Worldwide Transfer Pricing Reference Guide

2014

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Worldwide transfer pricing 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 *EY Worldwide transfer pricing reference guide* is a tool designed to help international tax executives quickly identify transfer pricing rules, practices and approaches. These various approaches must be understood in order for a company to carry out both compliance and planning activities. The information included in the guide now covers more than 110 countries and territories in which EY offers Transfer Pricing services.

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; frequency of tax audits and transfer pricing scrutiny by the tax authority; opportunities for advance pricing agreements (APAs); and expected reaction to the OECD Report on BEPS.

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 EY 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). EY also annually produces *The Worldwide Corporate Tax Guide*; *The Worldwide Personal Tax Guide*; and the *Worldwide VAT*, *GST and Sales Tax Guide*.

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The content is current as of 28 February 2014 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.

OECD Guidelines treatment: consideration given by the taxing authority to the OECD *Transfer Pricing* 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.

Frequency of tax Audits/transfer pricing scrutiny: discussion of the level of frequency 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.

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

Expected reaction to OECD Report on BEPS: perspective on initiated or expected reactions in the respective legislation to the OECD Report on BEPS.

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.

BEPS (Base Erosion and Profit Shifting)
On 12 February 2013 the OECD released its report *Addressing Base Erosion and Profit Shifting* followed by the release of an Action Plan on 19 July 2013. Thus, the OECD aims to develop approaches for addressing government concerns about multinational companies (MNCs) reducing their tax liability through BEPS activity.

CFC (controlled foreign corporation)
A subsidiary and member of a 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 those 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. This 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 consists of 28 member states.

EUJTPF (EU Joint Transfer Pricing Forum)
The EU Joint Transfer Pricing Forum consists of representatives of governments and the private sector, which 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 for 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 profits 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

Relevant regulations and rulings

- Ministry of Finance Regulation no. 1 on transfer pricing, dated 11 February 2002
- Instruction no. 5, dated 30 January 2006 of the Ministry of Finance on income tax law
  - Section 6 — transfer pricing definition; transfer pricing adjustments following the OECD Guidelines and APA negotiation with the Transfer Pricing Committee
- Instruction 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

New transfer pricing legislation is expected to be introduced in 2014. The new legislation is aimed at providing a more comprehensive regulatory framework on transfer pricing.

With the introduction of the new legislation it is expected that the burden of proof will be shifted from the tax administration to the taxpayer. Moreover, Government is currently in consultation with the business community on the contents of the documentation which general follows the Masterfile concept.

Finally, the new law is expected to make reference to the latest OECD Guidelines and allow the use of any of the OECD transfer pricing methods, to the extent a taxpayer can support the method applied.

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 also stipulated in the same guidelines that if the tax auditor considers that the intercompany pricing is likely to be not in line with the arm's length standard, such a case should be referred to this Committee.

Albania (continued)

Priorities/pricing methods (continued)

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 yet been established. 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. 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 on comparable goods or services prices, the tax authorities may refer to the OECD Guidelines for applying other methods when reviewing the transfer prices.

As mentioned above, changes are expected in the current approach under the new legislation to be introduced in 2014.

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 along with 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.

As aforementioned, it is expected that the burden of proof will shift to the taxpayer and the documentation requirements will be imposed as under the new legislation to be introduced in 2014.

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.

Albania (continued)

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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a tax audit in Albania is high for domestic and foreign companies. Usually, a tax audit covers three to four year period on a continuous basis. However, due to the fact that the tax authorities have in the past had a lesser focus on 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.

Expected reaction to OECD Report on BEPS

As of January 2014, the tax authorities have not reacted.

Algeria

Taxing authority and tax law

Tax authority: Generally referred to as the Algerian Tax Authorities or Direction des Grandes Entreprises (DGE) (large-sized taxpayers' direction).

Tax law: Transfer pricing matter is principally governed by:

- Article 141bis of the Algerian direct tax code
- Article 192 of the Algerian direct tax code
- Article 20ter of the Algerian tax procedure code
- Article 169bis of the Algerian tax procedure code

Relevant regulations and rulings

The Decree dated 12 April 2012 drew up a list of entities concerned by the obligation of providing transfer pricing documentation and the listed contents required.

OECD Guidelines treatment

The Algerian legislation on transfer pricing is inspired by the OECD Guidelines. However, no further indications or specifications are given on their practice.

Priorities/pricing methods

Algerian transfer pricing legislation and practice has started recently. The Algerian transfer pricing legislation does not provide any official transfer pricing method, but the Algerian tax authorities have issued guidelines in 2010 referring to the OECD methods. In theory, all OECD methods could be accepted, subject to justification, but in practice, the Algerian tax authorities are focused on an approach based on comparability.

Algeria is not a member of the OECD, and hence the Algerian tax authorities are not bound by the OECD principles.

Based on EY's understanding, Algerian tax authorities are developing a project on gathering financial databases for benchmarking purposes.

Algerian transfer pricing rules apply both for cross-border transactions and domestic transactions with related parties.

Transfer pricing penalties

If a company does not provide transfer pricing documentation or provides an incomplete transfer pricing documentation when filing its return, the tax administration is entitled to send a formal notice to provide the documentation or to complete it within 30 days. Should the company fail to provide the documentation or complete it within this timeframe, (i) a tax penalty of DZD500,000 (EUR5,000) might apply, and in case of a reassessment, an additional specific penalty amounting to 25% of the deemed transfer amount might also apply.

Penalty relief

No specific penalty relief is applicable to transfer pricing, but a general penalty relief could apply in the framework of a transaction (remise conditionnelle) procedure provided by the Algerian tax procedure code, under certain conditions. In this framework the Algerian tax authorities may grant at the request of the taxpayer's a mitigation of tax penalties or tax increases under a contractual basis. Please note that only the penalties and tax fines relating to the insufficiency of declaration are eligible to the negotiated transaction procedure.

The rebate granted by the authorities can be up to 95% of the penalties if the company commits to pay the principal and remaining penalties immediately.

Algeria (continued)

Documentation requirements

According to Article 04 of the Decree dated 12 April 2012, the transfer pricing documentation must contain:

Basic documentation of general information concerning the group

- A general description of the activity performed, including changes that occurred during the fiscal year
- A description of the organizational structure and the nature of the relations that link the foreign company and/or the Algerian company to the other Algerian company (organization chart, direct and indirect capital ties, voting rights, shareholders' agreement, business flows, etc.)
- A general description of the functions performed, risks incurred and assets of each related company
- A general description of the group's transfer pricing policy

Company-specific documentation

- A description of the company, the activities it performs and the nature of the transactions it is engaged in, including the changes that have occurred during the FY
- A description of the transactions performed with other related companies, including the nature of the flows of transaction and their amounts, including royalties — may be presented globally by transaction type
- Copies of the statutory auditors' annual reports and the financial statements for the FY concerned
- A list of the main intangible assets held (patents, trademarks, trade names, know-how, etc.) in relation to the company
- Copies of all agreements between the companies concerned
- Financial information, overhead and administrative expenses, and research and development costs
- Description and justification of the arm's length nature of the transfer pricing method chosen (OECD standards)
- For the documentary requirements, companies concerned may provide any other documentation that is likely to provide clarification to the tax administration

The entities concerned are required to provide the following information

- De jure or de facto legal entities or groups of legal entities working in the field of hydrocarbon activities and their subsidiaries as provided by law
- Joint stock companies and partnerships who have opted for the tax regime for joint stock companies whose sales at the close of the financial year are greater than or equal to DZD100 million
- De jure or de facto groups of companies, where the annual sales of any one of the member companies are greater than or equal to DZD100 million
- Companies established in Algeria that are members of foreign groups (whatever Algerian tax regime applies)

Documentation deadlines

The transfer pricing documentation must be filed at the DGE along with the annual tax return (no later than 30 April every year).

Companies not listed above have to prepare the same documentation in order to justify the transfer pricing policy in the framework of a tax audit.

Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is the same for all Algerian corporate tax assessments, i.e., four years following the year on which the tax is due.

Algeria (continued)

Return disclosures/related party disclosures

In the framework of a tax audit during which tax inspectors are entitled to audit possible infringement of the arm's length principle with related parties (intercompany transactions), i.e., the existence of commercial and/or financial relationship that differs from those which would be made between independent enterprises.

Transfer pricing-specific returns

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a tax audit in Algeria is high for domestic and foreign companies. Usually, a tax audit covers a three-to four-year period on a continuous basis.

Tax audit and tax reassessment related to transfer pricing are more and more frequent. Field auditors are not always applying transfer pricing concepts and, as a result, the adjustments are sometimes not only grounded on OECD Guidelines. It is also worth mentioning that there are currently no local financial public databases at disposition of tax authorities or companies.

APA opportunity

The Algerian tax legislation does not provide any specific APA procedure. However, a binding tax ruling procedure was introduced in the Algerian tax procedure code recently (for companies' eligible, to the DGE). This procedure could in theory cover transfer pricing.

Expected reaction to OECD Report on BEPS

As of January 2014, the tax authorities have not reacted to BEPS.

Angola

Taxing authority and tax law

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

Tax law: For the first time in Angola, qualifying taxpayers will have to document their transfer pricing policy with respect to 2013 transactions. Angola's new transfer pricing documentation rules are included in Presidential Decree 147/13 of 1 October 2013 (Statute of Large Taxpayers).

Given the status of the ongoing tax reform in Angola, any new legislation may be subject to administrative clarification at any point which may change the information provided in this report.

Relevant regulations and rulings

The Angolan law requires that all documents submitted to the tax authorities must be written or translated into the Portuguese language.

The Angolan Transfer Pricing Regime applies to taxpayers, who are listed or generally included in the list as Big Taxpayers and have a turnover in excess of AOA7 billion (approximately US$70 million). Ruling 472/14 of 28 February 2014 issued by Ministry of Finance has published the list of Big Taxpayers.

Both Article 55 of the Industrial Code (which establishes the general framework for application of the arm's length principle) and Article 11 of the Statute of Large Taxpayers clearly define all cases of legal and juridical dependency that will create related parties for transfer pricing purposes.

In this regard, concept of special relations is as follows:

- When the directors or managers of a company, as well as their spouses, ascendants and descendants, directly or indirectly have an ownership interest of 10% or more in the capital or the voting rights of the other entity
- When majority of the members of the board of directors or management are either common or distinct but related by marriage, non-marital partnership or direct kinship
- When one of the entities has contractual control over the other
- When the companies have a relationship of control or cross-ownership or contractual subordination contract, peer group or equivalent situation following the terms of Company Law
- When commercial relations between the two entities represent more than 80% of the volume of operations
- When one finances the other, to the extent of more than 80% of its credit needs

OECD guidelines treatment

As Angola is not an OECD member, the OECD Guidelines have not been adopted. It is uncertain whether the OECD Guidelines will be adopted or followed in practice at a later date.

The arm's length principle applies to all related party transactions.

The Masterfile concept established in the European Union Code of Conduct on transfer pricing documentation for associated enterprises is not adopted by the Angolan legislation.

Priorities/pricing methods

The new Angolan transfer pricing legislation, applicable for "large taxpayers," only foresees the application of the traditional transactional transfer pricing methods, namely the CUP method, Resale Price method and Cost Plus method.

Transfer pricing penalties

The most important implication of the rules is the placing of the burden of proof of the arm's length nature of pricing on the taxpayer — which may imply that the tax authorities will seek to adjust the prices and conditions applied in a related party transaction based on the available evidence, without any reference to the taxpayer's position.

Angola (continued)

Transfer pricing penalties

Non-compliance with transfer pricing documentation obligations will result in such taxpayers being forbidden from performing capital operations, current invisibles (payments for services and intangibles) or trading operations. Presently, the exchange control regulations in place require the intervention of the National Bank of Angola. In practice, this may completely block the day-to-day activity of any taxpayer whose identity is transmitted by the Angolan Tax Administration to the National Bank of Angola with the specification of non-compliance with tax obligations.

For the taxpayers referred in the list of Large Taxpayers (not yet published), lack of compliance with transfer pricing documentation requirements will most likely prevent the application of rights foreseen in the corresponding statute. This includes the possibility to pay the Industrial Tax at the Big Taxpayers Office, to have a closer relationship with the tax administration via the appointment of two inspectors who will deal with the taxpayer's day-to-day questions, and to pay tax debts in instalments.

If a transfer pricing adjustment is made, a penalty equivalent to 50% of the additional tax will be applied. On delayed interest a non-compounded rate of 2.5% per month (or 30% per year) will be levied.

The tax authorities are allowed to make transfer pricing adjustments regarding the last five years of activity.

With respect to correlative adjustments, they are only foreseen in the Industrial Tax Code for adjustments performed in relation to transactions involving Angolan taxpayers, as the country has not yet signed any Double Tax Treaty. The current transfer pricing legislation does not provide for correlative adjustments.

Accordingly, if the tax authorities deem a certain amount charged in a related party context to of an Angolan taxpayer to be not inconsistent with the arm's-arm's length principle, the authorities will adjust the price and assess additional tax, penalties and compensatory interest.

Penalty relief

Not applicable.

Documentation requirements

The requirement to prepare and submit the transfer pricing documentation will be applicable to all taxpayers reporting 2013 revenue — total of sales and services rendered — in excess of AOA7 billion (approximately of US$70 million).

The transfer pricing file must be prepared on an annual basis and must detail the relationships and prices established by the large taxpayers with the companies/entities with which they have special relations.

All commercial transactions, such as those involving goods, rights or services and financial operations are included and must be documented.

Under the Angolan legislation, the transfer pricing report will have to be prepared according to the following structure:

- Summary
- Macroeconomic environment
- Presentation of the entity
- Functional analysis of the entity
- Identification of the related party operations
- Economic analysis of the related party operations

Documentation deadlines

The transfer pricing file must always be prepared and submitted to the tax administration by 30 June.

Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing assessments is five years.

Angola (continued)

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

Not applicable.

Audit risk/transfer pricing scrutiny

No detailed information is currently available on the level of audit risk that exists in the transfer pricing environment. Since the law was recently enacted no patterns of audit risk have been established yet.

APA opportunity

Not yet foreseen.

Expected reaction to OECD Report on BEPS

Angola does not follow the OECD Guidelines, and the tax authorities have not reacted to BEPS.

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 on 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, No. 3,476/13 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 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, so far 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. However, market price must be used for tangible goods transactions between both related and independent parties where there is an international price in transparent market, unless there is evidence to the contrary.

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 who are not the final consignees of the goods, the applicable price is the prevailing price in the respective market on the day goods are loaded for shipment or, the agreed-upon price, if higher. This method may not apply, 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 the 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 of 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.

For 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 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

Argentina (continued)

Transfer pricing penalties (continued)

at arm's length. For non-compliance with the formal duties of furnishing information requested by the AFIP, the taxpayer faces fine of up to ARS45,000. The same applies for a failure, to keep vouchers and evidence of prices in files on hand and 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 prices, amounts received and profit margins that 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 in 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, Form 4501 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 on 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 in 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 10 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 and the voluntary declaration of the foreign exchange holding regime in place during calendar year 2013 added one additional year each 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.

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

Argentina (continued)

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 in tax havens)
- Annual Form 867 (for other exports and imports with independent parties not located in tax havens)
- Annual Form 4501 (for the digital filing of the transfer pricing study and CPA Certification)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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, however, there were a few court cases in favor of the tax authorities as well. In addition, some second level court cases are also being published. 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.

Expected Reaction to OECD Report on BEPS

There have been no significant changes in the local legislation regarding BEPS. Nevertheless, on 6 January 2014, AFIP published the Regulation N° 3577/14 establishing a new perception regime on the export of goods on which the final destination differs from the country of residence of the buyer. Among other OECD Reports, this resolution is based on BEPS citing that some technically legal practices may affect the tax levying.

In addition, AFIP reviewed the definition of Tax Heavens. On 7 January 2014, AFIP published a new list of the countries, jurisdictions, territories and tax systems that are considered as "cooperators" for the purpose of fiscal transparency. The new list includes the cooperators" divided into three categories, (i) Countries with which Argentina has signed Double Tax Treaties (DTT) or Tax Information Exchange Agreements (TIEA); (ii) Countries included in the Multilateral Convention on Mutual Administrative Assistance in Tax Matters; and (iii) Countries with which Argentina has initiated negotiations to sign a TIEA or a DTT with a broad clause for the exchange of information. Different tax treatment will apply to jurisdictions not considered as cooperators, including different treatment under transfer pricing, controlled foreign corporation, and foreign tax credit rules.

Argentina is a member country of the G-20 Group. Therefore, it can be expected that BEPS will have further effects in Argentina.

Armenia

Taxing authority and tax law

Taxing authority: State Revenue Committee.

Tax law: Currently, there are no local transfer pricing regulations in Armenia, but Armenia has double tax treaties with 41 countries that contain an article resembling Article 9 OECD Model Tax Convention on "Associated Enterprises."

Australia

Taxing authority and tax law

Taxing authority: Australian Taxation Office (ATO).

Tax law:

Australia's transfer pricing law is contained in:

- Division 13 of Part III of Income Tax Assessment Act 1936
- Subdivisions 815–A, 815–B, C and D of the Income Tax Assessment Act 1997
- Subdivision 284–E of the Tax Administration Act 1953
- Relevant provisions of double tax treaties

Applicability of legislation

Division 13 was enacted in 1982 and applies to income years that have commenced prior to 1 July 2013. Division 13 applies at the Commissioners discretion and cannot be self-assessed.

Subdivision 815–A was enacted in 2012 and applies to income years commencing between 1 July 2004 and 30 June 2013. It operates concurrently with Division 13 for transactions with related parties in countries which have a double taxation agreement with Australia. Subdivision 815–A applies at the Commissioners discretion and cannot be self-assessed.

Subdivision 815–B applies to taxpayers with income years commencing on or after 1 July 2013. 815–B can be applied by the Commissioner and must be self-assessed by taxpayers.

Recent changes

Subdivision 815–B, C and D were enacted in June 2013 and introduce some important changes to the transfer pricing rules. The key changes as a result of Subdivision 815–B is:

- Introduction of a self-assessment regime, effectively requiring public officers to sign-off on the appropriateness of their transfer pricing in order to satisfy their duties as public officer, and in certain circumstances the public officer may be liable to penalties
- Penalty regime linked to documentation, whereby preparing transfer pricing documentation is not compulsory; however failure to prepare documentation results in a taxpayer not being able to establish a reasonably arguable position, which results in higher penalties in the event of an ATO audit
- Extensive reconstruction provisions requiring taxpayers to go beyond the transactions in assessing their transfer pricing and providing the ATO with extensive powers to substitute transactions that the ATO believes better reflects arm's length behavior
- Provisions that effectively require a double test, where taxpayers have to assess the overall commerciality of their arrangements as well as the pricing of individual transactions

Subdivisions 815–C applies to permanent establishments. The subdivision applies the arm's length principle to permanent establishments to ensure that the amount brought to tax in Australia by entity's operating permanent establishments is not less than it would be if the permanent establishment was a distinct and separate entity operating independently. The rules and requirements contained in Subdivision 815–C apply in the same manner as those contained in 815–B.

Subdivision 815–D applies to partnerships and trusts using an analogous approach as found in 815–B and 815–C.

All Australian transfer pricing provisions are one-directional and only apply to increase a taxpayer's tax liability.

Subdivision 284–E outlines transfer pricing documentation requirements for taxpayers for whom Subdivision 815–B or C applies.

Relevant regulations and rulings

The following transfer pricing rulings and other guidance in the form of tax determinations and ATO booklets has been published by the ATO. The guidance is relevant for years starting before 1 July 2013.

Australia (continued)

Relevant regulations and rulings (continued)

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

In relation to years starting on or after 1 July 2013, updated guidance is expected to be provided over time. Currently, the first rulings, which will relate to documentation and reconstruction of transactions, are scheduled to be issued in draft in March/April 2014. A further Tax Determination on penalties is expected to follow; however, no date has been set yet for its release or for the release of rulings on any other topics.

While it is expected that a substantial part of the historical guidance will be incorporated in the new guidance, taxpayers should take care when relying on the rulings listed above and other guidance listed below for years starting on or after 1 July 2013 as the operation of the legislation has changed and changes in the ATO's interpretation are likely to occur. Please contact your EY transfer pricing contact to discuss the latest state of play.

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 (TD)

- TD2014/D7: Market support payments

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 APA Program

OECD Guidelines treatment

A recent court case, Commissioner of Taxation versus SNF (Australia) Pty Limited [2011] FCAFC 74, decided under Division 13 rejected the OECD Guidelines as relevant when interpreting Division 13 and rejected the use of the TNMM by the Commissioner.

In response to this case, Treasury drafted new transfer pricing provisions (Subdivisions 815-A and 815-B, C and D). These provisions refer directly to the OECD Guidelines as relevant guidance for the interpretation of the provisions and as such all methods described in the Guidelines can be used if they are the most appropriate.

Australia (continued)

Priorities/pricing methods

The ATO seeks to adopt the "most appropriate" transfer pricing method. Methods outlined in ATO rulings include traditional transaction methods (CUP, Resale Price and Cost Plus) and traditional profit based methods (Profit Split and TNMM).

Assessment and adjustment of transfer prices

Under Division 13 and 815–A, the Commissioner is the only person able to make an assessment of the arm's length consideration of the taxpayer's transactions. In addition, the Commissioner can only substitute an arm's length amount of consideration where a taxpayer has received less than an arm's length amount, or has paid more than an arm's length amount.

Subdivision 815–B, C and D operate on a self-assessment basis. They require public officers to assess whether the taxpayer received a transfer pricing benefit. Broadly, a transfer pricing benefit is received when an entity's taxable income or withholding tax payable is less than it would have been had the arm's length conditions operated. A transfer pricing benefit also arises where the entity's tax loss is greater than it would have been had the arm's length conditions operated. Where a taxpayer receives a transfer pricing benefit, the arm's length conditions should be substituted to determine its Australian taxable income.

Following the self-assessment, the Commissioner through the ATO, has the ability to raise adjustments where he is of the view that the self-assessed position still contains a transfer pricing benefit.

Reconstruction of transactions

Subdivision 815–B adopts a substance over form approach towards transactions. It requires the taxpayer to follow the economic substance of a related party arrangement where the economic substance does not match the legal form.

In addition, it requires the taxpayer to perform a commerciality test. Under this test, taxpayers must replace the actual commercial or financial relations if independent parties would not have entered into the actual arrangement but instead entered into a different arrangement or would not have entered into an arrangement altogether. Notably, the reconstruction provisions go further than those within the OECD Guidelines (para 1.64–1.66) which only apply if the uncommercial transaction also practically impedes the tax authority from determining the appropriate transfer price. This second leg is not included in Subdivision 815–B and the expectation is that the ATO will interpret the reconstruction provision broadly and could, for instance, seek a reconstruction of the arrangement where the use of a CUP would result in losses.

The ATO has also expressed the view that it can change individual elements of the actual arrangement outside the reconstruction provisions in order to improve comparability. For example, the ATO may seek to disregard certain terms of a transaction if these are not observed between independent parties. The ATO considers that this approach is a 'repricing' of a transaction rather than a reconstruction. We disagree with this interpretation and would regard any change in the actual transaction a reconstruction. It remains to be seen which view would prevail in a legal challenge.

Transfer pricing penalties

There are three types of penalties that could potentially apply in the event of an adjustment to transfer prices by the ATO. The first is a penalty for a scheme shortfall. The second is a penalty for the failure to take reasonable care. The third is a penalty for a false and misleading statement made by the taxpayer. Each of these is explained in more detail below. All penalties can apply to the same transaction. Further guidance on the application of penalties under the new legislation is expected to be released by means of a tax determination.

Penalties for scheme shortfalls

Where the Commissioner has determined that a taxpayer has received a scheme benefit, which includes all transfer pricing adjustments, a penalty can be applied. The level of penalty will vary depending on whether the taxpayer can establish a Reasonably Arguable Position" (RAP).

Under Division 13 or Subdivision 815–A, 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." As such, the mere existence of transfer pricing documentation does not guarantee that the taxpayer will be able to establish a RAP.

The same criteria apply in the context of Subdivision 815–B. However, in addition, transfer pricing documentation needs to be in existence at the time of lodging the tax return and this documentation must meet the prescribed requirements in order to have a RAP.

Australia (continued)

Transfer pricing penalties (continued)

The penalty rates if no RAP can be established are typically 25% to 50% of the shortfall amount. The shortfall amount can broadly be defined as underpaid tax.

Penalties for failure to take reasonable care

Penalties also apply where the Commissioner makes an adjustment that results in a tax shortfall and where the taxpayer has failed to take reasonable care. The level of the penalty varies depending on whether the taxpayer has failed to take reasonable care (25% of the shortfall amount), has acted recklessly (50%) or has had intentional disregard to the relevant rules (75%).

Penalties for false and misleading statements

Where the Commissioner determines that a taxpayer has made a false or misleading statement a penalty will apply. The level of the penalty varies depending on whether the taxpayer has failed to take reasonable care, has acted recklessly or has had intentional disregard to the relevant rules. The penalties range from 20 to 60 penalty units per statement and apply regardless of whether a shortfall resulted.

Public officer liability

As part of the income tax return process, the Public Officer of a company is required to declare that the information contained within the tax return is not false or misleading.

Where the ATO determines that a Public Officer has made a false or misleading statement on the income tax return, the Public Officer may be personally liable for penalties and could be subject to criminal prosecution.

Further, the Public Officer can be theoretically held liable for the penalties imposed on the company for lack of reasonable care or not having a reasonably arguable position. However, it would be unusual for the ATO to do so.

Shortfall Interest Charge

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.

Commissioner's discretion to remit penalties

Under PSLA 2008/18 the Commissioner may impose penalties for both a scheme shortfall and a false or misleading statement, but has discretion to remit the combined penalty to a more reasonable amount. Penalties are currently often forgiven where the taxpayer has a RAP. Further guidance on penalties under the new legislation is expected to be provided. However, given the specific nature of Subdivision 284–E, it would seem unlikely that the Commissioner would remit penalties in the future unless the prescribed documentation exists.

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 International Dealings Schedule) to support a reasonably arguable position, the penalty may be reduced.

The Commissioner has discretionary power to remit penalties where it is considered fair and reasonable to do so. It is in our view increasingly unlikely that he will apply this discretion unless a taxpayer has a RAP.

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

Australia (continued)

Documentation requirements (continued)

- Include business, economic and industry analysis
- 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.

Under subdivision 815–B, taxpayers that do not prepare contemporaneous transfer pricing documentation that meets the specific requirements set out in 284–E are precluded from having a RAP in the event of a transfer pricing adjustment. Whereas there is an expectation that ATO guidance on documentation will be based on current guidance, the new legislation will require substantially more analysis to be conducted if a taxpayer is to qualify for a RAP.

In order to satisfy 284–E it is required to maintain documents that:

- Are prepared contemporaneously (i.e., before the time by which the taxpayer lodges its income tax return)
- Are prepared in English, or readily accessible and convertible into English
- Explain the particular way in which the relevant transfer pricing provisions apply (or do not apply) to the taxpayer's international related party dealings
- Explain why the application of the transfer pricing provisions to the taxpayer's international related party dealings in the afore mentioned way, best achieves the consistency with the relevant guidance materials[1] (e.g., 2010 OECD Guidelines)

In combination with the manner in which Subdivision 815–B operates, this will mean that historical documentation and global documentation that is prepared without specific regard to the new legislation is unlikely to be sufficient to establish a RAP for penalty mitigation purposes. Additional information that should be considered when preparing documentation for Australian penalty mitigation purposes includes:

- An explanation of the way in which the Subdivision applies (or does not apply)
- An explanation of why the application of Subdivision as documented best achieves consistency with the guidance material such as the OECD Guidelines
- An assessment of whether the actual Commercial or Financial Relations (CoFR) can be used to determine the arm's length conditions or whether a substitution with hypothetical CoFR is required
- An assessment of the comparability of the actual circumstances with the circumstances used to establish the arms' length conditions
- An ascertainment of the actual and the relevant arm's length condition
- An ascertainment of the result of the application of the Subdivision in that particular way, compared to the non-application of the Subdivision

Documentation deadlines

Under Division 13 and Subdivision 815–A, there is no explicit requirement to prepare transfer pricing documentation within a particular timeframe. However, taxpayers are strongly encouraged to maintain contemporaneous documentation showing compliance with the arm's length principle.

Under Subdivision 815–B, any transfer pricing documentation should be contemporaneous, which means it needs to be completed at the time of lodging the tax return. If transfer pricing documentation is not prepared by the time the tax return is lodged, the taxpayer cannot have a RAP for penalty protection purposes.

Statute of limitations on transfer pricing assessments

Historically, there has been no statute of limitations with respect to transfer pricing adjustments. The tax legislation applicable for financial years starting before 1 July 2013, specifically empowers the Commissioner to make amendments to tax assessments in any year for transfer pricing adjustments under Division 13. As such, the years starting before 1 July 2013 remain open to challenge indefinitely.

[1]Guidance materials are outlined in sections 815–135 and 815–235.

Australia (continued)

Statute of limitations on transfer pricing assessments (continued)

Adjustments can be made under Subdivision 815–A for any financial years starting between 1 July 2004 and 30 June 2013 (inclusive). Similar to Division 13 there is no limitation on when adjustments can be made.

Under Subdivisions 815–B, C and D, amendments can be made within seven years following the date on which a notice of assessment is issued to the taxpayer.

In addition, some of Australia's double-tax agreements including those with New Zealand and Japan specify time limits for adjustments.

Return disclosures/related party disclosures

The ATO requires an International Dealings Schedule to be filed with the tax return. It requires taxpayers to disclose:

- Details of restructuring events involving international related parties (Question 17, which must be completed regardless of the quantum of the transactions)
- Dealings with branch operations (Question 18, which must be completed regardless of the quantum of the transactions)

In addition, where the aggregate amount of transactions or dealings with international related parties, both revenue and capital in nature is greater than AUD2 million the following information must be disclosed:

- Top three transactions (individually) and other transactions (combined) for the top three specified low-tax jurisdictions (Question 3)
- The top three transactions and other transactions for the top three non-specified jurisdictions (Question 4)
- For all international related party transactions (Questions 5 through 13)
  - Type of transaction, e.g., royalties, intercompany loans, technical services, administrative services
  - The quantum per type of transaction
  - The percentage of the transactions of each type that are covered by contemporaneous documentation that has been prepared in accordance with the four-step process (transfer pricing documentation does not need to be lodged with the tax return)
  - Transfer pricing methodologies selected and applied for each type of international related party transaction
  - Information on transactions for no payment or non-monetary payment, share-based employee remuneration and cost contribution arrangements (Question 14 through 16)

In addition, the IDS capture information on interests in foreign companies or foreign trusts, permanent establishments and thin capitalization. Separate thresholds apply for these disclosures.

Transfer pricing-specific returns

There is no specific return apart from the schedule to the tax return described above.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 that takes these factors, along with 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:

- Centralized business models with activity in low-tax jurisdictions, including principals, marketing hubs and procurement companies in low tax jurisdictions
- Low levels of profitability, or losses
- Financing arrangements, including interest-free loans, interest-bearing loans and guarantee fees
- Companies undergoing supply chain restructurings

Australia (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

- Business restructuring (particularly where profitability is reduced, or valuable Intangible property is transferred)
- Transactions with recognized tax haven jurisdictions
- Royalties
- Intangibles (both Australian and foreign-owned)
- Management services

In general, the risk of an annual tax audit in Australia would be assessed as medium. However, if taxpayers exhibit the risk factors indicated above, the risk of a review or audit increases significantly. In addition, 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 any general tax audit is very high.

More recently, the ATO has been also focusing on BEPS scenarios and has started to issue questionnaires to taxpayers. The risk of review for companies with these structures can be considered high.

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.

While maintaining the commitment to APAs in the "right circumstances," the ATO has more recently pulled back from providing APAs for fact patterns that it regards as being aggressive, and also the fact patterns that it regards as having a BEPS element. It is also reluctant to consider APAs for fact patterns that it deems to be too simple. The landscape continues to evolve and taxpayers considering an APA would be well advised to check the latest state of play with their advisers before approaching the ATO.

Against this backdrop, PS LA 2011/1 provides a detailed explanation of the benefits, limits and processes associated with an APA by which 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 a simplified APA product is available
- 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 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

Expected reaction to OECD Report on BEPS

The ATO and other Australian institutions are actively involved in the global BEPS debate, both within the OECD and in the G20.

The ATO has been questioning taxpayers on the issues raised in the OECD report on BEPS, which aims to produce measures to stop profit shifting by multinational enterprises. Specifically, the ATO has been issuing BEPS questionnaires to taxpayers as part of transfer pricing reviews, as such a number of APA applications and renewals have been held up while BEPS related queries are resolved.

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 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 include 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 methods. 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 prior year's additional 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 years, corporate income tax payments, regardless of whether there is sufficient documentation or not. There are no relief provisions available.

Austria (continued)

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 the 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 an 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 and appealable advance ruling issued by 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 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.

Expected reaction to OECD Report on BEPS

As a first step, on 9 January 2014, the MF published the 2014 Tax Amendment Act (Abgabenänderungsgesetz 2014; AbgÄG 2014), a draft bill for amendments to Austrian Tax Acts. Amongst other changes, it is planned that royalty and interest payments to domestic and foreign affiliated corporations shall no longer be tax deductible if the income of the recipient corporation is completely or predominantly

Austria (continued)

Expected reaction to OECD Report on BEPS (continued)

not subject to taxation or taxed at a rate of less than 10%. Further, if the tax rate is at least 10% (but less than 15%), half of the expenses shall be tax deductible.

At the moment other reactions of the MF to the OECD report on BEPS (especially to the items intangibles, country-by-country reporting and Masterfile documentation) cannot be anticipated. Based on the BEPS report, the Austrian tax authorities concentrate their resources on issues like intra-group transactions with low tax jurisdictions, IP migration, business restructurings, and intercompany licensing and financing.

Bahrain

Taxing authority and tax law

Taxing authority: Ministry of Finance.

Tax law: The Income Tax Law[1] (ITL) ratified by the Amiri Decree No. 22/1979.

Currently, there are no transfer pricing regulations and rulings in Bahrain. However, Bahrain has entered into double taxation treaties (DTTs), with approximately 39 countries, which contain an article that resembles Article 9 OECD Model Tax Convention on "Associated Enterprises".

Countries with which DTTs are in force include Algeria, Austria, Barbados, Belarus, Bermuda, Brunei, Bulgaria, China, Czech Republic, Egypt, Estonia, France, Georgia, Iran, Ireland, Isle of Man, Jordan, Korea, Lebanon, Luxembourg, Malaysia, Malta, Mexico, Morocco, Netherlands, Pakistan, Philippines, Seychelles, Singapore, Syria, Thailand, Turkey, Turkmenistan, United Kingdom, Uzbekistan and Yemen.

Bahrain has also entered into DTTs with Belgium, Sri Lanka and Sudan, which have not yet come into force.

[1]The application of Bahrain Income Tax Law is limited to the companies engaged in the exploration, production or refining of oil and other natural hydrocarbons in Bahrain.

Bangladesh

Taxing authority and tax law

Taxing authorities: National Board of Revenue (NBR)

Tax laws:

- Section 107A to 107J of the Income Tax Ordinance, 1984 as amended by Finance Act 2012
- Rule 70 to 75 of Statutory Regulatory Order 2012

The Finance Act 2012 introduced transfer pricing regulations in Bangladesh. However, the transfer pricing provisions shall come into force from the date specified by the NBR through notification in the official Gazette. Since, no notification has been issued by the NBR; the transfer pricing regulations are presently not applicable in Bangladesh.

Relevant regulations and rulings

The pricing of any income or expense arising from international transactions between associated enterprises will need to be determined with regard to the arm's length principle, using methods prescribed under Bangladesh transfer pricing legislation. Associated enterprises are those enterprises where more than 25% voting power in one is held by the other or a common parent holds more than 25% of voting power in both such enterprises. Transfer pricing provisions are applicable to the following types of transactions between associated enterprises, with at least one of them being a non-resident:

- Purchase, sale or lease of tangible or intangible property
- Provision of services
- Lending or borrowing money
- A mutual agreement or arrangement for cost allocation/apportionment
- Any other transaction having a bearing on the profits, income, losses, assets, financial position or economic value of such enterprises

Transactions with a third party is deemed to be as 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. An enterprise means a person or a venture of any nature and also includes a permanent establishment of such person or venture.

Priorities/pricing methods

Bangladesh legislation prescribes the following methods: CUP, RPM, Cost Plus, Profit Split, TNMM and any other method. Where it can be demonstrated that none of the first five methods can reasonably be applied to determine the arm's length price for an international transaction, Section 107C allows the use of any other method that can yield a result that is consistent with the arm's length price.

For the purpose of determining a comparable uncontrolled transaction, Rule 71(3) provides that data pertaining to only the relevant financial year should be used. However, the rule permits the use of data prior to the relevant financial year if it can be substantiated that such data bears facts which could have an influence on the analysis of comparability.

OECD guidelines treatment

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

Transfer pricing penalties

- For a failure to keep, maintain or furnish any information or documents as required by Section 107E, the taxpayer is imposed a penalty not exceeding 1% of the value of international transaction
- For a failure to comply with the notice or requisition under section 107C of the ordinance by the Deputy Commissioner of Taxes, the taxpayer is imposed a penalty not exceeding 1% of the value of international transaction
- For not furnishing an Accountant's Certificate, the taxpayer is fined an amount not exceeding BDT300,000 (approximately US$3,900)

Bangladesh (continued)

Penalty relief

No penalty relief regulation has been provided to date.

Documentation requirements

A detailed list of mandatory documents is listed in Rule 73. The categories of documentation required are:

- Profile of the multinational group including the consolidated financial statements of the group
- Profile of each member of the group including business relationships between each member
- Profile of each associate enterprise including tax registration numbers and financial statements of any associated enterprise operating in Bangladesh
- 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 comparability evaluation
- Description of methods considered
- Reasons for selection of method
- 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

The above documentation requirements shall not be applicable in case of a taxpayer, where the aggregate value of international transactions entered into during a financial year, as recorded in the books of accounts does not exceed BDT30,000,000 (approximately US$390,000).

Documentation deadlines

Currently, the transfer pricing regulations are not in force and the documentation deadlines are yet to be notified.

Statute of limitations on transfer pricing assessments

Currently the 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 July to 30 June). However, if the tax authorities determine that income has escaped assessment, it may be reopened within three years of the close of the financial year.

Return disclosures/related party disclosures

No specified disclosures are required to be filed with the income tax return.

Transfer pricing-specific returns

Under Section 107F, an accountant's report certifying that the documents and information maintained by a taxpayer is in line with the transfer pricing regulations of Bangladesh, is required to be provided by taxpayers entering into a transaction. The aggregate value of such transaction should exceed BDT30,000,000 (approximately US$390,000) in the books of accounts.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Currently there is no transfer pricing scrutiny risk in Bangladesh as the transfer pricing provisions have not yet come into force.

Bangladesh (continued)

APA opportunity

There is currently no formal APA program in Bangladesh.

Expected reaction to OECD Report on BEPS

There has not been any reaction by the tax authority up until January 2014.

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 significantly increased in size recently, 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 wording 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 practice (also covering APAs) was introduced on 24 December 2002 and came into effect on 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 Law of 23 December 2009 introduced a reporting requirement (Article 307, §1, s. 3 ITC) and a related tax deduction denial for payments to tax havens that are not reported, or that are lacking underlying bona fide business purposes (Article 198, 10° ITC). The main characteristics of this reporting requirement can be summarized as follows. The reporting requirement applies to payments of more than EUR100,000 per taxable period made by resident or non-resident entities (Belgian permanent establishments) to persons established in tax havens on or after 1 January 2010, whereby tax havens are defined with reference to a "black list" determined through a Royal Decree (it currently contains around 30 jurisdictions that either do not levy corporate income tax or have a nominal corporate income tax rate that is lower than 10%). A mandatory form (n° 275 F) for reporting direct or indirect payments to persons established in tax havens are available. 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 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 the 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

Taking into account the specifics of each case, the 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

Belgium (continued)

OECD guidelines treatment (continued)

Guidelines. Although there has been no direct communication with regards to the acceptability of the 2010 version of the OECD Guidelines. However, these are generally 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 expected 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.

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, the taxpayer has a period of 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 is required to 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.

Belgium (continued)

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 close 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 the disclosure is necessary to correctly assess the financial position of the company. This requirement is applicable in case 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 not considered 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 necessary information. This is 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.

Transfer pricing-specific returns

There are no specific transfer pricing returns in Belgium.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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. And 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 has expanded significantly and is using data mining techniques to select tax payers for in-depth transfer pricing audits. As such, they initiate several detailed transfer pricing audits each year. While the initial step of the audit process is a standardized questionnaire, in later stages typically a very detailed and case specific review is performed.

The transfer pricing audit team is also involved in cross-border transfer pricing audits (e.g., restructurings), which are held jointly along 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)

Frequency of tax audit and transfer pricing scrutiny by the tax authority (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.

Expected reaction to OECD Report on BEPS

The Belgian tax administration has not yet taken a formal position with respect to the debate around BEPS. There is not yet any proposed legislative change to the tax law or to the documentation requirements regarding transfer pricing. However, the Belgian tax administration is actively taking part in the discussion around BEPS and as a member country of the OECD, changes to the Transfer Pricing Guidelines are expected to affect Belgium. As such, it is expected that the BEPS debate is likely to have an impact on the tax audit climate (whereby the number of discussions around substance, PEs, etc., are expected to increase).

Bolivia

Taxing authority and tax law

Taxing authority: Servicio de Impuestos Nacionales.

Tax law: Law N° 843.

Relevant regulations and rulings

- Bolivian law does not contain transfer pricing specific rules. However, branches and other legal establishments of foreign companies in Bolivia must maintain separate accounting records from that of its head office, and other branches and establishments abroad
- Transactions between Bolivian companies comprised of foreign capital and foreign companies and individuals who directly or indirectly control the company, deemed to be similar to that entered into by independent parties. For this purpose, control is defined as the holding of 50% or more of the capital or decision-making power in the company
- For the purposes of the above rules, a Bolivian company comprised of foreign capital, is a company that is directly or indirectly controlled by companies and individuals residing or established abroad
- The legal acts conducted between a local company with foreign capital and a natural or legal person located abroad, that directly or indirectly, controls it, will be considered for all purposes as performed between independent parties, when the agreed conditions adjust to the normal practices of the market between independent parties

Based on the above mentioned:

- For Corporate Income Tax (CIT) purposes, tax authorities may challenge the deduction of any cost that is higher than market prices
- For determining the market prices, the authorities would use any procedure, so it is vital that the Bolivian company gathers support documentation about the payments
- Any transfer pricing study generated outside of Bolivia will not be relevant for tax support purposes, but would only be considered as a reference. Hence, it is highly recommended that the documents supporting the nature and substance of transactions between related parties are maintained by the Bolivian company

OECD Guidelines treatment

Bolivia is not an OECD member, and the OECD Guidelines are not mentioned in Bolivia's Income Tax Law and Regulations.

Priorities/pricing methods

There are no transfer pricing rules in Bolivia, but it must be noted that a draft of Investment Law, under review as of January 2014, establishes the application of transfer pricing rules in Bolivia (this is a general rule).

Transfer pricing penalties

Not applicable.

Penalty relief

Not applicable.

Documentation requirements

For CIT deduction purposes, for costs paid to related parties a challenge risk would be reduced as long as:

- The payments respect the market values (evidence is required to demonstrate this)
- The payments are subject to Bolivian taxes (withholding if they are applicable)
- The nature and substance of the services are supported by original documents (invoice, result reports, etc.)
- The contracts are clearly stated (it is recommended to sign them in Spanish and to legalize them)

Bolivia (continued)

Documentation deadlines

The income tax return is due within four months of the fiscal year end. There are no specific requirements to include details about market prices in the income tax return.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations for transfer pricing adjustments; rather, the general regime applies. Until August 2012, the general statute of limitation was four years calculated from 1 January of the year following the year in which the tax payment is due.

In September 2012, Law 291 (modification of Article 59° of the Bolivian Tributary Code) was issued, modifying the statute of limitation rules. However, this change is unclear as there are several interpretations in this regard.

Nevertheless, the largely accepted position involves that this new law has a prospective application, that is, tax authorities may control, carry out tax audits, verify and supervise the fulfillment of tributary formal and material obligations for the following range of years:

- 4 years in 2012
- 5 years in 2013
- 6 years in 2014
- 7 years in 2015
- 8 years in 2016
- 9 years in 2017
- 10 years in 2018

Return disclosures/related party disclosures

Not required.

Transfer pricing-specific returns

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Not applicable.

APA opportunity

Not applicable.

Expected reaction to OECD Report on BEPS

There has not been any reaction from the tax authorities up until January 2014.

Botswana

Taxing authority and tax law

Taxing authority: Botswana Unified Revenue Service.

Tax law: Currently, there are no local transfer pricing regulations in Botswana. However, Botswana has Double Tax Treaties (DTT) with Mauritius, South Africa, Sweden, France, Namibia, Seychelles, Zimbabwe, Barbados, India, Mozambique and Russia.

Brazil

Taxing authority and tax law

Taxing authority: Department of Federal Revenue of Brazil (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 by providing three different methods on imports and exports of assets, goods and services:
  - Imports:
    - Comparable independent price method (PIC) defined as the weighted average sales price for similar products/services to unrelated parties or between unrelated parties
    - Resale price minus gross profit method (PRL) defined as weighted average sales price minus certain adjustments less a statutory gross profit margin
    - Production cost plus profit method (CPL) defined as the weighted average actual costs incurred during the year to produce the same or similar product/services plus taxes and a gross profit markup of up to 20%
  - Exports:
    - Export sales price method (PVEx) defined as weighted average sales price to other customers or between unrelated parties during the same year
    - Resale price method defined as weighted average sales prices in the country of destination under similar payment terms minus taxes imposed by that country and a gross profit margin of 15% (for wholesale) or 30% (for retail)
    - Purchase or production cost method (CAP) defined as weighted average cost of acquisition or production increased by taxes and duties imposed by Brazil plus a gross profit mark up of at least 15% on the sum thereof
- Normative Instruction 243/02 provided the most relevant interpretations and was valid until the issuance of Normative Instruction 1.312/12 in 2012 with further amendments by Normative Instruction 1.321/13, 1.322/13 and 1.395/13
- Federal Law 12.715, published on 17 September 2012, introduced significant changes to the Brazilian transfer pricing rules. The amendments 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 is required when applying the PRL method, for the import of goods, services or rights, ranging from 20%–40% depending on the company's industry
    - 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 for the importation and exportation 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
- In December 2012, the Law 12.766 introduced further changes to the Brazilian transfer pricing rules for interest paid to related parties
  - 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 (US$) at a fixed rate, the parameter rate is the market rate of the sovereign bonds issued by the Government on the external market, indexed in US$
    - 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 LIBOR
- Normative Instruction (IN) 1.312/12 was also published in 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 the new Law 12.715/12, and exercises the power to determine certain rules, where the law provides the authority.
- On 18 January 2013, the Brazilian tax authorities issued 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, states 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
    - Therefore, the changes to the safe harbor introduced by IN 1.312/12 are effective from January 2013
  - Interest Bearing Intercompany Agreements:
    - Intercompany agreements entered into before 31 December 2012, will follow the previous rules (Law 9,430), whereby the interest, paid or received by the Brazilian taxpayers, registered 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$ for six 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 six month US$ 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 subjected to different interpretations
- On 2 August 2013, the Brazilian Ministry of Finance issued ordinance 427/2013, which provided the interest rate spread, which was mentioned but not specified in Law 12.766/2012. The annual spreads that depends on the Brazilian taxpayer's position on the loan, are as follows:
  - Brazilian entity as the borrower — Starting on 1 January 2013, the spread should be no more than 3.5%
  - Brazilian entity as the lender — From 1 January 2013 to 1 August 2013, no interest rate spread is required on the transaction. Starting on 2 August 2013, the spread is required to be no less than 2.5%
  - As specified in IN 1.322/13, intercompany agreements entered into as of 1 January 2013 or after will be subject to the new Law 12.766/12. Whereas, agreements previously entered into and registered with the Brazilian Central Bank will be grandfathered by the previous rules and will not be subject to the new requirements. 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
- IN 1.395/2013 provided further guidance regarding the application of the PCI and PECEX methods
  - Defined that commodities subject to the application of the PCI and PECEX methods are products listed in Appendix I and products traded in the commodities and futures exchanges listed in Appendix II
  - Established the possibility of adjustments in relation to variations of quality, features, and content of the substance of the product sold

Brazil (continued)

Relevant regulations and rulings (continued)

    - Established that in the absence of a quotation on the transaction date, the quotation to be used is the latest one available. Also, in case it is not possible to identify the transaction date, the date to be used is that of the import documentation or the product ship date for export purposes
    - Finally, the IN (SRF) established that, in the absence of a quotation of the goods in the commodities and futures exchanges (Appendix II), the prices of the imported and exported goods should be compared to those provided by the internationally recognized research institutions (Appendix III)
- In October 2013, the General Coordination of Taxation (COSIT) issued an administrative ruling (binding only for the tax payer requesting the ruling)[1] advising taxpayers and tax auditors on the Corporate Income Tax (CIT), and PIS/COFINS rules applicable to shared services costs and expense apportionment
    - Deductibility guidelines on shared services costs and expenses
        - The COSIT ruling[2] standardizes the Brazilian tax authorities' interpretation of CIT and PIS/COFINS rules applicable for shared services reimbursement
        - The ruling increases taxpayers' comfort level to execute cost sharing agreements, clarifying that it is possible to concentrate, in a sole entity, expenditure control related to core support services (e.g., human resources, accounting, legal, among others)
        - The ruling explains that the expenditures may later be apportioned to the group of entities that benefit from the services. It also clarifies that the deduction of said expenditures for CIT purposes are possible as long as the expenditures are:
            - Considered necessary, normal and usual for the group entities business
            - Paid and properly supported by any available documentation
            - Calculated based on reasonable and rational apportionment criteria, previously set forth in a formalized instrument signed by the parties
            - Related to the actual expenditures incurred by each company that is consistent with the global price paid by the goods or services acquired by the shared services center
    - It should be mentioned that all companies should keep a proper bookkeeping of all the acts directly related to the expenditures apportionment
    - Additionally, the Brazilian tax authorities now recognize that reimbursements paid in accordance with the above provisions should not be considered as taxable revenues for PIS/COFINS purposes at the shared service center level, provided that no markup is included in the portion paid by each company

OECD Guidelines treatment

Brazil's transfer pricing rules deviate significantly from international standards, including the 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, service or right.

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. The PRL method is the starting point for most importers mainly 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. This approach provides an estimate of the Brazilian taxpayer's potential exposure to transfer pricing. As a second step, since the Brazilian transfer pricing regulations do not have a most appropriate method concept; taxpayers often apply one of the two other methods

[1]COSIT Conflict resolution n. 23/2013 of 14 October 2013.
[2]COSIT Conflict resolution n. 23/2013 of 14 October 2013.

Brazil (continued)

Priorities/pricing methods (continued)

to reduce the potential transfer price exposure. Taxpayers may choose any method that suits them best. This approach provides taxpayers with the opportunity to focus on those products/transactions that generate the highest adjustments under the PRL method and then they can apply one of the alternative methodologies (i.e., CPL or PIC for each of these products/transactions, reducing or avoiding the adjustment). 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. The Brazilian tax authorities often challenge the application of the CPL and PICP method; consequently, it is crucial for the Brazilian taxpayer to prepare robust documentation to support the application of the PIC or CPL method.

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 parties located outside Brazil (related and unrelated)); 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 three year average is at least 10%. Additionally, starting 2013, to be eligible for the profitability safe harbor rules, intercompany export transactions cannot exceed 20% of total net export transactions. If the safe harbor is not met, usually the Cost Plus or Brazilian Resale Minus Method is applied.

For transactions of products considered as commodities, the safe harbor is not applicable.

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 (PCI and Pecex methods), 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 from 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 apply. If the taxpayer pays the related taxes late, but before an audit, the amount of the penalty may be up to 20% of the omitted tax (or 0.33% per day). 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 corporate income tax return (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 by each product, service, and right. For products, the taxpayer should document each product using the company's internal product codes used for inventory management purposes, and not the much broader fiscal nomenclature used for customs and indirect tax purposes.

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

Brazil (continued)

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.

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. In case of filling of amended tax returns the statute starts with the filling of the latest amended return.

Return disclosures/related party disclosures

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

Transfer pricing-specific returns

The DIPJ contains five specific forms that require taxpayers to disclose detailed information regarding their main intercompany import and export transactions. For more information refer to the "Documentation Requirements" section above.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 so is the likelihood of transfer pricing methodology being challenged. 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. The risk of a transfer pricing audit is high if the tax authorities identify inconsistencies in the information filed electronically, e.g., customs declaration, financial statements and other filing requirements like SISCOMEX/SISCOSERV.

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 to alter the fixed statutory profit margins. However, none has been granted till date due to formal limitations imposed. The current law 12.715/12 also provides the possibility to apply for alternative profit margins, but no regulations have been issued yet.

Expected reaction to OECD Report on BEPS

The Brazilian transfer pricing documentation approach follows statutory margins on a transaction by transaction basis which requires a fundamentally different documentation compared to the OECD transfer pricing documentation. The Brazilian tax authorities gather data from multiple sources to verify and audit a taxpayer's transactions. These include numerous databases which track the importation and exportation transactions occurring in Brazil. The inclusion of sharing information with other countries would not benefit the Brazilian tax authorities given the focus of the transfer pricing rules on fixed pre-determined profit margins. In the short term, it is unlikely that Brazil will amend its transfer pricing rules as a result of the OECD Report on BEPS.

Brunei

Taxing authority and tax law

Tax Authorities: Revenue Division and Ministry of Finance

Relevant regulations and rulings

Currently, there are no local transfer pricing regulations in Brunei, but Brunei has concluded around 10 income tax treaties that contain an article which resemble Article 9 OECD Model Tax Convention on "Associated Enterprises."

For income tax purposes, the authorities usually ask various questions for determining whether such transactions are concluded on an arm's length basis. Questions that are frequently asked include details and information on the relationship of the parties; the basis of determining prices or charges; policies on inter-company mark-ups, prices, cost allocation, etc.

Documentation requirements

Refer to the "Relevant regulations and rulings" section above.

Documentation requirements

The likelihood of an annual tax audit in general is medium. The likelihood that transfer pricing will be reviewed as part of that audit and the likelihood that the transfer pricing methodology will be challenged is medium.

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
- Ordinance N 9/14 August 2006 (Ordinance N 9) on the methods for determining market prices, promulgated in SG issue 70/29 August 2006)
- 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 transaction, in a market customary way of the relevant type at market prices, and that is intended to achieve the same economic result, but which does not lead to 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.

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 a part of the law. Nevertheless, it is in the 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 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.

Furthermore, Bulgarian transfer pricing rules do not explicitly deal with business restructuring.

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 most other 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.

Furthermore, a taxable person involved in a "hidden profit distribution" would be subject to an administrative sanction, amounting to 20% of the expense classified as a "hidden profit distribution." Both the expense classified as "hidden profit distribution" and the sanction would be non-deductible for corporate income tax purposes. In addition, the expense would be considered as deemed dividend and thus be subject to a withholding tax of 5%, without the possibility of relief.

Business expenses may be classified as a "hidden profit distribution" if an entity has:

- Accrued, paid or distributed to the benefit of the entity's shareholders or their related parties amounts which are:
  - Non-business related, or
  - In excess of market price levels
- Accrued interest costs on debt financing if at least three of the following criteria are met:
  - The loan principal exceeds the equity of the borrower as at 31 December of the preceding year
  - The repayment of the principal or the interest on the loan which is not limited by a fixed time period
  - The loan repayment or interest payments depend on whether the borrower ended on a profit position
  - The repayment of the loan depends on the satisfaction of other creditors' claims or on the payment of dividends

Penalty relief

Currently, no penalty relief is available.

Effective from 1 January 2014, a voluntary disclosure of "hidden profit distribution" will relieve taxpayers of the administrative penalty which is 20% of the hidden profit. This would allow taxpayers to self-adjust any overpriced group transactions with no threat of penalties.

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

Bulgaria (continued)

Documentation requirements (continued)

- 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 should have the transfer pricing Masterfile at their disposal, and that contain information on a group level, as well as a country-specific file prepared in Bulgarian for each tax year and updated annually.

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 prepared and made available in compliance with the NRA's guidelines before request.

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 could 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." For instance, 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 in the case where one of the parties holds 5% of the voting shares of the other party.

Under Bulgarian legislation "related parties" are:

- Spouses
- Certain type of relatives
- Employer and employee

[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, FY08 is open for tax audits until the end of FY14, since the CIT return for FY08 should have been filed by 31 March 2009.

Bulgaria (continued)

Return disclosures/related party disclosures (continued)

- Shareholders/partners
- Persons, where one of them participates in the management of the other or its subsidiary
- Persons, in whose management or controlling body participates one and the same person (legal or natural person), including cases when the natural person is a representative of another person
- A company and a person, where the person owns more than 5% of the company's shares with voting rights
- Persons, where one of them exercises "control" over the other
- Persons whose activity is controlled by a third person or its subsidiary
- Persons exercising joint control over a third person or its subsidiary
- Persons, where one of them is a commercial representative of the other
- Persons, where one of them has made a donation to the other
- Persons, who participate (directly or indirectly) in the management, the control or the capital of another person or persons, thus being able to negotiate terms, different from the regular ones

'Control', under the definition provided by the Bulgarian legislation, is present when the controlling party:

- Owns directly or indirectly, or under an agreement with another person, more than half of the votes at the general meeting of another person, or
- Has the possibility to determine directly or indirectly more than half of the members of the managing or controlling body of another person, or
- Has the possibility to manage, including through or together with a subsidiary, in accordance with a particular statute or contract, the activity of another person, or
- As a shareholder or a partner in an entity controls independently, in accordance with a deal made with other partners or shareholders of the same entity, more than half of the votes in the general meeting of this entity, or
- Can be by other means exert a decisive influence over the decision-making with respect to the activity of the entity.

Transfer pricing-specific returns

Transfer pricing-specific returns are not required in Bulgaria.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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.

Expected reaction to OECD Report on BEPS

In general, Bulgaria supports and prioritizes any measures to better tackle tax evasion and corporate tax avoidance worldwide. Bulgarian TP Audit Guidelines have already adopted the Masterfile approach five years ago.[2] However, there is no official reaction of the Bulgarian policy-makers to the OECD Report on BEPS.

[2] The Bulgarian National Revenue Authority recommends the use of the Masterfile/Country-specific file approach as introduced by the EU Joint Transfer Pricing Forum.

Cambodia

Taxing authority and tax law

Taxing authority: General Department of Taxation (GDT).

Relevant regulations and rulings

Article 18 of the Cambodia Law on Taxation (LOT), Allocation of income and deductions among taxpayers: In the case of two or more enterprises, whether incorporated or organized, in or outside of the Kingdom of Cambodia may distribute gross income, deductions, or other benefits among such enterprises and their owners in order to prevent the avoidance or evasion of taxes or to clearly reflect the income of such enterprises, or their owners.

For the purpose of this Article, two or more enterprises are under common ownership, if a person owns 20% or more in value or equity interests of each enterprise.

Cambodia has not concluded any double tax agreements as of January 2014.

Audit risk/transfer pricing scrutiny

There is no specific transfer pricing rule in Cambodia. Under the LOT, the tax regulations provide the tax authority with wide powers to reallocate income and expenditure between taxpayers having 20% or more common ownership. Transactions between related parties may be subject to redetermination by the Cambodian tax authority for the purpose of preventing tax avoidance. Therefore, in order to avoid the tax risk, companies should ensure that all related party transactions are conducted within the arm's length principle.

Cameroon

Taxing authority and tax law

Tax authority: General Director of Taxation

Tax law: General Tax Code

Relevant regulations and rulings

Circular on the Finance Law by the General Director of Taxation.

OECD guidelines treatment

Cameroon does not make any specific reference to the OECD Guidelines but refers to the arm's length principle.

Priorities/pricing methods

Not applicable.

Transfer pricing penalties

There are no specific rules for transfer pricing adjustments but generally all tax adjustments are subject to penalties.

Penalty relief

In case of partial or total failure to submit the required documentation, a notice to provide or complete the documentation will be served within 30 days to the company. This notice should remind the taxpayer of the penalties in case of failure to reply, including adjustments based on information available to the authority.

The taxpayer should make all attempts to submit the transfer pricing documentation within the deadline provided i.e., 15 March of each year.

Documentation requirements

Article 18-3 of the New Finance Law 2014 stipulates that:

"Companies falling under the Department in charge of large enterprises shall also submit within the same deadline and using the form provided by the Administration, the statement of shares which they own in other companies where such shares do not exceed 25% of their share capital. They shall attach a detailed statement of transactions with the companies which control them or which are under their control, be they in Cameroon or abroad. For the application of this provision, the notion of control must be understood as used in Article M 19 (a) (2) of the Tax Procedures Manual."

The documents to be included in the annual tax return are:

A statement of ownership in other companies if the ownership exceeds 25% of their share capital. The statement should be accompanied by the following elements:

- A general description of the ownership, including changes in securities occurred during the last two years of activities
- A general description of the legal and operational structures of the associated companies, including an identification of the associated structures engaged in transactions with the company
- A general description of the functions performed and risks assumed by the associated companies that affect the company and its business reporting
- A list of key intangible assets, including patents, trademarks, trade names and know-how related to the company filing the return

A detailed statement of the intra-group transactions:

- A description of transactions with other affiliates, including the nature, amount of flows, and fees

Cameroon (continued)

Documentation requirements (continued)

- A list of cost sharing agreements and, if applicable, a copy of the preliminary agreements on transfer pricing and rescripts relating to the determination of transfer prices, affecting the results of the enterprise filing the return
- An overview of the methods and the determination of transfer prices in accordance with the arm's length principle, including an analysis of the functions performed, assets used and risks assumed and an explanation for the selection and application of or the methods used
- A comparative analysis of the elements considered relevant for the company

Documentation deadlines

The transfer pricing documentation must be submitted each year along with the annual tax return no later than 15 March.

Statute of limitations on transfer pricing assessments

The statute of limitations on transfer pricing assessment is four years.

Return disclosures/related party disclosures

Tax payers must disclose related party transactions. Indeed, the provisions of Article 18-3 indicate that the company must provide a description of transactions with other affiliates, including the nature and amount of flows, including fees. These disclosures are to be included in the transfer pricing documentation submitted with the return.

Transfer pricing-specific returns

As of this point, the administration has not provided a standard template or submission form.

Audit risk/transfer pricing scrutiny

The likelihood of an annual tax audit in general is high. The likelihood that transfer pricing will be reviewed as part of that audit is also high. However, the likelihood that the transfer pricing methodology will be challenged is low.

APA opportunity

Advanced Pricing Agreement L 33 provides for some agreements for operations between the taxpayer and the authorities but no specific reference is made to transfer pricing agreements.

Expected reaction to OECD Report on BEPS

Even prior to the introduction of stringent transfer pricing requirements, Cameroon had a general anti-avoidance rule, which stated that in case of any agreement or legal act concealing the direct or indirect transfer of income or benefits, the tax authorities have the right to restore the transaction to its true substance and to reassess the taxable amounts. In addition, the Finance Law 2012 disallowed the deductibility of certain expenses when paid to recipients which are residents in tax havens jurisdictions.

Apart from the aforementioned, there has been no reaction on the OECD Report on BEPS from the Cameroonian tax authorities.

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 is 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, ministerial discretion regarding acceptance of downward tax adjustment requests, and the application of withholding tax to transfer pricing adjustments.

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.

The 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 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. The CRA's related IC's and other administrative guidance are considered instructive but not definitive. The OECD Guidelines and other OECD reports are not formally 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 (residual/contribution) and TNMM methods.

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.

Canada (continued)

Priorities/pricing methods (continued)

In 2012, following the 2010 revisions to the OECD Guidelines, which the CRA endorsed, TPM-14 was published. While not wholly abandoning the concept of a natural hierarchy of methods, it indicated that acceptance of the preferred method in a particular circumstance would depend on the degree of comparability available under each of the methods and the availability and reliability of the data.

Transfer pricing penalties

Subsection 247(3) of the ITA imposes a penalty of 10% of the net upward transfer pricing adjustments. 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 the taxpayer has not made reasonable efforts to determine and use arm's length transfer prices.

As set out in by TPM-07, all proposed reassessments involving potential 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.

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 (see below), and such documentation is in existence as of the due date of the tax filing. In the case of corporations, 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.

No transfer pricing penalties under subsection 247(3) 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 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

Canada (continued)

Documentation requirements (continued)

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).

TPM–09 sets out the CRA's views on the meaning of "reasonable efforts" under §247 of the Act. In practice, TPM–09 has not significantly enhanced clarity with respect to the reasonable efforts standard and, thereby, the potential application of transfer pricing penalties.

Documentation deadlines

Taxpayers must prepare or obtain records and documents that provide a description that is complete and accurate in all material respect for 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 corporations, 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 ordinarily cannot 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 years i.e., to seven years. This time period may be further extended if the taxpayer provides the CRA with a waiver (authorization by the taxpayer to the CRA to waive the time limit for reassessment). 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 at non-arm's length with 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.

Transfer pricing–specific returns

The above referred T106 returns are essentially transfer pricing returns.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 an annual tax audit is high, as so is the likelihood of transfer pricing being reviewed as part of the audit. The likelihood of a transfer pricing methodology being challenged, if transfer pricing comes under audit, is also high.

Per TPM–05, it is mandatory for CRA auditors to issue a formal written request to the taxpayer 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. This request triggers the three month window to provide the contemporaneous documentation.

Canada (continued)

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 the travel costs it incurs during the completion of an APA.

An APA request can cover a taxation year if the request is made before the filing-due date for that year. TPM-11, discusses the CRA policy with respect to rolling an APA back to prior years. The main limitation being 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 which are currently undergoing a transfer pricing audit.

Expected reaction to OECD Report on BEPS

Taxpayers and the CRA are closely monitoring the BEPS developments at the OECD. It is expected that the CRA will endorse the BEPS initiative and seek to implement elements of it in Canada. Taxpayers are concerned about the potential increase in the reporting burden and in double taxation conflicts.

Chile

Taxing authority and tax law

Tax authority: Internal Tax Service (Servicio de Impuestos Internos, or SII)

Tax law:

- Chilean taxation rules are established in the Income Tax Law (ITL), under section 41 E, introduced in September 2012
- Tax authority Circulars issued every year provides 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, introducing new transfer pricing rules with Article 41 E in the ITL.

Article 41 E established that any cross border transaction held by 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 established 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 established 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).

Resolution 67 of 2013 established the requirements and procedure for secondary adjustments.

Resolution 68 of 2013 established the requirements and procedures for APAs.

OECD guidelines treatment

Although the ITL does not mention the 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 considered as relevant data when dealing with transfer pricing issues.

Furthermore, current audit and litigation procedures have been grounded by the Chilean Tax Authority on the basis of the OECD Guidelines.

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 economic analysis for a case where none of the other methodologies are viable.

Chilean legislation 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

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 Annual Tax Unit (ATU)) or Article 41-E of the ITL (10 to 50 ATUs, up to 15% of equity capital or 5% of real capital).[1]

On the other hand, price, value or profit differences that result from applying these rules are subject to a sole tax of 35%, applied on the transfer pricing adjustment determined. This tax is to be paid by the Chilean taxpayer who is subject to the adjustment, 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 or audit process by the SII as determined by the former in a notification. It could also be subjected to additional penalties and interests.

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 to 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 on 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 may 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 this period, 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

Return disclosures/related party disclosures

From 2013 onwards, it is mandatory for taxpayers to file a transfer pricing sworn statement every year. It comprises of all intercompany transactions held in the prior year and it must also 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.

[1]One ATU is approximately US$900.

Chile (continued)

Return disclosures/related party disclosures (continued)

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 (US$1,000,000 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 the 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)

Transfer pricing-specific returns

The taxpayer is required to file Form N° 1907.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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. Hence, 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 international double 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 up to three commercial years.

Expected reaction to OECD Report on BEPS

As of January 2014, the Chilean tax authorities have not expressed any specific reactions to BEPS.

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 the 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 the 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, the SAT recognizes the OECD Guidelines and the transfer pricing methods named therein.

Priorities/pricing methods

The 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 China Tax Collection and Administration Law and Article 96 of China Tax Collection and Administration Law Implementation Regulations, as well as Article 44 of the CITL and Article 115 of the CITL Implementation Regulations.

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.

China (continued)

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 50% or less share of foreign ownership and 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 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 must 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).

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 these 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

audit. The likelihood of the transfer pricing methodology being challenged is characterized as medium.

In 2012, 175 transfer pricing audits were concluded, resulting in an aggregate tax liability adjustment of CNY34.6 billion. This amount is slightly higher than the CNY2.4 billion aggregate adjustment in 2011. Additionally, the value of self-assessed anti-avoidance adjustments significantly increased in 2012, reaching CNY28.3 billion, as compared to CNY20.8 billion in 2011.

In 2013, the Chinese tax authorities continued to focus on certain industries, such as automotive, pharmaceutical and retail. Additionally, topics such as market premium, location savings, and local marketing intangibles remain focus areas, which are likely to give rise to transfer pricing scrutiny.

In addition, intangible property and share transfer are the targeted areas under the SAT's examination strategy. The Chinese tax authorities are arguing for the use of income method 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 10 years of operating history before applying for an APA. Moreover, the ban on enterprises with a 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 (2012) was published in June 2013. China signed 12 APAs in 2012, including 3 unilateral APAs and 9 bilateral APAs. In total, 85 APAs were signed between 2005 and 2012.

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 signed 29 bilateral APAs between 2005 and 2012, and more cases are in the application and negotiation process.

Expected reaction to OECD Report on BEPS

Most of the areas and action items addressed in the BEPS reports are in line with the current enforcement environment in China. As an observing country, China is expected to closely monitor the development of OECD BEPS discussions and is likely to issue relevant regulations corresponding to BEPS actions in the near future.

- Intangible: SAT already recognizes the difference between legal title and substantial control of the intangibles. Through transfer pricing audits and APA negotiations, the SAT has advocated that profits associated with intangibles should be appropriately located according to value creation. In particular for R&D service providers in China, the SAT has taken the position that if the foreign service recipient's R&D activity depends on critical mass or a big cluster of technical capabilities sitting in the Chinese contract R&D center, China may deserve a profit-split result instead of a cost plus remuneration.
- Country-by-country reporting: SAT has already been keeping close watch on aggressive international tax structures. The current China CITL includes the General Anti Avoidance Rules (GAAR), which has granted authority to the SAT to use appropriate methods to adjust arrangements without business substance. In recent years, the SAT has also increased its participation in information exchange with overseas counterparties who have treaty or information exchange agreements with China. Therefore, China is likely to proactively respond to the country-by-country reporting under the OECD initiatives.
- Documentation Masterfile: Guoshuifa 2 requires Chinese taxpayers to disclose global value chain information and group's consolidated financial report in the contemporaneous transfer pricing document. In practice, the SAT has increasingly requested global information in transfer pricing controversy cases. Therefore, it is expected that China will welcome the documentation Masterfile approach.

Colombia

Taxing authority and tax law

Tax 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 as related party and must comply with the formal transfer pricing obligations in Colombia. 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 Article 260-1 of the Colombian tax code. The definition of tax haven is found in Article 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 regards 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 segmented or not) that is used to carry out the transfer pricing analysis of an intercompany transaction must be certified by an independent auditor.

Tax authorities have released notice mentioning that a new regulatory decree will be issued before the end of 2013.

OECD guidelines treatment

Although Colombia is not a member of the OECD, the 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 either in 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 the 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 must be used as 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. If no original invoice is available, a third party's valuation must be performed to prove the arm's length value of the acquired asset. 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.

Colombia (continued)

Priorities/pricing methods (continued)

- 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.

Transfer pricing penalties

The Colombian transfer pricing regime penalizes both the supporting documentation and the return, 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 US$212 limited to US$203.427
- Information inconsistencies — 1% of the value of the transactions reported with inconsistencies that were carried out with related parties, limited to US$53.682
- Omitted information (transactions) — 2% of the value of the omitted transactions carried out with related parties, limited to US$282.537. Additionally, rejection of cost and expenses related to the omitted operations may apply
- Omitted information (related parties located in tax havens) — 4% of the total value of the transactions carried out with related parties, limited to US$141.268. Additionally, rejection of cost and expenses related to the omitted operations may apply

Transfer pricing return

- Late filing — Starting at US$141 limited to US$135.618
- Information inconsistencies — 0.6% of the total value of the transactions carried out with related parties, limited to US$32.209
- Omitted information (transactions) — 1.3% of the total value of the transactions carried out with related parties, limited to US$282.537. Additionally, rejection of cost and expenses related to the omitted operations may apply
- Omitted information (related parties located in tax havens) — 2.6% of the total value of the transactions carried out with related parties, limited to US$84.761. Additionally, rejection of cost and expenses related to the omitted operations may apply
- Non-filing of the transfer pricing return — 10% of the total value of the transactions carried out with related parties, limited to US$282.537

The penalties mentioned above do not include 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)
  - If 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

[1]The amounts in US$ are applicable for taxable year 2013 and are subject to changes because of the exchange rate and the tax value unit (UVT).

Colombia (continued)

Penalty relief (continued)

The tax authority has a period of five years from the original date of filing to start an administrative process to impose fines regarding noncompliance of formal transfer pricing duties.

Transfer pricing adjustments

In the case of transfer pricing adjustments a penalty of up to 160% of the additional tax could be triggered. In case of a self-assessment or acceptance of the challenges made by the tax authorities, this fine could be decreased to 10%.

Documentation requirements

Taxpayers must prepare supporting documentation proving 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 US$141.268 for taxable year 2013. Decree 4349 outlines the information to be included in the transfer pricing documentation.

Documentation deadlines

- Documentation

  Documentation should be available to 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 electronic system. The due date is the same for filing both the transfer pricing documentation and the transfer pricing return.

- Filing returns

  Information regarding due dates is not available yet. It is expected that the due dates for documentation and informative return will be in the month of August.

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 if it's a foreign or local related party (free trade zone), 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 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)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 as reported by local entities. During audit, the tax authority requires companies to prove that the aforementioned service's and usefulness of the assistance's, 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 requires companies to prove that the usefulness of the aforementioned services', 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

In 2012, the first APA has been concluded in Colombia and several are in evaluation phase. The Colombian 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 APA agreement will be valid for the year it is subscribed, the year before and up to three taxable years after the year of the subscription.

Expected reaction to OECD Report on BEPS

There has not been any reaction from the tax authorities up until January 2014.

Republic of Congo

Taxing authority and tax law

Taxing authority: General Directorate of Taxes and Domains.

Tax law: General Tax Code.

Relevant regulations and rulings

Tax rulings or circulars regarding the application of transfer pricing rules have not yet been released, in spite of the recent reform introduced by the Finance Act 2012.

OECD guidelines treatment

There is no formal recognition of the OECD Guidelines in the Congolese legislation.

Theoretically, all pricing methods that are accurately justified in the transfer pricing documentation of the company may be accepted by the taxing authorities.

Priorities/pricing methods

The arm's length principle from the OECD Guidelines is the only principle expressly mentioned in the Congolese legislation.

Transfer pricing penalties

There is no accurate provision on how to determine underpayments; however it is likely that the taxing authorities may refer to the arm's length principle to raise illicit profits shifting.

The penalty for failure to maintain transfer pricing documentation is not specified.

Penalty relief

In order to mitigate or relieve the risk of assessment, it is recommended to have:

- Transfer pricing documentation in line with the policy followed by the group
- Information/supporting documents/data-entries on various transactions with related entities
- Tax rulings relating to the approval of pricing methods used by the company
- Global corporate structure map, with a description of functions/roles of each entity engaged in business and/or financial relations with the company
- Bookkeeping compliant with the local accounting system

In general, the prompt and complete disclosure of information requested in case of tax audit is seen as a feature of good co-operation from the taxpayer, which in turn may result in a fair treatment by the taxing authorities.

Documentation requirements

Transfer pricing documentation is effectively required for companies partially or wholly controlled or managed by multinationals. Transfer pricing documentation must include the following information:

- The group's policy on transfer pricing rules setting out the various pricing methods selected
- Agreement/chart or any other instrument relating to the attribution of costs, risks and functions within the group
- List of moveable assets held or used, especially patents, know-how and copyrights, and recapitulation of royalties paid up
- Cash pooling agreement
- Commissioning, brokerage, technical, administrative and financial support contracts, etc.,

Republic of Congo (continued)

Documentation deadlines

Transfer pricing documentation must be kept available at any time. In case of a tax audit, it must be provided from the starting date of the audit. Otherwise, the tax inspectors will summon within the next 30 days.

Various sanctions related to the non-completion of this requirement have not been specified yet.

Statute of limitations on transfer pricing assessments

In the absence of specific rules in this area, it is most likely that the general statute of limitations of four years from the date of the transaction in question, would apply.

Return disclosures/related party disclosures

All information/supporting documents/data-entries on various transactions with related parties must be disclosed.

Transfer pricing-specific returns

There are no specific transfer pricing returns for tax payers.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of occurrence of tax audits is low. In practice, annual tax audits are scheduled every two years. The likelihood of a transfer pricing review as part of a general tax audit is low. As of January 2014, Congo has not experienced audits on transfer pricing issues.

APA opportunity

Not applicable.

Expected reaction to OECD Report on BEPS

There has not been any reaction from the tax authorities until January 2014.

Costa Rica

Taxing authority and tax law

Taxing authority: Tax Administration of Costa Rica (Dirección General de Tributación, or DGT).

Tax law: Executive Decree No. 37898–H, Articles 1 to 11.

Relevant regulations and rulings

Executive Decree No. 37898–H (the TP Executive Decree), that adopts transfer pricing regulations applicable to individuals or business entities that conduct related party transactions, came into effect in Costa Rica on 13 September 2013.

Costa Rican transfer pricing provisions are mainly based on the OECD Guidelines and apply to all the transactions conducted by Costa Rican taxpayers with related entities resident abroad and within Costa Rica. The provisions also present an additional non-OECD method (the valuation of goods with international quotations method), that could be applied as an alternative to the CUP method.

The TP Executive Decree is effective upon its publication in the Official Gazette. Further regulation is expected in order to complement the TP Executive Decree.

OECD Guidelines treatment

Costa Rica is currently not an OECD member, but it is in the process of being evaluated for admission. There is no reference to the OECD Guidelines in the TP Executive Decree. However, in general local regulations follow the OECD standard. In addition, the OECD Guidelines have been mentioned and used as a reference in official audits and court resolutions.

Priorities/pricing methods

The TP Executive Decree requires the application of the most appropriate transfer pricing method. The specified methods used are: CUP, Resale Price, Cost Plus, Profit Split, TNMM and the valuation of goods with international quotations method that could be applied as an alternative to the CUP method.

Transfer pricing penalties

No express monetary penalties are applied when taxpayers fail to maintain contemporaneous transfer pricing documentation or transfer pricing information return. Nevertheless, the monetary penalties for noncompliance set forth in the Tax Code of Standards and Procedures should apply by default.

Penalty relief

There is currently no penalty regime in place.

Documentation requirements

Contemporaneous transfer pricing documentation related to domestic and cross-border related party transactions must be maintained in Spanish. The documentation must include the name, address and tax residency of the related persons with whom transactions are carried out, as well as the correct application of an approved method as stated in the TP Executive Decree. 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 must also be included.

Documentation deadlines

Taxpayers must prepare and maintain transfer pricing documentation on an annual basis. The TP Executive Decree does not state a deadline but rather indicates that further regulation would be provided in order to establish the due dates for documentation. The documentation must be at the disposal of the DGT upon request.

Statute of limitations on transfer pricing assessments

The standard statute of limitations on general tax assessments of four years should apply. This statutory period is extended to 10 years for unregistered taxpayers, fraudulent returns filed and for failure to file. The term is also extended in cases of amended returns.

Costa Rica (continued)

Return disclosures/related party disclosures

Related party disclosures have to be made in specific transfer pricing returns. There are no related party disclosures that are to be made on general income tax returns.

Transfer pricing-specific returns

There is an annual obligation for taxpayers to file a Transfer Pricing Information Return under the following situations: i) taxpayers conducting cross-border and local related party transactions, and ii) such taxpayers are categorized as big taxpayers or "grandes contribuyentes" or individuals or entities under the Free Zone Regime.

The forms, mechanisms and due dates are pending to be issued by the DGT.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The risk of a general tax audit is currently categorized as high, especially for taxpayers characterized as "big taxpayers" and multinational companies with related transactions. The risk of transfer pricing assessments as part of a general tax audit is considered high as well. In case transfer pricing is scrutinized, the risk that the transfer pricing methodology will be challenged is also high. As of today, the DGT has been very aggressively trying to apply only the CUP method.

Although the TP Executive Decree was recently published, transfer pricing has been part of the Costa Rican tax environment for the past 10 years.

Before the TP Executive Decree, there were no official transfer pricing rules in Costa Rica. Technically, to date, the Income Tax Law or the Tax Code of Standard and Procedures do not include any specific transfer pricing provision. Not even the general arm's length principle is codified. However, in an internal directive from 2003 (DGT-20-03), the DGT instructed its auditors to examine inter-company transactions under the general economic reality and substance over form principles defined under sections 8 and 12 of the Tax Code of Standards and Procedures and apply general transfer pricing principles. Even though there were no official regulations nor any kind of technical references or guidelines for the taxpayers, tax auditors reviewed and challenged related party transactions of primarily many multinational companies as well as some large local entities in Costa Rica. This resulted in very complex, confusing and especially expensive tax adjustments for the companies doing business in the country. These actions of the DGT were endorsed by several rulings from administrative and judicial courts, as well as from the Constitutional Chamber of the Supreme Court.

There was an attempt to pass transfer pricing legislation through Congress in 2012, but since it was included as part of the last tax reform package, it was also repealed after the whole law was declared unconstitutional by the Constitutional Court. However, despite the lack of a law regulating transfer pricing, the Constitutional Court stated that transfer pricing rules could be applied by the DGT based on sections 8 and 12 of the Tax Code of Standards and Procedures. A few months later, the TP Executive Decree was drafted and approved.

The TP Executive Decree is intended to formalize an administrative practice that has been in force for years and try to create a certain level of legal certainty in relation to this subject matter, while a more comprehensive legislation is passed by the Congress.

APA opportunity

APAs are contemplated under the provisions of the TP Executive Decree. Taxpayers can request an APA for a maximum of three years. However, the corresponding regulations have not yet been enacted.

Expected reaction to OECD Report on BEPS

As transfer pricing provisions in Costa Rica have just been enacted, there is no expectation of immediate or short term reaction regarding specialized topics covered in the OECD Report on BEPS.

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, and define the methods allowed and documentation required supporting 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 Guidelines. Furthermore, the Ministry of Finance issued instructions for the tax officials performing transfer pricing audits, which are also based on the OECD Guidelines.

Since Croatia became an EU Member on 1 July 2013, the Croatian tax authorities should also follow the recommendations and conclusions of the EU Joint Transfer Pricing Forum.

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 individual responsible 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 for 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;

Croatia (continued)

Documentation requirements (continued)

- 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;
- 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 the transfer pricing documentation from previous years documentation, reflecting adjustments made due to changes in relevant facts and circumstances; and
- 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 be 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 start requesting, on a case by case basis, a statement on transfer pricing method applied and/or transfer pricing documentation to be submitted as supporting documentation upon submission of the corporate income tax return (four months after the 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 2014 corporate income tax return has to be filed by 30 April 2015, filings for 2014 become statute-barred on 1 January 2019). However, the general statute of limitations may be extended, and starts again after 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 2014 become statute-barred on 1 January 2022, regardless of the number of intervening events initiated by the tax authority.

Note however that the amendments to the law provisions regulating the statute of limitation period of the right to assess tax, are in effect as of 1 January 2013. Based on the new rules, the statute of limitation period mentioned above could be prolonged in cases where 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

Based on the CIT legislation, no specific disclosures are required in the annual tax return.

Transfer pricing–specific returns

No specific requirements for a separate return (including an information return) for related party transactions are prescribed by the Croatian legislation.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 tend to dispute over 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.

Croatia (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

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.

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.

Expected reaction to OECD Report on BEPS

The Croatian tax authorities have published news on developments with respect to BEPS on their website. However, no official reaction to the Report on BEPS has been released by the Croatian tax authorities.

Republic of Cyprus

Taxing authority and tax law

Taxing authority: Inland Revenue Department.

Tax law: Currently, there are no local transfer pricing regulations in Cyprus. But Cyprus has 44 Double Tax Treaties, which contain an article that resembles Article 9 OECD Model Tax Convention on "Associated Enterprises."

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 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

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.

D-333 sets out documentation that would 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.

Czech Republic (continued)

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 requests so.

Statute of limitations on transfer pricing assessments

The general statute of limitations applies. Effective from 1 January 2011, the limit set by the Tax Code is three years from the end of the period for filing the return, on the taxable period concerned (i.e., during 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 time limit will also be prolonged if a supplementary tax return for the respective period is filed (should the taxpayer file an additional return during the 12 months prior to expiration of current limit, the limit is extended by one year) or if a tax loss carried forward may be utilized in that particular period. However, tax may not be assessed after 10 years.

Return disclosures/related party disclosures

Effective from 1 January 2001, the executives of a controlled entity are required to complete a memorandum with respect to relationships 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 in the corporate income tax return.

Transfer pricing-specific returns

No specific transfer pricing return is required.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 among many others aspects. 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 havens are closely scrutinized. The scrutiny of transfer pricing will only intensify. Also, in press statements, the MF has directed that the tax authorities should particularly focus on transfer pricing. In addition, they have created specialized sections within the tax authority that contain full-time specialists dedicated to transfer pricing issues.

APA opportunity

APA regulations were established under §38nc of the Income Tax Act, which became effective on 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 the determination of transfer price 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.

Expected reaction to OECD Report on BEPS

The Czech tax administration is acquainted with the OECD Report on BEPS. However, it has not prepared any particular steps to be taken in this respect so far.

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

The MT, for the purpose of its assessment, applies the principles of the OECD Guidelines.

Priorities/pricing methods

The following transfer pricing methods are accepted: CUP, Resale Price, Cost Plus, Profit Split and TNMM. While 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 that the penalty may amount to twice the cost saved by not submitting compliant documentation, and as much as DKK250,000 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 6.0 % (3.9% in 2013, 4.3% in 2012, 4.8% in 2011, 5.1% in 2010, 6.1% in 2009, 6.3% in 2008 and 5.8% in 2007) nondeductible surcharge on all adjustments of prior years' corporate taxes payable will be levied. Furthermore, nondeductible interest of 0.6% (0.4% in 2013, 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.

Documentation requirements

The documentation must be made available to the tax authorities within 60 days from when the notice is received. The earliest date for making such a request 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.

Documentation requirements (continued)

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 also adopted new rules allowing the tax authorities to request entities, subjected 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)

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 who 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.

Denmark (continued)

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 days' notice. The earliest date when 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 it was prepared within 60 days of the request from the tax authorities. However, recent argumentation by the tax authorities indicate 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. This interpretation, at this point in time, is not supported by case law.

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

Not applicable, please refer to the "return disclosures/related party disclosures" section above.

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 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 a key target for the tax authorities. In line with this focus, the tax authorities issued guidelines in 2009, on the valuation methods and documentation requirements applicable to companies/businesses, shares and intangible assets/IP in a related party context.

Most tax audits not only include, but are being initiated with, requests related to transfer pricing review. Intensified cooperation between the Nordic (Denmark, Sweden, Norway, Iceland and Finland) tax authorities has led to a higher level of information sharing and a significant increase in the number of coordinated intra-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 five to seven bilateral APAs annually. At this point, all applications for APAs have been accepted.

We expect an increase in the number of APAs that will be initiated and finalized in the next few years.

Denmark (continued)

Expected reaction to OECD Report on BEPS

During 2013 the OECD published a discussion paper and later in the year an Action Plan with a view to address the perceived flaws in the international tax rules including the following subjects:

Traditionally, Denmark has followed the advice of the OECD, and most of Denmark's double tax conventions are built on the OECD Model Tax Convention. It is therefore expected that Denmark will follow the advice of the OECD, and the amendments to the Model Tax Convention as a result of the Action Plan on BEPS.

The country-by-country reporting and the Masterfile documentation in particular, could lead to changes in domestic law regarding what is required in order to be compliant with Danish transfer pricing requirements, since these requirements focus mostly on documentation regarding operations in Denmark, and does not take on the holistic view that the OECD is planning along with the action plan.

Regarding IP, it should be noted that historically, the Danish tax authorities have been focusing on the transfer pricing area including international transfer of IP rights. As mentioned above, it is expected that Denmark will follow the amendments to the Model Tax Convention, and also any amendments to the OECD Guidelines, should it arise.

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 party 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 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. Furthermore, 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

Documentation requirements

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

- Relevant market conditions

Dominican Republic (continued)

Documentation requirements (continued)

- 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 annually file 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, 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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. Note however that the corresponding regulations to Article 281-bis have not yet been enacted.

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.

Dominican Republic (continued)

Expected reaction to OECD Report on BEPS

Transfer pricing provisions are relatively new in the Dominican Republic and the DGII's experience is still in the development stage. Therefore no immediate or short term reaction is expected regarding specialized topics covered in the OECD Report on BEPS.

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

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

Article 85 of the Tax Regulation (Reglamento a la Ley Orgánica de Régimen Tributario Interno) about International Intermediary: in case of exports and imports with related parties which work with primary agricultural product, non-renewable natural resources or any kind of commodity whose price is known in transparent markets, where an international intermediary is involved and is not the intended recipient of the goods, the local tax authority could consider this kind of intermediary as invalid (not substantial, hence, not deserving any margin) for the use of the CUP method.

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

SRI Resolution NAC-DGER2008–0464 establishes the transfer pricing exhibit and transfer pricing integral report content requirements, where documentation is required for domestic and cross border transactions with independence of the tax regime of the parties.

Resolution NAC DGERCGC 13–00011, established changes in the minimum values and types of transactions that is necessary for the presentation of the transfer pricing annex and transfer pricing report These amendments will apply to all the transfer pricing documentation since the year 2012.

The principal amendments are as follows:

Taxpayers are required to file the transfer pricing annex:

- If domestic and cross border related party transactions total amount for the fiscal year under documentation exceed US$3,000,000

Taxpayers are required to file the transfer pricing report:

- If domestic and cross border related party transactions total amount for the fiscal year under documentation exceed US$6,000,000

OECD Guidelines treatment

The SRI considers the 1995 edition of the 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 Profit Split method are considered the last resort methods by the SRI.

Ecuador (continued)

Priorities/pricing methods

The SRI accepts the following methods: 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, 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, whichever is higher. This method may not apply if the local exporter or importer is able to prove that substance of the operations of the consignee abroad and this intermediary party has no more than 20% of their operation with related parties.

Transfer pricing penalties

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

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

In spite of the above, there is a document issued by the tax authority (Instructivo para el Establecimiento de Sanciones Pecuniarias) which is used to establish the penalty amount, according to the seriousness of the fault/misdemeanor (late delivery or incomplete/erroneous information send by the local tax payers). Based on this document, late filing could imply a nominal penalty up to US$333.

Assessments of any kind, including transfer pricing adjustments, must charge interests (around 13% per year) between the time when the taxes were payable (typically in April, a year after the transactions were held) and the time when the tax is finally paid. In addition, a 20% surcharge on the assessment will be applied.

Penalty relief

Currently, no penalty relief is available.

Documentation requirements

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

- All transactions with domestic and cross border related parties, including those not affecting P&L but balance sheet
- 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 US$3 million in the reported fiscal year.

Additionally, the transfer pricing integral report must be presented to the SRI by companies with accumulated transactions with local/foreign related parties exceeding US$6 million in the reported fiscal year. This report must substantiate the analysis made for all transactions reported in the annex. Both documents must be filed no later than two months after the deadline for filing the income tax return.

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.

Transfer pricing integral report requirements:

- Full functional analysis of the multinational group and the local party

Ecuador (continued)

Documentation requirements (continued)

- 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
  - Details of comparable companies
  - Explanation for adjustments applied
  - Reason for rejection of searched comparable companies
  - Accepted comparable companies activities description and financial statements
  - Analysis description and conclusion
  - Transfer pricing report should be presented in physical and digital (PDF or text file)

Documentation deadlines

Adjustments and intercompany transaction figures must be included on the 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 file the transfer pricing annex starts when the aggregated figure of domestic and cross border related parties' transactions exceed US$3 million.

The integral report must be delivered in addition to the annex when those transactions exceed US$6 million, or when requested by the tax administration.

Return disclosures/related party disclosures

No specific related party information, apart 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 located in tax haven
- Parties buying or selling more than 50% of the products sold or bought by the local company
- Parties in 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 the transfer pricing study.

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

According to Resolution No. NAC-DGCCGCT2-00013, any country or jurisdiction will be considered as a tax haven, if the correspondent tax rate is lower than the 60% of the tax rate determined in Ecuador for a specific transaction. On the basis of the foregoing, the following countries were added to the preferential tax regimes list considered by the local tax authority: Estonia, Bulgaria, Macedonia, Ireland, Montenegro and Serbia.

Ecuador (continued)

Return disclosures/related party disclosures (continued)

Additionally, for some states in the United States, this regime applies to companies established as a Limited Liability Company (LLC), whose owners are not US residents and do not have obligation to pay the federal income tax. Ecuadorian tax administration stressed its interest in Delaware, Wyoming, Nevada and Florida.

Transfer pricing–specific returns

- Report of the external audit on financial statements shall include transfer pricing-specific comments that make it compulsory to communicate outcome of the transfer pricing analysis before the issuance of the audit report
- Income tax return includes transfer pricing-specific fields
- Transfer pricing integral report, if applicable, should be filed during June
- Related parties transactions annex, if applicable, should be filed during June

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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

The likelihood of an 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 likelihood of reviews challenging the methodology (or at least the comparables set) is over 75%.

On the other hand, there is a probability that for certain primary agricultural products, non-renewable natural resources or any kind of commodity the tax authority may use secret comparables or databases in order to make comparisons using the CUP method.

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

A transfer pricing audit is instigated by a central decision-making body. Various considerations are taken into account for 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
- Differences between data being reported to Customs Administration and to the Tax Administration
- Previous tax audits of the taxpayer
- The profitability of the local taxpayer

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 this taxpayer 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.

Ecuador (continued)

Expected reaction to OECD Report on BEPS

There is no evidence that the Ecuadorian tax authority will make any information exchange requirements with other tax authorities or utilize global transfer pricing documentation in order to demonstrate the non-existence of BEPS between related parties from the same multinational group, in the near future.

Egypt

Taxing authority and tax law

Tax 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 on transfer pricing principles and how to apply Article 30 of the ITL and Articles 38, 39 and 40 of its executive regulation, the ETA, with the assistance of the OECD, issued its transfer pricing guidelines in 2010. The ETA decided to issue its transfer pricing guidelines in a series of parts, with the first part focusing on the main concepts and issues. 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 APAs.

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

According to Article 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 spouse, ancestors and descendants (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 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 39 and 40, the methods of calculating the arm's length price. According to Article 39, the fair market price (FMP) shall be determined based on CUP, Cost Plus, or the Resale Price methods. According to Article 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 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 that it is the most appropriate method for the analysis and why the other methods are not appropriate.

Transfer pricing penalties

According to the ITL, if the tax amount included in the tax return, by the taxpayers, is less than the finally estimated tax amount, they shall be liable for a penalty based on the following:

Egypt (continued)

Transfer pricing penalties (continued)

- 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 need not be submitted with the tax return, but should be available at short notice if 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 year ending in December (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 for selecting this method
- The country of origin for tangible and intangible goods
- The country of the supplier

Transfer pricing-specific returns

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

Egypt (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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, the ETA has started paying extra attention to related party transactions during the corporate tax inspection from 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 the 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 the 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 none have been concluded to date.

Expected reaction to OECD Report on BEPS

Up until January 2014, the Egyptian tax authority has not issued any written document related to the BEPS project of the OECD.

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 valuation at fair market value principle, definition of related party, and comparability concept.

Disclosure in the tax report

Under the rules of the TC, when a taxpayer has assets with a value exceeding US$1,142,857 or sales higher than US$571,429 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 haven 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 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 have a preference for this method. Nonetheless, with the introduction of the GO, the following methods are acceptable: CUP, Resale Price, Cost Plus, TNMM and Profit Split.

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 transactions conducted with related parties, and with individuals or legal entities domiciled, incorporated or resident in tax haven jurisdictions for 10 years.

Said penalty cannot be less than nine minimum wages[1] (approximately US$2,018).

[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 US$224.21

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 US$1,121), 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 US$897).

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 US$672.63).

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 US$2018).

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 US$568.

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 after more than two months of 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, external auditor has to issue an opinion on transfer prices that practically requires taxpayers to prepare and maintain transfer pricing documentation by 31 May of each year, to support related party transactions. This is 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 prior audit (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 US$1,142,857 or sales higher than US$571,429 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 a part of the tax reform, subsection f) was added to Section 135 TC to include an obligation for an external tax auditor to incorporate a note in the 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 follow the fiscal year-end, when these transactions (individually or in the aggregate) are equal to or exceed US$571,429 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 (listed includes 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 US$672.63).

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 US$2,018).

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The risk of a general tax audit is currently categorized as medium. As part of all general tax audits, the tax authorities review in 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.

Expected reaction to OECD Report on BEPS

Transfer pricing provisions are relatively new in El Salvador and the DGII's experience is still in a developing stage. Therefore, no immediate or short term reaction is expected regarding specialized topics covered in the OECD Report on BEPS.

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 46 — 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 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 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 TNMM 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 EUR16 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 until actual payment (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 an 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 rate territory
- 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

Estonia (continued)

Transfer pricing penalties (continued)

Categories of documentation required:

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

Documentation deadlines

There is no deadline for preparing transfer pricing documentation. However, taxpayers are obliged to submit the documentation within 60 days 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 toll 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. The likelihood that transfer pricing will be reviewed as part of a general tax audit is high. 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.

Expected reaction to OECD Report on BEPS

The Estonian tax authorities have started to approach permanent establishments with respect to transfer pricing with a higher degree of diligence. But as BEPS is a rather new subject; the tax authorities have not yet formed their official opinion on the matter.

Fiji

Taxing authority and tax law

Tax authority: Fiji Revenue and Customs Authority (FRCA)

Tax law:

- Section 34, Income Tax Act
- Income Tax (Transfer Pricing) Regulations 2012
- Fiji's double tax agreements are also relevant tax laws in Fiji

Relevant regulations and rulings

The final Fiji Transfer Pricing Guidelines (FRCA Guidelines) were issued in 2012 and provide a guide to the application of Section 34 of the Income Tax Act and Income Tax (Transfer Pricing) Regulations 2012. These guidelines are intended to provide an overview of the framework within which the transfer pricing rules operate.

OECD Guidelines treatment

The FRCA adopts the positions outlined in the OECD Guidelines for multinational enterprises and tax administrations, and proposes to follow these Guidelines in administering Fiji's transfer pricing rules. Consequently, the FRCA Guidelines supplement the OECD Guidelines, rather than superseding them and accepts that the OECD Guidelines should be referred to if more detail is required in relation to issues arising.

Priorities/pricing methods

The FRCA accepts the most reliable method or methods chosen from the following:

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

Transfer pricing penalties

In accordance with the Income Tax (Transfer Pricing) Regulations 2012 the following penalties are applicable:

- Failure to keep required transfer pricing documentation is an offence and the person is liable upon conviction to a fine not less than FJD100, 000

In accordance with the Tax Administration Decree the following penalties are applicable:

- Failure to keep, retain or maintain accounts, documents or records as required under a tax law is liable:
  - If the failure is knowingly or recklessly made, a penalty equal to 75% of the amount of tax payable by the taxpayer for the tax period to which the failure relates; or
  - In any other case, a penalty equal to 20% of the amount of tax payable by the taxpayer for the tax period to which the failure relates
- Making false or misleading statements:
  - If the statement or omission was made knowingly or recklessly, a penalty equal to 75% of the tax shortfall; or
  - In any other case, a penalty equal to 20% of the tax shortfall
  - The amount of penalty imposed under the above mentioned cases is increased by 10 percentage points if this is the second application of the penalties relating to making false or misleading statements or 25 percentage points if this is the third or a subsequent application

Fiji (continued)

Penalty relief

Shortfall penalties may be reduced by 10 percentage points if the person voluntarily discloses the shortfall prior to the earlier of:

- Discovery by the FRCA of the tax shortfall; or
- The commencement of an audit of the tax affairs of the taxpayer

Shortfall penalties may also be reduced if a taxpayer has a past record of "good behavior."

Documentation requirements

There are no explicit requirements under Section 34 or any other provisions of the Income Tax Act for any particular category of information to be included in transfer pricing documentation.

The Income Tax (Transfer Pricing) Regulations 2012 requires that a taxpayer must record in writing, sufficient information and analysis to verify that it's controlled transactions are consistent with the arm's length principle.

The FRCA's 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 FRCA that a transfer pricing method used to establish the taxpayer's transfer prices are consistent with the arm's length principle in light of the relevant facts and circumstances.

Documentation deadlines

Documentation for transactions undertaken in a tax year must be in place prior to the due date for filing of the income tax return for that year.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations applicable to transfer pricing assessments. Accordingly, the statute of limitations applicable to all other assessments will also apply to transfer pricing assessments.

In accordance with the Tax Administration Decree the amendment of a tax assessment may be made:

- In the case of fraud, wilful neglect, or serious omission by or on behalf of the taxpayer, at any time; or
- In any other case, within six years of the date the FRCA served the notice of assessment on the taxpayer

Return disclosures/related party disclosures

There are no specific disclosure requirements. However, it is advisable to provide details of the following together with the income tax return; otherwise the FRCA may disallow a deduction for the same:

- Payments to non-residents such as dividends, interest, management fees, "know-how" payments, royalties or contract payments made

In some instances the FRCA may require additional details before assessing an income tax return.

Transfer pricing–specific returns

There is no separate transfer pricing return required to be filed in Fiji.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Tax audits are undertaken at the discretion of the FRCA. The FRCA selects audit targets based on certain criteria and risk profiling which include:

- Company incurring ongoing losses
- Lower than expected profitability
- Dealings with associates in tax haven jurisdictions

Fiji (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

- Dealings with associates in special purpose tax haven jurisdictions — these jurisdictions with relatively high headline tax rates but offer significant tax savings for specified activities
- Those who offer special reduced tax rates for a particular activity
- Poor compliance processes and records
- Intra group charges e.g., management/technical fees
- Large royalty payments and excessive debt levels (i.e., interest payments)
- Transfer of intangibles
- Business restructurings

APA opportunity

Currently, APAs are not available in Fiji , but may be considered later in the context of introducing a binding rulings process.

However, the FRCA does encourage taxpayers to discuss related party transactions with the FRCA prior to entering into the same with a view to eliminate any transfer pricing implications of the same, even though such discussions are not binding on either party.

Expected reaction to OECD Report on BEPS

There has not been any reaction from the tax authorities January 2014.

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 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 mainly relating 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 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)

When calculating the number of employees, amount of 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.

Finland (continued)

Documentation requirements (continued)

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 during a fiscal year if the total amount of transactions between two parties 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 in applying arm's length principles to the pricing of a transaction is five years from the beginning of the following year in 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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

Expected reaction to OECD Report on BEPS

As of January 2014, there are no proposed legislative changes to the tax law or to the documentation requirements regarding transfer pricing. However, the Finnish tax administration is actively taking part in the discussion concerning BEPS. Being a member country of OECD, changes to the transfer pricing guidelines will subsequently affect Finland.

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). The Mission d'expertise juridique et économique internationale (MEJEI) department includes now the teams in charge of MAP and APA.

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 mainly pertaining to Articles 57 and 238A of the FTC, and Articles L 13B and L 80B of the FPTC (main administrative guidelines BOI — BIC — BASE — 80, BOI — CF — IOR — 60-50 and BOI — INT — DC — 20-50)

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. Administrative guidelines (BOI — INT — DG — 20-30) specify the scope and the conditions to be met for the commencement of such a procedure (e.g., timing, absence of penalties).

Assessment of a transfer pricing documentation 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 Guidelines.

There is no specific French transfer pricing-related regulation pertaining to business restructuring (just under certain circumstances about burden of proof) 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 restructuring operations (site closure, lay-off, transfer of on-going concerns etc.). French tax inspectors are also paying more attention to financial transactions (e.g., loans, guarantees). They are also continuing discussions around intellectual property rights.

Priorities/pricing methods

The tax authorities accept the following methods: CUP, Resale Price, Cost Plus, Profit Split and TNMM; yet tax inspectors usually prefer the TNMM based on French comparables where the tested party is French.

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 special transfer pricing documentation requirements):

- Failure to provide complete information in the framework of Article L 13B FPTC may result in:

France (continued)

Transfer pricing penalties (continued)

  - A reassessment of the company's taxable profit based on information the tax authorities possess, and
  - 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 (per audited year) up to 5% of the transfer pricing reassessment potentially identified afterwards (this may change, please refer to the § below), 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 30%, and increases to 75% when the foreign entity is based in a "non-cooperative" jurisdiction). Note that the effective rate can be grossed-up. An additional "distribution" contribution of 3% is also applicable on the amount of the tax reassessments
- 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%) (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)

[1] See the Dividends or the Other Income clauses.

France (continued)

Documentation requirements (continued)

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

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.

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)

2014 French Finance Bill required taxpayers that fall within the scope of Article L13AA of the FPTC to include in their transfer pricing documentation, tax rulings (as defined in French tax law) obtained by all related parties from foreign tax authorities, as from the entry into force of the 2014 Finance Bill (i.e., 31 December 2013). In practice, the requirement does not cover documents obtained from foreign tax administrations and that would not be available to the French taxpayer.

The Fight Against Tax Evasion and Financial Criminality Bill that entered into force on 8 December 2013 introduced an Article 223 quinquies B in the French General Tax Code that substantially reinforces the French transfer pricing documentation requirements. Taxpayers filing their Corporate Income Tax (CIT) return as from this date and that are subject to the above-mentioned provisions of Article L13AA of the FPTC must — in addition to the preparation of an L13AA report — file "light" transfer pricing documentation, at the latest six months following the deadline for filing their CIT return — i.e., nine months following the closing of the fiscal year (FY). The "light" transfer pricing documentation should provide the following information:

- General description of the group (activities undertaken, main intangible assets owned in connection with the French taxpayer, transfer pricing policy applied, changes that occurred in the last FY); and

France (continued)

Documentation requirements (continued)

- Specific information regarding the French entity (activities carried out, changes in the last FY, list of the inter-company transactions if the aggregated amount per type of transaction exceeds €100,000, presentation of the transfer pricing methods used for determining arm's length transfer prices, changes that occurred in the last FY).)

As such, no detailed functional analyses or economic analyses will be required in this "light" documentation report and the penalty for a breach of this provision is minimal (€150). However, the purpose of this new provision is to be understood as an enhancement of the French Tax Authorities (FTA) capability to identify taxpayers with the highest transfer pricing exposure so as to allocate their audit resources accordingly. Such an approach — where taxpayers fail to file the report would of course be highly scrutinized — is in line with the latest OECD developments described in the White Paper on Documentation. Accordingly, the preparation of this "light" documentation report should therefore be seen as an important extension to the overall — already existing — obligation of documenting intra-group transactions in France.

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. 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.

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 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.

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).

French regulations provided that 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 currently be suspended during the entire mutual agreement process, and postponed until the competent authorities reach an agreement (Article L 189A of the FPTC). The 2014 French Finance Bill terminates this provision for MAPs opened as from 1 January 2014. It will thus no longer be possible to defer the payment of the French transfer pricing reassessment by opening a MAP.

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

See above the light documentation to be submitted to the French tax Authorities provided by new article 223 quinquies B of the French General Tax Code, for companies that satisfy specific criteria.

France (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 overestimated 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
- 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 feel that auditors cannot access information via normal investigative procedures.

Other tax audit trends:

- Huge increase in the implementation of police tax raids lead by the FTA (based on Article L16B FPTC)
- Development of computerized tax audits
- For certain taxpayers: New obligation to provide a file detailing all the accounting entries (article L 47 A 1), i.e., accounting records in the form of an accounting entry file (AEF). This obligation includes the provision of 18 compulsory fields. The non-disclosure of the AEF complying with French requirements may imply the application of penalty of EUR1,500.

Communication of the analytical and consolidated accounts in case of a tax audit: After enactment of the French 2014 Finance Bill (i.e., 31 December 2013), companies in the scope of L13AA of the FPTC or with a turnover exceeding €152.4m or €76.2m depending on their business activity will have to communicate their management accounting in case of an audit. The precise definition of the management accounting should be further clarified in future additional regulatory guidance. French holdings will also have to disclose details of their consolidated accounts, allowing the FTA to identify, for instance, the tax provisions. Currently, the penalty for a failure to comply with these provisions will be limited to €1,500.

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 (former 4 A-13-06 referred under BOI-SJ-RES-20-20 from September 2012), 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 the request to be submitted at least six months before the beginning of the first fiscal year covered. There is no rollback possibility.

France (continued)

Expected reaction to OECD Report on BEPS

There is a new obligation to provide accounting statements and consolidated accounts in case of tax audit (see section Audit risk/transfer pricing scrutiny) which is a direct implementation of a type of country-by-country reporting. It is too early to anticipate any further reaction.

Gabon

Taxing authority and tax law

Taxing authority: Gabonese Tax Administration.

Tax law: General Tax Code (GTC).

Section 12 and Section P 860 of the GTC contains the main legislative provisions concerning transfer pricing.

Section 12 of the GTC provides that transaction between group companies should be conducted as if the transaction were undertaken with third parties. The profit level of the transactions undertaken would also be taken into account.

Relevant regulations and rulings

There are no specific regulations or rulings.

OECD guidelines treatment

The tax administration accepts the OECD Guidelines.

Priorities/pricing methods

The tax administration should accept the methods prescribed by the OECD; i.e., CUP, Resale Price, Cost Plus, TNMM and Profit Split.

Transfer pricing penalties

Any excessive charges would be regarded as distributions of income and will be subject to withholding taxes as the case may be.

Tax adjustments for transfer pricing are subject to the normal penalty rules. In case of an audit from the tax authorities, an incorrect corporate tax return is subject to a penalty of 1.5% on the basis of amount recovered capped at 50%. In case of willful neglect, the penalty is increased by 100%. In case of fraud, the penalty is 150% over and above the penalty for incorrect tax return detailed above.

According to the Finance Act 2014, failure to submit the transfer pricing documentation is subject to a penalty of 5% on the profits transferred abroad (a minimum penalty of XAF5,000,000 per year).

Penalty relief

It is possible to get remission from penalties on special request to the tax administration.

Documentation requirements

Section P-860 provides that the company is required to provide a transfer pricing documentation which should detail the transfer pricing policy adopted by the head office. This document should include legal, economic, tax and accounting details and the methodology used to validate the transfer pricing policy. The document should also include details about the relationship which the company has with other group companies with whom transactions would be undertaken.

Documentation deadlines

Transfer pricing documentation should be provided at the start of the fiscal year of operation.

The Finance Act 2014 also specifies that the transfer pricing documentation should be provided at the start of an audit account. In case of violation, a warning of payment in a 15 days term is sent to the company.

Statute of limitations on transfer pricing assessments

The statute limitation is four years after the payment of corporate tax is due. Taxes are due by 30 April following the calendar year end.

Return disclosures/related party disclosures

There are no disclosure requirements.

Gabon (continued)

Transfer pricing–specific returns

No guidance is currently available on transfer pricing-specific returns.

Audit risk/transfer pricing scrutiny

The transfer pricing legislation is relatively new. However, tax audits are increasingly focusing on related party transactions especially where the taxpayer is in a recurrent loss position.

APA opportunity

Gabon has just introduced an APA program for transfer pricing in the Finance Act 2014.

Expected reaction to OECD Report on BEPS

It is expected that the law will be tightened to take into account the action plan of BEPS.

Georgia

Taxing authority and tax law

Taxing authority: The Revenue Service of Georgia (RS).

Tax law: Georgian Tax Code, effective from 17 September 2010 (GTC).

Relevant regulations and rulings

The transfer pricing general principles are provided in Articles 126-129[1] of the GTC.

Additionally, transfer pricing in Georgia is regulated by Instruction on Pricing International Controlled Transactions[2] (Instruction).

Georgian transfer pricing rules generally follow the OECD guidelines. They apply to cross border transactions between:

- A Georgian resident company and a related foreign company
- In certain cases these rules may also apply to transactions between a Georgian resident company and an unrelated foreign company, where the latter is a resident of a low tax jurisdiction/offshore country. The list of low tax jurisdictions/offshore countries is determined by the Government of Georgia.[3]

Related parties

The definition of related parties in transfer pricing law includes a list of criteria defining when companies and individuals can be declared related parties. The main criterion defining the relationship is the ownership threshold; i.e., if one party directly or indirectly controls, or factually controls more than 50% of another party. The definition of the factual control broadens the application of transfer pricing rules and covers situations when one party (i) provides financial instruments (credit, loan, guarantee) or securities which separately or in aggregate exceed 50 % of another party's capital, (ii) has the power to control the board of directors of another party or to participate in its profit or (iii) holds more than 50% of voting shares directly or through its relative.

OECD guidelines treatment

Georgia is not a member of OECD; however, the transfer pricing law is largely based on the principles stipulated by the OECD Guidelines. The Instruction on Pricing International Controlled Transactions contains direct reference to the OECD Guidelines 2010 and sets forth that the issues which are not regulated by the GTC or Instruction shall be regulated by the OECD Guidelines.

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. The three traditional methods prevail over the TNMM and Profit Split methods. It is also permissible to use some other method if none of the approved methods can provide reliable results and such other method yields a result consistent with that which would be achieved by independent enterprises engaging in comparable uncontrolled transactions under comparable circumstances. In such cases a taxpayer shall bear the burden of demonstrating that the above requirements have been satisfied.

Taxpayers should select the most appropriate method according to the nature of their business, comparability factors and the availability of relevant information. If there is a lack of internal comparables/information (or if these internal comparables/information are not accurate and/or reliable enough), the taxpayer may use external comparables from the foreign market.

Transfer pricing penalties

No specific penalties are defined for non-submission of transfer pricing documentation by the taxpayer. The standard penalties for underreporting of tax will apply if the tax authorities subsequently re-assess the amount of taxable profit of the Georgian entity.

Penalty relief

No specific penalty relief is available.

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[1] Decree #132 of 30 May 2013

[2] Approved by the Decree #423 of the Minister of Finance of Georgia

[3] Decree #132 of 30 May 2013

Georgia (continued)

Documentation requirements

The transfer pricing documentation does not have any predefined format; rather it should contain the following types of information:

- Overview of the business operations of the Georgian enterprise
- Analysis of the economic factors affecting the prices
- Organizational structure
- Description of the controlled transactions
- Analysis of the comparability factors
- Details of the group's transfer pricing policy
- Transfer pricing method applied and reasons for selection of a particular method
- Comparability analysis
- Details of advance pricing agreements relevant to the controlled transaction (if any)
- Conclusion on compliance with the arm's length principle, and, where relevant, on adjustments made by the Georgian enterprise to its transfer prices/taxable income
- Other information that may have a material effect with regard to the compliance of the arm's length principle

Documentation deadlines

The transfer pricing documentation must be complete by the date the taxpayer files its corporate tax return. Upon request by the tax authority, the documentation has to be submitted within 30 days of the request.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations on transfer pricing assessments. The general statute of limitation in Georgia is six years. It is automatically extended to 11 years when a taxpayer chooses a 10-year carryforward of losses. Tax cannot be reassessed after this period has elapsed.

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) will be required during the filing of corporate income tax return.

Transfer pricing-specific returns

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 instruction regulating transfer pricing inspection will only be effective from 1 January 2014.

APA opportunity

Unilateral APA (between resident taxpayer and the RS) is available only for transactions which separately or in aggregate exceed GEL50,000,000. In principle, the agreed-upon method is binding throughout the APA term, which is three years, with the possibility of extension.

The law also introduces the possibility to conclude multilateral APAs where the transactional counter-parties are located in a jurisdiction with which Georgia has a double tax treaty. However, due to the fact that there are no special regulations in this regard yet, it is

Georgia (continued)

APA opportunity (continued)

impossible to conclude multilateral APA's at this stage.

Expected reaction to OECD Report on BEPS

The expected reaction to OECD Report on BEPS is unknown as of January 2014.

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 intensification, §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.

As of 1 January 2013, a law amending §1 of the Foreign Tax Act has come into effect, which incorporates the authorized OECD approach (AOA) on the allocation of profits to permanent establishments into German law. The AOA treats a permanent establishment as a (nearly) fully separate entity for tax purposes. This includes the recognition of internal dealings between the head office and a foreign permanent establishment such as the supply of goods, a service provision and even licensing arrangements. These dealings have to be priced in accordance with the arm's length principle, i.e., including a profit element. Due to the lack of legally binding contracts between the different parts of one enterprise, contemporaneous transfer pricing documentation becomes crucial in order to defend the transfer prices applied for internal transactions. The new domestic rules stipulate that Germany will not tax the profits of the permanent establishment that are determined based on the AOA, if the AOA is not yet implemented in the applicable double tax treaty. However, for the treaty relief the taxpayer has to "prove" that the other Contracting State does not apply the AOA and that this will lead to double taxation.

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 and procedural guidance have been published since 1999.

Germany (continued)

OECD Guidelines treatment

The German tax authority considers its transfer pricing laws and regulations to be consistent with the 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).

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 fully 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 for routine functions and residual Profit Split as a method of last resort, i.e., if both transaction parties perform entrepreneurial functions and their individual contributions cannot be differentiated). In case of limited comparability, the range of available third party comparable data must be limited by applying statistical measures (e.g., the interquartile range).

If no comparable data exists, the law stipulates that taxpayers have to conduct a hypothetical arm's length analysis 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. If estimation by the tax authorities is indicated in such cases and it is only possible to determine the relevant income within a certain range, the range may be fully exploited to the taxpayer's detriment.

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. 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.

Penalties can be assessed based on the taxpayer's non-compliance with the documentation requirements. An actual income adjustment is not subject to penalties but interest is assessed on the additional tax payments (6% per annum, which is non-deductible for tax purposes). Interest starts accruing 15 months after the end of the calendar year in which the tax liability arose.

If the taxpayer fails to submit transfer pricing documentation or if the documentation provided is unusable or insufficient, a penalty of 5%–10% on the income adjustment will be applied, with a minimum penalty of EUR5,000.

Germany (continued)

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.

§ 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.

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: nature 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, and causes for losses from intercompany transactions as well as counter measures (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., 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).

Germany (continued)

Statute of limitations on transfer pricing assessments (continued)

§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.

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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 significant 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.

Expected reaction to OECD Report on BEPS

The OECD Report and discussions on BEPS in general add to the ongoing public debate on fair earnings and taxation of companies and individuals in Germany. This debate is being taken very seriously and is expected to have an effect on the tax audit climate.

Legal documentation requirements exist and the taxpayers' compliance with making available relevant information is being enforced. The same is true for IP structures, which are being increasingly scrutinized in tax audits. Masterfile documentation is maintained by many German taxpayers based on the concept proposed by the European Joint Transfer Pricing Forum and could be amended for additional requirements going forward.

Overall, with specific transfer pricing regulations already in place and with tax authorities' focus on transfer pricing audits already increasing, the BEPS debate will further intensify these developments.

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 14 September 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 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

Ghana (continued)

Priorities/pricing methods (continued)

Notwithstanding the transfer pricing methods stated, the Commissioner-General may use a different method, or in writing, permit 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, failure to maintain records, penalty for underpayment of tax and offenses, 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.

Statute of limitations on transfer pricing assessments

There is no guidance available on the statute of limitations on transfer pricing assessments.

Return disclosures/related party disclosures

A transfer pricing-specific form must be submitted.

Transfer pricing-specific returns

Filing of an Annual Return on transfer pricing transaction is required and forms part of the Corporate Income Tax Return (Form 22a or Form 22b). The return must be filed no later than four months after the end of the taxpayer's financial year. The return requires disclosure on intercompany transactions, related parties to the transactions and transfer pricing methods applied.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The Commissioner-General may, on receipt of returns filed, examine if the amounts charged to the final accounts, or credited to the final accounts 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.

Ghana (continued)

APA opportunity

There is no APA available to multinationals operating in Ghana.

Expected Reaction to OECD Report on BEPS

The Ministry of Finance has not provided indication on any specific legislative developments arising from the OECD BEPS report to take place within the next year.

Greece

Taxing authority and tax law

Taxing authority: General Secretary of Public Revenues.

Tax law:

- The recently adopted L.4172/2013 income tax code and the new Tax Procedures Code incorporated in L.4174/2013, which introduced extensive amendments in Greek transfer pricing legislation applicable as of 1 January 2014
- Double taxation treaties
- Supranational norms

Relevant regulations and rulings

- Ministerial Decision 1179/2013 issued by the Ministry of Finance providing details on the content of the Transfer Pricing File and Summary Information Table (SIT), for intercompany transactions referring to fiscal years starting on or after 1 January 2012
- Ruling 1220/2013 of the Ministry of Finance clarifying that for intercompany loan agreements a documentation requirement is needed for accrued interest exceeding EUR20,000, for fiscal years starting on or after 1 January 2012, and the threshold is in line with the minimum transaction value threshold, triggering documentation obligation, as set in the current tax law, which applies from December 2013
- Decision 1284/2013 of the General Secretary of Public Revenues, determining, the procedures for the conclusion, amendment, revocation and annulment of an APA. The decision refers to the procedures of both unilateral and bilateral APAs for cross-border intercompany transactions that take place in financial years starting 1 January 2014 onward
- A Ministerial Decision mentioned in the new Tax Procedures Code, which will stipulate the adequate content of the Masterfile, Local File (Greek File) and SIT as well as the acceptable transfer pricing method and details regarding exceptions from transfer pricing documentation requirements, is still pending

OECD Guidelines treatment

The aforementioned legislative framework confirms the application of the OECD Guidelines.

Priorities/pricing methods

Under current legislative framework, 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 is considered ineffective, provided that a detailed justification is included in the documentation files. The expected Ministerial Decision to be issued on the basis of the New Tax Procedures Code will redefine the methods as well as the hierarchy thereof. However, considering the income tax provision which makes reference to the application of the OECD Guidelines it is expected that the Ministerial Decision, in order to be in line with the law, should adopt the OECD methods and its best method approach.

Transfer pricing penalties

- For fiscal years ending 31 December 2012 and after, late filing of the SIT or of the transfer pricing documentation file upon the tax auditors' request, incurs 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
- For fiscal years starting 31 August 2013 and after, late filing of the SIT or of the transfer pricing documentation file upon the tax auditors' request or for inadequate/inaccurate documentation, incurs 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 SIT or the transfer pricing documentation file incurs a penalty of 1% on the gross income of the company, which cannot be lower than EUR10,000 or higher than EUR100,000. The same penalty applies for inadequate/inaccurate content of the SIT for fiscal years starting 1 January 2014 and after

Greece (continued)

Transfer pricing penalties (continued)

- 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 are set to the median price of the range re-established
- 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. In addition, penalties ranging from 10%–100% of the tax underpayment will apply, depending on the materiality of the tax adjustment and default interest on the amount of the tax liability due

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.

The transfer pricing file as per Ministerial Decision 1179/2013 consists of:

- The Masterfile, which is common for all group companies and contains common standardized information for the group affiliates as well as for the branches
- The Local File (Greek File), which is supplementary to the Masterfile 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

Documentation deadlines

There is no specific deadline to prepare the transfer pricing documentation file. However, after the relevant fiscal year end the taxpayer should be able to present the transfer pricing file to the audit authorities within thirty (30) days following their 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 the tax legislation. As a general rule, the Greek State's right to impose tax is limited to five years, but the State provides extensions on the above mentioned period.

Return disclosures/related party disclosures

Taxpayers should disclose their intragroup transactions by filing annually a SIT of transfer pricing information as follows:

- For fiscal years ending 31 December 2012 and after, within four months from the year end

Transfer pricing-specific returns

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

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 documentation file should be available to the certified auditors prior to the issuance of the Tax Certificate.

Greece (continued)

APA opportunity

The new Tax Procedures Code provides the possibility of an APA from 1 January 2014. An APA will cover any relevant criteria used for the determination of the intra-group pricing.

These criteria mainly include the transfer pricing method, the comparable data to be used and any relevant adjustments to be made as well as the critical assumptions under which the transfer pricing methodology approved will remain valid.

An APA term cannot exceed four years and a retroactive effect will not be possible.

Expected reaction to OECD Report on BEPS

The new Tax Procedures Code introduces a general tax anti-avoidance rule for the first time in the Greek tax law. The rule, whose application scope seems rather broad, seeks to capture cases where taxpayers make use of artificial structures without any underlying commercial substance and that have been implemented for tax avoidance purposes. This leads to the generation of tax advantages.

In cases where the rule is deemed applicable, the authorities may impose taxes while disregarding the artificially created structure.

Indicative criteria in order for an arrangement to be considered as artificial are included in the new provision, such as arrangements that are not in line with ordinary business practices and tax benefits that are not proportionate to the risks assumed.

Apart from the aforementioned, there has been no reaction on the OECD Report on BEPS from the Greek tax authorities.

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 and Regulations of the TLUL, Chapter III, Articles 33 to 66.

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 effective from 1 January 2013 onward.

Guatemalan transfer pricing provisions are mainly based on the 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 to the Chapter VI of the TLUL were enacted in 2013. The main provision of these regulations is the filing obligation in the form of a transfer pricing information return.

Regarding the tax year in which the transfer pricing obligations shall apply, the Government has been planning to change the regulations' effective date that was initially as of 2013 and onward to tax year 2015 and onward. While the foregoing is so far not official, it is however expected to be made public shortly. Nevertheless, it is also expected that the SAT will maintain their position that they have the authority to request information relating to intercompany transactions for their databases.

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

According to Article 66 of the Regulations to the TLUL, penalties for failure to comply with the transfer pricing obligations correspond to the general tax penalties. 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

Guatemala (continued)

Documentation requirements (continued)

  - 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
  - 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. It must be kept as a 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 statements (expressed in IFRS from fiscal 2013 onwards) to the annual tax return, which will include information regarding their intercompany transactions.

Transfer pricing-specific returns

Taxpayers are required to file, together with the annual tax return, a transfer pricing information return in the form of an Appendix.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit is currently categorized as medium. The likelihood 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 likelihood that the transfer pricing methodology will be challenged is medium.

APA opportunity

APAs are contemplated in Article 63 of the TLUL. Taxpayers can request an APA for a maximum of four years. The procedures for setting out an APA are established in Articles 57 to 63 of the Regulations to the TLUL.

Expected reaction to OECD Report on BEPS

Transfer Pricing provisions are quite new in Guatemala, thus no immediate or short-term reaction is expected regarding specialized topics covered in the OECD Report on BEPS.

Honduras

Taxing authority and tax law

Taxing authority: Tax Administration of Honduras (Dirección Ejecutiva de Ingresos, or DEI).

Tax law: Decree No. 232–2011, Articles 1 to 22.

Relevant regulations and rulings

Transfer Pricing Law (Decree No. 232–2011) establishes the regulations applicable to individuals or business entities that have related party transactions in Honduras.

Honduran transfer pricing provisions are mainly based on the OECD Guidelines and apply to all the transactions conducted by Honduran taxpayers with related entities resident abroad and with entities operating under a special tax regime in Honduras. The regulations also apply to transactions conducted by taxpayers with entities domiciled in tax havens.

Decree 232–2011 also includes an additional non–OECD method (the export valuation method), which is intended to be used for transactions involving goods with well-known prices in transparent markets.

Transfer Pricing Law will come into force on January 1 2014.

OECD Guidelines treatment

Honduras is not an OECD member, and there is no reference to the OECD Guidelines in the Decree 232–2011. However, local regulations generally follow the OECD standard.

Priorities/pricing methods

The provisions require the application of the most appropriate transfer pricing method. The specified methods are: CUP, Resale Price, Cost Plus, Profit Split, TNMM and the export valuation method.

Transfer pricing penalties

If taxpayers fail to provide or provide false, incomplete or inaccurate information under a request from the DEI, a penalty of US$10,000 applies.

If taxpayers report a taxable income lower than it should have been in arm's length conditions, a penalty of 15% over the corresponding adjustment applies.

If taxpayers fail to provide the correct information or fail to declare a correct taxable income, then the penalties will be the greatest of 30% or US$20,000.

If taxpayers fail to comply with any other provision of the Law, a penalty of US$5,000 applies.

Penalty relief

There is currently no penalty regime in place.

Documentation requirements

Contemporaneous transfer pricing documentation regarding related party transactions is mandatory and must be maintained. However, the current Transfer Pricing Law does not provide the list of information required to be included in the documentation. Further regulation setting out the general framework required for the support documentation is expected.

Documentation deadlines

Taxpayers are required to document and file information about their transactions with related parties on an annual basis upon filing their Income Tax Returns. Further regulation setting out time frames and forms is expected.

Honduras (continued)

Statute of limitations on transfer pricing assessments

The statute of limitations on general tax assessments is 5 to 10 years. The term is extended with the filing of an amended return.

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

Taxpayers are required to document and file information about their transactions with related parties on an annual basis by the time the Income Tax Return is filed. However, it is not clear in the law whether the documentation or a transfer pricing information return should be filed. This is expected to be clarified through further regulations.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit is currently categorized as high. The likelihood of transfer pricing assessments as part of a general tax audit is considered low. The DEI has not yet initiated any tax audits regarding transfer pricing because the regulations come into force as of tax year 2014. In case transfer pricing is scrutinized, the likelihood that the transfer pricing methodology will be challenged is unknown.

APA opportunity

APAs are contemplated under the provisions of the Decree 232–2011. Taxpayers can request an APA for a maximum of five years. However, the corresponding regulations have not yet been enacted.

Expected reaction to OECD Report on BEPS

As transfer pricing provisions in Honduras have just been enacted and will be effective from tax year 2014, there is no expectation of immediate or short-term reaction regarding the specialized topics covered in the OECD Report on BEPS.

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 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(1), 80(1A), 80(2), 82, and 82A of the IRO, for non-compliance with the requirements of the IRO. Offences can include any person who without a reasonable cause or with willful intent to evade tax: fails to comply with record-keeping requirements of Section 51(C) of the IRO; files an incorrect tax return; furnishes any incorrect information; fails to furnish a return in time; fails to inform chargeability to tax; makes any false statement in connection with a claim for any deduction of allowance; gives any false answer to any question or request for information asked or made in accordance with the provisions of IRO; makes use of any fraud, art, or contrivance to evade tax, among others.

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 subjected to a fine of HKD50,000, plus up to three times the amount of tax undercharged and three years of imprisonment.

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 upwards or downwards based on such facts of the case.

Hong Kong (SAR) (continued)

Documentation requirements

Although there is no contemporaneous transfer pricing documentation requirement in Hong Kong, Section 51C of the IRO requires taxpayers to maintain sufficient records on the transacting parties and other details of goods and service transactions. In addition, 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.

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

- Details on any relevant commercial and financial relations that fall with the scope of "closely connected non resident persons" or "transactions designed to avoid tax liability"
- 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 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood 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.

There are neither 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, etc.). 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 enquiries 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 likelihood of audit or transfer pricing scrutiny is dependent on the facts and circumstances of the taxpayer.

Hong Kong (SAR) (continued)

APA opportunity

An APA program was introduced by the IRD in March 2012. The IRD issued guidelines in the form of DIPN 48 that 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 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.

Expected reaction to OECD Report on BEPS

From a Hong Kong perspective, the IRD already takes a strong interest in base eroding intercompany payments made out of Hong Kong, including intercompany service fees and IP related payments. The IRD are therefore likely to take an eager interest in OECD work surrounding these issues.

From a foreign perspective, Hong Kong is often a location for multinational corporations to house regional principals, headquarters, and centralized services. As a result of the BEPS Report, foreign tax authorities may place greater scrutiny on tax models that arbitrage between Hong Kong's source-based system of taxation (which facilitates the possibility of offshore claims) and residence-based systems adopted in counterparty locations. The BEPS Report is also likely to place greater scrutiny on the substance of operations in Hong Kong relative to the global supply chain in which it operates, and the transparent documentation of such substance.

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 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, amended with the effective date of 21 June 2013.[1] Under special circumstances, the amended version is optionally applicable to compliance liabilities pertaining to 2012 as well[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
- 48/2007 — Guidelines issued by the tax authority on the preparation of simplified transfer pricing documentation and default penalties
- 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
- 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 of 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
- 19/2013 — Guideline issued by the tax authority on suretyship provided by related entities

OECD Guidelines treatment

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

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

[2]The newest amendments of the Decree 22 is practically applicable only for taxpayers whose fiscal year does not coincide with the calendar year and the deadline for the preparation of the transfer pricing documentation is not before 21 June 2013.

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 HUF8 million (approximately EUR26,500) 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 per fiscal year 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 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 parties participating in the related party transaction under review
- 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 relevant market (industry analysis)
- The method applied for establishing the arm's length price
- Reasons for selecting the method applied
- Description of comparable services and goods transactions
- Factors affecting the arm's length price, margin or profit and the extent of any necessary adjustments
- The arm's length price, margin or range
- Information on tax rulings or official and court procedures in progress relating to the given transaction
- Preparation and amendment date of the documentation

Documentation requirements (continued)

- If consolidated transfer pricing documentation is prepared (one documentation covering several similar or strongly interrelated 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

Based on the work of the European Union Joint Transfer Pricing Forum, in 2012 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. According to the amendment of Decree 22 in 2012, this type of documentation is applicable if the value of the transactions does not

Hungary (continued)

Documentation requirements (continued)

exceed HUF150 million (approximately EUR500,000) 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 mark-ups chosen from the range between 3% and 7% to be at arm's length. With the last amendment of Decree 22 in 2013, the arm's length range of mark-ups applicable without further analysis in the case of low value adding service transactions was modified to 3%–10%.

While the above provision came into force on 21 June 2013, it is important to note that these rules — under special circumstances[3] — can as well be applied for documentation due with respect to financial year 2012.

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

- Taxpayers are not obliged to prepare transfer pricing documentation for transactions where the arm's length value of contractual performance during the tax year in question (without value added tax) does not exceed HUF50 million (EUR167,000)
- When costs are recharged without applying any mark-up, provided that 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 (the last day of the fifth month following the closing of the given tax 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 the related party status 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 the 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.

Transfer pricing–specific returns

Not applicable in Hungary.

[3]The newest amendments of the Decree 22 is practically applicable only for taxpayers whose fiscal year does not coincide with the calendar year and the deadline for the preparation of the transfer pricing documentation is not before 21 June 2013.

Hungary (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood 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 common place; the number of audits and the amount of assessments is growing at a rate of roughly 50% each year. Since 2012 there are two groups within the tax authority dedicated to transfer pricing issues. One is specialized mainly in transfer pricing audits of large taxpayers, while the other deals solely with APA and transfer pricing-related MAP requests.

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

The tax authority is in continuous cooperation with other country's tax authorities and follows the international transfer pricing auditing practices as well, through which it constantly develops its dedicated transfer pricing experts and their auditing practices. Based on experience, the tax authority is now rather knowledgeable about matters concerning method selection; therefore, the likelihood 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. Anonymous pre-filing consultation with the tax authority's APA team is available free of charge. Unilateral, bilateral and multilateral APAs are available according to the provision. APAs may be requested for ongoing and future transactions and can be relied on 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[4] (approximately EUR33,000) depending on the type of APA and the transaction value. Starting from the year of filing a valid APA request, the taxpayer does not have to prepare transfer pricing documentation for the transaction(s) covered by the APA.

Expected reaction to OECD Report on BEPS

Based on the tax authority's communications in December 2013, they are aware of the importance of the recommendations outlined in the BEPS report and they are having internal discussions with the legislature on the potential implication of these rules in the Hungarian transfer pricing regulation.

Although no modification of the concerning Hungarian tax regulations has been officially promulgated so far, it is expected that the tax authority will take into consideration the final conclusions of the BEPS report in its future auditing practice.

[4]For bilateral APA, the application fee is between HUF 500,000 and HUF 7 million. If a request is submitted for an arm's length range, the application fee is HUF 500,000 in the case of traditional transfer pricing methods and 2 million, in the case of profit based methods.

Iceland

Taxing authority and tax law

Tax authority: Directorate of Internal Revenue

Tax law: Article 57 of Act No. 90/2003 on Income Tax

Relevant regulations and rulings

As the transfer pricing rules were introduced on 1 January 2014, there have not been any tax rulings.

According to the law, the government shall issue a regulation with additional guidelines on the subject of documentation and pricing. The regulation has not yet been introduced.

OECD Guidelines treatment

Tax authorities recognize the OECD Guidelines. According to the law, tax authorities may assess and adjust pricing between related parties based on the OECD principles.

With regards to the treatment of business restructurings in the light of the recent addition of Chapter IX of the OECD Guidelines, it is unclear what effect it will have since the domestic transfer pricing rules came into effect recently.

Priorities/pricing methods

The pricing methods are based on the OECD Guidelines. The provision does not specify any one method nor prioritize the methods in any way.

Transfer pricing penalties

The provision states that tax authorities may assess and adjust pricing between related parties, based on the OECD Guidelines provision. These adjustments can be performed within the domestic statute of limitation period, i.e., for the six previous years from the date of the adjustment.

A 25% penalty can be applied to the pricing adjustment in case of underpayments.

There is no penalty for failure to provide documentation.

Penalty relief

According to Article 108 of Act 90/2003 on Income Tax, the general rule is that penalty can be avoided if the taxable party is not responsible for the situation causing the adjustment of pricing or if the situation is caused by unforeseeable circumstances.

Failure to comply with documentation rules does not provide penalty relief.

Documentation requirements

Legal entities that have turnover or total assets exceeding ISK1billion in the previous year are required to document the nature and extent of transactions with related parties, including reasoning for transaction prices and other terms. The duty exists as of the beginning of the next operational year.

According to the law, the Minister of Finance will stipulate further rules on transfer pricing regulation, but has not been done yet.

It is also unclear whether Icelandic tax authorities will provide binding opinions on transfer pricing.

Documentation deadlines

Legal entities that are required to fulfil the documentation duty must start in the beginning of the next operational year in which turnover or total assets had exceeded ISK1 billion.

Documents must be provided to the tax authorities within 45 days of a request. Documents must be kept for seven years.

Iceland (continued)

Statute of limitations on transfer pricing assessments

The statute of limitation period is six years.

Return disclosures/related party disclosures

Legal entities must confirm that the documentation requirement has been fulfilled in the yearly tax return. Tax authorities have extensive authority to claim information. There is no specific disclosure requirement besides the documentation requirement.

Transfer pricing-specific returns

There are no such requirements, but rules on documentations have not yet been defined in a regulation.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general depends on several factors such as the surveillance plan of tax authorities, type of business, revenue and compliance. The likelihood can therefore be defined as medium.

There is high likelihood that transfer pricing will be reviewed as part of a tax audit.

Due to the fact that transfer pricing rules just came into effect, it is hard to assess the likelihood of transfer pricing methodology being challenged.

APA opportunity

Icelandic tax authorities do not issue APAs. It is uncertain if tax authorities will provide binding opinions on transfer pricing. Currently, there is no official source of guidance on the subject of transfer pricing besides the rule of law.

Expected reaction to OECD Report on BEPS

There has not been any reaction of the tax authorities up until January 2014.

India

Taxing authority and tax law

Taxing authorities:

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

Tax laws:

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

Relevant regulations and rulings

The pricing of international transactions between associated enterprises should 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.

Safe Harbor Provisions

On 18 September 2013, the CBDT introduced safe harbor provisions. The provisions provide minimum operating profit margins in relation to operating expenses a taxpayer is expected to earn for certain categories of international transactions, such as provision of software development services, information technology enabled services, knowledge process outsourcing services, contract research and development services, manufacture and export of automotive components etc., that will be acceptable to the tax authority. Further, the provisions also cover transactions pertaining to lending of money and providing guarantee by an Indian entity to its wholly owned subsidiary.

The transfer price contained in the safe harbor rules shall be applicable for five years beginning from financial year 2012–13. The safe harbor rules, optional for a taxpayer, contain the conditions and circumstances under which the norms/margins would be accepted by the tax authority and the related compliance obligations. The taxpayer has flexibility in electing the years to be governed by the safe harbor rules within the five year period. Where a taxpayer's transfer price is accepted by the tax authority under the safe harbor rules, the taxpayer shall not be entitled to invoke the mutual agreement procedure under an applicable tax treaty.

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 US$0.8 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.

India (continued)

Relevant regulations and rulings (continued)

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.

OECD guidelines treatment

Indian legislation is broadly based on the 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.

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.

Transfer pricing penalties

- For inadequate documentation, failure to report the transaction or 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 US$1,600)

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 is 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

India (continued)

Documentation requirements (continued)

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.

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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Internal guidelines have been issued by the tax authorities, pursuant to which companies with related party transactions in excess of US$3 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 US$0.8 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.

India (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

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.

In India adjustments by the competent tax authorities with regards to transfer pricing follow the regular appellate proceedings. In many cases, the appeals were pending at the first appellate authority for 3–5 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 roll-back 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.

Expected reaction to OECD Report on BEPS

The CBDT has not given any official reaction on the BEPS report.

Indonesia

Taxing authority and tax law

Taxing authority: Director General of Tax (DGT).

Tax law:

- Law Number 7 Year 1983 regarding Income Tax (amended by Law Number 36 Year 2008) (PPh Law)
- Law Number 6 Year 1983 regarding General Taxation Provisions and Procedures (amended by Law Number 16 Year 2009 (KUP Law)
- Law Number 8 Year 1983 regarding Value Added Tax of Goods and Services and Sales Tax on Luxury Goods (amended by Law Number 42 Year 2009) (PPN Law)

Relevant regulations and rulings

Indonesia's primary transfer pricing provisions are contained in Article 18 of the PPh Law. Article 18 (3) authorizes the DGT to re-determine the amount of taxable income and deductible expenditure for transactions between taxpayers, where a "special relation" exists. Article 18(3) also allows a re-determination of debt as equity. The re-determination should be made in accordance with equity and common practice of business with independent parties, i.e., in accordance with the arm's length principle. A "special relation" is deemed to exist where:

- A taxpayer has direct or indirect ownership of 25% or more in another taxpayer, or two or more other taxpayers
- A taxpayer controls another taxpayer, or two or more other taxpayers
- There is a family relation biologically or by marriage in the first degree

DGT Regulation PER-22/PJ/2013 (PER-22) also extends the ambit of Article 18 to domestic related party production sharing contracts, contracts of work or cooperative agreements for oil and gas extraction, and mining. PER-22 states that Article 18 will apply where transfer pricing between related parties is not specified in the production sharing contract, the contract of work or the cooperative agreement.

The DGT issues regulations which provide guidance on the application of tax law, rather than being binding on taxpayers. Regulation PER-43/PJ/2010 (PER-43) provides guidance on the application of the arm's length principle. In 2001, this regulation was amended by regulation PER 32/PJ/2011 (PER-32). Under these regulations, taxpayers should:

- Conduct a comparability analysis and determine comparable transactions
- Determine the appropriate transfer pricing method
- Apply the arm's length principle based on the results of the comparability analysis and the most appropriate transfer pricing method
- Document the steps taken in determining the fair price or fair profit in accordance with the provisions of the prevailing tax regulations

PER-43, as amended by PER-32, can apply to domestic related party transactions as well as international related party transactions. The regulations may be applied where there are transactions between a taxpayer and another domestic taxpayer or permanent establishment, where the related parties are subject to different tax rates caused by items such as:

- The imposition of final and non-final income taxes within a specific sector
- The imposition of the sales of luxury goods tax
- Transactions conducted with taxpayers of oil and gas production sharing contractors

OECD guidelines treatment

Indonesia is not a member of the OECD, although it has been granted "enhanced participation" status. The DGT largely endorses the principles of the OECD Guidelines in its regulations. However, it should be noted that the practical application of the arm's length principle by the DGT in an audit context regularly diverges from the principles endorsed by the OECD Guidelines.

Priorities/pricing methods

PER-32 states that the most appropriate transfer pricing method should be selected. The decision for the most appropriate method should regard:

Indonesia (continued)

Priorities/pricing methods (continued)

- The advantages and disadvantages of each method
- The suitability of the method based on the functional analysis
- The availability of reliable information to apply the method
- The level of comparability between the tested transaction and potential comparable data, including the reliability of potential adjustments

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 are no provisions for penalty relief.

Documentation requirements

Under PER-43, transfer pricing documentation is mandatory. In 2011, PER-32 limited the documentation requirement to transactions with a total value of IDR10 billion or more for each counter party in a fiscal year.

Taxpayers are required to indicate whether transfer pricing documentation has been prepared when they file the transfer pricing schedule to the corporate income tax return (Form 3A/3B) as well as to disclose the transfer pricing method that has been used to price their related party transactions during the year.

Documentation requirements are largely prescriptive and should also address key points that will be raised by the DGT on audit based on the transfer pricing audit regulations that have been introduced. Particularly, the most recent transfer pricing audit regulations were released at the end of 2013.

Documentation deadlines

As noted above, taxpayers are required to indicate whether transfer pricing documentation has been prepared when they file the transfer pricing schedule to the corporate income tax return in Form 3A/3B. Following a formal request for transfer pricing documentation from the DGT, taxpayers are required to submit their documentation within 30 days.

Statute of limitations on transfer pricing assessments

There is no separate statute of limitation for transfer pricing. Under Indonesian tax law, the DGT is permitted to conduct a tax audit, that includes assessments of the arm's length nature of related party transactions, within five years of the relevant fiscal year.

Return disclosures/related party disclosures

The disclosure of domestic and international related party transactions with the corporate income tax return is required in Form 3A/3B. The information required includes the counterparty, the type of transaction, the value of the transaction, the transfer pricing method applied and the reason for the application of the method. Additionally, taxpayers are also required to disclose whether they have prepared transfer pricing documentation.

Transfer pricing-specific returns

There are no transfer pricing-specific returns required until a transfer pricing audit commences, at which point the taxpayer is required to complete forms specific to the audit process.

Indonesia (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The DGT's national tax audit revenue target for 2013 was set at IDR18.5 trillion. The DGT has been aggressively auditing to achieve this target, with their key focus being transfer pricing.

Transfer pricing cases are typically commenced by generalist tax auditors in a taxpayer's relevant tax office. The DGT has a central transfer pricing team which is assigned to cases as needed.

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
- A tax refund position[1]
- Losses
- Lower net profit in comparison to other similar enterprises or to the industry average. The DGT issues 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
- Increasing gross revenue/receipts, but no change in net profit
- Related parties in tax havens

In May 2013, the DGT issued PER-22, which provides transfer pricing guidance to tax auditors. In November 2013, the DGT issued Circular Number SE-50/PJ/2013 ("SE-50") which provides further, more detailed, guidance on the same topic. Together, these recent publications include the following:

- A standard process to be undertaken in a transfer pricing audit
- Examples of the application of the different transfer pricing methods
- Guidance on the treatment of "special matters" which include services, intangible assets, loans (including thin capitalization), with examples
- Standard forms for DGT information requests, taxpayer responses and DGT working papers for transfer pricing analysis

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

APA opportunity

Under PER-43, APAs are available. The specific DGT guidance covering APAs is PER-69/PJ/2010 (PER-69). PER-69 states that APAs may be unilateral or bilateral.

Under PER-43, MAP is available, in accordance with the provisions of an applicable tax treaty. The specific DGT guidance covering APAs is PER-48/PJ/2010.

Expected reaction to OECD Report on BEPS

As Indonesia is a member of the G20, the DGT is actively participating in the BEPS discussions at the OECD. However, it is still too early to predict the influence BEPS will have on the Indonesian transfer pricing law and regulation.

[1] In this instance, a tax audit automatically commences.

Iraq

Taxing authority and tax law

Taxing authority: General Commission for Taxes (GCT).

Tax law: Law No. 113 of 1982, as amended.

Relevant regulations and rulings

Currently, there are no transfer pricing regulations in Iraq. However, the GCT expects that all transactions with related parties should be entered under the usual commercial rates as in contracts with unrelated third parties.

The GCT conducts a tax audit of each annual tax filing (audited financial statements prepared under the Iraqi Unified Accounting System and a tax return form) and will ask for any supporting documentation it deems necessary.

Finally, the GCT actively employs a deemed tax mechanism based on its own estimation of a reasonable profit (a deemed profit); this is the default position of the GCT despite the requirement to file audited financial statements. Consequently, the Iraqi tax authorities rely on the simplified method of applying a deemed tax to ensure that at least a minimum level of tax is paid in Iraq.

Iraq has entered into a bilateral double taxation treaty with Egypt and a multi-lateral double taxation treaty with the states of the Arab Economic Union Council. In practice, and with respect to Iraq taxation, it is not recommended to rely on a position based on a tax treaty between Iraq and another country, as GCT does not look to the treaties nor does it apply their provisions.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general is high and is mandatory for all tax filings.

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 has either turnover of less than EUR50 million or assets of less than EUR43 million. This is an annual test that is applied at group level.

Section 835F TCA 1997 (Section 835F) imposes an obligation on companies to have such records available 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 Guidelines extensively 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, standard tax geared corporate tax penalties which apply to the Irish self-assessment regime may be applied to transfer pricing assessments by the IRC.

Penalty relief

There are currently no penalty protection or relief rules in the regulations but the IRC has guided that the existence and quality of transfer pricing documentation will be a key factor in determining the level of penalties applicable to a transfer pricing adjustment, if any.

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 prepared based on the company's choice, and is likewise not required to prepare the documentation by itself. Moreover, the documentation need not be prepared or kept in Ireland, but when documented must be in a language of the State, i.e., English or Irish.

Ireland (continued)

Documentation requirements (continued)

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 in-scope transactions for 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 for a company to be in a position to make a correct and complete return, transfer pricing documentation should exist at the time of filing the tax 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 renegotiated 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.

Return disclosures/related party disclosures

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

Transfer pricing-specific returns

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 its 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 determining its compliance with the Irish regulations. A selection of

Ireland (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

will be requested by IRC to conduct a TPCR in any given year. The IRC have set out that their initial focus will be on a number of large companies but this is expected to be expanded in the coming years.

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. TPCR selection and transfer pricing audit activity commenced in 2013.

APA opportunity

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

Expected Reaction to OECD Report on BEPS

There has not been any reaction up until January 2014.

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 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 regulations require 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 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 adopts a combination of hierarchy and best method selection, where 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.

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

Israel (continued)

Transfer pricing-specific returns

Refer to the return disclosures/related party disclosures section.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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.

The issues of transfer of IP and financial transactions, along with the recent circulars on the restructuring and the stock options expenses as described above, are more likely to be challenged.

APA opportunity

Section 85A of the Israeli Income Tax Ordinance, 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.

Expected reaction to OECD Report on BEPS

Until January 2014, the Israeli tax authority have not submitted any formal document regarding BEPS, however, in recent tax audits, the ITA have focused on IP valuation, in light of the recent OECD's draft on this issue.

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 or Consolidated Corporate Income Tax Code), where transfer pricing is regulated in Article 110 (7) and Article 9 (3)–(4) for Corporate Income Tax (IRES).

On 23 December 2013, the Italian Parliament passed the budget law for 2014 (2014 Stability Law, published in the Official Gazette no. 302 of 27 December 2013), which includes clarifications on the application of the transfer pricing rules to the determination of the Regional Tax on Productive Activities (IRAP) taxable base (which is regulated by Legislative Decree no. 446 of 15 December 1997), also for the tax years following the one in progress at 31 December 2007.

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 and also follow the OECD approach. It also contains 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 Masterfile
- 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) is 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 Guidelines, where

Italy (continued)

Relevant regulations and rulings (continued)

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.

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 in 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.

The 2014 Stability Law provides important changes for groups involved in certain on-line businesses; from a transfer pricing perspective, the new rules provide that entities involved in the collection of on-line advertisement and in related auxiliary services on behalf of foreign group companies must use profit level indicators other than those applicable to the costs incurred in the conduct of their business. However, the 2014 Stability Law does not provide any guidance about an alternative transfer pricing method to be used. Exceptions apply to companies that reach an APA with the tax authority by way of the International Standard Ruling procedure (outlined in the following sections).

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 (both for IRES and IRAP purposes). 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

Italy (continued)

Transfer pricing penalties (continued)

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 tax 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*)

Penalty relief

Please refer to the section above for the application of the new penalty protection regime.

Following the clarifications and changes included in the 2014 Stability Law, with reference to any value adjustments that result from the application of transfer pricing rules for IRAP purposes, ordinary penalties provided by law do not apply; however this benefit is limited to the tax years following the one in progress at 31 December 2007 through those for which, at the date of entry into force of the new provision, the deadline for the filing of the tax return has elapsed. Notwithstanding the above, penalties will apply if the relevant legal measure (e.g., court decision) became final before the entry into force of the 2014 Stability Law.

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 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 by an additional year. Furthermore, for companies not benefiting from the 2002/2003 Italian Tax Amnesty, the assessment period is extended by two additional years.

Italy (continued)

Statute of limitations on transfer pricing assessments (continued)

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).

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit is high, as is the likelihood of being audited specifically on transfer pricing. The 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. Despite the general pressure put on commissionaire arrangements, it is also worthwhile mentioning a recent favorable Supreme Court decision (Boston Scientific case).

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 the 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 was 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.

Similar operating instructions on transfer pricing scrutiny are contained in the Circular Letter no. 25/E issued on 31 July 2013 where the compliance to the optional regime on transfer pricing documentation is identified as a positive factor of transparency and cooperation with the tax administration within the risk monitoring activities.

Italy (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

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 tries 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 19 March 2013, the Central Directorate for Tax Assessment released the second Italian International Standard Ruling Report. This provides a brief description of the procedure and a number of statistical details that may be useful for taxpayers interested in exploring an APA, including pre-filing.

Although the relevant APA law still refers only to unilateral APA, since 2010 the Revenue is open to enter into bilateral and multilateral APAs under the relevant treaties.

On 23 December 2013, the Italian Government issued Law Decree no. 145/2013 (the Destination Italy Decree) and the Parliament has 60 days to convert it into an ordinary law. The Destination Italy Decree extends the scope of the International Standard Ruling procedure to preliminary assessments of Italian permanent establishment of foreign entities and provides that the validity of agreements reached through the International Standard Ruling (e.g., including APAs) is increased from the previous three year term to five years.

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. 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.

Expected reaction to OECD Report on BEPS

The OECD Action Plan has not yet resulted in any legislative changes and there has been no formal announcement by the Government of any proposed changes in the law.

However, the mentioned Circular Letter no. 25/E issued on 31 July 2013, containing instructions for preventing and facing evasion, highlights the need for detecting and monitoring aggressive tax planning and international BEPS schemes, by expressly referring to the development of the OECD project on BEPS.

In addition, it is worthwhile noting that, following the local optional regime on transfer pricing documentation (based on the EU Code of Conduct and the OECD Guidelines) and the APA procedure, the Tax Administration has launched, in June 2013 a pilot project called Cooperative Compliance Program for large business taxpayers. The project aims at identifying the main features of a new form of relationship between Large Business Taxpayers and the Italian Tax Administration, so to make the current risk management monitoring activity (section 27, paragraphs 9 to 12, of decree-law no. 185/2008, as converted by section 1 of law 2/2009) evolve into a more advanced program, consistent with the recent recommendations by the OECD (Enhanced Relationship).

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 Guidelines for direction, and the Japanese transfer pricing Administrative Guidelines contain the following statement in Para. 1-2(3).: '*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*.'

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:
  - The first part of delinquency tax 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

Transfer pricing penalties (continued)

- The second part of delinquency tax 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.

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).

Japan (continued)

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 are 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a specific company being audited depends on that company's profile. In general, however, the likelihood 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. This likelihood has increased with the introduction of the New General Tax Law, which prohibits two or more separate tax audits for the same taxable period except in cases where the taxpayer's written consent has been obtained. The effect of this new Law is to incentivize the simultaneous conduct of a transfer pricing audit along with the general tax audit.

Taxpayers may also be audited on transfer pricing only (not part of a tax audit) when they consent to a separate transfer pricing audit. In general, the Japanese tax authorities request taxpayers to provide written consent prior to the start of an extensive transfer pricing 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 likelihood is generally medium-high for large taxpayers with significant related party transactions. The likelihood 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 in 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.

Japan (continued)

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.

Expected reaction to OECD Report on BEPS

The Japanese tax authorities are supportive of the contents of the OECD Report on BEPS as many of the issues raised in the report are generally consistent with the views of the NTA. However, neither there will be any immediate or significant changes to the current approach or practices of the NTA with respect to transfer pricing, nor is it expected that there will be any tax reforms or changes to legislation or administrative procedures as a result of the OECD Report in advance of any of the expected output of the BEPS Action Plan, and in particular recommendations regarding the design of domestic rules.

- **With regards to IP:** No immediate or significant change to the NTA's current approach is expected. The NTA has always taken the view that profits associated with intangibles should be appropriately allocated in accordance with value creation
- **On the Country-by-Country Reporting:** No immediate or significant change to the NTA's approach is expected. In an audit examination or in the review of an APA request, it is standard practice for the NTA to request taxpayers to provide data on the entire value chain under review even when using a "one-sided" transfer pricing method. It enables the NTA to develop a "big picture" view of the taxpayer's global value chain
- **Regarding the Documentation Masterfile:** No immediate or significant change to the NTA's current approach is expected. As described above, the NTA has always sought to develop the global value chain of the taxpayer. The OECD Report's support for increased transparency between the taxpayer and tax administrations is in line with the NTA's approach

Jordan

Taxing authority and tax law

Taxing authority: Income and Sales Tax Department.

Tax law: Currently, there are no local transfer pricing regulations in Jordan, but around 28 tax treaties have been concluded which contain an article which resembles Article 9 OECD Model Tax Convention on "Associated Enterprises."

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:

- Rules for monitoring transactions (No. 1324 of 11 November 2011)
- 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)
- List of exchange quoted goods (No.638 of 6 May 2009)

OECD Guidelines treatment

Although Kazakhstan is not a member of the OECD, the current transfer pricing law in Kazakhstan has some common features with the 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 US$4,000.

Transfer pricing penalties are also imposed on individuals for personal liability for an administrative violation. It also includes criminal liability, if the tax amount misreported exceeds approximately US$226,000. 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.

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.

Kazakhstan (continued)

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 and
- 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 monitoring 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 documentation supporting the applied transaction prices must be submitted within 90 days from 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.

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 the reporting year.

Apart from the above and the general transfer pricing documentation requirements, no other transfer pricing return is required to be filed.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

There are two types of tax audits in Kazakhstan that can cover transfer pricing issues: comprehensive tax audit and targeted tax audit. 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

Kazakhstan (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

The likelihood 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, 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., not more than three years from the date of signing)
- Other

Expected reaction to OECD Report on BEPS

No specific legislative reaction is expected with regard to introduction of the OECD Report on BEPS.

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.

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

Kenya (continued)

Documentation requirements (continued)

- 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, taxable income for the year.

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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 while 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.

Expected reaction to OECD Report on BEPS

There has not been any reaction from the tax authorities up until January 2014.

Kosovo

Taxing authority and tax law

Tax authority: Tax Administration of Kosovo

Tax laws and ministerial instructions:

- Law no.03/L-162, dated 29 December 2009 on Corporate Income Tax, as amended (CIT law)
  - Article 2, paragraph 1.18 — definition of related persons for corporate income tax (CIT) purposes
  - Article 27 — transfer pricing definition; transfer pricing methods
- Law no. 03/222, dated 12 July 2010 on Tax Administration and Procedures (tax procedures law)
  - Article 1, paragraph 1.27 — definition of related persons
  - Article 1, paragraph 1.45 — definition of market value
  - Article 46 — tax authorities' right of transfer pricing adjustments
- Double taxation treaties enacted by Kosovo

Relevant regulations and rulings

- Administrative Instruction no. 14/2010, dated 19 November 2010 of the Ministry of Economy and Finance on CIT law
  - Section 20, paragraph 1 — transfer pricing application
  - Section 20, paragraph 1–8 — transfer pricing methods priority application
  - Section 20, paragraph 9 — transfer pricing documentation

OECD Guidelines treatment

The Kosovan legislation on transfer pricing makes reference to the OECD Guidelines. The relevant regulatory framework for transfer pricing includes provisions of the CIT law and tax procedures law and related instructions.

Priorities/pricing methods

In general, the tax authorities follow the OECD Guidelines in examining related party transactions and transfer prices charged. However, contrary to the OECD's best method approach, the three traditional transactional methods are preferred, especially the CUP method. The tax authorities also allow the use of the profit split method when the activities of the transacting entities are highly integrated and intangibles are involved. The transactional net margin method is considered the last resort method.

Transfer pricing penalties

The current legislation does not provide for specific penalties in case of transfer pricing adjustments. Therefore, in case of an adjustment, the general tax penalties would apply. Hence, a penalty of 50% will be applicable on the amount of unpaid tax liability due to reduced taxable profit declared. If the taxpayer decides to amend the transfer pricing position taken previously, by filing an amended tax return, before a tax audit is initiated, then the penalty imposed for late filing will be 5% of the unpaid liability for each month of delay, capped at 25%. Moreover, a penalty for late payment of the tax liability is applicable at 1% thereof for each month of delay capped at 12%. Both penalties do not apply cumulatively, rather the late payment penalty starts applying to the extent the unpaid liability has not been paid by the time the late filing penalty reaches its ceiling. In both cases, default interest would apply which should be at least 0.5% higher than the bank lending rate interest in Kosovo.

Penalty relief

Currently, no penalty relief is available.

Documentation requirements

Taxpayers who carry out transactions with related parties must maintain sufficient supporting documentation to justify their transfer

Kosovo (continued)

Documentation requirements (continued)

price determination method and to show that it is in line with the arm's length principle. Such documentation should explain in detail the methodology used in arriving at the transfer prices applied.

Documentation deadlines

Not applicable.

Statute of limitations on transfer pricing assessments

The statute of limitation on transfer pricing assessments is six 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 Kosovan tax legislation, taxpayers are 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The lack of guidance and precedence on transfer pricing disputes exposes foreign investors to penalties and double taxation with regards to the transfer pricing positions taken, if the supporting documentation is not considered sufficient to justify them. Moreover, the laws and relevant guidelines do not provide for details on the contents of the documentation required to be kept by the taxpayer in order to substantiate the grounds on which the transfer prices applied are in line with the arm's length principle.

APA opportunity

Kosovan legislation does not provide for the possibility of an APA.

Expected reaction to OECD Report on BEPS

There has not been any reaction up until January 2014.

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.

Intra-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 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, intra-group financing and intellectual property) will be effective and imposed regardless of the transfer pricing method in place.

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 set for failure to maintain documentation.

Penalty relief

Kuwait does not have penalty relief.

Kuwait (continued)

Documentation requirements

Currently, Kuwait does not have any formal documentation requirements.

Documentation deadlines

Currently, Kuwait does not have any formal documentation requirements and hence has 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 so 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.

Expected reaction to OECD Report on BEPS

Up until January 2014, the tax authority has not issued any written document related to the BEPS Report of the OECD.

Laos

Taxing authority and tax law

Tax authority: Tax Department

Tax law: Amended Tax Law No 21/NA dated 20 December 2011

Relevant regulations and rulings

There are no transfer pricing regulations in Laos.

Laos has concluded Double Tax Treaties (DTT) with Brunei, China, Korea, Malaysia, Myanmar, Thailand and Vietnam, which are currently effective.

Priorities/pricing methods

By regulations, there are no specified pricing methods in Laos. In practice, the Tax Department may adopt a different pricing method such as averaged or market prices.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The Lao Tax Department conducts annual tax audit/assessment after the corporate taxpayers submit their annual corporate income tax returns and financial statements in March of the following year. There is no specific transfer pricing audit in Laos.

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 determines that the taxable income of the taxpayer may be adjusted upwards if related party transactions are not at arm's length. Transfer pricing documentation requirements are laid down in the Law on Taxes and Duties.

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 applied 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 Guidelines on the application of the transfer pricing methods. The State Revenue Service in most cases accepts the principles stipulated in the OECD Guidelines regarding structure of transfer pricing documentation.

Priorities/pricing methods

Five methods are accepted: CUP, Resale Price, Cost Plus, Profit Split and TNMM

Transfer pricing penalties

There is no specific 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 adjusted upwards and a penalty of 20% to 30% on the amount along with a late payment penalty (annual rate of 18%) on the additionally payable corporate income tax may be applied.

Penalty relief

There is no specific penalty relief with respect to transfer pricing adjustments. As per ordinary procedure, penalty imposed in the result of a tax audit may be reduced by 50%. In addition to this, in practice the existence of proper transfer pricing documentation reduces risk of transfer pricing adjustments.

Documentation requirements

Taxable persons with annual net turnover exceeding EUR1.43 million are obliged to prepare transfer pricing documentation for all related party transactions with annual value over EUR14, 300.

According to the Law on Taxes and Duties, transfer pricing documentation should 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 entity, including description of internal relations
- Information on taxpayer's business strategy — market strategy, product distribution strategy and supply chain as well as sales and management strategy that may potentially affect pricing policy of intercompany transactions
- Description of intangibles that may affect the transfer price (if any)
- 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 party
- Terms and conditions of the agreement concluded between the taxpayer and related party
- Forecast for taxpayer's operating activities in relation to the agreement concluded with related entity

Latvia (continued)

Documentation requirements (continued)

- Description of the selected transfer pricing method for testing compliance of the price (cost) applied to a controlled 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 party — concluded agreements, documents justifying expenses, written resolutions and decisions made in board, council, shareholder and other internal meetings

For non-qualifying taxpayers (with net turnover and related party transaction annual value under statutory threshold) preparation of transfer pricing documentation is optional. However, they still should comply with statutory requirement to controlled prices being at arm's length. In practice, it means that the taxpayer may provide the State Revenue Service with transfer pricing documentation that is limited in scope, substantiating that prices applied to intercompany transactions are at arm's length.

Documentation deadlines

There is no deadline set for the preparation of the transfer pricing documentation, but the relevant documentation could be required during the State Revenue Service's tax audit. The tax audit may be initiated throughout the year, however taxable income adjustments may take place after the corporate income tax return is filed (i.e., four to seven months after the end of financial year). Transfer pricing documentation should be submitted within 30 days following a request by the State Revenue Service.

Statute of limitations on transfer pricing assessments

The State Revenue Service has rights to make tax assessment of local transactions within three years, and cross border transactions within five years period after the tax becomes due.

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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Small and medium taxpayers in Latvia have a medium risk of being subject to a general tax audit, while large taxpayers have a high likelihood of tax audits. All taxpayers are exposed to high risk of transfer pricing being reviewed as a part of an audit. In addition, the likelihood that if transfer pricing is reviewed as a part of the audit, the transfer pricing methodology will be challenged, is medium for taxpayers.

APA opportunity

A taxpayer has 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 EUR1.43 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.

Expected reaction to OECD Report on BEPS

Currently, no law amendments have been anticipated with respect to the OECD Report on BEPS.

Lebanon

Taxing authority and tax law

The Lebanese tax regulation regarding transfer pricing is still not elaborated and clear.

Article 15 of the Income Tax Law states that, if it appears that establishments of foreign companies transfer part of their profits abroad either by increasing or by decreasing purchase or sale prices, or otherwise, the profits so transferred shall, for taxation purposes, be added to the profits shown in the accounts. In the absence of sufficient evidence that would enable the determination of the real profits, the profits of a similar establishment shall be taken as a basis for comparison and determination of the profit, in addition to the apparent indications and particulars gathered by the competent financial authorities.

In addition, in 2008, the parliament raised the tax procedures law. Article 10 of that law states that the tax authority has the right to reclassify certain transactions in the following instances:

- Virtual transaction for the purpose of tax evasion
- Legal transaction in form but for purpose of tax evasion
- Transactions between related parties if these transactions are not at arm's length

Arm's length value

Arm's length value is defined by the tax authorities under the Decision No 453/1 dated 22 April 2009, as the value of a similar transaction that occurs between independent persons and under similar comparable circumstances.

Individuals are considered related if any of them holds the authority of supervision, management or control over the other or if they are related by other means such that one party is an employee of the other or if any one of them is a guardian for the other.

Individuals and entities are considered related when any one of them has the authority of supervision and management over the other.

Entities are considered related if one entity has the authority of supervision and management on one or several other entities.

Tax evasion

The tax authorities defined the tax evasion as each action taken by the taxpayer in order to reduce or eliminate the tax due, or to postpone the tax due dates, or to increase the amount of deductible or refundable tax, when it is prohibited.

Libya

Taxing authority and tax law

Taxing authority: Tax Department of the Ministry of Finance.

Tax law: Currently, there are no local transfer pricing regulations in Libya, but Libya has concluded around 17 tax treaties which contain an article which resembles Article 9 OECD Model Tax Convention on "Associated Enterprises."

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 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 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, provided 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 EUR2.9 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 EUR87,000. 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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.

Expected reaction to OECD Report on BEPS

As the use of the OECD Guidelines is explicitly advocated in the regulations and rulings applicable in Lithuania, the Lithuanian tax authorities are likely to agree with the actions proposed in the OECD Report on BEPS and implement them accordingly, including changes with respect to intangibles, country-by-country reporting and Masterfile documentation. However, it is not known to what extent these changes will be implemented in the Lithuanian tax legislation.

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 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 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, TNMM, and Profit Split methods. 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 pricing 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 OECD Guidelines.

Moreover, for all new financing transactions, the tax authority may request supplementary information supporting the transfer prices 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 (continued)

Documentation requirements (continued)

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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 likelihood 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 APA 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 applied intercompany transfer prices.

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 and thus, 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.

Expected reaction to OECD Report on BEPS

Not applicable.

Former Yugoslav Republic of Macedonia

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 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 methods, 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.

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

Former Yugoslav Republic of Macedonia (contd)

Documentation requirements (continued)

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 is 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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.

Expected reaction to OECD Report on BEPS

There has not been any domestic reaction to the OECD Report on BEPS yet and no local guidance exists on the documentation contents.

Malaysia

Taxing authority and tax law

Taxing authority: Inland Revenue Board (IRB).

Tax laws: Income Tax Act, 1967 (ITA).

Relevant regulations and rulings

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 APA 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 APA rules set 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 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 Section 113(2) Penalty for incorrect return, incorrect information of the ITA is applied under which penalties 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 transfer pricing documentation is prepared, 25% where documentation is not prepared in accordance with the guidelines and no penalties apply where a contemporaneous transfer pricing documentation is prepared.

Penalty relief

An appeal for reduction in penalties can be made based on quality of the 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 Malaysia (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, from 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)

Frequency of tax audit and transfer pricing scrutiny by the tax authority (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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Tax audits, including transfer pricing audits, are normally conducted to cover a period of three to six years. As such, the likelihood 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.

Expected reaction to OECD Report on BEPS

There has not been any reaction from the tax authorities up until January 2014.

Maldives

Taxing authority and tax law

Taxing authority: Maldives Inland Revenue Authority (MIRA).

Tax law: Law No. 5 of 2011 (Business Profit Tax Act) and its supporting regulations and rulings.

Relevant regulations and rulings

The Maldives Business Profit Tax Act contains transfer pricing provisions under the Tax Avoidance section. This section applies where the computation of the taxable profits of a person for a tax year takes into account a transaction entered into directly or indirectly between that person and another person and those two persons are associated with each other.

MIRA either may disregard or apply arm's length terms in assessing tax.

In the Business Profit Tax Act persons are associated if:

- One controls the other or both are controlled by the same person.
- One is a relative of the other.

Person is relative of another if he or she is:

- The individual's spouse
- A brother, sister, parent, grandparent, or child of the individual or the individual's spouse
- A spouse of a person given above and a child includes a step child

OECD guidelines treatment

In general, the transfer pricing requirements follow the OECD Guidelines.

Priorities/pricing methods

The arm's length price is determined on the basis of comparison with similar goods or services provided between unrelated parties.

Transfer pricing penalties

Financial penalties in the form of interest and fines shall be imposed for non-compliance with business profit tax rules and may apply in case of deficiency assessment due to transfer pricing adjustments.

Penalty relief

There are no penalty relief provisions in place.

Documentation requirements

There are no specific documentation requirements.

Documentation deadlines

There are no documentation deadlines.

Statute of limitations on transfer pricing assessments

- Transfer pricing assessment is a part of the regular business profit tax by the MIRA.
- The MIRA may serve a notice of inquiry on the taxpayer within 12 months from the date of submission of the return for BPT.
- The MIRA can conduct tax assessments up to three years from the date of service of notice of inquiry.

Maldives (continued)

Statute of limitations on transfer pricing assessments (continued)

- The MIRA may conduct a tax audit for all taxes or certain types of taxes only (i.e., withholding tax (WHT), Goods and Services Tax (GST) or Business Profession Tax (BPT)). The tax audit covers a "tax period," which may be annual (usually the case for BPT) or monthly (usually the case for WHT and GST). After an audit is completed, a tax assessment is issued. However, if new relevant data/information is subsequently discovered after an assessment has been issued; the MIRA may revisit a tax period that has previously been audited. Data/information that was not previously disclosed during the tax audit process would be considered new data/information.
- In cases where a taxpayer has deliberately or fraudulently evaded tax, a notice of inquiry may be served within three years of the date on which sufficient information become available to the MIRA.

Return disclosures/related party disclosures

Related party disclosures must be disclosed in the notes to the audited financial statements, which are filed with the MIRA 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

During the income tax review process, the MIRA will likely demand the documentation supporting the transfer prices for intercompany transactions.

The MIRA conducts a tax audit of tax returns 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 no APA program available.

Expected reaction to OECD Report on BEPS

As of January 2014, the tax authorities have not reacted.

Malta

Taxing authority and tax law

Taxing authority: Inland Revenue Department.

Tax law: Main tax laws transpire from Income Tax Act (ITA) and Income Tax Management Act (ITMA).

Relevant regulations and rulings

The transfer pricing concept is recognized in a number of articles in the Income Tax Act and Income Tax Management Act (ITMA), notably Article 5(6) of the ITMA.

OECD Guidelines treatment

Agreements between associated enterprises must be entered into at arm's length, but Malta's transfer pricing rules are not very detailed.

Priorities/pricing methods

The Government has no specified preference as to the priority of methods. However the Cost Plus method is an acceptable pricing method.

Transfer pricing penalties

An incorrect transfer pricing structure could result in a tax assessment. Please refer to the section below for more details regarding penalties for omission.

Penalty relief

Where an omission from a return is amended by a taxpayer by means of the delivery of a further return (i.e., an adjustment form) before that taxpayer is notified by the Director General Income Tax (DGIT), an enquiry will be conducted into the taxpayer's tax declarations and liabilities and the further return is delivered to the DGIT within 12 months after the relative tax return date, such taxpayer is not subject to any additional tax.

If a further return is delivered to the DGIT after 12 months after the relative tax return date, but a notification in writing is not yet issued by the DGIT, the rate of additional tax for that omission shall be 0.1% per month of the endangered tax.[1]

If a further return is delivered to the DGIT after a notification in writing is issued by the DGIT, and the taxpayer is not notified with an assessment in which additional tax is charged for that omission, the rate of additional tax for that omission shall be 0.75% per month of the endangered tax.

If a further return is not delivered to the DGIT after a notification in writing is issued by the DGIT, and the taxpayer is notified with an assessment in which additional tax is charged for that omission, the rate of additional tax for that omission shall be 1.5% per month of the endangered tax.

Documentation requirements

Not applicable.

Documentation deadlines

Not applicable.

Statute of limitations on transfer pricing assessments

Time limits for when the tax authority can access tax and apply penalties for transfer pricing is six years. But in cases of evasion or fraud the time-limit for raising an assessment is open coded.

[1]Endangered tax means the difference between the tax declared to be chargeable by the taxpayer after taking into account any exemption, relief, allowance or tax credits to which he may be entitled and the tax actually chargeable after considering the same, but shall not include any additional tax.

Malta (continued)

Return disclosures/related party disclosures

Such information is required to be disclosed as part of the income tax return of the taxpayer.

Transfer pricing-specific returns

Malta does not require a separate return for related party transactions. Each company is required to file a separate income tax return, including information on related party transactions.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general is low. The likelihood that transfer pricing will be reviewed as part of that audit and the likelihood that the transfer pricing methodology will be challenged is low.

APA opportunity

Malta is not aware of any advanced pricing arrangements.

Expected reaction to OECD Report on BEPS

Malta is fully compliant with the OECD requirements with regard to intangibles as well as country-by-country reporting and Masterfile documentation.

Mauritius

Taxing authority and tax law

Mauritius Revenue Authority (MRA) and Income Tax Act 1995 (ITA 1995).

Relevant regulations and rulings

There are no relevant transfer pricing regulations. Under Section 159 of the ITA 1995, any person may apply for an advanced ruling. The MRA should issue the ruling within 30 days of the receipt of the application.

OECD guidelines treatment

Since Mauritius does not have any specific transfer pricing laws, this question never arose. Based on experience with the MRA, the OECD Guidelines have been used to determine the arm's length price.

Priorities/pricing methods

Not applicable.

Transfer pricing penalties

The penalty for any late payment of tax is 5% and monthly interest at the rate of 1% applies.

Penalty relief

Even though Mauritius does not have any transfer pricing regulations, the MRA can challenge intercompany transactions. The Director-General of the MRA is empowered to waive any interests and penalties where it is satisfied that the error is attributable to a just or reasonable cause.

Documentation requirements

As Mauritius does not have any transfer pricing laws, there is nothing specific that is prescribed or requested by the MRA through its statement of practice. It is recommended that all supporting documents such as comparable data and basis of allocation of profits are maintained.

Documentation deadlines

The MRA has up to five years from the submission of the tax return to issue a notice of assessment. The time frame to keep any documents under the Mauritian corporate laws is seven years.

Statute of limitations on transfer pricing assessments

Whilst there is no transfer pricing laws in Mauritius, the MRA may challenge intercompany transactions and has up to five years from the submission of the tax return to issue a notice of assessment. In the case of fraud and wilful neglect, the time limit of five years does not apply.

Return disclosures/related party disclosures

The tax payer should intimate in the return whether related party transactions have been made at arm's length or not.

Transfer pricing-specific returns

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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

Mauritius (continued)

APA opportunity

Under the Mauritian tax laws, an advanced ruling is possible.

Expected reaction to OECD Report on BEPS

Not applicable.

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 76-IX, X and XII, 90, 179, 180, 182 and 184 of the Income Tax Law (ITL)
- Article 34-A of Federal Fiscal Code (FCC)
- International Tax Treaties on Income and Capital (ITTIC) with more than 44 countries; most follow the OECD Model Tax Convention
- Value Added Tax (VAT) Law
- Miscellaneous Tax Resolution (MTR): Tax Regulations and Administrative Rules (TR and AR)
- Presidential Decree published on December 2013 addressing issues related to VAT cash flows and deductibility of certain labor benefit expenses for maquiladoras (contract manufacturers under IMMEX program)

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. A new temporary rule is expected addressing transfer pricing documentation for transactions among domestic related parties.

- ITL, Article 28 Section XXIX and XXXI: Non-deductibility of payments to domestic and/or foreign related parties under specific circumstances
- ITL, Article 76 Sections IX, X and XII: Taxpayer obligations for arm's length pricing (all), contemporaneous transfer pricing documentation (cross-border), transfer pricing disclosure (cross-border), ITL (Art. 180) method-application (all)
- ITL, Article 184: 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 179: Comparability, business cycles, permanent establishments and transfer pricing, tax havens and OECD Guidelines
- ITL Article 180: Transfer pricing methods, ranges and selection of the most appropriate method
- ITL, Article 182: Transfer pricing options for maquiladoras
- ITL, Article 184: Transfer pricing adjustments under ITTIC
- FFC, Article 34-A: Transfer pricing ruling (unilateral), bilateral APA under treaty
- MTR, TR: 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 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. New regulations are expected regarding such questionnaires.

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 180 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.

Mexico (continued)

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 US$4,122 to US$8,245 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.

Starting 2014 and anticipating the OECD´s BEPS Action Plan, ITL establishes in Article 28 Section XXIX that payments to foreign or domestic related parties will not be deductible, as long as these amounts are also deductible for the taxpayers' counterpart. Moreover, Section XXXI limits the deduction of payments made to foreign related parties for interests, royalties or technical assistance, if the related party receiving the payment is transparent for tax purposes, the payment is not considered taxable revenue for the counterpart or it is treated as non-existent for the foreign related party.

Penalty relief

Contemporaneous documentation might reduce tax penalties by 50%, as long as the taxpayer complies with formal requirements established in Article 76-IX. 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 180 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 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 76-IX, as long as companies do not cover threshold for revenues within the previous fiscal year (approximately US$1 million for distribution and manufacturing activities, or US$250,000 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 allowed 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 76-IX. New regulations about this matter are expected in 2014.

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

Mexico (continued)

Documentation deadlines (continued)

for each year. For those companies that chose to have a Tax Report based on their financial statements prepared 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 Tax 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 Tax Report," also due in June. New regulations regarding this matter are expected in 2014.

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, according to Article 182 of the ITL, an informative return must be filed by maquiladora companies (DIEMSE). Both informative returns must be filed by 30 June of the following year and require the same information to be submitted by Mexican taxpayers.

When filing the Tax Report or the Alternative Information to the Tax 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. 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.

- 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

Mexico (continued)

Return disclosures/related party disclosures (continued)

- 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 Tax 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.

Transfer pricing-specific returns

Exhibit 9 of the Multiple Informative Return (DIM) for transactions carried out with foreign related parties, as well as Manufacturing, Maquiladoras and Export Services' Informative Return (DIEMSE) for transactions carried out under the maquiladora regime, and Tax Report questionnaires.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

There is a high likelihood of a tax audit for 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.

SAT's internal criteria related to tax positions, which include transfer pricing comments is still valid[1] . 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 respectively. Unilateral APAs can cover the fiscal year of the application, the three subsequent fiscal years and a one-year rollback.

Starting 2014, self-assessment option for maquiladoras will no longer be available. As such, Mexican contract manufacturers with an IMMEX program will have to choose between applying Safe Harbor rules (taxable profit being the greater of applying a 6.5% return over total costs, or 6.9% return over total assets — including assets and inventories on consignment property of foreign parties but used in the manufacturing activity), or pursue an APA. An increasing amount of unilateral and bilateral APAs is expected derived from this new obligation.

Expected reaction to OECD Report on BEPS

BEPS recommendations are being actively adopted by Mexican tax authorities, both on ITL, Tax Regulations and Administrative Rules, as well as on transfer pricing audit criteria developed by SAT's personnel.

[1]Last update 23 July 2012

Montenegro

Taxing authority and tax law

Tax authority: Montenegrin Ministry of Finance

Applicable tax legislation: Corporate Income Tax Law (CIT Law)

Relevant regulations and rulings

Article 38 of the CIT Law defines "arm's length" principle and transfer pricing methods allowed.

At the moment, there is no obligation to prepare transfer pricing documentation in Montenegro.

OECD Guidelines treatment

Montenegrin transfer pricing provisions are generally based on the OECD Guidelines.

Montenegrin transfer pricing rules do not contain any specific provisions in relation to business restructurings.

Priorities/pricing methods

The CUP method has priority in the selection of the transfer pricing method. If CUP cannot be applied, the CIT Law also allows other two traditional transaction methods, Cost Plus and Resale Minus. Montenegrin transfer pricing regulations do not recognize transactional profit based methods (i.e., TNMM and Profit Split method).

Transfer pricing penalties

There are no explicit penalties if a taxpayer fails to disclose related party transactions in the annual CIT return.

Penalty relief

Not applicable.

Documentation requirements

Montenegrin CIT Law does not prescribe any transfer pricing documentation requirements.

Documentation deadlines

Not applicable.

Statute of limitations on transfer pricing assessments

The general statute of limitation period of five years for taxes in Montenegro would also apply for transfer pricing assessments. Five year period is counted from the beginning of the year following the year in which respective tax liability was to be assessed.

Return disclosures/related party disclosures

According to article 38 of the CIT Law, taxpayers are obliged to disclose in their annual CIT return the revenues and expenses resulting from the transactions with related parties, as well as to present and compare these with revenues and expenses which would have been realized in the same transactions, if conducted with unrelated parties. Any difference between the two should be included in the taxable basis.

Transfer pricing-specific returns

There is no specific transfer pricing return in Montenegro.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Audits by the Montenegrin tax authorities are not conducted on a regular basis and audited periods are not considered irrevocably closed.

Montenegro (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

Typically, audits take place not more often than once in three to five years, and they cover all taxes. Transfer pricing is likely to be within the scope of tax audits in the future periods. Given the lack of practice, limited level of sophistication can be reasonably expected from the Montenegrin tax authorities in reviewing related party transactions.

APA opportunity

Advance rulings and APAs are not available in Montenegro.

Expected reaction to OECD Report on BEPS

Applicable Montenegrin tax legislation on transfer pricing is in its early stages and it is likely that the OECD Report on BEPS is not immediately reflected in either the changes to the legislation or transfer pricing practice.

Morocco

Taxing authority and tax law

Tax authority: Direction Générale des Impôts (DGI), generally referred to as the Moroccan Tax Administration

Tax law: Transfer pricing aspects are regulated by Article 213-II and 214-III of the Moroccan Tax Code (MTC)

- Article 213-II of the MTC: Moroccan Tax Administration is authorized to adjust the taxable income and/or the declared turnover of the Moroccan enterprises which are dependent, directly or indirectly, on enterprises located inside or outside Morocco. In this case, the tax authorities are entitled to re-determine the profits that have been indirectly transferred. These adjustments are performed by way of comparison with similar independent enterprises or by way of direct appreciation based on the available information to the Tax Administration
- Article 214-III of the MTC: For operations involving foreign companies, the Tax Administration is entitled to request from local entities all documents and information related to:
  - The nature of relations linking the Moroccan company to the foreign company
  - The nature of the services provided or the products sold
  - The method of determination of the prices for the operations realized between the Moroccan and foreign companies
  - The foreign company's tax regime and tax rates

Relevant regulations and rulings

There are no tax regulations and rulings in Morocco that deal with transfer pricing aspects.

However, please note that Morocco has an Exchange Control regulation pursuant to which the Control Exchange Office can challenge excessive unduly transfer of payments abroad.

OECD Guidelines treatment

As Morocco is not an OECD member, the OECD Guidelines regarding transfer pricing issues are not being followed.

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

Priorities/pricing methods

According to the Moroccan Tax Law, the TNMM should be applied.

Transfer pricing penalties

Currently, there are no provisions in the MTC binding companies to submit or present transfer pricing documentation.

However, according to Article 214-III of the MTC, for operations involving foreign companies, the Tax Administration is entitled to request from local entities all documents and information related to:

- The nature of relations linking the Moroccan company to the foreign company
- The nature of the services provided or the products sold
- The method of determination of the prices for the operations realized between the Moroccan and foreign companies
- The foreign company's tax regime and tax rates

If no information is provided, a dependent relationship is deemed between the Moroccan company and the foreign company.

Generally penalties apply as a result of a transfer pricing reassessment (regardless of compliance with any transfer pricing documentation requirement) as follows:

In terms of Corporate Income Tax (CIT): The amounts reassessed are reinstated in the taxable income of the company and taxed at the applicable CIT rate. Besides penalties apply as follows:

- 15% for late filing or incomplete filing. In case bad faith is demonstrated, 100% penalty applies

Morocco (continued)

Transfer pricing penalties (continued)

  - 10% for late payment
  - 5% for the first month of late payment and 0.5% for each following month
- In terms of withholding tax: After a transfer pricing reassessment is made, the additional profit is usually qualified as a deemed dividend. Accordingly, a withholding tax is required (when a double tax treaty applies, the withholding tax depends on the relevant tax treaty provisions). In the absence of a specific tax treaty, the withholding tax nominal rate is 15%. Besides penalties regarding CIT, as described above, apply
- In terms of Value Added Tax (VAT): When reassessing transfer pricing, the Moroccan Tax Administration also reassess the corresponding VAT. Besides penalties regarding CIT, as described above, apply

Penalty relief

In the frame of a reassessment, regarding penalties, a reduction might be granted to taxpayers who introduce a tax claim before the Moroccan Tax Administration.

Having transfer pricing documentation does not grant tax payers with penalty relief. However, it could help in the frame of a tax audit to support the pricing policy of the company and to demonstrate to the Moroccan Tax Administration that the transfer policy adopted is rationale from an economic perspective and is not arbitrary.

Documentation requirements

Currently, there are no provisions in the MTC binding companies to submit or present transfer pricing documentation.

However, according to Article 214-III of the MTC, for operations involving foreign companies, the Tax Administration is entitled to request from local entities all documents and information related to:

- The nature of relations linking the Moroccan company to the foreign company
- The nature of the services provided or the products sold
- The method of determination of the prices for the operations realized between the Moroccan and foreign companies
- The foreign company's tax regime and tax rates

Documentation deadlines

The documents and information should be provided within 30 days of a request.

Statute of limitations on transfer pricing assessments

The statute of limitation for transfer pricing adjustments is the same as for all tax assessments, generally, four years following the year for which the tax is due (it might be longer when loss carries forward or VAT credit exist).

Return disclosures/related party disclosures

In the event of a request from the tax authorities at the time of an tax audit (on the basis of Article 214-III of the MTC), 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 Moroccan audited entity and the related parties), the nature of the services provided or the products sold, the method of determination of the prices for the operations realized between the Moroccan and foreign companies, the foreign companies tax regime and tax rates.

Transfer pricing-specific returns

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

Morocco (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood 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 Moroccan Tax Administration is becoming more extensive and accurate in its queries.

Transfer pricing issues that receive the greatest scrutiny are:

- Product sale prices (under or overestimated prices), especially, but not only, in case of losses
- Management fees
- Cost allocations
- Business restructurings (e.g., transfer of intangibles and of clientele, indemnity) or a sudden decrease in the operating margin likely to hide a change in the transfer pricing policy applied

APA opportunity

No APA procedure is provided by the Moroccan tax law.

Expected reaction to OECD Report on BEPS

There has not been any reaction from the Moroccan Tax Administration up until January 2014.

Myanmar

Taxing authority and tax law

Tax authority: Internal Revenue Department (IRD)

Tax law: Income Tax Law

Relevant regulations and rulings

There are currently no transfer pricing regulations and rulings in Myanmar.

OECD guidelines treatment

Not applicable.

Priorities/pricing methods

Not applicable.

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, a penalty not exceeding 10% of the tax may be imposed.

Penalty relief

Not applicable.

Documentation requirements

Not applicable.

Documentation deadlines

Not applicable.

Statute of limitations on transfer pricing assessments

In Myanmar, the tax return filed annually with the tax authority will be reviewed by the IRD before an assessment is made. Once the final assessment letter is issued, the taxpayer can settle the amount of tax assessed by the IRD. The IRD retains the right to reassess the company backdated for three years, but this period can be extended in case any tax evasion is suspected. However, there is no precedent case where the IRD has revisited the company with the MIC permit.

Return disclosures/related party disclosures

Not applicable.

Transfer pricing-specific returns

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general is low. This is because corporate income tax in Myanmar is on "annual agreed upon" approach. In other words, the IRD will send an assessment letter to the taxpayer at the end of the year if they do not agree with the corporate income tax return filed by the taxpayer. The taxpayer has options to either comply with additional assessment or appeal on such assessment. Hence, tax audit of the past year rarely happens.

Myanmar (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

Currently, the likelihood that transfer pricing will be reviewed as part of that audit is rather low.

So far, there has not been any challenge to transfer pricing methodology in Myanmar.

APA opportunity

Not applicable.

Expected reaction to OECD Report on BEPS

Not applicable.

Namibia

Taxing authority and tax law

Taxing authority: Directorate Inland Revenue (Inland Revenue).

Tax law: Section 95A of the Income Tax Act 24 of 1981 (the Act) contains the main legislative provisions concerning transfer pricing.

Section 95A authorizes Inland Revenue to adjust the consideration for goods or services to an arm's length price for the purposes of calculating the Namibian taxable income of a person.

Relevant regulations and rulings

There are no specific regulations or rulings; however, guidance on the application of section 95A is currently contained in Practice Note 2 of 2006 dated 5 September 2006.

OECD Guidelines treatment

Although Namibia is not a member of the OECD, Inland Revenue accepts the OECD Guidelines and has largely based its practice on them. Practice Note 2 provides as follows:

"This Practice Note is based on and acknowledges the principles of the OECD Guidelines. Nothing in this Practice Note is intended to be contradictory to the OECD Guidelines and in cases where there is conflict, the provisions of the OECD Guidelines will prevail in resolving any dispute.

"Any amendments made to the OECD Guidelines will be deemed to be incorporated into this Practice Note."

Inland Revenue also accepts the principle methods referred to in the OECD Guidelines.

Priorities/pricing methods

Inland Revenue accepts the methods prescribed by the OECD, i.e., CUP, Resale Price, Cost Plus, TNMM and Profit Split. According to Practice Note 2, "the suitability and reliability of a method will depend on the facts and circumstances of each case. The most reliable method will be the one that requires fewer and more reliable adjustments."

Transfer pricing penalties

No specific transfer pricing penalties are imposed in the Act. This being said taxpayers face the following penalties:

- Additional tax of up to 100% of the provisional tax amount short paid
- 200% of the additional tax resulting from an adjustment (in the event of default, omission, incorrect disclosure or misrepresentation)
- Interest of 20% per year

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, Inland Revenue 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.

Documentation requirements

There is currently no statutory requirement to prepare transfer pricing documentation. Furthermore the income tax return does not require confirmation that cross-border related party transactions are entered into at arm's length. Practice Note 2 of 2006, however, encourages taxpayers to prepare documentation should Inland Revenue request such information.

Documentation deadlines

There is currently no obligation to submit transfer pricing documentation.

Namibia (continued)

Statute of limitations on transfer pricing assessments

Namibia does not have a statute of limitation. The Inland Revenue may indefinitely conduct reviews/audits. However, in terms of the Income Tax Act, records must be maintained for a period of five years. It is unlikely that periods older than five years will be reviewed as taxpayers are only required to maintain records for a period of five years.

Return disclosures/related party disclosures

Currently there are no disclosure requirements.

Transfer pricing-specific returns

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Inland Revenue is not actively conducting transfer pricing reviews or tax audits at present. Inland Revenue does not have a dedicated transfer pricing team at present.

APA opportunity

Namibia does not currently have an APA program.

Expected reaction to OECD Report on BEPS

There has not been a reaction.

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. In November 2013, the Dutch Under-Minister of Finance issued a new decree on transfer pricing and the application of the arm's length principle, which combines and replaces two previous decrees on transfer pricing (i.e., IFZ 2001/295M and IFZ 2004/680M). This decree provides important insights into the Dutch tax administration's position in applying the arm's length principle in general and into specific types of common intercompany transactions, such as financial transactions, captive insurance companies, (in)tangible fixed assets, centralized procurement companies, and intercompany services. 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
- Accelerated Mutual Agreement Procedure decree, IFZ2008/248M
- Decree on profit allocation to permanent establishments (PEs), IFZ2010/457M
- Decree on transfer pricing and the application of the arm's length principle and the OECD Guidelines, IFZ 2013/184M

Additionally, it is expected that new guidance on the application of safe harbor rules on substance to group financing/licensing companies and holding companies, and exchange of information will be issued.

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 decree (as published by the Under-Minister of Finance in the decree of November 2013. According to this decree, the OECD Guidelines leave room for interpretation or require clarification on several issues. The goal of the decree is to provide insight into the position of the tax authority regarding these issues.

The transfer pricing decree of November 2013 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, financial transactions, captive insurance companies, (in) tangible fixed assets, centralized purchasing companies 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

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.

Netherlands (continued)

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. Once a final assessment for a financial year is imposed, additional assessments relating to that financial year can still be issued up to five years after the end of the financial year (respectively 12 years in case of foreign source income). Similarly this period is extended with the extension of the filing period granted to file the Dutch corporate income tax return. An additional assessment can however only be imposed if:

- The Dutch tax authority discovers a new fact that the Dutch tax authority reasonably should not have known at the moment the final assessment was issued
- The taxpayer acted in bad faith
- An additional assessment is only possible up to two years after the tax assessment has been issued in case of a mistake. A mistake is recognized if (i) no tax assessment has been issued at all and/or (ii) the tax assessment is too low, while the taxpayer reasonably should have known that the final tax assessment was incorrect (if the difference amounts to at least 30% of the total taxes due the taxpayer is deemed to have been aware of the mistake)

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 cross-border related party transactions involving tangible and intangible fixed assets during the fiscal year.

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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of being audited by the tax authority in the Netherlands is considered moderate. However, when one is being audited, the likelihood of transfer pricing issues being scrutinized is high. Thus the controversy risk is high as well. In particular, there is a high likelihood 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, centralized purchasing companies, captive insurance companies and financial services transactions (including loans and guarantees). During these transfer pricing audits the tax authority appears to have a particular interest in potential internal CUPs and the economic substance of a transaction.

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.

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.

Netherlands (continued)

APA opportunity (continued)

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 (MTC); commitment to tackle resolution of double taxation in cases ''not provided for in the Convention'' (Article 25(3) of the OECD MTC) 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 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.

Expected reaction to OECD Report on BEPS

The Dutch Under-Minister of Finance recognizes the importance of the current initiatives of the OECD to counter BEPS. Nevertheless, he emphasizes the importance of addressing BEPS in a multi-lateral context. As a first step a new Decree entered into force as of 1 January 2014, which codifies the existing administrative guidance on substance requirements for companies engaged in intermediary financing and/or licensing activities. Dutch companies that claim the benefits of a tax treaty or EU Directive (treaty benefits) should now declare in their annual Dutch corporate income tax return whether or not the taxpayer meets a defined set of substance requirements.

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 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 (or combination of methods) 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 evasion or a 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."

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).

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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.

New Zealand (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

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.

Expected reaction to OECD Report on BEPS

The IRD has not, to date, provided any comments on the OECD White Paper on Transfer Pricing Documentation although IRD is likely to support the OECD initiatives for a Masterfile provided that overall documentation provides an adequate evaluation of New Zealand specific functions, assets and risks.

IRD and The Treasury released a tax policy report (*Taxation of multinationals* August 2013) strongly supporting the approach suggested by OECD in its action plan and the focus and priority given to actions recommended in that plan. New Zealand officials are participating in the OECD work, but have noted that any initiatives to protect the New Zealand tax base from BEPS will be a key focus in determining the tax policy work program. The improvement to the transfer pricing rules on intangibles has been noted as an area of interest to IRD in the IRD's *Compliance Focus for Multinational Enterprises* (October 2013).

IRD has recognized that its disclosure requirements are light compared to many jurisdictions. IRD is currently examining initiatives that could be taken to improve the quality and usefulness of tax information collected by IRD. Under consideration is a form of declaration that would seek to collect key performance metrics, specific high-risk items (for example, cross-border interest payments) and group membership details. An annual transfer pricing disclosure form is not currently being considered. IRD is also looking at earlier filing of large corporate tax returns, minimum information required in financial statements filed with a tax return and possible voluntary code of practice on taxation for large corporates.

Nicaragua

Taxing authority and tax law

Taxing authority: Dirección General de Ingresos (DGI).

Tax law: Currently, there are no local transfer pricing regulations in Nicaragua. However, regulations will be in effect as of 2016.

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 are to be applied in a manner consistent with the OECD Guidelines and Article 9 of the UN and OECD Model Tax Conventions. The provisions of the relevant tax laws shall prevail in the event of inconsistency between the OECD Guidelines, the UN Practical Manual and the relevant tax laws.

Priorities/pricing methods

The regulations require the selection of the most appropriate transfer pricing method based on the facts and circumstances relating to the intercompany transaction(s) being analyzed. The regulations prescribe the following methods to be used in determining whether the result of a transaction is consistent with the arm's length:

- The CUP method
- The Resale Price method
- The cost plus method
- TNMM
- The Transactional Profit Spilt 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. 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.

Penalty relief

A taxable payer not complying with the 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 arm's 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.

The documentation must be made available to the FIRS within 21 days of written request. The FIRS may at its discretion extend this timeframe.

Documentation deadlines

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.

Statute of limitations on transfer pricing assessments

No clear statute 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 a TP Declaration form to the annual tax return as well as a TP Disclosure form.
The TP Declaration form requires the taxpayer to indicate whether or not it has complied with the TP Regulations and prepared TP Documentation. The TP Disclosure form requires disclosure of information about intercompany transactions and business restructuring.

Transfer pricing-specific returns

TP Declaration and TP Disclosure forms as noted above.

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.

Expected reaction to OECD Report on BEPS

So far there has not been any indication of how the FIRS will respond to the OECD Report on BEPS. The FIRS' current focus is on building capacity to implement the new transfer pricing regulations.

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 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.

Effective 2014, new interest deductibility restrictions on related party debt has come into effect. According to the new legislation, net interest expense paid to a related party can be deducted only to the extent that internal and external interest expense combined does not exceed 30% of taxable EBITDA. The restriction also covers third-party interest expenses, where a related party has provided a guarantee. Certain exemptions are expected to apply in relation to external debt guaranteed by a related party. Exemptions to the interest deductibility restrictions rule apply if the total amount of net interest expense does not exceed NOK5 million during the fiscal year.

OECD guidelines treatment

The NTA has a long history of following the 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 which the NTA applies often. The NTA does not accept the use of pan-European searches any more as the tax authorities 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 in the tax return.

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.

Transfer pricing-specific returns

There are no transfer pricing-specific returns. It is generally recommended that a description of significant intercompany transactions is provided in the tax return.

Norway (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a full corporate tax audit is in general low. The likelihood of a separate transfer pricing tax examination is however, considered high. For both separate transfer pricing tax examinations and full corporate tax audits, it is likely that the tax payer's related party transactions will be scrutinized and challenged.

The NTA has a strong focus on intercompany transactions and has established a transfer pricing network comprised of major tax offices, including the Directorate of Taxes. This focus continues to increase, in line with the rising number of dedicated transfer pricing tax inspectors within the NTA.

The NTA selects companies for audit based on the submitted form RF 1123 and the tax return. Companies are also selected through initiatives by the NTA targeting specific transactions, e.g., business restructuring or transactions involving IP. 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 chance 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 financial transactions in general will be targeted for audit.

APA opportunity

APAs are currently unavailable in Norway. A transfer pricing exemption exists on the sale of gas under the Petroleum Taxation Act.

Expected reaction to OECD Report on BEPS

- IP: It has been communicated that the NTA is participating in, and awaiting the outcome of the OECD's work on IP. It is assumed that the NTA will accept and adhere to OECD's new guidelines on IP, when finalized and implemented.
- Country-by-Country Reporting: From previous cases, the NTA exhibits an interest in reviewing the complete value chain in relation to tax audits, including requesting information for related parties domiciled in foreign jurisdictions. It is expected that the NTA will closely monitor the outcome of this initiative.
- Documentation Masterfile: Based on the information provided in the OECD White-paper on transfer pricing documentation, it appears that the Norwegian transfer pricing documentation rules are in line with the proposed Masterfile concept. As such, it is expected that the NTA will accept the OECD proposal.

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 and the Executive Regulations, clarifying certain provisions of the ITL, are issued by Ministerial Decision 30/2012. All tax legislation is enacted by the Royal Decree. Provisions that implement the tax law are introduced by Ministerial Decisions and Executive Regulations.

Relevant regulations and rulings

Articles 126 to 128 of the ITL contain the transfer pricing regulations.

OECD guidelines treatment

The 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. It is expected 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.

Transfer pricing-specific returns

Under the new Executive regulations which were issued in 2012 the tax return has been modified to provide information by the taxpayer on related party transactions. The disclosure requirement was effective from 2012.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general is high, as tax audits should be conducted on an annual basis. A review of transfer pricing is a key components of an annual tax audit and therefore, its likelihood of review is also high. 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.

Expected reaction to OECD Report on BEPS

Since there are no transfer pricing guidelines prescribed by the tax law in Oman, the expected reaction of the Omani tax authorities to OECD's Report on BEPS cannot be stated with certainty. However, taxpayers should maintain appropriate documentation (such as transfer pricing studies) to support value of transactions with related parties.

Pakistan

Taxing authority and tax law

Taxing authority: Federal Board of Revenue.

Tax law: Section 108 of the Income Tax Ordinance, 2001 (the Ordinance) deals with the powers of the Commissioner of Income Tax (the Commissioner) with regards to the determination of the arm's length value of any transaction between associates. In order to determine the arm's length result of any such transaction, the Income Tax Rules, 2002 (the Rules) state that the following methods may be applied by the Commissioner. These methods are identical to the methods available under the OECD Guidelines.

(a) The Comparable Uncontrolled Price method (CUP)

The price quoted for a transaction between uncontrolled parties on similar terms and conditions will be considered.

(b) The Resale Price method

Difference in the resale gross margin of the two transactions would be considered and compared for determining whether the transaction between controlled parties is on arm's length basis or not.

(c) The Cost Plus method

The cost plus markup realized in an uncontrolled transaction will be considered as a basis to determine whether a similar transaction between controlled parties is on an arm's length basis or not.

(d) The Profit Split method

Where group of associates is formed and the transactions are so interrelated that a separate basis is not possible to identify the arm's length results for a similar transaction between uncontrolled persons, the profit sharing basis agreed between independent persons forming an association would be considered.

It should be noted that between clauses (a), (b) and (c), the method that, having regard to all the facts and circumstances, provides the most reliable measure of arms' length result as in the opinion of the Commissioner shall be applied. The method in clause (d) shall apply only where the methods in clauses (a), (b) and (c) cannot reliably be applied.

Pakistan has concluded around 63 income tax treaties which contain an article which resembles Article 9 OECD Model Tax Convention on "Associated Enterprises."

Panama

Taxing authority and tax law

Taxing authority: Tax Administration of Panama (Autoridad Nacional de Ingresos Públicos, or ANIP).

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
- Executive Decree No. 958 with regulations on the related Transfer Pricing Sections of the Tax Code (Chapter IX of Title I of the Fourth Book)

Relevant regulations and rulings

Prior to fiscal year 2011, Law 33 introduced norms to adapt the Tax Code to International Double Tax Treaties (DTT) which 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 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 in Spanish. Documentation must include:

- The complete identification details of the taxpayer and of the non-resident related parties with whom transactions are carried out, as well as evidence of direct and indirect participation between related parties
- 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

Panama (continued)

Documentation requirements (continued)

by the taxpayer in its intercompany transactions. In addition, 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.

Internal comparables should be preferred over external comparables and the reasons for not applying internal comparables must be duly documented.

The documentation must be prepared considering the complexity and volume of the transactions and should include the information that the taxpayer used in its evaluation of the intercompany transactions consisting of information pertaining to both the multinational group to which the taxpayer belongs and the taxpayer itself.

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 ANIP, 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 ANIP 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 ANIP 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.

Expected reaction to OECD Report on BEPS

Transfer pricing provisions are relatively new in Panama and ANIP's experience is still in a developing stage. Therefore no immediate or short term reaction is expected regarding specialized topics covered in the OECD Report on BEPS.

Papua New Guinea

Taxing authority and tax law

Tax authority: Internal Revenue Commission (IRC)

Tax law: Division 15 of the Income Tax Act 1959 (the Act), Transfer Pricing: Determination of the taxable income of certain persons from international transactions and Papua New Guinea's (PNG) Double Tax Agreements.

Relevant regulations and rulings

IRC — Taxation Circular No2011/2 — Commissioner General's interpretation and application of the Taxation Laws on Division 15 of ITA 1959 (the Circular).

The Commissioner General supports having an APA program operating in PNG and will be issuing guidelines shortly of the type of APA program proposed for PNG and the circumstances in which taxpayers may be eligible for this arrangement.

OECD Guidelines treatment

The Circular acknowledges the OECD guidelines as well as guidance provided by the United Nations.

Although PNG is not a member country of the OECD, the OECD Guidelines are acknowledged as an important, influential document that reflects unanimous agreement amongst the member countries that was reached after an extensive process of consultation with industry and tax practitioners in many countries. The Circular states that the OECD Guidelines should be followed in the absence of guidance in terms of the Circular, the provisions of Division 15 or the Double Tax Agreements entered into by PNG.

The Commissioner General considers the guidance provided on business restructures contained in Chapter IX of the OECD Guidelines to be relevant and recommends that taxpayers follow the guidance in establishing arm's length conditions in international agreements with associated entities involving business restructures. Where appropriate, the Commissioner General will publish future guidance on this issue.

Priorities/pricing methods

Division 15 and the Double Tax Agreements entered into by PNG do not prescribe any particular methodology for the purpose of ascertaining an arm's length consideration. Given that there is no prescribed legislative preference, the Commissioner General would generally seek to use the most appropriate method as per the OECD Guidelines.

Transfer pricing penalties

The penalty, additional tax and offence provisions applicable in the event of default or omission in the completion of the tax return or evasion of taxation contained in the Act stipulate a fine not less than PGK1,000 and not exceeding PGK 50,000 and, in addition, the court may order the taxpayer to pay to the Commissioner General a sum not exceeding double the amount of income tax or dividend (withholding) tax that would have been avoided if the statement in the return had been accepted as correct, and these will also apply to default, evasion or omission relating to transfer pricing. The Act does not impose specific penalties in respect of non-arm's length pricing practices.

Penalty relief

Not applicable.

Documentation requirements

The general requirements of the Act require taxpayers to keep proper records relating to their transfer pricing. However, there is no specific statutory requirement to prepare and maintain transfer pricing documentation.

Documentation deadlines

As a general rule, the Commissioner General considers that taxpayers should contemporaneously document the process they have

Papua New Guinea (continued)

Documentation deadlines (continued)

followed and their analysis in determining transfer prices, in their efforts to comply with the arm's length principle. This should include some justification of why those transfer prices are considered to be consistent with the arm's length principle.

The IRC recommends that contemporaneous documentation be prepared for all future transactions that are entered into after the release of the Circular by a date no later than the date of lodgment of the tax return affected by those transactions.

Statute of limitations on transfer pricing assessments

There is generally no statute of limitations with respect to transfer pricing adjustments.

Return disclosures/related party disclosures

The IRC requires an International Dealings Schedule (IDS) to be filed with each tax return where the international related party dealings exceeded PGK 100,000 in value excluding the capital value of any related party loans and/or had loans with related parties whose aggregate capital value exceeded PGK 2 million at any time during the year.

Information disclosed on the IDS includes:

- International related party transaction types and quantum
- Countries with which the taxpayer has international related party transactions
- The percentage of transactions covered by contemporaneous documentation
- Transfer pricing methodologies selected and applied for each international related party type
- Details of branch operations

Transfer pricing-specific returns

As stated above, the IRC requires an International Dealings Schedule (IDS) to be filed with each tax return where the international related party dealings exceeded PGK 100,000 in value excluding the capital value of any related party loans and/or had loans with related parties whose aggregate capital value exceeded PGK2 million at any time during the year.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The Commissioner General allocates resources on transfer pricing cases according to the perceived risk to the revenue of taxpayer, in case of non-compliance with the arm's length principle. The more significant and broader the scope of dealings, the more likely that a taxpayer will be subject to a transfer pricing review. Businesses with significant levels of international dealings, who are constantly returning losses, are at the greatest risk of a transfer pricing review.

Taxpayers should be aware that the Commissioner General may pay closer attention to a transaction involving an associated entity resident in a country with lower tax rates than PNG. The perception exists that transactions involving low tax jurisdictions are often motivated by tax, rather than strictly commercial reasons. This will particularly be the case where the PNG entity has ongoing tax losses as a result of its dealings with a related party in a lower tax jurisdiction.

APA opportunity

The Commissioner General supports having an APA program operating in PNG and will be issuing guidelines shortly of the type of APA program proposed for PNG and the circumstances in which taxpayers may be eligible for this arrangement.

Expected reaction to OECD Report on BEPS

Not aware of any reaction.

Paraguay

Taxing authority and tax law

Taxing authority: Paraguay Tax Authorities (Subsecretaría de Estado de Tributación).

Tax law: Income Tax Law.

Relevant regulations and rulings

Paraguay does not have a specific transfer pricing law; however in October 2013 the National Congress enacted a new tax law that states a general disposition related to Sale Price Adjustment (Law N° 5061/13) that will be regulated by the Paraguayan Tax Authority. This new disposition is considered as a kind of transfer pricing regulation. This new regulation allows the Paraguayan Tax Authority to amend prices related to exportation operations for Corporate Income Tax purposes only.

Decree N° 1012 dated 26 December 2013 establishes that the mentioned disposition will be in force as of 1 July 2014.

Peru

Taxing authority and tax law

Tax authority: Superintendencia Nacional de Administración Tributaria (SUNAT)

Tax law: Article 32 (Item 4) and Article 32-A of the Peruvian Income Tax Law (PITL). The transfer pricing regulations are stated in Article 24 and Chapter XIX (Articles 108 to 119) of the PITL.

Relevant regulations and rulings

Transfer pricing rules have been effective in Peru since 1 January 2001. Nevertheless, over the years these rules have undergone several amendments into the PITL and tax code.

Transfer pricing rules apply both to cross-border and domestic transactions between related parties and all transactions with residents in tax haven jurisdictions.

The transfer pricing adjustments are applicable solely when (1) the value agreed by the related parties results in a lower taxable income than the one at arm´s length or (2) in any other case, if the tax authority considers that the related party transactions have reduced the amount of tax that would otherwise be due, compared to the same transactions between unrelated parties. The regulations consider that a reduced amount of income tax arises, for example, but not exclusively, in the following instances:

- A deferral of income is determined
- Higher tax losses have been determined than those which would have accrued at arm's length

OECD guidelines treatment

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

Priorities/pricing methods

Peruvian law implicitly adopts a best method rule, unless the transaction being evaluated is a sale or purchase of commodities or its derivatives. Under Peruvian legislation, the transfer pricing methods identified are CUP, Resale Price, Cost Plus, Profit Split, the Residual Profit Split and TNMM.

A forced CUP should be applied in cross border transactions of commodities and its derivatives in which the counterparty is a trading company. A comprehensive list of the products that should be evaluated with this method is not available yet, however, it does include metals and its derivatives, agricultural goods and its derivatives, hydrocarbons and its derivatives and fishmeal. The method has to be applied by adding or deducting to the internationally listed commodity price, certain industry common price adjustments including treatment charges, premiums or discounts. Specific regulations are pending issue.

If certain conditions are met by the trading company, the forced CUP should not be applied. Compliance with such conditions should be certified by a third party.

Transfer pricing penalties

Noncompliance 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 subject to a penalty 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.1

Likewise, noncompliance with the obligation to file the transfer pricing return in accordance with 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).

Peru (continued)

Penalty relief

Where a taxpayer does not comply with the obligation to have a transfer pricing technical study or present the transfer pricing information return and is subject to penalties the following reductions may be made:

- A 100% penalty reduction if the taxpayer files the transfer pricing information return after the due date, but before it is discovered and compelled to do so by SUNAT
- 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

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 either of the following conditions:

- The company's income exceeds PEN6 million (about US$2.2 million) and the amount of its intercompany transactions exceeds PEN1 million (about US$360,000)
- 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 deductible tax expense.

Documentation deadlines

Prior to 2012, there was no requirement to present the transfer pricing study to the tax authority. However, as provided by Ruling N°167–2006–SUNAT, the tax authority can request a transfer pricing study from taxpayer after the fiscal year closes.

The deadline for filing the transfer pricing return for the fiscal year 2010 onwards was June of the calendar year following the close of the fiscal year of the corresponding transfer pricing return.

From fiscal year 2012 onwards, the transfer pricing technical study should be filed alongside the transfer pricing information return. The deadline for the filing of both transfer pricing documents for the fiscal year 2012 was October 2013. The deadline for filing in following years is yet to be determined.

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 not only the value of the transactions, the transfer pricing method selected and the related party with whom the transactions were made, but also, from fiscal year 2012 onwards the results of the tested party, the interquartile range of selected comparables and the value of the transfer pricing adjustments.

Transfer pricing–specific returns

An annual transfer pricing information return should be filled by taxpayers in June, if they meet the following conditions:

- The amount of intercompany transactions exceeds PEN200, 000 (about US$72, 000)
  Or
- The company has been engaged in transactions from, to or through a low-tax jurisdiction for which the market value is lower than the computable cost

Peru (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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.

The Peruvian Tax Administration has already initiated a number of transfer pricing audits, since the legislation was first introduced in 2001. It has also examined a number of transfer pricing studies submitted by taxpayers and asked for adjustments to be made, resulting in increased tax liabilities. The likelihood that the transfer pricing methodology will be challenged is characterized as high.

It is expected that SUNAT will significantly increase its transfer pricing audit 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. Draft regulations detailing the procedure to be followed were recently issued.

Expected reaction to OECD Report on BEPS

It is expected that the tax authorities will progressively adopt the new chapters of the OECD Guidelines and BEPS project; however, not in the immediate term. Furthermore, it is expected that the country-by-country documentation model will remain in force.

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 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) 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 Guidelines and refer to them for further guidance and examples.

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.

Philippines (continued)

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. 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 not be 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.

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.

Philippines (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 an APA for their controlled transactions and MAP relief as prescribed under the bilateral tax treaties entered into by Philippines. Separate guidelines on the application for an APA and for MAP relief will be issued by the BIR.

Expected reaction to OECD Report on BEPS

At present, the BIR has no position yet regarding BEPS especially that the Philippine transfer pricing regulations are relatively new.

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:

- Personal Income Tax Act dated 26 July 1991 (PIT Act) Articles 25, 25a and 30d (Journal of Laws 2012, Item 361, as amended)
- 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)
- Tax Ordinance Act dated 29 August 1997, Articles 20a–20r (Journal of Laws 2012, Item 749, as amended)
- 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, as amended)
- 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, as amended)
- Ministry of Finance Decree of 9 April 2013, on the countries and territories applying harmful tax competition rules for the purposes of corporate income tax (Journal of Laws 2013, No. 494)
- Ministry of Finance Decree of 9 April 2013, on the countries and territories applying harmful tax competition rules for the purposes of personal income tax (Journal of Laws 2013, No. 493)

Relevant regulations and rulings

Article 11 of the CIT Act and Article 25 of the PIT Act introduced the arm's length principle, providing a definition of related party ("affiliation") and the ownership rules for determining when parties are related. 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 cover transactions in which payment is made directly or indirectly to an affiliated entity considered to be in a tax haven. The territories and countries considered to be tax havens are set out in the Ministry of Finance Decree of 9 April 2013. The Decree was issued separately for personal and corporate taxation purposes.

As of 1 January 2007, documentation requirements also apply to Polish based permanent establishments of foreign companies.

The pricing methods recognized by the tax authorities are contained in the Ministry of Finance Decrees of 10 September 2009. These Decrees describe the transfer pricing methods in detail and introduce the corresponding adjustment procedure (based on the OECD Guidelines), Arbitration Convention and Code of Conduct for Arbitration Convention. The Decrees also apply to Polish permanent establishments of the foreign companies and Polish taxpayers' foreign permanent establishments.

The amended Decrees implemented in July 2013:

- Give traditional methods priority over transactional methods for the purpose of assessing income in related party transactions (previously only the CUP method was indicated as the first-choice method)
- Provide specific criteria for the selection of the transfer pricing method
- Underline the significance of a comparability analysis

Relevant regulations and rulings (continued)

- Introduce a definition of low value-added services and set out guidelines for the tax authorities in respect of examining intra-group services of that type
- Expressly indicate that the cost base used for estimating the fee for low value-added services should exclude shareholder expenses
- Introduce a definition of a business restructuring (transfer of commercially significant functions, assets or risks between related entities)

The APA regulations are contained 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, the countries listed in Article 9a Clause 6 of the CIT Act (Article 25a Clause 6 of the PIT Act) as tax havens, are based on guidelines issued by and work done by the OECD. At the same time, the transfer pricing methods set out in the Polish rules are based on the authorized OECD approach.

The amended Decrees also introduce specific rules regarding business restructuring and guidelines for tax authorities during tax inspections. These rules are based on Chapter IX of the OECD Guidelines (Business Restructurings) and include a definition of a business restructuring, which covers not only firm-wide supply chain changes, but also less extensive restructurings involving shifts of risks among group companies (the regulations are designed to implement the OECD Guidelines in the local legislation and cover not only foreign but also local restructuring projects).

During a tax audit, detailed regulations on business restructuring require the tax authorities to focus on:

- Whether the restructuring arrangement would have been acceptable to independent companies
- Business reasons/commercial justification for the restructuring
- Benefits from the restructuring (including synergy effects)
- Options realistically available to the restructured parties
- Whether the allocation of risks properly reflects a given entity's capability to make risk management decisions or financial ability to bear the cost of the risk that has materialized

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 Transactional Net Margin Method (TNMM). The most appropriate method for assessing income should be chosen.

The amended Decrees give traditional methods priority over transactional methods for the purpose of assessing income in related party transactions (previously the CUP method was preferred method by tax authorities and possibility of CUP use was verified by them at first). When the transfer price is determined by the tax authorities, the application of traditional methods is verified in the first instance.

Additionally, the amended Decrees provide specific criteria for the selection of the transfer pricing method. In determining whether the correct pricing method has been selected the tax authorities will consider:

- The specifics of the transaction, including the parties' contribution to the transaction
- Access to reliable data on similar transactions/companies in the market
- Comparability of the respective transactions/companies

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.

Poland (continued)

Transfer pricing penalties

If the taxpayer does not provide transfer pricing documentation at the request of the Polish tax authorities and within a specified time, a 50% penalty tax rate is applied for any additional income assessed by the tax authorities, instead of the standard tax rates that generally apply. Moreover, the taxpayer will be required to pay interest on tax arrears and fiscal penalties resulting from Fiscal Penal Code as well as may face personal responsibility based on Commercial Code.

Penalty relief

If the taxpayer provides the required transfer pricing documentation on time 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 in excess of certain amounts, 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. The amounts referred to above are where the total transaction amount in a tax year exceeds the following limits:

- EUR100,000 if the transaction value does not exceed 20% of the share capital
- EUR30,000 if the transaction refers to services or intangibles
- EUR50,000 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 amount in a tax year exceeds EUR20,000.

As there is no specific form required for transfer pricing documentation, the CIT and PIT regulations instead determine the nature 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 contain all of them, the tax authorities may disregard the documentation.

In addition, taxpayers are obliged to prepare statutory Polish transfer pricing documentation and provide to the Polish tax authorities at their request.

Moreover, according to the amended Decrees, tax authorities should first examine low value adding services by reference to the documents the taxpayer has provided. The taxpayer may additionally prepare the documentation which should include in particular:

- A description of the type of services together with the reason justifying the classification of the service as a low value adding service
- Confirmation that a given service has been provided and information showing that its acquisition was reasonable, including a description of the service acquirer's benefits
- A description of and a justification for the provision of services
- A list, description and analysis of the related parties' expenses arising from the service
- A list of shareholder expenses
- A description of the cost sharing key
- A list of services available on demand

Poland (continued)

Documentation requirements (continued)

- A description of and a justification for the fee calculation formula
- Documentation of a given service which can be submitted to the tax authorities

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 transfer pricing adjustments. The general statute of limitations for tax assessment applies, and these provisions are contained in the Tax Ordinance Act. Under Article 70, §1 of the Tax Ordinance Act, an assessment must be made within 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
- 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 parties for tax purposes by virtue of family, property or employment relations between them or between their management, supervision or control personnel, or if the same person carries out management, supervision or control functions in both these entities.

If the parties to a transaction, due to their relationship, agree 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. The additional income assessed on the foreign entity may be deducted from

Poland (continued)

Return disclosures/related party disclosures (continued)

the income of the Polish entity (the so-called compensating adjustment). However, the adjustment must be agreed with the Polish tax authorities.

Adjustments to the domestic entities' income will be allowed in accordance with the double taxation between Poland and the foreign country (i.e., country of the domestic entity's related party) or on the basis of the EC Arbitration 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 the foreign related party receiving an assessment.

In addition, regulations relating to income adjustment also apply to permanent establishments.

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 certain 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
  - The total amount of liabilities or receivables resulting from all agreements concluded with the same non-resident in the tax year exceeds EUR300,000
  - 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
  - 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 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) 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general is 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, transfer pricing is on the agenda for tax control — 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., Transfer pricing audits in Poland focus on asset management, automotive industry, banking and capital markets, consumer products, pharmaceuticals, oil and gas industry, power and utilities, technology and real estate.

Poland (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

The likelihood that, if transfer pricing is reviewed as part of the audit, the transfer pricing methodology being 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 the OECD Guidelines and international practices has increased, the local approach tends to prevail during tax audits. Local benchmarks are preferred over pan-European ones. The pricing information from cross-controls in the industry is used for benchmarking.

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), financial transactions and more recently business restructurings.

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 an APA is defined in the Tax Ordinance Act as an agreement on the method of setting transfer prices between:
  - Two related domestic entities — those without foreign capital links
  - A domestic entity and its related foreign party
  - A domestic entity related to a foreign entity and another domestic entity related to the same foreign entity
- Bilateral: 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 less than PLN5,000 and cannot exceed PLN50,000
- Unilateral APA concerning a foreign entity — fee cannot be less than PLN20,000 and cannot exceed PLN100,000
- Bilateral or multilateral APA — fee cannot be less than PLN50,000 and cannot exceed PLN200,000

The mandatory elements of an APA application are:

- The suggested method for determining prices and an indication of the pricing method recognized by the tax 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 Polish language

Poland (continued)

APA opportunity (continued)

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).

Expected reaction to OECD Report on BEPS

In general, transfer pricing rules in Poland follow the OECD Guidelines and recommendations. While there has not been any official statement of the Polish tax authorities on the OECD Report on BEPS, the recent amendments to the Decrees and tax controls in the scope of transfer pricing may have been partially driven by the Report. As further legislative changes regarding transfer pricing are in progress, it can be expected that the OECD findings on BEPS will influence future regulations.

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 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)

- If the taxpayer has 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 then penalty related to late delivery can reach EUR 20,000 per year and per company
- If the taxpayer does not state in the IES that transfer pricing documentation is prepared but was notified by the tax authority to submit it then penalty for noncompliance related to omission/lack of evidence in Annual Tax and Accounting Return can reach EUR 45,000 per year and per company
- If 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 then penalty for noncompliance related to improper fulfillment can reach EUR 75,000 per year and per company
- If the taxpayer stated in the IES that transfer pricing documentation is prepared but refused to submit it to the tax authority (when duly requested), then penalty for noncompliance related to the refusal of transfer pricing documentation can reach EUR 150,000 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

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.

Portugal (continued)

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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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

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 as well as intercompany financial operations.

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

Portugal (continued)

APA opportunity (continued)

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 of 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.

Expected reaction to OECD Report on BEPS

There has not been any reaction up until January 2014.

Qatar

Taxing authority and tax law

The State of Qatar has two tax regimes both with transfer pricing provisions:

1. State tax regime — The Income Tax Law No. 21 of 2009 (Qatar Income Tax Law) and its related Executive Regulations should be applied to Qatar taxpayers, except those registered in the Qatar Financial Center (see below). The taxing authority under this regime is the Qatar Public Revenues and Taxes Department (PRTD).
2. Qatar Financial Centre (QFC) tax regime — The QFC Law, its regulations and the Qatar Financial Center Authority (QFCA) Tax Manual Extract on Transfer Pricing (TP Manual) should be applied to QFC registered entities. The taxing authority under this regime is the QFCA Tax Department.

Relevant regulations and rulings

State tax regime:

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

QFC tax regime:

The TP Manual provides guidance on the application of transfer pricing rules of the QFC Tax Regulations. Chargeable profits and tax losses must be calculated on an arm's length basis.

- Part 8 of the QFC Tax Regulations has a one-way adjustment approach and will only be applied where the resulting transfer pricing adjustment would result in an increase in the amount of chargeable profits or a reduction in tax losses.
- The TP Manual specifies that the arm's length capacity of a QFC taxpayer is the amount of debt which it could and would have financed its operations, as a stand-alone entity, from a non-related independent lender. The TP Manual has outlined safe harbor debt/equity ratios as follows:
  - 2:1 for a non-financial institution
  - 4:1 for a financial institution

OECD guidelines treatment

State tax regime:

Pursuant to the Executive Regulations to the Qatar Income Tax Law, where the data required to apply the CUP method is not available, the taxpayer should submit to the PRTD an application to adopt other transfer pricing methods approved by the OECD.

Qatar (continued)

OECD guidelines treatment (continued)

QFC tax regime:

The following methods noted under the OECD Guidelines may be used: CUP method, Resale Price method, Cost Plus method, Profit Split method and TNMM.

Priorities/pricing methods

State tax regime:

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 services
- Contractual terms
- Functions performed, assets used and risks incurred
- Economic circumstances

QFC tax regime:

Where CUP is available as evidence, the CUP method is likely to be the preferred method by the QFCA Tax Department. A discussion should be included in the documentation as to the appropriateness of the selected method.

Transfer pricing penalties

State tax regime:

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).

QFC tax regime:

If a QFC registered taxpayer fails to maintain adequate records to support the pricing of transactions with associates, or claims in his return that no adjustment is required under the Transfer Pricing Regulations without being able to substantiate that claim, then there may be a liability to a penalty for failure to maintain adequate records (not exceeding QAR20,000) or for making an incorrect return (financial sanction not exceeding the tax understated).

Penalty relief

State tax regime:

There is currently no penalty relief regime in place.

QFC tax regime:

There is currently no penalty relief regime in place.

Documentation requirements

State tax regime:

The Qatar Income Tax Law does not provide for specific documentation requirements, but since it requires the use of CUP method or other transfer pricing methods authorized by the OECD, there is an implied requirement to have documentation in place.

Qatar (continued)

Documentation requirements (continued)

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.

QFC tax regime:

The burden of proof is on the QFC registered taxpayer to establish that the actual conditions are consistent with the arm's length conditions. There are four classes of records or evidence that will need to be considered:

- Primary accounting records
- Tax adjustment records
- Records of transactions with associated business
- Evidence to demonstrate an arm's length result (this includes a description of the intercompany transactions and a functional analysis)

A transfer pricing study is specifically recommended where there is a risk that it may be perceived that QFC registered taxpayer's intercompany transactions are not based on arm's length principle, e.g., the taxpayer is incurring losses during the taxable year, or profits appear lower than previous years or compared to competitors in the industry, among other exceptional circumstances.

Documentation deadlines

State tax regime:

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.

QFC tax regime:

The TP Manual does not state that the taxpayer must file or have transfer pricing documentation completed at the time of filing its tax return. However, it is the assumption of the QFCA Tax Department that the QFC taxpayer will assess its intercompany transactions to be arm's length prior to completing its tax return, thus essentially necessitating the need to prepare an analysis of its intercompany pricing.

Statute of limitations on transfer pricing assessments

State tax regime:

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 10 year period shall start from the date of discovering the activities of the taxpayer by the PRTD.

QFC tax regime:

The time limit for the QFCA Tax Department to conduct tax assessment is six years after the end of the accounting period to which it relates.

Return disclosures/related party disclosures

State tax regime:

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.

QFC tax regime:

Related party transactions must be disclosed in the notes to the audited financial statements, which are filed with the QFC Tax Department along with the income tax return.

Transfer pricing-specific returns

State tax regime:

There is currently no requirement to prepare a separate tax return for related party transactions.

QFC tax regime:

There is currently no requirement to prepare a separate tax return for related party transactions.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

State tax regime:

During the income tax review process, the PRTD is likely to demand the documentation supporting the transfer prices for intercompany transactions to be produced.

The PRTD conducts a tax audit of all tax declarations that are submitted. The likelihood is medium to high.

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 transfer pricing documentation is available.

QFC tax regime:

In general, the QFC Tax Department conducts a tax audit of income tax returns that are submitted – the likelihood being medium to high. 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 transfer pricing documentation is available.

APA opportunity

State tax regime:

There is currently no APA procedure in place.

QFC tax regime:

The QFCA Tax Department has an advance ruling regime and welcomes QFC registered entities to apply for an APA to obtain certainty on its tax position.

Expected reaction to OECD Report on BEPS

So far there has not been any reaction by the State tax regime on BEPS.

The QFC tax regime has not issued any written guidance but it is expected to adopt the recommendations of the OECD on the BEPS project and cooperate with the international community to address relevant issues.

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 the OECD Guidelines into consideration 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 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. Currently the late payment interest is 0.04% per day of delay. In addition, late payment penalties of 0.02% per day of delay can also be imposed.

Penalty relief

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

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.

Romania (continued)

Documentation requirements (continued)

The transfer pricing documentation file should comprise of 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

Transfer pricing-specific returns

No specific transfer pricing returns for related party transactions are currently in place under the Romanian transfer pricing rules.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an 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.

Romania (continued)

APA opportunity (continued)

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.

Expected reaction to OECD Report on BEPS

Romanian tax authorities should also refer to the transfer Pricing Guidelines set by OECD when analyzing related party transactions. Thus, the OECD developments on transfer pricing matters (including those mentioned above) will normally be followed for Romanian purposes by tax authorities and tax payers. It is difficult to assess at this stage the extent of the implementation in the Romanian legislation of the results of such developments. Nevertheless, increased transfer pricing audit activity is expected.

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 US$1.7 million)[1]
- Third-party transactions where the counterparty is located in a certain jurisdiction (same threshold as above) [2]

In the domestic market, only related party transactions can be subject to transfer pricing control, and a RUB60 million (approximately US$1.7 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 tax at 0% rate

  Or
- One of the parties to the controlled transaction is registered in a special economic zone (such transactions will be controlled from 2014)
  Or
- Transactions where one of the parties operates drilling/holds license to explore oil & gas deposits on continental shelf (subject to several additional criteria)

For all other domestic related party transactions, a RUB3 billion (approximately US$86 million)[3] 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 Russia
- None of the parties have economically autonomous subdivisions in other regions of Russia 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% (the previous threshold was 20%) 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.

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[1] 1 US$ is equal to 35 RUBs.

[2] The list of jurisdictions is determined by the Ministry of Finance.

[3] This amount will be reduced to RUB1 billion in 2014.

Russian Federation (continued)

OECD guidelines treatment

Russia is not a member of the OECD; however, the new transfer pricing law is largely based on the principles stipulated by the OECD Guidelines.

Priorities/pricing methods

The transfer pricing law includes five methods similar to those used in the international transfer pricing practice. The Resale Minus method has first priority for a routine distributor. In all other cases CUP method prevails, whereas the Profit Split is a method of last resort.

Transfer pricing penalties

In 2012 and 2013, penalty provisions were not applicable. In 2014, transfer pricing penalties of 20% of the additional tax payable will be introduced. In 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 APA.

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 US$2.9 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 APA.

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 three years preceding the year when the audit is conducted.

- Transfer pricing audits of transactions performed in 2012 can be initiated no later than 30 June 2014
- 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 by way of in a transfer pricing specific return. Such return for 2013 is due by 20 May 2014, and for 2014 — by 20 May 2015.

Transfer pricing-specific returns

As above for return disclosures/related party disclosures.

Russian Federation (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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. It is difficult to gauge the likelihood that the transfer pricing methodology will be challenged during the course of an audit.

Starting from 2012, there are transfer pricing — specific audits which may be initiated separately from the general tax audits. The first transfer pricing audits for 2012 are currently in process and the outcome should be known later in 2014–2015.

APA opportunity

The APA program has been available from 1 January 2012 and only for "major taxpayers." A non-Russian 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 Russia has a double tax treaty.

Expected reaction to OECD Report on BEPS

Russian authorities confirmed that Russia would follow the OECD Action Plan on BEPS and would play a key role in prevention of aggressive tax planning behavior. As part of the ongoing initiatives, there are specific proposals on "de-offshorization" of Russian economy. These proposals, among others, include definition of "offshore" countries, adoption of Controlled Foreign Corporation (CFC) rules, work towards conclusion of exchange of information agreements with offshore countries, lack of state support to companies that use aggressive tax planning arrangements, mandatory disclosure of ultimate beneficial owners for certain companies, enforcement of administrative and criminal liability for tax evasion, etc.

Saudi Arabia

Taxing authority and tax law

Taxing authority: Department of Zakat and Income Tax (DZIT).

Tax law: Under Saudi tax law there are no specific transfer pricing regulations governing transactions with related parties. However the tax law contains certain provisions in respect of measures against the tax avoidance which may support the DZIT when challenging transactions between related parties.

In determining the tax liability, the DZIT is empowered to:

- Disregard a transaction that has no tax effect, or reclassify a transaction whose form does not reflect its substance
- Allocate income or expenses between related persons or persons under common control as necessary to reflect the income that would have resulted from a transaction between independent persons

According to the Saudi tax law, companies are considered related if 50% or more are owned or controlled by the same interest. In respect of capital companies, control is defined as ownership of the voting power, or value in the company, held directly or indirectly through one or more subsidiary of any type of company.

Withholding tax

Generally, the withholding tax (WHT) rates range from 5% to 20% for transactions between unrelated parties. Transactions between related parties are subject to 15% WHT.

Thin capitalization rules

The Saudi tax law does not contain any specific provision on thin capitalization. Further, the DZIT generally does not challenge the capital adequacy of a company. The level of capital for each entity is determined by the Saudi Arabian General Investment Authority (SAGIA) and the Ministry of Commerce and Industry (MOCI) based on the nature of the underlying project or the company's activity.

However, in accordance with the Saudi Arabian tax law, the deductibility of interest expense is capped as follows:

The lower of the interest charged for the year and income from loan fees (interest income) plus 50% of (A–B).

Where, A and B are defined as:

A: Income subject to tax less income from loan fee (interest income)

B: Expenses allowable for tax purposes less loan fee (interest expense)

Interest (or loan fees) in excess of the deductibility limit set out above is a permanent disallowance under the tax law and its by-laws.

Banks are excluded from the application of the above regulations. Further, interest payment by branch to head-office is not allowed as a deduction in the branch's tax declaration.

Relevant regulations and rulings

No transfer pricing regulations or rulings have been issued in Saudi Arabia by the DZIT.

OECD Guidelines treatment

The OECD Guidelines are not binding on the Saudi Arabian tax authority, but the DZIT does expect that transactions between related parties are in accordance with the arm's length principle as set out in the OECD Guidelines.

Priorities/pricing methods

No specific transfer pricing methods have been prescribed in the tax law, and as such there is no hierarchy or priority over which transfer pricing methods should be applied. If a taxpayer in Saudi Arabia adopts and properly implements a global transfer pricing policy that is based on the commonly accepted transfer pricing methods set out in the OECD Guidelines, then the DZIT should accept the methodology that has been applied.

Saudi Arabia (continued)

Transfer pricing penalties

There is currently no specific transfer pricing penalty prescribed under the law. However, penalties as prescribed under the general provisions of the Saudi tax law are applicable in cases of a deficiency assessment relating to a transfer pricing adjustment.

Penalty relief

No penalty relief is currently applicable under the Saudi Arabian tax law.

Documentation requirements

There is currently no requirement for taxpayers in Saudi Arabia to prepare contemporaneous transfer pricing documentation or for documentation to be submitted to the DZIT together with the filing of tax declaration. Nonetheless, the tax payer should maintain adequate documents to support the transaction.

Documentation deadlines

Not applicable.

Statute of limitations on transfer pricing assessments

There is no specific statute of limitations set out in the Saudi tax law with regard to transfer pricing assessments.

The general statute of limitation for the Saudi tax authority is five years and 10 years in cases where the tax return was not filed, or if filed, was found to be incomplete or incorrect with intent of tax evasion.

Return disclosures/related party disclosures

The tax law does not require taxpayers to submit a returns disclosure with respect to related party transactions.

Transfer pricing-specific returns

There is currently no requirement to prepare a separate tax return for related party transactions.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Transactions involving related parties are reviewed in considerable depth by the DZIT to verify if the transactions were made on an arms length basis.

APA opportunity

There is currently no APA procedure in place.

Expected reaction to OECD Report on BEPS

Currently there is no update on the DZIT’s view on BEPS.

Senegal

Taxing authority and tax law

Taxing authority: Senegalese Tax Authorities.

Tax law: Law n° 2012–31 dated 31 December 2012.

Relevant regulations and rulings

Articles 17, 18, 570, 638 and 639 of the General Tax Code, contain the Senegalese transfer pricing regulations, which are effective from 1 January 2013 (with retroactive effect to 2012).

The transfer pricing rules follow the arm's length principle and require the use of the most appropriate method to determine the price applied in related parties' transactions.

These rules apply to transactions between:

- Local companies controlling or being under the control of foreign companies
- Companies which are under the common control of a company or part of a group of companies controlling or being under the control of foreign companies

Dependence (shareholding) relationships presumably exist between two companies if:

- One company holds, directly or indirectly, the majority of the shares of the latter or has therein the decision-making power
- Both companies are placed under the control of the same entity, at the conditions provided in the point above

Basically, the obligation for a Senegalese company to maintain transfer pricing documentation is applicable if:

- The local entity realizes an annual net turnover (excluding VAT and taxes) higher or equivalent to XOF5 billion
- The local entity holds at the end of the concerned fiscal year, directly or indirectly, more than 50% of the share capital or voting rights of a local or foreign affiliated company, meeting the turnover condition mentioned above
- More than 50% of the share capital and voting rights of the local entity is held directly or indirectly at the end of the fiscal year, by a company meeting the turnover condition mentioned above

OECD Guidelines treatment

Senegal is not a member of the OECD. However, the Senegalese tax rules follow the OECD Guidelines.

Priorities/pricing methods

Senegalese transfer pricing regulations require from the concerned companies a documentation that supports the arm's length character of the prices applied in related party transactions. The tax law does not provide methods to price related party transactions.

Transfer pricing penalties

There are no specific transfer pricing penalties, but the general rule applies.

Under the Senegalese law, any tax due and payable, resulting from an adjustment performed by the tax authorities will be deemed an additional tax. Additional penalty can be issued for the underpayment of tax.

Furthermore, intra-group payments are only deductible if the debtor can prove to the tax administration that the transactions are real and remunerations are not excessive.

Penalty relief

Not applicable.

Senegal (continued)

Documentation requirements

Upon request, the Senegalese entity that is subject to maintain transfer pricing documentation has to provide the Senegalese Tax Authorities with a documentation that supports the prices applied in transactions of any nature realized with foreign affiliated companies in the sense of Article 17 of the Tax Code.

The required documentation includes at least the following information:

- General information relating to the group:
  - A general description of activities, including changes during the years concerned or under audit
  - A general description of legal and operational structures of the group, with an identification of the companies involved in the intra-group transactions
  - A general description of the function and risks assumed by the affiliated companies involved in the intra-group transactions provided that such role and function affect the audited company
  - A list of the main intangible assets held, namely patents, brands, commercial names and know-how, in connection with the audited company
  - A general description of the group's transfer pricing policy
- Specific information relating to the audited company:
  - A description of activities, including changes during the years concerned or under audit
  - A description of transactions realized with other affiliated companies, including the nature and the money flows, including royalties
  - A list of the cost sharing agreements, and a copy of prior agreements in respect of transfer pricing or documents relating to the determination of transfer prices, affecting the P&L (taxable profits) of the audited company
  - An introduction to the methodology used to determine the arm's length character of the transfer prices, including an analysis of functions performed, assets utilized and risks assumed, and an explanation to the selection and application of the chosen methodology
  - If the chosen methodology requires so, an analysis of comparables considered as relevant by the company

If in the course of a tax audit, the tax authorities have an indication that the company has made indirect transfer of profits, pursuant to Article 17 of the Tax Code, they can request for documents indicating the following:

1. The nature of the relationship between the audited company and the foreign company
2. The methodology for the calculation of prices relating to industrial, commercial and financial operations realized with foreign group companies; the supporting elements that justify the applied prices and, if applicable, agreed compensations
3. The activities developed by intra-group companies quoted in point 1 above, with respect to operations quoted in point 2 above
4. The fiscal treatment reserved to operations quoted in point 2 above and realized by companies outside Senegal by the audited company, or by companies quoted in point 1 whose major share capital or voting rights are held by the audited company

Documentation deadlines

The company has to provide transfer pricing documentation upon the tax authorities' request. However, if the documentation is not provided when requested or is incomplete, the tax authorities can ask the audited company, by means of a formal request to provide or to complete the documentation within 15 days.

Statute of limitations on transfer pricing assessments

The general statute of limitations is applicable to transfer pricing assessments. The period for the tax authorities to assess tax and any applicable penalties regarding transfer pricing matters is four years.

Senegal (continued)

Return disclosures/related party disclosures

Currently, the corporate income tax return does not include a transfer pricing schedule to be completed or specific transfer pricing related questions.

Transfer pricing-specific returns

There is no specific transfer pricing return.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The tax authorities may conduct a transfer pricing audit any time during the year. In general transfer pricing is frequently audited by the Senegalese Tax Authorities.

APA opportunity

Not applicable in Senegal.

Expected reaction to OECD Report on BEPS

There has not been any reaction from the tax authorities up until January 2014.

Serbia

Taxing authority and tax law

Tax authority: Serbian Ministry of Finance

Applicable tax legislation:

- Corporate Income Tax Law (CIT Law)
- Rulebook on transfer pricing and methods for the determination of arm's length prices in intra-group transactions (Rulebook)

Relevant regulations and rulings

Articles 59 through 61a of the CIT Law define the arm's length principle, the acceptable methods and obligation to prepare and file transfer pricing documentation. The Rulebook provides further details on these, and also prescribes obligatory content of the transfer pricing documentation.

OECD Guidelines treatment

Serbian transfer pricing provisions and documentation requirements are generally based on the OECD Guidelines.

Serbian transfer pricing rules do not contain any specific provisions in relation to business restructurings.

Priorities/pricing methods

Taxpayers may choose any of the defined traditional transaction methods (CUP, Cost Plus and Resale Minus) and transactional profit based methods (TNMM and Profit Split method). There is no priority in the selection of methods.

The taxpayer is also allowed to use any other unspecified method which is reasonable to apply in a given circumstance assuming that the specified methods cannot be applied.

Transfer pricing penalties

A penalty of approximately EUR20,000 can be imposed if the taxpayer fails to disclose related party transactions in the annual CIT return or does not prepare and file transfer pricing documentation by the prescribed deadlines.

In addition, the possible adjustment of taxable income on transfer pricing basis may result in penalty of up to 20% of the understated tax liabilities and may further result in increased interest for late tax payments.

Penalty relief

There is no penalty relief available, however, taxpayers may be permitted an additional period of up to 90 days to comply with transfer pricing documentary requirements (i.e., to submit to the tax authorities the prescribed transfer pricing document).

Documentation requirements

Starting FY2013 all taxpayers are obliged to prepare transfer pricing documentation that needs to contain mandatory elements and file it along with the annual CIT return. The prescribed elements of the transfer pricing documentation are:

- Analysis of the group
- Industry analysis
- Functional analysis
- Selection of transfer pricing method
- Conclusions reached
- Appendices

Currently, there is no materiality threshold for transactions or other conditions prescribed which would exclude or limit the general scope of transfer pricing documentation in particular cases.

Serbia (continued)

Documentation deadlines

Transfer pricing documentation is to be filed within six months upon reporting period date, an additional period of 90 days can be granted on request

Statute of limitations on transfer pricing assessments

The general statute of limitation period of five years for taxes in Serbia also applies for transfer pricing assessments. A five years period is counted from the beginning of the year following the year in which the respective tax liability arose.

Return disclosures/related party disclosures

According to Articles 59–61a of the CIT Law, taxpayers are obliged to disclose in their annual CIT the revenues and expenses resulting from transactions with related parties, as well as to present and compare these with revenues and expenses which would have been realized in the same transactions, if conducted with unrelated parties. Any difference between the two should be included in the taxable basis.

In addition, related party disclosures and details of transactions are to be documented through obligatory transfer pricing documentation which needs to be prepared and filed along with the CIT return.

Transfer pricing–specific returns

There is no specific transfer pricing return in Serbia.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Audits conducted by Serbian tax authorities are not on a regular basis and audited periods are not considered irrevocably closed. Typically, audits take place not more often than once in three to five years, and they cover all taxes. Transfer pricing is likely to be within the scope of most tax audits.

APA opportunity

Advance rulings and APAs are not available in Serbia.

Expected reaction to OECD Report on BEPS

Serbian tax legislation applicable on transfer pricing is in its early stages and it is unlikely for the OECD Report on BEPS to be immediately reflected in either changes of the legislation or transfer pricing practice.

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' 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 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. In particular, if there is a cost-pooling arrangement amongst related parties, the IRAS is only prepared to accept that services are charged without a mark-up provided that:

- The services are not provided to any unrelated party
- The provision of the services is not the principal activity of the service provider. If the cost of providing the services does not exceed 15% of the total expenses of the service provider for that financial year, the services will not be treated as the principal activity
- The services are listed in Annex A of the Singapore Loans and Services Guidelines
- There is documentation showing that parties intended to enter into the cost pooling arrangement before the provision of the service

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 goes from 100% to 400% of the underpaid tax. 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 analysis 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 analysis 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. Detailed transfer pricing documentation would usually include:

- Specific 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 a 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 year following the applicable financial year. For example, a Singapore corporate taxpayer that had a 31 December 2012 financial year end will be required to file its Singapore corporate tax return by 30 November 2013. The applicable year of assessment in this case is 2013, which corresponds to the basis period that is the financial year ended 31 December 2012.

Return disclosures/related party disclosures

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

Transfer pricing-specific returns

There is no transfer pricing return required to be filed either separately or along with the Singapore income tax return.

Singapore (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority

With the passing of a specific statutory provision on transfer pricing in 2009, there has been an increase in the number of tax queries that involves transfer pricing.

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.

The recent trend in Singapore transfer pricing audits and queries have varied between requesting high-level replies on the arm's length nature of a taxpayer's intercompany transactions to detailed information on specific transfer pricing transactions. In situations where more generic queries have been made, the IRAS has delved more deeply into the transfer pricing affairs of the taxpayer in later rounds of a tax query. In these situations, the likelihood that the IRAS may further request for Singapore transfer pricing documentation or further detailed explanation on the taxpayer's intercompany transactions is more.

Lately, there has been a decrease in the questionnaires being issued by the IRAS as part of the annual transfer pricing consultation process. 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. 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.

APA opportunity

APAs are available in form of unilateral, bilateral and multilateral APAs. 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 the commitments that should be made when an APA is requested
- That "rollbacks" are limited to bilateral and multilateral APAs

Expected reaction to OECD Report on BEPS

As of January 2014, there is no change to the regulatory environment.

Slovak Republic

Taxing authority and tax law

Taxing authority: Slovak Financial 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 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 that supports 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. As of 1 January 2014, the Slovak Income Tax Act reflects the updated version of the OECD Guidelines (e.g., elimination of preference in applying selected transfer pricing method).

Priorities/pricing methods

The Slovak Income Tax Act is in line with the OECD Guidelines. Combination of methods is permitted. Methods that are not listed may be used if they are in compliance with 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*0.25% = 0.75%) 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.

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.

Documentation requirements (continued)

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 15 days of the request. The documentation does not have to be disclosed unless requested by the tax authorities. As of January 2014, submission of documentation may be required without opening a tax audit prior to the request.

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).

Transfer pricing-specific returns

There are no transfer pricing-specific returns in Slovakia.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 to high.

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

Slovak Republic (continued)

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

companies that form part of a multinational group. In 2013, a group specialized in transfer pricing has been established within the structure of the Slovak tax authorities. Their first audits focused solely on the transfer pricing issues that have been opened.

APA opportunity

According to Section 18 (4) of the Slovak Income Tax Act, in case 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.

The request for APA must be filed at least 60 days before the start of the tax period in which the proposed method should apply. As of 1 September 2014, the APA request will be subject to a fee in the amount ranging between EUR 4,000 and EUR 30,000 (based on the value of the related transaction).

Expected reaction to OECD Report on BEPS

As of January 2014, no official communication has been published by the Slovak Ministry of Finance or the Slovak Financial Directorate in this respect.

However, the current focus of the Slovak Government in the area of taxation is combating tax fraud. As of 1 January 2014, various amendments to the tax legislation have been enacted with that aim.

Slovenia

Taxing authority and tax law

Taxing 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 which the 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 out 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 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 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 while 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 Masterfile 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 Masterfile and a country-specific file. Disclosure of any related party transaction amounts should be provided along 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 Masterfile is not kept in the Slovenian language, the tax authority may request a translated version before submission. An additional extension of 60 days may also be granted for the translation of the Masterfile.

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 in order to assess or collect tax, the relevant period is reset, without taking into account any previous lapse of time. Nevertheless, the tax authorities' right to assess and collect tax will cease after 10 years. The transfer pricing documentation must be archived for 10 years.

Return disclosures/related party disclosures

Related party transactions are reported as a component of the annual corporate income tax return.

Slovenia (continued)

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:

- When the cumulative amount of given or received loans from a particular related party exceeds EUR 50,000 in a tax period, the taxpayer must disclose the name of the related party, its state of residence and tax number, the cumulative amount of the loan given or received, and relationship with the related party.
- When the cumulative amount of other intercompany receivables or liabilities towards a particular related party exceeds EUR 50,000 in a tax period, the taxpayer must disclose the name of the related- party, its state of residence and tax number, 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 wherein 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. APA is expected be introduced in 2014.

Expected reaction to OECD Report on BEPS

As a member of OECD, Slovenia follows the recommendations presented by OECD. There have been no proposed changes in the legislation due to the OECD Report on BEPS up until January 2014.

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 had previously authorized the tax authority to adjust the consideration for goods or services to an arm's length price for the purpose 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 consider whether any term or condition imposed as part of any transaction, operation, scheme, agreement or arrangement differed to the terms and conditions that would have been agreed if the parties to the transaction were independent. Any difference in price between what was charged between the connected persons and what would have been charged between independent parties needs to be adjusted for in the tax return of the taxpayer. This is often referred to as the primary adjustment. To the extent that the taxpayer has not recovered the difference between the arm's length charge and the actual charge from the foreign related party, a deemed loan will arise. This is often referred to as the secondary adjustment. Deemed interest will accrue on the deemed loan. Therefore, the application of transfer pricing provisions has been widened. Two key changes affecting financial assistance arrangements and thin capitalization have also been incorporated under the new legislation. The first is the inclusion of financial 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 to determine an appropriate level of debt and interest rate to be charged.

Relevant regulations and rulings

There are no specific regulations or rulings. However, guidance on the application of §31 is currently contained in Practice Note 7 (6 August 1999) and in the addendum to the Practice Note 7 (29 September 2005). On 22 March 2013, a draft Interpretation Note (draft IN) was published by SARS. The draft IN provides an indication of the analysis and documentation that SARS would expect to see in relation to cross border financial assistance and thin capitalization. The final IN is binding only for SARS, and not for taxpayers and courts.

SARS has also contributed to the UN Practical Manual on Transfer Pricing for Developing Countries.

OECD Guidelines treatment

Although South Africa is not a member of the OECD, SARS accepts the OECD Guidelines and has largely based its practice on them. By the same token, SARS recognizes the five methods accepted by the OECD Guidelines. New changes to the legislation will ensure better alignment with the OECD Guidelines and with the approach adopted by the 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 adjustments to be made to foreign comparable company results used for benchmarking the results of the South African entity, so as to compensate for the differences in risks assumed by entities operating in a different jurisdiction. We note that SARS has a preference for comparable companies from emerging markets.

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 as a loan until a 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).

South Africa (continued)

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 is likely to take the view that the taxpayer's transfer pricing practices represent a lower tax risk. Such evidence may provide some mitigation against the maximum penalty on underpayment of income tax of 200% as provided for in the Tax Administration Act No 28 of 2011.

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. In addition, the ITR 14 return asks whether a taxpayer has prepared a transfer pricing policy document supporting the arm's length nature of transactions with connected parties in the respective fiscal year.

Documentation deadlines

Although there is no statutory requirement to prepare documentation, SARS recommends that taxpayers with cross border related party transactions do prepare appropriate documentation. Where a taxpayer indicates in the ITR 14 that it has prepared transfer pricing documentation, such documentation should be available on request by SARS.

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 ITR 14 asks for specific information pertaining to cross border transactions with connected parties. In particular, taxpayers are required to provide the values of individual cross border transactions entered into with foreign connected persons. In addition, taxpayers are required to provide certain financial ratios which indicate the level of borrowings and the overall performance of the South African entity.

Transfer pricing-specific returns

There are no transfer pricing returns. All transfer pricing related questions are in ITR14.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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. In particular, the information that is provided as part of the ITR 14 enables SARS to easily identify companies that are more likely to have a high risk profile. 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 on 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 not considered to be the most appropriate methodology or where the pricing methodology has been selected but can not be practically tested or implemented.

South Africa (continued)

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.

Expected reaction to OECD Report on BEPS

Following the 2013 Budget announcement, the Minister of Finance of South Africa publicized the members of a tax review committee on 17 July 2013. The committee, now known as the Davis Tax Committee (DTC), will examine the role of South Africa's tax system to promote growth, job creation, sustainable development and fiscal self-reliance. It will take into account the long term objectives of the National Development Plan in its work. The DTC has adopted a work program that has prioritized the establishment of specialist sub-committees on small businesses, the appropriateness of the tax base and tax mix in South Africa, and BEPS.

As of January 2014, neither specific results on the BEPS action items with regard to intangibles, value contribution and risk allocation have been published by this group nor has South Africa introduced specific legislation or published a decree.

South Korea (Republic of 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 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.

Priorities/pricing methods

The Korean transfer pricing regulations prescribe the following transfer pricing methods: CUP, RPM, Cost Plus (CP), Profit Split (PSM), TNMM, and other reasonable methods. Of the aforementioned transfer pricing methods, the taxpayer is to select the most reasonable method based on the availability and reliability of data.

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 within 60 days of the NTS' request. A one-time extension of 60 days may be granted, if reasonable circumstances specified in the LCITA exist. Failure to provide documentation requested by the NTS within the required due date, lead to a penalty of up to KRW100 million.

See below for further details regarding contemporaneous transfer pricing documentation.

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 if such documentation supports the reasonableness of the transfer pricing methods reported, the penalty for underreporting will be waived in case a transfer pricing adjustment is made.

PED Article 23 of the LCITA provides guidelines on the contents of 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 not 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.

South Korea (Republic of Korea) (continued)

Penalty relief (continued)

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 filing the annual corporate income tax returns. Also, documents are generally required to be submitted in the Korean.

Documentation deadlines

A taxpayer must submit documents and information requested by the NTS within 60 days of the NTS' 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.

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 mentioned above.

Transfer pricing-specific returns

The transfer pricing reporting forms discussed above is a part of the corporate income tax return which is filed with the tax authority.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Companies should expect to be audited every four to five years, depending on the size of the company, or more frequently if other special factors exist. The risk of transfer pricing being reviewed during a tax audit is high. The NTS requests transfer pricing documentation as a matter of policy, 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

Also, companies paying high royalties abroad or receiving high 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, the tax auditors are likely to challenge the method used by the taxpayer and may propose alternate methods that are less favorable to the taxpayer.

Recently, the NTS has been focusing on guarantee fees between Korean taxpayers and its foreign affiliates, especially from the perspective where the Korean taxpayer is providing the guarantee to its foreign affiliates. In an effort to ensure that the Korean taxpayer is receiving an arm's length fee for the guarantee provided, the NTS has developed certain models to determine the guarantee fee on the basis of which additional taxes are assessed taxpayers. Also, the NTS has introduced new legislation in the LCITA with respect to guarantee fees.

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. According to the LCITA, documents submitted to the NTS with regard to an APA are to be kept confidential. 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 2012 NTS APA annual report showed that a total of 58 APAs were applied in 2012 of which 41 were processed including 21 bilateral APAs and 20 unilateral APAs. According to the NTS annual report, a total of 358 APAs were applied for till the close of 2012 out of which 223 APAs were concluded.

Expected reaction to OECD Report on BEPS

The Korean tax authorities have been looking at BEPS issues, but have not issued any official position on this matter. However, they continue to identify and challenge income shift away from Korea using abusive transfer pricing schemes.

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 in 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 that 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 on 9 July 2010) and the Royal Decree-Law 13/2010 (approved on 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 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 in case of both 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 maintaining proper 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.

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.

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, a 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
- 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.

Spain (continued)

Penalty relief

Some reductions are applicable to penalties. Penalties do not apply on 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 (Masterfile) 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 Masterfile 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, trademarks and 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 compliance of the group's policy 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
- Corporate group's Annual Report or equivalent

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

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

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

Spain (continued)

Documentation requirements (continued)

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 relatedparty transactions do not exceed EUR100,000 (excluding the 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).

Transfer pricing–specific returns

The related party transactions have to be included in the Corporate Income Tax return. There are no specific transfer pricing returns for tax payers.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 others is low. However, the Spanish tax authority establishes its annual audit plans based on risk assessment on each taxpayer, so companies for 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 that transfer pricing methodology will be challenged is high. In particular, authorities are more often strongly 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).

Expected reaction to OECD Report on BEPS

Spanish tax administration has not yet produced a public reaction on how changes derived from the BEPS report will be addressed at a local level.

However, it is worth noting that in April 2013, the Spanish Government established the National Office for International Taxation (Oficina Nacional de Fiscalidad International (ONFI)) an élite force that will focus on the control and coordination of matters relevant to international tax, including transfer pricing and the APA program, and the coordination of tax audits of cross-border structures.

With the creation of this highly specialized unit, the Spanish Government follows the global trend to tackle aggressive tax planning and, in particular, what is perceived as an increase in the level of sophistication in the structuring of cross-border transactions.

The creation of the Spanish ONFI was announced by the Spanish State Secretary for the Treasury shortly after the Bureau of the OECD Committee on Fiscal Affairs meeting was held in Paris in November 2012. The meeting addressed corporate income tax and profit shifting from developed countries through tax planning strategies.

The creation of the ONFI evidences that the Spanish tax authorities, following the general trend, intend to increase the focus on cross-border payments and transfer pricing. While the ONFI provides the Spanish tax authorities with a highly specialized team to coordinate and concentrate the effort to control these areas, it also provides MNCs and other taxpayers the opportunity to interact with specialized tax officials. It is therefore expected that the APA program will run more efficiently going forward and be a frequently sought after alternative.

Sri Lanka

Taxing authority and tax law

Taxing authority: The Department of Inland Revenue (IRD).

Tax law: Section 104 of the Inland Revenue Act, No. 10 of 2006 (IRA).

Relevant regulations and rulings

Transfer pricing regulations contained in Extra Ordinary Gazette No. 1823/5 issued on 12 August 2013 under and in terms of Section 104 and 104A of the IRA.

OECD guidelines treatment

Although Sri Lanka is not a member of the OECD, the IRD broadly accepts the OECD Guidelines and has largely based its practice on them. Also, the IRD recognizes the five methods accepted by the OECD Guidelines.

Priorities/pricing methods

The IRD recognizes the methods outlined in the OECD Guidelines, which include the traditional transaction methods (CUP, Resale Price and Cost Plus) and profit methods (Profit Split and TNMM). 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 Profit Split method is accepted as an appropriate method in circumstances where unique intangibles or interrelated transactions exist.

Transfer pricing penalties

The IRA 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 the IRA on any person who without a reasonable cause files an incorrect tax return, furnishes any incorrect information, fails to furnish the return on time, fails to inform chargeability to tax, or makes an incorrect statement. Further, the Assessor can disregard a transaction if he is of the opinion that it may reduce or would have the effect of reducing the amount of tax payable and hence is artificial or fictitious or does not reflect its substance. Offenses can be subject to a fine or imprisonment of either description or both fine and imprisonment.

Penalty relief

Where taxpayers have made conscientious efforts to establish transfer prices that comply with the arm's length principle, and have prepared documentation to evidence such compliance, the IRD is likely to take the view that the taxpayer's transfer pricing practices represent a lower tax risk.

Documentation requirements

Transfer pricing regulations require extensive contemporaneous documentation. Taxpayers are required to keep all the documents in English evidencing that related party transactions are established on an arm's length basis. However, such documentation is required only if the transaction value exceeds LKR100 million for any year of assessment.

Documentation deadlines

Documentation is generally required upon request. The regulations require taxpayers to retain documents for a period of five years.

Statute of limitations on transfer pricing assessments

The statute of limitations is of two years if the return is duly filed within the deadline of 30 November. However, the statute of limitation will not apply in case of fraud or willful evasion.

Sri Lanka (continued)

Return disclosures/relatedparty disclosures

The IRD requires taxpayers to disclose in their return the details of persons receiving fees, interest, royalties etc., and their location.

Transfer pricing regulations require the disclosure of a transfer pricing policy statement, management perception of risk factors, etc., in the Directors' Report.

In accordance with Sri Lankan Accounting Standards, the company is required to disclose related party transactions in its financial statements.

Transfer pricing-specific returns

There are no requirements for a transfer pricing specific return.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Extra Ordinary Gazette No. 1546/10 issued on 22 April 2008 under and in terms of Section104 of the Inland Revenue Act, introduced transfer pricing regulations for the first time in Sri Lanka. However, these regulations were not enforced until the Government introduced a new set of guidelines effective from 1 April 2013. The IRD intends to enforce regulations from the year of assessment 2013/2014. In addition, the IRD has assigned a Commissioner to lead the transfer pricing audits and is currently in the process of developing a database for handling transfer pricing matters. This is the first time that the IRD has devoted significant resources specifically to transfer pricing related issues, which signals an increased focus on transfer pricing in the near future.

APA opportunity

The APA rules provide an opportunity for taxpayers to opt for a unilateral, bilateral or multilateral APA available for a fixed period of time.

Expected reaction to OECD Report on BEPS

Since Sri Lanka is not a member of the OECD, the IRD is unlikely to react to the OECD Report on BEPS.

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 contains 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 Guidelines, and the OECD Guidelines are applied by the courts and tax authorities.

Chapter IX of the OECD Guidelines (on Business Restructurings) has significantly increased the Swedish Tax Agency's focus on restructurings.

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.

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

Documentation requirements (continued)

The functional analysis should, in addition to identifying the functions performed, assets used and risks assumed, also describe which functions, assets and risks 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 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 for complying 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 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an 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 APA legislation, which allows for bilateral and multilateral APAs, is in line with international standards. 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.

Sweden (continued)

APA opportunity

In Sweden, formal APA procedures exist as of 1 January 2010.

Expected reaction to OECD Report on BEPS

In a joint statement issued in September 2013, Sweden, Denmark, Finland, Iceland, Norway and the United States stated that the fight against tax avoidance and evasion should be a top priority in all relevant international discussions. The six countries acknowledged the importance of the engagement of the G20 and expressed support for the work of the OECD on BEPS and automatic exchange of information as the new global standard. The countries agreed to make a concerted and collective effort to improve the transparency of companies and legal arrangements.

The Swedish Ministry of Finance has dedicated resources to BEPS. Sweden is likely to embrace the initiatives on country-by-country reporting and documentation Masterfile, but it is unclear how the updated guidance on intangibles, once finalized, will be received.

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 in Swiss tax law. However, a number of administrative directives (including circulars and circular letters) implicitly or explicitly refer to the determination of transfer prices, including:

- Circular letter No. 6 from 6 June 1997 regarding hidden equity
- Circular letter No. 8 from 18 December 2001 regarding international profit allocation of principal companies
- Circular letter No. 4 from 19 March 2004 referring to the taxation of service companies
- Circular from 25 February 2013 regarding interest payments between related group entities (updated yearly)

OECD Guidelines treatment

The SFTA instructed the Cantonal Tax Administrations, in its Circular Letter of 4 March 1997, to unconditionally adhere to the 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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.

Expected reaction to OECD Report on BEPS

Switzerland is supporting the BEPS initiative and is present in various working party groups of the OECD. However, no immediate action is expected due to BEPS in the near/mid-term. While Switzerland is in the process of adapting certain tax regimes and ruling practices which are considered harmful tax practice by some countries, these developments started before the BEPS initiative. Also, the Swiss competent authorities expect the number of MAPs to increase substantially.

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 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). However, the MOF does not follow the hierarchy of methods.

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 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; and
  - The enterprise does not utilize tax credits for more than TWD2 million in a particular year or a loss carryforward for more than TWD8 million for the preceding 10 tax years to reduce the income tax or undistributed earnings surplus tax

[1] Tax Letter Ruling No. 09704555160, issued in November 2008.

Taiwan (continued)

Documentation requirements (continued)

  - The enterprise, under the 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
  - Th e total annual controlled transactions amount is less than TWD200 million
- The total annual revenue (including operating and non-operating) of the enterprise exceeds TWD500 million but 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 the 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 is required upon filing of the return.

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

Taiwan (continued)

Return disclosures/related party disclosures (continued)

- 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

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 carryforwards 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 is 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 that 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.

The likelihood that the transfer pricing methodology will be challenged during the audit is high, if any of the factors or circumstances listed below is present:

[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)

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

- 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 by 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

Expected reaction to OECD Report on BEPS

Currently, the issue is still under discussion and no further action has been taken.

Tanzania

Taxing authority and tax law

Taxing authority: Tanzania Revenue Authority (TRA).

Tax law: There are currently no transfer pricing regulations in Tanzania.

Relevant regulations and rulings

Section 33 of the Income Tax Act, 2004 (ITA 2004) emphasizes the arm's length principle on transactions between associates.

OECD Guidelines treatment

The TRA's internal manual recognizes the application of the OECD methods in determining the arm's length pricing.

Priorities/pricing methods

The TRA's internal manual recognizes the application of the OECD methods in determining the arm's length pricing.

Transfer pricing penalties

There are no specific transfer pricing penalties. However, Section 33 gives the powers to make adjustments to a transaction that does not comply with the arm's length principle.

The law also imposes interest for underpayment of tax (Section 100 of the ITA 2004).

Penalty relief

Currently, there is no penalty relief available in Tanzania.

Documentation requirements

There are no transfer pricing documentation requirements in Tanzania. However, all transactions require supporting documentation.

Documentation deadlines

Not applicable.

Statute of limitations on transfer pricing assessments

No special rules. A general rule of three years applies.

Return disclosures/related party disclosures

The taxpayer is required to disclose the amount of sales, purchases and loans made or received from associates, in and outside of Tanzania in its tax return.

Transfer pricing-specific returns

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

There are no special transfer pricing audits; intercompany transactions are audited in the general tax audits.

Tanzania (continued)

APA opportunity

Section 131 provides for advanced private rulings provided all the material facts of the transaction are disclosed. However, it is not a common practice.

Expected reaction to OECD Report on BEPS

There has not been any reaction from the tax authorities up until January 2014.

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
- Thai Accounting Standard No. 37 and 47
- Transfer pricing guidelines: Departmental Instruction No. Paw. 113/2545 (DI 113)

Relevant regulations and rulings

On 16 May 2002, the TRD issued its guidelines specifically addressing transfer pricing. DI 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 Guidelines, including all the methods acceptable under the OECD Guidelines. This will include 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.

Documentation requirements

The following elements of contemporaneous documentation are specified:

Thailand (continued)

Documentation requirements (continued)

- 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
- 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 formal 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 is it necessary to file any documentation 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.

Transfer pricing-specific returns

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Scrutiny of transfer pricing during a tax audit or inquiry in Thailand is common and the risk for an average multinational company is from 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.

Since the corporate income tax reduction from 23% to 20% in 2013 and large government spending on improving infrastructure in Thailand, the level of tax enforcement has been increasing especially in the area of transfer pricing. TRD does not focus on specific country or industry; rather on multinational corporations of various industries that incurred intercompany fees, costs allocations, consecutive losses and fluctuation of profitability.

Generally, the TRD makes transfer pricing adjustments to the deductibility of expense items through its annual routine visits to

Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

taxpayers for reviewing 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.

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, 7 bilateral APAs have been concluded between Thailand and Japan to date. Currently, there are 20 bilateral APAs that are in the process of being reviewed and negotiated.

Expected reaction to OECD Report on BEPS

As Thailand is not part of the OECD member countries, change in practice under the Thai GAAP or requirement of transfer pricing documentation under the Thai transfer pricing guidelines is not expected in the near future.

Turkey

Taxing authority and tax law

Tax authority: Ministry of Finance

Tax law: Transfer pricing is regulated by Article 13 of the Corporate Tax Code numbered 5520, published on 21 June 2006.

Article 13 of the 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 comparable companies, 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, during transfer pricing inspections, tax auditors focus mostly on intercompany payments in form of 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.

OECD Guidelines treatment

The preamble to the law states that the provisions of international regulations, especially the 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 that 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, taxpayers are required to prepare (and submit upon request by the tax authority) an Annual Transfer Pricing Report which 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. The documentation should be submitted within 15 days upon request by the tax authority.

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.

Return disclosures/related party disclosures

Taxpayers are required to disclose information on all related party transactions (domestic and cross-border), regardless of the 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:

Turkey (continued)

Return disclosures/related party disclosures (continued)

- 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 must also 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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 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 2014.

Expected reaction to OECD Report on BEPS

Turkey uses the OECD's commentaries as a source for interpreting tax treaties. The preamble to the Corporate Tax Code states that the provisions of international regulations, especially the OECD Guidelines, are taken as a reference for transfer pricing regulations. There is no immediate impact of BEPS on the legislation or the tax administration practice. However, BEPS provisions are in line with the approach of Turkish tax policy in a general sense. It is expected that Turkey will continue its efforts to develop its international tax policy and will likely make reference to the BEPS initiatives.

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 either located in Uganda or outside of Uganda. Controlled transaction is defined as a transaction between associates. Further, the regulation makes reference to the definition of the term "associates" enshrined in the domestic Income Tax Act as follows "*Where any person, not being an employee, acts in accordance with the directions, requests, suggestions, or wishes of another person whether or not they are in a business relationship and whether those directions, requests, suggestions, or wishes are communicated to the first-mentioned person, both persons are treated as associates of each other.*"

Thin capitalization — Where for 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 Guidelines. However, where the OECD Guidelines are in conflict with Domestic Taxing Acts, the provisions in Domestic Taxing Acts take precedence.

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. Where one fails to put in place transfer pricing documentation under the transfer pricing regulations, the person is liable upon conviction to imprisonment for a term not exceeding six months or to a fine not exceeding 25 currency points (currently UGX500,000) or both. In addition to the above, in the event an upward transfer pricing 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

There is no specific penalty relief. However, there is room for objection and where such objection is ruled in favor of the taxpayer or on appeal to tribunal or a court of law where such appeal is ruled in favor of the taxpayer.

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. The URA came up with a practice note detailing the minimum information that should be included in a transfer pricing documentation.

Documentation deadlines

Transfer pricing documentation must be in place at the time the income tax return is filed with effective date as 1 July 2011. Failure to adhere to this could result in imprisonment or commercial penalty or both as highlighted above.

Uganda (continued)

Statute of limitations on transfer pricing assessments

The Act gives the URA the authority to make adjustments but does not indicate a time limit for such adjustments. Under Income Tax Act, the URA can revisit assessments backwards up to five years, but this period is unlimited in cases of fraud or any gross or wilful neglect by or on behalf of the taxpayer or discovery of new information.

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

There are no specific transfer pricing returns required to be filed with the tax authority. However, most recently the tax authorities have come up with a related party disclosure form which has been circulated to most MNEs as part of the initial transfer pricing audit procedure.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The URA has stated that it considers transfer pricing to be a major area of tax leakage, and 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.

Expected reaction to OECD report on BEPS

The tax authority is expected to receive OECD recommendations on BEPS as good news towards ensuring transparent disclosures from taxpayers in order to enhance tax revenue collection.

Ukraine

Taxing authority and tax law

Taxing authority: Ministry of Revenue and Duties of Ukraine is responsible for ensuring that taxpayers meet the requirements of the law.

Tax law: The Law of Ukraine №408-VII (4 July 2013) and Article 39 of the Ukrainian Tax Code[1]; regulations adopted pursuant to the Law.

Relevant regulations and rulings

Article39 does not specify a number of fundamental procedures and data sources related to transfer pricing; but these are determined in the subsequent laws and decrees (some of these are still being developed):

- Law of Ukraine № 657-VII (24 October 2013), amends the definition of "low tax jurisdictions," i.e., countries where Corporate Income Tax is 5 percentage points lower than that in Ukraine
- Decree of the Cabinet of Ministers of Ukraine №749 (2 October 2013), defines the percentage price range for specific goods in accordance with Ukrainian Classification of Foreign Traded Goods for the purposes of transfer pricing
- Decree of the Cabinet of Ministers of Ukraine №763 (17 October 2013), defines the algorithm for the interquartile range calculation
- Decree of the Cabinet of Ministers of Ukraine №764 (17 October 2013), defines procedures and requirements for APAs between the tax authorities and the taxpayer (bilateral and multilateral APAs are permissible). Timeframe for the review and signing of the APA and its duration is not specified
- Order of the Cabinet of Ministers of Ukraine №865-p (23 October 2013), provides a list of specialized commercial sources of information, which may be used for the purposes of transfer pricing
- Order of the Cabinet of Ministers of Ukraine №866-p (23 October 2013), provides a list of information sources containing data on market prices, which may be used for the purposes of transfer pricing
- Draft order of the Cabinet of Ministers of Ukraine regulating the requirements for Controlled Transactions Report, developed by the Ministry

The tax authorities provide their administrative interpretation and guidance with respect to the Law via the release of decrees, orders and pronouncements at public conferences and events.

OECD guidelines treatment

Ukrainian Law follows the main standards of the OECD Guidelines. The array of methods and documentation requirements closely follow the Guidelines.

The Law became effective on 1 September 2013, setting the first deadline for obligatory transfer pricing reporting (summary of controlled transactions) on 1 May 2014, which is also the date when the first transfer pricing documentation may be requested. Therefore, due to the limited time period since the Law came into force and absence of practical experience in Ukraine, tax audit treatment of transfer pricing cases is uncertain.

Priorities/pricing methods

The transfer pricing Law includes five methods similar to those specified by the OECD Guidelines. The CUP method has the priority, while use of the Cost Plus and Resale Minus methods may be complicated due to the lack of comparable accounting data. Profit-based transfer pricing methods may be used without specific restrictions.

Transfer pricing penalties

A mandatory Controlled Transactions Report is due on 1 May every year following the close of the year. The penalty for not filing a transfer pricing report is 5% of the total value of controlled transactions of the taxpayer during the reporting period.

Tax authorities may request transfer pricing documentation starting 1 May 2013 and the taxpayer has to submit it within one calendar month from the date of request (two months in case of large taxpayers). The penalty for not filing the transfer pricing documentation is 100 minimum wages (approximately UAH115,000/USD14,300).

[1]Further referred to as The Law or Article 39 and used interchangeably.

Ukraine (continued)

Transfer pricing penalties

The penalty for understatement of tax liabilities as a result of non-compliance with the transfer pricing rules is up to 50% of the understated tax (will not apply until 1 September 2014).

Penalty relief

Penalty relief is provided for transition period starting from 1 September 2013 until 1 September 2014 during which the penalty for the understatement of tax liabilities will be UAH1/USD0.125.

Documentation requirements

Documentation is required for Ukrainian entities with controlled transactions with non-resident related parties, any residents of "low tax jurisdictions" (with corporate profit tax rate lower than that in Ukraine by 5 percentage points) and related parties that are residents of Ukraine if they are loss-making, not regular corporate profit tax and VAT payers (or pay these taxes at a lower rate), or use single tax or agricultural tax regimes. Transactions listed above are subject to control if the annual amount of all transactions between two counterparties is at least UAH50 million (approximately USD6.25 million).

The largest taxpayers are supposed to submit a transfer pricing documentation containing the following information:

- Comprehensive information on related parties
- Information about the group (structure, description of activities, group transfer pricing policies)
- Description of the transaction (terms and conditions)
- Description of goods (works, services), including physical characteristics, quality and reputation in the market, the country of origin and manufacturer, trademark, etc.,
- Terms and conditions of the payments
- Factors that impacted the price
- Functional analysis and risk analysis
- Economic analysis (transfer pricing method applied, its substantiation, the amount of income/expenses, the profitability level, the calculation of the arm's length price/profitability range, the approach to selection of comparables, source of information)
- Comparability analysis of commercial and financial conditions of selected transactions
- Information on corresponding adjustments made by the taxpayer (if any)
- Transfer pricing documentation must be submitted in Ukrainian

Documentation deadlines

Taxpayers are obliged to submit transfer pricing documentation within one month (two months for large taxpayers) from the day following the date of receipt of a request from the tax authorities. The tax authorities may request the documentation no earlier than 1 May of the year following the reporting period.

Statute of limitations on transfer pricing assessments

The statute of limitations on transfer pricing assessments conforms to the general rules of the Tax Code of Ukraine and is three years (1095 days, as specified by the Code).

Return disclosures/related party disclosures

Taxpayers are required to submit a transfer pricing report (a report about controlled transactions) in a form that will be published by the Tax Ministry and should be filed before 1 May of the year following the reporting year. Initial transfer pricing reporting will have to be submitted in 2014. Penalty for not filing is 5% of the amount of controlled transactions.

Ukraine (continued)

Transfer pricing-specific returns

Ukrainian transfer pricing rules require the submission of a transfer pricing report disclosing all controlled transactions of a taxpayer for the reporting period. Refer to the section above for more details.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

According to the Law, transfer pricing audits should be performed independently from other tax audits. Notably, compliance with transfer pricing rules is not allowed to be audited during other tax audits. Audits to verify compliance with the transfer pricing rules are performed by a special division of the tax authority dealing with transfer pricing issues. Transfer pricing audits will be performed by local tax authorities led by a representative from the Tax Ministry.

In general, the likelihood of an annual tax audit may be assessed as high, and so is the likelihood of the transfer pricing review. The likelihood that the transfer pricing methodology will be challenged during the course of an audit is currently unknown due to the novelty of the legislation and absence of practical experience in Ukraine.

Self-and corresponding adjustments are possible. Self-adjustments are the upward adjustments of tax liabilities performed by taxpayers resulting from the application of the transfer pricing rules and have to be recorded in Corporate Profit Tax (CPT) and VAT returns. Deadlines for filing the transfer pricing report is not aligned with the deadlines for filing CPT and VAT returns.

APA opportunity

APAs are regulated by the Decree of the Cabinet of Ministers of Ukraine №764 (17 October 2013), which provides procedures for concluding APA agreements. An APA may be concluded between large taxpayers and the Tax Ministry. The Decree does not state clearly that an APA is binding on the tax authorities.

Expected reaction to OECD Report on BEPS

Ukrainian tax authorities are planning to participate in the global system of automatic exchange of tax information. There are currently no specific steps taken.

United Arab Emirates (UAE)

Taxing authority and tax law

Taxing authority: Ministry of Finance.

Tax law: Currently, there are no local transfer pricing regulations in UAE, but the UAE have concluded around 60 income tax treaties which contain an article that resembles Article 9 OECD Model Tax Convention on "Associated Enterprises."

United Kingdom

Taxing authority and tax law

Taxing authority: Her Majesty's Revenue and Customs (HMRC) publishes its internal guidance manuals 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 APA although some comfort may be gained through discussions with HMRC under its Real Time Working initiative; however, as noted above, its practice in a number of areas is set out in manuals, which it publishes on its website.

OECD Guidelines treatment

The 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. All the HMRC Guidance is based around adherence to the OECD Guidelines.

Following a tax case in 2010, HMRC now 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.

In addition HMRC often challenge the use of Cost Plus for high-value-add services where it looks to substitute some form of value-based fee by using Profit Split or a similar method.

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 (e.g., group balances allowed to build up without interest)
  - No attempt to determine an arm's-length price (e.g., no support for uplift applied in a cost plus)
- No attempt to support an arm's-length price (e.g., Shared service center overseas with turnover applied as allocation key for a cost plus charge, but no consideration of benefits test for UK entity)

United Kingdom (continued)

Transfer pricing penalties (continued)

- Policy, otherwise arm's length, not properly applied in practice

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 the types of documents that it might expect to be kept. This guidance is stated to be built on the guidelines 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 follows 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 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 be sufficient disclosure for HMRC to form a view as to the compliance with the arm's length principle.

United Kingdom (continued)

Transfer pricing–specific returns

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

HMRC has developed a "Stage Gate" process for transfer pricing enquiries, which is set out in the internal guidance published on its website. Where a case team identifies a transfer pricing issue that may necessitate an enquiry. , this process requires a transfer pricing specialist in HMRC to be assigned. 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 panel also then reviews progress at regular intervals during the enquiry and sign off on all settlement proposals.

HMRC considers that this process leads 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 where the sums warrant, a 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 being challenged 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 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 into the program there needs to be sufficient complexity in approaching compliance with the arm's length standard. Limited resources have historically restricted 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. As of 2011, 35 were and fully agreed although this has fallen slightly in 2012 and 2013 when only 32 and 27 respectively were agreed.

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 real time working initiative 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.

Expected reaction to OECD Report on BEPS

HMRC is fully aligned with the OECD and an active participator in a number of the key action points. It is unknown to what extent legislative changes will follow the finalization of the OECD Guidance. It is expected that little change will be required in relation to the Intangibles section but there could be changes required in relation to country-by-country reporting and possibly documentation.

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
- On 22 November 2013, the IRS issued Notice 2013-78, which contains a proposed revenue procedure that would update and supersede Revenue Procedure 2006-54,2006-2C.B 1035, providing guidance for requesting assistance from the US competent authority acting through the Advance Pricing and Mutual Agreement program (APMA). The intent of the proposed revenue procedure is to substantially improve clarity, readability, and organization of Revenue Procedure 2006-54. The IRS is seeking taxpayer comments by 10 March 2014. It is understood that the final revenue procedure will be issued later in the year 2014
- On 22 November 2013, the IRS issued Notice 2013-79, which contains a proposed revenue procedure that would update and supersede Revenue Procedures 2006-9 and 2008-31. The goal of the revenue procedure is to provide guidance and instruction on APAs, as well as provide guidance and instruction on the IRS's administration of APAs. The IRS is seeking taxpayer comments by 10 March 2014. It is understood that the final revenue procedure will be issued later in the year 2014
- In April 2007, Cost Sharing Arrangement (CSA) buy-ins was 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 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 by preparing 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 in, 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

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 size 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 US$10 million or more.

Transfer pricing-specific returns

Taxpayers are required to file Forms 5471, 5472, and 8865 regarding transactions with related parties.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit is dependent on the facts and circumstances. 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 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 2014.

Expected reaction to OECD Report on BEPS

The US Treasury is part of the BEPS Committee and is supportive of the BEPS effort. Some taxpayers have reported that the IRS has already begun implementing BEPS concepts. Additional governmental responses to the BEPS action plan are as follows:

In November 2013 the US Competent Authority noted that Action Item 14, (Effectiveness of Treaty Dispute Resolution Mechanisms), will put more pressure on competent authorities worldwide to ensure that mutual agreement procedures are up to date at a time when MAP programs are facing restricted resources.

US governmental officials in the House, Senate and Treasury have stated that the US will not delay its own current efforts at tax overhaul to address base erosion by waiting for the OECD BEPS project to come to fruition.

The US Treasury commented that any measure taken under BEPS Action Item 1, (Tax Challenges of the Digital Economy), must be wary of creating special rules for taxing the delivery of digital goods and services that could result in stripping income out of the US.

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 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 treatment 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 approximately US$230,000.

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 fifth and 90th day after the deadline, and 20% if it is paid 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.

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 US$6.5 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.

Uruguay (continued)

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.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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's comparable set.

The tax authority relies on a special team of professionals who have focused on performing tax audits for the biggest companies known as "Great Taxpayers." However, they have not focused on specific industries.

The focus is mainly on:

- Functional analysis
- Segmentation criteria revision
- Comparison between the financial information of the company considered for the transfer pricing analysis and the financial statements, identifying internal and external comparables

General observations pointed out at inspections are:

- Comparability adjustments made to the tasted party
- Rejection of the selected comparables companies
- Observations of companies which make continuous losses for many years

Uruguay (continued)

APA opportunity

Currently, no APA regime is specifically published in Uruguay, but the tax authority recently signed the first one.

Uruguayan transfer pricing rules have an APA regime. However, there are no specific procedures defined yet. Therefore, if the APA process is initiated and no agreement is finally reached, there are no rules about how the local tax authorities should proceed with provided information.

As of today, only one APA case has been publicly announced, and it was related to a chemical company that was going to start doing business in Uruguay.

Expected reaction to OECD Report on BEPS

As of January 2014, there are no proposed legislative changes to the tax law or to the documentation requirements regarding transfer pricing in Uruguay.

Uzbekistan

Taxing authority and tax law

Taxing authority: State Tax Committee of the Republic of Uzbekistan (and its regional subdivisions).

Tax law: There is no specific transfer pricing laws or regulations in Uzbekistan. The general Tax Code of the Republic of Uzbekistan contains an article, which states that for cross-border transactions between related parties the tax authorities may use the prices applied by unrelated parties for tax purposes. However, the Tax Code does not further regulate how such adjustments could be made, what methodologies are to be used, what sources of information are to be used, etc.

OECD guidelines treatment

Uzbekistan is not an OECD member; therefore, the OECD Guidelines are not applicable.

Priorities/pricing methods

Not applicable.

Transfer pricing penalties

Not applicable, as there are only general tax related penalties and no specific transfer pricing related penalties.

Penalty relief

Not applicable, as there are only general tax related penalty reliefs and no specific transfer pricing related penalty reliefs.

Documentation requirements

Not applicable, as there are only general tax related documentation requirements (e.g., all tax deductions should be justified and properly documented) and no specific transfer pricing related documentation requirements.

Documentation deadlines

Not applicable, as there are only general tax return filing deadlines and no specific transfer pricing related documentation deadlines.

Statute of limitations on transfer pricing assessments

Not applicable, as there only general tax related statute of limitations (i.e., five years) and no specific transfer pricing related statute of limitations.

Return disclosures/related party disclosures

Not applicable.

Transfer pricing–specific returns

Not applicable.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

Not applicable, as there are only general tax audits regularly conducted by the tax authorities and no specific transfer pricing related audits.

APA opportunity

Not applicable.

Expected reaction to OECD Report on BEPS

Not applicable.

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 the 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 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 Guidelines are applicable as a supplement to Venezuelan laws for the topics that are not covered in there.

Priorities/pricing methods

The acceptable methods are the 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 ranging 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.

Penalty relief

If a taxpayer applies a legally sanctioned transfer pricing method, this could be considered as 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.

[1] 2013 Tax Unit = BSF107/unit.

Venezuela (continued)

Documentation requirements (continued)

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 the SENIAT during a transfer pricing audit. For taxpayers whose fiscal year ends in December, it is mandatory to file 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, 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 (mentioned above).

Frequency of tax audit and transfer pricing scrutiny by the tax authority

The SENIAT continues being very active in transfer pricing audits. 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.

Tax audits have been focused both in formal duties (i.e., request of contemporaneous transfer pricing documentation, filing PT-99) and in the determination of proper taxable income in inter-company transactions (i.e., challenge methodology, comparables, use of multiple year data, segmented financial data by transaction and/or activity, among others).

The evaluation criteria to trigger a transfer pricing audit are:

- 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 to the study
- Have profit level indicators below the interquartile arm's length range
- Show lower operating margins compared with operating margins from prior years or with operating losses
- Late filing of transfer pricing information return

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.

Currently, in the transfer pricing review process, time frame to submit the information requested, ranges between two to three business days and there is reluctance in giving extensions.

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).

Venezuela (continued)

Expected reaction to OECD Report on BEPS

There have been no recent changes in tax regulations to address the BEPS project.

Nonetheless, current transfer pricing regulations do already require some information described in the OECD country by country reporting memo, such as a list of intangible goods which taxpayer owns or uses.

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 Amended Law on Tax Administration No. 21/2012/QH13 was officially issued on 3 December 2012 and took effect on 1 July 2013 (Amended Law). Decree 83/2013/NĐ-CP issued on 22 July 2013 stipulating in detail the implementation of a number of Articles of the Amended Law on Tax Administration No. 21/2012/QH13 (Decree 83/2013) and took effect on 15 September 2013. Decree 83/2013 also includes Article 34 stipulating the arm's length principle.
- Detailed transfer pricing regulations are included in Circular 117/2005/TT/BTC (Circular 117)[2] and Circular 66/2010/TT/BCT (Circular 66).[3] Circular 66 provides guidelines on the calculation of market prices in business transactions between related parties.
- Circular 201/2013/TT-BTC (Circular 201)[4] provides detailed guidance on the Advance Pricing Agreement application process.

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, 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.

In 2013, Vietnam continued to put considerable efforts in intensifying further transfer pricing audits. Particularly, tax authorities in large provinces and cities, for example Binh Duong Tax Department, issued formal notices requesting many enterprises to explain arm's length pricing of their related party transactions supported by relevant documentation for financial year 2012 and prior years. It is observed that foreign-invested companies are mainly selected for transfer pricing scrutiny with focus on companies with investors from Japan, Korea, Taiwan, Hong Kong SAR, Mainland China and the United States.[5]

The National Action Plan for the period of 2012–2015 which aims at least 20% of the annual tax audit cases devoted to transfer pricing audits have been strictly implemented from the central authority cascading to the provincial level. The purposes of this program are to create a stronger legal framework on transfer pricing and tax administration, provide training to build up capable human resources, develop and enhance reliable databases, and promote international cooperation in order to enhance the Vietnam tax authority's capacity for transfer pricing administration.

Recent reports mentioned that in the first nine months of 2013, more than 1,200 loss-making enterprises with transfer pricing signs were investigated. As a result of such audits, the tax inspectors made transfer pricing adjustments of VND1.6 trillion (approximately US$76.1 billion) and collected additional taxes and penalties amounting to VND481 billion (approximately US$22.9 million).[6]

During the audits, the Vietnam tax authorities have commonly challenged and adjusted pricing for the following transactions:

- Tangible transactions
  - Higher prices for purchase of materials, machinery and equipment
  - Low price for sale of goods

[1]This Law was enacted by National assembly on 29 November 2006 and effective from 2007.

[2]This Circular was issued by the Ministry of Finance on 19 December 2005.

[3]This Circular was issued by the Ministry of Finance on 22 April 2010, and supersedes Circular 117.

[4]This Circular was issued by the Ministry of Finance on 20 December 2013.

[5]EY Vietnam's transfer pricing alert in July 2013 entitled "Vietnam Tax Authorities increase Transfer Pricing enforcement activities

[6]VietnamNet Brigde's article entitled "The General Department of Taxation has taken drastic measures to crack down on transfer pricing, confirming it had carried out investigations on businesses using transfer pricing to lower tax obligations."

Vietnam (continued)

Relevant regulations and rulings (continued)

- Intangible transactions
  - Payment of royalty for technology transfer and trade mark
  - Inter-company service transactions
- Others
  - Significant loan interest
  - Disposal of fixed assets

The transfer pricing audits in 2013 are currently focusing on certain industries including the following:

- Garments, textiles and footwear industries
- Real estate
- Construction
- Automotive
- Motorbike assembly
- Electronics

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 sufficient or equivalent to the required transfer pricing documentation under Circular 66.

These recent developments with respect to enhanced legislation, tax authority's capacity building and the increasing sophisticated transfer pricing audits evidence that transfer pricing continues to be the national focus of Vietnam's tax authority for the period 2012–2015.

OECD guidelines treatment

Circulars 117 and 66 are generally based on the OECD Guidelines. How the GDT will apply the OECD Guidelines in interpreting the principles under the Circulars remains to be seen based on the first few years of implementation of the Circulars.

Priorities/pricing methods

Circular 66 permit 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 working 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 calendar 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 Amended Law on Tax Administration No. 21/2012/QH13, this interest penalty increases to 0.07% per day if outstanding tax due is over 90 calendar days. Taxpayer is also subject to a tax penalty of 20% of additional tax in case of incorrect declaration. Additional penalties of up to three times the outstanding tax due may be imposed in case of tax evasion or fraud.

Transfer pricing penalties (continued)

Vietnamese law allows for criminal proceedings against tax payers 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 US$5,000) 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 submission of transfer pricing documentation.

Documentation requirements

Contemporaneous documentation is required by Circular 66. Documentation must be provided within 30 working days of the tax authority's 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 that the taxpayer has reasonably concluded that, given the available data and the applicable pricing methods, the method used (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
- 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 party 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

Vietnam (continued)

Documentation deadlines

The documentation must exist at the time of the transaction. Taxpayers must provide documentation to the tax authorities within 30 working 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 limitations 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. Under the Amended Law on Tax Administration No. 21/2012/QH13, the statute of limitation applicable for tax collection is limited to 10 years.

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 on return disclosures/related party disclosures above.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

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 medium.

APA opportunity

Following the introduction of APA in the Amended Law on Tax Administration No.21/2012/QH3, the issuance of its implementation regulations (Decree 83 dated 22 July 2013) and the release of the Draft APA Circular for public comments, the Ministry of Finance (MoF) issued Circular No.201/2013/TT-BTC providing detailed guidance on the APA application process (Circular 201), which will take effect as of 5 February 2014.

The guidance on APAs and standardized processes and procedures for APA application included in Circular 201 are generally in line with the OECD's APA guidelines and effective APA regimes in other taxing jurisdictions. Below is the summary of the key features of the APA regime and application processes included in the Circular for your reference.

- APA definition: APA is a binding agreement between the taxpayer(s) and tax authority(s) that determines in advance the basis of tax calculation, transfer pricing methods and arm's length prices of the covered related party transactions for a specific period of time
- Scope of application: APA is available to corporate taxpayers who undertake domestic and/or overseas related party transactions
- Types of APA: Unilateral/bilateral/multilateral APA are all accepted

Vietnam (continued)

APA opportunity (continued)

- APA period: An APA can be effective up to five years with a renewal of a maximum of five years
- Competent authorities: The MoF gives final approval of APAs, with the GDT being in charge of signing off the APA application. The provincial tax departments assist in negotiating, processing and monitoring the APA application within their authority
- Database: Data and database use for price/profit margin analysis must be publicly recognized with the specified hierarchy of preference
- Confidentiality: Information confidentiality is to be observed by both taxpayer and tax authorities. All information/documents provided during the APA application process shall not be used as evidence for further tax audit, tax inspection, and tax imposition on the taxpayers
- Compliance after APA sign-off: Taxpayers are required to follow-up on annual reports to demonstrate compliance with the agreed APA terms
- Flexibility: Revision options available in case material assumptions established in the APA change and the agreed APA can be also used as a benchmark to revise declared prices/profit margins for past years to avoid tax penalties in accordance with the Law on Tax Administration
- Independent consultants: Both taxpayers and tax authorities are entitled to hire independent consultants to assist them during the APA process

Under the Circular 201, the APA application process covers the following steps:

- Application for consultation prior to official application for an APA (i.e., pre-filing consultation) — This pre-filing process is required with a prescribed form along with an exhaustive list of documents to be submitted. There is no specific timeline for this step. The official result of consultation is issued by the GDT within 30 working days of the end of the consultation process
- Formal application for APA — An eligible taxpayer may make an official application for an APA in the prescribed form along with documents required and processing fee. Official application for an APA must be submitted within 120 days of receipt of written approval from the GDT. An extension of 30 calendar days is available under reasonable circumstances
- Evaluation of APA application dossier — Meeting for discussion on working schedule between the GDT and taxpayers is organized within 15 calendar days of official application. The maximum period of time for the GDT to evaluate the application is 90 calendar days, with possible extension of 60 calendar days under reasonable circumstances
- Negotiation between tax authorities and tax payers — There is no specific timeline for negotiation process
- Sign-off and implementation of the APA

Expected reaction to OECD Report on BEPS

Vietnam authorities issued Circular 205/2013/TT-BTC, effective 6 February 2014, providing rules on the applicability of tax treaty benefits and general anti-abuse rules (GAAR). The most salient changes from the previous circular are the introduction of GAAR and the assertion and expansion of the beneficial ownership provisions. Generally, a tax treaty benefit will be denied if the main purpose of a transaction or arrangement is tax abusive and/or if a treaty benefit claimant is not a true beneficial owner.

Zimbabwe

Taxing authority and tax law

Taxing authority: The Zimbabwe Revenue Authority (ZIMRA).

The relevant statutes are:

- Income Tax Act [Chapter 23:06]
- Value Added Tax Act [Chapter 23:12]
- Capital Gains Tax Act [Chapter 23:01]
- Customs and Excise Act [Chapter 23:02]

Relevant regulations and rulings

Though Zimbabwe currently has no specific transfer pricing provisions in the Tax Acts, anti-avoidance provisions suffice to ensure tax compliance. The following are the provisions:

- Special provisions relating to persons carrying on business which extends beyond Zimbabwe (Section 19 of the Income Tax Act [Chapter 23:06])
  - Where the trade of any person extends to any country other than Zimbabwe and the Commissioner is satisfied that it is impossible or impracticable to ascertain the taxable income derived by such person from sources in Zimbabwe in the manner otherwise provided in this Act, such person shall submit proposals for the determination of his taxable income in some alternative manner to the Commissioner
  - The Commissioner can accept such proposal and the taxable income determined for any year of assessment shall be deemed to be the taxable income of the respective person for that year
  - In case no such proposals have been submitted, or if the Commissioner is not satisfied with the proposals submitted, the Commissioner may determine the taxable income in a manner that appears to him as the most appropriate, taking into account the circumstances of the case
- Special provisions relating to determination of taxable income of persons buying and selling any property at a price in excess of or less than the fair market price and of non-resident persons exporting products of Zimbabwe without prior sale (Section 23 of the Income Tax Act [Chapter 23:06])
  - The Commissioner may determine the fair market price of either movable or immovable in respect of persons carrying on trade in Zimbabwe where:
    - Property is purchased at a price in excess of the fair market price or
    - Property is sold at less than the fair market price
- Special provisions relating to determination of taxable income in accordance with double taxation agreements (Section 24 of the Income Tax Act [Chapter 23:06])
  - If cross border sales and any other transaction involving a foreign element of management, control and capital entered into and the conditions between the connected parties differ from those which would arise between parties dealing at arm's length, then the Commissioner is empowered to determine on an arm's length the basis of the taxable income on any party carrying on business in Zimbabwe
- Tax avoidance generally (Section 98 of the Income Tax Act [Chapter 23:06])
  - The Commissioner shall determine the liability for any tax and the amount thereof as if the transaction, operation or scheme had not been entered into or carried out, or in such manner as in the circumstances of the case he considers appropriate for the prevention or diminution of such avoidance, postponement or reduction where having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out, the Commissioner is of the opinion that:
    - It was entered into or carried out in a way which would not normally be employed or
    - That it has created rights and obligations which would not normally be created between persons dealing at arm's length

Zimbabwe (continued)

Relevant regulations and rulings (continued)

  - The avoidance or postponement of tax liability or the reduction of the amount of such liability was the sole or one of the main purpose of the transaction, operation or scheme

- Section 16 (1)(q) of the Income Tax Act [Chapter 23:06]
  - Save as otherwise expressly provided in this Act, no deduction shall be made in respect of any expenditure incurred by a local branch or subsidiary of a foreign company, or by a local company or subsidiary of a local company, in servicing any debt or debts contracted in connection with the production of income to the extent that such debt or debts cause the person to exceed a debt to equity ratio of 3 to 1
- Section 16 (1)(r) of the Income Tax Act [Chapter 23:06]
  - In the case of expenditure incurred on general administration and management in favor of a company of which the taxpayer is the subsidiary or holding company or (where the company is a foreign company) the local branch incurred after the commencement of trade or the production of income, any amount in excess of 1% of the amount obtained by applying the following formula:
A – (B + C)
Where:
A represents the total expenditure qualifying for deduction in terms of Section 15
B represents the expenditure on general administration and management paid outside Zimbabwe by such local branch or subsidiary, whether or not such expenditure was incurred by the head office of that foreign company;
C represents expenditure qualifying for deduction in terms of Section (2) of Section 15
- Second Schedule paragraph 4 and paragraph 12
  - Where trading stock or farm trading stock is disposed of or donated in pursuance of a scheme, transaction or operation the sole or main purpose which is to avoid, postpone or reduce tax liability, the Commissioner is empowered to determine the amount such stock would have realized had it been disposed of by sale in the ordinary course of trade
- Determination of fair market price of specified assets (Section 14 of the Capital Gains Tax Act [Chapter 23:01])
  - Where a person purchases a specified asset from any other person at a price in excess of the fair market price or where he sells a specified asset to any other person at a price less than the fair market price the Commissioner may, for the purpose of determining the capital gain or assessed capital loss, as the case may be, of such first-mentioned person, determine the fair market price at which such purchase or sale shall be taken into his accounts or returns for assessment
- Schemes for obtaining undue tax benefits (Section 77 of the Value Added Tax Act [Chapter 23:01])

Whenever the Commissioner is satisfied that, any scheme has been entered into or carried out that has the effect of granting a tax benefit to any person and having regard to the substance of the scheme:

  - Was entered into or carried out by means or in a manner which would not normally be employed for bona fide business purposes, other than the obtaining of a tax benefit
  - Has created rights or obligations which would not normally be created between persons dealing at arm's length
  - Was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit

The Commissioner shall determine the liability for any tax imposed by this Act, and the amount thereof, as if the scheme had not been entered into or carried out, or in such manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such tax benefit.

- Proposed new legislation:
  - Proposal to levy Capital Gains Tax on gains realized upon disposal of immovable property through cession
  - Proposal to introduce legislation to curb evasion of payment of capital gains tax on disposal of property through share transfers
- Transactions between associates, employers and employees
  - In any transaction between associates or between persons who are in an employer-employee relationship, the Commissioner may distribute, apportion or allocate income, deductions or tax credits between the associates or persons as he or she considers necessary to reflect the taxable income that would have accrued to them in an arm's length transaction

Zimbabwe (continued)

Relevant regulations and rulings (continued)

    - The Commissioner may adjust the income accruing from any transfer or license of intangible property between associates or persons in an employer-employee relationship so that it is commensurate with the income attributable to the property
    - In making the adjustment the Commissioner may re-characterize the source of income and the nature of any payment or loss as revenue, capital or otherwise
- Income splitting
    - Where an individual attempts to split income with an associate, the Commissioner may adjust the taxable income of the taxpayer and the associate to prevent any reduction in tax payable as a result of the splitting

OECD Guidelines treatment

Guidance may be sought from the OECD Guidelines where the methods are considered appropriate.

Priorities/pricing methods

The OECD pricing methods and the transaction methods like the CUP and Cost Plus are preferred.

Transfer pricing penalties

There are no specific penalties for transfer pricing but general penalty rules apply, that is, 100% penalties that can be negotiated provided the justifications are accepted by the ZIMRA.

Penalty relief

There is an internal general penalty loading model that is used by the ZIMRA which reduces the 100% and is affected by the level of cooperation of the taxpayer, culpability and/or the gravity of the offence. Therefore penalties can be negotiated provided justifications are available for consideration by the ZIMRA.

Voluntary disclosures and "good faith" do not necessarily lead to penalty relief.

Documentation requirements

There is no specific transfer pricing documentation regulations. But the taxpayer has to show adequate documentation that the prices are at arms' length and services have been performed and/or charges have been incurred. Generally documentation including information other than financial information on prices and pricing policy is to be provided.

Documentation deadlines

There are no documentation deadlines. However, in the event of a request by the ZIMRA, time limits are generally specified for the submission of documents.

Statute of limitations on transfer pricing assessments

No specific transfer pricing assessments and limits thereto, but the general assessment limits apply, that is, six years from the date of assessment where full disclosure was made in the tax return and accounts, or for infinite period where there is misrepresentation or fraud or willful non-disclosure.

Return disclosures/related party disclosures

Not requested in the tax return.

Zimbabwe (continued)

Transfer pricing-specific returns

There is currently no separate return for transfer pricing and/or for related party transactions.

Frequency of tax audit and transfer pricing scrutiny by the tax authority

There is currently increased focus on transfer pricing by Revenue Authorities including the ZIMRA.

Evidence on prices or margins that are at arm's length, requirements on disclosure of tax uncertainties/reserves are thus increasing. A Anti-avoidance provisions are used in Zimbabwe, however it involves comprehensive negotiation and time efforts with the tax authorities; the ZIMRA is still testing its position and arguments. Therefore, it is difficult to accord risk points with certainty.

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 medium.

APA opportunity

Currently, APAs are not available in Zimbabwe. However, the Commissioner-General may make advance tax rulings on any provision of the Capital Gains Tax Act [Chapter 23:01]; Customs and Excise Act [Chapter 23:02]; Income Tax Act [Chapter 23:06]; Value Added Tax Act [Chapter 23:12] whether on his or her own initiative or on application by any person interested in a transaction that is or may be liable to tax. These have a binding effect.

The Commissioner-General may also issue nonbinding private opinions to a person regarding the tax treatment of a particular set of facts and circumstances, or a particular transaction. A nonbinding private opinion may not be cited in any proceeding before the Commissioner-General or the courts, other than a proceeding involving the person to whom the nonbinding private opinion was issued.

Expected reaction to OECD Report on BEPS

There has been no reaction up until January 2014. But as Zimbabwe is a member of the African Tax Administration Forum (ATAF), the ZIMRA may uphold the ATAF's reactions.

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