



POSITION PAPER
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Presented by
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INTRODUCTION

Honorable Ministers, Ambassadors, Co-Chairs of the Vietnam Business Forum (“**VBF**”), Ladies and Gentlemen: On behalf of the Korea Chamber of Commerce in Vietnam (“**Kocham**”), we would like to first thank the Vietnamese Government for facilitating this ongoing dialogue at the VBF. We sincerely appreciate the opportunity to contribute at this forum.

Please find below a summary of four (4) key issues that are concern to Korean enterprises in Vietnam. We hope the legislators will consider and solve them in a prompt manner. Please refer to the list of key issues below:

1. Difficulties as to the import of used machinery and equipment;
2. Relaxation on import duty for finance leasing assets to export processing companies;
3. Relaxation of taxes related to importation of goods into Vietnam under incoterms’ conditions DAT, DAP, DDP;
4. Relaxation on restriction on import of used equipment aged more than 10 years.

For each issue, please refer to our comments, recommendation and request below:

1. DIFFICULTIES AS TO THE IMPORT OF USED MACHINERY AND EQUIPMENT

Comments

After a lot of argument and expectation, finally Ministry of Science and Technology issued Circular No. 23/2015/TT-BKHCN dated 13 November 2015 (“**Circular 23**”) in order to replace Circular No. 20/2014/TT-BKHCN dated 15 July 2014 on promulgating the import of used machinery, equipment and manufacture lines. Although Circular 23 just took effect on 1 July 2016 and is commented that its regulations are quite loosened and provide standardization for the import of used machinery, equipment and manufacture lines (“**Used Equipment**”), enterprises in general and foreign invested enterprises in particular importing Used Equipment served for new investment projects and expended investment projects in particular have been facing a lot of difficulties due to the excessively strict and equivocal regulations of Circular 23.

The first difficulty which enterprises have been facing is the issue while carrying out customs procedure as to the Used Equipment served for investment projects including new investment projects and expanded investment projects. The Used Equipment imported in this case shall be exempted from the conditions applicable for the import of the Used Equipment such as: The age of the Used Equipment must not be over 10 years and the Used Equipment must comply with standard on safety, energy saving and environment protection. However, both customs agency and enterprises desiring to import the Used Equipment confuse with an ambiguous regulation

which stating that the Used Equipment belonging to the list of the Used Equipment enclosed to the investment project dossiers which approved by competent authorities shall be exempted from the satisfaction of import conditions as to this regulation was issued without any guidance or explanation.

The second difficulty which enterprises have been facing is that Circular 23 stipulates that the Used Equipment must satisfy standards in accordance with the National Technical Regulations (QCVN) or National Standards (TCVN) of Vietnam or standard of Group of 7(G7) regarding safety and energy saving and environment protection. However, Circular 23 does not stipulate any other detailed criterion on safety and energy saving and environment protection. The unclear and vague law provision makes importers of the Used Equipment confuse the base to define the detailed criterion which the Used Equipment to be imported in Vietnam must satisfy.

Recommendation and requests

We would like to recommend three points in order to create advantageous conditions for enterprises desiring to import the Used Equipment as follows:

- In case of import of the Used Equipment served for new investment projects and expanded investment projects, the regulations should be clearly state which the competent authority having power to certified on the list of the Used Equipment is and detailize the import procedure.
- Ministry of Science and Technology should draft and promulgate more detailed provisions on safety and energy saving and environment protection which the Used Equipment must satisfy.
- To dispatch officials in charge of examination of standards which the Used Equipment must satisfy to Korea (to work at Incheon port or other ports) in order to check in advance the compliance of import conditions of the Used Equipment from Korea prior to its shipment.

2. RELAXATION ON IMPORT DUTY FOR FINANCE LEASING ASSETS TO EXPORT PROCESSING COMPANIES

Comments

According to part 1 of Official Letter 504/TXNK-CST dated 22 March 2016 of the Import-Export Department of Customs General Department (“**Letter 504**”), it is said that “Decree 39/2014/ND-CP of the Government dated 7 May 2014¹ does not provide for regulations on import duty applicable to goods imported by finance leasing company for leasing out to export processing enterprise (“EPE”). Therefore, the finance leasing company which imports the goods for leasing out to an EPE must declare and pay the import duty in accordance with laws.” Furthermore, Part 3 of Letter 504 also states that: “The imported machineries is under the ownership of the finance leasing company, therefore, when carrying out import procedures, it is not allowed to apply the form E13 – Import for creating the fixed assets of the EPE. The finance leasing company is required to apply suitable form of import-export as instructed in Official Letter No. 2765/TCHQ-GSQL dated 1 April 2015 of the General Customs Department”.

However, from the point of view of an EPE, which leases the assets from the finance leasing company under the form of finance leasing to create its fixed assets, an EPE suffers the disadvantages because in order to use the finance leasing assets, the import duty is required to be

¹ Decree 39/2014/ND-CP of the Government dated 7 May 2014 on operation of finance companies and finance leasing companies

declared and paid (as Letter 504). It means that the EPE must bear the import duty (which is included in finance leasing price) although an EPE should be exempted from this import duty.

Recommendation and requests

a. It is necessary to exempt import duty if the machinery, equipment is imported for an EPE to use under the form of finance leasing

Before Letter 504 is issued and takes effect, pursuant to Official Letter 16587/BTC-TCHQ dated 29 November 2013 (“**Letter 16587**”), it is said that “In case the finance leasing company imports the goods for leasing to the subjects which are entitled for import duty exemption in accordance with Clause 7, 9, 11, 12 and 14 of Article 100 of Circular 128/2013/TT-BTC, then the import duty shall be exempted as the same as the investor of the project directly imports the goods in accordance with Clause 1 Article 22 of Decree 16/2001/ND-CP as guided in item d, clause 22 Article 100 of Circular 128/2013/TT-BTC.”

After Letter 504 is issued and takes effect, effectiveness of a part of Letter 16587 is still recognized by Official Letter 4463/BTC-TCHQ of the General Customs Department dated 4 April 2016.

Furthermore, in a finance leasing contract, the lessor and lessee can reach an agreement that after the finance leasing term, the lessee will purchase the leasing machinery, equipment. In such case, the machinery, equipment shall become the fixed assets of the lessee if they satisfy the required conditions in accordance with laws. Therefore, it would be reasonable if the lessee, an EPE, can enjoy the import duty exemption for the goods imported to create its fixed assets in the future.

Therefore, it is necessary to exempt the import duty in case the finance leasing company imports the machinery/equipment for finance leasing to an EPE or when an EPE directly carries out the procedures for import such finance leasing goods. We propose that there should be another letter to amend Letter 504 above to exclude the disadvantages to the EPE and the finance leasing company.

b. In case finance leasing company imports the goods for leasing to the EPE, the import duty and VAT should be applied as if the EPE directly imported the goods

Pursuant to Article 22 of Decree 16/2001/ND-CP, taxes on machinery, equipment, means of transport and other movables assets which the financial leasing companies purchase in Vietnam or import for lease shall be the same as for cases where the lessees directly purchase or import these assets. However, Decree 39/2014/ND-CP which replaces Decree 16/2001/ND-CP does not have specific regulations on taxes applicable for finance leasing assets.

We propose to supplement and amend Decree 39/2014/ND-CP recognizing the same contents of Article 22 of Decree 16/2001/ND-CP: taxes on machinery, equipment, means of transport and other movable assets which the financial leasing companies purchase in Vietnam or import for lease shall be the same as for cases where the lessees directly purchase or import these assets. Accordingly, In case finance leasing company imports the goods for leasing out to the EPE, the import duty and VAT shall be applied as if the EPE directly imports the goods then the import duty and VAT applicable to such imported goods for finance leasing can be exempted in accordance with laws.

3. RELAXATION OF TAXES RELATED TO IMPORTATION OF GOODS INTO VIETNAM UNDER INCOTERMS' CONDITIONS DAT, DAP, DDP

Comments

Under Circular 103/2014/TT-BTC guiding the tax liability of foreign entities doing business or earning income in Vietnam (“**Circular 103**”), value added tax (“**VAT**”) and corporate income tax (“**CIT**”) shall be applied (“**Foreign contractor tax**” or “**FCT**”) if foreign entities provide goods under Incoterms rules that require the sellers to be responsible for any risk relating to goods delivered into Vietnam’s territory. Therefore, when foreign entities provide goods under Incoterms’ conditions such as DAT (Delivered at Terminal), DAP (Delivered at Place), DDP (Delivered Duty Paid) of which the delivery location is in Vietnam’s territory, the foreign entities shall be subject to FCT in accordance with Circular 103. However, in fact the transportation and delivery of goods within Vietnam are mostly carried out by transportation agencies, which are logistic companies in Vietnam. Such foreign entities almost have no profits from such transportation and delivery of goods but must pay the CIT based on the total value of goods and services receivable from the buyer. It’s unreasonable as the purpose of FCT should be to impose tax on incomes of the foreign entities which arise from their provision of services in Vietnam.

Besides, VAT is often calculated based on VAT input and VAT output. In case of importation under DDP condition, the seller is responsible for paying VAT when carrying out import procedures. Accordingly, there might be difficulties for the buyer in being refunded and deducted VAT as the VAT payer and the buyer in this case are different person.

Recommendation and requests

- We would like to request to adjust the method of calculating FCT to assure the original purpose of FCT in case foreign entities provide goods under Incoterms rules that require the sellers to be responsible for any risk arising to goods delivered into Vietnam’s territory. Accordingly, please consider imposing tax on incomes of the foreign entities which arise from their provision of services in Vietnam only.
- We would like to request competent authorities of Vietnam to promulgate regulations facilitating the deduction of VAT import for the seller who purchases the imported goods in case of import under DDP condition of Incoterms.

4. RELAXATION ON RESTRICTION ON IMPORT OF USED EQUIPMENT AGED MORE THAN 10 YEARS

Comments

Circular 23/2015/TT-BKHCN dated 13 November 2015 providing on import of used machineries, technological lines (“**Used Equipment**”) took effect from 1 July 2016 (“**Circular 23**”) and replaces Circular 20/2014/TT-BKHCN dated 15 July 2014 (“**Circular 20**”). In Circular 23, the Ministry of Science and Technology continued to keep this criterion for age of Used Equipment but extend it to 10 years unless it belongs to the exemptional cases². This regulation causes many disadvantages to companies in need of import Used Equipment and become barrier to foreign invested capital into Vietnam for the following reasons.

- Providing for the limited age of Used Equipment, Circular 23 requires importers to provides Certificate of the age and manufacturing standard of Used equipment from the manufacture

² In Circular 20, it is 10 years old.

or an inspection organization. This regulation increases the unreasonable costs when enterprises import the Used Equipment. At the same time, such regulations create the difficulties for the enterprises when they are required to contact the manufacturer or and inspection organization. In practice, when purchasing the Used Equipment, the enterprise must have to check the quality of the Used Equipment to make sure that they will gain the profit from their investment without requirements on checking the quality of the equipment from competent authorities. Furthermore a Use Equipment are often composed by many parts, each part may have different age, as a result it's difficult to determine the age of Used Equipment.

- The regulation on the age of Used Equipment is preventing enterprises from repairing their equipment and production lines because sometimes only the Used Equipment with the age over 10 years can be suitable to replace the defective one and be synchronous with the entire production line. Furthermore, the importation of the Used Equipment shall help the enterprises to save the repairing costs.
- Requirement that the age of the equipment must not be exceeding 10 years from the production year to the import year of the Used Equipment is an excessively strict and unrealistic regulation. The Ministry of Science and Technology should have taken in to account that, beside the age, the quality of equipment also depends on the characteristic, actual time of use, manufacturing place, maintenance and repairing condition etc. For example: A Used Equipment with the age of over 10 years can be better than that with the age of less than 10 years but manufactured by low technology and manufacturing standard and in poor maintenance conditions... Therefore, the regulation may force the enterprise who have demand to import the Used Equipment to decide to import the Used Equipment from the neighbor countries instead of from high-manufacturing standard countries like Japan, US, Europe ... As a result, it may cost more for the maintenance, repairing, energy and adversely affect the environment in comparison with the importation of the Used Equipment having more than 10 years old from the countries with high manufacturing standards. To some extent, with such criteria on the age of the Used Equipment, the Ministry of Science and Technology indirectly limit the right of small and medium enterprises to import of the Used Equipment with age over 10 years but still at good quality, reasonable price from the countries with high-manufacturing standard. Foreign investors who desire to invest into Vietnam having demand to use the Used Equipment may hesitate to invest because of this regulation.
- Circular 23 provide some exemptional cases for import the Used Equipment with age over 10 years, such as: (i) Import the Used Equipment belonging to the investment project, including new projects and extended projects if the documents of an investment project has a list of Used Equipment and a competent authority issues a decision on investment policies, and an investment registration authority issues an investment registration certificate in accordance with the Law on Investment; and (ii) Where an enterprise has to import a piece of equipment whose age exceeds 10 years to sustain its manufacturing or business operation, the Ministry of Science and Technology shall cooperate with other ministries and agencies in considering the case based on the enterprise's proposal and documents. Circular 23 just provides the general regulations without the detailed guidelines for implementing above regulations, thus, it may lead to insufficiency in implementing such regulations. Furthermore, such regulations are supposed to create the "beg-give" mechanism and lots of negatives may be arising in the process of carrying out related administrative procedures.

Recommendation and requests

On the basis of difficulties as mentioned above, we recommend to amend and supplement Circular 23 as follows:

- Remove the regulation relating age of Used Equipment not over 10 years.
- If the regulation related to age of Used Equipment is still necessary, there should be the cooperation between the Ministry of Science and Technology with the Ministry of Industry and Trade in issuing the regulations on importation of Used Equipment. At the same time, the age of the Used Equipment should not be so rigid and should not be applied the same to all kinds of equipment regardless of related factors other than age.

5. RELAXATION OF “EXPERT” REQUIREMENTS FOR ISSUANCE OF A WORK PERMIT

Comments

In accordance with Decree 11/2016/ND-CP dated 3 February 2016 which takes effect from 1 April 2016 (“Decree 11”), requirements for work permit granted to foreign workers were strengthened with the revision of enforcement regulations on foreign workers in Vietnam. In the past, experts were requested to be college graduates or higher or have not less than 5 years of experiences, but under Decree 11, they are presently requested to be college graduates or higher and have not less than 3 years of experiences. In details, Article 3.3 of Decree 1 provides as follows:

Expert means a foreign worker in **one of the following cases**:

- Having a certificate from an agency, organization or enterprise overseas confirming that he or she is an expert;
- Having a university degree or higher or the equivalent and having at least three (3) years' working experience in the specialty in which he or she was trained in conformity with the working position which the foreign worker proposes to undertake in Vietnam; and in special cases the Prime Minister shall consider and make a decision.

Recommendation

As foreign invested companies expand their business, they employ Vietnamese workers, but a certain number of new Korean workers need to be employed in order to facilitate communication and improve managerial efficiency. Accordingly, we highly recommend to relax the provision on conditions to be a foreign expert (for instance, just 2 years of experience is required and removal of requirement of university degree).

6. RELAXATION OF REGULATION ON A TIME LIMIT ON OVERTIME (30 HOURS PER MONTH)

Comments

In respect of overtime work limits, Article 106 of the Labor Code 2012 stipulates that the employer must ensure the number of overtime hours of the employee does not exceed 50% of the normal working hours in one day, and if the employer stipulates work on a weekly basis then the total of normal working hours plus overtime hours must not exceed twelve (12) hours in one day, and does not exceed 30 hours in one month, and the total overtime hours must not exceed two hundred (200) hours in one year, except in a number of special cases regulated by the Government where the number of overtime hours worked must not exceed three hundred (300) hours in one year.

The Labor Code 2012 limits the overtime hours to 30 hours per month as maximum regardless of peak-season and off-season of each enterprise. Accordingly, it is extremely difficult for manufacture enterprises to meet production orders or due date requested by buyers if fully complying with this restriction. It may seriously affect the business operation and will force enterprises to increase the number of shifts during peak-season, which will result in a substantial increase in labor costs. Air transport costs for delivering the products would be incurred and sometimes enterprises have to provide discount on product price in favor of buyers according to the conditions set by such buyers.

Recommendation

The above-said overtime restrictions are often pointed out by the foreign invested enterprises, particularly in manufacturing and other labor intensive industries that take advantage of the cheap labor costs when investing in Vietnam. This limitation may greatly impact on foreign investors' decisions on investing in Vietnam. Therefore, we would highly appreciate if the Vietnamese Government would consider removing the overtime restriction of thirty (30) hours per month, adjust and apply the overtime work regulations more flexibly in the following measures:

- During peak-season, the enterprise may flexibly extend the overtime of the employees to satisfy the due date set by a client/customer;
- During off-season, the enterprise may flexibly reduce the working hours/ the overtime of the employees.

7. AMENDMENT OF PROVISIONS ON DEBTS TO BE REPAID WITH LOANS (“ROLLOVER”)

Comments

In accordance with Article 10 on loan term under the Regulations on lending by credit institutions to clients (the “Regulation”) attached to Decision 1627/2001/QĐ-NHNN of the Governor of the State bank of Vietnam dated 31 December 2001, “*a credit institution and its client shall agree on a loan term based on the cycle of production or business, the period for recovery of investment project capital, the repayment capacity of the client, and the capital sources of the credit institution which are available for lending.*”

However, there is no separate provision under the Regulations on repayment and extension of loans, so the bank interprets that debts cannot be repaid with loans (so-called “Rollover”). Even though, Article 9.2 of the Regulations allows credit institution to conduct the Rollover in accordance with the specific regulations of State Bank of Vietnam. However, in practice, there is no specific legal provisions referring to this Rollover but only instructed under official letters or directives or decisions of the State Bank. In principle, the State Bank prohibits this Rollover.

In our opinion, prohibition of providing loan for Rollover is considered to aim to prevent a phenomenon known as “Robbing Peter to pay Paul” where banks and companies recklessly borrow money to cause insolvency and adverse effects on the economy, but it entails reckless financial costs on the part of companies.

Recommendation

Foreign banks have a safety device where loans are extended based on overall credit of a parent company in Korea and a subsidiary in Vietnam in consideration of credit rating, repayment ability and business plans at a time of loan appraisal. Therefore, legal regulations on Rollover is highly recommended to apply only to local banks in Vietnam, and foreign banks are excluded from application. In addition, we suggest to allow use of 50% of loans in repayment.