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Taxation of Digital Assets: New Law Issued

Key contacts

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On May 10, 2018 the Emergency Decree on Digital Assets Business 2561 ('the Decree on Business') was issued aiming to control the Digital Assets Businesses which include the undertaking of the following:

- Digital Assets trading/exchange center
- Digital Assets brokerage
- Digital Assets trader
- Other business related to Digital Assets as the Minister of Finance prescribes based on the SEC's recommendations

At the same time, the Emergency Decree No. 19 amending the Revenue Code ('the Decree on Taxation') was issued to add income and gains derived from, or on disposal of, Digital Assets as assessable income, as well as to add withholding tax requirement.

Meaning of Digital Assets

The Decree on Taxation does not provide the definition of a 'Digital Asset', however the term is defined in the Decree on Business to mean Cryptocurrency and Digital Tokens.

Cryptocurrency means an electronic data unit which is created on a system or electronically with the purpose to be used as a medium of exchange for goods, services or other rights, or exchange between Digital Assets, and shall include the other electronic data units as prescribed by the SEC's Notification.

Digital Token means an electronic data unit which is created on a system or electronically with the purpose to determine the right of person to participate in an investment, project or business; or to determine the right to acquire goods, services or other specific rights under an agreement between the issuer and the holder, and shall include the other right units as prescribed by the SEC's Notification.

Assessable income

The Revenue Code classifies assessable income into eight categories under Section 40(1) to 40(8). The Decree on Taxation adds two sub-categories of income under Section 40(4):

- The share of profits or other similar benefits derived from holding or the procession of Digital Token (Section 40(4)(h)), and
- Benefit derived from transfer of Cryptocurrency and Digital Token which exceeds the cost of the investment (Section 40(4)(i)).

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Withholding tax

Section 50 of the Revenue Code specifies withholding tax obligations in respect of payment of income to an individual. The Decree on Taxation adds the withholding tax requirement on assessable income derived from Digital Assets that fall under Sections 40(4)(h) and 40(4)(i) discussed above. The withholding tax rate is 15%.

KPMG's comments

In the context of an individual, a 15% withholding tax will be imposed on the two new sub-categories of income for both resident and non-resident individuals. A Thai resident will be subject to withholding tax under new Section 50(2)(f), whereas a non-resident individual will be subject to withholding tax under existing Section 50(2)(a). This section imposes a 15% withholding tax on income derived by non-resident individuals under Section 40(4), which will now include these two new sub-categories of assessable income.

Individual taxpayers will also be required to include such income as assessable income upon filing their annual personal income tax ('PIT') returns. 15% withholding tax suffered should be creditable against their final tax liability. Without the option to exclude such income from the annual PIT return (which, for example is available for dividend income received by a Thai tax resident), this could result in the individual taxpayer paying more than 15% tax on income from Digital Assets where his/her marginal tax rate exceeds 15%.

The law is silent on whether withholding tax will apply if the recipient is a local juristic company and there is currently no provision under the Revenue Code that requires withholding tax to be withheld on the payment of income under Section 40(4) to a local juristic company, except for interest and dividend income. This (no withholding tax) is in line with the current practice for the benefits or gains from transfer of securities or other similar instruments.

Although the law does not expressly mention the application of withholding tax on payments made to a non-resident entity, 15% withholding tax should in any event be imposed under the current provisions of Section 70 of the Revenue Code, which requires the payer of income to deduct 15% withholding tax (10% in case of dividends) on income under Sections 40(2) to 40(6) paid to non-resident entity not carrying on business in Thailand.

For non-resident taxpayers, it is important to consider the application of tax treaties as relief from the Thai withholding tax may be available. It is currently unclear how the Revenue Department will apply tax treaties to income and gains derived from Digital Assets. Ultimately, the outcome will depend on specific facts and circumstances that should be carefully analyzed by taxpayers.

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