

Alert on the Draft Circular on guidelines for APA application in tax administration

18 March 2021



Background of the Draft Circular

- On 11 March 2021, the Ministry of Finance issued Official Letter No. 2503/BTC-TCT on consulting the Draft Circular guiding the application of the Advanced Pricing Agreement (“APA”) in tax administration. This Circular will be replaced for Circular No. 201/2013/TT-BTC (“Circular 201”).
- Pursuant to Clause 12, Article 41, Decree No. 126/2020/ND-CP dated 19 October 2020 (“Decree 126”) and Decree No. 132/2020/ND-CP dated 05 November 2020 (“Decree 132”) of the Government, the draft Circular provides guidance on the following notable issues:
 1. Subjects of application
 2. Effect of APA
 3. Rules for concluding APAs
 4. Implementation process
 5. Transactions proposed to be covered by the APA
 6. Information used during the processing of APA application
 7. Implementation timeline





Notable issues

01

Subjects of application

Amendments to applicable subjects are as follows:

If the organization or entity having related transactions with the taxpayer is both the permanent establishment and the head office of the foreign enterprise, to the extent for the purpose of applying the APA to the related party transactions, each permanent establishment will be considered independent and completely separated from the foreign enterprise or other permanent establishments of that foreign enterprise.

03

Rules for concluding APAs

- The APA shall be held at the request of the taxpayer for official APA application together with the necessary records, documents and information provided by the taxpayer in accordance with Clause 3, Article 41, Decree 126;
- The APA application is made into 01 copy and written in Vietnamese language; the application for a bilateral or multilateral APA shall be made in Vietnamese language and enclosed with an English translation.

02

Effect of APA

The concluded APA is effective for a maximum period of 03 tax years from the effective date of APA. The effective date of APA is specified in Clause 7, Article 41 of Decree 126, e.g. APA is established before taxpayers file their taxes.

04

Implementation process

- The General Department of Taxation is the key contact point (who receive and send documents and notifications) between the Vietnam tax administration and foreign tax administration(s) during processing of application and supervision of implementation of bilateral and multilateral APAs.
- The Ministry of Finance approves the final draft APA drafted by the General Department of Taxation after the General Department of Taxation conducts evaluation, exchange and negotiation. Previously, as per Circular 201, the Ministry of Finance approves the plan for negotiating, then the General Department of Taxation conducts APA negotiations with taxpayers or with taxpayers and foreign tax administration(s).

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05

Transactions proposed to be covered by the APA

- Transactions proposed to be covered by the APA are related party transactions under the scope of Decree 132.
- Transactions proposed to be covered by APA must simultaneously satisfy the following conditions:
 - Transactions that are not related to CIT-exempt income in accordance with CIT incentives as per CIT regulations;
 - Transactions with sufficient information and documents to determine the nature of the related transaction in accordance with the principles of comparison analysis and selection of independent comparables according to the provisions of Decree No. 132;
 - Transactions where it is possible to search for the number of independent comparables to determine the standard arm's length range as per Decree No. 132 from a commercial database source with legal verification.
 - Transactions that actually occur in the taxpayer's production and business activities and will continue during the proposed APA application period, where results of the determination of the price or profit rate or profit allocation rate of the taxpayer in respect of the transactions experience no material variation between the tax years during the pre-filing period compared to the APA application period.
 - Transactions with tax liabilities incurred from transactions not under disputes, complaints about tax-related administrative violations; transactions that are not arranged for the purpose of tax evasion, avoidance or abuse of the Tax treaty.





Notable issues (cont.)

06

Information used during the processing of APA application

- The database selected for comparative analysis, selection of independent comparables for comparison, determining the price of related party transactions under the scope of application for APA is implemented in accordance with the Law on Tax Administration and regulations on database used in transfer pricing declaration, determination and management in Decree 132.
- The commercial database used for comparative analysis, determining the standard arm's length range of related transactions within the APA scope must be financial information and data that the enterprise acquires, collects, standardizes, and updates based on its audited financial statements and annual reports collected by data businesses from public information sources and accessible to all related parties.

07

Implementation timeline

The Draft Circular no longer provides content related to specific timeline for particular stage as Circular 201

In general, the draft Circular is prepared based on the legacy of Circular 201 on APA and at the same time ensured the feasibility of the implementation of this mechanism in Vietnam and international practice. Enterprises that are considering planning to apply the APA mechanism need to carefully study the changes in the new regulations to assess the feasibility as well as the long-term strategy, guaranteeing benefits as well as tax compliance obligation in related party transactions.



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