

Technical Update

January and February 2009

VIETNAM

Corporate Income Tax (CIT)

Income base for determining CIT reduction under Circular 03/2009/TT-BTC

On 4 February 2009, the MOF issued OL 1326/BTC-CST to provide guidance to the implementation of Circular 03/2009/TT-BTC dated 13 January 2009 on CIT reduction and extension (please refer to KPMG's January 2009 Tax Alert for more information).

A noteworthy point of OL1326 is that the income base for determining 30% CIT reduction under Circular 03 is the total income generated by small and medium enterprises, including incomes from transfer of land use right, transfer of real estate and other sources.

Enterprises who meet the criteria used for assessing small and medium enterprises regulated in Circular 03 should take the above rule into consideration when determining properly CIT reduction.

Tax deductibility to brokerage commission expenses incurred overseas

According to OL 137/TCT-CS dated 13 January 2009 of the GDT, brokerage commission expenses incurred overseas for the sale of products overseas would be allowed as deductible expenses for CIT purposes, if the following conditions are met:

- There is a regime on brokerage commission payments issued by an enterprise.
- Such brokerage commission payments are stated in a contract or appendices enclosed with a contract are substantiated with eligible supporting documents as required by law.
- The recipient of such commission payments must sign in acknowledgement of receipt of such payments.

However, OL 137 also allows that in case the recipient is unable to acknowledge receipt of such of such commission payments, or disagrees to be mentioned in the contract, then payment vouchers must bear the signature of the Director, Chief Accountant or Cashier of the commission payer.

OL 137 reaffirms that the above brokerage commission expenses shall be subject to the cap currently applicable to advertising and promotional expenses under the CIT law.

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Foreign contractor taxation for services carried out overseas

According to OL 130/TCT-HT issued by the GDT on 13 January 2009, consultation and designing services which are performed overseas by foreign contractors but provided to clients for their construction activities in Vietnam shall be subject to VAT.

The Vietnamese contracting party is responsible for filing, withholding and paying VAT liability on behalf of the foreign contractor as required by law.

With respect to CIT, in case the whole work is performed overseas, the entire contract value shall not be subject to CIT. On the contrary, if a portion of the work is performed in Vietnam and a portion is performed offshore but it is impossible to separate the value of each portion, the total contract value shall be subject to Vietnam CIT.

Vietnamese enterprises employing foreign contractors to perform work in 2008 should notice the above guidance for proper tax declaration.



Value Added Tax (VAT)

Guidance on taxation on export of domestically manufactured automobiles to Export Processing Enterprises (EPEs)

According to OL 78/TCHQ-KTTT dated 7 January 2009 of the General Department of Customs, domestically manufactured automobiles exported to EPEs shall be considered as export to non-tariff areas and therefore enjoy tax treatment applicable to exports, particularly:

- Export duty rate will be 0%.
- Import duty on materials used for the manufacture of such automobiles shall be refunded (if already paid) or exempted (if not yet paid).
- Output VAT will be 0%, with input VAT being creditable or refundable.
- SST which was paid at the stage of domestic manufacture will be refunded if the automobiles are registered for only use within the non-tariff area.

However, if such automobiles are used in the local territory as well, no SST refund is allowed.

Enterprises selling domestically manufactured automobiles, EPEs and enterprises operating in non-tariff areas purchasing automobiles should comply with the above.

Exported, imported goods which must be destroyed are not subject to VAT

OL 121/TCHQ-KTTT issued by General Department of Customs on 8 January 2009 clarifies that exported and imported goods, though having been cleared by the customs, that must be destroyed while still being under customs supervision, will not be subject to export-import duties and VAT.

Enterprises having exported or imported goods in 2008 should take note of the above guidance and make VAT adjustments where appropriate.

No adjustment of VAT invoices for goods denied but not returned to seller

OL 41/TCT-CS dated 5 January 2009 from the MOF guides that in case an enterprise that already exported goods and issued invoices to foreign customers and the foreign customers have received the goods but later found the goods to be defective and destroyed them without returning to the seller, it is not allowed for the seller to adjust the invoices already issued.

The input VAT attributed to the exported goods shall be creditable only when all conditions required under the VAT law, including payment via bank transfer, are met.

CIT liability shall be determined based on the contract value of the entire exported goods, after deduction of deductible expenses as regulated.

Enterprises exporting goods should pay attention to the above guidance when preparing their 2008 year-end CIT returns.

Personal Income Tax (PIT)

Guidance on PIT treatment for salaries, bonuses earned in 2008 but paid in 2009

On 18 February 2009, the MOF issued OL 1845/BTC-TCT providing guidance on PIT treatment for certain income items.

One noteworthy point is that income from salaries or bonuses which were generated from the business results of 2008 but paid to the employees after 1 January 2009, shall be governed by the provisions of the Law on PIT effective from 2009.

Employers are required to calculate the PIT amount, and at the same time, apply the PIT deferment policy for the period from 1 January 2009 and 31 May 2009 inclusive under Circular 27/2009/TT-BTC of the MOF (Please refer to KPMG Tax Alert February issue for more information).

In case an employer has already accounted the above income for 2008, adjustments would be required so that taxpayers can enjoy tax deferment.

Any withheld PIT amount must be refunded to the taxpayers.

The above regulation will have implications on income items such as Tet bonuses and year-end bonuses which are normally paid in January 2009.

Employers should pay attention to the above regulations and act accordingly.

PIT exemption on individual allowances paid by Social Insurance fund

On 5 February 2009, the GDT issued OL 395/TCT-TNCN to address again issues on PIT treatment with respect to maternity and sickness allowances for the years 2007 and 2008.

OL 395 reaffirms that all income items that an individual receives from the Social Insurance Fund pursuant to maternity allowance policy (including allowances received in lieu of salary during maternity leave) and sickness allowance policy under the Law on Social Insurance are exempt from PIT.

As a result, any PIT imposed on the above mentioned income items in 2007 and 2008 should be adjusted and offset against the PIT liabilities of 2008.

Abbreviations

CIT	Corporate Income Tax
EPZ	Export Processing Zone
FCT	Foreign Contractor Tax
FDI	Foreign Direct Investment
FIEs	Foreign Invested Enterprises
GDC	General Department of Customs
GDT	General Department of Taxation
HI	Health Insurance
IZ	Industrial Zone
LOE	Law on Enterprise
LOI	Law on Investment
MOF	Ministry of Finance
MOIT	Ministry of Industry and Trade
MOLISA	Ministry of Labour, Invalids and Social Affairs
MOST	Ministry of Science and Technology
MPI	Ministry of Planning and Investment
PE	Permanent Establishment
PIT	Personal Income Tax
SI	Social Insurance
SST	Special Sales Tax
VAT	Value Added Tax

Mandatory Insurance Contributions

Deferment in payment of 1% Unemployment Insurance premium and 1% Trade Union fee for the first 6 months of 2009

According to Resolution 32/2008/NQ-CP dated 31 December 2008 of the Government, enterprises are allowed a deferred payment of Unemployment Insurance premium at 1% of the salary fund for qualified employees, and 1% as Trade Union fee for the first 6 months of 2009. Enterprises must pay these dues in full during the last 6 months of 2009.

It appears that the Resolution only allows the deferred payment of the 1% portions applicable to the employers. The Resolution does not mention the 1% contributions for Unemployment Insurance and Trade Union fee respectively on the part of employees. Therefore, it is unclear at the moment as to how enterprises would deal with these contributions from employees.

The MOLISA is expected to issue further guidance on the implementation of the above Resolution. We will provide further updates on this subject.

Circular 04/2009/TT-BLDTBXH on Unemployment Insurance

On 22 January 2009, the MOLISA issued Circular 04/2009/TT-BLDTBXH providing detailed regulations on Unemployment Insurance.

Circular 04 elaborates the regulations under Decree 127/2008/ND-CP dated 12 December 2008 of the Government on Unemployment Insurance. Generally, Circular 04 provides the methods for calculating unemployment allowances, regulations on vocational training and job search support, health insurance during unemployment periods, unemployment insurance claim procedures, as well as relevant application forms.

Circular 04 takes effect from 1 January 2009.

Enterprises should comply with the provisions of Circular 04 accordingly.



Tax Administration

Counting number of late days for penalty purposes

According to OL 14/TCT-QLN dated 2 January 2009 of the GDT, the number of late days of tax payment will also cover public holidays, weekends and count between the date following the regulated deadline till the date when the taxpayers pay in full the tax amount, as evidenced on the tax payment receipt.

The issuance of OL 14 indicates that the tax authorities are increasingly enforcing the compliance with deadline for tax payments, and applying stricter counting of the number of late days for penalty purposes.

Enterprises need to pay closer attention to compliance with tax payment deadlines in order to avoid unnecessary sanctions.

Investment

Decree 133/2008/ND-CP on Technology Transfer

On 31 December 2008, the Government issued Decree 133/2008/ND-CP ("Decree 133") to provide provisions for the implementation of the Law on Technology Transfer.

This is a regulatory progress regarding technology transfer, as previous regulations on technology transfer were promulgated on the basis of the Civil Code.

Below are the key changes under Decree 133:

- Technology transfer contracts are no longer required to be registered with the competent authority (though investors reserve the right to register at their discretion). This has implications on the deductibility of royalties for CIT purposes, as previously only royalties paid for registered contracts were allowed as tax deductible.
- Notwithstanding the above, contracts for transfer of encouraged technologies must be registered, so that a certificate on registration and incentive entitlements can be issued.
- Registration documentation is now simplified.
- Of note, Decree 133 specifies tax incentive regimes to promote technology transfers in accordance with the Law on Technology Transfer, including:
 - o CIT exemption on income derived from the technology transferred as part of capital contribution by investors
 - o Import Duty exemption on goods directly used for technology development and innovation
 - o VAT exemption on imported machinery which cannot be produced domestically
 - o CIT exemption for 4 years on income generated as a result of applying encouraged technologies, provided that the tax exemption value does not exceed 50% of total investment expenditures
 - o Import Duty exemption for 5 years on goods imported for the purpose of technology replacement and innovation in areas with difficult or especially difficult socio-economic conditions
 - o 50% CIT reduction on income generated from the use of technology in rural, areas and areas with difficult or especially difficult socio-economic conditions
 - o CIT exemption for 4 years and fifty percent CIT reduction for the next 9 years, together with exemption from land tax for businesses engaged in technology inventing activities
 - o Exemption of technology transfer contract appraisal fees for organisations, individuals accepting technologies in areas with difficult or especially difficult socio-economic conditions.

Decree 133 came into effect from 2 February 2009 (i.e. 15 days after being officially gazetted) and replaces Decree 11/2005/ND-CP dated 2 February 2005 of the Government on technology transfer.

New regulations on Representative Offices in Vietnam of foreign securities institutions

On 26 December 2008 the MOF signed Decision 124/2008/QĐ-BTC to issue new Regulations on the establishment and operation of representative offices (RO's) in Vietnam of foreign securities institutions.

Under the new Regulations, in addition to foreign securities companies and fund management companies, those allowed to open RO's in Vietnam in the securities filed now include financial institutions having securities brokerage activities, and/or proprietary trading activities, and/or securities investment advisory activities, and/or securities underwriting activities. In addition, foreign institutions operating in the capital market and permitted to provide asset management services for a limited number of investors may also open RO's in Vietnam.

Prior regulations on limitation of the number of RO's (for a maximum of three ROs located in three different provinces/cities in Vietnam) are now removed.

Prior condition on the parent company having at least 3 years of operation is now also removed. Instead, though not explicitly provided for, from the technical requirements of the new Regulations it appears that a foreign securities institution must have at least one year of operation before it can apply to open an RO in Vietnam.

The timeline for processing RO establishment applications is now reduced to 7 business days, from previous 30 calendar days.

Within 5 business days from the date employing an expatriate staff to work for an RO, its parent company must send a report to the State Securities Commission together with all required approvals from other competent authorities related to the employment of such expatriate staff.

Other provisions on the restricted scope of activities, rights and obligations of an RO, the extendable 5-year term of operation for an RO generally remain unchanged compared to the 2004 Regulations.

The new Regulations will come into force 15 days from the day being officially gazetted and replaces contradictory regulations. RO's governed by the Law on Securities must adjust their operations to comply with the new Regulations within 3 months from the date these new Regulations come into force.

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