

## CLIENT UPDATE

### 2016 JUNE

# Recent Legal Developments in Vietnam

#### 1. Law on Export and Import Tax 2016

Due to the shortcomings and difficulties faced by the current Law on Export and Import Tax No. 45/2005/QH11 ("LOEIT 2005") – particularly in the context of Vietnam's deeper integration into the world economy, as well as its international trade and economic commitments – the government has recognised the need to modify and update the LOEIT 2015. Law No. 107/2016/QH13 ("LOEIT 2016") has now been introduced. Some notable points are:

- (a) LOEIT 2016 supplements regulations on anti-dumping, anti-subsidies, and safeguard tax into a separate chapter.<sup>1</sup> The Ministry of Industry and Trade is tasked with investigating and making decisions on applying these measures, whilst the Ministry of Finance is responsible for decisions relating to declaration, collection, payment, refund of such duties. Anti-dumping and anti-subsidy duties shall be applied for up to five years from the effective date of LOEIT 2016. The duration of safeguard duties will not exceed four years from the effective date of LOEIR 2016, inclusive of the temporary period.
- (b) LOEIT 2016 broadly grants tax exemptions to 23 lines of goods, greater than 10 as previously regulated in LOEIT 2005. In particular, notable additional goods include:<sup>2</sup>
  - (i) Materials, supplies, and components imported for manufacturing/processing export products; finished products imported to be fixed on processed products; outward processing products;
  - (ii) Goods for temporary import/export for repair and warranty;
  - (iii) Fertilizer and pesticide which have not been domestically produced, subject to necessity appraisal of line ministries;
  - (iv) Goods for non-commercial purpose, including: samples, photos, films, alternative models for samples, advertising publication in small quantities;
  - (v) Goods that are not domestically produced, which are imported directly for educational purposes.
- (c) Privileged enterprises subject to the priority regime under the Customs Law may enjoy a grace period of up to 40 days compared to other taxpayers. As such, instead of paying duties before goods are released, privileged enterprises may delay tax payments until the 10<sup>th</sup> day of the month following the release of the goods.<sup>3</sup>
- (d) Under the current LOEIT 2005, wrong declaration may be entitled to duty refund if such wrong declaration is conducted within 365 days from the date of detection. This regulation accommodates the possibility of refunding the overpaid duty if such wrong declaration is detected within 365 days since the customs declaration.<sup>4</sup> Nonetheless, LOEIT 2016 has abolished this regulation. As such, taxpayers will no longer have chance to claim the overpaid duty if such mistakes are made by themselves.

<sup>1</sup> Chapter III, LOEIT 2016

<sup>2</sup> Article 16, LOEIT 2016

<sup>3</sup> Article 9.2, LOEIT 2016

<sup>4</sup> Article 19.2, LOEIT 2005

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- (e) LOEIT 2016 takes effect from 1 September 2016.

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#### 2. Law on Tax Amendments 2016

On 6 April 2016, the National Assembly passed Law No. 106/2016/QH13 to amend some articles of Law on Value-added Tax, Law on Special Excise Duty, and Law on Tax Administration (“Law on Tax Amendments 2016”). The following points in Law on Tax Amendments 2016 deserve to be highlighted:

- (a) Law on Tax Amendments 2016 amends some articles of the Law on Value-added Tax as follows:<sup>5</sup>
- (i) There are non-taxable cases supplemented, including objects related to farming, breeding, aquaculture products, care services for elderly people and disabled people and exports that are raw natural resources;
  - (ii) Specifically, enterprises and cooperatives buying farming, breeding, aquaculture products that have not been processed into other products or have only been preliminarily processed, and which then sell such products to other enterprises or cooperatives are not required to declare and pay VAT but may deduct input VAT;
  - (iii) Export products of raw natural resources or minerals being non-taxable objects are defined more clearly. They now include export products having not been processed into other products, and goods processed from natural resources or minerals where the total value of natural resources or mineral plus energy costs makes up at least 51% of the product price;
  - (iv) For business establishments whose exported goods/services incur an input VAT of at least VND 300 million not being deducted in the month or quarter, these business establishments shall receive VAT refund for that month or quarter.
- (b) With regard to the Law on Special Excise Duty, the excise taxed price of a good or service, and the tax rate (%) in the special excise tax schedule were amended and supplemented as follows:<sup>6</sup>
- (i) Where goods subject to special excise tax are sold to a trading establishment which has a parent company-subsidiary company relationship or subsidiaries in the same parent company as the manufacturer or importer, or a trading establishment has an association therewith, the taxable price must not fall below the percentage (%) of average price paid by the trading establishments directly buying from the manufacturers or importers;
  - (ii) Taxable prices of imports at the time of importation are the prices subject to import duty plus the price for calculating import duty. If imports are eligible for exemption or reduction of import duty, the taxable price shall not include the reduction or exemption. Special excise tax on goods that was paid at importation may be deducted when determining the special excise tax on goods when they are sold;
  - (iii) Law on Tax Amendments 2016 amended the tax rate (%) of motor vehicles for the transport of fewer than 24 people.
- (c) Amendments related to Law on Tax Administration mention cases for enforcement of tax administration decisions and the sanctioning of acts of late tax payment:<sup>7</sup>
- (i) Regarding cases subject to enforcement of tax administrative decisions, the taxpayer shall pay late payment interest on the unpaid tax 0.03% per day, instead of 0.05% as previously stipulated;

<sup>5</sup> Article 1, Law on Tax Amendments 2016

<sup>6</sup> Article 2, Law on Tax Amendments 2016

<sup>7</sup> Article 3, Law on Tax Amendments 2016

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- (ii) For sanctions for late payment, Law on Tax Amendments 2016 amended the late payment interest on the unpaid tax, the date since when the new rate is applied and case which taxpayer is exempt from paying the late payment interest.
- (d) Law on Tax Amendments 2016 takes effect from two stages of 1 July 2016 and 1 September 2016.

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#### 3. Law on Right to Information 2016

Since the early 1990s, there has been dramatic global growth in the recognition and protection of the right to information. Over 100 countries now have national laws recognising individuals' right to access information held by public authorities as compared to 14 at the end of 1990. Furthermore, the right to information has been clearly recognised as a human right under international law, including the United Nations Convention against Corruption, Rio declaration on environment and development as well as in the UN Human Rights Committee's 2011 General Comment on Article 19 of the International Covenant on Civil and Political Right, which was ratified by Vietnam in 1982. In Vietnam, the right to information is protected under Article 25 of the 2013 Constitution which provides, inter alia, that citizens shall enjoy the right "to access information", the practice of which shall "be provided by the law". Though discussions about a draft right to information law have been taking place, on and off, since at least 2009, on 6 April 2016, the National Assembly passed Law No. 104/2016/QH13 on right to information ("Law on Right to Information 2016").

Law on Right to Information 2016 provides for the exercise of the citizens' right to access information, principles and procedures for exercising the right to access to information, responsibilities of state agencies in ensuring the citizens' right of access to information. Particularly, the following contents are of note:

- (a) **Right of Access:** citizens have the right to access information; furthermore, Article 36 gives foreigners who are resident in Vietnam the right to access information which is directly related to their rights and obligations. However, it is unclear whether legal entities have a right to make requests for information.<sup>8</sup>
- (b) **Scope:** access to information under the law is applied under the negative approach, which means all information can be access if it is not prohibited by laws.<sup>9</sup>
- (c) **Requesting Procedures:** the requesters must provide reasons for their requests.<sup>10</sup>
- (d) **Exceptions and Refusals:** in certain case, State agencies may refuse to provide information. In such case, such authority shall specify its reasons for refusal in writing.<sup>11</sup>
- (e) **Appeals:** Law on Right to Information 2016 provides that complaints, the filing of lawsuits or denunciations against acts in violation of the access to information law must be carried out in compliance with laws on complaints and denunciations and laws on administrative procedures.<sup>12</sup> However, experience in other countries demonstrates that having an independent administrative body is essential to the successful implementation of the right to information. In addition to providing an accessible, independent review of decisions to refuse access (i.e. an independent interpretation of the exceptions) such a body can play a number of important promotional roles, including serving as a centre of expertise and knowledge on this issue for the whole public sector and raising awareness about this right among the general public.
- (f) **Sanctions and Protections:** Law on Right to Information 2016 clearly provide the prohibited acts in providing information.<sup>13</sup> These are generally strong provisions on sanctions. Consideration should be given, however, to the idea of establishing a more independent system for applying disciplinary sanctions.

<sup>8</sup> Articles 4 and 36, Law on Right to Information 2016

<sup>9</sup> Article 5, Law on Right to Information 2016

<sup>10</sup> Article 24, Law on Right to Information 2016

<sup>11</sup> Article 28, Law on Right to Information 2016

<sup>12</sup> Article 14, Law on Right to Information 2016

<sup>13</sup> Article 11, Law on Right to Information 2016

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(g) **Promotional Measures:** Law on Right to Information 2016 provides several promotional measures which, in our opinion, complies relatively well with international standard.

(h) Law on Right to Information 2016 takes effect from 1 July 2018.

#### 4. Law on Pharmacy 2016

On 6 April 2016, the National Assembly passed Law No. 105/2016/QH13 on Pharmacy to regulate the pharmacy business in Vietnam ("Law on Pharmacy 2016") to replace the 2005 version. New regulations on pharmacy practices, pricing rules, better access to medicines, and registration requirements have been introduced, some of which are as follows:

(a) In addition to persons in charge of a pharmacy business, there are now two more types of person that are required to hold a pharmacy practising certificate, which include:<sup>14</sup>

(i) Persons in charge of quality assurance of a facility manufacturing drugs or medicinal ingredients; and

(ii) Persons in charge of clinical pharmacology of a health facility.

(b) Law on Pharmacy 2016 also provides new changes favour of pharmacy practising persons and facilities. As to the term "pharmacy practising certificate" and "certificate of satisfaction of eligibility of pharmaceutical business conditions", the renewal process for these certificates is officially abolished. This is a further development from Decree No. 89/2012/ND-CP which allowed these certificates to be granted with an indefinite term, instead of the five-year term as was the case previously.<sup>15</sup>

The new development reiterates the efforts of the government to reduce and simplify relevant administrative work and procedures.

(c) Regulations on drug price management are split into a separate chapter. Accordingly, Law on Pharmacy 2016 highlights the management principles of "market mechanism; respect the right to pricing and price competition of drug-trading entities" which is very promising to mitigate the authorities' deep intervention in price policies.<sup>16</sup>

For example, Law on Pharmacy 2016 no longer requires medicines which are paid from the state budget or reimbursed through the state health insurance to be subject to statutory ceiling prices. Lifting this pricing restriction is expected to allow the public healthcare sector to better serve its customers, especially as public healthcare covers the majority of the country's population.

(d) Under the previous regulations, in order to be exempt from clinical trial requirements before being circulated in Vietnam, foreign medicines must have been in circulation for at least 5 years in their country of origin. Law on Pharmacy 2016 now removes this 5 year requirement, meaning that patients in Vietnam will be able to have more access to foreign medicines.

(e) Law on Pharmacy 2016 allows some establishments to sell limited non-prescribed medicines (over-the-counter) without requiring such establishments to obtain a Certificate of Satisfaction of Eligibility of Pharmaceutical Business Conditions, including:<sup>17</sup>

(i) Establishments which conduct pharmaceutical activities for non-commercial purposes;

<sup>14</sup> Article 11, Law on Pharmacy 2016

<sup>15</sup> Articles 29.1 and 41.1, Law on Pharmacy 2016

<sup>16</sup> Article 106.1, Law on Pharmacy 2016

<sup>17</sup> Article 35.1, Law on Pharmacy 2016

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- (ii) Establishments which have medicine counters (dispensaries);
  - (iii) Establishments which produce and source pharmaceutical materials; and
  - (iv) Military medical establishments which supply medicines in areas with difficult socio-economic conditions, areas of minor ethnic groups, border areas and islands.
- (f) Medicinal ingredients for producing medicines that are granted certificates of trading in Vietnam are not required to be registered before being sold in Vietnam and not required to obtain import license.<sup>18</sup>
- (g) Law on Pharmacy 2016 takes effect from 1 January 2017.

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<sup>18</sup> Article 54.2(a) and Article 60.1, Law on Pharmacy

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#### 5. Ordinance on Market Surveillance 2016

On 8 March 2016, the Standing Committee of Vietnam National Assembly issued Ordinance No. 11/2016/UBTVQH13 on market surveillance ("Ordinance on Market Surveillance 2016"). Accordingly, the market surveillance authorities shall have the right to examine legal compliance of enterprises during its operation. Notable points during the examination are as follow:

- (a) The duration of each examination shall not exceed 3 days as of the issuance day of the Decision on Examination. Subject to the nature of the examination, the duration might be extended by the competent authority, but in any time, shall not exceed 5 days. The decision on extension must be issued under written form.<sup>19</sup>
- (b) Upon the examination, notable rights of the inspected enterprises are as below:<sup>20</sup>
  - (i) To be provided with notice in writing on the examination plan;
  - (ii) Reject the examination provided that such enterprises can prove that the examination does not comply with the laws; and
  - (iii) Request the examination authorities to rectify information publicly or apologize and compensate for any losses incurred in case the examination does not comply with the laws, leading to negative effect to reputation, honor of, and/or causing damages to such enterprises.
- (c) In addition, upon the examination, the market surveillance officers must have market examination cards to conduct examinations. The market examination card shall be valid for 05 years, as inscribed on the card, upon its issuance.<sup>21</sup>
- (d) Ordinance on Market Surveillance 2016 takes effect from 1 September 2016.

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<sup>19</sup> Article 22.2, Ordinance 11

<sup>20</sup> Article 30, Ordinance 11

<sup>21</sup> Article 12, Ordinance 11

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#### 6. Circulars No. 03/2016/TT-NHNN and No. 05/2016/TT-NHNN on enterprise's foreign borrowings and foreign debt repayments

On 26 February 2016, the State Bank of Vietnam issued Circular No. 03/2016/TT-NHNN on foreign exchange administration in respect of enterprises' foreign borrowings and foreign debt repayments ("Circular 03"). In the short time thereafter, on 15 April 2016, some articles of Circular 03 were further fine-tuned by another legal instrument - Circular No. 05/2016/TT-NHNN ("Circular 05"). Both Circular 03 and Circular 05 together set forth a new legal framework for foreign borrowings and debt repayments of enterprises, some points that deserve to be highlighted are as follows:

- (a) The declaration on registration information, registration changes of the loan and report on the implementation of conventional loans are now encouraged to be conducted through the website [www.sbv.gov.vn](http://www.sbv.gov.vn) or [www.qlnh-sbv.cic.org.vn](http://www qlnh-sbv.cic.org.vn), rather than the traditional forms of direct submission.<sup>22</sup>
- (b) The borrower, which has foreign loans granted by deferral of payment for imported goods, is no longer subject to loan registration, registration of loan changes as stipulated previously.<sup>23</sup> Further, Circular 05 also provides a clear definition for "foreign loan granted by deferral of payment for imported goods". These foreign loans are the amounts of goods imports that have the first date of disbursement preceding the last date of payment.<sup>24</sup> In particular:
  - (i) The date of disbursement of foreign loan shall be (1) the 90<sup>th</sup> day from the date that transport documents are issued if the bank providing account services requires transport documents included in the payment documents, or (2) the 45<sup>th</sup> day from the date that the examination of information in the cleared customs declaration if the bank providing account services does not require transport documents included in the payment documents; and
  - (ii) The last date of payment shall be (1) the final date of the payment time limit as shown in the contract, or (2) the last date of payment in reality if the contract is not followed or does not specify any payment time limit.
- (c) Time limits for submission dossiers regarding loan registration, registration of loan changes are decreased to:<sup>25</sup>
  - (i) 12 days for online submission;
  - (ii) 15 days for direct submission; and
  - (iii) 45 days for registration of a loan denominated in Vietnam dong.
- (d) If the borrower is a foreign-invested enterprise, a foreign borrowing and foreign debt repayment account must be the direct investment account.<sup>26</sup> Foreign-invested enterprises may use an account other than their direct investment account only to conduct short-term borrowing activities. As long- or medium-term loans must still be disbursed and repaid through this single direct investment account, they will continue to suffer from the disadvantages of less flexibility and higher costs associated with the transactions.<sup>27</sup>
- (e) Circular 03 has new regulations on cases where borrowers need only notify in writing to the State Bank without conducting registration for changes of the loan, such as change of the borrower's address in the city or province where the borrower's head office is located, change of the commercial transaction name of bank providing account service, change of the lender, related information

<sup>22</sup> Articles 5 and 6, Circular 03

<sup>23</sup> Article 4.1, Circular 03

<sup>24</sup> Article 1.1, Circular 05

<sup>25</sup> Article 13.4, Circular 03

<sup>26</sup> Article 24.2, Circular 03

<sup>27</sup> Article 1.2, Circular 05

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about lender in respect of a syndicated loan that designate the representative for lenders, except when a lender is also the representative for lenders in respect of a syndicated loan, and any change of lender that may entail changes to the roles of the representative for lenders.<sup>28</sup>

- (f) Circular 03 and Circular 05 concurrently took effect on 15 April 2016.

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<sup>28</sup> Article 15, Circular 03

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#### ASEAN Economic Community Portal

With the launch of the ASEAN Economic Community ("AEC") in December 2015, businesses looking to tap the opportunities presented by the integrated markets of the AEC can now get help a click away. Rajah & Tann Asia, United Overseas Bank and RSM Chio Lim Stone Forest, have teamed up to launch "Business in ASEAN", a portal that provides companies with a single platform that helps businesses navigate the complexities of setting up operations in ASEAN.

By tapping into the professional knowledge and resources of the three organisations through this portal, small- and medium-sized enterprises across the 10-member economic grouping can equip themselves with the tools and know-how to navigate ASEAN's business landscape. Of particular interest to businesses is the "Ask a Question" feature of the portal which enables companies to pose questions to the three organisations which have an extensive network in the region. The portal can be accessed at <http://www.businessinasean.com/>.

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