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Global Transfer Pricing

Arm's Length Standard

Global views within reach.

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Germany's draft tax law includes CbC measures

Germany's Ministry of Finance on June 1 issued a draft tax law that includes measures based on the recommendations in the OECD's final reports on the base erosion and profit shifting (BEPS) initiative and the amendments to the EU administrative cooperation directive to introduce country-by-country (CbC) reporting.

The draft law – *Draft law on the implementation of amendments to the EU Mutual Assistance Directive and other measures against base erosion and profit shifting* – also includes non-BEPS-related measures in response to judicial developments in cases where Germany's Federal Tax Court (BFH) decision went against the views of the tax authorities. The measures in the draft law generally were anticipated.

The draft law also would implement automatic information exchange procedures regarding advance cross-border tax rulings, to comply with a new EU directive (and would introduce a six-year retention period for information required to be exchanged under the Foreign Account Tax Compliance Act Agreement with the United States).

The CbC reporting rules would apply for fiscal years beginning after December 31, 2015 (except for the "secondary mechanism," which would apply only for fiscal years beginning after December 31, 2016).

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Proposed changes

CbC reporting: The proposed CbC rules would require multinational companies with consolidated group turnover of EUR 750 million or more to file a CbC report. The requirements for the report would be based on the recommendations under Action13 of the BEPS initiative and the EU CbC directive.

In line with the report on Action 13, the draft law would require a CbC report consisting of three parts: (i) an overview of the aggregate allocation of income, taxes, and business activities (including capital, assets, and employees) to each tax jurisdiction; (ii) a list of all "constituent entities" of the multinational group included in the aggregation for each tax jurisdiction; and (iii) additional information that is necessary to understand the information provided for the first two parts. The draft law also includes rules for the determination of a "surrogate parent entity" and a "local entity," for purposes of the CbC reporting rules. Certain information regarding an entity's status as an ultimate parent entity, surrogate parent entity, or local entity would have to be included in the annual tax return of the respective entity.

CbC reports would have to be filed electronically with the federal tax office no later than 12 months after the end of the relevant fiscal year. The draft law provides for a 15-year retention period for the data, which the federal tax authorities would have to comply with.

The draft law also would introduce a mechanism for the automatic exchange of CbC reports between governments.

Master file reporting obligation: The OECD recommendations under BEPS action 13 include the introduction of "master file" and "local file" reporting requirements for transfer pricing documentation purposes. An obligation for companies to prepare a local file already is part of German tax law in some cases; the draft law proposes only minor changes.

The draft law would introduce a new obligation to prepare a master file for certain German taxpayers that are part of a multinational group with consolidated turnover of at least EUR 100 million in the preceding year. However, as with the local file, the master file would have to be presented only upon request from the tax authorities in case of a tax audit. The information would have to be provided to the tax authorities within 60 days of the request (30 days for extraordinary business transactions).

Treaty override provision for the application of the arm's length principle: In 2014, the BFH held that Germany's tax treaties can limit Germany's taxing rights based on section 1(1) of the Foreign Tax Act (FTA) if the treaty contains a provision equivalent to the associated enterprises article (article 9) in the OECD model treaty and if the prices paid between the entities involved are at arm's length. The draft law proposes to amend section 1(1) of the FTA to eliminate this limitation. Germany's constitutional court recently held that the legislature can enact tax treaty override provisions that aim to secure Germany's taxation rights.

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Denmark finalizes implementation of OECD three-tiered approach to transfer pricing documentation

The Danish tax authorities (SKAT) on May 4 issued an executive order that implements the transfer pricing documentation recommendations from Action 13 of the OECD's base erosion and profit shifting (BEPS) Action Plan, including the master file/local file requirements.

Since the release of the final OECD BEPS reports in October 2015, Denmark has worked on implementing the three-tiered approach to transfer pricing documentation described in Action 13 into Danish legislation.

The Danish parliament on December 18, 2015, approved new transfer pricing legislation introducing country-by-country (CbC) reporting requirements. The new Danish CbC reporting requirements apply as of January 1, 2016. In addition to the new act, a draft executive order on CbC reporting was submitted for consultation on April 6, 2016. Once finalized, the draft executive order will specify certain technical details, as well as provide further details on the information and format to be contained in the CbC report.

Parallel to the implementation of the CbC reporting requirements, Denmark has been working on an update of its transfer pricing documentation requirements. The May 4 executive order implements the transfer pricing documentation recommendations from BEPS Action 13. As of FY 2016, Danish companies subject to the transfer pricing documentation requirements will have to prepare a master file and a local file.

Together, the new Danish CbC reporting requirements and the new transfer pricing documentation requirements effectively finalize the Danish implementation of the OECD's three-tiered approach.

Danish companies subject to the new transfer pricing legislation should expect a significant increase in compliance costs, compared to costs under the prior legislation.

Country-by-Country Reporting

According to the new Danish CbC reporting requirements, Danish companies are obligated to file a CbC report if the following conditions are met:

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- The multinational group's consolidated turnover exceeds DKK 5.6 billion (approx. EUR 750 million) in the financial year preceding the reporting year of the CbC report; and
- The group's ultimate parent company is resident in Denmark for tax purposes.

If the Danish company is not the ultimate parent company or not a tax resident of Denmark, the company need not prepare a CbC report under the Danish legislation. However, if the group's ultimate parent company is resident in a country that does not have a CbC reporting requirement, the rules may apply nevertheless.

The Danish CbC reporting requirement provides that Danish companies that are not the ultimate parent company shall prepare a CbC report if the Danish company is a tax resident of Denmark and one or more of the following conditions are met:

- The group's ultimate parent company is not required to file a CbC report in the country where it is resident for tax purposes;
- The CbC report is not automatically exchanged with Denmark through a specific agreement between the Danish competent authority and the jurisdiction of the ultimate parent company (even if a double tax treaty or similar agreement may exist); or
- The Danish company has been notified by the Danish tax authorities of a "systemic failure" by the ultimate parent company's country of residence to provide the CbC report to the Danish tax authorities.

In addition, the Danish regulations include a final exemption. A Danish company that is not the ultimate parent company, but is required to provide a CbC report because of one of the conditions listed above may not be required to provide the CbC report if it notifies the Danish tax authorities that another group company has been appointed surrogate parent company.

If no exemption applies, the CbC report must be filed with the Danish tax authorities no later than 12 months after the end of the fiscal year.

It should be noted that SKAT must be notified by the end of 2016 of which entity will submit the CbC report covering the Danish entity to which the Danish CbC legislation applies, and where this entity is resident for tax purposes. Thus, groups with Danish entities are advised to look into which group entity will prepare the CbC report. Although Denmark has aligned its implementation of the CbC reporting rules with the OECD guidance, other counties may add country-specific requirements into their local legislation. Therefore, it is further recommended that companies review the various local requirements when the CbC report is prepared.

As a supplement to the Danish CbC reporting legislation, a draft executive order was sent into consultation on April 6, 2016. Once finalized, the draft executive order will provide further details on the specific information to be filed and guidance on the format of the submission.

On January 27, 2016, Denmark, along with 30 other counties, participated in the signing ceremony for the OECD Multilateral Competent Authority Agreement (MCAA). From a Danish perspective, the signing of the MCAA effectively ensures the exchange of CbC reports between the Danish tax authorities and local tax authorities that have signed the MCAA. As of May 6, 2016, 33 countries had signed the MCAA.

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At present, several countries have already implemented, or are in the process implementing, CbC reporting requirements into national law. Parallel to the national implementation process, the EU Commission has drafted a revision to the Administrative Cooperation Directive, which was published on January 28, 2016, as part of the EU Anti-Tax Avoidance Package. The draft proposes mandatory implementation of the OECD's CbC reporting requirements within the EU.

Denmark generally supports international standards regarding transfer pricing. Therefore, it is expected that Denmark will support the EU Commission's proposed directives.

New Danish transfer pricing documentation requirements

The new executive order on transfer pricing documentation published May 4 replaces the former executive order on transfer pricing documentation, and generally follows the transfer pricing documentation recommendations from the BEPS Action 13 final report. As a result of this alignment with the international standard, the former specific Danish requirements, such as inclusion of the past three years of earnings before interest and tax (EBIT) and revenue, are not included in the new executive order.

Danish companies subject to the new Danish transfer pricing documentation requirements will have to prepare a master file and a local file in accordance with the new executive order as of FY 2016.

The exact level of detail of the transfer pricing documentation is for companies to decide, and depends on the extent and complexity of the group and its intercompany transactions. Under the new executive order, companies are required to include significantly more information and material, and perform more detailed analyses than under the prior executive order.

Danish transfer pricing documentation may be prepared in Danish, Swedish, Norwegian, or English.

The new Danish master file requirements generally follow those specified in Annex I of the "Transfer Pricing Documentation and Country-by-Country Reporting Final Report." Thus, companies are required to include comprehensive information regarding drivers of business profits and the supply chain, including a description of the group's five largest products/services measured by revenue, intangibles, sources of financing, detailed market descriptions, etc.

The information included in the master file shall be information that applies to the group as a whole.

In addition to the master file, the new executive order requires Danish companies and Danish permanent establishments to prepare a local file containing company-specific information.

As in the case of the master file, the new executive order generally follows the OECD BEPS Action 13 guidance, and thus must contain the information specified in Annex II of the "Transfer Pricing Documentation and Country by Country Reporting Final Report."

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Some of the information to be included in the local file is similar to the information required under the prior Danish transfer pricing documentation requirements. However, companies should expect the level of detail of the information and analyses required to be higher under the new executive order. The new executive order also requires new types of information, including copies of intercompany agreements, detailed information regarding local management, reconciliation spreadsheets that explain how the intercompany transaction volumes can be reconciled to the annual accounts, and allocation of roles and responsibilities of key employees.

In summary, the information required under the new statutory order is significantly more comprehensive and detailed than was required under the former Danish transfer pricing documentation requirements.

Penalties

The already existing Danish transfer pricing penalty regime will continue to apply following the introduction of the new requirements for transfer pricing documentation, and will also apply to the new CbC reporting requirements.

Conclusion

The new Danish transfer pricing rules adopting the OECD's three-tiered approach are significantly more prescriptive than the prior rules with respect to the specific information to be provided.

By introducing the new legislation on CbC reporting requirements and signing the MCAA, Denmark has effectively taken all the necessary steps to implement the CbC reporting requirements into Danish law. Danish companies subject to the Danish CbC reporting requirements will have to closely observe the ongoing status of the MCAA and similar CbC exchange agreements, to ensure that the group company that is preparing the CbC report on behalf of the group is located in a country that has signed the MCAA. Otherwise, a copy of the CbC report must be submitted to the Danish tax authorities.

The new Danish transfer pricing documentation requirements will require Danish companies to rethink their transfer pricing documentation if they have prepared documentation in accordance with existing rules. For many companies, the new regulations will require a new level of global coordination and documentation. In addition, the revised guidance contained in the OECD BEPS Action 8-10 report will have to be observed when preparing transfer pricing documentation. Specifically, thorough analyses will be necessary regarding the allocation of risks, functions, and actual decision making.

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US competent authority statistics reveal substantial increase in number of double tax cases resolved in 2015

The Internal Revenue Service on April 27 released competent authority (CA) statistics for the 12-month period from January 1, 2015, to December 31, 2015. The report contains statistics on cases handled by both the IRS Advance Pricing and Mutual Agreement (APMA) Program and the Treaty Assistance and Interpretation Team (TAIT), and includes information on requests received, cases resolved, and pending cases.[1]

The key trend the IRS CA statistics reveal is a 45 percent increase in the number of APMA cases the IRS resolved in 2015 (193 cases resolved in 2015, compared to 133 resolved in 2014). The 193 case resolutions in 2015 represent the highest number of cases resolved since 2002. However, 93 of those cases involved double tax cases with India, APMA Director Hareesh Dhawale said April 28 at a press conference.

Given the increased foreign and IRS audit activity seen in recent years, and heightened taxpayer awareness and acceptance of the CA process as an effective and practical way to resolve double taxation, this increase is not surprising. In addition, with the issuance of Rev. Proc. 2015-40 on August 12, 2015,[2] the IRS now allows certain requests for assistance arising from taxpayer-initiated transfer pricing adjustments, which is helpful to taxpayers that want to address potential foreign transfer pricing adjustments before a foreign audit commences.[3] This expansion of the CA process will likely result in more cases being filed in future years. Further, as countries adopt and companies seek to comply with recent base erosion and profit shifting

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[1]APMA has primary responsibility for cases arising under the business profits and associated enterprises article of US income tax treaties, and TAIT has primary responsibility for cases arising under all other articles of US income tax treaties.
[2]Rev. Proc. 2015-40 on requests for competent authority relief supersedes Rev. Proc. 2006-54.
[3]In the past, the IRS has generally not accepted such cases, on the basis that double taxation was not the result of government action as predicated in the mutual agreement procedure article of the relevant tax treaty. Also, under Notice 2013-78, which was the proposed version of Rev. Proc. 2015-40, the IRS reserved the right to deny requests for assistance if the taxpayer-initiated positions evinced after-the-fact tax planning or fiscal evasion, or were otherwise inconsistent with sound tax administration. Even though that language has been removed from Rev. Proc. 2015-40, presumably the IRS would still continue to deny relief in those situations.

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(BEPS) initiatives by the Organization for Economic Cooperation and Development (OECD), including country-by-country reporting in 2016, CA is expected to play an even more important role as both foreign and IRS audit activity is expected to continue to grow.

The IRS CA statistics also show a small increase in end-of-year inventory of APMA CA cases compared to 2014 (5 percent, or 755 in 2015, compared to 718 in 2014). In addition to the rising number of APMA CA cases received by the IRS, another likely factor in the increased inventory and case resolutions is the thaw in the relationship between the US and Indian competent authorities. During 2015, US taxpayers continued to file requests for relief in US-India double tax cases, and those cases have started to be resolved by the two governments.

Highlights of the 2015 CA statistics include the following:

- In 2015, the number of closed cases that resulted in full relief of double tax was 96 percent (or 93 percent, measured by the dollar amount of the total adjustments at issue).
- APMA and TAIT resolved a combined 215 cases in 2015 (193 CA cases and 22 TAIT cases); however, they received a combined total of 289 new CA requests, and now have a combined total of 998 requests pending in inventory. If the number of CA cases continues to rise in the future, the IRS will need to increase staffing levels significantly to keep pace with demand.
- The percentage of transfer pricing cases received by the IRS relating to US-initiated adjustments decreased in 2015 (21 percent in 2015 compared to 30 percent in 2014). In addition, the number of non-transfer-pricing cases received by the IRS that related to US-initiated cases also decreased, from 44 percent of cases received by the IRS in 2014 to 29 percent of cases received by the IRS in 2015. Of interest, while foreign-initiated adjustments accounted for 71 percent of non-transfer-pricing cases received in 2015, only 50 percent of cases resolved in 2015 were foreign initiated.
- The processing time for transfer pricing double tax cases increased in 2015 (from an average of 21.4 months in 2014 to 32.1 months in 2015). Remarkably, US-initiated transfer pricing double tax cases increased from 15.0 months in 2014 to 27.7 months in 2015. Non-transfer-pricing cases continued to be processed quickly in 2015, with an average processing time of 23.3 months, up from 19.8 months in 2014. Interestingly, US-initiated non-transfer-pricing cases processing times increased significantly from 14.3 months in 2014 to 28.9 months in 2015, while foreign-initiated non-transfer-pricing cases processing times decreased by 41 percent from 30.2 months in 2014 to 17.8 months in 2015.

Overall, the 2015 CA statistics are positive for US taxpayers. Looking forward, the number of requests for CA assistance is expected to continue to rise, in light of the foreign and IRS audit environment, the increased emphasis by the IRS on the need to seek CA assistance, and the new BEPS environment.

As the IRS continues to emphasize the need for US taxpayers to pursue effective and practical remedies, including recourse to competent authority, before claiming a foreign tax credit, US taxpayers under foreign audit should take care not to acquiesce to foreign-initiated adjustments. In addition, US taxpayers that are under tax or transfer pricing audit in foreign jurisdictions, or that have a reasonable expectation that they may be subject to a foreign tax

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audit, should be mindful of treaty timelines to request competent authority relief or file notifications, and take all necessary protective measures to preserve their right to seek competent authority relief. Taxpayers do not need to wait until the conclusion of a transfer pricing audit to take such measures. Failure to notify the IRS (or foreign tax authority) within the specified time frames will likely preclude the taxpayer from seeking competent authority relief from double taxation, which could give rise to issues regarding the creditability of foreign taxes.

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Indian APA has persuasive value for resolving disputes, even beyond rollback years

India's Income Tax Appellate Tribunal, Delhi bench, on April 25 issued an important ruling in the Ranbaxy Laboratories Limited case, stating that an advance pricing agreement (APA) can have strong persuasive value for resolving disputes regarding years prior to the rollback years, if the nature of the international transactions and the taxpayer's and the associated enterprises' functions, assets, and risks remain unchanged.

The Indian tribunal held that:

> "The concept and the methodology laid down in the APA can have the guidance value for the revenue authorities for the purpose of comparability analysis. The main intent of the APA is to protect the fair share of the revenue of the states in simple and efficient manner and to protect the tax base. …Therefore, the agreement entered into by the CBDT with the assesse, which has considered all the aspects of the manner of termination of the ALP which are also similar for this year, should be given highest sanctity and therefore the mechanism suggested in that agreement should be necessarily followed in determining ALP of the transactions for this year."

Facts

The taxpayer has been a manufacturer of pharmaceuticals for many decades, with several manufacturing locations. It is engaged in other activities such as R&D and quality control processes. For its multicountry operations, the taxpayer set up a number of wholly owned subsidiaries, joint ventures, and representative offices in different parts of the world.

The company's associated enterprises are engaged primarily in the distribution of pharmaceuticals to customers in overseas markets. Some associated enterprises are also engaged in the conversion and sale of active pharmaceutical ingredients (APIs) into dosage forms, repacking, and finishing activities. For transfer pricing purposes, the taxpayer characterized itself as a normal risk-bearing entity, bearing the risk of success or failure of the business. It also stated that the AEs were engaged only in the business of selling and distribution or secondary manufacturing activity, bearing minimum risk with least complex

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operations without owning any intangible or unique asset. Accordingly, it considered AEs as tested parties for determining the arm's length price.

During assessment proceedings, the Transfer Pricing Officer (TPO) rejected the selection of foreign AE as tested party on the ground that there is a geographical difference between the AE and the comparables, and selected the taxpayer as the tested party. The TPO determined the arm's length nature of the taxpayer's international transactions on the basis of a set of comparables selected by him, and made transfer pricing adjustment for the difference. The Dispute Resolution Panel (DRP) confirmed the adjustment made by the TPO.

Consequently, the taxpayer filed an appeal before the Tribunal.

Issues before the tribunal

The tribunal considered whether overseas AEs may be considered "tested parties" if they are the least complex entities, and whether the APA, which had been signed for 2014-15, can have any impact on the international transactions for the year under appeal.

Observations & ruling of the tribunal

The taxpayer submitted that it entered into an APA on August 7, 2015, with the CBDT, Government of India, for AY 2014-15. For the purpose of arriving at the advance pricing, the CBDT conducted a detailed functions, assets, and risks (FAR) analysis of the taxpayer and concluded that the taxpayer was an entrepreneur manufacturer and the AEs were functioning as distributors or secondary manufacturers.

The taxpayer also contended that there was no change in the FAR of the AEs in the year under appeal vis-à-vis the year of the APA. The mechanism for TP analysis as accepted in the APA may, therefore, be applied in the years under appeal also.

The Departmental Representative (DR) contested that an APA was merely a negotiated agreement, and was applicable only for the year for which it was entered into, and so it should not be applied retroactively to the year under appeal, which was not covered even under the rollback period.

The Tribunal observed that the CBDT agreed to accept AEs as the tested party in the APA with the taxpayer, and adopted the transactional net margin method (TNMM) as the most appropriate method. The CBDT also approved the concept of regional benchmarking for the purpose of determining the arm's length price, which basically meant that to select the appropriate comparables, regional benchmarking may be applied in case country-by-country benchmarking is not feasible, though the same would be preferred over regional benchmarking. In fact, the CBDT agreed to apply European benchmarking for South African, Peru, Ireland, and Romanian AEs, and Asian benchmarking for AEs in Nigeria, Malaysia, Egypt, Brazil, Thailand, and Morocco.

Based on the above, the tribunal held that even though the APA would be applicable for the year for which it had been entered into, the principles laid down in the APA for the

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comparability analysis would have great persuasive value for past years if the nature of the international transactions and the FAR of the AE and the taxpayer had remained the same.

The Tribunal also observed that if the CBDT agrees to apply the same terms and conditions to the rollback years, the methodology accepted in the APA may be applied in the year under appeal also, provided the international transactions and the FAR are the same for the year under appeal.

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Austria plans introduction of “standardized” transfer pricing documentation

Austria’s tax authorities on May 9 issued the long-awaited draft Transfer Pricing Documentation Act, which introduces obligatory standardized transfer pricing documentation requirements. The draft legislation is based on the OECD’s three-tiered standardized approach to transfer pricing documentation, and imposes penalties for failure to comply with country-by-country (CbC) reporting obligations. The review period of the draft TP documentation act ended on May 31, but it has yet to be approved by the national assembly.

Implementing BEPS action 13

In the course of the base erosion and profit shifting (BEPS) project, the OECD introduced extensive changes to existing transfer pricing documentation processes, such as the master file and local file concepts, and created an additional documentation element with the CbC report. Austria will follow the OECD guidance and implement the requirement to prepare a CbC report. The requirement will apply to fiscal years starting on or after January 1, 2016. At the same time, the preparation of the transfer pricing documentation will be mandatory and the master file concept is considered a standardized approach.

Standardization

Once the draft act becomes law, the transfer pricing documentation requirements will be a standardized process for the majority of Austrian companies that are members of multinational groups. Therefore, the preparation of a master file and a local file will be mandatory. Details on the content of those files will be provided by decree, but it may be assumed that they will largely correspond to those proposed in the OECD guidance.

Submission deadline

Companies should start preparing to comply with the documentation requirements for fiscal year 2016. Although the transfer pricing documentation reports do not have to be filed together with the tax return, the master file and the local file must be submitted upon request by the tax authorities within 30 days after filing the corporate income tax return. Given the extensive

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scope of information that needs to be prepared, an early kick-off for documentation projects is advisable.

Language

Transfer pricing documentation generally must be filed in an official language accepted by the tax authorities (de facto, German), but the authorities may make an exception and allow documentation to be filed in English to meet the 30-day submission deadline. However, the tax authorities may subsequently request an officially certified translation.

CbC Report

According to the Transfer Pricing Documentation Act, and in line with the OECD guidance, an Austrian resident ultimate parent company must submit a CbC report to the competent tax authority. In addition, an Austrian entity must assume the responsibility to submit the CbC report in exceptional cases even though it is not the ultimate parent company. A similar legislative requirement has been implemented in other countries to ensure the exchange of CbC information between the countries listed in the report, even if the exchange of information with the ultimate parent company's jurisdiction cannot be made legally or factually.

If the ultimate parent company is resident in Austria, the CbC report must be filed for fiscal years starting on or after January 1, 2016. In the case of an Austrian entity assuming the filing responsibility for the foreign ultimate parent company, the CbC report may be submitted for fiscal years starting on or after January 1, 2017. The deadline for electronic submission of CbC reports via "FinanzOnline" is 12 months after the last day of the relevant fiscal year. An ultimate parent company resident in Austria will therefore have to file the CbC report on December 31, 2017, at the latest, provided the fiscal year concurs with the calendar year.

Exceptions

As expected, a threshold for filing a CbC report has been implemented in the amount of EUR 750 million of consolidated group revenue. If the threshold was not exceeded in the preceding fiscal year, the multinational group does not have to prepare CbC documentation in Austria. Regarding the standardized requirements for documentation (i.e., preparation and submission of master file and local file), a member of an international group of companies resident in Austria that generated revenues in the preceding fiscal year below EUR 50 million is exempt from these documentation requirements. However, this threshold can be disregarded if commission revenues generated from foreign affiliated entities amounted to more than EUR 5 million in the preceding year. According to the explanatory notes, this threshold will be introduced to include commissionaire and agent structures, in which revenues are limited to commissions. Regardless of any thresholds, the competent tax authority can request the master file if the ultimate parent company is required to prepare master file documentation according to local legislation. Smaller companies must provide documents to the tax authorities upon request based on general documentation requirements to justify their intercompany pricing.

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Penalties

The draft legislation provides for penalties if the CbC report is not filed within the prescribed period, or if data to be submitted is missing or incorrect. Subject to the intentional violation of those requirements, which constitutes a fiscal offense, the penalty can amount up to EUR 80,000. In the case of a grossly negligent violation of the above-mentioned requirements, the penalty can be a maximum of EUR 25,000. According to the explanatory notes to the draft legislation, the Austrian entity will not be fined if a complete and accurate submission of the documentation is not possible because the entity is missing the required information and lacks the legal means to acquire that information. Negligent submission of incorrect data will not be subject to penalties.

Comments

The Transfer Pricing Documentation Act is based on the recommendations of the OECD BEPS project and de facto provides for documentation requirements for all Austrian companies that conduct cross-border intercompany transactions. Even though the legislation has not been finalized, enough information regarding thresholds and contents is provided in the draft so that companies that may be affected by the documentation requirements may start the process of preparing the required documentation.

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Cape Verde introduces transfer pricing rules

The Cape Verde government published in December 2015 legislation establishing a new transfer pricing regime that entered into force on January 1, 2016. The new rules focus on regulating the local application of the transfer pricing rules and principles included in the Corporate Income Tax Code in the context of the fiscal reform implemented by Law no 82/VIII/2015.

A recently published ministerial order – No. 75/2015 – defines the principal guidelines of the transfer pricing regime, empowers the tax authorities to make the necessary adjustments should they conclude that transactions between related parties were not in accordance with the arm's length principle, and defines new reporting and documentation requirements, as detailed below.

Scope of the new regime

The new regime contains detailed guidance on the transfer pricing rules applicable to any commercial transactions (involving goods, rights, or services) or financial transactions that begin or occur on or after January 1, 2015.

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According to the new legislation, entities are regarded as related for transfer pricing purposes taking into account a threshold of 20 percent of direct or indirect ownership in the capital or voting rights of both entities.

In addition, the regime stipulates that a special relationship must be deemed to exist when legal arrangements allow one company to influence the management decisions of another company, or when a taxpayer enters into transactions with an entity that benefits from a more favorable tax regime.

Reporting and documentation requirements

Contemporaneous transfer pricing documentation must be filed upon request by the tax authorities, and the new rules establish that its preparation is mandatory for:

- Companies classified as "Large Taxpayers" under specific legislation;
- Companies considered taxed under a privileged tax regime, as established in the General Tax Code;
- Permanent establishments of nonresident companies; and
- Other entities explicitly designated by the tax authorities.

In addition, all taxpayers must report in their annual fiscal and accounting declaration any controlled transactions entered into, identify the related parties involved, and state whether transfer pricing documentation was prepared in accordance with the law. The declaration must be filed by the seventh month following the year-end (that is, by July 30 for companies with fiscal years that match the calendar year).

The ministerial order specifically refers to the OECD's transfer pricing guidelines as a source of "high importance."

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Cyprus Ministry of Finance announces it will introduce CbC reporting legislation

Cyprus' Ministry of Finance on April 27 announced its intention to amend the country's legislative framework in relation to country-by-country (CbC) reporting, following the European Union Directive amending Directive 2011/16/EU, which was approved at the EU Finance Ministers Council meeting on May 25, 2016. The amendments are expected to be in line with

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the recommendations of Action 13 of the OECD final reports on Base Erosion and Profit Shifting (BEPS).

The ministry also announced that it support the provisions of Action 13 relating to the automatic exchange of country-by-country reports, and that all necessary procedures will be followed to adopt relevant provisions in domestic tax legislation.

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Have a question?
If you have needs specifically related to this newsletter's content, send us an email at clientsandmarketsdeloittetax@deloitte.com to have a Deloitte Tax professional contact you.

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