porterwright

INTERNATIONAL BUSINESS ALERT

JUNE 18, 2020

YUANYOU (SUNNY) YANG
412.235.1484
yyang@porterwright.com

New Section 301 investigations initiated relating to digital services taxes from multiple countries

On June 5, 2020, the Office of the U.S. Trade Representatives (USTR) published a Notice re Initiation of Section 301 Investigation of Digital Services Taxes, announcing that the USTR is commencing a Section 301 investigation relating to Digital Services Taxes adopted or under consideration by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey and the United Kingdom, pursuant to the Trade Act. The deadline to submit public comments to this Notice is July 15, 2020.

What are Digital Services Taxes?

Digital Service Taxes (DST) are taxes imposed on company revenues that are generated from providing certain digital services to, or aimed at, users in the jurisdiction. In the last two years, various jurisdictions have taken under consideration or adopted DST. These jurisdictions include:

Austria

In Oct. 2019, Austria adopted a DST that applies a 5% tax to revenues from online advertising services. The law went into force on January 1, 2020. The tax applies only to companies with at least €750 million in annual global revenues for all services and €25 million in domestic revenues for covered digital services.

Brazil

Brazil is considering a legislative proposal entitled the "Contribution for Intervention in the Economic Domain" (CIDE). If adopted, CIDE would apply to the gross revenue derived from digital services provided by large technology companies.

The Czech Republic:

The Parliament of the Czech Republic is considering a draft law that would apply a 7% DST to revenues from targeted advertising and digital interface services. The tax would apply only to companies generating €750 million in annual global revenues for all services and CZK 50 million in domestic revenues for covered digital services.

The European Union

The European Commission (EU) is considering a DST as part of the financing package for its proposed COVID–19 recovery plan. The EU DST is based on a 2018 DST proposal that was not adopted. The 2018 EU proposal included a 3% tax on revenues from targeted advertising and digital interface services, and would have applied only to companies generating at least €750 million in global revenues from covered digital services and at least €50 million in EU-wide revenues for covered digital services.

India

In March 2020, India adopted a 2% DST. The tax only applies to non-resident companies, and covers online sales of goods and services to, or aimed at, persons in India. The tax applies only to companies with annual revenues in excess of approximately Rs. 20 million (approximately U.S. $267,000). The tax went into effect on April 1, 2020.

Indonesia

Earlier this year, Indonesia adopted an electronic transaction tax that targets cross-border, digital transactions. Further implementing measures are required for the new tax to go into effect.

Italy

Italy has adopted a DST. The measure includes a 3% tax on revenues from targeted advertising and digital interface services. This tax applies only to companies generating at least €750 million in global revenues for all services and €5.5 million in domestic revenues for covered digital services. The tax applies as of January 1, 2020.

Spain

Spain is considering a draft DST. The measure would apply a 3% tax to revenues from targeted advertising and digital interface services. This tax would apply only to companies generating at least €750 million in global revenues for all services and €3 million in domestic revenues for covered digital services.

Turkey

Turkey has adopted a DST. The measure applies a 7.5% tax to revenues from targeted advertising, social media and digital interface services. The tax applies only to companies generating €750 million in global revenues from covered digital services and TL20 million in domestic revenues from covered digital services. The Turkish President has authority to increase the tax rate up to 15%. The law went into effect on March 1, 2020.

The United Kingdom

The United Kingdom is considering a DST proposal as part of its Finance Bill 2020. The measure would apply a 2% tax on revenues above £25 million to internet search engines, social media, and online marketplaces. The tax applies only to companies generating at least £500 million in global revenues from covered digital services and £25 million in domestic revenues from covered digital services. The bill is in the final stages of adoption by Parliament, and if passed, payments would be due from affected companies in 2021.

Why Section 301 Investigation Initiated?

According to the USTR, the "available evidence" suggests that "the DSTs [in the above jurisdictions] are expected to target large, U.S.-based tech companies." Accordingly, the USTR is concerned that the DST practices should be deemed "unfair and inequitable" practices by the above jurisdictions under the Trade Act. In consultation with the advisory committee and the Section 301 Committee, the USTR initiated the Section 301 investigation with respect to DSTs adopted or under consideration by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom, and has further requested consultations with the government in the above jurisdictions.

At this stage, the initial investigation will focus on the concerns related to:

1. The discrimination against U.S. companies;
2. Retroactivity; and
3. Possibly unreasonable tax policy for DST practices in the above jurisdictions.

The USTR may find that the DSTs diverge from norms reflected in the U.S. tax system and the international tax system by finding of:

4. Extraterritoriality;
5. Taxing revenue, not income; and
6. A purpose of penalizing particular technology companies for their commercial success.

The USTR will determine after the initial investigation if one or more of the DST practices are actionable under Section 301, and what action they may find appropriate if they found the DST practices actionable.

Take away

The USTR is now accepting comments over the initiation of the Section 301 investigation in the following areas:

- Concerns with one or more of the DSTs adopted or under consideration by the jurisdictions covered in these investigations.
- Whether one or more of the covered DSTs is unreasonable or discriminatory, including any other factors (other than the 3 factors identified above) that may warrant a finding that one or more of the covered DSTs are actionable under Section 301.
- The extent to which one or more of the covered DSTs burdens or restricts U.S. commerce.
- Whether one or more of the covered DSTs is/are inconsistent with obligations under the WTO Agreement or any other international agreement.
- The determinations required under section 304 of the Trade Act, including what action, if any, should be taken.

Companies in the digital business should be aware of this DST that has been imposed or may be imposed in the upcoming years, and consider whether or not to file public comments prior to July 15, 2020. All submissions must be in English and sent electronically via Regulations.gov. To submit comments via Regulations.gov, enter docket number USTR–2020–0022.

For more information please contact Yuanyou Yang or any member of Porter Wright's International Business & Trade Practice Group.