The Fine Print, Legal & tax insight: MIC list shows business limits

By Sebastian Pawlita and Myint Naing | Monday, 01 September 2014

The MIC has recently issued three new notifications dealing with important aspects of foreign direct investments in Myanmar: Notification 49/2014 lists businesses that are closed or only partially open to foreigners, notification 50/2014 explains for which businesses an environmental impact assessment report is required and notification 51/2014 lists businesses for which no exemption from commercial tax and customs duty is available.

Notification 49, dated August 14 2014, replaces notification 1/2013 ("Classification of Types of Economic Activities") and will become one of the documents that foreign investors will consult at an early stage in order to find out whether their investment plans stand any chance of regulatory approval.

However – although one should give the MIC credit for having slimmed down the list considerably – its practical importance should not be overrated. Experience with old MIC notification 1/2013 shows that what is in the notification and what is done in practice can be two different things. Some foreign investors found that ministries refused to support proposals which would have been permissible according to the notification, while others found support for their plans in spite of them not meeting all of the official requirements.

Furthermore, there are two methods to invest in Myanmar: Simply put, if a project involves the long-term lease of land, the investor has to obtain an investment permit from the MIC in accordance with the Foreign Investment Law. Notification 49/2014, being an implementing guideline of the Foreign Investment Law, only covers these investments. Other investments – usually in the services sector where the investment amount is comparatively small and there is no need to lease immovable property long-term – are, strictly speaking, not covered, although ministries and, especially, DICA may look to the notification for guidance nevertheless.

Nevertheless, the 49/2014 notification was compiled on the basis of input from the various ministries and as such should provide important insights into their policy.

The new notification is much shorter than the old one. This is in itself good news as it indicates that the overall number of official restrictions (prohibitions, joint venture requirements with local private entrepreneurs or the state, local contents requirements) has been reduced.

However, at least on first reading, one has the impression that there are now more businesses that officially require a joint venture than previously.

Section 2 states that "business activities which are not contained in this notification may be carried out as 100 percent foreign-invested business". It remains to be seen to what extent this promise will be implemented.

Like its predecessor, notification 49/2014 does not specify a minimum percentage of local shareholdings in compulsory joint ventures. It has been suggested that local shareholders must own at least 20pc of the joint venture company, but it is not entirely clear whether this requirement stipulated in section 20 Foreign Investment Rules applies to all compulsory joint ventures or only to those businesses that are explicitly categorised as “prohibited” and only exceptionally open to foreign investment.

Interestingly, the new notification contains no reference anymore to wholesale and retail trading. Theoretically, this means that foreigners should, contrary to present policy, be able to open supermarkets, distribution companies, etc, as section 2 of the new notification specifically states that non-listed business activities are completely open to foreign investment. Practice will show if there has really been a policy change.

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