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International

# NEWSLETTER

Issue September 2010



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## Legal News

### 1. Promulgation of Customs Procedures for goods processed with foreign party

**The Head of the General Department of Customs recently signed Decision No. 1820/QD-TCHQ dated July 28, 2010, promulgating the Procedures for Customs Management of Goods Processed with Foreign Business Entities.**

According to these Procedures, in addition to inspection of the qualification for acceptance of processing and inspection of the consistency, sufficiency and validity of the customs dossiers submitted or presented by enterprises, inspection of the manufacturing facilities will be conducted when there are doubts on the address of an enterprise (unreal or identical to that of another enterprise, etc.) which has been notified in its processing contract, and doubts on the manufacturing facilities or if the conditions are not satisfied for ensuring performance of the processing contract (there is no manufacturing facility, there is no production line, manufacturing equipment is unsuitable for the goods to be processed, etc.)

Customs procedures for export of the processed goods shall be performed in accordance with the Procedures for Customs Clearance for commercial export goods, except for inspection for imposing taxes. If border-gate transfer is applied to export of processed goods, it is required to comply with the guidelines on the procedures for customs management of goods exported through border-gate transfer. For batches of export cargo subject to field inspection, in addition to checking the name, quantity, type of goods, it is also required to compare the raw material samples taken upon import and presented by the enterprise to the materials forming the constituents of the products actually exported; when there are doubts, customs officers will make proposals to the leader of the relevant customs office for instructions on treatment thereof; verification by specialized authority may be required for determination thereof.

This Decision is effective as of August 1, 2001 and supersedes Decision No. 1179/QD-TCHQ dated June 17, 2009 of the Head of the General Department of Customs.

## **2. Consideration and approval of construction detailed plans, appraisal of preliminary designs of urban area and residential housing area projects**

**The Ministry of Construction recently sent Official Letter No. 1417/BXD-QLN dated July 30, 2010, to the People's Committees of provinces and cities under Central Authority on consideration and approval of the construction detailed plans, and appraisal of the preliminary designs of urban area and residential housing area projects.**

In the past time, the Ministry of Construction has received many official letters from the local authorities of many regions and from enterprises asking about the application of codes and standards related to appraisal and approval of urban area and residential housing area projects. According to these letters, many local authorities currently use the criterion on the number of residential apartments (condominiums) in their consideration and approval of the construction detailed plans and appraisal of the preliminary designs of urban area and residential housing area projects, based on the calculation that 1 apartment is equivalent to 4 residents, regardless of the size of the apartment. This leads to difficulties for many enterprises upon implementation, especially for those which have the intention to invest in and build medium-sized apartments (of around 50-70 m<sup>2</sup>).

However, the Vietnam Building Code on Regional and Urban Planning and Rural Residential Planning promulgated in Decision No. 04/2008/QĐ-BXD dated April 3, 2008 of the Minister of Construction only stipulates the control of the minimal usable area of land and the maximal plot ratio (by the area of the plot and the height of the construction work) and does not control the number of apartments in investment and construction of urban areas and residential housing and apartment groups.

If criteria on the permitted usable area of land, plot ratio and floor area ratio in accordance with the Vietnam Building Code on Regional and Urban Planning and Rural Residential Planning are applied and the number of apartments is controlled based on the calculation that 1 apartment is equivalent to 4 residents, the average area of an apartment will be indirectly controlled (the average area of an apartment will equal total construction floor area of the apartment / total number of residents x 4). In many cases, the average area of an apartment will be controlled at a high level (around 120 m<sup>2</sup>), which creates difficulties for investors to build medium-sized apartments affordable to the majority of households.

According to the Vietnam Construction Standard TCXDVN 323:2004 "High-rise Buildings – Design Standards", there are three classes of apartments: Class A with an area of 50-70m<sup>2</sup>, equivalent to 1-2 persons/household; Class B with an area of 75-100 m<sup>2</sup>, equivalent to 3-4 persons/household; Class C with an area of 105 m<sup>2</sup> or more, equivalent to 5-6 persons/household. It is obvious that it is not reasonable to apply the number of 4 residents on average to all classes of apartment areas; especially for apartments with an area of 50-70 m<sup>2</sup>.

The control of the number of apartments and the application of the calculation of 1 apartment equivalent to 4 residents are also ungrounded and no longer appropriate (according to statistical data on the population and housing in April 2009, the average number of mouths in an average household nationwide is 3.8; in Hanoi 3.6 and in Ho Chi Minh City 3.8).

On the other hand, according to applicable regulations on housing, enterprises are permitted and encouraged to invest in construction of apartments of appropriate area (over 45 m<sup>2</sup>) to meet the needs of middle- and low-income people (Clause 1 of Article 40 of the Law on Residential Housing stipulates that the floor area of a commercial apartment must not be smaller than 45 m<sup>2</sup>; Article 4 of Decision No. 67/2009/QĐ-TTg dated April 24, 2009 of the Prime Minister stipulates that the floor area of an apartment for low-income people must not exceed 70 m<sup>2</sup>).

Therefore, in order to facilitate construction of housing by investors as stipulated, the Ministry of Construction requests the People's Committees of provinces and cities to provide consistent instructions to organizations and enterprises in their region on implementation of appraisal and approval of urban area and residential housing area projects. Specifically, on the basis of consideration of the criteria on usable area of land equivalent to the number of residents, the criteria on the height of the construction work, plot ratio and floor area ratio as stipulated by the Vietnam Building Code on Regional and Urban Planning and Rural Residential Planning promulgated in Decision No. 04/2008/QĐ-BXD, it is advisable not to apply the calculation that 1 apartment is equivalent to 4 people to all sizes of apartments in order to control the number of apartments in housing projects.

If the number of apartments is considered and the design population is compared with the approved population, it is possible to apply the Vietnam Construction Standard TCXDVN 323:2004 "High-rise Buildings – Design Standards" in specific calculations of each class of apartments by size (Class A with an area of 50-70m<sup>2</sup>, equivalent to 1-2 persons/household; Class B with an area of 75-100 m<sup>2</sup>, equivalent to 3-4 persons/household; Class C with an area of 105 m<sup>2</sup> or more, equivalent to 5-6 persons/household).

### 3. Guidelines on method of adjustment of construction contract price

**The Ministry of Construction recently promulgated Circular 08/2010/TT-BXD dated July 29, 2010, providing guidelines on the method of adjustment of the price of construction contracts. Accordingly, the method of adjustment of the price of construction contracts is applied to investment projects for construction of works with State funding by 30% or more.**

This Circular is applied to organizations and individuals related to adjustment of the price of construction contracts of investment projects for construction of works with State funding by 30% or more. Organizations and individuals related to adjustment of the price of construction contracts of investment projects for construction of works with State funding by less than 30% are encouraged to apply this Circular.

For construction contracts of projects using Official Development Assistance (ODA) funds, if international treaties to which Vietnam is a member have provisions contrary to the provisions of this Circular, the provisions of such international treaties shall prevail.

Specifically, adjustment of the price of construction contracts shall only be applied during the implementation period of the contracts, including the extended periods as agreed in the contracts. Upon adjustment of the price of a construction contract, if the post-adjustment price does not exceed the total investment approved, the investor is entitled to decide such adjustment; in case it exceeds the total investment approved, such excess must be reported to the Investment Decision Maker for his/her permission.

The adjustment of the contract price is applied to contracts with fixed unit prices, contracts with adjustable unit prices, and contracts based on time. For lump sum contracts and contracts based on percentage (%), it is only permitted to adjust the contract price for additional workloads beyond the scope of works that must be performed in accordance with the executed contracts.

In addition, adjustment of the contract price must be agreed and specified in details by the parties in the contract on the cases where adjustment of the contract price is permitted and the sequence, scope, method, and grounds for adjustment of the contract price. The method of adjustment of the contract price must be accordant with the type of the contract price and the nature of the works in the contract.

The Circular also stipulates and provides guidelines on the cases where adjustment of the construction contract price is permitted; the method of adjustment of the construction contract price of lump sum contracts, contracts based on percentage (%); the method of adjustment of the contract price of contracts based on fixed unit prices; the method of adjustment of the contract price of contracts based on time; the method of adjustment of the contract price of contracts based on adjustable unit prices.

This Circular is effective as of September 15, 2010. Construction contracts which have been performed before the effective date of this Circular shall not necessarily be performed in accordance with this Circular. Application of provisions of this Circular will be decided by the Investment Decision Maker to contracts which are currently in the process of negotiation and have not been executed.

#### 4. Regulations on legal capital of banks to be amended

On August 25, 2010, the Governor of the State Bank signed Decision No. 2020/QĐ-NHNN establishing a Drafting Board and an Editorial Team for the Decree on amendment of and addition to Decree No. 141/2006/ND-CP of the Government on promulgation of the list of legal capital amounts of credit institutions.

Specifically, the State Bank officially established a Drafting Board and an Editorial Team to prepare contents for the amendment of and addition to the regulations on legal capital of credit institutions. This Drafting Board works on a concurrent basis, having the task of developing the Decree on amendment of and addition to Decree No. 141/2006/ND-CP of the Government on promulgation of the list of legal capital amounts of credit institutions in accordance with applicable regulations.

In the past time, there have been many comments on the directions of amendments of the aforesaid regulations, including the possibility to increase the legal capital of commercial banks to VND5,000 billion in 2012 and VND10,000 billion in 2015.



Meanwhile, according to current regulations, the legal capital amount in accordance with Decree 141/2006/ND-CP applicable in 2010 is VND3,000 billion for state-owned, joint stock, joint venture commercial banks, investment banks, cooperative banks, Central People's Credit Fund; VND5,000 for development banks and social policy banks; USD15 million for branches of foreign banks.

## 5. Import duties on aluminum products reduced to 0%

**The Ministry of Finance recently issued Circular No. 115/2010/TT-BTC amending preferential rates of import duties on some good items under group 7606 in the List of Tax Rates of the Preferential Import Tariffs under the list of taxable goods items issued together with Circular 216/2009/TT-BTC dated November 12, 2009.**

According to the newly promulgated policies, import duties on a number of aluminum products are reduced from 3% to 0%. Specifically, the above circular amends the rates of import duties from 3% to 0% on aluminum products which are flatted or shaped by rolling or pressing methods but without finishing, or other types.

Under the validity of the Circular, the above tax rates are effective and enforceable from September 18, 2010.

Along with reduction of the rates of import duties on a number of aluminum products, the Ministry of Finance also issued Circular No. 120/2010/TT-BTC providing guidelines on amendment of the preferential rates of import duties on a number of fertilizer products in the List of Tax Rates of the Preferential Import Tariffs.

Accordingly, the import duty rate of 6.5% will be applicable to the following goods items: Mineral or chemical fertilizers, containing phosphate (of the types used as feeds for domestic animals, burnt phosphate fertilizers); Superphosphate and burnt phosphate fertilizers, in the form of balls or similar forms or contained in packaging; Mineral or chemical fertilizers containing three elements of nitrogen, phosphorus and potassium, in the form of balls or similar forms or contained in packaging; Superphosphate, in the form of balls or similar forms or contained in packaging; Mineral or chemical fertilizers containing three elements of nitrogen, phosphor and potassium.

Previously, the Ministry of Finance also issued a circular permitting reduction of the rates of import duties on a number of toy products from 20% to 10%.

## Legal Advice

### QUESTIONS:

### **How late does an employee have to be in order for us (employer) to be able to start deducting wages?**

Tardiness or late for work is a violation if (i) working hours are set in your Company Internal Rules; (ii) the time for works are informed to the employee, by his/her supervisor based on the rules of the company and (iii) late for work is a violation set clearly in the company rules. You may set the time length for tardiness as your please, but it should not so harsh or unreasonable. Usually, tardiness is a violation subject to warning, or a category one type. Deduction of wage is prohibited for any sanction, except for damages that will be dealt with later on. Under Article 7 of Decree No. 41/CP of the Government dated 6 July 1995 (“**Decree 41**”) guiding details of a number of Articles of the Labour Code regarding disciplinary sanctions and financial liabilities, it is prohibited to use fine or wage deduction as a disciplinary measure. Therefore, you may not deduct wage of an employee due to his/her lateness in working.

To punish tardiness of employee you should have a “process” to moves the degree of violation from warning (category 1 type), to demotion for a certain period (category 2) and finally to not apt for the job assigned (category 3, where discharge is permissible).

As mentioned, a deduction of wage is only permissible when an employee causes damages to the properties of the company. Indeed, article 89 of the Labour Code provides that if an employee damages equipment or has other conducts causing damage the company’s assets; he/she must pay damages. Such damages could be paid by wage deduction. To apply it, however, the employer must discuss with Executive Committee of the Trade Union of the enterprise before making any deduction. The total of deduction may not exceed 30% of the employee’s wages in any month. The employee shall be entitled to be informed of the reason for any deductions from his/her wage (Article 60 of the Labour Code).

However, under Article 89 of the Labour Code and Article 14 of Decree 41, where the value of each damage is under VND5,000,000 (about US\$256), it shall be treated as a non-serious damage. In this case, the employee shall pay the maximum damages up to the total amount of his/her 3-month wage and this amount shall be deducted pursuant to Article 60 of the Labour Code as mentioned above.

Please contact us at DC Law offices or visit us at [www.dclaw.com.vn](http://www.dclaw.com.vn) for further information

### Ho Chi Minh Office

Email: [info@dclaw.com.vn](mailto:info@dclaw.com.vn)  
Website: [www.dclaw.com.vn](http://www.dclaw.com.vn)  
11A-11C Phan Ke Binh Street, DaKao Ward,  
District 1, Ho Chi Minh City  
Tel: 84 8.3821 9928  
Fax: 84 8.3821 9929

### Hanoi Office

Email: [info@dclaw.com.vn](mailto:info@dclaw.com.vn)  
Website: [www.dclaw.com.vn](http://www.dclaw.com.vn)  
Harec Building, Suite 1, Floor 9,  
4A Lang Ha street, Ba Dinh District, Hanoi  
Tel: 84 4.37772 6972  
Fax: 84 4.37772 6973



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