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## **Proposed eCommerce Tax Second draft of legislative proposals Response to Thai Revenue Department**

The European Association for Business and Commerce (EABC) is a registered Trade Association in Thailand. It was established as a consortium with sixteen Business Organizations and Chambers of Commerce in Thailand and Europe. In Thailand those chambers and similar organisations have some 2,000 members. With strong support from the European Union, EABC interacts as the unified voice of European business aiming to contribute towards the improvement of trade and investment in Thailand fostering stronger business co-operation between Europe and Thailand.

EABC is appreciative of the opportunity to provide comments on the second draft legislation about a tax on eCommerce. In our submission, we refer to the proposed legislative changes or amendments as 'the legislation'.

We recognize that the government intends to implement a policy of capturing VAT revenues related to eCommerce transactions where the end service is used in Thailand. The intention is in line with global moves and the use of VAT does seem an appropriate means of achieving the intended policy outcome.

However, we have some concerns and questions for clarification about the proposal as there do seem to be, in the current proposal, some potentially onerous and unfair requirements, perhaps with unintended consequences, and open operational issues.

Consistent with enhanced 'doing business' standings (where 'paying taxes' features as an important element) and aspirations for a Thailand 4.0, we also note the importance of ease of administration. Recent developments with the 'Guillotine project' also bring a higher standard of law making, a requirement for aspects such as ease of use, practicality and economic value without inappropriate burdensome regulations. We see these as positive developments.

Our conclusion is to propose that the legislation will only work effectively if fully on line, is compliant with existing VAT principles and has easy ways to measure and report on relevant revenue. Thus we would respectfully suggest a priority focus on these issues so that when launched, the regime will be attractive and encourage compliance.

Details follow.



## Description

As we understand it, put simply, the legislation has these features:

- i) VAT will apply to *foreign operators* providing services via electronic means for use in Thailand to non-VAT registered persons if their income from such services exceeds THB 1.8 million per year.
- ii) VAT will apply to the *foreign owner of a platform* (where a foreign operator provides services through that platform) where the revenue for services used in Thailand *generated through that platform* exceeds THB 1.8 million per year.
- iii) A non VAT registered person could be an individual natural person as an end user (who may never intend to be VAT registered) or for example an individual sole proprietor, or a company or other juristic person which is not required to register for VAT.
- iv) VAT registration is proposed via a simplified means, on-line. These foreign operators would be able to register for VAT through the TRD's website.
- v) This simplified registration system does not allow issuing tax invoices or claiming input VAT credits (We discuss below issues around the use of a means of registration which is consistent with the neutrality principle).
- vi) The threshold is to be revenues derived from services provided via electronic means to non-VAT registered persons for use in Thailand of over THB 1.8m in one year. (Under current practices, once registered, as we understand it, VAT would be leviable in subsequent years even if this threshold is not met, unless the provider de-registers)
- vii) Under existing law, foreign operators which already have a commercial presence (by whatever means) are not exempt from the scheme, but may already be registered for VAT.
- viii) Cases may involve foreign platforms providing services to Thai customers where the services are used in Thailand.
- ix) The new legislation would not apply to Thailand-based operators, whether or not they are currently registered for VAT.

## We have the following questions and points:

### 1. What is the means of providing the services? – section 3

- “Electronic” means “application by means of electronic, electricity, electromagnetic wave or any other similar means, and shall include application by means of light, magnetic or devices relating to applications by such means”; and
- “Platform” means “a computer program which can expand its capabilities unlimitedly, with continuous development of new functions or modules at all times

to create innovations, and can be linked to other systems, and shall include websites or services which third parties may write a program to link thereto or draw information therefrom automatically.”

TRD’s guidance states (at section 3, clause 6.5) that the term “digital platform” means “an intermediary which is an electronic channel which enables the service provider to provide electronic services to service recipients. For example, website, application and online marketplace”. This is broader than the defined terms, thus we would assume that it is the defined terms which prevail.

## **2. Services provided by electronic means – sections 6,7**

If a foreign operator provides services by electronic means to a non-VAT registered person, and the services are used in Thailand, the *foreign operator* would need to register and will be subject to VAT in Thailand if its income from the provision of such services exceeds THB 1.8 million in a year. The registration must be completed within 30 days from the date the THB 1.8 million threshold is exceeded.

Where a foreign operator provides services by electronic means to a non-VAT registered person and the services are used in Thailand, and it provides those services through a platform owned by a foreign resident, *the platform owner* may be required to register for VAT if the revenue (for services used in Thailand) generated through the platform exceeds THB 1.8 million.

The legislation would apply to “services provided by electronic means”. The term “electronic” is defined, but no further information is provided about which particular services will fall within their scope.

We would suggest that foreign operators would not be providing “services by electronic means” where they sell tangible goods, real property or rights to use them via electronic means, or conclude contracts via electronic means for the provision of services that will be performed or delivered physically. In other words, the amendments should not apply unless the underlying supply from the foreign operator to the Thai customer (for use in Thailand) is made by electronic means. For example, if a foreign operator sells tangible goods to Thai customers through an online marketplace, the sales should not be “services provided by electronic means” as the goods are not supplied electronically, even though the parties entered into the sales agreement through a website.

We note that online sales of intangible goods (e.g. some software, applications or music) are not “services provided by electronic means”, because under section 77/1 of the Revenue Code they are as we understand it, defined as “goods” and not “services”.

### 3. 'Used in Thailand'

It is a principle that in assessing the nexus or connecting factor of many taxes, location of use is relevant. It is a positive aspect to limit the use geographically and 'used in Thailand' is a possible way of doing this.

But a non-VAT registered recipient who uses the services in Thailand should not also be required to be a Thai tax resident that should not be a relevant consideration. If this is not the case, the amendments would create a significant compliance burden for foreign operators as they would need to collect information about the recipient's Thai tax residency status (eg. whether they spend more than 183 days of the year in Thailand).

Another relevant example is where foreign operators sell electronic vouchers through their website to Thai customers, which are redeemable at physical stores in Thailand or overseas. For the purposes of the legislation, is this supply intended to be "used" where the Thai customer purchases the voucher, or in the location where the voucher is ultimately redeemed?

Some practical guidance would be needed about how foreign operators can identify the location of their customers, since foreign operators making supplies by electronic means may not know where their customers are located. We suggest that the TRD considers allowing the foreign operator to rely on a proxy such as the guest's billing or shipping address, IP address, bank or credit card address, in line with the OECD's 2017 International VAT/GST Guidelines and similar rules in other countries, as the determinant of where the customer is. Such indicia may evolve over time with technology. One suggestion is to rely on self-declaration of the purchaser as to where the services are used, but this may not be in line with general international practice and thus in terms of harmonization may not be optimal.

### 4. Supplies made through foreign platforms

A platform is presumably a "platform of another person residing outside the Kingdom" (i.e. a foreign platform) if a foreign resident 'owns' the platform (e.g. owns the intellectual property relating to the platform), regardless of the location of the servers hosting the platform.

Clarification is needed about why these amendments apply only to foreign platforms and not to Thai platforms, as the policy underlying this amendment is not clear.

What about the scope and limits of the concept of "platform"? For example, we suggest that payment processing systems, carriage services provided by internet service providers, and online advertising companies be explicitly excluded from the concept of "platform", as they do not make supplies available themselves. We understand that these exclusions are consistent with similar provisions in other countries.

When is a platform required to register for and collect VAT on supplies made through the platform? Does this depend on whether the platform's turnover exceeds the turnover threshold, considering the total VAT derived by all foreign operators utilizing such platform to provide

services to Thai customers for use in Thailand? Or is the platform required to consider each foreign operator's individual turnover separately?

Will the platform be liable for VAT under these amendments in its own right, and it is not required to register or remit VAT on the foreign operator's behalf (i.e. as a VAT agent)?

## 5. On-line Travel Agents (OTA)

The example of OTAs presents a good example of where some more focus and understanding is needed.

**Commission model** – the guest books a hotel room via the OTA's website [AS1]the guest pays a gross rate of \$100 to the hotel and the OTA receives a commission of \$20. The OTA should pay VAT on \$20 only; the hotel is potentially taxed on \$80.

**Buy – sell model** – OTA buys rights to stay in hotel rooms for \$80 then re-sells them to guests for \$100. These should not be captured by the new legislation as it is not a service provided by electronic means.

We see an OTA not as a platform but a foreign operator providing its own facilitation services through electronic means (i.e. commission model) or making non electronic supplies (i.e. buy-sell model).

For noting (not part of the legislation but part of current and future practice, a Thai person going on holiday overseas should not attract any VAT when using a foreign OTA. If the OTA is in Thailand, CIT would apply to commissions under the commission model and to the margin as net income under the buy-sell model.

The two generic models described above may not reflect all variations and use cases but are a relevant guide. TRD may wish to consider holding a consultation forum with OTA, perhaps facilitated by a major accounting firm or firm.

## 6. Registration - sections 7 and 11

A simplified method of registration is proposed (i.e. online registration through the TRD's website ("simplified registration")). In this case registrants cannot claim input VAT credits or obtaining VAT refunds and cannot charge VAT from the purchase of services or issue tax invoices.

In the current draft it appears that the foreign operators are not allowed to opt for standard, paper based VAT registration where they would be able to issue tax invoices and claim VAT credits. Our understanding of VAT and similar indirect taxes is that they should be neutral – business to business transactions should not result in a net taxable position.

If standard VAT registration is not available, there would not be a level playing field between Thai and foreign operators, as Thai operators could claim credits for input VAT but foreign operators could not. The OECD noted in its 2017 International VAT/GST guidelines that foreign

businesses should not incur irrecoverable VAT under domestic VAT laws if this would constitute unjustified discrimination when compared to domestic businesses, and this discrimination could be avoided by allowing foreign businesses to recover input VAT under the standard VAT registration and compliance procedure.

Under the proposed simplified system, foreign operators would doubtless increase prices to cover the cost of VAT. This would be passed on to their customers. Thus in effect the cost of the foreign operator having to pay the VAT is covered with presumably no ability for those already in the VAT system to claw it back. This would seem to add to the cost of doing business – foreign operators in effect would transfer the economic burden to customers.

We would urge the TRD to consider this proposal in light of:

- a) Thailand's policy towards Thailand 4.0
- b) The World Bank 2018 ranking is 26<sup>th</sup> which is a significant improvement from the previous year. This was achieved by making some changes. 'Paying taxes' is one of the ten criteria used globally by the World Bank for assessment of ease of doing business. Adding complexity now to paying taxes may have an unintended result.
- c) The Guillotine project, in addition to a plan to cull some of the 6,000 licences, brings with it a new way of law making (under legislation proposed as part of that initiative) by applying APEC 'Good Regulatory Practice' principles which requires tests about aspects such as any proposed law's efficacy, ease of use, fairness etc. Effective consultation is also a part of this.
- d) Thailand's national policy is about digital government.

In light of these, we would suggest that standard VAT registration should be an option to these foreign operators and foreign operators should be able to obtain standard VAT registration online (i.e. through the TRD's website, or even an outsourced website acting on behalf of TRD).

Our understanding is that developments in tax would offer some means, with relevant customization, to support the VAT needs.

As an interim measure only, an option to choose standard or simplified VAT registration should be available, with a clear project plan and delivery date to be fully on-line for both registration processes.

However, there are significant negative aspects in the proposal that foreign operators cannot charge or collect VAT from their customers.

If a foreign operator is required to register for and remit VAT, how can the foreign operator be unable to "charge" or "collect" VAT from non-VAT registered persons? This seems inconsistent with rules in other countries and the underlying intent is not clear, as economically speaking the foreign operator can still pass the burden of the VAT on to the customer through a price increase. In addition, the underlying policy of VAT is that it is a tax on consumption, borne, ultimately, by the end customers.

If foreign operators have concluded contracts with Thai customers on VAT-exclusive terms, then they will need to renegotiate and amend each contract to increase the price to cover the additional cost of Thai VAT, which will create a significant administrative burden.

We understand that under the simplified registration rules, foreign operators can never issue tax invoices to non-VAT registered persons who use their services in Thailand. Although non-VAT registered customers may still require a tax invoice, for example, in order to obtain a tax deduction under various incentives provided by the government from time to time. Inability to obtain a tax invoice may limit Thai customers' choice in service providers, as if they purchase electronic services from a foreign operator they will not receive a tax invoice. Moreover, the foreign operators are disadvantaged as they may lose business from Thai customers. Again, we suggest that the legislation should provide that the foreign operator can elect to be subject to the standard VAT registration rules (with an electronic registration process) which would allow them to issue tax invoices if they want to.

## **7. No deemed PE**

We seek confirmation that a foreign operator which is required to register for VAT under the legislation does not automatically have a taxable presence / permanent establishment in Thailand for income tax purposes under either the simplified registration or standard registration rules. The VAT registration requirements will need to be amended to provide that the foreign operator is not required to establish an office or fixed place of business in Thailand, due only to these amendments.

## **8. Checking VAT number (TRD's guidance section 3, clause 4.1; 4.7, 7)**

In order to confirm whether the recipient of the services is VAT registered or not, the foreign operator or foreign platform should request its customers to declare their VAT number.

But further guidance is sought on how foreign operators should monitor and ensure that correct VAT numbers and valid details are provided by the customers. We suggest that the provision of a VAT number by the customer should be sufficient and no additional information should be required. Moreover, the foreign operators should not be required to verify that the customers' VAT number is correct, as this would impose a significant administrative burden.

TRD's guidance states that non-compliant foreign operators will be subject to similar surcharges, penalties and criminal fines as applicable to regular VAT registrants under the general Thai regulations.

TRD's guidance further states that a Thai VAT registrant which makes a payment to a foreign operator for services covered under the legislation and self-assesses VAT will not be able to claim the self-assessed VAT as input VAT, if the foreign operator is not in compliance with the Legislation.

If a foreign operator is not in compliance with the legislation then its Thai VAT-registered customers cannot claim self-assessed VAT as input VAT. This does not seem to reflect the fundamental VAT principle of neutrality. Neutrality is only achieved by ensuring that services acquired for use by VAT registrants are eligible for credits of input VAT. Moreover, it seems that this rule is punishing the Thai customers for the foreign operators' breaches of the rules of the legislation. This may also create an administrative burden on the Thai customers if they are required to determine themselves whether the foreign operator is in compliance with the legislation or not. Further guidance is required on how to monitor and ensure that the customers have ways to confirm whether the foreign operator is in compliance with the legislation.

EABC offers to provide any additional information or discuss further.

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