

# LEGAL NEWSLETTER

NHQuang&Associates



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## Notable activity in October 2021

In the morning of October 15, 2021, Vietnam Institute for Economic and Policy Research (VEPR) - University of Economics and Business, Vietnam National University, Hanoi; BIDV Training and Research Institute (BTRI); The Friedrich Naumann Foundation for Freedom (FNF) Vietnam have coordinated to organize the online Seminar "Facilitating household business activities towards recovery and growth under the new normal" via Zoom and live-stream on the fanpages of the organizations hosting the seminar.

Mr. Nguyen Hung Quang, Managing Partner of NHQuang&Associates, is one of the invited speakers to discuss and interact with participants at the Seminar, along with 3 other guest speakers including Dr. Can Van Luc, Chief Economist, Director of BTRI, Mr. Phan Duc Hieu, standing member of the National Assembly's Finance and Budget Committee, and Mrs. Bui Thu Thuy, Deputy Director of Enterprise Development Agency, Ministry of Planning & Investment.

Mr. Nguyen Hung Quang shared several issues to promote the development of household businesses, including: (1) Strengthening the guarantee of contract enforcement regulations without discrimination on the subject; (2) Strengthening support for household businesses to access financial resources (banks or other entities); (3) Reducing the regulatory compliance cost (reform of administrative procedures, tax reform), (4) Changing tax management methods to make it easier for people and businesses to identify, instead of just focusing on penalties.

# SOME NEW REGULATIONS ON ELECTRONIC INVOICES

QUOC KHANH

On September 17, 2021, the Ministry of Finance issued Circular 78/2021/TT-BTC guiding the implementation of several articles of the Law on Tax Administration, Decree 123/2020/ND-CP prescribing invoices and documents (**Circular 78**), completing the provisions on electronic invoices (**e-invoices**). Circular 78 will take effect from July 1, 2022, with the following key contents:

*Firstly*, Circular 78 stipulates the details of delegation to issue e-invoices. In comparison with the previous provisions in Circular 39/2014/TT-BTC guiding the implementation of Decree 51/2010/ND-CP and Decree 04/2014/ND-CP on invoices for the sale of goods, provision of services, delegation for invoice issuance (**Circular 39**), Circular 78 provides more specific guidance on the procedures to notify tax authorities about the delegation to issue e-invoices. Specifically, the parties must notify tax authorities according to the procedure for changing e-invoice registration information specified in Article 15, Decree 123/2020/ND-CP (**Decree 123**). In the announcements on the change of registration information for using e-invoices under Form 01DKTD/HDDT, both parties must fill the information of the used digital certificate in Part 5 "List of digital certificates in use". Remarkably, the delegated party's announcement must provide the name, the delegating organization, and the taxpayer identification number in column 5 Part 6 "Registration of invoice issuance delegation". Besides, Circular 78 does not require the delegated party to post the delegation announcement at the place of selling goods or providing services. Instead, both parties must publicize the delegation to issue invoices on their websites or publicly announce on the mass media. Upon delegation termination, Circular 78 does not require the parties to make any written confirmation, but to delete the relevant posts, announcements on their websites or publicly announce on the mass media. In addition, Circular 78 does not require reporting the use of invoices made under delegation, but asks the delegating party to transfer the e-invoice data to the direct managing

tax authority for the invoices made under delegation without tax authority's identification code.

*Secondly*, Circular 78 allows taxpayers to convert the application of e-invoices without tax authority's identification code into e-invoices with tax authority's identification code. Accordingly, taxpayers may choose to voluntarily apply e-invoices with tax authority's identification code, or in some situations, e-invoices with tax authority's identification code must be applied. In a compulsory situation, when the tax authority determines that a taxpayer is subject to a high tax risk under Circular 31/2021/TT-BTC, and issues a notice on conversion to e-invoices with tax authority's identification code, such taxpayer will have 10 working days to implement the conversion procedure. Accordingly, the taxpayer will submit the Declaration on change of e-invoice use information according to Form 01DKTD/HDDT under Appendix IA attached to Decree 123/2020/ND-CP (**Decree 123**) through the portal of the General Department of Taxation as prescribed in Article 15 of this Decree. After 12 months from the date of compulsory conversion to application of e-invoices with tax authority's identification code, the taxpayer can re-convert to e-invoices without tax authority's identification code.

*Thirdly*, Circular 78 stipulates the cases where household businesses and individual businesses must use e-invoices, including:

- (i) For household businesses or individual businesses that pay taxes according to the tax declaration method, they are required to issue e-invoices;
- (ii) For household businesses or individual businesses that pay presumptive tax, if they need to issue invoices, the tax authority shall provide e-invoices separately on an on-demand basis; and
- (iii) For household businesses or individual businesses that declare taxes on an on-demand basis, if they need to issue invoices, the tax authority shall provide e-invoices separately on an on-demand basis.

It is noted that for household businesses or individual businesses that do not conduct transactions with tax authorities by electronic means, have neither information technology infrastructure, accounting software system nor e-invoice set up the software to use e-invoices and transmit invoice data to buyers and tax authorities, it is not necessary to immediately apply the e-invoices. However, those household businesses and individual businesses are supposed to

gradually switch to using e-invoices within a maximum period of 12 months. For household businesses and individual businesses operating before July 1, 2022, this period will be calculated from July 1, 2022.

*Fourthly*, taxpayers must issue an invoice for every transaction. Circular 78 abolishes the validity of Circular 39/2014/TT-BTC guiding the implementation of Decree 51/2010/ND-CP and Decree 04/2014/ND-CP on invoices for the sale of goods and provision of services. Circular 78 does not provide any regulation on issuing invoices as Article 16 of Circular 39. It means that the law does not give any exclusions for issuing invoices for any transaction valued less than VND 200,000. Therefore, when Circular 78 takes effect, taxpayers must issue invoices for all transactions even if their value is under VND 200,000.



*Fifthly*, Circular 78 provides the roadmap for applying e-invoices. According to the Ministry of Finance's Official Letter 10847/BTC-TCT dated September 20, 2021 on coordination for e-invoice deployment as prescribed in the Law on Tax Administration 2019 and Decree 123, 6 provinces that will focus on building information technology infrastructure and solutions for this task in the initial phase include Ha Noi, Ho Chi Minh City, Hai Phong, Phu Tho, Quang Ninh, Binh Dinh. In the case where enterprises in these areas have not met the conditions on information technology infrastructure and still want to continue using invoices in the old form, such enterprises must send the invoice data to the tax authorities according to Form 03/DL-HDDT under Appendix IA attached to Decree No. 123/2020/ND-CP along with the submission of the added-value tax declaration. Newly established enterprises may register to use invoices according to the guidance by tax authorities. The first phase is expected to take place from November 2021 to March 2022. In the next phase, e-invoices will be deployed in all remaining provinces and cities.

## COMMENTS AND RECOMMENDATIONS

Firstly, the application of e-invoices brings tremendous benefits to individuals and businesses as well as convenience in state management in taxation. Circular 78 and Decree 123 have provided the guidelines for individuals and businesses to gradually switch to using e-invoices. Enterprises should study and prepare appropriate information technology infrastructure to apply e-invoices in accordance with Circular 78 and Decree 123.

Secondly, according to the roadmap, e-invoices will be first applied in Ha Noi, Ho Chi Minh City, Hai Phong, Phu Tho, Quang Ninh, Binh Dinh. Therefore, businesses in the above 6 provinces should prepare a plan for prompt application of e-invoices to match the general roadmap given by the Ministry of Finance.

# SOME IMPACTS OF RESOLUTION 126/NQ-CP ON BUSINESSES AND EMPLOYEES

THU TRANG

Resolution 126/NQ-CP amending Resolution 68/NQ-CP stipulating a number of policies to support employees and employers facing difficulties due to the COVID-19 pandemic (**Resolution 126**) issued by the Government on October 8, 2021 has attracted the attention from both businesses and employees. Compared with the provisions of Resolution 68/NQ-CP (**Resolution 68**), Resolution 126 has loosened the conditions for receiving support applied to enterprises and employees affected by the COVID-19 pandemic. Typical new points of Resolution 126/NQ-CP include:

*Firstly*, changing the conditions on the reduction rate of employees engaging in social insurance with respect to the procedure for temporary suspension of payment to the retirement - survivorship fund. According to Resolution 126, for employers that have fully paid social insurance premiums or are temporarily suspending payments to the retirement - survivorship fund until the end of January 2021 and affected by the COVID-19 pandemic, resulting in a reduction of 10% or more of the employees engaging in social insurance compared to January 2021 (including employees who stop working, suspend the performance of labor contracts, and agree to leave without pay), employees and employers are entitled to suspend the payment to the retirement - survivorship fund for 6 months from the time of submitting the application dossier. Previously, Resolution 68 stipulated the conditions on the reduction rate of employees engaging in social insurance of at least 15% as compared to April 2021.

*Secondly*, lessening the conditions for employers to borrow loans to pay wages when the employees stop working, to pay wages for restoring production; specifically, in respect of employers borrowing loans to pay wages when the employees stop working, Resolution 126 has removed the condition requesting "Employers to have no bad debt at any credit institutions and foreign bank branches at the time of



application for loans" in Resolution 68.

In addition, Resolution 126 also expands the scope of employers entitled to borrow loans to pay wages for restoring production by supplementing the employers with head quarters, branches, representative offices, production and business locations, etc. situated in the areas where the measures to prevent and control the pandemic under the principles of Directive 16/CT-TTg are applied during the period from May 1, 2021 to March 31, 2022.

*Thirdly*, expanding the group of employees who are entitled to the one-time support policy of VND 3,710,000/person when suspending labor contracts or taking leave without pay, in particular, employees working under labor contracts, engaging in compulsory social insurance by the time immediately preceeding the suspension of labor contract performance, taking leave without pay and subject to one of the following cases: experiencing COVID-19 treatment, taking medical isolation, being in locked-down areas, being unable to go to the workplace due to the competent state agencies' request for COVID-19 pandemic prevention and control; their employer is temporarily suspended from operation at the request of competent state agencies to prevent and control the COVID-19 pandemic or has its head office, branches, representative offices, production and business locations situated in the areas where the measures for the pandemic prevention and control under the principles of Directive 16/CT-TTg are applied, or their employer has to re-arrange the production and labor to prevent and control the COVID-19 pandemic.

The previous Resolution 68 stipulated a narrower



scope of beneficiaries to the policy, including: employees working at enterprises, cooperatives, public non-business units that can self-finance their own current expenditures or investment and current expenditures, people-founded and private educational institutions at preschool, kindergarten, primary school, junior high school, high school and vocational education level, which are suspended from operation as required by competent state agencies to prevent and control the COVID-19 pandemic.



*Fourthly*, expanding the cases of employees entitled to one-time support of VND 1,000,000/person for those suffering from work suspension, specifically employees working under labor contracts subject to work suspension for the reasons specified in Clause 3, Article 99 of the Labor Code; engaging in compulsory social insurance up to the time immediately before suspending work and subject to one of the following cases: **experiencing COVID-19 treatment**, taking medical isolation, being in a locked-down area or being **unable to come to the workplace at competent state agencies' request under the principles of Directive 16/CT-TTg**; **their employer has to suspend the operation at the competent state agencies' request or has its head office, branches, representative offices, production and business locations situated in the locality applied with the measures for pandemic prevention and control under Directive 16/CT-TTg or their employer has to re-arrange the production and labor to prevent and control the COVID-19 pandemic** for at least 14 **consecutive** days during the period from May 1, 2021 to the end of December 31, 2021.

*Fifthly*, expanding the group of employees entitled to the support of VND 3,710,000/person due to termination of their labor contracts, in particular those working under labor contracts, engaging in compulsory social insurance that have to terminate their labor contract during the period from May 1, 2021 to the end of December 31, 2021 and subject to one of the following cases: taking medical isolation, being in locked-down areas or being unable to go to the workplace at the request of competent state agencies to prevent and control the COVID-19 pandemic; their employer is temporarily suspended from operation at request of competent state agencies for COVID-19 pandemic prevention and control or their employer has its head office, branches, representative offices, production or business locations situated in the locality applied with the measures to prevent, control the pandemic under Directive 16/CT-TTg or their employer has to re-arrange the production and labor to prevent and control the COVID-19 pandemic but are not eligible for unemployment benefits.

## COMMENTS AND RECOMMENDATIONS

The amendments and supplements of Resolution 126 have facilitated more employers and employees to easily access the Government's support package of VND 26,000 billion, which brings enterprises more opportunities and conditions to restore their production and business after being interrupted by the COVID-19 pandemic.

Businesses should also note that, to enjoy the above-mentioned support policies, in addition to the provisions on eligibility conditions, they also need to strictly comply with the regulations on dossiers, forms, procedures to register for support as specified in Resolution 68, Resolution 126 and Decision 23/2021/QD-TTg (guiding Resolution 68 on the implementation of a number of policies to support employees and employers facing difficulties due to the COVID-19 pandemic). At the same time, businesses should proactively contact the local Social Insurance Agency, the local Bank for Social Policies for direct specific instructions, thereby quickly completing the application dossier and procedures.

# COMMENTS ON THE DRAFT DECREE ON PENALTIES FOR ADMINISTRATIVE VIOLATIONS IN CYBERSECURITY

KHANH QUYNH



In order to concretize some provisions related to the penalties for administrative violations against the Cybersecurity Law as well as to systemize the regulations currently scattered in various administrative sanction documents on information technology, telecommunications, commerce, finance, banking, etc., the Draft Decree on Penalties for Administrative Violations in Cybersecurity (**Draft Decree**) is being developed by the Ministry of Public Security and undergoing public consultations by agencies, organizations and individuals. In this Legal Newsletter, NHQuang&Associates would like to analyze some regulations potentially impacting the businesses once this Decree comes into force.

## **Regulations on subjects to be sanctioned for administrative violations in cybersecurity**

Organizations subject to sanctions are not only limited to organizations established under Vietnamese law, but also foreign enterprises, branches, representative offices, business locations of foreign enterprises providing services of telecommunications, Internet; services of content provision in cyberspace, information technology, cybersecurity, cyberinformation security; organizations and enterprises providing services of information content in cyberspace; organizations and enterprises registering domain names; information system administrators; information system operators; political, social, professional organizations and other non-business units.

Particularly, administrators of information

system are authorities, organizations and individuals authorized to directly manage the information system. For State agencies and organizations, administrators of information systems are ministers, ministerial-level bodies, Governmental agencies, People's Committees of provinces and centrally-run cities or the competent authorities making decisions in investment projects for the construction, establishment, upgrade and expansion of such information systems in accordance with Clause 1, Article 3 of Decree 85/2016/ND-CP on assurance of information system security by classification.

In accordance with the above regulations, it is found that the scope of sanctioned subjects in cybersecurity is quite wide because it covers nearly all subjects from domestic and foreign individuals to organizations involved in transmitting, using and controlling information. This reveals the State's viewpoint in tightening the control over cybersecurity. Thus, organizations operating in Viet Nam, whether they are Vietnamese or foreign enterprises, may possibly be the subjects of the Draft Decree if they perform any activity in cyberspace.

## **Regulations on acts of administrative violations in cybersecurity**

The violation acts are specified in 35 articles and classified into 5 large groups including (1) Violation of regulations on ensuring information security, (2) Violation of regulations on protection of personal data, (3) Violation of regulations on cyber-attack prevention, (4) Violation of regulations on implementing cybersecurity protection activities, (5) Violation of regulations on preventing the behaviors of using cyberspace, information technology, electronic means to violate the laws on social order and safety.

For each administrative violation in cybersecurity, an organization may be subject to warning or pecuniary sanction from 40 million to 200 million Viet Nam Dong, depending on the behavior and severity of the violation. Particularly, based on the nature, extent and consequences of the violation, the violators and aggravating circumstances, the number of violating times, the highest pecuniary sanction level may be up to 5 times of the prescribed fine or even 5% of the total revenue of the enterprise in Vietnamese market. Together with such key penalties, the Draft Decree also determines additional penalties such as depriving licenses, certificates, practice certificates or suspending operations for a definite term, etc. Simultaneously, additional remedial measures are applied, such as forced removal of the relevant programs and software; forced recall or destruction of the related products and equipment, stop of providing services harmful to cybersecurity; rectification of information violating the cybersecurity law, etc.

With the provisions in the Draft Decree, the behaviors to be sanctioned for administrative violations in cybersecurity have been specified and consistently applied. Specially, the violations addressed in the Cybersecurity Law and a number of guiding documents, but without sanctions, are now provided in more details. The following are some regulations that may generate adverse impact on businesses:

- Regulations on violations in personal data protection (from Article 14 to Article 30).

The Draft Decree has specified the sanctions corresponding to the issues mentioned in the Draft Decree on Personal Data Protection - the first comprehensive legal framework on data protection and privacy law established in Viet Nam. Accordingly, this Draft Decree provides in details the violations related to processing, accessing, storing, deleting, destroying, protecting, buying and selling personal data, and transferring personal data across borders, etc.

Notably, the Draft Decree has also mentioned the responsibilities of the Data Controller, the subject not yet governed in the current Draft Decree on Personal Data Protection (the latest draft is posted

on the Portal of the Ministry of Public Security on February 9, 2021). This may be a new point and will be updated in the forthcoming draft version of the Decree on Personal Data Protection.

As we have seen, once such regulations are approved, they shall bind and apply directly to all businesses which are storing and processing personal data. The businesses that do not comply with the regulations on personal data protection will be at a risk of a pecuniary sanction of up to 200 million Viet Nam Dong or even up to 5% of their total revenue in Viet Nam for violations repeated from the third time or more, or for disclosing or losing personal data after transferring across the border, resulting in over 1,000,000 data subjects being Vietnamese citizens. Simultaneously, such businesses also face with the interference from the management agencies in being subject to preventive measures not to conduct personal data processing or being required to stop providing services, being deprived of their licenses for personal data processing, etc. However, the Draft Decree has not yet specified the preventive measures.

- Regulations on ensuring information security (Article 37).

Domestic and overseas providers of services on telecommunication network, internet and value-added services in cyberspace in Viet Nam that collect, analyze or process personal information, data concerning relationships of their service users or data created by their service users in Viet Nam must store such data in Viet Nam in a specific period of time as stipulated by the Government. In particular, overseas enterprises operating in the above-mentioned fields must set up branches or representative offices in Viet Nam.

In case of violation against the regulations on data storage or establishment of branches or representative offices in Viet Nam, such organizations may be fined up to 200 million Viet Nam Dong or 5% of the total revenue in Viet Nam for any repeated violation from the third time or more; simultaneously, their right to use the business license in Vietnamese market will be deprived.

Additionally, businesses may be fined up to 160 million Viet Nam Dong if they fail to prevent or apply preventive measures not to the extent necessary to prevent information sharing or deleting within 24 hours from the time of receiving the request by competent state authorities.

## **Regulations on time-limit for sanctioning administrative violations**

The time-limit for sanctioning administrative violations in cybersecurity is 1 year, except for cases of administrative violations related to production, trading, import, supply, exploitation and export of cybersecurity products and services. In that event, the time-limit for sanctioning administrative violations is 2 years.

Basically, the method to determine the time for calculating the sanctioning time-limit in the Draft Decree shall follow the principles of the Law on Handling Administrative Violations. Specifically, in the case that an administrative violation has ended, the time-limit is calculated from the time of termination of the violation. For ongoing administrative violations, the time-limit shall be calculated from the time when the behavior is detected.

However, the Draft Decree provides further details in some special cases. Accordingly, for violations related to financial, credit and banking activities, the time-limit is calculated from the time of termination of the violations, which is the date on which the parties fulfill their obligations; for acts of registering, notifying, performing administrative procedures; failing to submit, issue internal regulations; and issuing internal regulations not in compliance with the law, the time-limit for sanctioning shall be the date of registering, notifying, performing the administrative procedures, submitting and issuing internal regulations. This provision contributes to more consistent and clearer application of the law.

Currently, the Draft Decree is still undergoing consultation and may have other noble amendments. Enterprises should frequently update the relevant information and follow up the process of the Draft to ensure that their activities as well as policies are in compliance with provisions of laws. We shall continue with further update once the Decree officially takes effect.



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