In this issue:

IRS issues final section 367(a) and (d) regulations

The US Department of the Treasury and the Internal Revenue Service on December 15 issued final regulations under section 367(a) and (d) of the Internal Revenue Code that coordinate the valuation rules of sections 367 and 482. The

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final regulations – T.D. 9803 – which generally mirror the proposed regulations,[1] apply retroactively to outbound transfers that occur on or after September 14, 2015 (the date the proposed regulations were filed).[2]

As discussed in more detail below, the final regulations provide as follows:

- When property is transferred to a foreign corporation pursuant to section 367, the value of such property must be determined under section 482.
- The useful life of intangible property transferred under section 367(d) is no longer limited to 20 years, although taxpayers may make an election to include the entire amount of the property's value in the annual inclusions over a 20-year period.
- The definition of the term "useful life" has been revised to account for the fact that exploitation of intangible property can result in both revenue increases and cost decreases.
- The IRS and Treasury continue to maintain that intangible property may have an indefinite useful life if it is used in the further development of the next generation of that intangible or of other property.

Valuations under section 367(d) coordinated with section 482

Like the proposed regulations, the final regulations specifically provide that when property is transferred to a foreign corporation, the value of such property must be determined under section 482.[3] The preamble explicitly states that these valuation rules were changed under the proposed regulations to better coordinate the regulations under sections 367 and 482, including the temporary regulations under Treas. Reg. §1.482-1T(f)(2)(i), which expanded the aggregation rules to value "all items of value" transferred in a section 367 transaction.[4] The final regulations continue this approach.

20-year election for income inclusions

The final regulations no longer limit the useful life under section 367(d) to 20 years.[5] Nevertheless, the final regulations do provide an election whereby the transferor may take into account the entire amount of the section 367(d) inclusions during the 20-year period beginning with the first year in which the US transferor takes into account income pursuant to section 367(d). As a result, if the taxpayer makes this 20-year election, the taxpayer will increase the size of the annual inclusions each year during that 20-year period.[6] The preamble states that the language "first year in which the US transferor takes into account income" reflects the possibility of delays between the year the intangible property is transferred and the first year in which exploitation results in taxable income being earned by the transferee.

To illustrate how the 20-year election would generally operate, the regulations provide an example whereby the useful life of a product is determined to exceed 20 years. Based on the present value of sales through the property's indefinite useful life, the sales-based royalty during the useful life normally would have been 6.8 percent. If the taxpayer makes the 20-year election, however, the income inclusions would be taken into account over a 20-year period instead. As a result, the sales-based royalty rate would increase to 10.3 percent.[7]

The final regulations provide a beneficial statute of limitations rule if the 20-year election is chosen. Specifically, if a taxpayer makes the 20-year election, then no adjustments will be made after the conclusion of the 20-year period.

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[1] 80 Fed. Reg. 55,568 (Sept. 16, 2015); *see also* T.D. 9738 (Sept. 16, 2015) (temporary regulations under section 482). For coverage of the proposed and temporary regulations, see Global Transfer Pricing Alert 2015-015, September 17, 2015. For information on the other international tax implications of these regulations, including the foreign goodwill and going concern rules, see United States Tax Alert dated December 20, 2016, on Deloitte.com.
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-transfer-pricing-alert-15-015-17-september-2015.pdf
[2] Treas. Reg. §§1.367(a)-2(k), 1.367(d)-1(j).
[3] Treas. Reg. § 1.367(a)-1(b)(3).
[4] For additional information on the temporary regulations under section 482, see Global Transfer Pricing Alert dated September 17, 2015.
[5] Treas. Reg. §1.367(d)-1(c)(3)(i).
[6] Treas. Reg. §1.367(d)-1(c)(3)(ii).
[7] Treas. Reg. §1.367(d)-1(c)(3)(iii).

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Thus, after the statute of limitations expires for taxable years during the 20-year period, a taxpayer will have no further section 367(d) inclusions as a result of an examination of taxable years that begin after the end of the 20-year period. However, despite this 20-year cut-off, for purposes of determining whether amounts included during the 20-year period satisfy the commensurate with income (CWI) standard, the IRS may still take into account information with respect to taxable years after the 20-year period, such as the income attributable to the transferred property during those later years.[8]

The application of the 20-year election will have to be reflected in a statement attached to a timely filed original income tax return (including extensions) for the year of the transfer. Once made, the election is irrevocable, and failure to file a timely statement for the election may not be remedied.[9]

Revised definition of useful life

In addition to the 20-year election, the final regulations also expand the definition of useful life. Now this definition includes the entire period during which exploitation of the transferred intangible property is reasonably anticipated to "affect the determination of taxable income."[10] The preamble states that this definition was revised to account appropriately for the fact that exploitation of intangible property can result in both revenue increases and cost decreases.

Like the proposed regulations, the final regulations state that exploitation of intangible property includes "any direct or indirect use or transfer of the intangible property, including…use in the development of other intangible property (and any exploitation of the other developed intangible property)."[11]

The preamble explains the reasoning behind this definition, stating that the value of many types of intangible property is derived not only from use of the intangible property in its present form, but also from its use in further development of the next generation of that intangible and other property.

To illustrate this, the preamble posits the following hypothetical. Assume that a software developer sells all of its copyright rights in its software to an unrelated party, and the copyright rights are expected to derive value both from: (i) the exclusive right to use the current-generation computer code to make and sell *current*-generation software products; and from (ii) the exclusive right to use the current-generation code in the development of other versions of the software, which will then be used to make and sell *future*-generation software products. In that case, the IRS and Treasury maintain that the software developer would expect to be compensated for the latter right. That is, if the software has value in developing a future generation of products, the software developer would not ignore the value of the use of the software in future research and development and hand over those rights free of charge. In addition, an uncontrolled purchaser would be willing to compensate the developer to obtain such rights.

This example continues the same line of reasoning as the definition of useful life in the proposed regulations. It also continues the line of reasoning adopted by the IRS and Treasury in the cost sharing regulations under Treas. Reg. §1.482-7(g)(1), which require valuation of all profits attributable to subsequently developed intangibles in a platform contribution transaction payment over the entire duration of the cost sharing activity.

Observations

Continuing along the lines the Treasury adopted in its rulemaking for the cost sharing regulations under section 482, these regulations under section 367 appear to be intended to reassert the position the IRS took in *Veritas Software Corp. & Subs. v. Commissioner*.[12] There, the transaction at issue involved a buy-in payment of technology under Treas. Reg. §1.482-7A (1996). The IRS economist assumed that the transferred technology had a perpetual useful life for purposes of the section 482 valuation, but the Tax Court disagreed. In pertinent part, the Tax Court stated:

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[8] Treas. Reg. §1.367(d)-1(c)(3)(ii)
[9] *Id.*
[10] Treas. Reg. §1.367(d)-1(c)(3)(i).
[11] *Id.*
[12] Veritas *Software Corp. & Subs. v. Comm'r*, 133 T.C. 297, 324 (2009), *nonacq.* A.O.D 2010-49, 2010-49 I.R.B. 803.

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In calculating his valuation of the buy-in payment, [the IRS economist] assumed a perpetual useful life for the transferred intangibles, yet acknowledged that "if you had 1999 products that you left untouched, that technology would age and eventually become obsolete" and that the preexisting product intangibles would "wither on the vine" within 2 to 4 years without ongoing R&D. The useful life of the preexisting product intangibles was, on average, 4 years, and certainly was not perpetual. Petitioner established that something, however, was perpetual – VERITAS US was in a perpetual mode of innovation. Before and after the CSA VERITAS US released numerous versions of its products. *Even with substantial ongoing R&D, VERITAS US products had finite lifecycles*. By the time a new product became available for purchase, the next generation was already in development." (Emphasis added)

The discussion of useful life in Treas. Reg. §1.367(d)-1(c)(3) appears to be inconsistent with the Tax Court's interpretation of the facts presented in *Veritas*.

The issuance of the final regulations may indicate that useful life assumptions, both in the context of cost sharing arrangements under section 482 and now in outbound transfers of intangibles under section 367, will receive expanded scrutiny by the IRS. The reference in Treas. Reg. §1.367(a)-1(b)(3) to section 482, along with the reference in the preamble to the expanded aggregation rules under Treas. Reg. §1.482-1T(f)(2)(i), suggests that the IRS will link sections 367 and 482 to value "all items of value" transferred in a section 367 transaction, as well.

– Philippe G. Penelle (Washington, DC)
Tax Principal
Deloitte Tax LLP
ppenelle@deloitte.com

David Varley (Washington, DC)
Tax Principal
Deloitte Tax LLP
dvarley@deloitte.com

Jamie Hawes (Washington, DC)
Senior Manager
Deloitte Tax LLP
jhawes@deloitte.com

Indonesia releases legislation for new documentation requirement including master file / local file and country-by-country reporting

Indonesia's minister of finance (MoF) has issued regulations implementing the new documentation requirements for transfer pricing matters, which include the master file/local file requirement and country-by-country (CbC) reporting for Indonesian taxpayers dealing with related parties.

As anticipated, Indonesia's master file/local file and CbC reporting rules are consistent with the Organisation for Economic Co-operation and Development recommendations outlined in the final report on Transfer Pricing Documentation and Country-by-Country Reporting – Action 13.

This new regulation on the documentation requirement – Regulation No. 213/PMK.03/2016 ("PMK-213") dated and effective 30 December 2016 – essentially introduces a three-tiered approach to documentation consistent with the BEPS Action 13 recommendations, provides a threshold on the maintenance of such documentation, and requires the documentation to be submitted in the local language, Bahasa Indonesia. The regulation provides detailed guidance on who should prepare it, what it should include, and when the documentation should be made available.

The regulation is issued primarily in relation to the transfer pricing documentation requirements and does not override the existing transfer pricing regulations governing the application of the arm's length principle, Directorate General of Taxation (DGT) Regulation No. PER-43/PJ/2010 (as amended by DGT Regulation No. PER-32/PJ/2011).

This article summarizes the salient features of PMK-213 and provides insight into the requirements for Indonesian taxpayers regarding their transfer pricing documentation obligations.

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Type of documents to be maintained

Under the current regulation governing transfer pricing, taxpayers were only required to maintain local transfer pricing documentation to establish the arm's length nature of their related-party transactions. Under PMK-213, taxpayers are now required to maintain three levels of documentation:

a. A master file;
b. A local file; and
c. A country-by-country report.

These documents must be submitted in the local language, Bahasa Indonesia. An exception is available for taxpayers that have approval to maintain their books in a foreign language and use a currency other than the rupiah. Those taxpayers can maintain the documents in English, accompanied with a translated version.

The table below provides a summary of requirements under PMK-213 and the key points Indonesian taxpayers should consider.

<table>
<tr><th colspan="2">Master file and local file (the "Transfer Pricing Document")</th></tr>
<tr><th>Requirements</th><th>Key points</th></tr>
<tr><td>
Coverage: Taxpayers that enter into related-party transactions that meet any one of the following thresholds/conditions are required to prepare the Transfer Pricing Document.

<table>
<tr><th>Item</th><th>Threshold</th></tr>
<tr><td>Gross revenue[13] in the preceding tax year</td><td>Exceeding IDR 50 billion</td></tr>
<tr><td>Tangible goods transactions in the preceding tax year

OR

Services, royalties, interest, or other transactions in the preceding tax year</td><td>Exceeding IDR 20 billion

Exceeding IDR 5 billion</td></tr>
<tr><td>Related-party transactions with affiliated party located in a jurisdiction with tax rate lower than Indonesia's (currently at 25 percent)</td><td>No threshold</td></tr>
</table>

In addition, a taxpayer that qualifies as a parent entity[14] of a business group with consolidated gross revenue of IDR 11 trillion is also required to maintain the Transfer Pricing Document.

In the event the preceding tax year covers a period of less than 12 months, the gross revenue or the related-party transactions are required to be annualized.

For bookkeeping in a currency other than the rupiah, the monetary value of the threshold is to be calculated using the exchange rate set by the MoF for tax calculations at the end of the tax year.
</td><td>
The new regulation has replaced the existing threshold determination based on the "per counterparty per annum" with thresholds based on gross revenue, transaction type, or counterparty's jurisdiction.

The regulation does not clearly exclude tax-neutral domestic transactions, which were excluded under the prior regulations (subject to certain conditions).

The threshold should be calculated based on the preceding tax year. For example, to determine whether the taxpayer must prepare the Transfer Pricing Document for tax year 2016, the threshold will be based on the values in tax year 2015.

Taxpayers should check the applicable corporate income tax rate of the jurisdictions in which its related parties (with whom it transacts) are located to assess eligibility for maintaining Transfer Pricing Document.

With the new gross revenue threshold, PMK-213 generally provides relief to small and medium-sized
</td></tr>
</table>

[13] Gross revenue is defined as the gross amount of revenue received or accrued in connection with the taxpayer's work, business, or main activities before deduction of discounts, rebates, and other deductions.
[14] Parent entity is defined as the entity directly or indirectly controlling the business group and is required to prepare consolidated financial statements under Indonesian Financial Accounting Standards.

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Master file and local file (the "Transfer Pricing Document")	
Requirements	**Key points**
The new regulation clearly specifies that even if taxpayers do not meet the above threshold to maintain the Transfer Pricing Document, they are still required to adhere to the arm's length principle for related-party transactions.	taxpayers regarding the administrative burden of documentation. However, with the new prescribed thresholds, more transactions will be brought within the ambit of the Transfer Pricing Document.
Contemporaneous information: The Transfer Pricing Document is to be based on data and information available at the time the related-party transactions are entered into. If the above requirement is not satisfied, the taxpayer will be deemed not to comply with the arm's length principle.	Taxpayers should anticipate a tight time frame for preparation of the transfer pricing documentation, which is required to be made available within four months of the end of the tax year. This poses a practical challenge regarding the availability of external comparable data and information.
Time frame: The Transfer Pricing Document must be available within four months after the end of the tax year, and must be accompanied by a statement letter regarding the time of the availability of such documents. The statement letter must be signed by the party providing the Transfer Pricing Document.	The new regulation imposes a tight timeline for preparation. It also poses a practical challenge regarding the availability of external comparable data and information.
Minimum contents of master file: • Ownership structure and chart, as well as the jurisdictions of the group companies; • Business activities carried out by the business group; • Intangible assets owned by the business group; • Financial activity/financing activities within the business group; and • Consolidated financial statements of the parent entity and tax information in relation to the related-party transactions. **Minimum contents of local file:** • Taxpayer's identity and business activity; • Information on transactions with related parties and independent parties, respectively; • Application of the arm's length principle; • Financial information of the taxpayer; and • Non-financial events/occurrences/facts influencing the pricing or the level of profits. A more detailed factual disclosure is required for commodity transactions. More detailed information on the contents of the local file is included in an attachment to PMK-213.	The contents of the master file and the local file are generally aligned with BEPS Action 13. However, the local file requirements in this new regulation are more extensive than in the existing regulations. This will require taxpayers to review their existing transfer pricing documentation structure and make necessary additions. The local file requires availability of legal agreements/contracts for all significant related-party transactions, as well as financial information. A segmented approach has been prescribed in the event the taxpayer has more than one business or functional characterization.
Disclosure requirement: Taxpayers are required to file a summary of the master file and local file as an attachment to the annual corporate income tax return in the format prescribed. The summary requires taxpayers to declare that the master file and local file contain the minimum content as per the requirement, and to provide the date on which the master file and local file became available.	This summary is in addition to the Special Attachment Forms (Forms 3A/3A-1 and Forms 3B/3B-1) that are filed with the annual corporate income tax return. Taxpayers should ensure that the disclosures in the Special Attachment

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<table>
<tr><th colspan="2">Master file and local file (the “Transfer Pricing Document”)</th></tr>
<tr><th>Requirements</th><th>Key points</th></tr>
<tr><td></td><td>Forms and the summary are consistent with the Transfer Pricing Document.</td></tr>
<tr><td>Timing of submission of the Transfer Pricing Document: The Transfer Pricing Document is required to be submitted to the Director General of Tax (DGT) upon request within the time specified under the provisions of tax laws and regulations.

In case of delayed submission, the Transfer Pricing Document will not be considered. Further penal implications as stipulated in the current tax laws may apply in case of noncompliance.</td><td>Strict enforcement to ensure timely submission of the Transfer Pricing Report to the DGT.

PMK-213 stipulates that the DGT may request the Transfer Pricing Document to review and monitor taxpayers’ compliance.</td></tr>
</table>

<table>
<tr><th colspan="2">Country-by-Country Report</th></tr>
<tr><th>Requirements</th><th>Key points</th></tr>
<tr><td>Coverage: Required to be prepared and submitted by a taxpayer that qualifies as parent entity of a business group with consolidated gross revenue of IDR 11 trillion.

When the parent entity is located in a foreign jurisdiction, the resident taxpayer is required to submit the CbC report when the country of the parent entity:

• Does not require submission of CbC report;
• Does not have an agreement with the government of Indonesia on exchange of information; or

Has an agreement but the CbC report cannot be obtained by the government of Indonesia.</td><td>Additional requirement for business groups with a parent entity based in Indonesia, especially if the business group also includes foreign subsidiaries.</td></tr>
<tr><td>Contemporaneous information: The CbC report is to be based on data and information available at the end of the tax year.</td><td>Tax year 2016 is the first year of coverage.</td></tr>
<tr><td>Timeline: The CbC report must be available within 12 months after the end of the tax year.</td><td>For the tax year ended 31 December 2016, the CbC report should be available by 31 December 2017.</td></tr>
<tr><td>Content: The CbC report is required to be prepared in the form/format prescribed as an attachment to PMK-213. The format is aligned with the CbC report template provided in the BEPS Action 13 final report, and requires preparation of the following information:

1. Allocation of income, taxes paid, and business activities per country per jurisdiction of all members of the business group, both local and foreign. This includes:
a. Name of country or jurisdiction;
b. Gross revenue divided between independent and related-party transactions. However, payments treated as dividends in the payer’s jurisdiction are excluded;
c. Profit (loss) before tax (non – operating income and expenses are included);
d. Income tax that has been withheld/collected/self-paid;
e. Income tax payable as reported in the income/(loss) statement and does not include deferred tax;
f. Registered capital. For permanent establishments (PEs), the amount will be registered capital reported by the head office</td><td>The CbC report format is in line with BEPS Action 13, which has been adopted by many countries. However, there is an additional requirement: the preparation and submission of a “working paper” as part of the CbC report.</td></tr>
</table>

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Country-by-Country Report	
Requirements	**Key points**
unless the country where the PE is located requires specific capital for the PE. g. Accumulated retained earnings. For PEs, the accumulated retained earnings must be reported by the head office; h. Number of permanent employees; and i. Net book value of tangible assets other than cash and cash equivalent. For PEs, the net value of the tangible assets must be reported for the countries where the PE is located. 2. A list of members of the business group and principal business activities per country or jurisdiction. This includes: a. Name of the entity in each jurisdiction; and b. Principal business activity. 3. Working paper of CbC report that includes the information used for preparation of the above forms. An additional requirement is the Tax ID number of the entity in the business group. The DGT is expected to issue additional implementing guidance on the CbC report.	
Timing of Submission: The first year of coverage is FY2016, and the report must be filed with the annual corporate tax return for the subsequent tax year, i.e., tax year 2017.	Only to be filed by taxpayers mentioned in the Coverage section above.

Conclusion

The new documentation regulation reflects Indonesia's commitment to the OECD's BEPS project in the interest of global transfer pricing consistency. The new documentation rule intends to strengthen the quality of documents maintained by taxpayers and to enhance transparency. Given the limited time frame to make the master file and local file available – four months from the end of the tax year (30 April 2017 for some taxpayers) – taxpayers will need to exercise more rigor in managing their transfer pricing affairs. Taxpayers also need to be proactive and make sure the information required for preparation of the master file and the local file is available to ensure compliance with the requirements prescribed under this new regulation.

The new documentation rule will require coordinated efforts between the taxpayer and its group to gather and prepare the necessary information, as some data may not be readily available to the taxpayer at the local level. This will ensure that the information disclosure is consistent across master file, local file, CbC report, and related-party transaction disclosure forms.

Transfer pricing policies should be robust and taxpayers are advised to take this opportunity to examine and revisit their existing transfer pricing policies to proactively manage transfer pricing issues and related exposure.

– Roy David Kiantiong (Jakarta)
Partner
Deloitte Indonesia
rkiantiong@deloitte.com

Balim (Jakarta)
Director
Deloitte Indonesia
bbalim@deloitte.com

Shivaji Das (Jakarta)
Technical Advisor
Deloitte Indonesia
shivdas@deloitte.com

Amit Sharma (Jakarta)
Technical Advisor
Deloitte Indonesia
Asharma2@deloitte.com

Eddy Ivan Utama (Jakarta)
Senior Manager
Deloitte Indonesia
eutama@deloitte.com

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IRS releases guidance on voluntary filing of CbC report for early reporting periods

The Internal Revenue Service on January 19 released Revenue Procedure 2017-23 (Rev. Proc. 2017-23) which provides that ultimate parent entities of US multinational enterprise (MNE) groups may file a Form 8975, Country-by-Country Report, and accompanying Schedule A, Tax Jurisdiction and Constituent Entity Information for reporting periods that: (i) are earlier than the applicability date of Treas. Reg. §1.6038-4; and (ii) begin on or after January 1, 2016 (early reporting periods).[15] The revenue procedure, which will be published in I.R.B. 2017-07, dated February 13, 2017, discusses the timing and manner of these early filings.[16]

Rev. Proc. 2017-23 elaborates on the guidance set forth in the final country-by-country regulations,[17] the preamble to which indicated that the US Treasury Department and the IRS would provide a procedure for ultimate parent entities of US MNE groups to file a Form 8975 for early reporting periods, so that constituent entities would be able to meet the filing requirements of jurisdictions that have adopted CbC reporting for annual accounting periods beginning on or after January 1, 2016.

Filing Procedures

To file a Form 8975 for early reporting periods, Rev. Proc. 2017-23 provides as follows:

- **General Rule:** Beginning on September 1, 2017, Form 8975 may be filed for an early reporting period with the income tax return (or other return as will be provided in the Instructions to Form 8975) for the taxable year of the ultimate parent entity of the US MNE group within which the early reporting period ends. For example, if the ultimate parent entity is on a calendar year, and if the early reporting period ends on December 31, 2016, then Form 8975 may be filed with the ultimate parent entity's income tax return for the 2016 taxable year.
- **Requirement to Amend Returns That Lack a Form 8975:** Ultimate parent entities that file (or have filed) an income tax return for a taxable year that includes an early reporting period but that do not include a Form 8975 must follow the procedures for filing an amended income tax return and attach Form 8975 to the amended return within 12 months of the close of the taxable year that includes the early reporting period. Filing an amended income tax return solely to attach Form 8975 in accordance with this revenue procedure will have no effect on the statute of limitations for the income tax return.
- **Encouragement to File Electronically:** To ensure timely automatic exchange of the information on a Form 8975 for an early reporting period, ultimate parent entities that are able to file their returns electronically are encouraged to file their returns and Forms 8975 electronically. An ultimate parent entity that files its return electronically must file Form 8975 through the IRS Modernized e-File system in Extensible Markup Language (XML) format, not as a binary attachment (such as a PDF file). The IRS intends to provide specific electronic filing information on Form 8975 to the software industry in early 2017 so that developers will be able to make Form 8975 available in their software ahead of the September 1, 2017, implementation date.[18]
- **Paper Filing:** For filers of Form 8975 that are not eligible to use Modernized e-File to file their income tax return, a paper version of Form 8975 will be made available in advance of the September 1, 2017, implementation date.

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[15] The applicability date of Treas. Reg. §1.6038-4 is June 30, 2016. *See* Treas. Reg. §1.6038-4(k).
[16] Draft versions of Form 8975 and associated Schedule A may be found at: https://apps.irs.gov/app/picklist/list/draftTaxForms.html;jsessionid=GFDfcwtqEejm2GJuSSs-Ng__?value=8975&criteria=formNumber&submitSearch=Find. To date, draft instructions for Form 8975 have not been issued.
[17] T.D. 8773, 81 Fed. Reg. 42483-42491 (June 30, 2016) (CbC reporting regulations).
[18] For the OECD's CbC Reporting User Guide and accompanying XML Schema, see OECD BEPS Action 13 – Country-by-Country Reporting XML Schema: User Guide for Tax Administrations and Taxpayers (March 2016), along with the accompanying ZIP file at http://www.oecd.org/tax/exchange-of-tax-information/country-by-country-reporting-xml-schema-user-guide-for-tax-administrations-and-taxpayers.htm. We anticipate that the version issued by the IRS and US Treasury Department will be substantially similar.

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Applicability Date

Rev. Proc. 2017-23 applies to reporting periods of ultimate parent entities of US MNE groups beginning on or after January 1, 2016, and before the applicability date of Treas. Reg. §1.6038-4, which, as noted above, is June 30, 2016.

Observations

Because of Rev. Proc. 2017-23's permissive rule for amending a taxpayer's income tax return, the IRS has effectively extended the deadline for Form 8975 from September 15, 2017, to December 31, 2017, for calendar year taxpayers, at least for the first early reporting period.

This rule is different from the requirement that generally applies under the final CbC reporting regulations, the preamble to which explicitly stated that: (i) comments had been submitted requesting that taxpayers be permitted to file Form 8975 up to one year from the end of the ultimate parent entity's taxable year; but that (ii) the IRS and US Treasury Department explicitly chose not to adopt this recommendation and required that Form 8975 be filed with the ultimate parent entity's tax return instead.[19] At the same time, this rule is consistent with the recommendation in Action 13 of the OECD's final BEPS report.[20] It is also consistent with the last sentence in the above-referenced section of the preamble to the final CbC reporting regulations, which states that Form 8975 may prescribe an alternative time and manner for filing than the regulations themselves.[21]

– Philippe G. Penelle (Washington, DC)
Principal
Deloitte Tax LLP
ppenelle@deloitte.com

David Varley (Washington, DC)
Principal
Deloitte Tax LLP
dvarley@deloitte.com

Jamie Hawes (Washington, DC)
Senior Manager
Deloitte Tax LLP
jhawes@deloitte.com

Joseph Tobin (Washington, DC)
Senior Manager
Deloitte Tax LLP
jtobin@deloitte.com

Chile introduces country-by-country reporting requirement

Chile's Internal Revenue Service (SII) on December 27, 2016, published Resolution No. 126, which introduces Sworn Statement 1937, the "Country by Country Report," based on the provisions set out in the OECD's final report on Action 13 of the base erosion and profit shifting (BEPS) project.

Who is required to file this sworn statement?

The sworn statement must be filed by the following taxpayers:

- Parent entities or parent companies of multinational groups that are residents of Chile for tax purposes, with consolidated group income of at least EUR 750 million in the 12 months prior to the beginning of the corresponding tax period); or
- Entities that belong to multinational groups that are resident in Chile for tax purposes, and that have been designated by the parent entity of the group as the only substitute for purposes of filing Sworn Statement 1937 on behalf of the parent or controlling entity.

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[19] T.D. 9773, Summary of Comments and Explanation of Revisions, section 9 – Time and Manner of Filing.
[20] *See* BEPS Action 13: 2015 Final Report, *Transfer Pricing Documentation and Country-by-Country Reporting*, ¶ 31 (saying that the date for completion of the CbC Report may be extended to one year following the last day of the fiscal year of the UPE, given that the final financial statements and other information which may be relevant for CbC data may not be finalized until after the due date for the tax returns in some countries for any particular fiscal year).
[21] T.D. 9773, Summary of Comments and Explanation of Revisions, section 9 – Time and Manner of Filing.

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Notwithstanding the foregoing, a taxpayer in Chile may be required to submit the sworn statement in the event the group's parent company is not obligated to do so in its country of tax residence, among other situations.

Filing date

The first CbC report must be filed by June 30, 2017, regarding the operations carried out in calendar year 2016.

Failure to file the CbC report, or erroneous, incomplete, or extemporaneous filings will be sanctioned with a fine of 10-50 annual tax units (USD 8,148 – USD 40,744).

What information is required?

The form requires quantitative and qualitative information of each of the group entities, such as:

- Income from transactions with related and unrelated parties;
- Profit (loss) before taxes;
- Income tax accrued and tax paid;
- Declared capital;
- Accumulated earnings;
- Number of employees;
- Tangible assets; and
- Main activities of each company.

– Alejandro Paredes (Santiago)
Partner
Deloitte Chile
aparedes@deloitte.com

Rocio Crespillo (Santiago)
Partner
Deloitte Chile
rcrespillo@deloitte.com

Singapore releases updates to transfer pricing guidelines

The Inland Revenue Authority of Singapore (IRAS) on January 12, 2017, released updates to the Singapore transfer pricing guidelines. The updated set of guidelines, amended mainly to reflect Singapore's adoption of the minimum standards under Actions 5 and 8-10 of the base erosion and profit shifting (BEPS) project and to introduce an "indicative margin" for related-party loans, replaces the third edition of the transfer pricing guidelines issued on January 4, 2016.

Key changes

The key changes in the updated guidelines are as follows:

Adoption of BEPS Action 5 (Standards on countering harmful tax practices) and BEPS Actions 8-10 (Transfer pricing)

The IRAS has enhanced the guidance on mutual agreement procedures (MAP) and advance pricing agreements (APAs) in its commitment to BEPS Action 5. The IRAS will spontaneously exchange information on cross-border unilateral APAs under tax treaty or exchange of information instruments, subject to certain conditions, with:

- Jurisdictions of residence of all related parties with whom the taxpayer enters into transactions that are covered by the unilateral APAs; and
- Jurisdictions of residence of the taxpayer's ultimate parent entity and the immediate parent entity.

Generally, information relating to unilateral APAs issued before April 1, 2017, will be exchanged by December 2017. Those issued after April 1, 2017, will be exchanged within three months after the date of the agreement.

In addition, reflecting Singapore's commitment to BEPS Actions 8-10, the IRAS has now clarified that the interpretation and application of the arm's length principle should be consistent with that under Actions 8-10, namely,

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that profits should be aligned with value creation, and where the real economic activities are located. Accordingly, the determination of risk for transfer pricing analysis purposes is also aligned to that under Actions 8-10.

The alignment with the BEPS actions came as no surprise, as Singapore has publicly committed itself to the BEPS minimum standards. Taxpayers seeking unilateral APAs should now be aware that such agreements may be shared.

Businesses should also review their existing transfer pricing policies, structures, and documentation to ensure that the arm's length principle has been applied according to the guidance under Actions 8-10, and not, for instance, based purely on contractual arrangements.

Introduction of "indicative margin" for related-party loans

To facilitate compliance with and adherence to the arm's length principle, the IRAS has put in place an "indicative margin" that taxpayers may apply on an appropriate base reference rate (e.g., LIBOR) to price the interest on their related-party loans obtained or provided on or after January 1, 2017.

Application of the indicative margin is not mandatory. It provides a straightforward way to price the interest on intercompany loans, in lieu of a detailed transfer pricing analysis. The intent is to provide administrative ease to businesses with relatively small amounts of intercompany borrowing and lending from having to develop and prepare a detailed transfer pricing analysis.

The indicative margin will be published on the IRAS website and will be updated at the beginning of each year. It is applicable to each Singapore dollar or foreign currency-denominated related-party loan that does not exceed SGD 15 million at the time the loan is obtained or provided. This amount is based on the loan committed, not the amount utilized.

If taxpayers choose to apply the indicative margin for their related-party loans, they are not expected to prepare transfer pricing documentation for these loans, and the loans will also be excluded when determining the safe harbor loan threshold of SGD 15 million under paragraph 6.19(f) of the transfer pricing guidelines.

The introduction of the indicative margin for related-party loans offers an alternative to detailed transfer pricing documentation for small loan amounts, and is a welcome move for businesses with small amounts of intercompany borrowing and lending. However, the application of an indicative margin is a "one-size-fits-all" approach, and it would be necessary to consider whether the results of such approach would still be considered arm's length from the perspective of the related counterparty to the loan, to avoid disputes and potentially double taxation on the interest amount.

– See Jee Chang (Singapore)
Partner
Deloitte Singapore
jcsee@deloitte.com

Lee Siew Ying (Singapore)
Partner
Deloitte Singapore
sylee@deloitte.com

Colombia's tax reform brings changes to transfer pricing regime

Colombia's tax reform bill – Law 1819, approved on December 23, 2016 – introduced changes to the country's transfer pricing regime, including the adoption of a country-by-country (CbC) reporting requirement, as well as master file and local file requirements.

As a result of the Colombian government's commitment to and active participation in the OECD's base erosion and profit shifting (BEPS) project, the tax reform includes the three-tiered approach for supporting documentation, as proposed by BEPS Action 13.

Master file and local file

In addition to the traditional local file, the transfer pricing supporting documentation shall incorporate a master file with relevant global information of the multinational group. The detailed contents of the master file are expected to be

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regulated by a forthcoming decree; however, BEPS Action 13 established guidelines regarding the information to be included.

The master file must be prepared/filed by all taxpayers who are subject to the requirement to file supporting documentation, regardless of whether they are controlling entities or subsidiaries domiciled in Colombia.

In addition to the certification of the statutory auditor, the financial and accounting information used for the preparation of the supporting documentation also must be signed by the taxpayer's legal representative.

Country by country report

As of tax year 2016, taxpayers domiciled in Colombia considered "controlling entities" of multinational groups with consolidated income equal or exceeding 81 million tax value units (UVTs) (approximately COP 2.4 billion), shall file a CbC report, which would include information related to the income and taxes recorded by each of the entities of the multinational group, as well as certain indicators related to the economic activity of each entity.

The tax reform does not establish the specific aspects to be included in the CbC report; however, the final report on BEPS Action 13 sets the minimum requirements of this report. Colombia will not only apply said requirements, but there will be some additional ones, which will be established by decree as well.

Moreover, the tax reform considers the possibility that subsidiaries or permanent establishments of multinational entities (MNEs) in Colombia may file this report on behalf of the parent company, if there is no CbC reporting legislation in the parent company's country of domicile.

Failure to comply with the CbC report filing requirement will be punishable in accordance with Article 651 of the Tax Code; therefore, the penalties included in the transfer pricing regime will not be applicable.

Transactions involving commodities

In line with Action 10 of the BEPS project, the tax reform establishes the comparable uncontrolled price (CUP) method as the most appropriate method to be applied in transactions involving commodities. For the analysis, the arm's length principle must be determined considering comparable transactions between independent third parties or public quotes, which indicate the price of the commodity during a given period in a domestic or international exchange market, and performing the reasonable comparability adjustments that may apply.

If the taxpayer does not provide reliable documentation (contracts, offers, or any other document that indicates the terms of the agreement) of the date on which the price was agreed in the controlled transaction, and the tax authority is unable to determine it in any other way, the tax authority may establish the date to set the price of the transaction with the available evidence or according to market practices.

In exceptional cases, other methods may be applied for the analysis in this type of transactions, provided that all economic, financial, and technical reasons are included for purposes of the analysis.

Penalties

Penalties for late filing of supporting documentation and the transfer pricing informative return will now be determined considering the days of delay and a percentage over the aggregated amount of the transactions subject to analysis.

In some cases the penalty caps were increased, making it more costly to fail to comply with the transfer pricing regime, with penalties that may reach COP 955 million (UVT – 2017).

A new penalty was added, related to the failure to file transfer pricing supporting documentation, which corresponds to 4 percent of the aggregated amount of the transactions subject to the regime that should have been included in said formal duty, without exceeding the equivalent of 25.000 UVT (COP 796 million).

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Malaysia introduces country-by-country reporting rules

Malaysia's Inland Revenue Board on December 23, 2016, issued country-by-country (CbC) reporting rules in line with the recommendations of the final report on the OECD's base erosion and profit shifting (BEPS) Action 13. The rules are based on the model legislation contained in the OECD's implementation package released on June 8, 2015.

This information is expected to assist IRB in conducting effective risk-based audits with more transparent information. However, the rules also state that the use of CbC report information by IRB will be restricted to assessing noncompliance or high level transfer pricing/BEPS risks, and cannot be considered as an alternate to a detailed transfer pricing audit. Further, IRB is obligated to preserve the confidentiality of the CbC report information that will be shared by taxpayers.

Apart from CbC reporting rules, IRB has also notified the rules[22] setting out special considerations for financial institutions or branches of overseas financial institutions to identify financial accounts in accordance with due diligence procedures. The required information regarding these accounts must be collected and furnished to the IRB, which will thereafter exchange it on an annual basis with the competent authorities of other jurisdiction on a reciprocity basis.

IRB has also come up with orders[23] that detail the administrative modalities of automatic exchange of information and mutual administrative assistance in tax matters.

Framework of the CbC reporting rules

The basic framework of the CbC reporting rules is outlined below:

Affected entities: The rules apply to multinational corporation groups (MCGs) that are required to prepare consolidated financial statements and have two or more corporations related through ownership or control having its tax residence in different jurisdictions and engaged in cross-border transactions. The ultimate holding company of such an MCG (resident and incorporated or registered in Malaysia) or any constituent entity of such MCG (resident and incorporated or registered in Malaysia or even under the laws of the territory outside Malaysia) must comply with CbC reporting rules.

The rules will also cover corporations resident in Malaysia that have a permanent establishment (PE) outside Malaysia that is subject to tax in the respective jurisdiction, or vice versa.

To reduce the compliance burden for small taxpayers, the rules prescribe a minimum threshold for applicability – total consolidated group revenue of at least MYR 3 billion in the financial year preceding the reporting financial year.

Reporting obligation: Under the rules, a Malaysian ultimate holding company or a surrogate holding company (called a reporting entity) of an MCG must file the CbC report. Surrogate holding company is defined as one of the constituent entities that is resident in Malaysia appointed by the MNE group as a sole substitute for the ultimate holding company to file the CbC report (hereinafter referred to as "surrogate parent filing"). Surrogate parent filing is required in following scenarios:

- The ultimate holding company is not resident in Malaysia and is not obligated to file a CbC report in its respective tax jurisdiction; or
- The jurisdiction in which the ultimate holding company is resident does not have a qualifying competent authority agreement in effect at the time of filing, or there is a systematic failure to seek information that has been notified by the Director General to the constituent entity resident in Malaysia.

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[22] Income Tax (Automatic Exchange of Financial Account Information) Rules 2016.
[23] Income Tax (Convention on Mutual Administrative Assistance in Tax Matters) Order 2016; Income Tax (Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information) Order 2016; Income Tax (Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports) Order 2016.

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Timeline: The rules are effective from January 1, 2017, and require annual CbC reporting for the entire financial year to be filed no later than 12 months from the close of the financial year of the reporting entity (for example, by December 31, 2018 for FY 2017).

Further, notification must be given to the Director General of IRB in writing by the constituent entity if it is the holding company or the surrogate holding company on or before the last day of the reporting financial year (that is, by December 31 for FY 2017). If the constituent entity is not a reporting entity, then the identity and tax residence of the reporting entity must be provided on or before the last day of the reporting financial year.

Content of CbC report: Under the CbC report rules, which are in line with the OECD template, the CbC report will have two parts:

- Part I: Aggregate information relating to the amount of revenue; profit or loss before income tax; income tax paid and income tax accrued; stated capital; accumulated earnings; number of employees; tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the MNE group operates. All the information must be reported in Malaysia's currency, the ringitt.
- Part II: List of all the constituent entities of the MNE group included in aggregation, specifying the nature of each entity's main business activity.

Format of filing: The CbC report must be filed in an electronic format through a common schema in Extensible Markup Language format (yet to be notified) which will again be in line with the OECD's suggested standardized electronic format for the exchange of CbC report information between jurisdictions. Further guidance on this is expected before December 31, 2017.

Penal consequences: The penalty provisions have already been introduced in the Finance Bill of 2016, which lays down the following penalty consequences for any CbC reporting-related defaults.

Default	Penal / Prosecution consequences
Failure to furnish CbC report (Sec 112A) Furnishing an incorrect return, information return/report (Sec 113A) Failure to comply with the rules on mutual administrative assistance (Sec 119B)	A penalty of not less than MYR 20,000 and not more than MYR 100,000, or imprisonment for a term not exceeding six months, or both

Way forward

As a next step, the information about the reporting entity (i.e., the ultimate holding company or surrogate holding company) must be provided to IRB on or before the end of the reporting financial year.

The promulgation of CbC reporting rules has provided the desired framework on the reporting obligations and compliance that must be performed by MCGs. Therefore, it is important for MCGs to identify any potential area of risk or gaps in their global tax structures, and make desired changes or build adequate, defensible positions to get ready for the audits that will be based on CbC report information.

– Theresa Goh (Kuala Lumpur)
Partner
Deloitte Malaysia
tgoh@deloitte.com

Ukraine introduces changes to transfer pricing legislation

The Ukrainian Parliament on 21 December 2016 passed a law "On amendments to the Tax Code of Ukraine (on the Improvement of the Investment Climate in Ukraine)," which introduced changes to the transfer pricing rules in Ukraine.

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The new law entered into force on 1 January 2017.

Key provisions

Increase of threshold for controlled transactions: Under the new rules, transactions are treated as controlled if the following two criteria are met:

- The taxpayer's income from all types of activities exceeds UAH 150 million or approximately USD 5.5 million (the threshold under the previous rules was UAH 50 million;
- The overall transactions amount with one counterparty exceeds UAH 10 million or approximately USD 0.4 million (compared to 5 million under the previous version).

Changes to deadline for submission of report on controlled transactions: The deadline for submission of the report on controlled transactions was changed to 1 October of the year following the reporting period. The deadline under the prior version of the law was 1 May. Thus, the report on controlled transactions entered into in 2016 should be submitted to the tax authorities before 1 October 2017.

Extension of the list of controlled transactions: The list of transactions subject to the Ukrainian transfer pricing regime has been extended. Effective 1 January 2017, the transfer pricing rules apply to the following transactions with nonresidents:

- Related-party transactions, including those that involve independent intermediaries with no substantial functions (in line with the old rules);
- Transactions involving the sale or purchase of goods and services through nonresident commission agents (old rules applied to the sale of goods only);
- Transactions with nonresidents from low-tax jurisdictions included in the list published by the Cabinet of Ministers of Ukraine (the CMU). Unlike the previous version, the new provision will be applicable not only to transactions with counterparties registered in low-tax jurisdictions, but also to transactions with tax residents of such jurisdictions (regardless of place of registration); and
- Transactions with nonresidents with specified organizational legal forms that do not pay corporate tax or are not tax residents of their state of registration. The list of organizational legal forms will be approved by the CMU.

New regulations on forward agreements: The rules for transfer pricing analysis of forward agreements that involve commodities have been improved and brought closer to compliance with the OECD requirements.

Hereinafter, the price comparison for transfer pricing analysis may be performed both on the date the forward agreement is signed and on the date of the actual supply, depending on when the price was actually set in the controlled transaction.

The law determines that for treatment of the agreement as a forward contract, taxpayers must notify the tax authorities within 10 days after singing the agreement. The form for such notification will be approved by the Ministry of Finance. The applicability of these new provisions before the form is approved is not certain.

Changes to self-initiated adjustments: The law introduces the right for taxpayers to perform adjustments to its tax liabilities to the minimum/maximum points on the range in case of any deviation from the arm's length price range. Conversely, during tax audits liabilities will be adjusted to the median of the arm's length range (which is less advantageous for the taxpayer).

Under the previous version of the rules, the median was used for both self-initiated adjustments and for adjustments made by the tax authorities.

Definition of comparable companies formally introduced: The law clearly determines the right of taxpayers to use financial data of comparable companies to calculate the market margin range, if information on comparable transactions is not available. The comparable companies should meet the following criteria:

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- The comparable companies must be engaged in activities comparable to the activity engaged in in the controlled transaction;
- The comparable companies may not have a subsidiary or parent company with shareholding that exceeds 20%;
- Do not have losses in more than one analyzed period.

These criteria (except for the losses criterion) were predominantly used in current practice, but were not formally approved at the legislative level.

Changes in penalties: The new law establishes the following fines for failure to submit the controlled transactions report and transfer pricing documentation.

Violation type	Previous rule	New rule
Nonsubmission of the controlled transactions report	300 minimum wages (approx. UAH 960,000)	300 minimum living wages (approx. UAH 463,000)
Failure to include transaction in the controlled transactions report	1 percent of the amount of the transactions not included, but no more than 300 minimum wages	1 percent of the amount of transactions not included, but no more than 300 minimum living wages
Late submission of the controlled transactions report	No specific provision (fine for nonsubmission was applicable)	1 minimum living wage for each day of delay, but no more than 300 minimum living wages
Failure to submit transfer pricing documentation	3 percent of the amount of the transactions, but no more than 200 minimum wages (approx. UAH 640,000)	3 % of the amount of transactions, but no more than 200 minimum living wages (approx. UAH 309,000)
Untimely submission of transfer pricing documentation	No specific provision (fine for nonsubmission was applicable)	2 minimum living wages for each day of delay, but no more than 200 minimum living wages

If the report on controlled transactions or transfer pricing documentation is not submitted within 30 days from the deadline for payment of the fine, an additional penalty in the amount of 5 minimum living wages for each day of nonsubmission is applicable.

– Alexander Cherinko (Kyiv)
Director
Deloitte Ukraine
acherinko@deloitte.ua

Dmytro Lytvyn (Kyiv)
Manager
Deloitte Ukraine
dlytvyn@deloitte.ua

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