

THE MINISTRY OF FINANCE

Circular No. 38/2010/TT-BTC of March 19, 2010, guiding tax provisions applicable to organizations and individuals that transfer the rights to explore, exploit and process minerals

Pursuant to the Law on Minerals and the Government's decrees detailing the implementation of the Law on Minerals;

Pursuant to current laws and ordinances on taxes, charges and fees, and the Government's decrees detailing the implementation of these laws and ordinances;

Pursuant to November 29, 2006 Law No. 78/2006/QH11 on Tax Administration, and the Government's documents guiding the implementation of the Law on Tax Administration;

Pursuant to the Government's Decree No. 118/2008/ND-CP of November 27, 2008, defining the functions, tasks, powers and organizational structure of the Ministry of Finance;

In furtherance of the Prime Minister's directing opinions notified in the Government Office's Official Letter No. 50/VPCP-KTTH of January 5, 2010,

The Ministry of Finance guides the implementation of tax regulations applicable to organizations and individuals that transfer the rights to explore, exploit and process minerals under Clause 6, Article 53 of the Government's Decree No. 160/2005/ND-CP of December 27, 2005, detailing and guiding the implementation of the Law on Minerals, and the Law Amending and Supplementing a Number of Articles of the Law on Minerals as follows:

Article 1. Subjects and scope of application

Organizations and individuals that are allowed to transfer the rights to explore, exploit and process minerals under Clause 6, Article 53 of the Government's Decree No. 160/2005/ND-CP and have actually transferred these rights shall be regarded as having transferred investment projects and obliged to pay taxes under this Circular.

Article 2. Value-added tax

Transfer of the rights to explore, exploit and process minerals and transfer of land use rights are not liable to value-added tax.

In case of transferring the whole investment project on mineral exploration, exploitation and processing accompanied by works and infrastructure facilities on land, machinery, equipment and vehicles, the values of these works and infrastructure facilities on land, machinery, equipment and vehicles must be separated and liable to value-added tax under the Law on Value-Added Tax and its guiding documents. In case the values of these items cannot be separated, value-added tax shall be paid at the rate of 40% of the whole transfer value.

Article 3. Enterprise income tax

An organization earning income from the transfer of the rights to explore, exploit and process minerals shall pay enterprise income tax, specifically as follows:

$$\begin{array}{l} \text{Payable} \\ \text{enterprise} \\ \text{income tax} \\ \text{amount} \end{array} = \begin{array}{l} \text{Taxed income} \\ \times \\ \text{Enterprise} \\ \text{income tax} \\ \text{rate} \end{array}$$

1. Determination of taxed income

$$\begin{array}{l} \text{Taxed} \\ \text{income} \end{array} = \begin{array}{l} \text{Transfer} \\ \text{price} \end{array} - \begin{array}{l} \text{Investments} \\ \text{not yet} \\ \text{recovered} \end{array} - \begin{array}{l} \text{Transfer} \\ \text{expenses} \end{array}$$

In which:

- Transfer price is the total value actually transferred under the transfer contract.

In case the transfer contract indicates the mode of payment in installments or deferred payment, the transfer price is the total value actually transferred within the time limit indicated in the transfer contract and exclusive of installment or deferred payment interests.

In case the transfer contract does not indicate a payment price or the tax office has grounds to believe that the payment price has not been determined based on the market price, the tax office may inspect and request the parties to the transfer to provide information relating to the determination of present and future values of the transferred project before the parties decide on the transfer and it shall assess the contract's payment value after referring to the market price, the price at which the project might be transferred to a third party or the prices of similar transfer contracts.

- Investments in a project on mineral exploration, exploitation and processing not yet recovered means reasonable expenses specified in the Law on Enterprise Income Tax and its guiding documents and determined based on books and documents by the date of transfer, minus recovered expenses previously accounted as taxable incomes for the determination of payable business income tax amounts.

In case the rights to explore, exploit and process minerals are further transferred by the organization, investments in the project shall be determined to be equal to the value of the previous transfer contract plus additional expenses (if evidence documents are available) minus recovered expenses.

- Transfer expenses include expense for carrying out necessary legal procedures for the transfer; charges and fees paid upon carrying out transfer procedures; expenses for the transaction, negotiation and signing of the transfer contract and other documented expenses for the transfer.

2. Tax rate

The enterprise income tax rate applicable to the transfer of the right to explore, exploit and process minerals is 25%.

3. Incomes from the transfer of the rights to explore, exploit and process minerals shall be separately accounted and are ineligible for enterprise income tax incentives.

4. In case the transfer of a project on mineral exploration, exploitation and processing is associated with a real estate transfer, income from the real estate transfer shall be separately accounted for tax declaration and payment under the Law on Enterprise Income Tax and its guiding documents, and may not be added to incomes or offset against losses of other business operations.

Article 4. Personal income tax

An individual earning incomes from the transfer of the rights to explore, exploit and process minerals shall pay personal income tax on incomes from capital transfer, specifically as follows:

$$\text{Payable personal income tax amount} = \text{Taxed income} \times \text{Tax rate}$$

1. Determination of taxed income

$$\text{Taxed income} = \text{Transfer price} - \text{Investments not yet recovered} - \text{Transfer expenses}$$

In which:

- Transfer price is the total value actually transferred under the transfer contract.

In case the transfer contract indicates the mode of payment in installments or deferred payment, the transfer price is the total value actually transferred within the time limit indicated in the transfer contract and exclusive of installment or deferred payment interests.

In case the transfer contract does not indicate a payment price or the tax office has grounds to believe that the payment price has not been determined based on the market price, the tax office shall assess the transfer price under the Law on Tax Administration and its guiding documents.

- Investments in a project on mineral exploration, exploitation and processing not yet recovered means reasonable expenses related to the generation of taxable incomes from business operations under the Law on Personal Income Tax and its guiding documents and determined based on books and documents by the date of transfer, minus recovered expenses previously accounted as taxable incomes for the determination of payable personal income tax amounts.

In case the rights to explore, exploit and process minerals are further transferred by the individual, investments in the project shall be determined to be equal to the value of the previous transfer contract plus additional expenses (if evidence documents are available) minus recovered expenses.

- Transfer expenses include expenses for carrying out necessary legal procedures for the transfer; charges and fees paid into the state budget upon carrying out transfer procedures; expenses for the transaction, negotiation and signing of the transfer contract and other lawfully

documented expenses for the transfer.

2. Tax rate

The personal income tax rate applicable to incomes from capital transfer is 20% under Article 17 of the Government's Decree No. 100/2008/ND-CP of September 9, 2008, detailing a number of articles of the Law on Personal Income Tax.

3. In case the transfer of the rights to explore, exploit and process minerals is associated with a real estate transfer, income from the real estate transfer shall be separately accounted for personal income tax declaration and payment under the Law on Personal Income Tax and its guiding documents.

Article 5. Other taxes, charges and fees

Other taxes, charges and fees must comply with current relevant legal documents.

Article 6. Organization of implementation

This Circular takes effect 45 days from the date of its signing. For cases in which the transfer of the rights to explore, exploit and process minerals is completed before the effective date of this Circular and for which taxes have been paid, no adjustment is required to be made. The time of completion of the transfer of the rights to explore, exploit and process minerals is the time when the parties to the transfer contract obtain approval of a competent licensing agency.

Other matters not guided in this Circular comply with current tax laws.

Any problems arising in the course of implementation should be reported to the Ministry of Finance for consideration and decision.-

For the Minister of Finance
Deputy Minister
DO HOANG ANH TUAN