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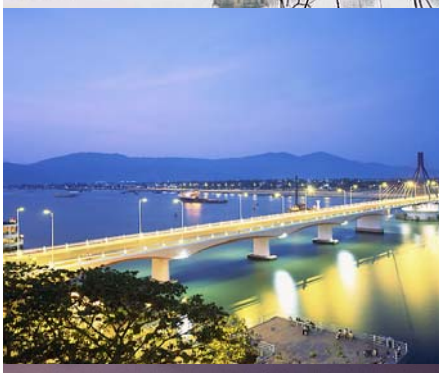

CONTENTS

PHUOC & PARTNERS

Ho Chi Minh City
Suite 1602, 16th Floor, Centec Tower,
72-74 Nguyen Thi Minh Khai Street,
District 3, Ho Chi Minh City
Tel: + 84 (8) 3 8 235895
Fax: + 84 (8) 3 8 235896
Email: info@phuoc-partners.com

Ha Noi
20th Floor, Tower B, Vincom City
Towers, 191 Ba Trieu Street, Hai
Ba Trung District, Ha Noi,
Tel: +84 (4) 3 974 8230
Fax: +84 (4) 3 974 8234
Email: info@phuoc-partners.com

Da Nang
5th Floor, Indochina Riverside
Towers, 74 Bach Dang Street
Hai Chau District, Da Nang City,
Tel: +84 (511) 3649 822
Fax: +84 (511) 3649 866
Email: info@phuoc-partners.com

PART I – CONCERNS

VAT incentive for exported services: being stuck in many ways

Lawyer Nguyen Huu Phuoc

Incentive tax rate

In order to encourage the exportation of services to earn foreign currency, the State has promulgated a lot of regulations, in which there is the incentive policy in value added tax (VAT). Accordingly, the exported services are granted the VAT rate of 0% as same as exported goods. The application of this tax rate will help to reduce the cost price of the exported services, hence increases competition capacity of Vietnamese services and products. Besides, it also helps the enterprises exporting services to be deducted or returned the input VAT levied on goods and services they have bought locally for the exporting of the services. Thence, the enterprises have got more financial conditions to train and improve professional capacity of their staff, increase the service quality and competitiveness.

However, the basic criteria to identify of which case the exported service granted VAT rate of 0% are not clear.

From "consumed outside Vietnam territory"…

Before 01 January 2009, beside the two sub-conditions of (i) having a contract signed with the buyer in a foreign country pursuant to the Commercial Law; and (ii) when the foreign buyer pays service fee in Vietnam to the service provider (Circular 84/2004/TT-BTC dated 18 August 2004), the prerequisite for the service exporting enterprise to be applied the VAT rate of 0% is that the service must be "consumed outside of Vietnam territory".

However, this notion is neither defined nor specifically guided, leading to the situation that tax agencies in different regions have interpreted it in different ways for a long time. Some agency interpreted that "service consumed outside of Vietnam territory" is the service consumed totally in a foreign country and not at all relating to Vietnam. Some agency understood that if the service serving the interest in Vietnam of a foreign organization; it will not be considered as being consumed outside of Vietnam territory. Some agencies even interpreted it more broadly, that only if that service related to or concerned with Vietnam, it may be considered as being consumed in Vietnam.

For example, Company A, established under foreign law, was going to establish an enterprise in Vietnam. Company A used the Vietnam market survey service provided by Company B in Vietnam. After finishing the service, Company B issued a bill of 0% VAT to Company A. At the end of the year, while inspecting the financial balance of Company B, the local tax authority did not agree to the issuance of 0% VAT bill since they consider that the market survey, although supplying to Company A, served the purpose of establish its subsidiary in Vietnam, hence that service is still deemed as "consumed in Vietnam", and would be taxable of 10% rate instead of 0% one. However, at that time Company A did not agree to pay such tax amount because they have balanced all expenses in establishing the enterprise in Vietnam with the accounting department of the group, and Company B had to "bear" the 10% of VAT that Company A ought to have paid, and had to pay administrative fine for delay in VAT payment.

To "have not resident office in Vietnam"…

From 1 January 2009 onward, Clause 1, Article 6 of Decree 123/2008/ND-CP of the Government dated 8 December 2008 (Decree 123) and Point 1, Item II, Part B of Circular No. 129/2008/TT-BTC of the Ministry of Finance dated 26 December 2008 (Circular 129) put forth the new standard as "foreign organization that has not resident office in Vietnam" to be granted the 0% VAT rate for the exported services in general (except some services not granted 0% VAT rate such as re-insurance to foreign countries; technology transfer and intellectual property transfer to foreign countries).

Circular 129 also encounters a trouble- it has no guidance of how to identify that a foreign organization has not resident office in Vietnam at the time signing service contract with the service supplier in Vietnam. This actually causes difficulty to both tax agencies and tax payers in the implementation of this requirement.

In Article 2 of Decree 123 and Official Letter 3824/TCT-CS of General Department of Taxation dated 18 September 2009 (Official Letter 3824) there is the guidance on the concept of "resident office in Vietnam", specified in the legal procedure document guiding on the implementation of Double Taxation Avoidance Agreements between Vietnam and other countries.

However, although the notion of resident office is defined as above, in reality, at the time point of signing the service contract with a foreign organization, the service supplier in Vietnam cannot be aware whether or not the foreign service-requester has got resident office in Vietnam, and issues invoice of 0% VAT only when there is confirmation from the foreign service-requester.

In some cases in which the payable amount of VAT is big, the foreign service-requester will request the tax authority of Vietnam to certify that the requester has not got a resident office in Vietnam. However, this request is not often met since now a mechanism for the tax authority to

issue this certification is not available. Even if such a mechanism is available, the tax authority of Vietnam is likely impossible to check that at that time point the foreign service-requester has got a resident office in Vietnam or not. Furthermore, the waiting time for issuing the certificate (if applicable) may be rather long, and the parties signing the contract sometimes cannot wait because of the urgency of the trading they want to execute.

Therefore, in order to reduce risk, the service supplier in Vietnam, in reality in some cases in which the profit gained from the supplying of the service is not high (below 10%), requires as the prerequisite for the contract signing the right to issue invoice of 10% VAT. In some other cases, the two parties agree that the foreign service-requester will undertake in writing that he has not a resident office in Vietnam. If after that the taxation authority affirms that the foreign service-requester has got a resident office in Vietnam at the time of signing the service contract or during the performance time of the contract, he shall reimburse the amount of VAT to the Vietnam party.

However, this does not reduce risk for the service supplier in Vietnam since the making of tax return and paying tax is presently under self-declare and self-paying mechanism. The taxation authority only makes tax balance for the service supplier in Vietnam in a rather long time after the issuing of invoice to the foreign service-requester (may be in 2-3 years). At that time may be the service supplier in Vietnam does not dealt with that foreign service-requester anymore. Otherwise, may be, for some reason, the foreign service-requester does not still exist for the Vietnam party to require him to pay the aforesaid 10% of VAT.

The need for a more practical and easier-to-apply guidance

In order to absolutely overcome the difficulties into which enterprises supplying service of Vietnam have to run, the State should review the determination under which resident office is the criterion for applying the tax rate of 0% of exported services. In case the criterion of resident office is still desired to determine that a service is really exported or not, a mechanism is needed for the service supplier of Vietnam to be able to determine exactly the status of the foreign partner, thereby to determine exactly the tax obligation of the deal.

On the contrary, if the determination of resident office status is unlikely feasible, the notion of resident office in Vietnam should be considered of being narrowed. This both has the significance of making easier the determination of having or not having resident office in Vietnam of the foreign service-requester, and has the significance of broaden the scope of VAT incentive for service exporting enterprises; especially for the deals in which enterprises are not entitled incentive tax rate only because the foreign service-requester has resident office in Vietnam but operation of this resident office does almost not affect the “exporting of service” nature of the deal.

In case the State sees that it is necessary to further encourage the service export activity and the criterion of resident office in Vietnam is not necessary anymore, the service can be fully determined as being exported through the requirement of providing the contract of service supply between the Vietnam organization and the foreign service-requester and voucher of payment for the exported service through a bank as well as other vouchers under prescription of laws.

PART II – REMARKABLE REGULATIONS

1. New regulations on minimum area wage rates

On 29 October 2010, the Government has issued Decree No. 107/2010/ND-CP stipulating minimum area wage rates for Vietnamese employees of enterprises with foreign owned capital, of foreign bodies and organizations, of international organizations, and of foreign individuals in Viet Nam ("foreign enterprises"), and Decree No. 108/2010/ND-CP stipulating minimum area wage rates for employees of Vietnamese companies, enterprises, co-operatives, co-operative groups, farms, family households, individuals and other Vietnamese organizations hiring labour ("local enterprises")

The two Decrees have adjusted four (04) minimum area wage rates. Accordingly, Vietnamese employees of foreign enterprises operating in Area I comprising urban districts of Ha Noi, and of Ho Chi Minh City shall have the minimum area wage rate of VND1,550,000/month, and the lowest minimum area wage rate is VND1,100,000/month applicable to Vietnamese employees of the foreign enterprises operating in Area IV comprising rural districts and townships in deep-lying and remote areas. As such, in comparison to the current regulations, the minimum area wage rate increases by VND210,000/month in Area I, VND100,000/month in Area IV.

Meanwhile, Vietnamese employees of local enterprises operating in Area I comprising urban districts of Ha Noi and of Ho Chi Minh City shall have the minimum area wage rate of VND1,350,000/month, and the lowest minimum area wage rate is VND830, 000/month applicable to Vietnamese employees of the foreign enterprises operating in Area IV comprising rural districts and townships in deep-lying and remote areas. As such, in comparison to the current regulations, the minimum area wage rate increases by VND370,000/month in Area I, VND100,000/month in Area IV.

The new minimum area wage rate shall be applicable as of 01 January 2011 for areas in Appendix 1 of Decree 107 and Decree 108.

Additionally, the two Decrees also define the list of adjusted areas for applying the minimum area wage rates comprising 03 areas: Area I, Area II, and Area III. In which, Area I will be extended to: Cu Chi District, Hoc Mon District, Binh Chanh District, and Nha Be District of Ho Chi Minh City; Bien Hoa City, Nhon Trach District, Long Thanh District, Vinh Cuu District, Trang Bom District of Dong Nai Province; Thu Dau Mot Township, Thuan An District, Di An

District, Ben Cat District, Tan Uyen District of Binh Duong Province; Vung Tau City of Ba Ria – Vung Tau Province. However, the upgraded areas shall apply the new minimum area wage rate as of 01 July 2011.

2. To repeal the regulations on temporary remittance of profit overseas every quarter or every six months for foreign direct investment

It is remarkable regulation of Circular No. 186/2010/TT-BTC dated 18 November 2010 of Ministry of Finance guiding remittance of profit overseas by foreign organizations and individuals having profit from direct investment in Vietnam in accordance with the Law on Investment.

According to the Circular, the investors are permitted only: (i) annual remittance of profit overseas, and (ii) remittance of profit overseas on termination of direct investment activity in Vietnam. The temporary remittance of profit overseas every quarter or every six months shall no longer apply.

Foreign investors shall be permitted to annually remit overseas the amount of profit distributed or received from direct investment activities in Vietnam on termination of the financial year after the enterprise in which the foreign investor participated by investment has fully discharged its financial obligations to the State of Vietnam in accordance with law and has lodged audited financial statements and the Corporate Income Tax finalization declaration for the financial year to the tax office directly managing it.

Foreign investors shall be permitted to remit profit overseas on termination of its direct investment activity in Vietnam after the enterprise has fully discharged its financial obligations to the State of Vietnam in accordance with law and has lodged audited financial statements and the Corporate Income Tax finalization declaration to the tax office directly managing it and at the same time has fully discharged its obligations in accordance with the provisions of the Law on Tax Management.

Additionally, the Circular stipulates that a foreign investor shall not be permitted to remit overseas the amount of profit distributed or received from direct investment activities in Vietnam of the year in which such profit arises if the investor's enterprise's financial statements of the year in which the profit arises still contain accumulated losses after carrying forward losses in accordance with the law on corporate income tax.

The Circular comes into effect as of 24 December 2010.

3. Enterprises can register, declare and pay taxes via electronic means

Recently, the Ministry of Finance has issued Circular No. 180/2010/TT-BTC dated 10 November, 2010 guiding electronic transactions in taxation sector. Namely, the Circular shall govern the following areas:

(i) Electronic transactions (ET) in the tax registration (not applicable for the tax registration in accordance with Decree No. 43/2010/ND-CP of the Government on enterprise registration); ET in tax declaration, ET in tax payment;

(ii) Procedures for the issuance, temporary suspension, and withdrawal of the Certificate for organizations providing services of ET value added in taxation sector; making ET in taxation sector through the organizations providing services of ET value added in taxation sector.

In order to make ET in taxation sector, taxpayers (except tax payable cases in Clause 1, Article 18 of this Circular which are otherwise stipulated by the banks) must meet the following conditions: (i) having digital deed issued by public organizations providing services for authentication of digital signatures is still valid, and (ii) enabling to access and use the internet and e-mail address in stable touch with the tax agencies. In addition, organizations and individuals making ET in taxation sector with tax agencies must use digital signatures signed with digital deed issued by public organizations providing services for authentication of digital signatures. Tax agencies must, upon implementing electronic notice as required in this Circular, use digital signatures signed with digital deed issued by public organizations providing services for authentication of digital signatures.

Also, according to this Circular, taxpayers are allowed to make electronic transactions in relation to tax via electronic information port of the tax agencies during 24 hours per day, 7 days per week, including holidays (Saturday, Sunday, holidays, New Year). The date of electronic tax filing is reckoned from 0:00 to 24:00 on the same day. Meanwhile, the time of electronic tax filing is as indicated on the Notice certifying electronic tax filing of tax agencies. The tax agencies send the Notice confirming the receipt of electronic tax filing to the e-mail address of the taxpayer or organizations providing T-VAN services (in case of using T-VAN services) no later than 15 minutes after the taxpayers or organizations providing T-VAN services have completed the electronic tax filing.

In the process of managing the electronic tax filings, the storage for electronic tax documents shall be made within the time-limit as prescribed by law as for paper documents. Where electronic documents are out of the time-limit for storage as required but relating to the information integrity of the information systems and the electronic documents under circulation, shall continue to be stored until the destruction of electronic documents not completely affecting to other electronic transactions is made.

In addition to the above contents, the Circular also stipulates specifically the procedures for tax registration, electronic tax declaration, ET on the procedures for collecting and paying taxes, the services of Tax – Value Added Network (T-VAN), making tax ET through organizations providing T-VAN services …, etc.

This Circular shall come in force from 01 January, 2011.

4. The equity of an investor in a project must be a minimum of 30% of the private participating portion in the investment project under the form of public – private partnership

This is one of the notable provisions of the Regulations on trial public – private partnership investment form issued with Decision No. 71/2010/QD-TTg dated 09 November, 2010 of the Prime Minister.

Investment under the form of public – private partnership is understood that the State and investors coordinate to execute the projects of infrastructure development, to provide public services on the basis of the project contract. In which, the participation of the State is a combination of forms of participation of the State including: the State capital, the investment incentives, relevant fiscal policies, being calculated in the total investment (total investment capital) of the Project, to increase the feasibility of the Project. Based on the nature of each Project, the State participating portion may include one or more forms as mentioned above. The State participating portion is not the equity of the owner in the project enterprise, not being associated with the right for profit share from revenues of the Project.

With respect to the Project under the form of public-private partnership, the total value of the State participating portion shall not exceed 30% of the total investment of the Project, unless otherwise decided by the Prime Minister. Investors can raise commercial loans, and other capital sources (without the Government guarantee) at a maximum of 70% of the private portion participating in the Project.

Applicable sectors for trial public – private partnership investment form including:

(i) Roads, road bridges and tunnels, and ferry landings for road traffic;

(ii) Railways, and railway bridges and tunnels;

(iii) Traffic in urban areas;

(iv) Airports, sea ports, river ports;

(v) Clean water supply systems;

(vi) Power plants;

(vii) Health (hospitals) and

(viii) Environment (waste treatment plants).

The Ministry of Planning and Investment is the competent agency for issuing the investment certificate (IC) for the Projects under the trial public – private partnership investment form.

Decision No. 71/2010/QD-TTg on the Regulations on trial public – private partnership investment form shall take effect from 15 January, 2011. These Regulations shall be implemented for from 3 to 5 years from the effective date until the Government issues a decree on investment under the form of public-private partnership in replacement for these Regulations.

PART III – NEW PROMULGATIONS OF THE MONTH

GOVERNMENT

1. Decree No. 111/2010/ND-CP dated 23 November 2010 making detailed provisions and guiding the implementation of a number of articles of Law on Judicial Record.
2. Decree No. 110/2010/ND-CP dated 09 November 2010 on amendment of, supplement to a number of articles of Decree No. 111/2005/ND-CP dated 26 August 2005 of the Government making detailed provisions and guiding the implementation of a number of articles of Law on Publication as amended, and supplemented by Decree No.11/2009/ND-CP dated 10 February 2009 of the Government.
3. Decree No.109/2010/ND-CP dated 04 November 2010 on rice export business.
4. Decree No. 108/2010/ND-CP dated 29 October 2010 stipulating the minimum area wage rates for employees of Vietnamese companies, enterprises, co-operatives, co-operative groups, farms, family households, individual and others Vietnamese organization hiring employees.
5. Decree No. 107/2010/ND-CP dated 29 October 2010 stipulating the minimum area wage rates for employees of foreign-invested enterprises, of foreign bodies and organization, of international organizations and of foreign individuals in Vietnam.

THE PRIME MINISTER

1. Decision No. 2135/QD-TTg dated 22 November 2010 approving the Project on "Production and issuance of electric passport of Vietnam".
2. Decision No. 72/2010/QD-TTg dated 15 November 2010 issuing the Regulations on establishment, management and implementation of the National Program on Trading Promotion.
3. Decision No. 71/2010/QD-TTg dated 09 November 2010 issuing Regulations on trial public private partnership investment form.
4. Decision No. 2011/QD-TTg dated 05 November 2010 on trial implementation of insurance for export credit.

MINISTRY OF FINANCE

1. Circular No. 189/2010/TT-BTC dated 24 November 2010 providing the collection rates; the regime for collection, the payment and control of using fees; charge of national domain name and Internet address of Vietnam.
2. Circular No. 186/2010/TT-BTC dated 18 November 2010 guiding remittance of profit overseas by foreign organizations, individuals having profit from direct investment in Vietnam in accordance with the Law on Investment.
3. Circular No. 180/2010/TT-BTC dated 10 November 2010 guiding the electronic transactions in taxation sector.

4. Circular No. 177/2010/TT-BTC dated 05 November 2010 providing for the regime on financial management of the Fund for Protecting Vietnamese citizens and legal entitles in foreign countries.

5. Circular No. 175/2010/TT-BTC dated 05 November 2010 amending, supplementing Circular No. 84/2008/TT-BTC dated 30 September 2008 of the Ministry of Finance guiding the implementation of a number of articles of the Law on Personal Income Tax and guiding the implementation of Decree No. 100/2008/ND-CP dated 08 September 2008 of the Government detailing a number of articles of Law on Personal Income Tax.

6. Circular No 172/2010/TT-BTC dated 02 November 2010 guiding the collection rates, the regime for collection, payment, control and use of fees in the customs sector.

7. Circular No. 169/2010/TT-BTC dated 01 November 2010 providing the collection rates, the regime for collection, payment, control and use of fees in aviation sector..

8. Decision No. 2905/QD-BTC dated 09 November 2010 correcting Circular No. 153/2010/TT-BTC dated 28 September 2010 of the Ministry of Finance guiding the implementation of Decree No. 51/2010/ND-CP dated 14 May 2010 of the Government providing on invoice for sales of goods and services providing.

MINISTRY OF LABOR, WAR INVALIDS AND SOCIAL AFFAIRS

1. Circular No. 36/2010/TT-BLDTBXH dated 18 November 2010 guiding the implementation of the minimum area wage rates for employees of Vietnamese companies, enterprises, co-operatives, co-operative groups, farms, family households, individual and others Vietnamese organization hiring employees.

THE STATE BANK OF VIETNAM

1. Decision No. 2868/QD-NHNN dated 29 November 2010 on the prime interest rate of Viet Nam Dong.

2. Circular No 23/2010/TT-NHNN dated 09 November 2010 on the management, operation and use of the Inter-banking Electronic Payment System.

3. Decision No. 2620/QD-NHNN dated 05 November 2010 on refinancing interest rates, discount interest rate, and interest rate on overnight loans, for inter-bank electronic payments and on loans to bank to cover shortages for settlement conducted by the State Bank of Vietnam.

MINISTRY OF CONSTRUCTION

1. Circular No 21/2010/TT-BXD dated 16 November 2010 guiding the certification of regulation compliance and publication of regulation compliance with respect to products, construction materials.

2. Circular No. 20/2010/TT-BXD dated 27 October 2010 guiding the trial establishment and publication of a number of indexes for evaluating real estate market.

Contact us

Ho Chi Minh City

Nguyen Huu Phuoc, Founding Partner
Nguyen Gia Huy Chuong, Managing Partner
Dinh Quang Thuan, Partner
Tran Thanh Tung, Senior Associate
Tran Ngoc Thuyet, Senior Associate
Anh Hong Ngan, Associate
Chally Jun Ryu, Associate, Korean Desk

Suite 1602, 16th Floor, Centec Tower, 72-74 Nguyen Thi Minh Khai Street, District 3,
Ho Chi Minh City
Tel: + 84 (8) 3 8 235895
Fax: + 84 (8) 3 8 235896
Email: info@phuoc-partners..com

Ha Noi

Truong My Ly, Partner
Nguyen Tuan Khang, Associate
Nguyen Thi Phuong Chung, Associate
Trinh Thu Hao, Associate

20th Floor, Tower B, Vincom City Towers, 191 Ba Trieu Street,
Hai Ba Trung District, Ha Noi
Tel: +84 (4) 3 974 8230
Fax: +84 (4) 3 974 8234
Email: info@phuoc-partners..com

Da Nang

Pham Quoc Tuan, Partner

5th Floor, Indochina Riverside Towers,
74 Bach Dang Street
Hai Chau District, Da Nang City,
Tel: +84 (511) 3649 822
Fax: +84 (511) 3649 866
Email: info@phuoc-partners..com