



Arm's Length Standard

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OECD on Track to Deliver New Guidance on Intangibles, Documentation

The Organization for Economic Cooperation and Development (OECD) is expected to release widely anticipated deliverables on two transfer pricing items from the Base Erosion and Profit Shifting Action Plan – intangibles and documentation – sometime before the meeting of the G20 finance ministers and central bank governors in Cairns, Australia, on September 20-21.

The OECD has stated its intent to provide a revised chapter V of its transfer pricing guidelines on documentation, and a revised chapter VI on intangibles.

The revisions to the OECD transfer pricing guidelines on documentation are expected to set a new global standard for transfer pricing documentation and to have a major impact on how multinational enterprises document their compliance with the applicable transfer prices rules. The revisions are expected to add for the first time new disclosure requirements regarding multinational enterprises' entire global operations. The new requirements for country-by-country financial disclosure and the new master file disclosure of how a multinational enterprise conducts its global operations will add a level of transparency to multinational enterprises' global operations that is not currently found in most documentation reports or available to tax auditors in many countries. Most countries are expected to adopt this new standard.

The revisions to the OECD transfer pricing guidelines on intangibles are a work in process, but will likely provide additional support to countries that take a broad view of the definition of intangibles and countries that utilize the discounted cash flow method to value intangibles. In addition, the OECD is expected to finalize important guidance on location-specific advantages, workforce in place, and the impact of "passive association" on the arm's length charge for interest and in other situations. Although this release is not expected to finalize the guidance for determining the related party entitled to the returns for the ownership and development of intangibles, the draft guidance in the release is expected to have a significant impact on the conversation on those issues.

Deloitte is monitoring OECD transfer pricing developments closely, and will conduct webcasts on the new guidance in the Americas, Asia, and Europe soon after the deliverables are released. Please look for an announcement of the webcasts and a link to sign up. We will also send out a special edition of the *Arm's Length Standard* to subscribers with our analysis of the new guidance and its implications for multinational enterprises soon after the release.

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India's 2014 Budget Includes Transfer Pricing Proposals

India's Finance Minister Arun Jaitley on July 10 unveiled Narendra Modi's government's first budget, which included some transfer pricing items from taxpayers' wish list.

Transfer pricing regulations were introduced in India in 2001. Since then, taxpayers have called for the introduction of the multiple-year data and arm's length range concepts. Finally, taxpayers may be in for the *Acche Din* (or good days) the Modi administration has promised.

Introduction of Range Concept

India's Income Tax Act, 1961, provides that when more than one price is determined using the most appropriate method, the arm's length price will be the arithmetic mean of such prices and the variation, if any, should not exceed 1 percent for wholesale traders and 3 percent in other cases.

In his speech, the finance minister proposed the introduction of the range concept to determine an arm's length price, to align with international best practices. International guidance such as the OECD transfer pricing guidelines, the UN Transfer Pricing Manual, and the transfer pricing regulations of developed countries adopt the concept of the interquartile range, whereby the results of the bottom quarter and the top quarter of the data set are discarded. If the price of the transaction under examination falls within the two quarters left, then the transfer price is said to adhere to the arm's length standard.

However, it is interesting to note that the finance minister mentioned that the arithmetic mean will not be done away with completely, and will continue to apply when the number of comparables is inadequate. The minister mentioned that the relevant data is under analysis and that detailed rules in this regard will be issued in due course. Taxpayers will have to wait for the rules to be issued for more clarity on the implementation of the range and mean concept.

Hopefully, the prescribed regulations will apply the concept of full range or interquartile range, rather than a restricted range for various industries/activities, such as the current 1 percent for wholesale trading and maximum of 3 percent for all other cases.

Multiple-Year Data

Current rules require that the data to be used for determining an arm's length price compulsorily must pertain to the year in which the international transaction is entered into, unless a taxpayer can provide evidence that the data for the prior two years has a bearing on the transfer price. This created significant issues for taxpayer, because some industries may be cyclical, prices are generally set based on the past year's data, and current-year data may not be available at the time documentation is prepared.

The finance minister proposed to amend the regulations to allow the use of multiple-year data, which is in line with international guidance and international best practices. However, no further details were provided in the Finance Bill or the Explanatory Memorandum. Again, taxpayers will have to wait for the rules/notifications to be issued for more clarity regarding implementation.

Rollback of Advance Pricing Agreements

In another welcome move that should help prevent and resolve disputes for open tax years and provide some certainty, the finance minister proposed a rollback mechanism under the current APA scheme, effective 1 October 2014.

The rollback will be available for a period of four years preceding the first year to which the APA applies. For example, if the APA has been agreed from FY 2015-16 onwards, then the agreement may also cover the prior four years – from FY 2011-12 to FY 2014-15. The explanatory memorandum provides that conditions, procedures, and the manner of the rollback will be issued.

Clear guidance should be provided on how the pending audit and appellate proceedings for the years covered under the rollback would work during the APA negotiation stage.

Deemed International Transactions

Under the existing provision, a transaction between an enterprise and another person that is not an Associated Enterprise (AE) would be deemed an international transaction when there exists a prior agreement between such other person and AE of the enterprise or when the terms of the relevant transaction are determined in substance between such other person and the AE. There have been tribunal judgments that have held that at least one of the parties to the transaction must be nonresident. The Finance (No.2) Bill 2014 proposes to amend the definition, effective for transactions entered into from FY 2014-15, to clarify that for a transaction to be deemed an international transaction the unrelated party may or may not be nonresident. The bill has further amended the rules to clarify that either the enterprise (that is, the assessee) or the associated enterprise must be a nonresident for purposes of the applicability of the deemed international transaction.

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France Postpones Due Date of New Transfer Pricing Documentation

The French Tax Administration (FTA) has announced that the transfer pricing documentation taxpayers must provide under the new requirement imposed by Article 223 quinquies B of the French Tax Code will be due November 20, 2014, for companies subject to the new requirement.

Initially, the requirement called for companies subject to this obligation to file the form within six months after the filing of the tax return. Thus, some companies would have had to file as early as July 2014. Now, all companies must file by November 20.

In addition, the FTA announced that it is preparing a specific form taxpayers would have to file to comply with their obligation. For now, the new form is being circulated as an unofficial draft. This draft form, which is clearly inspired by the current OECD work on country-by-country reporting, is a three-page document that would include information on the company, any intangible assets in use, and intercompany flows.

The main sections of the draft form call for:

- A short description of the company (name, identification number, address) and the activities of its corporate group;
- A list of the group's intangibles used by the French entity (stating the country of ownership of those intangibles);
- A general description of the taxpayer's group's transfer pricing policies;
- A list of all intragroup flows involving the French company, by nature of flows. For each flow, the information to be provided includes:
 - The nature of the transaction;
 - The aggregated amounts per type of transaction if they exceed €100 000;
 - A list of the countries involved in the transactions (according to ISO classification);

- o The transfer pricing method applied to the transactions; and
- o The royalty rates (paid or received) applicable to the transaction.

Taxpayers also must disclose whether any major changes in their transfer pricing policy occurred during the year, and provide enough details on the potential changes.

The form must be completed in French, and sent to the FTA in electronic format.

Administrative guidelines on the new obligation are expected to be published in the coming weeks to provide more information on the way the new transfer pricing documentation requirement should be dealt with by taxpayers, and on the form's specific format. Minor changes may therefore exist between the final form and the draft that was circulated.

The fact that a specific form, to be filed in electronic format, is put in place will allow the FTA to perform automated analyses to identify potential discrepancies in the filings (errors, significant variations from past years, differences with peers). This will give the FTA a large database on flows and transfer pricing methods applied by international groups, as well as a tool to better prioritize audits.

Thus, taxpayers should be careful when filling out the new form, and should consider the potential consequences of their statements. We strongly suggest that transfer pricing documentation be prepared in advance to the filing of the form. Indeed, having the transfer pricing documentation will provide French taxpayers a full view of their transfer pricing situation, allowing them to fully anticipate and appreciate the consequences of the information provided in the Article 223 *quinquies* B form.

Penalties for noncompliance with this new requirement are €150 for failure to file and €15 per instance of missing or erroneous information, with a €10,000 limit.

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US Multistate Tax Commission Continues to Explore Transfer Pricing

The Multistate Tax Commission's Arm's Length Adjustment Service (ALAS) Advisory Group – the group designated to lead the MTC's project to develop a multistate transfer pricing service – on July 28 convened in Albuquerque, New Mexico for its second in-person meeting. Although the project is still in its development phase, a recurring theme throughout the meetings has been the need for states to secure economic experts to support transfer pricing issues on audit and during litigation. In this Tax Alert we provide background regarding the ALAS project, summarize the July 28 meeting and the project timeline, and suggest additional considerations.

Background

Many states have the ability to evaluate and potentially challenge intercompany transfer pricing arrangements through arm's-length statutes and regulations similar to IRC §482, including the Treasury regulations thereunder. States also may

have statutes providing discretionary authority to adjust income, statutes requiring the add-back of certain intercompany payments, and statutory or judicial economic nexus principles.

State taxing authorities have had varying levels of success challenging and litigating transfer pricing arrangements. The ALAS project came about to enable states to pool resources to secure economic expertise to support arm's-length issues on audit and during litigation. The project may cover both domestic and international transfer pricing issues. Nine jurisdictions are officially participating in the project: Alabama, the District of Columbia, Florida, Georgia, Hawaii, Iowa, Kentucky, New Jersey, and North Carolina.¹

Economic Expertise

Project facilitator Dan Bucks² has indicated that a top priority of the ALAS project is obtaining joint economic expertise. Whether this should take the form of one or more economic experts employed directly by the MTC, third-party contractors engaged for economic support, or some combination of the two is currently under consideration. The ALAS Advisory Group has scheduled a meeting in Atlanta for October 6 to meet directly with several firms that have expressed an interest in providing third-party expertise.

Bucks discussed several ways to potentially improve the cost-effectiveness of retaining third-party expertise, including: (1) making sure auditors have obtained the appropriate background information before reaching out to third-party contractors; (2) training state or MTC audit staff to conduct first-level reviews to help identify inconsistencies and technical errors in taxpayer-provided transfer pricing studies; and (3) the MTC's direct employment of one or more economists.³

Information Sharing

Bucks suggested that the ALAS Advisory Group should consider adopting an information exchange policy for transfer pricing issues based on the model used by the Southeastern Association of Tax Administrators. The goal would be to make information sharing proactive; in other words, when one state taxing authority identifies a transfer pricing consideration during a taxpayer audit, it would notify the other participating taxing authorities and provide relevant information (such as its transfer pricing study), so they could take a coordinated audit approach.

Optional Joint Audit Models

Bucks proposed three possible models for providing joint audit services:

- Joint audits limited to transfer pricing issues only, separate from the regular MTC Audit Program;
- Joint audits that cover all corporate tax issues, including transfer pricing issues, separate from the regular MTC Audit Program; and
- Joint audits that cover all corporate tax issues, including transfer pricing issues, integrated with and conducted through the regular MTC Audit Program.⁴

While Bucks indicated a preference for the third option, there was no clear consensus as to which option might prevail. These joint audit services are being considered as a component that individual state taxing authorities could opt into or out of, since each state's interest in such services may vary.

¹ For more background information regarding the ALAS Advisory Group and the items discussed during the group's earlier (June 2, 2014) in-person meeting, see our previously issued Multistate Tax Alert. (http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us_multistate_tax_MTC_061014.pdf?id=us:em:na:als:eng:tax:081114)

² Dan Bucks was formerly the MTC Executive Director and Montana Director of Revenue.

³ See *Maximizing Cost-Benefit of Economics Expertise: Item III.A for July 28 Meeting*, available at: http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Events/ALAS_Advisory_Group/Memorandum%20on%20Maximizing%20Cost-Benefit%20of%20Economics%20Expertise%207-21-2014.pdf.

⁴ See *Summary of Issues for Joint Audit Models: Item III.D for July 28 Meeting*, available at: http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Events/ALAS_Advisory_Group/Memorandum%20on%20Audit%20Issues%207-21-2014.pdf.

Other Matters

The ALAS Advisory Group discussed several approaches that could be used to train existing auditors to handle transfer pricing issues and to coordinate with potential third-party contractors. The group is considering modeling a joint case resolution process (for disputes between states) on the MTC's existing Alternative Dispute Resolution process.⁵ The group also discussed whether advance pricing agreements between taxpayers and state taxing authorities may be implemented.

Timeline

The project plan proposes that the program will be designed in three phases, described as follows:

- A draft service design produced by mid-November 2014 for initial review by the MTC Executive Committee in December 2014.
- A revised service design completed by early April, 2015, to be approved by the MTC executive director and then submitted for review by the tax administrators of interested states.
- A final service design accompanied by signed commitments by interested states completed by June 20, 2015, to be considered by the MTC in July 2015. Participating states will be asked to commit to a six-month start-up period and an initial operating period of three or three-and-a-half years. If the service design is adopted in July 2015, the MTC anticipates implementation of the final service design (or a portion thereof) shortly thereafter.

The ALAS Advisory Group anticipates holding several additional meetings to further develop the project as the mid-November 2014 draft design deadline approaches, including the October 6, meeting with third-party contractors.

Additional Considerations

Although the full scope and potential implications of the MTC transfer pricing program are unclear at this time, state taxing authorities are likely to continue to conduct transfer pricing audits, and may explore various approaches to enhance their transfer pricing audit capabilities. In the interim, taxpayers may wish to consider preparing exam-ready transfer pricing documentation, to the extent it has not been prepared previously, and conducting a review of any existing transfer pricing studies to determine whether an update is advisable given any changes to the taxpayer's business activities.

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Netherlands Updates Decrees on APA and ATR Practice, Foreign Investor Desk, and Substance Requirements

The Dutch State Secretary for Finance on June 12 published five decrees updating and replacing previous guidance on advance pricing agreements (APAs) and advance tax rulings (ATRs), the substance requirements for holding companies and intragroup financing, licensing, and leasing companies, and introducing the new Foreign Investors Desk.

⁵ That process is available on the MTC website at:

http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Events/ALAS_Advisory_Group/MTC%20ADR%20Process%20Info%20and%20Procedures.pdf.

APAs/ATRs

The new decrees, like the old decrees, describe the conditions and procedures to obtain an APA or ATR. One key objective of the Netherlands is to provide taxpayers with a uniform and predictable APA/ATR practice with easy access, clear conditions, streamlined procedures, and minimal processing times. The requirements and procedures to obtain an APA or ATR remain comparable to those in previous decrees.

The most important changes introduced in the new decrees are as follows:

- The decrees clarify that the Netherlands will provide advance certainty only if:
 - The group of which the requesting entity is part conducts operational activities in the Netherlands, or has concrete plans to do so; or
 - The requesting entity meets specified minimum substance requirements for (intermediary) holding companies and intragroup financing, licensing, and leasing companies (except, for example, if advance certainty is requested regarding the absence of a Dutch permanent establishment).
- The duration of an ATR or APA is typically four to five years, but the new decrees specify that an ATR or APA may be concluded for a longer period on a case-by-case basis (such as long-term contracts).

Substance Requirements

The decrees provide welcome guidance and clarifications by the Ministry of Finance regarding its views on the minimum substance required for intragroup financing, licensing, and leasing companies to successfully claim application of the Dutch treaty network or the EU Interest & Royalty Directive, and to claim withholding tax credits.

As described above, if the minimum requirements are not met, the tax authorities will not enter into any ATR/APA discussions with the entity, and the Netherlands may pro-actively exchange information with the relevant foreign tax authority.

Foreign Investors Desk

The Foreign Investors Desk is meant to facilitate foreign investments into the Netherlands. The Desk will work closely with the APA/ ATR team and the Netherlands' Foreign Investment Agency to provide certainty on relevant tax aspects for companies that intend to make a significant investment in the Netherlands.

Although the decrees contain some new elements, the Dutch tax authorities' consistent approach toward companies with operational activities in the Netherlands and companies with sufficient substance continues, and as in the past, ultimately the source country must agree on the treaty position of the Dutch taxpayer.

The full text of the new decrees can be found online.

URL: <http://www.rijksoverheid.nl/documenten-en-publicaties/besluiten/2014/06/13/dgb-vpb-apa-atr-besluiten.html>

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Finnish Court Clarifies Scope of Transfer Pricing Statute

Finland's Supreme Administrative Court on July 3 issued a landmark ruling on the scope of section 31 of the Finnish Tax Procedure Act, which regulates transfer pricing adjustments. According to the court's ruling, recharacterization of a transaction is not allowed by virtue of Section 31 alone, in the absence of a clear tax evasion purpose for the transaction.

The case involved a €15 million loan Company A received from its majority shareholder, a Luxembourg resident. A had claimed an interest deduction of €1.3 million in 2009. The shareholder loan was provided because of bank requirements, which determined that the shareholder loan had to be subordinate to bank loans, and had to be treated as equity (a hybrid

loan) under the international financial reporting standards (IFRS). The loan was not backed by any security, it did not have a maturity date, and it was repayable simply upon a request by A.

The tax administration deemed the loan to be equity and disallowed the interest deduction. The legal basis for the decision was section 31 of the Tax Procedure Act, which incorporates the arm's length principle into Finnish tax laws and allows transfer pricing adjustments of the profits of Finnish taxpayers. However, the court ruled that Section 31 does not allow the recharacterization of a transaction, and that, given the consequences of recharacterization, such a decision would require an explicit mandate by law.

According to the court, it is irrelevant how Article 9 of the tax treaty between Luxembourg and Finland is interpreted, because domestic law does not authorize the reassessment made by the tax administration. The case was remanded to the tax administration for the assessment of arm's length terms in the transaction.

There are several cases pending that will likely benefit from the SAC's decision. It is public information that the tax administration has imposed back taxes and penalties of €136 million on Fortum (for tax year 2007 on income generated by a non-Finnish finance company) and €100 million on Nokian Tyres (for tax years 2007-2010 on income generated by a non-Finnish manufacturer and distributor) by virtue of Section 31 of the Act. There are also several cases in which the tax administration has applied section 28 of the Act, the general anti-avoidance rule, which allows the tax administration to look through arrangements whereby the obvious objective of a transaction is to evade taxes. In future tax audits, the tax authorities may present arguments on the tax-evasion nature of the transactions at issue.

This decision should serve as a reminder to document the underlying business reasons for all intercompany transactions.

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Albania Introduces Transfer Pricing Rules

New transfer pricing rules that follow the OECD transfer pricing guidelines became effective in Albania on 4 June 2014. The supporting Instruction "On Transfer Pricing" issued by the Ministry of Finance is currently in draft form; thus, provisions relating to this Instruction may be subject to change.

The transfer pricing rules apply to entities that engage in controlled transactions with nonresident related parties. In other words, the rules apply only to cross-border controlled transactions – transactions between an Albanian resident or Albanian permanent establishment of a nonresident and a nonresident/foreign permanent establishment of an Albanian resident.

Enterprises will be deemed to be related for transfer pricing purposes if:

- A person participates directly or indirectly in the management, control, or capital of another person; or
- The same person or persons participate(s) directly or indirectly in the management, control, or capital of both persons.

Direct or indirect participation in the management, control, or capital of another person occurs when a person owns directly or indirectly 50 percent or more of the share capital of the other (juridical) person, or effectively controls the business decisions of the other person.

According to the draft instructions, taxpayers engaging in controlled transactions that in the aggregate exceed LEK 50 million within the reporting period must complete and submit to the relevant regional tax directorate an annual controlled transactions notice. Taxpayers also must prepare and submit sufficient information and analysis to verify that their controlled transactions are consistent with the arm's length standard, thus placing the initial burden of proof for demonstrating compliance with the arm's length principle on the taxpayer. This burden will be considered to have been met when the taxpayer prepares transfer pricing documentation in accordance with the new rules.

Taxpayers with turnover of less than LEK 50 million will be considered to satisfy the transfer pricing documentation requirements even if the set of external comparable uncontrolled transactions used to demonstrate compliance with the arm's length standard are updated only every third reporting period, provided there have been no material changes to the controlled transactions, the external comparable uncontrolled transactions, or the relevant economic circumstances.

Transfer pricing documentation must be submitted to the tax authorities within 30 days of a request, and the annual controlled transactions notice must be submitted by 31 March of the year following the reporting year. Penalties apply for noncompliance.

The Ministry of Finance is expected to issue further guidance on the implementation of the new rules.

Further details on the new law, including guidance on documentation requirements, will be set forth in Instruction to be issued by the Minister of Finance.

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Tanzania Introduces Transfer Pricing Regulations

Following in the steps of its East African neighbors, and in line with global trends, Tanzania has formally issued transfer pricing regulations. The Income Tax (Transfer Pricing) Regulations 2014 were issued by way of a gazette notice published on 7 February 2014, and take effect on the publication date.

Who is affected by the Regulations?

The regulations apply to taxpayers dealing with related parties located both inside and outside the United Republic of Tanzania. The application of transfer pricing to related parties within Tanzania will impose a compliance burden on taxpayers even when there is no significant risk of loss of tax revenue. Most transfer pricing rules focus on cross-border transactions when the parties are located in different countries, thereby creating a potential for shifting profits from one country to the other.

Under Section 3 of the Tanzanian Income Tax Act (ITA), an entity is generally deemed to be related to another when a person, directly or through one or more interposed entities, controls or may benefit from 50 percent or more of the rights to income or capital or voting power of the other entity. Therefore, indirect control would also be considered in determining whether two parties are related for transfer pricing purposes.

The definition of related parties also covers relatives of individuals and partners in partnerships, as well as an entity that may reasonably be expected to act in accordance with the intentions of another.

Branches or permanent establishments are to be treated for purposes of the regulations as separate and distinct entities from the head office, and are therefore regarded as associates.

Recognition of OECD Guidelines

The regulations recognize the application of Article 9 of the OECD Model Tax Convention on Income and Capital, as well as the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations and the UN Transfer Pricing Practical Manual for Developing Countries, except when they are inconsistent with the ITA. This is useful, because it allows

taxpayers to rely on the detailed guidance contained in the OECD guidelines and, when appropriate, on existing documentation prepared in line with the OECD guidelines.

Determination of Arm's Length Price

The regulations are largely consistent with the OECD transfer pricing guidelines and the UN transfer pricing manual, and similarly provide five methods to be applied in the determination of the arm's length price in controlled transactions.

These methods include the traditional transaction methods:

- The comparable uncontrolled price (CUP) method – a transfer pricing method that compares the price for property or services transferred in a controlled transaction to the price for the same goods or services in a transaction at arm's length entered into on similar terms. If the terms are different, adjustments may be made to reflect those differences;
- The resale price method – a method that involves the comparison of the resale margin that a purchaser of property in a controlled transaction
- earns from reselling the property in an uncontrolled transaction with the resale margin that is earned in a comparable uncontrolled transaction; and
- The cost plus method – a method that compares the mark-up on costs directly or indirectly incurred in the supply of goods or services in a controlled transaction to the mark-up on the costs directly or indirectly incurred in the supply of goods or services in a comparable uncontrolled transaction.

The regulations also include transactional profit methods:

- The transactional net margin method – a method that involves comparing the net profit margin relative to the appropriate base such as costs, sales, or assets that a person achieves in a controlled transaction with the net profit margin relative to the same base achieved in a comparable uncontrolled transaction; and
- The profit split method – a method that involves comparing the division of profits or losses that a person achieves in a controlled transaction with the division of profits or losses that would be achieved when participating in a comparable uncontrolled transaction. This method is particularly suitable when there are several related parties involved in the supply chain.

The regulations allow a taxpayer to apply any other method if the taxpayer can establish that the above methods cannot be reasonably applied, and that the alternative method gives rise to a result that is consistent with that between independent persons engaging in comparable uncontrolled transactions.

The regulations on the one hand suggest a hierarchy of methods by stating that a person should first apply the traditional transaction methods before considering the transactional profit methods, but on the other hand state that one should apply the most appropriate method having regard to the nature of the transaction and the functions performed by the related parties. Further, the regulations stipulate that when the controlled transaction involves the sale or licensing of intangible property, the arm's length price should be determined by applying the CUP method or if the property is highly valuable or unique, the residual profit method.

Documentation Requirements

The regulations require affected taxpayers to prepare and maintain contemporaneous documentation, that is, documentation prepared at the time of the transaction. The documentation must be in place prior to the due date for submission of the tax return for the year in question. This implies that taxpayers must update their transfer pricing documentation on an annual basis. The documentation should be submitted within 30 days from the date of request by the Tanzania Revenue Authority.

Documentation should include records and documents that provide a description of the organization's structure, nature of the business or industry and market conditions, the controlled transactions, strategies and assumptions regarding factors that influenced the setting of any pricing policies, comparability, functional and risk analysis, and the selection of the transfer pricing method and its application.

Comparability Analysis

The regulations stipulate that when applying comparability factors in determining the arm's length price, the results of a controlled transaction should be compared with the results of uncontrolled transaction for the same basis year for a year of income. While the term "basis year" has not been defined in the regulations, we assume it implies a calendar coinciding with the year to which the transfer pricing documentation relates. This is likely to pose challenges in practice, as publicly available information or databases may not contain current-year data.

Intra-Group Services

The regulations stipulate that in justifying the arm's length nature of intragroup services, the taxpayer should demonstrate the benefit conferred or the commercial value to the taxpayer's business. In line with the OECD transfer pricing guidelines, the TRA will disregard charges if they involve shareholder or duplicative activities.

However, the regulations empower the TRA's commissioner to deem services received as "not appropriate" and disregard the charges for such services. This provision gives the TRA wide discretion, and may be misapplied, with adverse consequences to taxpayers.

Deemed Interest

The regulations give the TRA the right to impose a deemed interest expense on intragroup financing that is interest-free. Related persons involved in intragroup financing either directly or indirectly, with or without consideration, are required to determine the arm's length rate for such assistance. This also raises the possibility of the imposition of real withholding tax on deemed interest expenses.

Advance Pricing Agreements

The regulations contain provisions for advance pricing agreements (APAs), which allow taxpayers to apply for binding rulings with regard to the determination of transfer prices for future controlled transactions over a specified duration.

Taxpayers that wish to enter into an APA may apply to the commissioner, enclosing specified information pertaining to the controlled transactions and proposed transfer prices. The commissioner can accept, reject, or modify the proposal. If accepted, the APA will be in force for a period not exceeding five years.

The regulations empower the commissioner to cancel an APA by way of notice if the taxpayer fails to materially comply with the fundamental terms of the agreement, or if there is a change in tax law or a breach in one or more critical assumptions.

The recognition of APAs is a welcome development, because it provides taxpayers with a degree of certainty regarding their transfer pricing arrangements. However, flexibility on the number of years may have been a particularly important feature, because APAs with long terms are sometimes necessary to accommodate a taxpayer's business cycle.

Corresponding Adjustments

To eliminate double taxation, the regulations allow Tanzania taxpayers to apply for a corresponding adjustment under the following circumstances:

- A transfer pricing adjustment has been made in another country with which Tanzania has a double tax treaty with regard to transactions that affect a Tanzania taxpayer; and
- The adjustment results in taxation in another country of income that is also taxable in Tanzania.

This is also a positive measure, although Tanzania has a very limited number of double tax treaties. Currently, nine treaties are in force: with Canada, Denmark, Finland, India, Italy, Norway, South Africa, Sweden, and Zambia.

Penalties

The regulations impose stringent penalties for noncompliance. Noncompliance with the arm's length principle incurs a penalty equal to 100 percent of the tax underpayment. Additionally, a taxpayer that fails to prepare and maintain transfer pricing documentation commits an offense and is liable on conviction to imprisonment for a term not exceeding six months or a fine not less than TZS 50 million, or both.

Conclusion

With the introduction of the transfer pricing regulations, more formal, rigorous, and perhaps more frequent TRA transfer pricing audits appear to be looming on the horizon. Despite the possibility of harsh penalties, there is much positive in the regulations. They have removed significant uncertainty by revoking section 33 (1) of the ITA. For taxpayers, it is time to put in place appropriate transfer pricing documentation before the first tax return under the regulations is due to avoid the prospect of a run-in with the TRA that may result not only in financial penalties but also imprisonment.

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Greece Clarifies Transfer Pricing Documentation Rules

The Greek Ministry of Finance issued during the second quarter of 2014 two important decisions clarifying the transfer pricing documentation requirements and the applicable transfer pricing regime for prior years, because successive legislative amendments had given rise to significant confusion as to the applicable rules.

The most important points of the above decisions are summarized below.

Updating Documentation

The first important development concerns the updating of the transfer pricing documentation file and the benchmarking studies used to support the arm's length nature of intragroup transactions.

Under the existing provisions, the transfer pricing documentation file must be prepared annually and within four months after the fiscal year end. Ministerial Decision POL 1097, issued 9 April 2014, clarified that taxpayers may use the existing transfer pricing documentation file to cover also the next fiscal year's transfer pricing documentation requirements, provided the file is updated and includes all necessary changes. The taxpayer must disclose which sections of the existing documentation file were updated in relation to the previous fiscal year.

The updating process also must be completed within four months following the end of the fiscal year.

An important provision of this ministerial decision is the newly enacted obligation to include a "special chapter" in the transfer pricing documentation file, wherein the taxpayer is required to describe all facts and events of the prior fiscal year that have an impact on the information and data included in the file and that are due to market condition changes.

With respect to benchmarking studies, Ministerial Decision POL 1133, issued 15 May 2014, clarified that the same comparable data may be used for the following three years if the taxpayer can demonstrate that no changes to the operating conditions took place. The financial data of the comparable companies must be updated every year to demonstrate that the requirements are met.

Audits of Prior Years

Another major development was the issuance of detailed guidelines for tax auditors regarding audits of prior years, commencing with fiscal year 2008, the first year for which transfer pricing documentation rules were enacted in Greece. Ministerial Decision Δ 1058381, issued 7 April 2014, clarified the applicable framework regarding the audit of

intercompany transactions per fiscal year and the tax auditors' authorizations. The main provisions of this ministerial decision are as follows.

For fiscal years 2008 and 2009 – during which transfer pricing documentation obligations were established only by the legislation of the Ministry of Development – tax auditors have the right to request from taxpayers, within the framework of regular tax audits, the transfer pricing documentation files that should have been prepared for their intercompany transactions, and may evaluate them for purposes of their tax audit. Tax auditors should also examine whether the taxpayer has complied with the filing obligation regarding the list of intercompany transactions, that is, whether the list has been properly and timely filed.

For those two fiscal years, in addition to any eventual adjustment of the taxpayer's taxable profits with the relevant price difference, the following fines may also be triggered:

- A separate fine equal to 10 percent of the price difference assessed by the tax auditor;
- A fine of 10 percent of the transaction amount, if the transfer pricing documentation file is not provided to the tax auditors within the deadline set forth by the law (30 days from notification of the relevant request) or in case of failure to file the list of intercompany transactions for any of the specific fiscal years; and
- A separate fine equal to 0.1 percent of the taxpayer's turnover, in case of late filing of the above-mentioned list of intercompany transactions, which may not be less than €1,000 or more than €10,000.

For fiscal years 2010 and 2011, the transfer pricing documentation obligation existed only with respect to cross-border transactions, whereas for purposes of the Ministry of Development legislation, the documentation obligation also applied to domestic transactions. The ministerial decision clarifies that tax auditors are authorized to request the transfer pricing documentation files that taxpayers should have prepared under the provisions of the Ministry of Development legislation, that is, for both domestic and cross-border intercompany transactions, but with respect to domestic transactions they only evaluate the data contained in the relevant files, whereas with respect to cross-border transactions they should proceed to audit the relevant data. This measure gives them broader auditing authority with respect to the cross-border intercompany transactions of these fiscal years.

For fiscal years 2010 and 2011, in addition to any eventual adjustment of the taxpayer's taxable profits, the following fines may also be imposed:

- A fine equal to 20 percent of the additional net profits resulting from the transfer pricing adjustment; the reference to additional net profits, with the same wording as article 39 of the Greek Income Tax Code, leaves unanswered the important interpretation question whether for the fine to apply the taxpayer should be in a profit position after the transfer pricing adjustment, and not just reduced its losses.
- A special fine of 20 percent of the amount of the cross-border transactions, in case of failure to provide the tax auditors the requested transfer pricing file within the 30-day deadline, or if the transfer pricing file is incomplete.
- A separate fine of 0.1 percent of the taxpayer's turnover, in case of late filing of the list of intercompany transactions, which may not be lower than €1,000 nor higher than €10,000.

Finally, for fiscal years 2012 and 2013, the transfer pricing documentation obligation is regulated exclusively by the provisions of the Greek Income Tax Code, which cover both domestic and cross-border intercompany transactions. Tax auditors are authorized to request the relevant files and audit compliance with the applicable provisions, both in terms of the minimum statutory content and fulfilment of the arm's length principle.

For these fiscal years, in addition to any eventual adjustment of a taxpayer's taxable profits with the relevant price difference, the applicable fines involve only the following cases:

- Failure to file the Summary Information Table (which has replaced the list of intercompany transactions) or to provide to tax auditors the requested transfer pricing documentation file triggers a one-off penalty calculated at 1 percent of the taxpayer's turnover, which may not be lower than €10,000 or higher than €100,000.
- Late filing of the Summary information Table or late submission of the requested transfer pricing documentation file to the tax auditors triggers a one-off penalty calculated at 0.1 percent of the taxpayer's turnover, which may not be lower than €1,000 or higher than €10,000.

This ministerial decision has been issued at a critical time, because the tax authorities are increasing significantly the number of transfer pricing audits, and the numerous successive legislative amendments that took place in prior years created a lot of confusion – for taxpayers and tax auditors alike – as to what rules are applicable and for which fiscal year.

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