



Transfer Pricing Updates – Certain notable issues on implementing Transfer Pricing regulations in Vietnam

Having a look back after more than one year of implementation of Transfer Pricing regulations stipulated in Decree 20/2017/ND-CP and Circular 41/2017/TT-BTC.

Decree 20/2017/ND-CP (“Decree 20”) and Circular 41/2017/TT-BTC (“Circular 41”) on tax administration for related party transactions (“RPTs”) with effective from 1 May 2017 remark an important step in the process of legalizing Transfer Pricing regulations in order to reduce the State budget loss.

After more than 1 year of implementation and application of Decree 20 and Circular 41 along with other relevant regulations (i.e. New Law on Technology Transfer and Decree 76/2018/ND-CP guiding the Law effective from 1 July 2018, Law on Trade, Law on Intellectual Property, etc), via observing formal discussions between tax authorities and the companies, we would like to summarize certain critical issues for the companies, especially foreign invested companies who have significant related party transactions, for reference and application.





1. Important notes in the process of preparation of Transfer Pricing Documentation and Transfer Pricing inspection at the companies



Prioritize selecting internal comparable data such as gross profit margins of independent products/ groups of products (with independent revenue and cost of goods sold) for comparability analysis, where possible.



Examine carefully the comparability factors of externally selected independent comparable (e.g. economic sector, function, geographic market, scale and ownership structure, etc.). Consider selecting domestic independent comparables for some specific industries or fields for which Vietnam has advantages (e.g. agriculture, textile, footwear, etc.)



Consider making Transfer Pricing self-adjustments in a number of specific cases (e.g. consecutive loss of business results for many years without reasonable explanation). Making self-adjustment will bring certain benefits including avoidance of administrative penalties for incorrect declarations leading to lower tax obligations (20% of the underpaid tax) or having opportunity to enjoy incentives for the additional taxable income incurred due to the Transfer Pricing self-adjustments.



Ensure consistency between Transfer Pricing Disclosure Forms and the information analyzed in the Transfer Pricing Documentation.



Thoroughly examine the economic nature and supporting documents transactional basis (from Transfer Pricing as well as Corporate Income Tax perspective) instead of just focusing on the Company's aggregated profit margins.

2. Issues to be considered when implementing Technology Transfer Agreements and Technical Support Agreements with related parties

Perform a separate Benchmarking Study for the royalty fees paid to the related parties by applying Comparable Uncontrolled Price method (CUP method). This is also consistent with the provisions of the new Law on Technology Transfer whereby for cases of technology transfer between the parties in relation to the parent company - subsidiary company model or with related parties as determined by tax law, the price auditing procedure is conducted through the form of technology price valuation in accordance with the law upon tax authorities' request.

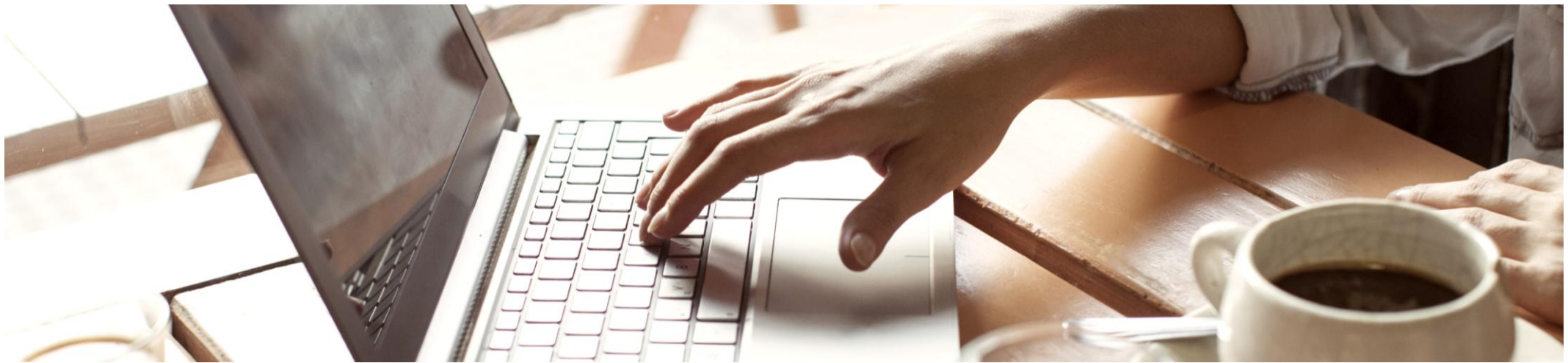
The economic nature of transactions (e.g. actually incurred, having supporting documents, real values brought to the transferee/receiver of technical support, not being duplicated with other transactions, capabilities of technology transferor and technical assistance providers, etc).

Under the provisions of the new Technology Transfer Law, technology transfer from foreign countries into Vietnam is subject to regulatory registration with competent state agencies. Please note that in order to register technology transfer contracts with competent agencies, the contracts need to comply with specific provisions in the new Technology Transfer Law (and sub-law documents) effective from 1 July 2018 (such as provisions on mandatory terms, technology transfer objects, registration dossiers, etc).

In the case of "amendments and supplements" to the signed contracts before 1 July 2018 (the effective date of the new Technology Transfer Law), the parties have the right to choose whether to register technology transfer contracts with the authority or not (except for "extension" cases).¹



1. Official letter No. 3050/BKHCHN-DTG dated 28 September 2018 of Ministry of Science and Technology



3. Interest expenses for companies with related party transactions

- On the issue of loan interest expenses not exceeding 20% of EBITDA for enterprises having RPTs, by the end of 2018, the General Department of Taxation has given their clear view on how to determine total deductible interest expenses upon determining corporate income tax obligations for enterprises having RPTs. Accordingly, Taxpayer's total loan interest expenses 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 (EBITDA) arising within that period, **regardless of whether the loan was granted by a related party or an independent party.**
- However, some current issues have not yet received final responses from the General Department of Taxation as a matter of effective period of Decree 20 in 2017, determining interest expenses to be deducted in case EBITDA is smaller than or equal to zero, etc².
- In practice, performing benchmarking study for interest expenses is still unpopular in Vietnam due to the complexity of financial transactions as well as the availability of comparable information. To ensure the best compliance, enterprises should consider collecting information about independent loans if possible (for example, between enterprises and independent commercial banks or independent data from third parties) as a basis for confrontation and explanation for related parties' interest expenses in case of being questioned by tax authorities.

Contacts

The above are preliminary summaries for the companies' information and reference. In case of specific issues, please contact the professionals at Grant Thornton for further advice.

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