NEWS LETTER ASIA

JUNE 2009

CHINA

NEW REGULATIONS ON TECHNOLOGY IMPORT AND EXPORT IN CHINA

The Ministry of Commerce (MOFCOM) promulgated on February 1st 2009 two regulations on technology import and export: "Measures for the Administration of Technologies Prohibited or Restricted from Import" and "Administrative Measures for Registration of Technology Import and Export Contracts". These two regulations effective as of March 1st 2009 replace the former versions dated from February 2002 which are abolished.

First of all, it is noteworthy to specify that in compliance with the "Regulation of the People's Republic of China on Technology Import and Export Administration", the Chinese authorities differentiate three categories of technologies:
- technologies prohibited from transfer or assignment;
- technologies restricted from transfer or assignment ; please note that we should seek MOFCOM's approval prior to the transfer, assignment or licensing;
- technologies allowable for transfer or assignment.

I – Import of restricted technologies

Import of restricted technologies entails obtaining of an import license issued by MOFCOM's local divisions.
The procedure for obtaining of an import license is as follows:

Step 1: the technology importer submits a written request to the local MOFCOM. Within thirty working days, the local MOFCOM should organize an expert committee (in technical and commercial field) so as to check and assess the related technology to be imported. Where the import is approved, the applicant shall be issued a "letter of intent on approval for technology import" (hereinafter referred to as "Letter of Intent") for a valid duration of three years. Then, the import may sign the technology import contract.

Step 2: to get the import license, the importer shall submit to the local MOFCOM the letter of intent, copies of the contract and of the co-contracting party's business licenses. (In addition, the regulation provides for the possibility for the importer to go through steps 1 and 2 concurrently.) The local MOFCOM should give its decision within ten days after application reception. Where the application is approved, the local MOFCOM shall issue to the importer a " technology import license". The contract comes into force on the date of issuance of the license.

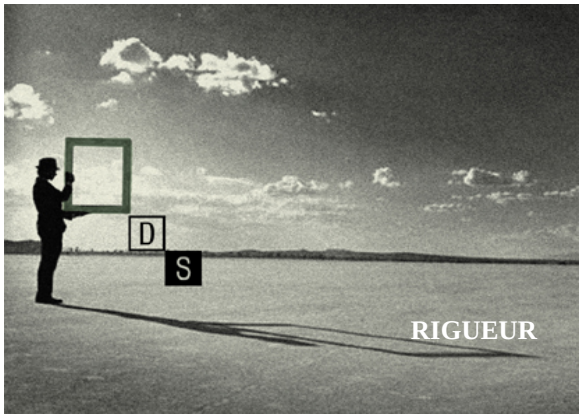
This "technology import license" is a compulsory document which enables in particular the importer to deal with payment formalities of contract price and customs formalities.
Eventually, it is specified that before getting the "technology import license", the importer should complete the registration formalities of his contract as stated hereinafter.

II – Registration of technology import or export contracts

The registration is mandatory for both the approved technologies and restricted ones.

II.1. Contracts subject to registration

Technology import/export contracts, namely patent assignment contracts, patent application assignment contracts, pat-



ent licensing contracts, technology secret licensing contracts, technical service contract and all other contracts related to technology import and export, are subject to registration with the MOFCOM or its local divisions (hereinafter referred to as "MOFCOM").

II.2. Registration time limit

The registration should be processed within 60 days after the contract becomes effective.
Except for contracts providing for a payment by commission, their registration should be carried out within 60 days after the initial date of determination of commission base and each modification of the calculation base is subject to a registration modification. In addition, the applicant should submit documents to justify determination of the calculation base.

II.3. Registration procedure

First of all the applicant proceeds to a preliminary contract registration by Internet (which necessitates getting an identification data card in advance) through the following website: http://fwmys.mofcom.gov.cn/aarticle/b/200607/20060702584399.html, then submits to MOFCOM, an application form for registration, a copy of the contract (compulsorily accompanied with a Chinese version) and a copy of the co-contracting party's business license. Within three days after the documents submission, the MOFCOM shall inform the applicant of his decision, and if approved, issue to the applicant a "technology import (or import) contract registration certificate".
The applicant should register with MOFCOM all modifications arising during implementation of the contract or any early termination of the contract.

II.4. Penalties

Though this regulation's draft provides for a penalty of 30 000 Yuan in case of failure to comply with the registration procedure and in particular with the registration time limit, this provision has been cancelled from the final version. As a result, no special penalty shall be imposed on the co-contracting party failing to respect the registration procedure.

INDIA

TAX DEDUCTION ON EXPATRIATES' SALARIES PAID OUTSIDE INDIA

On March 25, 2009, the Supreme Court of India rendered a landmark ruling in the case *CIT V Eli Lilly & Co. (India) P Ltd*, regarding the taxation in India of the overseas salary paid to expatriates.
In many instances, foreign companies having operations in India choose to depute their employees – who remain on their payrolls - to work for their Indian subsidiary or their Indian joint venture.
Since these foreign companies have no presence in India, the tax on the salary paid to the employees outside India is being paid through advance tax/ self-assessment tax scheme by the expatriate employees.
In the present case, a foreign company seconded expatriates to work in India for a joint venture set up in India with an Indian company. The expatriates rendered services exclusively to the joint venture company in India. They received a portion of their salary from the joint venture company and the other portion from the foreign company outside India. The joint venture company withheld taxes only on the portion of the salary actually paid in India, but not on the overseas salary of the expatriates. The expatriates paid taxes on the salary paid outside India via the advance tax mechanism.

The question brought before the Supreme Court by the Indian revenues authorities was whether TDS (tax deduction at source) provisions were applicable on the payment of overseas salary to the expatriates by the foreign company in respect of the services rendered in India?
Both the Income Appelate Tribunal and the High Court decided that the Indian joint venture was not liable to deduct tax at source on the income received by the expatriates overseas as the salary was not paid or payable by the Indian joint venture.
Overruling the existing case law, The Indian Supreme Court held that an Indian company is responsible for withholding tax on remuneration paid to its expatriates by a foreign company outside India if the services are rendered solely in India.
According to the Apex Court, expatriates' salary paid in consideration of the work performed in India is chargeable to tax in India irrespective of whether the salary amount is received in India or outside India. This is based on the legal assumption that when a person is in India, his entire salary income including the value of perquisites, accrues in India.
The *CIT V Eli Lilly & Co. (India) P Ltd* decision therefore brings within the net of withholding tax any payment chargeable under the head "Salaries" in India.
In cases where the expatriates are seconded to work for the Indian subsidiary or joint venture, then the Indian subsidiary or joint venture will now be under the obligation to make an estimate of income of their employees under the head "Salaries" and to withhold tax on salary paid overseas for services rendered in India.

JAPAN

ACT CONCERNING PARTICIPATION OF LAY JUDGES IN CRIMINAL TRIALS

In conjunction with the lay judge system starting on May 21st of this year, the Act Concerning Participation of Lay Judges in Criminal Trials ("Lay Judges Act") will be implemented. Because companies will be required to take actions for the lay judge system thereby, we would like to introduce the points for which companies should be prepared.

I - Grant of Leave

Article 100 of the Lay Judges Act stipulates that termination and any other prejudicial treatment shall not be taken on the ground of taking leaves to be lay judges. Therefore, companies must grant leaves necessary to report for the lay judge selection procedures and participate in lay judge trials, and it will be necessary to grant leaves for the time period stated in the summons. The number of days for a trial varies depending on cases: while approximately 70% will be completed within 3 days, it is anticipated that there may be cases that take more than 5 days, making it necessary to adjust assignments for smooth operations by conducting the handover, etc. in advance.
With respect to whether the leave will be paid or not, there is no specific stipulation in the Lay Judges Act and it is a matter to be decided by companies. Therefore, it is preferable to clearly address this point by internal rules in advance. Because, in lay judge trials, approximately 50 to 100 individuals will be summoned in order to select 6 lay judges for the particular case, the majority will be dismissed only after the half day (morning) of the summoned date. Hence, it is necessary for companies to clearly establish a rule on whether the non-selected individuals should report to work in the afternoon.

II - Withdrawal from Lay Judges

The grounds to withdraw from lay judges

are listed in Article 16 of the Lay Judges Act, and the sole ground of business will not generally grant withdrawal. However, if up to 2 months are marked as the "months during which being a lay judge is particularly difficult" in the questionnaire enclosed with the notice of the selection as a candidate for a lay judge and the ground to desire withdrawal is convincingly provided, the possibility to be summoned as a candidate for a lay judge will be lowered for the particular 2 months.
Therefore, it will be important for companies to provide proper advices to employees by informing the months during which the employees missing work would be inconvenient and reasons thereof, etc. in order to minimize the interference with the operation.

III - Treatment of Information Sufficient to Identify Lay Judges

It is stipulated in Article 101, Paragraph 1 of the Lay Judges Act that names, addresses and any other identifying information of lay judges, candidates for lay judges and the like shall not be made "public".
Hence, the receipt of notice of being registered to the list of candidates for lay judges shall not be posted by oneself or third parties at locations where unspecified number of individuals can view, such as the Internet, in a manner that enables identification of the individuals.
Nonetheless, there have been numerous prohibited actions of mentioning the receipt of the notice on blogs, etc. in which individuals can be identified. On the other hand, if a candidate for a lay judge is summoned by courts, it is necessary to report to his/her company the fact that he/she has become a candidate because it is necessary to be absent from the company to make appearance to a court.
Hence, in order to clarify to whom one can tell the receipt of the notice, it is necessary to inform employees that it is not illegal to notify the company thereof.
Because, as stated above, the lay judge system may affect companies' operations, it is important to update internal rules to deal with the lay judge system and to take actions to minimize the interference with operations, such as taking due care on allocation of assignments.

SINGAPORE

IMPLEMENTATION OF THE BANKRUPTCY (DEBT REPAYMENT SCHEME) RULES 2009

The Bankruptcy (Amendment) Act 2009, which came into force on May 18th, 2009 implements the Debt Repayment Scheme ("DRS") Rules.

Essentially, the DRS was introduced to create a "win-win" situation for both creditors and debtors.

I - The Debt Repayment Scheme

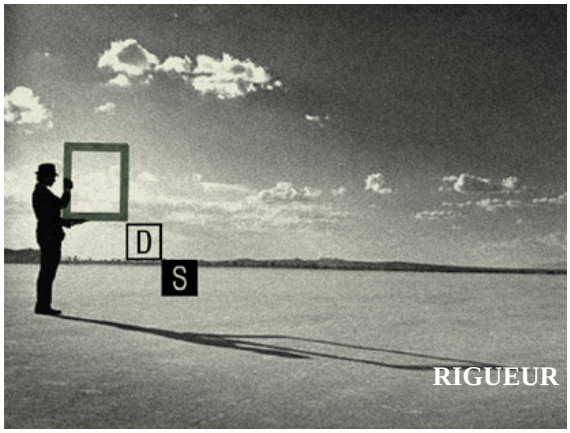
The DRS enables debtors to avoid bankruptcy by repaying their debts in compliance with the repayment scheme and according to their financial capacities.

Hence, a debtor will be given the opportunity to propose a debt repayment scheme, which has to be completed within 5 years, under the supervision of an Administrator.

The Administrator will ensure that the creditors' interests are not compromised, that is, creditors will receive no less than if the debtor had gone into bankruptcy.

A debtor suitable for a DRS will not be made a bankrupt, therefore the disqualification and disabilities of a bankrupt shall not apply to him.

Prior to the implementation of the DRS Rules, the Court would issue a bankruptcy



order following a bankruptcy application.

The Court will now adjourn the bankruptcy application for a period of six months or such other period, as the Court may think fit, and may refer the case to the Official Assignee, which will assess the debtor's financial situation and determine whether he meets the requirements for the DRS.

II - Conditions of suitability for the DRS

A debtor qualifies for a DRS providing the following conditions are met:

- the debts do not exceed SGD 100,000;
- the debtor is not an undischarged bankrupt and has not been a bankrupt at any time within the period of five years immediately preceding the date on which the bankruptcy application was made;
- there is no voluntary arrangement in effect concerning the debtor;
- the debtor is not subject to any DRS and has not been subject to any DRS at any time within a period of five years immediately preceding the date on which the bankruptcy application was made;
- the debtor is not a sole proprietor, a partner of a firm, or a partner of a limited liability partnership.

CASE LAW : PRE-CONTRACTUAL NEGOTIATIONS AND DRAFTS - ADMISSIBLE EVIDENCE - TO INTERPRET UNCLEAR CONTRACTUAL TERMS (SINGAPORE HIGH COURT)

In *Goh Guan Chong v Aspentech Inc. [2009]*, the Singapore High Court held that pre-contractual negotiations and drafts may be admissible for interpreting ambiguous terms of contract, provided they are:

1 - relevant to the final contract;
2 - reasonably available to the parties at the time of the contract; and
3 - they relate to a clear or obvious context.

However, the Court introduces an exception to the principle of "availability to the parties" : extrinsic evidence (ie: evidence related to a contract but not appearing on the face of it because they come from another source) that were available to only one party may be used against that party to determine its subjective intention, thereby revealing, *a contrario*, what the objective intention of the parties could *not* be.

In order to reach its decision the Court had to consider whether extrinsic evidence of pre-contractual negotiations, e-mail correspondence between the defendant's employees and the contract draft could be adduced in evidence to interpret the final employment letter.

This case emphasises the growing consideration given by the Singapore Courts to the contractual intention of the parties for interpreting ambiguous terms of contract.

This decision shows a shift towards a more contextual approach.

Nonetheless, the admissibility of extrinsic evidence such as pre-contractual oral/ written negotiations, correspondence and drafts is not systematic.

Ultimately, it lies upon the judges' discretion to determine, in each case, whether extrinsic evidence are acceptable in light of three criteria: relevance, availability and context.

PROPOSED CHANGES TO MAS' RULES ON PREVENTION OF MONEY LAUNDERING AND TERRORISM FINANCING

Pursuant to Singapore's decision to ratify the United Nations Convention Against Corruption (UNCAC), amendments to the Monetary Authority of Singapore ("MAS") Anti-Money Laundering and Countering of Terrorism Financing Notices would be required in order to bring Singapore's rules in

line with the UNCAC' s requirements.

Accordingly, three main issues are under review and proposed amendments are as follows:

I - Proposed change to enhance customer due diligence requirements

The UNCAC requires that financial institutions carry out customer due diligence on both foreign and domestic "Politically Exposed Person" ("PEP") as well as their family members and close associates.

In order to comply with the UNCAC' s requirements, the MAS proposes to extend the rule on "politically exposed person", which currently only refers to "foreign politically exposed person" to "local politically exposed person", thereby formally putting Singapore PEPs under scrutiny.

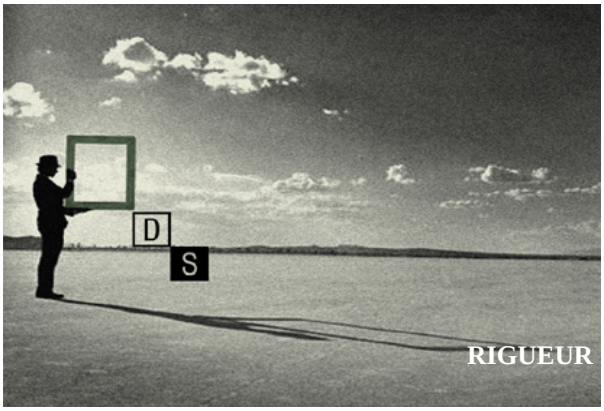
In practice, this change shall increase financial institutions' obligations to obtain information on the source of the funds that Singaporeans PEPs wish to deposit into an account and ascertain the source of their incomes.

This change will also affect the "financial institutions – customers' relations", since the clients' transactions will be closely monitored.

II - Proposed change to "simplified" customer due diligence requirements

The MAS proposes to amend its rules so that no simplified due diligence measures shall be accepted whenever there is a suspicion of money laundering or terrorism financing.

This change narrows down the scope of simplified due diligence measures by introducing a pre-requirement for the implementation of such simplified due diligence.



However, once this requirement is met, the implementation or operation of the simplified due diligence remain unchanged.

III - Proposed change to performance of customer due diligence measures by intermediaries

The MAS intends to spell out that the burden lies on financial institutions to immediately collect the information pursuant to a customer due diligence from the intermediary obtaining the due diligence information and material.

This proposed amendment is of significant importance, since under the current MAS Notice, financial institutions acting as intermediaries are not required to provide customer due diligence information right away, instead they are only required to do so upon request from the financial institution concerned.

It is at present time not mandatory for financial institutions to request information from their intermediary.

Therefore, this amendment would not only make the request for information immediate but also compulsory.

THAILAND

MANAGING THROUGH DIFFICULT TIMES

The consequences of the current economic crisis have not spared Thailand.
Managing employees through this difficult time can be a real challenge. Here is an overview of the different strategies HR directors should think of.

I - Negotiation

The first step is to negotiate with the employees or at the superior level, with Labor

unions or employee committee. Any amendment made to the terms and conditions of employment such as bonus, overtime, holidays has to be formalized in written and signed by the concerned parties.
The Personal Policy Rules (PPR) can also be amended after negotiation, but then the signed PPR must be filled at the local labor inspection.

II - Voluntary resignation

The idea is to convince the employee to resign instead of waiting that the HR director takes the decision to terminate his/her employment.
According to the Social Security Office (SSO) regulations, employees are entitled to a compensation paid by SSO, equivalent to 30% of their most recent gross wage (for the part not exceeding 15 000 THB per month), and for a six months period.

III - Temporary stoppage of work

According to section 75 of the Labor Protection Act 2008, work can be temporarily stopped for whatever cause other than a force majeure which affects the employees' work and which forces the employer to suspend in whole or in part the business.
Employers should be careful to give 3 days advance notice both to the employees and to the Labor Inspector. Moreover the employer must now pay 75% of current wages before the suspension of work for the entire period of business suspension, instead of the 50% in the previous version of the law (1998).

IV - Transfer of company

The principle of the law is that even if the transfer occurs in the same group of companies, the Severance Pay amount is due to the employee by the former employer.
In practice, we witness that the three parties finalize arrangements to avoid such consequence.

VI - Termination

Employer may give employees at least one cycle of payment advance notice, otherwise compensation must be paid instead of advance notice.

V. 1. Termination without cost

Terminate employment "without cost" implies that the Employer terminates the employment contract for cause such as dishonest performance of professional duties, intentional act against the employer, gross negligence, violation of company's rules, absence for 3 consecutives days or imprisonment.
The employer must in this case pay the balance of remaining compensations within 3 days after the termination date.

V. 2. Termination with cost

These cases of termination are not based on employees' fault but rather on economical reasons such as business restructuring, relocation of place of business, insolvency or closure of business.

The Employer has to pay the Severance Payment within 7 days. The amount of the Severance Pay can vary from 30 to 300 days compensation amount depending on months and years of service.
According to the SSO regulations, employees are also entitled to receive a 6 months compensation equivalent to 50% of their most recent gross wage (for the part not exceeding 15 000 THB per month equivalent to euros [...]).

Moreover, the employer has to be careful about the manner he terminates the employee's contract to avoid any further lawsuit. Indeed, even if there are sufficient grounds supporting the lay-off, the employee can sue his/her former employer for unfair termination. In the case that the Labor Court considers a termination as unfair, it

can order the employer to reinstate the former employee, and/or to pay complementary indemnities in addition to Severance Payment.
Even if not required by law, the employer should take proper action in order to inform the Labor Inspection before proceeding with lay-offs, so that the Labor Inspection could more easily deal with complaints filed by employees.

In that context of social consensus which characterizes Thailand, employers could have interest, as far as possible, to make announcements about pending lay-offs so that the employees can be early informed and prepare themselves to a possible unemployment situation. This could be particularly advisable in companies where labor unions are strong.

VIETNAM

AMENDMENTS TO A NUMBER OF LAWS CONCERNING INVESTMENT IN CAPITAL CONSTRUCTION

The Draft Law amending a number of articles of laws regarding the investment in capital construction has been revised for the third time on 28 May 2009. The National Assembly might be passing this Draft Law next June 19th.

I - Scope of application of the Draft Law

This Draft Law mainly amends the following Laws :

- The Law on Construction of 2003;
- The Law on Tendering of 2005;
- The Law on Enterprises of 2005; and
- The Law on Protection of Environment of 2005

The Vietnamese Government initially also proposed a Draft Law amending the Investment Law of 2005, the Land Law of 2003, Law on Fire Prevention and Fighting of 2001 and the Resolution 66/2006/QH11 regarding important national projects.

However, the Committee of the National Assembly deemed that it was more appropriate to focus on the Laws mentioned above in order to solve all difficulties encountered in practice.

II - Amendments to the Law on Construction

The Draft Law specifies all conditions on capability for organizations and individuals participating in activities in construction sector.

This Law will also define competence of the Prime Minister in the decision-making process, formulation of investment projects, design for construction of works, construction price appraisal, supervision of execution of works and management of investment projects for construction of works.

These amendments should simplify investment procedures in construction sector in Vietnam.

III - Amendments and additions to the Law on Tendering

The Law amends 18 articles of the current Law on Tendering. These changes concern notably guarantee of competitiveness in tendering for tenderers and application of administrative penalties in case of breaches of the Law on Tendering notably regarding the selection of contractor.

The Draft Law adds that a consultancy tenderer who prepared technical designs for execution of building work or other designs in accordance with international practice, or the tender documents for the tender package, shall not be permitted to partici-

pate in tendering for the supply of goods or for construction and installation for the same tender package for which the consultant provided such earlier consultancy services, except in the case of an EPC tender package.

IV - Amendment to the Law on Enterprises

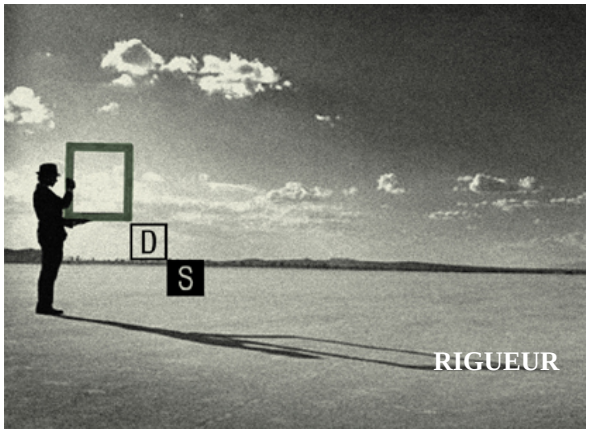
Pursuant to Law on Enterprises 2005, enterprises with foreign owned capital established prior to the date of effectiveness of this Law on July, 1st 2006 had the right either to carry out registration within a time-limit of two years, until July, 1st 2008 or not to carry out re-registration; but in such case, the enterprise was only allowed to conduct business operations in Vietnam within the scope of the lines of business and for the duration stipulated in its investment license.

The Project now removes this deadline of two years and amends this provision of article 170.2 (a) of the Law on Enterprises permitting in this way wholly foreign owned enterprises to carry out re-registration again and to extend their scope of activities.

V- Amendment to the Law on Protection of Environment

This Draft Law also repeals article 19.2 and amends clause 4 of article 22 of the Law on Protection of Environment.

Investors no longer have to prepare the environmental impact assessment report concurrently with the project feasibility study, they shall obtain approval of this report during the licensing process after granting the certificate of investment.



These changes should be welcome by investors, since the file requirements will be lighter.

Several issues of investment certificate have been delayed in order to respect these provisions.

This Draft Law also stipulates that the Vietnamese Government shall provide regulations on the point of time for approving the environmental impact assessment report applicable to each specific type of project.

TAX UPDATE

I - Corporate Income Tax

The Ministry of Finance ("MoF") provided on 20 May 2009 a draft of the Law on Amendment to a number of Articles of Law on Value Addex Tax (VAT) and Law on Corporate Income Tax (CIT) dated 3 June 2008 and Law on Tax Management dated 29 November 2008.

The National Assembly of the Socialist Republic of Vietnam should adopt in its 5th session this Law, which shall be of full force and effect as from 1 July 2009.

The more important amendments and additions concern incentives regarding the Law on CIT. The preferential rate of 10% shall apply to enterprises operating in the sectors of education and training, health care, culture, sport and the environment and activities of investment and construction of residential housing for students and for workers in industrial zones, export processing zones and high-tech zones, and for low income earners with residential housing difficulties.

This Law also makes provisions for the enterprises mentioned above, which shall be exempted from CIT for a maximum period of 4 years and shall be entitled to a 50% reduction of the amount of CIT payable for a maximum period of 9 subsequent years.

The CIT incentives stipulated in this Law shall apply from the 2009 tax assessment year.

II - Personal Income Tax

New provisions has been issued regarding the Net salary to be paid to employees according to the New Personal Income Tax (PIT) Law and the deferment of PIT payment for the first half of 2009.

II.1. New PIT Law and Conversion of Net salaries

Under the new PIT Law dated 1 January 2009, all employees are responsible for the payment of PIT liabilities and must receive a gross salary.

Many employees received in general a net salary and their employers directly paid their PIT to the Tax Department.

However, when employee were receiving a net salary, this resulted in negotiation on the gross salary to be paid. As a result it is now necessary for employers to pay a gross salary to their employees.

There is no important change if the salary was paid in gross. The amount of PIT to be paid by the employee is computed on the basis of the gross salary. Employers now only are responsible to outline the amount of PIT liability in employees' payslip for their awareness and they also have to notify the Tax Department of employees' PIT liabilities on a monthly basis.

Regarding net salaries, the General Department of Taxation issued on 28 April 2009 further guidelines on conversion of after-tax income to before-tax income (1578-TCT-TNCN) in accordance with Appendix 1-PL-TNCN, issued with Circular 84-2008-TT-BTC of the Ministry of Finance dated 30 September 2008.

The table of conversion of these guidelines made the conversion easier from net salaries (after-tax incomes) to gross salaries (before-tax incomes).

As mentioned above, when an employee received a net salary, employers have to convert these after-tax incomes to before-tax income in order to fix the amount of tax payable by employees.

In addition to these provisions, the Government decided to defer PIT payment for the first half of 2009.

II.2. Deferment of PIT payment

The Ministry of Finance issued Circular 27 on 6 February 2009 (Circular 27) and, Official Letters 1823 and 1845 on 18 February 2009, in order to provide guidelines on implementing deferment of time for payment of PIT from 1st January to the 31st May 2009.
This decision officially aimed to stimulate Vietnamese local economy and promote consumer' spending power

According to Circular 27 and PIT Official Letters, employers who deducted and paid PIT on behalf of taxpayers must not deduct anymore the PIT from income earned by employees as mentioned above.
If such tax has already been deducted between January 1 and May 31, 2009, it must be returned to employees, whose compensation is guaranteed on gross.

Only resident individuals were entitled to the deferral of PIT. Non residents will include individuals not present in Vietnam more than 183 days, individuals that depart Vietnam before 30th June 2009 and individuals who come to Vietnam from 1st January and it is not certain that they will become tax resident (Article 1- Circular 27-2009-TT-BTC on 6 February 2009 and point 1 of Official Letter 1823-BTC-TCT on 18 February 2009).
The National Assembly's Committee for Finance and Budget agreed "in-principle", on May 26 and 27, 2009 to waive definitively PIT liabilities for the em-

ployees and should adopt this measure in its 5th session some time in June.

PIT liabilities initially defers from January to May 2009, are now deferred until June 2009. This would result in an tax exemption for the period January-June 2009 and potentially July-December 2009 should the decision become effective.

The authorities will accept deferment of PIT until June whether companies pay salaries to their employees by July 1st, 2009. If the National Assembly's Committee decides in June to waive totally the PIT payment deferred from January 1 to June 30, 2009.

However, the National Assembly's Committee rejected on May 20 the waiver of PIT liability in the second half of 2009 for government officials and businessmen who have high income.

The Committee only agreed to waive the PIT on income from investment and capital transfers for the second half of 2009.

This is a political measure aimed at boosting consumption during this economic crisis.