

THAILAND

VAT Rules and E-Commerce in Thailand

Edwin van der Bruggen

Edwin van der Bruggen is a Tax Lawyer, Eurasian Structured Finance, Hong Kong, with ESF in Hong Kong and Bangkok. He teaches International Tax Law at Chulalongkorn University (Thailand) and is a fellow of Hong Kong Polytechnic University's Institute of Taxation.

1. INTRODUCTION

For the moment, there are no special legislative measures or regulations in Thailand with respect to the VAT treatment of the supply of goods or the providing of services by means of the Internet. Consequently, in theory at least, the normal rules apply. In order to determine the VAT consequences of an e-commerce transaction, the exact nature of the transaction must be ascertained. Primarily, it must be determined if the transaction was a sale of goods or the providing of a service.

It is noteworthy that under Thai VAT law, "goods" means both tangible and intangible goods (Sec. 77/1 (9) Revenue Code). The latter includes patent, goodwill, copyright, concessions, royalties, etc. (see for instance the Ministerial Regulation No. 189 clause 2). With respect to e-commerce, "goods" as defined for Thai VAT purposes may include a copyright on a software program, a computer game or the copyright a newspaper pays to a news agency to download and print a news article or a picture. Providing a service, however (Sec. 77/1 (10) Revenue Code), is also possible in e-commerce, for example access to a database for financial information, the furnishing of design services for engineering and construction, data storage services or data processing.

An interesting Revenue Department ruling No. Gaw Kaw 0811/Paw 3015 dated 19 April 2000 illustrates the difference between digitally delivered goods and services. The supplier obtained digitally stored product information from its customers and processed it into a presentable brochure for marketing purposes. When finished, the supplier sent the result to the customer by Internet. According to the ruling, this transaction had to be characterized as a service, and not as the sale of an intangible.

We will examine the application of the Thai VAT rules first concerning an inbound (sold or provided to Thai customer) transaction on goods and services, then for outbound transactions (sold or provided by a Thai supplier).

2. "IMPORT" OF GOODS INTO THAILAND BY ELECTRONIC MEANS

A foreign supplier of intangible goods to a Thai customer is liable to VAT in Thailand, regardless of whether he is also required to register for VAT purposes. A foreign supplier who brings goods into Thailand is considered an "importer" and is consequently a person liable to VAT under Sec. 82 (2) of the Revenue Code (RC). Usually, with respect to tangible goods, the VAT on import is collected by customs from the importer at the time of paying customs duties.

Obviously, these rules are not compatible with intangible goods being delivered over the Internet such as computer games, software or other copyrighted intangibles. Theoretically, the Thai customer can and must still pay the VAT (Sec. 83/6 RC), because in the case where the price of the goods (or services – see below) is paid to a supplier residing outside Thailand and temporarily carrying on the business of selling goods without being registered for VAT purposes, the payer is required to remit the VAT. It seems that such is unlikely to happen unless the customer is VAT registered. In other words, there is little possibility for tax authorities to enforce the responsibilities of a customer who is a natural person.

Alternatively, the supplier outside Thailand may apply for a VAT registration himself, and even nominate an agent to issue tax invoices, but in practice this is very difficult to achieve if there is no physical place of business in Thailand. Registration is in any case not required if the supplier is residing outside Thailand and "temporarily carries on the business of selling goods or providing services in Thailand" (Sec. 85/3 RC).

3. "IMPORT" OF SERVICES INTO THAILAND THROUGH ELECTRONIC MEANS

Similar incompatibilities may be found when providing services performed in a foreign country but used in Thailand. According to Sec. 77/2 of the RC, the provision of a service which is performed in a foreign country and made use of in Thailand shall be treated as provided in Thailand. Imagine a Thai customer paying for a financial information service provided by a US-based "dot-com", for data storage services, for information processing or for financial clearing. On those services VAT will be charged if the service is made use of in Thailand, which will usually be the case, unless there are exceptional circumstances. The latter may be the case if the Thai customer can prove it made use of the service in its branch in Laos, for example

(imagine a Thai bank with a branch in China obtaining financial analysis services with respect to certain Chinese clients).

As seen above with respect to the import of goods by a supplier residing outside of Thailand, the VAT on the service must in that case be remitted by the payer. The customer is required to remit the VAT to the tax authorities, but there are few ways to enforce this where natural persons are concerned.

4. PROBLEMS CREATED BY THE CURRENT SITUATION FOR INBOUND E-COMMERCE

Summarizing, it can be said that foreign suppliers of e-commerce sale of goods and provision of services to Thai customers, are nearly always liable to VAT on the transaction. Unlike with tangible goods, the VAT on which is collected at the border, the customer is usually required to remit the VAT himself. VAT registration for foreign suppliers is complicated and impractical in Thailand, unless they have a physical place of business in Thailand or an agent.

Two main problems can be identified at this stage. Firstly, it is clear that there are serious questions about the enforcement of the VAT remittance in these cases, especially when the customers are private persons and not enterprises. The first problem could be solved by VAT registration for foreign suppliers, but such is currently too impractical to be applied to e-commerce situations, which is the second problem.

5. SOLUTIONS IN THE EU AND OECD (INBOUND E-COMMERCE)?

The European Union has solved this problem by requiring a non-EU supplier to register for VAT purposes as soon as his annual sales to private customers exceeds EUR 100,000 (about THB 4 million) in the European Union. Registration can be done easily through automatic or electronic means, including the filing of the tax return and the payment of the tax. Registration would be necessary in only one EU Member State and be valid for the whole European Union.

In this way, the VAT payment on transactions with private persons is in most cases assured, as large Internet operators will usually comply with the law. Also, non-EU operators and EU operators of e-commerce business are on an equal basis when dealing with EU customers. Previously, buying a computer game from an e-company based in Germany would trigger VAT, but the same game could be delivered over the Internet without VAT by a US supplier.

The OECD's Report from Working Party No. 9 adheres to the same distinction between B2B (business to business) and B2C (business to consumer), and states that for B2B, consumption tax should be due in the business place of the customer. For B2C the OECD Report says the recipient's usual jurisdiction of residence should tax the consumption.

For Thailand to follow the European Union's example would have the same advantages: (1) VAT on transactions to customers is assured, and (2) unfair competition (because no VAT) between foreign and Thai operators is eliminated.

6. SITUATION FOR OUTBOUND E-COMMERCE

The VAT treatment in Thailand of outbound e-commerce (Thai supplier with foreign customers) is characterized by less incompatibilities than for inbound transactions. This is largely due to the fairly wide scope of the zero-rate VAT for export of both goods and services that is in force (Sec. 80/1 (1) and (2) RC) in Thailand.

Imagine a Thai e-commerce operator that sells pictures over the Internet to be used in travel guides. This would be considered an export of intangible goods and is consequently subject to a zero-rate VAT (Sec. 80/1 (1) RC). Note that the export is not VAT exempt, in which case the supplier would lose his right to deduct input VAT. The tax treatment for providing services abroad (provision of a service performed in Thailand and used in a foreign country) is similarly taxed at 0% VAT (Sec. 80/1 (2) RC). Thailand does not have the same problems as the European Union in this respect.

The problems that can be identified here are mostly related to the burden of proof. For services, it was previously required to prove that the service was used outside Thailand by means of a contract or other such documentation. In e-commerce transactions, particularly in those where a high volume of transactions take place in a short time (online gambling, database searches, etc.) hard-copy contracts may not exist. Therefore, it is encouraging that under Departmental Notification No. 105 payment records are since last year also acceptable as proof with respect to the foreign use of services. Similar difficulties may be expected for proving that intangible goods were indeed exported, so that the Thai supplier qualifies for the zero rate.

Another practical problem concerns services which are used outside of Thailand. In the context of e-commerce, often the supplier has no knowledge where his services or goods are actually used. In that case, the supplier will not be able to furnish the proof required by the Thai tax authorities that the zero-rate VAT for export does indeed apply. Imagine a Thai supplier of online financial information on Thai investments. Its subscribers may be worldwide banks and financial institutions that use this information globally, and also pass it on to their subsidiary in Thailand.

7. POLICY OPTIONS FOR THAILAND

This brief article cannot pretend to be a complete analysis of the VAT issues concerned, and certainly further study is necessary. Nevertheless, some points of attention and possible solutions may already be identified. What follows is a first attempt to review some questions and suggest some solutions.

The difficulties and incompatibilities of Thailand's VAT treatment of e-commerce are only partly the same as those that are found in the European Union and some other developed countries. Most of the problems mentioned here relate to inbound sale of goods and provision of services by foreign suppliers:

- there are insufficient guarantees that Thai customers of foreign e-suppliers will voluntarily comply with their responsibilities to pay VAT, especially private persons (B2C);
- Thai e-suppliers are put at a disadvantage compared to foreign suppliers of intangible goods or services, because the Thai operators are required to collect and remit the VAT on transactions within Thailand;
- Thai e-suppliers which “export” services and goods are hindered by rules which are not compatible (although it has improved with respect to services) with e-commerce, for proving they qualify for the zero-rate VAT.

Based on the above, the following (modest) suggestions may be made with respect to the VAT treatment of e-commerce in Thailand, without the pretence of being complete.

- (1) Create the requirement and the possibility for foreign suppliers to register for VAT purposes in Thailand (eventually when exceeding a certain threshold, for instance THB 1.2 million sales in Thailand as is currently in force domestically). This should be done besides the current temporary VAT registration, which is not compatible with the nature of e-commerce. By those means, the foreign supplier will collect and remit VAT, but only on sales to private persons.
- (2) This registration and payment should be possible online, through electronic means in case of a foreign supplier. In practice, specialized e-commerce operators will probably provide the service of complying with VAT rules and collecting payment.
- (3) Clarify and simplify the burden of proof with respect to the export of goods through electronic means.
- (4) Clarify the notion “use of services in a foreign country” to address electronic services which are globally available (both inside and outside of Thailand).