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### **No. 153 : New Retirement Scheme**

On 4 January 2017, Cabinet approved, in principle, the Labor Protection Act (No. ...) B.E. ..., as was proposed by the Ministry of Labor. The current draft law, stipulates that retirement will constitute termination, and as such, retiring employees will be entitled to a severance pay as provided under the Labor Protection Act B.E. 2541 (1998) (“LPA”). It is anticipated that the new law will be enacted in May of this year.

Despite Thailand’s labor law developments and their social ramifications, provisions governing retirement for private-sector employees, particularly retirement age, remain ambiguous. To date, three precedent court cases (Nos. 1617/2547, 4732/2548 and 3196/2551) clarify that the retirement of a private-sector employee is considered a termination of the prevailing employment contract, and, as such, the employer is obliged to pay severance.

Under the current scheme, when the work rules and regulations do not provide a retirement age, employees may work with its employer until the point of reaching mental incapacitation, and then resign from the company when they no longer need to work. In this regard, the employees will not be entitled to severance pay due to resignation.

This edition discusses retirement age, obligations of the employer and penalties under the draft law.

- Statutory retirement age

According to the draft law, if the company does not stipulate a retirement age either in its Work Rules and Regulations or in any of its other rules or regulations, then it will be implicit that the employee retires when he/she reaches 60 years of age.

Under the current scheme, if the company does not stipulate a retirement age in its various work rules and regulations and the particular employment contract, then it is implicit that employer and employee have not agreed over retirement benefits. In this situation, the employer will not have any obligation to pay severance pay.

- Obligation to pay “severance pay” upon retirement

The draft labor law clarifies that retirement is a termination of employment. The employer is obliged to immediately pay severance to employees who reach a retirement age, and at the following rates under Section 118 of the LPA:

- 30 days' wages where the service period is at least 120 days, but less than 1 year.
- 90 days' wages where the service period is at least 1 year, but less than 3 years.
- 180 days' wages where the service period is at least 3 years, but less than 6 years.
- 240 days' wages where the service period is at least 6 years, but less than 10 years.
- 300 days' wages where the service period is 10 years or more.

- New employment contract after retirement

After retirement of the employee and payment of its severance, both parties may agree to enter into a new employment contract identical or different to the previous one. The service period of such employee who has retired under the previous employment contract will not continue. Upon termination of the new contract, the employer is obliged to pay severance to the retiring employee based on a new service period thereunder.

- Criminal penalties against employer

An employer who fails to pay severance pay to a retiring employee will be subject to imprisonment not exceeding six months or a fine not exceeding Baht 100,000, or both pursuant to Section 144 of the LPA. In addition, the offending employer will be liable to pay interest to the employee according to Section 9 of the LPA.

#### Author's Note

Once this draft labor law is enacted, the employer should review its current work rules and develop the necessary provisions for retirement, particularly with respect to when retirement age is triggered (e.g. whether retirement age is reached upon the employee's date of birth or at the end of year of retirement).

To avoid applicable penalties and litigation processes in the Labor Court, the employer must also comply with legal procedures, e.g. severance pay, payable to retiring employees immediately upon termination.



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金融法関連	銀行、ファイナンスおよび金融・非金融会社の証券市場等、金融関連の法的アドバイスと書類作成
会社法関連	商法、民商法典、米国との条約、外国人事業法およびBOI、その他会社登録等の関連法令を踏まえた投資に対する法的アドバイス
企業合併と買収	企業合併と買収における実務サポート
一般的な法務サービス	不動産売買のアドバイスと交渉、就業規則の作成、雇用条件協約へのアドバイス、ジョイントベンチャー契約、リース契約などの各種契約書のチェックやドラフト作成
コンプライアンス	日常業務上のコンプライアンス、税還付、歳入局の要請による移転価格税制調査などのアドバイスとサポート
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税務調査へのサポート	税務上の問題や潜在リスクの調査および解決策の提案、税還付へのサポート、関税調査や歳入局の税務調査へのサポート

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### **No. 154 : Changes to Thai Personal Income Tax (“PIT”)**

The Revenue Code Amendment Act (No. 44) B.E. 2560 (2017) was published in the Royal Thai Government Gazette on 27 January of this year. The new law provides increases in deductible expenses and allowances, new thresholds for tax filing obligations, and an increase to the highest tax bracket at the progressive tax rate. The changes apply to assessable income for the 2017 tax year onwards.

The changes are summarized below.

#### **2016 & 2017 Deductible Expenses**

	2016	2017 onwards
Income under Sections 40 (1) and 40 (2) of the Revenue Code	40% of income, capped at THB 60,000	50% of income, capped at THB 100,000
Income under Section 40 (3) of the Revenue Code	40% of income from copyright , capped at THB 60,000	50% of income from goodwill, copyright, and other rights, capped at THB 100,000

#### **Allowances**

Type of allowance	2016	2017 onwards
Taxpayer	THB 30,000	THB 60,000
Taxpayer's spouse	THB 30,000	THB 60,000
Joint filing for taxpayer, and taxpayer's spouse who also earns income	THB 60,000	THB 120,000
Taxpayer's children	<ul style="list-style-type: none"> <li>● THB 15,000 for each child</li> <li>● THB 2,000 per child for education in Thailand</li> <li>● Limited to 3 children</li> </ul>	<ul style="list-style-type: none"> <li>● THB 30,000 for each child</li> <li>● Cancellation of the THB 2,000 education allowance</li> <li>● No limit on the number of children</li> </ul>
Estates	THB 30,000	THB 60,000
Unincorporated ordinary partnerships or group of persons	THB 30,000 for each partner, capped at THB 60,000	THB 60,000 for each partner, capped at THB 120,000

#### **Income Tax Brackets**

Net taxable income in the 30-35% range is amended as set forth in the table below:

2016 Net Taxable Income (THB)	2017 Net Taxable Income (THB)	Tax rate (%)
1-150,000	1-150,000	Exempt*
150,001-300,000	150,001-300,000	5%
300,001-500,000	300,001-500,000	10%
500,001-750,000	500,001-750,000	15%
750,001-1,000,000	750,001-1,000,000	20%
1,000,001-2,000,000	1,000,001-2,000,000	25%
2,000,001-4,000,000	2,000,001-5,000,000	30%
4,000,001 and over	5,000,001 and over	35%

\*The first THB 150,000 earned is still exempt by Royal Decree (No. 470) B.E. 2551 (2008)

### Tax Return Filings

Taxpayers who meet the following thresholds according to the corresponding taxpayer categories must file an annual tax return (PND.90 / PND.91).

Type	2016	2017 onwards
Taxpayers earning only employment income under Section 40 (1):		
● Single taxpayer	Income exceeds THB 50,000	Income exceeds THB 100,000
● Married taxpayer	Combined income exceeds THB 100,000	Combined income exceeds THB 200,000
Taxpayers who earn employment income under Section 40 (1) and/or other income:		
● Single taxpayer	Income exceeds THB 30,000	Income exceeds THB 60,000
● Married taxpayer	Combined income exceeds THB 60,000	Combined income exceeds THB 120,000
● Estates	Income exceeds THB 30,000	Income exceeds THB 60,000
● Unincorporated ordinary partnerships or group of persons	Income exceeds THB 30,000	Income exceeds THB 60,000

### Benefits from the changes

Taxpayers who earn average monthly employment income (salary, bonus, etc.) of THB 25,800 or less will not be subject to PIT in Thailand due to the increased standard deductible expense and tax allowance.

High income taxpayers with net taxable income exceeding THB 4 million will enjoy increased annual savings of THB 50,000 (1,000,000 x 5%) due to the now 30% tax rate.

### Author's Note

Companies paying income to their employees and other parties should adjust the withholding tax calculation in compliance with the changes. Withholding tax for the January 2017 payment may affect the withholding tax amount in February 2017 as the Amendment Act was announced in late January of this year. To help you avoid any possible non-compliance with withholding tax and PIT requirements, we are pleased to provide you with our tax advisory services.

DRKI's tax advisory services are structured to help you fully comply with Thai tax laws.



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### **No. 155 : Voluntary Audit Program's Extension in 2017**

*Good news for our readers--* Thailand's Customs Department has extended the period for the Voluntary Audit Program until the end of 2017 (31 December). The program enables private sector businesses to undergo customs reviews and potentially be exonerated for their unintentional customs offences, as well as the resulting penalties and surcharges. In extending the program, it is believed the Customs Department wants to encourage better compliance and transparency.

In this article, we discuss eligibility to participate in the program, as well as some commercial and legal implications for candidates to consider prior to asking for joining the program or to accepting the Customs Department's invitation.

#### **WHAT ARE THE BENEFITS OF PARTICIPATING IN THE VOLUNTARY AUDIT PROGRAM?**

Under the Voluntary Audit Program, the Customs Audit Bureau will allow importers to pay any duty and tax shortfalls at the Customs Department with no penalties and surcharges. Compare this to the normal customs post audit/investigations, where violating importers would be liable for up to 200% of duty shortfalls and 100% of VAT deficits, and a monthly 1% surcharge (if any), upon settlement.

To participate in the Voluntary Audit Program, business operators do not need to voluntarily declare their customs violations at the Port of Entry, where liabilities would be higher. (Eligibility for participation is discussed further below.)

#### **WHO CAN PARTICIPATE IN THE VOLUNTARY AUDIT PROGRAM?**

Business operators that have never been accused of the following customs offences may be eligible to participate in the program:

1. Smuggling;
2. Intentional tax evasion;
3. Importation of prohibited and/or restricted goods without proper licenses; or
4. Importation of goods that infringe intellectual property rights.

Also barred from participation are those accused of violations under a post customs post audit, customs investigation, or DSI proceedings.

### HOW CAN ONE PARTICIPATE IN THE VOLUNTARY AUDIT PROGRAM?

Customs Officers will select businesses from their database to receive a Customs Department Invitation Letter providing them an opportunity to participate on a voluntary basis. Business operators can only accept to participate by way of the invitation letter. When receiving the invitation letter, the business operator would accept the offer by sending its letter of acceptance to the authority.

Under certain circumstances, business operators may also make a request to the Customs Department for the opportunity to join the Voluntary Audit Program.

### DO ALL PARTICIPANTS RECEIVE THE PROGRAM'S BENEFITS?

Despite the business operator receiving, and then accepting, the Customs Department's invitation to join the program, its benefits are not guaranteed as not all violations are forgivable.

If Customs Officers discover that importers have intentionally committed customs offenses, then they can rescind any waivers of customs and VAT penalties and surcharges granted under this program. From our experience, this also applies to intentional evasions with respect to certain BOI issues and would be based on the discretion of the Customs Officers.

Further, the waivers granted to participants under previous program may be rescinded if Customs Officers discover recurring violations.

### AUTHOR'S NOTE:

The Voluntary Audit Program is a valuable opportunity for importers to mitigate exposure from unintentional customs offenses and to retroactively pay duty shortfalls without customs and VAT penalties and surcharges. If the business operator is not disqualified for the reasons mentioned above, among other issues, then it may be a promising candidate for the program. Though, this is normally an ideal supposition.

Business operators should be keenly aware of the possible consequences of accepting the Customs Department's invitation. Acceptance should be done after considerable evaluation of potential liabilities with respect to the business's customs profile. Importers should review their transactions and their declarations to the Customs Officers prior to making a decision to join the program, particularly if they are uncertain whether they have properly complied with complex Customs Regulations.



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## **No. 156 : Thailand's new Customs Act in 2017**

Thailand will have a new Customs Act to be announced in 2017. This new legislation would be a good start for Thailand's Customs regulatory upgrade as this new law replaces among the oldest of the 91 year-old Kingdom's law and other 22 Customs Acts. This excludes the current Customs Tariff Decree which is still applicable.

Customs Department officials claim the new law is a compromise for both business operators and the Customs Department. What significant issues and provisions of the forthcoming Customs Act for business operators should be discussed in this article?

### **1. Current Position and Process of Legislation**

The new Customs Act was completely approved on March 9, 2017 by the National Legislative Assembly ("NLA") and it is expected to be proposed for the consideration of, and the Royal Assent by, His Majesty the King within 25 days after the NLA's approval and once receiving Royal Assent, the law will be announced in the Royal Government Gazette. It is expected to have the new law to be announced in 2017. Then, the new customs law will be enforceable 180 days from its announcement in the Royal Government Gazette. During this period, the Customs Department will prepare to draft its new regulations to be consistency with the new Customs Act and to replace among its old and distinct customs regulations.

### **2. Presumption of guilty**

Under the new Customs Act, it will consider the intention of the persons/companies for committing the offence of the intentional tax evasion. The persons/companies will be no longer considered as committing the intentional tax evasion offence if they perform the incorrect declaration resulting in a duty shortfall with no intention to evade the duty. This is according to the basic criminal laws which are considered as criminal offences only if committing the unlawful act with intent or recklessness.

It will be the difference from the current Customs Act which the violation of the current customs provisions would be deemed to have committed a criminal offence in most cases regardless of whether or not the act was committed with or without intent or recklessness. It presumes the guilty on the customs mistakes regardless of committing with or without the intention, particularly the mistakes on the fault declaration to defraud the duty under Section 27 of the current Customs Act.

### 3. Customs Offenses and Punishments

Under the new Customs Act, the offences under Section 27 of the current Customs Act will be separated into three provisions for three different offences under the new Customs Act. The statutory penalty and punishment of each offence will be based on the severity of each offence.

The intentional tax evasion offence is punishable by a fine of 0.5 – 4 times the duty shortfall, or imprisonment not exceeding 10 years, or both. The 4 times the duty shortfall penalties are a ceiling and the Court may, at its discretion, reduce the penalty to the lowest rate at 0.5 times the duty shortfall.

The importation of prohibited and/or restricted goods without proper licenses is punishable by a fine not exceeding Baht 500,000, or imprisonment not exceeding 10 years, or both.

However, smuggling is still punishable at the rate of 400% of the duty-paid value of the goods and imprisonment not exceeding 10 years, or both. Customs authorities claim this offense damages the country.

These are different from the current Section 27 which all customs offences under this provision apply the same penalties calculated at 400% of the duty-paid value of the goods and imprisonment not exceeding 10 years, or both and the Court cannot make its decision/discretion to reduce the statutory penalty. These penalties have deterred many business operators from litigating their Customs cases in Court, opting to settle with authorities to mitigate possibly severe Court imposed liabilities.

This change is intended to provide business operators the opportunity to bring the case to the Court if they do not wish to settle with the Customs Department.

### 4. Tax Assessment and Appeals

The new Customs Act clearly specifies the timeframe during which the authority can assess duties and taxes. The Customs Department must assess customs duties and taxes within 3 years from the date of submitting the customs entry. The period can be extended for another 2 years if there is necessary cause. That period can be extended for another 5 years from the first and second extensions in cases of fraud in connection with duties and taxes owed. The total timeframe is 10 years.

When a business operator receives the assessment letter, it has the right to appeal to the Appellate Committee within 30 days from the date of receiving the assessment letter. The Appellate Committee will complete the consideration and conclusion of the case within 180 days from the date of filing appeal and completing all supporting documents. The consideration period can be extended for another 90 days. The total time frame for the Appellate Committee's consideration is 270 days.

The new Customs Act also enables the appellant to bring the case to the Court even if it does not provide any documents/information to the Appellate Committee or where the Appellate Committee cannot conclude the case within the specified timeframe. It will be a chance business operators to feel free to bring the case to the Court without waiting for a conclusion



of the case by the Customs Department if they do not trust on the consideration of the Customs Department.

## 5. BRIBES AND REWARDS

The new law maintains the system of bribes and rewards to Customs Officers. The bribes and rewards system influences the Customs Officers' performance in in the dispatch of their duties. In practice, the Customs Officers tend to become predatory in their investigations and audits particularly where case is highly technical, eventually leading to disputes.

However, the new Customs Act will reduce bribes and rewards from the maximum rate at 30-55% to 5-10%, depending on the customs offences. For example, in the false declaration and intentional tax evasion offences, there will be no bribe for the Customs Officers but the Customs Officers will receive the awards at 20% of the customs penalties and the total awards will be capped at Baht 5 million/case. In the smuggling, the bribe will be at 20% of the customs penalty with being capped at Baht 5 million and the awards will be at 20% of the customs penalty with being capped at Baht 5 million. The maximum bribe and awards for the smuggling offence will be at Baht 10 million.

## 6. Other Interesting Issues

- The Customs Department can perform the post audit within 5 years from the date of import/export.
- The Customs Department bears the burden of proof in a claim/accusation, according to the general principles of law.
- The customs surcharge is to be capped at 100% of the duty shortfall.

### AUTHOR'S NOTE:

This new Customs Act should be a valuable opportunity for both the Customs Department and business operators to work within a clearer legal framework. However, in the Author's view, the new law will not be among the country's best regulatory upgrades because significant controversy will still be created by Customs Officers' implementation of the new law. For example, the bribe and awards system is still existing because it is for the performances of the Customs Officers. Mistakes committed on import/export of the goods without licenses are still liable under the new Customs Act because of the customs law prevailing over the other specific laws.

Moreover, it is interesting what impacts are from this new Customs Act for business operators and the Customs Department during the connection between the old laws and the new Customs Act, particularly, the pending cases with the Customs Department. Business operators should consider what strategy we should do during this period and after the enforcement of the new Customs Act.



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