Transfer Pricing Express | Issue #2

In this issue:

Deadlines to request competent authority assistance to relieve double taxation | A country by country guide

Transfer pricing continues to be a top priority of tax authorities around the world, creating major risks for multinational companies. As foreign tax authorities aggressively assert transfer pricing deficiencies, a large number of taxpayers are being assessed with transfer pricing adjustments relating to their intercompany transactions.

As such, it is very important to understand the actions required to preserve the right to request competent authority assistance to relieve potential double taxation.

To relieve potential double taxation arising from transfer pricing adjustments, assistance is provided under the Mutual Agreement Procedure ("MAP") articles of the double tax treaties signed between Ireland and 72 other countries (currently 70 of them being in effect).

The MAP article in double taxation agreements provides for co-operation between the competent authorities of the two contracting states to resolve disputes that may arise under the treaty and to resolve cases of double taxation not provided for in the treaty.

To obtain relief from double taxation, the Irish and other countries' competent authorities should be notified of the proposed adjustments or a request for MAP assistance must be filed within specified deadlines outlined in the relevant Irish tax treaties.

These treaty deadlines do differ from domestic statutes of limitations. Therefore, protective actions should be taken to ensure access to MAP is preserved.

If a company is subject to a foreign transfer pricing audit and there is a reasonable expectation that it may be a transfer pricing adjustment which may give rise to double taxation, the relevant treaty timelines should be reviewed and consideration given to what actions need to be taken to ensure access to MAP is preserved.

The table on the next page provides a summary of the applicable time limits for requesting competent authority assistance between Ireland and some of its main treaty partners under the applicable tax treaty.

The majority of Ireland's double tax treaties include a three year time limit although some provide for a two year time limit or no time limit. In the absence of a defined time limit, Ireland's domestic tax laws state that the time limit for claiming repayment of tax is four years. Some of Ireland's tax treaties do state that MAP will be available irrespective of domestic time limits; e.g. Ireland-US treaty.

Separate to relief under a tax treaty, relief may be available under the EU Arbitration Convention for disputes between EU member states.

For further information relating to all 72 treaties which Ireland has entered into, please follow this link to the Revenue website.

Ireland's treaty partner	Notification | Action deadline per treaty
Australia	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
Austria	No deadline.
Belgium	The case must be submitted before the expiry of a period of two years from the notification of liability to or the deduction at source of the second charge to tax.
Canada	The case must be submitted within two years from the first notification of the action which gives rise to taxation not in accordance with the provisions of the treaty.
China	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
Denmark	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
Finland	The case must be presented within three years from the first notification of the action regarded by such resident as resulting in taxation not in accordance with the provisions of the treaty.
France	No deadline.
Germany	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
Greece	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
Hong Kong	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.

Ireland's treaty partner	Notification | Action deadline per treaty
Hungary	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
India	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
Israel	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
Italy	The claim must be lodged within two years from the date on which the tax was notified or withheld at the source or within two years of the entry into force of this Convention, whichever is the later.
Japan	No deadline.
Luxembourg	No deadline.
Malta	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
Netherlands	No deadline.
New Zealand	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
Norway	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
Poland	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
Portugal	The case must be presented within two years from the first notification of the action resulting in taxation not in accordance with the provisions of the treaty.
Russia	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.

Ireland's treaty partner	Notification | Action deadline per treaty
Singapore	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
South Africa	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
Spain	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
Sweden	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
Switzerland	No deadline.
Turkey	The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with the provisions of the treaty.
United Kingdom	No deadline.
United States	No deadline.

Markella Karakalpaki

Senior, Transfer Pricing

Country-by-country reporting notification deadlines

The first Country-by-Country Reports for the year ended 31 December 2016 will be filed during 2017.

An important aspect relating to Country-by-Country Reporting ("CbCR") compliance is that for many jurisdictions, there is a formal notification requirement to provide certain information pertaining to the status of entities in that location and to outline if such entities are CbCR filers (ultimate parent or surrogate parent) or constituent entities (where the CbCR for the MNE group will be filed in another location).

Annex IV of Chapter 5 of Action 13: "Transfer Pricing Documentation and Country-by-Country Reporting", contains model legislation that tax authorities can use to implement CbCR into domestic legislation. Article 3 of the model legislation states:

" 1. Any Constituent Entity of a MNE Group that is resident for tax purposes in [Country] shall notify the [Country Tax Administration] whether it is the Ultimate Parent Entity or the Surrogate Parent Entity, no later than [the last day of the Reporting Fiscal Year if such MNE Group].

2. Where a Constituent Entity of an MNE Group that is resident for tax purposes in [Country] is not the Ultimate Parent Entity nor the Surrogate Parent Entity, it shall notify the [Country Tax Administration] of the identity and tax residence of the Reporting Entity, no later than [the last day of the Reporting Fiscal Year of such MNE Group]."

Many tax authorities have transposed the above or a variant of the above language into domestic law. In Ireland, The Taxes (Country-by-Country Reporting) Regulations 2015, which was issued in December 2015, contains language mandating notification before the end of the financial year to which the CbCR relates. The recently issued Irish Revenue publication: "Country-By-Country Reporting – Some Frequently Asked Questions (FAQs)" from October 2016, confirmed that notification in Ireland will be via the Revenue Online Service ("ROS") platform.

Therefore, if an MNE group is within the remit of CbCR for the year ended 31 December 2016, then notification must be made by the Irish constituent entities within the group via ROS before the end of December 2016.

If the MNE group has an accounting year end of 31 March 2017 for example, then notification must be made by 31 March 2017. It should also be noted that notification is an annual requirement.

Other countries are only now providing details on how notification will operate in their jurisdictions. As of 15th November 2016, 22 countries have introduced notification requirements or are finalising rules re same. In addition, many countries have to date not provided any detail on how notification will operate in respective locations.

Based on information to date, notification timing broadly falls into the following categories:

- At the end of the financial year for which the CbCR relates (e.g. notification by 31 December 2016 for a CbCR that relates to 31 December 2016);
- At the date of filing of the corporation tax return of the relevant entity with details re notification contained therein;
- Twelve months after the financial year end for which the CbCR relates (i.e. notification by 31 December 2017 for a CbCR that relates to 31 December 2016);
- No notification requirement.

As of 15th November 2016, 22 countries have introduced notification requirements or are finalising rules re same.

For further information relating to CbCR regulations issued by Irish Revenue in December 2015, please follow this link to our global transfer pricing alert. For details in relation to Irish Revenue's updated frequently asked questions and answers pertaining to CbCR, including notification requirements, please follow this link to our global transfer pricing alert. Irish Revenue's updated FAQ guide can also be found here.

Gerard Feeney

Head of Transfer Pricing

& Richard Lombard

Senior Manager, Transfer Pricing

Year-end transfer pricing actions | Adjustments

Introduction
As the financial year-end approaches for the majority of companies, it is traditionally the time that groups make adjustments in order to address the inconsistencies between their actual financial results and the applicable transfer pricing policies. Such actions are reinforced by the fact that non-adherence to transfer pricing policies may result in challenges made by the tax authorities which continue to focus on the *ex post* results; i.e. on testing the arm's length nature of the transfer prices after the results of the transaction are known. This article outlines some guidance on the practical aspects and challenges related to the year-end adjustment processes.

Why do deviations occur?
There are multiple reasons behind the deviations which might occur during the financial year, including:

- Budgeting inaccuracies and changes in the market or operational environment. e.g. higher than expected operational costs or lower volume of sales due to unforeseen circumstances;

- Differences in reporting. Typically, the financial data used by companies for managing and controlling purposes derive from the management accounts. However, tax authorities assess the entities based on the local GAAP accounts. In order to arrive at such information, there are certain steps that need to be undertaken e.g. conversion of management accounts to IFRS financials and subsequently, conversion to local GAAP as shown in the figure below. Therefore, such a complex process may lead to deviations between the transfer pricing policy and the actual financial results.

- IT systems based on management accounts and not IFRS or GAAP data, on the same rationale as above;

- Operational disconnections between the tax and other departments. Transfer pricing policies are normally set by the tax departments but, in many cases, the day-to-day processes fall within the remit of the business or finance teams.

How to react?
Where there is need for a year-end transfer pricing adjustment, there are a number of aspects that need to be considered. The table below provides an overview of these aspects:

The 9 aspects of year-end adjustments

1	VAT
2	Acceptance under domestic law
3	Inventory calculation
4	Impact on management accounts
5	Documentation
6	Contractual agreement
7	Customs
8	Provisions
9	Employee participation

The 9 aspects of year-end adjustments

From a transfer pricing perspective, some key factors that need to be taken into account when considering transfer pricing adjustments are:

- **Identifying and implementing adjustments**: There are certain practical steps in relation to identifying and implementing a year-end adjustment:

  - *Actual results cross-check:* Cross-checking of the actual transfer prices or financial results with the prices or profit margins determined by comparable uncontrolled transactions or companies. It is crucial to use segmented statutory results of the company in relation to each intercompany transaction (if available), as these serve as the starting point for tax authorities.

  - *Analytical process:* If the prices or margins fall outside the target range, there are certain questions that need to be asked before making the adjustment, including - what is the reason for the deviation; who is the responsible party; is it a one-off or a recurring incident; and has an adjustment been made before? In relation to the latter, if adjustments are being repeatedly made, the reason might be that the underlying transfer pricing policies are either not consistent with the arm's length standard or too difficult to implement.

- *Size:* If a year-end adjustment is considered necessary, the company must determine whether the adjustment should be made to the external bounds of the arm's length range or to the median (or any other point within that range). While certain tax authorities usually make adjustments to the median, most companies proceed with adjustments to either the lower or upper quartile of the acceptable range.

- *Implementation*: To implement the year-end adjustment, the company must book the adjustment into its financial systems and issue a relevant intercompany invoice.

- **Timing:** Year-end adjustments are commonly made before the closing of the books at the end of the financial year. If done at year-end, the company may proceed with a one-off adjustment that is typically booked in *"Period 13"*. In practice, many tax authorities ask for details of such adjustments upon audit and the existence of large adjustments may give rise to conflict. Alternatively, some companies close their books, including transfer pricing calculations, by using forecasted financial data and true-ups based on actual numbers are booked in the following year.

- **Post-closing adjustments:** If the adjustment results in a downward adjustment to the taxable income reported in a previously filed return, the adjustment may not be allowed by certain local tax regulations.

Are there any other challenges?
As mentioned above, making a year-end adjustment may not only impact direct taxes but also indirect taxes such as VAT and customs. In relation to customs, as different regulations and filing methods exist, post-importation adjustments to the prices corresponding to year-end adjustments are also likely to require the existence of thorough documentation from a customs perspective. This can be very challenging since both administrations often present opposing views. If transfer pricing year-end adjustments are not well-managed from a customs perspective, companies may face the risk of duties and penalties from the custom authorities.

Other than the above, conversions to local GAAP may result to problems with the auditing processes and stretch the capabilities of the group's IT systems.

Is there a way to address the challenges?
Consideration should be given in putting in place intercompany agreements that include terms which describe the calculation methods and any adjustments that might need to be made. Tax authorities tend to pay attention to the terms of the intercompany agreements as a first indication of whether the intercompany transactions are arm's length, considering whether the relevant terms would be expected to be agreed between independent parties.

To avoid difficulties related to making adjustments to previously filed tax returns, consideration should be given to making more frequent adjustments throughout the year (e.g. quarterly or bi-annually) ensure transfer prices are contemporaneous.

In addition, companies should consider maintaining transfer pricing documentation in order to support year-end adjustments when they need to be made.

Finally, where double taxation arises due to the disallowance of year-end adjustments, entering into a MAP process could be also considered.

Markella Karakalpaki

Senior, Transfer Pricing

Grandfathering under Ireland's transfer pricing regime

Ireland's domestic transfer pricing law is contained in Part 35A of The Taxes Consolidation Act, 1997 ("TCA 1997"). Part 35A contains eight sections, 835A to 835H. As part of the introduction of the regime in Ireland, Irish Revenue allow certain transactions to fall outside the documentation requirement under Irish transfer pricing law – "grandfathering". But if you read Part 35A TCA 1997, you will not find any legislative reference to grandfathering. You need to refer to the original legislation contained in Section 42 of Finance Act 2010 to see any legislative reference to grandfathering. Section 42(2) states:

"This section applies for chargeable periods beginning on or after 1 January 2011 in relation to any arrangement…… other than any such arrangement the terms of which are agreed before 1 July 2010".

Whilst the above section did not transpose over to Part 35A, the enabling legislation is nevertheless still law until such time as it is amended or repealed.

Many Irish taxpayers within the scope of Ireland's transfer pricing regime undertook a detailed review of their transfer pricing arrangements with related parties before July 2010 to "grandfather" the terms and conditions. This effectively ensured that there was no requirement to formally document such transactions in a transfer pricing report or undertake economic analysis to determine an arm's length price for such transactions.

However, it is now over six years since the law was enacted and taxpayers need to reconsider whether transactions deemed to be grandfathered are still protected.

With the passage of time and constantly changing pace of business and operating models, taxpayers really need to consider whether they should still be relying on grandfathering for protection.

Irish Revenue have now formalised a separate transfer pricing audit team who have been undertaking audits for the last number of years. Based on experience of the type of questions and level of detail that are sought on Irish transfer pricing audits, it is this writer's view that the onus is very much on taxpayers to demonstrate that grandfathering is still valid and that upon audit, such assertion will be a focus of auditor scrutiny.

Potentially any amendment to a "grandfathered" arrangement or written agreement since July 2010 could mean that the underlying trading transaction is now within the remit of Part 35A TCA 1997. Consideration should be given to the following:

- If the agreement provides that the price is to be "agreed between the parties from time to time", have the parties agreed a course of action after 1 July 2010?
- Renewal clauses in agreements – does renewal require the action of either party to ensure continuation of the agreement after the initial term or does the agreement automatically renew year on year?
- Agreements, the term of which are dependent on the optional renewal of another agreement;
- Changes to the subject matter of the agreement – schedule of services provided or goods to be supplied;
- Changes to the parties to the agreement;
- Assignment of the agreement;
- Irrespective of what is contained in the agreement considered to be grandfathered - are the parties to the agreement still conducting business based on pre 1 July 2010 terms in practice?

Irrespective of whether a transaction is considered grandfathered or not, there are a number of sections in Ireland's tax laws that are of relevance and need to be considered when establishing prices between related parties.

Section 81 TCA 1997 is concerned with ensuring expenses deducted for the purposes of calculating tax are *"wholly and exclusively"* laid out or expended for the purpose of a company's trade in Ireland and are not of a capital nature.

Although not technically within the scope of Ireland's formal transfer pricing legislation, there has always been an arm's length requirement for Irish securitisation vehicles taxed under Section 110 TCA 1997. Recent proposed amendments to Section 110 as contained in the Finance Bill 2016 also increase the relevance of transfer pricing principles in certain circumstances.

There are also other provisions in Irish tax law, including anti-avoidance measures that deal with transfers of land between connected persons, Ireland's tonnage tax regime, the imposition of market value for Capital Gains Tax purposes on the disposal of assets between connected persons and the transfer of trading stock on the discontinuance of a trade.

The tax landscape has changed significantly since Ireland's transfer pricing law was introduced in 2010, particularly with the OECD Base Erosion and Profit Shifting ("BEPS") project. Many of the principles contained in Action 8-10 of the BEPS project in particular will materially impact transactions and render the assertion of "grandfathered" redundant.

As we approach the end of 2016, taxpayers need to have a process in place to review all material intercompany transactions to ensure that the arm's length principle is being adhered to, not only from an Irish transfer pricing perspective but also from the perspective of the other related party to the transaction.

Gerard Feeney

Head of Transfer Pricing

Contacts:

For additional information regarding transfer pricing, please contact one of the following members of our transfer pricing team in Ireland:

Gerard Feeney
Head of Transfer Pricing
Tel: + 353 (0)1 417 2403
Email: gfeeney@deloitte.ie

Kumar Das
Senior Manager | Transfer Pricing
Tel: +353 (0)1 417 3939
Email: kudas@deloitte.ie

James Smyth
Senior Manager | Transfer Pricing
Tel: +353 (0)1 407 4766
Email: jasmyth@deloitte.ie

Richard Lombard
Senior Manager | Transfer Pricing
Tel: +353 (0)1 417 3696
Email: rlombard@deloitte.ie

Wilco Froneman
Manager | Transfer Pricing
Tel: +353 (0)1 417 3728
Email: wfroneman@deloitte.ie

Markella Karakalpaki
Senior | Transfer Pricing
Tel: +353 (0)1 417 3700
Email: mkarakalpaki@deloitte.ie