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E-commerce tax – the Government's response on the second public hearing on the proposed draft law

The Thai Revenue Department (TRD) has issued its comments addressing key issues raised by potentially impacted foreign e-commerce operators under the second public hearing that was conducted in early February 2018 on the second draft of the proposed e-commerce law.

In a nutshell

Briefly, the second draft of the e-commerce legislative amendments that was released on 17 January 2018 proposed that a foreign company providing services through electronic media to a non-VAT registered person, and where the services are used in Thailand, must register and will be subject to 7% VAT in Thailand if its annual VAT-able income exceeds Thai Baht 1.8 million. Please refer to our previous Tax & Legal News Flash on this topic [here](#).

The second draft of the law raised a number of issues and concerns for many industry operators, mainly in connection with the lack of clarity on the practical application of the proposed law and certain compliance obligations to be imposed on foreign operators.

During the second public hearing on the second draft of the law that was open until 9 February 2018, some potentially impacted foreign e-commerce operators submitted their comments to the Thai government raising some of these issues for the TRD's consideration. The TRD has now published their responses to the comments received from the public.

TRD's comments

The TRD provided some additional guidance to clarify the precise scope of the digital services that should be captured under the proposed law.

In its comments the TRD has provided a list of examples (which we believe to be a non-exhaustive list) of the included services:

- hotel booking services (it appears that the TRD is limiting these to commission and other services income generated by the online travel agencies);
- e-books, movies, music, advertising, online gaming services (although not explicitly confirmed, this may cover all subscription-based media);
- use of program and information via the internet (whilst it is not clear what is intended to be included in this category, in our view, it may include all electronic data management services such as website hosting, online data warehousing, file-sharing and cloud storage services); and
- services related to downloadable music, stickers, programs (this should potentially extend to services related to all downloadable digital content).

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Online sales of tangible and intangible goods are excluded from the scope of the proposed law. The TRD also clarified that the sale of e-vouchers is excluded. The sale of software, applications or digital music, will not be considered a sale of intangible goods if there is no transfer of the intrinsic ownership right.

Importantly, the TRD has provided further clarification on the meaning of “used in Thailand” – a supply of digital services by a foreign operator will be captured under the proposed VAT charge if performed outside of Thailand but the services are consumed in Thailand, regardless of the tax residency status of the consumer.

In addition, the TRD provided some practical guidance on how to identify the location of the customers and determine if the services are consumed in Thailand. The TRD appears to allow the foreign operators to rely on the following proxy indicators to identify the location of the customers and, therefore, be able to conclude if the services are consumed in Thailand:

- Residency proxy (by using the address of the service recipient, the address given by the service recipient for the purpose of collecting the respective service fee, and/or telephone number);
- Payment proxy (i.e. bank account details or credit card information of the service recipient); and
- Access proxy (i.e. IP address of the service recipient).

In addition, it seems to have been clarified that VAT on supplies of digital services by foreign operators only applies to business-to-consumer (B2C) supplies. Foreign operators must therefore ascertain whether the customers are VAT-registered. Transactions with VAT-registered customers will continue to be subject to the standard self-assessment rules.

However, not all are good news from the TRD’s comments. The TRD appears to not allow foreign operators to elect between simplified registration for VAT and registration under the standard rules for VAT registration under the Revenue Code, which would allow the foreign operators to issue regular VAT invoices to their customers and claim credits for input VAT. The TRD commented that foreign operators can choose the standard full VAT registration, however in order to do so the foreign operators must have a business established in Thailand which will trigger a corporate taxable presence and potentially regulatory issues. Therefore, it appears to be confirmed that foreign operators providing digital services to consumers in Thailand would be incurring unrecoverable VAT, unless they choose to be full VAT registrants with the undesired consequences.

The proposed second draft of the law provides that the foreign operator is not allowed to “charge” or “collect” VAT from its customers in Thailand. In response to concerns raised, the TRD commented that although not legally allowed to charge the imposed “VAT” as a tax to its customers, the foreign operators may still be able to pass the economic burden of the imposed 7% VAT on to the customer by increasing the price of their services. It appears that the TRD is not intending to change their position on VAT recovery.

Positively, confirmation is provided by the TRD that payment processing systems are not captured under the proposed tax.

Regarding platforms, the TRD has clarified the meaning of a “platform” for the purposes of this law. A platform is “an intermediary which is an electronic channel which enables the service provider to provide electronic services to service recipients”. The TRD goes ahead providing some examples of platforms for the purposes of the draft law – websites, applications and online marketplaces are some examples. It has also been confirmed that closed platforms which only allow their business partners “to write programs for obtaining data or linking to other systems” are included in the definition of platform.

In addition, the TRD provided some further clarifications about the circumstances in which platforms are required to register for and collect VAT on supplies made through their platforms. It appears that an overseas platform will not be required to consider each foreign operator’s individual turnover separately but the total turnover derived by

all foreign operators utilizing such platform to provide services to Thai customers should be considered in order to assess whether the VAT threshold is reached and whether the platform will be required to register for and pay VAT.

The effective date of the law was confirmed to be 180 days after the law is published in the Royal Gazette. Although not explicitly confirmed by the TRD, it is likely that the draft law (potentially with some modifications to reflect the TRD's position on the concerns raised by the public) will now be submitted to the cabinet for approval before becoming effective.

The TRD has also commented that in due time and after enactment of the proposed law, guidelines will be released explaining the features of practical implementation of the proposed rules.

KPMG observations

Although some important clarifications released by the TRD undoubtedly provide some further clarity on the possible outcomes from the future implementation of an e-commerce tax in Thailand, the administration of the proposed e-commerce tax will, however, not be an easy one. The Thai government may wish to hold consultations and open forums with potentially impacted e-commerce foreign operators and/or observe how other countries have implemented their e-commerce levies to fully understand the challenges that may arise from enacting a tax on e-commerce, and the broader consequential impact on the Thai economy.

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