

## Client Alert

March 2011

### Amendments to Enterprise Income Tax Regulations

The Ministry of Finance issued Circular No. 18/2011/TT-BTC on 10 February 2011 to amend Circular No. 130/2008/TT-BTC regarding enterprise income tax. The Circular clarifies some deductibility rules and loss carry forward principles, and it elaborates the handling of transfer pricing determinations. Major changes are highlighted as follows:

#### Deductible and non-deductible expenses

Payment of school tuition for foreign employees' children and payment of house rent for employees as part of remuneration will be deductible if they are agreed upon in employment contracts and supported by proper documents.

Bonus payment for employees will not be deductible if the eligibility conditions and eligible amounts are not stated in either employment contracts or collective labor agreements or company's policy.

Foreign exchange loss is not deductible if the loss is incurred from revaluation of cash and accounts receivable in foreign currency and acquisition of fixed assets that have not yet been put into operation.

#### Loss carry forward

Consistent with the Ministry of Finance's Official Letter No. 7250/BTC-TCT dated 7 June 2010, the Circular stipulates that losses must be carried forward entirely and consecutively in the subsequent five years but it still does not clarify whether loss must be carried forward "consecutively" to profits arising in tax holiday or tax reduction years. The benefits of tax holiday, tax reduction and loss carry forward will be forfeited if losses must be carried forward to profit arising in the tax holiday or tax reduction period.

#### No tax on capital surplus

No enterprise income tax will be imposed on the difference between the issue price of shares and par value of shares when a joint stock company issues new shares. It will be recorded as capital surplus.

#### Transfer of capital or securities

Tax authorities may adjust the transfer price if they determine that the transfer price is not the market price. The Circular further stipulates that

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if the transfer price determined by tax authorities is not appropriate, it is possible to refer to the valuation of an authorized professional valuation organization. However, it is not clear as to what procedures would apply to prove that the transfer price determined by tax authorities is not appropriate.

Under the previous rule, if a transferor is an offshore entity, the transferee must be responsible for declaring, withholding and paying enterprise income tax on gains arising from the transfer on behalf of the offshore transferor. The Circular now adds that if both the transferor and the transferee are offshore entities, the local target company in which the transferor and transferee invest capital will assume this responsibility.

The Circular will apply from the tax year 2011.

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