

TAX NEWS

SPECIAL ISSUE - DECREE No. 20/2017/ND-CP, FEBRARY 24, 2017 PRESCRIBING TAX ADMINISTRATION FOR ENTERPRISES ENGAGED IN TRANSFER PRICING

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DECREE NO. 20/2017/ND-CP, FEBRUARY 24, 2017 PRESCRIBING TAX ADMINISTRATION FOR ENTERPRISES ENGAGED IN TRANSFER PRICING**1. Related parties**

Article 5. Related parties are parties having relationships where:

- 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;

đ) 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;

e) 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;

k) In other cases where an enterprise is in reality under management of, or control of decision on, business activities of the other enterprise.

2. Comparability analysis, selection of independent comparables for the purpose of comparing and determining prices of related-party transactions

Article 6. Comparability analysis, selection of independent comparables for the purpose of comparing and determining prices of related-party transactions.

Comparability analysis process is composed of the following steps:

- Identifying the nature of related-party transactions before making analysis of comparability with independent comparables;

- Comparably analyzing, finding and selecting independent comparables in the same or similar conditions on the basis of identifying comparison time, product specifications and contractual terms and conditions; analyzing the sector, market and economic conditions whenever transactions arise; analyzing related-party transactions and taxpayers performing related-party transactions; database sources; transfer pricing method and adjustment for any potential material difference;

- Identifying the level of price, profit margin or profit distribu-

tion rate, based on the results of analysis of independent comparables, as the basis for comparison or application to determination of corporate income tax obligations of taxpayers and avoidance of any reduction in tax obligations to the state budget. Calculation method must be identically applied in the operating and business cycle or stage in agreement with functions and business models as prescribed by Article 7 hereof.

3. Determination of costs for assessment of tax in certain specific cases for enterprises engaged in particular related-party transactions

Article 8 of Decree 20/2017/ND-CP provides as follows:

a) Related-party transactions which neither agree with the arm's length nature of transactions nor contribute to creating operating sales revenue or income of a taxpayer shall not incur any cost qualified as allowable tax deductions within a specified tax period, including:

- Payments to a related parties that does not perform any business operations relating to the industry or business activities in which a taxpayer is operating;
- Payments to a related party that performs business operations, but have the scale of assets, number of employees and operating functions incommensurate with the transactional value that this related party has obtained



from a taxpayer;

- Payments to a related party that does not have any right or responsibility relating to assets, commodities or services rendered to a taxpayer;
- Payments to a related party that is a resident entity within a country or territory that does not collect corporate income tax, and that does not contribute to creating sales revenue or added value from business activities of a taxpayer.

b) Transactions where services are rendered between related parties:

- Service costs that are not qualified as deductions from taxable incomes encompass costs arising from services rendered for the sole purpose of providing other related parties with benefits or values; services rendered to provide benefits for shareholders of related parties; services for which costs are repeatedly charged due to multiple related parties render the same services, or in which the added value offered to a taxpayer is unspecified; services which are, in nature, benefits obtained by a taxpayer as a member of a corporation and costs that a related party adds to third-party services rendered through a related intermediary without adding any value to these services.

c) Deducted costs



- a taxpayer can claim deductions for its service costs from tax within a specified tax period when meeting the following requirements where its services rendered have commercial, financial and economic value and are directly used in business activities of a taxpayer; services rendered by related parties are confirmed as already supplied only in the same conditions under which independent parties pay for these services; the arm's length principle and transfer pricing method or the method of allocation of service costs between related parties must be consistently applied in the entire corporation to payment of costs of similar services of which a taxpayer must provide a contract, evidencing documents, invoices and information concerning the method of calculation, factors of allocation and policies on prices within the corporation;
- Where there is a connection with centers performing specialized functions and synergies in creating the added value for the corporation, a taxpayer must determine total value created from these functions and identify the level of profit allocation proportionate to value of participation by related parties from which relevant costs of services paid to a related party to perform coordination or service supply functions

in arm's length transactions of same or similar nature have been deducted. VND 30 billion;

- Taxpayer's total loan interest cost arising within a specified tax period qualified as a deduction from income subject to corporate income tax shall not exceed 20% of total net profit generated from business activities plus loan interest costs and amortization costs arising within that period. This regulation shall not apply to taxpayers who are subjects of application of the Law on Credit Institutions and the Law on Insurance Business.

4. Safe harbor for transfer pricing documentation

Article 11 of Decree 20/2017/ND-CP provides as follows:

a) A taxpayer shall be exempted from the transfer pricing documentation requirements referred to in Section III and IV of the Form 01 given in the Appendix to this Decree only if it is engaged in a related-party transaction with an entity that must pay corporate income tax within the territory of Vietnam, is subject to the same corporate income tax rate as applied to the taxpayer, and where neither of them is not offered the corporate income tax incentive within a specified tax period, but shall be required to provide bases for such exemption in Section I, II included in the Form No.01 of the Appendix to this Decree.

b) The taxpayer shall be responsible for declaration of transfer pricing information according to the Form No.01 given in the Appendix to this Decree but shall be exempted from the transfer pricing documentation in the following circumstances:

- Taxpayer is engaged in the transfer pricing but the total revenue arising within a specified tax period is less than VND 50 billion and the total value of the related-party transactions arising within a specified tax period does not exceed

- Taxpayer already entering into Advance Pricing Agreement (APA) has submitted the annual report in accordance with legislation on Advance Pricing Agreement. For those related party transactions which are not covered by the APA, taxpayers are obliged to comply with the aforesaid transfer pricing documentation requirements referred to in Article 10 hereof;

- Taxpayer performing business activities by exercising routine functions, neither generating any revenue nor incurring any cost from operation or use of intangible assets, generating sales of less than VND 200 billion, as well as applying the ratio of net operating profit before loan interest and corporate income tax relative to sales revenue, engages in related-party transactions in the following sectors:

- + Distribution: At least 5%;
- + Manufacturing: At least 10%;
- + Toll manufacturing: At least 15%.



5. Rights and obligations of taxpayers in declaration and determination of transfer prices

Article 10 of Decree 20/2017/ND-CP provides as follows:

- Transfer pricing documentation package must be prepared before the time of filing corporate income tax finalization returns each year, and must be stored and presented to meet the demand for information requested by tax authorities. When a tax authority carries out transfer pricing audit, the time limit for provision of the transfer pricing documentation package shall not exceed 15 working days from the date of receipt of request from provision of information;

- Taxpayers shall be responsible for providing, in an suffi-



cient and accurate manner, and bearing legal responsibility for, information and documents included in the transfer pricing documentation package at the request of the tax authority during the consultation procedures prior to the audit as prescribed by Article 12 hereof. The time limit for submission of the transfer pricing documentation package is no longer than 30 working days from the date of receipt of the tax authority's request. Where sound reasons are provided by taxpayers, the submission deadline shall be extended only once to no longer than 15 working days as from the expiry date.

6. Appendix to Decree 20

- Form No.01: Information about related-party relationships and transactions;
- Form No.02: List of required information and documents in the Local File;
- Form No.03: List of required information and documents in the Global Master File;
- Form No.04: Declaration of information in the Country-by-Country report .

If a taxpayer having an ultimate parent company operates within the territory of Vietnam and generates at least eighteen thousand billions of Vietnam dong in global consolidated revenue, then it takes responsibility for preparing a Country-by-Country report included in the transfer pricing documentation package prepared by using the Form No. 04 given in the Appendix to this Decree.

7. Duties and powers of tax authorities in management of prices of related-party transactions

Article 12 of Decree 20/2017/ND-CP provides as follows:

a) Tax authorities shall consult the comparability analysis principle, transfer pricing principle and methods referred to herein as well as information about tax obligations of enterprises engaged in the transfer pricing in order to carry out tax imposition in the following cases:

- If enterprises fully comply with accounting, invoicing and evidencing documentation regulations, setting thresholds of revenue, costs or taxable income for the purpose of determination of tax obligations shall adhere to the comparability analysis principle, transfer pricing methods and databases used in management of prices of related-party transactions as prescribed by this Decree;
- If enterprises fall into other cases, imposition of tax shall be based on the tax authority's database in accordance with regulations on tax imposition applied to enterprises

that have not fully complied with accounting, invoicing and evidencing document regulations or regulations on handling of tax violations.



b) Tax authorities shall have authority to set the level of price, profit margin or profit allocation rate which is used for tax assessment or setting thresholds for taxable revenue or corporate income tax amount payable with respect to taxpayers engaged in the transfer pricing within a specified tax period, based on information, data and analysis of assessment of the tax authority in the cases where taxpayers commit violation against transfer pricing legislation as follows:

- Taxpayers do not provide or insufficiently provide information or do not submit the Form No.01 given in the Appendix hereto appended;
- Taxpayers provide insufficient information required in the transfer pricing documentation package referred to in the Form No. 02, 03 given in the Appendix to this Decree or do not present the transfer pricing documentation package and data, evidencing documents and materials used as the basis for comparability analysis and redetermination of prices in the transfer pricing documentation package at the tax authority's request within the permitted time limits referred to herein.
- Taxpayers use inaccurate or unreliable information about independent information to carry out comparability analysis, declare and determine the transfer price, or rely on materials, data and evidencing documents which are illegitimate, invalid or are of unclear origin to determine the level of price, profit margin or profit allocation rate applicable to related-party transactions;
- Taxpayers commits any violation against transfer pricing regulations set out in Article 11 hereof.

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