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Tax

New Transfer Pricing Requirements in China.

Frequently Asked Questions

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The new Enterprise Income Tax Law ("EIT Law"), its Implementation Rules, and the recently published Implementation Regulations for Special Tax Adjustments ("STA Rules"), effective 1 January 2008, have formalised the long-awaited contemporaneous transfer pricing documentation requirements in the People's Republic of China. 2008 was the first year for which contemporaneous transfer pricing documentation was required as part of an enterprise's Chinese transfer pricing compliance requirements. In this sense, 2008 was a landmark year in the history of Chinese transfer pricing.

As we embark on this new chapter of transfer pricing administration in China, we provide our responses to a list of frequently asked questions focused on the changes to China's transfer pricing regime. We hope this summary will help to address your concerns and guide you along the right path to managing your Chinese transfer pricing risks going forward.

1. How have the EIT Law, its Implementation Rules and STA Rules changed the transfer pricing landscape in China?

China's transfer pricing regime has been strengthened with the enactment of the EIT Law and its Implementation Rules. Chapter 6 of the EIT Law, entitled 'Special Tax Adjustments', contains specific provisions related to transfer pricing. The new provisions and the clarifications provided in the Implementation Rules bring China's transfer pricing regime closer to international standards by:

- Providing additional guidance on the acceptable transfer pricing methods by: (i) reducing uncertainty in the application of the traditional transactional methods; and (ii) specifically recognising the transactional net margin method ("TNMM") and profit split method as reasonable methods;
- Emphasising the use of advanced pricing arrangements ("APAs") as an administrative tool and introducing concepts such as thin capitalisation, cost sharing agreements ("CSA"), controlled foreign corporations ("CFC"), and general anti-avoidance rules ("GAAR");
- Establishing a requirement for taxpayers to prepare and maintain contemporaneous transfer pricing documentation; and
- Expanding the scope of China's transfer pricing regime to include domestic enterprises, in addition to foreign invested enterprises ("FIEs") and foreign enterprises ("FEs").

Furthermore, the provisions of the EIT Law and its Implementation Rules will facilitate the local and national tax authorities' enforcement of transfer pricing regulations by:

- Empowering the tax authorities to make adjustments to a taxpayer's taxable income when: (i) transactions do not comply with the arm's length principle; (ii) incomplete or false information is provided; or (iii) transactions are executed without a bona fide commercial purpose;
- Introducing an interest levy and a penalty regime on underpaid tax for transfer pricing adjustments; and
- Providing taxpayers with an incentive (by means of reduced penalty interest) to maintain adequate contemporaneous transfer pricing documentation.

To provide further administrative guidance in relation to Chapter 6 of the EIT Law and its Implementation Rules, the State Administration of Taxation ("SAT") published the STA Rules as set out in notice, Guo Shui Fa [2009] No.2, dated 8 January 2009. These STA Rules, effective 1 January 2008, represent the most important piece of transfer pricing legislation to consider when determining what a Chinese enterprise's transfer pricing compliance requirements are as of 2008. In addition to providing an outline to both taxpayers and tax authorities on their respective roles and responsibilities, the STA Rules provide detailed guidance on the following topics:

- Specific scope of the transfer pricing rules;
- Contemporaneous documentation and disclosure requirements;
- Audit and adjustment procedures; and
- Transfer pricing tools such as APAs and CSAs.

In light of the SAT's and local tax bureaus' increasing transfer pricing resources and technical expertise, we expect transfer pricing audits and APA negotiations in China to become more sophisticated in the future. In addition, with the introduction of the GAAR provisions, conducting adequate function and risk analyses has become even more important when undertaking tax planning.

2. What constitutes a related party in China?

According to Article 9 of the STA Rules, related parties or 'associated enterprises' as mentioned in Article 109 of the Implementation Rules of the EIT Law include situations where:

- One party directly or indirectly holds a total of 25 percent or more of another party's shares; or a third party holds, directly or indirectly, 25 percent or more of the shares of both parties. Where an entity owns more than 25 percent of an intermediary entity, its indirect ownership of the lower tier entity will be deemed to be the same as the intermediary's direct ownership of the lower tier entity;

- Debts owed by one enterprise to another enterprise (other than an independent financial institution) reach 50 percent of the enterprise's capital, or 10 percent or more of the total debts owed by one enterprise is guaranteed by another enterprise (other than an independent financial institution);
- More than half of one party's senior management personnel (including the members of the board of directors and managers), or at least one member of the board of directors who is able to exert control over the board of directors is appointed by another party; or two parties with more than half of their senior management personnel (including the members of the board of directors and managers), or at least one senior member of the boards of directors who is able to exert control over the board of directors is appointed by the same third party;
- More than half of one party's senior management personnel (including the members of the board of directors and managers) concurrently hold senior management positions (including the members of the board of directors and managers) of another party, or at least one senior member of the board of directors who is able to exert control over the board of directors concurrently is a senior member of the board of directors of another party;
- One enterprise's normal production and operation activities are dependent on intangibles licensed from another enterprise (including industrial property rights or patented technology);
- Purchases or sales by one enterprise are under the control of another enterprise;
- One enterprise's provision or receipt of services is primarily determined by another enterprise; and
- One enterprise has actual control over the other enterprise's production, operation, and trading activities through relationships associated with other interests (including family relationships).

As can be seen, the STA Rules put great emphasis on control when defining associated enterprises. In addition, due to the prescribed indirect ownership calculation method, minority-owned joint ventures, which would typically be considered third parties, might be treated as associated enterprises for tax purposes in China.

3. What are the new transfer pricing documentation requirements in China?

Enterprises engaged in related party transactions in China have the following three types of transfer pricing documentation requirements:

- Annual income tax filing disclosures;
- Contemporaneous transfer pricing documentation; and
- Provision of other relevant transfer pricing documentation upon request by the tax authorities.

Prior to 2008, FIEs and FEs were required to disclose information about their related party transactions in their annual income tax returns by submitting Form 13-A or Form 13-B. The STA Rules substantially expand the transfer pricing filing requirement for all enterprises who are taxed based on an actual profit basis by introducing nine annual income tax filing disclosure forms, one of which also includes a disclosure of whether contemporaneous transfer pricing documentation has been prepared by the enterprise to support the transfer pricing policies it used during the tax year. These forms, along with the annual income tax return, must be filed within five months after the end of the tax year, i.e., by 31 May.

According to the STA Rules, contemporaneous transfer pricing documentation should include:

- **Organisational Structure** - including the organisational structure of the group that the taxpayer is affiliated to, records regarding any development or changes in the relationships between the taxpayer and associated enterprises, information on associated enterprises including applicable tax rates and incentives, and the associated enterprises that exert direct influences on the inter-company pricing;

- **Overview of Business Operations** - including major economic and legal issues affecting the taxpayer and the industry such as a summary of the enterprise's development, summary of the industry's development, business strategy, industrial policy or industrial restrictions; description of the group's supply chain arrangement and the position that the taxpayer is located in the chain; summary showing percentage of enterprise's revenues and profits by business line; market and competition analysis; information regarding the functions, risks, and assets of the enterprise (with a specific requirement to prepare an official 'Functional and Risk Analysis' form) and the group's consolidated financial report that was prepared according to the group's year end;
- **Related Party Transactions** - including the types, participants, timing, amounts, currency and contractual terms of the related party transactions; description of the transactional model, terms applied and any changes to the model, operational flows including information on product and cash flows and flow comparisons with transactions with unrelated parties; intangible assets utilised and their impact on pricing policies; copies of the inter-company agreements and their execution status; analysis of the main economic and legal factors affecting the pricing of the related party transactions; and segmented financial analysis (with a specific requirement to prepare an official 'Annual Financial Analysis of Related Party Transactions' form);
- **Comparability Analysis** - including factors considered in performing the comparability analysis, information related to the functional profiles of the comparable companies, description of the comparable transactions, source, selection criteria and rationale for selection of comparables, and rationale for use of adjustments on the financial data; and

- **Selection and Application of Transfer Pricing Methods** - including rationale and support for selection of transfer pricing method, whether the comparable data can support a reliable application of the selected transfer pricing method, assumptions and judgments when determining comparable prices or profits, determination of the comparable prices or profits and justification of arm's length price or profit of the Chinese enterprise.

For companies required to prepare contemporaneous transfer pricing documentation according to the STA Rules, the documentation must be prepared by 31 May of the year following the year in which the related party transaction takes place, maintained for 10 years, and submitted to the local tax bureau within 20 days upon request. Failure to submit the required documentation, or the submission of incomplete or false information, will entitle the tax authorities to assess the taxpayer's taxable income based on a "reasonable" deemed income approach. As a transitional year, the deadline for contemporaneous transfer pricing documentation for 2008 will be 31 December 2009.

In addition to the documentation requirements described above, taxpayers may also be required to prepare contemporaneous documentation related to thin capitalisation and CSAs to support the arm's length nature of these transactions. During the CSA implementation years, contemporaneous documentation for CSAs will need to be submitted by 20 June of the following year.

4. Who is required to prepare contemporaneous transfer pricing documentation and in what language must the documentation be submitted?

According to the STA Rules, enterprises must prepare contemporaneous transfer pricing documentation as described above unless they meet one of the following exemption criteria:

- The annual amount of related party purchase/sales is less than RMB200 million (for toll manufacturing activities, the amount is calculated based on the import/export customs declaration prices) and the annual amount of other related party transactions is less than RMB40 million (for related party financing, the amount is calculated based on the interest received/paid). The determination of the abovementioned related party purchase/sales or other transactions should exclude those amounts already covered by CSAs or APAs effective in that year;
- Related party transactions are covered by an APA; or
- Foreign shareholding in the enterprise is less than 50 percent and the enterprise only transacts with domestic related parties.

However, notwithstanding the contemporaneous transfer pricing documentation requirement, all enterprises are required to abide by the arm's length principle in determining their transfer pricing policies and, upon audit, will be required to provide relevant documentation to the tax authorities within the time frame specified by the tax authorities.

Contemporaneous documentation must be submitted in Chinese.

5. Will the transfer pricing documentation requirements apply to branches and representative offices?

The STA Rules provide that enterprises which are taxed on an actual profit basis, including those non-resident enterprises with establishments in China which are taxed on actual profit basis, need to fulfill the transfer pricing annual filing disclosure requirements. Although it is not clearly stated in the STA Rules whether the contemporaneous documentation requirements would apply to the above non-resident enterprises, we believe the policy intent is to include these non-resident enterprises into the scope of the contemporaneous documentation requirements. It appears, however, that representative offices that are taxed on a deemed profit basis would not be subject to the above disclosure and documentation requirements.

6. What documentation strategy should multinational corporations ("MNCs") with multiple subsidiaries in China employ?

Because the contemporaneous transfer pricing documentation requirements will need to be satisfied on a stand-alone basis for each enterprise, transfer pricing compliance for MNCs with multiple subsidiaries in China would, at first glance, appear to be a daunting and almost impossible task. One recommended approach for MNCs is a 'phased approach', whereby the MNC first conducts an initial high level transfer pricing review to identify issues and to establish the degree of potential exposure for each subsidiary and each type of transaction. A consistent and efficient documentation strategy can then be developed to categorise the entities, share economic analyses, and identify possible synergies for functional, risk, and industry analyses. A master documentation file covering the major types of transactions may also be developed first before being rolled out to each individual entity in the group.

7. What are the acceptable transfer pricing methods in China and is there a hierarchy of methods?

According to the Implementation Rules of the EIT Law, the reasonable methods for transfer pricing analysis include:

- Comparable uncontrolled price ("CUP") method;
- Resale price method ("RPM");
- Cost-plus method;
- Transactional net margin method ("TNMM");
- Profit split method ("PSM"); and
- Other methods that comply with the arm's length principle.

The Chinese transfer pricing regime follows a 'best method' approach, in which a taxpayer must select the most appropriate method based on the nature of the transaction and the information available. Companies should assess the other reasonable methods and explain why they are rejected. The methods must be applied on a transactional basis rather than on an 'entity' basis unless the transactions are similar and can be aggregated.

The STA Rules also provide guidance on the selection and applicability of the methods. For each method, the STA Rules specify various factors that should be taken into account when selecting and applying the reasonable methods. If significant differences exist, then reliable adjustments should be made, but if reliable adjustments are not feasible, then another method should be selected.

8. May capital adjustments be used in China?

In July 2005, the SAT issued Guo Shui Han [2005] No. 745 ("Circular 745") indicating that local tax authorities should not apply capital intensity adjustments in transfer pricing audit investigations, negotiations of APAs, and in other transfer pricing comparability analyses unless certain conditions are met and approvals are obtained from the SAT.

Article 38 of the STA Rules follows this principle and states that when the tax authorities analyse and evaluate an enterprise's related party transactions, differences in operating profits due to variances in operating assets between the tested enterprise and the comparable companies should, in principle, not be adjusted. If an adjustment is necessary, the SAT's approval must be obtained.

9. Is the use of an arm's length range applicable in China?

We have observed in numerous audit cases in China that the tax authorities will adjust the profit of the audited enterprise to at least the median of the range established by comparables when the enterprise has a profitability lower than the range and a transfer pricing adjustment is assessed. In some cases, adjustments were made to the median level even when the audited enterprise's profitability fell within the range but below the median.

Article 41 of the STA Rules states that during an audit the tax authorities will, in principle, make a transfer pricing adjustment if the enterprise's profit level is lower than the median of the inter-quartile range established by comparables.

However, according to Articles 52(6) and 56(3) of the STA Rules, for purposes of implementing an APA, the comparable "range" should be determined and adjustments should be made to ensure that the results of the enterprise are within the "range".

10. Are there any restrictions on whether captive contract manufacturers can make a loss in China?

Article 39 of the STA Rules reiterates the position previously taken by Guo Shui Han [2007] No. 236 ("Circular 236") that a captive contract manufacturing entity must earn a profit that is reasonable given the functions and risks undertaken. In addition, the STA Rules state that enterprises with only a manufacturing function and bearing limited risks should not bear losses arising from business issues such as poor management decisions, insufficient capacity, product obsolescence, etc. It is the SAT's view that these enterprises should maintain a stable level of profit, and that the risk of volume shortfalls should not be borne by a captive contract manufacturer if it solely takes orders from related parties and manufactures for related parties.

11. Which companies are likely to be targeted for transfer pricing audits in China?

The STA Rules outline various types of enterprises as targets for transfer pricing audits. These targets include taxpayers that:

- have large amounts of related party transactions or multiple types of related party transactions;
- have long-term losses, marginal profits or fluctuating profits;
- have profit levels lower than the industry;
- have profit levels that obviously do not comply with the functions they perform and the risks they assume;
- have transactions with related parties registered in tax havens;
- fail to submit annual filing information on their related party transactions or fail to prepare, maintain, and submit contemporaneous transfer pricing documentation based on the STA Rules; and
- obviously disobey the arm's length principle.

The statute of limitations for transfer pricing audits in China is 10 years.

12. What are the transfer pricing audit procedures in China?

Chapter 5 of the STA Rules sets out the transfer pricing audit procedures in China, which are summarised below:

- The local tax authorities will conduct a desktop analysis to select audit targets based on historical tax returns, related party transaction annual filing forms and other tax related documents. An enterprise may provide contemporaneous transfer pricing documentation during the desktop analysis;
- The tax authorities will conduct a field audit of the selected audit target which will include interviews, reviews of the accounting books and site visits. When conducting a field audit, the audit team is required to show a 'Tax Inspection Certificate' and issue a 'Notice on Tax Audit';
- After the audit targets are selected, the tax authorities will have the right to require that the enterprise, its associated parties and comparable third party enterprises provide relevant documents. The tax authorities will make such requests by issuing a 'Tax Matter Notice';
- When conducting a transfer pricing audit, the tax authorities will analyse and evaluate whether the enterprise's related party transactions comply with the arm's length principle. Both public and non-public information may be used by the tax authorities in their comparability analysis;
- If the enterprise's related party transactions are proved to comply with the arm's length principle, the tax authorities will issue a 'Notice on Special Tax Audit Conclusion';
- If the enterprise's related party transactions are not proved to comply with the arm's length principle, the tax authorities will draft a preliminary adjustment plan based on calculations, verifications and their comparability analysis for review by the relevant internal tax department or deliberation group and for negotiation with the enterprise;
- The tax authorities will issue a 'Preliminary Special

Tax Audit Adjustment Notice' in accordance with the reviewing decision. If the enterprise disagrees with the preliminary adjustment opinion, it should inform the tax authorities in writing within seven days of receiving the 'Preliminary Special Tax Audit Adjustment Notice'. The tax authority will negotiate and deliberate again after receiving the enterprise's opinion;

- The tax authorities will determine the final adjustment and issue a 'Special Tax Audit Adjustment Notice' to the enterprise;
- After receiving the 'Special Tax Audit Adjustment Notice', the enterprise should pay the tax and interest due within the specified period. In the event of a disagreement between the tax authorities and the enterprise about the adjustment, the enterprise may choose to apply for an administrative appeal or file a lawsuit to the People's Court;
- After transfer pricing adjustments have been applied to an enterprise, the tax authorities will implement a follow-up supervision period of five years following the last year assessed, during which contemporaneous transfer pricing documents for each of the supervised years would need to be filed by 20 June of the following year.

13. What information will the Chinese tax authorities request during a transfer pricing audit?

Although the tax authorities have a standard set of inquiry forms, including functional and risk analysis and financial analysis forms, to identify the basic operational and financial information of an audited enterprise at the start of a transfer pricing audit, in practice the information requested during the later stages of an audit will largely depend on the experience and judgment of the official at the local tax bureau in charge. Generally, the following information may be requested:

- Contemporaneous transfer pricing documentation;
- Information on third party resale prices of products that are exported to overseas related parties;
- Information from overseas related parties and information from comparable third parties;

- Information on the expense and cost allocation between different types of transactions;
- Detailed evidence of the pricing policies with related parties, e.g., contracts and invoices; and
- Additional information depending on the taxpayer's industry and other factors.

The local tax bureau in charge will usually request information related to the investigation period, but it has discretion to extend the information request to the previous 10 years, which is the statute limitation for transfer pricing adjustments as stated in the Implementation Rules.

During a transfer pricing audit, the audited enterprise will be required to submit the requested documents within the period specified by the tax authorities, with a possible extension of a maximum of 30 days upon approval from the tax authorities. The tax authorities can also request information from comparable third parties and related parties during audits. For requests to related parties and comparable third parties, required documents must be submitted within the period as agreed with tax authorities. The maximum submission deadline will be 60 days. All documents for submission should be in Chinese and overseas information may need to be notarised.

14. What is the penalty for non-compliance?

According to the STA Rules, if a taxpayer fails to submit the required forms on its related party transactions with its annual tax return to the tax authorities, or fails to maintain relevant contemporaneous transfer pricing documents, the tax authorities could order it to rectify the situation within a certain time limit and may impose a fine of up to RMB10,000.

If a taxpayer refuses to provide documents on its related party transactions, provides false or incomplete materials, or provides untruthful reporting, the tax authorities could order it to rectify the situation within a certain time limit and may impose a fine of up to RMB50,000. In these situations, the tax authorities have the right to deem the enterprise's tax based on "reasonable" methods.

When a special tax adjustment is imposed, interest will be levied. According to the Implementation Rules of the EIT Law, interest will be computed using the RMB lending rate (published by the People's Bank of China) plus a 5 percent penalty interest rate. Interest will be computed on a daily basis on the amount of underpaid tax and this amount will not be tax deductible. The 5 percent penalty interest may be waived when the enterprise has prepared and submitted its contemporaneous transfer pricing documentation and other requested documents in a timely manner. The penalty interest will apply even if the taxpayer acted in good faith but mistakenly believed that it was exempted from the contemporaneous documentation requirement.

Due to the short deadlines and potentially large interest payments on reassessments, taxpayers are advised to manage their transfer pricing risk exposure proactively by preparing contemporaneous transfer pricing documentation in a timely manner to ensure compliance with the arm's length principle and the related burden of proof.

15. Are corresponding transfer pricing adjustments allowed?

The STA Rules provide a corresponding adjustment regime to eliminate double taxation issues.

If a corresponding adjustment involves an overseas related party of the audited taxpayer, the tax authorities of the other country would have to agree to any requested corresponding transfer pricing adjustment. If a tax treaty is in effect between China and the other country, the treaty's mutual agreement procedures ("MAP") provides a forum for the competent authorities of each country to attempt to resolve the double taxation issue. While every treaty is governed by its own provisions, taxpayers generally have three years from the date they receive an adjustment notice to submit a written request to the SAT, as well as the local tax authorities, to commence a MAP. MAPs can be time-consuming and are not widely used in China.

Regardless of whether a MAP is initiated, taxpayers in China must pay the taxes assessed by the local tax bureau in charge in the final assessment notice within the timeframe specified. A surcharge will be levied on a daily basis for any late payments.

16. What are the general advanced pricing arrangements ("APAs") regulations in China?

The STA Rules provide considerable guidance for APAs, implying the SAT's genuine desire that APAs be used as a viable administrative tool by both taxpayers and tax authorities to ascertain transfer pricing issues on a go-forward basis. APAs can be concluded unilaterally, bilaterally or multilaterally in China and related party transactions covered under an effective APA are exempted from the aforementioned contemporaneous documentation requirement. The APA application process covers six procedural phases including: pre-filing meetings, formal application, tax authorities' review and evaluation, negotiations, signing of the agreement, and monitoring and execution.

In general, APA candidates must meet the following requirements:

- Annual amount of related party transactions exceeds RMB40 million;
- Has fulfilled the obligations of declaring its related party transactions in its annual tax return; and
- Has prepared, maintained, and provided contemporaneous transfer pricing documentation in accordance with the provisions of the STA Rules.

The STA Rules provide that taxpayers can conduct APA pre-filing meetings on a no-name basis. The APAs can cover a period of three to five years starting from the year after the application year, and upon approval, the same methodologies agreed in the APA may be applied to prior years including the application year.

Although the SAT must approve all APAs, because the local tax bureaus are involved in the application and discussion process, taxpayers should consider the motivation and technical knowledge of the officials at the local tax bureau in charge before initiating an APA application. In addition, Guo Shui Han [2005] No. 1172 ("Circular 1172") encouraged local tax bureaus to focus on APA quality rather than the number of APA cases and to first consider taxpayers that have either been recently audited, or that are in an industry familiar to the tax bureau for entry into the APA programme.

For taxpayers seeking to apply for an APA, a first preparatory step should be to conduct a due diligence review of their transfer pricing policies over the most recent three fiscal years because information related to this period will likely be requested.

17. Are Cost Sharing Agreements ("CSAs") applicable in China?

Before the enactment of the EIT Law, CSAs were generally not allowed in China and the SAT only approved a couple of isolated and discretionary cases under individual rulings.

The EIT Law formally adopts CSAs as an applicable transfer pricing tool for allocating costs between associated enterprises for the development of intangible property and shared services. However, according to the STA Rules, CSAs for shared services will be applicable only for group purchase and marketing activities. The STA Rules provide that CSAs must be filed with the SAT through the local tax bureau within 30 days of the date when the agreement is reached. Local tax authorities will need to obtain approval from the SAT when determining whether a CSA is consistent with the arm's length principle. Costs incurred would not be deductible when:

- The CSA does not have a bona fide commercial purpose or economic substance;
- The CSA does not comply with the arm's length principle;
- The costs allocated are not commensurate with the benefits;
- The enterprise has not filed or prepared, maintained, and provided contemporaneous documents for the CSA in accordance with the STA Rules; and
- The enterprise will not be in operation for at least 20 years from when the CSA is signed.

During CSA implementation period, contemporaneous documentation specific to the CSA for each covered year must also be prepared and submitted to the tax authority by 20 June of the following year. CSAs may be reached in the form of an APA, however, the CSA documentation requirements will continue to apply, even if it was reached via an APA.

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