

ALERT ON DECREE NO. 132/2020/ND-CP REPLACING DECREE NO. 20/2017/ND-CP

Prescribing tax
administration for
enterprises engaging in
related party transactions

09 November 2020

Overview

- On 05 November 2020, the Vietnamese Government officially issued **Decree No. 132/2020/ND-CP** (“**Decree 132**”) replacing Decree No. 20/2017/ND-CP (“**Decree 20**”) prescribing tax administration for enterprises engaging in related party transactions (“RPTs”).
- Decree 132 will take effect from **20 December 2020** and be applicable to the **2020 Corporate Income Tax (“CIT”) year (that would mean retrospective application)**. Decree 20 and Decree No.68/2020/ND-CP (“**Decree 68**”) issued by the Government on 24 June 2020 prescribing tax administration for enterprises engaging in RPTs shall expire once Decree 132 takes effect.
- In general, Decree 132 **inherits and revises certain contents specified in Decree 20**, and **inherits Decree 68’s contents**. The Decree narrows the arm’s length range, and inserts new definition of related parties. At the same time, it focuses more on the importance of comparability principles, allows wider application of commercial databases, provides in further details of CbCR, and extends the cases which are exempted from Transfer Pricing (“TP”) filing – which may align better with Vietnam and international current practices.
- In this Alert, Deloitte Vietnam summarizes the key provisions and changes in Decree 132.

Content of Decree 132

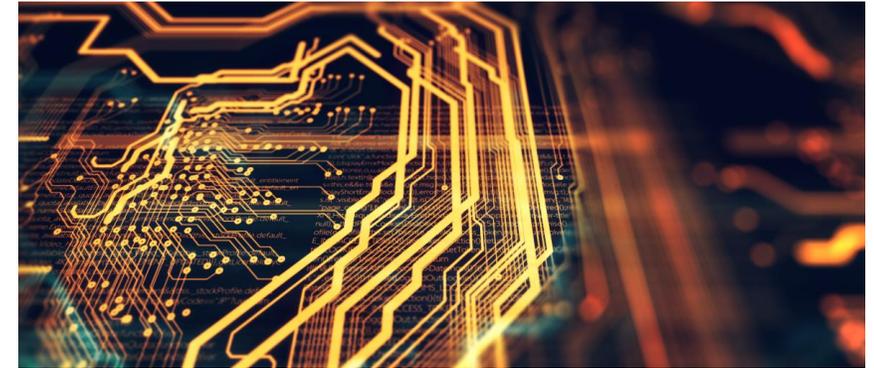
- Decree 132 has **04 chapters, 23 articles**, and is structured as below:
 - Chapter 1: General provisions – 5 articles (from Article 1 to Article 5);
 - Chapter 2: Comparability analysis, selection of independent comparables and TP method – 10 articles (from Article 1 to Article 15)
 - Chapter 3: Determination of expenses for tax calculation purposes and declaration and determination of RPTs – 4 articles (from Article 16 to Article 19);
 - Chapter 4: Enforcement – 4 articles (from Article 20 to Article 23).

Key changes

1. Expand subjects of application

Article 2, Decree 20 stipulates that **subjects of application** include “Organizations engaged in production of and trading goods or services (hereafter referred to as “taxpayers”), which are paying the Corporate Income Tax **by the declaration method** and carrying out business transactions with related parties.”

Article 2, Decree 132 expands these subjects of application by **removing the term “by declaration method”**. Therefore, this revision may imply that taxpayers who do not pay CIT by the declaration method (e.g., foreign contractors, etc.) may well be covered in the subjects of application of Decree 132.



2. Supplement related party relationship

Clause 2, Article 5, Decree 132 – prescribes types of related party relationship

Decree 132 supplements relationship type “l” as follows:

“l) Enterprises who transfer or receive the transfer of contributed capital of at least 25% of the owner’s contributed capital in the tax period; borrow or lend at least 10% of the owner’s contributed capital at the time of conducting transactions in the tax period with the individuals who operate or control the enterprises or with an individual falling in one of the relationship types as prescribed in point g this clause”

This supplement may give rise to additional declaration of related parties and related party transactions in comparison with provisions of Decree 20.

Key changes

3. Uplifting the lower threshold of the arm's length range

Article 4, Decree 132 defines “arm's length range” as the set of values **from the 35th percentiles to 75th percentiles**.

Accordingly, the lower threshold of the arm's length range has been uplifted from the **25th percentiles** (as prescribed in Decree 20) to **the 35th percentiles**, which effectively narrow the arm's length range.

Since Decree 132 shall be applicable to 2020 CIT tax period, with this change in the arm's length range, **taxpayers might need to review their currently applied pricing policy** to ensure that RPTs are set in accordance with the arm's length principles. In the context of 2020 where enterprises in several industry sectors have been negatively impacted by the Covid-19 pandemic, **tightening the arm's length range** would likely **pose remarkable challenges in 2020 TP compliance**.

4. Deductible net interest expenses in determination of CIT

Clause 3, Article 16 and Article 22, Decree 132 retained the **regulation and guidance relating to deductible net interest expenses in determination of CIT** in Decree 68 (including the retrospective application for fiscal years 2017 – 2018, and carry forward of interest expenses in excess of the cap over the next 5 years).

Therefore, although Decree 68 shall expire when Decree 132 takes effect, **the aforementioned regulation shall be retained in Decree 132**.



Key changes



5. Clarification on exemption of preparation of TP documentation

Regarding cases where taxpayers are exempted from declaration and preparation of TP documentation, Clause 1, Article 19, Decree 132 stipulates that taxpayers are exempted from **declaration of Part III, Part IV in Appendix I** and from **preparation of TP documentation** in case the taxpayers “(i) only engage in transactions with related parties who are subject to CIT in Vietnam, (ii) are subject to the same CIT rates as the taxpayers; and (iii) neither parties are entitled to tax incentives in the tax period”.

This provision may bring about a fair relief on related parties filing requirements to various taxpayers in the time to come.

6. Detailed guidance relating to Country – by – Country Report (“CbCR”)

Decree 132 (Clause 5, Article 18) prescribes detailed responsibility of the taxpayers relating to CbCR. For example:

- Where **the taxpayer is a global ultimate parent (“GUP”) company incorporated in Vietnam**, having global consolidated revenue of **more than VND 18 trillion**, the taxpayer is required to prepare and submit the CbCR (Appendix IV attached with Decree 132) **no later than 12 months purposes. from the financial year end**;
- Where **the taxpayer has GUP company incorporated overseas and is required to file CbCR in that country of residence**, Vietnam Tax authority will follow automatic exchange of information (“AEOI”) mechanism as stated in the International Tax Agreements. That would mean the taxpayer may not be subject to mandatory CbCR filing in Vietnam in the presence of such Agreements.

Please note however, that CbCR filing requirements in Decree 132 are **relatively complicated** and there are **various branching provisions to specific cases** – the taxpayers should resort to specific provision for specific case of the GUP to correctly determine the CbCR filing requirements to ensure compliance.

In addition, there is a new notable point in Clause 1c, Article 20, Decree 132, which clearly states that CbCR to be used for tax risk management and information exchanged purposes, and **not for tax adjustment**.





Key changes

7. Deadlines for providing TP documentation

Deadlines for providing TP documentation prescribed in Decree 132 is as follow:

- In **tax audit/ inspections**: In accordance with **Law on Inspection** from the date of receiving request to provide information.
- During **the consultation period prior to tax audit/ inspections**: No later than **30 working days** from the date of receiving written request to provide information of the Tax authorities and can be **extended once for no longer than 15 working days** from the expiry date with valid reasons.

In accordance with the prevailing regulation on tax inspection/ audit, the taxpayer is obliged to provide, supplement document and information within **no more than 10 working days** from the date of receiving the Tax authorities' request.

Accordingly, the deadlines for taxpayer to provide TP documentation during the tax inspections/ audits **has been shorten** as compared with the provision in Decree 20 (**no longer than 15 working days** from the date of receiving request from the tax authority).

Therefore, enterprise shall plan to prepare and maintain the TP documentation properly to comply with the submission timeline.



8. Databases used for comparability analysis and tax adjustments

Definition of “commercial databases” has been clarified, in which commercial database is considered as a verified database “**to be used for comparability analysis and determination of comparables in declaration and management of transfer pricing**” (Clause 1a, Article 17, Decree 132). Accordingly, the likelihood of successfully applying (and being accepted) commercial database by taxpayers can in theory be remarkably improved under Decree 132.

However, in case the taxpayers **do not comply** with the regulations on declaration and determination of RPTs; or **fail to provide** or **provide insufficient information** for determination of arm's length prices, Tax authorities shall still have the **right to make tax adjustment** using databases prescribed in the Law on Administration No. 38/2019/QH14, which shall include the **the Tax authorities' databases and the commercial database**.



Key changes

9. Clarification on broadening the scope of comparability analysis for related party transactions with particular or exclusive nature that are not comparable to any independent subjects

Decree 132 (Clause 2, Article 9) further clarifies that for related party transactions with particular or exclusive nature that cannot be compared to any independent subjects, the scope of comparability analysis shall be expanded as follow:

- Selection of independent comparables based on the most comparable economic subsectors with the taxpayer's operating subsector **within the same local market, same local country;**
- This can be expanded to include countries in the region with **similar industry conditions and similar economic developmental levels.**



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