

**No. 205/2013/TT-BTC**

*Hanoi, December 24, 2013*

## **CIRCULAR**

### **Guiding the implementation of the Agreements on avoidance of double taxation avoidance and prevention of fiscal evasion with respect to taxes on income and property between Vietnam and other countries currently in force in Vietnam<sup>1</sup>**

*Pursuant to the current legal documents on enterprise income tax and personal income tax;*

*Pursuant to June 14, 2005 Law No. 41/2005/QH11 on Conclusion, Accession to and Implementation of Treaties;*

*Pursuant to the Agreements on avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and property between Vietnam and other countries and territories currently in force;*

*Pursuant to the Government's Decree No. 118/2008/ND-CP, defining the functions, tasks, powers and organizational structure of the Ministry of Finance;*

*At the proposal of General Director of Taxation;*

*The Minister of Finance promulgates the Circular to guide the fundamental contents of the Agreements on avoidance of double taxation and prevention of fiscal evasion (below referred to as Agreements) with respect to taxes on income and property between Vietnam and other countries and territories (below collectively referred to as Contracting State or State, as the context requires) in force in Vietnam.*

## **Chapter I**

### **GENERAL PROVISIONS**

#### **Section 1**

#### **SUBJECTS AND SCOPE OF APPLICATION**

##### **Article 1. Subjects of application**

This Circular governs subjects that are residents of Vietnam or of the Contracting State to an Agreement concluded with Vietnam or of both.

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<sup>1</sup> Công Báo Nos 127-128 (23/01/2014)

1. Under the Agreements, the term “a resident of the Contracting State” means any person who, under the laws of that State, is liable to tax therein by reason of:

1.1. That person has a home, a period of residence in that State or meets any other criterion of similar nature, in the case of an individual; or

1.2. That person has a place of management, a registered office, or is established in that State or meets any other criterion of similar nature, in the case of an organization; or

1.3. This term covers also the State or local authorities of such State as it is prescribed in the Agreement.

2. Pursuant to the current tax laws of Vietnam, the following person is regarded as a resident of Vietnam:

2.1. An individual who meets either of the following conditions:

a/ Being present in Vietnam for 183 or more days computed in a calendar year or over 12 consecutive months from the first day of presence in Vietnam;

Individuals present in Vietnam under this Point are those who appear in the territory of Vietnam;

b/ Having a habitual abode in Vietnam in either of the following cases:

- Having a registered permanent home available to him/her in accordance with the law on residence;

- Having a house rented for residence in Vietnam in accordance with the law on housing, with the term of house rent contracts of at least 183 days in the taxable year.

In case an individual who has a habitual abode in Vietnam under this Point is actually present in Vietnam for less than 183 days in the taxable year but cannot prove that he/she is a resident of another State, then he/she is a resident of Vietnam.

*Example 1:* In 2010, a Japanese expert worked in Vietnam for 10 months. In June and December, he took a leave to visit his family. In 2009, he resided and worked in Japan. Japan’s taxable year is from April 1 of a year to March 31 of the subsequent year. So, in 2010, for the reason that he worked and habitually resided in Vietnam, he was regarded as a resident of Vietnam for the purpose of taxation though he still has home and family in Japan and holds the Japanese nationality (under Article 4, Clause b of the Vietnam-Japan Agreement). However, for the period from January 2010 to March 30, 2010, he was regarded as a resident of Japan for the purpose of tax finalization in Vietnam and Japan.

2.2. Organizations established and operating under the laws of Vietnam.

3. In case where a person is a resident of both Vietnam and the Contracting State to an Agreement concluded with Vietnam under the provisions of Clauses 1 and 2 of this Article, his/her residence status shall be determined as follows:

3.1. For an individual:

The criteria in the following priority order serve as the ground for determining that the person is a resident of Vietnam:

a/ He/she has a permanent home in Vietnam (house under his/her ownership, rented house or house under his/her use rights);

b/ He/she has permanent homes in both countries but has a closer economic relation in Vietnam such as an employment, a business location, a place for personal property management or closer personal relations in Vietnam such as familial relation (his/her parents, spouse or children residing in Vietnam) or social relation (he/she is a member of a social organization or professional association, etc.);

c/ It is impossible to determine in which country he/she has closer economic or personal relations or if he/she has no permanent home in either of the countries but has a longer time of presence in Vietnam in the taxable year;

d/ He/she is regularly present in both Vietnam and the Contracting State to an Agreement concluded with Vietnam or in neither of the countries but he/she holds the Vietnamese nationality or is identified as a Vietnamese citizen under the principle of effective Vietnamese nationality;

dd/ If he/she holds the nationalities of both Vietnam and the Contracting State to an Agreement concluded with Vietnam or of neither of the countries, the Vietnamese competent authorities and the competent authorities of the other Contracting State shall settle this matter through mutual agreement.

3.2. For a subject that is not an individual:

Specific provisions of each Agreement serve as the ground for determining that a subject that is not an individual is a resident of Vietnam. The Agreements usually provide the following criteria:

a/ If such subject is established or makes registration for operation in Vietnam, it is a resident of Vietnam;

b/ If such subject has its head office in Vietnam, it is a resident of Vietnam;  
or

c/ If such subject has its place of effective management in Vietnam, it is regarded as a resident of Vietnam (the place of effective management is usually a place where high-ranking officers or the leadership of the enterprise meet, consider and discuss matters and make management decisions or decisions on production or business activities of the enterprise, or where the most important accounting books are kept); or

d/ If such subject is established or makes registration for operation in both countries or has its head offices or places of effective management in both countries, the competent authorities of Vietnam and the Contracting State to an Agreement concluded with Vietnam shall determine that it is only a resident of either of the countries through mutual agreement. In case both Contracting States cannot reach a common agreement, it shall not be regarded as a resident for taxation of any country for the purpose of applying the Agreement.

The above provisions on residents are included in the Article Residents (usually Article 4) of the Agreements.

**Article 2. Taxes covered**

Taxes covered by the Agreements are those imposed on income and property specified in each Agreement.

1. In the case of Vietnam, the Agreements covers:

- a/ Enterprise income tax; and
- b/ Personal income tax.

2. In the case of the Contracting States to the Agreements concluded with Vietnam, taxes applicable under the Agreements are specified in Article 2 of the Agreements (usually Clause 3, Article 2).

*Example 2:* Article 2, Clause 3, Point b of the Agreement between Vietnam and State N provides as follows:

“3. Existing taxes to which the Agreement shall apply are:

...

a/ In State N:

- i) Income tax;
- ii) Corporate tax; and
- iii) Local inhabitant taxes on income.”

Under the above provision, in case a locality of State N levies a local inhabitant tax on income of residents and non-residents of State N, such tax falls within the scope of application of the Agreement between Vietnam and State N.

**Article 3. Immunities of members of diplomatic missions and consular posts**

Under the Agreements, the provisions of the Agreements do not affect the immunities of members of a diplomatic mission or consular post prescribed in the international treaties which the Socialist Republic of Vietnam has signed or acceded to.

The above-said provisions on immunities of members of diplomatic missions or consular posts are included in the Article Members of Diplomatic Missions and Consular Posts (usually Article 27) of the Agreements.

## **Section 2**

### **PRINCIPLES OF APPLICATION OF THE AGREEMENTS**

#### **Article 4.** Principles of application of the Agreements

The application and settlement of taxes in each case must be pursuant to the provisions of the relevant Agreement (including the Protocol and/or Letter of Exchange, if any).

#### **Article 5.** Application of the Agreements, tax law and relevant laws

1. In case there are disparities between the provisions of the Agreements and those of domestic tax laws, the provisions of the Agreements shall prevail.

2. The Agreements do not create new tax obligations or tax obligations that are different from or heavier than those prescribed by the domestic tax laws. In case an Agreement contains provisions under which Vietnam is entitled to tax a certain type of income or at a certain rate but Vietnam's current tax law has not yet provided the taxation of such income or provides a lower rate, Vietnam's current tax law shall apply. That means no taxation or taxation at a lower rate.

3. When Vietnam implements the provisions of an Agreement, at a time any term which is not defined in the Agreement will have the meaning it has under Vietnam's laws for the taxation purpose at such time. For a term which is not defined in the Agreement and neither defined nor concurrently defined in the laws of Vietnam and the Contracting State to the Agreement concluded with Vietnam, the competent authorities of both states shall settle the question through the mutual agreement procedure. For a term which is concurrently defined in the tax law and other laws, the definition in the tax law shall apply for the implementation of the Agreements.

**Article 6.** A number of cases of refusal to apply the Agreements on the basis of the principle of benefits of the Agreements

Unless otherwise provided in an Agreement on limitation on benefits, Vietnamese tax agencies shall refuse to apply the Agreement in the following cases:

1. The requester asks for the application of the Agreement to the tax amount levied more than three years before the time of request for application of the Agreement.

*Example 3:* During the period from 2006 to 2012, Vietnamese enterprise V earned an annual income from copyright royalties in Malaysia and annually paid tax in Malaysia under the Vietnam-Malaysia Agreement. On January 1, 2012,

enterprise V submitted a dossier of application for tax deduction under the Vietnam-Malaysia Agreement for the whole tax amount paid in Malaysia during the period from 2006 to 2012. In this case, Vietnamese tax agencies shall only consider tax deduction in Vietnam for the money amount already paid for the tax levied in Malaysia during the three-year period from October 1, 2009, to October 1, 2012.

2. The principal purposes of contracts or agreements are to enjoy tax exemption or reduction under the Agreement.

3. The requester is not the beneficial owner of the income on which the tax amount is requested to be exempted or reduced under the Agreement. The beneficial owner may be an individual, a company or an organization but must have the rights to own and control income, property or income-generating rights. When considering to identify an entity as a beneficial owner, the tax agency shall examine all factors and circumstances related to such entity on the “substance over form” principle because the purpose of the Agreement is to avoid double taxation and prevent fiscal evasion. In the following cases, an entity is not identified as a beneficial owner:

a/ The requester is a non-resident that is obliged to distribute more than 50% of its/his/her income to a resident of a third State within 12 months after receiving the income;

b/ The requester is a non-resident that has no (or almost no) business activity, except the property ownership or income-generating rights;

c/ The requester is a non-resident that has business activities but the quantity of its/his/her property, the scale of business or the number of employees is not proportionate to the received income;

*Example 4:* A bank of a country that has no Agreement concluded with Vietnam establishes a legal entity in France to provide loans in Vietnam and requests tax exemption for loan interests in Vietnam under the Tax Agreement between Vietnam and France. In this case, to determine whether the France-based legal entity is eligible for the application of the Agreement, the Vietnamese tax agency shall base itself on the loan amounts, capability of the France-based legal entity (the number and professional qualifications of employees, quantity of property and other physical foundations) to determine the proportionateness between the income and business scale of the legal entity. If the income of the legal entity is great while it has only one office in France with a few employees, the request for application of the Agreement shall be refused.

d/ The requester is a non-resident that has no (or almost no) right to control or dispose of, and bears no or very little risks for, income, property or income-generating rights;

dd/ The agreements on provision of loans or copyright or technical services between the requester being a non-resident and other entities in Vietnam contain conditions and terms in another agreement which the requester currently has with a third party and in which the requester is the recipient of loans, copyright or technical services;

e/ The requester is a resident of a country or territory that levies no income tax or levies an income tax at a low rate (under 10%) not for the reasons of investment promotion provided in the Agreement;

g/ The requester is an agent or an intermediary company (except the case where an agent or an intermediary company is authorized by a beneficial owner to request the application of the Agreement).

An intermediary agent or intermediary company is a company established in a Contracting State only in order to have a necessary legal form to exist for the only purpose of tax avoidance or reduction or profit transfer without carrying out any essential business activities such as production, trade or service provision.

#### **Article 7. Procedure for settlement of complaints under the Agreements**

The procedure for settlement of complaints under the Agreements is prescribed in the Article of Mutual Agreement Procedure (usually Article 25) of the Agreements.

1. For residents of Contracting States to Agreements concluded with Vietnam

1.1. In case a resident of a Contracting State to an Agreement concluded with Vietnam (below in this Article referred to as complainant) sees that Vietnamese tax agencies determine its/his/her tax obligations at variance with the Agreement, it/he/she may lodge a complaint according to the procedure prescribed by the Vietnam's tax law or legal documents on settlement of complaints.

1.2. The complainant may lodge a complaint not according to the procedure prescribed at Point 1.1 above but directly with a Vietnamese competent authority defined in Article 51 of this Circular or a competent authority of the Contracting State of which it/he/she is a resident for commencement of the mutual agreement procedure under the Agreement. In this case, the complaint must be lodged within 3 years after the tax agency issues the first notice leading to the taxation which is judged to be non-compliant with the Agreement by the complainant.

*Example 5:* On June 1, 2012, Mr. A, a resident of a Contracting State to an Agreement concluded with Vietnam received a personal income taxation decision of the Tax Department of province H and he saw that the tax obligations stated in such decision are non-compliant with the provisions of the

Agreement. After fulfilling the tax obligations stated in the taxation decision, Mr. A may lodge a complaint directly with the General Department of Taxation as the competent Vietnamese authority for settlement of his case. The time limit for him to lodge a complaint is 3 years counting from June 1, 2012.

1.3. To lodge a complaint under Points 1.1 and 1.2 of this Clause, the complainant shall strictly comply with the following provisions:

a/ He shall fulfill the obligations notified in the taxation decisions (tax-related administrative decisions, tax notices, etc.) of the tax agency before and during the course of lodging the complaint. If lodging a complaint about the tax amount calculated or assessed by the tax agency, the complainant shall still fully pay such tax amount, unless the competent state agency decides to suspend the execution of the decision on tax calculation or tax assessment of the tax administration agency;

b/ The competent Vietnamese authority may refuse to settle the complaint if such complaint is or has been settled by the court or is or has been settled according to the complaint settlement procedure of Vietnam; or the time limit for complaint lodging prescribed at Point 1.2 has expired.

## 2. For residents of Vietnam

In case a resident of Vietnam sees that a Contracting State determines its/his/her tax obligations at variance with the Agreement, it/he/she may request the competent Vietnamese authority to commence the mutual agreement procedure provided in the Agreement. Before requesting the competent Vietnamese authority to do so, the complainant shall fulfill the obligations notified in the taxation decisions of the tax agencies of Vietnam and the Contracting State to the Agreement concluded with Vietnam, if the law of such State so requests. The request for commencement by the competent Vietnamese authority of the mutual agreement procedure must be made within 3 years after the Contracting State issues taxation decisions which are seen by the resident of Vietnam as non-compliant with the Agreement.

## **Chapter II**

### **TAXES ON DIFFERENT TYPES OF INCOME**

#### **Section 1**

#### **INCOME FROM IMMOVABLE PROPERTY**

##### **Article 8. Definition of immovable property**

Under the Agreements, the term “immovable property” has the meaning under the law of the Contracting State where the property is situated and covers property accessory to immovable property, livestock and equipment used in agriculture and forestry, benefits enjoyed under the land law, the rights to use immovable property, the rights to enjoy payments for the exploitation of, or the

right to exploit, natural resources. Ships, boats and aircraft are not regarded as immovable property.

Specifically, in the case of Vietnam, immovable property includes:

- Types of property listed in the definition of immovable property in the Civil Code and the Law on Real Estate Business;
- Property accessory to the above-said immovable property;
- Livestock and equipment used in agriculture and forestry;
- Benefits enjoyed under the land law of Vietnam;
- The right to enjoy payments for the exploitation of, or the right to exploit, natural resources.

*Example 6:* A foreign resident will be regarded to have immovable property in Vietnam if such resident owns immovable assets in Vietnam, such as residential houses, construction works attached to land, including assets attached to such houses or construction works, or has the land use rights in Vietnam (under the 2005 Civil Code's Article 174: Immovable property and movable property) and if such resident has livestock in Vietnam directly related to such land use rights, this livestock shall be also regarded as immovable property in Vietnam.

**Article 9.** Determination of tax obligation for income from immovable property

Under the Agreements, all types of income earned by a resident of a Contracting State to an Agreement concluded with Vietnam from the direct use, exploitation or lease of immovable property in Vietnam, including also immovable property of enterprises or independent practitioners, are liable to income tax in Vietnam in accordance with the current tax laws of Vietnam.

*Example 7:* Overseas Vietnamese X is a resident of Singapore, owns a house in Vietnam and uses it for lease. Income from the lease of this house is liable to income tax in Vietnam though such person is not present in Vietnam throughout the taxable period.

The above-mentioned provisions on taxation on income from immovable property are included in the Article of Income from Immovable Property (usually Article 6) of the Agreements.

## **Section 2**

### **BUSINESS INCOME**

**Article 10.** Definition of business income

Under the Agreements, business income means income of enterprises of the Contracting States to the Agreements concluded with Vietnam (below

referred to as foreign enterprises) carrying out production and business activities in Vietnam, excluding the types of income specified in Section 1 and Sections 3 thru 17, Chapter II of this Circular.

**Article 11.** Determination of tax obligation for business income

1. In case foreign enterprises carry out production and business activities in Vietnam without forming legal persons in Vietnam.

1.1. Tax obligation

Under the Agreements, business income of a foreign enterprise will be taxed in Vietnam only if such enterprise has a permanent establishment in Vietnam and such income is directly or indirectly attributed to that permanent establishment. In this case, the foreign enterprise shall be taxed in Vietnam only on the part of income apportioned to such permanent establishment.

1.2. Definition of permanent establishment

1.2.1. Under the Agreements, “permanent establishment” means a fixed place of business of an enterprise, through which the business of the enterprise is wholly or partly carried out.

An enterprise of a Contracting State shall be regarded as having a permanent establishment in Vietnam if it fully satisfies the following three conditions:

a/ Maintaining in Vietnam an “establishment”, e.g. a building, an office or part thereof, a means or equipment, etc.; and

b/ This establishment is fixed, i.e. it must be established at a specified place and/or maintained on a permanent basis. The fixedness of a business establishment does not necessarily mean that such establishment must be attached to a specific geographical location for a certain length of time; and

c/ The enterprise carries out wholly or partly business activities through this establishment.

*Example 8:* Chinese company X opens a stall in a Tet (Lunar New Year) market place in Vietnam, through which it sells goods items. Then, this stall shall be regarded as a permanent establishment of company X in Vietnam.

1.2.2. An enterprise of a Contracting State shall be regarded as carrying out business activities through a permanent establishment in Vietnam in the following major cases:

a/ That enterprise has in Vietnam: place of management, branch (such as branch of a law firm, branch of a foreign office, branch of a tobacco company, branch of a bank, etc.), office (including commercial representative office authorized to negotiate and sign commercial contracts), factory, workshop, mine, oil or gas well, forwarding storehouse, a place of exploration or

exploitation of natural resources, or has equipment and facilities used for the exploration and exploitation of natural resources in Vietnam.

*Example 9:* A foreign subcontractor that uses means, equipment and labor for participation in oil and gas exploration activities in Vietnam shall be regarded as carrying out business activities through a permanent establishment in Vietnam.

b/ That enterprise has in Vietnam a building site, a construction, installation or assembly project, or carries out supervisory activities in connection therewith, provided that such site, project or activities last for more than 6 months or 3 months (depending on each Agreement) in Vietnam.

Building sites, construction or installation projects include the building site, construction of houses, roads, bridges, sewers, installation of pipelines, excavation, dredging, etc. The period (of 6 months or 3 months) is counted from the date the contractor commences the preparation for the construction in Vietnam, such as establishing its office, planning the construction, until the completion and transfer of the entire construction project in Vietnam, including the time of discontinuance of the project for any reasons.

Subcontractors of the Contracting State participating in the above construction, installation or assembly projects shall be also regarded as carrying out business activities in Vietnam through permanent establishments if they meet all the conditions prescribed at Point 1.2.1 above.

The time of execution of projects for the determination of permanent establishments for principal contractors is the sum of the time for the execution of contractual components by subcontractors and the time of execution by the principal contractor.

*Example 10:* Japanese company Z wins the bid for building a bridge in Vietnam. Bridge-building activities proceed as follows: 5 months of building bridge piles by subcontractor Y, also a Japanese company, and 3 months of building the bridge floor and finishing by contractor Z itself. In this case, under Article 5, Clause 3 of the Agreement between Vietnam and Japan, company Z shall be regarded as carrying out business activities in Vietnam through a permanent establishment because the total time of building the bridge is 8 months (5 months + 3 months). Company Y is not regarded as having a permanent establishment in Vietnam.

c/ That enterprise provides services including also consulting services in Vietnam through its employees or another person, provided that these services in a related project or projects last in a period or periods exceeding 183 days in each 12-month period.

*Example 11:* Swedish aircraft-manufacturing company D signs an aircraft maintenance service contract with Vietnam Airlines. Under the contract, during

the period from June 1, 2010, to May 30, 2011, company D sent teams of technical experts to Vietnam to work for a total of 190 days. In this case, under Clause 4, Article 5 of the Agreement between Vietnam and Sweden, company D shall be regarded as having a permanent establishment in Vietnam for the reason that its expert teams worked in Vietnam for more than 6 months in each 12-month period.

*Example 12:* Japanese consultancy company N signs consultancy service contracts with the investor of the project to construct power plant V in Vietnam, including: i) Contract on provision of consultancy services for the construction of the power plant which lasts 4 months from August 1, 2010 to November 30, 2010, and ii) contract on provision of consultancy services for the installation of the system of power generators which lasts 3 months from January 1, 2011, to March 31, 2011. Both contracts require the presence of representatives of company N at the site of construction and installation of power plant V to work throughout the contract term. To perform the contract on provision of consultancy services for the installation of the power plant, company N hires Japanese consultancy company B to perform the contract as its representative. In this case, under Clauses 4 and 5 of the Agreement between Vietnam and Japan, consultancy company N shall be regarded as having a permanent establishment in Vietnam for the reason that the representative of company N at the project is present in Vietnam for more than 6 months in each 12-month period. Consultancy company B shall not be regarded as having a permanent establishment in Vietnam for the reason that it is present in Vietnam for not more than 6 months.

*Example 13:* With the assumptions in example 12, in case consultancy company B and the investor of the project also sign a consultancy agreement during the trial operation period from April 1, 2011, to July 30, 2011, the contract also requires the representative of consultancy company B to be present at the site of trial operation of power plant V throughout the contract term. In this case, under Clauses 4 and 5 of the Agreement between Vietnam and Japan, consultancy company B shall be regarded as having a permanent establishment in Vietnam for the reason that its representative at the project is present in Vietnam for more than 6 months in each 12-month period.

Regarding the provision of services, though the Agreement prescribes that the permanent establishment covers the provision of services, including also consultancy services in Vietnam, through the enterprise's employees or another person, provided that these services in a related project or projects last in a period or periods exceeding 183 days in each 12-month period, the provision of services shall still be regarded as having a permanent establishment in Vietnam for the reason that the service provision period does not exceed 6 months in each 12-month period because of service characteristics and the three

conditions on permanent establishment prescribed at Point 1.2.1 above are still met.

*Example 14:* Swedish aircraft-manufacturing company D signs an aircraft maintenance service contract of a term of 2 years with Vietnam Airlines. Under the contract, annually company D sends teams of technical experts to Vietnam to work for a total of 90 days at the site of aircraft maintenance. In this case, under Clause 1, Article 5 of the Agreement between Vietnam and Sweden, company D shall be regarded as having a permanent establishment in Vietnam for the reason that its expert teams have annually worked at a fixed place in Vietnam (where aircrafts are maintained).

d/ That enterprise in Vietnam has a brokerage agent, a commission agent or any other agent, and such agents devote wholly or most of their agency activities for that enterprise (dependent agent).

*Example 15:* Company V, a resident of Vietnam, signs an agency contract for storage and delivery of paint products with company H, a resident of the United Kingdom. Under this contract, company V is not allowed to act as agent for any other paint manufacturer or distributor. In this case, though having no function to sign contracts or collect money in Vietnam, company V has become a dependent agent of company H. Under the Agreement between Vietnam and the United Kingdom (Clause 6, Article 5: Permanent establishment), company H shall be regarded as having a permanent establishment in Vietnam.

dd/ That enterprise gives a person in Vietnam:

(i) An authority to regularly negotiate and conclude contracts in the name of the enterprise; or sign contracts in his/her name with obligations or responsibilities binding on such enterprise; or

(ii) No such authority, but the right to regularly represent that enterprise in delivering goods in Vietnam.

1.2.3. A foreign enterprise is not regarded as having a permanent establishment in Vietnam in the following cases:

a/ That enterprise uses facilities in Vietnam solely for the purpose of storage or display of its goods.

b/ That enterprise has a stock of goods in Vietnam solely for the purpose of storage or display, of processing by another enterprise.

c/ That enterprise has a fixed place of business in Vietnam solely for the purpose of purchasing goods or collecting information for the enterprise.

d/ That enterprise has a fixed place of business in Vietnam solely for the purpose of carrying out preparatory or auxiliary activities for the enterprise.

1.2.4. In case a company being a resident of the Contracting State to an Agreement concluded with Vietnam controls, or is controlled by, a company

being a resident of Vietnam, or is carrying out business activities in Vietnam (possibly through a permanent establishment or in other forms), neither of the companies may become a permanent establishment of another company.

*Example 16:* A foreign enterprise contributes capital to a joint-venture enterprise or an enterprise with 100% foreign capital in Vietnam. In this case, the joint-venture enterprise or the enterprise with 100% foreign capital shall not be regarded as a permanent establishment of that foreign enterprise.

However, in case the company being a resident of the Contracting State to an Agreement concluded with Vietnam contributes capital to a joint-venture enterprise or an enterprise with 100% foreign capital in Vietnam (including export processing enterprise), such company shall be regarded as having a permanent establishment in Vietnam if:

- The joint-venture enterprise or enterprise with 100% foreign capital regularly negotiates or signs contracts in the name of such company; or signs contracts in its own name but with obligations or responsibilities binding on the foreign company; or

- The joint-venture enterprise or enterprise with 100% foreign capital regularly represents the foreign company in delivering goods in Vietnam; or

- Such foreign company has the right to dispose of the physical-technical foundations of such joint-venture enterprise or enterprise with 100% foreign capital in the course of production or business (i.e. the foreign company uses physical-technical foundations (if any) of the joint-venture enterprise or enterprise with 100% foreign capital in Vietnam in the course of production or business not based on market prices).

### 1.3. Determination of taxable incomes of permanent establishments

1.3.1. The determination of taxable incomes of permanent establishments of foreign enterprises, except foreign bank branches in Vietnam, as guided at Point 1.3.3 below, shall be conducted under documents guiding the implementation of the law on enterprise income tax for foreign organizations and individuals engaged in business activities without forming a legal person in Vietnam or earning incomes in Vietnam.

1.3.2. When determining expenses apportioned by the headquarters or offices of a foreign enterprise to a permanent establishment in Vietnam, the permanent establishment shall be regarded as an independent enterprise jointly carrying out the same or similar activities under the same or similar conditions totally independent from the headquarters or offices of the foreign enterprise. However, in any circumstances, the following amounts apportioned by the headquarters or offices of the foreign enterprise to a permanent establishment in Vietnam shall not be accepted as deductible expenses:

- Copyright royalties or similar payments for the utilization of inventions or similar rights;
- Commissions for services or for management work;
- Loan interests in any form.

1.3.3. The determination of taxable incomes of foreign bank branches in Vietnam shall comply with the guidance on determination of incomes liable to enterprise income tax of legal persons in Vietnam. However, in any circumstances, the following amounts apportioned by the headquarters or offices of foreign banks to their permanent establishments in Vietnam shall not be accepted as deductible expenses:

- Copyright royalties or similar payments for the utilization of inventions or similar rights;
- Commissions for services or for management jobs.

The above provisions on taxation on business incomes are included in the Article of Business Income (usually Article 7) of the Agreements.

2. In case foreign enterprises carry out production and business activities in Vietnam through forming legal persons in Vietnam.

According to Vietnam's current laws, foreign enterprises may conduct business in Vietnam through forming legal persons in Vietnam such as joint-venture enterprises or enterprises with 100% foreign capital.

Under the Agreements, these legal persons are obliged to pay tax on incomes from their production and business activities like other Vietnamese enterprises in accordance with the current Law on Enterprise Income Tax. Incomes that are earned by foreign enterprises in the form of profit divided to investors or income from the transfer of contributed capital amounts (if any) shall comply with the provisions of the relevant articles of the Agreements on Dividends or Income from Alienation of Property.

*Example 17:* A Chinese company T contributes 70% of capital to joint-venture company X in Vietnam. In 2009, joint venture X earned a profit of VND 100 million from its business activities. After paying enterprise income tax (EIT) in Vietnam at the tax rate of 25%, all of its after-tax profit is divided in proportion to capital contributions. In 2010, company T sold 50% of its capital contribution to joint-venture company X for VND 3 billion and collected an interest of VND 50 million on the loans provided to joint-venture X. The tax obligations of joint-venture company X and company T in 2010 are as follows:

- Joint-venture company X pays EIT like other Vietnamese enterprises, specifically:

$$\text{EIT} = \text{VND } 100 \text{ million} \times 25\% = \text{VND } 25 \text{ million}$$

- Chinese company T pays tax in Vietnam under the Agreement as follows:

+ For divided after-tax profit amount (VND 75 million x 70%): It shall pay tax on income from dividends (guided in Section 4. Income from Dividends, Chapter II of this Circular);

+ For income from the transfer of capital contribution (VND 3 billion): It shall pay tax on income from alienation of property (guided in Section 8. Income from Alienation of Property, Chapter II of this Circular);

+ For income from loan interest (VND 50 million): It shall pay tax on income from loan interest (guided in Section 5. Income from Loan Interest, Chapter II of this Circular).

### **Section 3**

#### **INCOME FROM INTERNATIONAL TRAFFIC**

##### **Article 12.** Definition of international traffic

Under the Agreements, international traffic means the carriage of cargo or passengers by ship or aircraft (some cases specified in each particular Agreement may also include means of transport by road of, inland waterway, below referred to as means of transport), conducted by enterprises of the Contracting State, except for the case these transport activities take place solely between two places in Vietnam or in the Contracting State to an Agreement concluded with Vietnam.

*Example 18:* A Japanese enterprise transports passengers and cargo in Vietnam. The following passenger and cargo transport activities of this enterprise shall be regarded as international traffic:

- Carriage of cargo and passengers from a place in Vietnam to a place in Japan (including also the carriage of such cargo and passengers from Hai Phong via Ho Chi Minh City and Osaka to Tokyo);

- Carriage of cargo and passengers from a place in Vietnam to a place outside Vietnam (for example, Singapore);

In case a ship of the above Japanese enterprise carries tourists on a package tour of Ho Chi Minh City - Singapore - Hai Phong; it starts off at Ho Chi Minh City and calls at the Singaporean port, after visiting Singapore, all passengers return to the ship for Hai Phong. In Singapore, this ship does not receive any more passengers. So, the passenger transport on the above voyage shall not be regarded as international traffic (because its departure and final arrival points are in Vietnam, though the ship's voyage consists of a trip occurring outside Vietnam).

**Article 13.** Identification of beneficial owners of the Agreements for incomes from international traffic

Depending on each Agreement, international transport enterprises of the Contracting State shall be identified according to the following criteria:

1. Enterprises are managed by residents of Vietnam or of the Contracting State to an Agreement concluded with Vietnam, or

2. Enterprises have a place of effective management in Vietnam or in the Contracting State to an Agreement concluded with Vietnam, provided that these enterprises own or have the rights to use at least the whole of a means of transport and use such means for cargo and/or passenger transport on international routes (referred to as means of transport directly managed by enterprises).

**Article 14.** Determination of income from international traffic

Depending on the provisions of each Agreement, income from international traffic by the persons stated in Article 13 above is eligible for tax exemption or reduction in Vietnam or in the Contracting State to an Agreement concluded with Vietnam.

The scope of application of tax exemption or reduction in Vietnam to enterprises of the Contracting State to an Agreement concluded with Vietnam covers:

1. Income from international traffic by means of transport directly managed by enterprises and from activities incidental to the international traffic, specifically:

1.1. Turnover from international traffic by means of transport directly managed by enterprises which issue transport documents (tickets, bills of lading or passenger and cargo transport manifests).

1.2. Turnover from the charter of part of means of transport (also referred to as space charter) or from the charter of the whole of means of transport by shipment directly managed by enterprises.

*Example 19:* Japanese shipping company A undertakes to transport cargo of company C from Vietnam to the Netherlands with the freight of USD 300. As shipping company A has no ship under its direct management, it charters a space aboard a ship of shipping company B of Thailand with the freight of USD 250. Apart from the above carriage of cargo for shipping company A, shipping company B also directly transports cargo of other customers on the same voyage with the freight of USD 200. In this case:

- For shipping company A, the amount of USD 300 earned from the transport of cargo for Company C or the amount of USD 50 earned as difference from its transport of cargo for Company C and charter of a space aboard the ship of company B shall all be regarded as income from international traffic by seagoing ship so as to enjoy exemption or reduction under the

Agreement between Vietnam and Japan because Company A does not directly manage the ship (just buying a space aboard the ship of shipping company B). Therefore, it is still liable to fully pay enterprise income tax.

- For shipping company B, the freight of USD 450 shall be regarded as income from international traffic eligible for tax reduction under the Agreement between Vietnam and Thailand (a 50% reduction of payable enterprise income tax).

1.3. Turnover from the carriage of cargo or passengers when the enterprises enter into partnerships to operate on international routes, provided that the enterprises enter into the partnerships on the basis of contributing means of transport directly managed by the enterprises or contributing funds for the operation of the means of transport directly managed by the partnerships and the involved parties use separate transport documents. In this case, turnover shall be determined on the basis of transport documents issued by the enterprises of the partnerships but must not exceed the space limits of the means of transport which the enterprises may exploit in accordance with the partnership agreements.

1.4. Turnover from the carriage of passengers or cargoes by means of transport managed by other enterprises, with international transport documents issued by the enterprises under either of the following two conditions:

a/ Such carriage stage is part of the international trip by the ship or aircraft directly managed by the enterprises and is stated in the transport documents issued by the enterprises themselves;

*Example 20:* Using example 19 above, Japanese shipping company A undertakes to transport cargo of company C from Vietnam to the Netherlands with the freight of USD 300. Yet, shipping company A has ship A1 under its direct management and this ship transports cargo at the second stage from Singapore to the Netherlands. For the first stage from Vietnam to Singapore, company A has to hire shipping company B of Thailand to transport the cargo with the freight of USD 50.

- For shipping company A: the amount of USD 250 (300 - 50) earned from the direct carriage of cargo in international traffic is eligible for tax reduction under the Agreement between Vietnam and Japan).

- For shipping company B: the freight of USD 50 shall be regarded as income from international traffic eligible for tax reduction under the Agreement between Vietnam and Thailand (50% reduction of payable enterprise income tax).

b/ That carriage is conducted on the basis of the agreement on the swapping of a space aboard a means of transport (referred to as space swapping) directly managed by an enterprise for a corresponding space aboard another

means of transport managed by another enterprise. In this case, turnover shall be determined on the basis of transport documents issued by the enterprise itself but must not exceed the space limit the enterprise is allowed to exploit free of charge aboard the means of the counterpart company in accordance with the space swapping agreement.

1.5. Income from the short-term letting (retention) of containers as an activity incidental to the operation of the means of transport directly managed by enterprises, if prescribed in the Agreements.

The nature of incidentality of an activity to the operation of means of transport of the short-term letting (retention) of containers shall be determined to be containers accompanying the means of transport entering a Vietnamese port, containers currently containing imported cargo and the container use charge is included in the freight; income from the short-term letting of containers arises because the cargo recipients retain containers beyond the time limit for free-of-charge use.

1.6. Turnover from the bareboat charter of ships or dry lease of aircraft (referred to as bareboat charter) which is incidental to the international traffic of the means of transport directly managed by the enterprises, if it is specified in the Agreements and fully meets the following three conditions:

a/ The means of transport is being used by the enterprise in international traffic; and

b/ The total chartering time is shorter than the time the means of transport is operated for international traffic by the enterprise itself within 12 months starting or ending the calendar year; and

c/ The charterer does not change the name and call signals of the means of transport.

Bareboat charter means that the charter of a ship whereby the shipowner provides the charterer with a ship, without crew.

Turnover mentioned at Points 1.5 and 1.6 above shall not be regarded as turnover from activities incidental to international traffic for application of the Agreements if enterprises do not derive any turnover stated at Point 1.1, 1.2, 1.3 or 1.4.

2. Where two or more enterprises carry out partnership activities in order to form a partnership without legal person status to carry out international traffic with means of transport directly managed by the partnership and transport documents issued in the name of such partnership, the identification of the scope of tax exemption or reduction under an Agreement shall be made separately for each party to the partnership under the Agreement between Vietnam and the State of which the party to the partnership is a resident or in which the party to the partnership has its place of effective management. The

bases for determination of turnover eligible for tax exemption or reduction are similar to those specified in Clause 1 and such turnover shall be apportioned according to the percentage of turnover divided to the party to the partnership under the partnership contract or agreement.

*Example 21:* The Scandinavian Airlines (SAS) partnership is engaged in transporting international passengers from Vietnam to Northern European countries. Therefore, the airlines' turnover arising in Vietnam shall be apportioned to the parties contributing capital to, and managing, SAS, which are residents of Norway, Denmark or Sweden for application in accordance with each relevant Agreement.

When declaring their tax obligations, the above enterprises shall separately account the above incomes for consideration of enterprise income tax exemption or reduction in accordance with the provisions on income from international. In any circumstances, turnover considered for tax exemption or reduction must not exceed the enterprise income tax-liable turnover of international traffic in accordance with relevant regulations.

Where an Agreement (like the Agreements with Bangladesh, the Philippines and Thailand) provides only a percentage of income tax reduction, enterprises shall pay tax on income from international traffic according to the non-reduction percentage.

The above provisions on taxation on income from international traffic are included in the Article of Ships and Aircraft (usually Article 8) of the Agreements.

## **Section 4**

### **INCOME FROM DIVIDENDS**

#### **Article 15.** Definition of dividends

Under the Agreements, dividends means amounts deducted from after-tax incomes of limited liability companies or joint-stock companies and paid to members of the limited liability companies or shareholders of the joint-stock companies, amounts deducted from after-tax incomes of joint-venture enterprises or wholly foreign-owned enterprises and paid to foreign parties, incomes derived from offshore (indirect) investment activities (excluding loan interests prescribed in Section 5, Chapter II of this Circular) by residents of Vietnam, and Vietnamese enterprises' divided incomes from offshore direct investment activities, which are treated by the Contracting States like dividends.

*Example 22:* Vietnamese enterprise S invests in States X and Y and the situation of its income and tax payment according to the regulations of States X and Y is as follows:

No.		State X	State Y
1	Pre-tax income	100	100
2	Income tax, 28%	28	28
3	After-tax income	72	72
4	Income tax on dividends	14.4 (tax rate of 20%)	Not regarded as dividends
5	Actually received income	57.6	72

So, enterprise S shall be regarded as having overseas dividends of 72 within the scope of the Agreement with State X, and having no dividends within the scope of the Agreement with State Y.

**Article 16.** Determination of tax obligation for income from dividends

1. Under the Agreements, Vietnam is entitled to tax dividends paid by a company being a resident of Vietnam to a resident of the Contracting State to an Agreement concluded with Vietnam at the limit rate set in each Agreement (usually not exceeding 15%), provided that the recipient is the beneficial owner.

2. In case a resident of Vietnam receives dividends from a company being a resident of the Contracting State to an Agreement concluded with Vietnam, this Contracting State is entitled to impose income tax under the provisions of Clause 1 of this Article, and Vietnam is entitled to tax this income in accordance with Vietnam's current tax law; but, at the same time, Vietnam shall apply methods for elimination of double taxation on this income (as prescribed in Chapter III of this Circular: Methods for elimination of double taxation in Vietnam).

3. In case a resident receives dividends which, under Vietnam's current tax law, are not taxed or are taxed at a rate lower than that prescribed in the Agreement, it/he/she shall fulfill the tax obligation prescribed by Vietnam's current tax law.

*Example 23:* A British company invested USD 14 million in a joint venture in Vietnam and in 2010 it received dividends from this joint venture. Under the Vietnam-UK Agreement (Clause 2.a, Article 10: Dividends), Vietnam is entitled to tax income from dividends of this British company at the rate of 7%, but, according to its current tax law, Vietnam does not tax income

from dividends of enterprises, so the British company does not have to pay tax on the above-said income.

**Article 17.** Identification of beneficial owners under the Agreements for income from dividends

Under the Agreements, the provisions on taxation on dividends are applicable only to residents that are concurrently the recipients and beneficial owners of shares, i.e., shareholders. Therefore, in addition to some cases not benefiting from the Agreements under the provisions of Article 6: Some cases of refusal to apply the Agreements on the principle of benefits of the Agreements, the reduction of or exemption from tax on income from dividends under the Agreements is not applicable to:

1. Recipients of paid dividends that are neither shareholders nor residents.

*Example 24:* An investment fund (established by members being residents of the Contracting States to the Agreements concluded with Vietnam) registers in State S to contribute capital to establishing joint-venture company V in Vietnam. This investment fund is not a resident of State S. Both the dividends received by the investment fund from joint-venture company V and the income received by the capital contributors from the dividends divided by the investment fund are not regulated by the Agreements between Vietnam and State S and the States of which the members are residents.

2. Dividends paid by a company being a resident of Vietnam to a Vietnam-based permanent establishment of a resident of the Contracting State to an Agreement concluded with Vietnam.

*Example 25:* Vietnam-based branch CV of French bank C purchases shares from a Vietnamese joint-stock company and receives a dividend. At the request of branch CV, such dividend is transferred directly to bank C headquartered in Paris. In this case, branch CV, not bank C, is the beneficial owner of the dividend. Because branch CV is a Vietnam-based permanent establishment of bank C, so, under the Vietnam-France Agreement (Clause 5, Article 10: Dividends), the provisions on taxation on dividends are not applicable to bank C but the provisions on taxation on business income shall apply (Article 7: Business profits, the Vietnam-France Agreement).

3. Dividends paid by a company being a resident of Vietnam to another Vietnamese company's permanent establishment based in the Contracting State to an Agreement concluded with Vietnam.

*Example 26:* Vietnamese bank V has branch VC in State L, the Contracting State to an Agreement concluded with Vietnam. According to the law of State L, branch VC is regarded as a permanent establishment of bank V in this State. Branch VC purchases shares from a Vietnam-based company and

receives dividends. In this case, the provisions on taxation on dividends in the Vietnam-L Agreement shall not apply.

The above-said provisions on taxation on income from dividends are included in the Article Dividends (usually Article 10) of the Agreements.

## **Section 5**

### **INCOME FROM LOAN INTEREST**

#### **Article 18.** Definition of loan interest

Under the Agreements, “loan interest” means income from loans provided in any forms, secured or not secured by mortgage and with or without the borrower’s right to enjoy profits, including also income from government securities and income from bonds or debentures, including also premiums and prizes attaching to such securities, bonds or debentures.

#### **Article 19.** Identification of tax obligation for income from loan interest

1. Under the Agreements, Vietnam is entitled to tax loan interest arising in Vietnam and paid to a resident of the Contracting State to an Agreement concluded with Vietnam at a limit rate (usually not exceeding 10%), depending on each Agreement, provided that the recipient is the beneficial owner.

Loan interest arising in Vietnam means loan interest which is borne and paid by any resident of Vietnam, including interests borne and paid by the Vietnamese Government and local authorities or Vietnam-based permanent establishments or fixed places of foreign residents.

*Example 27:* Vietnam-based branch QT of Thai bank Q pays to bank Q a loan interest. Because branch QT is a Vietnam-based permanent establishment of bank Q, such interest, under the Vietnam-Thailand Agreement, is regarded as arising in Vietnam and being taxed in Vietnam at the rate of 10% (Clause 2.a, Article 11: Loan interest). However, Vietnam’s current tax rate prescribed for income from loan interest in this case is 5%, so such interest is taxed in Vietnam at the rate of 5% only.

2. In case a resident of Vietnam receives a loan interest arising in the Contracting State to an Agreement concluded with Vietnam, this Contracting State is entitled to tax at source such income as prescribed in Clause 1 above and Vietnam is also entitled to tax this income in accordance with its current tax law but, at the same time, Vietnam shall apply methods for elimination of double taxation on this income (as prescribed in Chapter III of this Circular: Methods for elimination of double taxation in Vietnam).

3. In case Vietnam’s current tax law does not provide taxation on this type of income or provides taxation at a rate lower than that prescribed in the Agreement, the income earner shall fulfill the tax obligation prescribed by Vietnam’s current tax law.

*Example 28:* Using example 27 above, but with the assumption that the loan interest is paid to a resident being an individual in Thailand. Though, under the Vietnam-Thailand Agreement (Clause 2.b, Article 11: Loan interest), Vietnam is entitled to tax such interest at the rate of 15%, but, according to Vietnam's personal income tax law, the applicable tax rate is 5%. Therefore, Vietnam shall collect tax at the rate of 5% only, instead of 15%.

**Article 20.** Identification of beneficial owners under the Agreements for income from loan interest

Under the Agreements, the provisions on taxation on income from loan interests are applicable only to entities that directly provide loans and receive loan interests and are concurrently beneficial owners of such interests, i.e., lenders.

*Example 29:* A Vietnamese company signs a loan contract with bank H of the Republic of Korea (RoK). Under the contract, the Vietnamese company receives a loan from and pays both loan principal and interest to bank H into this bank's account opened at bank C in State C. In this case, RoK bank H is the beneficial owner of the interest, regardless of whether or not State C has concluded a double taxation avoidance agreement with Vietnam.

*Example 30:* Company A residing in Vietnam signs a loan contract with bank C in State X, bank D in State Y and bank E in State Z, and the loan is transferred directly from these banks' accounts to company A. States X and Y have concluded double taxation avoidance agreements with Vietnam. Company A may pay loan interest by: (i) transferring the loan interest directly to banks C, D and E each corresponding to their capital contribution rates; or (ii) transferring the whole loan interest to bank C, then the lenders (banks C, D and E) shall reach agreement on interest division. In this case, the Agreements are applicable to the interest for the syndicated loan of banks C and D in case (i) and bank C in case (ii).

*Example 31:* Using example 30 above, with the assumption that company A pays the loan interest by the following third method: (iii) transferring the whole loan interest to bank E, then the lenders (banks C, D and E) shall reach agreement on interest division. In this case, the Agreements are not applicable to banks C, D and E.

In addition to the cases not benefiting from the Agreements under Article 6: Cases of refusal to apply the Agreements on the principle of benefits of the Agreements, the reduction of or exemption from tax on income from loan interest under the Agreements is not applicable to:

1. Recipients of paid loan interest that are not the lenders.

*Example 32:* A Vietnamese company pays a loan interest to Thai bank C. At the request of this bank, such loan interest is transferred to French bank P

headquartered in Paris. In this case, Thai bank C, not French bank P, is the beneficial owner of the interest. Therefore, bank P is not entitled to request the application of the provisions of the Vietnam-France Agreement for such loan interest.

2. Loan interest arising in Vietnam and paid to a Vietnam-based permanent establishment of a resident of the Contracting State to an Agreement concluded with Vietnam.

*Example 33:* A Vietnamese company pays a loan interest to Vietnam-based branch V of foreign bank C being a resident of Thailand. In this case, the loan interest received by branch V is regarded as ordinary business income (not income from loan interest) of branch V in Vietnam under the provisions of the Vietnam-Thailand Agreement.

3. Loan interest arising in Vietnam and paid to another Vietnamese company's permanent establishment based in the Contracting State to an Agreement concluded with Vietnam.

*Example 34:* Vietnamese bank V has branch VC in State L, the Contracting State to an Agreement concluded with Vietnam. Under the law of State L, branch VC is regarded as a permanent establishment of bank V in this State. Branch VC provides a loan to a company in Vietnam and receives a loan interest. In this case, the provisions on taxation on loan interest under the Vietnam-L Agreement are not applicable.

4. Loan interest arising in Vietnam and paid to a third party's enterprise's permanent establishment based in the Contracting State to an Agreement concluded with Vietnam.

*Example 35:* A Vietnamese company pays a loan interest to State N-based branch N of bank C being a resident of Thailand. In this case, the loan interest received by branch N is not regulated by the Vietnam-Thailand Agreement.

5. Loans not directly transferred from an account of the lender being a resident of the Contracting State to an Agreement concluded with Vietnam.

*Example 36:* Using example 30 above, with the assumption that the whole loan under the contract is transferred to company A from bank E's account; then, the interest on such loan is not regulated by the Agreements.

The above provisions on taxation on income from loan interest are included in the Article Loan Interest (usually Article 11) of the Agreements.

## **Section 6**

### **INCOME FROM ROYALTIES**

#### **Article 21.** Definition of royalties

Under the Agreements, royalties means amounts paid for the use of or the right to use:

1. Copyright of literary, artistic or scientific works, including cinematographic films and tapes or discs used for radio or television broadcasting;
2. Patents;
3. Trademarks;
4. Designs, models, plans, secret formulas or processes;
5. Computer software;
6. Industrial, commercial and scientific equipment;
7. Information related to industrial, scientific and commercial experience.

**Article 22.** Identification of tax obligation for income from royalties

1. Under the Agreements, Vietnam is entitled to tax royalties arising in Vietnam and paid to a resident of the Contracting State to an Agreement concluded with Vietnam at a limit rate (usually not exceeding 10%), depending on each Agreement, provided that the recipient is the beneficial owner.

Royalties arising in Vietnam means royalties borne and paid by any resident of Vietnam, including those borne and paid by the Vietnamese Government and local authorities or Vietnam-based permanent establishments or fixed places of foreign residents.

2. In case a resident of Vietnam receives royalties arising in the Contracting State to an Agreement concluded with Vietnam, this Contracting State is entitled to impose income tax under Clause 1 above and Vietnam is entitled to tax this income in accordance with its current tax law but, at the same time, Vietnam shall apply methods for elimination of double taxation on this income (as prescribed in Chapter III of this Circular: Methods for elimination of double taxation in Vietnam).

*Example 37:* A lubricant-making joint venture in Vietnam signs with a company of the Republic of Korea (RoK) a contract which stipulates that this company transfers to the Vietnamese joint venture its lubricant-making formula for 20 years. When the Vietnamese joint venture pays royalties to the RoK company, it shall, according to Vietnam's current tax law, deduct 10% of the total royalties for payment to the state budget. However, under the Vietnam-RoK Agreement (Clause 2.a, Article 12: Royalties), this joint venture shall make a deduction at 5% only, instead of 10%.

3. In case Vietnam's current tax law does not provide taxation on this type of income or provides taxation at a rate lower than that prescribed in the

Agreements, the income earner shall fulfill the tax obligation as prescribed by Vietnam's current tax law.

*Example 38:* Using example 37 above, but with the assumption that the RoK company contributes as capital to the Vietnam-based joint-venture company the right to use the lubricant-making formula for 20 years. Under the Vietnam-RoK Agreement (Clause 2.a, Article 12: Royalties), Vietnam is entitled to tax royalties of the RoK company at the rate of 5% for the conversion of the right to use the lubricant-making formula into monetary capital. However, according to Vietnam's law, if capital contribution in technology transfer is exempted from income tax, then the RoK company is entitled to tax exemption.

**Article 23.** Identification of beneficial owners of the Agreements of income from royalties

Under the Agreements, the provisions on taxation on royalties are applicable only to entities that are concurrently recipients and beneficial owners of royalties, i.e., persons having the right to own, use and exploit copyright, and, therefore, are not applicable to:

1. Recipients of paid royalties that are not persons having the right to own, use and exploit copyright; or,

2. Royalties arising in Vietnam and directly related to a Vietnam-based permanent establishment of the beneficial owner being a resident of the Contracting State to an Agreement concluded with Vietnam; or,

3. Royalties arising in Vietnam and paid to another Vietnamese company's permanent establishment based in the Contracting State to an Agreement concluded with Vietnam.

*Example 39:* A Vietnam-based branch of a British tobacco company permits a Vietnamese company to use the formula and trademark of the British tobacco company in the Vietnamese company's products on the condition that the branch inspects and supervises the use process. In this case, royalties from the use of the formula and trademark of the British tobacco company are directly related to the branch. Because the branch is a Vietnam-based permanent establishment of the British tobacco company, so under the Vietnam-UK Agreement (Clause 4, Article 12: Royalties), Vietnam is entitled to tax this income like business income (Article 7: Business profits, of the Vietnam-UK Agreement).

The above provisions on taxation on royalties are included in the Article Royalties (usually Article 12) of the Agreements.

## **Section 7**

### **INCOME FROM THE PROVISION OF TECHNICAL SERVICES**

**Article 24.** Definition of technical service charges

Under the Agreements, technical service charges means payments in any forms and made to any entities, other than employees of the payers, for any technical, managerial or consultancy services.

**Article 25.** Determination of tax obligation for income from technical services

1. Under the Agreements, Vietnam is entitled to tax technical service charges arising in Vietnam and paid to a resident of the Contracting State to an Agreement concluded with Vietnam at a limit rate (usually not exceeding 10%), depending on each Agreement, provided that the recipient is the beneficial owner.

Technical service charges arising in Vietnam means payments borne and made in any forms by a resident of Vietnam, including those borne and paid by the Vietnamese Government and local authorities or Vietnam-based permanent establishments or fixed places of foreign residents.

*Example 40:* Company X, a resident of Vietnam, specializes in producing canned fruit. In order to expand its outlets to Europe, it hires company M in Germany to give legal advice on the procedures for opening a branch or finding a sale agent. This consultancy service is provided in Germany and company M has no permanent establishment in Vietnam.

In this case, when paying service charges to company M, company X is obliged to deduct enterprise income tax at a rate not exceeding 7.5% according to the Vietnam-Germany Agreement (Clause 1.b, Article 12: Royalties and technical service charges).

2. In case a resident of Vietnam receives a technical service charge arising in the Contracting State to an Agreement concluded with Vietnam, this Contracting State is entitled to impose income tax under Clause 1 above and Vietnam is entitled to tax this income in accordance with Vietnam's current tax law but, at the same time, Vietnam shall apply methods for elimination of double taxation on this income (as prescribed in Chapter III of this Circular: Methods for elimination of double taxation in Vietnam).

The above provisions on taxation on income being technical service charges are included in the Article Technical Service Charges (usually Article 13) of the Agreements.

**Section 8**

**INCOME FROM THE ALIENATION OF PROPERTY**

**Article 26.** Definition of income from the alienation of property

Income from the alienation of property means income in any forms from the sale or alienation (of the whole or part of) or exchange of the property and

rights over the property, including the case in which the property is brought into a business establishment in exchange for the rights therein.

**Article 27.** Determination of tax obligation for income from the alienation of property

1. Tax obligation for income from the alienation of immovable property in Vietnam

Under the Agreements, Vietnam is entitled to tax income derived from the alienation of immovable property in Vietnam by a resident of the Contracting State to an Agreement concluded with Vietnam in accordance with Vietnam's current tax law.

*Example 41:* A French petroleum oil-exploiting firm transfers its right to exploit petroleum oil at a location in Vietnam's sea; income earned shall be taxed in accordance with Vietnam's law.

2. Tax obligation for income from the alienation of movable property being business property of a Vietnam-based permanent establishment

Under the Agreements, Vietnam is entitled to tax income earned from the alienation of business property by a permanent establishment or the transfer of a Vietnam-based permanent establishment of a resident of the Contracting State to an Agreement concluded with Vietnam in accordance with Vietnam's current tax law.

*Example 42:* Bank branch C of State P (the Contracting State to an Agreement concluded with Vietnam) operates in Hanoi. In 2010, the branch terminated its operation and sold all equipment and property already used for its business purpose. Income from such alienation must be declared for tax payment (after subtracting the residual value of the equipment and property) at the enterprise income tax rate (25%) currently applicable in Vietnam.

3. Tax obligation with respect to income from the alienation of ships, boats and aircraft operating in international traffic

Under the Agreements, income from the alienation of ships, boats and aircraft operating in international traffic (as defined in Article 12 of this Circular: Definition of international traffic) and managed by international transport enterprises of the Contracting State to an Agreement concluded with Vietnam is not taxed in Vietnam.

4. Tax obligation for income from the alienation of capital of foreign investors in foreign-invested enterprises, trusts or partnerships in which the value of immovable property accounts for a major percentage to the total capital of enterprises

Most of the Agreements between Vietnam and other countries provide that Vietnam is entitled to collect income tax in case the foreign parties alienate

their capital in enterprises, trusts or partnerships being residents of Vietnam in which the value of immovable property accounts for a major percentage to the total capital of enterprises.

The percentage of the value of immovable property to the total property of an enterprise is the simple average of the percentages of the values of immovable property to the total property of that enterprise at the time of alienation of property, the time of starting and the time of ending a tax year preceding the year when the property is alienated. The determination of the value of immovable property must be based on the enterprise's audited balance sheets at the above times.

The major percentage of the value of immovable property to the total property of an enterprise shall be determined as follows:

- In case the Agreements specify a percentage or major percentage, the percentage specified in the Agreements shall apply, e.g., over 50% under Clause 4, Article 13 of the Vietnam-Spain Agreement, or under Clause 4, Article 14 of the Vietnam-Oman Agreement, and under Clause 4, Article 13 of the Vietnam-United Arab Emirates Agreement.

- In case the Agreements do not specify a percentage or major percentage, the applicable percentage shall be over 50%.

*Example 43:* On March 30, 2012, an investor being a resident of Indonesia alienated his capital portion in enterprise V in Vietnam. The percentages of the value of immovable property to the total property of enterprise V as of March 30, 2012, January 1, 2011, and December 31, 2011, are 60%, 40% and 53%, respectively. The major percentage of the value of immovable property to the total property of enterprise V for the purpose of identifying the tax obligation of the Indonesian investor shall be determined as follows:

Clause 4, Article 13: Profits from the alienation of property, of the Vietnam-Indonesia Agreement, states:

“4. Profits gained by a resident of a Contracting State from the alienation of shares or relevant interests in a company that has all or most of its property being immovable property situated in the other Contracting State may be taxed in the other State.”

The above stipulation does not provide a specific percentage of the value of immovable property in the company's property, so the percentage of over 50% shall be regarded as major.

The simple average of the percentages of the value of immovable property in the total property of an enterprise shall be determined as follows:

$$(60\% + 40\% + 53\%)/3 = 51\%.$$

So, in this example, the value of immovable property already makes up a major percentage to the total property of company V.

5. Tax obligation for income from the alienation of shares in a Vietnam-based company

Several Agreements provide that income from the alienation of shares of a resident of the Contracting State to an Agreement concluded with Vietnam in a company being a resident of Vietnam must be taxed in Vietnam.

*Example 44:* Clause 5, Article 13: Profits from the alienation of property, the Vietnam-Indonesia Agreement, states:

“Profits from the alienation of shares in a company being a resident of a Contracting State other than shares specified in Clause 4 may be taxed in that State.”

Under the above provision, if a resident of Indonesia earns income from the alienation of shares in a company being a resident of Vietnam, such income shall be taxed in Vietnam.

6. Tax obligation for income from the alienation of other property in Vietnam

Under the Agreements, income earned from the alienation of property other than the kinds of property specified in Clauses 1 thru 5 above in Vietnam by a resident of the Contracting State to an Agreement concluded with Vietnam shall not be taxed in Vietnam.

*Example 45:* A Chinese construction company brings machinery into Vietnam for the construction of a work for 3 months. After the construction period, this company returns home and sells the above machinery in Vietnam. Under the Vietnam-China Agreement, this company has no permanent establishment in Vietnam (Clause 3.a, Article 5: Permanent establishments), so it is not obliged to pay tax in Vietnam (Clause 6, Article 13: Profits from the alienation of property).

The above provisions on taxation on income from the alienation of property are included in the Article Income from the Alienation of Property (usually Article 13) of the Agreements.

## **Section 9**

### **INCOME FROM INDEPENDENT PERSONAL SERVICES**

**Article 28.** Definition of income from independent personal services

Under the Agreements, income from independent personal services means income earned by an individual who is a resident of the Contracting State to an Agreement concluded with Vietnam from independent activities of providing professional services such as scientific, literary, artistic, education or teaching

services, particularly independent professional services of physicians, lawyers, engineers, architects, dentists, accountants and auditors.

Income from independent personal services does not include remuneration from employment (prescribed in the Article Income from Dependent Personal Activities), directors' fees (prescribed in the Article Directors' Fees), pensions (prescribed in the Article Pensions), government services (prescribed in the Article Income from Government Services), income of pupils and students (prescribed in the Article Income of Students), teachers and professors (prescribed in the Article Income of Professors, Teachers and Researchers), and independent performances of artists and athletes (prescribed in the Article Income of Artists and Athletes).

**Article 29.** Determination of tax obligation for income from independent personal services

Under the Agreements, a resident of the Contracting State to an Agreement concluded with Vietnam who provides independent personal services in Vietnam is liable to pay personal income tax in Vietnam in the following cases:

1. Such person conducts independent professional practice through a fixed place.

The term "fixed place" refers to a place or an address of a habitual or stable nature within the territory of a nation, through which a person provides professional services (e.g., a medial counseling room, an architect's or lawyer's office, etc.). The principle for determination of a "fixed place" is similar to that for determination of a "permanent establishment" of an enterprise as stated at Point 1.2, Article 11 of this Circular.

2. Such person is present in Vietnam for 183 days or more in the tax year or within 12 months from the date he/she arrives in Vietnam, depending on each Agreement.

3. Such person earns a certain income, depending on each Agreement, from independent professional practice in Vietnam for a given period of time (usually within a fiscal year).

*Example 46:* In 2012, a physician being a resident of Bangladesh did a surgery in an international hospital in Vietnam and received VND 50,000,000. His presence in Vietnam for doing the surgery last 5 days. Under the Vietnam-Bangladesh Agreement (Clause 1c, Article 15: Independent personal services), such income of VND 50,000,000 exceeds USD 1,500, so he is liable to pay personal income tax in Vietnam.

The above provisions on taxation on income from independent personal services are included in the Article Independent Personal Services (usually Article 14) of the Agreements.

## Section 10

### INCOME FROM DEPENDENT PERSONAL SERVICES

#### **Article 30.** Definition of income from dependent personal services

Under the Agreements, income from dependent personal services means income in the form of remuneration earned by an individual who is a resident of the Contracting State to an Agreement concluded with Vietnam from his/her employment in Vietnam and vice versa. Income from dependent personal services does not include income of individuals in the capacity as independent professional practitioners (prescribed in the Article Independent Professional Services), members of enterprises' directorates (prescribed in the Article Directors' Fees), artistes and athletes (prescribed in the Article Income of Artistes and Athletes), employees serving foreign governments (prescribed in the Article Income from Government Services), and remuneration in the form of pensions (prescribed in the Article Pensions).

#### **Article 31.** Determination of tax obligation for incomes from dependent personal services

1. Under the Agreements, an individual, who is a resident of the Contracting State to an Agreement concluded with Vietnam, earns income from his/her employment in Vietnam, shall pay income tax in Vietnam in accordance with Vietnam's current regulations on personal income tax.

*Example 47.* In 2003, Mr. A, a resident of France, worked for bank branch F, a Vietnam-based branch of a French bank, for 2 months. All of his salary and other incomes were paid by branch F. In the years preceding and following the year 2003, Mr. A was not present in Vietnam. In this case, Mr. A is obliged to pay personal income tax on the income he earned during the time of working in Vietnam in accordance with Vietnam's current regulations on personal income tax.

2. If the individual stated in Clause 1 fully satisfies all the following three conditions, his/her remuneration from the employment in Vietnam shall be exempt from income tax in Vietnam:

a/ That individual is present in Vietnam for less than 183 days in a period of 12 months starting or ending within the taxable year; and

b/ The employer is not a resident of Vietnam, regardless of whether that remuneration is directly paid by the employer or through the employer's representative; and

c/ This remuneration is not borne and paid by the Vietnam-based permanent establishment set up by the employer.

*Example 48:* Japanese company N participates in setting up joint venture S specialized in the distribution of goods in Vietnam. In 2012, company N sent Mr.

Z to Vietnam in the capacity as its representative to negotiate on a contract on company N's supply of sale "know-how" to joint venture S for one month. In the years preceding and following the year 2012, Mr. Z was not present in Vietnam. All of his incomes and expenses were paid by company N. In this case, Mr. Z satisfies all the three conditions stated at Point 2 above, so he is exempt from personal income tax in Vietnam.

3. The term "employer" used at Point 2.b/ refers to real employer. Normally, a person shall be regarded as real employer if he/she has following rights and obligations:

a/ That person has rights over the products and services created by the employee and bearing responsibility as well as risks for such labor;

b/ That person gives instructions and supplies working tools to the employee;

c/ That person is entitled to control and bears responsibility for the workplace.

*Example 49:* Using example 48 above, in 2013, Mr. Z visited Vietnam in the capacity as specialist of joint venture S to guide the application of the "know-how" for 3 months. In the years preceding and following the year 2013, Mr. Z was not present in Vietnam. In the spirit of assisting joint venture S, company N paid for all incomes and expenses of Mr. Z during his working time in Vietnam. In this case, in terms of form, Mr. Z satisfies all three conditions stated at Point 2 above, but, in essence, compared to real employer's criteria, the real employer of Mr. Z during his working time in Vietnam is joint venture S, not company N. So, Mr. Z is not exempt from personal income tax in Vietnam.

4. Income earned by a Vietnamese being a resident of the Contracting State to an Agreement concluded with Vietnam not from his/her employment in Vietnam but from his/her employment overseas shall not be taxed in Vietnam.

*Example 50:* In 2011, Vietnamese construction company V sent its workers to work in its project in Laos for 12 months. Income for their work in Laos shall not be taxed in Vietnam.

5. Income earned by individuals employed aboard ships, boats or aircraft (crews) operating in international traffic by enterprises that are residents of, or have places of effective management in, Vietnam shall be taxed in Vietnam.

*Example 51:* Company S, a Vietnamese sea-shipping company, charters ships and foreign crews to operate on the China-Singapore international route. It is obliged to withhold personal income tax under Vietnam's laws from the salaries paid to individual crewmembers though these salaries constitute part of the ship charter costs.

The above provisions on taxation on income from dependent personal services are included in the Article Dependent Personal Services (usually Article 15) of the Agreements.

## **Section 11**

### **DIRECTORS' FEES**

#### **Article 32.** Definition of directors' fees

Under the Agreements, directors' fees mean incomes received in Vietnam by a resident of the Contracting State to an Agreement concluded with Vietnam in the capacity as a member of the Board of Directors or Managing Board of a company or as a senior manager of an enterprise being a resident of Vietnam; and vice versa. This income does not include salaries received by such members for other functions performed by them as employee, consultant or advisor, salaries of foreigners holding a post in Vietnam-based representative offices of foreign companies. These normal incomes shall be regarded as incomes from dependent personal services (prescribed in Section 10 - Income from dependent personal services, Chapter II of this Circular).

#### **Article 33.** Determination of tax obligation for directors' fees

Under the Agreements, individuals who are residents of the Contracting State to an Agreement concluded with Vietnam receive remuneration in the capacity as members of the Board of Directors, Managing Board or as senior managers of a company being a resident of Vietnam shall pay tax on such type of income in accordance with the regulations on personal income tax in Vietnam (regardless of whether they are present in Vietnam or not).

*Example 52:* A resident of the UK is a member of the Managing Board of a joint venture in Vietnam. In 2012, he worked in Vietnam for a total of 60 days and received remuneration in the capacity as a Managing Board member. Under the Vietnam-UK Agreement and Vietnam's current regulations on personal income tax, that Briton shall pay personal income tax on his remuneration earned for his capacity as a Managing Board member at the current rate (20%) of total income received as applicable to non-residents of Vietnam.

The above provisions on taxation on directors' fees are included in the Article Directors' Fees (usually Article 16) of the Agreements.

## **Section 12**

### **INCOME FROM PERFORMANCES OF ARTISTES AND ATHLETES**

**Article 34.** Definition of income from performances of artistes and athletes

Under the Agreements, income from performances in Vietnam by artistes and athletes means income from art or sport performances in Vietnam by

artistes or athletes themselves, who are residents of the Contracting State to an Agreement concluded with Vietnam; and vice versa.

**Article 35.** Determination of tax obligation for income from performances of artistes and athletes

1. Notwithstanding the provisions of Section 9 - Income from independent professional services and Section 10 - Income from dependent personal services, Chapter II of this Circular, income earned by an individual, who is a resident of the Contracting State to an Agreement concluded with Vietnam, from his/her art, sport performance in Vietnam shall be taxed in accordance with Vietnam's laws.

*Example 53:* In 2012, at the invitation of Vietnamese performance company V, a singer, a resident of the Republic of Korea, gave a performance in Vietnam and received VND 500 million in remuneration. He was in Vietnam for a three-day performance tour. Under the Vietnam-Republic of Korea Agreement (Clause 1, Article 17- Artistes and Athletes), the singer shall pay personal income tax in Vietnam.

2. Notwithstanding the provisions of Section 2 - Business income, Section 9 - Income from independent professional services and Section 10 - Income from dependent personal services, Chapter II of this Circular, income from art or sport performances in Vietnam which is not paid to the performing individuals being residents of the Contracting State to an Agreement concluded with Vietnam but to other persons shall be taxed in Vietnam in accordance with Vietnam's laws.

*Example 54:* Using example 53 above, singers of the Republic of Korea came to Vietnam for performances based on a contract (negotiated and signed in the Republic of Korea) between Vietnamese performance company V and the Star Company of the Republic of Korea. Under the Vietnam-Republic of Korea Agreement (Clause 2, Article 17 - Artistes and Athletes) income of the Star Company under this contract is liable to enterprise income tax in Vietnam.

3. In case the art or sport performances carried out by an individual or a company that is a resident of the Contracting State to an Agreement concluded with Vietnam within the framework of a program of cultural exchanges between the governments of the two countries, income earned from performances in Vietnam by such foreign individual or company is exempt from tax in Vietnam if the Agreement has such provisions.

*Example 55:* In 2012, within the framework of cultural exchange signed between the governments of Vietnam and the Republic of Korea, a singer, a resident of the Republic of Korea, gave one performance in Vietnam and received VND 500 million in remuneration. Under the Vietnam-Republic of

Korea Agreement (Clause 3, Article 17 - Artistes and Athletes), the singer is not required to pay personal income tax in Vietnam.

The above provisions on taxation on income of artistes and athletes are included in the Article Artistes and Athletes (usually Article 17) of the Agreements.

### **Section 13**

#### **PENSIONS**

##### **Article 36.** Definition of pensions

Under the Agreement, pensions means pensions received by a resident of the Contracting State to an Agreement concluded with Vietnam from his/her past employment in Vietnam; and vice versa. This income does not include pensions paid by the governments and local authorities of Vietnam and the Contracting State to an Agreement concluded with Vietnam because this income is regarded as income from Government services (prescribed in Section 14 - Income from Government services, Chapter II of this Circular).

##### **Article 37.** Determination of tax obligation for pensions

Depending on each particular Agreement, pensions shall be taxed:

a/ Only in the State of which the pension recipients are residents; or

b/ Only in the State where pensions are paid; or

c/ Both in the State of which the pension recipients are residents and in the State where the pensions arise, if the pension payers are residents of, or permanent establishments in, such States.

*Example 56:* Mr. F, a French citizen, worked in a private sector in France. Upon his retirement, he came to live in Vietnam. Under Article 17 - Pensions, of the Vietnam-France Agreement, his pensions, received from any French pension fund, shall only be taxed in Vietnam.

*Example 57:* Mr. M, a citizen of Oman, worked in a private sector in Oman. He paid his pension insurance premium to the Pension Insurance Fund of the Omani Government during his working time in the country. He came to live in Vietnam upon his retirement. Under Clause 2, Article 19 - Pensions and social insurance payments, of the Vietnam-Oman Agreement, his pension, received from this pension insurance fund, shall only be taxed in Oman.

*Example 58:* Mr. M, a resident of Denmark, worked in the private sector in Denmark and came to live in Vietnam upon his retirement. Under Article 18 - Pensions and other similar amounts, of the Vietnam-Denmark Agreement, pensions, received from Denmark, shall be taxed in Vietnam and Denmark if Denmark's national law has provisions on taxation on pensions.

The above provisions on taxation on pensions are included in the Article Pensions (usually Article 18) of the Agreements.

## **Section 14**

### **INCOME FROM GOVERNMENT SERVICES**

#### **Article 38.** Definition of Government services

Under the Agreements, income from Government services means wages, salaries or pensions paid by the Government or local authorities of the Contracting State to an Agreement to an individual for the tasks performed for that Contracting State.

#### **Article 39.** Determination of tax obligation for salaries from Government services

1. In case a foreigner sent by the Government of the Contracting State to an Agreement concluded with Vietnam to work in Vietnam for a Vietnam-based organization of that Government or for a program of economic or cultural cooperation or aid between the two States, his/her salary or wage paid by that foreign Government is exempt from income tax in Vietnam even though such person has become a resident of Vietnam for the purpose of performing such jobs.

*Example 59:* Mr. J, a citizen of Japan, works for JICA Vietnam office (of the Japanese Government). His salaries during his working time in Vietnam shall be exempt from personal income tax in Vietnam (Clause 1.a, Article 19, the Vietnam-Japan Agreement).

2. Salaries or wages paid by the Government of the Contracting State to an Agreement concluded with Vietnam shall only be taxed in Vietnam if they are paid to an individual being a resident of Vietnam for the tasks performed for that foreign Government in Vietnam and this individual satisfies one of the following two conditions:

a/ Holds the Vietnamese nationality; or

b/ Was a resident of Vietnam before performing the tasks in Vietnam for the foreign Government.

*Example 60:* Mr. V, a Vietnamese citizen, works in JICA Vietnam office (of the Japanese Government). Mr. V's salaries during his working time in JICA Vietnam office shall be subject to personal income tax in Vietnam according to Vietnam's Law on Personal Income Tax (Clause 1.b (i), Article 19, the Vietnam-Japan Agreement).

#### **Article 40.** Determination of tax obligation for salaries from Government services

2.3. A pension paid to an individual from a fund set up by the Vietnamese State or local authorities (below referred collectively to as the Vietnamese State) or paid directly by the Vietnamese State for his/her previous work for the Vietnamese State shall only be taxed in Vietnam, unless the above-said individual is concurrently a resident of the Contracting State to an Agreement concluded with Vietnam and holds the nationality of that Contracting State. In case the above-said individual is a resident of the Contracting State to an Agreement concluded with Vietnam and concurrently holds the nationality of that Contracting State, his/her pension shall only be taxed in that Contracting State.

*Example 61:* Mr. V, a Vietnamese citizen, worked for the Vietnamese Government and came to live in Japan upon his retirement. His pensions paid from his previous work for the Vietnamese Government shall be exempt from personal income tax in Japan (Clause 2.a, Article 19, the Vietnam-Japan Agreement).

*Example 62:* Mr. J, a citizen of Japan, worked for the Vietnamese Embassy in Japan. He still lived in Japan upon his retirement. His pensions paid for his work for the Vietnamese Government shall only be subject to personal income tax in Japan (Clause 2.b., Article 19, the Vietnam-Japan Agreement).

**Article 41.** Determination of tax obligation for salaries and pensions from Government business services

Notwithstanding the provisions of Articles 39 and 40 above, salaries, wages or pensions paid by a foreign Government to an individual for his/her participation in the foreign Government's business activities in Vietnam, such as activities of railway transport enterprises, postal enterprises or State performance companies, shall be taxed according to regulations, depending on each case as stated in Section 10 - Income from dependent personal services, Section 11- Directors' fees, Section 12- Income of Artistes and athletes, and Section 13- Pensions, Chapter II of this Circular.

The above provisions on taxation on income from Government services are included in the Article Government Services (usually Article 19) of the Agreements.

## **Section 15**

### **INCOME OF STUDENTS, INTERNS AND APPRENTICES**

**Article 42.** Definition of income of students, interns and apprentices

Under the Agreements, income of students, interns and apprentices in Vietnam in service of their education, study or vocational training in Vietnam, falling within the scope of regulation of this Article, only includes:

1. Income received from overseas sources for the purpose of their learning and maintenance in Vietnam.

2. Income received from their employment in Vietnam directly related to the education, study or vocational training in Vietnam (in the case it is specified in the Agreement). In some Agreements, only a certain level of this income is exempt from tax.

**Article 43.** Determination of tax obligation for income of students, interns and apprentices

If immediately before visiting Vietnam for education, study or vocational training, foreign students, interns or apprentices were residents of the Contracting State to an Agreement concluded with Vietnam, they shall be exempt from income tax in Vietnam on the types of income stated in Article 42.

*Example 63:* A student, a resident of China, comes to Vietnam to study folk arts for 4 years. During the time of study in Vietnam, he receives a monthly scholarship of VND 800,000 from China, a monthly income of USD 50 from teaching Chinese at a school in Hanoi and a total annual income of USD 2,500 for participation in Vietnamese folk art performances. Under the Vietnam-China Agreement (Article 20: Students, apprentices and interns), this student shall be exempt from personal income tax on the scholarship and income from art performance within the limit of USD 2,000; and pay tax on income from teaching and the amount in excess of USD 2,000 earned from performances.

The above provisions on taxation on income of students, interns and apprentices are included in the Article Students, Interns and Apprentices (usually Article 20) of the Agreements.

## **Section 16**

### **INCOME OF TEACHERS, PROFESSORS, AND RESEARCHERS**

**Article 44.** Definition of income of teachers, professors, and researchers

Some Agreements specifically provide the taxation of income earned by foreign teachers, professors and researchers from teaching, lecturing and researching activities in Vietnam. This income includes income earned from teaching, lecturing or researching activities at universities or educational establishments recognized by the Vietnamese Government.

**Article 45.** Determination of tax obligation for income of teachers, professors and researchers

1. Income of foreign teachers, professors and researchers from teaching, lecturing or researching activities in Vietnam under Article 44 above shall be

exempt from tax in Vietnam (within the time prescribed in the Agreement) if satisfying the following conditions:

- Immediately before visiting Vietnam for teaching, lecturing or researching activities, foreign teachers, professors or researchers are residents of the Contracting State to an Agreement concluded with Vietnam; and
- To teach, give lecture or conduct research at universities or educational establishments recognized by the Vietnamese Government.

*Example 64:* Under a cooperation program between Vietnam's University V and the Philippine University P, since 2012, University P sent a teacher to give lectures at University V for 3 years. The teacher shall be exempt from personal income tax in Vietnam on remuneration he/she earns from such teaching in University V for 2 years counting from the first day he/she arrives in Vietnam and pays personal income tax on remuneration he/she earns from such teaching in University V in the third year (Clause 1, Article 21: Teachers, professors and researchers, the Vietnam-Philippines Agreement).

2. The above-said tax exemption shall not apply to teaching or researching activities for the own purposes of an individual or a private organization.

*Example 65:* Under a contract signed with Hospital V, a private one in Vietnam, in 2012, a professor, a resident of the Philippines (in the capacity as a party to the contract) came to conduct research at this hospital for 12 months. He/she shall pay personal income tax in Vietnam for remuneration he/she earns from such researching activities under the contract.

The above provisions on taxation on income of teachers, professors and researchers are included in the Article Teachers, Professors and Researchers (usually Article 21) of the Agreements.

## **Section 17**

### **OTHER INCOME**

#### **Article 46.** Definition of other income

Under the Agreements, other income means all other incomes not yet mentioned in other provisions of the Agreements, such as income from lottery win, amounts won from gambling at casinos, financial supports from familial or marital obligations, etc.

#### **Article 47.** Determination of tax obligation for other income

1. Under the Agreements, a resident of the Contracting State to an Agreement concluded with Vietnam, who earns other income from Vietnam, shall pay tax under Vietnam's current tax law. Nevertheless, in some Agreements (for example, the Vietnam-France Agreement, the Vietnam-UK Agreement), Vietnam commits to grant tax exemption for other income in this case.

*Example 66:* Mr. H is a resident of China and Mr. P is a resident of France. During a two-week tour in Vietnam, both of them won a lottery prize of VND 20 million in Hanoi. According to Vietnam's personal income tax regulations, this type of income is irregular, so both of them have to pay tax in Vietnam on this prize. Under the Vietnam-China Agreement (Clause 2 of Article 22: Other income), Vietnam may tax Mr. H's income. Under the Vietnam-France Agreement (Clause 1 of Article 20: Other income), Mr. P's income is exempt from tax in Vietnam.

2. In case other income is related to a Vietnam-based permanent establishment of a resident of the Contracting State to an Agreement concluded with Vietnam, Vietnam is entitled to tax such income in accordance with the provisions of Vietnam's tax law and the provisions of Section 2- Business income and Section 9 - Income from independent professional services, as the case may be, Chapter II of this Circular.

*Example 67:* Bank branch V, a Vietnam-based branch of Japanese bank S, purchases a car of a company in State X and wins a sale promotion prize worth USD 10,000. This car is used for the business purpose of branch V. Notwithstanding the internal policy of bank S, which says that such income must be regarded as income of the headquarters and transferred into bank S's account in Japan, the income being this prize shall still be regarded as actually related to branch V, a Vietnam-based permanent establishment of bank S in accordance with the Vietnam-Japan Agreement (Clause 2 of Article 21), and, therefore, Vietnam is entitled to tax this income in accordance with the provisions of Vietnam's tax law and the provisions of Section 2- Business income, Chapter II of this Circular (Article 7 of the Vietnam-Japan Agreement).

The above provisions on taxation on other income are included in the Article Other Income (usually Article 22) of the Agreements.

### **Chapter III**

#### **RELIEF FROM DOUBLE TAXATION IN VIETNAM**

Under the Agreements, when a taxpayer being a resident of Vietnam derives an income from the Contracting State to an Agreement with Vietnam and has paid tax in that State (under the provisions of the Agreement and that State's laws), Vietnam may still tax such income but, at the same time, it is also obliged to apply methods for elimination of double taxation so that that taxpayer does not have to pay double tax.

Depending on each concluded agreement, Vietnam may apply one or a combination of the methods for elimination of double taxation prescribed in Articles 48, 49, and 50 of this Circular.

#### **Article 48. Tax credit**

In case a resident of Vietnam derives an income from and has paid tax in the Contracting State to an Agreement with Vietnam, if in that Agreement, Vietnam commits to apply tax credit, then, when this resident makes income tax declaration in Vietnam, such income shall be included in his/her taxable income in Vietnam in accordance with Vietnam's tax law and the tax amount already paid in the Contracting State shall be credited against the tax amount payable in Vietnam. The tax credit is effected on the following principles:

a/ Tax already paid in the Contracting State to be credited means a tax prescribed in the Agreements;

b/ The credited tax amount must not exceed the tax amount payable in Vietnam, which is computed on the income derived in the Contracting State in accordance with Vietnam's tax law, but the credit or refund of the tax amount overpaid overseas is not allowed;

c/ The tax amount paid in the Contracting State to be credited means a tax amount arising during the period of a tax year in Vietnam.

*Example 68:* Mr. A is a Lao citizen and a resident of Vietnam in 2011. In 2011, Mr. A earned an income of VND 40,000,000 from his employment for 8 months in Vietnam and an income of VND 80,000,000 from his employment for 4 months (from September 2011 to December 2011) in Laos. A Lao tax year is from October 1 to September 30 of the following year. Under the Agreement between Vietnam and Laos (Clause 1 of Article 15: Dependent personal services), Mr. A shall pay tax in Laos on his income derived from this State at the rate prescribed by the Laos' tax law (20%). It is assumed that Mr. A has no other income apart from the above incomes. In this case, tax declaration and payment and credit of the tax already paid in Laos by Mr. A in Vietnam will be as follows:

- Determination of Mr. A's taxable income in the 2011 tax year (according to Vietnam's tax law):

$$(VND 40,000,000 + VND 80,000,000) = VND 120,000,000$$

- Determination of Mr. A's income tax in the 2011 tax year (according to Vietnam's tax law):

$$(VND 60,000,000 \times 5\% + VND 60,000,000 \times 10\%) = VND 9,000,000$$

- The tax amount paid in Laos (according to Laos' tax law):

$$VND 80,000,000 \times 20\% = VND 16,000,000$$

- The tax amount calculated according to Vietnam's law on the income derived in Laos:

$$VND 9,000,000 : 12 \text{ months} \times 4 \text{ months} = VND 3,000,000$$

So, Mr. A is only entitled to the credit of VND 3,000,000 from the total tax amount of VND 16,000,000 already paid on the income of VND 80,000,000 derived in Laos.

*Example 69:* Vietnamese company V has a permanent establishment in Laos. In 2010, this permanent establishment was determined to have an income of USD 100,000. Under the Agreement between Vietnam and Laos (Clause 1 of Article 7: Enterprise Profit), under Laos' tax law, company V was obliged to pay income tax (at the rate of 20%) on this permanent establishment's determined income. In this case, tax declaration and payment and credit of the tax already paid in Laos by company V in Vietnam will be as follows:

- Determination of the tax amount paid in Laos (according to Laos' tax law):

$$\text{USD } 100,000 \times 20\% = \text{USD } 20,000$$

- Determination of tax amount payable in Vietnam (according to Vietnam's tax law):

$$\text{USD } 100,000 \times 25\% = \text{USD } 25,000$$

- The tax amount further payable in Vietnam:

$$\text{USD } 25,000 - \text{USD } 20,000 = \text{USD } 5,000$$

*Example 70:* Using example 69 above, with the assumption that company V is a joint-venture company eligible for an enterprise income tax rate of 10% in Vietnam. Then, in Vietnam, company V shall make tax declaration and payment and enjoy a credit of the tax already paid in Laos as follows:

- Determination of the tax amount paid in Laos (according to Laos' tax law):

$$\text{USD } 100,000 \times 20\% = \text{USD } 20,000$$

- Determination of the tax amount payable in Vietnam (according to Vietnam's tax law):

$$\text{USD } 100,000 \times 10\% = \text{USD } 10,000$$

- The maximum tax amount to be credited in Vietnam: USD 10,000

In this case, company V shall enjoy a credit of USD 10,000 from the total tax amount of USD 20,000 already paid in Laos. The difference of USD 10,000 (USD 20,000 - USD 10,000) may neither be deducted from the income tax on company V's domestically derived income (if any) nor be transferred to the following year.

#### **Article 49.** Method of credit of presumptive tax

In case a resident of Vietnam derives income from and must pay tax in the Contracting State to an Agreement with Vietnam (a reduced or exempted tax

as a special preference), if, in that Agreement, Vietnam commits to apply the method of credit of presumptive tax, when this resident makes income tax declaration in Vietnam, such income shall be included in his/her taxable income in Vietnam in accordance with Vietnam's tax law and the presumptive tax amount shall be deducted from the tax amount payable in Vietnam. The presumptive tax amount is the tax amount which should have been paid by a resident of Vietnam in the Contracting State to an Agreement with Vietnam on the income derived in that Contracting State, which, however, according to that Contracting State's law, is exempted or reduced as a special preference.

The tax credit is effected on the following principles:

a/ Tax already paid or regarded as having been paid in the Contracting State to be credited means a tax prescribed in the Agreements;

b/ The creditable tax amount must not exceed the tax amount payable in Vietnam, which is computed on the income derived in the Contracting State in accordance with Vietnam's tax law;

c/ The tax amount paid in the Contracting State to be credited means a tax amount arising during the period of a tax year in Vietnam.

*Example 71:* Vietnamese company Q has a permanent establishment in Uzbekistan. In 2010, this permanent establishment was determined to have an income of USD 100,000. According to Uzbekistan's tax law, this income was exempted from tax as a special preference (in case of non-exemption, it will be taxed at the rate of 33%). Company Q was obliged to pay tax in Vietnam at the current rate of 25%. Under the Agreement between Vietnam and Uzbekistan (Clause 5 of Article 24: Relief from Double Taxation), Vietnam is obliged to credit the presumptive tax (the tax amount which should have been paid but exempted in Uzbekistan). In this case, tax declaration and payment and deduction of the presumptive tax amount by company Q in Vietnam will be as follows:

- Determination of the presumptive tax amount in Uzbekistan (according to Uzbekistan's tax law):

$$\text{USD } 100,000 \times 33\% = \text{USD } 33,000$$

- Determination of the tax amount payable in Vietnam (according to Vietnam's tax law):

$$\text{USD } 100,000 \times 25\% = \text{USD } 25,000$$

So, company Q is regarded as having paid, though in fact being exempted from paying, USD 25,000 (out of a total of USD 33,000 computed according to Uzbekistan's tax law before the preference is granted) and have this tax amount deducted from the tax amount payable in Vietnam (meaning that it does not have to pay tax in Vietnam).

**Article 50. Method of indirect credit**

1. In case a resident of Vietnam derives income in the Contracting State to an Agreement concluded with Vietnam, for which an enterprise income tax has been paid before it is divided to him/her/it, and if under such Agreement, Vietnam committed to apply the method of indirect tax credit, when carrying out income tax declaration in Vietnam, such income will be included in the taxable income in Vietnam according to Vietnam's tax law, and the indirect tax amount already paid in the Contracting State will be credited against the tax amount payable in Vietnam. However, in all circumstances, the credited tax amount must not exceed the tax amount payable in Vietnam for the overseas income according to Vietnam's tax law.

The creditable indirect tax amount is the tax amount paid by a joint-stock company being a resident of the Contracting State to an Agreement concluded with Vietnam in such Contracting State in the form of enterprise income tax before paying dividends to a resident of Vietnam, provided that he/she/it controls directly a minimum percentage of the voting power of that joint-stock company (usually 10%).

*Example 72:* Vietnamese company V invested USD 10 million (equivalent to 20% of its equity capital) in Russian company N. In 2010, company N earned an income of USD 100,000 which was subject to taxation under the Russian Federation's tax law (at the tax rate of 30%). After-tax profit of company N was divided to company V up to its equity percentage at the tax rate of 10% in the Russian Federation (under Clause 2.a, Article 10: Dividends, the Agreement between Vietnam and the Russian Federation). Company V shall pay tax under Vietnam's tax law at the current tax rate (25%). In this case, the declaration for tax payment and indirect tax credit by company V in Vietnam will be as follows:

- The pre-tax profit to be enjoyed by Vietnamese company V in the total profit of Russian company N in the Russian Federation is:

$$\text{USD } 100,000 \times 20\% = \text{USD } 20,000$$

- The enterprise income tax amount paid by company N in the Russian Federation for the above profit amount of company V under the Russian Federation's tax law is:

$$\text{USD } 20,000 \times 30\% = \text{USD } 6,000$$

- Company V's after-tax dividend is:

$$\text{USD } 20,000 - \text{USD } 6,000 = \text{USD } 14,000$$

- The tax amount payable by company V in the Russian Federation for such dividend under the Agreement between Vietnam and the Russian Federation is:

$$\text{USD } 14,000 \times 10\% = \text{USD } 1,400$$

- The total tax amount payable by company V in the Russian Federation (including the direct tax amount payable by company V for its dividend and the indirect tax amount payable by company N having investment capital of company V for its total income) is:

$$\text{USD } 1,400 + \text{USD } 6,000 = \text{USD } 7,400$$

- The tax amount payable by company V in Vietnam under Vietnam's tax law is:

$$\text{USD } 20,000 \times 25\% = \text{USD } 5,000$$

In this case, company V may credit up to USD 5,000 from the total tax amount of USD 7,400 payable in the Russian Federation. The difference of USD 2,400 (USD 7,400 - USD 5,000) may not be credited in the tax amount on the domestic income (if any) of company V.

2. Although under the above provision, Vietnam only applies the method of indirect tax credit under the Agreement's commitments, if according to Vietnam's law, overseas incomes of a resident of Vietnam are subject to indirect tax credit, this provision may still apply.

*Example 73:* Using example 72 above, with the assumption that the investment in Russian company N is an offshore direct investment project of Company V under the Vietnamese law, even the investment proportion of Company V accounts for under 10% of the total equity capital of Company N, the method of indirect tax credit shall still apply (Point 21, Article 7, Chapter II of the Ministry of Finance's Circular No. 123/2012/TT-BTC of July 27, 2012, guiding a number of articles of Law No. 14/2008/QH12 on Enterprise Income Tax and guiding the implementation of the Government's Decree No. 124/2008/ND-CP of December 11, 2008, and Decree No. 122/2011/ND-CP of December 27, 2011, detailing a number of articles of the Law on Enterprise Income Tax) although such provision is not included in the Agreement between Vietnam and the Russian Federation (Clause 2, Article 23: Methods for Elimination of Double Taxation).

Notwithstanding the above provisions on application of methods for elimination of double taxation, if under the Agreements, overseas incomes of a resident of Vietnam are exempted from tax in Vietnam, such incomes will be exempted from tax and the tax amount already paid overseas will not be credited (which means such incomes are taxed only once and not subject to the methods for elimination of double taxation). For example: Scholarships of foreign pupils and students during their studies in Vietnam (Section 15: Income of Students, Interns and Apprentices, Chapter II of this Circular).

The above provisions on methods for elimination of double taxation are included in the Article methods for elimination of Double Taxation (usually Article 23) of the Agreements.

#### **Chapter IV**

### **RESPONSIBILITIES AND POWERS OF THE COMPETENT AUTHORITY**

**Article 51.** The competent authority

Under the Agreements, the Vietnamese competent authority in the Taxation Agreements is the Minister of Finance or a representative authorized by the Minister of Finance.

The Minister of Finance may authorize the General Department of Taxation to perform the responsibilities and powers specified in Article 52.

**Article 52.** Responsibilities and powers of the General Department of Taxation in implementation of the provisions of the Agreements

In order to implement the provisions of the Agreements, the General Department of Taxation is authorized by the Minister of Finance to perform the following responsibilities and powers:

1. To issue written notifications on the effect or cessation of effect of each Agreement in the field of taxation upon receiving notifications on the effect of treaties from the Ministry of Foreign Affairs.

2. To direct, guide, examine and inspect Tax Departments and Branches and authorized collecting organizations in the implementation of the Agreements.

3. To act as the Vietnamese competent authority in settling affairs related to the Agreements, including:

a/ Studying and settling disputes, complaints, petitions and other relevant matters arising in the course of implementation of the Agreements with the competent authority of the Contracting State to an Agreement with Vietnam by the mutual agreement procedure specified in the Agreement;

b/ Exchanging information with foreign tax agencies, utilizing information provided by foreign tax agencies and keeping confidential such information under the Agreements;

c/ Implementing measures to support the administrative management of taxation under the Agreements and in compliance with the Vietnamese law.

#### **Chapter V**

### **ORGANIZATION OF IMPLEMENTATION**

**Article 53.** This Circular takes effect on February 6, 2014, and replaces the Ministry of Finance's Circular No. 133/2004/TT-BTC of December 31, 2004, guiding the Double Taxation Avoidance Agreements in respect of taxes imposed on income and property between Vietnam and other countries which are in force in Vietnam. The procedures for application of the Agreements comply with the provisions of the Law on Tax Administration and current guiding documents.

Any problems arising in the course of implementation should be promptly reported to the Ministry of Finance for study and settlement.-

*For the Minister*  
Deputy Minister  
DO HOANG ANH TUAN