

Crowe Horwath Vietnam

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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:

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Decree No. 20/2017/ND-CP**Circular No. 66/2010/TT-BTC**

- 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.

- 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.

#	Decree No. 20/2017/ND-CP	Circular No. 66/2010/TT-BTC
	<ul style="list-style-type: none"> - 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. 	<ul style="list-style-type: none"> - The two enterprises have reached a business cooperation agreement on a contractual basis. - Not applicable. - Not applicable.
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.

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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.
6	Database used in declaring and determining transfer price includes: <ul style="list-style-type: none"> - 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. 	Database used in determining transfer price includes: <ul style="list-style-type: none"> - 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.
7	Reliability of comparable entity's financial data must be ensured. Regarding ratios, it must be rounded up to 2 digits after decimal point.	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.

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Decree No. 20/2017/ND-CP**Circular No. 66/2010/TT-BTC**

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.

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.

8 Disclose information on associated parties and relevant transactions:

- 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);
- Submit together with Corporate Income tax return.

Disclose information on related party transactions:

- Form No. 03-7/TNDN: Information on related party transactions (as promulgated in Circular No. 156/2013/TT-BTC);
- Submit together with Corporate Income tax return.

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Decree No. 20/2017/ND-CP**Circular No. 66/2010/TT-BTC**

9 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.	Not applicable.
10 Preparation, filing, and provision of Transfer pricing documentation: <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);- Transfer pricing documentation must be kept and presented on Tax Department's request.	Preparation, filing, provision of information, documents and vouchers as basic for determination of transfer price: <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;- Information, documents and vouchers must be kept as per current regulation on accounting, tax, and statistics and be provided on Tax Department's request.
11 Deadline to provide Transfer pricing documentation on Tax Department's request: <ul style="list-style-type: none">- 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.	Deadline to provide information, documents and vouchers on Tax Department's request: <ul style="list-style-type: none">- Within 30 working days and extension granted for further 30 working days with sound justification.

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12	<p>Transfer pricing documentation includes:</p> <ul style="list-style-type: none"> - 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). <p>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)</p> <p>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.</p>	<p>"Transfer pricing documentation" is equivalent to Local file as per Decree No.20.</p>
13	<p>Auditing and Accounting firms, consulting companies or tax agent companies are allowed to prepare transfer pricing documentation on behalf of taxpayer.</p>	<p>Not applicable/Not mentioned specifically.</p>
14	<p>Exemption from preparing transfer pricing documentation:</p>	<p>Not applicable.</p>

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- 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:
 - Distribution activities: $\geq 5\%$
 - Manufacturing activities: $\geq 10\%$
 - Outsourcing/ Processing: $\geq 15\%$

Enterprise that has signed Advance pricing arrangement.

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;**

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;

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Decree No. 20/2017/ND-CP**Circular No. 66/2010/TT-BTC**

- 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).
- 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.

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On April - 2017, Crowe Horwath Vietnam willing to invite you to a (free) Seminar (language: Vietnamese) to share about details of Decree No. 20/2017/ND-CP, in which, your company should be concerned about the risk and special notes when this Decree officially comes into effect. In addition, we will guide you basic for the preparation, filing, and provision of Transfer pricing documentation in compliance with Decree No. 20/2017/ND-CP. Details of the Seminar is as below:

- Seminar in Hanoi: **13-April-2017** - from 9h00 to 12h00
- Seminar in Ho Chi Minh city: **14-April-2017** - from 9h00 to 12h00

*(Noted: please register as soon as possible due to the space is limited;
We are sorry for refusing registration in case the Seminar is fully
registered; however, we planned a Seminar with the same subject on the
coming times and pleased to have your attention when the time comes)*