

FEATURES OF NEW REGULATIONS ON ENTERPRISE REGISTRATION

On 14 September 2015, the Government of Vietnam issued Decree No. 78/2015/ND-CP on enterprise registration (**Decree 78**), replacing Decree No. 43/2010/ND-CP of the Government of Vietnam, dated 15 April 2010, as amended by Decree No. 05/2013/ND-CP dated 9 January 2013, on the same matter (**Decree 43**).

This Legal Update provides an overview of the salient features introduced under Decree 78.

Enterprise registration authority

Decree 78 confirms that the Business Registration Division (**the Business Registration Division**) of each provincial or municipal Department of Planning and Investment (**DPI**) shall be the government authority responsible for enterprise registration.

With respect to the procedures for enterprise registration, the relevant licensing authority shall be the DPI only. Whereas under the Law on Investment 2014, the licensing authority in charge of the procedures for investment registration shall be: (i) the management board (**Management Board**) of an industrial zone, export processing zone, high-tech zone or economic zone (together, **Zones**) with respect to investment projects in their respective Zones; or (ii) the DPI with respect to investment projects outside the Zones. It seems that foreign invested enterprises in the Zones shall now be under the management authority of two separate agencies, namely the Management Board in relation to investment registration procedures and the DPI in relation to enterprise registration procedures. This is a new issue which requires the attention of foreign invested enterprises in the Zones.

It is further noted that, additional offices of the Business Registration Division may be established in Hanoi and Ho Chi Minh City to facilitate the enterprise registration process, upon the decision of the relevant provincial or municipal People's Committee and approval of the Ministry of Planning and Investment (**MPI**).

Shorter time limit for issuance of Enterprise Registration Certificate

To ensure consistency with the Law on Enterprises 2014, Decree 78 amends the time limit for the issuance of the Enterprise Registration Certificate (**ERC**) from five days as provided in Decree 43 to three days from the date of receipt of a valid application dossier.

In addition, in order to avoid lengthy delays for enterprises in cases whereby an application dossier is incomplete or the proposed name of the enterprise is not in compliance with the law, the Business Registration Division shall issue a notice setting out all of the requirements for amending or supplementing items/documents for the application dossier within three days as from the date of receipt of the application dossier. Furthermore, the Business Registration Division may not request any further documents other than those documents required by law during the assessment of an ERC application dossier.

After the three days have passed, those enterprises which do not receive any feedback from the licensing authorities shall be entitled to register a complaint in accordance with the regulations on complaints and denunciations.

Enterprise code

As provided in previous regulations, every enterprise shall be issued with an enterprise code, a unique code which will also serve as the tax code of such enterprise. With respect to a branch or representative office of an enterprise, they will be issued with a dependent unit code.

With respect to enterprises which have been established and operate under an Investment License or Investment Certificate, their tax code will be their enterprise code.

Name of enterprise

Decree 78 includes an additional case whereby the proposed name of an enterprise would be considered as a "name causing confusion". In particular, if the proposed name of an enterprise requesting registration is the same as the proper name of a registered enterprise (regardless of their corporate form), it will be treated as a name causing confusion and will not be eligible for registration.

However, Decree 78 further highlights that all foreign invested enterprises operating under Investment Licenses or Investment Certificates and having identical names which have been duly registered previously, and now such names cause confusion with a domestic enterprise, shall not be required to change the names.

In addition, Decree 78 also provides further guidance in dealing with the circumstance whereby enterprise names cause an infringement of industrial property rights of other entities.

Corporate seal

An enterprise has the right to decide on the form, number and contents of its seal, as well as the seal of its branches and representative offices. An enterprise may have more than one seal with the same form and contents. We note that under the Law on Enterprises 2014, a corporate seal must contain the enterprise name and enterprise code of the corporate entity.

Before use, change, deregistration or change of the number of seals or the seal of its branches and representative offices, the enterprise shall notify the relevant Business Registration Division of the sample seal for the purpose of publishing it on the National Business Registration Portal.

Registration for change of the registered items of an enterprise

The Business Registration Division shall issue the ERC in the case of:

- (i) registration for change of the head office of the enterprise;
- (ii) registration for change of the name of the enterprise;
- (iii) registration for change of the unlimited liability partners;
- (iv) registration for change of the legal representative of a limited liability company or joint stock company;
- (v) registration for change of the charter capital or ratio of capital contribution;
- (vi) registration for change of the members of a limited liability company with two or more members;
- (vii) registration for change of the owner of a one member limited liability company; or
- (viii) registration for change of the owner of a private enterprise as a result of the sale, a donation of the charter capital of an enterprise or the owner of a private enterprise becoming deceased or disappearing.

The Business Registration Division shall issue a certification of change if an enterprise so requires in the case of:

- (i) notification of supplementation or change of lines of business;
- (ii) notification of change of investment capital of the owner of a private enterprise;
- (iii) notification of change of information on the founding shareholders of a joint stock company;
- (iv) notification of change of the shareholders being foreign investors in an unlisted joint stock company;
- (v) notification of change of registered items on tax; or
- (vi) notification of change of managerial positions, information of shareholders being foreign investors, notification on private share placement, notification on leasing of private enterprise or notification on change of information on the authorised representative.

With respect to the registration of change of the registered business contents of the enterprises' branches, representative offices or business locations, the Business Registration Division shall issue a written confirmation on the change of the registered business contents on operation of the branches, representative offices or business locations.

Prior to registering a change in the head office, branches or representative offices of an enterprise, the enterprise is required to conduct the procedures for re-registration of the location with the tax authority in accordance with the tax regulations.

Subsequent to receiving the ERC or the certification on change of the business contents of the enterprise in relation to the lines of business, founding shareholders, or shareholders being foreign investors, the enterprise is required to pay a fee to publish the registered business contents of the enterprise on the National Business Registration Portal.

Procedures to change shareholders, or members in the case of contribution or acquisition of equity by foreign investors

Pursuant to the Law on Investment 2014, with respect to investment in the form of contribution of equity, or acquisition of equity, a foreign investor is required to implement registration procedures for such contribution or acquisition of equity if:

- (i) the foreign investor contributes equity, or acquires equity of a company operating in conditional business sectors applicable to foreign investors; or
- (ii) the contribution or acquisition of equity shall result in the ownership ratio of the foreign investor (or of an investor regulated at Article 23.1 of the Law on Investment) accounting for 51% or more of the registered charter capital of the company receiving such contribution or acquisition.

Within 15 days as from the date of receipt of a valid application dossier, the DPI shall issue a written notice approving the contribution of capital, or acquisition of equity in order to entitle the investor to proceed with the procedures for change of shareholders or members.

Online enterprise registration

Under Decree 78, the online system for enterprise registration through the National Business Registration Portal will be available for investors and enterprises. In particular, there are two means to register an enterprise online. In particular, registration can be undertaken via either a public digital signature or using a business registration account.

- **Online enterprise registration via public digital signature**

When undertaking online enterprise registration via a public digital signature, the legal representative of an enterprise shall declare information, upload electronic application dossiers, affix a public digital signature thereon and make payment of statutory fees in accordance with the procedures provided on the National Business Registration Portal.

Subsequent to the submission of an application dossier, the legal representative will be issued with an online acknowledgement of receipt of an application dossier.

If the application dossier satisfies the conditions on issuance of the ERC, the Business Registration Division shall transmit the enterprise information to the tax authority for automatic creation of tax code. Upon obtaining a tax code from the tax authority, the Business Registration Division shall issue the ERC and notify the enterprise of such issuance. In the case of an inadequate application dossier, the Business Registration Division shall send an online notification to the enterprise requesting for amendments or supplements to the application dossier.

- **Online enterprise registration by business registration account**

On the other hand, when undertaking online enterprise registration via a business registration account, the legal representative of an enterprise shall declare information and upload electronic versions of his/her identification documents on the National Business Registration Portal in order to be granted a Business Registration Account.

The legal representative shall use the Business Registration Account to declare information, upload application dossiers and verify the enterprise registration application dossiers in accordance with the procedures provided on the National Business Registration Portal.

Subsequent to the submission of an application dossier, the legal representative would be issued with an online acknowledgement of receipt of an application dossier.

If the application dossier satisfies the conditions on issuance of the ERC, the Business Registration Division shall transmit the corporate information to the tax authority for automatic creation of an enterprise code. Upon receipt of the enterprise code from the tax authority, the Business Registration Division shall notify the enterprise of the issuance of the ERC.

Subsequent to the receipt of notice of issuance of an ERC, the legal representative is still required to submit a hard-copy version of the application dossier enclosed with the online acknowledgement of receipt of the application dossier to the Business Registration Division. The legal representative may submit the hard-copy version of such application dossier at the Business Registration Division in person or by post.

Subsequent to the receipt of the hard-copy version, the Business Registration Division shall compare the type of items/documents provided in the online application dossier with those in the hard-copy application dossier and issue the ERC to the enterprise.

If the Business Registration Division does not receive the hard-copy application dossier within 30 days as from the date of issuance of the notification of issuance of the ERC, the online application dossier shall become invalid.

If the hard-copy application dossier is inconsistent with the online application dossier and the person handling the application dossier fails to notify the Business Registration Division of such difference in writing, such hard-copy application dossier shall be deemed to be fraudulent and shall be handled in accordance with the procedures for withdrawal of the ERC.

Withdrawal of the ERC

The ERC shall be withdrawn in accordance with the Law on Enterprises 2014 and the Law on Tax Management (amended) in the following cases:

- (i) information in the application dossier for enterprise registration is fraudulent;
- (ii) the enterprise was established by persons prohibited from enterprise incorporation;
- (iii) the enterprise suspends its business operations for one year without notification to the Business Registration Division and tax authority;
- (iv) the enterprise does not submit a report to the Business Registration Division within six months as from the expiry date for reporting or the date of written request by the Business Registration Division;
- (v) other cases pursuant to the Court's decision; or
- (vi) enforcement of an administrative decision on taxation.

Reinstatement of legal status for enterprise after the withdrawal of ERC

A significant improvement set out in Decree 78 compared to the previous legislation on enterprises provides guidance for the reinstatement of the legal status of an enterprise following the withdrawal of its ERC.

According to Decree 78, the Business Registration Division shall issue a decision on the cancellation of the previous withdrawal of an ERC and reinstatement of the legal status of an enterprise on the National Business Registration Portal in the following cases:

- (i) the Business Registration Division determines that the enterprise does not qualify as a case for which its ERC should be withdrawn; or
- (ii) the Business Registration Division receives a request from the tax authority to reinstate the legal status of the enterprise (which has previously had its ERC withdrawn) prior to any updating by the Business Registration Division on the National Business Registration Portal that such enterprise has been dissolved or within six months as from the date of issuance of the decision on the withdrawal of the ERC.

In addition, Decree 78 also provides a separate chapter on the registration of business households. Accordingly, the licensing authority for business households shall be the Finance and Planning Division of the People's Committee at Ward level.

Decree 78 will take effect as from 1 November 2015.

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