

Tax & Legal Update

May 2021

I. TAX UPDATE

1. Corporate Income Tax ("CIT")

- (i) *Revenue generated by branches is included into the revenue cap calculation to determine taxpayers eligible for 30% CIT reduction for fiscal year 2020*

According to Official Letter No. 967/TCT-CS dated 5 April 2021, on the grounds that a branch is a dependent business unit of a legal entity, the total revenue of an entity used to determine taxpayers eligible for 30% CIT reduction in accordance to Resolution No. 116/2020/QH14 and Decree 114/2020/ND-CP includes revenue generated by the branches which is included in the consolidated Financial Statements of the entity.

- (ii) *Support payment received from a business partner to become their agency within a specific period must be taxed as a lump-sum amount*

According to Official Letter No. 933/TCT-DNL dated 1 April 2021 of the GDT, if a company receives a support payment from a business partner who becomes their agency to distribute their products within a specific period and the income received is not for the service provision (e.g. to perform advertising or promotion services) to the business partner, the support payment is considered as an one-off income receipt subject to CIT at the payment receipt date. The company is not allowed to allocate the income over the agency serving period for CIT calculation.

- (iii) *Criteria for high technology company*

On 16 March 2021, the Prime Minister promulgated the Decision No. 10/2021/QĐ-TTg on the criteria for determining a high technology company. Accordingly, a high technology company must simultaneously meet the following requirements:

- Manufacturing products which belong to the list of high technology products which are encouraged to be developed under the Law on High Technology;
- Applying environmental-friendly and energy saving solutions, ensuring the product quality to meet the applicable Vietnamese standards or technical requirements, or international standards.
- Revenues generated from high tech products must account for at least 70% of total annual net revenues.
- Subject to the investment scale, Research and Development ("R&D") expenditure must be equal at least 0.5% to 2% of net revenue minus the input value. This means the R&D expenditure ratio shall only be based on the added value of the enterprise. Previously, the input value of material and component purchased domestically or from overseas was not deducted from the net revenue to determine the ratio.
- The ratio of employees directly participating in R&D activities, who are educated to college level or above and enter into a labor contract with the company for 1 year at least, over the total number of employees should be at least 1% to 5%, subject to the investment scale.
- Previously, only employees being educated to university level and above could be included to determine the ratio.

Decision 10 takes effect from 30 April 2020 and replaces the Decision No. 19/2015/QĐ-TTg dated 15 June 2015.

2. Value Added Tax (“VAT”)

- (i) *Supplementary VAT declaration to adjust the amount of the proposed VAT refund is allowed only if the VAT return of the next VAT declaration period and the application of VAT refund have not been submitted to the tax authorities*

According to the Official Letter No. 944/TCT-CS dated 1 April 2021, if a company registers to declare VAT by the credit method and has accumulated input VAT of VND300 million and above during the investment stage, such company is eligible for a VAT refund.

Upon the completion of investment stage, any accumulated input VAT incurred during investment stage of VND300 million and above must be declared at item [30] (i.e. Remaining input VAT of investment stage proposed for a VAT refund) of the last form 02/GTGT of the investment stage. Where the company has not declared such an amount at item [30], a supplementary VAT declaration to adjust the amount of the proposed VAT refund is allowed only if the VAT return of the next VAT declaration period and the application of VAT refund have not been submitted to the tax authorities.

- (ii) *Strict review and monitoring of VAT refund for ‘high risk’ companies*

According to the Official Letter No. 429/TCT-TTKT and 428/TCT-TTKT dated 22 February 2021, the GDT highlighted some typical fraudulent behaviors abusing the VAT refund related to export sale. Subsequently, the GDT has requested local tax authorities to strictly review and monitor VAT refunds, specifically:

- Review taxpayers exposed to high risks to plan for a tax audit / tax inspection (e.g. taxpayers doing business in electronic components trading, wood and wooden products trading, agricultural and forestry products trading);
- Review both the supporting documents and substance of the transactions to ensure the tax compliance;
- If any signal of tax violation is detected, the tax authorities to coordinate with the Police Department to inspect for further criminal handling;
- Coordinate with customs authorities, including customs authorities of the countries of import, to exchange and provide necessary information for tax management purposes.

3. Land rental fees

- (i) *Land compensation and clearance expenses must be offset against the land rental on a project basis*

According to the Official Letter No. 443/TCT-CS dated 23 February 2021 of the GDT, where a company advances land compensation and clearance expenses in accordance with the land compensation plan approved by the competent authorities, such land compensation and clearance shall be offset against the land rental and must be on project basis. The offset amount must not exceed the land rental payable.

- (ii) *Late implemented projects must pay land rental for the delayed period*

According to the Official Letter No. 1042/TCT-CS of the General Department of Taxation (“GDT”) dated 9 April 2021, where the project implementation is delayed compared to its registered timeline and such delay has been approved by the competent authorities, the project owner is not eligible to enjoy land rental exemption for the delayed period.

4. Tax administration

- (i) *Some tax circulars are still valid while the guiding circular to Decree 126/2020/ND-CP is not available*

According to the Official Letter No. 1938/BTC-TCT dated 26 February 2021, 24 circulars enlisted are not considered as elaborating documents of the Law on Tax Administration (“LTA”) No. 78/2006/QH11. Subsequently, whilst LTA No. 78/2006/QH11 and its guiding decrees have expired, the provision of such circulars, including Circular 156/2013/TT-BTC, remain valid for implementation until superseded by new legislative documents, except for guidance which has been stipulated in details under the LTA 38/2020/QH14 and the Decree 126/2020/ND-CP.

- (ii) *Circular 19/2021/TT-BTC dated 18 March 2021 of the Ministry of Finance guiding on electronic transaction in the tax field*

On 18 March 2021, the Ministry of Finance issued Circular 19/2021/TT-BTC guiding e-transactions in the tax field. Accordingly, tax administrative procedures such as tax registration, tax declaration, confirmation of tax liability fulfilment, tax payment offsetting, tax payment reduction / exemption, etc. are transacted under electronic forms. At the same time, tax authorities also implement transactions with the taxpayers via electronic method such as sending notifications, decisions and other documents to registered electronic portal of the taxpayers.

Taxpayers need to register to adopt the electronic tax transaction method. Where the taxpayers have carried out electronic tax transaction method before 3 May 2021 (the effective date of Circular 19), re-registration is not required.

II. LEGAL UPDATE

1. Shares/capital contribution acquisition falling out of “economic concentration in form of enterprise acquisition”

According to the Law on Competition 2018, enterprises participating in economic concentration activities (i.e. merger, consolidation, acquisition of share/capital contribution, joint venture amongst enterprises) must report the economic concentration before conducting such activities if they reach the notification thresholds. The notification threshold is determined based on total assets, total revenue, transaction value or combined market share, and specified in Decree No. 35/2020/ND-CP and the Law on Competition 2018.

However, the Vietnam Competition and Customer Authority recently issued guidance on enterprise acquisitions and economic concentration. According to this guidance, an investor holding controlling or governing shares/capital contribution in a Vietnamese enterprise (e.g. above 90%) who acquires shares/capital contribution from a minority investor in the same enterprise (e.g. under 10%) would not be considered as creating economic concentration in the form of enterprise acquisition under Article 29.4 of the Law on Competition 2018. Accordingly, the enterprise would not be required to report the economic concentration before conducting the share/capital contribution acquisition in this case.

2. Draft decree on management of medical devices

The Ministry of Health is soliciting public opinions on a decree to replace Decree No. 36/2016/ND-CP, Decree No. 169/ND-CP and Decree No. 03/2020/ND-CP on management of medical devices. Some highlights are listed below:

- Reducing the procedures for confirming advertisement contents and announcing the satisfaction of conditions for medical devices classification, manufacture, trading and technical consultancy. Instead, the enterprises will publish the relevant dossiers themselves and be able to conduct the advertisement or carry out the business after completing the self-publishing.
- Supplementing regulations on clinical trials for medical devices; import, export of goods containing drugs and precursors but not medicine or medical devices; and procedures for quick issuance of marketing authorization of medical devices in some cases.
- Doubling the timeline for the Ministry of Health to evaluate the marketing authorization dossiers and extend the validity of import licenses until end of 31 December 2022.

It is expected that the new decree on management of medical devices will be issued within this year.

3. Draft circular on pilot program for direct power purchase agreement (“DPPA”) between renewable energy generation companies and energy consumers

The Ministry of Industry and Trade (“MOIT”) has drafted, and is currently soliciting public opinion on, a circular for a pilot program for DPPA between renewable energy generation companies and energy consumers. According to this draft circular, renewable energy generation companies and energy consumers satisfying the following requirements can register with the MOIT to participate in the pilot DPPA Program:

- For renewable energy generation companies: they must (i) own a grid-connected solar or wind energy project having an installed capacity of more than 30 MW that has been included under the approved power development master plan; and (ii) commit to put the relevant power plant into commercial operation and participate in the Vietnam Wholesale Energy Market (“VWEM”) within 270 working days after being selected for pilot DPPA program.
- For energy consumers: they must (i) purchase electricity for industrial manufacturing purposes at the voltage level of 22 kV or higher, (ii) commit to using renewable energy, and (iii) commit to annual renewable energy consumption supplied by the participating power generation company equivalent to at least 80% of that supplied by EVN in the first 3 years participating in the pilot DPPA program.

If selected to participate in the pilot DPPA program, the energy consumers and renewable energy generation companies may directly negotiate and enter into a 10- to 12-year DPPA for the purchase and sale of electricity. The transactions for the purchase and sale of electricity will be conducted via VWEM in accordance with the regulations on the competitive wholesale electricity market issued by the MOIT.

The pilot DPPA program will be available nationwide with a capacity scale ranging up to 1,000 MW. It is expected that the MOIT will officially release the circular in Quarter III of this year, with the pilot DPPA program's implementation to follow.

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