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## Legal News

### 1. 3 steps to control taxable value of export and import goods

On January 24, 2011, the General Department of Customs has issued Decision No. 103/QD-TCHQ on the promulgation of order for inspection, consultation and determination of taxable price of export goods, import goods in the course of customs procedures.

The purpose of control for declarations of taxable price is to check compliance with the laws in declarations and determination of taxable price of the customs tax declarant to ensure declaration is made for the exact value and exact methods of determination of such value; and tax collection is made accurately and sufficiently for the state budget.

The process for verification of taxable value comprises of 3 steps. Step 1: Inspection of dossier; Step 2: actual examination of goods; Step 3: implementation of other tasks in relation to pricing; in such process, the result of inspection for the purpose of clear determination that violations of enterprises in incorrect declaration of goods (incorrect name of goods, incorrect types of goods or origin...) affect the determination of taxable value, shall be submitted to the Management of the Customs Department for transfer of dossier to the price or tax control officer, for implementation of inspection work in accordance with this Order.

The Circular also includes provisions on the order of consultation, according to which, immediately after receiving request for advice from the customs tax declarant or from the customs agency with grounds for suspicion in a special relationship affecting the transaction value, the customs agency shall implement the seven following 7 steps: classification of dossier by competence of consultation, sending invitation for consultation to the customs tax declarant, collecting information, data; dossier study, preparation of questions, organization of consultation, processing results of consultation and archiving consultation dossiers...

This Decision is effective as of January 29<sup>th</sup>, 2011 and supersedes Decision 1636/QD-TCHQ dated August 17<sup>th</sup> 2009; Appendix 1 of Decision 2396/QD-TCHQ dated December 9<sup>th</sup>, 2009 of the Head of the General Department of Taxation.



## 2. Interests of deposits in banks and credit organizations shall be PIT exempt

**The Ministry of Finance has just issued Circular No. 12/2011/TT-BTC dated 26 January 2011 and Circular 02/2010/TT-BTC providing guidance on the Law on Personal Income Tax.**

In accordance with said Circulars, the person making gold deposits under the form of gold deposit certificates shall not be subject to Personal Income Tax (PIT). Concurrently, income from interests of deposits with banks and credit institutions; interest from life insurance policies shall be PIT exempted.

PIT exempted interests are personal income arising from interest of VND, gold, foreign currency deposits in credit institutions in the form of current deposit, time deposit, savings, savings certificates, promissory bills, bills of credit, and other forms of deposits on the principle of full reimbursement of principal and settlement of interest to the depositor in accordance with agreements.

The basis for determination of PIT exempted income for the above interest amounts is also subject to extension, specifically: for income from interests of savings deposits (savings booklet or savings card), deposit certificates, promissory bills, bills of credit, and other documents on the principle of full reimbursement of principal and settlement of interest to the depositor in accordance with agreements. For income from interests of life insurance policies, such basis shall be the certificate of interest settlement from the life insurance policy.

Also in accordance with the Circular, individuals owning housing and land assigning their housing purchase contracts for residential units to be completed in the future (for a second transfer onwards, the parties shall present the first assignment contract); the purchase agreement for residential unit to be completed in the future entered with the project owner or with the project owner's real estate trading floor. Tax declaration shall be made in accordance with form provided.

In case the transfer price specified on the transfer agreement for residential units to be completed in the future and on the tax declaration form is not in conformity with market price, the tax authority shall prescribe a transfer price for the purpose of taxation after reference to the price of the project owners' real estate trading floor or the real estate trading floor where the transferred real estate is located.

This Circular is valid for implementation as of 12 March, 2011

### **3. Social Insurance and Unemployment insurance charge is 0.78%**

**As of 10 March 2011, Decision No. 04/2011/QĐ-TTĐ dated 20/01/2011 of the Prime Minister on financial control for Social Insurance shall officially take effect.**

This decision aims at renewing the financial mechanisms in the Social Insurance operations, and at improving SI effectiveness and performance. Accordingly, every year, at the same period of time prescribed for formulation of State Budget estimates, Vietnam Social Insurance shall be responsible for formulation of a financial plan to be submitted to the SI Social Insurance Management Council for approval and reporting to the Ministries of: Finance, Labour, War Invalids and Social Affairs; Health; such financial plan including such particulars as compulsory collection and payment of SI, voluntary SI, unemployment insurance, health insurance, investment plan for the preservation and development of insurance funds; expenditures for mechanism management; for investment and development.

The Decision also points out: charges for payment of retirement pensions, social insurance allowances, unemployment allowance shall be guaranteed at 0.78% of total payments and shall be allocated in the estimates of expenditures for mechanism management. 2% of the entire expenditure shall be deducted from such charges for the establishment of a reserve fund in view of risks caused by objective reasons; the balance shall used for payment of items such as: printing of forms, remittance fees, ATM card issue charge, purchase of equipment...

Another point to be noted is the Decision to create a tight legal corridor for the implementation of loans by the Vietnam SI with respect to commercial state banks, Bank for the Development of Vietnam, and Vietnam Bank for Social Policies. In accordance with such Decision, the term of the loans shall not exceed 5 years, loan interest shall be subject to agreement between the parties but not lower than the average interest rate for the same loan term of 04 transaction offices or branches within the premises of Hanoi City under 04 corresponding commercial state banks at the time the loan(s) are granted.

During the implementation of the loan agreement, if the average interest rate for the same loan term varies up to 30% in increase or decrease in comparison with the interest rate of the effective loan agreement, the parties shall adjust the loan interests in conformity with the corresponding interest rate. Overdue interest rate for subjects of Vietnam SI loans shall be 150% of the interest rate at the time of loan settlement.

Decision 41/2007/QĐ-Ttđ dated 29 March, 2007 of the Prime Minister on financial management of Vietnam SI shall be repealed from the date of effect of this Decision.

#### **4. Guidance for the selection of investors in BOT, BTO and BT contracts**

The Ministry of Planning and Investment has promulgated Circular No.03/2011/TT-BKHDT dated 27 January 2011 on guidance for implementation of certain provisions of Decree No. 108/2009/ND-CP dated 27/11/2009 of the Government on investment on the basis of Build-Operate-Transfer [BOT]; Build-Transfer-Operate [BTO], and Build-Transfer [BT].

According to the above, the general process for investor selection shall undergo 5 steps. Specifically, formulation, assessment and approval of the plan for investor selection; Preparation for investor selection, issuance of tender documents or of the Requirement Dossier and acceptance of the Tender Documents or Proposals; assessment of tender documents or proposals; presentation, assessment, approval and notification of results of investor selection.

The Party calling for tenders shall organize selection of the investor only after approval of the project under the project list promulgated by ministries, agencies, People's Committees of provinces; the feasibility study, the plan for selection of investors, the tender invitation documents or the Requirement Dossier has been approved.

In addition, the investor participating in the tender shall satisfy all 4 conditions: (1) a legal status (for organizations) or having capacity for civil acts in accordance with provisions of the laws (for individuals); (2) having sufficient capital for the implementation of the Project; (3) their participation in the tender shall be subject to independent tender application or partnership among Investors; (4) a written undertaking that investors are not in bankruptcy or in the process of dissolution, that they have not been concluded as having an unhealthy financial condition by competent bodies or are not currently under process for violations of the laws.

The Circular also specifies clearly that investors may be selected in two methods, i.e: public tender (domestic or international in case of several investors) and appointment of investor (for projects in response to urgent requirements or subject to decision of the Prime Minister for selection of Investor)

The party calling for tender may select the investor in accordance with other principles, but shall ensure the highest degree of competitiveness and effectiveness, and shall be responsible for its decision; within a period of maximum 10 business days from the date of approval of the Tender invitation dossier, or the





Requirement Dossier, the party calling for tender shall send such dossier to the Ministry of Planning and Investment for follow-up and management.

The Circular also provides in details 5 steps in the selection of the investors, and certain other important particulars on: Project agreement and related agreements, procedures for issuance of an Investment and Project implementation certificate...

This Circular enters in effect from 01/04/2011.

## Legal Advice

### QUESTION:

We have been asked to provide general provisions of Vietnamese law regarding establishment and operation of trade union in an enterprise.

### RESPONSE:

Vietnamese law gives trade unions much power and significant functions to protect the rights and benefits of employees, especially in labour dispute settlement. Therefore, in some circumstances, the absence of a trade union in an enterprise may create difficulties for not only the employees but also the employers in resolving employment and related issues.

A trade union in an enterprise is under the supervision of local trade union office (district or province, depending to what level an enterprise is administered), which protects no one but gives instruction, guidance and assistance to trade unions set up in the enterprises within such jurisdiction.

#### ***Rights to establish trade unions***

The employer does not have to set up a trade union. This is the right of the employees. Therefore, in principle, the latter are entitled to decide whether or not to establish a trade union to protect their rights and benefits. Employees of all types of enterprises (companies, foreign invested enterprises, representative offices) having more than 5 Vietnamese employees may establish a trade union at the workplace. As such, employees have legitimate rights to establish trade unions, but it is not compulsory for them to do so.

For enterprises which are newly established without trade unions, within 6 months after commencement of operations, the local trade union offices must establish trade unions at those enterprises under their jurisdiction.

#### ***The obligations of employers in the establishment of trade unions***

Although employers are not responsible for establishing trade unions, the Labour Code requires employers to co-operate closely with trade unions and create favourable conditions for the establishment of trade unions at their workplaces.

The employer must ensure the following at the workplace:

- provide the necessary working conditions and facilities to enable trade unions to carry out its

- its activities;
- to accept an employee who carries out trade union activities on a regular basis and receives a salary from trade union funds. Such person shall be entitled to the rights, benefits, and collective welfare enjoyed by other employees of the enterprise in accordance with the regulations of the enterprise and the collective agreement;
- such employee shall be given free time during working hours to perform such activities, and still be entitled to his full wage. Such free time shall depend on the size of the enterprise and the agreement reached with the employer but shall not be less than three full working days per month;
- provide facilities that are necessary for the operation of the trade union such as working place, means of transportation, communication, stationery and other facilities in accordance with enterprise's finance; and
- not to discriminate against an employee for his activities in setting up trade union or joining a trade union or his trade union activities. Furthermore, the employer is not allowed to use financial methods or other trickery to intervene the operation and organisation of the trade unions.

In practice, not many employers are willing in the establishment of trade unions or their activities.

### ***The Rights and Functions of Trade Unions***

Trade unions represent and protect the rights of the employees and strive to harmonise the relationship of employers and employees. To achieve this, the function of trade unions includes the following:

- to recommend on the internal labour regulations of the enterprise;
- to negotiate and sign the collective labour agreement;
- to be consulted in settlement of labour disputes and other claims relating to labour issues;
- to join meetings of employer relating to labour issues;
- to organize socio-economic, cultural and sport events and activities for employees;
- to manage and allocate the social welfare;
- to check and deal with significant legal labour issues;
- to make claims before competent courts, arbitrations or other authorities; and
- to claim for bankruptcy proceedings. Where the employer cannot pay the wages and/or other due debts for the employees and is in the bankruptcy situation, the trade union is entitled to claim for bankruptcy proceedings before the court in jurisdiction. In such proceedings, the representative of the trade union of the enterprise shall be considered as a creditor and entitled to participate in the Creditor Conference.



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