TAX POLICIES AND INVESTMENT ATTRACTION ISSUES IN VIETNAM

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At the final session of the 13th National Assembly's meeting on 7 April 2016, following the oath of inauguration, the new government was formed under the leadership of the new Prime Minister with a lot of expectations to be a friendly government, an active government being determined to reform. In order to become the enterprise's fellow-traveller, on 29 April 2016 in Ho Chi Minh City, the Prime Minister Nguyen Xuan Phuc has led the "Prime Minister with business community in 2016" conference to listen to the Vietnamese enterprise community's opinion. As the result of the conference, the Government has issued Resolution no. 35/NQ-CP dated 16 May 2016 on supporting and developing enterprises until 2020 to debate the difficulties on capital funding of the enterprises.

However, besides solutions on administration renovation, making favourable investment environment, protecting legal righ and benfit of enterprise, solutions on tax policy is still very general. In fact, recently, the implementation on regulations and policy of the tax authorities are still unclear, insufficient leading to difficulties for enterprises doing business in Vietnam. Under this article, we would like to highlight some tax issues as below:

1. Investment protection

Issues

Foreign enterprises making investments in Vietnam have the opportunities to be granted preferential incentives of the Government, which are clearly regulated in the investment license or the investment certificate of each enterprise. Therefore, the investors are guaranteed to be entitled to preferential incentives even in case there are any changes in the laws of Vietnam. Legal regulations on investment also acknowledge, secure and protect the investment incentives, income and legal rights and other benefits of investors, acknowledge the existence and long term development of investment activites.

However, several local tax departments have opinions and point of views which are different from the prevailing regulations of the Government, they do not agree with the incentives stated in the Investment certificate of enterprises and require enterprises apply the prevailing regulations, resulting in difficulties for enterprises when doing business and investment in Vietnam.

The fact that tax departments require enterprises to apply the prevailing regulations and deny the incentives stated in the Investment certificate is viewed to be against the principle of of the Government regarding investment protection and securing the rights of investors.

Recommendations

VBF propose that the Government and Ministry of Finance should provide clear guidances and instructions to local tax departments to respect the enterprise's investment incentives clearly stated in Investment Certificate and to avoid the inconsistent application of regulations, which raise concerns and mistrusts among foreign invested enterprises toward the Government's investment environment.

2. Investment expansion project for the period from 2009 to 2013

Issues

Practically, a number of companies increase their fixed assets from depreciation fund or profit after tax, these companies do not increase capital and the initial investment certificate does not state the capacity of the project; the increase of fix assets leads to the increase in capacity. And hence, tax authorities have viewpoints that companies have investment expansion project due to increase in capacity, and as a result, CIT incentives could not be enjoyed on profits allocated for investment expansion activities.

Recommendations

VBF propose that Ministry of Finance, in the regulations on investment expansion for the period from 2009 to 2013, should consider defining the investment as expansion project only when companies have increase adjustments on capital investment and implement the capital disbursement activities within that period.

3. Incentives for the project with the large investment capital

Issues

We understand that the government has extended the opportunities for some investment projects to apply preferential tax rates, in particular: "*Investment projects have not yet registered investment capital of up to 6.000 billion, however, have disbursements from 6,000 billion or higher for a period of 03 years from the initial lisences*" can also enjoy preferential tax of 10% within 15 years.

This regulation shall be warmly welcome by many enterprises, as well as increases opportunities to attract investment capital from domestic and foreign investors when making investment in Vietnam. However, to ensure fairness, the draft decree should also stipulate the similar policies to the enterprises that have projects with registered capital of more than 6,000 billion Dong (for example: 10,000 or 20,000 billion) and within 03 years from the date of being granted the investment certificate, enterprises have disbursed the capital of more than 6,000 billion Dong.

Recommendations

We propose to amend paragraph 1, article 5, Decree 218 as follows:

*"... - The project has a **minimum investment capital scale of 6 trillion Dong**, makes a minimum disbursement of 6 trillion Dong within the period of 3 years from the date of investment license and has a minimum total revenue reaching 10 thousand billion Dong/ year within the period of no later than 3 years since the project started generating revenue.*

*- The project has a **minimum investment capital scale of 6 trillion Dong**, makes a minimum disbursement of 6 trillion Dong within the period of 3 years from the date of investment license and employs more than 3,000 labours within the period of no later than 3 years since the project started generating revenue."*

4. CIT incentives for new investment projects with licenses granted before 01/01/2014

Issues

Although Official letter 12404/BTC-TCT and Circular 96/2015/TT-BTC by Ministry of Finance provided guidelines that the enterprise newly established from investment projects with investment license or investment certificate granted before 01/01/2014 and in process of investment, not yet put into operation and not yet generating revenue is entitled to CIT incentives similar to new investment project, regulations do not require the enterprises to amend its investment certificate from 01/01/2014 to enjoy CIT incentives like new investment project.

However, some local tax departments still assume that enterprise has to meet the condition "granted with amendment license to the investment certificate or amended investment license

from 01/01/2014 for that project" to enjoy CIT incentives like new investment project starting operation in 2014. It means that for the same investment project in the Industrial park satisfying the conditions of CIT incentives, if enterprise does not amend its investment license and start operation in 2014, that enterprise shall not be entitled to CIT incentives, whereas the project can be entitled to CIT incentives if it comes into operation late.

We understand that the Ministry of Finance have viewed that amendment to investment certificate is only matter of administrative procedure, not the key factor to assess whether one investment project is entitled to CIT incentives. Accordingly, the Ministry of Finance has issued Official letter to provincial tax departments and at the same time, amend such provision in Circular 96 in 2015. The practice of some local tax departments to request for amended investment certificate for investment projects coming into operation in 2014 is unreasonable and unfair.

Recommendations

We recommend the Ministry of Finance consider providing guidances to local tax departments to implement and create fairness for investors, in particular, "Enterprises newly established from investment project granted with Investment license or investment certificate before 01/01/2014 but in investment process, not yet put into production and not yet generating revenue shall be entitled to CIT incentives like new investment project" to be consistently applied from 2014, instead of applying to enterprises coming into operation from 2015.

5. Benefit for employees' family within capped limit of one month average salary:

Issues

Pursuant to prevailing regulations, direct expenditures on employees' welfare must not exceed actual average 01 month's salary for CIT purpose. In practice, these regulations have been encouraging companies to take care of their employees better. However, these regulations specifically stipulated that expenditures are direct for employees so that, in fact, when companies organise holiday trips for both employees and their families or common celebration events with employees' families (such as Family Day), expenditures on employees' families are usually considered as non-deductible expenses for tax purpose.

With those welfare expenditures serving as a motivation of employees, the extension of the beneficiaries to employees' families shall further enhance the relationship between employees and their companies. The separation of expenditures on employees and their families is not practical and difficult because of the large amounts of attendees and the big differences between initial registration and actual participants.

Recommendations

We recommend the regulations be amended as follows: *"Direct expenditures on employees' welfare with legitimate invoices and sufficient supporting documents as stipulated such as: expenditures on weddings, funerals of employees and their families;* ***expenditures on holidays, organisational events for both employees and their families****; expenditures on treatment support; expenditures on professional training; expenditures on supporting employees' families affected by natural disasters, hostilities, accidents, illnesses; expenditures on providing rewards for employees' children due to their educational achievements; expenditures on allowances for traveling during holidays of employees and other welfare expenditures as guided by Ministry of Finance; the total expenditure incurred in the tax year must not exceed actual average 1 month's salary"*

6. Regulations on the other benefit for employees

Issues

In addition to bonuses for employees, companies may apply special remuneration policies to motivate employees, especially ones at high-level management. For example: health insurance for employees' spouses and children, annual home trip air ticket for employee's families, visa application fee for employees' spouses and children (for expatriates),… These special benefits are to encourage employees to stay with their companies in the long term, to create differences to motivate employees. These benefits are taxable for Personal Income Tax purpose when incurred.

In fact, when carrying out tax audits, tax authorities usually take these expenditures out of deductible expenses of companies.

Recommendations

Benefits for employees' families, if specified in Labour contract, companies' Labour policy, are actually part of companies' remuneration policy to motivate and encourage employees to stay in long-term with their companies. These benefits are subject as taxable income for Personal Income Tax purpose so that they should be considered as deductible expenses of companies.

Therefore, VBF recommend the amendment and supplement of Point m, Clause 2, Article 9 Decree 218/2013/ND-CP as follows: "…expenditures on bonuses, life insurance for employees, **other benefits for employees (including their families)** for which the conditions for entitlement and rates of entitlement are not specified in one of the following dossiers: Labor contract; Collective labor agreement; Financial regulations of the Company, Corporation or Group; Reward regulations issued by the Chairman of the Board of Directors, General Director or Director under the Financial regulations of the Company or Corporation…"

7. Regulations on commissions, sale bonuses for agents who are individuals

Issues

Enterprises who incurred commissions, sale bonuses for agents with adequate lawful invoices and sufficient supporting documents shall be treated as deductible expenses for CIT purpose. However, the fact that the agent may be an organization, and also an individual.

Based on the new Draft decree, we understand that, the incomes from bonuses or commissions due to achieving sale volume are determined as non-flat revenue or invoiced revenue. Moreover, the Draft also specifies that Organization who pays this income will be obliged to deduct personal income tax. Therefore, for individuals receiving this revenue has completed their tax obligations, if they are required to issue invoice for the company could record those expenses as expenses related to business activities, it will be unreasonable and causes many difficulties for the individual agents.

Recommendations

We propose that the Government should amend Clause 5, Article 1 of Decree No. 12 as follows:
"a) Actual expenditures on the enterprise's operation, including all the following expenditures:
- Commissions, sales bonuses for agents who are individuals do not need VAT invoices
- Expenditures on provision of defense and security education, training, operation of the militia, and performance of other defense and security tasks as prescribed by law; expenditures on support for operation of Communist Party organizations and intramural socio-political organizations of enterprises;"

8. Capital Transfer

Issues

Pursuant to Clause 1, Article 14, Circular 78/2014/TT-BTC, local tax authorities require all the cases of transferring one member limited company owned by an organization associated with the transfer of real estate have to declare under the type of transfer of real estate using Form 08, whereas real estate part accounts for a very small percentage of the total assets of the Company. This provision does not reflect the true nature of the transaction.

In addition, According to guidance by the tax authorities in some Official letters (e.g. OL.766/TCT-DNL dated 29/2/2016), for the indirect capital transfer, the company having income from capital transfer (Company A) are considered as arising taxable income in Vietnam then have to declare and pay tax in Vietnam. In the mean time, in Country B, Company A also has income from the capital tranfer and then have to pay tax in Country B. This lead to the double taxation on one income.

Recommendations

Kindly request the Ministry of Finance/General Department of Taxation to amend regulations or specifically guide on which cases have to declare under regulations mentioned in Clause 1, Article 14 (considering based on the rate of property values on total assets) to reflect that the nature of transaction is real estate transfer.

In relation to indirect capital transfer, kindly request the Ministry of Finance/General Department of Taxation to issue specific guidelines for allocation taxable revenue between Country B and Vietnam as well as the application of DTA. Whether the DTA between Vietnam and Country A or between Vietnam and Country B shall be applied.

9. VAT refund for long term business activity

Issues

Pursuant to Circular 130/2016/TT-BTC, the tax refund for case that input VAT is not completely deducted after 12 months or 4 quarters from the first month or quarter input VAT is incurred shall no longer be applied. For some special business, for example, exported ship construction requires long term capital, even required capital is much larger than the one of new project.

However, there has not been regulation for tax refund for this case. Currently, VAT refund for the case of exported ship construction is applied only when the organization complete and export ship to abroad, even this process should take many years. This practice leads to significant difficults to the long term business activity and cannot motivate to develop the economy.

Recommendations

We highly recommend the Government to allow VAT refund for investment project in industries similar to exported ship construction having creditable VAT more than VND 300 mil regardless of actual exportation.

10. VAT refund for trading of imported and exported goods

Issues

In practice, regarding to import and export activity, input VAT usually is incurred from following expenses:

- Purchase expense (respectively incurred VAT at the import stage)
- Expenses directly related to the process of import-export of goods. For example, logistics services, warehousing expenses, unloading, ...; and
- Expenses are not directly related to the import-export activities. For example, administrative expenses, general expenses, etc.

Basing on the example in Point 3 Article 1 Circular 130, there are following issues:

- *Input VAT of expenses directly related to import and export activities of goods (items (i) and (ii)) are curently in the group of not eligible for VAT refund but withheld. This provisions are not really appropriate for our practice because we understand that the aforementioned input VAT is not refunded according to domestic tax regulations, and also not be refunded according to the customs authorities (?).*
- *There is no specific guidance on the processing of the input VAT of expenses not directly related to the export and import activities of goods (item (iii)). For example: Whether the VAT amount has been allocated to refund or not? Or all of them are not refundable?*

Recommendations

Kindly request the Ministry of Finance, the General Department of Taxation for more specific guidance on handling VAT input of the expenses directly/indirectly related to export activities of goods. Specifically: What kinds of expenses which its VAT input will be refunded or not be refunded but withhold? In case of being refundable, whether will it be refuned for the full VAT input or will be proportional allocated? Regarding to VAT on imported goods (which have been made the payment at the import stage), whether the authorization to handle tax refund (if any) will belong to tax authorities or customs authorities? In case of not being tax refunded, what is the reason?

11. Tax refund for enterprises that both export and sell its goods and services domestically

Issues

According to Point 3, Article 1, Circular 130/2016/TT-BTC: "4. Tax refund on exported goods and services: A business that both exports and sells domestically its goods and services in a month or quarter must record input VAT on its exported goods and services separately in accounting books. The input VAT on the exported goods and services, if not feasibly recorded in separate accounting books, shall be determined according to the proportion of the revenue of exported goods and services to the total revenue of goods and services through tax periods starting from the period that succeeds the latest tax period in which tax is refunded to the current period that tax refund is requested.

The Circular guides on tax declaration period and tax refund period, however, the Circular has no guidance on determining declaration period of refunded tax. Specifically, for case that before generating export revenue, enterprises only operate domestic business activities, the proportion of input VAT incurred during this period is very huge, so which direction in the followings will be appropriate for enterprises to handle the allocation of this input VAT:

- Allocating under the proportion of export revenue over total revenue of the entire declaration period from the beginning of operation until generating export revenue, or;
- Allocating under proportion of export revenue over total revenue of the declaration period generating export revenue.

In accordance with Point 1, Article 1, Circular 130/2016/TT-BTC: "If the amount of input VAT on exported goods and services (including the amount of input VAT separately recorded and the amount of input VAT determined through the above said proportion) remains at least VND 300 million after having been deducted from VAT on goods and services sold domestically, the business shall be eligible for a refund of VAT on exported goods and services. The refunded amount of VAT on exported goods and services shall not exceed the revenue from such exported goods and services multiplied by 10%."

According to Circular's guidance, enterprises having both export activities and domestic sale activities shall determine VAT amount is refundable or not refundable as follows:

- *Not refundable VAT amount shall be correlative with domestic sale activity.*
- *Refundable VAT amount shall be correlative with exporting activity and not larger than 10% of revenue of exported goods and services.*

After determining above amount, there could be a case that both input VAT amount of domestic sale activities and export activities respectively are deductible and carried forward to the next refund period. Circular has not provided guidance on this case. Shall this deductible VAT amount be accumulated into VAT amount of the next period to reallocate or be recorded separately and compared with 10% of the next period revenue of exported goods and services?

Recommendations
We recommend that Ministry of Finance and General Department of Taxation provide more examples about method to calculate the amount of VAT refunded in case enterprises both export and sell goods and services domestically in order that taxpayers understand and apply regulations properly.

12. Tax refund for businesses which have goods and services applied tax rate 5%

Issues
At present in the health care industry (being one of the essential supply industries) majority of medical products such as drugs and drug materials are subject to 5% VAT rate according to Article 10.11 Circular 219/2013/TT-BTC guiding the implementation of the Law on Value Added Tax.

Meanwhile, input costs that enterprises buy or outsource services such as service fees for customs clearance, warehousing, transportion, office rental costs, electricity, water, advertising and promotion, etc. are subject to 10 % VAT. To save investment costs as well as utilize economy of scales based on combined volumes and shared infrastructure, enterprises will normally outsource services including warehousing, logistics, promotion, advertising, etc. in order to ensure medicines are stored in most modern warehouses, best preserving quality, as well as the lowest fixed assets investment costs.

Due to output VAT at 5% while majority of input costs is VAT at 10%, input VAT is frequently not fully deductible in a month. Total VAT yet to be fully deducted in the year of our company is therefore vital to company’s operation and existence.

According to Article 10 of the Draft Decree guiding the Law 106/2016/QH13 effective from July 1, 2016, businesses with 5% VAT is no longer entitled to input VAT refund. This has severe impacts on the business activities of the company and its working capital. If input VAT is not refunded and must be recorded as expenses, the Company will suffer significant losse and can not continue to operate financially and are at risk of bankruptcy.

Article 10.3 of the Draft Decree provides "Business establishments with goods and services for export if the non-deductible input VAT is VND 300mil or more will be refunded per month/quarter". We understand that this tax refund provisions applicable to business establishments with exported goods and services is due to such business’ output VAT 0% while input VAT is generally 5% to 10%, resulting in frequent input VAT not fully deducted. Considering this aspect, we see the operation of businesses with products subject to VAT at 5% has the same situation with the base VAT export business. To that extend, allowing VAT refund to only business establishments exporting goods and services without granting VAT refund to business establishments with output VAT at 5% might be viewed as discrimination in term of taxes among businesses.

<u>*Recommendations*</u>

To ensure the essential goods with 5% VAT rate can reach consumers with preferential VAT rate at 5 % without adversely affecting the businesses providing these essential goods, and to ensure no discrimination between imported goods, goods of domestic production and exported goods in accordance with the spirit of WTO integration of the Government of Vietnam, we propose that business establishments having goods or services with 5% VAT rate be added to the list of business establishments entitled to VAT refund like in the case of business establishments exporting goods and services.

Accordingly we propose that Article 10.3 be revised as follows (or alternatively a new Article 10.4 is added to address the case of 5% VAT):

"3. Business establishments in the month (in the cases of monthly tax declaration), or in the quarter (in the case of quarterly declaration) having exported goods and services, or goods and services which are subject to VAT from 0% to 5% having non-deductible input VAT from VND 300 million or more, shall be entitled to VAT refund on a monthly, quarterly basis; In case the monthly, quarterly non-deductible input VAT is less than VND300 million, the business establishment shall be entitled to VAT deduction in the next quarter; in the case a business establishment has both goods and services for exports, goods or services with VAT rate from 0% to 5% and other goods and services for domestic consumption or with VAT rate greater than 0% or 5% respectively, the business establishment must account separately the VAT input used for manufacturing or trading in exported goods and services, goods and services with VAT rate at 0% to 5% from other goods and services. Where no separate accounting is maintained then the input VAT shall be determined by the ratio between the turnover of exported goods and services and goods and services with 0% to 5% VAT against the total sales of goods and services.

Business establishments shall not be eligible for VAT refund for the cases of importing goods for export, goods for export are not exported in the areas of export customs operations under the provisions of the Customs Law and the guidelines thereto.

The tax authority shall exercise the refund first with post audit for taxpayers which produce ~~export~~ goods eligible for VAT refund and which do not violate laws and regulations on tax and customs for two consecutive years; taxpayers which are not included in the high risk category according to the Law on Tax Administration."

13. VAT tax rate apply for export service

<u>*Issues*</u>

The issue of export services has been raised many times in previous VBF meetings but this remains an area of concern. Circular 219/2013/TT-BTC defines "export service" as a service which is provided directly to overseas organizations/individuals and which is consumed outside Vietnam.

The definition of "consumed outside Vietnam" is unclear, and in practice, enterprises in Vietnam providing services to overseas clients are usually unable to apply 0% VAT as the tax authorities argue that these services are consumed in Vietnam. Instead, 10% output VAT is applied to these services. This VAT amount cannot be recovered by the overseas client, which adds to the cost of services purchased from Vietnam and makes Vietnamese service exporters less competitive. This damages a vital sector of the Vietnam economy.

Because of the unclear definition of "consumed outside Vietnam", in practice very few services are treated as "exported" for VAT purposes. The tax authorities often focus more on the place of the performance of service rather than where they are consumed. Or they argue that if services

are performed in Vietnam, then they therefore relate to Vietnam and must be consumed in Vietnam also.

We also note that where a service is provided by a Vietnamese company to an overseas company, but is then recharged to an entity in Vietnam, the service in this case may ultimately be consumed in Vietnam. However in this case, the service fee will be subject to VAT under the foreign contractor withholding tax regulations and, therefore if 10% VAT is charged when the Vietnamese company invoices the oversea company, it will lead to double taxation.

Recommendations
We propose that Ministry of Finance should define export services based purely on where the customer (to which the invoice is issued) is located. This will ensure that Vietnam's VAT treatment of export services is in line with that of standard international practice and that Vietnamese service exporters are not in disadvantageous position versus their overseas competitors who enjoy zero VAT rate for their export services.

14. Term of warranty in the contract of supplying goods and services for Foreign Contractor

Issues
With respect to term of warranty attached to contract of supplying goods of foreign suppliers in Vietnamese market, this is a common and reasonable as assurance condition on quality of goods in order to protect the rights of buyers. This term has always existed in the purchase agreement, but in fact, this is the amount of damage which the seller and the buyer does not expect to apply. For this case, warranty is not service attached with the sypplying of goods and can not be separated from the value of goods. Warranty should be regarded as service in case the supplier provides and charges expense for the buyer incurred when the warranty in contract expires, and the buyer demands for repairs, maintenance.

In relation to FCT calculation for the warranty charges, the Vietnamese government in general and Ministry of Finance in particular, made of big step forward with Circular 103/2014/TT-BTC compared to the previous regulations. The Circular 103 reaffirms the spirit of the State of Vietnam that is always clear, make the right decisions in line with international practice, as well as make efforts to support businesses in the process of operating in Vietnam. The Circular 103 clarifies that the contract of delivering goods at Vietnamese border gates attached warranty conditions of suppliers is not subject to withholding tax. However, with the contract signed before Circular 103 took effect, there is no specific and consistent guidance even though this issue has been raised many times in the forum for dialogue between Ministry of Finance and Enterprises and also has been agreed in principle by the Ministry of Finance.

Recommendations
Therefore, in order to avoid unexpected issues during the fulfilment of the tax obligations of the businesses and concerns among enterprises doing business in Vietnam, as well as to unify methods of implementation of tax policy at all levels, VBF proposes the Ministry of Finance to provide detailed and consistent guidelines in terms of warranty clause in the contract of supplying goods of foreign suppliers accompanied with free warranty provisions is the responsibility of the seller and is not accompanied with any other services in Vietnam shall not be subject to withholding tax. Moreover, VBF kindly request Ministry of Finance to provide guidance for similar situations of the contracts signed before the Circular 103 took effect.

15. Foreign contractor tax with contract which have the activity of selling goods and services at the bonded warehouse

Issues

Currently, Tax Authority has some guidance (e.g. OL. 165/TCT-CS, CV1860/TCT-CS) that the foreign contractors having the activity of selling and distributing goods from the bonded warehouse to the inland are subject to the foreign contractor withholding tax in Vietnam.

Based on this guidance, Local tax authority claims that for any contract of importing goods with terms of delivery at the bonded warehouse, the foreign contractor will be subject to the foreign contractor withholding tax.

Recommendations

Kindly request the Ministry of Finance/General Department of Taxation to issue detailed guidance regarding contracts having terms of delivery at the bonded warehouse, stating which cases are subject to FCT and which cases are not subject to FCT.

We suppose that, in particular cases, the contracts having terms of delivery CIF/FOB – bonded warehouse are not subject to FCT.

16. The fine at 20% of the tax arrears or refundable tax due to wrong declaration

Issues

Pursuant to Clause 2, Article 6, Circular 66/2013/TT-BTC dated 15/11/2013 on penalties for administrative violations pertaining to taxation:

"b) The fine for understatement of tax payable or overstatement of refundable tax shall be 20% of the tax arrears or refundable tax. The fines incurred by taxpayers being households and individuals are specified in Article 107 of the Law on Tax administration."

Currently, some companies have the tax paid into the State budget more than the amount of tax payable on the tax returns, the tax payment checking books of such companies and the tax authority's system recorded that the companies are in overpaid position. However, when the tax authorities carry out inspections, checking at the enterprise, in addition to determining the additional amount of tax payable, the tax authorities impose the penalty of 20% on additional tax amount due to under-declaration although the enterprises have made full payment of tax payable to State budget.

In principle, the calculation of tax penalty should only be implemented for the cases with understatement of tax payment. In fact, some enterprises did not understand clearly about the policies, so they made full payment or overpaid of tax amount to State budget. The enterprises are self-conscious, not intentionally wrongly declare to use such tax amount for private purposes of the Enterprise and hence, therefore, it is unreasonable and unfair to impose fines of 20% of outstanding tax amount due to wrong declaration. Such situations are similar to cases for tax audit before refund, but actually the tax authorities shall properly not impose tax penalties if enterprises have not used such tax amount, particularly, when enterprises are not tax refunded, then the tax authorities do not apply the fine of 20% on the difference between the amount to be refunded and the amount on declaration of the enterprise.

Recommendations

For the consistent implementation of the regulations, Ministry of Finance and General Department of Taxation should provide guidelines for local departments of taxation about tax penalties, specifically: to clarify, to avoid confusion in the cases of tax payers wrongly declaring

but it does not lead to understatement of tax payable or overstatement of refundable tax and to impose administrative penalties with certain levels only.

In the future, Ministry of Finance should consider such provision in Amendment Circular on penalties for administrative violations pertaining to taxation.

17. Penalty on late payment of tax: inconsistency in prevailing regulations

Issues

We understand that the Ministry of Finance always tries to issue detailed guidelines to support enterprises complying well their tax obligation with the Government. However, there has been a conflict among legal documents issued at different times when stipulating 01 issue, which results in the concerns and worries for enterprises about the basis to determine the late payment interest they are required to pay to the State Budget, specifically:

On 27/12/2015, the Ministry of Finance issued Circular 26/2015/TT-BTC guiding in details the method to determine late payment interest as below:

"e) If the taxpayer's insufficient tax declared before January 01, 2015 is found by the tax authority after January 01, 2015 during inspection or by the taxpayer, late payment interest shall be charged an interest at 0.05% per day on the deficit of tax payable until tax is fully paid."

Accordingly, we understand that since 01/01/2015, the late payment interest is 0.05% on the insufficient tax, not differentiating the tax adjustment for which period. However, the Circular 130 stipulates that if insufficient tax amount paid to the State Budget is found, the enterprise should apply the late payment interest as regulated for each period, specifically, the tax period from 01/07/2014 to 31/12/2014, the late payment interest to be charged will be 0.07% on the understated tax payable since the 91th day. Therefore, for 01 issue on the determination of late payment interest, 02 legal documents have different guidances, which results in the difficulty for enterprises to calculate the late payment interest.

Recommendations

We propose that Ministry of Finance should provide consistant guidelines for specific cases so that enterprises can fulfil their rights and obligations to the State Budget. For inconsistance in prevailing regulations on penalty on late payment of taxation, Ministry of Finance should issue consistent guidelines to local taxation departments for their information and implementation.

18. Issuing invoices

Issues

Point 2a, Article 16, Circular 39/2014/TT-BTC:

"Article 16. Issuing invoices

2. Filling some specific items on an invoice

a) Item "Date of invoice":

....Date of a service provision invoice is the day on which the service provision is finished whether money is paid or not. In case services are prepaid or money is paid during service provision, the date of invoice is the payment date. ...

....Date of an invoice for construction and installation is the day on which the finished work or item is accepted and transferred, whether money is paid or not.

In case goods are delivered several times or a completed item or stage is transferred at a time, an invoice shall be issued for each time."

For providing normal services, Circular uses the finished date of service provision as the condition criteria for issuing invoice. However, there is no specific guidance for fully interpreting the term 'finished'. In practice, there are some types of service such as service collecting fee based on hour of supply, service collecting fee based on the percentage of client's revenue,…; which need time to reconcile and confirm between both parties to quantify the service fee after each period of finished and delivered service (such as per hour, per month, per quarter,…). In this case, should the term 'finished' be applied, then it will be difficult to enterprises to determine the exact service fee amount right at the end of each period of finished and delivered service. Therefore, in order to comply with the guidance in the Circular, enterprises will have to issue invoice on the estimated amount at the finished date and issuing the corrective invoice after both parties agree on the final amount of services fee. In our point of view, there are difficulties for enterprises to comply with both the Circular's guidance and the term & condition of the service contract at the same time.

In case of construction and installation, the interpretaion and application of the regualtion as follows:

- Construction and installation contracts signed and handed over in items/categories: it is clearly to identify the billing time based on the time on Handover Minutes of each item/category as regulated in circular.
- Construction and installation contracts signed and paid in progress: there is not any specific guidance in circulars. In fact, in order that enterprises issue invoices on time, they must adjust payment schedules in contracts in the base of the completion of works to bill.

This practice makes it difficult for enterprises in identifying the converted level of completion, and simultaneously in determining which exchange rate is relevant with the received amount as stated in the payment schedules of the signed contracts.

Recommendations

We recommend Ministry of Finance, General Department of Taxation should provide more detailed guidance in documents as reasonable evidence to determine time of finished service, simultaneously in case of construction and installation contracts paid in progress, the billing time should be the payment time in progress.

19. Conditions for input VAT deduction

Issues

Clause 6, Article 3, Circular 119/2014/TT-BTC amended Article 15, Circular 219/2013/TT-BTC on conditions for input VAT deduction as follows:

"Article 15. Conditions for input VAT deduction

2. Proofs non-cash payments for the purchases (including imported goods) that cost VND 20 million or more, except for the imports that cost below VND 20 million each, purchases that cost below VND 20 million inclusive of VAT, and imports being gifts, donations from overseas entities.

3. Bank transfer receipts are documentary evidence proving the transfer of money from the buyer's account to the seller's account (both accounts are already registered or notified to tax authority). The buyer is not required to register r notify the tax authority of its loan accounts at credit institutions used for paying suppliers opened at providers of payment services under legitimate payment methods such as checks, payment orders, cash collection orders, bank cards, credit cards, SIM cards (digital wallets), and other means of payment as prescribed (including the case in which the buyer transfers money from the buyer's account to the seller's account in the name of a private company's owner or from the buyer's account in the name of a private

company's owner to the seller's account if such accounts have been registered for with tax authorities).”

Regarding invoices relating to gift and donation, tax authorities do not require non-cash payments for VAT deduction. However, some imported goods as samples, test items being similar to gifts and donations (not generating payment obligation) currently being treated as ineligible for input VAT deduction.

Recommendations
Kindly request Ministry of Finance, General Department of Taxation to study and lay down a general principle that the cases without payment obligation do not need non-cash payments for input VAT deduction.

20. VAT on goods and services used for promotion in the hotel service industry

Issues
As stipulated in Decree 37/2006/ND-CP, the total execution time of discount within a year shall not exceed 90 days. However, according to the business models of hotel service, it is popular to have member card programs (the customer have to buy the card), within the time limit of card (usualy 12 months), customers will receive a discount when using services at the hotel. Therefore, the discount duration of membership cards often exceeds the provision of commercial law so that the receiving agency, namely Department of Trade and Industry, does not allow to re-register or register again. It leads to the risks of calculating VAT on the price to be reduced for the consumption period after 90 days.

In essence, this is a business model of hotels (customers buy cards to be entitled to benefits) then if consider this as a form of promotion and limiting the discount duration, it may limit the trend of enterprise's freedom in the business.

Recommendations
Kindly request Ministry of Finance, General Department of Taxation to study and supplement regulations that VAT on goods and services used for promotion does not comply with commercial laws except for trade discounts in the form of official membership card.