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## *IN FOCUS*

### Transfer Pricing



In times of increasing public debts and economic turbulences, states focus more on effectively enforcing existing taxes. One approach is the control of related party transactions, which may be used to distribute profit and losses between different tax jurisdictions, thereby minimizing tax burdens in jurisdictions with higher taxes. Transfer Pricing Regulations provide a basis for such control. Vietnam has updated its regulations with effect from 6 June 2010 (Circular 66/2010/TT-BTC, 22. April 2010, on the Determination of Market Prices in Business Transactions between Associated Parties), replacing former Circular 117.

With the amended circular, stronger focus will be laid on appropriate documentation of related party transactions. Tax authorities have been trained and will likely focus on this in tax audits, especially in cases where consequential losses are reported or reporting duties or not fulfilled.

The new circular brought slight clarifications, *i.a.* regarding the definition of material differences in the comparative analysis for assessment of prices as well as a slightly narrowed definition on related parties (as regards company financing). In addition, it requires the company to provide more information on related

party transactions, *i.e.* on the type of relationship as well as the related parties address and tax codes.

The Vietnamese Transfer Pricing Circular still defines “related parties” in a rather broad scope, *i.a.* comprising common ownership (direct and indirect, from 20 % stake holding), common control (*i.a.* more than 50 % of board members or one board member that has control of another entity, as well as family relationship or related head office and branches), common financing (more than 50 % of loans, if such loans account for at least 20 % of the charter capital), commercial relationship (50 % of purchase of raw materials from or sales of products to third parties, BCC contract), etc. Thus, transactions can easily fall within the scope of the Vietnamese Transfer Pricing Regulations even in cases which may not at first hand be considered as being “related party transactions”.

The key principle of transfer pricing regulations is that prices used in related party transactions need to be at arm length, meaning that they have to be based upon prices which would be reasonable negotiated between independent parties under comparable conditions. The methods to determine whether such prices are at arm length mainly consist of a comparative analysis between related and unrelated parties as well as the determination of the market price. In line with international practice by OECD, the Vietnamese regulations provide for five different methods, *i.e.* the comparable uncontrolled price method, the resale price method, the cost plus method, the comparable profit method and the profit split method. The Circular does not provide for a hierarchy but requires that the chosen method must be suitable and complete and reliable information for data

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International Attorneys-at-Law  
Ho Chi Minh City Hanoi Danang

analysis and comparison must be available.

The Transfer Pricing Circular places the burden of proof on the taxpayer. That means that the taxpayer has to maintain “contemporaneous” transfer pricing documentation and upon request has to submit such to the tax authorities within 30 days. In addition, all related party transactions need to be declared to the tax authorities within 90 days after the financial year end.

As the documentation requirements are rather comprehensive, related party transactions should be followed up upon implementation and suitable documentation should be produced at this stage. Documentation requirements comprise general information on the enterprises and associates parties, as well as information on the transaction conducted and information on the methods of determining the market prices, including *i.a.* information on the selection of the methods used as well as information, data and vouchers used for comparative analysis.

The tax authorities have the power to re-assess prices if such are not deemed to be at arm length in order to determine additional tax liability. In case of breaches, penalties of up to 3 times of the additional tax liabilities in tax evasion cases, as well as interest and fines have to be taken into account.

Transfer Price Regulations therefore require continued attention from taxpayers, as it is very likely that transactions between related parties will be assessed in a tax audit. Especially companies declaring losses are expected to be increasingly in focus as well as companies that fail to submit the annual report on related party transactions.

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