

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 investments 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 support and development to 2020 (“Resolution 35”). However, based on our actual observation, the process of implementation reveals issues and particularly tax and customs fields. We would like to raise some typical issues reported by enterprises within VBF.

1. The responsibility of customs and tax authorities when issuing Decision/Conclusion on tax and customs issues

Matching HS codes to 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 is a typical example showing the lack of responsibility of the customs authorities when applying HS codes to the goods.

In the process of customs declaration for goods imported during the period from 2012 to 2016, a company has applied HS codes in accordance with the guidance from Hai Phong Customs office who processes the customs declaration, and relied on a Notification on classification of goods issued by an Analysis and Categorization Center (hereafter refer as “Notification 1”).

The Company once again submitted an application to get an advance confirmation of the HS code for the goods, the General Department of Customs issued a new Notification (“Notification 2”) replacing Notification 1. Accordingly, the Company will use the new HS code for all the shipments imported after the issuance of Notification 2.

However, the Customs Authority came back to do a post-clearance audit of the Company’s customs declaration forms in the last 5 years and re-categorized, re-applied the new HS code for all of the same products the Company had imported since 2012. Consequently, the tax rate applicable with the new HS code was higher than that the company declared previously and the customs authority decided to recollect the missing tax payment, and interests for late payment and administration penalties.

Hence, customs authority has rejected their own previous conclusion while requesting the company to pay additional taxes together with late payment interests and administrative penalties. This created a huge financial loss and seriously affected the business operation of the company while it was not its fault.

The fact that tax policy needs to be amended from time to time is consistent with the reality as well as the international practices. However, tax policy can not be clear in all situations and may be subject to different interpretations. In fact, it is the true with investment expansion, some cases showed that the local tax authorities did not fully understand the purposes of lawmakers and made inappropriate conclusions. A local tax authority delivered a conclusion which was completely contrary to the original one but imposed late payment interest and administrative

fines on an enterprise. It was not the enterprise's but unclear policy that both taxpayers and tax authority did not fully comprehend. Such late payment interest and administrative fines have frightened investors, eroded the confidence of shareholders especially listed companies.

Since tax policy is unclear, both the tax authority and the company could not correctly determine the tax obligation of the company. In this case, the tax authority must bear the responsibility to cooperate and resolve the problem with the company, instead of putting all the burden on the taxpayer.

2. The Customs and Tax Authorities intentionally interpreted regulation in an unfavorable way for enterprises to increase the collection amount

As an international practice, regulations could not provide detail guidance for every specific case, so interpretation and flexibility is necessary. However in the implementation stage, tax officials should not deliberately interpret regulations in an unfavourable way, making difficulties for enterprises but act reasonably in accordance with policy and principles.

The Decree on penalties for administrative violation in customs procedures stipulates situations where administrative violations are not applied, including "Correctly declare the name of imported, exported goods but incorrectly declare HS codes, tax rates, tax payable amounts for the first time". The Decree also defines tax evasion, tax fraud acts as: "Incorrectly declare HS code, tax rates, tax payable amount once guided by customs authority";

With the above regulations, so far customs authority and enterprises understand that penalty will happen after customs authority provides guidance HS codes, tax rates, tax payable amounts. However, recently the customs authority has a new interpretation the penalty is only waived for the first declaration form only.

We understand that the legislators when making this regulation based on reasonability and considered difficulties in determining HS codes in reality. However, at the tax collection stage, customs officers deliberately interpret it in an inflexible and unfavourable way, assuming that the wrong declaration of HS from the 2nd declaration onwards a violation. This interpretation of law clearly put the company in a difficult position, making the regulations lose their practicality.

Warranty clause for imported goods is a common and reasonable practice as a measure to assure the quality of goods to protect the buyers' interests. This clause always exists in sales contracts but neither party wishes to exercise. In reality, in many contracts, the warranty never occurs. Therefore, the warranty clause in sales contracts only creates a binding responsibility of the seller not an attached service.

However, when applying Circular 60, local tax authorities still deliberately assume that this is a kind of enclosed service and impose foreign contractor tax on this measure. This interpretation is imposing and deliberately creates unfavourable conditions for enterprises just in order to increase the collection amount.

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

Under legal texts, there is a clear distinction in 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.

For example due to reasons such as not checking in the item finalizing refundable tax or using the incorrect form to declare input VAT that enterprises were declined of tax refund. In such cases, Tax authority should cooperate to resolve for the company, instead of basing on administrative errors of enterprise to decline their rightful benefits.

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 officials should carefully consider and be more responsible when issuing their conclusion and decisions.

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.