

JULY NEWSLETTER

In this edition of our newsletter we report on the following:

- i) New Decree on investment in the form of **public-private partnerships**;
- ii) New Decree on **state capital investment in enterprises**;
- iii) New Draft Circular regulating information **confidentiality in the banking sector**;
- iv) Update on the draft Law on Special Administrative and Economic Units of Van Don, Bac Van Phong, and Phu Quoc (proposing to extend the land lease term up to 99 years); and
- v) New Circular guiding Decree 146/2017/ND-CP on several **taxes**.

1. New Decree No. 63/2018/ND-CP on public private partnerships (PPP)

On 4 May 2018 the Government of Vietnam issued Decree No. 63/2018/ND-CP (**Decree 63**), replacing Decree No. 15/2015/ND-CP on investment in the form of a public private partnership (**Decree 15**). Decree 63 took effect from 19 June 2018.

Some of the major changes contained in Decree 63, as compared to the currently applicable Decree 15, include:

- **Removal of the requirement to obtain an Investment Registration Certificate for a PPP project**

Decree 63 provides for the removal of the requirements for investors to obtain an Investment Registration Certificate (**IRC**) for a PPP project. While this amendment aims to simplify the procedures for the implementation of PPP projects, it will need to be carefully coordinated with the provisions of the Law on Investment which still require the issuance of an IRC for foreign investors.

- **Minimum equity requirements to be maintained by investors of PPP projects**

Under Article 10 of the Decree 63, the equity capital to be maintained by PPP investors shall be at least 20% (rather than 15% as provided for under Decree 15) of the total investment capital with respect to projects having the total investment capital being up to 1,500 billion VND. With respect to

projects having the total investment capital being over 1,500 billion VND, the equity capital must comply with the following requirements: (i) the equity capital to be maintained by PPP investors shall be at least 20% (rather than 15% as provided for under Decree 15) with respect to the investment capital being up to 1,500 billion VND; and (ii) at least 10% of the total investment capital with respect to the rest of the investment capital.

- **Publication of information on PPP projects upon signing of project contracts**

Under Article 41 of Decree 63, the relevant authorised State agencies are required to make public certain key details on the project within 7 (seven) days upon signing of project contracts (including project name, contract signing date, contract term, identity and particulars of the investors, project implementation location, total investment capital, prices and fees of goods, services and other revenues, etc.).

- **Different procedures for PPP projects which apply high technology**

Article 9 of Decree 63 provides that PPP projects which apply high technology are subject to different implementation procedures as compared to other projects. Specifically, for these projects, the feasibility study is to be prepared by the investor(s) themselves after being selected, instead of being prepared by the Ministries or provincial People's Committees as it is the case for other projects. Decree 63 refers to the applicable law on high technology for the determination of projects applying high technology (currently being the Law on High Technology No. 21/2008/QH12 dated 13 November 2008 and its implementing regulations).

- **Preparation of model contracts for PPP projects**

According to Article 40.5 of Decree 63, Ministries and ministry-level agencies shall provide detailed guidelines on model project contracts that are consistent with the requirements applicable to the projects of each sector and that cover the detailed contents prescribed under Article 40.1.

- **Additional restrictions on investors' assignment of their rights**

Article 43 of Decree 63 consolidated the previous requirements under Decree 15 and its implementing regulations applicable to investors and assignees in order for the investors to be able to assign their rights and obligations in project contracts to their lender(s) or to other investors. In addition, Article 43.1 of Decree 63 further requires that such assignment can only be done after the completion of the construction works (for projects with construction components), or after the commencement of the operation phase (for projects without construction components). These requirements are aimed at preventing the situation where an investor bids for the project merely for the purpose of then assigning such project to other unqualified investors and without carrying out any implementation activities.

2. **New Decree 32/2018/ND-CP on State capital investment in enterprises**

On 8 March 2018, the Government issued Decree No.32/2018/ND-CP amending and supplementing certain articles of the Government's Decree No. 91/2015/ND-CP on State capital investment in enterprises, use and management of capital and assets of enterprises (**Decree 32**). Decree 32 took effect on 01 May 2018.

Decree 32 introduces major changes in relation to a number of important regulations on the sale of State capital in State-owned enterprises (**SOEs**). Some notable changes contained under the Decree 32 include the following:

- **SOEs are prohibited to invest in the real estate sector and certain other sectors**

- i) While Decree 91 provided a prohibition for SOEs to invest in real estate business (except for SOEs whose registered main business is real estate), Decree 32 now further specifies that SOEs are not allowed to use their assets, capital and land use rights to contribute capital or invest in the real estate sector (except for SOEs whose registered main business is real estate).

- ii) The prohibition that SOEs must not contribute capital or buy shares in banks, insurance companies, securities companies, venture investment funds, securities investment funds or securities investment companies (except for several very special cases decided by the Prime Minister) remains unchanged in Decree 32.

- **Regulations regarding determining the starting price of shares**

- i) Decree 32 provides a new requirement that any transfer of capital contribution or shares held by SOEs must be in accordance with a restructuring plan approved by the relevant authority, regardless of the value of the capital contribution or shares or the business status of the target company.
- ii) Before the commencement of the capital transfer process, SOEs must choose to sign a contract to hire an accredited valuation organisation to determine the starting price of shares. Accordingly, such organisation shall determine the actual value of SOEs' investment, including value formed by land use rights, value of intellectual property rights comprising cultural, other historical value, value of brands and commercial names (if any).
- iii) In the case of listed joint stock SOEs, if the starting price determined is less than the average reference price within 30 consecutive transaction days on stock exchanges before the disclosure of information about the sale of transferred capital shares, this average reference price shall be used as the start price at which capital is transferred for transactions performed on stock exchanges and off-the-exchange. The starting price shall be only valid for six months from the effective date of the valuation certificate or until the final transaction date.

- **Transfer process with respect to shares**

- i) The transfer of shares held by SOEs in a company being a listed company or having shares traded in a transaction system organised by the relevant Stock Exchange must have a minimum price being not less than the starting price as determined by the valuation organisation.
- ii) There are three methods to transfer shares held by SOEs in non-listed companies or listed companies where the transaction is not conducted on stock exchanges. The three methods are:
 - Public auction;
 - Competitive quotation; and
 - Agreement method.

These methods will be applied in order to transfer the shares. In addition to the above mentioned methods, SOEs may transfer shares by "book-building" method upon receiving an approval of the Prime Minister.

- **Transfer process with respect to capital contribution in limited liability companies**

Decree 32 also provides guidance for transfer of capital contribution in limited liability companies in accordance with the Law on Enterprises. In general, the transfer price will be agreed between the seller and the buyer on an arm's length basis and the price shall be evaluated by the valuation organisation.

- **Requirements regarding public disclosure**

- i) SOEs transferring their shares or capital contribution are required to make public disclosure of the information regarding the proposed transfer. The disclosure must be prepared in a prescribed form, which contains information in respect of the business operation report for the most recent two years and profit contribution and dividend plan for next year.

3. New Draft Circular regulating information confidentiality in the banking sector

The State Bank of Vietnam recently issued a Draft Circular on the protection of security and confidentiality of information system in the banking sector (**the Draft Circular**), aiming at replacing the current Circular No. 31/2015/TT-NHNN dated 28 December 2015 governing the same issues (**Circular 31**).

The Draft Circular applies to the State Bank of Vietnam, and to credit institutions (other than people's credit funds and microfinance institutions), branches of foreign banks, and intermediary payment services providers.

Below are some noteworthy developments in the Draft Circular as compared to the current Circular 31:

- **(1) Classification of information systems into 5 categories**

Under Article 4 of the Draft Circular, information shall be classified into different categories, being public information, internal information and confidential information, depending on the type and nature of the information and the allowable access to such information.

Furthermore, the information system shall be classified into five different levels, from Level 1 to Level 5. The classification is based on different criteria, including, among others, the type of information that is being processed by such information system, the continuity of operation of such information system, and the purpose of such information system.

More restrictive rules shall apply to information systems of higher level.

- **(2) Requirement on specialised units in charge of information security**

Under Article 12 of the Draft Circular, for entities which own information systems of Level 3, Level 4 and Level 5, or which directly manage and operate information systems of Level 3, Level 4 and Level 5, such entities are required to:

- i) Establish or appoint a specialised unit in charge of information security, which is responsible for ensuring information security and remedying any cyber information security incidents.
- ii) Establish or appoint a specialised unit in charge of management of cyber information security operation center (**SOC**) (noting that the Draft Circular specifically indicates that this requirement is not applicable to intermediary payment service providers). Any SOC must comply with various requirements in terms of its responsibilities and course of actions in case of any cyber information incidents, as provided under Article 45 of the Draft Circular.
- iii) Appoint different personnel for different functions, specifically:
 - a) Personnel in charge of the development of the information system should be separated from those in charge of the management of the information system;
 - b) Personnel in charge of the development of the information system should be separated from those in charge of the operation of the information system;
 - c) Personnel in charge of the management of the information system should be separated from those in charge of the operation of the information system; and
 - d) Personnel in charge of the security-checking of the information system should be separated from those in charge of the management and operation of the information system.

- **(3) Requirement for the use of third party service providers in relation to information systems**

The Draft Circular introduces several requirements in case an entity in the banking sector wishes to outsource its information system to a third party service provider.

Specifically, the Draft Circular provides for (i) several criteria that an entity must take into account when choosing a third party service provider, (ii) minimum required contents of an outsourcing contract with such third party service provider, and (iii) responsibilities of the entity in supervising the services provided by such service provider.

Article 31.4 of the Draft Circular clearly provides that for information systems of Levels 3, 4 and 5, the entity cannot outsource a third party service provider to perform all management work over the information system. In other words, in case of these systems, the entity owning such information system must ensure that it has resources to perform at least part of the management work.

Specifically in terms of cloud computing services, the Draft Circular requires that more restrictive criteria should be taken into account in the process of choosing a third party service provider. In case such service provider is an offshore entity and the information system is of Level 2 or higher, besides all criteria generally applicable, the Draft Circular requires that an entity must obtain legal opinions of a legal counsel experienced in advising on this kind of international contracts and on the terms and conditions of the service contract (that is signed between the entity owning the information system and the offshore cloud computing service provider).

4. Status of the proposal to extend the land lease term up to 99 years

In its last session the National Assembly discussed a draft Law on Van Don, Bac Van Phong, and Phu Quoc Special Administrative and Economic Units (*the Draft Law*). The Draft Law provides many incentives for both domestic and foreign investors in Van Don, Bac Van Phong, and Phu Quoc special administrative and economic units. Amongst other incentives, the Draft Law proposes to extend the term to lease land in those special units to 70 years, and up to 99 years in special projects upon the approval of the Prime Minister (while the maximum land lease term under the current Land Law is 50 years, and 70 years for special projects).

The proposal in the draft law was however controversial, and became a hot topic on Vietnamese news. The National Assembly therefore decided to take additional time to consider the Draft Law until the next meeting of the National Assembly in October 2018.

5. New Circular 25/2018/TT-BTC providing guidance on several taxes

On 16 March 2018, the Ministry of Finance issued Circular No. 25/2018/TT-BTC (*Circular 25*) providing guidelines for Decree 146/2017/ND-CP, and amending and supplementing some articles of Circular 78/2014/TT-BTC (*Circular 78*) and Circular 111/2013/TT-BTC (*Circular 111*) of the Ministry of Finance. Circular 25 took effect on 1 May 2018.

Circular 25 covers three different types of taxes: corporate income tax (*CIT*), value-added tax (*VAT*) and personal income tax (*PIT*).

- **Changes with respect to CIT calculation**

The threshold for deductible expenses for determining taxable income in relation to the voluntary pension fund, the purchase of voluntary pension insurance and life insurance for the employees and other funds having social security nature have been raised from one to three millions Vietnamese Dong (*VND*) a month for each employee.

The cost of purchase of life insurance for employees is, in addition to other deductible expenses as mentioned above, now capped at 3 million VND per month for each employee. Under the previous regulation there was no cap, and it was possible to deduct this type of expense from the taxable income regardless of its amount, as long as it had been clearly recorded in one of the labour contracts, collective labour agreements, financial rules of the Company or other corporate financial regulations.

Circular 25 also added a new case in which depreciation of fixed assets is counted into deductible

expenses. In case of a transfer of part or whole of the shares of a company or in case of acquisition of a company, if there is a transfer of the property in accordance with such acquisition, depreciation of transferred fixed assets shall only be considered as deductible expense in case those assets are eligible for depreciation deduction based on the remaining value in the accounting books of the transferor.

- **Changes with respect to VAT calculation**

- i) Some additional goods and services have been exempted from VAT, such as:
 - a) Exported products being resources and minerals not having been processed into other products; and
 - b) Exported products being goods processed directly from resources and minerals as main mineral, where the total cost of resources and minerals plus energy expenses accounts for more than 51% of production costs (except for cases listed in Article 1.1 of Decree 146/2017/ND-CP).
- ii) Circular 25 also introduced a change in the VAT refund mechanism, according to which VAT shall not be refunded if the exportation is not implemented in the geographical areas of customs operation in accordance with the provisions of customs legislation. The same applies for the case where imported goods are then exported and the exportation of such goods is not implemented in the geographical areas of customs operation in accordance with the provisions of customs legislation.

- **Changes with respect to PIT calculation**

Circular 25 has clarified the taxable income with respect to the income from transfer of securities. In particular, Circular 25 now directly refers to Article 6 of the Law on Securities and Article 120 of the Law on Enterprises (while the previous Circular 111 merely contained a general reference to the name of these laws), and has slightly changed the wording from “income from transfer of **shares** of individuals in joint stock companies” to “income from transfer of **share certificates** of individuals in joint stock companies”.

We trust that you find this edition of our newsletter an interesting read and welcome any feedback or comments you may have on any of our topics. Our address for comments is legalenquiries@frasersvn.com.

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