Summary of Transfer Pricing Guidelines in Vietnam under the Provisions of Decree 20/2017/ND-CP

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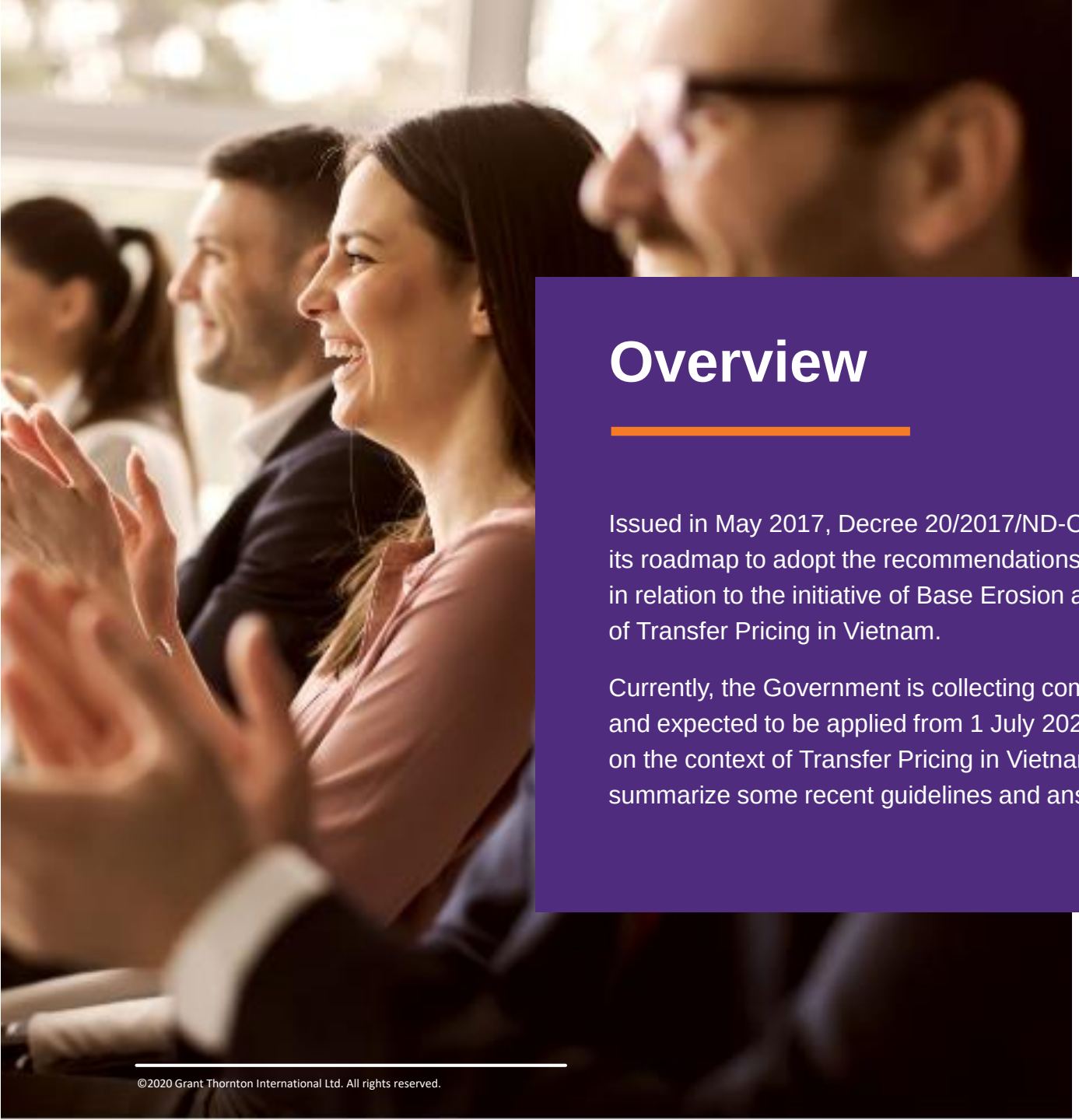

Overview

Issued in May 2017, Decree 20/2017/ND-CP ("Decree 20") was an important milestone for Vietnamese tax system in its roadmap to adopt the recommendations from Organization for Economic Co-operation and Development ("OECD") in relation to the initiative of Base Erosion and Profit Shifting ("BEPS") for the purpose of better controlling the concept of Transfer Pricing in Vietnam.

Currently, the Government is collecting comments on the draft Decree amending Decree 20 for early issuance this year and expected to be applied from 1 July 2020. In order to support the enterprise community to have a broader overview on the context of Transfer Pricing in Vietnam as prescribed under Decree 20, Grant Thornton Vietnam would like to summarize some recent guidelines and answers from local tax authorities on this issue for your reference.

1. Cases of exemption from preparation of Transfer Pricing Documentation and Forms

- Hanoi Tax Department claims that enterprises operating in the field of medical examination and treatment service are not exercising routine functions, therefore shall not meet the condition for Transfer Pricing documentation exemption in accordance with Point c, Clause 2, Article 11, Decree 20.

- Hai Phong Tax Department claims that in cases where enterprises incurred a borrowing transaction with related parties, the transaction prices of the loan shall be the interest incurred, not the loan principal.

- Binh Duong Tax Department claims that, in cases where an enterprise having shareholders being a company established in Vietnam (accounting for 51% of shares) and a company established in Japan (accounting for 49% of shares), during the covered fiscal year only incurred related party transactions (“RPTs”) with its Vietnamese shareholder, shall not be required to prepare Master File.

2. Determining the Corporate Income Tax (“CIT”) obligations for several types of RPTs incurred in the period

Hai Phong Tax Department claims that, for services with simple functions such as payment on behalf made by related parties that has additional mark-up, enterprises must prove that the payment value made to the related party is appropriate and corresponding to the value to be received by the enterprise from that service. Therefore, for the additional charge being not commensurate with the transaction value, the enterprise will be assuming the risk that these actual expenses with related parties shall be disallowed upon CIT calculation.

Hanoi Tax Department claims that enterprises are allowed to account the payment on behalf of Foreign Contractor Tax expense corresponding to the interest expense that exceeded 20% of Earning before Interest, Depreciation and Amortization (“**EBITDA”)** as deductible expenses for CIT purpose.

Most recently, on 8 June 2020, Hanoi Tax Department has issued the Official Letter No. 48057/CT-TTHT on selling supporting fees. Accordingly, selling supporting fees paid to related parties under commercial brokerage contracts, which do not fall into cases that transactions not conforming to the nature of independent transactions or not contributing to revenue generation, should be deductible for CIT purpose.

3. Determining the related parties being individuals

In Quarter 1, 2020, Hanoi Tax Department has issued the Official Letter No. 15990/CT-TTHT and Official Letter No. 6684/CT-THT. Accordingly, in cases where an individual does not contribute capital to the company but directly manages the company or an individual who is a member of the Members' Council participates in running the company’s business, these individuals shall be determined as related parties. Transactions which conducted between the company and these individuals are also considered as RPTs and are subject to Decree 20.

4. Determining interest expenses for CIT purposes for enterprises having related party transactions

On 24 June 2020, the Government has issued the Decree No. 68/2020/ND-CP amending Clause 3 Article 8 of Decree 20. Grant Thornton has published a Transfer Pricing newsletter on 1 July 2020 summarizing the changes under this new regulation relating to deductible interest expenses for enterprises having RPTs, and simultaneously provide specific recommended actions for enterprises.

Previously, General Department of Taxation has issued the Official Letter No. 3002/TCT-DNL dated 1 August 2019, with the following specific guidelines:

- Apply the regulations on interest expenses incurred from 1 May 2017 onwards until the end of the fiscal year, regardless of loan contracts signed before or after May 1, 2017;
- In case the taxpayer can record separately the business results from 1 May 2017 to the end of the fiscal year, the items used to calculate EBITDA is determined according to actual incurred value;
- In case the taxpayer could not record separately the business results from 1 May 2017 to the end of the fiscal year, the items used to calculate “Earnings before Interest, Tax, Depreciation and Amortization (EBITDA)” is allocated corresponding to the remaining months of the fiscal year.

Hanoi Tax Department has also previously provided guidance that the Interest expenses eligible for capitalization into the value of an investment project in the period are excluded from the total interest expenses incurred when determining deductible interest for CIT purpose in accordance with current regulations.

Ho Chi Minh City Tax Department has provided another official guidance, claiming that in case EBITDA is less than 0, the total interest expenses in the period of the Company are considered non-deductible expenses when determining taxable income for CIT purpose.

5. Transactions of transferring intangible assets into Vietnam

The Ministry of Science and Technology has issued the Official Letter No. 3050/BKHCN and Official Letter No. 3457/BKHCN-DTG providing guidance on some issues relating to registration of technology transfer contracts as below:

- In cases of “extension” of technology transfer contracts signed by the parties before 1 July 2018, the contracts shall fall into the cases of having to be registered for technology transfer.
- In case of “amendment” or “supplement” of technology transfer contracts signed before 1 July 2018, the parties may choose to either register or not register with competent state agencies.

The guidelines mentioned above are briefly summarized for reference purposes only. These may be private rulings guiding specific situations of each business. The application of these guidelines in similar situations should be carefully considered and consulted by experts before implementation. We are not responsible for any liabilities caused by the application of the above information in specific situations of enterprises without reference to our official professional advices.

If you have specific questions or would like to receive detailed documentation related to the above summaries, please contact our Transfer Pricing advisors at Grant Thornton for more comprehensive advices.

Contact

Please contact our professional advisors at Grant Thornton Vietnam for assistance with taxation, accounting, transfer pricing, labour, investment and customs as well as other legal issues you may have during your business operation.

Please visit our **Tax Hub** to view more information

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