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Indochina notes

Legal updates on investment, infrastructure and finance

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Personal income tax

Foreign investors in Vietnam have complained for years about the high rates of personal income tax (PIT) imposed on Vietnamese employees, which went up to 50 per cent on income of about US\$1,000/month, plus a 30 per cent surtax on take home income exceeding about US\$1,000/month. No deductions were allowed against income. As a result of these tax rates, foreign investors could not adequately reward talented local people, and often employed foreigners instead. Under the recent Ordinance 14 of the Standing Committee of the National Assembly, those tax burdens will be reduced on 1 July 2004.

Tax rates

- The maximum PIT rate has been revised down to 40 per cent from 50 per cent, applicable to locals and foreigners with monthly income of above 40m dong (up from 15m dong) and 80m dong (no change) respectively.
- The minimum taxable threshold for locals has been increased to 5m dong/month (up from 3m dong/month).
- The surtax of 30 per cent imposed on locals' take home income exceeding about US\$1,000/month has been eliminated.

The taxable income and tax rates applicable to locals and expatriates are as follows.

For locals

Unit: 1,000 dong

Grade	Average monthly income/ person	Tax rate (per cent)
1	Up to 5,000	0
2	Above 5,000 up to 15,000	10
3	Above 15,000 up to 25,000	20
4	Above 25,000 up to 40,000	30
5	Above 40,000	40

For expatriates

Unit: 1,000 dong

Grade	Average monthly income/ person	Tax rate (per cent)
1	Up to 8,000	0
2	Above 8,000 up to 20,000	10
3	Above 20,000 up to 50,000	20
4	Above 50,000 up to 80,000	30
5	Above 80,000	40

A tax rate of 25 per cent is applicable to total income earned in Vietnam by foreigners who stay in the country for fewer than 183 days in a 12-month period. Foreigners working in Vietnam for fewer than 30 days are no longer exempt, though tax treaties with the foreigner's home country (if any) may serve to shield the person from liability.

Taxable income

- Irregular income in the form of gifts will no longer be regarded as being taxable.
- Income from bank deposits, stocks and bonds is still 'temporarily' exempt from PIT.

Recruitment of foreign employees

Probably the most controversial legislation last year was Decree 105 of the Ministry of Labour, Invalids and Social Affairs (MOLISA), which limited the number of foreign employees that could be employed in a company to 3 per cent of the total workforce and a maximum of 50. MOLISA has now issued implementing regulations in the form of Circular 4 dated 10 March 2004. Foreign investors are unlikely to be overjoyed by the latest regulations, according to which:

- the cap can go up to 4.5 per cent with written approval of the chairman of the relevant provincial people's committee;
- foreigners employed prior to the Decree can remain employed until termination of their labour contracts;
- foreign-invested businesses approved prior to Decree 105 can continue to hire experts in accordance with approved personnel plans; and
- members of the board of management and directors will not be included when calculating the number of foreign employees.

By increasing the number of foreign employees that a company can hire, Circular 4 appears to amend Decree 105. From a constitutional point of view a circular cannot amend the provisions of a decree. However, foreign investors are not likely to take the point.

Ordinance on enforcement of civil judgments

Successfully litigating a claim is of little benefit (except to the lawyers involved) unless the judgment can be enforced. Those thinking about commencing a court action in Vietnam may not be very encouraged by the Ordinance on the enforcement of civil court judgments of the Standing Committee of the National Assembly, which becomes effective on 1 July 2004. The new Ordinance fails to address the fundamental problem that the enforcement agency has significant discretion over whether to enforce a judgment.

The new Ordinance provides, among other things, the following new features:

- the time period to issue the enforcement decision is reduced from 10 to 5 days;
- an enforcement fee is payable by the judgment creditor;
- land can now be seized (the old Ordinance covered only 'houses');
- the enforcement authority can deduct only up to 30 per cent of the income of the judgment (as opposed to 50 per cent under the old Ordinance);
- assets with a value below 10m dong can be sold directly by the enforcement authority (under the old Ordinance all property had to be sold at auction);
- the enforcement process can be postponed if (i) the judgment debtor's whereabouts have not been determined, (ii) the judgment debtor is seriously ill or (iii) 'for other reasons' the judgment debtor cannot perform its obligations;
- enforcement may be suspended if the judgment debtor is bankrupt;
- the enforcement authority is entitled to propose to the court or the prosecutor that the case be reopened or reheard if the enforcement authority considers that the case was not handled in accordance with law; and
- enforcement against assets used as security is only possible if (i) the judgment debtor has no other property and (ii) the property to be seized has a higher value than the secured obligations – the sale proceeds will be applied to the judgment debt after payment of the enforcement expenses and repayment of the secured obligations.

Unless foreign investors are provided with more comfort that a judgment debt will be enforced, they are likely to continue to shy away from commencing legal proceedings.

Compulsory auditing

The importance of independent audits is being appreciated more and more around the world. In countries with limited transparency, such as Vietnam, they are possibly even more important than in the scandal-prone West. On 30 March 2004, the government issued Decree 105, which requires independent audits for the following:

- financial reports of foreign-invested enterprises, listed shareholding companies, organisations with

- banking and credit activities, and development assistance funds are subject to compulsory audit; and
- financial reports of SOEs, and reports on construction capital costs of Group A projects.

The auditing of businesses borrowing loans from banks has to comply with the credit regulations.

Incentives for foreign-invested projects in Ho Chi Minh City

Ho Chi Minh City has always been in the forefront of foreign investment, but it is losing out to neighbouring provinces such as Dong Nai and Binh Duong. It is therefore trying to polish up its reputation as the most attractive destination for foreign investors. Decision 45 dated 24 February 2004 provides incentives to help investors during the process of seeking investment areas, assistance with compensation for site clearance, simplified investment procedures and post-licensing support. The types of investments that will be eligible for the preferential treatment include:

- high-tech industrial projects;
- projects for the production of new materials;
- new biotechnology projects;
- manufacturing of telecommunication and information equipment using new technology;
- production and processing projects where at least 80 per cent of the products are for export;
- production of high-quality raw materials, and semi-finished products for the footwear and garment industry for export;
- production of high-quality steel, alloy, non-ferrous metal, special metals, steel blanks and sponge iron;
- training programmers and skilled technical workers in the electronics and mechanical industries;
- provision of university and postgraduate education in technical, economic and IT fields;
- production of drugs for the treatment of tuberculosis, cardiovascular ailments, liver and kidney diseases, cancer and AIDS;
- hospitals specialising in mental diseases, cardiovascular and tropical diseases;
- blood and tissue banks;
- production of raw materials for antibiotics; and
- ship building and repair for vessels of 10,000 tons and above.

Investment incentives in Chu Lai Open Economic Zone

Many potential investors are complaining about the elimination, through the recent changes to the corporate income tax laws, of concessionary tax rates applicable to investment in much of the country's southern region. They should take note of Chu Lai Open Economic Zone's financial incentives described in Circular 11 dated 25 February of the Ministry of Finance, including a corporate income tax of 10 per cent for 15 years plus an exemption for four years after the first profitable year, and a 50 per cent reduction over the following nine years.

Chu Lai is in the central province of Quang Nam. It is not very close to either Hanoi or Ho Chi Minh City but has some fine beaches.

High-tech parks

Decision 53 issued on 5 April 2004 confirms that investors in hi-tech parks, local and foreign alike, have several incentives:

- the corporate income tax is 10 per cent throughout the project's life span, with an exemption for the first four profitable years and a 50 per cent reduction for the nine following years;
- they are allowed to mortgage land-use rights and property on the land for loans at credit institutions operating in Vietnam; and
- projects involved in technology development and research, and human resource training will be exempt from land rent.

Land uses right transfer tax

Under Official Letter 1069 of the Ministry of Finance dated 4 February 2004 businesses that transferred land use rights before 1 January 2004 will be subject to a land use right transfer tax in accordance with the provisions in the Law on Land Use Right Transfer Tax. Those that transfer land use rights after 1 January 2004 will pay tax in accordance with the Law on Corporate Income Tax. Such tax will not apply to households or individuals that transfer land use rights.

Anticompetitive acts

The long-awaited Competition Law is scheduled to be passed in November 2004. In the meantime Decree 170 of the Government dated 25 December 2003 affects monopolists.

Decree 170 provides measures to control 'price monopoly co-operation'. Parties in breach of Decree 170 could face a compulsory fixing of the price of goods and services, as well as financial and administrative penalties.

The following may be deemed to constitute price monopoly co-operation:

- agreements to fix prices, control prices, or change prices for the sale of goods and services in order to restrain competition;
- the simultaneous sale of identical or similar types of goods or services at uniform price by several different businesses;
- agreements to falsely create scarcity of goods by limiting production, distribution, transportation, sale of goods or supply of services, destroying or damaging goods, or taking advantage to speculate and increase prices;
- agreements to apply conditions for the supply, sale or purchase of goods, or of after-sales services, that affect the prices of goods or services; and
- agreements to change prices of goods and services to eliminate other enterprises or to force other enterprises to co-operate or become affiliates.

Restructuring sugar factories

The sugar industry in Vietnam has suffered at the hands of central planners. The mere title of Decision of the Prime Minister dated 4 March 2004 – on reorganisation of production and implementation of a number of solutions for overcoming difficulties faced by sugar factories and companies – betrays the absence of market forces. One is therefore tempted to suggest that further problems lie in store.

The Decision classifies sugar factories into three groups, and specifies the measures to be applied to each:

- group 1, factories that are operating efficiently, are instructed to take measures to develop further;
- group 2, factories that might just survive if the right magic were applied, are told to restructure or equitise; and
- group 3, the hopeless cases, must close down.

Infrastructure

Son La hydro power plant

The Prime Minister has approved the development of the 2,400MW hydro power plant in Son La Province. Decision 92 dated 15 January 2004 classified the project as of special importance, and the planners have already calculated that it will provide 9.429bn kWh to the national grid per year.

The Ministry of Finance (MOF) is authorised to provide a guarantee if the investor, Electricity of Vietnam, requires finance for the purchase of equipment that is not produced domestically. As the project is unlikely to be finished in the twinkling of an eye, the MOF will no doubt be hoping for a rapid upsurge in domestic electrical component production.

Registration of aircraft

Vietnam Airlines is on a geographically neutral buying spree: a few Boeing 777s here, a few Airbus there. This seems to have galvanised the Ministry of Transport, which issued Circular 1 on 16 January 2004 on the registration of aircraft, aircraft transfer and aircraft mortgage. Along with Circular 1 came a deluge of 22 forms to be used in connection with such registrations.

Circular 1 also provides the procedures for changes of registration, rectification of registration, extension of registration and registration of notice on disposal of secured aircraft.

In accordance with Decree 8 on the registration of secured transactions, Circular 1 explains how to obtain information about registered transactions relating to aircraft.

Internet management

Decision 71 of the Minister of Police dated 29 January 2004 moves forward the benighted internet regulations published in 1997. Yet the focus of Decision 71 is still to restrict the information that can be transmitted over the Internet.

- Internet providers are obliged to establish a firewall to prevent the transmission of data prohibited by law. Both incoming and outgoing data is to be stored on the server for at least 15 days from the date of transmission.

- Those found to be using the personal information and codes of others as a result of illegally downloading data may be fined the princely sum of between 200,000 and 1,000,000 dong (about US\$13 and US\$64 respectively).
- Internet users found to be in breach of the regulations on coding and decoding may be fined between 1,000,000 and 5,000,000 dong (about US\$64 and US\$320 respectively). Internet providers found to be in breach of such regulations may be fined between 10,000,000 and 20,000,000 dong (about US\$638 and US\$1,276 respectively).
- Dialling directly into foreign internet providers is prohibited.

New mobile phone service provider

Official Correspondence 325/CP-CN of the Prime Minister dated 2 March 2004 permitted the Military Telecommunications Corporation (Viettel) to establish a mobile information network. This took the number of mobile telephone service providers to five (Vinaphone, Mobiphone, and Viettel using GSM technology; S-Fone using CDMA technology; and Cityphone using iPass network).

Vietnam Posts and Telecommunications operated a monopoly with its two networks, Vinaphone and Mobifone, until last July, when Saigon Postel launched a network in co-operation with the South Korean consortium, SLD Telecom.

Prices

With a view to improving the investment environment, the government has requested the MOF in an official correspondence to carry out an audit of the real cost of providing certain goods and services. Official Correspondence 714 dated 17 February 2004 requested that particular attention be paid in the audit to costs in the post and telecommunications, maritime and air services, and electricity sectors.

Banking and finance

New banking legislation

Under Decision 109 on 30 January 2004 of the State Bank of Vietnam (SBV), the SBV is scheduled to issue various legal documents relating to banking activities in 2004, the most noteworthy of which are:

- a Decision promulgating the method of determining the limits on foreign loans to Vietnamese companies;
- a Circular guiding the use of foreign currency in connection with securities purchases, capital contributions and share purchases by foreign investors in Vietnamese companies;
- a Decision on valuable paper of credit institutions;
- a Decision on foreign exchange transactions (to replace the existing Decision 17);
- a Decision promulgating regulations on the purchase of shares in joint-stock commercial banks by foreign investors;
- a Circular on the organisation and operation of joint-venture banks; and
- a Circular guiding the implementation of the Decree on foreign exchange.

State Security Committees (SSCs)

In an attempt to strengthen the country's capital markets, the Prime Minister approved Decree 66 dated 18 February 2004, which integrated the SSC into the MOF. This should result in faster decision-making, as the SSC was previously effectively under the control of a number of agencies with different agendas, including the MOF, ministries of planning and investment, and SBV.

Pledge of valuable paper

Vietnam continues to develop and amend its laws with lightning speed. Within a few months of passing Decision 1452 of the State Bank of Vietnam on the regulations applicable to loans extended to banks by the SBV that are secured by the pledge of valuable papers, the SBV issued Decision 94 dated 20 January 2004, which amended it. Valuable papers used to secure the loans can consist of SBV notes, government bonds, and such other valuable papers as may be permitted by the SBV among other things, and they must have a term of at least two years.

SBV lifts limits on deposits placed abroad

Under Decision 293 on 22 March 2004 there will be no limit on the total amount of deposits that foreign bank branches and joint-venture banks in Vietnam will be allowed to place in credit institutions outside Vietnam.

This removes the cap of 30 per cent (for foreign banks) and 15 per cent (for joint-venture banks) of total chartered capital previously allowed to be deposited abroad.

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