

### LEGAL NEWS UPDATE

VOL 2 ISSUE 1

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106/2011/ND-CP	Decree No. 106/2011/ND-CP dated November 23, 2011 of the Government amending and supplementing a number of articles of the Government's Decree No. 26/2007/ND-CP dated February 15, 2007, detailing the implementation of E-transaction Law regarding digital signatures and certification service of digital signature
<b>THE PRIME MINISTER</b>	
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<b>THE MINISTRY OF FINANCE</b>	
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<b>THE STATE BANK OF VIETNAM</b>	
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#### COMMUNITY LAW FIRM

##### COMMUNITY LAW HANOI OFFICE

Unit 705, 7th Floor, DMC Tower, Kim Ma street,  
Ba Dinh Dist, Ha Noi

Email: [Hanoi@communitylaw.vn](mailto:Hanoi@communitylaw.vn)

Tel: (84-4) 2220 9868

Fax: (84-4) 2220 9678

##### COMMUNITY LAW HCMC OFFICE

Unit 1901, SAI GON TRADE CENTER, 37 Ton  
Duc Thang Street, Dist 1, HCM City

Email: [Hcm@communitylaw.vn](mailto:Hcm@communitylaw.vn)

Tel: (84-8) 2220 0930

Fax: (84-8) 2220 2201

## BUSINESS LAW – INTELLECTUAL PROPERTY – INVESTMENT MARKET EVALUATION

### CONTRACTOR SELECTION OF AIRCRAFT LEASE WILL BE ONLY MADE BY COMPETITIVE BIDDING



#### COMMUNITY LAW FIRM

***On December 05, 2011, the Government issued the Decree No. 110/2011/ND-CP on the management of lease and purchase of aircraft and aircraft engines, spare parts and supplies and maintenance and repair services of aircraft, aircraft engine, spare parts and supplies ("Decree No. 110/2011").***

The Decree No. 110/2011 will apply for the projects using 30% and more State capital; the activities which does not make investment project such as: lease aircraft, aircraft engine, aircraft spare parts and supplies and purchase of aircraft spare parts and supplies, service of aircraft spare parts and supplies... of Vietnamese enterprise having State capital of 30% and more.

The contractor selection of aircraft shall be carried out in the form of competitive bidding; In case the type of aircraft needed for lease is scarce and the contractor of aircraft lease requests for participation in an auction, the competent person of the enterprise shall decide on participation in the auction on the basis of aircraft information and market price.

In case of purchasing aircraft, the contractor of aircraft supply shall be chosen through the following forms: Opened bidding, Limited bidding and Contractor appointment by direct negotiation; the form of contractor appointment will be only applied when the supplier is aircraft producer and having approval of the Prime Minister.

***This Decree shall take effect on February 01, 2012.***

### AMENDMENT ON THE REGULATIONS OF CERTIFICATION SERVICE OF DIGITAL SIGNATURE

***On 23 November 2011, the Government promulgated the Decree No. 106/2011/ND-CP to amend and supplement a number of articles of the Decree 26/2007/ND-CP dated 15 February, 2007 providing detailed regulations on the implementation of the Law on E-transactions on digital signature and certification services of digital signature ("Decree No. 106/2011").***

The Decree No. 106/2011 provides additional regulations on public digital signature which is digital signature used by the subscribers using digital certificates created by certificates service provider of public digital signature. Specialized digital signature is the digital signature used by subscribers using digital certificates created by the certificates service provider of specialized digital signature created.

According to the Decree No. 106/2011, the legal representative of organizations providing certification services of public digital signature is not required to be knowledgeable about regulations on digital signatures and certification services of digital signatures as previously regulated. This new Decree only requires that technical staff, management staff, executive officers, security management staff and customer service personnel must meet professional requirements and scale of service; not yet be convicted.

A dossier applied for license of certification of public digital signature is also specifically regulated in this Decree. The dossier must be made in 06 sets (02 original and 04 copies).

***These amendments and supplements shall take effect on 01 February, 2012.***



## BUSINESS LAW – INTELLECTUAL PROPERTY – INVESTMENT MARKET EVALUATION

### REDUCTION OF 50% TAXABLE LAND LENT IN 2011 AND 2012



COMMUNITY LAW FIRM

***Economic institutions conducting businesses in the manufacturing sector in 2011 and 2012 will be entitled to 50 % reduction in land rental price for leased land which is annually paid, according to the Decision 2093/QĐ-TTg dated November 23, 2011 issued by the Prime Minister.***

The subjects of leased land rent reduction shall include: economic organizations which are in the period of redefining land rent price for the new stable period; economic organizations whose period of land rent exemption is expired are in the period of redefining land rent to be paid or; economic organizations used the land before March 1st, 2011 are temporarily paid land rent that must officially determine the land rent to be paid as from March 1st, 2011.

In order to be entitled to reduce 50% reduction, the economic organization must use the leased land in right purpose, in compliance with the land law; have leased land amount redefined in accordance with the regulations of Decree No. 121/2010/ND-CP dated 30 December that increases 02 times or more in comparison with the land leased amount paid in 2010 (provided that having the same purpose of land leased amount and area payable for land rent).

***This Decision takes effect as from the signing date.***

### GUIDELINES ON CUSTOMS IN RESPECT TO EXPORT AND IMPORT GOODS

***On November 27, 2011, the Ministry of Finance issued Circular No. 168/2011/TT-BTC guiding on State's statistics on customs in respect to exported and imported goods. ("Circular No.168/2011/TT-BTC")***

Specifically, the State's statistics on customs in respect to export and import goods are the process of collecting, processing, synthesizing, evaluating, publishing, storing, cooperating and exchanging information about exports and imports of Viet Nam operated by General Department of Customs.

The statistics of export and import goods applies in accordance with the general trade system implemented by the General Department of Customs. In some cases, in order to serve for the purpose of researching, comparing and analyzing, statistics on import and export goods of Viet Nam may be implemented according to the special trade system or extensively special trade system.

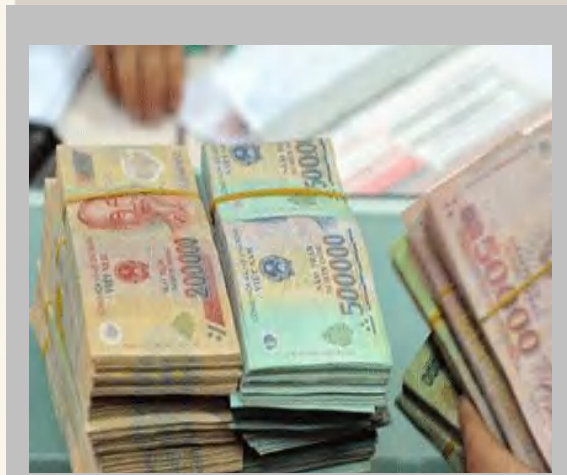
The scope of statistics is all goods taken out of the territory of Vietnam or brought into the customs territory of Vietnam that decrease or increase material resources of Vietnam. The time for statistical activities is the time when customs offices accept the customs declaration form; the statistic value of import and export goods is the value made by organizations, individuals for the purpose of summarizing and statistical report.

This Circular No. 168/2011/TT-BTC also regulates that statistical information on export and import goods is collected and processed through steps of customs professional procedures...

***The Circular No. 168/2011/TT-BTC shall take effect on January 15, 2012 and replace the Decision No. 124/2003/QĐ-BTC dated August 01, 2003 on an issuance of the regulations on State Statistics of the customs sector.***

**BUSINESS LAW – INTELLECTUAL PROPERTY – INVESTMENT MARKET EVALUATION**

**PROLONGING PAYMENT DEADLINES OF  
CORPORATE INCOME TAX FOR LABOR-INTENSIVE  
ENTERPRISES**



COMMUNITY LAW FIRM

***On November 25, 2011, the Ministry of Finance issued the Circular No. 170/2011/TT-BTC guiding the implementation of the Prime Minister's Decision No. 54/2011/QĐ-TTg of October 11, 2011, on prolonging payment deadlines 2011 corporate income tax for labor-intensive enterprises in some sectors to help them overcome difficulties and encourage their production and business.***

Specifically, the deadlines for payment of 2011 enterprise income tax will be prolonged for one year for labor intensive enterprises or cooperatives as from the date of tax payment as regulated.

Labor intensive enterprise is an enterprise having the total employees regularly used in 2011 of over 300 employees. In the case that the enterprise operates in the form of parent company-subsidaries, the number of employees used as a basis for prolonging tax payment in respect to the parent company will not include the employee of its subsidiaries

***This Circular takes effect on January 9, 2012, and applies to the prolongation of 2011 enterprise income tax payment deadlines under Decision No. 54/2011/QĐ-TTg.***

**GUIDANCE ON ENVIRONMENT PROTECTION  
FEES IN RESPECT TO MINERAL  
EXPLOITATION**

***On November 16, 2011, the Ministry of Finance issued the Circular No. 158/2011/TT-BTC guiding the implementation of the Government's Decree No. 74/2011/ND-CP of August 25, 2011, on environmental protection charge for mineral exploitation.***

The quantity of exploited minerals in the period for determining the payable amount of environmental protection fee is the quantity of crude mineral ores actually exploited in the period of fee payment, regardless of exploitation purpose and exploitation technology or exploitation areas or conditions.

Payment of environmental protection fee for mineral exploitation is not required for the following cases: organization, individual exploits minerals used as common construction materials within the residential land area under the land use right of a household or individual to serve the construction of such household's or individual's works at such land area; and organization, individual exploits for leveling grounds or building security and defense works.

Mineral exploiting organization, individuals shall submit declaration dossiers of environmental protection fee directly to the Tax Authority at which they declare and pay royalty tax. In case no environmental protection charge for mineral exploitation arises in a month, fee payers must still declare and submit charge declaration forms to Tax Authority.

***This Circular takes effect on January 1, 2012, and replaces the Ministry of Finance's Circular No. 67/2008/TT-BTC of July 21, 2008, and the Circular No. 238/2009/TT-BTC of December 21, 2009.***



### CASE STUDY 1:

#### TWO ENTERPRISES ON DISPUTE, THE EMPLOYEE NOT BE PAID SALARY

##### Contract termination contrary to the agreement

In order to ensure the situation of order and safety for the construction of construction work at Yen So Park, Gamuda Company (Malaysian contractor of the above-said construction work) signed an economic contract with Dai Viet Company for providing the security service. The representative of Dai Viet Company said, after signing the contract, their company provided 72 security staffs to work at the above-said construction works, however during the process of contract implementation, Gamuda Company regularly paid late the service fee, including the amount of worker's salaries.

On late September, 2010, Gamuda unexpectedly informed to the provision company of security service to request for contract termination. They based on the reason of working attitude, spirit of security staffs of Dai Viet Company that did not comply with the contract and many big losses of assets occurred in the construction work. Dai Viet Company requested that the contract termination must be informed prior 14 days in accordance with the signed contract. However at 14 pm, 27 September, Gamuda unexpectedly informed to request Dai Viet Company for withdrawing the whole staffs from the construction works before 17 pm without any notice.

After contract termination, the negotiation of payment for service fees of 04 months (including June, July, August, September with the total amount of more than 670 million Vietnam Dongs) that Gamuda Company is currently in debt with the employees of Dai Viet Company remains in controversy.

- **CASE STUDY 01:** TWO ENTERPRISES ON DISPUTE, THE EMPLOYEE NOT BE PAID SALARY
- **CASE STUDY 02:** TAX EVASION OF FDI BUSINESS
- **CASE STUDY 03:** FDI DISBURSEMENT: WEAK CAPACITY OF CAPITAL ABSORPTION

Gamuda Company requested to deduct more than 246 million Vietnam Dongs in the total debt amount due to deduction for some lost assets.

Dai Viet Company also sent a notice to the Police Authority of Hoang Mai District to investigate and clarify the loss of assets when having the signs of criminal, and on the basis of investigation results to find a resolution and avoid the unclearness that may damage the interest of the employees. On 18 October, the Police Authority of Hoang Mai District sent an official letter No. 798 to respond as follows: Dai Viet Company must directly negotiate with Gamuda Company to resolve the contract dispute. If not self- resolving the dispute, the parties may reach a judgment of dispute resolution in the court.

Due to dissatisfaction of being delayed salary payment in many months by Gamuda Company, many workers concentrated at the office of Gamuda Company to request for salary payment. Gamuda Company considered that the workers intendedly went on strike and caused the disorder so they requested the police to dissolve.

The negotiation between both companies has not reached any result, Gamuda Company insists on the perspective of deducting money for the asset loss. Dai Viet Company continues to fight for the employee interest. It is unclear when the dispute ends and the workers at the construction work of Yen So Park are still the ones badly affected when they have not yet received any wage in 04 months.

**Note of Community Law Firm: No comment**

## BUSINESS LAW– INTELLECTUAL PROPERTY – INVESTMENT MARKET EVALUATION

### CASE STUDY 2:

#### TAX MANAGEMENT AUTHORITY OF VIETNAM: DEBUNKING WAYS OF TAX EVASION OF FDI ENTERPRISES

Currently about 60% of foreign invested enterprises (FDI) operating in the field of garment, software, service, metal business ... in Ho Chi Minh City continuously declared loss in many years in order to tax in evasion. With many different ways of tax evasion, such enterprises declared their total expense on tax in global in the minimum level to gain the highest profit.

#### Many ways of tax evasion:

According to the Ho Chi Minh Tax Department, in order to avoid the taxable income in Vietnam, the FDI enterprises declared loss in many ways as follows: continuous declaration of loss in many years, proposal for VAT refund with a big amount of tax, accumulated loss over charter capital but still expansion of business and production, .... However, the most popular way is to declare the high price of input materials, declare higher fee of advertisement, promotion in order to reduce the profit. Moreover, in order to declare from profit to loss by the way of price transfer, FDI enterprises can not perform individually but perform in their whole group or associate themselves in each group. Therefore, those enterprises self- arrange for price transfer through the related transaction in order to gain the highest profit.

#### How to prevent?

As disclosed by Mr Nguyen Trong Hanh, Vice Director General of Ho Chi Minh Tax Department, based on the suspicious expression that can be considered as tax evasion of enterprise, the tax department classified enterprise, determined the risk level for inspection. In order to debunk the way of tax evasion of those enterprises, in the years of 2009 and 2010, the Tax Department chose about 40 enterprises to directly work and then request the enterprise for explaining why the enterprise continuous to lose while the revenue increases year by year.

After the meeting with the tax department, as from the year 2009 to end of 2010, 1,342 FDI enterprises in the location declaring profit that account 55.14% enterprise that must send the tax finalization report. In comparison with the year 2009, the number of FDI enterprise declaring profit increase 8%, mainly the FDI enterprise invited for working by Ho Chi Minh Tax Department.

In 2010, after inspecting 90 enterprises, it is reduced the loss of 1.637 billion Vietnam Dongs, collected and fined more an amount of 360 billion Vietnam Dongs. The average of loss decrease on each inspection profile is more than 18 billion Vietnam Dongs, collection and fine of more than 4 billion Vietnam Dongs per profile. Recently, in the first months of 2011, 04 Inspection Division of Tax Department also performed inspection in some enterprises, deducted loss of 817 billion Vietnam Dongs, collected and fined 418 Vietnamese Dongs.

The concentration on inspection in enterprises declaring loss at Ho Chi Minh City Tax Department has sent the warning to the enterprises regularly declaring loss, especially in respect to the enterprise having related transaction. Some enterprises have to amend the selling price, processing price. In respect to the enterprise that declares loss and does not pay tax, after inspection, must pay collected tax and be fined, lost the incentive right and withdraw VAT tax refunded or deduct loss.

According to Mr Hanh, together with the forms of propaganda and campaign, the Tax Department also instructs other responsible divisions to perform inspection, directly fight with some enterprises declaring typical loss, especially until this moment, the Tax Department has transferred 08 profiles of intentionally violating enterprises to the economic security authority for investigation. Moreover, in coming time, the Tax Department will increase the inspection performance of tax by specific matter to prevent price transfer in respect to the enterprises declaring loss in many years but still expanding business and production, in order to limit the loss declaration of enterprises and avoiding the loss of state budget.

**Note of Community Law Firm: The FDI enterprises declaring loss should have plan for suitable explanation and document preparation to avoid unexpected meeting with the authority for the reason of stability in operation.**

### CASE STUDY 3:

#### FDI DISBURSEMENT: WEAK CAPACITY OF CAPITAL ABSORPTION

The amount of capital registration is high but the absorption is low. This is “incurable disease” of Vietnam economy. The experts point out that there are two main reasons for low absorption. Including the reason that the FDI enterprise registered capital in paper that causes the FDI capital registration is virtual; in addition, other major cause is the limit of capital absorption capacity.

##### Low disbursement:

According to the calculation of Vietnam's Association of Foreign Invested Enterprises, until the end of 2010, the total capital of foreign direct investment (FDI) into Vietnam is 216 billion USD, but the capital disbursement is only 77 billion USD; this means that there has not yet disbursed 139 billion USD. Meanwhile, until November 2011, an additional 10.05 billion USD have been disbursed that increases ...1% in comparison with the same period in 2010.

In reality, Vietnam economy records a huge contribution of this source of investment capital. In detail, the FDI enterprises contribute more than 25% of total capital investment of the whole society; the export quota of the FDI enterprises uses 55% of the total export quota of the whole country. In addition, the FDI enterprise contribute significantly the positive element to Vietnam economy as transfer of new technology, creation of new employment for millions of employees, contribution to the training on enterprise administration and management.

Moreover, the high amount of capital registration, low amount of disbursement show the problem of management and absorption of FDI capital. In reality, many projects, FDI enterprises invest and register capital but can not perform because the investor does not have capital for disbursement. Relating to this problem, the experts are of the view that the fault belongs to vulnerabilities in management, control and evaluation, assessment of capacity of the responsible authority. The Government and the Ministry of Planning and Investment are planning to control the management on this type of enterprise, project. Especially, during the recent time, many local authorities has aggressively withdrawn the license, canceled the virtual FDI project to re-establish the order of FDI investment.

However, it is fair to say that the capacity of capital absorption of Vietnam is problematic. The representative of FDI enterprise disclosed that the biggest encumbrance and difficulty when the enterprise performs the project is the extremely complicated and troublesome administration procedures. However, even when having finished the administration procedure, the activities of site clearance are more difficult. During the recent time, billion USD projects are postponed due to the delay of site clearance. For example, the Saigon Atlantic Hotel City Project (Winvest Investment Vietnam Company Limited under the Winvest LCC Group, USA) with the investment capital of 4.1 billion USD can not implement or Guang Lian Steel Project with the investment capital of 4.5 billion USD is also in the situation of not handing over the site...



### Difficulty is still ... in trouble

En reality, the managing authority and FDI enterprise both understanding that it must improve the administration procedure, business environment and especially site clearance that may increase the FDI capital disbursement. However, it is still in difficulties when these improvements run slow. In the Tata Steel (Hatinh) Project, even this enterprise agreed to advance about 30 million USD to pay for site clearance, it does not help much. The reason is that the project needs the land area of 900 ha, relocation of about 3,000 household so the expense and compensation of site clearance is up to 4,000 billion Vietnam Dongs. The provincial budget is not enough to implement while it is difficult to convince the investor to advance more money. Thus when this 05 billion USD project is in the status of preparation and implementation of administration procedures, the representative of this enterprise discloses about possibility of transferring the capital to other country.

Together with those difficulties, the FDI communities also point out that aside from the infrastructure, the human resources and plan of supporting industries are the weakness of Vietnam. Mr Shinichi Iwana (The President of Association of Japanese Enterprises in Danang) said that, in order to facilitate to increase the FDI capital, beside the problem on infrastructure and procedure, Vietnam needs focus on training of human resources to reduce the time and training expense for the enterprises.

The expert are also of view that if Vietnam meets the condition such as infrastructure, human resource, the speed of FDI disbursement will be faster, the scale of project will be completed sooner for operation and in use; even the possibilities of expansion of investment scale will be considered when the investment environment becomes attractive.

According to the statistics, the capacity of capital disbursement of Vietnam is more and more difficult. The detail is that in 2000, the enterprise disbursed 2.2 billion USD FDI capital (used more than 90% of total investment capital) but in 2006, it was disbursed 4.1 billion USD (used 40%). Until 2011, the disbursement of capital is 4.5 billion USD (used less than 30% of total investment capital). Doctor Le Dang Doanh is of the view that the above statistic point out the inefficiency of disbursement in Vietnam.

***Note of Community Law Firm: The FDI enterprises before investment registration should consider capital sources and only register investment project when meeting the investment conditions. It is easy to increase investment capital but the decrease of investment capital is really difficult.***