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ABOGADOS

The Ministry of Information and Communications **Technology** stated the services that are **exempt** from **Sales Tax.**

legal bulletin

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35th Edition

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Table of Contents

Newly proposed changes to the Free Trade Zones regime.

Currently, the Colombian Tax and Customs Office (DIAN) is redesigning the Colombian free trade zone regime, for this, in the last month it has prepared both a Decree bill intended to adjust some specific matters necessary for the preparation of the regime to new commercial challenges and a draft **Resolution** (the "Proposal") which purpose is to regulate some articles of **Decree 2147/2016** (free trade zones regime) in order to facilitate the regime operability. The main changes brought by the mentioned drafts are the following:

Resolution Draft

Main adjustments are:

1. Regarding the customs regime for Free Trade Zones (FTZ), the Proposal confirms the possibility for FTZ industrial users to act as Importers of Record (IOR) of goods produced and/or manufactured within the FTZ facilities. However, the Proposal indicates that such operation must be conducted under the principle of exclusivity, hence import must correspond to sales of such goods made from the FTZ.

   Although the Proposal's goal is clear, such restriction may result contrary to the development of business with companies operating from FTZ's.

   Also, the Proposal establishes the possibility for FTZ industrial users to import the replacement parts or replacement materials directly related to the goods produced or transformed within the FTZ.

   In any case income resulting from the sale of such goods may not exceed 20% of total income corresponding to the revenue generating activity.

2. The "FTZ Forms" for the movement of goods may be corrected to modify aspects such as the physical units' quantity, description and cost of the goods, provided it is made within 5 business days after the Form authorization date, for which, the number and date of the Form subject to correction together with the corresponding justification must be indicated.

3. Regarding goods destruction, the FTZ operator user (both for permanent and temporary FTZ) having products in serious state of impairment, decomposition, total damage, or total loss, must inform the customs authority with jurisdiction on the FTZ 2 business days before the goods destruction.

In such cases in which the destruction request is executed by the FTZ industrial or commercial user and these are not the owners of the goods, the request must include the authorization from the owner of the goods.

Once the destruction of the goods is conducted, the FTZ operator user must record it in the FTZ stock control system.

4. Regarding the recently created "voluntary abandonment" possibility, the Proposal indicates that whoever has the right to dispose over the goods may produce a request in writing to DIAN with jurisdiction where the products are located. Such request must be made 10 business days before the "legal abandonment" of the goods apply and should not cover items mentioned in article 91 of Decree 2147/2016.

   The decision accepting the voluntary abandonment would indicate the actions the applicant must follow in order to turn the goods in, in accordance with their characteristics or nature and the delivery time. As a consequence, having accepted the abandonment, the interested party would pay the expenses derived from this action.

5. The Proposal regulates the termination of activities both for FTZ users and FTZ themselves. In this sense, specific rules on the stock deposition are set. It also establishes a special procedure for stock management when the FTZ user losing the qualification is the FTZ operator user.

6. At the same time, according to the Proposal, the Resolution establishes the proceeding to be followed when the goods are moved to facilities next to a "Single enterprise" FTZ, for which it would be necessary for the imported product to follow the production line and in case of inspection or physical review the customs officer could conduct it regardless of the production stage.

   Regarding the FTZ Goods Movement Form (GMF), this would be authorized once the clearance permit or removal of the relevant import return is obtained.

7. Regarding the re-entry of goods that temporarily leave the FTZ towards the rest of the national customs territory, a GMF would be required, indicating the goods re-entering and the GMF number authorizing the temporary exit.

   In case the goods were subject to industrial processes, the GMF would need to include the amount and features of the re-entering raw materials, inputs or intermediate goods, together with the information of the goods produced or transformed in the rest of the country, based on the goods that temporarily were outside the FTZ.

Decree draft

This regulation will introduce important changes to consider, some of the most important are listed below:

1. Regulates the possibility for non-free trade zone users to provide services to industrial users without implying the latter are outsourcing the activities for which they were qualified as such.

   This important change boosts the economies of scale and the productive chains with individuals and companies operating outside the free zone.

2. The scope of the annual audits is extended, verifying, among other factors, the corporate, financial and accounting situation of the operator user, and checking this user is not economically or corporately linked with its industrial users.

   Even though this obligation could be understood from the current regulation, DIAN is eager to have a greater control capacity.

3. Regulates the FTZ Forms establishing that they can be corrected anytime without penalty (this must be regulated through a Resolution produced by DIAN).

4. Considers the possibility for industrial users to store, without legal breaches, replacement parts and materials directly related to the goods produced or processed in the free zone.

5. Adjust the sanctions regime, modifying the value of some of the penalties and changing the scope of others.

6. The entry into force of Decree 2147/2016 will be postponed until November 30th 2019.

In accordance with the above, the proposed Resolution and Decree would regulate the previous situations that have been provided in Decree 2147/2016. Notwithstanding, it is necessary to indicate that, as the relevant adjustments are made to this regulation proposal, modifications may arise or be removed from the proposed Resolution or from the Decree project.

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Congress enacted the Law providing the regulation and supervision of financial conglomerates

On September 21, **Law 1870/2017** (the "Law") was enacted, providing the regulation and supervision of financial conglomerates, as well as the inspection and surveillance regime of the controlling parties of such conglomerates. According to this law, a financial conglomerate is comprised by a set of entities, having a common controlling company, two or more national or foreign entities exercising an activity supervised by the Finance Superintendence of Colombia ("Superfinanciera"), and with an entity, at least, exercising such activities in Colombia.

In this context, the law provided that a financial conglomerate is comprised by the controlling company and its subordinates, which may be:

- Entities subject to the inspection and surveillance of Superfinanciera and its domestic and/or foreign financial subordinates.
- Foreign companies performing activities subject to the surveillance carried out by Superfinanciera and its national and/or foreign financial subordinates.
- The corporate bodies or investment vehicles through which the controlling company (referred to as financial holding company in this regulation) exercises control over the entities aforementioned.

It should be noted that the law provided that the definition of control and subordination shall be governed by articles 260 and 261 of the Code of Commerce.

Any corporate body or investment vehicle exercising:

1. The first level of **control** (closest corporate body or investment vehicle having common control over the FC entities), or
2. **Significant influence** over the entities part of the FC (base on Art. 261(1) of the Code of Commerce, for which common shares with voting rights of those shareholders who cannot have control according to the governing laws shall not be computed).

Also, Law 1870/2017 determined that the financial holding company is the one where a corporate body or investment vehicle exercises first level control or has significant influence over the other companies comprising

the financial conglomerate. For such purpose, such law defines significant influence as that event where more than fifty percent (50%) of capital belongs to the parent company, directly or through or with the participation of its subordinates, or their subordinates, for these purposes, without computing the shares with preferred dividend and no voting rights.

On the other hand, the Law provided that the financial holdings, whose registered office or place of formation is abroad, may be exempt from this regulation when they accredit to Superfinanciera that the country where they operate has a regulatory regime, comprehensive and consolidated supervision equivalent to the one set by the regulatory entity in Colombia. However, if the holding company is located in a jurisdiction without a regulation equivalent to the one provided by Superfinanciera, it may request information it considers necessary to supervise the entity operating in Colombia.

Other aspects included in this law are the powers granted to the Finance Superintendence of Colombia for the supervision of financial conglomerates, without prejudice to the other attributions of the entity for the individual and consolidated supervision. Some of them are:

- Give instructions to the companies comprising the conglomerate, related to risks management, information disclosure, conflicts of interest and corporate governance.

- Order changes in the conglomerate structure, when the existing one does not allow appropriate information disclosure, the comprehensive and consolidated supervision, as well as the identification of the real beneficiary and those companies that make part of the holding.

- Authorize the financial conglomerate to make capital investment, directly or indirectly, in insurance companies, financial institutions and the stock market pursuant to **article 88** and letter b) numeral 2° of **article 326** of the Organic Statute of the Financial System.

- The Superintendence shall be entitled to carry out control and supervision on the conglomerates as provided in letter l) numeral 3° of the Organic Statute of the Financial System.

Additionally, article 5 of such law established the intervention instruments, in order for the National Government to exercise intervention functions on the financial conglomerates. In this context, the intervention instruments relate to:

- Fix the proper capital levels of the financial conglomerates, based on the activities developed by the companies comprising such conglomerates and their inherent risks. However, if each financial entity which is part of a conglomerate meets the capital levels and solvency margins required by the regulation in force, solvency margins shall not be required for the conglomerates.

- Establish the criteria for Superfinanciera to exclude from the comprehensive and consolidated supervision corporate bodies and investment vehicles belonging to the conglomerate.

- Establish the parameters to determine the quality of the affiliated parties to the conglomerate and financial holding.

- Establish the exposure and concentration risk limits which the conglomerate must comply with.

The National Government shall enact the regulation of the powers granted by article 5 of Law 1870/2017, within 6 months following the entrance into force of the law.

Finally, it is necessary to note that the financial conglomerate definition only has effects for the consolidated regulation and supervision pursuant to this Law; therefore, it has no effect in accounting, tax, labor or any other terms.

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Agreement no. 2/2017 of the National Hydrocarbons Agency required insurance in the allocation of areas agreements

On May 18th, 2017, the National Hydrocarbons Agency (the "ANH") issued Agreement No. 2 of 2017 (the "New Agreement") in order to set new rules to contract the exploration and production of hydrocarbons owned by the Nation. With the New Agreement, the provisions set forth in Agreement No. 4 of 2012 and its further amendments were comprehensively substituted.

The New Agreement modified some of the requirements for insurance and guarantees the ANH requests in the allocation of areas agreements (hydrocarbons exploration and production agreements).

What requirements remain under the New Agreement?

The New Agreement, like the former, indicates that the specific requirements for insurance and guarantees (i.e. coverage, amounts and validities) shall be established by the ANH in the terms of reference or in the corresponding selection procedure, which must be in line with the Minutes of the Agreement.

Also, with the New Agreement some requirements that State contractors must comply with when taking the insurances and guarantees required in each allocation of areas agreement are maintained:

1. Taking insurance with insurers legally authorized in Colombia.
2. That the guarantees (if any) are demand guarantees.
3. That the insurance policies do not expire due to default in the payment of premiums or by unilateral termination.
4. Restoration of the amount of the guarantee or insurance policy in case this has been reduced.

Additionally, the ANH reserves its capacity to terminate unilaterally the allocation of areas agreement when there is breach by the contractor of its duty to constitute, extend, renew, or restore the guarantees and insurance affecting the Agreement.

What is new in the New Agreement?

Unlike the former agreement, the New Agreement individualizes the type of insurance the contractor must take:

1. Compliance
2. Compliance of labor obligations
3. Tort liability

Notwithstanding the foregoing, the New Agreement does not indicate rules for setting the insured amounts and the coverage of such insurance, these shall be set forth in the terms of reference or in the corresponding selection procedure.

On the other hand, the New Agreement imposes on the contractor the obligation to require from the subcontractors to contract the same insurance policies the ANH initially required from it and under the same conditions. In addition, the ANH requires the contractors to give notice to the insurer about all contractual amendments related to the allocation of areas agreement.

Finally, in case of non-conventional hydrocarbons deposits, the contractor must take a special tort liability insurance with the following characteristics defined in article 72.8 of the New Agreement:

1. The insured amount must be equal to $39,250,000 of 2016.
2. The insured amount of this insurance policy must be updated for every twelve (12) month subsequent period, in accordance with the percentage variation of the Producer Price Index, issued by the United States Labor Department.
3. The validity of the insurance policy must be by annual periods, except for the last validity which must comprise the final annual period and three (3) more years.

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The Superintendence of Industry and Trade indicated the procedure to be followed for the international transfer of personal data

The "transfer of personal data" occurs when personal data is shared to a third party that will act as controller of the information received. This controller will process the data on its own and for its own purposes. In this sense, the "transfer" consists in delivering personal data to a third party so that it processes the information with complete autonomy and without being subject to any subordination or dependence towards the sender. In accordance with **article 26 of Law 1581/2012** ("Law 1581"), the transfer of personal data to countries that do not provide appropriate levels of data protection, is forbidden.

However, the international transfer may be done when complying with one of the following assumptions:

- The receiving country offers an appropriate level of protection, in accordance with the standards set forth by the Superintendence of Industry and Trade (the "SIC").
- The transfer is made under any of the exceptions provided in article 26 of Law 1581, namely: i) authorization by the holder of the data; ii) bank or stock trading transfer, and; iii) legally required transfers for the protection of the public interest or for the exercise or defense of a right in a legal process.
- Declaration of Conformity regarding the viability of the data transfer issued by SIC.

Law 1581 empowered the SIC to establish the standards to determine the requirements for country to assure adequate level of personal data protection, and the issuance of the Declaration of Conformity and, when is required.

In this context, on August 10th, the SIC issued **External Circular 05/2017** ("Circular 005"), established the standards to determine that a personal data receiver has the proper information level were set forth, the countries which are deemed to have proper protection levels were indicated and the requirements for conducting international transfers of personal data were specified.

I. Standards of a proper level for personal data protection of a receiving country.


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Under the provisions in Circular 005, the SIC will consider a receiving country provides proper data protection when it:

- Has rules regulating the treatment of personal data and they comprise the principles of legality, purpose, freedom, veracity or quality, transparency, access and restricted circulation, security and confidentiality.
- Establishment of regulations of rights of the personal data holders and duties of those processing personal data.
- There are means and conduits for protection and effective exercise of the holders' rights, as well as compliance with the existing laws.
- There is an authority in charge of supervising the treatment of personal data and compliance with the law and applicable regulation and guaranteeing effective compliance of the protection of the holder's rights.

II. Countries deemed by SIC to have appropriate protection levels.

The SIC concluded in Circular 005, based on the standards contained therein, a list that names the countries that, in its opinion, offer an appropriate protection level, including Germany, the United States, France, Serbia, Sweden, Romania, Peru, the Netherlands, Portugal, Poland, the United Kingdom, Iceland, among others. The SIC, however, reserves the power to review the mentioned list and include or exclude the countries it considers pertinent.

Circular 005 indicated that, despite the data transfer being made to countries with appropriate protection levels this does not exempt those who make them from their duty to demonstrate they have implemented the necessary measures to guarantee the correct treatment of the personal data.

If it is intended to transfer personal data to a country not included in the SIC list, the interested party must check if the operation is established among the exemptions provided in article 26 of Law 1581, abovementioned, or if the receiving country meets the standards of proper level of protection, also abovementioned. If any of these assumptions is met, the interested party may make the transfer. In the event that none of them is met, the interested party must request a conformity declaration from the SIC.

Circular 005 also stated that the simple cross-border transit of data does not imply data transfer to third countries, as the cross-border transit is considered a "simple passing of data through one or several territories using the infrastructure comprised by all the networks, equipment and services required to reach its final destination."

III. Declaration of Conformity.

According to Law 1581, in those events when a country receiving personal data is not included in the list of countries with an appropriate level of protection or that the transfer is not covered by any exception, the interested party shall propose to the SIC the issuance of a declaration of conformity on the viability of the operation.

In its request, the interested party shall provide to the SIC information according to the conditions provided in the **"Guideline for Requesting a Conformity Declaration on Personal Data International Transfers".** Nonetheless, the SIC shall be entitled to request supplementary information in order to determine if the required assumptions for the viability of the operation are met.

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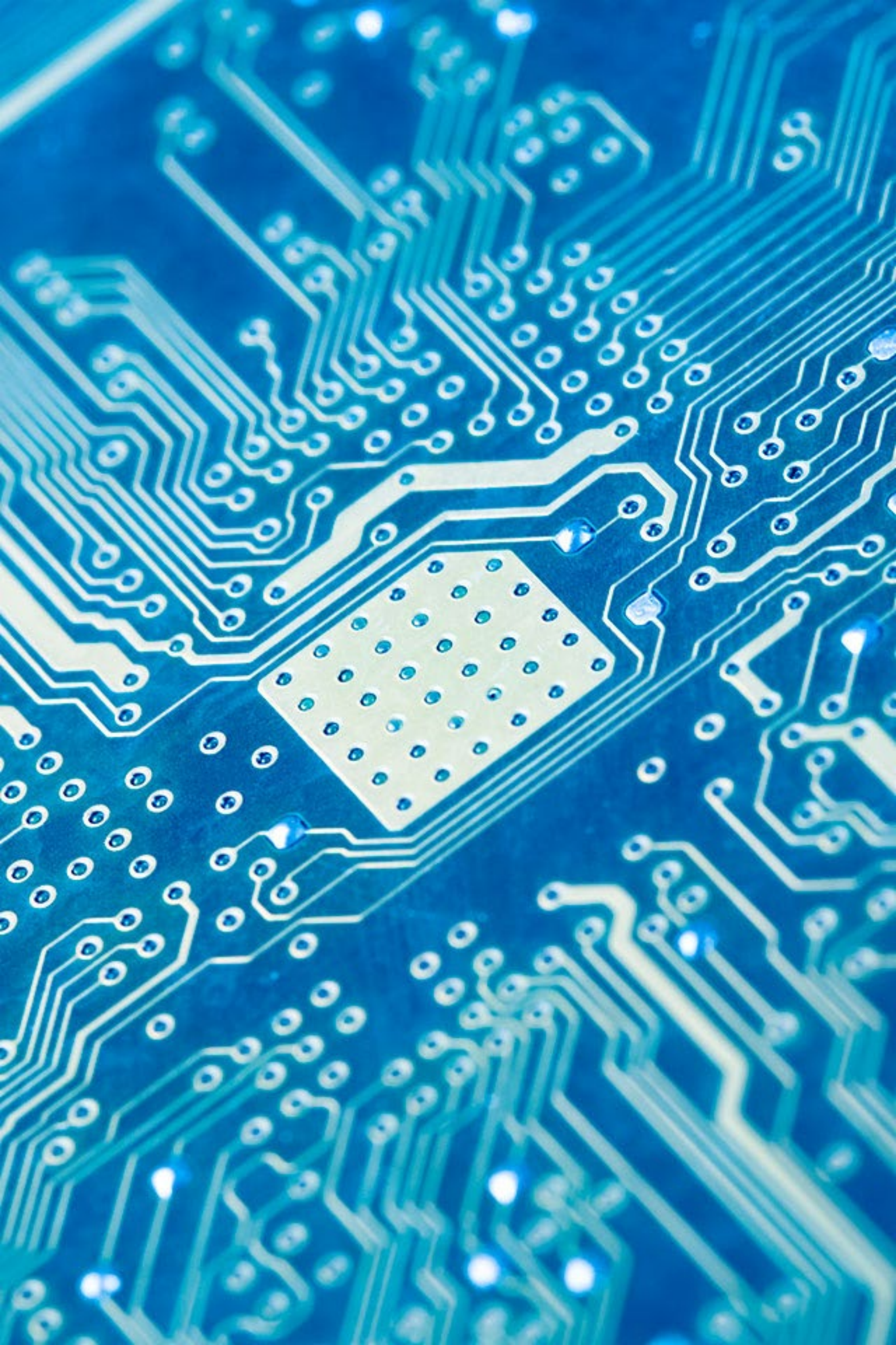
The Ministry of Information and Communications Technology stated the services that are exempt from Sales Tax.

On the 25th of August, the Ministry of Information and Communications Technology enacted **Decree 1412/2017** (the "Decree"), aiming to classify software and virtual education services for the commercial development of digital contents. This aims to regulate numerals 23 and 25 of **article 476 of the Tax Code**, stating what services are exempt from Sales Tax.

In this context, the Decree provides the following characteristics of the digital content: (i) its commercial value is not determined by the inputs used for its creation; (ii) it can be copied, transmitted or used through telecommunication networks or tools of Information and Communications Technology (ICTs).

Also, the Decree defined the software for the development of digital contents as the "set of programs and routines that allow computers to perform certain tasks related to the creation and production of digital content," classifying it as follows:

- Integrated development environment.
- Development engine of videogames.
- Plugin and extension for the creation of digital content.
- Graphics editing software.
- Digital illumination and rendering software.
- Additive manufacturing software.
- Pre-production, production and video editing software.
- Sound production and editing software.
- 2D and 3D modelling software.
- Animation software.
- Software for the creation of visual effects, digital composition and post-production.
- Augmented reality software.
- Virtual reality software.
- IT systems integration software.
- Version control software.
- Software for the creation of workflows for the creation of digital content.
- Software for the analysis, marketing and monetization of digital content.
- Artificial intelligence software.



Without prejudice to the above, the software classification list may be expanded by the Ministry of ICTs.

In turn, the Decree determined those services considered as virtual education services for the creation of digital content, as follows:

- Digital animation.
- Big data.
- Videogames development.
- Sound design and editing.
- Graphics Editing.
- Video editing and production.
- Illumination and rendering.
- Additive manufacturing.
- Artificial intelligence.
- Internet of things.
- 2D and 3D modelling.
- Post-production, visual effects and digital composition.
- Programming.
- Production, management, marketing and monetization of digital content.
- Virtual and augmented reality.
- User usability and interface.

Additionally, Decree 1412/2017 provided the possibility for interested parties to request to the Ministry of ICTs to certify the software and the courses for the development of digital content.

It must be noted that the webpages provision service, hosting, cloud computing and remote maintenance of programs and equipment, are also exempt from Sales Tax, and that there is no regulation applicable to these services yet.

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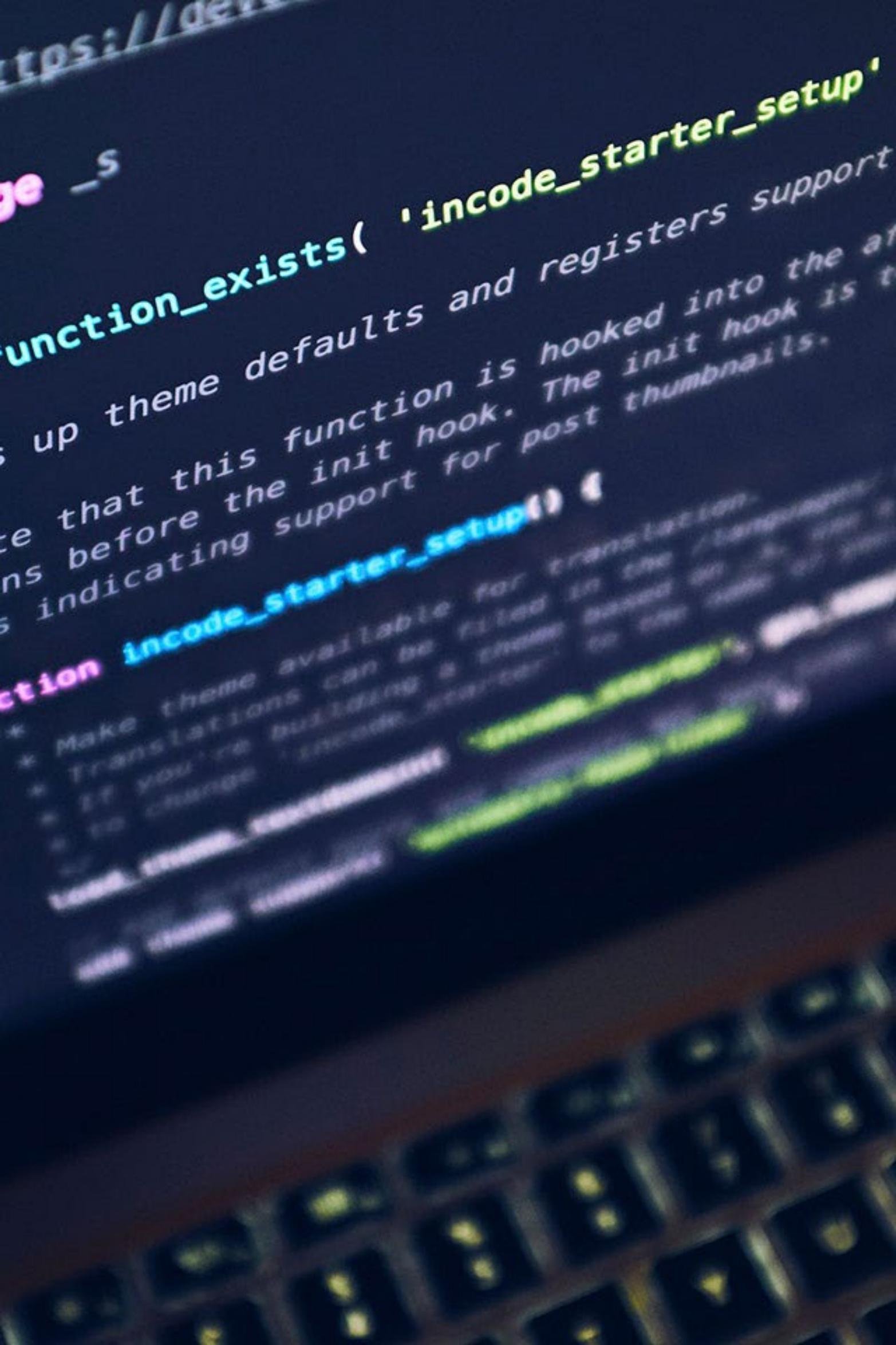
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