



2011 Global Transfer Pricing Desktop Reference

Foreword

This 2011 Global Transfer Pricing Desktop Reference is one of the most comprehensive and authoritative guides of its kind, compiling essential information regarding the transfer pricing regimes in 52 jurisdictions around the world and the OECD. This edition of the Global Transfer Pricing Desktop Reference includes information that has been thoroughly reviewed and updated.

Given the complexity of transfer pricing issues, the Global Transfer Pricing Desktop Reference should be the starting point rather than the finish line for all your transfer pricing inquiries. You will not find more knowledgeable and experienced guides for that journey than the transfer pricing specialists based in Deloitte member firms around the world.

For more information regarding transfer pricing issues in specific countries, and about Deloitte's tax practice in those jurisdictions, please turn to the list of Deloitte member firm contacts at the end of the Global Transfer Pricing Desktop Reference.

For further information about the Global Transfer Pricing Desktop Reference and the transfer pricing practice of Deloitte member firms in general, please contact Betty Fernández at betfernandez@deloitte.com, or visit <http://www.deloitte.com/tax>



Argentina

General information

Tax authority and law

Argentine Tax Office (Administración Federal de Ingresos Públicos); Law 20.628 and amendments (Article 8, Article 15, and new article added after Article 15).

Regulations, rulings, guidelines

Decree 1344/98. General Resolution No. 1122/01.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Transfer pricing rules apply when transactions are entered into with foreign affiliates, entities in tax havens, and foreign entities with an economic link.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, TNMM, and the quotation value of the asset on a transparent market on the day the goods have been shipped (when “commodities” are exported through an international intermediary agent who is not the ultimate recipient of the goods).

Priority of methods

Best method, except in the case of commodities exports destined to related parties when made through an international intermediary agent who is not the ultimate recipient of the goods, in which case the quotation value of the asset on a transparent market on the day the goods are shipped is mandatory.

Availability of benchmarking/comparative data

International databases are used. The availability of local information must be analyzed on a case-by-case basis. Some information is available, but it is not organized in a database.

Are foreign comparables acceptable to local tax authorities?

Local regulations do not provide a clear answer. The use of foreign comparables has not been questioned up to now, and has been informally accepted when tax authorities review the annual transfer pricing reports.

Services issues

Are management fees deductible?

Yes, but payments must satisfy the arm’s length standard and have a direct relation with the income generated, and documentation must be kept.

Are management fees subject to withholding?

Yes.

May stock option costs be included in the cost base for intercompany services charges?

Yes, if the employee who benefits from the plan is included in the subsidiary’s payroll.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

There is no specific provision on this issue. However, it usually depends on the documentation and the way in which taxpayers prove the rationality of the charges.

Are cost contribution or cost sharing payments deductible?

Yes, but payments must satisfy the arm’s length standard and have a direct relation with the income generated, and documentation must be kept.

Are cost contribution or cost sharing payments subject to withholding tax?

It depends on the nature of the charges; for example, does the cost contribution or cost sharing payment include services?

What is the payer’s tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible if they satisfy the arm’s length standard, have a direct relation with the income generated, and documentation is kept.

Documentation and tax return disclosures

Documentation requirements

In addition to Forms F742 and F743, taxpayers must file financial statements for the current and two preceding years (only for the first filing), and an annual transfer pricing report certified by a CPA.

Deadline to prepare documentation

There is no statutory deadline for preparation.

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Deadline to submit documentation

Form F742 must be filed within five months from the end of the first six-month period of the fiscal year. Form F743, the financial statements, and the transfer pricing study must be filed within eight months from the year-end. F 741 must be filed within five months of the end of each semester of the fiscal year. Form F 867 must be filed within seven months from the year-end.

Acceptable languages for documentation

Documentation must be in Spanish.

Tax return disclosures

Forms F742 and F743 require disclosure of related-party transactions with foreign entities for the first six-month period of each fiscal year and for the entire fiscal year, respectively. Form F741 (semiannual) requires disclosure of imports or exports of assets with an international well-known price, performed with independent third parties. Form 867 requires disclosure of import and export transactions on noncommodities with unrelated parties in excess of ARS 1 million (US \$250,000).

Transfer pricing adjustments**Statute of limitations on assessment for transfer pricing adjustments**

Generally six years from tax year-end.

Self-initiated adjustments

There is no formal procedure.

Taxpayer set-offs for other related-party transactions

There is no formal provision.

Interest and penalties**Additional assessment payment deadline**

Additional payment is due when the assessment is issued; interest is assessed from the original income tax return filing due date (five months after year-end).

Penalty on transfer pricing assessment

Specific transfer pricing penalties apply for failure to file transfer pricing returns (US \$5,000); for refusal to file, when requested, transfer pricing returns (up to US \$12,000); for failure to comply with formal procedures (up to US \$12,000); and for underpayment of tax (one to four times the underpaid tax).

Reduction in transfer pricing penalties

There is no provision on this issue.

Advance Pricing Agreements (APAs)**Are APAs Available?**

APAs are not available.

APA filing fee

Not applicable.

APA term of agreement

Not applicable.

Competent authority**When may taxpayer submit tax adjustment to Competent Authority (CA)?**

Argentina will follow the mutual agreement procedure under the relevant income tax treaty.

May CA develop new settlement positions?

There is no formal procedure.

May taxpayer go to CA before paying tax?

Yes, it is not necessary to pay the tax due before going to CA.

Australia

General information

Tax authority and law

Australian Taxation Office (ATO); Division 13 of Part III, Income Tax Assessment Act 1936 (Effective 1982).

Regulations, rulings, guidelines

Taxation Rulings: TR92/11, TR94/14, TR95/23, TR97/20, TR98/11, TR98/16, TR1999/1, TR1999/8, TR2000/16, TR2001/11, TR2003/1, TR2004/1, TR2007/1, TR 2010/7.

All Taxation Rulings below have retroactive effect to 1982:

- TR 92/11 — loan arrangements and credit balances (10/92)
- TR 94/14 — basic concepts underlying the operations of Australia's transfer pricing rules (5/94)
- TR 95/23 — advance pricing arrangements (6/95)
- TR 97/20 — pricing methodologies (11/97)
- TR 98/11 — documentation (6/98)
- TR 98/16 — penalties (11/98)
- TR 1999/1 — charging for services (1/99)
- TR 1999/8 — consequential adjustments (6/99)
- TR 2000/16 — relief from double taxation and the Mutual Agreement Procedure
- TR 2001/11 — operation of Australia's permanent establishment attribution rules (10/2001)
- TR 2003/1 — thin capitalization — applying the arm's length test
- TR2004/1 — cost contribution arrangements.
- TR2007/1 — effect of determinations under Division 13 (3/2007)
- TR 2010/7 — interaction of Australia's thin capitalization and transfer pricing rules.

The ATO recently issued a Draft Taxation Ruling (TR 2010/D2) providing guidance on the application of Australia's transfer pricing rules to business restructurings by multinational enterprises.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Transfer pricing rules (Division 13 of Part III, Income Tax Assessment Act 1936) are potentially applicable to any dealings under an international agreement if the parties are not dealing at arm's length. The parties need not be related to one another, and there are no control requirements.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split (e.g., Contribution Analysis or Residual Analysis), TNMM.

Priority of methods

The most appropriate method rule applies. Subject to the availability of reliable comparables data, traditional transaction methods are preferred in practice to transactional profit methods.

Availability of benchmarking/comparative data

Financial data from published accounts is available via numerous databases.

Are foreign comparables acceptable to local tax authorities?

The ATO requires use of the most reliable available comparables data. On this basis, in practice it ordinarily prefers local comparables data; however, it may accept foreign comparables when reliable local comparables data are not available. Any analysis using foreign comparables should "take into account the differences in geographic, economic and market conditions, etc., operating offshore and other factors which may affect reliability of the data." (TR 98/11, para. 10.11).

Services issues

Are management fees deductible?

Yes, subject to the general rules of deductibility under s. 8-1 Income Tax Assessment Act 1997.

Are management fees subject to withholding?

No.

May stock option costs be included in the cost base for intercompany services charges?

Yes, if an independent service provider would be expected to do so. There is no specific guidance regarding treatment of stock options; therefore, general guidelines on intra-group services in Taxation Ruling TR 1999/1 apply.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes; under Australian law commissionaire arrangements take effect as undisclosed agencies. A commissionaire arrangement may be ineffective to reduce taxable Australian profit when it gives rise to a dependent agent permanent establishment of the nonresident principal.

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Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes. Taxation Ruling TR 2004/1.

Are cost contribution or cost sharing payments deductible?

Yes. Taxation Ruling TR 2004/1.

Are cost contribution or cost sharing payments subject to withholding tax?

No.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Australia generally follows the OECD Guidelines on this issue — Taxation Ruling TR 2004/1.

Documentation and tax return disclosures

Documentation requirements

There is no legal requirement to keep transfer pricing documentation. However, Taxation Ruling TR 98/11 recommends contemporaneous documentation to evidence compliance with the arm's length principle to reduce the risk of an audit and to mitigate penalties in the event of an audit adjustment.

Deadline to prepare documentation

Documentation is defined as "contemporaneous" if prepared by the due date for filing the annual income tax return.

Deadline to submit documentation

Upon request.

Acceptable languages for documentation

Documentation must be in English.

Tax return disclosures

Schedule 25A requires disclosure of types of transactions, dollar amounts, countries involved, number of related parties involved, documentation maintained, and methodologies used. The ATO has developed a new schedule to replace the current Schedule 25A and Thin Capitalization schedule, to be initially used (optionally) by selected financial service taxpayers in FY10, by all financial services taxpayers in FY11, and by all taxpayers in FY12. The new form will be referred to as the "International Dealings Schedule."

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Currently, there is no time limit on the ATO's authority to make transfer pricing adjustments; however, it has been proposed (for some time now) to limit this to eight years.

Self-initiated adjustments

Adjustments are accepted after year-end if the net effect is to increase taxable income. If the net effect is to decrease taxable income, a taxpayer should be able to demonstrate there was a binding agreement requiring the adjustment to ensure compliance with the arm's length principle.

Taxpayer set-offs for other related-party transactions

Intentional set-offs are allowed if on arm's length terms and conditions. Unintentional set-offs are considered only in the context of mutual agreement procedures.

Interest and penalties

Additional assessment payment deadline

Generally 30 days from the date of assessment. Further extension of time for payment may be negotiated with the ATO.

Penalty on transfer pricing assessment

Penalty of 50 percent of additional tax payable (when there was a dominant tax avoidance purpose) or from 10 percent to 25 percent (in all other cases, reducible when the taxpayer has a reasonably arguable position). Interest penalties are imposed at gazetted interest rates.

Reduction in transfer pricing penalties

Discretionary reduction may be available if the taxpayer makes a reasonable attempt to comply with the arm's length principle and has contemporaneous documentation. A penalty may be reduced to zero when specified conditions apply (see TR98/16, para. 36).

Advance Pricing Agreements (APAs)

Are APAs Available?

Yes, under Taxation Ruling TR 95/23 (unilateral, bilateral, and multilateral). In August 2010 the ATO released draft guidance on the operation of the APA program. The APA Guide distinguishes streamlined APAs, standard APAs, and complex APAs, and explains the process relevant to each. The final guide is expected to be released by February 2011.

APA filing fee

There is no fee for filing an APA request.

APA term of agreement

Generally three to five years forward.

Competent authority**When may taxpayer submit tax adjustment to Competent Authority (CA)?**

A request may be submitted after the proposed adjustment is communicated to the taxpayer in writing; this may be before the issue of formal notices of assessment/amended assessment.

May CA develop new settlement positions?

CA may negotiate an agreement based on different position from an ATO-initiated adjustment (unless an adjustment is decided by an appellate body, such as AAT or a court).

May taxpayer go to CA before paying tax?

Yes. A taxpayer may go to CA after the amount of a proposed adjustment is communicated in writing to the taxpayer — this may be before payment of the tax.

Austria

General information

Tax authority and law

Federal Ministry of Finance; Section 6 para. 6 Income Tax Act, Section 8 para 1 and 2 Corporate Income Tax Act.

Regulations, rulings, guidelines

In October 2010, the Austrian Ministry of Finance issued specific Transfer Pricing Guidelines as a decree, which is binding on the Austrian tax authorities but nonbinding on taxpayers and courts. These are the first domestic transfer pricing guidelines ever published by the Austrian Ministry of Finance, and they regularly refer to the OECD Transfer Pricing Guidelines 1995/2010, as well as to the OECD Report on the Attribution of Profits to Permanent Establishments.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Two enterprises are associated if one participates directly or indirectly in the management, control, or capital of the other, or if both are under common control.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, and TNMM.

Priority of methods

Austria follows the 2010 OECD Transfer Pricing Guidelines, whereby the selection of a transfer pricing method always aims at finding the most appropriate method for a particular case. In cases when more than one method can be applied in an equally reliable manner, the traditional transaction methods are preferable to the transactional profit methods.

Availability of benchmarking/comparative data

Pan-European data is used.

Are foreign comparables acceptable to local tax authorities?

Yes.

Services issues

Are management fees deductible?

Yes. Austria follows the OECD Transfer Pricing Guidelines in this regard.

Are management fees subject to withholding?

Generally, no. However, royalties and payments for the provision of technical or commercial consulting services carried out in Austria are subject to withholding tax.

May stock option costs be included in the cost base for intercompany services charges?

The Austrian tax authorities have issued no specific opinion on this topic. The arm's length principle and the OECD Transfer Pricing Guidelines must be considered.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are cost contribution arrangements or cost sharing agreements accepted?

Yes. Austria follows Chapter VIII of the OECD Transfer Pricing Guidelines.

Are cost contribution or cost sharing payments deductible?

Yes, provided the arm's length payments to the CCA or CSA are deductible according to general Austrian tax rules.

Are cost contribution or cost sharing payments subject to withholding tax?

Generally, no. However, royalties and payments for the provision of technical or commercial consulting services carried out in Austria are subject to withholding tax.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

In principle, under the Austrian Commercial Code it must be decided if buy-in payments are deductible or amortizable over the useful life of the intangible.

Documentation and tax return disclosures

Documentation requirements

Austria imposes no specific statutory documentation requirements. Recommended documentation should follow the OECD Transfer Pricing Guidelines. The Austrian Ministry of Finance accepts the EU-TPD (from the Code of Conduct of the Joint Transfer Pricing Forum). Information concerning documentation of cross-border transactions can also be found in the Austrian Transfer Pricing Guidelines.

Deadline to prepare documentation

Not applicable.

Deadline to submit documentation

Not applicable.

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Acceptable languages for documentation

Generally, documentation should be prepared in German. However, a tax auditor may accept documentation in English, depending on his or her language ability.

Tax return disclosures

No specific disclosure required.

Transfer pricing adjustments**Statute of limitations on assessment for transfer pricing adjustments**

Five to 10 years from tax year-end, depending on the specific circumstances.

Self-initiated adjustments

An intercompany agreement is required in advance. If transfer prices are recognized as not being at arm's length, an adjusted tax return must be filed.

Taxpayer set-offs for other related-party transactions

Austria follows the OECD Transfer Pricing Guidelines with regard to international transactions.

Interest and penalties**Additional assessment payment deadline**

Payment is due one month after assessment, if no suspension is granted.

Penalty on transfer pricing assessment

There are no specific transfer pricing penalties. Interest may be imposed on late payment of any additional corporate income tax liabilities caused by a transfer pricing assessment. If a hidden dividend distribution is assumed, withholding taxes might be imposed.

Reduction in transfer pricing penalties

There is no provision.

Advance Pricing Agreements (APAs)**Are APAs Available?**

As of 2011, two procedures are available: 1) a ruling request, binding on the basis of good faith; or 2) a formal unilateral APA procedure.

APA filing fee

Between EUR 1,500 and EUR 20,000, depending on the taxpayer's sales.

APA term of agreement

Not specified.

Competent authority**When may taxpayer submit tax adjustment to competent authority (CA)?**

A taxpayer may submit an application for mutual agreement procedure during a tax audit after notification of the proposed adjustment and within the deadline specified in the applicable income tax treaty.

May CA develop new settlement positions?

Yes.

May taxpayer go to CA before paying tax?

Yes, provided certain procedures are followed. Interest may be assessed.

Belgium

General information

Tax authority and law

Administration of Direct Taxes. In 2006, a Special Transfer Pricing Audit Cell was created. General tax law on avoidance of profit shifting applies (articles 26, 49, 54, 55, 56, 79, 207 and 344 of Income Tax Code). Law of 21 June 2004 introduced transfer-pricing-specific cross-border rules and correlative adjustments under Articles 185, §2, and 235 ITC. For APAs, mutual agreement or arbitration procedure, the OECD's arm's length standard, as introduced by article 185 §2 ITC, applies.

Regulations, rulings, guidelines

Administration of Direct Taxes. In 2006, a Special Transfer Pricing Audit Cell was created. General tax law on avoidance of profit shifting applies (articles 26, 49, 54, 55, 56, 79, 207 and 344 of Income Tax Code). Law of 21 June 2004 introduced transfer-pricing-specific cross-border rules and correlative adjustments under Articles 185, §2, and 235 ITC. For APAs, mutual agreement or arbitration procedure, the OECD's arm's length standard, as introduced by article 185 §2 ITC, applies.

Administrative Transfer Pricing Circular Letter of 28.06.1999; Administrative Arbitration Convention Circular Letter of 07.07.2000 and Administrative Circular Letter of 25.05.2003 (addendum to Circular Letter of 07.07.2000); Administrative Circular Letter of 04.07.2006 regarding article 185 §2 ITC; Administrative Circular Letter of 14.11.2006 on transfer pricing documentation and transfer pricing audits.

Rulings are published (in French or Dutch) on <http://ccff02.minfin.fgov.be/KMWeb/browseCategory.do?method=browse¶ms.selectedCategoryId=840>.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Belgium has a very broad interpretation of interdependence criteria, which includes not only legal but also factual control (e.g., common management).

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split (e.g., Contribution Analysis or Residual Analysis), TNMM.

Priority of methods

The most appropriate method should be used. Belgium follows the OECD Transfer Pricing Guidelines. Profit-based methods (TNMM, PS) are commonly accepted by the Belgian tax authorities.

Availability of benchmarking/comparative data

Financial data from published accounts is available via numerous databases, mainly Amadeus and Belfirst.

Are foreign comparables acceptable to local tax authorities?

Yes. The Belgian tax authorities allow the use of pan-European comparables.

Services issues

Are management fees deductible?

Yes. Belgium follows the OECD Transfer Pricing Guidelines in this regard.

Are management fees subject to withholding?

No.

May stock option costs be included in the cost base for intercompany services charges?

Belgium has no special rules on this issue. General OECD principles apply.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are cost contribution arrangements or cost sharing agreements accepted?

Yes. Articles 26, 49, and 185 §2 of ITC.

Are cost contribution or cost sharing payments deductible?

Yes. Articles 26, 49, and 185 §2 of ITC.

Are cost contribution or cost sharing payments subject to withholding tax?

No.

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What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Belgium follows the OECD Transfer Pricing Guidelines in this regard.

Documentation and tax return disclosures

Documentation requirements

Belgium has no statutory documentation requirements. Recommended documentation should follow the OECD Transfer Pricing Guidelines. Administrative Circular of 14.11.2006 on transfer pricing documentation refers explicitly to EU-TPD (from the Code of Conduct of the European Union's Joint Transfer Pricing Forum). There is no contemporaneous documentation obligation, but lack of documentation creates a substantial risk of a thorough transfer pricing audit and imposition of penalties.

Deadline to prepare documentation

There is no statutory deadline for preparation of documentation.

Deadline to submit documentation

Within 30 days of request. Administrative Circular of 14.11.2006 on transfer pricing documentation encourages tax inspectors to grant extensions if it is practically impossible to provide transfer pricing documentation within the 30-day period.

Acceptable languages for documentation

Documentation may be in English, Dutch, French, or German.

Tax return disclosures

No specific tax return disclosures are required. For accounting periods starting from 1 September 2008, certain corporations are required to report material non-arm's-length transactions with related parties in their annual accounts. An extensive reporting obligation applies to the following corporations:

- corporations listed on a stock exchange;
- corporations whose shares are traded on a Multilateral Trading Facility;
- corporations that meet more than one of the criteria to be considered a large group under article 16§1 of the Belgian Companies Code.

These companies must report all non-arm's length transactions with related parties. However, there is an

exemption for transactions between group members when the subsidiaries involved are wholly owned by a member of that group. The following information must be reported:

- the amounts involved in the transactions;
- the nature of the relationship with the related parties; and
- all other information needed to ensure an accurate view of the financial position of the corporation.

For payments from January 1, 2010, there is a new reporting obligation for companies to report all direct and indirect payments to tax havens. The new reporting obligation applies to resident and nonresident companies. They must report all direct and indirect payments insofar as these payments:

- amount to at least EUR 100,000 in the taxable basis (on a consolidated basis); and
- are made to persons located in countries that are considered (i) uncooperative jurisdictions by the OECD, throughout the entire taxable period, as not having effectively or substantially implemented the OECD standards on the exchange of information or (ii) tax havens (zero-tax or low-tax jurisdictions).

The payments must be reported in euro on Form 275F, which must be attached to the corporate income tax return.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Generally, three years from tax year-end (five years in case of fraud).

Self-initiated adjustments

Not permitted in principle, but possibly allowed under an APA.

Taxpayer set-offs for other related-party transactions

The tax authorities are traditionally reluctant to accept set-offs. Intentional set-offs (direct or indirect) have been accepted by tax courts.

Interest and penalties

Additional assessment payment deadline

Assessment must be paid within two months after the notification is sent. Interest for late payment is due as well. If a taxpayer files a tax protest, special rules are applicable for payment of tax and interest.

Penalty on transfer pricing assessment

Ordinary penalties apply — 10 to 200 percent of the additional tax (10 percent penalty even in the absence of bad faith).

Reduction in transfer pricing penalties

No penalty if taxpayer proves incorrect reporting was due to circumstances beyond its control and action was taken in good faith (assuming that documentation is present at the start of the tax audit). Penalties increase in case of bad faith and/or repeated infringement.

Advance Pricing Agreements (APAs)**Are APAs Available?**

APAs are available under Law of 21.06.2004 introducing new ruling regime and (in the case of bilateral APAs) under MAP of applicable double tax treaty.

APA filing fee

No fee.

APA term of agreement

Maximum term of five years, potentially renewable. Terms commonly range between one and three years.

Competent authority**When may taxpayer submit tax adjustment to competent authority (CA)?**

An application for MAP must be filed within two or three years (or shorter time frame, depending on the applicable double tax treaty) of first notification of the proposed adjustment communicated to the taxpayer in writing.

May CA develop new settlement positions?

The tax authorities may unilaterally withdraw or reduce a tax adjustment (Article 376, Sec. 1 of ITC). In practice, however, withdrawal is unlikely.

May taxpayer go to CA before paying tax?

Yes. A MAP request can be filed before the tax is paid. Usually, suspension of collection is granted as long as MAP is pending.

Brazil

General information

Tax authority and law

Brazilian Revenue Services (Receita Federal do Brasil — RFB); Ordinary Federal Law 9.430/96. Provisional Measures.

Regulations, rulings, guidelines

Regulatory Instructions # 243/02, 321/03, 382/03, 602/05, 703/06, 801/07, 898/08, 1.124/11.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Article 2 of Regulatory Instruction No. 243/02 provides detailed information on related entities. Entities located in low-tax jurisdictions are considered related for transfer pricing purposes.

Methods and comparables

Acceptable methods

Transactional methods, mostly using statutory gross profit margins. For import transactions: (i) PIC (comparable uncontrolled price); (ii) PRL (Resale Price Method — prescribes statutory gross profit margin of 60 percent for imports of components or raw materials and 20 percent for the other hypothesis; and (iii) CPL (production cost in the country of origin plus 20 percent profit margin). For export transactions: (i) CAP (production cost plus 15 percent profit margin); (ii) PVEX (sales price on exports); (iii) PVA and PVV (resale price minus respectively 15 percent for wholesale, 30 percent for retail). Safe-harbor exceptions are available for exports only. Refer to Regulatory Instructions Nos. 243/02, 382/03.

Priority of methods

Taxpayer may use the method that yields the lowest taxable income.

Availability of benchmarking/comparative data

Limited local data is available. Reliable international information may be used to calculate comparable prices.

Are foreign comparables acceptable to local tax authorities?

Foreign comparables are acceptable only for purposes of the PIC method in relation to import transactions, and the PVA and PVV methods in relation to export transactions.

Services issues

Are management fees deductible?

Yes, if the services are provided as rendered and are necessary, useful, and common to the kind of business in question. However, the transfer pricing rules will be applied to determine the deductible amount.

Are management fees subject to withholding?

Yes, in general 25 percent withholding tax will be applied.

May stock option costs be included in the cost base for intercompany services charges?

No specific regulation in this regard. Generally, Brazilian tax legislation considers only the costs directly related to the service performed as part of that service. Each situation must be individually analyzed.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are cost contribution arrangements or cost sharing agreements accepted?

There is no specific statutory authority, but limited cost sharing may be possible.pt.

Are cost contribution or cost sharing payments deductible?

Yes, provided the conditions for deductibility are met — the payments must have a direct relation with the income generated and documentation must be kept.

Are cost contribution or cost sharing payments subject to withholding tax?

Yes. Ordinary Federal Law 9.779/99.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments may be deductible, provided the conditions for deductibility are met — the payments must have a direct relation with the income generated and documentation must be kept.

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Documentation and tax return disclosures

Documentation requirements

Detailed information is required to fill out the income tax return, to be provided by specific Transfer Pricing Study at the end of the calendar year. Additional data may be requested by the tax authorities during tax due diligence. An electronic documentation system called Audin would be required.

Deadline to prepare documentation

Documentation must be prepared by the due date for paying the income tax, Jan. 31 or Mar. 31, depending on the company, and June 30 to fill out the annual income tax return. Under the Audin system, 20 days after request.

Deadline to submit documentation

Documentation must be submitted within 20 days of a request.

Acceptable languages for documentation

Documentation must be in Portuguese.

Tax return disclosures

Taxpayers must identify parties, methods, prices of operations relating to purchase and sale of rights, services, or interest on loan agreements not registered with the central bank within transfer pricing regime. A taxpayer cannot change its transfer pricing method after the start of a tax audit.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Five years from the date of filing the return.

Self-initiated adjustments

Adjustments of taxable income based on transfer pricing study.

Taxpayer set-offs for other related-party transactions

Not applicable.

Interest and penalties

Additional assessment payment deadline

Generally, 30 days from the date of assessment. The deadline may vary if the assessment is administratively and/or judicially contested.

Penalty on transfer pricing assessment

Ordinary penalties apply based on additional tax: 75 percent to 150 percent would increase to 112.5 percent to 225 percent. In the case of incorrect or omitted information on Audin, a penalty of 5 percent of the transaction price, limited to 1 percent of annual gross revenue would be imposed. Failure to submit electronic files by the deadline would result in a penalty of 0.02 percent of net revenue, up to 1 percent of net revenue.

Reduction in transfer pricing penalties

Upon examination and assessment, the taxpayer may be granted a 50 percent reduction in penalties for an uncontested payment.

Advance Pricing Agreements (APAs)

Are APAs Available?

No. Brazilian rules do not contemplate APAs. However, a taxpayer is allowed to request, based on proper studies and analysis, modifications of the statutory margins stated.

APA filing fee

Not applicable.

APA term of agreement

Not applicable.

Competent authority

When may taxpayer submit tax adjustment to competent authority (CA)?

Upon filing of the income tax return (DIPJ).

May CA develop new settlement positions?

Yes.

May taxpayer go to CA before paying tax?

Yes. The taxpayer may go to CA for a formal consultation to verify the correct application of transfer pricing legislation.

Canada

General information

Tax authority and law

Canada Revenue Agency (CRA); Income Tax Act Section 247 (effective for tax years beginning after 1997).

Regulations, rulings, guidelines

CRA Information Circular 87-2R. Transfer Pricing Memoranda published by the CRA. *CAN

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Parent companies and subsidiaries are subject to transfer pricing rules, as are companies subject to common control. In addition, certain companies that are considered not dealing at arm's length in fact.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, TNMM.

Priority of methods

Hierarchy of methods: transaction-based methods preferred over profit-based methods; profit split preferred over TNMM; residual profit split preferred over other profit splits.

New 2010 OECD guidelines suggest using the "most appropriate" method. It is expected that Information Circular 87-2R will be updated to reflect the new 2010 OECD guidelines, including the "most appropriate" method standard. Until Information Circular 87-2R is updated, taxpayers must be cautious when using the most appropriate method standard rather than the CRA's hierarchy of methods standard.

Availability of benchmarking/comparative data

Numerous databases containing detailed information on Canadian public companies are available.

Are foreign comparables acceptable to local tax authorities?

Yes, foreign comparables are often used to supplement a Canadian comparables set, provided the taxpayer conducts additional analysis to account for any differences in geographic markets and the taxpayer ensures that the foreign comparables meet the comparability standards required by the transfer pricing methods used in Canada.

Services issues

Are management fees deductible?

Yes, provided the charge is in accordance with the arm's length principle.

Are management fees subject to withholding?

Yes; however, withholding tax is exempted under most Canadian income tax treaties.

May stock option costs be included in the cost base for intercompany services charges?

Stock option costs might be included in the cost base for a Canadian outbound intercompany service charge, but stock option costs are not deductible in Canada.

Commissionaire arrangements

Are commissionaire arrangements allowed?

No.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes. Canada follows Chapter VIII of the OECD Guidelines.

Are cost contribution or cost sharing payments deductible?

Yes. Payments are currently deductible under either subsection 37(1) if they qualify as scientific research and experimental development or paragraph 18 (1)(a) if they qualify as a regular business expense that is income in nature. Payments are amortizable if capital in nature.

Are cost contribution or cost sharing payments subject to withholding tax?

No. Income Tax Act 212(1)(d)(viii).

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Canada follows the OECD Guidelines. Payments are deductible or amortizable over useful life.

Documentation and tax return disclosures

Documentation requirements

Taxpayers must document pricing decisions in accordance with prudent business practices. Documentation contemporaneous with transactions is required to avoid a potential transfer pricing penalty. Effective for tax years beginning after December 31, 1997.

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Deadline to prepare documentation

Documentation must be prepared by the due date for filing the annual income tax return.

Deadline to submit documentation

Documentation must be submitted within three months of a written request.

Acceptable languages for documentation

Documentation is accepted in both English and French, the official languages of Canada.

Tax return disclosures

Form T106 requires disclosure of types of transactions, dollar amounts, related companies and countries involved, methodologies used, and whether the documentation requirements have been met. The reporting person has to file the T106 form if the total reportable transactions (revenue from and expenditure to, loan/advances/investment increases and decreases, and derivative revenue from and expenditure to) for all the nonresidents combined exceeds CAN \$1,000,000.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

For Canadian private corporations, six years from the date of the initial assessment after return filing; for foreign controlled corporations and public corporations, seven years from that date.

Self-initiated adjustments

Adjustments should be made if a taxpayer recognizes that its transfer prices are not arm's length. Adjustments should accrue in the year in which a transaction occurs and be fully documented. Adjustments favorable to the taxpayer are subject to the discretion of the Minister of National Revenue.

Taxpayer set-offs for other related-party transactions

The CRA is reluctant to accept set-offs, and prefers that transactions be "unbundled" and priced separately; set-off may be allowed for purposes of calculating a penalty, subject to the documentation requirements. Transfer pricing memorandum (TPM-06) provides information on the CRA's administrative positions regarding bundled transactions.

Interest and penalties

Additional assessment payment deadline

An additional payment is due when an assessment is issued; interest begins to accrue from the due date or the original tax return. However, provisions exist to allow deferral of payment of additional taxes owed.

Penalty on transfer pricing assessment

A transfer pricing penalty of 10 percent of the total transfer pricing adjustment may be imposed if the adjustment exceeds a threshold. Effective for tax years beginning after 1998.

Reduction in transfer pricing penalties

No penalty is imposed if the taxpayer made a reasonable effort to determine an arm's length price, including contemporaneous documentation. Transfer pricing memorandum (TPM-09) provides information on the CRA's administrative positions on the meaning of reasonable effort.

Advance Pricing Agreements (APAs)

Are APAs Available?

Information Circular 94-4R (International Transfer Pricing: Advance Pricing Arrangements (APAs)/Unilateral, Bilateral, and Multilateral. Information Circular 94-4R (Special Release) issued March 18, 2005, entitled Advance Pricing Arrangements for Small Businesses (unilateral APAs only).

APA filing fee

A nonrefundable user charge for each accepted APA request or renewal to cover estimated "out-of-pocket" costs, such as travel and accommodation expenses, is charged. Any amount paid in excess of actual costs will be refunded to the taxpayer. For Small Business APAs, a flat fee of CAN \$5,000 will be charged.

APA term of agreement

Depending on the proposal, industry, and the transactions involved, the term is usually three to five years, but may vary depending on facts, circumstances, and the resolution of the particular case. Can only roll back to taxation years that are not under audit or for which a documentation request letter has not been received. Rollbacks are not permitted for Small Business APAs.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

A request may be submitted after the proposed adjustment is communicated to the taxpayer in writing.

May CA develop new settlement positions?

The CA may negotiate an agreement based on a new settlement positions, unless an adjustment has been determined by Appeals or the courts. CA cannot settle on an amount higher than the amount initially reassessed.

May taxpayer go to CA before paying tax?

Yes. A taxpayer may go to CA after a proposed adjustment is communicated in writing to the taxpayer. There are also rules allowing full or partial deferral of payment of the taxes in dispute.

Chile

General information

Tax authority and law

Internal Revenue Service (Servicio de Impuestos Internos — SII); Articles 36 and 38 of Income Tax Law (D.L. No. 824 of 1974).

Regulations, rulings, guidelines

Ruling No. 3/98 of the SII and article 38 of the Income Tax Law.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Transactions between “related parties” (as defined under Chilean law and regulations) in which one of the parties is a foreign entity will be subject to transfer pricing rules.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus.

Priority of methods

The CUP is preferred over other methods.

Availability of benchmarking/comparative data

Limited local data is available.

Are foreign comparables acceptable to local tax authorities?

Yes.

Services issues

Are management fees deductible?

Yes, as long as there is a direct and verifiable relationship between the need for the service and the income.

Are management fees subject to withholding?

Yes, payments made to entities or individuals not domiciled in Chile for services rendered abroad are subject, without any deductions, to withholding as the remuneration is paid, credited, or placed at the beneficiary’s disposal.

May stock option costs be included in the cost base for intercompany services charges?

No.

Commissionaire arrangements

Are commissionaire arrangements allowed?

There is no specific statutory authorization.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

There is no specific statutory authority.

Are cost contribution or cost sharing payments deductible?

No information on the subject is available.

Are cost contribution or cost sharing payments subject to withholding tax?

Payments would most likely be subject to withholding tax.

What is the payer’s tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

No information on this subject is available.

Documentation and tax return disclosures

Documentation requirements

There is no statutory requirement for documentation.

Deadline to prepare documentation

Not applicable.

Deadline to submit documentation

Not applicable.

Acceptable languages for documentation

There is no statutory requirement for documentation.

Tax return disclosures

No specific disclosures are required.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

The general statute of limitations is three years from the date of the infraction or breach.

Self-initiated adjustments

No information on this subject is available.

Taxpayer set-offs for other related-party transactions

Not applicable.

Interest and penalties

Additional assessment payment deadline

Not applicable.

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Penalty on transfer pricing assessment

SII may redetermine a taxpayer's transfer prices for Income Tax Law purposes, establish a new tax base for income tax, and impose penalties for underpayment of those taxes.

Reduction in transfer pricing penalties

No provision.

Advance Pricing Agreements (APAs)

Are APAs Available?

No.

APA filing fee

Not applicable.

APA term of agreement

Not applicable.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

Not applicable.

May CA develop new settlement positions?

There is no formal procedure.

May taxpayer go to CA before paying tax?

There is no formal procedure.

China

General information

Tax authority and law

State Administration of Taxation (SAT); Article 36 of the Tax Collection and Administration Law (Tax Collection Law); Article 41 to 48 of the PRC's new Enterprise Income Tax (EIT) Law (Chapter 6, Special Tax Adjustments) that entered into effect on January 1, 2008.

Regulations, rulings, guidelines

- Articles 109 to 115 and articles 121 to 123 of the implementation rules for the new EIT Law govern the transfer pricing regime;
- Circular of the State Administration of Taxation on the Issuance of the Implementation Measures for Special Tax Adjustments (Trial Implementation) (Guo Shui Fa [2009] No. 2);
- Circular of the State Administration of Taxation on Printing and Issuing the Annual Report on the Affiliated Transactions of Enterprises of the People's Republic of China (Guo Shui Fa [2008] No. 114);
- Circular of the Ministry of Finance and the State Administration of Taxation of Notice on the Tax deductibility of Interest Expense Paid to Related Parties (Cai Shui [2008] No. 121);
- Circular of the State Administration of Taxation on the Issuance of Requirements of Annual Reporting Forms for Related-Party Transaction of Enterprises (2008 version) (Guo Shui Han [2009] No. 72);
- Circular of the State Administration of Taxation on Collection of 2008 Enterprise Income Tax (Guo Shui Han [2009] No. 134) ;
- Circular of the State Administration of Taxation on the Notice on Relevant Issues Concerning Enhancement of the Follow-up Administration on Transfer Pricing Adjustments (Guo Shui Han [2009] No. 188);
- Circular of the State Administration of Taxation on Strengthening Supervision and Investigation of Cross-Border Related-Party Transactions (Guo Shui Han [2009] No. 363);
- Circular of the State Administration of Taxation on Notice regarding the Status of Anti-tax Avoidance Efforts in 2009 (Gui Shui Han [2010] No. 84); Circular of the State Administration of Taxation on Notice on Conducting Examinations of Contemporaneous Documentation (Gui Shui Han [2010] No. 323; and
- China Advance Pricing Arrangement Annual Report (2009).

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

China has adopted a broad definition of associated enterprises with a strong emphasis on control. An entity with significant control over the taxpayer's senior management, purchases, sales, production, and the intangibles and technologies required for the business is defined as a related party.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Transactional Net Margin, Profit Split, and other methods in compliance with the arm's length principle according to article 111 of the implementation rules to the new EIT Law, and to article 23-27 of Circular of the State Administration of Taxation on the Issuance of the Implementation Measures for Special Tax Adjustments (Trial Implementation) (Guo Shui Fa [2009] No. 2).

Priority of methods

Reasonable method following the arm's length principle.

Availability of benchmarking/comparative data

The tax authorities generally require the use of Chinese comparable companies (listed on the Shanghai and Shenzhen stock markets) but may also accept foreign comparable companies if necessary. In Circular Guo Shui Han [2005] No. 239, the tax authorities state that they could use as a possible resource the BvD Osiris database during a transfer pricing audit. Based on the newly released implementation regulations, the tax authorities may use both public and nonpublic information to analyze whether related-party transactions conform to the arm's length principle.

Are foreign comparables acceptable to local tax authorities?

If the tax authorities are convinced that no domestic comparables are available, taxpayers may use foreign comparables. However, the degree of acceptance is subject to the local tax authorities' discretion. Under Guo Shui Han [2005] 239, taxpayers searching for comparable companies should use the BvD database.

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Services issues

Are management fees deductible?

According to article 49 of the implementation rules to the new EIT law, management fees are not deductible. Fees for specific services received may be deductible, but the tax authorities will likely request extensive documentary evidence on the services being provided, the reasonableness of the charging basis, and benefits derived by the PRC entity from such services.

Are management fees subject to withholding?

Effective 1 January 2008, fees for services rendered both in and outside the PRC are subject to Business Tax at a 5 percent rate.

May stock option costs be included in the cost base for intercompany services charges?

China has no formal provision on this issue. In practice, stock option costs are not included in the cost base for intercompany services charges unless they are included in the local statutory financial statements.

Commissionaire arrangements

Are commissionaire arrangements allowed?

China has no specific provision on this issue. However, a foreign principal would likely be deemed to have a permanent establishment in China if a commissionaire structure were adopted.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes. Chapter 7 of Circular of the State Administration of Taxation on the Issuance of the Implementation Measures for Special Tax Adjustments (Trial Implementation) (Guo Shui Fa [2009] No. 2) provides guidance on cost sharing arrangement administration in China. An enterprise is required to report the cost sharing arrangement to the SAT within 30 days of the arrangement being concluded, and the arrangement should comply with the cost-revenue matching principle. Generally, the tax authorities prefer R&D arrangements; currently, service cost sharing arrangements are acceptable for group procurement and group marketing activities only.

Are cost contribution or cost sharing payments deductible?

Yes, provided the arrangement complies with the arm's

length principle and relevant supporting documents are filed with the tax authorities upon their request, in accordance with article 112 of the implementation rules to the new EIT law. However, the allocated costs may become nondeductible if there is a lack of commercial purpose and economic substance; failure to comply with the arm's length principle; failure to maintain documentation; or if the enterprise's operating period is less than 20 years from the signing of the cost sharing arrangement.

Are cost contribution or cost sharing payments subject to withholding tax?

China has no specific provisions on this issue.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Buy-in payments should be treated in accordance with the relevant provisions for asset purchase.

Documentation and tax return disclosures

Documentation requirements

Taxpayers with related-party transactions are required to prepare contemporaneous documentation, subject to the following exemption criteria: (1) Foreign direct or indirect ownership is less than 50 percent and all related-party transactions are with Chinese resident companies; (2) related-party purchase/sale of goods transactions are less than RMB 200 million (where toll manufacturing transactions are determined based on customs declared import/export prices of consigned materials and finished goods) and all other related-party transactions are less than RMB 40 million (including services, interest, and royalties), excluding transactions covered by APAs or CSAs; or (3) the taxpayer has an APA with the tax authorities.

Guo Shui Han [2009] No. 363 requires loss-making enterprises with limited functions and risks, such as toll and contract manufacturers, limited-risk distributors, or contract R&D service providers to prepare and submit contemporaneous documentation and other relevant materials to justify the structuring of related-party transactions and arm's length nature of their profits to the relevant in-charge tax bureau. Regardless of whether these companies exceed the minimum threshold of documentation requirement under Guo Shui Fa [2009] No. 2 or not, they are required to prepare and submit the contemporaneous documentation by June 20 of the following year when the company incurs losses.

Deadline to prepare documentation

For companies that meet the requirements of Guo Shui Fa [2009] No. 2, documentation should be prepared by the filing date of the annual income tax return (31 May).

For companies that meet the requirement of Guo Shui Han [2009] No. 363, documentation should be prepared by June 20 of the following year when the company incurs losses.

Deadline to submit documentation

Taxpayers are required to submit documentation within 20 days upon request by the tax authorities.

Companies that meet the requirement of Guo Shui Han [2009] No. 363 should furnish the documentation voluntarily to the tax bureau by the deadline, as specified in the circular.

Acceptable languages for documentation

Documentation must be in Chinese.

Tax return disclosures

The annual income tax return package includes a set of nine related-party transaction disclosure forms requiring disclosure of information on associated parties, related-party transactions (including sales & purchases, services, financing, transfers of tangible and intangible assets), CFCs, and outbound payments.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

The EIT law confirms that the statute of limitations on assessment of transfer pricing adjustments is 10 years.

Self-initiated adjustments

Upward adjustments are permitted when filing the annual income tax return after closing of the accounts.

Taxpayer set-offs for other related-party transactions

When transactions between related parties are offset, the tax authorities will in principle restore the transactions and evaluate each related-party transaction separately when conducting a comparability analysis and making adjustments.

Interest and penalties

Additional assessment payment deadline

Payment is due within the time frame set by the governing tax bureaus, normally between 15 days and one month. An extension (for a maximum of three months) for payment will be subject to approval by the governing tax bureau at the provincial level.

Penalty on transfer pricing assessment

Penalties apply for failure to file the related-party transaction disclosure forms (RMB2,000 — 10,000); for refusing to provide contemporaneous documentation and other information on related-party transactions, or providing false or incomplete information (RMB10,000 — RMB50,000). Transfer pricing adjustments are subject to interest (based on the RMB benchmark lending rate published by the People's Bank of China) plus penalty interest of 5 percent if the taxpayer has not complied with the contemporaneous documentation requirements.

Reduction in transfer pricing penalties

The 5 percent interest penalty may be waived if contemporaneous documentation is prepared.

Advance Pricing Agreements (APAs)

Are APAs Available?

APAs are allowed under Chapter 6 of the State Administration of Taxation on the Issuance of the Implementation Measures for Special Tax Adjustments (Trial Implementation) (Guo Shui Fa [2009] No. 2). An APA generally includes six phases, including prefiling meeting, formal application, review and evaluation, negotiations, signing of the agreement, and monitoring and execution. APAs may be unilateral, bilateral, or multilateral.

With the issuance of China's Advance Pricing Arrangement Annual Report [2009] in January 2011, the Chinese tax authorities have signaled their willingness to accept more APA applications going forward.

APA filing fee

There is no fee for filing an APA application.

APA term of agreement

Generally three to five years forward; rollback available subject to approval from the tax authorities.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

After obtaining approval from the tax authorities of the treaty partner, the affected enterprise will report the adjustment, including the basis for the adjustment, contents, covered time period, and detailed calculation, in writing to its governing tax bureau. After review, the governing tax bureau will report the case to the SAT, which will deal with it accordingly. The enterprise should apply for corresponding adjustments within three years from the date the enterprise or its related parties receive the transfer pricing adjustment notice. Late applications will not be entertained.

May CA develop new settlement positions?

There is no formal procedure. However, CA may develop a new position after tax administrative or judicial review. And according to Gui Shui Han [2010] No. 84, CA negotiation is stated as a way of settlement in the tax authority's 2010 anti-avoidance tax work arrangement.

May taxpayer go to CA before paying tax?

Generally, no, because taxpayers must settle tax liabilities with the governing tax bureau within the prescribed time period. If payment is delayed for valid reasons, an application must be filed within the prescribed time period. Upon approval, tax payment may be postponed for no more than three months.

Colombia

General information

Tax authority and law

Colombia Tax Office (Dirección de Impuestos y Aduanas Nacionales-DIAN); Book 1, Title I, Chapter XI, Articles 260-1 to 260-10 of the Tax Code.

Regulations, rulings, guidelines

Tax Code Articles 260-1 to 260-10. Decree 4349 of 2004.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Direct or indirect ownership of 50 percent or more. Administrative and economic control variables also applied. Transactions with companies located in tax havens are subject to transfer pricing rules.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, Residual Profit Split, TNMM.

Priority of methods

Most appropriate method, according to a transaction's characteristics.

Availability of benchmarking/comparative data

There is public information about private companies, but no formal position from the tax authorities on its use as benchmark.

Are foreign comparables acceptable to local tax authorities?

Yes.

Services issues

Are management fees deductible?

Yes.

Are management fees subject to withholding?

Yes, if the service has been rendered in Colombia.

May stock option costs be included in the cost base for intercompany services charges?

There is no formal provision or position from the tax authorities.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are cost contribution arrangements or cost sharing agreements accepted?

Yes.

Are cost contribution or cost sharing payments deductible?

Yes, but only if the payments have a direct relation with income generated in Colombia.

Are cost contribution or cost sharing payments subject to withholding tax?

Yes, under ordinary rules.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible or amortizable if tax has been withheld.

Documentation and tax return disclosures

Documentation requirements

Documentation to support transfer prices is required, and must be kept for a five-year period.

Deadline to prepare documentation

Documentation must be available to the tax authorities on July 1 of the following year.

Deadline to submit documentation

Within 15 days from the date of the request from the tax authorities.

Acceptable languages for documentation

Documentation must be in Spanish; however, some annexes could be submitted in English, but the tax authorities could request a translation.

Tax return disclosures

Article 260-8 of the Tax Code requires taxpayers to file an annual informative transfer pricing return. The return must be filed on July. At the same date detailed information about the potential comparables must be submitted. In some cases, a consolidated return must be filed between July 29 and July 30.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

The general rule is two years from the date of filing the income tax return.

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Self-initiated adjustments

There is no formal procedure.

Taxpayer set-offs for other related-party transactions

There is no formal provision.

Interest and penalties**Additional assessment payment deadline**

Additional payment is due when the assessment is issued; interest is assessed from the due date of the original filing.

Penalty on transfer pricing assessment

Ordinary penalties of up to 160 percent of unpaid tax may apply.

Reduction in transfer pricing penalties

Ordinary penalties may be reduced to 10 percent of the additional tax.

Advance Pricing Agreements (APAs)**Are APAs Available?**

APAs are available for fiscal year 2006 and subsequent years.

APA filing fee

No regulations on this issue to date.

APA term of agreement

Up to three years forward and the year of request.

Competent authority**When may taxpayer submit tax adjustment to competent authority (CA)?**

There is no formal procedure.

May CA develop new settlement positions?

There is no formal procedure.

May taxpayer go to CA before paying tax?

There is no formal procedure.

Czech Republic

General information

Tax authority and law

Ministry of Finance; Section 23 para. 7 of the Act on Income Taxes (Effective January 1, 1993).

Regulations, rulings, guidelines

Decree D-332 on the application of international standards to the taxation of transactions between related persons; Decree D-333 on binding ruling over the transfer pricing policy used in related-party transactions (APA); Decree D-334 on the recommended scope of TP documentation (in accordance with EU TPD).

These decrees became effective on 1 January 2011, and replace the previous version of the decrees (D-258, D-292 and D-293) that were valid at the end of 2010.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

The nature/extent of a transaction is decisive, as a substance-over-form rule applies in the Czech Republic.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split (e.g., Contribution Analysis or Residual Analysis), TNMM.

Priority of methods

The most reasonable method should apply, taking into account the specific circumstances of a transaction.

Availability of benchmarking/comparative data

Pan-European database Amadeus is available to the Czech tax authorities. Companies are entitled to support their transfer pricing arrangements with benchmark analyses.

Are foreign comparables acceptable to local tax authorities?

Czech comparables are preferred, but if not available, relevant foreign comparables may be considered. Pan-European benchmark searches are generally accepted by the Czech tax authorities.

Services issues

Are management fees deductible?

Generally, yes; however, tax deductibility is determined on a case-by-case basis.

Are management fees subject to withholding?

Depends on the pertinent tax treaty. In most cases, there is no withholding tax on management fees.

May stock option costs be included in the cost base for intercompany services charges?

Generally, yes. However, Czech tax legislation does not provide any guidance on this subject, and the Czech tax authorities' position is unknown due to the lack of practical experience.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes. The Czech Republic follows Chapter VIII of the OECD Transfer Pricing Guidelines.

Are cost contribution or cost sharing payments deductible?

Generally, yes; however, tax deductibility is determined on a case-by-case basis.

Are cost contribution or cost sharing payments subject to withholding tax?

No.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible or amortizable.

Documentation and tax return disclosures

Documentation requirements

There is no legally binding provision on the obligatory scope of transfer pricing documentation. However, the Ministry of Finance issued Decree No. D-334, effective 1 January 2011, on the recommended scope of transfer pricing documentation, which complies with the OECD Transfer Pricing Guidelines and the EU TPD. The recommendations are not legally binding but are generally accepted. Decree No. D-334 replaces Decree No. D-293, which was effective from 1 January 2006 until 31 December 2010..

Deadline to prepare documentation

There is no statutory deadline for preparation of documentation.

Deadline to submit documentation

There is no statutory deadline for the submission of documentation. Documentation could be requested by the tax authorities during a tax audit.

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Acceptable languages for documentation

The tax administration officially accepts documentation in the Czech or Slovak languages; however, a particular tax office might accept documentation prepared in other commonly spoken languages the tax office is familiar with, such as English.

Tax return disclosures

No specific disclosures are required.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

The general provisions apply: the general term of limitation is three years from the date when the deadline for submitting an ordinary tax return passed, or when a tax liability became due. In certain cases, the period can be extended up to 17 years.

Self-initiated adjustments

Upward adjustments are permitted; it is unclear whether a decreasing adjustment is available.

Taxpayer set-offs for other related-party transactions

Set-offs are generally not permitted.

Interest and penalties

Additional assessment payment deadline

Additional tax is payable within 15 days of receipt of an assessment.

Penalty on transfer pricing assessment

Ordinary penalties apply. The interest rate is applied for each day of the tax arrears: Repo rate of CNB p.a. + 14 percent (for a maximum five years of tax arrears). If the discrepancy was discovered by the tax authorities, the taxpayer must pay a penalty of 20 percent on additional tax assessed (5 percent if decreasing a tax loss).

Reduction in transfer pricing penalties

There is no provision on this issue. Penalties may be reduced or waived through negotiation on a case-by-case basis.

Advance Pricing Agreements (APAs)

Are APAs Available?

APAs have been available since 1 January 2006.

APA filing fee

CZK 10,000 (approx. USD 500 USD, EUR 375 EUR).

APA term of agreement

Maximum three years.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

There is no formal procedure. The Czech Republic follows the mutual agreement procedures for the pertinent treaty provisions.

May CA develop new settlement positions?

Yes.

May taxpayer go to CA before paying tax?

Yes, but liability to pay tax will not be avoided.

Denmark

General information

Tax authority and law

Ministry of Taxation (Skatteministeriet); Tax Assessment Act Section 2; Tax Control Act Section 3B (Effective for tax years beginning on or after January 1, 1998).

Regulations, rulings, guidelines

Danish Tax Assessment Guide for Companies and Shareholders 2010-2, section S.1.2; Guidelines on Tax Return Information Requirements (Dec. 2000); Guidelines on Documentation Requirements (Feb. 2006); Regulation no. 42 of January 24, 2006, on Transfer Pricing Documentation.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Transfer pricing legislation is applicable to transactions between companies that are under common control, that is, the same shareholder or group of shareholders, directly or indirectly, control more than 50 percent of the share capital or more than 50 percent of the voting power. Companies are also deemed to be under common control if they share the same management, even if the shareholders are not the same.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split (e.g., Contribution Analysis or Residual Analysis), TNMM.

Priority of methods

Transaction-based methods are preferred over profit-based methods.

Availability of benchmarking/comparative data

Financial data from published accounts is available via Danish databases.

Are foreign comparables acceptable to local tax authorities?

Yes.

Services issues

Are management fees deductible?

Yes.

Are management fees subject to withholding?

Management fees are subject to withholding tax of 25 percent, to the extent the fees include a royalty component. Withholding tax may be reduced under tax treaties.

May stock option costs be included in the cost base for intercompany services charges?

No. Stock option costs must be allocated at market price on the date of the allocation.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes. Denmark follows Chapter VIII of the OECD Guidelines.

Are cost contribution or cost sharing payments deductible?

Yes.

Are cost contribution or cost sharing payments subject to withholding tax?

No.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible or amortizable.

Documentation and tax return disclosures

Documentation requirements

The statute requires contemporaneous transfer pricing documentation. An exemption from documentation requirements exists for small and medium-sized enterprises.

Deadline to prepare documentation

Transfer pricing documentation should be prepared by the filing date of the income tax return.

Deadline to submit documentation

Sixty days upon request from the tax authorities.

Acceptable languages for documentation

Documentation may be in Danish, English, Swedish, or Norwegian.

Tax return disclosures

Taxpayers must disclose information on all controlled transactions. Form 05.021 must be completed with the income tax return (the English version is Form 05.022).

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Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Five years and four months from tax year-end.

Self-initiated adjustments

Denmark has no specific legislation, practice, or case law on this issue. Adjustments are likely to be acceptable if they are made pursuant to a prior agreement and they result in arm's length pricing.

Taxpayer set-offs for other related-party transactions

Denmark follows the OECD Guidelines on this issue.

Interest and penalties

Additional assessment payment deadline

Payable the first day of the month following the additional assessment (Corporate Tax Act, Section 30(2)).

Penalty on transfer pricing assessment

Denmark imposes a penalty for noncompliance with the documentation requirements, and for filing incorrect information regarding qualification for the small and medium-sized enterprises (SME) exemption from documentation requirements. The penalty for noncompliance is equal to 200 percent of the cost saved by not preparing the documentation. A penalty of 10 percent of any adjustment increasing taxable income may be triggered.

Reduction in transfer pricing penalties

The penalty for noncompliance may be reduced to 100 percent of the cost saved if the documentation is prepared upon request by the tax authorities.

Advance Pricing Agreements (APAs)

Are APAs Available?

Yes, unilateral and bilateral APAs are available.

APA filing fee

The filing fee for unilateral APAs is DKK 300; for bilateral APAs there is no filing fee.

APA term of agreement

No stated term.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

A request may be submitted after the proposed adjustment is communicated to the taxpayer.

May CA develop new settlement positions?

Yes, unless the taxpayer has received a court decision.

May taxpayer go to CA before paying tax?

Yes. An extension to pay the tax may be obtained upon application. If an extension is granted, the taxpayer incurs variable nondeductible interest on the amount from Nov. 1 of the year following the tax year until payment. Interest is currently 0.9 percent per month.

Ecuador

General information

Tax authority and law

Internal Revenue Service (Servicio de Rentas Internas, or SRI); Executive Decree No. 2430, published in the Official Gazette No. 494 of 31 December 2004.

Regulations, rulings, guidelines

The transfer pricing regime has been applicable in Ecuador since fiscal year 2005, following a reform to the Regulation for Application of the Tax Law on December 31, 2004. That regulation was in effect from 2005 to 2007. On December 29, 2007, a reform to the Tax Law was issued, introducing the transfer pricing regime that has been in effect from 2008 to date.

An important change applicable since 2008 requires taxpayers domiciled in tax havens and jurisdictions with lower tax rates to be considered related parties.

Through Resolution No. NAC-DGER 2008-0182, the SRI issued a list of 89 countries considered tax havens, and deemed preferential tax regimes those countries in which the income tax rate is below 15 percent.

Another significant change effective from 2008 is that the Regulation for Application of the Tax Law establishes a precedent with respect to application of transfer pricing methodologies, as well as providing for the possibility of taxpayers consulting the tax administration with regard to valuations of operations undertaken with related parties.

On December 23, 2009, through a reform to the Tax Law (applicable for year 2010 and thereafter), related parties are deemed to be those with which the entity undertakes 50 percent or more of its sales or purchases of goods, services, or any other type of operation with any one individual or company. In addition, a further article states that taxpayers complying with the following requirements are exempt from application of the transfer pricing regime:

- Tax liability exceeds 3 percent of taxable income;
- No operations are performed with residents in tax havens or preferential tax regimes; and
- No contracts for the exploration and exploitation of non-renewable resources are entered into with the State.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Related parties are defined as follows:

- Individuals or legal entities, domiciled or otherwise in Ecuador, in which one party participates, either directly

or indirectly, in the management, control, or capital of the other; or in which a third party participates, either directly or indirectly, in the management, control, or capital of the others.

- Entities domiciled, constituted, or located in a jurisdiction with lower tax rates (less than 15 percent) or in tax havens, and whose taxpayers undertake transactions with Ecuadorian taxpayers, are also considered related parties.
- Parties with whom Ecuadorian taxpayers maintain 50 percent or more of operations related to the purchase or sale of goods, services, or other types of operations.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, Residual Profit Split, Transactional Operating Profit Margins Method.

Priority of methods

Art. 82 of the Tax Law establishes the obligation to apply a priority or hierarchy with respect to selecting the most applicable method, as follows: (1) CUP; (2) Resale Price; (3) Cost Plus; (4) Profit Split; (5) Residual Profit Split; and (6) Transactional Operating Profit Margins Method.

Availability of benchmarking/comparative data

At the local level, there is no comparative data, because the number of companies listed in the Ecuadorian stock market is minimal and the amount of available information is also very limited (financial statements audited by Control Entity). The available information does not include details of the business activity, clients, or commercialization levels, which are needed to perform a functional analysis and the comparability required for a transfer pricing study.

Are foreign comparables acceptable to local tax authorities?

Yes.

Services issues

Are management fees deductible?

Yes, provided the corresponding income tax was withheld.

Are management fees subject to withholding?

Yes, the withholding tax rate is 25 percent.

May stock option costs be included in the cost base for intercompany services charges?

There are no local tax regulations determining the treatment of stock option costs.

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Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes.

Are cost contribution or cost sharing payments deductible?

Yes.

Are cost contribution or cost sharing payments subject to withholding tax?

Yes, subject to 25 percent income tax withholding.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible, provided the cost is related to the business activity of the Ecuadorian taxpayer and the 25 percent income tax withholding at source has been performed.

Documentation and tax return disclosures

Documentation requirements

The Appendix of Operations with Overseas Related Parties (AOPRE) must be submitted in the following circumstances:

- If the accumulated amount of operations with overseas related parties for the year exceeds US\$3,000,000; or
- If the accumulated amount of operations with overseas related parties for the year is between US\$1,000,000 and US\$3,000,000 and that amount exceeds 50 percent of total income.

The AOPRE must be submitted in a program provided by the SRI and sent by Internet. The amount corresponding to operations performed during the fiscal year with related parties must be presented by type of operation and by related party.

Taxpayers that perform operations with overseas related parties for an amount exceeding US\$5,000,000 in the fiscal year must submit a transfer pricing report.

Other taxpayers (those undertaking operations with overseas related parties for an accumulated amount of less than US\$5,000,000 or performing transactions with local related parties) are required to maintain

supporting documents with respect to the application of the arm's length principle. That information may be requested by the tax administration at any time.

On April 25, 2008, the Internal Revenue Service (SRI) issued Resolution No. NAC-DGER 2008-0464 establishing the information to be included in the transfer pricing report. The report must include an index, be bound and numbered, and must be signed by the taxpayer's legal representative.

Deadline to prepare documentation

The Appendix of Operations with Overseas Related Parties (AOPRE) and the transfer pricing report must be prepared by March of the following fiscal year, thereby providing for timely preparation of the income tax return and inclusion of all transfer pricing information.

Deadline to submit documentation

The Appendix of Operations with Overseas Related Parties (AOPRE) and the transfer pricing report must be submitted two months after filing the income tax return (June of the following fiscal year, the specific day will depend on the taxpayer's I.D. No.).

Acceptable languages for documentation

Documentation must be in Spanish.

Tax return disclosures

The income tax return must include the amount of the adjustment determined in the transfer pricing study to determine the taxable income and corresponding income tax. If no transfer pricing adjustment is included in the income tax return that must be filed in April, the taxpayer may subsequently file a correcting return to pay income tax due plus the respective interest.

In addition, the income tax return also must include the total amount of transactions performed with overseas related parties during the tax year, disaggregated as follows: assets; liabilities; income; and expenses (informative data).

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Tax liability prescribes in three years if the income tax return was filed accurately and on time, and in six years if it was incomplete or filed late.

Self-initiated adjustments

Not applicable.

Taxpayer set-offs for other related-party transactions

Not applicable.

Interest and penalties**Additional assessment payment deadline**

Not applicable.

Penalty on transfer pricing assessment

Unnumbered article following Art. 22 of the Tax Law states that the failure to file a transfer pricing appendix or a transfer pricing report, or filing with errors or with differences with respect to the income tax return is subject to fines of up to US\$15,000.

Reduction in transfer pricing penalties

Not applicable.

Advance Pricing Agreements (APAs)**Are APAs Available?**

No formal APA program exists.

APA filing fee

Not applicable.

APA term of agreement

Not applicable.

Competent authority**When may taxpayer submit tax adjustment to Competent Authority (CA)?**

The procedure and timing will depend on the pertinent tax treaty.

May CA develop new settlement positions?

No clear guidance on this issue is available.

May taxpayer go to CA before paying tax?

No.

Finland

General information

Tax authority and law

Finnish Tax Administration (Verohallinto). Tax Procedure Act.

Regulations, rulings, guidelines

The National Board of Taxes issued a guidance letter on documentation on 19 October 2007.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

The control test requires that one company have direct or indirect ownership of more than 50 percent of the capital or voting power; the right to appoint more than half the members of the board of directors; or other means of control of another company.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, TNMM.

Priority of methods

No priority established under domestic law.

Availability of benchmarking/comparative data

Comparative data is available; Finnish companies must file their financial statements with the public trade register annually.

Are foreign comparables acceptable to local tax authorities?

Yes. Pan-European comparables are accepted, but comparability is analyzed on a case-by-case basis.

Services issues

Are management fees deductible?

Yes, provided the services benefit the company and the arrangement meets the general documentation and pricing requirements.

Are management fees subject to withholding?

No.

May stock option costs be included in the cost base for intercompany services charges?

An award settled using newly issued shares does not give rise to a deductible cost for the company. However, if an award is settled using shares purchased from a common stock exchange, the amount paid for the shares will be deductible, provided certain requirements for tax deductibility are met.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are cost contribution arrangements or cost sharing agreements accepted?

Yes.

Are cost contribution or cost sharing payments deductible?

Yes.

Are cost contribution or cost sharing payments subject to withholding tax?

It depends on the nature of the arrangement.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible directly or amortizable over the useful life of the intangible, over a maximum of 10 years.

Documentation and tax return disclosures

Documentation requirements

The documentation requirements are applicable to accounting periods starting on or after 1 January 2007. Documentation requirements are in line with the OECD Transfer Pricing Guidelines. Documentation drafted in accordance with the EU Code of Conduct is acceptable.

Documentation must include:

- a description of the taxpayer's business activities;
- a description of the connection between the associated companies;
- information on transactions undertaken with associated companies;
- a functional analysis of the transactions undertaken with associated companies, providing information on functions performed and risks assumed;
- a comparability analysis, including information on comparable transactions or companies, validating the arm's length level of the applied transfer pricing; and
- a description of the selected pricing method and its application.

Deadline to prepare documentation

Documentation must be prepared annually, and the request to provide documentation for a specific tax year may be made six months after the end of that fiscal year.

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Deadline to submit documentation

Documentation must be provided within 60 days from a request by the tax authorities. If additional requests are made, 90 days' response time is allowed. Discretionary extensions may be possible.

Acceptable languages for documentation

According to the National Board of Taxes Guidance Letter, documentation drafted in Finnish, Swedish, or English is acceptable. If English is used, a translation of key points into either of the official languages — Finnish or Swedish — may be requested.

Tax return disclosures

A taxpayer must state in its tax return whether it engaged in related-party transactions, and whether it was required to prepare transfer pricing documentation. Information on functions, profitability, and related-party transactions is requested in Form 78, to be appended to the tax return.

Transfer pricing adjustments**Statute of limitations on assessment for transfer pricing adjustments**

General rules apply; five years from finalization of the actual assessment of the filed tax return (in practice, six years from tax year-end).

Self-initiated adjustments

Through standard tax assessment and appeal mechanisms.

Taxpayer set-offs for other related-party transactions

There is no formal provision.

Interest and penalties**Additional assessment payment deadline**

General rules apply. Penalties and interest may also be applicable.

Penalty on transfer pricing assessment

The maximum penalty for noncompliance with documentation requirements is €25,000 per request. Ordinary discretionary penalties apply at a maximum of 30 percent on the reassessed amount of income. The penalty is payable in all cases, whether or not actual tax for the reassessed amount of income is payable (for instance, in case the company is still in a loss-making position after the adjustment). In addition, penalty interest may be imposed. Penalty interest is the reference rate based on the Interest Act (633/1982) plus 7 percent. For example, the penalty interest for 1 January — 30 June 2011 is 8 percent.

Reduction in transfer pricing penalties

Discretionary reductions are possible.

Advance Pricing Agreements (APAs)**Are APAs Available?**

APAs are not available, except (possibly) under a treaty's mutual agreement procedure. Taxpayers may also apply for a general advance ruling on transfer pricing issues.

APA filing fee

Not applicable.

APA term of agreement

Not applicable.

Competent authority**When may taxpayer submit tax adjustment to competent authority (CA)?**

There is no formal procedure, but the provisions of pertinent tax treaties and the European Union's Arbitration Convention must be observed.

May CA develop new settlement positions?

Yes.

May taxpayer go to CA before paying tax?

Generally, tax must be paid. The tax authorities' authority to postpone collection of unpaid taxes does not cover mutual agreement procedures.

France

General information

Tax authority and law

French Tax Administration; General Tax Code Article 57 (profit transfer), Articles 238 A and 209 B (CFC rules), Tax Procedure Book Article L.13AA for general transfer pricing documentation requirements and Article L.13AB for additional requirements for transactions with “uncooperative havens” as defined in Article 238-0-A of the French Tax Code; Article L 80 B 7 (APAs) and Supreme Tax Court case law on Abnormal Act of Management, L. 188A (extension of statute of limitations when FTA makes request from foreign tax authorities).

Regulations, rulings, guidelines

Administrative Doctrine on Article 57, Adopted Procedures L.13AA and L.13AB (22 December 2009), Administrative Instruction on the MAP (February 2006), Administrative Instructions on APAs (September 1999 and June 2005), OECD Transfer Pricing Guidelines (generally accepted in practice). Instruction 4A 10 10 (official interpretation of articles L13AA and L13AB).

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Direct or indirect dependence link; dependence can be de jure or de facto.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, TNMM.

Priority of methods

Transaction-based methods are preferred over profit-based methods.

Availability of benchmarking/comparative data

Yes, benchmark and economic analysis are highly recommended to support the audited company's results.

Are foreign comparables acceptable to local tax authorities?

No, except pan-European benchmarks, and only if they include a meaningful set of French entities.

Services issues

Are management fees deductible?

Yes, provided they meet the arm's length standard.

Are management fees subject to withholding?

No, except for any portion rejected as not meeting the arm's length standard (deemed dividend).

May stock option costs be included in the cost base for intercompany services charges?

Administrative costs related to stock option plans could be recharged in the framework of a Management Fees Agreement. General rules of deductibility apply for French tax purposes.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes, but such arrangements are targeted for tax audits.

Cost sharing agreements

Are cost contribution arrangements or cost sharing agreements accepted?

Yes. France follows Chapter VIII of the OECD Transfer Pricing Guidelines.

Are cost contribution or cost sharing payments deductible?

Yes. General Tax Code, CGI, art. 39-1-1.

Are cost contribution or cost sharing payments subject to withholding tax?

No.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

If a deemed acquisition, no current-year deduction is available, but the payments are amortizable over the useful life of the intangible (General Tax Code, art. 39, 1-2). If the payment is a deemed royalty payment, a current deduction is permitted.

Documentation and tax return disclosures

Documentation requirements

Yes, dynamic and contemporaneous documentation requirements are in place as of January 2010 following the adoption of procedures L13AA and L13AB.

Deadline to prepare documentation

As of fiscal year 2010, contemporaneous transfer pricing documentation (documenting fiscal year 2010) should be drafted at the time when the tax return is filed in France.

Deadline to submit documentation

Documentation should be provided to the French tax authorities the day the tax audit begins. If documentation is not available, the tax authorities will send an official request to provide the documentation within the next 30 days. Failure to do so will incur a penalty.

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Acceptable languages for documentation

If documentation is not in French, the tax authorities may ask for a translation into French.

Tax return disclosures

No specific disclosures are required.

Transfer pricing adjustments**Statute of limitations on assessment for transfer pricing adjustments**

Three years plus the current year, but the period can be extended if tax losses are imputed or carried forward. An extension is possible in case foreign tax authorities' assistance is required (Tax Procedure Book, L. 188A).

Self-initiated adjustments

Permitted if substantially justified.

Taxpayer set-offs for other related-party transactions

There is no formal provision; France follows the OECD Transfer Pricing Guidelines.

Interest and penalties**Additional assessment payment deadline**

General rules apply.

Penalty on transfer pricing assessment

As of 1 January 2010, companies subject to the new transfer pricing documentation requirements will be subject to a penalty, per audited year, amounting to 5 percent of the transfer pricing reassessment basis, with a minimum of €10,000 in case of failure to provide information on time

or providing only partial information. Bad-faith penalties (40 percent of tax assessment) may apply (may be 80 percent in case of fraud or 150 percent in specific cases).

Reduction in transfer pricing penalties

There is no provision in this regard.

Advance Pricing Agreements (APAs)**Are APAs Available?**

Bilateral and unilateral agreements are available (in specific cases). Multilateral agreements may be possible.

APA filing fee

There is no fee.

APA term of agreement

Three to five years forward.

Competent authority**When may taxpayer submit tax adjustment to competent authority (CA)?**

In most cases, within three years following receipt of a notice of tax assessment (depending on the relevant tax treaty).

May CA develop new settlement positions?

Yes, unless the taxpayer has entered into a closing agreement or received a court decision.

May taxpayer go to CA before paying tax?

Yes. CA procedure automatically defers payment.

Germany

General information

Tax authority and law

Federal Ministry of Finance; Section 8 para. 3 Corporate Income Tax Act (KStG); Section 4 para. 1 Income Tax Act (EStG); Section 1 Foreign Tax Code (AStG); Section 90 para. 3 and section 162 para. 3 and 4 General Tax Code (AO). Decree-law on the manner, content, and extent of documentation in the sense of section 90 para. 3 of the General Tax Code (GAufzV), decree-law on relocation of business functions (FVerIV).

Regulations, rulings, guidelines

Principles for the Examination of Income Allocation in the Case of Internationally Related Enterprises of Feb. 23, 1983; Principles for the Examination of Income Allocation by Cost Sharing Arrangements between Internationally Related Enterprises of Dec. 30, 1999; Principles for the Audit of Income Allocation between Internationally Affiliated Enterprises in Cases of Employee Secondments of Nov. 9, 2001; Principles for the Audit of the Income Allocation Between Related Parties with Cross-Border Business Relations in Respect of the Duty of Determination, the Duty of Cooperation, Adjustments, Mutual Agreement Procedures, and EU Arbitration Procedures of April 12, 2005; Principles for the Examination of Income Allocation between Affiliated Companies in the Case of International Relocation of Functions dated October 13, 2010.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

The "related parties" doctrine under sec. 1 para. 2 of the Foreign Tax Code applies. A person is related to the taxpayer: 1) if such person holds, directly or indirectly, a participation of at least ¼ in the taxpayer's capital, or if such person is able to exercise, directly or indirectly, a controlling influence or vice versa, if the taxpayer holds a substantial participation in such person's capital or is able to exercise, directly or indirectly, a controlling influence on such person; 2) if a third person holds a substantial participation both in such person's and the taxpayer's capital, or is able to exercise, directly or indirectly, a controlling influence on both of them; or 3) if such person or the taxpayer is able, in agreeing on the terms and conditions of a business relationship, to exercise influence on the taxpayer or on the person based on facts beyond such business relationship, or if one of them is personally interested in the other party's earning of such income.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus. The tax authorities accept TNMM and Profit Split methods under certain conditions. There is a hypothetical arm's length test (prudent business manager) in case the other methods do not apply.

Priority of methods

According to Sec. 1 para. 3 sentence 1 Foreign Tax Code, the CUP, Resale Price, and Cost Plus methods are the preferred methods if fully comparable arm's length prices can be determined. If fully comparable arm's length data cannot be determined, limited comparable data shall be used after making appropriate adjustments under the application of an appropriate transfer price method (Profit Split, TNMM). If even limited comparable arm's length data cannot be determined, the taxpayer must perform a hypothetical arm's length test (prudent business manager).

Availability of benchmarking/comparative data

External comparable data on German comparables is hardly available.

Are foreign comparables acceptable to local tax authorities?

Pan-European benchmarks are often accepted by the German tax authorities.

Services issues

Are management fees deductible?

Generally, yes. However, if shareholder costs are included in management fees, the German tax authorities tend to refuse tax deductibility. The German tax authorities use a very broad definition of the term "shareholder costs" that is not in line with the OECD approach (cf. Sec. 7.9 of the OECD guidelines).

Are management fees subject to withholding?

Generally, no. Withholding taxes may be triggered if management activities also involve the transfer of intellectual property.

May stock option costs be included in the cost base for intercompany services charges?

No specific rules; according to the general rules for the cost plus method, the service charge is based on the appropriate costs related to the provision of intercom-

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pany services plus an appropriate mark-up. Consequently, as long as the salary including the stock option costs of the employee providing the intercompany services is appropriate, the service charges should be deductible in Germany. However, depending on the structure of the individual stock option plan, this applies only if the stock option plan results in a tax deductible cost.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are cost contribution arrangements or cost sharing agreements accepted?

Yes. Cost Sharing Regulations of December 30, 1999. German Ministry of Finance Letter IV B4-S1341-14/99.

Are cost contribution or cost sharing payments deductible?

Yes. Chapter 2 of the Cost Sharing Regulations.

Are cost contribution or cost sharing payments subject to withholding tax?

Generally, no. Withholding taxes may be triggered if cost contribution or cost sharing activities also involve the transfer of intellectual property.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Buy-in payments are deductible or amortizable over the useful life of the intangible. Buy-in payments may result in taxable gains for the recipient.

Documentation and tax return disclosures

Documentation requirements

The economic and legal basis for arm's length prices and conditions in cross-border transactions with related parties must be documented. Details are determined in the Decree Law on the manner, content and extent of documentation in the sense of section 90 para. 3 of the General Tax Code (GAufzV). Further details on documentation requirements are outlined in the administrative principles as of April 12, 2005, issued by the Federal Ministry of Finance.

Deadline to prepare documentation

Documentation must be prepared contemporaneously for extraordinary transactions. For regular business transactions, there is no deadline to prepare documentation.

Deadline to submit documentation

Within 60 days of auditor's request for ordinary business transactions, and within 30 days for extraordinary business transactions.

Acceptable languages for documentation

Documentation must be in German; however, taxpayers may ask for approval to prepare English documentation.

Tax return disclosures

No specific disclosures are required.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Four years from the end of the year within which the return is filed; 10 years in case of tax evasion or fraud.

Self-initiated adjustments

Adjustments are expected to be based on agreements concluded in advance. Upward adjustments may be required by law if German income is too low.

Taxpayer set-offs for other related-party transactions

Set-offs are permissible only if: (a) unrelated parties would also agree to such balancing; (b) the benefits provided/received may be quantified regarding each transaction; and (c) the set-off arrangement was made in advance or was conducted at arm's length.

Interest and penalties

Additional assessment payment deadline

Payment is due one month after the assessment, if no suspension is granted.

Penalty on transfer pricing assessment

If documentation is not submitted, or if the documentation is essentially unusable, or if, in case of doubts regarding the appropriateness of the transfer prices, the foreign transaction partner does not cooperate in clarifying the doubts, the tax authorities can make an estimate. In that case, the German tax authorities are entitled to adjust to the most unfavorable point of the arm's length range. A penalty of 5 percent to 10 percent of the income adjustment will be assessed, with a minimum surcharge of €5,000 if the documentation is not provided or if the documentation is essentially unusable. In case of delayed submission, the surcharge may be up to €1 million, at least €100 per day. Penalty payments are not deductible (sec. 162 para. 4 General Tax Code).

Reduction in transfer pricing penalties

If failure to fulfill documentation requirements is excusable, the tax authorities may refrain from imposing a penalty.

Advance Pricing Agreements (APAs)**Are APAs Available?**

APAs are available; details on the implementation of APAs are outlined in the Federal Ministry of Finance's ordinance of October 5, 2006.

APA filing fee

There is a €20,000 application fee.

APA term of agreement

The Federal Ministry of Finance ordinance states that the APA term should be no less than three years, but should not exceed five years.

Competent authority**When may taxpayer submit tax adjustment to competent authority (CA)?**

In principle, taxpayers may submit applications during a tax audit if the proposed adjustment is communicated to the taxpayer. Specific timelines may vary according to the pertinent tax treaty.

May CA develop new settlement positions?

Yes, but the taxpayer is asked for approval before settlement.

May taxpayer go to CA before paying tax?

Yes. Taxpayers may go to CA after the amount of the proposed adjustment is communicated to the taxpayer, before paying the tax. After the tax assessment, the payment could be suspended.

General information

Tax authority and law

Ministry of Development (MoD)– Law 3728/2008 and Ministry of Finance (MoF) — Law 2238/1994 as amended by Law 3775/2009 and 3842/2010.

Regulations, rulings, guidelines

MoD: Ministerial Decision A2 8092/31.12.2008 & Circular A2 2233/7.5.2009. The MoF regulations are expected to be issued soon.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Law 3728/2008 applies to transactions between “associated” parties as defined in art.42e of Greek Company Law (2190/1920). Law 2238/1994 applies to transactions between entities that are connected through direct or indirect administrative or financial dependence or control due to common shareholders or administration.

Methods and comparables

Acceptable methods

MoD: CUP, Resale Price, Cost Plus, Profit Split, TNMM. MoF: Law makes explicit reference to the OECD Transfer Pricing Guidelines. Clarifications are expected to be issued soon.

Priority of methods

MoD: Most appropriate method. Transaction-based methods preferred over profit-based methods. MoF: clarifications to be issued soon, but are expected to be in accordance with the above.

Availability of benchmarking/comparative data

Financial data from published accounts is available via numerous databases.

Are foreign comparables acceptable to local tax authorities?

No specific provisions exist on the matter. European comparables are expected to be acceptable.

Services issues

Are management fees deductible?

Management fees are deductible under general deductibility conditions: expense must be deemed “productive” by the competent tax authorities; percentage payable by Greek taxpayer should not exceed average payments made by other group companies participating in cost contribution/sharing arrangements; written agreements are

generally encouraged; and the nature of the expense must be described in detail in the relevant invoice.

Are management fees subject to withholding?

In principle they are treated as services; thus the 25 percent withholding tax rate applies, unless an income tax treaty exists and the recipient does not have a permanent establishment in Greece, in which case no withholding tax is due. In practice, there is a risk management fees would be treated as royalties, in which case they would be subject to withholding tax at a rate at 25 percent, subject to override by income tax treaties and the EU royalties’ directive.

May stock option costs be included in the cost base for intercompany services charges?

There are no specific provisions on the matter.

Commissionaire arrangements

Are commissionaire arrangements allowed?

While Greek tax law does not explicitly prohibit the use of commissionaire arrangements, they are generally discouraged because they give rise to permanent establishment issues.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes.

Are cost contribution or cost sharing payments deductible?

Yes, they are deductible under general deductibility conditions: expense must be deemed “productive” by the competent tax authorities; the percentage payable by the Greek taxpayer should not exceed the average payments made by other group companies participating in cost contribution/sharing arrangement; written agreements are generally encouraged (required in the case of royalties); and the nature of the expense must be described in detail in the relevant invoice.

Are cost contribution or cost sharing payments subject to withholding tax?

Yes. If payments are considered royalties, they are subject to withholding tax at a rate at 25 percent, subject to override by income tax treaties and the EU royalties’ directive; if they are considered services, again the 25 percent withholding tax rate applies, unless an income tax treaty exists and the recipient does not have a permanent establishment in Greece, in which case no withholding tax is due.

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What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

There are no specific provisions.

Documentation and tax return disclosures

Documentation requirements

MoD: Greek companies and branches of foreign MNEs with annual revenues exceeding €1.000.000 are required to prepare and update a transfer pricing documentation file that includes all the necessary information for the justification of pricing between the Greek affiliate and the Greek and foreign entities of the group in a given financial period. The file must contain documentation for all transactions exceeding €200.000 per annum.

MoF: Greek companies and branches of foreign MNEs are required to prepare and update a transfer pricing documentation file that includes all the necessary information for the justification of pricing between the Greek affiliate and the foreign entities of the group in a given financial period. The file must contain documentation for all transactions exceeding €100.000 per annum.

Deadline to prepare documentation

Not applicable.

Deadline to submit documentation

Documentation must be submitted 30 days following the authorities' written request.

Acceptable languages for documentation

MoD rules require that documentation must be in Greek. Under the MoF, the acceptable language is not specified. Clarifications are expected, and most likely will require that documentation be in Greek.

Tax return disclosures

MoD: Greek companies and branches of foreign MNEs with annual revenues exceeding €1.000.000 are required to file with the Ministry of Development a list of their inter-company transactions (including triangular ones) disclosing their value, nature, and respective counterparties. The list must be submitted within four months and 15 days following the end of the taxpayer's accounting year. MoF: Does not require specific disclosures in the tax return.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Five years (under the generally applicable statute of limitations for corporate income tax). However, there are several exemptions whereby such period could be extended when a particular fiscal year is nearly subject to limitation.

Self-initiated adjustments

No specific provisions exist. Self-initiated adjustments of profit in the tax return should be acceptable if they increase taxable income. As regards adjustments via credit /debit notes issued by Group companies, Greek tax auditors tend to be negative toward them, especially if issued at year end and if they lead to a reduction of profits of the Greek taxpayer. Following recent amendment to the Greek Income Tax Code to adopt the OECD Transfer Pricing Guidelines, the authorities' above approach may change.

Taxpayer set-offs for other related-party transactions

No specific provisions in the transfer pricing legislation. Restrictions are imposed by other laws.

Interest and penalties

Additional assessment payment deadline

Additional assessments are paid in installments: the first installment is payable upon acceptance of the assessment (settlement) and the remaining amount is payable in six equal monthly installments.

Penalty on transfer pricing assessment

MoD: 10 percent on the amount of transactions not included in the transfer pricing file or the annual lists of intragroup transactions. €5.000 + notification of tax authorities in case the company is found to operate outside the arm's length range. Penal sanctions provided by the Greek Market Inspection Code also apply.

MoF: a fine of 20 percent on the amount of transactions not sufficiently documented in the company's transfer pricing file. Corporate income tax on the adjusted taxable income + 20 percent thereon + penalties at 2 percent per month.

Reduction in transfer pricing penalties

MoD: None.

MoF: Penalties may be reduced by 40 percent (the reduction does not apply to the 20 percent fine nor to additional corporate income tax imposed on adjusted profits).

Advance Pricing Agreements (APAs)**Are APAs Available?**

No.

APA filing fee

Not applicable.

APA term of agreement

Not applicable.

Competent authority**When may taxpayer submit tax adjustment to Competent Authority (CA)?**

A request may be submitted after the proposed adjustment is communicated to the taxpayer in writing.

May CA develop new settlement positions?

CA may negotiate an agreement based on a different position.

May taxpayer go to CA before paying tax?

Yes.

Hong Kong

General information

Tax authority and law

Inland Revenue Department; Inland Revenue Ordinance.

Regulations, rulings, guidelines

Departmental Interpretation and Practice Notes No. 46.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Both domestic and cross-border transactions could be under attack, if they do not comply with the arm's length principle and result in a tax benefit obtained.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, TNMM; other methods if sufficiently supported.

Priority of methods

The most appropriate method is required. Transaction-based methods are preferred over profit-based methods.

Availability of benchmarking/comparative data

Financial data from published accounts of Hong Kong listed companies is available via numerous databases. Taxpayers generally will rely on common databases provided by vendors (such as BVD's Osiris).

Are foreign comparables acceptable to local tax authorities?

In the absence of local comparables, yes, as long as they can be proved to be comparable to the tested party.

Services issues

Are management fees deductible?

Generally yes, but subject to the general deductibility condition under Section 16(1) of the Inland Revenue Ordinance, as well as the arm's length requirement.

Are management fees subject to withholding?

No, but if the foreign company renders the services in Hong Kong, the fees will be subject to tax in Hong Kong itself.

May stock option costs be included in the cost base for intercompany services charges?

Hong Kong does not have specific guidelines on this issue. The relevant factors may include the definition of the cost base in the service agreement, and the accounting treatment.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes. However, the use of commissionaire arrangements is generally ineffective, because they give rise to significant permanent establishment issues in Hong Kong for the foreign principal.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Hong Kong does not have specific guidelines on this issue.

Are cost contribution or cost sharing payments deductible?

Hong Kong does not have specific guidelines on this issue; taxpayers must rely on the general deduction rule, Section 16(1) in the Inland Revenue Ordinance.

Are cost contribution or cost sharing payments subject to withholding tax?

Hong Kong does not have specific guidelines on this issue; withholding will apply if the payment is for the use of intangibles specified in Section 15(1)(a), (b), (ba) of the Inland Revenue Ordinance.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Hong Kong does not have specific guidelines on this issue; taxpayers must rely on the general deduction rule, Section 16(1) in the Inland Revenue Ordinance.

Documentation and tax return disclosures

Documentation requirements

Hong Kong does not have a contemporaneous documentation requirement, but the tax authorities may ask a taxpayer to submit documentation to justify its transfer pricing.

Deadline to prepare documentation

Not applicable.

Deadline to submit documentation

Not applicable.

Acceptable languages for documentation

English.

Tax return disclosures

Taxpayers are required to disclose the countries of incorporation of related parties that had transactions with the Hong Kong taxpayer.

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Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Six years after the year of assessment in which the transaction took place.

Self-initiated adjustments

Adjustments are permitted after year-end if the net effect is to increase taxable income. If the net effect is to decrease taxable income, the adjustment (i.e., true-down) must be done before closing the accounts for the current financial year, and the taxpayer must demonstrate that there was a binding agreement with its related supplier obligating a retroactive true-down/up to ensure profit complies with the arm's length requirement.

Taxpayer set-offs for other related-party transactions

Set-off of transactions is subject to the Inland Revenue Department's agreement, and taxpayers are required to explain and support the set-off, upon query by the IRD.

Interest and penalties

Additional assessment payment deadline

Generally 40 to 50 days from the date of assessment.

Penalty on transfer pricing assessment

No specific penalty is applicable. However, if there are tax evasion or tax avoidance motives, a maximum penalty of 300 percent of the tax underpaid due to the non-arm's-length transfer pricing arrangement may be imposed.

Reduction in transfer pricing penalties

Taxpayers can make representations that there were no tax evasion or avoidance motives, or that a reasonable attempt was made to comply with the arm's length principle, for the tax authorities' consideration.

Advance Pricing Agreements (APAs)

Are APAs Available?

No APA mechanism is available.

APA filing fee

Not applicable.

APA term of agreement

Not applicable.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

MAP requests will be entertained after a taxpayer receives in writing a transfer pricing adjustment proposed by the tax authority of the other contracting state.

May CA develop new settlement positions?

It is possible.

May taxpayer go to CA before paying tax?

Yes. A taxpayer may go to MAP after the amount of the proposed adjustment is communicated in writing to the taxpayer — this may be before the tax is paid.

Hungary

General information

Tax authority and law

Hungarian Tax Authority (HTA); Corporate Income Tax Act Article 18 (transfer pricing rules), Article 4/23 (definition of related parties) and Article 31/2 (reference to OECD Guidelines); Tax Procedures Act Article 1 (8) on arm's length principle, Article 132/B-C on APA, Article 176/A on the application of the Arbitration Convention; Hungarian Ministry of Finance issued Decree no. 22/2009 on transfer pricing documentation requirements; Hungarian Ministry of Finance issued Decree no. 38/2006 on APAs; VAT Act Article 67 (determination of tax base if consideration is not arm's length).

Regulations, rulings, guidelines

Ruling 1999/103 on the possibility of unilateral adjustments performed by the tax authorities; rulings on several transfer pricing documentation-related issues: e.g., 2004/37, 2005/55, 2007/49, 2007/77, 2007/97, 2007/133, 2007/139, 2008/13, 2008/32, and 2010/21.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

If a company has directly or indirectly more than 50 percent of the voting rights in another company, or holds by way of any agreement with another member of the company more than 50 percent of the voting rights in the company, or is entitled to appoint/dismiss the majority of the executive officers or the supervisory board members of another company, the companies will be deemed related. Foreign head offices and Hungarian branches or Hungarian head offices and foreign branches are also deemed to be related parties.

Methods and comparables

Acceptable methods

From 1 January 2011, CUP, RPM, Cost Plus, TNMM and the Profit Split method are the designated methods. Other methods may be applied if the arm's length price cannot be supported by these methods.

Priority of methods

Hungary establishes no priority of methods. Other methods may be used after the listed ones have been eliminated.

Availability of benchmarking/comparative data

Limited local data is available; however, pan-European data may be used for transfer pricing purposes.

Are foreign comparables acceptable to local tax authorities?

Yes.

Services issues

Are management fees deductible?

Yes, if the taxpayer can prove that (i) the management services were actually rendered, (ii) they were incurred in the company's business interest, and (iii) the fees applied are at arm's length.

Are management fees subject to withholding?

As of 1 January 2011, withholding taxation has been abolished in Hungary.

May stock option costs be included in the cost base for intercompany services charges?

Hungary has no formal guidelines or rulings on this subject. Generally, all costs related to the provision of a service should be included in the cost base of that service.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

There is no specific statutory authority on this issue. The Hungarian tax authorities are likely to follow the OECD Transfer Pricing Guidelines.

Are cost contribution or cost sharing payments deductible?

No formal guidelines or rulings exist, but these costs should be deductible in accordance with standard deductibility rules.

Are cost contribution or cost sharing payments subject to withholding tax?

As of 1 January 2011, withholding taxation has been abolished in Hungary.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible or amortizable.

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Documentation and tax return disclosures

Documentation requirements

Transfer pricing documentation must be prepared for all related-party transactions (including minor transactions, such as cost recharges); however, in some cases simplified documentation is appropriate.

Deadline to prepare documentation

Transfer pricing reports are to be filed by the filing date of the annual income tax return.

Deadline to submit documentation

Documentation need not be submitted to the tax authorities; however, it should be provided immediately upon request.

Acceptable languages for documentation

Transfer pricing documentation and supporting documentation may be compiled in languages other than Hungarian, but the taxpayer is liable to present a Hungarian translation of documentation at the tax authorities' request by the deadline specified.

Tax return disclosures

As of 1 January 2010, the taxpayer may choose to prepare documentation based on the existing Hungarian documentation requirements or follow the EU Masterfile concept (centrally prepared Masterfile and country-specific documentation). The taxpayer's choice must be indicated in the corporate income tax return submitted for the respective year. The relevant rules are incorporated in Decree no. 22/2009 on transfer pricing documentation requirements.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Five years from the last day of the year when the pertinent tax return is due.

Self-initiated adjustments

Taxpayers may initiate adjustments. Reduction of the tax base is possible (except if the related party is a CFC) if parties sign a document declaring the difference between the arm's length price and the price used, and the other party must be subject to Hungarian corporate tax or a similar tax abroad.

Taxpayer set-offs for other related-party transactions

There is no formal provision.

Interest and penalties

Additional assessment payment deadline

Generally, 15 days from the date of enforcement of the document establishing the additional payment.

Penalty on transfer pricing assessment

If tax base adjustments result in a tax default, the standard assessments — tax penalty and late payment interest — will be due in accordance with the general rules. Furthermore, if the taxpayer fails to present appropriate transfer pricing documentation at the request of the tax authorities, it may be fined up to HUF 2 million per related-party contract or per related-party transaction if there are no written contracts.

Reduction in transfer pricing penalties

There is no provision in this regard.

Advance Pricing Agreements (APAs)

Are APAs Available?

APAs have been available since 1 January 2007.

APA filing fee

The fees for unilateral APAs are as follows:

- HUF 500,000 – HUF 2 million if the arm's length price can be determined with the CUP, Resale Minus, or Cost-Plus methods;
- HUF 2 million – HUF 7 million if the arm's length price can be determined by using other methods

The fees for bilateral APAs are HUF 3 million – HUF 8 million, and for multilateral APAs HUF 5 million – HUF 10 million.

APA term of agreement

Three to five years. The term could be extended by an additional three years.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

There is no formal procedure. Hungary will follow the mutual agreement procedure for the pertinent income tax treaty.

May CA develop new settlement positions?

Hungary has no practice relating to CA settlements.

May taxpayer go to CA before paying tax?

Penalties determined in the resolution issued by the second instance tax authority must be paid. However, a request could be filed with the court for suspension of the execution, or suspension is automatic as of 2008 in case the EU Arbitration Convention is applied.

General information

Tax authority and law

Ministry of Finance-Central Board of Direct Taxes (CBDT); Income Tax Act 1961, Sections 92 to 92F of Income Tax Act. The CBDT has set up a separate Transfer Pricing Cell for conducting transfer pricing audits.

Regulations, rulings, guidelines

Rules 10A to 10E of the Income Tax Rules 1962; Circular No.12 of August 23, 2001; Circular No. 14 of December 24, 2001; Administrative Guidelines of May 20, 2003.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

The regulation requires direct or indirect participation in the management, control, or capital of the other enterprise, or participation of other enterprise or by the same person in such enterprise. The regulation gives illustrative list of relationships to which transfer pricing rules apply: equity holding of 26 percent; control of board of directors; loans/guarantees; dependence on the use of specified intangibles of the other enterprise; influence over supply of raw materials/finished products.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split (e.g., Contribution Analysis or Residual Analysis), TNMM, or such other method as may be prescribed. The Federal Budget 2009 empowered the CBDT to determine the arm's length price subject to safe harbor rules. Provisions relating to safe harbor rules are included in the Income Tax Act, 1961, as amended by Finance (No. 2) Act 2009. The safe harbor rules are expected to be notified in the near future.

Priority of methods

Taxpayers must use the most appropriate method.

Availability of benchmarking/comparative data

The available databases provide financial statements and related profitability of external comparables. However, the databases are not comprehensive.

Are foreign comparables acceptable to local tax authorities?

There is no specific prohibition.

Services issues

Are management fees deductible?

No formal guidelines, but payments for management fees may be deductible.

Are management fees subject to withholding?

Yes.

May stock option costs be included in the cost base for intercompany services charges?

No formal guidelines, but stock options may be included in the cost base for intercompany service charges.

Commissionaire arrangements

Are commissionaire arrangements allowed?

There is no specific statutory authorization.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes.

Are cost contribution or cost sharing payments deductible?

There are no formal guidelines, but payments for shared research and development costs may be deductible.

Are cost contribution or cost sharing payments subject to withholding tax?

Arguably, no.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

There are no formal guidelines. Payers can consider such payments as for the acquisition of intangible depreciable assets, i.e., a capital expenditure.

Documentation and tax return disclosures

Documentation requirements

There are detailed requirements on the maintenance of prescribed information and documentation.

Deadline to prepare documentation

Documentation must be prepared by the due date for filing the annual income tax return.

Deadline to submit documentation

Documentation must be submitted within 30 days of a request (a one-time extension of 30 days is available on application).

Acceptable languages for documentation

Documentation in English is accepted and in practice preferred.

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Tax return disclosures

A report giving the particulars of associated enterprises, international transactions, arm's length price, and method used for determining the arm's length price must be submitted to the Tax Office. The report must be signed by an independent practicing chartered accountant.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Forty-five months from tax year-end.

Self-initiated adjustments

There are no formal procedures.

Taxpayer set-offs for other related-party transactions

There is no formal provision.

Interest and penalties

Additional assessment payment deadline

Generally 30 days from the date of service of notice of demand. An extension of time may be requested but interest must be paid.

Penalty on transfer pricing assessment

One hundred percent to 300 percent of additional tax. Penalty for failure to maintain or furnish prescribed information and documentation — 2 percent of the value of international transaction. The penalty for failure to furnish with the return a report from an accountant is INR 0.1 million.

Reduction in transfer pricing penalties

A penalty is not leviable if transfer prices were computed by using the most appropriate method, in good faith, and with due diligence. For other penalties, reasonable cause must be proven. Penalties may be contested on appeal.

The Federal Budget 2009 introduced a Dispute Resolution Panel to expedite resolution of disputes on a fast-track basis. This dispute resolution mechanism is applicable for taxpayers subject to transfer pricing adjustment and to foreign companies. Provisions relating to ADRP are included in the Income Tax Act, 1961 as amended by Finance (No. 2) Act 2009. Formal rules in respect of ADRP are also notified.

Advance Pricing Agreements (APAs)

Are APAs Available?

APAs are proposed to be available from 1 April 2012.

APA filing fee

Not applicable.

APA term of agreement

Not applicable.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

An application for mutual agreement procedure may be filed after notification of the tax assessment, and must be filed normally within three years of notification, unless modified by a treaty.

May CA develop new settlement positions?

There is no formal procedure.

May taxpayer go to CA before paying tax?

Yes, payment may be suspended by the tax authority at taxpayer's request.

Indonesia

General information

Tax authority and law

Directorate General of Taxation. Article 18 (3) of Income Tax Law No. 36 of 2008 stipulates that the tax office is authorized to redetermine non-arm's length related-party transactions using acceptable transfer pricing methodologies. Article 2 of Value Added Tax Law No. 42 of 2009 stipulates that market price applies to related-party transactions.

Regulations, rulings, guidelines

Article 16 (2) and (3) of Government Decree (GR) No. 80/2008 stipulates that supporting documents for related-party transactions are required in the event of tax audit. Transfer Pricing Guideline regulated through Directorate General of Taxation Regulation (DGT) No. PER 43/PJ/2010. Guidelines of Transfer Pricing Audit are updated through DGT letter No. S-153/PJ.04/2010 in addition to DGT Decree No. KEP-01/PJ.7/1993 and DGT circular letter No. SE-04/PJ.7/1993. OECD Guidelines (generally accepted in practice).

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Related parties are defined in Article 18 (4) of Income Tax Law. Direct or indirect ownership of at least 25 percent, or association of companies with investment of at least 25 percent. Taxpayers that control other taxpayers, or two or more taxpayers under the same control, either directly and indirectly (including management and technology).

Methods and comparables

Acceptable methods

CUP, Resale Price Minus, Cost Plus, Profit Split, and TNMM.

Priority of methods

The transfer pricing methods shall be applied in a hierarchical order, as follows: (1) CUP; (2) Resale Price or Cost Plus; and (3) Profit Split method or TNMM.

Availability of benchmarking/comparative data

Limited local database is available. The Indonesian tax authorities usually use the BvD database (Osiris, Orianna). Additionally, DGT has issued 14 benchmarking ratios for 100 types of industries as a supporting tool to evaluate the arm's length nature of a taxpayer's financial performance and tax compliance.

Are foreign comparables acceptable to local tax authorities?

No formal provisions or guidelines. In practice, Pan-Asian and global public listed comparable companies are acceptable.

Services issues

Are management fees deductible?

Generally, yes. Articles 6 and 9 of Income Tax Law.

Are management fees subject to withholding?

Depends on the tax treaty and the availability of the Certificate of Domicile from the counterpart tax authority.

May stock option costs be included in the cost base for intercompany services charges?

There is no specific restriction.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

No specific rule. Indonesia will most likely follow the OECD Transfer Pricing Guidelines and review on a case-by-case basis. A benefits analysis will be requested.

Are cost contribution or cost sharing payments deductible?

Generally, yes. To the extent payments are arm's length, amounts are deductible if related to taxable income and not capital.

Are cost contribution or cost sharing payments subject to withholding tax?

Depends on the type of payment. For example, if the payment is considered a royalty, withholding tax would apply.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible or amortizable, depending on the specific facts. Payments must relate directly to the taxpayer's taxable income.

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Documentation and tax return disclosures

Documentation requirements

TP guidelines (PER 43/PJ/2010) provide that documents for the determination of Fair Price or Fair Profit to be made available by taxpayer shall at least cover a detailed description of the company, its policy on price determination and/or cost allocation determination, the results of a Comparative Analysis, selected comparison; and notes on the application of the transfer pricing method.

Documentation must be prepared for domestic and cross-border transactions.

Deadline to prepare documentation

There is no statutory deadline for preparation.

Deadline to submit documentation

There is no statutory deadline for submission, given that only disclosure of related-parties information is required in the corporate income tax return. However, the Indonesian tax authorities may request a transfer pricing study during the tax audit process, and it would be part of the required documents to be submitted within a one-month period.

Acceptable languages for documentation

There are no statutory acceptable languages to be used in documentation. However, the languages accepted for bookkeeping purposes are English and Indonesian.

Tax return disclosures

For the 2009 tax return and going forward, PER 39/PJ/2009, which deals with the annual corporate income tax return, requires more detailed disclosure of related-party transactions, which consists of two forms: (1) Details of the related parties transactions and (2) Notes on transfer pricing documentation.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

General rule applies. Starting with 2008 tax year, the statute of limitations is five years.

Self-initiated adjustments

In general, not allowed. In case an APA is entered into to cover the prior year, a compensating adjustment may be made through an amendment of the tax return.

Taxpayer set-offs for other related-party transactions

There is no formal procedure.

Interest and penalties

Additional assessment payment deadline

The additional assessment with penalties should be settled within one month after the date of issuance of the tax assessment. From 2008 onwards, the objected or appealed assessment could be settled within one month after the final decision.

Penalty on transfer pricing assessment

Ordinary penalties apply — interest of 2 percent per month for a maximum 24 months for tax audit assessments. For criminal acts, three months to six years imprisonment and/ or tax penalties of maximum of 400 percent may be imposed.

Reduction in transfer pricing penalties

There is no specific provision. Ordinary rules apply, i.e., application for a reduction may be made to the Indonesian tax authorities.

Advance Pricing Agreements (APAs)

Are APAs Available?

Yes. Regulation of DGT No. PER 69/PJ/2010 regarding APAs was issued on 31 December 2010.

APA filing fee

The guidelines do not specify a filing fee.

APA term of agreement

An APA may be applied for a maximum of three years, starting from the tax year in which the APA is agreed. An APA can also be applied for a year before the APA is agreed, as long as the annual income tax return for that tax year has not been audited, no objection or appeal on it has been filed, and there is no indication of criminal conduct in taxation.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

An application for mutual agreement procedure may be filed after notification of the tax assessment, and must be filed normally within three years of notification, unless modified by a treaty.

May CA develop new settlement positions?

There is no experience or precedent on this issue.

May taxpayer go to CA before paying tax?

No.

Ireland

General information

Tax authority and law

The Revenue Commissioners. Taxes Consolidation Act 1997 Section 835A -835H. Transfer pricing rules included in Finance Act 2010 for trading transactions between associated persons. Effective for chargeable periods beginning on or after 1 January 2011.

Regulations, rulings, guidelines

The law is to be interpreted in accordance with the OECD Transfer Pricing Guidelines.

The Revenue Commissioners have issued Guidance Notes in relation to documentation obligations (see below under "Documentation Requirement").

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

The associated test is met if there is more than a 50 percent shareholding connection (broadly defined) between the parties either directly or indirectly, subject to the exclusions for certain small and medium sized entities as laid out in the EU Commission Recommendation of 6 May 2003 (2003/361/EC).

Methods and comparables

Acceptable methods

Ireland follows the OECD guidelines in this regard.

Priority of methods

Ireland follows the OECD guidelines in this regard.

Availability of benchmarking/comparative data

Not generally available.

Are foreign comparables acceptable to local tax authorities?

Yes.

Services issues

Are management fees deductible?

There is no specific legislation. General rules on deductible expenses apply, that is, fees are deductible provided they are connected with the company's trade and on an arm's length basis.

Are management fees subject to withholding?

No.

May stock option costs be included in the cost base for intercompany services charges?

Not specified in Irish legislation. Irish Revenue is likely to follow the OECD Transfer Pricing Guidelines. The tax deductibility of amounts associated with stock option costs depends on the specific costs and timing of taxation of the options. There is a requirement to account for the costs under Irish GAAP/IFRS.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes.

Are cost contribution or cost sharing payments deductible?

Yes.

Are cost contribution or cost sharing payments subject to withholding tax?

No.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Deduction is not permitted if buy-in payments are capital in nature. Buy-ins would generally be treated as revenue, in which case they would be deductible.

Documentation and tax return disclosures

Documentation requirements

The Revenue Commissioners have issued Guidance Notes in relation to documentation obligations. The guidance states that it is best practice that the documentation be prepared at the time the terms of the transaction are agreed. The guidance also states that for a company to be in a position to file a complete and correct tax return for an accounting period in which there are trading transactions with associates, the documentation should exist at the time the tax return is due (normally eight months and 21 days after the end of an accounting period).

Documentation prepared in accordance with the OECD Transfer Pricing Guidelines or EU TPD will be acceptable.

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Deadline to prepare documentation

Documentation should be available by the due date for filing the corporate tax return.

Deadline to submit documentation

Records are to be made available for inspection within a period of not less than 21 days from the request.

Acceptable languages for documentation

Records are required to be kept in an official state language — Irish or English.

Tax return disclosures

No specific disclosure required.

Transfer pricing adjustments**Statute of limitations on assessment for transfer pricing adjustments**

General rules of assessment apply. Effective January 1, 2005, the time limit is four years from the end of the accounting period in which the return is filed, but the Irish Revenue have in the past agreed to a more generous time limit on a case-by-case basis. Prior time limit (until 31 December 2004): six years. Domestic time limits are overridden by the terms of any applicable tax treaty and the EU Arbitration Convention.

Self-initiated adjustments

Self-initiated adjustments to income are not allowed under transfer pricing law.

Taxpayer set-offs for other related-party transactions

Finance Act (No 2) 2008 introduced a restriction on tax deductions for any payment an Irish company makes as a result of a transfer pricing adjustment. Such adjustments must be agreed under the relevant MAP article in a tax treaty or under the EU Arbitration Convention, and not adjusted by reference to the provisions of a contractual agreement.

Interest and penalties**Additional assessment payment deadline**

General rules of assessment apply; the tax paid on account must be at least 90 percent of the final liability to avoid interest charges.

Penalty on transfer pricing assessment

There is no specific transfer pricing penalty.

Reduction in transfer pricing penalties

Not applicable.

Advance Pricing Agreements (APAs)**Are APAs Available?**

No guidelines on APAs have been issued.

APA filing fee

Not applicable.

APA term of agreement

Not applicable.

Competent authority**When may taxpayer submit tax adjustment to Competent Authority (CA)?**

There is no formal procedure in place. It is recommended that details of the tax adjustment be submitted as early as possible to ensure that the applicable time limits under Irish domestic law, where relevant, are met.

May CA develop new settlement positions?

Yes.

May taxpayer go to CA before paying tax?

There is no formal process in place — would need to be considered on a case-by-case basis.

Israel

General information

Tax authority and law

Income Tax Ordinance. Article 85a, which deals with transfer pricing in international transactions, was enacted as part of the 2003 Israeli tax reform.

Regulations, rulings, guidelines

Transfer pricing regulations under article 85a, approved 29 November 2006, and effective immediately.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Transfer pricing rules apply when a "special relationship" exists between parties to a transaction, which includes the relationship between an individual and his/her relatives, the control by one party to the transaction over the other, or control by one individual over the other parties to the transaction, whether direct or indirect, individually or together with other individuals.

Methods and comparables

Acceptable methods

CUP, Cost Plus, Resale Price, TNMM, Profit Split, Residual Profit Split, and other unspecified methods.

Priority of methods

Transaction-based methods are preferred over profit-based methods.

Availability of benchmarking/comparative data

Limited local data is available.

Are foreign comparables acceptable to local tax authorities?

Israeli comparables are preferred, but if not available, relevant foreign comparables may be considered.

While understanding the fact that finding local comparables is not always possible, the Israeli tax authorities will reject any attempt at what they view as "cherry picking" of foreign comparables, when the tested party is an Israeli party. An effort should be made to seek local comparables; if Israeli comparables cannot be found, the ITA would look for a set of comparables that will satisfy the comparison criteria specified in the proposed regulations. In this instance, there is no strict rule as to what is better to use, a set of European comparables or a set of U.S. comparables, and it should be determined on a case-by-case basis. Moreover, the ITA may allow the use of a combination of comparables from Europe, the United States, and Israel, as

long as they meet the comparability standards set by the ITA in the proposed regulations.

Services issues

Are management fees deductible?

Yes, provided the fees are at arm's length.

Are management fees subject to withholding?

Generally, no.

May stock option costs be included in the cost base for intercompany services charges?

There is no formal provisions.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

There is no specific statutory authority; however, cost contribution arrangements and cost sharing agreements are accepted by the tax authorities.

Are cost contribution or cost sharing payments deductible?

Generally, yes, as long as the payments satisfy the arm's length standard and are not capital in nature.

Are cost contribution or cost sharing payments subject to withholding tax?

There are no formal guidelines.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

There are no formal guidelines; however, in most cases, payments are treated as royalty payments.

Documentation and tax return disclosures

Documentation requirements

Documentation should include: (1) a description of all entities involved in cross-border transactions; (2) an industry description and market trends; (3) functional and risk analysis; (4) holding and ownership structures; (5) IP ownership; (6) primary contracts; (7) selection of method; (8) selection of profit level indicator; (9) description of comparable transactions/companies; (10) economic results; (11) adjustments performed; and (12) opinions provided.

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Deadline to prepare documentation

There is no statutory deadline for preparation of documentation. However, an appropriate arm's length analysis is required prior to the submission of the declaration form.

Deadline to submit documentation

Documentation must be submitted within 60 days of a request.

Acceptable languages for documentation

Generally, documentation may be submitted in English or in Hebrew. The Israeli Tax Authority may require, in certain circumstances, the submission of documentation in Hebrew, the official language of Israel.

Tax return disclosures

An annual declaration form (Form 1385) of all controlled transactions, prices, and terms is required, including an officer's declaration of what constitutes arm's length prices and the terms of reported controlled transactions.

Transfer pricing adjustments**Statute of limitations on assessment for transfer pricing adjustments**

Three years from the end of the tax year for which a return is filed.

Self-initiated adjustments

There is no formal procedure.

Taxpayer set-offs for other related-party transactions

There is no formal provision.

Interest and penalties**Additional assessment payment deadline**

General rules apply.

Penalty on transfer pricing assessment

In accordance with the Israeli Tax Ordinance, ordinary penalties apply — 4 percent + CPI + 15 percent penalties, under certain conditions.

Reduction in transfer pricing penalties

There is no provision on this issue.

Advance Pricing Agreements (APAs)**Are APAs Available?**

According to Article 85a, APAs are available.

APA filing fee

Not specified.

APA term of agreement

Not specified.

Competent authority**When may taxpayer submit tax adjustment to Competent Authority (CA)?**

There is no formal procedure.

May CA develop new settlement positions?

There is no formal procedure.

May taxpayer go to CA before paying tax?

There is no formal procedure.

Italy

General information

Tax authority and law

Article 110 (7) of Presidential Decree n. 917/1986 (for corporate tax purposes — IRES); Legislative Decree n. 446/1997 (for regional tax purposes — IRAP); article 1, § 2-ter of Legislative Decree n.471/1997.

Regulations, rulings, guidelines

Circular Letter nos. 32/9/2267 (September 22, 1980), 42/12/1587 (December 12, 1981) and 271/E/1059 (October 21, 1997). Circular Letter nos. 141/E/86270 (June 4, 1998), 98/E/107570 (May 17, 2000) and 148/E/139500 (July 26, 2000) for IRAP purposes only; Decision of the Commissioner of Italy Revenue Agency dated September 29, 2010; Circular Letter no. 58/E (December 15, 2010).

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

In addition to the control relationships considered in article 2359 of the Civil Code, transfer pricing rules apply to any kind of relationship determining actual or potential economic influence on business decisions, by means of a combination of, but not limited to, exclusive agreements, joint ventures, the presence of common members in the boards of directors, family relationships, financial relationships, participation in trusts, etc. (Circular letter no. 32/9/2267, September 22, 1980, chapter I, par. 4).

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Comparison, Profit Split, Invested Capital Profitability, Economic Sector Gross Margin.

Priority of methods

Transaction-based methods are preferred over profit-based methods. CUP is preferred over the Resale Price and Cost Plus methods.

Availability of benchmarking/comparative data

Comparative data is not generally available.

Are foreign comparables acceptable to local tax authorities?

Yes, provided local comparables are not available and foreign markets are deemed sufficiently similar.

Services issues

Are management fees deductible?

Yes, provided the fees are at arm's length, are adequately supported/documented, refer to services inherent to the taxpayer's business activity, and benefits are proved/documented. Stewardship costs, as well as costs for "duplicated" services, are not deductible.

Are management fees subject to withholding?

No, unless paid in the form of a royalty for the use of some intangible assets (e.g., business know-how, global customers lists, etc.).

May stock option costs be included in the cost base for intercompany services charges?

Italian tax authorities have not taken an official position on this topic. In principle, a tax deduction might be allowed, provided that the total intercompany stock option costs recharged are arm's length, and the provisions in the intercompany services agreement are consistent with those that would have been agreed upon by two independent parties.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes. Circular letter no. 32/9/2267, September 22, 1980, chapter VI, par. 6.

Are cost contribution or cost sharing payments deductible?

Yes, but payments must satisfy the arm's length standard and have sufficient nexus with the taxpayer's income production.

Are cost contribution or cost sharing payments subject to withholding tax?

No.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments for patents, processes, and formulas can be depreciated over two years; trademarks over 18 years. Other rights are deductible or amortizable over the useful life or agreed period (Presidential Decree no. 917/86, article 103).

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Documentation and tax return disclosures

Documentation requirements

Italy does not have a statutory requirement, but documentation is recommended to avoid shifting the burden of proof of arm's length prices to the taxpayer. In addition, documentation is necessary to obtain penalty protection. Contemporaneous documentation is also required for all cost sharing arrangements. Regs. §1.482-7T(k)(2).

Deadline to prepare documentation

Documentation for penalty protection purposes must be prepared by the tax return filing date relevant to the fiscal year being covered.

Deadline to submit documentation

In case of a tax audit, tax inspectors may ask to be provided with transfer pricing documentation, if available. Normally, the request should be satisfied within 15 days (the term may be extended, but only at the tax authorities' discretion). If the taxpayer communicated the availability of proper documentation for purposes of penalty protection, the term is 10 days.

Acceptable languages for documentation

The Italian tax authorities have the right to require that all documentation submitted be in Italian, or translated into Italian before submission. They may accept documentation in other languages (a frequent occurrence) but there is no guarantee that they will. The tax authorities are not obligated to accept documentation in foreign languages. Documentation prepared for penalty protection purposes must be in Italian.

Tax return disclosures

Tax return (form "UNICO" — RF section) requires disclosure of direct/indirect control by/of nonresident entities and relationships with nonresident entities under common control.

In the tax return, a box must be checked to communicate to the tax agency that "proper" documentation has been prepared to access the penalty protection regime.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Four calendar year from the end of the calendar year in which the tax return was filed. The term is extended to eight years in case of assessment of criminal infringements. Tax returns for years 1997-2002 remain open to assessment for six years (instead of

the ordinary four) if the company did not avail itself of any of the tax amnesties available for those years.

Self-initiated adjustments

Italy permits adjustments in filing both original and amended returns after the close of book year-end, as long as the adjustment does not provide for a decrease in income. Adjustments may trigger penalties, on an increasing scale, the later they are made in respect to the deadline for the filling of the income tax return they refer to.

Taxpayer set-offs for other related-party transactions

Italy has no formal provision on this subject. In general, set-offs must be separately booked, both for civil and tax regulation purposes.

Interest and penalties

Additional assessment payment deadline

General assessment rules are applicable. The deadline is 60 days after notification of a payment request. In case of appeal, the tax authorities are entitled to claim payment of one-half of the tax and interest, even if the court decision is pending.

Penalty on transfer pricing assessment

Ordinary penalties apply — 100 percent to 200 percent of additional tax, increased by one-third of the unpaid tax and applicable interest if taxable income is derived from foreign sources. Beginning April 15, 2000, criminal penalties (one to six years' imprisonment) may apply in some circumstances (tax fraud, significant tax evasion, or failure to disclose significant income).

Taxpayers may avoid the application of administrative penalties in the case of transfer pricing adjustments, provided that proper documentation has been prepared and promptly handed over to the tax auditors. Moreover, the taxpayer must have communicated in advance to the Revenue Agency (by a specific electronic form for fiscal years prior to that including May 31, 2010, and by checking a box in the income tax return for subsequent fiscal years) the availability of such "proper" documentation relevant to the intercompany transactions carried out in each fiscal year.

Reduction in transfer pricing penalties

Penalties may be reduced to one-fourth if paid, without appealing to the Tax Court, within 60 days from the notification of the tax assessment notice by the tax office. New rules, recently introduced, provide for further reductions (to

one-eighth) of the original penalty if certain conditions are met (acceptance by taxpayer of the tax adjustment claimed in the tax auditors' report; waiver of right to appeal).

Advance Pricing Agreements (APAs)

Are APAs Available?

According to Article 8 of Law Decree n. 269/2003, effective January 1, 2004, taxpayers with international business activities may apply for an "International Tax Ruling," with contents and effects similar to a unilateral APA, regarding transfer prices, interest, dividends, and royalties. The Revenue Agency released instructions for the application of the ruling procedure in July 2004.

APA filing fee

Not applicable.

APA term of agreement

Once signed, the agreement would remain in force for three years (including the year in which it is signed), unless new facts emerge that would change the conditions regarding the transactions covered by the agreement.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

Italy follows the mutual agreement procedure for the pertinent treaty, or the Arbitration Convention procedure if the related party is located in an EU member state (pursuant to EU Arbitration Convention 90/436/CEE).

May CA develop new settlement positions?

Yes.

May taxpayer go to CA before paying tax?

Yes. If certain circumstances are met (e.g., if payment would imply severe and irreparable damage to the taxpayer), the tax authorities, at the taxpayer's request, may temporarily suspend recovery of tax and interest assessed if a mutual agreement/arbitration procedure is started.

Japan

General information

Tax authority and law

National Tax Agency (NTA); Special Taxation Measures Law (STML), Article 66-4 and Article 68-88 for companies filing consolidated tax returns.

Regulations, rulings, guidelines

Enforcement Order 39-12 and 39-112 (for companies filing consolidated tax returns). Enforcement Ordinance 22-10, and 22-10(2), 22-74, and 22-75. TP commissioner's directive (guideline) issued June 1, 2001, partially amended several times. Reference Case Studies on Application of Transfer Pricing Taxation issued on June 25, 2007.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Transfer pricing rules apply to transactions between a Japanese taxpayer corporation and a foreign related party. "Related parties" are defined as entities with a "special relationship" because of direct or indirect legal control (through shareholding) or control-in-substance (personnel dependence, transactional dependence, financial dependence, or similar dependence factors).

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, TNMM (TNMM is applicable for tax years beginning on or after April 1, 2004) and similar methods.

Priority of methods

Transaction-based methods are preferred over profit-based methods.

Availability of benchmarking/comparative data

Comparative data is available using several databases with SIC codes and keywords (many of them in Japanese).

Are foreign comparables acceptable to local tax authorities?

No.

Services issues

Are management fees deductible?

Arm's length charges for intragroup management and similar services are deductible (in accordance with the OECD Guidelines and Japan's transfer pricing guidelines).

Are management fees subject to withholding?

No withholding tax is imposed if the services are performed outside of Japan. Withholding taxes may be applicable if the services are performed in Japan.

May stock option costs be included in the cost base for intercompany services charges?

There is no specific statutory authorization.

Commissionaire arrangements

Are commissionaire arrangements allowed?

There is no specific statutory authorization.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes. Japan follows the rules adopted in TP commissioner's directive (guideline) issued March 20, 2006.

Are cost contribution or cost sharing payments deductible?

Yes, as long as the payments satisfy the arm's length standard.

Are cost contribution or cost sharing payments subject to withholding tax?

There is no specific statutory authorization.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible or amortizable over the useful life.

Documentation and tax return disclosures

Documentation requirements

Enforcement Ordinance 22-10 lists 14 items of information/documents that must be presented to the tax authorities during a tax audit without delay.

The 14 requested information items/documents are divided in large into two categories: 1) Nine items that show that controlled transactions were conducted under conditions similar to those of uncontrolled transactions, such as pricing policies used in business, intercompany agreement, and negotiation process with affiliated companies on pricing; and (2) five items such as comparables and transfer pricing methods used for sanity-check purposes with respect to the controlled transactions conducted with the items listed in the first category.

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Deadline to prepare documentation

If a taxpayer is not equipped with the above information before it starts any controlled transaction, it could be subject to the presumptive taxation rule whereby the tax authorities are allowed to use secret comparables.

Deadline to submit documentation

Documentation must be submitted upon request.

Acceptable languages for documentation

Documentation must be in Japanese.

Tax return disclosures

Schedule 17(4): Detailed statement concerning foreign affiliated persons and applied transfer pricing methods.

Transfer pricing adjustments**Statute of limitations on assessment for transfer pricing adjustments**

Six years from the due date for filing the income tax return.

Self-initiated adjustments

Written guidelines for self-initiated adjustments (TP commissioner's directive (guideline)) were issued on October 22, 2008.

Taxpayer set-offs for other related-party transactions

Set-off is permitted if: (1) an adjustment has been made with the same related party during the same tax year; and (2) after set-off, the two transactions are considered conducted at arm's length.

Interest and penalties**Additional assessment payment deadline**

Generally within 30 days from a notice of deficiency. Interest on a deficiency is imposed from the date of the statutory notice, in addition to interest for the shorter period of: (1) the number of days between the date the original return was filed and the notice of deficiency, or (2) 12 months.

Penalty on transfer pricing assessment

Japan does not have specific transfer pricing penalties. The ordinary penalty is 10 percent to 15 percent of the additional tax (35 percent for concealment of facts). The delinquency tax rate is the lower of 7.3 percent and 4 percent plus the special discount rate for commercial bills at the central bank.

Reduction in transfer pricing penalties

There is no provision on this subject.

Advance Pricing Agreements (APAs)**Are APAs Available?**

Both unilateral and bilateral APAs are available. The NTA prefers bilateral APAs. The TP commissioner's directive (guideline) was issued June 1, 2001.

APA filing fee

There is no fee for an APA application.

APA term of agreement

Generally, three to five years forward; rollback is available on bilateral APAs (TP commissioner's directive). In practice, APA terms vary.

Competent authority**When may taxpayer submit tax adjustment to Competent Authority (CA)?**

In practice, following receipt of the formal deficiency notice; however, no specific requirement with regard to the point at which the taxpayer may submit a request. Some treaties impose limitations, but most have no particular limitations as to the deadline for filing an application.

May CA develop new settlement positions?

Yes. Japan follows the OECD Guidelines.

May taxpayer go to CA before paying tax?

Yes. Under the 2007 tax reform, applicable from April 1, 2007, payment of tax and penalties may be postponed, and delinquent tax may be exempt during a CA procedure if the taxpayer applies for this.

Kazakhstan

General information

Tax authority and law

The Tax Committee and the Customs Committee of the Ministry of Finance; Law "On transfer pricing" dated 5 July 2008.

Regulations, rulings, guidelines

The Code of the Republic of Kazakhstan "On Taxes and other obligatory payments to the budget" (the Tax Code); Resolution of the Government dated 12 March 2009 "On approval of the list of officially recognized sources of information on market prices"; Resolution of the Government dated 12 March 2009 "On approval of the list of goods (works, services) international transactions that are subject to monitoring"; Order of the Minister of Finance dated 12 February 2009 #63 "On approval of rules for concluding an agreement on application of transfer prices"; Order of the Minister of Finance dated 12 February 2009 #63 "On approval of rules for conducting monitoring of transactions"; "List of exchange goods" adopted by government regulation dated 6 May 2009 #638; "List of countries with concessional tax regime" adopted by government regulation dated 31 December 2008 #1318.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

The transfer pricing rules apply to both related and unrelated parties.

Methods and comparables

Acceptable methods

CUP, Cost Plus, Resale Price, Profit Split, Net Profit.

Priority of methods

The CUP has first priority. If it is impossible to apply CUP, other methods may be used following the following hierarchy: (1) Cost Plus, (2) Resale Price, (3) Profit Split, (4) Net Profit.

Availability of benchmarking/comparative data

A list of international bulletins, magazines, and other sources of information was established by Resolution of the Government dated 12 March 2009. The list of officially recognized sources of information on market prices has first priority. Other sources of data may be used under the following hierarchy: (1) sources of information on stock exchange quotations; (2) data of state bodies, authorized bodies of other states and organizations; (3) information programs used for purposes of transfer pricing, information submitted by the transaction parties, and other sources of information.

Are foreign comparables acceptable to local tax authorities?

Yes.

Services issues

Are management fees deductible?

Yes, in accordance with general tax legislation (the Tax Code), if related to the generation of taxable income and documented justifiably. Not deductible by nonresident companies if not associated with a permanent establishment in Kazakhstan.

Are management fees subject to withholding?

Yes, in accordance with general tax legislation (the Tax Code), if received by a nonresident company from Kazakhstan sources and not attributable to that nonresident company's permanent establishment in Kazakhstan. An exemption from Kazakhstan withholding tax may apply under an applicable tax treaty.

May stock option costs be included in the cost base for intercompany services charges?

There are no specific provisions.

Commissionaire arrangements

Are commissionaire arrangements allowed?

There are no specific provisions.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

There are no specific provisions.

Are cost contribution or cost sharing payments deductible?

There are no specific provisions. However, under general tax legislation (the Tax Code), nonresident companies operating in Kazakhstan through permanent establishments are allowed to deduct general and administrative expenses if stipulated by the relevant income tax treaty. The methodology and procedure of such deductibility is regulated by provisions of the Tax Code.

Are cost contribution or cost sharing payments subject to withholding tax?

Yes, depending on the nature of the agreements.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

There are no specific provisions.

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Documentation and tax return disclosures

Documentation requirements

Transaction parties are obligated to maintain documentation justifying the reasonableness of the prices used. Kazakhstan's transfer pricing regulations also introduced annual reporting requirements in the form of monitoring of international transactions in certain goods and services, the list of which is approved by the government of Kazakhstan. Reporting includes: documentation confirming the justification of prices used; the method used to determine the market price and the source of information used; a description of the goods (work, services), contractual terms, and business strategy; information on the trade broker's margin; other documents and data proving the consistency of the prices applied with market prices.

Deadline to prepare documentation

Documentation must be prepared by 15 April of the year following the reporting year for transactions in goods (works, services) subject to monitoring. Additional supporting documents for purposes of monitoring may be requested and must be submitted within 30 calendar days after receipt of the request. Otherwise, in general cases upon request of the authorities, supporting information and documents must be prepared and submitted within 90 days.

Deadline to submit documentation

By 15 April of the year following the reporting year for transactions in goods (works, services) subject to monitoring. Additional supporting documents for purposes of monitoring may be requested and must be submitted within 30 calendar days after receipt of the request. Otherwise, in general cases supporting information and documents must be submitted within 90 days upon request from the authorities.

Acceptable languages for documentation

Documentation in Russian and Kazakh is generally acceptable. However, the reporting forms for transfer pricing monitoring must be in Russian.

Tax return disclosures

There are no specific provisions.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Five years, as stipulated by general tax legislation (the Tax Code).

Self-initiated adjustments

Self-initiated adjustments are allowed. The procedure for such adjustments is regulated under general tax legislation (the Tax Code).

Taxpayer set-offs for other related-party transactions

There are no specific provisions.

Interest and penalties

Additional assessment payment deadline

Payment must be made within 20 working days, as stipulated by general tax legislation (the Tax Code).

Penalty on transfer pricing assessment

Penalty of 50 percent of additionally accrued tax and interest on underpaid tax of 2.5 times the refinancing rate established by the National Bank for each day the tax obligation remains overdue.

Reduction in transfer pricing penalties

Penalties may be avoided in case of self-initiated adjustments as stipulated by general tax legislation (the Tax Code).

Advance Pricing Agreements (APAs)

Are APAs Available?

Yes.

APA filing fee

There is no fee.

APA term of agreement

Up to three years from the signing date.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

There are no specific provisions.

May CA develop new settlement positions?

There are no specific provisions.

May taxpayer go to CA before paying tax?

There are no specific provisions.

Kenya

General information

Tax authority and law

Kenya Revenue Authority; Section 18(3) of the Income Tax Act deals with transfer pricing legislation. This anti-avoidance section deals with transactions that are not at arm's length, and grants the tax authorities power to restate those transactions.

Regulations, rulings, guidelines

The Income Tax (Transfer Pricing) Rules, 2006, issued by the Minister for Finance on 15 June 2006.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

The rules define related parties as one or more enterprises whereby: (a) one of the enterprises participates directly or indirectly in the management, control, or capital of the other; or (b) a third person participates directly or indirectly in the management, control, or capital of both.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split (e.g., Contribution Analysis or Residual Analysis), TNMM. The KRA commissioner may approve another method when, in his opinion, the arm's length price cannot be determined using any of the methods contained in the guidelines.

Priority of methods

The rules give an equal rating to all methods. However, transaction-based methods are listed above the profit-based ones.

Availability of benchmarking/comparative data

No database of local comparables is available. KRA has formally accepted the use of European comparables. KRA has subscribed to the Orbis database, which contains global comparables.

Are foreign comparables acceptable to local tax authorities?

Yes. However, there is no guidance on adjustments that should be made.

Services issues

Are management fees deductible?

Generally, yes.

Are management fees subject to withholding?

Yes, subject to withholding tax at a default rate of 20 percent for nonresidents (subject to income tax treaties).

May stock option costs be included in the cost base for intercompany services charges?

Yes, the total costs pertaining to employing certain individuals should be included in the cost base.

Commissionaire arrangements

Are commissionaire arrangements allowed?

No guidelines provided. The principle will have to be tested with the KRA.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

No guidelines provided.

Are cost contribution or cost sharing payments deductible?

No guidelines provided.

Are cost contribution or cost sharing payments subject to withholding tax?

No official guidelines provided. The principle will have to be tested with the KRA.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

No guidelines provided.

Documentation and tax return disclosures

Documentation requirements

Documentation pertaining to transfer pricing must be made available to the Kenyan tax authorities upon request.

Deadline to prepare documentation

No statutory deadline for preparation of documentation.

Deadline to submit documentation

Documentation must be submitted upon request.

Acceptable languages for documentation

Documentation must be in English.

Tax return disclosures

The Kenya Revenue Authority has recently

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proposed additional transfer pricing requirements to the annual tax return. It is highly likely that this proposal will be finalized quickly.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Just like for other income tax assessments, the Revenue Authority has the power to make assessments for up to seven years back. However, when there is evidence of fraud, there is no time limit for making assessments.

Self-initiated adjustments

The revenue authority requires that the taxpayer file an application under section 90 of the Income Tax Act for amendment of self assessment returns. This usually triggers a tax audit.

Taxpayer set-offs for other related-party transactions

No formal provision.

Interest and penalties

Additional assessment payment deadline

The due date is that which applies to the balance of tax for the year to which the self-assessment and thus the additional assessment will attract interest from the date on which the tax for the year in question should have been paid (i.e., four months after the year-end),

Penalty on transfer pricing assessment

Penalties will apply for transfer pricing purposes under ordinary penalty sections of the Kenyan Income Tax Act.

Reduction in transfer pricing penalties

There is no provision.

Advance Pricing Agreements (APAs)

Are APAs Available?

No.

APA filing fee

Not applicable.

APA term of agreement

Not applicable.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

There is no formal procedure.

May CA develop new settlement positions?

There is no formal procedure.

May taxpayer go to CA before paying tax?

No guidelines provided.

Korea

General information

Tax authority and law

National Tax Service (NTS); Law for the Coordination of International Tax Affairs (LCITA) (effective January 1, 1996).

Regulations, rulings, guidelines

Presidential Enforcement Decree, Ministerial Enforcement Ordinance, Basic rulings for LCITA. Basic rulings were released in June 2004 to provide more clear-cut guidelines.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

A special relationship exists if one party (i) owns directly or indirectly 50 percent or more of the total shares of another party; or (ii) has substantial control, and common interests exist between both parties.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, TNMM, Profit Split.

Priority of methods

There is no hierarchy of methods; taxpayers must use the most appropriate method (amended as of 27 December, 2010).

Availability of benchmarking/comparative data

Yes. Several databases are available to the public.

Are foreign comparables acceptable to local tax authorities?

Yes, but subject to aggressive scrutiny. Local comparables are preferred.

Services issues

Are management fees deductible?

Management fees paid to overseas related parties, including a parent company, for services can be deductible for Korean tax purposes only if the following conditions are met: (i) Actual performance of services is verified by relevant documents, such as a service performance schedule, progress report, information on the service provider, or expense reports; (ii) Service provided by a foreign related company must be related to the domestic company's business or directly related to profitability of the domestic company; (iii) Payments for the services must be at arm's length; and (iv) Service agreement should be in writing.

Are management fees subject to withholding?

No withholding tax applies if the related services are performed outside Korea. However, if the relevant services are performed in Korea, withholding tax can be imposed in accordance with tax treaties or local tax law.

May stock option costs be included in the cost base for intercompany services charges?

The NTS might include stock option costs in the cost base for intercompany service charges if the costs are closely related with the business of the Korean entity.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes.

Are cost contribution or cost sharing payments deductible?

Yes.

Are cost contribution or cost sharing payments subject to withholding tax?

No, subject to certain exceptions.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible or amortizable over the useful life of the intangible.

Documentation and tax return disclosures

Documentation requirements

Korea does not impose a documentation requirement. However, 10 percent underreported tax penalty in case of a transfer pricing income adjustment as a result of a tax audit can be waived by preparing contemporaneous documentation by the tax return due date.

Deadline to prepare documentation

There is no deadline to prepare documentation. However, the contemporaneous documentation preparation deadline is the tax return due date.

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Deadline to submit documentation

Transfer pricing documentation must be submitted within 60 days of a request for transfer pricing documentation (one-time extension of 60 days may be available for justifiable reason). Contemporaneous documentation must be submitted within 30 days of a request.

Acceptable languages for documentation

Documentation must be submitted in Korean. Documentation in English might be acceptable, but only if the NTS allows it.

Tax return disclosures

Taxpayers are required to submit (1) Disclosure of the Transfer Pricing Method; (2) Intercompany Transaction Summary Report; and (3) Income Statement for Foreign Related Parties.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Five years from the day after the due date for filing the income tax return; seven years for nonfilers; 10 years in case of fraud.

Self-initiated adjustments

An adjustment is permitted in filing the original return and amended tax return. In case of decreasing taxable income, an amended tax return must be filed within three years of filing the original return.

Taxpayer set-offs for other related-party transactions

Offsetting is permitted with proof that such differences are effectively offset against the price applied to another transaction between the same related parties during the same taxable year.

Interest and penalties

Additional assessment payment deadline

Normally 30 days from the date of issuance of the tax assessment bill by the tax authorities.

Penalty on transfer pricing assessment

A penalty of up to KRW 100 million may be imposed for failure to provide documents in 60 days (one 60-day extension allowed) upon request from the NTS. The NTS may disregard the documents presented as supporting documents for tax appeal or CA if the documents were not submitted within 60 days (or 120 days) upon request from the NTS without justifiable reason. Underreported tax penalty is 10 percent (amended as of 27 December, 2010).

Reduction in transfer pricing penalties

The 10 percent underreported tax penalty may be waived if (1) supporting documentation is presented and Competent Authority confirms justifiable position; (2) the NTS accepts a unilateral APA; or (3) contemporaneous documentation is prepared and maintained when the tax return is filed, and submitted within 30 days of request.

Advance Pricing Agreements (APAs)

Are APAs Available?

Both unilateral and bilateral APAs are available.

APA filing fee

There is no fee for filing an APA application.

APA term of agreement

There is no limitation on APA period. The taxpayer shall specify the fiscal years for which the APA would apply.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

An application for CA must be filed within three years after notification of the tax assessment, when the tax assessment may result in taxation not in accordance with the provisions of tax treaties.

May CA develop new settlement positions?

Yes.

May taxpayer go to CA before paying tax?

Yes, by submitting an application before receiving a tax assessment bill. Payment will be deferred only if the other contracting state allows it reciprocally.

Luxembourg

General information

Tax authority and law

Luxembourg Tax Administration. Article 56 of the Income Tax Law and Art. 164 para. 3 ITL.

Regulations, rulings, guidelines

Circular ITL NS No.164/1 dated 9 June 1993;
Circular ITL No.164/1 dated 23 March 1998.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Concepts of associated enterprises and control are broadly defined. There is no requirement that two parties must be directly linked by way of ownership, but rather that a "special economic relationship" exists between them, that is, any relationship deviating from the usual commercial relationships observed between third parties.

Methods and comparables

Acceptable methods

Luxembourg follows the OECD Transfer Pricing Guidelines in this regard.

Priority of methods

Luxembourg imposes no priority of methods.

Availability of benchmarking/comparative data

Limited Luxembourg comparables data is available. Pan-European benchmark studies are usually accepted.

Are foreign comparables acceptable to local tax authorities?

There are no specific regulations. Pan-European benchmark studies are usually accepted.

Services issues

Are management fees deductible?

Yes, provided the fees are at arm's length.

Are management fees subject to withholding?

No.

May stock option costs be included in the cost base for intercompany services charges?

Yes.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes. Luxembourg follows Chapter VIII of the OECD Transfer Pricing Guidelines.

Are cost contribution or cost sharing payments deductible?

Yes, as long as the payment satisfies the arm's length standard.

Are cost contribution or cost sharing payments subject to withholding tax?

No, but if the payment can be characterized as a disguised profit distribution it may be subject to withholding tax.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Luxembourg follows Chapter VIII of the OECD Guidelines in this regard.

Documentation and tax return disclosures

Documentation requirements

No specific documentation is required.

Deadline to prepare documentation

There is no statutory deadline for preparation.

Deadline to submit documentation

Documentation must be submitted upon request.

Acceptable languages for documentation

The official languages are Luxembourgish, French, and German. English is generally accepted.

Tax return disclosures

No specific disclosure required.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Generally five years from tax year-end; this period is delayed when postponement of payment. In case of tax evasion, the period is 10 years.

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Self-initiated adjustments

Adjustments are in principle permitted in filing of original tax return before an assessment becomes final.

Taxpayer set-offs for other related-party transactions

There is no formal provision.

Interest and penalties**Additional assessment payment deadline**

General rules apply. Payment is due one month after the assessment, if no suspension is granted.

Penalty on transfer pricing assessment

Ordinary penalties apply, up to four times the amount of tax evaded in case of tax evasion and 10 times in case of tax fraud.

Reduction in transfer pricing penalties

There is no provision.

Advance Pricing Agreements (APAs)**Are APAs Available?**

There is no formal APA procedure. Taxpayers may request a unilateral tax clearance from the Luxembourg Tax Authority for guidance on the application of Luxembourg tax law.

APA filing fee

There is no fee.

APA term of agreement

There is no stated term.

Competent authority**When may taxpayer submit tax adjustment to Competent Authority (CA)?**

In most cases, within three years from the first notification of proposed adjustment (depending on the relevant tax treaty).

May CA develop new settlement positions?

There is no formal procedure.

May taxpayer go to CA before paying tax?

There is no formal procedure. Tax to be paid may be suspended.

Malaysia

General information

Tax authority and law

Inland Revenue Board. Specific provisions relating to transfer pricing and thin capitalization have been enacted under section 140A of the Income Tax Act. These provisions are effective from 1 January 2009.

Regulations, rulings, guidelines

Transfer Pricing Guidelines were issued on 2 July 2003, basically following the OECD Transfer Pricing Guidelines. New regulations and revised Transfer Pricing Guidelines under the new provision 140A are currently being drafted, but it is not known when they will be issued.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Under section 140A(5), the transfer pricing rules apply when transactions or financial assistance arrangements (thin capitalization) are entered into between:

- Persons one of whom has control over the other;
- Individuals who are relatives of each other; or
- Persons both of whom are controlled by another person.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, TNMM, and the Profit Split method are acceptable under the existing regulations.

Priority of methods

Traditional transactional methods — CUP, Resale Price and Cost Plus — are to be considered before the transactional profits methods — Profit Split and TNMM. The global formulary method is clearly rejected.

Availability of benchmarking/comparative data

No online database of local private limited companies exists. Because the IRB requires local comparables, searches are done manually at the Companies Commission of Malaysia.

Are foreign comparables acceptable to local tax authorities?

Only when it can be proven that no Malaysian comparables are available. In those cases, Pan-Asian comparables are preferred.

Services issues

Are management fees deductible?

Yes, to the extent the fees are revenue in nature and directly related to services provided to the Malaysian entity. Benefits analysis, evidence of services received, and proof of arm's length nature of the payment are required.

Are management fees subject to withholding?

Yes, when the services are provided in Malaysia.

May stock option costs be included in the cost base for intercompany services charges?

There are no transfer pricing rules in Malaysia on the treatment of stock options. Therefore, general deductibility rules and the arm's length principle apply, specifically the benefit test.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes, but such arrangements give rise to significant risk of creating a permanent establishment.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

There is no specific mention of cost contribution arrangements or cost sharing agreements in the Transfer Pricing Guidelines. Malaysia will most likely follow OECD Guidelines and review on a case-by-case basis. A benefits analysis will be requested.

Are cost contribution or cost sharing payments deductible?

Yes, to the extent that they are arm's length, of a revenue nature, and incurred wholly and exclusively in the production of assessable income. Benefits must be commensurate with payments.

Are cost contribution or cost sharing payments subject to withholding tax?

May be subject to withholding tax, depending on the context and the location where services are provided.

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What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Deductibility will depend on the nature of the intangibles. Payments incurred during the development of an intangible would more likely than not be considered capital in nature, and hence not deductible for tax purposes.

Documentation and tax return disclosures

Documentation requirements

The new Section 140A clearly requires contemporaneous transfer pricing documentation to be prepared.

Deadline to prepare documentation

There is no statutory deadline for preparation. Documentation should be contemporaneous.

Deadline to submit documentation

Companies with related-party transactions are expected to have transfer pricing documentation for the past six years ready and be able to furnish it to the IRB, upon request, within 14 days.

Acceptable languages for documentation

Documentation may be in Malay or English.

Tax return disclosures

All related-party transactions, including gross margin and profit before tax, must be disclosed in annual tax return. Specific information requested.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Six years from the end of the year of assessment to which the income or expenditure relates. The period is unlimited in cases of negligence, willful default, or tax evasion.

Self-initiated adjustments

Upward adjustments are permitted (may or may not be subject to audit) but downward adjustments may not be acceptable, and would most likely trigger TP audit.

Taxpayer set-offs for other related-party transactions

Generally not permitted.

Interest and penalties

Additional assessment payment deadline

Usually within 30 days from the date of Notice of Additional Assessment. Usually within 30 days from the date of Notice of Additional Assessment.

Penalty on transfer pricing assessment

No specific transfer pricing penalties. Existing penalty provisions under the Tax Audit framework apply to transfer pricing adjustments.

Reduction in transfer pricing penalties

Penalties may be imposed or mitigated at the discretion of the Director-General of Inland Revenue. If contemporaneous transfer pricing documentation is available, the penalty may be reduced/mitigated. For prior years, if transfer pricing documentation is prepared, the penalty may be reduced.

Advance Pricing Agreements (APAs)

Are APAs Available?

APA provisions have been enacted under section 138C of the Income Tax Act, effective January 1, 2009. APA rules are expected to be released soon. The IRB has accepted a number of unilateral APA applications, and the first one was finalized in January 2011.

APA filing fee

The APA fee is not fixed at the moment.

APA term of agreement

The standard term will be included in the APA rules that are expected to be issued soon. The IRB will accept a three-to-five-year term depending on the nature of the business.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

There is no formal procedures. Generally follows MAP procedures for the pertinent treaty provisions.

May CA develop new settlement positions?

There is no formal procedure.

May taxpayer go to CA before paying tax?

There is no formal procedure.

Mexico

General information

Tax authority and law

Servicio de Administración Tributaria (SAT); Mexican Income Tax Law Articles 2 (Sec VI and last two paragraphs), 31 (Sec V, XIV, XIX), 32 (Sec XVII, XVIII, XIX, XXII, XXIII, XXVI), 86 (Secs XII, XIII, XV), 91 (Sec I, II), 92, 106, 109, 133 (Secs X, XI), 172 (Sec XI), 173 (Sec XI, XIV), 190, 215, 216, 216-Bis and 217; Mexican Flat Tax Law Articles 3 (Sec VI) and 18 (Sec III). Mexican Income Tax Law Regulations — Article 276. Mexican Federal Fiscal Code — Articles 83 (Sec XV), 84 (Sec III).

Regulations, rulings, guidelines

Annual Miscellaneous Tax Provisions for Maquiladora companies, APA filing, Informative Return for Export-Oriented Manufacturing Companies (IMMEX), Informative Transfer Pricing Return, and Statutory Tax Report Filing System (SIPRED), Transfer Pricing Questionnaire. Articles 276 and 260 of the Income Tax Law Regulations.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Direct or indirect management, supervision, control, or ownership in another company.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, Residual Profit Split, Transactional Operating Profit Margin Method (TOPMM).

Priority of methods

The CUP is considered the preferred method, followed by the Cost Plus and Resale Price methods. Profit-based methods are to be applied if the CUP, Cost Plus, and Resale Price methods are not applicable. The Profit Split and Residual Profit Split methods, and TOPMM, are not applicable in specific circumstances.

Availability of benchmarking/comparative data

Very limited local comparable transactions and companies information is available; generally, taxpayers and the tax administration have used foreign comparable data for benchmarking purposes.

Are foreign comparables acceptable to local tax authorities?

Yes.

Services issues

Are management fees deductible?

Yes, provided information is available to demonstrate the service was actually provided, the charge is not made on an allocation basis, and other formal requirements are met (such as transfer pricing documentation).

Are management fees subject to withholding?

No, if the service is provided by a resident in a treaty country. Otherwise, companies are subject to 25 percent withholding tax if the services are provided in Mexico.

May stock option costs be included in the cost base for intercompany services charges?

There is no specific regulation or audit experience on this issue. It may be possible to deduct if the costs are considered strictly necessary for the Mexican entity's business purpose.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes, although they may be subject to increased scrutiny from the tax authorities.

Cost sharing agreements

Are cost contribution arrangements or cost sharing agreements accepted?

Domestic law prohibits the deduction of costs charged by a nonresident on an allocation basis. For treaty countries, there may be possible relief under a nondiscrimination basis, provided every case is presented to the competent authorities under the mutual agreement procedure.

Are cost contribution or cost sharing payments deductible?

No.

Are cost contribution or cost sharing payments subject to withholding tax?

These decisions would be made on a case-by-case basis.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

These decisions would be made on a case-by-case basis.

Documentation and tax return disclosures

Documentation requirements

Contemporaneous documentation must show that prices with each domestic and foreign related party set on

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a transaction-by-transaction basis are at arm's length. (Documentation requirement effective 1997, transactional analysis effective 2000.)

Deadline to prepare documentation

Documentation must be prepared by the due date for filing the income tax return (March 31).

Deadline to submit documentation

Upon request from the SAT.

Acceptable languages for documentation

Documentation must be in Spanish.

Tax return disclosures

The following items are required: Annual Tax Return; Informative Transfer Pricing Return; Informative Return for Export-Oriented Manufacturing Companies (IMMEX); Tax Certificate or Statutory Filing System (SIPRED); and Questionnaires in the SIPRED.

A transfer-pricing-specific informational return must be filed annually disclosing related parties and their corresponding transactions, including the method applied for analysis. Additionally, an annual questionnaire must be filed regarding intercompany transactions and documentation.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Generally, five years from the date of filing the income tax return. If an amended return is filed, the statute is extended five years after the date of the amendment filing.

Self-initiated adjustments

May be made only if it does not derive from a primary adjustment proposed by the competent authority of a treaty partner.

Taxpayer set-offs for other related-party transactions

Only intentional set-offs are permitted under the OECD Transfer Pricing Guidelines.

Interest and penalties

Additional assessment payment deadline

Forty-five days from notification of the assessment in writing.

Penalty on transfer pricing assessment

Ordinary penalties apply — 40 percent of tax deficiency if paid before the notice of deficiency is issued, 55 to 75 percent in other cases, adjusted for inflation and interest.

Reduction in transfer pricing penalties

Fifty percent reduction if transfer price is documented.

Advance Pricing Agreements (APAs)

Are APAs Available?

Federal Fiscal Code Article 34-A provides for unilateral and bilateral APAs.

APA filing fee

Approximately US\$780 for filing the request, U.S. \$156 for submission of the annual report during the APA term. The amount is periodically updated for inflation.

APA term of agreement

Up to three years forward, one year back, and the issuing year. The term can be longer if negotiated under the mutual agreement procedure in accordance with a tax treaty.

Competent authority

When may taxpayer submit tax adjustment to competent authority (CA)?

Mexico would follow the mutual agreement procedure for the pertinent treaty provisions.

May CA develop new settlement positions?

Yes.

May taxpayer go to CA before paying tax?

Generally, tax must be paid.

Netherlands

General information

Tax authority and law

Netherlands Revenue. Corporate Income Tax Act Article 8b and 8c.

Regulations, rulings, guidelines

- Transfer Pricing Decree, March 30, 2001, IFZ 2001/295;
- Decree on intercompany services and CCAs, August 21, 2004, IFZ 2004/680 (adjustment of Transfer Pricing Decree of March 30, 2001);
- Decree on APAs, ATRs, Financial Service Entities, August 11, 2004, DGB 2004/1338;
- Decree on TP Coordination Group, August 11, 2004, DGB 2004/1339;
- APA Decree, August 11, 2004, IFZ 2004/124;
- ATR Decree, August 11, 2004, IFZ 2004/125;
- Decree on Financial service companies, August 11, 2004, IFZ 2004/126; and
- Q&A Decree re financial service companies, August 11, 2004, IFZ 2004/127.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

The definition of “associated enterprises” in article 8b Corporate Income Tax Act follows the wording of article 9 of the OECD Model Treaty. Companies are considered to be associated if one company has an equity participation in, or management control over another enterprise, which provides the company sufficient control to influence relationships that may give rise to non-arm’s-length arrangements. A ruling from the Dutch tax authorities can provide certainty on this topic.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, TNMM.

Priority of methods

Taxpayers are free to choose a method; however, the method chosen should lead to an arm’s length result.

Availability of benchmarking/comparative data

Yes, comparative data is available.

Are foreign comparables acceptable to local tax authorities?

Generally, yes, as long as the markets are similar.

Services issues

Are management fees deductible?

Yes. Specific guidance on management fees is included in the Decree of August 21, 2004, nr. IFZ 2004/680 (Decree on intercompany services and CCAs).

Are management fees subject to withholding?

No.

May stock option costs be included in the cost base for intercompany services charges?

Certain stock option costs might be included. The Dutch Corporate Income Tax Act, under certain circumstances, excludes these costs from the tax base, making them nondeductible.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes. Netherlands follows Chapter VIII of the OECD Transfer Pricing Guidelines. Specific guidance on CCAs is included in the Decree of August 21, 2004, nr IFZ 2004/680 (Decree on intercompany services and CCAs).

Are cost contribution or cost sharing payments deductible?

Yes, unless an asset is capitalized. The company may choose to deduct or to capitalize the development costs of an intangible asset that is expected to generate benefits in other years.

Are cost contribution or cost sharing payments subject to withholding tax?

No.

What is the payer’s tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Generally, capitalization of payments and amortizable over the economic life of the intangible. The maximum amortization for goodwill is 10 percent of the value per year.

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Documentation and tax return disclosures

Documentation requirements

There are statutory requirements for entities subject to the Corporate Income Tax Act. Documentation should be part of the taxpayer's general books and records.

Deadline to prepare documentation

For entities subject to the Corporate Income Tax Act, documentation should be in place at the time the intercompany transaction takes place.

Deadline to submit documentation

Upon request. If the documentation cannot be presented upon request, a reasonable time (one to three months) will be granted to prepare the documentation.

Acceptable languages for documentation

Dutch law does not require that documentation be in a specific language, but it does require that the information included in documentation be accessible to the tax authorities. It is possible to have documentation in various languages, in addition to Dutch and English. If the documentation is not in Dutch, the tax inspector can require a translation.

Tax return disclosures

There is an obligation to identify intragroup transactions.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Generally, five years from tax year-end. Twelve years if the adjustment relates to income from a foreign country.

Self-initiated adjustments

Adjustment permitted in filing of original return after close of book year-end, as long as the adjustment relates to a fact that existed at book year-end and the assessment has not become final.

Taxpayer set-offs for other related-party transactions

Generally not permitted. Set-offs may be considered if the benefits of the transactions are balanced to some extent. The taxpayer must prove that set-off leads to an arm's length result.

Interest and penalties

Additional assessment payment deadline

General rules apply. Interest accrues from the end of the tax year in which the assessment is made to the final assessment date.

Penalty on transfer pricing assessment

No transfer-pricing-specific penalty charges. General penalties apply — maximum of 100 percent in case of malicious intent.

Reduction in transfer pricing penalties

Penalties may be reduced or forgiven if documentation reflects justifiable position.

Advance Pricing Agreements (APAs)

Are APAs Available?

Yes. APA Decree, August 11, 2004, nr. IFZ2004/124.

A prefiling meeting is available upon request. Small business taxpayer APAs are available; in such cases, the tax authorities assist the taxpayer to find comparables. A case management plan is established for every APA request, including a time schedule for processing and finalizing the APA request.

APA filing fee

There is no fee.

APA term of agreement

Four to five years. Longer terms may be possible in case of long-term contracts. Rollback is possible, if the relevant facts and circumstances have not changed, or if accurate adjustments can be made.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

An application for mutual agreement procedure may be filed after notification of the tax assessment, and must be filed within three years of notification, unless modified by a treaty.

May CA develop new settlement positions?

Yes, unless the taxpayer has entered into a closing agreement or received a court decision.

May taxpayer go to CA before paying tax?

Yes. Taxpayer may go to CA after receiving a final tax assessment; accelerated CA is available upon request.

New Zealand

General information

Tax authority and law

Inland Revenue Department (IRD); Sections YD 5, GB 2 and GC 6 — 14 of Income Tax Act of 2007 (effective 2008/2009).

Regulations, rulings, guidelines

Transfer Pricing Guidelines.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Any two companies are associated persons when there is a group of persons that have a 50 percent or greater voting, market value, or income interest in the two companies, or control of the two companies by any other means (section YB 2(1)). There are also definitions of associated persons for persons, partnerships, and trusts. An anti-avoidance provision (section GB 2) requires compliance with the transfer pricing rules in case of an arrangement that has a purpose or effect of defeating the intent and application of the transfer pricing rules.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, (e.g., Contribution Analysis or Residual Analysis), CPM.

Priority of methods

Taxpayers must use the most reliable method. Transaction-based methods are preferred over profit-based methods.

Availability of benchmarking/comparative data

Limited public New Zealand comparable data is available regarding companies and certain transaction types.

Are foreign comparables acceptable to local tax authorities?

The use of foreign comparable companies is permitted in cases in which there are no sufficiently comparable New Zealand companies and the companies are resident in markets similar to that of New Zealand.

Services issues

Are management fees deductible?

Yes, to the extent payments are arm's length.

Are management fees subject to withholding?

Withholding tax obligations arise to the extent the fees constitute royalties in accordance with Income Tax Act 2007 and the applicable income tax treaty. The fees will also be subject to withholding tax if the services are physically performed in New Zealand. To the extent the charge is not arm's length, a deemed dividend will arise that will be subject to withholding tax.

May stock option costs be included in the cost base for intercompany services charges?

The IRD has no specific provisions. However, it is expected that general principles will apply and stock option costs can form part of the cost base if they represent a cost of providing services. The cost of providing "shareholder services" should not form part of the cost base.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Undisclosed principal arrangements may be achieved. Care must be taken when drafting the legal agreements to achieve the desired result.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

There is no specific statutory authority. The IRD Guidelines endorse Chapter VIII of the OECD Transfer Pricing Guidelines.

Are cost contribution or cost sharing payments deductible?

There is no specific statutory authority. To the extent payments are arm's length, amounts are deductible if related to revenue items and not capital.

Are cost contribution or cost sharing payments subject to withholding tax?

Generally no, but the nature of the underlying costs must be considered.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are amortizable over the useful life of the intangible, provided the asset satisfies the definition of depreciable intangible property.

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Documentation and tax return disclosures

Documentation requirements

IRD Guideline suggests specific documentation required to demonstrate compliance. Contemporaneous documentation is encouraged (effective 1996). Lack of documentation will shift the burden of proof from the Commissioner to the taxpayer.

Deadline to prepare documentation

There is no statutory deadline for preparation of documentation.

Deadline to submit documentation

Documentation must be submitted upon request.

Acceptable languages for documentation

Business records must be maintained in English, although approval can be obtained to maintain these records in another language. To the extent transfer pricing documentation does not fall within the definition of business records (economic analysis is unlikely to be deemed "business records") this section does not apply. Accordingly, documentation can be maintained in a language other than English. However, if the documentation is to be provided to the IRD to support a taxpayer's position, the IRD would expect taxpayers to translate it into English.

Tax return disclosures

No specific disclosure is required.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Four years from the end of the year in which the income tax return is filed.

Self-initiated adjustments

An adjustment may be made by filing a notice of proposed adjustment within four months of the self-assessment date or the issue of an assessment by the IRD (section 89D and 89DA). This may not be necessary if the IRD agrees that an adjustment should be made (section 113).

Taxpayer set-offs for other related-party transactions

Set-offs are allowed in relation to amounts arising in the same income year, or the immediately preceding or succeeding income year, and the set-off relates to the same class of transaction, or if the two transactions are linked.

Interest and penalties

Additional assessment payment deadline

General rules apply. Half the tax is payable a month after the new assessment date, the remainder on settlement. Interest is applicable from the date tax would have been payable.

Penalty on transfer pricing assessment

Ordinary penalties apply — 20 percent for not taking reasonable care, or for taking an unacceptable tax position (Section 141A and 141B). A 40 percent penalty is charged for gross carelessness (Section 141C). Interest is charged on any outstanding tax at the prevailing interest rate (as established by the IRD).

Reduction in transfer pricing penalties

Penalties may be reduced if documentation shows that taxpayer: (1) exercised reasonable care or (2) adopted an acceptable interpretation of the law. Penalties may also be reduced by up to 100 percent for disclosures made before audit.

Advance Pricing Agreements (APAs)

Are APAs Available?

APAs are available under Section 91E of the Tax Administration Act of 1994 or under the mutual agreement procedure (unilateral and bilateral).

APA filing fee

There is no fee for a bilateral APA, and a minimal application fee for a unilateral APA.

APA term of agreement

There is no stated term.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

New Zealand follows the mutual agreement procedure for the pertinent treaty provisions.

May CA develop new settlement positions?

Yes.

May taxpayer go to CA before paying tax?

Yes, but liability to pay tax will not be avoided.

General information

Tax authority and law

Council of Organization for Economic Cooperation and Development (OECD); Articles 9 and 25 of OECD Model Tax Convention.

Regulations, rulings, guidelines

Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (as amended). OECD Transfer Pricing Guidelines do not always have a legally binding effect in domestic law, but carry considerable weight and govern the application of Article 9 of the OECD Model Tax Convention in international law.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Two enterprises are associated if one participates directly or indirectly in the management, control, or capital of the other, or if both are under common control.

Methods and comparables

Acceptable methods

Traditional transaction methods (CUP, Resale Price, Cost Plus) and transactional profit methods (Profit Split — Contribution Analysis or Residual Analysis, TNMM).

Priority of methods

As a result of the July 2010 update to the OECD's Transfer Pricing Guidelines, profits methods are now on a par with traditional methods. But a CUP is still preferable.

Availability of benchmarking/comparative data

The OECD guidelines set the standard for comparability.

Are foreign comparables acceptable to local tax authorities?

Geographic location is one factor that determines whether markets in which the independent and associated enterprises operate are comparable. Ch. I, 1.30. If these differences have a material effect on price, adjustments must be made. Generally, OECD member countries expect comparables to be selected from the same or the most similar market as the market in which the tested party operates. But this is not restricted to purely geographic market differences; i.e., if there are no comparability differences between geographic markets, then comparable companies should not be rejected merely because they are resident in a different country.

Services issues

Are management fees deductible?

Determined under local law.

Are management fees subject to withholding?

Determined under local law.

May stock option costs be included in the cost base for intercompany services charges?

There is no bar to this in the OECD Guidelines. It is a question of what would have been agreed to and charged between the parties involved had they been independent enterprises.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Determined under local law.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes. OECD Guidelines Chapter VIII.

Are cost contribution or cost sharing payments deductible?

Deductibility is determined under the laws of applicable country, based on the nature of the activity undertaken in the arrangement. Chapter VIII, s.23.

Are cost contribution or cost sharing payments subject to withholding tax?

Generally, no. However, tax treatment should be determined under the laws of applicable country. Chapter VIII s.23.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

CCA rules state that the costs of any CCA should be judged by reference to the benefits derived or expected.

Documentation and tax return disclosures

Documentation requirements

Depends on local law. The OECD Transfer Pricing Guidelines do not provide relief from documentation requirements imposed under local laws. It is reasonable for tax authorities to expect taxpayers to prepare and maintain such material.

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Deadline to prepare documentation

Depends on local law. Taxpayers should make reasonable efforts to document transfer prices and maintain documentation prepared in this process. There is more than one view on whether documentation needs to be in force when a transaction takes place.

Deadline to submit documentation

Depends on local law. In a timely manner when requested.

Acceptable languages for documentation

Local languages are preferred, but there is a growing acknowledgement that English may also be appropriate.

Tax return disclosures

Depends on local law. Generally, disclosures should be limited to information sufficient to allow tax administration to determine which taxpayers need further examination.

Transfer pricing adjustments**Statute of limitations on assessment for transfer pricing adjustments**

Determined under local law.

Self-initiated adjustments

Depends on local law. Self-initiated adjustments are not accepted by many OECD member countries without considerable scrutiny.

Taxpayer set-offs for other related-party transactions

Depends on local law. Intentional set-offs should be assessed in accordance with the arm's length principle to quantify the values claimed as set-offs. Tax administrators have discretion to grant or deny taxpayer's request for reduction in an adjustment based on unintentional over-reporting of taxable income.

Interest and penalties**Additional assessment payment deadline**

Depends on local law.

Penalty on transfer pricing assessment

Depends on local law. However, the OECD Transfer Pricing Guidelines recognize that promoting compliance should be the primary objective of civil tax penalties.

Reduction in transfer pricing penalties

Depends on local law. Reduction is not specified. However, imposition of sizeable penalties is deemed unfair if taxpayers make reasonable effort in good faith.

Advance Pricing Agreements (APAs)**Are APAs Available?**

Chapter IV.F (multilateral, bilateral, and unilateral APAs); Annex "Guidelines for Conducting Advance Pricing Arrangements under the Mutual Agreement Procedure."

APA filing fee

Depends on local law. The OECD Transfer Pricing Guidelines recognize that APA user fees may be charged, but do not have to be.

APA term of agreement

Depends on local law.

Competent authority**When may taxpayer submit tax adjustment to Competent Authority (CA)?**

Depends on applicable double tax treaty between countries involved. Notification requirement and/or the time limit for notification or filing of a competent authority request may apply.

May CA develop new settlement positions?

CAs should endeavor to reach agreement acceptable to the taxpayer. CAs' power to compromise an adjustment depends on the provisions of domestic law

May taxpayer go to CA before paying tax?

Countries are encouraged to suspend collection of tax and interest until mutual agreement procedures are completed.

Norway

General information

Tax authority and law

Tax Directorate (Skattedirektoratet). The General Tax Act section 13-1.

Regulations, rulings, guidelines

The arm's length principle is incorporated in the General Tax Act section 13-1. Generally, the OECD Transfer Pricing Guidelines apply.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Transfer pricing rules apply when there is community of interest between parties. Filing and documentation rules apply if there is at least 50 percent direct or indirect joint ownership. The tax authorities will most likely continue to focus on transactions when there is direct or indirect ownership of more than 50 percent.

Methods and comparables

Acceptable methods

Norway follows the OECD Transfer Pricing Guidelines in this regard.

Priority of methods

Norway follows the OECD Transfer Pricing Guidelines in this regard.

Availability of benchmarking/comparative data

Yes, comparables data is available.

Are foreign comparables acceptable to local tax authorities?

There is no specific regulation on this issue. Pan-European comparables will normally be accepted if the OECD Transfer Pricing Guidelines' comparability factors are met.

Services issues

Are management fees deductible?

Yes.

Are management fees subject to withholding?

No.

May stock option costs be included in the cost base for intercompany services charges?

There are no specific regulations on this issue.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes. There are no specific statutory requirements. The Norwegian tax authorities are likely to follow the OECD Transfer Pricing Guidelines.

Are cost contribution or cost sharing payments deductible?

Yes. However, in some cases payments must be capitalized and amortized according to the rules that apply for the asset to be developed.

Are cost contribution or cost sharing payments subject to withholding tax?

No.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are normally capitalized and amortized to the extent that the decline in value is obvious.

Documentation and tax return disclosures

Documentation requirements

Contemporaneous transfer pricing documentation is required. The documentation must include:

- A description of the legal ownership structure of the group and the geographical affiliation of the various entities.
- A description of the operational structure of the group.
- A brief historic description of the group, its business activities, and any previously implemented reorganizations.
- A description of the industry.
- A description of material changes to the enterprise or group in the year.
- Financial information for the last three years, including an explanation for any loss.
- A description of the nature and scope of controlled transactions in the year, including details of any aggregated transactions. This description should also relate to the five comparability factors contained in the OECD Guidelines and hence contain a full functional analysis.
- An explanation of any cost contribution arrangements.

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- Additional information in respect of any centralized services or intangible property.
- Information concerning the selection and application of the price setting method.
- A comparability analysis.
- Copies of agreements relevant to the controlled transactions, including any tax authority rulings or other agreements reached in respect of them in any tax jurisdiction.
- A description of any immaterial transactions.

Small and medium-sized enterprises are exempt from the documentation requirement. An enterprise is exempt if, together with related companies and entities, it has less than 250 employees and either annual revenue of NOK 400 million or less or a balance sheet value of NOK 350 million or less.

Deadline to prepare documentation

Effective from tax year 2008, contemporaneous transfer pricing documentation must be prepared for each fiscal year by the tax return filing date.

Deadline to submit documentation

Within 45 days upon request from the tax authorities.

Acceptable languages for documentation

Norwegian, Swedish, Danish, and English.

Tax return disclosures

A specific form must be filed with the tax return that details the nature and extent of transactions with related parties. This applies only if the total amount of such transactions in an income tax year exceeds NOK 10 million, or if the gross intercompany debt at the income tax year-end exceeds NOK 25 million.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Generally 10 years from tax year-end. Limited to two years if the taxpayer has provided all relevant information at the time of filing.

Self-initiated adjustments

There is no formal procedure.

Taxpayer set-offs for other related-party transactions

There is no formal provision.

Interest and penalties

Additional assessment payment deadline

The general rules for assessments apply (normally payment must be made some weeks after the reassessment is made).

Penalty on transfer pricing assessment

A penalty is levied if the taxpayer has provided incorrect or insufficient information for the tax authorities to determine whether the pricing is arm's length. The penalty rate is up to 60 percent (normally 30 percent) of the additional tax.

Reduction in transfer pricing penalties

There is no provision in this regard.

Advance Pricing Agreements (APAs)

Are APAs Available?

APAs are available only for the pricing of natural gas.

APA filing fee

Not applicable.

APA term of agreement

Not applicable.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

There is no formal procedure.

May CA develop new settlement positions?

There is no formal procedure.

May taxpayer go to CA before paying tax?

No.

Peru

General information

Tax authority and law

National Superintendence of Tax Administration (SUNAT); Articles 32 and 32-A of the Income Tax Law (text approved by Legislative Decree 945). (Effective for transactions from January 1, 2001).

Regulations, rulings, guidelines

Articles 24 and 108-118 of the Income Tax Regulations (Supreme Decree 122-94-EF, modified by Supreme Decree 190-2005-EF) and Resolution 167-2006.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Related parties are those that share (1) Partners or common stockholders representing over 30 percent of the capital, directly or indirectly; (2) Common directors, managers, or other executives with power of decision in financial and commercial agreements; (3) Consolidation of financial statement; (4) Sales of asset and/or services equal to, or higher than, 80 percent of total annual income in favor of one unrelated company or of companies related between themselves and a 30 percent of total annual cost for the buying party (both requirements must be met to be economically related); (5) Joint venture contracts with independent accounting, in transaction with their contracting parties; (6) permanent establishments in Peru in respect to the corresponding company abroad; and (7) Natural persons are included among subjects under analysis if applicable.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, Residual Profit Split, TNMM.

Priority of methods

Taxpayers must choose the best method.

Availability of benchmarking/comparative data

Available local data is very limited.

Are foreign comparables acceptable to local tax authorities?

Yes, the law expressly states that foreign comparables are acceptable.

Services issues

Are management fees deductible?

Yes, they are deductible, except if the fees are paid to a resident in a tax haven.

Are management fees subject to withholding?

Management fees are not deductible if the management services are rendered abroad, but if rendered in Peru the fees are subject to 30 percent withholding; if the service qualifies as technical assistance, the withholding tax rate would be 15 percent.

May stock option costs be included in the cost base for intercompany services charges?

Yes.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes.

Are cost contribution or cost sharing payments deductible?

Yes, if the cost portion corresponding to the Peruvian taxpayer relates to actual services rendered in connection with the generation of taxable income in Peru and the amount is reasonable in relation to such income.

Are cost contribution or cost sharing payments subject to withholding tax?

Yes, depending on the nature of the payment. For instance, royalties for the use or license to use of trademarks, patents, know-how are subject to income tax withholding.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Any payment abroad for the use or the right to use intangibles is subject to income tax withholding, but is deductible as an expense if it relates to the generation of taxable income in Peru, and the amount is reasonable.

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Documentation and tax return disclosures

Documentation requirements

Taxpayers must have a Technical Study supporting TP calculations, also indicating the transfer pricing method applied. Detailed documentation and information for each transaction and the Technical Study must be kept available for SUNAT during the established period.

Deadline to prepare documentation

Tax authorities require that the technical study be ready at the end of the fiscal year.

Deadline to submit documentation

The deadline for filing the transfer pricing tax return is in June of each year.

Acceptable languages for documentation

Documentation must be in Spanish.

Tax return disclosures

Taxpayers must file a special tax return containing information regarding the transactions subject to the transfer pricing regime.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Four years, extended to six years if a return was not filed. This period is computed from January 1 of the calendar year following the date when the tax return should have been filed (income tax annual returns must be filed during the three calendar months following the end of the corresponding fiscal year).

Self-initiated adjustments

Adjustments are permitted.

Taxpayer set-offs for other related-party transactions

Set-offs are permitted if the related parties are local companies, or if the transactions are with companies domiciled in countries with which Peru has signed treaties to avoid double taxation.

Interest and penalties

Additional assessment payment deadline

Not specified.

Penalty on transfer pricing assessment

Specific infractions (and the corresponding penalty) are established for transfer pricing.

Reduction in transfer pricing penalties

Twenty percent, 30 percent, or 50 percent discount if taxpayer meets certain conditions.

Advance Pricing Agreements (APAs)

Are APAs Available?

Although the Income Tax Law establishes the possibility for taxpayers and the CA to determine valuation methods by means of advance agreements, this possibility is now limited to taxpayers with international operations.

APA filing fee

Not specified.

APA term of agreement

The fiscal year in which the APA is approved and three years thereafter.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

At any time after filing the original annual income tax return, but before the beginning of the fiscal review.

May CA develop new settlement positions?

CA may modify or supplement an assessment already notified to the taxpayer only in some cases, such as when irregularities are detected in the taxpayer's documentation or accounting records that could have led to errors on the part of the authorities.

May taxpayer go to CA before paying tax?

Yes, the taxpayer may file a sustained claim with the CA within 20 working days after notification of a tax assessment.

Philippines

General information

Tax authority and law

Bureau of Internal Revenue. The Philippines does not have specific transfer pricing laws, but the Bureau of Internal Revenue, as a matter of policy, subscribes to the OECD Transfer Pricing Guidelines, until the final draft of the Revenue Regulations on Transfer Pricing are formally issued.

Regulations, rulings, guidelines

No formal regulations have been issued to date. A proposed revenue regulation prescribing more specific guidelines on transfer pricing is pending with the Bureau of Internal Revenue, but had not been approved at press time.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

A controlled taxpayer is covered by the transfer pricing rules. Any two or more organizations or trades, or businesses owned or controlled directly or indirectly by the same interests are covered.

Methods and comparables

Acceptable methods

The draft rules adhere to the methods provided under the OECD Transfer Pricing Guidelines, such as CUP, Resale Price, Cost Plus, and Profit Split.

Priority of methods

The Philippines follows the OECD Transfer Pricing Guidelines in this regard.

Availability of benchmarking/comparative data

There is no readily available data. Benchmarking and selection of comparative data for local comparables may be done by accessing the Philippine Securities and Exchange Commission portal.

Are foreign comparables acceptable to local tax authorities?

Yes, if local comparables are not available.

Services issues

Are management fees deductible?

Yes.

Are management fees subject to withholding?

Normally, yes.

May stock option costs be included in the cost base for intercompany services charges?

Yes.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes.

Are cost contribution or cost sharing payments deductible?

Yes.

Are cost contribution or cost sharing payments subject to withholding tax?

It depends on the nature of the cost.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Not applicable.

Documentation and tax return disclosures

Documentation requirements

Transactions must be documented by an agreement.

Deadline to prepare documentation

An agreement must be prepared prior to the transaction.

Deadline to submit documentation

Documentation must be available at any time during an investigation.

Acceptable languages for documentation

Section 234 states that books and records must be kept in Pilipino, English, or Spanish; documents kept in other languages must be translated.

Tax return disclosures

There is no provision in this regard.

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Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Within three years after the last day prescribed by law for the filing of the respective tax return. If the tax return is filed after the period prescribed by law, the three-year period will be counted from the day the return was filed.

Self-initiated adjustments

Self-initiated adjustments may be made through amendment of tax returns.

Taxpayer set-offs for other related-party transactions

Not applicable.

Interest and penalties

Additional assessment payment deadline

Normally, 30 days from receipt of the assessment.

Penalty on transfer pricing assessment

Ordinary surcharge of 25 percent and Interest of 20 percent annually may apply. If the transaction is deemed fraudulent, the surcharge is 50 percent.

Reduction in transfer pricing penalties

Not applicable.

Advance Pricing Agreements (APAs)

Are APAs Available?

APAs are available under the draft transfer pricing rules.

APA filing fee

Not applicable.

APA term of agreement

The proposed regulations limit the application of the APA to prospective years and transactions, and the actual term will depend on the industry, products, or transactions involved.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

Any time before the issuance of a Letter of Authority (LOA), and within three years from the filing of the tax return.

May CA develop new settlement positions?

Yes, if it determines that the correct amount of tax was not paid.

May taxpayer go to CA before paying tax?

Yes.

Poland

General information

Tax authority and law

Inland Revenue; articles 9a, 11, 19 and 27 of Corporate Income Tax Law; section IIa of Tax Ordinance of 29 August 1997 (APA), Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (23 August 2007).

Regulations, rulings, guidelines

Executive Ordinances of 10 September 2009, Ordinance on Tax Havens of 16 May 2005, Ordinance on APA Realization of 31 May 2006. Also, amendment to the Accounting Act of 18 March 2008, which requires entities to disclose in their financial statements information on significant transactions with related entities that are not at arm's length.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Five percent direct or indirect share in capital. Other types of relationship (e.g., effective control) are also taken into account. The rules apply to both Polish and foreign parties. Transfer pricing restrictions apply also to foreign entrepreneurs operating through a permanent establishment in Poland, and transactions with entities in tax havens (regardless of the relationship).

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split (Contribution Analysis or Residual Analysis), TNMM.

Priority of methods

CUP, then transaction-based preferred over profit-based.

Availability of benchmarking/comparative data

Increased role of benchmarking; the tax authorities try to use secret comparables in audits.

Are foreign comparables acceptable to local tax authorities?

Only if taxpayer can prove that local data is unavailable.

Services issues

Are management fees deductible?

Yes, provided the benefit test is met. Costs of shareholders' activities are not deductible.

Are management fees subject to withholding?

Not in the case of tax treaty partner countries, provided the Polish entity presents a tax residency certificate of payment prior to the payment and there is tax treaty protection.

May stock option costs be included in the cost base for intercompany services charges?

The issue is not addressed in Polish transfer pricing regulations. Costs of stock-based compensation are not listed in Art. 16 of the Corporate Income Tax Act, i.e., they are not directly excluded from tax-deductible costs. Therefore, provisions of Art. 15 of the CIT Act should apply, so if the taxpayer is able to prove that the specific persons whose stock-option plan costs are included in the cost base are engaged in the provision of services for the Polish entity, and these services pass general benefit test, stock-option costs (being a part of the charge-out) may be treated as tax deductible costs.

The issue has not been raised in an audit yet, so there is no precedent or case law. If the tax authorities become aware that the stock options are not 'cash expenses' they may begin to disallow or at least more strenuously challenge their deductibility.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

There is no specific provision.

Are cost contribution or cost sharing payments deductible?

Yes, provided the benefit test is met. A detailed cost breakdown and transfer pricing documentation are usually required.

Are cost contribution or cost sharing payments subject to withholding tax?

Not in the case of tax treaty partner countries, provided the Polish entity presents a tax residency certificate of payment prior to the payment and there is tax treaty protection.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

There is no specific provision.

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Documentation and tax return disclosures

Documentation requirements

Documentation must be prepared for domestic and cross-border transactions exceeding annual value thresholds (generally €100,000 for tangibles, €30,000 for services and intangible transactions, €20,000 for transactions with entities in tax havens). Documentation requirements apply to foreign entrepreneurs operating through a permanent establishment in Poland.

Deadline to prepare documentation

There is no statutory deadline for preparation of documentation, but case law indicates that the documentation should be prepared no later than the transaction is concluded and updated subsequently.

Deadline to submit documentation

Seven days from the tax authorities' request.

Acceptable languages for documentation

Documentation must be in Polish.

Tax return disclosures

Taxpayers must disclose in their annual corporate income tax return whether they are obliged to prepare transfer pricing documentation. In addition, transactions with foreign related entities exceeding EUR 300,000 during the tax year must be disclosed on the appropriate form. Other transactions upon tax authorities' request.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Five years from the end of the year in which the tax return is filed.

Self-initiated adjustments

There is no formal procedure. Taxpayer-initiated adjustments may be made on an amended return within five years from the date of filing the tax return.

Taxpayer set-offs for other related-party transactions

Set-offs are permitted for transactions with the same party.

Interest and penalties

Additional assessment payment deadline

In general, additional Corporate Income Tax assessments relate to tax liabilities that arose in the past; therefore, the additional tax assessed, together with penalty interest, is payable on the day of receipt of the assessment decision.

Penalty on transfer pricing assessment

For transactions below the threshold for mandatory documentation, or above the threshold when documentation is presented and accepted, the penalty is 19 percent. For transactions above the threshold when documentation is not presented or accepted, the penalty is 50 percent. Potentially, personal sanctions based on Penal Fiscal Code — criminal sanction, including imprisonment — could be imposed.

Reduction in transfer pricing penalties

No provision.

Advance Pricing Agreements (APAs)

Are APAs Available?

APAs are available, including for foreign entrepreneurs operating through a permanent establishment in Poland.

APA filing fee

In general, 1 percent of the transaction value, with the following thresholds: domestic unilateral agreement: PLN 5,000-50,000; foreign unilateral agreement: PLN 20,000-100,000; bilateral/multilateral foreign agreements: PLN 50,000-200,000.

APA term of agreement

Five years, but the term may be extended for further unlimited five-year periods.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

An application for mutual agreement procedure (based both on the EU Arbitration Convention and a tax treaty) may be filed after notification of the tax assessment, and must be filed within three years of notification (Executive Ordinance).

May CA develop new settlement positions?

Yes, unless the taxpayer has received a court decision.

May taxpayer go to CA before paying tax?

Yes, but liability to pay tax will not be avoided.

Portugal

General information

Tax authority and law

General Tax Directorate (Direccao-Geral dos Impostos) (DGCI); Article 63 of the Corporate Income Tax Code, applicable for tax years beginning after December 31, 2001.

Regulations, rulings, guidelines

Ministerial Order (Portaria) #1446-C/2001;
Ministerial Order (Portaria) #620-A/2008.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Any of the following conditions would define the relationship as related party:

- (i) one entity participates directly or indirectly in at least 10 percent of the share capital or voting rights of another entity;
- (ii) both entities are at least 10 percent owned, directly or indirectly, by the same legal entity;
- (iii) an entity and the members of its corporate bodies, or any administration, direction, management, or supervising boards;
- (iv) entities in which the majority of the Board of Directors are constituted by the same persons;
- (v) entities related under a subordination agreement or any other agreement of a similar nature;
- (vi) economic, commercial, financial, professional, or legal dependence;
- (v) transactions between a resident entity and entities resident in clearly more favorable tax regimes (as listed in Ministerial Order # 150/2004).

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split (Contribution Analysis or Residual Analysis), TNMM.

Priority of methods

Taxpayers must use the most appropriate method. Transaction-based methods are preferred over profit-based methods.

Availability of benchmarking/comparative data

Despite the relatively small economy, local comparable data for independent companies is usually available. Taxpayers use the SABI database covering Portuguese companies; if none are available, Spanish companies.

Are foreign comparables acceptable to local tax authorities?

Local comparables are preferred, but others are permitted whenever Iberian comparables are not available.

Services issues

Are management fees deductible?

Yes. However, the management fees must reflect the economic benefit and the arm's length principle. Specific rules apply to intragroup services, as defined in the applicable transfer pricing Ministerial Order.

Are management fees subject to withholding?

Yes. However, if an income tax treaty is available, the management fees will not be subject to withholding tax, provided procedures are followed.

May stock option costs be included in the cost base for intercompany services charges?

Yes, provided an economic benefit exists for the company.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes. Specific documentation requirements are set out for cost contribution arrangements.

Are cost contribution or cost sharing payments deductible?

Portugal has no formal guidelines on this issue. Payments will be deemed deductible provided they comply with the domestic general deduction provision.

Are cost contribution or cost sharing payments subject to withholding tax?

Yes. However, if payments are structured as services, there is no withholding tax under income tax treaties, if certain procedures are followed.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible and amortizable over the period of use of the intangible, if applicable.

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Documentation and tax return disclosures

Documentation requirements

Taxpayers with net sales and other operating income exceeding EUR 3 million in the previous year must maintain a wide range of contemporaneous documentation.

Deadline to prepare documentation

The 15th day of the 7th month following the tax year-end.

Deadline to submit documentation

Documentation must be submitted upon request.

Acceptable languages for documentation

The legislation requires documentation to be submitted in Portuguese. In practice, the Portuguese authorities accept documentation submitted in English, provided the taxpayer seeks prior approval.

Tax return disclosures

In the Annual Declaration, the taxpayer must (i) identify related parties with which it entered into transactions; (ii) specify the amount of each transaction; (iii) list the methodologies used; and (iv) declare if contemporaneous documentation is available.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

General tax law provisions apply. Tax assessments may be issued only within a four-year period following the last day of the tax year concerned.

Self-initiated adjustments

Adjustments in both original and amended returns after year-end are permitted as long as the transaction takes place with a foreign related party and there is no decrease in the taxable income. Adjustments to decrease taxable income are allowed only after an administrative appeal.

Taxpayer set-offs for other related-party transactions

There is no formal provision on this issue.

Interest and penalties

Additional assessment payment deadline

Taxes are payable within 30 days from the date of assessment, on the combined amount of the defaulted tax and the appropriate compensatory interest.

Penalty on transfer pricing assessment

No transfer-pricing-specific penalties apply. General tax penalties of up to €100,000 apply for refusal to provide information or incorrect or incomplete information.

Reduction in transfer pricing penalties

Penalties may be reduced depending on the circumstances.

Advance Pricing Agreements (APAs)

Are APAs Available?

APAs have been available since July 2008 through Ministerial Order # 620-A/2008.

APA filing fee

The filing fee for an APA application is between € 3,150 and € 35,000, depending on taxpayer turnover. These fees are reduced by 50 percent for renewals or revisions of existing APAs.

APA term of agreement

Maximum term of three years.
Taxpayers may seek renewal.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

After notification of the tax assessment, or when any action that gives rise to, or is likely to give rise to, double taxation not in accordance with a double tax treaty has occurred.

May CA develop new settlement positions?

CA may issue a new position after administrative and/or judicial review. However, if a court decision is available, it must be reflected in the CA's position.

May taxpayer go to CA before paying tax?

Yes. Taxpayer may appeal the assessment or file for judicial review. Deferral of payment is subject to further conditions.

Romania

General information

Tax authority and law

National Agency for Fiscal Administration and Ministry of Public Finance; Romanian Fiscal Code.

Regulations, rulings, guidelines

OECD Transfer Pricing Guidelines, Methodological Norms of the Romanian Fiscal Code, Order 222 / 2008 regarding the content of the transfer pricing file issued by the National Agency for Fiscal Administration, Government Decision no. 529 / 2007 regarding the approval of APA and advanced fiscal solutions.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

At least one of the entities must own a minimum of 25 percent of the other company (direct or indirect control).

Methods and comparables

Acceptable methods

CUP, Cost Plus, Resale Price Minus, Profit Split, TNMM.

Priority of methods

The method that yields the most accurate results has priority. However, transaction-based methods are preferred over profit-based methods.

Availability of benchmarking/comparative data

Usually, the Amadeus Bureau van Dijk database is used. However, if there are other ways to obtain relevant financial data available for comparable companies, such information may be used.

Are foreign comparables acceptable to local tax authorities?

Yes. According to Order 222 / 2008 regarding the content of the transfer pricing documentation file, when a benchmark study is performed, it is recommended that Romanian comparables be used. However, if there is not enough information within the Romanian market, comparable companies from the European Union or international comparables are accepted.

Services issues

Are management fees deductible?

Yes, if certain conditions are met (i.e., the management services were actually rendered, and supporting documentation for those services is provided).

Are management fees subject to withholding?

No, if a relevant income tax treaty is in place and a valid certificate of fiscal residency is made available.

May stock option costs be included in the cost base for intercompany services charges?

There are no specific rules in Romania regarding the treatment of stock options; therefore, the general deductibility rules and the arm's length principle apply.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes, but these types of agreements are carefully scrutinized by the Romanian tax authorities. The allocation key used should demonstrate consistency in its applicability. The use of such allocation key should be clearly described, not only for the Romanian taxpayer, but for all entities to which the allocation key is applied. The local transfer pricing documentation should illustrate how the Romanian company benefits from the services received, and should provide details regarding the allocation key (and must demonstrate that the services were actually provided).

Are cost contribution or cost sharing payments deductible?

Yes, but they must comply with certain domestic deductibility rules.

Are cost contribution or cost sharing payments subject to withholding tax?

Generally, no.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Romania generally follows the OECD Transfer Pricing Guidelines. The Romanian legislation does not include any requirements in this respect.

Documentation and tax return disclosures

Documentation requirements

Taxpayers must prepare a transfer pricing documentation file in compliance with domestic requirements regarding transfer prices, to demonstrate the extent to which intra-group transactions meet the arm's length principle.

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Deadline to prepare documentation

Not applicable. However, in case of a tax audit the taxpayer might obtain up to three months to prepare the documentation. If the transfer pricing study is not prepared during that period, the company may obtain an extension equal to the first period of time.

Deadline to submit documentation

Upon written request issued by the tax authorities.

Acceptable languages for documentation

Documentation must be prepared in the Romanian language.

Tax return disclosures

The tax return does not include any information related to transfer pricing transactions. However, according to Order 222/ 2008 regarding transfer prices, transfer pricing documentation should disclose information regarding the industry, group, economic environment, type of transactions, amounts relevant for those transactions, countries involved, number of related parties involved, functions performed, assets employed, risks undertaken, methods used, and benchmark analysis.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

The statute of limitation is currently five years.

Self-initiated adjustments

Year-end adjustments are not covered by the Romanian legislation on transfer pricing, and to what extent the Romanian tax authorities will accept such adjustments cannot be determined. In practice, the tax authorities analyze carefully year-end transfer pricing adjustments received by Romanian entities from related parties. For certainty, obtaining a binding ruling is advisable.

Taxpayer set-offs for other related-party transactions

Set-offs are allowed only on arm's length terms and conditions.

Interest and penalties

Additional assessment payment deadline

The Romanian legislation on transfer prices does not include any regulations in this respect.

Penalty on transfer pricing assessment

Adjustments performed on the profit level of the company subject to the transfer pricing analysis and penalties for late payment taxes, according to the Fiscal Procedure Code, which could be up to 15 percent of the transfer pricing adjustment. If the transfer pricing documentation is incomplete or nonexistent, a fine of €3000 may be imposed.

Reduction in transfer pricing penalties

Transfer pricing penalties could be reduced to zero if documentation is complete and the prices of the intercompany transactions are in compliance with the arm's length principle.

Advance Pricing Agreements (APAs)

Are APAs Available?

According to Government Decision no. 529 / 2007 regarding the approval of APAs and advance fiscal solutions, unilateral, bilateral, and multilateral APAs may be entered into.

APA filing fee

Between €10,000 and €20,000. The fee for the modification of an existing APA is set between €6,000 and €15,000.

APA term of agreement

Up to five years.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

When the taxpayer realizes that the transaction was not performed according to the arm's length principle. Also, if the related party's tax authority performs adjustments on the transaction carried out with the Romanian company.

May CA develop new settlement positions?

The competent authority may reconsider and develop a new settlement position if the arm's length principle is not met.

May taxpayer go to CA before paying tax?

If an adjustment is received from the Romanian tax authorities, the taxpayer can contest this adjustment in a court of justice. However, until a favorable answer is received from the court, the tax should be paid. If the adjustment is received indirectly from a related party, as a result of an audit by foreign tax authorities, this adjustment should be accepted by the Romanian fiscal authorities before modifying the corporate income tax computation.

Russia

General information

Tax authority and law

Russian Tax Office (Federal Tax Service); Tax Code of the Russian Federation Part 1: articles 20, 40; Part 2: articles 154, 161, 187, 211, 250, 269, 280, 301-305, 340. A draft law introducing new transfer pricing rules in Russia has been introduced, but it has not yet been enacted. It has passed a first reading in parliament, and the Russian State Duma is expected to hold a second reading in the spring of 2011.

Regulations, rulings, guidelines

No transfer pricing regulations have been issued.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

The following transactions are subject to transfer pricing control in Russia: All cross-border transactions (including those between formally independent parties); all barter transactions (including purely domestic transactions and those between formally independent parties); all related-party transactions (including purely domestic transactions); and transactions where the price applied by the same taxpayer in analogous transactions deviates by more than 20 percent within a short period of time.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus.

Priority of methods

In strict order: CUP, Resale Price, and Cost Plus. Only upon failure of application of the first method may other methods be applied.

Availability of benchmarking/comparative data

According to the Tax Code, exchange quotations and official sources of information should be used to determine market prices. However, the Tax Code does not explain what is meant by "official sources of information." According to the Russian federal and regional arbitrage practice, those may consist of data received from state statistical committees; information from newspapers; bulletins (from any international organization); and other sources of information.

Are foreign comparables acceptable to local tax authorities?

There are no specific guidelines in the Tax Code regarding acceptable comparables. In practice, foreign comparables may be accepted, if it is reasonably

substantiated that they are appropriate to establish a market price level for a particular transaction.

Services issues

Are management fees deductible?

Yes, expenses associated with the management of an organization or individual subdivisions thereof, and expenses for the acquisition of services involving the management of an organization or individual subdivisions thereof could be deducted (if general criteria of tax deductibility are met).

Are management fees subject to withholding?

Management fees paid to a foreign legal entity are in principle not subject to Russian withholding tax, but this should be confirmed on a case-by-case basis depending on the exact nature of the services.

May stock option costs be included in the cost base for intercompany services charges?

Because cost sharing arrangements are not regulated in Russian legislation, the stock option costs may be included in the cost base for intercompany services charges only if the purchase of the stock option was requested by the payer of charges (e.g., under a commissionaire agreement).

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

There is no specific provision in this regard.

Are cost contribution or cost sharing payments deductible?

Deductibility may be challenged by the tax authorities, because there is no specific legislation, and it may be difficult to establish a direct link between the shared expenses and related profits of a Russian company.

Are cost contribution or cost sharing payments subject to withholding tax?

May be applicable, depending on the nature of the payment. However, treaty relief is usually available.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Not applicable

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Documentation and tax return disclosures

Documentation requirements

No specific documentation requirement. However, under the general rules, the tax authorities are empowered to request any documentation supporting the tax calculation.

Deadline to prepare documentation

Not applicable.

Deadline to submit documentation

Not applicable. However, if the tax authorities request documentation in accordance with the general rules, documentation would have to be submitted within 10 days after the request.

Acceptable languages for documentation

Documentation must be in Russian, or include a translation into Russian.

Tax return disclosures

No specific disclosures required.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Three years from tax year-end

Self-initiated adjustments

There is no formal procedure.

Taxpayer set-offs for other related-party transactions

There is no formal provision.

Interest and penalties

Additional assessment payment deadline

There are no specific regulations applicable to transfer pricing. The general settlement procedure is applicable.

Penalty on transfer pricing assessment

No specific transfer pricing penalties, but additional assessment of the tax due and assessment of interest on the tax payment apply, calculated as 1/300 of the Central Bank of Russia interest rate for each day of delay. In case of tax evasion, penalties equal to 20 percent of tax due may be assessed.

Reduction in transfer pricing penalties

No specific provision. However, the general rules for reduction of penalties may apply.

Advance Pricing Agreements (APAs)

Are APAs Available?

APAs are not available..

APA filing fee

Not applicable.

APA term of agreement

Not applicable.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

There is no formal procedure.

May CA develop new settlement positions?

There is no formal procedure.

May taxpayer go to CA before paying tax?

There is no formal procedure.

Singapore

General information

Tax authority and law

Inland Revenue Authority of Singapore (IRAS); new section (Section 34D) legislated in Singapore Income Tax Act in 2010, establishing the legal requirement for related-party transactions to be carried out at arm's length. Section 34D now provides IRAS with the legal authority to enforce the arm's length principle and make adjustments if related-party transactions are not carried out on an arm's length basis.

Regulations, rulings, guidelines

IRAS Transfer Pricing Guidelines were officially issued on 23 February 2006. They endorse the arm's length principle, as defined by the OECD. Additional guidelines on related-party loans and services were issued on 23 February 2009.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Singapore's tax authority expects related-party transactions to be carried out at arm's length. Persons are considered related parties when one person, directly or indirectly, has the ability to control the other, or when both of them, directly or indirectly, are under the control of a common person. Related parties include associated enterprises and separately taxable entities of an enterprise, such as permanent establishments of the enterprise.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, TNMM, and Profit Split.

Priority of methods

Taxpayers must use the method that produces the most reliable results.

Availability of benchmarking/comparative data

Several business databases are available to identify comparable companies. Financial data from published accounts is available from the Accounting and Corporate Regulatory Authority.

Are foreign comparables acceptable to local tax authorities?

There are no specific guidelines published by the Singapore tax authority. In practice, the IRAS shows a clear preference for local comparables, and foreign comparables would likely be more acceptable if it is not feasible to obtain domestic comparables.

Services issues

Are management fees deductible?

Yes, if they are incurred wholly and exclusively in the production of assessable income of the payer, are not referable to a stewardship function, and the quantum satisfies the arm's length standard. For reimbursement/cost allocation, the expense must not be specifically prohibited under the Singapore Income Tax Act.

Are management fees subject to withholding?

Following the enactment of the Income Tax (Amendment) Act 2009, withholding tax will no longer apply to management fees for services rendered by nonresidents entirely outside of Singapore, subject to certain conditions.

May stock option costs be included in the cost base for intercompany services charges?

Yes, because this cost will be considered part of the fully absorbed cost required to provide the service.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes, but these arrangements give rise to significant risk of creating a permanent establishment.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

There is no specific statutory authority. The Singapore tax authority is likely to follow the OECD Transfer Pricing Guidelines. Some guidelines on cost pooling arrangements are available in additional guidelines on related-party loans and services issued on 23 February 2009, but such arrangements apply only to services.

Are cost contribution or cost sharing payments deductible?

Yes, provided they are incurred wholly and exclusively in the production of assessable income of the payer and do not include capital expenditure (e.g., depreciation).

Are cost contribution or cost sharing payments subject to withholding tax?

No, subject to certain exceptions.

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What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Deductibility will depend on the nature of the intangibles. If payment is for goodwill, it is not deductible. If it is a license fee for the right to use the intangible, it would generally be tax deductible.

Documentation and tax return disclosures

Documentation requirements

There are no statutory requirements or penalty specifically for insufficiency of documentation. However, during an audit, the lack of documentation poses the risk of challenge and adjustments by the IRAS, because the IRAS considers the lack of such documentation as the taxpayers' failing to undertake reasonable effort to demonstrate compliance with the arm's length principle. The IRAS also stresses the importance of adequate documentation should the taxpayer be involved in a mutual agreement procedure.

Deadline to prepare documentation

There is no statutory deadline for preparation.

Deadline to submit documentation

Documentation must be submitted in a timely manner when requested. From experience, this is typically no more than a month from the time of the request.

Acceptable languages for documentation

Documentation must be in English.

Tax return disclosures

There are no disclosure requirements for year of assessment 2004 and subsequent periods (financial years ending after 31 December 2002). For earlier years, taxpayers are required to disclose the value and counterparty of some related-party transactions, and whether arm's length prices were charged.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Six years from the year of assessment to which the income/expense is related. Effective from year of assessment 2008, this period is reduced to four years. In cases of tax evasion, the period is unlimited.

Self-initiated adjustments

Not permitted.

Taxpayer set-offs for other related-party transactions

Generally not permitted.

Interest and penalties

Additional assessment payment deadline

Additional tax is payable within one month from the date of the Notice of Additional Assessment, unless the "stand over" of tax applies.

Penalty on transfer pricing assessment

There are no specific transfer pricing penalties. Existing penalty provisions under the Singapore Income Tax Act are applicable, ranging from 100 percent to 400 percent of underpaid tax, and may include fines and imprisonment.

Reduction in transfer pricing penalties

There is no provision regarding this issue.

Advance Pricing Agreements (APAs)

Are APAs Available?

Yes (unilateral and bilateral). The Transfer Pricing Guidelines provide guidance on making an APA request. Supplementary guidelines on APAs were issued on 20 October 2008.

APA filing fee

There is no fee.

APA term of agreement

Generally three to five years forward. Rollback may be allowed on a case-by-case basis.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

Singapore follows the mutual agreement procedure for the pertinent treaty provisions, as well as that stated in the Transfer Pricing Guidelines.

May CA develop new settlement positions?

Yes.

May taxpayer go to CA before paying tax?

No. Tax must be settled in accordance with the Singapore Income Tax Act first, unless the Singapore tax authority agrees to "stand over" such tax liability, on the condition that late payment penalties would be imposed.

Slovakia

General information

Tax authority and law

Slovak tax authorities; Section 18 of Income Tax Act No 595/2003 Coll as further amended (ITA).

Regulations, rulings, guidelines

ITA, MF/8288/2009-72, OECD Guidelines.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

The nature/extent of a transaction is decisive, as a substance-over-form rule applies in the Slovak Republic.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, TNMM.

Priority of methods

Taxpayers must use the most reliable method. Transaction-based methods are preferred over profit-based methods.

Availability of benchmarking/comparative data

Pan-European database Amadeus is available to the Slovak tax authorities. Companies are entitled to support their transfer pricing arrangements with benchmark analyses.

Are foreign comparables acceptable to local tax authorities?

Yes. The Slovak tax authorities prefer Slovak comparables. If not available, relevant foreign comparables may be considered. The Slovak tax authorities generally accept Pan-European benchmark searches.

Services issues

Are management fees deductible?

Generally, yes; however, tax deductibility is determined on a case-by-case basis.

Are management fees subject to withholding?

It depends on the pertinent tax treaty. In most cases, there is no withholding tax on management fees.

May stock option costs be included in the cost base for intercompany services charges?

Generally, yes. However, Slovak tax legislation does not provide any guidance on this subject, and the Slovak tax authorities' position is unknown due to lack of practical experience.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Generally, yes; however, tax deductibility is determined on a case-by-case basis.

Are cost contribution or cost sharing payments deductible?

Generally, yes; however, tax deductibility is determined on a case-by-case basis.

Are cost contribution or cost sharing payments subject to withholding tax?

Generally, no.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible or amortizable.

Documentation and tax return disclosures

Documentation requirements

The Ministry of Finance of the Slovak Republic published on 22 January 2009 guidelines — MF/8288/2009-72 — specifying the content of documentation required for IFRS and non-IFRS filers.

Deadline to prepare documentation

Documentation must be prepared up front for the relevant taxation period.

Deadline to submit documentation

Within 60 days from the date of the request from the tax authorities.

Acceptable languages for documentation

Transfer pricing documentation must be submitted in the Slovak language. However, at the taxpayer's request, the tax authorities may allow the transfer pricing documentation to be submitted in a language other than the Slovak language.

Tax return disclosures

No specific disclosure required.

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Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Ten years from the end of the year in which the annual income tax return should be filed.

Self-initiated adjustments

Upward adjustments permitted; it is unclear whether a decreasing adjustment is available.

Taxpayer set-offs for other related-party transactions

Generally not permitted.

Interest and penalties

Additional assessment payment deadline

Additional tax is usually payable within 30 days of receipt of assessment.

Penalty on transfer pricing assessment

Ordinary penalties apply. If discrepancy was assessed, the taxpayer must pay a penalty of three times the European Central Bank (ECB) basic rate, but at least 10 percent on additional tax assessed, and the late payment interest of four times ECB basic rate per annum, but at least 15 percent p.a. of outstanding tax liability.

Reduction in transfer pricing penalties

There is no provision. Penalties may be reduced or waived if the taxpayer files a request and consequently negotiates with the tax authorities on a case-by-case basis.

Advance Pricing Agreements (APAs)

Are APAs Available?

Yes. APAs cover only the appropriateness of the method used, not the margin/mark-up.

APA filing fee

Small application fee (up to €10).

APA term of agreement

Maximum five years.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

There is no formal procedure. The Slovak Republic follows the mutual agreement procedure for pertinent treaty provisions.

May CA develop new settlement positions?

Yes.

May taxpayer go to CA before paying tax?

Yes, but liability to pay tax will not be avoided.

South Africa

General information

Tax authority and law

South African Revenue Service (SARS); section 31 of the Income Tax Act No 58 of 1962 (effective July 19, 1995). Section 9D also requires the consideration of transactions between a CFE and a connected person to reflect an arm's length price consistent with the provisions of Section 31.

Regulations, rulings, guidelines

Practice Note 7, issued August 6, 1999; Practice Note 2 (thin capitalization), issued May 14, 1996, and amended May 17, 2002, as well as the OECD Guidelines.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

"Connected person" relationships are defined in section 1.1.4 of Practice Note 7 of the South African Income Tax Act.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split (e.g., Contribution Analysis or Residual Analysis), TNMM.

Priority of methods

No priority; however, the most reliable method is preferred.

Availability of benchmarking/comparative data

Comparables data regarding South African companies is not publicly available.

Are foreign comparables acceptable to local tax authorities?

Yes. Pan-European comparables are preferred, although U.S. and Australian comparables may be acceptable in some circumstances.

Services issues

Are management fees deductible?

Generally, yes. When an indirect method of allocation has been used, it is necessary to apply to the South African Reserve Bank to remit the management fees. This application must be made on an annual basis.

Are management fees subject to withholding?

No.

May stock option costs be included in the cost base for intercompany services charges?

Yes, the total costs of employing certain individuals should be included in the cost base.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes. South Africa follows Chapter VIII of the OECD Transfer Pricing Guidelines.

Are cost contribution or cost sharing payments deductible?

Yes. Income Tax Act Section 11(a) — General deductions formula.

Are cost contribution or cost sharing payments subject to withholding tax?

No.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible or amortizable over the useful life of the intangible.

Documentation and tax return disclosures

Documentation requirements

Generic statutory requirements followed. Practice Note 7 broadly follows OECD Transfer Pricing Guidelines Para. 5.4. While there is no requirement to have documentation, the tax return does ask if documentation is available, and SARS has recommended that taxpayers do prepare documentation to cover the relevant intercompany transactions.

Deadline to prepare documentation

There is no formal deadline for preparing documentation. However, there are certain questions in the income tax return that ask whether or not a transfer pricing policy has been prepared.

Deadline to submit documentation

Documentation must be submitted upon request.

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Acceptable languages for documentation

Documentation must be in English.

Tax return disclosures

When a taxpayer has a transfer pricing policy, this should be submitted with the tax return.

Transfer pricing adjustments**Statute of limitations on assessment****for transfer pricing adjustments**

Three years from the date of the original assessment when full disclosure has been made. There is no time limitation for inaccurate or incomplete disclosure.

Self-initiated adjustments

There is no formal procedures. However, SARS requires taxpayers to make adjustments; the income tax return for companies specifically provides a line for transfer pricing adjustments.

Taxpayer set-offs for other related-party transactions

Practice Note 7 recognizes that such arrangements do sometimes occur between independent enterprises and should be assessed in terms of the arm's length principle.

Interest and penalties**Additional assessment payment deadline**

Outstanding tax must be paid by the second date reflected on the assessments; this is 30 days after the date of assessment.

Penalty on transfer pricing assessment

Ordinary penalties apply, up to 200 percent of unpaid tax for material nondisclosure and tax evasion; interest is charged at 11 percent per annum on underpaid tax.

Reduction in transfer pricing penalties

There is no provision in this regard, but there's usually room for negotiation.

Advance Pricing Agreements (APAs)**Are APAs Available?**

APAs are not available.

APA filing fee

Not applicable.

APA term of agreement

Not applicable.

Competent authority**When may taxpayer submit tax adjustment to Competent Authority (CA)?**

There is no formal procedure.

May CA develop new settlement positions?

There is no formal procedure.

May taxpayer go to CA before paying tax?

No.

Spain

General information

Tax authority and law

Tax Administration; Corporate Income Tax Act (Royal Legislative Decree 4/2004) and Nonresidents Tax Act (Royal Legislative Decree 5/2004). Article 16 of CITA (Royal Legislative Decree 4/2004) governing transfer pricing rules has been changed significantly by the Tax Fraud Prevention Act published on Nov. 30, 2006 (Law 36/2006). Royal Decree 1793/2008 develops the Corporate Income Tax Regulation. Additionally, new regulations have been approved in 2010 — Royal Decree 6/2010 on the simplification of the documentation requirements for small and medium-sized enterprises, and Royal Decree 897/2010, which develops the simplification of the taxpayer documentation in general.

Regulations, rulings, guidelines

Effective February 19, 2009, Royal Decree 1793/2008 provides detailed documentation rules, penalty procedures, tax audit transfer pricing process, secondary adjustments, and APA-specific procedure. Rulings: formal consultations to tax authorities. Royal Decree 1794/2008, governing the Mutual Agreement Procedure and EU Arbitration Convention (EU/90/436) from a Spanish domestic perspective.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Extensive rules exist governing the nature of related parties. Those rules have been slightly modified by law 36/2006 and other regulations.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, and TNMM.

Priority of methods

CUP, Cost Plus, and Resale Price methods have priority. When it proves difficult to apply those methods due to complexity or lack of available information, Profit Split and TNMM are also allowed.

Availability of benchmarking/comparative data

Iberian database Sabi provides information on more than 1 million Spanish companies. Pan-European databases with Pan-European data are also used.

Are foreign comparables acceptable to local tax authorities?

New legislation is based on the OECD Transfer Pricing Guidelines and the work of the European Joint Transfer Pricing Forum. Although pan-European comparables should be accepted, in practice the Spanish tax authorities have expressed a strong preference for the use of local comparables whenever possible.

Services issues

Are management fees deductible?

Management fees are deductible if they're at arm's length, and the service produces or may produce a profit to the company receiving the services. This benefit must be proved and documented.

Are management fees subject to withholding?

Yes, unless a tax treaty is in force. If management fees include intangibles (e.g., software license), royalty withholding tax may apply.

May stock option costs be included in the cost base for intercompany services charges?

Spanish tax law does not provide an explicit answer to this question. Nevertheless, any intercompany services charge should pass the "benefit test" and meet the arm's length principle. Accounting regulations could help support the case, but temporary issues need to be addressed.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes, even though there is no specific legal framework for them, and the Spanish tax authorities have focused since 2008 on analyzing the permanent establishment exposure of such agreements.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes, cost contribution arrangements and cost sharing agreements are specifically mentioned and requirements are set out in law: identification of the parties, description of activities or project, calculation method and allocation criteria applied, extension, and buy-in and buy-out payments.

Are cost contribution or cost sharing payments deductible?

Yes, if the requirements of law and regulation (arm's length principle) are met.

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Are cost contribution or cost sharing payments subject to withholding tax?

Yes, unless an income tax treaty is in force.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible or amortizable over the useful life of the intangible.

Documentation and tax return disclosures

Documentation requirements

Established by Royal Decree 1793/2008. Closely aligned with the EU Transfer Pricing Forum's Code of Conduct concepts, Masterfile and local file. The OECD Transfer Pricing Guidelines also apply.

The new regulations on the simplification of taxpayer documentation requirements mentioned above (RD 897/2010) provide an exemption from the requirement to prepare documentation if the intercompany transactions undertaken with a given related party are valued at under € 250,000. There are also exclusions for transactions involving intangible assets, transmission of real estate, and transmissions of shares.

Deadline to prepare documentation

Transfer pricing documentation should be available for the tax authorities at the conclusion of the voluntary period for filing the Annual Corporate Tax Return (e.g., for fiscal year ending 31 Dec. 2010, the due date is 25 July 2011).

Deadline to submit documentation

There is no deadline to submit documentation, but the tax authorities may request it even on the day after filing the Annual Corporate Tax Return.

Acceptable languages for documentation

There are no specific rules in this regard. Documentation should be acceptable in line with the recommendations of the EU Joint Transfer Pricing Forum. Documentation in languages other than Spanish would be examined on a case-by-case basis, depending on the tax inspector's preference. From a strategic perspective, it is preferable to prepare documentation in Spanish. If needed as evidence (especially in court) it should be translated into Spanish.

Tax return disclosures

The model contains information requirements oriented to report intragroup relationships, as established to identify the taxpayer management team, the taxpayer's ownership in other entities, and

other entities' participation in the taxpayer.

The Model 200 (Corporate Tax Return) also incorporates information to be included in a defined section with reference to the taxpayer's intercompany transactions. The specific information required is:

- Name of the related taxpayer or legal entity
- Tax number of the related taxpayer or legal entity
- Relationship type
- Country or province of the related party
- Type of transaction
- Transaction characteristic (income or payment)
- Transfer pricing valuation Method
- Transaction amount

The tax authorities are expected to use this information to select transfer pricing audit targets.

Only the intercompany transactions undertaken by the taxpayer with a given related party over €100,000 must be disclosed in the Corporate Tax Return.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Normally four years from the due date for filing the corporate income tax return.

Self-initiated adjustments

The General Tax Directorate has publicly expressed its distaste for self-initiated adjustments, because they could mean the taxpayer has not fulfilled the "fair value" accounting compulsory principle. This position could evolve.

Taxpayer set-offs for other related-party transactions

Not permitted.

Interest and penalties

Additional assessment payment deadline

General rules for administrative assessments apply. Interest is applicable from the date the tax would have been payable.

Penalty on transfer pricing assessment

For fiscal years 2007 and 2008:

- Tax penalty of 50 percent to 150 percent (aprox.) of the tax not paid would be required if transfer pricing documentation is lacking and adjustment is made;
- 15 percent of losses to carry forward; and
- 50 percent of tax credit inappropriately taken.

For fiscal year 2009 and onwards:

- Tax penalty from €1,500 per item of data to €15,000 per group of data omitted, if there is lack of documentation or incomplete documentation, and no transfer pricing adjustment is made.
- 15 percent of adjustment (minimum) if documentation is lacking or incomplete and transfer pricing adjustment is made.

In some cases, penalties of up to 3 percent of the entity's turnover may be imposed, up to a maximum of €600,000. Secondary adjustments are applicable according to law (i.e., recharacterization of transaction).

Reduction in transfer pricing penalties

Reductions between 22.5 percent and 50 percent of transfer pricing penalties may be applied (Article 188.3 of General Taxation Law 58/2003).

Advance Pricing Agreements (APAs)

Are APAs Available?

Yes, there is a specific regulation that includes provisions on: Information and documentation requirements, procedure, Competent Authority, terms and timing, modifications and extensions, resolutions, and multilateral APAs.

APA filing fee

Not applicable.

APA term of agreement

Up to four fiscal years following the year of approval, the negotiation year itself, and one year rollback in some cases. Maximum term is six years

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

A request may be submitted after the proposed adjustment is communicated to the taxpayer in writing.

May CA develop new settlement positions?

Yes.

May taxpayer go to CA before paying tax?

No. The tax due must be paid or otherwise guaranteed but then payment suspended.

Sweden

General information

Tax authority and law

Swedish Tax Administration (Skatteverket); Chapter 14 §§ 19-20 of the Swedish Income Tax Act.

Regulations, rulings, guidelines

Arm's length principle (SFS 1999:1229; 14:19-20); documentation requirements (SFS 2001:1227; 19:2a-2b); APAs (SFS 2009:1289); case law (RÅ 1991 ref. 107).

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Direct or indirect management, supervision, ownership, or control in another company is required. In determining whether control exists, a shareholder should take into account share capital and voting power of other shareholders, if an agreement regarding the exercise of common control has been made between the shareholders. Accordingly, if three unrelated taxpayers each owns 1/3 of a company and a shareholder agreement regarding the exercise of common control has been concluded, transactions between the company and the shareholders will qualify as controlled transactions. Moreover, companies may be affiliated based on either de jure control or de facto control. The term covers legal persons in which the same group of shareholders may exercise control or that share the same management even if the shareholders are not the same. Accordingly, if three unrelated taxpayers each own 1/3 of two companies, the two companies will be affiliated. Moreover, two companies may also be affiliated even if they are not owned by the same group of shareholders if the two companies have the same management.

Methods and comparables

Acceptable methods

Sweden follows the OECD Guidelines in this regard.

Priority of methods

Sweden follows the OECD Guidelines in this regard.

Availability of benchmarking/comparative data

Information is available from the Swedish Companies Registration Office.

Are foreign comparables acceptable to local tax authorities?

An assessment will be made on a case-by-case basis. Pan-European comparables will normally be accepted if comparability factors according to the OECD Guidelines are met.

Services issues

Are management fees deductible?

Yes, if the cost equals the benefit received. OECD principles generally apply for the deductibility of mark-ups.

Are management fees subject to withholding?

No.

May stock option costs be included in the cost base for intercompany services charges?

No formal guidance or case law is currently available.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes.

Are cost contribution or cost sharing payments deductible?

Yes, if the cost equals the benefit received. OECD principles generally apply.

Are cost contribution or cost sharing payments subject to withholding tax?

No.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible or amortizable.

Documentation and tax return disclosures

Documentation requirements

Statutory documentation requirements are effective as of January 1, 2007. EU transfer pricing documentation is accepted.

Deadline to prepare documentation

There is no statutory deadline to prepare documentation, but documentation is expected to exist on a current basis. Documentation may be requested as of the date for submission of the tax return.

Deadline to submit documentation

Upon request. Thirty days are generally provided for submission.

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Acceptable languages for documentation

Documentation may be prepared in Swedish, English, Danish, or Norwegian.

Tax return disclosures

No specific disclosure is required for intragroup transactions.

Transfer pricing adjustments**Statute of limitations on assessment for transfer pricing adjustments**

Six years from tax year-end.

Self-initiated adjustments

There is no formal procedure.

Taxpayer set-offs for other related-party transactions

No formal provision, but Sweden generally follows the OECD Guidelines.

Interest and penalties**Additional assessment payment deadline**

Sweden's general tax rules apply.

Penalty on transfer pricing assessment

Sweden does not impose specific transfer pricing penalties. Ordinary penalty of 20 percent to 40 percent of the additional tax on the income adjustment may be imposed.

Reduction in transfer pricing penalties

There is no provision in this regard.

Advance Pricing Agreements (APAs)**Are APAs Available?**

Formal rules on APA filing procedures are effective January 1, 2010. Only bilateral or multilateral APAs are allowed.

APA filing fee

The fee for filing for APA is approximately €15,000.

The fee for filing for renewal of an APA is approximately €10,000. The fee for filing for a renewal with changes is approximately €12,500.

APA term of agreement

Generally three to five years.

Competent authority**When may taxpayer submit tax adjustment to Competent Authority (CA)?**

Within three years from receiving the tax assessment decision the taxpayer believes is in conflict with the tax treaty.

May CA develop new settlement positions?

No formal procedure exists in this regard.

May taxpayer go to CA before paying tax?

Yes.

Switzerland

General information

Tax authority and law

Swiss Federal Tax Administration (SFTA) and the Cantonal Tax Administrations. Switzerland does not have specific transfer pricing legislation, although authority to adjust the net profits of a taxpayer on an arm's length basis for all non-commercially justified expenses is found in Art. 58 of the Federal Taxes Act and Art. 24 of the Harmonization of the Cantonal Tax Laws Act.

Regulations, rulings, guidelines

No specific guidelines; however, the Swiss tax authorities generally follow the OECD Transfer Pricing Guidelines. Specific regulations have been issued on services (SFTA Circular 2004), debt/equity ratio (SFTA Circular 1997), and interest on intercompany loans (annual SFTA circulars).

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

There are no specific rules regarding the definition of related companies. The Swiss tax authorities generally follow the OECD's definition of "Associated Enterprises."

Methods and comparables

Acceptable methods

All OECD methods are accepted.

Priority of methods

Historically, preference was given to the traditional transaction methods such as the CUP, Cost Plus, and Resale Price methods, in line with the 1995 OECD Guidelines, although the TNMM was widely used in practice. Profit split methods were mostly used in the context of a local unilateral Swiss Tax Ruling or Advance Pricing Agreement with another country or countries. However, with increased transfer pricing sophistication on the part of the tax authorities and the 2010 update of the OECD Transfer Pricing Guidelines, the preference for traditional transaction methods is fading.

Availability of benchmarking/comparative data

There is limited Swiss comparables data. Pan-European benchmark studies are usually accepted.

Are foreign comparables acceptable to local tax authorities?

There is no specific prohibition; in practice, foreign comparables are acceptable.

Services issues

Are management fees deductible?

Yes, provided the fees are at arm's length.

Are management fees subject to withholding?

No.

May stock option costs be included in the cost base for intercompany services charges?

In general, at the level of a Swiss subsidiary, employee stock option costs should qualify as a business-related expense that can be included in the cost base for intercompany service charges, and the tax authorities should allow the deductibility of these costs. However, these costs should be analyzed based on the specific facts and circumstances of each case, as there are some specific rules in Swiss tax law relating to employee stock option costs.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes.

Are cost contribution or cost sharing payments deductible?

Yes, as long as the payment satisfies the arm's length standard.

Are cost contribution or cost sharing payments subject to withholding tax?

No, as long as the price is at arm's length. If not at arm's length, it is considered a "deemed dividend" and therefore subject to withholding tax.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Buy-in payments are deductible or amortizable over the useful life of the intangible (decided on a case-by-case basis depending on facts and accounting treatment).

Documentation and tax return disclosures

Documentation requirements

No specific documentation is required.

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Deadline to prepare documentation

Not applicable.

Deadline to submit documentation

Upon request. In general, a taxpayer has 30 days to submit the documentation, although time extensions may be granted if necessary.

Acceptable languages for documentation

English is the default for most clients, and is widely accepted; however, German, French, and Italian documentation may be submitted, depending on the region in which the taxpayer is based.

Tax return disclosures

No specific disclosure is required.

Transfer pricing adjustments**Statute of limitations on assessment for transfer pricing adjustments**

Generally, five years after the taxable year in question, but in case of appeals, up to 15 years.

Self-initiated adjustments

There is no formal procedure.

Taxpayer set-offs for other related-party transactions

No formal provision.

Interest and penalties**Additional assessment payment deadline**

Not specified.

Penalty on transfer pricing assessment

No specific transfer pricing penalties. General penalty rules apply, but are usually applied only in case of fraud and negligence. Penalties are nondeductible and between 100 percent and 300 percent of tax revenue lost. Non-arm's-length transfer pricing could be deemed a "hidden profit distribution" subject to federal withholding tax (35 percent).

Reduction in transfer pricing penalties

Not applicable.

Advance Pricing Agreements (APAs)**Are APAs Available?**

Yes. The contents of the application follow the guidance provided in the OECD Transfer Pricing Guidelines.

APA filing fee

No fee.

APA term of agreement

Subject to negotiation, generally three to five years forward.

Competent authority**When may taxpayer submit tax adjustment to Competent Authority (CA)?**

There is no formal procedure.

May CA develop new settlement positions?

There is no formal procedure.

May taxpayer go to CA before paying tax?

There is no formal procedure.

Taiwan

General information

Tax authority and law

Ministry of Finance; Article 43-1 of Taiwan Income Tax Law.

Regulations, rulings, guidelines

Regulations Governing Assessment of Profit-Seeking Enterprise Income Tax on Non-Arm's Length Transfer Pricing (the Transfer Pricing Guidelines).

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

A party that has equity ownership, common management, or effective control over the finance, personnel, or operations of another party, or enters into a joint venture agreement with another party will be treated as related to that party. Detailed definitions of related party are included in the Transfer Pricing Guidelines.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Comparable Profit, Profit Split, other arm's length methods approved by the Ministry of Finance.

Priority of methods

The best method rule applies.

Availability of benchmarking/comparative data

Data on public companies may be found through the Securities and Futures Bureau website or in newspapers.

Are foreign comparables acceptable to local tax authorities?

Taiwan comparables are preferred. However, the tax authorities will accept foreign comparables if the number of Taiwan comparables is insufficient.

Services issues

Are management fees deductible?

Yes.

Are management fees subject to withholding?

Management fees will be exempt from withholding tax only in the following cases: (1) The fees are allocated from a head office or regional headquarters to a Taiwan branch; or (2) the management services are rendered offshore and evidence could be provided to adopt the Rules to Recognize Taiwan-Source Income. Advanced application would be required in the latter situation.

May stock option costs be included in the cost base for intercompany services charges?

Yes, stock option costs could be included in the service expenses charged to Taiwan affiliates and not subject to Taiwan withholding tax. The Taiwan entity could take the deduction on its income tax return, but the employees who are granted the stock option must recognize income on their individual income tax returns accordingly.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

The Rules to Recognize Taiwan-Source Income, released by the MOF on September 3, 2009, accepted cost sharing agreements for R&D expenses, with the following conditions:

- The CSA is a joint research and development project between all participants;
- All participants shall jointly own the intellectual property and enjoy its benefits according to the cost and effort contributed by each party respectively; and
- No royalty payment or tax evasion is involved under the cost sharing agreement.

For other cost sharing expenses, advanced application to the tax authorities on a case-by-case would be required.

Are cost contribution or cost sharing payments deductible?

Yes.

Are cost contribution or cost sharing payments subject to withholding tax?

If the cost sharing payment qualified as a payment pursuant to a cost sharing agreement according to the Rules to Recognize Taiwan-Source Income, it will not be recognized as Taiwan-source income and therefore will be exempt from Taiwan withholding tax.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible or amortizable over the useful life of the intangible.

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Documentation and tax return disclosures

Documentation requirements

Contemporaneous documentation has been required since the 2005 tax year.

Deadline to prepare documentation

Contemporaneous documentation must be prepared when taxpayers file their corporate income tax returns. For calendar year taxpayers, the period to file the tax return is May 1 to May 31 of the year following the closing of the accounting year.

Deadline to submit documentation

Taxpayers must furnish documentation within one month after receiving a written request from the tax authorities. One extension of another month is possible, for acceptable reasons.

Acceptable languages for documentation

Documentation should be in Chinese, except as otherwise approved by the tax authorities.

Tax return disclosures

Taxpayers who conduct reportable transactions are required to disclose related-party information on their income tax returns.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Generally, five years from the date of filing the return

Self-initiated adjustments

Based on an MOF ruling, self-initiated adjustments to the median of the interquartile range are allowed under the comparable profits method.

Taxpayer set-offs for other related-party transactions

There is no formal provision.

Interest and penalties

Additional assessment payment deadline

Taxpayers should make the payment before the due date indicated on the payment notice.

Penalty on transfer pricing assessment

Substantial adjustments made by tax authorities based on the Transfer Pricing Guidelines will trigger a penalty of up to 200 percent of underpaid taxes under Article 110 of Taiwan's Income Tax Law.

Reduction in transfer pricing penalties

No provision.

Advance Pricing Agreements (APAs)

Are APAs Available?

APAs are allowed for taxpayers who meet the criteria defined in the Transfer Pricing Guidelines. Eligible taxpayers must file an application to the tax authorities by the end of the first year in which the transactions covered in the APA were conducted.

APA filing fee

There is no fee.

APA term of agreement

An APA will be effective for a period of three to five years, or the duration of the covered transactions, whichever is shorter. An extension of up to five years may be allowed.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

There is no formal procedure.

May CA develop new settlement positions?

Yes.

May taxpayer go to CA before paying tax?

No tax payment is required at the reexamination stage. However, the taxpayer is required to pay half of the tax payable before filing appeals applications with the MOF.

Thailand

General information

Tax authority and law

Revenue Department; Section 65 bis(4), Section 70 ter, Section 65 bis (7), Section 65 (13), (14) and (15) of the Thai Revenue Code.

Regulations, rulings, guidelines

Departmental Instruction No. Paw. 113/2545 (issued May 16, 2002 — “Calculation of corporate income tax in the case of establishing transfer pricing”).

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Departmental Instruction No. Paw. 113/2545 applies the definition of “Associated Enterprise” from the OECD Transfer Pricing Guidelines.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, other methods that are acceptable by international standards and that appropriately apply to the actual transactions.

Priority of methods

Transaction-based methods are preferred over profit-based methods.

Availability of benchmarking/comparative data

Audited financial statements filed by all registered (private and public) companies with the Thai Ministry of Commerce are available through an online database.

Are foreign comparables acceptable to local tax authorities?

The Thailand Revenue Department has a strong preference for Thai comparables. However, if the taxpayer has attempted to obtain local comparables and they are not available, foreign comparables from similar markets are likely to be accepted by the local tax authorities.

Services issues

Are management fees deductible?

Yes, provided the services result in a benefit to the Thai company and the fees are determined on an arm’s length basis.

Are management fees subject to withholding?

Yes, 15 percent withholding tax applies to management fees paid cross-border. This withholding tax will normally be exempted under an applicable income tax treaty, unless the fees are characterized as royalties.

May stock option costs be included in the cost base for intercompany services charges?

No specific statutory authority. Thailand’s tax authority is likely to follow the OECD Transfer Pricing Guidelines.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes, but such arrangements give rise to significant risk of creating a permanent establishment.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

There is no specific statutory authority. Thailand’s tax authority is likely to follow the OECD Transfer Pricing Guidelines.

Are cost contribution or cost sharing payments deductible?

Yes, provided the taxpayer can substantiate that the cost relates specifically to the taxpayer’s business.

Are cost contribution or cost sharing payments subject to withholding tax?

Yes, depending on the nature of the payment. For example, if the payment is considered a royalty, withholding tax would apply.

What is the payer’s tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments are deductible or amortizable over the useful life of the intangible, depending on specific facts. Payments must relate directly to the taxpayer’s business.

Documentation and tax return disclosures

Documentation requirements

No statutory requirements, but Instruction 113/2545 indicates that Revenue officers should evaluate certain documents. There is, therefore, an implicit assumption that these transfer pricing documents should be maintained.

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Deadline to prepare documentation

There is no statutory deadline for preparation. However, because taxpayers are required to respond to questions in the "Declaration Form" regarding pricing of transactions, transfer pricing documentation should be prepared by the return filing date.

Deadline to submit documentation

Documentation must be submitted in a timely manner when requested.

Acceptable languages for documentation

The Thai Revenue Department will accept English documentation in the first instance, but may request that some or all documentation be translated into Thai. Documentation for APAs must be in Thai.

Tax return disclosures

A "Declaration Form" attached to the annual corporate tax return requires answers to questions regarding whether revenues and expense transactions are based on market prices.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

A summons for tax examinations must be issued within two years of the filing date, or five years when tax evasion is suspected. A tax assessment must be issued within 10 years.

Self-initiated adjustments

Adjustments permitted, whether increasing or decreasing profit. In the case of a profit increase, a taxpayer will be subject only to a surcharge of 1.5 percent per month. In either case, there must be adequate documentation to substantiate the adjustment in the current period.

Taxpayer set-offs for other related-party transactions

There is no formal provision.

Interest and penalties

Additional assessment payment deadline

Generally 30 days from the date of receipt of the assessment notice. An extension may be requested.

Penalty on transfer pricing assessment

There are no specific transfer pricing penalties; the general corporate tax penalty regime applies. A penalty of up to 100 percent of the additional corporate tax and interest surcharges of 1.5 percent per month may apply on outstanding tax.

Reduction in transfer pricing penalties

There is no provision; however, the taxpayer may apply to the assessment officer or appeal to the Board of Tax Appeal for reduction of penalty.

Advance Pricing Agreements (APAs)

Are APAs Available?

According to Departmental Instruction No. Paw. 113/2545 (Clause 5), APAs are available. However, based on current practice, the Thai Revenue Department is not willing to accept applications for unilateral APAs. Bilateral agreements may be applied for under the mutual agreement procedure of treaties. The Thai Revenue Department has issued a booklet including guidance for bilateral APAs.

APA filing fee

No fee.

APA term of agreement

The term of bilateral APAs may be three to five years.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

There is no formal procedure. Thailand follows the mutual agreement procedure under the relevant tax treaty (usually three years).

May CA develop new settlement positions?

There is no formal procedure.

May taxpayer go to CA before paying tax?

No. The tax due must be paid or otherwise guaranteed.

Turkey

General information

Tax authority and law

Ministry of Finance — Revenue Administration; New Turkish Corporate Tax Code (Law No. 5520) Article 13 — Disguised Profit Distribution through Transfer Pricing (effective 1 January 2007), Article 41/5 of Income Tax Law, Transfer Pricing Decree No. 2007/12888 (announced on 6 December 2007), Transfer Pricing General Communiqué No. 1 and 2 (announced on 18 November 2007 and 22 April 2008, respectively), Transfer Pricing Decree No. 2008/13490 (announced on 13 April 2008).

Regulations, rulings, guidelines

Article 13 of the Turkish Corporate Tax Code provides the general principles. Transfer pricing applications are explained via examples stipulated in Communiqués No. 1 and 2, as well as Transfer Pricing Decree No. 2007/12888 and Decree No. 2008/13490. In addition to the Communiqués and Decrees, a guideline is announced as of November 23, clarifying the main concepts presented in the communiqués. The guideline includes detailed explanations regarding annual documentation requirements with a sample report format.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Article 13 of The Turkish Corporate Tax Code defines “related parties” as: (1) companies’ own shareholders and corporations and individuals related to those shareholders; (2) Corporations and individuals who directly or indirectly control or are controlled by a corporation or its shareholders through management, supervision, or share capital; (3) Spouses of the shareholders, siblings, and parents of the shareholders and up to third degree (inclusive) natural and in-law relatives of the shareholders. Transactions with parties resident in countries deemed to cause harmful tax competition (to be determined by the Council of Ministers) are also considered related-party transactions. Further detailed explanations of the definition of “related party” are provided in Section 3 of TP General Communiqué No. 1. TP General Communiqué No. 2 has further expanded the scope of related-party definition by treating the purchase of goods by a local Turkish distributor from a foreign company as “related-party transaction” even though there is no shareholder.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, and TNMM as well as unspecified methods.

Priority of methods

Although there is no definite hierarchy, transactional methods are explicitly preferred.

Availability of benchmarking/comparative data

Not generally available. There is no local database providing comparative data for Turkish companies. Only public companies’ financial statements are available to the public.

Are foreign comparables acceptable to local tax authorities?

Local rules do not provide a clear answer. Because there is currently no specific prohibition, and considering the absence of domestic comparables, it might be inferred that foreign comparables should be acceptable, provided that any differences in geographic markets can be eliminated through adjustments and/or analyses. When determining transfer pricing-related assessments, Turkish tax inspectors may be highly likely to use “secret comparables” to which only they have access. Turkish taxpayers are advised to be ready to challenge this approach.

Services issues

Are management fees deductible?

Yes, provided the following conditions are satisfied: (a) Benefit Test: the management service concerned must be necessary and useful for the income generating activities of the recipient in Turkey; (b) The management service must actually be performed, and performance must be verified through a service performance schedule, time/expense reports, and progress reports; (c) the amount/level of the management fees must be at arm’s length. Stewardship costs are nondeductible (in accordance with the OECD Transfer Pricing Guidelines).

Are management fees subject to withholding?

Management fees may be subject to withholding tax depending on the nature and place of the service being provided. Relevant double tax treaty provisions may eliminate withholding tax under certain conditions.

May stock option costs be included in the cost base for intercompany services charges?

Stock option cost is a cost incurred for employees and deemed a benefit (salary) provided to the employee. Once charged to a Turkish company regarding an employee, it should normally be made subject to income withholding tax through payroll. Accordingly, stock option costs should

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be separately treated from intercompany service charges.

Commissionaire arrangements

Are commissionaire arrangements allowed?

There is no specific authorization for commissionaire arrangements. Such arrangements may give rise to permanent establishment risk.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Cost contribution arrangements and cost sharing agreements are generally acceptable within the framework of intragroup services shared by and between the group companies. However, sufficient documentation must be presented regarding the receipt, benefit, and arm's length nature of services received.

Are cost contribution or cost sharing payments deductible?

According to TP General Communiqué No. 1, to ensure tax deductibility, the following conditions must be satisfied: (a) Benefit Test: The services underlying CCAs or CSAs must be performed in reality. The payments must be related to services that contribute to the generation and securing of revenues in Turkey; (b) the group company in Turkey receiving the service must need the pertinent service; (c) the portion of the costs to be allocated with respect to the services provided for the benefit of the Turkish recipient must meet the arm's length principle; and (d) relevant supporting documentation must be maintained.

Are cost contribution or cost sharing payments subject to withholding tax?

Yes, depending on the nature of the payment and type of underlying service. Income tax treaties may eliminate the withholding tax or reduce the rate, depending on the type of service and where the service has been performed, and the period of physical presence in Turkey to provide the services.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Payments for the right to use an intangible based on a CSA or a CCA can be deductible provided that (a) benefit test is passed, (b) the allocation keys are determined based on arm's length principle, and (c) supporting documentation is available. Payments for the right to use an intangible are regarded as a royalty and therefore subject to withholding tax.

Documentation and tax return disclosures

Documentation requirements

Contemporaneous documentation is required every year as an obligation starting from the 2007 tax year. Any work papers, documents, and records that constitute the basis or proof regarding determination of the arm's length price must be maintained. Detailed annual documentation requirements have been introduced through Transfer Pricing General Communiqués No. 1 and 2 announced on 18 November 2007 and 22 April 2008, respectively. Turkish corporate taxpayers registered with the Large Taxpayers' Tax Office (LTTO) are required to prepare annual transfer pricing documentation report regarding both cross-border and domestic transactions with related parties. The annual TP documentation report is to be prepared according to the guidelines stipulated in Appendix 3 of TP General Communiqué No. 1. Corporate taxpayers not registered with the LTTO but with other tax offices are required to prepare annual TP documentation reports only with respect to their cross-border transactions with related parties.

Related-party transactions with companies in Turkish Free Trade Zones (FTZ) as well as related-party transactions between a company in a Turkish FTZ and a local Turkish company are also to be included in the scope of the annual TP documentation report with effect from 1 January 2008.

Deadline to prepare documentation

The deadline for preparation of the annual TP documentation report and supporting documents is the last day for submission of the annual corporation tax declaration.

Deadline to submit documentation

No specific deadline is indicated in TP General Communiqué No. 1 for submission of the annual TP documentation report. The report does not have to be submitted to the tax office unless it is officially requested by the tax authorities. However, upon any official request that can be made by tax authorities after the submission deadline for the annual corporate tax return, taxpayers are obliged to present the report to the Turkish tax authorities within 15 days from the date of receiving the official notification from the tax authorities.

Acceptable languages for documentation

According to TP General Communiqué No. 1, the only acceptable language is Turkish. Notarized Turkish translations of supporting documents in other languages must be made available and presented to the tax authorities upon request.

Tax return disclosures

All corporate taxpayers are required to complete a "Form Relating to Transfer Pricing, Controlled Foreign Companies and Thin Capitalization" as stipulated in Appendix 2 of Transfer Pricing Communiqué No. 1, and submit it to their tax office together with their corporate tax returns.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Five years from tax year-end.

Self-initiated adjustments

Based on the general provisions, self-initiated adjustments can be made through "regret filing" procedures as long as the adjustment does not cause a decrease in income.

Taxpayer set-offs for other related-party transactions

There is no formal provision.

Interest and penalties

Additional assessment payment deadline

Additional tax assessments must be paid within 30 days from the date of notification of the additional assessment. Taxpayers may file a lawsuit against the Tax Administration within this 30-day period. However, the right to request a reduction of penalties is lost if legal action is taken.

Penalty on transfer pricing assessment

There is no specific transfer pricing penalty. The general penalty provisions in the Turkish Tax Procedures Code apply: (1) general tax loss penalty is 100 percent of unpaid tax; (2) interest applied on additional assessment on a monthly basis (1.40 percent effective from 19 October 2010; 1.95 percent effective between 19 November 2009 and 18 October 2010 and 2.5 percent between 21 April 2006 and 18 November 2009) for the period between the normal due date of the additional tax assessed and the date of assessment.

Reduction in transfer pricing penalties

There is no specific reduction provision for transfer-pricing-related penalty assessments; general rules apply. Taxpayers may appeal to the Ministry of Finance for a reduction in the tax loss penalty through settlement procedures before or after imposition of the assessment. Fifty percent of the tax loss penalty imposed may be reduced if the taxpayer applies to the tax office within 30 days from the date of notification so as to pay the additional tax assessed without going to tax court. In the case of imposition of procedural penalties, which are usually fixed amounts, a reduction equal to one-third of the procedural penalty is possible.

Advance Pricing Agreements (APAs)

Are APAs Available?

Yes. There is an APA unit within the Turkish Revenue Administration. According to the TP decrees officially announced on 6 December 2007 and 13 April 2008, the scope of APAs is limited to cross-border related-party transactions of corporate taxpayers. Applications for unilateral, bilateral, and multilateral APAs are allowed.

APA filing fee

The APA application fee is 33,172 TL (approximately €16,500) and 26,537 TL (approximately €13,270) for subsequent renewals.

APA term of agreement

Up to a maximum period of three years.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

There is no formal provision.

May CA develop new settlement positions?

There is no formal procedure and no practice relating to CA settlements.

May taxpayer go to CA before paying tax?

Yes, taxpayer may, in principle, go to competent authority after the amount of the proposed adjustment is communicated in writing to the taxpayer, before paying the tax. However, there are no official guidelines yet in Turkish legislation as to how to go to CA to process a tax adjustment.

United Kingdom

General information

Tax authority and law

Inland Revenue; Following the UK's Tax Law Rewrite project, with effect from 1 April 2010 for accounting periods ending on or after 1 April 2010, the UK transfer pricing legislation is found in Part 4 of the Taxation (International and Other Provisions) Act 2010 (TIOPA 2010) (S 146 et seq).

The mutual agreement procedure is covered in Part 2 of TIOPA 2010 (ss 124-125). APAs are covered in Part 5 of TIOPA 2010 (S 218 et seq). Permanent establishment are covered in CTA 2010 (ss 1141-1144). Rules about attribution of profit to branches are covered in Section 20, CTA 2009.

Regulations, rulings, guidelines

HMRC Tax Bulletin Issues 31 (European Arbitration Convention), 37 (record keeping and transfer pricing for financial transactions), 38 (penalties), 43 (APAs), 46 (nonresident landlords), 60 (conduct of transfer pricing enquiries), Special Edition April 2000 on April 2003 UK/US treaty (Mutual Agreement Procedure), and HMRC Statement of Practice 04/07 (Advance Thin Capitalization Agreements under APA legislation).

In March 2010 HMRC released updated thin capitalization guidance that expanded existing guidance and added guidance on private equity-backed businesses, lending against property values, and the use of credit ratings for debt pricing. This guidance also incorporates their previously published statement of practice on Advance Thin Capitalisation Agreements (SP04/07) with further guidance in Tax Bulletin 01/09. In September 2010 HMRC announced that they have been working to revise and update their previously published statements and guidance on Advance Pricing Agreements (SP3/99) and Mutual Agreement Procedure and Arbitration (Tax Bulletins 25 and 31). In December 2010 HMRC issued an updated version of SP3/99 (SP2/10 — APAs) to provide greater transparency regarding the processes in respect of APAs for businesses and advisors, and also to cover the relevant legislative changes that have been enacted since 1999.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

Parties are deemed related when one party directly or indirectly participates in the management, control, or capital of the other, or when the same person or persons directly

or indirectly participate in the management, control, or capital of both parties. Generally, there is a 51 percent test of control, but it can go down as low as 40 percent. Persons "acting together" to exert control in relation to financing arrangements are also deemed related.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split (e.g. Residual Analysis), TNMM.

Priority of methods

The new OECD Transfer Pricing Guidelines (July 2010) do not impose a distinct hierarchy of methods, since the choice of one method over another is based "on the most appropriate method to the circumstances of the case." Nevertheless, certain comparisons need to be undertaken, in particular with regards to the availability and reliability of the data. Moreover, the OECD Transfer Pricing Guidelines state that taxpayers retain the freedom to apply other, nonspecified methods, provided the derived result satisfies the arm's length principle.

Availability of benchmarking/comparative data

Detailed information on UK registered companies is available.

Are foreign comparables acceptable to local tax authorities?

Sometimes (the HMRC's general preference is for UK comparables).

Services issues

Are management fees deductible?

Yes.

Are management fees subject to withholding?

No.

May stock option costs be included in the cost base for intercompany services charges?

UK transfer pricing legislation does not include specific guidance on the treatment of stock options as part of a cost plus arrangement. The UK tax authorities have published internal manuals that indicate they would like to see the cost of stock options added to a company's cost base and recharged with a mark up. However, the majority of comparable companies in the UK that would be identified in a benchmarking study do not offer stock options to their employees. Considerable care

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must be taken in determining whether the cost of stock options should be included in the cost base, and the situation should be reviewed on a case-by-case basis.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Yes, but should be expected to be subject to HMRC challenge. In the UK the equivalent of a “commissionaire” is an “undisclosed agent.”

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes. The UK follows Chapter VIII of the OECD Guidelines.

Are cost contribution or cost sharing payments deductible?

Yes, although taxpayers may be required to recognize the underlying character of the costs shared and treat accordingly.

Are cost contribution or cost sharing payments subject to withholding tax?

No.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Tax depreciation may be available on a buy-in payment for qualifying intangibles. A buy-in may also be structured as a license, in which case royalties may be deducted.

Documentation and tax return disclosures

Documentation requirements

Taxpayers should keep records to support details in the tax return. Records should be retained for six years from the end of the accounting period for which relevant, or from the date on which an enquiry for that period is completed.

Failure to compile and retain transfer pricing documentation for the relevant period may result in a penalty of up to £3,000 (FA 1998, Sch 18, para 23(1)).

Deadline to prepare documentation

Records of transactions with associated businesses and of any tax adjustments must be prepared by the filing date of the annual income tax or corporation tax return. Evidence to demonstrate compliance with the arm's length principle may be requested at any time by the tax authorities.

Deadline to submit documentation

Under general information powers for self-assessment, documentation must be submitted within 30 days of a request.

Acceptable languages for documentation

Documentation must be in English.

Tax return disclosures

No separate disclosure is required (by signing the tax return, the taxpayer will be implicitly confirming compliance with the arm's length standard).

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Four years from accounting year-end. The period may be extended up to 20 years in case of negligence or fraud.

Self-initiated adjustments

The UK has a requirement to adjust to arm's length prices only when this increases UK taxable profit or reduces UK losses; there is no provision for downward profit or upward loss adjustments. For intra-UK transactions, an upward profit adjustment in the return of one party to a transaction can be compensated by a downward adjustment in the other party's tax return.

Taxpayer set-offs for other related-party transactions

The UK follows the OECD Transfer Pricing Guidelines. In practice, an overall set-off made in respect of transactions or series of transaction with the same related party will be considered.

Interest and penalties

Additional assessment payment deadline

Generally 30 days from the date of receipt of the assessment notice. An extension may be requested.

Penalty on transfer pricing assessment

Ordinary provisions for self-assessment apply — tax geared up to 100 percent of tax unpaid. For returns due after 1 April 2009, penalties are linked to the behavior that gives rise to the error: if reasonable care was taken (no penalty); careless behavior (minimum 0 percent and maximum 30 percent); deliberate careless behavior (minimum 20 percent and maximum 70 percent); and deliberate and concealed error (minimum 30 percent and maximum 100 percent). If there is no additional tax liability due to losses

or availability of UK group relief, a penalty charged at a discounted rate of the gross adjustment may still apply.

Reduction in transfer pricing penalties

HMRC will not charge a penalty if the taxpayer took 'reasonable care' but still made an error. Penalties may be avoided by taking reasonable care to provide correct returns and documents; keeping adequate records to enable the taxpayer to provide complete and accurate returns and documents; requesting a tax advisor's advice; and raising the problem on submission of the return or document. Penalties may be reduced by disclosing errors; helping to calculate the extra tax due; and providing HMRC with access to check figures.

Advance Pricing Agreements (APAs)

Are APAs Available?

Yes. HMRC Statement of practice 3/99 on Advance Pricing Agreements and Tax Bulletin Issue 43.

On 17 December 2010, HMRC issued an updated version of SP3/99 (SP2/10 — APAs) to provide greater transparency regarding the processes regarding APAs for businesses and advisors, and also to cover the relevant legislative changes that have been enacted since 1999.

APA filing fee

No fee.

APA term of agreement

Generally three to five years forward; either the taxpayer or HMRC may seek rollback.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

When an action giving rise to, or likely to give rise to, double taxation not in accordance with an income tax treaty has occurred, or when equivalent provisions in the European Union Arbitration Convention are satisfied.

May CA develop new settlement positions?

Yes.

May taxpayer go to CA before paying tax?

Not normally, unless the relevant transaction is under transfer pricing audit simultaneously in two countries (one major exception is when it relates to U.S./UK transactions; in that case, payment of tax can be suspended under U.S./UK treaty provisions). Generally, HMRC will negotiate under CA proceedings only in respect of final assessments.

United States

General information

Tax authority and law

Internal Revenue Service (IRS); Internal Revenue Code §482 (latest amendment effective for tax years beginning after December 31, 1986).

Regulations, rulings, guidelines

Reg. §1.482, Reg. §1.6662-6.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

The definition of control for transfer pricing purposes includes any kind of control, direct or indirect, whether legally enforceable or not. It is the reality of control that is decisive, not its form or the way it is exercised.

Methods and comparables

Acceptable methods

For tangible property: comparable uncontrolled price method, resale price method, cost plus method, comparable profits method, profit split method, and unspecified methods.

For intangible property: comparable uncontrolled transaction method, comparable profits method, profit split method, and unspecified methods. For Platform Contributions (buy-ins): comparable uncontrolled transaction method, income method, acquisition price method, market capitalization method, residual profit split method, and unspecified methods. For services: services cost method, comparable uncontrolled services price method, gross services margin method, cost of services plus method, comparable profits method, profit split method, and unspecified methods.

Priority of methods

The best (most reliable) method is required.
Reg. §1.482-1(c)(1).

Availability of benchmarking/comparative data

Multiple local databases containing sufficient qualitative and quantitative information to identify comparables exist, and information from those databases is acceptable to the local tax authorities.

Are foreign comparables acceptable to local tax authorities?

Ordinarily, comparables should be derived from the geographic market in which the tested party operates.
Reg. §1.482-1(d)(4)(ii). Geographic market is any

geographic area in which the economic conditions are substantially the same and may include multiple countries.

Services issues

Are management fees deductible?

Yes. IRC §162.

Are management fees subject to withholding?

No.

May stock option costs be included in the cost base for intercompany services charges?

Stock option costs are required to be included in the cost base for intercompany services charges. Reg. §1.482-9(j).

Commissionaire arrangements

Are commissionaire arrangements allowed?

No.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes. Reg. §1.482-7T (intangible property);
Reg. §1.482-9(b)(7) (services).

Are cost contribution or cost sharing payments deductible?

Whether such payments are deductible or capitalized is determined under U.S. domestic tax rules.

Are cost contribution or cost sharing payments subject to withholding tax?

No.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Whether such payments are deductible or capitalized is determined under U.S. domestic tax rules.

Documentation and tax return disclosures

Documentation requirements

Contemporaneous documentation is required for penalty protection. Regs. §1.6662-6.

Contemporaneous documentation is also required for all cost sharing arrangements. Regs. §1.482-7T(k)(2).

Deadline to prepare documentation

Documentation must be prepared by the filing date of the annual income tax return.

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Deadline to submit documentation

Documentation must be submitted within 30 days of request.

Acceptable languages for documentation

Documentation must be in English.

Tax return disclosures

Forms 5471 and 5472 require disclosure of detailed information on controlled transactions with foreign entities. Reg. §1.482-7T(k)(4) requires a controlled participant to file a Cost Sharing Statement with the IRS within 90 days after the first occurrence of intangible development costs, and to make specified disclosures on its annual tax return. The Schedule of Uncertain Tax Positions (UTP) is required for certain taxpayers starting with 2010 tax returns.

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

Three years from the original due date or filing date of return, whichever is later. For substantial omissions of income, the period is extended to six years. In cases of nonfiling or fraud, the period is unlimited.

Self-initiated adjustments

Upward and downward adjustments are allowed on timely filed original returns. Adjustments on amended returns are allowed only if they do not decrease taxable income.

Taxpayer set-offs for other related-party transactions

Transactions with the same controlled taxpayer in the same year are taken into account if the taxpayer: (1) determines an appropriate arm's length charge; (2) documents all correlative adjustments; and (3) notifies the IRS's district director within 30 days of the notice of proposed adjustment or deficiency.

Interest and penalties

Additional assessment payment deadline

Interest is assessed from the due date of the original filing. Additional extensions for payment of tax are available when filing protests. The interest rules are not specific to transfer pricing; interest payable is determined under U.S. domestic tax rules.

Penalty on transfer pricing assessment

Transfer pricing penalty of 20 percent or 40 percent of additional tax resulting from adjustments exceeding objective thresholds may be imposed.

Reduction in transfer pricing penalties

No penalty will be assessed if the best method was reasonably selected and applied, sufficient documentation was prepared contemporaneously with tax return filing, and provided to the IRS within 30 days of a request.

Advance Pricing Agreements (APAs)

Are APAs Available?

Yes. Rev. Proc. 2006-9 allows multilateral, bilateral, and unilateral APAs.

APA filing fee

The fee is \$50,000 for original APA requests and \$35,000 for routine renewal requests; \$22,500 for small business taxpayer APA original and renewal requests; and \$10,000 for amending APA requests or a completed APA.

APA term of agreement

Generally, the term is five years. Longer terms may be considered as appropriate. Either the taxpayer or the IRS may seek rollback to open tax years.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

A request may be submitted after the amount of the proposed adjustment is communicated to the taxpayer in writing.

May CA develop new settlement positions?

CA may negotiate an agreement based on different position from the U.S.-initiated adjustment, unless the taxpayer has entered into a closing agreement or has litigated the adjustment.

May taxpayer go to CA before paying tax?

Yes. The taxpayer may go to CA after the amount of the proposed adjustment is communicated in writing to the taxpayer, before paying the tax.

Venezuela

General information

Tax authority and law

National Integrated Tax and Customs Service Administration (SENIAT); Income Tax Law (ITL) Nr. 38.628 Chapter III Title VII (Latest amendment effective February 16, 2007).

Regulations, rulings, guidelines

SENIAT Providence NR sNAT-2003-2424, dated February 13, 2004 (effective from date of issuance).

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

- One company's direct or indirect participation in another company's management, control, or capital;
- Direct or indirect participation of two companies in another company's management, control, or capital;
- Operations with a party located in a foreign tax haven; and
- A third party that operates on behalf of a company in Venezuela to perform transactions with a related party of said company in Venezuela.

(Art. 116,117, 118 and 119 ITL)

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, Profit Split, TNMM.

Priority of methods

Taxpayers must use the best method, with priority for CUP.

Availability of benchmarking/comparative data

Yes, but the number of local publicly held companies is limited.

Are foreign comparables acceptable to local tax authorities?

Yes, there is no legal limitation on using foreign comparable companies.

Services issues

Are management fees deductible?

Yes.

Are management fees subject to withholding?

Yes. The withholding rate depends on the type of contract. If it is a professional fees contract, the withholding rate is 34 percent of 90 percent of gross income. If it is a technical assistance contract, the withholding rate is 34 percent on a 30 percent basis.

When an income tax treaty is in effect, taxation will occur in the country from which the service provision has originated. The company not domiciled in Venezuela will tax according to the treaty, not the local legislation. This applies to both professional fees and technical assistance contracts.

May stock option costs be included in the cost base for intercompany services charges?

Considering that the amount of the stock option is a Venezuela-source cost, it may be included in the cost base.

Commissionaire arrangements

Are commissionaire arrangements allowed?

No.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

Yes, cost contribution arrangements and cost sharing agreements are accepted for permanent establishments only.

Are cost contribution or cost sharing payments deductible?

Yes. If a place of business qualifies as a permanent establishment, it can deduct cost contribution or cost sharing payments, with the exception of cost/expenses for royalties, technical assistance, technological services, and professional services fees.

Are cost contribution or cost sharing payments subject to withholding tax?

Not applicable.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

No. However, certain treaties may impose withholding tax.

Documentation and tax return disclosures

Documentation requirements

Contemporaneous documentation required under ITL art. 169, effective for tax years beginning after February 16, 2007.

Deadline to prepare documentation

Documentation must be contemporaneously prepared each tax year.

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Deadline to submit documentation

Documentation must be submitted upon request.

Acceptable languages for documentation

Documentation and information related to transfer pricing calculations indicated in the tax return or informative return forms must be kept by the taxpayer duly translated to Spanish, if necessary.

Tax return disclosures

Article 168 of the ITL provides the Informative Return must be filed in June of each year. However, SENIAT Providence NR SNAT-2003-2424 of February 13, 2004, establishes that a return must be filed within the six-month period following year-end for fiscal years ending in a month other than December.

Transfer pricing adjustments**Statute of limitations on assessment for transfer pricing adjustments**

Four years from the date of filing return, or six years if overall tax compliance was not accomplished.

Self-initiated adjustments

Adjustments are permitted. The ITL states that if the conditions in a transaction between related parties are not at arm's length, the benefit not accounted for must be included in the company's income, subject to taxation and be reflected on the tax return, allocating the proper adjustment to the fiscal year in which the transaction took place.

Taxpayer set-offs for other related-party transactions

There is no formal provision.

Interest and penalties**Additional assessment payment deadline**

Additional payment is due when the assessment is issued.

Penalty on transfer pricing assessment

Ordinary penalties apply, at 25 percent to 200 percent of additional tax. The penalty for failure to have documentation and to comply with the arm's length principle is 300-500 Tax Units. The penalty for failure to file the transfer pricing return is 10-50 Tax Units. Tax Code art. 66, 103, 104, 111 effective 10/2001.

Reduction in transfer pricing penalties

Reduction applies if transfer prices is documented according to the pertinent legislation (Tax Code art. 96 num. 5).

Advance Pricing Agreements (APAs)**Are APAs Available?**

Yes (unilateral and bilateral). Title VII, Chapter III, Fifth Section of ITL (Latest amendment effective February 16, 2007).

APA filing fee

Not specified. Taxpayer must bear the cost of an APA application.

APA term of agreement

The ITL specifies only that APAs may be longer as a result of a friendly procedure under the terms of a tax treaty.

Competent authority**When may taxpayer submit tax adjustment to Competent Authority (CA)?**

There is no formal procedure.

May CA develop new settlement positions?

Yes.

May taxpayer go to CA before paying tax?

Yes.

Vietnam

General information

Tax authority and law

General Department of Taxation; Circular 66/2010/TT-BTC, dated 22 April 2010, and issued by the Ministry of Finance now provides guidelines on the calculation of arm's length prices in business transaction between affiliated parties. Circular 66 entered into effect on 6 June 2010, and replaces Circular 117/2005/TT-BTC dated 19 December 2005.

Regulations, rulings, guidelines

There are no official guidelines other than Circular 66. Some Official Letters have been issued by the local Departments of Taxation to guide in the implementation of Circular 66, to require supplementary submission of transfer pricing returns for fiscal years before 2010, and to require submission of transfer pricing documentation, but those letters are legally applicable only to the taxpayers involved. For example, the deadline for supplementary submission of transfer pricing returns before 2010 varies depending on the practice of each local tax department. Notwithstanding these letters requiring filing, the returns by law should have been submitted annually, together with the corporate tax return.

At the present time, transfer pricing is a hot issue in Vietnam and is being strongly focused on by the tax authorities, from requests for provision of transfer pricing documentation to tax audits.

Nature/extent of relationship between parties to a transaction required for transfer pricing rules to apply?

The definition of related parties in Circular 66 is more extensive and clearer than the definition in Circular 117. There are two additional criteria to determine related parties: (i) Two enterprises that hold directly or indirectly at least 20 percent of the investment capital of a third enterprise are considered affiliated; and (ii) An enterprise that provides a guarantee or grants a loan that constitute 20 percent or more of the amount of the investment capital or which is more than 50 percent of the total value of the long- and medium-term loans of another enterprise will be regarded as related.

In addition, Circular 66 quantifies the definition of "material difference" that would trigger an adjustment to the comparable price or transaction. Accordingly, any factor that triggers at least a 1 percent increase or

decrease in the transaction price or a 0.5% increase or decrease in gross profit ratio or other profitability ratios would be considered a material difference; and consequently, appropriate adjustments to the comparable price or transaction should be made.

Methods and comparables

Acceptable methods

CUP, Resale Price, Cost Plus, CPM, and Profit Split.

Priority of methods

Vietnam has not established a priority of methods. The taxpayer must establish it is using the "best" method appropriate under the circumstances, including the reliability of supporting documentation.

Availability of benchmarking/comparative data

Local Vietnamese company comparables are very limited due to the limited number of public companies and the quality of information available.

Are foreign comparables acceptable to local tax authorities?

There are no formal provision/guidelines on this issue, but in practice foreign comparables would be acceptable as supporting documentation if no or limited domestic comparables are available. ASEAN or pan-Asian comparables would be preferable.

Services issues

Are management fees deductible?

Management fees charged to local Vietnamese subsidiaries are not deductible, unless they are for specific services rendered by the foreign parties. Most management fees fail to establish specific services and hence do not get to the question of whether the fees are arm's length. Allocation of overhead expenses to permanent establishments is limited to a formula apportionment based on revenue. However, few companies other than banks operate through PEs in Vietnam due to licensing issues.

Are management fees subject to withholding?

Foreign contractor withholding tax (FCWT) is generally applicable to payments of management fees to foreign entities rendering such services for Vietnamese entities. The FCWT is comprised of both a VAT and a corporate income tax element, and has various rates of withholding, depending on the circumstances.

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May stock option costs be included in the cost base for intercompany services charges?

There are no specific provisions in the regulations that prohibit these costs from being included in the cost base for intercompany services charges.

Commissionaire arrangements

Are commissionaire arrangements allowed?

Not applicable.

Cost sharing agreements

Are Cost Contribution Arrangements (CCA) or Cost Sharing Agreements (CSA) Accepted?

There is no specific statutory authority on this issue.

Are cost contribution or cost sharing payments deductible?

Not applicable.

Are cost contribution or cost sharing payments subject to withholding tax?

Not applicable.

What is the payer's tax treatment of payments to a contributor of preexisting intangibles to a CCA or CSA?

Not applicable.

Documentation and tax return disclosures

Documentation requirements

Taxpayers must maintain "contemporaneous" documentation, including a transactional description including the related party, product specifications, contractual terms, and pricing method adopted. The documents must be available in Vietnamese and submitted to the tax authorities within 30 days upon request. If the taxpayer does not maintain contemporaneous documentation, it would be impossible to provide the documents as requested.

Deadline to prepare documentation

Taxpayers must maintain "contemporaneous" documentation. The documents must be available and submitted to the tax authorities within 30 days of a request. If the taxpayer does not maintain contemporaneous documentation, it would be impossible to provide the documents as requested.

Deadline to submit documentation

When the tax office so requests, a taxpayer must provide information, documents, and source documents within 30 working days from the date of receipt of the request in writing from the tax office. This period may be extended

once for a maximum of 30 days from the expiration of the original 30-day period for legitimate reasons.

Acceptable languages for documentation

Documentation must be in Vietnamese. Documents in other languages must be translated.

Tax return disclosures

Taxpayers must prepare a declaration of related transactions — Form GCN-01/QLT — set out in Appendix 1-GCN/CC issued together with Circular 66. The deadline for submission of this form is the same as the deadline for submission of corporate income tax finalization declaration (90 days after the end of the fiscal year).

Transfer pricing adjustments

Statute of limitations on assessment for transfer pricing adjustments

General rules apply: five years from tax year-end.

Self-initiated adjustments

There is no formal procedure.

Taxpayer set-offs for other related-party transactions

No formal provision.

Interest and penalties

Additional assessment payment deadline

If the tax authorities request the additional assessment payment during a tax audit, the taxpayer must pay by the deadline set by the tax officer on a case-by-case basis.

Penalty on transfer pricing assessment

Penalties will be levied in addition to transfer pricing adjustments. Circular 66 does not provide any guidelines on administrative fines or specific transfer pricing penalties. Instead, the penalty will be governed by the effective Law on Tax Management.

Under the Law on Tax Management, there will be an administrative penalty for failure to comply with tax regulations. When an enterprise makes voluntary adjustments, the underdeclared amount will be treated as a late payment and is subject to late payment interest of 0.05 percent per day. When an enterprise makes an incorrect declaration, a fine will be imposed on the underdeclared tax, if any, in addition to the late payment interest. When an enterprise commits acts of tax evasion or tax fraud, the fine is one to three times the underdeclared tax. Late filing of 90 days or more constitutes tax evasion. Failure to file the annual tax declaration form for related-

party transactions and/or to have documentation may trigger the one to three times tax evasion penalty.

Reduction in transfer pricing penalties

No provision.

Advance Pricing Agreements (APAs)

Are APAs Available?

While APAs are currently not available, there have been indications of more interest in the concept of APAs from the tax authorities over the last year.

APA filing fee

Not applicable.

APA term of agreement

Not applicable.

Competent authority

When may taxpayer submit tax adjustment to Competent Authority (CA)?

There is no formal procedure.

May CA develop new settlement positions?

No experience or precedent, because Vietnam is not known to have ever been involved in a CA procedure under any of its tax treaties.

May taxpayer go to CA before paying tax?

No experience or precedent, because Vietnam is not known to have ever been involved in a CA procedure under any of its tax treaties.

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