

An aerial photograph of a bay in Vietnam, featuring limestone karsts and two boats on the water. The sky is a warm, golden color, suggesting sunrise or sunset. The water is a deep blue-green. The karsts are covered in lush green vegetation. Two boats are visible: a larger white and blue cruise ship and a smaller red and white boat.

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Legal and tax

VIETNAM
2022: YEAR IN REVIEW

VDB LOI IN VIETNAM

VDB Loi has been operating in Vietnam since **2013**. Our practice concentrates on the natural synergies that exist between legal and tax. We solve our clients' issues by knowing their business, their industry and seeing the broad picture of doing business in Vietnam.

A combination of Vietnamese and international experts in our team allows us to provide in-depth local law and tax advice that takes into account modern international standards and approaches, thus anticipating clients' expectations and helping them reach their goals in the most efficient manner.

Our advice is relied upon by international and development financial institutions for some of the region's largest ever financing transactions. Multinationals often choose us for complex large-scale investment projects in a wide range of sectors.

We have particularly strong expertise in Energy and Infrastructure, Project Finance, Real Estate, TMT, and Tax. VDB Loi also provides ongoing support to its clients at all stages of their investments in Vietnam, from initial market entry, business set up, and obtaining regulatory approvals, to continued compliance with reporting and filing requirements.

IN THIS PUBLICATION

We share some of the key overviews prepared by VDB Loi team in Vietnam over the course of 2022, as well as a year-end update summarizing some of the latest developments.

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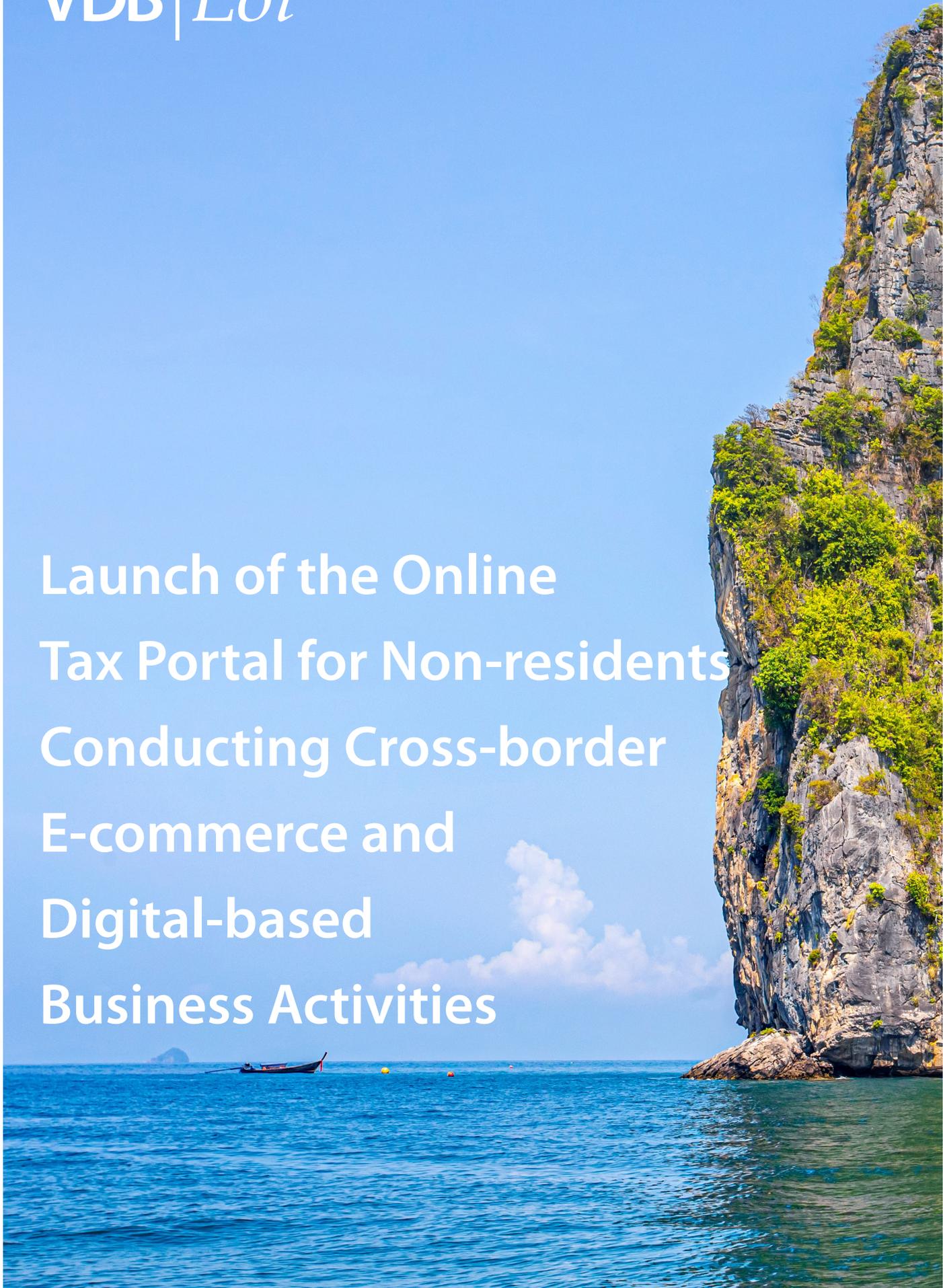
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Launch of the Online
Tax Portal for Non-residents
Conducting Cross-border
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GENERAL REGULATIONS

The Vietnam tax authorities have been enhancing the tax management mechanism to collect tax from non-residents who generate income from Vietnam through cross-border e-commerce and digital-based business activities. One of the most common methods is via the withholding mechanism, whereby the resident buyer is required to withhold, declare, and file the tax on behalf of the non-resident. However, this can only work when the buyer is an organization that is under strict obligation to comply with the tax, accounting, and forex control regimes. It is more difficult for the tax authorities to manage the income flow of non-residents if the buyers are individuals, who account for a larger portion of revenue. This has become even more challenging when individuals can pay for services via various payment solutions.

In this regard, the Ministry of Finance issued Circular 80/2021/TT-BTC dated 29 September 2021 (the “**Circular**”) providing guidance on Decree 126, which elaborates on some articles of the Law on Tax Administration. Among others, the Circular provides details on the rights and obligations of the relevant parties to ensure the tax compliance of non-residents deriving income from Vietnam through e-commerce and digital platform-based activities in Vietnam.

It also includes a list of the organizations and individuals relevant to the tax administration of these activities:

1. Overseas suppliers without permanent establishments in Vietnam carrying out e-commerce and digital platform-based activities and providing other [such] services for organizations and individuals in Vietnam (hereinafter referred to as “**overseas suppliers**”).
2. Vietnam customers of overseas suppliers.
3. Tax agents and organizations that are operating under Vietnam’s law and are authorized by overseas suppliers to apply for taxpayer registration, and declare and pay tax [on their behalf] in Vietnam.
4. Commercial banks, payment service providers, organizations, and individuals whose rights and obligations are relevant to e-commerce, digital platform-based activities and other [such] services provided by overseas suppliers without permanent establishments in Vietnam.

The Circular establishes a direct and simplified online portal through which overseas suppliers can register with and declare tax directly to the Vietnam tax authorities, eliminating burdensome paperwork. Alternatively, overseas suppliers can authorize a Vietnam tax agent to process their tax registration and declarations on their behalf.

Overseas suppliers who fail to either register to declare and pay tax directly with the tax authorities or authorize a qualified tax agent to do so will be subject to paying tax through a withholding mechanism. The Circular provides specifics for this depending on the type of buyer:

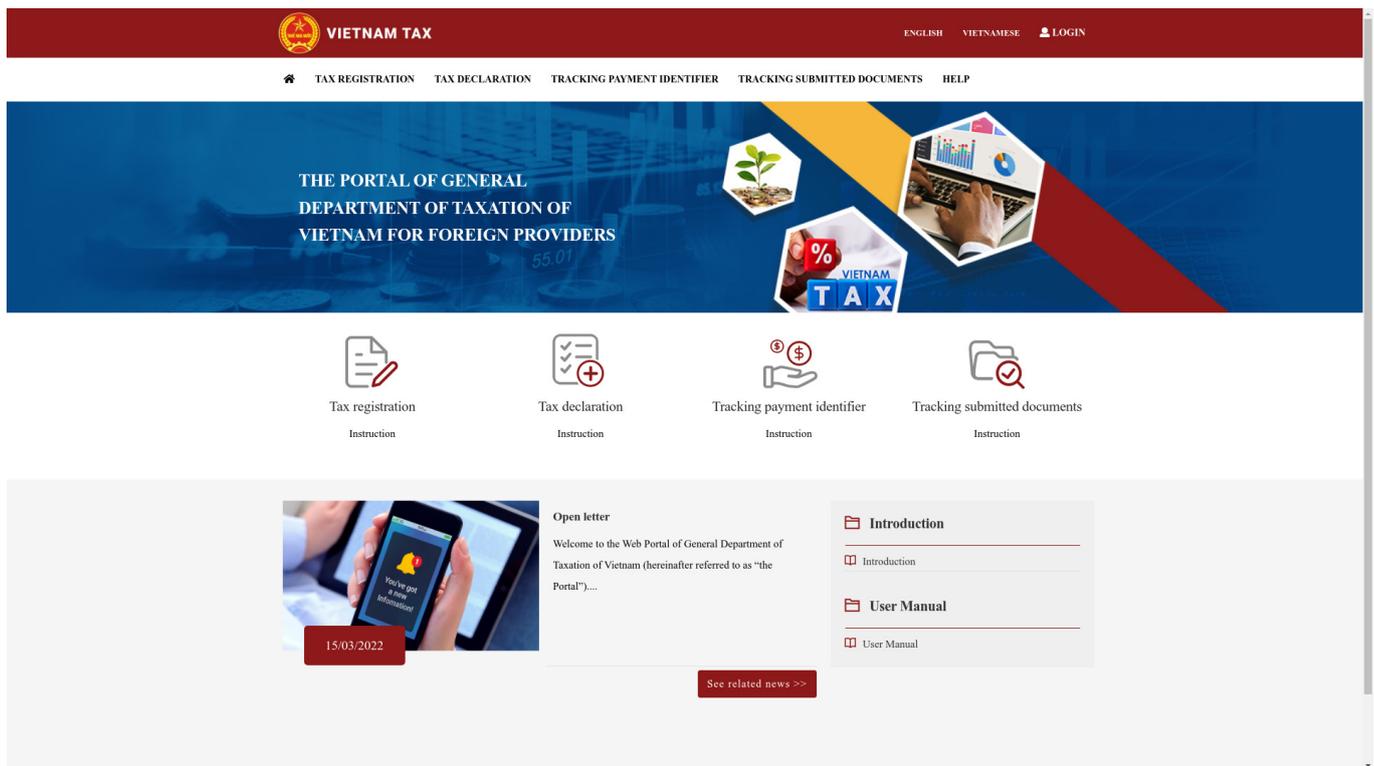
- Buyers that are organizations subject to the tax regime in Vietnam will withhold tax and remit it to the tax authorities as done prior to the issuance of this Circular.
- For transactions with buyers that are individuals:
 - In most cases, the commercial bank or payment service provider will be tasked with withholding and remitting the tax when it processes the transaction.
 - If it is not possible for the commercial bank or payment service provider to withhold the tax, they must monitor the amounts transferred to the overseas supplier and report it to the General Department of Taxation on the 10th of every month.

To implement this, the General Department of Taxation will be responsible for maintaining a list of such overseas suppliers and providing their names and websites to the headquarters of banks and payment service providers in order for their branches to withhold tax when processing payments for transactions with these overseas suppliers.

Under relevant double taxation agreements (“**DTAs**”), the Vietnamese tax authorities have the right to coordinate with the tax authorities of other countries with regard to overseas suppliers required to declare and pay taxes in Vietnam, including collecting taxes in arrears and enforcing measures against non-compliance.

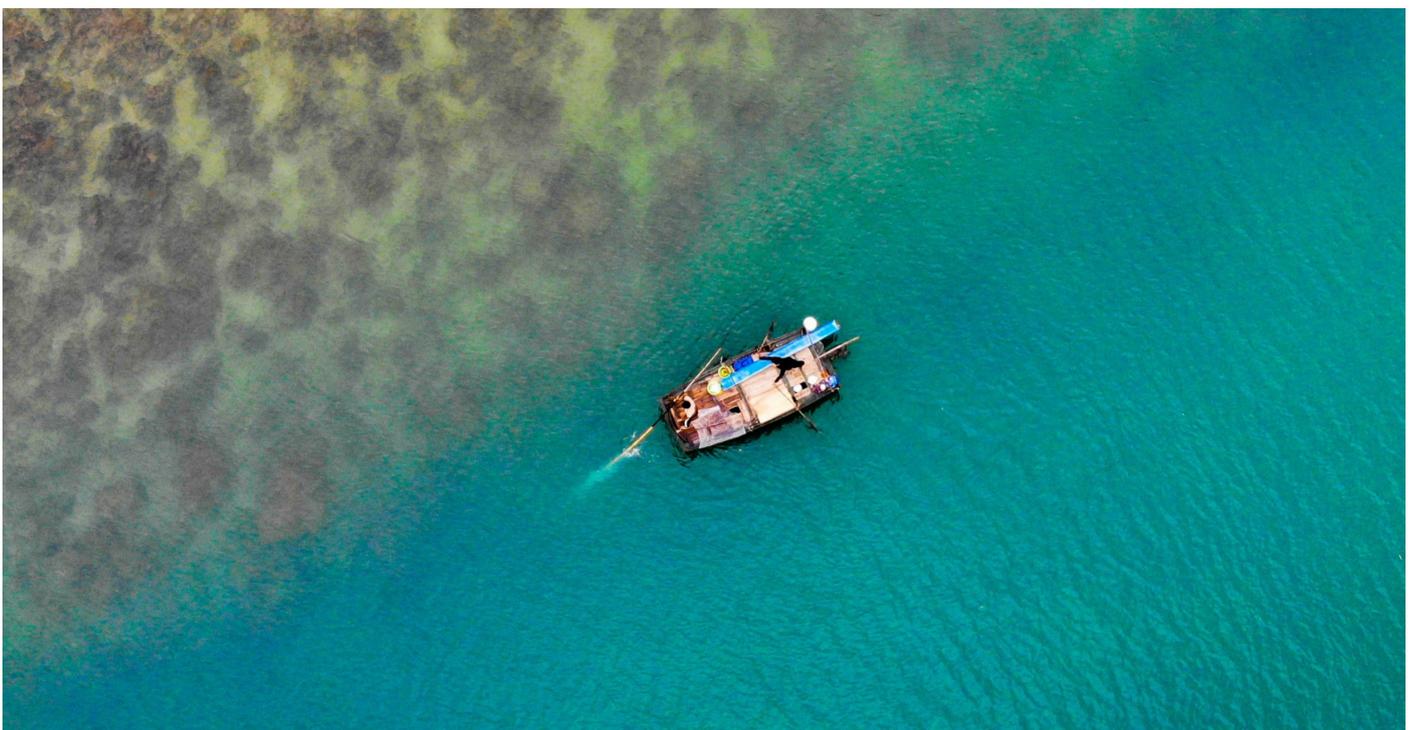
ONLINE PLATFORM FOR DIRECT TAX REPORTING

On 21 March 2022, the General Department of Taxation announced the opening of the online portal for overseas suppliers at <https://etaxvn.gdt.gov.vn> (see a screenshot of the portal below).



Overseas suppliers with income from Vietnam will now be able to register, declare, and pay tax through this portal without having to submit hard copies of documents to the Vietnamese tax authorities.

Overseas suppliers will have to go through an initial registration procedure the first time they enter the portal, and will need the ability to access and use the internet and a working email address to communicate directly with the tax authorities. After successfully completing the tax registration procedure, information about their electronic transaction account and tax identification number will be sent to the email address used for registration.





Overseas suppliers will need to make quarterly tax declarations by completing Form No. 02/NCCNN on the portal (a sample of which was issued with the Circular). They will declare and pay tax in a freely convertible foreign currency into the state budget revenue account, instructions for which are on the portal.

Revenue subject to value added tax and corporate income tax is calculated as a percentage of the business revenue generated from Vietnam. Overseas suppliers may carry out procedures for tax exemption or reduction under an applicable DTA.

The Circular sets out the approach for the determination of revenue subject to tax in Vietnam:

“a) Information used for identification of transactions of organizations and individuals purchasing goods and services in Vietnam:

a.1) Information relevant to payments made by the organization or individual in Vietnam, such as information about the credit card based on Bank Identification Number (BIN), bank account or similar information used by the buyer to pay the overseas supplier.

a.2) Information about residence of the organization or individual in Vietnam (payment address, delivery address, home address or similar information provided by the buyer for the overseas supplier).

a.3) Information about access of the organization or individual in Vietnam such as country code of the SIM card, IP address, landline location or similar information about the buyer.

b) When a transaction is found to be located in Vietnam, the overseas supplier shall:

b.1) Use two consistent pieces of information, including information about payment made by the organization or individual in Vietnam and information about residence or access of the organization or individual in Vietnam.

b.2) In case information about the payment made by the organization or individual cannot be collected or contradicts the other information, the overseas supplier may use two consistent pieces of information, including information about residence and information about access of the organization or individual in Vietnam.”

Overseas suppliers should retain the information used to identify transactions with buyers in Vietnam as mentioned above in order to facilitate tax inspection by the Vietnamese tax authorities.

** This article was originally published in May 2022*

An aerial photograph of a tropical beach with clear turquoise water. Several boats are visible: a large white boat with a blue canopy in the upper left, a smaller white boat in the center, and another large white boat with a blue canopy in the lower left. The beach is white and sandy, with some green trees and shadows visible in the bottom left corner.

Pathway to an Independent Power Project in Vietnam

Steps involved in launching a privately-
initiated IPP project by a foreign
investor



I. MAIN REGULATORY PATHWAYS FOR A NEW PROJECT

Investors in Vietnam can choose different routes to implement their projects. The major pathways are envisaged by the PPP Law and the Investment Law.

1. The PPP Law pathway

Under the PPP (public-private partnership) regime, project would generally be implemented on the basis of a PPP contract signed by the investor with the relevant government authority. Selection of the investors can be done through: (i) open bidding, (ii) competitive negotiation and (iii) (in limited specifically identified cases) through direct selection, which is referred to as “investor appointment” in the PPP Law.

PPP Law also envisages an option where a project can in certain cases be proposed not by the government side, but by a private developer. If such project will be authorized for implementation, then at the investor selection stage, the investor who made the initial proposal will be entitled to the preferential treatment. Namely such investor will be eligible for additional scoring incentives when various proposals will be evaluated.

2. The Investment Law pathway

Under the Investment Law, an investor can propose and implement a project subject to receipt of relevant approvals, licenses and registrations. Competitive selection may or may not be applicable, depending in particular on whether the investor already has the land required for the project.

3. Which route to take?

As between the above routes, the choice is usually made taking into account the following major considerations:

- a. sector/industry of the project;
- b. whether the project is being initiated by the government side or by the investor;
- c. whether investor already has the land necessary for the project and where such land is located (e.g. whether it is located in an industrial park or elsewhere, as land allocation procedures differ depending on the location);
- d. does the investor need support from the government in implementing the project, or the investor would like and is able to implement it fully at its own expense.

These aspects are further considered below in more detail.

II. HOW DOES THE INDUSTRY AND SIZE OF THE PROJECT IMPACT ON THE AVAILABLE ROUTE?

It is important to note that PPP Law provides for a specific list of industries in which a project can be implemented on PPP basis. These include projects in the following sectors:

1. transportation,
2. power grids and power plants. **Except:** hydropower plants and those that are subject to the state monopoly requirement as provided in the Law on Electricity (such as, for example, operation of large-scale power

- plants (e.g. nuclear and several specifically designated hydro- stations),
3. water resources and irrigation; clean water supply; water drainage and wastewater treatment; waste management and disposal,
 4. healthcare; education – training, and
 5. information technology infrastructure.

PPP Law further requires minimum capital to be invested: at least VND 200 billion (approx. USD 8.6 mln.), except for projects in healthcare and education, in which the minimum capital requirement is reduced to VND 100 billion.

In terms of Investment Law route, approach is generally formulated in the opposite way, i.e. there is a list of banned activities in which investors should not be involved (the list is set in Article 6 of the Investment Law, and includes for example dealing with listed narcotic substances, trade in specific chemicals, etc.).

III. INVESTMENT LAW ROUTE – WHO APPROVES THE PROJECT AND HOW TO INITIATE IT?

Approval of “investment guidelines”

Generally, for larger and more complex projects it is necessary for “investment guidelines” to be first approved by the government authority of competent level. Examples of such projects are listed below and the level of approval (National Assembly, Prime Minister or Provincial People’s Committee) depends on the size, complexity and the impact that the project may have.

National Assembly

Projects that exert great effects or potentially serious effects on the environment, including, for example:

- a. nuclear power plants;
- b. investment projects that require relocation of 20,000 people or more in mountainous areas or 50,000 people or more in other areas.

Prime Minister

- a. investment projects that require relocation of 10,000 people or more in mountainous areas or 20,000 people or more in other areas;
- b. airports and aerodromes; cargo terminals of airports and aerodromes with a capacity of at least 1 million tons per year;
- c. ports and wharves in which investment is at least VND 2,300 billion within the category of Class I seaports;
- d. investment projects on petroleum processing;
- e. investment projects which involve betting and casino services.

Provincial People’s Committees

- a. construction of residential housing that use at least 50 hectares of land or less than 50 hectares of land but with a population of at least 15,000 people in an urban area; or that use at least 100 hectares of land or less than 100 hectares of land but with a population of at least 10,000 people in a non-urban area;



- b. investment projects of foreign investors and foreign-invested business organizations executed on islands or in border or coastal communes; in other areas affecting national defense and security.

The investors willing to undertake a project that requires one of the above approvals will need to apply for it via the Ministry of Planning and Investment (for projects that are subject to National Assembly or Prime Minister approval) or via provincial Departments of Planning and Investment (for projects that are subject to Provincial People's Committee approval).

The **application dossier** would typically include:

- An application, including a commitment to incur related costs, if the project is not approved;
- Documents relating to the investor's legal status;
- Documents relating to financial capacity of the investor, such as financial statements of the parent company, funding commitments from parent company or from a bank;
- Proposal for implementation of the investment project (including investment objectives, amount of required capital and plan for raising capital, location, duration and schedule of the investment project, information about the current use of land in the location of the project);
- If the project does not require the government to allocate or lease land, investor provides a copy of the available document regarding the land use right;
- Description of the technology to be used in the investment project.

"Investment Registration Certificate"

Upon receipt of the above approvals "in principle", or (for projects that do not require such approval "in principle") – directly, the investor would apply for **an investment registration** certificate at the local investment registration authorities.

Certain conditions apply, including:

- The investment project shall not involve any banned business lines (as listed in the laws)
- There is a project site available for execution of the project. In practice this means that investor was able to obtain necessary land use rights for the project (e.g. through lease) and can provide evidence thereof in the application dossier.

IV. WHAT ARE THE ROUTES TO RECEIVE LAND RIGHTS BY A FOREIGN OWNED PROJECT SPV?

General regime: land "allocation", "lease", "land use certificate"

In Vietnam land is not "owned" either by individuals or by entities, whether they are Vietnamese or foreign. The Constitution provides that land is owned by the people and that the state administers land on people's behalf.

In its exercise of the people's rights, the state allocates land to individuals or organizations. This means that the state may permit an individual or an organization to use a piece of land for a definite or an indefinite period of time, with or without the need to pay a land use fee, or lease a piece of land to individuals, households or companies.

Individuals or entities to whom a piece of land was allocated or leased, must use the land for the purposes stipulated in the land allocation decision or in the land lease agreement.

In terms of terminology that is used in regulations and practice, reference is usually made to "allocation" of land when the land user acquires the land use right and pays a fee to the government for such allocation. Where reference is made to "lease", the user is normally required to pay rent (on regular basis or in lump sum for the whole lease term).

Land use right is evidenced by a "certificate of land use right, residential house ownership and ownership of other assets attached to the land" ("LUR Certificate") granted by a competent state agency.

Specifics of the regime to be followed by foreign investors

Foreign owned enterprise (a "FOE") can receive LUR Certificate through leasing or subleasing land from: (1) the competent government authority or (2) from other land users, provided that such land users are permitted by law to lease or sublease land.

The identity of the entity that can potentially grant land use rights to a FOE usually depends on the location of the project site:

A FOE that intends to implement a project in **an industrial zone** may:

- a. lease land from the industrial zone developer; or
- b. sublease land from another enterprise located in such zone with the approval of the industrial zone developer.

For **project outside of industrial zones** a FOE usually may:

- a. lease land from the competent government authority; or
- b. lease / sublease land from a domestic economic entity that is permitted to sublease land in accordance with its LUR Certificate. The plot must be already connected to the utilities infrastructure suitable for industrial development; or
- c. FOE may sublease land (also on the condition that the land plot is connected to the required utilities infrastructure) from another FOE within the remaining term of the original lease,

The term of validity of the LUR Certificate generally coincides with the term of the investment registration certificate, but may generally not exceed 50 years (or 70 years in specific areas).

IV. WHAT ARE THE KEY OPERATIONAL PERMITS REQUIRED FOR A LARGE ENERGY PROJECT?

The precise scope of required permits of course depends on the specifics of each project. However, the key approvals would typically include:

1. as mentioned above, the investment registration certificate (“**IRC**”) for the project;
2. **business registration certificate** for incorporation of the project company; and
3. **operating license(s)** (if required) in certain conditional business, such as **electricity generation**, chemical production, intermediary payment solutions, etc.

In addition to the above, the project company would also typically be required to obtain construction permit, EIA approval, Firefighting and Fire Prevention certificate.

V. WHAT IS THE USUAL CORPORATE VEHICLE USED FOR THE PROJECT SPV?

Project companies are set up in one of the forms envisaged by the Law on Enterprises of Vietnam. The most frequently used forms are a limited liability company or a joint stock company (in this form there must be a minimum of three shareholders).

VI. PROJECT FINANCING ASPECTS. WHICH SECURITY CAN BE OFFERED BY THE PROJECT COMPANY TO LENDERS

Please refer to our separate briefing “**Foreign Loans for Vietnamese Borrowers – Q&A**” on the following [LINK](#).

VII. TAX, CUSTOMS AND OTHER INCENTIVES

Investors can benefit from a range of incentives envisaged by the Tax Law, Land Law and other laws in Vietnam. As such either a PPP project or a privately-initiated project can enjoy generally consistent incentive schemes.



VIII. ENERGY SECTOR: SPECIFICS OF REGULATION AND EXPECTED DEVELOPMENTS

Private investments into the power transmission grid

Article 4 of the Law on Electricity 2004 was amended in January 2022 to allow private sector to:

1. invest in the construction of the transmission grid; and
2. operate the transmission grid that was so developed.

This positive change in regulation would allow investors to benefit from a broader range of structuring options when developing their projects, in particular in the renewables sector, where project sites may not necessarily be closely located with the existing grid network.

“Direct PPAs”

In May 2022 the Ministry of Industry and Trade of Vietnam (“**MOIT**”) released another draft circular regarding the implementation of the pilot program for direct power purchase agreements (“**DPPA**”).

The regulation is intended to allow new contractual mechanisms between power developers and private consumers.

Under the latest draft, the pilot scheme will apply to:

- On the generators’ side - the generating units (wind or solar power plants) with an installed capacity of more than 30 MW connected to the national power system, which includes:
 - a. Power plants that are ready to go into operation, but are not eligible for application of the electricity price mechanism under:
 1. the Prime Minister’s Decision No. 13/2020/QD-TTg dated April 6, 2020 on incentive mechanisms encouraging the development of solar power in Vietnam (for solar power); or
 2. the Prime Minister’s Decision No. 37/2011/QD-TTg dated June 29, 2011 on the mechanism to support the development of wind power projects in Vietnam; or
 3. Decision No. 39/2018/QD-TTg dated September 10, 2018 of the Prime Minister amending and supplementing a number of articles of Decision No. 37/2011/QD-TTg dated June 29, 2011 of the Prime Minister on the mechanism to support the development of wind power projects in Vietnam (for wind power).
 - b. Power plants that are not yet in operation, are under construction, are included in the electricity development planning, have identified investors and are selected by competent state agencies according to current regulations and are expected to be completed, accepted for commercial operation within 270 working days from the date of implementation of the pilot DPPA program.
- On the consumer side: large electricity users (customers), being organizations and individuals that are purchasing electricity for industrial production purposes in the amount of 22 KV or more.

The DPPA arrangement in the pilot scheme includes the following transactions:

1. Bilateral contract between Customer and Generator. The generating unit and the customer directly negotiate and sign a bilateral contract covering among other things:

- Contractual output and contract price: the two parties agree on trading cycles on the spot electricity market; reference price (or spot price) to be set according to the spot price of electricity market that is announced in accordance with the provisions of Circular No. 45/2018/TT-BCT dated November 15, 2018 of the Minister of Industry and Trade; parties will be making payments to each other depending on the difference between the contract price and the reference price which is the spot price of electricity.

2. Purchase of electricity of generating units through the spot electricity market.

- The generating unit also signs a contract with the Electricity of Vietnam (EVN) to participate in the competitive wholesale electricity market and sell all the electricity of the power plant project to the spot electricity market. The generating unit is responsible to register and participate in the competitive wholesale electricity market according to the provisions of Clause 2, Article 4 of Circular No. 45/2018/TT-BCT.

3. Sale of electricity by EVN to the customers

- The EVN will then distribute and supply electricity to customers to meet the entire demand for electricity for production activities at the registered pilot scheme location at the retail price of electricity specified in the Prime Minister's Decision No. 24/2017/QĐ-TTg dated June 30, 2017.

The total capacity of power plants participating in the pilot program of direct purchase and sale of electricity should not exceed 1,000 MW.

The generating unit must satisfy, in addition to the above criteria, the following requirements:

- There should be no limitation on power generation capacity due to grid overload at the time of registration for commercial operation.
- There should be no effective power purchase agreement signed with EVN at the time of registration for participation in the pilot scheme.
- There is a binding agreement with one (or more) customers under the DPPA if selected to participate in the pilot scheme.

Power development plan

The Power Development Plan is a document of fundamental importance for the energy sector in Vietnam. Projects initiated either by the investor or by the government are generally firstly assessed and approved for inclusion into the PDP.

The power development plan has been prepared by localities based on their demand, land, conditions and presented to MOIT for consolidation and approval (after getting approval by the Prime Minister).

If an investor would want to initiate a new project (which is not yet included in the PDP), it would need to conduct the pre-feasibility study, research and apply to the local People's Committee for submission to the MOIT for approval and inclusion in the PDP.

Following that, the investment process into the project can be undertaken as described above.

The Council for Appraisal of National Electricity Development Plan for the period of 2021-2030, with a vision to 2045 (Electricity Planning VIII) approved the draft "**PDP VIII**" on 26 April 2022. The next step in the approval process is its approval by the Prime Minister.

The latest version of PDP VIII has considered a lot of matters associated with commitments related to energy transition in the spirit of commitments at COP 26. In particular, the PDP VIII is addressing the issues of total installed capacity, structure of power sources (reduce coal power, increase renewable energy), policy and roadmap for energy conversion and the allocation of power sources in regions, general economic efficiency issues (reducing investment costs for power sources and power grid).

** This article was originally published in July 2022*

SETTING UP OR ACQUIRING MANUFACTURING BUSINESS IN VIETNAM

Possible routes

Tax analysis

Relocation of foreign personnel



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SETTING UP NEW BUSINESS

Pre-feasibility and project location

The first step relating to establishing a manufacturing subsidiary in Vietnam that a foreign investor needs to undertake, is to define the scope business objectives.

Pre-feasibility study is performed, for the purposes of which investors typically approach local authorities to get general guidance or assistance with respect to available location, land use rights and land clearance matters.

For certain proposed projects that fall under the conditional list of activities that have significant impact on the social and environment or land use right, investors must first obtain in-principle approval from local authorities or Prime Minister or the National Assembly. The selection of investors for the proposed projects can then be conducted through a bidding process. In relation to projects in the energy sector, please refer to our separate briefing “Pathway to an independent power project in Vietnam” through the following [link](#).

Investment Registration Certificate

Once the proposed project has been approved in principle (if required) and location (land use right) is obtained, the local licensing authorities (i.e. Department of Planning and Investment) shall grant the investor an Investment Registration Certificate which is a confirmation of the government that the proposed project has been accepted and registered.

The Investment Registration Certificate is required when:

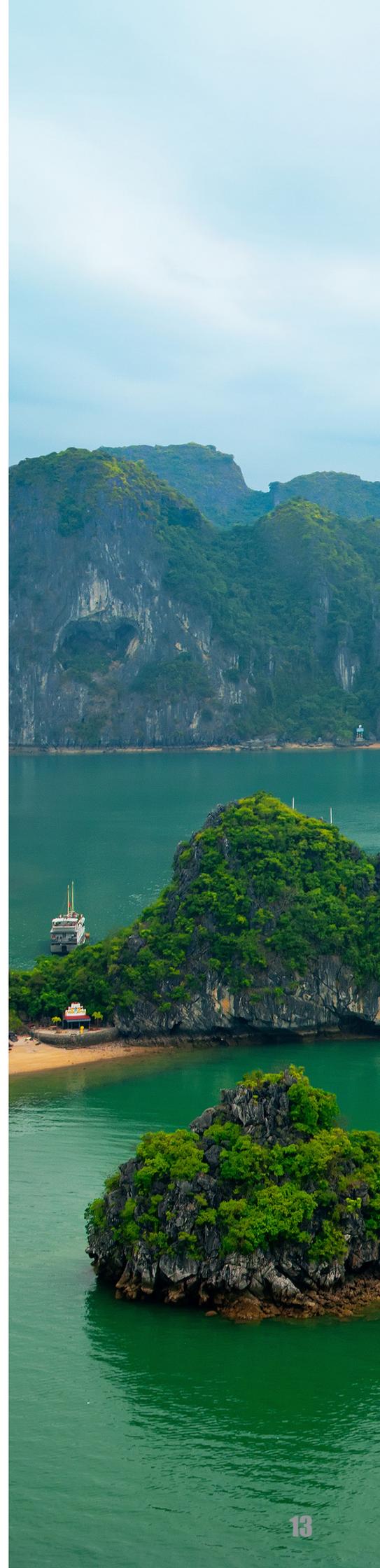
- a foreign investor or a foreign owned enterprise with more than 50% foreign ownership apply for a new project; or
- the proposed project is a “conditional project” (as per the defined lists associated to the Investment Law and its decrees. For example: manufacturing and distribution of media products, including video recordings; construction, operation and management of river ports, seaports and airports; real estate business; manufacturing, sale tobacco products, tobacco ingredients, equipment for tobacco industry; paper production).

The main contents of the IRC includes project code, investor’s information, project company information, business objectives and location of the project, investment capital and other conditions that investors must comply with.

For projects that do not require approval in principle, investor can file an application for proposed project with the local licensing authorities for assessment. Upon satisfying criteria and conditions (e.g. market entry limitations, restrictions, conditional project), the local licensing authorities will issue the Investment Registration Certificate (typically - within 15 working days, but in some cases may take longer).

Enterprise Registration Certificate

As a next step for implementing the approved project, the investor will also apply to the same licensing authorities (but different division) to register the project company incorporation and to receive the Enterprise Registration Certificate.





The process includes registration of the legal entity, articles of association and the list of shareholders, so that the project company is able to implement the project, perform obligations as well as comply with other local regulations in terms of corporate, labour, tax, accounting, banking and foreign exchange control.

Land acquisition

In considering possible location of the manufacturing project, investor can choose among the following routes for land acquisition:

- Acquisition of land use right directly from the local government. This can be conducted via an auction. The result of this is that the investor shall be allocated a land use right or a land lease right. Lease can be on annual payment basis or a lump sum payment basis for the whole term of the lease.
- Acquisition of the land use rights by way of receiving capital contribution in kind from local partners or from a receiving proper transfer of the land lease right.
- Acquisition of the land use right by receiving sub-lease of the land use right in an industrial zone or an export processing zone. This route is often quite straightforward and involves smaller volume of administrative work.

ACQUISITION OF EXISTING BUSINESS

Share acquisition

Foreign investors often consider entering the market through a share acquisition of an existing project company that operates the project.

Amendment of the Investment Registration Certificate

In case the foreign investors undertake investment in Vietnam through share acquisition of a target company, it is not required to apply for new Investment Registration Certificate. In case the target company has already obtained an Investment Registration Certificate for the project, there will be a requirement of amendment of the Investment Registration Certificate once the foreign investor acquires the shares of the target project company.

Share Acquisition Approval

One of the key administrative steps for the investor to acquire shares of an existing target company incorporated in Vietnam is that the receipt of the share acquisition approval from local licensing

authorities. The requirement to obtain such consent for acquisition of shares by foreign investors applies in the majority of cases.

Upon filing the application for share acquisition, the local licensing authorities will make assessment of criteria and conditions applicable for the business industry in terms of international, regional commitments, domestic conditions, financing capacity of investor.

In general, investor can expect to receive a response within 15 working days from submission date, but in some cases, it can take a bit longer.

Share purchase documentation and taxes

Once the share acquisition is approved, the investor and target company can proceed with execution of share purchase agreement, filing capital gain tax returns, corporate registration updates (amendment of the Enterprise Registration Certificate and relevant operating licenses (if any)).

As a general rule, if the seller of the shares is a non-resident of Vietnam, the buyer shall have obligation to withhold and file capital gain tax on behalf of the seller. In case the buyer is also a non-resident, then the target company will have such obligation.

Assets acquisition

Under this approach, the investor must establish a Bidco (subsidiary) in Vietnam to acquire the relevant assets.

Acquisition of project assets at construction stage

There is no concept of transferring an ongoing business, but rather a transfer of an investment project at construction stage (partially or in whole). In other words, it refers to a change of the investor during the project construction phase and prior to commencement of commercial operation.

In such case it is also necessary to go through approval procedures for changing the investor in the manner that is similar to obtaining such approval in case of share acquisition.

From tax perspective, the transfer of the investment project will be subject to capital gain tax in the same manner as a share transfer. The difference is that in the asset transfer scenario the investment development cost will be taken into account, whereas in the share transfer it would be the cost of equity.

Acquisition of project assets at operation stage

In case of a transfer of an operating business in whole or in part, there are no specific procedures for the transaction, and the Bidco will typically purchase assets from the seller. For those employees transferred from the seller to the buyer, it would be necessary to terminate their employment relationship with the seller (their old employer) and enter into new employment contracts with the buyer (Bidco).

Any other commercial contracts with customer, suppliers, land lease right usually need to be updated or amended to have buyer (Bidco) as a party.



Tax comparison of acquisition options

The key tax aspects of a share deal structure and an asset deal structure can be summarized as aspects:

SHARE DEAL

- Capital gain tax: 20% net gain by the Seller
- Buyer/Target has obligation to withhold, declare and settle tax obligation on behalf of the seller to the government (except where the seller is a resident of Vietnam)
- Transaction is not subject to VAT
- Buyer needs M&A approval from local licensing authorities to acquire the shares
- Timeline: 1-2 months

Post-acquisition:

- CIT: 20%
- Possible tax incentive applies for project located in the industrial zone or encouraged business sectors
- VAT: generally 10%
- Interest on offshore loan: 5% withholding tax
- Cross border transaction service fee: 5% VAT and 5% CIT
- Dividends distribution: no withholding tax for corporate shareholder

ASSET DEAL

- Buyer must have a Bidco in Vietnam to acquire the Assets
- Establishment of Bidco will take around 3-4 months to obtain both IRC and BRC
- Bidco is required to establish a special bank account (DICA) to receive equity contribution and offshore loans
- Mid- and long-term offshore loan is required to be registered with the State Bank of Vietnam
- Upon Assets acquisition, generally, 10% VAT applies on the Assets transfer. Certain intangible assets are not subject to VAT
- VAT paid on Assets can be creditable against its output VAT without time limitation
- A transfer of the land lease rights generally applies after obtaining approval from the Industrial Park Management Board (if location is within the industrial zone).

Post-acquisition:

- CIT rate: 20%
- Possible tax incentive applies for project located in the industrial zone or encouraged business sectors
- VAT: generally 10%
- Interest on offshore loan: 5% withholding tax
- Cross border transaction service fee: 5% VAT and 5% CIT
- Dividends distribution: no withholding tax for corporate shareholder



MAIN OPERATIONAL LICENSES FOR MANUFACTURING BUSINESS

In addition to the above key investment and registration permit (i.e. Investment Registration Certificate and Enterprise Registration Certificate), the project company may need to obtain other licenses or permits to conduct the factory construction and operation. These typically include:

- construction permit,
- operating license in relevant industry (e.g. chemical industry, alcohol, medicine, tobacco)

EMPLOYMENT ISSUES

Basic wage

Basic wage applies to employees who work for non-foreign-invested enterprises such as state agencies, state-owned enterprises, and other domestic enterprises. The basic monthly wage is VND 1,490,000 per month.

Minimum wage

The minimum wage is the lowest monthly wage that may be paid to an employee hired to perform a basic job that does not require training. The minimum wage is fixed from time to time by the Government.

There are three types of minimum wage. The minimum wage is computed on a monthly, daily, and hourly basis, and it is defined in accordance with regional areas and industries.

“Regional minimum wage” applies to employees who work for enterprises with foreign-invested capital and other foreign organizations and is dependent on the classification of the enterprise. The regional minimum wage system is divided into four levels depending on the location.

Overtime payment

As a general rule, a worker who works overtime is entitled to receive commensurate pay. The Labor Code provides different mandatory payment rates for overtime: 150% after normal working hours, 200% on weekends, and 300% on a holiday or a paid leave day, exclusive of the wage for the holiday. Employees and their employer may agree on an amount of overtime that may generally not exceed four hours per day and 200 hours per year. In some special cases, it may reach 300 hours per year.

Labor Code requires that workers who work overtime at night must receive an amount which is at least equal to the rate applied to overtime payment as



mentioned above, plus the nightshift salary rate, plus 20% of salary which applies to normal working hours during the daytime.

Annual leave

An employee who has worked for one year is entitled to a statutory annual leave of at least 12 working days. An employee who has worked for less than a year may receive leave on a pro-rated basis. If by reason of termination of employment or for any other reason an employee has not taken all of his annual leave, the employee must be paid for the days not taken. Employees are then entitled to one additional day of annual leave for every five years of employment.

Bonuses

Paying annual bonuses is generally a matter of an employer's own discretion, based on the enterprise's annual business performance and its workers' performance. However, the practice that many employers have been following is to pay an annual bonus equivalent to at least one month's salary. An employee in his first year may receive a portion of the annual bonus corresponding to the time he has been with the enterprise.

Social, health, unemployment insurance and other statutory contribution

Social insurance, health insurance and unemployment insurance are applicable to both Vietnamese and foreign individuals who are employed under the labor contract.

Under the compulsory social insurance, compulsory health insurance, and unemployment regimes, both the employer and the employee are required to contribute to the insurance fund. Their contributions are based on the entire contracted salary that an employee receives. The government also contributes and provides additional funds.

Nevertheless, the Law on Social Insurance sets a ceiling for the salary on which contributions will be calculated, and no contribution need be made beyond this ceiling. If an employee's salary is more than 20 times higher than the Government's basic wage, then for the purposes of calculating social insurance contributions, the employee's salary will be deemed to be fixed at 20 times the basic wage.

Therefore, the maximum social insurance contribution will depend on the minimum wage fixed by the Government from time to time. The maximum salary for the purpose of unemployment insurance contribution is generally 20 times that of regional minimum wage.

Retrenchment (severance)

An employer has a right to terminate employees in certain circumstances and must pay a retrenchment (severance/redundancy) allowance. Labor Code provides for the payment of the retrenchment allowance for employees who have worked for the employer for at least a year.

Types of retrenchment allowance vary depending on the particular circumstances of a retrenchment. For example, if the employer unilaterally terminates an employee in case of natural disasters, fire, or other cases of force majeure, and the employer has in fact made every effort to avoid termination but is nevertheless compelled to make cuts in production and workforce, the employee may receive a severance equal to one-half of a month's salary for every year of employment.

If the enterprise merges or is divided, an employee whose employment is discontinued as a result of such merger or division is entitled to receive a redundancy allowance of one month's salary for every year of employment or a total of two months' salary, whichever is greater. Other benefits, such as accumulated leave or bonuses, must also be paid.



Internal Labor Rules

A company must have internal labor rules (“ILRs”) in writing, if it has 10 or more employees. The ILRs must include information on the following:

- Working hours and rest breaks;
- Company rules and discipline;
- Occupational safety and hygiene in the work place;
- Protection of assets and confidentiality of technology and business secrets of the company; and
- Conduct which is in breach of labor rules and penalties imposed for those breaches and responsibility for damages.

Detailed and properly formulated ILRs are important in order for the employer to take disciplinary action against an employee or to terminate a labor contract in case of an employee's poor performance, breach of rules or even breaking the law. It may be more problematic for a company to dismiss an employee for an offense if that offense is not specified in its ILRs or if the company does not have duly registered ILRs.

Trade Unions

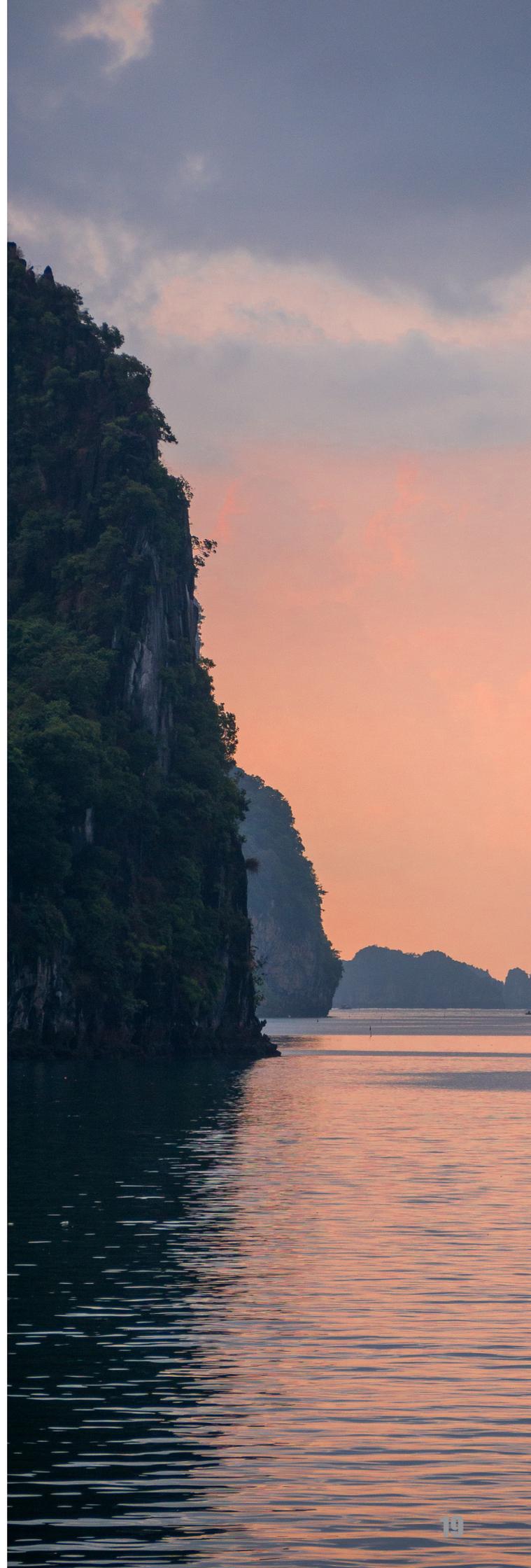
Vietnam has a separate Law on Trade Unions that deals with the establishment and operation of trade unions at all levels. Trade unions are empowered to monitor compliance with labor regulations.

The right to form a trade union is given to all employees. Employer is required to acknowledge the status of a legally established trade union to assist, if requested, in its formation and to provide facilities in order for the trade union to function. An employer may not discriminate against an employee because such employee has formed or joined a trade union.

Whether in the public or private sector, an enterprise is required to contribute to a fund for trade union. The rate of contribution is generally equal to 2% of the payroll.

Work Safety

The law strictly requires an employer to implement safety measures in the workplace. Liability is imposed on the employer in relation to work-related accidents that cause injuries or casualties to its employees in the course of employment. If an employee is not covered by social insurance, the employer is obliged to pay compensation to the employee or beneficiary. Whether or not the employee was at fault is generally irrelevant in respect to the employer's obligation to



pay compensation, but fault is relevant in determining how much is to be paid.

Requirements in connection with *foreign personnel relocation to Vietnam*

Expatriates' employment is often related to managerial positions or to a position requiring a high level of specific expertise.

The work of foreign expatriates in Vietnam is regulated by Decree No. 152/2020/ND-CP of the Government.

With limited exceptions, most expatriates who work in Vietnam are required to have a work permit. If exempted from a work permit, it is nevertheless still necessary to obtain a certification of work permit exemption from local labor authorities.

Work permit is an important document, which also allows to apply for a temporary residence card or a work visa for Vietnam. Foreign applicant needs to meet the following criteria for the purposes of application:

- Age: over 18 years old
- Have a good health condition that satisfies the job's specific demands and requirements.
- Free of any criminal records in their home country or not currently facing criminal prosecution by the Vietnamese and foreign authorities.
- Meet the requirements for job positions as follows:
 - **For foreign experts:**
 - Having a bachelor's degree or higher or equivalent and a certificate of at least 3 years of experience working in the trained field relevant to the job position the foreign worker is expected to work for in Vietnam; or

- Confirmation of at least 5 years of experience working in the trained field relevant to the job position the foreign worker is expected to work for in Vietnam.
- **For technical workers:**
 - Having been trained in technical or other fields for at least 1 year and having worked for at least 3 years in that field, or
 - Confirmation of at least 5 years of working experience in a job suitable for the position expected to be work in Vietnam,
 - The company where the foreigner is working has a suitable line of business on its business registration certificate.
- **For management positions (such as Directors, CEOs):**
 - Decision on the appointment, and
 - Confirmation of at least 3 years of working experience in the relevant position.

** This article was originally published in August 2022*



FOREIGN CONSTRUCTION CONTRACTOR IN VIETNAM: LOCAL COMPLIANCE FRAMEWORK



DOES FOREIGN CONTRACTOR NEED TO ESTABLISH A SUBSIDIARY IN VIETNAM TO PERFORM CONSTRUCTION ACTIVITY IN THE COUNTRY?

Vietnam law defines foreign contractor as “a foreign organization or individual that is legally capacitated and having civil legal capacity to conclude and execute the contract. Passive legal capacity and active legal capacity of the foreign contractor shall be determined according to the law of the country of which the contractor holds nationality. The foreign contractor may be a general contractor, contractor, joint venture contractor or sub-contractor.”

Construction activities in Vietnam can include “construction planning, formulation of an investment project to construct a work, construction survey, construction design, construction, construction supervision, project management, selection of contractors, pre-acceptance test, handover of the work for exploitation or use, its warranty and maintenance and other activities related to its construction.”

Foreign contractor can establish a Vietnam subsidiary entity to perform construction activities with 100% foreign ownership. Relevant CPC (Central Product Classification) for the business objectives can include CPC 511 to CPC 518.

As a matter of practice, the route with establishing a subsidiary is usually followed by construction companies that intend to take part in multiple projects over a long period of time. Direct participation without establishing a subsidiary can make more sense to participate just in a single project.

WHICH REGISTRATIONS AND LICENSES ARE REQUIRED TO BE RECEIVED BY THE FOREIGN CONTRACTOR?

Under domestic laws, foreign contractor is only permitted to carry out construction activities in Vietnam upon receiving a construction operating license issued by state agency in charge of construction.

The foreign contractor must submit an application to the agency issuing construction operating license which is either (i) Construction authorities affiliated to the Ministry of Construction for those projects of national importance, group-A projects or construction projects located in at least two provinces or (ii) local Departments of Construction for those group-B or group-C projects of provinces.

Foreign contractor is generally expected to set up a joint venture (partnership or consortium) with a Vietnamese contractor or employ Vietnamese sub-contractors, unless Vietnamese contractors are do not have capabilities to execute tasks of the contract package.

Usual timeline to obtain a construction operating license is 20 days but in some cases it can take longer.

Once the license is obtained, foreign contractors must comply with its obligations that are usually set out in the license, including:

- Set up a project office and make relevant registrations with local authorities;
- Register for Foreign Contractor Tax (FCT) compliance;
- Recruit employees;
- Obtain insurance.

DOES THE CUSTOMER THAT HIRES A FOREIGN CONTRACTOR NEED TO RECEIVE ANY LICENSES OR PERMITS?

Project owner does not need license to engage with foreign contractor, but needs to comply with bidding regulation to select contractor in the cases required by law.

Requirements applicable to the project owner engaging foreign contractors to conduct the construction activities include the following:

- enter into contract with the foreign contractor if such foreign contractor obtained the construction operating license;
- supervising the foreign contractor in relation to the work allocated for main contractor/ sub-contractor or between contractors in a consortium;
- consider the capacity and possibility of use of domestic construction equipment before agreeing a list of construction machinery, equipment of foreign contractor that applies for temporary import – re-export;
- consider capacity of technical labor supply in Vietnam before agreeing on a list of foreigner staff working for the foreign contractor by the time they apply for entering Vietnam;
- certify statement of imported materials of the foreign contractor upon the construction completion;
- for management consultancy project and/or

supervising construction quality project, inform other contractors and government agencies in charge of construction quality management to be aware of the functions and tasks of the foreign contractor.

CAN FOREIGN CONTRACTOR RELOCATE CONSTRUCTION WORKERS FROM ABROAD FOR THE PURPOSES OF IMPLEMENTING WORKS ON AN INDIVIDUAL PROJECT?

As a general requirement, only economic management experts, technical management experts and skilled employees that are not available in Vietnam can be relocated to Vietnam from abroad.

Prior to recruiting foreign workers, foreign contractor shall specify the quantity, qualifications, professional competence and experience of foreign workers that are needed for performance of the project in Vietnam and submit a written request for the recruitment of Vietnamese workers to the job positions to the President of the People's Committee of province where the project is performed.

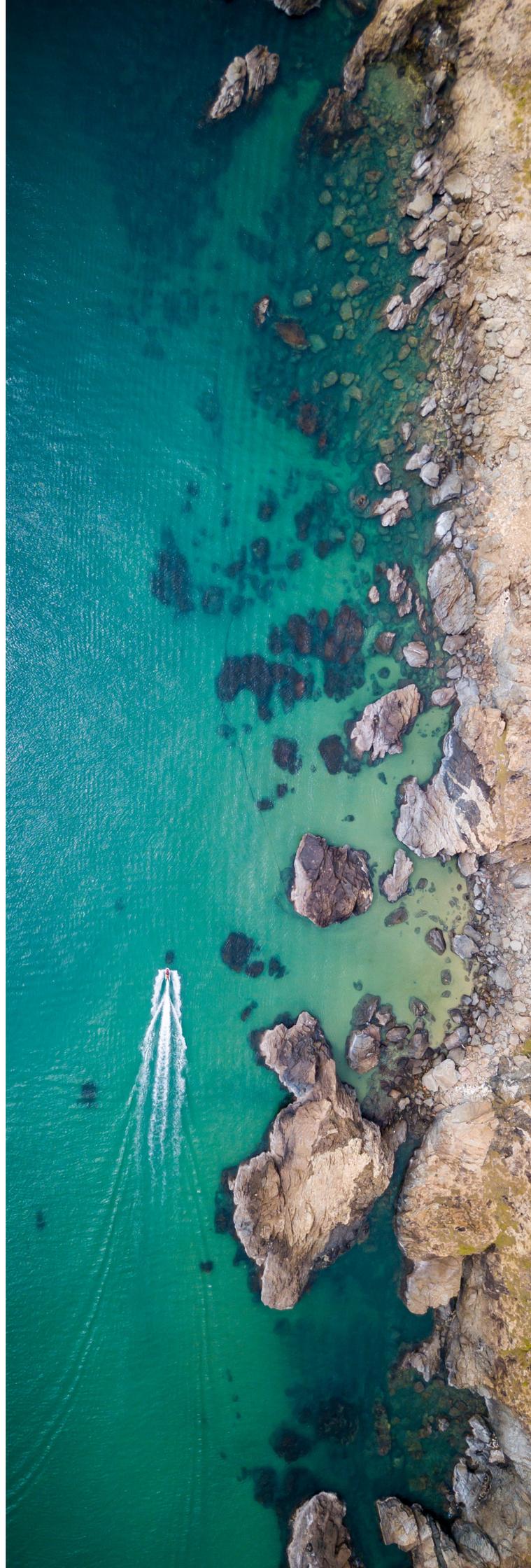
The President of the People's Committee of province shall direct local agencies and organizations to recommend and supply Vietnamese workers to the contractor and cooperate with other local agencies and organizations in recommending and making Vietnamese workers available to the contractor.

If Vietnamese workers are not made available to the contractor within 2 months from the day on which a request for recruitment of 500 workers or more is received, or within 1 month from the day on which a request for recruitment of 100 to fewer than 500 workers is received, or within 15 days from the day on which a request for recruitment of fewer than 100 workers is received, the President of the People's Committee of province shall consider allowing the contractor to recruit foreign workers to hold relevant job positions.

HOW TO HIRE LOCAL EMPLOYEES.

There are no special procedures for the foreign contractors to hire local employees. There are no restrictions on the number of local employees to be hired as long as the foreign contractor complies with generally applicable labour regulations.

When no local subsidiaries are established, employment agreements are typically executed by the project office of the foreign contractor registered





in Vietnam. The project office is not a legal entity in nature, but from operating perspective, it acts as a representative office with authorization from the foreign contractor to manage and fulfill rights and obligation in Vietnam in dealing with third parties including signing employment contracts directly with local employees.

PAYMENTS TO FOREIGN CONTRACTOR FROM LOCAL CUSTOMER: FOREIGN EXCHANGE REGIME

The project office is required to establish a bank account in Vietnam to facilitate for receiving payments from project owner, pay expenses, taxes and similar payments.

The project office must comply with the forex control regulations as a resident of Vietnam. As such, transactions between the project office and other residents must be quoted, priced, and paid in local currency. In addition:

- a. For costs outside Vietnam involving the implementation of bidding package through international bid as prescribed in the Law on bid: Contractors are allowed to bid in foreign currency and receive payments in foreign currency by transfer from investors or principal contractors for payment and remittance to foreign countries.
- b. For implementation of bidding package as prescribed by law on oil and gas: Contractors are allowed to bid in foreign currency and receive payments in foreign currency by transfer from investors or principal contractors for payment and remittance to foreign countries.

In practice, for smaller scale projects where the foreign contractor chooses to declare and pay tax under withholding method (i.e., the project owner will withhold and declare on behalf of the foreign contractor), then project owner can make the payment remittance directly to foreign bank account of foreign contractor after deducting the withholding tax. The project owner can demonstrate the invoice (in foreign currency) and construction contract to the commercial bank for approving the payment remittance. The bank in such case would sell necessary foreign currency to make it possible to make the remittance. Certain banks can request to see withholding tax evidence even though the regulations require the project owner to have obligation to declare and pay withholding tax within 10 days from actual remittance.

For other large-scale projects, such as those involving bidding process, foreign contractor often implements project and fulfils its tax obligation through its project office in Vietnam. The project office will be the one to issue invoice in local currency to the project owner and receives payments made into its Vietnam bank account. It can then use these amounts to cover Vietnam expenses or buying foreign currency from commercial bank to remit to offshore supplier/vendor to pay for overseas costs as mentioned in the bidding package.

Once the project office is liquidated and all Vietnam tax is cleared, profit after tax can be remitted overseas.

TAX REGIME

Under Vietnamese tax laws, foreign business organizations (with or without a permanent establishment in Vietnam) and foreign business individuals (whether they are residents or non-residents of Vietnam) must pay the Foreign Contractor Tax if they have business activities in Vietnam or income derived from Vietnam as defined under Circular 103.

Income derived from Vietnam is defined as the income, in any form, of a foreign contractor or foreign subcontractor that is paid by a Vietnamese party irrespective of the location of the business establishment through which the foreign contractor or foreign subcontractor conducts its business activities. Generally, foreign companies and individuals without a legal presence in Vietnam are subject to FCT: (i) if the services are performed in Vietnam; or (ii) the income is derived from Vietnam.

The FCT rates are based on the foreign contractor's line of business. In terms of construction activities, the VAT component ranges from 3% - 5% and Corporate Income Tax component is 2%.

Foreign contractors declare and pay FCT by one of the following three methods:

- The Withholding Method - the Vietnamese contracting party (customer) withholds the FCT when paying the foreign contractor;
- The VAS Method - the foreign contractor registers under the Vietnamese accounting system for the direct payment of taxes to the tax office; or
- The Hybrid Method - the foreign contractor registers only for VAT. It is a hybrid, with elements of both the VAS Method and the Withholding Method.

The most commonly used is the Withholding Method. Under this method, the foreign contractor is not required to register under VAS or to pay FCT directly to the tax office. The Vietnamese contracting party is responsible to withhold the FCT – both the VAT and CIT portions – from payments made to the foreign contractor and pay it to the tax office on the foreign contractor's behalf. The added value used for VAT calculations and the CIT rate are fixed rates based on the nature of the service.

Applying the VAS Method is similar to paying tax as an enterprise with a taxable presence in most respects. The taxpayer will be expected to comply with relatively strict provisions on the deduction of head office expenses and the non-deductibility of invoices that do not comply with all formal requirements.

Under the Hybrid Method, the tax authorities grant a VAT number to the foreign contractor. The foreign contractor would then be allowed to offset input VAT (charged by local suppliers, such as subcontractors), but would still have to pay CIT by means of withholding.

** This article was originally published in September 2022*



RENEWABLE ENERGY

PROJECTS:

AN IMPORTANT STEP TO

DETERMINE TARIFFS FOR

TRANSITIONAL SOLAR

AND WIND POWER

PLANTS

Over the last few years a lot of attention in Vietnam was focused on the possible rate of tariff that should apply to the transitional solar and wind projects, i.e. projects that were initiated earlier, but did not meet the deadline of the previously introduced feed-in-tariff. The opportunities to become eligible for such feed-in-tariff expired on 31 December 2020 for solar, and on 31 October 2021 for wind projects.

At the moment, there are still many renewable energy projects already approved, remaining at different phase of construction, but that did not qualify for the feed-in-tariff scheme.

It has been so far subject to unresolved uncertainty as to which tariff would eventually apply to such projects. This in turn meant lack of clarity for the developers in relation to the potential rates of return and possibility to obtain external project financing.

On 3 October 2022 the Ministry of Industry and Trade (MOIT) issued Circular 15/2022/TT-BCT ("**Circular 15**") providing for the regime and method of formulating ranges of power generating tariffs for transitional solar and wind power plants.

ELIGIBLE PROJECTS

Circular 15 applies to Vietnam Electricity ("**EVN**") and organizations and individuals investing in:

1. solar power plants that have signed power purchase agreement (PPA) with EVN before January 1, 2021; or
2. wind power plants with PPA signed before November 1, 2021,

but did not meet the eligibility criteria for the feed-in-tariff under Decision No. 13/2020/QĐ-TTg dated April 6, 2020 and of Decision

No. 39/2018/QĐ-TTg dated September 10, 2018.

The Circular 15 strongly emphasizes that such power plants must nevertheless adequately comply with regulations and law on investment, construction, adhere to absorption capacity of the national electrical grid and the ability to release capacity of electrical grids; strictly comply with electricity price structures at the time of operation, and assume responsibilities for project effectiveness according to the approved regulations.

Important to note that **those projects that have signed PPA with EVN** qualify for the purposes of this Circular 15. Projects that do not have a signed PPA can be expected to be subject to separate regulation.

Further to note is that at this stage Circular 15 does not specifically regulate how project-specific tariffs will be negotiated on the basis of the established tariff range.

WHAT REGULATORS ARE EXPECTED TO DETERMINE

The Circular provides for the procedure to determine a so-called **maximum or ceiling tariff**, being the tariff applicable to the Standard Power Plant. In turn, a **Standard Power Plant** is deemed to be a power plant with capacity of 50 MW.

Circular 15 provides for a formula to determine the maximum tariff taking into account the **average fixed costs** and **fixed O&M** costs of the project.

PROCEDURAL STEPS FOR IMPLEMENTATION

The Circular 15 takes effect on **25 November 2022** and within 15 days from the effective date, project developers are expected to provide feasibility study or technical design information to EVN. Data from these documents will be used to determine the Ceiling Tariffs.

EVN may on its own (or by engaging a consultant) determine specifications, calculate, and determine electricity generation price range of the standard solar power plant and standard wind power plant in accordance with guidance of the Circular 15.

Within 45 days from the effective date of Circular 15, EVN is responsible for developing electricity generation price range of ground-mounted solar power plants, floating solar power plants, onshore wind power plants, and offshore wind power plants. Such ranges would then need to be shared with the

Electricity Regulatory Authority of Vietnam (ERAV) for assessment.

Within 45 days from the date on which adequate documents on calculating electricity generation price range are received, ERAV will perform the appraisal of the electricity tariff range using methods prescribed in the Circular 15.

Within 10 working days from the date on which appraisal results are concluded, ERAV will finalize the documents and request the MOIT to approve electricity generation price range applied to the aforementioned power plants and shall publish that on its website.

It is thus expected to roughly take 3 to 4 months to have such tariff scheme finalized and commercialized.

PROJECT FINANCING ASPECTS

From the perspective of financing relevant projects, it is worthwhile to note that when describing various parameters to be used in the maximum tariff calculation formula, Circular 15 provides that:

1. the average loan repayment period is assumed at 10 years;
2. the debt-to-equity ratio is assumed at 70:30; and
3. the period of economic life of the project is assumed at 20 years.

AMENDMENTS TO PPAS; PATHWAY TO PROJECT FINANCING; REFINANCING

Based on Circular 15, it may be expected that in a few months a lot of work would need to be done by the government authorities and developers: negotiating amendments to the pre-existing PPAs to reflect the pricing on the basis of the thresholds to be determined in accordance with the Circular 15. Further regulatory decisions on this can also be expected. The practice of developing such amendments and their scope (i.e. whether they will be limited to pricing only, or other amendments can or need to be introduced), would be developed.

These changes will hopefully also unlock more opportunities to arrange project financing or refinancing of earlier obtained debt on improved terms for the transitional solar and wind projects.

* This article was originally published in October 2022



YEAR-END UPDATES
— AS OF DECEMBER 2022

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ENERGY SECTOR – PDP VIII REMAINS IN DRAFT FORM

In November 2022, Ministry of Industry and Trade submitted 8th draft version of **Power Development Plan VIII** to the Government for consideration. The plan remains subject to final approval.

FOREIGN EXCHANGE CONTROLS – NEW REGULATION FOR FOREIGN LOANS

State Bank of Vietnam issued **Circular 12/2022/TT-NHNN**, dated 30 September 2022, setting forth the procedure for registration of foreign loans.

Circular requires registration of mid-term and long-term foreign loans, as well as short-term loans with the principal repayment period extended, which have more than 1 year of maturity. Term of a loan is to be generally determined from the scheduled date of first fund withdrawal to the scheduled date of final repayment.

Circular establishes deadlines within which borrowers are required to submit registration dossier to competent authorities, being generally 30 working days from signing the loan agreement or relevant loan extension.

There are detailed requirements as to the contents of the dossier, which include borrower's registration documents, documents substantiating borrowing purposes (e.g. plans of use of the borrowed funds).

Circular further sets out the procedure of registering amendments of earlier received foreign loans.

The registration authority for foreign loans depends on the size of the loan. Foreign Exchange Management Department of the State Bank of Vietnam is to register loans of over **USD 10 million**. Smaller loans are generally registered with the branch of SBV at the location of the borrower.

Circular includes a separate chapter that sets out the regime of borrower's bank accounts used to receive and repay foreign loans, and the regime of relevant cash transfers (including purchase of foreign currency for the purposes of debt service).

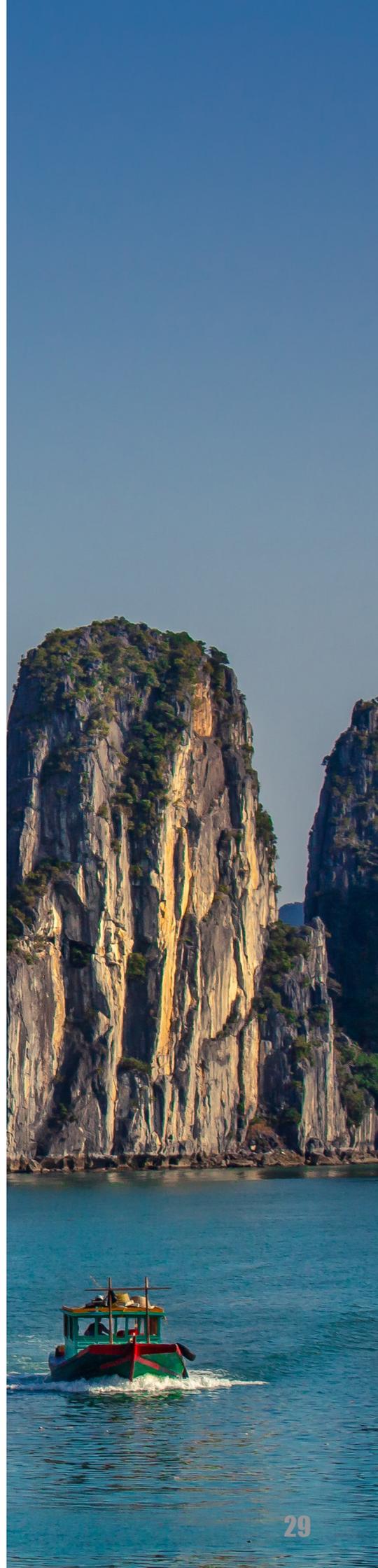
Among other things, the Circular expressly envisages several scenarios where discharge of loan debt may take place without settlements through borrower's designated bank accounts in Vietnam (e.g. debt-to-equity conversion, set-off, settlements using borrower's bank account abroad (where borrower obtained permission to do so)).

Circular sets out the procedure for cash transfers in case of performance of obligations by a guarantor or through remittance of proceeds from enforcement of security.

The Circular entered into force on **15 November 2022** and substituted earlier issued regulations in this area.

FOREIGN EXCHANGE CONTROLS – BANKS ARE REQUESTED TO STRICTLY VERIFY COMPLIANCE WITH FOREX REGIME

On 20 October 2022, State Bank of Vietnam issued an official letter No. 7384/NHNN-QLNH addressed to commercial banks and branches of foreign



banks (“**Credit Institutions**”). Under the letter the SBV requests:

- The Credit Institutions must strictly perform its legal obligations in terms of checking, verifying and storing documentation upon providing payment services and cross-border remittances for customers.
- The verification of documentation includes their check for compliance with forex control regulations and purpose of transactions.
- Strictly comply with the forex control regulations in relation to inbound or outbound investment activities by investors.
- Strictly comply with regulations on foreign loan and registration of foreign loan under new Circular 12/2022.
- Immediately inform the Public Security Authorities for investigation and settlement when finding out individual or organization in breaching the laws and regulations.

TMT – DATA STORAGE

The Government of Vietnam issued Decree No. 53/2022/ND-CP on 15 August 2022 in relation to the regime of data storage by telecommunication companies. The Decree entered into force on 1 October 2022.

Among other things, foreign and domestic enterprises that provide services on telecommunications networks, the Internet, and value-added services in cyberspace in Vietnam are required to retain certain data in Vietnam, in accordance with the list set out in the Decree.

TAX – CORPORATE INCOME TAX

New Decree No. 91/2022/NĐ-CP was issued on 30 October 2022 by the Government, relating to the regime of corporate income tax.

Pursuant to the decree, total provisional corporate income tax paid for the four quarters of the year must equal at least 80% of the corporate income tax payable under the annual tax finalization dossier.

This is a change from Decree No. 126/2020/NĐ-CP, which specified that the total provisional corporate income tax paid for the first three quarters of the year must equal at least 75% of the corporate income tax payable under the annual tax finalization dossier.

Under the Decree 91, owner of e-commerce platforms

shall provide tax authorities with full, accurate and timely information about traders, organizations and individuals whose goods or services are entirely or partially traded on their e-commerce platforms, including: sellers’ names, taxpayer identification numbers, ID numbers or passport numbers, addresses, phone numbers; revenue from online orders. Information shall be provided electronically every quarter by the last day of the first month of the succeeding quarter via the web portal of General Department of Taxation in the format announced by General Department of Taxation.

This is an addition to the **Decree 126**, which already set out 7 cases that an individual or organization must provide information to tax authorities, including:

- Providers of tax and accounting services; export and import trustees; persons authorized to pay tax on behalf of taxpayers, tax payment guarantors; independent audit companies shall provide information about their agreements with the taxpayers and documents as the basis for determination of tax obligations as prescribed by the Law on Tax Administration and relevant laws when requested in writing by tax authorities.
- Organizations and individuals that are business partners or customers of taxpayers shall provide information about the taxpayers in accordance with the Law on Tax Administration and relevant laws when requested in writing by tax authorities.
- Vietnam Chamber of Commerce and Industry shall provide monthly information about issuance of Certificates of Origin to exports of Vietnam by the 5th of the next month.
- Income payers shall provide information about paid income and deducted tax when preparing annual tax finalization dossiers or requested by tax authorities.
- Competent authorities shall provide information before auction of imported goods that are exempt from tax or not subject to tax for customs authorities, which will impose tax liability.
- Other organizations and individuals shall provide information in accordance with the Law on Tax Administration and relevant laws.
- When the tax authority makes a written request for information, the requested party shall provide the information within 10 days from the receipt of such request.

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