International Tax

KPMG in Vietnam

FOREWORD

Never before have management of tax risk, alignment of tax with business goals, and improvement of efficiency of tax operations played a critical role in the success of a business.

In this edition, KPMG Vietnam (KPMG) explores topical international tax issues to help you make sense of the complexities of the highly-regulated international tax environment.

We will discuss the following issues that were top-of-mind in 2016:

- Capital Gains Tax – Offshore transfer of shares/capital
- Foreign Contractor Tax – The right to use intellectual property
- Notable developments of tax treaties – A glimpse of the US and Panama Treaties

The topics we discuss in this edition reflect Vietnamese tax laws and regulations in place as at the date of this newsletter, and may not reflect changes to laws, regulations, and tax policies enacted after that date.

The information contained herein is intended to be general in nature only.

Advice should be sought to determine if this information is applicable to specific circumstances.

CAPITAL GAINS TAX - OFFSHORE TRANSFER OF SHARES/ CAPITAL

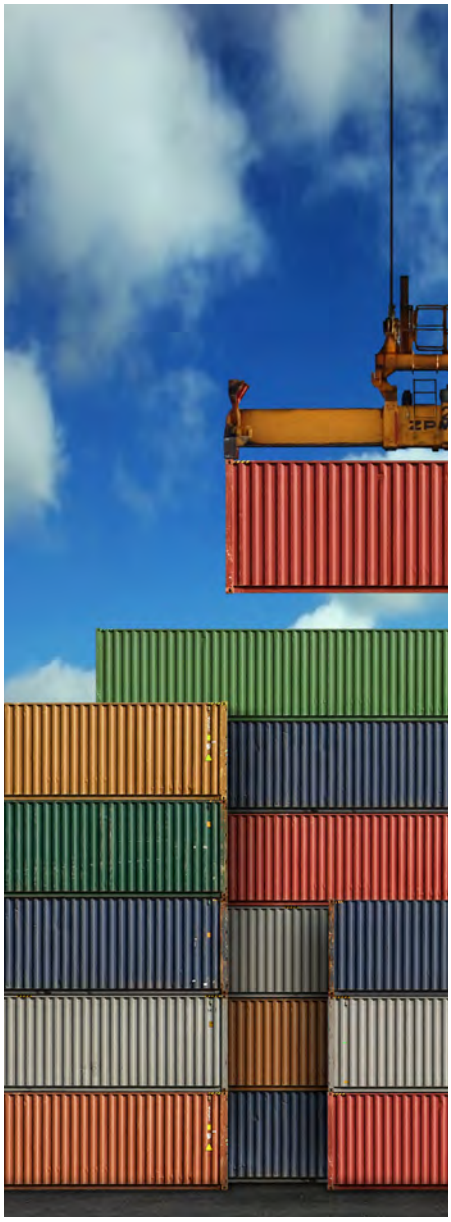
The Law on Corporate Income Tax (CIT) defines income tax payers in Vietnam to include foreign business organisations with or without a Permanent Establishment (PE) in Vietnam earning income arising in Vietnam.

The Vietnamese tax authorities have recently interpreted the above provision to include income derived from indirect/offshore transfer of shares/capital by foreign business organisations and sought to tax such gains or income.

There are no specific guidelines on threshold limits, computation and withholding mechanisms which would apply to offshore/indirect transactions as a general taxation regime. According to some private rulings issued by the fiscal authorities in 2015 and 2016, the Vietnamese tax authorities took a position on tax treatment and collection for some indirect/offshore transfers.

With reference to the oil and gas sector, we have observed that on 26 February 2016, the Ministry of Finance issued Circular 36/2016/TT-BTC ("Circular 36") providing guidance on the tax policies for oil and gas exploration and exploitation activities. According to this Circular, where a company incorporated overseas assigns its capital or shares, or other similar interest in another foreign-based company who directly or indirectly holds the assets or the rights to participate in oil and gas projects in Vietnam, it is considered to have derived income from the transfer of the right to participate in oil and gas agreements in Vietnam, and therefore subject to Vietnamese tax.

The above is seen as a new development in Vietnamese tax authorities' tax collection in respect of offshore capital transfers. Given the absence of general guidelines, each specific transaction should be analysed separately, taking into consideration the Vietnam-based assets of the target offshore company, as well as the jurisdictions of the parties involved to determine application of a specific tax treaty.



FOREIGN CONTRACTOR TAX – THE RIGHT TO USE INTELLECTUAL PROPERTY

Payments made to foreign contractors for the right to use a trademark are subject to FCT at a deemed CIT rate of 10%, and a deemed Value Added Tax ("VAT") rate of 5%, under withholding methods for FCT purposes.

Foreign Contractor Tax (FCT) implications of payments for the right to use the trademark

Several discussions have taken place recently surrounding the FCT implications of payments made to foreign contractors for the right to use a trademark, especially with regards to the VAT component.

Some taxpayers have adopted the practice of declaring VAT exemption for this kind of payment, whilst others declared VAT thereon but at different VAT rates.

In addressing this issue, the Ministry of Finance (MoF) recently issued Official Letter 10453/BTC-CST and Official Letter 15888/BTC-CST to provide clarity, and also to provide guidance to taxpayers on how the guidance of these Official Letters should be implemented/followed.

These OLs specify that,

- if the direct filing/hybrid method is adopted for FCT declaration and payment purposes, the applicable VAT rate is 10%;
- if the withholding method is adopted for FCT declaration and payment purposes, the applicable deemed VAT rate is 5%.

The MoF also provides that:

- those FCT declarations and payments made before 7 November 2016 [the date of the OL15888], but not in accordance with this guideline, need not be amended;
- any FCT declarations and/or payments made after 7 November 2016 must follow this guideline.

TAX TREATIES - A GLIMPSE OF THE US AND PANAMA TAX TREATIES

Up to date Vietnam has 76 treaties with other jurisdictions, of which 67 treaties are in effect.

Vietnam newly signed several Income Tax Treaties with other jurisdictions, which include the United States of America, Panama, Malta, Portugal, Estonia, and the 2016 Protocol to India – Vietnam Income Tax Treaty.

Notable are the United States – Vietnam Income Tax Treaty, and the Panama – Vietnam Income Tax Treaty.

The United States – Vietnam Income Tax Treaty

The United States (US) and the Socialist Republic of Vietnam (Vietnam) signed the first income tax treaty, together with an accompanying protocol, on 7 July 2015.

The Treaty and its Protocol will enter into force upon ratification by both Contracting States.

Once it has taken effect, the Treaty and its Protocol will have an impact on cross-border transactions of both US and Vietnamese investors. Notable provisions under the Treaty, amongst others, are highlighted as follows:

- The definition of a Permanent Establishment (PE) is generally similar, although not identical, to that of most mentioned in other recent treaties between Vietnam with other jurisdictions;
- The term "resident" under the US – Vietnam Treaty is broader compared to most other treaties of Vietnam, to include pensions funds, and exclusively religious, charitable, scientific, artistic, cultural, or educational organisations;
- The treaty limits on payments of interests, and royalties, with a certain of un-common exceptions, are not lower than the Vietnamese withholding FCT rates, therefore the treaty benefits would not be enjoyed by the US residents in this respect;

  The Treaty explicitly excludes payments for leasing ships, aircrafts or containers, if such ships, aircrafts or containers are operated by the lessee in international traffic, from the governance of the provision on royalties in the Treaty. Rather, the provision on Business Profits shall apply.
- Gains from alienation of shares of capital stock of a company whose property does not principally, directly or indirectly, consist of immovable property situated in Vietnam, may not be taxed in Vietnam. The threshold limit on the ownership of the immovable property for the purpose of that provision is 30%. That threshold limit is normally observed at 50% in a number of other recent treaties between Vietnam and other jurisdictions;
- The Treaty includes an Article on LOB (limit of benefit) based on the US model.

The Panama – Vietnam Income Tax Treaty

Panama and Vietnam signed the income tax treaty (together with an accompanying protocol) on 30 August 2016, however, the treaty is not yet in force. Notable is the agreement on the exchange of tax information under this Treaty, which will help the Governments reinforce the tax administrations, especially after the Panama Papers leaks.

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