

# LEGAL NEWSLETTER

NHQuang&Associates



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## ***Notable activity in July 2021***

*To implement the Work Plan of the EU Justice and Legal Empowerment Programme in Viet Nam (EU JULE) supported by EU and United Nations Development Programme (UNDP), on July 21, 2021, the Department of Legal Dissemination and Education, the Ministry of Justice, and UNDP Viet Nam organized an online seminar to comment the draft Report on Development of a Comprehensive Strategy to Strengthen Legal Awareness, focusing on vulnerable groups. The report aims to analyze the socio-economic-political context, legal framework and related factors which are necessary for the development of a comprehensive strategy/program to raise legal awareness for the people, focusing on vulnerable groups.*

*At the Seminar, as the team leader, Mr. Nguyen Hung Quang presented a summary of the Report and provided an in-depth analysis of the methodology and recommendations in the Report. The Seminar received a number of comments from other experts, scientists, policymakers, and managers of legal dissemination and education of some localities, thereby contributing significantly to the Report finalization.*

# SOME NEW REGULATIONS ON PRELIMINARY ENVIRONMENTAL IMPACT ASSESSMENT

QUOC KHANH

On May 21, 2021, the Government issued Decree 54/2021/ND-CP on preliminary environmental impact assessment (**Decree 54**) to replace Article 12 of Decree 40/2020/ND-CP. This Decree came into force from the date of signing and provided the following contents:

*Firstly*, the subjects of preliminary environmental impact assessment are investment projects specified in Appendix II, Section I attached with Decree 40/2019/ND-CP. These projects are subject to (i) public investment projects (except for the cases specified at Point a, Clause 1, Article 3, Decree 54), (ii) Public Private Partnership projects, (iii) investment projects that require in-principle approval of investment as prescribed by investment laws, and (iv) projects subject to issuance of investment certificates (except for issuance of investment registration certificates at the request of investors).

*Secondly*, Decree 54 regulates the contents of preliminary environmental impact assessment, including: (i) Assessing the conformity of the investment project location with the national environmental protection strategy and planning, for each region, province and other relevant plannings, (ii) Identifying and forecasting the main environmental impacts of the project based on factors of scale, production technology and implementation location, (iii) Identifying sensitive environmental factors of the investment project area according to the plans on location (if any), (iv) Analyzing, evaluating, selecting the plan regarding scale, production technology, waste treatment technology, project implementation location and solutions for reducing environmental impacts, and (v) Determining the main environmental issues and scope of impact on the environment to be noted in



the process of implementing environmental impact assessment.

*Thirdly*, preliminary environmental impact assessment will be carried out in the process of making pre-feasibility study report, investment in-principle proposal report, application dossier for in-principle approval of investment, application dossier for investment registration certificate. Accordingly, the governmental authorities will consider the contents of preliminary environmental impact assessment during their review and appraisal of investment and construction dossiers.

## COMMENTS AND RECOMMENDATIONS

*Firstly*, preliminary environmental impact assessment is a tool for governmental authorities to filter investment projects with potential risks of environmental pollution right from the stage of investment consideration and approval. Decree 54, hence, contributes to better completion of the "initial filtering tool". Thereby, governmental authorities can assess the impact of investment projects on the environment more accurately.

*Secondly*, the Law on Public Investment, the Law on Investment, the Law on amendment to the Construction Law all govern preliminary environmental impact assessment but there is not yet a specific guidance for preliminary environmental impact assessment while implementing investment projects. This leads to inconsistent contents of preliminary environmental impact assessment in investment projects and makes it difficult for investors in initial investment procedures. After the effective date of Decree 54, investors can base on the Decree to develop the contents of their investment report related to preliminary environmental impact assessment.

Enterprises with projects subject to preliminary environmental impact assessment need to update and research the provisions of Decree 54 to have appropriate implementation plans ensuring the project schedule.

# SEVERAL POLICIES TO SUPPORT EMPLOYEES AND EMPLOYERS FACING DIFFICULTIES DUE TO THE COVID-19 PANDEMIC

MAI PHUONG

With the complicated development of the COVID-19 pandemic, the Government issued the Resolution 68/NQ-CP on July 1, 2021 on Policies to support employees and employers facing difficulties due to the COVID-19 pandemic (**Resolution 68**) and the Decision 23/2021/QD-TTg on July 7, 2021 stipulating the implementation of a number of policies to support employees and employers facing difficulties due to the COVID-19 pandemic (**Decision 23**) to minimize the negative impacts of the pandemic on production, business and people's lives. Some outstanding policies of Resolution 68 and Decision 23 are as follows:

*Firstly, amendment to the contributions of some social insurance regimes for employers and employees*, including: (i) reduction of insurance premiums for occupational accidents and diseases, and (ii) suspension of contributions to the Fund for retirement and survivorship, specifically:

(i) In the *policy of reducing insurance premiums for occupational accidents and diseases*, employers will be entitled to a reduction in the contribution to the Insurance fund for occupational accidents and diseases applied to employees under this regime (except for cadres, civil servants, public employees, People's armed forces, employees in agencies of the Party, the State, administrative agencies, public non-business units that receive salaries from the State budget). The contribution rate will be reduced from 0.3% or 0.5% (in accordance with Article 4, Decree 58/2020/ND-CP) to 0% of the salary fund as the basis for social insurance premiums. Employers will provide the entire amount obtained from the contribution reduced for the employees in prevention and fight against the COVID-19 pandemic. Thus, in essence, during the period when the policy is applied

from July 1, 2021 to June 30, 2022, employees will be supported by the State with an amount equivalent to the contribution to the Insurance fund for occupational accidents and diseases while still being entitled to this insurance regime.

(ii) In the *policy of suspension of contributions to the Fund for retirement and survivorship*, the beneficiaries include both employers and employees. In order to enjoy this incentive, employers need to meet the following conditions: (i) having fully paid social insurance premiums or being under the suspension of contributions to the Fund for retirement and survivorship until the end of April 2021, and (ii) are affected by the COVID-19 pandemic, which results in a downsize in the number of employees engaged in social insurance by at least 15% at the time of application submission compared to April 2021. The number of employees recognized as "being downsized" has been specifically stipulated, which is the total of (i) the number of employees who terminate their employment contracts, working contracts in accordance with laws minus the number of new employees who enter into employment contracts, working contracts from May 1, 2021 to the date the employers submit written requests for this incentive, and (ii) the number of employees who are under suspension of employment contracts/taking unpaid leaves/under work suspension for at least 14 working days within a month.

Regarding the application procedure, from July 1, 2021 to the end of June 30, 2022, employers need to submit written requests to (i) the social insurance agency to which the social insurance premiums are paid, and (ii) the local Department of Labor - Invalids and Social Affairs. Employers and employees will be suspended from making contributions to the Fund for retirement and survivorship for 6 months from the time of application submission. However, if they have been suspended from making contributions to the Fund for retirement and survivorship in accordance with Resolution 42/NQ-CP dated April 9, 2020, Resolution 154/NQ-CP dated October 19, 2020, the total time of contribution suspension must not exceed 12 months.

Second, **preferential loan** for employers to pay the salary for work suspension, production restoration.

Accordingly, employers are entitled to borrow capital from the Bank for Social Policies at an interest rate of 0% and exempt from applying loan security measures with a loan term of no more than 12 months to pay up to 3 months of region-based minimum wage for employees. Regarding loan conditions, in the case of a loan to pay the salary for work suspension, employers must satisfy the following conditions: (i) their employees (who engage in compulsory social insurance up to the month preceding work suspension) are under work suspension for at least 15 consecutive days due to the COVID-19 pandemic from May 1, 2021 to the end of March 31, 2022, and (ii) they have no non-performing loan at credit institutions and foreign bank branches in the loan application time. In the case of a loan to pay the salary for restoring production, the main conditions to be satisfied include: (i) having employees engaging in compulsory social insurance up to the loan application time, (ii) having a production and business recovery plan, and (iii) having no non-performing loan at credit institutions and foreign bank branches in the loan application time. Regarding the application documents, in essence, the documents required are to prove the above conditions, including: (i) Loan application form, (ii) List of employees engaging in compulsory social insurance, Certificate of establishment, (iii) production and business recovery plan, etc.

In addition, Resolution 68 and Decision 23 also stipulate other forms of support, such as cash support for business households, employees who are under work suspension/subject to employment contract termination/under suspension of employment contracts/taking unpaid leaves; support funds for employers' training and improving vocational skills, etc.

## **SOME COMMENTS AND RECOMMENDATIONS**

Being one of the latest supporting resolutions in the fourth wave of COVID-19 pandemic with a relatively wide scope, form and target audience, Resolution 68 not only provides urgent support solutions at the present time but also helps employees and enterprises make the necessary preparations to continue their operation in the near future, especially in the context that in the first five months of 2021, nearly 60,000 enterprises across the country had to shut down, suspend operations or dissolve, which witnesses an increase of 23% compared to the same period in 2020. Moreover, Resolution 68 is recognized as having simple and friendly policies when

reducing the number of administrative procedures by 2/3, helping the beneficiaries enjoy incentives more easily. The composition of the application documents and the processing steps have been simplified to ensure a shorter time for administrative procedures, from 2 to 7 working days depending on each procedure. In the context of the COVID-19 pandemic, State agencies also proactively apply online methods in receiving and returning documents to limit direct contact. For example, Vietnam Social Security has been developing and integrating the function of supporting enterprises in declaring electronic records to enjoy incentives in Resolution 68 on eBH software, such as suspension of contributions to the Fund for retirement and survivorship; support of preferential loan for employers to pay the salary for work suspension, production restoration; support for employees under work suspension, etc.

Resolution 68 is a newly issued document and the processing document procedures to enjoy incentives are continuously updated by State management agencies to further support the people. Therefore, enterprises need to pay attention to the provisions of Resolution 68, guiding documents as well as instructions of local State agencies (via media, email notifications, etc.) to promptly implement procedures and enjoy incentives. In addition, on July 22, 2021, the Government Portal announced and opened an online hotline to support people facing difficulties due to the COVID-19 pandemic in accordance with Resolution 68 and Decision 23. Enterprises and people with urgent problems arising in the process of accessing and benefiting from support policies can send feedbacks and recommendations to the Government Portal in the following ways: (i) Send emails to: [thongtinchinhpheu@chinhpheu.vn](mailto:thongtinchinhpheu@chinhpheu.vn), (ii) Send messages via Email section of Government Information fanpage on Facebook at: <https://www.facebook.com/thongtinchinhpheu>, or (iii) Fill out and send information according to the form at <https://hotro.chinhpheu.vn/> for answers and instructions.



# KEY CHANGES IN THE ADVANCE PRICING AGREEMENT

KHANH QUYNH

On June 18, 2021, the Ministry of Finance issued Circular 45/2021/TT-BTC guiding the application of the Advance Pricing Agreement (**APA**) in tax administration for enterprises with related-party transactions (**Circular 45**). This Circular takes effect from August 3, 2021 and replaces Circular 201/2013/TT-BTC (**Circular 201**) guiding APA application issued previously.

In fact, APA is not a new scheme but it has already been stipulated in the Law on amending and supplementing a number of articles of the Law on Tax Administration 2012 and guided by Circular 201. Accordingly, APA is determined as a form of legal commitment between tax authorities and taxpayers on tax calculation basis, pricing methodologies, or market prices applied to related-party transactions over a fixed period of time in the future on the basis of taxpayers' request.

Notwithstanding several amendments and supplements to regulations on tax administration, the APA scheme is still considered as an useful tool of tax authorities in the prevention of fraud transfer pricing practices and an effective solution of enterprises in reducing the risk of transfer price for related-party transactions. Consequently, the legislative framework for this scheme has been increasingly improved, and is specified in Law on Tax Administration 2019, Decree 126/2020/ND-CP guiding a number of articles of the Law on Tax Administration (**Decree 126**), Decree 132/2020/ND-CP on tax administration for enterprises with related-party transactions (**Decree 132**) and Circular 45 as the latest



document. In this Legal Newsletter, NHQuang shall analyze some notable contents mentioned in Circular 45, including:

## Eligible transactions to be applied for

Eligible transactions for APA application are related-party transactions specified in Clause 2, Article 1 of Decree 132, such as purchase, sale, exchange, assignment and transfer of goods, and provision of services; borrowing, lending, financial services, financial security and other financial instruments; purchase, sale, assignment and transfer of tangible assets, intangible assets and agreements on purchase, sale or common use of resources such as assets, capital, employees and sharing of costs between related parties, except for business transactions involving goods and services whose prices are controlled by the Government in accordance with laws on prices.

Simultaneously, the above-mentioned transactions must satisfy all of the following conditions:

- (i) Actually incurred during the business and production operations of taxpayers and will continuously incur during the APA's covered period;
- (ii) Have the bases to determine the nature of transaction for imposing tax obligations, and benchmark for analyzing, comparing and selecting the arm's length transactions under Articles 6 and 7 of Decree 132, based on the information and data that comply with the provisions in Point b Clause 6 Article 42 Law on Tax Administration 2019.
- (iii) Not be subject to any tax dispute or complaint;
- (iv) Be conducted in a transparent manner and not for the purpose of tax evasion, avoidance, and abuse of any tax treaties;

## Principles of APA application

The proposal for APA is built on 2 core principles: (i) Principle of arm's length transaction, and (ii) Principle of substance over form. Additionally, the principle of APA implementation mandatorily based on taxpayer's official request for APA application, enclosed with necessary dossiers, documents and data fully and accurately provided by taxpayers, is also supplemented.

## APA application procedures; rights and obligations of taxpayers

In essence, these contents are updated and adjusted in conformity with the corresponding provisions of the Law on Tax Administration 2019 and Decree 132. Accordingly, the most prominent amendment is the content related to appraisal of APA application; APA negotiation and discussion are established to clarify the scope of these procedures. In particular, Circular 45 has removed the administrative procedure of consultation before official submission of the application. Moreover, the processing time for administrative procedures is also removed alongside the worldwide trend. On account of complication of APA settlement, especially bilateral or multilateral APAs, even countries with many years of experience in dealing with APA requests do not specify or fix a processing time for this procedure either.

## APA effectiveness and implementation effectiveness

The maximum effective period of a signed APA is 3 years but should not exceed the actual number of years that a taxpayer has operated, declared and paid corporate income tax in Viet Nam.

Any APA application submitted before the effective date of Circular 45 that has not been concluded and whose proposed APA term has not ended by August 3, 2021 will be subject to Circular 45, Law on Tax Administration and Decree 126.

## COMMENTS AND RECOMMENDATIONS

Although the legal framework for APA has been developed and gradually improved, the actual implementation of this scheme still encounters many challenges, especially the limitations in approach of the database sources for APA's application appraisal. Since being specified in the Law on amending and supplementing a number of articles of the Law on Tax Administration 2012 and guided by Circular 201 up to now, there has been few applications for APA and no APA has been successfully signed in Viet Nam yet. This clearly shows that the pursuit of a consensus on the method of determining taxable prices is not just a piece of cake.

From the perspective of taxpayers, the applicable regulations are now creating a "proactive" position for enterprises in applying for APA. Particularly, the APA application must originate from the taxpayers' "voluntariness" rather than the imposition of the tax authority. Therefore, enterprises should weight up the associated pros and cons of APA implementation to choose the most optimal option.

In addition, enterprises should pick over the rights of taxpayers recognized by law in order to optimize such regulations. For example, enterprises reserve the right to invite or hire independent experts who have skills and knowledge suitable for APA's contents to participate in APA discussion and negotiation with tax authorities. Besides, when realizing any disadvantage to taxpayers, enterprises can request for withdrawal of application or termination of negotiation at any time before APA conclusion; or even propose to amend or invalidate a signed APA if it is subject to the cases specified in Clauses 9 and 10, Article 41 of Decree 126.



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