

DC LAW NEWSLETTER

International

Issue October 2009



INDEX

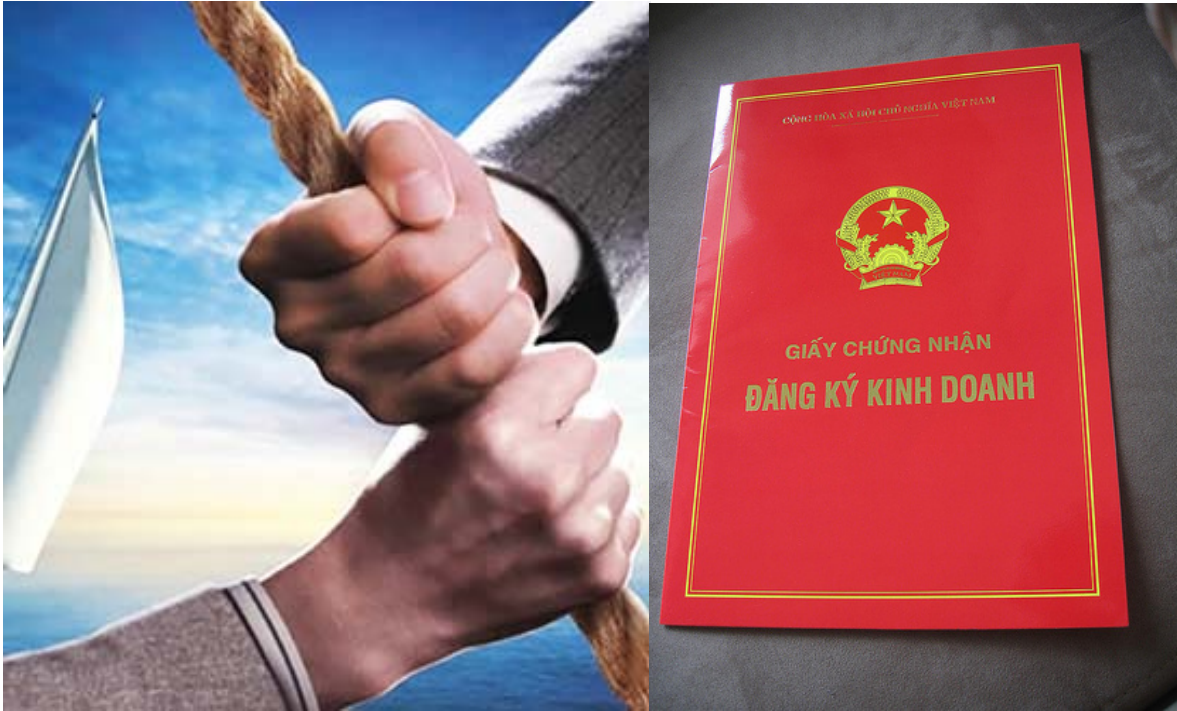
Part 1. Legal News

1. [Guidelines on issuance of business licenses](#) Page 2-3
2. [Plan on restructuring the Electricity industry in Vietnam](#) Page 4-5
3. [PIT applicable to transfers and receipt of Real Property](#) Page 6-8
4. [Procedures for issuance of licenses to FIE for trading and distribution](#) Page 9

Part 3. Legal Advice

- [Break ground under Vietnamese law for a residential construction project](#) Page 10-11

1. Guidelines on issuance of business licenses



On May 18, 2009, the Ministry of Industry and trade issued the Official Letter 4422/ BCT-KH which provides the guidelines on issuance of business licenses for trading and distribution activities by enterprises with foreign owned capital which have been granted an investment certificate in an industrial zone, export processing zone or economic zone. In details, they include:

A. Authority to issue business licenses to carry out trading and distribution activities:

Trading and distribution activities including import, export, distribution of goods and the activities prescribed in the Commercial Law shall be subject to procedures for the issuance of a business license.

After receiving a written approval from the Ministry of Trade and Industry, provincial people's committees shall be responsible to issue business licenses for trading and distribution activities to enterprises with foreign owned capital which have already been issued with an investment certificate.

B. Guidelines on order and procedures for issuance of business licenses:

1. Application file requesting issuance of a business license

The application file shall comprise:

1.1 The file on evaluation of the investment project

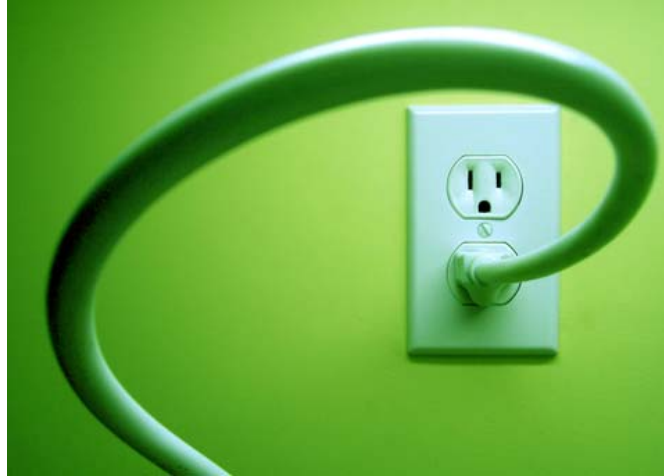
1.2 The file for issuance of a business license comprising:

- a. Request for issuance of a business license made on standard form MD-1 which was issued with Circular 09;
- b. Explanatory statement proving satisfaction of business conditions completed on the standard form in the Appendix of this Official Letter;
- c. Registration document of items for exercise of trading and distribution activities specifying whether the operational form is wholesale, retail, or establishment of a retail sales outlet for groups of goods; commercial advertising; commercial assessment services; or so forth.

2. Rules on issuance of business licenses

- o A business license shall be issued on standard form GP-1 which was issued with Circular 09.
- o The rules set out in article 8 of Decree 23 must be followed closely. An Official Letter seeking an opinion from the Ministry of Industry and Trade must contain a request for an opinion on or an assessment of the status of investment in capital construction to form the enterprise in accordance with the schedule stipulated in the eco-technical explanatory statement, the current status of production and business activities, and the status of discharge of tax obligations to the State.
- o Grant of a business license to an enterprise shall be considered to be a concurrent addition to the operational objectives of the enterprise.

2. Plan on restructuring the Electricity industry in Vietnam

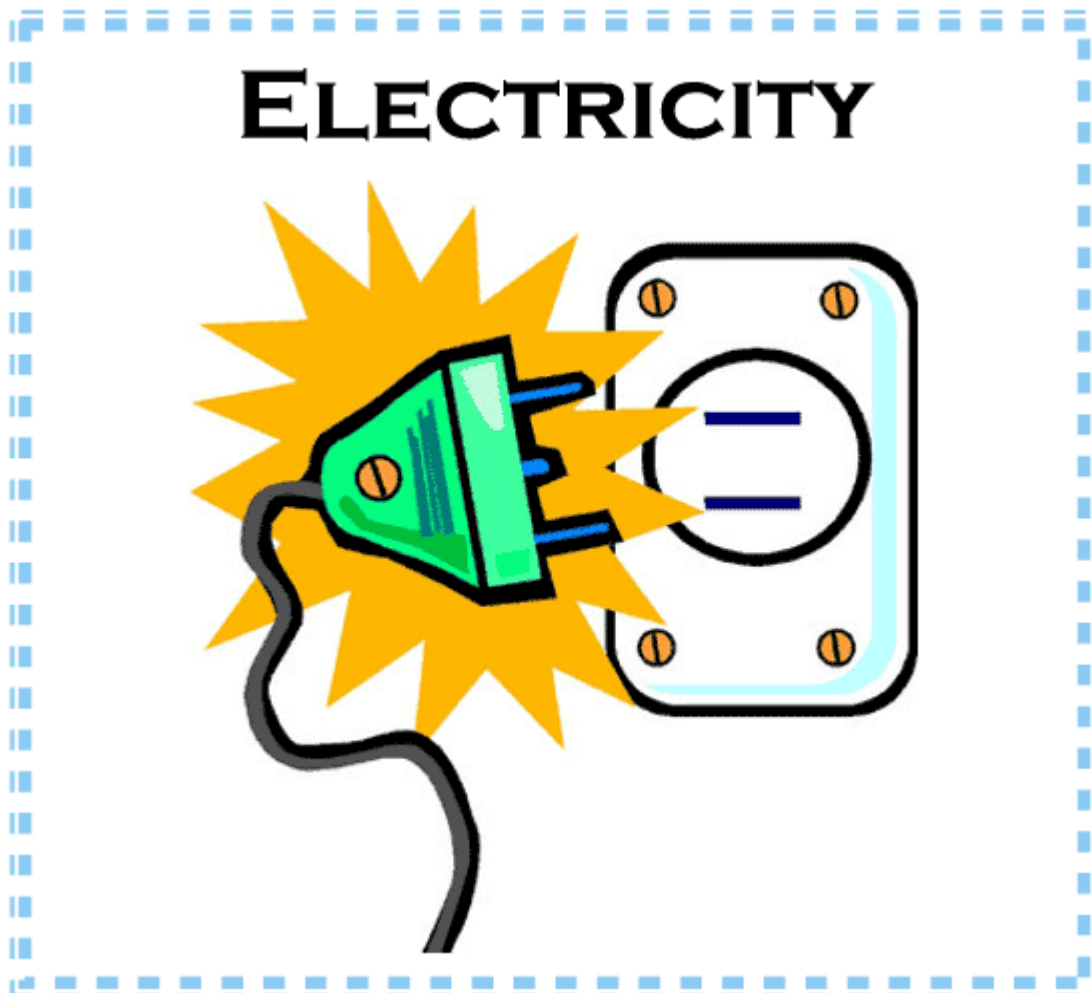


On July 31, 2009, the Vietnam Government Office issued the Notice 232/TB-VPCP with conclusions of the Prime Minister of the government regarding the Plan on restructuring the electricity industry to develop an electricity market of Vietnam. The Plan includes a consideration of the new requirement that, in practice, investment in electricity generation requires not only investment from Electricity of Vietnam (“EVN”), but also from many other investors and from all economic sectors. Also, the Plan includes different options for restructuring the electricity industry.

1. Regarding electricity generation projects, the Ministry of Industry and trade shall check the performance of electricity generation projects in accordance with Power Development Master Plan VI. Besides, projects which current investors are unable to initiate should be assigned to other investors to implement. Nevertheless, investors should be sought for projects which do not yet have an investor. Priority should be given to investors being EVN, PetroVietnam and Vinacomin.

2. Regarding electricity prices, the Ministry of Industry and Trade shall preside over management with the Ministry of Finance and the Ministry of Planning and Investment to formulate a regime for adjusting electricity selling prices in accordance with the market regime. Also, the three Ministries should ensure that electricity investors and commercial operators cover their investment costs and obtain a reasonable profit; and that family household in rural areas, poor families, and a number of other special subjects are subsidized. In addition, the Ministry of Industry and Trade shall make a submission to the Prime Minister to establish a Working Group for foreign investors to negotiate their electricity selling prices to EVN and other State bodies for the purposes of ensuring a reasonable profit, financial transparency, and harmonization between the interests of the State, of investors and of consumers. More to the point, the Ministry of Industry and Trade shall issue regulations on the contents, order and procedures for evaluation and approval of contracts for the purchase and supply of electricity.

3. Regarding administration of the electricity system, the Ministry of Industry and Trade shall issue Regulations on administration of the National Electricity System.
4. Regarding economical electricity use, the Ministry of Industry and Trade shall research and submit to the Prime Minister a National Electricity Economizing Program to be followed from the investment stage.
5. Regarding the restructure of EVN, EVN shall lead over co-ordination with relevant bodies to research and formulate a Plan on restructuring the electricity generation member units of EVN to become independent electricity generation companies. Also, EVN shall formulate and submit to the Prime Minister a Plan to establish electricity distribution Corporations namely Northern Viet Nam, Central Viet Nam, Southern Viet Nam, Ha Noi, and Ho Chi Minh City, to operate in the form of parent-subsidary companies.



3. PIT applicable to transfers and receipt of Real Property



On August 12, 2009, Ministry of Finance issued Circular 161-2009/TT-BTC to provide guidelines of personal income tax (“PIT”) applicable to transfers of real property and receipt of inheritances and gifts being real property. This Circular shall be full force and effect after 45 days from the date of its signing.

In the case of determining who the taxpayer liable to pay tax is, they are concluded specifically as follows:

1. The individual transferor shall be the taxpayer on a transfer of real property. If a transfer contract stipulates that the transferee must be responsible for the tax obligations on behalf of the transferor, then the transferee shall be liable to declare and pay tax.
2. The individual recipient of an inheritance or gift being real property shall be the taxpayer on receipt of such inheritance or gift.
3. Each individual joint owner shall be the taxpayer on a transfer of jointly owned real property, or on receipt of an inheritance or gift being jointly owned real property. Also, each individual named in the official document of donation shall be the taxpayer in a case of inheritance or a gift being real property.
4. If a land certificate has not yet been issued for real property which is transferred and the competent State administrative authority has consented to the transfer, then other valid documents recognized by the competent State body shall provide the basis for determining who the taxpayer is.

In the cases where PIT is exempt or shall temporarily not be collected, they are determined as follows:

1. PIT shall temporarily not be collected from any individual or family household with a land use right ,and/or who owns a house when making capital contribution by such real property in order to establish an enterprise or to increase production and business capital of an enterprise in accordance with law.
Any individual contributing capital by real property must attach to his or her tax declaration, documents proving the capital contribution by real property. If profit is distributed to such individual, then that individual must pay PIT on such capital investment activities. If such individual transfers his or her capital contribution portion to another entity, then the former individual must pay PIT on income from the capital transfer, and must also pay PIT on the earlier transfer of the real property as capital contribution to the enterprise.
2. Income being compensation received when the State recovers land, including income paid by economic organizations and compensation or assistance received when one's land is recovered by the State.
3. PIT shall also be exempt on income from the transfer of residential house, right to use residential land, and assets on the land by an individual who has only one sole residential house and/or residential land use right in Vietnam. A transferor shall be liable to make self-declaration specifying the PIT is exempt and shall be legally liable for the declaration that he or she has only one sole residential house and/or residential land use right in Vietnam.

Regarding the obligation to declare and pay tax on transfer of real property, there are four important points to keep in mind

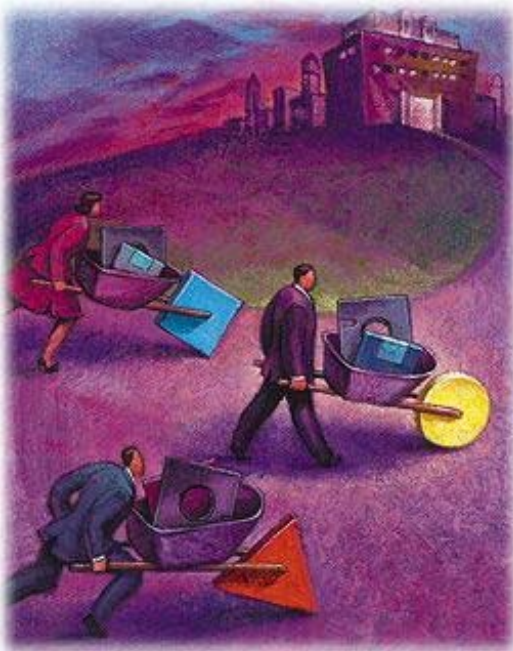
1. If an individual has a land use right and/or owns a house which he or she uses to guarantee loan capital or to make payment at a bank or credit institution; then at the due date for repayment, such individual is unable to repay and the bank or credit institution conducts procedures to realize the property by selling it. Subsequently the bank or credit institution must declare and pay PIT on behalf of the individual prior to conducting accounting finalization of the debt to such individual.
If an individual has a land use right and/or owns a house which he or she mortgages in order to borrow capital or to make payment to another entity which then transfers all or a part of such property in order to recover the debt, then the previous individual must declare and pay PIT or else the entity when conducting procedures to transfer the property must declare and pay PIT on behalf of such previous individual prior to conducting accounting finalization of the debt.
The individual named on the land use right certificate shall be PIT exempted when a bank conducts a realization sale of the asset being the sole residential house and/or residential land use right of such individual.
2. If an individual transfers a real property to an entity pursuant to an execution judgment of a court, then such individual must declare and pay tax or the entity holding the auction must declare and pay PIT on behalf of the transferor. However, PIT will be exempted in the case where real property owned by an individual is confiscated by a competent State authority and then auctioned.

3. If individuals exchange land as between themselves, then each individual exchanging land must declare and pay PIT.
4. If an individual contributes capital to an entity to construct a house in order for such individual to have the right to purchase an apartment or the house foundations; however, during the contractual process, such individual transfers his or her capital contribution and right to purchase and apartment or the house foundations to another entity, then such individual must declare and pay PIT on such activity.

The price of a transfer of real property to be used as the basis for assessing PIT shall be the price in accordance with the transfer contract. If the land price in the transfer contract is less than the price level stipulated by the provincial people's committee, then the basis for calculating the land price shall be the regulations of the provincial people's committee for purposes of assessing tax. If the land price in the contract is higher, then the land price in the contract shall be used for the tax assessment.

In the cases of receipt of an inheritance or gift being real property, the basis for assessing tax shall be the value of the property at the time of lodging a valid file with the competent State administrative body. The value of a land use right shall be determined on the basis of land prices stipulated by the provincial people's committee; and the value of houses and buildings, including engineering works, on the land shall be the values for assessing registration fees.

4. Procedures for issuance of licenses to FIE for trading and distribution



Distribution

On July 13, 2009, the Ministry of Industry and Trade issued Letter 6656/BCT-KH to provide the specific guidelines on files for issuance of licenses for trading and distribution activities by enterprises with foreign owned capital.

In the case of investment for the first time in order to carry out trading and distribution activities, files for issuance of a license shall be prepared in accordance with paragraph (a) of clause 2 of Part II of Circular 09/2007/TT-BTM (“Circular 09”) of the Ministry of Industry and Trade dated July 17, 2007.

In the case of additions in order to carry out trading and distribution activities, the people’s committee of a province or city shall be responsible to issue business licenses for trading and distribution activities to enterprises with foreign owned capital which have been issued with an investment certificate, after obtaining written approval from the Ministry of Industry and Trade.

In the details, the application file for issuance of business license shall comprise:

- File for evaluation of an investment project.
- File for issuance of a business license comprising:
 - a) Application for issuance of business license on Form MD-1 with Circular 09;
 - b) Explanatory statement on satisfaction of business conditions;
 - c) Registration of items for carrying out trading and distribution activities: specifying the form of activities as being wholesale, retail or establishment of outlets to retail groups of goods; commercial advertising; commercial assessment; ect.

Could you advise us exactly when we can break ground under Vietnamese law for a residential construction project?

Due to a lack of specific information as to the scale, location, purpose of and amount of investment of the project, this answer will address general issues that may be appropriate to you. Moreover, the law in this area is especially convoluted and ambiguous. Thus, we have sought the input from our contacts in the Ministry of Construction. What is recommended in this answer is a combination of guidance from various sources in the law (as set out above) and what is required, in practice, to secure approval for construction.

Under Vietnamese laws, a project involving construction of residential units is mainly regulated by the laws on construction and laws on residential housing. Because there is no single legislation governing a residential construction project, the state authority (the provincial Department of Construction (“**DOC**”)) combines the requirements of both the construction laws and residential housing laws in considering whether to allow an investor to develop a residential project.

Generally, the DOC will require all of the following:

- (a) the establishment of a construction project;
- (b) three-step designs (as required under construction laws); and
- (c) the establishment of a residential project (as required under housing laws).

Upon fulfillment of these requirements, the DOC will grant a “decision on approval of a housing development project” which is equivalent to a construction permit. This DOC decision will finally allow the investor to commence construction.

1. Establishment of a Construction Project

To commence a construction project, the construction laws require that an investor establish a “construction project,” even if an IC has been obtained¹. The aim of the construction project is to help the investor to clarify the necessity and effectiveness of the project. The construction project is composed of two parts, namely the explanatory part and basic (preliminary) design part¹.

2. Designs for a Construction Project

Since your residential project will probably be classified as a First or Second Class Project,¹ Decree 12/2009/ND-CP requires three steps in the designs of the project. The first step is the formulation of a “basic design” (also called the “preliminary design”) as mentioned in the preceding section. The second step is formulation of the technical design. The third one is formulation of design drawings for the execution of building works.¹

The second and third steps of design must follow the approved basic design (the first step). An investor can prepare the three-step designs if it is licensed to do this.¹ If not, it may hire an

architectural company to do so. Except for the first design (basic design) that must be approved by the licensing body, the investor is entitled to approve (or, if licensed for architectural services, prepare and approve) the second and third designs. In other words, it need not obtain separate intermediary government approval. In most cases, it will simply approve (i.e., sign off on) the second and third designs prepared by its architects for submission to the DOC.

3. Establishment of the Residential Project

Dossiers for establishment of a residential housing project to be submitted to the DOC.

Thus, as for the designs and drawings, the laws require three designs as explained above and five drawings under this Section.

4. Submission of the Application File for Decision on Approval of Housing Development Project and Recommendation

Upon meeting the requirements for the establishment of the construction project, three-step designs, and the establishment of the residential project, the provincial people's committee is required to consider whether to issue the decision for approval of a residential housing development project within 45 days from receipt of the full and valid project files. However, the process is much longer in practice.

Please contact us at DC Law offices or visit us at www.dclaw.com.vn for further information

Ho Chi Minh Office

NGUYEN, Danny
Business Development Manager

danny.nguyen@dclaw.com.vn

11A-11C Phan Ke Binh Street, DaKao Ward,
District 1, Saigon

Tel: 84 8.3821 9928

Fax: 84 8.3821 9929

Hanoi Office

DAO, Bich Huong
Manager

huong.dao@dclaw.com.vn

Harec Building, Suite 1, Floor 9,
4A Lang Ha street, Ba Dinh District, Hanoi

Tel: 84 4.37772 6972

Fax: 84 4.37772 6973



The contents of the newsletter do not constitute legal advice and do not necessarily reflect the opinions of our firm or any of our attorneys or consultants. The newsletter provides general information, which may or may not be correct, complete or current at the time of reading. The content is not intended to be used as a substitute for specific legal advice or opinions. Please seek appropriate legal advice or other professional counseling for any specific issues you may have. DC LAW expressly disclaims all liability relating to actions taken or not taken based on any or all contents of the newsletter.