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Trade

Multi-level sale needs a legal framework

Multi-level sales: What exactly is this?. There are currently controversial opinions towards the role of multi-level sales in Vietnam. The situation for multi-level sales has been become difficult when it started widely rumouring that some multi-level sales enterprises carry out unfair acts by practicing multi-level sales and cheat purchasers taking part in their sales networks. Multi-level sales have been rather popular for recent years while Vietnamese legislations have no regulations on such activity.

In the worldwide, businesses have become aware of multi-level sales for a long time. However, whereas some countries acknowledged it as legitimate commercial activity, others prohibit multi-level sales to be practiced in their territories.

We can not ignore advantages of multi-level sales such as it is a network that in which from multi-level sales enterprises to distributors and customers, they all have profits from the sales; some expenses like expenses for advertising, promoting goods or services of enterprises practicing multi-level sales are no longer necessary, etc. The disadvantages of multi-level sales, as it can be clearly seen, are mainly found in the structure of the sales, a pyramid scheme focusing rather on recruiting distributors than on selling goods or services. Then the evident result is that the number of distributors (and also be consumers) multipliers and continue to multiplier. At a time when the markets for such goods or services are saturated (and it may be saturated soon), the network of multi-level sales may be at the risk of totally collapsed.

Recently, Ministry of Trade has sent out a draft Decree on Controlling Multi-level Sales in Vietnam for commenting. The cautious attitude of lawmakers towards multi-level sales has been revealed in the name of the draft Decree. The draft Decree includes five Chapters.

Definition of multi-level sales

In the draft Decree, multi-level sales is defined as a mode of business organization, operated in different levels. Participants of multi-level sales will receive commissions, bonus and/or other economic gains arising from their own sales or from the sales of other participants in the network organized by the former subject to permission of multi-level sales organizing enterprises.

Enterprises practicing multi-level sales shall be under supervision of the Ministry of Trade and provincial Department of Trade where appropriate.

Requirements for practicing multi-level sales

As purported under the draft Decree, enterprises wishing to practice multi-level sales will have to obtain a "Certificate for practicing multi-level sales" from the Ministry of Trade. The dossier for obtaining such Certificate shall include plans of operating multi-level sales, the main contents of which shall include: (i) amount and the calculation formula of commissions, bonus and other economic gains to participants; (ii) sample contract to be signed with participants; (iii) type, quality, price, usage and mode of usage of goods sold

through multi-level sales; and (iv) regulations on warranty, returning or re-buying goods that sold through multi-level sales. The dossier lodged with the Ministry of Trade shall be examined within 30 days as from the filing date.

Some restrictions on multi-level sales

Leading bureaucrats in State authorities, individuals involved in some economic-related criminals and property-related criminals shall not be permitted to practice multi-level sales. Foreign organizations and foreigners, including overseas Vietnamese are intended also not to be permitted to directly participate in multi-level sales.

In addition, there are certain commodities that shall not be permitted to participate in multi-level sales. They include goods which are banned to be circulated in the market, medicines for human use, vaccine of all types, biological products, medical equipments and instruments, veterinary products, products for plant protection, poisonous chemical substances and products containing poisonous chemical substances as defined by laws.

Multi-level sales enterprises and participants

The relation between multi-level sales enterprises and its participants shall be governed by their signed contract, the main contents of which are expressly stipulated in the draft Decree. Noteworthy, the draft Decree anticipates that where a participant of multi-level sales causes damages to consumers, the involved multi-level sales enterprise shall be liable to promptly indemnify consumers. The multi-level sales enterprise may be subsequently entitled to request the participant's refund of paid compensation or to initiate a lawsuit against the participant in front of civil courts.

Multi-level sales enterprises shall not be authorized to conduct certain actions, which may infringe the legitimate rights of participants. Multi-level sales enterprises can not request participants to buy goods that can not be sold in a short period. Multi-level sales enterprises, additionally, are not permitted to refuse to pay, without reasonableness, commissions, bonus or other economic gains that participants are entitled to receive.

In turn, participants must not sell goods by the way that misleads consumers in term of the real usage, price and functions of goods. Participants, likewise, shall not use deceitful measures aimed at attracting people into the multi-level sales.

While a legal document governing such activities has not been promulgated, multi-level sales have been carrying out. Some enterprises are legitimately doing business in such way, but some are hurting consumers. There are existing debates relating to the legality of such activities. It is hoped the Decree will be released soon to govern the matter.

Taxation

High income tax changes

The Ordinance on income tax applicable to high income earners has just been amended on March 24, 2004. Incomes subject to personal income tax now includes:

- *Regular incomes* in the forms of salary, wage, allowance, bonus; income earned from scientific and technical services, royalties of using patents and trademarks, informatics, consultancy, training and agent services; income from royalties; commissions; income other than salary or wage earned from business and production activities or from provision of services not subject to corporate income tax except for income stipulated in Article 3 of the Ordinance;
- *Irregular incomes* in the following forms: technology transfer, except for gifts, donations; and lottery winnings.

Threshold of taxable income is now VND5 million for Vietnamese, increased from VND3 million. No change is made to tax threshold applicable to foreigners. The highest tax rate is reduced from 50% to 40%.

Incomes not subject to personal income tax now includes:

- Workplace changing allowance; toxic and dangerous work allowance; region allowance; seniority allowance for armed forces; customs and important forces, position and liability allowance for officers and public staff; special allowance for remote islands and border regions where daily activities are subject to specially difficult conditions; allowances for attracting employees; business trip allowance; fixed expenses for meal; special allowances for a number of industries in accordance with the provisions of the State; and other allowances funded by the State Budget.
- Bonus for technical innovations, inventions; national and international prizes; bonus accompanied with titles bestowed by the State; bonus or other treatments funded by the State Budget.
- Social benefits, insurance compensation, severance payments, unemployment allowance, allowance for secondment to production units in accordance with the provisions of law.
- Incomes of private business household owners subject to corporate income tax.
- Payments for social insurance, medical insurance extracted from salaries and wages in accordance with the provisions of law.

Those changes shall be of full force on and from 01 July 2004.

Other documents

- On Mar 01, 2004, the Minister of Finance issued Decision No. 23/2004/QD-BTC, providing temporary preferential import duty rate for a number of iron and steel items.
- On Mar 15, 2004, the Minister of Finance issued Decision No. 25/2004/QD-BTC amending the import duty rate for a number of gold products subject to group 7108 in the preferential import duty tariff.

SOEs Reform

Legal issues relating to holding company and its conversion in Vietnam

Massive debates are in existence in the mass media recently on “holding company”. What is it? Can holding company be set up in Vietnam? If yes, how?

Though the issuance of the new Law on SOEs (called “the Law on SOEs 2003”) where principal provisions on State holding company can be found, those are still being in question that need to be further clarified and extended. In such a context, this aims to provide some introduction about holding company concept and some legal aspects on conversion of GCs and large-scaled SOEs under holding company model in Vietnam.

Concept of holding company

Holding company is widely known as company normally owns shares or capital in other companies, which is sufficient enough to control over operations of those companies (called as subsidiary).

Holding company can be formulated in different legal forms, but joint stock company form is normally selected. Holding company is normally formulated to ally with other (existing) companies in order to increase operational efficiency, removing competition or to have supplementary activities in the same sector.

Holding company can be either a passive company or active company which does both financial investment and carries out its own business. Major functions of an active holding company include (i) financial investment, (ii) management and control, and (iii) providing internal services.

Legal framework on holding company in Vietnam

Except some principal provisions in the Law on SOEs 2003, detailed provisions on holding company are still absent in Vietnam. At the moment, in addition to the law on cooperatives and provisions on individual businesses, there are different laws on different types of business companies in Vietnam: (i) the Law on SOEs 2003 governing State owned companies, (ii) the Law on Enterprises 1999 governing other types of companies (including joint stock companies, limited liability companies, partnerships and private enterprises), and (iii) the Law on Foreign Investment in Vietnam 1996 governing companies with foreign capital.

Aiming at providing guidelines for implementation of the Law on SOEs 2003, a draft decree on conversion of State General Corporations (GCs) under holding company model is being finalized for issuance before the effective date of the Law (i.e. 1/7/2004).

Parent companies

Pursuant to the Law on SOEs 2003, holding company group (or GCs invested and established by companies) is a financial alliance of large-scaled company wholly owned

by State with other companies, in which State owned company keeps the controlling rights over the others. Holding company (called Parent company or State owned company with controlling rights over the others, according to the Law on SOEs 2003) is one which owns entirely charter capital or having shares of over 50% of charter capital of other companies, and having the controlling rights over those companies.

Subsidiaries and affiliates

Pursuant to the Law on SOEs 2003, a subsidiary (called “Subsidiary”) is company whose from 50% of its charter capital are owned by Parent company, and an affiliate (called “Affiliate”) is one whose less than 50% of its charter capital are owned by Parent company. Subsidiaries and Affiliates operate under the Law on Enterprises 1999, Law on Foreign Investment in Vietnam 1996, and no subsidiaries in a holding company group are permissible to retain State owned company status.

Relationship between Parent company and its subsidiaries/affiliates

Rights and obligations of a Parent company are defined depending on the level of ownership in its subsidiaries and affiliates.

Parent company has exclusive right to make decisions on strategic issues, investment, management, human resources, finance, and approve charter of Subsidiaries being 1 member State limited liability companies, while having the rights and obligations of major shareholders in other types of subsidiaries, and exercises rights and obligations of normal shareholder in its affiliates.

Some legal issues

Though having no prohibitions on setting up holding companies in Vietnam, the silence of the Law on Enterprises 1999 and Law on Foreign Investment in Vietnam 1996 with few provisions on holding company in the Law on SOEs 2003, are bringing about a number of legal and practical issues to be solved during the process of conversion of GCs under holding company model.

This part gives only discussions on legal issues coming from the Law on SOEs 2003, with a view to giving smooth forward on GC conversion into holding companies in Vietnam.

Relationship between parent company and subsidiaries still retaining State owned company status and having not been converted

Some GCs having conversion decision could not complete immediately the conversion of legal status or ownership of all member State owned companies. As a result, some State owned companies would be in existence in the holding company group. The issue is how to define the relationship between the parent company and those companies since the Law on SOEs 2003 does not allow to retain the State owned company status in a holding company group, hence having no provision governing the relationship between parent company and those companies.

To avoid the loose and administrative relationship that used to be in existence between the former GCs and their member SOEs, the same provisions on the relationship

between parent company and 1 member State LLCs should be temporarily “borrowed” to govern the relationship in the holding company group between parent company and its State owned subsidiary companies which have not been converted.

Legal basis for the multi-layer holding company model

According to the Law on SOEs 2003, there is a considerable number of SOEs within GCs which are eligible to be transformed under the holding company model. Since the Law on SOEs 2003 has no provision on subsidiaries being State owned companies as mentioned above, should a GC be converted under the holding company model, its member State owned companies including those permissible for conversion under the same holding company model, would be required logically to be transformed into 1 member State LLCs, multi-member LLCs, joint stock companies, or be separated from the GC to become a new holding company independently from the GC.

While the Law on SOEs (Article 55) does not allow State-owned holding company inside another holding company, the fact may need that organizational structure or model to have a large-scaled Economic groups with multi-layer holding company structure that allows consolidating or further strengthening the power of the GCs after conversion.

Owner representative in the multi-layer holding company

As compared with the Law on SOEs 1995, the Law on SOEs 2003 (Chapter V, Section 1) prescribes in more details the relationship between State owner and companies wholly or partly owned by the State, as well as organizations and individuals assuming the function of the State owner. According to the Law on SOEs 2003, the Government and Prime Minister directly exercise a number of ownership rights and obligations and delegate the remaining ownership rights and obligation to line ministries, provincial people’s committees, Ministry of Finance, BOMs for those companies that have the BOM.

In the holding company group, BOM of the parent company is the direct representative of owner in the parent company and at the same time the representative of owner in its wholly owned subsidiaries, and shareholder or capital investors in subsidiaries and affiliates.

Again, the existence of holding companies inside another holding company would bring about legal issue to be addressed, i.e. what is the role of BOM of the parent company at lower level? Can BOM of the parent company at lower level be the direct representative of owner therein while BOM of the parent company at higher level has already assumed the role of the representative of owner?

Ownership and management relationships within the holding company group

As earlier mentioned, the parent company sole controls strategic and investment decision, management structure, staffing and financial management of its subsidiaries being 1 member State LLCs. In such case, the parent has the right to approve the charter and exercise its control over the management structure of 1 member State LLCs. BOM or Chairperson of 1 member State LLC is hold accountable to the parent company (i.e. BOM) for the performance of his/her rights and obligations concerning company’s development targets assigned by the parent company.

With respect to subsidiaries where the parent company owns majority shareholdings, the parent company, as the majority shareholder, exercise its control over the subsidiaries through its representative(s) in those subsidiaries. Representative of the parent company is entitled to exercise rights and obligations of the majority shareholder at General shareholder meetings, Company member meetings, BOM, or via managerial positions like General Director (Director) and so on in subsidiaries. In practice, General shareholder meetings, Company member meetings, BOM, and General Director (Director) of subsidiaries, but not the parent company or its representative, are agencies making decisions on subsidiaries' issues. Diversification in terms of legal status, ownership and internal organizational structure of subsidiaries reflects a need for a clear stipulation of the relationship between the parent and its representatives in the subsidiaries, and rights and obligations of the representative(s) in exercising rights and obligations in subsidiaries.

Similar issues also need to be address in the relationship between the parent company and affiliates.

Development of common business strategy for holding company group

Differences of the legal status among the parent company and subsidiaries and affiliates have resulted in a number of obstacles in developing and implementing a general business strategy. Being a State-owned company, the parent company can be set up in limited areas and sectors which provide essential products and services to the society, applying high technologies, being the driving force for the economy, operating in areas of extraordinary economic and social disadvantages where other non-state sectors are not interested to invest, etc. (Article 6, the Law on SOE 2003 and Decision No.58). In the meantime, subsidiaries being not State-owned companies, are allowable to do business registration in any business sector that is not prohibited by the law and in any location they wish to do business (the Law on Enterprises 1999). This, together with other excuses, may result in the situation that subsidiaries and affiliates, for the sake of their own interest, pursuing business targets which do not match with or conflict to core business of their parent company.

Responsibility for making financial and investment decision in parent company

The variation in legal status of the parent company and subsidiaries and affiliates has also brought about impediments to the process for making investment and operational decisions. In practice, a lot of decision on investment, sales and liquidation of assets, lending and borrowing, and collateral and mortgage of the parent company (whose value exceed 50% of the net book value) can be implemented once the comment or approval of the owner's representative is achieved. This again may create problems in defining liability for the losses incurred as the result of the approval and implementation of the above-mentioned decisions.

Conclusions

To solve the legal impediments as mentioned above and give more fuel for conversion process (corporatisation) of State owned companies in Vietnam, at this stage, the guidelines for implementation of the Law on SOEs 2003, including the regulations on multi-layer holding company structure, economic groups, setting up State financial

investment companies which will take over the State ownership function from State agencies, etc. should be soon accelerated.

In a longer term, it is necessary to develop the common Law on Enterprises on the basis of combining all the Law on SOEs, Law on Enterprises, and Law on Foreign Investment in Vietnam.

Intellectual Property

Border measures for fighting against copyright piracy

In the bidding for WTO's accession, Vietnam has to implement the commitments to TRIPs including intellectual property (IP) and copyright enforcement. In the prevailing Vietnamese legal system, amongst the provisions on administrative, civil and criminal sanctions against copyright infringements, another integral measure of border remedies is also required to be comprehensively regulated and enforced. On October 17, 2003, the Ministry of Culture and Information and the General Department of Customs jointly issued Inter-Ministerial Circular No. 58/2003/TTLT-BVHTT-BTC (Circular 58), effective on and from November 17, 2003, providing guidelines for protection of copyright by Customs Offices towards imports and exports.

Prior to the promulgation of Circular 58, Articles 57 –to 59 (Section 5) of the Customs Law, and the Government's Decree No. 101/ND-CP dated December 31, 2001 have provided framework procedures for intellectual property owners to register their IP right protection with Vietnamese Customs and to request for the provisional suspension of goods suspected of IP infringements. Nevertheless, those provisions are still general and vague, for instance there is not detailed provisions on responsibilities of relevant parties, settlement of infringing goods, and compensation etc Visually, Circular 58 is supposed to supplement those gaps.

Scope of protection

Given that Customs Offices are authorized to merely conduct its functions on copyright protection in relation to imports and exports, but not all goods, Customs Offices just interfere in reproduction of goods circulated through borders without permission of copyright holders and constituted of copyright infringements in accordance with prevailing laws. Accordingly, Circular 58 provides for registration for protection of any copyrighted imported/exported goods except for humanitarian aids, temporary imports for re-exports, goods in transit and gifts which are duty free under regulations of Customs Law.

Entitled claimants

Generally, any persons who has copyrighted goods are entitled to request Customs Offices to protect their copyright in case they realized any goods suspected for copyright infringement. Those persons may be authors, work's owners being Vietnamese individuals or organizations, authorized industrial property agents. Foreigners who have their own works to be created and fixed in any material from or firstly published in

territory of Vietnam, and American and Swiss authors shall be protected by Customs Offices.

Registration for protection

As a principle, copyright is deemed as belonging to civil matters in Vietnam. Therefore, if no request submitted by claimant, Customs Offices will not always automatically put forth expeditious action against copyright infringement. Besides, it depends on the range of border areas requested for copyright protection, General Department of Customs or Provincial Customs or Customs Branches would be the competent bodies handling the cases. In order to establish copyright protection at Customs Offices, the claimants can file applications for copyright protection for a long term or on the case-by-case basic.

Request for long-term protection is filed to Customs Offices in case copyright holders has not found out any information on exported or imported items in connection to copyright violation. Customs Offices will require claimants to submit advance payments, each valued at least VND 20 million, or guarantee letters of certain amount, each equivalent to at least VND 50 million from third party, or securities for payment from credit institutions.

For case-by-case protection, Circular 58 requires that the claimants should demonstrate their doubt of sure piracy with initial authentic proofs when submitting requests for provisional suspension of Customs procedures. These proofs must be sufficient for Customs Offices to specify pirated lines i.e. identification of the infringer (exporter/importer), country of origin, details of transportation, expected post of discharge and post of entry, authority to proceed with customs formalities, description or photo of pirated commodities, etc.

Remedies

Impartially, decisions on provisional suspension of customs procedures would be delivered to both claimants and suspects. The suspension shall be effective within 10 to 20 days, during such period Customs Offices will inspect the suspected goods for final decisions and subsequent remedies. Fines on infringement will be from VND200,000 to VND70,000,000 depending on seriousness, arisen expenses, etc.

Should claimants withdrawn their requests or prove no evidence of infringement in due course, the head of Customs Offices shall decide to release the suspended goods, keep completing procedures on customs clearance, and settle all expenses and losses for illegal suspension from the deposit of the claimants. Disputed cases relating to border measures imposed on copyright infringement can be brought to trial by competent courts in Vietnam.

Other Sectors

Finance

- Inter-ministerial Circular No. 15/2004/TTLT-BTC-BYT-BNV dated 25 Feb 2004 of the Ministry of Finance - the Ministry of Health - the Ministry of Interiors, guiding the financial managing regime applied to profit non-business units operating in the field of public healthcare.
- Circular No. 15/2004/TT-BTC dated 09 Mar 2004 of the Ministry of Finance, guiding Decree No. 170/2004/ND-CP dated 25 Dec 2003 of the Government on detailing the implementation of some articles of the Ordinance on Price.

Labour

- On 04 Mar 2004, the Ministry of Labour, War Invalids and Social affairs, the Ministry of Finance and Ministry of Defence jointly issued Inter-ministerial Circular No. 03/2004/TTLT-BLDTBXH-BTC-BQP, guiding the implementation of the adjustment of pension for employees retired before April 1993 in accordance with Decree No. 31/2004/NĐ-CP.
- The Ministry of Labour, War Invalids and Social affairs issued Circular 04/2004/TT-BLDTBXH dated 10 Mar 2004 guiding some articles of Decree No. 105/2003/ND-CP dated 17 Sep 2003 of the Government on recruitment and management of foreign employees working in Vietnam. *We will introduce further analyses on this Circular in the next issue.*

Export - Import

- Decision No. 24/2004/QĐ-BTC dated 05 Mar 2004 of the Minister of Finance, amending the contents of export declaration form.
- On 10 Mar 2004, the Ministry of Finance issued Circular No. 16/2004/TT-BTC, guiding the implementation of Decree 99/2004/ND-CP issuing the List of goods and import duty tariff of Vietnam to implement the frame Agreement on overall economic co-operation between ASEAN and China.
- On 16 Mar 2004, the Ministry of Trade issued Decision No. 1205/2004/QĐ-BTM on quota of textiles and garments exported to the USA and quota notification for complete contracts with high exporting price.

Miscellaneous

- On 23 Mar 2004, the Government issued Decree No. 104/2004/ND-CP on Official Gazette of Vietnam.

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