**POSITION PAPER OF TAX AND CUSTOMS WORKING GROUP**

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

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In recent years, the Government has really paid attention to renovate the business and investment environment, support enterprises, reform administrative procedures, attract investment and promote the socio-economic development. This is reflected through the issuance of many resolutions and directives such as Resolution 35/NQ-CP, Resolution 19/2017/NQ-CP, or Directive 20/CT-TTg with the purpose to rectify inspection activities, remove difficulties and accompany with enterprises. However, based on our actual observation, the implementation of investment and tax policies reveal some issues and have yet to meet the expectation of enterprises.

1. **Investment protection**

For investors, licenses issued by the competent authority are regarded as strong commitment between the Government of Vietnam and the investors. These documents are very important in securing their investment activities in Vietnam. The Investment Law has always affirmed the principle of investment protection; accordingly, in case under the new regulations, investment incentives are lower than those stipulated in the licenses, the investors are entitled to continue enjoying investment incentives provided in such licenses. However, in practice, there are many cases where enterprises have been licensed with specific incentives and have implemented in accordance with such incentives. However, when the tax authorities conducted tax audit and inspection, they denied and refused to apply incentives that the enterprise being granted. In some cases, the tax authorities claimed that the licensing agencies have made mistakes when issuing such incentives to investors, accordingly required enterprises to pay additional tax, late payment interest and even pay penalties due to incorrect tax declaration. From the perspective of investors, they argue that the Government has failed to comply with the commitments, disrespect the principle of investment protection, and that the tax authorities are forcing enterprises to take responsibility and suffer the damages for the mistakes made by the governmental authorities themselves. Such situations often cause great distress and loss of confidence among investors. As a result, they will express their resentment on different investor forums and communities, which in turn seriously affects the investment environment and the ability of Vietnam to attract new investors.

1. **Complying with the tax philosophy when collecting tax**

The tax regulations need to be constantly amended in order to be in line with the economic development in general and with business activities of enterprises in particular. However, tax policy can not be clear in all situations and may have different interpretations. Hence, the implementation of tax policies should be based on reasonableness and the tax philsophy. In fact, some cases showed that the local tax authorities do not fully comprehend the purpose of lawmakers and make inappropriate conclusions which are unfavorable to enterprises, or even go against the economic nature of transactions. In addition, there are issues that have been specified clearly in legal documents but tax officers still treat in a different way to increase the tax collection. We would like to represent several examples as below to illustrate some cases where tax officers, due to revenue pressure, has solely relied on the appearance to forcefully interpret tax policies in a beneficial way to tax collectors rather than looking at the nature of transaction. In some cases, the tax authorities and the customs authorities even rely on the forms and the appearance of documents to conclude and deem a nature of the transaction completely different from the fact.

***Example 1:***

A Japanese enterprise has a huge investment in a Southern industrial park; at that time, with the big scale of the investment project, this industrial park was considered as a destination of new industries. For a large-scale project requiring a construction and installation period of from 4 to 5 years, the investor stagnated a large amount of capital in the input VAT amount during such period. They was applying for VAT refund for investment project. However, when declaring input VAT, the enterprise conducted tax declaration in accordance with Form 01 instead of Form 02 as stipulated by the regulations. Regarding this issue, the local tax department provided guidance and the enterprise amended the declaration in accordance with such guidance. After that, the company applied for VAT refund and was accepted by the local tax department in their working minutes. However, when the application dossier for VAT refund was reported to the General Department of Taxation, it was rejected due to incorrect declaration form. The company sent a written explanation to the General Department of Taxation and the Ministry of Finance to affirm that their tax refund dossier is in accordance with the provisions of law. Under the request of General Department of Taxation, the Company also had to work with the Ministry of Industry and Trade to obtain a confirmation that the products of the investment project are natural resources and minerals that have been processed into other products. Although this is not a mandatory document in the tax refund application dossier, however in order to clarify the situation and affirm that the enterprise meets all requirements and accordingly be eligible for tax refund, the enterprise worked with the Ministry of Industry and Trade to obtain the aforementioned confirmation to submit to the General Department of Taxation. Nonetheless, after more than 6 months since the enterprise explained with the General Department of Taxation, the enterprise have not yet received any official reply.

In this case, the tax authorities have deliberately relied on administrative errors to distort the nature of the case and this is against the tax philosophy.

***Example 2:***

Pursuant to regulations, with regard to import-export duty, post-clearance audit conclusion of customs authority on audited issues must be considered the official conclusions and binding for enterprises. Since import-export duty is an indirect tax, upon receiving the official post-clearance audit conclusions by customs authority for a certain period, the company must carry out necessary measures in accordance with these conclusions and correct the derogation (if any). The company believed that they have complied with customs regulations and was reassured to continue their operations.

However, there are incidents where at different post-clearance audits (for instance, 3 years or 5 years later, or by another customs department), customs authorities disclaimed prior conclusions on the same issue that was already handled, causing the increment in tax payables; the company was requested to retrospectively pay taxes while their business plan and profit and loss calculation have been completed.

It can be said that the opinions of customs authority in their conclusions and texts are still subjective, inconsistent and without careful consideration. In such case, what is the legal basis for the retrospective application of the latter issued inspection conclusion and is it fair when the company is held responsible for the consequences customs authority’s error fall upon the enterprise?

For cases such as above, during dispute settlement, the first-time appeal handling authority is the authority who issued the conclusion and tax imposing decision, likely the issues are not appropriately resolved out. Independence and objective treatment are also not guaranteed for the second appeal, significantly affecting the enterprise’s operation. Moreover, the enterprise will also not know how to implement other guidance from customs authority, as they cannot be assured that they will not be penalized in the future even if they comply with these conclusions and guidance.

***Example 3:***

Regarding the inspection of dutiable value for customs purpose, there have been cases where importer was imposed higher value by customs authority based on administrative errors such as not filling or not ticking in appropriate items on the customs declaration, without reasonable legal base and explanation. After duly going through the appeal process, the unfair decision on imposing taxes above has been revoked, requiring the customs authority who issued the decision on imposing taxes to reconsider their audit conclusion and re-determine the customs value as well as payable taxes (if any) for the company. However, the customs authority has been delaying for many months and not taking any action to correct their mistakes and close the issue for the company. Consequently, the company has a huge pending tax amount overpaid to customs. According to legal regulations, if there is any unpaid tax amount, the company must pay immediately and late payment interests will arise if the deadline has passed. From the position of the company, they have to pay immediately the imposed tax amount, otherwise they will be suspended, hence not be able to carry out business. However, the refund of wrongly imposed taxes for enterprises which should be implemented by the relevant customs authority can be delayed and not be taken place timely.

***Example 4:***

In terms of Personal Income Tax (“PIT”), many Japanese enterprises have encountered the same problem which is the formula to convert after-tax income (i.e. NET income) to before-tax income (i.e. GROSS income).  Previously, the enterprises applied the formula as officially guided by the Ho Chi Minh Tax Department.  However, later at tax audit/tax inspection stage, the General Department of Taxation has provided a totally different guidance and requested the retroactive application for the period from 2009 to 2012.  Such retrospective application requirement has undoubtedly resulted in not only additional PIT liability but also interest for late payment and administrative penalty for incorrect tax declaration for the enterprises.  That fact is eroding the enterprises’ trust in an investment environment where tax policies are becoming inconsistent and tax authorities are exercising their rights to impose tax without firm legal bases and reasonability/justice.

***Example 5: Refund procedure***

The feedbacks from field study showed that most businesses did not have any troubles with lodging documents for tax refund. However, there existed a number of issues in implementation of refund procedures in several provinces such as:

* Time to get refund: businesses must wait longer to get a tax refund despite the statutory time limit for tax pre-audit refund is 6 days and post-audit refund is 40 days since the date of complete lodgment of application.
* Application documents for refund: The tax refund application is still done on a manual basis and taxpayers must visit Tax Office to lodge the application for a tax refund.
* Businesses have expressed concern about the un-availability of refund for the remaining credits after input deduction, the businesses must carry over to the subsequent filing periods. This limitation will cause a cash flow issue for the businesses. On the other hand, there lacks fairness in tax refund procedures. If the businesses are late in paying tax, they are subject to overdue payment penalty and interest, whereas they are not entitled to interest on late refunds by the Tax Department to businesses.
* Tax administration: Businesses complained that in some provinces, they must submit the commitment that they had not made any purchases from the newly-established businesses. A number of tax officers still asked for Statement of invoices, receipts and evidences of purchases and sales although it’s not required by the tax laws.

*Implication:*

* The extra requirements for additional documents are troublesome and costly to businesses.
* Delayed refunds can cause cash flow problems for businesses. All businesses viewed that the overdue payment penalty interest is too high while they got nothing in the cases of late tax refund.
* The required commitment of not purchasing from newly-established businesses s troublesome to businesses because the buying businesses do not know if the suppliers/ vendors are the newly-established or not. Furthermore, this requirement may discriminate against the newly-established businesses, making it difficult for them to sell goods.

*Recommendations:*

* GDT should review and enhance the risk assessment criteria for identifying high risk taxpayers, adopting a triage process which allows the speedy issue of refunds for the vast bulk of eligible exporters and expansionary businesses. Preferably, the issue of refunds to low risk businesses should be automated.
* In the medium term, GDT should move to electronic invoices rather than paper invoices. This would better support risk based triage and verification, and post offset risk based audit activities. Develop a more risk based audit program post the issue of VAT and CIT refunds and/or the offset of VAT credits.
* In the medium to long term GDT should develop an integrated data warehouse system to support risk assessment and compliance activities.
* Ensure that the local tax authorities will not ask businesses for more documents than what are legally required.

***Example 6:***

*Offset the payments among the tax instruments*

Currently, the businesses are not allowed to offset the overpaid amount of one tax with others underpaid. It is not allowed to offset between sub-items of the same tax. One business representative complained that they misposted the PIT of employee’s earnings from capital investment (sub-item 1004) to earning from salary (sub-item 1001), and the tax was paid fully and timely. However, the Tax Authority still imposed the penalty and overdue payment interest, and there was no impact on the tax revenue.

The disallowance of offsetting overpaid amount and underpaid amount among the tax instruments by the same tax payer caused unnecessary troubles for the businesses.

*Recommendation:*

Tax Authority should impose the penalty only after offsetting among the tax instruments, sub-accounts and sub-items. In cases of misposts where the total tax paid is more than or equal to tax payable, businesses should be reminded and should adjust numbers, there should not be any administrative penalty and overdue payment interest.

***Example 7:***

*Advertisement and promotion expense*

Under the Law on Commerce, businesses running advertisements or promotion programs must register with the Department of Industry and Trade (DOIT). The output VAT invoice must be zero-rated. Also, the time limit for running the programs of promotion, discounts, is not allowed to exceed 90 days per year and 45 days per program.

Many businesses complained that it was difficult to register the advertisement or promotion programs with the DOIT, for example the production and retail businesses, who often display the sample and trial products, cannot comply with the registration with department of commerce because these sample and trial products are used very frequently to promote sales. Therefore, when the auditing, the tax authority disallowed these expenses due to lack of supporting documents as required and the businesses are penalized for this. In other cases, businesses have sent the registration letters to department of commerce but have not got any confirmation on acceptance or rejection. Due to the business needs, the businesses went on to implement the advertisement and promotion programs, as a result, the expenses were disallowed for deduction during tax audit.

*Implication:*

The expenses, incurred by the businesses during business operation, were disallowed from the deduction due to lack of evidence of registering the advertisement and promotion programs with the regulatory agencies.

*Recommendations:*

There should be better coordination and information sharing between General Department of Taxation and the DOIT to save the troubles for the businesses.

GDT should contemplate the option of accepting registration paper copy sent to the DOIT as eligible and allow businesses to deduct the expenses under such cases. The businesses are encouraged to keep the receipts.

**3. VAT Invoice**

*3.1 VAT Invoice registration*

*Issue:*

Entities in Vietnam can use pre-printed invoices, self-printed invoices or electronic invoices, being piloted recently. The tax invoice template must contain stipulated items and be registered with or notified to the local tax authorities; and within 5 days, the tax authority must issue a notice on VAT invoice usage to the businesses. For exported goods, commercial invoices can be used instead of domestic tax invoices.

GDT procedures for administering the self-printed invoices are on manual basis and very time-consuming for businesses. According to businesses’ feedbacks, it took them about 30 days from getting the Tax ID to being allowed to use the VAT invoice, and they must follow a complicated and prolonged process of many administration steps by the tax authority.

*Implication:*

Businesses must spend too much time to use VAT invoices for the business operation.

*Recommendation:*

The GDT should review the process of authorizing/issuing VAT invoices for the businesses to remove the unnecessary steps. It is recommended to remove the requirement of GDT acceptance on VAT invoice usage to shorten the time of endorsing VAT invoices for the businesses.

*3.2 Invoicing for transactions worth 200.000 VND and above*

*Issue:*

As stipulated by point b, Article 16.2 Circular 39/2014/TT-BTC, for all the sales worth more than 200K VND, where the buyers do not either get the invoices or provide name, addresses, tax ID, the seller must issue the invoice for each and every transaction within the day. Businesses complained that the requirement to issue invoices within the day for all transaction above 200K VND is very complicated, time-consuming and costly to businesses to hire people to write these invoices. This is especially burdensome to businesses with many retail stores.

*Implication:*

The businesses responded during the field study that many businesses processed 4000-5000 orders a day (e-commerce businesses) with individual value of more than 200K and the customers do not wish to take the invoices. The workload involved with issuing invoices is too burdensome. It takes lots of accounting staff resource just to write invoices to meet the requirement by the tax authority, resulting in increased costs and difficulties for businesses to keep the books.

*Recommendation:*

It is recommended that businesses be allowed to use electronic invoices or cash receipts, or make an aggregate invoice by end of the day for all transactions above 200K VND, of which the customers do not wish to take the invoices.

*3.3 Receipts for retail transactions below 200.000 VND*

*Issue:*

Currently, the regulations allow for issuing aggregate invoices by end of the days for all the sales below 200K VND. The seller will make an aggregate statement of all sales below 200K VND by end of the day. However, for the buyers of purchases below 200K VND, the expenses are not deductible for tax if there are no invoices. There are differences in the way the tax missions treated this situation, some allow tax deduction, some do not allow.

*Implication:*

As per feedbacks with the businesses, the value of each individual transaction is below 200K VND, but the number of transactions per year is quite a lot. If the businesses are not allowed to deduct these expenses from the calculating VAT without the invoices, the individual expenses will add up to a big amount of non-deduction, causing disadvantage for businesses, especially the newly established or small businesses, who need financial support to grow.

*Recommendation:*

Ministry of Finance, General Department of Taxation should consider allowing businesses to post these expenses as deductible and at the same time encourage businesses to keep the evidences to prove that those are the real transactions.

*3.4 Invoices of businesses in cases of suspension, closure and dissolution*

*Issue:*

Businesses purchased goods and services and at the time of purchases, the selling businesses were operating normally, and then these selling businesses suspended, closed, or dissolved its operation due to some reason, all the invoices previously issued by these businesses were deemed as in-eligible and these expenses incurred by buying businesses were ruled out from deduction despite the substance of the transaction. It does not matter whether the transactions were made in practice or the selling businesses ran away or dissolved following the procedures.

*Implication:*

Businesses are subject to additional overdue payment penalty interest on the un-paid amount, causing troubles for the bona fide businesses.

Businesses cannot ascertain the legitimacy of VAT invoices unless those VAT invoices originated from the list of ‘bogus’ businesses provided by the Tax authority.

*Recommendation:*

It is recommended to base on several signs of misconduct by businesses and to focus on the transaction details and trails of those businesses and third party information to check the substance of the transaction and ensure the legitimate rights of the businesses.

It is advisable to contemplate the solutions of moving the risks to Tax Authority in the cases where there is no evidence of wrong-doing by the selling businesses and allowing the expenses to be deductible.

It is necessary to re-engineer the process to target the businesses forging invoices and support businesses to better detect the ‘bogus’ ones, for example, to develop a mobile application to detect forged invoice.

If there are no policy changes on the current policy on non-deduction, it is necessary to develop guidelines to eliminate the overdue payment penalty interest for bona fide businesses.

**4. Sanctions for tax officers**

The Law on State Compensation stipulates that the State is responsible for paying compensation to the damaged enterprises for unlawful acts of executing tax and customs policies of state agencies. At the same time, the Ministry of Finance has also issued regulations on disciplining of tax and customs officers who commit violations. However, in practice, when the tax authorities make mistakes, the tax officers are irresponsible for imposing tax policy that causes losses to the enterprises do not conduct any compensation to enterprises. On the contrary, when businesses make mistakes or do not comply the law, they are immediately subject to severe penalties and sanctions, which seriously affecting to the cash flow of investment project.

In addition, we also find that the current tax law does not yet have specific regulations for acts of promulgating documents, decisions, official letters with unlawful contents, or the promulgated documents having contradictory content for the same issue. Because of having no penalties for dealing with these cases, the lack of prudence of tax officials in the preparation of documents, tax recollection decisions, official letters to enterprises have been increasing. The examples outlined and analyzed above regarding the intentional interpretation of words in legal documents in an unfavorable way to enterprises, or claiming administrative errors to impose taxes unreasonably are the typical examples that lawmakers can rely on to do research and provide appropriate sanctions for tax officers.

1. **Administrative procedures to reduce tax compliance time**

In order to promote the reform of administrative procedures, the tax authorities are currently using the Tax Management System (TMS) to manage tax debts of enterprises. Accordingly, this system will automatically calculate the amount of tax levies, interest on late payment based on the tax return of enterprise. However, in fact, there are debts automatically recorded on system that even the tax authorities themselves cannot explain to the enterprises. This leads to the enterprises taking a lot of time to confront, and explain to the tax authorities. There are tax debts that enterprises have to travel dozens of times, and last for whole year in order to be processed on the system.

***Suggestions:***

During implementation process, the tax authorities must strictly comply with the commitments with investors, and implement in the respectful spirit for the law, respect for taxpayers, cooperation and removal of difficulties. The tax authorities need to base on the nature of transactions and the business activities of enterprises practically to assess the violation and provide appropriate penalty for the violation accordingly. The tax authorities should not force the administrative errors to ignore entirely the nature of transaction.

There should be clear sanctions for tax officers when they wrongly implement as well as issue unlawful decisions, official letters so that tax officers can be more responsible for their own decisions. Furthermore, there should be a hotline to receive feedbacks and answer queries of enterprises. Especially those who are in charge of answering queries should be really knowledgeable about tax laws or competent enough to contact functional departments to thoroughly solve the questions of enterprises and avoid negativity in tax collection activities.

**6. Import Duties under FTAs: Different tariff treatment for goods manufactured in Vietnam**

In pursuing global economic integration, Vietnam has signed various free trade agreements, and granted preferential tariff treatment to goods imported from these trading partners. Nonetheless, goods which are manufactured in Vietnam and qualify relevant origin rules, except for goods manufactured in non-tariff zones, are imported into local market in on-the-spot exportation/importation scheme, are not governed under such preferential treatment.

Together with development of international trade, on-the-spot exportation/importation has become a common practice in current global supply chains. As a country specializing in toll manufacturing and contract manufacturing, Vietnam has become a destination for many international brand owners looking for input materials and manufacturing services. Among different trading practices, a common one may follow the process in which an international seller signs a toll manufacturing contract with a Vietnamese manufacturer to manufacture a specific product, and resells such a product to another Vietnamese buyer. Such practice constitutes on-the-spot exportation/importation where the goods do not physically exit Vietnam, but legally, being exported out of, and re-imported into Vietnam in the name of the international seller. To that end, the goods will be subject to import duties when they are imported into Vietnam.

When a free trade agreement is in place, the imposition of normal or MFN import duties to goods under on-the-spot exportation/importation conducted by domestic enterprises, while extends preferential tariff treatment to goods under on-the-spot exportation/importation conducted by enterprises in non-tariff zones, or physically imported into Vietnam, may give rise to certain paradox of tariff treatment. Another example showing the obstacle that current regulation creates toward free trading flows is that an originating goods of Vietnam is physically exported to Singapore with a C/O Form D which then may be attached with Back-to-Back C/O issued by the Singaporean authority, and shipped back for importation into Vietnam. Though this example is not commercially reasonable, in such cases, it is apparently that the goods will be entitled to ATIGA's special preferential import duty treatment as they fulfil all 4 conditions as set forth in Preferential Treatment Rules.

When comparing the aforementioned examples and the on-the-spot exportation/importation conducted by domestic enterprises, both cases share the same conditions in terms of the goods under consideration and involved parties. The only difference is that the goods in on-the-spot exportation/importation conducted by domestic enterprises are not physically exported out of Vietnam. However, such difference does not alter the nature of the transaction and origin of the goods, and in order to enjoy the preferential tariff treatment, the Singaporean seller has no choice, but to pay the freight and insurance unnecessarily.

***Suggestion:***

We understand that the Government recognizes this paradox and issues certain guidance not to apply MFN rate in certain cases (e.g. Official Letter No. 2497/BCT-XNK of the Ministry of Industry and Trade dated 23 March 2011, Official Letter No.1744/TCHQ-GSQL of the General Department of Customs dated 22 April 2011). Nonetheless, the guidance are not legal documents but instead just temporary guidelines.

Therefore, we propose the Government consider amending related current regulations, to officially grant preferential tariff treatment to goods under on-the-spot exportation/importation conducted by all domestic enterprises located in non-tariff zones and not located in non-tariff zones.

The above are some notable issues in the tax enforcement that we have observed recently. Hopefully in the coming time, with the cooperation and coordination of Government Agencies, the obstacles of enterprises will be solved thoroughly, resources will be saved, and foreign investors’ confidence will be strengthened during their operation in Vietnam.