LEGAL NEWSLETTER

IN THIS LEGAL NEWS LETTER

Notable activity in November, 2022

On November 11, 2022, the Supreme People's Court, together with the European Union (EU) and the United Nations Children's Fund (UNICEF) held a Seminar to comment on the Formative Evaluation of Family and Juvenile Courts Report. The Seminar was held at the headquarters of the Supreme People's Court with the participation of Mr. Nguyen Chi Cong, Director of Department of Legal affairs and Research administration, Supreme People's Court, Mrs. Nguyen Thanh Truc – the representative from UNICEF, Deputy Chief of the Family and Juvenile Court of the High People's Court in Ha Noi, and some judges, representatives of relevant ministries and experts in juvenile justice, etc. Representatives of ministries and experts actively gave comments and suggestions to improve the report. This Report is expected to be an important reference document in developing the Law on Juvenile Justice in Viet Nam.

As the leader of the consulting team of UNICEF who directly implemented the report, Mr. Nguyen Hung Quang, Managing Partner of NHQuang&Associates gave the presentation on the overview of the Formative Evaluation of Family and Juvenile Courts Report, which highlights the achievements, existing bottlenecks and barriers and proposes ways to promote the work of the Family and Juvenile Courts in the context of juvenile justice reform in Viet Nam.

SOME NEW POINTS ON TAX OBLIGATIONS WHEN SETTING UP AND USING ENTERPRISES' SCIENCE AND TECHNOLOGY DEVELOPMENT FUND

HUNG THINH

On November 7, 2022, the Ministry of Finance issued Circular 67/2022/TT-BTC providing guidelines for tax obligations when enterprises set up and use their Science and Technology Development Funds (**Circular 67**). Circular 67 amends, supplements, and annuls a number of provisions in Joint Circular 12/2016/TTLT-BKHCN-BTC providing guidelines for the allocation and management of the science and technology development fund in enterprises (**Joint Circular 12**). Circular 67 shall take effect from December 23, 2022 and set forth a number of new points compared to Joint Circular 12 as follows:

Firstly, Circular 67 gathers a number of provisions scattered in Joint Circular 12 into a separate clause on principles of using the Science and Technology Development Fund (**Fund**) with the following outstanding contents:

- The Fund shall be reserved only for enterprises' investments in research and development of science and technology and the expenditures permitted from the Fund in accordance with the law;
- Expenditures from the Fund must be fully evidenced by invoices, receipts as per regulations. For the expenditures from the Fund without evidence as prescribed, it is required to fulfill the obligation of payment to the state budget in accordance with Clause 1 Article 4 Circular 67;
- The use of the Fund shall be subject to the first-in first-out principle.

Secondly, Circular 67 amends and supplements some contents related to the determination of tax obligations when enterprises misuse, unuse or underuse 70% of the annual Fund contribution, specifically:

- Giving specific instructions to determine the commencement of the 5-year term for the case of receiving Fund transfer to determine tax obligation when an enterprise unuses or underuses 70% of the annual Fund contribution. Accordingly, this term commences from the corporate income tax (**CIT**) period in which the enterprise receives the Fund transfer;
- Amending the duration in which the interest on the recovered CIT amount imposed on the misused amount of Fund shall be calculated continuously from the day following the Fund contribution date to the day preceding the date on which the recovered tax amount is remitted into the state budget. Previously, under Joint Circular 12, the interest is imposed from occurrence of the violation until the date of payment of the financial obligation to the state budget;
- Supplementing cases accounted as expenditures from the Fund including: the amount paid to the National Science and Technology Development Fund or the Science and Technology Development Fund of the governing ministry, province and city (if any) in accordance with the regulations of the Ministry of Science and Technology;
- Supplementing the provisions that at the time of receiving Fund transfer, if the transferring enterprise is enjoying CIT incentives, the recovered CIT amount will be determined according to the CIT incentives of the transferring enterprise at the time of transfer.

Thirdly, Circular 67 supplements the content on management of assets formed from the Fund, typically:

- Expanding the cases where fixed assets formed from the Fund must be documented for supervision and management in accordance with the law and the depreciation of fixed assets must not be included in tax-deductible expenses

when determining taxable incomes subject to CIT. Specifically, Circular 67 recognizes the case of purchasing machines and equipment for technological innovation, directly serving production and business activities of enterprises in 2 years (in 2022 and 2023) based on the National Assembly's fiscal and monetary policies for supporting the 2022 socio-economic recovery and development program.

- Permitting and guiding the management of assets in the cases where fixed assets are used simultaneously for scientific and technological research as well as production and business activities of enterprises. Specifically, if the fixed assets formed from the Fund have not yet been depreciated fully, are used simultaneously for scientific and technological research as well as production and business activities of an enterprise, the enterprise shall continue the supervision and management under the Ministry of Finance's regulations on management, use and depreciation of fixed assets and is not subject to account fixed asset depreciation into tax-deductible expenses when determining taxable incomes subject to CIT.

COMMENTS AND RECOMMENDATIONS

Circular 67 is promulgated with the aim to remove difficulties and create more favorable conditions for enterprises in fulfilling their tax obligations when setting up and using the Fund, for example, specifying contents related to the determination of tax obligation when enterprises misuse, unuse or underuse 70% of the annual Fund contribution, allowing fixed assets to be used simultaneously for scientific and technological research as well as production and business activities, etc. The provisions of Circular 67 will apply for determination of tax obligations from 2022 CIT period. Enterprises should conduct a thorough study of Circular 67 and related documents in order to set up, manage, and use the Fund in accordance with the provisions of the law.

UPDATES ON FOREIGN EXCHANGE ADMINISTRATION IN RESPECT OF ENTERPRISES' FOREIGN LOAN BORROWING AND REPAYMENT

GIA KHANH

On September 30, 2022, the State Bank of Vietnam (**SBV**) promulgated Circular 12/2022/TT-NHNN on guidelines for foreign exchange administration in respect of enterprises' foreign borrowing and repayment (**Circular 12**), replacing Circular 03/2016/TT-NHNN and its amendments and supplements (Circular 05/2016/TT-NHNN, Circular 05/2017/TT-NHNN). Circular 12 took effect from November 15, 2022 with some notable points as follows:

Firstly, Circular 12 provides further regulations on the implementation of foreign loans after a borrower is divided, separated, consolidated, or merged. Accordingly, Circular 12 stipulates that the organization inheriting the rights and obligations related to foreign loans shall continue to perform the borrower's responsibilities. The determination of the inheriting organization shall comply with the laws on enterprises in cases of division, separation, consolidation, or merger of enterprises. There are 2 scenarios for the situation in which a borrower is divided or separated:

(i) In the case where there is only one inheriting organization, the lender, the newly established organization after division, the separated organization and the separating organization shall conclude an agreement to decide which organization shall inherit the rights and obligations of the borrower divided or separated regarding the foreign loan;

(ii) In the case where several organizations are jointly obligated for foreign loan repayment, these organizations shall:

- enter into a written agreement on authorizing an organization to perform administrative procedures and to conduct reporting regimes related to the foreign loan;
- jointly open an account for foreign borrowing and repayment. In the event that there is no common account for foreign borrowing and repayment, these organizations shall ensure that they open the account for foreign borrowing and repayment at the same bank providing account services with a view to continuing to repay the foreign loan;
- in the event that one of the organizations being jointly responsible for the repayment obligation of a foreign loan is a foreign direct investment (**FDI**) enterprise, the use of the account for repayment of this loan shall be in accordance with Article 6, Circular 12 instead of other regulations on opening and use of FDI capital accounts. The bank at which the organizations with joint responsibility open an account to repay the foreign loan is not mandatory to be the bank where the FDI capital account is opened.

Secondly, Circular 12 supplements cases of amending foreign loans in which borrowers make changes on the Portal for administration of foreign borrowing and repayment without guarantee by the Government. Accordingly, there is no need to register for changes to foreign loans as of November 15, 2022, including:

(i) Change to the plan of interest and fee payment of foreign loans compared to the plan confirmed by the SBV in the written confirmation of registration or confirmation of registration for foreign loans adjustment without changing the method of interest and fee determination as specified in the relevant foreign loan agreement;

(ii) Change (increase or decrease) to the amount of capital withdrawal, repayment of principal, interest, and fees within 100 currency units of the foreign loan currency compared to the registered amount stated in the written confirmation of registration or confirmation of registration for foreign loan adjustment;

(iii) Change to the actual amount of capital withdrawal and principal repayment of a specific period to be fewer than the amount stated in the

plan for capital withdrawal and repayment in the written confirmation of registration or confirmation of registration for foreign loan adjustment.

Thirdly, Circular 12 supplements guidance on foreign exchange administration in respect of asset security for foreign loans. Accordingly, Article 36, Circular 12 stipulates that if there is any activity for the disposal of secured assets, the proceeds gained from the disposal of the secured assets within Vietnamese territory must be transferred to the lender or lender's representative for executing asset secure obligation via a bank serving secured transactions as prescribed in Article 37, Circular 12. In the case where the securing party receives the collateral itself to replace the obligation performance, the borrower is liable for notifying the bank (account service provider) that the loan obligation has been paid by the corresponding form.

Furthermore, the borrower of foreign loans should note the change related to the period for reporting foreign borrowing and repayment without guarantee by the Government. Accordingly, such reports would be made monthly instead of quarterly as previously stipulated under Circular 03/2016/TT-NHNN.

COMMENTS AND RECOMMENDATIONS

With the promulgation of Circular 12, enterprises, especially borrowers of foreign loans, should pay more attention to regulations on division, separation, consolidation or merger of borrowers in the context that a large number of foreign enterprises tend to restructure due to the impact of the economic downturn. The provisions of Circular 12 relative to disposal of secured assets involving foreign loans should also be addressed for implementation at the commercial banks that provide secured transactions services. Besides, they should also address the obligation to notify and prepare documents for the banks to permit the money transfer to fulfill the security obligation for foreign loans. In addition, the update of Circular 12 in terms of administrative procedures (registration, registration for changes to foreign loans, reports on the implementation of foreign loans, and changes in application forms) is necessary for borrowers to comply with the SBV's requirements.

NEW POINTS ON TAX ADMINISTRATION

HAI LINH

On October 30, 2022, the Government issued Decree 91/2022/ND-CP (**Decree 91**) amending Decree 126/2020/ND-CP guiding the Law on Tax Administration (**Decree 126**). Decree 91 takes effect from the time of promulgation and includes a number of outstanding contents as follows:

Firstly, supplementing regulations on the final date of the time limit for submission of tax declaration documents, time limit for tax payment, time limit for tax administration agencies to handle application documents, and validity period of decisions on enforcement of administrative decisions on tax administration. Accordingly, if the last day of the above-mentioned time limits falls on a statutory holiday, the working day immediately following that holiday will be taken as the final date. Previously, Decree 126 did not regulate this issue.

Secondly, supplementing the provision that if a personal income tax declarant is an organization or individual paying income and subject to monthly or quarterly declaration of personal income tax, such declarant is not required to submit the personal income tax declaration documents if there is no withholding personal income tax of income recipients in such month/quarter.

Thirdly, amending regulations on provisional paid tax amounts. Accordingly, enterprises shall temporarily pay corporate income tax for 4 quarters with the provisional paid amount not lower than 80% of the total payable corporate income tax amount according to the annual finalization. It replaces the previous regulations that enterprises temporarily pay for the first 3 quarters with the amount provisionally paid not less than 75% of the total payable corporate income tax according to the annual finalization (point b, clause 6, Article 8, Decree 126).

It should be noted that the regulation on provisional tax payment analyzed above will apply from the tax year 2021 as follows:

(i) By the effective date of Decree 91 (October 30, 2022), if the provisional paid tax for the first 3 quarters of the tax year 2021 is not less than 75% of the payable amount according to the annual finalization, taxpayers do not have to implement the provisions on the rate of provisional payment for 4 quarters specified in Clause 3, Article 1, Decree 91.

(ii) By the effective date of Decree 91 (October 30, 2022), if the provisional paid tax for the first 3 quarters of the tax year 2021 is lower than 75% of the payable amount according to the annual finalization, and the late payment amount is not increased, the taxpayers are entitled to follow the rate of provisional payment for 4 quarters specified in Clause 3, Article 1 of Decree 91.

In the case that the competent agency for inspection and examination has calculated the late payment amount according to point b, point c, point g, clause 6, Article 8, Decree 126, and after applying the rate of provisional payment for the 4 quarters prescribed in clause 3, Article 1 of Decree 91, the late payment amount reduces, the taxpayers shall submit a written request for reduction of late payment amount under Form No. 01/GTCN in the Appendix attached with Decree 91 to the tax agency where the late payment amount incurs (either the directly managing tax agency or the tax agency of the locality where enterprises having activities eligible for corporate income tax incentives). After the reduction, if any late payment amount is overpaid, Article 60 and Chapter VIII of the Law on Tax Administration No. 38/2019/QH14 and its guiding documents shall apply.

Fourthly, supplementing regulations on the time when organizations declare, pay taxes on behalf of individuals who receive dividends or bonuses in form of securities. Decree 126 already addresses tax declaration on behalf of individuals who receive dividends, bonuses in form of securities; however, companies have not yet successfully developed the software to track investors' personal incomes for tax deductions; therefore, it is necessary to delay the

implementation of this regulation. Under Decree 91, regulations on tax declaration on behalf of individuals in Decree 126 shall be implemented from January 1, 2023. In case of individuals receiving dividends in form of securities, the individuals being existing shareholder who receives bonuses in securities are recorded in the investors' securities account until December 31, 2022 and the securities companies, commercial banks where they open securities custody accounts, fund management companies to which individuals entrust their investment portfolios, securities issuers have not yet declared or paid taxes on their behalf. Such individuals shall declare and pay personal income tax in accordance with the laws on personal income tax and be neither administratively sanctioned for late submission of tax declaration documents nor subject to late-payment amounts (if any) as prescribed in clause 11, Article 16 of the Law on Tax Administration from December 05, 2020, to the end of December 31, 2022.

In addition, Decree 91 also promulgates a new form of Notice on cessation of the use of invoices, replacing Form No. 04-1/CC in Appendix III attached with Decree 126.

COMMENTS AND RECOMMENDATIONS

The promulgation of Decree 91 aims to overcome a number of obstacles and difficulties in the process of implementing the provisions of Decree 126. For example, the amended regulation on provisional paid tax amounts is to solve obstacles when implementing the regulations in practice because under Decree 126, by the time limit for provisional payment of corporate income tax of the third quarter, enterprises need to estimate the total payable corporate income tax amount of the whole year as a basis to determine the amount of provisional tax payment of the first 3 quarters of the year (this deadline is October 30 every year for enterprises of which fiscal year coincides with the calendar year). It is unreasonable to require enterprises to estimate the tax payable for the whole year while there are 2 months left to end the year in terms of time, not creating favorable conditions for taxpayers. Or the amendment of regulations on the final date of the time limit for tax declaration submission, time limit for tax payment, time limit for tax administration agencies to handle application documents, and validity period of decisions on enforcement of administrative decisions on tax administration also aims to overcome obstacles for both enterprises and tax authorities when implementing the regulations in practice.

Enterprises should update and research the provisions of Decree 91 to ensure the implementation of tax obligations in compliance with the law.

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