

VIETNAM

SETTING UP OR ACQUIRING MANUFACTURING BUSINESS IN VIETNAM

POSSIBLE ROUTES

TAX ANALYSIS

RELOCATION OF FOREIGN PERSONNEL



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In this outline we describe typical Vietnam law matters that arise when foreign investors create a new, or acquire existing manufacturing project in Vietnam.

Foreign investors considering their entry into Vietnam usually make the choice between: (1) creating a new subsidiary, or (2) acquiring an existing project.

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 | ASSET DEAL |
|---|--|
| <ul style="list-style-type: none">• 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 <p><u>Post-acquisition:</u></p> <ul style="list-style-type: none">• 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 | <ul style="list-style-type: none">• 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). <p><u>Post-acquisition:</u></p> <ul style="list-style-type: none">• 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.

Disclaimer:

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