**SHORT-TERM FOREIGN LOANS FOR PAYING SALARY – SOME ISSUES SHOULD BE NOTED**

**Paying salary for employees is required by the Law. In pandemic period, all enterprises, in general, and foreign invested enterprises (FDI enterprise) are also facing difficulties in capital. To resolve the current difficulties, many FDI enterprises find financial sponsorship from the short-term foreign loans without the Government’s guarantee. However, they have also been met a dilemma due to unclear regulations.**

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The fight against COVID-19 in Vietnam for fourth wave started from the last days of April and is becoming more fierce and severe. Along with the COVID-19 is a reduction in revenue, property value, which continually increases the demand of working capital in the enterprises, in general, and the FDI enterprises in particular, in recent, to a high level which has been never seen before. Especially, paying employees must be prioritized at first, to ensure that the persistence of employees, side by side with the enterprises, to overcome the challenging period. In addition to accessing domestic loans, the FDI enterprises also ask for supports from their parent company, foreign credit institutions to call the capital through the foreign loans under self-borrowing – self-payment manner.

**Unevenness of regulation in reality**

The payment for salary is listed into group of short-term debt and the enterprises usually use the short-term debt (have duration lower than one year) to cover expense of short-term capital demand, including the salary payment for employees. In fact, in loan transaction, the FDI enterprises (borrower) usually make a loan agreement through foreign loan contract with lender being the bank(s) in country where the parent company is headquartered and this parent company will play a role of the guarantor that it guarantees the lender for borrower’s obligation of debt paying.

In legal aspect, the short-term foreign loan methods are not particularly regulated. The laws only provide conditions for the lenders and borrowers, mostly in Decree 12/2014/TT-NHNN dated 31 March 31 2014, stipulating the enterprises’ foreign loan condition without the Government’s guarantee (“Decree 12/2014”). Because of essential demand of capital lending, the FDI enterprises want to get short-term loan based on their business cycle. Accordingly, the lender and borrower will agree to sign the loan contract with a maximum duration of one year, for example, with 10 million US Dollars (USD), the lender choose to disbursement in many installments. Each installment can be one month, or two months or three months with the loan, from the original 10 million USD, is divisions corresponding to stable timelines per installment. In the due date, if the borrower does not give back, the lender has right of clearing at borrower’s principal debt balance and this money can become a new loan. Besides, every new disbursement is also paid the lender by the borrower with final maturity date is one year since the first time of disbursing.

The patterns of this new lending method are totally coincidental with description of revolving loan applied for domestic credit institutions. Pursuant to Article 27.7 Decree 39/2016/TT-NHNN dated 30 December 2016, it can be defined that the revolving loan has the patterns as follows: (i) borrowing purpose is for the sponsorship of capital demand which has the business cycle not over one month, (ii) the borrower can use the principal debt balance and put it from the former business cycle into the later business cycle; and (iii) the borrowing duration is not over three months.

In principle, the borrower is not allowed to obtain the short-term loan for the using purpose of medium-term or long-term capital. The loan used for payment is considered to be used in a right purpose of the loan for short-term debt paying, under the accounting principle in Vietnam. Therefore, it can be understood that if the revolving loan as above complied the general regulations and particular condition, especially stipulated in the Decree 12/2014, as same as other conditions in Decree 03/2016/TT-NHNN dated 26 February 2016, guiding some regulations of foreign exchange management of borrowing, paying foreign debt of the enterprises, the parties can absolutely sign, perform and enter into the contract legally.

However, in fact, when the foreign loan structure operates such as the “revolving loan”, it shall be difficult to “get the nod” from State bank (SB). Also, it can be understood that (i) the SB is worried that it will not be able to control FDI enterprises’ cash flow when the revolving loans shall be continually performed from the disbursement, repaying, restructuring of loan until the debt is paid off, which is cleared and performed by the parties, lender and borrower, (ii) for the domestic revolving loans, commercial banks and the SB can easily control the use of loan in the right purpose, but for the foreign revolving loans, the foreign lenders are beyond the SB’s control, thus, the loan can be used in a wrong purpose and effects on borrower’s financial operation in Vietnam and other subjects which have the transaction with the lender, and (iii) the parties shall be not allowed to apply forms of international borrowing forms which are not particularly regulated in relevant legal documents. As a flexibility, to avoid risks possibly arises in future, the lender and borrower, after that, make an adjustment of the borrowing method, accordingly, that the loan contract most generally recorded the short-term loan lower than one year, paid in many installments by the parties’ self-performance and the borrower will not have to pay a fine due to pay earlier than loan duration and the cash flow must be actually transferred. So that, when paying debt, the borrower only has to show the loan contract, attached with a debit note of debt to show to the commercial bank for proceeding with the payment. Although creating a transparency in the loan transaction, rapidly adapting the capital needs, however, this solution is just a temporary replaced measure. A clear legal corridor is still essential in every cases.

**From practical experience**

To solve problems in recent situation, when the enterprises need to borrow the short-term loan with complex disbursement and repayment schedule, they should contact, check with the SB, consult with the SB’s opinion before entering into the loan contract. In the meanwhile, the laws needs to have the regulation tighter, clearer and more specific on the forms of international borrowing similar to the listing of domestic loans, or needs to approach the measure that the enterprises can do whatever the legal prohibition is silent on.

It should be thought that, in urgent case such as current pandemic, creating favorable condition for the enterprises to easily and rapidly get the short-term loan to help them overcome pandemic difficulty and hardship is necessary. On the other side, obviously, the enterprises also have to enhance the awareness of responsibility in debt paying and ensure a compliance of legal regulations.

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*(1) Article 112.1.4.e Decree No. 200/2014/TT-BTC dated 22 December 2014 guiding enterprise accounting system.*