Vietnam taxation in Digital Economy

The rapid advent of information and communication technology (“ICT”) has been seen changing the way of doing business nowadays and making certain traditional practices and methods employed in levying and collecting taxes obsolete.

For direct taxes, as identified by the Organisation for Economic Co-operation and Development (“OECD”), three key issues arising from the characteristics of the digital economy comprise digital presence versus traditional taxable presence, data/value creation, and characterisation of income derived from the digital economy.

In response to this emerging issue, the OECD, in October 2015, issued its final report on Base Erosion and Profit Shifting (“BEPS”) Action 1 that seeks to address both direct and indirect tax challenges in the digital economy.

This Action 1 recommends a “value creation” concept to address the direct tax issues wherein profits outcome should be aligned with substantive economic activities and value created. However, getting consensus, among the tax jurisdictions, on where such substantive economic activities are taken place and where value is created, poses practically challenges and would give rise to lengthy disputes.

As is the “destination principle” introduced in this Action 1 to address the value added tax (“VAT”) on cross-border transactions wherein the country where final consumption occurs should charge VAT, mechanism in place to collect tax – particularly in the digital business-to-consumer (“B2C”) transactions, remains the question of practical standpoint.

Despite the above challenges, policymakers around the world, including across the Asia Pacific region, have been seen taking steps to enact laws to tax the digital economy or transactions related to e-commerce based on their own interpretation and implementation of Action 1.

China’s State Administration of Taxation (“SAT”), for example, has introduced a number of measures to deal with B2C e-commerce businesses operating cross-border. In China, many foreign e-commerce businesses are increasingly using big online shopping platforms such as TMall international to reach Chinese customers. These platforms have been already required to collect indirect taxes. For direct taxes, permanent establishment (“PE”) can be asserted for e-commerce traders on (i) warehousing in China (leveraging the new BEPS PE preparatory and auxiliary and anti-fragmentation rules), (ii) local operations for the purpose of liaising with customers (using the new BEPS Agency PE rules), and (iii) use of servers (including, potentially, the usage of the servers of the online shopping platforms).
The **Australian Government** introduced a new law, in February 2017, applying the Australian Goods and Services Tax (“GST”) to international sales of services and digital products provided to Australian consumers.

In Thailand, due to the increase in online spending, the **Thai Revenue Department** (“TRD”) has recently formed a team to focus on e-commerce and digital business.

**Vietnam** has although not had in place a separate regime on taxation of digital economy, the Government of Vietnam has indicated that studying the OECD’ BEPS Actions 1 on the digital economy with an intention to develop a set of rules that seeks to deal with income derived from Vietnam by the digital companies is at the top of the Government’s agenda. Notwithstanding that the Government of Vietnam might have been seen already brought some expanded PE concepts into effect under the current interpretive guidance on Vietnam’s tax treaties, such as the General Department of Taxation in its official letter (Official Letter 2826/TCT-DNL) provides that the involvement in the negotiation or performance of contracts by staff of a foreign company’s representative office in Vietnam would constitute a PE for this foreign company in Vietnam.

Deputy General Director of Vietnam’s General Department of Taxation has recently affirmed that all kinds of e-commerce also including B2C and customer-to-customer (“C2C”) transactions will be obliged to declare and pay tax on their income arising from Vietnam. The Government has also indicated their intention to require foreign digital companies to register, declare and pay tax in Vietnam.

In the meantime, Vietnam is trying to reinforce its current Foreign Contractor Tax (“FCT”) regime to protect its taxing right on Vietnam-sourced income derived from certain e-commerce businesses. Notably, the Ministry of Finance (“MoF”) of Vietnam on 18 January 2017 issued an official guidance, Official Letter 848/BTC-TCT (“OL848”), clarifying the FCT declaration and payment obligations with respect to commission income of foreign digital companies, conducting business in online room booking services in Vietnam.

This OL848 stipulates that regardless of where Vietnamese accommodation establishments receive the room rate directly from guests, and use part of that amount to make payment of commission to the foreign digital companies, OR where the foreign digital companies collect room rate directly from guests and transfer the remaining amount (i.e. room rate collected from guest less the foreign digital companies’ commission) to the Vietnamese accommodation establishments, the Vietnamese accommodation establishments are required to declare and pay FCT on behalf of the foreign digital companies.

Official Letter 11828/BTC-CST by the MoF, guiding Uber in Vietnam or entities delegated by Uber in the Netherlands to declare and pay FCT on behalf of Uber in the Netherlands, would also help illustrate the Government’s effort towards enhancing the current FCT regime to deal with the tax issues arising from the digital economy.

Multinational enterprises operating in the digital economy are recommended to monitor the development of tax policies in this area, and be prepared for potential changes to their operations, investment structures and increased global tax risks. With e-commerce a rising trend globally, companies should start preparing for the eventual adaptation of Action 1.

**Reference:**

### Tax Treaties

#### Panama – Vietnam Income Tax Treaty

The Panama – Vietnam Income Tax Treaty which was concluded on 30 August 2016 by the Government of Panama and the Government of Vietnam came into force on 14 February 2017, and will take effect from 1 January 2018 in both Vietnam and Panama.

#### Portugal – Vietnam Income Tax Treaty

The Portugal – Vietnam Income Tax Treaty which was concluded on 3 June 2015 by the Government of Portugal and the Government of Vietnam takes effect from 1 January 2017 in both Vietnam and Portugal.

#### 2016 Protocol to India – Vietnam Income Tax Treaty

This 2016 Protocol concluded on 3 September 2016, takes effect from 21 February 2017.
OECD’s BEPS Action 15 on Multilateral Instrument

The Action Plan to address BEPS published in October 2015 by the OECD identifies, among other recommendations, the need for making changes in the current Model of Tax Treaty and setting a tool to implement tax treaty-related measures to prevent BEPS.

This tool is named for Multilateral Instrument (the “MLI”) which “will implement minimum standards to counter treaty abuse and to improve dispute resolution mechanisms while providing flexibility to accommodate specific tax treaty policies. It will also allow governments to strengthen their tax treaties with other tax treaty measures developed in the OECD/G20 BEPS Project”, and the negotiations on which were concluded by more than 100 jurisdictions on 24 November 2016.

The OECD has held a series of events to allow different countries to discuss their position on this MLI and get prepared for the signing ceremony to be held in Paris on 7 June.

In Vietnam, the General Department of Taxation has petitioned to the MoF of the need for Vietnam to adopt the MLI. Given the significant impacts the MLI may have on more than 70 treaties concluded between Vietnam and other countries/territories, the MoF is thoroughly considering the petition before seeking consultation from the relevant ministries.