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## Legal News

### 1. Tightening lending and payment in foreign currencies

The Governor of the State Bank of Vietnam (SBV) on November 10, 2010 issued Decision No. 2677/QD-NHNN regarding establishment of an Inter-Department Working Group for monitoring the sale and lending for payment of imported goods.



According to this Decision, by the end of the day, the Working Group shall be responsible for monitoring and reporting to the Governor on a daily basis the situation of sale, lending and remittance by credit institutions (CI) for payment of imported goods in connection with the List of Non-essential Imported Goods Items (under Decision 1899/QD-BCT dated April 16, 2010 of the Ministry of Industry and Trade) and the List of Essential Goods Items Manufactured Locally (under Decision No. 2840/QD-BCT dated May 28, 2010 of the Ministry of Industry and Trade).

Members of the Working Group include officials of such Departments as the Department of Foreign Exchange Control; the Department of Monetary Policy; the Banking Inspection and Supervision Agency and the Office of the SBV. This Decision is effective from the signing date thereof.

This Decision shows the SBV's tighter control over the use of foreign currencies in CIs in order to stabilize the exchange rates and gold prices.

## 2. Guidelines on personal income tax on bonuses in shares



The General Department of Taxation on November 2, 2010 issued Official Letter 4418/TCT-TNCN providing guidelines on personal income tax on bonuses in shares.

Accordingly, if an individual receives a bonus in shares; upon sale of the same shares, he/she must conduct tax finalization of personal income tax (PIT). The individual must declare such income tax by himself/herself for general incorporation into his/her incomes from salary for the whole year. Where the individual's tax finalization is conducted through a paying organization, such paying organization (a commercial bank) shall be responsible for conducting the tax finalization for the individual with the bonus value determined in the bonus amount recorded in the accounting books of the organization (the bank). On the other hand, if such individual does not conduct the tax finalization through a paying organization, the paying organization shall be responsible for providing confirmation on the bonus value in the bonus amount recorded in the accounting books of the paying organization for use as a basis for finalization of taxes of the individual.

Also according to prevailing regulations, upon assignment of bonus shares, an individual shall not have to immediately make declaration and payment of personal income taxes on incomes from salary; at the end of the year, the individual must incorporate such incomes into his/her general incomes from salary for the whole year and conduct tax finalization in order to determine the accurate PIT amount taxable for the whole year. Upon assignment of bonus shares, in addition to payment of PIT as set forth above, the individual must pay a tax amount on the assignment of securities at 0.1% of the assignment value or at 20% of the difference between the actual assignment price and the par value or the bonus value recorded in the accounting books of the bonus paying organization.

### **3. Guidelines on certification and announcement of conformity to technical regulations for construction material products and goods**

The Ministry of Construction recently promulgated Circular No. 21/2010/TT-BXD dated November 16, 2010 providing guidelines for certification of conformity to technical regulations and announcement of conformity to technical regulations for construction material products and goods in import, manufacture, circulation in the market, and use for construction works.



This Circular is applicable to organizations and individuals related to the activities of certification and announcement of conformity to technical regulations for construction material products and goods.

Specifically, certification of conformity to technical regulations and announcement of conformity to technical regulations are obligatory to organizations and individuals who have construction material products and goods which are subject to application of corresponding codes or compulsory technical standards which have not been converted into codes. The activities of certification and announcement of conformity to technical regulations shall be performed in accordance with the “Regulations on certification of conformity to standards and conformity to technical regulations and announcement of conformity to standards and conformity to technical regulations” promulgated together with Decision No. 24/2007/QĐ-BKHCN dated September 28, 2007 of the Ministry of Science and Technology, and in accordance with the guidelines in the Circular.

In addition, the Circular also provides for the responsibilities of the State management agencies being the Department of Science, Technology and Environment (the Ministry of Construction), the Department of Construction Materials (the Ministry of Construction) and the Departments of Construction of provinces and cities under central authority for implementation thereof.

The Circular shall be effective 45 days after the date of signing thereof.

#### 4. Guidelines for remittance of profits abroad

The Ministry of Finance has promulgated Circular No. 186/2010/TT-BTC dated November 6, 2010 providing guidelines for remittance of profits abroad by organizations and individuals earning profits from direct investments in Vietnam in accordance with the Law on Investment.

Pursuant to this Circular, profits that foreign investors remit from Vietnam abroad shall be legitimate profits distributed or earned from direct investment activities in Vietnam in accordance with the Law on Investment, after financial obligations to the State of Vietnam have been fully performed as stipulated.



Profits remitted abroad annually are those distributed to or earned by foreign investors in the fiscal year from direct investment activities based on the audited financial statements and the corporate income tax finalization declarations of the enterprises in which the foreign investors invest, plus other profits such as incompletely carried forward profits from the previous years; then subtracted by the sums used or undertaken to be used by the foreign investors for reinvestment in Vietnam, sums of profits that the foreign investors have used for covering their expenses on production and business operations or on their personal needs in Vietnam.

In case an investor terminates its investment activities in Vietnam, profits to be remitted abroad shall be the total profits earned by the foreign investor in the course of its direct investment in Vietnam, less the profit amounts used for re-investment, profits already remitted abroad in the course of operation of the foreign investor in Vietnam and the profit amounts used for other expenditures of the foreign investor in Vietnam.

The circular also provides that a foreign investor is not permitted to remit abroad the profits distributed to it or earned by it from its direct investment activities in Vietnam in the year when such profits are generated, in case the financial statements of the enterprise in which the investor invests for the year when such profits are generated still show accumulated losses after losses have been carried forward in accordance of the laws on corporate income tax.

Regarding the time for remitting profits abroad, the circular provides that the foreign investor is permitted to remit abroad the profits distributed to it or earned by it from its direct investment activities in Vietnam on an



annual basis at the end of the fiscal year, after the enterprise in which the investor invests has fulfilled financial obligations to the State of Vietnam in accordance with the laws, has submitted the audited financial statements and the corporate income tax finalization declaration for the fiscal year to the direct tax management authority.

In case of termination of its direct investment activities in Vietnam, the investor is permitted to remit profits abroad after the enterprise in which the investor invests has fulfilled financial obligations to the State of Vietnam in accordance with the laws, has submitted the audited financial statements and the corporate income tax finalization declaration to the direct tax management authority and has fulfilled all its obligations in accordance with the Law on Tax Management.

## Legal Advice

### QUESTION:

We have been asked to provide a comparison between a business cooperation contract (“**BCC**”) and a joint venture (“**JV**”) under Vietnamese law.

### RESPONSE:

The establishment and operation of a BCC is regulated by Investment Law dated 29 November 2005 and Decree No. 108/2006/ND-CP dated 22 September 2006 (collectively referred to as “**Investment Law**”).

The BCC is a vehicle for investment as a joint venture company (“**JVC**”) or a wholly foreign owned one (“**WFOE**”), it must obtain the investment license, enjoys investment incentives and allows the investor to remit profit and capital back home. The main difference is that in the BCC the local party and the investor do not set up a legal entity. As such, the BCC is a project of the local party. The reasons for choice of this vehicle are: the duration of the project is short, a few years; the investment amount is small; the foreign party controls the market, the expertise or management required for the project in contemplation and does not want to share; or the local party wants to be in control of the scope of the project.

### **Advantages of a BCC**

The BCC has a major advantage in terms of flexibility. The parties maintain their own interests but combine them for the purposes of the project and may agree to share profits based on their capital contribution or the products made by the project. Thus, in a real estate development project, each party can agree to divide up the total number of area or floors and they each collect revenue separately.

### **Issues to Consider**

Because the BCC is made via a contract and no legal entity is formed, all issues relating to the relationship between the parties must be set out in the BCC; the responsibilities and rights of the parties, and the same with all other issues, as the law leaves these up to the parties to decide how their relationship will be maintained. It should be noted that in some ways as between the parties, a BCC is no different from a JV Agreement in terms of remedy. In both cases, should one of the parties fail to carry out their obligations under such contract, the only remedy the other party has is a breach of contract claim.



Under the Investment Law, the Foreign Party may apply to open its own administrative office to carry out its obligations under the BCC. This office may open a bank account, sign contracts in respect of the rights the Foreign Party has as agreed in the BCC, lease office space, and obtain a seal.

In the BCC, the Foreign Party may decide all activities alone, if it can arrange with the local party to hold key positions in the management unit set up for implementing the project; however, it must get a power of attorney from the local party who runs the company to which the BCC project attach. On all instrument issued by the management unit or for the project, there must be the seal of the company in order for those instrument to be of full force and effect.

Just like a JV, the Foreign Party may always transfer its rights under the BCC to another party.

Unlike a JV, however, neither party to a BCC can acquire the other party's interest as a BCC by definition requires that there must be two parties to such contracts. However, it is possible for the Foreign Party to transfer its rights to the assets to the local party (which is a legal entity) and consequently have a stake in the company of the local party. The only issue is that this local entity may be carrying out a variety of other businesses and the foreign partner will be subject to the same.



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