

Legal news

April 2010

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INVESTMENT LAW

Foreign investment: how to register the shareholder status?

By Luu Tien Ngoc

Back ground

The more integration by Vietnam into the global economy, the more investment and business opportunities are available for foreigners. To do their investment in Vietnam, foreigners can choose either foreign direct investment (“FDI”) or foreign indirect investment (“FII”). If under FDI scheme, foreigners have to, before July 2006, follow the Law on Foreign Investment in Vietnam of 1996 (“FIL 1996”). If under FII scheme, foreigners have to, before July 2006, follow the Law on Enterprises of 1999 (“LoE 1999”), and the Law on Domestic Investment Promotion of 1998 (“LDIP 1998”). From July 2006, all Investment, including FDI and FII, must be in compliance of the Law on Investment of 2005 (“LoI 2005”), which together with the Law on Enterprises of 2005 (“LoE 2005”) provide an equal playing field for all enterprises in Vietnam, including foreign invested companies (“FIE”) established under FIL 1996 and Vietnamese company established under LoE 2005.

Under the LoI 2005, “direct investment” means a form of investment where investors invest their investment capital and participate in its management, while “indirect investment” means a form of investment where investors buy shares, [capital contribution], bonds, other valuable papers, by themselves or via investment funds or other financial intermediates, but not participate in management.

Still discrimination between investment in FIEs and Vietnamese companies

In theory, as mentioned above, all enterprises play on the same playing field, without any discrimination in terms of corporate incorporation, corporate governance, procedures and conditions for investment projects. However, in fact, they are still being treated in different way, particularly in terms of business registration for corporate incorporation, investment registration as well as any amendment thereof. Distinction can be seen in licensing authorities.

With respect to FIEs, though it is called differently “business registration” for corporate incorporation and “investment registration” for investment projects, the procedures for them are basically the same as previously. The investment registration requires an investment approval under FIL 1996, and it is quite different from the business registration applicable to Vietnamese companies. [Registration here means you complete your action then registration with authorities]. [Approval here means you need to get approval from authorities before any action]. In particular, an FIE will be granted with the so called “Investment Certificate”, which serves at the same time as a “Business Registration Certificate” for incorporation of a Vietnamese company, and a “Investment Certificate” for an investment project. The licensing authorities are provincial-level people’s committees (“PC”) that are supported by

provincial-level departments of planning and investment (“DPI”), which are again, basically the same as the licensing authorities as provided under FIL 1996.

With respect to Vietnamese companies, a new incorporation will be granted with a Business Registration Certificate. Once it makes a new investment project, subject to certain law provisions, it will be granted with an Investment Certificate. The licensing authorities are business registration divisions (“BRD”) under DPIs.

Differences leading to uncertainties for shareholding registration and risks to investors

As mentioned above, in theory, all types of enterprise whatever it is FIE or Vietnamese, will be regulated by the same legislation and play on the same playing field. However, in fact, the said differences in requirements, conditions, and procedures for business and investment registration as well as in licensing authorities, have resulted in certain distinction in registration of the shareholder status of investors in FIEs and Vietnamese companies.

With respect to FIEs, particularly unlisted companies, it seems that all changes in shareholder structure, e.g. when capital transfer is occurred, etc., must be registered with PCs for an amendment of the Investment Certificate. Then, in the amendment IC the names of all investors and any changes thereof must be recorded. This requirement appears to be inconsistent with what the LoE 2005 says about enterprises generally, e.g. only the changes in the ownership percentage by founding shareholders, will require an amendment to the Certificate of Business Registration, see further below. Consequently, it will lead to much paperwork and time-consuming both for FIEs and licensing authorities. Moreover, no provision as well as nowhere can be seen in the Investment Certificate to recognize the status of founding shareholders of FIEs. This may cause troubles not only for FIEs but also for licensing authorities to deal with related issues, e.g. whether a capital assignment transaction involving founding shareholders of the companies will be subject to limits imposed upon founding shareholders within the first three years as provided for in the LoE.

With respect to Vietnamese companies, only a change of shareholding by founding shareholders must be registered with BRUs for an amendment of the Business Registration Certificate. Registration is also required for shareholders of over 5% of the charter capital. Capital transactions among other shareholders will not be required to be notified and/ or registered, and then no amendment of the Business Registration Certificate will be needed. This seems much simpler than the requirements, conditions and procedures applicable to FIEs as mentioned above.

Move forwards

To remove the above said differences and create a common playing field where all enterprises are really equal, from the practical point of view, we believe that, the same requirements, conditions and procedures for business and investment registration will be sooner or latter applicable to all enterprises, without discrimination, regardless of what they are, FIEs or Vietnamese companies. To do so, amendment to the LoE 2005 and LoI 2005 should be considered and made soon, we think.

Other Sectors

Finance

- On April 12, 2010, the Government issued Decree No. 41/2010/ND-CP on credit policies for development of agriculture and rural area.
- Circular No. 56/2010/TT-BTC dated April 16, 2010 of the Ministry of Finance providing guidelines for the management and supervision of using the capital from international bonds of the Government issued in 2010.
- On dated April 15, 2010, the Ministry of Finance stipulated Circular No.54/2010/TT-BTC on amendment and supplement to the Inter-ministerial Circular No. 90/2006/TTLT-BTC-BNV dated May 6, 2006 of the Ministry of Finance and the Ministry of Home Affairs providing guidelines for the functions, duties, power and organizational mechanism of the bodies specialized in financial field under the People's Committees at provincial and district levels.
- Circular No. 51/2001/TT-BTC dated April 14, 2010 of the Ministry of Finance on amendment and supplement to Circular No. 59/2008/TT-TBC dated July 4, 2008 of this Ministry providing guidelines for the management and use of the proceeds acquired from dealing with law violations in anti-smuggling, commercial frauds, and counterfeits.
- On April 8, 2010, the Ministry of Finance issued Circular No. 46/2010/TT-TBC providing for the management, payment and finalization of the investment capital for investment projects on socio-economic infrastructure construction in poor districts in implementing Resolution No. 30a/2008/NQ-CP dated December 27, 2008 on the Program of supporting for quick and sustainable alleviation of poverty with respect to 61 poor districts.

Banking

- Circular No. 12/2010/TT-NHNN dated April 14, 2010 of the State Bank of Vietnam guiding the credit institutions to provide loans in Vietnamese Dong to clients based on negotiable interest rates.
- On April 5, 2010, the State Bank of Vietnam stipulated Circular No. 11/2010/TT-NHNN repealing Directive No. 04/2003/CT-NHNN dated June 18, 2003 on strengthening the internal control and internal auditing in the State Bank.

Taxation

- Decision No. 814/QD-BTC dated April 15, 2010 of the Ministry of Finance correcting Circular No. 37/2010/TT-BTC dated March 18, 2010 of this Ministry

providing guidelines for the issuance, use and management of computer-aided documents on personal income tax reduction.

- On April 5, 2010, the General Department of Taxation issued Decision No.566/QD-TCT on organization of working on Saturdays to receive and solve administrative procedures on taxation.
- Decision No. 588/QD-BTC dated March 22, 2010 of the Ministry of Finance announcing the average commercial electricity sale price applied as the price to calculate the tax for water natural resource used for hydraulic power generation in 2010.
- On April 22, 2010, the Ministry of Finance stipulated Circular No. 65/2010/TT-BTC on adjusting the import tax rates applied to automobile item under Group 8704 in the Preferential Import Tariff and providing guidelines for dump truck classification.
- Circular No. 63/2010/TT-BTC dated April 22, 2010 of the Ministry of Finance providing guidelines for the adjustment of the preferential import tax rates applied to a number of items in the Preferential Import Tariff.
- On April 19, 2010, the Ministry of Finance issued Circular No. 59/2010/TT-BTC providing for the implementation of the preferential import tax rates applied to a number of items under Group 2710 in the Preferential Import Tariff.

Trade

- Decision No. 36/2010/QD-TTg dated April 15, 2010 of the Prime Minister promulgating the Regulation on coordination in inspecting the quality of products and goods.
- On April 14, 2010, the Prime Minister stipulated Decision No.428/QD-TTg promulgating the mechanism and policies for encouraging foreign trade development in the border areas of Vietnam-Laos and Vietnam-Cambodia.
- Circular No. 16/2010/TT-BTC dated April 20, 2010 of the Ministry of Industry and Trade on issuance of codes for textile and garment manufacturers being exporters to the United-States market.

Labour

- On April 13, 2010, the Ministry of Labour, Invalids and Social Affairs issued Decision No. 495b/QD-LDTBXH approving the method and the total estimate of surveying the actual situation of labour utilization and demand in 2010.
- Circular No. 15/2010/TT-BLDTBXH dated April 20, 2010 of the Ministry of Labour, Invalids and Social Affairs providing guidelines for adjustment of pensions, social insurance allowances and monthly subventions under Decree

No.29/2010/ND-CP dated March 25, 2010 and Decree No.28/2010/ND-CP dated March 25, 2010.

- On April 7, 2010, the Ministry of Labour, Invalids and Social Affairs stipulated Circular No. 06/2010/TT-BLDTBXH providing guidelines for the implementation of the general minimum wage for State-owned companies and one member limited liability companies of which the charter capital is wholly owned by the State.
- Circular No. 07/2010/TT-BYT dated April 5, 2010 of the Ministry of Health providing guidelines for the assessment of work capacity reduction for the workers participating in the compulsory social insurance.

Transport

- On April 2, 2010, the Government issued Decree No. 34/2010/ND-CP on sanctioning administrative violations in the land road transport field.
- Circular No. 60/2010/TT-BTC dated April 20, 2010 of the Ministry of Finance on the amendment and supplement to Circular No. 53/2010/TT-BTC dated May 21, 2007 of this Ministry providing guidelines for the regime of collection, payment, management and use of the fee for land road vehicle driving examination.
- On April 19, 2010, the Ministry of Transportation stipulated Circular No.10/2010/TT-BGTVT providing for the land road management and maintenance.

Construction

- Decree No. 39/2010/ND-CP dated April 07, 2010 on management of the urban underground construction space.
- On April 7, the Government issued Decree No. 38/2010/ND-CP on management of urban space, architecture and landscape.
- Decree No. 37/2010/ND-CP dated April 7, 2010 on establishment, appraisal, approval and management of urban planning.

Land

- On April 8, 2010, the Prime Minister stipulated Decision No. 34/2010/QD-TTg promulgating the regulations on compensation, support and resettlement for the irrigation or hydraulic power projects.
- Decision No. 24/2010/QD-UBND dated April 7, 2010 of the People's Committee of Ho Chi Minh City promulgating the Regulation on auctioning the land use rights to allocate the land with collection of land use fees or lease the land in Ho Chi Minh City.

- On April 16, 2010, the Ministry of Finance issued Circular No. 57/2010/TT-BTC providing for the estimate preparation, use and finalization of expenditures for organizing the compensation, support and resettlement when the State recovers the land.
- Circular No. 06/2010/TT-BTNMT dated March 15, 2010 of the Ministry of Natural Resources and Environment providing for the techno-economic norms to prepare and adjust the land use planning and plans (Part II and the end).

Natural Resources - Environment

- On April 5, 2010, the Ministry of Industry and Trade stipulated Decision No.1669/QD-BTC on the addition of zone planning to exploration, exploitation, processing and use of mineral group of limestone (marble), feldspar, kaolin and magnezit until 2015, with orientation to 2025.
- Circular No. 09/2010/TT-BGTVT dated April 6, 2010 of the Ministry of Transport providing for the environmental protection in the development of transport infrastructure.
- On March 30, 2010, the Ministry of Finance and the Ministry of Natural Resources and Environment jointly issued Inter-ministerial Circular No.45/2001/TTLT-BTC-BTNMT providing for the management of the expenditures for environment.

Energy

- On April 15, 2010, the Ministry of Industry and Trade stipulated Circular No.13/2010/TT-BTC providing for the methods of calculation, order, and procedures for the expenditure projection for running the electricity system and electricity market.
- Circular No. 14/2010/TT-BTC dated April 15, 2010 of the Ministry of Industry and Trade providing for the methods of preparation, order, procedures to establish, issue, and manage the electricity transmission prices.

Judiciary

- On April 12, 2010, the Government issued Decree No. 40/2010/ND-CP on the examination and dealing with the legal documents.
- Decision No. 445/QD-TTg dated April 7, 2010 of the Prime Minister approving the implementation plan of the United-Nations Treaty on Anti-corruption.
- On April 1, 2010, the Hanoi People's Committee stipulated Decision No.13/2010/QD-UBND issuing the regulations on receiving citizens and resolving their claims and denunciations under the competence of Hanoi.

Agriculture - Forestry

- Circular No. 15/2010/TT-BNNPTNT dated March 22, 2010 of the Ministry of Agriculture and Rural Development promulgating the additional list of forestry plant varieties permitted for business and production.
- On April 5, 2010, the Ministry of Agriculture and Rural Development issued Circular No. 21/2010/TT-BNNPTNN adding some more kinds of plant to the list of protected plant varieties.

Tourism

- Circular No. 48/2010/TT-BTC dated April 12, 2010 of the Ministry of Finance providing guidelines for the regime of collection, payment and management of fees for issuance of international travel business certificate, permits for establishment of branches and representative offices of foreign tourist enterprises in Vietnam, professional licensed tourist guide cards, and tour presenter certificates.
- On April 12, 2010, the Ministry of Finance stipulated Circular No. 47/2010/TT-BTC providing for the regime of collection, payment and management of fees for assessing and ranking the tourist accommodation establishments and for appraising service business entities that are qualified to serve tourists.

Miscellaneous

- Decree No. 45/2010/ND-CP dated April 21, 2010 providing for the organization, operation and management of associations.
- On April 15, 2010, the Government issued Decree No. 43/2010/ND-CP on enterprise registration.
- Decision No. 506/QD-TTg dated April 22, 2010 of the Prime Minister approving the Treaty between the Government of the Socialist Republic of Vietnam and the Government of the French Republic on cultural centres.
- On April 21, 2010, the Ministry of Planning and Investment stipulated Circular No.08/2010/TT-BKH providing for the details of the preparation of reports on tendering result assessment.

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