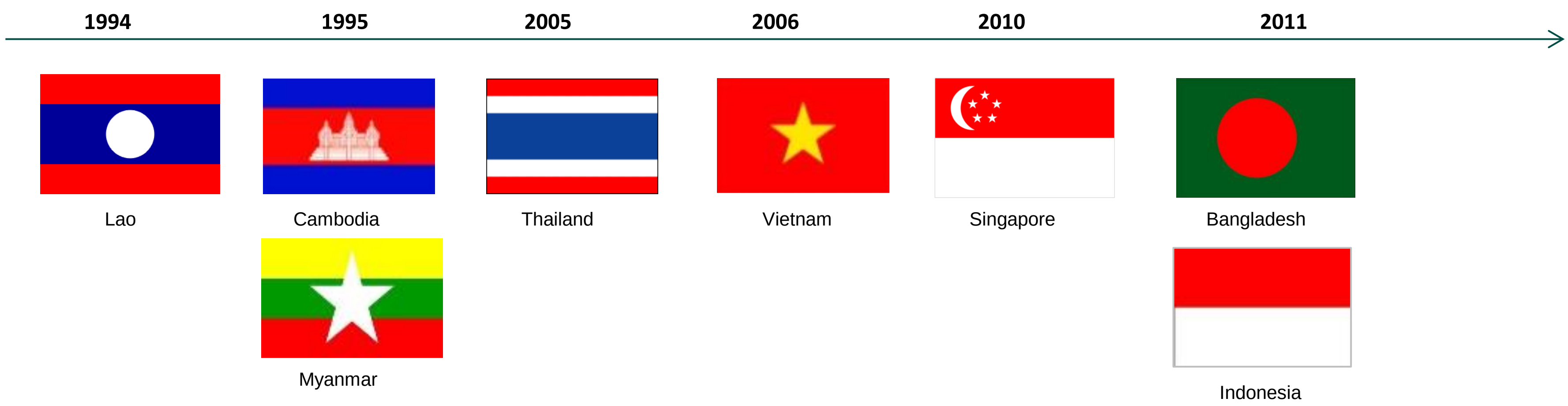
Myanmar Laws, Regulations and Policies that every investor should know

William D. Greenlee, Jr., Partner, DFDL Myanmar
Jack Sheehan, Partner, Tax Practice Group

What makes us unique?

"We are pioneers in emerging markets"



Our Strategy

Not "Go Where our Clients Go", BUT "Go BEFORE you Go".

AGENDA

1. Myanmar Law, Regulations and Policies
2. Recent Myanmar Legislation
3. Tax considerations and protection for Canadian companies considering doing business in Myanmar

AGENDA

1 Myanmar Law, Regulations and Policies

2 Recent Myanmar Legislation

3 Tax considerations and protection for Canadian companies considering doing business in Myanmar

Myanmar Laws, Regulations and Policies that every investor should know

DFDL LEGAL & TAX

1. Preliminary
2. The Foreign Investment Law (FIL)
3. The Rules and Notification
4. Foreign Equity Ratio – Bring in Capital
5. Using Immovables as (Loan) Security
6. Labor
7. Foreign Arbitration

1. Preliminary

DFDL LEGAL & TAX

- Myanmar's New Foreign Investment Law ("**FIL**") was passed on November 2, 2012
- The FIL is optional, except in certain sectors (as described below)

FI under FIL	FI under the Myanmar Companies Act
Special benefits (long term lease, tax holiday, etc.)	No special benefits
Bring in capital higher; burdensome application	Bring in capital lower; Less formation documentation

- This presentation will focus on the Foreign Investment under the new FIL regime

2. Foreign Investment Law (FIL)

- Myanmar's New Foreign Investment Law ("**FIL**") was passed on November 2, 2012. It replaces the MFIL of 1988.
- Generally the FIL is **optional except** in the case of a) major infrastructure deals 2) manufacturing and 3) State Owned Enterprise Law of 1989 ("**SOE Law**"). With FIL approval comes notification issued under the SOE Law to grant an exemption.
- Where the FIL is optional, the reason investors use the FIL is to get the **benefits**, like land rights and the tax holiday, discussed later.
- Administration by the **Myanmar Investment Commission** (**MIC**).

FIL— General Attributes of FIL

- Government **guarantee against expropriation**. Same in old and new law.
- **Foreign exchange benefits** (guaranteed remittance of profits; remittance upon exiting the investment). Same in old and new law.
- **Equity** in an FIL company **can be transferred** with approval of MIC.
- FIL companies may enter into **long-term leases** up to 50 years + 10 + 10
- **Tax holiday.** Accelerated depreciation and customs exemptions are the same as the old law with added incentives.

3. The Rules and Notification

- On 31 January 2013, as per the FIL, the Ministry of National Planning and Economic Development issued the FIL Rules (the "**Rules**") and the MIC issued the Notification № 1/2013 (the "**Notification**").
- The Rules and Notification provide additional details and guidance on the FIL.

DFDL LEGAL & TAX

- **Transferable Equity**: One of the most important features of the Rules is that shares held by Myanmar citizens of entities formed under the FIL, *with MIC approval*, may now be transferred to foreigners and vice versa. [Rule 65]
- If an **extension** is needed for the **construction period**, the investor must apply to the MIC at least 60 days before expiration of the construction period. [Rule 57]
- Investor can **sub-lease or mortgage the long lease** on application to the MIC. This is a significant step in further developing off-shore financing.

The Rules - Provisions

- Investors must submit a **progress report** to the MIC every 90 days. [Rule 52]
- The investor must submit a **schedule of investment** if the proposal provides that the investment will be brought in over a period of time. [Rule 135]
- The Rules are **not applicable to trading**. [Rule180]

The Rules—Prohibitions

There are a few prohibitions in the rules, notably:

Schedule 1

- Drilling oil and gas hand-dug wells up to 1,000 feet in depth
- Small and medium mineral production
- Electricity generation under 10 megawatts

Schedule 2

- Small farming

Schedule 3

- Small livestock breeding

Schedule 4

Fishing in Myanmar’s Territorial waters

DFDL LEGAL & TAX

I. Category 1. Economic Activities Prohibited to Foreign Investors

Important examples:

Production of arms and explosives for defense; Prospecting, exploration and production of jade and gemstones; Small and medium scale production of minerals;

II. Category 2. Economic Activities Only under Joint Ventures for Foreign Investors

Not necessarily 80-20 as set forth in Rule 20. Can be any amount unless limited elsewhere, for example in Category 3, below.

Important examples:

Large scale production of minerals, construction of buildings, infrastructure projects, tourism, food industry, brewery, bottled water business, packaging, large scale mineral production, air transport services, hospital business

DFDL LEGAL & TAX

III. Category 3. Economic Activities Permitted with Specific Condition

Important examples:

- **Saw mills**—maximum 25% for foreign investor; Mining—limits on exploration feasibility study, can be extended and production 15 year production period, 5-year extensions ; Casinos—Myanmar people can't play; Hotels—100% foreign ownership allowed in 3-stars and above hotels. All others must be joint ventures;
- **Approval or recommendation** from the Union Government and relevant ministry are often required;

- **Some activities are only allowed in JV with the State such as:**
  - Production and marketing of rare earths, strategic mineral, radioactive mineral, manufacturing and marketing of gems, jewelry and finish products (statue, curving), Production and marketing of explosive chemicals, Production of vaccine and distribution of it, Shipping agency services for foreign owned ships, Dockyard services, Government-Foreign investment hospital/clinics, exploration and production of coal.
  - Business concerning with **sales of electricity** by establishing hydropower and coal-fired thermal power plants – JV with State required on BOT basis

IV. <u>Category 4</u>. Environmental (and Social) Impact Assessments

Important examples:

Hard minerals; Oil & Gas; Hydroelectric power deals

4. Foreign Equity Ratio – Bring in Capital

DFDL LEGAL & TAX

Permitted Foreign Equity in FIL company:

- 100% foreign ownership allowed unless provided otherwise.
- If JV is needed:
  - Equity ratio between foreign investor and local partner 'upon mutual agreement between the parties' except in restricted sectors
  - No general limitation on foreign investors lower limit
- Some special limitations, e.g. Saw mills (max. 25% FI) , Production of semi-finished wood products (max. 35% FI)

Bring in Capital

- No MIC notification – see previous MFIL, USD 300,000 for services and USD 500,000 for manufacturing

5. Using Immovables as (Loan) Security

- **General Rule:**

The ability of foreign companies in Myanmar to secure immovable property, or foreign banks located outside Myanmar to take security of immovable property for their loans or credit facilities for various transactions, is limited.

- **Principal**
  - A security can be taken over immovable property under the ***Transfer of Property Act of 1882***. This Act is the basic law applying to most transactions involving immovables such as sale, mortgage, gift, lease, exchange and charge.
  - Security which falls within this Act includes both traditional ***mortgages*** and so-called "***charges***" on immovable property.
    - Distinction
      - » *Mortgage*: A mortgage is a "transfer" of an interest in specific immovable property to secure a debt or an obligation which can give rise to a monetary claim if there is a breach of such obligation by the mortgagor.
      - » *Charge*: There is no "transfer" of an interest but only the creation of a right to make payment out of certain property as security for a debt.

5. Using Immovables as (Loan) Security

DFDL LEGAL & TAX

Transfer of Immoveable Property Restriction Law of 1987

- This law generally prohibits “transfer’ of immovables to foreigners.
- ”*Immovables*” are defined as lands and benefits arising out of land, buildings and things built or imbedded in the earth and other things attached to the buildings. This presumably would include an interest in a lease as well as a mining lease/concession.
- Section 3 provides that *“no person shall transfer any immovable property by way of sale, purchase, gift, acceptance of a gift, mortgage, acceptance of a transfer by any other means to a foreigner or a company owned by a foreigner”.*
- a “charge” may (in theory at least) be created on immovable property as a security taken by (foreign) lenders since it does NOT involve the “transfer” of an immovable.

5. Using Immovables as (loan) Security

DFDL LEGAL & TAX

Myanmar's New Foreign Investment Law/The Rules of 31 Jan, 2013:

- The FIL permits (with MIC approval) the mortgage of leases and sub-letting.
- An investor may sub-lease or mortgage a long-term lease on application to the MIC. [Rule 62].

Registration of Mortgages and Charges:

- Registration must be made in the Office of the Registration of Deeds (Registration Act) and with the Directorate of Investments and Companies Registration under the Companies Act.

Conclusion:

- Although in theory charges (Transfer of Property Act) and mortgages of leases (under the FIL) are possible we are not aware of any (foreign) lender ever having done this.

6. Labor

For skilled positions, the FIL provides an obligation to increase over time the use of local Myanmar staff. The investor is to achieve:

- At least 25 % of its workforce to be Myanmar nationals during the first two years;
- At least 50% during the second two years; and
- At least 75% during the third two years.

7. Foreign Arbitration

- Rule 169 and 170 of the FIR seem to suggest that investors may be able to choose alternative non-Myanmar governing law and arbitration rules (like Singapore).
- The **New York Convention** has recently been acceded to by Myanmar and which has come into effect in July 2013. However, only enforceable when ratified. Ratification is expected soon. However, timeframe is unclear.

AGENDA

1 Myanmar Law, Regulations and Policies

2 Recent Myanmar Legislation

3 Tax considerations and protection for Canadian companies considering doing business in Myanmar

Key Recent Legislation

- **New Myanmar Citizens Investment Law of 31 July 2013**
  (repealing the Myanmar Citizens Investment Law of 1994)
  – Purpose: Align the MCIL with the FIL, i.e. foreseeing similar benefits tax exemptions, guarantee against nationalization
  – Main Provision article 16.e: *"[the investor is] entitled to transfer and sell some portion of his shares or all shares to any foreigner or to any foreign company in accord with the Foreign Investment Law."* – Unofficial translation

    ! shares of a Myanmar Investment company may now be transferred or sold to foreigners or foreign entities with MIC approval

    ? Article unclear - Wait for issuing rules and regulations

  – MIC the relevant authority (same as old law and FIL)

Key Recent Legislation *cont'd*

- **New Central Bank Law of 11 July 2013**
  - Law gives autonomy to the Central Bank from the Finance Ministry which is very relevant as to increasing investors' confidence in investing in Myanmar
  - Rules have to be adopted within three months of the law coming into force
  - The new law contains no regulations on the formation of joint ventures between foreign and local banks yet.
- **The Security Exchange Law of 31 July 2013**
  - First important step in establishing the Myanmar stock exchange (originally set to be established by October 2015, but may be sooner)
  - Daiwa Research Institute and Tokyo Stock Exchange of Japan helped in the drafting

DFDL LEGAL & TAX

Social Securities Law, enacted on 4 June 2013

- Relevant as it brings compliance obligations regarding health and insurance onto the table
- Notifications expected to be enacted soon

Foreign Exchange Management Law of 10 August 2012

(repealing the Foreign Exchange Regulations Act, 1947)

- Issuing rules and regulations expected to provide more clarity

Farmland Law of 30 March 2012 and Farmland Rules of 31 August 2012 – both enacted on 31 August 2012

(repealing the Land Nationalization Act, 1953; Tenancy Law, 1963; Peasant's Right Protection Law, 1963; Nationalization of Farm Land and Rules of 1954 and the Land Rent Rules of 1963.)

- Relevant considering that reference to "*La Na 39*" Land is now not accurate.
  **Note: for land cases prior to the enactment of the Farmland law and rules, "La Na 39" can be regarded as still applicable.*
- As from now, reference to Land Use Certificates should be made.
- However, still a general lack of implementation of the communal registrations of the LUCs.

Legislation expected to pass soon

- **Myanmar Arbitration Law** – Implementing the New York Convention (expected by the end of 2013)
- **Telecommunications Law** – Recently two Telecom licenses have been granted (expected in the next coming months)
- **Myanmar Companies Act** - On 23 July, the Director General of the Ministry for National Planning and Economic Development announced that the Myanmar Companies Act of 1914 is set for revision. He referred to rewriting the law, rather than amending it. ADB is helping the Ministry to rewrite the Act. Online company registration planned.
- **Condominium Law** - being finalized. This law will reportedly allow foreigners limited ability to buy apartments.

Legislation expected to pass soon

- **Mining Law** or Amendment to existing 1994 Mining Law - Australia assists Myanmar in the regulatory reform of the sector. The new regime is set to ease restrictions and attract foreign investment into its mining sector.
- Amendments to **Transfer of Property Act**
- **Printing and Publishing Law**– The Bill was approved by the Lower House of Parliament. However it is controversial. The Myanmar Journalists Network is opposed to the Bill, saying that it restricts media freedom.
- Regulation implementing various provisions of **Foreign Exchange Management Law**
- Regulation implementing various provision of the **Central Bank Law** related to Foreign Banks

Conclusion for Business

- Many old laws on the books:
  - not always relevant to current age and int'l practices;
  - implementation, application and enforcement inconsistent;
  - not always well known.
- Too many new laws, requiring deep and broad expertise from too few people.
  - Too many priorities: Many changes to system required to upgrade system;
  - Law making institutions and person overwhelmed;
  - Source of drafts the government (greatest resources): circulated?
- Potential Result:
  - Framework laws, with substantive details in the decrees;
  - Slowing rate of progress?
  - Lack of implementation: Laws effective but not applied (CBM law example) (still apply old regulations)

AGENDA

DFDL LEGAL & TAX

1 Myanmar Law, Regulations and Policies

2 Recent Myanmar Legislation

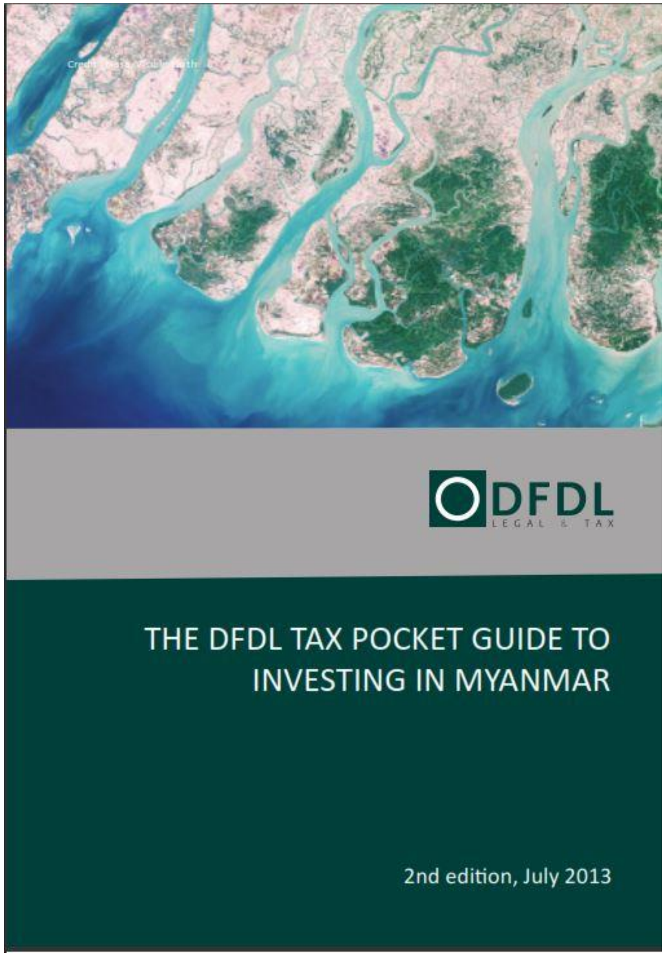
3 Tax considerations and protection for Canadian companies considering doing business in Myanmar

An updated and new edition of

The Tax Pocket Guide to Investing in Myanmar

is now available online.

Download at www.dfdl.com



Canadians investing in Myanmar

DFDL LEGAL & TAX

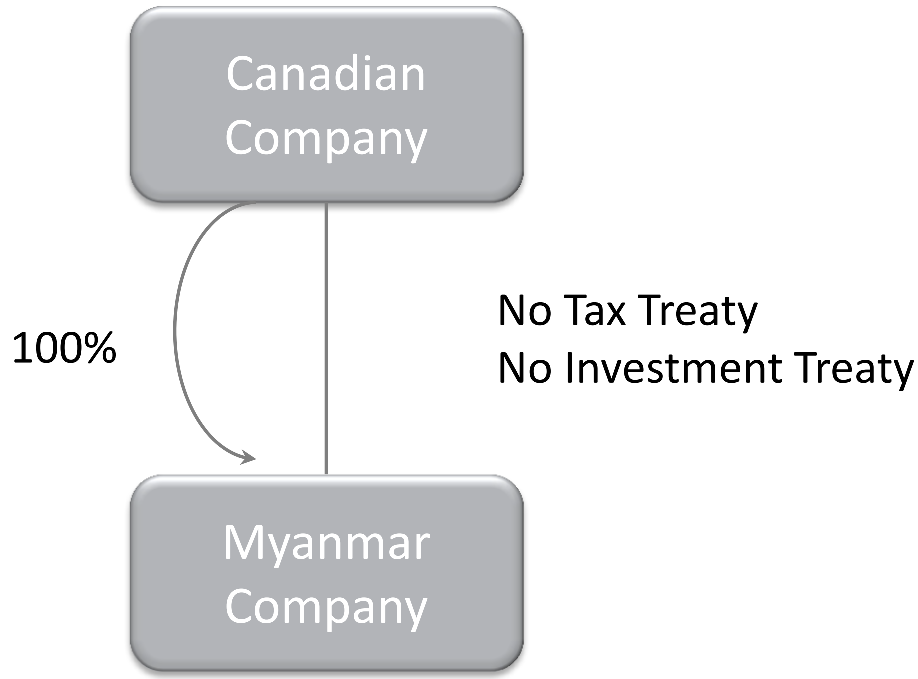
- What protection is available to Canadian companies and individuals doing business in Myanmar?
- How international tax and investment planning can help Canadian investors?
- How can Thailand based investors invest into Myanmar?

Comparison of Myanmar and Thai Taxes

DFDL LEGAL & TAX

	Myanmar	Thailand
CIT/Profit Tax	25% / 35%	20%
Commercial Tax, VAT	5%	7%
Withholding Tax - Dividends	0%	10%
Withholding Tax - Interest	15%	15%
Withholding tax - Royalties	20%	15%
Withholding tax – Service Fees ,Management Fees	3.5%	15%
Personal Income tax – Residents – Non residents	1-20% 35%	5-37%
Capital Gains Tax	40%	20%
Capital Gains Tax for Oil & Gas	40% - 50%	20%
Tax Treaty with Canada	No	Yes
Investment Treaties with Canada	No	Yes

Example: Canadian Co invests in Myanmar Co



Tax Treaties

- Singapore, Malaysia, UK, India, Lao PDR, Vietnam, Korea and treaties signed with Indonesia and Bangladesh which are pending ratification into force.

Investment Treaties

- China, India and Philippines in force. Treaties with Lao PDR, Thailand and Vietnam which are pending ratification into force.
- ACIA – ASEAN Comprehensive Investment Agreement.

DFDL LEGAL & TAX

Investment Treaties

- Investor protection of moveable and immoveable property
- Protection of concession/contracts including mineral extraction
- Shareholder protection over net operating profits
- Protection on proceeds from the sale of investments
- Specific provisions on dispute resolutions, if not resolved within six months case referred to international tribunal

What are the Benefits of Tax Treaties *cont'd*

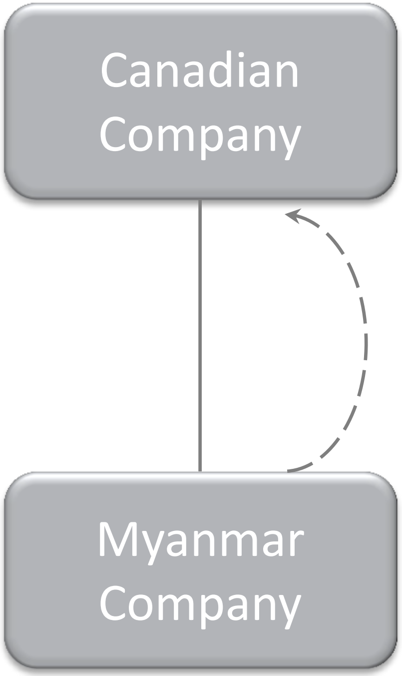
Tax Treaties

- Protection/exemption from capital gains tax on sale of investments
- Exemption from CIT/profit tax on short term projects
- Exemption from personal income tax for employees working on short-term assignments
- Reduction in withholding taxes applied to payments of dividends, interests and royalties

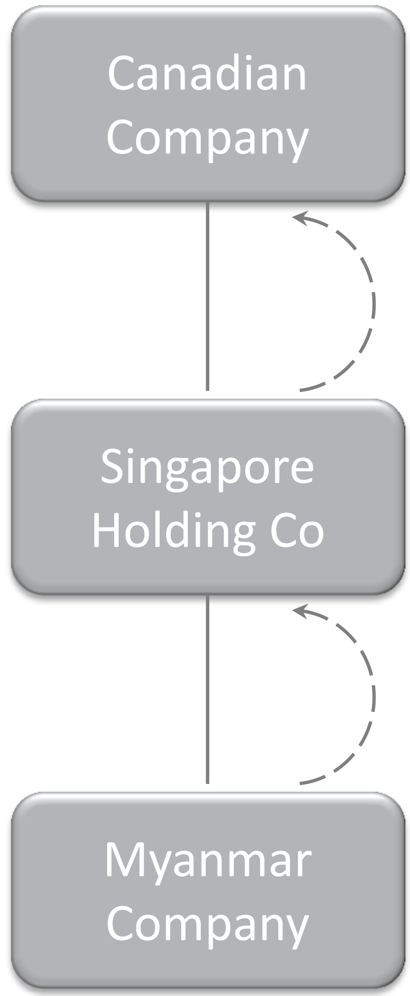
Canada - Myanmar

Withholding Tax on Transactions:

– Dividends	0%
– Interest payment on loans	15%
– Royalties & IP	20%
– Management fees	3.5%
– Other service or profit fees	3.5%
– Capital gain tax when company is sold	40%-50%



International Tax Structuring for Canadian Companies in Myanmar



Dividend = 0%

Tax Treaty → Yes
Investment Treaty → Covered by ACIA

Capital Gains Tax = 0%

Dividend = 0%
Interest = 8-10%
Royalties = 10-15%
Service Fees = 0%/3.5%

Capital Gains Tax under Treaty = 0%/10%

How can Thai based Investors invest into Myanmar?

- Thai tax system is unfavorable for outbound investment as it taxes all types of income from all sources.
- There may also be merit to using a Thai Regional Operating Headquarters as an investment vehicle.
- Thailand and Myanmar have signed a tax treaty.
- ACIA.

How can tax treaty and ACIA benefit Canadian investors with existing Thai companies?

Thailand/Myanmar short-term project

Example

A Canadian company has won a tender for a short term contract to provide services to a project in Myanmar.

- Duration – 5 months
- Service fees – in USD 5,000,000
- 20 Project Personnel with average salaries of USD 150,000 pa

Thailand/Myanmar short-term project *example cont'd*

DFDL LEGAL & TAX

If direct from Canada:

Profit Tax =	5,000,000
	X 3.5%
	175,000

Personal Income Tax

Let's say (5/12 months)

Salaries of 20 project personnel

Salary 150,000 cost =	1,250,000
PIT	X 35%
	437,000

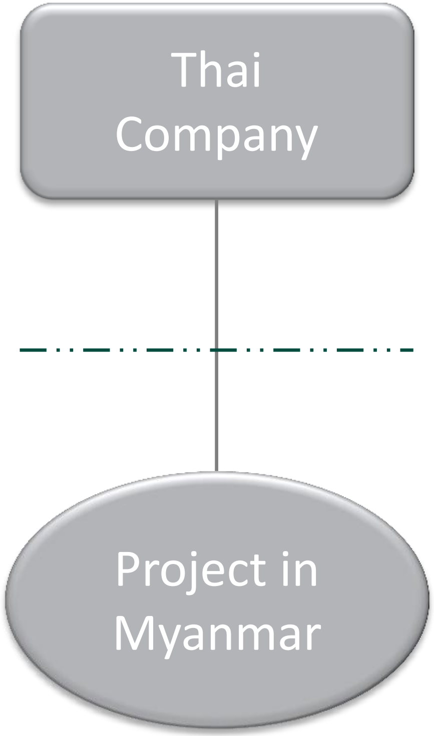
If Thai company provides services directly to Myanmar Project

Profit tax on service fee of 5,000,000:

= Zero, exempt under tax treaty if under 6 months in any 12 month period

Personal income tax on salaries of project team:

= Zero, exempt from PIT in Myanmar if in country for less than 183 days in any 12 month period



Practical Tax Considerations for Investing in Myanmar

DFDL LEGAL & TAX

- Tax treaty relief is not automatic and an application must be submitted to the IRD and are considered on a case by case basis.
- Myanmar tax laws are vague and do not provide coverage of many transactions entered into by international companies.
- No tax ruling regime exists and can be difficult for the IRD to "sign off" on transactions.
- Low levels of compliance by local Myanmar entities can make receiving the correct documentation for tax purposed burdensome (e.g. commercial tax invoices).
- Many tax officials lack the experience and understanding of international tax transactions.
- No transfer pricing rules exist in Myanmar which can make it difficult to determine when prices are set on an arms' length basis.

Tax Planning is Important

Thank you

William D. Greenlee, Jr.
Partner, Deputy Managing Director, Myanmar
Head of DFDL China Desk

william.greenlee@dfdl.com

Jack Sheehan
Partner, Tax Practice Group

jack.sheehan@dfdl.com

Excellence · Creativity · Trust

Since 1994