

A. Transfer pricing Policy, MAP and APA

I. Overview of the current Transfer Pricing legislation in Vietnam

1.1 Before 2006

On 20 October 1997, the Ministry of Finance (MoF) issued Circular 74-TC/TCT, which was the earliest legal document to define related parties in a Vietnamese context. However, the applicability of this circular was limited to foreign-invested enterprises. Circular 89/1999/TT-BTC, which was issued on 16 July 1999, also provided guidelines on the definition of related parties. However, neither of these circulars specifically stipulated the TP methods to be used or any documentation requirements

The MoF issued Circular 13/2001/TT-BTC (“Circular 13”) on 8 March 2001 to provide guidelines on implementation of the Corporate Income Tax Act applicable to FIEs. It specified three traditional TP methods applicable to determining the arm’s length nature of related-party transactions:

- (i) comparable uncontrolled price method;
- (ii) resale price method; and
- (iii) cost plus method.

However, Circular 13 did not provide any detailed guidelines on application of the methods or guidance on documentation requirements. The Business Income Tax Act (“BIT Act”) issued in 2003, which came into force on 1 January 2004, requires all transactions between related parties to be conducted at market prices (the arm’s length principle).

2. Years 2006-2009

Pursuant to the BIT Act, the MoF issued Circular 117/2005/TT-BTC (“Circular 117”) in 2006 to provide guidelines on related-party transactions and the disclosure of documents and information.

Besides laying down the requirement for companies to comply with the arm's length standard, it also requires them to submit an annual TP declaration form and maintain contemporaneous TP documentation from 2006 on. Non-compliance carries a fine of up to VND 5 million.

Since the introduction of Circular 117, TP issues have been raised in some general tax audits conducted by provincial tax authorities on various industries (i.e. automotive, garment, electronics, etc.).

3. Years 2010 to date

- (i) issuance of a new TP circular by the GDT (Circular 66/2010/TT-BTC – Circular 66) to replace Circular 117.
- (ii) companies with related-party transactions and loss-making companies are likely to be targeted for audits;
- (iii) announcement by the MoF that a new TP project is being set up in which tax and customs agencies will work together;
- (iv) increasing number of TP queries raised during normal tax audits;
- (v) compilation of a target list for TP audits, comprising both MNEs and local companies that generate successive losses;
- (vi) a desk review and a focus on factual analyses;
- (vii) requests for TP declaration forms and TP documentation.

Circular 66 is considered the most comprehensive transfer pricing regulation in Vietnam to date. From a technical viewpoint, the Vietnamese TP regulations under Circular 66 are modelled on the OECD transfer pricing guidelines for multinational enterprises and tax administrations ("TP Guidelines"). Circular 66 adopts the arm's length principle and the transfer pricing methods set out in the OECD TP Guidelines.

The provisions of Circular 66 are applicable to organisations that are subject to BIT Law in Vietnam and carry on business partly or wholly in Vietnam with related parties. Any transaction carried out between related parties (e.g. buying, selling, exchanging, leasing, renting, transferring or concession of goods or services) may come under the scope of Circular 66. However, related-party transactions

involving products for which the prices are under state control are excluded from the scope of the circular.

Similar to the OECD Guidelines, Circular 66 also contains guidelines on the following four key subjects: comparability analysis, transfer pricing methods, selection and application of the most appropriate method, and documentation. Part B, Article 4, of Circular 66 also has detailed guidance with respect to the comparability analysis.

One key difference between Circular 66 and the OECD TP Guidelines is the definition of related parties. The definition adopted in Circular 66 is much broader than that in the OECD TP Guidelines.

(i) First, the 20% capital participation of 20%, either direct or indirect, is much lower than that laid down in many other countries.

(ii) Second, the definition of related parties goes beyond ownership/control criteria. It also includes significant business relationships between unrelated parties. For example, when a Vietnamese company's sales or purchases from an independent entity exceed 50% of total sales or the sum total of the cost of raw materials, materials and supplies or input products, these transactions are regarded as related-party transactions.

Vietnamese taxpayers are required to record and maintain contemporaneous TP documentation, and to submit it to the tax authorities within 30 days of their asking. Transfer pricing documentation under Circular 66 should include:

(i) general information on the business establishment and related parties;

(ii) the business establishment's transactions; and

(iii) the methods of calculating arm's length prices

Moreover, under the Vietnamese TP regulations, no specific provisions are available for Advanced Pricing Arrangements ("APAs"). Nor are any safe harbour rules laid down in the law

II. Overview of the current APA policy

The mechanism on determining APA is based on the following basis:

With the open door policy attracting investment, foreign investment enterprises have become an active part in the economic sectors contributing to the economic growth of Vietnam. However, when analyzing the issues, we found that "artificial loss, real interest" caused by taking advantage of transfer pricing issues (internal buying and selling without following the principle of market value. The deployment of anti-transfer pricing inspections on international transactions is quite complex due to the lack of information evidencing the fraud issues on the buying and selling cost and it is difficult to verify the actual foreign buyer and seller.

In order to restrict this problem according to the principle of market value, enabling SMEs to comply with the laws of the investment receiver and the laws of capital exporter, OECD members and other countries in the area such as China, Thailand, Indonesia, Malaysia, Singapore... already have had regulations on advance agreed mechanism for methods of determining the market value between tax authorities and multinational companies, including the participation from the tax authorities in related countries.

According to this mechanism, multinational enterprises should actively propose method on determining prices or level of prices when making purchase and sale between the members of the group before they declare and pay tax. Vietnam tax authorities (may coordinate with foreign tax authorities which already have signed agreements on avoidance of double taxation with Vietnam) will supervise and control to prevent transfer pricing fraud.

The additional of mechanism APA creating the initiative for businesses in making plan and complying tax obligations, and facilitating the collection, exploitation effectively the income on the basis of business multinational investment enjoy incentives and they can access to and exploit goods and services market, then they must be obliged to contribute financially to society.

In order to step by step implement legalizing provisions on APA, the Ministry of Finance conducted to find out the experience from many countries (such as Australia, Singapore, China, India, Thailand, Indonesia, etc.) to be able to apply on the conditions of the

economy as well as the current tax administration issues in Vietnam. And the Ministry of Finance has also submitted the report to the Prime Minister for approval to launch the pilot implementation of the APA on a foreign enterprise which has branches operating in Vietnam.

III. MAP

Provisions on MAP is regulated in DTA between Vietnam and its partners. However, MAP is not regulated in any specific Law in Vietnam. MAP will be considered to be built after APA passing by National Assembly.

B. Recent development on Transfer Pricing Policy and APA

1. The Issuance of a new TP circular by the MoF (Circular 66/2010/TT-BTC – Circular 66)

2. The draft amendments to the Tax Administration Law to introduce APAs were discussed at the National Assembly in May 2012. The Action Plan devotes a significant part for the MoF's plan on this major reform of the transfer pricing regime by specifying a clear path forward to issue regulations on APAs during 2012-2013 to implement the amended Tax Administration Law. If this proposal is approved by NA, the regulation on APA will be applicable from 2014.

Whilst the law is yet to be enacted (expectedly by the National Assembly in October 2012), the developments show the revenue authority's serious determination to enhance the transfer pricing regime with the APA initiatives.

APAs are noted by the MoF/GDT as a potentially effective tool to manage transfer pricing matters with taxpayers and promote inbound investment. Advance pricing arrangement is slated as one of the items in the prime ministerial Decision 732/QD-TTg dated May 17, 2011 on tax reforms.

For companies, the benefits of having an APA are clear in terms of certainty for tax authorities' acceptance of their transfer pricing policy and accordingly tax outcome. This is needed by many,

especially the multinational companies, in making decisions on investment.

C. Capacity building Program on APA

In recent years, Vietnam has focused on strengthening the management of transfer pricing through taxpayer awareness, taxpayer support, inspection and auditing. However, the results are limited because an audit case of transfer pricing often takes a long time, involves spending a lot of money and requires a large amount of financial and human resources. This leads to conflicts and appeals of taxpayers to the tax authorities related to determining arm's length method.

Recently, a number of MNEs operating in Vietnam have proposed applying the APA regime to GDT, but until now this issue is being researched.

Based on the practices, the issuance of legal document and implementation APA program is very necessary in order to facilitate relevant taxpayers in compliance with tax law about transfer pricing as well as to participate to the stability of the business and investment environment.