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E-commerce Transactions-Who has the Taxing Rights?

Modern technology has progressed at such a rapid pace that electronic commerce has now emerged as a major tax issue and one that the Tax Authorities have not fully come to grips with. Because of internet technology, a non-resident person can be in one place and conduct business in cyberspace thus effectively deriving income in another country without the need to establish a physical presence there. The question arises as to how such a person would be taxed.

Under the general guiding principles of taxation, a resident would normally be taxed on worldwide income with a credit or exemption being granted for any taxes paid abroad in the country where the income is sourced. A non-resident on the other hand is generally only taxable in the source country if income is derived there (subject to certain exemptions and exclusions that may be provided under a double tax treaty). Passive income such as interest, dividends and royalties would normally only be subject to a final non-resident withholding tax imposed in the country of source, whilst business income would only be subject to tax in that country if the entity carries on business there through some form of permanent establishment ("PE"). The issue arises as to whether a PE would be deemed to exist with respect to carrying on business of e-commerce trading.
In nearly every Double Tax Agreement ("DTA"), a PE is deemed to exist in that country if any person (other than a broker, general commission agent or any other agent of an independent status) regularly secures orders or exercises an authority to conclude contracts in that country on behalf of an entity located abroad. It has been argued by a number of Tax Jurisdictions that the website, server or internet service provider ("ISP") fulfils that role of an agent and thus would deem that entity to have a PE in the country where the website, server or ISP is used or located.

Whilst it can be argued that the location where the computer is operated from may constitute a PE in that country where it is situated, a distinction needs to be made between this hardware and the data and software stored on the equipment. An internet web site, which is a combination of software and electronic data, does not of itself constitute tangible property and the definition of PE means a fixed place of business through which the business of an enterprise is carried on. The OECD has therefore concluded that a website could not be considered a PE.

The server on which the web site is stored (being a tangible piece of computer equipment having a physical presence and location) may however be considered a PE in some circumstances. The server would need to be located at a certain place for a

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sufficient period of time and the operations carried on through the computer equipment should not be of a preparatory or auxiliary character. In most instances, the server that hosts a web site is used exclusively for advertising, displaying a catalogue of products or providing information to potential customers and such activities would be considered preparatory or auxiliary in nature and thus are specifically excluded under the definition of a PE. On the other hand, if typical core business functions relating to a sale are performed by the server at that location (eg conclusion of a contract with a customer, processing of the payment and delivery of goods), such activities might suggest that a PE exists.

The place where the server is located may also constitute a PE if the enterprise carrying on business through a web site has the server at its own disposal (for example which it owns or leases) and operates the server on which the web site is stored and used. This would cover for instance those ISPs which are specifically in the business of operating their own servers for the purpose of hosting web sites for other entities.

The issue of a PE has also been considered with respect to ISPs that provide the service of hosting web sites of other enterprises on their own servers. The OECD has considered that such ISPs would generally not be regarded as an agent of such enterprises because in the main they would not have authority to conclude contracts in the name of these enterprises. In any case even if the ISP had the authority to conclude contracts and regularly exercised that power, they would generally only be regarded as independent agents for many different enterprises and therefore would be excluded from the deemed definition of the “agency” PE.

In addition, the “agency” PE would only apply to persons that act on behalf of the enterprise. Under the respective DTA, the term person is defined to generally only include an individual or company and other body of persons. Therefore the web site and server should also not be considered a PE under this concept of dependent agent.

Whilst the OECD has concluded that the conduct of electronic commerce in most instances would not give rise to a PE unless there are other factors that support a fixed place of business, Thailand is not a member of the OECD and may adopt a different approach. It should also be noted that the presence of a permanent establishment is relevant only where a double tax treaty exists between the particular jurisdictions.

In the absence of a double tax treaty, the non-resident, which does not have any physical presence in Thailand but sells goods or services through the internet to customers in Thailand may likely be considered as carrying on a business in Thailand and subject to tax under section 76 bis of the Revenue Code. The Revenue Department has not made any specific rules in relation to e-commerce because in practice it is rare for a non-resident to make substantial profit by merely operating a server and a web site in Thailand without having any other physical presence.