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Tax Newsletter

August 2018

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NEW REGULATIONS

Renewal of Vietnam economic sector system

On 06 July 2018, the Prime Minister issued Decision No. 27/2018/QD-TTg on renewal of Vietnam's economic sector system.

The renewed sector system issued in this Decision remains unchanged with five levels. However, the number of sectors in the fourth and fifth level has increased. Specifically, the fourth level sector increases from 437 to 486 sectors, while the fifth level sector increases from 642 to 734 sectors.

In addition, the renewed sector system provides the detailed guidance and explanation on the scope of economic activity to be classified into each sector.

This Decision took effect from 20 August 2018 and replaced Decision No. 10/2007/QD-TTg dated 23 January 2007.

Handbooks of customs clearance and tax administration for imported and exported goods

On 28 June 2018, the General Department of Customs issued two handbooks (by Decision No. 1920/QD-TCHQ and Decision No. 1925/QD-TCHQ) related to customs clearance and tax administration of imported and exported goods. Some highlights from these handbooks are as follows:

- With respect to the customs clearance of imported and exported goods: The handbook provides guidance on: (i) Examination, consultation and determination of dutiable value of imported and exported goods and (ii) Classification in respect of customs tariffs on imported and exported goods.

  Of special note, the handbook provides detailed explanation and guidance on the application of six General Rules Interpretation ("GRIs") for goods classification.

- With respect to tax administration of imported and exported goods: The handbook sets out the procedure for customs officers to handle tax administration relating to exported or imported goods, including: (i) notification of the tax exemption list; (ii) tax

reduction; (iv) tax refund and (v) no tax collection.

These handbooks took effect after 15 days from the signing date.

Format of data communication between Customs authorities and enterprises in processing, manufacturing of exported goods

On 09 August 2018, the General Department of Customs issued Decision No. 2270/QD-TCHQ on the format of data communication between Customs authorities ("CAs") and export processing enterprises ("EPEs"), enterprises in processing and manufacturing exported goods ("PME").

The Decision announces that data communication between CAs and EPEs, PMEs should be applied in eXtensible Markup Language ("XML"). Please refer to the Annex of this Decision for more details.

The Decision took effect from the signing date and replaced Decision No. 2228/QD-TCHQ dated 05 July 2017.

GUIDING DOCUMENTATIONS

Corporate Income Tax ("CIT")

Recording the cost incurred for the information technology projects overseas

On 31 July 2018, Hanoi Tax Department issued Official Letter No. 53064/CT-TTHT providing guidance on the recognition of depreciation expenses for information technology ("IT") projects overseas.

Specifically, where a company invested an overseas IT system (server) which met the criteria for tangible fixed assets and/or intangible fixed assets and its ownership of the IT system was determined by the competent authorities in Vietnam with supporting legitimate documents, the company could make depreciation in accordance with the regulations.

The aforementioned depreciation expenses should be deductible for CIT purposes if meeting certain conditions as regulated. However, in case the company could not maintain the sufficient legitimate documents for the ownership of the company for such overseas IT system, the company could not claim depreciation expenses for such asset as deductible expenses.

With respect to the actual expenses incurred in Vietnam for the services actually consumed related to the overseas server system, they are also considered as deductible expenses for CIT purposes if satisfying the conditions prescribed in Article 4 of Circular No. 96/2015/TT-BTC dated 22 June 2015.

Personal Income Tax ("PIT")

PIT treatment on salary paid during probation period

On 02 August 2018, Hanoi Tax Department issued Official Letter No. 54155/CT-TTHT guiding the PIT treatment on salary paid during probation period. Specifically:

- Upon the termination of the probation contract, the company would be responsible for withholding the PIT liabilities on progressive tax rates before making salary payments to employee, including the salary payment for the probation period provided that the company continues signing the labor contract with the employee with contract terms of three (03) months or more.

- Upon the termination of the probation contract, the company would be responsible for withholding the PIT liabilities at the rate of 10% for the employment income amounting VND 2 million and above, received during the probation period.

- Where an employee has only one income source being subject to PIT rate of 10%, but total estimated taxable income after family relief is not at the income level to be taxed, the employee is required to make such confirmation under Form No. 02/CK-TNCN (attached to Circular No. 92/2015/TT-BTC dated 15 June 2015 issued by the Ministry of Finance) and send it to the company. Based on such confirmation, the company would not temporarily withhold PIT at the rate of 10% when paying income to the employee.

The guidance in Official Letter No. 54155 aligns with previous guidance given in Official Letter No. 47484/CT-TTHT dated 09 July 2018 issued by Hanoi Tax Department and Official Letter No. 1559/CT-TTHT dated 28 February 2018 issued by Ho Chi Minh Tax Department.

PIT rate of 10% applicable to taxable income from consultancy services agreement by non-business individual

On 25 July 2018, Hanoi Tax Department issued Official Letter No. 51692/CT-TTHT on PIT for individuals providing consultancy services.

Under the current regulations, organizations and individuals paying salary, remuneration and other expenses of VND 2 million or above per time for tax residents without labor contracts are required to withhold PIT liabilities with tax rate of 10% before making such payments. Accordingly, if the company signs the service contracts with non-business individuals for the consultancy of implementation phase, it could be considered that there would be no labor contracts between the company and the individuals available, therefore, the company should withhold PIT liabilities at the rate of 10% for those payments of VND 2 million or above.

At the year-end, such individuals are required to aggregate all of their income from their salaries and wages for tax finalization purposes using the progressive PIT rates (if such individuals are subject to compulsory PIT finalization responsibilities).

The guidance in Official Letter No. 51692 aligns with previous guidance given in Official Letter No. 2754/TCT-TNCN dated 23 June 2017 by the General Department of Taxation.

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Foreign Contractor Withholding Tax ("FCWT")

FCWT exemption for income from consultancy services for ODA projects in Vietnam

On 31 July 2018, Hanoi Tax Department issued Official Letter No. 53151/CT-TTHT guiding on FCWT treatment for foreign contractors providing consultancy services for ODA projects in Vietnam. The tax obligations of foreign contractors are determined as follows:

- When the non-refundable ODA project in Vietnam is under a foreign contractor agreement with the price quoted exclusive of VAT, the foreign contractor should be exempted from VAT liability, but be subject to CIT liability as prescribed.

- When the non-refundable ODA project is under a foreign contractor agreement with the contract price inclusive of VAT, or the project uses the preferential loan, the foreign contractor shall be subject to both VAT and CIT liabilities as prescribed.

- When the project uses simultaneously non-refundable ODA and preferential ODA loans, which are financed under separate agreements or disbursed separately for each specific project activity, the tax treatment would be applied separately for each source of capital as mentioned above. In contrast, if there are no separate financing agreement or separate disbursement for each source of capital, the foreign contractor shall be subject to FCWT liabilities with the least-favorable tax rates applicable to ODA projects.

In case where foreign contractors apply deemed FCWT method, the income from consultancy services will be subject to 5% of VAT and 5% of CIT (Article 12, Article 13 of Circular No. 103/2014/TT-BTC).

This matter was previously addressed in Official Letter No. 2000/CT-TTHT dated 15 January 2018 issued by Hanoi Tax Department with the same viewpoint.

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Value Added Tax ("VAT")

VAT treatment on asset lease in EPEs

On 31 July 2018, Hanoi Tax Department issued Official Letter No. 53153/CT-TTHT guiding VAT treatment on asset lease in EPEs. Specifically:

- The company granting the financial lease of assets to the EPE, should be entitled to 0% VAT on such lease activity and the refund of relevant input VAT in accumulated amount of VND 300 million or more if such activity satisfies the conditions stipulated in Point b, Clause 2, Article 9, Circular No. 219/2013/TT-BTC.

- If upon the termination of financial lease contract, the EPE receives the ownership of the leased asset after full rental payment as prescribed in the lease agreement (i.e. asset buy-back at nominal value), then the company granting the financial lease contract would not be required to declare VAT for the related revenue. The exception is for financial lease of car where, as regulated, there is a requirement for invoices to be issued and declared for VAT liabilities.

- If the lease contract is terminated before the due date, and two parties choose to fully credit input VAT for the leased asset, the lessee would adjust the input VAT that was previously credited based on the remaining value stated in the asset handover minutes when returning the asset to lessor. If the lessee were an EPE, the company would not be required to declare and pay for VAT for lease asset value up to the time of recollection. If upon the contraction termination, financial lease company sells such asset to the non-EPE, VAT invoice would be issued at 10% VAT rate for the asset sale.

- In the lease contract is terminated before due date; the company leases this asset to other non-EPE; and both the company and the new lessee agree to credit the input VAT on the asset's residual value on the instalment basis, then the company is required to issue the invoices at each instalment to the lessee, and declare for VAT as regulated. Where both parties fully transfer VAT based on residual value, the company must issue invoice and declare VAT reflecting the residual value of the leased asset as regulated.

The guidance in Official Letter No. 53153 aligns with previous guidance given in Official Letter No. 83300/CT-TTHT dated on 28 December 2017 and Official Letter No. 76519/CT-TTHT dated 23 November 2017 of Hanoi Tax Department.

VAT refund for re-exported goods

On 02 August 2018, Hanoi Tax Department issued Official Letter No. 54150/CT-TTHT regarding VAT refund for re-exported goods.

In this regard, from 01 February 2018, enterprises imported goods for export are allowed to claim VAT refund as regulated at Article 2, Circular No. 25/2018/TT-BTC dated 16 March 2018.

Previously, specifically from 01 July 2016 to 01 February 2018 exclusive, the enterprises are not allowed to claim VAT refund for the imported goods for export according to Circular No. 130/2016/TT-BTC.

The guidance in Official Letter No. 54150 aligns with previous guidance given in Official Letter No. 55656/CT-TTHT dated 09 August 2018 of Hanoi Tax Department.

VAT offset from extra-provincial business when claiming for VAT refund

On 03 August 2018, Hanoi Tax Department issued Official Letter No. 54472/CT-TTHT regarding from extra-provincial business (i.e. business in provinces other than that of the headquarter being located without establishing any dependent units therein) when claiming for VAT refund.

Pursuant to Point 4, Clause 3, Article 1, Circular No. 130/2016/TT-BTC, input VAT related to exported goods and services (G&S) can be claimed for VAT refund - if the accumulated input VAT is in the amount of VND 300 million or above after being offset against the VAT payable of domestic sales of G&S.

On the other hand, pursuant to Point e, Clause 1, Article 2, Circular No. 26/2015/TT-BTC, the VAT paid for extra-provincial business is allowed to be deductible from VAT payables in the headquarter.

Hence, in case the company incurs exporting, domestic sales and extra-provincial business, the company could claim for VAT refund for the input VAT from exporting activities from the amount of VND 300 million or above after offsetting

against VAT payables from domestic sales of G&S.

VAT payable from domestic sales of G&S is determined by the output VAT from domestic sales of G&S deduct with input VAT from domestic sales of G&S and VAT paid from extra-provincial business.

The guidance in Official Letter No. 54472 aligns with previous guidance given in Official Letter No. 1510/TCT-KK dated 23 April 2018 of the General Department of Taxation with the same viewpoint.

Tax treatment on domestic liquidation fixed assets in EPEs

On 03 August 2018, Hanoi Tax Department issued Official Letter No. 54475/CT-TTHT regarding tax treatment on domestic liquidation of fixed assets in EPEs.

Pursuant to Clause 55, Article 1, Circular No. 39/2018/TT-BTC, EPEs are allowed to liquidate imported fixed assets domestically. Accordingly, EPEs are required to submit the customs declaration reflecting the change of asset usage, declare and pay for import duty and import VAT to Customs authorities.

Simultaneously, when liquidating the fixed assets, EPEs are required to request for the invoice issuance by Tax authorities to deliver the invoices to buyers (local entities) for such liquidation.

VAT payable for liquidation of fixed assets is determined as the difference between VAT recorded in sales invoice and import VAT paid when changing purpose of asset usage (according to Clause 9, Official Letter No. 18195/BTC-TCHQ dated 08 December 2015 issued by the Ministry of Finance).

The guidance in Official Letter No. 54475 aligns with previous guidance given in Official Letter No. 3652/TCT-CS dated on 08 September 2015 issued by the General Department of Taxation with the same viewpoint.

Additional deemed VAT/duty on imported goods are creditable/deductible

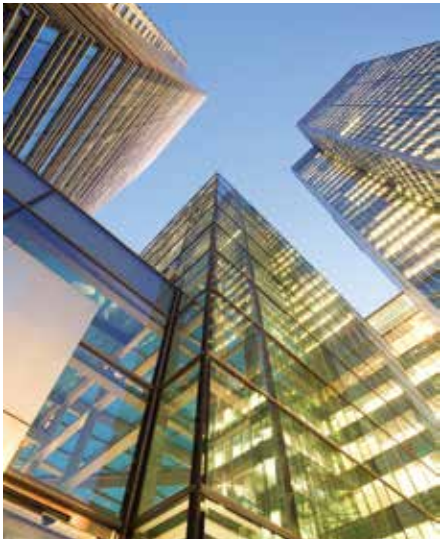
On 02 February 2018, Hanoi Tax Department issued Official Letter No. 54152/CT-TTHT guiding on deemed tax on imported goods.

Where the company subjected to tax violation leading to additional customs duty and import VAT liabilities but did not fall into cases of tax fraud or tax evasion, it would be allowed to credit such additional

input VAT paid in full if meeting regulated conditions for the credit. From CIT perspectives, the additional customs duty payment could be claimed as deductible expenses if all conditions prescribed at Article 4, Circular No. 96/2015/TT-BTC are fully met.

However, the penalty from the administration violation and late payment penalty (if any) would not be deductible CIT calculation purpose.

The guidance in Official Letter No. 54152 aligns with previous guidance given in Official Letter No. 66618/CT-TTHT dated 10 October 2017 of Hanoi Tax Department with the same viewpoint.



Import and export duty

Reinforcement of imported scraps inspection

The Government Office and Vietnam Marine Administration issued Notification No. 281/TB-VPCP dated 07 August 2018 and Official Letter No. 2907/CHHVN-VTDVHH dated 26 July 2018 guiding the reinforcement of the inspection on imported scraps. Key points are as follows:

- Marine Administration will enhance its coordination with Customs authorities in the inspection of ships that transport used iron, steel, plastic, paper that are not aligned with HS codes for imported scrap list under Decision No. 73/2014/QD-TTg.

- The Ministry of Natural Resources and Environment ("MNRE") is recommended to conduct a general inspection of imported scrap licensing and withdraw licenses of any enterprises that are found to be in violation. Additionally, MNRE should reconcile all the licenses of imported scrap that are still within the import quota.

  In the future, MNRE would not issue new licenses for imported scraps under entrustment

arrangement. New licenses shall only be issued for enterprises who could prove their demand of scraps and the capacity of scraps usage for their manufacturing activities to MNRE.

With respect to the scrap containers that are left at the seaports without recipient, they must be disposed or moved to another place.

- Marine Administration have requested marine port operating enterprises to control consignments which are declared as imported scraps, and only unload goods from ships if shipping lines, shipping agents or consignment owners present the relevant license and Commitment document stating the time to receive goods together with the deposit confirmation for port (if any).

  Where the relevant license is not presented, such consignments are forced to be moved to overseas port for discharge. In addition, for any consignments of imported scraps that have already been at the seaport for over 30 days, Customs authorities are recommended to transfer them to other places to promptly release the outstanding consignments.

Customs duty exemption and refund is not applicable to on-the-spot export of material

On 01 August 2018, the General Department of Customs issued Official Letter No. 4532/TCHQ-TXNK guiding the customs duty treatment of on-the-spot exported/imported goods.

Specifically, pursuant to Clause 1, Article 36, Decree No. 134/2016/NĐ-CP, taxpayers would be entitled to import duty refund in cases where the taxpayers paid import duty for imported goods for manufacturing business and such goods were used for manufacturing and the finished goods are exported overseas or to non-tariff zones. However, where the imported material are used for manufacturing, and the finished goods are on the spot exported, customs duty exemption and refund would not be applicable.

The General Department of Customs acknowledges the comments of provincial Customs departments regarding to customs duty exemption for processing products for on-the-spot export and would requests the competent authorities

for further consideration, amendment, and supplementation of Decree No. 134/2016/NĐ-CP for the practical approach.

Separate record for permitted import-export activities and manufacturing for export

On 01 August 2018, Hanoi Tax Department issued Official Letter No. 53976/CT-TTHT guiding the separate accounting record and allocation of expenses between trading activities and export-manufacturing activities of EPEs. Specifically:

With respect to accounting records and storage: when conducting the trading and related trading activities in Vietnam, the EPE is required to separate the accounting books for revenue and expenses related to its trading operations. In addition, the EPE is required to arrange for the separate storage area for such trading from the area of goods manufactured by the EPE or establish a separate branch outside the EPE/ export process zone to conduct such trading activities.

With respect to tax treatments and customs procedures:

- When selling goods domestically, the EPE uses the sale invoices and declare and pay for VAT liabilities as regulated;
- When exporting goods overseas, EPE conducts the export procedures as other local enterprises with the export activities and applies the VAT rate at 0% if qualifying the export conditions prescribed in Circular No. 219/2013/TT-BTC.

Further guidance on Decree No. 59/2018/ND-CP, Circular No. 39/2018/TT-BTC

On 15 August 2018, the General Department of Customs issued Official Letter No. 4787/TCHQ-TXNK addressing certain concerns with respect to Decree No. 59/2018/ND-CP and Circular No. 39/2018/TT-BTC. Some highlights are as follows:

With respect to customs valuation:

- In cases where Customs authorities have suspicions on declared values of export or import goods; the goods are classified as high risk of customs valuation, and the importing or exporting enterprises are classified under the regulations as non-compliance enterprises, then the importing or exporting enterprises, are required to explain and prove the declared customs value during the customs declaration procedure.

- Where Customs authorities have sufficient basis to reject the declared customs value, they would issue a Customs Valuation Notification and the enterprises would be required to make supplementary customs declarations within 05 days. If the enterprises fail to make supplementary declarations by the due date, or the enterprises do not declare the customs value in line with the Customs Valuation Notification, then Customs authorities would deem the relevant customs duty and taxes, and sanction administrative violations (if any) disregarding any challenge by the enterprises.

With respect to exporting processing/ manufacturing:

- In cases where an enterprise:
  - paid import duty on goods imported to manufacture goods for export,
  - did not directly manufacture all the exported goods, but
  - partly or fully transferred the imported goods to another enterprise for processing; and
  - receives the goods back from the other enterprise (after processing), subsequently exports the finished goods,

  then as the exported goods, were processed by other enterprises, they could not satisfy the prescribed conditions for tax refund in accordance with Decree No. 134/2016/ND-CP, thus, they would not be eligible for import duty refund.

- In cases where:
  - goods imported for production and trading are manufactured finished goods for exports; and
  - the finished goods are actually exported overseas or to non-tariff zones,

  then such imported goods shall be eligible for import duty refund.

  However, in case of the on-the-spot exported finished goods, the relevant imported goods would not be eligible for customs duty refund.

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Shared usage of C/O when importing goods from bonded warehouses

On 16 July 2018, the General Department of Vietnam Customs issued Official Letter No. 4178/TCHQ-GSQL guiding the shared usage of C/O when importing goods from bonded warehouses.

According to Circular No. 38/2018/TT-BTC, goods from overseas to bonded warehouses for frequent importation could use one C/O for the whole consignment.

Tax administration

Tax registration for foreign traders without presence in Vietnam

On 09 August 2018, the General Department of Taxation issued Official Letter No. 3065/ TCT-KK guiding tax registration for foreign traders without presence in Vietnam.

Accordingly, when foreign traders, who have no presence or establishment in Vietnam, want to do trading business as foreign contractors and enter into commercial contracts with Vietnamese customers in Vietnam, they must be granted with Registration certificate for import and export rights.

In addition, where the foreign traders want to declare and pay the arising FCWT liabilities directly with the Vietnamese tax authorities, they are required to register for a 10-digit tax code according to Clause 3, Article 7, Circular No. 95/2016/TT-BTC after obtaining the Registration certificate for import and export rights.

The declaration and payment of FCWT liabilities under hybrid method shall be in accordance with Official Letter No. 4431 /TCT-KK dated 23 September 2016 issued by the General Department of Taxation.

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Correction on the notification of invoices issuance by organizations

On 09 August 2018, the General Department of Taxation issued Official Letter No. 3074/TCT-CS correcting Official Letter No. 1546/TCT-CS to Tax Department of Kon Tum, Bac Giang, Quang Ngai and Hanoi with respect to the notification of VAT invoice of organizations.

Accordingly, the Official Letter has removed the following guideline: "Based on the demands to use invoices and the compliance of invoice management and usage by organizations, the direct managing tax authorities determine the quantity of invoices to be used from 03 months to 06 months based on the notification of VAT invoice of organizations".

Determination of the permanent establishment of a foreign entity in Vietnam

On 08 August 2018, the General Department of Taxation issued Official Letter No. 3040/ TCT-HTQT guiding the determination on UPS's permanent establishment in Vietnam.

Accordingly, based on the General Department of Taxation's determination, although Cuu Long Company in Vietnam was not directly authorized to conclude the express delivery contract under the name of UPS Company, Cuu Long Company performed the services on behalf of the UPS Company by collecting service charges from UPS customers and transferring such fees to UPS Company. In other words, Cuu Long Company performed as a representative of UPS Company in partly carrying out UPS Company's business activities in Vietnam (i.e. collection of service charges).

In addition, the management activities of Cuu Long Company are under the detailed instructions and certain control of UPS Company, thus, Cuu Long Company loses its independence status when implementing the agreements with UPS Company. Furthermore, the logistics activities which are provided by Cuu Long Company to its customers in Vietnam are limited and controlled by UPS Company.

Therefore, UPS Company is determined to have a permanent establishment in Vietnam through Cuu Long Company.

Separate accounting for trading and export processing activities and application of tax incentives for EPEs

On 01 August 2018, Hanoi Tax Department issued Official Letter No. 53976/CT-TTHT guiding the allocation of expenses in trading and export processing activities and application of tax incentives for EPEs.

- *With respect to separate accounting for trading and export processing activities:*

  Where EPEs are permitted to perform the trading activities, and directly related trading activities in Vietnam, they are

  - required to separate their accounting books for revenue and expenses for such trading activities for tax purposes, and

  - not allowed maintain trading accounting records together with export processing activities in one accounting book.

  In addition, EPEs are required to:

  - arrange storage areas for trading activities under the rights of import and export which are separate from storage areas for export processing activities; or

  - set up a separate branch to carry out such trading activities.

  Procedures to update the tax registration, registration for branch establishment (if any) are performed in the local Department of Planning and Investment.

  When making domestic sales of goods, EPEs issue sales invoices and declare VAT for such sales as regulated. If the goods are exported to foreign countries, EPEs should carry out the export declaration as same as local entities and could apply the VAT rate of 0% when satisfying the export conditions prescribed in Circular No. 219/2013/TT-BTC.

- *With respect to application of CIT Incentives:*

  In cases where:

  - EPE's investment projects are located in industrial zones (which are not in the favorable socio-economic areas), and
  - satisfy the conditions of new investment projects according to Clause 3, Article 10 of Circular No. 96/2015/TT-BTC

  then the EPEs would be exempted from CIT for 02 years and 50% of CIT reduction for subsequent 04 years for such projects.

  The separate accounting for trading and export processing activities was mentioned in Official Letter No. 74/CT-TTHT dated 05 January 2016 by Ho Chi Minh Tax Department with the same viewpoint.

House construction activities for household must declare for tax liabilities

On 09 August 2018, the General Department of Taxation issued Official Letter No. 3077/TCT-CS on tax administration for housing construction activities.

Regarding the tax declaration and payment for housing construction activities, the General Department of Taxation issued Official Letter No. 3381/TCT-CS dated 08 September 2008, and Official Letter No. 2010/TCT-CS dated 16 May 2017.

Accordingly, households are not required to pay for VAT, CIT and PIT if they construct their houses by themselves. In case households engage with contractors being business establishments to build houses, such contractors should declare and pay for tax as prescribed.

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