Asia Franchise
亚洲特许经营
加盟连锁/投资良机
& Business Opportunities

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Five Must-Do Franchise Support Tactics
五项必要特许经营权支持策略

Franchising in China: Disclosure Requirements, Re-Sale Price Maintenance and Enforcement
特许经营在中国: 披露要求以及转售商品价格的固定与执行

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Franchising in Thailand – Some current issues
泰国的特许经营——目前存在的一些问题

In Thailand, the franchising agreement is a legally binding agreement which outlines the franchisor's terms and conditions for the franchisee. As in most jurisdictions, it governs duties, rights, and obligations between the parties. The franchisor transfers to the franchisee a concept, a brand and know-how while the franchisee agrees to obey to all the specifications of the franchisor.

Today, there are currently more than 400 franchisors (majority foreign-owned) and more than 10,000 franchisees in Thailand. Most franchise operations take place in the food and restaurant sector, followed by services, education, and retailing, according to the Thai Department of Internal Trade.

No specific legislation in Thailand offers a comprehensive guide to franchising in general. Several laws are applicable to a franchising contract such as the Civil and Commercial Code or Trademark Act or even the Revenue Code.

It is within the Thai Revenue Code that many issues particular to franchising are addressed. In Thailand, 15% of the royalties owed to foreign franchisors not carrying on business in Thailand must be paid by Thai entities as the Thai withholding tax. The franchisee, as the payer of royalties, has the duty to withhold 15% income tax and remit the tax to the Revenue Department. Moreover, Thai franchisees have the duty to withhold 3% income tax and remit the tax to the Revenue Department. Likewise, VAT is imposed on payment of royalties to foreign franchisors. The Thai licensee, as a payer of royalties, is required to self-assess and remit 7% VAT to the Thai Revenue Department. The VAT paid to the Thai Revenue Department can subsequently be used by the Thai licensee as a credit against its VAT payable, or claimed as a refund. Those three taxes are the cornerstones of Thai tax law on franchising agreement.

It should be added that under Thai tax law, a foreign corporation (or in this case a foreign franchisor) may be considered as carrying on business in Thailand if it has in Thailand an employee or a representative whose activities generate income or gains in Thailand for the overseas corporation/ overseas franchisor. Because this person is generating revenue for the foreign franchisor in the form of the royalty stream, the franchisor might be subject to Thai income tax (30% corporate income tax on net profits). The relevant regulation under the Thai Revenue Code is Section 76 bis. Here, the practical application would be to carefully monitor the number of days and the type of services an employee of the overseas corporation/franchisor provides services to the Thai franchisee in order to not be deemed as carrying on business.

A new issue has been tackled by the Supreme Court in the judgment No. 4440/2552 of 2009. It concerns the treatment of local marketing expenses incurred by a franchisee in Thailand. In that case, the franchise contract stipulated that in addition to paying the foreign franchisor a franchise fee for the use of its intellectual property, the franchisor will control and supervise the marketing activities including advertising and promotion schemes of products. The marketing costs shall be borne by the franchisee, depending on the gross sale. The expenses are aimed at increasing brand awareness and generating local revenue, which hopefully will directly benefit the local franchisee. The Court decided that such payments should be considered taxable income to the franchisor. The Supreme Court held that the marketing expenses paid in Thailand to Thai firms should be treated as a part of the royalty fees payable to the foreign franchisor, and as such should also be subject to the 15-per-cent Thai withholding tax. Said benefits received by the foreign franchisor fall under the definition of "taxable income" under Section 39 of the Thai Revenue Code. The Court provided several reasons to justify that the marketing fees shall be taxable to the foreign franchisor. Firstly, the franchisor derives an economic benefit from having effective control over the franchisee›s marketing activities and does not have to promote its brand itself. Secondly, the minimum marketing expenses to be incurred are calculated on a similar basis to the franchise fees, and therefore are of a similar nature to the royalty fees. Last but not least, a Thai franchisee providing consideration in the form of indirect benefits, not subject to withholding tax would be unfair avoidance of Thai tax and encourage tax planning by foreign companies not carrying on business in Thailand.

Illustration:

Revenue	US$1,000,000
Gross Royalty—e.g.5%	US$ 50,000
Withholding Tax 15%	US$7,500
Income Tax 3%	US$ 1,500
VAT 7%	N/A
Marketing Contribution—e.g.2%; 15% of 2%	US$3,000
Net Royalty Income to franchisor	US$38,000

Accordingly, franchisors may be exposed to additional tax consequences in regards to how local marketing/advertising spend may be calculated as taxable under this decision. According to Thai tax regulations, foreign franchisors will face lower 'net' royalties (here, in our example, a net Royalty of 3.8% instead of 5%). Careful tax planning is critical.

In order to get around the solution of the Supreme Court judgment, two possible ways can be used. The first one would be to redraft the contract so that the marketing activities are not completely controlled or dictate by the franchisor. The second way would be to design a clause with a new mechanism to calculate marketing expenses that is different from the royalties' stipulation in order to differentiate the two concepts.

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在泰国，特许经营协议是一份具有法律约束力的协议，概述了授权商对加盟商的条款及条件。正如在大多数司法权区一样，它管理着各方之间的职责、权利和义务。加盟商同意遵守授权商的所有规格时，授权商向加盟商转移概念、品牌和技术诀窍。

在泰国，目前有400多家授权商（多数是外商独资）和10,000多家加盟商。根据泰国内贸厅的统计，大多数特许经营业务出现在食品和餐饮业，其次是服务、教育和零售业。

总的来说，在泰国没有专门的立法为特许经营提供全面的指导。有多个法律适用于特许经营合同，例如民事和商法典，或者商标法，甚至税收法。

泰国税收法解决了特许经营特有的许多问题。在泰国，应付予不在泰国经营业务的外国授权商15%的特许权使用费，必须由泰国实体支付，作为泰国预扣税。作为特许权使用费的支付者，加盟商有义务预扣15%的所得税，代缴到税务局。而且，泰国的加盟商有义务预扣3%的所得税，代缴到税务局。同样，对支付给授权商的特许权使用费征会征收增值税。作为特许权使用费的支付者，泰国的被许可人需要自行评税，并向税务局代缴7%的增值税。支付给税务局的增值税随后可以被泰国的被许可人作为其应纳增值税的一项抵免，或者要求退税。这三个税种是泰国在特许经营协议方面的税收法律基石。

还应指出，根据泰国税法，如果外国公司（或者在这种情况下的外国授权商）在泰国的雇员或代表的活动为海外公司或海外授权商产生了收入或者增加了收益，可被视为在泰国经营业务。因为这个人为外国授权商以特许权使用费的形式产生收入，授权商可能要支付泰国所得税（30%的公司净利润所得税）。泰国税收法对此的相关规定是第76条。这里，为了不被视为经营业务，实际应用将谨慎监控海外公司/授权商的雇员为泰国加盟商提供服务的天数和服务类型。

最高法院在2009年第4440/2552号判决中解决了一个新问题。它关系到加盟商在泰国当地产生的营销费用的处理问题。在该种情形下，特许经营合同规定，除了作为其知识产权的使用费，向外国授权商支付特许经营费，授权商还会控制和监督其营销活动，包括产品广告和促销计划。营销费用应该由加盟商承担，取决于总销售额。这些费用的目的是提高品牌意识，并在当地产生收入，希望能直接让当地加盟商受益。法院裁定支付给授权商的这种费用应该作为应税收入。最高法院认为，在泰国，支付给泰国公司的营销费用应该作为支付给外国授权商的特许权使用费的一部分，因此也应当缴纳15%的泰国预扣税。外国授权商取得的上述收益符合在泰国税收法第39条“应税收入”的定义。法庭提供多个理由来证明外国授权商的营销费用应纳税。首先，授权商的经济利益来自于对加盟商营销活动的有效控制，并且不需要推广其品牌。其次，产生的最低营销费用是根据特许权使用费的类似基准来计算的，因此是一个类似性质的特许权使用费。最后，但同样重要，泰国的加盟商以间接利益形式提供报酬，毋须缴纳预扣税，不正当地规避了泰国税项，鼓励不在泰国经营业务的外国公司进行税务规划。

插图：

收入	1,000,000美元
特许权使用费总额——例如：5%	50,000美元
预扣税15%	7,500美元
所得税3%	1,500美元
增值税7%	不适用
营销贡献——例如：2%；2%中的15%	3,000美元
授权商的特许权使用费净收入	38,000美元

因此，根据这一决定，由于当地的市场营销和广告支出可能作为应纳税计算，授权商可能须缴纳附加税。根据泰国税收法规，外国授权商将面临更低的“净”特许权使用费（这里，在我们的例子中，净特许权使用费为3.8%，而不是5%）。精心的税收规划至关重要。

为了避开最高法院判决的解决方案，可以使用两种可能的方法。第一种方法是要重新起草合同，市场营销活动就是不完全被授权商控制和支配。第二种方法是设计一种跟特许权使用费的规定不同的新机制条款来计算市场营销费用，以便区分不同的两种概念。

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