

**DECREE NO. 68 ON AMENDING AND
SUPPLEMENTING CLAUSE 3, ARTICLE 8 OF
DECREE NO. 20/2017/NĐ-CP PRESCRIBING TAX
ADMINISTRATION FOR ENTERPRISES
ENGAGED IN TRANSFER PRICING**



UPDATE DECREE NO. 68

OVERVIEW OF DECREE NO. 68

On 24 June 2020, Decree No. 68/2020 / ND-CP ("Decree No. 68") granted by the Government on amending and supplementing Clause 3 Article 8 of Decree No. 20/2017/ND-CP ("Decree No. 20 ") on tax administration for enterprises engaged in transfer pricing.

The content of Decree No. 68 involves the level of deductible interest expenses for enterprises engaged in transfer pricing. Decree No. 68 shall take effect from the date of signing and be applied from the 2019 tax period. Also, it allows enterprises to apply the retrospective effect of provisions on deductible interest expenses under the guidance of the Decree for the fiscal year 2017 and 2018, instead of following the guidance of Decree No. 20.

The tax update hereby raises some key points of Decree No. 68.



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DETAIL CONTENTS

Article 1. To amend and supplement Clause 3, Article 8 of Decree No. 20/2017 / NĐ-CP dated 24 February 2017 by the Government on tax administration for enterprises engaged in transfer pricing as follows:

a) The total loan interest cost (after deducted the deposit interest and loan interest) arising within a specified tax period qualified as a deduction from CITable income shall not exceed 30% of total net profit generated from business activities, loan interest cost (after deducted the interest of deposit and loan interest) and amortization costs arising within that period.

Changes:

- Changing the phrase "Total loan interest cost (after deducted the deposit interest and loan interest)" compared to Decree No. 20 just stated as "Total loan interest cost". Hence, Decree No. 68 allows enterprises to offset loan interest costs on deposit interest and loan interest ("Total net interest expense") before determining deductible expenses.
- Increasing the deductible interest expense ratio to 30% of net profit from operating activities in the period plus net interest expenses incurred in the period and amortization costs ("EBITDA") instead of 20 % under the former regulation.

Challenges:

Decree No. 68 does not specify whether EBITDA is negative, net interest expenses will be wholly non-deductible or not?

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Article 1. To amend and supplement Clause 3, Article 8 of Decree No. 20/2017 / ND-CP dated 24 February 2017 by the Government on tax administration for enterprises engaged in transfer pricing as follows:

b) The non-deductible interest cost as prescribed in point a of this Clause shall be transferred to the next tax period upon determining that the total non-deductible interest cost eligible to be deducted in case the total deductible interest cost in the subsequent tax periods lower than the level prescribed in point a of this Clause.

Time for transfer of the interest cost shall not exceed 05 consecutive years from the following year of the year, which incurring non-deductible interest cost.

Changes:

Non-deductible interest costs are allowed to be transferred into subsequent tax periods without more than 5 consecutive years from the following year of the year which incurring non-deductible interest costs.

Notes: The deductible interest costs during the period, including net interest and transferred interest of prior periods, will be controlled at under the 30% EBITDA threshold of the transferred period.

Challenges: Decree No. 68 does not specify whether this non-deductible interest expense in the period will be transferred to the next period, in case of EBITDA in the period is negative, or not. Hence, this could be a challenge when applied by Enterprises.

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Article 1. To amend and supplement Clause 3, Article 8 of Decree No. 20/2017 / ND-CP dated 24 February 2017 by the Government on tax administration for enterprises engaged in transfer pricing as follows:

c) Regulations prescribed in point a of this Clause shall not apply to the loan of the taxpayers who are credit institutions according to the Law on Credit institutions; organization engaged in insurance business according to the Law on Insurance Business; loans for official development assistance (ODA), concessional loans of the Government according to the methods that the Government borrow from foreigner to provide on-lending loan to enterprises; loans for implementation of national target programs (new rural program and sustainable poverty reduction); loans for implementation of program and project on social welfare policy of the State (resettlement housing, worker and student housing and other social welfare projects).

Changes:

Supplementing some subjects not applied regulations on interest rate control compared to the former provisions of Decree No. 20 such as ODA loans, concessional loans of the Government according to the methods that the Government borrow from foreigner to provide on-lending loan to enterprises; loans for implementation of national target programs and social welfare projects.

Challenges:

Decree No. 68 does not specify whether the application of a controlled rate to the interest expenses of enterprises is a loan from associated parties or the entire interest expenses incurred in the period (including the independent parties). Pursuant to the recent guidelines of the General Department of Taxation, the interest expense controlled is the total one incurred in the period of enterprise incurring associated transactions.

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Article 1. To amend and supplement Clause 3, Article 8 of Decree No. 20/2017 / ND-CP dated 24 February 2017 by the Government on tax administration for enterprises engaged in transfer pricing as follows:

d) Taxpayers shall declare the rate of loan interest cost arising in a period according to Form No. 01 in the Appendix of Decree No. 68/2020/ND-CP.

Challenges:

Form 01 has currently not been updated on tax declaration software, so enterprises are likely to continue using the former one when preparing the 2019 tax finalization for the period ended 31 March 2020, as well as could not make additional declarations according to the form for the fiscal year 2017, 2018 and 2019 have submitted the finalization of CIT.

NEW POINTS:

Article 2. Implementation and effect:

1. This Decree takes effect on the signing date and shall be applied from the 2019 period of CIT.

2. For the 2017 and 2018 CIT period, cases declared as prescribed in Clause 3 Article 8 of Decree No. 20 shall be applied retrospective effect of regulations in the Article 1 of Decree No. 68, specific as follow:

a) The taxpayers shall be allowed to supplement the declare dossier for financial finalization of CIT in 2017 and 2018 to determine the loan interest cost and CIT payable (if any) and pay for the competent tax authority before 01 January 2021. The competent tax authority shall take responsibility for tax administration works, inspect the tax declaration dossier at the tax office as prescribed in the Law on tax administration as well as guidance documents. After the supplement declaration, if the CIT decreases, the late payment shall be reduced in correspondence (if any).

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b) In case the taxpayer has the CIT and late payment paid to the State budget are more than those re-determined, the differences shall be offset to the amount of CIT in 2020. If the CIT in 2020 is not enough to offset, the remaining amount shall be offset in the CIT payable in the following year but no longer than 05 years from 2020. At the end of this time limit, the remaining tax shall not be settled.

c) In case the tax authority or the competent agency did conduct inspection and have the conclusion or handling decision as prescribed in the Law on Tax Administration, the taxpayer shall propose the competent tax authority to redetermine the amount of tax liability. Pursuant to the proposal of the taxpayer and other related dossiers and documents, the tax authority shall determine the tax payable and the late payment in correspondence to offset the difference as prescribed in point b of this Clause. Determining the tax payable shall be conducted at the tax office, not at the office of the taxpayer and not adjust the inspection and conclusion or the handling decision of fiscal year 2017 and 2018. In case the administrative violations on tax being handled according to the procedure of denunciation settlement, the amount of fine for administrative violations on tax shall not be modified.



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