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Tax Alert

Tax and Legal

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New Transfer Pricing ("TP) Decree released

On 5 November 2020, the Government issued a new TP Decree No. 132/2020/NĐ-CP ("**Decree 132**") to replace the existing Decree No. 20/2017/NĐ-CP ("**Decree 20**") and Decree No. 68/2020/NĐ-CP ("**Decree 68**"). Decree 132 takes effect from 20 December 2020 and is applicable for the tax year 2020 onwards.

In this Tax Alert, we highlight the key changes introduced by Decree 132.

1. Broadened subjects of application

Decree 132 broadens its application to taxpayers paying corporate income tax ("**CIT**") that have related party transactions ("**RPTs**"). Such general provisions could imply that foreign contractors would also be subject to the application of the decree.

2. New arm's length range

Decree 132 defines the standard arm's length range to be the 35th to 75th percentile value derived from at least five (5) independent comparables (Note that the lower bound of the arm's length range has increased from the previously 25th percentile as provided in Decree 20). In case the results of the taxpayer fall outside the arm's length range, the tax authority has the right to make a transfer pricing adjustment to the median value of this range.

Taxpayers need to re-evaluate their transfer pricing policies / positions for the tax year 2020 onwards and align their benchmarking analyses, where appropriate, to mitigate transfer pricing risks.

3. Use of commercial database

Decree 132 nominates the use of commercial and public databases as a valid data source for performing benchmarking analysis by both taxpayers and tax authorities alike.

The Decree, however, still gives tax authority the power to use the internal databases of the government (i.e., "secret comparable data") to make a TP adjustment in cases where a taxpayer is deemed not fully compliant with the relevant requirements of the decree. These conditions to fulfil the compliance requirements are highly subjective and could result in lengthy disputes.

4. Enhanced requirements on Country-by-country Report ("CbC Report")

Key changes to the CbC Report filing and submission include:

- For a Vietnamese ultimate parent company (with worldwide consolidated revenue in a fiscal year from VND 18,000 billion), it is required to file the CbC Report within 12 months from the end of the relevant fiscal year.
- For a Vietnamese taxpayer with a foreign ultimate parent company which is obliged to prepare CbC Report in its respective jurisdiction – or such foreign ultimate parent company appoints another entity ("**Surrogate Parent**") to file the CbC Report on its behalf in the Surrogate Parent's country of residence – in principle, the Vietnamese Tax Authorities will obtain such CbC Report from the respective overseas jurisdiction through the automatic exchange of information ("**AEOI**"). However, local filing (upon request) is required if the CbC Report cannot be exchanged because
  - There is no competent authority agreement between Vietnam and the respective overseas jurisdiction; or
  - Due to systematic failure of the exchange mechanism (e.g., suspension of the AEOI or the CbC Report not automatically provided to Vietnam)

— Taxpayers that may be subject to local filing shall provide written notification to Vietnamese authorities, on or before the fiscal year end date of the ultimate parent company, in advance in the following cases: (i) where there are multiple subsidiaries in Vietnam, the ultimate parent company delegates the local filing obligation to one entity; or (ii) to provide information (name, tax code, jurisdiction) of the ultimate parent or the Surrogate Parent, if applicable.

5. Revised interest deductibility cap rules

The interest deductibility cap rules have been relaxed, and key changes include:

— The cap is increased to 30% (from 20% under Decree 20) of total net operating profit before interest, tax, depreciation and amortization (NOPBITDA).

— The interest expense subject to the cap calculation is the net amount, i.e. interest expense after offsetting against interest income (from deposits and loans). The offset of interest income against interest expense was not addressed in Decree 20.

— Non-deductible interest expense can be carried forward for use in future years within a five (5) year limit, provided that the interest expense of the future years does not exceed the 30% cap.

— Certain government assistance loans are exempt from this interest limitation rule.

The question of interest, which is capitalized and not expensed, was not specifically addressed in Decree 132, and so remains an area of uncertainty.

6. Other notable points

— The definition of related parties is now broadened to include cases related to capital transfers and loans between enterprises and individuals that manage, control such enterprises or individuals under one of the relationships as prescribed in the Decree. This could imply that such transactions are now considered related party transactions, and therefore, have to conform with the arm's length principle.

— The decree implies that overseas related parties can be selected as the "tested party" for benchmarking purposes, depending on specific facts and circumstances of the parties involved and/ or nature of RPTs.

— The deadline for submitting the TP documentation at the request of the tax authority in the event of a tax / transfer pricing audit shall be in accordance with the Law on Inspection, which does not specify the time frame for providing information. This means that the taxpayers may have to provide the TP documentation within several days upon request from the tax inspectors.

— Taxpayer engaged in related party transactions solely with domestic related parties can be exempt from preparing TP documentation if the following conditions are met: (i) taxpayer and related parties have the same CIT rates, and (ii) none of the parties enjoy tax incentives.

Takeaways

As the first applicable tax year (i.e. 2020) under Decree 132 is fast approaching, we strongly recommend that taxpayers (especially multinational companies) study the new changes and quickly assess the potential impact on their business and tax controls for tax year 2020 (and going forward) and consider implementation plans in advance, where possible.

Should you require any further information or support, please contact our experts or your usual KPMG advisors.

Contact us

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