

KEY CHANGES IN THE ADVANCE PRICING AGREEMENT

KHANH QUYNH

On June 18, 2021, the Ministry of Finance issued Circular 45/2021/TT-BTC guiding the application of the Advance Pricing Agreement (**APA**) in tax administration for enterprises with related-party transactions (**Circular 45**). This Circular takes effect from August 3, 2021 and replaces Circular 201/2013/TT-BTC (**Circular 201**) guiding APA application issued previously.

In fact, APA is not a new scheme but it has already been stipulated in the Law on amending and supplementing a number of articles of the Law on Tax Administration 2012 and guided by Circular 201. Accordingly, APA is determined as a form of legal commitment between tax authorities and taxpayers on tax calculation basis, pricing methodologies, or market prices applied to related-party transactions over a fixed period of time in the future on the basis of taxpayers' request.

Notwithstanding several amendments and supplements to regulations on tax administration, the APA scheme is still considered as an useful tool of tax authorities in the prevention of fraud transfer pricing practices and an effective solution of enterprises in reducing the risk of transfer price for related-party transactions. Consequently, the legislative framework for this scheme has been increasingly improved, and is specified in Law on Tax Administration 2019, Decree 126/2020/ND-CP guiding a number of articles of the Law on Tax Administration (**Decree 126**), Decree 132/2020/ND-CP on tax administration for enterprises with related-party transactions (**Decree 132**) and Circular 45 as the latest



document. In this Legal Newsletter, NHQuang shall analyze some notable contents mentioned in Circular 45, including:

Eligible transactions to be applied for

Eligible transactions for APA application are related-party transactions specified in Clause 2, Article 1 of Decree 132, such as purchase, sale, exchange, assignment and transfer of goods, and provision of services; borrowing, lending, financial services, financial security and other financial instruments; purchase, sale, assignment and transfer of tangible assets, intangible assets and agreements on purchase, sale or common use of resources such as assets, capital, employees and sharing of costs between related parties, except for business transactions involving goods and services whose prices are controlled by the Government in accordance with laws on prices.

Simultaneously, the above-mentioned transactions must satisfy all of the following conditions:

- (i) Actually incurred during the business and production operations of taxpayers and will continuously incur during the APA's covered period;
- (ii) Have the bases to determine the nature of transaction for imposing tax obligations, and benchmark for analyzing, comparing and selecting the arm's length transactions under Articles 6 and 7 of Decree 132, based on the information and data that comply with the provisions in Point b Clause 6 Article 42 Law on Tax Administration 2019.
- (iii) Not be subject to any tax dispute or complaint;
- (iv) Be conducted in a transparent manner and not for the purpose of tax evasion, avoidance, and abuse of any tax treaties;

Principles of APA application

The proposal for APA is built on 2 core principles: (i) Principle of arm's length transaction, and (ii) Principle of substance over form. Additionally, the principle of APA implementation mandatorily based on taxpayer's official request for APA application, enclosed with necessary dossiers, documents and data fully and accurately provided by taxpayers, is also supplemented.

APA application procedures; rights and obligations of taxpayers

In essence, these contents are updated and adjusted in conformity with the corresponding provisions of the Law on Tax Administration 2019 and Decree 132. Accordingly, the most prominent amendment is the content related to appraisal of APA application; APA negotiation and discussion are established to clarify the scope of these procedures. In particular, Circular 45 has removed the administrative procedure of consultation before official submission of the application. Moreover, the processing time for administrative procedures is also removed alongside the worldwide trend. On account of complication of APA settlement, especially bilateral or multilateral APAs, even countries with many years of experience in dealing with APA requests do not specify or fix a processing time for this procedure either.

APA effectiveness and implementation effectiveness

The maximum effective period of a signed APA is 3 years but should not exceed the actual number of years that a taxpayer has operated, declared and paid corporate income tax in Viet Nam.

Any APA application submitted before the effective date of Circular 45 that has not been concluded and whose proposed APA term has not ended by August 3, 2021 will be subject to Circular 45, Law on Tax Administration and Decree 126.

COMMENTS AND RECOMMENDATIONS

Although the legal framework for APA has been developed and gradually improved, the actual implementation of this scheme still encounters many challenges, especially the limitations in approach of the database sources for APA's application appraisal. Since being specified in the Law on amending and supplementing a number of articles of the Law on Tax Administration 2012 and guided by Circular 201 up to now, there has been few applications for APA and no APA has been successfully signed in Viet Nam yet. This clearly shows that the pursuit of a consensus on the method of determining taxable prices is not just a piece of cake.

From the perspective of taxpayers, the applicable regulations are now creating a "proactive" position for enterprises in applying for APA. Particularly, the APA application must originate from the taxpayers' "voluntariness" rather than the imposition of the tax authority. Therefore, enterprises should weight up the associated pros and cons of APA implementation to choose the most optimal option.

In addition, enterprises should pick over the rights of taxpayers recognized by law in order to optimize such regulations. For example, enterprises reserve the right to invite or hire independent experts who have skills and knowledge suitable for APA's contents to participate in APA discussion and negotiation with tax authorities. Besides, when realizing any disadvantage to taxpayers, enterprises can request for withdrawal of application or termination of negotiation at any time before APA conclusion; or even propose to amend or invalidate a signed APA if it is subject to the cases specified in Clauses 9 and 10, Article 41 of Decree 126.

