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CLIENT ALERT VIETNAM

MANAGING CHANGE

Issue:
October
2019

New Law on Tax Administration

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KEY ISSUES

On 13 June 2019, the National Assembly of Vietnam enacted the new Law on Tax Administration (“New LTA”) in their all-out effort to establish an effective tax regime by setting fundamental and far-reaching principles of tax risk management in order to protect their tax bases and to tackle tax challenges in harmony with the policies of the OECD/G20 Inclusive Framework on BEPs in which Vietnam is involved.

Compared to the current tax framework, the New LTA establishes notable changes in the implementation policies to move forward step-by-step to an efficient tax collection mechanism. Specifically, the New LTA identifies the neuralgic spot at which certain cross-border transactions have been closely associated with tax risks in order to safeguard the tax sovereignty of the Vietnamese taxation authorities over such transactions.

The New LTA will come into force as of 1 July 2020. This Alert spotlights some issues which will be subject of the domestic tax reform in Vietnam in the forthcoming.

TAX ADMINISTRATION IN THE DIGITAL ECONOMY

Recent years have witnessed a rapid growth as to the e-commerce penetration rate in the Vietnamese market. While the advent of the digital economy undoubtedly creates many new channels to spread out market reach on a global scale, it is nevertheless alleged to pose tax challenges to the Vietnam jurisdiction when tax liabilities in cross-border transactions, which should have been levied by the Vietnamese tax authorities, could be evaded.

To level the playing field for the bricks and mortar businesses and online businesses in view of the Vietnamese tax environment, the New LTA proposes the following solutions to mitigate base erosion and profit shifting (BEPs) availed by the digital players.

(I) STRENGTHENING VIETNAM’S TAXING RIGHTS TO INTERNATIONAL E-COMMERCE TRANSACTIONS

Under the existing tax legislation, there are two underlying taxes - Value Added Tax (“VAT”) and Corporate Income Tax (“CIT”) - to be imposed on foreign entities carrying on business in Vietnam by the Vietnamese tax authorities. In the concept of

nexus rules, these taxes shall be levied on businesses with a local physical presence in Vietnam; and each party involved shall conduct tax declaration and payment on its own. Otherwise, such business may be subject to the foreign contractor withholding tax (“FCWT”) regime, inclusive of VAT and CIT components. According to the FCWT regime, there is a reverse charge system possible in connection with the taxation imposed on foreign entities. Thereby, the obligation to pay VAT and/or CIT may be moved from the foreign sellers to the buyers of goods/services - being taxpayers in Vietnam. In other words, the FCWT mechanism requires Vietnamese buyers to be liable to withhold the corresponding amount of CIT and VAT prior to proceeding the payment to foreign sellers.

However, there are concerns about how the FCWT regime may control e-commerce transactions being business-to-consumer (B2C) or consumer-to-customer (C2C) transactions, while the prevailing legal regulations stipulate the withholding agents to be limited to organizations or businesspersons purchasing goods and/or services from offshore suppliers. It appears that the tax management in B2C and C2C transactions is not considered appropriate in the existing FCWT regime due to highly digitalized business models.

For the time being, a large volume of cross-border businesses transacted by foreign entities on media platforms and online marketplaces manage to avoid taxation by the Vietnamese jurisdiction for certain reasons; namely because of not having a permanent establishment in Vietnam, or because of the current FCWT regime not covering B2C and C2C transactions in which the parties involved are not organizations or businesspersons.

In reaction to these tax challenges posed by digitalization, the New LTA stipulates the relevant parties to comply with the following obligations for the purpose of tax administration:

Obligations of foreign suppliers doing business via intermediate digital platforms of which the income is generated from Vietnam:

In such circumstance, offshore suppliers are required to conduct tax registration and payment in Vietnam by themselves or to authorise third party(ies) to perform such obligations in their stead. The foreign supplier shall be assigned a tax code to be used for tax declaration and payment purposes.

Obligations of competent authorities:

There is a great deal of new provisions introduced with the New LTA to vest the authority of tax administration in Vietnam agencies. Most emphatically, it is the first time that a substantive law stresses the responsibilities of coordination in tax administration between not only taxation agencies, but also ministries, ministry-level agencies, governmental agencies, the State Bank of Vietnam (SBV) and commercial banks. Notably, in addition to the withholding model applied to Vietnamese contracting parties in e-commerce transactions, the New LTA regulates the rights and liabilities of commercial banks to withhold and remit tax(es) on behalf of offshore organizations and individuals doing e-commerce business and deriving income from Vietnam. This new tax collection model for cross-border e-business activities breaking new grounds, we note that the current state is a policy design phase and, therefore further specific guidance to avoid practical difficulties in applying this model is being drafted by the Vietnamese lawmaker.

(II) ADOPTING TRANSFER-PRICING REGULATIONS

Amongst the measures to streamline the tax framework emphasized by the New LTA, the adoption of the arm's length and of the substance over form principles are at the heart of the transfer pricing regulations. The by-law documents, Decree No. 20/2017/ND-CP and Circular 41/2017/TT-BTC, enacted prior to the LTA have given detailed guidance on the implementation of the transfer-pricing regulations.

The adoption of advance pricing arrangements (APAs) in determination of the taxed price is required to be approved by the Ministry of Finance prior to the application in transactions between related parties.

(III) MODERNIZING THE TAX ADMINISTRATION SYSTEM

In consistency with the current Decree 119/2018/ND-CP promulgating e-invoices to be used in the sale and purchase of goods and services, and with Circular 68/2019/TT-BTC guiding a number of articles of Decree 119/2018/ND-CP, the New LTA stipulates the roadmap for the use of e-invoice and e-documentation in tax administration. The implementation of the New LTA's provisions in relation with e-invoices will officially start on 1 July 2020. As a matter of practice, any agencies, organisations and individuals are encouraged to apply e-invoices and e-documentation

regulations prior to the statutory effective date of such regulatory regimes.

OTHER SUBSTANTIAL CHANGES

Circumstances subject to "moratorium of tax debts" (in Vietnamese words: khoan tiền thuế nợ)

The New LTA specifies the circumstances under which the taxpayer is permitted to defer his due tax liabilities from being considered as a debt for which penalties and/or late payment interest on due tax amounts might be charged.

There are certain specific circumstances subject to "moratorium of tax debts" prescribed by the New LTA:

- The taxpayer is deceased or is declared by a competent court to be deceased, or missing or to have lost capacity for civil acts;
- The taxpayer is carrying out dissolution procedures in compliance with the relevant orders and procedures in terms of taxation and enterprise perspective;
- The taxpayer, or the party having related rights and obligations, has lodged the petition to commence bankruptcy in accordance with relevant applicable laws;
- The taxpayer is no longer conducting business at the registered business address after the competent authorities duly verified such non-presence of taxpayer and gave nationwide notice of this fact; or there is no presence of a legal representative of the taxpayer at the contact address registered with the tax authorities.
- The tax authority addresses a proposal in writing about the revocation of incorporation licenses of the taxpayer; or the incorporation licenses of the taxpayer are revoked by the competent licensing authorities.

It is advised that the taxpayer shall take into account the occurrence of such circumstances in their business life, and strive to comply with the compulsory procedures and application dossier to mitigate undesirable tax consequences.

Piercing the corporate veil in the event of compulsory enforcement of administrative regulations

The individual being as the legal representative of the taxable entity enforced compulsorily to fulfil tax payment obligations under an administrative decision on tax management, may be subject to suspension of emigration in accordance with the law on entry and exit. As such, foreign legal representatives of Vietnam-based companies should be careful about the matters of tax compliance of

his/her company, as they may give rise to the risk of being suspended for emigration.

Re-inspection during tax inspection activities

In cases where a conclusion on tax administration is detected to infringe the regulations prescribed in the New LTA, the competent authorities are entitled to a re-inspection. The limitation period for re-inspection is two (2) years from the date of signing an inspection conclusion.

In addition to the aforementioned substantial changes, the New LTA also comprises further changes, such as the exemption from penalties and late payment interest imposed on tax shortfall in case of a taxpayer relying on the decision of the competent taxation authorities, the taxpayers' entitlement to interest accrued on tax refund where they are prevailing parties in tax disputes, etc.

CONCLUSION

While the detailed tax guidance is still being drafted owing to the tax challenges correlating with the increasingly digitalized economy, the likelihood is that the new approach to tax risk management will soon be factored in Vietnamese tax policies. A full awareness of the current tax environment is therefore crucial to the management of tax compliance risks.

Focusing on the tax compliance matters and having the high benchmark for providing tax services with an interdisciplinary approach and a global reach, Rödl & Partner are able to assist clients in their business success through our innovative and effective tax solutions.

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