

DECREE 20
REGULATING
TAX MANAGEMENT OF ENTERPRISES WITH RELATED TRANSACTIONS
[TRANSFER PRICING]

24 February 2017

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GOVERNMENT

SOCIALIST REPUBLIC OF VIETNAM

Independence - Freedom - Happiness

No. 20/2017/NĐ-CP

Ha Noi, 24 February 2017

**DECREE
REGULATING
TAX MANAGEMENT OF ENTERPRISES WITH RELATED TRANSACTIONS
[TRANSFER PRICING]¹**

Pursuant to the *Law on Organization of the Government* dated 19 June 2015;

Pursuant to the *Law on Tax Management* dated 29 November 2006 as amended by a Law dated 20 November 2012;

Pursuant to the *Law on Corporate Income Tax [CIT]* dated 3 June 2008 as amended by a Law dated 19 June 2013;

Pursuant to Law 71 amending Tax Laws dated 26 November 2014;

Pursuant to the *Law on Investment* dated 26 November 2014;

Pursuant to the *Law on Enterprises* dated 26 November 2014;

Pursuant to the *Law on Accounting*² dated 20 November 2015;

On the proposal of the Minister of Finance;

The Government hereby issues a Decree regulating tax management of enterprises with related transactions [transfer pricing].

CHAPTER 1

General Provisions

Article 1 Governing scope

- 1 This Decree regulates the principles, methods, sequence and procedures for fixing the price of related transactions [transfer pricing]; the obligations of taxpayers to declare and fix the price of related transactions and to declare and pay tax; and the responsibilities of State agencies to manage, check and inspect tax of taxpayers which generate related transactions.
- 2 Related transactions within the governing scope of this Decree means transactions arising during production and business activities of taxpayers which have an associated relationship as prescribed in article 5 of this Decree, except for business transactions regarding goods and services within the authority of the State to fix prices in accordance with the law on pricing.

¹ Allens footnote: Square brackets contain translator's comments only.

² Allens footnote: Article 6.6 of this Law introduced the international *substance over form* accounting principle by stipulating that "formulation and presentation of financial statements must ensure that the substance of a transaction is reflected rather than its form and name".

Article 2 Applicable entities

- 1 Organizations producing and trading goods and services (hereinafter abbreviated as *taxpayers*) subject to payment of corporate income tax in accordance with the declaration method and having related party transactions as defined in article 5 of this Decree.
- 2 Tax authorities comprising the Department General of Taxation, provincial Tax Divisions and district tax offices.
- 3 Other State agencies, organizations and individuals involved in application of the provisions on transfer pricing including tax authorities of nations and territories which have an effective Tax Treaty with Vietnam.

Article 3 Principles of application

- 1 Taxpayers with related transactions must declare them; and [must] exclude factors reducing the tax obligations resulting from the dominant, effective associated relationship, in order to fix the tax obligations on a related transaction the same as those on independent transactions made on the same conditions³.
- 2 Tax authorities shall manage, check and inspect related transactions of taxpayers on the principle of independent transactions and substance over form for the purpose of not recognizing related transactions which reduce tax obligations of enterprises to the State budget, and shall adjust the price of related transactions in order to correctly fix tax obligations as prescribed in this Decree.
- 3 The principle of an independent transaction is applied in accordance with the principle of the transaction being between independent parties which do not have an associated relationship [as stipulated in] a Tax Treaty effective for implementation in Vietnam.

Article 4 Definitions

- 1 *Tax Treaty* is an abbreviated term for Agreements on avoidance of double taxation and prevention of tax evasion with respect to various types of taxes imposed on income and signed between Vietnam and various nations and territories, including Treaties amending any Treaty currently effective for implementation in Vietnam.
- 2 *Foreign tax authority* means the tax authority of a country or territory which has entered into a Tax Treaty with Vietnam.
- 3 *Related transaction* means a transaction arising between parties with an associated relationship during production and business and comprises a purchase, sale, exchange, lease, lease out, borrowing, lending, delivering and/or transferring machinery, equipment or goods or supplying services; borrowing, lending, [providing] financial services, financial security and other financial instruments; purchase, sale, exchange, hiring, hiring out, borrowing, lending, delivering and/or transferring tangible or intangible assets, and reaching agreement on common use of resources such as collaborating or cooperating to exploit the use [employment] of manpower; and sharing expenses between related parties.
- 4 *Independent transaction* means a transaction between unrelated parties.
- 5 *Independently comparable objects ["comparables"]* means independent transactions or enterprises conducting independent transactions selected on the basis of a comparability analysis and identification of matching comparables to fix a price level, a profit ratio, and/or a profit split ratio

³ Allens footnote: In the OECD (Organization for Economic Cooperation and Development) transfer pricing guidelines, the related transaction is referred to as the *controlled transaction* and the comparable independent transactions as *uncontrolled transactions*.

aimed at fixing the tax payable to the State budget by the taxpayer and ensuring it complies with the *Law on Tax Management* and the *Law on CIT*.

- 6 *Material difference* means a difference in information or data which materially or significantly affects price, profit ratio and/or the profit split ratio of the transacting parties.
- 7 *Database of tax authority* means information and data which the tax authority formulates and manages in accordance with the *Law on Tax Management* relevant to fixing taxpayers' tax obligations and which is collected, analysed, stored, updated and managed by the tax authority from various sources including databases and information exchanged with foreign tax authorities and competent agencies.
- 8 *The principle of "substance over form"* is a principle aimed at analysing the production and business operation of a taxpayer in order to identify the nature of a related transaction and compare it with similar independent transactions, ensuring that the related transaction correctly reflects the commercial, economic and financial nature as if between non-related parties, thereby preventing the dominant related transaction from distorting the taxpayer's tax liability to the State budget. This principle relies on data and the actual performance of the transaction between the related parties to compare it with independent transactions made on the same conditions, regardless of the form of the transaction as expressed in the contract or document between the related parties. The nature of the commercial, economic and financial relationship of the related transaction shall be identified by comparing it with independent transactions made on the same conditions.
- 9 *Range of independent transactions' value ["arms' length range"]* means a collection of values regarding price levels, profit ratios or profit split ratios of comparables selected by the tax authority and the taxpayer on the basis of the databases prescribed in article 9 of this Decree. These values [must] have a reliable level of comparability with each other. In necessary cases, the statistical probability method may be applied to identify a standard arms' length range and in-between values which are representative, universal [general] or common aimed at increasing the reliability of the comparables collected.
- 10 *Ultimate parent of the group* is a term used to describe the legal entity which directly or indirectly owns the equity of the other legal entities within the multinational group and which is itself not owned by any other legal entity. The consolidated financial statements of the ultimate parent of the group are not consolidated into any of the financial statements of any other legal entity worldwide.

CHAPTER 2

Specific Provisions

Article 5 Parties with an associated relationship [related parties]

- 1 Parties with an associated relationship (hereinafter abbreviated as *related parties*) means parties with one of the following relationships:
 - (a) One party participates directly or indirectly in the executive management, control, capital contribution to or investment in the other party;
 - (b) The parties are directly or indirectly subject to executive management, control, capital contribution or investment by another party.
- 2 Related parties as prescribed in clause 1 above are specified in detail as follows:
 - (a) One enterprise holds directly or indirectly at least twenty five per cent (25%) of the contributed capital of the owner [equity] of the other enterprise;

- (b) A third party directly or indirectly holds at least twenty five per cent (25%) of the contributed capital of the owners [equity] of both enterprises;
- (c) One enterprise is the biggest shareholder of contributed capital of the owner [equity] of the other enterprise, holding directly or indirectly at least ten per cent (10%) of the total shareholding of the other enterprise;
- (d) One enterprise guarantees another enterprise or provides it with loans in any form (including third party loans secured by financial sources of the related party and including financial transactions of a similar nature) on condition that such loans account for at least twenty five per cent (25%) of contributed capital of the owner [equity] of the borrowing enterprise and account for more than fifty per cent (50%) of the total value of medium and long-term loans of the borrowing enterprise;
- (dd) One enterprise appoints members of the executive board [management] of another enterprise or holds the controlling right in it [the second enterprise] on condition that the number of such members appointed by the first enterprise accounts for over fifty per cent (50%) of the total number of members of the executive board [management] or the first enterprise holds the controlling right in the second enterprise; or one of the members appointed by the first enterprise has the power to decide the financial policies or business activities of the second enterprise;
- (e) Two enterprises both have above fifty per cent (50%) members on the executive board [management of each of the two enterprises] or both have a member with power to decide the financial policies or business activities [of each of the two enterprises] who are appointed by the same third party;
- (g) Two enterprises are executively managed or controlled regarding personnel, financial and business activities by individuals in the relationship of husband and wife, or parent and child (including both natural, adopted and children-in-law), two siblings, grandparent and grandchild, uncle or aunt and niece or nephew;
- (h) Two business establishments have the relationship of head office and resident establishment, or are resident establishments of the same foreign organization or individual;
- (i) One or more enterprises are under the control of one individual by his or her capital contribution to such enterprise/s or by his or her direct participation in executive management of the enterprise/s;
- (k) Other cases in which an enterprise is in reality subject to executive operation and decisive control of its production and business activities by the other enterprise.

Article 6 *Comparability analysis and selection of independent comparables to compare and fix the price of a related transaction*

- 1 The principle of comparability analysis of independent transactions and the principle of substance over form in order to identify the nature of a related transaction as similar to the comparables [is regulated as follows]:
 - (a) [In order to identify] the nature of a transaction, a comparison shall be made between the legal contract or transaction agreement or document of the related parties with the actual conduct [of such transaction] by the parties. If a taxpayer has a related transaction but there are no written agreements or if any existing written agreement is inconsistent with the independent transaction principle [arms' length principle] or if the actual conduct of the transaction is inconsistent with the arms' length principle between unrelated parties, then the related party transaction must be determined in accordance with its true business nature as if between independent [non-related] parties as follows: a related party receiving income and/or profit from a related transaction with the taxpayer must have the ownership and business risk controlling right with respect to the assets, goods, services, resources or rights with economic interests attached and must have the right to create income from shareholding, share certificates and other financial instruments and the taxpayer

incurring expenses as a result of the transaction with the related party must receive actual benefits and economic value or a contribution to the creation of turnover or added value to the production and business activities of such taxpayer in compliance with the arms' length principle;

- (b) The nature of the transaction is determined by the method of collating information, source vouchers and data about the transaction and the risks of the related parties during the actual conduct of production and business.
- 2 A comparability analysis must ensure that there is a similarity between the independent comparables and the related transaction, without material differences affecting price level, profit ratio or profit split ratio between the parties. If there are such material differences affecting such items, then there must be a further analysis, determination and adjustment by eliminating the material differences from the comparables as prescribed in clause 3 below and in compliance with each method for fixing the price of the related transaction [transfer pricing method] as stipulated in article 7 of this Decree.

A comparability analysis to find similar [analogous] independent comparables:

- (a) Selection of internal independent comparables being transactions between a taxpayer with unrelated parties ensuring similarity and no material differences regarding price level, profit ratio or profit split ratio between the parties. If there are no similar internal independent comparables, then comparables shall be chosen in accordance with sub-clauses (b) and (c) of article 9.3 of this Decree. A comparison between a related transaction and an independent transaction shall be conducted on the basis of comparing each transaction with each similar product. If transactions are not able to be compared based on products, then the agglomeration of transactions must ensure consistency regarding their nature and actual business practice and application of the transfer pricing methods stipulated in article 7 of this Decree;
- (b) Financial data of comparables must be reliable for use in declaring and assessing tax and must comply with the provisions on accounting, statistics and taxation. The time [period] when the comparable transactions were conducted must be the same as for time of the related transaction or their fiscal year must be the same as the fiscal year of the taxpayer, except in a special case where it is necessary to extend the comparison period as prescribed in sub-clause (d) below. Data formats must ensure that price levels are comparable and assessable as at the time of the transactions or within the same tax assessment period; and data comparing profit ratios or profit split ratios must be taken within at least three (3) consecutive tax periods. The taxpayer should round up value ratios and corresponding ratios to the second digit after the decimal point. If relative figures are taken from announced data which does not have absolute numbers attached and the relative figures have not been rounded up, then these figures should be taken from data which has been announced and which cites its sources;
- (c) The minimum number of independent comparables to be selected after comparability analysis and adjustment of material differences is as follows: one comparable if there is no difference between the related transaction or the taxpayer conducting the related transaction [on the one hand] and the independent comparable [on the other hand]; three comparables if there are differences between the comparables but there is sufficient information and data for eliminating the material differences, and five or more comparables if there is only information and data for eliminating most of the material differences between the independent comparables;

If the similarity between the selected comparables is not reliable, then the statistical probability method should be applied to determine a standard arms' length range and to select a value between the collected comparables to adjust and fix a price level, profit ratio or profit split ratio of the taxpayer in accordance with the transfer pricing methods stipulated in article 7 of this Decree;

- (d) In the case of a related transaction which is unique or which has distinctive characteristics so that independent comparables cannot be found for comparison purposes, then the scope of the

comparability analysis should be broadened to cover the industry, geographical market and/or the period of time over which the comparison is made in order to find [appropriate] independent comparables. Broadening the scope of the comparability analysis should be conducted as follows: selection of independent comparables from the economic sub-industry with the highest similarity to that of the taxpayer in the same geographical market; and by expanding the geographical market to include countries in the region with similar industry conditions and similar economic developmental status.

If there is a broadening of the comparability analysis to select independent comparables from other geographical markets, then there must be both a qualitative and quantitative analysis of similarities and of material differences prescribed in sub-clauses (e) and (d) of this article 6.2 and in article 7.2; or figures and data from comparables of the previous year may be used and adjustments made to material differences because of the time factor (if any).

The extended period over which figures and data of independent comparables is gathered should not exceed one fiscal year [before or after] the fiscal year of the taxpayer if the pricing method stipulated in article 7.2 [transactional net margin method] is used.

- (dd) The bases and methods for fixing prices and independent comparables selected, and for adjusting price levels, profit ratios or profit split ratios by a taxpayer in order to determine CIT obligations of the taxpayer must not reduce the [amount of] tax payable to the State budget.
- 3 A comparability analysis applying the method of comparing, reviewing and adjusting material differences between comparative factors in order to select independent comparables:
- (a) The comparative factors include the special product characteristics of the goods, services or assets (hereinafter abbreviated as *product characteristics*); the operational functions and assets and production and business risks⁴; and the contractual conditions and economic conditions in which the transaction/s took place;
 - (b) An analysis of the operational functions, assets, and production and business risks must determine the main functions associated with use of the various types of assets, capital and expenses including cooperation in exploiting and using manpower and splitting expenses between the related parties and risks of investment of such assets and capital as well as [assumption of risks regarding] ability to make a profit from business transactions. The functional analysis is the basis for re-determining and redistributing the actual production and business risks of the related parties;
 - (c) An analysis of the special comparative factors of intangibles must include a review and analysis of the right to recover economic benefits stipulated in the contract or agreement and the non-contractual relationships which result in economic benefits to the parties. The analysis of intangibles must be based on ownership of [who owns] the assets; potential benefits from the intangibles; geographical restrictions with respect to the use and exploitation of rights to the intangibles; asset lifecycle; rights and relationships which bring economic benefits; whether the franchisee participates in developing the intangibles and its operational function, and the actual ability of each related party to control business risks regarding the entire process of development, increase, maintenance, protection and exploitation of such intangibles;
 - (d) An analysis of the economic conditions at the time the transaction arose must include the cost advantage based on factors being the geographical location and the specialization function; and the developmental status of the market and economic conditions of the business industry and sector of the taxpayer;

⁴ Allens footnote: The OECD transfer pricing guidelines state that regard must be had to what the taxpayer obtained in return for the functions it performed, the assets it used, and the risks it assumed.

(dd) A comparability analysis and elimination of material differences means an analysis and elimination of both qualitative and quantitative differences of information or financial figures which have a major impact on the factors used as the basis for determining the price of the related transaction in accordance with each of the pricing methods prescribed in article 7 of this Decree. A determination of the material differences based on quality and quantity comprises: Quantitative differences mean differences determined by absolute numbers regarding the business cycle, and the number of years for which the enterprise has been established and operating, or by relative numbers such as differences regarding financial criteria in accordance with the special characteristics of the investment industry or trade or operational function, and differences regarding working capital; qualitative differences mean information determined and based on each pricing method.

Information determined to be critical comprises: Differences regarding product characteristics, contractual conditions, functions, assets, risks, the business industry or trade, and economic conditions of the taxpayer and of the independent comparables; and differences regarding policy, investment environment, and the impact of input costs of production and business in different geographical markets.

Quantitative and qualitative differences must be reviewed and adjusted as corresponding to the comparative factors with a critical impact on the transfer pricing methods stipulated in article 7 of this Decree.

(e) The results of analysis shall be the basis for selecting independent comparables appropriate for each transfer pricing method stipulated in article 7 of this Decree.

4 The comparability analysis process comprises the following steps:

- (a) A determination of the nature of the related transaction before conducting an analysis of the similarity of the independent comparables;
- (b) A comparability analysis, search and selection of similar independent comparables on the basis of determining the comparison period, product characteristics, and contractual conditions; an analysis of the industry, market and economic conditions at the time the transactions arose; an analysis of the related transaction and of the taxpayer conducting it; database sources; and the method for determining the price of the related transaction and for adjusting material differences (if any);
- (c) A determination of the price level, profit ratio or profit split ratio based on the results of analysing the independent comparables as the basis for comparing, applying and fixing the [amount of] CIT payable by the taxpayer without reducing the tax obligations payable to the State budget. Calculation methods must be applied uniformly throughout the business cycle and business and production phase, consistent with the business function and models prescribed in article 7 of this Decree.

Article 7 Methods of comparing and fixing the price of the related transaction [transfer pricing methods]

Methods of comparing and fixing the price of the related transaction (abbreviated to *transfer pricing methods*) shall be applied in conformity with the principle of independent transactions, the nature of the transaction and the function of the taxpayer, on the basis of uniform calculation and application throughout the entire business and production circle and stage; and shall be based on the financial data of the independent comparables selected in accordance with the principles for comparability analysis stipulated in article 6 of this Decree. The transfer pricing method/s to be selected shall be from the methods prescribed below, based on the special characteristics of the related transaction, the availability of information and data, and the nature of the pricing method.

The transfer pricing methods are regulated as follows:

1 The method of comparing the price of the related transaction with the prices of independent transactions (hereinafter abbreviated as the *comparable uncontrolled price method or CUP*):

- (a) Cases when the CUP method is applied comprise: The taxpayer conducts the related transaction for each type of goods, tangible assets or type of services with conditions regarding trading and common circulation on the market or at a price announced on domestic and international commodity and services markets; a transaction being payment of royalties when exploiting tangible assets; payment of loan interest during lending and borrowing activities; or the taxpayer conducts both independent transactions and the related transaction for products with the same product characteristics and on the same contractual conditions;
- (b) The CUP method is applied on the principle that there are no differences regarding the product characteristics and contractual conditions when comparing the price of independent transactions with the price of the related transaction with a material impact on the product price. If there are material differences affecting the product price, then these material differences must be eliminated.

Factors being product characteristics and contractual conditions with a material impact on the product price comprise: Special characteristics, quality, and the brand or trade mark of the product, and its size and trading volume. Contractual conditions on the supply and delivery of the products comprise: Volume, period of delivery, period of payment and other conditions of the contract; distribution and sale rights in the goods, services or assets affecting the economic value and market where the transaction takes place, and other factors affecting the [unit] price of products being economic conditions and operational function of the taxpayer.

- (c) Determination method: the [unit] price of the product in the related transaction shall be adjusted to the product prices in the independent transactions or to a price within the standard [price] range of the independent transactions of the independent comparables in accordance with the provisions of this Decree.

If the product price has been announced on domestic and international goods and services trading floors, then the product price in the related transaction shall be determined as the product price announced at the same time and on the same trading conditions. A taxpayer purchasing machinery and equipment from a related party overseas must have data and source vouchers proving the standard purchase price in accordance with the arm's length principle as at the time of purchase: In the case of new machinery and equipment, the comparable price is the price in the invoice for purchase by the related party from an independent party; and in the case of second-hand machinery and equipment, there must be an original invoice and/or source voucher as at the time of purchase when the asset price was re-determined in accordance with the current provisions of law guiding management, use and depreciation of fixed assets.

- (d) The result of determining the price of the related transaction shall be the taxable price for the purposes of declaring and fixing [assessing] the amount of CIT payable, which must not reduce the amount of tax payable by the taxpayer to the State budget.

- 2 The method of comparing the profit ratio of the taxpayer with profit ratios of independent comparables [*transactional net margin method or TNMM*]:

- (a) This method is applied when the taxpayer does not have a database and information in order to apply the CUP method prescribed in clause 1 above; or the taxpayer is unable to compare product transactions on the basis of comparing each transaction with another similar transaction, because the agglomeration of transactions is aimed at compliance with the nature and actual conduct of business and accordingly a profit margin of independent comparables must be selected, or the taxpayer does not perform any independent function regarding the entire production and business chain, or does not participate in overall special related transactions as prescribed in clause 3 below;

- (b) Principles of application: The TNMN method is applied on the basis that there are no differences in functions performed, assets used or risks assumed; and no differences between economic conditions and the cost accounting methods of the taxpayer and of independent comparables materially affecting the profit ratio. If there are such material differences, then they must be eliminated.

Factors being business functions, assets, risks and economic conditions which may materially affect the profit margin comprise: Factors related to assets, capital and expenses; the actual controlling rights and decision-making rights serving performance of the main function of the taxpayer; characteristics of the business operational industry and of the product production and sales market; cost accounting methods and product cost structure; and the economic conditions in which the transactions took place.

Other factors which materially affect [the profit rate] may be identified by an investigation of actual conduct as between the related parties, including the commercial or financial relations of the multinational group; technical assistance; sharing of business know-how; use of seconded staff or concurrent staff, and the economic conditions of the industry and business sector of the taxpayer. Other comparable factors are product characteristics and contractual conditions.

A taxpayer conducting business with a simple function, without the decision-making right for business strategy and with transactions which create a small amount of added value, and including enterprises producing or distributing goods which do not assume the risk of goods in store or market risks and do not generate revenue or expenses from exploitation of intangibles, are not subject to losses during production and business from such risks;

- (c) Calculation method: This method uses the gross profit margin or net profit margin of independent comparables in order to fix a corresponding gross profit margin or net profit margin of the taxpayer. The selection of the gross profit rates or net profit rates is based on revenue and expenses or on assets depending on the nature and economic conditions of the transactions; and on the function of the taxpayer and cost accounting methods of the parties. The basis of the profit margin is revenue and expenses or assets as set out in the accounting figures of the taxpayer without the related parties controlling or making any decision about the price of such related transaction.

- The method of comparing gross profit margin over turnover (the resale price method):

The buying price of the goods, services or assets (cost price) from the related party equals (=) selling price (net turnover) of such goods, services or assets resold to an independent party less (-) gross profit over the selling price (net turnover) of the taxpayer less (-) a number of other expenses included in the buying price namely import duty, customs fees, insurance costs and international freight (in any).

Gross profit over selling price (net turnover) of the taxpayer is determined from independent comparables and equals (=) selling price (net turnover) of the taxpayer multiplied by (x) gross profit rate over the selling price (net turnover) of the selected independent comparables.

The ratio of gross profit over selling price (net turnover) of the selected independent comparables is a price within the standard arms' length range of such gross profit ratios over selling price (net turnover) of the selected independent comparables, used to adjust [the taxpayer's price] for consistency in accordance with the principles stipulated in this Decree.

The buying price from the related party (or cost price) as adjusted in accordance with the independent comparables is the price for assessing tax, for declaring expenses and for determining the amount of CIT payable by the taxpayer.

- The adjusted buying price (or cost price) from the related party, as adjusted by comparing with the independent comparables, shall be the price for tax calculation purposes, and for declaration of expenses and determination of the CIT payable by the taxpayer.

- The method of comparing ratio of gross profit over cost price (the cost price plus profit method):

The selling price or net turnover of the goods, services or assets sold to the related party is determined as equal to (=) cost price of the goods, services or assets bought from an independent party plus (+) profit over the cost price of the taxpayer.

Gross profit over cost price of the taxpayer is determined from independent comparables as equal to (=) cost price of the taxpayer multiplied by (x) ratio of profit over cost price of the selected independent comparables.

The ratios of gross profit over cost price of the selected independent comparables is a value within the standard arms' length range of the ratios of gross profit over cost price of the selected independent comparables used to make the appropriate adjustment in compliance with the principles stipulated in this Decree.

The selling price to the related party (or net turnover), adjusted in accordance with the independent comparables shall be the price for tax assessable purposes and for declaration of expenses and for fixing the amount of CIT payable by the taxpayer.
 - The method of comparing net profit ratios:

The net profit ratio pre-loan interest fees and pre-CIT on revenue, expenses or assets of the taxpayer conducting the related transaction is adjusted in accordance with the net profit ratios pre-loan interest fees on revenue, expenses or assets of the selected independent comparables, as the basis for adjusting and fixing the tax obligations of the taxpayer.

Net profit does not include the difference between turnover and expenses of financial activities.

The net profit ratios selected are a value within the standard arms' length range of the net profit ratios of the selected independent comparables in order to adjust and determine taxable income and the amount of tax payable by the taxpayer in compliance with the principles stipulated in this Decree.

Criteria on pre-loan interest fees and pre-CIT net profit ratios shall be determined in accordance with the provisions of the law on accounting and the law on management of tax and CIT.
- 3 The method of profit split between the related parties:
- (a) The method of profit split between the related parties is used in the following circumstances: the taxpayer participates in conducting a combined related transaction of a special, unique and secret [closed] nature within the group, in activities of development of new products, using exclusive technology for participating in a value chain of monopoly [exclusive] transactions of the group or in the development, enhancement, maintenance, protection and exploitation [DEMPE] of monopoly [exclusive] intangible assets, without any basis for determining the price as between the related parties, or simultaneously conducts complex financial transactions related to multiple world financial markets; or the taxpayer participates in digital economy related transactions where there is no basis for determining the price as between the related parties, or participates in creation of added value from combined efforts within the group, or the taxpayer implements its own sovereign [autonomous] function throughout the entire production and business process and is not an applicable entity as prescribed in clauses 1 and 2 of this article;
 - (b) Principles of application: the profit split method means allocation of total profit of the related transactions to determine the profit of the taxpayer. This method is applicable to the total actual profit plus potential profit from the related transactions prescribed in sub-clause (a) above, determined from financial figures provided from valid and appropriate source vouchers; and the value and profit of the related transactions must be determined by the same accounting method throughout the entire period of applying the profit split method;

- (c) Calculation method: the adjusted profit of the taxpayer is allocated from the total profit from the related transaction comprising actual profit and potential profit collectable by the parties participating in such transaction.

The adjusted profit of the taxpayer includes total basic profit plus extra profit. Basic profit is determined in accordance with the method of comparing profit ratios prescribed in clause 2 above. Extra profit is determined as a ratio allocated on one or more factors such as revenue, expenses, assets or manpower of the related parties to the transaction and in compliance with the arms' length principle.

If there is insufficient information and databases to make an adjusted allocation of profit as prescribed above, then allocation may be based on one or more factors such as revenue, expenses, assets or manpower of the related parties to the transaction and in compliance with the arms' length principle.

- (d) The adjusted profit of the taxpayer is the basis for determining taxable income and the amount of CIT payable without reducing the amount of the tax payable by the taxpayer to the State budget.

Article 8 *Determining expenses for tax assessment purposes in a number of specific cases applicable to enterprises with special related transactions*

- 1 [Expenses of] a related transaction which are inconsistent with the nature of independent transactions or which do not contribute to the creation of turnover or income for the production and business activities of the taxpayer shall be non-deductible expenses for tax assessment purposes in the period, and such non-deductible expenses comprise:

- (a) Payments to related parties which do not have any production and business activities related to the industry and trade or production and business activities of the taxpayer;
- (b) Payments to related parties with production and business activities but their assets size, staff numbers and production and business functions are disproportionate to the transaction value receivable by such related parties from the taxpayer;
- (c) Payments to related parties which do not have interests or responsibilities related to the assets, goods or services provided to the taxpayer;
- (d) Payments to related parties which are residents of a country or territory which does not collect CIT, and/or does not contribute to the creation of turnover or added value for the business and production activities of the taxpayer.

- 2 Transactions being a provision of services as between related parties [intra-group services]:

- (a) Except for the expenses prescribed in sub-clause (b) below, a taxpayer may deduct the service charge when assessing tax in any one period if all the following conditions are satisfied: the services provided were of a commercial, financial and economic value and directly served the production and business activities of the taxpayer; intra-group services shall only be determined as having been supplied when independent parties in similar circumstances would have paid for these services; the service fees were paid on the arms' length principle and on the basis of calculating the price of related transactions, or intra-group allocation of the service fees must be uniformly applied throughout the group with respect to the equivalent type of services and the taxpayer must provide a contract, source vouchers, invoices and information about the calculation method, the allocation factors and the group's pricing policy on the services provided.

[If intra-group services] relate to centres implementing specialized functions and combining efforts to create added value for the group [synergies], then the taxpayer must determine the total value created from such functions, and determine the level of profit allocation appropriate to the value of the contribution from the related parties after subtracting (-) the corresponding amount of service fees

for the related party performing the function of co-ordinating and providing the services in an independent transaction of a similar nature.

- (b) Service fees which are non-deductible when determining taxable income comprise: expenses arising from services provided only for the purpose of serving the interests of or creating value for other related parties; services serving the interests of shareholders of related parties; services with multiple charges which a number of related parties provide with respect to one type of services, and for which added value for the taxpayer is unable to be determined; and services in the nature of services for which the benefit received by the taxpayer is due to it being a member of the group and the fees are fees which a related party added to the services provided by a third party in the related party's capacity as an intermediary without contributing additional value to such services.
- 3 Total loan interest expenses incurred in the tax period of the taxpayer which are deductible when assessing taxable income for CIT purposes shall not exceed 20% of the total net profit from business activities before loan interest expenses and depreciation in the period of the taxpayer.

This provision does not apply to taxpayers being applicable entities of the *Law on Credit Institutions* and the *Law on Insurance Business*.

Taxpayers shall declare their loan interest expenses ratio within a tax period on standard form 1 in the Appendix⁵ issued with this Decree.

Article 9 Databases used during declaration, determination and management of transfer pricing

- 1 Databases to be used by taxpayers during declaring and fixing prices of related transactions comprise:
 - (a) Databases which organizations conducting business in information provide, including financial information and enterprise data which these organizations collate from public information sources and which they store, update and manage the use of (hereinafter abbreviated as *commercial databases*);
 - (b) Information and data about enterprises publicly announced on the securities market;
 - (c) Information and data announced on both domestic and international commodity exchanges;
 - (d) Information which domestic agencies and line ministries publicly announce, and information obtained from other official sources.
- 2 Databases to be used by tax authorities during management of transfer pricing comprise:
 - (a) Databases prescribed in clause 1 above;
 - (b) Information and data exchanged with foreign tax authorities;
 - (c) Information which Vietnamese agencies and line ministries provide to tax authorities;
 - (d) Databases of tax authorities.

The databases of tax authorities shall be used during risk management and for fixing prices of related transactions in cases of a breach of the provisions of article 12.3 of this Decree.

- 3 The analysis and selection of comparables for analysing and arriving at an arms' length range shall comply with the principle of comparability analysis and the transfer pricing methods stipulated in this Decree, in accordance with the following priority order for selection of comparative data:
 - (a) Internal comparables of the taxpayer;

⁵ Allens footnote: The Appendix has not been translated.

- (b) Comparables resident in the same country or territory as the taxpayer;
- (c) Comparables in countries in the region with similar industry conditions and economic developmental status.

If foreign comparables in other geographical markets are selected, there must be an analysis of their similarity [or resemblance] and of both their quantitative and qualitative material differences in accordance with article 3.6(e) and 7.2 of this Decree.

Article 10 Rights and obligations of taxpayers during transfer pricing

- 1 Taxpayers with related transactions within the governing scope of this Decree have the rights prescribed in the *Law on Tax Management*.
- 2 Taxpayers with related transactions within the governing scope of this Decree are responsible to declare and fix the price of any such transaction without reducing the amount of CIT payable in Vietnam in accordance with this Decree.

Taxpayers are responsible, when requested by the tax authorities, to prove that they have selected a transfer pricing method stipulated in this Decree.

- 3 Taxpayers with related transactions within the governing scope of this Decree are responsible to declare information about their associated relationships and about the related transactions on standard form 1 in the Appendix issued with this Decree, and to lodge it together with the declaration on accounting finalization of CIT.
- 4 Taxpayers are responsible to archive and provide a file on transfer pricing comprising:
 - (a) A national file on standard form 2 in the Appendix;
 - (b) A file with information on the global group on form 3 in the Appendix;
 - (c) Report on inter-country profit of the ultimate parent company on standard form 4 in the Appendix.

A taxpayer being an ultimate parent company in Vietnam with global consolidated turnover during the tax assessment period of 18 billion VND or more is responsible to prepare an inter-country profit report within its file fixing the price of a related transaction on form 4 in the Appendix.

A taxpayer having its ultimate parent company oversees is responsible to provide a copy of the inter-country profit report of the ultimate parent company if such ultimate parent company of the taxpayer must file this report with the tax authority in its home country, in accordance with the standard declaration form of such tax authority in the home country or on the standard declaration form 4 in the Appendix to this Decree. A taxpayer failing to provide an inter-country profit report must provide a written explanation of the reasons, the legal grounds for same, and including an extract of the specific provisions of the country not permitting the taxpayer to provides an inter-country profit report.

- 5 A file determining the price of a related transaction must be prepared prior to the time of annual declaration for finalization of CIT, and such file must be retained and presented on request by the tax authority. When a tax authority conducts a check or inspection of the taxpayer, the deadline for provision of any file fixing the price of a related transaction is 15 business days after receipt of a written request from the tax authority. Files fixing prices of related transactions and other information, data and source vouchers of the taxpayer shall be provided to the tax authorities in accordance with the provisions of the *Law on Tax Management*. Data and source vouchers used as the bases for comparability analyses and for transfer pricing must specify their origin; and if data in comparables is accounting figures then the taxpayer is responsible to store it and provide it to the tax office.
- 6 Taxpayers are responsible to provide complete and accurate information and data from their transfer pricing files on request by the tax authorities, and taxpayers shall be legally liable for same; such

data must be provided on request during the consultation process and also prior to the conduct of a check or inspection as prescribed in article 12 below. The deadline for providing a transfer pricing file is 30 business days after receipt of a written request from the tax authority. Where the taxpayer has a justifiable reason, this deadline may be extended once by not more than 15 business days.

- 7 Independent consultants, accountants or tax agents acting as representatives for taxpayers and preparing transfer pricing files are responsible to comply with the *Law on Tax Management* applicable to enterprises with related transactions as described in this Decree, and shall be liable [for such files] in accordance with law.
- 8 The Ministry of Finance shall provide specific guidelines on the information contents required to be prepared on standard forms 1 to 4 inclusive in the Appendix to this Decree.

Article 11 *Cases in which taxpayers are exempt from providing declarations and exempt from preparing transfer pricing files [safe harbor provision]*

- 1 A taxpayer is exempt from making a declaration of the price fixed for a related transaction as set out in sections 3 and 4 of standard form 1 in the Appendix to this Decree, if the transaction is only with a related party which also pays CIT in Vietnam, subject to the same CIT rates as the taxpayer, and neither party was entitled to CIT preferences during the tax assessment period; but such taxpayer must declare the basis for exemption as set out in sections 1 and 2 of standard form 1.
- 2 A taxpayer must declare the price fixed of a related transaction on standard form 1 but is exempt from preparing a transfer pricing file in the following cases:
 - (a) The taxpayer has related transactions but its total turnover generated in the tax assessment period is less than 50 billion VND and the total value of all related transactions generated in the tax assessment period is below 30 billion VND;
 - (b) The taxpayer has signed an Advanced Pricing Agreement [APA], in which case it must lodge an annual report in accordance with the provisions of the law on advance agreements on pricing methods⁶. However in the case of related transactions not within the scope of applicability of the APA, the taxpayer must declare the prices fixed of a related transaction in accordance with article 10 of this Decree;
 - (c) The taxpayer conducts a business with simple functions, without generating turnover, with expenses from activities being exploitation and use of intangibles, with revenue less than 200 billion VND, and applies the following pre-loan interest and pre-CIT net profit ratios over turnover in the following sectors:
 - Distribution: from 5% or more;
 - Production: from 10% or more;
 - Processing: from 15% or more.

Any taxpayer not applying the net profit rate prescribed in this clause must prepare transfer pricing files in accordance with regulations.

Article 12 *Responsibilities and powers of tax authorities during management of transfer pricing*

- 1 To apply risk management during tax management of transfer pricing in accordance with the law on taxation.

⁶ Allens footnote: See see Circular 201/2013/TT-BTC of the Ministry of Finance dated 20 December 2013 guiding the application of advance pricing agreements during tax management.

- 2 Tax authorities shall fix tax payable in the following cases, based on the principles for comparability analysis and the transfer pricing methods stipulated in this Decree and based on information in declarations of tax obligations by enterprises with related transactions:
 - (a) Where the enterprise fully complies with the regime on accounting, invoices and source vouchers: fixing turnover, expenses or taxable income for the purpose of fixing amounts of tax payable shall be based on the principles of comparability analysis and transfer pricing methods and the databases used during management of transfer pricing as stipulated in this Decree;
 - (b) In other cases, fixing amounts of tax payable shall be based on the databases of the tax authorities in accordance with the provisions on fixing tax payable by enterprises which do not fully comply with the regime on accounting, invoices and source vouchers or which are in breach of tax regulations.
- 3 Tax authorities have the right to fix price levels, profit ratios and profit split ratios used to declare tax assessments and to fix taxable income or the amount of CIT payable in the case of a taxpayer with a related transaction in the tax assessment period and based on information, data and analysis by the tax authority where the taxpayer has breached the law on transfer pricing as follows:
 - (a) The taxpayer fails to fully declare information, or fails to lodge standard form 1 in the Appendix;
 - (b) The taxpayer fails to provide complete information in any transfer pricing file as required by standard forms 2 or 3, or fails to present such file together with data and evidence proving the basis of the comparability analysis and of fixing the relevant price in such file at the request of the tax authority, within the deadline prescribed in this Decree;
 - (c) The taxpayer uses information about independent comparables which is untruthful or unreal in order to conduct the comparability analysis and to declare the price of a related transaction, or bases such price on unlawful or invalid data and evidence, or fails to specify the origin of such material used to fix a price, profit ratio or profit split ratio applied to the related transaction;
 - (d) The taxpayer breaches the provisions on transfer pricing stipulated in article 11 of this Decree.
- 4 Tax authorities must preserve confidentiality of the information provided by taxpayers and relevant to transfer pricing as prescribed in this Decree. Provision of information to agencies and organizations shall be implemented in accordance with clause 5 below.
- 5 If during a check or inspection of transfer pricing there are difficulties regarding the relevant regimes and policies of an industry or sector, then the tax authorities may obtain an opinion from the following related agencies, organizations and individuals:
 - (a) The agency managing the specialized agency or branch, and specialized industry or branch organizations or associations;
 - (b) Tax authorities are responsible to provide files and information relevant to the transfer pricing to such specialized branch agencies or organizations in order to obtain their opinion, and the latter must preserve the confidentiality of such information in accordance with law.
- 6 Tax authorities may exchange information about a taxpayer with foreign tax authorities for consultation purposes before, during and after the process of a check and inspection of transfer pricing as follows:
 - (a) If during risk management of transfer pricing the tax authority considers it necessary to exchange information in advance with the taxpayer regarding standard form 1 and the taxpayer's file on the transfer pricing, then the tax authority may send a consultation proposal to the taxpayer for advance exchange of information about its transfer pricing file in accordance with the provisions of this Decree;

- (b) If the tax authority needs to contact and exchange information with a foreign tax authority regarding an inter-country profit report or about other information, then it shall do so in accordance with the procedures bilaterally agreed on exchanging information in the relevant Tax Treaty. In necessary cases, the tax authority shall provide written notice to the taxpayer regarding temporary suspension of the check or inspection in order to exchange information with the foreign tax authority in accordance with the provisions of the law on taxation;
 - (c) Tax authorities are responsible to facilitate the taxpayer to provide evidence and explanations regarding the data and figures in independent comparables used in the taxpayer's file fixing the price of the related transaction.
- 7 If the tax authority and the taxpayer have signed an Advance Pricing Agreement [APA], then the tax authorities are responsible:
- (a) To manage, check and inspect related transactions not within the governing scope of the APA in accordance with the risk management principle;
 - (b) Manage, check and inspect compliance by the taxpayer with the APA in accordance with law.

Article 13 Responsibilities of ministries, ministerial equivalent agencies and provincial people's committees

- 1 The Ministry of Finance is responsible:
 - (a) To exercise State management of transfer pricing in accordance with the provisions of this Decree;
 - (b) To preside over management with the Ministry of Information to disseminate information about State management of transfer pricing;
 - (c) To conduct checks and inspections of compliance with the provisions on transfer pricing of this Decree.
- 2 The State Bank is responsible:

To coordinate in providing information and figures on foreign debt and foreign debt repayment by specific enterprises with related transactions pursuant to a list provided by the tax authorities, including the amounts of loans and their interest rates, periods for repayment of principal and interest, actual capital drawdowns and actual repayments of principal and interest, and any other relevant information.
- 3 The Ministry of Planning and Investment is responsible to coordinate in providing its database on registration of business industries and trades by enterprises; the database on investment capital structure as at the time of licensing and as at the time of any amendments to the relevant investment certificate or enterprise registration certificate, and any other information relevant to investment projects when the tax authority undertaking a check or inspection discovers indications of transfer pricing to evade tax, at the request of the tax authority.
- 4 The Ministry of Science and Technology and the Ministry of Agriculture and Rural Development are responsible, within the scope of their respective duties and powers, to cooperate in providing databases relevant to technology transfer contracts, industrial property transfer contracts, and transfers of rights to seed varieties, files registering intellectual property rights after establishment of industrial property rights, and rights to seed varieties, and to provide information to the tax office when their opinion is sought during management of tax arising from transfer pricing.
- 5 The Ministry of Information is responsible to coordinate in providing databases on enterprises licensed to conduct business in sectors within such ministry's managerial scope, and information about related transactions in the digital economy sector when requested by the Ministry of Finance.

- 6 The Ministry of Industry and Trade is responsible to coordinate in providing databases regarding the price of transactions on the domestic commodity market and other information within the scope of the tasks and managerial authority of such ministry, in accordance with requests from the tax authority regarding management of prices of related transactions.
- 7 Provincial people's committees are responsible to direct their Departments of planning and investment and their Departments of finance and other provincial committees to formulate databases within the sectors managed by them in order to assist the work of managing transfer pricing.

CHAPTER 3

Implementing Provisions

Article 14 Effectiveness

This Decree is of full force and effect as from 1 May 2017.⁷

Article 15 Responsibilities for implementation

- 1 The Ministry of Finance shall provide specific guidelines on articles 6, 7, 10.8 and 11.2(c); and shall preside over coordination with relevant ministries and other agencies and with provincial people's committees in organizing implementation of this Decree.
- 2 Ministers, head of ministerial equivalent agencies and of Government agencies, chairmen of provincial people's committees, and other organizations and individuals involved are responsible to implement the provisions of this Decree.

On behalf of the Government
Prime Minister
NGUYEN XUAN PHUC

⁷ Allens footnote: Note this Decree does not specifically repeal Circular 66 of the Ministry of Finance dated 22 April 2010 providing guidelines on transfer pricing; however it is expected that the Ministry will soon issue a new Circular guiding implementation of this Decree.