



NEWSLETTER

Edition 3, 2012



Dear Readers,

We welcome you to this latest edition of the Frasers' Newsletter, and recent developments from the world of Vietnamese legislation.

In this edition, we report on:

- A pilot scheme to refund VAT for foreigners exiting Vietnam, how it will be applied and the procedures to follow;
- The State Bank of Vietnam's policies to regulate credit growth in 2012, extent of the growth and restrictions over the areas of lending;
- New legislation, in the form of Circular 40 on the licensing, operation and organisation of banks (including 100% foreign owned banks and joint venture banks); and
- Information about the Prime Minister's initiative to remove some of the requirements for notarisation of contracts relating to land use rights and residential property.

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.

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.

PILOT SCHEME FOR REFUNDING VALUE ADDED TAX (VAT) FOR FOREIGNERS EXITING VIETNAM

As from 1 July 2012, a pilot scheme for refunding VAT for foreign passport holders exiting Vietnam will come into operation. Decision No. 05/2012/QĐ-TTg dated 19 January 2012 regulates a pilot scheme to refund VAT on goods purchased by foreigners in Vietnam on exit through Hanoi's Noi Bai International Airport and Ho Chi Minh City's Tan Son Nhat International Airport (**Decision 05**).

Who is entitled to a VAT refund?

A person may be entitled to a VAT refund if s/he:

- has a non-Vietnamese passport; and
- is not a member of a cabin crew on a flight leaving from Vietnam to a foreign country.

Goods subject to VAT refund

Goods subject to this pilot scheme must satisfy all of the following conditions:

- be goods subject to VAT, new and permitted to be carried onto an aircraft as prescribed by the law on aviation security and safety;
- not be in the list of goods banned from export or limited for export;

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- have an invoice together with a declaration of tax refund issued within 30 days prior to the date the person exits Vietnam; and
- have a value, recorded in the invoices and declarations of tax refund (individual or cumulative), of 2 million VND or more and be bought in one shop on one day.

Businesses taking part in the pilot scheme

Not all businesses will be able to issue tax invoices for reclaiming VAT. A business entity can participate in the pilot scheme if it:

- is an enterprise established and operating under Vietnamese law, trading refundable items and located in Hanoi, Ho Chi Minh City or certain fine art or handicraft centres; and
- registers and is chosen by the Ministry of Finance for the pilot scheme.

VAT refund procedures

The procedures for obtaining a VAT refund are as follows:

- Prior to check-in, at the airport, the customs office will need to see: passport (original), invoice/tax refund declaration (original) and goods for which the tax refund is requested.
- After checking the goods and paperwork above, the customs officer will sign, certify and stamp the invoice/tax refund declaration and return it.
- After customs and immigration, the claimant must present the VAT refund agent with: passport, boarding pass and invoice/tax refund declaration .
- After checking the documentation the VAT refund agent will process and refund the VAT refund in Vietnamese Dong.

Refunded amount

The refunded amount will be the amount of VAT charged on the goods less the administration fee collected by the authorised bank. This administration fee cannot exceed 15% of the total refunded amount.

The VAT refund pilot scheme will run from 1 July 2012 to 30 June 2014.

TIGHT CREDIT CONTROL POLICY IN 2012 OVER DOMESTIC LENDING

In an attempt to control inflation and ensure macro-economic stability, the State Bank of Vietnam (**SBV**) issued Official Letter No. 674/NHNN-CSTT dated 13 February 2012 setting out its policies on the control of credit activities in 2012 (**Official Letter 674**). One of the SBV's goals is to exert greater control over the credit growth and loan balance ratio of credit institutions.

Credit growth control

According to Official Letter 674, credit institutions must formulate a plan for the control of credit growth for

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2012, and implement such plan strictly, on the basis of the credit growth criteria notified by the SBV to each credit institution. Credit institutions must also, on the basis of their credit growth plan for 2012, formulate credit growth plans for each quarter; and assign credit growth plans for 2012 to their own branches and transaction departments. The provincial SBV branch in the locality of a credit institution's branches and transaction departments will exercise the function of State administrative management of local credit activities.

According to Directive No. 01/CT-NHNN dated 13 February 2012 of the State Bank of Vietnam on implementing currency policy and ensuring safety and effectiveness of banking activities in 2012 (**Directive 01**), the State Bank of Vietnam has allocated credit institutions into four groups pursuant to their operational situation and credit growth potential. Credit institutions in each group will be assigned a particular maximum credit growth rate. After six months of implementation, the rate may be adjusted in accordance with credit and currency developments.

We set out below a table showing the current credit growth rate allocated to credit institutions by the SBV to date:

	Group I, maximum credit growth rate in 2012: 17%	Group II, maximum credit growth rate in 2012: 15%	Group III, maximum credit growth rate in 2012: 8%	Group IV, maximum credit growth rate in 2012: 0%
Name of credit institutions	Vietcombank, BIDV, Vietinbank, ACB, Sacombank, Eximbank, Techcombank, VPbank, VIB, SeAbank, Maritime Bank, MHB, Military Bank, Agribank, SHB	DongA Bank, NamA Bank, Southernbank, OCB, AnBinh Bank, PG Bank, KienLongbank, DaiAbank, Lienvietpostbank, BaoVietbank, Westernbank, Oceanbank	Habubank	

Credit activities control in non-encouraged sectors

Under Official Letter 674, credit institutions must limit the ratio of their loan balance in non-encouraged sectors over their total loan balance for the whole of the year 2012 to a maximum of 16%. Loans in *non-encouraged* sectors comprise:

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- loans made for investment and business in securities, but excluding loans to employees of a State-owned company to purchase shares issued on an equitisation;
- loans made for capital requirements to service living conditions, and loans made by issuance and use of credit cards (referred to as consumer loans), but excluding the balance of loans made for capital requirements for home construction, home repairs and home purchase where the source of the loan repayment is the salary of the borrower; and
- loans made for investment and business in real estate, but excluding loans made for the following capital requirements:
 - construction of housing for sale or lease to low income earners and to workers in industrial zones, export processing zones and economic zones;
 - construction of rent free residential housing for workers in industrial zones, or with collection of rent but where the rent does not exceed the residential housing rent stipulated by the provincial people's committee and the construction or rental costs are included as reasonable expenses in prime cost production when calculating corporate income tax; and
 - construction of works or projects being residential housing developments which are almost complete and will be handed over or commissioned for use during 2012 in accordance with clauses in the construction contract signed between the investor and contractor, or in the contract for purchase and sale of assets, or in the contract for purchase and sale of the residential housing unit, or in the contract for lease of assets.

The SBV appears to be seeking to dampen down speculation and investments in sectors such as real estate and securities, which have shown high volatility over recent years. For businesses operating in those sectors credit is likely to be harder to obtain and the banks, willing and able to lend in those sectors, fewer in number and may impose stricter conditions. However, the general limitations in credit growth for the above listed credit institutions may also have a knock on effect to lending generally, limiting the potential for commercial growth. Potential borrowers are likely to need to demonstrate a sound business plan and good prospects in order to raise funds in this more restrictive environment.

NEW LEGISLATION ON LICENSING, ORGANISATION AND OPERATION OF BANKS

On 15 December 2011, the State Bank of Vietnam (**SBV**) issued Circular No. 40/2011/TT-NHNN (**Circular 40**) regulating the licensing, organisation and operation of commercial banks, foreign bank branches, and representative offices in Vietnam of foreign credit institutions and of other foreign organisations with a banking operation. The "**Licence**" referred in Circular 40 includes a licence for the establishment and operation of a commercial bank, establishment of a foreign bank branch, establishment of a representative office issued by the State Bank.

Circular 40 clarifies some definitions, in which:

- *Bank with 100% foreign owned capital* means a commercial bank with 100% of its charter capital owned by

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foreign credit institution(s), established in accordance with Vietnamese law, with its head office in Vietnam, in the form of either: a single member limited liability company with 100% of its charter capital owned by a foreign bank; or a multiple member limited liability company in which one foreign bank owns 50% of the charter capital;

- *Joint venture bank* means a commercial bank established, and with its head office, in Vietnam with capital contributed by a Vietnamese party (comprising one or more Vietnamese banks) and a foreign party (comprising one or more foreign banks) on the basis of a joint venture contract; which is established in the form of a limited liability company with two to five members, of which one member and its related persons must not own more than 50% of the charter capital.
- *Other foreign organisation with a banking operation* means an organisation established under the law of a foreign country, and permitted to conduct regular business and regularly provide one or more of the following professional activities: receipt of deposits, extension of credit, and provision of payment services via accounts.

Circular 40 guides the implementation of the Law on Credit Institutions No.47/2010/QH12 (**Law on Credit Institutions**), whose aim is to reform administrative procedures and intensify state control over banking activities. For these purposes, Circular 40 repeals and replaces many previous provisions on licensing conditions and procedures, charter, operation, capital of credit institutions, including Circular 09/2010/TT-NHNN and parts of Circular 03-2007-TT-NHNN, amongst others. In this article we provide an overview of some of the substantial changes brought about by Circular 40.

Licencing

The Governor of the SBV will be the person authorised to issue decisions issuing and revoking licences.

Under Circular 40, the licence issued to the bank, foreign bank or representative office will contain specific provisions on the parameters of the banking operations and other business activities of commercial banks and foreign bank branches, or the operational extent of a representative office. Investors in the banking sector in Vietnam will have to weigh up the costs and benefits of applying for a wide ranging licence which will permit the bank to carry out a wide range of activities (but may be harder to obtain) and a narrower licence, which might be easier to obtain but which may need to be amended subsequently.

To obtain a Licence, a credit institution has to satisfy a multitude of conditions required by the Law on Credit Institutions and Circular 40.

In addition to the provisions of the Law on Credit Institutions, Circular 40 imposes stricter conditions with respect to founding members and shareholders, for example:

- * *With respect to a licence for establishment and operation of a shareholding commercial bank:* Each founding shareholder must:
 - undertake to assist the shareholding commercial bank financially to resolve its difficulties with capital or solvency;

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- not be a founding shareholder, owner, founding member or strategic shareholder of another credit institution.

Founding shareholders who are individuals must hold Vietnamese nationality, and be the manager of an enterprise whose business was profitable for at least three consecutive years prior to the year of lodging the application file for licensing, or they must have a university or post-graduate degree in economics or from a law faculty.

The bank must have at least two shareholders which are organisations established in accordance with the laws of Vietnam. At the time of lodging the application dossier for licensing, such organisation must have fulfilled all of its obligations regarding tax and social insurance, have equity of a minimum of 500 billion VND and have been profitable in the five years immediately preceding the application. Where the organisation is a commercial bank, it must have at least 100,000 billion VND in total assets and not have breached the SBV's regulations on prudential ratios in banking operations during the preceding year.

For at least five years from the date of licensing, founding shareholders must continue to own jointly at least 50% of the charter capital subscribed for on establishment of the bank. Of this total, founding shareholders who are organisations must own jointly at least 50% of the total shareholding of all founding shareholders.

- * *With respect to a licence for the establishment and operation of a joint venture bank or bank with 100% foreign owned capital:* Founding members or the owner of the bank who are a foreign credit institution must:
 - within the five years immediately preceding the year of lodging the application file for licensing and up until the time of issuance of the licence, not have committed any serious breach of the regulations on banking operations or of the other laws of its home country; be in profit; and have an assessment by its home country's competent authority as to it satisfying capital adequacy, other prudential ratios, complying with regulations on risk management and establishment of reserves;
 - be classified by international credit rating institutions as having a stable or better ranking and at the level of having the capability to implement financial undertakings and to operate normally even when the economic situation and conditions change in a non-profitable direction;
 - have total assets at least the equivalent of ten (10) billion US dollars at the end of the year immediately preceding the year of lodging the application licensing dossier;
 - not be the owner, founding member or strategic shareholder of another Vietnamese credit institution.

For a minimum period of 5 years from the date of licensing, the founding members must continue to own jointly 100% of the charter capital of the bank.

To obtain a licence for the establishment of a foreign bank branch, the parent bank must satisfy all the

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conditions for the establishment of a joint venture bank or bank with 100% foreign owned capital, but the total capital requirement is raised to at least the equivalent of twenty (20) billion US dollars.

Under Circular 40, the Head of the representative office of a foreign bank or other foreign organisation with a banking operation may not concurrently be the general director (director) of a foreign bank branch in Vietnam. Furthermore, under Circular 40 the Head of the representative office is not permitted to sign any business or investment contracts for the parent foreign bank with a Vietnamese organisation or individual. It is unclear whether the Head of the representative office can sign contracts as an authorised person (i.e. under a power of attorney) or not. We hope that this is merely an oversight on the part of the Vietnamese legislators and will wait for further guidelines on this point.

The maximum duration of a Licence is 99 years for a commercial bank or foreign bank branch, and five years for a representative office. A commercial bank, foreign bank branch or representative office must commence its operations within twelve months from the date of issuance of its licence, failing which the SBV may revoke its licence.

Assignment and redemption of capital contribution

Article 31 of Circular 40 deals with the assignment and redemption of the capital contribution portion in a joint venture bank, or bank with 100% foreign owned capital. To carry out an assignment or redemption, the bank, the founding member(s) and purchaser must satisfy multiple conditions on time limits and capacity. In particular:

- Founding members are only permitted to assign their capital contribution portions to other founding members for a period of five years from the date of issuance of the licence;
- Contributing members are only permitted to assign their capital contribution portions to other contributing members for a period of three years from the commencement of contributions..
- Two noteworthy conditions for redemption of capital are: (i) being in profit for the five consecutive years prior to the year of requesting such redemption, and having no accumulated losses; and (ii) having no penalty levied by the SBV for an administrative breach in the monetary and banking operations sector for the five consecutive years prior to the year of requesting such redemption and up until the time the SBV consents to such redemption.

The assignment and redemption of a capital contribution are also subject to the written consent of the SBV prior to implementation.

Circular 40 also supplements regulations on organisational structure, management and executive operations of banks. Circular 40 came into effect on 1 February 2012.

NEW CONCLUSIONS OF THE PRIME MINISTER ON NOTARISATION PROCEDURES FOR CONTRACTS CONCERNING RESIDENTIAL HOUSES AND LAND USE RIGHTS

On 28 February 2012, the Office of the Government issued Notice 63/TB-VPCP (**Notice 63**) addressing the Prime Minister's conclusions on the Government's strategy for simplifying and eliminating the compulsory

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requirement for contracts concerning residential houses and land use rights to be notarised. Under current policy these contracts are required to be notarised, otherwise they are not deemed to be legally valid and cannot be relied upon in a court of law by the parties to the contract.

Following Notice 63, notarisation will no longer be required to confirm the legitimacy of contracts relating to the following matters:

- Lease of land use rights, or of land use rights and assets attached to the leased land;
- Exchange of agricultural land use rights;
- Lending or permitting other people to stay in residential houses; and
- Authorisation to manage residential houses.

Notice 63 also clarifies the cases in which notarisation will still be compulsory. Contracts which concern the following matters will still need to be notarised in accordance with the laws of Vietnam:

- Mortgage of land use rights, or of land use rights and assets attached to land;
- Contribution of capital by land use rights, or by land use rights and assets attached to land;
- Transfer of land use rights, or of land use rights and assets attached to land;
- Donating land use rights, or land use rights and assets attached to land;
- Purchasing residential houses;
- Exchange of residential houses;
- Mortgage of residential houses; and
- Contribution of capital by means of residential houses.

Pursuant to Notice 63, the Ministry of Justice and the Ministry of National Resources and Environment will provide detailed guidelines on the procedures for notarisation and certification of contracts or documents relating to such changes. The ministries will also continue to examine new recommendations on eliminating requirements to notarise or certify contracts related to this area.

Whilst contracts relating to commercial properties will still need to be notarized, it is promising that the Government has made a commitment to reduce the administrative procedures linked to contracts concerning land use rights and residential houses. We look forward to more guidance on the practical implementation of Notice 63 in the future and will keep our readers up to date on developments.