



Global Business Tax Transfer Pricing Alert | Belgium

Key features of 2023 transfer pricing audit wave

The Belgian tax authorities' national transfer pricing (TP) audit team has launched the 2023 TP audit wave. Initial indications are that the 2023 wave will extend over several months, even though some taxpayers may have already received a TP audit questionnaire.

The 2023 TP audit questionnaire is generally aligned with that of 2022; however, additional questions specific to the taxpayer may also be included. A key change for 2023 is the extended deadline of 20 days to request a pre-audit meeting, and the Belgian tax authorities have emphasised the importance of these meetings in refining the scope of the TP audit.

This alert summarises the key aspects of the 2023 TP audit wave and the upcoming changes in future years.

Selection process includes focus on noncompliance with TP reporting requirements

Companies will be selected for the 2023 TP audit wave based on the outcome of a risk assessment analysis, performed by the tax authorities' "MANTRA" software.

Although the criteria used to perform the risk assessment remain confidential, it would be reasonable to assume that indicators such as volatile sales or profit margins, structural loss-making positions, significant carry forward losses, high debt to equity ratios, important yearend adjustments, the presence of a permanent establishment, or business restructurings, among others, would lead to an increased likelihood of being subject to a TP audit.

Additionally, compliance with Belgian documentation requirements (i.e., local file form, master file form, and country-by-country (CbC) report or CbC notification obligation) is taken into account in the selection process.

Noncompliance with these TP documentation requirements will substantially increase the likelihood of selection for a TP audit. Therefore, companies have a higher risk of being selected where:

- **No TP form has been filed:** Belgian entities required to file a TP form but which fail to do so will be particularly likely to be considered for selection for the coming TP audit wave.
- **An incomplete TP form has been filed:** The TP form does not include all the required information (e.g., only part A of the local file form has been completed when the entity also was required to complete part B).
- **An incorrect TP form has been filed:** The TP form has been filed with incorrect information. Other sources of information submitted by the company or publicly available, such as corporate income tax returns, annual accounts, annual reports, etc., may be used to check the accuracy of the information provided in the TP forms.
- **Late filing of the TP form:** Applicable deadlines are not met.

Noncompliance with the TP documentation requirements also may trigger penalties ranging from EUR 1,250 to EUR 25,000.

The Belgian tax authorities have already started to send out the first penalty notifications for late submission or failure to submit TP forms (see our [Tax Alert](#) of 13 October 2022).

In light of the above, companies are strongly recommended to check that they have complied with all relevant TP documentation requirements and compliance obligations. However, it should be noted that this does not preclude companies that do not reach documentation thresholds from receiving a request for a pre-audit meeting or a TP audit questionnaire.

Changes in the TP audit process

As stated above, a major change for the 2023 TP audit wave is the extension to 20 days, from 10 days, for the national TP audit team to request the pre-audit meeting.

The objectives of the pre-audit meeting are to provide the TP audit team with an overview of how the company operates within the group and from a TP perspective, allow for a potential onsite visit, and answer any questions the taxpayer may have in view of the upcoming TP audit.

In the 2023 version of the TP audit questionnaire, the Belgian tax authorities have noted that holding a pre-audit meeting allows them to simplify the questionnaire, and the expected answers. Taxpayers may wish to proactively organise a pre-audit meeting as it can reduce the workload involved in responding to the questionnaire, and it may also provide the opportunity to clarify any misunderstandings on either side. This meeting may also be particularly useful in the context of the seventh question on the questionnaire, related to the segmentation of the taxpayer's profit and loss (P&L) account by type of activity. If not already available, the preparation of this analysis can be onerous for the taxpayer, and it may be valuable to receive preliminary guidance from the TP audit team on how to correctly segment the P&L.

The average TP audit takes between seven and 18 months, depending in part on whether the required TP documentation is readily available. In this respect, it is crucial to ensure consistency between past or pending TP reporting to the Belgian tax authorities (i.e., the local file form, master file form, or CbC report) and the information provided to tax officials during the 2023 audit. Careful preparation for the pre-audit meeting is essential as the meeting will have an impact on the entire audit process and should also enable the scope of the

customised TP audit questionnaire to be narrowed down, depending on the type of information provided.

Tax adjustments

Under measures providing for effective cash taxation further to tax audit adjustments, no tax attributes (including current year and brought forward tax losses and dividends received deduction (DRD), the investment deduction, the innovation income deduction (IID), and the notional interest deduction (NID)) may be offset against the additional taxable base resulting from an adjustment, other than current year DRD that has not yet been fully claimed. The application of the measure is limited to situations where the adjustments imposed by the tax authorities have resulted in an additional tax liability of at least 10%.

Belgian law also provides for adjustments for abnormal or benevolent advantages received in particular situations (articles 79 and 207 of the Belgian Income Tax Code). A Belgian company that receives (directly or indirectly) an abnormal or benevolent advantage from a company to which it is directly or indirectly related, may not use any current year and brought forward tax losses, or apply the participation exemption, investment deduction, IID, or NID against the taxable income arising from that advantage.

The risks are significant because the adjustments may sometimes result in double economic taxation of the same income for two related entities in two different jurisdictions.

Increased number of “unsettled” cases

Whereas previously a majority of TP audit cases in Belgium resulted in a settled outcome, an increasing number of audit cases have seen the Belgian tax authorities unwilling to alter their position or maintaining a proposed TP adjustment, triggering the start of the administrative appeal procedure.

The taxpayer then has the option to submit a formal tax appeal before the Belgian courts, and/or to initiate the mutual agreement procedure (MAP) available under Belgium’s tax treaties. A MAP is intended to eliminate double taxation, including as a consequence of a TP adjustment. These procedures can be undertaken simultaneously, and taxpayers should evaluate the benefits of each course of action based on the circumstances of their particular case.

Future developments

Despite the fact that some taxpayers have already received a TP audit questionnaire, not all affected taxpayers have been contacted yet, as the 2023 TP audit wave is expected to last for several months. It is also important to note that, based on the law of 20 November 2022, amendments to the investigation, assessment, objection, and retention periods entered into force as from tax year 2023 (i.e., financial years closing as from 31 December 2022). The current three-year investigation period is extended to six years when the tax return includes certain international elements, such as transfer pricing documentation (see our [Tax Alert](#) of 13 October 2022).

Deloitte seminars

Deloitte Belgium is running a number of in person TP controversy seminars in our offices in Liège on 8 February 2023, Antwerp on 9 February 2023, Gent on 10 February 2023, and Gateway (Zaventem) on 15 February 2023 at which Deloitte specialists will provide more information on the recent and upcoming changes to the TP audit procedure and discuss potential appropriate strategies to adopt when facing a TP audit.

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