

## Irish revenue issue guidance notes on transfer pricing documentation obligations

The Irish Revenue recently issued guidance notes on the documentation requirements for companies that fall within the remit of the new Irish transfer pricing regime introduced earlier this year.

The Irish tax authorities introduced a formal transfer pricing regime for companies within the charge to tax in Ireland on their trading activities for accounting periods beginning on or after 1 January 2011.

The new legislation allows for grandfathering of arrangements that were in place before 1 July 2010, which provided a window of opportunity for companies to review their intercompany arrangements before that date with a view to removing those arrangements from the scope of the regime.

### Summary of new revenue guidance notes

The most significant new information contained in the guidance notes is that the Irish Revenue will regard as a best practice for documentation to be prepared at the time the terms of a transaction are agreed. If documentation is not prepared at that time, documentation should be in existence at the time the tax return is filed, which is normally the 21<sup>st</sup> day of the 9<sup>th</sup> month after the company's year end.

The second significant new point relates to cases in which a trade is transferred from one company to another in the course of a scheme of reconstruction or amalgamation. The Irish Revenue will treat an agreement entered into by the transferring company as having been entered into by the acquiring company. When the transferring company availed itself of grandfathering in relation to the agreement, the acquiring company effectively steps into the shoes of the old company and can avail itself of grandfathering of the agreement going forward.

Full details of the guidance notes are summarized as follows.

### Documentation obligations

The Irish transfer pricing regime will be effective for companies within the charge to tax in Ireland on their trading activities for accounting periods beginning on or after 1 January 2011.

The transfer pricing legislation imposes an obligation on companies to have available such records as may reasonably be required for determining whether the company's trading income is arrived at under the arm's length principle.

The guidance notes issued indicate that there is no requirement for documentation to be kept in a standard form. However, the guidance states that documentation prepared in accordance with either the EU's Transfer Pricing Documentation (EU TPD) Code of Conduct or the OECD's Transfer Pricing Guidelines will represent good practice and will be acceptable.

The Irish company subject to the transfer pricing regime does not have to prepare the transfer pricing documentation itself if a related counterparty in the other jurisdiction that the Irish company transacts with has prepared documentation to support the arm's length pricing of the transaction.

The transfer pricing documentation must be sufficient to demonstrate that a company complies with the Irish transfer pricing rules. The documentation provided will be dictated by the facts and circumstances of the transactions in question. The Irish Revenue accepts that the generation of documentation can pose a costly administrative burden on companies, and that the cost should be commensurate with the risk involved. This is in line with Chapter V of the OECD Transfer Pricing Guidelines, which states that "Documentation requirements should not impose on taxpayers costs and burdens disproportionate to the circumstances."

A comprehensive list of documentation that should be retained for transfer pricing purposes, which is not intended to be exhaustive, is included in the guidance notes. This list includes the following:

- The associated persons for purposes of the regime;
- The nature and terms of transactions within the scope of the regime;
- The methods by which the pricing of the transactions is calculated;

- Any benchmarking of comparables and functional analysis undertaken to support the pricing;
- How the method chosen results in arm's length pricing;
- Details of budgets, forecasts, and other relevant information relied upon in arriving at the arm's length terms; and
- The terms of the relevant transactions with both third parties and affiliates.

The pricing and documentation generated should be reviewed at regular intervals to ensure the pricing remains at arm's length. For Irish companies subject to the transfer pricing regime, this will mean annual reviews should be undertaken to comply with the requirements and update the documentation if necessary, to ensure the pricing remains at arm's length.

### Timing of preparation of documentation

The guidance notes state that it is a "best practice" for the documentation to be prepared at the time the terms of the transaction are agreed. This may be an onerous task for companies to comply with, especially if they are relying on counterparty documentation from another jurisdiction to comply with the Irish transfer pricing documentation requirement, which may not be in place at the time the terms of the transaction are agreed.

The guidance notes also state that documentation should exist at the time the tax return is filed. This is normally eight months and 21 days after the end of the taxpayer's accounting period. Irish taxpayers, if relying on counterparty documentation, will have to ensure that their affiliate in the counterparty jurisdiction has prepared the documentation and can make it available to the Irish company by the deadline. When there is no counterparty documentation in place, the onus will be on the Irish company to generate the documentation to meet the obligation under law.

Under audit, the Irish Revenue can seek transfer pricing documentation to support the arm's length pricing of transactions. The legislation states that if the Irish Revenue requests such documentation, it should be provided within a period of not more than 21 days. Penalties apply when such a request is not complied with.

The guidance notes indicate that when a transfer pricing adjustment is made during the course of a Revenue audit, the quality of supporting documentation will be a key factor in determining the level of penalty to be imposed. The existing interest and penalty regime in Irish tax law applies to transfer pricing adjustments.

### Grandfathering – When no documentation is required

As previously mentioned, the transfer pricing legislation allows for grandfathering of existing arrangements, the terms of which were in place and agreed by both parties before 1 July 2010. The documentation requirements do not apply to arrangements between affiliates that are considered grandfathered.

To the extent that the fundamental terms of an agreement are amended after 1 July 2010, the transaction will lose its grandfathered status and will fall within the remit of the transfer pricing regime.

The guidance notes also outline a scenario whereby a trade is transferred from one company to another in the course of a scheme of reconstruction or amalgamation. When such a transfer occurs, the Irish Revenue will treat an agreement entered into by the transferring company as having been entered into by the acquiring company. If the transferring company availed itself of the grandfathering exception in relation to an agreement, the acquiring company effectively steps into the shoes of the old company and can avail itself of grandfathering of the agreement going forward.

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