Recent Legal Developments in Vietnam

1. New regulation on tax management for enterprises having related transaction

In the spirit of the government's Resolution 19-2016/NQ-CP, which promulgates key measures to improve the business environment and enhance national competitiveness, on 24 February 2017, the Government issued Decree No. 20/2017/ND-CP regulating tax management for enterprises engaging in related party transactions ("Decree 20") to combat transfer pricing and create a better investment climate in Vietnam. Decree 20 will take effect on 1 May 2017. Notable points of Decree 20 are as follows:

Definition of related parties

Pursuant to Decree 20, the ownership threshold is increased from the current 20% to 25% to identify related parties in comparison with current regulations specified in Circular 66 guiding the determination of market prices in business transactions between associated parties ("Circular 66"). Decree 20 eliminates definitions of related parties prescribed in the previous regulation such as (i) over 50% of products (calculated for each kind of product) sold by one enterprise which is directly or indirectly controlled by the other enterprise; and (ii) two entities have a business cooperation agreement on a contractual basis. In addition, under Decree 20, related parties also are defined as entities which are controlled by an individual through his/her contribution of capital to or direct involvement in the management of the enterprise.

Comparability analysis

Decree 20 provides new regulations on the substance-over-form principle for the purpose of comparing and determining prices of related party transactions.

Accordingly, the nature of related party transactions will be evaluated by comparing legally binding agreements, documents or arrangements on transactions of related parties with the reality of execution of these transactions by such parties. In case there are no legally binding agreements or such binding agreements are not compliant with the arm's length principle between unrelated parties, the related party transactions must be defined by the true nature of the business transactions between independent parties.[1]

Deductible expenses in common transactions

The decree specifies that new expenses that cannot be justified as arm's-length or which do not create income and added value for the taxpayer are not deductible. These include expenses paid to related parties:[2]

(i) Which perform no business relevant to the taxpayer.

(ii) Whose scale, number of employees and business functions are inappropriate to the value of the transaction and income received by the related party.

[1] Decree 20, Article 6.1.
[2] Decree 20, Article 8.1.

(iii) Which are not capable of controlling their business risks for their assets, goods, and services supplied to the taxpayer.

(iv) Which are resident in jurisdictions which do not impose corporate income tax.

Related party transaction documents

Decree 20 requires tax payers to prepare and maintain the related party transaction documents, including:[3]

(i) Local TP documentation (Local file);

(ii) Global Master file; and

(iii) Country by Country report (CbC report)

A taxpayer is exempt from preparing related party transaction documents, though they must submit annual transfer pricing declaration forms if one of the following conditions is met:[4]

(i) having revenue below VND 50 billion and the total value of related party transactions below VND 30 billion in a tax period;

(ii) the taxpayer entering into an Advance Pricing Agreement (APA) has submitted an annual APA report(s); or

(iii) having revenue below VND 200 billion and performs simple functions and achieves at least the following ratios of earnings before interest and tax to revenue on its respective business: distribution (5%), manufacturing (10%), processing (15%).

2. New Regulations on Commercial Mediation

On 24 February 2017, the Government issued Decree No. 22/2017/ND-CP on Commercial Mediation ("**Decree 22**") which takes effect on 15 April 2017.

Under the Commercial Law 2005, commercial mediation has been mentioned as a dispute settlement mechanism. However, prior to Decree 22, there was no further guidance on this mechanism. Decree 22 set out new principles, policy, requirements, sequence and procedures for resolving disputes through commercial mediation.

Notable points of Decree 22 are as follows:

(i) For the scope of settlement, disputes arising from commercial activities or disputes where at least one party is involved in commercial activities or disputes otherwise specified in other legislations may be resolved by commercial mediation;[5]

[3] Decree 20, Article 10.4.
[4] Decree 20, Article 11.2.
[5] Decree 22, Article 2.

(ii) For principles of dispute settlement, the settlement of disputes via commercial mediation must comply with the principle of voluntarism and equality relating to rights and duties between parties. Information relating to the mediation must be kept confidential, unless otherwise agreed by the parties or other regulations of the law;[6]

(iii) For forms of mediation agreement, a mediation agreement must be in writing and may be made in the form of a mediation clause in an agreement or as a separate agreement;[7]

(iv) For process of commercial mediation, the parties may agree to follow the mediation rules of a commercial mediation center or apply the mediation procedures agreed between them. In the absence of an agreement on the commercial mediation procedure, the mediator(s) may apply the procedure that is most appropriate to the nature of the dispute, as long as the procedure is approved by the parties. Commercial mediation may be conducted by one or more mediators, as agreed by the parties. The mediator(s) has the right to offer proposals on the resolution of the dispute at any time during the dispute resolution process. The time and place of the meditation may be agreed by the parties, or otherwise chosen by the mediator. [8]

(v) For the enforcement of the result of the mediation, when the parties reach a resolution as a result of a successful mediation, they must prepare a written document regarding the successful mediation, to be executed the parties and the mediator. This settlement agreement shall be binding on the parties.[9]

(vi) For recognition of successful mediation, either party shall have the right to request the Vietnamese court to recognize the settlement agreement. The procedure for such recognition is provided under Chapter XXXIII of the 2015 Civil Procedure Code.[10]

(vii) Decree 22 also stipulates the requirements for operation of mediator and commercial mediation organizations (including commercial mediation center and arbitration center). Notably, foreign commercial mediation organizations may also be licensed to operate in Vietnam via the forms of branch or representative office established in Vietnam. The Ministry of Justice and Provincial Department of Justice are the competent State authorities granting the licenses for establishment and operation of commercial mediation organizations.

3. Draft of Law on Competition Amendment 2017

On 5 April 2017, the Ministry of Industry and Trade issued the second Draft Law on Competition ("**Draft Law**"). Below are some notable points of the Draft Law, taking into consideration of the current regulations of Competition Law No. 27/2004/QH11 ("**Competition Law 2004**"):

(i) Under the Draft Law, it is clear that foreign enterprises will be subject to the Vietnamese competition regulations as they are listed as one of the governing subjects of the law.[11]

(ii) The Draft Law supplements ways to determine an enterprise's market share other than just based on turnover of the enterprises like the Competition Law 2004. Particularly, according to the Draft Law, enterprise's market share is defined by revenue, turnover or unit of goods and services.[12] Moreover, the

[6] Decree 22, Article 4.
[7] Decree 22, Article 11.
[8] Decree 22, Article 14.
[9] Decree 22, Article 15.
[10] Decree 22, Article 16.
[11] Draft Law, Article 2.1.
[12] Draft Law, Article 11.

Draft Law also stipulates the ways to determine market share of some specific enterprises including insurance companies and credit institutions.[13]

(iii) The Draft Law supplements certain agreements which are demeed to restrain competition. Unlike the Competition Law 2004, the draft does not apply any specific threshold of market share to determine and regulate the agreements in restraint of competition. Instead, it generally prohibits the following agreements in restraint of competition:

(A) Agreements which are conducted by competitors. This group may include agreements on fixing the sale or purchase price of goods and services, agreements on distributing outlets, sources of supply of goods, provision of services, agreements on restricting or controlling produced, purchased or sold quantities or volumes of goods or services, agreements on conniving to enable one or all of the parties of the agreement to win bids for supply of goods or provision of services; and

(B) Agreements of competition which cause or may potentially cause significant impact which restrain the competition. This group may include agreements to restrain technical or technological developments or to restrain investment, agreements to impose on other enterprises conditions for signing contracts for the purchase and sale of goods and services or to force other enterprises to accept obligations which are not related in a direct way to the subject matter of the contract, agreements on fixing re-sale price of goods and services, agreements on not transacting with other organizations or individuals, etc.

Provisions on exemption and leniency are added to enhance the efficiency of detecting and handling cases of competition restriction.[14]

(iv) An enterprise shall be deemed to be in a dominant market position if such enterprise has a market share of 30% or more in the relevant market or has a significant market power. Market power of an enterprise will be determined based on various critera such as market share, market structure, technology power, financial capacity, IP rights, infrastucture, etc.

(v) The Draft Law changes the way of controlling economic concentration in the manner of empowering the competent administrative body to assess the impact of competition to economic concentration and enhancing the initiative of the enterprises to implement notifying procedures to the competent administrative body and extending the assessment factors of an economic concentration case.[15]

Unlike the Competition Law 2004, the Draft Law generally stipulates that economic concentration will be prohibited if it causes or has the ability to cause significant impact to competition in Vietnam.[16]

In addition, economic concentration may be subject to a notification with the National Competition Committee in the following cases if before the economic concentration is conducted:

(1) One of the parties participating to the economic concentration has a market share of 20% or more in the relevant market;

(2) The value of economic concentration transactions from VND300 billion or more, or

[13] Draft Law, Article 11.
[14] Draft Law, Article 17.
[15] Draft Law. Article 28, 29.
[16] Draft Law, Article 29.

(3) One of the parties participating to the economic concentration has a total turnover in Vietnam's market from VND500 billion or more in two years before implementing economic concentration.[17]

(vi) Administrative fines are amended. Accordingly, a maximum fine imposed for agreements in restraint of competition or abuse of dominant market position or monopoly position is 10% of the total turnover of the violator in the financial year preceding the year in which the prohibited practice took place. The maximum fine imposed to a breach in economic concentration is only 5% of the same. The maxium fine imposed to a breach in unfair competition is VND500 million.

(vii) It is expected that the new competition law (if passed) will take effect in 2019.

[17] Draft Law, Article 25.

Contacts

Chau Huy Quang
Managing Partner

D +84 8 3821 2382
F +84 8 3520 8206
quang.chau@rajahtannlct.com

Vu Thi Que
Partner

D +84 8 3821 2382
F +84 8 3520 8206
que.vu@rajahtannlct.com

Pham Manh Dzung
Partner

D +84 8 3821 2673
F +84 8 3821 2685
dzung.pham@rajahtannlct.com

Lim Wee Hann
Partner
Rajah & Tann Singapore LLP

D +65 6232 0606
F +65 6428 2201
wee.han.lim@rajahtann.com

ASEAN Economic Community Portal

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.

Our Regional Contacts

RAJAH & TANN | *Singapore*

Rajah & Tann Singapore LLP
T +65 6535 3600
F +65 6225 9630
sg.rajahtannasia.com

R&T SOK & HENG | *Cambodia*

R&T Sok & Heng Law Office
T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN 立杰上海
SHANGHAI REPRESENTATIVE OFFICE | *China*

Rajah & Tann Singapore LLP
Shanghai Representative Office
T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

Assegaf Hamzah & Partners

Jakarta Office
T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office
T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Lao PDR*

Rajah & Tann (Laos) Sole Co., Ltd.
T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*

Christopher & Lee Ong
T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

RAJAH & TANN NK LEGAL | *Myanmar*

Rajah & Tann NK Legal Myanmar Company Limited
T +95 9 73040763 / +95 1 657902 / +95 1 657903
F +95 1 9665537
mm.rajahtannasia.com

GATMAYTAN YAP PATACSIL
GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*

Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)
T +632 894 0377 to 79 / +632 894 4931 to 32 / +632 552 1977
F +632 552 1978
www.cagatlaw.com

RAJAH & TANN | *Thailand*

R&T Asia (Thailand) Limited
T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office
T +84 8 3821 2382 / +84 8 3821 2673
F +84 8 3520 8206

Hanoi Office
T +84 4 3267 6127
F +84 4 3267 6128
www.rajahtannlct.com

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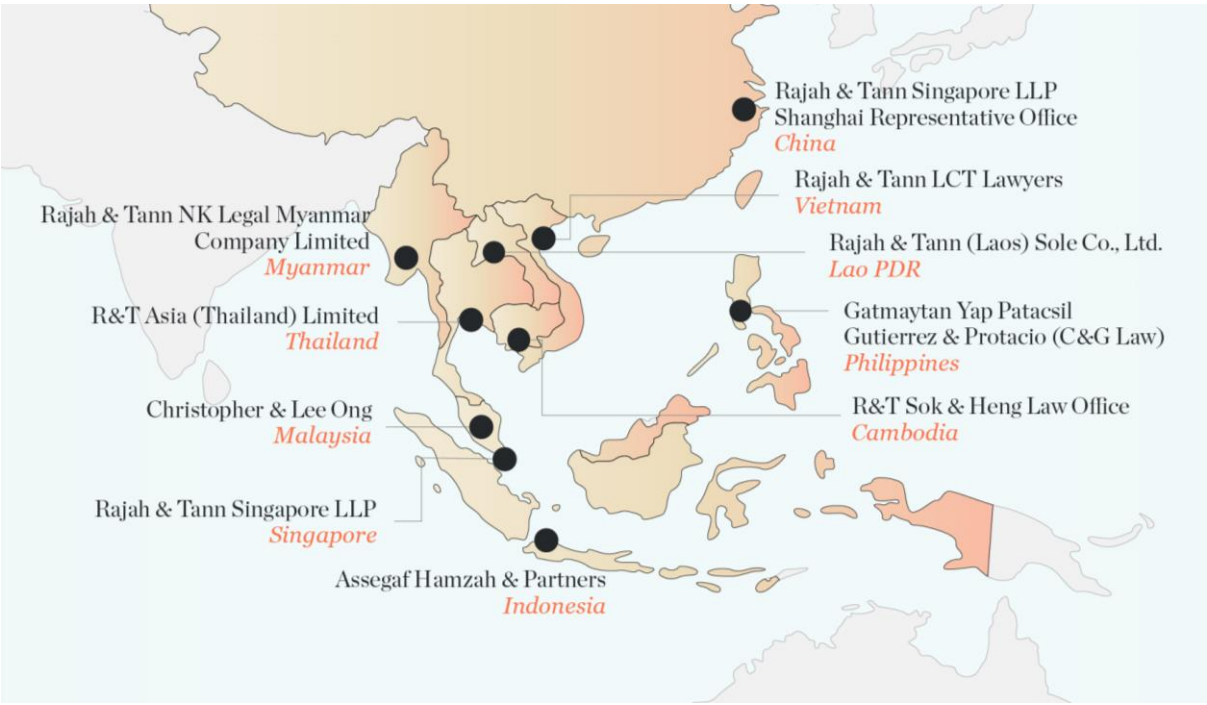

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