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PERSONAL INCOME TAX LAW

PIT assistance potentially opens a can of worms

By Luu Tien Ngoc

While the decision to defer personal income tax (“PIT”) payments has been applauded, it has resulted in some interesting legal dynamics.

On February 6, 2009 the Ministry of Finance (“MoF”) issued Circular No.27/2009/TT-BTC on the deferment of personal income tax payments (“Circular 27”) and on February 18, 2009, Official Letter No.1823 /BTC-TCT further guiding the implementation of the deferment (“Letter 1823”). Their positive meanings aim to serve the government’s policies to stimulate consumption and support people hurt by the current economic slowdown. However, from a legal point of view, such documents contain some of questionable provisions. Below are two points that we would like to discuss.

Firstly, the subjects entitled to the PIT payment deferment:

It is stipulated in Circular 27 that taxpayers entitled to PIT payment deferment comprise:

- Resident individuals who have taxable income from business, salary and wages, capital investments, capital transfers (including transfer of securities), copyright or from franchises; and
- Non-resident individuals having taxable income from capital investments, capital transfers (including transfer of securities), income from copyright, or income from franchises.

Taxpayers not entitled to deferments are:

- Resident individuals who have income from real property transfers, winnings or prizes, inheritances, or receipt of gifts; and
- Non-resident individuals (including those who do not have a presence in Vietnam or who will depart from Vietnam prior to June 30, 2009) who have income from business, salary and wages, real property transfers, winnings or prizes, inheritances or from receipt of gifts.

The questionable point comes from the extension information, i.e. “non-resident individuals including those do not have a presence in Vietnam or depart from Vietnam prior to 30 June 2009.”

As defined in Clause 2, Article 1 of Decree No.100/2008/ND-CP, dated 8 September 2008 detailing implementation of the PIT Law (“Decree 100”), “resident individual” means a person satisfying one of the following conditions:

- Being present in Vietnam for a period of 183 days or more within one calendar year or for 12 consecutive months from the first date on which such individual is in Vietnam; or
- Having either a residential location for which permanent residence has been registered pursuant to the law on residence or a leased residence to stay in Vietnam pursuant to the law on residential housing, where the lease contract has a term of 90 days or more within the tax calculation year.

And “non-resident individual” means a person not satisfying any of the conditions stipulated above.

So, according to the Circular 27, can a resident tax payer who satisfied the second condition as provided by Decree No.100 (i.e. by having a lease contract of at least 90 days) and who “depart[ed] from Vietnam prior to June 30, 2009”, be entitled to PIT payment deferment? If yes, the extension information as put in the brackets above should not be necessary to include in the Circular 27. If no, how would that tax payer be defined? Can he/ she be turned into non-resident individual? If that is the case, it is clear that the extension information put in the brackets above is not compatible with—and in fact seems contrary to—the provisions of the PIT Law and Decree 100 on residential tax payers.

Besides, those “who do not have the presence in Vietnam” is repetitious and should not be necessary to include into the Circular 27 to explain more about the non-resident tax payer.

To be clear and consistent in implementation, and notwithstanding the provisions as given in the Circular 27, *all resident tax payers including those who will depart from Vietnam prior to June 30, 2009 should be entitled to the PIT payment deferment, in accordance with the Circular 27.*

Secondly, there will be problems associated with the obligations of taxpayers and related parties after May 31, 2009 if the PIT payment exemption is not approved by the National Assembly:

Pursuant to the Circular 27, tax payers entitled to PIT payment deferment will have the right to hold the payable PIT during the period from January 1, 2009 to May 31, 2009 inclusive. However, such deferment does not mean a type of tax exemption nor tax deduction granted to taxpayers. The settlement thereof, i.e. to repay or be exempted, as clearly mentioned in the Circular 27, shall be finally subject to the decision made by the National Assembly, proposed in May 2009, upon the proposal from the government. The question is who will bear the obligation to repay the deferred PIT to the state budget? With respect to the tax payers who register, declare and pay PIT directly to the state budget, the response seems clear. But how can the obligation be defined where the PIT is registered, declared and paid indirectly through organizations paying the taxable income? *Logically, tax payers shall carry that obligation, not their income paying organizations.*

Though the tax payers are entitled to hold the payable PIT during the period from January 1, 2009 to May 31, 2009, at the same time Circular 27 still requires the income paying organizations to calculate the payable but deferred PIT amount

when paying incomes to the PIT deferment-entitled tax payers. As usual, the taxable PIT report must be submitted to the tax authority on a monthly basis for management of deferred PIT payments.

The obligation of holding, deduction and payment of PIT, due to the tax authority each time income arises, is widely known to belong to the income paying organization, which shall be subject to penalty if it fails to satisfy its obligation. So in addition to the above question of who will bear the obligation to repay the deferred PIT during the period from January 1, 2009 to May 31, 2009, the next question to ask is whether or not the income paying organizations will bear any related obligation? *Logically, the income paying organizations should bear no obligation, while they may have the right to claim for any compensation if the non-payment of the deferred PIT by the tax payers causes a loss, damage to their reputation or so forth. When necessary, they may have the right to deduct from the income payable to the tax payers after May 31, 2009, to fully repay for the deferred PIT, subject to further specific guidance from the MoF.*

As provided by Circular 27, in cases where the income paying organizations have deducted PIT but not yet paid the state budget before the issuance of Circular 27, they shall be responsible for returning the deducted PIT to tax payers. The deadline for doing this, as guided by the Letter 1823, shall be the last working day of February 2009 (February 27, 2009 at the latest). Since the Circular 27 shall be effective after 45 days from its issuance date, and shall not be effective on February 27, 2009, the question is can that provision of the Letter 1823 be enforceable— and if yes, on which legal ground?

For the foregoing questionable points, we think that clarifications on MoF guidelines should be made to ensure the smooth and correct implementation of the largely-welcome and expected PIT incentives.

Other Sectors

Finance

- Decision No. 94/QD-BTC of the Ministry of Finance, dated January 13, 2009 announcing the list of legal instruments solely or jointly issued by this Ministry, for which the validity has expired.
- On January 9, 2009, the Hanoi People's Committee issued Decision No. 24/2009/QD-UBND on the collection of fees for auctions in the area of Hanoi.
- Circular No. 07/2009/TT-BTC of the Ministry of Finance, dated January 15, 2009 guiding the standard forms for implementation of public management and use of State assets and data reports on the state of management and use of State assets.
- On January 2, 2009, the Ministry of Finance stipulated Circular No. 01/2009/TT-BTC guiding the implementation of Decision No. 101/2008/QD-TTg of the Prime Minister, dated July 18, 2008 promulgating the mechanism of financial management and personnel regarding the State Treasury system under the Ministry of Finance for the period from 2009 to 2013.

Banking

- Decision No. 131/QD-TTg of the Prime Minister, dated January 23, 2009 on providing assistance through interest rates that favour of organizations and individuals borrowing capital from banks for production and business.
- On January 23, 2009, the State Bank of Vietnam issued Decision No. 174/QD-NHNN on the interest rates on obligatory deposits in Vietnamese Dong with respect to credit institutions.
- Decision No. 173/QD-NHNN of the State Bank of Vietnam, dated January 23, 2009 on the interest rates applicable to regrant of capital, re-reduction, overnight loans in interbank electronic payments and loans for redressing capital shortages in the balance payments of the State Bank of Vietnam.
- On January 23, 2009, the State Bank of Vietnam stipulated Decision No. 172/QD-NHNN on the basic interest rates in Vietnamese Dong.
- Decision No.14/2009/QD-TTg of the Prime Minister, dated January 21, 2009 promulgating the Regulation on a guarantee for loans by enterprises from commercial banks.
- On December 31, 2008, the State Bank of Vietnam issued Decision No. 3281/QD-NHNN on the interest rates on deposits exceeding obligatory reserves

in foreign currencies with respect to credit institutions and interest rates on deposits in foreign currencies of the State Treasury at the State Bank.

Taxation

- Decision No. 16/2009/QĐ-TTg of the Prime Minister, dated January 21, 2009 promulgating a number of tax solutions to implement the policy on stimulating demands for investment and consumption, preventing economic decline, and solving difficulties of enterprises.
- On January 22, 2009, the Ministry of Finance stipulated Circular No. 15/2009/TT-BTC guiding the implementation of preferential import tax rates regarding a number of items under Group 2710 in the preferential import tariff.
- Circular No. 12/2009/TT-BTC of the Ministry of Finance, dated January 22, 2009 guiding the implementation of an extension of the term for submission of corporate income tax in 2009 with respect to enterprises operating a number of business lines.
- On January 21, 2009, the Ministry of Finance issued Circular No. 10/2009/TT-BTC guiding the registration, deduction, declaration and finalization of personal income tax with respect to individuals who are insurance agents.
- Circular No. 05/2009/TT-BTC of the Ministry of Finance, dated January 13, 2009 guiding a number of contents on customs procedures, export taxes, import taxes and tax administration regarding exported and imported goods in accordance with Resolution No. 30/2008/NQ-CP of the Government, dated December 11, 2008.
- On January 13, 2009, the Ministry of Finance stipulated Circular No. 04/2009/TT-BTC guiding the implementation of reimbursement of value-added tax in accordance with Resolution No. 30/2008/NQ-CP of the Government, dated December 11, 2008.
- Circular No. 03/2009/TT-BTC of the Ministry of Finance, dated January 13, 2009 guiding the reduction and term extension for submitting corporate income tax in accordance with Resolution No. 30/2008/NQ-CP of the Government, dated December 11, 2008, on urgent solutions for preventing economic decline, maintaining economic growth and ensuring social welfare.

Insurance

- On January 22, 2009, the Ministry of Labour, War Invalids and Social Affairs issued Circular No. 04/2009/TT-BLĐTBXH guiding the implementation of a number of articles of Decree No. 127/2008/NĐ-CP, dated December 12, 2008 detailing and guiding the implementation of a number of articles of the Law on Social Insurance with respect to unemployment insurance.

- Circular No. 02/2009/TT-BLDTBXH of the Ministry of Labour, War Invalids and Social Affairs, dated January 15, 2009 guiding the adjustment of social insurance-paid monthly income of workers who participate in voluntary social insurance in accordance with Decree No. 134/2008/ND-CP, dated December 31, 2008.
- On January 14, 2009, the Ministry of Labour, War Invalids and Social Affairs stipulated Circular No. 01/2009/TT-BLDTBXH providing the levels for adjustment of social insurance-paid wages and remunerations with respect to workers implementing the wage regime chosen by the employer pursuant to Clause 2, Article 5 of Decree No. 83/2008/ND-CP, dated July 31, 2008.

Trade

- Decree No. 06/2009/ND-CP, dated January 22, 2009 sanctioning administrative violations in the field of alcohol and cigarettes production and trade.
- On December 31, 2008, the Government issued Decree No. 132/2008/ND-CP detailing the implementation of a number of articles of the Law on Quality of Products and Goods.
- Decision No. 04/2009/QD-TTg of the Prime Minister, dated January 9, 2009 on the extraction of the Fund for Stabilization of Oils and Gas Prices.
- On January 9, 2009, the Prime Minister stipulated Decision No. 03/2009/QD-TTg on the adjustment of collection levels of oils and gas fees.
- Decision No. 29/2009/QD-UBND of the Hanoi People's Committee, dated January 9, 2009 on the collection of fees for provision of information about secure transactions in the area of Hanoi.
- On January 9, 2009, the Hanoi People's Committee issued Decision No. 08/2009/QD-UBND on the collection of fees for registration of secure transactions in the area of Hanoi.
- Decision No. 50/2008/QD-BCT of the Ministry of Industry and Trade, dated December 30, 2009 promulgating standards regarding the head of branch and chief of delegation of market management.
- On January 21, 2009, the Ministry of Industry and Trade stipulated Circular No. 02/2009/TT-BCT guiding the distribution and use of expenditure sources to support works that direct and guide the fight against smuggling, commercial fraud and counterfeit goods of market management forces' superior authority.

Labour

- Decision No. 09/2009/QD-UBND of the Hanoi People's Committee, dated January 9, 2009 on the collection of fees for granting working permits to foreigners working in Vietnam in the area of Hanoi.

- On January 22, 2009, the Ministry of Labour, War Invalids and Social Affairs issued Circular No. 03/2009/TT-BLDTBXH guiding the implementation of regional allowances regarding persons who are enjoying retirement pensions, one-time social insurance, monthly working capacity loss allowances, or labour accident or occupational disease allowances in accordance with Decree No. 122/2008/ND-CP, dated December 4, 2008.

Education

- Decision No. 07/2009/QD-TTg of the Prime Minister, dated January 15, 2009 promulgating conditions and procedures for the establishment, suspension of operation, merger, division, separation, and dissolution of universities.
- On December 31, 2008, the Ministry of Education and Training stipulated Decision No. 82/2008/QD-BGDDT promulgating the Regulation on organization and operation of specialized high schools.
- Decision No. 80/2008/QD-BGDDT of the Ministry of Education and Training, dated December 30, 2008 promulgating regulations on standards for appraisal of the educational quality of high schools.

Transport

- On January 16, 2009, the Prime Minister issued Decision No. 11/2009/QD-TTg on the amendment of and supplement to a number of articles of Decision No. 125/2004/QD-TTg of the Prime Minister, dated July 9, 2004 on the announcement, receipt, transmission and handling of maritime security information.
- Decision No. 06/2009/QD-TTg of the Prime Minister, dated January 15, 2009 approving the Plan on the implementation of the International Convention on Maritime Search and Rescue of 1979 (SAR 79 Convention).
- On January 9, 2009, the Hanoi People's Committee stipulated Decision No. 38/2009/QD-UBND on the collection of fees for passing bridges in the area of Hanoi.
- Decision No. 31/2009/QD-UBND of the Hanoi People's Committee, dated January 9, 2009 on the collection of fees for watching over traffic means temporarily detained due to breach of laws on land road traffic order and security in the area of Hanoi.
- On January 8, 2009, the Prime Minister issued Decision No. 21/QD-TTg approving planning on the development of aviation transport for the period to 2020 with orientation to 2030.

Construction

- Resolution No. 33/2008/NQ-CP of the Government, dated December 31, 2008 on the pilot implementation of a number of administrative procedures in construction investment regarding projects in new urban zones, residential housing areas and the technical infrastructure of industrial parks.
- On January 12, 2009, the Hanoi People's Committee stipulated Decision No. 40/2009/QD-UBND on the selling prices of separated houses located on surface of roads and streets promising high profitability in accordance with Resolution No. 48/2007/NQ-CP of the Government, dated August 30, 2007, and of residential houses that have separated land surface areas exceeding residential land limit in the area of Hanoi.
- Decision No. 33/2009/QD-UBND of the Hanoi People's Committee, dated January 9, 2009 on the collection of fees for assessment of tender results in the area of Hanoi.
- On January 9, 2009, the Hanoi People's Committee issued Decision No. 15/2009/QD-UBND on the collection of fees for assessment to grant land use rights in the area of Hanoi.
- Decision No. 14/2009/QD-UBND of the Hanoi People's Committee, dated January 9, 2009 on the collection of fees for construction in the area of Hanoi.
- On January 9, 2009, the Hanoi People's Committee stipulated Decision No. 11/2009/QD-UBND on the collection of fees for grant of construction permit in the area of Hanoi.

Land

- Decision No. 17/2009/QD-UBND of the Hanoi People's Committee, dated January 9, 2009 on the collection of fees for exploitation and use of documents on land in the area of Hanoi.
- On January 9, 2009, the Hanoi People's Committee issued Decision No. 10/2009/QD-UBND on the collection of cadastral fees in the area of Hanoi.

Environment

- Decree No. 07/2009/ND-CP, dated January 22, 2009 on the amendment of and supplement to a number of articles of Decree No. 160/2005/ND-CP, dated December 27, 2005 detailing and guiding the implementation of the Law on Minerals and the Law amending and supplementing a number of articles of this law.
- On January 19, 2009, the Government stipulated Decree No. 05/2009/ND-CP, detailing the implementation of the Ordinance on Natural Resource Tax and the Ordinance amending and supplementing Article 6 of this Ordinance.

- Decree No. 04/2009/ND-CP, dated January 14, 2009 on the incentives and supports for activities of environmental protection.
- On January 9, 2009, the Hanoi People's Committee issued Decision No. 36/2009/QD-UBND on the collection of fees for evaluation of projects and reports on the exploration, exploitation and use of underground water; exploitation and use of surface water, discharge of waste water into water sources and irrigation works in the area of Hanoi.
- Decision No. 26/2009/QD-UBND of the Hanoi People's Committee, dated January 9, 2009 on the collection of environment protection fees with respect to daily-life waste water in the area of Hanoi.
- On January 9, 2009, the Hanoi People's Committee stipulated Decision No. 18/2009/QD-UBND on the collection of fees for report on result of exploration for assessing reserves of underground water in the area of Hanoi.
- Decision No. 07/2009/QD-UBND of the Hanoi People's Committee, dated January 9, 2009 on the collection of fees for grant of permit for discharging waste water into water sources and irrigation works in the area of Hanoi.
- On January 9, 2009, the Hanoi People's Committee issued Decision No. 05/2009/QD-UBND on the collection of fees for granting permits to exploit and use surface water in the area of Hanoi.
- Decision No. 03/2009/QD-UBND of the Hanoi People's Committee, dated January 9, 2009 on the collection of fees for granting licenses for the exploration, exploitation and use of underground water in the area of Hanoi.
- On January 9, 2009, the Hanoi People's Committee stipulated Decision No. 21/2009/QD-UBND on the collection of fees for environmental protection with respect to mineral exploitation in the area of Hanoi.
- Decision No. 15/2008/QD-BTNMT of the Ministry of Natural Resources and Environment, dated December 31, 2008 promulgating the regulations on protection of underground water as natural resource.
- On December 30, 2008, the Ministry of Natural Resources and Environment issued Decision No. 14/2008/QD-BTNMT promulgating the regulations on exploration and classification of reserves and natural resources with respect to mines of gold, tin and titanium mineral sands.
- Decision No. 102/2008/QD-UBND of the People's Committee of Ho Chi Minh City, dated December 30, 2008 on the implementation of a pilot policy on payment for forest services in the area of Ho Chi Minh City.

Science - Technology

- On January 16, 2009, the Prime Minister stipulated Decision No. 10/2009/QD-TTg on the regime of support for development of main point mechanical

products and the list of these products, and the list of projects on investment in production of such products for the period from 2009 to 2015.

- Decision No. 39/2009/QĐ-UBND of the People's Committee of Hanoi, dated January 9, 2009 on the collection of fees for licensing evaluation to use industrial explosive materials in the area of Hanoi.
- On January 9, 2009, the Hanoi People's Committee issued Decision No. 04/2009/QĐ-UBND on the collection of fees for granting licenses for electricity operations in the area of Hanoi.
- Decision No. 01/QĐ-TTg of the Prime Minister, dated January 2, 2009 on the establishment of the Chemical Department under the Ministry of Industry and Trade.

Information - Communication

- On January 10, 2009, the People's Committee of Ho Chi Minh City stipulated Decision No. 01/2009/QĐ-UBND promulgating the Regulation on the management and use of Ho Chi Minh City's Official Gazette website.
- Circular No. 14/2008/TT-BTTTT of the Ministry of Information and Communication, dated December 31, 2008 guiding the management of expenditures supporting the implementation of evaluation and certification of the output of telecommunication services of public use in localities.
- On December 24, 2008, the Ministry of Information and Communication issued Circular No. 10/2008/TT-BTTTT on the Regulation on settlement of disputes related to Vietnam's ".vn" national domain names.
- Circular No. 09/2008/TT-BTTTT of the Ministry of Information and Communication, dated December 24, 2008 guiding the management and use of internet natural resources.
- On December 18, 2008, the Ministry of Culture, Sports and Tourism stipulated Inter-ministerial Circular No. 85/2008/TTLT-BVHTTDL-BTTTT guiding the licensing, registration and implementation of advertisements in newspapers, computer information networks, publications and works of inspection, examination. The Circular also guides the handling of violations.

Judiciary

- Resolution No. 720/2008/UBTVQH12 of the Standing Committee of the National Assembly, dated December 25, 2008 on the assignment of competence for hearing criminal cases as stipulated in Clause 1, Article 170 of the Criminal Proceedings Code, and competence for hearing civil cases as stipulated in Article 33 of the Civil Proceedings Code to people's courts of rural districts, urban districts, township and provincial cities.

- On December 31, 2008, the Hanoi People's Committee issued Decision No. 64/2008/QD-UBND on the implementation of an assistance regime regarding public officials and servants in charge of receiving citizens and handling claims and denunciations in the area of Hanoi.

Agriculture

- Decision No. 13/2009/QD-TTg of the Prime Minister, dated January 21, 2009 on the use of State credits for development investment to continue the implementation of programmes on consolidation of canals and ditches, development of rural traffic routes, infrastructure of aquaculture and infrastructure of rural trade villages for the period from 2009 to 2015.
- On December 31, 2008, the Ministry of Agriculture and Rural Development stipulated Decision No. 130/2008/QD-BNN promulgating the Regulation on controlling residues of toxic substances from breeding aquacultural animals and from the products from such animals.
- Decision No. 129/2008/QD-BNN of the Ministry of Agriculture and Rural Development, dated December 31, 2008 promulgating regulations on experimentation on, recognition of and naming of new fertilizers.
- On December 30, 2008, the Ministry of Agriculture and Rural Development issued Decision No. 126/2008/QD-BNN on the amendment of and supplement to regulations on standard dossiers for the quarantine of animals and products from animals, and veterinary hygiene inspection accompanying Decision 86/2005/QD-BNN of the Minister of Agriculture and Rural Development, dated December 26, 2005.
- Decision No. 124/2008/QD-BNN of the Ministry of Agriculture and Rural Development, dated December 30, 2008 promulgating an additional list of plant varieties permitted for production and business.
- On December 11, 2008, the Ministry of Agriculture and Rural Development stipulated Decision No. 119/2008/QD-BNN promulgating an additional list of animal medicines, vaccines, biological products, micro-organisms and chemicals used in veterinary medicine that are permitted for circulation in Vietnam (Stage II in 2008).

Enterprise

- Decision No. 30/2009/QD-UBND of the Hanoi People's Committee, dated January 9, 2009 on the collection of fees for evaluation of dossiers, and conditions for practicing the profession of underground water drilling in the area of Hanoi.

- On January 9, 2009, the Hanoi People's Committee issued Decision No. 02/2009/QD-UBND on the collection of fees for issuance of business registration certificates, and the provision of business registration information in the area of Hanoi.
- Decision No. 99/2008/QD-UBND of the People's Committee of Ho Chi Minh City, dated December 31, 2008 promulgating the collection levels of fees for issuance of business registration certificates in the area of Ho Chi Minh City.
- On January 13, 2009, the Ministry of Planning and Investment stipulated Circular No. 01/2009/TT-BKH on the amendment of and supplement to this Ministry's Circular No. 03/2006/TT-BKH, dated October 19, 2006 guiding a number of contents on dossiers, processes, and procedures of business registration in accordance with Decree No. 88/2006/ND-CP, dated August 29, 2006 on business registration.

Miscellaneous

- Resolution 01/NQ-CP of the Government, dated January 9, 2009 on essential solutions directing and steering the implementation of plans for socio-economic development and estimation of the State budget in 2009.
- On January 6, 2009, the Government issued Decree No. 02/2009/ND-CP providing for the organization and operation of private libraries serving communities.
- Decision No. 12/2009/QD-TTg of the Prime Minister, dated January 19, 2009 promulgating the plan on initial implementation of Resolution No. 30/2008/NQ-CP of the Government, dated December 11, 2008 on urgent solutions for the prevention of decline, maintenance of economic growth and ensurance of social welfare.
- On January 15, 2009, the Hanoi People's Committee stipulated Decision No. 43/2009/QD-UBND providing the levels of monthly assistance for persons under social assistance, who live in communities managed by communes, wards, townships and social assistance establishments under the Ministry of Labour, War Invalids and Social Affairs.
- Decision No. 64/QD-TTg of the Prime Minister, dated January 13, 2009 approving the Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Cuba on mutual investment promotion and protection.
- On January 2, 2009, the Prime Minister issued Decision No. 01/2009/QD-TTg on the establishment of the Hanoi Securities Exchange.

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