Transfer of right to use trademark shall be subject to Value Added Tax

Tax Alert - Tax and Legal

September 2016

According to recent guidance under Official Letter No. 10453/BTC-CST dated 27 July 2016 ("Official Letter 10453"), after consulting with the Ministry of Science and Technology, the Ministry of Finance opines that where a foreign party allows a Vietnamese party to use their goods' trademark for selling purpose, such activity shall be considered as the transfer of right to use trademark, but distinguishes itself from the transfer of intellectual property in accordance with the Law on Intellectual Property. As a result, in addition to the CIT portion of 10%, the income from the transfer of right to use trademark should be subject to VAT at 10% (applicable for cases declaring VAT under credit method), or 5% (applicable for cases declaring VAT under deemed method). Therefore, the FCT on income from the transfer of right to use trademark shall consist of both CIT and VAT portions.

Nowadays, it is a common practice for foreign invested enterprises in Vietnam to enter into an agreement with other foreign companies to use their goods' trademark and remunerate the foreign companies for such agreement. From a tax perspective, the income of foreign companies should be subject to Vietnamese Foreign Contractor Tax ("FCT"). A question arising from this is whether the FCT on such income consists of only Corporate Income Tax ("CIT") or includes Value Added Tax ("VAT") as well. If it includes VAT, what should be the applicable VAT rate in this case?

Under the provision of Circular 103/2014/TT-BTC on FCT ("Circular 103"), income from royalty is subject to CIT at the deemed rate of 10%. Income from royalty defined under the Circular also includes income received from transfer the right to use and transfer of intellectual property rights.

Under the provision of prevailing Law on Value Added Tax ("VAT"), transfer of intellectual property ownership in accordance with the Law on Intellectual Property is not subject to VAT.

Based on the aforementioned regulations, most enterprises have self-assessed that the income of foreign parties derived from the allowance to use the goods' trademark is under the category of intellectual property. Subsequently, Vietnamese entities have normally withheld, declared and paid FCT at 10% for the CIT portion, and not withheld, declared and paid the VAT portion for such income.

Notwithstanding the above, according to recent guidance under Official Letter No. 10453/BTC-CST dated 27 July 2016 ("Official Letter 10453"), after consulting with the Ministry of Science and Technology, the Ministry of Finance opines that where a foreign party allows a Vietnamese party to use their goods' trademark for selling purpose, such activity shall be considered as the transfer of right to use trademark, but distinguishes itself from the transfer of intellectual property in accordance with the Law on Intellectual Property. As a result, in addition to the CIT portion of 10%, the income from the transfer of right to use trademark should be subject to VAT at 10% (applicable for cases declaring VAT under credit method), or 5% (applicable for cases declaring VAT under deemed method). Therefore, the FCT on income from the transfer of right to use trademark shall consist of both CIT and VAT portions.

Practically, prior to the issuance of Official Letter 10453, certain rulings on the related FCT policies have been unclear and inconsistent on the VAT portion. Throughout tax audits, some local tax authorities have concurred with the current treatment of enterprises that 10% CIT and no VAT would be imposed on similar transactions.

Official Letter 10453 is silent on the retrospective application, and the guidance itself is a private ruling for a specific case. However, other local tax authorities may adopt the same treatment to other similar transactions, and collect the additional VAT if the companies have not declared and paid the VAT portion. Therefore, when a company enters into an agreement of trademark use right transfer, it is recommended that the company should carefully review its current FCT declaration. The company should also review the conclusion of the recent tax audit carried out by the tax authorities to supplement the VAT declaration in accordance with the current regulations. In case there is any uncertainty, the company should seek specific guidance from the tax authorities / Ministry of Finance.

Contact us

KPMG Tax and Advisory Limited

Warrick Cleine
Chairman & CEO
Vietnam and Cambodia
Tax Managing Partner

Hanoi

Do Thi Thu Ha, Senior Partner
Hoang Thuy Duong, Partner
Le Thi Kieu Nga, Partner
Nguyen Thu Huong, Partner
Nguyen Ngoc Thai, Director
Nguyen Hai Ha, Director
Pham Thi Quynh Ngoc, Director
Ho Dang Thanh Huyen, Director
Taninaka Yasuhisa, Japanese Desk

46th Floor, Keangnam Landmark 72
E6 Pham Hung Road, Me Tri Ward
South Tu Liem District, Hanoi

T: +84 4 3946 1600
F: +84 4 3946 1601
E: kpmghanoi@kpmg.com.vn

Ho Chi Minh City

Nguyen Cong Ai, Partner
Richard Stapley-Oh, Partner
Ninh Van Hien, Partner
Ta Hong Thai, Partner
Ho Thi Bich Hanh, Partner
Nguyen Thanh Hoa, Director
Huynh Ngoc Nhan, Director
Nguyen Thanh Tam, Director
Joost van Vliet, Director
Tran Duy Binh, Director
Bui Thi Thanh Ngoc, Director
Michal Jacob, Director
Watari Takashi, Japanese Desk

10th Floor, Sun Wah Tower
115 Nguyen Hue Street, Ben Nghe Ward
District 1, Ho Chi Minh City, Vietnam

T: +84 8 3821 9266
F: +84 8 3821 9267
E: kpmghcmc@kpmg.com.vn

kpmg.com.vn