SHORTFALLS IN THE IMPLEMENTATION OF POLICY AND THEIR INFLUENCES ON THE INVESTMENT ENVIRONMENT

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In recent years, the Government has paid much attention to renovate the business environment, support the enterprises, attract investment and promote the socio-economic development. This is reflected through the issuance of Resolution 35/NQ-CP dated 16 May 2016 on policy of enterprise development to 2020 ("Resolution 35"). However, based on our actual observation, the process of implementation shows a lot of issues and most seriously being the tax and customs fields. We would like to raise some typical issues reported by enterprises within VBF.

1. The lack of responsibility of customs and tax authorities causes unforeseeable financial losses for businesses

HS code declaration issue

The application of HS codes for the imported and exported goods is one of the most controversial issues, showing the perplexity and inconsistency of customs authority. Practically, it has caused huge financial losses, serious impact on the business and investment activities of the enterprises. The below example is a typical one showing the lack of responsibility of the customs authorities when applying HS codes to the goods.

In the process of customs declaration for imported good during the period from 2012 to 2016, a Company has applied HS codes in accordance with the guidance from the Customs office who receiving customs declarations, the Haiphong Customs Sub-Department for management of goods for processing investment, and based on a Notification on classification of goods issued by the Analysis and Categorization Center (hereafter refer as "Notification 1").

Since there are different opinions on the classification of HS code, the Company once again submitted an application to the General Department of Customs to get an advance confirmation for such products. After completing the procedures to determine the HS code, the General Department of Customs issued a new Notification ("Notification 2") replacing Notification 1. Accordingly, all the shipments imported after the issuance of Notification 2, the Company switched to apply the new HS code according to the guidance in this notification.

However, the Customs Authority came back to do a post-clearance audit for the customs declaration forms of the Company in the last 5 years and re-categorized, re-applied a different code for all of the products the Company imported from 2012 under Notification 2. Consequently, the tax rate applicable to this new HS code is higher than the tax rate applicable to the HS code that the company declared previously. Customs authority accordingly decided to recollect the additional tax, late payment interests and administration penalty.

Import duty is an indirect tax, the company already included all the payable taxes in the price of goods sold to customers. The company also sold all the goods imported previously to customers and there were no inventories; all business profits and losses have been reflected and reported to related parties. The re-classification of HS code for the period prior to the issuance of Notification 2 seriously impact to the business activities of the company. The company is now unable to re-calculate the prices of the goods that they already sold to customers while the main reason for change is due to the complexity of product analysis and categorization. Even Customs Authority and the Analysis and Categorization Center, which are the competent bodies

specialized in analyzing and categorizing products, could not accurately determine the HS code for this product from the beginning.

Proposal

In this case, the Company is not at fault and this can not be regarded as an offense. The company has declared based on the Notification of result of commodity analysis and categorization issued by the Analysis and Categorization Center and the Notification of the General Department of Customs from effective date of each Notification. The declaration of the Company is totally well-founded. The customs authority in this case should consider the application of the new HS code according to Notification 2 from the date this Notification was issued to ensure fair treatment to the Company.

Incentives for investment expansion issue

The tax policy needs to be amended from time to time is also consistent with the reality as well as the international practices. However, tax policy can not be clear in all situations and may have different interpretations. In fact, some cases showed that the local tax authorities do not fully understand the purpose of lawmakers and made inappropriate conclusions. There is a case that the local tax authority previously issued a decision requiring the enterprise to comply. But afterwards, such local tax authority delivered a different conclusion being completely contrary to the original one and concurrrently impose late payment interest and administrative fine for the enterprise. The origin of the violation is not from the fault of the enterprise but from unclear policy that both taxpayers and tax authority do not fully comprehend. Such late payment interest and administrative fines have caused extreme confusion for investors, affecting the confidence of shareholders especially listed companies.

Example: A manufacturing company in Ho Chi Minh City is qualified to receive corporate income tax incentives. These incentives were fully granted in the Investment Registration Certificate of Company. Pursuant to the license, the company based on tax incentive given in its license to declare tax and relevant tax incentive during its operation accordingly. The HCM Tax Department conducted and completed tax inspection of the company at its premise by signing the Minutes of Tax inspection and issuing the Decision to re-collect all the tax shortfall. In the Minutes of Tax inspection, the tax authority also confirm the incentives that the company is entitled to.

One year later, when a new guidance for incentive applicable to expanding investment projects was issued, HCM tax department came back to inspect the company, revisited the issue that the authority already inspected and concluded, but at this time the authority changed their opinion on the incentives applied to the company, accordingly requested to re-collect additional tax. To show the cooperative attitude, the company immediately paid the additional taxes ensuring the compliance with the law. However, the tax department further requested the company to pay the late payment interests and administrative penalty as well.

The tax authorities denied their own conclusions made earlier does not show the responsibility of the tax authority when making conclusions. The Company is extremely worried and anxious when the tax authority frequently changes their view in applying tax regulation. More importantly, the company has to bear a serious consequent of such change by paying late payment interests and administrative penalty for the act that they totally not aware of the non-compliance.

Proposal

Since tax policy is unclear, both the tax authority and the company could not correctly determine the tax obligation of the company, when the tax authority re-determine tax obligation, the company was very cooperative by paying the additional tax immediately. Therefore, tax authority should not request for late payment interests and administration penalty in this case

2. The Customs and Tax Authorities intentionally interprets regulation in an unfavorable way for enterprise in order to increase the collection

First-time wrong declaration of tax code, tax rate and tax payable issue

The Decree on penalties for administrative violation in customs stipulates the situations where administrative violations are not applied, including "Correctly declare the name of actual import, export goods but incorrectly declare HS code, duties rate, payable duties for the first time". The Decree also defines tax evasion, tax fraud acts including: "Incorrectly declare HS code, duties rate, payable duties for goods of which HS code, duties rate, and payable duties were guided by the customs authority";

Given the above regulations, up until now the customs authority and the company all understand that the violation that will be penalized is the incorrect declaration after being guided by the customs authority on HS code, duties rate, and payable duties. However, recently the customs authority has a new interpretation that tax penalty is only waved the first declaration form, the wrong HS code declaration from the second customs declaration form onwards will be penalized for violation.

This interpretation is not in line with the principles the regulation. At the time the company self-declared, they could only classify and apply HS code according to their understanding. Due to the complexity of the categorization and application of HS code, the application of code is may be incorrect. The procedure to pre-determine HS code is also very time-consuming. Hence, the importation of good before exactly determining HS codes is possibly happened. Therefore, it is necessary for a closely inspection, review and guidance from Customs Authority. When having a guidance from the Customs Authority, the company can have a strong foundation to correctly apply HS code. Therefore, only the incorrect declaration after being guided by the Customs Authority should be considered as intentionally incorrect declaration or violation act that must be penalized.

We understand that the legislators when making this regulation based on the above principle and considered the actual difficulties in determining HS code. However, at the tax collection stage, customs officers deliberately interpret in an inflexible and unfavourable way, assuming that the wrong declaration of HS from the 2nd declaration onwards is considered a violation act. This interpretation of law clearly put the company in a difficult position, making the provisions of the law losing their practicality.

Proposal

Legal texts are made with certain principles and meanings. When customs officials incorrectly understand or deliberately wrongly interpret the law, it shall lose its meaning and go against the core principles put forward by the Government for the purpose of developing enterprise. In this situation, the first-time wrong declaration should be understood as the the wrong declaration until receiving guidance from customs authority.

Warranty clause issue

Warranty clause for import goods is the common and reasonable practice as a clause to guarantee the quality of goods to protect the interests of buyers. This clause always exists in sales contract but actually it is a clause that both parties do not wish to apply. In reality, for many contracts, the warranty never occurs. Therefore, the warranty clause in the sales contract only creates a binding responsibity for the seller but not an attached service.

Circular 60/2012/TT-BTC. "Circular 60" provides clear regulation on:

"2. Foreign organizations, individuals providing goods for Vietnamese organizations and individuals without the attached services performed in Vietnam in the following forms:

- Goods delivery at foreign border gates: the seller shall be liable for all responsibilities, cost and risks relating to the goods export and delivery at foreign border gates; the buyer shall be liable for all responsibilities, cost and risks relating to the goods receipt and transportation from foreign border gates to Vietnam.

- Goods delivery at Vietnam's border gates: the seller shall be liable for all responsibilities, cost and risks relating to the goods until goods to the Vietnam's border gate; the buyer shall be liable for all responsibilities, cost and risks relating to the goods receipt and transportation from the Vietnam's border gate."

With the substance of the warranty clause and the the provision of Circular 60 as above, the warranty clause cannot be considered an attached service. It can be understood that where forein contractors carry out pure trading activities at the border gate with warranty clause in the contract, they are not subject to foreign contractor tax.

However, when applying Circular 60, the local tax authorities still deliberately assume that this is a kind of enclosed service and impose foreign contractor tax on this transaction. This intepretaion is imposing and deliberately create unfavourable conditions for enterprises to increase revenue.

3. Relying on administrative error to impose unreasonable tax, to deprive the rightful benefit of the Enterprise

Aggravating administrative violation issue

Pursuant to Law No. 106/2016/QH13 amending the Law on value added tax, from 1/7/2016, enterprises will not get Value Added Tax ("VAT") refund for the case of having non-credited input VAT of above 300 milions in consecutive 12 months or 4 quarters. In theory, non-credited input VAT qualified for VAT refund for the period prior to 1/7/2016 should still be refunded. However, in practice, tax authority has rejected tax refund application of many companies for the reason that they failed to fix the amount of input VAT to be applied for refund in the VAT declaration form of June 2016 or Quarter 2, 2016 of which deadline for submission was on 20/7/2016 or 30/7/2016. To fix the amount, the company is simply required to check in one item on the value added tax declaration form. But due to the change in regulation and the new regulation does not clearly state the deadline to fix the amount to be applied for tax refund, most of enteprirses were aware of such requirement and missed the deadline. Now, they could not come back to fix that amount of input VAT.

On the other hand, forms of tax declaration change frequently due to changes in regulations and guiding circulars. In another case, the Enterprise is aware of the necessity of full tax declaration and payment, however, they have not been updated the change of forms yet. Therefore, in some cases the Enterprise declares in the wrong form of tax declaration. Practically, there are some enterprises declaring wrong forms of input VAT and for that reason, were rejected the refund of input VAT by tax authorities.

In these cases, tax authorities relied on an administrative error to deprive the rightful benefit of the Enterprise which is inconsistent with the doctrine of tax policy.

Proposal

The tax authority should coordinate to resolve complications for businesses, instead of basing on administrative errors of enterprise to decline their rightful benefits. In the above situations, VAT refurn application for the period before the effective date of the new Law should be accepted to ensure fairness. For enterprises using the incorrect form to declare input tax, tax authority should only give administrative penalties for these errors and continue to proceed tax refund for these enterprises.

4. Suggestions

The Customs and Tax Authorities should regularly organize training sessions to inform and update tax and customs policies to collecting officials to ensure that regulations are thoroughly understood and respected in the implementation stage.

The tax authority must take responsibility with their conclusions and decisions. Each official text at any level should clearly stipulate rewards and penalties so that tax offcials should carefully consider and be more responsible when issuing their conclusion and decisions.

Under regulations, there is a clear distinction penalties between administrative violation and intentional wrong declaration with the aim to evade tax, the implementation should be in the manner of respecting the law, respecting the tax payer, cooperating and resolving difficulties. The Customs Authority needs to consider the nature of the transaction and the actual business activities of the company to evaluate the violation and penalize appropriately to the violation. They should not impose and exploit the administrative violation and overstate it to be tax evasion.

The above are some notable issues in tax and customs enforcement that we have observed recently.

Hopefully in the coming time, with the cooperation and coordination of Governmental Agencies, the obstacles of enterprises shall be solved thoroughly, saving resources to create confidence for investors during their operation in Vietnam.