

Definition of Digital Goods under Value Added Tax Law in Thailand and European Union

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ABSTRACT

Technological advances have had a major impact on traditional buying and selling goods or services changing them from a physical undertaking to a completely digital form. But Value Added Tax systems of Thailand do not have the legislation to deal with the tax collection especially in digital goods. The lack of or insufficient definition under the Revenue Code that is vague and unclear of intangible goods is the main reason to Value Added Tax imposition such as downloading music or E-book from website, selling goods or services, and so on. Although the revenue Department has set guidelines for determining Value Added Tax liability of intangible goods in the Ministerial Regulation No.189 B.E.2534. However, selling of the said goods cannot be determined certainty and clarity.

Therefore, this independent study aims to analyze the problems of digital goods in the definition. The study adopted the documentary analysis the legislation concerning the definition of digital goods to solve the problems by the law of European Union related to digital goods to be applied method of Value Added Tax collection adequately and define digital goods in the Revenue Code.

It would not only bring about the better understanding of the rationale of the digital goods under Value Added Tax law, but also contribute to the more correct and appropriate interpretation of law. More importantly, it would help Thailand to develop the Value Added Tax law regarding digital goods towards the same direction of foreign regulations.

Keywords: Digital Goods, VAT Collection, Electronic Commerce, Intangible Property, section 77/1 (8)(10) and 83/6 of the Revenue Code B.E. 2481

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Introduction

During the past 5 years (A.D. 2013-2018), Thai people has used the internet up to 96%, resulting in the majority of Thai people's lives as well as the overall economy to change to digital life. Based on report results from Thailand Internet User Profile 2018¹ by Electronic Transactions Development Agency (Public Organization), it was found that Thai people have changed their lifestyles or activities via online more than before. The top 5 popular activities of Thai people via internet are namely social media usage, sending emails, finding information, watching video, listening to music as well as purchasing goods and online services. Online shopping or E-Commerce transactions are one of the top 5 internet usage of Thai people. It indicates that VAT collection under the Revenue Code shall require the collection from sales of goods and services, including the importation of goods into Thailand. In case that selling goods via electronic commerce is within the scope of value added tax. Entrepreneurs or sellers have the duty to register and pay VAT. In the European Union, selling goods online via electronics channel is becoming more popular and tends to be more popular in the recently future where sellers tend to avoid VAT by refraining from collection from buyers which causes many problems such as causing goods from electronic trading to be cheaper than those in general stores, creating incentives to avoid paying taxes, and so on.

Owing to current online transactions, the Revenue Department cannot collect tax because the shop is not registered as a juristic person correctly. The online transactions is the nature of money transfers between buyers and distributors directly leading to be impossible to verify. From the data review, the group of online sellers has been increasing rapidly. As a result, the government must find measures to solve the problem of tax collection in order to make the collection of taxes from entrepreneurs who sell goods or provide services electronically, including VAT collection properly. And to create fairness among entrepreneurs, it is necessary to improve the Revenue Code to suit the current business model by initiate the law on tax collection from transaction operators via electronic systems. In Thailand, Electronic commerce business is considered as a commercial business that must be registered in accordance with the announcement of the

¹ Electronic Transactions Development Agency. (2019). Report of the internet user behavior survey in Thailand 2018 (Thailand Internet User Profile 2018). Bangkok: Office of Strategy Development Office Electronic transaction (Public Organization) Ministry of Digital Economy and Society, p. 48-49.

Commerce for Entrepreneurs must register a commercial (Issue 11)2010, dated 10th November 2010. There are 4 areas, namely, 1) e-Commerce, 2) Internet Service Provider : ISP, 3) Web Hosting, and E-Marketplace.

E-Commerce has the characteristics of buying, selling or exchanging goods or it is general trading characteristics; all of these characteristics use the internet as a tool for dealing, buying and selling goods and services resulting in an individual, Juristic Person as well as entrepreneurs, who have income from selling all types of goods or services that provide services in Thailand or provide them in foreign and have used those services in Thailand that rely on transactions through electronic systems, are responsible for paying VAT under the Revenue Code.

As previously mentioned, it indicates that the e-commerce business generates tremendous revenue, resulting in customers who sell goods or services through e-commerce and have the same rights and obligations in filing and paying taxes. However, when considering the relevant laws and comparing Thai laws with the laws of leading countries that have developed electronic commerce, European Union. It can be seen that Thailand has no obvious provisions in the Revenue Code or secondary laws issued under the Revenue Code for the collection of taxes arising from electronic commerce (E-Commerce). In particular, there is no law or regulation on taxation of digital goods from foreign countries.

Due to the legal problem regarding the imposition of digital goods from foreign countries from online shopping via electronic commerce or E-Commerce mentioned above. The researcher is interested to study the concepts, theories as well as principles related to VAT collection in digital goods including foreign laws in order to analysis and compare with Thailand and consider using as a way to collect VAT to be effective enough for tax collection from electronic commerce. As well as raising the level of VAT collection of the digital goods for greater efficiency which will be able to effectively solve the VAT collection problem from conducting electronic commerce in Thailand and will bring stability and sustainable fiscal economy to the country.

Methods

The methodology of this work is mainly based on document research by collecting data from all relevant documents both Thai and foreign languages from books, journals, legal provisions, articles, as well as verdicts, rulings and discussions, in order to

analyze, compare laws, and propose solutions, The Revenue Code including rules, regulations, as well as announcements issued under Revenue Code.

Literature Review

The Revenue Code does not provide the definition of digital goods but it can refer to be the meaning of intangible property in general according to the section 40 (3) and section 78/3 (1), the type of assessable income such as the fee of goodwill, copyright fee or other rights. In the interpretation of other rights, a judgment of the Supreme Court 1271/2531 explained that the rights of others must be interpreted in the same fee as copyright and the fee of Goodwill which means the remuneration of rights in the property such as trademarks, patents or trade secrets²

The fee of goodwill is the popularity that people or customers have for their business due to its reputation. Goodwill is a form of property rights which is the goodwill that the business partner has created the trust to consumers. Therefore, it is considered a valuable business asset which can be sold or distributed³

Royalty fee means remuneration for copyright usage. In which copyright refers to rights that solely person who shall act any work under the Copyright Act that the work of the creator has done as defining in the definition under Section 4 and explaining the copyrighted work in Section 6 of Copyright Act B.E. 2537.

Other rights fee means⁴ because it is the provisions provided after the term copyright. It can be shown that the word has the same meaning when copyright is intellectual property; Therefore, other rights fee means the rights of intellectual property. The nature of types of income under Section 40 (3) and Section 40 (8) or collectively called royalty fee. It can be compared with the double taxation treaty. The content specification depends on both contracting parties. Generally, the meaning adopts from

² Somsak Anaksela, "The problem of applying transfer pricing principles Applied to corporate income tax according to the Code Revenue Department ". Page 71

³ Suchada Thanjindawong, "Problems related to income taxation on the payment of intangible properties received by foreign companies not operating business in Thailand." (Thesis Master Degree, Faculty of Law Thammasat University, 2005), p. 18.

⁴ Chaiyasit Trachootham, Tax Law Teaching (Bangkok: Thai Bar Institute of Law Training, 2013). Page 186.

the example of OECD or UN with the definition of royalty fee set in Article 12. It is mainly the definition as follows.⁵

"The term of royalty fee used in this article means any payment received as remuneration for usage or the right to exercise in any literature, art or science including film, patent, trademark, model, any plan, formula or secret process or for usage or rights to use industrial, commercial, or scientific equipment or for information about industrial, commercial, or scientific experience." In addition, according to the double tax treaty between Thailand and the United States includes profits from the transfer of intangible property and rights in intangible property for information about industrial, commercial, or scientific experience, Judgment from the Supreme Court of Thailand No. 3867/2531 and 3874/2531 given the definition including compensation for providing help or technical service as well.

In addition, the term of incorporeal property may compare with the intangible property from the broad definition that is also shown in the Royal Decree issued under Article 65 bis (2) of Revenue Code (Issue 145) B.E. 2527. It stipulated the rules, procedures, conditions, deduction rates and depreciation of the property. By the Section 4 (4) requires the depreciation of incorporeal property is that "The cost of obtaining the rights to the goodwill formula, trademarks and rights to operate the business under a license, patent, copyright or other rights"⁶

Therefore, the royalty fee in the meaning of revenue code and double tax treaty are the remuneration of intangible property. This can help to clearly illustrate examples of intangible property. However, the definition of royalty fee under this Revenue Code is to determine what kind of income must be taxed with the state.

Furthermore, the Revenue Code has the meaning to consideration of intangible property to compare according to the section 77/1(9) stipulated that "corporeal or incorporeal property susceptible of having a value and of being appropriated whether or not for sale, use or any purposes, and shall include every imported item" and related to section 77/1(10) stipulated that "any actions in return for consideration which is not sale of goods and shall include services for the purpose of a person's own business, but excluding:

⁵ Sumet Sirikhunchot, International Tax Law. Page 161.

⁶ Somsak Anaksela, "The problem of the principle of transfer pricing Applied to corporate income tax according to the code Revenue Department ". Page 61.

(a) the use of services or goods directly for the purpose of a person's own business in accordance with rules, procedures and conditions as prescribed by the Director-General,

(b) the use of money for benefit by depositing with banks or purchasing bonds or securities,

(c) any other actions as prescribed by the Director-General with the Minister's approval;"

In addition, there is no clear definition of electronic commerce as well as a digital goods. But considered e-commerce as part of electronic commerce transactions. The Electronic Transactions Act B.E. 2544 (2001), Section 4 has the following definitions: "Electronics" means the application of the electron method, electromagnetic wave or other similar methods and shall include the optical application method magnetic method or devices related to the implementation of such arrangements. "Electronic Transactions" means transactions conducted created using the technique electronically, in whole or in part. However, there is no specific definition for the digital goods so need to adapt e-commerce as a part of the analyzing on the issues of digital goods.

Section 77/2 of the Revenue Code stipulates that large businesses must pay the first type of value-added tax is a business selling goods in the Kingdom. The second type is service businesses in the Kingdom and the third category is the import of foreign goods into in the Kingdom.⁷

The word "sale" according to section 77/1 (8) of the revenue Code means distribution, transfer of goods, whether with benefits or compensation or not and shall include

(A) Product hire purchase agreement installment purchase agreement. The ownership of the goods has not been transferred to the buyer when the product has been delivered to the buyer Or a contract to sell products that comply with the rules and conditions specified by the Director-General of the Revenue Department with the approval of the Minister of Finance

(B) Deliver the product to the seller's representative

(C) Exporting products out of the Kingdom

⁷ Tangkitvanich, S. (2000). Assessing Global E-Commerce Policies: A Perspective from Thailand. NEWSBRIEF 31, p. 15.

(D) use of products of any type, except the use of products for assembly own business directly by the rules Procedures and conditions prescribed by the Director-General

(E) There is a lack of goods in the report of goods and raw materials

It can be noticed that the term "sale" under the Revenue Code has a wider meaning than "sell" according to the Civil and Commercial Code because it includes giving; therefore, it can be said that the term "sale" according to the Revenue Code means the transfer of goods from one person to another. Regardless of changing hands of the goods will be in any manner such as product give-away, product distribution, product giving, giving trial product. Therefore, considered as a sale according to the definition of all revenue codes that may be classified as not subject to VAT. It can be seen that there is no Thai tax law to deal with value added tax for digital goods in Thailand.

Electronic services can be implemented which easily makes the services of foreign operators to recipients in Thailand. It is widespread under Section 83/6 (2) of the Revenue Code requiring that the payer has the duty to remit VAT when payment is made to the operators that provide services in overseas and that service is used in Thailand. However, Fee payers who are natural persons has submitted a VAT. In the case of paying for services for electronic services, there is limited to create unfairness in the tax burden between domestic and foreign entrepreneurs. This affect to revenue collection of the state. In this event, the Gen. Prayut Chan-o-cha has the duty to amend the Revenue Code in order to have an electronic tax by announcing the Revenue Code Amendment Act (No. 48) B.E. 2562 or the "E-Tax Act". With the amendment, being that the financial institutions and persons to provide electronic financial services, e-wallet must report information of those who have specific transaction accounts to the Revenue Department, whether an individual or a juristic person (a person registered as a limited partnership or a company) both Thai and foreigners which the specific transaction account will begin to take effect (Transactions occurred) in the fiscal year 2020, must have the following conditions:

1) Having deposits or money transfers to all accounts from 3,000 times or more per year and no matter how many baht is received at a time

2) Deposit or transfer money to all accounts from 400 times per year or more and the total amount of 2,000,000 baht or more per year. The conditions which must both times and the amount of money deposited or transferred.

It appears that entrepreneurs who operate e-commerce businesses agree with electronic tax collection but do not agree with the need to report accounting movements

because Thailand has announced a policy to be a digital country. Thailand promotes commercial electronic commerce and pushes the country into a cashless society but causing entrepreneurs to be afraid to be checked.

The European Union adopted the Council Directive of 2002/38/EC to amend the Sixth Council Directive of 7 May 2002 for VAT collection from electronic commerce.⁸ When the EU Council Directive 2002/38/EC was promulgated for amendment to the Directive, changed the rules of VAT collection for the sale of goods and services through electronic systems from digital delivery. The concepts can be summarized as digital goods sent through electronic systems are considered as services. Selling digital goods or providing services online is considered a service. The country that has the duty to collect VAT for electronic services is countries that use services that adhere to the principles of destination taxation. According to the European Commission and Article 7 of the VAT Implementing Regulation, electronically supplied services consist in “services which are delivered over the Internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology”⁹ including this category the so-called digital goods.¹⁰ European Union have the rules of VAT collection on the sale of goods and services specified the digital goods that sent through electronic systems are considered as service or selling that digital goods or providing services online is considered a service also. The Value Added Tax of the European Union in the taxation system of Sixth Directive into goods or service seems clear as electronic transactions are delivered digitally.

Results

This article found that Thai law has the problems related to the lack of digital goods definition in the interpretation. When Considering the Revenue Code in section

⁸ Petcharat Supanimitkulkij, "Introducing Value Added Tax Law on Electronic Commerce The first version of the world," Revenue Department, Issue 7, Year 49, p.38, (July 2002).

⁹ EUROPEAN COMMISSION. Definition at https://ec.europa.eu/taxation_customs/individuals/21buying-goods-services-online-personal-use/buying-services/electronically-supplied-services_en, (last visited 16 March 2020).

¹⁰ AL, ALEKSANDRA - (2016) –“Taxation of Digital Supplies in the European Union and United 40 States - What Can They Learn from Each Other?”. Page 245.

77/1 (9) states that "goods" means corporeal or incorporeal property susceptible of having a value and of being appropriated whether or not for sale, use or any purposes, and shall include every imported item."When music, game computers, or E-books are intangible property that has a value, and the owner of the property can have the ownership or possess rights. All of them are considered as goods under the Revenue Code. But, downloading the music game computers, or E-books from the website is the sale of goods or service. In this regard, the Revenue Code section 77/1 (8) and (10) laid down the principles as follows: section 77/1 (8) "Sale" means disposal, distribution, or transfer of goods whether or not for benefit or a consideration. Section 77/1 (10) "Service" means any actions in return for consideration which is not sale of goods and shall include services for the purpose of a person's own business. The problem in this case shown that the downloading music, game computers, or E-books from the website that sells such songs or novels in the form of E-Book are considered to be goods or services according to the Revenue Code. The author has the opinion that in general the concept of sale and purchase law. The rights of ownership in goods will be transferred as soon as the buyer and seller have the intention buy and sell goods. While the service is done in relation to the hired work that is not related to the transfer the ownership of the goods. Therefore, downloading digital goods such as game computers, E-Book via the internet, shall not be considered as the sale as defined in Section 77/1 (8) because the ownership of the said digital goods still belongs to the owner of original song or author's E-Book. The rights that the buyer of goods are just the rights of license to use the copyright from copyright holder only with the website amazon.com offering the said goods as an intermediary to provide the data download services, so downloading of digital goods via the internet should be considered as providing the services under the Revenue Code. It can be seen that the sale of a digital goods is the sale of goods that is different from a sale in general since the digital goods is the intangible goods, such as the intellectual property rights, electricity etc. It is difficult to know whether the goods redelivered to the buyer. The Revenue Department has laid out the guidelines for defining the liability to levy the value added tax of intangible goods in the form of Ministerial Regulation No. 189 (B.E.2534). Therefore, selling the intangible goods and cannot be specified exactly when the transfer is made.VAT liability occurs when goods are purchased, or tax invoices are issued before paying the goods price. However, if the intangible goods and cannot be determined when there is a transfer, but the goods quantity can be clearly determined. It must be considered as VAT liability according to the principle of selling goods in general cases. When the goods are delivered or payment or issue the tax invoice before the delivery of goods.

On the other hands, the author see that the definition related to the electronic transactions of goods or services in European Union Directive is clear rather than the definition of goods or services of value added tax law in Thailand. The European Union Directive can be shown that the value added tax purposes trade in digital goods be deemed as a supply of services.¹¹ It follows that intangible property does not constitute goods, but such property to be the services according to such definition. On the contrary, the regulation concerning VAT of digital goods in Thailand is too broad to considering the interpretation which kind of digital goods shall be. If no specification related to the digital goods, the levy shall be unfair to taxable person. Such damages result from the lack of or insufficient information and understanding in regard of VAT in the digital goods.

Also, Thai law has the problems related to the lack of digital goods definition in the tax jurisdiction. In the case of the Revenue Code section 83/6 required buyers of goods and services of the Multinational Company Corporations (MNCs), both corporate and individual, are responsible for paying VAT. In the case of the purchase of digital goods such as E-Book, music files, image files and LINE stickers, etc. Currently, the Revenue Department does not have a way for individuals to pay VAT. In order to avoid the complexity of reviewing or establishing regulations regarding to earning assessable income of E-Commerce businesses that are subject to income tax between domestic entrepreneurs and entrepreneurs in foreign countries. E- payment tax law or the Revenue Code Amendment Act (No. 48) B.E. 2562, stipulates that financial institutions and electronic financial service providers, e-wallet must report information of account holders for a specific transaction to the Revenue Department both Thai and foreigners by a special transaction account effective on (Transactions occurring) However, the enactment of such laws is not an online sales tax in anyway. Because it is just for the bank to disclose account information for the Revenue Department to inspect only which may be taxed or not. Therefore, no specification related to the VAT collection according to digital goods, the levy shall not be effective. Such damages result from the lack of or insufficient information and understanding in regard of VAT in the digital goods will not bring stability and sustainable fiscal economy to Thailand.

¹¹ Jones, R. & Basu, S. 2002. Taxation of electronic commerce: A developing problem. *International Review of Law Computer & Technology*.

Conclusion and Recommendation

In the conclusion, European Union have the rules of VAT collection on the sale of goods and services specified the digital goods that sent through electronic systems are considered as service or selling that digital goods or providing services online is considered a service also. The Value Added Tax of the European Union in the taxation system of Sixth Directive into goods or service seems clear as electronic transactions are delivered digitally. The digital goods are classified to be intangible goods and complied with a supply of services.

In Thailand, the selling of intangible goods or digital goods such as music downloading, computer games, video, movies, music videos via the internet. In this case of such downloading is for personal use or for own entertainment, there is no rights to reproduce or modify. Regarding to Value Added Tax, the import of tangible goods shall have to pay VAT. For intangible or digital goods, the consumers must remit the value added tax according to Section 83/6 (2) of the Revenue Code. It can be concluded that the internet has allowed a better chance for businesses to access and compete under the same conditions to the market. Yet, countries have the responsibility to establish the conditions to provide a fair competition. Digital goods seem to have a lower price since VAT is not included, which is against the principles of fair tax collection. Also, the practice of tax collection systems is also ineffective, that is not facilitated or speed to taxpayers, and in the sense of tax authorities, there is still no way to check taxation systematically, which is contrary to the principle of efficiency of taxation.

For the recommendation, the author recommends to

1. Revising the provisions of Revenue Code in Section 77/1(5) the term "entrepreneur" by adding in this definition that include the operator of the digital goods and in Section 77/1(8) the term "sale" adding the selling goods or providing services related to the digital goods. When the provisions of the Revenue Code are explicit. There is no need to interpret the law, it will allow the operator of the digital goods to know and understand the duty to pay VAT.

2. Adding the definition of digital goods that should be defined as the intangible property and treated as a supply of services as the law of European Union. Also, having the value and is protected by intellectual property law and specified the kind of digital goods as the provision of e-books, movies, music, advertisement, games online, line stickers, using program or data via internet providing download services etc.

3. Issuing Ministerial Regulations or Notification of the Ministry to set the tax collection practices from digital goods by adopted the law of European Union as dividing the type of transaction into the service to be the VAT register and the service for non-register only to levy the VAT fairness.

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