

Transfer Pricing Country Summary Vietnam

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Legislation

Existence of Transfer Pricing Laws/Guidelines

The legal framework for transfer pricing was introduced by the in Article 9 of Foreign Investment Law 1996, requiring parties of joint ventures to value the in-kind capital contribution on the market price basis. Furthermore, the circulars adopted by the Ministry of Finance, namely Circular 74/1997-TC-TCT, Circular 89/1999/TT-BTC and Circular 13/2001/TT-BTC are specifically applicable for foreign direct investment companies and provide guidance for tax authorities in determining tax liability for this type of companies. Formal transfer pricing guidelines and documentation requirements have been finalized and released by the Ministry of Finance Circular No. 117/2005/TT-BTC. Some legal framework is also defined under the Circular 60/2007/TT-BTC, Circular 28/2011/TT-BTC in guiding the Law on Tax Management

On 22 April, 2010, the Ministry of Finance introduced comprehensive transfer pricing regulations in Circular 66/2010/TT-BTC, effective as of June 6, 2010. Circular 66 provides guidance on the implementation of the provisions on the determination of market prices in business transactions between affiliated parties, as a basis to declare income tax liability of business.

On 24 February 2017, the government released transfer pricing decree No. 20/2017/ND-CP (and Circular 41/2017/TT-BTC dated 28 April 2017) which replace Circular 66/2010/TT-BTC: "*Providing tax administration applicable to enterprises having controlled transactions*" which took effect from 1 May 2017. The decree presents stricter regulations which are based on OECD guidelines and BEPS actions, and includes three-tiered transfer pricing documentation requirements, new transfer pricing declaration forms, and guidance on the deductibility of related-party expenses and interest.

Definition of Related Party

Organizations producing and trading goods and services perform business transactions with affiliated parties, are obliged to declare and define the obligations of enterprise income tax in Vietnam. The purchase, sale, exchange, rent, lease, transfer or assignment of goods and services in the business process between affiliated parties, except business transactions between enterprises in Vietnam with affiliated parties relating to products subject to price adjustment of the State, shall comply with the provisions of the law on prices.

According to Circular 66, parties shall be deemed to be "associated" when:

- One party is involved directly or indirectly in administration, control, capital contribution or investment in any form in the other party; or
- Both or all parties are directly or indirectly managed or controlled by another (third) party or both or all parties make capital contribution or invest in any form in another (third) party; or
- Both or all parties participate directly or indirectly in administration, control of, capital contribution to or investment in any form in another (third) party.

Related parties defined in Decree 20/2017/ND-CP refer to the relationship of one of the following cases:

- a) A party participates directly or indirectly in the management, control or equity of the other, or puts investment in the other;
- b) Parties participate directly or indirectly in the common management, control, or the capital of or put investment in, other parties.

2. Related parties referred to in Clause 1 of this Article shall be subject to the following specific provisions:

- a) An enterprise participates directly or indirectly in at least 25% of equity of the other enterprise;
- b) Both enterprises own at least 25% of equity in which a third party participates directly or indirectly;
- c) An enterprise is the shareholder who has the greatest ownership of equity of the other enterprise, or participates directly or indirectly in at least 10% of total share capital of the other enterprise;
- d) An enterprise guarantees or offers another enterprise a loan under any form (even including third-party loans guaranteed by financing sources of related parties and financial transactions of same or similar nature) to the extent that the loan amount equals at least 25% of equity of the borrowing enterprise and makes up for more than 50% of total medium and long term debts of the borrowing enterprise;
- e) An enterprise appoints a member of the executive board responsible for the leadership or control of another enterprise provided the number of members appointed by the former accounts for more than 50% of total number of members of the executive board responsible for the leadership or control of the latter; or a member appointed by the former has the right to decide financial policies or business activities of the latter;
- f) Both enterprises appoint more than 50% of membership of the executive board or have one member of the executive board authorized to decide financial policies or business activities who is appointed by a third party;
- g) Both enterprises are managed or controlled in terms of their personnel, financial and business activities by individuals, each of whom is in one of the following relationships with the others such as a wife, husband, natural/foster father, natural/foster child, natural/foster older/younger sibling, brother/sister-in-law, maternal/paternal grandfather/grandmother, maternal/paternal grandchild, and maternal/paternal aunt, uncle and sibling;
- h) Both business entities have transactions, either between their head offices and permanent establishments or between permanent establishments of overseas entities or individuals.
- i) One or more enterprises is/are put under control of one individual through either his/her capital participation into that enterprise or his direct involvement in administration of that enterprise;
- j) k) In other cases where an enterprise is in reality under management of, or control of decision on, business activities of the other enterprise.

Transfer Pricing Scrutiny

On May 21, 2012 the Ministry of Finance approved the Action Plan for Transfer Pricing Management, under Decision 1250/QD-BTC, effective as dated. Accordingly, during the period 2012-2015, at least 20% of the annual tax audits or inspection is subject to transfer pricing audits. The Action Plan mainly focuses on assessing the transfer pricing risks.

In addition, Law No.21/2012/QH13 dated on November 2, 2012 amends and supplements some articles of the Law on Tax Administration. Multinationals that report consistent losses while continue to expand operation can expect to be scrutiny from tax authority.

Furthermore, the European Commission, together with the OECD and World Bank has also implemented a project assisting Vietnam to improve the tax regulations and tax administration for international taxation focusing on transfer pricing for the period 2012–2013 (EU Project).

Transfer Pricing Penalties

According to the amended Tax Administration law, effective as of July 1, 2016, tax authorities may make adjustments to corporate income tax liability in the following cases:

- Failure to disclose, or incomplete disclosure, of related party transactions;
- Failure to produce information, documents or source documents within 30 days of a request by the tax authority;
- Intentional erroneous application of the provisions of the Circulars and failure to produce required documentation within 90 days of the date of request by the tax authority.

Administrative penalties ranging from VND 500,000 to VND 5 million may be imposed for failure to comply with transfer pricing documentation and disclosure requirements. The penalty also includes late payment interest charges of 0.03 percent per day on overdue. In addition, tax evasion or fraud is subject to one to three times the tax liability amount.

Advance Pricing Agreement (APA)

Law No.21/2012/QH13 dated on November 2, 2012 amends and supplements some articles of the Law on Tax Administration. The supplement includes mechanisms for prior agreement on the valuation method (APA) in transfer pricing in foreign investment enterprises. The APA mechanism facilitates the collection of operating revenues and losses reduction; and encourages the initiative from FDI enterprises in business planning and implementation of tax obligations.

Tax authority honors APAs with taxpayers and tax authorities in foreign countries with which Vietnam has signed an agreement to avoid double taxation and tax evasion. Until now, Vietnam has signed 79 tax agreements with its trading partners.

Documentation And Disclosure Requirements

Tax Return Disclosures

Taxpayers are required to file Form 01, 02, 03, 04 (where applicable) (under Circular 41/2017/TT-BTC) to disclose their transactions with related parties, the details of these transactions and the transfer pricing methods used to calculate the prices in these transactions. The disclosure form must be submitted together with the corporate income tax return, which must be filed within 90 days of the close of the fiscal year.

Required disclosures include the types and values of transactions, transfer pricing methods, names of related parties, nationality, tax code (if applicable) and their addresses.

Level of Documentation

Under Decree 20, a three-tiered transfer pricing documentation was introduced where affected taxpayers are obligated to prepare and maintain a master file, a local file, and country-by-country report.

Record Keeping

Thus, the documentation must exist at the time of the transfer pricing transaction.

Language for Documentation

Documentation for submission to the tax authority should be in Vietnamese. Documents in foreign language must be translated into Vietnamese. Taxpayers are liable for the accuracy of the translation.

Small and Medium Sized Enterprises (SMEs)

Under the new Decree, a taxpayer is exempt from preparing transfer pricing documentation if one of the following applies:

- The taxpayer has revenues below VND 50 billion and the total value of related-party transactions is below VND 30 billion during the tax period;
- The taxpayer has revenues below VND 200 billion, exercises only simple functions, and has the following ratios of earnings before interest and tax to revenue on its business:
 - 5% distribution;
 - 10% manufacturing;
 - 15% processing.
- The taxpayer concludes an APA and submits annual APA reports

Deadline to Prepare Documentation

The transfer pricing documentation shall be prepared before the submission date of the annual tax return.

Deadline to Submit Documentation

Taxpayers must provide documentation to the tax authorities within 30 days of a written request. In case enterprises have plausible reasons, a one-time, 30-day extension may be granted.

APA application should be sent to the General Department of Taxation within 120 days of the taxpayer receiving written approval from the General Tax Department about filing formal APA.

Statute Of Limitations

There are several different statutes of limitations available. For tax penalty, the statute of limitation can be two years, five years and even ten years.

Transfer Pricing Methods

Decree 20 allows the following transfer pricing methods:

1. The method for comparing the price of related-party transaction with that of independent transaction (CUP);
2. Method for comparing the profit margin of taxpayers with that of independent comparables:
 - The method for comparing the gross profit to sales (the resale price method);
 - The method for comparing the gross profit to the cost (the cost-plus method);
 - The net profit margin comparison method;
3. Method for allocation of profits between related parties.

Taxpayers and tax authority can negotiate and agree an APA, but in general must use the most appropriate method under the regulations. An APA can be unilateral, bilateral or multilateral. There is no hierarchy among the methods, although recent practice shows that the Vietnam tax authority has a growing preference for the CUP method.

Comparables

Comparables need to correspond to the same financial year as the transaction at hand. Still, preceding years' data can be used in cases when current information is not available in the comparables database during the benchmarking analysis.

Tax authorities are also allowed to use internal databases for transfer pricing assessments where a taxpayer is deemed compliant with the regulations in Decree 20.