



March 23, 2021

His Excellency Đinh Tiến Dũng
Minister of Finance
28 Tran Hung Dao, Hoan Kiem District, Hanoi

Re: Draft Circular on Law on Tax Administration Released on Feb. 25, 2021

Dear Minister Dung:

Our organizations represent many of the world's top Internet and technology companies and we appreciate the opportunity to work with you on the government's goal of developing a vibrant and competitive digital economy in Vietnam. We believe this goal can only be realized if the regulatory environment is modern and in-line with global best practices. In this regard, please consider our comments and recommendations on Chapter 9 of the recently released Draft Circular on the Law on Tax Administration.

Chapter 9 of the Draft Circular creates a complex web of Corporate Income Tax (CIT), Value Added Tax (VAT), Permanent Establishment (PE) and Withholding Tax (WHT) obligations – and does not address the overlap with tax treaties entered into by Vietnam. If enacted, this will result in onerous and unnecessary burdens throughout the value chain, including on Vietnamese consumers.

Definitions of E-Commerce Activities and Digital-Based Business

In Article 3, definitions of “e-commerce activities” and “digital-based business” are overly broad and seem to include every business transaction with a Vietnamese customer conducted through the internet.

We recommend a more narrow definition to cover specific business activities. For example, (i) to exclude B2B activities since they are already subject to existing Foreign Contractor Tax (FCT) rules, and/or (ii) to include de minimis thresholds to exclude activities/business with minimal transactions in Vietnam.

Article 3 should provide clear and detailed definitions to allow taxpayers and withholding agents to determine which transactions are in-scope and to minimize confusion and relieve foreign suppliers of administrative and compliance burdens for limited transactions in Vietnam.

Permanent Establishment (“PE”)

The government should clarify its legal authority in including a deemed PE provision in the Draft Circular when it is not in the Law on Tax Administration. We recommend removing paragraph 1 of Article 84 as this is against international tax norms, tax treaty provisions and domestic tax laws on how PE should be defined and determined.

Vietnam is a member of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS). As currently drafted, Article 84 raises questions about Vietnam's interpretation of PE and its commitment to the OECD two-pillar approach since it is not aligned with the current OECD global solution. A key aspect of the two-pillar solution is to require countries to remove and not pursue unilateral gross-revenue tax measures that target foreign businesses. The effect of the Draft Circular will be to implement exactly the type of measure that the Inclusive Framework seeks to prevent. We also seek clarity on Vietnam's plans once a global solution on the taxation of the digitalizing economy is achieved through the OECD process.

Responsibility for Overseas Suppliers to Register, Declare and Pay Tax

Regarding Article 88, 89 and 94, we recommend that Vietnam confirm that tax registration by overseas suppliers is not mandatory. The government needs to clarify the legislative hierarchy between Vietnam's existing FCT rules and the Draft Circular. In situations where overseas suppliers are already subject to FCT, the government should clarify and confirm that since the FCT rules were implemented earlier in time, they obtain legislative precedence and should continue to apply to overseas suppliers. We believe that under these rules, overseas suppliers do not have obligations to register and file for tax in Vietnam.

In situations where foreign suppliers are protected under tax treaties, foreign suppliers should not be required to register for CIT. Moreover, as foreign suppliers are protected under tax treaties, they also should not be required to temporarily pay the CIT. The government should create a mechanism (e.g. information provided in the GDT web portal) to allow Vietnamese B2B customers and financial institutions ("FIs")/WHT agents to take into account foreign supplier's eligibility for tax treaty protection and/or application submitted for tax treaty protection to prevent over-withholding of CIT.

Given this scenario, Vietnam should create separate registration, filings, and forms for VAT and CIT so that overseas suppliers can decide whether to register or not, and whether to register for VAT and/or CIT. In cases where overseas suppliers register for CIT, tax must be determined based on net income, and not on a gross basis as currently provided in the Draft Circular. This recommendation is aligned with international tax norms where CIT is calculated based on net income to allow for deductions of expenses.

We also recommend that Vietnam also include safe harbor rules to avoid double taxation on a transaction when two non-conflicting information sources are used to determine if a transaction arises in Vietnam, as there may still be ambiguity on the location of the customer – or that the information indicates that the transaction may be subject to tax in multiple jurisdictions. The safe harbor should allow the overseas supplier to make the determination to tax the transaction in a single location in a consistent manner.

Regarding the WHT mechanisms provided in the Draft Circular, in cases where Vietnamese customers have agreed contractually that they will bear the tax, in the context of a B2C transaction, FIs/WHT agents need to have this information to avoid wrongly withholding tax on payments made to overseas suppliers. We believe such tax should be due and recovered from Vietnamese customers and that overseas suppliers would not have obligations to register and file for tax in Vietnam. The Draft Circular has not taken such commercial arrangements into account.

Information needs to be available to FIs for them to determine the appropriate taxable base to apply the WHT, depending on the type of transactions. For example, a Vietnamese business sells its products on a foreign e-commerce marketplace, which collects the sales proceeds for orders concluded on the marketplace. The foreign marketplace operator in turn remits the sales proceeds to the Vietnamese seller after deducting its fees/commission. Upon purchase and remittance of the sales proceeds to the foreign marketplace operator by Vietnamese customers, FIs should not withhold tax on the total sale proceeds charged to the customer, as these do not wholly represent the sales proceeds of the foreign marketplace operator. Rather, only a portion of the commission retained or paid to the foreign marketplace operator should be subject to withholding.

Provisions on VAT

VAT on B2B Customers

Under current rules, if a Vietnamese B2B payer remits the VAT component of the FCT, that payer would obtain an input VAT credit, making this VAT component cost-neutral. However, if a non-resident registers to self-remit the VAT component - and collects this VAT from the Vietnamese B2B customer - then the Vietnamese B2B customer would not obtain an input VAT credit under the current VAT rules.

The GDT has verified that the 2020 Law on Tax Administration will not impose new taxes, and that the extended withholding tax obligations (under existing FCT) rules are intended to support local tax collection measures for VAT and CIT.

In this regard, we recommend that the Circular make clear that VAT collected and remitted by a self-registered non-resident should be claimable by the Vietnamese B2B customer as an input VAT credit, just as it is today. There should not be a cost difference to the Vietnamese B2B payer regardless of whether the non-resident self-registers to remit FCT itself or not. We believe it would be reasonable for the business to claim this input VAT credit without having to be issued a statutory VAT invoice by the non-resident.

VAT on B2C Customers

Under current rules, individual payers are not responsible for FCT compliance. Under the new structure, however, Commercial Banks or Intermediary Payment Providers will be responsible to withhold if the payee non-resident is not self-registered. Accordingly, where no VAT collected previously had existed under previous rules, where a non-resident sold to a local B2C customer, the new rules would effectively impose a new VAT obligation on such B2C sales. We recommend that the Circular clarify if this is the intention of these rules.

Entry into Force

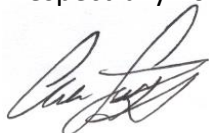
We believe the government should provide a reasonable phase-in period to allow businesses and FIs to build new systems to facilitate compliance with the new tax collection mechanism. This transition period would also allow the MOF/GDT time to perform a broad impact assessment of this measure and put into place necessary web portal and systems. Our members recommend a 12–18-month transition period after all implementing circulars are enacted.

In addition, Articles 88, 89 and 90 should only take effect on the same day that the GDT Web Portal is operational and assessable by overseas suppliers after the transition period. It is unreasonable to expect overseas suppliers to monitor revenue arising in Vietnam from the effective date of this Circular, then perform tax registration, declare and remit tax (including taxes arising from the effective date of this Circular) in the first quarter from the time the system comes into operation.

Our organizations appreciate your efforts during the drafting process to improve the Law on Tax Administration. Our members have an interest in Vietnam's continued success and we hope the recommendations in this letter can minimize double taxation, confusion, and inefficiencies in the current text of Chapter 9. The cost of tax administration in Vietnam is high, and we hope the government will consider our suggestions to reduce administrative complexity and uncertainty under the new circular.

Our organizations place great importance on engagement with the government and we believe that robust dialogue between the government and the private sector helps lead to optimal public policy outcomes. Thank you in advance for your consideration of our comments.

Respectfully Yours,



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