

THE INWARD
INVESTMENT AND
INTERNATIONAL
TAXATION REVIEW

TWELFTH EDITION

Editor
Tim Sanders

THE LAWREVIEWS

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PREFACE

In January 2021, the 11th edition identified and described two material global tax trends that emerged in 2020: the response of economies to the covid-19 pandemic and the taxation of the digital economy. These two trends evolved through 2021 and can be expected to occupy centre stage in 2022 and beyond.

In 2020 and 2021, governments sought to bolster economies hit by the pandemic through a series of measures ranging from furlough schemes, postponing tax deadlines and deferring tax payments to relaxing residence rules. In 2021 and into 2022, governments will face the difficult balancing act of continuing to support their economies and encourage growth on the one hand, while needing to raise money from damaged economies to pay for such support and reduce the size of large deficits on the other, without such tax raising stifling any recovery. Precisely how each jurisdiction will deal with this balance remains uncertain and is a key area to observe in 2022. At this stage it appears that, while we may see some limited tax rises, more rigorous tax enforcement is likely to play a material role.

On 1 July 2021, a statement was made by the G20 Finance Ministers that on 8 October 2021 resulted in the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS 2) that contains details of how Pillars 1 and 2, which seek to address the issues raised by the digital economy, will be applied in practice. Pillar 1 deals with the reallocation of certain profits from very large multinational enterprises to market jurisdictions, while Pillar 2 deals with a global minimum tax. Among significant points to note is that under Pillar 1 it is intended that a new multilateral convention will be drafted and available for signature in 2022 that will remove unilateral digital services taxes and similar measures. Some jurisdictions that have applied a unilateral solution, notably the United Kingdom, Austria, France, Italy and Spain, have committed to transition from existing digital services taxes to the new multilateral approach solution. Under Pillar 2, the minimum tax rate is set at 15 per cent rather than the previously proposed rate of 'at least 15 per cent'. This has already had an impact, with Ireland announcing an increase in its minimum corporate rate to 15 per cent. While a remarkable amount of progress has been made in a short time, there are still important technical issues to be addressed quickly if the timetable, which proposes implementation in 2023, is to be adhered to. However, there is sufficient detail in the proposals for businesses likely to be affected to consider starting the process of reviewing their internal procedures and processes to ensure they can be compliant.

It is hoped that this volume will prove to be a useful guide to the tax rules in the jurisdictions where clients conduct their businesses. Each chapter aims to provide topical and current insights from leading experts on the tax issues and opportunities in their respective jurisdictions. While specific tax advice is always essential, it is also necessary to have a broad understanding of the nature of the potential issues and advantages.

The views expressed in this book are those of the authors and not of their firms, the editor or the publishers. Every endeavour has been made to ensure that what you read is the latest intelligence.

Tim Sanders

London

January 2022

VIETNAM

*Thanh Vinh Nguyen*¹

I INTRODUCTION

In the first nine months of 2021, GDP growth was approximately 1.42 per cent,² and the total amount of registered foreign investment reached US\$22.15 billion.³ Major investors include Singapore, South Korea, China, Japan, Hong Kong and Taiwan. The investment mostly focused on the processing and manufacturing sector with the total newly registered capital of US\$11.8 billion.⁴ In addition, Vietnam has welcomed the investment in renewable energy.

Trade war between the United States and China not only poses a challenge but also creates an opportunity for Vietnam. However, the biggest challenges are the underlying problems for the economy such as low-tech skills, exhausted lands and natural resources, and low productivity and competition.⁵ To improve the business environment and attract investment, the government has been focusing on reforming the administration and reducing the obstacles to investment. Specifically, from 2016 to November 2020, more than 1,000 administrative procedures have been reduced and simplified, and 3,893 out of 6,191 business conditions have been abolished.⁶ On 15 July 2021, the government issued Resolution No. 76/NQ-CP on the administrative reform plan for the period from 2021 to 2030. This Resolution aims to cut down and simplify at least 20 per cent of administrative procedures and 20 per cent of compliance costs until 2025. Vietnam's business environment is targeted to be ranked among the top 30 countries.⁷

On 12 November 2018, the Vietnam National Assembly officially ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which entered into force for Vietnam from 14 January 2019. After the effectiveness of CPTPP, Vietnam's exports to markets in CPTPP countries such as Japan, Canada and Mexico achieved significant increases.

In addition, after years of preparation and negotiation, Vietnam and the European Union have approved and ratified the European Union–Vietnam Free Trade Agreement

1 Thanh Vinh Nguyen is a partner at Baker McKenzie.

2 <https://www.gso.gov.vn/en/data-and-statistics/2021/10/press-conference-to-announce-the-socio-economic-situation-in-the-3rd-quarter-and-9-months-of-2021/>.

3 <https://www.mpi.gov.vn/en/Pages/tinbai.aspx?idTin=51558&cidcm=122>.

4 *ibid.*

5 <https://vov.vn/kinh-te/xung-dot-thuong-mai-my-trung-va-co-hoi-thach-thuc-cho-viet-nam-931553.vov>.

6 <https://laodong.vn/thoi-su/tiet-kiem-hon-6300-ti-nho-cat-giam-don-gian-hoa-thu-tuc-hanh-chinh-890532.ldo>.

7 <https://en.vietnamplus.vn/govt-issues-state-administration-reform-master-programme-for-20212030/204813.vnp>.

(EVFTA), which came into effect on 1 August 2020. The EVFTA provides expansive preferential market access as well as preferential duty treatments for goods traded between Vietnam and EU Member States.

On 1 January 2022, the world's largest free trade agreement, the Regional Comprehensive Economic Partnership (RCEP) agreement, will take effect. RCEP was signed in November 2020 by the 15 member countries, including the Association of Southeast Asian Nations (ASEAN) members Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam, and the ASEAN free trade agreement partner countries Australia, China, Japan, New Zealand and South Korea.

II COMMON FORMS OF BUSINESS ORGANISATION AND THEIR TAX TREATMENT

i Corporate

Inward investors may choose to establish a limited liability company (LLC) or a joint-stock company (JSC) for investment in Vietnam.

There are two different types of LLC: a single-member LLC (SMLLC) and a multi-member LLC (MMLLC). SMLLCs are owned by one organisation or an individual member (company owner) who is liable for the debts and liabilities of the company to the extent of the amount of the charter capital of the company. An MMLLC is an enterprise that has more than one but no more than 50 members, which may be organisations, individuals or a combination of both. MMLLCs have the same legal status as SMLLCs. However, in SMLLCs, the company owner has more autonomy with regard to decisions made about the company than those of MMLLCs. With MMLLCs, capital transfers are limited in the sense that capital may be sold to external investors only after all other members of the MMLLC have decided not to purchase that capital. The new Enterprise Law, which took effect on 1 January 2021, also limits the duration for capital contributions in LLCs to within 90 days of the issuance of the enterprise registration certificate. In the event of failing to meet the deadline, the enterprise is required to adjust its charter capital to be settled at the amount actually contributed.⁸

The corporate form of JSC is more flexible and does not have limitations for the number of shareholders. With the development of two stock exchanges (i.e., the Ho Chi Minh Stock Exchange and the Hanoi Stock Exchange) and over-the-counter markets, JSCs are the appropriate choice when there is a higher capacity of capital mobilisation and tend to be the more popular option for foreign investors looking into M&A deals.

ii Non-corporate

A partnership is a form of enterprise set up by at least two partners, who are personally liable for its debts (partnership). Limited liability partners may also join in the partnership and are only liable to the extent of their capital contribution. This form of business is not common for inward investment.

⁸ Article 47 Law No. 59/2020/QH14 dated 17 June 2020 of the National Assembly on Enterprises (the Enterprise Law).

A private enterprise is established by an individual who is the owner of the enterprise. This individual is liable by all of his or her assets for the enterprise's debt. However, in practice, inward investors are not able to establish private enterprises owing to complications with identifying foreign assets.

For these reasons, non-corporate entities are not commonly chosen for inward investment in Vietnam.

III DIRECT TAXATION OF BUSINESSES

i Tax on profits

Determination of taxable profit

Enterprises established under Vietnamese law are subject to enterprise income tax (EIT) on their worldwide income. These enterprises are allowed to deduct income tax paid overseas against the EIT payable in Vietnam in accordance with the provisions of the EIT Law.⁹

A permanent establishment (PE) of a foreign enterprise is subject to EIT on its income derived from Vietnam and on its income derived outside Vietnam related to the PE's activities.

Foreign companies that are located abroad but are engaging in business activities in Vietnam or deriving income in Vietnam are also subject to EIT.

Taxable profit (or actual assessable income) is based on an accrual basis and is subject to adjustments of non-deductible expenses for the purposes of calculating the EIT payable, except for the deemed tax rates applicable to the income of business entities established under foreign laws or of enterprises established under Vietnamese law, which can determine revenue but cannot determine expenses and business profits. Taxable income is made up of the taxable turnover minus tax-deductible expenses plus other taxable incomes. Assessable income is equal to the taxable income minus the tax-exempt income and the losses carried forward. In addition, funds for scientific and technological development set up by enterprises can be deducted against the assessable income before multiplying the tax rate for calculating the EIT payable.

'Tax-deductible expenses' means expenses incurred for business purposes and supported by appropriate documents, invoices or payment vouchers proving that payments were made on a non-cash basis (non-cash payment is a requirement for tax deductibility with respect to payments from 20 million dong or more), except for certain expenses subject to limitations on deduction (e.g., depreciation expense subject to the statutory depreciation rates, contributions of voluntary pension funds, voluntary pension premiums for employees).

Enterprises can use the straight-line method in calculating the depreciation of tangible fixed assets and amortisation of intangible fixed assets. Accelerated depreciation can be applicable to enterprises in business sectors that require fast changes or rapid development.

Capital and income

To the extent that capital profits mean the profits gained from the transfer of capital or from the transfer of securities, generally capital profits will be considered as other taxable income of the enterprise, which will be included in the taxable income used as a base to calculate

9 Law No. 14/2008/QH12 dated 12 June 2008 of the National Assembly on Enterprise Income Tax, as amended by Law No. 32/2013/QH13 passed by the National Assembly on 19 June 2013 and Law No. 71/2014/QH13 passed by the National Assembly on 26 November 2014 (the EIT Law).

assessable income. However, with respect to enterprises eligible for EIT incentives, capital profits are not subject to tax incentives, but they are permitted to be offset against the losses from the business enjoying EIT incentives.

Losses

Enterprises can carry forward the loss from a fiscal year entirely and consecutively for a maximum of five years, and the loss carry-forward years must be counted consecutively. This means that the loss must be carried forward ‘entirely’ and ‘consecutively’ even when enterprises are in a period of enjoying a tax holiday or tax reduction.

In cases where an enterprise undergoes a conversion, merger or consolidation, losses that occurred prior to such conversion, merger or consolidation can be offset against the taxable income of the year when such conversion, merger or consolidation occurs, or the loss may be permitted to continue to carry forward in the following years, but not exceeding five years from the year when the loss arose.

Rates

The current standard rate is 20 per cent, applicable to corporate forms and non-corporate forms beginning 1 January 2016.¹⁰

Investment projects that meet incentive conditions regarding industry, location or large-scale investment capital may enjoy preferential tax rates of 10, 15 or 17 per cent.

From 6 October 2021, investment projects that qualify certain conditions regarding large-scale investment capital, disbursement condition and four criteria including high technology, share of Vietnamese businesses participating in the value chain, added values, and technology transfer are entitled to enjoy the special investment incentive with tax rates of 5 per cent, 7 per cent and 9 per cent.

Administration

There are three levels of tax authorities in Vietnam. The General Department of Taxation (GDT) is the central tax authority. The GDT implements tax laws and provides the Ministry of Finance (MOF) with feedback on enterprises and assists it in creating tax policy. The provincial-level tax department manages district-level sub-tax offices. The tax departments and the sub-tax offices are responsible for collecting all types of tax, except for duties and taxes relating to import and export, which are under the management of the customs authorities. Depending on the scale of its investments, an enterprise may either be administered by the tax department or the sub-tax office.

Enterprises must make provisional EIT payments on a quarterly basis, by the last day of the first month of the following quarter (e.g., 30 April, 31 July, 31 October and 31 January of the following year). Enterprises are also required to conduct annual EIT returns and pay any tax deficits by the last day of the third month of the following fiscal year. The fiscal year is usually the calendar year. If taxpayers choose a fiscal year different from the calendar year, the fiscal year must start on the first day of a quarter and must last for 12 months.

10 Decree No. 218/2013/ND-CP dated 26 December 2013 of the government detailing and guiding the implementation of the Enterprise Income Tax Law and its amended decrees.

Tax authorities routinely conduct tax audits. A tax audit may be conducted at a tax authority if there are some unclear points in the tax documents submitted by an enterprise. Tax audits may be scheduled to be conducted at the enterprise's premises or may occur when that enterprise has a tax refund or is suspected of being in breach of tax regulations.

When enterprises have tax issues, they may seek guidance on these issues by coming to the tax authority in person or by sending a letter to the tax authority. In practice, it may take the tax authority one month to reply to an enterprise's letter. However, there is no formal procedure provided by law regarding the responsibility of tax authorities to provide guidance or reply to enterprises.

Enterprises in Vietnam may challenge the tax authority's assessment by appealing to the tax authority that issued the tax assessment. If the enterprise is not satisfied with the initial tax authority's conclusion on the appeal, it may then appeal to the higher level of that tax authority. Enterprises are also permitted to bring a case to court upon the receipt of the tax authority's assessment or after receiving the conclusions on the appeals of the tax authority that issued the tax assessment or of the higher level of that tax authority.

Tax grouping

A parent company is required to prepare and submit consolidated financial statements to the tax authorities¹¹ in which the figures on assets, payable accounts, owner's equities, revenues, other incomes and costs stated in the consolidated financial statement reflect the amount added from the figures of the parent company and those stated in the financial statements of the subsidiaries. The names of the subsidiaries must be stated in the consolidated financial statement.¹²

There are no specific provisions regarding tax treatments applicable to a group comprising a parent company and its subsidiaries. However, in principle, a parent company and its subsidiaries are independent and equal in contracts, transactions and other interactions.¹³ Each entity of a group is responsible for its own tax obligations and those of its shareholders.

ii Other relevant taxes

Business licence fee

The business licence fee is exempted in the first year of establishment or doing business (from 1 January to 31 December) for: (1) newly established organisations with a new tax code and a new enterprise code; (2) households, individuals and groups of individuals doing business for the first time; and (3) branches, representative offices and business locations established by the above during their period of business licence fee exemption.¹⁴

After the exempted year (if applicable), enterprises and their branches, being business entities, are required to pay a business fee once a year. The annual business fee, as detailed below, will be applied based on the charter capital stated in the enterprise registration certificate or business registration certificate of the enterprise or branch.¹⁵

11 Article 197 of the Enterprise Law.

12 Points 12 and 28 of Vietnamese Accounting Standard No. 25.

13 Article 196 of the Enterprise Law.

14 Decree No. 22/2020/ND-CP on 24 February 2020 amending Decree No. 139/2016/ND-CP on business licence fees, taking effect on 25 February 2020.

15 Decree No. 139/2016/ND-CP dated 4 October 2016 of the government regulating licensing fees.

Charter capital	Annual business fee
More than 10 billion dong	3 million dong
From 10 billion dong or less	2 million dong
For branches, representative offices, business location, public service providers and other business organisations	1 million dong

If an enterprise has no charter capital, it will depend on the investment capital stated in the investment registration certificate.

Branches of enterprises that do not state their registered capital in their business registration certificate must pay a business fee of 1 million dong annually.

Value added tax

Value added tax (VAT) applies to the supply of goods and services that are deemed to be used 'for production, business or other consumption in Vietnam'. A number of goods and services are exempt from VAT.

The VAT Law provides three rates of tax: zero, 5 and 10 per cent. The standard VAT rate is 10 per cent. Exported goods and services are zero-rated if goods or services are provided to customers overseas and consumed outside Vietnam or within tariff-free zones.

Foreign companies located abroad and engaging in business activities in Vietnam or deriving income in Vietnam are also subject to VAT regardless of whether they have a PE in Vietnam or not.

Special consumption tax

Enterprises that produce or import goods or provide services subject to special consumption tax (SCT) are required to declare and pay SCT in addition to VAT. SCT does not apply to subsequent stages in the distribution of goods. However, from 1 January 2016, imported goods, except for gasoline, are subject to SCT at the importation stage based on the import price (import SCT) and at the distribution stage based on the distribution price (distribution SCT). Import SCT can be offset against distribution SCT for the purpose of calculating the distribution SCT payable.¹⁶ As a result, the SCT amount payable for imported goods is higher from 2016, because SCT is eventually calculated based on the distribution price rather than on the import price.

Goods and services subject to SCT include:

- a* cigarettes and cigars;
- b* spirits and beer;
- c* automobiles with fewer than 24 seats, motorcycles with a capacity of over 125cc, aircraft and yachts (except those used for business in the transportation or tourism sector);
- d* gasoline of all kinds;
- e* air conditioners with a capacity of 90,000Btu or less;
- f* playing cards and votive paper; and
- g* the operation of dancehalls, massage lounges, karaoke parlours, casinos, electronic prize games, betting businesses, golf and lotteries.

¹⁶ Decree No. 108/2015/ND-CP dated 28 October 2015 of the government on 28 October 2015 detailing a number of articles of the Law on SCT and the amended Law on SCT and its amended Decree No. 100/2016/ND-CP.

Land rental and non-agricultural land use tax

Enterprises are subject to land rental for land areas leased from the state or from companies developing industrial zones and export processing zones. Enterprises can also be subject to non-agricultural land use tax when using non-agricultural land for business purposes, such as for industrial zoning, mining and commercial use.

Registration fee

Ownership of the following assets is subject to a registration fee:

- a* houses and land;
- b* ships;
- c* boats;
- d* aircraft;
- e* automobiles;
- f* motorcycles; and
- g* hunting and sporting rifles.

Personal income tax

Personal income tax (PIT) is imposed on the income of employees of enterprises. However, enterprises being income payers are required to withhold PIT on employment income and then declare and pay PIT to the tax authority on behalf of their employees.

Residents are subject to progressive tax rates ranging from 5 to 35 per cent on worldwide employment income. Non-residents are subject to a flat tax rate of 20 per cent on Vietnam-derived employment income.

iii Taxation of overseas suppliers engaging in e-commerce business and digital based business

The MOF issued guidance on taxation of overseas suppliers engaging in e-commerce business and digital based business in Circular 80/2021/TT-BTC. Circular 80/2021/TT-BTC will take effect from 1 January 2022.

Overseas suppliers will conduct tax registration on an electronic portal of the GDT. Overseas suppliers will conduct tax registration and start declaring and paying taxes after the announcement of the GDT that the electronic portal system goes into operation. Overseas suppliers declare and pay VAT and corporate income tax (CIT) on a quarterly basis at deemed rates on the revenues they receive.

If overseas suppliers do not register to pay taxes in Vietnam, Vietnamese organisations that purchase goods or services of overseas suppliers or distribute goods or provide services on behalf of overseas suppliers will be responsible for declaring, withholding and paying VAT and CIT at the deemed rates on revenues on behalf of overseas suppliers (i.e., the current foreign contractor tax withholding regime).

If overseas suppliers do not register to pay taxes in Vietnam with respect to sale of goods or provision of services to individuals, commercial banks and intermediary payment service providers will be responsible for withholding and paying VAT and CIT on a monthly basis at the deemed rates on revenues on behalf of overseas suppliers.

IV TAX RESIDENCE AND FISCAL DOMICILE

i Corporate residence

The tax laws neither define the term ‘corporate residence’, nor provide the conditions under which a non-locally incorporated entity (or foreign enterprise) can be a resident in Vietnam. According to the current provisions of the EIT Law, it may be interpreted that an enterprise would be considered fiscally resident in Vietnam if it is established under Vietnamese law.

ii Branch or permanent establishment

PEs of foreign enterprises are determined in accordance with the EIT Law, which defines PEs as including the following:

- a* a branch, management office, factory, workshop or means of transportation;
- b* a mine, oil or gas well, or place of extraction of natural resources;
- c* a building site, construction, assembly or installation project;
- d* an establishment furnishing services, including consultancy services, through employees or other personnel;
- e* an agency of the offshore company; and
- f* a representative in Vietnam in the following instances: he or she has the authority to enter into contracts in the name of the offshore company; or he or she does not have the authority to enter into contracts in the name of the offshore company, but regularly carries out deliveries of goods or provision of services in Vietnam.

If foreign enterprises are residents of a country that Vietnam has an effective tax treaty with, PE assessment will be in accordance with the tax treaty. Foreign enterprises from those countries may seek exemption from EIT on business income in Vietnam in accordance with the relevant tax treaty provisions, subject to certain procedures, provided that the concerned activities do not constitute a PE.

Currently, Vietnam’s World Trade Organization commitments allow foreign enterprises in certain service areas to set up branches in Vietnam, while such allowance for other service areas may be later phased in (e.g., non-life insurance, securities, computer and related services, management consultant services, construction and franchising). However, as a matter of practice, the government has only allowed foreign law firms and banks to set up branches in Vietnam. Branches in Vietnam are dependent units of foreign companies that operate under an establishment certificate issued by the competent licensing authority.¹⁷

Foreign contractors engaging in construction works in Vietnam can obtain contractor permits issued by the competent licensing authority and then can set up management offices in Vietnam.

Foreign enterprises having PEs in Vietnam, adopting the Vietnamese accounting system and having a tax code (i.e., branches, foreign contractors having contractor permits) issued by the tax authorities are subject to EIT at a rate of 20 per cent of the actual assessable income, which is the same rate for enterprises established under Vietnamese law. Otherwise, tax rates deemed at a rate of 1, 2 or 5 per cent will be imposed on a foreign enterprise’s revenue derived from Vietnam, and on its revenue derived outside Vietnam relating to the PE’s activities.

¹⁷ Decree No. 07/2016/ND-CP dated 25 January 2016 of the government detailing regulations of the Commercial Law on representative offices, branches of foreign businesses in Vietnam.

V TAX INCENTIVES, SPECIAL REGIMES AND RELIEF THAT MAY ENCOURAGE INWARD INVESTMENT

i Holding company regimes

There is no particular tax incentive for holding company regimes. The general rule is that if a local holding company receives after-tax profits or dividends from its local subsidiaries, such after-tax profits or dividends will not be taxed again at the level of the holding company.¹⁸

ii IP regimes

Investment in R&D is entitled to special tax treatment. Particularly, revenues derived from new investment projects in the fields of scientific research and high technology development and application will enjoy an EIT rate of 10 per cent within the 15 years from the licensing date. Venture investment in high technologies and high-tech start-ups is also entitled to this tax regime.

In addition, R&D income derived from scientific research and technology development of products under testing production, or products made from new technology applied in Vietnam for the first time, or technology transfer to individuals and entities in areas of special hardship, are tax-exempt for a certain period as provided by law.¹⁹

iii State aid

State aid is found mainly in the form of tax incentives to facilitate the development of certain sectors (e.g., R&D, infrastructure development, education, training and healthcare) or to develop geographically disadvantaged areas by granting special tax regimes to business entities established in such areas.

The government also provides financing aid to projects of special importance and social development projects. The Vietnam Development Bank (VDB), a non-profit stated-owned institution, finances the industries of infrastructure, mechanical engineering and business development at a subsidised rate of interest.²⁰

By raising capital from Vietnamese and foreign sources, and through receiving funds from the state budget, the VDB is able to provide loans at a reduced rate thanks to certain special mechanisms, such as a compulsory reserve ratio of zero per cent, and its solvency being guaranteed by the government.

iv General

At the start of 2016, the EIT rate was reduced by 2 per cent to its current rate of 20 per cent.

Tax incentives with respect to new investment projects include preferential tax rates, tax exemption and tax reduction. Preferential tax rates of 10, 15 or 17 per cent may be

18 Article 4.6 Law No. 14/2008/QH12 dated 3 June 2008 of the National Assembly on Enterprise Income Tax and its amended law.

19 Article 4 Law No. 14/2008/QH12 dated 3 June 2008 of the National Assembly on Enterprise Income Tax and Article 1.3 Law No. 32/2013/QH13 dated 19 June 2013 on Amendments of Law on Enterprise Income Tax.

20 Circular No. 18/2010/TT-NHNN dated 16 September 2010 of the State Bank of Vietnam (SBV) detailing the provision of interest rate support for organisations and individuals borrowing medium or long-term loans from the Vietnam Development Bank.

granted if a new investment project meets incentive conditions regarding the investment sector, location and scale of the project. New investment projects may enjoy tax exemptions for two or four years, and 50 per cent tax reductions for four, five or nine years.

Investment sectors entitled to tax incentives will be limited to high-tech industries, scientific research and technological development, infrastructure development, software product production, education and training, medical services, sports and cultural activities, and environmental activities.

Tax incentives are also granted to enterprises established in industrial zones (except industrial zones located in geographical areas with advantageous socio-economic conditions), economic zones, high-tech zones, geographical areas with difficult socio-economic conditions and geographical areas with especially difficult socio-economic conditions.

Since 1 January 2014, under the amended EIT Law, tax incentives are granted to large-scale manufacturing projects (except for production of goods subject to special consumption tax and exploitation of mineral resources) with investment capital at least 6 trillion dong.

The government has offered special investment incentives for certain new or expanded investment projects from 6 October 2021. Accordingly, investment projects in especially preferential industries may enjoy special incentives including reduced CIT rates of 5 per cent, 7 per cent or 9 per cent if they meet certain conditions in terms of investment capital, high technology, share of Vietnamese businesses participating in the value chain, added value, or technology transfer. In addition, the number of years for tax exemption and reduction is also longer for such projects. Tax exemption will last from 5 years to 6 years and 50 per cent tax reduction is ranged from 10 years to 13 years.

No tax incentives are applicable to capital gains, interest income, foreign currency trading, recovered bad debts, income from business activities outside Vietnam, precious mineral resources, oil and gas exploration and exploitation, or electronic games of chance and betting.

VI WITHHOLDING AND TAXATION OF NON-LOCAL SOURCE INCOME STREAMS

i Withholding on outward-bound payments (domestic law)

Interest payable to foreign companies is subject to a withholding EIT rate of 5 per cent.

Royalties paid to foreign companies for transfer of ownership of intellectual property are subject to a withholding EIT rate of 10 per cent. There will be additional 5 per cent withholding VAT levied in case of a licensing arrangement (i.e., transfer of use right).

Dividend payments to offshore investors other than individual investors are not subject to any further withholding tax. From 2009, individual investors are subject to a 5 per cent PIT on distributed profits or dividends.

ii Domestic law exclusions or exemptions from withholding on outward-bound payments

There is no particular domestic law exclusion or exemption from withholding on outward-bound payments except for dividend payments as mentioned above.

iii Double tax treaties

Vietnam has tax treaties with 76 countries currently in force. In addition, four tax treaties have been signed but are not yet in force, including the tax treaty between Vietnam and the United States, which was officially concluded in July 2015. Except for the tax treaty with the United States, which is based on a US model from 2006, all other tax treaties are based on Organisation for Economic Co-operation and Development and United Nations Model Conventions.

The current domestic withholding tax rate is lower than or equivalent to those of most treaties.

	Dividend	Interest	Royalty
Domestic standard tax rate	Zero % (foreign companies) 5% (individuals)	5%	10%
Australia	10%	10%	10%
Canada	5 to 15%	10%	7.5 to 10%
China	10%	10%	10%

iv Taxation on receipt

A local holding company will not be subject to tax on receipt of local after-tax profits or dividends.

Foreign tax credit is allowed subject to supporting documents. The tax credit may not exceed the amount of the Vietnamese tax (before application of the credit) that is attributable to the income derived from the foreign country.

VII TAXATION OF FUNDING STRUCTURES

i Thin capitalisation

There is currently no restriction on debt-to-equity ratios. However, there are restrictions applicable to specific sectors, such as the wind power sector, where the law requires that equity be equal to at least 20 per cent of the total investment capital. In addition, there is a minimum charter capital (i.e., equity) requirement in certain sectors, such as securities, banking and multi-level sales. In practice, the licensing authority, at its discretion, may question the feasibility of the project if the equity is deemed too low. In addition, total net interest expenses (after offsetting interest income) allowed to be deductible for EIT purposes must not exceed 30 per cent of earnings before interest, taxes, depreciation and amortisation if the taxpayer has related-party transactions (not necessarily related-party loan transactions).²¹

ii Deduction of finance costs

Interest expenses incurred with respect to debt capital (i.e., the difference between the investment capital and the charter capital as stated in the investment certificate) are fully deductible if the investors have contributed the registered charter capital in compliance with

21 Decree No. 68/2020/ND-CP (Decree 68) amending and supplementing Clause 3, Article 8 of Decree 20/2017/ND-CP (Decree 20) which takes effect from 24 June 2020 to 19 December 2020; and Decree No. 132/2020/ND-CP which will take effect from 20 December 2020 replacing Decree 20 and Decree 68.

the agreed schedule, and the loan agreements are properly supported and offshore medium or long-term loans are properly registered with the SBV. For interest to be tax deductible, the interest rates charged by lenders other than credit institutions and corporate lenders (i.e., the rates charged by individual lenders) must not be more than 1.5 times the basic interest rate announced by the SBV at the time that the borrower obtains the loan.

iii Restrictions on payments

Payment of dividends of a foreign-owned company can be done based on the year-end profit after the company has fulfilled its statutory tax and financial obligations.

If the company has accumulated loss according to its annual audited financial statements, then payment of dividends is not allowed.

iv Return of capital

Equity capital may be reduced by means of return of registered capital. In principle, a return of charter capital can be done only after more than two years of consecutive operation from the date of incorporation, and the company must ensure that it can pay the outstanding liabilities even after such return of capital.

VIII ACQUISITION STRUCTURES, RESTRUCTURING AND EXIT CHARGES

i Acquisition

Acquisition is usually effected either at the onshore level (by using a local or non-local entity as a buyer) or at the offshore level (by using a special vehicle to acquire shares of an offshore company directly or indirectly holding shares or capital in a company incorporated in Vietnam).

Capital gains tax is summarised in the table below.

Transferor	Transferee	LLC (capital contribution)	Private JSC (shares)	Public company (shares)
Resident legal entity	Resident/non-resident	20% of net gain Transferor to declare and pay tax		
Non-resident legal entity	Resident	20% of net gain Transferee to withhold tax		0.1% of proceeds Securities company/bank/ transferee to withhold tax
	Non-resident	20% of net gain Target to declare and pay tax		0.1% of proceeds Securities company/bank/ target to withhold tax

Until the introduction of Decree 12/2015/ND-CP with effect from 1 January 2015 (Decree No. 12), Vietnamese tax law did not address capital gains tax on indirect transfers. According to Decree No. 12, taxable incomes (or gains) derived in Vietnam by a foreign or offshore company (regardless of whether it has a PE in Vietnam and its location of doing business) are any incomes (or gains) derived from certain M&A activities, including transfers of contributed capital, investment projects, the right to contribute capital and the right to participate in investment projects. However, Decree No. 12 and other relevant tax regulations do not specifically address how the taxable gain would be calculated and which party would be liable for tax declaration and payment in the context of indirect transfers. This gives rise to uncertainty in its implementation.

ii Reorganisation

Mergers, demergers, separations and consolidations are allowed and stipulated under the Enterprise Law, but such reorganisation occurs between locally established entities. There is no particular tax treatment for these types of reorganisation. Generally, if any party derives gains under such reorganisation, capital gains tax would be triggered on that party.

iii Exit

A foreign investor can exit from its investment in Vietnam by transferring its shareholding in its Vietnamese subsidiary or liquidating such subsidiary. The transfer of capital or shares is subject to capital gains tax as mentioned in Section VIII.i. The transfer of assets for liquidation purposes is subject to VAT (at the standard rate of 10 per cent) and EIT on the difference between the transfer price and the net book value of the assets.

IX ANTI-AVOIDANCE AND OTHER RELEVANT LEGISLATION

i General anti-avoidance

Vietnam does not have comprehensive general anti-avoidance rules. However, it addresses the issue through other separate tax rules, such as transfer pricing rules and beneficial ownership requirements for the purposes of claiming a tax treaty benefit.

ii Controlled foreign corporations

Vietnamese law does not yet have any rules for controlled foreign corporations.

iii Transfer pricing

Transfer pricing issues have attracted more attention from Vietnamese policymakers in recent years. In an effort to strengthen existing transfer pricing rules and enforcement, the government issued Decree No. 20/2017/ND-CP (Decree 20) regulating tax administration with respect to enterprises having transactions with related parties, as amended and supplemented by Decree 68/2020/ND-CP. Recently, the government issued Decree No. 132/2020/ND-CP (Decree 132) prescribing tax administration for enterprises with related-party transactions, replacing Decree 20 and Decree 68. Decree 132 took effect on 20 December 2020 and is applicable for the 2020 Corporate Income Tax year onwards.

The aforementioned Decrees on transfer pricing provide legal framework for related-party transactions in Vietnam. These Decrees provide detailed guidance on the determination of arm's-length pricing of related-party transactions, rights and obligations of taxpayers, tax authorities and other relevant authorities. Prices in related-party transactions are determined through comparability analysis, which requires the elimination of significant differences by evaluating criteria comprising product characteristics, asset and operation functions, business risk, contractual terms of the transaction and economic conditions of the transaction. The new Law on Tax Administration 2019 adopted by the National Assembly codifies transfer pricing rules.

In principle, these Decrees continue to maintain five methods of determining market prices, including comparable uncontrolled price, resale price method, cost plus method, profit comparable method and profit-split method. There is no hierarchy among the methods. The most appropriate method will be adopted based on the conditions of the transaction, information and data for a comparability analysis. 'Substance over form' is the core principle

of related-party transactions, which relies on data and actual transactions of related parties for comparison with independent transactions under similar conditions regardless of the form of transactions presented in the agreements of related parties. The tax authorities' power to scrutinise related-party transactions from a transfer pricing perspective will, therefore, go beyond the form of contracts and agreements.

The Decrees on transfer pricing provide more reporting and documentation obligations in addition to the existing ones, which require intensive information and documentation from taxpayers, which must be submitted together with the annual enterprise income tax finalisation return. For ultimate parent company taxpayers in Vietnam, further documentation and report are required when the consolidated global revenue during the tax period is 18 trillion dong or more. According to Decree 132, for taxpayers having the ultimate parent company in a foreign country, taxpayers are required to provide a copy of country-by-country report (CbCR) of the ultimate parent company in the event the ultimate parent company is required to submit this declaration to the tax authority where it is incorporated, except for the case where such a CbCR is made available to the Vietnamese tax authorities through the automatic exchange of information procedure. If the overseas ultimate parent company is not obliged to file a CbCR in its respective jurisdiction, international tax treaties shall be applied.

Taxpayers are partly or fully exempt from preparing and maintaining transfer pricing reports or transfer pricing documentation in the following cases:

- a* related-party transactions between local taxpayers that apply the same income tax rate and do not enjoy income tax incentives;
- b* the total revenue in a tax period is lower than 50 billion dong and the total value of related-party transactions in a tax period is lower than 30 billion dong;
- c* the taxpayers signed an advanced pricing agreement (APA); and
- d* the taxpayers perform business with simple functions with revenue of lower than 200 billion dong without generating revenue or incurring expenses related to the exploitation and usage of intangible assets and apply a net profit margin before interest and income tax over revenue as follows:
 - distribution: 5 per cent or more;
 - production: 10 per cent or more; and
 - toll manufacturing: 15 per cent or more.

The Amended Tax Administration Law effective from July 2013 provided the concept of the APA for the first time. On 18 June 2021, the MOF issued the guidance for the implementation of APA.²² Enterprise income taxpayers are allowed to initiate the following APA procedures:

- a* a taxpayer must file the APA application dossier (in Vietnamese) to the GDT;
- b* the GDT will appraise the submitted APA dossier to check, compare, determine and evaluate the completeness, accuracy, legality, reasonableness, and validity of the information provided;
- c* the tax authorities and taxpayer will negotiate the terms of the APA; and
- d* if the GDT agrees to the terms discussed and negotiated with the transaction parties, the final draft will be approved by the MOF with a maximum duration of three tax years.

22 Circular No. 45/2021/TT-BTC dated 18 June 2021, issued by the Ministry of Finance guiding the application of the APAs to enterprises having related-party transactions.

The procedure is under the supervision of the MOF and subject to its approval. The GDT will be responsible for receiving the application; handling the requests on the application of the APA, extension and amendment of the signed APA; cancelling, revoking the signed APA and monitoring the implementation, and the respective local tax authorities may also be involved in the negotiation and implementation of the APA.

iv Tax clearances and rulings

Advance tax rulings are not specifically provided under the law. However, as a matter of practice, taxpayers can write to the tax authorities to request confirmation or clarification on particular tax issues. The tax authorities' response may not be always helpful or address the issue, but in certain cases it is helpful to gain more clarity and confirmation. The new law on tax administration (which came into force from July 2020) provides that taxpayers will not be subject to administrative penalty and late payment interest if they have already complied with guidelines and decisions of the tax authorities or other competent authorities in relation to their tax liabilities. This would imply that taxpayers still need to pay tax additionally assessed by the tax authorities even if the assessment is not in line with the previous guidance of the tax authorities.

A taxpayer can also request the tax authority to confirm the status of the tax payment (i.e., no tax debt). However, such confirmation or clearance is based on the records available to the tax authority, and the tax authority takes the position that it can retroactively assess additional tax if violations are found later. The statute of limitations for tax assessment and imposing interest is 10 years from the date on which the violation is detected.

X YEAR IN REVIEW

Transfer pricing continues to be one of the hot topics of the year. With the participation in the base erosion and profit shifting (BEPS) inclusive framework as an official member, Vietnam will continue its effort to address the BEPS minimum standards in its legislation. Capital gains tax with respect to offshore indirect share transfer remains a controversial issue in the absence of a thorough technical and legal basis. The newly issued rules on taxation of e-commerce and digital based business of overseas suppliers are expected to raise compliance challenges as the rules do not properly and sufficiently address various aspects of e-commerce business. Regarding e-invoicing, the newly issued Decree 123/2020/ND-CP provides that the mandatory use of e-invoices is postponed until 1 July 2022.

XI OUTLOOK AND CONCLUSIONS

Pressure for further reform will continue as a key element for changes in the taxation environment. Phase-ins of free trade deals will lead to stricter management in tax compliance and an increase in indirect taxes.

To provide guidance for implementation of the new law on tax administration adopted in June 2019 and taking effect from 1 July 2020, the government recently issued a number of decrees on taxation. During the first 10 months in 2021, the MOF issued various regulations to provide guidance on the implementation of a number of tax issues such as cross-border e-commerce transactions, simplifying the administrative tax procedures, and a number of tax relief measures to support enterprises affected by the covid-19 outbreak.

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