VIETNAM

TRANSFER PRICING LANDSCAPE

2005: The Ministry of Finance issued formal and detailed transfer pricing regulations vide Circular 117/2005/TT-BTC taking into consideration the dynamic global complexities. Since then, various issues were raised in tax audits by the General Department of Tax (GDT); out of which successive losses of MNCs on account of transfer pricing, was found critical as it impacted tax collection.

June 2010: A new Circular 66/2010/TT-BTC; replacing erstwhile Circular 117 was issued by the Ministry of Finance.

Introduction

The provisions of Circular 66 are applicable to business organisations that conduct business transactions in Vietnam with their affiliated parties. Any transaction carried out between the affiliated parties (e.g. purchase, sale, exchange, lease, transfer or assignment of goods or services) may come under the scope of Circular 66. However, transactions between the affiliated parties involving products for which the prices understate control, are excluded from the scope of the circular.

Affiliated party

An affiliated party covers relations arising out of capital participation, control or management, family relationships, etc. with a threshold as low as 20%. Furthermore, the definition goes beyond the ownership/control criteria to include the following purchase/sale transactions between unrelated parties if it exceeds 50% of total purchases/sales.

It also extends to intangible assets/intellectual property and company financing. Transfer pricing regulations in Vietnam also apply to domestic transactions between related parties.

Arm's length principle

Arm's length principle shall be in accordance with market prices on the basis of a comparison of the similarity between related transactions and independent transactions.

Transfer pricing documentation

Contemporaneous documentation

Contemporaneous transfer pricing documentation should include extensive disclosures relating to the following:

- Description of transactions,
- Related parties,
- Product specifications,
- Contractual terms,
- Selection and application of the pricing method(s).

Having the documentation prepared in time can provide penalty protection, shift the burden of proof to the local tax authority and mitigate the risk of adjustments made using secret comparables. Also, the documentation must be prepared in Vietnamese.

Submission of documentation

Taxpayers are required to prepare documentation on an annual basis. However, there is no guidance on whether refreshing comparables would suffice if there is no change in business/transactions from the previous year.

Documentation needs to be submitted within 30 days of request from GDT which may be extended up to 30 days or less from the expiry date, provided the taxpayer has a legitimate reason.

Exemptions and thresholds

No specific exemptions and threshold have been prescribed for the purpose of documentation requirements.

Selection of method

Transfer pricing methods are similar to the five methods specified in the OECD Transfer Pricing Guidelines.

There is no specified hierarchy for selecting the most appropriate method.

Selection of comparables

Taxpayers are required to use databases recognised formally by the government for benchmarking analyses. Due to the paucity of comparables, companies generally rely on Asia-Pacific regional comparables as a benchmark. Bureau van Dijk databases Oriana and Osiris are generally used.

However, recently the GDT has made efforts to establish its own database of comparable information that can be used for benchmarking analysis.

The tax authorities are also empowered to use secret comparables under certain circumstances based on internal data to make a presumptive assessment of tax.

Arm's length range

The allowable arm's length range in Vietnam refers to the standard market price margin which is either:

- Values calculated from independent transactions selected for comparison when upto three comparable transactions are used; or
- Values falling between the first and the third quartiles, calculated from the market price margin of independent transactions when more than three comparable transactions are used.

Certain specific transactions

Royalty payments

High value royalty transactions or those not supported by a benchmarking study, are at a high risk and may be challenged by tax authorities.

Management fees

Management fees charged to local Vietnamese subsidiaries are not deductible, unless they are for specific services rendered by foreign parties.

Hence, taxpayers must substantiate this requirement and need to justify that services and their consequential benefits were actually received with supporting documents.

Persistent losses

Companies which are expanding their business despite continuous losses as well as companies whose business models do not match with the loss portion are being increasingly scrutinised by the tax authorities.

Reporting and compliance

Related party transaction disclosure with annual corporate income tax return

Taxpayers must prepare a declaration of related transactions in Form 03-7/TNDN and the due date for filing the form is the same as that of filing the corporate income tax finalisation declaration i.e. the 90th day after the end of the fiscal year.

Transfer pricing audit/assessment

There is no specific audit procedure set out for transfer pricing. The normal practice is to conduct transfer pricing audits as a part of general tax audits.

GDT's Action Plan for transfer pricing management during 2012-2015 specified that transfer pricing audit will be carried out in respect of atleast 20% of cases for annual tax audits and/or inspections at both central and provincial levels. It has also stated that future audits are more likely to be focused on transfer pricing risk assessments.

The tax authorities can assess and make appropriate transfer pricing adjustments in the following circumstances where the tax office suspects that the taxpayer has:

- Computed price margins using documents/data which are illegal or improper or originate from an unclear source;
- Created false independent transactions or intentionally treated related transactions as independent transactions and used it for comparison;
- Failed to declare or insufficiently declared related transactions and failed to comply with time limits to provide various details;
- Failed to apply or incorrectly applied the provisions intentionally, and failed to prove the contrary within 90 days of notice.

If an adjustment is proposed by the GDT and the taxpayer is aggrieved by this action, an appeal can be filed before the administrative court.

APA and MAP procedures

Taxpayers entering into domestic as well as overseas related party transactions may apply for Advance Pricing Agreement (APA) for a period of maximum five years which can be extended by another five years. An APA can be unilateral, bilateral or multilateral.

The APA application should be submitted in Vietnamese, however, applications pertaining to bilateral and multilateral APAs should be submitted in Vietnamese with a corresponding English translation.

Detailed APA policies and procedures are laid down in Circular 201/2013/TT-BTC which came into effect on 5 February 2014. No fee has been prescribed for filing an APA application.

Mutual Agreement Procedure (MAP) can be applied by taxpayers within three years from the date of first notification by the tax authority in relation to the tax treatment which the taxpayer considers not to be in accordance with the relevant double taxation agreement.

Penalties and other consequences of non-compliance

No specific penalties have been mentioned. Instead, the penalties are governed by the effective law on tax management.

Voluntary adjustments made by the taxpayer are considered as undeclared amounts and hence, subject to late payment interest charges at the rate of 0.05% per day. In case of incorrect declaration, a fine equal to 20% of the undeclared tax will be imposed in addition to the late payment interest charges.

Evasion of tax or fraud attracts penalties from one to three times the undeclared tax liability amount depending on the nature of the offences and circumstances.

BEPS/CbC applicability

As of now, Vietnam has not accepted recommendations of OECD and G20 Base Erosion and Profit Shifting (BEPS) Project. Furthermore, no clarity/information regarding the implementation of country-by-country (CbC) reporting in future years has been provided by the Ministry of Finance in Vietnam.

Other relevant aspects

In order to implement the transfer pricing action plan for the period 2012-2015, a Transfer Pricing Audit Department was established within the GDT in July 2015 followed by various local transfer pricing audit departments in other cities of Vietnam in November 2015.

SUMMARY OF TRANSFER PRICING REQUIREMENTS

Effective from	2005
Compliance requirements	• Declaration of related transactions in Form 03-7/TNDN to be filed by 90th day from the end of the fiscal year; • Contemporaneous documentation to be prepared on an annual basis and submitted within 30 days in case of an enquiry from GDT.
Penalties	Penalties from one to three times of undeclared tax liability for evasion of tax; Voluntary adjustments– late payment interest; Incorrect declaration – 20% fine.
Method and preference for comparable	Five methods as defined by the OECD. Preference for internal comparables.
Peculiar features	Separate transfer pricing audit department established in July 2015.
Safe harbour and APA	APA available; however, safe harbour not available
BEPS/CbC applicability	Currently, not available.

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Key contact

Maulik P. Doshi
Partner, Transfer Pricing

E: maulik.doshi@skpgroup.com
T: +91 22 6617 8041
M: +91 98205 40027

skpgroup.com

linkedin.com/company/skp-group

twitter.com/SKPGroup

facebook.com/SKPGroupIndia

plus.google.com/+SKPGroup

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