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# Legal

# Newsletter

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## **PART I – CONCERNS**

### **2% or 25%**

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From the effective date of Law on Personal Income Tax (PIT) on 01 January 2009, personal income tax has replaced tax of land use right transfer in real estate transferring activity of individuals. Regarding such tax collection, there arise many issues, including determination of PIT rate when the tax payer who has transferred its real estate makes the tax declaration and payment.

### **2% or 25%?**

In 2008, Ms Lan residing in HCM City bought a house from her cousin. Due to the kinship, the two parties agreed to state the price in the sale contract of the house as VND 4 billion, much lower than market price, in order to reduce the payable tax of land use right transfer and registration fee. At the beginning of 2010, Ms Lan sold that house under a notarized contract at the price of VND 10 billion. In case of applying the 25% PIT rate on the difference between purchase price and sale price (during that time the house was not repaired or renovated, so relevant costs are not taken into account), PIT amount will be VND1.5 billion. Whereas, if classified into the type of tax payment of which there are not enough sufficient invoices and voucher for determination of the difference between purchase price and sale price, the payable tax would be only 2% of sale price of the house as per the contract, i.e. VND 200 million. Basing on the two above figures, it is obvious that there is a great difference between the two payable tax amounts calculated in two different ways for the same transaction.

Something worth saying is that the type of tax rate to be applied is excessively subject to the act of the taxpayer and the consideration of tax officials due to the fact that guiding regulations have not been clear and consistent.

### **Failure of the guidance documents**



From the day Decree No. 100/2008/ND-CP of the Government (Decree 100) came into existence and took effect on 01 January, 2009, in only over one year the Ministry of Finance issued three relevant guiding circulars, comprising Circular No. 84/2008/TT-BTC dated 30 September 2008 (Circular 84), Circular No. 161/2009/TT-BTC dated 12 August 2009 (Circular 161) and Circular No. 02/2010/TT-BTC dated 11 January 2010 (Circular 02), not to mention a series of guiding documents issued by the General Department of Taxation.

According to Circular 84, in case of taxable income can be determined – by deducting purchase price and relevant reasonable expenses

from sale price, with competent invoice and receipts in accordance with providing regulation (comprising expenses and fees according to regulation of laws regarding the granting of land use right that the land user has paid to the budget, expenses of repairing, improving and upgrading the house, and other expenses directly relating the transfer), personal income tax of the income arising from real estate transfer is 25% of taxable income. In case the cost price (purchase price) and the relating expenses cannot be determined, personal income tax will be determined as 2% of the transfer price.



According to Circular 161 and Circular 02, the tax rate of 25% of taxable income will be applied when two principal conditions are met: (i) transfer price stated in the transfer contract and in tax return is not less than the price provided by the People's Committee at province level at the effective time of the transfer; (ii) legal invoice and voucher are available demonstrating the purchase price and relevant expenses (if any). In the process of tax declaration, the tax payer shall take

responsibilities to show the foresaid documents to the tax office. Only when showing the sufficient valid invoice and voucher as required, the real estate transferor will be granted the 25% tax rate. Logically, we can infer that in case the taxpayer does not meet the conditions for granting the 25% tax rate, he/she will be subjected to the tax rate of 2% of the transfer price.

In reality, most sellers would like enjoy the tax rate of 2% of transfer price, because the fluctuation of real estate price in Vietnam is rather high, accordingly the purchase price is normally much lower than the sale price. In this case, according to Circular 84 and Circular 161 the seller has not the obligation to show documents demonstrating the purchase price as well as the relating expenses, and the seller will be reckoned as not having sufficient invoice and voucher and will be "granted" the 2% tax rate. This application is simple and favourable to the taxpayer as well as easy and convenient for tax officials in handling the documents; furthermore, this application does not break the relevant legal documents.

The Official Letter No. 762/BTC-TCT ("Letter 762") issued by the Ministry of Finance on 16 January 2009 expresses clearly this view: "To facilitate taxpayers, personal income tax of income arising from real estate transfer will be calculated at the tax rate of 2% of transfer price stated in transfer contract. In case this price is lower than the price rate provided by People's Committee at province level or at level of city directly under the central government, the taxable amount will be based on the price provided by People's Committee of the city or province. In case the real estate transferor can show sufficient valid document and voucher to

determine the transfer price, purchase price and expenses relating to the transfer activity, and the taxpayer suggests the application of the tax rate of 25% of the income because the payable amount is lower in comparison with the application of 2% of the transfer price, then the taxpayer is allowed to pay tax at the rate of 25% of income from the transfer activity”.

However, Letter 762 was indirectly voided by the Circular 161 because the latter has higher legal effect. Like the previous Circular 84, Article 6 of Circular 161 only provides that in case the cost price (purchase price) and relating expenses cannot be determined to form the basis for determination of taxable income, the tax rate of 2% will be applied, but does not provide how to reckon as “cost price and relating expenses cannot be determined”. Circular 02 also requires tax agencies to check tax return and records accompanying the documents to consider the tax rate of 25% without any mention how to check return document in case the taxpayer declares in the direction of insufficient documents for the application of the 2% tax rate.



If it is reckoned that the taxpayer is not honest in reporting of the missing of documents or the inability to determine the original price so that he/she will be granted to 2% tax rate, tax officials are improbable to produce proof to the

contrary. If the tax officials can copy from somewhere some documents showing the cost price and relating expenses, it is difficult to affirm that those documents are “sufficient” in order to apply the 25% tax rate. Furthermore, the guiding documents do not require tax agencies to do this.

In reality, tax officials, if doubting that the taxpayer declares not honestly, will return the documents and require the taxpayer to declare again. The reply in writing (if any) is not actually persuasive for the returning of documents since this is just the subjective view of the tax officials. For any reason, there is no document stipulating that upon the taxpayer declares in the direction of the application of 2% tax rate and the tax agencies have to check in the direction of forcing the taxpayer to be subject to the 25% tax rate. Therefore, the honest declarer will get into troubles, the dishonest declarer will try to make the tax officials to accept the return documents, while the tax officials are not obliged in how to check the honesty of the tax declaration documents. Meanwhile, the difference between the two forms of tax payment is sometimes very large. In this case, the negative agreement between the taxpayer and the tax officials is likely to arise.

### **The demand for a simple and clear solution**

On which tax rate the calculation of personal income tax is based is not a matter to be further discussed. Something worth saying is the closeness and reasonableness in guiding regulations and mechanism for the implementation of these regulations.

If the Ministry of Finance finds it necessary to give priority to create favourable conditions for

taxpayers, allow them to be free to determine the tax amount to be paid, should it be reasonable for the instructions in Circular 762 to be used again? Meanwhile, taxpayers should consider their benefits to determine the tax rate to be applied: if they want to enjoy the 25% tax rate which will result in a payable tax lesser in comparison with the application of the 2% tax rate, they shall show sufficient valid documents and vouchers to demonstrate the transfer price, cost price and expenses related to the transfer; otherwise the tax rate of 2% will be automatically applied. In this case the tax agencies will only have to check whether the valid required documents are sufficient or not when the taxpayer would like to pay under the 25% tax rate.

In contrast, in case the tax agencies find it necessary to keep the currently applied guiding documents, they should clearly stipulate in which case the tax agencies have to apply the 2% tax rate to calculate the PIT amount. In addition, it should be clearly stipulated that when reviewing the documents, if the tax agencies reckon that the declaration of the tax payer in the direction of insufficiency of invoice and voucher is out of basis, they need to take which steps of specific inspection and to which extent they will be responsible in proving that the tax rate of 25% of taxable income is to be applied.



## **PART II – REMARKABLE REGULATIONS**

### **1. Remarkable points of new Decree guiding the Law on Import and Export Duties**

On 13 August 2010, the Government issued Decree No. 87/2010/ND-CP detailing the implementation of the Law on Import and Export Duties.



Accordingly, as of 01 October 2010, goods being mail items or parcels in express mail services having the minimum dutiable value as stipulated by the Prime Minister shall be exempt from import and export duties.

In addition, raw materials, materials and component parts which are not yet able to be produced domestically and are imported for production of investment projects in the sectors where investment is specially encouraged or in areas with specially difficult socio-economic conditions shall be exempted from import duty for a duration of 5 years from the commencement of production.

However, the exemption from import duty for a duration of 5 years as above mentioned shall not apply to projects on production and assembly of automobiles, motorcycles, air-conditioners, electric heaters, fridges, washing machines, electric fans, dishwashers, disk players, stereo systems, electric irons, water boilers, hairdryers, hand dryers and other items of goods as decided by the Prime Minister.

Besides, imported goods by BOT enterprises and sub-contractors for implementation of Build-Operate-Transfer (BOT), Build-Transfer-Operate (BTO) and Build-Transfer (BT) projects are no longer subject to import duty exemption.

Furthermore, also according to this Decree, the enjoyment of incentives on export and import duties of foreign invested enterprises which were issued with the Investment Licenses or Investment Certificates shall be applied as follows:

- (i) Enterprises which were issued the IL due to re-registration or registration for replacement of their investment certificates shall continue to enjoy incentives on export and import duties as state in the investment license or investment certificates which were issued before the time of re-registration or registration for replacement of the investment certificate. Where an investment license or investment certificate issued before the time of re-registration or registration for replacement of the investment certificate does not

contain any incentive on export or import duty, the law on export and import duties which was effective at the time of registration of the customs declaration on exported and imported goods shall apply. Where an enterprise re-registers or registers for replacement of its investment certificate and concurrently expands the scale of a project or invests in other new projects or extends the duration for implementation of a project, the incentives on export or import duty applicable to the expanded scale of the project, the investment in other new projects or the extended duration for implementation of the project shall be in accordance with the law on export and import duties at the time of re-registration or registration for replacement of the investment certificate;

(ii) Enterprises having any encouraged investment project which has already been issued with an investment licence or a certificate of investment incentives at a higher level than the incentives on export and import duty stipulated in this Decree, such project shall continue to enjoy its former level of incentive for the remaining duration; and if an investment licence or an investment certificate provides for a level of incentives on export or import duty which is lower than the preferential levels stipulated in this Decree, such project shall be entitled to the level stipulated in this Decree for the remaining duration.

(iii) Enterprises having any investment project which was issued with an investment licence, a business registration certificate or an investment certificate before the date on which Vietnam officially became a member of the World Trade Organization (i.e. 11 January 2007) and which is entitled to enjoy incentives on export or import duty (except for the case of export textiles and garments) resulting from its satisfaction of the conditions on export ratio stipulated in legal instruments on foreign investment in Vietnam, on encouragement of domestic investment and on export and import duties, then such project shall continue to enjoy the incentives on export and import duties stipulated in such legal instrument until the end of 2011.

This Decree shall be of full force and effect as of 01 October 2010.



## 2. Guidance on offer to sale and listing of securities in Vietnam by foreign issuing organizations are now available



On 02 August 2010, the Government issued Decree No. 84/2010/ND-CP amending and supplementing a number of articles of Decree No. 14/2007/ND-CP dated 19 January 2007 detailing the implementation of a number of articles of the Law on Securities.

Accordingly, any foreign issuing organization shall be entitled to public offer to sale securities in Vietnam provided that following conditions are satisfied:

- (i) Having an investment project in Vietnam which has been approved by the competent authorities; having an issue plan and using the proceeds earned from the public offer to sale of securities tranche to invest in its project in Vietnam;
- (ii) Having undertaking of foreign organizations to implement the project in Vietnam;
- (iii) Having undertaking of not remitting mobilized funds to foreign countries and not withdrawing counterpart equity during the term of the licensed project;

- (iv) Having undertaking to fully implement obligations of issuing organizations in accordance with the law of Vietnam;
- (v) Having at least one securities company which was duly established and is validly operating in Vietnam engaged in underwriting; and
- (vi) Complying with legal provisions on foreign exchange control with respect to the issuance of stocks in Vietnam.

In addition, any foreign issuing organization shall be able to list its securities on the Stock Exchange in Vietnam provided that following conditions must be satisfied:

- (i) Being securities issued in Vietnam;
- (ii) Number of securities registered for listing corresponds to the number of securities permitted to offer for sale in Vietnam;
- (iii) Having undertaking to fully implement obligations of a listed institution in accordance with the law of Vietnam;
- (iv) Being consulted for securities listing by one securities company which was duly established and is validly operating in Vietnam.

The dossier, order and procedures for approval of the registration for offering to sale and listing, de-listing securities in Vietnam by

a foreign organization shall be implemented in accordance with guidelines of the Ministry of Finance.

Besides, this Decree also amends and supplements a number of provisions on public

offer to sale of securities, public companies, fund management of securities investment companies, etc.

This Decree shall be of full force and effect as of 20 September 2010.

### **3. The maximum fine applicable to an administrative offence in relation to social insurance is 30,000,000 VND**



This is one of new provisions in Decree No. 86/2010/ND-CP issued by the Government on 13 August 2010 providing for penalty for administrative offence in relation to social insurance. In comparison with the current provision, the maximum fine increased by 10,000,000 VND.

One of important change of the new Decree is to provide the fine applicable to certain act groups of the employer, for example: not to pay compulsory social insurance, unemployment insurance at right level as stipulated, to prepare wrong list of employees to enjoy compulsory social insurance regime (such as: allowances for

illness, pregnancy, maternity, accident at work, professional diseases...), to certify incorrectly the working duration and the level of payment of compulsory social insurance, unemployment insurance of the employees, etc, shall be imposed on their violation with respect to each employee instead of fixing the penalty based on the number of employees that such employer commits violation and the maximum fine is not exceed 20,000,000 VND.

It is noted that exceeding the period of 10 days from the date of delivery of decision on administrative penalty, if any employer fails to voluntarily retrospectively pay or retrospectively paid the unpaid social insurance not in full to the social insurance fund, unemployment fund, then the authorized persons shall have the right to apply the coercive method to withdraw the relevant amount from the deposit account of such employer to pay for the unpaid or delay paid amount of social insurance as well as the interest arisen from such unpaid or delay paid amount to the social insurance fund and unemployment fund.

The authorized person to apply the coercive method as mentioned above shall be (i) Chairman of the People's Committee at province level; (ii) Chairman of the People's

Committee at district level; (iii) Inspector of the Department of Labour, Invalids and Social Affairs; and (iv) Inspector of the Ministry of Labour, Invalids and Social Affairs.

This Decree shall be of full force and effect as of 01 October 2010 and replace Decree No. 135/2007/ND-CP dated 16 August 2007 of the Government providing for penalty for administrative offense in relation to social insurance.

#### **4. Dealing with taxes, invoices in case of transfer of the contract of purchasing real estates by a client contributing capital to purchase real estates to other organizations, individuals**

According to guidance in the Official Letter No. 2846/TCT-CS dated 02 August 2010 of the Ministry of Finance, if a client contributed capital to purchase real estates being individual transfers his/her contract of contributing capital to purchase real estates to other organizations, individuals; provided that the transfer is implemented in accordance with the law, having the transfer contract in which new client (organizations, individuals undertaking the contract transfer from the client contributed capital for purchasing real estates) shall be inherited interest and obligations of the current client then the business entity of real estate shall issue invoice to the new client when this client makes further payment in accordance with progress. If the business entity of real estate and a client being individual entered into a deposit contract on the purchase (or contributing capital for purchase) of real estates, after that the client transfers his/her rights and obligations to the third party then such client shall be liable for declaration and payment of personal income tax for the transfer of real estates.

If a client contributing capital to purchase real estates being enterprise (“purchasing enterprise”) entered into a contract of contributing capital to purchase certain apartments and was issued with the VAT invoices by the Company engaged in business

of real estates at the time of collection of contributed capital then when such enterprise transfers its contract of contributing capital to purchase apartments to other organizations, individuals, provided that the transfer is implemented in accordance with the law, having the transfer contract in which new client (organizations, individuals undertaking the contract transfer from the purchasing enterprise) shall be inherited interest and obligations of the purchasing enterprise then such purchasing enterprise shall issue invoice to its clients based on the transferring value. The purchasing enterprise shall be liable for declaration and payment of corporate income tax for the income from transfer of real estates in accordance with the law. The Company engaged in business of real estates shall issue invoice to the new client (organizations, individuals undertaking the contract transfer from the purchasing enterprise) when the last one makes further payment in accordance with progress.

It shall not be adjusted if any Companies engaged in business of real estates, were guided by Department of Taxation, before the date of issuance of this official letter, to take back old invoices to issue new invoice when the client contributing capital to purchase real estates.

## **PART III – NEW PROMULGATIONS OF THE MONTH**

### **GOVERNMENT**

1. Decree No. 91/2010/ND-CP dated 20 August 2010 providing for policy applicable to redundant employees in case of rearrangement of one member limited liability company owned by the State.
2. Decree No. 90/2010/ND-CP dated 18 August 2010 providing for the National Database on population.
3. Decree No. 88/2010/ND-CP dated 16 August 2010 detailing, guiding the implementation of a number of articles of the Law on Intellectual Property and the Law amending and supplementing a number of articles of the Law on Intellectual Property with respect to the rights to a plant variety.
4. Decree No. 87/2010/ND-CP dated 13 August 2010 detailing the implementation of a number of articles of the Law on Import and Export Duties.
5. Decree No. 86/2010/ND-CP dated 13 August 2010 on penalties for administrative offense in social insurance sector.
6. Decree No. 85/2010/ND-CP dated 02 August 2010 on penalties for administrative offenses in relation to securities and stock market.
7. Decree No. 84/2010/ND-CP dated 02 August 2010 amending and supplementing a number of articles of Decree No. 14/2007/ND-CP dated 19 January 2007 of the Government detailing the implementation of a number of articles of the Law on Securities.

### **THE PRIME MINISTER**

1. Decision No. 1451/QD-TTg dated 12 August 2010 issuing the National Action Plan on anti-money laundering and anti-terrorism funding.
2. Decision No. 1374/QD-TTg dated 06 August 2010 on budget for implementation of the Programme on promotion of border gate trading in 2010.
3. Decision No. 50/2010/QD-TTg dated 28 July 2010 issuing the regime on dealing with risked debts at the Bank for social policy.

### **MINISTRY OF FINANCE**

1. Circular No. 122/2010/TT-BTC dated 12 August 2010 amending and supplementing Circular No. 104/2008/TT-BTC dated 13 November 2008 of the Ministry of Finance guiding the

implementation of Decree No. 170/2003/ND-CP dated 25 December 2003 of the Government detailing the implementation of certain articles of the Ordinance on Pricing and Decree No. 75/2008/ND-CP dated 09/6/2008 of the Government amending and supplementing a number of articles of Decree No. 170/2003/ND-CP dated 25 December 2003 of the Government detailing the implementation of a number of articles of the Ordinance on Pricing.

2. Circular No. 119/2010/TT-BTC dated 10 August 2010 guiding the collection, management and use of the revenue from maritime security fee and the financial regime in the field of supplying public utility for ensuring maritime security.
3. Circular No. 118/2010/TT-BTC dated 10 August 2010 guiding the financial regime and tax applicable to entities engaged in business of bottled liquefied petroleum gas.
4. Circular No. 116/2010/TT-BTC dated 04 August 2010 amending, supplementing Circular No. 137/2009/TT-BTC dated 03 July 2009 of the Ministry of Finance guiding the implementation of certain articles of Decision No. 33/2009/QD-TTg dated 02 March 2009 of the Prime Minister issuing the financial mechanism, regime applicable to Border gate economic zones.
5. Circular No. 115/2010/TT-BTC of the Ministry of Finance amending the preferential import duty rates of certain items under heading 7606 in the list of duty rates of the preferential import and export duty tariff according to the list of taxable goods issued together with Circular No. 216/2009/TT-BTC dated 12 November 2009.

### **MINISTRY OF INDUSTRY AND TRADE**

1. Decision No. 4361/QD-BCT dated 18 August 2010 on announcing the list of goods permitted to be traded on the Commodity Exchange.

### **MINISTRY OF CONSTRUCTION**

1. Circular No. 14/2010/TT-BXD dated 20 August 2010 providing for quality control of products, construction materials, ceramic tiles.
2. Circular No. 11/2010/TT-BXD dated 17 August 2010 guiding the administration of database on urban underground works.
3. Circular No. 10/2010/TT-BXD dated 11 August 2010 providing for dossier of each kind of urban planning.
4. Circular No. 08/2010/TT-BXD dated 29 July 2010 guiding the method on adjusting the price of the construction contract.

**STATE BANK OF VIETNAM**

1. Decision No. 1819/QD-NHNN dated 27 July 2010 on the prime interest rate in Vietnam dong.

**MINISTRY OF INFORMATION AND COMMUNICATION**

1. Circular No. 18/2010/TT-BTTTT dated 30 July 2010 issuing the National Technical Standard on telecommunication.

**MINISTRY OF CULTURE, SPORTS AND TOURISM**

1. Circular No. 09/2010/TT-BVHTTDL dated 24 August 2010 detailing the implementation of certain provisions in Decree No. 75/2010/ND-CP dated 12 July 2010 of the Government providing for penalties for administrative offense in relation to culture



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