority must maintain an awareness of the possible disadvantages of tax incentives so as to design, carefully assess and administer tax incentive measures. The reasons that the government may lose revenue which should have been collected without tax incentives must be taken into consideration. A study by the OECD suggests that ‘transparency, simplicity, stability and certainty in the application of the tax law and in tax administration are often ranked by investors ahead of special tax incentives’.⁷⁶⁷ This research further recommends that financial control by the government is identified as a crucial factor in establishing the stability of tax laws, as it would give a greater level of certainty in the administration and execution of tax laws and lead to greater stability and increased taxpayer confidence.⁷⁶⁸

As explained earlier in this chapter, tax incentive schemes, namely CIT exemption, tax holidays, import duties exemption and deduction of the cost of project infrastructure, currently fall under BOI administration, as a result of the IPA 2001. However, other

⁷⁶⁴ UN, Tax Incentives (n 547) 23.

⁷⁶⁵ Richard M. Bird, *Tax Incentives for Investment: The State of the Art*, Canadian Tax Paper No. 64 (Canadian Tax Foundation Publications Department 1980) 46.

⁷⁶⁶ *Ibid.*

⁷⁶⁷ The Organisation for Economic Co-operation and Development, ‘Tax Incentives for Investment-A Global Perspective: experiences in MENA and non-MENA countries’ (MENA-OECD Investment Programme June 2007) 4.

⁷⁶⁸ *Ibid.*

types of tax incentives are given under the provisions of the Revenue Code and other secondary legislation, which are administered by the Revenue Department. A diverse range of agencies dealing with tax incentives causes inconvenience to investors, but were they to deal with one agency only, investors could estimate the overall cost of tax incentives and all of the costs entailed at the initial stage of business operation.⁷⁶⁹ In addition, as explained in Chapter 4, the BOI's main responsibility is to promote investment, not to collect revenue through taxation because it is part of the Ministry of Industry and is not a revenue authority. Due to the fact that the administration of tax incentives involves designing, granting, implementing and following up compliance with companies that are entitled to tax incentives, tax incentives administered by a non-revenue authority can create a bureaucratic burden and cause confusion among investors.⁷⁷⁰

Conclusion

This chapter attempted to establish the types of tax incentives both in general, and those which are offered in particular by the Thai Revenue Department and the BOI. Tax incentives provided for BOI businesses are examined in view of the importance of such industrial sectors or activities. This chapter also provided a background to the following discussions of conflicting tax jurisdictions. Furthermore, the disadvantages in each type of tax incentive discussed in this chapter, together with a critique on the use of tax incentives and the possibility of revenue loss, emphasise the necessity for tax incentives to be administered by a tax authority, and not by a non-tax authority such as the BOI. The problem of overlapping responsibilities of two or more government agencies will be discussed further in the following chapter. It is evident from this chapter, though, that tax incentives influence the decisions of foreign investors to invest in a country; nonetheless, other non-tax factors in the investment climate should not be overlooked. It may be suggested that tax incentives should be used primarily as a signposting device for specially needed activities and in targeted areas.

⁷⁶⁹ UN, Tax Incentives (n 547) 23.

⁷⁷⁰ Ibid.

6 Jurisdictional Problems

Introduction

The preceding chapter has shown that tax incentives in Thailand fall under both the Thai Revenue Department and the Thai Board of Investment (BOI). While this may not be a problem in relation to many incentives, there is one major area of concern in relation to BOI-promoted companies, and most importantly foreign investing companies. This chapter therefore examines issues arising from the overlapping jurisdictions of the Revenue Department and the BOI concerning the provisions of tax incentives for BOI-promoted companies. It begins by examining tax incentive provisions in the Investment Promotion Act of 2001 (IPA 2001). The fact that these provisions do not clearly define some of their terms or specify methods of tax calculation is problematic. The problem raised by this chapter is of significant interest and to both current and prospective investors in Thailand, since a heavy tax burden and obscure regulations can constitute significant obstacles to investment.⁷⁷¹

6.1 Incidences of Problem Areas

As explained in Chapter 4, the Board of Investment of Thailand (BOI), through the IPA 2001, has the authority to grant certain privileges to eligible businesses or projects. These privileges include land ownership rights, visa facilitation, work permits, tax holidays, exemptions from duties and tax deductions for construction and utility costs, as specified in the IPA 2001. While the BOI is responsible for tax incentives for BOI-promoted projects, the Revenue Department is responsible for the administration of personal income tax, corporate income tax (CIT) and value added tax (VAT). The BOI's power regarding tax incentives, as specified under the IPA 2001, can overlap with the jurisdiction of the Revenue Department, since some of its areas of oversight involve relief from taxes that are administered by the Revenue Department.

⁷⁷¹ Chadin Rochananonda, 'Tax Incentives and FDI in Thailand' (2006), Fiscal Policy Office, Ministry of Finance in Thailand <<http://www.econ.hit-u.ac.jp/~ap3/apppdfi6/paper/THAILAND.pdf>> accessed 10 November 2011.

Furthermore, the IPA 2001 does not, or does not clearly specify its terms and the methods of tax calculation in the areas in which it gives jurisdiction to the BOI, which leads to the question as to whether or not the Revenue Department, as a main revenue authority, should have tax jurisdiction over questionable income. Specific examples of these overlapping jurisdictions are discussed below. An analysis of the problems will follow a summary of the issues.

6.1.1 Interpreting terms under the IPA 2001, s. 31

The first problematic issue is jurisdiction over the interpretation of the term ‘the date income is first derived from a promoted project’ in Section 31 paragraph one of the IPA 2001. According to this section:

A BOI-promoted person shall be granted exemption of CIT on the net profit derived from the BOI-promoted project as prescribed by an announcement of the Board, of which the proportion to the investment capital excluding cost of land and working capital shall be taken into consideration by the Board, for a period of not more than eight years from the date income is first derived from such project.

From this provision, it is unclear what date is deemed ‘the date income is first derived from the project’. In addition, the IPA 2001 does not explain which authority is in charge of interpretation, which can cause difficulties, especially when finished products are intended for export.⁷⁷² The date could be deemed either the date of a sale agreement or the date the product leaves the factory.⁷⁷³ According to the BOI’s practice and opinion, ‘the date income is first derived from the project’ is the first day of the BOI tax exemption period, so when a business starts to receive income, the tax exemption period should start immediately. The BOI issued a guideline in Memorandum No. *Nor Ror*⁷⁷⁴ 1301/2523 dated 14 March 1991, stating that ‘the date income is first derived from a promoted project’ is not the date on which the promoted project is partly or fully

⁷⁷² Ornjira Tangwongyodying and Janist Aphornratana, *Quick Thai Tax Guide* (PricewaterhouseCoopers 2002) 99.

⁷⁷³ *Ibid.*

⁷⁷⁴ *Nor* and *Ror* are two Thai alphabets.

started. According to this guideline, the promoted project start date is merely the date when the BOI approves that the company meets all the requirements and conditions as stated in a certificate.⁷⁷⁵

The first example of the Revenue Department's interpretation of 'the date income is first derived from a project' is in Rev. Dept.Rul⁷⁷⁶ No. *Gor Kor* 0811/16548 dated 1 December 1998. In this ruling, the date the promoted company was entitled for a payment from an export constituted the date in question, even though the company did not receive the money. The next ruling regarding the same matter is Rev.Dept. Rul No. *Gor Kor* 0706/1918 dated 7 March 2006. In this ruling, the BOI-promoted company, operating an electricity generation plant, was granted tax exemption for eight years. It started its business on 4 September 2000. On 1 October 1999, the company tested an electricity generating system by sending electricity to a buyer and charged fees only for the portion of energy that met the standard set by the buyer. In December 1999, the buyer paid the fees, which were entered into the accounts of the company as variable operating expenses, as stated in the contract. According to this ruling, 'the date income was first derived from a project' was the day on which the company first received a fee from generating electricity. Consequently, the BOI-promoted company started to earn income from the BOI-promoted project on the day it received the electric fee from the buyer, namely 1 October 1999.

The second major problem area is the difference in methods of profit/loss calculations, under Section 31 Paragraph one of the IPA 2001, by the BOI and the Revenue Department. This matter is complicated further by the fact that there is no one official interpretation by the BOI, whose current practice is to allow each promoted company to request a letter of clarification on any issue relating to its projects.⁷⁷⁷ The *Minebea* case, which will be discussed later in this chapter, is the only case on profit/loss calculation to have reached the courts; as such, it is the only case for which the BOI's interpretation is

⁷⁷⁵ BOI Memorandum No. *Nor Ror* 1301/2523 dated 14 March 1991.

⁷⁷⁶ Revenue Department Ruling.

⁷⁷⁷ The Board of Investment Memoranda *Aor Gor* 0901/NorTor/000820 dated 12 November 2007, *AorGor/NorTor*/000821 dated 12 November 2007 and *AorGor*0901/000888 dated 14 November 2006 (in Thai).

publically available. In contrast, the Revenue Department has issued a large number of notices interpreting the ambiguous provision of the IPA 2001 on this matter.

Revenue Department Notification dated 5 February 1987, regarding the calculation of net profit/loss for BOI-promoted companies and juristic partnerships, defined the term ‘income which shall be entitled to tax exemption’ thus:

Firstly, income from the sale of products and services of BOI-promoted projects⁷⁷⁸, and secondly, sale of semi-finished products in accordance with types and quantity as specified in promoted certificates.⁷⁷⁹ Next, ‘income’ means income from the sale of obsolete machines, parts, tools and appliances, for operating promoted projects. This also includes machines, parts, tools and appliances which are used in non-BOI-promoted projects; however, income will be divided between the BOI-promoted project and non-BOI-promoted project according to their quantity produced.⁷⁸⁰ Finally, ‘income’ is defined as income from interest or income which derives from regularly operating a business provided that such income is approved by the BOI and the Revenue Department. In the case where a BOI-promoted business is conducting a BOI-promoted project and a non-BOI-promoted project, income under this category has to be divided according to quantity produced between the BOI-promoted project and the non-BOI-promoted project.⁷⁸¹

The Revenue Department has ruled on this issue as specified in the several Revenue Department Rulings. In Rev.Dept.Rul No. *Gor Kor* 0706/2622 dated 28 March 2006, the Revenue Department took the view that the transfer of gas through a pipeline was one of a number of processes involved in delivering a product to the customer, and therefore was part of a product cost. Accordingly, the company’s income from transferring gas via a pipeline was not tax-exempt because the ownership of the gas was

⁷⁷⁸ Revenue Department Notification (RDN) dated 5 February 1987, 2.1.

⁷⁷⁹ RDN dated 5 February 1987, 2.2.

⁷⁸⁰ RDN dated 5 February 1987, 2.3.

⁷⁸¹ RDN dated 5 February 1987, 2.4.

transferred to the buyer when the gas was delivered and measured at the delivery point, which is the end of the pipeline in front of the buyer's plant. The Revenue Department has stated that the company in this case has to combine the remaining profit/loss with those of non-tax-exempt business operations for the purpose of tax calculation.⁷⁸² Regarding income to be calculated for net profit, the Revenue Code Section 65⁷⁸³ and 65 (2)⁷⁸⁴ specify the principles for determining the calculation of taxable net profit.

Where a cylinder head manufacturing company which was promoted by the BOI used their cylinder heads as a part of engine production (which was a non-BOI-promoted project), only income from the sale of the cylinder heads (provided that they and the engine were clearly separable) was tax-exempt.⁷⁸⁵ Another example of the Revenue Department's interpretation concerns losses on currency exchange rates. Under this ruling, a company's loss on currency exchange rates in the accounting period of 1997 was deemed expenditure of a non-BOI-promoted project, provided that the loss was incurred before the company started to receive income from a BOI-promoted project.⁷⁸⁶ Furthermore, the Revenue Department ruled that in the case where a BOI-promoted company (an electricity and steam generator) received compensation from an insurance company for loss of income due to a mechanical failure or accident, so such compensation was not income derived from operating a BOI-promoted business. Accordingly, this income was not exempt from CIT.⁷⁸⁷

The third issue can be seen in the interpretation of 'expenses to be calculated for net profit under Section 31 paragraph one of the IPA 2001. Following the Departmental Notification dated 5 February 1987, an example of the Revenue Department's practice can be seen in Rev.Dept.Rul No: *GorKor* 0706/2935 dated 10 April 2006, which ruled on a calculation of net profit/loss. The Revenue Department explained that the company

⁷⁸² Rev.Dept.Rul No. *Gor Kor* 0706/Por./1175 dated 10 February 2006.

⁷⁸³ See Appendix 4.

⁷⁸⁴ See Appendix 5.

⁷⁸⁵ Rev.Dept.Rul No. *Gor Kor* 0706/10750 dated 23 December 2005.

⁷⁸⁶ Rev.Dept.Rul No. *Gor Kor* 0811/*Gor*.1325 dated 5 October 2000.

⁷⁸⁷ Rev.Dept.Rul No. *Gor Kor* 0811/7832 dated 25 December 2000.

which was granted a BOI promotion to produce ethanol was also selling benzene 91, but it was not granted a BOI promotion for the sale of this product. Although the cost of purchasing benzene 91 is an expense which evidently belongs to a non-BOI business, income from selling and the expense of purchasing benzene 91 have to be combined together in a profit/loss calculation for a non-BOI business. The Revenue Department also ruled in Rev.Dept.Rul No: *GorKor* 0706/648 dated 25 January 2005 that a company operating both BOI and non-BOI-promoted businesses had to share expenses incurred from paying interest according to the proportion of the BOI-promoted business and non-BOI-promoted business.⁷⁸⁸

The fact that the IPA 2001's provisions regarding tax incentives for BOI-promoted companies are unclear has led to cases of serious uncertainty particularly when they were interpreted by the BOI. However, in practice, the Revenue Department can claim to have the power to interpret unclear provisions by maintaining that they follow Departmental Notification dated 5 February 1987. This issue will be discussed in more detail in the *Minebea* case analysis.

The following summarised issues are presented to explain the relevant provisions regarding tax incentives offered under the IPA 2001 and their interpretation by the Revenue Department. The difficulties created by this issue will be analysed in the section 6.2, entitled 'Problem Analyses'.

6.1.2 Interpretation of 'a CIT exemption on dividends' under the IPA 2001, s.34

According to Section 34 of the IPA 2001:

Dividends derived from a BOI-promoted project, which is granted an exemption of CIT, shall be exempted from computation of taxable income throughout the period the BOI-promoted person receives the exemption of CIT.

The tax calculation regarding this issue is also prescribed in the Departmental Notification dated 5 February 1987, which states that dividends that are granted a tax

⁷⁸⁸ Rev.Dept.Rul No. *Gor Kor* 0706/648 dated 25 January 2005.

exemption have to be paid and received within the exemption period before they would qualify for exemption. In addition, dividends have to be paid from the net profit of the BOI-promoted company. Where dividends are paid or received after the tax exemption period has expired, the dividend receiver is not entitled to the tax exemption. Concerning this matter, the Revenue Department ruled that the BOI-promoted company, entitled to a tax exemption for eight years, which ended on 2 September 2004, paid two dividends, in November 2004 and June 2005, and the shareholders whom the dividends were paid were not entitled to tax exemption,⁷⁸⁹ because the dividends were paid after the end of the tax exemption period. It is evident that there are two different laws relating to the issue of tax exemption on dividends. The primary law, namely the IPA 2001, does not specify that the dividend which will be tax-exempt must be paid within the tax exemption period, which means that BOI-promoted companies have had to take the precaution of studying many laws and regulations in order to receive the benefits offered by the BOI.

6.1.3 Interpretation of ‘a corporation tax rate reduction’ under the IPA 2001, s.35.

According to Section 35 of the IPA 2001:

The BOI has the power to grant a BOI-promoted person operating their project in locations or zones specified by the BOI a 50% reduction of the normal CIT rate on the net profit derived from the BOI-promoted project for a period of up to five years after the end of the exemption period.

An example of the Revenue Department’s ruling on this issue is Rev.Dept.Rul. No: *Gor Kor* 0706/1357 dated 17 February 2006. The BOI-promoted person in this ruling conducted both BOI-promoted and non-BOI-promoted activities. All of their BOI-promoted activities had been granted tax exemption at different times. To be entitled to a 50% CIT reduction under section 31(1) of the IPA 2001, the BOI-promoted person has to calculate the net profit/loss of each project individually. However, the net profits/losses of both the BOI-promoted business and non-BOI-promoted business must

⁷⁸⁹ Rev.Dept.Rul. No. *Gor Kor* 0706/1625 dated 27 February 2006.

be combined together for tax purposes. After that, the tax reduction of 50% had to be applied. Another case regarding tax reduction is Rev.Dept.Rul. No. *Gor Kor* 0706/627, dated 12 July 2004. The Revenue Department commented that the ‘normal rate’ in this case meant the normal CIT rate which the company had to pay during a promoted period according to Section 35 (1), the IPA 2001. The company in this instance was entitled to a reduction rate of 25% of the net profit, and therefore, the ‘normal rate’ was this 25%. As a result, the company had to pay CIT at a rate of 12.5% of the net profit.

The next issue is an interpretation of ‘expense deduction in excess of the correct rate’ under Section 35 of the IPA 2001. This provision provides that ‘the BOI can grant a BOI-promoted person operating the promoted project in certain locations or zones permission to deduct, for the purpose of CIT, an amount double the costs of transportation, electricity and water supply incurred in the operation of the project.’ The issue was raised by the BOI-promoted company that was uncertain as to whether the double deduction could be applied to expenses incurred in both the production plant and in the office. The Revenue Department ruled in Rev.Dept.Rul. No. *Gor Kor* 0706/1849 dated 6 March 2006 that a BOI-promoted company producing electrical parts and appliances was able to deduct double expenses paid for electricity and water supplies incurred in both of these places.

6.1.4 Interpretation of ‘a deduction of an amount equal to 5% of the increased income’ under the IPA 2001, 36 (4).

Section 36 (4) of the IPA 2001 empowers the BOI to grant the BOI-promoted person permission to deduct from the income assessable for payment of CIT an amount equal to 5% of the increased income over the previous year. This is provided that the increase is derived from the export of products or commodities produced or assembled by the promoted person. The Revenue Department ruled on this issue, in Rev.Dept.Rul. No. *Gor Kor* 0802/12550 dated 20 July 1994, as follows:

A BOI-promoted person shall receive a promotion for a period specified in the certificate of BOI promotion and deem export income in the first accounting year to be a base year even if there was no export in any accounting year. The company cannot claim any deduction in the first or the base year, since there is no increased income over the

previous year. In the second and third years, the company has to compare export income with increased income over the previous year. From the fourth year to the tenth year, income for each year must not be less than the average of the previous three years. Only a deduction in accordance with this specific method can be taken from assessable income during a promoted period.

It is evident that the provision of the IPA 2001 does not clearly state the method used to calculate 'increased income', which left the BOI-promoted companies in doubt and led to them seeking clarification from the Revenue Department. In addition, the Revenue Department Ruling is not, in fact, legally binding.

6.1.5 Interpretation of 'a withdrawal of the rights and benefits of CIT' under the IPA 2001, s. 55/1.

As specified under Section 55/1 of the IPA 2001, in cases where the BOI has withdrawn the rights and benefits of CIT, the BOI-promoted person should be treated as though they had not been entitled to the rights on the exemption or reduction of CIT for the accounting year in which such rights and benefits were withdrawn. Further, the BOI may withdraw rights and benefits concerning CIT and make the withdrawal retroactive to the financial year that the BOI-promoted person violated or failed to comply with the conditions stipulated by the BOI.

In one ruling on this issue, the Revenue Department viewed that the BOI-promoted company's right on CIT exemption ceased after the company transferred its business, including all the rights and licences, to another company. In this case, the BOI withdrew the certificate of promotion. However, the rights and benefits which were received before the certificate of BOI promotion was withdrawn were not affected.⁷⁹⁰ This also suggests that the IPA 2001's provision specifying 'the rights and benefits that the BOI-promoted companies are entitled to be valid until the certificate of BOI promotion is withdrawn' is unclear.

⁷⁹⁰ Rev.Dept.Rul. No. *Gor Kor* 0706/10550, dated 19 December 2005.

6.2 Problem Analyses

Taking into account the above rulings of the Revenue Department, it is possible to conclude that potential ambiguity exists in the interpretation of tax incentive provisions under the IPA 2001, as there is uncertainty in interpreting the terms ‘income’, ‘expenses’ and ‘the date income is first derived from a promoted project’, as well as the method of tax calculation, particularly where the calculation of net profit and loss is concerned. The problem becomes apparent when the scope of businesses exempt from taxation under the BOI promotion is examined. These businesses may be selling manufactured or semi-finished products, and under the BOI certificate are exempt from CIT.

The fact that companies may operate BOI-promoted and non-BOI-promoted activities simultaneously, and that they may also operate more than one BOI-promoted activity at any one time, can also lead to difficulties in interpreting the legislation. Confusion arises because the BOI grants tax incentives and is in charge of establishing promotion criteria and approving promoted projects, whereas the Revenue Department takes charge of tax assessment for all businesses in the country, including the BOI-promoted businesses. The current situation can lead to confusion over which particular body holds authority over tax incentives.

In practice, BOI-promoted businesses have to consult the BOI or the Revenue Department or both authorities regarding unclear terms or tax calculation under the provisions of the IPA 2001. This system is confusing because on the one hand the BOI is acting as an investment-promotion agent and grants incentives, both tax and non-tax oriented, as we learned from Chapters 4 and 5. On the other hand, the Revenue Department is the country’s primary revenue authority, and has claimed that they are following the guidelines set up by the Departmental Notification, dated 5 February 1987. Adding to the problem is the issue of hierarchy of legislation, namely whether, in this case, the Departmental Notification dated 5 February 1987, issued through the Revenue Code, should be considered as secondary legislation. Where this is the case, it would rank below the IPA 2001 under the rule of hierarchy of law. This will be discussed in detail in Chapter 7.

The next problem concerns the extended and complicated procedure involved in clarifying the law and in seeking an authority which has jurisdiction over tax incentives. The power of the BOI over tax incentive issues is, in practice, unclear, leaving many promoted companies in doubt whether to follow the instructions of the BOI as an authority which grants certificates of BOI promotion and fiscal and non-fiscal incentives through the IPA 2001, or the Revenue Department, as the authority which has power over taxation, including tax assessment and tax collection. It can be seen from the above mentioned cases that BOI-promoted companies often need to spend a good deal of time and money consulting both bodies, as well as employing legal or tax specialists to ensure that they are complying with all the laws and will not face fines from the Revenue Department at a later stage. However, memoranda provided by the BOI to BOI-promoted companies, and the Revenue Department rulings are not legally binding. Therefore, if taxpayers disagree with the Revenue Department's ruling on a particular problem, they can go to court. This uncertainty, if left unchecked, could lead to both bodies losing credibility in the eyes of investors and could worsen Thailand's investment climate, particularly as viewed by foreign investors.

The possible differences between the two bodies in interpretation of profit/loss calculation may be rooted in the fact that they have different objectives. As explained previously in Chapter 4, the BOI aims to give incentives and promote investment, especially FDI, so it is not primarily concerned with the collection of tax revenue, as this is the Revenue Department's responsibility. Interpreting tax provisions by the BOI therefore tends to be in favour of BOI-promoted companies, particularly with regard to a reduced tax burden as evident in the following section regarding the *Minebea* case. This problem can be considered a regulatory and bureaucratic impediment to investment. Adding to the problem is the issue of the unclear provisions of law. Under the current system, whereby tax incentives are provided by the BOI under the IPA 2001, problems have arisen because the wording of the Act omits certain details and explanations, most notably the definition of 'income' and calculations of profit/loss and expenses, as explained above.

The problems discussed above were at the level of Revenue Rulings and did not reach the court. Nevertheless, there has been litigation in the famous *Minebea* case.

6.3 The *Minebea* Case

6.3.1 Background to the *Minebea* case

The dispute between the plaintiff NMB-Minebea Thai Ltd ('Minebea'), and the defendant, the Revenue Department, is of significant importance.⁷⁹¹ Minebea was founded in Thailand in 1980 as 'NMB Thai Ltd', a Japanese-owned manufacturer of miniature instrument ball bearings (used in information and telecommunication equipment such as personal computers, and household electrical appliances, such as videocassette recorders, video cameras and air conditioners, all of which have become essential to modern-day living). After an amalgamation of seven companies in 2008, the company became known as NMB-Minebea Thai Limited.⁷⁹² The following is a summary of the case which will be followed by detailed case analysis.

Minebea, a leading global supplier of high-precision mechanical and electronic components,⁷⁹³ had been granted a tax exemption by the BOI on many of its projects. The main issue of the case is that Minebea generated losses on some projects and profits on others, raising the question, which was taken by Minebea to the Central Tax Court, as to whether losses on one BOI-promoted project must be offset against profits on another BOI-promoted project in the same company. The Central Tax Court ruled, on 13 October 2010, in favour of Minebea, with no requirement to offset losses against other BOI-promoted projects in the same company, as the Revenue Department claimed. The Revenue Department has since appealed to the Supreme Court, which has yet to reach a decision (as of 15 November 2011). The Revenue Department stands by

⁷⁹¹ See Thavorn Rujivanarom and Siripong Suppakijjanusorn, 'State Council rules in favour of BOI?' *Bangkok Post Business* (Bangkok, 21 April 2009) <<http://www.bangkokpost.com/business/economics/15378/state-council-rules-in-favour-of-boi>> accessed 10 November 2011. Nareerat Wiriyapong and Wichit Chantanusornsiri 'Court rules in favour of Minebea', *Bangkok Post Business* (Bangkok, 14 October 2010) <<http://www.bangkokpost.com/business/economics/201265/court-rules-in-favour-of-minebea>> accessed 10 November 2011. Theodore Spevik, 'BOI taxpayers may have a reason to celebrate', *The Nation* (Bangkok 18 November 2010) <<http://www.nationmultimedia.com/home/BOI-taxpayers-may-have-a-reason-to-celebrate--30142476.html>> accessed 10 November 2011.

⁷⁹² NMB Minebea Thailand, 'History' <<http://www.minebea.co.th/history.html>> accessed 10 November 2011.

⁷⁹³ NMB Minebea Thailand, 'Profile of Minebea' <<http://www.minebea.co.th/profile.html>> accessed 10 November 2011.

its interpretation that a loss on one BOI-promoted project must be offset against the profit on another BOI-promoted project.

In Thailand, unless the application is limited or specific treatment is required under the Revenue Code, the computation of a company's net profits relies fundamentally on generally accepted accounting principles.⁷⁹⁴ According to Uraepatanapong and Prasongpravit, what is recognised in the profit and loss account⁷⁹⁵ as income is likely also to be recognised as such for tax purposes. In addition, with the exception of certain specified types of businesses, a corporation is required to apply the accruals basis in order to recognise income for tax purposes.⁷⁹⁶ CIT is computed by taking into account all revenue arising from or in consequence of business carried on in an accounting period, and then deducting this revenue from all expenses, in accordance with conditions prescribed in Sections 65 (2) and 65 (3) of the Revenue Code. Companies are allowed to deduct any losses that they make from future profits from all sources for tax purposes. This so-called 'loss carry forward' is, in Thai tax law, limited to the next five tax years of the company.⁷⁹⁷ As one of the privileges under the IPA 2001, a BOI-promoted company is entitled to deduct annual losses from the net profit accrued after its tax holiday has finished for a period of not more than five years from the expiry date of such period.⁷⁹⁸

The problem arises when the promoted company operates more than one BOI-promoted project. The BOI, which is in charge of investment promotion and granting incentives according to the IPA 2001, is of the view that profits and losses from one BOI-promoted project should not be offset against the other BOI-promoted projects for CIT

⁷⁹⁴ Kitipong Uraepatanapong and Rachanee Prasongpravit, 'Relationship between Accounting and Taxation Principles' (2002) Thailand, ASIA-PACIFIC Tax Bulletin, IBFD, May/June, 171.

⁷⁹⁵ Profit and Loss Account is defined as: in the United Kingdom, 'the Income Statement'. In turn, the Income Statement is defined as: 'A key Financial Statement that reflects a company's revenues and expenses throughout the fiscal accounting period; the results it presents thus contain the cumulative effect of the reporting period. Presentation of the income statement can vary by country, accounting regime and/or industry sector'. Erik Banks, *The Palgrave Macmillan Dictionary of Finance, Investment and Banking* (Palgrave Macmillan 2010) 405.

⁷⁹⁶ Uraepatanapong & Prasongpravit (n 794) 171.

⁷⁹⁷ RC, s 65 (3).

⁷⁹⁸ IPA 2001, s 31 para 4.

purposes.⁷⁹⁹ Each BOI-promoted project is entitled to a privilege of ‘loss carried forward’, and therefore should be entitled to offset its own loss/profit. In this way, if the BOI-promoted project incurs significant loss, it is allowed to be carried forward for five years after the end of its tax holiday, without having been offset against other BOI-promoted project(s) within the same BOI-promoted companies.

This is, however, contrary to the opinion of the Revenue Department, which is continuing to review and assess the BOI-promoted companies by using another method of calculation, i.e. to offset one BOI project’s loss against another BOI project’s profit. Consequently, the BOI tax privilege on ‘loss carry forward’ did not apply as the BOI and investors, whom the BOI sought to encourage, had envisaged. In other words, the BOI-promoted companies cannot fully enjoy the privilege of ‘loss carry forward’.

As noted in Chapter 5, many governments, including the Thai government, adopt a tax mechanism to allow investors who are making losses to carry forward these losses as thus minimise the effective tax rate. An interpretation of the calculation of net profits/losses by the Revenue Department would affect the tax status of the BOI-promoted companies for both past and future transactions, and could result in many of these enterprises incurring penalties and surcharges, because companies with similar circumstances to Minebea’s, which either fail to file their tax returns or file returns containing inaccurate, false or inadequate information, are currently subject to penalties.⁸⁰⁰ Additionally, where companies do not comply with an order to pay the tax assessed, they are required to pay a penalty equal to twice the amount of tax due, as specified under Section 71 (2) of the Revenue Code.⁸⁰¹ In addition to paying the fine, if

⁷⁹⁹ The Board of Investment Memoranda *Aor Gor 0901/Nor Tor/000820* dated 12 November 2007, *Aor Gor/Nor Tor/000821* dated 12 November 2007 and *Aor Gor 0901/000888* dated 14 November 2006 (in Thai).

⁸⁰⁰ RC, s 71 (1).

⁸⁰¹ RC, s 71 States: In the case where:

(1) a company or juristic partnership does not file particulars necessary for tax calculation under the provisions of this Part or does not keep a book of account or does not follow requirements prescribed under Sections 17 and 68 (2) or does not bring books of account, documents or other evidence to an assessment official for interrogation under Section 19 or Section 23, the assessment official shall have the power to assess tax at the rate of 5 per cent of gross income before deduction of any expenses or gross sales before deduction of expenses of the accounting period, whichever is higher. If gross income before deduction of expenses or gross sales before deduction of expenses cannot be determined, the assessment official shall have the power to assess by comparing with the gross amount of the previous accounting

the companies fail to pay tax within the time limit, they have to ‘pay a surcharge of 1.5% per month or part of a month of an amount of tax payable’.⁸⁰² Thus, legal challenges against the Revenue Department’s stance are currently under way. The BOI has also decided to begin an investigation into the problem in order to find a solution and to regain investor confidence.⁸⁰³

6.3.2 The Board of Investment Perspective

According to Section 31 of the IPA 1977, as amended by the IPA 2001 (No.3), promoted persons are entitled to offset an annual loss incurred during a tax exemption period against net profits after the end of the tax exemption period. The BOI set up this calculation method for cases where BOI-promoted companies carry on more than one BOI-promoted project. The BOI issued corresponding memoranda in order to answer queries from BOI-promoted companies, and to set guidelines for companies operating several promoted activities to comply with accordingly. Examples of these memoranda are *Aor Gor 0901/Nor Tor/000820* dated 12 November 2007, *Aor Gor/Nor Tor/000821* dated 12 November 2007 and *Aor Gor 0901/000888* dated 14 November 2006. According to these memoranda, if one project has a net profit and another project has a net loss in the same year, it is not necessary for the BOI-promoted company to offset the net loss of one BOI project against the net profit of the other. The BOI is of the view that the net profit of a BOI-promoted project which is entitled to tax exemption should be exempt without having to be first deducted from the losses of promoted activities.

period. If the amount of the previous accounting period cannot be determined, he shall assess as he deems appropriate.

(2) If any company or juristic partnership does not record particulars or records incompletely or does not record accurately within an account as prescribed under Sections 17 and 68 (2) resulting in paying no tax or less tax, an assessment official shall have the power to assess missing tax at the rate specified in Section 67 and may order that person to pay surcharge of two times of the amount of missing tax.

⁸⁰² RC, s 27.

⁸⁰³ See Thailand Board of Investment, ‘BOI Policies’ <http://www.boi.go.th/english/about/boi_policies.asp> accessed 10 November 2011.

The BOI's interpretation can be illustrated as follows: promoted activities that are located in Zone 3⁸⁰⁴ are granted tax exemption for eight years starting from the date income is first derived from such activities, and annual losses incurred during year 1 through to year 8 can be deducted from net profits between year 9 and year 13. The promoted business may choose to deduct such losses from the net profit of any one year or of several years. In practice, the decision is based on annual losses incurred from year 1 to year 8, which are carried forward to year 9, and net profits accumulated from year 9. If a net loss is greater than a net profit, the net loss will be carried forward to year 10. Accordingly, the privilege of loss carry forward to be utilised after the end of the tax exemption period under the IPA 2001 Section 31 circumvents the general rule specified by Section 65 (3) (12) of the Revenue Code, which states that:

The following items shall not be allowed as expenses in the calculation of net profits...

(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...**

As a result, it is not compulsory for the BOI-promoted companies to offset losses against profits, as one BOI-promoted project may use the privilege of loss carry forward for a longer period than another BOI-promoted project's period. This is possible because each BOI-promoted project may be entitled to different amounts of tax-exempt years (such as three or five years). Another reason is that offsetting losses against every project, each year, can reduce the benefit of the loss carry forward as an incentive. The policy of granting incentives to each project is also supported by BOI Announcements Nos. 1/2526 (1983), 1/2536 (1993), Subject: Policies and Criteria for BOI Promotion⁸⁰⁵, and 1/2543 (2000), Subject: Type, Size and Condition for Promotion, which indicate that the BOI has authority to approve each project in accordance with the specified criteria.

⁸⁰⁴ See Thailand Board of Investment, 'Projects in Zone 3 in Thailand Board of Investment, BOI Privileges by Location' <http://www.boi.go.th/english/about/boi_privileges_by_location.asp> accessed 10 November 2011.

⁸⁰⁵ This announcement was superseded by BOI Announcement No. 1/2543 (2000).

The BOI has taken the view (as can be seen from the legal opinion of the Council of State *Aor Gor* 0901/*Gor Mor*/000026 dated 19 January 2009) that the IPA 2001 is applicable to this issue regarding profit/loss calculation, because the IPA 2001 is a special law while the Revenue Code is a general one.⁸⁰⁶ Therefore, the criteria and enforcement stipulated in the IPA 2001 should be construed to maintain the spirit of the special law. Consequently, the BOI views that there is no requirement to consolidate the loss and profit of the BOI-promoted projects for the loss carry forward rule.⁸⁰⁷

6.3.3 The Revenue Department and the Board of Taxation Perspective

In practice, the Revenue Department applies Section 65 of the Revenue Code in calculating net taxable profits. This provision, as a general rule, considers one taxpayer as one tax unit. However, the Revenue Department issued an essential notification, Departmental Notification dated 5 February 1987, regarding the calculation of net profit/loss for BOI-promoted companies and juristic partnerships Clause 4.1 (a) ‘‘Annual Loss’’, according to the Departmental Notification means annual loss without deducting from annual profit accruing during a tax-exempt period, as specified by Section 65 (3) (12) of the Revenue Code.’ Department Notification dated 5 February of 1987 also provided broad guidelines for BOI taxpayers to calculate their net profit/loss for CIT purposes. Clause 4.2 (a) of the Notification provides that ‘if a BOI-promoted project shows net losses and a non-BOI-promoted project shows net profit, the BOI-promoted person is entitled to deduct the net loss of BOI-promoted projects from the net profit of non-BOI-promoted projects.’ This was supported by Rev.Dept.Rul. No. *Gor Kor* 0802/13731 dated 27 July 1993 in which the Revenue Department stated that the net profits/losses of a BOI-promoted project should be calculated individually.

In addition, if a tax-exempt BOI-promoted project suffers a net loss, such a loss could be offset against the net profit of a non BOI-promoted business without having to first offset the net profit against a tax-exempt BOI-promoted project. The same practice was confirmed in the Board of Taxation ruling No. 35/2540 (1997) regarding the calculation of net loss from BOI-promoted businesses dated 9 June 1997. This board, as explained in Chapter 3, is a tax review body made up of officials from the Ministries of Finance,

⁸⁰⁶ The issue regarding ‘special and general law’ will be discussed in the next chapter.

⁸⁰⁷ The legal opinion of the Council of State *Aor Gor* 0901/*Gor Mor*/000026 dated 19 January 2009.

Revenue, Customs, Excise, Fiscal Policy and Council of State. The Board of Taxation in this ruling held the view that annual loss should be deducted from net profit within five years from the expiration of the tax holiday period, and it was not necessary to deduct from annual net profit accrued during the tax exemption period.⁸⁰⁸

It is important to note that in 2005, the Revenue Department started to change its interpretation and method regarding the calculation of net losses from BOI-promoted businesses. It published Rev.Dept.Rul. No. *GorKor 0706/ (GorMor.03) /408* dated 17 May 2005, a ruling which changed the calculation method of net losses for BOI-promoted businesses with CIT exemption, overriding the Departmental Notification dated 5 February 1987. The 2005 ruling viewed all tax-exempt BOI projects as a single project and required a BOI-promoted company with two or more tax-exempt projects to offset the net profit/loss among different BOI-promoted projects of the same BOI-promoted companies. As such, only net loss from all projects would be allowed to be offset against net profit from non BOI-promoted projects.

Nonetheless, this contradicted its previous ruling from 1993, which provided that the net loss of a tax-exempt BOI-promoted project can immediately be offset against net profits from a non-BOI-promoted business.⁸⁰⁹ To confirm its position, the Revenue Department also issued a response letter to the BOI: No. *GorKor 0725/12101*, dated 11 December 2007, regarding a calculation of annual losses of businesses that have more than one BOI-promoted project. The Revenue Department set the rule that businesses with more than one BOI-promoted project have to calculate annual loss by offsetting losses during an exemption period against the net profit of every BOI-promoted project in the same accounting period. In a case where there is any remaining annual loss, it can be offset against net profits accruing within five years after expiration of the tax exemption.⁸¹⁰

In 2009, the Board of Taxation issued a Ruling No. 38/2552 dated 13 February 2009 concerning corporation tax and the offsetting of losses against a net profit after

⁸⁰⁸ The Board of Taxation ruling No. 35/2540 (1997).

⁸⁰⁹ Rev.Dept.Rul. No. *Gor Kor 0802/13731* dated 27 July 1993.

⁸¹⁰ IPA 2001, s 31 para 4.

expiration of the tax exemption period. In this Ruling, the Board of Taxation agreed with the Revenue Department's interpretation of the one entity concept for all BOI-promoted projects. Where the business operated more than one BOI-promoted project, the company had to combine the net profit and net loss incurred under all projects into one amount of profit or loss. If the net amount was a loss, the company could carry forward any net loss incurred during the tax exempt period for it to be deducted as expenditure from net profit incurred for five years after the tax exemption expired. BOI-promoted business could choose to offset such loss against net profit of any one or several years.⁸¹¹

6.3.4 The Opinion of the Council of State

The BOI sought the legal opinion of the Council of State on this matter. (*Aor Gor* 0901/*Gor Mor*/000026 dated 19 January 2009). Previously, the Council of State had commented, based on the precedent of a decision made in 1987⁸¹² (Council of State No. 197/2530, (1987), that the BOI-promoted persons are eligible to offset not only net loss which exceeds net profit, but also annual loss (during the exemption period) against net profit (after the expiry of the exemption period). This interpretation is in line with Section 31, paragraph four of the IPA 2001, which states that a loss which has been incurred during a tax exemption period can be deducted from the net profits accrued after the expiration of the tax exemption period.

In Opinion of the Council of State No. 158/2552 (2009), the Council of State (Legislative Committee 5) considered the issue with a representative of the Ministry of Finance (the Revenue Department) and a representative of the Ministry of Industry (the Board of Investment), who presented facts and supporting documents. In this case, when businesses have more than one promoted project, tax exemption for each project can last for a different period of time. In addition, a tax exemption period will start from the day the business receives its first income from a promoted project. BOI-promoted businesses are required to prepare profit and loss accounts separately from other

⁸¹¹ IPA 2001, s 31 para 4.

⁸¹² The IPA was first enacted in 1977, and was amended in 1991 (No.2) and, most recently, in 2001 (No.3).

activities for the purpose of profit and loss calculation under Section 31 of the IPA 2001.

The Council of State considered two issues which were raised by the BOI. The first concerned the meaning of the term ‘annual losses’ as well as the calculation of the loss. The second issue concerned the question of which authority has the power to interpret the IPA 2001. The Council of State offered the opinion that the IPA 2001, being a special law on tax incentives, should prevail over the Revenue Code, a general law on taxation.⁸¹³

In addition, paragraphs one and two of Section 31 of the IPA 2001 specify that a BOI-promoted person shall be granted CIT exemption on the net profit derived from the BOI-promoted project for a period of time. Paragraph four of Section 31 of the IPA 2001 states that where a loss has been incurred while receiving tax exemption (referred to in paragraphs one and two), the board may grant permission to BOI-promoted person to carry over the loss and offset it against the net profit accruing after the exemption period, for a period of five years. This provision is designed to give tax exemption for the net profit or to deduct annual losses from the net profit once the tax exemption expires, because BOI-promoted persons operate businesses that are considered by the BOI as significant activities for Thailand. The IPA 2001, as a special law, therefore prevails over the Revenue Code. This idea is also supported by the opinions of the Council of State (the general meeting) Nos. 403/2544 (2001) and 209/2551 (2008). According to which, in a case where special law stipulates special taxation methods, the Customs Tariff Act B.E. 2530 (1987), as a general law, shall not be applicable. If we apply the same reasoning, the Revenue Code, as a general tax law, should not be applicable in this case. In order for someone to gain BOI-promoted status, the BOI considers the application as prescribed in Section 17 under the IPA 2001.

Furthermore, the BOI has to consider whether investment projects are economically and technologically sound, in accordance with Sections 18 and 20 under the IPA 2001. The tax exemption period of each project can be different. Moreover, paragraph four of Section 31 under the IPA 2001 allows the setting-off of an annual loss during the tax

⁸¹³ Opinion of the Council of State No. 158/2552 (2009) (in Thai).

exemption period against net profit within five years after expiration of the tax exemption period. The BOI-promoted person may choose to offset such a loss against the net profit of any one year or several years, which demonstrates the spirit of the IPA 2001 in calculating the annual loss on individual projects. The Council of State, therefore, was of the view that the annual loss calculation method proffered by the BOI should be applicable. It is evident from the opinion of the Council of State that a BOI-promoted company's annual loss should be calculated according to BOI practices. In light of this, the problem of an authority of interpretation is solved; inasmuch that the BOI's interpretation of the IPA 2001 should prevail.

6.4 The Central Tax Court Judgment: Red- Number Case No. 190/2553 NMB-Minebea Thai Ltd v the Thai Revenue Department

The following are the claims of the plaintiff and the defendant in the *Minebea* case.⁸¹⁴

6.4.1 The Plaintiff's Claims

The plaintiff disagreed with the assessment by the Revenue Department and the Board of Appeal's decision. The plaintiff was granted an investment promotion certificate and incentives by the BOI in accordance with the IPA 2001, which is a special law specifying that the BOI can consider, under its own criteria, whether to grant a promotion to a specific company. Therefore, the company should be, by law, entitled to the privilege of loss carry forward.

The plaintiff argued that the Revenue Department had changed its opinion and practice regarding the meaning of 'annual loss' and its calculation under Section 31 of the IPA 2001. Therefore, in the view of the plaintiff, the Revenue Department's practice and opinion were uncertain and had been changed over the time

⁸¹⁴ The Central Tax Court Judgment: Black-Number Case No. 177/2552, Red- Number Case No. 190/2553 *NMB-Minebea Thai Ltd v the Thai Revenue Department*⁸¹⁴, rendered on 13 October 2010.

A Black-Number Case No. is allocated to cases before they are decided, ordered, distributed, or temporarily distributed by the courts.

A Red-Number Case No. is allocated to cases, which have already been decided, ordered, distributed or temporarily distributed by the courts. The court registered these numbers in the directory of the court starting from No. 1 over the year arranged in a sequence number until the end of the year.

The plaintiff also argued that the profits and losses of each project should not be offset because each project was promoted separately by the BOI and was entitled to different incentives with different periods of promotion. In addition, the plaintiff was required to prepare a separate financial statement for each project. In the opinion of the Revenue Department, the calculation, which combined the net profits/losses of every project, could lead to a mix-up of all profits and losses, making it impossible to distinguish which net profit belonged to which project.

The plaintiff offered the following table of the respondent's calculations, claiming them to be invalid.

Table 1 Plaintiff illustration of the profit/loss calculation by the Revenue Department.

Year	Project			Total	Deduct loss (S. 31 Para 4)	Remarks
	A	B	C			
	Years of Tax Exemption					
	5	3	3			
1	- 400	- 300	+ 200	- 500		
2	+ 100	+ 200	+ 400	+ 700	-	<i>Entitled for tax exemption for profit of Project A,B,C</i>
3	+ 100	+ 100	+ 200	+ 400	-	<i>Entitled for tax exemption for profit Project A,B,C</i>
4	- 200	+ 100	+ 200	+ 100	- 100	<i>Loss - 400</i>
5	+ 100	+ 200	- 200	+ 100	-	<i>Entitled for tax exemption for profit of Project A</i>
6	+ 500	- 200	- 300	0	-	
7	+ 300	- 100	- 150	+ 50	- 50	<i>Loss - 350</i>
8	+ 300	- 100	- 100	+ 100	- 100	<i>Loss - 350</i>
9	+ 300	- 100	+ 50	+ 250	- 250	<i>Impossible to identify to which project loss belongs.</i>

Note: Values are not true. They are created by the plaintiff for illustrative purposes.

Source: Adapted from The Central Tax Court Judgment: Red- Number Case No. 190/2553 *NMB-Minebea Thai Ltd v the Thai Revenue Department* rendered on 13 October 2010.

From this table, it becomes apparent that the company lost 500 in year 1, which was used in years 4, 7 and 8, without it being clear which amount belonged to which project.

In year 1, Project A actually lost 400, and Project B lost 300. The defendant's interpretation calculated the loss at only 500, making it impossible to identify which losses belonged to Project A or Project B, or how much.

In year 9, it is unclear whether the loss of 250 belongs to Project A or B. If it belongs to Project B, the company cannot use it in accordance with Section 31, Paragraph 4 of the IPA 2001 because the project was granted exemption from CIT for only three years. By the ninth year, the five-year period after the expiry of the exemption, within which the loss could be used, had itself expired. If the loss belonged to Project A, the company could use it in accordance with the terms of the IPA 2001. From the above illustration, Project A was granted five years' CIT exemption and could use the benefit of loss carry-forward until year 10.

This illustration presents an objective of the IPA 2001 – to consider each project and grant tax incentives individually according to the company's circumstances. As such, a project making profit benefits from tax exemption, whilst one incurring a loss has the benefit of loss carry-forward. From this, we can deduce that the BOI's interpretation of the provisions of law takes precedent over that of the Revenue Department.

The plaintiff also requested the court to order the Revenue Department to refund VAT that was wrongfully offset against the tax liability under the assessment, together with interest of 1% per month since the date of the offset. This matter, however, is not the focus of this thesis, and this part of the claim will not be discussed further.

6.4.2 The Revenue Department (respondent)'s claims

The Revenue Department had calculated the loss to be carried forward and claimed that Minebea should pay the CIT together with an accounting surcharge for the years 1997, 1998 and 1999. Minebea had been granted two or more BOI promotion certificates, so was required to combine the net profit and loss incurred under both into one amount. If this combined amount resulted in a net profit, the company would have been exempt from CIT; if it resulted in a loss, though, they could carry it forward and deduct it from net profit at any point during the five years after the expiry of the tax-exempt period.

However, if a company had been granted two or more certificates of BOI promotion, with one certificate valid for total exemption from income tax and another certificate only for a 50% reduction (for not more than five years from the expiry of the exemption period), then it could use any net loss incurred from exempt business operations as deductible expenditure from net profit under the 50% reduction of income tax privilege. Should there be any remaining net loss, it would be used as a deduction against net profit of non-tax-exempt business operations.

The Revenue Department applied Section 65 of the Revenue Code in calculating the taxpayer's net taxable profit. Section 65 considers one taxpayer as one tax unit, so the net taxable profit or loss derived by one taxpayer from more than one BOI-promoted project must be combined first, before it is offset against taxable profit from any non-BOI-promoted activity and taxed as one tax unit. The Revenue Department claimed that Section 31, Paragraph one of the IPA specifies that 'the promoted person shall be granted exemption of the CIT on the net profit derived from the promoted project'. The Revenue Department further viewed that the terms 'net profit' and 'net loss', however, are not defined under the IPA, and so they have to be defined in accordance with Section 65.⁸¹⁵

The Revenue Department also used its Notification dated 5 February 1987 (regarding the calculation of net profit and loss for BOI-promoted and non-BOI-promoted projects) to state that the profits and losses of such projects should be calculated separately. On 13 February 2009, the Board of Taxation issued Ruling No.38, which agreed with the Revenue Department's interpretation. According to the Board of Taxation's view, Section 31 of the IPA 2001 grants exemption from CIT on the net profit derived from any BOI-promoted project. In their view, this law is applicable to every separate BOI-promoted project that a company might have. Therefore, the 'one entity' concept for all BOI-promoted projects has to be applied when companies operate more than one BOI-promoted project.

⁸¹⁵ RC, s 65, 'Income subject to tax under this Division shall be net profits, computed by taking into account all revenue arising from or in consequence of the business carried on in an accounting period and deducting there from all expenses in accordance with conditions prescribed in RC, ss 65 (2) and 65 (3)'.

For example, a company can combine the profit from BOI-promoted and non-BOI-promoted projects to calculate the net profit for the payment of CIT, which suggests that the net profit and loss of all BOI-promoted projects must be combined first, before they are combined again, with the profits and losses from non-BOI-promoted projects.

6.4.3 The Central Tax Court's Decision

On 13 October 2010 the Central Tax Court passed judgment on the issue of whether the loss from one or more BOI-promoted projects has to be offset against the profits of other BOI-promoted projects.

The court, agreeing with the BOI's opinion, ruled that the IPA 2001 is a special law and is applicable only to taxpayers who are granted BOI privileges, hence overriding the Revenue Code, which is a general law and is applicable to all taxpayers. The court also ruled that the profit calculation, as prescribed in Revenue Code Section 65 paragraph one, stating the obligation of a company to combine all net profit/loss of all activities, is for a general situation, where there are no laws providing specific rules. This was the opinion of The Central Tax Court Decision: Red- Number Case No. 190/2553 *NMB-Minebea Thai Ltd) v the Thai Revenue Department*.

The important question to be considered is whether Section 31 of the IPA 2001 provides a specific rule in profit/loss calculation which differs from the rules set in Revenue Code, Section 65 paragraph one. In addition, the IPA 2001 was drafted with the aim of meeting Thailand's specific requirements, such as investment stimulation, increased employment, increased income and more even income distribution, through the offer of incentives to specific investments, as described in Chapter 4. The BOI was set up as a government agency to support investment and provide an increased level of convenience in operating businesses in Thailand, and it has the power to decide on incentives, including tax incentives, in accordance with Section 31 of the IPA 2001.

The court in this judgment referred to Sections 16⁸¹⁶ and 19⁸¹⁷ of the IPA 2001, which empower the BOI to consider the type and size of the entity to be granted for privileges

⁸¹⁶IPA 2001, s16, 'The activities which are eligible for investment promotion by the Board are 'those which are important and beneficial to the economic and social development, and security of the country,

and conditions. It indicated that the BOI has the power over whether or not to grant the privileges, including tax incentives. In addition, the court ruled that the IPA 2001 is intended to exempt the promoted person from CIT on a project by project basis, as opposed to combining the projects, because each promotion certificate is granted by the BOI under different conditions and periods of time.

Consequently, the court decided that the Revenue Department's assessment (that a BOI-promoted business must offset one project's loss against the profits of other projects in the same accounting period for the purposes of tax calculations) was not legally valid. In other words, a company which was granted BOI tax privileges for more than one project is eligible to calculate taxable profit and loss on each individual project separately.

The court was of the opinion that Section 31 of the IPA 2001 is not clear on the direction and method of calculating profits for BOI-promoted projects that are eligible for tax exception. The Central Tax Court in this case adopted the concept of 'intention of legislature', which conveys the concept of purpose and objective (or spirit) of the IPA 2001, in order to give tax exemption to promote investment. The court also held that if there appears to be any doubt or ambiguity, the case will be resolved in favour of the party who would be liable to the penalty,⁸¹⁸ as outlined in Section 11 of the Civil and Commercial Code, in order to prevent potentially innocent parties from being fined

activities which involve production for export, activities which have high content of capital, labour or service or activities which utilise agricultural produce or natural resources as raw materials, provided that in the opinion of the Board, they are non-existent in the Kingdom, or existent but inadequate, or use out-of-date production processes.

The Board shall make an announcement designating the types and sizes of investment project eligible for promotion and may stipulate there in the conditions under which promotion is to be granted and may amend or abolish those conditions at any time.

In the case where the Board is of the opinion that any project announced to be eligible for promotion under paragraph two no longer requires to be promoted, it may announce a temporary or permanent cancellation of promotion for that project'

⁸¹⁷ IPA 2001, s 19: 'The investment project to which the Board may grant promotion shall be one which incorporates appropriate measures for the prevention and control of harmful effects to the quality of the environment in the interest of the common good of the general living of the public and for the perpetuation of mankind and nature'.

⁸¹⁸ This can be compared with the Thai Supreme Court Decision No. 1908/2538 (1995) where the court held that 'the Revenue Code is public law which stipulates duties and relationships between individuals and the state and organs of state. The Revenue Code affects individual rights and property rights, hence, it has to be strictly constructed in the way not increase burdens or affect the rights of the taxpayers' (in Thai).

unfairly when there is an element of uncertainty. Accordingly, the tax provision in this case favoured Minebea. The interpretation of tax law will be discussed further in the next chapter.

In addition, the view of the court was that paying tax is a citizen's duty. With respect to tax obligations, the taxpayer is deemed to be a debtor and the state a creditor. Although tax legislation is categorised as a public law which regulates the relationships between individuals (and organisations) and the state and its organs, under some circumstances the principle and provision of private law must be used in order to interpret specific cases.⁸¹⁹ Consequently, the power of public finance belongs to the government, and tax legislation is therefore a public law. The court in this case held the application of Section 11 of the Civil and Commercial Code, which is a private law, in order to rule that the interpretation should be made in favour of Minebea – the party that would be liable to the penalty. The Revenue Department was ordered to return the offset amount to Minebea.

In addition, despite the fact that it ruled in favour of Minebea, the court suggested that, since the granting of tax incentives entails the loss of public revenue, it should be considered a 'tax expenditure' according to Article 167 paragraph 1 of the Constitution of Thailand⁸²⁰. It is necessary, therefore, for the BOI, when assessing the allocation of tax incentives, to consider whether or not the project's anticipated benefits to the economy and society are worth the loss of public revenue.

The court held that the provisions on tax incentives should be specified in the body of revenue law, since the IPA 2001 itself is not a revenue law, and is not administered by the revenue authorities. The BOI's practice of granting tax incentives independently from the Ministry of Finance is flawed, since the BOI tends not to take into account the

⁸¹⁹ John F. McEldowney, *Public Law* (3rd edn Sweet & Maxwell Limited 2001) 6.

⁸²⁰ Constitution of Thailand 2007, art 167: 'The submission of annual appropriations bill for the fiscal year shall, for the sake of consideration, clearly contain accompanying documents which shall include the details of the estimated revenues, objectives, activities, plans, projects of each item of expenditure as well as shall demonstrate the monetary and financial status of the country relating to the overall of economic circumstance resulting from expenditure and the provisions of income, interest and missing income out of individual exclusion of various taxes, the necessity of the submission of binding budget for the next fiscal year, debt burden and debt incurred by State and financial status of State enterprise in the year such budget is to be approved and the last fiscal year.'

potential loss of revenue, which is otherwise an important consideration for the Ministry of Finance.

6.5 Analysis of the *Minebea* Case

Section 31 of the IPA 2001 gave the BOI the authority to allow BOI-promoted persons the right to deduct an annual loss, provided that it had been incurred during the period of promotion (for valid activities), against net profits accrued for no more than five years after the end of tax exemption. This differs from the provisions of Section 65 (3) (12) of the Revenue Code (see Appendix 4), according to which losses from the previous accounting periods may be carried forward for five accounting periods to be offset against future profits from all sources.⁸²¹

Section 65 (3) (12) of the Revenue Code is a general rule of loss carry forward which applies to all companies and partnerships. As stated by Siriwan, this section allows net losses brought forward from accounting periods no longer than five years preceding the current accounting period for the purpose of computing the net profits of general companies that are not promoted by the BOI.⁸²² According to this rule (a) a net loss has to be calculated in accordance with Section 65 (2) and 65 (3); (b) a net loss must be brought forward from accounting periods no longer than five years preceding the current accounting period and (c) a net loss from the preceding accounting period must be carried forward to offset against the net profit of the first profitable accounting period. After that, a net loss (if any) can be used to offset against the net profits of the following accounting periods for no more than five years.⁸²³

Company A., after beginning business, has net loss/profit after complying with the Revenue Code Sections 65(2) and 65(3) as follows.

⁸²¹ RC, s 65 (3) (12) :‘For the purpose of computing net profits, none of the following items shall be allowed as expenses:(12) Any damage recoverable under an insurance or contract of indemnity or the net losses incurred in preceding accounting periods except the net losses brought forward from accounting periods no longer than five years preceding the current accounting period.’

⁸²² Yupadee Siriwan,*Tax Accounting* (Champa Printing 2009) 8-11, 8-12 (in Thai).

⁸²³ Pajitr Rojanavanij, Choomporn Sansai and Saroch Thongprakam, *Taxation* (Sayamcharoenpanich Ltd 2006) 2-162 (in Thai) and Siriwan (n 822).

Table 2. Illustration explaining the loss carry forward rule according to the Revenue Code, s 65 (3) (12).

Accounting Period	Profit	Net Loss
2001	-	200
2002	50	-
2003	20	-
2004	-	180
2005	50	-
2006	30	-
2007	200	-
2008	-	60
2009	40	-
2010	-	70
2011	130	-

Note: Values (in thousand GBP) are for illustrative purposes only. The accounting years have been changed by the researcher.

Source: Adapted from Rojanavanij, Sansai & Thongprakam, Taxation, Sayamcharoenpanich Ltd, Bangkok, 2006, p.2/163 (in Thai).

(1) The net loss of 200 for the year 2001 can be considered for offsetting during five consecutive accounting periods (2002-2006). During the periods of 2002, 2003, 2004, 2005 and 2006, we see profits of 50, 20, 50, and 30, respectively. The total is 150. Therefore, the net loss of 200 in 2001 can be offset against the net profit of 150, leaving no profit on which Company A must pay tax (in 2006). The remaining loss of 50, however, cannot be carried forward in 2007, since this is more than five years since the expiry of the incentive as allowed by Section 65 (3) (12).

(2) The net loss of 180 for the 2004 can be carried forward to 2007 since it is not more than five years from the expiry of the incentive. There is no need to offset this loss of 180 against the net loss from 2005 and 2006 because those net profits were offset against 2001. Hence, the net loss of 2004 can be offset against the net profit of 200 in 2007, so the company has to pay tax on this net profit of 20 in 2007.

(3) The net loss of 60 in 2008 can be carried forward to be offset against the net profit of 40 in 2009. There is no tax payment for 2009, and the net loss of 20 can be carried forward in the following accounting periods.

(4) The net loss of 70 in 2010 can be offset against the net profit of 130 in 2011. Also, the net loss of 20 in 2008 can be deducted, in addition to the net loss of 70. Hence, there is a net profit of 40 left in 2011 and Company A has to pay CIT on this amount.

Loss carry forward and offsetting have to be in sequence with the first profitable accounting period. The Supreme Court Decision 3185/2522 (1979) held that 'loss carried forward' no more than five years preceding the current accounting period means carried forward according to accounting standard every year until the year which first shows a net profit. The remaining losses can be carried forward to offset against the following years (if there is any profit). This is in contrast with Section 31, Paragraph four of the IPA 2001, according to which the promoted companies may choose to deduct losses from the net profits of any one year or several years. This contradiction makes it evident that the IPA 2001's provision on tax incentives is unclear and must be amended to specify the method of calculations.

The first issue to be determined is which law should be applicable in this dispute – the IPA 2001 or the Revenue Code, Section 65 plus the Notification of the Revenue Department (5 February B.E. 2530 (1987)). The principles relating to the resolution of such conflicts (*lex superior*, *lex priori* and *lex specialis*) will be discussed in the following chapter. In order to establish that the IPA is a specific law, as is the view of the BOI and Council of State, a comparison can be drawn with the opinion of the Council of State No. 209/2551 (2008) Re: Value Added Tax on shipments from one export processing zone⁸²⁴ to another export processing zone. In this case, the Council of State stated that the Industrial Estate Authority of Thailand Act of 1979 is a special law which specifies special tax collection; the Revenue Code, as a general law, is therefore

⁸²⁴ 'Export Processing Zone' means 'an area designated for industrial activities, trading or services or other activities beneficial to or connected with industrial activities, trading or services for the purpose of exporting products'. The Customs Department of the Kingdom of Thailand <<http://www.customs.go.th/Customs-Eng/EPZ/EPZ.jsp?menuNme=FreeZone>> accessed 10 November 2011.

not superseded. This issue is considered in the next chapter regarding ‘Norm Conflict Resolutions’.

The recommendation of this thesis is that where there is uncertainty in the interpretation or implementation of the IPA 2001, the BOI should be entitled to give a preliminary elucidation. This is aimed at achieving a uniformity of understanding and avoiding doubts among potential investors who consider the BOI as an investment agency responsible for all aspects of investment. In practice, the BOI has written to promoted companies to clarify the procedures regarding investment. With regard to the *Minebea* case, the BOI received complaints from BOI-promoted companies that the Revenue Department had interpreted and issued its rule regarding a calculation of the ‘annual losses’ for BOI-promoted persons who have more than one BOI-promoted project.

The uncertainty surrounding the appropriate authority on tax incentives is evident from the confused response and relationship between both the BOI and Revenue Department and investors. Letters and memoranda written by the BOI to investors provide information that contradicts the Revenue Department’s position, whereby the BOI argues that tax assessment should be separated for two or more BOI-promoted projects, and the BOI-promoted persons should be entitled to the benefit of ‘loss carry forward’ over several years up to a maximum of five years. However, the Revenue Department still holds the view that the tax authority, rather than the investment promotion authority, should hold authority over tax privileges, which in this case means that profits and losses occurring in the same accounting period should be consolidated. This incident shows the ambiguity of tax administration. Investors can be granted tax incentives by the BOI under the IPA 2001, but will be assessed to pay taxes by the Revenue Department. Under this system, it is not necessarily clear whether investors will receive the incentives guaranteed by the BOI, so they may have to consider extra tax planning to guarantee their entitlement to tax incentives, which consequently could increase the overall cost of operating businesses in Thailand.

As discussed in Chapter 4, investors may be discouraged from investment if the cost of law, administrative procedures, competent legal and tax advice and the cost of enforcement, through litigation or other forms of dispute resolution, are significant and unpredictable. The worst case scenario is the loss of current or prospective investors’

confidence in doing business in Thailand, as well as their consideration of other better administrated countries as investment destinations. A number of companies have attracted the attention of the Revenue Department for their calculations of net profit and loss.⁸²⁵ For instance, an American food producing company was suddenly assessed by the Revenue Department and made to pay tax of approximately GBP 20 million. The company, however, did not appeal to the court but rather expressed its consideration to relocate its business to another country.⁸²⁶

It is evident from the *Minebea* Case, in which a value added tax refund was retained by the Revenue Department as a means of guarantee for the tax payment during the appeal procedure, that companies are not then able to receive the cash refunded from the Revenue Department in order to operate their businesses. Regarding the appeal process, where the appellant has the approval of the Director-General to defer payment pending the judgement of the Court, the payment must be made within the period of 30 days from the result of the court's final decision.⁸²⁷ In the *Minebea* case, the assessment official initially refused to refund VAT to Minebea for the period of the appeal procedure. The Central Tax Court stated that the Revenue Code does not contain a provision allowing the Revenue Department to offset the VAT that was due to be refunded to Minebea against the amount of CIT that the company was claimed to be paid. The court applied Section 344 of the Civil and Commercial Code⁸²⁸ and ruled that, as this case was still under appeal and the VAT was not to be offset against the tax liability under the assessment in this case, the Revenue Department must return the offset amount to Minebea, together with interest of 1% per month since the date of the offset.⁸²⁹

⁸²⁵ Prachachat Online News, 'Prime minister decides the conflict between the BOI and the Revenue Department, requesting an opinion of the Council of State on double tax collections' 19 November 2009, Year 33, vol. 4159
<www.prachachat.net/view_news.php?newsid=02p0102191152§ionid=0201~&day=2009-11-19> accessed 10 November 2011.

⁸²⁶ Ibid.

⁸²⁷ RC, s 31.

⁸²⁸ CCC, s 344. A claim against which there is a defence may not be set-off. Prescription does not exclude set-off, if the claim barred by prescription was not barred at the time at which it could have been set-off against the other claim.

⁸²⁹ The Central Tax Court Judgment: Red- Number Case No. 190/2553 *NMB-Minebea Thai Ltd v the Thai Revenue Department*.

It should be noted that this dispute occurred during the period of global economic crisis, as a consequence of which many multinational companies suffered, and are still suffering, losses. The problem of unclear jurisdiction can cause a number of BOI-promoted companies to be assessed and fined by the Revenue Department if they refused to comply with a notice of tax assessment. Moreover, the BOI-promoted companies that disagree with the Revenue Department's practice may have to hire expensive lawyers and experts in order to proceed with any appeal and/or lawsuit. Considering the importance of FDI in Thailand, the government needs to eliminate obstacles to doing business as much as possible, beginning with the ambiguous legislation regarding investment. From the aforementioned facts, this problem needs to be resolved.

A strong case can be made for Minebea's claim that, since it was approved and granted a BOI promotion certificate, together with incentives, it should be entitled to the privilege of loss carry forward. This researcher also agrees with Judge Kongiead, who decided the *Minebea* case, that the process of promotion approval that relates to taxes should be considered by the relevant tax authorities, namely the Revenue Department.⁸³⁰ A careful study into the loss of revenue from granting tax incentives should be conducted. These two issues will be further discussed and recommendations for the future will be offered in the following chapter.

Both the BOI and the Central Tax Court agreed that any privilege for loss carry forward should be applicable to the BOI-promoted project, or projects, on an individual basis, and that there is no requirement to consolidate the loss and profit of the BOI-promoted projects for loss carried forward. Following the BOI's interpretation on tax calculation could be beneficial to foreign and Thai investors under the BOI-promoted project rules. The problematic interpretation of tax incentives for the BOI-promoted businesses, however, especially in the *Minebea* case, demonstrates the uncertainty regarding the issue of tax jurisdiction, i.e. which government agency should have authority over the BOI tax incentives, and under which law? The problem occurs because different government agencies exercise jurisdiction over the same tax issue. It is evident that the

⁸³⁰ Central Tax Court Judgment Red-Number Case No. 190/2553.

scope of the power of the BOI or the Revenue Department over BOI tax privileges is problematic. The IPA 2001 enables the BOI to grant tax incentives in accordance with its provisions, with the aim of exempting BOI-promoted persons from general tax provisions under the Revenue Code. In addition, the first priority of the Revenue Department and the Board of Taxation is to collect as much tax as possible in order to meet the national revenue target.

Where the profit/loss calculation is concerned, the Revenue Department's practices during the past two decades demonstrate administrative inconsistency. Since 2005, the Revenue Department has started to rule that companies have to combine all profits/losses for every BOI-promoted project, which has resulted in BOI-promoted companies receiving incomplete or even incorrect incentives, and not what the BOI aimed to grant. Following an interpretation by the Revenue Department, if a loss of the second BOI-promoted project has to be offset against a profit of the first BOI-promoted project, the loss of the BOI-promoted company is then less than the amount that the company should be entitled to be carried forward after the end of the tax holiday.

To illustrate this point, imagine a hypothetical case in which Company ABC has two BOI-promoted projects: Project A and Project B. Project A has a net profit of GBP 10,000 which will be exempt from CIT. Project B has a net loss of GBP 20,000. This GBP 20,000 loss of profit is carried forward to offset net profit (if any) after the tax exempt period. After the exemption period expires for both projects, calculations by the BOI and the Revenue Department lead to different outcomes. The BOI-promoted company incurs a net profit of GBP 200,000 after the tax exempt period.

The calculation, according to the BOI is:

$$\text{CIT (rate of 30\%)} = [200,000 - 20,000] \times 30\% = 54,000$$

The calculation, according to the Revenue Department is:

$$\text{CIT (rate of 30\%)} = [200,000 - (20,000 - 10,000)] \times 30\% = 57,000$$

It is clear from the above illustration that the calculation according to the Revenue Department, which requires offsetting the profit/loss of Projects A and B, increases the tax burden on the BOI-promoted businesses.

Another issue of concern is that the Revenue Department's aim is to administer the tax system fairly and efficiently. In addition, it has to be aware of all kinds of possible tax abuse by taxpayers as demonstrated by the discussion of tax incentives in Chapter 5. As regards the *Minebea* case, the Revenue Department has to comply with the Board of Taxation Ruling No. 38/2552 which became effective in 2009, because government officials must act in compliance with the law, as stated under Article 74 of the 2007 Constitution of Thailand.⁸³¹ In addition, the status of the Board of Taxation Ruling is finalised in accordance with the Revenue Code, Section 13 (7) paragraph three, and thus tax officials must comply with it at all time.

Had Minebea not initiated court proceedings, they would have been subject to the same treatment as any company that did not comply with the Revenue Department's instructions whereby would have sent them a summons, and continued tax assessment in line with those BOI-promoted companies that do not comply with official instructions. In cases where companies disagree with the tax assessment officers or the Board of Taxation, they are able to appeal to the Central Tax Court and subsequently can appeal to the Supreme Court, whose decision will apply only to the parties in that case. This essentially causes a costly and extended procedure for both the investors and the Revenue Department. Satit Rungkasiri, Director-General at the Revenue Department, gave his opinion that 'the entire problem comes as a result of differences between the Revenue Department and the BOI in interpreting the law. Both agencies will have to discuss this issue further.'⁸³²

As pointed out earlier, the problematic jurisdiction does not only affect Minebea but also extends to other BOI-promoted companies, which under similar conditions to Minebea may be affected by the Supreme Court's judgment, which is unpredictable and may take a long time. At present, BOI-promoted companies may decide whether to comply with the Revenue Department's current practice or with the Central Tax Court's

⁸³¹ Constitution of Thailand 2007, art 71 states 'every person shall have a duty to defend the country, maintain the national interests and obey the law'.

⁸³² Wichit Chantanusornsiri, 'Minebea Ruling May Open Door for More Refund Bids', *Bangkok Post* (Bangkok 26 October 2010) <<http://www.bangkokpost.com/business/economics/203077/minebea-ruling-may-open-door-for-more-refund-bids>> accessed 10 November 2011.

judgment. The language of the IPA 2001, as exemplified in the *Minebea* case, is not clearly worded and does not state about the profit/loss calculation. As such, it cannot be interpreted according to its literal meaning as a solid rule, which is why the Central Tax Court adopted the ‘intention of legislature’ rule, incorporating the principle that in cases of doubt the ruling should be made in favour of the party who bears the obligation. This latter principle, however, is controversial, with certain academic research, as well as cases, deciding in favour of the revenue collector.

The *Minebea* case is noteworthy for the fact that the BOI had sought an opinion from the Council of State to interpret the IPA 2001. The current practice in which government agencies are recommended to seek legal opinions from the Council of State can instead extend the conflict resolution procedure. As explained in Chapter 2, subsection 2.6.2, entitled Organisation and Functions, the Council of State’s function is as a consultative body and provides advice to governmental bodies. However, its opinions, which are ‘usually conservative advice’,⁸³³ are not legally binding on either the government agency or individuals. This is demonstrated by the *Minebea* case, where the court did not mention the opinion of the Council of State. It is important to emphasise that were the Council of State to play a greater role as a legislation-drafting body, such ambiguity as exists in the IPA 2001 would be lessened. As it stands, the fact that the Council of State can advise, but lacks a legally binding opinion, leads to confusion in the resolution of disputes and prolongs procedures concerning both the relevant government agencies and any individual affected.

Conclusion

This chapter examined the problem of overlapping powers over tax privileges for BOI-promoted companies under the IPA 2001. The provisions of the law itself are also unclear, which is evident through a number of rulings issued by the Revenue Department and memoranda issued by the BOI to investors on unclear provisions under the IPA 2001. The problem regarding profit/loss calculation for BOI-promoted companies, particularly, the *Minebea* case was selected as an example of this problem

⁸³³ Glen Lewis, *Virtual Thailand: the media and cultural politics in Thailand, Malaysia and Singapore* (Taylor & Francis, 2006) 102.

because a number of BOI-promoted companies are in similar situations as that of Minebea and the fact that this is the only case of its kind to be filed to the court. In this case, the plaintiff, a Japanese-owned company has been engaged in businesses in Thailand for a number of years, and one of the major contributors of FDI. These factors all contribute to the significance of the case. The incidences raised in this chapter established that there are differing opinions and practices on tax incentives between the two relevant government agencies, namely the Revenue Department and the BOI, which subsequently result in uncertain and extended administrative procedures. This chapter also questioned the current function of the Council of State (as noted in the *Minebea* case) as to whether its action prolongs and causes more complicated procedure. This issue will be discussed, and a solution suggested in Chapter 8. We have learned from Chapter 4 that foreign investment is crucial to the continued growth of Thailand's economy. Hence, the major problem of conflicting and ambiguous jurisdiction, as discussed in this chapter, needs to be addressed in order to eliminate a potentially significant disincentive to FDI in Thailand, and to enhance the country's attractiveness for investors, particularly in the context of the current global economic slump. It is therefore necessary for the Thai government to find a solution to this problem, and establish a consistent administration and body of policy on tax incentives. One possible method would be through an amendment of the current legislation and an incorporation of tax incentives in the Revenue Code. This will be discussed in more detail in Chapter 8.

7 Norm Conflict Resolution and Legal Certainty

Introduction

The current problems regarding tax incentives, of which the *Minebea* Case is the most prominent example, are due to overlapping jurisdiction on tax incentives, divided between the Revenue Department and the Board of Investment. With respect to the *Minebea* case, the Central Tax Court was confronted choosing between two laws. In this case, both the IPA 2001 and the Revenue Code were applicable laws, but they clearly conflict with one another. This chapter, which will examine this problem is divided into two sections and aims to answer the following questions:

1: *Which law should be applicable in this case in light of the current legislation?*

2: *What are the consequences of applying the law to the current problem?*

The first question involves a general discussion on the principles of norm⁸³⁴ conflict resolution, and on their occurrence and applicability in Thailand. The outcome of this analysis is to apply the principle to resolve the conflict under current laws. The second question concerns the following issues. Firstly, what are the possible consequences of applying the law? Secondly, what is the root of the problem? Is it that both the BOI and the Revenue Department have authority over tax incentives? Lastly, which authority should ideally have jurisdiction over tax incentives, and from which law is this authority acquired?

⁸³⁴ This research defines 'norms' as a mandatory rule of social behaviour established by the state, such as laws and regulations. For definition of norms, see Jack P. Gibbs, 'Norms: The Problem of Definition and Classification' *American Journal of Sociology*, Vol. 70, No. 5 (Mar, 1965) 586-594 <<http://www.jstor.org/stable/2774978>> accessed 10 November 2011.

7.1 Which law should be applicable in this case with respect to current legislation?

As Lindroos noted, 'It is accepted that every legal system must address the question of the relationship between its norms'.⁸³⁵ In an ideal normative world, it is always possible to determine the relationship between two or more norms by either establishing the superiority of a higher norm over a lower norm or by giving priority on other grounds, such as *lex posterior* or *lex specialis*.

7.2 General Conceptual Framework of Norm Conflict and Legal Reasoning

Pauwelyn's book and Kelsen's post-1960 writings will be drawn upon significantly, due to their sustained focus on the notion of conflict of norms. Kelsen's definition, typical and similar to many others, is thus:

A conflict between two norms occurs when there is an incompatibility between what one ought to do under the first norm and what one ought to do under the second norm, and therefore obeying or applying one norm necessarily or potentially involves violating the other.⁸³⁶

According to Pauwelyn, 'it is crucial to know what the law is, where it can be found and how the judge will apply it in case there is, for example, a conflict of norms'.⁸³⁷ In most conflicts, when faced with what are known as 'conflicts in the applicable law' both norms will continue to exist.⁸³⁸ Courts can apply priorities in applying the law, in which

⁸³⁵ Anja Lindroos 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*' (2005) *Nordic Journal of International Law* 74: HeinOnline, Koninklijke Brill NV.27.

⁸³⁶ 'Ein Konflikt zwischen zwei Normen liegt vor, wenn das, was die eine als gesollt setzt, mit dem, was die andere als gesollt setzt, unvereinbar ist, und daher die Befolgung oder Anwendung der einen Norm notwendiger-order möglicherweise die Verletzung der anderen involviert.' Kelsen (1979), cited in Jorg Kammerhofer, *Uncertainty in International Law: a Kelsenian perspective* (Routledge 2011) 141. This is an unremarkable definition, similar to many others. See also Wladyslaw Czaplinski, W. & Danilenkow, G.M. 'Conflict of norms in international law', 21 *Netherlands Yearbook of International Law* (1990) 3-42 at 12-13; Karl Wolfram, 'Conflict between Treaties', in: Rudolf Bernhardt (ed.), *Encyclopedia of public international law* (2000) Vol. 4, 935-941.

For conflict of norms in general, see Stanley L. Paulson 'Kelsen's Legal Theory: the Final Reound' (1992) *HeinOnline Oxford Journal. Legal Stud* 12, 265; B.A.O Williams, 'The Inaugural Address: Consistency and Realism' (1966) *Aristotelian Society* vol 40, 1-22, reprinted in Bernard Williams, *Problems of the Self* (Cambridge Univeristy Press 1973) 187-206.

⁸³⁷ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2004) 7-8.

⁸³⁸ *Ibid* 327.

event, both norms survive the conflict and are considered ‘valid’ and ‘legal’.⁸³⁹ The conflict is then resolved in favour of one of the two rules because that rule has been, or can be, labelled as the more ‘prominent’ or ‘relevant’ one. The result of these ‘priority rules’ is that only one of the two rules applies to the particular situation.⁸⁴⁰

In determining the issue of which norm, between two norms, is to be applied, one has to consider applicability rather than validity. In this sense, ‘conflict in the applicable law’ is a question of which law to choose, not one of the validity or legality of one norm or the other.⁸⁴¹ The fact that a rule is considered valid does not necessarily mean that it is always to be considered applicable.⁸⁴²

In states that fall under EC law, for example, a national competition law may be discounted because, as national law, it takes second place to Council Regulations.⁸⁴³ Pauwelyn defines conflict broadly, in contrast with the narrow and more traditional view of conflict as ‘a collision of mutually exclusive obligations in two norms’.⁸⁴⁴ As part of his wide angle on conflict, Pauwelyn discusses comprehensive conflict-avoidance⁸⁴⁵ and resolution techniques.⁸⁴⁶ He also discusses a broad range of problems and offers an equally broad range of answers. A norm with a narrower scope or validity is felt to be more effective than one with a more general scope, and thus is said to ‘prevail’.⁸⁴⁷ As Lindroos noted, ‘if two provisions cannot be applied to the same circumstances at the same time, no questions of conflict or parallel application can be

⁸³⁹ Ibid.

⁸⁴⁰ Ibid.

⁸⁴¹ Ibid.

⁸⁴² Uta Bindreiter, *Why Grundnorm?: a treatise on the implications of Kelsen's doctrine* (Springer 2002) 5.

⁸⁴³ Ibid.

⁸⁴⁴ Sungjoon Cho, ‘Review Title: WTO’s Identity Crisis’, Global Law Books <www.globallawbooks.org> accessed 10 November 2011.

⁸⁴⁵ Pauwelyn (n 837) chs 6-7.

⁸⁴⁶ Ibid 25-26.

⁸⁴⁷ Kammerhofer (n 836) 156.

raised'.⁸⁴⁸ This discussion addresses only situations of genuine conflict between legal norms within the parameters of Lindroos's strict definition. Its main question is, therefore, when there is a conflict between two norms, which of the two should be applied?⁸⁴⁹

Norm conflict resolution theories are found in both international and domestic legal systems. Regarding conflict of norms in international public law, Lasok and Stone explain that conflict of laws problems arise in cases involving 'foreign elements'⁸⁵⁰, i.e. matters which by their nature cannot be disposed of conveniently simply by reference to a 'domestic' rule of law of the forum.⁸⁵¹ Jenks is of the view that a 'conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.'⁸⁵²

According to Lasok and Stone, the worldwide existence of a variety of legal systems implies the choice of several possible solutions to the problem in hand.⁸⁵³ That is not to say that an individual state has recourse to all of the possible solutions, since some may be impossible under its legal system, but simply that no conflict problem has a cut-and-dried answer.⁸⁵⁴ A question on how a state could be expected to react in a given situation cannot be answered by purely analysing the norms that would follow from article 38 of the Statute of the ICJ,⁸⁵⁵ but must instead embrace norms set forth by history, self-interest and potential political impacts.⁸⁵⁶

⁸⁴⁸ Lindroos (n 835) 47.

⁸⁴⁹ Pauwelyn (n 837) 5.

⁸⁵⁰ For nature and scope of the conflict of laws in British legal system, see David McClean *Morris: The Conflict of Laws* (4th edn Sweet & Maxwell Ltd 1993).

⁸⁵¹ Dominik Lasok and Peter Stone, *Conflict of Laws in the European Community* (Professional Books Limited 1987) 3.

⁸⁵² Wilfred Jenks 'The Conflict of Law-Making Treaties', 30 BYIL (1953) 401, at 426 (emphasis added) in Erich Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006), *The European Journal of International Law*, vol 17, no. 2, 401.

⁸⁵³ Lasok & Stone (n 851) 3.

⁸⁵⁴ *Ibid.*

⁸⁵⁵ The International Court of Justice 'is the principal judicial organ of the United Nations (UN). It was established in June 1945 by the Charter of the United Nations and began work in April 1946. The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized

What is the precise definition of ‘conflict’? In many instances, what may seem like a conflict is only a ‘divergence’ which can be resolved by means of, for example, treaty interpretation.⁸⁵⁷ The necessity to identify when exactly two norms are ‘in conflict’ means that this study cannot be limited to setting out a number of rules of priority in international law.⁸⁵⁸ In addition, it is important to address the definition of conflict and the different avenues that may lead to convergence of norms.⁸⁵⁹

Conflicts in an international legal context arise because of an increase of treaty-based subsystems such as that of the WTO, the Framework Convention on Climate Change or the World Intellectual Property Organisation.⁸⁶⁰ These bodies have their own sector-specific ‘international law’, law-makers and law-enforcement mechanisms. In this context, an alternative term to ‘conflict of norms’ could be ‘conflict of obligations’.⁸⁶¹ It is important to note that international law involves both obligations and rights,⁸⁶² so a conflict may therefore arise not only between two different obligations, but also between an obligation and an explicit right.

Norm conflict resolution theories presume the resolution of conflict and the importance of the treaty interpretation process in so doing.⁸⁶³ Under the British legal system, questions of jurisdiction tend to be accorded more prominence than those of choice of

agencies’’ <<http://www.icj-cij.org/court/index.php?p1=1&PHPSESSID=49722f09cf19cc92e78bb2241c7dfdc1>> accessed 10 November 2011.

⁸⁵⁶ Pauwelyn (n 837).8.

⁸⁵⁷ Ibid 9.

⁸⁵⁸ Ibid 5.

⁸⁵⁹ Ibid.

⁸⁶⁰ Isabelle Van Damme, *Treaty interpretation by the WTO Appellate Body* (Oxford University Press 2009) 18.

⁸⁶¹ Pauwelyn (n 837).9.

⁸⁶² Theodore Dwight Woolsey, *Introduction of the study of international law: designed as an aid in teaching, and in historical studies* (C. Scribner, 1864) 18.

⁸⁶³ J.H.C. Morris, *Conflict of Laws* (David McClean, 4th edn, Sweet & Maxwell Ltd, 1993) 3.

law when conflicts are being addressed.⁸⁶⁴ Often, if the question of jurisdiction (in both English and other countries' courts) is answered, the question of the choice of law does not need to be asked.⁸⁶⁵

Before moving on to discuss norm conflict resolution principles, the differences between international and domestic legal systems must be taken into account, because, although some norm conflict resolution rules are used in both legal systems, some may not apply or may have limitations. There are five criteria differentiating the international legal system from domestic legal systems. First of all, the international legal system is decentralised and fragmented, in which under it the creation, applications, and implications of norms are built on structure and logic which differ from domestic law,⁸⁶⁶ there is no centralised legislator in the international legal system.⁸⁶⁷ Norms are created by the subjects of international law in a variety of forms, many of which are disconnected and independent from each other, creating a system different from the domestic legal order.⁸⁶⁸

Secondly, the normative order⁸⁶⁹ in an international legal context can be considered from 'the perspective of bilateral state relations, something that does not easily lend itself to the establishment of systemic relations between norms',⁸⁷⁰ which is in contrast to domestic law based on 'hierarchy and institutional structures'.⁸⁷¹

Thirdly, for countries with heavily institutionalised governmental structures, international law and its norms may be viewed as a means of regulating bilateral

⁸⁶⁴ Ibid.

⁸⁶⁵ Ibid.

⁸⁶⁶ Unknown, *Nordic Journal of International Law* Vol 74 (Nyt Nordisk forlag 2005) 28.

⁸⁶⁷ Pauwelyn (n 837)13.

⁸⁶⁸ Lindroos (n 835) 28.

⁸⁶⁹ Hans Kelsen, *General Theory of Law and State* (Lawbook Exchange Ltd 2007) 350.

⁸⁷⁰ Lindroos (n 835) 28.

⁸⁷¹ Ibid.

relationships between states,⁸⁷² which does not encourage a systematic understanding of the relationships between norms.⁸⁷³ This lack of structured relationships between the bodies of law and of a centralised law-making process is the essential difference between domestic and international legal order.⁸⁷⁴

Fourthly, international law may change over time. Any later norm can, in principle, overrule an earlier one, in other words states can change their mind at any point in time, subject to *jus cogens*⁸⁷⁵ and the principle *pacta tertiis nec nocent nec prosunt*^{876, 877}. Hence, the potential for conflict to arise must be multiplied by a time factor whereby an earlier norm may conflict with a later one, the same way an older norm may need to be interpreted and applied against the background of a newer norm.⁸⁷⁸

Lastly, states, although considered under international law to constitute one single entity, are represented in the international law-making process by a multitude of agents.⁸⁷⁹ Even if, for most treaties, Parliament's approval may be required, the fact remains that treaties are not normally negotiated by Members of Parliament but by diplomats or civil servants.⁸⁸⁰ Likewise, the delegates representing a state in the WTO context are mostly not the same as those representing the same state in the United

⁸⁷² Hanna Bokor-Szegő, *Questions of international law: Hungarian perspectives* (Martinus Nijhoff Publishers 1986) 21. Mario Telò, *International relations: a European perspective* (Ashgate Publishing Ltd 2009) 75.

⁸⁷³ Lindroos (n 835) 28.

⁸⁷⁴ *Ibid.*

⁸⁷⁵ *Jus Cogens* (Latin) meaning 'compelling law'. This 'higher law' may not be violated by any country. For *Jus Cogens* in theory and practice, see Dinah Shelton, *Normative Hierarchy in International Law*, *The American Journal of International Law*, Vol. 100, No. 2 (April 2006) 291-323. <<http://www.jstor.org/stable/3651149>> accessed 10 November 2011.

⁸⁷⁶ Latin: 'a treaty binds the parties and only the parties; it does not create obligations for a third state'. <<http://law.jrank.org/pages/21415/pacta-tertiis-nec-nocent-nec-prosunt.html>> accessed 10 November 2011.

⁸⁷⁷ Pauwelyn (n 837) 14.

⁸⁷⁸ *Ibid.*

⁸⁷⁹ Martin Loughlin, *The idea of public law* (Oxford University Press 2003) 65.

⁸⁸⁰ Pauwelyn (n 837) 14.

Nations Environment Programme (UNEP), the World Health Organisation (WHO) or the World Intellectual Property Organisation (WIPO).⁸⁸¹

Problems related to the interplay between different treaty regimes relate to treaties and custom or general principles of law, and do not only surface in the WTO. Given the overlap between different regimes of international law – be it the UN Security Council dealing with human rights and war crimes, the World Bank addressing environmental sustainability or the WHO negotiating a treaty to regulate the sale of tobacco products – the question of how different norms of international law interact is omnipresent.⁸⁸²

In domestic law, the hierarchy of norms is determined *by whom* and *how* the norm was enacted, for example by constitutional procedure, a federal or central legislature or local government.⁸⁸³ The situation is different under international law because in this instance the crucial factor is not so much by whom or how the norm was created, but rather what it is about, what it itself says about its hierarchical status and when it was established. This thesis does not examine specific cases of interplay or conflict rules of international law; rather, it attempts to provide a conceptual framework within which the interplay between domestic norms can be examined. Although domestic legal systems and the international legal system share some fundamental concepts relating to the conflict of norms, one must keep in mind the aforementioned differences.

In Thailand, the terms ‘conflict of laws’ or ‘conflict of jurisdictions’ are used in private international law. However, the country’s legal system has only just begun to address this matter ‘international law has no direct application in the municipal legal system in Thailand’.⁸⁸⁴ With respect to conflict in domestic law, Thai courts generally apply principle of norm conflict resolution when deciding which law should be applicable to a specific dispute. Where there is only one clearly stipulated law applying to an issue, it should be applicable to the dispute; however, the Thai courts also adopt the following

⁸⁸¹ Ibid.

⁸⁸² Edward McWhinney, Sienho Yee and Jacques-Yvan Morin, *Multiculturalism and international law: essays in honour of Edward McWhinney* (BRILL 2009) 130.

⁸⁸³ Pauwelyn (n 837) 96.

⁸⁸⁴ Ko Swan Sik and M. C. W. Pinto, *Asian Yearbook of International Law* Vol 4 1994 (Martinus Nijhoff Publishers 1996) 171.

norm conflict resolution principles when there are two or more laws that apply to the same issue.

Owing to the existing jurisdictional problem examined in the previous chapter, and as noted by Kammerhofer:

Conflicts of norms are a cause for uncertainty because if more than one norm refers to the same type of behaviour, the danger is very real that the subject of law which is confronted by this phenomenon will be physically unable to behave in conformity with both applicable norms.⁸⁸⁵

He further suggests that the problem arises as a result of adopting the means for resolving a conflict of norms without thoroughly studying their theoretical bases.⁸⁸⁶ With this in mind, the next part of this chapter will consider each of the relevant norm conflict resolution principles in order to decide which should properly solve the current conflict between two types of laws.

It is important to consider whether the norm among two conflicting norms is unclear before applying norm conflict resolution. As pointed out by Sadat-Akhavi, the use of interpretation to resolve the ambiguity of norms is a common practice.⁸⁸⁷ The removal of such ambiguity is fundamentally important, as it is impossible to ascertain a conflict between norms unless their exact meanings are known.⁸⁸⁸ Furthermore, any vagueness existing in norms can actually give the mistaken impression that they conflict, when in reality they only need clarification in order for their separateness to become clear.⁸⁸⁹ The issue of whether the provisions of the IPA 2001 are ambiguous and need interpreting before norm conflict resolutions can be applied will be discussed below.

⁸⁸⁵ Ibid139.

⁸⁸⁶ Ibid 140.

⁸⁸⁷ Sadat-Akhavi, *Methods of resolving conflicts between treaties* (Martinus Nijhoff Publishers 2003) 25.

⁸⁸⁸ Ibid.

⁸⁸⁹ Ibid.

7.3 Norm Conflict Resolution Maxims in General and in Thailand

The maxims of norm conflict resolution are traditionally accepted, to some extent, as logical; likewise, they are assumed to be in accordance with the ‘universal character of legal reasoning’.⁸⁹⁰ This research focuses on the three most commonly used and widely accepted resolving devices, the *lex posterior*, *lex specialis* and *lex superior* maxims. The problem with these devices is that they are so universally accepted that no one questions their legitimacy as a means of resolving conflicts of norms.⁸⁹¹

7.3.1 *Lex superior legi inferiori derogat*

According to Eiter, Faber and Truszczyński, the principle of *lex superior* means that ‘the rule issued by a higher hierarchical authority overrides the one issued by a lower one’.⁸⁹² Essentially, it lays the foundations for a ‘complex, hierarchical legal system’,⁸⁹³ with the hierarchy built into the fundamental structure of the legal system.⁸⁹⁴ The principle of *lex superior* was intentionally designed, unlike other doctrines such as *lex specialis* and *lex posterior*, which were established to choose the applicable norms from two conflicting norms.⁸⁹⁵

It remains a well-known fact that there is no single normative hierarchy in the international legal system (see above).⁸⁹⁶ The disputed notion of *jus cogens* and Article 103 of the UN Charter did attempt to establish some hierarchical relations in

⁸⁹⁰ Gerard Conway, ‘Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ’ (2010) German Law Journal Vol. 11, No. 09, 984.

⁸⁹¹ Kammerhofer (n 836) 146.

⁸⁹² Thomas Eiter, Wolfgang Faber and Mirosław Truszczyński, ‘Logic Programming and Non-Monotonic Reasoning’ (6th international conference, LPNMR 2001, Vienna, Austria, 17-19 September 2001: proceedings Vol. 6) 372 referred to as ‘Eiter *et al.*’.

⁸⁹³ Marie-Francine Moens and Peter Spyns, *Legal Knowledge and Information Systems: JURIX 2005: the 18th Annual Conference* (IOS Press 2005) 33

⁸⁹⁴ *Ibid.*

⁸⁹⁵ *Ibid.*

⁸⁹⁶ Michael M. Wood and Arnold A. Pronto, *The International Law Commission 1999-2009: Vol IV: Treaties, Final Draft Articles and Other Materials, Vol 4* (Oxford University Press, 2011) 776. Jan Klabbers, Anne Peters and Geir Ulfstein *The constitutionalization of international law* (Oxford University Press 2009) 337. Richard A. Falk and Saul H. Mendlovitz, *International Law Vol 2* (Transaction Publishers 1966) 21.

international law by establishing a priority of norms,⁸⁹⁷ but in practice, the *lex superior* maxim does not always provide an easy solution.⁸⁹⁸ The privileged status of the constitution depends on the ability of the courts to judge the constitutionality of laws. Where this is the case, the courts still need to take care to record conflicts and invalidities in laws, which likewise they do not necessarily do. It is also possible that courts may refuse to admit to a conflict that they had previously overlooked.⁸⁹⁹ Added to this is the fact that superior legislation may actually allow an inferior one to issue rules ‘with derogatory force relative to the norms on an immediately higher level’.⁹⁰⁰ A statute might, for example, allow an executive body to issue decrees which can repeal or deviate from existing statutes.

The privileged status of the *lex superior* doctrine is the key to the concept of norms. Normative systems come about because norms and only norms can generate further norms. Unlike the other maxims discussed in this chapter, the *lex superior* maxim has to be taken very seriously if one is to properly understand the idea of norms as formal ordering of ideals. The primacy of *lex superior* also includes the primacy of *lex posterior* and *lex specialis*,⁹⁰¹ which do not prevail because they are newer or have a special status but because their primacy is prescribed and those prescriptions themselves prevail.⁹⁰²

Moreover, a norm that occupies a superior position may not actually be the preferable one because there are certain circumstances in which a superior norm, such as the constitution, conflicts with but does not invalidate an inferior norm, such as a statute. This occurs in the legal system of the Netherlands, according to which the highest norm

⁸⁹⁷ For methods of norm conflict resolution in international law context, see Marko Milanovic, ‘A norm conflict perspective on the relationship between international humanitarian law and human rights law’ (2009) *Journal of Conflict & Security Law*, Thomson Reuters (Professional) UK Limited.

⁸⁹⁸ Alf Ross, *On Law and Justice* (The Lawbook Exchange Ltd 2004) 132.

⁸⁹⁹ *Ibid.*

⁹⁰⁰ *Ibid.*

⁹⁰¹ Kammerhofer (n 836) 175-176.

⁹⁰² Theodor Schilling, ‘Rang und Geltung von Normen in gestuften Rechtsordnungen’ (1994) (400-401 in Kammerhofer (n 836) 176. For more explanation on the idea of a *lex superior* that ‘privileges’ are claim over another, how this superiority is achieved - how far it can be achieved see Kammerhofer (n 836) 176.

is the constitution. Judges are not permitted to review the constitutionality of statutes.⁹⁰³ In this case, the superiority of the norm is assured at a political level and requires the legislature to be vigilant about conforming thereto.⁹⁰⁴

The *lex superior* maxim is clearly a design feature whereby sources of law are explicitly stratified.⁹⁰⁵ The legislator may sometimes immediately regulate reasoning, explanation and communication strategy,⁹⁰⁶ but must do so in his own words, and the representation of these constraints on reasoning activity can be left to the organisation representing their interpretation of those words.⁹⁰⁷

The doctrine of *lex superior* is known in Thailand as ‘rules of hierarchy of laws’, whereby the provisions of any law, rule or regulation, which are contrary to or inconsistent with the constitution, are rendered unenforceable.⁹⁰⁸ The notion of a super statute – a fundamental law superior to ordinary law – is curbed by declaring those laws unenforceable if they are contrary to the constitution,⁹⁰⁹ which holds the supreme hierarchy of laws because it is a piece of law that every member of society agrees to respect.⁹¹⁰ The Thai legal system has adopted this rule to make it clear that an Act of Parliament cannot be contrary to the constitution, which thus takes priority.⁹¹¹ The absolute supremacy of the constitution over other laws, as is the case in Thailand, is not the case in other countries, though, because as discussed earlier supremacy in the United

⁹⁰³ Constitution of the Netherlands, art 2 states: ‘The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts’.

⁹⁰⁴ Barak (n 314) 76.

⁹⁰⁵ Alexander Boer, Tom van Engers, and Radboud Winkels, ‘Traceability and Change in Legal Requirements Engineering’ in Pompeu Casanovas, Ugo Pagallo, Giovanni Sartor and Gianmaria Ajani (eds), ‘An Approaches to the Complexity of Legal Systems’ (International Workshops AICOL-I/IVR-XXIV September 2009 and AICOL-II/JURIX December 2009) 86.

⁹⁰⁶ Ibid.

⁹⁰⁷ Ibid.

⁹⁰⁸ Constitution of Thailand 2007, art 6.

⁹⁰⁹ Dick A.E. Howard ‘Reflection on the Rule of Law America’s 400th Anniversary at Jamestown’ (2007) University of Richmond Law Review 9, 29.

⁹¹⁰ Borwornsak Uwanno, *Public Law Volume III* (Nititham 1995) 18 (in Thai).

⁹¹¹ For more details regarding ‘Constitutional Supremacy’ in Thailand, see Panikabutara Coorey Pornsakol, ‘The evolution of the rule of law in Thailand: The Thai constitutions’ (2008) UNSWLRS 45 <<http://www.austlii.edu.au/au/journals/UNSWLRS/2008/45.html>> accessed 10 November 2011.

Kingdom lies with Parliament, the supreme law-making body,⁹¹² and legislation is the supreme source of law.⁹¹³ The United Kingdom and New Zealand do not have written constitutions against which primary legislation can be compared to review whether its constitutionality and validity.⁹¹⁴

In contrast, Thailand has a formal, written constitution that restricts the legislature's power to enact law by delineating particular legal rights as constitutional. This system is constitutional, rather than parliamentary supremacy, which means that they are mutually exclusive, since the former principle can render action or laws enacted by the latter invalid.⁹¹⁵ The concept of constitutional supremacy results in a rigid constitution under which special procedures for amendment are required.⁹¹⁶ Regarding the concept of supremacy under Thai Constitution law, *coups d'états* were used for many years as an unconstitutional means of achieving the desired constitutional changes.⁹¹⁷ Consequently, constitutional supremacy 'has instead undermined the sanctity of the very concept it purported to promote'.⁹¹⁸ Taken to its eventual conclusion, constitutional supremacy may be perceived as undemocratic, taking power away from the most recently elected representatives of the people.⁹¹⁹ Parliamentary supremacy provides the counterpoint to this,⁹²⁰ as Parliament, unlike a constitution, can be held to account and changed should elements of it be deemed to be working against the will or needs of the people.⁹²¹

⁹¹² Leslie W. White and William D. Hussey, *Government in Great Britain, the Empire, and the Commonwealth* (CUP Archive, 1961) 31.

⁹¹³ Irving Stevens, *Constitutional & Administrative Law* (3rd edn Pearson Professional Limited 1996) 39.

⁹¹⁴ Alex Carroll, *Constitutional and Administrative Law* (6th edition, Pearson Education Limited 2011) 18; Anthony Lester, *A British Bill of Rights* (Institute for Public Policy Research, 1990) 7. Hilaire Barnett, *Constitutional and Administrative Law* (5th edn Cavendish 2005) 9. Stevens (n 913) 39.

⁹¹⁵ Douglas M. Johnston and Gerry A. Ferguson, *Asia-Pacific Legal Development* (UBC Press 1998) 156.

⁹¹⁶ Wing Cheong Chan, *Support for Victims of Crime in Asia* (Taylor & Francis 2007) 194.

⁹¹⁷ *Ibid.*

⁹¹⁸ *Ibid* 195.

⁹¹⁹ Johnston and Ferguson (n 915) 158.

⁹²⁰ *Ibid* 158.

⁹²¹ *Ibid.*

The concept of hierarchy of law is that an authority of a lower law is inferior and cannot violate a higher law (see Chapter 2). In other words, the hierarchy of laws establishes relationships of inferiority and superiority between levels of laws. In this hierarchy, primary legislation is higher than or superior to secondary legislation. In Thailand, constitutional supremacy can be seen from the established hierarchy of laws, i.e. supreme law, primary legislation and secondary legislation. Primary (or ‘parent’) legislation consists of an Act of Parliament, the legal code and Emergency Decrees. The Act is passed by Parliament.

In considering a bill for an Act, the House of Representatives and the Senate must provide the elected representatives of the people with the right to vote on the passing of the bill.⁹²² Codes are dealt with in much the same way as Acts and are promulgated by the legislative branch. These codes include the Civil and the Commercial Code, the Penal Code, the Civil and Criminal Procedure Codes and the Revenue Code. As explained in Chapter 2, an Emergency Decree is enacted by the executive branch, through the cabinet, although it is subject to subsequent confirmation by Parliament.⁹²³ It also has the same force as an Act. The conclusion which can be drawn from the principle of constitutional supremacy is that the constitution is the highest law. As such, when any laws are in conflict with the constitution or constitutional laws, they will be null and void. Regarding a law and regulation, the same rule is applied: ‘A regulation that contradicts a law is invalid’.⁹²⁴

It is worth making note of a special legal hierarchy of norms in the United Kingdom. According to AV Dicey, a late nineteenth-century British constitutional expert, the principle of ‘parliamentary sovereignty’⁹²⁵ (or interchangeably ‘parliamentary supremacy’) means:

Neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any

⁹²² Constitution of Thailand 2007, art163.

⁹²³ Constitution of Thailand 2007, art184.

⁹²⁴ Daljit Singh, *Southeast Asian affairs 2003* (Institute of Southeast Asian Studies 2003) 123.

⁹²⁵ The word ‘sovereignty’ is ‘generally understood as referring to an ultimate source of authority’; Carroll (n 914) 33.

law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.⁹²⁶

Since these words were written in 1885, the nature of parliamentary sovereignty in the UK has changed.⁹²⁷ The power of the House of Lords, which is for the most part hereditary, and can be deemed undemocratic, was reduced through the Parliament Acts of 1911 and 1949,⁹²⁸ which led to the balance of power shifting even further towards the fully-elected House of Commons. It is that house that now effectively holds sovereignty, as opposed to Parliament as a whole (that is, both houses as a single entity).⁹²⁹ The doctrine of parliamentary supremacy upholds the notion that statute possesses legal supremacy. An Act of Parliament is the highest and most authoritative source of law,⁹³⁰ as it can make, repeal or override any other law, including one that contravenes international law. It is obligatory for courts to enforce and uphold such an Act.⁹³¹

In the United Kingdom, Parliament's legislative supremacy serves in place of a written constitution, and includes the power to legislate on constitutional matters.⁹³² This means that, effectively, any Act passed by British Parliament can repeal or amend any other Act.⁹³³ The key premise of British jurisprudence and legislation is the supremacy of Parliament⁹³⁴ whereby the enactments of the elected body are considered by definition constitutional, and their constitutionality cannot be challenged. In effect, they are the

⁹²⁶ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (1885) (10th edn, Macmillan 1959) 39.

⁹²⁷ Andy Williams, *UK Government & Politics* (Heinemann, 1998) 83.

⁹²⁸ *Ibid.*

⁹²⁹ *Ibid.*

⁹³⁰ Dicey (n 926) 39.

⁹³¹ Adam Tomkins and John Millar, 'Clause 18 of the Bill: Parliamentary Sovereignty and EU Law' in Great Britain: Parliament: House of Commons: European Scrutiny Committee, *The EU Bill and Parliamentary Sovereignty*, 10th Report of Session 2010-11 Vol. 2 (The Stationery Office 2011)

⁹³² Anthony Wilfred Bradley and Keith D. Ewing, *Constitutional and Administrative Law*, Vol 1 (Pearson Education, 2007) 57.

⁹³³ *Ibid.*

⁹³⁴ For a detailed discussion on the United Kingdom Parliament's unlimited law making power, see Hilaire Barnett, *Constitutional & Administrative* (7th edn Routledge-Cavendish 2009) 145-147.

constitution⁹³⁵ because the state's lack of a written constitution ensures that Parliament can exercise supremacy in all cases.⁹³⁶

The sovereignty of Parliament gives the UK legislative system two main characteristics.⁹³⁷ The first is that any statute enacted is valid and is not in contradiction of any existing national or international law.⁹³⁸ The second is that any statute may, either explicitly or implicitly, be repealed or amended by a later statute: Parliament cannot bind its successors 'and no Parliament is bound by Acts of its predecessors'.⁹³⁹

The United Kingdom's joining of the European Community (EC) in 1973 posed the most significant challenge to sovereignty in Parliament's history. By joining the EC, the United Kingdom accepted that a supranational organisation could make decisions which would directly affect British society.⁹⁴⁰ The country's signing of the Treaty of Rome effectively gave European law superior status to the law of the country, and required that British law fell in line with European law.⁹⁴¹ Likewise, it gave European courts the power of judicial review over British Acts of Parliament, so Europe can scrutinise British Acts of Parliament, refer them to the European Court of Justice and even, in extreme cases, suspend them.⁹⁴²

The doctrine of parliamentary supremacy can be challenged on several grounds.⁹⁴³ The first is that it is an anachronism, a product of historical circumstances that are no longer

⁹³⁵ See Dicey (n 926) 87-89. For a review of Dicey's thinking, see Edward McWhinney, *Judicial Review* (4th edn University of Toronto Press 1969) 31-34.

⁹³⁶ Johnston and Ferguson (n 915) 155.

⁹³⁷ J.E.S. Fawcett, 'The Issue of Parliamentary Sovereignty' in James P. Barber and Bruce Reed, *European Community: Vision and Reality* (Taylor & Francis 1973) 198.

⁹³⁸ Tomkins and Millar (n 931); Brian Thompson, *Constitutional & Administrative Law* (Blackstone Press Limited 1993) 51.

⁹³⁹ Fawcett (n 937) 198; A W Bradley and K D Ewing, *Constitutional and Administrative Law* (15th ed Pearson Education Limited 2011) 60. Bradley & Ewing (n 932) 60.

⁹⁴⁰ Williams (n 927) 84.

⁹⁴¹ *Ibid.*

⁹⁴² Thompson (n 938) 63.

⁹⁴³ For in depth discussion and debates regarding the implications of Parliamentary sovereignty of the pre- and post-1991 senses, see Nick W. Barber, 'The afterlife of Parliamentary sovereignty' (2011) (Oxford University Press and New York University School of Law I.CON Vol. 9 No. 1, 144-154.

relevant⁹⁴⁴ because it was introduced in the mid-nineteenth century, when Britain was enjoying industrialisation, expanding overseas interests and experiencing relative stability and prosperity.⁹⁴⁵ In this context, coupled with the Victorian belief in hierarchy, the notion that Parliament could single-handedly deliver ongoing prosperity seemed reasonable.⁹⁴⁶ Since then, forces both domestic and international (such as the EC, UN and NATO) have made parliamentary supremacy seem out of date and, at worst, undemocratic.⁹⁴⁷

Alder argues that there is no longer a consensus on Parliament's total supremacy, and there is no compelling legal reason why it should be the case. Since there exists no written constitution, the doctrine relies on nothing but its general acceptance by the courts.⁹⁴⁸ According to Allan, the courts have a responsibility to uphold the principle that they are concerned not with the statute generally but with its application to each individual case.⁹⁴⁹ Jones and Berrington note that the British public does not unequivocally support the doctrine of parliamentary sovereignty⁹⁵⁰ so as supranational institutions gain more power, it is likely to weaken further. It amounts to, they argue, 'a doctrine of lawyers, textbooks and government propagandists, not a doctrine of the people.'⁹⁵¹

The principle of *lex superior* does not resolve the conflict highlighted with regard to jurisdiction over tax incentives in Thailand. The IPA 2001 and the Revenue Code are both Acts of the Thai Parliament, and as such, they are of equal standing. Thus, recourse must be made to other norm conflict resolution principles.

⁹⁴⁴ John Alder, *Constitutional and Administrative Law* (Palgrave Macmillan 2011) 165.

⁹⁴⁵ Ibid.

⁹⁴⁶ Ibid.

⁹⁴⁷ Ibid.

⁹⁴⁸ Ibid.

⁹⁴⁹ T.R.S. Allan *Constitutional Justice* (Oxford University Press 2001) ch8.

⁹⁵⁰ Peter Jones and Hugh Berrington, *Party, Parliament and Personality: essays presented to Hugh Berrington* (Routledge 1995) 153.

⁹⁵¹ Ibid.

7.3.2 *Lex specialis derogate legi generali*

The maxim *lex specialis derogate legi generali* refers to the principle of *lex specialis* as a rule to resolve a genuine conflict between two norms. According to this principle, the special norm prevails over the general norm in the event of conflict.⁹⁵² Based on the references to *lex specialis* maxim in the writings of Grotius, de Vattel and Pufendorf, there are two reasons for letting a specific norm prevail over a general one: (1) the specific norm is the more effective or precise norm, allowing for fewer exceptions (the *lex specialis*, if it prevails, is indeed already an exception to the *lex generalis*) and (2) as a consequence, the special norm reflects most closely, precisely and strongly the consent or expression of will of the states in question.⁹⁵³

In the event of conflict between two laws, the *lex specialis* doctrine prevails, and where the *lex specialis* doctrine gives no indication of how to proceed, the principle of *lex generalis* alone shall govern.⁹⁵⁴ It is possible, in theory, for general and more specific pieces of legislation to coexist without challenging either's validity or applicability.⁹⁵⁵ In the case of a conflict between two treaties, the more specific one would prevail;⁹⁵⁶ however, as Pauwelyn has noted where there are two rules to solve the conflict– the *lex specialis* and the *lex posterior* – on these grounds it is difficult to conclude that the *lex specialis* principle prevails over its counterpart.⁹⁵⁷

As mentioned above, and as pointed out by Milanovic, international law lacks one central legislator and a definite hierarchy of its rules (other than *jus cogens*).⁹⁵⁸ It also lacks a unified international judiciary to which all pertinent disputes could be referred.

⁹⁵² Pauwelyn (n 837) 385.

⁹⁵³ Samuel von Pufendorf, *Droit de la Nation et des Gens*, book V, chapters XII-XXIII (quoted in de Vattel, *Droit des Gens*, 511).

⁹⁵⁴ Pauwelyn (n 837) 387.

⁹⁵⁵ Rudiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Springer 2003) 155. Hannah Tonkin, *State Control Over Private Military and Security Companies in Armed Conflict* (Cambridge University Press 2011) 149.

⁹⁵⁶ *Ibid.*

⁹⁵⁷ Pauwelyn (n 837) 395.

⁹⁵⁸ Milanovic (n 897) 459.

For these and other reasons, in international law the *lex specialis* maxim is at best a fairly limited tool of norm conflict avoidance.⁹⁵⁹

In a domestic legal context, the maxim of *lex specialis* has its origin in Roman law and its descendants, common law systems.⁹⁶⁰ The ancient Roman *Corpus Juris Civilis*,⁹⁶¹ for instance, contains a notation by Aemilius Papinianus that ‘in the entirety of law, the special takes precedence over genus, and anything that relates species is regarded as most important’,⁹⁶² making it clear that the ‘specific prevails over the general’.⁹⁶³ Also, ‘there is no specific legislative intention of the *lex specialis* maxim, highlighting its role as an informal part of legal reasoning, that is of the pragmatic process through which lawyers go about interpreting and applying formal law’.⁹⁶⁴ According to Moens and Spyns, it is possible to discover *lex specialis* ordering between two legal provisions by comparing their logical content.⁹⁶⁵

The limitations of the principle of *lex specialis* can be seen when a norm conflict in the domestic legal system becomes apparent. In such a case, the decision-maker is guided by the hierarchical and institutional structure of the legal order which provides predetermined norm relations.⁹⁶⁶ In this way, such a conflict can be solved by recourse to the hierarchy of laws and the primacy of norms. Where two norms are of equal status, the principles of *lex posterior* and *lex specialis* may be used.⁹⁶⁷ Furthermore, there are a variety of rules of interpretation and other maxims that may be applied in conflict

⁹⁵⁹ Ibid.

⁹⁶⁰ Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Oxford U.P. 1950): Treaty Interpretation and Other Treaty Points’, XXXIII British Yearbook of International Law 1957, 236.

⁹⁶¹ The three great compilations of Justinian, the Institutes, the Pandect or Digest, and the Code. See Sir William Smith, *Dictionary of Greek and Roman Antiquities, Volume 1* (Walton and Maberly 1859) 363-364.

⁹⁶² See Theodor Mommsen, Paul Krueger and Alan Watson (ed), *The Digest of Justinian vol. IV* (University of Pennsylvania Press 1985).

⁹⁶³ Fitzmaurice (n 960) 236.

⁹⁶⁴ Martti Koskenniemi (2004) ‘The ILC Report, Study on the Function and Scope of the *lex specialis* rule and the Question of Self-Contained Regimes’, 4 ILC, 7 May 2004, ILC(LVI)SG/FIL/CRD. 1 (2004) para 21.

⁹⁶⁵ Moens and Spyns (n 893) 33.

⁹⁶⁶ Lindroos (n 835) 39.

⁹⁶⁷ Ibid.

resolution, such as *lex prior*, *lex posterior*, autonomous operation,⁹⁶⁸ legislative intent, a *contrario*,⁹⁶⁹ *acquiescence*,⁹⁷⁰ *contra proferentem*,⁹⁷¹ *eiusdem generis*⁹⁷² and *expressio unius est exclusio alterius*⁹⁷³.⁹⁷⁴ As Jenks points out, ‘no particular principle or rule can be regarded as of absolute validity’.⁹⁷⁵ In other words, these other principles may take precedence over the principle of *lex specialis* or they may be applied concurrently.⁹⁷⁶

The application of *lex specialis* doctrine faces difficulties when it is necessary to determine the relationship between two different normative orders or rules deriving from different areas of law, such as environmental norms and trade norms. Such a situation gives rise to three main problems.⁹⁷⁷ Firstly, the *lex specialis* maxim does not provide for a solution when two norms are regarded as special.⁹⁷⁸ An environmental norm and a trade norm, for example, can each be regarded special in a particular case.⁹⁷⁹ Secondly, as the maxim is a mechanical principle without clear content it does not provide guidance in determining what is general and what is special.⁹⁸⁰ Giving priority to special norms within the system of unclear norm relations in which a decision cannot

⁹⁶⁸ Ernst-Ulrich Petersmann, ‘WTO Dispute Settlement Practice 1995-2005: Lessons from the Past and Future Challenges’, in Yasuhei Taniguchi, Alan Yanovich and Jan Bohanes (eds), *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations, and Regionalism in Asia* (Cambridge University Press 2007) 38.

⁹⁶⁹ From a contrary position.

⁹⁷⁰ Tacit or passive conduct that implies agreement or consent.

⁹⁷¹ ‘Of the interpretation of an ambiguous contract against the party which proposed or drafted the contract or clause’. Online Oxford Dictionary <<http://oxforddictionaries.com/definition/contra+proferentem>> accessed 10 November 2011.

⁹⁷² Of or as the same kind. Denoting a rule for interpreting statutes and other writings by assuming that a general term describing a list of specific terms denotes other things that are like the specific elements. Online Oxford Dictionary <<http://oxforddictionaries.com/definition/eiusdem+generis>> accessed 10 November 2011.

⁹⁷³ The expression of one thing is the exclusion of another.

⁹⁷⁴ Jenks (n 852) 407.

⁹⁷⁵ Ibid.

⁹⁷⁶ Lindroos (n 835) 41.

⁹⁷⁷ Ibid 42.

⁹⁷⁸ Ibid 42.

⁹⁷⁹ Ibid.

⁹⁸⁰ Ibid 42.

rely on such relations means that the decision actually relies on political or other considerations.⁹⁸¹ In addition, applying the *lex specialis* maxim raises the more difficult question of the relationship between the two norms, and the most difficult issue, accordingly, remains: How should one ultimately determine what is more special and what is more general?⁹⁸² Any such determination always remains relative and has to be performed *in casu*,⁹⁸³ as no guidelines with clearly delineated requirements are provided in scholarly literature.⁹⁸⁴

It has been argued that the convention whereby the special norm prevails over the general norm is a principle of legal logic, or legal reasoning,⁹⁸⁵ which can be defined, according to Shytov, as ‘a kind of reasoning which through finding relevant facts, appropriate legal rules, and good reasons for the application of these rules to the case, leads to a legal decision’.⁹⁸⁶ However, as Gehring noted, ‘special’ does not necessarily equate to ‘true’ or ‘better’,⁹⁸⁷ and so the logicity of this maxim can be doubted – a narrower norm is not always more effective than a wide one, and a general norm does not lose its validity because of the existence of a special one.⁹⁸⁸

Thai courts also adopt the rule of *lex specialis*. The following laws were considered as special laws and passed by Thailand’s Supreme Court: (1) the Land Code of 1954; (2) Securities Exchange of Thailand Act of 1974; (3) the Announcement of the National Executive Council No. 337 dated 13 December 1972; (4) the Thailand Buddhist Order Act of 1954; (5) Social Security Act of 1990; (6) the Interest for Loan of Financial Institution Act of 1980 and (7) Customs Act of 1926.

⁹⁸¹ Ibid.

⁹⁸² Lindroos (n 835) 48).

⁹⁸³ In case (in judicial meaning).

⁹⁸⁴ Lindroos (n 835) 48).

⁹⁸⁵ Pauwelyn (n 837)126. For legal logic rules see Larry Alexander, *Legal Rules and Legal Reasoning* (Ashgate/Dartmouth 2000).

⁹⁸⁶ Alexander Nikolaevich Shytov, *Conscience and love in making judicial decisions* (Springer 2001) 54.

⁹⁸⁷ Markus W. Gehring, *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 91.

⁹⁸⁸ Ibid 92.

In Supreme Court Decision No. 2959/2536 (1993), concerning the transfer of the ownership of land with a *Nor Sor 3 Gor* document,⁹⁸⁹ which is complete only upon registration with the competent officials, the court ruled that Section 4 (2) of the Thailand Land Code B.E. 2497 (1954)⁹⁹⁰ is a special law in this case. The transfer of land possession according to Section 1378 of the CCC⁹⁹¹ is not applicable. In the case of securities exchange, the Supreme Court ruled that transactions must follow the Securities Exchange of Thailand Act, B.E. 2517 (1974). This Act is a special law, and the role of the defendant in this case is trading in the securities market, rather than the transfer of real shares. Therefore, the defendant is not required to comply with the procedure specified in Section 1129 of the CCC.⁹⁹² Further, the securities transfer by the defendant is not void, despite the fact that it was not set out in writing and was not signed by the transferor and receiver.⁹⁹³ Next, the Supreme Court held in Supreme Court Decision No. 2228 - 2229/2531 (1988) that the Announcement of the National Executive Council No. 337 dated 13 December 1972 is a special law and exempt from the provisions of the Thai Nationality Act B.E. 2508 (1965).⁹⁹⁴ The defendant's nationality was revoked under the National Executive Council No. 337.

In Supreme Court Decision No. 953/2508 (1965), the court ruled that the Thailand Buddhist Order Act of 1954 is a special law and prevails over the CCC. Therefore, the

⁹⁸⁹ The *Nor Sor 3 Gor*'s holder has the right to use the land provided that every condition to issue the title deed has been met. This document implies that the issue of the title deed is pending (s. 1 of the Land Code 1954).

⁹⁹⁰ The Thailand Land Code 1954, s 4 states 'On and from the enforcement date of the Announcement of the Revolutionary Council, the transfer of ownership or possessory right in the land for which the Title Deed or the Utilization Certificate has already been issued shall be made in writing and registered with the competent officials'.

⁹⁹¹ CCC, s 1378 states 'Transfer of possession is effective when delivery of the property possessed'.

⁹⁹² CCC, s 1129, para 2 states 'The transfer of shares entered in a name certificate is void unless made in writing and signed by the transferor and the transferee whose signatures shall be certified by one witness at least'.

⁹⁹³ Supreme Court Decision No. 1827/2532 (1989).

⁹⁹⁴ The Thai Nationality Act 1965, s 7 (3).

provisions regarding possession of property as specified in Sections 1367,⁹⁹⁵ 1369,⁹⁹⁶ and 1377,⁹⁹⁷ are overridden by provisions under the Buddhist Order Act of 1954, according to section 41-44 of which, the property of a Buddhist organisation is prohibited for possession and transfer, unless it is allowed exclusively by a Buddhist organisation.

Social Security Act B.E. 2533 (1990) was ruled in Supreme Court Decision No. 2040/2539 (1996) to be a special law entitling employees to invalidity benefits according to a cause unrelated to work.⁹⁹⁸ As a result, provisions of the CCC, which is a general law, were not applicable in this case. Supreme Court Decision Nos.3923/2539 (1996) and 881/2517 (1974) ruled that the Bankruptcy Act of 1940 (the current version is 2004) is a special law which overrides the CCC. The Supreme Court also ruled that the Interest for Loan of Financial Institution Act of 1980 Sections 4 and 6 override the CCC Section 654.⁹⁹⁹ In the loan contract between the commercial bank and the borrower, the overdue interest rate of 18.5% (which exceeds 15% as limited under the CCC Section 654) is enforceable.¹⁰⁰⁰

With respect to penal laws as special laws, the Supreme Court¹⁰⁰¹ considered Section 27 of the Customs Act of 1926 which states that a person who avoids paying customs duty tax shall be fined four times the price of goods, and for each separate offence. In addition, the court considered Section 120 of this Act which states that:

⁹⁹⁵ CCC, s 1367 states ‘A person acquires possessory right by holding a property with the intention of holding it for himself’.

⁹⁹⁶ CCC, s 1369 states ‘A person who holds a property is presumed to hold it for himself’.

⁹⁹⁷ CCC, s 1377 states ‘Possession comes to an end if the possessor abandons the intention to possess or no longer holds the property. Possession does not come to an end if the possessor is prevented from holding the property by some cause which is temporary in its nature’.

⁹⁹⁸The Social Security Act 1990, s 69 states ‘The insured person shall be entitled to invalidity benefits according to the cause unrelated to work when he or she has paid contribution for a period of not less than three months during the period of fifteen months before being invalid’.

⁹⁹⁹ CCC, s 654 states ‘Interest shall not exceed 15% per year; when a higher rate of interest is fixed by the contract, it shall be reduced to 15% per year’.

¹⁰⁰⁰ Supreme Court Decision No. 3348/2542 (1999).

¹⁰⁰¹ Supreme Court Decision No. 401/2509 (1966).

The provisions of this Act shall prevail in all matters concerned with customs duty, where they are inconsistent with the provisions of other Acts or Notifications in force, and Acts or Notifications which will come into force at a future date shall not be deemed as repealing, restricting, altering, or withdrawing the powers under this Act unless such new Act or Notification expressly states such an intention.

The court ruled in this case that the Customs Act of 1926 is a special law and prevails over general laws. Hence, it did not apply Section 31 of the Criminal Code of 1956,¹⁰⁰² which specifies that the court shall impose a fine on every individual offender. This provision conflicted with Section 27 of the Customs Act of 1926, which in this case is a special law; therefore, Section 31 of the Criminal Code of 1956 was overridden by the Customs Act of 1926.¹⁰⁰³ This case could be applied to the Revenue Code, which, as explained in Chapter 3, contains criminal penalties such as fines and jail sentences.¹⁰⁰⁴ Since penalties for the contravention of laws can affect a person's liberty, the Revenue Code is to be seen as a special law, prevailing over general laws such as the CCC.

7.3.3 *Lex posterior derogat priori*

The *lex posterior* principle, or 'application of the last in time rule',¹⁰⁰⁵ means that 'the rule enacted at a later point in time overrides the earlier one'.¹⁰⁰⁶ In international law, this rule does not work well where sources other than treaties are concerned, and even among certain treaties the *lex posterior* doctrine assumes that the two conflicting norms emanate from the same law-maker, so that a later ruling of that law-maker should prevail over an earlier one.¹⁰⁰⁷ International law is a forum in which differing and

¹⁰⁰² The Thai Criminal Code 1956, s 31 states 'In case of the Court shall pass judgment inflicting the punishment of fine on several offenders for the same offence and in the same case, the Court shall inflict the punishment of fine on every individual offender' (in Thai).

¹⁰⁰³ The same rule was applied in Supreme Court Decision No.166/2508 (1965).

¹⁰⁰⁴ Criminal penalties are specified in RC, ss 35, 35 (2), 36, 37, 37 (2).

¹⁰⁰⁵ Benedetto Conforti, *International Law and the Role of Domestic Legal Systems* (Martinus Nijhoff Publishers 1993) 41.

¹⁰⁰⁶ Eiter et al (n 892) 372.

¹⁰⁰⁷ See generally Stanley L. Paulson, 'On the Status of the *lex posterior* Derogating Rule' in Richard Tur and William Twining (ed), *Essays on Kelsen* (Oxford: Clarendon Press 1986) 229-47.

sometimes conflicting law making-processes coexist.¹⁰⁰⁸ These can include rulings based on both explicit or implicit consent and a range of internationally-based agents (these include diplomatic protocols and customs regulations).¹⁰⁰⁹ Other law-making processes arise from the conduct of the state at the highest level, such as international treaties.¹⁰¹⁰

Relying in this context on a later expression overruling an earlier one, when the forms, characteristics and even authors of the expression are so divergent, is problematic.¹⁰¹¹ The application of the principle of *lex posterior* to international law creates major problems.¹⁰¹² Treaties, for example, can revise laws, most notably human rights law and trade laws, by adding further details or confirming prior norms.¹⁰¹³ When dealing with two separate but overlapping systems – national and international law – it can be extremely difficult to ascertain which norm was created later, making *lex posterior* a less effective principle of norm conflict resolution.¹⁰¹⁴

The *lex posterior* doctrine usually relates to conflicts created inadvertently by the law-maker, since it can be supposed that a law-maker will not deliberately or knowingly pass laws that contradict others.¹⁰¹⁵ If a contradictory law is passed, it would ideally explicitly repeal the earlier law that it contradicts.¹⁰¹⁶ It is not, however, always possible to achieve this, as the huge number of rules in any legal system, coupled with the fact that new laws are passed on a considerable scale, means that it is difficult to conduct a

¹⁰⁰⁸ Pauwelyn (n 837) 97.

¹⁰⁰⁹ Ibid.

¹⁰¹⁰ Ibid.

¹⁰¹¹ Ibid.

¹⁰¹² Berta Esperanza Hernández-Truyol and Stephen J. Powell, *Just Trade: a new covenant linking trade and human rights* (NYU Press 2009) 69.

¹⁰¹³ Ibid.

¹⁰¹⁴ Ibid.

¹⁰¹⁵ Gerard M. Conway, 'Conflict of Norms in European Union Law and the Legal Reasoning of the European Court of Justice' (Doctor of Philosophy, Brunel University 2010) 123.

¹⁰¹⁶ Bradley and Ewing (n 932) 59.

comprehensive review of all existing laws when a new law is being enacted.¹⁰¹⁷ Although non-contradiction could be achieved by giving priority to the earlier law, the later law represents the most recent will of the law-maker, and in a democracy represents the most recent expression of democratic consent.¹⁰¹⁸

In the United Kingdom, the doctrine of *lex posterior* is known as ‘the doctrine of implied repeal’, meaning that:

Where two Acts conflict with each other, and the conflict cannot be resolved in another way, the courts apply the Act which is later in time; the earlier Act is taken to have been repealed by implication to the extent of the inconsistency.¹⁰¹⁹

Two Acts coming into conflict can give rise to the conclusion that the latter is automatically more valid where the issue of conflict is concerned:¹⁰²⁰ ‘if two Acts are inconsistent or repugnant, the later will be read as having impliedly repealed the earlier’.¹⁰²¹ However, the court leans against implying such a repeal in that unless the two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied.¹⁰²² Because the judiciary generally seeks to avoid implicit repeals of any legislation, the law is that later enactments do not automatically repeal earlier ones.¹⁰²³ Consequently, the words of the later enactment must make it clear, for example this term; ‘by their necessity to import a contradiction’

¹⁰¹⁷ Conway ‘Conflict of Norms in European Union Law and the Legal Reasoning of the European Court of Justice’ (n 1015) 123.

¹⁰¹⁸ *Ibid.*

¹⁰¹⁹ Bradley and Ewing (n 932) 59.

¹⁰²⁰ Donald James Gifford and John R. Salter, *How to Understand an Act of Parliament* (Routledge 1996) 120.

¹⁰²¹ *Herbert Berry Associates Ltd v Inland Revenue Commissioners* [1977] 1 WLR 1437, HL at 1443.

¹⁰²² *Herbert Berry Associates Ltd v Inland Revenue Commissioners* [1977] 1 WLR 1437, HL at 1443.

¹⁰²³ Gifford and Salter (n 1020) 120.

should be specified.¹⁰²⁴ In the case of litigation, any party contending that there was an implicit repeal to a piece of legislation must take on the burden of proof.¹⁰²⁵

Any conflict between two statutory norms can bring the doctrine of implied repeal into play, but only when they ‘stand upon the same subject matter’.¹⁰²⁶ Inconsistency between two laws gives rise to implied repeal; this is the case no matter what the subject of the laws.¹⁰²⁷ Such inconsistency makes it impossible for both laws to be applied in their entirety,¹⁰²⁸ so according to the principle of parliamentary supremacy, the later law must prevail.¹⁰²⁹ Hence, the principle of implied repeal is being treated as a constituent element of at least the traditional view of parliamentary sovereignty.¹⁰³⁰

The concept of ‘implied repeal’ can be illustrated with reference to the so-called *Metric Martyrs* case, in which a number of British market traders were found to be selling goods using imperial rather than metric measurements, contrary to the regulations of the European Communities Act 1972 section 2 (ECA). According to this Act, goods were to be sold in metric measurements only. The traders invoked the British Weights and Measures Act of 1985, which permitted the use of both imperial and metric systems. As the later Act, it was claimed that it implicitly repealed any power that the ECA may have had to enforce the use of the metric system and impose penalties on those who refused to use it.¹⁰³¹ Laws LJ, however, viewed that the 1972 Act was a ‘constitutional statute’ and not subject to implied repeal.¹⁰³² With the above considerations in mind, it

¹⁰²⁴ *Garnett v Bradley* [1978] 3 App Cas 944, Lord Black burn at 966.

¹⁰²⁵ *Gifford and Salter* (n 1020) 120.

¹⁰²⁶ Nicolas W. Barber and Alison L. Young, 'The Rise of Prospective Henry VIII Clauses and their Implications for Sovereignty' (2003) Public Law 115.

¹⁰²⁷ Sarah Worthington, Alan Dashwood and Angela Ward, *The Cambridge Yearbook of European Legal Studies*, Vol. 2 (Hart Publishing 2000) 410.

¹⁰²⁸ *Ibid.*

¹⁰²⁹ *Ibid.*

¹⁰³⁰ *Stevens* (n 913) 41. *Worthington et al* (n 1027) 410.

¹⁰³¹ *Hunt v London Borough of Hackney; Thoburn v City of Sunderland; Harman v Cornwall County Council; Collins v London Borough of Sutton* [2002] EWHC (Admin) 195.

¹⁰³² *Hunt v London Borough of Hackney; Thoburn v City of Sunderland; Harman v Cornwall County Council; Collins v London Borough of Sutton* [2002] EWHC (Admin) 195, para 53.

may be desirable for the courts to re-examine the doctrine of parliamentary supremacy, which would make it possible to create statutory provisions which guard against implied repeals, making the system easier to understand.¹⁰³³

Two cases, *Vauxhall Estates Ltd v Liverpool Corporation*¹⁰³⁴ and *Ellen Street Estates Ltd v Minister of Health*,¹⁰³⁵ both dealt with similar issues. The 1919 Acquisition of Land (Assessment of Compensation) Act ensured that owners of slum housing were properly compensated for its demolition. The 1925 and 1930 Housing Acts, however, reduced the level of compensation offered. In light of this, property owners sought to secure compensation based on the terms of the original Act of 1919 by referring to section 7 of the 1919 Act, which stated that:

The provisions of the Act or order by which the land is authorised to be acquired [...] shall have effect subject to this Act and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect [...]

In both cases, the plaintiffs argued that the above passage was legally binding and should prevail over the 1925 and 1930 Acts. For their case to succeed, they needed to prove that the 1919 Act constituted the effectively constitutional position, being secured and so holding a superior status in law, thus making it binding on future parliaments. In both the *Vauxhall Estates* and *Ellen Street Estates* cases, the court ruled that the 1925 Act did implicitly repeal that of 1919, in accordance with the maxim of *lex posterior*.¹⁰³⁶

It is to be noted that where two conflicting laws actually deal with two distinct subjects, it can be argued that their different subject matters actually make it possible for them to operate side by side.¹⁰³⁷ If the earlier statute was more specific than the later, and the

¹⁰³³ Worthington *et al* (n 1027) 415.

¹⁰³⁴ [1932] 1 KB 733, HL.

¹⁰³⁵ [1934] 1 KB 590, CA.

¹⁰³⁶ [1932] 1 KB. 733, at 745.

¹⁰³⁷ Stevens (n 913) 41.

later did not give any indication that it was intended to affect the earlier, it can be possible to interpret the latter to make it inapplicable to the more specific matter.¹⁰³⁸ The principle of *lex specialis* is invoked in such a case.¹⁰³⁹

Thailand also applies the maxim of *lex posterior* under which the latest law abrogates the earlier law which it contradicts. This rule relates to the date the law became effective (when it started to be enforced)¹⁰⁴⁰ but it cannot be applied to actions undertaken before the effective date.¹⁰⁴¹ However, a higher law always overrides a lower law, no matter whether it was effective before or after the lower law,¹⁰⁴² so the new law is only to be applied to specific situations and does not replace the former law, which is a general one.¹⁰⁴³ For instance, the CCC, which was in force in 1925, specifies that ‘interest must not exceed 15% per year when a higher rate of interest is fixed by the contract for the rate higher than 15%, it shall be reduced to 15% per year.’ According to the Anti-Usury Act of 1932, usury is a criminal offence. The Supreme Court ruled that the clause regarding interest was unenforceable, as it was forbidden under the Anti-Usury Act of 1932. However, the loan contract is still valid and the borrower must pay back the loan with the interest of 15%, as specified under the CCC, which is a general law.¹⁰⁴⁴ Therefore, the *lex specialis* principle prevails over the *lex posterior* principle in this case.

7.4 Which norm conflict resolution principle should be applicable to the present case (the conflict of the IPA of 2001 and the RC)?

In the *Minebea* case, the principle of the *lex superior* is regarded as the first resolution rule particularly in this conflict analysis. The Revenue Code is a parent legislation which delegated to the administrative body the power to collect tax from citizens. Subordinate

¹⁰³⁸ Ibid.

¹⁰³⁹ Ibid.

¹⁰⁴⁰ Tachmai Ruksasut, ‘Hierarchy of Law’ in Manit Jumpa, *Legal Foundation* (10th edn Chulalongkorn Publishing 2010) 82 (in Thai).

¹⁰⁴¹ Ibid.

¹⁰⁴² Ibid.

¹⁰⁴³ Kittisak Prokati, ‘General Rule of Application and Interpretation of law’ (2011) *Journal of 100 years in memorial of Jitti Thingsapat* <<http://www.keepandshare.com/doc/656202/?da=y>> (in Thai) accessed 10 November 2011.

¹⁰⁴⁴ Supreme Court Decisions Nos. 521/2488 (1945), 607/2494 (1951), and 1238/2502 (1959).

legislation, according to the Revenue Code, includes Royal Decrees, Ministerial Regulations, Notifications of the Director-General and Notifications on Income Tax. In the *Minebea* case, the secondary law is the Revenue Departmental Notification dated 5 February 1987, which provides broad guidelines by which BOI-promoted companies can calculate their net profits/losses for CIT purposes.

In practice, important issues of law, including penalties, are specified by the Act of Parliament (as explained in Chapter 2 and with respect to tax in Chapter 3), while additional but minor details are specified under secondary law by an administrative body. However, with reference to the *Minebea* case, although profit/loss calculation is specified by a Revenue Department Notification, the IPA 2001, which is a primary law, takes precedence.

The status of secondary law made by an administrative body, in Thailand can be compared with that of the United Kingdom, where HMRC is able to use its discretion to make statutory concessions where it deems necessary. Its power to do so, however, was limited in 2005, when the courts delivered the *Wilkinson* judgement.¹⁰⁴⁵ In that case, a widower claimed that he was entitled to the same tax allowance granted to widowed women. Lord Hoffmann rejected the case on the grounds that, although HMRC could make extra statutory concessions, ‘construing the power so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant, and on grounds not of pragmatism in the collection of tax but of general equity between men and women’ was beyond their powers.¹⁰⁴⁶

Such an interpretation should likewise apply in the *Minebea* case. The applicable Revenue Departmental Notification dated 5 February 1987 does not convey the objective of granting tax incentives, as specified under Section 31 of the IPA 2001, which is itself an Act of Parliament. In fact, the case of *Minebea* concerns a calculation of the net profit/loss of two BOI-promoted companies. Clause 4.1 of Revenue Department Notification dated 5 February 1987¹⁰⁴⁷ does not specify that their losses

¹⁰⁴⁵ *Regina v. Her Majesty's Commissioners of Inland Revenue* [2005] UKHL 30, TC 722.

¹⁰⁴⁶ [2005] UKHL 30, para 21.

¹⁰⁴⁷ For Revenue Department Notification dated 5 February 1987, see pp. 120-121 of this thesis.

must be offset among BOI-promoted companies, which is not the case where there are BOI-promoted projects and non-BOI-promoted projects in which according to clause 4.2 of this notification, only net loss from all projects would be allowed to be offset against net profit from non-BOI- promoted projects. Therefore, clause 4.2 of the 1987 notification cannot be applied to the *Minebea* case.

Considering the Board of Taxation Ruling No. 38/2552 issued on 13 February 2009, as already mentioned in the previous chapters with reference to the hierarchy of tax laws and the status of the Board of Taxation Rulings, Board of Taxation rulings are binding only on the revenue officers, and not on other government agencies and taxpayers. Consequently, the legal effect of this Board of Taxation Ruling is that revenue officers, including the assessment officer and competent officials, are bound to follow it.¹⁰⁴⁸ In the *Minebea* case, the revenue officials have to follow the Board of Taxation Ruling No. 38/2552 (2009).

Of the IPA 2001 and the Revenue Code, then, which occupies the higher position? Parliamentary Acts and Codes are at the same level in the hierarchy of laws. As a result, the IPA 2001 is of a status equal to the Revenue Code under the *lex superior* rule. The next rule to be taken into account is *lex specialis* in order to consider which norm is more special and should override the general one. Although the Revenue Code is considered a specific law (dealing with tax) in comparison to other, more general, commercial laws, the IPA 2001 clearly stipulates special provisions for tax incentives.

The Investment Promotion Act has been in use since 1977 and since 2001 in its current form. As outlined in Chapter 4, the aim of this Act is to grant incentives to invest in export industries, protect domestic industries, expand infrastructure and eliminate obstacles to investment. These aims reflect the main objective of Thailand to promote investment. All three versions of the IPA (1977, 1991 and 2001) are considered investment law, promoting foreign and domestic investment by granting equal levels of incentives. The BOI was set up specifically to promote investment and is itself a special government agency with the power to grant fiscal and non-fiscal incentives to investors who are qualified for specific projects. Contrary to the mission of the BOI, the Revenue

¹⁰⁴⁸ RC, s 13 (7) para 2.

Department's mission is to increase the budget by increasing tax collection,¹⁰⁴⁹ because tax revenue is essential to a country's development. The government controls the level of national income through the management of government spending and revenue. Government expenditure can generate income for the population by paying government officers' salaries, which in turn, will be spent on goods and services and could stimulate the wider economy.¹⁰⁵⁰

Under Section 31 of the IPA 2001, the BOI has authority to grant a BOI-promoted person exemption from corporate income tax; more specifically, the BOI has discretion not to grant a tax exemption to promoted activities which are deemed unsuitable for such incentives.¹⁰⁵¹ In addition, Section 31 prescribes special tax treatments for the BOI-promoted companies, and the objective of this provision is to give tax incentives to specific companies that are qualified to receive investment promotion. The provision regarding tax calculation under Section 65 of the Revenue Code is for companies operating general businesses, which do not qualify for BOI-promotion. This also suggests that the IPA 2001's provision, specifying 'the rights and benefits that the BOI-promoted companies are entitled to are valid until the certificate of BOI promotion is withdrawn', is unclear. As explained earlier in this chapter, revenue law, including the Revenue Code, is considered a special law regarding taxation, but only where it is compared to the CCC. In cases where there are clearly defined provisions under the Revenue Code, the provisions of the CCC are not applied.

For this reason, together with an analysis of the *Minebea* case, pinpointing a specific case on losses carried forward, the IPA 2001 should be considered a specific law. This opinion is supported by the BOI, the Council of State (No. 158.2552 (2009) and up to the present time Central Tax Court Decision No. 190/2553, which was rendered on 13 October 2010. The IPA also most closely reflects the intention of the legislative body when drafting original investment promotion laws and subsequent amended versions to support investment. As outlined in Chapter 3, the Thai tax court considers the intent of

¹⁰⁴⁹ Revenue Department, 'Mission of the Revenue Department' <<http://www.rd.go.th/publish/29984.0.html>> accessed 10 November 2011 referred to as 'Mission of the Revenue Department'.

¹⁰⁵⁰ On the other hand, taxation can reduce the national income when the government collects more taxes from the population.

¹⁰⁵¹ See IPA 2001, s 32.

the law a rule in statutory interpretation. To comply with the rule of separation of powers, the power of legislation belongs to the National Assembly. The objective of the IPA 2001 must therefore be considered in an interpretation of law. All of these reasons support the argument that the IPA 2001 is a special law and so should prevail over the Revenue Code, which in this case is a general law.

The principle of *lex posterior* does not apply to this conflict, since its root is the inconsistency between the two different laws, and so it does not regard the date the law became effective. Consequently, the *lex posterior* rule is overridden by the *lex specialis* rule in the case of conflict between the Revenue Code and the IPA 2001.

7.5 What are the consequences of applying the principle of *lex specialis*?

This research agrees with the Central Tax Court in applying the *lex specialis* doctrine in the *Minebea* case. Although the IPA 2001 is a special law overriding the general provisions specified in the Revenue Code, its provisions do not explain practices regarding tax returns and the calculation of profit/loss. The Revenue Department itself accepted that the IPA 2001 is a specific law which the Revenue Code may not contradict.¹⁰⁵² However, the Revenue Department claimed that the issue under consideration is not the use of BOI tax holiday privileges but their calculation method according to the Revenue Code and under the jurisdiction of the Revenue Department. The Revenue Department can currently follow the Revenue Departmental Notification dated 5 February 1987 and treat a BOI company with multiple BOI projects as one tax unit; thus, profits/losses from all projects must be calculated altogether, because legislation on the matter, section 31 of the IPA 2001, is unclear.

Although the Central Tax Court adopted the *lex specialis* maxim and ruled that the IPA 2001 overrides the Revenue Code, the problem of unclear or ambiguous provisions in the IPA 2001 remains. The court in this case considered the objectives of the IPA 2001 to help with the interpretation process, and drew parallels with the use of Section 11 of the Thai Civil and Commercial Code to interpret an ambiguous provision in favour of the taxpayer. There are two possible outcomes of the Supreme Court's eventual decision on the *Minebea* case. On the one hand, if a final court judgement ruled in favour of the

¹⁰⁵² The defendant's claim in the Central Tax Court Decision: Red- Number Case No. 190/2553 NMB-*Minebea Thai Ltd v the Thai Revenue Department*, 13 October 2010 (in Thai).

Revenue Department, the assessment officer or the competent official has the power to enforce the unfavourable part of the judgement retrospectively, but only on the person who is a party to the case (*Minebea*). The revenue official will have to rely on Section 13(7) paragraph 3 of the Revenue Code, which provides that ‘the rulings given by the Board of Taxation shall be final’. In this case, there is an eligible and applicable law. On the other hand, if the final judgment changes the opinion of the Board of Taxation or upholds the Central Tax Court’s judgment, the Supreme Court’s judgment shall bind only the parties in the specific case, not other taxpayers who have already been penalised by the tax officers.¹⁰⁵³ Regardless of whether the Supreme Court upholds the Central Tax Court’s decision or it may not; there still remains the problem with ambiguity in provisions of the IPA 2001.

7.6 Theoretical Approach to the Problem

As discussed earlier in this chapter, it is important to examine whether the norm is unclear or not before applying norm conflict resolution principles. This section will demonstrate the importance of certainty in law, and will examine in particular provisions under the IPA 2001 and whether or not they are unclear.

It is important to understand the rationale of legal clarity. First, the liberty and property rights of citizens should be protected, and the extent and limitation of such rights must be in accordance with the provisions of the law.¹⁰⁵⁴ Under Thailand’s constitution, citizens have a duty to obey the law, provided that it is clearly specified.¹⁰⁵⁵ From the problem analysis in Chapter 6, it can be seen that the IPA 2001 creates conflicts and contradictions. Although it specifies conditions and procedures for the BOI-promoted companies that qualify for tax incentives, it leaves the authority regarding tax calculations and assessment with the Revenue Department, which utilises the Revenue Code and other subordinate laws. The *Minebea* case clearly showed the problem inherent in this tax incentive system.

This jurisdictional conflict of tax incentives between the IPA 2001 and the Revenue Code, particularly the provision regarding net profit/loss calculation, is ambiguous. Tax

¹⁰⁵³ Suparak Pinijkul, *Financial Law and Taxation* (Winyuchon Publishing Limited 1999)138-139 (in Thai).

¹⁰⁵⁴ Constitution of Thailand 2007, art 41

¹⁰⁵⁵ Constitution of Thailand 2007, art 71

legislation should be certain,¹⁰⁵⁶ so it is crucial that the method for calculating any benefit should be clearly outlined in legislation or regulation should be explained simply and should be as transparent as possible.¹⁰⁵⁷ It should also include the person, a particular transaction and the amount of money which is subject to tax. The clear intention is that taxpayers should be able to anticipate the consequences of their ordinary personal and business affairs,¹⁰⁵⁸ as well as be entitled to plan their conduct in accordance with a given tax structure, and that their legitimate expectations arising from a given tax structure must be respected. In order for taxpayers to plan their financial activities properly, the tax system must provide them with maximum certainty regarding the tax that they will be required to pay.¹⁰⁵⁹

Where FDI is concerned, it is unlikely that any large company would make major investments without first formulating a detailed business plan and a cost/benefit analysis.¹⁰⁶⁰ Certainty is also beneficial to the country because it makes it possible for the tax authority to predict roughly the amount of tax that can be collected to add up to revenue, thus enabling the government to adjust the national budget accordingly. However, in this case, the BOI-promoted companies cannot anticipate the amount of tax which they are obliged to pay. A good tax policy does not only ensure that tax is collected. It must achieve ‘justice’ or ‘fairness’ for taxpayers’ compliance.¹⁰⁶¹ Therefore, the current tax incentive system can be unfavourable to the revenue authority

¹⁰⁵⁶ Lesley Browning, James Campbell and Emma Chamberlain, *Revenue Law Principles and Practice* (22nd edn, Lexis Nexis 2004) 7.

¹⁰⁵⁷ Raymond H.C. Luja, *Assessment and Recovery of Tax Incentives in the EC and the WTO: A View on State Aids, Trade Subsidies and Direct Taxation* (Intersentia 2003) 172.

¹⁰⁵⁸ OECD Committee of Fiscal Affairs Forum on Tax Administration ‘Tax guidance series, Taxpayers’ Rights and Obligations-Practice Note’ 4 referred to as OECD Note: Tax guidance series.

¹⁰⁵⁹ Shekel (n 644) 18; Organisation for Economic Co-operation and Development ‘*Taxpayers’ rights and obligations: a survey of the legal situation in OECD countries*’ (Organisation for Economic Co-operation and Development 1990) 13.

¹⁰⁶⁰ Abel Moreira Mateus and Teresa Moreira, *Competition law and economics: advances in competition policy enforcement in the EU and North America* (Edward Elgar Publishing 2010) 373.

¹⁰⁶¹ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1776, Book V, ch. 2,

For the aspect of ‘fairness’ in terms of the UK tax system, see Graeme Macdonald and David Martin ‘Tax and Accounting A Response to the 2003 Consultation Document on Corporation Tax Reform’ (2004) Tax Law Review Committee, The Institute for Fiscal Studies (February 2004) TLRC Discussion Paper No. 4, ss 3.1-3.2. <<http://www.ifs.org.uk/comms/dp4.pdf>> accessed 10 November 2011.

as it is unable to estimate exactly how much tax can be collected, and it is unfair to BOI-promoted companies because they are unable to estimate how much tax they need to pay. Certainly, this creates a negative environment for investment. As viewed by Mallampally and Sauvant:

Equally important, with FDI policy frameworks becoming more similar, countries interested in encouraging investment inflows are focusing on measures that facilitate business. These include investment promotion, investment incentives, and after-investment services, improvements in amenities, and measures that reduce the “hassle” costs of doing business.¹⁰⁶²

Governments may, and do, attempt to guide public habits and behaviour through the use of taxation, for example tax incentives to attract investment in specific areas or specially needed sectors. In the case of Thailand, a number of incentives are offered through the BOI. Governments including the Thai government should not, however, overlook the basic principle of taxation.¹⁰⁶³

According to Wagner, ‘no single principle of taxation can ever be decisive in itself; the various principles are all relevant to any one problem of taxation’.¹⁰⁶⁴ In relation to tax incentives, though, it is important to remember that their purpose is to attract domestic and foreign investors into particular activities or areas. A tax incentive system should not be uncertain, since the investment that the government encourages is in the greater national interest (as described in Chapter 4 section 4.4). An explanation of the causes of legal uncertainty is essential and has been critically analysed in the previous chapter. Knowing these points, law-makers can prevent uncertainty and conflict in legislation through amendment or the passing of new legislation – in Wagner’s words, finding ‘the

¹⁰⁶² Padma Mallampally and Karl P. Sauvant, ‘Foreign direct investment in developing countries’ (1999) (Finance and Development, 36, 1) 36, 37.

¹⁰⁶³ Luja (n 1057) 11.

¹⁰⁶⁴ Adolph Wagner, ‘The Basic Principles of Taxation’ (1890), in: Finanzwissenschaft, part II, 2nd edn, Leipzig in Richard A. Musgrave and Alan T. Peacock (eds), *Classics in the theory of public finance* (Macmillan & Co 1958) 10.

reasons why the law is uncertain will also help us better understand the theory of norms and its failings.’¹⁰⁶⁵

Generally, there are two types of legal uncertainty: subjective and objective. ‘Subjective uncertainty’ refers to individual assessments of the given situation; in short, there is uncertainty as to what actually constitutes the law.¹⁰⁶⁶ ‘Objective uncertainty’ is a concrete situation that can be observed by all concerned, in which statutory regulations for certain sets of facts are either non-existent or do not form a reliable basis for decisions. Wagner has stated that ‘legal uncertainty always occurs when individual factors are uncertain of the effects of provisions of the dominant legal system on the results of their actions’.¹⁰⁶⁷ In a broader sense, the term covers both ‘subjective’ and ‘objective’ legal uncertainty.

To give several scenarios, ‘objective legal uncertainty’ could apply to a situation in which there are no statutory rules and regulations to deal with it – because it has never before been encountered, perhaps. The second type of objective uncertainty occurs where regulations are unstable over and beyond consumption or investment periods.¹⁰⁶⁸ This can be due to the fact that amendments to statutes are frequent and unforeseeable, so that even experts are not clear about the current legal position and the continuance of subjective claims. The last situation of legal uncertainty is the denial of justice, which is understood to be the obstruction or prevention of the enforcement of legal rights by state authorities or employees.¹⁰⁶⁹

In practice, however, certainty is not always possible, since taxpayers may not always know in advance the effect of those rules, which depends on the facts and circumstances

¹⁰⁶⁵ Kammerhofer (n 836) 3.

¹⁰⁶⁶ Helmut Wagner, ‘Costs of Legal Uncertainty: Is Harmonization of Law a Good Solution? Modern Law for Global Commerce: Congress to celebrate the fortieth annual session of UNCITRAL’, Vienna, 9-12 July 2007 University of Hagen and Princeton University (May 2007) 2.
<<http://www.uncitral.org/pdf/english/congress/WagnerH.pdf>> accessed 10 November 2011.

¹⁰⁶⁷ Ibid.

¹⁰⁶⁸ Ibid.

¹⁰⁶⁹ Ibid; For the effects of legal uncertainty on business, see Richard G. Shell and Reginald H. Jones, *Legal uncertainty and business risk* (Reginald H. Jones Centre, Wharton School, University of Pennsylvania 1988)

in a particular case.¹⁰⁷⁰ At the same time, tax authorities are not obliged to provide taxpayers with certainty in relation to the application of anti-abuse provisions aimed at those who seek to circumvent the intent of the legislation.¹⁰⁷¹ The researcher therefore recommends that tax avoidance strategies, particularly with regard to multinational companies' transactions, need to be investigated further.¹⁰⁷² The current problem is that it is uncertain whether the Revenue Department or the BOI should have jurisdiction over tax incentives. Although it can be assumed that all of these agencies and departments are acting in the national interest, they have different priorities and their particular responsibilities are not always clearly delineated.¹⁰⁷³

Is this legal uncertainty over tax incentives in Thailand due to the fact that they fall under the control of a non-tax authority? Or is it because the IPA 2001 should clearly specify provisions regarding tax incentives? The problem arises from the fact that the BOI gives the impression of being a tax authority under the IPA 2001, whereas the real authority lies with the Revenue Department. In the *Minebea* case, the BOI took the issue to the Council of State, which is in charge of drafting legislation and offering expert opinions regarding provisions in legislation. At the same time, revenue officers took action against the BOI-promoted company, which then had to proceed with lawsuits against the Revenue Department. There are other BOI-promoted companies which are in the same situation as Minebea and are being assessed by the Revenue Department for tax that should have been waived, at least according to the IPA 2001.¹⁰⁷⁴

The uncertainty arising from this case was confirmed by Assavapokee, a leading tax advisor to a number of companies, who stated that this problem 'has an impact on and

¹⁰⁷⁰ Carlo Romano, *Advance tax rulings and principles of law: towards a European tax rulings system?* (International Bureau of Fiscal Documentation 2002) 217.

¹⁰⁷¹ OECD Note: Tax guidance series (n 1058) 4.

¹⁰⁷² In the case of the United Kingdom, HMRC's Anti-Avoidance Group (AAG) was set up for the development, maintenance and delivery of the department's anti-avoidance strategy, see Mary Hyland and Lisa-Jane Harper, *Tolley's Corporation Tax 2010-2011* (LexisNexis 2010) 40.

¹⁰⁷³ Easson (n 8) 160.

¹⁰⁷⁴ Prachachat News Ooline 'Council of State ruled on a disagreement between the BOI and the Revenue Department', Year 33, No.4206, 3 May 2010.
<http://www.prachachat.net/view_news.php?newsid=02inv01030553§ionid=0203&day=2010-05-03> accessed 10 November 2011.

jeopardises the BOI promotion scheme and the efforts of the Thai government to promote Thailand as a great place to invest'.¹⁰⁷⁵ He suggests that BOI-promoted companies could be subject to unanticipated assessments by the revenue officer. He also comments:

So what exactly does the “BOI” means for foreign investors? One thing we certainly don’t want to hear is that it no longer means the “Board of Investment”, and now stands for “Beware of Inland Revenue Services”.¹⁰⁷⁶

Section 31 of the IPA 2001 is considered an ambiguous provision because its terms are too broad and fail to cover specific points. It contains words or terms which cover several possibilities, and it is left to the users of the law to judge what situations are covered by such the words or terms. Even if the law had been drafted in detail, with the lawmakers trying to cover every possible contingency, some situations could arise which are not specifically covered. The question, then, is whether the court should interpret the legislation so as to include the situation which was omitted, or whether they should limit the law to the precise meaning specified by the legislative body. The court then has to use one or more of the statutory interpretation rules, as laid out in Chapter 3. There is, of course, potential for words or phrases in the law to cause uncertainty.

It is specified in the 2007 Constitution of Thailand that the National Assembly, the Council of Ministers, the courts and state agencies are to perform duties of office by the rule of law.¹⁰⁷⁷ Everyone within the jurisdiction, Thai nationals and foreigners alike, can have confidence that their activities will be judged in accordance with established rules and principles of law. Thus, their personal liberty and the liberty to conduct business affairs are subject to restraint, only by virtue of legal powers clearly vested in persons

¹⁰⁷⁵Chinawat Assavapokee, ‘New Taxation Ruling Could Hurt Companies That Receive BOI Investment Privileges’ (2009) Thai-American Business, vol 4, 24
<www.amchamthailand.com/asp/view_doc.asp?DocCID=2455> accessed 10 November 2011.

¹⁰⁷⁶Ibid.

¹⁰⁷⁷Constitution of Thailand 2007, art 3.

acting with the authority of the state under the constitution or under legislation as interpreted by the judges in courts.¹⁰⁷⁸

Complex and incomprehensible tax laws have become an increasing feature of modern taxation systems, to the detriment of both taxpayers' and tax administrators.¹⁰⁷⁹ In Thailand, Ministerial Notifications have been proven to create inconsistency because they are issued by an administrative body, not the legislative body. As such, legislation issued by an administrative body, instead of elected representatives, can violate the principle of 'no taxation without representation'.¹⁰⁸⁰ Rulings have, in time, turned into what they should not have been, i.e. an additional source of legislation, so potential solutions should therefore be examined. An efficient legislation-drafting process is essentially crucial, since it can decide whether the enforcement of the law is in line with an objective of such law. A careful drafting process can prevent conflicts of jurisdiction and avoid the procedure in selecting norm conflict resolution.

Two factors are of key importance in determining the certainty of a law – the clarity of its wording and understanding, and the confidence that it will be interpreted and applied consistently. A system which adheres to these principles and treats people equally under these measures is more likely to be viewed by taxpayers as fair.¹⁰⁸¹ If they are to influence investor decisions, tax incentives need to be predictable. The qualifying conditions for tax incentives should be set out clearly and in detail in the legislation so that potential investors may determine whether or not they will qualify for the incentive, or what they have to do in order to qualify.¹⁰⁸² It is important here to look back at the

¹⁰⁷⁸ Scott Veitch, Emiliios Christodoulidis and Lindsay Farmer, *Jurisprudence Themes and Concepts* (Routledge-Cavendish 2007) 7.

¹⁰⁷⁹ Kelly Edmiston, Shannon Mudd and Neven Valev, 'Tax Structures and FDI: The Deterrent Effects of Complexity and Uncertainty' (2003) (Fiscal Studies Vol. 24, No. 3) 356. See an analysis of the rule of simplicity and the draft of tax statute in Louis Eisenstein, 'Some Iconoclastic Reflections on Tax Administration' (1945) Harvard Law Review 477-547.

¹⁰⁸⁰ See Lambert M. Surhone, Miriam T. Timpledon and Susan F. Marseken, *No Taxation without Representation* (Betascript Publishers, 2010). John Bell Henneman, *Studies in the history of Parliaments* (Comparative Legislative Research Centre University of Iowa, 1982) 263. Laurence H. Tribe, *American Constitutional Law*, Foundation Press, 1978) 445.

¹⁰⁸¹ Great Britain: Parliament: House of Commons: Treasury Committee, *Principles of Tax Policy: Report, Together with Formal Minutes, Oral and Written Evidence* (The Stationary Office 2011) 15.

¹⁰⁸² Easson (n 8) 160-161.

formulation of policy on incentives including tax incentives.¹⁰⁸³ Were all of the agencies concerned involved in its formulation? Most importantly, were the potential costs of incentives (in terms of administrative burden and loss of public revenue) weighed up against the anticipated benefits? Not only must tax administration collect tax as stated by law, but it must also consider the cost of public service, as well as compliance and administration.¹⁰⁸⁴ Because Thailand abides by a civil law system, relying primarily on the wording of legislation to make citizens' rights and obligations clear, a high level of clarity and certainty is needed in its tax law.¹⁰⁸⁵

7.7 Should the BOI or the RD have authority over tax incentives? Which law should be applicable to disputes on tax incentives?

As we have seen from the previous section, investors will normally apply for tax privileges early in the investment process. For obvious reasons, new investors can be reluctant to start operations or make significant business commitments without being sure of their tax status. Incentive legislation is found in both foreign investment laws and tax laws. The granting of incentives, both fiscal and non-fiscal, can be set out in the general foreign investment legislation.¹⁰⁸⁶ However, as this chapter has illustrated in detail, this can cause significant problems because tax provisions in investment law may be drafted with little regard for their relation to general tax law, as has been the case in Thailand. The relationship between tax holidays, especially the loss carry forward rule, and general tax law was not considered in enough detail during the legislative draft process.

Because of the risk of conflicts of legislation, and the danger of overlapping incentives whereby investors can unfairly reap the benefits twice, it is advisable that all tax measures are contained in tax legislation only. It is crucial to establish which body has

¹⁰⁸³ For empirical studies on tax policy and investment see e.g. Kelly D. Edmiston, 'Tax Uncertainty and Investment: A Cross-Country Empirical Examination', *Economic Inquiry*, 42 (3), July 2004, 425-440; and Luis H.R. Alvarez, Vesa Kannianen and Jan Södersten, 'Tax Policy Uncertainty and Corporate Investment: A theory of Tax-Induced Investment Spurts', *Journal of Public Economics*, 69 (1), 1998, 17-48; and Richard Hartman, 'The Effects of Price and Cost Uncertainty on Investment', *Journal of Economic Theory*, 5 (2), 1972, 258-266.

¹⁰⁸⁴ Katarina Ott, 'Tax Administration Reform in Transition: The Case of Croatia' (1998) (Institute of Public Finance Occasional Paper No. 5) 4.

¹⁰⁸⁵ Because there are a number of principles to be considered for a good tax system, it is difficult to decide definitively whether one principle is better than others. They should all be studied to ascertain which the correct one for any given situation is.

¹⁰⁸⁶ Easson (n 8) 160-161.

the authority to decide whether an investment qualifies for tax privileges, at what level the decision is taken and the level of discretion that such the body can exercise. The case analysis in Chapter 6 revealed the need for ‘certainty’ in the tax incentive system. Therefore, the conclusion can be drawn that a single body should have authority over tax incentives. Easson recommends that the body in charge should itself have the authority to grant privileges, as opposed to just helping investors to apply for them.¹⁰⁸⁷

This research argues that the tax authority should, rather than only granting privileges (as does the BOI currently), also cover the control and management of such privileges. The real problem is that the Revenue Department is currently the only real authority to control taxation, including incentives. Under the current legislation, and in accordance with the norm conflict resolution principles discussed in the earlier part of this chapter, the IPA 2001 should be applicable to disputes on tax incentives for BOI-promoted companies because it is a specific law and prevails over the Revenue Code, which is a general set of laws regarding tax. In addition, in order to improve clarity and certainty in taxation, taxpayers should be responsible only for what the legislation clearly specifies, and only at the time when their transaction occurs. Because tax law is a public law with criminal penalties, ambiguities should always be interpreted in favour of the taxpayer, to avoid cases of mistakenly fining or jailing innocent people.

Under the current legislation, the researcher agrees with the Central Tax Court that the IPA 2001 is a specific law and that the BOI should have authority over tax incentives. The current different objectives of the BOI and the Revenue Department, coupled with their overlapping responsibilities, are the main causes of the problem, and so it is clear that the system needs reform.

Conclusion

This chapter focused on significant types of norm conflict resolution doctrines, namely *lex superior*, *lex specialis* and *lex posterior* which are regularly used in both

¹⁰⁸⁷ Ibid 160-162. On the role of investment promotion agencies generally, see Louis T. Wells and Alvin G. Wint, ‘Marketing a Country: Promotion as a Tool for Attracting Foreign Investment Revised Edition’ (2000) FIAS Occasional Paper
<http://www.worldbank.org/external/default/WDSContentServer/WDSP/IB/2000/05/25/000094946_00051005302185/Rendered/PDF/multi_page.pdf> accessed 10 November 2011.

international law and domestic law systems. In Thailand, these three rules are also applied by the courts where there is conflict between two laws that apply to the same subject at the same time. As demonstrated in Chapter 6, the main issue in the *Minebea* case is whether the Revenue Code or the IPA 2001 should be applicable in the issue of tax incentives for BOI-promoted businesses. The Central Tax Court applied the *lex specialis* maxim and ruled that the IPA 2001 should be applied as a specific law, overriding the Revenue Code. The court also adopted the rule on statutory interpretation in that, where the jurisdiction over tax is unclear, the court should interpret the law to be in favour of taxpayers. It is, however, important to note that Thai courts, using a civil law system, need to follow the exact wording of legislation. This stands in contrast to the British common law system under which the final interpretation by the court can create legal precedent.

This chapter concluded that the IPA 2001 should be applicable to the *Minebea* case and other problematic provisions under the IPA 2001, provided that there is no reform or legal amendment. According to the analysis presented in this chapter, section 31 of the IPA 2001 is unclear on the method of profit/loss calculation when a tax exemption is to be calculated. The *Minebea* case emphasised the fact that provisions regarding tax incentives for BOI-promoted companies under the IPA 2001 are unclear and cause difficulties for both investors and government authorities. A reform of the tax incentive system to clarify meaning and tax calculation under the provisions of the IPA 2001 may therefore ease the conflict. Alternatively, the Revenue Code could provide a solution to the problem by specifying tax incentives for BOI-promoted businesses itself. The next chapter will make suggestions for the reform of legislation and administration regarding tax incentives.

8 Conclusion and Recommendations

8.1 Conclusion

This thesis has examined in detail the workings of Thailand's legal system in order to provide a full context for the legislative problems discussed. It has also provided a full framework – drawing on the experience of other states' legislatures – within which the problem of conflicting laws can be analysed. The conclusions that may be drawn from the studies in this thesis are first summarised, and then followed by a brief final comment. The second part of this chapter deals with recommendations.

The Thai legal system and its characteristics were explained in Chapter 2. Its mixed character as a civil law system with common law traits is essential to understanding the problems outlined in this thesis and the typical approaches and procedures that the Thai courts might take to address them. The fact that decisions made by the courts do not set a legally binding precedent, as under common law (the most famous example of which is the British legal system), but can still influence judges' decisions, is characteristic of this mixed system. Thailand is a constitutional monarchy, in which the king acts as head of state within the parameters of the constitution. Its formal, written constitution is the supreme law. The Tax Court is one of the specialised courts through which an appeal can be taken directly to the Supreme Court. Thus, the court procedure is accelerated, since the case does not have to be heard by the Appeal Court. The hierarchy of laws in Thailand places primary legislation and secondary legislation beneath the constitution, in that order, while the constitution itself, as mentioned above, is the supreme law, with any legislation contradicting it automatically judged null and void. This thesis has discussed the exact hierarchy of laws and its implications in some detail.

As Chapter 3 reveals, taxes are crucial to Thailand's economy, as they are the main source of revenue for financing public sector spending, including economic growth support, resource management, the maintenance of economic stability and income allocation. This chapter examined the sources and the scope of Thai revenue law, along with its administration. More specifically, it addressed the hierarchy of tax legislation, which is a substantial topic of discussion regarding the relationship between norm conflict resolution principles and tax law. Chapter 3 went on to specify the duties of the Revenue Department, namely to collect all taxes efficiently to administrate the tax system and that it is part of the Ministry of Finance, which in turn has responsibilities over all public finance, taxation, treasury and other revenue-generating enterprises. This chapter also laid out specific statutory interpretation rules adopted by the Thai courts.

Thailand is one of Asia's most popular investment destinations. Gains from FDI have aided the country's recovery from the 1997 Asian financial crisis, and FDI is seen by the Thai government as a viable means of achieving sustainable development. When practiced responsibly and efficiently it can be a productive means of educating and training the workforce in developing industrial techniques, and can guarantee minimal environmental impact. Post-1997, the Thai government became aware of the pressing need to attract capital into the country, fresh investment was essential in order for the nation's economy to grow and prosper. FDI continues to be an important means of income generation in Thailand and, as this thesis argues, should be developed and encouraged. However, due to domestic political unrest, the *Map Ta Phut* case and the global economic crisis, the confidence and interest of both foreign and domestic investors has decreased, leading them to delay and even abandon potential investments. A solution to this decline and a resolution to the problem would encourage investment by guaranteeing specific and predictable incentives.

The BOI was established to provide investment incentives to foreign or local investors that invest in promoted or priority activities; the BOI stipulates and revises investment promotion schemes in accordance with the objectives of the government at the time, and it is a government agency under the auspices of the Ministry of Industry. The BOI introduced investment promotional schemes, including tax and non-tax oriented incentives in order to eliminate avoidable burdens that could deter investors, such as bureaucracy and high tax costs at start-up. Chapter 4 explained that the BOI's role is as

a ‘one-stop’ governmental body, dealing with and supporting all aspects of investment, both foreign and domestic. The history, importance and responsibilities of the BOI raise a critical question, in that why should it, as opposed to the Revenue Department, have jurisdiction over tax incentives? As discussed in Chapter 3, the most important role of the Revenue Department is to enhance revenue collection and improve expenditure management. This objective differs from that of the BOI, which aims to promote investment by offering tax exemptions or reductions.

The objectives of the Revenue Department and the BOI are therefore clearly different. The conflict problem is generated by the two government agencies undertaking their roles with little collaboration, i.e. the Revenue Department collects taxes from promoted companies, whilst the BOI grants promoted companies tax exemptions in order to generate further investment in Thailand. However, a solution cannot be found easily, as there are a number of factors, such as economic situation, political instability, requirements for specific types of investments and influence from investors, which lead taxpayers to prefer the BOI as a one-stop service agency. From the perspective of investors, it is quicker and more convenient to contact one agency to deal with the setting up of businesses, work permits, land ownership and incentives – both tax and non-tax related. From the government’s perspective, the fact that the BOI is responsible for investment promotion alone means that it understands the current requirements of the Thai economy and which types of activities and areas should be promoted.

The varying types of tax incentives offered by the Thai Revenue Department and the BOI were discussed in Chapter 5. More specifically, the tax incentives provided for BOI-promoted businesses were examined in relation to their importance and impact on business sectors or activities. This chapter provided the background to subsequent discussions on the conflict of jurisdiction over tax incentives. As the thesis emphasises and as Luja suggests, fiscal incentives should be considered preferable to other means of subsidy for a variety of reasons,¹⁰⁸⁸ including confidentiality, sensitivity, visibility, politics, and tax expenditure, if used as a policy instrument. According to Luja, as long as the cost of tax expenditure is apparent, a reduction in tax could indeed be a viable option for grants, if considered appropriate. Politicians should be cautious that in opting

¹⁰⁸⁸ Luja (n 1057) 19.

for fiscal subsidies the tax system is not overly complicated for the taxpayers.¹⁰⁸⁹ Nevertheless, it has been argued that tax incentives may not work and may potentially cause revenue loss. With this in mind, the issues discussed in this chapter are intended to further enhance the debate on the amendment of tax incentive provisions. Although tax incentives influence the decisions of foreign investors to invest in a country, it is vital that other non-taxation factors in the investment climate should not be overlooked. This thesis suggested that tax incentives are to be used primarily as a signposting device, especially for required activities and in targeted areas.

Law and economics play equal parts in the debate on tax incentives. Economic principles largely dictate the system when it comes to revenue enhancing and each tax incentive should be carefully considered to ascertain if it is fit for purpose. There are potential pitfalls that need to be noted, though. Size must be budgeted for and tax incentives reviewed on a regular basis to ensure that government funding and resources are being used efficiently and consistently. Furthermore, it is essential to consider whether tax incentive provisions should still be included in the IPA 2001. If this is the case, it is crucial to analyse whether or not the IPA 2001 should be amended in order to address the problem of unclear provisions.

Chapter 6 outlined problems caused by the Revenue Department and the BOI's overlapping power over tax incentives. This was borne out by a number of rulings asking the Revenue Department for advice on the unclear provisions of the IPA 2001 regarding tax incentives for BOI-promoted businesses. Problems regarding profit and loss calculations for BOI-promoted companies were particularly noteworthy, with the *Minebea* case a prime example. A number of BOI-promoted companies were in similar situations. The Revenue Department and the BOI hold different opinions and practices where tax incentives are concerned, which has brought about uncertain and extended administrative procedures as opposed to efficiently administered foreign investment, which is necessary for the continued growth of Thailand's economy. Over the course of this thesis, the major problem of ambiguous jurisdiction was addressed in the hope that a potentially significant disincentive to FDI within Thailand can be eliminated.

¹⁰⁸⁹ Ibid.

The specific issue discussed in Chapter 6 arose after inconsistent interpretations, by the Revenue Department and the BOI, regarding the calculation of net losses from companies operating more than one promoted project. The question was as follows: When the net loss from promoted business is considered, should it mean either each promoted project individually or all promoted projects of that company combined? In the *Minebea* case, the Revenue Department did not accept the BOI's calculation; instead, they adopted their own calculation of loss and profit under the 'single entity' concept. Consequently, companies have been taxed at much higher rates. Even though the Council of State issued its opinion, agreeing with the BOI, tax officers are still continuing this practice (according to the Board of Taxation No: 38/2552) until the courts give a final order. As a consequence, it is imperative that the Thai government finds a solution to this problem and establishes one consistent administration for tax incentives. The amendment of legislation and the incorporation of tax incentives to the Revenue Code could be a solution to the problem.

Lastly, Chapter 7 dealt with the means through which conflicts in law can be solved. The principles of norm conflict resolutions were explored in this chapter. In Thailand, three specific principles are used by the courts where there is conflict between two laws applying to the same subject at any one time. This research explained the characters and rationales of the three principles, namely the principles of *lex superior*, *lex priori*, and *lex specialis*. In the *Minebea* case, the Central Tax Court ruled in favour of Minebea by applying existing legislation according to the 'separations of powers' rule, under which the court cannot make law. Here, the court used the maxim of *lex specialis* and further ruled that the IPA 2001 is a specific law which overrides the Revenue Code (the general law). As such, it showed compliance with the principle of certainty when the fact is that the jurisdiction over tax is not precise or clear.

Thai courts, in line with their civil law system, are required to follow the exact wording of legislation. As there is no specific wording in the IPA 2001 specifying the means of calculating profit and loss, a reform of the tax incentive system to clarify the meaning of words and specify tax calculations under the provisions of the IPA 2001 would hopefully ease the conflict. There is also the possibility that incorporating provisions for tax incentives into the Revenue Code could be a solution to the problem. Chapter 6 examined this idea in detail, including its consequences and aspects that should be

considered for reform. The *Minebea* case demonstrated that provisions regarding tax incentives for promoted companies under the IPA 2001 are unclear. This case shows that the dispersal of power over tax incentives across two regulatory authorities, the Revenue Department and the BOI, creates uncertainty and can lead to lengthy legal procedures, which can prove costly to both the government and investors. What is clear is that the administration of taxation should be clear and manageable.

It is also imperative that taxpayers have a thorough grasp and understanding of how the system works. This is essential for many reasons, not least because it reduces the likelihood of accidental tax evasion, whereby people have not understood their obligations. Financial planning can also be facilitated, allowing people to budget for their tax liabilities in advance to avoid unexpected financial difficulty. This thesis has attempted to highlight the conflict of jurisdiction over tax incentives and the problems that it creates. The system is in need of reform.

Recommendations

The first recommendation is to examine the possibility of combining the two separate authorities that have jurisdiction over tax issues. The United Kingdom is an example of a country which merged its different tax departments into one. There was a merger of the Inland Revenue and HM Customs and Excise Departments, hence forming HM Revenue & Customs (HMRC), on the 18 April 2005.¹⁰⁹⁰ By using technologies such as the computerisation of records and self-assessment, the policies and procedures of tax administration can be simplified. Such tools make a separate tax department unnecessary and reduce the costs and bureaucracy associated with the separation of tax administration into different departments. This thesis does not, however, recommend the combination of the Revenue Department, the Custom Department and the Excise Department, which currently share responsibility for tax administration as a whole. It suggests, rather, that the use of a primarily non-tax authority (the BOI) to oversee tax

¹⁰⁹⁰ See for example the Commissioners for Revenue and Customs Act 2005 which received Royal Assent on 7 April 2005; Treasury Press Notice, 13 May 2004 <www.hm-treasury.gov.uk> accessed 18 November 2011. See also House of Commons Treasury Committee, 'The Merger of Customs & Excise and the Inland Revenue', Ninth Report of Session 2003-04, HC556 (The Stationary Office Limited 2004) 1-68 <<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmtreasy/556/556.pdf>> accessed 18 November 2011.

matters causes problems. Historically, the BOI was set up as a single body responsible for all investment-related matters and to grant tax incentives to investors. However, currently this scenario is no longer preferable due to problems with overlapping jurisdiction and unclear provisions of law, together with continual changes in business operations and tax planning. Therefore, this thesis recommends considering whether the inclusion of tax provisions in otherwise non-tax legislation, such as the IPA 2001, should be terminated. This will be dealt with in section 8.3 onwards.

One possible solution is aimed at finding policies that entail the co-operation and co-ordinated action of the BOI and the Revenue Department, with the intention of avoiding duplication, confusion and oversight. This solution may be a problematic one to implement, since some roles and objectives of the two authorities contradict one another. One example is that the current objective of the BOI, is to promote investment by giving tax exemptions, whereas the aim of the Revenue Department is to maximise tax collections.

The current tax incentive provisions under the IPA 2001, as this thesis has made clear, are difficult to understand clearly, and are equally as tricky to implement uniformly. In this case, it is unclear as to whether the responsible authority is the BOI or the Revenue Department. As such, the existing system is open to a high level of tax planning, making complex forms of tax evasion possible and causing an increase in tax collection costs for the state and in compliance costs for taxpayers. Taking these insights into account, the most viable solution in Thailand's case is to amend the current legislation, for which two options can be considered.

The first option is the amendment of the Revenue Code, Section 65, which should specify that 'companies which are promoted by the Board of Investment shall be subject to the calculation of net profit or net loss under this provision'. Instead, it should be amended to specifically include the terms of such calculations. Hopefully, therefore, this should make it clear that the Revenue Department is the body responsible for all tax matters, including tax incentives for BOI-promoted companies. The second option is to amend the IPA 2001 by clarifying its problematic terms, particularly where tax calculation, especially profit/loss calculation, is concerned. A clause, similar to section 120 of the Customs Act of 1926 (see below) could be added:

The provisions of this Act shall prevail in all matters concerned with investment promotion, including fiscal and non-fiscal incentives granted by the Board of Investment. Where the provisions of this Act are inconsistent with the provisions of other Acts or Notifications, such Acts or Notifications which will come into force at a future date shall not be deemed as repealing, restricting, altering, or withdrawing the powers under this Act unless such new Acts or Notifications expressly state such an intention.

Under current legislation, one point needs to be considered for the IPA to have its jurisdiction over tax incentives. Section 13 (7) of the IPA 2001 states ‘[...] the office shall have the power and duty to perform other duties in the furtherance of the objectives of the Act.’ Furthermore, as we have seen in Chapter 4 of this thesis, one of the objectives of this Act is to grant incentives, including tax incentives, as a means to promote investment. This provision can therefore be considered as giving authority to the BOI to clarify any matter, including tax incentives stipulated under the Act, and to seek legal opinion from the Council of State.

The two options stated above, in solving the problem of conflict between the IPA 2001 and the Revenue Code might actually create other problems because the BOI has different objectives to the Revenue Department and is not responsible for collecting the country’s tax revenue. Rules concerning the calculation, interpretation and application of the law could, under the jurisdiction of the BOI, be biased in favour of investors. It is also important to understand that the BOI has no power to enforce the law, and in the case of disputes, higher authorities might have to be consulted. The inclusion of tax provisions in non-tax legislation, as evident in the case of the IPA 2001, is problematic. Neither does the BOI have tax officials who can efficiently advise or assist investors on tax matters.

Under Thailand’s current system, the BOI’s role is to promote investment, both domestic and foreign, in the Thai economy, including through the use of tax incentives, because Thailand is an economically developing country under difficult political circumstances and still requires foreign investment. Consideration must, however, be

given to the nature of the promoted companies and the conditions they must meet to be entitled to such incentives, as well as what constitutes the most advantageous use of the investment.¹⁰⁹¹ Any enacted reform should develop clearly defined policies and establish efficient regulatory measures. In this context, it is therefore submitted that the Revenue Department should have sole jurisdiction over tax incentives. Reform of revenue administration will be considered in light of this recommendation.

A number of commentators offer succinct analyses of the precise reasons why a country must ensure that its tax administration is as efficient as possible. The first point is that the actual amount of tax revenue that flows into public funds depends almost entirely on the efficiency of the body dealing with tax administration.¹⁰⁹² A weakness in this area leads to a loss in public funds from tax evasion.¹⁰⁹³ Secondly, it is clear that the investment climate is directly affected by the standard of tax administration because potential investors are deterred not only by high levels of taxation,¹⁰⁹⁴ but also by an administration that appears unpredictable or predatory, as well as complicated or overly bureaucratic.¹⁰⁹⁵ Thirdly, poor administration, leading to inefficient calculation or collection of taxes, actually puts law-abiding firms, who make a concerted effort to administrate their own tax well, at a disadvantage.¹⁰⁹⁶ This lessens the incentives for firms to be vigilant about their own tax payments. Finally, global business environments are moving and changing rapidly, with globalisation presenting an array of

¹⁰⁹¹ Richard A. Toby, *The Theory and Practice of Income Tax*, (Sweet & Maxwell Ltd 1978) 191.

¹⁰⁹² Jit B.S. Gill, 'The Nuts and Bolts of Revenue Administration Reform' (2003) Lead Public Sector Management Specialist Europe and Central Asia Region, 1-2
<<http://siteresources.worldbank.org/INTTPA/Resources/NutsBolts.pdf>> accessed 10 November 2011.

¹⁰⁹³ Michael Wenzel and Natalie Taylor, 'Toward Evidence-Based Tax Administration' *Australian Journal of Social Issues* 1 August 2003, 410.

¹⁰⁹⁴ Christina D. Romer and David H. Romer, 'The Macroeconomic Effects of Tax Changes: Estimates based on a New Measure of Fiscal Chocks' University of California Berkeley March 2007, 36
<<http://elsa.berkeley.edu/~cromer/RomerDraft307.pdf>> accessed 21 November 2011.

¹⁰⁹⁵ Gill (n 1092); For suggestions on tax cooperation between business and the revenue body, see Dennis J. Ventry, 'Cooperative Tax Regulation' *Connecticut Law Review*, Vol 41, No. 2 December 2008, 431-492; Aristidis Bitzenis, Antonis Tsitouras and Vasileios A. Vlachos, 'Decisive FDI obstacles as an explanatory reason for limited FDI inflows in an EMU member state: The case of Greece' *Journal of Socio-Economics*, Vol. 38, Issue 4, August 2009, 695-696. See also Edmiston (n 1085).

¹⁰⁹⁶ See, for example, the Dutch development on tax administration to improve the investment and business climate in Theo Poolen, 'Dutch Tax Administration: Improvement in Tax Practice' *Journal of International Taxation*, Vol 18, Issue 2, February 2007, 56-57.

opportunities for companies to practice tax manipulation and avoidance.¹⁰⁹⁷ Hence, the following aspects must be taken into consideration to decide the best and most suitable solution to this current problem.

8.2 Tax Incentive Reform

This thesis has examined the problems of conflict and lack of clarity in tax incentive jurisdiction between the Revenue Department and the BOI. Such overlaps and conflicts should, if possible, be completely eliminated. It is therefore recommended that tax incentive provisions be incorporated in the Revenue Code under the jurisdiction of the Revenue Department, as this would avoid the difficulties that have been highlighted in this thesis. Most importantly, this would add to the efficiency of Thailand's tax system. It is recommended that Thai policymakers, in pursuing the suggested reforms, should address the following important questions.

8.2.1 Granting of tax incentives by the Revenue Department

It has been shown that tax incentives are a significant factor taken into consideration by foreign investors. In addition, FDI is important for Thailand's sustainable economic development. However, there are also difficulties associated with the use of tax incentives, as they require a special set of interpretative tools because they have unique features such as 'high level[s] of detail' and a 'self-contained nature'.¹⁰⁹⁸ It is important to have a competent body which can monitor and evaluate the practical effect of tax incentives on the overall economy of the country. It is possible, at least in theory, to restrict tax incentives to incremental investment by countries already operating in Thailand, rather than to grant them primarily to FDI investments that might set up in the country regardless.¹⁰⁹⁹ However, it is difficult to determine which of the prospective

¹⁰⁹⁷ Louis Kaplow, 'Taxation', NBER Working Paper No. 12061 February 2006 in Polinsky, A. Mitchell and Steven Shavell (eds.) *Handbook of Law and Economics Vol. 1* (Amsterdam :Elsevier 2007) 71. See also, James Andreoni, Brian Erard and Jonathan Feldstein (1998) 'Tax Compliance' *Journal of Economic Literature* 36, No. 2, 818-860; and Slemrod and Yitzhaki 'Tax Avoidance, Evasion, and Administration' NBER Working Paper Series, Working Paper 7473, 1-76 <<http://www.nber.org/papers/w7473>> accessed 10 November 2011.

¹⁰⁹⁸ Michael Livingston, 'Practical Reason, 'Purposivism,' and the Interpretation of Tax Statutes' *Tax Law Review* Vol. 51 (1995-1996) 678.

¹⁰⁹⁹ See Joel Bergsman, 'Advice on Taxation and Tax Incentives for Foreign Direct Investment (1999) FIAS Paper. To this proposition, Bergsman comments that 'most FDI promoters have neither the expertise nor the stingy integrity that would be needed to exercise if they did have it'.

investors would come to Thailand only if granted incentives, and which would be attracted by other factors, such as a skilled workforce or low costs. Further complicating the matter is the fact that, if pressed, all prospective investors are likely to agree that tax privileges are essential to their investment decision.¹¹⁰⁰

An interesting and useful suggestion is made by Wells and Allen, who suggest that the cost of incentives be charged to the budget of the department granting them.¹¹⁰¹ In this way, the authority which is responsible for tax incentives is likely to be more cautious in risk and cost assessment. This thesis also recommends that the tax authority – which, under the terms set out in this thesis, should be taken to mean the Revenue Department – could grant tax incentives in accordance with the criteria set forth for granting tax incentives. It is suggested that the criteria for granting tax incentives should be expressed in the Revenue Code or by Royal Decree. Each application should be assessed on its own merit, and care should be taken that the system is kept quick and efficient.¹¹⁰² In addition, there should be a provision to specify explicitly the guaranteed period, such as ‘This condition will be valid until [whatever date].’ Furthermore, as demonstrated in Chapter 5, the potentially adverse effects of using tax incentives, including the creation of exploitable loopholes in the tax system, are evident.¹¹⁰³ To prevent this, the Revenue Department should take responsibility for the administration of tax incentives because with its competent tax officials, it is capable of anticipating possible tax abuses and taking appropriate and prompt action when needed.

This thesis proposes that the better solution to prevent the conflict between the IPA 2001 and the Revenue Code on the issue of tax incentives is to incorporate the provisions regarding tax incentives in the Revenue Code. This is due to the following reasons.

¹¹⁰⁰ Easson (n 8) 163.

¹¹⁰¹ See Louis T. Wells and Nancy J Allen, ‘Tax Holidays to Attract Foreign Direct Investment: Lessons from two Experiments’, (2001) Foreign Investment Advisory Service.

¹¹⁰² Jacques Morisset and Neda Pirnia, ‘How Tax Policy and Incentives Affect Foreign Direct Investment: A Review’ (2001) Policy Research Working Paper 2509 <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2001/01/20/000094946_01010905342188/Rendered/PDF/multi_page.pdf> accessed 10 November 2011.

¹¹⁰³ For research on tax avoidance behaviour in response to tax policy, see Joel Slemrod and Shlomo Yitzhaki (n 1097).

Firstly, the Revenue Department is a tax authority and has competent tax officials who can employ techniques against tax abuses¹¹⁰⁴ with more knowledge and experience than officials from the Ministry of Industry and the BOI. As Chalk noted in relation to investment in the Philippines, ‘companies in receipt of the various incentives often do not comply with the BOI’s regulations to supply information and financial statements and the BOI appears to have little resources to monitor and control the abuse of incentives’.¹¹⁰⁵

Secondly, all the principles and practices regarding taxation, including tax administration, assessment and legal actions conducted by officials, should be specified under the Revenue Code, which is primary legislation, and not in secondary legislation, because secondary legislation, by an executive body, concerning matters which can affect the statuses and rights of the citizens might not be properly examined. This issue can be supported by the opinion of Lord Hoffmann in the *Wilkinson* case, as discussed in section 7.4 in Chapter 7. According to current practice, the Revenue Department can issue notifications to supplement the Revenue Code, which is the primary legislation. The Revenue Department’s role should primarily be tax administration and collection rather than the interpretation of tax legislation, which should be the responsibility of the courts. Likewise, the Revenue Code should be written as clearly as possible and can be supplemented by Revenue Department Notifications or other secondary legislation, but only where matters need to be clarified further, and such matters must not impose more burdens on taxpayers. As suggested by Chalk, all tax law should be made by statute to ensure that all such legislation is properly scrutinised.¹¹⁰⁶

This researcher accepts the argument that secondary legislation has a place in the formulation of policy, provided that it is limited to the clarification of minor or one-off issues, and in cases in which a statute would be difficult to formulate.¹¹⁰⁷ This research

¹¹⁰⁴ Examples of tax abuses are round-tripping, fly-by-night operations, new firms for old, sale of assets in respect of which incentives have been granted.

¹¹⁰⁵ Nigel A. Chalk, ‘Tax Incentives in the Philippines: A Regional Perspective’ (2001) IMF Working Paper WP/01/181, 24.

¹¹⁰⁶ Ibid 16.

¹¹⁰⁷ This idea is recommended by Great Britain: Parliament: House of Commons: Treasury Committee, *Principles of Tax Policy: Report, Together with Formal Minutes, Oral and Written Evidence* (The Stationary Office 2011) 17.

has proven that the IPA 2001's provisions on tax incentives create an unacceptable level of uncertainty, which could result in protracted and costly resolution processes. Its recommendation, therefore, is that these particular provisions should be specified by the Revenue Code, or at least by Royal Decree. The current practice, whereby the method of tax calculations is specified by a Departmental Notification, should be ceased forthwith.

Thirdly, stipulating tax incentive provisions under the Revenue Code should enhance transparency and efficiency in tax administration. There are increasing numbers of certificates of promotion being issued, showing that there are more BOI-promoted projects being approved.¹¹⁰⁸ Tax incentive administration, therefore, should be enhanced, and conducted by a tax specialised agency. In addition, the administrative expenses of tax collecting should not be excessive. The current system, having two authorities, is more costly than having the Revenue Department handle all tax matters. The collection of revenue should be relatively easy, without causing a disproportionate burden to the tax administration or high compliance costs to the taxpayer. In the highly competitive arena of the world economy, Thailand's investment climate could be improved radically by the implementation of a new investment policy paradigm, thus attracting more foreign capital. The system of tax incentives must be made clearer, as well as more consistent and predictable,¹¹⁰⁹ which could be achieved under a new scheme centred on administration by the Revenue Department.

¹¹⁰⁸ For numbers of BOI promotion certificate issued in 2009-2011 (January – September), see Promotion Certificate Issued, Board of Investment Thailand
<http://www.boi.go.th/upload/content/1109_cer_en_96591.pdf> accessed 10 November 2011.

¹¹⁰⁹ This proposal is in line with OECD's tax agenda to promote voluntary compliance, see Organisation for Economic Co-Operation and Development, 'OECD's Current Tax Agenda' April 2011

8.2.2 Important points to be considered for incorporating tax incentive provisions under the Revenue Code

First and foremost, it is recommended that tax reform regarding incentives for BOI-promoted companies should be made at an appropriate time. Considering the global economic crisis, Thailand's political instability and the latest severe bout of flooding, the Thai government must be very careful when considering the most suitable time for reform. Particularly, unpredictable or sudden changes in tax measures can be harmful to investors,¹¹¹⁰ so sufficient prior notice of changes in tax incentives and amendments to their provisions should be given to both foreign and domestic investors, which will provide a greater degree of certainty. One suggestion is to have a 'road map', which sets out how the Thai government intends to approach its reform of the tax incentive system over the next five years. This practice is currently being conducted by the United Kingdom Treasury Department.¹¹¹¹

The change of tax incentive administration is proposed to be announced one year before the effective date, and should be considered together with the plan to reduce the national corporate tax rate. The Thai Cabinet approved on 11 October 2011 a plan to reduce the national corporate tax rate from the standard rate of 30% to 23% for the year ending 31 December 2012, and on 1 January 2013, it will be reduced to 20%.¹¹¹² The purpose of this plan is to promote Thailand's competitiveness in the global market, and to prepare for its membership to the ASEAN Economic Community (AEC), which was initiated by ASEAN leaders with the vision to 'transform ASEAN into a single market and production base that is highly competitive and fully integrated into the global community by 2015'.¹¹¹³ This economic integration is aiming for 'the elimination of

¹¹¹⁰ Great Britain Treasury Committee (n 1107) 22; see Kevin A. Hassett and Gilbert E. Metcalf, 'Investment with Uncertain Tax Policy: Does Random Tax Policy Discourage Investment?' *The Economic Journal*, 109 (457) July 1999, 372-393.

¹¹¹¹ HM Treasury, 'Part 1: The Corporate Tax Road Map' <www.hm-treasury.gov.uk/corporate_tax_reform.htm> accessed 21 November 2011. This note gives an overview and general analysis of the Road Map. For comments on the UK Corporate Tax Road Map, see Chris Sanger, 'Corporate Tax Road Map' (2011) *British Tax Review* 1, 2-10.

¹¹¹² Cabinet of Thailand, Cabinet Resolution 'Tax measures to promote competitiveness of Thailand on the global market' 11 October 2011 (in Thai) <http://www.cabinet.thaigov.go.th/cc_main21.htm> accessed 10 November 2011.

¹¹¹³ Association of Southeast Asian Nations, 'An ASEAN Economic Community by 2015' Fact Sheet 2008/AEC/001-2, 20 August 2008 <www.asean.org/Fact%20Sheet/AEC/2007-AEC-001-2.pdf> accessed 10 November 2011.

tariffs, free movement of professionals, freer movement of capital and a streamlined customs clearance procedure'.¹¹¹⁴ Thus, the plan to change tax incentive administration and the incorporation of tax incentive provisions under the Revenue Code should be carried out shortly after, or together with, the plan to reduce the corporate tax rate for the purpose of revenue adjustment and overall national tax reform.

Second, there should be an assessment of whether the administration of current tax incentives by the Revenue Department is workable. Tax incentives which are currently governed by the Revenue Department are those for regional operating headquarters (ROHs), as explained in Chapter 5. The calculation of corporate income tax (CIT) under this ROH scheme has to follow Sections 65 and 65 (2) of the Revenue Code, which specifies the determination of profit and loss whereby each business must calculate profit and loss separately from another business (if there are ROH businesses and non-ROH businesses). With respect to expenses, they must be apportioned based on the proportion of income derived from the ROH business and the non-ROH business.¹¹¹⁵ The same practice is adopted for loss calculation, where the deduction of losses incurred from the ROH business in any accounting year is restricted to ROH profits (not combined with non-ROH profits) of subsequent accounting years.¹¹¹⁶ This ROH scheme shows that tax incentives which aim to encourage foreign companies to set up regional headquarters in Thailand could be overseen by the Revenue Department. In this way, tax practice and authority are clearly specified. With this in mind, it can be argued that bringing the ROH scheme under the auspices of the Revenue Department could help it to be better monitored and made more user-friendly. Additionally, it could be used alongside the double tax agreements that are currently implemented by the Revenue Department.

Regarding the ROH scheme, approved by the Revenue Department. There are, however, issues relating to the ROH scheme which the Thai government should take into account. ROH legislation has proved disappointing to many foreign investors, who may initially

¹¹¹⁴ Ibid.

¹¹¹⁵ Tom O'Shea, Prangtip Anantavipat, and Piphob Veraphong, 'Thailand Enacts Tax Incentives for Regional Operating Headquarters' Tax analysts 3 December 2010 <www.ccls.qmul.ac.uk/docs/staff/oshea/52179.pdf> accessed 10 November 2011.

¹¹¹⁶ Ibid.

have considered Thailand an appealing investment destination.¹¹¹⁷ Hong Kong and Singapore, for example, now seem more appealing destinations in the region.¹¹¹⁸ Critics of the ROH argue that the scheme's lack of provision for foreign currency bank accounts, and the relatively small number of work permits available to foreign staff, makes it unviable in its current form.¹¹¹⁹ In addition, tax incentives under the control of an authority such as the Thai Revenue Department, known for unpopular tax collecting policies, may not seem appealing to investors.

Another tax incentive scheme which is currently under the control of the Revenue Department is tax incentives for R&D projects. As Chapter 5 outlined, 100% CIT exemption for companies' R&D projects is provided under the conditions set out by the Revenue Department.¹¹²⁰ The benefit of this R&D scheme is an increase in expenditure on R&D by international groups. Further research into the possible benefits of such a scheme should be undertaken.

The third issue to consider is the fact that the change of tax incentive jurisdiction to the Revenue Department might raise concerns around tax compliance. The Revenue Department should adopt a measure to balance between respecting the rights, privacy and commercial confidentiality of investors on the one hand, and efficient administration and the prevention of non-tax compliance on the other. Neither should this process lose sight of the fact that BOI-promoted companies still need to benefit from tax incentives, without feeling unreasonably persecuted by the authority.

Lastly, the process of tax incentive incorporation to the Revenue Code must address the relationship between policy and drafting, anticipating application and interpretation, drafting for a judicial audience and the relationship between statutes, regulations and other secondary legislation.¹¹²¹ It is desirable that the relationship between the Revenue

¹¹¹⁷ Seri Manop & Doyle (n 629).

¹¹¹⁸ Ibid

¹¹¹⁹ Ibid.

¹¹²⁰ Royal Decree B.E. 2539 (1996) No. 297.

¹¹²¹ For more detail regarding technique of drafting tax laws, see Victor Thuronyi (ed), 'Tax Law Design and Drafting', (1996) International Monetary Fund, Chapter 3.

Code and secondary laws be clear to taxpayers. An explicit provision which specifies them should therefore be introduced.

Provisions regarding tax incentives for BOI-promoted companies under the Revenue Code Section [...] prevail over the inconsistent provisions of Royal Decrees, Ministerial Regulations, Ministerial Instructions and Ministerial Notifications.

Furthermore, whenever a tax policymaker foresees or encounters undefined or unclear terms or methods of tax calculations, these incidences should be taken into account when drafting or amending tax laws.¹¹²² More specifically, provisions regarding tax incentives under the Revenue Code should clearly define unclear terms and methods of tax calculation, as evident from the discussion in Chapter 6, in order to avoid uncertainty in interpretation. Other types of secondary laws are for tax officials to comply with in operating tax provisions under the Revenue Code. Secondary laws can also deal with types, criteria and conditions of businesses and the amounts of taxes which are constantly evolving. However, secondary legislation should not result in more burdens on taxpayers.

8.2.3 Tax incentives and the possibility of corruption

The main purposes of taxation are to acquire sources of revenue, to support economic growth, to manage resources and to maintain economic stability. However, the Thai government has also used its taxation system for other purposes, such as to promote investment. Under the current situation, decisions of the BOI are difficult to predict, owing to the lack of clarity in the legislation. The result is that potential investors may incur a substantial outlay of time and money before learning the terms on which the investment may proceed. A system whereby the BOI has discretion over tax incentives can be an invitation to corruption, since investors do not wish to waste money on tax litigation and may be more tempted to bribe officers instead. Two possible reasons for ceasing corruption among BOI officials are that (1) it is easier to hide corruption by claiming that they lack expertise and (2) the BOI can be biased to give as many tax

¹¹²² Similar practices are presented in Kiyoshi Nakayama, 'Tax Policy: Designing and Drafting a Domestic Law to Implement a Tax Treaty', International Monetary Fund Fiscal Affairs Department, Technical Notes and Manuals, March 2011, 1-10 referred to as 'OECD, Tax Policy'.

incentives as possible, without sufficient risk assessment, in order to convince investors to invest in Thailand. After tax incentive provisions are incorporated into the Revenue Code, there should be raised awareness among tax officials, who can be accused of any bribery. This thesis suggests that the process of granting tax incentives should be changed from discretionary to automatic, so tax incentives should be automatically granted to investors where all the prescribed criteria and conditions are met. Another suggestion for the problem of corruption is that, since tax incentives are granted by revenue officials, these officials' forms of motivation should be altered. In order to reduce corruption, honesty should be rewarded through promotions and higher pay, as well as corruption punished through financial penalties and possible dismissal.¹¹²³

8.2.4 The consequences of tax incentive reform for investors

The reform of tax incentive administration and legislation, as this thesis has proposed, would ideally enhance overall certainty in the amount of tax due to be paid by investors, whose concerns may arise as they will have to contact the Revenue Department directly, whereas in the current practice, the BOI facilitates and provides assistance for essential matters, including tax queries. However, as analysed in this thesis, BOI-promoted companies currently have to spend money and time in seeking advice from both authorities, regarding tax issues. The new proposal can eliminate the cost and time that these BOI-promoted companies spend, and make it possible to estimate tax cost of operating a business. Hopefully therefore, there should be fewer trials because tax legislation and authority will be clearly specified. This, ideally, would improve investors' opinions of the tax system and lead to higher voluntary compliance.

8.2.5 The new role of the BOI

According to the thesis's analysis, the current practice, whereby the BOI is responsible for granting tax incentives under the IPA 2001, could lead to an unacceptable level of unpredictability and inconsistency in the tax system. In the rapidly changing world of the 21st century, Thailand faces the challenge of remaining attractive to foreign investors. It is therefore imperative that the BOI must change with the times in order to

¹¹²³ Ott (n 1084); for more research on tax systems and corruption see Mukul G Asher, 'Design of Tax Systems and Corruption' Paper for Conference on 'Fighting Corruption: Common Challenges and Shared Experiences', organized by the Konard Adenauer Stiftung, and the Institute of International Affairs (SIIA), Singapore, 10-11 May 2001 <<http://www.cpsindia.org/designoftaxsystemsandcorruption.htm>> accessed 10 November 2011.

maintain and enhance Thailand's appeal. The main objective of the BOI's proposed new initiatives is for it to become less a regulator and more a facilitator of investment. Its role should not be ambiguous, nor should it prolong business operations. As indicated in this thesis, the current situation concerning consulting the BOI regarding investment issues, especially tax incentive matters can create more confusion for investors. As such, it is submitted that the BOI's main role should be that of an investment facilitator. The current practice of 'One Start One Stop' (OSOS), is an investment centre established by the BOI to offer a wide range of investment-related services. Representatives from the Ministry of Finance, including the Revenue Department, Customs Department and Excise Department, are also based there. The recommendation is to define clearly the roles of the BOI and other related governmental agencies.

8.2.6 The changing contents of tax policy

Tax policies change with each successive government, bringing new challenges each time. Often, incoming governments do not pay sufficient attention to the existence of problems in the system, preferring to deal with more pressing issues. Therefore, tax legislation of the previous government can cause problems and obstacles in the current application of law. Consequently, government tax policy needs to evolve, as one policy might be practical at one particular time but create problems later.

The formulation of tax policy will never give a simple solution to a country's economic needs; it involves the balancing of a variety of often conflicting objectives. Furthermore, there is no catch-all solution that suits all countries; therefore, tax reform must be adjusted to local requirements, cultural prerogatives, legal traditions, available workers and local resources. A state – Thailand in this instance – may wish to attract foreign investment, but will simultaneously wish to maximise its tax revenue from such investment. This is the very reason for seeking to attract such investment initially. A balance must be struck between maximising potential tax revenue and making the country an attractive destination for FDI. Tax incentives to promote investment may also create distortions in the balance of industries that choose to locate in Thailand, and may also create instability within the tax system. They can give rise to complex problems surrounding classification and interpretation, and in the worst-case scenario can be exploited through tax evasion.

With these considerations in mind, how can the Thai tax authorities minimise revenue loss through tax incentives? Should they consider restricting the use of incentives in order to prevent such loss? Altung *et al* conducted an empirical study, which concluded that the greater the investment stimulus, the more the investor perceives it as temporary. As such, large investment stimuli could have the effect of destabilising investment,¹¹²⁴ so policy-makers must strike a balance here between high levels of stimulus and the encouragement of stable, sustainable investment.¹¹²⁵ In Thailand's case, further research into whether short-term, immediate or long-term investment would generate more foreign capital is required. One suggestion is that the cost-effectiveness of tax incentives could be improved by careful targeting and design.¹¹²⁶ However, tax incentives do not constitute the only investment promotion strategy open to the Thai government, so various other promotion programmes and circumstances should also be adopted. Any future research on this subject should study whether Thailand should still use tax incentives as a means to encourage investment, taking into account the conflict discussed in this thesis and the literature on the potential drawbacks of tax incentives.

8.2.7 Incentives on custom duty

The BOI offers import duty exemptions, which are not the focus of this thesis, on the import of machinery and raw materials. However, given the recommendation that the revenue authority should have authority over tax incentives, and that tax incentive provisions should include these import duty exemptions, they should also be specified under revenue law. In Thailand, the Customs Act of 1926 is regarded as revenue law. Therefore, provisions regarding exemptions and reduction from customs duty should be removed from the IPA 2001 and specified instead under the Customs Act of 1926 for the same reasons as recommended in the case of corporate income tax.

8.2.8 Cooperation and Joint Committee

In order to eliminate possible bias on tax incentive management after tax incentive provisions are incorporated under the Revenue Code, and which are then administered

¹¹²⁴ Sumru Altug, 'Tax and Irreversible Investment', (2004) (Centre for Dynamic Macroeconomic Analysis Working Paper Series CDMA04/04, 14 November 2004) 54.

¹¹²⁵ *Ibid.*

¹¹²⁶ Taxation and Technology Transfer (n 691) 27.

by the Revenue Department, a joint committee of the BOI and the Revenue Department is recommended for establishment. The fundamental roles of this joint committee would be to act as a dedicated agency and to establish a framework for co-operation between the BOI and the Revenue Department in the field of taxation, particularly tax incentives provided for BOI-promoted companies.

This committee will set out the role of each authority and explain how they work together towards the common objective of overall national revenue. The actions and responsibilities of each body should be well-defined, which could avoid duplication as each authority must have a clearly defined role to avoid overlaps of responsibility. To strengthen the links and to support co-operation between the two authorities, there should be regular information exchange through a series of on-going, regular monthly meetings. A special meeting could be held to discuss specific cases of significance such as special requirements of investment, tax planning techniques for BOI-promoted companies, or any problems identified. This committee should have a significant role in the amendment of the IPA and Revenue Code provisions on tax incentives. It is proposed that members of the committee are led by the prime minister, ensuring clear political support, and include equal numbers of representatives from the Ministry of Finance and the Ministry of Industry. This committee should have a full-time staff to guarantee efficient operation. It will be the principal forum for agreeing policy and, where appropriate, coordinating or agreeing action between two authorities. The joint committee should guarantee direct input into the process of the designing and implementing of investment promotion policy for both the BOI and the Revenue Department.¹¹²⁷

The roles of the committee should include: first, the co-operation of the BOI and the Revenue Department on shared plans and projects on important matters, the consideration of problems concerning the practicalities of tax incentives, and means of solving them quickly and with minimal impact on investors, discussion of the ongoing role of investment in supporting the development of the Thai economy, the organisation of administrative work assigned to related agencies and bodies, the appointment subcommittees and focus groups to particular assignments, and lastly, the two bodies'

¹¹²⁷ See Thomsen (n 938) 104.

working together with the common goal of Thailand's sustainable economic development in mind.

In addition, it is suggested that there should be a mechanism to establish involvement from the private sector, i.e. foreign and domestic investors should be able to make proposals or recommendations regarding tax and investment promotion policies.¹¹²⁸

8.2.9 Enhancement of FPO performance

As described in Chapter 3 section 3.4.1, the Fiscal Policy Office (FPO), under the Ministry of Finance is in charge of analysing and advising on the economic and fiscal policies of the country. Economic and fiscal systems do not rely only on taxation but also other factors such as investment, social management and foreign capital inflows. In order to strengthen fiscal sustainability, economic and financial systems and social and environmental development, the FPO should act as a planner and a controller by taking into account other factors that contribute to Thailand's economic sustainability. The tax incentive system for investment promotion is to be included, and there should be efficient and competent personnel who are specialised in foreign investment, investment promotion and investment incentives working alongside economists and public finance, as well as tax experts in making fiscal policy. Subsequently, operating sectors such as the Revenue Department and other governmental agencies can follow the guidelines and policies set up by the FPO in the same direction. The FPO must ensure a sound and comprehensive evaluation of tax incentive measures, possibly through a cost-benefit analysis.

8.2.10 The new role of the Revenue Department

After the incorporation of tax incentives in the Revenue Code, the Revenue Department's role should move away from that of a mere tax collector,¹¹²⁹ so it needs to take into account other governmental policies that aim to achieve the same goal, and

¹¹²⁸ This is one of the recommendations by the OECD to enhance a good tax administration, see Organisation for Economic Co-operation and Development, 'Principle of Good Tax Administration-Practice Note' Tax guidance series General Administrative Principles-GAP001, issued 25 June 1999, amended 2 May 2001, 4.

¹¹²⁹ See the issues regarding tax administrative performance and tax reform in Richard M. Bird, 'Administrative Dimensions of Tax Reform' (2004) Asia-Pacific Tax Bulletin March 2004, 134-150. See also the role of tax for development in OECD, Tax Policy (n 1122) 20-21.

should in no way obstruct economic growth.¹¹³⁰ Thailand should consider the practices of other competitive countries such as Singapore, Hong Kong, Vietnam, Malaysia and India and choose the most suitable and practicable measures and policies to be adopted. As this thesis argued, tax incentives under the jurisdiction of the revenue body can guarantee certainty in tax compliance. The new role of the Revenue Department should be to assess current tax measures, judge whether they meet their targets and improve tax incentive measures to be in line with the objectives of the country. An example of helping to enhance an investment environment is evident through the Canadian Customs and Revenue Agency's strategies to promote voluntary compliance by both domestic and foreign businesses.¹¹³¹ By establishing OSOS, an investment centre with staff from the Revenue Department, a sound investment environment can be promoted.

8.2.11 The role of the Council of State

An interesting point regarding the status of the opinions of the Council of State emerges from the *Minebea* case. In general, all government agencies must refer to the Office of the Council of State in order to seek opinion on legal queries. This practice is in accordance with the Cabinet Resolution No. *Nor*¹¹³² 11310/2482 on 2 March 1939. As explained in Chapter 2, the opinions of the Council of State have no legally binding effect on individuals but can influence government agencies in the enforcement or interpretation of rules and regulations. It is evident from the *Minebea* case that the system of seeking an opinion from the Council of State actually prolongs the overall conflict resolution and results in a more complicated legal procedure. Furthermore, the opinion is not binding and can hamper effective legal administration. The researcher

¹¹³⁰ For an aspect of tax policy to support other policy goals in the United Kingdom, see House of Commons Treasury Committee, 'Principles of Tax Policy' Eight Report of Session 2010-11, HC753, 15 March 2011, 1-66
<<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmtreasy/753/753.pdf>> accessed 21 November 2011.

¹¹³¹ The Canada Customs and Revenue Agency, 'The Role and Strategies of the Tax Administration in Developing Countries: Methods to Promote Voluntary Compliance' Inter-American Centre of Tax Administration, Third Regional Training Workshop on International Taxation 3 December 2002; Canada Revenue Agency, 'Audits and Investigations' <<http://www.cra-arc.gc.ca/gncy/lrt/dt-eng.html>> accessed 19 November 2011.

See also Richard M. Bird and Eric M. Zolt, 'Introduction to Tax Policy Design and Development' Paper Prepared for Practical Issues on Tax Policy in Developing Countries, World Bank 28 April-1 May 2003, 25-26.

¹¹³² A Thai alphabet.

therefore wishes to emphasise that this system should be reconsidered and, if possible stopped because the court should play the full role in deciding legal matters. Other functions of the Council of State, such as drafting laws and regulations, submitting opinions to the Cabinet for new legislation or legal amendment should be retained.

8.2.12 Tax incentive reconsideration

No matter how carefully targeted they are, tax incentives are likely to have some revenue cost, which has to be paid for through a reduction in the services provided by the host government, by an increase in other taxes or by increased spending introduced by new investors. If the Thai government reduces expenditure on education, health or infrastructure, the result may be to make the country less attractive to other potential investors. Then again, if it increases taxes on wages and consumption to compensate for the corporate income tax revenue lost because of increased incentives, labour and living costs are likely to rise, once more with a possible detrimental effect on other investments, especially domestic investment. Some investors may be attracted by tax incentives, while others may be deterred by their potentially negative consequences. There are also likely to be other costs such as efficiency costs caused by the distortions that incentives produce, social costs (in the form of corruption and rent-seeking) and administrative costs.¹¹³³ Some of those costs certainly are very difficult to measure or to predict.¹¹³⁴ As we have learned from the literature referred to earlier in this thesis, and as argued by Athukorala, tax incentives ‘do not generally work unless they are appropriately combined with other initiatives to improve the general investment climate’.¹¹³⁵ A healthy investment environment would take into consideration such factors as political stability and the macroeconomic context, as well as the issues discussed in this thesis. The object here is not to examine the propriety of tax incentives in general, but to provide solutions to the problems inherent in the current Thai incentive system.

¹¹³³ Zee *et al* (n 561).

¹¹³⁴ Easson (n 8) 77.

¹¹³⁵ Prema-chandra Athukorala, ‘Trends and Patterns of Foreign Direct Investments in Asia: An Interpretative Survey’ Draft paper for presentation to the conference on ‘The Future of Economic Integration in Asia’ co-organised by the faculty of Economics, Thammasat University and Japan Bank for International Cooperation, 20-21 November 2008.

The *Minebea* case and the problems analysed in this thesis should be the catalyst for a reconsideration of the tax incentive system, and possibly an amendment of the IPA 2001, bringing it up to date with the current economic and investment situation. The proposed solution is to incorporate all the tax incentive provisions under the Revenue Code, and for these to be under the sole jurisdiction of the Revenue Department.

Appendix 1

Bank of Thailand

Net Flow of Foreign Direct Investment Classified by Sector

(Unit : Millions of Baht)

Last Updated : 31 Aug 2011 14:30

Retrieved date : 29 Oct 2011 01:15

	2010	2009	2008
1 Industry	101,059.88	133,246.52	196,743.19
2 Food & sugar	13,840.23	5,824.28	5,069.87
3 Textiles	1,527.38	1,733.10	748.66
4 Metal & non metallic	1,650.43	1,148.42	1,635.95
5 Electrical appliances	15,670.28	3,136.54	43,680.88
6 Machinery & transport equipment	15,320.64	82,945.90	38,253.14
7 Chemicals	13,631.68	9,794.17	14,518.23
8 Petroleum products	6,630.61	6,718.78	-14,878.66
9 Construction materials	318.55	359.24	130.45
10 Others	32,470.03	21,586.06	107,584.62
11 Financial institutions	-5,044.05	-36,534.14	9,193.18
12 Trade	18,065.07	11,201.66	1,156.56
13 Construction	-7,302.20	754.90	-1,054.96
14 Mining & quarrying	10,878.55	18,896.01	-96.71
15 Agriculture	186.55	253.56	317.61
16 Services	7,002.00	-7,372.16	14,052.29
17 Investment	162.42	31.65	222.79
18 Real estate	19,625.76	24,973.93	33,956.71
19 Others	13,451.27	8,562.52	-6,160.75
20 Total	158,085.27	154,014.47	248,329.93

Source:

Bank of Thailand

Remark:

1. The figures cover investment in non - bank sector only.

2. Direct Investment = Equity Investment plus loans from related companies.

Since 2001, 'Reinvested earnings' has been incorporated into direct investment as well.

3. From April 2004 onwards inputs for private financial flow data are obtained through data sets electronically.

Appendix 2

Bank of Thailand

: Net Flow of Foreign Direct Investment Classified by Country

(Unit : Millions of Baht)

Last Updated : 31 Aug 2011 14:30

Retrieved date : 29 Oct 2011 01:20

	2010	2009	2008
1 Japan	34,078.70	93,130.46	66,860.86
2 United States of America	15,997.27	-11,761.11	-7,358.06
3 EU (15) 4/	46,631.43	33,634.79	9,415.81
4 EU 5/	47,193.18	33,873.76	8,261.33
5 Austria	-122.42	324.37	675.26
6 Belgium	4,628.45	300.42	655.74
7 Germany	-340.99	3,340.52	-10,139.65
8 Denmark	4,063.38	3,306.18	3,859.79
9 Spain	2,142.39	4,382.41	2,203.18
10 Finland	86.53	208.61	98.50
11 France	5,814.66	5,567.76	-372.16
12 United Kingdom	3,703.80	-567.76	1,955.61
13 Greece	5.52	16.00	44.72
14 Ireland	-819.53	-1,133.73	806.99
15 Italy	624.28	307.56	-99.32
16 Luxembourg	3,430.17	3,141.24	985.80
17 Netherlands	21,726.25	13,080.47	8,507.85
18 Portugal	10.32	3.99	11.01
19 Sweden	1,678.58	1,356.70	222.46
20 Cyprus	162.82	58.35	-1,622.50
21 Czech Republic	19.05	8.23	51.55

22	Estonia	23.51	17.59	67.20
23	Hungary	42.52	32.46	26.85
24	Latvia	97.65	68.59	162.30
25	Lithuania	11.28	26.80	40.83
26	Malta	145.96	-45.24	9.90
27	Slovakia	20.75	22.51	23.22
28	Poland	16.75	13.05	18.48
29	Slovenia	7.73	35.23	21.62
30	Bulgaria	0.04	-0.19	0.99
31	Romania	13.63	1.58	45.04
32	ASEAN (5) 6/	12,019.28	22,666.95	8,035.80
33	ASEAN 7/	12,411.14	22,947.70	6,168.96
34	Brunei Darussalam	7.71	-371.75	76.90
35	Indonesia	-116.85	-172.80	8.04
36	Malaysia	3,440.57	2,864.71	1,719.38
37	Philippines	1,233.43	606.13	617.70
38	Singapore	7,454.41	19,740.67	5,613.75
39	Cambodia	194.89	203.52	27.41
40	Laos	179.70	11.81	-2,488.23
41	Myanmar	6.79	19.31	561.09
42	Vietnam	10.47	46.09	32.88
43	Hong Kong	13,975.06	4,271.78	30,548.63
44	Taiwan	799.68	1,568.64	-506.15
45	Korea, South	4,416.82	3,615.99	2,725.68
46	China	2,623.45	746.29	195.82
47	Canada	698.11	468.25	880.42
48	Australia	1,947.42	2,304.43	2,728.55
49	Switzerland	108.69	2,514.53	14,985.65
50	Others	23,835.70	333.71	122,838.20
51	Total	158,085.27	154,014.47	248,329.93

Source:

Bank of Thailand

Remark:

1. The figures cover investment in non - bank sector only.
2. Direct Investment = Equity Investment plus loans from related companies.
Since 2001, 'Reinvested earnings' has been incorporated into direct investment as well.
3. From April 2004 onwards inputs for private financial flow data are obtained through data sets electronically.
4. Prior to May 2004, EU comprises 15 countries: Austria, Belgium, Germany, Denmark, Spain, Finland, France, United Kingdom, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal and Sweden.
5. Since May 2004, EU comprises 25 countries, including also Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovakia, Poland and Slovenia.
Since Jan 2007, EU comprises 27 countries, including also Bulgaria and Romania.
6. Prior to 1999, ASEAN comprises 5 countries: Brunei Darussalam, Indonesia, Malaysia, Philippines and Singapore.
7. Since 1999, ASEAN comprises 9 countries, including also Cambodia, Laos, Myanmar and Vietnam.

Appendix 3

(UNOFFICIAL TRANSLATION)

Based on Board of Investment Announcement

No. 10 / 2552

Types, Sizes and Conditions of Activities Eligible for Promotion

The Board of Investment deems it appropriate to adjust criteria for activities eligible for promotion in order to respond to the current economic and investment situation. By virtue of Section 16 paragraph 2 of the Investment Promotion Act B.E. 2520 (1997), the Board of Investment hereby announces that:

1. Announcement of the Board of Investment No. 2/2543 dated 1 August 2000 regarding types, sizes and conditions of activities eligible for promotion shall be revoked.
2. Activities on the list attached to this announcement are eligible for investment promotion.
3. A minimum level of investment capital (excluding cost of land and working capital) of one million baht shall be required for all types of activities eligible for promotion.
4. Promoted projects must comply with the conditions specified for each type of activity.
5. The rights and benefits provided for promoted projects shall be in accordance with Board of Investment Announcement No. 1/2543 regarding policies and criteria for investment promotion, except that which is specified in the list of activities attached to this announcement.
6. Projects designated as priority activities shall be entitled to the following privileges:
 - 6.1 Exemption of import duty on machinery, regardless of zone

6.2 Eight-year corporate income tax exemption, regardless of zone

6.3 Other rights and benefits shall be granted according to BOI Announcement No.1/2543 dated 1 August 2000.

7. Activities classified as being of special importance and benefits to the country shall be granted the following tax incentives:

7.1 Exemption of import duties on machinery, regardless of zone

7.2 Eight-year corporate income tax exemption, regardless of zone, NOT subject to the corporate income tax exemption cap

7.3 Other rights and benefits shall be granted according to BOI Announcement No.1/2543 dated 1 August 2000.

8. Activities in electronics and electrical appliance industry shall be granted the rights and benefits according to BOI Announcement No. 4/2549 dated 20 March 2006 regarding investment promotion policy for electronics and electrical appliances industry.

9. The Board may announce the suspension of any activity on the investment promotion list attached to this announcement when it considers that promotion is no longer necessary. The Board may also add new activities to the list if it considers that such activities should be promoted.

10. This announcement shall be applicable to applications submitted from 14 September 2009 onwards.

11. For projects in any activity that have already submitted the application for promotion or have been promoted prior to 14 September 2009, if such projects have not yet used their tax privileges prior to 14 September 2009, they can apply to be administered under the new investment promotion list and follow the new conditions specified therein. Letter of intention must be submitted to the Office of the Board of Investment within 30 December 2009.

12. All BOI announcements that refer to the Announcement of the Board of Investment No. 2/2543 dated August 1, 2000 regarding types, sizes and conditions of activities eligible for promotion shall be referred to this announcement instead.

Announced on 15 October 2009.

List of Activities Eligible for Promotion (Information as of February 2011)

Section 1: Agriculture and Agricultural Products

Section 2: Mining, Ceramics and Basic Metals

Section 3: Light Industry

Section 4: Metal Products, Machinery and Transport Equipment

Section 5: Electronic Industry and Electric Appliances

Section 6: Chemicals, Paper and Plastics

Section 7: Services and Public Utilities

Appendix 4

Revenue Code Section 65 States:

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 (2) and 65 (3). 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 to the accounting period as prescribed by the Director-General.

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.

In a necessary case, a taxpayer may file a request to the Director-General to change the accrual basis and accounting method for the calculation of income and expenses under paragraph 2. And when approved by the Director-General, he shall comply with the accounting period as prescribed by the Director-General.

Source: The Thai Revenue Department, the Thai Revenue Code

Appendix 5

Revenue Code Section 65 (2) States:

The calculation of net profit and net loss under this Part shall follow the following conditions:

(1) Items specified in Section 65 (3) 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 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.

(5) Money, asset or liability having value or price in foreign currency on the last day of an accounting period, shall be converted into value or price in Thai currency as follows:

(a) in the case of a company or juristic partnership other than (b), the value or price of money or assets shall be converted to Thai currency using the average buying rate of commercial banks that is calculated by the Bank of Thailand. The value or price of liability shall be converted to Thai currency using the average selling rate of commercial banks that is calculated by the Bank of Thailand.

(b) In case of a commercial bank, or other financial institution as prescribed by the Minister, the value or price of money, assets or liability shall be converted to Thai currency using the average buying and selling rates of commercial banks that are calculated by the Bank of Thailand.

Money, assets or liability having value or price in foreign currency that is received or paid during an accounting period shall be converted into value or price in Thai currency using the market price on the day of such receipt or payment.

(6) Value of stock on the last day of an accounting period shall be calculated in accordance with the cost or market price, whichever is lower, and such value shall be deemed to be the value of stock carried forward into the new accounting period.

Once the calculation of cost in Paragraph 1 is calculated in accordance with an accounting rule, such rule shall continue to be used in the future unless the Director General grants approval to change the rule.

(7) In calculating the cost of goods imported from abroad, the assessment official shall have the power to assess by comparing with the cost of the same type and kind of goods imported into other countries.

(8) If the cost of goods is in foreign currency, it shall be converted into Thai currency using the market exchange rate on the day of the acquisition of the goods unless such foreign currency is convertible under official rate, then it shall be converted into Thai currency using that official rate.

(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.

If any bad debt that is included as income is paid afterwards, it shall no longer be included as income again.

(10) For a limited company incorporated under Thai laws, dividends received from a company incorporated under Thai laws, mutual fund or financial institution incorporated under the specific Thai laws for the purpose of lending to promote agriculture, commerce or industry and share of profits derived from a joint venture shall be included as income, but only half of the amount received. However, the following limited companies incorporated under Thai laws shall not include as income the dividends received from a company incorporated under Thai laws, mutual fund or financial institution incorporated under the specific Thai laws for the purpose of lending

to promote agriculture, commerce or industry and share of profits from a joint venture as income;

(a) listed company

(b) limited company other than (a) which hold shares in a limited company paying dividends at least 25% of voting shares and the limited company paying the dividends does not hold shares in the limited company receiving the dividends, whether directly or indirectly.

Paragraph 1 shall not apply in a case where a limited company or a listed company deriving income which is the said dividend or share of profits by holding shares or investment units which incur the dividends or share of profits less than 3 months as from the date of acquisition of the shares or the investment units to the date in which such income arises, or by transferring shares or investment units 3 months from the date in which such income arises.

Dividends from the investment of provident funds under Section 65 (3) (2) shall not be deemed to be dividends or share of profits under Paragraph 2.

(11) Interest on loan which is subject to withholding tax under the law governing Petroleum Income Tax shall be included in the calculation of income, but only the amount remaining after the tax is withheld under the above law.

(12) Dividends or share of profits which is subject to withholding tax under the law governing Petroleum Income Tax, shall be included in the calculation of income, but only the amount remaining after the tax is withheld under the above law, and if the recipient is a listed company or is a company incorporated under Thai laws and not falling under Section 75, the provisions in (10) shall apply *mutatis mutandis*.

(13) A foundation or association which carries on business that produces revenue shall not include registration fees or maintenance fees from members, or cash or assets received as donations or gifts, whichever the case may be, in the calculation of his income.

(14) An output tax received or receivable by a company or juristic partnership which is a VAT registrant, and the value added tax which is not a tax under Section 82/16 and refunded under Chapter 4 shall not be included as income.

Source: The Thai Revenue Department, the Thai Revenue Code

Appendix 6

Revenue Code Section 65 (3) states: The following items shall not be allowed as expenses in the calculation of net profits:

(1) Reserves except:

(a) Insurance premium reserves for life insurance set aside before calculation of profit, but only the amount not exceeding 65% of the amount of insurance premiums received in an accounting period after deducting premiums for re-insurance.

In a case where money is paid out on an amount insured on any life insurance policy whether in full or in part, only the paid amount which does not exceed the reserves under Paragraph 1 for such policy shall not be allowed as expense.

In a case where any life insurance policy contract is terminated, the amount of remaining reserve under Paragraph 1 for such policy shall be calculated in the calculation of income in the accounting period in which the contract is terminated.

(b) Insurance premium reserves for any other insurance set aside before the calculation of profit, but only the amount not exceeding 40% of the amount of insurance premiums received in an accounting period after deducting premiums for re-insurance and this amount of reserves set aside shall be income in the calculation of net profit for tax purposes in the following accounting period.

(c) A reserve set aside for bad debts or suspected bad debts from liability arising from the provision of credit which a commercial bank, finance company, securities company or credit foncier company sets aside under the laws governing commercial banks or laws governing the finance business, securities business and credit foncier business, as the case may be; but only the amount set aside which increases from such type of reserve appearing in the balance sheet of the previous accounting period.

For the increased reserve set aside under paragraph 1 and treated as expense for the purpose of calculating net profit or net loss in any accounting period, if afterwards, there is a reduction of such reserve; such reduced reserve which was already used as expense shall be included as income in the accounting period in which the reserve is reduced.

(2) Fund except provident fund under the rules, procedures and conditions prescribed by a Ministerial regulations.

(3) Expense for personal, gift, or charitable purpose except expense for public charity, or for public benefit as the Director-General prescribes with the approval of the Minister, shall be deductible in an amount not exceeding 2% of net profit. Expense for education or sports as the Director-General prescribes with the approval of the Minister shall also be deductible in an amount not exceeding 2% of net profit.

(4) Entertainment or service fees that are not in accordance with the rules prescribed by a Ministerial Regulation.

(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.

(6 (2) 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.

(7) The withdrawal of money without remuneration of a partner in a juristic partnership

(8) The part of salary of a shareholder or partner which is paid in excess of appropriate amount.

(9) Expense which is not actually incurred or expense which should have been paid in another accounting period except in the case where it cannot be entered in any accounting period, then it may be entered in the following accounting period.

(10) Remuneration for assets which a company or juristic partnership owns and uses.

(11) Interest paid to equity, reserves or funds of the company or juristic partnership itself.

(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.

(13) Expense which is not for the purpose of making profits or for the business.

(14) Expense which is not for the purpose of business in Thailand.

(15) Cost of purchase of asset and expense related to the purchase or sale of asset, but only the amount in excess of normal cost and expense without reasonable cause.

(16) Value of lost or depleted natural resources due to the carrying on of business.

(17) Value of assets apart from devalued assets subject to Section 65 (2)

(18) Expense which a payer cannot identify the recipient.

(19) Any expense payable from profits received after the end of an accounting period.

(20) Expense similar to those specified in (1) to (19) as will be prescribed by a Royal Decree.

Source: The Thai Revenue Department, the Thai Revenue Code

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