



ClientAlert

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Introduction

Dear Reader,

This month saw a handful of new regulations and even full-fledged laws that affect business in Vietnam. We've briefed them and outlined the most important changes from each new regulation. They cover numerous topics concerning tax administration, foreign exchange control, intellectual property, fisheries, architecture and education.

As always we hope you find this month's Client Alert helpful and wish you dry feet in the continuing rainy season. We also hope you had an enjoyable Mid-Autumn Festival. We look forward to working with you.

Kind regards,
Indochine Counsel

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Tax Administration Law

On 13 June 2019, the National Assembly of Vietnam issued the Law on Tax Administration No. 38/2019/QH14 (the “**TAL 2019**”), which will replace the current laws on tax administration as from 1 July 2020, including Law No. 78/2006/QH11, Law No. 21/2012/QH13, Law No. 71/2014/QH13, and Law No. 106/2016/QH13. Remarkable changes under TAL 2019 are as follows:

1. Applying modern information technology application in tax administration, applying principles of tax administration based on international rule, including the principle of operational nature, transactions to determine tax obligations, principles of risk management and other principles;
2. Clarifying risk levels in the tax administration is conducted based on the level of compliance with laws by taxpayers. In the process of classifying risk levels, tax administration authorities will consider relevant contents, including information on signs of risk, violation activities in tax administration, information on results of professional operations of tax authority and other relevant authorities in accordance with TAL 2019;
3. Implementing measures to collect taxes based on international treaties of which Vietnam is a member including:
 - (a) requesting offshore tax administration authorities and other competent authorities to collect tax debts arising in Vietnam; and
 - (b) supporting the offshore tax administration authorities to collect tax debts arising overseas for taxpayers based in Vietnam.
4. Introduction of a new taxation regime for offshore service providers, including e-commerce business;
5. Supplementing some provisions to ensure rights of the taxpayers and support the transactions with the tax authority:
 - (a) Deadline for individuals directly to file their annual personal income tax (PIT) return is extended by one month (the last day of the 4th month from the end of the calendar year);
 - (b) After the filing deadline, if mistakes in submitted tax returns come to light, taxpayers are allowed to submit revised returns up to 10 years after the filing deadline, but this must be done before the tax authorities issue a decision to commence a tax audit of the years in question;
 - (c) Taxpayers are entitled to request the tax authority to pay interest at 0,03% per day based on the overpaid amount paid by the taxpayer to the tax authority;

- (d) Taxpayers are notified the deadlines for settlement of tax refunds, non-refundable tax amounts and legal bases for non-refundable tax amounts;
- (e) Taxpayers are entitled to search, view and print all electronic documents that they have sent to the portal of tax administration authorities, described in this Law and the law on electronic transactions;
- (f) Taxpayers are entitled to use electronic documents in transactions with tax administration authorities and relevant authorities, organizations; and
- (g) Taxpayers are not imposed a penalty for tax administration violation, and interest on late payment is waived if the taxpayers implement based on the guidance and decisions of tax authorities and other competent authorities.

New rules for foreign exchange control of foreign direct investment activities in Vietnam

On 26 June 2019, the State Bank of Vietnam (the “**SBV**”) promulgated Circular No. 06/2019/TT-NHNN guiding foreign exchange control of foreign direct investment activities in Vietnam (“**Circular 06**”), which replaces Circular No. 19/2014/TT-NHNN. Circular 06 provides new provisions in relation to the direct investment capital account (the “**DICA**”) as follows:

1. The enterprises with foreign direct investment capital (the “**FDI Enterprises**”) are defined clearly and in detail under Circular 06. In particular, FDI Enterprises comprise:
 - (a) Enterprises established in the form of investment to establish an economic organization with foreign investors who are members or shareholders and which must conduct procedures for issuance of an investment registration certificate in accordance with the law on investment;
 - (b) Enterprises not within the case prescribed in sub-clause (a) above with foreign investors holding 51% or more of the charter capital of the enterprise, comprising:
 - (i) An enterprise having a foreign investor who contributes capital or purchases shares or a capital contribution portion in the enterprise (operating in an industry or trade whether or not investment and business is subject to conditions applicable to foreign investors) resulting in foreign investors owning 51% or more of the charter capital of the enterprise;
 - (ii) An enterprise established after a demerger, division, merger or consolidation resulting in foreign investors owning 51% or more of the charter capital of the enterprise;
 - (iii) A newly established enterprise in accordance with specialized branch law;

- (c) Project enterprises established by foreign investors to implement PPP projects in accordance with the law on investment.
2. The above mentioned FDI Enterprises and the foreign investors participating in a BCC, and foreign investors directly implementing a PPP project in cases where a project enterprise is not established (hereinafter referred to as foreign investors directly implementing the PPP project) are the entities that are allowed to open and use the DICA.
 3. If an enterprise has a foreign investor who has opened and operated an indirect investment capital account (“**INCA**”) to contribute capital to or purchase shares or a capital contribution portion in such enterprise resulting in foreign investors owning 51% or more of the charter capital, then that enterprise must open a DICA in accordance with provisions of Circular 06.
 4. The following enterprises which have opened the DICA must proceed with closing the DICA, concurrently the foreign investor as non-resident owning shares, part of capital contribution hereunder must open the INCA under the regulation on foreign exchange:
 - (a) enterprise with a foreign investor owning below 51% capital charter of the enterprises, except in the case prescribed in Item 1(a) above;
 - (b) enterprises are not required to obtain the investment registration certificate (the “**IRC**”), but they have the demand of issuance of the IRC and have been issued the IRC by the provincial DPI;
 - (c) FDI Enterprises having the stocks which have been either listed in the stock trading floor, or registered for trade on the Stock Exchange; and
 - (d) One of foregoing enterprises which is currently borrowing/repaying a foreign loan via a DICA, it may continue to maintain such account for the purposes of such loan in accordance with the law on borrowing foreign loans and their repayment by enterprises.

Circular 06 took effect on 6 September 2019.

Amendments of the Law on Intellectual Property to comply with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

On 14 June 2019, the Law amending the Law on Insurance Business and the Law on Intellectual Property (the “**IP Law**”) was ratified by the National Assembly of Vietnam, with the aim of making the national legislation compatible with respective provisions in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (the “**CPTPP**”). Remarkable amendments in respect of

patents, geographical indications, trademarks, intellectual property protection, IPRs enforcement are as follows:

1. Regarding patents, Article 60 has been amended to extend the time limit for exceptions where the invention in a patent application shall not be considered as the lack of novelty due to the abused disclosure from six (6) months as promulgated in the 2005 IP Law, to 12 months counting from the date of such abused disclosure. This time limit of 12 months is also applied for the cases where the invention is disclosed in a patent application or a granted patent which has been published by the National Office of Intellectual Property (the “NOIP”) not in accordance with the prevailing laws or the patent application has been filed by a person having no filing rights therefor. In addition, the technical solution(s) disclosed in such cases shall not be used as prior art for valuation of the inventive step for such invention in question.
2. Article 80 specifies that the basis for determining whether or not a designation or an indication has become the generic name of goods in Vietnam, which is a subject excluded from protection as geographical indication in Vietnam shall be the perception or awareness of relevant consumers in Vietnam. Article 80 also specifies that in addition to protected trademarks, pending trademarks having earlier filing date or priority date, if applicable, shall be used as ground for considering the registrability of a geographical indication application, and the confusability to the customers as to the commercial origin of the goods bearing the filed geographical indication shall be the object of the examination.
3. In accordance with Articles 136 and 148, the use of a registered trademark by the licensee under a trademark license agreement without registration thereof with the NOIP shall be eligible for the prescribed trademark owner’s obligation of using such trademark.
4. In order to be compatible with Article 18.74.4 of the CPTPP, Article 205 specifies the grounds for determining physical damage suffered by the IPRs owner as the result of a concluded IPRs infringement, which shall be compensated by the infringer in question, comprising:
 - (i) total damage attributed to money plus profits acquired by the infringer from the infringement if the lost profit suffered by the IPRs owner has not counted in the total physical damage; or
 - (ii) price of IPRs license in the assumed arm’s length transaction; or
 - (iii) other measures of counting such physical damage proposed by the trademark owner in accordance with the prevailing law; or
 - (iv) in case where it is impossible for applying the said grounds, as decided by the court in question subject to the damage amount, but not higher than VND500 million.

However, Article 198 provides that in case of no infringement concluded by the court in a lawsuit, the IPRs owner shall compensate to the suspected infringer for its reasonable attorney's costs and other expenses in accordance with the prevailing laws. In addition, in

case where a person abusing the IPRs enforcement and accordingly, causing damage to another person, the latter shall have the right to submit a petition to the court, requesting for compensation for its suffering damage, including reasonable attorney's costs.

5. The important note is that the amended IP Law will take retroactive effect from 14 January 2019, same as the date of entry into force of the CPTPP in Vietnam, and shall apply to:
 - (a) IP applications filed as from 14 January 2019;
 - (b) Requests for cancellation of validity of patents, utility solution patents and certificates of geographical indication registrations granted for applications filed as from 14 January 2019;
 - (c) Requests for termination of validity of trademark registrations filed as from 14 January 2019;
 - (d) IPRs enforcement requests accepted by the competent authorities as from 14 January 2019; and
 - (e) Other requests in respect of IPRs protection conducted as from 14 January 2019.

Decree No. 42/2019/ND-CP

On 16 May 2019, the Government promulgated Decree No. 42/2019/ND-CP on penalties for administrative violations against regulations on fisheries (“**Decree 42**”), replacing Decree No. 103/2013/ND-CP dated 12 September 2013.

Main contents

Decree 42 deals with administrative violations, penalties, fines, remedial measures against each violation and the authority of each title to make a record and impose a sanction on each administrative violation in the area of fisheries.

According to Decree 42, the maximum fine imposed on an individual is VND1,000,000,000 (which is 10 times higher than the maximum fine regulated in Decree 103). The fines shall be double when applied for an organization which commits the same administrative violation as the individual.

Decree 42 clearly stipulates the fine applied for each violation levels in fisheries, especially for serious violations and violations against regulations on areas banned from fisheries. In addition, an offender may, depending on the nature and seriousness of the breach, also be subjected to one or more additional penalties as follows:

- (a) Suspension of license or practicing certificate or operations for a fixed period;
- (b) Confiscation of exhibits and instrumentalities of administrative violations, including: Fishing vessels, fishing gears, electrofishing equipment, chemicals, banned chemicals, toxins, fish and fishery products, certificates, licenses, permits or written approvals whose contents are

erased or altered;

and several measures for remedying consequences of the violation in addition to measures regulated by the law on dealing with administrative offences.

Limitation period for handling administrative offences

The limitation period for imposing penalties for fisheries is one (1) year. The limitation period for imposing penalties for administrative violations against regulations on production, trading, import and export of fishing vessels, aquatic breeds, aquatic feeds, products used for remediation of aquaculture environment and protection of aquatic resources shall be two (2) years.

Decree 42 took effect on 5 July 2019.

Law on Architecture No. 40/2019/QH14

On 13 June 2019, the Law on Architecture No. 40/2019/QH14 (the “**LOA**”) was passed by the National Assembly and will come into effect as from 1 July 2020. Below are the key highlights of the LOA:

Architecture must show traditional cultural values

Article 5 of the LOA provides that entities and persons shall be responsible for protecting, conserving and upholding traditional cultural values infused into architectural products. Traditional cultural values in the architecture sector include typical characteristics, features and particular marks in terms of natural, socio-economic, cultural and artistic conditions; habits and customs of involved ethnics; construction techniques and materials, all of which must be incorporated in architectural structures and convey the signature style of Vietnamese architecture.

Architectural advisory council

A national architectural advisory council is established under the Prime Minister’s decision and Provincial-level architectural advisory councils are established under the decisions of the Chairman / Chairwomen of People’s Committees to give counsel in architecture-related matters and architecture of several important construction projects.

Architecture plan test

Architectural plan test refers to a test designed to select the best architectural plan that meets requirements concerning planning, architecture, culture, socio-economic efficiency, national defence, security and environmental protection. Under Article 17 of the LOA, the following construction projects shall be subject to the compulsory requirement for participation in the architectural plan test,

including:

- (a) Special-class or class-I public construction works; and
- (b) Provincial-level central train terminals and civil aviation terminals; bridges inside class-II or higher-level urban areas and inner-city railway stations; statues and construction projects symbolic of tradition, culture and history at localities; important construction projects and landmarks located inside urban areas and along main streets that are specified in urban planning and design schemes and regulations on management of architecture approved by competent authorities.

Requirements for practice of architecture

The person holding the title as the leader of architectural design, the person bearing professional responsibility for architecture who works for entities providing architectural services and self-employed practicing architects must hold the certificate of practice of architecture which can be valid nationwide for the duration of ten (10) years.

Self-employed practicing architects shall render architectural services under contracts with entities and persons specified herein and other provisions of relevant laws according to Article 25 of the LOA. In addition, entities practicing architecture, including architect's offices, public service organizations or other businesses, shall be organized and operating under the LOA, the 2014 Law on Enterprises and other related laws and regulations.

Practice of architecture by foreign citizens in Vietnam

According to Article 31 of the LOA, foreign architects can practice architecture in Vietnam if they meet the following requirements:

- (a) obtaining architecture practicing certificates issued in Vietnam or valid ones issued by regulatory authorities in their home countries and recognized or converted in Vietnam; and
- (b) complying with Vietnam's law and rules of professional conduct for practicing architects in Vietnam.

New Law on Education

On 14 June 2019, the National Assembly of Vietnam issued the Law on Education No. 43/2019/QH14 (the “**2019 Education Law**”) with some highlighted contents as follows:

1. In addition to new provisions on non-profit private schools as one of the types of school in the national educational system, the 2019 Education Law also sets out specified definitions of career orientation, student classification and transferability in education. In particular:

- (a) Career orientation in education is a system of measures implemented inside and outside educational institutions to provide students with knowledge about professions and the ability to choose a profession based on a combination of personal desires, fortes and social labour demands;
 - (b) Student classification is a measure of organizing educational activities on the basis of career orientation in education, enabling lower secondary and upper secondary graduates to continue with their studies in higher educational levels/qualifications or vocational education or to join the labour force with regard to personal capacity, circumstances and social demands, contributing to the regulation of the professional structure following the developing requirements of the country; and
 - (c) Transferability in education is the act of using available study results to continue studying in other educational levels and qualifications within the same specialization or switching to another specialization, mode of education and training qualification with corresponding content requirements, ensuring transferability between educational levels and training qualifications of general education, vocational education and higher education.
2. Students at pedagogical institutions are supported with tuition and living expenses throughout the entirety of the course. Two years after graduation, if persons that receive the subsidies do not work in the field of education or fail to work in education for a sufficient duration, they will have to reimburse the State for the subsidies. The maximum time limit for reimbursement is equal to the training duration.
3. Requirement for qualification of teachers are as follows:
- (a) Teachers of preschool: must possess at least a pedagogical college diploma; and
 - (b) Teachers of primary school, secondary school and high school: must possess at least a bachelor's degree in pedagogy training.
4. Students at primary education level in public educational institutions are not required to pay tuition. Pre-school children at 5 years of age in villages and communes with exceptional difficulties, ethnic minority areas, remote and isolated areas, coastal areas and islands shall be exempted from tuition.

The 2019 Education Law will take effect from 1 July 2020.

About Indochine Counsel

Established in October 2006, Indochine Counsel is one of the leading business law firms in Vietnam. The firm provides professional legal services for corporate clients making investments and doing business in Vietnam. The legal practitioners at Indochine Counsel are well qualified and possess substantial experience from both international law firms and domestic law firms. The firm boasts more than 45 legal professionals working at the main office in Ho Chi Minh City and a branch office in Hanoi.

Indochine Counsel's objective is to provide quality legal services and add value to clients through effective customized legal solutions that work specifically for the client. The firm represents local, regional and international clients in a broad range of matters including transactional work and cross-border transactions. The firm's clients are diverse, ranging from multinational corporations, foreign investors, banks and financial institutions, securities firms, funds and asset management companies, international organizations, law firms to private companies, SMEs and start-up firms in Vietnam.

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- Taxation
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- Mining & Energy
- International Trade
- Dispute Resolution

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