

Global Transfer Pricing Landscape

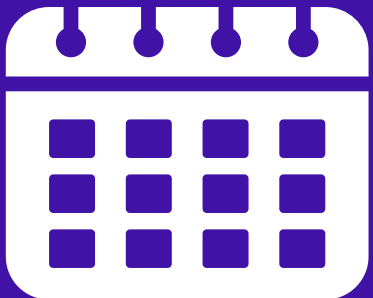
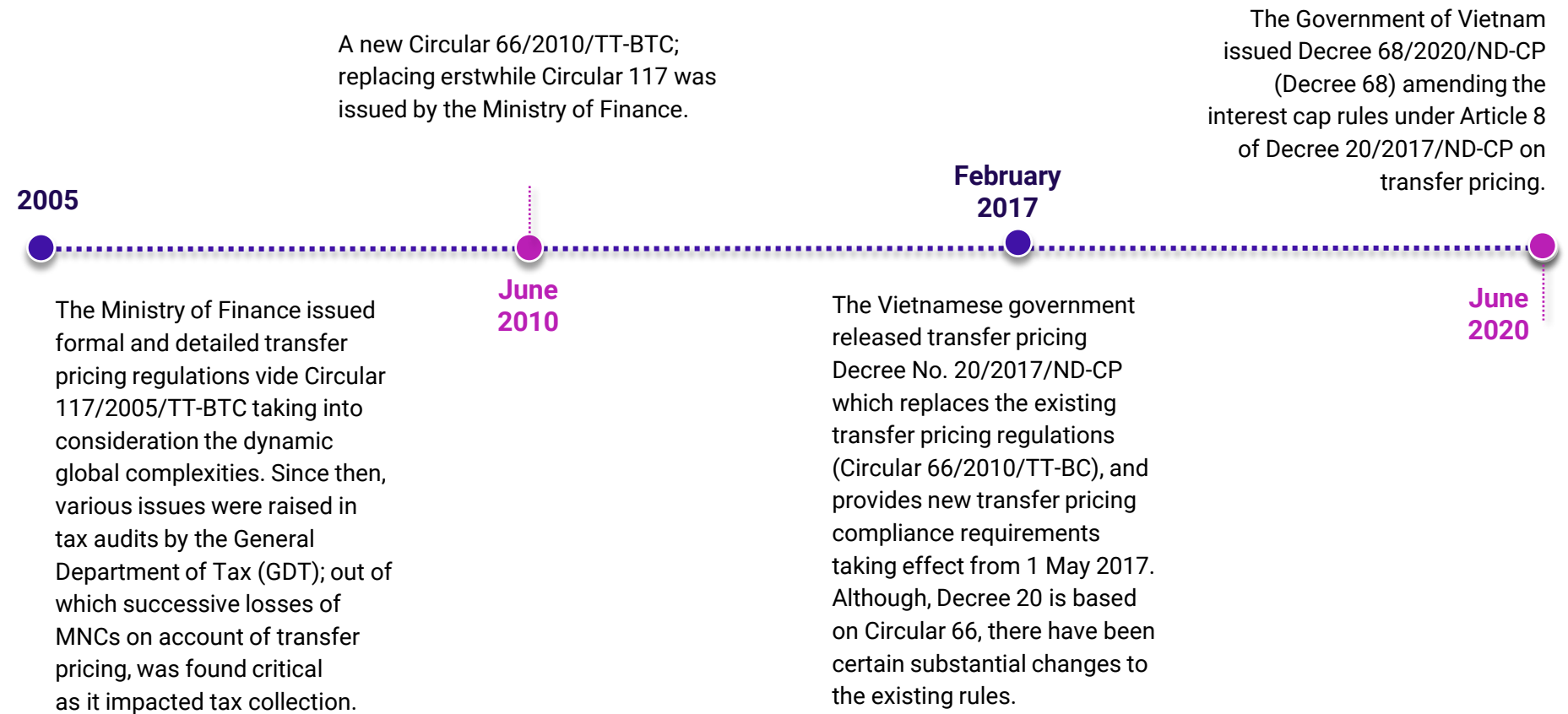
Vietnam

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Highlights



Introduction

Vietnam has implemented transfer pricing rules that are broadly in line with the Organization for Economic Cooperation and Development's (OECD) transfer pricing guidelines. Contemporaneous documentation is required for transactions between related parties. Any transaction carried out between the affiliated parties (e.g., purchase, sale, exchange, lease, transfer, or assignment of goods or services) may come under the scope of transfer pricing.

However, transactions between the affiliated parties involving products for which the prices are under state control are excluded.

On 24 February 2017, the Vietnamese Government released a transfer pricing Decree No. 20/2017/ND-CP (Decree 20), which replaces the existing transfer pricing regulations (Circular 66/2010/TT-BC). The decree is applicable from 1 May 2017 and provides new transfer pricing compliance requirements (documentation and transfer pricing declaration forms) and guidance on deductibility of related party expenses, including interest expense.

New Principles and Rules

A number of new principles and rules are introduced to assist tax authorities in disregarding/re-characterizing certain transactions resulting in reduced tax revenue:

- Substance over form principle;
- Measuring comparability of related party transactions against independent transactions;

- For intangibles – Analyzing Development, Enhancement, Maintenance, Protection, and Exploitation (DEMPE) functions.

Affiliated Party

Affiliated party covers relations arising out of capital participation, control or management, family relationships, etc. As per Decree 20, the definition of an affiliated party is as below:

Direct party ownership:

- One enterprise directly or indirectly holds at least 25% of contribution capital of the owner of the other enterprise; or
- Both enterprises directly or indirectly hold at least 25% of the contribution capital of the owner of a third party.

Indirect related parties – borrowings:

- One enterprise guarantees or gives to the other enterprise loans in any form on the condition (including loans from the third party guaranteed from the finance of related parties and financial transactions having similar nature) that such loans account for at least 25% of the capital contribution of the owner of the borrowing enterprise and account for over 50% of the total value of medium-term and long-term loans of the borrowing enterprise.

Others:

- One or many businesses controlled by an individual through his/her personal contribution capital in those businesses, or directly engaged in business management or

- Other cases, in which one enterprise is actually managed or controlled in the decision by business activities of another enterprise.

Principle

Arm's-length principle shall be in accordance with market prices on the basis of a comparison of the similarity between related transactions and independent transactions.

Transfer Pricing Documentation

Country by Country Reporting (CbCR)

Decree 20 introduces a three-tiered transfer pricing documentation approach (comprising of a Master File, Local File, and CbCR), thereby revisiting the contemporaneous documentation requirement with an aim to collect more tax-related information on multinational companies (MNC). It follows the approach set out in the BEPS Action Plan 13 (guidance on transfer pricing documentation and CbCR).

In addition, taxpayers are required to prepare mandatory disclosure forms, which must be submitted with their tax returns.

The taxpayer is required to maintain CbCR if:

- The ultimate parent company is required to submit the same in its respective tax jurisdiction; or
- In case, where the Vietnamese ultimate parent company with a consolidated group turnover in a fiscal year exceeds VND 18,000 billion. In case of non-compliance, the taxpayer needs to furnish a written explanation

For the reason and legal basis (if any).

The three-tiered documentation has to be prepared before the submission of the annual return, i.e., within 90 days from the end of the relevant fiscal year.

The CbCR prepared (in Form No. 04) by Vietnamese headquartered groups needs to be submitted to the tax authority.

Submission of documentation

Taxpayers are required to prepare documentation on an annual basis. However, there is no guidance on whether refreshing comparables would suffice if there is no change in business/transactions from the previous year.

During the tax audit, the deadline for submission of transfer pricing documentation is no later than 15 working days upon tax authority's request.

During the consultation procedure prior to an audit, the documentation needs to be submitted within 30 days of a request from GDT. This may be extended further up to 15 days or less from the expiry date, provided the taxpayer has a legitimate reason.

The documentation is to be submitted in the Vietnamese language.

Exemption cases for transfer pricing documentation:

- The companies which only engages in transactions with related party taxpayers in Vietnam,
- The companies who have the same CIT rate and,
- The entities who enjoy CIT incentives during the CIT period.

Exemptions and thresholds

A taxpayer is exempt from preparing transfer pricing documentation (but not all other aspects of the transfer pricing decree) if one of the following conditions is met:

- has revenue below VND 50 billion and the total value of related party transactions below VND 30 billion in a tax period;
- concludes APA and submits annual APA report(s);
- has revenue below VND 200 billion, 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/Toll Manufacturing (15%).

Taxpayers engaged in related party transactions solely with domestic related parties could be exempt from disclosing information on such transactions in the new transfer pricing declaration form under the condition that both parties have the same tax rate and neither party enjoys tax incentives

Selection of method

Transfer pricing methods are similar to the five methods specified in the OECD transfer pricing guidelines.

No hierarchy for the selection of the most appropriate method.

However, local regulations acknowledge the preference of using internal comparable transactions.

Selection of comparables

The decree provides detailed guidance on comparability analysis, including the use of data sources, selection of transfer pricing methods, the minimum number of comparable companies, and other adjustment factors (such as location-specific advantages). Comparable data needs to correspond with the same financial year as the tested party/transactions. However, data of the preceding one year can be used if current information is not available in the database at the time when the benchmarking analysis is conducted.

The tax authorities are also empowered to use internal databases for transfer pricing assessment purposes in cases wherein the taxpayer is deemed non-compliant with the requirements of the decree. Thus, the hierarchy of comparables used for benchmarking purpose is as follows:

- Internal comparables of the taxpayer;
- Comparables located in the same country/territory as the taxpayer;
- Comparables located in the same region which have similar industry and scale of operations.

Arm's length range

The allowable arm's-length range in Vietnam refers to the standard market price margin, which is either of the following:

- Values calculated from independent transactions selected for comparison when up to three comparable transactions are used; or

- Values falling between the first and the third quartiles, calculated from the market price margin of independent transactions when more than three comparable transactions are used.

Decree 20 allows tax officers to deem tax liability but does not clearly mention a specific value for adjustment. Given the guidance on comparability analysis for value for transfer pricing adjustment, the median value may potentially be used as the minimum for deeming the tax liability by tax offices in case of a tax/transfer pricing audit.

Certain Specific Transactions

Royalty payments

High-value royalty transactions or those not supported by a benchmarking study are at a high risk and may be challenged by the tax authorities..

Management fees

Management fees charged to local Vietnamese subsidiaries are not deductible unless they are for specific services rendered by foreign parties.

Hence, taxpayers must substantiate this requirement and justify that services and their consequential benefits were actually received along with supporting documents.

In addition, Decree 20 sets out various criteria, including producing evidence for reasonableness of service charge calculation method and disallowance of expenses where direct benefit or additional value to the taxpayer cannot be demonstrated, viz, duplicate services, shareholder costs, etc. In such cases, the

markup of third-party expenses, re-charged to Vietnamese taxpayers, are also not deductible.

Persistent losses

Companies that are expanding their business despite reporting continuous losses, as well as companies whose business models do not match with the reported losses portion, are being brought under meticulous scrutiny by the tax authorities.

Restriction on interest deductibility introduced

In line with BEPS Action Plan 4 (Limiting base erosion involving interest deductions and other financial payments), Vietnam had introduced a restriction on interest deductibility. As per Decree 68/2020, the provisions related to tax-deductibility of interest on loans (for both, related party and third party loans) were amended as follows:

- The cap on the deductibility of loan interest expenses for Corporate Income Tax (CIT) increases to 30% (up from 20%). The calculation of the deductibility cap is based on the ratio of net interest expenses (after offsetting interest income) over total gross profit plus net interest expense plus depreciation expenses;
- Interest expense which is in excess of the 30% cap can be carried forward to the following year for deduction for a maximum period of five years;
- The 30% interest cap is not applicable in certain cases, including: credit institutions, insurance institutions, ODA (Official Development Assistance) loans, preferential loans made by the government, and loans made for implementing national programs and state social benefit policies;

- The interest expense ratio is to be declared in Form no 1;
- Decree 68 allows for the retrospective application of the deductibility of loan interest expenses as mentioned above to the CIT periods 2017 and 2018;
- The insurance and banking companies are excluded from the interest limitation rules.

Reporting and Compliance

Mandatory disclosure of related party transactions in Form No. 01

Taxpayers are required to comply with mandatory disclosures of related party transactions and transfer pricing information in Form No. 01, which is to be filed within 90 days from the end of the financial year. Decree 20 has brought about significant changes in Form No. 01 with regard to voluntary transfer pricing adjustment (viz, operating results of taxpayers with three forms for different sectors).

Taxpayers who have domestic related party transactions are exempted from filing a disclosure in the form, where both entities have the same tax rate and gained no incentive in the relevant period. However, the exemption needs to be declared in Section I and Section II of the form.

This form also requires disclosure of a few more details, including segmentation of profit and loss by a related party and third party transactions. Any gap between the margins earned on related and third party transactions which increases the taxpayer's risk profile could trigger queries from tax authorities. Taxpayers that are exempt from preparing transfer pricing documentation are still required to

submit Form No. 01 and submit it along with their corporate tax returns.

Failure to disclose in Form GCN-01/QLT or Form 03-7/TNDN implies exposure to a reassessment of transfer prices, which can be accompanied by penalties and interest charges. Administrative penalties for failure to submit a tax return may also be applied

Transfer pricing audit/assessment

The normal practice is to conduct transfer pricing audits as a part of general tax audits. However, Decree 20 does not provide guidance on how adjustments should be carried out and their potential impact on other forms of taxes. The decree emphasizes that taxpayers carrying out routine functions and bearing no market risk shall not incur losses.

The tax authorities can assess and make appropriate transfer pricing adjustment in the following circumstances where the tax office suspects that the taxpayer has:

- Computed price margins using documents/data which are illegal, improper, or originate from an unclear source;
- Created false independent transactions or intentionally treated related transaction as an independent transaction and used it for comparison;
- Failed to declare or has insufficiently declared related transactions;
- Failed to submit Form No. 01 and has failed to comply with time limits to provide details;

- The taxpayer does not provide sufficient information on transfer pricing documentation with Form No. 02 (Local File), Form No. 03 (Master File), and Form No. 4 (CbCR) and also does not submit evidence and other documents requested within the time prescribed;
- Failed to apply or has incorrectly applied the provisions intentionally and failed to prove the contrary within 90 days of notice.

If an adjustment is proposed by the GDT and the taxpayer is unsatisfied by the said action, an appeal can be filed before the administrative court.

Further, the statute of limitations on the assessment of transfer pricing adjustments is ten years. However, tax recovery can be indefinite if the entity failed to register itself as a taxpayer.

APA and MAP Procedures

Taxpayers entering into domestic as well as overseas related party transactions may apply for an APA for a maximum period of five years, which can be extended by another five years. An APA can be unilateral, bilateral, or multilateral.

The APA application should be submitted in Vietnamese; however, for applications pertaining to bilateral and multilateral APAs, the application should be submitted in Vietnamese and a corresponding English translation.

Detailed APA policies and procedures are laid down in Circular 201/2013/TT-BTC, which came into effect on 5 February 2014. No fee has been prescribed by the government for filing an APA application.

A Mutual Agreement Procedure (MAP) can be applied by taxpayers within three years from the date of first notification by the tax authority in relation to the tax treatment which the taxpayer considers to be not in accordance with the relevant double taxation agreement.

No specific penalties have been mentioned by the government for non-compliance. Instead, the penalties are governed by the effective law on tax management.

Penalties and Other Consequences of Non-compliance

No specific penalties have been mentioned by the government for non-compliance. Instead, the penalties are governed by the effective law on tax management.

Voluntary adjustments made by taxpayers are considered as an undeclared amount and hence, subject to late payment interest charges at the rate of 0.05% per day on the overdue tax of up to 90 days and 0.07% per day on the overdue tax of over 90 days. In case of incorrect declaration, a fine equal to 20% of undeclared tax will be imposed in addition to late payment charges.

Evasion of tax or fraud attracts penalties ranging from one to three times the undeclared tax amount, depending on the nature of the offenses and circumstances.

Further, late payment of tax will be subject to late payment interest charge only, if voluntarily rectified by taxpayers prior to tax audit notice by local tax authorities.

Administrative penalties may apply in case of transfer pricing adjustments.

Other Relevant Aspects

In addition to the issuance of Decree 68 amending Article 8 Clause 3 of Decree 20 on loan interest expense deductibility, the Ministry of Finance (MoF) is finalizing the Draft Decree on Tax Administration for companies having transactions with related parties (“Draft Decree”).

Various points included in this Draft Decree pertains to:

- Change in percentile for the purpose of arm’s-length range,
- Principle to expand the scope for selection of comparables for benchmarking analysis,
- Use of databases to determine deemed tax adjustments in tax audits,
- Additions to transfer pricing documentation exemption cases,
- Compliance obligations regarding CbCR etc.

Summary of Transfer Pricing Requirements

Effective from

2005

Compliance Requirements

- Declaration of related transactions in Form No 01 to be filed by 90th day from the end of the fiscal year.
- Contemporaneous documentation revisited. Three-tiered transfer pricing documentation comprising of Master File, Local File, and CbCR to be prepared before the submission of the annual return (i.e. within 90 days from the end of the relevant fiscal year).

Penalties

Penalties from one to three times of undeclared tax liability for evasion of tax.

Voluntary adjustments - Late payment interest.

Incorrect declaration - 20% fine.

Method and Preference for Comparable

Five methods as defined by the OECD

Preference for internal comparables.

Peculiar Features

Separate transfer pricing audit department established in July 2015

Use of secret comparables during assessment

Safe Harbour and APA

APA available; however, safe harbour not available

BEPS/CbCR Applicability

Applicable

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Our cross-functional teams serve a wide range of industries, with a specific focus on healthcare, food processing, and banking and financial services. Over the last decade, we have built and leveraged capabilities across key global markets to provide transnational support to numerous clients.

We provide an array of solutions encompassing Consulting, Business Services, and Professional Services. Our solutions help businesses navigate challenges across all stages of their life-cycle. Through our direct operations in USA, India, and UAE, we serve a diverse range of clients, spanning multinationals, listed companies, privately owned companies, and family-owned businesses from over 50 countries.

Our team provides you with solutions for tomorrow; we help you *Think Next*.

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