



MERGERS AND ACQUISITIONS

Thailand

Taxation of Cross-Border
Mergers and Acquisitions

2010 Edition

TAX

Thailand

Introduction

Thailand's government is a constitutional monarchy. Executive powers are exercised by the Prime Minister and the Council of Ministers, legislative power by the National Assembly, and judicial powers by a judicial system composed of the Courts of First Instance, the Court of Appeals, and the Supreme Court.

The principal taxation law of Thailand is the Revenue Code 1938. Royal Decrees, Ministerial Regulations, Ministerial Notifications, and Board of Taxation Directives and Rulings supplement the Code. The Director-General of Revenue administers the country's tax legislation.

A separate income tax law relates to companies involved in the exploitation of naturally occurring Thai oil and gas assets.

Companies that receive Board of Investment (BOI) promotion may obtain special taxation incentives for a number of years from the commencement of operations.

Recent Developments

Very little has occurred from a tax perspective over the last few years that would directly affect mergers and acquisition (M&A).

Asset Purchase or Share Purchase

An acquisition in Thailand generally takes the form of a purchase of the shares of a company, as opposed to acquisition of the target's business and assets.

From a tax perspective, the likely recapture of capital allowances (that is, taxable gain on sale of assets) is likely to make asset acquisitions less attractive for the seller. However, the benefits of asset acquisitions for the purchaser should not be ignored, particularly given the potential step-up in the tax cost base of the assets to market value and the fact that purchased goodwill is tax deductible generally over 10 years. Some of the tax considerations relevant to each method are discussed later in the chapter. The relative advantages are summarized at the end of the chapter.

Purchase of Assets

A purchase of assets will usually result in an increase in the tax cost base of those assets to the acquisition cost. In addition, historical tax liabilities generally remain with the company and are not transferred with the assets.

However, the restrictions on foreign investment imposed under the Foreign Business Act may limit the ability to acquire the assets directly without setting up a Thai subsidiary and obtaining the relevant approvals (if available), or acquiring through a majority Thai-owned structure.

Purchase Price

For tax purposes, it will be necessary to apportion the total consideration among the assets acquired. It is generally advisable for the purchase agreement to specify the allocation, which will normally be acceptable for tax purposes provided it is commercially justifiable.

Goodwill

Intangible assets, including goodwill, formulae, trademarks, business licenses, patents, copyright, or any other right are generally depreciable for tax purposes at the rate of 10 percent per year, or if the period of use is limited, 100 percent divided by the useful life.

Depreciation

A company is entitled to depreciate capital expenditure by using its acquisition cost base. Depreciation will commence from the date of acquisition, and must be apportioned if the asset is acquired part-way through a fiscal year.

The company may adopt its own depreciation method; however the useful life of the asset must not exceed those prescribed by the Thai Revenue Code.

Broadly the prescribed straight line depreciation rates are as follows:

- Machinery and related equipment – 20 percent
- Permanent buildings – 5 percent
- Temporary buildings – 100 percent

- Depletable natural resources – 5 percent
- Goodwill, formulae, trademarks, business licenses, patents, copyrights, or any other rights – 10 percent or if the period of use is limited 100 percent divided by the useful life
- Computer software, equipment and hardware – 33.33 percent
- Other assets (excluding land or inventory) – 20 percent

Tax Attributes

Tax losses are not transferred on an asset acquisition. They remain with the original company in which they were derived. However, it may be possible for certain tax privileges obtained under Thailand's BOI to be transferred to the acquiring company with the relevant assets to which they relate.

Value-Added Tax (VAT)

VAT is payable by suppliers of taxable goods and in respect of services rendered in Thailand or performed offshore and used in Thailand.

VAT is currently levied at the standard rate of 7 percent on the taxable base for the goods or services rendered. Certain supplies are exempt from VAT or zero-rated (that is, 0-percent VAT).

Transfer Taxes

A number of documents and transactions are subject to stamp duty in Thailand at the applicable rates. Stamp duty is also capped for certain instruments. Stamp duty is applicable to the following:

- Lease of land or building – 0.1 percent of the rent
- Transfer of share, debenture or bond – 0.1 percent of the greater of the paid-up value of share, or the transfer price
- Hire of work agreement – 0.1 percent of the contract value
- Loan of money – 0.05 percent of the loan, capped to THB 10,000

Stamp duty may not be applicable in certain situations, or an exemption may be available. For example, stamp duty is not payable on share transfer documents in respect of securities listed in Thailand. In addition, any transfer executed offshore should not be subject to

stamp duty until the transfer document is brought back into Thailand.

In certain circumstances the liability to remit the stamp duty to the Revenue Office may rest with the purchaser, such as when services are provided by a non-resident to a Thai recipient.

The acquisition of land will also give rise a transfer fee imposed on the transfer of the property (generally split equally between purchaser and seller). The fee is equal to 2 percent of the Land Department's assessed value; however there are reductions for certain types of immovable properties from 2 percent to 0.01 percent for transfers prior to 28 March 2010.

Purchase of Shares

There is no mechanism in the Thailand tax legislation for the purchase price of a target company's shares to be pushed down to increase the tax base cost of that company's underlying assets.

Tax Indemnities and Warranties

In a share acquisition, the purchaser is taking over the target company together with all related liabilities, including contingent liabilities. The purchaser will, therefore, normally require more extensive indemnities and warranties than in the case of an asset acquisition. Where significant sums are at issue, it is customary for the purchaser to initiate a due diligence exercise, which would normally incorporate a review of the target's tax affairs.

Tax Losses

Tax losses incurred by a legal corporation may be carried forward for a maximum of five consecutive accounting periods and set off against profits of whatever nature (there is no concept of carry-back). Tax losses are not foregone upon a change in the ownership of the company or a change in the company's business; any carried forward losses should survive acquisition.

Thailand has no separate capital gains tax; all losses are of a revenue nature, and can be used to offset any type of income earned in the future. A company's brought-forward tax losses cannot be used to offset profits of other companies through group relief.

Pre-Sale Dividend

The seller may prefer to realize part of the value of his/her investment as income by means of a pre-sale dividend. The rationale here is that the dividend may be partially or fully exempt, and would reduce any gain on the disposal which may be fully assessable.

Transfer Taxes

The transfer of shares in a Thailand company will be subject to stamp duty in Thailand at the rate of 0.1 percent of the greater of the paid-up value of the shares or the nominal value. The stamp duty liability will prima facie fall on the transferor, however should the transaction be executed offshore, the liability will rest with the first holder of the share transfer document in Thailand.

Choice of Acquisition Vehicle

The most common form of entity in Thailand is the private limited company. In general, foreign companies prefer to operate as private limited companies, as opposed to branch offices, to limit liabilities. Thailand does not generally recognize flow-through vehicles such as trusts.

Local Holding Company

A Thai holding company may be used; however, with a lack of grouping rules available to offset any losses in a group with income from other entities, this may not be an attractive option.

A Thai holding company may also be relevant where the foreign ownership restrictions would not allow majority foreign ownership. A Thai private limited company may be wholly-owned by foreigners, however, for certain business activities reserved for Thai nationals, foreigner participation is generally allowed up to 49 percent.

Dividends paid from the underlying company should be exempt from tax in the hands of the holding company, provided they hold at least 25 percent of the shares in the company and they hold the shares for at least three months either side of payment of the dividend.

Foreign Parent Company

Because of the restrictions on foreign ownership, a foreign company cannot hold assets directly (in particular restrictions on land ownership). In certain circumstances a Thai private limited company may be wholly-owned by foreigners, but, as mentioned above, certain business activities are reserved for Thai nationals with foreigner participation limited to 49 percent.

Thailand imposes withholding taxes (WHT) on dividends (10 percent on all dividends paid to foreign companies) and interest (10 percent/15 percent). In addition, foreigners may be subject to WHT in Thailand on disposal of any local assets; a Thai purchaser would be required to withhold from the sale proceeds an amount equal to 15 percent of the gain derived by the foreign entity on disposal.

Non-Resident Intermediate Holding Company

If the foreign country taxes foreign capital gains and dividends, it is not uncommon for a foreign intermediate holding company to be used to defer this tax. Potential tax benefits may also be attained on disposal, with double tax agreements (DTAs) with certain countries also providing for an exemption from local WHT on any gain derived upon disposal.

Local Branch

A company incorporated under foreign laws may establish a branch office to do business in Thailand.

As a condition for approval of an Alien Business License for a branch of a foreign corporation, minimum capital of THB 3 million must be brought into Thailand.

For tax purposes, the branch of the foreign company should constitute part of the same legal entity as its head office. The branch would be taxable in Thailand on net profits attributable to its business in Thailand. Any gains derived from the sale of branch assets would be prima facie subject to tax in Thailand.

It should be noted that while a foreign corporation would not be taxable in Thailand on foreign-sourced income, the same is not always true for a branch; fees paid by a foreign entity to the branch in respect of work performed by the branch would be subject to Thai tax.

Joint Ventures

Although an unincorporated joint venture has not yet been recognized under the Thai Civil and Commercial Code, income from a joint venture is subject to corporate tax under the Revenue Code, which classifies it as a single tax entity.

Choice of Acquisition Funding

A purchaser using a Thailand acquisition vehicle to carry out an acquisition for cash will need to decide whether to fund the vehicle with debt or equity, or even a hybrid instrument which combines the characteristics of debt and equity. The principles underlying these approaches are discussed later in the chapter.

Debt

The advantage of debt is the potential tax-deductibility of interest and the ease in repatriating the investment contribution through repayment of debt principal, because the payment of dividends is not deductible and returns of capital can be administratively difficult and time-consuming.

Because of the lack of grouping rules in Thailand, if the debt is at the Thai company level it should be held in the

company earning the taxable profits to ensure the tax-deductibility benefit.

Although there are no debt/equity restrictions for income tax purposes, there may be other regulatory requirements which require a certain level of equity (such as BOI rules, which generally require a 3:1 debt-to-equity ratio).

Deductibility of Interest

There is no formal definition of interest in Thai tax law, however it generally includes: interest on bonds, deposits, debentures, bills, and secured/un-secured loans.

Generally interest expenses incurred on funds borrowed for the purpose of the business are deductible and include borrowings to fund share acquisitions and for the payment of dividends. Broadly, a company's accounting treatment of interest will be followed for tax purposes (that is, generally on an accruals basis, even where the interest is not actually paid for an extended period of time).

Thailand has no thin-capitalization provisions to limit the deductibility of interest based on debt/equity levels. However, the Thailand Revenue Department may apply the transfer pricing rules to restrict interest deductibility when the interest rate charged is higher than an arm's length rate.

Withholding Tax on Debt and Methods to Reduce or Eliminate

Interest payments offshore are subject to WHT at the rate of 15 percent of the gross amount. The rate may be reduced to 10 percent under an applicable DTA when the interest is paid to a bank or financial institution.

Although a deduction is provided in Thailand for interest on an accruals basis, the remittance of WHT to the Revenue Department must be on payment. As such, there may generally be timing benefits available when the debt is with an entity that would only seek to tax the interest income on a cash basis.

Checklist for Debt Funding

- Interest payments offshore are subject to WHT at 15 percent of the gross amount.
- The lack of thin-capitalization provisions, combined with a 37-percent effective tax rate on the repatriation of profits offshore through the payment of dividends, means that debt funding may reduce the effective tax rate if the level of profits permits.

Equity

A purchaser may use equity to fund its acquisition, and foreign investors may be required to use a certain debt/equity ratio to ensure certain BOI approvals are attained.

There is no minimum level of capitalization; however a limited company's capital must be sufficient to accomplish its objectives. In addition, all shares must be subscribed to, and at least 25 percent of the shares must be paid up.

Using only equity funding may not be attractive, because dividends are not deductible for Thailand tax purposes, and the effective tax rate on the repatriation of profits offshore from Thailand is 37 percent (30-percent corporate tax plus 10-percent WHT). In addition, because of the difficulty in achieving a return of capital it may be difficult for the investor to recover the funds it has injected.

However, despite this lack of flexibility, equity may be more appropriate than debt in certain circumstances, such as when the target is loss-making, or it may not be possible to obtain immediate tax relief for interest payments.

Thailand allows for an entire business transfer, under which the business and liabilities of one company are transferred to another company as an asset sale. The Thailand Revenue Code allows the transaction to be accounted for at book value for corporate income tax purposes (that is, no taxable gain or loss), but the consideration paid can be at market value. Furthermore, the Thailand Revenue Code allows the asset transfer to be free of VAT. One of the conditions of the entire business transfer is that the transferor must start liquidation procedures in the year of the transfer.

Thailand also has an amalgamation process where two companies can merge to form a new company. This transaction should be free from Thai corporate income tax, but any tax losses in either of the original companies will be lost. Both the original companies dissolved as a part of the amalgamation.

Hybrids

Generally hybrid securities, including redeemable preference shares, are not available.

Discounted Securities

The tax treatment of securities issued at a discount to third parties will generally follow the accounting treatment (that is, the discount accrues over the life of

the security). The discount should constitute interest for WHT purposes.

Deferred Settlement

The tax legislation is not clear on the treatment of deferred settlements. Each case should be considered on its merits.

Other Considerations

Concerns of the Seller

The seller may prefer to realize part of the value of his/her investment as income by means of a pre-sale dividend. The rationale here is that the dividend may be partially or fully exempt, and would reduce any gain on the disposal which may be fully assessable.

If the seller is a non-resident of Thailand, the vendor may prefer to dispose of the shares in a Thailand resident company to another non-resident company, to avoid any potential WHT in Thailand.

Company Law and Accounting

Under Thai law, there are two types of companies, limited companies, and public limited companies. Incorporation and operation of limited companies are governed by the Civil and Commercial Code, while public limited companies are normally governed by the Public Limited Company Act 1992.

Additionally, the Foreign Business Act 1999 should be considered as the most important law for foreign investors, since it specifies the foreign ownership restrictions on certain activities that may require the permission from the authorities prior to engaging the business.

The basic concept of the limited company is similar to a western corporation. A limited company is a legal person with a registered capital that should be reasonably sufficient to achieve the company's objectives. The minimum number of shareholders required at all times is three. The liability of shareholders is limited to the fully paid-up amount of shares held, but the minimum payment for each share is only 25 percent of par value. In addition, non-voting rights are not permitted both in common or preference shares. Unless it is prescribed as a business reserved for Thai nationals, for which foreign participation is only allowed up to 49 percent, the company may be wholly-owned by foreigner.

Although the procedure of incorporation of a public limited company is not much different from a limited company, the governmental regulatory requirement is more complex, since a public limited company is

allowed to sell its shares to the public. A limited company can be converted to a public limited company according to the relevant regulations. The advantage is that a public limited company may offer both its shares and debentures to the public. A public limited company wishing to list its shares on the Stock Exchange of Thailand (SET) must obtain the approval from SET and the Securities and Exchange Commission of Thailand.

Although Thailand has not yet adopted the International Financial Report Standards (IFRS), international accounting principles are generally recognized and practiced in Thailand.

Audited financial statements of legal entities (including companies, branches, representative, and regional offices, etc.) must be certified by an authorized auditor and lodged with the Revenue Department and the Commercial Registrar for each accounting year. Documents may be prepared in any language, provided a Thai translation is attached.

A newly-established company should close its accounts within 12 months from the date of registration. The accounting year is generally the calendar year. If a company wishes to change its accounting period it must obtain written approval of the Director-General of the Revenue Department.

Group Relief/Consolidation

Thailand does not provide for group relief or tax consolidation for corporate tax purposes.

Transfer Pricing

Thailand has no detailed transfer pricing legislation. However, transfer pricing guidelines were issued by the Thai Revenue Department on 16 May 2002 (Departmental Instruction No. Paw 113/2545). The transfer pricing guidelines issued by the Thai Revenue authority do not have the status of legislation, but are internal directives that Thai Revenue officials must adhere to when conducting tax audits, reviews, and investigations.

A key element of the guidelines relates to the Thai Revenue's definition of market price. The concept of an arm's length price under the Organization for Economic Cooperation and Development's (OECD) Transfer Pricing Guidelines was adopted by the Revenue Department as a guide in establishing the market price. Broadly, market price is defined by the guidelines to mean compensation for goods, services, or interest that independent contracting parties would determine in good faith (the comparable transaction).

Dual Residency

There are no real advantages in seeking to establish a dual-resident company.

Foreign Investments of a Local Target Company

A Thai legal company will be taxed on all foreign income, including foreign dividends, interest, and gains derived from foreign investments. There are however, no controlled foreign company (CFC) or similar provisions that seek to tax the income where it is being earned offshore.

In addition, the foreign dividends may be exempt from Thai corporate tax if the Thailand company holds at least 25 percent of the shares of the foreign company (for a period of at least six months prior to receipt of the dividend), and the underlying profits from which the dividends were paid were subject to tax in the foreign country at a rate of at least 15 percent.

Comparison of Asset and Share Purchases

Advantages of Asset Purchases

- The purchase price of the relevant assets, including goodwill, may be depreciated for tax purposes.
- Liabilities and business risks of the vendor company will not be transferred to the purchaser.

Withholding Tax Rate Chart

All payers of certain types of assessable income are required to deduct tax at source from payments of such income to overseas resident individuals and corporations at the following rates:

Assessable Income	Withholding (%)	Tax Rate Note
Dividends	10	N/A
Interest	10 or 15	1
Royalties	5, 8, 10, or 15	2
Gains from the sale of shares within Thailand	0 or 15	3
Distribution of profits	10	N/A
Management fees, technical fees and other income, subject to withholding under Section 70 of the Revenue Code	15	4

Source: Section 50 & Section 70 of the Thai Revenue Code

1. The 10 percent rate applies to interest paid to foreign bank or financial institutions (including insurance companies) with residence in a country having a DTA with Thailand.
2. Lower rates of 5, 8 or 10 percent exist for royalties paid for the use of copyright of literary, artistic or scientific work or for the use of industrial, commercial or scientific equipment, to residents of certain countries with DTAs with Thailand.
3. Certain gains are tax-free under the terms of certain DTAs.
4. Under Thailand's DTAs, provided such income is not excluded from the meaning of "business profits" or not specifically treated as a royalty, entities without a Thai PE are not subject to Thai tax on such income. Accordingly, they are not subject to Thai withholding tax.

- It is possible to acquire only parts of the business.
- Interest to fund the acquisition of assets should be tax deductible.

Disadvantages of Asset Purchases

- Possible taxable gains derived from the assets in the hands of the seller.
- Benefits of tax losses remain in the target company.

Advantages of Share Purchases

- The vendor should not be subject to any taxable gains on the underlying assets.
- The purchaser may benefit from any unused tax losses despite the change in ownership or possible change in the loss company's business.
- Other tax benefits may also be acquired, such as deferred tax assets, tax credits, etc.

Disadvantages of Share Purchases

- The purchaser acquires historic tax cost base and there is no mechanism to reset the tax cost of the assets to market value for tax purposes.

As of 1 January 2009, Thailand has signed DTA's with 52 countries. The following withholding tax rates apply to recipient countries that do not have a PE or fixed base in Thailand.

Country	Dividends (%)	Interest (%)	Royalties (%)
Armenia	10	10/15 ¹	15
Australia	10	10/15 ¹	15
Austria	10	10/15 ¹	15
Bahrain	10	10/15 ¹	15
Bangladesh	10	10/15 ¹	15
Belgium	10	10/15 ¹	5/15 ²
Bulgaria	10	10/15 ¹	5/15 ¹⁰
Canada	10	10/15 ¹	5/15 ³
China, P.R.	10	10/15 ¹	15
Cyprus	10	10/15 ¹	5/10/15 ¹¹
Czech Republic	10	10/15 ¹	5/10/15 ⁴
Denmark	10	10/15 ¹	5/15 ²
Finland	10	10/15 ¹	15
France	10	3/10 ⁵	0/5/15 ⁶
Germany	10	10/15 ¹	5/15 ²
Hong Kong	10	10/15 ¹	5/10/15 ⁴
Hungary	10	10/15 ¹	15
India	10	10/15 ¹	15
Indonesia	10	10/15 ¹	15
Israel	10	10/15 ¹	5/15 ³
Italy	10	10/15 ¹	5/15 ²
Japan	10	10/15 ¹	15
Korea, Rep.of	10	10/15 ¹	5/10/15 ¹³
Kuwait	10	10/15 ¹	15
Laos	10	10/15 ¹	15
Luxembourg	10	10/15 ¹	15
Malaysia	10	10/15 ¹	15
Mauritius	10	10/15 ¹	5/15 ¹⁰
Nepal	10	10/15 ¹	15
Netherlands	10	10/15 ¹	5/15 ²
New Zealand	10	10/15 ¹	10/15 ⁷
Norway	10	10/15 ¹	5/10/15 ¹²
Oman	10	10/15 ¹	15
Pakistan	10	10/15 ¹	10/15 ⁶
Philippines	10	10/15 ¹	15
Poland	10	10/15 ¹	0/5/15 ⁶
Romania	10	10/15 ¹	15
Seychelles	10	10/15 ¹	15
Singapore	10	10/15 ¹	15
Slovenia	10	10/15 ¹	10/15 ⁷
South Africa	10	10/15 ¹	15
Spain	10	10/15 ¹	5/8/15 ⁸
Sri Lanka	10	10/15 ¹	15
Sweden	10	10/15 ¹	15
Switzerland	10	10/15 ¹	5/10/15 ⁴
Turkey	10	10/15 ¹	15
Ukraine	10	10/15 ¹	15
United Arab Emirates	10	10/15 ¹	15
United Kingdom	10	10/15 ¹	5/15 ²
United States	10	10/15 ¹	5/8/15 ⁹
Uzbekistan	10	10/15 ¹	15
Vietnam	10	10/15 ¹	15

Source: The Web site of the Revenue Department of Thailand. Last updated 1 January 2009

Notes

1. 10 percent applies to a recipient that is a bank or financial institution (including an insurance company)
15 percent for other interest payments.
2. 5 percent for the use of or the right to use any copyright of literary, artistic, or scientific work
15 percent for other royalties.
3. 5 percent for production or reproduction of any literary, dramatic, musical, or artistic work (but not including royalties in respect of motion picture films and works on film or videotape for use in connection with television)
15 percent for other royalties.
4. 5 percent for alienation or the right to use any copyright of literary, artistic, or scientific work
10-percent rate for alienation of any patent, trademark, design or model plan, secret formula, or process
15-percent rate for other royalties.
5. 3 percent for interest paid on loans or credits granted for four years or more with the participation of a financing public institution to a statutory body or to an enterprise in relation to the sale of any equipment or to the survey, the installation or the supply of industrial, commercial or scientific premises, and public works
10 percent applies to a recipient that is financial institution.
6. 0 percent for films or tapes (payable to a Contracting State or State-owned company)
5 percent for the use of or the right to use any copyright of literary, artistic, or scientific work
15 percent for other royalties.
7. 10 percent for the use of or the right to use any copyright, any industrial, commercial or scientific equipment, any motion picture film or film or videotape or any other recording for use in connection with television, or tape or any other recording in connection with radio broadcasting; the reception of, or the right to receive, visual images or sounds or both and the use in connection with television or radio broadcasting, visual images or sounds, or both, transmitted by satellite or cable, optic fiber or similar technology
15-percent rate for other royalties.
8. 5 percent for the use of or the right to use any copyright of literary, dramatic, musical, artistic, or scientific work excluding cinematograph films or films or tapes used for radio or television broadcasting
8 percent for the use of or the right to use industrial, commercial, or scientific equipment
15-percent rate for other royalties.
9. 5 percent for the use of or the right to use any copyright of literary, artistic, or scientific work including software, and motion pictures and works on film, tapes or other means of reproduction for use in connection with radio or television broadcasting
8 percent for the use of or the right to use industrial, commercial or scientific equipment
15-percent rate for other royalties.
10. 5 percent for the use of or the right to use any copyright of literary, dramatic, musical, artistic, or scientific work excluding cinematograph films or films or tapes used for radio or television broadcasting
15-percent rate for other royalties.
11. 5 percent for the use of or the right to use any copyright of literary, artistic, or scientific work including software, cinematograph films or tapes used for radio or television broadcasting
10 percent for the use of or the right to use industrial, commercial, or scientific equipment, or for information concerning industrial, commercial, or scientific equipment
15-percent rate for other royalties.
12. 5 percent for the use of or the right to use any copyright of literary, artistic, or scientific work;
10 percent for the use of industrial, commercial, or scientific equipment
15 percent for other royalties.
13. 5 percent for the use of or the right to use any copyright of literary, artistic, or scientific work including software, and motion pictures and works on films, tapes or other means of reproduction for use in connection with radio or television broadcasting
10 percent for the use of or the right to use any patent, trademark, design or model, plan, secret formula, or process
15 percent for the use of or the right to use industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience.

KPMG in Thailand

Wirat Sirikajornkij
KPMG Phoomchai Tax Ltd
48th Floor, Empire Tower
195 South Sathorn Road
Bangkok
10120
Thailand

Tel. +66 (0) 2 677 2423
Fax +66 (0) 2 677 2222
e-Mail: wsirikajornkij@kpmg.co.th

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