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In this edition of our newsletter, we report on:

- Reductions in Corporate Income Tax;
- Amendments to Article 170 of the Law on Enterprises;
- E-commerce legislative developments;
- a new Circular on market surveillance agency inspections and associated administrative violations; and
- a new Circular on Real Estate Investment Trusts (***REIT***'s).

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 *newsletter@frasersvn.com*.

Whilst we aim to provide a useful update on new legislation, Frasers' Newsletter does not constitute formal legal advice. Should you feel that you require further information on any of the issues in this edition of our Newsletter, please contact us at the address above or via your usual Frasers' legal adviser.

AMENDMENTS TO THE LAW ON CORPORATE INCOME TAX

Law No.32/2013/QH13 on Amendments of and Supplements to the Law on Corporate Income Tax (***Amended CIT Law***) was passed by the National Assembly on 19 June 2013. Designed to address the challenges identified after four years of implementing the current Law on Corporate Income Tax (***CIT Law***), the Amended CIT Law is expected to enforce Vietnam's tax reform roadmap (2011-2020) by reducing the rate of corporate income tax (***CIT***), thus more effectively supporting enterprises to expand their production, stimulate investments, and ensuring a more level playing field for all enterprises.

A draft of the Decree on implementing the Amended CIT Law (***Draft Decree***) has been prepared simultaneously, to ensure that the Amended CIT Law is promptly and effectively enforced.

The main points of the Amended CIT Law are outlined below:

Taxable income and tax exempt income

In the Amended CIT Law, the types of taxable income have been expanded. Among the types of income now considered to be taxable are: income from the transfer of capital contribution rights, the transfer of investment projects, the transfer of rights to participate in investment projects, and income from the transfer of rights to explore, mine and process minerals. Income from the transfer of real property, as well as those activities listed in the CIT Law (collectively, ***infrequent activities***) must be determined separately and will not qualify for tax incentives. However, unlike the current provisions, the Amended CIT Law allows profits and losses from these activities to be offset against each other. If after such offsetting, an enterprise still suffers losses, except from the transfer of rights to participate in the exploration and exploitation of minerals investment projects, the losses may be offset against the profit from production and business activities in the same tax assessment. In addition, these losses can be carried forward with the same principal. The maximum period for carrying forward losses is five consecutive years as from the first year after the losses arise.

Apart from an increase in the types of taxable income, the Amended CIT Law also supplements numerous cases of CIT exemption. For example, to encourage investment projects with eco-friendly technology, income from the transfer of certified emission reductions (***CERs***) is exempt from corporate income tax. CERs, a standardised emission offset instrument, is a special "good" of enterprises conducting Clean Development Mechanism projects and issued with certificates of emissions reduction in accordance with the Kyoto Protocol on climate change.

Deductible expenses

In order to be consistent with the applicable provisions on value added tax (***VAT***), the Amended CIT Law requires that invoices must be issued for the purchase of goods and services valued at VND20 million and above, and that there must also be a receipt proving a cashless payment, unless Government regulations stipulate otherwise.

Under the Amended CIT Law, numerous expenses have been removed from the list of non-deductible expenses. Among them are a portion of the expenses used for raw materials, supplies, fuel, power and goods which exceed the general level of wear and tear determined by the enterprise; the actual prices of the goods when they leave the factory or the warehouse for delivery to the customer; financial aid or charitable homes for underprivileged people provided by law or financial aid paid in accordance with State programs in areas with especially challenging socio-economic conditions. The deductible limit for advertising and marketing expenses directly related to production and business activities has increased from 10% to 15% of the total amount of deductible expenses, and is applicable to all enterprises.

The following expenses, however, may not be deducted from CIT:

- a portion of expenses that are payments to a voluntary retirement fund, social welfare fund or voluntary retirement insurance program for employees when such contributions exceed the amount stipulated by the law. According to the Draft Decree, this amount is limited to VND1 million per month for each employee. This supports the Government's plan to stimulate voluntary retirement funds which in turn may help to stimulate the economy and provide aid to the country's social security programmes; and

- expenses for the following business activities: banking, insurance, lotteries, securities and a number of other special business activities as stipulated in the regulations of the Ministry of Finance.

Tax rates

As provided in the Amended CIT Law, the CIT tax rate is adjusted as follows:

- Beginning 1 January 2014, the general rate of CIT shall be reduced from 25% to 22%. As from 1 January 2016, this tax rate shall be further reduced to 20%.

  However, enterprises having an annual turnover not exceeding VND20 billion shall be entitled to apply a CIT rate of 20% from 1 July 2013, with the exception of some business sectors, among others, in real estate, capital transfers, project transfers, and income from doing business outside Vietnam. The turnover that determines if an enterprise is entitled to this tax rate is calculated based on the turnover of the preceding year.

- The CIT rate applied to the activities of prospecting, exploration and mining of petroleum and gas and other rare and precious natural resources in Vietnam shall be from 32% to 50%, subject to each specific project and business establishment. The tax rate in this circumstance remains unchanged according to the current provision. The Government is responsible for providing guidance to implement this issue.

Preferential tax rates

Preferential tax rates remain at 10% and 20%. However, the range of entities benefiting from the preferential tax rates has expanded.

A corporate income tax rate of 10% shall apply for 15 years to income from the following sources:

(i) new investment projects in areas with challenging socio-economic conditions, in economic zones and in high-tech zones;

(ii) new investment projects in scientific research and technological development; projects considered priority high technology investments in accordance with the Law on High Technology; certain high-tech projects; development of special infrastructure facilities for the State; production of software products; production of composite, light or valuable and rare materials; and production of recyclable or green energy;

(iii) high-tech enterprises and agriculture enterprises using high technology;

(iv) new investment projects in production (except projects involving products subject to special sales tax and mining projects). According to the Amended CIT Law, those projects must have investment capital of at least VND6,000 billion which shall be disbursed within three years as from the date of issuing the investment licence, and reaching at least VND10,000 billion per year in turnover after three years as from the first year reporting turnover; or having investment capital of at least VND6,000 billion which shall be disbursed within three years as from the date of issuing the investment licence and having at least 3,000 employees.

A corporate income tax rate of 10% shall apply without any time limit to income from the following sources:

(i) participation in the socialisation of certain sectors, including education and training, occupational training, healthcare, culture, sports and the environment, as encouraged by

specific policies of the Government;

(ii) investment in construction of social residential housing for sale, lease and hire purchase to the entities prescribed in Article 53 of the Law on Residential Housing 2005. This preferential tax rate is applicable as from 1 July 2013;

(iii) newspapers (including press advertising) or publishing activities by press agencies in accordance with the Law on Press or publishing activities by publishers in accordance with the Law on Publications;

(iv) certain agriculture and forestry activities as prescribed in the Amended CIT Law;

(v) certain agriculture, forestry, aquaculture and salt production activities of cooperative organisations;

A corporate income tax rate of 20% (to be reduced to 17% as from 10 January 2016) shall apply for 10 years to income from the following sources:

(i) new investment projects conducted in areas with challenging socio-economic conditions;

(ii) new investment projects in the production of high quality steel, energy-saving products, machinery and equipment used in agriculture, forestry, aquaculture and salt production activities, livestock and seafood or projects to develop "traditional business" (we await further guidelines for a definition of this term).

The duration of preferential tax rates may be extended in the case of large-scale and high technology projects seeking investment, but the duration of the extension shall not exceed 15 years.

The duration of the preferential tax rate shall be calculated from the first year in which the enterprise reports a turnover from the new investment project. With respect to high-tech enterprises or agriculture enterprises applying high technology or projects with high technology, the duration of the preferential tax rate shall be counted as from the time when the appropriate certificates are issued, proving the usage of high technology.

Duration of tax exemptions and reductions

Subject to the type of investment project, a qualifying enterprise shall be exempt from CIT for the following periods of time:

- a maximum of four (4) years, and shall be entitled to a 50% reduction of the amount of CIT payable for a maximum of nine (9) subsequent years; or
- a maximum of two (2) years, and shall be entitled to a 50% reduction of the amount of CIT payable for a maximum of four (4) subsequent years.

The duration of tax exemption and reduction shall be calculated from the first year in which the enterprise has taxable income from a new investment project. If an enterprise does not have taxable income in the first three (3) years as from the first year in which it has turnover from the new projects, the duration of tax exemption and reduction shall be calculated from the fourth year. With respect to high-tech enterprises or agricultural enterprises applying high technology, this tax incentive duration shall be counted as from the time when appropriate certificates are issued confirming the use of high technology.

In addition, the Amended CIT Law allows an enterprise with an existing investment project in the sectors or geographical areas subject to CIT incentives, and in the process of

expansion, by installing new production lines, expanding production scale or renovating production technology, to continue to enjoy tax incentives for the remainder of the project or to enjoy CIT exemption or reduction on any increased income resulting from such investment for the duration as a new investment project. However, this project must satisfy one of the following conditions (with the exception of M&A projects):

- the net value of increased immovable assets of the project at the time of completion and operation must be at least VND10 billion or VND20 billion subject to existing CIT incentives applicable to the project; or
- the net value of the immovable assets of the project must have increased by at least 20%; or
- proposed growth following expansion is at least 20%.

Transition term

The Amended CIT Law shall take effect as from 1 January 2014. Relevant provisions in other legislation which are contrary to the new regulations shall be repealed.

Enterprises that have investment projects entitled to CIT incentives pursuant to CIT legal Instruments prior to the effective date of the Amended CIT Law, shall continue to be entitled to such incentives for the remainder of the term or, in certain cases, entitled to enjoy tax incentives under the new law provided they are still within the term of entitlement for tax Incentives at the end of the tax assessment period for 2013.

AMENDMENTS TO THE LAW ON ENTERPRISES

Article 170 of the Law on Enterprises 2005 (***LoE***), being amended by Article 3 of the Law Amending and Supplementing a Number of Articles of the Laws Concerning Capital Construction Investment 2009 (***Article 170***) governs the status of Foreign Investment Enterprises (***FDIE***s) established before the enforcement of the LoE on 1 July 2006, under which such enterprises shall choose (i) to re-register their businesses under the new law before 1 July 2011, or (ii) not to re-register.

Enterprises that elect to re-register their business shall be treated with the full rights and obligations of FDIEs under the current LoE. FDIEs that choose not to re-register their business shall be limited from extending their line of business, project time and will be permitted to operate only within the permitted duration on their current Investment Certificate (***IC***).

The purpose of Article 170 was to provide a framework for existing FDIEs in response to the enforcement of the new LoE, urging FDIEs to re-register for better governance of the State, as well as for better assurance of their rights and obligations. However, as of December 2012, only 3,000 FDIEs (of the total 6,000) had applied for re-registration. The remaining 3,000 FDIEs risk dissolution once the permitted operation period on their existing IC expires, and without the right to apply for an extension.

It is noted that although the choice to re-register is left up to the FDIEs, the decision to not re-register not only affects the FDIEs themselves, but also impacts upon foreign investment and therefore the national economy. Consequently, in order to safeguard FDIEs that have not yet re-registered, as well as to encourage continued foreign investment activities, the Government has provided amendments to Article 170.

By Law No. 37/2013/QH13, the National Assembly recently amended Article 170 (***Amended LoE***).

Under the Amended LoE, Article 170 still gives FDIEs the choice whether or not to re-register. Furthermore, the rights and obligations of FDIEs under these two options are more open and practical compared to the previous options. Under the option of re-registration, the time period for registering the application has been omitted, leaving FDIEs to decide upon a suitable time to register their enterprise for compliance with the current LoE. However, with respect to FDIEs whose time limit has expired but the dissolution process has not been completed and they want to continue their operations, such FDIEs must be registered before 1 February 2014 under specific conditions regulated by the Government. The option to not re-register has also been optimised by allowing FDIEs to continue their business operations under their existing Investment Certificate and company charter; while other activities falling outside of the current Investment Certificate will be executed under the regulations of the LoE. This means that applications for amendments to their IC are still possible, provided they comply with the current LoE regulations. In particular, the Amended Law on Enterprises provides that FDIEs are allowed to adjust and add new business lines on the condition that these adjustments do not affect the existing duration of such FDIEs. If these adjustments impact on the existing duration of the FDIEs or FDIEs want to alter their duration, such FDIEs must be re-registered.

In general, the Amended LoE should provide an opportunity for FDIEs that have not re-registered after 1 July 2006 to decide how their enterprise will operate following the enforcement of the LoE coming into effect.

E-COMMERCE TRANSACTIONS

The Government has issued Decree 52/2013/ND-CP dated 16 May 2013 providing for e-commerce transactions (***Decree 52***). Decree 52 will replace Decree 57/2006/ND-CP of the Government regarding e-commerce, and shall come into force as from 1 July 2013.

Meanwhile, the Ministry of Industry and Trade (***MOIT***) is consulting the public on the contents of the draft Circular in respect of the procedures for the registration, rating and announcement of the operation of e-commerce websites (***Draft Circular***).

The salient features of Decree 52 and the Draft Circular include the following:

- Decree 52 is compulsorily applied to individuals and organisations participating in e-commerce activities on Vietnamese territory, including those of (i) Vietnamese nationality, (ii) Vietnamese residence, or (iii) having a Vietnamese presence through investment, branch/representative office establishment or website establishment with a Vietnamese domain. The e-commerce activities of foreign traders without any commercial presence in Vietnam are not subject to Decree 52.
- Decree 52 prohibits, among other things, the organising of business, marketing networks for e-commerce services, in which each member has to pay an initial settlement to buy services, and then receives a commission, bonus, or other economic interest from successfully convincing others to join the network.

Entering into e-contracts

E-documents can be recognised as original documents if (i) they are signed with registered digital signatures or certified by an e-contract authentication service provider; and (ii) the information in the e-documents is fully accessible.

Furthermore, the places of business of the author and recipient of the e-document will be deemed the places of origin and destination of the e-document. The vendor and purchaser should both

specify their respective places of business before entering into an e-contract. Should no specific place of business be listed, the place of business of an individual will be his/her residential address. The locations of servers, facilities or access points, or the locations mentioned in the domain name or emails will not be automatically considered as the place of business of the vendor.

E-contracts entered into between an individual and an automatic information system, or between two systems, are recognised as being entered into by individuals. Where an individual exchanges information with a system in order to formulate a contract, a mechanism must be in place to edit input information. Otherwise, the individual has the right to cancel a record with incorrect information provided the individual:

- immediately notifies the system of incorrect information; and
- has not yet used or obtained any benefit from the ordered goods or services provided by the vendor.

Online order functions

The terms and conditions (including production/service information) of online orders displayed on a website are deemed to be the offers proposed by a vendor to all visitors to the website.

When a customer uses the online order function of a website, it will be considered an order for the respective goods/services. The online order function must include a mechanism that allows customers to review, edit and then confirm or cancel their order (e.g. products/services, quantity, price and payment) before an order can be accepted as an online contract.

A vendor must accept or decline an order within the period specified on the website or twelve (12) hours from the time the order is made. The acceptance will confirm the products/services, quantity, total price, delivery time and contact information to the vendor. This acceptance will form an online contract binding the two parties.

The website must have a function by which a customer is able to terminate an e-contract in accordance with the procedures provided by the vendor.

E-commerce websites

Decree 52 sets out two types of e-commerce websites including e-commerce trading websites and e-commerce service websites, consisting of trading platforms, online auctions and online sales promotions. While the MOIT must be notified of a new e-commerce trading website, e-commerce service sites are subject to registration with the MOIT for official operation.

E-commerce trading websites must include, among other things, information about the name, address, and business registration certificate, contact details of the vendors, product/service description, price, general terms and conditions of the sale, delivery and payment.

E-commerce platform websites can be organised in the form of an “e-market” which allows vendors to display and sell goods/services in virtual stores, or advertising for sale and purchase in accordance with the registered and disclosed e-commerce platform rule published on the main page of the website.

Online auction websites must be owned by entities which have been registered for the auction service business and have suitable technical systems to record the auction prices and

display the highest price at least every 30 seconds from the opening of the auction.

Online sales promotion websites are used to sell goods and services at discounted prices in the form of coupons or customer cards. The owners of such websites and the vendors must enter into sales promotion agreements which outline the liabilities of the two parties.

The MOIT has the authority to announce the following information on its official e-commerce portal:

- a list of e-commerce trading websites and service websites that have been recognised by or registered with the MOIT;
- a list of e-commerce website ratings service providers; and
- a list of websites that have violated the law or breached the regulations in respect of customer rights.

E-commerce website rating and auxiliary services

The MOIT has the authority to issue a licence in respect of e-commerce ratings websites. Foreign ratings companies are permitted to provide ratings services in Vietnam, subject to licences issued by the MOIT. The licences have a maximum term of five (5) years.

Only Vietnamese organisations are eligible to apply for personal information security ratings or certification service licences.

Vietnamese organisations with suitable business plans are eligible to apply for an e-contract filing and certifying service licence. The applicant must deposit a specific amount of money (to be regulated later by the MOIT) at a commercial bank or commit to purchase professional insurance for compensation to customers (if any).

NEW CIRCULAR ON MARKET SURVEILLANCE AGENCY INSPECTIONS AND ADMINISTRATIVE VIOLATIONS

On 2 May 2013, the Ministry of Industry and Trade (***MOIT***) promulgated Circular 09/2013/TT-BCT providing regulations on the inspections and penalties imposed by the Market Surveillance Agency for administrative violations in industrial and trade operations (***Circular 09***). After coming into effect on 1 July 2013, the procedures for inspections and management of administrative violations in general, including administrative breaches in the intellectual property sector (as stipulated in Circular 12/2008/TT-BCT of the MOIT dated 22 October 2008 providing guidelines on procedures for the market surveillance agency to receive, accept jurisdiction of and resolve applications to deal with administrative violations in the intellectual property sector (***Circular 12***)), shall be governed by this Circular.

Form and basis of inspection

The Market Surveillance Agency shall be authorised to conduct two types of inspections, namely regular inspections and unscheduled inspections. Regular inspections shall be carried out according to the inspection plans that are formulated, approved and issued by the competent Market Surveillance authority. Such inspection plans are comprised of an annual inspection based on the products, sector, location, and objects being inspected. Unscheduled inspections shall be implemented upon receipt of information in respect of acts breaching or showing signs of breaching the law, or at the request of a relevant government authority.

The information upon which unscheduled inspections shall be based includes the following:

(i) mass media;

(ii) letters of complaint, denunciation or similar reports of organisations and individuals;

(iii) requests to handle the administrative violations of an organisation and/or individual;

(iv) officers who are assigned the task of monitoring and detecting administrative violations or who are conducting an inspection, or handling administrative violations; or

(v) written directions from the head of a competent State surveillance agency.

For administrative breaches in the intellectual property sector

As mentioned above, administrative breaches in the intellectual property sector are also covered under Circular 09. Therefore, receiving, handling and resolving applications dealing with such breaches have significantly changed. Specifically, pursuant to Circular 12, in order to request support in dealing with infringements of intellectual property rights in relation to goods with a counterfeit geographical indication, and illegally copied goods on the domestic market, a rights holder has to submit a file to the relevant market surveillance body. However, according to Circular 09, the inspection may be arranged based upon the information set out above, and whether or not it is deemed to be justified, (i) the decision to conduct the inspection shall be issued; or (ii) an examination of such information shall be carried out. If any of the conditions specified in Article 16 of Circular 09 are satisfied, an inspection shall be conducted (unless the intellectual property legislation provides otherwise).

Measures to prevent and ensure the settlement of administrative violations

During the course of inspection and settlement of administrative violations, market surveillance agents shall be entitled to apply measures to prevent and ensure the handling of administrative violations in accordance with the laws on the handling of administrative violations. With the exception of critical cases, all cases involving searching, vehicle checks, and examination of administrative procedures or concealed administrative violations, must have written approval from a competent authority before an inspection can occur.

NEW CIRCULAR ON REAL ESTATE INVESTMENT TRUSTS

Real Estate Investment Trusts (***REITs***) are well established investment vehicles in numerous markets around the world, and play a vital role in the raising of investment capital. On 15 September 2012, after much discussion concerning the benefits of REITs in mobilising available capital sources, particularly during times of economic downturn, the Government succeeded in passing Decree 58/2012/ND-CP, stipulating and guiding the Law on Securities and the Law Amending and Supplementing the Law on Securities, and providing a legal framework for REITs (***Decree 58***).[1] Subsequently, in accordance with Decree 58, Circular 228 dated 27 December 2012 was passed, and came into effect as from 1 July 2013, providing detailed guidelines on the establishment, capital raising, operation, and liquidation of REITs.

As provided in Circular 228, REITs are organised in the form of either a REIT fund (***REIT Fund***) or a securities company specialising in real estate (***SCRE***).[2] A REIT must be a public fund that is managed by a fund management company under the supervision of a supervisory bank and the fund units must be listed on a stock exchange. While REIT Funds are closed investment funds offering fund certificates to the public without commitment on redemption,

[1] Articles 90 and 91, Decree 58.
[2] Article 1.1, Circular 228.

SCREs offer shares to the public like an ordinary securities company but with the capital invested in real estate.

A REIT Fund may invest in real estate for the purpose of leasing or another use with a long-term stable income. A REIT Fund may not engage in property development and can only purchase properties under-construction in limited circumstances. Furthermore, a REIT Fund must hold its property for at least two years except in certain limited cases.

Unlike other types of investment funds, at least 65% of the net asset value (***NAV***) of a REIT must be invested in property. Moreover, a maximum of 35% of the NAV may be invested in cash, valuable papers and negotiable instruments with specific limitations on each item.[3] In other words, REITs are permitted to invest up to 100% of their investment in real estate, while the respective percentage applied to other closed funds is 10%.[4]

Circular 228 also specifies the steps for the initial public offering (***IPO***) of REIT fund certificates/SCRE shares and the procedures for establishment of a REIT, as follows:

1. registration for IPO of a REIT;
2. sale and distribution of REIT fund certificates/SCRE shares;
3. establishment of a REIT Fund/SCRE;
4. ownership recording in Registration Book for REIT fund certificates/SCRE shares; and
5. listing of REIT fund certificates/SCRE shares.

Additional public offering (***APO***) procedures are also outlined in Circular 228.

[3] Article 9.3, Circular 228.
[4] Article 92, Law No. 70/2006/QH11 on Securities; and Article 1.17, Law No. 62/2012/QH12 on amending and supplementing a number of articles of Law on Securities.

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