

Monthly Newsletter

April, 2017





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Comparison between Decree 20/2017 and Circular 66/2010

On 24 February 2017, Vietnam Government has issued **Decree No. 20/2017/ND-CP** on tax administration with respect to enterprises that carry out related party transactions. This Decree **takes effect from 01 May 2017** and regulations stated in this Decree shall replace ones in the Circular No. 66/2010/TT-BTC dated 22 April 2010 issued by Ministry of Finance to guide the determination of market prices in business transactions between associated parties.

In general, Decree No. 20/2017/ND-CP has updated new guidelines of OECD and BEPS actions (Base Erosion and Profit Shifting Project).

In comparison with Circular No. 66/2010/TT-BTC, there are significant differences in Decree No. 20/2017/ND-CP as below:

#

Decree No. 20/2017/ND-CP

- 1 Determination of related parties:
- The number of association forms: **10**
 - Association via direct/ indirect ownership of capital: **>= 25%**
 - Association via borrowing and lending: loan principal **>=25% of chartered capital** of borrower; and principal > 50% of total medium and long-term liabilities of borrower.
The loan includes ones from third party which is guaranteed by a related party; and similar financial arrangements.
 - Not applicable.
 - Not applicable.
 - Not applicable.
 - Not applicable.
 - Association via one or more enterprises being under control of one individual in forms of capital contribution or direct participation in that enterprise's management.
 - Association via other forms where one enterprise being put under supervision and control by another enterprise.

Circular No. 66/2010/TT-BTC

- Determination of related parties:
- The number of association forms: **13**
 - Association via direct/ indirect ownership of capital: **>= 20%**
 - Association via borrowing and lending: loan principal **>=20% of investment capital** of borrower; and principal > 50% of total long-term liabilities of borrower.
Not applicable/Not mentioned specifically.
 - Association via use of intangible assets and/or intellectual property rights of the other enterprise for which it has to make a payment amounting to 50% or more of COGS (or costing) of such products.
 - Association via one enterprise supplying more than 50% of total value of raw materials, materials, supplies or input products (excluding depreciation expenses on fixed assets).
 - Association via one enterprise directly or indirectly exerting control over 50% of output volume (for each type of product) of the other enterprise.
 - The two enterprises have reached a business cooperation agreement on a contractual basis.
 - Not applicable.
 - Not applicable.

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#	<u>Decree No. 20/2017/ND-CP</u>	<u>Circular No. 66/2010/TT-BTC</u>
2	Application of “ Substance over form ” principle to determine the nature of related party transactions in-order to approve or reject such transactions.	Not applicable/Not mentioned specifically.
3	Application of “Ultimate parent entity” term to define legal entity that owns directly or indirectly a sufficient interest in one or more other Constituent Entities of such MNE Group; and there is no other Constituent Entity of such MNE Group that owns directly or indirectly an interest in that enterprise.	Not applicable/Not mentioned specifically.
4	Requirement to analyze specific factors of intangible assets.	Not applicable/Not mentioned specifically.
5	Disallowance of specific deductions for income tax purpose where: <ul style="list-style-type: none">- Expenses incurred in respect of related parties that are not based on the arm’s-length principle; nor to generate revenue, income for the taxpayer;- Expenses incurred in provision of some services; Interest expenses exceeding 20% of EBITDA.	Not applicable/Not mentioned specifically.

#

Decree No. 20/2017/ND-CP

- 6 Database used in declaring and determining transfer price includes:
- Public information from stock market;
 - Database provided **by data publishers**;
 - **Public information from domestic and international commodities exchange**;
- Public information from Vietnam authorities and **other official sources**.

- 7 Reliability of comparable entity's financial data must be ensured. Regarding ratios, it must be rounded up to **2 digits** after decimal point.
- After comparability analysis and adjustments for material difference, the minimum of comparable uncontrolled entities:
- One entity where there is no difference;
 - Three entities where differences exist but there is sufficient information, data to eliminate all significant differences;
- Five** entities at least where there is information, data to eliminate most of significant differences.

Circular No. 66/2010/TT-BTC

- Database used in determining transfer price includes:
- Public information from stock exchange;
 - Data and documents on business transactions for income tax purpose that are provided by taxpayer;
 - Data certified or publicly disclosed by organisations, individuals operating in qualified public practices;
- Data certified or supplied on request by Ministries, Departments, associations, organisations certified by the Government.

- Sources of comparable data must be clearly stated so that Tax Department can conduct inspection and verification. Regarding ratios, it must be rounded up to 3 digits after decimal point.
- After comparability analysis and adjustments for material difference, the minimum of comparable uncontrolled transactions:
- One transaction where there is no difference;
 - Three transactions where differences exist but there is sufficient information, data to eliminate all significant differences;
- Four transactions where there is information, data to eliminate most of significant differences.

#	<u>Decree No. 20/2017/ND-CP</u>	<u>Circular No. 66/2010/TT-BTC</u>
8	<p>Disclose information on associated parties and relevant transactions:</p> <ul style="list-style-type: none">- Form No. 01: Information on related parties and relevant transactions at Appendix as promulgated in Decree No.20;- Form no. 02: List of information and documents need to be provided in Local file;- Form no. 03: List of information, documents need to be provided in Master file;- Form no. 04: Disclose information of Country-by-Country Report (in case Ultimate parent entity is required to prepared this Report by Tax jurisdiction); <p>Submit together with Corporate Income tax return.</p>	<p>Disclose information on related party transactions:</p> <ul style="list-style-type: none">- Form No. 03-7/TNDN: Information on related party transactions (as promulgated in Circular No. 156/2013/TT-BTC); <p>Submit together with Corporate Income tax return.</p>
9	<p>Taxpayer is exempted from determining transfer price at Section III, Section IV, Form No. 01 where business transactions are carried out with related party who is also subject to Vietnam corporate income tax, at the same tax rate; and no party is entitled to tax incentives in the tax period. Exemption basic must be disclosed at Section I, Section II, Form No. 01.</p>	<p>Not applicable.</p>
10	<p>Preparation, filing, and provision of Transfer pricing documentation:</p> <ul style="list-style-type: none">- Transfer pricing documentation must be prepared annually, and completed before income tax return declaration deadline (within 90 days from fiscal year end); <p>Transfer pricing documentation must be kept and presented on Tax Department's request.</p>	<p>Preparation, filing, provision of information, documents and vouchers as basic for determination of transfer price:</p> <ul style="list-style-type: none">- Information, documents, vouchers and transfer pricing method must be prepared at the time that related transactions occur; be updated during transaction period; <p>Information, documents and vouchers must be kept as per current regulation on accounting, tax, and statistics and be provided on Tax Department's request.</p>

#

Decree No. 20/2017/ND-CP

- 11** Deadline to provide Transfer pricing documentation on Tax Department's request:
- Case 1: on tax inspection: within **15 working days**;
- Case 2: During consultation process before inspection: within **30 working days**; only one extension granted for further **15 working days** with sound justification.

- 12** Transfer pricing documentation includes:
- Local file (as per Form No. 02 in Appendix promulgated in Decree No. 20);
 - Master file (as per Form No. 03 in Appendix promulgated in Decree No. 20);
 - Country-by-Country report of Ultimate parent entity (as per Form No. 04 in Appendix promulgated in Decree No. 20).

Taxpayer is responsible for preparing this document where it is Ultimate parent company in Vietnam of which consolidated revenue amounts to VND 18 trillion or more (approx. USD 792 million or JPY 90 billion)

In case of foreign Ultimate parent company, it is taxpayer's responsibility to submit a copy of this report if the Ultimate parent company is required to prepare this report under local tax jurisdiction. Otherwise, taxpayer has to prepare document to explain.

Circular No. 66/2010/TT-BTC

Deadline to provide information, documents and vouchers on Tax Department's request:

Within **30 working days** and extension granted for further **30 working days** with sound justification.

"Transfer pricing documentation" is equivalent to Local file as per Decree No.20.

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#	<u>Decree No. 20/2017/ND-CP</u>	<u>Circular No. 66/2010/TT-BTC</u>
13	Auditing and Accounting firms, consulting companies or tax agent companies are allowed to prepare transfer pricing documentation on behalf of taxpayer.	Not applicable/Not mentioned specifically.
14	Exemption from preparing transfer pricing documentation: <ul style="list-style-type: none">- Enterprise of which total annual revenue is less than VND 50 billion (approx. USD 2.2 million or JPY 250 million) and total annual value of related party transactions is less than VND 30 billion (approx. USD 1.32 million or JPY 150 million);- Enterprise that carries out simple function, does not earn revenue, nor incur expenditure derived from using intangible assets and annual revenue is less than VND 200 billion (approx. USD 8.8 million or JPY 1 billion) and EBIT/revenue satisfies:<ul style="list-style-type: none">▪ Distribution activities: $\geq 5\%$▪ Manufacturing activities: $\geq 10\%$▪ Outsourcing/ Processing: $\geq 15\%$ Enterprise that has signed Advance pricing arrangement.	Not applicable.

#

Decree No. 20/2017/ND-CP

15 Income tax assessment:

Tax Department has power to assess the price/ profit ratios/ profit allocation ratios used to declare income tax; and assess taxable income, income tax payable where:

- Enterprise does not make full declaration nor submit Form No. 01;
- **Enterprise does not make full declaration in Form No. 02 and Form No. 03;**
- Enterprise uses information on uncontrolled transactions in an incorrect way; or does not clearly state sources of information;

Enterprise commits infringement on regulation of determination of transfer price as stipulated at Clause 11 Decree No. 20 (as mentioned at Point 14 above).

Circular No. 66/2010/TT-BTC

Income tax assessment:

Tax Department has power to assess price used to declare income tax, and assess taxable income, or income tax payable where:

- Enterprise does not make full declaration nor submit Form No. 03-7/TNDN;
- Enterprise relies on illegal or ineligible documents, data and vouchers; or does not clearly state sources of information;
- Enterprise counterfeits uncontrolled transactions; or disguise related party transactions as uncontrolled ones;

Tax Department casts doubt that enterprise does not apply or deliberately disobey regulations as stipulated at Circular No. 66; and enterprise cannot justify themselves within 90 days since receipt of Tax Department's Notice.

Conclusion: Decree No. 20/2017/ND-CP is highly consistent with OECD Transfer pricing guidelines and BEPS actions as well. The consistency shall support MNE group that do business in Vietnam in complying with tax rulings on related party transactions; however, new rules shall increase compliance burdens on Vietnam companies.

Value Added Tax

Taxation policies on goods given away for free from welfare fund

On 14 March 2017, GDT issued Official letter No. 834/TCT-DNL as guidance for tax policies on goods given away for free from welfare fund. Based on that:

- Where an enterprise uses products manufactured by itself or purchased for resales, then uses part of those as free-of-charge gifts for its employees on public holiday and financed by welfare fund; then the enterprise is entitled to claim deductible VAT as per regulations, and must issue VAT invoices, and calculate and pay VAT in a manner similar to sales to customers.
- Where an enterprise uses welfare fund to purchase external goods and give those away for free to its employees in public holidays, and not for the purpose of business activities, then the enterprise is not entitled to VAT input. Where the above goods are used to give away to its employees, the enterprise is not required to issue invoice, and not entitled to claim deductible expenses on assessing corporate's taxable income.

Health insurance in the formula for determining assessable income

In Official Letter 2037/BTC-TCT dated 16 February 2017, Minister of Finance expressed its opinion on conversion of foreign employees' PIT-exclusive income.

According to the Official Letter, where foreign employee who has labour contract from which derived income is net of PIT, and the Company pay Health insurance, rental charges, and PIT on that employee's behalf; in order to calculate assessable income, Health insurance paid by the company is assessable, and also deductible in the formula for determining assessable income, because Health insurance is an allowed deduction.

Decreasing the premium rate of social insurance for employers since June 1, 2017

On April 14, 2017, the Government has enacted Decree 44/2017/NĐ-CP providing policies about required social insurance premium rate to Insurance Fund for labor accident and occupational diseases. According to this decree, the premium rate that employers are required to pay monthly to Insurance fund for labor accident and occupational disease has been amended as below:

- From 1% to 0.5% based on the salary funds on which social insurance premiums are based for employees defined at point a, b, c, d, dd and h, clause 1, Article 2 of **Law on Social Insurance 2014** (excluding the employees who are domestic helpers).
- For employees who have been working under definite-term labor contracts from 01 to under 03 months, they will be complied with such regulation since January 01, 2018.

Accordingly, total monthly social insurance paid by employer will be reduced from **18%** to **17.5%**.

This decree comes into force since June 1, 2017.

Additional guidance on accounting of mixed-use building

On April 12, 2017, Ministry of Finance has enacted Circular 28/2017/TT-BTC ("Circular 28") amending and supplementing Circular 147/2016/TT-BTC ("Circular 147") and Circular 45/2013/TT-BTC ("Circular 45") guiding regulation on management, use and depreciation of fixed assets. The content of Circular 28 is as follows:

Eliminating Clause 1 Article 1 Circular 147

(Clause 1 Article 1 Circular 147 stated that: "For assets being mixed-use building which both serves the enterprise's operation and put up for sale or for lease according to laws, the enterprise shall determine and separate the areas for sale and for lease. Such areas must not be recorded as fixed assets and must not be depreciated. If the areas for sale and/or for lease cannot be separated, the enterprise must not record the whole building as a fixed asset and must not depreciate it.").

Amending, supplementing bullet No.3 Point e Clause 2 Article 4 Circular 45 as bellows:

For assets being mixed-used building which both serves the enterprise's operation and put up for sale or for lease according to laws, the enterprise shall determine and separate the areas to record for each purpose of using, according to the percentage of each area on finalized value, or according to actual area used for each purpose.

- For assets (areas) used to serve enterprise's operation and for lease (financial lease excluded): they must be recorded as fixed asset being managed, used and depreciated according to regulations.
- For assets (areas) for sale: they must not be recorded as fixed assets and must not be depreciated, they must be supervised as an asset for lease.

Other

For assets being mixed-used building which both serves the enterprise's operation and put up for sale or for lease according to laws, if the enterprise cannot determine and separate the asset (area) that serves each purpose, then the enterprise must not record the whole asset (area) as fixed asset and depreciate it.

For shared assets relating to mix-used buildings as playing field, passageway, parking field, value determination and depreciation method for them must follow criteria to determine value of each asset and depreciate mix-used buildings.

Circular 28 comes into force from May 26, 2017 and is applied since fiscal year 2016.

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Hanoi Office

Address: Suite 1205, 12th Floor, IPH Office Tower
241 Xuan Thuy, Cau Giay District, Hanoi, Vietnam

Tel: +(84-4) 2220 8334 / 37

Fax: +(84-4) 2220 8335

Newsletter in-charge

Ms. Nguyen Thi Thu Huyen

Mobile: +(84) 988 238 234

Ho Chi Minh Office

Address: 14th Floor, TNR Tower, 180-192 Nguyen Cong Tru,
District 1, Ho Chi Minh City, Vietnam

Tel: +(84-8) 3827 8516 / 19

Fax: +(84-8) 3827 8517

Newsletter in-charge

Mr. Phan Doan Khanh

Mobile: +(84) 972 487 048

