



Transfer pricing newsletter

October 2021

General Department of Taxation commentary on Circular 45/2021/TT-BTC

On 25 August 2021, the General Department of Taxation (“GDT”) issued Official Letter No. 3194/TCT-DNL (“**Official Letter 3194**”) introducing new contents of Circular 45/2021/TT-BTC (“**Circular 45**”) to Tax Departments of provinces and municipalities.

Notable points including new changes to the Advanced Pricing Agreement (“**APA**”) program, comments from the GDT on the reasons for the new points of Circular 45, and insights from KPMG Vietnam are as follows:

No.	Sections/Articles of Circular 45	New points compared to old Circular 201	GDT’s comments on the reasons for new points	KPMG’s observations
1	Covered transactions under APA (Article 3)	Additional requirements for covered transactions: <ul style="list-style-type: none"> - Transactions that have actually occurred and continue to occur during the proposed covered period; - Transactions that have basis for determining tax liabilities and conducting benchmarking using comparable data. 	In line with Law on Tax Administration and Transfer Pricing Decree 132.	It is no longer feasible to request APA for contemplated / proposed transactions that have yet to materialize.
2	Documentation and information, data used (Article 6)	Information provided by taxpayers must be sufficient and complete in accordance with Law on Tax Administration and Decree 132.	Ensures the information and data provided by taxpayers are in accordance with Law on Tax Administration, Decree 132.	GDT has high expectation for cooperation by taxpayers and transparency of information provided. Managing the APA process will be critical to avoid delays. In addition, the database used must be a legally verified commercial database.
3	Pre-filing (Consultation) prior to the submission of	No regulation requiring pre-filing consultation prior to the submission of the official application.	Pre-filing consultation is no longer mandatory to reduce administrative procedures.	This change is welcomed because taxpayers can now lodge the official APA application without prior approval from GDT, which may reduce the administrative

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	the official application			burdens on both GDT and taxpayers.
4	Review of APA application (Article 7)	<p>No regulation requiring set timeline/deadline for tax authority to review the APA application.</p> <p>GDT can consider applying other tax administrative measures including tax inspection/ audit to verify the completeness, accuracy, lawfulness, and reasonableness of information provided by taxpayers.</p>	<p>Time/effort required to review each APA application is different and dependent on specific cases.</p> <p>Information/data provided by taxpayers and obtained through site visits may not be sufficient in certain cases; and thus, tax authorities can perform additional measures, including tax audit or tax inspection.</p>	<p>Cooperation and managing the APA process will be key to avoid delays.</p> <p>It is unclear to the extent and scope of the tax audit or inspection that GDT can conduct, especially since the APA program promotes transparency through voluntary disclosure of information between taxpayers and tax authorities. This language is rather ambiguous and clearly contradictory to the "spirit" of the APA program. Nevertheless, Circular 45 does address the issue / concern on confidentiality and use of information provided by taxpayers. Specifically, taxpayers and tax authorities are required to uphold confidentiality of information during the APA process. Further, information provided by the taxpayers shall not be used by the tax authority as evidence for tax audit if the APA is cancelled, terminated or withdrawn.</p>
5	Discussion and negotiation of APA content (Article 8)	Clarification on the purpose of discussing/negotiating and reaching agreement on the proposed contents of the APA with the taxpayers and counterparty tax authority(s).	Provides clarification on the contents for discussion and negotiation in all APA cases.	This is welcomed since it provides more clarity on the legal framework for GDT in handling bilateral/multilateral APA cases at final stage (i.e. negotiation and conclusion).

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		For bilateral/multilateral APAs, taxpayers are responsible for informing its related party(s) to request the relevant counterparty tax authority(s) to facilitate discussion and negotiation with GDT.	Ensures bilateral/multilateral APA applications are submitted simultaneously to relevant tax authorities.	Managing the APA process will be key to avoid delays.
6	Rights, obligations and responsibilities of taxpayers (Article 9)	Taxpayers with unilateral APA that is exposed to double taxation or subjected to disadvantages resulting from income tax adjustment made by its counterparty tax authority(s) can seek resolution / relief by requesting GDT to revise or terminate the APA.	Taxpayers are still obliged to fulfill its obligations of the APA, unless APA is revised or terminated by regulation.	This change provides taxpayers with legal basis to request for revision or termination of concluded unilateral APA that may create additional tax burdens / double tax issues for taxpayers.
		No specific regulation on adjusting the taxpayer's taxable income for the years before the APA was signed and effective (i.e. this includes the years when the APA was being reviewed and processed). Such adjustment of taxable income is carried out in line with general tax principles.	In line with the regulations at Law on Tax Administration and Decree 126 and Decree 132 regarding adjusting taxable income for related party transactions.	This change implies that roll-back is not allowed, which could potentially result in double tax issues for the 'open' years (i.e. the years before the APA was signed and effective).
7	Rights and responsibilities of tax authorities (Article 10)	Tax authority can terminate the APA negotiation if the involved parties cannot reach agreement on the APA contents when the covered period ends.	APA is negotiated for future years (i.e., APA is established before taxpayers submit their CIT returns per Law on Tax Administration). Thus, if agreement cannot be reached before the covered period ends, then the APA can be terminated by tax authority.	Taxpayers may need to request for a change in the proposed covered period if the originally proposed period is expected to end before the APA is concluded. However, there is a risk that GDT may not agree to handle that case again based on the view that the APA application does not "improve the effectiveness of tax management" as specified in Paragraph 2, Article 5 of Circular 45.
		Clarification on the responsibilities of the local Tax Departments during the processing of the APA and management, inspection and audit of the concluded APAs.	Clarify the responsibilities of Tax Departments in handling and monitoring the APA.	

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8	Confidentiality (Article 11)	In case information and data provided by taxpayers are public, tax authorities can continue using such data to determine taxpayers' tax obligations.	Clarify the scope, authority and responsibility of tax authority in regards to confidentiality and use of information provided by taxpayers.	
9	Effective duration of APA (Clause 2 Article 12)	Maximum duration of APA is three years, but not exceeding the actual number of years that taxpayers have operated and paid corporate income tax in Vietnam.	Based on Law on Tax Administration and Decree 126.	The covered period is a maximum of three years, instead of the previous allowable period of five years.
10	Transition regulation (Clause 2 Article 13)	For APA applications submitted before the effective date of Circular 45 but have not yet been concluded and the proposed APA covered period has not ended at the effective date of Circular 45, such applications shall continue to be processed.	Allows taxpayers who submitted APA applications before the effective date of Circular 45 to transition to new APA rules.	Relevant APA applicants need to consult with GDT to restart the process as changes in Circular 45 could have significant impact on their existing applications. For example, a point to note is that the benchmarking needs updating according to the new provision of Decree 132, which specifies the standard arm's length range ranging from the 35 th percentile to the 75 th percentile.

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