

Legal news

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Foreign Investment

Unequal tax treatment may negative foreign investment inflow

[This is made in a continuous attempt from our Legal news March 2003 to better understand what Decision 36 regulates relating to capital contribution and share buying by foreign investors in local companies. This Article was published in the Vietnam Investment Review]

With a number of first-ever-seen developments against Decision 145, the recently issued Decision 36/2003/QĐ-TTg, dated 11 March 2003, of the Prime Minister, promulgating the Regulations on capital contribution and share purchase by foreign investors in local companies (Decision 36), is widely referred to as an important vehicle for channelling foreign investment in Vietnam. *Nevertheless some still concern about the tax regime therein applicable to foreign investors and how to make that comparable to what available under the Law on Foreign Investment in Vietnam (FIL).*

Article 15.4 of Decision 36 confirms that “foreign investors will have the full right to remit abroad all of their investment including principals and interest, the proceeds from transferred capital and/or sold shares, and other legitimate incomes in Vietnam, after fulfilling their financial obligations in accordance with the laws of Vietnam”. *While the financial obligations can be identified, the phrase “laws of Vietnam” needs however further clarifications in this case.*

At present, there are different legal documents concerning financial obligations of foreigners doing business in Vietnam. The FIL covers foreign direct investment activities (FDI). Circular 169/1998/TT-BTC, dated 22 December 1998, of the Ministry of Finance, providing guidelines on tax regime applicable to foreigners doing business in Vietnam not under the forms set forth by the FIL, covers other foreign business activities (mainly foreign contractor activities) not under the FIL in Vietnam. *And, the Law on Encouragement of Domestic Investment (LEDI) deals with domestic investment activities including capital contribution and share purchase by foreign investors (excluding non-resident foreigners) in local companies. 30% of the charter capital is currently the threshold that allows to legally differentiate the FDI under the FIL (with over 30%) from foreign indirect or domestic investment under the LEDI (up to 30%).*

Although both govern investment by foreign investors in Vietnam, each however introduces different tax regimes. *It is seen that better tax treatments could be obtained under the FIL thanks to a more transparent legal framework while under the LEDI foreign investors would have no choice other than recently accepting some tax disadvantages.*

The first relates to the corporate income tax applicable to companies where foreign investors are members or shareholders. The tax rate under the LEDI is standardized 32% (This tax rate is being considered to reduce to 28% in the Law on Corporate Income Tax, as per the recent proposal of the Ministry of Finance, while the basic tax rate of 25% as presently under the FIL is being considered to increase to 28%, in order to create an equal tax ground for all types of business), with preferential rates of 25%, 20% and 15% applicable to some encouraged projects. In the meantime, the basic tax rate under the FIL is lower equal to just 25%, with different preferential rates of 20%, 15% and even 10%.

In this point, the higher tax would indirectly lower the dividends that foreign investors could earn from their investment under the LEDI and Decision 36 if compared with the same under the FIL.

The second relates to tax incentives applicable to re-investment by using locally earned incomes. Article 15.5 of Decision 36 allows foreign investors “to enjoy tax incentives under either the LEDI or the FIL if using their earnings from capital contribution and share purchase in local companies to re-invest in local companies”. It means that they will enjoy tax incentives under the LEDI if doing re-investment in local companies, and tax incentives under the FIL if doing the same in foreign invested companies including capital contribution for setting up new projects. The issue here is that while the FIL clearly defines which tax incentives that foreign investors can obtain there under, tax incentives unfortunately could not be found anywhere in the LEDI and elsewhere in its implementing documents including Decree 51/1999/ND-CP, dated 8 July 1999, of the Government, providing the guidelines for the implementation of the LEDI (Decree 51) and recently Circular 98/2002/TT-BTC, dated 24 October 2002, of the Ministry of Finance, providing the guidelines for the implementation of tax exemption and reduction under Decree 51.

The legal silence may cause foreign investors under the LEDI and Decision 36 again in a disadvantageous position compared with the same under the FIL.

The third and last relates to the personal income tax holidays applicable to foreign individual investors. Article 15.6 of Decision 36 states that “foreign individual investors are free from paying personal income tax on their income from capital contribution and share purchase in local companies, in accordance with Decree 51”.

According to Decree 51, foreign individual investors who contribute capital and buy shares in local companies under Decision 36, shall be legally obligated to pay the personal income tax on their dividends although the tax holidays can be temporarily valid for the first 5 or 10 years as the case may be thanks to the recent individual investment promotion policy. According to the Article 27 of LEDI and Article 28 of Decree 51, foreign investors including individuals shall finally be responsible for paying the withholding tax at the standard rate of 5% upon any their abroad profit remittance.

In the meantime, when foreign individual investors under the FIL who set up their 100% owned enterprises or contribute capital in joint venture companies (and after their companies fulfill all corporate financial obligations to the State), they shall be free from paying personal income tax on their dividends. They shall only be obligated to pay the withholding tax at the rate of either 3%, 5% or 7% as the case may be, upon any their abroad profit remittance (Along with the consideration on increasing of the corporate income tax to 28% from 25% as presently, this type of tax is also being considered to abolish, at the recent request by the Ministry of Finance).

Tax discrimination applicable to investment by foreign investors is seen in this third and last point between the FIL and the LEDI.

To maximize the advantages that Decision 36 recently introduces, supplementations to Decision 36 and/or a new regulations should be made providing a transparent tax regime to foreign indirect or domestic investment under the LEDI which could be comparable in the long run with what available under the FIL. *To this end, due attentions*

should be paid to the recent proposals by the Ministry of Finance requesting to make revisions of some tax laws, notably the Law on Corporate Income Tax and relevant tax provisions in the FIL.

FIEs pilot equitization goes on stream

[This Article was published in the Vietnam Investment Review's Legal Column]

Nearly 7 months after submission of the final draft to the National Assembly Standing Committee for directing, the Decree on conversion of a number of FIEs into shareholding companies was officially signed by the Prime Minister on 15 April 2003, Decree 38/2003/ND-CP. The Decree, together with Decision 36 on buying local companies' shares by foreigners was held up due to the aftermath of the Asian financial crisis.

The Decree consists of 27 Articles in 5 Chapters. In comparison with the 11 September 2002 draft, generally speaking, Decree 38 appears to have been tightened with more circumspect stipulations disclosing the Government's wariness in the equitization of FIEs.

Requisition for conversion

A FIE eligible to be selected in conversion if its registered legal capital has been fully contributed; it has been officially in operation for at least three years including the last year before conversion shown profits; and the FIE must be engaging in industry, agriculture or service sector.

Steps of conversion

Decree 38 does not detail all steps in conversion, perhaps a Circular of the Ministry of Planning and Investment (MPI) shall do that. FIEs generally must go through: evaluation process, completion and submission of application dossier to the MPI, the MPI and the Ministry of Finance shall consider the applied dossier with the Prime Minister reserves right to have final decision.

Decree 38 allows FIEs to use evaluation services provided by local consulting firms, finance, auditing, or stocks trading companies.

Whilst it could be seen some dozens of eligible FIEs wishing to become shareholding companies, it remains a question of how many FIEs will be selected by the MPI and the Prime Minister for conversion. FIEs should note Article 26 of Decree 38 sets forth a time frame for selection of FIEs in conversion is only a year from the effective date of the Decree (*see the Official Gazette*).

Operations of shareholding FIEs

It is worth noting firstly that shareholding FIEs shall operate under neither the Law on Enterprises which generally provides legal framework governing the operations of the shareholding companies, nor the Law on Foreign Investment in Vietnam, but under Decree 38 itself. Decree 38 unclearly says that where any provision is absent in this Decree, shareholding FIEs' operations shall be governed by other relevant stipulations. Beside repeating some provisions of the Law on Enterprises relevant to operations of

shareholding FIEs, Decree 38 explicitly refers to certain clauses and articles of such Law to be applied.

Shareholding FIEs shall be entitled to continuously enjoy preferential corporate income tax as they did previously in accordance with the investment licence and the Law on Foreign Investment in Vietnam. Protection of legitimate rights and interests of foreign investors are still assured.

Decree 38 requires each of shareholding FIEs must have at least one foreign founder and total stakes held by foreign founding shareholders must equal at least 30% of the chartered capital of that enterprise.

The transfer of foreign shareholders' shares to foreigners can be freely conducted, meaning be not required approval by authority (subject however to the conditions for transfer of name bearing stocks), meanwhile the transfer of foreign shareholders' shares to Vietnamese entities is subject to compulsory approval by the MPI. This is to better control foreign investors' abandonment from the country.

Shareholding FIEs shall be permitted to listing in the domestic stocks markets. However, listing in overseas must be approved by Vietnamese competent authority, whose name is anonymous in the Decree. Foreign shareholders, being either resident or non-resident in Vietnam, are permitted and entitled to engage in management activities of the enterprise.

Other news

By Decision 49/2003/QD-TTg and Decision 50/2003/QD-TTg dated 14 April 2003, the Prime Minister agreed to establish the Management Board of Dak-lak Industrial Zones and one for Hatay Industrial Zone. Such Management Boards are therefore authorized to issue certain investment licences and to manage investment projects within their industrial zones.

Trading

Compulsory selling proportion of foreign currency is reduced to nil

By Decision 46/2003/QD-TTg dated 2 April 2003, the Prime Minister reduced the mandatory selling rate of foreign currency from 30% as in Decision 562/2002/QD-NHNN of the Governor of the State Bank of Vietnam dated 3 June 2002 to 0%.

Enhancing local enterprises competitiveness

According to the Prime Minister's Directive 08/2003/CT-TTg dated 4 April 2003, all State competent authorities are required to recheck all issued legal instruments governing business enterprises for up-to-date adjustments.

The Ministry of Finance (MoF) is required to continuously creating favorable conditions for private sector and cooperate with the MPI to use more effectively the fund for development assistance. The MPI is assigned to issue Circular detailing the Governmental Decree on conversion of FIEs into shareholding companies. The

Directive also requires the People's Committee at all levels to stimulate the activities of Credit Guarantee Fund for the small and medium enterprises, helping them have greater access to banking credit.

Administrative sanctions against business registration violations

On 10 April 2003, the Government issued Decree 37/2003/ND-CP on administrative sanctions against violations on business registration. This Decree is applicable to organizations and individuals undertaking registration for business, branch and representative office establishment, and business households. Those violated regulations under the Decree 02/2000/ND-CP on business registration such as declaration of the shareholders, the legal representative; declaration of headquarter and business office; capital contribution; submission of financial report, etc. may be subject to penalty of from VND100,000 to VND10,000,000.

Adjustment of charter capital of joint stock companies

Since the issuance of the Law on Enterprises in 1999, change to charter capital and shares quantum of joint stock companies (JSCs) was firstly guided on 20 March by Circular 19/2003/TT-BTC of the MOF.

JSCs are allowed to increase its charter capital by the following ways:

- Issuing new shares to mobilize capital;
- Converting issued bonds into shares;
- Paying dividend by shares;
- Issuing new shares to admit a part of or the whole of other companies;
- Transferring surplus capital into charter capital increase.

Also, JSCs have the right to decrease charter capital whenever there is a need to change business sectors, reorganize organizational structure, abolish company holding shares etc.

Selling and buying company shares as well as issuing new shares are not considered as financial business activities and therefore shall not be subject to corporate income tax and value added tax.

Other documents

- Decision 57/2003/QD-TTg dated 14 April 2003 of the Prime Minister on approval of crucial investment promotion programs;
- Dispatch 1416/TM-DB dated 8 April 2003 of the Ministry of Trade on investment co-operation within ASEM;

Import - Export

Point of time for calculation of import, export duty

According to Circular 26/2003/TT-BTC dated 1 April 2003 of the MOF, the point of time for calculation of import and export duty is stipulated in Circular 172/1998/TT-BTC guiding Decree 54/CP dated 28 August 1993 and Decree 94/1998/ND-CP dated 17 November 1998, meaning the date of submission of the declaration form of imports and exports to the customs offices.

Stop importing CKD1 automobile parts

By Decision 48/2003/QD-TTg suspending the application of Inter-ministerial Circular 03/2001/TTLT-BKHDT-BCN-BTM dated 18 May 2001, the Prime Minister temporarily stopped the importation of CKD 1 automobile parts.

Other documents

- Decision 0271/2003/QD-BTM dated 13 March 2003 of the Ministry of Trade issuing the list of goods entitled to export credit supports in 2003;
- Decision 47/2003/QD-BTC dated 11 April 2003 of the Ministry of Finance on nullification of minimum price for imposition of import duty on EU originated liquor and alcohol drinks;
- Decision 48/2003/QD-BTC dated 11 April 2003 of the Ministry of Finance on nullification of the rate for collection of price variation on EU originated import patterned tiles;
- Decision 53/2003/QD-BTC dated 16 April 2003 of the Ministry of Finance on customs formalities applied to imports, exports changing the border gates.
- Circular 33/2003/TT-BTC dated 16 April 2003 of the Ministry of Finance guiding customs procedures with respect to imports, exports by post.

Labour

Regulations on Social Insurance Changes

In accordance with Circular 07/2003/TT-BLDTBXH detailing Decree 01/2003/ND-CP dated 9 January 2003 on social insurance, an employee who has paid social insurance for full 15 years shall be entitled to get retirement wage equal to 45% of the average monthly wage serving as the basic for social insurance contribution. Then, from the sixteenth year upwards, retirement wage for male and female employees shall be plus 2% and 3% respectively for each year of social insurance contribution, but in no case exceeding 75%.

Other provisions for calculation of social insurance allowances are also detailed in Circular 07.

Other documents

- Government's Decree 30/2003/ND-CP dated 30 March 2003 on determination of functions, obligations, rights and organisational structure of the Ministry of Labour, War Invalids and Social Affairs;
- Government's Decree 33/2003/ND-CP dated 2 April 2003 on amendments of and additions to a number of articles of Decree 41/ND-CP dated 6 July 1995 on labour disciplines and material responsibilities;
- Circular 08/2003/TT-BLDTBXH dated 8 April 2003 of the Ministry of Labour, War Invalids and Social Affairs guiding the implementation of regulations on working leaves for health rehabilitation as provided by the Government's Decree 01/2003/ND-CP dated 9 January 2003;
- Decision 369/2003/QD-BLDTBXH dated 2 April 2003 of the Ministry of Labour, War Invalids and Social Affairs on extension of duration of area subsidy;
- Dispatch 1098/LDTBXH-BHLD dated 10 April 2003 of the Ministry of Labour, War Invalids and Social Affairs on working time and rest time, safety and hygiene in working places.

Education - Culture**Educational and cultural establishments in Vietnam**

The Ministry of Education and Training (MoET), on 31 March 2003, issued Circular 15/2003/TT-BGD&DT on setting up and operations of foreign non-profit educational and cultural establishments in Vietnam. Such establishments may be set up under the form of representative offices, co-operative or independent establishments.

The MoET has authority to grant the license based on the following conditions:

- The formation of establishments must be in line with educational and cultural development policies;
- Educational programs of establishments must meet all requirements on contents and methods as stipulated in the Law on Education and subordinate legal instruments; and
- Plans for operations must be feasible.

Other Sectors**Taxation**

- Dispatch 1263TCT/CS dated 9 April 2003 of the General Department of Taxation regarding duration for tax exemption and reduction pursuant to the Law on Domestic Investment Promotion;
- Dispatch 1677/TCHQ-KTTT dated 17 April 2003 of the General Department of Customs regarding price for tax calculation as stipulated in the Ministry of Finance's Circular 08/2002/TT-BTC;

- Dispatch 1669/TCHQ-KTTT dated 17 April 2003 of the General Department of Customs regarding tax calculation in accordance with motorbikes localization rate.

Banking

- Decision 312/2003/QD-NHNN dated 4 April 2003 of the State Bank of Vietnam amending Article 1(a) of Circular 03/2003/TT-NHNN dated 24 February 2003 providing guidelines for borrowing without collateral pursuant to Government's Resolution 02/2003/NQ-CP dated 17 January 2003;
- Decision 343/2003/QD-NHNN dated 10 April 2003 of the State Bank of Vietnam on amendments of and additions to Article 1 of Decision 418/2000/QD-NHNN7 dated 21 September 2000 on foreign currency borrowers of credit institutions.

Auditing

- Decision 28/2003/QD-BTC dated 14 March 2003 of the MOF on announcement of five Vietnamese auditing standards. Standards issued this time include: (220) Auditing quality control; (320) Essentiality of auditing; (501) Additional auditing evidences of special items and events; (560) Events occurring after close of financial books; and (660) Use of other auditors' data.

Securities

- Decision 50/2003/QD-BTC dated 15 April 2003 of the Ministry of Finance on amendments of and additions to some provisions on membership, listing, announcement and securities transactions issued in conjunction with Decision 79/2000/QD-UBCK dated 29 December 2000 of the State Securities Committee. Several matching-order transaction units have been reduced; while buying shares, the cash balance of the buyer must be at minimum depository amount of 70%, instead of old rate of 100%;
- Decision 51/2003/QD-BTC dated 15 April 2003 of the Ministry of Finance on amendments of and additions to some provisions on securities custody, clearing and registration issued in conjunction with Decision 05/1999/QD-UBCK3 dated 27 March 1999 and Decision 43/2000/QD-UBCK3 dated 14 June 2000 of the State Securities Committee. Foreigners wishing to take part in securities trading should apply for securities trading code via any securities custody member (previously, foreigners must apply via foreign securities custody members).

Telecommunications

- Decision 739/2003/QD-GCTT dated 21 March 2003 of VNPT on issuance of international 171 telephone charges;
- Decision 741/2003/QD-BBCTV dated 21 March 2003 of VNPT on issuance of special international telephone charges;
- Decision 742/2003/QD-GCTT dated 21 March 2003 of VNPT on connection fee and service charges at public places applied to subscription of GSM mobile phone services;

- Decision 47/2003/QD-BBCVT dated 20 March 2003 of the Ministry of Posts and Telematics (MoPT) on international telephone charges of PSTN network;
- Decision 48/2003/QD-BBCVT dated 20 March 2003 of the MoPT on IP protocol international telephone charges;
- Decision 49/2003/QD-BBCVT dated 20 March 2003 of the MoPT on GSM mobile phones post-paid charges;
- Decision 50/2003/QD-BBCVT dated 20 March 2003 of the MoPT on GSM mobile phones pre-paid charges;
- Decision 53/2003/QD-BBCVT dated 20 March 2003 of the MoPT on charges of interprovincial telecommunication channels leasing applied to Internet connection services providers;
- Decision 54/2003/QD-BBCVT dated 20 March 2003 of the MoPT on charges of international telecommunication channels leasing;
- Decision 55/2003/QD-BBCVT dated 20 March 2003 of the MoPT on charges of leasing international telecommunication channels applied to Internet connection services providers for international Internet connection;
- Decision 56/2003/QD-BBCVT dated 20 March 2003 of the MoPT on telephone charges of Internet access via PSTN;
- Decision 57/2003/QD-BBCVT dated 20 March 2003 of the MoPT on charges of installation and leasing gate for Internet direct connection;
- Decision 58/2003/QD-BBCVT dated 20 March 2003 of the MoPT on charges of installation and leasing gate for Internet direct connection by software parks.

Equitization

- Prime Minister's Decision 368/QD-TTg dated 3 April 2003 on approval of master plan for reorganization and restructuring of SOEs under Vietnam National Coal Corporation in 2003-2005 period;

Miscellaneous

- Prime Minister's Decision 45/2003/QD-TTg dated 2 April 2003 on establishment of Departments of Natural Resources and Environment, replacement of Departments of Science, Technology and Environment by Departments of Science and Technology under provincial people's committees;
- Government's Decree 30/2003/ND-CP dated 30 March 2003 on determination of functions, tasks, authority and organisational structure of governmental bodies.

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