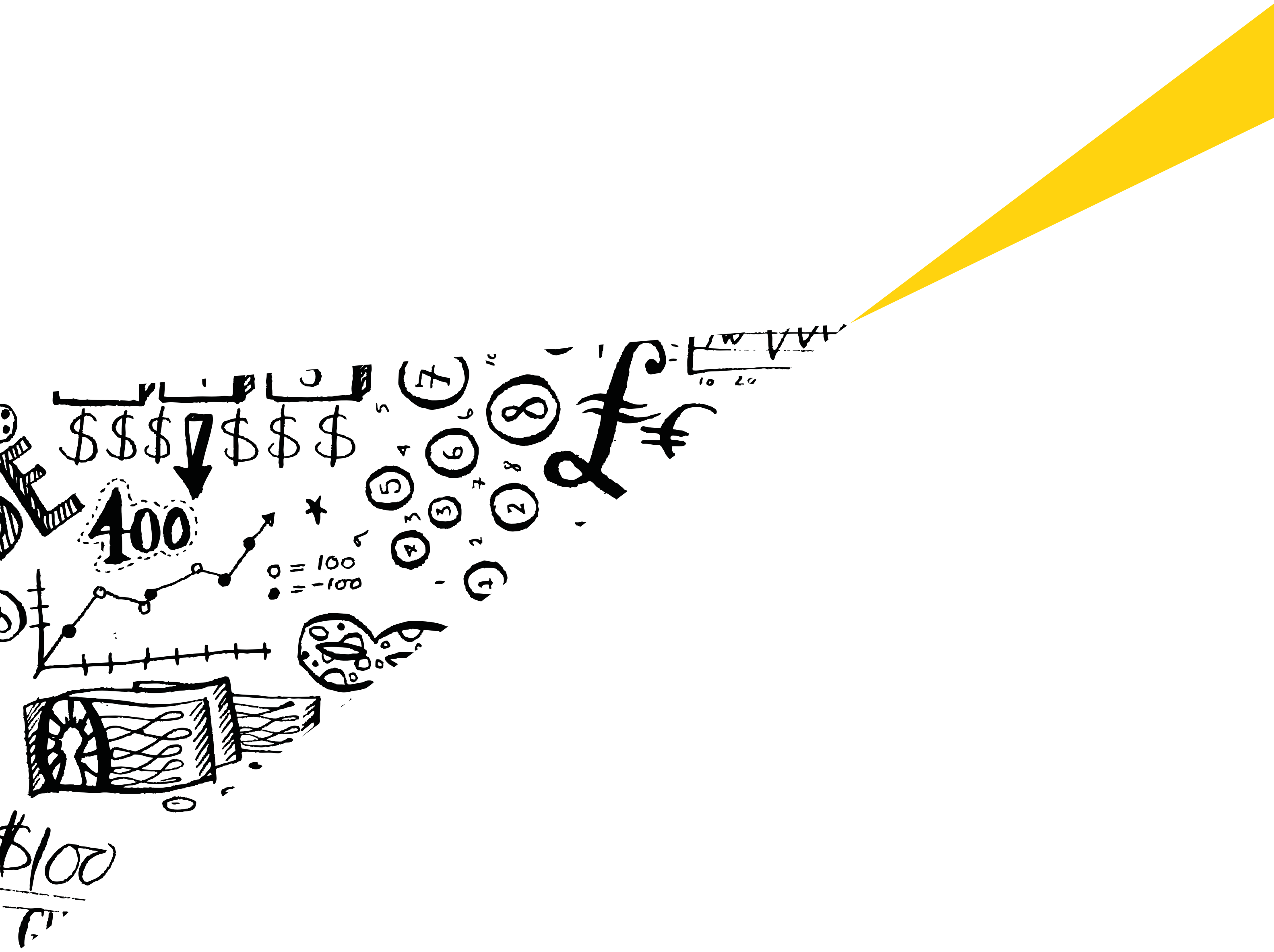
Transfer pricing global reference guide



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Transfer pricing global reference guide

Planning transfer pricing strategies, working to limit tax exposures and defending a company's return position and transfer pricing practices on a global basis, requires knowledge of a complex web of country tax laws, regulations, rulings, methods and requirements.

The Ernst & Young *Transfer pricing global reference guide* is a tool designed to enable international tax executives to quickly identify the transfer pricing rules, practices and approaches that have been adopted by over 45 countries. These various approaches must be understood in order to complete both compliance and planning activities.

The guide outlines basic information for the covered countries regarding their transfer pricing tax laws, regulations and rulings, Organisation for Economic Co-operation and Development (OECD) guidelines treatment, priorities and pricing methods, penalties, the potential for relief from penalties, documentation requirements and deadlines, statute of limitations, required disclosures, audit risk and opportunities for Advance Pricing Agreements (APAs).

A web-based version of this brochure can be found at www.ey.com/transferpricingguide. Please check this web page periodically for late-breaking country developments. Commentaries from transfer pricing professionals are also available at this site.

For a more detailed discussion of any of the country-specific transfer pricing rules, or to obtain further assistance in addressing and solving intercompany transfer pricing issues, please contact your local Ernst & Young office, the relevant country contact listed at the back of this brochure or post an email query at www.ey.com/transferpricingguide.

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Argentina

Taxing authority and tax law

Internal Revenue Service (Administración Federal de Ingresos Públicos --- AFIP); Income Tax Law (ITL) and Regulations.

Relevant regulations and rulings

Currently in effect: AFIP-DGI (AFIP-Dirección General Impositiva) Regulation No. 1,122 (Published 31 October 2001, but applicable for fiscal years beginning on 31 December 1999) as amended by several regulations (No. 1,227/02; No. 1,296/02; No. 1,339/02; No. 1,590/03; No. 1,663/04; No. 1,670/04; No. 1,918/05; No. 1,958/05, No. 1,987/05 and External Note No. 1/08). Binding tax rulings for general application are not provided. Opinions from the tax authority are scarce and non-binding.

OECD guidelines treatment

Argentina is not an OECD member, and the OECD Transfer Pricing Guidelines are not referenced in Argentina's Tax Law and Regulations. However, the tax authority usually recognizes the OECD Transfer Pricing Guidelines in practice as long as they do not contradict the ITL and Regulations. A first-level court case dated 15 August 2007 was based on the provisions of the OECD Transfer Pricing Guidelines. Given this, from a practical point of view, the OECD restructuring paper is likely to affect the transfer pricing analyses of the Argentine companies.

Priorities/pricing methods

The tested party must be the local entity (i.e., the entity based in Argentina). The taxpayer selects the most appropriate method, but the AFIP may oppose the selection. The accepted methods for transactions with related parties and tax havens pursuant to the ITL are the Comparable Uncontrolled Price (CUP), Resale Price, Cost Plus, Profit Split and Transactional Net Margin Methods. The ITL does not prioritize methods. Regulation 1,122/01 states the best method rule. The use of an interquartile range is mandatory. Unless there is evidence to the contrary, the market price must be used for tangible goods transactions with both related and independent parties where there is an international price in a transparent market. In addition, for transactions involving grains, oleaginous products, other soil products, oil and gas and in general all goods with well-known prices in transparent markets and where the local company operates through international intermediaries who are not the final consignees of the goods, the applicable price is the prevailing price in the respective market on the day loading for shipment is finished, or the agreed-upon price if higher. This method may not apply, however, if the local exporter is able to prove the substance of the operations of the consignee abroad. The AFIP has the power to limit the application of this method or extend it to other transactions under certain circumstances. Export and import transactions with independent parties not located in tax havens are subject to information requirements if the annual amount of the transaction exceeds ARS 1,000,000 or the transactions are exports and imports of commodities. The requirements depend on different annual transaction amounts and, in some cases, may include calculations of profit margins.

Transfer pricing penalties

For unpaid taxes related to international transactions, the taxpayer is fined 100% to 400% of the unpaid tax. Penalties for fraud are two to ten times the unpaid taxes. Criminal tax law stipulates imprisonment for two to six years if the unpaid tax exceeds ARS 100,000 for each tax and fiscal year. If the unpaid tax exceeds ARS 1,000,000, the prison term will increase, ranging from three-and-a-half to nine years. For the late filing of tax returns containing international transactions involving the export/import of goods with independent parties, the taxpayer will be fined ARS 9,000. For the late filing of tax returns concerning other international transactions, the taxpayer will be fined ARS 20,000. For the application of penalties related to late filing or lack of filing, it is irrelevant whether the transactions were arm's length. For non-compliance with the formal duties of furnishing information requested by the AFIP, the taxpayer faces fines up to ARS 45,000. The same applies to a failure to keep vouchers and evidence of prices on available files and failure to file tax returns upon request. If tax returns are not filed after the third request, and the taxpayer has income amounting to more than ARS 10,000,000, the fine is increased from ARS 90,000 to ARS 450,000. Interest is applicable on unpaid tax balances (as from 1 July 2006, the rate is 2% on a monthly basis and 3% upon lawsuit filing).

Argentina (continued)

Penalty relief

Concerning underpayment and fraud, if the non-recidivist taxpayer voluntarily amends the tax returns before receiving a special notice (or vista) from the AFIP, the penalty is reduced to one-third of the minimum fine. If the tax returns are amended within 15 days of receiving the notice, the penalty is reduced to two-thirds of the minimum fine. If the non-recidivist taxpayer accepts the adjustments assessed by AFIP and pays the amounts due, the penalties are set at the minimum amount. If the taxes due do not exceed ARS 1,000 and are paid voluntarily, or within 15 days from the special notice, then no penalty shall be applied.

Documentation requirements

Transfer pricing regulations require extensive contemporaneous documentation. Taxpayers are required to keep and eventually submit all the documents evidencing that prices, amounts received and profit margins have been established on an arm's length basis. Furthermore, taxpayers are required to keep an annual transfer pricing study for transactions, subject to transfer pricing methods, with related parties, deemed related parties and independent parties located at tax havens."

Documentation deadlines

The transfer pricing documentation must be ready for filing with the AFIP by the date the corresponding transfer pricing return filings are due. A special report, financial statements and certification must be filed with the tax authority by the end of the eighth month after the end of the fiscal year. The annual transfer pricing return must also be filed by the end of the eighth month after the end of the fiscal year. The semiannual returns must be filed by the end of the fifth month after the end of the relevant six-month period. The annual return for export and import transactions with independent parties not located at tax havens must be filed by the end of the seventh month after the end of the fiscal year.

Statute of limitations on transfer pricing assessments

The general statute of limitations for federal tax matters is five years for registered taxpayers or for those who are exempt from registration and 10 years for unregistered taxpayers. These periods begin on 1 January of the year following the year in which the tax return is due. The transfer pricing documentation must be kept by the taxpayer and provided upon AFIP´s request for up to five years after the period established by the statute of limitations.

Return disclosures/related-party disclosures

Taxpayers are required to file the following documentation with the AFIP: a special report including the key elements of the transfer pricing study, such as the methods used for the transfer pricing analysis and the conclusions made; audited financial statements for the fiscal year; an independent Certified Public Accountant's certification of certain contents of the special report; Annual Form 743 return; Form 742 return (for the first six-month period of each fiscal year); Semi-Annual Form 741 return for commodities exports and imports with independent parties not located at tax havens; and Annual Form 867 return for other exports and imports with independent parties not located in tax havens.

Audit risk/transfer pricing scrutiny

Transfer pricing audits are becoming more frequent and intensive, so that a medium risk may be assessed. It is likely that the Argentine tax authority will strictly enforce penalties with companies that are not complying with transfer pricing requirements.

APA opportunity

APAs are not specifically addressed.

Australia

Taxing authority and tax law

Australian Taxation Office (ATO); Division 13 of Part III of Income Tax Assessment Act and relevant provisions of double tax treaties.

Relevant regulations and rulings

Taxation Ruling (TR) TR92/11: Loans, TR94/14: Application of Division 13, TR95/23: APAs, TR97/20: Methodologies, TR98/11: Documentation, TR98/16: Penalties, TR 1999/1: Services, TR2000/16: Relief from Double Taxation, TR2001/11: Permanent Establishments, TR2001/13: Interpretation of Australia's Double Tax Agreements, TR2002/2: Meaning of Arm's Length for the purposes of § 47A(7) Dividend Deeming Provisions, TR2002/5: Definition of Permanent Establishment, TR2003/1: Arm's Length Debt Test, TR 2004/1: Cost Contribution Arrangements, TR2005/11: Branch Funding for Multinational Banks and TR2007/1: Consequential Adjustments.

Tax Determinations (TD) TD2002/20: Film Production Companies and the Impact of the Tax Offset Scheme, TD2202/28: Foreign Bank Election to not Apply Part IIIB of the Income Tax Assessment Act (1936), TD2007/1: Market Value of Goodwill of an Entity that becomes a Member of a Consolidated Group. Draft Tax Determinations, TD2007/D20: Interaction of Division 13 and the Thin Capitalization Rules, TD2008/D3: Interaction of Division 13 and the Debt/Equity Rules.

ATO booklets: Concepts and Risk Assessment, Applying the Arm's Length Principle, Advance Pricing Arrangements, Documentation and Risk Assessment for Small to Medium Businesses, Dependent Agent Permanent Establishments and Marketing Intangibles Draft "Business Restructuring – Discussion Paper on application of Australia's transfer pricing rules" and ATO Discussion Draft on Intra-group finance guarantees and loans. Application of Australia's transfer pricing and thin capitalization rules.

OECD guidelines treatment

The ATO accepts the principles of the OECD guidelines and indicates in the relevant ATO transfer pricing tax rulings where there are "differences in emphasis or extensions of OECD principles." The ATO will consider the use of all of the OECD-recognized transfer pricing methods and will also consider broader (or other) methods for particular facts and circumstances.

Priorities/pricing methods

The ATO seeks to adopt the "most appropriate" method. Methods outlined in ATO rulings include traditional transaction methods (CUP, Resale Price and Cost Plus) and profit methods (Profit Split and TNMM). Although traditional transaction methods (e.g., CUP) may be preferred by the ATO, the TNMM is accepted as an appropriate method by the ATO in circumstances where traditional transaction data is not available, comparable or reliable. A recent draft Administrative Appeals Tribunal decision has placed more emphasis on transaction methods and was critical of the particular application of the TNMM. However, the decision is still in draft and even once finalized may be subject to appeal; therefore, it is impossible to draw definitive conclusions from the decision at this stage.

Transfer pricing penalties

If the Commissioner applies Division 13 and the relevant section of the International Tax Agreement Act, and it is determined that there is a transfer pricing adjustment resulting in a tax shortfall, a penalty of 25% applies, but is reduced to 10% where the taxpayer can demonstrate that it has a reasonably arguable position (RAP). Where the tax commissioner can demonstrate that the sole or dominant purpose is tax avoidance, a penalty rate of 50% applies, but is reduced to 25% where the taxpayer can demonstrate that they have a RAP.

The taxpayer may have a RAP "if it would be concluded in the circumstances, having regard to relevant authorities, that what is argued for is about as likely to be correct as incorrect or is more likely to be correct than incorrect."

Penalties could increase by a further 20% if the taxpayer "took steps to prevent or obstruct" the ATO from discovering the tax shortfall or if a penalty was imposed for a previous accounting period.

For 2004-05 and later income years, a Shortfall Interest Charge (SIC) will apply to any amount of tax shortfall from the day on which income tax under the first assessment for that income year was due and payable to the day on which the Commissioner gave notice of an assessment. SIC applies regardless of whether or not the taxpayer is liable for any shortfall penalty. The SIC rate is the base interest rate plus an uplift factor of three percentage points.

Australia (continued)

Penalty relief

Penalties will be reduced by 20% for voluntary disclosure after notification of an audit or by 80% for voluntary disclosure before notification of an audit. Where the taxpayer has contemporaneous documentation (i.e., prepared prior to or at the time of filing the company's annual tax return and Schedule 25A) to support a RAP the penalty may be reduced. Additionally, the Commissioner of Taxation has discretionary power to remit penalties where he considers it fair and reasonable to do so. A taxpayer with an APA will not incur penalties except in relation to non-arm's length dealings that are not covered by the APA or non-compliance with the terms and conditions of the APA.

Documentation requirements

The ATO has outlined a four-step process in TR98/11 to assist companies in satisfying contemporaneous documentation requirements. This process is not mandatory but is highly recommended. The documentation should record the transfer price setting process and, in particular, verify the outcome of those transactions against the arm's length standard. The documentation should include business, economic and industry analyses. In addition, taxpayers are expected to implement a review process to ensure that transactions and outcomes are reviewed at appropriate intervals and to ensure that the impact of material changes in the business are considered and documented. The documentation should be relevant to the Australian operations (i.e., country- and company-specific).

Documentation deadlines

Documentation should be contemporaneous with the relevant transactions. Documentation is generally only required to be submitted to the ATO following a specific notification, for example, during an ATO transfer pricing documentation review or audit, and it is expected to be provided within two weeks of an ATO request.

Statute of limitations on transfer pricing assessments

There is generally no statute of limitations with respect to transfer pricing adjustments. The tax legislation specifically empowers the Commissioner of Taxation to make amendments to tax assessments in respect of any year for transfer pricing adjustments. Australia and Japan have recently signed a new double tax agreement which provides for a statute of limitations on transfer pricing adjustments. A tax authority must initiate an enquiry into an enterprise's profits within seven years from the end of the taxable year in which the profits at issue might have been expected to have accrued to the enterprise. However, the statute of limitations does not apply in the case of fraud, willful default or if the inability to initiate the enquiry results from the actions or inaction of the enterprise. The treaty is yet to receive ratification and as such is not yet in force.

Return disclosures/related-party disclosures

The ATO requires a Schedule 25A to be filed with each tax return. Information disclosed on the Schedule 25A includes (1) industry classification code(s), (2) countries with which the taxpayer has international related-party transactions, (3) international related-party transaction types and quantum, (4) the percentage of transactions covered by contemporaneous documentation that has been prepared in accordance with the four-step process, (5) transfer pricing methodologies selected and applied and (6) interests in foreign companies or foreign trusts.

Audit risk/transfer pricing scrutiny

In determining whether an Australian taxpayer's transfer pricing should be reviewed or audited by the ATO, the ATO generally gives consideration to the size and nature of the related-party dealings, the quality of any transfer pricing documentation and whether or not the taxpayer's results appear to be commercially realistic. The ATO has developed a sophisticated risk engine which takes these factors, along with a number of other financial and industry data, into consideration in determining which taxpayers to review. Related-party transactions undertaken in connection with the following may receive particular attention by the ATO:

Australia (continued)

Audit risk/transfer pricing scrutiny (continued)

- Royalties
- Intangibles (both Australian and foreign-owned)
- Management services
- Financing arrangements, including interest-free loans, intercompany interest rates and guarantee fees
- Companies undergoing supply chain restructurings

The ATO also focuses on taxpayers whose overall operations do not achieve a commercially realistic result (e.g., incur losses or low returns in any particular year or over a range of years). Additionally, the ATO has been focusing on the arm's length nature of business restructures.

The ATO concentrates on a range of industries each year, including mining, energy and utilities, motor vehicles, pharmaceuticals, distributors, banking and insurance. The ATO continues to conduct transfer pricing record reviews (documentation reviews) and transfer pricing audits. These reviews and audits target small and medium-sized enterprises as well as large enterprises.

The risk of transfer pricing audit in Australia would be assessed as medium/high as the ATO continues to perform transfer pricing audits and make transfer pricing adjustments.

APA opportunity

The ATO actively promotes the use of APAs and has a well-established program for both unilateral and bilateral APAs. Circumstances that the ATO has indicated may be unsuitable for an APA include those where (1) timely agreement is unlikely to be reached with respect to the methodology, comparable data and overall arm's length outcome, (2) there is a lack of materiality in the dealings in the context of the business, (3) there is insufficient complexity to warrant the level of certainty that is provided by an APA or (4) obtaining a tax benefit in Australia or overseas was a principal element of the dealings.

Contents

Austria

Taxing authority and tax law

Ministry of Finance (MF). § 6(6) Income Tax Act, § 8(2) Corporate Income Tax Act, § 138 Federal Tax Code.

Relevant regulations and rulings

Income Tax Guidelines 6.13.3, 2511 -2513; Corporate Income Tax Guidelines 14.8.2, 1147; ministerial decrees AÖF Nr. 114/1996, 122/1997, 155/1998, 171/2000; and several published opinions regarding selected transfer pricing issues.

OECD guidelines treatment

Austria, as an OECD member country, has fully adopted the OECD Guidelines by publishing them in the form of several ministerial decrees. The OECD Transfer Pricing Guidelines may be considered internally binding upon the tax authorities. As they are not legally binding in Austria, Austrian tax courts and the taxpayer are not obliged to follow them. In practice, however, there is a strong reliance on the OECD Guidelines not only by the tax authorities but also by the tax courts and in Austrian literature. In addition to the OECD Guidelines the tax authorities generally follow OECD papers, such as the OECD Discussion Draft on Transfer Pricing Aspects of Business Restructurings, published on 19 September 2008. According to ministerial decree BMF010221/0626-IV/4/2006, the tax authorities plan to enact national Transfer Pricing Guidelines based on the OECD Transfer Pricing Guidelines in the near future.

Priorities/pricing methods

Based on the OECD Transfer Pricing Guidelines, the MF accepts CUP, Resale Minus, Cost Plus, Profit Split and TNMM. However, it strongly prefers traditional transaction methods.

Transfer pricing penalties

If the income is increased because the arm's length criterion has not been met, non-deductible interest in the amount of 2% points above the base rate is levied on any prior year's corporate income tax payments. Lack of, or insufficient, transfer pricing documentation does not lead to specific penalties but increases the risk that the tax authorities will regard a transaction as non-compliant with the arm's length criterion and estimate a tax base adjustment.

Penalty relief

If the taxpayer provides formerly lacking or insufficient documentation to the tax authorities, the tax authorities are obliged to base their consideration upon such documentation. However, the interest will become due regardless of whether there is sufficient documentation or not.

Documentation requirements

In practice, transfer pricing documentation is required. However, there are no specific documentation rules. Austrian tax authorities promote the opinion that an obligation to prepare contemporaneous transfer pricing documentation can be derived from the general regulations concerning bookkeeping for tax purposes. Following the OECD Transfer Pricing Guidelines or the annex to the code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU) is therefore recommended.

Documentation deadlines

Documentation should be prepared contemporaneously. The documentation should be available upon request of the tax authorities within two to three weeks following the request.

Austria (continued)

Statute of limitations on transfer pricing assessments

The statute of limitations on a transfer pricing adjustment usually is six years after the end of the calendar year in which the relevant fiscal year ends. The term may be extended up to 10 years.

Return disclosures/related-party disclosures

No specific continuous disclosure is required in the annual tax return. In case of a tax audit, the auditors usually ask for a description of major related-party transactions as well as for disclosure of all contracts in place with related parties and transfer pricing studies available. In some cases, an extensive questionnaire is discussed.

Audit risk/transfer pricing scrutiny

Tax authorities regularly examine related-party transactions and transfer prices charged. There is a noticeable trend towards increased awareness of transfer pricing problems among tax auditors. Generally, the transfer pricing audit risk can be considered medium.

APA opportunity

Currently, there is no legal basis for APAs in Austria. The introduction of APAs is subject to discussion. It is possible to get a unilateral ruling for transfer pricing issues only.

Belgium

Taxing authority and tax law

The taxing authority responsible for transfer pricing in Belgium is the Belgian Administration of Direct Taxes, which is part of the Federal Public Service Finance. While transfer pricing issues can be raised in the course of an ordinary tax audit, a specific transfer pricing audit team has been created within the Belgian tax authority. This highly specialized team, which has nation-wide authority, operates autonomously and selects its audit targets, but also provides support to other field inspectors if requested.

While no specific transfer pricing legislation exists in Belgium, the arm's length principle was formally introduced into the Belgian tax law by the law of 21 June 2004, introducing Article 185, § 2 of the Belgian Income Tax Code (ITC) (entered into force on 19 July 2004). This article's content is equivalent to Article 9, § 1 and § 2 of the OECD Model Tax Convention.

In addition, the ITC contains various provisions which directly or indirectly relate to transfer pricing. These provisions can be found in articles 26, 49, 54, 55, 79, 207, 344 and 345 of the Belgian ITC. These articles deal with the notion of abnormal and gratuitous benefits (indirectly embodying the arm's length principle), the deductibility of expenses and avoidance of the shifting of profits.

The general provisions of the Belgian ITC, e.g., regarding penalties, late interest payments, etc., also apply in transfer pricing matters.

A general advance ruling (or APA) regime was introduced through the law of 24 December 2002 and became effective as of 1 January 2003.

Relevant regulations and rulings

The Belgian tax administration has issued various guidelines on transfer pricing:

- Administrative guidelines on the offensive aspects of transfer pricing, issued in 1999
- Administrative guidelines on the defensive aspects of transfer pricing, issued in 2000 and 2003
- Administrative guidelines providing the tax authority's view on the interpretation of article 185, §2 ITC, which introduced the arm's length principle into Belgian tax law, issued in July 2006
- Administrative guidelines regarding the formal creation of a transfer pricing audit team within the Belgian tax authorities, issued in July 2006
- Administrative guidelines on transfer pricing documentation, the transfer pricing code of conduct and transfer pricing audits, issued in November 2006

Rulings are provided on the basis of a general ruling practice (see APA opportunity). APAs are provided on an individual basis, taking into account the specifics of each case. The Belgian government has furthermore implemented a regime which provides, for tax purposes, a deduction on risk capital (i.e. qualifying equity), also known as a Notional Interest Deduction.

In addition, the Belgium government also introduced a special tax deduction for income derived from the use of patents. As a result of this deduction, income that is patent-related is subject to an effective Belgian tax rate of 6.8%, which is a very advantageous regime compared to the standard corporate income tax of 33.99% that is normally levied.

OECD guidelines treatment

The Belgian tax authority indicates several times in its administrative guidelines that taxpayers should generally follow the guidance mentioned in the OECD Transfer Pricing Guidelines.

Priorities/pricing methods

Although taxpayers are in principle free to choose any OECD transfer pricing method as long as the method chosen results in arm's length pricing for the transaction, conceptually, transaction-based methods are preferred over profit-based methods.

Taxpayers are not required to use more than one method, although they should be able to support their decision to apply a particular method.

Belgium (continued)

Transfer pricing penalties

The general tax penalty framework applies to transfer pricing adjustments. These penalties vary from 10% up to (in very exceptional cases) 200% of the additional tax; the rate depends on the degree of intent to avoid tax or the degree of the company's gross negligence.

Furthermore, interest for late payments is due on additional tax assessments (including assessments resulting from a transfer pricing adjustment).

Penalty relief

Since additional tax assessments depend on the degree of intent to avoid taxes or on the company's gross negligence, penalties can be reduced or eliminated if the taxpayer can demonstrate its intent to establish transfer prices in accordance with the arm's length principle (e.g., through its documentation efforts).

Documentation requirements

No legislative guidance regarding the nature and content of proper transfer pricing documentation exists. However, the 1999 administrative guidelines state that documentation should demonstrate that the taxpayer's pricing complies with the arm's length principle to avoid an in-depth transfer pricing audit. These 1999 guidelines recommend that documentation includes, at a minimum:

- Activities of the group (including competitive position, level of market, economic circumstances, business strategies, etc.)
- Identification and characterization of intercompany transactions and contractual relationships among affiliates
- Functional analysis (including an overview of the functions, risks and intangibles)
- Transfer pricing methods used
- Economic analysis

The 2006 administrative guidelines on transfer pricing confirm Belgium's agreement with the principles outlined in the EU Code of Conduct. Therefore, the information expectation contained in this Code of Conduct should also be considered from a Belgian transfer pricing documentation perspective. These administrative guidelines also refer to the concept of a prudent business manager in order to encourage companies to ensure that transfer pricing documentation is available.

Although the burden of proof lies with the tax authorities, the taxpayer needs to provide information on its transfer pricing policies applied to allow the tax authorities to verify the company's tax position.

Documentation deadlines

Given the absence of any formal transfer pricing documentation requirements, there is no deadline for the preparation of transfer pricing documentation. However, since upon a tax audit, a taxpayer has a one-month period (which can be prolonged if valid reasons exist) to provide all information requested, including all information that allows verification of its taxable income – and therefore, the arm's length nature of the transfer prices – it is recommended that each transaction be documented at the time it is executed. Additionally, the 1999 guidelines provide that if the taxpayer can demonstrate upon a tax audit that it has made sufficient efforts to prepare transfer pricing documentation, the tax inspector does not need to carry out an in-depth tax audit.

Statute of limitations on transfer pricing assessments

The general rules regarding the statute of limitations apply to transfer pricing assessments. Therefore, generally speaking, the tax authority is entitled to make additional assessments during a period of three years starting from the closing of the accounting year.

However, in the case of fraud, the tax authority has the right to adjust the income during a five-year period, provided that the taxpayer receives prior notice of serious indications of fraud. Some other, exceptional statutes of limitations also exist for specific situations.

Return disclosures/related-party disclosures

No specific disclosure requirements exist for filing the tax return.

Belgium (continued)

Audit risk/transfer pricing scrutiny

The transfer pricing audit risk may be regarded as medium-high.

The Belgian tax authorities have demonstrated an increased interest in transfer pricing since the first circular letter on transfer pricing, introduced in 1999. Thereafter, the introduction of the arm's length principle in the Belgian legislation in 2004 and the organization of a special transfer pricing team in 2006 increased the focus on transfer pricing. This transfer pricing audit team is expected to be informed of every transfer pricing investigation performed by the local tax audit teams to ensure a consistent and experienced approach. The tax authorities have their own targets and perform multinational tax audits (e.g. in case of a restructuring).

The transfer pricing audit team is also involved in cross-border transfer pricing audits, which are held jointly with the tax authorities of Belgium's neighboring countries. In addition to this special team's increased audit activity, tax inspectors are also increasing their focus on transfer pricing during general tax audits.

The 2006 administrative guidelines contain a list of events that could trigger a high transfer pricing risk and lead to increased audit scrutiny:

- Structural losses
- Business reorganizations
- Migration of businesses
- The use of tax havens or low-tax rate countries
- Back-to-back operations
- Circular structures
- Invoices for services sent at the end of the year (i.e. management services)

The Belgian tax authorities indicated in their November 2006 circular that transfer pricing cases associated with business restructurings will be among the priorities in their audit efforts.

The recent developments are likely to result in increased focus on transfer pricing, especially considering the evolution of the Belgian TP audit relationship with other tax authorities. Transfer pricing audits are becoming more aggressive. They are being approached from an economic perspective and are focused on such specific issues as business conversions and restructurings. The Service for Advance Decisions is currently working on a paper dealing with conversions and exit charges/settlements.

In our experience with the Belgian tax authorities, the recent developments will result in more focus on transfer pricing, especially considering the evolution that the Belgian TP audit cell is working closely together with other tax authorities.

APA opportunity

The 2003 corporate tax reform introduced a general ruling practice under Belgian tax law. Additional guidance in this respect is provided through various Royal Decrees.

As a result of the law of 21 June 2004, the Service for Advance Decisions became an autonomous department (led by a committee of four) as of 1 January 2005. More than 80 specialists in various domains of taxation, including transfer pricing, assist the committee. This service has increased flexibility in the ruling process and shortened the decision period (usually less than three months from the filing date for unilateral APAs). This committee is also able to rule prospectively on corresponding downward profit adjustments under Article 185, § 2, thus offering significant transfer pricing planning opportunities.

Brazil

Taxing authority and tax law

Brazilian Internal Revenue Service (IRS); Internal Revenue Code by Decreto 3000, 26 March 1999 (RIR99).

Relevant regulations and rulings

Coefficients to compensate exports for Brazilian currency appreciation:

- 2008 coefficient: 1.20 (Normative Instruction No. 898/08 and Ordinance No. 310/08)
- 2007 coefficient: 1.28 (Normative Instruction No. 801/07 and Ordinance No. 329/07)
- 2006 coefficient: 1.29 (Normative Instruction No. 703/06 and Ordinance No. 425/06)
- 2005 coefficient: 1.35 (Normative Instruction No. 602/05 and Ordinance No. 436/05)

Ordinance No. 222/08; provides guidance with respect to requests for changing statutory profit margins.

Normative Instruction No. 243, 11 November 2002; changed application of Resale Minus 60%, Law No. 9.959, 27 January 2000; introduced new method: Resale Minus 60% (applicable for raw materials).

Law No. 9.430, 27 December 1996; introduced transfer pricing rules in Brazil.

OECD guidelines treatment

Brazil's transfer pricing rules deviate significantly from international standards (including the OECD guidelines) in that there are no profit-based methods. Intercompany transactions need to be documented on a strict transactional basis, and fixed statutory profit margins (generally not arm's length) apply. No functional or industry analyses are required. Instead, the local subsidiary will have to document for each imported (or exported) product or service that it complies with at least one of Brazil's statutory transactional methodologies (CUP, Resale Minus or Cost Plus).

Priorities/pricing methods

As a first step in the transfer pricing documentation process, Brazilian companies have applied the Brazilian Resale Price less Profit Method (Método do Preço de Revenda menos Lucro or (PRL)) to document a company's transfer prices. Brazilian companies have started the documentation process with the PRL because the method relies entirely on import cost, local production cost and resale price information available internally, relieving the company of the burden of soliciting data from its foreign-related suppliers. In addition, since the PRL is the method favored by the Brazilian tax authority in the case of an audit, this approach provides a reliable estimate of Brazil's potential transfer pricing exposure.

Transfer pricing penalties

Since there are no special penalties for transfer pricing, general tax penalties are applicable. The amount of the penalty may be up to 20% of the omitted tax (or 0.33% per day) if the taxpayer pays the related taxes late but before an audit. Meanwhile, if the tax authority assesses the taxpayer as part of a transfer pricing audit, the applicable penalties may range from 75% to 225% of the omitted taxes.

Penalty relief

Not applicable.

Brazil (continued)

Documentation requirements

Brazilian taxpayers are required to document their international intercompany transactions on an annual basis. The Brazilian annual tax declaration (DIPJ) contains five specific forms that require taxpayers to disclose detailed information regarding their main intercompany import and export transactions. As part of these contemporaneous documentation requirements, taxpayers need to disclose the total transaction values for the most traded products, services or rights, the names and locations of the related trading partners, the methodology used to test each transaction, the calculated benchmark price, the average annual transfer price and the amount of any resulting adjustment.

Given the detailed transactional focus of the Brazilian regulations and the absence of any basket approach, taxpayers are required to document their transfer prices on a product code by product code basis, service type by service type and right by right. In this context, product code refers to a company's internal product codes used for inventory management purposes and not the much broader fiscal nomenclature used for customs and indirect tax purposes.

Taxpayers are expected to have the calculations and documentation necessary to support the information filed as part of the annual tax declaration ready for potential inspection by the tax authority as of the declaration's filing date, i.e., usually the end of June of the ensuing calendar year.

Documentation deadline

The contemporaneous documentation required as part of the DIPJ usually has to be filed by the end of June of the following fiscal year. Taxpayers are expected to have the detailed calculations and documentation necessary to support the information filed as part of the DIPJ ready for potential inspection as of the declaration's filing date.

Statute of limitations on transfer pricing assessments

A general statute of limitations applies, which is five years from the first day of the following fiscal year.

Return disclosures/related-party disclosures

The transfer pricing adjustments must be effected in December and reflected in the annual income tax return (due June of next year), when the company will also have to disclose the transfer pricing methods chosen and any related information.

Audit risk/transfer pricing scrutiny

In an effort to expedite audits in Brazil's data-intensive transfer pricing documentation environment, Brazilian audit teams have been equipped with new computers and specialized software applications, including internally developed systems capable of analyzing and auditing large volumes of accounting and transaction data.

The Brazilian tax authority expects the International Affairs Special Office (DEAIN) and the regional audit groups to continue to increase their numbers of specialized transfer pricing auditors. It is believed that the DEAIN and the regional transfer pricing auditors are becoming increasingly sophisticated in their audit approaches as they grow in number and experience.

There is a growing concern that many transfer pricing auditors, because of their particular training and tools, tend to rely on mechanical approaches to audits, while they ignore, or are unaware, of possible underlying business economics. While efforts are being made to increase auditors' knowledge of economics, it is expected that this approach to auditing will continue for the next few years.

APA opportunity

Not applicable.

Canada

Taxing authority and tax law

Section 247 of the Income Tax Act (Canada) (ITA) received Royal Assent on 18 June 1998, and became generally applicable to taxation years that began after 1997. It constitutes Canada's transfer pricing legislation and deals with the determination of transfer pricing adjustments, the recharacterization of transactions, penalties, records/documents required to be made or obtained, contemporaneous documentation requirements and timing of provision to the Minister when requested, plus ministerial discretion regarding acceptance of downward adjustment requests.

The Canada Revenue Agency (CRA) is responsible for ensuring that taxpayers meet the requirements of the law.

Relevant regulations and rulings

The CRA does not set out its views and positions on transfer pricing issues by legal doctrine or in a detailed fashion or examples. The CRA prefers to outline its views in general principles.

It provides its administrative interpretations and guidance with respect to § 247 and its application through the release of Information Circulars (IC), Transfer Pricing Memoranda (TPM) and pronouncements at public conferences, symposia and conventions. ICs usually address major subjects from a general perspective, while TPMs typically provide supplementary detailed explanations and guidance on specific issues related to the major subject.

CRA's current key pronouncements on transfer pricing are:

- IC87-2R, International Transfer Pricing, 27 September 1999
- IC94-4R, International Transfer Pricing: Advance Pricing Arrangements (APAs), 16 March 2001
- IC94-4R (Special Release), Advance Pricing Arrangements for Small Businesses, 18 March 2005
- IC71-17R5, Guidance on Competent Authority Assistance Under Canada's Tax Conventions, 1 January 2005

The CRA issued TPM-12 on 12 December 2008 which provides formal guidance regarding the Accelerated Competent Authority Procedure (ACAP). Taxpayers may request assistance for subsequent assessed taxation years on the same issues included in a Mutual Agreement Procedure (MAP) process. The main objective of the ACAP is to streamline certain steps in the MAP process such as being able to simultaneously negotiate with the foreign Competent Authority for both MAP and ACAP years.

The CRA is a member of the Pacific Association of Tax Administrators (PATA). Relevant guidance is issued by PATA from time to time on topics of mutual interest, e.g., the PATA Transfer Pricing Documentation Package, released March 2003.

Additional information and guidance on transfer pricing-related matters can be obtained from the CRA's website: www.cra-arc.gc.ca

OECD guidelines treatment

While no mention is made of the OECD guidelines in § 247 of the ITA, the legislative provision is intended to reflect the arm's length principle as set out in the OECD guidelines. The CRA has also endeavored to harmonize its administrative guidance and approach to transfer pricing with the OECD guidelines. As noted in IC87-2R: "This circular sets out the Department's views on transfer pricing and also provides the Department's position with respect to the application of the OECD guidelines."

When dealing with transfer pricing issues domestically, reliance is typically placed on the relevant Canadian statutory provisions. CRA's related ICs and other administrative guidance are considered instructive but not definitive. Moreover, the OECD guidelines are not usually recognized as authoritative; however, courts and other dispute resolution channels (e.g., competent authority) may consider the international principles and standards established by the OECD in reaching a decision.

Priorities/pricing methods

The CRA accepts the transfer pricing methods recommended in the OECD guidelines when such methods are applied correctly and result in an arm's length price or allocation. These transfer pricing methods include the:

- CUP method
- Resale Price method

Canada (continued)

Priorities/pricing methods (continued)

- Cost Plus method
- Profit Split method (residual/contribution)
- TNMM

However, the CRA considers the use of the Profit Split method as a method of last resort.

The CRA considers, notwithstanding that § 247 does not so stipulate, that there is a natural hierarchy in the application of the above-noted transfer pricing methods, with the CUP method providing the most reliable indication of an arm's length transfer price or allocation and the Profit Split method providing the least reliable indication of an arm's length result. The Tax Court of Canada has embraced the hierarchy of methods as outlined in the OECD guidelines.

The CRA does not require or impose a "best method" rule. The CRA believes that the most appropriate method to be used in any situation will be that which provides the highest degree of comparability between transactions, following an analysis of the hierarchy of methods.

Transfer pricing penalties

Subsection 247(3) of the ITA causes a taxpayer to be liable for a penalty of 10% of the net upward transfer pricing adjustments made under subsection 247(2) of the ITA, if such transfer pricing adjustments exceed the lesser of 10% of the taxpayer's gross revenue for the year and CAD 5,000,000.

A taxpayer will be deemed not to have made reasonable efforts to determine and use arm's length transfer prices or allocations unless the taxpayer has prepared or obtained records or documents which provide a description that is complete and accurate in all material respects of the items listed in subsection 247(4) of the ITA, and such documentation is in existence as of the tax filing due date. In the case of Canadian corporate entities, such documentation must exist six months after the year-end. For partnerships, the due date is five months after the year-end. Further, a taxpayer will be deemed not to have made reasonable efforts to determine and use arm's length transfer prices or allocations if the taxpayer does not provide the records or documents to the CRA within three months of the issuance of a written request to do so.

Transfer pricing-related penalties are exacted without reference to the taxpayer's income or loss for the relevant reporting year and are not tax deductible.

Penalty relief

If a taxpayer, subject to an upward adjustment of its transfer prices or allocations, was considered to have made reasonable efforts to determine and use arm's length transfer prices or allocations with respect to such adjustments, no penalty would be applicable to such adjustments.

As required by TPM-07, all proposed reassessments involving transfer pricing penalties are required to be referred to the Transfer Pricing Review Committee (TPRC) for review and recommendation for final action. The TPRC, after consideration of the facts and circumstances and representations by the relevant taxpayer, will conclude whether or not a transfer pricing penalty is justified.

No transfer pricing adjustments under subsection 247(2) of the ITA should arise regarding transactions covered by an APA as long as the APA remains in effect and the taxpayer complies with its terms and conditions.

When the CRA has reassessed a transfer pricing penalty and the Canadian competent authority and relevant foreign counterpart negotiate a change to the amount of the transfer pricing adjustment, the CRA will adjust the amount of the Canadian transfer pricing penalty accordingly.

Documentation requirements

Subsection 247(4) of the ITA requires that a taxpayer must have records or documents, as a minimum, that provide a complete and accurate description, in all material respects, of the following items:

Canada (continued)

Documentation requirements (continued)

- The property or services to which the transaction relates
- The terms and conditions of the transaction and their relationship, if any, to the terms and conditions of each other transaction entered into between the persons or partnerships involved in the transaction
- The identity of the persons or partnerships involved in the transaction, and their relationship at the time the transaction was entered into
- The functions performed, the property used or contributed and the risks assumed by the persons or partnerships involved in the transaction
- The data and methods considered and the analysis performed to determine the transfer prices, the allocations of profits or losses or contributions to costs for the transaction
- The assumptions, strategies and policies, if any, that influenced the determination of the transfer prices, the allocations of profits or losses or contributions to costs for the transaction

In addition, although its views are not law, the CRA indicates in Information Circular 87-2R that it expects a taxpayer's documentation to include certain additional information (e.g., details of cost contribution arrangements, translations of foreign documents and other general guidance).

The CRA issued TPM 09 on 18 September 2006. The purpose of this memo was to define the meaning of "reasonable efforts" under §247 of the Act. In practice, TPM 09 has not significantly enhanced clarity with respect to the reasonable efforts standard and, thereby, the potential application of transfer pricing penalties.

Documentation deadlines

Taxpayers must prepare or obtain records and documents which provide a description that is complete and accurate in all material respects of the items listed in subsection 247(4) of the ITA, and such documentation must be in existence as of the tax filing due date. In the case of Canadian corporate entities, such documentation must exist six months after the year-end. For partnerships, the due date is five months after the year-end.

Taxpayers must provide documentation to the CRA within three months of the issuance of a written request.

Statute of limitations on transfer pricing assessments

Under subsection 152(4) of the ITA, the Minister may not ordinarily reassess after the normal reassessment period as defined in subsection 152(3.1) of the ITA. For most multinational taxpayers, that period is four years beginning after the earlier of the day of mailing of a notice of an original assessment for the year and the mailing of an original notification that no tax is payable for the year, unless the taxpayer has made misrepresentations, committed a fraud or filed a waiver, in which case the Minister may reassess a taxpayer at anytime. Where a Notice of Reassessment is issued at a later date, the first assessment notice is still viewed as the original assessment for the purposes of determining the normal reassessment period under subsection 152(3.1) of the ITA.

With respect to transactions involving non-arm's length dealings with non-residents, the reassessment period is extended an additional three years to seven years. This time period may be further extended when taxpayers provide CRA with a waiver, i.e., authorization by the taxpayer to the CRA to waive the normal reassessment period in respect of a taxation year, as defined in subsection 152(3.1) of the ITA, within which the Minister may assess, reassess or make additional assessments under subsection 152(4) of the ITA.

Return disclosures/related-party disclosures

Taxpayers are required to file form T106 annually, reporting the non-arm's length transactions they had with non-residents during the taxation year. The form T106 is filed together with the corporate tax return. Data from the T106 is entered into a CRA database and is used to screen taxpayers for international tax audits.

Canada (continued)

Audit risk/transfer pricing scrutiny

The CRA continues to receive additional funding for its audit of international activities and to focus its audit resources on the examination of international transactions, especially transfer pricing.

The risk of a transfer pricing audit in Canada is high. Canadian companies with cross-border dealings with related parties can expect a request from the CRA for their required transfer pricing documentation prior to or during the course of an audit. As noted in TPM-05, "Contemporaneous Documentation," effective October 2004, it is mandatory for field auditors to issue a formal written request to taxpayers for their transfer pricing documentation prior to commencement of the audit or when cross-border non-arm's length transactions with non-residents are identified during the course of an audit.

APA opportunity

The CRA launched its APA program in July 1993. As set out in its Information Circular 94-4R, it offers taxpayers the opportunity to pursue unilateral, bilateral or multilateral APAs. In addition, the CRA has made a small business APA program available to Canadian taxpayers under certain conditions. The CRA charges taxpayers only travel costs it incurs in the pursuit of an APA.

On 20 August 2008, the CRA issued TPM 11, which discussed the CRA policy with respect to rolling an APA back to prior years. The main limitation imposed by TPM 11 is that APAs may not be rolled back to years for which a request for contemporaneous documentation has been issued. Effectively, this means that APAs cannot be rolled back to taxation years under transfer pricing audit.

An updated version of IC94-4R is expected to be released soon.

China

Taxing authority and tax law

State Administration of Taxation (SAT). People's Republic of China (PRC) Corporate Income Tax Law, Chapter 6, Articles 41 through 48 and PRC Corporate Income Tax Law Implementation Regulations, Articles 109 through 123.

Notice Containing Related Party Transaction Annual Reporting Forms (Guoshuifa (2008) No. 114) and Implementation Measures for Special Tax Adjustments (Guoshuifa (2009) No. 2).

Relevant regulations and rulings

Notice Regarding Issues Concerning Capital Adjustments in Tax Administration Works Related to Transfer Pricing (Guoshuihan No. 745 (2005)). Investigations of Loss-Making Foreign Entities and Foreign Invested Entities with Single Manufacturing Functions (Guoshuihan (2007) No. 236). Strengthening Transfer Pricing Investigations (Guoshuihan (2007) No. 363). Notice on the Tax Deductibility of Interest Expense Paid to Related Parties (Caishui (2008) No. 121).

OECD guidelines treatment

In principle, the SAT recognizes the OECD guidelines and the relevant transfer pricing methods.

Priorities/pricing methods

The SAT accepts a reasonable method. The SAT will accept CUP, Resale Price and Cost Plus. Other methods, including the Profit Split, and the Transactional Net Margin Method (TNMM), are also considered. For the TNMM, the profit level indicators most often used are operating margin and total cost markup. Balance sheet profit level indicators such as return on assets or return on capital employed are rarely used.

Transfer pricing penalties

Article 48 of the PRC Corporate Income Tax Law stipulates that interest will be applied to the under-reported tax resulting from special adjustments to tax payments, including transfer pricing adjustments. Article 122 of the PRC Corporate Income Tax Law Implementation Regulations references Article 48 and states that interest imposed on special tax adjustments is based on the base renminbi (RMB) lending rate published by the People's Bank of China plus an additional 5% interest charge.

Additionally, per Article 106 of Guoshuifa (2009) No. 2, taxpayers that refuse to provide contemporaneous documentation or those that refuse to file, file false information, and/or file incomplete related-party reporting forms are subject to monetary penalties pursuant to Article 70 of the PRC Tax Collection and Administration Law and Article 96 of the PRC Tax Collection and Administration Law Implementation Regulations, as well as Article 44 of the PRC Corporate Income Tax Law and Article 115 of PRC Corporate Income Tax Law Implementation Regulations.

Penalty relief

According to Article 122, the additional 5% interest can be avoided if contemporaneous documentation has been prepared in accordance with the relevant law and regulations and can be provided within 20 days of request.

Documentation requirements

The PRC Corporate Income Tax Law and the PRC Enterprise Income Tax Law Implementation Regulations imply that taxpayers are expected to maintain contemporaneous transfer pricing documentation. Articles 13 through 20 of Guoshuifa (2009) No. 2 formally introduces and clarifies China's contemporaneous transfer pricing documentation requirements.

Article 14 of Guoshuifa (2009) No. 2 specifies five primary components of China's contemporaneous documentation:

- Organization structure
- Information of business operations
- Information of related-party transactions
- Comparability analysis
- Selection and application of transfer pricing methods

China (continued)

Documentation requirements (continued)

Article 15 states that certain enterprises can be exempted from the preparation, maintenance, and provision of contemporaneous documentation:

- Those conducting RMB 200m or fewer in annual related-party purchase and sale transactions and RMB 40m or fewer in annual related-party ‘other’ transactions (intangibles, services, and interest from financing transactions)
- Those with transactions covered by an advance pricing arrangement (APA)
- Those with a 50% or less share of foreign ownership that only conduct related-party transactions within China

Documentation deadlines

Article 16 of Guoshuifa (2009) No. 2 specifies that taxpayers should finish the preparation of contemporaneous documentation on or before 31 May of the following year and that all documentation should be submitted to tax authorities within 20 days of a request.

Article 116 of Guoshuifa (2009) No. 2 however states that the deadline for fiscal year 2008 documentation can be extended to 31 December 2009. This one-time extension only applies to documentation prepared for fiscal year 2008, the first year during which taxpayers in China are required to document the arm’s-length nature of their intercompany dealings.

Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments may vary; however, adjustments can be applied for a period of up to 10 years.

Article 20 of Guoshuifa (2009) No. 2 states that contemporaneous documentation should be maintained for a period of 10 years (starting from 1 June of the year following the transactions).

Return disclosures/related-party disclosures

Article 43 of the Corporate Income Tax Law and Guoshuifa (2008) No. 114 requires that taxpayers complete and submit nine comprehensive Related Party Transaction Annual Reporting Forms along with their annual tax filing. Per Article 16 of Guoshuifa (2009) No. 2, these forms must be submitted on or before 31 May following a fiscal year, including related-party transactions conducted during fiscal year 2008, i.e. Related Party Transaction Annual Reporting Forms for fiscal year 2008 are due on or before 31 May 2009.

Audit risk/transfer pricing scrutiny

The risk of transfer pricing issues being reviewed under audit is medium to high.

2007 witnessed the SAT perform adjustments of RMB 9b, an increase from 5.9b during 2006. The SAT continues to focus on enterprises that have sustained losses in the past, especially those paying intercompany service charges or royalties. With the release of China’s final implementation rules contained within Guoshuifa (2009) No. 2, it is likely that there will be an increase in transfer pricing audit activity in the coming years.

APA opportunity

APAs are available in China. Guidance regarding the APA process and procedures is provided in Articles 46 through 63 of Guoshuifa (2009) No. 2.

The validity of an APA is generally between three and five years. Enterprises no longer need to have ten years of operating history before applying for an APA and the ban on enterprises with major tax evasion history has been lifted as well. Annual related-party transaction volumes must only be greater than or equal to RMB 40m, rather than the previously required RMB 100m. Applications for APAs involving more than one in-charge province can be submitted directly to the SAT in Beijing.

Colombia

Taxing authority and tax law

Dirección de Impuestos y Aduanas Nacionales (DIAN). Law 788 enacted in 2002 and Law 863 enacted in December 2003 established the transfer pricing practice in the Tax Code; articles 260-1 to 260-10.

The definition of "related parties" is found in articles 450 and 452 of the Tax Code; articles 260, 261, 263 and 264 of the Commercial Code; and article 28 of Law 222 of 1995.

Relevant regulations and rulings

Regulatory Decree 4349 published in December 2004 provides the Transfer Pricing Guidelines applicable in Colombia, including the contents of the transfer pricing documentation and return, use of financial data and APA program.

OECD guidelines treatment

Although Colombia is not a member of the OECD, its guidelines are generally followed in the local regulations.

Priorities/pricing methods

The law establishes six methods: CUP, Resale Price, Cost Plus, Profit Split, Residual Profit Split and TNMM. The selection of the method should be based on the characteristics of the transaction under analysis. The selected method should be the one that better reflects the economic reality of the transaction, provides the best information and requires fewer adjustments. Local companies' information is available and should be used for benchmark analyses when applicable.

Transfer pricing penalties

In the case of partial noncompliance with transfer pricing documentation requirements, taxpayers bear penalties of 1% of the total value of transactions with foreign related parties during the relevant tax year or 0.5% of the taxpayer's net income or gross capital of the income tax return of the same tax year or in the last tax return filed. Penalties cannot exceed 28,000 UVT (Tax Value Unit). Additionally, when the taxpayer does not present the required documentation, the penalties are calculated in the same way as in partial noncompliance, and those penalties cannot exceed 39,000 UVT.

Regarding the transfer pricing return, penalties for late filing are calculated in the same manner as penalties for noncompliance with documentation requirements, but applied on a monthly basis and cannot exceed 39,000 UVT. With respect to transfer pricing adjustments, the tax authority penalizes taxpayers with an extra penalty of 160% of the unpaid tax.

If a taxpayer fails to fulfill its obligation of declaring transfer pricing transactions, the default fine is 10% of the taxpayer's net income or gross capital in the income tax return of the same tax year or in the last tax return filed. The penalties cannot exceed 39,000 UVT.

Penalty relief

Regarding transfer pricing studies, penalties are reduced by 50% if the omission, mistake or weakness is repaired before sanction notification or reduced by 25% if they are repaid within two months after penalty notification.

With respect to the transfer pricing return, once the taxpayer becomes liable for penalties for not presenting the return form, such penalties can be reduced by 25% if the taxpayer presents the return before the new deadline.

Documentation requirements

Taxpayers must prepare supporting documentation showing that each transaction with foreign related parties is conducted according to the arm's length principle. Documentation is not required for transactions within the fiscal year that do not exceed 10.000 UVT.

Regulatory Decree 4349 outlines the information to be included in transfer pricing documentation.

Colombia (continued)

Documentation deadlines

Documentation should be in existence by 30 June of the next fiscal year. After this date, the tax authority can request transfer pricing documentation for up to five years.

For fiscal year 2008, the transfer pricing return should be submitted between 8 July and 30 July depending on the Tax ID number.

Statute of limitations on transfer pricing assessments

Taxpayers must keep transfer pricing documentation for five years. DIAN may review the transfer pricing assessments any time during this period of time.

Return disclosures/related-party disclosures

As part of the transfer pricing return, taxpayers must disclose information on related parties.

Audit risk/transfer pricing scrutiny

In February 2006, the tax authority requested a transfer pricing study from almost all of the taxpayers who had filed the transfer pricing return for fiscal year 2004 (approximately 1,250 taxpayers).

After the review of the documentation, some corrections were requested. Until May 2006, approximately six taxpayers were under the tax authority's scrutiny for lack of proper 2004 documentation.

Additionally, the tax authority has requested clarifications from some taxpayers regarding whether they had intercompany transactions that were not declared. The tax authority's interest in transfer pricing matters has increased during the last two years.

During 2007, approximately 350 taxpayers had requests for their transfer pricing studies for fiscal year 2005 and 2006. In 2008, over 10 taxpayers were requested to deliver their transfer pricing studies for fiscal year 2007, mainly in coal and oil industries. No further requests have been received from tax authority. In this sense, audit risk has been low, but there is a new transfer pricing team at the tax authority, leaving uncertain what their attitude will be for 2009.

APA opportunity

The tax reform enacted in 2003 established APA regulations. APAs may be granted for a four-year term and they can be renewed. For the time being, only unilateral APAs are available. No double taxation treaties are currently in force.

A treaty with Spain became effective during 2008, and a new treaty with Switzerland is expected to be approved during 2009.

Czech Republic

Taxing authority and tax law

Ministry of Finance. The Income Tax Act § 23 (7) --- arm's length principle and § 38nc --- APA scope and procedures.

Relevant regulations and rulings

Directive D-258 discusses the application of international standards in the taxation of transactions between associated companies, i.e., transfer prices. D-258 confirms the applicability of the OECD Transfer Pricing Guidelines for both international and domestic transactions (with certain exceptions).

Directive D-292 outlines requirements concerning § 38nc of the Income Tax Act. D-292 comments on the principles of binding assessments, which correspond to the preliminary price agreement principles within the meaning of the OECD guidelines.

Directive D-293 outlines requirements on the expected scope of documentation of a transfer pricing method agreed between related persons. D-293 comments on the scope and nature of transfer pricing documentation in accordance with the European Union (EU) Transfer Pricing Documentation requirements created by the EU Joint Transfer Pricing Forum.

Directives D-258, 292 and 293 are not legally binding but are usually followed in practice by the Czech tax authority.

OECD guidelines treatment

Based on Directive D-293 (not legally binding), the OECD guidelines as well as the Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the EU are generally accepted in the Czech Republic. This directive also mentions that transfer pricing documentation prepared in accordance with the Code of Conduct "should be sufficient" for substantiating the method of calculation of the arm's length price.

Priorities/pricing methods

The Ministry of Finance follows the OECD Transfer Pricing Guidelines. Use of profit-based methods is possible where substantiated.

Transfer pricing penalties

There are no specific transfer pricing penalties. Generally, upon a successful challenge of transfer pricing prices by the tax authority, a penalty of 20% of the unpaid tax or 5% of the decreased tax loss may be applied. Thereafter, interest is assessed at 14% above the "repo rate" (or repurchase agreement rate) of the Czech National Bank (for 5 years at maximum).

Penalty relief

There is no specific relief or reduction of penalties for transfer pricing. It is at the discretion of the Ministry of Finance to decrease penalties; however, this is limited to specific situations.

Documentation requirements

There are no specific statutory requirements in place. It is crucial for the taxpayer to have supporting documentation in case the transactions are audited by the Czech tax authority, as the burden of proof remains with the taxpayer. The Czech tax authority has great discretion in deciding what level and nature of documentation is sufficient. During the tax audit, the authority may request any documentation that reasonably substantiates the actual character and substance of the transaction, its benefits for taxpayers, the appropriateness of the level of fees and the transfer pricing method selected. The analysis of a controlled transaction and the identification of comparables could be useful. Therefore, a high level of formal evidence may be necessary to support various aspects of the transaction. Deadlines for submitting the required documentation may be 15 or 30 days after the request is delivered to the taxpayer.

D-293 describes the documentation that is expected and may be required by the tax authority. Nevertheless, as the directive is not legally binding, there is no legal requirement to prepare documentation.

D-292 sets out documentation that should serve as the initial basis for filing the application for issuance of a binding assessment. The submitted documentation should contain information on the group, information on the company, information on the business relationship, information on other circumstances affecting the business relationship and information on the transfer pricing method.

Czech Republic (continued)

Documentation deadlines

There is no specific deadline to prepare documentation, since no specific statutory documentation requirement exists.

In the event of a transfer pricing challenge, the taxpayer must file information before the statutory deadline for tax proceedings. This is generally within 15 days of the receipt of a request by the tax authority. This time limit may be extended at the discretion of the tax authority if a request is made by the taxpayer.

Statute of limitations on transfer pricing assessments

The general statute of limitations applies. The limit is three years from the end of the taxable period during which the duty to file a tax return arose. However, if the Czech tax authority undertakes an act directed at the assessment of tax, then the three-year time limit begins again. The limit will also be prolonged if the supplementary tax return for the respective period is filed or if a tax loss carryforward may be utilized in the particular period. Tax may not be assessed, however, later than 10 years or 17 years if tax losses were incurred (15 years in case of tax losses incurred in 2004 and onwards).

Return disclosures/related-party disclosures

Effective from 1 January 2001, the executives of a controlled entity are required to complete a memorandum with respect to relations and transactions with companies in the group. This does not apply if a controlling agreement is concluded. Note that this is based on commercial legislation rather than tax legislation, and the memorandum has no direct tax impact or tax aspects. Taxpayers must provide documentation of transactions with related parties in the corporate income tax return.

Audit risk/transfer pricing scrutiny

The risk of transfer pricing issues being reviewed under an audit is medium. The Czech tax authority has adopted a global approach. Audit subjects are selected based on complex criteria and transfer pricing is only one aspect among many others. Intangibles, royalties and service fees are seen as the most likely transfer pricing audit issues. Although no specific country is targeted for transfer pricing audits, transactions with tax haven countries are closely scrutinized.

APA opportunity

APA regulations were established under § 38nc of the Income Tax Act, which became effective on 1 January 2006. Upon the tax entity's request, the tax administrator decides whether a taxpayer has chosen a transfer pricing method that would result in a transfer price determination on an arm's length basis. The binding assessment can only be issued for transactions effective in a particular tax period or that will be effective in the future. It is impossible to apply for a binding assessment of business relationships that have already affected the tax liability. D-292 details the procedure for issuing binding assessments and the necessary particulars for the application. Generally, the tax administrator should issue the decision within six months assuming all documentation and information are provided, but this deadline is not legally binding.

Denmark

Taxing authority and tax law

Ministry of Taxation (MT). § 2 of the Tax Assessment Act; §§ 3B, 14(4) and 17(3) of the Tax Control Act; and §§ 26 and 27 of the Tax Administration Act.

Relevant regulations and rulings

Regulation number 42 of 24 January 2006 pertains to the documentation of the pricing of intercompany transactions and guidelines for preparation of written documentation. The Regulation sets forth the minimum requirements and guidelines for tax assessment and for disclosing information. The Regulation is referred to as the Executive Order on Transfer Pricing Documentation.

OECD guidelines treatment

The MT will, for the purpose of its assessment, apply the principles of the OECD Transfer Pricing Guidelines.

Priorities/pricing methods

The MT accepts CUP, Resale Price, Cost Plus, Profit Split and TNMM.

Transfer pricing penalties

Fines were introduced for income years commencing on or after 2 April 2006, if the transfer pricing documentation requirements are not observed either intentionally (deliberate omission) or due to gross negligence or if incorrect and misleading information on the exemption rule for small and medium-sized companies is given. The amount of penalty is twice the costs saved for not having prepared the transfer pricing documentation in the first place. The penalty may be reduced by 50% if the documentation required is produced subsequently. If, in addition, the income is increased because the arm's length criterion has not been satisfied, the minimum fine will be increased by an amount equal to 10% of the income increase.

In case of income adjustments, a 6.3% (5.8% for 2007, 5.3% for 2006, 5.4% for 2005, 5.7% for 2004 and 10% for 2003) nondeductible surcharge on all adjustments of prior years' corporate taxes payable will be levied. Furthermore, a non-deductible interest of 0.6% (0.6% for income year 2007, 0.5% for the income years 2005-2006 and 0.6% for the income years 2003-2004) for each month since the due date for the corporate tax payable for the income year in question is applicable.

Penalty relief

If the taxpayer prepares the lacking or insufficient documentation and ensures that the documentation meets the requirements, the fine (except that which is related to the increase of taxable income) will be reduced to half of the original amount.

Documentation requirements

The documentation must be available upon request from the tax authority within 60 days' notice. The earliest such a request can be made is the date of filing for a company's tax return. The transfer pricing documentation requirements affect both domestic and foreign intercompany transactions. In certain circumstances the transfer pricing documentation requirements are reduced for small and medium-sized companies (companies are classified according to thresholds measured at group level), as well as for entities subject to tonnage tax.

The documentation requirements were tightened as of 2006. According to the Executive Order on Transfer Pricing Documentation, the documentation should include:

- A description of the group, including the legal group structure, the history of the group, including a description of restructurings, operational structure and primary business activities, as well as a description of the industry in which it operates
- A description of the Danish entity, its intercompany transactions and the other entities involved (primary business activities and three years' key financials for all entities involved)
- A description of each intercompany transaction including (1) parties, types of products/services/assets transferred and the volumes involved, (2) an analysis of functions and risks undertaken and assets employed by the entities involved, (3) contractual terms, (4) economic conditions and (5) business strategies

Denmark (continued)

Documentation requirements (continued)

- Comparability analysis by intercompany transaction, including (1) information about the transfer pricing policy and method applied, and how the transfer pricing principles are implemented in practice, e.g., whether year-end adjustments are made, and (2) an analysis of how the transfer prices satisfy the arm's length principle
- A list of any written intercompany agreements entered into by the Danish entity and a copy of any written agreements in place with foreign tax authorities regarding transfer prices

According to the tightened documentation requirements, a taxpayer must, within 60 to 90 days' notice, provide external comparable searches as part of the arm's length analysis upon request from the Danish tax authority.

Documentation deadlines

The deadline for preparing documentation is the same as the deadline for filing the tax return. Documentation must be provided upon request. Sixty days' notice is given.

Statute of limitation on transfer pricing assessments

The statute of limitations for a transfer pricing assessment is 1 May in the sixth year after the end of the calendar year following the income year.

Return disclosures/related-party disclosures

Form 05.021 (05.022 ---English version) discloses information on all controlled transactions and whether the company is qualified for reduced documentation requirements.

Audit risk/transfer pricing scrutiny

The risk of transfer pricing issues being reviewed under an audit is high. Six transfer pricing audit centers across Denmark are operated by the tax authorities with the single purpose of carrying out transfer pricing audits. Consequently, we see a strong focus on transfer pricing. Also, we see a tendency towards most normal tax audits being initiated with requests related to transfer pricing. Intensified cooperation between the Nordic tax authorities has led to a higher level of information sharing and a significant increase in the number of coordinated cross-Nordic audits.

APA opportunity

The Danish legislation provides for unilateral APAs only. There is no APA regime in place, but the MT has entered into a limited number of bilateral APAs.

We expect this area will develop significantly within the next few years.

Ecuador

Taxing authority and tax law

Internal Revenue Service (Servicio de Rentas Internas or SRI); Master Tax Code, Internal Tax Regime Organic Law (Ley Orgánica de Regimen Tributario Interno or LORTI) and its Regulation.

Relevant regulations and rulings

Article 56 of the Law for Reform and Tax Fairness (R.O. 242-3S, 29-XII-2007) defined related parties. Article 78 established the transfer pricing regime. Article 10 established the concept of sub-capitalization, which requires the amount of the external debt not be greater than 300% of the share capital in order to consider interest payments abroad as deductible expenses. The SRI Resolution NAC-DGER2008-0464 established the transfer pricing exhibit and transfer pricing integral report content requirements. Resolution NAC-DGER 2005-0641 established the median calculation and arm's length standard. Resolution NAC-DGER2008-0182 established a list of tax havens or low tax rate jurisdictions as well as the contents and the mandatory filing of a transfer pricing study. The OECD Transfer Pricing Guidelines are applicable as an indices technique.

OECD guidelines treatment

The SRI considers the OECD guidelines as a technical reference for analyzing intercompany transactions. All OECD methods are considered to be valid analyses frameworks.

Priorities/pricing methods

The SRI accepts the CUP, Resale, Cost Plus, Profit Split, Residual Profit Split, and Transactional Net Margin methods. There is a best method rule and a hierarchy of methods. Indeed, the SRI has made the application of the CUP method mandatory. If the CUP method cannot be applied, the Resale or the Cost Plus methods must be implemented. If none of these methods can be executed due to the complexity of the transactions under analysis, the SRI accepts the other analyses frameworks mentioned above as valid ones, leaving the Transactional Net Margin Method as the method of last resort. The direct implication is that all method rejections must be thoughtfully documented.

There are specific CUP method applications. More specifically, for exports and imports of tangible goods between related and independent parties where there is an international price in transparent markets, the market price is used, unless there is evidence to the contrary. In addition, there is another application for companies that operate through international intermediaries, who are not the final consignees or producers of the goods. Such goods include all products with well-known prices in transparent markets. In these cases, the price to be applied is the price in those markets on the day the goods are loaded for shipment or the agreed-upon price if higher. This method may not apply if the local exporter or importer is able to prove the substance of the operations of the consignee abroad and that this intermediary part has not more than 20% of its operations with related parties.

Transfer pricing penalties

Penalties up to USD 15,000 could be applied if deadlines are not met or where inaccuracies are detected. Interest could be applicable on unpaid adjustments as part of the income tax.

Penalty relief

No penalty relief regime has been provided.

Documentation requirements

The SRI requires a Transfer Pricing Annex report to be filed, detailing all transactions with foreign related parties, methods applied in analyzing each transaction and calculated adjustments for each transaction, using software provided by the tax administration.

This declaration must be filed by companies with accumulated transactions with related parties exceeding USD 1m in the reported fiscal year. Additionally, the Transfer Pricing Integral Report must be presented to the SRI by companies with accumulated transactions with related parties exceeding USD 5m in the reported fiscal year. This Report must substantiate the analyses made of all transactions reported in the Annex. Both documents must be filed up to two months after the income tax return deadline.

Nevertheless, the SRI may require, at any time, the Transfer Pricing Annex and/or the Integral Report even though the company does not reach the threshold, or in the case of intercompany transactions between domestic related companies.

Ecuador (continued)

Documentation requirements (continued)

Transfer Pricing Integral Report Requirements:

- Full functional analysis of the multinational group and the local party
- Risk analysis of the local company and assets detail
- Intercompany transactions detail and functional description
- Market analysis including global and local descriptions and a demand analysis for both levels
- Economic analysis including:
  - Detailed and quantified information for each type of operation held with foreign related parties
  - Detailed reasoning for selecting a method
  - Profit level indicator selection process
  - Comparable companies detail
  - Applied adjustments explanation
  - Reason for rejection of searched comparable companies
  - Accepted comparable companies activities description and financial statements
  - Analysis description and conclusion

Documentation deadlines

Adjustments and intercompany transaction figures must be included on an Income Tax Return form (due in April). The Transfer Pricing Annex and Integral Report must be filed two months after filing the tax return. That is, from 10 June to 28 June depending on the company's Tax ID Number.

Statute of limitations on transfer pricing assessments

The statute of limitations is three years from the date of the income tax return filing and six years if overall tax compliance was not accomplished.

The obligation to prepare and present the Transfer Pricing Annex starts when related parties' transactions exceed USD 1m. The Integral Report must be delivered in addition to the Annex only when those transactions exceed USD 5m.

Return disclosures/related-party disclosures

No specific related-party information, aside from the documentation required by transfer pricing regulations, is required. However, these regulations also require the following additional parties to be treated as related:

- Tax-haven located companies
- Parties buying or selling more than 50% of the products sold or bought by the local company
- Parties on which the local company has at least a threshold of 25% ownership

Audit risk/transfer pricing scrutiny

Recent audit activity directed specifically at transfer pricing has been detected. Certain cases on relevant industries have become publicly notorious.

APA opportunity

Transfer prices can be proposed to the tax authority along with the relevant documentation. The SRI has two years to resolve the proposal. Prices defined will be applicable for the next three years and for the previous year. Nevertheless, the SRI has not accepted any proposal to be studied yet.

Egypt

Taxing authority and tax law

Egyptian Tax Authority, Income Tax Law No. 91 of 2005.

Relevant regulations and rulings

According to Article no. 30 of the income tax law "If the associate persons set conditions in their commercial or financial dealings different from the conditions taking place between non-associate persons, which are liable to reduce the tax base or transfer its burden from a taxable person to another tax-exempted or non-taxable person, the Administration may determine the taxable profit on basis of the neutral price."

The head of the Administration may conclude agreements with associate persons on one or more methods for determining the neutral price in the Administration's dealings.

OECD guidelines treatment

Pursuant to the executive regulations of the income tax law, in case none of the three methods referred to in the law are possible to apply, any one of the methods mentioned in the form of the OECD, or any other method suitable for the taxpayer may be followed.

Priorities/pricing methods

According to Article no. 39 of the executive regulations of the Income Tax Law, the fair market price prescribed in Article no. 30 of the law shall be determined according to the following methods:

- Comparative uncontrolled price method
- Cost plus method
- Re-sale price method

Note that according to Article no. 40 of the executive regulations the preferred method for determining the neutral price shall be the comparative uncontrolled price method. In case the data necessary for applying this method are unavailable, any of the two other methods prescribed in the previous article may apply.

Transfer pricing penalties

According to the income tax law, if the tax amount the taxpayers includes in the tax return is less than the amount of the finally estimated tax, they shall be liable for a penalty based on the following:

- 5% of the tax payable on the non-included amount if such amount is between 10% and 20% of the legally payable tax;
- 15% of the tax payable on the non-included amount if such amount is between 20% and 50% of the legally payable tax;
- 80% of the tax payable on the non-included amount if such amount is more than 50% of the legally payable tax

Penalty relief

As of this date, the Tax Authority has not issued any instructions or guidelines regarding proper TP documentation.

Documentation requirements

As of this date, the Tax Authority has not issued any instructions or guidelines regarding proper TP documentation.

Egypt (continued)

Documentation deadlines

As of this date, the Tax Authority has not issued any instructions or guidelines regarding proper TP documentation.

Statute of limitations on transfer pricing assessments

According to the income tax law the statute of limitations is five years.

Return disclosures/related-party disclosures

According to the corporate tax return format, the tax payer is obliged to declare the following:

- Name of the related party/parties
- The nature of the relationship
- Type of the related parties transactions, if any
- The value of the transactions
- The method used to determine the FMP
- The country of origin for goods
- The country of the supplier

Audit risk/transfer pricing scrutiny

No TP assessment has taken place as of this date. To the best of our knowledge the Tax Authority will demand that the taxpayer file a TP study starting in financial year 2009 along with the corporate tax return.

APA opportunity

The head of the Administration may conclude agreements with associate persons using one or more methods for determining the neutral price in the Administration's dealings.

Estonia

Taxing authority and tax law

The Tax and Customs Board. Current Estonian transfer pricing legislation is effective as of 1 January 2007. Transfer pricing issues are regulated by the Estonian Income Tax Act: Article 50, subsections 4 - 6, Article 53 subsection 46, and Article 14 subsection 7. The documentation requirements are stipulated in the Income Tax Act, Article 50 subsection 7.

Relevant regulations and rulings

The Ministry of Finance issued a transfer pricing regulation on 11 November 2006 (No. 53), which came into force on 1 January 2007. The regulation sets out in more detail the principles for determining arm's length prices, and it also establishes documentation requirements. There have not been any substantial court rulings or tax proceedings on transfer pricing issues in Estonia.

OECD guidelines treatment

The Estonian tax authorities follow the OECD Transfer Pricing Guidelines. Nevertheless, the domestic legislation is the prevailing law.

Priorities/pricing methods

The Tax and Customs Board accepts the CUP, Resale Price, Cost Plus, Profit Split, Transactional Net Margin methods or, if necessary, any other suitable method. The methods are not hierarchical and are all treated as equal. However, if available, internal and Estonian domestic data is preferred for determining arm's length prices.

Transfer pricing penalties

If the required documentation or the relevant tax return is not submitted in time, the fine may be as high as EEK 50,000. In the case of intentional submission of wrong information in the tax return that results in less tax paid, a criminal penalty may be imposed and the fine may be as high as EEK 250m. If tax is assessed, interest from the tax amount at the rate of 0.06% per day will be imposed retroactively as of the date when the tax was supposed to be paid.

Penalty relief

There is no penalty relief if a taxpayer has the necessary documentation, but the transfer pricing is determined to be non-arm's length and there is an income tax adjustment. However, imposing a fine is probably more the exception than the rule. Interest for the delay of the tax fine payment is always enforced.

Documentation requirements

The documentation requirement is imposed in the following cases:

- Resident credit institution, finance institution, insurance agency and listed company
- If one party of the transaction is a resident of a low tax rate territory
- Resident legal person
  - Who has more than 250 employees, including associated persons or
  - Whose turnover, including associated persons, in the previous financial year was at least EUR 50m or
  - Whose consolidated net assets were at least EUR 43m
- Non-resident who has a permanent establishment in Estonia and
  - Who has more than 250 employees, including associated persons or
  - Whose turnover, including associated persons, in the previous financial year was at least EUR 50m or
  - Whose consolidated net assets were at least EUR 43m

Estonia (continued)

Documentation requirements (continued)

Categories of documentation required:

- Company analysis
- Industry analysis
- Functional analysis
- Economic analysis

Documentation deadlines

There is no deadline for preparing transfer pricing documentation. However, taxpayers are obliged to submit the documentation within 60 days upon the request of the tax authority.

Statute of limitations on transfer pricing assessments

The statute of limitations period for making an assessment of tax is three years. In the event of intentional failure to pay or withhold an amount of tax, the limitation period for making an assessment of tax is six years. A limitation period starts from the due date of submission of the tax return, which was not submitted or which contained information that caused an amount of tax to be calculated incorrectly.

Return disclosures/related-party disclosures

An annual report including a description of transactions with related parties is required to be filed within six months from the end of the relevant financial year. If the taxpayer has the obligation to keep the necessary documentation, a respective analysis must have been carried out.

The documentation does not have to be filed with the tax return.

Audit risk/transfer pricing scrutiny

The taxpayers in Estonia run a high risk that transfer prices will be scrutinized during a tax audit. However, today the overall risk for Estonian taxpayers can be evaluated as medium.

APA opportunity

Currently, the Estonian tax laws do not provide an opportunity to conclude APAs.

Finland

Taxing authority and tax law

Ministry of Finance; Finnish Fiscal Assessment Act § 14 a-c, § 31, § 32, § 75 and § 89.

Relevant regulations and rulings

Finnish Fiscal Assessment Act § 14 a-c, § 31, § 32, § 75 and § 89, Government Proposal and Tax Administration's Guidelines of 19 October 2007.

OECD guidelines treatment

The Finnish regulations and tax practice in general follow the OECD Transfer Pricing Guidelines and the approaches presented in the OECD Discussion Draft on Business Restructurings.

Regarding the business restructurings, the Finnish Tax Administration's Guidelines state that the business restructurings should be examined as a whole from a transfer pricing perspective. However, the guidelines state that the specific circumstances and effects of the restructuring on the material functions of parties should be taken into account and the arm's length principle has to be utilized. Nevertheless, the guidelines are general in nature and do not specifically state how the tax authorities should consider individual cases.

There is no established case law on business restructurings in Finland. However, there have been some advance rulings relating mainly to the transfer and valuation of intangibles.

Priorities/pricing methods

Taxpayers may choose any OECD transfer pricing method as long as the chosen method results in an arm's length pricing for the intra-group transaction. In its selection of the method, a taxpayer should take into consideration the aspects regarding the application of methods stated in the OECD Transfer Pricing Guidelines.

Transfer pricing penalties

A tax penalty of up to EUR 25,000 can be imposed for a failure to comply with the transfer pricing documentation requirements, even if the pricing of intra-group transactions has been at arm's length. In addition, the possible adjustment of taxable income may result in a separate tax penalty of up to 30% of the adjusted amount of income as well as penalty interest.

Penalty relief

Penalties can be reduced or removed if the taxpayer presents supplementary transfer pricing documentation that supports the arm's length nature of the intra-group transactions. The determination of penalties will be made on a case-by-case basis.

Documentation requirements

Transfer pricing legislation came into effect on 1 January 2007. The provisions contained in the law apply to financial periods beginning on 1 January 2007 or later.

The transfer pricing documentation aims to prove that the prices used in cross-border intra-group transactions are acceptable from the perspective of the tax authority. According to the law, the documentation obligation applies to the following entities:

- Group companies if the group employs at least 250 employees, regardless of the amount of turnover or assets
- Group companies if the group employs less than 250 employees and if the company's turnover exceeds EUR 50m and their assets are worth more than EUR 43m
- The Finnish branches of a foreign company if the above conditions are met by this company
- Companies which are not small- and medium-size enterprises, as defined by criteria (related to, for example, a company's independence) contained in the European Commission's Recommendation on the definition of micro, small- and medium-sized enterprises (2003/361/EC).

Finland (continued)

Documentation requirements (continued)

When calculating the amount of employees, turnover or assets of an enterprise or a branch owned by a foreign company, information regarding the foreign owners is also taken into account, depending on the share of ownership.

Group companies are required to prove the arm's length nature of cross-border intra-group transactions by preparing transfer pricing documentation. According to the law, the documentation should contain the following information:

- A description of the business
- A description of associated enterprises
- Information on transactions between associated enterprises
- Functional analysis regarding transactions between associated enterprises
- A comparability analysis, including available information on comparables
- A description of the transfer pricing method and its application

Less extensive documentation is required if the total amount of transactions between two parties during a fiscal year does not exceed EUR 500,000.

Documentation deadlines

A taxpayer has to submit the transfer pricing documentation for a specific fiscal year within 60 days upon a request of the tax authorities, but not earlier than six months after the end of the financial period. The additional clarifications concerning the documentation have to be submitted within 90 days of a request by the tax authorities.

Statute of limitations on transfer pricing assessments

The time limit for the adjustment of income due to the failure to apply arm's length principles to the pricing of a transaction is five years from the beginning of the following year during which the taxation was finalized.

Return disclosures/related-party disclosures

Based on Paragraph 26.4 of the Taxation Procedure Act, if the other party of the transaction is a non-resident, and if the tax authorities cannot obtain adequate information on the transaction by using an appropriate international treaty, the taxpayer is responsible for presenting such information.

Audit risk/transfer pricing scrutiny

The tax authority is being very active and the risk for transfer pricing audit is high. All kinds of intra-group transactions have been under scrutiny in tax audits.

APA opportunity

Advance rulings are available in Finland. There is no legislation for APAs; however, the tax authorities have indicated their willingness to utilize them.

France

Taxing authority and tax law

French Tax Authority (FTA) generally or also Direction Générale des Finances Publiques (sometimes referred to as Direction Générale des Impôts - DGI).

French Tax Code: Articles 57 and 238A. French Procedure Code: Articles L13B and L188A. Case law application of Abnormal Management Act theory.

Thin capitalization is covered by articles 212 and 39-1 of the French Tax Code.

Relevant regulations and rulings

Administrative Doctrine on Articles 57 and 238A of the French Tax Code and Article L 13B of the French Procedure Code.

OECD guidelines treatment

The French tax authorities consider the French transfer pricing regulations to be wholly consistent with OECD guidelines.

There is no specific regulation in France about business restructuring and the FTA did not comment so far about the draft released by the OECD. Experience shows that tax auditors often consider that a decrease in profit is an indicator that an intangible has de facto been transferred. In addition specific care should also be paid to closure costs in light of the TP profile of the group entities at hand.

Priorities/pricing methods

The FTA accepts CUP, Resale price, Cost plus, Profit Split and TNMM, but prefers transactional methods.

Transfer pricing penalties

After an adjustment (added profit) is made, the added profit is analyzed as deemed dividends:

- When the beneficiary is located outside of France and no double tax treaty applies, the distribution is subject to a 25% to 75% withholding tax.
- When the beneficiary is located outside France and a double tax treaty applies, the application of a withholding tax depends on the tax treaty provisions (see the dividends clause or the other incomes clause).
- The late payment interest is applied particularly in cases of tax reassessments in application of Article 57 of the French Tax Code. Beginning on 1 January 2006, the late payment interest rate is 0.40% per month (4.80% per year).
- Supplementary penalties are applicable if the taxpayer has acted in bad faith (40%) or fraudulently (80%).

Specific transfer pricing penalties are also applicable in situations where the taxpayer has failed to answer the tax authority's request for documentation (Article L 13 B of the French Procedural Tax Code). Failure to provide complete information can result in a reassessment of the company's taxable profit, based on information the tax administration possesses, and a penalty of EUR 10, 000 for each year that it is audited.

In addition, a transfer pricing adjustment may also result in business tax and employee profit sharing impacts.

Penalty relief

During a tax audit and before the tax authorities send the notice of reassessment, taxpayers are allowed to correct their errors or omissions in consideration of a reduced late interest rate payment, equal to 70% of the actual tax rate (3.36% per year). In this respect, taxpayers must file a complementary tax return and pay the corresponding additional taxes at the same time.

Documentation requirements

There is no formal obligation to document transfer prices. However, given the practice of the FTA at the time of an audit, the short delay granted to submit the documentation and the large scope of documentation to be provided, a de facto documentation obligation exists in France.

France (continued)

Documentation requirements (continued)

On 10 November 2005, the European Commission adopted a code of conduct aimed at harmonizing transfer pricing documentation across Europe. The code recommends the use of a master file documentation coupled with specific documentation for each country involved in intercompany transactions. Although there is no official position from the FTA, it is likely that in the future the recommendations provided by the code will be followed. As a matter of fact, a draft about legal TP documentation requirements is currently being discussed by the FTA with the business community; the outcome of such discussions cannot be anticipated. According to the project, and if adopted as is, a TP report (except for certain medium/small companies) would be expected from the taxpayer at the time of an audit within, by law, a very short time frame (possibly 30 days) with the risk of an additional penalty (possibly 5% of the TP adjustment) in case the policy does not respect the arm's length principle. Changes would then reside in the penalty and the fact that the FTA would no longer need to prove a problem to ask for the documentation (as is the case today with Article L 13 B of the French Procedural Tax Code).

Upon request the taxpayer is expected to provide the following documentation:

- Method selected
- Analysis of controlled transactions
- Identification of comparables & competitors
- Economic analysis
- Functional analysis
- Legal and management accounts
- Description of the tax regime applied to the subsidiaries of the audited French company
- Nature of the relations with the related parties
- Activity of the related parties
- Business overview
- Intangibles
- Organizational structure

Documentation deadlines

As mentioned above, there is no formal requirement to provide the FTA with contemporaneous documentation without a specific request.

However, in the case of a tax investigation, transfer pricing documentation requested by the FTA should be provided within a short time period. If a specific request is made from the FTA (Article L 13 B of the French Procedural Tax Code), then the documentation must be submitted within 60 days, though it may be possible to obtain a 30-day extension in exceptional circumstances.

Statute of limitations on transfer pricing assessments

The statute of limitations on assessment for transfer pricing adjustments is the same as for all corporate tax assessments: generally three years following the year for which the tax is due (might be longer under certain circumstances e.g. PE qualification). In cases where a mutual agreement procedure to avoid double taxation under a tax treaty or the European Arbitration Convention is initiated following a proposed tax adjustment, tax collection is suspended during the entire mutual agreement process and is postponed until the competent authorities reach a decision. Suspension of tax collection can be requested for mutual agreement procedures initiated as of 1 January 2005, which means that these procedures can be related to tax adjustments proposed prior to 1 January 2005.

Return disclosures/related-party disclosures

In the case of a specific request from the FTA (Article L13 B of the French Procedural Tax Code), there is an obligation to disclose the nature of the relations with the related parties (i.e., the links of dependence between the French audited entity and the related parties). This article also states an obligation to disclose the activities of the related parties. An annual report is required if the party files for an APA.

France (continued)

Audit risk/transfer pricing scrutiny

The risk of transfer pricing issues being scrutinized during a tax authority audit is high. The number of tax audits in transfer pricing is increasing considerably, and the French tax authority is becoming more extensive and accurate in their queries since it now also uses economic arguments.

Transfer pricing issues that receive the greatest scrutiny are:

- Product sale prices (under or over estimated prices)
- Management fees
- Agents and commissionaire schemes (e.g., conversion of a distributor into an agent)
- Permanent establishment issues
- Closure/conversion costs
- Intangibles and economic ownership problems
- Business restructuring (marketing intangibles, indemnity)

Following a tax reassessment, a taxpayer can request relief on the basis of a mutual agreement procedure in a tax treaty or the European Arbitration Convention in order to avoid double taxation. On 23 February 2006, the FTA published administrative guidelines which specify the area of application and the conditions of implementation of such procedures. One of the main measures is the suspension of the deadline of tax collection from the opening of the procedure until a solution is reached (Article L 189 A of the French Tax Procedure Code).

APA opportunity

Bilateral and, under certain circumstances, unilateral APAs are available under French Procedural Tax Code, § L 80 B 7°. The section was released by the Finance Amendment Act for 2004 and is effective as of 1 January 2005. It incorporates existing procedures as described by French administrative guideline 4 A-8-9 dated 7 September 1999.

On 28 November 2006, the FTA released a new administrative guideline (Instruction 4 A-13-06), adding a simplified APA procedure for small and medium enterprises and presenting an online guide with respect to transfer pricing methods.

Germany

Taxing authority and tax law

German taxes are administered either by the German Federal Central Tax Office (Bundeszentralamt für Steuern) or by German state tax authorities. German tax law is found in tax acts, executive order laws, double taxation treaties and supra-national norms.

Relevant regulations and rulings

German tax law assesses intercompany transactions by following the arm's length principle (§ 1 Foreign Tax Act). Detailed transfer pricing regulations concerning the cross-border transfer of functions were incorporated into § 1 of the Foreign Tax Law since 1 January 2008. An Executive Order Law providing details on how the new transfer pricing provisions relate to business restructurings and function transfers is effective from 2008 onwards. Other relevant provisions for transfer pricing issues in German tax law are § 8 (3) German Corporate Income Tax Act (hidden profit distribution), § 4 (1) German Income Tax Act with Directive R40 of the German Corporate Tax Directives (hidden capital injection), as well as §§ 90 (3), 162 (3), (4) German General Tax Code and the Executive Order Law to § 90 (3) German General Tax Code.

To help interpret the above outlined provisions, the German tax authority issued a circular on the *Principles Governing the Examination of Income Allocation between Multinational Enterprises* in 1983, known as the Administration Principles. The Administration Principles do not constitute binding law for taxpayers or the courts but are binding for the tax authority and, thus, serve as an indication to taxpayers as to how the tax authority will treat specific intercompany transactions between related parties. The purpose of the Administration Principles can be interpreted as to provide a directive concerning the tax audit treatment of transfer pricing cases and to ensure the uniform application of rules and methods by the tax authorities.

In addition to the Administration Principles, administration circulars concerning income allocation with regard to cross-border secondment, costs contribution arrangements, permanent establishments and procedures have been published since December 1999.

OECD guidelines treatment

The German tax authority considers its transfer pricing laws and regulations to be consistent with OECD guidelines. The OECD guidelines provide support for domestic use; however, German transfer pricing regulations and practices differ with regard to certain issues, e.g., reluctance to use transactional profit methods and documentation requirements for secondments.

Priorities/pricing methods

Under the arm's length principle, it is assumed that the taxpayers have acted in a manner comparable to unrelated parties. This assumes that all material information about the transaction (complete information about the counterparty) is available and that the parties acted as prudent and diligent business managers.

Under the new law (effective 1 January 2008), the application of the transfer pricing method is dependent on the availability and quality of third-party comparable data. Three different situations are distinguished: full comparability of the data, limited comparability of the data and non-availability of third-party comparable data.

When full comparability of third-party data exists, the new law stipulates the priority of the traditional transaction methods: CUP, Resale Price and Cost Plus. Any price within the full range of full comparable third-party data meets the arm's length principle.

If limited comparability of data is available, the taxpayer has to select an appropriate transfer pricing method to determine the transfer price. In case of limited comparability of data, only the interquartile range of the comparable data, considering the appropriate adjustments, can be applied.

If no comparable data is available, a "hypothetical arm's length price" determination applies. Accordingly, in compliance with the so-called prudent and diligent business manager principle, and based on the functional analysis and internal projections, the taxpayer has to establish an area of "hypothetical" arm's length prices. The area of negotiation is defined by the minimum price of a hypothetical seller and by the maximum price of a hypothetical purchaser. The taxpayer must prove the value with the highest probability within the area of negotiation, otherwise the mean value is assumed to be the arm's length transfer price for the transaction under review.

Germany (continued)

Transfer pricing penalties

If a taxpayer does not comply with its duty to document its transfer pricing to the extent outlined in § 90 (3) German General Tax Code, a refutable presumption applies according to which the income of the German company under review has been reduced by means of inappropriate transfer prices, which forms the basis of a transfer pricing adjustment by the tax authority.

Tax authorities may apply § 162 (3) of the German General Tax Code if the taxpayer submits no or only insufficient documentation or if exceptional transactions have not been recorded contemporaneously. In all three cases, the tax authority is authorized to estimate the income, provided that the taxpayer cannot rebut the presumption.

The legislation takes into consideration that an appropriate single transfer price does not exist and that comparable third-party prices may vary within price ranges. However, it explicitly entitles the tax authority to make use of the full price range estimating the income, in case of insufficient documentation, to the detriment of the taxpayer.

If the taxpayer fails to submit transfer pricing documentation or if the documentation is unusable or insufficient, or if the documentation for extraordinary business transactions is not prepared contemporaneously, a surcharge of 5%-10% on the income adjustment will be applied, with a minimum surcharge of EUR 5,000. For late filing, the taxpayer faces a penalty up to EUR 1m (minimum penalty of EUR 100 per day of delay). Penalties are imposed after the closing of a tax audit. The aforementioned penalties constitute non-tax deductible expenses.

Under the law effective 1 January 2008, in the event that the taxpayer's transfer price falls outside the full range (in case of full comparability of third-party data) or the interquartile range (in case of limited comparability of third-party data) of arm's length prices, the transfer price is adjusted to the median of the range.

Interest is assessed on tax payments (6% p.a., which is non-deductible for tax purposes).

There are also penalties for tax evasion.

Penalty relief

The taxpayer is required by law to present utilizable documentation to the tax authority. Accordingly, no penalty relief applies.

Documentation requirements

Section 90 of the German General Tax Code contains transfer pricing documentation requirements. For the documentation of transfer pricing issues, an Executive Order Law (effective 30 June 2003) prescribes general requirements and the documentation required in special circumstances. A circular (Administration Principles - Procedures) dated 12 April 2005 provides the tax authority's interpretation of the requirements set out in the General Tax Code and in the Executive Order Law.

General documentation requirements are:

- General information: shareholder relationships, organizational and operative group structure and operations
- Description of intercompany transactions: manner and extent of transactions, intercompany contracts and a list of important intangibles
- Functions and risks analysis: description of functions and risks the taxpayer bears within the intercompany transaction, contractual terms, business strategies and value chain
- Transfer pricing analysis: selection of the transfer pricing method, appropriateness of the method selected, calculation of the transfer price, list of comparables and documentation of adjustment calculations

Special documentation requirements:

The taxpayer has to document special circumstances which are used to substantiate the arm's length nature of the price determined, including: special business strategies, cost allocation agreements, overview of APAs and mutual agreement procedures, information on transfer price adjustments, causes for losses from intercompany transactions, as well as countermeasures (if losses occur in more than three consecutive financial years).

Germany (continued)

Documentation deadlines

Contemporaneous documentation requirements exist only for exceptional business transactions. For extraordinary business transactions (e.g., legal restructuring within the group), the documentation must be contemporaneous, i.e., prepared within six months of the end of the business year in which the transaction has occurred. However, the preparation of contemporaneous documentation is strongly recommended for all cross-border transactions.

Documentation must be submitted within 60 days upon receipt of the tax authority's request. In the case of extraordinary business transactions (e.g., transfer of functions), documentation must be submitted within 30 days of the tax authority's request. In general, the request is made in the course of a tax audit.

Statute of limitations on transfer pricing assessments

There are no special time limit provisions applicable if intercompany transactions are involved. The general regime of the statute of limitations applies in accordance with the General Tax Code. Accordingly, each case has to undergo careful consideration to determine the specific statute of limitations. Most taxes are levied by way of assessment. Assessments can only be made within the statutorily prescribed assessment period, which is subject to the statute of limitations for assessments. The assessment period for taxes (§ 169 General Tax Code) is four years. For customs duties, it is shorter, and in case of grossly negligent evasion of taxes or tax fraud, it is much longer (10 years in the case of tax fraud). These periods commence at the end of the calendar year in which the tax liability arose. The assessment period, however, does not start prior to the end of the calendar year in which the taxpayer has submitted the tax return (but also does not start later than three years after the year the tax liability has arisen). There are a number of statutory exceptions to the statute of limitations for assessments, e.g., it should be kept in mind that the limitation period is interrupted when a tax audit begins.

Return disclosures/related-party disclosures

There are no specific disclosure requirements.

Audit risk/transfer pricing scrutiny

The risk of transfer pricing issues being scrutinized during a tax audit is high. Due to the documentation requirements, and in the light of the new stricter law effective 1 January 2008, it is expected that transfer pricing issues will attract significantly more attention in tax audits than in the past. It is expected that transactions qualifying as exceptional business transactions under the documentation provisions, such as the transfer of functions and risks, will particularly attract the tax auditors' attention.

APA opportunity

APAs are generally available. The German Ministry of Finance issued an APA circular on 5 October 2006 which defines the APA procedures and provides guidance with regard to the negotiation of APAs. Additionally, the Annual Tax Act 2007 introduced fees for APAs. The administrative competence for APAs is centralized in the Federal Central Tax Office. The APA process typically takes from one and a half years to several years from application to conclusion. An agreement reached between two competent authorities will be made conditional in two regards: the taxpayer must consent to the intergovernmental agreement, and must waive its right to appeal against tax assessments to the extent they are in line with the contents of the APA.

Greece

Taxing authority and tax law

Greek Transfer Pricing Documentation Law is founded on Law 3728/18-12-2008 and Ministerial Decision 2- 8092 /31.12.2008. The Ministry of Development is the auditing authority of the TP rules, while in case of identification of TP infringements the case is referred to the supervising tax authorities for the application of the relevant provisions of the tax legislation and the imposition of the relevant tax sanctions.

Relevant regulations and rulings

The above mentioned Law and Ministerial Decision confirm the applicability of the OECD Transfer Pricing Guidelines. Transfer Pricing Documentation rules were recently (December 2008) introduced in Greece and therefore no special regulations and rulings exist for the interpretation of the relevant provisions.

OECD guidelines treatment

The Ministry of Development, the Greek supervising authority of intra-group transactions, recognizes the OECD guidelines and considers its transfer pricing laws and decisions to be consistent with OECD guidelines. However, due to the limited time period since the Greek TP Law was approved by the Greek Parliament and applied in the Greek market, the tax audit treatment of transfer pricing cases cannot be ascertained, nor is it known whether the tax authorities will follow the uniform application of rules and methods.

Priorities/pricing methods

The Ministry of Development follows the OECD Transfer Pricing Guidelines. All three of the traditional transactional methods (CUP, Resale Price, and Cost Plus) can be applied while the use of profit-based methods is possible where substantiated. In particular, other (non-traditional) transfer pricing methods such as the "Transactional Net Margin Method" (TNMM) and the "Transactional Profit Split Method" can be used only in the cases where the use of the above traditional transfer pricing methods is considered ineffective, provided that a detailed justification is included in the documentation files.

Transfer pricing penalties

In accordance with L. 3728/2008, a penalty equal to 10% of the value of the transactions for which no file has been submitted to the auditing authorities or for which the lists of intra-group transactions have not been submitted timely, is imposed.

In case an infringement of the arm's length principle is assessed from the audit report, a fine of EUR 5000 apart from the penal sanctions is triggered. The case is referred to the supervising tax authorities for the application of the relevant provisions of the tax legislation and the imposition of the relevant tax sanctions, i.e. any price difference (over or under-invoiced amount) according to the above is deemed to be an accrued profit for the respective enterprise and will be included in its actual profits and be taxed accordingly. Additionally, a penalty equal to 10% of the price difference assessed will be imposed, regardless of any other penalties applicable for inaccurate tax return filings.

Penalty relief

There is no specific relief or reduction of penalties for transfer pricing. The decision of the Head of the Market Supervision Authority is given to the company under audit within 30 days of its issuance. The above decision may be challenged by means of recourse to the Ministry of Development within five working days of its receipt by the audited company. The Minister of Development should decide within 10 working days of the filing of the recourse. In case of rejection of the recourse by the Minister, the audited company is entitled to appeal against the negative decision by filing a recourse to the competent Administrative First Instance Court within 60 days of its formal notification of the company. The recourse to the Administrative Court is legally acceptable provided that 20% of the fines and penalties assessed to the company, is paid.within 10 working days of the filing of the recourse. In case of rejection of the recourse by the Minister, the audited company is entitled to appeal against the negative decision by filing a recourse to the competent Administrative First Instance Court within 60 days of its formal notification of the company. The recourse to the Administrative Court is legally acceptable provided that 20% of the fines and penalties assessed to the company, is paid.

Greece (continued)

Documentation requirements

For the purposes of assessing the compliance of the liable companies with the arm's length principle, the following documentation files should be available upon request of the supervising authorities of the Ministry of Development and within 30 days from the notification of such request.

With respect to groups of companies with a Greek parent company, the "Master Documentation File" should include the following information:

Group - related information

- The organizational, legal and operational structure of the Group, including any permanent establishments and interests in partnerships, as well as general background information of the Group's industry and the financial data relating to it
- General description of the Group activity, the business strategy, including changes of the business strategy as compared to the previous financial year
- General description and implementation of the Intra-Group transfer pricing policy, if applicable.
- General presentation of transactions concluded between the Greek parent company and its affiliated companies (Greek or foreign), as well as of the transactions among the affiliated companies, if one of these is Greek, namely:
  - Nature of transactions (e.g. sale of goods, provision of services, financial transactions, etc.)
  - Invoices' flows and
  - Amounts of transaction flows

The description of the affiliated companies or of their permanent establishments that enter into the above transactions shall include the scope of their activities, the years of operations, the annual turnover, the number of employed personnel, etc.

- General description of functions and risks undertaken by the affiliated companies, including the changes incurred to this end as compared to the previous year.

In addition, a general description of the tangible assets used by the Group for the purposes of carrying out the above functions.

- The ownership of intangibles (patents, trademarks, brand names, know-how, etc.) and royalties paid or received.
- List of any Advance Pricing Agreements concluded by the Group companies with foreign tax authorities.

Company - related information

- A detailed presentation of the transactions with associated companies for which the obligation documentation exists:
  - Nature of transactions (sale of goods, provision of services and financial transactions)
  - Invoice flows, and
  - Amounts of transaction flows
- Comparative analysis:
  - Characteristics of goods and services
  - Functional analysis (functions, risks, used fixed assets, etc.)
  - Contractual terms
  - Economic circumstances
  - Specific business strategies
- Description of the transfer pricing method implemented, among those specified in the OECD Transfer Pricing Guidelines as well as argumentation on the selection criteria thereof
- Relevant information on internal and/or external comparables, if available
- Description of other data or circumstances, which are deemed to be relevant

Greece (continued)

Documentation requirements (continued)

With respect to groups of companies with a foreign parent company as well as foreign companies operating with any type and legal form in Greece, the "Greek Documentation File", should include the following information:

Group - related information

- The organizational, legal and operational structure of the Group, including any permanent establishments and interests in partnerships, as well as general background information of the Group's industry and the financial data relating to it
- General description of the Group activity, the business strategy, including changes of the business strategy as compared to the previous financial year
- General description and implementation of the Intra-Group transfer pricing policy, if applicable
- General presentation of transactions concluded between the Greek parent company and its affiliated companies (Greek or foreign)
- General description of functions and risks undertaken by the affiliated companies, including the changes incurred to this end as compared to the previous year
- The ownership of intangibles of the Group (patents, trademarks, brand names, know-how, etc.) and royalties paid or received
- List of any Advance Pricing Agreements concluded by the Group companies with foreign tax authorities

Company - related information

- A detailed presentation of the transactions with associated companies for which the obligation documentation exists:
  - Nature of transactions (sale of goods, provision of services, financial transactions)
  - Invoice flows, and
  - Amounts of transaction flows
- Comparative analysis:
  - Characteristics of goods and services
  - Functional analysis (functions, risks, used fixed assets, etc.)
  - Contractual terms
  - Economic circumstances
  - Specific business strategies
- Description of the affiliated companies or of their permanents establishments that enter into those transactions or agreements
- Description of the transfer pricing method implemented, among those specified in the OECD Transfer Pricing Guidelines as well as argumentation on the selection criteria thereof
- Relevant information on internal and/or external comparables, if available
- Description of other data or circumstances which are deemed to be relevant

Documentation deadlines

The liable companies should submit annually to the Ministry of Development, within 4 months and 15 days of their fiscal year-end, a list with the details of their intra-group transactions, such as, especially, the number and the value thereof.

The above mentioned documentation files should be available upon request from the supervising authorities of the Ministry of Development and within 30 days from the notification of such request.

Greece (continued)

Statute of limitations on transfer pricing assessments

Documentation files must be kept by the liable companies for a period equal to the prescription period of the State's right to impose tax (statute of limitations), as the latter is specified by the provisions of tax legislation.

Return disclosures/related-party disclosures

The liable companies disclose their intra-group transactions through the submission of a list to the Ministry of Development, annually. In particular, the said list should be filed within 4 months and 15 days from their fiscal year-end (as stated above in "Documentation Deadlines").

Audit risk/transfer pricing scrutiny

Transfer pricing audits are expected to become more frequent and intensive. It is likely that the Greek tax authority will impose penalties on companies that are not complying with transfer pricing requirements.

APA opportunity

Currently, the use of APAs is not permitted. It is expected that the introduction of APAs will be discussed in the near future. However, a unilateral APA procedure has been introduced that addresses intra-group service centers operating for the exclusive benefit of affiliates abroad. Under this proposal, after filing an application with the Greek tax authority, the entities may be taxed on a cost plus basis, using an agreed mark-up, for a period of up to five years.

Hungary

Taxing authority and tax law

The organization responsible for dealing with tax issues in Hungary is the Hungarian Tax and Financial Control Office (tax authority).

The following transfer pricing legislation is effective in Hungary:

- Section 4.23 (definition of related party for Corporate Income Tax (CIT) purposes) and § 18 (correction of prices applied between related parties) of the Act LXXXI of 1996 on Corporate Income Tax and Dividend Tax (Act on CIT)
- Section 1.8 (definition of fair market price), § 23(4) (b) (reporting related party at the tax authority), § 132/A and 132/B (provisions on the Hungarian APA) and § 178.17 (definition of related party) of the Act XCII of 2003 on Tax Procedure (Act on Tax Procedure)
- Section 259.13 (definition of non-independent party for value-added tax (VAT) purposes) of the Act CXXVII of 2007 on Value Added Tax (Act on VAT)
- Section 3.69 (definition of independent party for Personal Income Tax (PIT) purposes) of the Act CXVII of 1995 on PIT
- Ministry of Finance Decree 18 of 2003 on the fulfillment of transfer pricing documentation obligations
- Ministry of Finance Decree 38 of 2006 on the administrative procedure for obtaining an APA

Relevant regulations and rulings

37/2004 Guideline issued by the Hungarian tax authority on fulfillment of the transfer pricing documentation requirement.

55/2006 Guideline issued by the Hungarian tax authority on the application of the Transactional Net Margin Method.

77/2007 Guideline issued by the Hungarian tax authority on the preparation of consolidated transfer pricing documentation.

139/2007 Guideline issued by the Hungarian tax authority on the application of transfer pricing methods in practice.

17/2008 and 48/2007 Guidelines issued by the Hungarian tax authority on the preparation of simplified transfer pricing documentation and default penalties.

OECD guidelines treatment

OECD Discussion Draft on Business Restructurings: Business restructuring issues have occurred more often in the past few years in Hungary. However, the Hungarian tax authority does not have much experience in reviewing or challenging business restructurings from a transfer pricing perspective. Therefore, business restructuring issues have been dealt with on a case by case basis with the Hungarian tax authority so far.

Priorities/pricing methods

Hungarian legislation does not prioritize transfer pricing methods. As a general rule, the arm's length price should be determined by one of the traditional transaction methods described by the OECD, including CUP, Resale Price or Cost Plus methods. Any other method may be applied if the traditional methods are not applicable. If a non-traditional method is applied, the reasoning behind the use of the method must be provided by the taxpayer.

Transfer pricing penalties

A penalty of 50% of the unpaid tax may be imposed, as well as a late payment interest charge at double the prime rate of the National Bank of Hungary, in line with general rules. A default penalty up to HUF 2m (approximately EUR 7,000) may be levied for not fulfilling, or not properly fulfilling, the content and formal documentation requirements. The HUF 2m default penalty is applicable per documentation and per year under tax audit.

Penalty relief

Not applicable.

Hungary (continued)

Documentation requirements

The Act on CIT states that companies which do not qualify as small companies (small companies are defined as employing less than 50 persons and having less than EUR 10m in total turnover on a consolidated basis) must document the methods they used to determine the fair market prices, as well as the facts and circumstances supporting them. The detailed documentation obligation must be applied for all agreements in effect and where there was a supply in the tax year. The details of the documentation obligation are regulated by the Ministry of Finance Decree 18 of 2003. Foreign entities (usually foreign taxpayers carrying out business activities through a Hungarian permanent establishment) are also subject to the documentation obligation. However, according to the relevant transfer pricing regulation, there is an option to prepare simplified documentation if the value of the transactions covered by definite term contracts does not exceed HUF 50m.

The Hungarian transfer pricing documentation requirements are consistent with the OECD Transfer Pricing Guidelines. The following list outlines the compulsory elements of the Hungarian transfer pricing documentation:

- Name, registered seat (official location) and tax number (or company registration number and the name and seat of the registering authority) of the related party
- Content of the agreement with the related party, which includes:
  - Subject of the agreement
  - Signing date (amendment date) of the agreement
  - Period during which the agreement is effective
  - Characteristics of the service provided and/or goods sold (functional analysis)
  - Method and terms of the fulfillment of the agreement
- Analysis of the market (industry analysis)
- The method applied for establishing the arm's length price
- Reasons for selecting the method applied
- Description of comparable services and goods transactions
- Factors affecting the arm's length price, margin or profit and the extent of any necessary adjustments
- The arm's length price or margin
- Information on pricing agreements and court procedures
- Preparation date of the documentation

Documentation deadlines

The transfer pricing documentation for contracts effective in a given tax year is required to be prepared by the deadline for filing the annual corporate income tax return (i.e., within 150 days from the year-end).

Statute of limitations on transfer pricing assessments

The general rules are applicable. The statute of limitations lapses on the last day of the fifth calendar year calculated from the tax year in which taxes should have been declared, reported or paid in the absence of a tax return or reporting.

Return disclosures/related-party disclosures

Within 15 days of concluding its first contract with a related party, the taxpayer must report the name, registered seat and tax number of the contracting party to the tax authority.

In the CIT return, the tax base should be adjusted if the price used in the related-party transaction differs from the fair market price.

According to the Hungarian transfer pricing regulations, the taxpayer is not required to file the transfer pricing documentation with the tax authority; however, the taxpayer needs to present the documentation during a tax audit.

The Financial Statements of companies include certain compulsory disclosures on related-party transactions.

Hungary (continued)

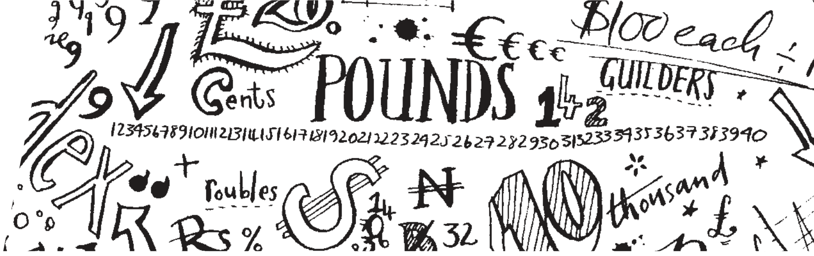
Audit risk/transfer pricing scrutiny

The risk of transfer pricing issues being scrutinized during a tax authority audit is steadily growing. Since the decree on the documentation obligation came into force, the tax authority checks the existence of the documentation. Based on our experience, the tax authority usually inspects whether the content and formal requirements are fulfilled in the documentation. From the beginning of 2007, the tax authority started to train transfer pricing specialists. The tax authority's knowledge of the application of transfer pricing methods is expected to increase during the tax audits.

Overall, the risk of a transfer pricing audit can be set at medium, due to the fact that the tax authority focuses on reviewing the transfer pricing documentation in the framework of almost every tax audit. As a result, significant default penalties are levied if the transfer pricing documentation is missing or incomplete. However, the tax authority rarely challenges the transfer prices applied in related-party transactions (only in very obvious cases) if proper transfer pricing documentation is available. However, we expect this to change in the near future.

APA opportunity

As of 1 January 2007, a formal APA regime was introduced in Hungary. Unilateral, bilateral and multilateral APAs are available according to the new provision. APAs requested for future transactions can be used for three to five years and they can be extended for a further three years. The application fees for APAs range from HUF 5m (approximately EUR 19,000) to HUF 20m (approximately EUR 74,000) depending on the type of APA and the transaction value. The tax authority is responsible for the establishment of APAs and dealing with other transfer pricing-related issues.



India

Taxing authority and tax law

Income Tax Department. Section 40A (2), §§ 92-92F, 271, 271AA, 271BA and 271G of the Income Tax Act, 1961.

Relevant regulations and rulings

Rule 10 to 10E of the Income Tax Rules, 1962.

OECD guidelines treatment

The Indian legislation is broadly based on the OECD guidelines. In conformity with the OECD guidelines, the legislation prescribes the same five methods to compute the arm's length price. Further, the revenue authorities generally recognize the OECD guidelines and refer to the same for guidance, to the extent they are not inconsistent with the domestic law.

Priorities/pricing methods

The Indian legislation prescribes the following methods: CUP, Resale Price, Cost Plus, Profit Split and Transactional Net Margin Method. The legislation also grants the power to the Central Board of Direct Taxes (CBDT) to prescribe any other method; however, no other method has been prescribed by the CBDT to date. No hierarchy of methods exists. The most appropriate method should be applied.

Transfer pricing penalties

For inadequate documentation, the taxpayer is fined 2% of the transaction value. For not furnishing sufficient information or documents requested by the tax officer, the taxpayer is fined 2% of the transaction value. If due diligence efforts to determine the arm's length price have not been made by the taxpayer, then 100% to 300% of incremental tax on transfer pricing adjustments may be levied by the tax officer. For not furnishing an Accountant's Certificate (Form 3CEB) along with the return of income, the taxpayer is fined USD 2,200.

Penalty relief

Penalties may be avoided if the taxpayer can demonstrate that it exercised good faith and due diligence in determining the arm's length price. This is also demonstrated through proper documentation and timely submission of documentation to the revenue authority during assessment proceedings.

Documentation requirements

A detailed list of mandatory documents are listed in Rule 10D (1). The categories of documentation required are:

- Ownership structure
- Profile of the multinational group
- Business description
- The nature and terms (including prices) of international transactions
- Description of functions performed, risks assumed and assets employed
- Record of any financial estimates
- Record of uncontrolled transaction with third parties and a comparability evaluation
- Description of methods considered
- Reasons for rejection of alternative methods
- Details of transfer pricing adjustments
- Any other information or data relating to the associated enterprise which may be relevant for determination of the arm's length price

A list of additional optional documents is provided in Rule 10D (3). The taxpayer is required to obtain and furnish an Accountant's Certificate (Form 3CEB) regarding adequacy of documentation maintained.

India (continued)

Documentation deadlines

The information and documentation specified should, as far as possible, be contemporaneous and exist by the specified date of the filing of the income tax return, which has been changed to 30 September instead of 31 October following the end of the financial year.

Although an Accountant's Report must be submitted along with the tax return, the taxpayer is not required to furnish the transfer pricing documentation with the Accountant's Report at the time of filing the tax return. Transfer pricing documentation must be submitted to the tax officer within 30 days of the notice during assessment proceedings.

Statute of limitations on transfer pricing assessments

Tax assessments (where a matter has been referred to the transfer pricing officer) are to be completed within three years and nine months of the end of the financial year (1 April to 31 March). However, if the revenue authority determines that income has escaped assessment, an assessment may be re-opened within seven years of the end of the financial year.

Return disclosures/related-party disclosures

Under § 92E, an Accountant's Report is required to be provided along with the tax return. The accountant certifies whether proper documentation is maintained by the taxpayer.

In accordance with Indian Accounting Standard 18, the company is required to disclose related-party transactions in its financial statements.

Audit risk/transfer pricing scrutiny

Internal guidelines have been issued by the revenue authority, pursuant to which companies with related-party transactions in excess of USD 3.75m are being scrutinized. In most cases, the revenue authority does not seem to have adopted a centralized or coordinated approach to audits, with officers in different locations taking divergent positions on similar taxpayer fact patterns. Substantial documentation is being requested in the course of audit proceedings. The information technology, business process outsourcing, banking and pharmaceutical sectors have received particular attention. The revenue authority has sought an updated analysis using data that may not be available to the taxpayer at the time of the preparation of contemporaneous documentation. Furthermore, officers have insisted on unbundling transactions in cases where the taxpayer has adopted an aggregate or combined approach to its transfer pricing documentation. During recent audits, the approach adopted by the taxpayer in the selection of comparable data has received considerable attention from the revenue authorities.

APA opportunity

APAs are not available yet, but may become available as India increases its third-party comparables database and gains more experience in cross-border transfer pricing issues.

Indonesia

Taxing authority and tax law

Indonesian Tax Authority. Article 18 of the Indonesian income tax law.

Relevant regulations and rulings

A new income tax law implemented on 1 January 2001 contains transfer pricing provisions in Article 18, but implementing regulations have not yet been issued. The only regulations issued to date (Director General of Tax Circular Letter No SE-04/PJ.7/1993) are old and predate the new income tax law. Indonesia's transfer pricing rules apply to both domestic and cross-border transactions between parties that have a special relationship. Domestic transfer pricing rules apply because there is no grouping of tax losses in Indonesia.

OECD guidelines treatment

Indonesia is not a member of the OECD, but generally favors its principles and methods.

Priorities/pricing methods

The CUP is favored. Other allowable methods include Cost Plus, Sales Minus, Resale Price and those accepted by the OECD (usually profit-based methods).

Transfer pricing penalties

There is a penalty of 2% per month, up to a maximum of 48%, on any tax underpayment discovered during a transfer pricing audit.

Penalty relief

Not applicable.

Documentation requirements

There are no formal documentation requirements at this time. However, the tax authority usually requires the production of invoices and agreements as a minimum requirement.

Documentation deadlines

Not applicable.

Statute of limitations on transfer pricing assessments

Not applicable.

Return disclosures/related-party disclosures

Disclosure of related-party transactions in the tax return has been required since 1 January 2002. Domestic and international related-party transactions are required to be disclosed. The information that must be disclosed includes the type of transaction, the value of the transaction, the transfer price and the method used to determine the transfer price.

Indonesia (continued)

Audit risk/transfer pricing scrutiny

There is no specialized investigation unit in the Indonesian tax authority and most transfer pricing queries arise during regular tax audits. The number of transfer pricing adjustments increased significantly in recent years, especially in cases where Indonesian entities have suffered losses, or where the export prices to related entities differs from the local sales price. In the past, the Indonesian tax authority's efforts have traditionally concentrated on intangibles and services (e.g., management fees, royalties, service fees and interest), but recent experience shows an increasing interest in the transfer pricing of tangible goods.

In practice, taxpayers that exhibit the following characteristics are more at risk of being subject to a transfer pricing audit:

- A large number of related-party transactions
- Losses for more than two consecutive years
- An increase in gross revenue or receipts but no change in net profit
- Erratic profit and loss histories
- Associated parties in tax havens
- Lower net profit in comparison to the industry average or other similar enterprises

APA opportunity

The income tax law of 2001 contains bilateral and unilateral APA mechanisms. The income tax law suggests that APAs are only for cross border transactions, but conflicting statements have been made by senior tax officials that APAs may also apply to domestic transactions.

Israel

Taxing authority and tax law

Israeli Tax Authority (ITA). Income Tax Ordinance § 85A and Income Tax Regulations (Determination of Market Terms), 2006.

Relevant regulations and rulings

The ITA Income Tax Regulations (Determination of Market Terms) were drafted pursuant to § 85A of the Israeli Income Tax Ordinance. Final regulations were adopted in November 2006. The Israeli Transfer Pricing (ITP) Regulations apply to all international intercompany transactions. The Regulations apply to all transactions carried out subsequent to their validation on 29 November 2006. The ITP Regulations are based upon a combination of the OECD Transfer Pricing Guidelines and the US Transfer Pricing Regulations.

Taxpayers are required to comply with the proper timing for the submission of documentation (i.e., 60 days from official demand of a tax inspector), which shifts the burden of proof to the tax authority if the prices do not appear to be at arm's length.

As a transitional provision, a transfer pricing study documented prior to the publication of the ITP Regulations will be accepted for a period of two years upon their publication provided that the documentation was conducted based on the OECD guidelines or guidelines published by its members (e.g., the US).

The ITP requires that, commencing with tax year 2007, Israeli annual tax returns include a form (Form 1385), specific to transfer pricing, that delineates the intercompany transactions, details of the other party and its residency, the price of the transactions and signatures on declarations that the international intercompany transaction is at arm's length.

OECD guidelines treatment

The ITA considers its transfer pricing laws and regulations to be wholly consistent with the OECD guidelines and the US Treasury Regulations under §1.482. For domestic use, the OECD guidelines do not provide support and would not be directly relevant to the application of any pricing methods. However, an arm's length study documented prior to the publication of the ITA Regulations will be accepted for a period of two years as of the Regulations' publication provided that the documentation was conducted based on the OECD guidelines or guidelines published by its members.

Priorities/pricing methods

To determine whether an international transaction is at arm's length terms, the ITP Regulations require the taxpayer to apply one of the following methods in the following hierarchy:

- CUP or Comparable Uncontrolled Transaction (CUT)
- Comparable profitability
  - Cost Plus or Resale Price method
  - CPM or TNMM
  - Profit Split Method
- Other methods

An international transaction is at arm's length if through the application of an approved method, the result falls within a defined interquartile range. As an exception, the entire range of values will apply when the transfer pricing method applicable is a CUP or CUT, and no adjustments were performed. If the international transaction is outside the range of comparable transactions, the median should be applied as the transaction's price.

Israel (continued)

Priorities/pricing methods (continued)

Additionally, the ITP Regulations stipulate the use of several profit level indicators (PLIs) depending on the particular industry and environment. For example, when appropriate, the following PLIs may apply: A cost-plus mark-up may be applied to a company's direct costs

- A gross profit margin may be applied
- The operating profit or loss applicable for comparable transactions
- The profit or loss derived as a proportion of the firm's assets, liabilities or capital
- Other measures considered appropriate under the circumstances

Transfer pricing penalties

The ITA has not specified any penalties with regards to its transfer pricing regulations. However, general tax penalties applied by the ITA, with regards to a tax deficit, will also apply on transfer pricing adjustments.

Penalty relief

Not applicable.

Documentation requirements

A taxpayer is required to file a transfer pricing report with the Tax Assessing Officer, at the Tax Assessing Officer's request, within 60 days from the application date. Documentation is required to include the following data:

- Details of the taxpayer, including group structure, the parties to the international transaction, their residency and any special relations between the taxpayer and the other transaction parties
- The contractual terms, including specifications of the asset, the service granted, the price paid, the loan and credit terms and related guarantees
- The taxpayer's area of activity and any relevant developments
- The economic environment in which the taxpayer operates and the related risks
- Details of all transactions entered into by the taxpayer with a related party
- An economic analysis

The taxpayer is also required to attach additional documents that corroborate the data submitted, such as transaction contracts and any other contracts between the related parties and tax returns filed with foreign tax authorities.

Documentation deadlines

A taxpayer is required to file a transfer pricing report with the Tax Assessing Officer, at the Tax Assessing Officer's request, within 60 days of the application date. Form 1385 should be attached to the annual tax return.

Statute of limitations on transfer pricing assessments

The Israeli Income Tax Ordinance has general rules for auditing a tax return. As such, the statute of limitations is usually three years (or four if the commissionaire extends the time period) beginning at the end of the fiscal year tax return was filed.

Israel (continued)

Return disclosures/related-party disclosures

Commencing with the fiscal year ending 2007, taxpayers must attach to the annual tax returns a specific transfer pricing form (Form 1385), in which the following should be disclosed:

- a short description of the intercompany transaction details of the other party and its residency
- the prices of the transactions
- signatures on declarations that the international transactions were at arm's length

Audit risk/transfer pricing scrutiny

Medium Risk: The risk of transfer pricing scrutiny during a tax audit has increased exponentially following the issuance of the ITP Regulations and Form 1385. Transfer pricing will now be monitored with greater regularity and with increased ITA experience. In order to cope with the changing transfer pricing climate in Israel, the ITA has established a new division to enforce and regulate the ITP Regulations.

APA opportunity

The Israeli Income Tax Ordinance's § 85A, which governs the ITP Regulations, stipulates in article 85A (d) the condition under which an APA may be conducted and delineates the scope of an APA. The process starts with a detailed application filed by the taxpayer that includes all the relevant details. Under the APA process, the ITP must respond within 120 days (though the time can be extended up to 180 days) otherwise the application will be approved automatically, and the intercompany policy will be deemed as providing reasonable arm's length prices.

Italy

Taxing authority and tax law

Amministrazione Finanziaria (Administration of Finance and revenue authority). Tax law is embedded in the Presidential Decree n. 917 of 22 December 1986, where transfer pricing is regulated in Article 110 (7) and Article 9 (3)-(4).

Relevant regulations and rulings

Administration of Finance Circular Letter n. 32/9/2267 of 22 September 1980, and Circular Letter n. 42/12/1587 of 12 December 1981. Circular Letter n. 1 dated 20 October 1998, that outlines general methods for tax audits and includes transfer pricing in the framework of regular audits of multinational enterprises.

Decision of the Italian Supreme Court (Corte di Cassazione) n. 22023 of 13 October 2006 that held the burden of proof is on the tax authority for transfer pricing issues. According to the Supreme Court, and following the 1995 OECD guidelines, in the jurisdictions where the burden of proof is on the tax authority, the taxpayer is not obliged to give evidence that the transfer prices comply with the arm's length principle unless the tax authority has already proved (prima facie) that the taxpayer has not complied with the arm's length principle.

OECD guidelines treatment

The Italian transfer pricing rules are mainly provided by the tax law provisions (Article 110 (7) and Article 9 (3)-(4) of the Presidential Decree n. 917 of 22 December 1986), Administration of Finance Circular Letter n. 32/9/2267 of 22 September 1980 and Circular Letter n. 42/12/1587 of 12 December 1981.

The 1980 Circular Letter follows the 1979 OECD Transfer Pricing Guidelines and, although it was issued before the date of enforcement of Article 110 (7) mentioned above, its provisions are still fully applicable. On the other hand, the 1995–1999 OECD guidelines have not been converted yet into specific official Italian guidelines, but only translated by the Italian Ministry of Finance.

The Decision n. 22023 of the Italian Supreme Court makes a clear reference to the OECD guidelines stating that the burden of proof is on the tax authority.

Ernst & Young is not aware of any official interpretation of the Italian Tax Authorities on the OECD Discussion Draft on Business Restructurings. The only case law on cross-border business restructurings Ernst & Young is aware of is the Ruling n. 124 dated 7 November 2006 in which the Revenue Agency deemed as occurred a sort of transfer of business concern (not specified if going concern or single assets) abroad in the case of a British insurance company which, after having operated on the Italian market for a certain number of years through a permanent establishment, subsequently provided directly its services to the Italian customers, by appointment of a fiscal representative in Italy (free supply of services).

Priorities/pricing methods

Transactional-based methods, such as CUP, Resale Price and Cost Plus, are preferred over profits-based methods, such as Profit Split, Profit Comparison, Economic Sector Gross Margin and Invested Capital Profitability.

According to the Italian transfer pricing rules (particularly the 1980 Circular Letter), the profits-based methods could be used:

- When it is impossible to use the three basic methods
- When
  - Uncertainties arise in verifying the correct use of the three basic methods
  - It is necessary to separate the differential element between two transactions which are susceptible to comparison in order to use one of the three basic methods

Transfer pricing penalties

General penalties for underpayment apply (Legislative Decree n. 471 of 18 December 1997). In particular, in a case where the tax return has been filed, general administrative penalties apply in the amount equal to a minimum of 100% up to a maximum of 200% of the additional tax or the minor tax credit assessed by Italian tax authorities. This penalty applies when, with reference to the single taxes, (1) the taxable income declared is lower than the one assessed, (2) the taxes declared are lower than those due or (3) the tax credit declared

Italy (continued)

Transfer pricing penalties (continued)

is greater than the one due to the taxpayer. The same penalties apply where undue tax allowances or deductions from the taxable income have been declared in the tax return. Interests on taxes or additional taxes due also apply. The yearly interest rate is presently equal to 2.75% of the taxes due (Article 20 of Presidential Decree n. 602 of 29 September 1973). Because of the relatively high amount of potential tax revenue in a transfer pricing audit, tax officers often refer assessments to public prosecutors to explore possible criminal tax law ramifications, as permitted under Legislative Decree n. 74 of 10 March 2000. Some mitigation is provided by Art. 7 whereby taxpayers are supposed to disclose their transfer pricing policy in their financial statement.

Penalty relief

There is no provision concerning penalty relief.

Documentation requirements

There are no specific documentation requirements provided. However, it is highly recommended that one prepare transfer pricing documentation that adheres to the OECD Transfer Pricing Guidelines. All income and deduction items should be adequately substantiated. According to Article 32 of Presidential Decree n. 600 of 20 September 1973, Italian tax authorities may require taxpayers to produce or send deeds and documents (in the form of questionnaires) concerning the assessment to which they are subject. Taxpayers are required to comply with the tax authority's requests.

Italian substantive and procedural law does not contain specific rules on the relevance of the documentation. Taxpayers are only obligated to submit the compulsory accounting books and other documents specifically required by the tax authorities (a completely different approach must be followed under the Italian anti-tax-haven provisions where, legally, the burden of proof shifts to the taxpayer).

Documentation deadlines

There is no statutory deadline. However, the deadline cannot be less than 15 days from the notification of the tax authorities' documentation request, in accordance with Article 32 of Presidential Decree n. 600 of 29 September 1973. The tax authority retains discretion over extension requests.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations on an assessment for transfer pricing. The general statute of limitations period for tax purposes applies. Therefore, tax assessments must be notified to the taxpayer by 31 December of the fourth year following the year for which the tax return has been filed. If the tax return has been omitted or is treated as null and void, the assessable period for the relevant year is extended by one additional year. Furthermore, for companies that do not benefit from the 2002/2003 Italian Tax Amnesty, the assessable period is extended by two additional years.

Return disclosures/related-party disclosures

Italian companies must officially communicate (in documents, correspondence, register of companies) whether they are managed and controlled by another company and the name of the related company (Article 2497-bis of the Italian Civil Code). Financial statements should include essential data of the managing or controlling company's financial statement and relations with related parties (Articles 2424, 2427, 2428 and 2497-bis of the Italian Civil Code). The tax return should disclose transactions with tax havens concerning costs and expenses.

Italy (continued)

Audit risk/transfer pricing scrutiny

The risk of transfer pricing scrutiny during a tax audit is high. In fact, transfer pricing receives the greatest scrutiny. Italian tax authorities usually challenge the price of intercompany transactions that do not comply with the arm's length principle or that result in a mismatch between the characterization of entities and their remuneration. There appears to be a tendency toward challenging transfer pricing in combination with issues related to tax havens and permanent establishments (especially since the Italian Supreme Court's "Philip Morris" case decision in 2002: Ministry of Finance (Tax Office) v. Philip Morris (GmbH), Case 7682/05 of 25 May 2002).

In addition, there is generally greater tax audit activity and particular attention paid to major taxpayers, where the Italian tax authorities are devoting greater resources in intelligence and monitoring activities on multinationals (see also, Italian Tax-Police Command, Results of the first eleven months of the 2002 and future strategies, press release of 19 December 2002). According to Article 42 of the Financial Law of 2000 (n. 388 of 23 December 2000), beginning from 2002, taxpayers with a business volume or turnover not lower than about EUR 26m are expected to be systematically audited at least once every two years, while the taxpayers with a business volume not lower than EUR 5.2m will be audited at least once every four years. These audits may be complete and extensive or just focus on specific items.

This approach of the Italian tax authorities has also been confirmed by the Circular Letter n. 3/E of 29 January 2004 which stressed a special focus on tax havens, reorganizations, rulings and fiscal units. For these goals, the Italian tax authorities will increase the exchange of information with the foreign tax authorities.

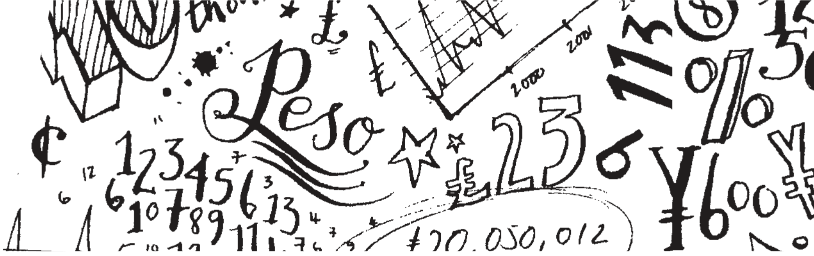
Likewise, the Circular Letter n. 6/E issued by Central Revenue Agency on 25 January 2008 provides operating guidelines to tax authorities in relation to the prevention and combat of tax avoidance, and among the most delicate and crucial areas to be assessed, it mentions intercompany transactions and transfer prices according to the provisions of Art. 110 (7) of the Presidential Decree n. 917 of 22 December 1986.

Furthermore, Law Decree n. 185 issued on 29 November 2008 is introducing the category of "mega" taxpayers stating that "in relation to the corporate income tax and VAT returns of relevant size companies, the Central Revenue activate substantial controls by the year following the one of the filing," where "relevant size companies are the ones which achieve a (yearly) turnover not lower than EUR [300m]. Such threshold will be gradually lowered to EUR [100m] by 31 December 2011."

In addition to all the above, the Italian Supreme Court is developing a broad concept of "abuse of law," deemed to be inspired by the Italian Constitution Law, that is trying to introduce a general anti-avoidance principle potentially applicable to all the operations that appear to be carried out for tax reasons only, without real business purposes.

APA opportunity

The Italian government introduced a unilateral ruling system mainly relating to transfer pricing, dividends and royalties. The law has been enacted with the "Provvedimento del Direttore dell'agenzia delle entrate," dated 23 July 2004. This document provides a number of practical guidelines to apply and conduct the ruling program. Since Italy provides a variety of tax rulings, the interactions between the APA and the other tax rulings should be evaluated on a case-by-case.



Japan

Taxing authority and tax law

National Tax Agency (NTA). Special Taxation Measures Law (STML) Article 66-4 (Special Provisions for Taxation of Transactions with Foreign Related Persons) and Article 68-88 (Special Taxation Measures of Transactions between Consolidated Corporations and Foreign Related Persons).

Relevant regulations and rulings

STML-Enforcement Order 39-12, STML Enforcement Regulations Art. 22-10, STML-Circular 66-4-(1)-1 to 66-4-(8)-2, Commissioner's Directive on the Establishment of Instructions for the Administration of Transfer Pricing Matters (Administrative Guidelines), and Commissioner's Directive on the Establishment of Instructions for the Administration of Transfer Pricing Matters for Consolidated Corporations (Administrative Guidelines for Consolidated Corporations), Commissioner's Directive on Mutual Agreement Procedures.

OECD guidelines treatment

The NTA refers to the OECD guidelines for direction, and the Japanese transfer pricing Administrative Guidelines contain the following statement: "In light of the importance of a common understanding regarding transfer pricing by each country's tax authorities for the resolution of international double taxation that arises due to taxation pursuant to the transfer pricing tax system, appropriate administration shall be carried out by referring to the OECD Transfer Pricing Guidelines to the extent necessary in examinations and in reviews of requests for APA's" (Para. 1-2(3)). However, under audit tax examiners often point out that Japan is not bound by the OECD guidelines and that they will follow their interpretation of Japanese tax laws and regulations even where there may be a disagreement over whether their approach is consistent with the OECD guidelines. On the other hand, the most recent US–Japan tax treaty explanation refers extensively to the OECD guidelines and suggests greater harmonization in the future.

Priorities/pricing methods

In general, transaction-based methods are preferred over profit-based methods. The tax authorities require that the CUP, Resale Price, and Cost Plus methods be used whenever possible, only allowing the use of other methods (e.g., Profit Split and Transactional Net Margin Method) after the first three have been discounted. The TNMM is available for fiscal years starting on or after 1 April 2004. Note that there are some cases in which the Residual Profit Split Method, which is accepted by the Japanese tax authorities as one type of the Profit Split Method mentioned above, is applied.

Transfer pricing penalties

Transfer pricing assessments are subject to the same penalties that apply to general corporate tax assessments. There are two types of penalties: underpayment penalty tax and delinquency tax (interest). Underpayment penalty tax is computed as either 10% of the additional assessed taxes (up to JPY 500,000) or 15% of the additional tax, depending on the amount of underpayment.

The delinquency tax (interest) rate begins from 4% per year plus the official discount rate and increases after a certain period to 14.6% per year.

There is no separate penalty for failure to prepare and maintain transfer pricing documentation.

Japan (continued)

Penalty relief

There are no specific provisions for reductions in underpayment penalties.

However, the 2007 tax reforms allowed for the provision of a grace period for the payment of assessed taxes – including penalty taxes – for taxpayers submitting an application for mutual agreement procedures. The taxpayer must submit a separate application to be entitled to the grace period, which is defined as the period starting on the initial payment due date of assessed taxes and ending on the day one month after the day following the day on which the "correction" based on the mutual agreement has been made (or the day on which a notification was issued that an agreement could not be reached). Any delinquency taxes accrued during the grace period will be exempted. However, under STML Article 66-4-2(2), where the tax authority grants a postponement of tax payment, the tax authority requires the taxpayer to provide security (i.e., collateral) equivalent to the amount of the tax payment. This new transfer pricing rule will be applicable for applications for a grace period made on or after 1 April 2007.

Documentation requirements

There are currently no statutory documentation requirements. The documentation that will be examined during a transfer pricing audit is disclosed in the Administrative Guidelines. Failure to provide such documentation in a timely manner upon request can trigger the tax examiner's authority to collect transactional data from comparable firms to use as "secret comparables" for the taxpayer. That is, the comparables are not disclosed to the taxpayer because the transactional data of the companies are confidential.

Documentation deadlines

The taxpayer is required to provide the tax authority with documentation (i.e., information and records) relevant to the establishment of the arm's length price in a timely manner upon request. There is no exact deadline specified.

Statute of limitations on transfer pricing assessments

The statute of limitations on transfer pricing assessments is six years from the deadline for filing tax returns for a fiscal year (STML Article 66-4(16)).

A corporation must maintain corporate tax records for seven years from the fiscal year end (Corporation Tax Law Art. 126 and 150-2; Corporation Tax Law Enforcement Regulation, Article 59 and 67).

Return disclosures/related-party disclosures

The taxpayer must file Schedule 17-3, Detailed Statement Concerning Foreign Affiliated Persons and Related Party Transactions for fiscal years beginning on or after 1 April 2003. Schedule 17-3 requires that taxpayers disclose the transfer pricing methods applied in calculating the arm's length prices of the foreign related-party transactions. This requirement implies that taxpayers are expected to identify the appropriate transfer pricing methods for their related-party transactions and be able to demonstrate the appropriateness of those methods. Therefore, this rule can be interpreted as a de facto transfer pricing documentation requirement as taxpayers are expected to maintain documents in support of any tax return disclosure.

Effective 30 April 2008, Schedule 17-3 requires taxpayers to disclose the following three additional information items:

- The number of employees of the foreign related party
- The amount of retained earnings of the foreign related party for the preceding year
- Any APA agreed between the taxpayer and the foreign Competent Authority.

Japan (continued)

Audit risk/transfer pricing scrutiny

Audit risk is generally medium-high for large taxpayers with significant related-party transactions. The risk is increased for taxpayers who meet any of the following criteria:

- In industries targeted by the NTA
- With low profits or losses in Japan
- High profits in foreign affiliates as disclosed on Schedule 17-3 (relative to profits reported in Japan)
- With fluctuating profitability
- Who have significant transactions with tax havens
- In industries with high margins. The NTA is likely to seek to apply comparables, including secret comparables available only to the NTA.

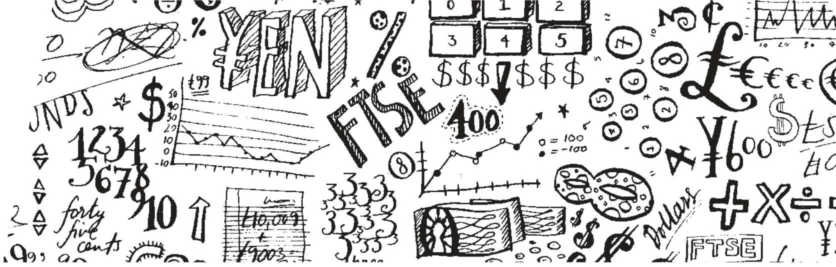
APA opportunity

Unilateral and bilateral APAs are available, though the NTA prefers bilateral. APA guidelines are included in the Administrative Guidelines.

The NTA has recently shown a willingness to accept profit-based methods, such as the TNMM.

The NTA amended the filing deadline for APA applications on 22 October 2008. Previously, the APA must be filed by the tax return filing deadline of the first year to be covered by the APA. The new NTA guidance sets the APA filing deadline as the day preceding the first day of the first fiscal year to be covered by the proposed APA.

However, the new guidance does allow for a transition period. If the first covered year starts between 1 November 2008 and 1 November 2009, the transition rule applies. The transition rule indicates that the APA application is due eight months after the due date of the tax return for the last year before the covered period. In practice, this means the application is due eleven months after the first day of the covered period.



Latvia

Taxing authority and tax law

The State Revenue Service. The arm's length principle is established in the Law on Corporate Income Tax. Article 12 of the Law on Corporate Income Tax of Latvia determines that the taxable income of the taxpayer may be increased if related-party transactions are not arm's length.

Relevant regulations and rulings

4 July 2006 Cabinet Regulations No. 556 set the transfer pricing methods applicable for determining arm's length prices in related-party transactions.

OECD guidelines treatment

Latvian transfer pricing legislative acts contain a reference to the OECD Guidelines on the application of the transfer pricing methods. The State Revenue Service also generally accepts the OECD Guidelines principles regarding transfer pricing documentation structure.

Priorities/pricing methods

Five methods are accepted – Comparable uncontrolled price method, Resale price method, Cost plus method, Profit split method and TNMM.

Transfer pricing penalties

There is no separate penalty for not having transfer pricing documentation. In case the prices applied in transactions between related parties are not at arm's length, the taxable income of the taxpayer may be increased and a penalty in the amount of 30 – 50% and a late penalty charge (annual rate of 18%) on additionally payable corporate income tax may be applied.

Penalty relief

There is no penalty relief; however, the existence of transfer pricing documentation generally reduces transfer pricing risks.

Documentation requirements

Latvian legislative acts do not provide specific requirements regarding preparation of transfer pricing documentation. However during tax audits taxpayer should be able to justify that prices applied in transactions between related parties are arm's length. Generally transfer pricing risks are lower if the documentation prepared is based on the OECD Guidelines.

Documentation deadlines

There is no specific deadline for the preparation of the transfer pricing documentation but the relevant documentation could be required during the State Revenue Service tax audit.

Statute of limitations on transfer pricing assessments

Generally the State Revenue Service has rights to make a tax assessment for three years from the payment date of respective tax. This general rule is applicable also to transfer pricing tax assessments.

Return disclosures/related-party disclosures

Related-party transactions must be disclosed in appendix 2 of the corporate income tax return. The taxpayer should disclose related parties involved in related-party transactions, type of transaction (e.g. purchase or sale of goods, services or fixed assets), volume of transactions and transfer pricing methods applied.

Audit risk/transfer pricing scrutiny

Taxpayers in Latvia run a medium risk that transfer prices will be scrutinized during a tax audit.

APA opportunity

There are no specific APA rules in Latvia.

Lithuania

Taxing authority and tax law

Ministry of Finance of the Republic of Lithuania and the State Tax Inspectorate. The arm's length principle is established in the Corporate Income Tax of Lithuania and its implementation rules introduced in 2004.

Relevant regulations and rulings

Article 40 of the Law on the Corporate Income Tax of Lithuania. Order of the Minister of Finance No 1K- 123 as of 9 April 2004 on transfer pricing evaluation and documentation rules. Order of the Head of the State Tax Inspectorate No VA-27 as of 22 March 2005, on the associated party transaction disclosure in the annual corporate income tax return.

OECD guidelines treatment

The use of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrators is explicitly advocated in the regulations and rulings applicable in Lithuania. Other OECD papers, such as regarding business restructurings and profit allocation to permanent establishments, are not explicitly implemented in the Lithuanian legislation, however, in practice they are frequently referred to for practical guidance.

Priorities/pricing methods

Transaction-based methods are preferred over profit-based methods. Taxpayers are encouraged to use profit-based methods only if transaction-based methods are not sufficient. Taxpayers are not required to use more than one method; however, a combination of methods may be used in all cases providing support for the decision to apply any particular method.

Transfer pricing penalties

There are no specific transfer pricing penalties. General tax penalties applicable in the case of the taxable income adjustments by the tax authority are equal to 10% to 50% of the tax additionally calculated. In addition, the penalty interest will apply.

There are no special penalties related to the non-provision of the transfer pricing documentation at the request of the tax authorities.

Penalty relief

Not applicable.

Documentation requirements

The transfer pricing documentation requirements are binding for resident and non-resident legal entities registered as corporate income taxpayers in Lithuania, whose revenues in Lithuania in the year before the transactions were conducted exceeded EUR 2.9m.

In addition, transfer pricing documentation requirements are applicable to the credit institutions such as banks and entities providing financial services (e.g., insurance companies), irrespective of their revenue size.

The transfer pricing documentation has to contain:

- Details of the transactions
- Terms and conditions of the transactions
- Participants in the transactions, including their legal and organizational structure
- Functions performed, property used or contributed and the risks assumed by the parties
- Data and methods considered and the analyses performed to determine the transfer prices
- All relevant assumptions, strategies and policies that influenced the determination of the methods applied

In general, the OECD guidelines' principles are to be followed.

Lithuania (continued)

Documentation deadlines

There are no specific requirements or schedules for the preparation of transfer pricing documentation. Taxpayers must submit the transfer pricing documentation within 30 days of the corresponding notice by the tax authorities.

Statute of limitations on transfer pricing assessments

Transfer pricing assessments may occur during the five years before the year in which the assessment takes place.

Return disclosures/related-party disclosures

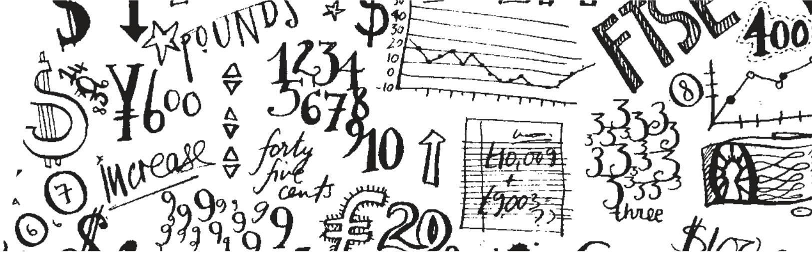
An associated party disclosure annex to the annual corporate income tax return has to be submitted within nine months after the end of each tax period, in case the associated-party transactions of the taxpayer exceed in annual value approximately EUR 87,000. In the annex, taxpayers are required to inform the tax authorities whether any prescribed transfer pricing methods have been used in the transactions disclosed.

Audit risk/transfer pricing scrutiny

Taxpayers in Lithuania run a high risk that transfer prices will be scrutinized during a tax audit.

APA opportunity

Currently, the Lithuanian tax laws do not provide for an opportunity to conclude APAs.



Malaysia

Taxing authority and tax law

Inland Revenue Board (IRB). General Anti-Avoidance Provision (§ 140 of the Malaysian Income Tax Act, 1967: Power to disregard certain transactions if not deemed arm's length), (§ 138C of the Malaysian Income Tax Act, 1967: *Advance Pricing Arrangement*), (§ 140A of the Malaysian Income Tax Act, 1967: *Power to substitute the price and disallowance of interest on certain transactions*) and Transactions by Non-Residents (§ 141 of the Malaysian Income Tax Act, 1967: *Powers regarding certain transactions by non-residents*).

Relevant regulations and rulings

The IRB released the Malaysian Transfer Pricing Guidelines on 2 July 2003 which specify documentation requirements.

OECD guidelines treatment

The Malaysian Transfer Pricing Guidelines are largely based on the governing standard for transfer pricing, which is the arm's length principle as established in the OECD guidelines. The IRB respects the general principles of the OECD guidelines.

Priorities/pricing methods

The IRB accepts CUP, Resale Price, Cost Plus, Profit Split and TNMM. However, the Malaysian Transfer Pricing Guidelines state that the traditional methods are preferred over the profit methods and advise that the profit methods should only be used when the traditional methods cannot be reliably applied or cannot be applied at all.

Transfer pricing penalties

There are no specific penalties for transfer pricing. However, the existing legislation and penalty structure under the Malaysian Income Tax Act, 1967, are applied. Penalties for transfer pricing adjustments can range from 100% to 300% of the undercharged tax. There are no transfer-pricing-specific documentation penalties.

Penalty relief

A reduction in penalties can be negotiated based on quality of contemporaneous transfer pricing documentation.

Documentation requirements

Contemporaneous documents pertaining to transfer pricing need not be submitted with the tax return form, but should be made available to the IRB upon request. All relevant documentation must be in, or translated into, Bahasa Malaysia (the national language) or English. There is no disclosure required on a tax return to indicate that transfer pricing documentation has been prepared.

The IRB has set out a list of information and documentation to be prepared for transfer pricing purposes. This list is neither intended to be exhaustive nor meant to apply to all types of businesses. Instead, taxpayers are advised to maintain information and documentation that are applicable to their circumstances. The list includes:

- Company details
  - Ownership structure showing linkages between all entities within the Multinational Enterprise (MNE)
  - Company organization chart
  - Operational aspects of the business including details of functions performed
- Transaction details
  - A summary of transactions with other entities in the same MNE, indicating the name and address of each entity in the MNE with whom international transactions have been entered into, and the type of transactions, e.g., purchase of raw material or fixed assets, sale of finished goods, borrowing of money.
  - A summary of transactions similar to the above that are conducted with independent parties or information derived from independent enterprises engaged in similar transactions or businesses
  - Economic conditions during the time of the transactions
  - Terms of the transactions, including where applicable contractual agreements with overseas associated parties with regard to technical assistance fees, management fees, marketing fees, recruitment fees or other services provided, royalties payable, purchase or rental of equipment or other assets, handling charges, loans, allocation of overhead expenses or any specific expenses

Malaysia (continued)

Documentation requirements (continued)

(e.g., promotional or advertising) borne by the foreign entity or other forms of payment to overseas associates

- Pricing policy over the past seven-year period
- Breakdown of product manufacturing costs
- Product price list

- Determination of arm's length price
  - The pricing method adopted, showing how the arm's length price is derived, and indicating why that method is chosen over other methods
  - Functional analysis taking into consideration all risks assumed and assets employed
  - If a comparability analysis results in a range of arm's length outcomes, then the furnishing of documents relating to all of the outcomes and the reasons for choosing that particular arm's length price from the range of outcomes must be given.

Documentation deadlines

There is no documentation deadline. However, documentation should be prepared contemporaneously. As tax returns are due for filing to the IRB within seven months of the close of a company's financial year-end, it is advisable that transfer pricing documentation be prepared before the submission date of the return.

Statute of limitations on transfer pricing assessments

There is a six-year statute of limitations for tax adjustments, and documentation must be kept for seven years. There is no statute of limitations in instances of fraud, willful default or negligence.

Return disclosures/related-party disclosures

Disclosure of arm's length values is required in the tax return for the following transactions:

- Sales to related companies
- Purchases from related companies
- Other payments to related companies
- Lending to and borrowing from related
- Receipts from related companies

Audit risk/transfer pricing scrutiny

The risk of transfer pricing scrutiny during an audit is high. Tax audits are carried out under a self-assessment regime. Every company is expected to be subject to a desk or field audit at least once every five years. With the release of the Malaysian Transfer Pricing Guidelines, greater scrutiny on transfer pricing has been observed in these field audits. Ernst & Young's experience is that every multinational corporation that was audited over the last 12 months was scrutinized on its transfer pricing policy. Since the beginning of 2005, the number of transfer pricing audits and investigation activity by the IRB increased significantly. There is a specific transfer pricing unit in the IRB to handle all transfer pricing audits.

This scrutiny is expected to increase significantly with the introduction of § 140A of the Malaysian Income Tax Act, 1967: *Power to substitute the price and disallowance of interest on certain transactions*. This section effectively shifts the onus unto the taxpayer to prove arm's length pricing in acquisition or supply of property and services. Furthermore, this section also imposes thin capitalization rules, disallowing deductions for interest, finance charge and other consideration in respect of financial assistance between related persons.

APA opportunity

The introduction of § 138C in the Malaysian Income Tax Act, 1967 effectively formalizes the availability of unilateral and bilateral APAs in Malaysia. However, at this stage, formal guidelines on APAs are still in draft form, and the IRB has previously indicated that it will consider any terms and conditions which are the norm observed in the transfer pricing regimes in other jurisdictions. A specific transfer pricing unit in the IRB has been established to oversee the APA applications and negotiations.

Mexico

Taxing authority and tax law

The Administración Central de Auditoría de Precios de Transferencia of the Mexican Tax Administration Service (SAT) is in charge of enforcing transfer pricing rules. This office is in charge of audits and the APA Program. The main legal provisions dealing with transfer pricing are Articles 86-XII, XIII and XV, 215, 216, 216-BIS and 217 of the Mexican Income Act, as well as Article 34-A of the Federal Fiscal Code. Article 216-BIS of the Income Tax Act provides special rules for maquiladoras.

Relevant regulations and rulings

Tax regulations are issued by Mexico's President. The SAT publishes administrative rules on a regular basis, and few rules and regulations deal with transfer pricing issues.

OECD guidelines treatment

The OECD guidelines act as an auxiliary in the interpretation of the rules as long as they do not contradict the Mexican Income Act or international treaties.

Priorities/pricing methods

The transfer pricing methods in Mexico are the CUP, Resale Price, Cost Plus, Profit Split, Residual Profit Split and TNMM. Effective 2006, there is a best method rule and a hierarchy of methods. The CUP and other traditional transactional methods are preferred to profit-based methods. No alternative methods are acceptable.

Transfer pricing penalties

No specific penalties are applied when taxpayers do not prepare or do not have contemporaneous transfer pricing documentation. However, there are information return-related penalties. A penalty of USD 4,100 to USD 8,037 can be assessed if the information return on related-party transactions is not filed or is incomplete or incorrect.

If a transfer pricing adjustment is determined, and as a consequence unpaid contributions are established, a monetary sanction of 55% to 75% shall be applied.

Also, if a transfer pricing adjustment reduces a net operating loss (NOL), the penalty ranges from 30% to 40% of the difference between the determined NOL and the NOL in the return. It is worth mentioning that both penalties described above will also need to be calculated based on surcharges and updates.

There are no penalties for a valuation misstatement. There are no penalties in case of a self-correction before an audit. Waivers and abatements are possible under limited circumstances.

The Mexican Tax Administration Service has taken the position that failure to comply with transfer pricing documentation requirements results in the non-deductibility of payments to non-resident related parties.

Penalty relief

According to Art76 of the Federal Fiscal Code, if the taxpayer prepares and maintains annual transfer pricing documentation, a penalty relief between 27.5% and 37.5% of the tax omitted applies. Waivers and abatements are possible under limited circumstances such as financial hardship (during 2006). Penalties may be reduced after the audit has started by self-correction procedures.

Documentation requirements

Documentation requirements include the name, address and tax residency of the non-resident related persons with whom transactions are carried out, as well as evidence of direct and indirect participation between related parties. It is necessary to include in the documentation information on the functions, activities, assets used and risks assumed by the taxpayer involved in each transaction. It is also necessary to include information and documentation on comparable transactions or companies by type of transaction. Domestic intercompany transactions are also required to be documented by demonstrating that an accepted pricing methodology is being applied.

Taxpayers are required to identify non-resident related-party transactions clearly on their accounting records. Documentation must be readily available by due date of the tax return. The Multiple Annual Tax Return includes an appendix for the disclosure of information

Mexico (continued)

Documentation requirements (continued)

related to intercompany transactions with non-resident related parties. Tax returns require the following information by type of transaction and by related party:

- Names, countries and tax identification numbers of affiliates
- Types of transactions and corresponding amounts
- Transfer pricing methods
- Gross or operating margins earned on each transaction (only applicable under certain types of transactions)

Documentation deadlines

A transfer pricing study must be in place at the time the company files its annual income tax return (by the end of March of the following year) and must be kept along with the company's accounting records for five years.

The external auditor of each Mexican taxpayer is required to disclose the company's compliance with all tax obligations, including those related to transfer pricing. This disclosure is made through the Annual Tax Report (Dictamen Fiscal) that must be filed by certain companies by 30 June every year.

In order to issue a signed Dictamen Fiscal, the auditor must verify, among other things, that the company's transfer pricing documentation is in place for the fiscal year under analysis and that it complies with the requirements stated in the Mexican Law. Auditors may be granted an extension of one or two months to issue the Annual Tax Report.

The information return on related-party transactions must be filed electronically along with the annual income tax return. Transfer pricing documentation must be readily available as part of the accounting records by 31 March. The SAT has taken the position that failure to comply with the documentation requirements results in non-deductibility of payments to non-resident related parties.

Statute of limitations on transfer pricing assessments

The statute of limitations on assessment in Mexico is five years. The term is affected by amended returns with respect to items changed, and it is suspended by audit. The SAT has two years to complete a transfer pricing audit.

Return disclosures/related-party disclosures

Mexican taxpayers must submit a transfer pricing return to the SAT (Exhibit 9) which is due contemporaneously with the submission of the annual tax return. Information to be disclosed includes non-resident related-parties' tax address and tax identification number, transaction classifications, amounts, methods to be applied for analyses and profit or loss obtained. The information return must be filed by 31 March of each year.

Audit risk/transfer pricing scrutiny

Limited risk structures, highly leveraged structures, migration of intangible property, cost-sharing agreements and pro-rata based management fees are areas of significant audit risk.

APA opportunity

Unilateral and bilateral APAs are available under Article 34-A of the Federal Fiscal Code and Mexico's tax treaties. Unilateral APAs can cover the fiscal year of the application, the three subsequent fiscal years and a one-year rollback.

Netherlands

Taxing authority and tax law

Tax authority Articles 3.8 and 3.25 of the Dutch Income Tax Act 2001. Articles 8 and 8b of the Dutch Corporate Income Tax Act 1969. Effective 1 January 2002, Article 8b codifies the arm's length principle and introduces transfer pricing documentation requirements in the Netherlands that came into force.

Relevant regulations and rulings

Besides the articles in Dutch tax law as mentioned above, the Dutch Under-Minister of Finance issued several decrees in August 2004, which bring up to date existing decrees published in 2001, with adjustments and improvements in the rules for obtaining advance certainty. These 2004 decrees provide more clarity regarding how the fiscal rules within the APA/Advance Tax Ruling (ATR) practice should function. Furthermore, one decree clarifies how the Dutch tax authorities will treat certain issues regarding the application of the arm's length principle. The decrees provide the formal position of the Dutch tax authority, but do not legally bind the taxpayer.

The eight decrees published are:

- APA decree, IFZ2004/124M
- ATR decree, IFZ2004/125M
- Decree regarding financial service activities, IFZ2004/126M
- Questions and answers on the decree regarding service entities and grandfather regime ruling policy, IFZ2004/127M
- Decree on advance certainty and good faith versus treaty partners, DGB2004/1337M
- Decree on APAs, advance tax rulings (atrs), financial services entities, interposed holdings, contact point potential foreign investors, organization and competency rules, DGB2004/1338M
- Implementation decree regarding the Coordination Group Transfer Pricing, DGB2004/1339M
- Adjustments to the transfer pricing decree of 30 March 2001, application of the arm's length principle and the OECD guidelines, IFZ2004/680M

OECD guidelines treatment

The Dutch tax authority in general follows the OECD guidelines. Further guidance regarding the interpretation and application of the arm's length principle is provided by the Dutch transfer pricing decrees (as published by the Under-Minister of Finance in the decree of 30 March 2001, updated with the decree of 21 August 2004). According to these decrees, the OECD guidelines leave room for interpretation or require clarification on several issues. The goal of these decrees is to provide insight into the position of the Dutch tax authority regarding these issues. The transfer pricing decree of August 2004 is an excellent source for transfer pricing guidance. It provides specific guidance on intra-group services and shareholder activities, support services, contract research, cost contribution arrangements, arm's length price determination when the value at the time of the transaction is uncertain and other topics. With respect to business restructuring no specific guidance has been issued to date but as already noted the Dutch tax authority in general follows the OECD guidance in this respect.

Priorities/pricing methods

There is no "best method" rule. Taxpayers are in principle free to choose any OECD transfer pricing method as long as the method chosen results in arm's length pricing for the transaction. Taxpayers are not obligated to test all the methods, though they must substantiate the method chosen. The Dutch tax authority prefers traditional transaction methods over transactional profit methods.

Transfer pricing penalties

The lack of transfer pricing documentation will shift the burden of proof regarding the arm's length nature of the transfer prices used to the taxpayer.

During the parliamentary discussions regarding the introduction of the arm's length principle and transfer pricing documentation requirements (i.e., Article 8b) into the Dutch Corporate Income Tax Act, a question was raised regarding the Dutch policy in connection

Netherlands (continued)

Transfer pricing penalties (continued)

with the levying of administrative penalties in case of a transfer price adjustment. The Dutch Under-Minister of Finance declared that in case of transfer price adjustments the levy of an administrative penalty under the circumstance of an incorrect income tax return should be limited to cases in which it is plausible that the agreed transfer price is not regarded as arm's length as a result of a pure intentional act. Therefore, an administrative penalty will not be imposed even in the case of gross negligence or conditional intentional act according to this policy announcement.

In case of a pure intentional act as set forth above, the tax may be increased with a maximum penalty of 100% of the (additional) tax due, plus interest.

Penalty relief

It is unlikely that there will be transfer pricing-related tax penalties if there is proper transfer pricing documentation available by the taxpayer and the documentation at hand adequately substantiates the arm's length nature of the intercompany transactions undertaken by the taxpayer.

Documentation requirements

Taxpayers are obliged to prepare documentation that describes how the transfer prices have been established and which must be included in the accounting records. Furthermore, the documentation needs to include sufficient information that would enable the Dutch tax authority to evaluate the arm's length nature of the transfer prices applied between associated enterprises. The parliamentary explanations to Article 8b do not describe an exhaustive list of information that should be documented.

The transfer pricing documentation could consist of the following elements:

- Information about the associated enterprises involved
- Information on the intercompany transactions between these associated enterprises
- A comparability analysis, describing the five comparability factors as set forth in Chapter I of the OECD guidelines
- A substantiation of the choice of the transfer pricing method applied
- A substantiation of the transfer price charged
- Other documents, such as management accounts, budgets and minutes of shareholder and board meetings

Documentation deadlines

Documentation is generally expected to be available at the time when the taxpayer enters into a transaction. This has been communicated by the Dutch Ministry of Finance. However, if the transfer pricing documentation is not available upon the request of the Dutch tax authority, taxpayers are granted a minimum time frame of four weeks to prepare the documentation. This period may be extended to a maximum of three months depending on the complexity of the intercompany transactions in which the taxpayer is engaged.

Statute of limitations on transfer pricing assessments

The statute of limitations on transfer pricing assessments is the same as the statute of limitations on tax assessments (as covered by the General Tax Act). The statute of limitations for making an assessment is three years from the end of the fiscal year. If the tax inspector has granted an extension for filing the tax return, the assessment period is extended with the period of extension. An additional assessment must be made within a period of five years, starting from the end of the fiscal year (this period will also be extended with the possible period of the filing extension). With respect to foreign-source income, the period for making an additional assessment is 12 years. For the tax authority to be able to impose such an additional assessment, there needs to be a new fact which the Dutch tax authority did not know or could reasonably not have known upon the moment of imposing the initial tax assessment (unless the taxpayer did not act in good faith).

Return disclosures/related-party disclosures

Dutch corporate income taxpayers are required to confirm in the corporate income tax return (by checking a separate box) whether they have been involved in related-party transactions during the fiscal year. The related-party transactions need to be specified in a separate appendix to the Dutch corporate income tax return.

Netherlands (continued)

Audit risk/transfer pricing scrutiny

The risk of transfer pricing issues being scrutinized during a tax authority audit is high and consequently the controversy risk is high as well. Transfer pricing is a key issue in any tax audit, and many companies are subject to separate transfer pricing audits. A functional analysis is incorporated into many of these audits and forms the basis of transfer pricing risk analyses of taxpayers. The tax authority has, among others, shown interest in performing head office audits (which include intra-group services and other activities performed by the head office) and characterizations in terms of alignment of functions and risks. Next to head office activities intangibles transactions are being evaluated, as well as business reorganizations. The Dutch tax authority has also focused, as a natural result of the risk analyses, on transactions with entities located in low effective tax rate countries.

APA opportunity

Unilateral, bilateral and multilateral APAs with rollback features are available. The APA process currently operates well in the Netherlands, despite earlier criticism regarding the uncertainty of obtaining APAs for financial service entities (see below). Pre-filing meetings with taxpayers to discuss the case before a formal APA request is made, support for small taxpayer APAs and case management plans have been introduced and processing time has been reduced.

Financial services entities consist of both financing (mere receipt and payment of intercompany interest) and licensing (mere receipt and payment of intercompany royalties) companies. For license companies, the first APA under the new regime was granted by the Dutch tax authority in 2005. For finance companies, the APA process had been functioning successfully for a number of years already by 2005. A number of substantial improvements for Dutch financial services entities were introduced in 2005, which mainly relate to a reduction in the applicable transfer pricing documentation requirements.

Mutual agreement procedure

On 29 September 2008 a decree (IFZ2008/ 248M) describing the Mutual Agreement Procedure (MAP) process under bilateral treaties and the EU arbitration convention has been published. The decree aligns the MAP process in the Netherlands with the OECD Memorandum on Effective Mutual Agreement Procedures (MEMAP) making the route to obtaining avoidance of double taxation more accessible and transparent for taxpayers. Key features of the new Decree are: formal introduction of an Accelerated Competent Authority Procedure (ACAP); endorsement of arbitration to resolve MAP cases; targeting a reduction of MAP related expenses; introducing transparency into the process by providing regular feedback and updates to the taxpayer; encouraging use of Article 9(2) of the OECD Model Convention; commitment to tackle resolution of double taxation in cases "not provided for in the Convention" (Article 25(3) of the OECD Model Convention) in addition to the more traditional double taxation cases.

New Zealand

Taxing authority and tax law

The taxing authority in New Zealand is the Inland Revenue Department (IRD). Sections YD 5, GB 2 and GC 6 to GC 14 of the Income Tax Act 2007. New Zealand's double tax agreements are the relevant tax laws in New Zealand.

Relevant regulations and rulings

The final version of Transfer Pricing Guidelines issued in October 2000.

OECD guidelines treatment

The IRD fully endorses the positions set out in chapters one to eight of the OECD guidelines and proposes to follow those positions in administering New Zealand's transfer pricing rules. Consequently, New Zealand's guidelines should be read as supplementing the OECD guidelines, rather than superseding them. This applies for the domestic application of the New Zealand rules, as well as in relation to issues raised under New Zealand's double tax agreements. On business restructuring, IRD's approach seems to be largely in line with the recently published OECD paper. The IRD are cognisant of the fact that multinational enterprises undergo restructuring activities during the course of their existence and lifecycle. In addressing the restructuring issues, IRD will be seeking to ensure that there is a commercial case for effecting any restructure and that the economic substance aligns with the legal form of the arrangement. The IRD has released some high-level guidance in the form of the following ten questions that should be addressed by companies undertaking cross-border business restructures. These questions aim to help ascertain the commercial viability of the restructuring.

Priorities/pricing methods

The IRD accepts the most reliable method chosen from CUP, Resale Price, Cost Plus, Profit Split and CPM (TNMM).

Transfer pricing penalties

Penalties are imposed under § 141A-F of the Tax Administration Act 1994: 20% penalty for not taking reasonable care, 20% penalty for an unacceptable tax position, 40% penalty for gross carelessness, 100% penalty for an abusive tax position and 150% penalty for an evasive or similar act.

Penalty relief

Shortfall penalties may be reduced upon voluntary disclosure to the Commissioner of the details of the shortfall. If the disclosure occurs before notification of an investigation, the penalty may be reduced by 75%. If disclosure occurs after notification of an investigation, but before the investigation commences, the penalty may be reduced by 40%. Shortfall penalties may be reduced by a further 50% if a taxpayer has a past record of "good behavior."

Documentation requirements

There are no explicit requirements in New Zealand's transfer pricing legislation (§ GC 6 to GC 14 of the Income Tax Act 2007) for any particular category of information to be included in transfer pricing documentation. Section GC 13 requires taxpayers to select and apply an appropriate transfer pricing method for tax return purposes. The New Zealand Transfer Pricing Guidelines indicate that a taxpayer's main purpose in preparing and maintaining documentation should be to place the taxpayer in the position where they can readily demonstrate to the IRD that a transfer pricing method has been used to determine whether the taxpayer's transfer prices are consistent with the arm's length principle in light of the facts and circumstances.

Documentation deadlines

There is no express legislative requirement for a taxpayer to document its transfer pricing policies and practices in New Zealand. However, the New Zealand Transfer Pricing Guidelines indicate that taxpayers who prepare and maintain transfer pricing documentation are more likely to ensure the burden of proof (that prices are not arm's length) remains with the Commissioner.

New Zealand (continued)

Statute of limitations on transfer pricing assessments

The Commissioner's power to issue amended assessments is subject to a four-year time limit. A taxpayer has the ability to extend the applicable time bar by up to an additional six months by signing a waiver, which generally arises when a dispute is not resolved, and more time would allow completion of the dispute process by mutual agreement of both parties or where another case before the court is likely to resolve the issue in current dispute.

Return disclosures/related-party disclosures

A company's income tax return requires disclosure of:

- Payments to non-residents such as dividends, interest, management fees, "know-how" payments, royalties or contract payments made
- Whether the company is controlled or owned by non-residents
- Whether the company holds an interest in a controlled foreign company

Audit risk/transfer pricing scrutiny

The risk of transfer pricing scrutiny during a tax audit is high. Risk Assessment Review questionnaires relating to transfer pricing and thin capitalization are typically issued to companies during general income tax audits and as part of the IRD's transfer pricing review process. Recently, the IRD has also issued questionnaires in respect of interest, guarantee fees and royalties. In addition, there is a separate questionnaire for branches.

APA opportunity

Section 91E of the Tax Administration Act 1994 allows a unilateral APA to be issued in the form of a binding ruling. Bilateral or multilateral APAs may be entered into pursuant to New Zealand's double tax agreements under the mutual agreement procedure provisions. The IRD has not established any formal guidelines for APAs, as each case is considered to be different, depending on a taxpayer's specific facts and circumstances. The IRD has suggested pre-application conferences to make the APA application process less time consuming

Norway

Taxing authority and tax law

The Norwegian Tax Authority (NTA). The arm's length principle is stated in § 13-1 of the General Taxation Act, and the transfer pricing filing and documentation requirements are stated in the Tax Administration Act § 4-12.

Relevant regulations and rulings

In June 2007, the Norwegian Parliament adopted new transfer pricing regulations. The requirements are effective as of January 2008. The new requirements entail that all companies subject to the requirements must submit an additional form with the tax return, starting from the fiscal year 2007.

While there have not been legal documentation requirements as such previously, Norwegian taxpayers have for a long time been required to provide extensive information and documentation to the tax authorities on their request.

OECD guidelines treatment

The NTA has a long history of following the OECD Transfer Pricing Guidelines. The Norwegian regulations follow OECD principles, and documentation prepared in line with the OECD guidelines will generally meet the Norwegian requirements.

The Norwegian General Tax Act § 13-1 gives the OECD guidelines a strong and formal status under Norwegian tax law. However, OECD chap. IV (Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes) and chap. V (Documentation) are not included. The status of the OECD guidelines is limited to that of guidance, and they do not constitute binding rules.

The principles outlined in the OECD Discussion Draft on the Transfer Pricing Aspects of Business Restructurings are already being applied by the NTA. Recent tax audits and court cases have shown that although the discussion draft is not part of Norwegian legislation, the principles described in the draft are applied in practice.

Priorities/pricing methods

The OECD pricing methods are accepted by the Norwegian tax authority. The traditional transaction methods (CUP, RPM and Cost Plus) are generally preferred to the transactional profit methods (TNMM and Profit Split). There seems to be increasing support for the applicability of the profit methods under certain circumstances.

There is no specified priority under Norwegian tax law, but reference is often made to the OECD hierarchy. As stated by the Norwegian Supreme Court, the Norwegian General Tax Act § 13-1 allows for the use of several transfer pricing methods, including methods not described by the OECD guidelines, provided those methods will provide arm's length results.

Transfer pricing penalties

Transfer pricing penalties (surtax) range from 15% to 45% based on the tax adjustments. In case of gross negligence, a surtax of up to 60% may be levied. However, the normal surtax rate is 30%. Additionally, a non-deductible interest charge will apply per year.

Failure to comply with the filing requirement (described below) will carry the same penalties and risk as failure to complete the annual tax return. The same is applicable if the documentation is not submitted by the deadline.

Penalty relief

A 30% penalty is normal; however, the penalty may be reduced or even eliminated if proper documentation has been prepared.

Disclosure in the tax return may in principle relieve penalties, as the tax authorities will then have been informed and may further investigate the transfer pricing case. The application of penalties is however becoming increasingly common.

Norway (continued)

Documentation requirements

The Norwegian transfer pricing requirements consist of two specific parts: filing and documentation requirements.

The filing requirement is an attachment to the annual tax return (Form RF-1123), which includes a listing of all intercompany transactions. The form will serve as a basis for the NTA when targeting transfer pricing tax audits. The filing requirements are applicable for all transactions reported in the tax return, starting from the fiscal year 2007.

In addition, covered taxpayers are obliged to prepare transfer pricing documentation that describes how the transfer prices have been established between associated enterprises. The documentation needs to include sufficient information that would enable the Norwegian tax authority to evaluate the arm's length nature of the transfer prices applied between associated enterprises. Both cross-border and domestic transactions are covered.

Documentation deadlines

The transfer pricing documentation must be submitted within 45 days after a request by the NTA. All documentation must be retained for 10 years.

Statute of limitations on transfer pricing assessments

The general statute of limitations for tax assessments in Norway states that issues regarding the tax return cannot be raised more than 10 years after the end of the income year. Transfer pricing documentation must therefore be retained and stored for at least 10 years.

The deadline is three years for changes of the tax return based on the tax authority's discretionary assessments, or the interpretation of the tax legislation, if the tax return filed is correct and complete.

The statute of limitations is two years if any tax adjustment is against the taxpayer, provided the taxpayer has not given incorrect or incomplete information to the tax authority.

Return disclosures/related-party disclosures

The filing requirement is an attachment to the annual tax return (Form RF-1123) which includes a statement of all intercompany transactions. The form will serve as a basis for the NTA when targeting transfer pricing tax audits.

Audit risk/transfer pricing scrutiny

The risk of transfer pricing issues being reviewed under an audit is high. The tax authority has a strong focus on intercompany transactions and has established an in-house transfer pricing network where the major tax offices, including the Tax Directorate, are members. The introduction of the 2007 transfer pricing documentation and filing requirements exemplifies the increased transfer pricing focus. The NTA has launched a transfer pricing audit campaign against Tax Effective Supply Chain Management (TESCM) conversions, and the first cases have been brought to court. Situations especially targeted by the tax authority are limited risk distributors or commissionaires with low margins, and those that have recently experienced reduction in margins.

In addition, the transfer pricing of intangible property is expected to be a focus area of the NTA in the near future.

APA opportunity

APAs on transfer pricing assessments are currently unavailable. There is one exemption for the transfer pricing on the sale of gas under the Norwegian Petroleum Tax Act.

Peru

Taxing authority and tax law

Superintendencia Nacional de Administración Tributaria (SUNAT); Article 32, Item 4 and 32-A of the Peruvian Income Tax Law (PITL).

Relevant regulations and rulings

Transfer pricing regulations were in force as of 1 January 2001 (Article 32 of PITL). Subsequently, Legislative Decree 945 and Legislative Decree 953 introduced transfer pricing amendments into the PITL and tax code, which were in force as of fiscal year 2004. The regulations are detailed in Article 24 and Chapter XIX (Articles 108 to 119) of the Peruvian Income Tax Regulations.

The Peruvian transfer pricing rules apply both to cross-border and domestic transactions between related parties. Additionally, all transactions with tax haven residents are considered to be with related parties. Thus, they are subject to the transfer pricing regulations. In the case of domestic transactions, they must be considered not only for income tax purposes but also for VAT and excise tax.

OECD guidelines treatment

The PITL refers to the OECD guidelines as a source of interpretation for transfer pricing analysis, as long as they do not contradict the PITL.

Priorities/pricing methods

Peruvian law implicitly adopts a best-method rule. Under Peruvian legislation, the transfer pricing methods identified are CUP, Resale Price, Cost Plus, Profit Split, the Residual Profit Split and Transactional Net Margin Method.

Transfer pricing penalties

Non-compliance with the obligation to present a transfer pricing technical study, or documentation and information supporting the calculation of the prices agreed on in transactions with related parties, is penalized with a fine of 0.6% of the company's net income of the year before that under scrutiny. The penalty cannot be less than 10% of a Tax Unit, nor more than 25 Tax Units.

Likewise, non-compliance with the obligation to file the transfer pricing return according to the dates established by SUNAT is subject to a fine of 0.6% of the company's net income of the year before that under scrutiny. The penalty cannot be less than 10% of a Tax Unit nor more than 25 Tax Units.

The adjustments to annual taxable income resulting from the tax authority's application of the transfer pricing provisions will be subject to additional penalties which may be up to 50% of the resulting tax deficiency (income misstatement penalties).

Penalty relief

The penalty reductions that a taxpayer can be subject to for not complying with the obligations of having a transfer pricing technical study or the transfer pricing informative returns are the following:

- 80% penalty reduction if the taxpayer rectifies the infraction and pays the corresponding fine within the time established by SUNAT
- 50% penalty reduction if the taxpayer rectifies the infraction but does not pay the corresponding fine within the time established by the SUNAT

Documentation requirements

Since 2006, taxpayers are compelled to keep a transfer pricing study if they meet any of the following conditions:

- The company's income exceeds PEN 6m and the amount of its intercompany transactions exceeds PEN 1m
- The company has been engaged in transactions from, to or through a low-tax jurisdiction

Peru (continued)

Documentation deadlines

According to the tax regulations published in 2008, the deadline for filing the transfer pricing return for the fiscal year 2007 to the tax authority was from 11 to 26 August 2008, depending on the tax identification number of the company. It is expected that the deadlines to file transfer pricing returns in the future will be similar dates.

Additionally, as provided in the N°167-2006-SUNAT Resolution, the tax authority can require a transfer pricing study from taxpayers once the fiscal year has ended. Nevertheless, as an exception, taxpayers who solely were or will be engaged in transactions with domiciled related parties during fiscal years 2006 and 2007 are not obligated to document their intercompany transactions.

Statute of limitations on transfer pricing assessments

According to Articles 87-7 and 43 of the Peruvian Tax Code, the statute of limitations on income tax assessments is four years after 1 January of the year that follows the year the annual income tax return is due (generally, 31 March) and six years for returns that were never filed.

Return disclosures/related-party disclosures

The main information required by the transfer pricing information return is the amount of the transaction, the transfer pricing method selected, the related party with whom the transaction was made and the amount of the adjustment, among others.

Audit risk/transfer pricing scrutiny

The risk of transfer pricing issues being reviewed under a tax audit is moderate. The Peruvian Tax Administration has not yet initiated any tax audits regarding transfer pricing issues. Nevertheless, transfer pricing technical studies are being requested by SUNAT during fiscal audits.

APA opportunity

APAs are available for cross-border transactions only.

Poland

Taxing authority and tax law

Corporate Income Tax Act dated 15 February 1992 (CIT Act), Articles 9a, 11 and 19 § 4 (Dz. U. No 21, item 86) Personal Income Tax Act dated 26 July 1991 (PIT Act) Articles 25, 25a and 30d (Dz. U. No. 80, item 350); Tax Ordinance Act dated 29 August 1997, Articles 20a-20r (Dz. U. No. 137, item 926); Ministry of Finance Decree of 16 May 2005, on the countries and territories applying harmful tax competition rules (Dz.U. No 94, item 791).

Relevant regulations and rulings

Article 11 of CIT Act and Article 25 of PIT Act introduce the arm's length principle, providing a definition of affiliation and criteria for the determination of the size of direct and indirect shares held in another entity. Documentation requirements can be found in Article 9a of the CIT Act and Article 25a of the PIT Act. Transfer pricing penalties are defined in Article 19 section 4 of the CIT Act and Article 30d of the PIT Act.

Article 9a of the CIT Act and Article 25a of the PIT Act provide detailed information on transactions which are subject to documentation requirements, including value limits and categories of such transactions.

According to Articles 9a of the CIT Act and 25a of the PIT Act, the documentation requirements also encompass transactions in which payment is made directly or indirectly to an entity in a territory or country considered to be a tax haven. The list of these territories and countries is presented in the Ministry of Finance Decree of 16 May 2005, on the countries and territories applying harmful tax competition rules. The Decree was issued separately for personal and corporate taxation purposes.

The pricing methods recognized by the tax authority are described in the Ministry of Finance Decree of 10 October 1997, on the method and procedure for assessing taxpayers' income by estimating the prices in transactions conducted by these taxpayers.

It is expected that the Ministry of Finance will soon issue a Decree on the procedure for eliminating double taxation in the situations of a corresponding adjustment based on the OECD guidelines, Arbitration Convention and Code of Conduct for Arbitration Convention based on the revised corporate income tax act as of 1 January 2009. Until the new Decree is issued the Ministry of Finance Decree of 10 October 1997 is applicable but will not be later than 31 December 2009.

The APA regulations are specified in Articles 20a-20r of the Tax Ordinance Act. Introduction of APAs has brought with it special reporting requirements. According to the Ministry of Finance Decree of 31 May 2006, taxpayers who have agreed to an APA must submit together with their annual CIT return a progress report on the implementation of the method stipulated in the APA decision.

OECD guidelines treatment

The Polish transfer pricing regulations do not refer to the OECD guidelines directly. Reference to the OECD guidelines is made only through the listing of tax havens. According to Article 9a section 6 of the CIT Act (Article 25a section 6 of the PIT Act), the list of countries recognized as tax havens is issued with regard to settlements made by the OECD. At the same time, the transfer pricing methods presented in the Polish rules are based on the OECD approach. There are no specific rules regarding the business restructuring issues in the Polish transfer pricing law. The OECD business restructuring report should, however, be an indication for the Polish tax authorities when verifying the restructuring cases in Poland.

Priorities/pricing methods

Generally, the transfer pricing methods accepted by the tax authority are based on the OECD guidelines. These methods are: CUP, Resale Price, Cost Plus, Profit Split and TNMM. The transactional methods are preferable. When the transfer price is determined by the tax authority, the application of CUP method is verified in the first instance.

If a taxpayer has determined the arm's length value of a transaction by applying one of the three accepted transactional methods (CUP, Resale Price and Profit Split), and there is no doubt about the objectivity in choosing the method, the method is also binding on the tax authority.

Poland (continued)

Transfer pricing penalties

Taxpayers face a 50% penalty tax rate for income assessed by the tax authority.

Penalty relief

The penalty rate can be reduced to the normal tax rate only if the taxpayer provides the required documentation in due time as specified by the tax authority.

Documentation requirements

Taxpayers carrying out transactions with related parties, as defined in the Polish CIT and PIT Acts, are obliged to prepare tax documentation. Requirements for such transactions apply where the total transaction amount in a tax year exceeds the following limits:

- EUR 100,000, if the transaction value does not exceed 20% of the share capital
- EUR 30,000, if the transaction refers to services or intangibles
- EUR 50,000, for other types of transaction between related entities

Taxpayers carrying out transactions in which payments are made directly or indirectly to an entity in a territory or country recognized as a tax haven are obliged to prepare tax documentation for such transactions when the total transaction amounts in a tax year exceed EUR 20,000.

The documentation requirements apply also to permanent establishments of foreign companies in Poland.

As there is no required specific form for transfer pricing documentation, the CIT and PIT regulations instead determine the extent of the documentation. The statutory transfer pricing documentation should cover at least the following elements:

- Functions performed by the parties to the transaction (with the consideration of assets employed and risks borne)
- Expected transactional costs and the method and payment due dates
- Method and manner of calculating profits and the transaction value
- Business strategy, if it influenced the transaction value
- Other factors influencing the transaction value
- Expected benefits from intangible performances or services -- this element applies only to the purchase of intangibles or services

These elements are mandatory, so if the documentation prepared does not meet one of these requirements, such documentation may be disregarded by the tax authority.

Documentation deadlines

There is no deadline for preparing the transfer pricing documentation; however, taxpayers are obliged to submit the documentation within seven days of the tax authority's request.

Statute of limitations on transfer pricing assessments

There are no special time limit provisions applicable to intercompany transactions. The general regime of the statute of limitations applies in accordance with the Tax Ordinance Act. According to Article 70, § 1 of the Tax Ordinance Act, the assessment period for tax is five years from assessment to the end of the calendar year in which the tax fell due.

Poland (continued)

Return disclosures/related-party disclosures

Information about related-party transactions is one of the elements of the annual income tax return. The taxpayer is required to indicate in the return whether it was obliged to prepare transfer pricing documentation or not.

Taxpayers who have concluded APAs must enclose, with their annual tax returns, a special report on the implementation of the transaction method chosen. The form of this report is given in the Ministry of Finance Decree of 31 May 2006.

Definition of related parties

Polish regulations recognize related entities in the following situations:

- The domestic entity participates directly or indirectly in managing or controlling the foreign entity or has a share in its capital
- The foreign entity participates directly or indirectly in managing or controlling a domestic entity or has a share in its capital
- The same legal and natural persons participate directly or indirectly at the same time in managing or controlling a domestic entity and foreign entity or have shares in their capital
- The domestic entity participates directly or indirectly in the managing or controlling of another domestic entity or has a share in its capital
- The same legal and natural persons participate at the same time directly or indirectly in managing or controlling domestic entities or have shares in their capital

Capital relations exist if one of the entities or contracting parties holds in the capital of the other entity, directly or indirectly, at least a 5% share. Domestic entities are also considered related for tax purposes by virtue of family, property or employment relations between them or between their management, supervision or control personnel, or if the same person carries out management, supervision or control functions in both these entities.

If the parties to a transaction, due to their relationship, agree or impose terms and conditions which differ from those that would be agreed to by unrelated parties, and as a result of these terms and conditions a domestic entity does not report income from the transaction or reports income that is lower than would be expected if the connection did not exist, the tax authorities may assess additional income and determine the tax due on such income for the domestic entity.

The above rules also apply to the allocation of taxable profit to the permanent establishment of a foreign entity in Poland.

Domestic entities transacting with foreign related parties are allowed to adjust their income if the foreign tax authorities question the transactional prices as not meeting the arm's length principle and, consequently, additional income for the foreign entity is assessed and the tax due on such income is determined (the so-called "corresponding adjustment ").

Adjustments to the domestic entities' income will be allowed as long as the agreement on the avoidance of double taxation between Poland and the country (i.e. country of the domestic entity's related party) will provide for the opportunity to do so.

In addition, regulations relating to income adjustment will also apply to the permanent establishment of foreign companies in Poland, with reference to the income generated through the permanent establishment and included in the permanent establishment's income.

Analogous elimination of double taxation is not allowed by Polish regulations in the case of domestic related transactions.

Audit risk/transfer pricing scrutiny

The number of transfer pricing audits has steadily increased and the risk is growing. The risk of scrutiny and a very detailed approach of the tax authorities during transfer pricing audit and consequently a tax assessment are high. While the acceptance of OECD guidelines and international practices has increased, the local approach tends to prevail during audits. Local benchmarks are preferred over pan-European ones. The pricing information from cross controls in the industry is used for benchmarking. Internal third-party transactions are used as a comparison for application of the CUP method, which is preferred by tax authorities. Moreover, Polish tax authorities have increased cooperation in the exchange of information with other countries.

The compliance regime is still rigorous in Poland. The court rulings focus mainly on legal rather than economic issues.

The most frequently audited types of transactions are limited risk structures such as limited risk distributors or contract manufacturers, immaterial services (including cost-sharing arrangements) and loans.

Poland (continued)

APA opportunity

The APA regulations came into force on 1 January 2006. The APA procedures are described in Articles 20a-20r of the Tax Ordinance Act. An APA concluded for a particular transaction is binding on the tax authority with regard to the method selected by the taxpayer. APAs in Poland may apply to transactions that have not yet been executed or transactions that are in progress at the time the taxpayer submits an application for an APA. Under the Polish rules, three types of APAs are available:

- Unilateral Agreement: This type of APA is defined in the Tax Ordinance Act as an agreement on the method of setting transfer prices between:
  - Two domestic entities – those without foreign capital links
  - A domestic entity and its related foreign party
  - A domestic entity related to a foreign entity and another domestic entity related to the same foreign entity
- Bilateral Agreement: This is an agreement concerning cross-border transactions which can be given by the Polish Ministry of Finance upon the request of a domestic entity, but only after consultations and upon obtaining consent issued by the tax authority of the related foreign entity
- Multilateral Agreement: If the agreement concerns a transaction concluded by a domestic entity with foreign entities from more than one country, in order to conclude such an agreement, the consents of all foreign entities' tax authorities are required

There are no transaction value limits to be covered by the APAs. In order to submit an application for an APA, the taxpayer must pay a fee which is usually 1% of the transaction value. However, the Tax Ordinance Act sets the following fee limits:

- Unilateral APA --- fee cannot be lower than PLN 5,000 and cannot exceed PLN 50,000
- Unilateral APA concerning a foreign entity --- fee cannot be lower than PLN 20,000 and cannot exceed PLN 100,000
- Bilateral or multilateral APA --- fee cannot be lower than PLN 50,000 and cannot exceed PLN 200,000

The mandatory elements of an APA application are:

- The suggested method for determining prices and an indication of the pricing method recognized by the tax authority
- A description of the manner of application of the suggested method, with an indication of the principles for price calculation, forecasts and analyses on which the calculation is based
- A description of the circumstances which may affect the prices
- The documents which may determine the transaction price (agreements, arrangements and other documents indicating the intentions of the parties to the transaction)
- The suggested length of the APA arrangement
- A list of entities with whom the transaction will be concluded, including their agreement to submit to the tax authority all documents and provide necessary explanations with regard to the relevant transaction
- The application must be submitted in the Polish language

The Tax Ordinance Act precisely defines the terms under which the APA procedure is to be completed:

- The unilateral APA must be issued without unnecessary delay within six months of the start of the APA application procedure
- The bilateral APA must be issued without unnecessary delay within 12 months of the start of the APA application procedure
- The multilateral APA must be issued without unnecessary delay within 18 months of the start of the APA application procedure

The APA is issued by the Ministry of Finance in the form of an administrative decision and the general administrative procedure resulting from the Tax Ordinance Act applies to the APA. In consequence, the above time limits for the APA procedure may be extended if necessary.

The period for which the APA may be concluded must be no longer than five years. The APA may be extended for another five years if the criteria applied in concluding the APA have not changed or the entity applies for an extension of the APA not later than six months before it expires. The decision is valid from the date of its delivery to all parties (including the Polish and foreign – if applicable - tax authorities).

Portugal

Taxing authority and tax law

Article 58 of the Corporate Income Tax Code tax authority.

Relevant regulations and rulings

Administrative Decree 1446-C/2001 of 21 December 2001.

OECD guidelines treatment

The Portuguese tax authority recognizes both the transactional and profit-based methods in the OECD Transfer Pricing Guidelines. Theoretically, any method is acceptable provided that it can be justified and that the traditional transactional or profit-based methods are not applicable

Priorities/pricing methods

The transfer pricing methods described in the Portuguese legislation are based on the OECD guidelines and, thus, do not introduce significant changes to the widely accepted methods recognized among transfer pricing administrators and practitioners.

However, the Portuguese rules also state (paragraphs 1 and 2 of Article 4 of the transfer pricing Ministerial Order) that the most appropriate method should be applied to a controlled transaction or to a series of transactions in order to determine whether those transactions comply with the arm's length principle.

This principle reflects a best method rule. This means that a taxpayer is expected to use the method or methods most suitable to each case, thus explaining not only the reason why a certain method is considered as the most appropriate to test whether the controlled transactions comply with the transfer pricing rules, but also why other methods are rejected.

Transfer pricing penalties

Transfer pricing adjustments are subject to the general tax penalty regime and, thus, are subject to withholding, late payment and bad-faith penalty provisions. Penalties for non-compliance with mandatory contemporaneous documentation rules may reach EUR 100,000 per year and per company. A late payment interest penalty is also applicable for transfer pricing adjustments at the rate of 4% per year. Failure to comply with documentation requirements may result in the application of secret comparables.

Penalty relief

The general tax penalty regime applies.

Documentation requirements

The Portuguese transfer pricing rules require taxpayers with a turnover and other income in excess of EUR 3m in the prior year to prepare contemporaneous documentation in the Portuguese language, which should provide evidence of market parity regarding the terms and conditions agreed, accepted and practiced in the operations made with related parties, as well as the selection and utilization of the best method. The regulations divide the documentation between relevant, supporting documentation and that which is applicable to cost contribution arrangements and intra-group services.

The transfer pricing documentation should include:

- Related-party status, according to the definition presented in Article 58 of the Corporate Income Tax Code (a company subject to a substantially favorable tax regime or included in the Portuguese offshore blacklist is considered to be a related party, independent of other related-party criteria)
- Characterization of the taxpayer's activity and that of the related parties with whom it engages in commercial transactions

Portugal (continued)

Documentation requirements (continued)

- Identification of all intercompany transactions
- The volumes, terms and conditions of the transactions for the past three years
- The counterparties to the transactions
- A functional analysis for each relevant transaction
- Technical studies focusing on essential areas of business
- A description of the method used and demonstration of how the prices are calculated
- Information about Portuguese comparables (geographical comparability requirement)
- The legal entity organization structure
- A description of the activities
- All intercompany contractual agreements and unrelated-party agreements

Documentation deadlines

For companies adopting the calendar year for tax purposes, the documentation must be prepared by the last day of June of the year following the one which it concerns or six months after the corresponding tax year end for those not using the calendar year.

All Portuguese-based companies have a statutory obligation to keep available and in good order their tax documentation file for the relevant year for a 10-year period. It must be kept at the Portuguese establishment or premises and should be prepared by the last working day of the six-month period following the tax year end. However, the tax authorities may, and do, ask for documentation on transactions at any time after they take place.

Statute of limitations on transfer pricing assessments

Assessment is possible during the four years after the end of the assessment year. The transfer pricing documentation must be kept by the taxpayer for 10 years.

Return disclosures/related-party disclosures

The main disclosure requirements at this level are contained in annexes A, B, C and H (transfer pricing annexes) of the annual declaration. The deadline for submission is the same as for the annual documentation. Taxpayers have to state in good faith in the annual declaration whether they have complied with the contemporaneous documentation requirements. Criminal ramifications may result in the case of misleading information.

Audit risk/transfer pricing scrutiny

Since January 2004, entities resident in blacklisted offshore countries or territories are deemed related parties for transfer pricing purposes. Additionally, in 2007, the Portuguese tax authority began making positive adjustments to taxpayers' taxable profits as a result of tax audits. These adjustments are based on a benchmark computed with the financial information of an internal database called MGIT.

In respect to the comparables analysis performed by the tax authority, the following issues are relevant:

- Entities with a recurrent loss situation are excluded from the comparables final sample
- Comparables identification is not disclosed in the final sample
- A transaction is considered arm's length only if within the computed interquartile range
- Only the median of the interquartile range of the benchmark is considered when the tax adjustments are made

More recently special emphasis is being put on the quality of comparables, namely on royalty CUP analysis. Head-office interest charged to branches is the most recent area of scrutiny and adjustments.

APA opportunity

An APA program was included in the Portuguese corporate income tax code in 2008. Taxpayers are now allowed to negotiate clearance for a period of three years regarding a transaction with transfer pricing implications.

Romania

Taxing authority and tax law

Ministry of Finance --- National Agency for Fiscal Administration (ANAF). Law 571/2003 regarding the Fiscal Code as subsequently completed and amended. Government Decision 44/2004 for the approval of the Norms for the application of Law 571/2003 regarding the Fiscal Code, as subsequently completed and amended.

Relevant regulations and rulings

ANAF Order 222 /2008 on the content of the transfer pricing documentation file and Rulings. Decision 529/2007 approving the procedure for the issuance of advance individual rulings and advance pricing agreements. Government Ordinance 92/2003 regarding the Fiscal Procedure Code, as subsequently completed and amended.

OECD guidelines treatment

The Romanian Fiscal Code and the related Norms provide that the Romanian tax authority should also take into consideration the OECD guidelines when analyzing the prices applied in related-party transactions. In addition, the legislation on transfer pricing documentation requirements also refers to the EU Code of Conduct on transfer pricing documentation (C176/1 of 28 July 2006).

Priorities/pricing methods

The transfer pricing methods provided by the OECD guidelines are accepted by the Romanian tax authority. The traditional methods (CUP, Resale Price Method and Cost Plus Method) are generally preferred to the transactional profit methods (TNMM and Profit Split). More specifically, when it is possible to apply, the CUP is the preferred traditional method for assessing the market value of related-party transactions.

Transfer pricing penalties

Failure to provide the authorities with transfer pricing documentation upon request and within the required term is sanctioned with a fine of approximately EUR 4,000.

Additionally, failure to present the transfer pricing documentation file or presentation of an incomplete file could trigger an estimation of the transfer prices by the tax authority. Such estimation would be performed by simply using the arithmetic average of prices for any three transactions identified as similar by the authority. The resulting adjustments would trigger a profits-tax liability of 16% (the standard profits tax rate) and late payment interest of around 36% p.a.

Penalty relief

No specific penalty relief provisions are currently in place under the Romanian transfer pricing legislation.

Documentation requirements

Even though the documentation requirements were introduced in the Romanian regulations from 2006, the specific content of the transfer pricing documentation file was formally detailed by Romanian tax authorities only in February 2008.

Such requirements provide that Romanian entities having transactions with non-resident related parties should make available upon the request of the tax authority, and within a required term, a file comprising the transfer pricing documentation for such transactions. Taxpayers that entered into APAs for related-party transactions are not required to prepare and submit a transfer pricing documentation file for the periods and transactions covered by such APAs.

The transfer pricing documentation file should comprise information regarding the taxpayer, the group and the related-party transactions (including an analysis of functions performed and risks assumed by the related parties), as well as information on the transfer pricing methods used for determining the value of related-party transactions and a set of relevant statistical comparables.

Romania (continued)

Documentation deadlines

The term for the provision of the transfer pricing documentation file is set by the tax authority depending on the complexity of transactions, and it can be for a period of up to three months from the date of tax authority's request (such term may be extended only once for a period equal to the initial period). The transfer pricing documentation may be requested by the tax authority during any tax audit (e.g., audits for VAT reimbursement requests), and there is no specific requirement to have the transfer pricing documentation submitted to the Romanian tax authority together with annual tax returns.

Separately, taxpayers that have an APA must submit annually to ANAF a report regarding observance of the APA terms and conditions. This report deadline is similar to that of the submission of annual financial statements, i.e., normally the end of May. Noncompliance leads to cancellation of the APA.

Statute of limitations on transfer pricing assessments

No specific statute of limitations rules are provided for transfer pricing assessments; however, general rules for statute of limitations are applicable, i.e., the Romanian tax authority may normally review tax-related matters retroactively for five years (or 10 years in the case of fiscal evasion or fraud).

Return disclosures/related-party disclosures

Generally, information on the related-party transactions undertaken by a Romanian entity is disclosed only upon the specific request of the Romanian tax authority. Also, for statutory accounting reporting purposes, Romanian companies are required to disclose the transactions undertaken with related parties.

Separately from the above, the Romanian legislation provides for the following general disclosure requirements:

- Disclosure of transactions performed by Romanian entities with non-resident companies for which the Romanian company has an obligation to withhold taxes
- Disclosure or registration of contracts concluded by Romanian entities with non-resident companies and individuals performing in Romanian construction works, assembly, supervisory activities, advisory and technical assistance activities and any other similar activities which may trigger Romanian permanent establishment exposure
- Disclosure of long-term financing contracted by a Romanian entity with non-resident companies or individuals

Audit risk/transfer pricing scrutiny

The risk of transfer pricing scrutiny by the Romanian tax authority during a tax audit is medium to high.

APA opportunity

Comprehensive APA procedures and requirements have been in effect in Romania since June 2007. An APA may be unilateral (involving only one tax administration) or bilateral or multilateral (involving two or more tax administrations).

By means of an APA, the ANAF will approve the specific transfer pricing method utilized by a multinational entity prior to the actual transaction. APAs are binding on the tax authority as long as their terms and conditions are observed by taxpayers.

The term for issuing an APA is 12 months for unilateral agreements and 18 months for bilateral or multilateral APAs. The fees payable to ANAF for issuance or amendment of an APA are:

- EUR 20,000/EUR 15,000 ---in case of large taxpayers or for agreements on transactions with a consolidated value exceeding EUR 4m
- EUR 10,000/EUR 6,000 --- in all other cases

As a general rule, APAs are issued for a period up to five years; however, this term may be extended in certain cases.

Russia

Taxing authority and tax law

The Federal Tax Service of the Russian Federation. The Tax Code of the Russian Federation (the Tax Code).

Relevant regulations and rulings

Transfer pricing rules are stipulated primarily in Articles 20 and 40 of the Russian Tax Code. A number of clarifications from the tax authority and extensive court practice exist; however, these sources are of a non-binding nature.

OECD guidelines treatment

The taxing authority does not recognize the OECD guidelines. However, to a certain extent, the Russian Tax Code's provisions follow these guidelines, e.g., three transfer pricing methods are stipulated (CUP, Resale Minus and Cost Plus), though it is noted that the application of the Resale Minus and the Cost Plus methods differ from the approach set out in the OECD guidelines.

Amendments to the transfer pricing legislation are currently being discussed by the Russian government. If the amendments are introduced, the Russian transfer pricing rules will be brought more in line with international practice, including explicit functional analysis requirements, transfer pricing documentation and reporting on transfer prices and policies when filing a tax return. However, the Russian transfer pricing rules are not likely to be based on OECD principles and it is not likely that the amended transfer pricing rules will include any provisions on the treatment of restructurings.

These amendments may be effective from 1 January 2010 though it is possible that the taxpayers will be given one additional year to adjust to the new principles and that they will only come into "full" effect as of 1 January 2011, for example with regard to documentation and reporting requirements

Priorities/pricing methods

There are three methods mentioned in the Tax Code: CUP, Resale Minus and Cost Plus methods. In the Tax Code, the three methods are set out in a strict hierarchy. The Resale Minus method is used only if there is no information available about the prices used in identical or similar transactions by independent entities, and the Cost Plus method is applied only if both the CUP and the Resale Minus methods are inapplicable. The Resale Minus and Cost Plus methods are tested at the operating margin level, which in effect makes them similar to the OECD guidelines' TNMM method.

Transfer pricing penalties

There are no specific transfer pricing penalties. In case of a tax assessment as a result of a transfer pricing adjustment, the tax authority will charge the tax itself and interest, which is calculated as 1/300 of the refinancing rates of the Russian Central Bank for each day while the tax was underpaid. The current refinancing rate is 13.00%. The tax authority may also seek to charge a 20% penalty (40% in the case of a deliberate tax violation), and although the Tax Code does not provide the tax authority with the right to do so, it has been successful in imposing such penalties in a number of court cases.

Currently, transfer pricing documentation is not required. However, the above-mentioned expected amendments may stipulate the obligation to have such documentation for certain transactions (and corresponding fines for its absence are expected to be stipulated). These amendments may be brought into effect from 1 January 2010.

Penalty relief

Penalties are not imposed if the taxpayer voluntarily pays the tax before the tax authority indicates the tax underpayment.

As noted above, there are no specific transfer pricing penalties in the Tax Code and the court practice has been of conflicting nature in this area. In some cases, there were penalties imposed by the tax authority for transfer pricing violations, but these were cancelled by the court (generally, based on the grounds that transfer pricing rules are of an estimative nature rather than a precise tax calculation).
At the same time, there are at least three court cases at the level of the Federal Arbitration Court where the court upheld both the transfer pricing adjustment and the penalty imposed by the tax authority.

Russia (continued)

Documentation requirements

There are no specific documentation requirements under the Russian transfer pricing rules.

Documentation deadlines

Not applicable.

Statute of limitations on transfer pricing assessments

The general rule is that the tax authority may audit three years preceding the year when the audit is conducted. For example, if the tax audit is performed in 2008, in addition to 2008, the authority can audit 2005, 2006 and 2007. In a case where it is proved that a taxpayer acted in "bad faith," including where a taxpayer actively prevented the tax audit procedures, the statute of limitations could be expanded.

Return disclosures/related-party disclosures

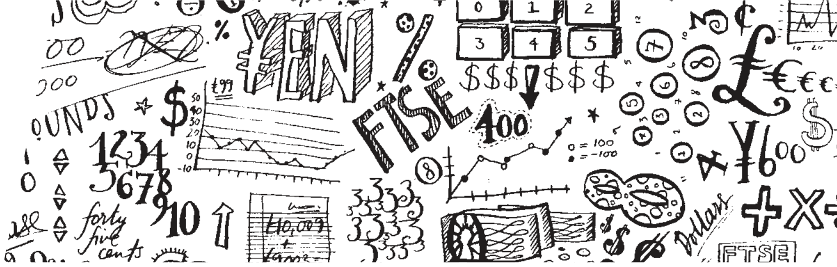
There are no disclosure requirements at the present time. However, the expected amendments to the transfer pricing rules would require the disclosure of transactions with related parties and also other types of "controlled transactions" (e.g., cross-border provision of services, transactions with parties located in low-tax jurisdictions, etc.). The expected amendments might include a transactional threshold of RUR 10m.

Audit risk/transfer pricing scrutiny

At the moment, the overall risk of a successful transfer pricing audit is still low. For example, as of 2007, based on the available data, the tax authority only succeeded in approximately 15% of the transfer pricing tax court cases. However, although taxpayers win the majority of transfer pricing cases, the tax authority continues to increase the number of cases they take to court year by year, and in 2007, around 600 court cases included references to the transfer pricing rules. Out of those cases, it is estimated that approximately 30% were primarily focused on transfer pricing issues.

APA opportunity

APAs are not allowed under the current legislation, but it is expected that an APA program will be available under the amended TP rules. It might only be available for "major" taxpayers.



Singapore

Taxing authority and tax law

Inland Revenue Authority of Singapore (IRAS). Singapore does not have specific transfer pricing legislation. General income tax provisions cover transfer pricing. These are § 53 (2A) of the Income Tax Act, which concerns related-party business dealings between a non-resident and a resident, and § 33 of the Income Tax Act, which is a general anti-avoidance provision.

Relevant regulations and rulings

The IRAS issued Transfer Pricing Guidelines on 23 February 2006 (Singapore Transfer Pricing Guidelines). There are also supplementary circulars on the IRAS's transfer pricing consultation process and administrative procedures relating to APAs (referred to further below).

OECD guidelines treatment

The Singapore Transfer Pricing Guidelines are consistent with the OECD Transfer Pricing Guidelines. The principles and transfer pricing methods set out in the OECD guidelines are acceptable in Singapore.

Priorities/pricing methods

The IRAS does not have a specific preference for any of the five prescribed methods outlined in the OECD guidelines. The transfer pricing method that produces the most reliable results should be selected and applied.

Transfer pricing penalties

There are no specific penalties regarding transfer pricing. Under general tax provisions relating to understatements of income, the penalty range is from 100% to 400% of the tax underpaid. In practice, where a transfer pricing adjustment is made, penalties will most likely be applied if the taxpayer has no or insufficient transfer pricing documentation.

Penalty relief

In general, tax penalties can be mitigated if there is reasonable cause for the understatement of income. Good-quality transfer pricing documentation is important in mitigating penalties.

Documentation requirements

Singapore tax law and the Singapore Transfer Pricing Guidelines do not explicitly impose a formal requirement to prepare transfer pricing documentation. The IRAS expects taxpayers to assess their transfer pricing risk and prepare transfer pricing documentation commensurate with that risk. At a minimum, Singapore taxpayers should perform and document a transfer pricing risk assessment regarding their related-party dealings. Based on the assessment, the taxpayer should determine whether more detailed transfer pricing documentation should be prepared.

A transfer pricing risk assessment should cover at least the following information:

- A description of the taxpayer's related-party transactions, including the amount of the transactions and their contractual terms
- A high-level functional analysis that describes the key contributors to the relevant transactions in terms of functions performed, assets developed, assets used and risks assumed
- An outline of the taxpayer's assessment of its tax risk

If a Singapore taxpayer has complex or large transactions, preparation of more detailed transfer pricing documentation may be necessary to substantiate compliance with the arm's length principle. More detailed transfer pricing documentation would usually include:

- Detailed factual information regarding the related-party transactions, including the functions performed, assets developed, assets used and risks assumed in relation to the transaction
- An analysis of the applicable industry in which the taxpayer operates
- Selection and application of one of the transfer pricing methods specified in the Singapore Transfer Pricing Guidelines
- An economic analysis that supports the use of the selected method using appropriate benchmarking data and analysis

Singapore (continued)

Documentation deadlines

There is no deadline for the preparation of documentation. However, when a taxpayer believes that it has potential transfer pricing risk, then transfer pricing documentation should be prepared contemporaneously. There is also no submission requirement or deadline. However, documentation should be made available if requested by the IRAS.

Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is as follows:

- If the year of assessment is 2007 or a preceding year of assessment the statute of limitations is six years from the end of the year of assessment to which the transfer pricing issue relates.
- If the year of assessment is 2008 or a subsequent year of assessment the statute of limitations is four years from the end of the year of assessment to which the transfer pricing issue relates.

Return disclosures/related-party disclosures

No specified disclosures are required on Form C, Singapore income tax return.

Audit risk/transfer pricing scrutiny

The purpose of the Singapore Transfer Pricing Guidelines is to create an awareness of transfer pricing issues. Given the IRAS's desire to create awareness about transfer pricing, it is likely that over time there will be an increase in the number of tax audits that involve transfer pricing.

In July 2008 the IRAS issued a circular on "Transfer Pricing Consultation." The transfer pricing consultation process is intended to assess the level of taxpayers' compliance with the Singapore Transfer Pricing Guidelines and to identify potential areas where the IRAS can further facilitate and advise taxpayers on appropriate transfer pricing practices. The initial phase of the consultation process involves the issuance of a questionnaire regarding certain transfer pricing matters. These questionnaires are (and have been) issued to various taxpayers. Based on the answers to the questionnaire the IRAS will assess whether a field visit to the taxpayer's business operations and review of the taxpayer's transfer pricing documentation are necessary. Further steps may involve specific guidance from the IRAS to the taxpayer regarding compliance with the arm's length principle.

The risk of a transfer pricing audit is currently medium.

APA opportunity

Unilateral, bilateral and multilateral APAs are available. However, for bilateral and multilateral APAs, there must be a double tax agreement between Singapore and the other involved country or countries. The Singapore Transfer Pricing Guidelines outline the procedures for applying for an APA. Further procedural guidance on the APA process has been provided in the IRAS circular "Supplementary Administrative Guidance on Advance Pricing Arrangements" issued in October 2008. The circular applies to APA requests made after 20 October 2008 and includes guidance on the following:

- Suggested timing for the overall APA process
- The circumstances where the IRAS may reject a taxpayer's APA request
- The nature of taxpayer resources and commitments that should be made when an APA is requested
- That "roll-backs" are limited to bilateral and multilateral APAs

Slovak Republic

Taxing authority and tax law

Slovak Tax Directorate, local tax authorities and Ministry of Finance.

Sections 2, 17 (5, 6, 7) and 18 of the Income Tax Act. Act on International Assistance and cooperation by tax administrators.

Relevant regulations and rulings

The Slovak transfer pricing rules laid down in the Income Tax Act generally conform to the OECD guidelines. The OECD Transfer Pricing Guidelines were published in the Slovak Financial Newsletter but are not legally binding. Nevertheless, the tax authority should follow them in practice.

The Slovak Income Tax Act has been amended with effect as of 1 January 2009. The amendment introduced an obligation of the taxpayer to prepare and keep transfer pricing documentation supporting the transfer pricing method used in transactions with foreign related parties. The required content of transfer pricing documentation is stipulated in Guidance No. MF/8288/2009-72 of the Slovak Ministry of Finance.

OECD guidelines treatment

The Slovak tax authorities usually follow the provisions of the OECD guidelines. The acceptable methods listed in the Income Tax Act correspond with the methods stipulated by the OECD guidelines.

Priorities/pricing methods

The Slovak Income Tax Act prefers the methods based on the comparison of prices over methods based on the comparison of profits, combined methods or other alternative methods. The method used must respect the arm's length principle. The general recommendations provided in the OECD guidelines should be followed.

Transfer pricing penalties

No penalties specific to transfer pricing exist. The penalty for unpaid (or understated) tax liability equals three times the basic interest rate of the European Central Bank (at the date of issue 3*2% = 6%). This is not a per annum rate, but rather the penalty would be a multiple of this rate and the under-declared tax, irrespective of the time of tax underpayment. In addition, a penalty for the breach of non-monetary obligations (e.g., non-existing or insufficient supporting documentation) of an amount up to EUR 33,193.92 can be imposed. On assessing the penalty for the breach of non-monetary obligations, the tax authorities have to take into account all the circumstances that led to the breach of nonmonetary obligations (e.g. importance, duration and consequences of the breach).

Penalty relief

There are no specific reductions in penalties. Generally, a penalty is reduced by half if the taxpayer submits a supplementary income tax return where the tax base is adjusted upwards. Upon a successful challenge of transfer prices by the tax authority, no specific reduction in penalties is available.

Documentation requirements

The required content of transfer pricing documentation is stipulated in Guidance No. MF/8288/2009-72 of the Slovak Ministry of Finance. The intent of the Guidance is to conform with the EU Code of Conduct on transfer pricing documentation for associated enterprises in the European Union (No. 2006/C 176/01).

Transfer pricing documentation must be prepared for related-party transactions with an amount exceeding the level of materiality for accounting purposes (as defined by International Financial Reporting Standards). Documentation must be prepared separately for each transaction or homogenous group of transactions.

For taxpayers obliged to use International Financial Reporting Standards (banks, insurance companies, pension funds, companies exceeding a certain size), the Guidance prescribes the required contents of the transfer pricing documentation, which are generally in line with the Masterfile approach set out by the EU Code of Conduct on Transfer Pricing Documentation. The documentation will consist of global (masterfile) and local documentation. The masterfile will have to contain information with regard to the whole group of related

Slovak Republic (continued)

Documentation requirements (continued)

parties (overview of the industry, business strategies and general overview of functions, risks and assets of the members of the group). The local documentation will contain information regarding the Slovak taxpayer. Moreover, the approach to transfer pricing, methods used, and description of transactions with related parties should be covered by the documentation. The local documentation should also include analysis of the comparability of the transactions.

For other taxpayers, the Guidance does not stipulate the contents of the documentation. However, the transfer pricing documentation must prove that prices applied in related-party transactions conform to the arm's length principle.

The language of the documentation should be Slovak, unless approved otherwise at the taxpayer's request.

It is not clear from the Guidance whether the documentation requirements will also apply for transactions performed or contracts concluded prior to 1 January 2009. However, the tax authorities already require taxpayers to have sufficient transfer pricing documentation prepared in the case of a tax audit. This stems from the provision of the Income Tax Act stipulating that the burden of proof rests with the taxpayer.

Documentation deadlines

If requested by the tax authorities, transfer pricing documentation must be submitted within 60 days of the request. The documentation does not have to be disclosed, unless requested by the tax authorities.

Statute of limitations on transfer pricing assessments

The statute of limitations in Slovakia in the case of applying a Double Tax Treaty is 10 years from the end of the year in which the respective tax return is filed.

Return disclosures/related-party disclosures

Transfer pricing documentation does not need to be enclosed with the tax return. The taxpayer should only state (on a specific row of the tax return) the difference (if any) between the prices used in transactions with related parties and the prices at an arm's length level which decreased the tax base. The tax base must be at the same time increased by this difference.

Since 2007 the corporate income tax return includes a row where the total amount of revenues from transactions with related parties must be stated (regardless of whether there are differences from arm's length prices).

Audit risk/transfer pricing scrutiny

Overall, the likelihood that a company with significant related-party transactions will get a transfer pricing audit can be classified as medium.

The Slovak Tax Authorities have been historically relatively inactive in this area, with only few complex transfer pricing audits performed. However, following the amendment to the Income Tax Act, the Slovak Tax Authorities have recently intensified their activities in the area of transfer pricing and are increasingly focusing on the transfer pricing and related documentation when auditing companies that form part of a multinational group. Thus, we expect the level of risk to increase in the future.

APA opportunity

According to Section 18 (4) of the Slovak Income Tax Act, in cases of cross-border transactions, the taxpayer may request the tax authority to approve the selected transfer pricing method. If approved, the method should be applied for a maximum of five tax periods. The Income Tax Act, however, does not explicitly stipulate that the tax authority may approve the particular price or margin percentage used. Therefore the use of advance pricing agreements in Slovakia is rather limited.

South Africa

Taxing authority and tax law

Section 31 of the Income Tax Act 58 of 1962 (the Act) contains the main legislative provisions concerning transfer pricing. Section 31 authorizes the Commissioner of the South African Revenue Services (SARS) to adjust the consideration for goods or services to an arm's length price for the purposes of computing the South African taxable income of a person.

Relevant regulations and rulings

There are no specific regulations or rulings; however, guidance on the application of § 31 is contained in Practice Notes Number 2 (14 May 1996) and 7 (6 August 1999).

OECD guidelines treatment

Although South Africa is not a member of the OECD, the South African tax authority accepts the OECD guidelines and has largely based Practice Note 7 on these Guidelines. By the same token, the South African tax authority recognizes the five methods accepted by the OECD.

Priorities/pricing methods

The SARS accepts the methods prescribed by the OECD, i.e., CUP, RPM, Cost Plus, TNMM and Profit Split. The SARS prefers transaction-based methods over profit-based methods, but the TNMM is most commonly applied by taxpayers and generally accepted, provided the taxpayer can show that reliable data was not available to apply CUP, RPM or Cost Plus. Reasons for discounting other methods must be given, and as such, the SARS does, in practice, apply a hierarchy of methods. The SARS may require that adjustments be made on foreign comparable company results used in benchmarking the results of the South African entity, to compensate for differences in risks assumed by entities operating in a different jurisdiction.

Transfer pricing penalties

Any adjustments made by the SARS under § 31 are deemed to be dividends, and the Secondary Tax on Companies (STC) at a rate of 12.5% (10% with effect from 1 October 2004) will be levied. There are no other specific penalties for transfer pricing, but general penalty rules are applicable, which could reach 200% of the additional tax resulting from an adjustment (where no or inadequate disclosure was provided).

Penalty relief

Where taxpayers have made conscientious efforts to establish transfer prices that comply with the arm's length principle, and have prepared documentation to evidence such compliance, the SARS is likely to take the view that the taxpayer's transfer pricing practices represent a lower tax risk. Accordingly, the preparation of sound and consistent transfer pricing practices may reduce the possibility of an audit and, therefore, reduce the likelihood of incurring penalties.

Documentation requirements

The taxpayer has the burden of proof that its prices are arm's length. The best way to discharge the burden of proof is by developing a transfer pricing policy, determining the arm's length amount and voluntarily producing documentation to evidence the analysis undertaken. Having said this, the SARS would expect taxpayers to have created, referred to and retained transfer pricing documentation in accordance with prudent business management principles, i.e., the principles that would govern the process of evaluating a business decision at a similar level of complexity and importance.

There is no specific statutory requirement to prepare transfer pricing documentation. However, a company that has such documentation is required to submit it together with its tax return.

South Africa (continued)

Documentation deadlines

Transfer pricing documentation should be prepared not later than the date of submission of a tax return affected by the intercompany transactions. Tax returns are due 12 months after a company's financial year-end with no further extension.

Statute of limitations on transfer pricing assessments

The statute of limitations is three years from the date of assessment. There is no limitation on the examination of a tax return if an amount was not assessed due to fraud, misrepresentation or non-disclosure of material facts.

Return disclosures/related-party disclosures

The company has to answer a number of questions and provide further details specifically related to its transfer pricing policies and documentation in its annual tax return.

Audit risk/transfer pricing scrutiny

The risk of transfer pricing issues being reviewed under an audit is high, as transfer pricing remains an area of focus for the SARS. The SARS communicates on a regular and ongoing basis with other revenue authorities, particularly the United Kingdom's HMRC.

APA opportunity

APAs are not available.

South Korea

Taxing authority and tax law

National Tax Service (NTS). The Law for Coordination of International Tax Affairs (LCITA).

Relevant regulations and rulings

Presidential Enforcement Decree (PED), the Ministerial Decree and Interpretations.

OECD guidelines treatment

The LCITA has priority over the OECD guidelines. The NTS recognizes the OECD guidelines, but the OECD guidelines have no legally binding effect. Hence, if a taxpayer's argument is based on the OECD guidelines only and not the LCITA, in practice, the NTS or regional tax offices may not accept it.

Priorities/pricing methods

The South Korean transfer pricing regulations prescribe the following transfer pricing methods: CUP, Resale Price Method, Cost Plus Method, Profit Split Method, TNMM, and other reasonable methods. Among the aforementioned transfer pricing methods, the taxpayer is to select the most reasonable method based on the availability and reliability of data. However, according to the LCITA, the transaction-based methods, i.e., CUP, Resale Price Method and Cost Plus Method, have priority over the profit-based methods, i.e., Profit Split Method and TNMM. Other reasonable methods may be selected if none of the five specific methods can be applied.

Transfer pricing penalties

There are two types of penalties associated with a transfer pricing adjustment: an underreporting penalty and an underpayment penalty.

- The underreporting penalty is approximately 10% of the additional taxes resulting from a transfer pricing adjustment.
- The underpayment penalty, which is an interest payment in nature, is calculated as 0.03% of the additional taxes on a transfer pricing adjustment per day (10.95% per annum) on the cumulative days. The counting of cumulative days of the underpayment starts from the day after the statutory tax filing due date, which comes three months after the fiscal year-end, and ends on the date that a tax assessment or payment is made.

There is also a penalty of up to KRW 30m for failure to provide the documentation requested by the tax authority within the due date. In general, the documents are to be submitted within 60 days of the date of request. However, the taxpayer may be granted a one-time extension for 60 days if the reasonable circumstances specified in the LCITA exist.

Penalty relief

Under the LCITA Article 13 and PED Article 23, the underreporting penalty is waived if the mutual agreement procedure (MAP) result confirms that a taxpayer is not guilty of negligence, i.e., a taxpayer shall (i) select and report the most appropriate transfer pricing method specified in the LCITA, (ii) actually apply the selected method and (iii) maintain supporting documentation.

At the end of 2008, new contemporaneous TP documentation rules were introduced in Korea. Specifically, the revision to Article 13 of the LCITA was finalized on 26 December 2008 to include an additional provision on underreporting penalty relief. The new provision is effective from the date of the enactment (i.e. 26 December 2008) and shall be applied to TP adjustments made thereafter. It states that if the taxpayer has prepared and maintained contemporaneous TP documentation for the TP methods applied to the cross-border intercompany transactions reported in the corporate income tax return, and such documentation supports the reasonableness of the TP methods reported, the penalty for underreporting will be waived in the case where a TP adjustment is made.

The revision to the PED of the LCITA that provides guidelines on the implementation of this new provision was released on 4 February 2009. The effective date is the same as the finalization date (i.e., 4 February 2009), and shall be applied from the tax year into which its effective date falls.

South Korea (continued)

Penalty relief (continued)

In general, the TP documentation should include information on the taxpayer's business (including functions performed and factors that can affect pricing for intercompany transactions with related parties), details on cross-border intercompany transactions, an explanation of the TP method selected and reasons for not selecting other TP methods prescribed in the regulations, and details on the comparable company or transaction data used. The guideline also stipulates that the comparable data used should be representative and should not have been selectively chosen to favor the taxpayer's position (i.e., no "cherry picking"). In the case where a taxpayer applies a TP method different from that agreed in an APA or selected by tax auditors in a tax audit, the taxpayer needs to justify the use of the different TP method.

Documentation requirements

At the time of filing the corporate income tax return, a taxpayer is required to submit certain transfer pricing reporting forms. Under the new contemporaneous TP documentation rules, in order to receive the benefit of the relief from the underreporting penalty, taxpayers are required to prepare and maintain TP documentation by the due date of the filing of the annual corporate income tax returns. If requested by the tax authority, such contemporaneous TP documentation must be submitted to the tax authority within 30 days of the request.

Documentation deadlines

A taxpayer must submit documents and information requested by the tax authority within 60 days upon the request of the tax authority. A one-time extension for 60 days may be granted if reasonable circumstances specified in the LCITA exist. Contemporaneous TP documentation should be submitted to the tax authority within 30 days of the request. The tax authorities may also request a taxpayer submit certain information including a TP study at the time of a tax audit. In that case the taxpayer is given only a 10-day notice.

Statute of limitations on transfer pricing assessments

The statute of limitations on transfer pricing adjustments is generally five years. It extends to 10 years in case of a fraud or other wrongful act and seven years if a taxpayer does not submit the tax filing on the due date.

Return disclosures/related-party disclosures

The LCITA requires a taxpayer to submit the following transfer pricing reporting forms when filing the annual corporate income tax return:

- A form explaining the transfer pricing method selected and the reason for the selection of the method for each intercompany transaction. There are different forms for different types of transactions, i.e., tangible property transactions, intangible property transactions, service transactions and cost-sharing arrangements.
- A summary of cross-border intercompany transactions with foreign related parties
- Summary income statements of foreign related parties having cross-border intercompany transactions with the South Korean entity

Audit risk/transfer pricing scrutiny

The risk of transfer pricing issues being reviewed under an audit is high. The NTS has recently begun to routinely ask for transfer pricing documentation, even outside of the audit context. The NTS closely monitors companies whose profitability suddenly drops or companies whose profits fluctuate substantially over a number of years, and they are likely to be subject to tax audits. Also, companies paying large royalties abroad or receiving large management service fee charges or cost allocations from overseas related parties will likely be subject to scrutiny by the tax authority. The introduction of the new contemporaneous TP documentation rules shows the Korean tax authority's increased focus on TP related issues in Korea.

APA opportunity

Unilateral and bilateral APAs are available under the LCITA. In order to encourage the application of APAs, the NTS does not require an application fee, and the LCITA guarantees the confidentiality of the data submitted to the NTS with regard to an APA. In addition, the Korean tax authority is making all efforts to shorten the time being taken to process the APA. Furthermore, the Korean tax authority released its first Annual Report on APAs which includes information such as statistics on the type of APAs being concluded, the countries that are counterparties to APAs, time taken to process APA cases, etc.

Spain

Taxing authority and tax law

State Agency of Tax Administration (AEAT) and General Directorate of Taxation (DGT). Spanish Consolidated Corporate Income Tax Law (CCITL) Art. 16 (the Law).

Relevant regulations and rulings

On 18 November 2008, by Royal Decree, the Spanish Government has approved and published regulations that specify transfer pricing documentation requirements (Royal Decree 1793/2008) applicable to persons or entities participating in related-party transactions.

Transfer pricing documentation requirements have been in effect in Spain since 2006 (following Law 36/2006, applicable to tax periods beginning as from 1 December 2006). This includes a shift of the burden of proof to the taxpayer, and penalty regime. However, the Law did not include a detailed description of what the documentation should contain, except that the transfer pricing documentation had to reflect the arm's length principle and the arm's length test should be based on one of the methods specified in the Law (i.e. CUP, Cost Plus, Resale Minus, TNMM and Profit Split). The new regulations provide more details regarding the information that should be included in the documentation. Spanish taxpayers engaged in related-party transactions are now required to prepare two sets of documentation: (i) a "master file" related to the group as a whole and (ii) a "local" file for each taxpayer containing specific information on the description, analysis and valuation of the controlled transactions.

OECD guidelines treatment

Spanish Transfer Pricing legislation follows the OECD guidelines and those of the European Union Transfer Pricing Forum.

Priorities/pricing methods

The Law establishes that, in order to determine the market value, one of the following methods should be applied: CUP, Cost Plus or Resale Minus. These methods are on the same preferential level in the valuation method hierarchy.

When due to the complexity or to the information relating to the transactions, the above methods may not be applied properly, TNMM or Profit Split may be used.

Transfer pricing penalties

Failure to comply with the documentation requirements specified in the new regulations may result in major penalties. These penalties can result from not having correct documentation and/or from not applying the arm's length principle (market value).

When the assessment does not produce a tax adjustment, the penalty will be 1,500 Euros per fact, or 15,000 Euros per group of facts omitted, inaccurate or false.

When the tax authorities adjust the pricing of a transaction, the penalty may add up to 15% of the gross adjustment.

There will be no penalties where the obligation to document has been complied with, even if the Tax Authorities reassess the value of transactions.

In addition to the above, the new regulations also include the applicability of "secondary adjustments" (i.e., in those transactions where both values will have for the related parties the tax treatment that corresponds to the nature of the profit realized). The Law makes a clarification for cases where the link is defined in light of the relationship between the shareholder and the entity, the difference shall (proportionally to the participation in the entity) be considered as (1) dividends whenever such difference is in favor of the shareholder or (2) contributions by the shareholder to the entity's equity whenever the difference is in favor of the entity.

The above sanctions are compatible with aggravating circumstances such as resisting, obstructing, excusing or negating the tax authority's actions.

Spain (continued)

Penalty relief

Some reductions are applicable to penalties. Penalties should not apply with the fulfillment of the documentation requirements.

Documentation requirements

The documentation requirements are in line with those of the EU Joint Transfer Pricing Forum (JTPF). Accordingly, two types of documentation must be maintained: one global document for the group (master file) and one document for each group entity (local file). The documentation will cover domestic and international transactions. However, transactions within the same fiscal unit are exempted from the documentation requirements.

The master file documentation requirements establish the necessity of:

- General description of the organizational, legal and operative group structure, and any change thereof
- Identification of the group entities that enter into related-party transactions to the extent that they affect the operations of the Spanish corporate taxpayer, directly or indirectly
- General description of the nature, amounts and flows of related-party transactions completed by corporate group entities, to the extent that they affect the operations of the Spanish corporate taxpayer, directly or indirectly
- General description of the functions performed and the risks assumed by the different group entities, to the extent that they affect the operations of the Spanish corporate taxpayer, directly or indirectly, including any changes since the last fiscal year
- List of intangibles (including patents, trade marks, commercial brands) owned by the group, to the extent that they affect the operations of the Spanish corporate taxpayer, directly or indirectly, as well as the considerations derived from the use of these intangibles
- Description of the group's transfer pricing policies, including the pricing methodology used to justify the group policy's compliance with the arm's length principle
- List of cost-sharing and services agreements between group entities relevant to the Spanish corporate taxpayer
- List of APAs and agreements entered into, as relevant to the Spanish corporate taxpayer, and
- Corporate group's Annual Report or equivalent

On the other hand, the local documentation requirements establish the necessity of:

- A detailed description of the taxpayer's business and business strategy, including changes in the business strategy compared to the previous tax year
- A description and explanation of the specific controlled transactions, including the transactions (tangible and intangible assets, services, financial, etc.), invoices and amounts of the transactions
- A comparability analysis, including:
  - Amounts of the transactions
  - Characteristics of property and services
  - Functional analysis (functions performed, assets used, risks assumed)
  - Contractual terms
  - Economic circumstances
  - Specific business circumstances
- An explanation about the selection and application of the transfer pricing methods, why the methods were selected and how they were applied
- Any other relevant information used by the taxpayer to value related-party transactions, as well as any agreement entered into with shareholders that may affect the transaction valuation

Further information could be required by the tax administration during a tax audit in regards to the related-party transactions.

Spain (continued)

Documentation deadlines

Documentation will have to be kept by companies once the corporate income tax return is filed.

Statute of limitations on transfer pricing assessments

A general statute of limitations of four years applies. The term will be interrupted in case of a tax audit. If a new income tax return is filed with the tax authorities, the four-year period is suspended and a new one begins.

Return disclosures/related-party disclosures

Specific disclosure rules exist for transactions with "tax havens," even with unrelated parties (as per a black list).

Audit risk/transfer pricing scrutiny

High risk - Spanish Tax Authorities have stated that Transfer Pricing audits will be a priority from 2009 on forward.

APA opportunity

Taxpayers may request the tax authorities value related-party transactions before they are carried out. This request has to be filed with a proposal based on the arm's length principle. On the other hand, the tax authorities may also settle agreements with other tax authorities in order to determine the market value of the transactions jointly (i.e., bilateral APAs).

The new regulation has improved the previous regime on APAs by extending the valid term from a three-year period to a six-year period (e.g., the previous year, when the time limit for filing the tax return has not yet expired, the current year and the next four years).

Sweden

Taxing authority and tax law

Swedish Tax Agency. Sections 14:19-20 of the Income Tax Act include the arm's length principle. Sections 19:2a and b of the Law (2001:1227) on income tax returns and income statements include the documentation requirements regarding transfer prices.

The Swedish Tax Agency is responsible for the correct and uniform implementation of the tax laws. It issues guidelines, recommendations and publishes its standpoints on specific issues to the local tax offices.

Relevant regulations and rulings

Section 12:4 of the regulations (2001:1244) on income tax returns and income statements and the regulations (SKVFS 2007:1) regarding documentation of the pricing between associated enterprises. The Swedish Tax Agency also issues general taxation guidelines, which include information on transfer pricing.

OECD guidelines treatment

The Swedish tax laws on transfer pricing refer to the OECD Transfer Pricing Guidelines, and they are applied by the courts and tax authorities.

The OECD Discussion Draft on Business Restructurings is expected to significantly increase the Tax Agency's focus on restructurings but potentially also on existing structures, for example in relation to allocation of risk between related parties.

Priorities/pricing methods

One of the methods described in OECD guidelines should be applied. Transaction-based methods are preferred over profit-based methods.

Transfer pricing penalties

There are no specific transfer pricing penalties. General penalty rules apply, with penalties ranging from 10% to 40% of the additional tax imposed. In transfer pricing cases, penalties at a rate of 40% are generally imposed.

Penalty relief

Penalties are imposed on taxpayers for supplying the Tax Agency with inaccurate or insufficient information. In the preparatory work to the law that introduces transfer pricing documentation requirements, it is stated that if an income adjustment is made because the taxpayer's prices are not deemed to be at arm's length; the penalties might be reduced or eliminated if the taxpayer has prepared proper transfer pricing documentation.

Documentation requirements

Multinational enterprises are required to document transactions with related companies as of 1 January 2007. The new legislation introduces formal transfer pricing documentation requirements in relation to cross-border transactions within multinational enterprises. The documentation must include:

- A description of the company, organization and business operations
- Information regarding the characteristics and scope of the transactions
- A functional analysis
- A description of the chosen pricing method
- A comparability analysis

The functional analysis should, in addition to identifying the functions performed, risks assumed and assets used, also describe which functions, risks and assets contribute to the company's ability to generate profit. Moreover, the importance of the comparability factors described in the OECD guidelines is highlighted.

Documentation prepared in accordance with the code of conduct regarding European Union Transfer Pricing Documentation (EU TPD) is deemed to comply with the Swedish documentation requirements. The documentation should be prepared in the Swedish, Danish, Norwegian or English language.

Sweden (continued)

Documentation requirements (continued)

For transactions of limited value, it is possible to prepare simplified documentation. Transactions of limited value for fiscal year 2009 include the sale or purchase of goods amounting to approximately SEK 27m or less per counterparty on a yearly basis, or other transactions amounting to approximately SEK 5m or less per counterparty on a yearly basis. Simplified documentation is not possible for transactions involving the sale of intangible assets.

The simplified documentation should include the following:

- The group's legal and organizational structure and a description of the business operations
- The counterparty to the transaction and information on that entity's business operations
- Information on the intercompany transactions, including the type of transaction, amounts and value
- The method applied to the transaction to comply with the arm's length principle
- Information on comparable transactions, if utilized

Documentation deadlines

The underlying analysis should, in principle, be prepared in connection with the transaction. The final documentation should be available upon request from the Tax Agency. Such a request is possible from the date that the income tax return is filed.

Statute of limitations on transfer pricing assessments

A general statute of limitations applies, which is within five years of the year of assessment.

Return disclosures/related-party disclosures

No specific disclosure requirements when filing the tax return currently exist.

Audit risk/transfer pricing scrutiny

The risk that transfer price adjustments will be scrutinized during an audit is high. There has been a significantly increased focus from the tax authority on transfer pricing-related issues.

APA opportunity

There are no formal APA procedures. However, a number of informal APAs have been completed between the Swedish authorities and treaty partners. A formal APA procedure has been proposed and is expected to be effective as of 2010. The proposal includes bilateral and multilateral APAs only.

Contents

Switzerland

Taxing authority and tax law

Cantonal Tax Authorities (tax assessments) / Federal Tax Administration (SFTA; competent authority). There are no specific references to transfer pricing in Swiss tax law. However, legal support for adjusting taxable profits of a taxpayer is derived from the arm's length principle in Article 58 of the Federal Direct Tax Act.

Relevant regulations and rulings

There are no specific transfer pricing regulations.

OECD guidelines treatment

The SFTA has instructed the cantonal tax administrations in a Circular Letter issued in 1997 to adhere to the OECD Transfer Pricing Guidelines for transfer pricing matters. There are no specific tax regulations on business restructurings in Switzerland.

Priorities/pricing methods

The Swiss tax administration adheres to the OECD guidelines and prefers the transactional methods over the profit-based methods. According to Circular Letter 4/2004 the profit margin for service companies must be determined in accordance with the arm's length principle, i.e. for each taxpayer individually on the basis of comparable uncontrolled transactions considering appropriate margin ranges. The Circular Letter also implicitly states that the Cost Plus method is the most appropriate method for service companies to price their services. However, concerning the provision of financial and management services, the cost-plus method shall only be accepted in exceptional cases. Generally, when the taxpayer can, based on appropriate documents and records, prove that the applied margin is too high, the Swiss tax administration may exceptionally allow for a lower margin.

Transfer pricing penalties

There are no specific transfer pricing penalties, but general penalty rules apply. However, penalties are only imposed in cases of fraud or negligence. Interest charges for late payment are due in case of adjustments.

Penalty relief

There are no special provisions for reductions in penalties.

Documentation requirements

There are no specific documentation requirements. However, if challenged by the tax authority, the taxpayer has to demonstrate that the transfer prices applied were based on sound economic and commercial reasoning on an arm's length basis.

Documentation deadlines

There are no special provisions for documentation deadlines.

Statute of limitations on transfer pricing assessments

The general rule provides for up to 10 years back from the end of the assessment year, if new facts or circumstances are discovered by the tax administration.

Return disclosures/related-party disclosures

There are no formal related-party disclosure requirements. However, in the case of a tax audit or request from competent authorities, the taxpayer must provide the requested information to a reasonable extent.

Audit risk/transfer pricing scrutiny

The risk that transfer pricing issues will be scrutinized during an audit is at a medium level. Transfers of intangibles and transfers with offshore entities, in particular in the financial industry, receive specific scrutiny.

APA opportunity

There are no formal APA procedures. However, though the Federal Tax Administration participates in multilateral APAs, unilateral rulings are more common in practice.

Taiwan

Taxing authority and tax law

National Tax Administration (NTA); Republic of China (ROC). Articles 43-1 of the Income Tax Law (ITL). Article 50 of the ROC Financial Holding Company Law. Article 42 of the ROC Business Mergers and Acquisitions Law.

Relevant regulations and rulings

The Taiwan Transfer Pricing Examination Guidelines (TP guidelines) were put into effect on 30 December 2004.

OECD guidelines treatment

The NTA recognizes the OECD guidelines.

Priorities/pricing methods

In accordance with the TP guidelines, the pricing methods are as follows: CUP, Resale Price, Cost Plus, Profit Split, Comparable Profit method (or TNMM) and other methods prescribed by the Ministry of Finance (MOF).

Transfer pricing penalties

Pursuant to the TP guidelines, under certain circumstances, a maximum of 200% of the tax shortfall could be imposed if assessed by the tax authority.

Penalty relief

Not applicable.

Documentation requirements

Except for immaterial related-party transactions, extensive contemporaneous documentation is required. According to the TP guidelines, upon filing of the annual income tax return, an enterprise must have the transfer pricing report and relevant documents prepared.

In December 2005, the Taiwan tax authority issued a safe harbor rule for transfer pricing reports in Tax Letter Ruling No. 09404587590. The ruling provides that an enterprise is not required to prepare a transfer pricing report (other supporting documents are allowed) if any of the following criteria is met:

- The total annual revenue (including operating and non-operating) of the enterprise does not exceed TWD 100m
- The total annual revenue (including operating and non-operating) of the enterprise exceeds TWD 100m but does not exceed TWD 300m
  - The enterprise does not utilize tax credits for more than TWD 1m or loss carryforwards for more than TWD 4m to reduce the income tax or undistributed earnings surplus tax
  - An enterprise under the Financial Holding Company Law or Mergers and Acquisitions Law has no overseas related parties (whether a company or an individual), or an enterprise has no overseas affiliated companies
- The total annual controlled transactions amount is less than TWD 100m

If the Taiwan enterprise meets the safe harbor threshold and does not prepare a transfer pricing report, the Taiwan tax authority still may request "other supporting documents" as evidence of the arm's length nature of the intercompany transactions. One example of an "other supporting document" as stated under the ruling is the parent or headquarters' transfer pricing report, as long as it does not significantly vary from the concepts presented in the Taiwan TP guidelines.

In November 2008, the Taiwan tax authority released a new ruling letter (No.09704555160) to further loosen the safe harbor criteria. The new rule is applicable for fiscal years ending in December 2008 and onwards. The ruling states that an enterprise is not required to prepare a transfer pricing report if any of the following three criteria are met:

Taiwan (continued)

Documentation requirements (continued)

- The total annual revenue (including operating and non-operating) of the enterprise does not exceed TWD 300m
- The total annual revenue (including operating and non-operating) of the enterprise exceeds TWD 300m but does not exceed TWD 500m and
  - The enterprise does not utilize tax credits for more than TWD 2m in a particular year or a loss carry-forward for more than TWD 8m for the preceding five tax years to reduce the income tax or undistributed earnings surplus tax
  - An enterprise under Financial Holding Company Law or Mergers and Acquisitions Law has no transactions with any overseas related parties (whether a company or an individual), or an enterprise has no transactions with overseas affiliated companies; or
- The total annual controlled transactions amount is less than TWD 200m

The categories of documentation required are:

- Business overview
- Organizational structure
- Description of controlled transactions
- Transfer pricing report, including:
  - Industry and economic analysis
  - Functions and risks analysis
  - Application of the arm's length principle
  - Selection of comparables and related information
  - Comparability analysis
  - Transfer pricing methods selected by the enterprises
  - Transfer pricing methods selected by related parties under the same control
  - Result of comparables search under the best method of transfer pricing
- Report of affiliated enterprises under Article 369 of the ROC Company Law
- Any other documents that have significant influence over pricing between the related parties

Documentation deadlines

According to the TP guidelines, upon filing the annual income tax return, the taxpayer must have the transfer pricing report and relevant documents prepared. If the tax return meets the requirement for certification, the Tax CPA has to note on the return whether the enterprise has prepared a transfer pricing report in accordance with the TP guidelines. No attachment of the report to the return is required upon filing.

In accordance with the TP guidelines, upon audit, the enterprise has to provide the tax authority with the report within one month. With the approval of the tax authority, the submission could be extended for one month under special circumstances.

Statute of limitations on transfer pricing assessments

The statute of limitations is five years if the tax return was timely filed and seven years if not.

Return disclosures/related-party disclosures

Beginning in 2004, a taxpayer must disclose related-party transactions and include the disclosure under the annual income tax return pursuant to the TP guidelines. The disclosure generally includes:

- The investing structure
- Identification of related parties
- The related-party transaction amounts by type

Taiwan (continued)

Return disclosures/related-party disclosures (continued)

- The related-party transaction balances
- The related parties' financial information, including total revenues, gross margins, operating margins and net margins
- Whether the enterprise has prepared transfer pricing documentation for that fiscal year

In December 2005, the Taiwan tax authority issued a safe harbor rule for related-party transaction disclosures in Tax Letter Ruling No. 09404587580. The Ruling provides that an enterprise must disclose related-party transactions on its income tax return if the sum of its annual operating and non-operating revenue (total annual revenue amount) exceeds TWD 30m and also meets one of the following:

- Has related parties outside the territory of the ROC (including the headquarters and branches)
- Utilizes tax credits for more than TWD 500,000, or utilizes loss carryforwards for more than TWD 2m to reduce the income tax or undistributed earnings surplus tax
- Exceeds total annual revenue of TWD 300m

Audit risk/transfer pricing scrutiny

On 2 August 2005, the MOF issued a Tax Letter Ruling No. 9404540920 that set forth the circumstances for a transfer pricing audit as follows:

- The gross profit ratio, operating profit ratio and net income before tax ratio are below the industry average
- The parent or headquarters reports profit on the global consolidation level, but the local affiliate reports loss or much less profit than the industry average
- An enterprise reports significant fluctuations of profit over the transaction year and the two years preceding
- An enterprise fails to disclose related-party transactions in accordance with the related-party transaction disclosure requirements
- An enterprise fails to determine whether its related-party transactions are within an arm's length range and fails to prepare documents in accordance with the TP guidelines
- An enterprise fails to charge related parties in accordance with the TP guidelines or charges an abnormal amount
- An enterprise fails to provide the transfer pricing report upon a tax audit
- The transfer pricing of the enterprise has been adjusted by the tax authority, in which case, the tax years preceding and subsequent to the year of a transfer pricing audit are likely to be selected for audit
- An enterprise has significant or frequent controlled transactions with related parties in tax havens or low tax jurisdictions
- An enterprise has significant or frequent controlled transactions with related parties entitled to tax incentives
- Any other transaction fails to meet the arm's length requirements in accordance with the TP guidelines

In general, the level of audit risk is high. In the past year, there has been increased activity from Taiwan's tax authority especially with respect to requests to see documentation reports. These requests seem to be made irrespective of the revenue, the existence of cross border transactions or relative size of the company. In particular, companies conducting business through tax havens have attracted more scrutiny along with those making losses.

APA opportunity

APAs are available under articles 23 through 32 of the TP guidelines. According to Tax Letter Ruling No. 9404540920, under an APA, a tax return is not subject to a transfer pricing audit except for the following circumstances:

- The enterprise fails to provide the tax authority with the annual report regarding the implementation of the APA
- The enterprise fails to keep the relevant documents in accordance with TP guidelines
- The enterprise fails to follow the provisions of the APA
- The enterprise conceals material facts, provides false information or conducts wrongful acts

Thailand

Taxing authority and tax law

Thai Revenue Department (TRD). General transfer pricing relevant provisions of the Thai tax code (dealing with exchanges at below market price in general) are: Thai Revenue Code § 65 bis (4); § 70 ter; § 65 bis (7); § 65 ter (13), (14) and (15); and § 79/3.

Transfer pricing guideline: Departmental Instruction No. Paw. 113/2545.

Relevant regulations and rulings

On 16 May 2002, the TRD issued its guideline specifically addressing transfer pricing. The guideline, Departmental Instruction No. Paw. 113/2545, is written in the form of an internal departmental instruction which provides guidance to tax officials for tax audit purposes.

OECD guidelines treatment

Thailand's transfer pricing guideline, Departmental Instruction No. Paw. 113/2545, generally follows the model of the OECD guidelines, including allowing all methods allowed under the OECD guidelines. This includes supporting material beyond the scope of the OECD guidelines. The OECD guidelines are not binding on the TRD. The OECD guidelines may, however, be persuasive in areas not addressed by the Thai Transfer Pricing guideline.

Priorities/pricing methods

The TRD accepts CUP, Resale Price and Cost Plus. Other commercially used methods are also acceptable, such as the OECD's Profit Split and TNMM.

Transfer pricing penalties

There is no explicit penalty for transfer pricing assessments. Nor is there an explicit penalty for not having transfer pricing documentation.

However, for tax shortfalls in general, if a company is assessed by the TRD, a penalty of 100% or 200% of the tax shortfall and a 1.5% per month surcharge may be imposed. The 1.5% monthly surcharge is capped at 100% of the tax shortfall amount.

Penalty relief

In the event of a transfer pricing adjustment, there is no formal penalty relief for having in place transfer pricing documentation.

Penalties may be reduced by half or waived if the taxpayer voluntarily files a return and accounts for the tax shortfall. Surcharges are a form of interest and cannot be reduced. Contemporaneous documents cannot be used to reduce the penalty for a transfer pricing shortfall. However, they are important for the defense of transfer pricing should a tax audit take place.

Documentation requirements

The following extensive contemporaneous documentation is specified:

- The structure and relationships between business entities within the same group, including the structure and nature of business carried on by each entity
- Budgets, business plans and financial projections
- Taxpayers' business strategies and the reasons for adopting those strategies
- Sales and operating results and the nature of transactions between business entities within the same group
- Reasons for entering into international transactions with business entities in the same group
- Pricing policies, product profitability, relevant market information and profit sharing of each business entity
- Functions performed, assets utilized and risks assumed by the related business entities should all be considered
- Support for the particular method chosen

Thailand (continued)

Documentation requirements (continued)

- Where other methods have been considered, details of those methods and the reasons for their rejection (contemporaneously documented)
- Evidence supporting the negotiation positions taken by the taxpayer in relation to the transactions with business entities in the same group and the basis for those negotiating positions
- Other relevant documentation (if any) supporting the transfer prices

Documentation deadlines

The taxpayer is required to submit the transfer pricing documentation within one month of receiving the letter from the TRD requesting the documentation.

Statute of limitations on transfer pricing assessments

Under Section 19 of the Thai tax code, the statute of limitations is two years from the date of filing the tax return. This period is extendible to five years if tax evasion or fraud is suspected.

Return disclosures/related-party disclosures

No disclosure of the existence or non-existence of transfer pricing documentation is required to be submitted with a tax return. Nor does any documentation need to be filed with a tax return.

Under the Thai Federation of Accounting Professions and Securities and Exchange Commission of Thailand (SEC) regulations, the related-party transactions of companies listed on the SEC must be disclosed in the company's financial statements and annual report. Non-listed companies are not required to disclose related-party transactions in their financial statements.

Audit risk/transfer pricing scrutiny

Scrutiny of transfer pricing during a tax audit or inquiry in Thailand is common and the risk to the average multinational company is moderate to slightly high. The TRD expects taxpayers to cooperate in providing relevant transfer pricing support documentation. It is likely that failure to do so will lead to a tax audit.

Up until the present, there have been no formal transfer pricing audits in Thailand. Generally, the TRD makes tax adjustments to the deductibility of expense items through its annual routine visits to taxpayers to review their business operations. During such checks, if officials find any transactions warranting further scrutiny (including deductibility of expenses arising from intercompany transactions), a further investigation will be conducted. In most cases, the taxpayer under investigation will be required to add back the expenses (to the extent deemed excessive) to taxable income and pay the additional tax arising. The final tax adjustments are then generally settled by way of negotiations.

Since 2006, there has been more aggressive enforcement by the TRD in all areas of tax, especially transfer pricing. The increased level of enforcement mainly arises from tax collection pressure on the TRD to compensate for customs duty and excise tax shortfalls.

APA opportunity

From late 2004 onwards, there have been an increasing number of taxpayers filing APA requests (both unilateral and bilateral) with the TRD. The TRD has set up a formal APA committee to handle these APA applications. There have been a number of APAs concluded.

Turkey

Taxing authority and tax law

Ministry of Finance is the taxing authority. Transfer pricing is regulated in Article 13 of Corporate Tax Code numbered 5520, published 21 June 2006.

Article 13 of Corporate Tax Code states: "Income shall be considered to have been wholly or partially distributed in a disguised manner through transfer pricing, if the company engages in purchase of goods and services with related parties at prices or at amounts which they determine are not complying with the arm's length principle."

Transfer pricing provisions have been effective since January 2007.

Relevant regulations and rulings

There is a cabinet decree published in December 2007, and two communiqués have been issued by the Ministry of Finance, namely "General Communiqué on Disguised Profit Distribution By Means of Transfer Pricing Serial No. 1 and 2." There is no ruling, controversery and court case given to date concerning the new transfer pricing regulations.

A large number of court cases exist on the subject of disguised profit distribution (legislation before transfer pricing). They are mostly conflicting and fail to establish case law which would bind all the parties.

OECD guidelines treatment

In the preamble of the law, it is stated that the provisions of international regulations, especially the OECD Transfer Pricing Guidelines, are taken as a reference. However there is no particular reference to the OECD guidelines in the actual content of the regulations, including Article 13 of the Corporate Tax Code, the related decree and communiqués. In addition, there are two major differences from the OECD approach: the term "related party" is defined in a very broad manner, for example it includes all shareholders regardless of the level of interest and domestic related-party transactions are also covered by the new rules.

In general, the new transfer pricing rules place significant documentation and disclosure requirements on Turkish taxpayers, but it is difficult to estimate the level of assurance provided by fulfilling these requirements at the moment, as the intention of the new transfer pricing rules from the tax authority's point of view is to protect Turkey's tax base.

One of the obstacles in the way of a smooth transition in the application of the new transfer pricing rules is the lack of a reference for comparable searches and the difficulty in finding comparables, in particular in the Turkish domestic market. Please note that there is not any local database available for benchmarking studies.

Priorities/pricing methods

Taxpayers can use the following methods in order to prove that the prices applied in their transactions with related parties are arm's length: CUP, Resale Price and Cost Plus. If it is not possible to reach the arm's length price through one of these traditional methods, profit methods such as Profit Split, TNMM/CPM and other methods to be determined by the taxpayers can be selected. Taxpayers should select the most appropriate method according to the nature of their business, comparability factors and availability of relevant information. There is no priority among the traditional methods.

Transfer pricing penalties

There are no specific transfer pricing penalties, but a disguised income distribution is assumed if the transfer prices applied in related-party transactions do not meet the arm's length principle. If such a disguised distribution is assessed during a tax audit, (1) for corporate income tax purposes, 20% corporate income tax is calculated again as if no disguised distribution were applied and (2) dividend withholding tax of 15% is calculated over the net amount of the disguised distribution. Additionally late payment interest and a tax loss penalty (which is the same as tax loss amount) is charged to the tax payer.

Penalty relief

There are no special provisions for penalty relief. However, it is possible to come to a reconciliation regarding tax loss and tax penalty assessed. In such reconciliation the taxpayers may claim good faith.

Turkey (continued)

Documentation requirements

Taxpayers are required to submit a transfer pricing form related to transactions with related parties. This form should be submitted as a supplement to the corporate tax return, which must be filed by the deadline of the 25th day of the fourth month following the fiscal year.

In addition to the transfer pricing form, certain taxpayers are required to file an "Annual Transfer Pricing Report." This requirement applies to:

- Corporate taxpayers who are registered with the "Grand Taxpayers Tax Office" prepare the report covering all domestic and foreign related-party transactions
- Corporate taxpayers having activities in Turkish Free Trade Zones prepare the report covering domestic transactions conducted with related parties
- Other taxpayers prepare the report for the purpose of disclosing transactions conducted with foreign related parties

This documentation report should include, company analysis, industry analysis, related parties, each transaction conducted with related parties with their values, functional analysis and economic analysis (selection of transfer pricing method, benchmarking studies and financial analysis).

The Report is required to be prepared by the 25th day of the fourth month following the fiscal year, which is the due date of the corporate income tax return. After this date taxpayers should present their documentation reports to the Tax Authority within 15 days of a request by the Tax Authority.

Documentation deadlines

Stated in "Documentation requirements" section above.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations on transfer pricing assessments, but general rules for the statute of limitations are applicable, which is five years from accrual of the tax payment.

Return disclosures/related-party disclosures

Taxpayers are required to disclose information on all related-party transactions in their transfer pricing forms. In addition, taxpayers are required to prepare an Annual Transfer Pricing Report which should include this information in detail.

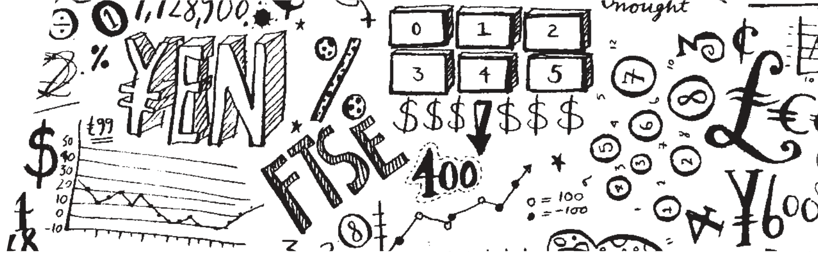
The information will include the name or title of the local related party, taxpayer identification number, name of the foreign related-party and the country in which it resides. Other required disclosures include the sale and purchase of commodities both in the form of raw material and finished goods, the lease of any property, construction services, research and development, commission-based services, all related-party financial transactions, including lending and borrowing funds, marketable securities, insurance and other transactions and intra group services. Taxpayers also must disclose the transfer pricing methods applied in the related-party transactions.

Audit risk/transfer pricing scrutiny

The risk of transfer pricing scrutiny during a tax audit is high. Tax inspectors generally focus on related-party transactions. With the abundance of related-party transactions, it is likely that tax inspectors will extend their tax audits. New transfer pricing rules have increased the awareness of transfer pricing applications in general. As a result it is expected that the tax audits in the following year will focus on related-party transactions.

APA opportunity

An APA is possible upon the demand of the taxpayer. In principle, the agreed-upon method would be binding through the period determined; however, it cannot exceed three years. APA applications will be allowed for Grand Taxpayers Tax Office corporate taxpayers as of 1 January 2008 for their foreign transactions. Other taxpayers will be able to apply for APAs as of 1 January 2009.



United Kingdom

Taxing authority and tax law

Her Majesty's Revenue and Customs's (HMRC) authority and applicable law is found in a number of taxing Acts, predominantly, Schedule 28AA, Income and Corporation Taxes Act of 1988, § 12B Taxes Management Act of 1970, § 108-111 and Schedule 16 Finance Act of 1988 (full text of the basic rule now appears in Schedule 28 AA ICTA 1988). The Finance Act of 2004 also introduced provisions extending the transfer pricing code to include thin capitalization issues and transactions within the United Kingdom (UK), including between entities in the UK under common control. From 1 April 2004, transfer pricing laws are no longer restricted to cross-border transactions. There are grandfathering provisions for the exemption of dormant companies as well as exemptions for certain transactions of small- and medium-sized enterprises.

Finance Act (No. 2) 2005 introduced further amendments to Schedule 28AA extending the transfer pricing provisions, effective as of March 2005, to include two additional situations in which financing transactions are entered into for an entity: (1) where two or more persons finance an entity and act together to collectively control the entity, and (2) where a person finances an entity and a position of control will come into existence within six months of the financing. Grandfathering provisions exist under certain conditions to ensure that the amendments will only apply to transactions effective from 1 April 2007. Where a company's accounting period straddles a relevant date (4 March 2005 and 1 April 2007, date of contract variation), profits and losses are to be calculated as if there were two distinct accounting periods divided by the relevant date.

Relevant regulations and rulings

There are no specific regulations (with the exception of provisions for APAs as below), but there are "Guidance Notes" provided in HMRC Tax Bulletins (covering audit handling, share options, VAT considerations, Mutual Agreement Procedure (MAP), penalties and documentation). Additionally, HMRC has published several technical notes and made their internal manuals dealing with Transfer Pricing available.

The Varney Report of November 2006 (produced by Sir David Varney for the Chancellor) included various recommendations for changes to the way HMRC interacts with taxpayers. HMRC has responded to the recommendations made and for transfer pricing this has included a mandated risk assessment and the publication of a Code governing Transfer Pricing Enquiries. This includes the requirement for risk assessment and the need to present a business case to one of two panels set up for the purpose before any enquiry is commenced. The panels will also review progress during the enquiry and sign off settlement proposals.

With a thorough risk assessment leading to what HMRC believe are more targeted and focused enquiries on areas warranting specialist transfer pricing resources, the risk of audit is therefore high where there are red flags present in the accounts – changed business structure, losses, wildly fluctuating margins, high value adding functions, etc.

OECD guidelines treatment

The OECD Transfer Pricing Guidelines are effectively imported into UK tax legislation, as the law is to be interpreted in a way that best accords with the guidance. Therefore, there is general adherence to the OECD guidelines.

HMRC actively participates in OECD Committees and generally tries to act in accordance with OECD pronouncements. In this regard for instance they have regard to the OECD's position on the transfer pricing of share options in interpreting the UK Transfer Pricing Tax code. However while may of the OECD's comments or suggested approaches contained within the recent Discussion Draft on Business Restructurings are already aligned with the UK's position (it operates a function over form philosophy), it is nevertheless regarded by HMRC as a discussion draft and not necessarily informative in all situations as to the correct interpretation of the UK law.

Priorities/pricing methods

With alignment to the OECD guidelines required under the statutory provisions, the most appropriate method of pricing is effectively required under the UK legislation. HMRC prefers transaction methods over profit methods (such as with the TNMM). However, there is a recent move by the HMRC towards testing results against systems profits. This may also be mirroring OECD developments in this area.

Transfer pricing penalties

Two possible penalty regimes are currently applicable; however, provisions in the Finance Act of 2004 confirm that penalties for the failure to prepare and maintain adequate transfer pricing documentation will be waived under certain circumstances in the two years beginning 1 January 2004. This period has now ended.

United Kingdom (continued)

Transfer pricing penalties (continued)

Currently, UK tax law provides that tax-geared penalties of up to 100% of any underpaid tax apply to the filing of an incorrect return due to fraudulent or negligent conduct under Section 95/96 of the Taxes Management Act of 1970 and Paragraph 20 Schedule 18 Finance Act of 1988. Failure to have a policy documented as arm's length may be seen as negligent. A flat penalty of GBP 3,000 applies for failure to keep proper records under Paragraph 23 Schedule 18 of the Finance Act of 2004. There is a general increase in the use of neglect penalties across the board for all adjustments to profits. This is now extending to routine transfer pricing adjustments.

For accounting periods after 1 April 2008, the provisions for neglect penalties have changed. The statutory reference is found in Schedule 24 Finance Act 2007. These provisions are couched in terms of careless or deliberate inaccuracies rather than neglect. They remain tax geared at up to 100% of the potential lost revenue figure. This is, however, now calculated without adjustment for the availability of loss reliefs and where the adjustment affects losses only, the lost revenue figure to which the penalty percentage is applied is calculated at 10% of the loss adjustment.

Penalty relief

The best protection against neglect penalties is a transfer pricing policy which fully documents and evidences due consideration of the application of the arm's length principle in the preparation of the relevant tax return. Mitigation of the current tax-geared penalties, where applicable, will however be made with regard to size, gravity, disclosure and cooperation. For the code effective from 1 April 2008, mitigation is largely restricted to disclosure.

Documentation requirements

HMRC has long struggled with guidance in the documentation requirements area. Tax Bulletin 37 originally set out HMRC expectations; however, this guidance is now superseded by the guidance published with the pre-budget report in December 2003.

The guidance published with the pre-budget report 2003, and now confirmed in the HMRC manuals, sets out what types of documents HMRC might expect. This divides documentation into primary accounting records, tax adjustment records and, most important, evidence. Documentation relating to evidence of compliance with the arm's length principle is to follow the OECD guidelines, and HMRC set out some suggestions on what this should or may include such as:

- Identification of the associated enterprises with whom the transaction is made
- A description of the nature of the business
- The contractual or other understandings between the parties
- A description of the method used to establish an arm's length result, with an explanation of why the method is chosen
- An explanation of commercial and management strategies, forecasts for the business or technological environment, competitive conditions and regulatory framework

HMRC applies a risk-based approach under which they would expect the level and depth of analysis to be dictated by the perceived risk of tax loss through manipulation of pricing. This typically allows a light touch approach to most UK to UK transactions.

Documentation deadlines

Under the current guidance, the first two categories of documentation should be in existence when the accounts are prepared and the return submitted. In relation to documentary evidence of arm's length pricing, it is not needed in a form capable of production to HMRC until a request by HMRC has been made. The previous guidance published by HMRC confirmed that all documentation should be in existence at the time the return is submitted. In practice, evidence confirming adherence to the arm's length principle should exist at the time of submission of the return if difficulties in its production are to be avoided.

Statute of limitations on transfer pricing assessments

Discovery assessments can be raised 6 years after the company's accounting period ends, but this is extended to 21 years where the misstatement is due to fraudulent or negligent conduct by the taxpayer. Determinations can be raised five years from the date of filing, or six years from the end of the company's accounting period. The legislation applicable before 1999 operated in a different manner, and as a result, an investigation started now would not normally lead to transfer pricing adjustments for periods before 1999.

United Kingdom (continued)

Return disclosures/related-party disclosures

There are no return disclosure requirements except those required in statutory accounts and in annual reports filed in compliance with any current APAs. The absence of disclosure requirements will typically leave prior years open to discovery assessments.

Audit risk/transfer pricing scrutiny

HMRC now conducts a risk assessment before inquiry and is mandated to have a business case signed off by a panel set up for this purpose. Every Transfer Pricing Enquiry will now involve at least one transfer pricing specialist from HMRC's Transfer pricing Group (TPG). HMRC has also highlighted areas of concern that are likely to lead to inquiries (e.g., changed business structures and characterizations) and have invested heavily in transfer pricing investigation resources since early 2008. Additionally, there is pressure on HMRC to maximize taxes, and transfer pricing is known to be an area of high priority.

APA opportunity

Section 85-87 of the Finance Act of 1999 introduced legislation on APAs. A Statement of Practice published in September 1999 supplements this legislation. Bilateral and unilateral APAs are available, but bilateral APAs are preferred. For APAs to be admitted to the program there needs to be sufficient doubt or difficulty in approaching compliance with the arm's length standard. Limited resources limit the UK to around 18-20 new admissions to the program each year.

United States

Taxing authority and tax law

Internal Revenue Service (IRS); Internal Revenue Code (IRC) § 482, § 6038A, § 6038C, and § 6662.

Relevant regulations and rulings

Treasury Regulations (Treas. Regs.) § 1.482; § 1.6662; § 1.6038A; § 1.6038C; Revenue Procedure (Rev. Proc.) 2006-54; Rev. Proc. 99-32; and Rev. Proc. 2006-9. Final regulations (T.D. 9088) on compensatory stock options under IRC § 482 released on 25 August 2003, maintain that stock-based compensation must be taken into account in determining operating expenses for qualified cost-sharing arrangements (CSAs) under Treas. Reg. § 1.482-7. Audit checklist on CSAs was issued in August 2005. In April 2007, CSA buy-ins were designated by the IRS as a "Tier I" issue, and thus susceptible to intensified audit scrutiny. A Coordinated Issue Paper was released on 27 September 2007 providing internal IRS guidance for examiners in developing CSA exam positions. The Department of Treasury and the IRS released temporary CSA regulations with an effective date of 5 January 2009 (T.D. 9441, 74 FR 340). These regulations revise the proposed regulations issued in 2005 and replace the existing CSA regulations from 1995. The temporary regulations provide the IRS with discretion to make periodic adjustments and formalize other new requirements for compliance.

New final, temporary, and proposed regulations related to services were issued on 31 July 2006. The new rules were effective 1 January 2007, and apply to tax years beginning after 31 December 2006. In conjunction with the new regulations, the IRS also issued Announcement 2006-50, which contained a proposed list of "specified covered services" that relate to a specific cost-based method. The new services regulations require stock-based compensation to be considered in total costs. On 20 December 2006, the IRS released Notice 2007-5 and Revenue Procedure 2007-13, which extended the effective date of the Services Cost Method until 1 January 2008 and added to the list of "covered services."

OECD guidelines treatment

The IRS considers its transfer pricing laws and regulations to be wholly consistent with OECD guidelines. For domestic use, the OECD guidelines do not provide support, and would not be directly relevant to the application of any pricing methods. However, if taxpayers pursue competent authority relief from double taxation or a bilateral APA, then the OECD guidelines would be important and may be used to demonstrate compliance with international principles.

Priorities/pricing methods

For tangible goods, the IRS accepts the CUP, Resale Price, Cost Plus, CPM, Profit Split, and unspecified methods. For intangible goods, the IRS accepts the Comparable Uncontrolled Transaction (CUT), CPM, Profit Split, and unspecified methods. The new services regulations provide for the following methods: Services Cost Method, Comparable Uncontrolled Services Price, Gross Services Margin, Cost of Services Plus, CPM, Profit Split, and unspecified methods. The Coordinated Issue Paper related to CSAs advises IRS auditors that unspecified methods are appropriate for valuing buy-ins (such as the "income method" and the "acquisition price method"). The regulations provide a "best method rule" for determining the appropriate method to be applied by the taxpayer for each intercompany transaction.

Transfer pricing penalties

Taxpayers may be liable for either a 20% or 40% penalty for underpayment of tax (IRC § 6662), as a percentage of the underpayment, or the penalty may apply to a valuation misstatement. There is not a U.S. penalty for failure to have documentation, but documentation may help to avoid a penalty.

Penalty relief

Penalties may be avoided by adequate disclosure on IRS Form 8275 for disregarding rules or regulations and for a substantial understatement of income tax. Penalties for negligence and for a valuation misstatement are not avoided by disclosure. No penalties apply, however, if there was reasonable cause and the taxpayer acted in good faith with respect to the transaction. The regulations provide guidance for establishing reasonable cause and good faith, for example, by preparing documentation or by obtaining an APA.

Documentation requirements

Transfer pricing documentation is not required by law. However, in practice, it is recommended that taxpayers maintain contemporaneous documentation in order to avoid penalties. Documentation must be provided to the IRS within 30 days of a request during an IRS examination. To be considered contemporaneous, the documents must be in existence when the return is filed, but their existence does not need to be disclosed with the tax return and they do not need to be provided with the return.

United States (continued)

Documentation requirements (continued)

For penalty avoidance purposes, a taxpayer is considered to have satisfied the documentation requirement if it maintained sufficient documentation to establish that the taxpayer reasonably concluded that, given the available data and the applicable pricing methods, the method (and its application of that method) provided the most reliable measure of an arm's length result under the principles of the best method rule.

A method determined as part of an APA is a consideration for whether the taxpayer's method was reasonable. The principal documents required by regulations are:

- An overview of the taxpayer's business and an analysis of legal and economic factors affecting pricing
- A description of the organizational structure
- Any documents explicitly required by regulations (e.g., CSA documents)
- A description of the pricing method and reasons why the method was selected (a best method analysis)
- A description of alternative methods and why they were not selected
- A description of controlled transactions and any internal data used to analyze them
- A description of comparables used, how comparability was evaluated and any adjustments
- An explanation of any economic analysis and any projections used to develop the pricing method
- Any material data discovered after the close of the tax year but before filing the tax return
- A general index of the principal and background documents and a description of the recordkeeping system

Documentation deadlines

If documentation is prepared to help protect against penalties, then it must be in place by the filing date of the U.S. tax return. Taxpayers must provide documentation to the IRS within 30 days of an examiner's request.

Statute of limitations on transfer pricing assessments

A general statute of limitations applies, which is three years from the later of either the tax return due date or the date the return was actually filed. For substantial understatements of income, the statute is extended to six years. For fraud, there is no statute of limitations.

Return disclosures/related-party disclosures

Taxpayers are required to file Forms 5471 and 5472 regarding transactions with related parties, and they may also need to file Form 8275 (regarding disclosure).

Audit risk/transfer pricing scrutiny

The risk of transfer pricing scrutiny during a tax audit is high. Transfer pricing is extensively regulated. The designation of CSAs and intellectual property transactions as a Tier I issue for IRS auditors increases the risk for those transactions. This has been borne out in practice, where documentation is requested at the start of any international-issues audit.

APA opportunity

The IRS has an APA Program Office dedicated to analyzing and negotiating unilateral APAs, as well as bilateral and multilateral APAs with competent authority, as provided in Rev. Proc. 2006-9. The revenue procedure has strict case management procedures, disclosure requirements, and detailed guidance for taxpayers and the IRS in submitting APA requests and processing the analyses. Competent authority guidance is provided in Rev. Proc. 2006-54, which compliments the requirements of Rev. Proc. 2006-9.

Venezuela

Taxing authority and tax law

Venezuelan Tax Administration (SENIAT). 2001 Master Tax Code: chapter III, Articles 220 to 229, Articles 109, 110 and 111. The 2001 Venezuelan income tax law, chapter III, Articles 112 to 170. The 2007 Income Tax Law Reform, article 118, inclusion of thin capitalization rules.

Relevant regulations and rulings

On February 2007, a partial reform of the Income Tax Law and rules in thin capitalization were published in the Official Gazette No.38.628. The thin capitalization rules apply, as of fiscal year 2008, to where a Venezuelan taxpayer or a Venezuelan permanent establishment has debt (controlled debt) to companies or individuals who are considered related according to Title VII, Chapter III, in the transfer pricing rules. The main inclusions are as follows:

- Taxpayer will have a limited possibility to deduct interest expenses resulting from related parties' loans when the average of its debts (with related and unrelated parties) exceeds the amount of the average of its equity for the respective fiscal year
- The extent of debt that exceeds the taxpayer's equity will be treated as equity for income tax purposes

OECD guidelines treatment

The 1995 OECD guidelines are applicable as a supplement to these rules for everything else not considered in the Venezuelan Income Tax Law.

Priorities/pricing methods

The acceptable methods are OECD methods: CUP, Resale Price, Cost Plus, Profit Split and TNMM. Priority is given to the CUP method.

Transfer pricing penalties

By failing to apply the transfer pricing methods, the taxpayer faces fines from 300 to 500 Tax Units. The 2008 Tax Unit is BSF 41.00/unit. In addition, there will be a fine ranging from 25% to 200% of the omitted tax amount, and late payment interest may also be added to these amounts in the case of a transfer pricing assessment. Failing to issue the transfer pricing informative return (PT-99) will trigger a penalty of 10 to 50 Tax Units.

Penalty relief

If a taxpayer complies with a transfer pricing method, this could be considered a mitigating circumstance in the determination of an assessment. This penalty relief is based on previous tax audit procedure and assessments, but there is not a legal provision to support it.

Documentation requirements

Effective in 2002, taxpayers are required to prepare and maintain supporting and extensive contemporaneous documentation. The documentation requirements include functions, assets, risks, organizational structure, business descriptions, detailed information of all operations with related and non-related parties, audited financial statements, agreements and contracts, reasoned method selection, inventory valuation method (if applicable), analysis results and other relevant information.

Documentation deadlines

The taxpayer must prepare documentation by the filing date of the annual income tax return at the end of every fiscal year. In addition, the taxpayer must submit the documentation upon request by SENIAT during a transfer pricing audit. It is mandatory to file the transfer pricing informative return (PT-99) during the month of June for those taxpayers who have their fiscal year ending in December. In other cases, the filing deadline will be six months after the specific year's closing.

Venezuela (continued)

Statute of limitations on transfer pricing assessments

The statute of limitations is four years from the date of filing the return and six years if the taxpayers failed to comply with the filing of any tax return, such as an income tax return, VAT returns or customs duties returns. PT-99 is not considered a tax return.

Return disclosures/related-party disclosures

A controlled party's information return must be filed during the six months immediately following the closing of each tax year. The PT-99 form is available in the tax authority's website (www.seniat.gob.ve).

Audit risk/transfer pricing scrutiny

SENIAT has been very active in transfer pricing audits lately. In the general tax audit plan called Zero Evasion Plan, SENIAT has added transfer pricing as a relevant topic to be audited. Thus far, audits have been performed on taxpayers in the oil industry, pharmaceutical industry, service providers, consumer products industry, automotive and steel and iron producers.

SENIAT has issued several transfer pricing assessments to relevant multinational corporations in diverse industries, which have been publicly informed, and the amounts were from USD 5m to USD 67m.

The audits have been organized by industry and the taxpayers are selected by:

- Having inconsistency between the transfer pricing report, income tax return and the transfer pricing informative return
- Using the TNMM
- Using non-updated financial information from comparable companies up to June of the fiscal year subject to study
- Having profit level indicators below the interquartile arm's length range
- Showing lower operating margins compared with operating margins from the previous year

The risk of transfer pricing scrutiny is high when a taxpayer performs financial operations directly or indirectly with related parties and when taxpayers have technical assistance or know how agreements with related parties abroad.

APA opportunity

Unilateral and bilateral APAs are available to the extent that they are carried out with nations that have outstanding double taxation treaties (see income tax law Articles 143 to 167, and Master Tax Code chapter III, Articles 220 to 229, Articles 109, 110 and 111).

Vietnam

Taxing authority and tax law

General Department of Taxation (GDT). Decree 164/2003/NDCP dated 22 December 2003, Decree on Detailed Provisions Implementing the Law on Corporate Turnover Tax. Circular 117/2005/TT/BTC (Circular 117) dated 19 December 2005 of the Ministry of Finance, *Circular Providing Guidelines on the Calculation of Market Prices in Business Transactions between Related Parties.*

Relevant regulations and rulings

See above Decrees and Circular. Circular 117 became effective on 27 January 2006. Circular 117 will soon be amended by Circular 01/2009/TT/BTC which clarifies the scope of the definition of "related party" and shortens the period within which to submit the documentation from 90 to 10 days from the date of demand by the tax authorities. Circular 01 is still in draft form as of February 2009.

OECD guidelines treatment

Circular 117 is generally based on the OECD guidelines. How the GDT will apply the OECD guidelines in interpreting the principles under Circular 117 remains to be seen during the first few years of implementation of the Circular. Transfer pricing documentations adhere to the OECD guidelines in applying the principles of Circular 117.

Priorities/pricing methods

Circular 117 permits the use of the following methods: CUP, Resale Price, Cost Plus, CPM (or TNMM) and Profit Split. Taxpayers must use the most appropriate method under the regulations. There is no hierarchy among the methods.

Transfer pricing penalties

Adjustments in corporate income tax liabilities may be made by the tax authority in the following cases:

- Failure to disclose, or incomplete disclosure, of related-party transactions
- Failure to produce information, documents or source documents within 30 days of a request by the tax authority
- Intentional erroneous application of the provisions of the Circular and failure to produce substantiation requirements within 90 days of the date of request by the tax authority

Penalty relief

Penalties may be avoided by adequate disclosure on Form GCN-01/HTQT of the related-party transactions and the preparation and timely production of transfer pricing documentation.

Documentation requirements

Contemporaneous documentation is required by law. Documentation must be provided to the tax authority within 30 days upon request. The documents must be in existence when the transaction occurs and must be updated during the performance of the transaction.
For penalty-avoidance purposes, a taxpayer is considered to have satisfied the documentation requirement if it maintained sufficient documentation to establish that the taxpayer reasonably concluded that, given the available data and the applicable pricing methods, the method (and its application of that method) provided the most reliable measure of an arm's length result under the principles of the most appropriate method rule.

The principal information and documents required by the regulations are:

- Information on relations between affiliated parties and the taxpayer
- Information and updated reports on strategy for development, administration and control between affiliated parties
- The pricing policy for transactions in relation to each group of products in accordance with the general guidance of affiliated parties and the taxpayer
- Documents and reports on the process of development, business strategy, projects, production, business or investment plans

Vietnam (continued)

Documentation requirements (continued)

- Regulations and procedures for financial statements and internal control reports of the company and of affiliated parties to the transactions
- A diagram of transactions and documents describing transactions, including information on parties to transactions, order and procedures for payment and delivery of products
- Documents specifying properties and technical specifications of products, the breakdown of costs (or cost) of one product, selling price of products, total amount of products produced or traded and sold in the period (specifying such items on the basis of the related transaction and an independent transaction, if any) and the quantity of products
- Information, documents and source documents concerning the process of negotiation, signing, performance and liquidation of economic contracts and agreements related to transactions (usually including a description of products, place of transaction, form of transaction, value of transaction, terms of payment, payment documentation, period of performance, minutes of meetings or instructions of the management regarding the process of negotiation, signing and the performance of a transaction)
- Information, documents and source documents related to economic conditions of the market at the time of the related transactions affecting the method of calculation of a price for transactions (for example, changes in exchange rates and policies of the government affecting prices in transactions and financial incentives)
- The pricing policy for selling and purchasing products and the procedures for control and approval of prices
- Information, documents and source documents used to select the most appropriate method, including data used for comparative analysis and adjustment of significant differences
- Other information or documents used to select and apply the methods

Documentation deadlines

The documentation must exist at the time of the transaction. Taxpayers must provide documentation to the tax authorities within 30 days of a request. If the taxpayer intentionally fails to apply the provisions of Circular 117, and fails to produce the documentation within 90 days of request, an adjustment of corporate income tax liabilities will be made.

Statute of limitations on transfer pricing assessments

The general principles on statutes of limitations apply. There is no statute of limitations with respect to the recovery or re-collection of taxes. However, administrative penalties may be imposed only within two or five years from the date of commission to the date of discovery of the violation for tax procedures or tax evasion, respectively.

Return disclosures/related-party disclosures

Taxpayers are required to file Form GCN-01/HTQT to disclose their transactions with related parties, the details of these transactions and the transfer pricing methods used to calculate the prices in these transactions. The disclosure form must be submitted together with the corporate income tax return, which must be filed within 90 days of the end of the fiscal year.

Audit risk/transfer pricing scrutiny

The risk of transfer pricing audit is high with respect to automobile and pharmaceutical companies. Companies which are reporting losses during their tax incentive periods are targeted for TP audits.

APA opportunity

Circular 117 does not provide for unilateral or bilateral APAs.

The Ernst & Young global transfer pricing practice

Successfully managing business and tax issues related to transfer pricing involves much more than documentation compliance. Transfer pricing affects almost every aspect of multinational enterprises and can significantly impact its worldwide tax burden. Our transfer pricing and tax-effective supply chain management professionals help multinational enterprises address this burden, as well as harness long-term tax and business benefits.

The size and global reach of the transfer pricing group enable us to respond immediately with recommendations aimed at the most complex global and local transfer pricing issues faced by multinational enterprises . We have integrated tax and economics into a unified transfer pricing approach that is an Ernst & Young hallmark. Our multi-disciplinary teams help multinational enterprises develop transfer pricing strategies, tax effective solutions and controversy management approaches that best fit their objectives.

Some highlights regarding our global transfer pricing and tax effective supply chain management group are shown in the table below.

Ernst & Young global transfer pricing group highlights

Our global network of transfer pricing advisors	**1000+** transfer pricing professionals spanning **50** countries	‣ 400+ people in 11 countries in the Americas ‣ 300+ people in 13 countries in Asia Pacific ‣ 300+ people in 26 countries in Europe, the Middle East and Africa
Tax authority insights	Our global transfer pricing group includes former senior tax officials of **20+** countries	‣ 5 countries' tax authorities in the Americas (Brazil, Ecuador, Mexico, US, New Zealand) ‣ 5 countries' tax authorities in Asia Pacific (China, India, Indonesia, Japan, New Zealand) ‣ 12 countries' tax authorities in Europe, the Middle East and Africa (Belgium, Denmark, Finland, Hungary, Israel, Netherlands, S. Africa, Spain, Sweden, Switzerland, Turkey, UK)
Transfer pricing regulatory experience	Our professionals have been involved in advising governments on the implementation of responsible transfer pricing regulations for **20+** countries	‣ 4 countries' transfer pricing regulations in the Americas (Argentina, Mexico, US, Venezuela) ‣ 5 countries' transfer pricing regulations in Asia Pacific (India, Indonesia, Japan, Philippines, Taiwan) ‣ 15 countries' transfer pricing regulations in Europe, the Middle East and Africa (Belgium, Czech Rep., Denmark, Estonia, Finland, Greece, Hungary, Israel, Lithuania, Netherlands, Portugal, S. Africa, Switzerland, Turkey) ‣ We have provided ad hoc advisory services to the OECD on transfer pricing issues, such as comparable company searches and transfer pricing documentation
Leader in advance pricing agreements	We have negotiated **800+** APAs globally across **20+** countries	‣ We pioneered the APA process, having conducted the first APA globally in 1990 ‣ We were involved in negotiating the first APA in 11 countries (Australia, Belgium, Canada, Czech Rep., Japan, Netherlands, New Zealand, Norway, Slovak Rep., Thailand, US)
Thought leadership	Recognized as an authoritative advisor in transfer pricing globally	‣ Many of our people globally have regularly published technical articles during the last two years in professional periodicals such as the *BNA Transfer Pricing Report* ‣ Our biennial *Global Transfer Pricing Survey* is recognized as the most authoritative research on global transfer pricing trends ‣ Our *Global Transfer Pricing Reference Guide*, a web-based resource that is updated twice a year provides rules, practices and approaches for 45+ countries

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About Ernst & Young
Ernst & Young is a global leader in assurance, tax, transaction and advisory services. Worldwide, our 135,000 people are united by our shared values and an unwavering commitment to quality. We make a difference by helping our people,our clients and our wider communities achieve their potential.

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About Ernst & Young's Transfer Pricing and Tax Effective Supply Chain Management services
We bring you a global perspective based on our long-standing experience of what really works in transfer pricing and tax effective supply chain management (TESCM). Our multidisciplinary TESCM teams work with you on supply chain design, business restructuring, systems implications, transfer pricing, direct and indirect tax, customs and accounting. We can help you build and implement the structure that makes sense for your business, improve your processes and manage the cost of trade.

Our transfer pricing professionals help you review, document, manage and defend your transfer pricing policies and processes — aligning them with your business strategy. Our talented people work with you to build the proactive, pragmatic and integrated strategies that address the tax risks of today's businesses and help your business achieve its potential. It's how Ernst & Young makes a difference.

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