

Update on Decree 91 and reminders of transfer pricing compliance obligations for 2022

Tax Alert | November 2022

This Alert highlights the following key points:

- ▶ Update on changes as per Decree 91/2022/ND-CP issued by the Government on 30 October 2022
- ▶ Transfer pricing compliance obligations in Vietnam and Transfer pricing planning for 2022

In this Tax Alert, we are delighted to highlight the key points of Decree 91/2022/ND-CP which amends and supplements some articles of Decree 126/2020/ND-CP.

We would also like to deliver a reminder of some notes in relation to obligations of complying with the transfer pricing regulations for the fiscal year 2022 in accordance with Decree 132/2020/ND-CP.

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Decree 91/2022/ND-CP amending and supplementing some articles of Decree 126/2020/ND-CP

The Government recently issued Decree 91/2022/ND-CP (Decree 91) on 30 October 2022 amending and supplementing some articles of Decree 126/2020/ND-CP (Decree 126) dated 19 October 2020 which elaborates the Law on Tax Administration. Decree 91 took effect on the signing date, 30 October 2022.

Below are some points of Decree 91:

- ▶ **Expiration of time limits:** if the deadline of a tax filing, a tax payment, the deadline for tax authorities to process applications or the effectiveness of enforcement decisions falls on a non-workday, the actual deadline shall be the next workday.
- ▶ **Submission of withholding personal income tax (PIT) returns:** Income paying bodies are not required to file withholding PIT returns if there is no withholding obligation arising in a tax filing period.
- ▶ **Determination of quarterly provisional corporate income tax (CIT) payment:** Taxpayers are required to make provisional quarterly CIT payments based on the business results of a quarter. The provisional CIT payments of four quarters made in the year however must not be less than 80% of the annual CIT liability. Otherwise, taxpayers are subject to late payment interest on any tax shortage which is calculated from the date of the deadline of the quarter 4 CIT payment until the day prior to the date of paying the tax shortage.

This provision is applicable from tax year 2021 onwards. For tax year 2021 in particular, the application of the determination of provisional CIT payments as per Decree 91 is only applicable to taxpayers who made provisional CIT payments in the first three quarters of 2021 lower than 75% of the total CIT liability *and* such an application does not lead to an increase in late payment interest.

If a company has been imposed with late payment interest on a shortage of provisional CIT payments of the first three quarters of 2021 calculated in accordance with Decree 126 by the tax authorities, it is allowed to submit Form 01/GTCN to the tax authorities requesting the tax authorities to apply the relevant provision of Decree 91 to make decremental adjustment to the late payment interest. The company can claim a refund for the overpayment of the late payment interest.

- ▶ **Obligations of disclosure of information of e-commerce platform owners:** Vietnamese entities which are the owners of e-commerce platforms are required to disclose to the tax authorities the information of entities and individuals that perform whole or part of their sale activities on the platforms. The disclosure includes information of the entities and individuals' revenue of selling goods/services via the platforms and must be made by the end of the month following the reporting quarter and in an electronic form.
- ▶ **Obligations of withholding PIT from dividends/bonuses granted in the form of securities to individuals:** Decree 91 allows a deferral of PIT withholding and declarations on behalf of individuals who receive dividends/bonuses in the form of securities which are recorded in their securities accounts before 1 January 2023.

Individuals who receive dividends/bonus in the form of securities assume the responsibility for declaring and paying PIT directly with the tax authorities without being imposed with penalties/late payment interest for the period from the effective date of Decree 126 on 5 December 2020 to the end of 31 December 2022, if relevant organizations have not withheld and paid PIT from the individuals' income being dividends/shares received in securities.

From 1 January 2023, the relevant organizations are obliged to withhold and declare PIT on dividends/bonuses on behalf of individuals who receive this kind of income in the form of securities.

Compliance obligation in accordance with Vietnamese Transfer Pricing regulation for 2022

Vietnamese Transfer Pricing regulations are set out in Decree 132/2020/ND-CP (Decree 132) which takes effect from 20 December 2020 and is applicable for the CIT reporting period of 2020 onwards. Decree 132 requires Vietnamese taxpayers engaging in related party transactions to maintain and provide a Transfer Pricing documentation report that includes the following information, document, data and records:

- ▶ Information on related party relationships and related party transactions prescribed in Appendices I, II, III attached to Decree 132.
 - ▶ Taxpayers that have related party transactions that are subject to this Decree are obliged to declare information on related party relationships and related party transactions prescribed in Appendices I, II and III attached to this Decree, and submit those appendices together with the annual CIT finalization returns.
- ▶ A Local File, which comprises of information on the related party transactions, transfer pricing policies and transfer pricing methodologies, must be prepared and maintained at the taxpayers' premises following the list of content, information, and documents prescribed in Appendix II attached to Decree 132.
 - ▶ The transfer pricing documentation report must be prepared and maintained before the due date of annual CIT finalization returns and be submitted upon the tax authority's request.
 - ▶ The deadline to submit a transfer pricing documentation report is 30 working days from the date receiving tax authority's written request. The submission deadline can be extended only once to a maximum of 15 working days from the initial deadline provided that taxpayers have sound reasons for the extension.
 - ▶ Taxpayers are responsible for justifying the analysis, comparison, and selection of transfer pricing methodologies in accordance with Decree 132 upon competent authorities' requests.
- ▶ A Master File, which comprises of information regarding the multinational group's business activities, transfer pricing policies and transfer pricing methodologies applied for the group, as well as group's income allocation and activity allocating policies, functions performed throughout group's value chain following the list of content, information and documents prescribed in Appendix III attached to Decree 132.
- ▶ An Ultimate Parent Company's Country-by-Country Report following Clause 5, Article 18 of Decree 132 and Appendix IV attached to Decree 132 must be submitted to the tax authorities no later than 12 months from the fiscal year end of Ultimate Parent Company.

Risks for non-compliance with Decree 132

The Tax authorities reserve the right to impose transfer price; profit margin; profit allocation ratio; taxable income or CIT payable to taxpayers who fail to comply with the regulations regarding the declaration and determination of related party transactions or fail to provide sufficient information and data to declare and determine transfer prices of related party transactions in the following cases:

- ▶ Taxpayers fail to declare or insufficiently declare information of Appendix I or do not submit Appendix I attached to Decree 132
- ▶ Taxpayers provide insufficient information required in the transfer pricing documentation report prescribed in Appendix II and III attached to Decree 132 or fail to provide the transfer pricing documentation report as well as the data, documents and materials used as a basis for making the analysis, comparison, determination of transfer prices in transfer pricing documentation report pursuant to tax authority's request within the stipulated timeline of Decree 132. Information declared in the transfer pricing documentation report is considered material if it affects the analysis result concerning the selection of independent comparables; transfer pricing methodologies or the adjustment results of transfer price, profit margin, profit allocation ratio of taxpayers

- ▶ Taxpayers use inaccurate or unreliable information in relation to independent comparables to analyze, declare and determine transfer prices of related party transactions; or rely on materials, data and documents that are illegitimate, invalid or are of unclear origin to determine the transfer price, profit margin or profit allocation ratio applied in related party transactions
- ▶ Taxpayers have any violation against transfer pricing regulations relating to cases where taxpayers are exempted from the declaration and preparation of transfer pricing documentation report.

Other noticeable points

Point b, Clause 1, Article 8, Decree 132 states that:

“b) If the price, profit margin, profit allocation ratio of taxpayers does not fall within the arm’s length range of independent comparables, taxpayers are obliged to determine values falling within the arm’s length range that reflect the highest level of similarity to a related party transaction in order to make an adjustment to the price, profit margin, profit allocation ratio of a related party transaction; but should not result in any reduction in taxpayers’ taxable income and tax liability to the state budget.”

Accordingly, taxpayers should manage their pricing proactively to ensure they are in compliance with the arm’s length principle without needing to undertake a downward adjustment. This also mitigates the risk of having non-arm’s length results being adjusted by the tax authorities to the median value of the arm’s length range pursuant to Clause 2c, Article 8, Decree 132.

Furthermore, taxpayers should be aware that any transfer pricing adjustments should be calculated taking into account of the requirement set forth in Decree 91 above, which requires that the provisional CIT payments of four quarters made in the year cannot be lower than 80% of the annual CIT liability as per the CIT finalization return of such a year.

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