

Legal news

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Taxation

Income Tax Ordinance “Leaves Contentious Points Unanswered”

By Dang Trong Hieu

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Following the Ordinance No. 14/2004/PL-UBTVQH11 on income tax for high income earners (called PIT Ordinance) dated 24 March 2004, the Government of Vietnam issued Decree No. 147/2004/ND-CP (Decree 147) to provide detailed guidance on the implementation of the PIT Ordinance. Ordinance 14 was issued by amending and supplementing a number of articles of the Ordinance No. 35/2001/PL-UBTVQH10 dated 19 May 2001.

Important issues in the PIT Ordinance, including taxable and non-taxable income types subject to PIT, PIT declaration and finalization, and PIT requirements on foreigners for leaving Vietnam have all been clarified though there still remain some contentious matters.

In addition to the increase in income tax threshold for Vietnamese individuals (from VND 3 million up to VND 5 million) and the adjustment of top tax brackets for both Vietnamese individuals and foreigners (average monthly incomes of above VND 40 million and VND 80 million respectively) that are subject to the same PIT rate of 40%, in accordance with the PIT Ordinance and Decree 147, the structure of taxable income has also been revised. This is to broaden regular income sources by the inclusion of a number of income sources previously categorized as irregular income and other new income sources such as income earned from scientific, technical services, income from the licensing of rights to use patents and trademarks, income from informatics services, training, consultancy and agency services, royalties, broker's commission. It is of note that irregular income as defined in the PIT Ordinance and Decree 147 also no longer includes gifts or donations in kind received from overseas other than income from technology transfer and lottery winnings.

Regarding such re-structure, there is a contentious point in the PIT Ordinance that has not been yet clarified in Decree 147. As mentioned above, in accordance with the PIT Ordinance and Decree 147, income from the licensing of rights to use patents and trademarks shall fall under the scope of regular income while irregular income includes income from transfer of technology. However, based on provisions of Chapter III, Part VI of the Civil Code, transfer of technology consists of transfer of intellectual property objects including the licensing of patents and trademarks. On the other hand, it could be understood that income from the licensing of rights to use patents and trademarks is also considered as that from transfer of technology. As different income tax rate scales applied to regular and irregular income, the distinction between them should therefore be made as clear as possible to avoid any controversy. For such reason, the irregular income should have been drafted to include the income of transfer of technology except the income from the licensing of rights to use patents and trademarks as categorized as regular income. It is hoped that such discrepancy shall be settled in the coming Circular of the Ministry of Finance guiding the implementation of Decree 147.

Another point worthy of note for foreigners having income derived in Vietnam is that the PIT Ordinance and Decree 147 no longer accept the “non-taxable income” for foreigners residing in Vietnam for less than 30 days. According to these regulations, regular income derived in Vietnam by foreigners shall be taxable based on two rate scales subject to the length of their residence in Vietnam: foreigner residing in Vietnam for over 183 days or more within a consecutive 12-month period from the first date of arrival will be subject to tax tariff and foreigners who spend less than 183 days subject to a fixed rate of 25 per cent.

The other, no less important aspect provided for in Decree 147 is that foreigners residing in Vietnam and in receipt of income derived in Vietnam should pay attention to is they are now required to submit their income tax receipt in order to be permitted to leave Vietnam. Nevertheless, Decree 147 does not clarify who shall issue the income tax receipt, the tax department or the company where the foreigners receive income after income tax deduction. Again, Decree 147 leaves it for the coming Circular to explain.

Other recently issued documents:

- Circular 84/2004/TT-BTC on August 18, 2004 of the Ministry of Finance, on amendment of and supplementation to Circular 120/2003/TT-BTC dated December 12, 2003, guiding the implementation of Government's Decree 158/2003/ND-CP dated December 10, 2003, with detailed regulation on the implementation of the Law on valued-added tax and on amendment thereof.
- On August 31, 2004 the Ministry of Finance issued Circular 87/2004/TT-BTC, guiding the implementation of duty and export tax and.
- On September 01, 2004 the Ministry of Finance issued Circular 88/2004/TT-BTC, on amendment of and supplementation to Circular 128/2003/TT-BTC dated December 22, 2003, guiding the implementation of Government's Decree 164/2003/ND-CP dated December 22, 2003, with detailed regulation on the implementation of the Law on corporate income tax.

Industrial property

Entering the Copyright Protection Convention, Long Road Ahead for Vietnam

By Le Ba Thanh Chung

On June 7, 2004, the President signed Decision No. 332/2004/QD-CTN on adhering the Berne Convention for the Protection of Literary and Artistic Works (“The Convention”). The signing paves the way for Vietnam to become the 156th official member of Union established under such Convention.

The Berne Convention, which adopted in Berne, Switzerland in 1886, has overcome eight amendments within 1896 to 1979. As defined in the Convention, the expression "literary and artistic works" includes every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons; dramatic works; musical compositions with or without words; cinematographic works; works of drawing, painting, architecture, sculpture, photographic works; works of applied art etc.,

The Convention sets up several fundamental principles and dozens of regulations on minimum protection as well as specific regulations applied for developing countries. In which attention should be paid to the following principles:

National Treaty: The works from a country of the Union must be given the protection in the other member countries of the Union. The works mentioned in this principle are those of nationals or first published in one of the member countries;

Automatic protection: Copyright over works is established at the time the created work is expressed in a certain material form, regardless of being published, registered or not.

According to the Convention, any country, regarded as a developing country, will enjoy some privileges than the others such as the rights to allow its citizens to translate or reproduce the protected works without being subject to Article 8 [Right of Translation] and Article 9 [Right of Reproduction] of the Convention. Certainly, the privilege rights must be carried out under the strict conditions and requirements of the Convention.

Thanks to the Convention, as from the effective date of October 26, 2004, Vietnamese literary and artistic works shall be protected in 155 other member nations without any compulsory requirement of registration or publication. In return, Vietnam shall be also responsible for the reciprocal protect of the copyright for the same type of works coming from such countries.

However, facing the implementation of the Convention, there is a rising suspicion from both local and international IP practitioners as well as the whole society on the compatibility between the requirements of the Berne Convention and the laws system of Vietnam covering the copyright matter and also the practices of copyright protection in Vietnam.

In term of legal system, copyright matters have been stipulated in a chapter of the Civil Code and then, a number of under-law documents, such as Governmental Decrees including Decree No.76-CP, Decree No.60, and Ministerial Circulars including Circular No 27/2001/TT-BVHTT, Inter-Circular No 01/2001/TANDTC-VKSNDTC-BVHTT, Inter-Circular No. 58/2003/TTLT-BVHTT-BTC, etc.

One thing could be easily recognized is that the regulations on the matter are spread across a quite a number of legal instruments, which were issued at different points of time and with the involvement of numerous State bodies. This causes the complication, difficulty and may be the conflict in the course of interpretation and implementation of such legal provisions themselves, but not mentioning the adaptation of the newly-executed Berne convention to such system.

This problem originates from the fact that currently, no capable State body bearing the main responsibility for the management of copyright and related rights and more importantly, assume all liabilities for the situation of rampancy of copyright infringements in the society but such arduous jobs are assigned and allocated to a varieties of authorities with the loose and weak co-ordination among themselves.

To successfully deal with the situation, it is hoped that a law on Intellectual Property which includes a specific part on Copyright protection shall be passed soon. Then, the new law is expected to codify the requirements of the Convention as well as unify the relevant national regulations on copyrights. An apt State body playing the role as a clue or contact point for the copyright protection should also be identified with detailed obligations, scope of power to deal with the violation and even the liabilities in case of failure in fighting against the piracy of copyrighted works.

To have a more concrete understanding of the point, one should take a look at the situation of U.S. - Vietnam Bilateral Copyright Agreement. The entry into force, in December 1998, of the U.S. - Vietnam Bilateral Copyright Agreement marked a great hope to cut the piracy of U.S. copyright in Vietnam, but very little changes have been witnessed. Virtually, most copy of U.S. video, sound recording, computer program and book in the country is illegal and unauthorized, and Vietnam's enforcement system is seemingly overloaded and unprepared to keep control over the situation. According to the estimation of the International Intellectual Property Alliance, a private sector coalition formed in 1984 to represent the U.S. copyright-based industries (including motion pictures, recording and publishing), the rampant piracy of copyrighted works in Vietnam accounts for 98%-100% and causes the damages to the relevant industries of United States of America up to millions U.S. Dollars annually.

Anyway, the effectiveness of the Berne Convention means that foreign copyrights must be protected in Vietnam. The commitments of copyright protection will allow Vietnam to march toward the international integration that is perennially planned. However, the extent to which rights may be enforced against piracy needs to be tested through the time.

Law on Intellectual Property Rights is on the highway

By Vu Thi Hong Yen

The Government's Office has recently issued a Dispatch No. 3985/VPCP dated August 3, 2004 to the Ministry of Science and Technology ("the MoST") and Ministry of Justice, approving the initiation of the Ministry of Science and Technology to issue a unified law on Intellectual Property Rights (IPRs).

The initiation of MoST is revealed in the Proposal on Perfection of the Legal System on IPRs Protection which was officially submitted to the Prime Minister in April of this year. In the proposal, the MoST suggested the issuance of a law governing of IPRs for the purpose of promoting effective and adequate protection of IPRs in Vietnam and perfectionizing the legal system of IPRs in order to comply with international and bilateral commitments, notably the commitments in the BTA and to boost the access of Vietnam into WTO.

Having only one law regulating IPRs in the legal system for protection of IPRs has become popular in numerous countries all over the world. However, in Vietnam, the need of issuance of a unified Law on IPRs has been subjected to debates for years.

Currently, Vietnamese legal system of protection of IPRs grounds on the Civil Code passed on 1995, the supreme source of regulations on the protection of both copyrights and industrial property rights. Regarding this, the Civil Code has spared a separate part

to lay the basic legal ground for IPRs protection but not an unified legal instrument governing only IPRs like those of many other nations.

The MoST's proposal comprehensively analyses the problems raised in the operation of current IPRs system in Vietnam. Indeed, it is such a desultory legal documents for IPRs protection. As the Civil Code can contain the basic regulations on the IPRs protection only, these regulations should be particularized for proper implementation. Therefore, basing on the basic regulations of Civil Code, numerous legal instruments such as Decree, Circular and Dispatch have been released to interpret, provide guidelines on and in somewhere amend certain provisions in the code where the issuers of such instruments deemed suitable. This creates the fact that in certain circumstances, provisions of some legal instruments of the lower level in the system shall be applicable but not those in the upper level. These problems become the main obstacle in the implementation process of these instruments and make the enforcement of protected intellectual property rights ineffective in the past years. The rampancy of IPRs violation may enjoy the scatter of, overlapping and conflict among such legal documents. Therefore, it is essential that regulations of current IPRs system should be re-organized, and above all an unified law on IPRs should be passed by the National Assembly soon to perfectionize the IPRs protection system in Vietnam.

An outline on the contents of draft Law on IPRs is presented together with the Proposal.

Generally seen, regulations in the draft Law are mostly collected from a number of relevant Decree, Circular and Dispatch in the field of IPRs protection. The draft Law on IPRs comprises of 6 main parts, of note are the parts about Copyrights, Industrial Property Rights and IPRs Enforcement. Apart from the traditional matters of IPRs like protectable subject matters of IPRs, procedures for IPRs establishment, enforcement of IPRs, other IPRs related matters such as IP Representative, Inventions encouragement, Public services pertaining to IPRs are also stipulated in the draft law.

The issuance of an unified Law on IPRs also raise a question of amending the Civil Code so that the scope of application of Civil Code on IPRs does not step on that of a Law on IPRs. The matter is also mentioned in the MoST's Proposal. Accordingly, the part about IPRs and Technology Transfer in the Civil Code will be abolished. However, the principal regulations about IPRs in this part shall not be deleted but will be moved to another appropriate parts of Civil Code. The other of the part shall be moved to the law on IPRs.

The Law on IPRs is expected to be passed in the year 2005. Currently, the preparation for the draft Law on IPRs have been in progress. The National Office of Intellectual Property shall be the body in charge to prepare the draft. The draft then shall be examined by the MoST and Ministry of Justice before submission to the National Assembly for passage.

Enterprises and Measures To Protect Their Domain Name in Vietnam

By Ho Tuong Vy

The 21st century is deemed to be an epoch of high technology and informatics. Nowadays, whenever you want to search for some pieces of information, you just simply access the internet and type the website's address to be visited or just some key words. Then, the net will automatically find out such quickly and savingly. The benefits brought by technology and informatics to human beings are obvious.

Being aware of the importance of Internet, the Vietnamese Government has promulgated a series of provisions on this issue, among which Decision No.92/2003/QD-BBCVT dated May 26, 2003 by the Ministry of Post and Telecommunication (MPT) on Management and Usage of Internet resources (Decision No.92 in short) is an important legal base for fostering the development of not only Domain Name (DN) system but Internet resources in Vietnam as well.

Under Decision No.92, besides DNs like ".vn" and ".net", in Vietnam, there are some secondary DNs, such as Internet DNs like ".com.vn" for organizations, enterprises and commercial individuals, or ".net.vn" for agencies, organizations, enterprises implementing network functions. And Geographical secondary DNs which are Internet DNs as specified by names of provinces and cities at the central level including "hanoi.vn", "dongnai.vn", There are also third, fourth and fifth level DNs.

Decision No.92 provides that domestic or foreign agencies, organizations and individuals involving in Internet activities shall be entitled to register third level DNs under the second level DNs of highest level national DNs ".vn", and only a few subjects can be allowed to register under ".vn", namely agencies, organizations under political system, electronics press, Internet Exchange Provider, Internet Service Provider, Online Service Provider, Internet Content Provider and other entities.

The Vietnam National Internet Centre (VNNIC) under the MPT is responsible for management, allocation, supervision and promotion of the use of Internet resources in Vietnam. Accordingly, domestic or foreign agencies, organizations and individuals can ask VNNIC to allocate DNs by filing this body with an application together with their Establishment Decision or Business License or Representative Office License for agencies, organizations, enterprises, or Identity card or residence book for individuals, or passport and residence card or provisional residence certificate issued by competent bodies to foreign residents in Vietnam.

When a legal registration file is received, VNNIC will examine and inform the result on website <http://www.vnnic.net.vn> in 04 working days. The disputable DN shall be published at this address in further 03 working days before the DN is officially granted and the allocated DN must operate within 60 days as from the receipt of the DN grant, otherwise such DN shall be revoked. Exemption may happen upon the provision of legitimate reasons for such retardation.

However there exists some lacunas in Decision No.92s which may hamper the proper development of DN system in Vietnam. For instance, the principle "first come, first served" applied by VNNIC to examine and issue the DNs. Accordingly, if two

organizations or individuals file “DN registration applications” to VNNIC, it will examine and issue the DN to whom submit the application sooner provided that the DN in application differs than those registered, even with only slightest distinguishable factor. The matter is that, you can register a company’s name or of a trademark which is not under your property as the registration procedures are so simple: VNNIC inform the relevant subjects of the matter; if no reply within 03 working days accounting from the VNNIC’s announcement, the registration of such DN will be accepted and officially granted.

This provision creates no regime to prevent persons with bad faith may exploit such provisions to file application to register the DNs the same with the name of the others or famous trademarks and offer the resale of such to make money as the number of persons receive the relevant messages from VNNIC is quite limited and as they do not know VNNIC’s website and are also unaware of such regulations whereas the website of VNNIC is considered unpopular and the registration of DN is pretty new-fangled in Vietnam. Secondly, the three-day time for replying the announcement is so a short duration.

Thus, the MPT is suggested to enact the regulations on DN examination and allocation logically and closely.

Furthermore, MPT, in connection with the examination regulation, only mentions it generally and confusingly. Thus, you may wonder how a disputable DN is upon Decision No.92 and the standards which VNNIC has utilized to appreciate the available for disputation of DN to be allocated besides the subjective options of VNNIC.

Registered DN shall not contain phrases of words in violation with national interest, or inappropriateness with social morality, and jeopardize the national benefits, inappropriate to the social virtue, national habits and customs. As for this provision, MPT need to clarify the definition “violation with national interest, or inappropriateness with social morality, and jeopardize the national benefits, inappropriate to the social virtue, national habits and customs” since the comprehension of the meaning of the above definitions over domestic organizations and individuals is fairly facile; however, to foreign organizations and individuals, it is arduous to correctly comprehend those definitions to avoid registering the violated DNs due to the differences of language, culture and customs.

Moreover, VNNIC recommended that registration of DN related to geographical indications, famous person, father-figure or common names of economic industry, commodity, products, pharmaceuticals, inter-governmental, social, political organizations should be avoided. In case of necessity, legitimate and clear proof should be submitted for VNNIC’s consideration. It evidently limits the right of organizations, businesses or individuals involving in business operation or production. As usual, the enterprises will choose the DNs regarding their business scope or the name of their major products or services. Such an alternative will help consumers to easily remember their DNs and conveniently access their website to get necessary information although consumers themselves can know or remember their business or their products or their services only. Hence, this provision needs to be adjusted to meet the real-life situation in Vietnam.

With regard to the transfer of registered DN, Decision No.92 holds that agencies, organizations and enterprises shall be responsible to return Internet resources to VNNIC in case of unnecessary for their use. It means that VNNIC does not allow the owner to transfer his registered DN to anyone when he has no demand and the DN must be absolutely restored to VNNIC. Should the others want to utilize the DN, the new application must be submitted.

DN, in other countries, is considered as a valuable asset, similar to trademark. If the trademark is directly attached to the products for the purpose of promoting the products bearing the trademark, DN is a mediate means of advertisement because consumers can find out the useful information concerning enterprises as well as their products by browsing their website through the DN. At present, many DNs are valued approximately several million dollars, namely “business.com” (7.5 million dollars), or “casino.com” (5.5 million dollars), etc. Consequently, it is a great obstacle over the development of DN system in Vietnam if the provision has still been existed for the reason that no enterprise risks themselves to invest a large amount of money in building and expanding his DN should he knows that his DN must be returned to VNNIC when his enterprise will be merged into the others.

By enacting a series of provisions on Internet field, the Vietnamese Government has shown that they have a timely and proper awareness over this matter. Yet, at the beginning, the provisions when come into effect has revealed many certain limitations. Therefore, it is hoped that the rational and synchronous provisions on Internet resources will be quickly stipulated for application as well as execution more effectively.

Then, in waiting for further protection measures from the State, enterprises, famous person and also those have potential demand to use DN adhere to their name, trademark, other object should pay more attention on the matter or make a more solid position by register their DN beforehand.

Other Sectors

Finance

- On September 03, 2004 the Ministry of Finance issued Circular 89/2004/TT-BTC, providing guidance on the risk of development investment credit of the State.

Fee and charges

- Circular 90/2004/TT-BTC dated September 07, 2004 of the Ministry of Finance, guiding the collection, payment, management and using of road fee.

Banking

- Decision 1160/2004/QĐ-NHNN on September 13, 2004 of the State Bank of Vietnam, promulgating the Regulation on saving money.

Trading

- Interministerial Circular 05/2004/TTLT-BTM-BTC-BGTVT-BNN&PTNT-BYT-BTS-NHNN dated August 17, 2004 of the Ministry of Trade, Ministry of Finance, Ministry of Transportation, Ministry of Agriculture and Rural Development, Ministry of Health, Ministry of Fishery, State Bank of Vietnam, guiding the

implementation of Decision 252/2003/QĐ-TTg of Prime Minister dated November 24, 2003, on the management of cross-border trade with the countries having the same frontier.

- On August 20, 2004 the Ministry of Trade issued Directive 06/2004/CT-TM, on reinforcement of the inspection on the traffic-way of the Market Management Forces.
- Circular 07/2004/TT-BTM dated August 26, 2004 of the Ministry of Trade, guiding detailed classification of materials, components used for manufacturing, which are exempted from import duty in 5 years as from the begin of manufacturing of the enterprises having foreign investment capital.

Import - Export

- Ordinance 22/2004/PL-UBTVQH11 dated August 20, 2004 of the Standing Committee of the National Assembly, on the resistance of subsidized commodities imported to Vietnam.

Customs

- The Ministry of Finance issued Decision 69/2004/QĐ-BTC on August 24, 2004, promulgating the Regulations on customs procedures of processed goods with foreign traders.

SOEs reform

- Decision 155/2004/QĐ-TTg dated August 24, 2004 of the Prime Minister, promulgating the criteria, list for classification of state enterprises and independent accounting Member Company belong to General Corporation.

Labor

- On September 08, 2004 the Prime Minister issued Decision 163/2004/QĐ-TTg, on the establishment, management and using of the Fund for labor export assistance.

Securities

- The Government issued Decree 161/2004/ND-CP on September 07, 2004, dealing with administrative violations in the field of securities and securities market.
- The Ministry of Finance issued Decision 73/2004/QĐ-BTC on September 03, 2004, on promulgation of the Regulations on organization and operation of securities investment funds and fund management companies.

Land

- On August 11, 2004, the Ministry of Justice issued Dispatch 18/TP-DKGDBD, on the registration, releasing information on mortgage, guarantee with land use right, land attached property in the period that guiding documents on Land Law 2003 have not been issued.

Post - Telecommunication

- On August 18, 2004 the Government issued Decree 157/2004/ND-CP, guiding a number of articles concerning post in the Ordinance on Post and Telecommunication.

- On September 03, 2004 the Government issued Decree 160/2004/ND-CP, guiding a number of articles concerning telecommunication in the Ordinance on Post and Telecommunication.

Miscellaneous

- On August 13, 2004 the Prime Minister issued Decision 145/2004/QD-TTg, Decision 146/2004/QD-TTg and Decision 148/2004/QD-TTg on the major directions for development of the social- economic of focus economic zones of the North, the Central and the South to 2010 and orientation to the year of 2020.

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