



## NEWSLETTER

### Edition 2, 2012



#### Dear Readers,

We welcome you to this latest edition of the Frasers' Newsletter, with some new and exciting developments from the world of Vietnamese legislation and of Frasers Law Company.

#### **Frasers Invests In The Future With Appointment Of A New Partner**

Frasers is proud to announce the appointment of Justin Gisz as a partner of Frasers Law Company. Justin has worked at Frasers since 2007 during which time he has become a valued team member and well respected in the business community for his sound commercial sense and understanding of clients' requirements. With his extensive knowledge of Vietnamese and international law, Justin was recently commended in the Legal 500 Asia Pacific Guide as "*technically strong, incredibly responsive, and delivers a consistent, quality service*" and his appointment as a partner will strengthen Frasers practice, ensuring its long term development and growth. Justin's focus is on corporate and commercial matters. Managing Partner Mark Fraser commented "Frasers is absolutely delighted that Justin has been made a partner within our firm. Justin's promotion highlights his long term commitment to Frasers and to delivering consistently high quality advice and leadership within the Frasers team to our clients, who rank as some of the world's largest global and multinational companies."

Fundamental to building a strong practice which provides both development opportunities for its lawyers and a first class service to clients, Frasers is also pleased to announce the elevation of Ms Luu Thi Xuan Trang, Ms Phung Thi Thanh Thao, Mr Nguyen Viet Ha and Mr Pham Ba Linh to the level of Senior Associate.

Turning to legal developments, we report on updates to regulations on Personal Income Tax for foreigners working in Vietnam, the law on special sales tax, and the subject of consularisation and consular certification of documents – a process that many associated with, or invested in, Vietnam will have come across.

In this newsletter we review:

- Official Newsletter 4263 giving guidance on the responsibility for personal income tax for foreign workers in respect of income earned in Vietnam;
- Decree 111 on the procedures for consularisation and consular certification, including the contents of the dossier that has to be submitted when applying for this process; and
- Decree 113 amends the provisions on special sales tax, aiming to clarify the application of this tax and cease the double taxation burden which has accrued to certain domestically manufactured goods since the introduction of the environmental protection tax.

We trust that you find this edition of the newsletter an interesting read and welcome any feedback or comments you may have on any of our topics. Our address for comments is [newsletter@frasersvn.com](mailto:newsletter@frasersvn.com).

Whilst we aim to provide a useful update on new legislation, Frasers' Newsletter does not constitute formal legal advice. Should you feel that you require further information on any of the issues in this edition of the Newsletter please contact us at the address above.

## More Guidance For Foreigners Paying Personal Income Tax On Income In Vietnam

Many foreign nationals working (and paying income tax) in Vietnam may have business interests or income paid outside Vietnam. Furthermore, many businesses operating in Vietnam have employees who may come to Vietnam frequently and whose responsibilities encompass Vietnamese operations, even though such persons may not be employed or resident in Vietnam. The Vietnamese General Department of Taxation has sought to extend its jurisdiction over such income for some time and has recently issued further guidance on what income is deemed taxable in Vietnam and how it is calculated.

On 24 November 2011, the General Department of Taxation promulgated Official Letter No. 4263/TCT-TNCN on personal income tax obligations for foreigners receiving income from work in Vietnam (**Official Letter 4263**). Official Letter 4263 also applies to foreign individuals who are the head of a representative office or project manager in Vietnam but receive income paid from overseas (whether into an account in Vietnam or overseas). The exact wording of the official letter is strict, leading to the situation where it could theoretically cover salary earned for work carried out relating to Vietnam, for example a CEO based in Hong Kong, but managing the Vietnam business remotely.

Where such individual is considered to be a resident individual under the Law on Personal Income Tax<sup>1</sup>, then the taxable income shall be considered to mean the income arising both within and outside the territory of Vietnam, irrespective of where the income is paid or received.

Where such individual is considered to be a non-resident individual<sup>2</sup>, then the taxable income is considered to be the income arising as a result of conducting work in Vietnam, irrespective of where the income is paid.

In the event that the income is paid from overseas for work conducted concurrently in Vietnam and overseas (worldwide salary income) and the part of income paid for working in Vietnam is not separable from other income, then the total income arising in Vietnam is determined according to a formula issued by the General Department of Taxation as follows:

For non-resident individuals:

$$\begin{array}{l} \text{Total income} \\ \text{arising in} \\ \text{Vietnam} \end{array} = \frac{\text{Number of working days} \\ \text{for work in Vietnam}}{\text{Total number of working} \\ \text{days in the year}} \times \text{Worldwide salary} \\ \text{income (pre-tax)} + \text{Other taxable income} \\ \text{(pre-tax) arising in} \\ \text{Vietnam}$$

<sup>1</sup> Resident individual means any person satisfying either of the following conditions:

- being present in Vietnam for a period of one hundred and eighty-three (183) days calculated within one western calendar year or within twelve (12) consecutive months from the date of entry into Vietnam; or
- having a regular residential location in Vietnam being a residential location for which permanent residence has been registered or a property rented pursuant to a lease for a term for residential purposes.

<sup>2</sup> Non-resident individual means any person not satisfying the conditions of resident individual above.

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For resident individuals:

$$\begin{array}{r} \text{Total income} \\ \text{arising in} \\ \text{Vietnam} \end{array} = \frac{\begin{array}{r} \text{Number of days} \\ \text{present in Vietnam} \end{array}}{365 \text{ days}} \times \begin{array}{r} \text{Worldwide salary} \\ \text{income (pre-tax)} \end{array} + \begin{array}{r} \text{Other taxable income} \\ \text{(pre-tax) arising in} \\ \text{Vietnam} \end{array}$$

In which case, other taxable income (pre-tax) arising in Vietnam means other benefits (whether or not in cash) to which the employee is entitled apart from salary, paid by the employer to the employee or paid by the employer on behalf of the employee.

The taxation authorities aim to cast their net wide. Individuals and organisations who conduct business in Vietnam should be aware of the regulations in order to ensure compliance and prevent undue personal income taxation complications arising. However, we query the practicality and enforceability of the provisions at present and will keep our readers updated on developments in enforcement measures by the Vietnamese taxation authorities.

## Consular Certification And Consularisation Of Documents In Vietnam - New Regulations

Investors, or foreign nationals, in Vietnam may be familiar with the need to have official documents “consular certified” and “consularised”, whether it be certificates of professional qualifications, birth certificates or other official documents.

- Consular certification is the process of certification by a competent Vietnamese authority of the signature, seal, and title of **Vietnamese** papers. After this process, such papers can be used in a **foreign country**
- Consularisation is the certification by a competent Vietnamese authority of the signature, seal, and title of **foreign papers**. After this process, such papers can be used in **Vietnam**

Until now there has been some degree of confusion as to the correct procedure required for this process and many readers will have experienced the frustration of finding that different requirements are levied by different government departments when it comes to this process.

On 5 December 2011, the Vietnamese Government issued Decree 111/2011/ND-CP on consular certification and consularisation (**Decree 111**) to create an explicit legal framework for this process based on the Law of the Representative Authorities of the Socialist Republic of Vietnam in Foreign Countries, dated 16 June 2009. Pursuant to Decree 111, “consular certification” and “consularisation” must be performed by a competent Vietnamese authority, and will comprise certification of the seal, signature, and title of the documents.



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### A Glance At The Procedures

The competent authorities to carry out consular certification and consularisation are:

- In Vietnam, the Ministry of Foreign Affairs, which body may authorise the Department of External Relations, at central government level, to receive the dossier of consular certification and consularisation.
- Outside Vietnam, the representative offices of Vietnam. Pursuant to Article 5.2 of Decree 111, such offices are: diplomatic representative offices, consulates (i.e. Embassy, Consulate General or Consulate<sup>3</sup>) or other bodies authorised to perform the functions of a consulate of Vietnam in a foreign country.

All bodies and individuals may apply for consular certification or consularisation for their own or another's document, without the requirement for a power of attorney. There are some exceptions to the general provisions, for example: where an old signature or seal can no longer be made out, or where dealing with documents issued by the previous government before 30 April 1975. In these cases the documents must be produced directly at the Ministry of Foreign Affairs.

For regular cases, the dossier can be sent directly to the competent authorities mentioned above, either in person or by post.

When applying for consular certification and consularisation, an applicant should prepare a dossier including:

- application form requesting consular certification or consularisation (as applicable);
- The documents required to be consular certified or consularised.

With respect to a request for consularisation, the documents must be certified by the diplomatic representative office, consulate or other agency authorised to perform consular functions on behalf of the foreign country;

- For documents requiring consularisation: a translation into Vietnamese or English of the documents requested to be consularised, if it is not written in such language already;
- One copy of the document for archiving.

The applicant must produce original identity papers (for example passport, identity card) when presenting the dossier in person, or attach a copy of such papers where the dossier is sent by post. Whilst the legislation does not specify that the copy of such identity papers should be notarised, experience of Vietnamese bureaucracy suggests that this would be a wise precaution to prevent the application being returned.

The time limit for completion of the process should be no greater than five working days. Where the authenticity of the document has to be verified, the time limit can be extended. However, Decree 111 does not clarify further when these circumstances will apply. The certifying body must retain a copy of the file for a period of between 3-10 years.

<sup>3</sup> Article 4, Law on the representative authorities of the Socialist Republic of Vietnam in foreign countries.

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### Exceptions

The process of consular certification and consularisation is, however, only a certification of the seal, signature, and title of the relevant document; and does not include certification of the content and form of the document. Decree 111 furthermore states that the documents containing the following may not be consular certified or consularised:

- deletions or amendments which have not been corrected in accordance with the law;
- conflicting details;
- forgeries;
- contents which may damage the wellbeing of the Vietnamese State;
- documents not containing original signatures or seals; or
- documents issued, certificated by the incorrect authorities.

In addition, Decree 111 also sets out categories exempted from consular certification and consularisation, which include:

- documents exempted pursuant to an international convention of which both Vietnam and the relevant foreign country are members;
- documents exempted under the principle of reciprocity;
- document transferred directly by diplomatic communication between the competent bodies of the relevant States;
- where the receiving bodies in Vietnam or the relevant foreign country do not require consular certification or consularisation, in accordance with applicable laws, or
- other cases exempted under Vietnamese regulations.

Decree 111 came into force on 1 February 2012.

### Amendments To The Special Sales Tax In Vietnam

On 8 December 2011, the Government issued Decree 113/2011/ND-Cp (**Decree 113**) amending and supplementing a number of articles of Decree 26/2009/ND-CP dated 16 March 2009 (**Decree 26**) guiding the implementation of certain articles of the Law on Special Sales Tax (**Law on Special Sales Tax**). Decree 113 came into effect on 1 February 2012 and amends Article 2, 3, 4, 5 and 7 of Decree 26 in order to further provide guidelines for the application of special sales tax in practice.

Special Sales Tax (**SST**) in Vietnam is a tax levied on various goods and services deemed to be in the “luxury” sector: certain types of tobacco, spirits, automobiles, gambling and discotheques to name a few. The level of the tax varies from 10% up to 70% depending upon the class of goods or services.

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#### ***Changes in taxable prices***

The most important change brought about under Decree 113 is in relation to the taxable SST price in the case of domestically manufactured goods. As a result of the creation of the environmental protection tax which has been applied since 1 January 2012, Vietnamese legislators have determined that the price for the purpose of determining the SST price is the price *after* deduction of environmental protection tax. This provision aims at avoiding the double taxation otherwise imposed on the taxable objects of both SST and environmental protection tax.

#### ***Development of mechanisms to determine the selling price***

Where the SST payer is an individual or organisation engaged in manufacturing or importing goods subject to SST or conducting business in services subject to SST, the method of determination for the taxable sale price will vary depending upon the selling method of such goods or services. Pursuant to Decree 26, where an establishment manufacturing goods subject to SST sells them via its subsidiary, which is a dependent cost accounting entity, the taxable price is the price at which the subsidiary sells the goods. Where the manufacturing establishment sells the goods via an agent on commission, who sells at the correct price stipulated by the manufacturing establishment, then the taxable price is the selling price stipulated by the manufacturing establishment without excluding commission.

However, if the manufacturer sells the goods via a commercial business establishment, then the taxable price is the selling price of the manufacturer, which should not be more than 10% lower than the average selling price of the commercial business establishment. If the sale price of the commercial establishment is 10% (or more) higher than the selling price of the manufacturer, then the tax office will fix the taxable price for the purposes of SST.

With respect to passenger vehicles, Decree 113 stipulates that the average sale price of the business establishment is the sale price of such vehicle *excluding* any additional equipment or accessories installed at the request of the customer.

#### ***Tax rates***

Similarly to Decree 26, Decree 113 also refers to the Law on Special Sales Tax to provide the SST rates applicable to goods and services. However, with respect to vehicles designed to carry both passengers and cargo, Decree 113 states that such vehicles means vehicles with two or more rows of seating and designed with a fixed partition between the passenger and cargo sections, in accordance with the national standard stipulated by the Ministry of Science and Technology (**MST**). We understand that while we are still waiting for such guidelines from the MST, such vehicles will not be deemed to be a taxable object for the purpose of SST.

#### ***Tax credits***

Pursuant to Decree 26, taxpayers who are manufacturers of goods subject to SST, where the goods are manufactured from raw materials also subject to SST will be entitled to a credit for such tax already paid on the raw materials when fixing the amount of SST payable at the manufacturing stage. The amount of credited SST will correspond to the amount of SST levied on the raw materials used to manufacture the goods for sale.



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Further to this regulation, Decree 113 provides that such credit only applies to the amount of SST imposed on imported raw materials and raw materials purchased directly from domestic manufacturers.

Decree 113 is surely welcome in clarifying the taxation regime applicable to SST and for avoiding the double taxation applicable to certain products. This is an important income stream for the government and an area that it is looking to refine.