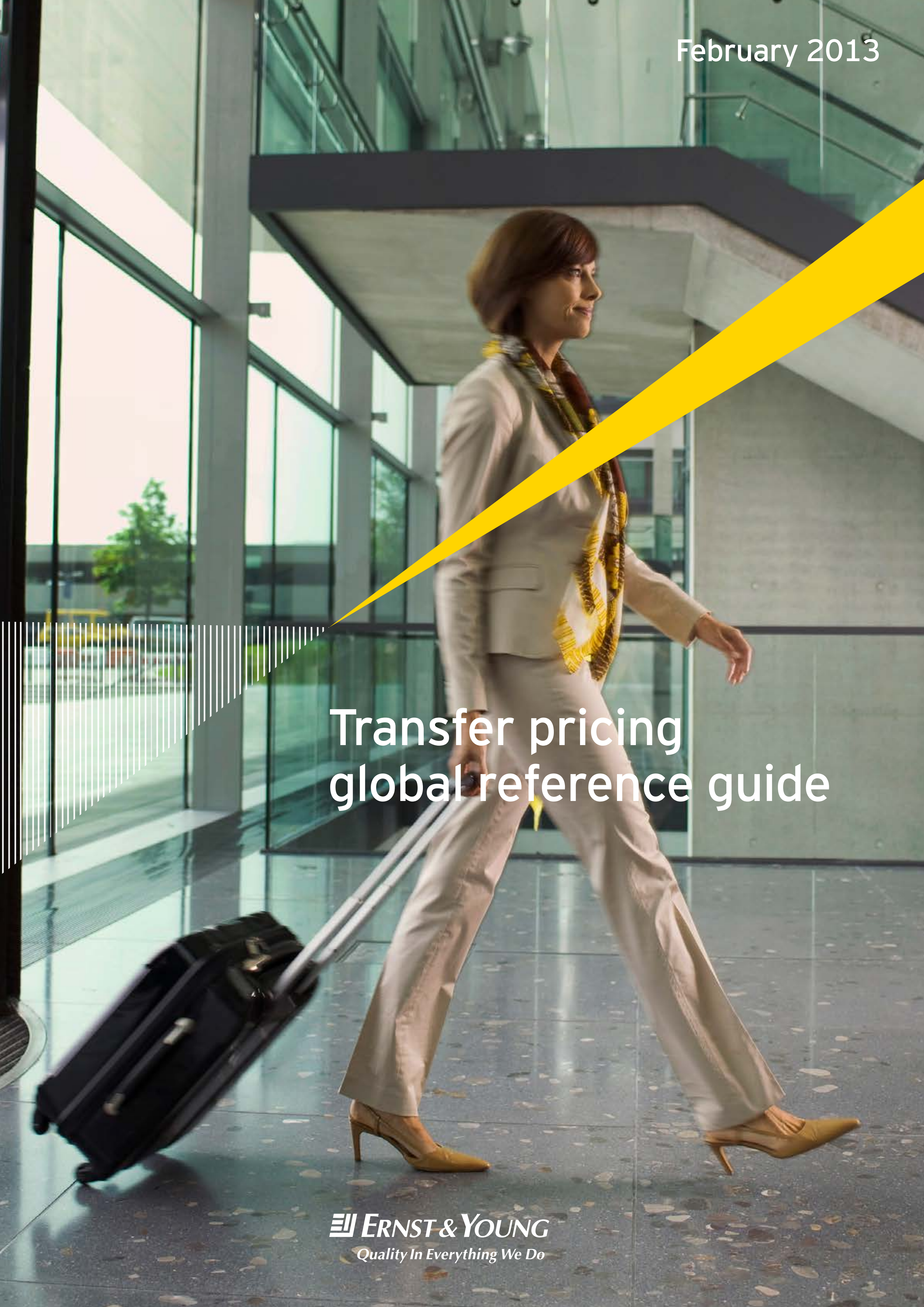

February 2013

Transfer pricing global reference guide

Ernst & Young
Quality In Everything We Do

Transfer pricing global reference guide

Planning transfer pricing strategies which support a company's business activities and tax return position and transfer pricing practices on a global basis require 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 help international tax executives to quickly identify the transfer pricing rules, practices and approaches that have been adopted by more than 70 countries and territories. These various approaches must be understood in order for a company to carry out both compliance and planning activities.

The guide outlines basic information for the covered jurisdictions 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; transfer pricing-specific returns; 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.

For a more detailed discussion of any of the country-specific transfer pricing rules, or to obtain further assistance in addressing and resolving intercompany transfer pricing issues, please contact your local Ernst & Young office or the relevant jurisdiction contact listed at the back of this brochure.

Please note the availability of other transfer pricing materials such as survey reports that share views of tax authorities and tax directors (www.ey.com/tp). Ernst & Young also annually produces *The Worldwide Corporate Tax Guide; The Global Executive;* and the *Worldwide VAT, GST and Sales Tax Guide*.

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The content is current as of 28 February 2013 unless otherwise noted. This publication should not be regarded as offering a complete explanation of the tax matters referred to and is subject to changes in the law and other applicable rules.

Legend

Taxing authority and tax law: name of taxing authority and statutory provisions currently in effect in each jurisdiction.

Relevant regulations and rulings: current transfer pricing rules and regulatory provisions in effect in each jurisdiction.

Organisation for Economic Co-operation and Development Guidelines treatment: consideration given by the taxing authority to the OECD *Transfer P*ricing Guidelines *for Multinational Enterprises and Tax Administrations*.

Priorities/pricing methods: transfer pricing methods allowed, as well as the priority of each method.

Transfer pricing penalties: discussion of potentially applicable transfer pricing penalties if a taxpayer is determined not to be in compliance with the rules imposed by the taxing authority.

Penalty relief: potential ways in which penalties may be reduced or avoided.

Documentation requirements: governing tax authority requirements or recommendations that taxpayers prepare and maintain written documentation to confirm that the amounts charged in related party transactions are consistent with the arm's length standard.

Documentation deadlines: deadline for preparing transfer pricing documentation.

Statute of limitations on transfer pricing assessments: discussion of the applicable statute of limitations regarding transfer pricing examination and assessments.

Return disclosures/related party disclosures: information on disclosures required from taxpayers regarding related party transactions.

Audit risk/transfer pricing scrutiny: discussion of the level of risk of the tax authority subjecting taxpayers to general audits, scrutinizing related party transactions and challenging the transfer pricing methodology employed. This is based on the past experience of our local tax professionals and is not a forward-looking prediction.
You should not plan your activities on the basis of the level of risk of tax authority audits taking place.

APA opportunity: discussion of the possibility of obtaining an advance pricing agreement with the tax authority.

Glossary of terms

APA (advance pricing agreement)
An agreement between a tax authority and an MNE about the determination of the appropriate transfer pricing method to be used for pricing intercompany transactions. APAs may be unilateral, bilateral (two governments) or multilateral (three or more governments).

Arm's length principle
The standard adopted by the OECD and in many jurisdictions, which mandates that the result related parties obtain from an intercompany transaction approximates the result that uncontrolled parties would have obtained had they undertaken the same transaction under the same circumstances.

CFC (controlled foreign corporation)
A subsidiary and member of an MNE group.

CPM (comparable profit method)
A method that, under US regulations, is used to determine an arm's length consideration for transfers of intangible property. If the reported operating income of the tested party is not within a certain range, an adjustment will be made. In effect, this method requires a comparison of the operating income that results from the consideration actually charged in a controlled transfer with the operating income of similar taxpayers that are uncontrolled.

CSA (cost sharing agreement) or CCA (cost contribution arrangement)
A framework agreed among enterprises to share the costs and risks of developing, producing or obtaining assets, services or rights and to determine the nature and extent of the interests of each participant in the result of the activity of developing, producing or obtaining those assets, services or rights.

CUP (comparable uncontrolled price)
A transfer pricing method that compares the price for property or services in a controlled transaction with the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances.

ETR (effective tax rate)
The percentage obtained by dividing the taxpayer's tax liability by his or her total taxable income, which reflects the rate at which a taxpayer would be taxed if his or her tax liability were taxed at a constant rate rather than progressively.

EU (European Union)
The European Union, currently consisting of 27 member states.

EUJTPF (EU Joint Transfer Pricing Forum)
The EU Joint Transfer Pricing Forum consists of representatives of governments and the private sector who advise and consult on transfer pricing issues.

FTE (full-time equivalent)
Used in this survey to indicate the number of resources employed by tax authorities to undertake transfer pricing reviews in their jurisdictions.

GAAP (Generally Accepted Accounting Principles)
The rules and practices required to be followed in certain jurisdictions in keeping financial records and books of account.

MNE (multinational enterprise)
A member of a related group that carries on business directly or indirectly in two or more countries.

MAP (mutual agreement procedure)
A dispute resolution process found in Article 25 of the OECD Model Tax Convention, as well as in various double tax conventions. MAP is a government-to-government process of negotiation to resolve matters of taxation not in accordance with the particular tax treaty and to attempt to avoid double taxation.

OECD (Organisation for Economic Co-operation and Development)
An intergovernmental organization, based in Paris, formed to foster international trade and economic development. The OECD has 34 member states. Among its many concerns are the removal of tax barriers to the free flow of goods and services and the avoidance of double taxation of income or profits. The OECD has developed guidelines and a model tax convention; see below.

OECD Guidelines
Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, the latest edition of which was published by the OECD in 2010. The OECD Guidelines endorse the arm's length principle and consist of a statement of principles rather than a set of specific rules to be applied.

OECD Model Tax Convention
Model Tax Convention on Income and Capital, last published by the OECD in September 2010. The Model Tax Convention is to be used by member states in negotiations of bilateral double tax treaties. The OECD also provides commentary on the interpretation of the Model Tax Convention and states that member countries should follow this commentary, subject to their expressed reservations thereon, when applying and interpreting their double tax treaties.

PLI (profit level indicator)
Ratio that measures the relationship between an entity's profit and the resources invested or costs incurred to achieve that profit. Refer above to CPM for further discussion of their application.

PATA (Pacific Association of Tax Administrators)
An association of the tax administrations of Australia, Canada, Japan and the United States formed to foster cooperation and the exchange of information among them. PATA has published guidance on APAs, MAPs and documentation requirements.

TNMM (transactional net margin method)
The transactional net margin method is a profits-based method that compares the profitability of an MNE member with the profits of comparable entities undertaking similar transactions. The CPM in the United States is similar to TNMM.

Albania

Taxing authority and tax law

Tax authority: General Directorate of Taxes (GDT)

Tax laws and ministerial instructions:

- Law no. 8438, dated 28 December 1998 on Income Taxes, as amended (income tax law)
  - Article 2, section 1, item (c) — definition of related party for corporate income tax (CIT) purposes
  - Article 36, paragraph 1 — correction of prices applied between related parties
  - Article 36, paragraph 2 — APA
- Law no. 9920, dated 19 May 2008 on Tax Procedures in the Republic of Albania (tax procedures law)
  - Article 5, section 1, item (h) — definition of related persons
  - Article 71, item (dh) — alternative assessment methods in transfer pricing adjustments
  - Article 72, section 2 — basis of application of alternative assessment methods
- Double taxation treaties enacted by Albania
- Decree no. 5, dated 30 January 2006 of the Ministry of Finance on income tax law
  - Section 6 — transfer pricing definition; transfer pricing adjustments following OECD Transfer Pricing Guidelines (OECD Guidelines) and APA negotiation with the Transfer Pricing Committee
- Decree no. 24, dated 2 September 2008 of the Ministry of Finance on tax procedures law
  - Article 51.3 — data used to determine the market value
  - Article 71.1, item (dh) — tax authorities' right to use alternative assessment methods in transfer pricing adjustments
  - Article 72.3, section 2 — the basis of applying the alternative assessment methods for related parties transactions

Relevant regulations and rulings

Ministry of Finance Regulation no.1 on transfer pricing, dated 11 February 2002.

OECD Guidelines treatment

The Albanian legislation on transfer pricing makes reference to the OECD Guidelines, specifically to the 1995 edition thereof.
The instruction on income tax and the transfer pricing regulation provides that the tax authorities, when applying the related provisions on transfer pricing, should resort to the OECD Guidelines for further guidance.

Priorities/pricing methods

Pursuant to the administrative guidelines on the interpretation of the income tax law, issued in 2006, the Transfer Pricing Committee, attached to the GDT, is the only body empowered to challenge the transfer prices applied by the taxpayer. Moreover, it is stipulated in the same guidelines that if the tax auditor considers that intercompany pricing is likely not compatible with the arm's length standard, the case should be referred to this Committee. The Transfer Pricing Committee should benchmark the prices used in such transactions with comparable uncontrolled prices and, if this is not possible (e.g., due to lack of appropriate data), resort to the Resale Price or the Cost-Plus method. In case none of the traditional transaction methods can be applied, due to absence of reliable data on gross margins of comparables, the Committee may apply any one of the transactional profit methods (Transaction Net Margin or Profit Split).

However, this committee has not been established yet. Moreover, the recent tax procedures law and related administrative guidelines contradict the aforementioned income tax guidelines by stipulating that the tax authorities may reassess the tax liabilities of a taxpayer, if the arm's length standard was not respected when the parties determined the transfer prices applied. To that end, they can use:

- Internal comparable uncontrolled prices
- External comparable uncontrolled prices
- Customs reference prices
- Data collected by the GDT on the prices used in comparable transactions

Finally, in case there is no data available for comparable goods or services prices, the tax authorities may refer to the OECD Guidelines for applying other methods when reviewing the transfer prices.

Albania (continued)

Transfer pricing penalties

The current legislation does not provide for specific penalties in case of transfer pricing adjustments. Therefore, in case of an adjustment, general tax penalties would apply. Hence, a penalty of 100% would apply on the amount of unpaid tax liability due in addition to the amount of reduced declared taxable profit. If, before a tax audit is initiated, the taxpayer decides to amend the transfer pricing position previously taken by filing an amended tax return for the difference between the transfer price and the market price, then the penalty imposed will be 5% of the unpaid liability for each month of delay, capped at 25%. In both cases, default interest would apply at a rate of 120% of the interbank interest rate published by the Bank of Albania.

Penalty relief

Currently, no penalty relief is available.

Documentation requirements

The Albanian transfer pricing rules do not impose any transfer pricing documentation requirement on taxpayers. In contrast, the tax administration bears the burden of proof in the first place; i.e., they are obligated to substantiate on what grounds they consider that the transfer prices applied are not in line with the arm's length standard. However, it is recommended to have a defense file available in case the tax administration challenges the intercompany transactions as incompatible with the arm's length standard during a tax audit.

Documentation deadlines

Not applicable.

Statute of limitations on transfer pricing assessments

The statute of limitations on transfer pricing assessments is five years. Transfer pricing is audited in the general course of a corporate income tax audit.

Return disclosures/related party disclosures

The current legislation does not provide for any return disclosures/related party disclosures. According to the Albanian transfer pricing regulations, the taxpayer is not required to file any transfer pricing documentation with the tax authority.

Companies' financial statements include certain compulsory disclosures on related party transactions.

Transfer pricing-specific returns

Not applicable.

Audit risk/transfer pricing scrutiny

The likelihood of a tax audit in Albania is high for domestic and foreign companies. Usually, a tax audit covers a three-to four-year period on a continuous basis. However, due to undeveloped practices, tax authorities' limited knowledge of transfer pricing and lack of documentation requirements, the risk of transfer pricing issues being scrutinized during a tax audit is medium.

APA opportunity

Albanian legislation provides for the possibility of an APA. Once concluded, an APA is binding on both the taxpayer and the tax administration. However, the competence for negotiating an APA on behalf of the Government has been assigned to the Transfer Pricing Committee, which has not yet been established.

Angola

Taxing authority and tax law

Taxing authority: Angola Ministry of Finance/National Directorate of Taxes

Angola has draft transfer pricing rules, which are expected to be released in 2013; however, Angola's anti-avoidance legislation references the arm's length standard. The draft transfer pricing rules largely follow the OECD Transfer Pricing Guidelines (OECD Guidelines).

Relevant regulations and rulings

There are no specific transfer pricing rules and regulations. The general legislation covers all controlled transactions entered into by the tested party and its related entities (including commercial transactions — goods, rights or services — and financial transactions).

OECD Guidelines treatment

Despite Angola not being a member of the OECD, the country's draft transfer pricing rules are based on the main principles contained in the OECD Guidelines, with the exception of the mandatory adoption of one of the three "transactional methods," according to the draft legislation.

The arm's length principle applies to all related party transactions. Currently, there are no specific thin capitalization rules, as they are covered neither in the general anti-avoidance legislation, nor in the draft transfer pricing rules. Adjustments made by the tax authorities on the taxable income derived from controlled transactions may occur.

Priorities/pricing methods

The draft legislation, applicable for "large taxpayers," only allows the use of the "traditional transactional transfer pricing methods" — CUP method, Resale Price method and Cost Plus method.

Transfer pricing penalties

There are no specific transfer pricing penalties. Penalties and other consequences related to the new transfer pricing regime will be determined in the new General Tax Code, which has not yet been enacted.

Penalty relief

Penalties and other consequences related to the new transfer pricing regime will be determined in the new General Tax Code, which has not yet been enacted.

Documentation requirements

Transfer pricing documentation is required for all tax years and transactions commencing on or after 1 January 2012. Specific documentation requirements have been proposed; i.e., documentation will consist of an annual transfer pricing file containing all relevant transactions with related entities and will be required when an entity's total turnover at fiscal year end exceeds 300 million UCFs (approximately USD280 million).

Angola (continued)

Documentation deadlines

An entity-specific transfer pricing file would have to be prepared and submitted to the tax administration within six months of the fiscal year end.

Statute of limitations on transfer pricing assessments

No detailed information is currently available on the statue of limitations for transfer pricing assessments.

Return disclosures/related party disclosures

No detailed information is available, other than the submission of an entity-specific transfer pricing file.

Transfer pricing-specific returns

No detailed information is available on a transfer pricing return, other than that entity-specific information must be made available. However, the code will bring in specific disclosure requirements once it has been enacted.

Audit risk/transfer pricing scrutiny

No detailed information is currently available on the level of audit risk that exists in the transfer pricing environment.

APA opportunity

No information is currently available on possible APA opportunities.

Argentina

Taxing authority and tax law

Tax authority: Internal Revenue Service (Administración Federal de Ingresos Públicos, or AFIP)

Tax law: Income Tax Law (ITL) and Regulations

Relevant regulations and rulings

Regulations 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, No. 3,132/11, No. 3,149/11 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 country, and the OECD Transfer Pricing Guidelines (OECD Guidelines) are not referenced in Argentina's ITL and Regulations. However, the tax authority usually recognizes the OECD Guidelines in practice, as long as they do not contradict the ITL and Regulations.

Several First Level Court cases also recognize the use of the OECD Guidelines, insofar as they do not contradict the ITL and Regulations.

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. Pursuant to the ITL, the accepted methods for transactions with related parties and tax havens are the CUP, Resale Price, Cost Plus, Profit Split and TNMM. The ITL does not prioritize methods. Regulation 1,122/01 articulates 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.

For transactions involving grains, oleaginous products, other soil products, oil and gas and all other goods with well-known prices in transparent markets and where the local company operates through international intermediaries that 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, if higher than the market price, the agreed-upon price. This method may not apply, however, if the local exporter is able to prove the substance of the operations of the consignee abroad following certain specific tests included in the regulations. The AFIP has the power to limit the application of this method or extend it to other transactions, depending on the 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 ARS1 million, or if 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. This fine is graduated, depending upon the level of compliance with the formal duties related to the control of taxes derived from international transactions. 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 ARS100,000 for each tax and fiscal year. If the unpaid tax exceeds ARS1 million, the prison term will increase, ranging from three-and-a-half to nine years.

Argentina (continued)

Transfer pricing penalties (continued)

For the late filing of tax returns containing international transactions involving the export/import of goods with independent parties, the taxpayer will be fined ARS9,000. For the late filing of tax returns concerning other international transactions, the taxpayer will be fined ARS20,000. For the application of penalties related to late filing or lack of filing, it is irrelevant whether or not the transactions were at arm's length. For noncompliance with the formal duties of furnishing information requested by the AFIP, the taxpayer faces fines of up to ARS45,000. The same applies to a failure to keep vouchers and evidence of prices in files on hand 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 ARS10 million, the fine is increased from ARS90,000 to ARS450,000. Interest accrues on unpaid tax balances (as from 1 January 2011, the rate is 3% on a monthly basis and 4% upon lawsuit filing).

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 ARS1,000 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 file an annual transfer pricing study for all transactions 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. An annual transfer pricing study, financial statements and certification must be filed with the tax authority by the beginning 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 close of the fiscal year. However, transfer pricing adjustments must be recognized as of the date the income tax return is due (i.e., fifth month after the fiscal year end). The semi-annual 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. Additionally, form 969 must be filed annually, within 15 days of the income tax return deadline.

Statute of limitations on transfer pricing assessments

The general statute of limitations for federal tax matters is five years for registered and registration-exempt taxpayers, and ten years for unregistered taxpayers. These periods begin on 1 January following the year in which the tax return is due. The moratorium regime in place during calendar year 2009 added one additional year to the statute of limitations period for certain fiscal years. The taxpayer must keep the transfer pricing documentation on hand, and provide it upon AFIP's request for up to five years after the period established by the statute of limitations.

Argentina (continued)

Return disclosures/related party disclosures

Taxpayers are required to file the following documentation with the AFIP:

- An annual transfer pricing study
- Audited financial statements for the fiscal year, in case they have not already been filed before
- An independent certified public accountant's certification of certain contents of the transfer pricing study
- Transfer pricing-specific returns

Transfer pricing-specific returns

Taxpayers are required to file the following transfer pricing-specific returns with the AFIP:

- Annual Form 743
- Annual Form 969
- Form 742 (for the first six-month period of each fiscal year)
- Semi-annual Form 741 (for commodities exports and imports with independent parties not located at tax havens)
- Annual Form 867 (for other exports and imports with independent parties not located in tax havens)

Audit risk/transfer pricing scrutiny

The likelihood of an annual tax audit in general can be considered high; meanwhile, the chances of a transfer pricing review during such an audit is estimated as medium. Nevertheless, once transfer pricing has become a topic of the audit, the likelihood of the tax authority challenging the taxpayer's transfer pricing methodology is high.

In addition, the trial-level court cases are being published. Although in most of these cases the taxpayers' positions prevailed, there were two court cases in favor of the tax authority. It is likely that the tax authority will try to increase revenue and strictly enforce penalties with companies that are not complying with transfer pricing requirements.

APA opportunity

Currently, APAs are not specifically addressed.

Australia

Taxing authority and tax law

Taxing authority: Australian Taxation Office (ATO)

Tax law: Division 13 of Part III of Income Tax Assessment Act 1936, Subdivision 815-A of the Income Tax Assessment Act 1997 and relevant provisions of double tax treaties.

Tax law rewrite: The Treasury has announced a rewrite of Division 13 and a review of Australia's transfer pricing rules. The first tranche of this legislation, the Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No.1) 2012 (relating to certain retrospective aspects regarding treaty partners — hereinafter referred to as "Subdivision 815-A") was passed by Parliament on 20 August 2012 and received Royal Assent on 8 September 2012. As Treasury is of the opinion that this legislation represents only a 'clarification' of the existing position regarding the role of Australia's double tax agreements in settling domestic transfer pricing disputes, the legislation has retroactive application for income years commencing on or after 1 July 2004.

An exposure draft of the second tranche of proposed legislation dealing with prospective legislative changes was released on 23 November 2012. The second tranche of proposed legislation introduces new Australian transfer pricing rules with significant self-assessment and documentation requirements.

The issue of profit attribution to permanent establishments will also be dealt with separately through a Board of Taxation review.

The Assistant Treasurer has released a consultation paper on the proposed changes to the provisions stating that the aim of the rewrite is to "bring them into line with Australian and international developments." This reform is driven by recent judicial decisions to the effect that the ATO's practice does not align with Australia's tax laws.

The application on a retrospective basis of the treaty provision will be controversial for some taxpayers and would appear to be linked to preserving the ATO's position in several high profile audit cases. This will be of great concern for taxpayers that have taken the position that existing legislation and treaties have different outcomes.

Relevant regulations and rulings

Taxation Rulings (TR)

- TR92/11: Loans
- TR94/14: Application of Division 13
- 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
- TR2007/1: Consequential Adjustments
- TR2010/7: Interaction of Transfer Pricing and Thin Capitalisation Provisions
- TR2011/1: Transfer Pricing Implications of Business Restructures

Tax Determinations (TD)

- TD2002/20: Film Production Companies and the Impact of the Tax Offset Scheme
- TD2002/28: 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
- TD2008/20: Interaction of Division 13 and the Debt/Equity Rules
- Concepts and Risk Assessment

Australia (continued)

Relevant regulations and rulings (continued)

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
- Marketing Intangibles, Business Restructuring — Discussion Paper on application of Australia's transfer pricing rules
- ATO Discussion Paper on Intra-group finance guarantees and loans — Application of Australia's transfer pricing and thin capitalization rules

ATO Practice Statements (PS LA): PS LA 2011/1: ATO's Advance Pricing Arrangement (APA) Program.

OECD Guidelines treatment

The ATO accepts the principles of the OECD Transfer Pricing Guidelines (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. However, a recent court case, Commissioner of Taxation v SNF (Australia) Pty Limited [2011] FCAFC 74, has rejected that the OECD Guidelines are relevant when interpreting Division 13. As a result of this issue and other issues raised by the SNF case, the Treasury has engaged in a process to rewrite of Australia's transfer pricing provisions (refer above).The new transfer pricing rules effectively incorporate the OECD Guidelines into Australia's domestic transfer pricing legislation.

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). Two transfer pricing decisions placed more emphasis on transaction methods and were critical of the particular applications of the TNMM. The cases resulted in the Treasurer commencing a rewrite of Australia's transfer pricing provisions, the results of which are noted above.

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. However, it is reduced to 10% where the taxpayer can demonstrate that it has a reasonably arguable position (RAP).

Where the Commissioner can demonstrate that the sole or dominant purpose is tax avoidance, a penalty rate of 50% applies. However, it 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) applies 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 approach to the application of penalties to transfer pricing adjustments will be identical whether the adjustment is made under Division 13 or Subdivision 815-A.

In addition to the above, the Exposure Draft of the second tranche of transfer pricing legislation currently proposes that, in the absence of appropriate transfer pricing documentation, it is not possible for a taxpayer to have a RAP.

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/International Dealings Schedule) to support a RAP, the penalty may be reduced.

The Commissioner 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 the 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
- Include business, economic and industry analyses
- Be relevant to the Australian operations (i.e., country- and company-specific)

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 Exposure Draft of the new transfer pricing legislation (refer above), as currently drafted, links contemporaneous documentation requirements to the penalty provisions. Taxpayers who do not prepare contemporaneous transfer pricing documentation are precluded from having a RAP in the event of a transfer pricing adjustment. However, taxpayers will not be directly penalized simply because they do not prepare documentation.

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.

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 to make amendments to tax assessments in any year for transfer pricing adjustments. However, Australia's double-tax agreements with New Zealand and Japan do include time limits for adjustments.

The Exposure Draft of the second tranche of transfer pricing legislation (refer above), as currently drafted, includes an eight year time limit for amendment of assessments. Further, as the effective date of Subdivision 815-A is 1 July 2004; this Subdivision will not apply to transfer pricing arrangements before this date.

Return disclosures/related party disclosures

The ATO requires an International Dealings Schedule (replaces Schedule 25A) to be filed with each tax return where the aggregate amount of transactions or dealings with international related parties, both revenue and capital in nature, is greater than AUD2 million. Information disclosed on the International Dealings Schedule includes:

- Countries with which the taxpayer has international related party transactions
- International related party transaction types and quantum
- The percentage of transactions covered by contemporaneous documentation that has been prepared in accordance with the four-step process for each international related party transaction type (e.g., royalties, intercompany loans, services, etc.)
- Transfer pricing methodologies selected and applied for each international related party transaction type

Australia (continued)

Return disclosures/related party disclosures (continued)

- Details of restructuring events involving international related parties
- Dealings with branch operations
- Interests in foreign companies or foreign trusts

The ATO is also undertaking a pilot program for the 2012 income year that will require some taxpayers to disclose whether they have a material reportable tax position (RTP). The test for an RTP is "what is argued is less likely or about as likely to be correct as incorrect" (i.e., where there is 50% or less likelihood of the position being upheld by a Court). The 2012 pilot applies to selected large and key taxpayers in Australia balancing on 30 June, and it is expected the pilot will roll out to a wider population in 2013.

Given the changes in the tax law and the inherent complexity and uncertainty of transfer pricing issues, taxpayers will need to carefully assess whether they have an RTP with respect to transfer pricing.

Transfer pricing-specific returns

Australian taxpayers are not required to file a separate return specifically related to transfer pricing. However, for all corporate tax returns lodged after 1 July 2012 and relating to the 2012 income tax return (or later financial years), taxpayers are required to complete the International Dealings Schedule (IDS) of their corporate tax returns. The IDS requires disclosure of a taxpayer's international related party dealings, including dealings involving permanent establishments.

The IDS replaced the Schedule 25A form, and requires significantly more information regarding international related party transactions, including:

- Disclosure on a "transaction category" basis, with greater segmentation of transaction categories (e.g. financing transactions, services transactions, royalty transactions, licence fees, derivatives, etc.)
- Disclosure of methods used to set or test the arm's length nature of dealings on a "transaction category" basis
- Disclosure of proportion of dealings covered by documentation on a "transaction category" basis
- Whether certain specific types of transactions have been entered into (e.g. business restructures).
- Disclosure of all transactions (i.e. both related and unrelated party transactions) with specified "low tax" jurisdictions.

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:

- Royalties
- Intangibles (both Australian and foreign-owned)
- Management services
- Financing arrangements, including interest-free loans, interest-bearing loans and guarantee fees
- Companies undergoing supply chain restructurings
- Transactions with recognised tax haven jurisdictions
- Low levels of profitability, or losses

Australia (continued)

Audit risk/transfer pricing scrutiny (continued)

The risk of an annual tax audit in Australia would be assessed as medium. However, where the taxpayer enters into a material level or percentage of international related party transactions, the likelihood that transfer pricing would be reviewed as part of the audit is very high. If transfer pricing is reviewed as part of the audit, the likelihood that the transfer pricing methodology will be challenged is dependent on the facts and circumstances of the case and in particular, on the ATO's assessment of whether the taxpayer's results are commercially realistic.

APA opportunity

On 17 March 2011, the ATO released their revised policies and procedures for the APA Program, PS LA 2011/1, which is administratively binding on the ATO. The Practice Statement reinforces the ATO's stated commitment to maintaining the APA Program as an effective part of Australia's transfer pricing regime.

It provides a detailed explanation of the benefits, limits and processes associated with an APA so taxpayers can make an informed decision as to whether to seek an APA in light of their facts and circumstances.

- For taxpayers whose turnover is less than AUD250 million, the introduction of a simplified APA product, combined with the opportunity to use ATO benchmarking analysis, gives them easier access to the APA Program, with its accompanying level of certainty and lower risk profile
- For larger taxpayers whose international related party transactions are more intricate, the creation of the complex APA product provides a framework to examine and resolve an approach for collateral issues, giving taxpayers an all encompassing approach to their cross-border transactions
- Taxpayers need to carefully consider their approach to transfer pricing and reconsider if an APA is appropriate for them. All this needs to be done in light of the ATO's new Risk Differentiation Framework. Entering the APA program can potentially lower a taxpayer's risk category which can in turn drastically alter the ATO's approach to audit and other compliance enforcement activities of the taxpayer going forward
- Taxpayers should consider whether key benefits of entering into an APA are applicable to their particular facts and circumstances. These benefits include:
  - Providing certainty of transfer pricing methodology
  - Providing taxpayers with a more flexible approach to obtain approval for a novel methodology
  - Reducing compliance costs by eliminating the risk of transfer pricing risk review or audit
  - Reducing the record-keeping burden
  - Allowing a taxpayer to better predict costs and expenses, including tax liabilities

Austria

Taxing authority and tax law

Taxing authority: Ministry of Finance (MF)

Tax law:

- Section 6(6) Income Tax Act
- Section 8 Corporate Income Tax Act
- Sections 124, 131 and 138 Federal Tax Code (FTC)
- Section 118 FTC regarding unilateral APAs

Relevant regulations and rulings

- Transfer Pricing Guidelines (BMF-010221/2522-IV/4/2010, 28 October 2010)
- Income Tax Guidelines 6.13.3, 2511-2513
- Corporate Income Tax Guidelines 14.8.2, 1147
- Ministerial decrees AÖF Nos. 114/1996, 122/1997, 155/1998, and 171/2000
- Several opinions published by the MF regarding selected transfer pricing issues

OECD Guidelines treatment

As an OECD member country, Austria recognizes the OECD Transfer Pricing Guidelines (OECD Guidelines). According to the Austrian Transfer Pricing Guidelines, the arm's length principle contained in income tax law has to be construed in line with the OECD Guidelines and any updates thereto.

In addition to the OECD Guidelines, the tax authorities also observe the OECD Report on the Attribution of Profits to Permanent Establishments (AOA), although the AOA is currently not fully applicable, as none of Austria's current double tax treaties includes the new Article 7.

The Austrian Transfer Pricing Guidelines were released in the form of a ministerial decree. They are binding on the Austrian tax authorities, but are not binding on Austrian courts or taxpayers.

Priorities/pricing methods

Based on the OECD Guidelines and the Austrian Transfer Pricing Guidelines, the MF accepts CUP, Resale Minus, Cost Plus, TNMM and Profit Split. The MF follows the replacement of the hierarchy of transfer pricing methods according to the 2010 update of chapters I to III of the OECD Guidelines. Particularly, the TNMM and the Profit Split method are no longer considered methods of last resort. According to the Austrian Transfer Pricing Guidelines, the method that provides the highest degree of certainty for the determination of an arm's length transfer price has to be selected.

Transfer pricing penalties

There are currently no specific transfer pricing penalties in Austria. If the taxable income is increased because the arm's length criterion has not been met, non-deductible late payment interest in the amount of two percentage points above the base rate (published by the European Central Bank) is levied on any additional prior year's corporate income tax payments for a maximum period of 48 months. Nonexistent or insufficient transfer pricing documentation does not lead to specific penalties. However, a lack of documentation increases the risk that the tax authorities will regard a transaction as noncompliant with the arm's length criterion, and thus, the risk of a transfer pricing adjustment is also increased (any adjustments will be calculated by estimation).

Penalty relief

If the taxpayer provides insufficient documentation to the tax authorities, the tax authorities nonetheless are obliged to base their consideration upon such documentation. Late payment interest will become due on any additional prior year's corporate income tax payments, regardless of whether there is sufficient documentation or not. There are no relief provisions available.

Documentation requirements

The Austrian Transfer Pricing Guidelines clearly state that there is an obligation to prepare transfer pricing documentation based on the Federal Fiscal Code's (FTC's) general provisions concerning bookkeeping, record-keeping and the disclosure requirement for tax purposes. Regarding content and scope, documentation must be in line with the documentation requirements according to the OECD Guidelines (in particular, according to Chapters V, VIII and IX). It is also permissible to prepare documentation that follows the Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the European Union (EU). According to a published opinion of the MF, the country-specific transfer pricing documentation prepared in accordance with the EU Code of Conduct has to be prepared in the official Austrian constitutional language, which is German.

Documentation deadlines

According to a published opinion of the MF, transfer pricing documentation must be available at the time the tax returns are filed. Therefore, documentation should be prepared contemporaneously and must be provided to the tax authorities upon request (which is usually during a tax audit). Usually, the tax auditor will determine a submission deadline, which can vary greatly from case to case (e.g., from only one week to several weeks). Upon the tax auditor's consent, an extension of the deadline is possible. Given a clear statement contained in the Austrian Transfer Pricing Guidelines regarding the requirement to prepare transfer pricing documentation, short submission deadlines will likely become the norm in the future.

Statute of limitations on transfer pricing assessments

The statute of limitations on a transfer pricing adjustment is usually 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 an increasing number of cases, an extensive transfer pricing questionnaire is discussed.

Transfer pricing-specific returns

No transfer pricing specific returns have to be filed along with the annual tax returns.

Austria (continued)

Audit risk/transfer pricing scrutiny

Tax authorities regularly examine related party transactions and transfer prices charged. There is a clear trend towards increased awareness of transfer pricing problems among tax auditors.

In general, the likelihood of annual tax audit (i.e. every fiscal year being examined) is high. The likelihood that transfer pricing will be reviewed as part of that audit is also high. The likelihood that the transfer pricing methodology will be challenged can be characterized as medium to high, depending on the specific circumstances of the case.

APA opportunity

Based on Section 118 FTC, it is possible to apply for a unilateral, binding, appealable advance ruling issued by the competent tax office on the tax treatment of a particular (but yet-to-occur) transfer pricing issue. The fee for such a unilateral APA amounts up to EUR20,000.

Under specific circumstances, it is possible to ask the Austrian tax authorities to participate in negotiations of a bilateral APA on the basis of Article 25(3) of the respective double tax treaty.

Belgium

Taxing authority and tax law

Taxing authority

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 nationwide authority, operates autonomously and selects its audit targets autonomously. In addition, it provides support to other field inspectors, if requested.

Tax law and decrees

While no specific transfer pricing legislation exists in Belgium, the arm's length principle was formally introduced into Belgian tax law on 21 June 2004, by Article 185, §2 of the Belgian Income Tax Code (ITC) (entered into force on 19 July 2004). This article's content is similar to that of 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, for instance those regarding penalties, late interest payments, etc., also apply to transfer pricing matters.

A general advance ruling (or advance pricing agreement (APA)) regime was introduced on 24 December 2002 and became effective as of 1 January 2003. The Royal Decree of 10 August 2009 requires Belgian companies to provide certain additional information regarding transfer pricing in the notes/annex section of their statutory annual accounts.

The Budget Law of 23 December 2009 introduced a reporting requirement (Article 307, §1, s. 3 ITC) and a related tax deduction denial for unreported payments or payments lacking underlying bona fide business purposes (Article 198, 10° ITC). The main characteristics of the new reporting requirement can be summarized as follows. The reporting requirement applies to payments of more than EUR100,000 per taxable period made to persons established in tax havens by resident or non-resident entities (Belgian permanent establishments). The reporting requirement is applicable only in respect of such payments made on or after 1 January 2010. Further, these provisions do not apply to privately owned businesses.

Tax havens are defined with reference to the "black list" determined by the Royal Decree dated 6 May 2010 and published in the Belgian Official Gazette of 12 May 2010. It currently contains 30 jurisdictions that either do not levy corporate income tax or have a nominal corporate income tax rate that is lower than 10%, such as in the Cayman Islands, the Channel Islands, the United Arab Emirates, Monaco, Moldavia, etc. It is unclear whether or not the OECD's 'grey-listed' jurisdictions are to be taken into account.

A Royal Decree dated 7 May 2010, published in the Belgian Official Gazette of 25 May 2010, determines the model form (n° 275 F) for reporting direct or indirect payments to persons established in tax havens. This new reporting requirement is applicable Irrespective of the forms to be filed in accordance with Article 57 ITC ("secret commissions"). Failure to report payments results in non-deductibility of such payments. In addition, these deductions are applicable upon presentation of proof by the Belgian tax payer that these payments relate to actual and bona fide, at arm's length transactions with persons other than artificial constructions.

Relevant regulations and rulings

The 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, introducing 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 tax authority, issued in July 2006
- Administrative guidelines on transfer pricing documentation, the transfer pricing code of conduct and transfer pricing audits, issued in November 2006

Belgium (continued)

Relevant regulations and rulings (continued)

Taking into account the specifics of each case, rulings are provided on the basis of a general ruling practice (see APA opportunity, below). APAs are provided on an individual basis and 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 government introduced a special tax deduction equal to 80% of the income derived from the use of patents. As a result of this deduction, income that is patent-related is subject to an effective tax rate of 6.8% or less.

OECD Guidelines treatment

The tax authority indicates in its administrative guidelines that taxpayers should generally follow the guidance mentioned in the OECD Transfer Pricing Guidelines (OECD Guidelines). Although there has been no direct communication with regards to the acceptability of the 2010 version of the OECD Guidelines, these are generally considered accepted by the Belgian tax authorities.

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.

Transfer pricing penalties

The general tax penalty framework applies to transfer pricing adjustments. These penalties vary from 10% to 200% (in exceptional cases) 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, for late payments, interest 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 in Belgium. 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. The 1999 guidelines recommend that documentation include, 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
- Economic analysis sections regarding the transfer pricing methods used

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. In order to encourage companies to ensure that transfer pricing documentation is maintained, these administrative guidelines refer to the concept of a prudent business manager. Although the burden of proof lies with the tax authority, to allow the tax authority to verify the company's tax position, the taxpayer needs to provide information on its transfer pricing policies applied.

Belgium (continued)

Documentation deadlines

Given the absence of any formal transfer pricing documentation requirements, there is no statutory deadline for the preparation of transfer pricing documentation. However, upon a tax audit, a taxpayer has one month to provide all information requested (including all information that allows verification of its taxable income and thus, the arm's length nature of the transfer prices). It is therefore recommended that each transaction be documented as executed. For valid reasons, the one month period can be extended.

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 as well. Therefore, the tax authority is entitled to make additional assessments for 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 seven-year period, provided that the taxpayer receives prior notice of serious indications of fraud. In case of tax losses, the statutes of limitations do not run until these tax losses are effectively used to offset taxable income. 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. However, in Belgium the accounting rules introduced through the Royal Decree of 10 August 2009 require companies to provide certain additional information related to transfer pricing in the notes/annex section of their statutory annual accounts:

- Companies must provide information regarding the nature and business purpose of their relevant off-balance sheet arrangements, if underlying risks and benefits are considered material, and when the disclosure is necessary to correctly assess the financial position of the company. This requirement is applicable in cases of intra-group guarantees, pledges, factoring liabilities, transactions with special-purpose entities — whether transparent or not — and offshore entities.
- Companies must disclose their material transactions with affiliated parties that are considered not to be at arm's length. Depending on the type of company, a different scope of information is to be provided, ranging from a mere listing of such transactions, to the mentioning of the amounts involved alongside all other information necessary to provide a correct view of the financial position of the company.

While this new rule is not included in the Belgian tax code, it creates a requirement for the relevant entities to review and document the arm's length nature of their intercompany transactions. Noncompliance may potentially result in director liability. In addition, any such information disclosed provides an excellent source of information for a tax inspector to initiate a (targeted) transfer pricing audit.

Audit risk/transfer pricing scrutiny

In Belgium, the likelihood of a tax audit may be regarded as medium. In practice, tax inspectors also increasingly add a review of transfer pricing aspects to the audit. This is the case regardless of whether or not the tax inspectors are supported by dedicated transfer pricing inspectors. Accordingly, the likelihood that transfer pricing will be reviewed as part of that audit is considered medium-high. The likelihood that, if transfer pricing is reviewed as part of the audit, the transfer pricing methodology will be challenged, is considered low. However, as discussed below, for certain types of transactions this risk is significantly higher.

The tax authority has demonstrated an increased interest in transfer pricing since the first circular letter on transfer pricing was issued 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. The 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 transfer pricing audit team is also involved in cross-border transfer pricing audits (e.g., restructurings), which are held jointly with the tax authorities of neighboring countries. In addition to this special team's increased audit activity, field tax inspectors are also increasing their focus on transfer pricing during general tax audits.

Belgium (continued)

Audit risk/transfer pricing scrutiny (continued)

The 2006 Administrative Guidelines contain a list of events that could trigger a high risk of transfer pricing scrutiny during an audit:

- 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 tax authority indicated in its November 2006 circular that transfer pricing cases associated with business restructurings will be among the priorities in their audit efforts.

These developments have further increased the focus on transfer pricing, especially considering the evolution of the Belgian transfer pricing audit relationship with other tax authorities. Transfer pricing audits have become more aggressive. They are being approached from an economic perspective and are focused on specific issues like business conversions and restructurings.

Considering that the Belgian transfer pricing audit cell is working closely with other tax authorities, it is expected that the focus on transfer pricing will increase.

APA opportunity

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

The Service for Advance Decisions became an autonomous department as of 1 January 2005, as a result of the law of 21 June 2004. More than 100 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 that is usually between two and four months from the filing date in case of 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

Taxing authority: Brazilian Internal Revenue Service (Receita Federal)

Tax law: Internal Revenue Code by Decreto 3000, 26 March 1999 (RIR99)

Relevant regulations and rulings

- Law No. 9.430, enacted 27 December 1996, introduced transfer pricing rules in Brazil
- Normative Instruction 243/02 provided the most relevant interpretations and was valid until the issuance of Normative Instruction 1.312 /12
- Federal Law 12.715, published on 17 September 2012, introduced significant changes to the Brazilian transfer pricing rules. However, for the tax year 2012, Brazilian companies are eligible to adopt the updated rules, which are mandatory from 1 January 2013 onwards. Among other changes, the following amendments are included:
  - Imports
    - Introduction of a minimum requirement for the application of the Brazilian uncontrolled price method (PIC) for internal comparables on imports
    - New minimum statutory gross profit margin required when applying the Resale Price Method (PRL), for the import of goods, services or rights, ranging from 20% to 40% depending on the company's industry:
      - Forty percent (40%): pharmaceutical/pharma-chemical products; tobacco products; optical, photographic and cinematographic equipment and instruments; dental, medical and hospital equipment and instruments; extraction of petroleum and natural gas; and petroleum-related products
      - Thirty percent (30%): chemical products; glass and glass products; pulp, paper and paper products; and metallurgy
      - Twenty percent (20%): for all the other businesses
    - FOB price as basis for PRL calculation
  - Transfer pricing methods for commodities
    - Intercompany imports and exports of commodities will have to be tested using PCI (quotation on imports) and PECEX (quotation on exports), respectively. Additionally, the law authorizes the Brazilian tax authorities to determine what will be considered as commodities and which commodity exchange should be recognized for applying the newly introduced methods
    - The safe harbor rules no longer apply in case of export of commodities
  - Procedural changes
    - Inability to change previously selected transfer pricing methodology once the tax inspection has been initiated, unless the method is disqualified by the tax authorities
  - Interest
    - Deductibility is limited to interest expenses that would correspond to the LIBOR rate for US deposits of 6 months plus an annual spread of up to 3%
    - The subsequently obtained parameter rate can still be increased by an annual spread that is to be established by the Ministry of Finance based on a market average of up to 3%
- On 28 December 2012, Law 12.766/12 introduced further changes to the recently-enacted changes to the Brazilian transfer pricing rules for interest paid to related parties
  - Law 12.766 revokes the general rule (recently amended by Law 12.715/12), which stated that the benchmark for interest expense would correspond to the LIBOR rate for US deposits of 6 months plus an annual spread of up to 3%
  - The calculation of the maximum amount of deductible expenses and minimal revenue arising from interest subject to transfer pricing regulations should observe the following:

Brazil (continued)

Relevant regulations and rulings (continued)

    - In case of transactions in US Dollars (USD) at a fixed rate, the parameter rate is the market rate of the sovereign bonds issued by the Government on the external market, indexed in USD
    - In case of transactions in Brazilian Real (BRL) at a fixed rate, the parameter rate is the market rate of the sovereign bonds issued by the Government on the external market, indexed in BRL
    - In case of transactions concluded abroad in BRL at a floating rate, the Ministry of Finance will determine the parameter rate; and for all other cases, the parameter rate is the LIBOR
  - The subsequently obtained parameter rate can still be increased by an annual spread that is to be established by the Ministry of Finance based on a market average (the previous 3% limitation is now revoked).
  - The new rules enter into force 1 January 2013
- Normative Instruction (IN) 1.312/12 was also published 28 December 2012, and it consolidates Brazil's transfer pricing legislation and revokes all previous Normative Instructions related to transfer pricing (including IN 243/02). Moreover, IN 1.312/12 provides guidance on the application of Law 12.715/12, the main goal of which is to simplify compliance, reduce areas of controversy and attract more investment. IN 1.312/12 provides guidance on how the tax authorities interpret the new law and exercise the power to determine certain rules where the law provides the authority:
  - Imports
    - Clarification on how to determine whether the Brazilian taxpayer is engaged in industries that would be subject to different gross margin requirements and in cases where the same imported product is used for different industries
    - FOB price is the basis for the PRL calculation
  - Exports/safe harbor
    - Raised the profitability threshold from 5% to 10%, and introduced a cap that the intercompany export transactions cannot exceed 20% of total net export transactions
  - Transfer pricing methods for commodities
    - Intercompany imports and exports of commodities listed in Annex 1 or Annex 2 will have to be tested using PCI (quotation on imports) and PECEX(quotation on exports), respectively. Consequently, it lists commodity exchanges that should be recognized to apply the new methods and in addition the publications of authorized institutions in the case of commodities not traded on a stock exchange market
    - The so called divergence margin was reduced to 3% for commodities, whereas it is 5% for all others
  - Procedural Changes
    - Inability to change previously-selected transfer pricing methodology once the tax inspection has been initiated, unless the method is disqualified by the tax authorities. The selection should be made when filing the corporate income tax return (DIPJ)
    - Back-to-back transactions (transactions in which the purchasing or selling of goods occur without their physical entry into or exit from Brazil) are required to comply with Brazilian transfer pricing regulations
- The changes listed above regarding Método dos Preços Independentes Comparados (PIC), Método do Preço de Revenda menos Lucro (PRL), PCI and PECEX methods enter into force as of 1 January 2013. However, taxpayers are still eligible to adopt the new rules for calendar year 2012
- On 18 January 2012, the Brazilian tax authorities issued Normative Instruction ("IN") 1.321/13 and IN 1.322/13, which provided further guidance on two issues related to the recently enacted changes to the Brazilian transfer pricing rules:
  - Safe Harbor Provisions
    - IN 1.322/13 clarified that for calendar year 2012, the former safe harbor rules, as described by IN 243/02, should be applied. IN 243/02 established as the profitability safe harbor, that the Brazilian taxpayer must earn a net profit before income taxes of 5% on export revenues to related parties. IN 1.321/13 also allows the option of applying either a three-year analysis (current year and two previous years) or a one-year analysis using the relevant year under consideration.

Brazil (continued)

Relevant regulations and rulings (continued)

    - Therefore, the changes to the safe harbor introduced by IN 1.312/12 are effective starting January 2013.
  - Intercompany Interest
    - Intercompany agreements entered into before 31 December 2012, will follow the previous rules (Law 9,430), whereby the interest, paid or received by Brazilian taxpayers with registration with the Brazilian Central Bank are not subject to transfer pricing rules. If the agreement is not registered, then taxpayers will be subject to the limitation of Libor with deposits in US dollars for 6 months + 3%.
    - Intercompany agreements entered into as of 1 January 2013 or after will be subject to the new Law 12.766/12 that differentiates interest rates depending on the underlying currency of each agreement and also allows for a variable spread to be issued by the Brazilian Ministry of Finance. Please note, that the renewal or re-negotiation of existing agreements should be considered as a new transaction and, therefore, subject to the new regulations.
    - Brazilian taxpayers who opt for the application of the new transfer pricing rules of the Law 12.715/12 — e.g., reduced profit margins on the application of the Brazilian "resale minus method" (PRL method) should then, in the opinion of the Brazilian tax authorities, be subject to the limitation of 6 month USD Libor plus a spread of 3%, regardless of the registration with the Brazilian Central Bank. This interpretation is not included in the Law and therefore subject to different interpretations.
- Ordinance No. 222/08 provides guidance with respect to requests for changing statutory profit margins

Coefficients to compensate exports for Brazilian currency appreciation:

- 2011 coefficient: 1,11 (Normative Instruction No 1.233/12)
- 2010 coefficient: 1,09 (Normative Instruction No. 1.124/11 and Ordinance 4/11)
- 2009 coefficient: 1.00 (Normative Instruction No. 1010/10)
- 2008 coefficient: 1.20 (Normative Instruction No. 898/08 and Ordinance No. 310/08)

OECD Guidelines treatment

Brazil's transfer pricing rules deviate significantly from international standards, including the OECD Transfer Pricing Guidelines (OECD Guidelines), as there are no profit-based methods and the concept of a functional and risk analysis is not included. Intercompany transactions need to be documented on a strict transactional basis, and fixed statutory profit margins apply. The local entity will have to document its compliance with at least one of Brazil's statutory transactional methodologies (PIC, Resale Minus or Cost Plus) for each imported (or exported) product or service.

Priorities/pricing methods

As a first step in the transfer pricing documentation process, Brazilian companies importing from abroad usually apply 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 start the documentation process with the PRL because the method relies entirely on import cost, local production cost and resale price information available in Brazil, 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 case of an audit, this approach provides a reliable estimate of a Brazilian entity's potential transfer pricing exposure. As a second step, since in Brazil there is no order of preference for the transfer pricing methods, taxpayers may choose whichever method suits them best. This approach affords taxpayers the opportunity to focus on those products/transactions that generate the highest adjustments and they can apply different methodologies for each of these products/transactions; e.g., Cost Plus or CUP. The other methods are often more favorable, as the result is more likely to be in line with international expectations. The only condition is that taxpayers must be able to document the chosen method properly.

Brazil (continued)

Priorities/pricing methods (continued)

Brazilian companies exporting abroad — except for commodities under the new rules — often apply the safe harbor rules to avoid applying additional transfer pricing methods. Exports are exempt from applying the transactional transfer pricing rules if they meet one of the three safe harbors. The first one applies to small exports compared to the overall business (less than 5% of revenue is exported to related parties); the second one applies if the average price on exports is at least 90% of the average domestic sales price; and the third one applies if the net profit from exports on a 3 year average is at least 5 % for years through 2011 and 10% for 2012 onward. If the safe harbor is not met, usually the Cost Plus or Brazilian Resale Minus Method is applied. Additionally, for the safe harbor rules to apply, from 2012 onward, intercompany export transactions cannot exceed 20% of total net export transactions.

For intercompany import/export transactions, no adjustment will be required as long as the actual transfer price does not exceed the determined transfer price by more than 5% (divergence margin). However, in the case of commodity imports and exports, the divergence margin is reduced to 3%.

It is important to note, that under the new rules introduced by Law 12.715, the taxpayer is bound to the transfer pricing method chosen and a change of method during tax audit is only accepted for years 2012 onward if the tax auditor applies a different method.

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

Currently, no penalty relief is available.

Documentation requirements

Brazilian taxpayers are required to document their international intercompany transactions on an annual basis. The 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 product code by product code, service type by service type and right by right bases. In this context, product code refers to a company's internal product codes used for inventory management purposes, and not to 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 following calendar year).

Documentation deadlines

The contemporaneous documentation required as part of the DIPJ usually has to be filed by the end of June of the following calendar 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.

Brazil (continued)

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

Transfer pricing-specific returns

The corporate income tax return (DIPJ) contains five specific forms that require taxpayers to disclose detailed information regarding their main intercompany import and export transactions.

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.

Although large companies are more likely to be audited than small ones, in general, the likelihood of general tax audits in Brazil is characterized as medium. The likelihood of transfer pricing being reviewed as part of an audit is also characterized as medium, as is the likelihood of a challenge of the transfer pricing methodology. For certain industries; e.g., automotive, pharmaceutical, chemical and oil and gas industry and intragroup services into Brazil (services, cost allocations) the likelihood of a transfer pricing audit is high.

APA opportunity

Currently, there is no opportunity to pursue an APA.

In certain cases, unilateral rulings on the interpretation of law, not on the actual price to be applied, are possible.

Tax payers may request under the Law 9.959 and the current Law 12.715 to alter the fixed profit margins. However, no requests have been granted to date.

Bulgaria

Taxing authority and tax law

Taxing authority: National Revenue Agency (NRA)

Tax laws, rules and regulations:

- Corporate Income Tax Act (CITA), promulgated in the State Gazette (SG) issue 105/22 December 2006
- Tax and Social Insurance Procedure Code (TSIPC), promulgated in SG issue 105/29 December 2005
- Double taxation treaties enacted by Bulgaria

Relevant regulations and rulings

Bulgarian tax legislation does not explicitly contain an articulation of the arm's length principle. According to Article 15 of CITA, where related parties enter into transactions whose commercial and financial terms differ from those of unrelated party transactions, resulting in a different taxable base than the taxable base that would have been achieved as a result of unrelated party transactions, the tax authorities will adjust the taxable base accordingly.

Furthermore, under Article 16 of CITA, where one or more transactions, including between unrelated parties, have been concluded under terms in which the fulfillment leads to lower or no taxation, the taxable base will be determined taking no notice of these transactions, certain terms or their legal form. Instead, the taxable amount that would be obtained upon effectuating a customary transaction of the relevant type at market prices and that is intended to achieve the same economic result but which does not result in lower or no tax will be considered.

The methods applied for determining the arm's length prices have been introduced by TSIPC and Ordinance N 9/14.08.2006 (Ordinance N 9) by the Bulgarian Minister of Finance (order and means of application of the methods for determining market prices, promulgated in SG issue 70/29 August 2006).

The NRA released a Manual on Transfer Pricing Audits (the Manual) in 2008. By introducing a chapter on Transfer Pricing Documentation (documentation) requirements in the Manual early in 2010, the NRA approved the documents that transfer pricing auditors would require during their investigations.

The Manual is binding on tax auditors. However, it is not technically part of the law. Nevertheless, it is in taxpayers' interest to comply with the Manual, since it defines what the NRA usually requires during a transfer pricing audit. Compliance with the Manual is expected to significantly narrow the scope of disputes over transfer pricing matters during tax audits.

OECD Guidelines treatment

In general, the Bulgarian transfer pricing requirements follow the OECD Transfer Pricing Guidelines (OECD Guidelines). However, the 2010 version of the OECD Guidelines, in which the hierarchy of methods is abolished, has not yet been introduced in the local transfer pricing legislation.

Priorities/pricing methods

Under Bulgarian transfer pricing legislation, one of the following methods should be applied in order to determine the market price:

- CUP
- Resale Price or Cost Plus
- Profit Split or TNMM

Unlike those of most of OECD members, Bulgarian transfer pricing rules provide for a hierarchy of methods. Ordinance N 9 regulates the order of consideration: the application of traditional transfer pricing methods is preferred. Moreover, the CUP method is considered to be the most direct and reliable measure of an arm's length price for controlled transactions. TNMM and Profit Split methods are used only in cases where the result of applying the traditional methods is not satisfactory.

Bulgaria (continued)

Transfer pricing penalties

If the taxpayer fails to provide documentation when requested by the tax authorities, a fine for not cooperating could be imposed. However, this fine is insignificant (i.e., in the range of BGN250 to BGN500, or approximately EUR128 to EUR256). Therefore, the main consequence for the entity would be the adjustment of its taxable profit if the tax auditors conclude that the price applied in controlled transactions is not at arm's length.

Penalty relief

Currently, no penalty relief is available.

Documentation requirements

Taxpayers bear the burden of proof regarding the arm's length nature of the controlled price, and must present all relevant evidence. If the taxpayer provides a transfer pricing documentation file, the tax authorities will be obliged to follow the approach/method used to establish the transfer price. If they disagree with the transfer price applied, they should come up with evidence of the market price they consider appropriate, based on any readily available public information.

Based on the Manual, the documentation should contain information on the following topics:

- Presentation of the group:
  - Legal, functional, finance and management organization of the group (legal, functional, finance and management organizational charts of the group)
  - Economic role of the divisions within the group
  - Allocation and financing of intellectual property
- Knowledge of the controlled company and its activity:
  - Object of activity and market of the company (an economic analysis of the market: structure, size, competitors, development, success factors and risks)
  - Functional analysis of the company
  - Use of intellectual property
  - Financing of the enterprise
- Analysis of associated transactions:
  - Presentation of the selected economic model: an explanation of the specific strategy of the enterprise (for example, the penetration policy to gain a share of a particular market)
  - Presentation of the associated transactions: objects of transactions, distribution, services, financial transactions, contracts, countries involved, special terms and conditions
- Functional analysis:
  - Who plays what role in an associated transaction; analysis of functions, risks and assets of each party in the transaction
  - Analysis of methods: presentation of the transfer pricing method used
  - Economic and financial analysis of the transaction: profits, analysis of the market, nature of the financial terms and conditions

The Manual recommends that taxpayers have the transfer pricing master file at their disposal, and that the file contains information on a group level, as well as a country-specific file prepared in Bulgarian for each tax year and updated annually. In addition, the Manual provides for the possibility for a simplified filing, if certain thresholds of the transactions are not exceeded.

Bulgaria (continued)

Documentation deadlines

Under the Bulgarian transfer pricing rules, taxpayers involved in controlled transactions are not obligated to file their transfer pricing documentation with the NRA. Transfer pricing documentation is submitted to the tax authorities only upon request (e.g., during a tax audit or tax documentation review when a tax refund or tax relief under a Double Tax Convention is claimed).In the course of a transfer pricing audit, the tax authorities could request documents and information within a certain limited period of time. The information requested usually concerns the group's structure, the audited company and its activities, analysis of transactions involving related parties, the functions performed in relation to those controlled transactions, proof and written explanation with regard to the transfer pricing methods applied, among others. It is time consuming to prepare and present the required documentation according to the NRA requirements. Therefore, the time limit set by the NRA (i.e., usually 14 days) is likely to be insufficient. For that reason, taxpayers are encouraged to have their transfer pricing documentation available and prepared in compliance with the NRA's guidelines.

Statute of limitations on transfer pricing assessments

In Bulgaria, documentation may be required for any open tax year, as well as for tax obligations not covered by the statute of limitation period.

As a general rule, the statute of limitation period for CIT is five years from the year following the year of expiry of the statutory term granted for filing CIT returns.[1]

Return disclosures/related party disclosures

Related party transactions falling within the scope of Article 15 of CITA must be disclosed in the annual tax return.

Furthermore, taxpayers are required by the National Accounting Standards (as well as by the International Accounting Standards) to disclose in their financial statements relationships between related parties regardless of whether there have been transactions between them, as well as the related party transactions. Bulgarian tax legislation provides for a quite broad definition of "related parties." To wit, for accounting purposes, related parties should be parties where one of which exercises control over the other, whereas for tax purposes, parties will be related not only in case of control, but also even in the case where one of the parties holds 5% of the voting shares of the other party.

Transfer pricing-specific returns

Transfer pricing-specific returns are not required in Bulgaria.

Audit risk/transfer pricing scrutiny

In general, the likelihood of an annual tax audit is characterized as low. The likelihood that transfer pricing will be reviewed as part of that audit is characterized as high, and the likelihood that the transfer pricing methodology will be challenged is characterized as medium.

APA opportunity

No binding ruling or APA opportunities are currently applicable.

Taxpayers are allowed to file a request for a written opinion of the NRA or the Minister of Finance on the interpretation and application of the tax law with regard to a specific tax issue. However, the value of the position of the tax authorities on a particular tax aspect is very limited, as the tax authorities refuse to provide any opinion on transactions that have not yet been structured and documented.

1 The Bulgarian statutory term for both filing the annual CIT return and remittance of the amount due is 31 March of the following year. Thus, for example, FY07 is open for tax audits until the end of FY13, since the CIT return for FY07 should have been filed by 31 March 2008.

Canada

Taxing authority and tax law

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

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 re-characterization of transactions, penalties, records/documents required to be made or obtained, contemporaneous documentation requirements and timing of provision to the Minister when requested along with ministerial discretion regarding acceptance of downward tax adjustment requests.

Relevant regulations and rulings

The CRA does not set out its views and positions on transfer pricing issues by a legal doctrine or by providing detailed 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

Additional information and guidance on transfer pricing related matters, including the TPMs, can be obtained from the CRA's website (www.cra-arc.gc.ca/tx/nnrsdnts/cmmn/trns/menu-eng.html)

OECD Guidelines treatment

While no mention is made of the OECD Transfer Pricing Guidelines (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 IC 87-2R, the "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 placed on the relevant Canadian statutory provisions. CRA's related ICs and other administrative guidance are considered instructive but not definitive. The OECD Guidelines and other OECD reports are not usually recognized as authoritative; however, courts and other dispute resolution channels (e.g., competent authority) will usually 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. The transfer pricing methods specified in IC 87-2 include: CUP, Resale Price, Cost Plus, Profit Split method (residual/contribution) and TNMM.

Traditionally, the CRA considered that, notwithstanding the fact that §247 does not so stipulate, 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. Traditionally, the CRA did 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.

Following the 2010 revisions to the OECD Guidelines, which the CRA has endorsed, it is understood that the CRA will be updating its published guidance to reflect the revisions, moving away from its position on a natural hierarchy. However, the timing for these updates remains uncertain.

Canada (continued)

Transfer pricing penalties

Subsection 247(3) of the ITA imposes a penalty of 10% of the net upward transfer pricing adjustments made under subsection 247(2) of the ITA. These penalties are applicable if such adjustments exceed the lesser of 10% of the taxpayer's gross revenue for the year or CAD5 million, and if the taxpayer has not made reasonable efforts to determine and use arm's length transfer prices.

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 that 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 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 assessed without reference to the taxpayer's income or loss for the relevant reporting year and are not tax deductible.

Penalty relief

If a taxpayer is considered to have made reasonable efforts to determine and use arm's length transfer prices or allocations with respect to adjusted non-arm's length transactions, no penalty is assessed.

As set out in 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 the taxpayer's representations, will conclude whether or not a transfer pricing penalty is justified.

No transfer pricing adjustments under subsection 247(2) of the ITA should arise with respect to 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. If the result of the change is that the adjustment no longer exceeds the penalty threshold, the penalty is rescinded.

Documentation requirements

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

- 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, IC 87-2R notes that the CRA 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 memorandum 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.

Canada (continued)

Documentation deadlines

Taxpayers must prepare or obtain records and documents that 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 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 a notice of an original assessment for the year or the day of mailing an original notification that no tax is payable for the year. The time limit applies unless the taxpayer has made misrepresentations, committed fraud or filed a waiver, in which case the Minister may reassess a taxpayer at any time.

With respect to transactions involving non-arm's length dealings with non-residents, the reassessment period is extended by an additional three to seven years. This time period may be further extended if the taxpayer provides the CRA with a waiver (i.e., authorization by the taxpayer to the CRA to waive the normal reassessment period). Waivers may be provided by the taxpayer within the seven year extended reassessment period.

Return disclosures/related party disclosures

Taxpayers are required to file a T106 information return annually, reporting the transactions undertaken with non-arm's length non-residents during the taxation year. The T106 is a separate information return, but is usually filed together with the corporate tax return (although there are separate penalties if the T106 information return is filed late). Data from the T106 is entered into a CRA database and is used to screen taxpayers for international tax audits.

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.

For large corporations, the likelihood of annual tax audit in general is high, as is the likelihood of transfer pricing being reviewed as part of the audit. Similarly, the likelihood of a transfer pricing methodology being challenged, if transfer pricing comes under audit, is high.

Canadian companies with cross-border transactions 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 upon 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 IC94-4R, 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 completion 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 under §247 has been issued. Effectively, this means that APAs cannot be rolled back to taxation years under transfer pricing audit.

Chile

Taxing authority and tax law

Taxing authority: Internal Tax Service (Servicio de Impuestos Internos, or SII)[1]

Tax law:

- Chilean taxation rules are established in the Income Tax Law (ITL), enacted in 1974
- Tax authority Circulars issued every year provide interpretation of the articles of the ITL, and are not modifications of the law

Tax reform

Law 20630, which amends the ITL and finances the Educational Reform, was published in the Official Gazette on 27 September 2012. It introduces new transfer pricing rules with Article 41 E in the ITL.

Article 41 establishes that any cross border transaction held with a related party, with an unrelated entity domiciled in a tax haven, in a back-to-back transaction or any transactions resulting from a restructuring process is subject to the transfer pricing regulations. The new regulation is applicable as of 1 January 2013 and applies to 2013 tax obligations and thereafter, thus affecting the intercompany transactions entered into during and after commercial year 2012.

For prior years, transfer pricing matters were regulated by Article 38 according to which the burden of proof was on the Internal Revenue Service (IRS) and no obligations relative to statements, studies or methods were set forth therein. Relationship rules

According to Article 41 E, parties are deemed to be related when:

- One or more parties participate directly or indirectly in the direction, control, capital, profits or revenues of another party
- Permanent establishments, agencies and branches with its headquarters
- Transactions carried out with residents in tax havens
- Individuals with their spouses or relatives up to the fourth grade
- One of the parties carries out transactions with a third party that in turn carries out similar transactions with parties related to the latter (back to back)

Relevant regulations and rulings

Resolution 114 of 2012 establishes an obligation to file monthly and annual sworn statements whenever a taxpayer enters into a financial derivatives transaction with a foreign or domiciled related party or unrelated party. This resolution presents four different types of sworn statements to be filed by taxpayers, according to their level of involvement in these types of transactions. Their noncompliance could lead the SII to disregard the related expenses, as well as impose high fines.

Resolution 115 of 2012 establishes an obligation to maintain a technical study whenever a taxpayer enters into a transaction of financial derivatives with a foreign or domiciled related party. This resolution states a minimum of information to be contained in the report. The taxpayer's noncompliance could lead the SII to disregard the related expenses, as well as impose high fines.

Resolution 14 of 2013 established the annual informative transfer pricing return specifics (form, due date and requirements).

OECD Guidelines treatment

Although the ITL does not mention the OECD Transfer Pricing Guidelines (OECD Guidelines), it is important to note that Chile was accepted as a full member of the OECD in 2010. Therefore, the guidelines should be treated as relevant data to be considered when dealing with transfer pricing issues.

1 http://www.sii.cl

Chile (continued)

Priorities/pricing methods

The transfer pricing methods accepted are the same as those established by the OECD Guidelines. Additionally, a sixth, or "other" method, is acceptable when applied in any reasonable economical analysis for a case where none of the other methodologies are viable.

It considers the "best method rule," which means that the taxpayers must choose the method that best reflects the transaction's economic reality to determine its market value. The taxpayer should be able to demonstrate or sustain the applicability of such a method over the others.

Transfer pricing penalties

In case the taxpayer does not file the sworn statement by the due date, or files an incorrect or incomplete statement, it is subject to a fine of 10 ATU to 50 ATU (1 Annual Tax Unit is approximately USD900).

On the other hand, price, value or profit differences that result from applying these rules are subject to a fine of 35% of such difference, regardless of the type of company. If the adjustment is made by the SII by means of an assessment, an additional 5% will be applied, unless the taxpayer had furnished the information/documentation required during the inspection process by the SII as determined by the former in a notification. It could also be subject to additional penalties and interests.

Additionally, taxpayers that do not comply with filing the transfer pricing return are subject to fines according to Article 97 of the tax code (a fine of 20% to 100% of one ATU) or Article 41-E of the ITL (10 to 50 ATUs, up to 15% of equity capital or 5% of real capital).

Penalty relief

There is currently no penalty relief available. However, maintaining contemporary transfer pricing documentation would be accepted by the tax authority as proof of the taxpayer's "good faith." In these cases, the transfer pricing penalty may not be imposed.

Documentation requirements

Taxpayers must keep all the relevant information supporting the methods used to determine whether their transactions are in accordance with the arm's length principle or not ready and available to be furnished upon the SII's request. The SII may also request foreign authorities furnish information related to intercompany transactions.

Documentation deadlines

There are no deadlines to present a transfer pricing study.

The due date to file the transfer pricing return is the last business day of June.

Statute of limitations on transfer pricing assessments

The general statute of limitations is three years. It could be extended to six years if no return is filed, or if the authorities consider that the returns are false. Based on Circular 49, there are distinct limits to conducting audits, depending on the size, complexity and other characteristics that can arise. In this sense, in the case of a certain set of transfer pricing audits, the applicable statute of limitations will be 12 months, during which the tax authority will test the proper application of the arm's length principle. These special cases are:

- The determination of the taxpayer's net income, where there are taxable sales or revenues in excess of 5,000 monthly tax units (UTM)
- A review of the tax effects of corporate reorganization, or
- A review of the accounting of transactions between related companies

Chile (continued)

Return disclosures/related party disclosures

From 2013 onward, it is mandatory for taxpayers to file a transfer pricing sworn statement every year. It comprises all intercompany transactions held in the prior year and it must disclose all transactions held with related parties, transfer pricing method applied, organization structure of the economic group, and other data derived from the transfer pricing economic analysis.

Taxpayers must meet any of the following conditions in order to be obliged to file this return:

- Companies considered as mid-sized or large as of 31 December of the commercial year to be disclosed
- Companies entered into transactions with parties domiciled in tax haven countries (according to the list in Article 41-D of the ITL)
- Companies that have entered into transactions of more than CLP500,000,000 (USD1,000,000 or the equivalent in a foreign currency) with non-domiciled related parties as of 31 December of the commercial year to be disclosed

Transactions with related parties must be registered by type of transaction and by related entity. The IRS also requires technical aspects to be filed, such as:

- The transfer pricing method used
- Profit level indicator applied
- Global or segmented analysis
- Party analyzed
- Transfer pricing adjustments (if applicable)

Audit risk/transfer pricing scrutiny

The burden of proof of demonstrating that transfer prices in transactions with related parties are consistent with the arm's length principle is on the taxpayer.

Currently, there is a high probability that the tax authority will audit transfer pricing (there could be a preference in favor of retail, pharmaceutical and mining companies). Indeed, there has been a significant increase in transfer pricing audit cases, due to Chile's recent inclusion as a full member of the OECD. Many of the transfer pricing audits taking place in Chile are derived from a tax audit process. That is why there is a high possibility that Chilean companies are subject to an audit and also a high likelihood that transfer pricing will be reviewed as a part of that audit. This is especially true in cases where the taxpayer has registered intercompany charges and these charges have been treated as deductible from taxable income.

It is important to highlight that when a taxpayer is subject to a tax or transfer pricing audit performed by the Chilean authorities, keeping a transfer pricing study will be considered as a strong mechanism of defense.

Finally, it should be taken into account that taxpayers are entitled to amend the price, value or profit related to their transactions on the basis of transfer price adjustments made in other countries that have entered into a convention for the avoidance of double international taxation with Chile. This adjustment may be applied within a term of five years from the fiscal year the transaction triggered tax effects in Chile, provided that the adjustment is final in the other country.

APA opportunity

Taxpayers may propose price, value or profit advance agreements with regard to their transactions. To that end, a request and a transfer pricing study need to be filed. The SII may completely or partially accept the request or reject it within a period of six months after the relevant information has been furnished by the taxpayer. The resolution to accept or reject the proposed agreement cannot be challenged, either by an administrative or legal process. This agreement may last for up to three commercial years.

China

Taxing authority and tax law

Taxing authority: State Administration of Taxation (SAT)

Tax laws and regulations:

- China Corporate Income Tax Law (CITL), Chapter 6, Articles 41 to 48
- CITL Implementation Regulations, Articles 109–123

Relevant regulations and rulings

- Guoshuifa (2008) No. 114, (Guoshuifa 114) — Notice Containing Related Party Transaction Annual Reporting Forms
- Guoshuifa (2009) No. 2, (Guoshuifa 2) — Implementation Measures for Special Tax Adjustments
- Caishui (2008) No. 121, (Caishui 121) — Notice on the Tax Deductibility of Interest Expense Paid to Related Parties
- Guoshuihan (2009) No. 363, (Guoshuihan 363) — Notice on the Strengthening, the Monitoring and Investigation of Cross-border Related Party Transactions [for Single Function Entities]
- Guoshuihan (2009) No. 188, (Guoshuihan 188) — Notice on Intensifying the Transfer Pricing Follow-up Administration
- Guoshuihan (2010) No. 323, (Guoshuihan 323) — Notice on Guidance Given by SAT to Tax Bureaus with respect to Contemporaneous Documentation Reviews
- Guoshuihan (2011) No. 167, (Guoshuihan 167) — The Annual Anti-tax Avoidance Work Report (reports the 2010 anti-tax avoidance enforcement work conducted by SAT and the 2011 work plan)
- Guoshuifa (2012) No. 13, (Guoshuifa 13) — Regulation for Internal Procedures of Special Tax Adjustments (Trial Implementation)
- Guoshuifa (2012) No. 16, (Guoshuifa 16) — Notice regarding the "Procedural Guidelines for Joint Review of Significant Special Tax Adjustments Cases (Trial)"
- Guoshuihan (2011) No. 111, (Guoshuihan 111) — 2011 Annual Anti-tax Avoidance Work Report

OECD Guidelines treatment

In principle, SAT recognizes the OECD Transfer Pricing Guidelines (OECD Guidelines) and the transfer pricing methods named therein.

Priorities/pricing methods

SAT accepts reasonable methods, including CUP, Resale Price and Cost Plus. Other methods, including Profit Split, and TNMM, are also considered. For the TNMM, the profit level indicators most often used are operating margin and markup on total costs. 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 CITL 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 CITL Implementation Regulations references Article 48 and states that the 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 2, taxpayers that refuse to provide contemporaneous documentation, as well as those that file false and/or file incomplete related party reporting forms are subject to monetary penalties pursuant to Article 70 of the China Tax Collection and Administration Law and Article 96 of the China Tax Collection and Administration Law Implementation Regulations, as well as Article 44 of the CITL and Article 115 of the CITL Implementation Regulations.

China (continued)

Penalty relief

According to Article 122 of the CITL Implementation Regulations, the additional 5% interest charge (applied on the basis of Article 48 of the CITL) 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 a request.

Documentation requirements

The CITL and the CITL Implementation Regulations imply that taxpayers are expected to maintain contemporaneous transfer pricing documentation. Articles 13 through 20 of Guoshuifa 2 formally introduce and clarify China's contemporaneous transfer pricing documentation requirements.

Article 14 of Guoshuifa 2 specifies five primary components of China's contemporaneous documentation:

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

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

- Those conducting CNY200 million or fewer in annual related party purchase and sale transactions and CNY40 million or fewer in annual related party "other" transactions (intangibles, services, and interest from financing transactions)
- Those with transactions covered by an 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 2 specifies that taxpayers should finish the preparation of contemporaneous documentation on or before 31 May of the following calendar year and that all documentation should be submitted to tax authorities within 20 days of a request.

Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is 10 years.

Article 20 of Guoshuifa 2 states that contemporaneous documentation should be maintained for 10 years (starting from 1 June of the year following the transactions).

Return disclosures/related party disclosures

Article 43 of the CITL and Guoshuifa 114 require that taxpayers complete and submit nine comprehensive 'Related Party Transaction Annual Reporting Forms' along with their annual tax filing. Per Article 16 of Guoshuifa 2, these forms must be submitted on or before 31 May of the following calendar year, including related party transactions conducted during the fiscal year (e.g., Related Party Transaction Annual Reporting Forms for fiscal year 2011 are due on or before 31 May 2012).

China (continued)

Transfer pricing-specific returns

China does not have transfer pricing-specific returns. However, in their annual income tax returns, taxpayers are required to disclose certain transfer pricing information on the "Related Party Transaction Annual Reporting Forms." On these forms, taxpayers are required to disclose the total amount of related party transactions involving either the purchase or sale of tangible goods, provision or receipt of services, transfer or licensing of tangible/intangible assets, or financing. If a given transaction involving either the purchase or sale of tangible goods, or the provision or receipt of services with any single overseas related party and the value of the transaction exceeds 10% of the total transactional category, then the name of the related party and the transfer pricing policies need to be specified on the forms.

Audit risk/transfer pricing scrutiny

In general, the likelihood of an annual tax audit is characterized as high, as is the risk of transfer pricing issues being reviewed under an audit. The likelihood of the transfer pricing methodology being challenged is characterized as medium.

In 2011, 207 transfer pricing audits were concluded, resulting in an aggregate tax liability adjustment of CNY2.4 billion. This amount is slightly higher than the CNY2.3 billion aggregate adjustment in 2010. Additionally, the value of self-assessed anti-avoidance adjustments significantly increased in 2011, reaching CNY20.8 billion, as compared to CNY7.2 billion in 2010.

In 2012, the Chinese tax authorities continued to focus on certain industries, such as automotive, shipping and retail. Additionally, topics such as market premium, location savings and local marketing intangibles remain focused areas which are likely to give rise to transfer pricing scrutiny.

In addition, intangible property and share transfer are targeted areas under the SAT's examination strategy. The Chinese tax authorities are arguing for the use of income method to be used when valuing intangible property or share transfer transactions. The first reported case involving the use of the income method to a share transfer was concluded resulting in an additional tax payment of CNY11 million.

APA opportunity

APAs are available in China. Guidance regarding the APA process and procedures is provided in Articles 46 through 63 of Guoshuifa 2.

The duration 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 CNY40 million, rather than the previously required CNY100 million. Applications for APAs involving more than one in-charge province can be submitted directly to the tax authority in Beijing.

The China Advance Transfer Pricing Arrangement Annual Report (2010) was published on 12 April 2012. China signed eight APAs in 2010, including four unilateral APAs and four bilateral APAs. In total, 61 APAs were concluded between 2005 and 2010.

Finally, negotiation of bilateral APAs has become an increasingly effective tool in mitigating transfer pricing risks. Since 2009, there has been a continual decline in the number of unilateral cases, with a sharp increase in bilateral cases. China concluded 16 bilateral APAs between 2005 and 2010, and more cases are in the application and negotiation process.

Colombia

Taxing authority and tax law

Taxing authority: Dirección de Impuestos y Aduanas Nacionales (DIAN)

Tax law:

- Law 788 (enacted December 2002) and Law 863 (enacted December 2003) establish transfer pricing rules; Articles 260-1 to 260-11 of the Colombian tax code. On 26 December 2012, the Colombian Government issued a tax bill which included significant modifications to the transfer pricing regime. Under these modifications, a permanent establishment (PE) is considered a related party and the definition of a tax haven has changed. Additionally, transactions carried out between taxpayers in Colombia and their related parties located in free trade zones are also subject to transfer pricing rules and regulations.
- The definition of related parties is found in Articles 260-1 and 260-7 of the Colombian tax code.

Relevant regulations and rulings

Regulatory Decree 4349, published in December 2004, establishes transfer pricing guidelines, including the contents of the transfer pricing documentation and the informative return, use of financial information and the APA programs.

Decree 1602, published in July 2012, included a few changes with regard to procedures for applying for an APA.

It is important to highlight that the tax bill mentions that it is not mandatory to use the interquartile range as the accepted measure to determine if the analyzed transaction complies with the arm's length principle. Accordingly, it is possible to use other statistical measures, including the total range.

Additionally, the tax bill established that the financial information (whether it is segmented or not) used to carry out the transfer pricing analysis of an intercompany transaction must be certified by an independent auditor.

OECD Guidelines treatment

Although Colombia is not a member of the OECD, its Transfer Pricing Guidelines (OECD Guidelines) are generally followed in local regulations. According to Sentence C-690 of the Colombian Constitutional Court, issued on 12 August 2003, the OECD Guidelines and Commentaries are an auxiliary source of guidance and interpretation, but they are not mandatory for the Colombian tax authority. However, the OECD Guidelines have been mentioned and have been used as a reference in official audits.

Priorities/pricing methods

Colombian tax law has established five transfer pricing analysis methods: CUP, Resale Price, Cost Plus, TNMM and Profit Split (which can be applied in either the form of a contribution analysis or a residual analysis).

Method selection should be based on the characteristics of the transaction under analysis. The selected method should be the one that best reflects the economic reality of the transaction, and one that provides the best information and requires the least adjustments (best method).

Some of the important changes in the transfer pricing regime are:

- When internal comparables are available, they take priority when carrying out the transfer pricing analysis
- When using the CUP method to analyze the purchase of used assets between related parties, the original purchase invoice issued by the third party to the related party abroad must be used to obtain the initial purchase value, thus taking into account the asset's depreciation since acquisition, in compliance with Colombian GAAP
- The equity value cannot be used to analyze the purchase/sale of stocks that are not publicly traded on the stock market or those transactions that involve the transfer of other assets that have difficulties when being compared. Instead, financial valuation methods must be used, particularly those that calculate the market value through the discounted cash flow method
- With regard to the payment of services abroad, the taxpayer must demonstrate that the services were in fact received and that there is a benefit for the Colombian entity. Moreover, it is necessary to prove that the fee paid complies with the arm's length principle
- Company restructurings which include redistribution of functions, assets and risks, must comply with the arm's length principle

Colombia (continued)

Transfer pricing penalties

Under the Columbian transfer pricing regime both the supporting documentation as well and the return could be subject to penalty, however it is important to mention that the tax bill introduced in 2012 modified some aspects of the penalties applied. The following penalties apply[1]:

Transfer pricing documentation

- Late filing — Starting at USD226 limited to USD45.238
- Information inconsistencies — 1% of the total value of the transactions carried out with related parties, limited to USD57.301
- Omitted information (transactions) — 2% of the total value of the transactions carried out with related parties, limited to USD301.584
- Omitted information (related parties located in tax havens) — 4% of the total value of the transactions carried out with related parties, limited to USD150.792

Transfer pricing return

- Late filing — Starting at USD151 limited to USD144.760
- Information inconsistencies — 0,6% of the total value of the transactions carried out with related parties, limited to USD34.381
- Omitted information (transactions) — 1,3% of the total value of the transactions carried out with related parties, limited to USD301.584
- Omitted information (related parties located in tax havens) — 2,6% of the total value of the transactions carried out with related parties, limited to USD90.475
- Non filing of the transfer pricing return — 10% of the total value of the transactions carried out with related parties, limited to USD301.584

The penalties mentioned above do not contemplate the additional fines and penalties that taxpayers incur for the amendment of income tax returns or transfer pricing adjustments.

Penalty relief

The transfer pricing regime gives taxpayers in Colombia penalty relief, as mentioned below:

Transfer pricing documentation

- Reduced sanction (before the tax authority's penalty order)
- When the taxpayer amends its transfer pricing documentation for the inconsistencies or omissions, before the tax authority issues its penalty order, the penalty will be reduced to 50% of the amount determined in the official assessment

Transfer pricing return

- Reduced sanction (before the tax authorities penalty order)
  - When the taxpayer amends its transfer pricing return for the inconsistencies or omissions, before the tax authority issues its penalty order, the penalty will be reduced to 50% of the amount determined in the official assessment
  - The transfer pricing return can be voluntary amended for two years from the original date of filing

The tax authority has a period of five years from the original date of filing to issue an official assessment.

1 The amounts in USD are applicable for taxable year 2012 and are subject to changes because of the exchange rate.

Colombia (continued)

Documentation requirements

Taxpayers must prepare supporting documentation which supports the assertion that each transaction with foreign related parties complies with the arm's length principle. The transfer pricing documentation includes a functional analysis (organizational structure, business description, functions, assets, risks and detailed information of the intercompany transactions, among others), a macroeconomic analysis, an industry analysis and an economic analysis.

Documentation is not required for transactions that do not exceed USD150.792 for taxable year 2012. Decree 4349 outlines the information to be included in the transfer pricing documentation.

Documentation deadlines

A. Documentation

Documentation should be available for the tax authorities by June 30 of the following fiscal year.

In this regard, Regulatory Decree 1602, issued in July 2012, added the obligation to file the transfer pricing documentation with the tax authority every year, via its web site. The due date is the same for filing both the transfer pricing documentation and the transfer pricing return for fiscal year 2012.

B. Filing returns

For fiscal year 2012, transfer pricing returns must be submitted between 9 July 2013 and 22 July 2013, depending on the taxpayer's tax ID number.

Statute of limitations on transfer pricing assessments

The general rule for statute of limitations for transfer pricing adjustments is two years. In some cases (losses or set-off of losses), the statute of limitations is five years.

Return disclosures/related party disclosures

As part of the transfer pricing return, taxpayers must disclose information on related parties, such as country of residence and tax ID number.

Other information disclosed on the transfer pricing return includes the type of intercompany transaction, the amount of the transaction, the transfer pricing methodology applied, the company assessed, the price/margin obtained in the transaction and the arm's length range.

It is also necessary to include information regarding comparability adjustments, designation of the tested party, and the amount of the adjustments made on the income tax return, if any and the financial information that was used (segmented or complete information).

Transfer pricing-specific returns

See the return disclosures/related party disclosures section above.

Colombia (continued)

Audit risk/transfer pricing scrutiny

Since 2004, the tax authorities have improved their audit processes, focusing on the hydrocarbon and mining industries, especially in the following aspects:

- Challenge of benefits and actual rendering of technical services and technical assistance reported by local entities. During audit, the tax authority has been requiring companies to prove that the aforementioned services's and assistance's usefulness, non-duplication, benefits, etc. comply with Article 107 of the Colombian tax code
- Challenge of benefits and actual rendering of general services (accounting, administrative, marketing, etc.). During audit, the tax authority has been requiring companies to prove that the aforementioned services's usefulness, non-duplication, benefits, etc. comply with Article 107 of the Colombian tax code
- The tax authority challenges those taxpayers that "confess" that the intercompany transactions do not comply with the arm's length principle. In many cases, taxpayers include in their transfer pricing informative return a result below the market range, but they give theoretical explanations as to why they are in this situation
- The tax authority challenges extraordinary adjustments that taxpayers include in their transfer pricing analysis, such as exchange rate gains/losses, government regulations, differences between Colombian GAAP and US GAAP, etc.

APA opportunity

Although as of 2012 no APAs have been concluded in Colombia, the tax authority promotes them as a viable and advantageous option for taxpayers, as they consolidate the taxpayer's transfer pricing position across several years instead of on a year to year basis. The only difference introduced with the reform is the duration of the agreement as stated in the CTC "the APA agreement will be valid for the year it is subscribed, the year before and up to three (3) taxable years after the year of the subscription."

Croatia

Taxing authority and tax law

Tax authority: Ministry of Finance

Tax law:

- The Corporate Income Tax Act (the CIT Act)
- The Corporate Income Tax Bylaw (the CIT Bylaw)

Relevant regulations and rulings

Article 13 of the CIT Act and Article 40 of the CIT Bylaw prescribe arm's length pricing as the basic principle to be followed, define the methods allowed and documentation required to support prices between related parties.

In general, arm's length pricing is required only for cross-border transactions between related parties. However, in line with the Amendments to the CIT Act (in force as of 1 July 2010), the obligation to comply with transfer pricing rules is extended to transactions between domestic entities if one of the entities is either in a tax loss position or in a special tax status (paying tax at lower rate or exempt from paying corporate income tax). Note that this is in line with the non-binding, official opinion of the tax authorities issued prior to the legislation amendments' introduction (i.e., the opinion governs prior to 1 July 2010). At present, neither the CIT Act nor the CIT Bylaw provides extensive guidance or instruction to taxpayers with regard to meeting the transfer pricing requirements.

OECD Guidelines treatment

Although Croatia is not an OECD member country, the provisions of relevant Croatian tax legislation are generally based on the OECD Transfer Pricing Guidelines (OECD Guidelines). Furthermore, the Ministry of Finance issued instructions for the tax officials performing transfer pricing audits, which are also based on the OECD Guidelines.

Priorities/pricing methods

The Croatian CIT regulations do not provide detailed rules on how to arrive at the arm's length price that should be applied in related party transactions. However, the CIT Act prescribes the methods that a taxpayer can use to determine the arm's length price: CUP, Resale Minus, Cost Plus, Profit Split and TNMM. All five standard methods are allowed, however traditional transactional methods (CUP, Resale Minus and Cost Plus) have priority over profit-based methods when establishing whether or not the conditions imposed between related parties are at arm's length. If possible, the CUP method should be applied. Transactional profit methods (Profit Split and TNMM) should be used only on occasions where traditional methods cannot be reliably applied.

Transfer pricing penalties

Fines of up to HRK200,000 (approximately EUR27,000) for a company, and HRK20,000 (approximately EUR2,700) for the responsible individual within the company, may be imposed for any underestimation of the corporate income tax liability. Penalty interest is calculated from the date when the tax was due until the date when the tax is paid.

Penalty relief

There are no specific provisions concerning penalty relief.

Documentation requirements

According to the CIT Bylaw, a taxpayer should prepare documentation to substantiate the arm's length nature of the prices charged in transactions with any related parties. Such documentation will include:

- Information on the corporate group in which it operates and its position in the group, an analysis of related party transactions and other details of the group and the taxpayer;
- The transfer pricing method applied, including a description of the data, methods and analysis performed in the process of determining transfer prices and provide reasons why the particular method was selected;

Croatia (continued)

Documentation requirements (continued)

- Assumptions and evaluations used in the process of determining transfer prices (in line with the principle of unbiased transactions), with reference to comparability, functional analysis and risk analysis
- All calculations of transfer pricing based on the selected method (such documentation should enable a comparison with the prices applied by other comparable taxpayers)
- Update to transfer pricing documentation from previous years, reflecting adjustments made due to changes in relevant facts and circumstances
- Provision of additional documents upon which the transfer pricing analysis was based or to which the documentation refers

The taxpayer must maintain the documentation concerning related parties and intercompany transactions.

Documentation deadlines

There is no specific deadline for the preparation of the transfer pricing documentation prescribed by the legislation. The law requires the transfer pricing documentation to be readily available and provided to the tax authorities upon their request in a tax audit. The documentation should be in Croatian.

Although not prescribed by CIT legislation, in practice the tax authorities started requesting, on a case by case basis, a statement on transfer pricing method applied and transfer pricing documentation to be submitted as supporting documentation upon submission of the corporate income tax return (four months upon end of the taxpayer's fiscal year).

Statute of limitations on transfer pricing assessments

The general statute of limitations for determination of tax liabilities and rights in a particular tax period expires at the end of the third year following the year in which a tax return should have been filed (e.g., as the 2012 corporate income tax return has to be filed by 30 April 2013, filings for 2012 become statute-barred on 1 January 2017). However, the general statute of limitations may be extended, and restarts after each intervention by the tax authority concerning a tax return which has been filed. The absolute statute of limitations expires at the end of the sixth year following the year in which the tax return should have been filed. Therefore, filings for 2012 become statute-barred, regardless of the number of intervening events initiated by the tax authority, on 1 January 2020.

Note however that the amendments to the law provisions regulating statute of limitation period of the right to assess tax have been introduced and are in effect as of 1 January 2013. Based on the new rules, statute of limitation period mentioned above could be prolonged in cases when investigations are initiated over a director, shareholder or related party in connection to the abuse of rights (e.g., deliberate actions aimed at non-payment of tax) or unexplained sources of assets.

Return disclosures/related party disclosures

No specific disclosures are required in the annual tax return. However, Croatian tax authorities regularly request information on transfer pricing methods used after the CIT return has been filed.

Transfer pricing–specific returns

No specific requirements for a separate return (including an information return) for related party transactions are prescribed by Croatian CIT Act or Bylaw.

Croatia (continued)

Audit risk/transfer pricing scrutiny

In the past few years, the tax authorities have increased their focus on prices applied in transactions with related parties and thus, the frequency of transfer pricing audits has increased. Initially, due to limited experience in transfer pricing, the tax authorities tended to dispute service charges between related companies. However, there is a noticeable trend towards an increase in transfer pricing knowledge of tax inspectors and awareness of the transfer pricing issues.

In 2009, the tax authorities issued a manual containing the instructions that should be followed by the tax inspectors in transfer pricing audits. The manual also provides a translation of the OECD Guidelines. Therefore, it can be inferred that the tax authorities consider the OECD Guidelines to represent a good theoretical basis for defining transfer prices and for preparing the documentation which supports them. To wit, transfer pricing documentation prepared in line with the OECD Guidelines is accepted by the tax authorities.

Once a tax audit is initiated, there is a high risk of transfer pricing being reviewed within the audit, especially in cases involving high value related party transactions.

APA opportunity

Currently, there is no legal basis for APAs in Croatia.

Czech Republic

Taxing authority and tax law

Tax authority: Ministry of Finance (MF)

Tax law: The Income Tax Act §23(7) — arm's length principle, and §38nc — APA scope and procedures

Relevant regulations and rulings

Directive D-332 discusses the application of international standards in the taxation of transactions between associated companies. D-332 confirms the applicability of the OECD Transfer Pricing Guidelines (OECD Guidelines) for both international and domestic transactions (with certain exceptions).

Directive D-333 outlines requirements concerning §38nc of the Income Tax Act and comments on the principles of binding assessments, the latter of which corresponds to the preliminary price agreement principles within the meaning of the OECD Guidelines.

Directive D-334 outlines requirements on the expected scope of documentation of a transfer pricing methodology agreed upon between related parties. It also comments on the scope and nature of documentation in accordance with the Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the EU (Code of Conduct), created by the EU Joint Transfer Pricing Forum.

Directives D-332, 333 and 334 are not legally binding, but are usually followed in practice by the tax authority.

OECD Guidelines treatment

Based on Directive D-334, the OECD Guidelines, as well as the Code of Conduct, 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 calculating the arm's length price.

Priorities/pricing methods

The MF follows the OECD Guidelines. Use of profit-based methods is acceptable where substantiated.

Transfer pricing penalties

There are no specific transfer pricing penalties. Generally, upon a successful challenge of transfer pricing by the tax authority, a penalty of either 20% of the unpaid tax or 1% of the decreased tax loss will be applied. Thereafter, interest is assessed at 14% above the "repo rate" (or repurchase agreement rate) of the Czech National Bank (for five years at maximum).

Penalty relief

There is currently no penalty relief regime in place. It is at the discretion of the MF to decrease penalties; however, this is limited to specific situations.

Documentation requirements

There are no statutory documentation requirements in place. It is crucial for the taxpayer to have supporting documentation in case the transactions are audited by the tax authority, as the burden of proof rests with the taxpayer. The 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-334 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.

Czech Republic (continued)

Documentation requirements (continued)

D-333 sets out documentation that should serve as the initial basis for filing the application for issuance of a binding assessment. The documentation supporting a request for a binding assessment should contain information on the group, the company, the business relationship, other circumstances affecting the business relationship and the transfer pricing method.

Documentation deadlines

There is no specific deadline to prepare documentation, since no 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 taxpayer's receipt of a request from the tax authority. This time limit may be extended at the discretion of the tax authority if the taxpayer so requests.

Statute of limitations on transfer pricing assessments

The general statute of limitations applies. Effective 1 January 2011, the limit set by the Tax Code is three years from the end of the period for filing of the return of the taxable period in question (i.e., in which the tax liability arose). However, if the 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 (should the taxpayer file an additional return in the 12 months prior to expiration of current limit, the limit is extended by one year) or if a tax loss carry forward may be utilized in the particular period. However, tax may not be assessed after 10 years.

Return disclosures/related party disclosures

Effective 1 January 2001, the executives of a controlled entity are required to complete a memorandum with respect to relationships to 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 on tax legislation, and the memorandum has no direct tax impact or tax aspects. Taxpayers must provide documentation of transactions with related parties on the corporate income tax return.

Transfer pricing-specific returns

No specific transfer pricing return is required.

Audit risk/transfer pricing scrutiny

In general, the likelihood of an annual tax audit is characterized as medium. The likelihood that transfer pricing is reviewed as part of that audit is high. The likelihood that transfer pricing methodology will be challenged as part of the audit is characterized as medium.

The 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. The scrutiny of transfer pricing will only intensify, and in press statements, the MF has directed the tax authorities should particularly focus on transfer pricing. In addition, they have created specialized sections within the tax authority containing full-time specialists dedicated to transfer pricing issues.

APA opportunity

APA regulations were established under §38nc of the Income Tax Act, which became effective 1 January 2006. Upon the taxpayer's request, the tax administrator decides whether the 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 tax liability. D-333 details the procedure for issuing binding assessments and the particulars for the application. Generally, the tax administrator should issue the decision within six months.

Denmark

Taxing authority and tax law

Taxing authority: Ministry of Taxation (MT).

Tax law:

- Section 2 of the Tax Assessment Act
- Sections 3B, 14(4) and 17(3) of the Tax Control Act
- Sections 26 and 27 of the Tax Administration Act

Relevant regulations and rulings

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

The tax authorities published additional documentation guidelines on valuation in August 2009. The guidelines are applicable to the valuation of companies and division, including valuation of goodwill and Intellectual Property (IP) rights. Furthermore, the guidelines include a description of valuation models, recommendation of use and guidelines for the documentation of the valuation. The guidelines are referred to as the Guidelines of Valuation.

OECD Guidelines treatment

Ministry of Taxation, for the purpose of its assessment, applies the principles of the OECD Transfer Pricing Guidelines (OECD Guidelines).

Priorities/pricing methods

The following transfer pricing methods are accepted: CUP, Resale Price, Cost Plus, Profit Split and TNMM. Selecting the most appropriate method, the taxpayer should take into consideration the aspects regarding the application of methods stated in the OECD Guidelines..

Transfer pricing penalties

Penalties were introduced for income years commencing on or after 2 April 2006. Penalties are applicable if the transfer pricing documentation requirements are not observed either intentionally (deliberate omission), because of gross negligence, or due to the provision of incorrect and misleading information on the exemption rule for small and medium-sized companies.

The penalty regime was changed in Act 591 of 18 June 2012. The changes clarify the penalty amount of twice the cost saved by not submitting compliant documentation to be DKK 250,000 per legal entity per year, if insufficient transfer pricing documentation is submitted. If in addition, the income is increased, an additional fine of 10% may be imposed on the income adjustment. If proper documentation is prepared, no penalty can be imposed. Where there is an income adjustment, a 3.9% (4.3% in 2012, 4.8% in 2011, 5.1% in 2010, 6.1% for 2009, 6.3% for 2008 and 5.8% for 2007) nondeductible surcharge on all adjustments of prior years' corporate taxes payable will be levied. Furthermore, nondeductible interest of 0.4% (0.5% for the income years 2010-2012, 0.6% for income years 2007-2009 and 0.5% for the income year 2006) for each additional month after the corporate tax payable for the income year in question is due.

Penalty relief

If the taxpayer provides insufficient documentation and later supplements it to meet the requirements, the fine will be reduced to half of the original amount (DKK125,000). However, the 10% penalty on an income adjustment still applies.

Denmark (continued)

Documentation requirements

The documentation must be made available to the tax authorities within 60 days from when the notice is received. The earliest such a request can be made is the filing date of a company's tax return. Please refer to the section about documentation deadlines for further information on the deadline for preparing the documentation.

The transfer pricing documentation requirements include both domestic and foreign intercompany transactions. Under certain circumstances, the transfer pricing documentation requirements are reduced for small and medium-sized companies (companies that are classified according to thresholds measured at group level).

The documentation requirements were tightened as of 2006. According to the Executive Order on Transfer Pricing Documentation, the documentation must 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:
  - Parties, types of products/services/assets transferred and the volumes involved
  - An analysis of functions and risks undertaken and assets employed by the entities involved
  - Contractual terms
  - Economic conditions
  - Business strategies
- Comparability analysis for each intercompany transaction, including:
  - 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)
  - 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

Upon request from the tax authorities, a taxpayer is required to provide a benchmark study as part of the transfer pricing analysis within 60 to 90 days. As of August 2009, additional documentation guidelines are applicable to the valuation of companies/businesses, shares and intangible assets/IP in a related party context.

In addition to the new penalty rules, the Parliament adopted new rules allowing the tax authorities to request, entities that are subject to the transfer pricing documentation requirements to obtain an auditor's report under special circumstances. The auditor's report must state that the auditor has not, during the audit, become aware of any matters giving rise to a conclusion that the transfer pricing documentation i) does not give a true and fair view of the controlled transactions, ii) does not meet the documentation requirements, or iii) is not in accordance with the arm's length principle.

The tax authorities can request an auditor's report from the company, if the company has had either:

- Controlled transactions with entities in countries outside the EU and EEA with which Denmark has not concluded a tax treaty (low-tax countries)

Or

- An average operating loss for the past four year period according to the annual report — measured as the profit/loss before net financials, extraordinary items and tax (EBIT)

Denmark (continued)

Documentation requirements (continued)

By measuring the average operating loss over a four year period, loss-making companies are prevented from recording a small profit in one year to get out of the rule.

Further, it is a condition that the request for an auditor's report by the tax authorities is an appropriate and relevant control measure. Auditor's reports are expected to be requested only in a relatively limited number of instances every year.

An auditor's report cannot be prepared by the auditor that audits the entity's financial statements or contributes to drafting its transfer pricing documentation.

The company will have minimum 90 days to prepare the auditor's report. The expenses related to the auditor's report must be borne by the company itself.

Documentation deadlines

A company subject to the documentation requirement is required to submit Form 05.021 on controlled transactions together with the tax return.

The transfer pricing documentation for a particular income year should be prepared at the time when the tax return is submitted. The tax authorities can request the taxpayer to submit the transfer pricing documentation with a 60 day notice. The earliest such a request can be made is the filing date of a company's tax return. In the past, the documentation requirements were met if the documentation was prepared within 60 days of the request from the tax authorities. However, recent practice shows that the rules shall be interpreted such that the taxpayer is obligated to prepare contemporaneous documentation; i.e., it is understood that the documentation should be prepared as a part of tax returns each year.

Statute of limitations 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 or not the company qualifies for reduced documentation requirements.

Transfer pricing-specific returns

N/A, please see the section above "return disclosures/related party disclosures"

Denmark (continued)

Audit risk/transfer pricing scrutiny

The risk of a general tax audit can be characterized as moderate. As the majority of audits carried out in Denmark are transfer pricing audits, the risk of transfer pricing being scrutinized during an audit is high. The likelihood that the transfer pricing methodology will be challenged is also high.

Dedicated transfer pricing audit centers across Denmark are operated by the tax authority with the single purpose of carrying out transfer pricing audits independently of general tax audits. The government has launched new initiatives with a focus on MNEs, including increasing the funds allocated to the tax authorities, and tightening the penalty rules in transfer pricing cases. The tax authority's focus is especially on MNEs with the following matters:

- MNEs that either are break even or are loss making
- Transfer of business or intangibles/restructurings
- Transactions with perceived low tax jurisdictions
- Transactions with non-treaty partners
- Financial transactions
- Intergroup services

The transfer of business/intangibles out of Denmark is key target for MT. In line with this focus, the August 2009 MT guidelines were published on the valuation methods applicable to and documentation of companies/businesses, shares and intangible assets/IP in a related party context.

Most tax audits not only include but are also being initiated with requests related to transfer pricing review. Intensified cooperation between the Nordic taxing 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 both unilateral and bilateral APAs. There is no APA regime in place, but the tax authorities enter into 5-7 bilateral APAs annually. At this point, all applications for APAs have been accepted.

We expect this area will develop within the next few years, meaning that we expect an increase in the number of APAs that will be initiated and finalized.

Dominican Republic

Taxing authority and tax law

Taxing authority: Tax Administration of the Dominican Republic (Dirección General de Impuestos Internos, or DGII)

Tax law: In January 2007, an amendment to Article 281 of the Tax Code introduced the arm's length principle, allowing the DGII to adjust prices used in related parties' transactions that do not meet this standard.

Relevant regulations and rulings

Transfer pricing regulations are in effect as of fiscal year 2011.

Regulations regarding the general guidelines and penalties were enacted by the DGII on 2 June 2011 through Revenue Ruling No. 04-2011. As of 9 November 2012, through the enactment of Law 253-12 (Law), these regulations were incorporated into the Article 281 of the Tax Code.

The aforementioned Law broadened the scope of the Article 281 of the Tax Code, which now states that transfer pricing regulations apply to intercompany transactions conducted by a Dominican taxpayer with:

- Related parties resident in the Dominican Republic or abroad
- Entities located in a low tax jurisdiction, or tax haven
- Entities which benefit from a preferential tax regime

Further regulations are pending enactment by the DGII following the issuance of the Law.

OECD Guidelines treatment

Under Revenue Ruling No. 04-2011, the OECD Transfer Pricing Guidelines (OECD Guidelines) can be relied upon for interpretation of the rules, as long as they do not contradict the Dominican Tax Code or any rulings issued by the DGII.

Priorities/pricing methods

The transfer pricing methods in the Dominican Republic are: the CUP, Resale Price, Cost Plus, Profit Split, Residual Profit Split and TNMM. With Law 253-12, the CUP, Resale Price and Cost Plus methods take priority over the transactional methods.

Law 253-12 also presents an additional non-OECD method (the import and export valuation method), which is intended to be used for transactions involving imports or exports of goods with well known prices in transparent markets.

Transfer pricing penalties

Failure to supply transfer pricing documentation on time or failure to provide true, complete or accurate information could result in penalties up to 0.75% of the previous year's income. In addition, any additional tax generated by price adjustments made by the DGII should be subject to surcharges and penalty interest.

Penalty relief

A taxpayer might benefit from the reduction of the surcharges assessed as a result of any adjustments made by the DGII. These reductions might be as follows:

- 40% reduction of the surcharges assessed, if the company decides to voluntarily amend its tax return without any prior notice from tax authorities
- 30% reduction of the surcharges, if after being audited, the difference between the estimated tax and the effectively paid tax represents less than 30% of the latter

Dominican Republic (continued)

Documentation requirements

Contemporaneous transfer pricing documentation related to cross-border intercompany transactions must be kept and maintained. Documentation must include:

- Relevant market conditions
- A detailed description of the nature of the transactions
- Information on the taxpayer including financials and a detailed analysis of functions, risks and assets
- Comparability analysis
- Transfer pricing method(s) employed
- Other

It is also necessary to include the method selection process and specification of the price or margin, or range of prices or margins applied by the taxpayer to its intercompany transactions.

Documentation deadlines

Documentation must be readily available by the due date of the annual income tax return and must be kept as part of the company's accounting books and records. If requested by the tax authorities, documentation should be provided within the period the tax authorities stipulate in the notice.

Statute of limitations on transfer pricing assessments

The statute of limitations is three years. The term is affected by amended returns. However, if a taxpayer fails to file a return, the period is extended to five years.

Return disclosures/related party disclosures

There are no related party disclosures that are to be made on general income tax returns.

Transfer pricing-specific returns

Under Revenue Ruling No. 04-2011, taxpayers should file annually an information return describing the transactions conducted with:

- Related parties resident in the Dominican Republic or abroad
- Entities located in a low tax jurisdiction, or tax haven
- Entities which benefit from a preferential tax regime

Information to be disclosed includes related parties' tax address and tax identification number, transaction classifications, amounts, invoices for each transaction, and methods to be applied for analysis and profit or loss obtained, among others. This return shall be filed within 180 days after the closing date of the fiscal year.

Dominican Republic (continued)

Audit risk/transfer pricing scrutiny

The risk of a general tax audit is currently categorized as medium. The risk of transfer pricing assessments as part of a general tax audit is considered medium as well. Even though transfer pricing regulations are new in the country, the DGII has initiated tax audits regarding transfer pricing issues.

In case transfer pricing is scrutinized, the risk that the transfer pricing methodology will be challenged is medium.

APA opportunity

APAs, bilateral or multilateral, are contemplated in Article 281-bis of the Tax Code. Taxpayers can request an APA for a certain time period and renew for an additional three years.

Furthermore, Law 253-12 contemplates a protection regime (regimen de protección) oriented to specific industries or economic activities, even though the Law does not mention the specific industries or activities subject to this regime. The DGII could determine a minimum price or margin if the taxpayer agrees and reflects it in its income tax return. Such a price or margin could be calculated considering the total value of income, assets, costs and expenses and other variables that may be justified. DGII issues a corresponding resolution once the industry or economic activity is selected.

Ecuador

Taxing authority and tax law

Tax authority: Internal Revenue Service (Servicio de Rentas Internas or SRI)

Tax law: Internal Tax Regime Organic Law (Ley Orgánica de Régimen Tributario Interno or LORTI) and its regulations

Relevant regulations and rulings

- Title 1, Chapter I, 1st unnumbered after Art. 4, LORTI — definition of related parties
- Title 1, Chapter IV, § 2 LORTI — establishment of the transfer pricing regime

In the same section mentioned above, the fifth unnumbered Article after Article 15, establishes an exception to the transfer pricing regime application when a taxpayer complies with all of the following conditions concomitantly:

- Has tax payable greater than the 3% of their taxable income
- Does not perform transactions with tax havens
- Does not have government contracts related to the exploration and exploitation of non-renewable resources

Article 90 LORTI establishes the utilization of secret comparables for the review of the application of the arm's length principle.

Article 87 of the Tax Regulation (Reglamento para la Aplicación del Régimen Tributarios Interno) establishes the median calculation and arm's length standard.

In addition, the Tax Regulation establishes the concept of sub-capitalization, which requires the amount of the external debt not be greater than 300% of the equity, if interest payments abroad are to be considered deductible expenses.

SRI Resolution NAC-DGER2008-0464 establishes the transfer pricing exhibit and transfer pricing integral report content requirements.

OECD Guidelines treatment

The SRI considers the 1995 edition of the OECD Transfer Pricing Guidelines (OECD Guidelines) to be a technical reference for analyzing intercompany transactions. However, LORTI holds supremacy over the OECD Guidelines.

Ecuador follows a hierarchy of transfer pricing methods. Local regulations establish that only the six methods established in the OECD Guidelines are applicable. The CPM and full profit split method are considered the last resort methods by the SRI.

Priorities/pricing methods

The SRI accepts the CUP, Resale, Cost Plus, Profit Split, Residual Profit Split, and TNMM. There is 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 reliably applied, due to the complexity of the transactions under analysis, the SRI accepts the other methods mentioned above as valid ones, leaving the TNMM as the method of last resort. The implication is that all method rejections must be thoughtfully documented.

There are specific CUP method applications. 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 operating through international intermediaries who are not the final consignees or producers of certain 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 party has no more than 20% of its operations with related parties.

Ecuador (continued)

Transfer pricing penalties

Ecuador has a specific transfer pricing penalty regime. There are processes in place to ensure the consistent application of transfer pricing penalties in the jurisdiction.

Penalties up to USD15,000 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.

Assessments of any kind, including transfer pricing adjustments, must charge interests from the time when the taxes were payable. In addition, a 20% surcharge on the assessment will be applied.

Penalty relief

Currently, no penalty relief regime is available.

Documentation requirements

The SRI requires a transfer pricing annex report to be filed, detailing:

- All transactions with foreign related parties
- The methods applied in analyzing each transaction
- 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 USD3 million in the reported fiscal year, or companies with accumulated transactions with related parties between USD1 million and USD3 million in the reported fiscal year, where the amount represents up to 50% of the total revenues.

Additionally, the transfer pricing integral report must be presented to the SRI by companies with accumulated transactions with related parties exceeding USD5 million in the reported fiscal year. This report must substantiate the analyses made for all transactions reported in the annex. Both documents must be filed no later than two months after the income tax return deadline.

Notwithstanding the rules, 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 amounts. It may also request these documents where there are transactions between domestic related companies, regardless of the involved amounts. These reports were infrequently requested prior to 2011. Going forward, it is expected that the demand for these documents will only increase, given that the Code of Production established certain tax-free activities within Ecuador.

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 acceptance or rejection of 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

Ecuador (continued)

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 no later than two months after filing the tax return. That is, from 10 June to 28 June depending on the ninth digit of the company 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 USD3 million or when related parties' transactions between USD1 million and USD3 million represents up to 50% of the total revenues.

The integral report must be delivered in addition to the annex when those transactions exceed USD5 million, or when demanded by the tax administration.

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:

- Companies in tax havens
- 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

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.

Article 1 of Resolution NAC-DGERCGC09-00704, excluded Uruguay from the list of counties considered as a tax havens by the SRI.

Audit risk/transfer pricing scrutiny

In recent years, the number of cases involved in ongoing litigation and undergoing domestic appeals (preceding court action) has increased. Tax havens are frequently involved in disputes.

The likelihood of annual tax audit in general is dependent on several factors, including revenues, industry, and compliance precedents, but can be characterized as high.

If a taxpayer is selected for a general tax audit, the likelihood that transfer pricing will be reviewed as part of that audit is high.

The likelihood that, if transfer pricing is reviewed as part of the audit, the transfer pricing methodology will be challenged is also high. For example, in audits where transfer pricing is a subject of the audit, the percentage of reviews where assessments are based on challenging the methodology (or at least the comparables set) is over 75%.

Certain taxpayers continuously face a high risk of tax administration audits. These taxpayers are usually defined by total revenue, or because of certain business activities in relevant industries.

A transfer pricing audit is instigated by a central decision-making body. Various considerations are taken into account in determining which taxpayers to audit, including (ranked in order of importance):

- The outcome of a risk assessment by the SRI
- The nature of related party transactions undertaken by the taxpayer
- The outcome of customs
- Previous tax audits of the taxpayer
- The profitability of the local taxpayer

Ecuador (continued)

Audit risk/transfer pricing scrutiny (continued)

The sale of tangible goods (representing 80% of the current case load) and intra-group services (approximately 20% of the current case load) are currently the focus of the Directorate of Taxes for transfer pricing review.

APA opportunity

Ecuador currently has no formal APA program. The local law outlines the possibility of APA-like procedures and prescribes that regulations will be issued by the tax administration on the application process of APA. However, relevant regulations have not yet been issued. Therefore, no taxpayer has started consultation for an APA-like procedure.

Generally, the procedures require taxpayers to satisfy inquiries relating to the previous two taxable years from the tax administration, after which taxpayers may propose, through consultation with the tax administration, applicable prices for the APA term.
The APA term includes the year preceding the APA application, the year of the APA application and the two tax years following the application. The SRI has up to two years to resolve the proposal, but the actual time will depend on the caseload.

Egypt

Taxing authority and tax law

Taxing authority: Egyptian Tax Authority (ETA)

Tax law: Income Tax Law No. 91 of 2005 (ITL)

Relevant regulations and rulings

In order to raise taxpayer awareness of transfer pricing principles and how to apply Article no. 30 of the ITL and Articles no. 38, 39 and 40 of its executive regulation, the ETA, with the assistance of the OECD, issued its transfer pricing guidelines in 2010. ETA decided to issue its transfer pricing guidelines in a series of parts and to focus on the main concepts and issues in the first part. Accordingly, the first part provides taxpayers with guidance on the arm's length principle, comparability analysis, transfer pricing methods and documentation requirements.

The upcoming parts of the transfer pricing guidelines will address other issues, such as the application of the arm's length principle to transactions involving intangible property, intra-group services, cost contribution arrangements (CCAs) and advance pricing agreements (APAs).

Taxpayers are able to submit their transfer pricing documentation in English. However, an Arabic version is generally requested during the inspection process.

According to Article no. 30 of the ITL, 'If the associated persons set conditions in their commercial or financial dealings different from the conditions taking place between non-associated 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 arm's length pricing.'

The head of the Administration may conclude advance agreements with associated persons on one or more methods for determining the arm's length price.

According to the transfer pricing guidelines, a related party is defined as any person who has a relationship with a taxpayer that may lead to an effect on that taxpayer's taxable profit. Based on the transfer pricing guidelines, related parties include:

- A husband, wife, ancestors and descendents (family members)
- Capital associations and a person that holds at least 50% of the value of shares or voting rights, whether directly or indirectly
- Partnerships, the joint partners and silent partners of those partnerships
- Any two or more companies where a third party holds 50% or more of the value of shares or of the voting rights in each company

OECD Guidelines treatment

Pursuant to the executive regulations of the ITL, in case none of the three methods referred to in the law are applicable, any one of the methods mentioned in the OECD Transfer Pricing Guidelines (OECD Guidelines), or any other acceptable method suitable for the taxpayer may be followed.

Priorities/pricing methods

The executive regulations of the ITL establish, in Article nos. 39 and 40, the methods of calculating the arm's length price.

According to Article no. 39, the fair market price shall be determined according to either the CUP, Cost Plus, or the Resale Price methods.

According to Article no. 40, the preferred method for determining the neutral price shall be the CUP method. In case the data necessary for applying this method is unavailable, any of the two other methods prescribed in Article no. 39 may be applied.

In case of inability to apply any of the three methods mentioned, any other method described by the OECD Guidelines or any other method appropriate for the taxpayer may be followed.

Profit based methods noted in the OECD Guidelines, such as the TNMM are acceptable methods, provided the tax payer can demonstrate it is the most appropriate method for the analysis and why the other methods are not appropriate.

Egypt (continued)

Transfer pricing penalties

According to the ITL, if the tax amount included in the tax return, by the taxpayers, 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

There is currently no specific penalty related to transfer pricing; however, any adjustments based on related party transactions which cannot be defended due to the absence of a transfer pricing study or sufficient supporting documents will be subject to the normal penalties and interest mentioned in the ITL.

Documentation requirements

The Egyptian transfer pricing rules place the burden of proof on the ETA, provided that the taxpayer can produce sufficient transfer pricing documentation (and other supporting documents, including intercompany agreements, schedules, and invoices) to support its declared transactions on the tax return. According to the rules, however, the burden of proof shifts to the taxpayer in the event that the tax return is not filed or the taxpayer fails to produce proper transfer pricing documentation to support its tax return positions.

The transfer pricing documentation does not need to be submitted with the tax return, but should be available at short notice should it be requested by the ETA.

Documentation deadlines

Taxpayers are obliged to prepare transfer pricing reports beginning with fiscal year 2010. However, they do not need to submit the transfer pricing study with the annual tax return. The transfer pricing report will be required during the inspection process. From 2010 onward, Egyptian transfer pricing documentation is required to be contemporaneous with the tax return. Egyptian tax returns are filed four months following the year end of the company's fiscal year. Companies are allowed to file for a two month extension. Hence, at the latest, transfer pricing documentation should be completed by June for companies with December year-end (and in principal by end of April) to be contemporaneous.

Statute of limitations on transfer pricing assessments

The statute of limitations is five years.

Return disclosures/related party disclosures

The corporate tax return, in the related party disclosure section, requires taxpayers to provide the following information:

- Name of the related party/parties, along with the group structure
- 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 and the reasons of selecting this method
- The country of origin for tangible and intangible goods
- The country of the supplier

Egypt (continued)

Transfer pricing-specific returns

There are no separate return to be filed for transfer pricing. However, disclosure of related party transactions is required on the corporate tax return.

Audit risk/transfer pricing scrutiny

Transfer pricing is now part of the general corporate tax return audit. The Republic of Egypt indicated in its annual general budget — Taxation Chapter, that transfer pricing adjustments are a major and priority source of tax income to the country. Hence, ETA has started paying extra attention to related party transactions during the corporate tax inspection for financial year 2005 onwards. During the assessment, the ETA demands documents to support intercompany pricing.

Taxpayers who will provide sufficient documentation proving that they exerted efforts to establish transfer prices that comply with the arm's length principle are likely to be assigned by ETA a low tax risk rating. However, taxpayers giving inadequate consideration to their transfer pricing practices will be assigned a high risk rating.

Taxpayers with high perceived risk are more likely to be audited by ETA than those perceived to have low risk.

The ETA intends to issue periodic clarifications in connection with the transfer pricing issues that might arise from its practical experience.

APA opportunity

APAs are available in Egypt, but to the best of our knowledge, none have been concluded to date.

El Salvador

Taxing authority and tax law

Taxing authorities: Dirección General de los Impuestos Internos (DGII) and Ministerio de Hacienda (MH)

Tax law: Salvadorian Tax Code (TC) Sections 62-A, 124-A, 135-f), 147-e), 199-A, 199-B, 199-C, and 199-D

Relevant regulations and rulings

Effective as of 29 December 2009, the Salvadorian Congress passed a tax reform modifying the TC through Decree No. 233. Among the most relevant changes were the introduction of the valuation at fair market value principle, the definition of related party, and the comparability concept.

Disclosure in the tax report

Under the rules of the TC, when a taxpayer has assets with a value in excess of USD1,142,857 or sales higher than USD571,429 during the previous fiscal year, it must appoint an external tax auditor (certified public accountant) to perform a statutory tax audit and file the resulting tax audit report within the first five months following the tax year that was audited (deadline of 31 May or when applicable, the next business day).

As part of the tax reform, subsection (f) was added to Section 135 TC to include an obligation for an external tax auditor to include a note in its report regarding transactions conducted by the taxpayer with its related parties or entities domiciled in tax haven jurisdictions, indicating if the taxpayer complies with the transfer pricing legislation (mainly the arm's length principle).

As of March 2012, the MH on its website published an Administrative Guideline or Guía de Orientación (GO) No. 001/2012 intended to provide general guidance to taxpayers on the tax treatment of related party transactions or transactions with entities domiciled in tax havens jurisdictions.

The GO is intended to supplement the TC by defining guidelines for both taxpayers and tax auditors. For taxpayers, it provides guidance on topics such as the identification of related parties, transfer pricing methodology and documentation requirements, as well as on the application of withholding tax and non-deductibility of costs and expenses in related party transactions and transactions with tax havens. For tax auditors, it provides guidance on disclosure in the tax report.

OECD Guidelines treatment

El Salvador is not a member of the OECD; however, via the GO, it refers to the OECD Transfer Pricing Guidelines (OECD Guidelines) and the definitions contained therein. It is more likely than not that tax authorities accept transfer pricing analyses made in accordance with OECD Guidelines.

Priorities/pricing methods

The law does not regulate specific transfer pricing methods, but it establishes that tax authorities are empowered to apply the CUP method when adjusting prices. Therefore, in practice, tax authorities would have a preference for this method. Nonetheless, with the introduction of the GO, the following methods are acceptable: 1) CUP Method, 2) Resale Price Method, 3) Cost Plus Method 4) TNMM, and 5) Profit Split Method.

Transfer pricing penalties

Failure to maintain transfer pricing documentation

A penalty of 2% over taxpayer's equity as reflected in the taxpayer's balance sheet, minus surplus on the revaluation of assets, is imposed when the taxpayer does not have supporting documentation or fails to comply with the obligation to maintain all documentation, for 10 years for transactions conducted with related parties, and with individuals or legal entities domiciled, incorporated or resident in tax haven jurisdictions.

Said penalty cannot be less than nine minimum wages[1] (approximately USD2,018).

1 The minimum wage is established by the Salvadorian Labor Ministry. As of 16 May 2011 and according to Executive Decree No 56 published in the Official Gazette No 391, the monthly commercial minimum wage to which the TC refers, was established as USD224.21

El Salvador (continued)

Transfer pricing penalties (continued)

Failure to comply with Section 135-f

In case the external tax auditor fails to comply with the new requirement under Section 135-f TC, a penalty of five minimum wages is established for the tax auditor (approximately USD1,121), regardless of any other penalty that may be imposed by the local CPA's Council for not complying with the responsibilities of the profession.

Additionally, in case the tax auditor's noncompliance is due to the fact that the taxpayer failed to provide the information and documentation requested and required by the tax auditor, a penalty of 0.1% over taxpayer's equity as reflected on taxpayer's balance sheet, minus surplus on the revaluation of assets, would be imposed on the taxpayer. Said penalty is at least four monthly minimum wages (approximately USD897).

Failure to file related parties' information return

In case of noncompliance with the filing obligation of the information return, Article 244 literal l) TC establishes a penalty of 0.5% over taxpayer's equity as reflected in the taxpayer's balance sheet, minus surplus on the revaluation of assets, or not less than three monthly minimum wages (approximately USD672.63).

When there is no balance sheet, or it is not possible to determine the taxpayer's equity, a penalty of nine minimum wages would be applicable (approximately USD2018).

General penalties and interest in case of tax adjustments

In case of adjustments for underpayments either on Income Tax or VAT, a general penalty of 25% of the unpaid tax applies, at least USD568.

Furthermore, interest payments also apply. If the tax liability is paid within two months of the original payment term, the applicable annual interest rate is 7.62%, but if the tax liability is paid more than two months after the original payment term, the applicable annual interest rate is 11.62%.

Penalty relief

According to Article 261 TC, if there is voluntary disclosure and payment, before any notice of an examination is received from tax authorities, a 75% penalty reduction applies; if an examination is already ongoing, a 30% penalty reduction may still apply.

Documentation requirements

Currently, transfer pricing documentation is indirectly required in El Salvador through the GO, and it is advisable to document and adequately support all transactions made with related parties for the external tax auditor to verify and reflect in the Tax Audit Report that said transactions comply with transfer pricing regulations. Furthermore, the tax authorities have already started transfer pricing audits, and in case a taxpayer does not maintain contemporaneous transfer pricing documentation, no penalties apply, but there is a higher risk that tax authorities may attempt to recalculate and adjust according to their criteria.

In any case, taxpayers should have all supporting data and information that demonstrate that its intercompany transactions meet the arm's length principle test.

Among the documentation requirements by the GO, information about the taxpayer and its multinational group should be included, as well as a complete functional analysis, criteria for selection of comparables and applicable methodology.

The GO recognizes the arm's length standard, the comparability criteria, the transfer pricing methods, and implicitly, the overall OECD Guidelines, as a valid reference for establishing transfer prices.

Despite the fact that there is no explicit documentation obligation for taxpayers in the TC, the fact that the external auditor has to issue an opinion on transfer prices, practically requires taxpayers to prepare and maintain transfer pricing documentation by 31 May of each year, to support related party transactions so this can be reviewed in the Annual Tax Report (Dictamen Fiscal).

Documentation deadlines

It is recommended to prepare and maintain contemporaneous transfer pricing documentation within the first five months of the year following the one audited (period ending 31 May).

El Salvador (continued)

Statute of limitations on transfer pricing assessments

Under the current legislation and in particular the rules of the TC, the ordinary statute of limitations is three years; however, when no tax return has been filed, the statute of limitations is extended to five years.

Return disclosures/related party disclosures

Disclosure in the Tax Report

Under the rules of the TC, when a taxpayer has assets with a value in excess of USD1,142,857 or sales higher than USD571,429 during the previous fiscal year, it is required to appoint an external tax auditor (CPA) to perform a statutory tax audit and file the resulting tax audit report within the first five months following the tax year that was audited (deadline of 31 May or when applicable the next business day).

As part of the tax reform, subsection f) was added to Section 135 TC to include an obligation for an external tax auditor to include a note in its report regarding transactions conducted by the taxpayer with its related parties or entities domiciled in tax haven jurisdictions, indicating if the taxpayer complies with the transfer pricing legislation (mainly the arm's length principle).

Transfer pricing-specific returns

Article 124-A TC establishes an obligation for taxpayers to file an information return on transactions conducted with related parties (F-982) within the first three months that follows the fiscal year-end, when these transactions (individually or in the aggregate) are equal to or exceed USD571,429 annually.

Among the information that is required by Form F-982:

- The name of the related party or of the tax haven domiciled party
- The tax ID number, if said party is domiciled in El Salvador
- The annual amount of the transaction(s)
- The comparability criteria applied
- The methodology applied
- The comparability adjustments made
- The description of the transaction (there are listed 19 operations of income, 20 of expense, 7 of assets and 5 of liabilities)

In case of noncompliance with the filing obligation of this information return, Article 244 literal l) TC establishes a penalty of 0.5% over taxpayer's equity as reflected on the taxpayer's balance sheet, minus surplus on the revaluation of assets, or at least three monthly minimum wages (approximately USD672.63).

When there is no balance sheet, or it is not possible to determine a taxpayer's equity, a penalty of nine minimum wages applies (approximately USD2018).

Audit risk/transfer pricing scrutiny

The risk of a general tax audit is currently categorized as medium. As part of every general tax audit, the tax authorities review compliance with transfer pricing regulations. Thus, the risk that transfer pricing will be scrutinized as part of a general tax audit is medium. The tax authorities have been investing in training personnel outside the country to implement transfer pricing audit programs. The tax authorities have already started scrutinizing the transfer pricing of some taxpayers, in order to confirm that they are complying with the transfer pricing rules as established in the TC.

In case transfer pricing is scrutinized, the risk that the transfer pricing methodology will be challenged is low.

APA opportunity

There is no APA program available.

Estonia

Taxing authority and tax law

Tax authority: The Estonian Tax and Customs Board

Tax law: Estonian Income Tax Act:

- Article 8 — associated persons
- Article 50 sections 4 – 8
- Article 53 section 4 paragraph 6 — permanent establishments
- Article 14 section 7 — sole proprietors
- Article 50 section 7 — documentation requirements

Current Estonian transfer pricing legislation is effective as of 1 January 2007, amended as of 1 January 2011.

Relevant regulations and rulings

The Ministry of Finance issued a transfer pricing regulation on 10 November 2006 (No. 53), which came into force on 1 January 2007. The regulation sets out in more detail the principles for determining the arm's length price, and also establishes documentation requirements. There have been a few court rulings and an increasing number of tax proceedings on transfer pricing issues in Estonia.

OECD Guidelines treatment

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

Priorities/pricing methods

The Tax and Customs Board accepts the CUP, Resale Price, Cost Plus, Profit Split, and Transactional Net Margin methods or, if necessary, any other suitable method. There is no hierarchy of methods; all are treated as equal. However, if available, internal and Estonian domestic data is preferred for determining the arm's length price.

Transfer pricing penalties

If the required documentation or the relevant tax return is not submitted on time, the fine may be as high as EUR3,200.
In case of intentional submission of wrong information on the tax return that results in less tax paid, a criminal penalty may be imposed and the fine may be as high as EUR15 million. If tax is assessed, interest on 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 (here, interest is subject to income tax at the rate of 21/79 as a non-business-related expense).

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 payment is always assessed.

Documentation requirements

All entities must be able to prove that transactions with related parties take place at arm's length. Yet, an additional documentation requirement is imposed in the following cases if the taxpayer is:

- A resident credit institution, finance institution, insurance agency or a listed company
- A resident of a low tax territory

Estonia (continued)

Documentation requirements (continued)

- A resident legal person or a non-resident with a permanent establishment in Estonia conforming to the following:
  - Number of employees (including associated persons) is at least 250
  - Turnover of the financial year preceding the transaction with associated persons was at least EUR50 million
  - Consolidated balance sheet net assets were at least EUR43 million

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 of the tax authority's request.

Statute of limitations on transfer pricing assessments

The statute of limitations 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. The statute of limitations begins to run as of the due date of submission of the tax return that was either not submitted or contained information leading to an incorrect determination of tax due.

Return disclosures/related party disclosures

An annual report, including a description of transactions with related parties, must be filed within six months of the end of the relevant financial year. If the taxpayer has the obligation to prepare the transfer pricing documentation, such documentation must be completed every financial year.

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

Transfer pricing-specific returns

Currently, the Estonian tax laws do not require a separate return for related party transactions.

Audit risk/transfer pricing scrutiny

In general, the likelihood of an annual tax audit is characterized as medium. There is a high likelihood that transfer pricing will be reviewed as part of general tax audit. Further, the likelihood that the transfer pricing methodology will be challenged is characterized as medium.

APA opportunity

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

Finland

Taxing authority and tax law

Tax authority: Finnish Tax Administration

Tax law: Finnish Tax Act on Assessment Procedure §§14 a-c, 31, 32, 75 and 89

Relevant regulations and rulings

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 (OECD Guidelines).

Regarding business restructurings, the Finnish Tax Administration's Guidelines state that from a transfer pricing perspective, business restructurings should be examined as a whole. 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 of the OECD transfer pricing methods, 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 Guidelines.

Transfer pricing penalties

A tax penalty of up to EUR25,000 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 EUR50 million and their assets are worth more than EUR43 million
- 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 on a pro rata basis.

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 EUR500,000.

Documentation deadlines

A taxpayer has to submit the transfer pricing documentation for a specific fiscal year within 60 days of a request by 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 Finnish Tax Act on Assessment Procedure, if the other party to 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.

Transfer pricing-specific returns

If a taxpayer (including Finnish branch of a foreign company) is obligated to prepare transfer pricing documentation in Finland, the Finnish tax authorities also require Form 78 to be completed and disclosed with the annual corporate income tax return. Information regarding intra-group cross-border transactions, which normally cannot be directly found in the company's financial statements, is reported on Form 78.

However, information regarding the transfer pricing method applied is not reported in this form.

Audit risk/transfer pricing scrutiny

In general, the likelihood of annual tax audit is characterized as low. There is a high likelihood of transfer pricing being reviewed as part of an audit, and the likelihood of a challenge to the transfer pricing methodology is similarly high.

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

Tax authority: Generally referred to as the French Tax Authorities (FTA), or Direction Générale des Finances Publiques (DGFiP); formerly Direction Générale des Impôts (DGI).

Tax law, main technical provisions:

- French Tax Code (FTC) Articles 57 (arm's length principle), 238A (reversal of burden of proof in case of tax haven), and 209B (CFC regulation)
- French Procedural Tax Code (FPTC) Articles L 10, L 13AA, L 13AB, L 13B, L 80B and L 188A
- Case law about application of the theory of Abnormal Act of Management and Article 57 of the FTC
- Thin capitalization rules are also covered by Articles 212 and 39-1 of the FTC

Relevant regulations and rulings

Administrative doctrine pertaining mainly to Articles 57 and 238A of the FTC, and Articles L 13B and L 80B of the FPTC.

Administrative guidelines 4 A-10-10 N° 1 of 4 January 2011, in relation to the application of the new documentation requirement provided by Articles L 13AA and L 13AB FPTC.

Following a tax reassessment, taxpayers can request mutual agreement procedure (MAP) relief (on the ground of tax treaty or the European Arbitration Convention) in order to avoid double taxation resulting from the reassessment. On 23 February 2006, the FTA published administrative guidelines (#14 F-1-06) specifying the scope and the conditions to be met for the commencement of such a procedure.

Assessment of a penalty under L13 AA (transfer pricing documentation penalty regime) does not prevent the taxpayer from seeking recourse under MAP provisions.

OECD Guidelines treatment

The French tax authorities consider the French transfer pricing regulations to be consistent with the OECD Transfer Pricing Guidelines.

There is no specific French transfer pricing-related regulation pertaining to business restructuring or attribution of profits to permanent establishments.

Experience in business restructurings shows that tax auditors often consider that a decrease in profit as an indicator of a de facto transfer of something of value, which should be taxed. In addition, special attention should be paid to closure costs in light of the transfer pricing profile undertaken by the group entities at hand. French tax inspectors are also paying more attention to financial transactions (e.g., loans, guarantees), as well as continuing discussions around intellectual property rights.

Priorities/pricing methods

The tax authorities accept the CUP, Resale Price Method, Cost Plus Method, Profit Split and TNMM; yet tax inspectors usually prefer the TNMM.

Transfer pricing penalties

Penalties specific to a failure to comply with the transfer pricing documentation requirement apply, in addition to the fiscal penalties generally applied as a consequence of a transfer pricing reassessment. Indeed, transfer pricing reassessments from the FTA trigger an adjustment of the taxable profit for corporate income tax purposes (and other taxes, depending on the case).

Specific transfer pricing penalties are applicable in situations where the taxpayer failed to answer the tax authorities' request for documentation, either on the basis of Article L 13B FPTC (which relates to general transfer pricing documentation requirements, provided the FTA can give evidence of transfer pricing problems before it applies this Article), or on the basis of Articles L 13AA and L 13AB FPTC (which relate to newly published special transfer pricing documentation requirements):

France (continued)

Transfer pricing penalties (continued)

- Failure in providing complete information in the framework of Article L 13B FPTC may result in:
  - A reassessment of the company's taxable profit based on information the tax authorities possess
  - The application of a EUR10,000 penalty for each year audited.
- Failure to provide sufficient transfer pricing documentation under the framework of Articles L 13AA and L 13AB, FPTC will trigger penalties from EUR10,000 up to 5% of the transfer pricing reassessment potentially identified afterwards, depending on the "seriousness of the breach." Such penalties are due per fiscal year audited.

The maximum penalty of 5% of gross amounts reassessed would be applied if the taxpayer does not have any transfer pricing documentation. Further, it is not tax-based; i.e., the penalty for having no or insufficient transfer pricing documentation is calculated on the gross amount reassessed and not on the (potential) additional tax due as a result of the reassessment.

Penalties generally applied as a result of a transfer pricing reassessment, regardless of compliance with transfer pricing documentation requirements:

- After a transfer pricing reassessment is made, the additional profit is usually qualified as a deemed dividend. Accordingly, a withholding tax is usually required (when a double tax treaty applies, the withholding tax depends on the relevant tax treaty provisions[1]. In the absence of a specific tax treaty, the withholding tax nominal rate is generally 25%, and increased to 50% when the foreign entity is based in a "non-cooperative" jurisdiction)
- In case the transfer is treated as a deemed dividend, the tax authorities also usually apply a 10% penalty for absence of declaration of the withholding tax. Such penalty is applied regardless of the good faith of the taxpayer
- Late interest payments are applied in case of tax reassessments made on the ground of Article 57 of the FTC. The ordinary late payment interest rate is 0.40% per month (i.e., 4.8% per year)
- Supplementary penalties are applicable if the taxpayer committed a willful offence (formerly bad faith) (40%) (much more frequently applied by the tax authorities) or to have acted fraudulently (80%). In these cases, taxpayers are denied recourse through MAP.

In addition, the adjustment may result in a reassessment of other taxes and contributions, such as business/local taxes and employee profit-sharing regimes.

Penalty relief

During a tax audit and before the tax authorities send the notice of reassessment, taxpayers, under the framework of Article L 62 FPTC, are allowed to correct their errors or omissions in consideration of a reduced late payment interest rate (3.36% per year), which is equal to 70% of the ordinary late payment interest rate. In this respect, taxpayers must file a complementary tax return and pay the corresponding additional taxes at the same time.

Documentation requirements

General transfer pricing documentation requirements (Article L 13B FPTC) where L13AA does not apply

The FTA may require information pertaining to transfer pricing in the course of an audit (based on Articles L 13 B and L 10 FPTC). The nature of required information, and the short deadline under which a taxpayer may have to provide it, lead to a de facto documentation requirement covering any French-based company. The following main documents are usually expected (the list is not exhaustive and communication of the expected documents depends on the strategy decided at the time of the tax audit):

- Business and organizational structure overview
- Functional analysis, contracts, legal and management account information
- Method selected and economic analysis (including identification of competitors and comparables, depending upon the transfer pricing method)

Special transfer pricing documentation requirement (Articles L 13AA and L 13AB FPTC)

1 See the Dividends or the Other Income clauses.

France (continued)

Documentation requirements (continued)

Pursuant to Article L 13AA FPTC, and for fiscal years 2010 and after, companies that satisfy the criteria listed below must provide their transfer pricing documentation upon the tax inspector's request (thus, in the context of a tax audit):

- Have total net sales (before taxes), or total gross assets, equal to or greater than EUR400 million
- Hold, directly or indirectly, at the closing date of the fiscal year, more than 50% of the capital or voting rights in a legal person having such turnover or gross assets
- Are, on the closing date of the fiscal year, more than 50% held, directly or indirectly, by such a legal person
- Belong to a French tax consolidated group that includes at least a legal person that meets one or more of the aforementioned criteria

If the documentation is not immediately provided to the FTA, it should be delivered within 30 days of the FTA's request. In case of missing documentation, or if the taxpayer fails to provide an exhaustive and comprehensive documentation within 30 days of a formal notice from the FTA, a penalty up to 5% of the transfer pricing reassessment would be applied, with a minimum of EUR10,000 per fiscal year under audit. An extension of the deadline to furnish the documentation could be granted by the FTA for a period not exceeding two months.

The contents of the transfer pricing documentation to be made available to the FTA are two-fold:

- **General information concerning the related enterprises (economic, legal, financial background of the group):**
  - General description of the activity carried out, including changes that occurred during the audited period compared to previous years
  - General description of the legal and operational structures (with identification of the entities involved in controlled transactions)
  - General description of the functions carried out and risks borne by the related entities to the extent that they impact the audited company
  - List of the main intangible assets held in relation to the audited company
  - General description of the transfer pricing policy of the group
- **Specific information pertaining to the audited company:**
  - General description of the activity carried out including changes that occurred during the audited period compared to previous years
  - General description of the transactions carried out with related enterprises including amount and nature of the flows including royalties
  - List of the cost-sharing agreements, copy of transfer pricing rulings
  - Presentation of the methods used to determine the transfer prices (including an analysis of the functions, risks and assets and with an explanation on the choice of applied methods)
  - Where necessary, an analysis of the comparables used (including characteristics of the goods and services, functional analysis, contract clauses, economic situation and specific strategies of the companies used as comparables)

Pursuant to Article L 13AB FPTC, all French companies involved in transactions with companies located in non-cooperative jurisdictions (as defined by the Article 238-0 A FTC) have to provide, in addition to the documentation described in Article L 13AA FPTC, supplementary documentation including all documents normally required by the FTA from companies subject to Corporate Income Tax, and such requirement notably includes French accounting-compliant balance sheet and the profit and loss statement of the foreign company.

French taxpayers that do not meet the conditions set out in Articles L 13AA and L 13AB FPTC nevertheless remain bound by the general transfer pricing documentation requirements set out in Article L 13B FPTC and the general information sharing rule set out in Article L 10 FPTC.

France (continued)

Documentation deadlines

General transfer pricing documentation requirement (Article L 13B FPTC):

Upon the FTA's request, documentation must be submitted within 60 days, though it may be possible to obtain a 30 day extension in exceptional circumstances. Exceeding such deadline may trigger penalties mentioned previously.

Special newly published transfer pricing documentation requirement (Articles L 13AA and L 13AB FPTC):

Upon the FTA's request, documentation must be submitted immediately upon first request made by the tax inspector in the course of an audit. If not, the FTA will send a formal claim for the documentation that will provide for a 30 day deadline, after which penalties for documentation failure will apply. The taxpayer may request an extension of maximum 30 day time limit.

Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is the same as for all French corporate tax assessments: generally, three years following the year for which the tax is due (it might be longer under certain circumstances; e.g., permanent establishment qualifications, loss carry forwards). A special extension can apply in case of a request for international tax assistance (Article L 188A FTPC).

In cases where MAP relief is sought (to avoid double taxation on the ground of a tax treaty or the European Arbitration Convention), tax collection can be suspended during the entire mutual agreement process, and is postponed until the competent authorities reach an agreement (Article L 189A FPTC).

Return disclosures/related party disclosures

In the event of a specific request from the tax authorities at the time of an audit (on the basis of either Articles L 13AA and L 13AB FTPC, or Article L 13B FPTC), there is an obligation to disclose the nature of the relationship between the taxpayer and the related parties (i.e., the links of dependence between the French audited entity and the related parties). These legal provisions also provide for an obligation to disclose the activities of the related parties.

Transfer pricing-specific returns

There is no transfer pricing-specific return to be filed.

Audit risk/transfer pricing scrutiny

The risk of a general tax audit is high, as is the risk that transfer pricing issues will be scrutinized during the audit. Similarly, if transfer pricing is reviewed as part of the audit, the likelihood that the transfer pricing methodology will be challenged is high. The number of tax audits in transfer pricing is increasing considerably, and the FTA are becoming more extensive and accurate in its queries, since they now use economic bases, as well as legal bases.

Transfer pricing issues that receive the greatest scrutiny are:

- Business restructurings (e.g., transfer of intangibles and of clientele, indemnity) or a sudden decrease into the operating margin likely to hide a change in the transfer pricing policy applied
- Product sale prices (under or over estimated prices), especially, but not only, in case of losses
- Management fees
- Agents and commissionaire operations (e.g., conversion of a distributor into an agent)
- Permanent establishments
- Closure/conversion costs

France (continued)

Audit risk/transfer pricing scrutiny (continued)

- Intangibles and economic ownership (including questions about royalties)
- Benchmarking exercises (the FTA expect a search made on French databases when the tested party is French and usually reject pan-European searches)

As an alternative to transfer pricing dispute, the FTA today are keen on making a permanent establishment characterization and do not hesitate to resort to judicial searches in instances where the FTA feels that auditors cannot access information via normal investigative procedures.

There are rather few court decisions in France going into detailed transfer pricing issues. One of the main questions relates to the burden of proof, which is usually said to rest with the tax inspectors.

APA opportunity

Bilateral and, under certain circumstances, unilateral, APAs are available (Article L 80 B 7° of the FPTC). No fees are required. This section was provided by the Finance Amendment Act for 2004 and came into force as of 1 January 2005. It incorporates existing procedures as described by the French administrative guideline #4 A-8-99, dated 7 September 1999. A specific procedure also exists for certain activities (e.g., headquarter profile).

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

In theory, the process requires that the request be submitted at least six months before the beginning of the first fiscal year covered. There is no rollback possibility.

Germany

Taxing authority and tax law

Taxing authority: German taxes are administered either by the German Federal Central Tax Office (Bundeszentralamt für Steuern) or by German state authorities

Tax law: German tax law is found in tax acts, executive order laws, double taxation treaties and supra-national norms

Relevant regulations and rulings

The taxing authorities assess intercompany transactions by following the arm's length principle (§1 Foreign Tax Act). The German interpretation of the arm's length principle generally follows the definition in Article 9 of the OECD Model Tax Convention. However, a relevant exception, §1 Sentence 2 Foreign Tax Act, stipulates that for the interpretation of the arm's length principle, it is assumed that both parties involved in an intercompany transaction have full knowledge about all facts and circumstances (information transparency).

Detailed transfer pricing regulations concerning the cross-border transfer of functions were incorporated into §1 Foreign Tax Act on 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.

In October 2010, new Administration Principles were released that include 81 pages of clarifications concerning the application of §1(3) of the Foreign Tax Act and the Executive Order Law on Transfer of Business Functions. The Administration Principles detail, for example, circumstances under which a business restructuring and function transfer would be exempt from the taxable valuation of the so called "transfer package." In such cases, the receiving entity of a function exclusively performs the transferred function for the transferring entity and receives a cost-based remuneration (i.e., based on the cost plus method or a cost-based TNMM), in accordance with the arm's length principle. In such cases, it is assumed that the transfer package did not include any significant intangible property or other advantages and, thus, a valuation of the transfer package is not required. This exemption from examination of the transfer package generally affects the transfer of routine functions whose execution is connected with low risks and that, as a consequence, are usually remunerated on the basis of the cost-plus method.

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)
- §90(3), 162(3) and 162(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, indicate how the tax authority will treat specific intercompany transactions between related parties. The purpose of the Administration Principles is to provide a directive concerning the tax audit treatment of transfer pricing cases, and to ensure the uniform application of rules and methods.

In addition to the two Administration Principles mentioned above, administration circulars concerning income allocation with regard to cross-border secondment of personnel, costs contribution arrangements, permanent establishments and procedural guidance have been published since 1999. As of 1 January 2013, a law amending §1 of the Foreign Tax Act is in effect, which incorporates the authorized OECD approach (AOA) on the allocation of profits to permanent establishments into German law.

OECD Guidelines treatment

The German tax authority considers its transfer pricing laws and regulations to be consistent with the OECD Transfer Pricing Guidelines (OECD Guidelines). The OECD Guidelines provide support for domestic use, but do not constitute binding law in Germany. German transfer pricing regulations and practices do differ from those of the OECD Guidelines with regard to certain issues (e.g., the application of transactional profit methods, documentation requirements, and the treatment of transfers of functions).

Germany (continued)

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 tax law effective 1 January 2008, the application of transfer pricing methods 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 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 exists, all OECD methods are allowed; i.e., the aforementioned traditional methods and the transactional profit methods (TNMM and residual Profit Split). In case of limited comparability, third party comparable data must be adjusted (e.g., by statistical procedures, interquartile range).

If no comparable data exists, the law stipulates that taxpayers have to conduct a hypothetical arm's length comparison to derive arm's length transfer prices. 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 a range of "hypothetical" arm's length prices. The range of negotiation is defined by the minimum price a hypothetical seller would accept and by the maximum price a hypothetical purchaser would pay. The taxpayer must use the value within the range of negotiation that has the highest probability of complying with the arm's length principle. If the taxpayer provides no reasoning behind choosing that value, the arithmetic mean of the range of values is assumed to be the arm's length transfer price for the transaction under review.

Transfer pricing penalties

If a taxpayer does not comply with the transfer pricing documentation requirements to the extent outlined in §90(3) of the German General Tax Code, a rebuttable presumption applies under which the taxpayer's income had been reduced by the amount of inappropriate transfer prices, thereby forming the basis of a transfer pricing adjustment.

Taxing authorities may apply §162(3) of the German General Tax Code if the taxpayer submits no or 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 does not rebut the presumption. This also holds true when a taxpayer does not disclose relevant data only available with the foreign related parties.

The legislation takes into consideration that a single appropriate transfer price does not exist and that comparable third party prices may vary within price ranges. However, when the documentation provided is insufficient, German law explicitly entitles the tax authority to make use of the full price range, to the taxpayer's detriment.

If the taxpayer fails to submit transfer pricing documentation, if the documentation provided is unusable or insufficient, or if the documentation for extraordinary business transactions is not prepared contemporaneously, a penalty of 5%–10% on the income adjustment will be applied, with a minimum penalty of EUR5,000. For late filing, the taxpayer faces a penalty of up to EUR1 million (minimum penalty of EUR100 per day of delay). Penalties are imposed after the closing of a tax audit. The aforementioned penalties constitute non-deductible expenses for tax purposes.

Under the tax 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.

§ 146(2b) of the German Federal Tax Code further allows the assessment of penalties of up to EUR250,000 in case documents are not provided to tax auditors in a timely manner upon request.

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

There are also penalties for tax evasion.

Germany (continued)

Penalty relief

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

Documentation requirements

§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 any special circumstances used to substantiate the arm's length nature of the price determined, including: special business strategies, business restructurings, cost contribution 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).

Documentation deadlines

Contemporaneous documentation requirements exist only for exceptional business transactions in Germany. For such 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).

§175a General Tax Code stipulates that tax assessments can be amended due to the result of a MAP/EU arbitration procedure up to one year after the effective date of such agreement, irrespective of whether the aforementioned statutes of limitations have expired before.

Germany (continued)

Return disclosures/related party disclosures

Apart from transfer pricing documentation requirements, there are currently no specific disclosure requirements.

Transfer pricing-specific returns

Apart from transfer pricing documentation requirements, no separate returns for related party transactions are currently required.

Audit risk/transfer pricing scrutiny

The likelihood of a tax audit in Germany is high for domestic and foreign groups of companies. Usually, a tax audit covers a three to four year period on a continuous basis. The risk of transfer pricing issues being scrutinized during a tax audit is also high, and continuously rising. Due to the documentation requirements, and in light of the stricter law effective 1 January 2008, it is expected that transfer pricing issues will continue to attract significantly more attention in tax audits. It is expected that transactions qualifying as exceptional business transactions under the documentation provisions, such as the transfer of functions, will particularly attract the tax auditors' attention. Further, many tax audits increasingly focus on (brand) royalty charges and management services cost allocations into Germany. The likelihood that, if transfer pricing is reviewed as part of the audit, the transfer pricing methodology will be challenged is also high.

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 can take anywhere from eighteen months 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 that they are in line with the content of the APA.

Ghana

Taxing authority and tax law

Taxing authority: Ghana Revenue Authority (GRA)

Tax law: Transfer pricing regulations, 2012 (L.I 2188)

Relevant regulations and rulings

The Finance Minister has, in accordance with the provisions of Section 114(1)(d) of the Internal Revenue Act, 2000, enacted the transfer pricing regulations, 2012 (L.I 2188) which are effective from 27 July 2012.

The transfer pricing rules follow the arm's length principle and require the use of the "most appropriate" method to price related party transactions.

The rules apply to transactions between:

- Taxpayers in a controlled relationship
- A permanent establishment (PE) and its head office
- A PE and other related branches of the PE
- A taxpayer and another taxpayer who are in an employment relationship

The regulations apply to the following intercompany transactions between affiliated companies:

- The purchase and sale of goods
- The purchase, sale, lease or use of a tangible asset
- The purchase, sale, lease or use of an intangible asset
- The provision of management services, technical services and other intra group services
- The provision of finance and other financial arrangements
- Rent and hire charges
- Any other transaction that may affect the profit or loss of an entity

Thin capitalization: An exempt-controlled resident entity, a non-resident person, other than a financial institution, is deemed to be thinly capitalized if the ratio of the offshore related party interest bearing debt to equity exceeds 2:1. Interest deductions or exchange losses arising on debt in excess of the 2:1 are disallowed. An exempt-controlled resident entity is a resident entity of which at least 50% of the underlying ownership or control is held by a nonresident.

OECD Guidelines treatment

The rules follow the 2010 OECD Transfer Pricing Guidelines (OECD Guidelines).

Priorities/pricing methods

The transfer pricing rules require the use of the "most appropriate" method to price related party transactions.

Similar to the OECD Guidelines, the transfer pricing methods approved by the Commissioner-General are:

- The CUP method
- The Resale Price method
- The Cost-Plus method
- The Transactional Profit Split method
- TNMM

Notwithstanding the transfer pricing methods stated, the Commissioner-General may use a different method, or in writing, permit

Ghana (continued)

Priorities/pricing methods (continued)

a taxpayer to use another method. The Commissioner-General may do this when, considering the nature of the transaction, he deems that the arm's length price cannot be determined by the use of any of the five stated transfer pricing methods. A taxpayer who intends to use an unspecified method may have to apply to the Commissioner-General for permission to do so. The taxpayer has to prove that none of the specified methods can reasonably be applied to determine the arm's length nature of the intra-group pricing, and that the unspecified method yields a result consistent with the arm's length principles.

Transfer pricing penalties

The provisions of the Act on fraud, failure to file returns, penalty for under-payment of tax and offences, may also apply to the transfer pricing regulations.

Penalty relief

Under Ghanaian law, any tax due and payable, resulting from an adjustment performed by the Commissioner General will be deemed an additional tax. Additional penalties can be issued under the Act for offences on fraud, failure to file refund or the underpayment of tax.

Documentation requirements

The rules state that a person who engages in a transaction with another person with whom it has a controlled relationship shall maintain contemporaneous documentation detailing the transactions engaged in by that person for each tax year. The regulations provide guidance on the nature of documentation to be retained. Generally this follows the OECD requirements.

The taxpayer shall for purposes of these regulations file returns on income in accordance with Section 72 of the Act. The form prescribed by the Commissioner-General for purposes of filing returns on income shall include a list of disclosures relating to the taxpayers transfer pricing study.

Documentation deadlines

The Commissioner General may request additional information from the taxpayer, who would be required to comply with the request within the required time frame. No guidance is currently available on the duration of that timeframe. It is anticipated that guidance relating to documentation will be released shortly.

Statute of limitations on transfer pricing assessments

The statute of limitations is 6 years from the date of assessment.

Return disclosures/related party disclosures

The tax return is likely to include a transfer pricing schedule to be completed.

Transfer pricing-specific returns

Refer to the above section.

Audit risk/transfer pricing scrutiny

The Commissioner-General may, on receipt of returns filed, examine the amounts charged or credited to the final accounts to determine whether they are within the arm's length range.

The Commissioner-General may also conduct a transfer pricing audit any time during the year, even when the person has not filed a return.

APA opportunity

There is no opportunity for an APA in Ghana.

Greece

Taxing authority and tax law

At the beginning of January 2013, a new tax bill was introduced, which brought significant changes to Greek transfer pricing legislation. As a general remark, the parallel legislative framework for transfer pricing; i.e., the Ministry of Development and Ministry of Finance, has been abolished.

The provisions relating to the documentation of intragroup transactions are amended for fiscal years starting on or after 1 January 2012. The major amendments are as follows:

- All intragroup transactions including the transfer of shares, parts and real estate property are subject to the provisions of Articles 39 and 39A of the Greek income tax code
- The definition of affiliated companies has become broader and now includes companies that exercise influence or have a relationship of management or financial dependence or control with one of the affiliated companies
- Intercompany transactions with a cumulative annual value of up to EUR100,000 are exempt from the transfer pricing documentation requirements, if the total turnover of the affiliated companies is up to EUR5,000,000. If the total turnover of the affiliated parties is higher than EUR5,000,000, transactions with an annual value of up to EUR200,000 are also exempt
- Transfer pricing provisions introduced by the Ministry of Development (Article 26 of Law 3728/2008) are abolished as of the publication of this Law in the Government Gazette, with the following exceptions:
  - The audit of the 2008 and 2009 transfer pricing documentation files remains under the purview of the Ministry of Development, whereas the audit of transfer pricing documentation files prepared under the provisions of Law 3728/2008 (of the Ministry of Development) for fiscal years 2010 and 2011 will be conducted by the Ministry of Finance
  - Where penalties for late submission of intragroup transactions' listings were not assessed under Law 3728/2008 until the publication of the new Law, the applicable penalties will be reduced to 0.1% on gross revenues of the company, which cannot be lower than EUR1,000 or higher than EUR10,000.
  - The tax office of large enterprises is considered to be the competent tax office for the performance of audits
  - The transfer pricing documentation file must be prepared within fifty (50) days of the fiscal year end, while the deadline for fiscal year 2012 is 10 May 2013

Relevant regulations and rulings

A Ministerial Decision will be issued by the Ministry of Finance within one month of the tax bill's publication in the Government Gazette.

OECD Guidelines treatment

The aforementioned legislative framework confirms the applicability of the OECD Transfer Pricing Guidelines (OECD Guidelines).

However, due to the limited time period since the amended Greek transfer pricing law was approved by the Greek Parliament, the tax audit treatment of transfer pricing cases cannot be ascertained. In any case, more details will be provided by virtue of the Ministerial Decision, the issuance of which is pending.

Priorities/pricing methods

The tax authorities follow the OECD 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, profit-based transfer pricing methods such as the TNMM and the Transactional Profit Split method can be used only in cases where the use of the above traditional transfer pricing methods are considered ineffective, provided that a detailed justification is included in the documentation files.

Greece (continued)

Transfer pricing penalties

- The transfer pricing documentation file must be prepared within fifty (50) days of the fiscal year end and should be accompanied by a Summary Information Table filed electronically within the same deadline.
- In case of late filing of the Summary Information Table or the transfer pricing documentation file, a fine amounting to 0.1% on the gross income of the company, which cannot be lower than EUR1,000 or higher than EUR10,000, whereas non-filing of the above incurs a penalty of 1% on the gross income of the company, which cannot be lower than EUR10,000 or higher than EUR100,000.
- When the intragroup prices are considered to be undocumented, the relevant tax authorities proceed with their determination on the basis of data available from every provided source. In cases where the range of prices or profits is not acceptable to the tax authorities, the intragroup prices may fall anywhere within the accepted range or at the median price.

  The prices of the intragroup transactions are considered undocumented in the following circumstances:

  - Failure to submit the transfer pricing file to the competent audit authority
  - Maintaining an inaccurate or insufficient transfer pricing file, provided that the audit verification regarding the accuracy of calculating or documenting the intragroup prices is impossible and cannot be remedied by the provision of additional information to the auditors
  - Providing insufficient or inaccurate additional information, to the extent that the audit verification of the intragroup prices is impossible
- Companies operating in Greece with related parties should apply terms and conditions to those transactions that do not unjustifiably differ from those which would be agreed to between independent third-party enterprises for the same or similar transactions (arm's length principle).
- In case of violation of the relevant provisions, the difference in taxable profits shall increase the gross revenue of the company, without any fines imposed other than those prescribed in Law 2523/1997 (relating to additional income taxes and penalties for inaccurate filing of income tax returns.)

Penalty relief

No penalty relief is available.

Documentation requirements

To show compliance with the arm's length principle, the taxpayer should make the documentation files available within 30 days of a request from the supervising authorities of the tax office of large enterprises.

The transfer pricing file consists of:

- The Master File, which is common for all group companies and contains common standardized information for the group affiliates as well as for the branches
- The Greek File, which is supplementary to the Master File and contains additional information regarding the Greek companies of the group, the permanent establishments of the foreign entity in Greece or the permanent establishments of the Greek entity abroad

A Ministerial Decision will be issued by the Ministry of Finance within one month following the publication of the tax bill in the Government Gazette, so as to define the documentation requirements.

Greece (continued)

Documentation deadlines

The transfer pricing documentation file must be prepared within fifty (50) days of the fiscal year end and should be accompanied by a Summary Information Table filed electronically within the same deadline.

The transfer pricing documentation file should be submitted before the competent audit authority, in the frame of an ordinary tax audit, within 30 days of the notification of a request.

Statute of limitations on transfer pricing assessments

Taxpayers must keep documentation files for a period equal to the prescribed period of the State's right to impose tax (statute of limitations), as specified by the provisions of tax legislation. As a general rule, the Greek State's right to impose tax is limited to five years, but the State provides extensions of the above mentioned period (e.g., tax obligations of fiscal year 2000 are not statute barred yet).

Return disclosures/related party disclosures

Taxpayers disclose their intragroup transactions by filing annually a summarized table of transfer pricing information within 50 days of the end of the accounting period.

Transfer pricing-specific returns

Greece does not require a separate return (including information return) for related party transactions.

Audit risk/transfer pricing scrutiny

According to Article 82 par. 5 of Law 2238/1994, certified auditors are obliged to issue a Tax Certificate to the companies they audit by performing a special audit in their tax affairs taking place in parallel with the statutory audit. Based on this, the transfer pricing file should be available to the certified auditors prior to the issuance of the Tax Certificate, and in any case, within 50 days of the end of the accounting period.

APA opportunity

The procedure for obtaining an advance pricing agreement (APA) with the tax authorities will be introduced as of 1 January 2014.

The initial duration of the APA is two years, and the option of renewal, review, revocation or cancellation of the APA is provided under certain circumstances.

Guatemala

Taxing authority and tax law

Taxing authority: Tax Administration Superintendence (Superintendencia de Administración Tributaria or SAT)

Tax law: Tax Legislation Update Law (TLUL) Chapter VI, Articles 54 to 67

Relevant regulations and rulings

Guatemala issued transfer pricing rules in 2012, which are included in the TLUL of the Congress Decree 10 — 2012. The rules are applicable from fiscal year 2013 onward.

Guatemalan transfer pricing regulations are mainly based on the OECD Transfer Pricing Guidelines (OECD Guidelines) and apply to all the transactions conducted between Guatemalan taxpayers and their related parties abroad. The transfer pricing rules also present an additional non-OECD method (the import and export valuation method), which is intended to be used for transactions involving imports or exports of goods with well-known prices in transparent markets.

Regulations are pending enactment by the SAT. It is expected that the regulations will include details regarding penalties and general guidelines, including the filing obligation of a transfer pricing information return.

OECD Guidelines treatment

Guatemala is not an OECD member, and there is no reference to the OECD Guidelines in the TLUL. In addition, since transfer pricing regulations are new in Guatemala, there is no background on the treatment that is given to the OECD Guidelines.

Priorities/pricing methods

Acceptable transfer pricing methods are: CUP, Resale Price, Cost Plus, Profit Split, TNMM and the Imports and Exports Valuation method. The CUP, Resale Price and Cost Plus methods take priority over the transactional methods.

Transfer pricing penalties

Since there are no special penalties for failure to comply with the transfer pricing obligations, general tax penalties are applicable. Penalties for failure to present the transfer pricing documentation, upon request of the tax authority, would be of GTQ5,000 for the first time, GTQ10,000 for the second time, and GTQ10,000 plus 1% of the taxpayer's gross income from then on.

In addition, any additional tax generated by price adjustments made by the SAT is subject to surcharges and penalty interest.

Penalty relief

There are currently no provisions for reductions in penalties.

Documentation requirements

Contemporaneous transfer pricing documentation must be maintained. The documentation must include:

- Taxpayer corporate group information that affects the relationship with the taxpayer:
  - General information regarding the corporate group's legal and organizational structure
  - Description of the intercompany transactions performed by the companies of the corporate group
  - Description of the functions performed and risks assumed by the companies of the corporate group
  - Information regarding the intangible assets of the corporate group
  - Description of the transfer pricing policy of the corporate group
  - Intercompany service agreements subscribed by the companies of the corporate group
  - APAs subscribed by the companies of the corporate group

Guatemala (continued)

Documentation requirements (continued)

  - Annual report of the corporate group
- Taxpayer information:
  - Identification of the taxpayer and its related parties
  - Description of the intercompany transactions performed by the taxpayer
  - Comparability analysis
  - Description of the transfer pricing methodology applied

Documentation deadlines

Documentation must be readily available by the same due date of the annual income tax return and must be kept as part of the company's accounting books and records. If requested by the tax authorities, documentation should be provided within 20 days from the receipt of the notice.

Statute of limitations on transfer pricing assessments

The statute of limitations on assessment is four years.

Return disclosures/related party disclosures

Taxpayers are required to attach their audited financial statement (expressed in IFRS from fiscal 2013 onwards) to the annual tax return, which will include information regarding their intercompany transactions.

Transfer pricing-specific returns

There is no specific transfer pricing return to be filed.

Audit risk/transfer pricing scrutiny

The risk of a general tax audit is currently categorized as medium. The risk of transfer pricing assessments as part of a general tax audit is low. The SAT has not yet initiated any tax audits regarding transfer pricing issues, due to the fact that the transfer pricing regulations are new and are applicable from fiscal year 2013.

In case transfer pricing is scrutinized, the risk that the transfer pricing methodology will be challenged is low.

APA opportunity

APAs are contemplated in Article 63 of the TLUL. Taxpayers can request an APA for a maximum of four years. However, the corresponding regulations have not yet been enacted.

Hong Kong (SAR)

Taxing authority and tax law

Tax authority: Inland Revenue Department (IRD)

Tax law:

- Section 16 of the Inland Revenue Ordinance (IRO) on deductibility of expenses in arriving at assessable profits
- Section 17 of the IRO on prohibited deductions
- Section 20 of the IRO on basis for taxation of closely connected non-resident persons
- Section 61A of the IRO on transactions designed to avoid tax liability

Relevant regulations and rulings

Departmental Interpretation Practice Note 48: Advance Pricing Arrangement (DIPN 48), issued in March 2012

Departmental Interpretation Practice Note 46: Transfer Pricing Guidelines — Methodologies and Related Issues (DIPN 46), issued in December 2009

Departmental Interpretation Practice Note 45: Relief from Double Taxation due to Transfer Pricing or Profit Reallocation Adjustments (DIPN 45), issued in April 2009

OECD Guidelines treatment

DIPN 46 is largely based on the OECD Guidelines, and it is stated that the practice followed by the IRD will generally not differ from the transfer pricing methodologies recommended by the OECD Guidelines.

Priorities/pricing methods

The IRD recognizes the methods outlined in the OECD Transfer Pricing Guidelines, which include the traditional transaction methods (CUP, Resale Price and Cost Plus) and profit methods (Profit Split and TNMM). The use of other methods is also allowed to the extent the OECD-recognized methods are not applicable. The process of selecting a method should be aimed at finding the most appropriate method. Although the traditional transaction methods may be preferred by the IRD, as they are seen to be the most direct means of establishing the arm's length price, the TNMM is accepted as an appropriate method in circumstances where traditional transaction data is not available, comparable or reliable.

Transfer pricing penalties

The IRO does not impute penalties targeted specifically at transfer pricing, and there are no provisions for applying penalties for a lack of transfer pricing documentation by itself. However, the IRD is empowered to take punitive action under Section 80(2) of the IRO on any person who without a reasonable cause files an incorrect tax return; furnishes any incorrect information; fails to furnish a return in time; fails to inform chargeability to tax or makes an incorrect statement. Further, the IRD can impose penalties under Section 82 of the IRO on any person who willfully (with intent to evade or to assist any other person to evade tax) omits from a return any sum that should be included; makes any false statement or entry in any return; makes any false statement in connection with a claim for any deduction of allowance; signs any untrue statement/return; gives any false answer to any question or request for information asked or made in accordance with the provisions of IRO; prepares or maintains any false books of accounts; or makes use of any fraud, art or contrivance to evade tax.

Offenses can be subject to a fine of HKD10,000, plus up to three times the amount of tax undercharged. In the case of willful intent, the taxpayer can be subject to a fine of HKD50,000, plus up to three times the amount of tax undercharged and three years of imprisonment.

Hong Kong (SAR) (continued)

Penalty relief

The scale of penalty to be imposed on a taxpayer in Hong Kong is determined based on the nature of the omission, quantum of understatement of income or profits, scale of the business, the degree of the taxpayer's cooperation or disclosure, and the length of offence period. Penalties can be scaled upward or downward based on such facts of the case to a maximum of 25%. Further adjustments may be applied in exceptional cases.

Documentation requirements

There is no contemporaneous transfer pricing documentation requirement in Hong Kong. However, upon an audit or investigation, the taxpayer is expected to have maintained records that have details on intercompany transactions with regard to the nature of transactions and payments made/received.

As per DIPN 46, upon an enquiry, audit or investigation, the IRD will look for the following documentation:

- The nature, terms, prices and quantum of relevant transactions, including transactions that form a series and any relevant offsets
- The method by which the nature, terms and quantum of relevant transactions were arrived at, including any study of comparables undertaken
- The manner by which the selected method has resulted in arm's length terms, etc., or where it has not, the computational adjustment required and how it has been calculated. This usually includes an analysis of market data or other information on third party comparables
- The terms of relevant commercial arrangements with both third party and group customers. These include contemporaneous commercial agreements (e.g., service or distribution contracts, loan agreements) and any budgets, forecasts or other papers containing information relied on in arriving at arm's length terms, etc.

In addition, DIPN 46 also refers to the OECD Guidelines for further guidance on documentation requirements.

Documentation deadlines

Documentation is generally only required upon request.

Statute of limitations on transfer pricing assessments

The statute of limitations in Hong Kong is six years after the end of the assessment year. In case of fraud or willful evasion, the statute of limitations is extended to 10 years from the end of the assessment year.

Return disclosures/related party disclosures

The IRD requires taxpayers to disclose in their annual profits tax return whether they have transactions with non-resident persons, fees paid on royalties, fees paid to non-residents for services rendered in Hong Kong, and the location of the non-resident person.

Transfer pricing-specific returns

There are no specific returns which have to be filed for transfer pricing purposes.

Hong Kong (SAR) (continued)

Audit risk/transfer pricing scrutiny

The risk of an annual tax audit in Hong Kong may be triggered by a variety of situations, such as where the accounts of a business are heavily qualified, profits or turnover are deemed unreasonably low, filing of tax returns are persistently delayed or omitted, business records are not properly maintained, or if there is failure to provide requested information.

Whilst there are no field auditors nor is there a separate division within the IRD that deals specifically with transfer pricing cases, transfer pricing may be reviewed as part of an audit if the IRD suspects that transactions have not been carried out on an arm's length basis (i.e., goods sold/purchased at a deflated/inflated price, service/royalty fees are not commensurate with benefits received, transactions are with tax haven locations). An audit related to transfer pricing will be aimed at reviewing the intercompany pricing policies and any analysis prepared to support the pricing, taking into consideration the facts of the business and the transactions. Transfer pricing inquiries typically arise as part of general field audits, with the deductibility of expenses or payments to related parties being a common line of enquiry. The risk of audit or transfer pricing scrutiny is dependent on the facts and circumstances of the taxpayer.

APA opportunity

An APA program was introduced by the IRD in March 2012. The IRD issued guidelines in the form of DIPN 48, which provides details on the key features of the APA program in Hong Kong. APAs will be limited to bilateral or multilateral agreements and generally not to unilateral agreements. Unilateral agreements may be considered if a treaty partner does not wish to participate in an APA, where the Hong Kong (SAR) competent authority is unable to reach an agreement with the relevant treaty partner, or where a non-treaty partner is prepared to give a unilateral APA regarding transactions integrally linked to the transactions covered by a bilateral or multilateral APA.

Hungary

Taxing authority and tax law

Tax authority: National Tax and Customs Office (NTC)

Tax laws and ministerial decrees:

- Act LXXXI of 1996 on Corporate Income Tax (CIT) and Dividend Tax (Act on CIT)
  - Section 4.23 — definition of related party for CIT purposes
  - Section 18 — correction of prices applied between related parties
  - Section 31(2) — reference to the OECD Guidelines
- Act XCII of 2003 on Tax Procedure (Act on Tax Procedure)
  - Section 1.8 — definition of fair market price
  - Section 23(4)(b) — reporting related parties to the tax authority
  - Sections 132/B and 132/C — provisions on the Hungarian APA
  - Section 172.16 — penalties related to documentation
  - Section 176/A — on the Mutual Agreement Procedure
  - Section 178.17 — definition of related party
- Section 259.13 within Act CXXVII of 2007 on Value Added Tax (Act on VAT) defines a non-independent party for VAT purposes
- Section 3.69 within Act CXVII of 1995 on Personal Income Tax (PIT) defines independent party for PIT purposes
- Ministry of Finance Decree 38 of 2006 on the administrative procedure for obtaining an APA
- Ministry of Finance Decree 22 of 2009 (Decree 22) on the fulfillment of transfer pricing documentation obligations effective from 1 January 2010 and to be first applied to tax liabilities for 2010[1,2]

Relevant regulations and rulings

- 37/2004 — Guideline issued by the tax authority on the fulfillment of the transfer pricing documentation requirement
- 55/2006 — Guideline issued by the tax authority on the application of the Transactional Net Margin Method
- 77/2007 — Guideline issued by the tax authority on the preparation of consolidated transfer pricing documentation
- 139/2007 — Guideline issued by the tax authority on the application of transfer pricing methods in practice
- 17/2008 and 48/2007 — Guidelines issued by the tax authority on the preparation of simplified transfer pricing documentation and default penalties
- 13/2008 — Guideline issued by the tax authority regarding when related party relations should be determined
- 16/2010 — Guideline issued by the tax authority on changes to the definition of related parties from 2010
- 21/2010 — Guideline issued by the tax authority on the adjustment related party items in connection with the assumption of loan and waiver of receivables
- 41/2010 — Guideline issued by the tax authority on the adjustment of the prices for in-kind contributions

OECD Guidelines treatment

The Act on CIT contains specific reference to the OECD Guidelines. Recent tax authority practice is that if the Hungarian tax laws do not include regulations on specific issues, the OECD Guidelines may be used as primary reference.

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1 Containing the new provisions with regard to the EU Masterfile concept.

2 Decree 22 was amended effective 1 January 2012.

Hungary (continued)

Priorities/pricing methods

The OECD Guidelines were amended in July 2010. The Act on CIT has implemented them effective 1 January 2011. Accordingly, the three traditional methods (CUP, Resale Price and Cost Plus) and the profit-based methods recommended by the OECD (i.e., TNMM and Profit Split) are now practically equivalent. Other methods can also be used, but only subsequent to the rejection of the five major methods.

Transfer pricing penalties

In relation to a tax base adjustment, 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 of up to HUF16 million (approximately EUR51,000) may be levied for not fulfilling, or not properly fulfilling, the content and formal documentation requirements. As a general rule, the default penalty is levied for each set of documentation under tax audit.

Penalty relief

Currently, no penalty relief is available.

Documentation requirements

The Act on CIT states that companies that do not qualify as small enterprises (small enterprises are defined as employing fewer than 50 persons and having less than EUR10 million 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 related party agreements in effect and supply was made in the tax year. The details of the documentation obligation are regulated by Decree 22. Foreign entities (usually foreign taxpayers engaged in business activities through a Hungarian permanent establishment) are also subject to the documentation obligation. However, transfer pricing rules are not required to be observed where the CIT base would not change even if a non-arm's length price was applied (if the income attributable to the foreign permanent establishment is exempt from Hungarian tax, based on the applicable double tax treaty).

Overall, the Hungarian transfer pricing documentation requirements are consistent with the OECD Guidelines. The following list outlines the compulsory elements of the Hungarian full-scope 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

Hungary (continued)

Documentation requirements (continued)

- The arm's length price or margin
- Information on pricing agreements and court procedures
- Preparation and amendment date of the documentation
- If consolidated transfer pricing documentation is prepared (one documentation covering several similar or sequence of transactions), reasons for consolidation have to be provided

According to Decree 22, a taxpayer can choose to prepare "separate" or "joint" documentation. By introducing the joint transfer pricing documentation option, the Decree essentially adopted the regulations regarding the Masterfile concept as included in the EU's Code of Conduct on transfer pricing documentation. The joint documentation consists of two parts: common documentation containing standard information on the members of the group within the EU (i.e., Masterfile) and specific documentation describing the agreements concluded between the Hungarian taxpayer and its related parties. Taxpayers must declare to the tax authority (on the CIT return) which type of transfer pricing documentation they would like to prepare (either the single documentation or the joint documentation).

The common document has to be prepared with respect to the member states of the European Union and should also include the controlled transactions carried out between third-country companies and EU group companies.

The obligatory elements of the common documentation are the following:

- A general description of the business and the business strategy of the enterprise including the changes from the previous year
- A general description of the organization, the legal and operational structure of the group (including an organizational chart, a list of the group members and a description of the parent company's participation in the operation of its subsidiaries)
- A list of the related parties carrying out controlled transactions with group members within the EU
- A general description of controlled transactions (list of the significant controlled transactions, e.g., sale of tangible fixed assets, provision of services, development of intangible assets and provision of financial services including the values of these transactions)
- A general description of the functions and risk, and the changes in these compared to the previous year
- Information on the ownership of intangible assets and on royalties paid and received
- A description of the group's transfer pricing policy or transfer pricing system
- Cost contribution agreements and APAs relating to the determination of the arm's length price and court decisions on the arm's length price
- Date of preparation and modification of the documentation

The country–specific documentation must include the following information:

- 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
- Description of the business enterprise and the strategy of the business enterprise including the changes compared to the previous year
- Subject of the agreement, description of the transactions, value of the transactions, signing date (amendment date) of the agreement, period during which the agreement is effective
- Comparable search (characteristics of the service provided and/or goods sold, functional analysis, contractual conditions, economic circumstances)
- Description of the comparable data
- Transfer pricing policy of the group
- Preparation date and modification date of the documentation

Hungary (continued)

Documentation requirements (continued)

Based on the work of the European Union Joint Transfer Pricing Forum, Decree 22 introduced low value-added intra-group services in the Hungarian transfer pricing regulations. Low value-added intra-group services are typically routine services provided between related parties outside the scope of main business activity (e.g., information technology services or administration services). For these services, taxpayers may prepare transfer pricing documentation encompassing a relatively less-detailed technical analysis. This type of documentation is applicable if the value of the transactions does not exceed HUF150 million (approximately EUR480,000) or 5% of the service provider's net income and 10% of the recipient's operational costs and expenditures in the given tax year. In this case, the cost plus method is accepted without a separate analysis and the law considers markups chosen from the range between 3% and 7% to be at arm's length.

While the above provisions came into force on 1 January 2012, it is important to note that these rules can be applied for all documentation due with respect to financial year 2011.

Exemptions from the documentation obligation according to the amendments of Decree 22 are as follows:

- The simplified documentation obligation no longer applies (i.e., if the value of the transactions does not exceed HUF50 million (approximately EUR160,000) in the period between the effective date of the contract and the last day of the tax year)
- When costs are recharged without applying any markup, provided that the transaction is not the main activity of either party and the service provider is not a related party from the perspective of the taxpayer or the cost bearing entity
- Where the tax authority established the applicable arm's length price in a resolution (APA)
- Cash transfers
- Transactions carried out between a Hungarian resident taxpayer's foreign permanent establishment and its related party, if the taxpayer's CIT base does not include the income attributable to the foreign permanent establishment

For 2009 and onwards, the documentation can also be prepared in a foreign language. However, at the tax authority's request, the taxpayer has to prepare a Hungarian translation (an exception applies for English, French and German language documentation).

Documentation deadlines

The transfer pricing documentation for contracts effective in a given tax year has to be prepared by the deadline for filing the annual CIT return (within 150 days of the close of the year).

Statute of limitations on transfer pricing assessments

In the absence of a tax return or appropriate reporting, 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. However, within the framework of the Arbitration Convention, it is possible to request a tax base adjustment even after the statute of limitations has expired.

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. Cessation of a controlled transaction must also be reported.

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. In their year-end corporate tax returns, taxpayers must declare which type of transfer pricing documentation they have elected to prepare.

According to 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.

Companies' financial statements 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. The tax authority now routinely checks the existence and completeness of the documentation (i.e., whether all transactions are covered).

For larger transactions, the tax authority usually inspects whether the content and formal requirements are fulfilled in the documentation. Since the beginning of 2007, the tax authority has started to train transfer pricing specialists. Consequently, the tax authority's knowledge of the application of transfer pricing methods has increased significantly. Since 2009, targeted transfer pricing audits have been commonplace; the number of audits and the amount of assessments is growing at a rate of roughly 50% each year.

The likelihood of comprehensive tax authority audits is characterized as medium; however, large taxpayers are reviewed every two to three years.

For medium and large taxpayers, the risk of an audit with a transfer pricing focus can be characterized as high. In particular, the tax authority places significant focus on loss-making taxpayers.

The tax authority challenges the transfer pricing methodology especially where the taxpayer came to an unusual conclusion regarding the transfer prices or:

- If the pricing method is unusual
- Where the transactions themselves can be regarded as unusual or unique

Based on our experience, the tax authority is now rather knowledgeable about matters concerning method selection; therefore, the risk of the taxpayer's application of a particular transfer pricing methodology being challenged is characterized as medium to high.

APA opportunity

On 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 HUF500,000 (approximately EUR1,600) to HUF10 million (approximately EUR32,000) 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 issues.

India

Taxing authority and tax law

Taxing authorities:

- Central Board of Direct Taxes (CBDT)
- Income Tax Department

Tax law:

- Sections 92-92F, 144C, 271, 271AA, 271BA and 271G of the Income Tax Act, 1961
- Rules 10A to 10T and Rule 44GA of the Income Tax Rules, 1962

Relevant regulations and rulings

The pricing of international transactions between associated enterprises will need to be determined with regard to the arm's length principle, using methods prescribed under Indian transfer pricing regulations. Associated enterprises are enterprises for which 26% voting power in one is held by the other or a common parent holds at least 26% of voting power in both such enterprises. Transfer pricing provisions are applicable to the following types of transactions between associated enterprises:

- Purchase, sale or lease of tangible or intangible property
- Provision of services
- Lending or borrowing money or capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities, or any type of advance, payments or deferred payment or receivable, or any other debt arising during the course of business
- A mutual agreement or arrangement for cost allocation/apportionment
- A transaction of business restructuring or reorganization
- Any other transaction having a bearing on the profits, income, losses or assets of such enterprises

Transactions with a third party will be deemed transactions between associated enterprises if the third party has a prior agreement with the associated enterprise, or if the terms of the relevant transaction are determined in substance between the third party and the associated enterprise.

Specified domestic transactions

With effect from the financial year 2012-13, the transfer pricing provisions are applicable to "specified domestic transactions" if the aggregate value of such transactions exceeds USD1 million (approximately). "Specified domestic transactions" include payments to related parties, inter-unit transfer of goods or services of profit-linked tax–eligible units, transactions of profit-linked tax holiday–eligible units with other parties and any other transaction that may be notified by the CBDT. By extending transfer pricing provisions to specified domestic transactions, the pricing of these transactions will need to be determined with regard to the arm's length principle, using methods prescribed under Indian transfer pricing regulations.

Priorities/pricing methods

Indian legislation prescribes the following methods: CUP, Resale Price, Cost Plus, Profit Split and TNMM. In addition, with effect from financial year 2011-12, the legislation also provides a sixth method: namely, any other method that takes into account the price charged or paid for a similar uncontrolled transaction. No hierarchy of methods exists; rather, the most appropriate method should be applied.

OECD Guidelines treatment

Indian legislation is broadly based on the OECD Transfer Pricing Guidelines (OECD Guidelines). Five of the six methods prescribed in the legislation to compute arm's length prices are in conformity with the OECD Guidelines.

Further, the tax authorities generally recognize the OECD Guidelines and refer to them for guidance to the extent that they are not inconsistent with domestic law.

India (continued)

Transfer pricing penalties

- For inadequate documentation, failure to report the transaction, maintenance or furnishing of inaccurate particulars, the taxpayer is fined 2% of the transaction value
- For a failure to furnish 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 income tax return, the taxpayer is fined approximately INR100,000 (approximately USD2,000)

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 tax authorities 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.

Documentation deadlines

The information and documentation specified should, as far as possible, be contemporaneous, and should be in existence on the filing date of the income tax return, which is 30 November following the close 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 48 months of the close of the financial year (1 April to 31 March). However, if the tax authorities determine that income has escaped assessment, an assessment may be reopened within seven years of the close of the financial year.

India (continued)

Return disclosures/related party disclosures

The taxpayer needs to specify whether it is liable to file the accountant's report as the due date for return filing depends on the same.

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

Transfer pricing-specific returns

Under Section 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.

Audit risk/transfer pricing scrutiny

Internal guidelines have been issued by the tax authorities, pursuant to which companies with related party transactions in excess of USD3 million are being compulsorily scrutinized. Cases with lesser transactional values are also often picked up for audit. Audits are carried out on an annual basis, and once a case is selected for transfer pricing audit, there is a high likelihood of recurring audit thereafter.

In most cases, the tax authorities do not seem to have adopted a centralized or coordinated approach to audits, with officers in different locations taking divergent positions on similar fact patterns. Substantial documentation is being requested in the course of audit proceedings.

The likelihood of a general tax audit is characterized as high. Further, the likelihood that transfer pricing will be reviewed as part of a general audit is also characterized as high, provided that the aggregate value of international transactions exceeds USD1 million. Finally, if transfer pricing is reviewed as part of the audit, the likelihood that the transfer pricing methodology will be challenged is also high.

The information technology, business process outsourcing, banking and pharmaceutical sectors have received particular attention. Additionally, the tax authorities are increasingly scrutinizing intra-group services received and royalty payments made by Indian taxpayers. The taxpayer is required to demonstrate that the intra-group services were actually rendered or the IP was actually provided, and that such rendering or provision resulted in a tangible benefit to the taxpayer. In recent audits, there has also been a significant focus on marketing intangibles. In many cases, brand promotion expenses incurred by Indian subsidiaries have been held as excessive when compared with industry standards, and thus disallowed.

The tax authorities have 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 disaggregating transactions 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 tax authorities.

Transfer pricing additions in India go through the regular appellate proceedings. In many cases, the appeals were pending at the first appellate authority for three to five years. Hence, to fast-track transfer pricing issues, in 2009, the government introduced an alternative dispute resolution process. Under this process, the taxpayer may choose to approach a dispute resolution panel in case a transfer pricing adjustment is proposed by the tax officer. The panel should dispose of the matter within nine months. The panel's decision, which was binding on the tax officer till last year, will now be appealable. This process is expected to significantly expedite the first stage of the litigation process in India, which usually takes much longer.

APA opportunity

An APA regime has been introduced in India with effect from 1 July 2012. The APA rules provide an opportunity for taxpayers to opt for a unilateral, bilateral or multilateral APA. The APA can be valid for a maximum period of five years, with no rollback provision and require payment of a specified fee. The APA filing process includes a pre-filing submission, filing the APA request itself, negotiating the APA, execution and monitoring. Taxpayers are required to prepare and file an annual compliance report for each year under the APA, which is subject to a compliance audit by the tax authorities.

Indonesia

Taxing authority and tax law

Taxing authority: Directorate General of Tax (DGT)

Tax law: Article 18 of the Indonesian Income Tax Law (ITL), enacted 1 January 2009

Relevant regulations and rulings

The ITL contains transfer pricing provisions under Article 18, which requires that all intercompany transactions be conducted in accordance with "fairness" and "common business practice". The article's implementing regulation PER-43/PJ/2010 (PER-43), which adopts the arm's length" principle, was promulgated by the tax authority on 6 September 2010. Amendments to this regulation were introduced by regulation PER 32/PJ/2011 (PER-32)[1]. PER-43 mandates the preparation of transfer pricing documentation and provides the guidelines for establishing the arm's length nature of the transactions. In particular, it requires taxpayers to:

- Conduct a comparability analysis and determine comparable transactions
- Identify the appropriate transfer pricing method
- Apply the arm's length principle based on the results of the comparability analysis and appropriate transfer pricing methods on the transaction between a taxpayer and the parties having a special relationship
- Document the steps taken in determining the fair price or fair profit in accordance with the provisions of the prevailing tax regulations

Taxpayers are no longer required to document and conduct comparability analyses for transactions with a total value of less than IDR10 billion for each transaction counterpart.

PER-43, as amended by PER-32, applies to domestic transactions only if the related domestic enterprises are subject to different tax rates, and the related party transaction is:

- Subject to final and non-final taxes within a specific sector
- Subject to Luxury Goods Tax
- Conducted with a taxpayer that is an oil and gas production sharing contractor

OECD Guidelines treatment

Indonesia is not a member of the OECD, although it has been granted "enhanced participation" status. PER-43 reconfirms the basic transfer pricing concepts and principles of the OECD Transfer Pricing Guidelines (OECD Guidelines).

Priorities/pricing methods

Selection of a transfer pricing method is to be carried out via "the most appropriate method" test. This implies that taxpayers can choose to use the method that is appropriate based on the nature of the transaction and available data, inter alia, without having to first reject methods that were traditionally preferred. In applying the most appropriate transfer pricing method, the following factors should be considered:

- The advantages and disadvantages of each method
- The appropriateness of the method with the nature of related parties transactions, which is established based on the functional analysis
- The availability of reliable information to be applied on the chosen method and/or any other method
- The level of comparability of the transactions between related parties with transactions between unrelated parties, including the reliability of adjustments made to eliminate any discrepancy of the differences that exist

1 Promulgated on 11 November 2011.

Transfer pricing penalties

There is a penalty of 2% per month — up to 48% — on any tax underpayment arising from adjustments of income and costs corresponding to related party transactions as a result of the tax audit process.

Inappropriate disclosure of information relating to related party transactions by a taxpayer in corporate income tax return may be construed as an act of fraud that could lead to an administrative penalty of up to 400% of tax underpayment.

Penalty relief

There is currently no penalty relief regime in place.

Documentation requirements

Under PER-43, transfer pricing documentation is mandatory. Within 90 days of the close of the fiscal year, and simultaneously with the submission of the corporate tax return, taxpayers are required to disclose information used to establish the arm's length nature of its price or profit in related party transactions. The information required must include:

- Detailed description of the tested party, such as structure of group's business, ownership structure, organizational structure, operational aspects of business activities, list of competitors, and descriptions of business environment
- Pricing policies and/or cost allocation policies
- Results of comparable analysis on characteristics of products being traded, results of functional analysis, economic conditions, provisions of the contracts/agreements, and business strategy
- Selected comparable transactions
- Application of the transfer pricing methods selected by the taxpayer

Based on the DGT's letter No. S-479/PJ.033/2012 issued on 27 April 2012, taxpayers are not required to submit their transfer pricing documentation simultaneously with their corporate tax returns. However, taxpayers are required to present their transfer pricing documentation upon request from the Indonesian tax authorities.

Documentation deadlines

Under PER-32, taxpayers are required to submit the transfer pricing documentation in reporting their related party transactions. Related party transactions must be reported in the Annual Income Tax return. Furthermore, in a tax audit, any document requested by tax auditor must be provided within a month from the date of request. Further, under PER-43, all documentation to support the arm's length nature of the related party transactions, including a transfer pricing study, must be maintained for 10 years from the close of the relevant fiscal year.

Statute of limitations on transfer pricing assessments

There is no separate statute of limitations under PER-43. However, under the tax laws, the tax authority is allowed to conduct a tax audit, which includes assessing the arm's length nature of related party transactions, within five years from the relevant fiscal year.

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 must be disclosed. Required information includes the type of transaction, the value of the transaction, the transfer price and the method used to determine the transfer price. However, since 2009, the disclosure requirements have expanded to include a confirmation of the information that the taxpayer used to establish the arm's length nature of the related party transactions.

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. In 2010, a special group of transfer pricing auditors was formed within the tax authority. Enterprises with significant intercompany transactions generally face a high risk of a transfer pricing audit. The number of transfer pricing adjustments increased significantly since 2009, especially in cases where Indonesian entities have filed for tax refunds or incurred losses. The DGT'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 at a higher risk of being subject to a transfer pricing audit:

- A large number of related party transactions
- Losses for more than three 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 other similar enterprises or to the industry average. Since October 2009, the DGT has issued a series of Circular Letters that provide benchmarking ratios for various industries. Under these circular letters, those taxpayers whose profits fall below the range of profit ratios are exposed to increased transfer pricing audit risk

In March 2009, the DGT issued letter No. S-153/PJ.4/2010, which provides guidelines for tax officers for application of the arm's length principle in the context of a tax audit. In general, the main issues that have to be examined in an audit of the related party transactions are as follows:

- Existence of special relationship between the parties (since tax adjustments can be made only with regards to related party transactions)
- Selection of independent transactions that are comparable
- Selection of examined/audited party and tested transaction
- Comparability of conditions of related party transaction and comparable independent transaction
- Selection of a profit level indicator for benchmarking
- Selection and application of a transfer pricing method to apply the arm's length principle

Under PER-43, as amended by PER-32, any transfer pricing adjustment made by the tax authority can result in a corresponding adjustment to the income or costs of the foreign or local counterpart of the transaction.

In general, the risk of an annual tax audit is characterized as medium; however, the risk of an immediate tax audit after a taxpayer applies for a tax refund is high. The risk that transfer pricing will be reviewed as part of a regular tax audit is characterized as high, while the risk that tax authority will challenge the transfer pricing methodology is also high.

APA opportunity

Under PER-43, an APA is available as a means of mitigating future transfer pricing disputes with the tax authority. The APA can be unilateral or bilateral. In 2010, the DGT passed its APA regulations, PER 69/PJ/2010 dated 31 December 2010.

In addition, under PER-43, a Mutual Agreement Procedure (MAP) is available, in accordance with the provision of an applicable tax treaty. The procedures for applying for MAP relief is further regulated under PER-48/PJ/2010 that was issued by the DGT on 3 November 2010.

Ireland

Taxing authority and tax law

Tax authority: The Irish Revenue Commissioners (IRC)

Tax law: Part 35A Taxes Consolidation Act (TCA) 1997

Relevant regulations and rulings

Section 835C TCA 1997 (Section 835C) sets out the main transfer pricing regulations.

The regulations apply to any arrangement between associated enterprises involving goods, services, money or intangible assets, but only where those transactions meet the definition of being an Irish trading (Case I/II) transaction for one or both of the parties, and only where those arrangements are entered into or amended on/after 1 July 2010. The regulations apply to both domestic and cross border transactions where Irish trading receipts are understated or trading expenses are overstated.

There are exemptions from these regulations for small and medium enterprises where a company has fewer than 250 employees and either turnover of less than EUR50 million or assets of less than EUR43 million. This is an annual test.

Section 835F TCA 1997 (Section 835F) imposes an obligation on companies to have available such records as may reasonably be required for the purposes of determining whether the trading income of the company has been computed in accordance with the requirements of Section 835C. Transfer pricing documentation is fundamental to validating and explaining the pricing of the intra-group transactions, and if requested, has to readily establish to the IRC's satisfaction that the transfer prices are consistent with the arm's length requirements of Section 835C.

OECD Guidelines treatment

The regulations adopt the OECD Transfer Pricing Guidelines (OECD Guidelines) wholesale into the domestic legislation. The IRC's application of the regulations in relation to documentation will accept both the "EU Transfer Pricing Documentation" guidance and Chapter V of the OECD Guidelines (the OECD rules only apply insofar as they relate to trading transactions).

Priorities/pricing methods

The arm's length principle asserts that intra-group transfer prices should be equivalent to those that would be charged between independent persons dealing at arm's length in otherwise similar circumstances. Ireland accepts this principle as set out in Article 9 of the OECD Model Tax Convention and also in the respective "Associated Enterprises" article in Ireland's double taxation treaties. To establish an arm's length price, the OECD Guidelines will be referenced.

Transfer prices should be reviewed at regular intervals to determine that pricing remains at arm's length.

Transfer pricing penalties

There is no separate statutory regime for transfer pricing penalties. However, normal penalties which apply to the Irish self-assessment regime may apply.

Penalty relief

No penalty relief regime has been provided to date.

Ireland (continued)

Documentation requirements

The documentation must be sufficient to demonstrate a company's compliance with the transfer pricing regulations according to guidance issued by IRC in their Tax Briefing Issue 07 in June 2010. The actual documentation required will be dictated by the facts and circumstances of the transactions. The cost of producing the documentation should be commensurate with the risk involved. It would be expected that complex and high value transactions would generally require more detailed documentation than simple high volume transactions.

The transfer pricing documentation may be kept in the form of the company's own choosing, and the company is not required to prepare the documentation itself. The documentation does not need to be prepared or kept in Ireland, but must be in a language of the State, i.e., English or Irish.

The documentation is required to contain the following:

- The associated persons that are party to the transaction
- The nature and terms of the transaction
- The terms of relevant transactions with both third-parties and associates
- The method or methods, by which the pricing of the transactions were derived, including any comparability analysis and any functional analysis undertaken
- The application of the transfer pricing method
- Any budgets, forecasts or other relevant papers relied on in arriving at an arm's length result

This documentation should be reviewed at regular intervals to determine whether the pricing remains at arm's length. The IRC has stated that they will be guided by Chapter V of the OECD Guidelines and by EU transfer pricing documentation guidance in applying the documentation requirement.

Documentation deadlines

Documentation must be available for transactions that take place in accounting periods beginning on or after 1 January 2011. While there is no statutory deadline with respect to documentation, a separate guidance note issued by IRC states that it is considered best practice that some transfer pricing analysis is prepared at the time the terms of the transaction are agreed, and that it is also considered best practice that the documentation exists at the time of filing the tax return, so that the company is in a position to make a correct and complete return. The tax return is due nine months after the end of an accounting period.

The documentation requirements do not apply to a transaction, the terms of which were agreed before 1 July 2010, if:

- The terms of the agreement clearly envisage the transaction
- Application of these terms delivers the price of the transaction
- An agreement to enter into a further agreement would not meet these conditions

However, intercompany arrangements that were agreed prior to 1 July 2010, and that are re-negotiated and re-signed after 1 July 2010, are within the scope of the regulations.

Statute of limitations on transfer pricing assessments

The statute of limitations is currently four years after the end of the tax year or the accounting period in which the return is made.

Ireland (continued)

Return disclosures/related party disclosures

There are currently no requirements on return disclosures or related party disclosures.

Audit risk/transfer pricing scrutiny

Compliance with the transfer pricing regulations will be subject to audit. The new provisions delegate transfer pricing auditing to officers authorized for that purpose by the IRC. This ensures that the audits concerned will be undertaken by officers who appreciate, and are equipped to deal with, the complexities involved in applying the arm's length principle.

The IRC released further guidance on 26 November 2012, setting out their proposed approach to monitoring compliance with the Irish regulations. The guidance released as 'Revenue eBrief 62/2012' introduced a new procedure referred to as the "Transfer Pricing Compliance Review" (TPCR), which is a self-review carried out by a company/group of its compliance with the Irish regulations. A selection of companies will be requested by IRC to conduct a TPCR in any given year. They have set out that their initial focus will be on a number of large companies.

TPCRs will not be considered revenue audits but based on a risk assessment by the IRC, certain cases may be escalated to a transfer pricing audit. It is anticipated that TPCR selection and audit activity will commence in 2013.

APA opportunity

There is currently no formal APA program in Ireland, but the IRC continues to enter into APAs on a case-by-case basis.

Israel

Taxing authority and tax law

Taxing authority: Israeli Tax Authority (ITA) is responsible for ensuring that taxpayers meet the requirements of the law.

Tax law: Income Tax Ordinance §85A and Income Tax Regulations (Determination of Market Terms), 2006 provide guidance on transfer pricing.

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 carried out subsequent to the validation of regulations on 29 November 2006. The ITP Regulations are based on a combination of the OECD Transfer Pricing Guidelines (OECD Guidelines) and the US transfer pricing regulations.

In Israel, taxpayers are required to comply with the proper timing for submission of documentation (i.e., 60 days from the official demand of a tax inspector), which shifts the burden of proof to the taxing authority if the latter challenges the transfer pricing.

The ITP requires that, commencing with tax year 2007; Israeli annual tax returns include a form (#1385) specific to transfer pricing that identifies the intercompany transactions, details of the other party and its residency, the transaction volume and a signature on a declaration that the international intercompany transaction is at arm's length. According to the taxing authority, such declaration must be supported by documentation that meets the documentation requirements.

In the last few years, the ITA has released several publications on various issues that affect transfer pricing:

- Restructuring — The ITA provides guidance to its local assessing officers on how to deal with post-acquisition restructuring and intellectual property (IP) migration following such restructuring
- Capital notes — Capital notes enable Israeli taxpayers to finance their foreign subsidiaries with non-interest financial debt instruments
- Inclusion of stock option expenses by Israeli cost plus companies — The ITA asserts that these expenses should be included, and points out that two cases addressing this issue are currently being litigated

OECD Guidelines treatment

The ITA considers its transfer pricing rules and regulations to be consistent with the OECD Transfer Pricing Guidelines. However, usually a local adaptation is necessary, mainly with respect to the interquartile range when the CUP method is used, and the decision of whether to use local, European or US comparables. Israel also adopted a combination of hierarchy and best method selection, where the CUP is the superior method and the rest are secondary to CUP but equally so.

Priorities/pricing methods

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

- CUP or CUT
- Comparable profitability
  - Cost Plus or Resale Price
  - CPM or TNMM
  - Profit Split
- Other methods

An international transaction is at arm's length if, through the application of the selected 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 are performed. If the international transaction's result is outside the range, the median should be applied as the arm's length price for the transaction.

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. In addition, false declaration on form #1385 may expose the signing officer to criminal charges.

Penalty relief

There is no penalty relief regime applicable in Israel.

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 must include the following data:

- Taxpayer's group structure, the parties to the international transaction, their residency and any special relations between the taxpayer and the other 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 taxing authorities.

Documentation deadlines

Taxpayers in Israel must provide documentation within 60 days of a tax assessing officer's request.

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 in which the 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 (# 1385), in which the following should be disclosed:

- A short description of the intercompany transaction details of the other party and its residency
- Transactions' volume
- Signatures on all declarations (forms) that the international transactions were conducted at arm's length

Transfer pricing-specific returns

Refer to the return disclosures/related party disclosures section.

Audit risk/transfer pricing scrutiny

The likelihood of an annual tax audit in general is high. Traditionally, taxpayers operating in the international arena or subsidiaries of foreign companies have higher likelihood of being audited.

The likelihood that transfer pricing will be reviewed as part of that audit is high, while the likelihood that the transfer pricing methodology will be challenged in a transfer pricing review is moderate, if supported by robust transfer pricing documentation. When no documentation exists, the methodology is more likely to be challenged.

Following the recent circulars on the restructuring and the stock options expenses as described above, these issues are more likely to be challenged.

APA opportunity

Section 85A of the Israeli Income Tax Ordinance, which governs the ITP Regulations, stipulates in article 85A (d), the conditions under which an APA may be concluded and delineates the scope of an APA. The process starts with a detailed application that includes all the relevant details. Under the APA process, the ITA must respond to the taxpayer's application 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. In practice, a complete APA procedure may take 12 months.

Italy

Taxing authority and tax law

Taxing authority: Amministrazione Finanziaria (Administration of Finance and Revenue Authority, or AFRA)

Tax law and decrees: Embedded within the Presidential Decree no. 917 of 22 December 1986 (Decree 917), where transfer pricing is regulated in Article 110 (7) and Article 9 (3)-(4).

Relevant regulations and rulings

Legislative Decree no. 78 of 31 May 2010 (Decree 78) introduced an optional transfer pricing documentation provision in the Italian tax law. Article 26 outlines that if the taxpayer provides tax authorities with proper transfer pricing documentation during a tax assessment, no tax penalties (currently varying from 100% to 200% of the additional taxes) will be applied on possible tax adjustments, should the tax authority determine the intercompany transactions are not in compliance with the arm's length standard.

On 29 September 2010, the Commissionaire of the Italian Revenue Agency released the "provvedimento" (operational instructions) to implement the provisions endorsed in Article 1 (2-ter) of Legislative Decree no. 471, which was enacted on 18 December 1997 (Decree 471). The new documentation regime is commented on in Circular Letter 58/E, dated 15 December 2010 (Circular 58/E), which provides interesting insights.

The documentation regime innovates the way Italy traditionally looked at transfer pricing. However, there are some grey areas still left. Compliance with the Italian transfer pricing documentation regime is not mandatory. In this respect, taxpayers are expected to make a strategic management decision, taking into consideration that the penalty protection is only afforded if there is complete and appropriate transfer pricing documentation in place. If not, maximum penalties apply. The transfer pricing documentation format must follow the one provided by the law, must be in Italian, and its contents must be detailed enough to provide officers with a substantial view of the intercompany flows and related policies.

The instructions basically implement the EU Code of Conduct on transfer pricing by also following the OECD approach, but also contain very specific requirements for properly assembling the transfer pricing file. Compliance with the instructions will protect taxpayers from tax penalties on adjustments arising from transfer pricing audits. Current provisions provide for very high penalties, ranging from 100% to 200% of any additional taxes. Among the most significant implications of the new requirements are that taxpayers must:

- Assess the Italian entity's type to determine the proper documentation to be prepared for penalty avoidance
- Advise the tax authority as to the existence of current transfer pricing documentation for the current tax year with the filing of the tax return
- Advise the tax authority as to the existence of transfer pricing documentation for open tax years before 29 December 2010
- Have country specific documentation prepared, regardless of whether there is a Master File
- Take steps to avoid a challenge by the tax authority based on incomplete or false documentation, which could negate penalty protection

The taxpayer's notice to the tax authority, indicating that transfer pricing documentation exists for FY2010 (and subsequent fiscal years), must be filed annually, along with the tax return. For prior fiscal years subject to tax audits, a similar notice should have been provided by 28 December 2010. Late notices will only be deemed effective as long as they are filed prior to the beginning of any tax inspection.

Strategic risk management decisions need to be made by each taxpayer, possibly in coordination with central management.

It is not clear whether and to what extent previous Circular Letter nos. 32/9/2267 of 22 September 1980 (Circular 32/9/2267) and 42/12/1587 of 12 December 1981 (Circular 42/12/1587) are still valid (at least as internal administrative guidelines).

Circular Letter no. 1 of 20 October 1998 outlines general methods for tax audits and includes transfer pricing in the framework of regular audits of multinational enterprises.

Italian Supreme Court (Corte di Cassazione) Decision no. 22023 of 13 October 2006 notes that the burden of proof rests on the tax authority for transfer pricing issues. According to the Supreme Court, and subsequently confirmed by the 2010 OECD Transfer Pricing Guidelines (OECD Guidelines), 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.

Italy (continued)

Relevant regulations and rulings (continued)

In Ruling no. 124, dated 7 November 2006, the court addressed the case of a British insurance company which, after having operated in the Italian market for a certain number of years through a permanent establishment, subsequently provided its services directly to Italian customers, by appointing a fiscal representative in Italy (free supply of services). The Revenue Agency concluded that a transfer of a business concern had occurred (not specified if going concern or single assets).

OECD Guidelines treatment

The Italian transfer pricing rules are mainly encompassed in the tax law provisions of Decree 917, Circular 32/9/2267, and Circular 42/12/1587. These rules are largely consistent with the OECD guidelines.

Italian representatives actively participated to the OECD discussion on business restructuring, as well as in the approval process for the new version of the OECD Guidelines released in July 2010.

Priorities/pricing methods

Transactional methods, such as CUP, Resale Price and Cost Plus, are preferred over profits-based methods. Under the new transfer pricing documentation rules, taxpayers are expected to perform an industry, group and company analysis as well as a detailed functional and risk analysis. These analyses should include an indication of potential changes in the functions performed, assets used and risks assumed as compared to the previous tax year, with specific reference to changes that occurred in the context of a business restructuring.

The selection of the transfer pricing method entails an explanation of the reasons for using a particular method that produces results consistent with the arm's length standard. Should a profit method be selected when a traditional transactional method could be applied in an equally reliable manner, the taxpayer should explain why the latter had been excluded. The same explanation applies where a method other than the CUP method is selected, in the event the latter could have been applied to achieve equally reliable results.

An accurate description of the taxpayer's procedure for the selection of comparable transactions will have to be provided, as well as, if needed, a clear description of the underlying steps in arriving at an arm's length range.

Small and medium-sized companies are not required to refresh the benchmarks every year.

Transfer pricing penalties

If and when the above-mentioned optional transfer pricing documentation regime for penalty protection purposes is deemed inapplicable (however, with various degrees of judgment), general penalties for underpayment apply (Decree 471). In particular, where the tax return has been filed, standard administrative penalties apply in the amount equal to a minimum of 100%, up to a maximum of 200%, of the additional taxes or the minor tax credit assessed by Italian tax authorities. According to Circular Letter 58/E, higher penalties may be, in principle, applicable when the documentation is not deemed complete and appropriate. Penalties apply when:

- The taxable income declared is lower than the one assessed;
- The taxes declared are lower than those due; or
- The tax credit declared 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. Interest on taxes or additional taxes due also applies. 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 no. 74 of 10 March 2000. Some mitigation is provided by Article 7, whereby taxpayers are supposed to disclose their transfer pricing policy in their financial statement. Hopefully, the new transfer pricing documentation will not only reduce administrative penalties, but also help in demonstrating taxpayers' good faith, in case of possible tax criminal ramifications.

Circular 58/E provides some steps to be followed to escalate issues related to the penalty protection for tax assessments in excess of EUR10 million from local to regional tax offices, and eventually, to the central tax offices (Direzione Centrale Accertamento).

Italy (continued)

Penalty relief

Please see above for the application of the new penalty protection regime.

Documentation requirements

Proper documentation for penalty protection purposes must be drafted on a yearly basis if the taxpayer falls within the scope of paragraph 7 of Article 110 of Decree 917, and it must be available in each of the taxable periods subject to audit.

The filing of the documentation does not bind the tax authorities to the application of Article 1, paragraph 2-ter of Decree 471, when:

- Notwithstanding compliance with the formal structure referred to in Articles 2.1. and 2.2., the documentation delivered during the course of an audit is not complete and consistent with the provisions endorsed by the current decision;

  Or

- The information provided in the documentation is not consistent, wholly or partly, with the reality. Omissions or partial inaccuracies that do not hamper either the activity carried out by the auditors, or the accuracy of the outcome of such analysis, does not impede the application of Article 1, paragraph 2-ter of Decree 471.

Documentation deadlines

Taxpayers shall communicate to the Italian Revenue Agency the availability of proper documentation on the annual income tax return (i.e., in a dedicated box).

The submission of the proper documentation to the tax authorities must be executed within 10 days of a request. In case, during an audit or any other assessment activity, supplementary information is needed, it must be provided either within seven days of a request (or in a longer time period depending on the complexity of the transactions under analysis), to the extent that the period is consistent with the time of the audit. Once the time periods have elapsed, the tax authorities are not bound by the application of Article 1 paragraph 2-ter of Decree 471.

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, taxpayers must receive notice of tax assessments 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 assessment period for the relevant year is extended an additional year. Furthermore, for companies not benefiting from the 2002/2003 Italian Tax Amnesty, the assessment period is extended by two additional years.

In case of a potential criminal tax allegation, tax officers may invoke a specific law that allows the standard five year statute of limitations to be doubled.

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 from the managing or controlling company's financial statements 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. The same disclosure is also valid for taxpayers with intercompany flows that are to be grouped in costs versus revenues.

Transfer pricing-specific returns

In Italy there are no specific transfer pricing returns. As already mentioned, for the purposes of the optional penalty protection regime, taxpayers who intend to adhere to such regime, shall communicate to the Italian Revenue Agency the availability of proper documentation on the annual income tax return (i.e. in a dedicated box).

Italy (continued)

Audit risk/transfer pricing scrutiny

The risk of a general tax audit is high, as is the risk of being audited specifically on transfer pricing. Italian tax authorities usually challenge the price of intercompany transactions that they deem do not comply with the arm's length principle or that result in a mismatch between the characterization of entities and their remuneration. The likelihood of the transfer pricing methodology being challenged is also high, as tax officers often try to challenge all of the various aspects of transfer pricing; i.e., not only the methodology, but also the functional analysis, comparables, etc. There appears to be a tendency toward challenging transfer pricing in combination with issues related to tax havens, permanent establishments and/or abuse of law.

Circular 58/E provided an interim penalty regime. Italy is particularly active in challenging taxpayers on deemed permanent establishments. Following the Italian Supreme Court's "Philip Morris" case, additional case law is available in this respect.

In addition, there is generally greater tax audit activity and particular attention paid to large taxpayers, where the Italian tax authorities are devoting greater resources in intelligence and monitoring activities on multinationals. Likewise, Circular Letter no. 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 crucial areas to be assessed, it mentions intercompany transactions and transfer prices according to the provisions of Article 110 (7) of Decree 917. Legislative Decree no. 185 issued on 29 November 2008 introduced the category of "large" taxpayers, stating that "in relation to the corporate income tax and VAT returns of relevant size companies, the Central Revenue activates substantial controls in the year following the one of the filing," where "relevant size companies are the ones which achieve a (yearly) turnover not lower than EUR300 million. Such threshold will be reduced to EUR100 million by 31 December 2011."

Starting from 2012, in implementing the provisions of paragraph 10 of Article 27 of the Legislative Decree no. 185 of 2008, Circular Letter 18/E, dated 31 May 2012, provides that the "tutorship" activities shall cover all the large taxpayers (then about 3,200 companies, compared to about 2000 tutorials in 2011). As part of the tutorship activities, the need to maintain a high level of attention is re-affirmed, for the purpose of identifying a number of phenomena related to important risk factors that are also carefully considered by the OECD. Transfer pricing is expressly mentioned among such phenomena.

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

With Article 8 of Legislative Decree no. 269, enacted 24 November 2003, the Italian government introduced a unilateral ruling system mainly relating to transfer pricing, dividends and royalties. The law was enacted with the "Provvedimento del Direttore dell'Agenzia delle Entrate," dated 23 July 2004. This document provides a number of practical guidelines for the ruling program.

On 21 April 2010, the Central Directorate for Tax Assessment released the first Italian International Standard Ruling Report. This provides a number of statistical details that may be useful for taxpayers interested in exploring an APA, including pre-filing.

Although the APA law still refers only to unilateral APA, the Revenue is now more open to consider entering into bilateral APAs under the relevant treaties.

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 basis.

Mutual Agreement Procedures

On 5 June, 2012, The Italian tax authorities issued a Circular Letter (the Circular) pertaining to the settlement of international tax disputes, and more specifically clarifying some of the procedures involved in using the MAP process. In addition, the roles in the management of the MAP process and the involvement of both the Italian tax authorities and the Italian Ministry of Economy and Finance (hereinafter collectively referred to as Tax Authorities) are described in the Circular.

A relevant aspect clarified by the Circular is the relationship between MAPs and Italian litigation procedures. More in details, it is stated that the existence of a litigation procedure does not affect the course of the MAP until a tax court decision is issued. In such a case, the Circular clarifies that the decision of the tax court becomes final for the Italian tax authorities having the same effect on MAPs as under the settlement procedures. As far as the Arbitration Convention is concerned, access to the advisory commission phase is allowed only if the taxpayer renounces the option to pursue the domestic litigation procedure.

Japan

Taxing authority and tax law

Taxing authority: National Tax Agency (NTA)

Tax law:

- Special Taxation Measures Law (STML) Article 66-4/66-4-2 — Special Provisions for Taxation of Transactions with Foreign Related Persons
- STML Article 68-88/ 66-88-2 — Special Taxation Measures of Transactions between Consolidated Corporations and Foreign Related Persons

Relevant regulations and rulings

- STML — Enforcement Order 39-12, 39-12-2/ 39-112, 39-112-2
- STML — Enforcement Regulations Article 22-10, 22-10-2/ 22-74, 22-75
- STML — Circulars 66-4-(1)-1 to 66-4-(9)-2/ 68-88(1)-1 to 68-88(9)-2
- Commissioner's Directive on the Establishment of Instructions for the Administration of Transfer Pricing Matters (Administrative Guidelines)
- 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 Transfer Pricing Guidelines (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 Guidelines to the extent necessary in examinations and in reviews of requests for APAs. Administrative Guidelines, Para. 1-2(3)

Under audit, however, tax examiners often point out that Japan is not directly 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 or not 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. Furthermore, changes were made to the Japanese transfer pricing rules in 2011 that were explicitly linked to similar changes in the OECD Guidelines, possibly suggesting greater harmonization in the future.

Priorities/pricing methods

Historically, Japanese tax authorities have required 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 TNMM) after the first three have been discounted. However, triggered by similar changes in the OECD Guidelines, STML 66-4 and 66-4-2 were amended to eliminate the hierarchy of methods in favor of the most appropriate method approach, for tax years beginning on or after 1 October 2011.

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 — computed as either 10% of the additional assessed tax (up to JPY500,000), or 15% of the additional tax, depending on the amount of underpayment
- Delinquency tax (interest) accrues in two parts:
  - First, there is delinquency tax, which accrues for one year following the due date of the original tax return at a rate of 4% per year plus the official discount rate as of 30 November of the prior fiscal year
  - The second part is delinquency tax, which accrues from the date following the date of the assessment notice until the date the additional tax is paid. For the first three months following the date of the assessment notice (including the one month period from the date of the notice until the payment deadline and two months following the deadline) the rate of delinquency tax is 4% per year plus the official discount rate as of 30 November of the prior fiscal year. For any delinquency tax accruing after this period, the rate increases to 14.6% per year

There is no separate penalty for failure to prepare and maintain transfer pricing documentation. However, unlike in many other countries, preparation of sufficient documentation does not lead to penalty relief in case of an assessment.

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. The grace period is the period starting on the initial payment due date of assessed taxes (if the application submission date is later than the initial payment due date, the submission date is applicable) and ending one month after 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) (which grants a postponement of tax payment), the tax authority requires the taxpayer to provide security equivalent to the amount of the tax payment (i.e., collateral). This new transfer pricing rule applies for applications for a grace period made on or after 1 April 2007.

Documentation requirements

The 2010 tax reform effective 1 April 2010 clarified expectations around documentation, by amending the STML to state that documents listed in the ministerial ordinance should be provided without delay when requested during the course of an examination. The ministerial ordinance in question (STML Enforcement Regulations Art. 22-10, 22-74) was in turn amended to include a detailed list of documents to be submitted. The previous version of the STML had required that "documents or accounting books" be rendered, without specifying what types of documents and books were required. The substance of the new list in the ministerial ordinance is largely identical to a list previously disclosed in the Administrative Guidelines (an advisory document), but the promotion to the ministerial ordinance, coupled with the citation in the STML, gives this list the force of regulation.

The list of documents is now formally linked to existing language in the STML stipulating that failure to provide appropriate materials 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. Alternatively, an examiner can resort to "presumptive taxation," presuming an arm's length price with reference to profit ratios of other corporations in the industry which carry out similar activities.

Japan (continued)

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 in Japan 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 17-4 (previously Schedule 17-3), Detailed Statement Concerning Foreign Affiliated Persons and Related Party Transactions. Schedule 17-4 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.

Schedule 17-4 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

Transfer pricing-specific returns

Schedule 17-4 must be attached to the regular annual tax return when the taxpayer has foreign related party transactions during the fiscal year.

Audit risk/transfer pricing scrutiny

The likelihood of a specific company being audited depends on that company's profile. In general, however, the risk of a general tax audit in Japan could be said to be medium-high to high, as compared to other jurisdictions. The Japanese tax authorities have a robust and aggressive enforcement mechanism, and tax audits are a regular tool of enforcement. Medium to large taxpayers can expect a tax audit on a regular basis, especially given the recent need for enhanced government revenue.

Tax examinations will usually include a review of transfer pricing issues, even if the examination team lacks specialized transfer pricing expertise. A tax examiner may challenge transfer pricing directly, or may refer the file to a specialized transfer pricing team for follow up. Thus, the likelihood that transfer pricing will be a part of a general tax audit is similarly characterized as medium-high to high.

Japan (continued)

Audit risk/transfer pricing scrutiny (continued)

Taxpayers may also be audited on transfer pricing only, even in the absence of a general tax audit. The NTA and the major regional tax bureaus together employ a large corps of dedicated transfer pricing specialists to actively enforce Japan's transfer pricing rules. Transfer pricing 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 17-4 (relative to profits reported in Japan)
- With fluctuating profitability
- Who have significant transactions with low tax jurisdictions
- In industries with high margins; the NTA is likely to seek to apply its own comparables, including possibly secret comparables available only to the NTA (although secret comparables have become less common in recent years)

Whether the transfer pricing review arises out of a general tax audit or a transfer pricing audit, once the review is underway, the likelihood that the transfer pricing methodology will be challenged is high if the taxpayer appears unprepared to defend its transfer pricing policies and methods.

APA opportunity

Unilateral and bilateral APAs are available and very common; however, the NTA prefers bilateral APAs. APA guidelines are included in the Administrative Guidelines. Rollback of up to six years is possible in the case of a bilateral APA; however rollback is not permitted in unilateral cases.

The NTA regularly accepts profit-based methods, such as the TNMM.

The APA filing deadline is the first day of the first fiscal year to be covered by the proposed APA.

Kazakhstan

Taxing authority and tax law

In Kazakhstan, the tax and customs authorities are authorized to regulate transfer pricing. The tax authorities include:

- The Tax Committee of the Ministry of Finance (TCMF) of the Republic of Kazakhstan and its territorial tax bodies
- The customs authorities, including the Customs Control Committee (CCC) of the Ministry of Finance, its territorial subdivisions, custom houses, customs points, checkpoints at the customs border of the Republic of Kazakhstan, and specialized customs offices

Relevant regulations and rulings

The Law of the Republic of Kazakhstan, No. 67-IV on Transfer Pricing, of 5 July 2008, regulates transfer pricing. Additionally, transfer pricing in Kazakhstan is regulated by the following subordinate legal acts:

- Instruction on examining transfer pricing in international business transactions (pending approval of the Ministry of Finance)
- Rules for monitoring transactions (No. 62 of 12 February 2009)
- Rules for concluding agreements on the application of transfer pricing (No. 1197 of 24 October 2011)
- Rules on the procedure for cooperation with authorized bodies in examining transfer pricing issues (No. 129 of 26 March 2009)
- List of goods (including work and services) in international business transactions which are subject to transaction monitoring (No. 293 of 12 March 2009)
- List of officially recognized sources of information on market prices (No. 292 of 12 March 2009)

OECD Guidelines treatment

Although Kazakhstan is not a member of the OECD, the currently effective transfer pricing law in Kazakhstan has some common features with the OECD Transfer Pricing Guidelines (OECD Guidelines). However one of the principal differences from the OECD Guidelines is that the Kazakhstan transfer pricing legislation targets all international business transactions, regardless of whether the parties are related or not.

Priorities/pricing methods

The transfer pricing law supports five pricing methods, given in order of priority: CUP, Cost Plus, Resale Price, Profit Split and TNMM. Although the methods have similar names, their application may differ from that described in the OECD Guidelines.

Transfer pricing penalties

Special penalties are in place for failure to comply with the documentation requirements established by the transfer pricing legislation (i.e., monitoring reporting and documentation supporting the transaction price). The maximum amount of penalty is set at approximately USD4,000.

Transfer pricing penalties are also imposed on individuals for personal liability for an administrative violation, including criminal liability, if the tax amount misreported exceeds approximately USD231,000. Such violations can result in investigation by the financial police and in the prosecution of individuals who are held responsible for violations.

The penalty for an understatement of tax resulting from a transfer pricing adjustment is up to 50% of the additional accrued tax amount. In addition, interest for the delayed payment of the additionally assessed tax resulting from the transfer pricing adjustment is calculated at two and a half times the National Bank refinancing rate.

Kazakhstan (continued)

Penalty relief

The legislation in Kazakhstan considers cases for penalty relief when an entity may be exempt from administrative liability. These cases, amongst others, include exemption from administrative liability in connection with active repentance, an insignificant violation, expiration of the statute of limitations, and exemption on the basis of an act of amnesty.

Despite legal provisions allowing for exemption, in practice, implementation is quite rare.

Documentation requirements

Documentation requirements are established for two categories of transactions in Kazakhstan:

- Transactions with goods (including work and services) that are subject to monitoring
- All other transactions with goods (including work and services) subject to transfer pricing control

Taxpayers involved in transactions subject to monitoring are required to prepare and submit reports on an annual basis. Monitoring reports include information on the applied prices, relationships of the parties, industries and market conditions, business strategy, transfer pricing methodology, functional and risk analysis, tangible and intangible assets, method, source of information used for determination of a market price and other related information.

Transaction participants executing transactions with other goods (including work and services) that are subject to transfer pricing control should also maintain documentation supporting the applied prices, but this documentation must not be as detailed as that required for monitoring reports.

Documentation deadlines

Monitoring reports must be submitted to the tax authorities no later than 15 May of the year following the reporting year. The filing deadline can be extended up to the extension period granted for filing a corporate income tax declaration.

The documentation supporting the applied transaction prices must be submitted within 90 days of the date of the competent authority's request.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations on transfer pricing assessments. The general statute of limitations period for the assessment of penalties for underpayments of tax, understatements of income, or overstatements of expenses, is five years from the date of the relevant violation. Within the same statute of limitations period, the taxpayer has the right to introduce amendments and additions to its tax reporting.

Return disclosures/related party disclosures

Currently, no related party disclosure is required on tax declarations, though both National Accounting Standards and International Financial Reporting Standards (IFRS) require such disclosures in financial statements.

Kazakhstan (continued)

Transfer pricing-specific returns

Taxpayers involved in transactions subject to monitoring are required to prepare and submit reports on an annual basis. The deadline for filing such reports is 15 May of the year following reporting year.

Apart from the above and general transfer pricing documentation requirements, no other transfer pricing return is required to be filed.

Audit risk/transfer pricing scrutiny

There are two types of tax audits in Kazakhstan that can cover transfer pricing issues: complex and thematic. A complex audit is aimed at checking whether tax obligations for all types of taxes and other obligatory payments for the fiscal year, including those related to transfer pricing, have been fulfilled or not. A complex tax audit can take place only once a year, while a thematic tax audit can be conducted once every six months and only reviews tax obligations on specific issues or taxes (e.g., transfer pricing issues).

The likelihood of a tax audit depends on a tax risk level assigned to a particular taxpayer. There are several criteria for the determination of the level of tax risk. The main criterion is the coefficient of tax burden of the taxpayer. Depending on the level of risk, the tax authorities determine the frequency of tax audits to be conducted:

- For high level of risk — not more than 1 tax audit per annum
- For medium level of risk — not more than 1 tax audit in 3 years
- For low level of risk — not more than 1 tax audit in 5 years

The risk of transfer pricing issues being scrutinized during an audit and the tax authority challenging the transfer pricing methodology is high. The export of goods from Kazakhstan receives greater scrutiny. A review of the method, its use and the interpretation of information on market prices often results in transfer pricing adjustments that are often contested by taxpayers.

APA opportunity

Transaction participants are allowed to conclude an agreement on the application of transfer prices. The procedure for requesting such an agreement is included in the rules for concluding agreements on the application of transfer pricing[1], and discusses the following:

- List of documents required for concluding the agreement
- Procedure for consideration of a request by the authorized bodies (tax and customs authorities)
- Duration of the agreement (e.g., three years from the date of signing)
- Other

Rules for concluding agreements on the application of transfer pricing, No. 1197 of 24 October 2011.

1 Rules for concluding agreements on the application of transfer pricing, No. 1197 of 24 October 2011

Kenya

Taxing authority and tax law

Taxing authority: Kenya Revenue Authority (KRA)

Tax law: Transfer pricing in Kenya is regulated by the Income Tax Act (Chapter 470, Laws of Kenya) and the Income Tax (transfer pricing) (amended) rules 2012

Relevant regulations and rulings

Section 18(3) of the Income Tax Act articulates the arm's length principle and provides guidance on the definition of related persons. The transfer pricing guidelines apply to:

- Transactions between associated enterprises within a multinational company, where one enterprise is located in, and is subject to tax in Kenya, and the other is located outside Kenya
- Transactions between a permanent establishment and its head office or other related branches, in which case the permanent establishment shall be treated as a distinct and separate enterprise from its head office and related branches

OECD Guidelines treatment

The income tax (transfer pricing) rules provide for the application of the OECD methods in determining the arm's length pricing.

Priorities/pricing methods

Rule 4 of the aforementioned rules provides that a taxpayer may choose from among six methods when determining the arm's length price: CUP, Resale Price, Cost Price, Profit Split, TNMM and any other method as the Commissioner for Domestic Taxes may prescribe.

In 2012, the transfer pricing rules were amended to give the commissioner powers to prescribe the application of the above methods. The practice notes on the application of the methods are yet to be released by the KRA.

Transfer pricing penalties

There are no specific transfer pricing penalties. However, the Commissioner for Domestic Taxes can conduct an audit and make adjustments in the taxable profit and demand tax where applicable. Any tax due and unpaid in a transfer pricing arrangement is deemed to be additional tax for the purposes of Sections 72D, 94 and 95 of the Income Tax Act.

Section 72D of the Income Tax Act provides that a penalty of 20% shall immediately become due and payable on the unpaid tax after the due date

Section 94 of the Income Tax Act provides that a late payment interest of 2% per month — or part thereof — shall be charged on the tax amount, including the penalty remaining unpaid for more than one month after the due date, until the full amount is recovered

Section 95(1) provides that if the tax assessed on the total annual income of a person is greater than 10% of the estimated amount of chargeable tax on the taxpayer's provisional income tax return for that year, interest at the rate of 2% per month shall be payable on the entire difference between the tax assessed and the tax estimated

Penalty relief

Currently, there is no penalty relief available.

Kenya (continued)

Documentation requirements

The Commissioner for Domestic Taxes may, where necessary request information, including books of accounts and other documents relating to transactions where transfer pricing is applied. Such documents shall include information relating to:

- The selection of the transfer pricing method and the reasons for the selection
- The application of the method, including the calculations made and price adjustment factors considered
- The global organization structure of the enterprise
- The details of the transaction under consideration
- The assumptions, strategies and policies applied in selecting the method
- Other background information regarding the transaction

The books of accounts and other documents shall be prepared in, or translated into, English at the time the transfer price is established.

Where a taxpayer avers the application of arm's length pricing, such taxpayer shall:

- Develop an appropriate transfer pricing policy
- Determine the arm's length price as prescribed under the guidelines provided under these rules
- Furnish documentation evidencing their analysis upon request by the Commissioner

Documentation deadlines

The deadline for preparing documentation is the same as the deadline for filing the tax return (i.e., within six months after year end). Appropriate documentation must be provided upon request.

Statute of limitations on transfer pricing assessments

According to Section 56(3) of the Income Tax Act, the statute of limitations for transfer pricing assessments is seven years after the relevant year of income, unless the Commissioner has reasonable cause to believe that fraud or gross or willful neglect has been committed in connection with, or in relation to, tax for a year of income.

Return disclosures/related party disclosures

According to the corporate tax return format, the taxpayer is required to declare the name(s) and address(es) of related party(ies) outside Kenya.

Transfer pricing-specific returns

There are no specific transfer pricing returns for tax payers.

Audit risk/transfer pricing scrutiny

The taxing authority has intensified transfer pricing audits and has been issuing communications challenging already filed transfer pricing policies. The likelihood of occurrence of tax audits is high and the likelihood of a transfer pricing review as part of general tax audit is medium. The likelihood of the transfer pricing methodology being challenged in a transfer pricing review is high.

APA opportunity

In Kenya, no specific APA rules are applicable.

Kuwait

Taxing authority and tax law

Taxing authority: Department of Inspections and Tax Claims (DIT)

Tax law: Decree No. 3 of 1955 as amended by Law No. 2 of 2008.

Relevant regulations and rulings

The Executive Bylaws to Law No. 2 of 2008 provide for the following with respect to related party transactions:

Material cost: The DIT deems the following profit margins on imported material cost:

‣ Imports from head office	10% to 15%
‣ Imports from related parties	6.5% to 10%
‣ Imports from third parties	3.5% to 6.5%

Design and engineering fees incurred abroad: The DIT deems the following profit margins for design expenses incurred outside Kuwait:

‣ Design work carried out by the head office	20% to 25%
‣ Design work carried out by the related parties	15% to 20%
‣ Design work carried out by third parties	10% to 15%

Consultancy fees incurred abroad: The DIT deems the following profit margins on consultancy fees incurred outside Kuwait:

‣ Consultancy work carried out by head office	25% to 30%
‣ Consultancy work carried out by related parties	20% to 25%
‣ Consultancy work carried out by third parties	15% to 20%

Related party leases: Lease expenses arising from assets rented from related parties are only allowed as a deductible expense after customs documents evidencing the value of the assets are presented to the DIT. The lease expenses will be limited to the amount of depreciation normally charged on the asset for its use in Kuwait.

Inter-group financing: For the entity paying interest, the DIT normally disallows all interest charged by a related party for Kuwait tax filing purposes.

Intellectual property: The DIT would determine the reasonableness of charges from related parties for intellectual property based on supporting documents.

OECD Guidelines treatment

Due to the expanding tax treaty network based generally on internationally accepted transfer pricing principles (such as the OECD Transfer Pricing Guidelines); the arm's length principle is generally followed by the DIT. As Kuwait does not have formal transfer pricing regulations, there is always a risk that the tax authorities will not (completely) accept the transfer pricing method used. This risk is however smaller if the transfer pricing method to be used is internationally accepted and the supporting documentation is available.

Internal guidelines of the tax authorities (with respect to material cost, design and consultancy fees incurred abroad, related party leases, inter-group financing and intellectual property) will be effective and imposed regardless of the transfer pricing method in place.

Kuwait (continued)

Priorities/pricing methods

The DIT does not have a specific preferred method. However it may be useful in discussions with the DIT if the transfer pricing method used is based on internationally accepted principles and supporting transfer pricing documents are in place.

Transfer pricing penalties

Kuwait does not have specific transfer pricing penalties or penalties for failure to have documentation.

Penalty relief

Kuwait does not have penalty relief.

Documentation requirements

Currently, Kuwait does not have any formal documentation requirements.

Documentation deadlines

Currently, Kuwait does not have any formal documentation requirements and therefore also no documentation deadlines.

Statute of limitations on transfer pricing assessments

Kuwait does not have specific transfer pricing assessments. However, certain related party transactions are included in the annual corporate income tax return. Law No. 2 of 2008 provides for a statute of limitations period of five years.

Return disclosures/related party disclosures

Taxpayers must disclose related party transactions as part of the annual corporate income tax return with respect to material cost, design and consultancy fees incurred abroad, related party leases, intra-group financing and intellectual property.

Transfer pricing-specific returns

Kuwait does not require a separate return for related party transactions.

Audit risk/transfer pricing scrutiny

Every submitted corporate income tax return is audited by the DIT, whereby the related party transactions are also part of this audit.

In general, the likelihood of an annual tax audit is characterized as high, as is the likelihood that transfer pricing will be reviewed as part of an audit. The likelihood that the transfer pricing methodology will be challenged is characterized as low. However, if the intercompany transactions relate to material cost, design and consultancy fees incurred abroad, related party leases, intra-group financing and/or intellectual property, the likelihood of a challenge to the transfer pricing methodology is characterized as high.

APA opportunity

APAs are not available in Kuwait.

Latvia

Taxing authority and tax law

Tax authority: The State Revenue Service

Tax law: 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 at arm's length. Additionally, amendments to the Law on Taxes and Duties effective from 1 January 2013 set requirements regarding transfer pricing documentation.

Relevant regulations and rulings

Cabinet Regulations No. 556, promulgated on 4 July 2006, set the transfer pricing methods applicable for determining arm's length prices in related party transactions. Additionally, specific Cabinet Regulations set requirements regarding the conclusion of APAs.

OECD Guidelines treatment

Latvian transfer pricing legislative acts contain a reference to the OECD Transfer Pricing Guidelines (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 — CUP, Resale Price, Cost Plus, Profit Split 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 20% to 30% and a late penalty charge (annual rate of 18%) on the additionally payable corporate income tax may be applied.

Penalty relief

There is currently no penalty relief available; however, the existence of transfer pricing documentation generally reduces risk of transfer pricing adjustments.

Documentation requirements

In accordance with amendments to the Law on Taxes and Duties, effective from 1 January 2013, taxable persons with annual net turnover exceeding LVL1 million (approximately EUR1.42 million) will be obligated to prepare transfer pricing documentation for all related party transactions with value over LVL10,000 (approximately EUR14,230).

According to the Law on Taxes and Duties, transfer pricing documentation must contain the following information:

- General overview of the industry — brief description of taxpayer's operations in recent years
- Organizational and legal structure of the taxpayer and related company, including description of internal relations
- Information regarding business strategy of the taxpayer — market strategy, product distribution strategy and supply chain as well as sales and management strategy that may potentially affect pricing policy of inter-company transactions
- Information identifying operations between related companies — functions of the group members, including associated risks and assets employed, as well as role and responsibility of each group member involved in the transactions and information regarding restructuring of taxpayer's operations resulting in transfer (acquisition) of business functions, assets or risks to (from) related party for the price compliant to the market price
- Description of the goods or services in the transaction between the taxpayer and related person

Latvia (continued)

Documentation requirements (continued)

- Terms and conditions of the agreement concluded between the taxpayer and related person
- Forecast of the operating activities of taxpayer in relation to the agreement concluded with related company
- Description of the selected transfer pricing method for identification of the compliance of the price (cost) applied to a transaction with the market price (cost)
- Depending on the selected transfer pricing method — financial analysis of comparable unrelated companies or analysis of price (cost) applied to comparable transactions between unrelated companies and its compliance with the market price (cost)
- Other documents supporting the price (cost) applied to transactions between the taxpayer and related person — concluded agreements, documents justifying expenses, written resolutions and decisions made in board, council, shareholder and other internal meetings

For other taxpayers, requirements related to preparation of transfer pricing documentation is optional, although, the existing requirement that the prices applied in transactions between related companies have to be at arm's length, as stated in the Law on Corporate Income Tax, remains in force. In practice, it means that the taxpayer would be able to prove to the State Revenue Service that prices applied to inter-company transactions are at arm's length by using limited scope transfer pricing documentation.

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. The tax audit may be started immediately after submitting the corporate income tax return (i.e., four to seven months after the end of financial year). In addition, new regulations effective from 1 January 2013 require transfer pricing documentation to be submitted within 30 days of a request from the State Revenue Service.

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. However, according to the new regulations, the State Revenue Service has rights to make a tax assessment for five years from the payment date of the respective tax for cross border related party transactions.

Return disclosures/related party disclosures

Related party transactions must be disclosed in Appendix 2 of the Corporate Income Tax Return. The taxpayer should disclose the related parties involved, the types of transactions (e.g., purchase or sale of goods, services or fixed assets), volume of transactions and transfer pricing methods applied.

Transfer pricing-specific returns

There are no transfer pricing-specific returns in Latvia; however, related party transactions must be disclosed in Appendix 2 of the Corporate Income Tax Return.

Audit risk/transfer pricing scrutiny

Small and medium taxpayers in Latvia have a medium risk that they will be subject to a general tax audit, while large taxpayers have a high risk of audit. All taxpayers have a high risk that transfer pricing will be reviewed as a part of an audit. In addition, there is a medium risk for all taxpayers that if transfer pricing is reviewed as a part of the audit, the transfer pricing methodology will be challenged.

APA opportunity

Amendments to the Law on Taxes and Duties that are effective from 1 January 2013 create an opportunity to conclude an APA between the taxpayer and the State Revenue Service for cross border transaction with a related foreign company when the transaction exceeds LVL1 million (approximately EUR1.4 million) over a period of 12 months.

There are specific Cabinet Regulations regarding an APA that specify the information to be included in an APA application, describe the procedure and timeframe for concluding an APA, and set the fee for filing an APA.

Lithuania

Taxing authority and tax law

Taxing authority: Ministry of Finance of the Republic of Lithuania and the State Tax Inspectorate

Tax law: The arm's length principle is established in the Law on 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 (OECD Guidelines) is explicitly advocated in the regulations and rulings applicable in Lithuania. Other OECD papers, such as those regarding business restructurings and profit allocation to permanent establishments, are not explicitly implemented in the Lithuanian legislation.

Priorities/pricing methods

The CUP method is preferred over other pricing methods. In cases where the CUP method cannot be reliably applied, other transaction based methods such as Resale Price or Cost Plus shall be used. 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 there is adequate support for the decision to apply any particular method.

Transfer pricing penalties

There are no specific transfer pricing penalties. General tax penalties of 10% to 50% of the additional tax are applicable in the case of taxable income adjustments. Moreover, penalty interest will apply.

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

Penalty relief

Transfer pricing penalties are subject to general penalty relief rules.

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 2.9 million.

In addition, transfer pricing documentation requirements are applicable to 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 principles in the OECD Guidelines 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 (Form FR0528) to the annual corporate income tax return has to be submitted in case the associated party transactions of the taxpayer exceed an annual value of approximately EUR 87,000. On Form FR0528, taxpayers are required to provide information about the transaction(s) between associated parties related to fixed tangible and intangible assets, stocks and goods, financial and other services, securities and derivatives, rent of property and loans. The taxpayers are also required to inform the tax authorities whether any transfer pricing method prescribed in transfer pricing rules have been used in the transactions disclosed.

Transfer pricing–specific returns

The rules for completing the associated party disclosure form (Form FR0528) are set forth in the Order of the Head of the State Tax Inspectorate No VA-27 as of 22 March 2005. Form FR0528 must be submitted within six months of the end of each tax period. No other transfer pricing–specific returns shall be provided to the Lithuanian tax authorities.

Audit risk/transfer pricing scrutiny

In general, the likelihood of a tax audit is characterized as medium. General tax audits are conducted at the discretion of the tax authorities. The likelihood that transfer pricing will be reviewed as part of an audit is characterized as high. Transfer pricing is high on the agenda during the tax audit. Transfer pricing documentation is always requested and analyzed. The likelihood that the transfer pricing methodology will be challenged is characterized as high. Tax authorities make an independent analysis of a taxpayer's tax position and analyze both documentation and factual results. Adjustments have been applied much more frequently than in previous years.

APA opportunity

As of 1 January 2012, taxpayers may conclude unilateral APAs with the Lithuanian tax authorities on prospective transactions. Bilateral or multilateral APAs may be concluded based on existing tax treaties for the avoidance of double taxation.

Luxembourg

Taxing authority and tax law

Tax authority: The Luxembourg tax authority

Tax law: Income tax law, general tax law, Circular LIR n° 164/2 and Circular LIR n° 164/2 bis on the tax treatment of companies carrying out intra-group financing activities in Luxembourg.

Relevant regulations and rulings

The Luxembourg Income Tax Law (ITL) contains two articles relating to transfer pricing: Article 56 ITL on Transfer of Business Profits and Article 164(3) ITL on Hidden Profit Distribution. Both articles encourage the general application of the arm's length standard for transactions between related parties. The ITL does not contain any other specific guidelines or regulations.

However, the Luxembourg tax authority issued two circulars, on 28 January 2011 (Circular LIR n°164/2) and on 8 April 2011 (Circular LIR n°164/2bis), respectively, regarding the tax treatment applicable to companies carrying out intra-group financing activities.

Circular LIR n°164/2 clarifies, in broad terms that the OECD Transfer Pricing Guidelines (OECD Guidelines) should be used as a reference when determining the arm's length remuneration to be realized by companies carrying out intra-group financing activities. Moreover, it explains the substance requirements to be met by these entities, and defines the procedure to follow in order to obtain clearance from the Luxembourg tax authority on the arm's length remuneration of the financing activities.

Circular LIR n°164/2bis clarifies the effect of Circular LIR n°164/2 on intra-group financing transactions set up prior to its issuance. It notably provides a grandfathering period up to 31 December 2011 for clearances issued prior to 28 January 2011 and for companies to comply with the requirements of Circular LIR n° 164/2.

OECD Guidelines treatment

The OECD Guidelines are not officially incorporated into Luxembourg tax law. As confirmed in Circular LIR n° 164/2 on intra-group financing transactions, the Luxembourg tax authority usually refers to the OECD Guidelines for assessing the arm's length character of intercompany transactions. Considering that the OECD Guidelines are not incorporated into Luxembourg income tax law, the arm's length nature of intercompany transactions may also be established with reference to other generally accepted transfer pricing guidelines or regulations.

Priorities/pricing methods

There are no specific pricing methods mentioned in the ITL. All methods advocated by the OECD are acceptable under the current administrative practice, such as CUP, Resale Price, Cost Plus method, TNMM, and Profit Split. There are no priorities established between the different methods.

Transfer pricing penalties

To the extent that the arm's length criteria is not respected, the tax authority may reassess and/or adjust the taxable result but no penalties are set forth in the tax law for cases in which such adjustments are made.

Penalty relief

Since there are no specific transfer penalties in the tax law, there are no specific provisions for penalty reductions.

Documentation requirements

Luxembourg tax law includes general documentation requirements, but does not provide specific transfer pricing documentation regulations. Thus, intercompany transactions should always be supported at least by appropriate agreements and other supporting legal documentation. With reference to the circulars on intra-group financing transactions, transfer pricing documentation supporting the remuneration needs to be compliant with the OECD Guidelines.

Moreover, for all new financing transactions, the tax authority may request supplementary information supporting the transfer prices

Luxembourg (continued)

Documentation requirements (continued)

applied on intercompany transactions at the time they are executed. In this respect reference is also made, in principle, to the OECD Guidelines for adequate documentation.

Luxembourg is also adhering to the EU Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the EU. As a consequence, contemporaneous transfer pricing documentation available at headquarter level may also be used in Luxembourg to support the arm's length nature of intercompany transactions.

Documentation deadlines

As a general rule, contemporaneous documentation should exist when transactions are carried out. That rule also applies to transfer pricing documentation. As the tax law does not contain specific transfer pricing documentation regulations, Luxembourg tax law does not include a deadline to produce transfer pricing documentation. The tax authority may request, in the context of an audit that transfer pricing documentation be provided within a certain timeframe. Such timeframe may be as short as 14 days, but may be extended upon request.

Statute of limitations on transfer pricing assessments

There are no specific limitations on transfer pricing adjustments; rather, the general rules apply. The statute of limitations is, in principle, five years starting from 1 January of the calendar year following the relevant tax year. In case no tax return or an incomplete tax return is filed, as well as in case of fraud, the statute of limitations is extended to 10 years. Moreover, once a Luxembourg company has been assessed for income and net wealth tax purposes for a particular year, the tax authority may not reassess the relevant tax year, unless they have obtained new information and the statute of limitations has not yet run. As long as the tax authority has issued a provisional tax assessment, the taxable base may still be adjusted after the issuance of the provisional assessment, until the statute of limitations has run.

Return disclosures/related party disclosures

There are no specific disclosures required when filing tax returns. It is, however, a common practice that transactions with related parties are detailed by nature and by related party in a schedule attached to the tax returns.

Transfer pricing-specific returns

There are currently no specific transfer pricing returns requirements.

Audit risk/transfer pricing scrutiny

There are no specific rules regarding transfer pricing audits in Luxembourg. Transfer pricing should normally be reviewed as part of a regular tax audit. The risk of transfer pricing being reviewed under a tax audit is characterized as medium.

The Luxembourg tax authority randomly selects companies to subject to a tax audit, unless there are indications on the tax returns that the taxable basis is potentially wrong. The tax authority has the right to carry out an audit during the statute of limitations period until final income tax assessments are issued.

APA opportunity

Although no formal advance pricing agreement procedure exists in Luxembourg, the tax authority may express an opinion on transfer prices used by taxpayers on a case-by-case basis. In that respect, advance clearance can be sought from the Luxembourg tax authority on the intercompany transfer prices being applied.

According to the circulars on intra-group financing activities, binding clearance may be obtained by a company carrying out intra-group financing activity in Luxembourg, as long as that company has sufficient economic and organizational substance in Luxembourg.

The validity of an advance clearance on the pricing of intra-group transaction is five years, unless the facts and circumstances change warrant a different time period. The advance clearance will not be valid if the actual facts have not been disclosed or if the advance clearance conflicts with international tax rules. Upon request, the application of the advance clearance may be extended for an additional five years.

Macedonia, Former Yugoslav Republic of

Taxing authority and tax law

Tax authority: Revenue Office and Customs Office

Tax laws and ministerial instructions:

- Corporate Income Tax (CIT) Law
  - Article 13 para 1 — correction of prices applied between related parties; reference to transfer pricing methods
  - Article 14 para 1 — correction of the interest rate applied between related parties
  - Article 16 — related party definition
- Tax Procedures Law
  - Article 60 — obligation of the taxpayer to justify, upon a tax authority's request, any tax position taken
- Customs Law
  - Article 28 para 2 — definition of fair market price for customs purposes
- Double taxation treaties enacted by Macedonia

Relevant regulations and rulings

- 135/2011 — Administrative guideline on the obligation of the taxpayer to provide, upon a tax authority's request, analysis of why the transfer prices applied were considered to be at arm's length
- 135/2011 — Administrative guideline — a safe harbor rule for intercompany interest charges
- 39/2005 — Administrative guideline — defining related party for customs purposes

OECD Guidelines treatment

No reference is made in the law or in the administrative guidelines to the OECD Transfer Pricing Guidelines (OECD Guidelines). However, in the absence of any guidance, outlining what the contents of adequate documentation should look like, the OECD Guidelines can effectively serve as a model.

There are no specific tax regulations on business restructurings in Macedonia

Priorities/pricing methods

The CIT law makes explicit reference to the CUP and the Cost Plus method, although preference is for the CUP method. No reference is made to the other transfer pricing methods of the OECD Guidelines. However, using one of the other OECD transfer pricing methods should be acceptable, as long as no comparable uncontrolled prices are available and the taxpayer's analysis demonstrates that the method chosen is the most appropriate one, in line with the OECD Guidelines.

Transfer pricing penalties

Failure to report the correct amount of tax liability results in a penalty of up to 10 times the amount of the understatement of tax. Additionally, a default interest of 0.03% applies on the amount of the additional tax liability for each day of delay in settling such liability. Penal prosecution may not be ruled out if there are sufficient indications that there is a tax evasion in place. For not providing the tax authority, upon its request, with transfer pricing documentation, a fine ranging between EUR2,500 to EUR3,000 is imposed. For the same offence, tax authorities are entitled to suspend the taxpayer's business activity for 3 to 30 days.

Penalty relief

Currently, no penalty relief is available.

Macedonia, Former Yugoslav Republic of (continued)

Documentation requirements

No specific transfer pricing documentation requirement exists under the current tax legislation. The first transfer pricing guidance formally issued by the Ministry of Finance on 15 December 2011 stipulates that the taxpayer who is involved in intercompany transactions is obligated to present, upon the tax authority's request, sufficient information and analysis for proving that the prices applied are in line with the arm's length principle. In practice, a transfer pricing analysis prepared in line with the OECD Guidelines should be sufficient for the taxpayer to comply with the tax authority's request.

Documentation deadlines

There are currently no specific provisions for documentation deadlines. In the tax authority's request, the timeframe within which the taxpayer should provide the documentation is specified. However, in practice, the timeframe is very short; hence, it is advisable that the documentation be compiled as soon as practicable after the close of the tax year.

Statute of limitations on transfer pricing assessments

There is a five year statute of limitations for all taxes after which the tax authorities may not audit the taxpayer's reported position and reassess his tax liabilities. Audited tax periods can be re-audited further to the decision of the tax authority, as long as the five year time period has not elapsed.

Return disclosures/related party disclosures

There are currently no specific disclosure requirements.

Transfer pricing-specific returns

There are no transfer pricing-specific return requirements.

Audit risk/transfer pricing scrutiny

There is no mandatory frequency of performing tax audits. Initiation of a tax audit rests at the discretion of the tax authority, exercised in accordance with the audit plans. In general, the likelihood of an annually recurring tax audit is high. Likewise, the likelihood that transfer pricing will be reviewed as part of that audit is also high. This is due to the reforms of the corporate income tax regime in 2009, under which the annual tax base of a taxpayer includes expenses not recognized for tax purposes and additional income resulting from any transfer pricing adjustments, whereas any reported profits are subject to taxation only upon distribution. The likelihood that the transfer pricing methodology will be challenged is medium.

APA opportunity

The tax legislation does not provide for a binding advance pricing agreement. However, companies are entitled to file an application to the tax authority for a ruling with respect to the tax position they intend to take, to which the tax authority is obliged to reply. Due to lack of training in tackling transfer pricing issues, the responses are often ambiguous. In any case, the request should be accompanied by a transfer pricing analysis and a request to the tax office for its opinion on the compatibility of the methodology followed in setting the transfer prices with domestic law requirements. Although the tax authority's opinion is not binding, it represents the tax administration's position and should be considered by a tax auditor, unless the factual or regulatory background has changed.

Malaysia

Taxing authority and tax law

Taxing authority: Inland Revenue Board (IRB)

Tax laws: Income Tax Act, 1967 (ITA)

Transfer Pricing Provision

- Section 140A ITA: Power to substitute the price and disallowance of interest on certain transactions
- Section 138C ITA: Advance Pricing Arrangement
- Income Tax (Transfer Pricing) Rules 2012 (P.U. [A] 132)
- Income Tax (Advanced Pricing Arrangement) Rules 2012 (P.U. [A] 133)

General Anti-Avoidance Provision

- Section 140 ITA: Power to disregard certain transactions if not deemed arm's length

Transactions by Non-Residents

- Section 141 ITA: Powers regarding certain transactions by non-residents

The transfer pricing and advanced pricing agreement rules were issued in May 2012, but have a retroactive effective date of 1 January 2009. The transfer pricing rules make it mandatory for taxpayers to prepare contemporaneous transfer pricing documentation for their related party transactions.

The advanced pricing agreement (APA) rules sets out the legal provisions pertaining to the application for unilateral and bilateral APAs in Malaysia.

The IRB released the 2012 Malaysian transfer pricing guidelines in July 2012 superseding the original Malaysian transfer pricing guidelines issued in 2003. The transfer pricing guidelines set out further guidance in relation to the application of the transfer pricing legislation in Malaysia (i.e., Section 140A and the transfer pricing rules).

In addition, the IRB issued the Malaysian APA guidelines in July 2012 to provide guidance on the application for APAs in Malaysia.

OECD Guidelines treatment

The 2012 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 Transfer Pricing Guidelines (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 rules 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 ITA is applied. Penalties for transfer pricing adjustments can range from 100% to 300% of the undercharged tax. There are no specific transfer pricing documentation penalties in the legislation. However, the guidelines stipulate penalties of 35% on the balance of tax undercharged where no contemporaneous documentation is prepared and 25% where documentation is not prepared in accordance with the guidelines.

Penalty relief

An appeal for reduction in penalties can be made based on quality of contemporaneous transfer pricing documentation.

Malaysia (continued)

Documentation requirements

Contemporaneous documentation pertaining to transfer pricing need not be submitted with the tax return, but it should be made available to the IRB upon request. All relevant documentation must be in, or translated into, Bahasa Malay (the national language) or English.

There is no disclosure required on a tax return to indicate that transfer pricing documentation has been prepared.

Contemporaneous transfer pricing documentation should include records and documents providing a description of the following:

- Organizational structure including an organization chart covering persons involved in a controlled transaction
- Nature of the business or industry and market conditions
- The controlled transaction
- Strategies, assumptions and information regarding factors that influenced the setting of any pricing policies
- Comparability, functional and risk analysis
- Selection of the transfer pricing method
- Application of the transfer pricing method
- Documents that provide the foundation for or otherwise support or were referred to in developing the transfer pricing analysis
- Index to documents
- Any other information, data or document considered relevant by the person to determine an arm's length price

Documentation deadlines

Contemporaneous transfer pricing documentation is defined as transfer pricing documentation brought into existence:

- When a person is developing or implementing any controlled transaction
- Where in a basis period for a year of assessment the controlled transaction is reviewed and there are material changes, the documentation shall be updated prior to the due date for furnishing a return for that basis period for that year of assessment

Statute of limitations on transfer pricing assessments

There is a five year statute of limitations for tax adjustments (reduced from six years, effective 1 Jan 2013), 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 companies
- Receipts from related companies

Transfer pricing-specific returns

The IRB started, in July 2011, to require a form related to Information on cross-border transactions to selected corporate taxpayers to request for the following information for a given year:

- Name(s) of ultimate, holding companies, subsidiaries, both local and foreign, and affiliates in Malaysia
- A chart of the global corporate structure to which the taxpayer belongs, including ultimate holding companies, direct and indirect subsidiaries, associated companies and other related parties, indicating the companies with whom the taxpayer conducts related party transactions

Malaysia (continued)

Transfer pricing-specific returns (continued)

- Information on cross border intercompany transactions such as:
  - Sales/purchases of stock-in-trade /raw materials/other tangible assets
  - Royalties/license fees and other payments on use of intangible assets
  - Management fees including fees/charges for financial, administrative, marketing and training services
  - Research and development
  - Rent/lease of assets
  - Interest
  - Guarantee fees
  - Other services not falling under any of the above categories
- Particulars of financial assistance (showing balances during the year and the ending balance) with related companies outside Malaysia such as:
  - Interest bearing loans
  - Interest bearing trade credit
  - Interest free loans
- Description of the taxpayer's business activity:
  - Manufacturing [Toll/Contract/Full Fledged]
  - Distributor [Commissionaire/Limited Risk/Full Fledged]
  - Service provider
  - Others (taxpayer to specify)
- The taxpayers are required to specify the industry in which they operate and the associated industry code
- The taxpayers are also required to confirm if they have prepared transfer pricing documentation for the relevant year

The issuance of the Form MNE 2012 is an indication of the IRB's increasing attention to transfer pricing. The purpose of the form is to assess taxpayers' risk profiles, as well as their level of compliance with the transfer pricing provisions. The form will initially be issued to selected corporate taxpayers to gather information for the basis period for the year of assessment 2009 and taxpayers will be given 30 days to complete and return the Form to the IRB. In future, it is expected that the form will be issued to selected corporate taxpayers subsequent to the filing of their annual income tax returns.

Audit risk/transfer pricing scrutiny

Tax audits, including transfer pricing audits, are normally conducted to cover a period of three to six years. As such, the risk of a taxpayer being subjected to an annual audit could be characterized as medium.

For companies with related party transactions, the likelihood that transfer pricing will be reviewed is characterized as high; every multinational corporation that was audited over the last 12 months had its transfer pricing policy scrutinized.

As mentioned above, the IRB has indicated via the transfer pricing rules and guidelines 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. Accordingly, if a profits-based method is applied without substantiation, the risk of the methodology being challenged is high.

APA opportunity

The introduction of §138C ITA effectively formalizes the availability of unilateral and bilateral APAs in Malaysia. Additionally, formal APA rules and guidelines in relation to APAs have been issued and a specific unit in the IRB to oversee the APA applications and negotiations has been established.

Mexico

Taxing authority and tax law

Tax authority: There is a single Central Transfer Pricing (Audits)Administration within the Tax Administration Service (SAT), which is responsible for enforcing the transfer pricing rules in Mexico for both: (a) audits and (b) transfer pricing rulings, APAs and mutual agreement procedure (MAP) relief.

Tax law:

- Articles 86-XII, XIII and XV, 106, 215, 216, and 217 of the Federal Fiscal Code (FCC)
- Income Tax Law (ITL)
- Article 18 — III of Regulations of The Income Tax Law (RITL)
- International Tax Treaties on Income and Capital (ITTIC) with more than 44 countries; most follow the OECD Model Tax Convention
- Flat Rate Business Tax Law (FRBTL)
- Value Added Tax (VAT) Law
- Miscellaneous Tax Resolution (MTR): Tax Regulations and Administrative Rules (TR and AR)
- Presidential Decrees preventing companies in IMMEX (formerly Maquila program) to be negatively affected by FRBT and providing other incentives

Relevant regulations and rulings

Tax legislation is issued by the Ministry of Finance and approved by the Congress. The SAT publishes administrative regulations and administrative rules on a regular basis. Increasingly, more regulations deal with intercompany transactions, the most relevant of which relate to the application of tax relief for the maquiladora regime through presidential decrees for the ITL and FRBTL (issued on 12 October 2011). As of 12 November 2012, temporary rule I.3.8.3 allows Mexican taxpayers that conduct intercompany transactions with domestic related parties not to prepare transfer pricing documentation, as long as companies do not exceed a revenue threshold in the previous fiscal year.

- ITL, Article 86 Sections XII, XIII and XV: Taxpayer obligations for arm's length pricing (all), contemporaneous transfer pricing documentation (cross-border), transfer pricing disclosure (cross-border), ITL (Art. 216) method-application (all)
- ITL, Article 106: Statement of the arm's length principle: right of the tax authority to adjust to arm's length result; related party definition (OECD)
- ITL, Article 215: Comparability, business cycles, permanent establishments and transfer pricing, tax havens and OECD Transfer Pricing Guidelines (OECD Guidelines)
- ITL Article 216: Transfer pricing methods, ranges and selection of the most appropriate method
- ITL, Article 216 Bis: Transfer pricing methods for maquiladoras (contract manufacturing under IMMEX program)
- ITL, Article 217: Transfer pricing adjustments under ITTIC
- FRBTL, Article 18, Section III: Taxpayer obligation for arm's length pricing
- FFC, Article 34-A: Transfer pricing ruling (unilateral), bilateral APA under treaty
- MTR, TR and AR, I.3.8.3: Domestic transaction documentation (threshold) obligation

A final note on formal requirements: questionnaires related to the tax records reviewed by an external registered audit (external CPA) as part of the Tax Audit Report, or by the taxpayer itself as part of the Alternative Information Filing, were published in the Miscellaneous Tax Resolution. Three of such questionnaires relate almost exclusively to intercompany transactions and require a great deal of detail.

Mexico (continued)

OECD Guidelines treatment

The ITL states that the OECD Guidelines can be relied upon for interpretation of the rules as long as they do not contradict the ITL or International tax treaties.

Priorities/pricing methods

The transfer pricing methods in Mexico, established in Article 216 of the ITL, are CUP, Resale Price, Cost Plus, Profit Split, Residual Profit Split and TNMM. Effective 2006, the ITL specifically requires a hierarchical consideration of transfer pricing methods, with a particular preference for the CUP, and then for the traditional transactional methods over the transactional profit methods.

Transfer pricing penalties

No explicit, monetary penalties are applied when taxpayers do not maintain contemporaneous transfer pricing documentation. However, an implicit penalty supported by an aggressive interpretation of the ITL, taken by the SAT, and confirmed by a tax court case, is that failure to comply with documentation requirements would result in non-deductibility of the corresponding payments to foreign related parties.

There are specific penalties for a failure to file or the untimely filing of the transfer pricing information return. A penalty of approximately USD4,122 to USD8,245 can be imposed if the information return on foreign related party transactions is not filed, or is incomplete or incorrect.

If a transfer pricing adjustment is determined by the SAT, and as a consequence unpaid contributions are determined, penalties could vary from 55% to 75% of the omitted taxes, plus surcharges and inflation adjustments. Also, if a transfer pricing adjustment reduces the net operating loss (NOL), the penalty ranges from 30% to 40% of the difference between the determined NOL and the NOL in the tax return plus surcharges and inflation adjustments.

There are no penalties if the taxpayer self-corrects its tax results before an audit, and reduced penalties apply if self-correction is made during the audit but before the tax assessment. Waivers and abatements are possible under limited circumstances.

Penalty relief

Contemporaneous documentation might reduce tax penalties by 50%, as long as taxpayer complies with formal requirements established in Article 86-XII. The unpaid taxes could be reduced to 27.5% to 37.5% of the unpaid tax, and in the case of over-determined NOLs, penalties could be reduced to 15% to 20% of the overstated NOL.

Documentation requirements

Contemporaneous transfer pricing documentation related to cross-border intercompany transactions must be maintained. Documentation must 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 and correct application of an approved method as stated in Article 216 of the ITL, following the hierarchy established therein. It is necessary to include in the documentation information regarding functions performed, assets used and risks borne by the taxpayer involved in each transaction. Information and documentation on comparable transactions or companies by type of transaction must also be included.

Taxpayers are required to identify related party transactions clearly on their accounting records. Also, domestic intercompany transactions are also required to be documented by demonstrating that an accepted pricing method (i.e., one that is listed in the ITL) has being applied and that the arm's length standard has been met.

Mexican taxpayers performing intercompany transactions with foreign related parties are permitted to not maintain formal transfer pricing documentation following the requirements stated in Article 86-XII, as long as companies do not cover threshold for revenues within the previous fiscal year (approximately USD1 million for distribution and manufacturing activities, or USD250,000 for provision of professional services). As for Mexican taxpayers performing transactions with domestic related parties, as of 12 November 2012, temporary rule I.3.8.3 allows entities that conduct intercompany transactions with domestic related parties not to prepare contemporaneous transfer pricing documentation, based on the same threshold amounts considered in Article 86-XII.

Mexico (continued)

Documentation deadlines

Transfer pricing documentation 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 at least five years after the filing of the last tax return for each year. For those companies that chose to have their Financial Statements certified by an External Auditor (Dictamen Fiscal), the taxpayer's external auditor is required to disclose the company's compliance with all tax obligations, including those related to transfer pricing. This disclosure is made through the Financial Audit Report that must be filed by 30 June every year. As of 2010, taxpayers may choose not to go through the external Tax Certification (Dictamen Fiscal) and submit the required tax information themselves, in a filing called "Alternative Information to the Audit Report", also due in June.

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 (Exhibit 9 of the Multiple Annual Tax Return) to the SAT which is due contemporaneously with the submission of the annual tax return. Such informative return includes an appendix for the disclosure of information related to intercompany transactions with foreign related parties, including 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 applied
- Gross or operating margins earned on each transaction (only applicable for certain types of transactions)
- Withholding rates, and fiscal year during which deductions of the intercompany transaction were registered

Also, as of 2012, an informative return must be filed by maquiladora companies (DIEMSE) in order to access flat rate benefits derived from valid the presidential decree. Both information returns must be filed by 31 March of the following year and require the same information to be submitted by Mexican taxpayers.

When filing the Financial Audit Report or the Alternative Information to the Audit Report, the auditor or the taxpayer must indicate, among other things, that the company's transfer pricing documentation is in place and the transfer pricing tax return was filed for the fiscal year under review and that it complies with the requirements stated in the ITL and FRBTL. Further, the auditor or the taxpayer must complete and file a large number of detailed questionnaires, including the ones described below, which deal with intercompany transactions:

- Attachment 32: Information regarding related party transactions, such as:
  - Tax ID
  - Tax name
  - Country of residence
  - Type of intercompany transaction
  - Amount of the intercompany transaction
  - Transfer pricing methodology applied
  - Assessment regarding transfer pricing compliance

This information is required for all intercompany transactions (i.e., with foreign and domestic related parties, for each related party and type of transaction). This questionnaire is intended to verify compliance with ITL not only with respect to transfer pricing aspects, but also with respect to deductibility requirements of all tax positions.

Mexico (continued)

Return disclosures/related party disclosures (continued)

- Attachment 33: Questionnaire on related party transactions. This questionnaire includes, among others, the following sections:
  - APAs (if applicable)
  - Transfer pricing documentation compliance and filing date of informative tax return
  - Application of primary and/or corresponding adjustments
  - Tax ID of the adviser/preparer of the transfer pricing documentation
  - Confirmation of deduction of pro-rata charges
  - Information regarding financial derivative operations
  - Information regarding thin capitalization
  - Maquiladora rules compliance
- Transfer pricing questionnaire related to the review conducted by the external auditor (not included in the Alternative Information to the Audit Report file):
  - Questions regarding the confirmation of all aspects related to cross-border and domestic intercompany transactions

Transfer pricing documentation must be readily available as part of the accounting records by 31 March. An aggressive interpretation of the ITL, taken by the SAT, and confirmed by a tax court case is that failure to comply with the documentation requirements results in non-deductibility of payments to related parties.

Audit risk/transfer pricing scrutiny

High audit risk focusing on business restructuring (limited risk structures, migration of intangible property and centralization of functions and risks in favorable tax jurisdictions), highly leveraged structures, cost-sharing agreements, and pro rata — based charges in general, including management fees.

On 23 July 2012, the SAT published internal criteria related to tax positions, which included transfer pricing comments. Most of these rules regarding transfer pricing are related to formal documentation requirements for Mexican taxpayers carrying out intercompany transactions with both domestic and foreign related parties. These criteria are some of the areas upon which SAT focuses during transfer pricing audits, in addition to substantive and technical issues regarding compliance, planning and transfer pricing documentation.

APA opportunity

Unilateral and bilateral APAs are available under Article 34-A of the FFC 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: Dutch Tax Administration (Belastingdienst)

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 codified the arm's length principle and introduced transfer pricing documentation requirements in the Netherlands

Relevant regulations and rulings

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

The ten 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, 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 Transfer Pricing Guidelines (OECD Guidelines), IFZ2004/680M
- Accelerated Mutual Agreement Procedure decree, IFZ2008/248M
- Decree on profit allocation to permanent establishments (PEs), IFZ2010/457M

OECD Guidelines treatment

The tax authority generally 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 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 restructurings, no specific guidance has been issued to date. However, the tax authority generally follows the OECD guidance in this subject.

Netherlands (continued)

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. Since the 2010 revision of the OECD Guidelines, which establishes the most appropriate method rule for the selection of the transfer pricing method, there is no longer a hierarchy among the methods. Nevertheless, the OECD Guidelines do state that where a CUP method and another transfer pricing method can be applied in an equally reliable manner, the CUP method is to be preferred. Taxpayers are not obligated to test all the methods, though they must substantiate the method chosen.

Transfer pricing penalties

The lack of transfer pricing documentation will shift the burden of proof regarding the arm's length nature of the transfer price 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 with the levy 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 event of gross negligence or conditional intentional act under 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 penalties if there is proper transfer pricing documentation prepared 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 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 provide an exhaustive list of information that should be documented.

Transfer pricing documentation could include:

- 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

Netherlands (continued)

Documentation deadlines

Documentation is generally expected to be complete when the taxpayer enters into a transaction, according to the Dutch Ministry of Finance. However, if the transfer pricing documentation is not available upon the request of the tax authority, taxpayers are granted four weeks to prepare the documentation. This period may be extended up to 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 taxpayer's fiscal year. If the tax inspector has granted an extension for filing the tax return, the assessment period is extended to the end of the extension period. An additional assessment must be made within a period of five years, starting from the end of the taxpayer's 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 tax authority did not know or reasonably could not have known when it imposed 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.

Transfer pricing-specific returns

Dutch corporate income taxpayers are not required to file a specific transfer pricing return in addition to the regular corporate income tax return.

Audit risk/transfer pricing scrutiny

The risk of being audited by the tax authority in the Netherlands is considered moderate. However, when one is being audited, the risk of transfer pricing issues being scrutinized is high and consequently, the controversy risk is high as well. In particular, there is a high risk that the transfer pricing methodology will be assessed relative to the specific facts and circumstances.

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 analysis 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 in analyzing the economic substance of transactions, in terms of alignment of functions and risks. Next to head office activities, intangibles transactions are often evaluated, as well as business reorganizations and financial services transactions. During these transfer pricing audits the tax authority appears to have a particular interest in potential internal CUPs.

The tax authority has also focused, as a natural result of the risk analysis, on transactions with entities located in low effective tax rate countries.

Netherlands (continued)

APA opportunity

Unilateral, bilateral and multilateral APAs with rollback features are available. The APA process works very efficiently in the Netherlands. There are a number of specific features that enable an efficient and transparent process, including the option to hold pre-filing meetings, the opportunity to develop a case management plan with the APA team to agree upon timing and key steps, and even specific support regarding economic analysis that is available to small taxpayers.

There are specific (unilateral) APA options for Dutch financial services entities. Financial services entities consist of both financing (mere receipt and payment of intercompany interest) and licensing (mere receipt and payment of intercompany royalties) companies.

The Dutch tax authorities process many unilateral and bilateral APAs on annual basis. The Dutch competent authority has bilateral APA experience across all continents.

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 was 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 relief from 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 Tax Convention; commitment to tackle resolution of double taxation in cases "not provided for in the Convention" (Article 25(3) of the OECD Model Tax Convention) in addition to the more traditional double taxation cases.

Attribution of profits to permanent establishments

On 27 January 2011, a decree was published in the Government Gazette concerning the attribution of profits to permanent establishments (PE Decree). This PE Decree provides further insights into tax authority's position on permanent establishments; following the publication of the 2010 OECD Report on the Attribution of Profits to Permanent Establishments (PE Report) and the OECD work on article 7 of the OECD Model Tax Convention (MTC), including commentary, in recent years. The PE Decree, effective as of 28 January 2011, provides that the Dutch policy concurs with the conclusions established in the PE Report. Furthermore, it clarifies the tax authority's position regarding the dynamic approach to interpreting tax treaties, the preference for the capital allocation approach when allocating "free" capital to a permanent establishment, the preference for the fungibility approach when allocating the amount of interest, certain issues regarding dealings involving group services, intangible assets and financial assets, and certain specific topics, including advance certainty.

New Zealand

Taxing authority and tax law

Taxing authority: Inland Revenue Department (IRD)

Tax law:

- Sections YD 5, GB 2 and GC 6 to GC 14 of the Income Tax Act 2007 (ITA)
- Section 141A-K of the Tax Administration Act 1994 (TAA) governs the imposition of penalties
- New Zealand's double tax agreements are also relevant tax laws in New Zealand

Relevant regulations and rulings

The final New Zealand Transfer Pricing Guidelines (IRD Guidelines) were issued in October 2000. While the IRD Guidelines are still relevant, the IRD is now applying the latest 2010 OECD Transfer Pricing Guidelines (OECD Guidelines), which are consistent with New Zealand's transfer pricing legislation and double taxation treaties.

OECD Guidelines treatment

The IRD fully endorses the positions set out in Chapters I to IX of the OECD Guidelines and generally follows those positions in administering New Zealand's transfer pricing rules. Consequently, the IRD 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.

In addressing business restructuring issues, the IRD will seek to ensure that there is a commercial case for any restructuring 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 10 questions that should be addressed by companies undertaking cross-border business restructurings. These questions aim to help ascertain the commercial rationale of the restructuring.

Priorities/pricing methods

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

Transfer pricing penalties

Under §141A-K of the TAA, the following penalties are imposed:

- A 20% penalty for not taking reasonable care
- A 20% penalty for an unacceptable tax position
- A 40% penalty for gross carelessness
- A 100% penalty for an abusive tax position
- A 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 100% (only for lack of reasonable care or unacceptable tax position categories) or 75% for other shortfall penalties
- 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."

New Zealand (continued)

Documentation requirements

There are no explicit requirements in New Zealand's transfer pricing legislation (§§GC 6 to GC 14 ITA) 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 IRD Guidelines indicate that a taxpayer's main purpose in preparing and maintaining documentation should be to place the taxpayer in the position where it can readily demonstrate to the IRD that a transfer pricing method has been used to establish that the taxpayer's transfer prices are consistent with the arm's length principle in light of the relevant facts and circumstances.

Documentation deadlines

Although there is no explicit legislative requirement for a taxpayer to document its transfer pricing policies and practices, the IRD Guidelines indicate that taxpayers who prepare and maintain transfer pricing documentation are more likely to ensure that the burden of proof (that prices are not at arm's length) remains with the Commissioner. The IRD will generally request a copy of a taxpayer's transfer pricing documentation as part of an income tax audit and/or transfer pricing risk assessment. While each case is different, a taxpayer is generally given 20 working days to submit the documentation upon request.

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 statute of limitations by 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 (CFC)

More detailed disclosure of various financial information and other data is now required for interests held in CFCs.

Transfer pricing-specific returns

There is no separate transfer pricing return required to be filed in New Zealand (notwithstanding the disclosures outlined above).

However, the IRD does request multi-national companies and branches to complete detailed transfer pricing questionnaires as part of its transfer pricing risk assessment activities (see next section for further details).

New Zealand (continued)

Audit risk/transfer pricing scrutiny

The risk of an annual tax audit is characterized as medium to high. Tax audits are undertaken at the discretion of the IRD. The IRD selects audit targets based on certain criteria such as low profitability/losses, industry performance, transaction types (e.g. large intercompany finance arrangements) and media reports. However, most large companies can typically expect to be audited every five years.

The risk of transfer pricing scrutiny during a tax audit is characterized as high. Risk Assessment Review questionnaires relating to transfer pricing and thin-capitalization are typically issued to companies during general income tax audits or risk reviews and as part of the IRD's specific transfer pricing review process. The questionnaires request detailed information including financial details of the New Zealand taxpayer and consolidated group, types and values of related party transactions, methodologies used, details of any business restructures and whether transfer pricing documentation has been prepared.

The IRD also uses questionnaires in respect of interest, guarantee fees and royalties. In addition, there is a separate transfer pricing questionnaire for branches.

The risk of the transfer pricing methodology being challenged is dependent on the complexity of the cross-border associated party transaction. Transactions involving provision of intangibles, financing and intra-group services tend to receive higher scrutiny during a transfer pricing risk review.

APA opportunity

Section 91E of the TAA 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 encourages pre-application conferences to make the APA application process less time-consuming.

Nigeria

Taxing authority and tax law

Taxing authority: Federal Inland Revenue Service (FIRS)

Tax law: The income tax (transfer pricing) regulations No 1, 2012

Relevant regulations and rulings

The transfer pricing regulations will apply to transactions between connected persons (related parties as defined within the regulations) carrying on the following activities:

- Sale and purchase of goods and services
- Sale, purchase or lease of tangible assets
- Transfer, purchase, license or use of intangible assets
- Provision of services
- Lending or borrowing of money
- Manufacturing arrangements
- Any transaction which may affect profit and loss or any other matter incidental to the foregoing

For purposes of the application of the regulations, it should be noted that permanent establishments (PEs) will be treated as separate entities and any transaction between a PE and its head office or other connected taxable persons will be considered a controlled transaction subject to the transfer pricing rules.

OECD Guidelines treatment

The rules will accept the application of the standard OECD Transfer Pricing Guidelines (OECD Guidelines) and the UN Practical Manual on transfer pricing. However, the provisions of the relevant tax laws shall prevail in the event of conflict in the application of the UN Practical Manual and the OECD guidelines.

Priorities/pricing methods

The rules consider the selection of the most appropriate transfer pricing method based on the facts and circumstances relating to the intercompany transaction(s) being analyzed. The regulation prescribed the following methods to be used in determining whether the result of a transaction is consistent with the arm's length principle:

- The CUP method
- The Resale Price method
- The Cost Plus method
- TNMM
- The Transactional Profit Split method
- Any other method which may be prescribed by the regulations made by the FIRS from time to time

A connected tax payer may apply a transfer pricing method outside of the specified methods if it can be established that: (i) none of the listed methods can be reasonably applied; and (ii) the method used gives rise to a result that is consistent with the arm's length principle.

Transfer pricing penalties

A taxable person who fails to comply with the provisions of the regulations will be liable to a penalty based on the relevant provisions of the applicable tax laws (Companies Income Tax Act, Petroleum Profits Tax Act, Capital Gains Act, Stamp Duties Act and Personal Income Tax Act).

For example, under the Companies Income Tax Act, late filing of corporate income tax return attracts a penalty of NGN25,000 in the first month in which the failure occurs; and NGN5,000 for each subsequent month in which the failure continues. While late payment of tax due attracts a penalty of 10% plus interest at bank lending rate.

Nigeria (continued)

Transfer pricing penalties (continued)

It should be noted that the regulations are silent with regard to accrued interest on underpayment of tax. Generally, the FIRS applies interest at the prevailing interest rate on underpayments of tax. Since interest over a number of years can cumulatively result in significant amounts, clarity should be obtained with regard to the applicability of interest in this respect.

Penalty relief

A taxable payer not complying with the transfer pricing regulations will be liable to a penalty as prescribed in the relevant provision of the applicable law. Relief from penalties is not clear however the existence of documentation may provide some mitigation.

Documentation requirements

Taxpayers are required to develop and maintain sufficient information or data to establish that the pricing of their controlled activities are consistent with the arms length principles as outlined in the regulations. Specifically, the regulations provide that the documentation must be prepared taking into account the complexity and volume of the applicable transactions.

Furthermore, it should be noted that the documentation must be made available to the FIRS upon written request. The documentation should be provided to the FIRS within 21 days of request. The regulations provide further clarity by stating that the documentation should be in place prior to the due date for filing the income tax return for the year in which the documented transactions occurred.

Documentation deadlines

The regulations require that the documentation be contemporaneous with the filing of the income tax return for that year.

Statute of limitations on transfer pricing assessments

No clear statue of limitations exists in the current regulations but all supporting documentation to the taxpayer's returns has to be retained for a period of six years.

Return disclosures/related party disclosures

Taxpayers are required to complete and attach the Transfer Pricing Declaration form (a copy of which was included with the regulations) to the annual tax return for the year to which it relates. Due to the length of time, most connected party transactions are entered into, it may be prudent to interpret this requirement as an annual filing as opposed to merely limiting it to the year in which the transaction occurred as outlined within the regulations.

Transfer pricing-specific returns

The tax return contains a specific transfer pricing schedule, which needs to be completed.

Audit risk/transfer pricing scrutiny

No clear information is yet available on the audit risks or transfer pricing scrutiny within the jurisdiction of Nigeria.

APA opportunity

The regulations indicate that a taxable person may request either a unilateral, bilateral or multilateral APA.

Norway

Taxing authority and tax law

Taxing authority: The Norwegian Tax Authority (NTA) is responsible for ensuring that taxpayers meet the requirements of the law.

Tax law: The arm's length principle is stated in the Taxation Act (1999) §13-1, and the transfer pricing filing and documentation requirements are stated in the Tax Administration Act (1980) §4-12.

Relevant regulations and rulings

In June 2007, the Norwegian Parliament adopted new transfer pricing regulations (Tax Administration Act §4-12). The requirements became effective as of January 2008. The transfer pricing requirements consist of two specific parts: filing and documentation requirements.

The Ministry of Finance also published the guidelines to the Norwegian documentation requirements in 2007. These guidelines outline specific requirements to include in the Norwegian documentation.

OECD Guidelines treatment

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

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

We have also seen that the principles outlined in OECD Guidelines Chapter IX on the Transfer Pricing Aspects of Business Restructurings are being applied by the NTA. Recent tax audits and court cases have shown that the principles described in OECD Guidelines chapter IX are applied in practice.

Priorities/pricing methods

The pricing methods contained in the OECD Guidelines are accepted by the NTA. The traditional transactional methods (CUP, Resale Price and Cost Plus) are generally preferred to the profit-based methods (TNMM and Profit Split). However, there seems to be increasing support for the applicability of the profit-based methods under certain circumstances. A recent court case acknowledges the use of TNMM. We also see that the NTA applies the method often. Recently we have seen that the NTA denies the use of Pan-European searches, as they believe that the Norwegian market in general has higher profit margins, as Norway has not been affected by the financial crisis in the same way as many other European countries.

There is no specified priority of methods under Norwegian tax law. As stated by the Norwegian Supreme Court, the Taxation Act §13-1 allows for the use of several transfer pricing methods, including methods not described in the OECD Guidelines, provided those methods provide arm's length results.

Transfer pricing penalties

The transfer pricing penalty (surtax) is 30% of the tax adjustments, provided that the tax authority concludes that the taxpayer provided incomplete or incorrect information when submitting the tax return. If sufficient and correct information is provided, no penalty will be imposed. 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, annual interest charge will apply.

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

Norway (continued)

Penalty relief

A 30% penalty is normal; however, the risk of a penalty being imposed may be reduced if proper documentation is prepared.

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

Documentation requirements

In Norway, the transfer pricing requirements consist of two specific parts: filing and documentation requirements.

The filing requirement is an attachment to the annual tax return (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.

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 NTA to evaluate the arm's length nature of the transfer prices applied between associated enterprises. Both cross-border and domestic transactions are covered. Specific requirements worth mentioning with respect to the Norwegian documentation rules are as follows:

- Key financial figures on all transaction parties to the Norwegian entity
- Description of how the transfer price on a transaction is actually computed
- The level of detail required depends on the complexity of the transaction, and in particular, if the transaction is of high value, intangibles are involved, and/or there may be a tax motivation for pricing the transaction on non-arm's length conditions

Documentation deadlines

The transfer pricing documentation must be submitted within 45 days of a request by the NTA. All documentation must be retained for 10 years. The tax authority assumes that documentation is made on a contemporaneous basis and, accordingly, does not allow for extensions.

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 after a period of 10 years from the end of the income year. Transfer pricing documentation must therefore be retained and stored for at least 10 years.

Taxpayers have three years to amend 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 (RF-1123), which includes a listing of all intercompany transactions. The form serves 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.

Norway (continued)

Audit risk/transfer pricing scrutiny

The likelihood of an annual tax audit in general is low, while the likelihood that transfer pricing will be reviewed as part of that audit is high. The likelihood that, if transfer pricing is reviewed as part of the audit, the transfer pricing methodology will be challenged, is also high.

The NTA has a strong focus on intercompany transactions and has established a transfer pricing network comprising major tax offices, including the Directorate of Taxes.

The NTA selects companies for audit based on the submitted form RF 1123 and the tax return. If selected, the first step is for the taxpayer to submit its transfer pricing documentation for review.

Based on the initial review, the company is selected for audit if the documentation does not provide sufficient information and answers about the internal transactions and the profitability of the company.

Currently, any company with a low margin or losses transacting with a foreign related party has a high risk of a tax audit. In addition, year-end adjustments are rarely accepted, and this is often used as an argument by the NTA to claim that the result is not arm's length. The NTA has communicated that cash pooling and financial transactions in general will be targeted for audit. The selection process will be based upon the contents of form 1123, in combination with the taxable result of the company.

APA opportunity

APAs are currently unavailable in Norway. A transfer pricing exemption exists on the sale of gas under the Petroleum Taxation Act.

Oman

Taxing authority and tax law

Taxing authority: Secretariat General for Taxation (SGT), a part of the Ministry of Finance, is the body authorized to regulate transfer pricing.

Tax law: The Income Tax Law (ITL) is issued by the Royal Decree 28/2009. All tax legislation is enacted by Royal Decree. Provisions that implement the tax law are introduced by Ministerial Decisions/Executive Regulations.

Relevant regulations and rulings

Articles 126 to 128 of the ITL contain the transfer pricing regulations.

OECD Guidelines treatment

The OECD Transfer Pricing Guidelines (OECD Guidelines) are not binding for Oman. However, the tax authorities in the past have taken the OECD Guidelines into account.

Priorities/pricing methods

No pricing methods have been prescribed in the law or under the existing regulations. The law mentions that the pricing shall be taken into account, assuming the terms on which the transactions would have been entered into by independent persons. This suggests the CUP method. We expect that the tax authorities will enact more rules and publish more guidance in the coming years.

Transfer pricing penalties

There is currently no specific transfer pricing penalty prescribed in the law.

Penalty relief

As there are no specific transfer pricing penalties, no penalty relief is currently applicable. While there are no specific provisions for relief, the tax department does look at each case independently and has, in the past, waived the delay penalty on late submissions of tax returns.

Documentation requirements

The law has not provided any specific documentation requirements. Therefore, documentation requirements are determined on a case to case basis.

Documentation deadlines

As no documentation requirements have been provided, no documentation deadlines are currently applicable.

Statute of limitations on transfer pricing assessments

There are no separate transfer pricing assessments conducted in Oman. The transfer pricing assessment will be conducted as a part of the regular tax assessment for a tax year. The statute of limitations to complete the regular tax assessment is five years from the end of the year in which a tax return is submitted.

Return disclosures/related party disclosures

Oman follows International Financial Reporting Standards (IFRS). Therefore, the SGT expects the taxpayer to disclose the related party transactions in their financial statements in accordance with the IFRS.

Oman (continued)

Audit risk/transfer pricing scrutiny

The likelihood of an annual tax audit in general is high, and tax assessments are conducted on an annual basis. Review of transfer pricing is one of the main processes of an annual tax assessment. Therefore, it is highly likely that transfer pricing will be reviewed as part of the tax assessment. As there is no specific methodology prescribed in the tax law, the appropriate transfer pricing methodology used is determined on a case to case basis. Accordingly, the likelihood of the methodology being challenged in a transfer pricing audit is also high.

APA opportunity

There is no opportunity to conclude an APA.

The provision of advance rulings is not mentioned in the ITL; therefore, the tax department is not legally bound to grant an advance ruling. However, as a matter of practice, the tax department has been responding to advance ruling requests. These responses are binding on the tax department for that particular case and cannot be generally applied for any other case.

Panama

Taxing authority and tax law

Taxing authority: Tax Administration of Panama (Dirección General de Ingresos, or DGI)

Tax law:

- Law No. 33 enacted in 2010 (Law 33) and applicable for fiscal years 2011 and onward, established the transfer pricing provisions in the Tax Code (Chapter IX of Title I of the Fourth Book); Articles 762-A to 762-K
- Law No. 52, that modified Law 33 and related Sections of the Tax Code, was enacted in August 2012 and is applicable to fiscal years ending after August 2012

Relevant regulations and rulings

Previously (for fiscal year 2011), Law 33 introduced norms to adapt the Tax Code to International Double Tax Treaties (DTT) — applied only to taxpayers with transactions conducted with affiliates resident in countries with which Panama had signed DTT. With Law 52, all cross-border intercompany transactions conducted by Panamanian taxpayers are now subject to transfer pricing obligations, according to modified Section 762-D of Tax Code.

OECD Guidelines treatment

The OECD Transfer Pricing Guidelines can be relied upon for interpretation of the rules, as long as they do not contradict the Panamanian Tax Code or international tax treaties.

Priorities/pricing methods

The transfer pricing methods in Panama are: 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 circumstances of the case and the one that best respects the arm's length principle.

Transfer pricing penalties

Failure to file the transfer pricing information return results in a penalty of 1% of the total amount of intercompany transactions. For the penalty calculation, the gross amount of the transactions will be considered regardless of their nature; i.e., regardless of whether they are items of income, expense or deduction.

Penalty relief

There is currently no penalty relief regime in place.

Documentation requirements

Contemporaneous transfer pricing documentation related to cross-border intercompany transactions must be kept and maintained. Documentation must include:

- The complete identification details of the taxpayer and of the non-resident related parties with whom transactions are carried out
- A detailed description of the nature, characteristics and amount of all intercompany transactions of the taxpayer, including the transfer pricing method employed

It is also necessary to include the method selection process and specification of the price or margin, or range of prices or margins applied by the taxpayer in its intercompany transactions. The documentation must be prepared considering the complexity and volume of the transactions and should include the information that the taxpayer had used to determine the evaluation of the intercompany transactions consisting of information about the multinational group to which the taxpayer belongs and of the taxpayer itself.

Panama (continued)

Documentation requirements (continued)

The information of the multinational group contained in the documentation should include:

- A general description of the organizational, legal and operating structure of the group, with any relevant changes
- Identification of the related parties with whom the taxpayer conducts intercompany transactions
- The transfer pricing policy of the multinational group, if any

Documentation deadlines

Documentation must be readily available by the date on which the transfer pricing information return is due and must be kept along with the company's accounting books and records. If requested by the DGI, documentation should be provided within 45 days of notification.

Taxpayers should file an information return on cross-border intercompany transactions annually, and it should be filed within six months of the close of the fiscal year.

Statute of limitations on transfer pricing assessments

The statute of limitations on assessments is three years. The term is extended with the filing of an amended return.

Return disclosures/related party disclosures

There are no related party disclosures to be made on general income tax returns.

Transfer pricing-specific returns

An information return (Form 930) on the transactions conducted with related parties resident abroad should be filed within six months of the close of the fiscal year.

The information return is an annual obligation, and failure to comply with the filing requirement results in a penalty of 1% of the total amount of intercompany transactions. For the penalty calculation, the gross amount of the transactions will be considered regardless of their nature; that is, whether they are items of income, expense or deduction.

Audit risk/transfer pricing scrutiny

The risk of a general tax audit is currently categorized as medium. The risk of a transfer pricing assessment as part of a general tax audit is low. The DGI has not yet initiated any tax audits regarding transfer pricing issues, due to the fact that the transfer pricing regulations are new in the country. However, they have requested transfer pricing documentation from taxpayers that fell under the norm in 2011. For the last couple of years, the DGI has worked on the creation of a specialized transfer pricing unit.

In case transfer pricing is scrutinized, the risk that the transfer pricing methodology will be challenged is low.

APA opportunity

Currently, no APA program has been established.

Peru

Taxing authority and tax law

Taxing authority: Superintendencia Nacional de Administración Tributaria (SUNAT)

Tax law: Article 32 (Item 4) and Article 32-A of the Peruvian Income Tax Law (PITL)

Relevant regulations and rulings

Transfer pricing regulations have been effective since 1 January 2001 (Article 32 of the PITL). Nevertheless, over the years these rules have undergone several amendments into the PITL and tax code. The regulations are detailed in Article 24 and Chapter XIX (Articles 108 to 119) of the Peruvian Income Tax Regulations.

The transfer pricing rules apply both to cross-border and domestic transactions between related parties, and all transactions with tax haven residents.

The transfer pricing adjustments are applicable solely when the valuation agreed to by the parties results in a determination of income tax lower than that which would have been calculated if the market value had been applied. Namely, the regulations consider that a lower amount of income tax is determined when:

- The deferral of income is detected
- Higher tax losses are calculated than ones that would have accrued

OECD Guidelines treatment

The PITL refers to the OECD Transfer Pricing Guidelines (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 TNMM.

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 to in transactions with related parties, is penalized with a fine of 0.6% of the company’s net income for the year preceding that which is 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 subjects the taxpayer to a fine of 0.6% of the company’s net income for the year preceding that which is 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 of up to 50% of the resulting tax deficiency (income misstatement penalties).

Penalty relief

The penalty reductions that a taxpayer can be subjected to for not complying with the obligation to have a transfer pricing technical study or present the transfer pricing information return are:

- An 80% (transfer pricing study) or 90% (transfer pricing return) penalty reduction if the taxpayer rectifies the infraction and pays the corresponding fine within the time established by SUNAT
- A 50% (transfer pricing study) or 80% (transfer pricing return) penalty reduction if the taxpayer rectifies the infraction, but does not pay the corresponding fine within the timeframe established by SUNAT
- A 100% penalty reduction if the taxpayer files the transfer pricing informative return after the due date, but before it is detected and compelled to do so by SUNAT

Peru (continued)

Documentation requirements

Since 2006, taxpayers have been required to keep a transfer pricing study if they fall within the scope of the transfer pricing rules contained in Article 32-A of the PITL, and if they meet any of the following conditions:

- The company's income exceeds PEN6 million, and the amount of its intercompany transactions exceeds PEN1 million
- The company has been engaged in transactions from, to or through a low-tax jurisdiction

From 30 June 2012 on, transfer pricing formal obligations (transfer pricing study and transfer pricing return) will apply only to transactions that involve taxable income and/or acceptable tax expense.

Documentation deadlines

There is no deadline to present the transfer pricing study to the tax authority. Nevertheless, as provided in Resolution N°167-2006-SUNAT, the tax authority can request a transfer pricing study from taxpayers after the close of the fiscal year.

According to the tax regulations published in 2010, the deadline for filing the transfer pricing return for the fiscal year 2010 onwards is in June of the calendar year following the close of the fiscal year of the corresponding transfer pricing return.

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 details to be disclosed in the transfer pricing information return are, inter alia, the amount of the transactions, the transfer pricing method selected, the related party with whom the transactions were made and the amount of the adjustment.

Audit risk/transfer pricing scrutiny

The likelihood of an annual tax audit is characterized as medium, as is the likelihood that transfer pricing issues being reviewed as part of a general audit. Also, the likelihood that the transfer pricing methodology will be challenged is characterized as high. The Peruvian Tax Administration has already initiated tax audits regarding transfer pricing issues. Nevertheless, there are not many taxpayers currently being audited. It is expected that SUNAT will increase its audit reviews during the coming years.

APA opportunity

From 2013, unilateral and multilateral APAs will be available for all transactions (cross-border and domestic transactions between related parties and with tax haven residents). Multilateral APAs will be available only with countries that have entered into double tax avoidance treaties with the Peruvian Fiscal Administration.

Philippines

Taxing authority and tax law

Taxing authority: The Bureau of Internal Revenue (BIR)

Tax law: Under Section 50 of the National Internal Revenue Code of 1997 (Tax Code), as amended, the Commissioner of Internal Revenue has the power to allocate income and expenses between or among related parties/taxpayers or make transfer pricing adjustments to reflect the true taxable income of taxpayers.

Relevant regulations and rulings

Revenue Memorandum Circular (RMC) No. 26-08 formally adopted the OECD Transfer Pricing Guidelines (OECD Guidelines) as interim transfer pricing guidelines in the Philippines. The RMC specifically states that the BIR, as a matter of policy, subscribes to the OECD Guidelines, and until the draft regulations are issued, any and all concerns on transfer pricing shall be resolved in accordance with them.

On 23 January 2013, the BIR issued transfer pricing regulations. These are found in Revenue Regulations No. 2-2013, which implement Section 50 of the Tax Code. The transfer pricing regulations apply to cross-border transactions between associated enterprises and domestic transactions between associated enterprises.

Transactions entered into prior to the effective date of the transfer pricing regulations shall be governed by the laws and other administrative issuances prevailing at the time the controlled transactions were entered into.

The transfer pricing regulations shall take effect 15 days after publication in a newspaper of general circulation. The regulations were published on 25 January 2013.

In July 2009, the BIR issued Revenue Memorandum Order (RMO) No. 23-2009, mandating the National Investigation Division (NID) of the BIR to audit related companies and conglomerates, including their officers and related individual taxpayers, to ensure that such taxpayers are clearly reflecting income and expenses that are attributable to controlled transactions. The RMO further states that various schemes being employed by conglomerates and groups of companies to reduce the amount of taxes shall be identified, such as (but not limited to) the use of tax-exempt entities or those with special tax privileges, intercompany loans and advances, cost sharing, and the supply of goods and services. In the conduct of audit, particular attention shall be given to transfer pricing issues, which will be factored into the taxpayer's audit findings.

RMO No. 36-2010 was issued in March 2010 and prescribes the rules and procedures governing the conduct of special investigation and enforcement activities of related companies, conglomerates, their affiliates and subsidiaries for taxable year 2009. The RMO amended RMO No. 23-2009 and now directs the Large Taxpayers Service and the Enforcement Service to identify conglomerates consisting of related companies (parent company, affiliates and subsidiaries) that will be subject to audit under the program. The investigation covers all internal revenue taxes for taxable year 2009 and has to be completed no later than six months from the issuance of the letter of authority (LA).

In March 2012, the BIR issued RMO No. 5-2012, prescribing the guidelines and policies in the conduct of Performance Benchmarking Method. Under this RMO, benchmarking shall be done separately for individual and corporate taxpayers. The BIR will categorize taxpayers into the following: high risk — over 30% below benchmark; medium risk — 16% to 30% below benchmark; low risk — 15% or less below benchmark. Taxpayers classified as high risk shall be the top priority for enforcement actions, such as audit.

OECD Guidelines treatment

The transfer pricing regulations are largely based on the OECD Transfer Pricing Guidelines (OECD Guidelines) and refer to them for further guidance and examples.

Philippines (continued)

Priorities/pricing methods

The transfer pricing regulations adopt the methods to determine the arm's length price under the OECD Guidelines; i.e., CUP, Resale Price, Cost Plus, Profit Split and TNMM. There is no specific preference for any one method. In determining the arm's length result, the most appropriate method for a particular case shall be used.

Transfer pricing penalties

The transfer pricing regulations adopt the provisions of the Tax Code and other applicable laws in the imposition of penalties on any person who fails to comply with or violates the provisions and requirements of the regulations. In case of a deficiency assessment due to a transfer pricing adjustment, the general penalties apply. These are a 25% surcharge (50% in fraud cases) and 20% interest per annum.

Penalty relief

There is no penalty relief regime in the transfer pricing regulations.

Documentation requirements

The transfer pricing regulations require the maintenance and retention of contemporaneous documentation. It is contemporaneous if it exists or is brought into existence at the time the associated enterprises develop or implement any arrangement that might raise transfer pricing issues, or review these arrangements when preparing tax returns.

The documentation should be retained and preserved within the period specifically provided in the Tax Code as the retention period, which is three years from the filing of the annual income tax return. It will, however, be in the best interest of the taxpayer to maintain documentation for purposes of Mutual Agreement Procedure (MAP) and possible transfer pricing examination.

The details of the documentation shall include but are not limited to the following:

- Organizational structure
- Nature of the business/industry and market conditions
- Controlled transactions
- Assumptions, strategies, policies
- Cost Contribution Arrangements (CCA)
- Comparability, functional and risk analysis
- Selection of the transfer pricing method
- Application of the transfer pricing method
- Background documents
- Index to documents

Documentation deadlines

Under the transfer pricing regulations, the documentation is not required to be submitted when the tax returns are filed. However, such documentation should be retained by the taxpayers and submitted to the authorities when required to do so.

Philippines (continued)

Statute of limitations on transfer pricing assessments

The general statute of limitations applies, which is three years after the last day prescribed by law for filing the return, except in cases of fraud with the intent to evade tax, in which case the statute of limitations is 10 years from the discovery of fraud.

Return disclosures/related party disclosures

Related party disclosures are required only in the notes to the audited financial statements, which must be filed along with the annual income tax return.

Transfer pricing-specific returns

There is no requirement for filing transfer pricing-specific returns.

Audit risk/transfer pricing scrutiny

The likelihood of an annual tax audit in general is high. With the issuance of the transfer pricing regulations, the likelihood that transfer pricing will be reviewed as part of an audit is high. The likelihood that, if transfer pricing is reviewed, the transfer pricing methodology will be challenged is also high.

APA opportunity

The transfer pricing regulations give the taxpayers the option to avail itself of an APA for their controlled transactions and MAP relief as prescribed under the bilateral tax treaties entered into by the Philippines. Separate guidelines on the application for an APA and for MAP relief will be issued by the BIR.

Poland

Taxing authority and tax law

Taxing authority:

- The Tax Inspection Department in the Ministry of Finance, which coordinates and supervises the work of the local Tax Inspection Offices/ Bureaus
- The Income Tax Department in the Ministry of Finance — with regard to APA and MAP procedures

Tax Laws and Decrees:

- Corporate Income Tax Act dated 15 February 1992 (CIT Act), Articles 9a, 11 and 19 §4 (Journal of Laws 2011, No. 74, item 397, as amended)
- Personal Income Tax Act dated 26 July 1991 (PIT Act) Articles 25, 25a and 30d (Journal of Laws 2012, Item 361, as amended)
- Tax Ordinance Act dated 29 August 1997, Articles 20a-20r (Journal of Laws 2012, Item 749, as amended)
- Ministry of Finance Decree of 16 May 2005, on the countries and territories applying harmful tax competition rules for the purposes of corporate income tax (Journal of Laws No. 94, item 791)
- Ministry of Finance Decree of 16 May 2005, on the countries and territories applying harmful tax competition rules for the purposes of personal income tax (Journal of Laws No. 94, item 790)
- Ministry of Finance Decree of 10 September 2009, on the method and procedure for assessing corporate taxpayers' income by estimating the prices in transactions conducted by these taxpayers, and on the method and procedure for eliminating double taxation of taxpayers in case of related parties' income adjustment (Journal of Laws No. 160, item 1268)
- Ministry of Finance Decree of 10 September 2009, on the method and procedure for assessing personal taxpayers' income by estimating the prices in transactions conducted by these taxpayers, and on the method and procedure for eliminating double taxation of taxpayers in case of related parties' income adjustment (Journal of Laws No. 160, item 1267)

Relevant regulations and rulings

Article 11 of the CIT Act and Article 25 of the PIT Act introduce the arm's length principle, providing a definition of "affiliation" and the 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 Clause 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 guidance regarding 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 considered to be in 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.

As of 1 January 2007, documentation requirements apply also to Poland-based permanent establishments of foreign companies.

The pricing methods recognized by the tax authorities are described in the Ministry of Finance Decrees of 10 September 2009. These Decrees replace the one dated October 1997, and the major changes concern the redefinition of selected transfer pricing methods (more precise description) and the introduction of the corresponding adjustment procedure (based on the OECD Transfer Pricing Guidelines (OECD Guidelines), Arbitration Convention and Code of Conduct for Arbitration Convention and the revised Polish Corporate Income Tax Act of 1 January 2009). Provisions of the Decrees also apply to Polish permanent establishments of the foreign companies and Polish taxpayers' foreign permanent establishments.

Poland (continued)

Relevant regulations and rulings (continued)

The APA regulations are specified in Articles 20a-20r of the Tax Ordinance Act. The 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, along with their annual CIT return, a progress report on the implementation of the method stipulated in the APA decision. APAs may also be concluded by permanent establishments of foreign companies in Poland, as well as permanent establishments of Polish taxpayers based abroad.

OECD Guidelines treatment

The Polish transfer pricing regulations do not refer to the OECD Guidelines directly. Nevertheless, the tax authorities sometimes refer to the OECD Guidelines when applying transfer pricing principles; e.g. during APA negotiations. Also, reference to the OECD Guidelines is made with respect to tax havens. According to Article 9a Clause 6 of the CIT Act (Article 25a Clause 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 authorized OECD approach.

There are no specific rules regarding the business restructuring issues in the Polish transfer pricing law. Chapter IX of the OECD Guidelines (Business Restructurings) should, however, be an indication of the tax authorities' approach when examining restructuring cases in Poland.

Priorities/pricing methods

Generally, the transfer pricing methods accepted by the tax authorities are based on the OECD Guidelines. These methods are: CUP, Resale Price, Cost Plus, Profit Split and TNMM. The traditional methods are preferred over others. When the transfer price is determined by the tax authorities, 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 traditional methods (i.e., 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 authorities.

Transfer pricing penalties

If the taxpayer does not submit transfer pricing documentation at the request of the Polish tax authorities, a 50% penalty tax rate is applied for income assessed by these authorities, instead of the standard tax rates that generally apply. Moreover, the taxpayer will be required to pay interest on tax arrears and penal fiscal penalties resulting from personal responsibility.

Penalty relief

If the taxpayer timely provides the required transfer pricing documentation as specified by the tax authorities (i.e., within seven days of the date of a request), the penalty rate for income assessed can be reduced to the normal tax rate.

Documentation requirements

Taxpayers carrying out transactions with related parties and permanent establishments of foreign companies functioning in Poland, as defined in the Polish CIT and PIT Acts, are required to prepare transfer pricing 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; and
- 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.

Poland (continued)

Documentation requirements (continued)

As there is no specific form required 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 does not meet one of these requirements, the tax authorities may disregard it.

In addition, taxpayers are obliged to prepare statutory Polish transfer pricing documentation and provide to the Polish tax authorities at their request.

Documentation deadlines

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

Statute of limitations on transfer pricing assessments

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

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 or not it was required to prepare transfer pricing documentation.

Taxpayers who have concluded APAs must enclose, with their annual tax returns, a special report on the implementation of the transaction method chosen. The format of this report is detailed in the Ministry of Finance Decree of 31 May 2006, which contains the model report on the implementation of a selected transfer pricing method for corporate income tax purposes (Journal of Laws No. 99, item 687).

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; or
- 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 at least a 5% share of the other entity's capital, directly or indirectly. 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.

Poland (continued)

Return disclosures/related party disclosures (continued)

If the parties to a transaction, due to their relationship, agree to or impose terms and conditions which differ from those that would be agreed to by unrelated parties, resulting in the domestic entity not reporting income from the transaction or reporting lower income than would be expected if the relationship did not exist, the taxing 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 and to Polish taxpayers carrying out transactions with their permanent establishments abroad.

Domestic entities transacting with foreign related parties are allowed to adjust their income if the foreign tax authorities assert that the transactional prices do not meet the arm's length principle. Consequently, additional income for the foreign entity is assessed and the tax due on such income is determined (the so-called "corresponding adjustment"). Prerequisites of making the adjustment must however be justified and accepted by the Polish tax authorities.

Adjustments to the domestic entities' income will be allowed on the basis of the agreement on the avoidance of double taxation between Poland and the country (i.e., country of the domestic entity's related party) or on the basis of Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of related entities. An application regarding such adjustments should be filed within three years of receiving the decision on assessing the additional income of the taxpayer or the contracting related party.

In addition, regulations relating to income adjustment also apply to permanent establishment.

Analogous elimination of double taxation is not allowed by Polish regulations in cases of transactions between domestic related entities.

Transfer pricing-specific returns

Polish tax law does not require any transfer pricing-specific returns. However, taxpayers transacting with related entities are subject to the following reporting/information requirements:

- Disclosing in annual tax income returns whether the taxpayer was required to prepare statutory transfer pricing documentation of transactions with related entities;
- Reporting to the Polish tax authorities agreements with non-residents; such information should be submitted within three months of the end of a tax year (by filling the ORD-U form). This reporting requirement applies to agreements where:
  - One-off amount of receivables or liabilities resulting from the agreement with a non-resident exceeds EUR 5,000 and the non-resident owns an enterprise, branch or representative office in Poland; or
  - The total amount of liabilities or receivables resulting from all agreements concluded with the same non-resident in the tax year exceeds EUR 300,000 and:
  - One party to the agreement participates directly or indirectly in the management or control of the other party to the agreement or has a share in its capital entitling it to at least 5% of all voting rights; or
  - Another entity, not being party to an agreement, at the same time participates directly or indirectly in the management or control of each party to the agreement or has a share in their capital entitling it to at least 5% of all voting rights in each of the parties to the agreement.
- Preparing information on payments to non-residents on which withholding tax is collected and submitting it to the tax office responsible for taxation of foreign persons and to the beneficiary of the payment by the end of the third month of the year following the tax year in which withholding tax was paid (IFT-2/IFT-2 form). Moreover, the taxpayer is required to (at the related party's request) to prepare and send the information to the taxpayer and the competent tax office within 14 days from the date when the request is submitted.

Those taxpayers who have obtained an APA decision from the Polish Minister of Finance must submit, along with their annual CIT return, a progress report on the implementation of the method stipulated in the APA decision.

Poland (continued)

Audit risk/transfer pricing scrutiny

The likelihood of an annual tax audit in general is at least medium, considering the current fiscal needs of the Polish government. However, it may differ depending on a number of factors, such as the taxpayer's financial position, the income tax paid in prior years versus the current fiscal year, related party transactions, and claims for an overpaid tax refund, among others.

The likelihood that transfer pricing will be reviewed as part of that audit depends on the subject and scope of the transfer pricing review, but the likelihood that the taxing authorities will request the statutory transfer pricing documentation (based on Article 9a of the CIT Act) is high. In general, the likelihood that the tax authorities will review the transfer pricing policy is medium, but certain factors can increase the risk to high. These factors include: losses (especially if incurred in transactions with related parties), substantial intercompany charges for intangibles, services or financing, changes in the business model, sudden reduction in profitability (e.g., as a result of business restructurings), year-end adjustments (especially if they are one-off profit transfers), etc.

The likelihood that, if transfer pricing is reviewed as part of the audit, the transfer pricing methodology will be challenged is high. The tax authorities usually engage in a dedicated transfer pricing audit if they notice irregularities in intercompany settlements or believe that the financial result is biased by transfer pricing. In such cases, they often challenge the transfer pricing methodology applied.

Although 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 the tax authorities. Moreover, the tax authorities have increased cooperation in the exchange of information with tax authorities in other countries.

The compliance regime is still rigorous in Poland. 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, intangible services (including cost-sharing arrangements) and loans.

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 authorities 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: 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

    Or
  - A domestic entity related to a foreign entity and another domestic entity related to the same foreign entity
- Bilateral: 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 authorities of the related foreign entity
- Multilateral: 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 — 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

Poland (continued)

APA opportunity (continued)

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 authorities
- 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 taxing authorities 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 is 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 no later than six months before it expires. The decision is valid from the date of its delivery to all parties (including Polish and foreign — if applicable — tax authorities).

Portugal

Taxing authority and tax law

Tax authority: The Portuguese General Tax Directorate (Autoridade Tributária) is responsible for ensuring that taxpayers meet the requirements of the law.

Tax law: Article 63 of the Corporate Income Tax Code articulates the arm's length principle and provides guidance on transfer pricing in Portugal.

Relevant regulations and rulings

Ministerial Order 1446-C/2001 of 21 December 2001 (Transfer Pricing Ministerial Order), issued by the Minister of Finance, implements Article 63 of the Corporate Income Tax Code regarding the application of the transfer pricing methods, cost-sharing agreements, intra-group services agreements, documentation requirements and the corresponding adjustments procedure.

A detailed APA procedure, setting out the APA submission requirements, APA process and fees was implemented by Ministerial Order 620-A/2008 of 16 July (which came into force on 17 July).

Furthermore, a general anti-avoidance provision applies to all simulated transactions and the rules embodied in the thin-capitalization, controlled foreign corporations (CFCs) and anti-tax haven regimes may be used in the general context of transfer pricing.

OECD Guidelines treatment

The Portuguese regulations and tax practice follow the OECD Transfer Pricing Guidelines (OECD Guidelines).

Business restructurings are specifically addressed in the Portuguese transfer pricing regulations as activities that must rely on the arm's length principle; however, the approaches stated in Chapter IX of the OECD Guidelines are likely to affect the transfer pricing audit activity.

The Masterfile concept established in the European Union Code of Conduct on transfer pricing documentation for associated enterprises is not yet adopted by the Portuguese legislation; however, the transfer pricing documentation prepared locally addresses all the relevant topics contained therein and is more rigorous in terms of content.

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. In fact, 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 implies 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 or not the controlled transactions comply with the transfer pricing rules, but also why other methods are rejected.

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

Transfer pricing penalties

Failure to comply with documentation requirements may result in a possible shift of the burden of proof and the application of secret comparables.

Transfer pricing adjustments are subject to the general tax penalty regime. Penalties for noncompliance with mandatory contemporaneous documentation rules may reach EUR150,000 per year and per company. A late payment interest penalty is also applicable for transfer pricing adjustments at the rate of 4% per year.

Transfer pricing rules were extended by the publication of specific legislation on penalties for noncompliance with the documentation obligations in 2012. The General Regime on Tax Infractions (RGIT) addresses the following penalties:

Portugal (continued)

Transfer pricing penalties (continued)

- The taxpayer stated in the Annual Tax and Accounting Return (IES) that transfer pricing documentation is prepared and despite being notified by the tax authority to submit, it was late in its delivery. The penalty related to late delivery can reach EUR20,000 per year and per company.
- The taxpayer does not state in the IES that transfer pricing documentation is prepared but was notified by the tax authority to submit it. The penalty for noncompliance related to omission/lack of evidence in Annual Tax and Accounting Return can reach EUR45,000 per year and per company.
- The taxpayer stated in the IES that transfer pricing documentation is prepared and was notified by the tax authority to submit it, but the documentation was not prepared. The penalty for noncompliance related to improper fulfillment can reach EUR75,000 per year and per company.
- The taxpayer stated in the IES that transfer pricing documentation is prepared but refused to submit it to the tax authority (when duly requested). The penalty for noncompliance related to the refusal of transfer pricing documentation can reach EUR150,000 per year and per company.

Penalty relief

The general tax penalty regime applies in Portugal. The determination of penalties will be made on a case-by-case basis.

Documentation requirements

The Portuguese transfer pricing rules require taxpayers with a turnover and other income in excess of EUR3,000,000 in the prior year to prepare contemporaneous documentation in 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 shall include:

- Related party status, according to the definition presented in Article 63 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, regardless of any other related party criteria)
- Characterization of a taxpayer's activity and that of the related parties with whom it engages in commercial and/or financial transactions
- Identification of all intercompany transactions (volumes, terms and conditions) for the year under analysis, as well as for the previous two years, or for the period that they occurred (if less)
- A functional analysis for each relevant transaction
- Technical studies focusing on essential areas of business
- A description of the method used and evidence of how the prices are calculated
- Information about Portuguese comparables (geographical comparability requirement)
- The legal entity's organization structure
- All intercompany contractual agreements and unrelated party agreements

Portugal (continued)

Documentation deadlines

In Portugal, the documentation must be prepared by the 15th day of the seventh month after the corresponding tax year-end. However, the tax authority may, and does, ask for documentation on transactions at any time after they take place.

Statute of limitations on transfer pricing assessments

In Portugal, assessment is possible during the four years after the end of the assessment year. All Portugal-based companies have a statutory obligation to keep available (at the Portuguese establishment or premises) and in good order, their transfer pricing documentation for the relevant year for a 10-year period.

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 Tax and Accounting Return which include (on a yearly basis) the following information:

- Identity of the related entities
- Amount of transactions conducted with each of the related parties
- Confirmation that proper contemporaneous (annual) transfer pricing documentation is prepared on a timely basis and is currently retained

The deadline for the submission of such return corresponds to the 15th day of the seventh month after the corresponding tax year end. Taxpayers have to state in good faith in this annual return that they have complied with the contemporaneous documentation requirements and its preparation. Misleading information may result in criminal proceedings.

Transfer pricing-specific returns

There are no specific transfer pricing returns. As mentioned above, transfer pricing information is disclosed on the IES in its transfer pricing annexes.

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 from the financial information available on an internal database called MGIT.

With 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 it is within the computed interquartile range
- Only the median of the interquartile range of the benchmark is considered when tax adjustments are made

Portugal (continued)

Audit risk/transfer pricing scrutiny (continued)

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. Cross-border restructuring is also an area of intense scrutiny in Portugal.

The likelihood of an annual tax audit in general is medium, as is the likelihood that transfer pricing will be reviewed as part of that audit. The likelihood that, if transfer pricing is reviewed as part of the audit, the transfer pricing methodology will be challenged is high.

APA opportunity

An APA program was included in the Portuguese Corporate Income Tax Code in 2008 (Article 138). Ministerial Order 620-A/2008 allows taxpayers to negotiate the following types of APAs:

- Unilateral — when the parties of the agreement are DGCI and one or more taxpayers of Individual Income Tax (IRS) or Corporate Income Tax (IRC) that are mentioned in Article 2 of the Ministerial Order.
- Bilateral or multilateral — besides entering into an agreement between DGCI, IRS and IRC taxpayers, the taxpayer has also signed an agreement with one or several tax authorities, under the mutual agreement procedure predicted in a convention, intended to avoid double taxation on income taxes.

APA negotiation timeframe

Portuguese legal timeframe foresees the following phases:

- Pre-filing phase — entails a preliminary evaluation of the initial taxpayer proposal and may involve joint meetings with the tax authorities
- Submission phase — analysis and negotiation of the APA proposal, which in any case should be presented at least 180 days before the beginning of the applicable tax year. Tax authorities' timeframe to evaluate the content of an APA proposal is of 180 days, in the case of unilateral agreements, and extends to a 360 days period in case of bilateral/multilateral agreements
- Conclusion of the APA process

APAs may not exceed a three-year period, which may be renewable upon written request to the tax authority.

Application fee

An APA is subject to a filing fee ranging from EUR3,150 to EUR35,000 paid to the tax authority, depending on the taxpayer's average turnover (fees are reduced by 50% for renewals or revisions of existing APAs).

APA compliance responsibility

Upon the conclusion of an APA, the taxpayer is responsible for ensuring compliance with the policies, methodologies and terms that are agreed in the proposal.

Whenever any of the conditions are altered, the taxpayer should formally inform the tax authority or face the penalty of the APA being invalidated.

However, it should also be noted that the burden for monitoring the compliance of the terms agreed to in the APA rests with the tax authority.

In this context, the taxpayer is required to prepare an annual report on the implementation of the agreement, envisaging the validation and verification of the compliance of the methods used and the terms of the agreement. This annual report shall be sent to DGCI upon the deadline established for the submission of the Annual Tax and Accounting Return.

APA public data

Portuguese tax authorities do not disclose information on APAs submitted or concluded. Despite the fact that some information is publicly known, tax authorities are keen to increase the transparency of the APA process in Portugal. Hence, taxpayers are encouraged to submit proposals.

Qatar

Taxing authority and tax law

Taxing authority: Public Revenues and Taxes Department (PRTD)

Tax law: Law No. 21 of 2009 (Qatar Income Tax Law) and it's supporting Executive Regulations

Relevant regulations and rulings

The Qatar Income Tax Law introduced transfer pricing provisions within the general anti-tax avoidance framework, which states that "where the taxpayer enters into arrangements or carries on operations or transactions and one of the main purposes of which is to avoid the payment of the tax due, the PRTD may counteract the tax advantage the taxpayer obtained because of such arrangements, operations or transactions, in accordance with the provisions of the Executive Regulations of the Qatar Income Tax Law." The Qatar Income Tax Law aims to ensure that related party transactions are conducted under arm's length conditions. As such, the PRTD may:

- Apply the arm's length value to a deed or an economic event subjected to a different value by the taxpayer
- Recharacterize the contract where the form of such a deed does not reflect the substance thereof
- Adjust the amount of the tax due by the taxpayer or any other person involved in the type of arrangements, operations or transactions

Under the Executive Regulations of the Qatar Income Tax Law, a person shall be deemed to be related to another person in any of the following cases:

- For natural persons, where one of them is a spouse, an in-law or a relative to the other up to the fourth degree
- For natural and legal persons, where the natural person owns, alone or with other related person or persons, directly or indirectly, more than 50% of the capital, voting rights or income rights of the legal person
- For legal persons, where one of them owns, alone or with other related person or persons, more than 50% of the capital, voting rights or income rights of the other, or where another person, or other related persons, own, directly or indirectly, more than 50% of the capital, voting rights or income rights of both legal persons

OECD Guidelines treatment

Pursuant to the Executive Regulations to the Qatar Income Tax Law, where the data required to apply the CUP method is not available, taxpayer should submit to the PRTD an application to adopt other transfer pricing methods approved by the OECD.

Priorities/pricing methods

Under the Executive Regulations to the Qatar Income Tax Law, the arm's length price should be determined using the CUP method. This price is determined on the basis of comparison with similar goods or service provided between unrelated parties, taking into account in particular the:

- Characteristics of the goods or service
- Contractual terms
- Functions performed, assets used and risks incurred
- Economic circumstances

Transfer pricing penalties

There are currently no specific transfer pricing penalties for failure to properly document intercompany transactions. However, financial penalties, in the form of interest, imposed for noncompliance with income tax rules under the Qatar Income Tax Law, may apply in case of deficiency assessment due to transfer pricing adjustments.

Interest on any additional income tax due resulting from a transfer price adjustment may be levied at a rate of 1.5% per month of delay (capped at amount of income tax due).

Qatar (continued)

Penalty relief

There is currently no penalty relief regime in place.

Documentation requirements

The Qatar Income Tax Law does not provide for specific documentation requirements, but since the Qatar Income Tax Law requires the use of the CUP method, or other transfer pricing methods also authorized by the OECD, there is an implied requirement to have documentation in place. A written approval to use an OECD authorized transfer pricing method other than the CUP method may be obtained from the PRTD in advance of the related party transactions taking place. In the application, a transfer pricing study should be submitted along with an explanation of why it is not possible to use the CUP method and why an alternative OECD-approved method is appropriate.

Documentation deadlines

There is currently no requirement for contemporaneous transfer pricing documentation or for documentation to be submitted to the PRTD together with the filing of tax declaration.

A transfer pricing study should be submitted along with the application to use a transfer pricing method other than the CUP method. The study may also be required by the PRTD during the tax review process.

Statute of limitations on transfer pricing assessments

Transfer pricing assessment is a part of the regular corporate income tax audit by the PRTD. The statute of limitations to complete a regular tax audit is five years following the year in which the taxpayer submitted the tax return.

Where the taxpayer fails to submit the tax return, the right of the PRTD to assess the tax and financial penalties related thereto shall expire 10 years after the taxable year in respect of which the taxpayer did not file the return. Where the taxpayer fails to register with the PRTD, the ten year period shall start from the date of discovering the activities of the taxpayer by the PRTD.

Return disclosures/related party disclosures

Related party disclosures must be disclosed in the notes to the audited financial statements, which are filed with the PRTD in support of the tax declaration.

Transfer pricing-specific returns

There is currently no requirement to prepare a separate tax return for related party transactions.

Audit risk/transfer pricing scrutiny

During the income tax review process, the PRTD will likely demand the documentation supporting the transfer prices for intercompany transactions be produced.

The PRTD conducts a tax audit of all tax declarations that are submitted, and the likelihood of a review of transfer pricing as part of the regular audit is medium to high. The likelihood of a challenge to the transfer pricing methodology, however, is characterized as low to medium, provided that sufficient documentation is available.

APA opportunity

There is currently no APA procedure in place.

Romania

Taxing authority and tax law

Taxing authority: Ministry of Finance, National Agency for Fiscal Administration (ANAF)

Tax law:

- 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
- Decision 529/2007, approving the procedure for the issuance of advance individual rulings and APAs
- 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 tax authority should also take into consideration the OECD Transfer Pricing Guidelines (OECD Guidelines) when analyzing the prices applied in related party transactions. In addition, the legislation on transfer pricing documentation requirements in Romania also refers to the European Union 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 tax authority. The traditional methods, CUP, Resale Price and Cost Plus, are generally preferred to the profit-based methods (TNMM and Profit Split).

When its application is appropriate, the CUP is the preferred 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 time period is sanctioned with a fine of up to RON14,000 (approximately EUR3,200).

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 deemed to be similar by the authority. The resulting adjustments would trigger a profits-tax liability of 16% (the standard profits tax rate) and late payment interest and penalties according to the provisions of the legislation. Effective 1 October 2010, the late payment interest is 0.04% (the late payment interest was 0.1% per day of delay prior to 1 July 2010 and 0.05% after 1 July 2010). In addition, late payment penalties of 5% (for outstanding tax liabilities paid within 30 to 90 days of the due date) or 15% (for outstanding tax liabilities paid more than 90 days after the due date) may also be imposed.

Penalty relief

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

Romania (continued)

Documentation requirements

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

Romanian entities having transactions with related parties should make available upon the request of the tax authority, and within the required term, the transfer pricing documentation file 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 the APA.

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. Finally, it should contain a set of relevant statistical comparables.

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. 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 submit transfer pricing documentation to the Romanian tax authority along with the annual tax returns.

Separately, taxpayers that have an APA must include in the annual report and submit to ANAF regarding observance of the APA terms and conditions. This report deadline is similar to that of the submission of annual financial statements, normally at the end of May. Noncompliance with documentation deadline provisions leads to cancellation of the APA.

Statute of limitations on transfer pricing assessments

No specific statute of limitations exists 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 related party transactions undertaken by a Romanian entity is disclosed only upon the specific request of the Romanian tax authority. 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 services in Romania which may trigger Romanian permanent establishment exposure
- Disclosure of long-term financing contracted by a Romanian entity with non-resident companies or individuals

Romania (continued)

Transfer pricing-specific returns

No specific transfer pricing returns for related party transactions are currently in place under the Romanian transfer pricing rules.

Audit risk/transfer pricing scrutiny

The likelihood of annual tax audit in general can be characterized as medium. The likelihood that transfer pricing will be reviewed as part of that audit is high and the likelihood that, if transfer pricing is reviewed as part of the audit the transfer pricing methodology will be challenged, is medium.

APA opportunity

Comprehensive APA procedures and requirements have been in effect in Romania since June 2007. An APA may be unilateral, bilateral or multilateral.

By means of an APA, the ANAF approves 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.

Unilateral APAs are issued for a term of 12 months, while bilateral and multilateral APAs are issued for a term of 18 months. The fees payable to ANAF for issuance or amendment of an APA are:

- EUR20,000 (issuance), EUR15,000 (amendment) — in case of large taxpayers or for agreements on transactions with a consolidated value exceeding EUR4 million
- EUR10,000 (issuance), EUR6,000 (amendment) — in all other cases

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

Russian Federation

Taxing authority and tax law

Taxing authority: The Federal Tax Service of the Russian Federation (FTS)

Tax law: Federal Law No. 227-FZ, effective from 1 January 2012 (Law 227)

Relevant regulations and rulings

Law 227 reduces the types of transactions subject to transfer pricing control by focusing more on related party transactions and includes only certain types of third-party transactions.

In relation to cross-border transactions, the following will be subject to transfer pricing control:

- All related party transactions (no threshold)
- Third-party transactions involving goods traded on global commodity exchanges such as oil and oil products, ferrous metals, non-ferrous metals, fertilizers, precious metals and precious stones if the annual income, as a result of all transactions between the parties, exceeds RUB60 million (approximately USD2.2 million)
- Third-party transactions where the counterparty is located in a certain jurisdictions (same threshold as above)[1]

In the domestic market, only related party transactions can be subject to transfer pricing control, and a RUB60 million (approximately USD2.2 million) threshold applies for the following transactions:

- The subject of the transaction is an object of assessment to mineral extraction tax calculated at an ad valorem tax rate; or
- One of the parties to the controlled transaction is exempt from paying profit tax, or pays the tax at the 0% rate; or
- One of the parties to the controlled transaction is registered in a special economic zone (such transactions will be controlled from in 2014).

For all other domestic related party transactions, a RUB3 billion (approximately USD108 million)[2] threshold applies in order for them to become subject to transfer pricing control. Also, there will be certain domestic transactions of this type that are exempt from transfer pricing control; e.g., transactions between members of a domestic consolidated group of taxpayers, or if the following criteria are met:

- Both parties are registered within the same region of Russian Federation
- None of the parties have economically autonomous subdivisions in other regions of Russian Federation nor pay income tax to the budgets of other regions
- None of the parties have tax losses
- There are no other grounds for the transaction to be controlled (same criteria which are applicable for the RUB60 million threshold outlined above)

Related parties

The definition of related parties is broadened and the transfer pricing law includes a list of criteria defining when companies and individuals can be declared related parties. The main criterion defining the relationship remains the same, being the ownership threshold; i.e., if one party directly or indirectly controls more than 25% of another party.

Courts can declare companies and/or individuals to be related on any other grounds, if it is proven that the relationship between the parties influenced the terms and the results of the transactions.

OECD Guidelines treatment

Russian Federation is not a member of OECD; however, the new transfer pricing law is largely based on the principles stipulated by the OECD Transfer Pricing Guidelines (OECD Guidelines).

1 The list of jurisdictions is determined by the Ministry of Finance.

2 This amount will be reduced to RUB2 billion in 2013 and to RUB1 billion in 2014.

Russian Federation (continued)

Priorities/pricing methods

The transfer pricing law includes five methods similar to those used in the international transfer pricing practice. The CUP method has first priority, whereas the Profit Split is a method of last resort. Furthermore, taxpayers are able to use any methods and not only the five provided for in the law.

Transfer pricing penalties

In 2012 and 2013, penalty provisions will not be applied. From 2014, transfer pricing penalties of 20% of the additional tax payable will be introduced. From 2017, the penalties will be increased to 40%.

Penalty relief

Penalties will be imposed if a taxpayer's income is adjusted as a result of a transfer pricing audit, and if the taxpayer did not provide the requested transfer pricing documentation. Penalties cannot apply if prices were established in accordance with an applicable advance pricing agreement.

Documentation requirements

The law envisages that taxpayers must prepare and maintain a certain set of documents, in any suitable form, justifying the pricing method used in controlled transactions where the annual revenue of all controlled transactions between the same related parties exceeds RUB100 million (approximately USD3.6 million).

Documentation is not required for cross-border third party transactions, transactions where prices conform to a regulated price or a price that is prescribed by the anti-monopoly authorities, transactions with securities and derivatives traded on an organized equity market and for transactions covered by an advance pricing agreement.

Documentation deadlines

Transfer pricing documentation must be presented within 30 days of the tax authorities' request. The request can be issued no earlier than 1 June of the year following the year in which the controlled transaction took place.

Statute of limitations on transfer pricing assessments

The general rule is that the tax authority may audit the taxpayer for up to the three years preceding the year when the audit is conducted.

- Transfer pricing audits of transactions performed in 2012 can be initiated no later than 31 December 2013
- Transfer pricing audits of transactions performed in 2013 can be initiated no later than 31 December 2015

Return disclosures/related party disclosures

Disclosure of transactions with related parties and also other types of third-party transactions which would remain subject to transfer pricing control (e.g., transactions with parties located in low-tax jurisdictions and cross-border sale of oil and oil products, minerals) is required.

Audit risk/transfer pricing scrutiny

In general, the likelihood of an annual tax audit is characterized as high, as is the likelihood that transfer pricing will be reviewed as part of an audit. The likelihood that the transfer pricing methodology will be challenged during the course of an audit is currently unknown, as the transfer pricing law is only effective from 1 January 2012.

APA opportunity

The APA program is available from 1 January 2012 and only for "major taxpayers." A non-Russian Federation company cannot apply for an APA. The law also introduces the possibility to conclude multilateral APAs where the transactional counter-parties are located in a jurisdiction with which Russian Federation has a double tax treaty.

Singapore

Taxing authority and tax law

Taxing authority: Inland Revenue Authority of Singapore (IRAS)

Tax law: Section 34 D of the 2009 Singapore Income Tax act relates to transfer pricing and empowers the IRAS to make transfer pricing adjustments in cases where a Singapore taxpayer's transfer pricing practices are not consistent with the arm's length principle.

Relevant regulations and rulings

The IRAS issued transfer pricing guidelines on 23 February 2006 (Singapore transfer pricing guidelines). Subsequently, the IRAS also published circulars and other guidance on the following topics:

- Transfer pricing consultation process — relates to the IRAS's program to assess whether taxpayers are following the recommendations in the Singapore transfer pricing guidelines (IRAS Circular — Singapore Transfer Pricing Consultation, published on 30 July 2008)
- Procedures for advance pricing agreements (APA Guidelines) — outlines timelines and format for information provided to the IRAS in connection with a taxpayer's request for an APA (IRAS Supplementary Circular — Supplementary Administrative Guidance on Advance Pricing Arrangements, published on 20 October 2008)
- Transfer pricing guidelines for related party loans and related party services (Singapore Loans and Services Guidelines) — further guidance on the application of the arm's length principle to related parties (IRAS Supplementary e-Tax Guide — Transfer Pricing Guidelines for Related Party Loans and Related Party Services, published on 23 February 2009)

OECD Guidelines treatment

The Singapore transfer pricing guidelines and circulars/other guidelines are generally consistent with the OECD Transfer Pricing Guidelines (OECD Guidelines). The principles and transfer pricing methods set out in the OECD Guidelines are acceptable in Singapore.

However, there are certain differences between the OECD Guidelines and the Singapore Loan and Services Guidelines. Specifically, services provided by a Singapore taxpayer in a cost pooling arrangement should not be the "principal activity" of the taxpayer. Services are considered the principal activity of the Singapore service provider if the costs relating to the provision of the service exceed 15% of the Singapore service provider's total expenses in a financial year. Further, cost pooling should only be used for "routine" services, as defined by the Singapore Loans and Services Guidelines.

Priorities/pricing methods

The IRAS generally does not have a specific preference for any of the five prescribed methods outlined in the OECD Guidelines, and stipulates that the transfer pricing method that produces the most reliable results should be selected and applied. However, there is an exception for loan transactions: the Singapore Loans and Services Guidelines note that the CUP method is the preferred method for substantiating the arm's length nature of interest charges.

Transfer pricing penalties

There are no specific penalties regarding transfer pricing adjustments. 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, the general penalty rates are applicable and 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.

Singapore (continued)

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 amounts 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 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

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 earlier, 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 later, the statute of limitations is four years from the end of the year of assessment to which the transfer pricing issue relates

Singapore corporate taxpayers are required to file tax returns by 30 November of the following year after the applicable financial year. For example, a Singapore corporate taxpayer that had a 31 December 2010 financial year end will be required to file its Singapore corporate tax return by 30 November 2011. The applicable year of assessment in this case is 2011, which corresponds to the financial year ended 31 December 2010.

Return disclosures/related party disclosures

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

Singapore (continued)

Transfer pricing-specific returns

There is no transfer pricing return required to be filed either separately or along with the Singapore income tax return.

Audit risk/transfer pricing scrutiny

With the recent passing of a specific statutory provision on transfer pricing, and given that the purpose of the Singapore transfer pricing guidelines is to create an awareness of transfer pricing issues, 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. To date, there have been four rounds of the transfer pricing consultation process and it is likely there will be further in the future.

The Loans and Services Guidelines required that existing cross-border loans be at arm's length by 1 January 2011, so it is likely there will be a particular focus on current cross-border loans implemented prior and subsequent to this date.

In general, the likelihood of an annual tax audit is characterized as medium. If an audit is conducted, the likelihood of transfer pricing being reviewed is characterized as medium. The likelihood that the transfer pricing methodology is challenged as part of an audit is also characterized as medium.

APA opportunity

Unilateral, bilateral and multilateral APAs are available, and there has been a large increase in requests for APAs since the availability of APAs was clarified in the Singapore transfer pricing guidelines in February 2006. 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 includes guidance on the following:

- Suggested timing for the overall APA process: the taxpayer should ideally approach the IRAS 10 months prior to first day of the APA period to initiate discussions regarding the APA request
- Content requirements for pre-filing materials and formal APA submission
- The process following the filing of the formal APA submission, including regular updates with the taxpayer
- The circumstances under which 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

Tax authority: Slovak Tax Directorate, local tax authorities and Ministry of Finance

Tax law:

- 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 established in the Income Tax Act generally conform to the OECD Transfer Pricing Guidelines (OECD Guidelines). The OECD Guidelines were published in the Slovak Financial Newsletter, but are not legally binding. Nevertheless, the tax authorities generally follow them in practice.

Since 2009, taxpayers are obliged 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 tax authority usually follows the provisions of the OECD Guidelines; e.g., the acceptable methods listed in the Income Tax Act correspond with the methods listed in the OECD Guidelines. However, the 2010 update to the OECD Guidelines has not yet been incorporated into the Slovak Income Tax Act.

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.

Transfer pricing penalties

No penalties specific to transfer pricing exist. The penalty rate for unpaid (or understated) tax liability is the highest of either three times the basic interest rate of the European Central Bank (at the date of issue 3*0.75% = 2.25%) or 10%. The penalty is not a per annum rate, but 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 EUR3,000 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 non-monetary obligations (e.g., importance, duration and consequences of the breach).

Penalty relief

There are no specific penalty reductions. 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 authorities, no specific penalty reduction is available.

Slovak Republic (continued)

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 Guidance aims to conform to 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 (IFRS)). Documentation must be prepared separately for each transaction or homogenous group of transactions.

For taxpayers obliged to use IFRS (banks, insurance companies, pension funds, companies exceeding a certain size), the Guidance prescribes the required contents of the transfer pricing documentation, which is generally in line with the Masterfile approach set out by the EU Code of Conduct on Transfer Pricing Documentation. The documentation should consist of global (Masterfile) and local documentation. The Masterfile has to contain information with regard to the whole group of related parties (overview of the industry, business strategies and general overview of functions, risks and assets of the members of the group). The local documentation should 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 otherwise approved at the taxpayer's request. The tax authorities have stated that documentation presented in English, German or French should also be accepted. There is positive experience with submitting documentation in English.

It is not clear from the Guidance whether the documentation requirements 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 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 state (on a specific row of the tax return) the difference (if any) between the prices charged in transactions with related parties and the arm's length prices that decreased the tax base. The tax base must be at the same time increased by this difference.

The corporate income tax return includes a summary table where the amounts of various types of related party sales and purchases must be stated (regardless of whether there are divergences from arm's length prices).

Slovak Republic (continued)

Transfer pricing-specific return

There are no transfer pricing-specific returns in Slovakia.

Audit risk/transfer pricing scrutiny

In general, the likelihood of a corporate income tax audit in Slovakia is high, while the likelihood that the taxpayer's related party transactions will be reviewed as part of that audit is medium.

Based on experience with transfer pricing audits in Slovakia, if transfer pricing is reviewed as part of the tax audit, the risk of a challenge by the Slovak tax authorities to the taxpayer's methodology is also medium.

Following the introduction of the obligation to prepare and keep transfer pricing documentation, the tax authority has intensified its activity in the area of transfer pricing and is increasingly focused on the transfer pricing and related documentation when auditing companies that form part of a multinational group. Recently, services received from related parties are under particular scrutiny by Slovak tax authorities.

APA opportunity

According to Section 18(4) of the Slovak Income Tax Act, in cases of cross-border related party 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 does not explicitly stipulate that the tax authority may approve the particular price or margin percentage used. Nevertheless, the Slovak tax authority may approve the practical application of the transfer pricing method (e.g., process of identifying comparable transactions or entities). Given this, an APA should provide a reasonable level of comfort for taxpayers.

Despite the above, given the wording of the Income Tax Act, the use of APAs in Slovakia has been limited so far.

Slovenia

Taxing authority and tax law

Tax authority: Davčna uprava Republike Slovenije (DURS)

Tax law:

- Corporate Income Tax Act (Zakon o davku od dohodkov pravnih oseb)
- Regulation on Transfer Prices (Pravilnik o transfernih cenah)
- Regulation on the Acknowledged Interest Rate (Pravilnik o priznani obrestni meri)
- Tax Procedure Act (Zakon o davčnem postopku)

Relevant regulations and rulings

Articles 16 and 17 of the Corporate Income Tax Act provide the definition of related party and general requirements with which related parties need to comply. These requirements are explained in more detail in the Regulation on Transfer Prices.

Article 18 of the Corporate Income Tax Act sets the basis for documentation requirements, which are then elaborated upon in the Tax Procedure Act.

Article 19 of the Corporate Income Tax Act provides the general rules on the acknowledged interest rate on intercompany loans. The rules are defined in more detail in the Regulation on the Acknowledged Interest Rate. The Acknowledged Interest Rate rules establish a safe harbor for interest rates on intercompany loans.

Article 382 of the Tax Procedure Act provides general information on transfer pricing documentation requirements in Slovenia.

Articles 397 and 398 of the Tax Procedure Act provide regulations with respect to transfer pricing penalties.

OECD Guidelines treatment

As the Slovenian transfer pricing regulations follow the principles established in the OECD Transfer Pricing Guidelines (OECD Guidelines), the tax authority, in the absence of guidance in Slovenian legislation, will also consider the OECD Guidelines during tax audits.

Priorities/pricing methods

Following the changes to the OECD Guidelines with respect to the hierarchy of transfer pricing methods, Slovenian Regulation on Transfer Prices introduced its "best method rule" in the beginning of 2012. The best method rule replaced the previous hierarchy that preferred traditional transactional methods over transactional profit methods. However, to some degree, the preference for transactional methods over profit methods still exists: when both can be applied in an "equally reliable manner," the traditional transactional method should be selected. There is a similar conclusion regarding the application of the CUP method, which will trump any other method if both can be applied in an equally reliable manner.

Transfer pricing penalties

A taxpayer may be fined up to EUR30,000 if the transfer pricing documentation is not submitted in the prescribed manner; additionally, the individual responsible for the preparation of the documentation on behalf of the taxpayer may also be fined up to EUR4,000. In case of a tax adjustment, late payment interest and penalties for offences may be charged. If the additional tax exceeds EUR5,000, the tax offence is qualified as a severe tax offence and fines in the amount of 45% of the additional tax may be levied.

Penalty relief

Penalties (fines) for a tax offence may be avoided if the taxpayer makes a voluntary disclosure before receiving the notice at the beginning of a tax audit or the notice at the beginning of a tax offence procedure or criminal procedure. When making voluntary disclosure, the taxpayer should adjust the tax liability accordingly.

When making the voluntary disclosure, the taxpayer also must pay the amount of tax due and late payment interest. When tax and late payment interest are paid simultaneously with making the disclosure, the taxpayer avoids facing penalties for a tax offence.

Slovenia (continued)

Documentation requirements

The Slovenian transfer pricing documentation requirements are based on the master file concept. Under this concept, as recommended by the European Community (EC) Council as well as the EU Joint Transfer Pricing Forum, the transfer pricing documentation should consist of a master file and a country-specific file. Disclosure of any related party transaction amounts should be provided with the tax return when it is filed with the tax authority.

The local legislation sets the following documentation requirements:

The master file

The master file normally includes documentation common to the whole group. It may be prepared by the group's headquarters and should include a general description of the way business is conducted by the group companies. The file should include the following:

- A description of the taxable person
- A description of the global organizational structure of the group
- An explanation of the type of connections between the companies in the group
- An explanation of the method used in the determination of transfer prices
- A description of the business activities and business strategies (including any general economic and other factors, an assessment of the competitive environment, etc.)

Country specific documentation

The local documentation should describe the company's course of business, but on a local level. The country-specific documentation should normally include:

- A description of transactions between affiliated persons
- A functional analysis determining the main functions performed and risks undertaken by the taxpayer, and outlining which adjustments may need to be made in relation to comparable situations
- A description of any comparable search performed
- A description of business strategies
- A description of goods/services transferred/rendered
- A description of the method applied for establishing the arm's length price
- Any other information that might be relevant from the transfer pricing perspective should also be included in the documentation

Documentation deadlines

The documentation should be provided to the tax authority upon request, usually made in the course of a tax audit. If it is impossible to submit the documentation immediately, an extension of up to 90 days (depending on the extent and complexity of the information) may be granted. If the master file is not kept in the Slovenian language, the tax authority may request that it be translated before submission. An additional extension of 60 days may also be granted for the translation of the master file.

Statute of limitations on transfer pricing assessments

The statute of limitation on corporate income tax assessments is generally five years. If the tax authorities intervene with any official action against the taxpayer with a purpose to assess or collect tax, the relevant period is reset, without taking into account any previous lapse of time. Nevertheless, the right of the tax authorities to assess and collect tax will cease after 10 years. The transfer pricing documentation must be archived for 10 years.

Slovenia (continued)

Return disclosures/related party disclosures

Related party transactions are reported as a component of the annual corporate income tax return.

Transfer pricing–specific returns

As mentioned above, it is necessary to report related party transactions as part of the information included on the annual corporate income tax return. In addition, if certain conditions are fulfilled, specifically prescribed attachments must be enclosed with the corporate income tax return. Such conditions include:

Where the cumulative amount of given or received loans from a particular related party exceeds EUR50,000 in a tax period, the taxpayer must disclose the name of the related party, its state of residence and tax number, and the cumulative amount of the loan given or received and relationship with the related party. Similarly, where the cumulative amount of other intercompany receivables or liabilities towards a particular related party exceeds EUR50,000 in a tax period, the taxpayer must disclose the name of the related party, its state of residence and tax number, and the cumulative amount of receivables or liabilities towards the related party and the relationship with the related party.

A similar attachment is required if the resident taxpayer has tax losses generated from previous periods, if it is taxed at a 0% corporate income tax rate or at a lower rate than the general one, or if the resident related party is tax exempt.

Audit risk/transfer pricing scrutiny

In general, the risk of an annual tax audit is medium. The likelihood that transfer pricing will be reviewed as part of the audit is high. Also, the likelihood that the transfer pricing methodology will be challenged during the tax audit is high.

The tax authority mainly initiates a transfer pricing audit where a Slovenian taxable person is part of a multinational group. The following transactions are currently under increased scrutiny by the tax authority:

- Intra-group services
- Intangible goods (e.g., royalties and licensing)
- Financial transactions (e.g., loans and cash pooling)

Additional risk factors are the profitability of the local taxpayer, business restructurings, the nature and volume of related party transactions, transfer pricing issues identified in previous tax audits, and information available from media.

APA opportunity

There is no possibility of applying for an APA in Slovenia.

South Africa

Taxing authority and tax law

Taxing authority: Commissioner of the South African Revenue Services (SARS)

Tax law: Section 31 of the Income Tax Act 58 of 1962 (the Act) contains the main legislative provisions concerning transfer pricing.

Section 31 previously authorized the tax authority 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.

For years of assessment commencing on or after 1 April 2012, the legislation changed, allowing the tax authority to adjust any term or condition imposed in any part of a transaction, scheme or arrangement, thus widening the application of the section. Two key changes affecting financial assistance arrangements have also been incorporated under the new legislation. The first is the inclusion of finance arrangements between South African branches of foreign companies and another foreign company in the group. The second, perhaps a more radical change, is the move from a debt to equity ratio test, for assessing thin capitalization, to an arm's length test in determining an appropriate funding position.

Relevant regulations and rulings

There are no specific regulations or rulings; however, guidance on the application of §31 is currently contained in Practice Notes Number 2 (14 May 1996) and 7 (6 August 1999). These Practice Notes are still in place. Notwithstanding they do not strictly speak of the new legislation. It is anticipated that both the Practice Notes will be withdrawn shortly, to be replaced by a single Interpretation Note.

SARS has also contributed to the UN Manual on transfer pricing.

OECD Guidelines treatment

Although South Africa is not a member of the OECD, SARS accepts the OECD Transfer Pricing Guidelines (OECD Guidelines) and has largely based its practice on them. By the same token, SARS recognizes the five methods accepted by the OECD Guidelines. The new changes to the legislation will ensure closer alignment with the OECD Guidelines and with the approach adopted by OECD member countries.

Priorities/pricing methods

SARS accepts the methods prescribed by the OECD; i.e., CUP, Resale Price, Cost Plus, TNMM and Profit Split; and has indicated that it will subscribe to the OECD view on accepting a best method approach, as long as it is substantiated. SARS may require that adjustments be made to foreign comparable company results used for benchmarking the results of the South African entity, so as to compensate for differences in risks assumed by entities operating in a different jurisdiction.

Transfer pricing penalties

For years of assessment commencing on or after 1 April 2012, any transfer pricing adjustment will be deemed a loan, on which interest at an arm's length rate should be charged. The proposed change allows for a secondary adjustment on the South African taxpayer's taxable income in the form of interest on the deemed loan amount. The amount would also be deemed to be a loan until the point in time where the pricing is corrected or the difference in pricing between the two related parties is settled through the repatriation of funds or through a possible mutual agreement procedure (MAP). 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 (in the event of default, omission, incorrect disclosure or misrepresentation).

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, SARS will likely take the view that the taxpayer's transfer pricing practices represent a lower tax risk. Such evidence may provide some mitigation against the 200% additional tax.

South Africa (continued)

Documentation requirements

There is currently no statutory requirement to prepare transfer pricing documentation; however the income tax return does require confirmation that cross-border related party transactions are entered into at arm's length, suggesting a need to evidence this.

Documentation deadlines

Transfer pricing documentation should be prepared contemporaneously and, if with respect to a specific financial year, no 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 normal statute of limitations is three years from the date of assessment. Under the new Tax Administration Act, self-assessment provisions have an extended statute of limitations of five years. As transfer pricing is now a self-assessment provision, the statute of limitations is arguably now five years. This can be extended or removed in cases of fraud, misrepresentation or nondisclosure of material facts.

Return disclosures/related party disclosures

The requirement for disclosure continues to increase, and this trend is expected to continue. Currently disclosure focuses on a series of questions relating to the nature of the transactions (particularly for lending arrangements and management services), the existence of documentation, and whether the transactions occur at arm's length.

Audit risk/transfer pricing scrutiny

SARS follows a risk approach in assessing the level of transfer pricing risk. If risk is found to exist, SARS will proceed with conducting an audit. The last few years have seen an increased focus on transfer pricing audits with some significant assessments being raised. SARS has a specialized transfer pricing team which has experienced significant growth in the last few years.

The likelihood of a general annual tax audit is currently assessed as medium, and the likelihood of transfer pricing forming a part of such an audit is high. The major focus from an audit perspective under the existing legislation has been the implementation of stated policies, determination of the cost base, and examination of the comparables used by the tested party to justify that its prices are at arm's length. Recently, audit activity has increased and taxpayers are required to provide evidence to support many of the areas scrutinized. The likelihood that the transfer pricing methodology will be challenged is high, especially in a situation where the taxpayer's transfer pricing methodology is considered not to be the most appropriate methodology or where the pricing methodology has been selected but can practically not be tested or implemented.

APA opportunity

South Africa does not currently have an APA program, although one is being considered. The legislation also currently prohibits SARS from providing an advance ruling to establish a price.

South Korea

Taxing authority and tax law

Taxing authority: National Tax Service (NTS)

Tax law: The Law for Coordination of International Tax Affairs (LCITA)

Relevant regulations and rulings

- Presidential Enforcement Decree (PED)
- Ministerial Decree and Interpretations

OECD Guidelines treatment

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

Following the recent changes to the OECD Guidelines, the Korean government made significant amendments to the LCITA and the PED on 27 December 2010 and 30 December 2010, respectively.

Priorities/pricing methods

The Korean transfer pricing regulations prescribe the following transfer pricing methods: CUP method, RPM, Cost Plus (CP) Method, Profit Split Method (PSM), 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.

One of the amendments to the LCITA replaced the prior hierarchical approach with the selection of the most reasonable method. Prior to the recent amendments to the LCITA, the transaction-based methods (i.e., CUP, RPM and CP method, with no internal priority amongst these three methods), took priority over the profit-based methods (i.e., PSM and TNMM, with no internal priority between these two methods).

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 payment for the tax assessment is made.

There are certain penalties for failing to comply with information/documentation requests issued by the NTS. A taxpayer must submit information and documents requested by the NTS within 60 days of the NTS's request. A one-time extension for 60 days may be granted, if reasonable circumstances specified in the LCITA exist. For failure to provide documentation requested by the NTS within the required due date, there is a penalty of up to KRW100 million. This penalty has been increased from "up to KRW30 million" to "up to KRW100 million," as a result of amendments to the LCITA in late December 2010.

See below for further details regarding contemporaneous transfer pricing documentation.

South Korea (continued)

Penalty relief

Under Article 13 of the LCITA, if the taxpayer has prepared and maintained contemporaneous transfer pricing documentation for the transfer pricing methods applied to the cross-border intercompany transactions reported in the corporate income tax return, and such documentation supports the reasonableness of the transfer pricing methods reported, the penalty for underreporting will be waived if a transfer pricing adjustment is made.

PED Article 23 of the LCITA provides guidelines on contents of the contemporaneous transfer pricing documentation. In general, contemporaneous transfer pricing 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 transfer pricing method selected and reasons for not selecting other transfer pricing 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 transfer pricing 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 transfer pricing method.

The underreporting penalty may also be waived in a mutual agreement procedure (MAP) if the result confirms that the taxpayer is not guilty of negligence. In the case of a unilateral APA, the NTS may decide whether or not the taxpayer is guilty of negligence. If the taxpayer can show that it (i) selected and reported the most reasonable transfer pricing method specified in the LCITA, (ii) actually applied the selected method, and (iii) maintained supporting documentation, then there is no negligence.

Documentation requirements

At the time of filing the corporate income tax return, a taxpayer is required to submit certain transfer pricing reporting forms (refer to return disclosures/related party disclosures below for more details).

Under the contemporaneous transfer pricing documentation rules, in order to receive relief from the underreporting penalty, taxpayers are required to prepare and maintain transfer pricing documentation by the due date of the filing of the annual corporate income tax returns. Also, documents are generally required to be submitted in the Korean language.

Documentation deadlines

A taxpayer must submit documents and information requested by the NTS within 60 days of the NTS's request. A one-time extension of 60 days may be granted if reasonable circumstances specified in the LCITA exist. Contemporaneous transfer pricing documentation should be submitted to the NTS within 30 days of the request.

The NTS may also request that a taxpayer submit certain information (including transfer pricing documentation) during a tax audit. In that case, the taxpayer may be given a shorter notice, e.g., 10 days, to submit the information.

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.

South Korea (continued)

Return disclosures/related party disclosures

At the time of filing the corporate income tax return, the LCITA requires a taxpayer to submit the following transfer pricing reporting forms:

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

There are certain minimum threshold exemptions for the first and third forms.

Audit risk/transfer pricing scrutiny

Companies should expect to be audited every four to five years, depending on the size of the company and unless other special factors exist. The risk of transfer pricing being reviewed during a tax audit is high. The NTS, as a matter of policy, requests transfer pricing documentation, and such requests can be made separately from a tax audit. The NTS closely monitors companies whose profitability suddenly drops and companies whose profits fluctuate substantially over a number of years. These companies 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 NTS. Generally, if transfer pricing is reviewed as part of a tax audit and another reasonable transfer pricing method would not be in the taxpayer's favor, the risk that the transfer pricing methodology will be challenged is high.

APA opportunity

Unilateral, bilateral and multilateral APAs are available under the LCITA. In order to encourage the use of APAs, the NTS does not require an application fee, and documents submitted to the NTS with regard to an APA are to be kept confidential, in accordance with the LCITA. In addition, the APA officials of the NTS are making efforts to shorten the APA processing period.

The NTS releases annual reports on APAs, which include information such as statistics on the type of APAs being concluded, the countries that are counterparties to APAs, time taken to process APA applications and other related information. The 2010 NTS APA annual report showed that a total of 255 APAs were applied for and 158 APAs were concluded as of the close of 2010. The annual report also showed that 43 APAs were applied for in 2010, and of the 43, 10 bilateral APAs and 15 unilateral APAs were processed during the year.

Spain

Taxing authority and tax law

Taxing authority: State Agency of Tax Administration (AEAT) and General Directorate of Taxation (DGT)

Tax law: Spanish Consolidated Corporate Income Tax Law (CCITL), Article 16

Relevant regulations and rulings

On 18 November 2008, by Royal Decree, the Spanish Government 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 1 December 2006). This includes a shift of the burden of proof to the taxpayer and a change in the penalty regime. However, the law did not include a detailed description of what the documentation should contain, except to say that it 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 Price, TNMM and Profit Split).

Regarding transfer pricing penalties, the Royal Decree-Law 6/2010 (approved on 9 April 2010) introduces amendments modifying the penalty amounts for companies that meet certain criteria. The Royal Decree 897/2010 (approved 9 July 2010) and the Royal De+approved 3 December 2010) introduce certain amendments consisting of exemptions to transfer pricing documentation requirements.

OECD Guidelines treatment

Spanish transfer pricing legislation explicitly endorses the application of the OECD Transfer Pricing Guidelines (OECD Guidelines) and those of the European Union Joint Transfer Pricing Forum (EUJTPF).

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 Price. These methods are on the same preferential level in the valuation method hierarchy.

Given the complexity of certain transactions or the availability of information relating to the transactions, the above methods may not be applicable, and TNMM or Profit Split may be used.

In practice, TNMM is commonly applied both in case of audits and APAs.

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 EUR1,500 per fact, or EUR15,000 per group of omitted, inaccurate, or false facts.

In the case of entities whose net sales do not exceed EUR10 million in the period, but related party transactions exceed EUR100,000, the amount of the penalty will have as a maximum limit the lesser of the two following quantities:

- 10% of the related party transactions
- 1% of net sales

When the tax authorities adjust the pricing of a transaction, the penalty may be 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.

Spain (continued)

Transfer pricing penalties (continued)

The Supreme Court is analyzing the validity of the penalty regime application, based on the formal proceeding in which regulations have been established. As a practical consequence, there are only a limited number of cases in which penalties are applied.

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 (in proportion to the entity's degree of participation) be considered as:

- Dividends, whenever such difference is in favor of the shareholder, or
- 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 authorities' actions.

Penalty relief

Some reductions are applicable to penalties. Penalties do not apply with the complete fulfillment of the documentation requirements, even if a reassessment is proposed by the tax authorities.

Documentation requirements

The documentation requirements are in line with those of the EUJTPF. 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 descriptions 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

Spain (continued)

Documentation requirements (continued)

- 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.

There are some exemptions for documenting related party transactions:

- Exemptions by volume:
  - For those corporate income tax taxpayers whose transactions carried out with the same related party do not exceed EUR250,000 at market value (taking into account the total transactions carried out with the same related party)
  - Entities whose net sales do not exceed EUR10 million in the period and related party transactions do not exceed EUR100,000 (excluding listed tax haven jurisdictions)
- Exemptions by transaction characteristics
  - Performed between entities within tax consolidation groups
  - Performed between economic interest groupings or temporary business alliances, and their shareholders
  - Carried out within the scope of an IPO
  - Carried out between saving banks integrated in a vehicle approved by the Bank of Spain

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 blacklist).

Spain (continued)

Audit risk/transfer pricing scrutiny

The tax authorities have stated that transfer pricing audits will be a priority from 2009, particularly with regard to business restructurings and intangible transactions.

The likelihood of an annual tax audit in general varies from one industry to the other and depends on the size of the taxpayer. Very large companies (annual revenues in excess of EUR60 million) normally come under audit on a yearly basis, so the risk is high.

Risk of general audit for large companies (annual revenues from EUR6 million to EUR60 million) is medium, while the risk of audit for the rest of companies is low. However, the Spanish tax authority establishes its annual audit plans based on risk assessment on each taxpayer, so companies to which risk factors apply may be exposed to an increased risk.

The likelihood that transfer pricing will be reviewed as part of an audit is high, if the taxpayer regularly enters into cross-border related party transactions. For all other cases, the risk of a transfer pricing review during a general audit is medium.

Where the transfer pricing policy is under review, the risk of a challenge to the transfer pricing methodology is high. In particular, authorities are more often aggressively challenging the comparability analysis, by applying the most recent OECD guidance on the nine step process and interquartile range application.

APA opportunity

Taxpayers may request the tax authority to issue rulings on 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 authority 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 (encompassing 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

Taxing authority: 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.

Tax law:

- Sections 14:19-20 of the Income Tax Act include the arm's length principle
- Sections 39:15-16 of the Tax Procedures Act (***Sw: Skatteförfarandelagen*** (2011:1244)) include the documentation requirements regarding transfer prices
- Advance Pricing Agreements Act (***Sw: Lag (2009:1289) om prissättningsbesked vid internationella transaktioner***)

Relevant regulations and rulings

The Swedish Tax Agency has issued regulations (SKVFS 2007:1) regarding documentation of the pricing between associated enterprises. The Swedish Tax Agency also continuously issues general taxation guidelines and opinions, which include information on transfer pricing.

OECD Guidelines treatment

The Swedish tax laws on transfer pricing refer to the OECD Transfer Pricing Guidelines (OECD Guidelines), and the OECD Guidelines are applied by the courts and tax authorities.

Chapter IX of the OECD Guidelines (on Business Restructurings) is expected to not only significantly increase the Swedish 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, all things being equal, preferred over profit-based methods.

Transfer pricing penalties

There are no specific transfer pricing penalties in Sweden; however 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 Swedish Tax Agency with inaccurate or insufficient information. In the preparatory work to the law that introduced 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 documentation shall 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

Sweden (continued)

Documentation requirements (continued)

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.

For transactions of limited value, it is possible to prepare simplified documentation. Transactions of limited value for fiscal year 2013 include the sale or purchase of goods amounting to approximately SEK28 million or less per counterparty on a yearly basis, or other transactions amounting to approximately SEK5.5 million or less per counterparty on a yearly basis. Simplified documentation is not possible for transactions involving the sale of intangible assets.

The simplified documentation shall 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 Swedish 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 five years from the year of assessment.

Return disclosures/related party disclosures

No specific disclosure requirements currently exist for filing the tax return. However, submitting the documentation when filing the tax return may eliminate risk of penalties.

Transfer pricing-specific returns

There are no specific returns that have to be filed for transfer pricing purposes.

Sweden (continued)

Audit risk/transfer pricing scrutiny

The likelihood of annual tax audit in general is medium to high. The likelihood depends on a number of factors such as, but not limited to, the industry in which the company operates, occurrence of certain transactions, the outcome of previous tax audits, and changes in turnover, profit levels, etc…as compared to prior years.

The likelihood that transfer pricing will be reviewed as part of that audit is high. The Swedish Tax Agency's focus on transfer pricing-related issues has increased significantly since the introduction of formal documentation requirements in 2007. In some cases, tax audits focus on transfer pricing only.

The likelihood that if transfer pricing is reviewed as part of the audit, the transfer pricing methodology will be challenged is medium. The likelihood depends, for example, on the transactions involved, the transfer pricing methods applied, whether or not documentation and agreements have been prepared, and whether the documentation and agreements are adhered to in practice.

APA opportunity

In Sweden, formal APA procedures exist as of 1 January 2010.

Switzerland

Taxing authority and tax law

Tax authority:

- Cantonal Tax Administration (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 the taxable profits of a taxpayer is derived from the arm's length principle in Article 58 of the Federal Direct Tax Act on a federal level, as well as in Article 24 of the Federal Law on the Harmonization of the Cantonal and Communal Taxes on a cantonal level. In fact, these two articles reject a tax deduction for non-commercially justifiable expenditures. This in turn provides the legal background for an adjustment to taxable profit in cases of deviations from the arm's length principle.

In addition, for intercompany loans, there are administrative directives regarding "safe-harbor regulations," which allow for the setting of interest rates without any specific documentation.

Relevant regulations and rulings

There are no specific transfer pricing regulations.

OECD Guidelines treatment

The SFTA instructed the Cantonal Tax Administrations, in its Circular Letter of 4 March 1997, to unconditionally adhere to the OECD Transfer Pricing Guidelines (OECD Guidelines) for transfer pricing matters. There are no specific tax regulations on business restructurings in Switzerland; i.e., Switzerland follows the OECD view.

Priorities/pricing methods

The SFTA adheres to the OECD Guidelines and hence, the application of the respective methods therein.

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 individual taxpayer 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, based on a functional and risk analysis. However, concerning the provision of financial and management services, the cost plus method shall only be accepted in exceptional cases.

The SFTA uses in principle a full cost approach, including all direct and indirect costs. In exceptional cases, if the taxpayer can prove, based on appropriate documents and records, that the applied margin is too high, the SFTA can allow for a lower margin.

Transfer pricing penalties

There are no specific transfer pricing penalties, but general penalty rules apply. However, (non tax-deductible) penalties are only imposed in cases of fraud or negligence. Although no penalties apply in the event of adjustments, interest charges for late payment are due in such a case.

Penalty relief

There are no special provisions for penalty reductions.

Switzerland (continued)

Documentation requirements

There are no specific documentation requirements. However, if challenged by the SFTA, the taxpayer has to demonstrate that the transfer prices applied were based on sound economic and commercial reasoning on an arm's length basis.

Although it can be concluded from the Federal Direct Tax Act that in principle, upon request of the Swiss tax administration, a taxpayer should prepare transfer pricing documentation, there is little guidance on the structure of such documentation.

However, based on the references to the OECD Guidelines in the 1997 Circular Letter, OECD-compliant documentation in one of the official languages of Switzerland is accepted by the SFTA. Due to the lack of sufficient independent comparable companies in the Swiss market, pan-European comparables are usually accepted.

Documentation deadlines

There are currently no special provisions for documentation deadlines.

Statute of limitations on transfer pricing assessments

The general rule provides for up to 10 years from the end of the tax 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.

Transfer pricing-specific returns

There are no specific returns which have to be filed for transfer pricing purposes.

Audit risk/transfer pricing scrutiny

Generally, the SFTA is increasing its scrutiny of transfer pricing arrangements. In particular, the remuneration for transfers of intangibles, services, intercompany financing as well as business restructurings are being scrutinized more often than in the past. In current tax audits, transfer pricing is often reviewed as part of an audit; however, the risk of any reassessment is low assuming that transfer prices have been appropriately set and documented.

APA opportunity

Despite the fact that there are no specific formal APA procedures, tax rulings are a common practice in Switzerland. Hence, unilateral APAs can be obtained in due time and with reasonable efforts. Regarding multilateral APAs, the SFTA has already participated in several cases. APA procedures are carried out in accordance with the applicable rules for mutual agreement procedures. All Swiss signed double tax treaties usually contain a provision on the mutual agreement procedure, under which the SFTA can launch an APA process.

Taiwan

Taxing authority and tax law

Taxing authority: National Tax Administration (NTA)

Tax laws:

- Articles 43-1 of the Income Tax Law (ITL)
- Article 50 of the Financial Holding Company Law (FHCL)
- Article 42 of the Business Mergers and Acquisitions Law (BMAL)

Relevant regulations and rulings

The Regulations Governing of Assessment of Profit-Seeking Enterprise Income Tax on Non-Arm's-Length Transfer Pricing (transfer pricing guidelines) came into effect on 30 December 2004.

OECD Guidelines treatment

The tax authority recognizes the OECD Transfer Pricing Guidelines (OECD Guidelines).

Priorities/pricing methods

In accordance with the OECD Guidelines, the pricing methods are as follows: CUP, Resale Price, Cost Plus, Profit Split, Comparable Profit, and other methods prescribed by the Ministry of Finance (MOF).

Transfer pricing penalties

Pursuant to the transfer pricing guidelines, under certain circumstances, a maximum of 200% of the tax shortfall could be imposed if assessed by the tax authority.

Penalty relief

There is currently no penalty relief regime in place.

Documentation requirements

Except for immaterial related party transactions, extensive contemporaneous documentation is required. According to the transfer pricing guidelines, upon filing the annual income tax return, the enterprise must have the transfer pricing report and relevant documentation prepared.

If the enterprise meets the safe harbor threshold and does not prepare a transfer pricing report, the tax authority may still request "other supporting documents" as evidence of the arm's length nature of the intercompany transactions. One example of an "other supporting document" is the parent's or headquarters' transfer pricing report, as long as it does not significantly vary from the concepts presented in the transfer pricing guidelines.

The MOF released a letter ruling[1] to further relax the safe harbor criteria. The rule is applicable for fiscal years ending December 2008 and onwards. The ruling states that the enterprise is not required to prepare a transfer pricing report if any of the following five criteria are met:

- The total annual revenue (including operating and non-operating) of the enterprise does not exceed TWD300 million
- The total annual revenue (including operating and non-operating) of the enterprise exceeds TWD300 million but does not exceed TWD500 million
- The enterprise does not utilize tax credits for more than TWD2 million in a particular year or a loss carry forward for more than TWD8 million for the preceding five tax years to reduce the income tax or undistributed earnings surplus tax

1 Tax Letter Ruling No. 09704555160, issued in November 2008.

Documentation requirements (continued)

- The enterprise, under FHCL or BMAL, has no transactions with any overseas related parties (whether a company or an individual), or the enterprise has no transactions with overseas affiliated companies
- The total annual controlled transactions amount is less than TWD200 million

If the taxpayer does not qualify for the safe harbor, its documentation file must contain:

- 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 Taiwan Company Law
- Any other documents that have significant influence over pricing between the related parties

Documentation deadlines

According to the transfer pricing 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 transfer pricing guidelines. No attachment of the report to the return is required upon filing.

In accordance with the transfer pricing guidelines, upon audit, the enterprise has to provide the NTA with the report within one month. With the approval of the NTA, the submission deadline can 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 with the annual income tax return (pages 18-21) pursuant to the transfer pricing guidelines. The disclosure generally includes:

- The investing structure
- Identification of related parties
- The related party transaction amounts by type
- 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

Taiwan (continued)

Return disclosures/related party disclosures (continued)

The tax authority has issued safe harbor rules for related party transaction disclosures in two rulings.[2] Both rulings provide that the 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 TWD30 million and meets one of the following criteria:

- The enterprise has related parties outside the territory of Taiwan (including the headquarters and branches)
- The enterprise utilizes tax credits for more than TWD500,000 or utilizes loss carry forwards for more than TWD2 million to reduce the income tax or undistributed earnings surplus tax
- The enterprise has a total annual revenue exceeding TWD300 million

Transfer pricing-specific returns

Other than the information specified in the return disclosures/related party disclosures section above, there are currently no transfer pricing-specific returns required by the NTA.

Audit risk/transfer pricing scrutiny

The MOF has issued a ruling[3] that sets forth circumstances under which a transfer pricing audit will be triggered:

- 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
- The enterprise reports significant fluctuations in profit over the transaction year and in the two preceding years
- The enterprise fails to disclose related party transactions in accordance with the related party transaction disclosure requirements
- The 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 transfer pricing guidelines
- The enterprise fails to charge related parties in accordance with the transfer pricing guidelines or charges an abnormal amount
- The 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
- The enterprise has significant or frequent controlled transactions with related parties in tax havens or low tax jurisdictions
- The 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 transfer pricing guidelines

In general, the likelihood of an annual tax audit is characterized as high, as the NTA is conducting corporate income tax audits with a high frequency.

The likelihood that transfer pricing will be reviewed as part of the annual corporate income tax audit is also characterized as high. All the corporate income tax audits may include the request and review of the documentation, as well as related supporting materials. In the past year, there has been increased activity from the NTA, especially with respect to requests to see documentation reports. In particular, companies conducting business through tax havens have attracted more scrutiny, along with those making losses.

2 Tax Letter Ruling Nos. 09404587580 (for tax year 2005) and 09604503530 (for tax year 2006 and onwards).

3 Tax Letter Ruling No. 09404540920, issued on 2 August 2005.

Taiwan (continued)

Audit risk/transfer pricing scrutiny (continued)

The likelihood that the transfer pricing methodology will be challenged during the audit is high, if any of the factors or circumstances listed below are present:

- Whether the tested party is the least complex entity in a transaction
- Why different transactions are tested on an aggregate basis
- Whether the denominator for calculating the profit level indicator is one of the variables in the controlled transaction
- Whether the use of intangible assets by related parties are remunerated accordingly/fairly
- Whether services provided to related parties are remunerated accordingly/fairly
- When the payment terms for accounts receivable are significantly longer between related parties than third parties, or when overseas deferred expenses are significant or out-of-the ordinary. In each case, Taiwan's tax authority will consider these transactions as a type of loan and expect interest income to be paid to the lender
- Whether reasonable fee income is received from acting as the guarantor for a related party

APA opportunity

APAs are available under Articles 23 through 32 of the transfer pricing guidelines. According to Tax Letter Ruling No. 9404540920, under an APA, a tax return is not subject to a transfer pricing audit except under 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 transfer pricing guidelines
- The enterprise fails to follow the provisions of the APA
- The enterprise conceals material facts, provides false information or conducts wrongful acts

Tanzania

Taxing authority and tax law

Taxing authority: Tanzania Revenue Authority (TRA)

Tax law: There is anti avoidance rules applicable in Tanzania are outlined in Section 33 of the Income Tax Act 2004. However, the rules are still largely not enforced, and currently no guidance is available from the TRA on how the rules should be applied in practice.

Relevant regulations and rulings

According to the Income Tax Act 2004, Section 33 applies to transactions with resident and non-resident related parties.

Tanzania's thin capitalization rules are based on a 70% to 30%debt-to-equity ratio as per the Finance Act 2010, which is contained in Section 12 of the Income Tax Act 2004.

OECD Guidelines treatment

In principle, the TRA follows the OECD Transfer Pricing Guidelines (OECD Guidelines).

Priorities/pricing methods

The OECD transfer pricing methods are accepted in practice. It is difficult to find Tanzanian comparables for benchmarking and, as a result, comparables from other countries are relied upon. However, in principle, the TRA is not obliged to accept foreign comparables.

Transfer pricing penalties

While there are no specific transfer pricing penalties, if the Commissioner effects a transfer pricing adjustment which results in an increase in taxable income, and hence tax payable, there is a risk that penalties and interest may be imposed, since penalties are generally imposed for late filing of returns and late payment of tax.

Penalty relief

The tax authority has discretionary powers, confirmed by legislation, to reduce or not impose penalties.

Documentation requirements

Currently, there are documentation requirements but there is no clear guidance on transfer pricing documentation requirements. The corporate tax return requires taxpayers to disclose transactions with foreign related parties, although this information tends to mirror the details already provided in a company's financial statements.

Documentation deadlines

There are no clear guidance on documentation requirements and documentation deadlines. However, it is expected that a transfer pricing study is in place before the related party transactions are conducted or entered into.

Tanzania (continued)

Statute of limitations on transfer pricing assessments

The statute of limitations on transfer pricing assessments is three years from the date of filing the tax return (three months after year end). However, in cases where the tax authorities suspect fraud or intent to evade payment of tax, the three year limitation does not apply.

Return disclosures/related party disclosures

Transfer pricing disclosures are required to be prepared and a summary thereof is required to be submitted with the tax return. This information, along with supporting documentation, should only be presented to the revenue authority upon request for such information, for example under a tax audit. Description and amounts of related party transactions need to be submitted with tax returns.

Transfer pricing-specific return

No detailed information available on the submission of transfer pricing specific returns

Audit risk/transfer pricing scrutiny

No specific procedures have been established by the TRA in relation to transfer pricing audits. Currently, transfer pricing issues are raised during the course of a normal TRA audit. TRA auditors have recently started to request copies of transfer pricing policies and reports.

Unfortunately, no case law on transfer pricing is available for guidance.

APA opportunity

A company may apply in writing to the Commissioner for a private ruling under the normal tax provisions. The company is required to make a full and true disclosure of all aspects of the arrangement relevant to the ruling application. Subject to this, the Commissioner may, by notice in writing served on the company, issue a private ruling setting out his position regarding the application of the Act to the company with regard to the arrangement proposed. Until the legislating of specific transfer pricing rules, it is not clear whether the ruling program will be extended to include APAs.

Thailand

Taxing authority and tax law

Taxing authority: Thai Revenue Department (TRD)

Tax laws, agreements and standards:

- Provisions of the Thai Tax Code (TTC) dealing with exchanges at below-market price:
  - Sections 65 bis (4) and (7)
  - Section 70 ter
  - Section 65 ter (13), (14), (15) and (19)
  - Section 79/3 under the Thai Revenue Code
- Double Tax Agreements between Thailand and other countries
- Standard Accounting No. 37 and 47
- Transfer pricing guidelines: Departmental Instruction No. Paw. 113/2545 (DIP 113)

Relevant regulations and rulings

On 16 May 2002, the TRD issued its guidelines specifically addressing transfer pricing. DIP 113 is written in the form of an internal departmental instruction which provides guidance to tax officials for tax audit purposes.

On 23 April 2010, the TRD issued the Bilateral Advanced Pricing Arrangement (BAPA) guidelines, stipulating the rules governing the BAPA process, including procedures for BAPA applications, level of information required, circumstances under which the TRD may discontinue a BAPA, and taxpayer compliance after a BAPA is concluded.

OECD Guidelines treatment

The Thai transfer pricing guidelines generally follow the OECD Transfer Pricing Guidelines (OECD Guidelines), including allowing all the methods acceptable under the OECD Guidelines. This includes supporting material beyond the scope of the OECD Guidelines. The OECD Guidelines are not binding on the TRD; however, they may be persuasive in areas not addressed by DIP 113.

Priorities/pricing methods

The TRD, by default, accepts TNMM, although they would also accept CUP, Resale Price, Cost Plus and other commercially used methods, such as the Profit Split, as specified in the OECD Guidelines.

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 transfer pricing documentation in place.

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, documentation is an important tool in the defense of transfer pricing, should a tax audit take place.

Thailand (continued)

Documentation requirements

The following elements of contemporaneous documentation are 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
- 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 as and when requested by the TRD by the submission date stipulated in the request letter. However, the taxpayer may request an extension of the submission deadline, if necessary. Such a request must be a letter submitted to the TRD. In general, the maximum extension is one month after the TRD has received the letter.

Statute of limitations on transfer pricing assessments

Under Section 19 of the TTC, the statute of limitations is two years from the date of filing the tax return. This period may be extended to five years upon suspicion of tax evasion or fraud.

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 (SEC) regulations, the related party transactions of companies listed by 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.

Thailand (continued)

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 supporting documentation. It is likely that failure to do so will lead to a tax audit.

Generally, the TRD makes transfer pricing 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 the expenses (to the extent deemed excessive) back to taxable income and pay the resultant additional tax. 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.

In general, the likelihood of an annual tax audit is characterized as medium. The likelihood of transfer pricing being reviewed as part of an audit is characterized as high, as is the likelihood of a challenge of the transfer pricing methodology.

APA opportunity

Given that bilateral APA guidelines were issued in April 2010, TRD actively encourages taxpayers to enter into an APA to obtain a greater degree of certainty and eliminate double taxation, as provided for in double tax treaties between Thailand and other jurisdictions. Currently, TRD is very active in negotiating APAs with Japan, and also actively working to negotiate with other countries.

Since the issuance of the Thai transfer pricing and bilateral APA guidelines in 2002 and 2010, respectively, four bilateral APAs have been concluded between Thailand and Japan to date. Currently, there are fifteen bilateral APAs that are in the process of being reviewed and negotiated.

Turkey

Taxing authority and tax law

Tax authority: Ministry of Finance

Tax law: Transfer pricing is regulated by 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 do not comply with the arm's length principle."

Transfer pricing provisions have been effective since January 2007.

Relevant regulations and rulings

There are two cabinet decrees published in December 2007 and April 2008. Further, two communiqués have been issued by the Ministry of Finance, the "General Communiqué on Disguised Profit Distribution by Means of Transfer Pricing Serial Nos. 1 and 2." Additionally, the Revenue Administration issued guidance in 2009 regarding mutual agreement procedures, and in 2010 regarding disguised profit distribution through transfer pricing.

There are some rulings related to the indirect tax aspect of transfer pricing adjustments. Additionally, there is a court case that highlights the Tax Court's position, with respect to the use of databases for transfer pricing documentation purposes. The Tax Court rejected the use of the Amadeus database for benchmarking studies on the grounds that the database does not contain any Turkish comparables, but only provides information on the companies located throughout Europe, or a "pan-European" comparable set. The court decision is limited to the specific facts of the case; however, it has raised questions about whether it is appropriate to use the Amadeus database in transfer pricing documentation (Rep. of Turkey, Istanbul, 11th Tax Court Decision, E. 2009/3169, K. 2010/2091).

A large number of court cases exist on the subject of disguised profit distribution. They are mostly conflicting, and fail to establish a body of case law binding to all the parties. Moreover, tax auditors recently started transfer pricing inspections focusing on intercompany payments (e.g., royalties, management fees, and cost allocations). At the end of these inspections, tax auditors either reject the deductibility of these payments, claiming that they are, in fact, distributions of profit, or re-group these payments as royalties, so that they may assess withholding taxes. In addition, transfer pricing audits in the pharmaceutical sector continue, and tax auditors often attack the taxpayer's application of the Resale Price or TNMM by using secret comparables.

OECD Guidelines treatment

The preamble to the law states that the provisions of international regulations, especially the OECD Transfer Pricing Guidelines (OECD 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 decrees and communiqués. In addition, the law diverges from the OECD approach on two major points: first, the term "related party" is broadly defined (e.g., it includes all shareholders, regardless of the level of interest), and second, it also applies to domestic related party transactions.

In local transfer pricing rules, there is no reference to business restructurings. However, there are strict provisions in local tax codes regarding anti-abuse rules and the substance-over-form principle.

In general, transfer pricing rules place significant documentation and disclosure requirements on Turkish taxpayers, but during transfer pricing inspections, it seems that fulfilling these requirements does not provide any assurance to taxpayers. It would not be wrong to state that the tax auditors are still not fully aligned with the OECD Guidelines, and that there is a very strong tendency towards using the CUP method despite difficulties in comparability as well as the fact that the regulations endorse all the transfer pricing methods listed in the OECD Guidelines.

Priorities/pricing methods

Taxpayers can use the following methods to prove that the prices charged 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-based methods such as Profit Split, TNMM and other methods determined by the taxpayers can be used.

Turkey (continued)

Priorities/pricing methods (continued)

Taxpayers should select the most appropriate method according to the nature of their business, comparability factors and the availability of relevant information. There is no priority among the traditional methods. However, there is a priority among comparables and if there are internal comparables, they should be analyzed first. Only if there is a lack of internal comparables (or if these internal comparables are not accurate and/or reliable enough), can external comparables then be used.

Transfer pricing penalties

There are no specific transfer pricing penalties, but a disguised income distribution is assumed to exist if the transfer prices applied in related party transactions do not meet the arm's length standard. If such a disguised distribution is assessed during a tax audit:

- For corporate income tax purposes, 20% corporate income tax is recalculated as if the disguised distribution had not been made
- Dividend withholding tax of 15% is calculated over the net amount of the disguised distribution

Additionally, a late payment interest penalty (1.4% monthly) and a tax loss penalty (which is the same as tax loss amount) are charged to the tax payer.

Penalty relief

There are no special provisions for penalty relief. Having transfer pricing documentation does not provide taxpayers with penalty relief or protection. However, it is possible to come to a settlement regarding the tax loss amount and the tax penalty assessed. In settlement negotiations, the taxpayers may assert a good faith defense.

Documentation requirements

Taxpayers are required to submit, as an attachment to the corporate income tax return, a transfer pricing form detailing related party transactions.

In addition to the transfer pricing form, certain taxpayers are required to file an "Annual Transfer Pricing Report." This requirement requires:

- Corporate taxpayers who are registered with the "Large Taxpayers Tax Office" to prepare the report covering all domestic and foreign related party transactions
- Corporate taxpayers having activities in Turkish Free Trade Zones to prepare the report covering domestic transactions conducted with related parties
- Other taxpayers to prepare the report for purposes 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 and its value, functional analysis and economic analysis (selection of transfer pricing method, benchmarking studies and financial analysis).

Documentation deadlines

Documentation must be complete by the date that the taxpayer files its corporate tax return. Upon request by the tax authority, the documentation has to be submitted within 15 days of the request.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations on transfer pricing assessments. Rather, the general rule for the statute of limitations is applicable, which is five years from accrual of the tax payment.

Turkey (continued)

Return disclosures/related party disclosures

Taxpayers are required to disclose information on all related party transactions (domestic and cross-border), regardless of magnitude, in their transfer pricing forms. In addition, taxpayers are required to prepare an annual transfer pricing report which should include the following information in detail:

- 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.

Transfer pricing-specific returns

Taxpayers are required to submit a transfer pricing form detailing related party transactions. This form should be submitted as an attachment to the corporate income tax return.

In the transfer pricing form, the taxpayer has to disclose information on its related parties (both domestic and international) that engage in intercompany transactions with the taxpayer, the nature (purchase of raw materials, licensing of intangible assets, etc.) and amounts of the transactions, as well as the total amount of intercompany transaction(s) priced at each transfer pricing method applied by the taxpayer.

Audit risk/transfer pricing scrutiny

For medium- and large-sized multinational firms, the likelihood of an annual tax audit is high. Most large-sized multinationals are handled by a specific tax office (Large Taxpayers Tax Office), which requests information from these taxpayers throughout the year. Also, taxpayers in sectors including pharmaceuticals, telecommunications, banking and finance, and automotive are often continuously audited. Moreover, most of the tax revenue in Turkey is generated through indirect taxes; thus, companies subject to excise taxes are usually subject to closer examination.

The risk of transfer pricing scrutiny during a tax audit is high, as tax inspectors generally focus on related party transactions. The frequency of transfer pricing audits has increased and these audits are mainly focused on intra-group charges, such as management fees and cost allocations. Tax inspectors often look for whether specific services or projects were provided to the recipient under management services or not (e.g., preparation of a procurement agreement, redesign of compensation policy or legal advisory for a court case). If the service charges are not documented with specificity as to the type of service being provided to the Turkish entity, then they are likely to be treated as royalties (and therefore, subject to withholding tax), based on the claim that industrial or commercial experience is used.

The likelihood of a challenge to the transfer pricing methodology is similarly high. Tax auditors have continued to conduct transfer pricing audits in the pharmaceutical sector, for the active pharmaceutical ingredient prices imported from group companies. In these tax audits, tax auditors have basically rejected the transfer pricing methods applied by the taxpayers and assessed tax and penalties by using the CUP method.

APA opportunity

A bilateral, unilateral or multilateral APA is possible upon the request of the taxpayer. In principle, the agreed-upon method is binding throughout the APA term, which is three years, with the possibility of a three-year extension.

APA applications are allowed only for cross-border intercompany transactions, and the Revenue Administration has concluded only three APAs as of January 2013.

Uganda

Taxing authority and tax law

Taxing authority: Uganda Revenue Authority (URA)

Uganda's transfer pricing legislation is contained in the Income Tax (transfer pricing) regulations 2011, under Sections 90 and 164 of the Income Tax Act, Cap 340, effective 1 July 2011.

Relevant regulations and rulings

Uganda's transfer pricing regulations apply to a controlled transaction if one party to the transaction is subject to tax in Uganda and the other party is located outside of Uganda. Control is deemed to exist if one party to the transaction directly or indirectly controls 50% or more of the voting rights of the other party. In addition, the legislation is worded wide enough to capture transactions between parties without common shareholding where there is a commercially dependent arrangement.

Thin capitalization — Where a non-financial services, offshore related party intends to fund its Uganda operations with interest bearing debt, the debt-to-foreign equity ratio cannot be in excess of 2:1 at any time during a year of income. A deduction is disallowed for the interest paid by the company during the year on that part of the debt which exceeds the 2:1 ratio. Interest deduction will be allowed on all interests generated from local financial assistance.

OECD Guidelines treatment

Uganda regulations adopt the arm's length standard and recognize the OECD Transfer Pricing Guidelines (OECD Guidelines).

Priorities/pricing methods

Uganda accepts the five methods specified in the OECD Guidelines. The most appropriate method is selected based on the circumstances and data available.

Transfer pricing penalties

Specific transfer pricing penalties apply for failure to comply with transfer pricing documentation requirements. These include imprisonment, a monetary penalty or both. In the event an adjustment is raised by the URA, a 20% penalty on the shortfall will be imposed where the provisional tax paid is less than 90% of the actual tax liability. The penalty on late payment is 2% per month on the shortfall and 2% of the gross tax liability for the year when the return is filed late. Other civil and criminal penalties may be applied in specific circumstances.

Penalty relief

The specific penalties have not been finalised, but it is expected that penalties would be the same as if one had not submitted a policy in the first place; i.e., a financial penalty of UGX500,000, and/or six months imprisonment for the directors if convicted.

There would also be penalties in respect of the tax not paid that should have been paid, based on the different Acts — for income tax the penalty is 2 percent per month, and for VAT is 2 percent per month (both compounded).

Documentation requirements

Taxpayers are required to maintain sufficient information and analysis to verify that the pricing, terms and conditions attached to the controlled transactions are consistent with the arm's length standard. However, clear guidance on the format and level of detail required for documentation is not yet available.

Uganda (continued)

Documentation deadlines

Transfer pricing documentation must be in place at the time the income tax return is filed. Failure to adhere to this could result in imprisonment.

Statute of limitations on transfer pricing assessments

This has not yet been specified. The Act gives the URA the authority to make adjustments but does not indicate a time limit for such adjustments. It appears that upon submission of the transfer pricing policy to the URA, the company can negotiate with the URA until an agreement is reached, after which no further adjustments can be made by either party for that financial year

Return disclosures/related party disclosures

The following transfer pricing information needs to be disclosed:

- The group organization structure of the entity
- The details of the transaction under consideration
- The transfer pricing method including the reasons for its selection
- The assumptions, strategies and policies applied in selecting the method
- The application of the method, the calculations made and price adjustment factors considered
- The transfer pricing policy agreement
- Such other background information as may be necessary

Transfer pricing-specific returns

No detailed information available on the requirements of specific transfer pricing submissions.

Audit risk/transfer pricing scrutiny

The URA has stated that it considers transfer pricing to be a major area of tax leakage, and as such, is expected to focus its resources on monitoring cross-border transactions going forward. The URA has already instigated transfer pricing audits under its previous anti-avoidance rules.

APA opportunity

Applications for unilateral and bilateral APAs are allowed.

United Kingdom

Taxing authority and tax law

Taxing authority: Her Majesty's Revenue and Customs (HMRC) publishes its internal guidance on its website and this provides tax payers and their advisers with insight into how HMRC applies the legislation. HMRC also publishes technical notes and Statements of Practice concerning a number of transfer pricing topics.

Tax law: The UK's domestic transfer pricing legislation is now consolidated and set out in Part 4 of the Taxation (International and Other Provisions) Act 2010 (TIOPA 2010). This covers cross border and UK/UK transactions.

Relevant regulations and rulings

The UK does not have a rulings process for transfer pricing outside of an Advance Pricing Agreement (APA).

OECD Guidelines treatment

The OECD Transfer Pricing Guidelines (OECD Guidelines) are effectively imported into the UK transfer pricing rules with the requirement that they be used in its interpretation. Finance Act 2011 included provisions confirming that for accounting periods ending on or after 1 April 2011, the 2010 Version of the OECD Guidelines is to be used in reinterpreting the UK Transfer Pricing Statutory code. In this regard, §164 TIOPA 2010 confirms that the UK's transfer pricing provisions are to be construed in alignment with Article 9 of the OECD Model Tax Convention and its associated transfer pricing guidelines. For these purposes, "transfer pricing guidelines" means all the documents published by the OECD at any time before 1 May 1998 "as part of their Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations" and any other documents designated as such by Treasury order. Currently, as noted above, the 2010 version is to be used for accounting periods ending on or after 1 April 2001, while the 1998 version applies to earlier periods.

Notwithstanding the above, HMRC actively participates in OECD committees and generally tries to apply the most recent OECD guidance and pronouncements to the interpretation of double taxation agreements that are based on the OECD Model Convention.

Priorities/pricing methods

The OECD Guidelines are followed with regard to pricing methods.

Following a tax case in 2010, HMRC more routinely challenges the robustness of external CUP data (particularly in relation to IP licenses), unless there has been analysis around the relevant parties bargaining positions in agreeing to the third party license arrangements.

Transfer pricing penalties

For accounting periods ending on or after 1 April 2008, the provisions for neglect penalties are set out in Schedule 24 Finance Act 2007. These provisions are couched in terms of careless or deliberate inaccuracies, rather than neglect. They are tax geared at up to 100% of the potential lost revenue figure. However, this is 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.

HMRC has recently published revised guidance setting out examples of negligence/carelessness which carry lower tax geared penalties (maximum penalty of 30%), and deliberate inaccuracies where the penalties will be higher (maximum penalty of 70%).

Examples of negligence and carelessness include:

- No attempt to price the transaction
- Shared service centre overseas, cost base, allocation key applied — turnover, modest mark up, but no consideration of benefits test for UK entity
- Policy, otherwise arm's length, not properly applied in practice

United Kingdom (continued)

Transfer pricing penalties (continued)

Examples of deliberate inaccuracies include:

- A clear internal CUP has been omitted with no reasonable technical analysis to support why it has been disregarded
- A cost plus return to a company that has in reality controlled the development of valuable intangibles (as not demonstrable as a sub-contractor to group members)
- Material factual inaccuracies in the functional analysis on which the pricing analysis has been based

Penalty relief

The best protection against neglect penalties is the demonstration of sufficient due diligence with regard to compliance. This is best shown through transfer pricing documentation which fully evidences proper consideration of the application of the arm's length principle in the preparation of the relevant tax return.

Documentation requirements

HMRC's internal guidance sets out what types of documents that it might expect to be kept. This guidance is stated as building upon that published by OECD. The UK guidance divides documentation into primary accounting records, tax adjustment records and, most importantly, evidence. Documentation relating to evidence of compliance with the arm's length principle is to follow the OECD Guidelines, and HMRC has set out some suggestions on what this should or may include, such as:

- An 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 or test the 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 incorrect and non-arm's length pricing. This typically allows a light touch approach to most UK to UK transactions.

Documentation deadlines

Under the current guidance, evidence of arm's length pricing should exist at the time of submission of the relevant tax return.

Statute of limitations on transfer pricing assessments

With effect from 1 April 2010, assessments may be made four years following the end of the relevant accounting period for instances of carelessness, and this is extended to 20 years where there have been deliberate understatements. This is on the basis that the error was not fully disclosed in the body of the tax return or other documents submitted.

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.

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 specific requirements will typically leave prior years open to discovery assessments as there will not have been sufficient disclosure for HMRC to form a view as to compliance with the arm's length principle.

United Kingdom (continued)

Audit risk/transfer pricing scrutiny

HMRC has developed a "Stage Gate" process for transfer pricing enquiries, which is set out in the internal guidance published on its website. This process requires a transfer pricing specialist in HMRC to be assigned where a case team identifies a transfer pricing issue that may necessitate an enquiry. The specialist helps the case team to prepare a risk assessment and a business case for submission to one of two panels before an enquiry is commenced. The responsible panel is required to then sanction or not the opening of an enquiry as the initial stage gate. The panels also then review progress at regular intervals during the enquiry and sign off on all settlement proposals.

HMRC considers that this process should lead to more targeted and focused enquiries on areas warranting specialist transfer pricing resources. The risk of a transfer pricing audit is therefore high where there are red flags present in the accounts or tax return, such as business structure changes, losses, wildly-fluctuating margins, and high value-adding functions. These reasons provide a compelling risk-assessment and business case for the opening of an enquiry.

Under the general risk-based approach to compliance, most MNCs will have had their transfer pricing considered as part of HMRC's general risk assessment process, which will cover all aspects of tax compliance. These risk assessments are undertaken in real time and before the filing of the relevant return. The use of panels and stage gates in transfer pricing enquiries will however mean that only those MNCs rated high risk for cross border matters, thus warranting a transfer pricing enquiry beyond a risk assessment, will be subject to a full enquiry on the submission of the relevant return. As such, the number of actual enquiries has fallen over recent years, but with high risk cases subject to a detailed and extensive enquiry.

In general, the likelihood of an annual tax audit is characterized as low. There is no system for annual tax audits, as HMRC operates a risk assessment approach to audits and enquiries. The likelihood that transfer pricing will be reviewed as part of an audit is characterized as medium. Most MNCs will have transfer pricing considered as part of their overall risk assessment, but only those seen as high risk in this area will then be subject to an audit. However, the likelihood of a challenge to the transfer pricing methodology is characterized as high. Most risk assessments have, at their core, a challenge regarding methods and the appropriateness of their application

APA opportunity

APA opportunities are available and admissions to the program are expected to significantly increase. The legislation governing the APA process is set out in Part 5 of TIOPA 2010. A statement of practice governing the application of the statutory provisions for APAs was first published in 1999, and a revised statement was published at the end of 2010 — SP2 2010. For APAs to be admitted to the program, there needs to be sufficient complexity in approaching compliance with the arm's length standard. Limited resources have historically kept the UK to around 20 new admissions to the program each year, although additional resources in 2011 confirm a stated intention to increase this number substantially and fully 35 were agreed in that year.

The UK also operates a thin-capitalization agreement system, which uses the APA legislation. These are known as Advance Thin Cap Agreements (ATCAs). Agreements in this regard are typically couched around covenants similar to that of third-party lenders.

The UK operates a risk-based approach to enquiries and in relation to compliance obligations. Most MNCs will have had a risk assessment in the UK and may approach HMRC for a discussion around the risks associated with their transfer pricing on a prospective basis. Historically, agreements reached following such discussions were couched solely in terms of risk (i.e., transfer pricing seen as low risk). More recently, following changes to their procedures at the end of 2011, risk assessment agreements may now also confirm the method used in determining or testing pricing as compliant with the arm's length principle. Although still short of an APA and its contractual terms, such agreements nevertheless provide upfront comfort as to the meeting of compliance obligations and the robustness of intra-group pricing. Such discussions are encouraged by HMRC.

United States

Taxing authority and tax law

Taxing authority: Internal Revenue Service (IRS) is responsible for ensuring that taxpayers meet the requirements of the law.

Tax law: Internal Revenue Code (IRC) §§482, 6038A, 6038C, 6662 and 7701(o); regulations adopted pursuant to those sections.

Relevant regulations and rulings

- Treasury Regulations (Treas. Regs.) §§1.482, 1.6662, 1.6038A, 1.6038C.
- Revenue Procedure (Rev. Proc.) 99-32, Rev. Proc. 2006-9, Rev. Proc. 2006-54,and Rev. Proc. 2007-13.
- In April 2007, cost sharing arrangement (CSA) buy-ins were designated by the IRS as a "Tier I" issue, and thus susceptible to intensified audit scrutiny. While the IRS's tiering process was officially eliminated in August 2012, it was replaced by knowledge networks known as Issue Practice Groups (IPGs) for domestic issues and International Practice Networks (IPNs) for international issues. CSA buy-ins are expected to continue to be an issue upon which the IPNs will focus.
- A Coordinated Issue Paper (CIP) was released on 27 September 2007, providing internal IRS guidance for examiners in developing CSA exam positions. However, the CIP was withdrawn on 26 June 2012.

The CSA regulations were issued in final form on 16 December 2011. Additional temporary and proposed regulations were published on 19 December 2011. The final CSA regulations closely follow the temporary CSA regulations that were issued in January 2009, and the additional temporary and proposed regulations make only minor changes to the final regulations. The final regulations provide the IRS with the discretion to make periodic adjustments and formalize other proposed requirements for compliance.

Finalized services regulations were issued on 31 July 2009. These regulations provided for only minor modification of the temporary regulations that had been in effect as of 1 January 2007. The new services regulations explicitly require stock-based compensation to be considered as part of total costs. Guidance regarding the list of "specified covered services" as defined in Treas. Reg. 1.482-9(b)(3)(i) can be found in Rev. Proc. 2007-13.

OECD Guidelines treatment

The IRS considers its transfer pricing laws and regulations to be wholly consistent with OECD Transfer Pricing Guidelines (OECD Guidelines). For domestic purposes, 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, the OECD Guidelines are relevant 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 CUT, CPM, Profit Split, and unspecified methods. For services, the IRS accepts the Services Cost, Comparable Uncontrolled Services Price, Gross Services Margin, Cost of Services Plus, CPM, Profit Split, and unspecified methods. For CSAs buy-ins, the IRS accepts the CUT, Income, Acquisition Price, Market Capitalization, Residual Profit Split and unspecified methods.

The regulations provide a "best method rule" for determining the appropriate method to be applied by the taxpayer for each intercompany transaction.

United States (continued)

Transfer pricing penalties

Pursuant to IRC §6662, taxpayers may be liable for either a 20% or 40% penalty for an underpayment of tax attributable to a substantial or gross valuation misstatement, respectively. The penalties are calculated as a percentage of the underpayment, or the penalty may apply to a valuation misstatement. There is no penalty for failure to have documentation; however, documentation may help avoid penalty.

Penalty relief

Penalties may be avoided by establishing reasonable cause and good faith via the preparation of documentation of the taxpayer's application of IRC§482 as described below.

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 the penalties described above. The existence of documentation need not be either disclosed on, or provided with, the return.

For penalty avoidance purposes, a taxpayer is considered to have satisfied the documentation requirement if it maintained certain documentation (further described below) that substantiates the taxpayer's assertion that it reasonably concluded that, given the available data and the applicable pricing methods, the method (and its application) provided the most reliable measure of an arm's length result under the principles of the best method rule.

The principal documents required by the regulations are:

- An overview of the taxpayer's business and an analysis of the 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 that were made
- 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
- 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 a timely filed US 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 in the US, which is three years from the later of either the tax return due date or the date the return was actually filed. The statute is extended to six years for substantial understatements of income. There is no statute of limitations for fraud-related adjustments.

Most treaties with trading partners provide the IRS access to closed years in order to provide relief from double taxation pursuant to a mutual agreement procedure

United States (continued)

Return disclosures/related party disclosures

Under new regulations issued in 2010, certain taxpayers must also disclose their uncertain tax positions (UTPs) on Schedule UTP, and provide information such as the ranking of the positions by the sizes of their reserves, and concise descriptions of the tax positions. There is a phase-in period so that by 2014, the UTP disclosures will be required by corporations with assets of USD10 million or more.

Transfer pricing-specific returns

Taxpayers are required to file Forms 5471, 5472, and 8865 regarding transactions with related parties.

Audit risk/transfer pricing scrutiny

The likelihood of an annual tax audit is dependent on the facts and circumstances (i.e., an individual's audit risk is low, while risk would be medium with regard to a corporation that is a member of a multinational enterprise). The introduction of high risk transactions increases the likelihood of a tax audit.

In general, the risk of transfer pricing scrutiny during a tax audit is high. Transfer pricing is extensively regulated in the US and the IRS has recently taken a number of administrative steps to increase its ability to focus on international transactions, with particular emphasis on transfer pricing. New positions have been created within the IRS's Large Business and International Division for a "Deputy Commissioner (International)" and a "Director of Transfer Pricing Operations" and a significant number of transfer pricing professionals have been hired. As a result of this emphasis, documentation is frequently requested at the outset of any examination of taxpayers transacting with foreign related parties.

The overall likelihood that the transfer pricing methodology will be challenged during the initial stages of any audit, where there are international transactions, is high. However, experience has shown that well-reasoned documentation reduces the likelihood of further scrutiny.

APA opportunity

Taxpayers may request unilateral, bilateral or multilateral APAs. The APA process is administered by the IRS's Advance Pricing and Mutual Agreement (APMA) Program. Guidance regarding APAs can be found in Rev. Proc. 2006-9. The revenue procedure has strict case management procedures, disclosure requirements, and detailed guidance regarding the submission and processing of APA requests. Additional competent authority guidance is provided in Rev. Proc. 2006-54. Updates to both Revenue Procedures are expected to be issued sometime in 2013.

Uruguay

Taxing authority and tax law

Taxing authority: General Tax Direction (Dirección Nacional Impositiva — DGI)

Tax law: Income Tax Law and Regulations

Relevant regulations and rulings

Transfer pricing documentation requirements have been in effect in Uruguay since 1 July 2007 (following Law #18.803), but they were not regulated until 26 January 2009 with the publication of Decree # 56/009. Additional modifications were made by Decree #392/009.

DGI issued Resolution # 2.084/009 on 1 December 2009 (with the modifications introduced by Resolution # 819/010 and #2.098/009), which defined concepts and established requirements for the transfer pricing report.

OECD Guidelines treatment

Uruguay is not an OECD member, and the OECD Transfer Pricing Guidelines (OECD Guidelines) are not mentioned in Uruguay's Income Tax Law and Regulations. As transfer pricing practice is relatively new in Uruguay, there is no background on the regard, if any, that is given to OECD Guidelines.

Priorities/pricing methods

The law establishes that in order to determine the market value, one of the following methods should be applied: CUP, Resale Price, Cost Plus, Profit Split and TNMM. For the application of the transfer pricing methods, the comparability analysis and justification for such prices may be performed on the local or foreign party as the tested party. If the foreign party is the tested party, certified documented evidence will be required in the country of origin, issued by a firm of well-known independent auditors, duly translated and authenticated.

Uruguayan law does not prioritize methods. However, for transactions involving imports or exports of goods with well known prices in transparent markets, those prices must be used. If the transactions are performed through international intermediaries who are not the final consignees of the goods, the applicable price is the price in the respective market. The price to be used is the one in the respective market on the day of the shipment or, if it was registered in the Mercantile Office, the price on the day of the contract.

Transfer pricing penalties

The penalty for those who breach the formal requirements established in the transfer pricing framework (i.e., fail to timely file a transfer pricing report and tax return) will be applied on a graduated scale, in accordance with the severity of the breach. The maximum fine could amount to up to roughly USD230,000.

When there is an underpayment due to transfer pricing, the taxpayer is penalized with a tax omission fine that is 5% of the amount of the underpayment, if it is paid before the fifth day after the deadline, 10% if it is paid between the five and 90 days after the deadline, and 20% if it is paid more than 90 days past the deadline. In each case, corresponding surcharges are added.

It is important to note that if the DGI requires the transfer pricing study and a company does not file it, the DGI can suspend the certificate that shows that the taxpayer fulfilled its tax obligations. The immediate consequence of this is that it bars the taxpayer from being able to import goods or obtain a bank loan.

Penalty relief

There are currently no provisions for reductions in penalties.

Uruguay (continued)

Documentation requirements

Only those taxpayers that fall under one of the following categories are obliged to file the transfer pricing study and the transfer pricing annual return (Form 3001) with the tax authorities:

- The total amount of the taxpayer's transaction(s) subject to the transfer pricing rules is higher than 50 million indexed units (approximately USD5 million)
- The DGI requests that the taxpayer file the report and the information return

However, all companies who have dealings with related companies must prepare a transfer pricing study.

Documentation deadlines

The income tax return is due within four months of the close of the fiscal year end. In that filing, the company must disclose whether or not a transfer pricing adjustment is required to achieve an arm's length result in its transactions with both related parties and unrelated parties located in tax havens. In such cases, the transfer pricing analysis should be performed by that time, even though the documentation is not due until nine months after the fiscal year end.

The deadline for providing the required documentation is nine months after the end of the fiscal year if:

- The transfer pricing annual return (Form 3001), including detailed information regarding all cross-border intercompany transactions and all transactions with unrelated entities located in tax havens, has been filed

Transfer pricing study (Regs. 2.084/009) is to be filed along with Form 3001.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations for transfer pricing adjustments; rather, the general regime applies. Assessments can be raised five years after the company's accounting period ends, but this is extended to 10 years where the difference is due to fraudulent or negligent conduct by the taxpayer.

Return disclosures/related party disclosures

Taxpayers are required to file:

- The transfer pricing study, including the key elements such as the functions and activities of the company, risks and assets used, the methods used, the interquartile range, details of the comparables, etc.
- Annual tax return Form 3001

Transfer pricing-specific returns

Only those taxpayers who are obliged to file the transfer pricing study must file the transfer pricing annual return (Form 3001) to the tax authorities.

In that annual return, the company must provide information about the related party transactions.

Audit risk/transfer pricing scrutiny

The likelihood of an annual tax audit in general is medium, while the likelihood that transfer pricing will be reviewed as part of that audit is high. The likelihood that, if transfer pricing is reviewed as part of the audit, the transfer pricing methodology will be challenged is high. Transfer pricing practice is new in Uruguay; therefore, there isn't a lot of background on audit practices. However in the cases known, the taxing authority has challenged the methodology and the company comparable set

APA opportunity

Currently, no APA regime is specifically published in Uruguay, but the tax authority recently signed the first one.

Venezuela

Taxing authority and tax law

Taxing authority: Venezuelan Tax Administration (National Integrated Service of the Customs and Tax Administration — SENIAT)

Tax law:

- 2001 Master Tax Code, Chapter III, Articles 109 to 111, and 220 to 229
- 2001 Venezuelan Income Tax Law, Chapter III, Articles 111 to 170
- 2007 Income Tax Law Reform, Article 118 — inclusion of thin capitalization rules

Relevant regulations and rulings

Administrative Order N°SNAT/2010/0090, issued by the SENIAT, was published in Official Gazette N°39,557 of 20 December 2010. It establishes the procedure for the calculation and use of the arm's length range for transfer pricing purposes. The main considerations are as follows:

- The use of the interquartile range as the arm's length range
- In case the price or amount or profit margin is within the interquartile range (arm's length range), the tax administration will deem it as agreed to by independent parties. If, however, it is not within the interquartile range, the taxpayer must take the median of the range as the arm's length price

In February 2007, a partial reform of the Income Tax Law and rules on thin capitalization were published in the Official Gazette No.38.628. The thin capitalization rules apply, as of fiscal year 2008, to Venezuelan taxpayers or Venezuelan permanent establishments holding debt (controlled debt) of companies or individuals who are considered related according to Title VII, Chapter III of the transfer pricing rules. The main inclusions are as follows:

- Taxpayers will have limited possibility to deduct interest expenses resulting from related parties' loans, when the average amount of debt (with related and unrelated parties) exceeds the average amount of equity for the respective fiscal year
- The amount by which the debt exceeds the taxpayer's equity will be treated as equity for income tax purposes

OECD Guidelines treatment

The 2010 OECD Transfer Pricing Guidelines (OECD Guidelines) are applicable as a supplement to Venezuelan laws for topics not covered there under.

Priorities/pricing methods

The acceptable methods are OECD methods: CUP, Resale Price, Cost Plus, Profit Split and TNMM. In Venezuela, the CUP method takes priority over others.

Transfer pricing penalties

When failing to apply the transfer pricing methods prescribed by law, the taxpayer faces fines from 300 to 500 tax units.[1] In addition, there is a fine ranging from 25% to 200% of the omitted tax amount. If there is a transfer pricing assessment, late payment interest may also be added to these amounts. A failure to file the transfer pricing information return (PT-99) will trigger a penalty of 10 to 50 tax units.

1 2010 Tax Unit = BSF65/unit.

Venezuela (continued)

Penalty relief

If a taxpayer applies a legally sanctioned 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 procedures and assessments, but there is no legal provision supporting it.

Documentation requirements

Effective since 2002, taxpayers are required to prepare and maintain extensive supporting and contemporaneous documentation. The documentation requirements include details on the 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. For taxpayers whose fiscal year ends in December, it is mandatory to file the transfer pricing information return (PT-99) during June. In other cases, the filing deadline will be six months after the fiscal year end.

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 taxpayer fails to comply with the filing of any tax return, including returns for income tax, VAT or customs duties. However, the information return (PT-99) is not considered a tax return for penalty purposes.

Return disclosures/related party disclosures

A controlled party's PT-99 must be filed during the six months immediately following the close of each tax year. The PT-99 form is available on the tax authority's website (www.seniat.gob.ve).

Transfer pricing-specific returns

A controlled party's PT-99 must be filed during the six months immediately following the close of each tax year. The PT-99 form is available on the tax authority's website (*www.seniat.gob.ve*).

Venezuela

Audit risk/transfer pricing scrutiny

SENIAT has been very active in transfer pricing audits lately. It has added transfer pricing as a relevant topic to be audited during general tax audits. Thus far, audits have been conducted on taxpayers irrespective of industry. Additionally, audits have targeted service providers.

SENIAT has publicized the issuance of several transfer pricing assessments to multinational corporations in diverse industries, and the assessed amounts have ranged from USD5 million to USD67 million.

Tax audits are organized by industry and the taxpayers selected are those that:

- Have inconsistencies between the transfer pricing report, income tax return and the transfer pricing information return
- Use non-updated financial information from comparable companies up to June of the fiscal year subject of the study
- Have profit level indicators below the interquartile arm's length range
- Show lower operating margins compared with operating margins from prior years

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.

During 2012, one of the relevant considerations in the transfer pricing review process has been the period required to submit the information requested, which currently ranges between three to five business days.

The likelihood of an annual tax audit in general is high, as is the likelihood that transfer pricing will be reviewed as part of the audit. However, the likelihood that if transfer pricing is reviewed as part of the audit, the transfer pricing methodology will be challenged, is low.

APA opportunity

Unilateral and bilateral APAs are available to the extent that they are carried out with nations that have concluded double taxation treaties with Venezuela (refer to Income Tax Law Articles 143 to 167, and Master Tax Code Chapter III, Articles 109 to 111 and Articles 220 to 229).

Vietnam

Taxing authority and tax law

Taxing authority: General Department of Taxation (GDT)

Tax Law, Decrees and Circulars:

- Article 37 of the Law on Tax Administration[1] articulates the arm's length principle, which empowers tax authorities to adjust the value of purchases, sales, exchanges and accounting records of goods and services of taxpayers, if that value is not in accordance with market prices. The arm's length principle is also included in Article 26 of Decree 85/2007[2] and Article 21, Clause 2.b of Circular 28/2011/TT-BTC (Circular 28).[3]
- The Amended Law on Tax Administration No. 21/2012/QH13 was enacted on 20 November 2012 and will take effect on 1 July 2013 (Amended Law). It was officially issued on 3 December 2012.
- Detailed transfer pricing regulations are included in Circular 117/2005/TT/BTC (Circular 117)[4] and Circular 66/2010/TT/BCT (Circular 66).[5] Circular 66 provides Guidelines on the calculation of market prices in business transactions between related parties.

Relevant regulations and rulings

Circular 117 is still applicable to transactions that took place in financial years 2006–2009. Circular 66 governs transactions between related parties which take place from 1 January 2010 onwards.

Circular 66 sets forth formal and comprehensive guidelines on many significant issues related to the interpretation and application of the arm's length principle. In addition to articulating the arm's length principle, Circular 66 provides definitions of market prices, material differences and associated parties; lists acceptable transfer pricing methods; and addresses the "most appropriate method" rule. In addition, it provides guidance on the arm's length range, benchmarking principles and acceptable databases and reiterates the two mandatory transfer pricing compliance requirements — preparation and submission of the annual declaration of related party transactions, and maintenance and submission (if requested) of the contemporaneous transfer pricing documentation.

To underscore the Vietnam tax authorities' focus on transfer pricing, various official letters from provincial tax authorities requesting companies to submit their annual transfer pricing declaration forms and contemporaneous transfer pricing documentation were issued since the issuance of Circular 66.[6] In July 2011, the GDT published a survey on transfer pricing on its official website. The purpose of the survey was to collect information, data, suggestions and comments on the implementation of the current Vietnam transfer pricing regulations (Circular 66) and seek recommendations on how to improve transfer pricing policy going forward. The respondents were taxpayers, local tax departments and local tax officers. The survey shows the tremendous effort of the Vietnam tax authority in enforcing and developing current transfer pricing regulations in the wake of the transfer pricing audits of some companies in Vietnam. The queries in the survey re-emphasize the tax authority's focus on the following:

- Loss making entities in years 2006-10
- Compliance with the transfer pricing disclosure form and documentation from 2006-10
- Nationality of related parties

1 This Law was enacted by National assembly on 29 November 2006 and effective from 2007.

2 This Decree was issued by the Government on 7 June 2007, stipulating in detail the implementation of a number of Articles of the Tax Administration Law.

3 This Circular was issued by the Ministry of Finance on 28 February 2011, providing guidelines for the implementation of Decree 85/2007 and Decree 106/2010/ND-CP.

4 This Circular was issued by the Ministry of Finance on 19 December 2005.

5 This Circular was issued by the Ministry of Finance on 22 April 2010 and supersedes Circular 117.

6 Official Letter 3304/TB-CT, issued by the Ho Chi Minh City (HCMC) Tax Department on 15 September 2010; Official Letter 17825/CT-KT1, issued by the Hanoi Tax Department on 29 September 2010; Official Letter 6443/CT-TB, issued by the Vung Tau Tax Department on 21 October 2010; and Official Letter No. 3278/TCT-CS issued by the Ca Mau Tax Department on 13 September 2011

Vietnam (continued)

Relevant regulations and rulings (continued)

As a result of regular tax and transfer pricing examination and inspection in 2011, the Ho Chi Minh City (HCMC) Tax Department identified 10% of taxpayers, or 17,000 companies, in the territory as being highly likely to use transfer pricing for tax evasion. It was reported that a list of foreign-invested companies suspected of using transfer pricing to evade taxes was forwarded to a specialized unit of the Police Department for further tax evasion investigation.[7]

The GDT has reported that 923 loss-making companies were audited in 2011. Most tax/transfer pricing audits were conducted in large provinces and cities including Hanoi, Ho Chi Minh, Binh Duong, Lam Dong, Thanh Hoa, Quang Ninh, Bac Ninh, Khanh Hoa, An Giang, Vinh Phuc, Ba Ria-Vung Tau, Gia Lai and Ha Tinh. As a result of such audits, the tax inspectors disallowed reported losses of VND4.4 trillion (approximately USD209 million) and collected additional taxes and penalties amounting to VND1.65 trillion (approximately USD78.5 million), four times higher than those in the prior year.[8]

The massive transfer pricing enforcement efforts in 2011 continued in 2012. In a conference organized by the Investment and Trade Promotion Centre and the People's Committee of Ho Chi Minh City on 5 April 2012, the GDT shared the following information:[9]

- In February 2012, a specialized transfer pricing team was established at the GDT level to administer the transfer pricing compliance of taxpayers with related party transactions. In the near future, large provinces are also expected to have a specialized transfer pricing team.
- The GDT also shared its transfer pricing inspection plan for the year 2012, where 7,800 companies with related party transactions are targeted, especially foreign-invested companies with significant volume of related party transactions, under suspicion of transfer pricing manipulation, in consecutive loss making positions, with significant amount of tax due, not audited or inspected or entitled to tax incentives.

On 21 May 2012, Vietnam's Ministry of Finance (MOF) issued Decision No. 1250/QD-BTC approving the National Action Plan for 2012-2015, which covers, among others, the following core measures:

- Amend and improve the transfer pricing legal framework by revising the existing transfer pricing regulations and including new specific rules/provisions governing related party transactions
- Enhance and develop processes and procedures, including risk analysis and assessment applicable to transfer pricing audits
- Develop and enhance the tax authority's database on profit margins of independent companies operating in high transfer pricing risk industries and market prices of products and services as basis for transfer pricing analysis and tax/transfer pricing adjustments by the tax authority
- Identify and investigate typical transfer pricing manipulation models by taxpayers in Vietnam, evaluate initial results of national transfer pricing administration, and address areas of improvements
- Intensify further transfer pricing audit activities by ensuring that at least 20% of the total number of annual tax audit cases are devoted to transfer pricing
- Develop and prepare transfer pricing training materials for tax officers with an emphasis on international best practices and practical tax/transfer pricing audit experience in Vietnam; and conduct comprehensive transfer pricing trainings for tax officers at both central and local levels
- Implement international cooperation projects to enhance the tax authority's capacity for transfer pricing administration using best practices and national tax/transfer pricing audit experience
- Coordinate among ministerial agencies and cooperate with foreign tax authorities in administering and implementing appropriate measures against transfer pricing abuse

7 Tuoi tre newspaper dated 28 July 2011 and Ernst & Young Vietnam's TP alert in August 2011 entitled "Vietnam's General Department of Taxation Intensifies Focus on Transfer Pricing."

8 Websites: http://www.baohaiquan.vn/Pages/Can-sua-doi-Luat-de-nang-cao-hieu-luc-phap-ly-trong-chong-chuyen-gia.aspx, http://vov.vn/Home/Nam-2011-so-doanh-nghiep-bi-thanh-tra-chuyen-gia-tang-10-lan/20121/196101.vov and Ernst & Young Vietnam's TP alert in January 2012 entitled "Transfer pricing regulatory enforcement — Vietnam tax authority continues to intensify audits in 2012."

9 Ernst & Young Vietnam's TP alert in May 2012 entitled "Vietnam Tax Authority reveals 2012 Transfer Pricing inspection plan."

Vietnam (continued)

Relevant regulations and rulings (continued)

- Develop and implement a national communication strategy to increase awareness of Vietnamese transfer pricing regulations and compliance policies for taxpayers, tax officers and state agencies
- Implement these measures through the GDT

Furthermore, the EU Commission, together with the OECD and World Bank, are implementing a project assisting Vietnam to improve the tax regulations and tax administration for international taxation focusing on transfer pricing for the period 2012-13 (EU Project). The aim of this project is to support the Vietnamese tax officers by equipping them with the knowledge, appropriate tools and practical skills necessary to effectively implement and enforce Vietnamese transfer pricing regulations. The ongoing EU Project covers the following two components:

- Capacity building for a core group of future transfer pricing specialists focusing on the overall legislative and policy framework, including training activities and foreign study tours for experience
- Regional workshops for tax officers focusing on operational aspects of transfer pricing administration

In addition to the above, tax authorities at both central and local levels as well as the General Economic Inspection Department of the Government Office have conducted tax/transfer pricing audits in different large provinces and cities such as Ho Chi Minh City, Binh Duong, Dong Nai and Ba Ria — Vung Tau. In such tax/transfer pricing audits, the tax authorities challenged the pricing of related party transactions, adopted transfer pricing methods, and requested the submission of annual transfer pricing declaration forms and contemporaneous transfer pricing documentation. In many non-compliance cases where taxpayers failed to provide documentation, tax authorities proposed transfer pricing adjustments, which created tax payable and imposed penalties based on secret comparables.

Recent reports mentioned that in 2012, the HCMC Tax Department has inspected more than 1,300 companies, including local and foreign companies that reported losses, among others. As a result, the tax inspectors collected additional taxes of around VND2.5 trillion (approximately USD119 million) and disallowed deduction of around VND78 billion (approximately USD3.7 million).[10]

During the audits, the Vietnam tax authorities have commonly challenged and adjusted pricing for the following transactions:

- Tangible transactions
  - Higher price for purchase of materials, machinery and equipment[11]
  - Low price for sale of goods
- Intangible transactions
  - Unreasonable technology transfer and trademark fees
- Others
  - Significant loan interest
  - Low toll fee[12]

Furthermore, the tax authorities noted some inadequacies in the documentation provided by the taxpayers; i.e., the documents provided/made available by taxpayers were seen as not compliant with Circular 66, specifically the sections relating to company analysis, industry analysis, benchmarking, etc. Notably, though tax regulations allow valid invoices and inter-company agreements as supporting documents for corporate income tax or VAT purposes, the same are not as sufficient as or equivalent to the required transfer pricing documentation under Circular 66.

These recent developments with respect to enhanced legislation, the tax authority's capacity building and the increasing transfer pricing audits are evidence that transfer pricing continues to be the national focus of Vietnam's tax authority for the period 2012-15.

[10] Saigon Times Newspaper dated 6 December 2012 entitled "16 FDI firms with transfer pricing signs inspected."

[11] Saigon Times Newspaper dated 6 December 2012 entitled "16 FDI firms with transfer pricing signs inspected."

[12] Website: http://www.baohaiquan.vn/Pages/Can-sua-doi-Luat-de-nang-cao-hieu-luc-phap-ly-trong-chong-chuyen-gia.aspx

Vietnam (continued)

OECD Guidelines treatment

Circulars 117 and 66 are generally based on the OECD Transfer Pricing Guidelines (OECD Guidelines). How the GDT will apply the OECD Guidelines in interpreting the principles under the Circulars remains to be seen during the first few years of implementation of the Circulars.

Priorities/pricing methods

Circular 66 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, although recent practice shows that the Vietnam tax authority has a growing preference for the CUP method.

Transfer pricing penalties

The tax authorities may make adjustments to corporate income tax liability 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 Circulars and failure to produce required documentation within 90 days of the date of request by the tax authority

Administrative penalties ranging from VND500,000 to VND5 million may be imposed for failure to comply with transfer pricing documentation and disclosure requirements, and an interest penalty of 0.05% of the outstanding tax due may also be imposed if a transfer pricing adjustment is made. Under the recently issued Amended Law, this interest penalty will increase to 0.07% per day if outstanding tax due is more than 90 days. Additional penalties of up to three times the outstanding tax due may be imposed if there is a finding of tax evasion or fraud.

Vietnamese law allows for criminal proceedings against taxpayers if it is proven that there is a significant tax evasion. According to the Vietnamese Criminal Law, if the underpaid tax amount is VND100 million (approximately USD5,000) or more, the taxpayer may be subject to tax penalties under criminal proceedings.

Penalty relief

Penalties may be mitigated by timely and adequate disclosure of the related party transactions on forms GCN-01/TNDN (Appendix 1-GCN/HTQT of Circular 117) and GCN-01/QLT (Appendix 1-GCN/CC of Circular 66), and by the preparation and timely production of transfer pricing documentation.

Documentation requirements

Contemporaneous documentation is required by Circular 66. 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 purposes, a taxpayer is considered to have satisfied the documentation requirement if it maintained documentation showing the taxpayer reasonably concluded that, given the available data and the applicable pricing methods, the method (and its application) 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 transactions 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

Vietnam (continued)

Documentation requirements (continued)

- Documents and reports on the process of development, business strategy, projects, production, business or investment plans
- 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 written request. In case enterprises have plausible reasons, a one-time, 30-day extension may be granted. The transfer pricing documentation must be submitted in Vietnamese.

Statute of limitations on transfer pricing assessments

There is no statute of limitations that specifically applies to transfer pricing in Vietnam. Hence, general principles on statutes of limitation apply:

- For violations of tax procedures, administrative penalties can be imposed within two years from date of commission of the violation to the date of discovery of the violation and recorded in writing.
- For acts constituting tax evasion or tax fraud not serious enough for penal liability examination, acts of late tax payment and declaration of inadequate tax amounts, administrative penalties may be imposed only within five years from the date of commission of the violation to the date of discovery of the violation and recorded in writing.

"Date of commission" is the statutory deadline for submission of the required tax return or the date the tax authority issues a tax refund, exemption or reduction decision in case of tax refund, exemption or reduction. Note that beyond the above periods (two and five years), a violator will no longer be subject to the imposition of the above-described administrative penalties but will still be asked to pay the insufficient, evaded or fraudulent tax amount. Hence, it can be said that the statute of limitations does not apply with respect to the recovery or collection of taxes. However, this will change effective 1 July 2013, when the Amended Law takes effect. Under it, the statute of limitation applicable for tax collection is limited to 10 years.

Vietnam (continued)

Return disclosures/related party disclosures

Taxpayers are required to file Form GCN-01/TNDN (under Circular 117) and Form GCN-01/QLT (under Circular 66) 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 close of the fiscal year.

Transfer pricing-specific returns

Please see discussion "Return disclosures/related party disclosures" above.

Audit risk/transfer pricing scrutiny

The risk of a general tax audit is characterized as high, while the risk that transfer pricing will be reviewed as a part of the general tax audit is medium to high. The risk that the transfer pricing methodology will be challenged if transfer pricing is a subject of the general audit is characterized as low to medium.

APA opportunity

The Amended Law introduces and serves as legal basis for APAs in Vietnam for the first time.

Under the Amended Law, an APA is defined as an agreement between the tax authority and taxpayer for a period of time which sets the basis of tax calculation, pricing methods or arm's length prices of related party transactions prior to the submission of tax and customs declaration dossiers, where appropriate. Under the same law, unilateral, bilateral or multilateral APAs are allowed. Bilateral and multilateral APAs will be applied with tax authorities in countries and territories that have signed double tax treaties with Vietnam to avoid double taxation and prevent income tax evasion. Detailed regulations on APA are expected to be issued in 2013.

As the APA concept is relatively new in Vietnam, the GDT and MOF launched a pilot APA program with a few large companies operating in Vietnam so that the MOF could gain experience and formulate an appropriate approach before promulgating detailed APA implementing regulations. Pursuant to the pilot project, the MOF and GDT are negotiating a bilateral APA with a large multinational company.

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EYG No. CS0077

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