

TAX INSIGHT: VAT ON SERVICES DONE IN THAILAND USED IN A FOREIGN COUNTRY

Service providers are normally entitled to charge VAT at a zero rate on services performed in Thailand and used by customers outside Thailand. In the past, the services had to be used entirely overseas, according to the original version of Clause 2 (1) of the Revenue Department director-general's notification on VAT No.105. This is not necessarily the case any more.

Under the revised version of the same clause, which became effective on April 29, 2011, if the services performed in Thailand are used both in Thailand and abroad, the portion of the services used abroad would be exempt from VAT while the portion used in Thailand would be subject to 7% VAT.

Nevertheless, if the evidence to support the portion of the services that was used abroad cannot be made available during a tax audit, the Revenue Department might impose 7% VAT on all the services used, both in Thailand and abroad.

A Revenue Department ruling in June, No. Gor. Kor. 0702/Por./5147 dated June 21, 2012, addressed the services provided by one operator, which included merchandising, inspection and report preparation, vendor compliance and shipping process services. The customer

was based outside Thailand and reports of the results were sent electronically to an information database. The customer used the reports in a foreign country to make decisions on purchasing goods from manufacturers in Thailand. The ruling stated that the services were subject to 0% VAT regardless of the fact that the manufacturers might be allowed to view the reports afterward.

This ruling appears to be in conflict with a judgement issued in April by the Supreme Court, No. 6710/2554, issued in April 2012. The court held that, in respect of the submission of the service provider's reports of the results of the goods inspection, price assessment, manufacturer quality assessment and sample analysis to a customer outside Thailand, it was merely a report of the results of the services used by the foreign customer. It was not the same as the results of the services being sent for use outside Thailand.

The results of the services may well be used abroad by the foreign customer when making a decision on whether to purchase, bargain the price, hire someone to produce or export goods or analyse samples in Thailand at a later time. It is a matter of using the results of the

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inspection and other services rendered by the service provider after they have been completed. It does not appear to be the case that "the result of the services is sent for use entirely in a foreign country", as stated in the notification on VAT No.105. Consequently, the service provider was not entitled to a 0% VAT.

The Supreme Court's conclusion was that the report of the inspection and testing services was irrelevant because the actual services had already been completed inside Thailand. The court's logic appears to regard the results of the services as being used in Thailand because the decision of the foreign customer would lead to price negotiation and/or the purchase of goods in Thailand. Consequently, the service provider would not qualify under the condition that the services had to be used entirely outside Thailand and therefore 7% VAT would

apply. This Supreme Court judgement settled the dispute while the original version of Clause 2 (1) was still in effect.

In contrast, the latest ruling of the Revenue Department, which was provided as a result of a request by one taxpayer, demonstrates more understanding of the nature of the inspection and testing services contracted and refers to the amended Clause 2 (1). The portion of services used abroad would be exempt from VAT.

Although the services have already been completed in Thailand, the reports of the results are delivered to a foreign customer to be used to make decisions outside Thailand.

A subsequent purchase of goods or price negotiation is merely a consequence of those decisions that took place after the services had been completed.

Revenue officers would generally apply the principles and conclusions of the Supreme Court as the authority for the VAT treatment of inspection and testing services performed by a service provider to a customer in a foreign country.

This situation would inevitably result in a great deal of uncertainty for service providers and eventually become a burden for them if they have to charge VAT to

their foreign customers to avoid the risk of incurring penalties and surcharges arising for not being entitled to an exemption from VAT.

On the other hand, 7% VAT charged on inspection and testing services would be an incremental cost for foreign customers since they would have no means of claiming back the tax.

Even though the latest version of Clause 2 (1) provides that the portion of services used abroad is subject to 0% VAT and the portion used in Thailand is subject to 7% VAT in the case where the services performed in Thailand can be used both in Thailand and abroad, it remains unclear as to how to prove the portion and use of services outside Thailand as well as who would be considered as the actual user of the services.

Consequently, it is important for companies to keep themselves updated on the latest VAT regulations and interpretations of both the Revenue Department and the courts while this aspect of the law remains uncertain.

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