

## THE IMPOSITION OF TAX ON OVER-THE-TOP CONTENT PROVIDERS IN THAILAND<sup>\*</sup>

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### Abstract

Due to abrupt growth of technology, digital contents are conveyed to the consumer via the internet or other telecommunication networks., This is called Over-the-top (OTT) service. Most of the OTT service providers are foreign companies which have no taxable presence in Thailand. Their incomes are from subscription fees and advertising fees collected from consumers or advertisers in Thailand, where they pay no tax to the Thai tax authorities. The Organisation for Economic Co-operation and Development (OECD) insists that profit should be taxed in a jurisdiction where the digital service is consumed. However, under the Thai Revenue Code, the current provisions related to income tax and VAT on a foreign company whose services are consumed in Thailand are not efficient and not practicable.

This article suggests that the relevant provisions for income tax and VAT on foreign entities under the Revenue Code should be amended in order to enforce and convince the large foreign OTT service providers to comply with tax measures in Thailand.

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**Keywords:** Over-the-top, Digital Services, Income Tax, Value Added Tax, Fiscal Measures.

## **1. Introduction**

During the last few years, many forms of content providers around the world have increased, and their businesses have expanded throughout multiple countries. News, advertisement, programs, information and other media contents are transmitted to the public in the form of sound and image via internet connection without using traditional broadcasting networks. The delivery of those media contents through a platform is Over-the-top (OTT) service. This service allows consumers to pick any content they want. Moreover, consumers may skip advertisements, duration of which is in general shorter than regular TV broadcasting.

OTT can be largely categorized into three different revenue models, which are SVOD (subscription-based services such as Netflix and Amazon), AVOD (free and ad-supported services such as Youtube and Crackle) and TVOD (transactional services such as iTunes and Amazon Instant Video that allow users to pay for an individual piece of content).<sup>1</sup>

In Thailand, many huge OTT businesses, e.g., Facebook, Google or YouTube, have expanded their services in Thailand. Under the Thai Revenue Code, income of foreign OTT service providers is considered to be assessable income from service under Section 40 (8) which is not subject to withholding tax. In general, a foreign company which does not carry on business in Thailand but gained the income from Thailand will be liable for withholding tax only if such income is the assessable income under Section 40 (2) (3) (4) (5) or (6). From the given fact, the law on withholding tax in Thailand has not yet covered an income of foreign OTT service providers. However, such foreign OTT providers are subject to VAT since the OTT contents are provided abroad and consumed in Thailand. The consumer in Thailand, during the payment for a service, is required to remit VAT instead

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<sup>1</sup> Roshan, 'Video on Demand Revenue Models: What's the best for your business?' (Muvi, 20 March 2018) <[www.muvi.com/blogs/video-on-demand-revenue-models-whats-the-best-for-your-business.html](http://www.muvi.com/blogs/video-on-demand-revenue-models-whats-the-best-for-your-business.html)> accessed 23 October 2018

of a foreign OTT service provider (a business person).<sup>2</sup> Nevertheless, in practice, no VAT is remitted by the consumer in Thailand. A large number of incomes without tax liability generally causes a challenging issue for the Thai government, especially, the Revenue Department, to find an appropriate measure to impose the tax on these businesses.

## **2. The Definition of Over-the-top (OTT) Service**

YouTube, Netflix, Ifixand Line TV are some samples of the online content providers who provide media content to the audience through the internet including audio, video, and live broadcasting. Nowadays, the audiences are able to access their favorite contents or updated news via the internet. They do not need to have a traditional cable or satellite TV subscription which has been a dominant way of watching TV from national free-to-air TV services and any Pay-TV operators. Those prominent content providers are Over-the-top (OTT) service provider. OTT service is known as a new media platform allowing audiences to pause, stop, and continue their contents freely. OTT service enables the consumer to watch TV programs anywhere and at anytime. The contents are delivered to the consumer in form of streaming or downloaded file. Consumers can choose to watch the content by using internet-enabled and portable device such as smart phone, tablet and etc.

## **3. The Problems on the Enforcement of Current Tax Laws on OTT Service Providers in Thailand**

The Thai Revenue Code cannot effectively enforce tax laws on multinational transactions in OTT business. Several forms of tax avoidance, which are regarded as Base Erosion and Profits shifting (BEPS), are used by

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<sup>2</sup> Chaiyasit Trachutham, Kham Sorn Vicha Kodmhai Pasee-arkoen [Taxation] (Institute of Legal Education of the Thai Bar Association, 10<sup>th</sup> edn, 2015)) ชัยสิทธิ์ トラชูธรรม, คำสอนวิชากฎหมายภาษีอากร (สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา พิมพ์ครั้งที่ 10, 2558)

foreign OTT providers and other multinational companies to decrease the tax burden in the countries where their incomes are generated. The current domestic tax authority is not competent to collect tax from foreign OTT providers. The international government organizations, such as the OECD, have strongly determined to cope with tax avoidance of digital businesses by releasing an Action Plan and other fiscal measures. In this regard, the Revenue Department as well as other domestic organizations such as the Office of National Broadcasting and Telecommunication Commission, which is liable for regulating the current TV platform and another registered platform, are also trying to find a suitable measure to tax the revenues of OTT business in Thailand. And, amending the current tax law is a tool that the Revenue Department should rely on to deal with such tax avoidance arising from multiple gaps of the current law.

#### **4. Tax Mechanism and Legal Measure to Address Tax Avoidance of OTT Service Providers**

##### **4.1 Withholding Tax**

Withholding tax is a mechanism which applies at a source of payment related to digital supplies and intangible services. The jurisdictions, where withholding tax is enforced, are the place where the digital supplies are provided. The supplies can be produced by a non-resident provider.

In the Article 7 of OECD Model Tax Convention, the business profits of a provider who is in a Contracting State shall be taxed only in such jurisdiction, except the business profits of a provider who carries on its business in another Contracting State through its permanent establishment located therein.<sup>3</sup>

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<sup>3</sup> OECD Model Tax Convention, art 7

“1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on

There is a current issue regarding the enforcement of withholding tax on the consumer in the business to consumer (B2C) transaction since many private consumers have low experience in withholding tax payment, which will result in administrative cost to the government. On the other hand, in case of business to business (B2B) transaction, the purchaser who is a business operator has enough experience to comply with withholding tax. To this end, the use of intermediary may alleviate the withholding burden of the consumer in the source country. However, it needs a mandatory registration system for non-resident providers to register a bank account which is used for a payment from the resident consumer so that the intermediary is able to withhold the tax from the payment transacted via such bank account.<sup>4</sup>

#### 4.2 Value-Added-Tax (VAT)

Value-added-tax (VAT) is an indirect tax imposed on the exchange of goods and services with a value. VAT is collected by the goods and services providers and absolutely charged from the final consumer. The VAT/GST Guidelines were accepted by the Council of the OECD in 2016. The issues of the collection of tax on cross-border transaction of digital supplies have also been mentioned in OECF/G20 BEPS Project.<sup>5</sup> The providers (traders) will charge VAT from the consumers by giving an invoice in which

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business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.”

<sup>4</sup> Organisation for Economic Cooperation and Development, ‘Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report’ (OECD/G20 Base Erosion and Profit Shifting Project, OECD, 2015) <[www.oecd-ilibrary.org/docserver/9789264241046en.pdf?expires=1563848849&id=id&accname=guest&checksum=2DF5195A88AC0A670498330F3EEADFF4](http://www.oecd-ilibrary.org/docserver/9789264241046en.pdf?expires=1563848849&id=id&accname=guest&checksum=2DF5195A88AC0A670498330F3EEADFF4)> accessed 18 June 2019

<sup>5</sup> Organisation for Economic Cooperation and Development, ‘International VAT/GST Guidelines’ (OECD) <[www.oecd.org/ctp/international-vat-gst-guidelines-9789264271401-en.htm](http://www.oecd.org/ctp/international-vat-gst-guidelines-9789264271401-en.htm)> accessed 20 June 2019

the amount of tax charged is shown. The tax charged from the consumers is at the rate specified for goods and services.

In case of the international trade of services and intangible properties, the border controls and fiscal frontiers cannot effectively proceed. According to the rules of the place of consumption, international trade services and intangible supplies should be taxed on consumption. The reasons for using destination principle for VAT on digital supplies are to maintain the international neutrality and to set up a robust barrier to tax evasion and tax avoidance.

In case of OTT services and other digital supplies that the foreign provider has remotely provided and has no business presence, it will be difficult for the tax authority to regulate and enforce VAT over them. Moreover, a private consumer has low incentive to pay or declare VAT, and the administrative costs of collection of a small amount of VAT from numerous private consumers are high. Therefore, a foreign provider of a digital supply should be responsible for the accurate charging and remittance of VAT to the tax authority in the jurisdiction where the final consumption occurs. However, this method can be slightly complicated because the provider is not located in the jurisdiction of consumption. Moreover, a non-resident provider is also required for registration, collection and remittance of VAT therein. The procedures of VAT registration and compliance should be simple and separated from a domestic registration since the foreign providers are obliged to register for VAT in several jurisdictions.

#### **4.3 Diverted Profits Tax (DPT)**

Diverted Profits Tax (DPT) or Google tax is a new tax measure which is not a part of corporation tax and mostly enforced in the UK. It applies to large multinational enterprises where their business activities are carried out in the UK and the profits are diverted to avoid creating the UK taxable presence or to use other agreements between affiliated entities or intra-

group expenditure to exploit tax mismatch.<sup>6</sup> DPT aims to apply to diverted profits arising on or after 1 April 2015 with tax charge at rate 25% while the UK current corporation tax is 19%. Hence, it is expected that the multinational enterprises will adjust their tax structures in compliance with corporation tax in order to avoid the higher rate of DPT.

The significant strength of DPT is that it is not covered by tax treaties. Accordingly, the foreign company cannot take advantages of tax treaties for tax avoidance. In order to comply with the EU law, DPT has been a measure ensured to enforce against unacceptable tax planning designed to erode the UK tax base.

## **5. Foreign Law and Policies on OTTS and Other Digital Supplies Taxation**

In Germany the OTT service provider is liable for paying a film levy to the German Federal Film Board (FFA).<sup>7</sup> Such levy is not an ordinary tax since it will be a fund for German local film production. Moreover, in the case of Netflix, the European Court of Justice mentioned that German government is empowered to impose a film levy on foreign OTT providers and other VoD providers even though their headquarters are located outside Germany.

In Colombia, in accordance with Colombian Tax Code and Law 1819 of 2016, 19% of VAT has been imposed on OTT service providers including

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<sup>6</sup> HM Revenue & Customs, 'Diverted Profits Tax: Guidance' (November 2015) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/768204/Diverted\\_Profits\\_Tax\\_-\\_Guidance\\_December\\_2018\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/768204/Diverted_Profits_Tax_-_Guidance_December_2018_.pdf)> accessed 18 June 2019

<sup>7</sup> German Federal Film Board, 'FFA in Brief' (FAA) <[www.ffa.de/ffa-overview-1.html](http://www.ffa.de/ffa-overview-1.html)> accessed 17 May 2019



both domestic and foreign companies.<sup>8</sup> The VAT will be imposed in the circumstance where the consumer is in Colombia or the OTT service receives a benefit therein.

In Argentina, according to the Decree No. 354/ 2018, the VAT rate for digital services is 21%. Under the Decree, the digital service provided by a foreign company and carried out through the internet or any adaptation or application of protocols, platforms or technology for a consumer in Argentina is subject to VAT.

## 6. Conclusion

The revenues and profits of OTT service providers have increased. However, many OTT service providers such as Facebook have been criticized for paying only a small amount of tax to their local tax authorities since the company uses a contrived structure to move the profits and liabilities to other jurisdictions where there is no or lower tax rates. Several tax mechanisms have been introduced to eliminate tax avoidance and enforce the OTT service providers as well as other digital platform providers to comply with the tax measures of the countries where their services are consumed and bring about revenue. The introduction of the effective and practical tax measures under Thai laws, especially the Revenue Code, will enforce and convince many foreign OTT service providers to conform to those Thai tax laws. Their revenues and profits will be under supervising by the Revenue Department of Thailand. The unacceptable tax planning will be addressed and the Thai government will gain a large number of revenues from such foreign entities.

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<sup>8</sup> Laura Duran, 'VAT on digital services in Colombia' (Baker Mckenzie, *Lexology*, 28 February 2019) <[www.lexology.com/library/detail.aspx?g=6803a06d-da3b-472c-a25b-0074cf0026ed](http://www.lexology.com/library/detail.aspx?g=6803a06d-da3b-472c-a25b-0074cf0026ed)> accessed 21 May 2019

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