

# Forms of Doing Business in Vietnam

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## LIST OF ACRONYMS

<b>AFTA</b>	ASEAN Free Trade Area
<b>ASEAN</b>	Association of South East Asian Nations
<b>BCC</b>	Business Cooperation Contract (under the <i>LFI</i> and <i>Investment Law</i> )
<b>BOM</b>	Board of Members
<b>BOO</b>	Build-Own-Operate
<b>BOT</b>	Build-Operate-Transfer
<b>BRC</b>	Business Registration Certificate
<b>BT</b>	Build-Transfer
<b>BTO</b>	Build-Transfer-Operate
<b>CEO</b>	Chief Executive Officer
<b>CEPT</b>	Common Economical Preferential Treatment
<b>DOIT</b>	Department of Industry and Trade
<b>EFOC</b>	Enterprise with 100% Foreign Owned Capital (under the <i>LFI</i> )
<b>EIT</b>	Enterprise Income tax
<b>FIE</b>	Foreign Invested Enterprise
<b>GSM</b>	General Shareholders Meeting
<b>JSC</b>	Joint Stock Company
<b>JVC</b>	Joint Venture Company
<b>LFI</b>	Law on Foreign Investment in Vietnam
<b>LLC</b>	Limited Liability Company
<b>MFN</b>	Most Favored Nation
<b>MOF</b>	Ministry of Finance
<b>PC</b>	Partnership Company
<b>PIT</b>	Personal Income Tax
<b>PSC</b>	Product Sharing Contract
<b>RO</b>	Representative Office
<b>SIAA</b>	State Investment Administration Authority
<b>VAT</b>	Value Added Tax
<b>WTO</b>	World Trade Organization

## INTRODUCTION

Since Vietnam first opened its doors to foreign direct investment in the late 1980s, the primary way to establish a long-term corporate presence in Vietnam had been to set up a Foreign Invested Enterprise (“**FIE**”) under the *Law on Foreign Investment in Vietnam of 1996* (“**LFI**”) and its predecessor the 1987 *Law on Foreign Investment*.

However, on 1 July 2006 the amended *Enterprise Law* and the new *Investment Law* superseded the *LFI* as the main legislation governing foreign investment in Vietnam. The application of these laws is still unfolding with the issuance of implementing regulations, so in practice the questions that invariably arise with new legislation are being answered gradually over time.

This publication outlines the new corporate vehicles that are available to foreign investors and traders for conducting business operations in Vietnam under the *Enterprise Law* and *Investment Law* (e.g., limited liability companies and joint stock companies), and alternative means for establishing a business presence in Vietnam (e.g., representative offices, branches, human resources, and franchising and technology licensing). It summarizes and evaluates the legal forms of doing business in Vietnam including their tax implications, and outlines the consequences these new laws will have for existing investments in Vietnam.

## I. INVESTMENT UNDER THE ENTERPRISE LAW AND THE INVESTMENT LAW

Under the *Investment Law*, investors or enterprises undertaking a project with foreign investment capital must complete investment registration or evaluation formalities before the relevant central or provincial level State Investment Administration Authority (“**SIAA**”), or the Government (for certain projects), which will issue them investment certificates.

The *Enterprise Law* stipulates that every enterprise must receive a business registration certificate (“**BRC**”) prior to beginning operations. The BRC sets out the specific scope of business activities that an enterprise is permitted to undertake in Vietnam. However, it is possible to expand the scope of activities in the BRC with the approval of the business registration authority.

Under the *Investment Law*, foreign investors making a first-time investment in Vietnam must complete investment registration or evaluation formalities with the relevant central or provincial level SIAA or the Government (for certain projects), which will issue them an “investment certificate.” An investment certificate will serve concurrently as a BRC.

In some cases, investment certificates are issued automatically if certain conditions are met. In other cases, the granting of investment certificates is discretionary and investors may not be allowed to carry out the investment project they apply for.

The implementation and operation of foreign-invested projects are governed by the implementing rules for the *Enterprise Law* and the *Investment Law* in addition to other laws regulating areas such as accounting, tax, competition, financing, labor relations, land, intellectual property, technology transfer, etc.

## **II. FOREIGN-INVESTED ENTERPRISES ESTABLISHED PRIOR TO THE AMENDED INVESTMENT LAW AND ENTERPRISE LAW**

The *Enterprise Law* and *Investment Law* stipulate that an FIE established before the amended *Enterprise Law* and the *Investment Law* in mid-2006 had the option of:

- (1) Re-registration and re-organization of the FIE's management and activities according to the *Enterprise Law*;
- (2) Conversion of its form of company; or
- (3) Continued operation in accordance with its current investment license without re-registration.

The original deadline for this re-registration was 1 July 2011, but in response to calls from the business community, the period has been extended indefinitely, so it is still possible to re-register in order to expand a company's scope of business or extend its term.

### III. THE FORMS OF INVESTMENT

#### A. The Forms of Investment

New FIEs must register according to the forms as prescribed under the *Enterprise Law* and *Investment Law*. The forms of investment for pre-existing FIEs that did not re-register under the *Enterprise Law* and *Investment Law*, remain valid and may maintain their form of investment under the former *LFI*.

Therefore, a foreign investment project in Vietnam currently can be seen under the form of any of the following investment vehicles:

- i. The Limited Liability Company (“**LLC**”);
- ii. The Joint Stock Company (“**JSC**”);
- iii. The Partnership Company;
- iv. The Business Cooperation Contract (“**BCC**”);
- v. Build-Operate-Transfer (“**BOT**”), Build-Transfer-Operate (“**BTO**”) and Build-Transfer (“**BT**”) projects;
- vi. Public – Private Partnership (“**PPP**”) projects;
- vii. The Enterprise with 100% Foreign-Owned Capital (“**EFOC**”) (*this vehicle as a corporate form is no longer available under the Enterprise Law and Investment Law*); and
- viii. The Joint Venture Company (“**JVC**”) (*this vehicle as a corporate form is no longer available under the Enterprise Law and Investment Law*).

Strictly speaking, the BOT project (and its variants) and the PPP project may be implemented by a project enterprise set up under the form of an LLC or JSC, albeit with certain

distinguishing legal characteristics, rather than as a separate form of foreign investment.

Collectively, these entities are referred to as FIEs.

## **A.1 The LLC**

Under the *Enterprise Law*, an LLC may take the form of either an LLC with two or more members (**“Multiple Member LLC”**) or an LLC with one member (**“Single Member LLC”**). An LLC has its own charter and board of directors, known as the Board of Members (**“BOM”**), and has the right to establish dependent units such as branches or representative offices domestically or abroad.

An LLC has the status of a recognized legal entity and a member of an LLC is responsible for the debts and liabilities of the enterprise to the extent of the amount of capital that the member has contributed or committed to contribute to the enterprise. Unlike a JSC, an LLC cannot issue shares.

### **i. Multiple Member LLC**

A Multiple Member LLC is an enterprise that has more than one but no more than fifty members, which may be organizations, individuals, or a combination of both.

#### *a. Rights of a Member*

A member of a Multiple Member LLC has the right to, among other things:

- Attend meetings of the BOM;
- Cast votes in a number that is proportionate to its capital contribution;

- Be distributed shares and profits proportional to its capital contribution; and
- Be given priority in contributing additional capital.

A member can transfer, dispose of or ask the company to buy back its capital contribution portion in accordance with the *Enterprise Law* or as stipulated in the company charter.

*b. Management and Control*

The BOM is the highest decision making body of a Multiple Member LLC and its members are appointed in proportion to their respective capital contribution portions. A Multiple Member LLC having more than 11 members must also establish a Control Committee.

*c. Meetings*

The chairperson of the BOM or a member or group of members that own more than 25% of the charter capital can call a meeting of the BOM.<sup>1</sup> In the event that a member owns more than 75% of the capital, the minority members acting jointly have the right to call a meeting. A quorum is established when members representing at least 75% of the charter capital are present.<sup>2</sup> If the first meeting fails to have the necessary members to constitute a quorum, a second meeting may be convened within the 15 days following the first meeting and the second meeting must have members representing at least 50% of the charter capital.<sup>3</sup> If the second meeting does not meet the

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1 Or a smaller portion as stipulated in the company charter.

2 Or as stipulated in the company charter.

3 Or as stipulated in the company charter.

quorum, a third meeting may be held within 10 days, at which time the meeting is conducted irrespective of attendance.

The company charter stipulates the frequency of BOM meetings, but the BOM must meet at least once a year.

*d. Voting*

Resolutions can be adopted by means of voting at a meeting, seeking written opinions (i.e., written resolutions in lieu of a meeting), or by other methods as provided in the company charter (e.g., by electronic means, such as video conferencing).

The *Enterprise Law* provides that a resolution will be adopted at a meeting when it is approved by a number of votes representing at least 65% of the total contributed capital of the members attending the meeting.<sup>4</sup> In the process of ratifying Vietnam's accession to the World Trade Organization ("**WTO**"), the National Assembly amended this rule by allowing investors (in a limited number of cases) to stipulate a lower threshold in their company charter.<sup>5</sup>

Approval from a number of votes representing at least 75% of the total contributed capital of the members attending the meeting must be obtained for a resolution on:

- A sale of assets with a value equal to, or greater than 50% of the total value of the company's assets (as stated in the company's latest financial report or a smaller proportion stipulated in the company's charter);

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<sup>4</sup> Or as stipulated in the company charter.

<sup>5</sup> Resolution No. 71/2006/QH11 on Ratification of the Instrument of Accession to the World Trade Organization ("**Resolution No. 71**").

- A resolution on an amendment and supplement to the company's charter; or
- A resolution on the company's reorganization or dissolution.

A resolution adopted by means of seeking written opinions must be approved by a number of members representing at least 75% of the charter capital.

*e. Managerial Personnel*

A Multiple Member LLC must have one director or general director of the company appointed by the BOM, who may or may not be a member of the company. The General director is responsible for the day-to-day operation of the company and is usually the legal representative of the company, although the charter may provide otherwise.

**ii. Single Member LLC**

A Single Member LLC is owned by one organization or individual member ("**Company Owner**") who is liable for the debts and liabilities of the company to the extent of the amount of the charter capital of the company. A Single Member LLC has the same legal status as a Multiple Member LLC, but the Company Owner has more autonomy with regards to decisions made about the company. The Company Owner may appoint either a representative to be the president or more than one representatives to create a BOM, which will implement the Company Owner's rights and obligations on its' behalf.

Meetings of the BOM (if the company has one) must have at least two-thirds of the representatives present and each representative has a vote of equal validity. A resolution of the

BOM is adopted when it is approved by more than a half of the number of attending representatives, based on their amount of capital contribution.

Similar to a Multiple Member LLC, a Single Member LLC must have a director or general director appointed by the President or the BOM, who is responsible for the day-to-day operation of the company and is usually the legal representative of the company, although the charter may provide otherwise.

The Company Owner must appoint between one and three controllers who bear responsibility of supervising the performance of the Board of Members (or the President) and the director (or general director), and carrying out other tasks assigned by the Company Owner.

A Company Owner must contribute capital in a full and timely manner and a Single Member LLC must not reduce its charter capital. A Single Member LLC may increase its charter capital by way of additional investment from the Company Owner or by obtaining capital contributions from other persons. In the event that part of the charter capital is contributed by or transferred to another organization or individual, the company must register to convert into a Multiple Member LLC within 15 days from the date of transfer.

## **A.2 The Joint Stock Company**

Under the *Enterprise Law*, a JSC is an enterprise whose charter capital is divided into shares held by three or more organizations or individuals. A JSC is a recognized legal entity under Vietnamese law and shareholders are responsible for the debts and liabilities of the enterprise to the extent of the amount of their contributed capital. A JSC has the right to

issue securities in order to raise capital and it may list on the Securities Exchange.

The founding shareholders of a JSC must subscribe for at least 20% of the total number of common shares that the JSC is authorized to offer for sale. The JSC must have common shares and may have preferred shares and/or issue bonds. Shareholders in JSCs may be Vietnamese or foreign. A common shareholder has the right, among other things:

- To attend the General Shareholders Meeting;
- To vote in a number that corresponds to his/her/its amount of shares;
- To receive dividends, to transfer his/her/its shares as stipulated under the *Enterprise Law*; and
- To be given priority in buying new shares offered for sale.

Under the *Enterprise Law*, a JSC is organized as follows:

a. *General Shareholders Meeting*

General Shareholders Meeting (“GSM”) consists of all shareholders having the right to vote and is the highest decision-making body of a JSC. Its main powers include:

- Adopt the company’s development orientation;
- Decide on the types/classes of shares and the total number of shares in each type/class authorized to be offered for sale; decide on the annual dividend rate for each type/class of shares, except where the company’s charter stipulates otherwise;
- Elect, relieve duty of and discharge the members of the BOM and members of the Control Committee;

- Decide on an investment or a sale of assets/property with a value equal to or greater than 50% of the total value of assets stated in the most recent financial statements of the company if the company's charter does not stipulate a different proportion;
- Decide on the amendment and/or supplement of the company's charter, except in circumstances where the charter capital is adjusted due to an additional sale of new shares within the extent of the number of shares authorized to be offered for sale as stipulated in the company's charter;
- Adopt annual financial statements;
- Decide on a buy-back of more than 10% of the total number of shares in each type/class that have been sold;
- Review and handle violations committed by the BOM and/or Control Committee which cause damage to the company and the company's shareholders;
- Decide on a company reorganization or dissolution;
- Approve the report of the BOM evaluating the actual status of the business management tasks in the company and approve the report of the Control Committee on the management of the company by the BOM and the Director/General Director;
- Decide on remuneration for the BOM; and
- Approve the related transactions with a value from 50% (or a lower percentage as may be provided in the company's charter) of the total value of the company's assets stated in its most recent financial statements.

The GSM may meet annually or extraordinarily, at least once a year. The quorum of the meeting is at least 65% of the total number of voting shares. If the first meeting fails to meet this quorum, the quorum for the second meeting is at least 51% of the total number of voting shares. If the second meeting fails to meet this quorum, the third meeting will be held irrespective of the quorum.

Resolutions of the GSM are adopted at a meeting when they are approved by a number of shareholders representing 65% (or more as may be provided in the company's charter) of the total number of voting shares of all shareholders attending the meeting (the specific proportion is stipulated by the company's charter). A percentage of at least 75% (or more as may be provide in the company's charter) will be required for the resolutions relating to the following issues:

- Decision on the types/classes of shares and the total number of shares in each type/class authorized to be offered for sale;
- Amendment and/or supplement of the company's charter;
- The company's re-organization or dissolution; and
- An investment or sale of assets/property with a value equal to or greater than 50% of the total value of assets stated in the most recent financial statements of the company (unless the company's charter stipulates a different proportion).

As an exception, a cumulative voting is always required for the election of members to the Board of Management and the Control Committee.

*b. Board of Management*

The BOM is the managing body of a JSC consisting of not less than 3 members and not more than 11 members if the company charter does not provide otherwise. BOM members are elected by the GSM by way of cumulative vote for a term of up to 5 years and can be re-elected.

Generally speaking, the BOM has the full authority to, in the name of the company, make decisions, exercise the company's rights and perform the company's obligations that do not fall under the authority of the GSM.

The BOM may meet periodically or extraordinarily. The Chairperson will convene a periodical meeting at any time necessary, though the BOM must meet at least once every quarter. A meeting of the BOM may be conducted when there are three-quarters or more of the total number of its members attending the meeting.

A resolution of the BOM may be adopted if approved by the majority of the members attending the meeting; in the event of even votes, the Chairperson has the casting vote.

*c. Director/General Director*

The Director/General Director is appointed by the BOM for a term of up to 5 years and can be re-appointed. The Director/General Director is responsible for the day-to-day operation of the company. The Director/General Director is the legal representative of the company, unless the charter gives this status to the Chairperson of the BOM.

The Director/General Director of a JSC must not concurrently hold the position of the Director/General Director in another enterprise.

*d. Control Committee*

A Control Committee is required for a JSC having more than 11 shareholders who are individuals, or having a shareholder that is an organization owning more than 50% of the total number of shares of the company.

The Control Committee consists of 3 to 5 members if the company Charter does not provide otherwise, and must have at least 1 of its members being an accountant or auditor. The Control Committee members are appointed by GSM by way of cumulative vote for a term of up to 5 years and can be re-elected. In general, the Control Committee is responsible for supervising the performance of the BOM and the Director/General Director, and carrying out other tasks assigned by the GSM. The Partnership Company

A Partnership Company is a form of enterprise set up by at least two partners. A Partnership Company must have two general partners and may also have limited partners (literally, “capital contributing members”). General partners are liable for all obligations of the Partnership Company with their own property, while limited partners are only liable to the extent of their capital contribution. To date, Partnership Companies have not been a common vehicle for foreign investment in Vietnam.

### **A.3 The Business Cooperation Contract**

A BCC is a contractual relationship akin to a partnership which does not create a new legal entity but which is licensed to engage in business activities in respect of a specific project in Vietnam. BCCs are most commonly used in the oil industry, where production sharing contracts have traditionally been structured as BCCs, and in telecommunications and advertising

projects. This is changing as LLCs and JSCs are being allowed into these fields.

#### **A.4 Build-Operate-Transfer (BOT), Build-Transfer-Operate Contract (BTO) and Build-Transfer (BT) Contracts**

BOT contract means a form of investment whereby a competent State body and an investor enter into a contract to construct and operate of an infrastructure facility for business purposes for a fixed duration; and, upon expiry of the duration, the investor transfers such facility, without compensation, to the State of Vietnam.

BTO contract means a contract entered into by a competent State body and an investor for the construction of an infrastructure facility upon the completion of which the investor will transfer such facility to the State of Vietnam. The Government will grant the investor the right to commercially operate such facility for a certain fixed period of time in order to recover the investment capital and earn profit.

BT contract means a contract entered into by a competent State body and an investor for the construction of an infrastructure facility upon the completion of which the investor will transfer such facility to the State of Vietnam. The Government will facilitate implementation of another project by the investor in order to recover investment capital and earn profit, or will make payments to the investor under the agreements in the BT contract.

BOT, BTO and BT contracts (referred to as “**project contracts**”) are encouraged for a number of projects relating to constructing, operating, renovating, expanding, modernizing or managing infrastructure facilities such as roads, bridges, tunnels, railways, airports, seaports, river-ports, ferry-landings,

waste water treatment facilities, power plants, etc. Some notable characteristics of these project contracts include:

- i. Equity of an Investor to a Project Contract: The law requires that the equity of an investor used for carrying out a project must reach the certain minimum ratio.<sup>6</sup> In addition, the law also requires that the State's capital contributed to the project contract must not exceed 49% of total investment capital of the project.
- ii. Selection of Investors of a Project Contract: A list of BOT Projects, BTO Projects and BT Projects will be formulated by ministries, branches and provincial people's committees based on socio-economic development master plan in their respective branches and localities. Investors of a project contract must be selected by either tendering or appointment. Tendering is applied when there are two or more investors having concurrently registered for any project on the announced List of Projects. An appointment of investors can be conducted if (i) the project is required to be carried out to satisfy an urgent need to use infrastructure facilities as decided by the Prime Minister; or (ii) only one investor has registered to implement the project within 30 working days from the last publication date of a List of Projects. I

In addition, the law also contains provisions dealing with the situation in which an investor proposes a project,

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<sup>6</sup> For projects with total investment capital of below 1,500 billion Dong, the equity of the investor must not be lower than 15% of the total investment capital of such project. For projects with total investment capital of 1,500 billion Dong or more, the ratio is not lower than 15% for the portion of investment capital up to 1,500 billion Dong, and not lower than 10% for the portion of investment capital above 1,500 billion Dong.

which is not in the list of announced or promulgated projects.

- iii. **Project Enterprise:** An investor to a project contract may set up a project enterprise to organize and manage the business of a project. The project enterprise may directly manage or commercially operate the project facility or hire a management organization to do so, provided that the enterprise shall solely bear the responsibilities of such management organization.

The project enterprise may take the form of an limited liability company or a joint stock company under Enterprise Law.

#### **A.5 Public – Private Partnership (“PPP”)**

Investment under the form of PPP is defined as the coordination between the State and an investor to implement a project for infrastructure development or for provision of public services on the basis of a project contract. The PPP concept was introduced to improve on the BOT structure, which has had only limited success in mobilizing private capital for infrastructure projects.

At the time of this report, investment in the form of PPP is still under a pilot program governed by the Regulations on Pilot Public Partnership Investment Form (“PPP Regulations”).<sup>7</sup> As a result, PPP investments are allowed in only limited infrastructure sectors, including airport, seaport, power plant, road, railway, water supply, healthcare, urban transport sectors, etc.). Eligible projects must also meet certain criteria set out by the PPP Regulations, including:

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<sup>7</sup> Promulgated by Decision No. 71/2010/QĐ-TTg issued by the Prime Minister on 9 November 2001.

- Being an important, large-scale, and urgently needed project;
- Being able to return capital to the investor from reasonable revenue sources from users;
- Being able to take advantages of the technology, managerial and operational experience of private sector, and to effectively utilize the financial capacity of the private sector: or
- Other criteria set out by the Prime Minister.

In a pilot PPP investment, there are two participating portions, including:

- Private participating portion, comprising of equity of the investor (which must account for at least 30% of the portion), domestic and international capital sources and other capital sources to be raised on the principle that they do not result in public debt; and
- State participating portion, which is a combination of any of State capital, investment incentives and relevant financial policies. This portion can be used for recovery of part of project costs, construction of supporting facilities, site clearance, resettlement or other works. However, it is not an equity contribution in the project enterprise and is not associated with any rights to receive profit from project revenue. In addition, the value of this portion may not exceed 30% of the total investment of the project (unless otherwise approved by the Prime Minister).

A list of projects under PPP form calling for investors is approved by the Prime Minister based on the request from the Ministry of Planning and Investment, whose request is based

on the proposals from ministries, provincial authorities and investors. Investors for these projects will be selected through a bidding process. A winning bidder will need to sign a project contract with the competent State authority, apply for an investment certificate, and set up a project enterprise before implementing the project.

It should not be understood that only the BOT/BTO/BT and PPP can be used for infrastructure projects; investors can also structure such projects as standard FIE's (LLCs, JSCs), albeit with different tax and legal consequences.

#### **A.6 The Joint Venture Company**

Under the now outdated *LFI*, a Joint Venture Company ("**JVC**") was an independent Vietnamese legal entity established between two or more parties (at least one of which must be Vietnamese) with a specified amount of paid-up capital ("**Legal Capital**"), limited liability, its own charter and board of management. Although investing by way of a joint venture is referred to as a potential form of investment under the *Investment Law*, the *Enterprise Law* does not include JVCs as a form of enterprise; "joint venture" in the context of the *Investment Law* simply means a company set up between Vietnamese and foreign investors. JVCs which does not re-register as LLCs before 30 June 2011 deadline will lose their ability to expand their scope of business or extend their term of operation.

#### **A.7 Enterprises with 100% Foreign-owned Capital**

Under the *LFI*, an EFOC was a 100% foreign-owned, independent legal entity with limited liability under Vietnamese law owned by one or more foreign investors. There was no Vietnamese party involved in an EFOC and no joint venture

contract. As noted earlier in the discussion of the JVC, the investors in an existing EFOC has the opportunity to re-register as an LLC before 30 June 2011.

#### **A.8 Term and Termination under the Enterprise Law and the Investment Law**

The operational duration of an enterprise is not limited under the *Enterprise Law*, although the term of any specific project is limited under the *Investment Law*.

Under the *Enterprise Law*, an enterprise may terminate in the following cases:

- a. The operational duration stated in the charter expires and there is no decision to extend;
- b. As decided by the BOM or the Company Owner or the General Shareholders Meeting;
- c. The enterprise does not have the required minimum number of members or shareholders under the *Enterprise Law* for a period of six consecutive months; or
- d. The BRC is revoked.

In the event that an enterprise terminates of its own volition, it will only be allowed to do so once it has discharged all debts and property obligations.

The term of operation of a project is stated in the investment certificate. The maximum initial term of foreign investment projects under the *Investment Law* is 50 years, although a project may receive a project term of up to 70 years in special circumstances.

An investment project terminates in the following circumstances:

1. The term of operation stated in the investment certificate expires;
2. Conditions for termination of operations as stipulated in the relevant contract, enterprise charter, agreement, or undertakings of the investor regarding the schedule for the project implementation are met;
3. The investor decides to terminate the project operations; or
4. Pursuant to a decision of the SIAA, or a court or arbitral judgment, or a decision due to a breach of law.

## **B. Investing in Domestic Vietnamese Enterprises – Limitations on Foreign Ownership**

There is a growing amount of activity in acquisition of stake holding in locally-owned Vietnamese companies by foreign investors. With their new access to the world's major export markets (in particular the United States since it granted Vietnam Most Favored Nation (“**MFN**”) status in December, 2001) local companies are experiencing robust growth and foreign investors naturally want to get on board. While “phantom” foreign funding of Vietnamese enterprises has been a known phenomenon since the early 1990s, a formal legal basis has been created to support and regulate foreign ownership in Vietnamese enterprises, albeit with certain limitations and conditions. Recently some legal regulations covering this area have been adopted, including the rules on private placement and procedures for foreign investor buying newly issued shares of JSCs. However, this area of law needs continuous development due to practical obstacles and conflict of opinions of different authorities.

## **B.1 Methods of Making Investment in Domestic Vietnamese Enterprises**

In general, foreign investors may invest in Vietnamese enterprises under the main methods as follows:

- Purchase capital contribution portions or the right to contribute capital from existing members in limited liability companies or partnership companies;
- Contribute new capital to limited liability companies and partnership companies;
- Purchase a portion of capital in private enterprises from its owners;
- Contribute new capital to the private enterprises;
- Purchase shares initially offered to non-founding shareholders in joint stock companies;
- Purchase shares authorized to be offered for sale, treasury shares, and additional shares issued by joint stock companies; and
- Purchase shares or the right to purchase shares from existing shareholders of joint stock companies (including listed companies on stock exchanges).

Depending on the type of transaction, the deal may result in a conversion among corporate forms, such as between a Single Member LLC and a Multiple Member LLC, LLC and JSC, or private enterprise and LLC.

## B.2 Foreign Ownership Limitations

Foreign investors may purchase capital contribution or shares in domestic Vietnamese companies with no limitation, subject to the following restrictions:

- The cap on foreign investment in public companies<sup>8</sup> is 49%<sup>9</sup>;
- The cap on foreign investment in enterprises doing business in certain sectors where specialized branch laws provide for foreign ownership must comply with such provisions (for example a cumulative 30% limit applies to banks);
- The cap on foreign investment in enterprises doing business in services will be in accordance with the Vietnamese WTO commitments on services; and
- The cap on foreign investment in enterprises with 100% State owned capital undergoing equitization or converting their form by other methods will be in accordance with the plans approved by competent authorities.

Despite the above provisions allowing foreign investors to make investments in domestic Vietnamese companies, the procedures for them to do so are still subject to a number of uncertainties. Major questions that do not have clear cut answers include (i) whether foreign investors need to apply

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8 A public company is a JSC that (i) has already conducted the public offering of its stocks; or (ii) has its stocks listed at a stock exchange; or (iii) has its stocks owned by at least one hundred investors, excluding professional securities investors; and has a contributed charter capital of VND 10 billion or more.

9 Decision No. 55/20052009/QĐ-TTg on Percentage of Participation of Foreign Parties in Securities Market of Vietnam ("**Decision No. 55**").

for an investment certificate when investing in domestic Vietnamese companies (and if so, in which cases and how), and (ii) whether the investment by foreign investors would turn the domestic Vietnamese companies into a foreign invested company and subject them to restrictions applicable to foreign invested companies (and if so in which cases).

## **IV. THE APPROVAL PROCESS FOR FOREIGN INVESTORS**

### **A. Project Classification**

Foreign investment projects either qualify for “registration” or require “assessment.”

#### **A.1 “Registration Projects”**

Projects in the registration category must have an amount of investment capital less than 300 billion Vietnamese dong and not fall into the “list of fields in respect of which investment is subject to conditions.”

#### **A.2 “Assessment Projects”**

Projects in the assessment category have an amount of investment capital equal to or greater than 300 billion Vietnamese dong and/or are projects that fall into the “list of fields in respect of which investment is subject to conditions.”

### **B. The Application Process**

Once the relevant authorities have been identified and consulted, with respect to the parameters of a proposed project, foreign investors must prepare and submit the necessary documents in order to receive an investment certificate. This will be in the form of an investment registration dossier for registration projects and a project dossier for assessment projects. As previously noted, investors making a first-time investment in Vietnam must have an investment project and must complete the investment registration or investment assessment formalities in order to be issued an investment

certificate. The investment certificate in this case serves concurrently as a BRC.

**i. Investment Registration Dossier for Registration Projects**

An investment registration dossier must be submitted to the SIAA and must include:

- a. Documents attesting to the:
  - i) Legal status of the investor;
  - ii) Objectives, size and location of the investment project;
  - iii) Investment capital and implementation schedule of the project;
  - iv) Land use requirements and undertakings as to environmental protection; and
  - v) Proposals for investment preferential treatment (if any).
- b. A report on the financial capacity of the investor; and
- c. The joint venture contract/members agreement or BCC and the enterprise charter (if any).

**ii. Project Dossier for Assessment Projects with Investment Capital of 300 Billion Vietnamese Dong or more that do not fall into the List of Fields in respect of which Investment is Subject to Conditions**

A project dossier must be submitted to the relevant authority as stipulated by the Government and must include:

- a. A document requesting the issuance of an investment certificate;

- b. A document confirming the legal status of the investor;
- c. A report on the financial capacity of the investor;
- d. A statement detailing the investment objectives, location, land use requirements, investment size, investment capital, implementation schedule of the project, technological solutions and solutions for the environment; and
- e. The joint venture contract/members agreement or BCC and the enterprise charter (if any).

The aspects of an assessment include:

- a. Conformity with the technical infrastructure facility master plan, land use master plan, construction master plan, and master plan for the use of minerals and other natural resources;
- b. Land use requirements;
- c. Implementation schedule of the project; and
- d. Solutions for the environment.

**iii. Assessment Projects with Investment Capital of Less than 300 Billion Vietnamese Dong that fall into the List of Fields in respect of which Investment is Subject to Conditions**

A project dossier must be submitted to the relevant authority as stipulated by the Government, include an explanatory statement on the conditions that the investment project must satisfy, and must meet the following conditions:

- a. Submit the documents prescribed for investment registration dossiers for registration projects under section B(ii) above; and

- b. Ensure that assessment aspects cover the conditions that the investment project must satisfy.

**iv. Assessment Projects with Investment Capital of 300 Billion Vietnamese Dong or more that fall into the List of Fields in respect of which Investment is Subject to Conditions**

A project dossier must be submitted to the relevant authority as stipulated by the Government and the investment project must complete the following assessment formalities:

- a. Submit the documents prescribed for investment registration dossiers for registration projects under section B(i) above; and
- b. Ensure that assessment aspects cover the conditions that the investment project must satisfy and the assessment aspects stipulated under the *Investment Law*.

**v. Business Registration Dossier with respect to the Enterprise Law**

In addition to the project dossiers above, where a new FIE is being established together with the project, a business registration dossier is also required. This includes:

- a. The draft company charter;
- b. A roster of the members and the following documents for each:
  - i) Members who are individuals: Photocopy of lawful personal identification;
  - ii) Members who are organizations: Photocopy of establishment decision; BRC or equivalent

- document; power of attorney, lawful personal identification of an authorized representative; and
- iii) Member which is a foreign organization: Photocopy of BRC or equivalent document must be certified within three months prior to the date of submission of the registration dossier.
- c. Confirmation letter from competent organization/authority regarding Legal Capital (if concerning lines of business where Legal Capital is required by law); and
  - d. Certificates to practice of the director, general director or other individuals (if concerning lines of business where a certificate to practice is required by law).

## **C. Timing of Approval Procedures**

### **i. Projects that Qualify for “Registration”**

For foreign investment projects that qualify for “registration,” the SIAA is obliged to issue an investment license within 15 days from the date of receipt of the fully prepared application dossier, if all conditions and formalities are satisfied.

### **ii. Projects subject to “Appraisal”**

Foreign investment projects that do not qualify for “registration” are subject to “appraisal,” in which case the SIAA has wider discretion to approve or disapprove the project within 30 - 45 days.

## **D. Post-Establishment Formalities**

Securing an investment certificate or certificate business registration only marks the beginning of the legal life of an

FIE. Once the investment certificate or BRC has been issued, a number of subsequent administrative formalities must be undertaken within specific time limits. Some of these formalities include:

- Announcing the approval and some of the contents of the investment license in designated Vietnamese newspapers;
- Arranging to have a chop/seal made and registering it with the local office of public security;
- Opening bank accounts;
- Registering labor recruitment plans with the local labor office;
- Signing labor, insurance, service and various other contracts;
- Obtaining a land use rights certificate in the name of the FIE (if applicable);
- Signing and obtaining approvals and registrations, as applicable, for ancillary contracts, such as technology and trademark license agreements, loans, supply and sales contracts, etc.;
- Drawing up plans and obtaining approval for the import of materials and equipment, etc.;
- Registering with local tax and other authorities;
- Submitting the proposed accounting system to the MOF for approval; and
- Appraising and verifying capital contributions.

## E. Fields in which Investment is Encouraged

The implementing regulations of the *Investment Law* lists a number of fields in which investment is encouraged. These are subject to specific conditions but generally include the following areas:<sup>10</sup>

- Manufacture of new materials and production of new energy; manufacture of products of high technology, of bio-technology and of information technology; mechanical manufacturing;
- Breeding, rearing, growing and processing agricultural, forest and aquaculture products; salt making; production of artificial strains, new plant varieties and livestock breeds;
- Use of high technology and modern techniques; protection of the ecological environment; research, development and nursery of high technology;
- Labor intensive industries;
- Construction and development of infrastructures and important projects;
- Development of education, training, health care, physical training and sports; and
- Other manufacturing and service sectors.

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<sup>10</sup> Decree No.108/2006/ND-CP Providing Detailed Provisions and Guidelines for the Implementation of a Number of Articles of the Investment Law (Appendix 1), ("**Decree No. 108**").

## F. Taxation of Foreign Businesses

FIEs and foreigners doing business in Vietnam may be subject to a number of taxes, including enterprise income tax ("**EIT**"), value-added tax ("**VAT**"), foreign contractor tax, special consumption tax, and import and export duties.

In general, FIEs are subject to the same laws on VAT, EIT and other taxes applied to all business entities and activities in Vietnam. However, the tax liabilities of an FIE or the method of collection may vary considerably depending upon the form of business, or whether it qualifies for any special tax preferences. FIEs, foreign contractors and branch offices are subject to EIT in Vietnam, and representative offices may constitute taxable permanent establishments where their activities rise to a level defined by the law.

A brief summary of relevant taxes and tax incentives pertaining to foreign businesses in Vietnam is provided below.

## G. Enterprise Income Tax

On 3 June 2008, the National Assembly of Vietnam adopted the new Enterprise Income Tax Law ("**EIT Law**") which came into effect on 1 January 2009. The *EIT Law* replaces the former *EIT Law* and its implementing regulations.

EIT is the most important form of taxation in Vietnam for many foreign investors. It is imposed on FIEs and branches who derive income from both within and outside of Vietnam.

Foreign companies located abroad but engaging in business activities in Vietnam or deriving income in Vietnam are also subject to EIT. However, foreign companies from countries that have entered into a double-taxation treaty with Vietnam may be eligible for protection from a certain degree of tax exposure.

Taxable income by definition is total turnover minus deductible expenditures, plus other income. EIT is assessed on assessable income, which is the taxable income after further deducting tax-exempt income and losses carried forward. Loss can be carried forward for five years after the year the loss is incurred. Except for restrictions or caps on deductibility of certain specific expenditures, expenditures are generally tax deductible if the following conditions are met:

- (1) Expense actually incurred and related to the business operations; and
- (2) Expense is supported with sufficient invoices or vouchers in accordance with the regulations.

Vietnam imposes a cap on deductibility of expenses for advertising, promotion, representation, entertainment, brokerage commission, conferences, marketing, payment discounts, and volume discounts. The cap is 10% of other deductible expenses and for trading companies, other deductible expenses for the purpose of calculating the cap do not include the cost of goods sold. Under the *EIT Law*, this cap is raised to 15% for the first three years after the company is established.

## **H. Tax Incentives**

Tax incentives are granted to investment projects based on investment sectors and locations. Under the *EIT Law*, business sectors entitled to tax incentives will be limited to only high-tech industries, scientific research and technological development, infrastructure development, software product production, education and training, medical services, sports and cultural activities and environmental activities. Tax incentives are also granted to enterprises established in economic zones, high-

tech zones, geographical areas of difficult socio-economic conditions and geographical areas of especially difficult socio-economic conditions.

The tax incentives include preferential tax rates of 10% or 20%, tax exemption for two or four years, and 50% tax reduction for four, five or nine years.

The *EIT Law* provides for a research and development tax break. Locally-established enterprises may use up to 10% of the annual assessable income for this fund. Within five years, if less than 70% of the fund is used, or the fund is not used for appropriate purposes, the enterprise must pay back the tax on the unused or misused funds, coupled with any late payment interest or late payment penalty.

No tax incentives are applicable to capital gains (capital transfer, real estate transfer, asset disposal), interest income, foreign currency trading, recovered bad debts, income from business activities outside Vietnam, precious mineral resources, oil and gas exploration and exploitation, or electronic games of chance and betting.

## **I. Value Added Tax**

On 3 June 2008, the National Assembly of Vietnam adopted the Value Added Tax Law ("**VAT Law**"), which took effect on 1 January 2009.

### **i. Scope of Application and Tax Rates**

VAT applies to the supply of goods and services that are deemed to be used "for production, business or other consumption in Vietnam." A considerable number of goods and services are exempt from VAT. Under the *VAT Law*, import of equipment, machinery, specialized means of transport, and construction

materials not yet produced locally are not considered to be tax-exempt supplies, unless they are for scientific research and technological development or for oil and gas exploration and exploitation activities. Derivative financial transactions are also VAT-exempt.

The *VAT Law* maintains the three tax rates of 0%, 5%, and 10%. The standard VAT rate is 10%. Exported goods and services are zero-rated. Export is deemed to include provision of goods and services to an export processing enterprise inside Vietnam.

## **ii. Payment of VAT**

Normally, VAT payments are computed and made on a monthly basis, based on a credit method which allows the taxpayer to deduct invoiced input VAT incurred from the output VAT charged to customers during the month. Accordingly, the actual VAT payment consists of net VAT on the value added to the goods or services supplied by the taxpayer. Input VAT incurred for providing VAT-exempt supplies is not creditable. The *VAT Law* requires any payment for each purchase or aggregate purchases from one supplier in one day amounting to 20 million VND (approx. US\$1,025)<sup>11</sup> or more to be made via a bank in order to be eligible for credit of input VAT.

In addition to computing net VAT based on the credit system described above, the *VAT Law* also provides for a second method of computing VAT whereby the payable VAT will be assessed directly on the value added during the supply of goods or services. Among others, this method applies to foreign contractors that do not have a permanent establishment in Vietnam; or the business operation in Vietnam in accordance with contracts is less than 183 days; or the foreign contractor

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<sup>11</sup> Reflecting the exchange rate in January 2011.

does not adopt the Vietnamese Accounting System for the work in Vietnam.

## **J. Special Consumption Tax**

In addition to VAT, certain goods and services are subject to a special consumption tax at the stage of production, importation or supply of the service. In accordance with the new *Special Consumption Tax Law* taking effect from 1 April 2009, the taxable goods and services include:

- Cigarettes, cigars and other tobacco products;
- Spirits;
- Beer;
- Automobiles with less than 24 seats;
- Motorcycles with a cylinder of over 125cm;
- Aircrafts and yachts;
- Gasoline, naphtha, reformade component;
- Air-conditioners with the capacity of 90,000BTU or less;
- Playing cards;
- Votive paper;
- Dancing hall businesses;
- Massage and karaoke businesses;
- Casino businesses, prized electronic games and betting businesses;
- Golf businesses; and
- Lottery businesses.

## K. Foreign Contractor Tax

Offshore entities are considered foreign contractors and subject to foreign contractor tax comprising of VAT and EIT in the following instances:

- Offshore business organizations with or without a permanent establishment in Vietnam that conduct business in Vietnam or have income derived from Vietnam as a result of contracts; or agreements with organizations; or individuals in Vietnam (**“Foreign Contractors”**); and
- Offshore business organizations with or without a permanent establishment in Vietnam that conduct business in Vietnam or have income derived from Vietnam as a result of contracts; or agreements with foreign contractors to perform part of the work (**“Foreign Sub-Contractors”**).

When the Foreign Contractor is a business individual, he/she will be subject to VAT and personal income tax. The information below discusses the VAT and EIT liability of organizational foreign contractors in accordance with *Circular No. 134*<sup>12</sup> and *Circular No. 197*.<sup>13</sup>

There are three methods of tax payment and calculation.

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12 Circular No. 134/2008/TT-BTC Providing Detailed Regulations on Taxation Applicable to Foreign Contractors and Foreign Subcontractors Doing Business in Vietnam or Having Income Derived From Vietnam (**“Circular No. 134”**).

13 Circular No. 197/2009/TT-BTC Supplementing Circular No. 134/2008/TT-BTC Providing Detailed Regulations on Taxation Applicable to Foreign Contractors and Foreign Subcontractors Doing Business in Vietnam or Having Income Derived From Vietnam (**“Circular No. 197”**).

### Method 1: VAT Payment by Offsetting Input VAT Against Output VAT and EIT Payment Based on Actual Assessable Income

Foreign Contractors must meet all the following conditions to use Method 1:

- The foreign contractor has a permanent establishment in Vietnam;
- The business operation in Vietnam in accordance with contracts is for 183 days or more from the effective date of the contract; and
- The Foreign Contractor adopts the Vietnamese Accounting System.

Under this method, the Foreign Contractor can charge output VAT to clients in Vietnam and offset input VAT incurred if applicable from output VAT to arrive at the VAT amount payable. The EIT will be assessed at 25% of the assessable income after making eligible expense deductions. The Foreign Contractor will conduct tax filings and tax payments directly with the tax authority. The Vietnamese contracting party must inform the tax authority in writing of the adoption of this method by the Foreign Contractor within 20 working days from the signing date of the contract.

### Method 2: Tax Withholding by the Vietnamese Contracting Party

If the Foreign Contractor does not meet the three conditions above, the Vietnamese contracting party will be responsible for withholding and paying VAT and EIT on behalf of the Foreign Contractor. The Vietnamese contracting party must conduct tax registration to adopt this method with the tax authority within 20 working days from the signing date of the contract.

### VAT Calculation

The VAT amount payable is equal to the added value multiplied by the VAT rate. The current standard VAT rate is 10% while some goods and services are subject to a 5% rate.

The added value is determined at a deemed percentage of the taxable turnover. The taxable turnover is the total turnover including taxes and costs paid by the Vietnamese contracting party for providing taxable services or services associated with supply of goods.

The deemed percentage of the taxable turnover for calculating the added value differs based on the business line as follows:

<b>No.</b>	<b>Business line</b>	<b>Percentage of the taxable turnover as the added value</b>
1	Service; or Lease of machinery and equipment; or Insurance	50%
2	a) Construction or installation including supply of materials or machinery or equipment	30%
	b) Construction or installation without supply of materials or machinery or equipment	50%
3	Transportation, production, other business	30%

Foreign Contractors applying this method cannot claim deduction of input VAT incurred in Vietnam, if any.

EIT Calculation

The EIT amount payable is determined by multiplying the taxable turnover by the deemed EIT rate. The taxable turnover is the total turnover including taxes (except for VAT) and costs paid by the Vietnamese contracting party. The deemed EIT rates for different types of income are as follows:

<b>No.</b>	<b>Business line</b>	<b>Deemed EIT rate</b>
1	Commerce: distribution, supply of goods, raw materials, materials, machinery or equipment associated with services in Vietnam	1%
2	Service; or Lease of machinery and equipment; or Insurance	5%
3	Construction	2%
4	Production, other business, transportation (including sea and air transportation)	2%
5	Lease of aircrafts, aircraft engines, aircraft parts and ships	2%
6	Reinsurance	2%
7	Securities transfer	0.1%
8	Loan interest, bond interest, certificate of deposit interest	10%
9	Royalty income	10%

### Method 3: Hybrid Method of Tax Calculation and Payment Reintroduced

Foreign contractors may elect to register and pay VAT under the credit method (output VAT less input VAT as described in Method 1 above), but pay EIT on the deemed basis (as described in Method 2 above), if the following conditions are met:

- (i) The foreign contractor has a permanent establishment in Vietnam;
- (ii) The business operation in Vietnam in accordance with contracts is 183 days or more from the effective date of the contract; and
- (iii) The foreign contractor organizes the accounting work in accordance with accounting laws and regulations and the Ministry of Finance's guidance.

Within 20 working days from the signing date of the contract, the Vietnamese contracting party (or the foreign contractor engaging foreign subcontractors as the case may be) are required to send a written notice to the local tax authority regarding the foreign contractor's or the foreign subcontractor's adoption of the hybrid method.

## **L. Taxation of Capital and Securities Assignments**

Gains from capital and securities assignments are subject to EIT if the assignor is an organization or personal income tax if the assignor is an individual.

Organizations assigning capital other than securities (e.g., assigning charter capital in a limited liability company) are subject to 25% EIT on the net gain, which is the difference

between the assignment price and the buying price of the assigned capital after deduction of assignment expenses.

Securities assignment will be taxed at a rate of 0.1% EIT on the total transfer proceeds of securities. Securities for this purpose are shares in public companies in accordance with articles 25 and 26 of the Securities Law. According to articles 25 and 26 of the Securities Law, a public company is a joint stock company in one of the following three forms:

- A company that has made a public offer of shares;
- A company which has shares listed on a Stock Exchange or Stock Trading Center; or
- A company which has shares owned by at least 100 investors excluding professional securities investors, and which has paid-up charter capital of 10 billion Vietnam Dong or more. The public company in this case must submit the public company file as referred to in article 26.1 of the Securities Law to the State Securities Commission within 90 days after it becomes a public company.

## **M. Import and Export Duties**

Under the *Law on Import and Export Duties*, goods imported to or exported from Vietnam are subject to duty, including goods destined for or coming from one of the country's export processing zones.

Encouraged investment projects (i.e., investment in encouraged sectors or encouraged regions) may enjoy duty-free import of certain fixed assets such as machinery and equipment, special purpose means of carriage and their accompanying components and spare parts, and construction materials not

yet produced domestically. Imported materials for export production may generally be exempt from import duty or eligible for duty drawback, if paid.

## **N. Regional Free Trade Agreements**

In addition to Vietnam's accession to the WTO, it is constructing a network of bilateral and multilateral trading arrangements that have an impact on customs duties depending on the origin of the goods imported. The most significant of these arrangements to date has been the ASEAN Free Trade Area ("**ACFTA**"), ASEAN – Korea Free Trade Area ("**AKFTA**"), Vietnam – Japan Economic Partnership Agreement ("**AJEPA**"), ASEAN – Australia – New Zealand Free Trade Agreement ("**AANFTA**") and ASEAN – India Free Trade Area ("**AIFTA**").

## **O. Personal Income Tax**

The personal income tax ("**PIT**") regime in Vietnam governed by the *Ordinance on Income Tax for High Income Earners ("**PIT Ordinance**")*,<sup>14</sup> has been replaced by the provisions of the *Law on Personal Income Tax, ("**Law on PIT**")* which commenced 1 January 2009.

### **i. Taxable Income**

The *Law on PIT* imposes tax on the following ten types of income:

1. Business income: income from production, trading and service activities, independent business.

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14 Ordinance No. 14-2004-PL-UBTVQH11 on Personal Income Tax for High Income Earners (repealed), ("**PIT Ordinance**").

2. Salaries, wages, allowances, remuneration, benefits in cash or in kind and bonus (collectively referred to as “salaries and wages”).
3. Income from capital investment such as loan interest, dividends, income from capital investment in other forms except for Government bond interest.
4. Income from capital transfer: income from transfer of capital portions in economic organizations, income from securities transfer and income from capital transfer in other forms.
5. Income from transfer of immovable property: income from transfer of land use right and assets attached to the land, income from transfer of the right to ownership or use of houses, income from transfer of the right to land lease or water surface lease, and other income from transfer of immovable property.
6. Prizes: lottery prizes, promotion prizes, prizes from betting and casino, prizes from games or contests or other forms of prizes.
7. Income from copyright: income from assignment or transfer of the right to use of objects of intellectual property right, income from technology transfer.
8. Income from franchising.
9. Inheritances being securities, capital portions in economic and business organizations, immovable property and other assets of which the ownership or use must be registered.

10. Gifts being securities, capital portions in economic and business organizations, immovable property and other assets of which the ownership or use must be registered.

## ii. **Tax Payers: Resident or Non-Resident?**

Tax payers are classified either as 'residents,' or 'non-residents' and are subject to different rates on this basis.

Residents are those who meet one of the following conditions:

- Being present in Vietnam for 183 days or more in a calendar year or in 12 consecutive months from the first day of presence in Vietnam;
- Having a registered regular residence (e.g., foreigners having a Permanent Residence Card or Temporary Residence Card); or
- Having a lease contract in Vietnam (including hotel stays) with a term of 90 days or more in a tax year.

Individuals who do not meet the above conditions are non-residents.

## iii. **Tax Rates**

### a. Tax rates for Residents.

The tax rates for residents will depend on the source of income, as outlined in the following tables:

#### *Progressive Tax Rates*

The progressive tax rates apply to a resident's income from business, salaries and wages.

<b>Level</b>	<b>Assessable Income Per Year (VND million dong)</b>	<b>Assessable Income Per Month (VND million dong)</b>	<b>Tax Rate (%)</b>
1	Up to 60	Up to 5	5
2	Over 60 to 120	Over 5 to 10	10
3	Over 120 to 216	Over 10 to 18	15
4	Over 216 to 384	Over 18 to 32	20
5	Over 384 to 624	Over 32 to 52	25
6	Over 624 to 960	Over 52 to 80	30
7	Over 960	Over 80	35

In arriving at the assessable income from business income, salaries and wages, it is allowable to deduct the following from the taxable income: statutory insurance contributions, qualified charitable contributions, personal deduction of 4 million VND per month for the taxpayer, and a deduction of 1.6 million VND per month for each eligible dependent.

#### *Flat Tax Rates*

The flat tax rate applies to a resident's income from capital investment, capital transfer, real estate transfer, prizes won, copyright royalties, commercial franchising, inheritances, or gifts.

<b>Assessable Income</b>	<b>Tax Rate (%)</b>
(a) Income from capital investments	5
(b) Income from royalties and franchises	5
(c) Income from winnings or prizes	10
(d) Income from inheritances and gifts	10

(e) Income from transfer of capital (when the original cost and transfer expenses can be determined)	20
Sales proceeds of securities transfer (when the original cost and transfer expenses cannot be determined)	0.1
(e) Income from real property transfers where it is possible to determine the purchase price and transfer expenses	25
Sales proceeds of real property transfers where it is not possible to determine the purchase price and transfer expenses	2

b. Tax Rates for Non-Residents

Non-residents are subject to tax on income derived from Vietnam. The assessable income of non-residents is gross income without any deductions.

<b>Assessable income</b>	<b>Tax rate</b>
Business income being gross turnover from (i) goods trading, (ii) service business and (iii) production, construction, transportation and other business activities	1% / 5% / 2% respectively
Salaries and wages	20%
Income from capital investments	5%
Proceeds from transfer of capital	0.1%
Sales proceeds of immovable property	2%
Income from copyright or franchising	5%
Income from prizes, inheritances or gifts	10%

#### **iv. Exemption**

The *Law on PIT* provides for tax exemptions in certain limited cases, mainly for the following types of income:

- Income derived from the transfer of immovable property between family members and relatives;
- Income derived from the transfer of the land use right and house of an individual when they are the only land use right and house of the individual;
- Land use right assigned by the State to individuals;
- Inheritances and gifts in the form of immovable property between family members and relatives;
- Bank deposit interest and interest from life insurance policies;
- Remittances given by overseas Vietnamese people;
- Additional payments for working the night shift or overtime;
- Pensions;
- Scholarships;
- Compensation from insurance policies, work-related accident compensation and other compensation from the State; and
- Charities and foreign aid.

## V. OTHER FORMS OF DOING BUSINESS IN VIETNAM

Apart from the forms of business provided under the *Enterprise Law*, *Investment Law* and former *LFI*, other means of establishing a commercial presence in Vietnam include representative offices and branch offices. Contracted projects and franchising (licensing) arrangements are also possible and, increasingly, foreign investors are also being allowed to take minority positions in domestic Vietnamese companies.

### A. Representative Offices

A foreign party interested in having an institutional presence in Vietnam may establish a Representative Office (“**RO**”). ROs do not constitute independent legal entities and are only allowed to engage in market research, “soft” marketing, liaison with the head office abroad in respect of trade and investment matters and overseeing the implementation of contracts in Vietnam. They are prohibited from engaging in direct profit-making activities and receiving any form of revenue.

#### i. Relevant State Authorities

The authority to oversee and manage most ROs is vested in the Department of Industry and Trade (“**DOIT**”) of the city/province where the ROs are located. The DOIT is responsible for reviewing applications and issuing RO licenses to all foreign companies except those operating in special commercial sectors such as banking, finance, legal services, culture, education, tourism, airlines or other sectors as stipulated by law. The DOIT is also empowered to amend, extend, revoke and annul such licenses.

## **ii. Permissible Scope of Activities**

Under current Vietnamese regulations on ROs, the scope of activity of an RO is rather narrow. An RO is not permitted to engage in direct business activities, provide services relating to remittances in foreign currency by overseas Vietnamese, receive payments on behalf of affiliated offices, buy goods and commodities for export or to sell goods imported into Vietnam.

Legislation governing the activities of ROs specifically stipulate that ROs may not engage in the production or trading of goods or services generating income. In addition, ROs may not sublet commercial or residential premises, nor can they act as a representative for other companies in Vietnam. ROs are also not allowed to represent any foreign company other than its direct parent company<sup>15</sup>, even if such company is an affiliate of the parent company in the same global group. However, ROs may rent their own office premises and other residential premises necessary for operations.

The chief representative of the RO and other staff members may not enter into any type of commercial contracts on behalf of the parent company with a Vietnamese enterprise except where a legally valid power of attorney is granted by the head of the parent company for each contract.

## **iii. Criteria for Eligibility**

The conditions that a foreign company must meet to be considered for an RO license in Vietnam are that it has a lawful business registration under foreign law and it has been operating for at least one year from the date it was legally established under foreign law.

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<sup>15</sup> The direct parent company of a RO is the applicant for the establishment of that RO in Vietnam.

#### iv. Licensing Fee

Currently, if the applicant receives a notice from the DOIT stating that its application has been approved and that the license is available for collection, the applicant must pay a licensing fee in the amount of VND1,000,000 (approx. US\$50).<sup>16</sup>

### B. Branch Offices

Branch offices are dependent units of foreign companies licensed to do business directly in Vietnam. Under present law, the types of businesses that may open branches are restricted.

Under *Decree No. 72* and its implementing *Circular No. 11*,<sup>17</sup> foreign companies that have done business in certain fields for more than five years may set up branches in Vietnam in accordance with Vietnam's commitments to the WTO and other treaties in respect to trading and distribution activities. Vietnam's commitments to the WTO allow foreign companies in some service areas to set up branches in Vietnam, subject to certain phasing (e.g. non-life insurance, securities, computer and related services, management consultant services, construction, and franchising). However, as a matter of practice, the Government has only allowed foreign law firms and banks to set up branches in Vietnam.

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<sup>16</sup> Reflecting the exchange rate in January 2011.

<sup>17</sup> Decree No.72/2006/ND-CP Providing Detailed Regulations for Implementation of the Commercial Law with Respect to Representative Offices and Branches of Foreign Merchants in Vietnam ("**Decree No.72**").

Circular No. 11/2006/TT/BTM/Providing Guidelines for Implementing Decree No.72/2006/ND-CP ("**Circular No.11**").

## C. Franchising

Vietnam has provided for franchising in the *Commercial Law*, and the Government has issued *Decree No. 35*,<sup>18</sup> detailing the implementation of the *Commercial Law* specifically in relation to franchising activities. Guidelines on procedures for registration of franchising activities are set out by *Circular No. 09*.<sup>19</sup> However, other laws on the subject of technology transfer and to some extent, intellectual property licenses, can also be used as the basis for establishing a franchise.

### i. Criteria for a Franchisor

According to *Decree No. 35*, franchisors must meet certain criteria before establishing franchises in Vietnam. The main criteria are as follows:

- The franchise system has been operating for at least one year. In cases where the Vietnamese party who is the franchisee in a master-franchise contract wishes to establish a sub-franchise, they must have engaged in the relevant franchising activities in Vietnam for at least one year before granting a sub-franchise;
- A franchise operation must be registered with the relevant State authorities before performing franchise transactions; and
- The provision of products and services under a franchise must not violate law, i.e., such products and services must

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18 Decree No. 35-2006-ND-CP Providing Detailed Provisions for Implementation of the Commercial Law with respect to Franchising Activities (**Decree No. 35**”).

19 Circular No. 09-2006-TT-BTM Providing Guidelines on Procedures for Registration of Franchising Activities (“**Circular No. 09**”).

not be prohibited by law; in cases where the provision of such products and services is restricted, the providers must have duly obtained the necessary license(s) from the competent State authorities.

## ii. **Registration of Franchise Operation**

Unlike intellectual property licenses and technology transfers for which the registration of a contract with State authorities is mandatory for some types of contracts but optional for others, parties to a franchise contract do not have to register their contract with State authorities. Instead, franchisors are required to register their franchise operation with relevant State authorities before entering into franchise contracts. Registration of franchise operation can be understood as a disclosure procedure by which franchisors submit their plan to enter into franchise contracts to State authorities and the details of their background and franchise system.

According to *Decree No. 35* and *Circular No. 09*, the files for registration of franchise operation are generally as follows:

1. Application made in due form;
2. An introduction of franchise made in due form stipulated by the Ministry of Industry and Trade;
3. Audited Financial Report for the most recent year; and
4. Documents verifying:
  - The legal status of the franchisor; and
  - The titles of protection of Intellectual Property Rights granted in Vietnam or abroad in the case of transferring registered Intellectual Property Rights.

The files for registration of franchise operation will be submitted to:

- The Ministry of Industry and Trade (“**MOIT**”) if franchises are to be made from foreign countries to Vietnam, including the cases where a franchise is transferred from non-tariff zones, export-processing zones and other special customs zones into the territory of Vietnam;
- MOIT if franchises are to be made from Vietnam to foreign countries, including any cases where a franchise is transferred from Vietnam to non-tariff zones, export-processing zones and other special customs zones; or
- A provincial department of trade, if a franchise is made within the territory of Vietnam.

This means that foreign franchisors must register their planned franchise operation with the MOIT before entering into a franchise contract with a local franchisee.

It is noteworthy that even though franchise contracts are not subject to registration procedures, their contents regarding intellectual property licensing and technology transfer are still subject for registration with relevant State authorities under laws and regulations on intellectual property and technology transfer.

### **iii. Taxation of Franchise Fee**

Taxation of franchise fees is not clearly provided for in prevailing laws. However, tax on royalties gained from the license of intellectual property rights and technology transfers which involve franchises are already provided by law. The transferor has the obligation to pay tax on royalties. The applicable tax

rate is based on the foreign contractor tax rates as previously discussed and must be withheld by the transferee.

Vietnam has signed bilateral tax treaties with some countries, and these treaties provide a basis for reducing certain types of royalties. This provides some tax planning opportunities in cases where the royalties are significant enough to merit it.

## **D. Technology Transfer**

The new *Law on Technology Transfer* was passed by the National Assembly on 29 November 2006 and took effect on 1 July 2007. This law significantly liberalized technology transfer transactions in Vietnam. In addition to the *Law on Technology Transfer*, laws on intellectual property and to some extent laws and regulations on franchising serve as the legal grounds for technology transactions in Vietnam.

### **i. Types of Technology Transfer**

The *Law on Technology Transfer* includes provisions on the types of technology transfer but also adds more clarification as to the classification of technology transfer. Technology transfer can be performed through 2 major forms, i.e., (a) as a whole or (b) as a part of another transaction. In particular:

- (a) To perform technology transfer independently; or
- (b) To perform technology transfer as parts of projects or transactions as follows;
  - Investment project;
  - Franchise;
  - License or assignment of intellectual property rights; or

- Sale or purchase of machinery attaching technology transfer.

It is noteworthy that the *Law on Technology Transfer* requires the transfer of industrial property rights in technology transfer contracts to follow the regulations on intellectual property. However, unregistered or expired intellectual property may also be the subject of technology transfer.

## ii. Registration Requirements

The new *Law on Technology Transfer* removes most of the requirements for registration and approval that applied to most technology transfers and licenses in the past, and replaces that system with a system under which only “conditional” technologies require appraisal.

Technologies are classified into three types:

- Technologies in which transfer is encouraged, e.g. environmentally friendly technologies, technologies preventing disasters, diseases, etc. (**“encouraged technologies”**);
- Technologies in which transfer is restricted, including those involving risks to human health, the environment and national security (**“restricted technologies”**); and
- Technologies in which transfer is prohibited (**“prohibited technologies”**).

Among the above, contracts for transfer of restricted technologies are subject to approval procedures. It is noteworthy that the *Law on Technology Transfer* requires not only “approval procedures” but for parties to seek permission from State authorities before signing technology transfer contracts of restricted technologies.

### **iii. Term of Contracts**

The *Law on Technology Transfer* removes all time-limits for technology transfer transactions and leaves parties to decide the term of contracts without any limit.

It also leaves parties to decide the effective date of technology transfer contracts unless the cases where the transferred technologies fall within the list of restrictions, in which case the effective date of contract is the date the contract is approved by the State authority.

### **iv. Taxation**

The transferor has the obligation to pay tax on the amount of revenue generated from the technology transfer. The applicable tax rate is based on the foreign contractors tax rates as discussed earlier and is withheld by the transferee.

## **E. Foreign Contractors**

According to *Circular No 134*, foreign contractors are foreign business organizations with or without a permanent establishment in Vietnam, and foreign business individuals whether they are residents or non-residents of Vietnam, that conduct business in Vietnam or have income derived from Vietnam as a result of contracts or agreements with organizations or individuals in Vietnam. No legal entity is established for foreign contractors in Vietnam. This form of business is best suited for short-term, cross-border, one-off projects, and where there is no requirement for hiring local/Vietnamese employees directly.

A foreign contractor may perform contracts in Vietnam only on a project-by-project basis. With this form, an offshore business organization may enter into a services contract with its customer in Vietnam to perform work for a specific project. This offshore organization may then send its foreign employees to Vietnam to work within the scope of the services contract. Foreign contractors are not able to hire local Vietnamese as employees directly.

**(i) Foreign contractor permit**

Generally there is no separate “contractor permit” required for foreign contractors, except where the foreign contractors engage in the following activities provided by *Decision No. 87*<sup>20</sup>:

- Consultancy on investment and construction;
- Supply of technological materials and equipment which form part of technical services relating to construction projects; and
- Execution of construction projects.

A prerequisite for a foreign contractor to apply for a contractor permit is that the foreign contractor must have a partnership with a Vietnamese contractor or engage a Vietnamese subcontractor (unless otherwise permitted by the Prime Minister or otherwise provided by the law of Vietnam).

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<sup>20</sup> Decision No. 87/2004/QĐ-TTg of the Prime Minister regarding Management of Operations of Foreign Contractors in the Field of Construction in Vietnam, dated 19 May 2004 (“**Decision No. 87**”)

## (ii) Work Permit/ Notification Requirements

As foreign contractors are not employed by a local Vietnamese entity, they are not considered employees in Vietnam. Foreign contractors are required to obtain work permits for themselves if they are working in Vietnam for more than three (03) months. Work permits are issued by the local Department of Labor, War Invalids and Social Affairs (“**DOLISA**”), which has a maximum term of thirty-six (36) months and can be renewed, re-issued, or revoked in accordance with *Decree No. 34*<sup>21</sup>.

As foreign contractors work on a project basis, they may not transfer equipment or employees from one project directly to another project in Vietnam. In order to work on another project, the individual foreign contractors (also generally referred to as “**foreign contractors**”) would have to obtain a separate work permit and may also have to obtain a separate visa. Similarly, equipment that is brought into Vietnam to be used in one project may not be transferred for use on another project upon completion. The equipment would normally have to be exported and then re-imported to be used in the new project.

Although a Foreigner Contractor may be exempt from the work permit requirement on the basis that he/she is working in Vietnam for less than three (03) months, strictly speaking a notification must be made (by the foreign employer or the Vietnamese customer) to the local DOLISA (where the individual will regularly work) at least seven (07) days prior to the date of commencing work.

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<sup>21</sup> Decree No. 34/2008/ND-CP of the Government regarding employment and administration of foreigners working in Vietnam, dated 25 March 2008 (“**Decree No. 34**”)

**(iii) Tax Implications for Foreign Contractors**

Foreign contractors are subject to foreign contractor tax consisting of value added tax and enterprise income tax where the foreign contractor is an organization, and value added tax and personal income tax where the foreign contractor is an individual. Please see **Chapter IV. Section K (Foreign Contractor Tax)** for a detailed discussion on tax issues relevant to foreign contractors.

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