



Worldwide  
Transfer Pricing  
Reference Guide  
2015-16



# Worldwide Transfer Pricing Reference Guide

The proliferation of transfer pricing rules and regulations around the world in recent years, and the huge increase in focus on the subject by the world's tax authorities, require practitioners to have knowledge of a complex web of country tax laws, regulations, rulings, methods and requirements.

The EY *Worldwide Transfer Pricing Reference Guide* is a tool designed to help international tax executives quickly identify transfer pricing rules, practices and approaches. These must be understood in order for a company to carry out both compliance and planning activities. The information included in the guide now covers 117 countries and territories in which EY offers transfer pricing services. Countries appearing in the guide for the first time are Azerbaijan, Equatorial Guinea, Gibraltar, Guam and Mongolia.

The guide outlines basic information for the covered jurisdictions regarding their transfer pricing tax laws, regulations and rulings; Organisation for Economic Co-operation and Development (OECD) guidelines treatment, priorities and pricing methods; penalties; the potential for relief from penalties; documentation requirements and deadlines; statute of limitations; required disclosures; transfer pricing-specific returns; frequency of tax audits and transfer pricing scrutiny by the tax authority; opportunities for advance pricing agreements (APAs) for the countries.

On 5 October 2015, the OECD released final reports on all 15 focus areas in its Action Plan on Base Erosion and Profit Shifting (BEPS). In an accompanying explanatory statement, the OECD described the next steps in its work on BEPS, including additional work on technical matters and plans for monitoring with respect to the implementation of the BEPS recommendations. In conjunction with the release of the reports, the OECD held a press conference followed by a technical briefing, both by webcast, to provide an overview of the final BEPS output.

EY has compiled a series of tax alerts and webcasts that help unravel some of the details behind the BEPS actions. Use the link below to follow and track the latest developments that may be relevant.

## EY on BEPS

A web-based version of this brochure can be found at [ey.com/transferpricingguide](http://ey.com/transferpricingguide). Please check this web page periodically for late-breaking country developments. For a more detailed discussion of any of the country-specific transfer pricing rules, or to obtain further assistance in addressing and resolving intercompany transfer pricing issues, please contact your local EY office or the relevant jurisdiction contact listed at the back of this guide.

Please note the availability of other transfer pricing materials such as survey reports that share views of tax authorities and tax directors ([ey.com/tp](http://ey.com/tp)). EY also annually produces: the *Worldwide Corporate Tax Guide*; the *Worldwide Personal Tax Guide*; and the *Worldwide VAT, GST and Sales Tax Guide*.

The content is current as of July 2015 unless otherwise noted. This publication should not be regarded as offering a complete explanation of the tax matters referred to and is subject to changes in the law and other applicable rules.

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# Legend

Taxing authority and tax law: name of taxing authority and statutory provisions currently in effect in each jurisdiction.

Relevant regulations and rulings: current transfer pricing rules and regulatory provisions in effect in each jurisdiction.

OECD Guidelines treatment: consideration given by the taxing authority to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

Documentation requirements: governing tax authority requirements or recommendations that taxpayers prepare and maintain written documentation to confirm that the amounts charged in related party transactions are consistent with the arm's-length standard.

Priorities/pricing methods: transfer pricing methods allowed, as well as the priority of each method.

Return disclosures/related party disclosures: information on disclosures required from taxpayers regarding related party transactions.

Transfer pricing-specific returns: these include any transfer pricing-specific forms required to be filed within the jurisdiction.

Documentation deadlines: deadline for preparing transfer pricing documentation.

Transfer pricing penalties: discussion of potentially applicable transfer pricing penalties if a taxpayer is determined not to be in compliance with the rules imposed by the taxing authority.

Penalty relief: potential ways in which penalties may be reduced or avoided.

Statute of limitations on transfer pricing assessments: discussion of the applicable statute of limitations regarding transfer pricing examination and assessments.

Frequency of tax audits/transfer pricing scrutiny: discussion of the level of frequency of the tax authority subjecting taxpayers to general audits, scrutinizing related party transactions and challenging the transfer pricing methodology employed. This is based on the past experience of our local tax professionals and is not a forward-looking prediction.

APA opportunity: discussion of the possibility of obtaining an advance pricing agreement with the tax authority.



# Glossary of terms

## APA (advance pricing agreement)

An agreement between a tax authority and an Multinational Enterprises (MNE) about the determination of the appropriate transfer pricing method to be used for pricing intercompany transactions. APAs may be unilateral, bilateral (two governments) or multilateral (three or more governments).

## Arm's-length principle

The standard adopted by the OECD and in many jurisdictions, which mandates that the result related parties obtain from an intercompany transaction approximates the result that uncontrolled parties would have obtained had they undertaken the same transaction under the same circumstances.

## BEPS (Base Erosion and Profit Shifting)

On 12 February 2013 the OECD released its report Addressing Base Erosion and Profit Shifting followed by the release of an Action Plan on 5 Oct 2015. Thus, the OECD aims to develop approaches for addressing government concerns about multinational companies (MNCs) reducing their tax liability through BEPS activity.

CFC (controlled foreign corporation)

A subsidiary and member of a MNE group.

## CPM (comparable profit method)

A method that, under US regulations, is used to determine an arm's-length consideration for transfers of intangible property. If the reported operating income of the tested party is not within a certain range, an adjustment will be made. In effect, this method requires a comparison of the operating income that results from the consideration actually charged in a controlled transfer with the operating income of similar taxpayers those are uncontrolled.

CSA (cost sharing agreement) or CCA (cost contribution arrangement)

A framework agreed among enterprises to share the costs and risks of developing, producing or obtaining assets, services or rights and to determine the nature and extent of the interests of each participant in the result of the activity of developing, producing or obtaining those assets, services or rights.

**CUP (comparable uncontrolled price)**

A transfer pricing method that compares the price for property or services in a controlled transaction with the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances.

**ETR (effective tax rate)**

The percentage obtained by dividing the taxpayer's tax liability by his or her total taxable income. This reflects the rate at which a taxpayer would be taxed if his or her tax liability were taxed at a constant rate rather than progressively.

**EU (European Union)**

The European Union currently consists of 28 Member States.

**EUJTPF (EU Joint Transfer Pricing Forum)**

The EUJTPF consists of representatives of governments and the private sector, which advise and consult on transfer pricing issues.

**FTE (full-time equivalent)**

Used in this survey to indicate the number of resources employed by tax authorities to undertake transfer pricing reviews in their jurisdictions.

**GAAP (Generally Accepted Accounting Principles)**

The rules and practices required to be followed in certain jurisdictions for keeping financial records and books of account.

**MNE (multinational enterprise)**

A member of a related group, that carries on business directly or indirectly in two or more countries.

**MAP (mutual agreement procedure)**

A dispute resolution process found in Article 25 of the OECD Model Tax Convention (MTC), as well as in various double tax conventions. MAP is a government-to-government process of negotiation to resolve matters of taxation not in accordance with the particular tax treaty and to attempt to avoid double taxation.

**OECD (Organisation for Economic Co-operation and Development)**

An intergovernmental organization, based in Paris, formed to foster international trade and economic development. The OECD has 34 member states. Among its many concerns are the removal of tax barriers to the free flow of goods and services and

the avoidance of double taxation of income or profits. The OECD has developed guidelines and a Model Tax Convention (MTC); see below.

**OECD Guidelines**

Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, the latest edition of which was published by the OECD in 2010. The OECD Guidelines endorse the arm's-length principle and consist of a statement of principles rather than a set of specific rules to be applied.

**OECD Model Tax Convention (MTC)**

Model Tax Convention (MTC) on Income and Capital, last published by the OECD in September 2010. The Model Tax Convention (MTC) is to be used by member countries in negotiations of bilateral double tax treaties. The OECD also provides commentary on the interpretation of the Model Tax Convention (MTC) and states that member countries should follow this commentary, subject to their expressed reservations thereon, when applying and interpreting their double tax treaties.

**PLI (profit level indicator)**

Ratio that measures the relationship between an entity's profits and the resources invested or costs incurred to achieve that profit. Refer to CPM above for further discussion of their application.

**PATA (Pacific Association of Tax Administrators)**

An association of the tax administrations of Australia, Canada, Japan and the United States formed to foster cooperation and the exchange of information among them. PATA has published guidance on APAs, MAPs and documentation requirements.

**TNMM (transactional net margin method)**

The TNMM is a profits-based method that compares the profitability of an MNE member with the profits of comparable entities undertaking similar transactions. The CPM in the United States is similar to TNMM.

# Albania

## Taxing authority and tax law

Tax authority: General Directorate of Taxes (GDT)

Tax law: Income Tax Law

## Relevant regulations and rulings

Tax laws and ministerial instructions:

- ▶ Law No. 8438 on Income Taxes, as amended (Income Tax Law), dated 28 December 1998
  - ▶ Article 2, Section 4, items (a) and (b) create a new definition of "related party" for corporate income tax purposes.
  - ▶ Effective 4 June 2014, Articles 36-36/7 were introduced, providing a more comprehensive regulatory framework on international transfer pricing, aligned with the OECD Transfer Pricing Guidelines of 2010 (OECD TPG 2010).
  - ▶ Article 36/5 introduces transfer pricing documentation requirements for the first time.
- ▶ Law No. 9920 on Tax Procedures in the Republic of Albania (Tax Procedures Law), dated 19 May 2008
  - ▶ Article 115/1 addresses penalties related to transfer pricing.
- ▶ Double taxation treaties enacted by Albania

On June 2014, the Ministry of Finance issued Instruction No. 16, dated 18 June 2014, for the implementation of the new transfer pricing legislation, providing further guidance on the application of the arm's-length principle and the preparation of the transfer pricing documentation.

On February 2015, the Ministry of Finance issued Instruction No. 9, dated 27 February 2015, introducing specific rules and procedures on the implementation of the APAs.

## OECD Guidelines treatment

The arm's-length principle under the Albanian transfer pricing legislation and instruction is in line with the provisions of Article 9(1) of the OECD Model Tax Convention on Income and on Capital (2010) and those as referred to in the OECD Transfer Pricing Guidelines (TPG) 2010.

Specific reference to the OECD TPG 2010 is made with respect to the "arm's-length principle" definition, the recommendation to use in the comparability analysis, the nine-step process of the OECD TPG 2010 in the search for comparables and the preparation of the transfer pricing documentation, which should be in line with the EU Code of Conduct on transfer pricing documentation for associated enterprises. No specific guidance on business restructurings has been issued to date. However, the tax authority should generally follow the OECD guidance.

However, when the OECD TPG 2010 and Albanian Income Tax Law and Instructions differ or conflict, the Albanian Income Tax Law and Instructions shall prevail.

## Documentation requirements

Documentation requirements are stipulated in Article 36, Paragraph 5, of the Income Tax Law. Further guidance on the documentation deadlines, content and form is provided in Instruction No. 16, "On Transfer Pricing," dated 18 June 2014.

The transfer pricing file, consisting of the "master file" and the "country file," is considered to satisfy the requirements of Albanian legislation when it is prepared in line with the Code of Conduct on transfer pricing documentation for associated enterprises in the EU and the annex thereof and is approved by Resolution 2006/c176/01 of 27 June 2006 of the EU Council.

## Albania (continued)

### Documentation requirements (continued)

Transfer pricing documentation should contain:

- ▶ An overview of the taxpayer's business operations and organization chart
- ▶ A description of the group's corporate organization structure, of which the taxpayer is a member, and the group's operating structure
- ▶ A description of the controlled transaction, including analysis of the comparability factors and details of applied transfer pricing policies
- ▶ An explanation of the most appropriate transfer pricing method selected and, where relevant, of the financial indicator
- ▶ A comparability analysis, including a description of the process carried out to identify comparable uncontrolled transactions, an explanation of the basis for the rejection of any potential internal comparable uncontrolled transactions, a description of the comparable uncontrolled transactions, an analysis of the comparability of the controlled transactions and the comparable uncontrolled transactions, and information on any comparability adjustments made
- ▶ An explanation of any economic analysis and projections relied upon
- ▶ Conclusions on whether the conditions of the controlled transactions are consistent with the arm's-length principle, including details of any adjustments made to ensure compliance
- ▶ Details of any APAs or similar arrangements in other countries applicable to the controlled transactions
- ▶ Any other information that may have a material impact on the determination of the taxpayer's compliance with the arm's-length principle, with respect to the controlled transactions

### Priorities/pricing methods

Under the current legislative framework, all transfer pricing methods advocated by the OECD Guidelines are acceptable, namely CUP, resale price, cost-plus, TNMM and profit split.

Where it can be proved that none of the approved methods can be reasonably applied, taxpayers are allowed to use other, more appropriate methods. Preference is given to the best method providing the most reliable results.

### Return disclosures/related party disclosures

For fiscal years ending 31 December 2014 and after, taxpayers are required to report all controlled transactions annually by filing a Controlled Transaction Notice if the aggregate value of their controlled transactions exceeds ALL50 million.

When determining the annual aggregate transaction value, taxpayers should take into account all intercompany transaction amounts (i.e., without offsetting credit and debit values).

The notice contains information on the nature of intercompany transactions per counterparty, the value thereof, the transfer pricing method applied and whether transfer pricing documentation exists. Furthermore, there are listed transactions for no consideration and business restructurings, including reallocation of functions, assets or risks, and changes in the group legal structure.

The notice should be submitted by 31 March of the following year.

### Transfer pricing-specific returns

Albania does not require a separate return for related party transactions.

### Documentation deadlines

There is no specific deadline as there are no contemporaneous documentation requirements.

Documentation must be submitted within 30 days upon receipt of the tax authority's request, which can be initiated at any time after the filing due date of the income tax return (i.e., 31 March of the following year).

The documentation may be submitted in English or Albanian. If it is submitted in English, it should be accompanied by a notarized translation into Albanian, which should be provided within 30 days from the tax authorities' request for translation.

## Albania (continued)

### Documentation deadlines (continued)

Transfer pricing documentation should be updated annually. However, taxpayers with a turnover of less than ALL50 million and that use external comparable data can use the same data for three consecutive fiscal years, provided there have been no material changes in the conditions of the controlled transactions, the comparability of the external data and the relevant economic circumstances.

### Transfer pricing penalties

Failure to file the Controlled Transaction Notice (explained above) is subject to a penalty of ALL10,000 for each month of delay.

Transfer pricing adjustments, where no documentation has been made available, trigger late payment penalties of 5% of the additional income tax liability assessed for each month of delay, capped at 25% thereof, as well as default interest.

### Penalty relief

Taxpayers that have submitted the transfer pricing documentation in a timely manner (i.e., within 30 days upon tax the authorities' request) shall be relieved from penalties in the case of a transfer pricing adjustment, and they will be liable to pay only the additional tax liability and default interest.

In principle, the tax administration bears the burden of proof to substantiate on what grounds they consider that the transfer prices applied are not in line with the arm's-length principle. However, when the taxpayer has prepared documentation and makes it available to the tax authorities, the burden of proof shifts to the taxpayer.

### Statute of limitations on transfer pricing assessments

The statute of limitations on transfer pricing assessments is five years from the date the related corporate income tax return is filed.

When a taxpayer becomes subject to a penal court proceeding concerning its tax liabilities, the tax authorities' rights to make a tax reassessment on the matter at issue in the proceeding are not prescribed.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a tax audit in Albania is high for domestic and foreign groups of companies. Usually, a tax audit covers the last three to four years. In light of the new transfer pricing rules that became effective on 4 June 2014, and especially due to the newly introduced documentation requirements, transfer pricing issues are expected to continue to attract significant attention in tax audits, and we anticipate that transfer pricing tax audits will increase rapidly.

The tax administration is unlikely to challenge the methodology applied. In principle, in examining the arm's-length character of a transaction, the tax administration should use the same transfer pricing method applied by the taxpayer, to the extent that it is the most appropriate one for that transaction.

### APA opportunity

Taxpayers who undertake controlled transactions exceeding in aggregate the value of EUR30 million for the proposed period of application are eligible to apply for unilateral, bilateral and multilateral APAs with no rollback option. Exceptions to the aggregate transaction value threshold are cases of high complexity and of high commercial and economic value to the Republic of Albania. The maximum proposed period of the APA is five years unless the APA is bound to a governmental agreement ratified by law. The instruction on APAs provides management procedures, disclosure requirements and detailed guidance regarding the submission and processing of APA requests.

# Algeria

## **Taxing authority and tax law**

Tax authority: Generally, referred to as the Algerian tax authorities or Direction des Grandes Entreprises (DGE) (large-sized taxpayers' direction)

Tax law: Algerian Direct Tax Code - Algerian Tax Procedures Code

## **Relevant regulations and rulings**

The transfer pricing matter is principally governed by:

- ▶ Article 141 bis of the Algerian Direct Tax Code
- ▶ Article 192 of the Algerian Direct Tax Code
- ▶ Article 20 ter of the Algerian Tax Procedure Code
- ▶ Article 169 bis of the Algerian Tax Procedure Code

The decree, dated 12 April 2012, drew up a list of entities obligated to provide transfer pricing documentation and listed its content.

## **OECD Guidelines treatment**

The OECD Guidelines inspired the Algerian legislation on transfer pricing. However, specifications about how they work together in practice are not provided explicitly.

## **Documentation requirements**

According to Article 04 of the Decree dated 12 April 2012, the transfer pricing documentation must contain:

Basic documentation of general information concerning the group, including:

- ▶ A general description of the activity performed, including changes that occurred during the fiscal year
- ▶ A description of the organizational structure and the nature of the relations that link the foreign company or the Algerian company to the other Algerian company (such as organization chart, direct and indirect capital ties, voting rights, shareholders' agreement, business flows)
- ▶ A general description of the functions performed, risks incurred and assets of each related company
- ▶ A general description of the group's transfer pricing policy

Company-specific documentation:

- ▶ A description of the company, the activities it performs and the nature of the transactions it is engaged in, including changes that have occurred during the fiscal year
- ▶ A description of the transactions performed with other related companies, including the nature of the flows and their amounts (including royalties); this information may be presented globally by transaction type
- ▶ Copies of the statutory auditors' annual reports and the financial statements for the fiscal year concerned in the documentation
- ▶ A list of the main intangible assets held in relation to the company (such as patents, trademarks, trade names and know-how)
- ▶ Copies of all agreements between the companies concerned
- ▶ Financial information, overhead and administrative expenses, and research and development costs
- ▶ Description and justification of the arm's-length nature of the transfer pricing method chosen (OECD standards)

## Algeria (continued)

### Documentation requirements (continued)

Companies concerned about the documentation requirement may provide any other documentation likely to provide clarification to the administration.

The entities concerned are required to provide the following information:

- ▶ De jure or de facto legal entities or groups of legal entities working in the field of hydrocarbon activities and their subsidiaries, as provided by law
- ▶ Joint stock companies and partnerships that have opted for the tax regime for joint stock companies whose sales at the close of the financial year are greater than or equal to DZD100 million
- ▶ De jure or de facto groups of companies in which the annual sales of any one of the member companies are greater than or equal to DZD100 million
- ▶ Companies established in Algeria that are members of foreign groups (regardless of the Algerian tax regime applied)

### Priorities/pricing methods

Algerian transfer pricing legislation and practices are recent. The Algerian transfer pricing legislation does not provide any official transfer pricing method, but the Algerian tax authorities issued guidelines in 2010 referring to the OECD methods. In theory, all OECD methods could be accepted, subject to justification, but in practice, the Algerian tax authorities are focused on an approach based on comparability.

Based on our understanding, Algerian tax authorities are developing a project to gather financial databases for benchmarking purposes.

Algerian transfer pricing rules apply both for cross-border transactions and domestic transactions with related parties.

### Return disclosures/related party disclosures

In the framework of a tax audit, tax inspectors are entitled to audit possible infringement of the arm's-length principle with related parties (intercompany transactions) – as in, the existence of a commercial or financial relationship that differs from those that would be made between independent enterprises.

### Transfer pricing-specific returns

Not applicable.

### Documentation deadlines

The transfer pricing documentation must be filed at the DGE with the annual tax return (no later than 30 April every year).

Companies not listed above have to prepare the same documentation to justify the transfer pricing policy in the framework of a tax audit.

### Transfer pricing penalties

If a company provides incomplete transfer pricing documentation or no documentation at all when filing its return, the tax administration is entitled to send a formal notice asking for it to be completed or provided within 30 days. The penalty for not doing so can be DZD500,000. In the case of a reassessment, an additional specific penalty amounting to 25% of the amounts deemed transferred might also apply.

### Penalty relief

No specific penalty relief is applicable to transfer pricing, but general penalty relief could apply in the framework of a transaction (*remise conditionnelle*) procedure provided by the Algerian Tax Procedure Code, under certain conditions.

### Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is the same as for all Algerian corporate tax assessments (i.e., four years following the year for which the tax is due).

## Algeria (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The likelihood of a tax audit in Algeria is high for domestic and foreign companies. Usually, a tax audit covers a three- to four-year period on a continuous basis.

Tax audits and tax reassessments related to transfer pricing are more and more frequent. Field auditors are not always familiar with transfer pricing concepts, and the adjustments sometimes are not only grounded in the OECD Guidelines. It is also worth mentioning that currently, there are no local public financial databases.

### **APA opportunity**

The Algerian tax legislation does not provide a specific APA procedure. However, a binding tax ruling procedure was introduced in the Algerian Tax Procedure Code recently (for companies eligible for the DGE), and in theory, it could cover transfer pricing.

# Angola

## Taxing authority and tax law

Taxing authority: Angola Ministry of Finance/General Tax Administration (*Administração Geral Tributária*)

Tax law: Industrial Tax Code (*Código do Imposto Industrial*)

## Relevant regulations and rulings

Presidential Decree 147/13 of 1 October 2013, specifically Section II and Articles 10-13 (Statute of Large Taxpayers) and Article 50 of Law 19/14 of 22 October, approving the Industrial Tax Code provides guidance on transfer pricing regulations. The Angolan transfer pricing regime applies to the so-called Large Taxpayers with a turnover in excess of AOA7 billion. The latest Large Taxpayers' List was released in Order 599/14 of 24 March 2014 and includes 486 companies to which transfer pricing rules apply. In addition, the Order also establishes that, apart from the companies listed as Large Taxpayers, large government-owned companies, financial institutions, oil and gas, and diamond companies, as well as telecommunications companies, are, by nature, Large Taxpayers and therefore subject to the Statute of Large Taxpayers and to the transfer pricing rules established therein.

Both Article 50 of the Industrial Code (which establishes the general framework for application of the arm's-length principle) and Article 11 of the Statute of Large Taxpayers clearly define all cases of legal control that create a situation of related parties for transfer pricing purposes.

In this regard, the concept of special relations is as follows:

- (i) When the directors or managers of a company, as well as their spouses, ascendants and descendants, have directly or indirectly an ownership interest of 10% or more in the capital or the voting rights of the other entity
- (ii) When the majority of the members of the board of directors or management are either common or distinct but related by marriage, non-marital partnership or direct kinship
- (iii) When one of entities has contractual control of the other
- (iv) When the companies have a relationship of control or cross-ownership or contractual subordination contract, peer group or equivalent situation following the terms of company law
- (v) When commercial relations between the two entities represent more than 80% of the volume of operations
- (vi) When one finances the other, to the extent of more than 80% of its credit portfolio

## OECD Guidelines treatment

OECD Guidelines have not been adopted in the newly released regulations since Angola is not an OECD member country, although certain OECD language is included in the transfer pricing regulations enacted.

The arm's-length principle applies to all related party transactions.

## Documentation requirements

For the first time in Angola, qualifying taxpayers have documented their transfer pricing policy with respect to the intragroup transactions performed during fiscal year 2014. Angola's new transfer pricing documentation rules are included in the Statute of Large Taxpayers. The obligation to prepare and file the transfer pricing report with respect to the intragroup transactions performed during fiscal year 2014 – due to the late release of the Large Taxpayers' List on 24 March 2014, there was a postponement of the obligation to prepare documentation, initially foreseen with respect to intragroup transactions performed during fiscal year 2013 – was further clarified with the release of Circular 12/DT/DNI/2014.

The requirement to prepare and submit transfer pricing documentation applies to all companies included on the Large Taxpayers' List published on 24 March 2014, large government-owned companies, financial institutions, oil and gas, and diamond companies, as well as telecommunications companies and companies reporting annual revenue in excess of AOA7 billion.

## Angola (continued)

### Documentation requirements (continued)

The transfer pricing file must be prepared on an annual basis and must detail the relationships and prices established by the Large Taxpayers with their respective associated enterprises.

All commercial transactions, such as those involving goods, rights or services, and financial operations, are included and, therefore, are subject to documentation.

Under the Angolan transfer pricing legislation, the report has to be prepared according to the following structure:

- a) Summary
- b) Macroeconomic environment
- c) Presentation of the entity
- d) Functional analysis of the entity
- e) Identification of the related party operations
- f) Economic analysis of the related party operations

The Angolan law requires that all documents submitted to the tax authorities must be written in or translated to Portuguese.

### Priorities/pricing methods

The new Angolan transfer pricing legislation, applicable to Large Taxpayers, only foresees the application of the so-called "traditional transactional transfer pricing methods," namely the CUP method, the resale price method and the cost-plus method.

### Return disclosures/related party disclosures

No related party detailed information is disclosed to the General Tax Administration, other than the submission of an entity-specific transfer pricing file, when applicable.

### Transfer pricing-specific returns

Not applicable.

### Documentation deadlines

The transfer pricing file must be prepared and submitted to the tax administration within six months of the fiscal year-end (typically, companies have a fiscal year aligned with the calendar year).

### Transfer pricing penalties

The General Tax Administration notifies Large Taxpayers that failed to file transfer pricing documentation for the payment of a tax fine under the General Tax Code, namely No. 2 of Article 198, ranging from AOA10,000 to AOA50,000. Existing notifications indicate that the maximum amount of the range is being applied. The application of penalties in this regard will imply a reputational risk to the taxpayer as it will be considered "noncompliant."

Moreover, noncompliance with transfer pricing documentation requirements will result in such taxpayers being forbidden from performing capital operations, current invisible transactions (payments for services and intangibles) or trading operations that, according to the exchange control regulations presently in place, require an intervention from the National Bank of Angola. In practice, it may completely block the day-to-day activity of any taxpayer whenever its legal name is communicated by the General Tax Administration to the National Bank of Angola with the specification of noncompliance with tax obligations.

For Large Taxpayers, the lack of compliance with the transfer pricing documentation requirements should also prevent the application of rights foreseen in the corresponding statute, namely the possibility to pay the Industrial Tax at the Large Taxpayers Office, to have a closer relationship with the tax administration via the appointment of two inspectors who will deal with the taxpayer's day-to-day questions and to pay tax debts in installments.

## Angola (continued)

### Transfer pricing penalties (continued)

The most important implication of the recent transfer pricing rules enacted in Angola was shifting the burden of proof to the taxpayer, which is now required to produce contemporaneous documentation to sustain the transfer prices applied to transactions performed with associated enterprises. If the tax authorities deem that a certain amount charged in a related party context to an Angolan taxpayer is not consistent with the arm's-length principle, the Angolan tax authorities will propose an adjustment to the price of a given transaction and assess additional tax, penalties and compensatory interest. The tax authorities are allowed to open an audit and perform transfer pricing adjustments regarding the last five fiscal years.

If a transfer pricing adjustment is made, a penalty equivalent to 35% of the additional tax will be applied, plus delay interest at the noncompounded rate of 1% per month (or 12% per year).

With respect to correlative adjustments, they are only foreseen in the Industrial Tax Code for adjustments performed in relation to transactions involving Angolan taxpayers, as the country has not yet signed any double tax treaty. The current transfer pricing legislation does not provide for cross-border correlative adjustments.

### Penalty relief

Not applicable.

### Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing assessments is 5 years from the last day of the tax year-end or 10 years in case of tax infringement.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

No detailed information is currently available about the level of audit risk that exists in the transfer pricing environment. Since the law was recently enacted, no patterns of audit risk have yet been established.

However, despite its early stage, transfer pricing audits are expected to increase as the subject is more on the radar of the government and Angolan tax authorities.

### APA opportunity

Not yet foreseen.

# Argentina

## Taxing authority and tax law

Tax authority: Internal Revenue Service (*Administración Federal de Ingresos Pùblicos*, or AFIP)

Tax law: Income Tax Law (ITL) and Regulations

## Relevant regulations and rulings

Regulations currently in effect:

- AFIP *Dirección General Impositiva* (DGI) Regulation No. 1,122 (Published 31 October 2001, but applicable for fiscal years beginning on 31 December 1999) applies, as amended by several regulations: No. 1,227/02, No. 1,296/02, No. 1,339/02, No. 1,590/03, No. 1,663/04, No. 1,670/04, No. 1,918/05, No. 1,958/05, No. 1,987/05, No. 3,132/11, No. 3,149/11, No. 3,476/13, No. 3,573/13, No. 3,576/13 and External Notes No 6/05 and No. 1/08.
- Binding tax rulings for general application are not provided.
- Opinions from the tax authority are scarce and non-binding.

## OECD Guidelines treatment

Argentina is not an OECD member country, and the OECD Guidelines are not referenced in Argentina's ITL and Regulations.

However, the tax authority usually recognizes the OECD Guidelines in practice, as long as they do not contradict the ITL and Regulations. Several first-level court cases also recognize the use of the OECD Guidelines, insofar as they do not contradict the ITL and Regulations.

## Documentation requirements

Transfer pricing regulations require extensive contemporaneous documentation. Furthermore, taxpayers are required to file an annual transfer pricing study for all transactions with related parties, deemed related parties and independent parties located in tax havens.

Taxpayers are required to keep and eventually submit all of the documents evidencing that prices, amounts received and profit margins have been established on an arm's-length basis.

## Priorities/pricing methods

The ITL does not prioritize methods; Regulation No. 1,122/01 articulates the best-method rule.

The tested party must be the local entity (i.e., the entity based in Argentina). The taxpayer selects the most appropriate method, but the AFIP may oppose the selection. Pursuant to the ITL, the accepted methods for transactions with related parties and tax havens are CUP, resale price, cost-plus, profit split and TNMM.

The use of an interquartile range is mandatory. Unless there is evidence to the contrary, the market price must be used for tangible goods transactions with both related and independent parties where there is an international price in a transparent market.

For transactions involving grains, oleaginous products, other soil products, oil and gas, and all other goods with well-known prices in transparent markets, and where the local company operates through international intermediaries that are not the final consignees of the goods, the applicable price is the prevailing price in the respective market on the day when the loading of the shipment is finished (or it is the agreed-upon price, if higher than the market price). This method may not apply, however, if the local exporter can prove the substance of the operations of the consignee abroad following certain specific tests included in the regulations. The AFIP has the power to limit the application of this method or extend it to other transactions, depending on the circumstances.

Export and import transactions with independent parties not located in tax havens are subject to information requirements if the annual amount of the transaction exceeds ARS1 million, or if the transactions are exports and imports of commodities. The requirements depend on different annual transaction amounts and, in some cases, may include calculations of profit margins.

## Argentina (continued)

### Return disclosures/related party disclosures

Taxpayers are required to file the following documentation with the AFIP:

- ▶ An annual transfer pricing study
- ▶ Audited financial statements for the fiscal year, in case they have not already been filed before
- ▶ An independent certified public accountant's certification of certain contents of the transfer pricing study
- ▶ Transfer pricing-specific returns

### Transfer pricing-specific returns

Taxpayers are required to file the following transfer pricing-specific returns with the AFIP:

- ▶ Annual Form 743
- ▶ Annual Form 969
- ▶ Form 742 (for the first six-month period of each fiscal year)
- ▶ Semiannual Form 741 (for commodities exports and imports with independent parties not located in tax havens)
- ▶ Annual Form 867 (for other exports and imports with independent parties not located in tax havens)
- ▶ Annual Form 4501 (for the digital filing of the transfer pricing study and certified public accountant's certification)
- ▶ Monthly Form 968 (transaction with local related parties)

### Documentation deadlines

The transfer pricing documentation must be ready to be filed with the AFIP by the date that the corresponding transfer pricing return filings are due. An annual transfer pricing study, financial statements, Form 4501 and certification must be filed with the tax authority by the beginning of the eighth month after the end of the fiscal year.

The annual transfer pricing return must also be filed by the beginning of the eighth month after the close of the fiscal year. However, transfer pricing adjustments must be recognized as of the date the income tax return is due (i.e., the fifth month after the fiscal year-end). The semiannual returns must be filed by the end of the fifth month after the end of the relevant six-month period. The annual return for export and import transactions with independent parties not located in tax havens must be filed by the end of the seventh month after the end of the fiscal year.

Additionally, Form 969 must be filed annually, within 15 days of the income tax return deadline.

Finally, Form 968 must be filed the last business day of the following month to be informed.

### Transfer pricing penalties

For late filing of tax returns containing international transactions involving the export or import of goods with independent parties, the taxpayer will be fined ARS9,000. For late filing of tax returns concerning other international transactions, the taxpayer will be fined ARS20,000. For penalties related to late filing or lack of filing, it does not matter whether the transactions were at arm's length.

For noncompliance with the formal duties of furnishing information requested by the AFIP, the taxpayer faces fines of up to ARS45,000. The same applies to failure to keep vouchers and evidence of prices in files on hand and failure to file tax returns upon request. If tax returns are not filed after the third request, and the taxpayer has income amounting to more than ARS10 million, the fine is increased from ARS90,000 to ARS450,000. Interest accrues on unpaid tax balances (as of 1 January 2011, the rate is 3% on a monthly basis and 4% upon lawsuit filing).

For unpaid taxes related to international transactions, the taxpayer is fined 100% to 400% of the unpaid tax. This fine has different levels, depending upon the level of compliance with the formal duties related to the control of taxes derived from international transactions. Penalties for fraud are 2 to 10 times the unpaid taxes.

Criminal tax law stipulates imprisonment for two to six years if the unpaid tax exceeds ARS400,000 for each tax and fiscal year. If the unpaid tax exceeds ARS4 million, the prison term will increase, ranging from three-and-a-half years to nine years.

## Argentina (continued)

### **Penalty relief**

Concerning underpayment and fraud, if the non-recidivist taxpayer voluntarily amends the tax returns before receiving a special notice (or *vista*) from the AFIP, the penalty is reduced to one-third of the minimum fine. If the tax returns are amended within 15 days of receiving the notice, the penalty is reduced to two-thirds of the minimum fine. If the non-recidivist taxpayer accepts the adjustments assessed by AFIP and pays the amounts due, the penalties are set at the minimum. If the taxes due do not exceed ARS1,000 and are paid voluntarily, or within 15 days from the special notice, then no penalty shall be applied.

### **Statute of limitations on transfer pricing assessments**

The general statute of limitations for federal tax matters is five years for registered and registration-exempt taxpayers and 10 years for unregistered taxpayers. These periods begin on 1 January following the year in which the tax return is due.

The moratorium regime in place during calendar year 2009 and the voluntary declaration of the foreign exchange holding regime in place during calendar year 2013 added one additional year each to the statute of limitations period for certain fiscal years. The taxpayer must keep the transfer pricing documentation on hand and provide it upon AFIP's request for up to five years after the period established by the statute of limitations.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The likelihood of an annual tax audit in general can be considered high; meanwhile, the chance of a transfer pricing review during such an audit is estimated as medium. Nevertheless, once transfer pricing has become a topic of the audit, the likelihood of the tax authority challenging the taxpayer's transfer pricing methodology is high.

In addition, trial-level court cases are being published. In most cases, the taxpayers' positions prevailed, but a few were in favor of the tax authority. In addition, some second-level court cases are also being published. The tax authority will likely try to increase revenue and strictly enforce penalties with companies that are not complying with transfer pricing requirements.

Recently, the tax authorities have focused on transactions involving the importation of goods from a principal located in a jurisdiction different from where the goods were manufactured, causing a price difference because of the value added by the intermediate company. Further scrutiny and foreign trade controversy are expected with regard to transfer pricing, customs and foreign exchange control issues under the argument of "tax planning harmful to foreign trade."

### **APA opportunity**

Currently, APAs are not specifically addressed.

# Armenia

## **Taxing authority and tax law**

Taxing authority: Ministry of Finance

Tax law: Income Tax Law

## **Relevant regulations and rulings**

Currently, Armenia does not have local transfer pricing regulations but does have double tax treaties with 41 countries that contain an article that resembles Article 9 of the OECD Model Treaty on "associated enterprises."

## **OECD Guidelines treatment**

Not applicable.

## **Documentation requirements**

Not applicable.

## **Priorities/pricing methods**

Not applicable.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

Not applicable.

## **Penalty relief**

Not applicable.

## **Statute of limitations on transfer pricing assessments**

Not applicable.

## **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

Not applicable.

## **APA opportunity**

Not applicable.

# Australia

## Taxing authority and tax law

Taxing authority: Australian Taxation Office (ATO)

Tax law: Income Tax Assessment Act 1936, Income Tax Assessment Act 1997 and Tax Administration Act 1953

## Relevant regulations and rulings

Australia's transfer pricing law is contained in:

- ▶ Division 13 of Part III of Income Tax Assessment Act 1936
- ▶ Subdivisions 815-A, B, C and D of the Income Tax Assessment Act 1997
- ▶ Subdivision 284-E of the Tax Administration Act 1953
- ▶ Relevant provisions of double tax treaties

### Applicability of legislation

Division 13 was enacted in 1982 and applies to income years that commenced before 1 July 2013. Division 13 applies at the Commissioner's discretion and cannot be self-assessed.

Subdivision 815-A was enacted in 2012 and applies to income years commencing between 1 July 2004 and 30 June 2013. It operates concurrently with Division 13 for transactions with related parties in countries that have a double taxation agreement with Australia. Subdivision 815-A applies at the Commissioner's discretion and cannot be self-assessed.

Subdivisions 815-B, C and D apply to taxpayers with income years commencing on or after 1 July 2013. The Commissioner can apply Subdivisions 815-B, C and D, and taxpayers must self-assess them.

### Recent changes

Subdivisions 815-B, C and D were enacted in June 2013 and introduced some important changes to the transfer pricing rules, including:

- ▶ A self-assessment regime, effectively requiring public officers to determine whether the taxpayer has received a transfer pricing benefit to satisfy their duties in signing off on the tax return. In extreme cases, the public officer may be liable for penalties if they do not discharge this responsibility.
- ▶ Penalty regime linked to documentation. The preparation of transfer pricing documentation is not compulsory. However, failure to prepare documentation contemporaneously in accordance with the new rules prevents the taxpayer from establishing a reasonably arguable position (RAP). This will typically result in larger penalties if the taxpayer receives a transfer pricing adjustment that increases its tax liabilities in Australia. Extensive reconstruction provision. The new rules provide the ATO with extensive powers in relation to examining the actual commercial and financial relations between a taxpayer and its international related parties and substituting them with what the ATO considers a better reflection of arm's-length commercial and financial relations. These substituted transactions then form the basis for determining the arm's-length conditions. This provision must also be self-assessed by the taxpayer.
- ▶ Compliance with the arm's-length principle is assessed on the alignment of the taxpayer's actual cross-border conditions with arm's-length conditions. Conditions are defined broadly to encompass all pricing and non-pricing aspects relevant to the economic substance of the business and its international arrangements. This effectively gives rise to a "double test," where taxpayers have to assess the overall commerciality of their arrangements as well as the pricing of individual transactions.

Subdivision 815-C provides specific rules for permanent establishments to make certain that the amount brought to tax in Australia by entities operating permanent establishments is not less than it would be if the permanent establishment was a distinct and separate entity operating independently. The rules and requirements contained in Subdivision 815-C apply in broadly the same manner as those contained in Subdivision 815-B. Subdivision 815-C does not fully align with the OECD guidance and requires an allocation of actual revenue and expenses.

Subdivision 815-D applies to partnerships and trusts using an analogous approach as found in Subdivisions 815-B and 815-C.

## Australia (continued)

### Relevant regulations and rulings (continued)

All Australian transfer pricing provisions are one directional and apply only to increments in a taxpayer's tax liability. Subdivision 284-E outlines transfer pricing documentation requirements for taxpayers for whom Subdivision 815-B or Subdivision 815-C applies.

The ATO has published the following transfer pricing rulings and practice statements (PS) in relation to the current transfer pricing legislation:

- ▶ PS LA 3672: When an entity will be liable for a transfer pricing penalty and how the penalty is assessed
- ▶ PS LA 3673: Guidance for transfer pricing documentation
- ▶ TR2014/8: Transfer pricing documentation requirements
- ▶ TR2014/6: Relevance of actual commercial or financial relations in the identification of arm's-length conditions
- ▶ PS LA 2015/4: Advance pricing arrangements

PS LA 3672, PS LA 3673 and TR2014/8 cover transfer pricing documentation and penalties when applying the new transfer pricing law. TR2014/6 sets out the Commissioner's views on the application of the reconstruction provision as well as its interaction with other sections of Subdivision 815-B and the OECD Guidelines.

PS LA 2015/4 was released on 23 July 2015. This practice statement sets out the new process to be followed by ATO officers including a "whole-of-code review" for any taxpayers that seek to enter into the APA program or renew an already existing APA.

While not technically a practice statement or ruling, the ATO has also issued guidance that allows the application of simplified transfer pricing record keeping for small taxpayers, distribution entities, certain types of services and small loans under certain circumstances.

The ATO has also published a large number of transfer pricing rulings and other guidance in the form of tax determinations Practice Statements and booklets in relation to the historical transfer pricing legislation. This guidance, which is relevant for years starting before 1 July 2013, includes:

#### Taxation rulings (TRs)

- ▶ TR92/11: Loans
- ▶ TR94/14: Application of Division 13
- ▶ TR97/20: Methodologies
- ▶ TR98/11: Documentation
- ▶ TR98/16: Penalties
- ▶ TR1999/1: Services
- ▶ TR2000/16: Relief from Double Taxation
- ▶ TR2001/11: Permanent Establishments
- ▶ TR2001/13: Interpretation of Australia's Double Tax Agreements
- ▶ TR2002/2: Meaning of Arm's Length for the Purposes of §47A(7) Dividend Deeming Provisions
- ▶ TR2002/5: Definition of Permanent Establishment
- ▶ TR2003/1: Arm's-Length Debt Test
- ▶ TR2004/1: Cost Contribution Arrangements
- ▶ TR2005/11: Branch Funding for Multinational Banks
- ▶ TR2007/1: Consequential Adjustments
- ▶ TR2010/7: Interaction of Transfer Pricing and Thin Capitalization Provisions
- ▶ TR2011/1: Transfer Pricing Implications of Business Restructures

While aspects of the historical guidance are expected to be incorporated into guidance on the current legislation, taxpayers should take care when relying on the rulings listed above and other guidance listed below for years starting on or after 1 July 2013, as the operation of the legislation has changed and the ATO's interpretation is likely to evolve.

## Australia (continued)

### Relevant regulations and rulings (continued)

#### Tax determinations (TDs):

TD2002/20: Film Production Companies and the Impact of the Tax Offset Scheme

TD2002/28: Foreign Bank Election to Not Apply Part IIIB of the Income Tax Assessment Act (1936)

TD2007/1: Market Value of Goodwill of an Entity That Becomes a Member of a Consolidated Group

TD2014/14: Income Tax Deductibility of Payments Made by Australian Companies to Foreign Subsidiaries

#### ATO booklets:

- ▶ *Concepts and Risk Assessment*
- ▶ *Applying the Arm's-Length Principle*
- ▶ *Advance Pricing Arrangements, Documentation and Risk Assessment for Small to Medium Businesses*
- ▶ *Dependent Agent Permanent Establishments*
- ▶ *Marketing Intangibles, Business Restructuring – discussion paper on application of Australia's transfer pricing rules*
- ▶ *ATO Discussion Paper on Intra-group Finance Guarantees and Loans – application of Australia's transfer pricing and thin capitalization rules*

#### Assessment and adjustment of transfer prices

Subdivisions 815-B, C and D operate on a self-assessment basis. They require public officers to assess whether the taxpayer received a transfer pricing benefit. Broadly, a transfer pricing benefit is received when an entity's taxable income or withholding tax payable is less than it would have been had the arm's-length conditions operated. A transfer pricing benefit also arises when the entity's tax loss is greater than it would have been had the arm's-length conditions operated. Where a taxpayer receives a transfer pricing benefit, the arm's-length conditions replace the actual conditions to determine its Australian taxable income.

Following the self-assessment, the Commissioner, through the ATO, can raise adjustments when he believes that the self-assessed position still contains a transfer pricing benefit.

For years that fall under the historical Division 13 and Subdivision 815-A, the Commissioner is the only person able to make an assessment of the arm's-length consideration of the taxpayer's transactions. In addition, the Commissioner can substitute an arm's-length amount of consideration only when a taxpayer has received less than an arm's-length amount or has paid more than an arm's-length amount.

#### Reconstruction of transactions

Subdivision 815-B adopts a substance-over-form approach toward transactions. It requires the taxpayer to follow the economic substance of a related party arrangement where the economic substance does not match the legal form.

In addition, it requires the taxpayer to perform a commerciality test. Under this test, taxpayers must replace the actual commercial or financial relations if independent parties "would not have entered into the actual arrangement but instead would have entered into a different arrangement" or "would not have entered into an arrangement at all." Notably, the reconstruction provisions go further than those within the OECD Guidelines (para. 1.64–1.66), which apply only if the uncommercial transaction also practically impedes the tax authority from determining the appropriate transfer price. This second leg is not included in Subdivision 815-B, and the ATO is expected to interpret the reconstruction provision broadly and could, for instance, seek a reconstruction of the arrangement to align transfer pricing adjustments in accordance with what the Commissioner considers to be commercially realistic behavior and outcomes, even where comparable and reliable CUP information is available.

In addition, the ATO can apply the general anti-avoidance provisions to reconstruct or disregard a transaction where the dominant purpose of a "scheme" is to avoid/reduce the taxpayer's tax liability. The recent Federal Budget contains an expansion of the general anti-avoidance provisions in situations where:

- ▶ Sales are made by an overseas entity to an Australian customer.
- ▶ An Australian affiliate is involved with the sales process (e.g., by managing the customer relationship on a day-to-day basis) but does not constitute a permanent establishment.

The legislation is currently before Parliament and can be further expanded. In addition, there are exceptions and rebuttable assumptions to this fact pattern.

## Australia (continued)

### Relevant regulations and rulings (continued)

The ATO has also expressed the view that it can change individual elements of the actual arrangement outside the reconstruction provisions to improve comparability. For example, the ATO may seek to disregard certain terms of a transaction if these are not observed between independent parties. The ATO considers that this approach is a "repricing" of a transaction rather than a reconstruction. We disagree with this interpretation and would regard any change in the actual transaction as a reconstruction. It remains to be seen which view would prevail in a legal challenge.

### OECD Guidelines treatment

The court case, *Commissioner of Taxation v. SNF (Australia) Pty Limited [2011] FCAFC 74*, decided under Division 13, rejected the OECD Guidelines as relevant when interpreting Division 13 and rejected the Commissioner's use of the TNMM.

In response to this court case, transfer pricing provisions (Subdivision 815-A was released in 2012 and Subdivisions 815-B, C and D) were released in 2013. These provisions refer directly to the 2010 OECD Guidelines as relevant guidance for the interpretation of the provisions. It is anticipated that a reference to the revised OECD Guidelines, released on 5 October 2015, will be incorporated into the Australian transfer pricing framework by regulation in the near future.

### Documentation requirements

The preparation of transfer pricing documentation is not compulsory. However, under Subdivision 815-B, taxpayers that do not prepare contemporaneous transfer pricing documentation that meets the specific requirements set out in Subdivision 284-E are precluded from establishing a RAP in the event of a transfer pricing adjustment. This will typically result in larger penalties if the taxpayer receives a transfer pricing adjustment that increases its tax liabilities in Australia.

To satisfy Subdivision 284-E, it is required that the documentation:

- ▶ Be prepared contemporaneously (i.e., before the time by which the taxpayer lodges its income tax return)
- ▶ Be prepared in English, or readily accessible and convertible into English
- ▶ Explain the particular way in which the relevant transfer pricing provisions apply (or do not apply) to the taxpayer's international related party dealings
- ▶ Explain why the application of the transfer pricing provisions to the taxpayer's international related party dealings in that way best achieves the consistency with the relevant guidance materials<sup>1</sup> (e.g., 2010 OECD Guidelines)

The ATO further recommends taxpayers answer the following five questions in their documentation:

- ▶ What are the actual conditions that are relevant to the matter?
- ▶ What are the comparable circumstances relevant to identifying the arm's-length conditions?
- ▶ What are the particulars of the methods used to identify the arm's-length conditions?
- ▶ What are the arm's-length conditions, and is/was the transfer pricing treatment appropriate?
- ▶ Have any material changes and updates been identified and documented?

The manner in which Subdivision 815-B operates implies that historical documentation and global documentation that are prepared without specific regard to the new legislation are unlikely to be sufficient to establish a RAP to mitigate penalties. Additional information that should be considered when preparing documentation for such purposes includes:

- ▶ An explanation of the way in which the subdivision applies (or does not apply)
- ▶ An explanation of why applying the subdivision, as documented, best achieves consistency with the guidance material, such as the OECD Guidelines
- ▶ An assessment of whether the actual commercial or financial relations (CoFR) can be used to determine the arm's-length conditions or whether a substitution with hypothetical CoFR is required
- ▶ An assessment of the comparability of the actual circumstances with the circumstances used to establish the arm's-length conditions

<sup>1</sup> Guidance materials are outlined in Sections 815-135 and Sections 815-235.

## Australia (continued)

### Documentation requirements (continued)

- ▶ An ascertainment of the relevant actual and the arm's-length conditions
- ▶ An ascertainment of the result of the application of the subdivision in that particular way, compared with the non-application of the subdivision

### Priorities/pricing methods

The legislation requires taxpayers to adopt the "most appropriate" transfer pricing method and refers to the OECD Guidelines in this regard. Methods include traditional transaction methods (CUP, resale price and cost-plus) and traditional profit-based methods (profit split and TNMM).

### Return disclosures/related party disclosures

The ATO requires an International Dealings Schedule to be filed with the tax return. It requires taxpayers to disclose:

- ▶ Details of restructuring events involving international related parties (Question 17, which must be completed regardless of the quantum of the transactions)
- ▶ Dealings with branch operations (Question 18, which must be completed regardless of the quantum of the transactions)

In addition, where the aggregate amount of transactions or dealings with international related parties, both revenue and capital in nature, is greater than AUD2 million, the following information must be disclosed:

- ▶ Top three transactions (individually) and other transactions (combined) for the top three specified "low-tax" jurisdictions (Question 3)
- ▶ The top three transactions and other transactions for the top three non-specified jurisdictions (Question 4)
- ▶ For all international related party transactions (Questions 5 through 13):
  - ▶ Type of transaction, e.g., royalties, intercompany loans, technical services, administrative services
  - ▶ The quantum per type of transaction
  - ▶ The percentage of transactions of each type covered by contemporaneous documentation that has been prepared in accordance with the four-step process (transfer pricing documentation does not need to be lodged with the tax return)
  - ▶ Transfer pricing methodologies selected and applied for each international related party transaction type
  - ▶ Information on transactions for no payment or nonmonetary payment, share-based employee remuneration and cost contribution arrangements (Questions 14 through 16)

In addition to the transfer pricing disclosures, the International Dealing Schedule captures information on interests in foreign companies or foreign trusts, permanent establishments and thin capitalization. Separate thresholds apply for these disclosures.

### Transfer pricing-specific returns

There is no specific return, apart from the schedule to the tax return described above.

### Documentation deadlines

Under Division 13 and Subdivision 815-A, there is no explicit requirement to prepare transfer pricing documentation within a particular time frame. However, taxpayers are strongly encouraged to maintain contemporaneous documentation showing compliance with the arm's-length principle.

Under Subdivision 815-B, any transfer pricing documentation should be contemporaneous, which means it needs to be completed when the tax return is lodged. A failure to meet this requirement results in an inability to have a RAP, which cannot be rectified at a later point in time.

## Australia (continued)

### Transfer pricing penalties

Three types of penalties could apply when the ATO adjusts transfer prices: (1) a penalty for a scheme shortfall, (2) a penalty for the failure to take reasonable care and (3) a penalty for a false and misleading statement made by the taxpayer. Each of these is explained in more detail below. All penalties can apply to the same transaction. Draft guidance on the assessment of transfer pricing penalties under the new rules is set out in PS LA 3672.

#### Penalties for scheme shortfalls

Where the Commissioner has determined that a taxpayer has received a scheme benefit, which includes all transfer pricing adjustments, a penalty can be applied. The level of penalty will vary depending on whether the sole dominant purpose of the arrangement is to obtain a transfer pricing benefit and whether the taxpayer can establish a RAP.

Under Division 13 or Subdivision 815-A, the taxpayer may have a RAP "if it would be concluded in the circumstances, having regard to relevant authorities, that what is argued for is about as likely to be correct as incorrect or is more likely to be correct than incorrect." As such, the mere existence of transfer pricing documentation does not guarantee that the taxpayer will be able to establish a RAP.

The same criteria apply in the context of Subdivision 815-B. However, transfer pricing documentation also needs to exist when the tax return is lodged, and it must meet the prescribed requirements in order to be able to have a RAP.

The penalty rates if no RAP can be established are typically 25% to 50% of the shortfall amount. The shortfall amount can broadly be defined as underpaid tax.

#### Penalties for failure to take reasonable care

Additional penalties apply where the Commissioner makes an adjustment that results in a tax shortfall and the taxpayer has failed to take reasonable care. The level of the penalty varies depending on whether the taxpayer has failed to take reasonable care (25% of the shortfall amount), has acted recklessly (50%) or has had intentional disregard of the relevant rules (75%).

#### Penalties for false and misleading statements

Where the Commissioner determines that a taxpayer has made a false or misleading statement, a penalty will apply. The level of the penalty varies depending on whether the taxpayer has failed to take reasonable care, has acted recklessly or has had intentional disregard for the relevant rules. The penalties range from 20 to 60 penalty units<sup>2</sup> per statement and apply regardless of whether a shortfall resulted.

#### Penalties in relation to sales made by an overseas entity directly to an Australian customer

A 100% penalty applies in situations where tax is underpaid as the result of applying the specific anti-avoidance provision for sales being made by an overseas entity to an Australian customer where an Australian affiliate of the selling entity is involved.

#### Public officer liability

As a part of the self-executing nature of the new transfer pricing legislation, the onus is also on the public officer to confirm that actual conditions are consistent with arm's-length conditions before signing the income tax return. If the conditions do not align and a transfer pricing benefit has been received, the business must adjust its taxable income, tax losses or other tax attributes.

As part of the income tax return process, the public officer of a company is required to declare that the information contained within the tax return is not false or misleading.

Where the ATO determines that a public officer has made a false or misleading statement on the income tax return, the public officer may be personally liable for penalties and could be subject to criminal prosecution. Further, the public officer can be theoretically held liable for the penalties imposed on the company for lack of reasonable care or not having a RAP; however, it would be unusual for the ATO to do so.

<sup>2</sup> Penalty units are used to define the amount payable for fines for many offenses in Australia. One penalty unit is currently AUD180.

## Australia (continued)

### Transfer pricing penalties (continued)

#### Shortfall interest charge (SIC)

For 2004-05 and later income years, a SIC applies to any amount of tax shortfall from the day on which income tax under the first assessment for that income year was due and payable to the day on which the Commissioner gave notice of an assessment. SIC applies regardless of whether the taxpayer is liable for any shortfall penalty.

#### Penalty relief

Where the taxpayer has contemporaneous documentation (i.e., prepared prior to, or at the time of, filing the company's annual tax return and International Dealings Schedule) to support a RAP, the penalty may be reduced. Penalties will be reduced by 20% for voluntary disclosure after notification of an audit, or by 80% for voluntary disclosure before notification of an audit.

A taxpayer with an APA will not incur penalties, except in relation to non-arm's-length dealings that are not covered by the APA, or for noncompliance with the terms and conditions of the APA.

#### Commissioner's discretion to remit penalties

Under PS LA 2008/18, the Commissioner may impose penalties for both a scheme shortfall and a false or misleading statement, but it has the discretion to remit the penalty in part or in total. The practice statement provides some very restrictive examples in which penalties are to be remitted. Given the specific nature of Subdivision 284-E, it would seem unlikely that the Commissioner would remit penalties in the future unless the prescribed documentation exists.

#### Statute of limitations on transfer pricing assessments

Under Subdivisions 815-B, C and D, amendments can be made within seven years following the date on which a notice of assessment is issued to the taxpayer.

Historically, there has been no statute of limitations with respect to transfer pricing adjustments. The tax legislation applicable for financial years starting before 1 July 2013 specifically empowers the Commissioner to make amendments to tax assessments in any year for transfer pricing adjustments under Division 13. As such, years starting before 1 July 2013 remain open to challenge indefinitely.

Adjustments can be made under Subdivision 815-A for any financial years starting between 1 July 2004 and 30 June 2013 (inclusive). Similar to Division 13, there is no limitation on when adjustments can be made.

In addition, some of Australia's double tax agreements, including those with New Zealand and Japan, specify time limits for adjustments.

#### Frequency of tax audit and transfer pricing scrutiny by the tax authority

In determining whether an Australian taxpayer's transfer pricing arrangement should be reviewed or audited, the ATO generally considers the size and nature of the related party dealings, the quality of any transfer pricing documentation, and whether the taxpayer's results appear to be commercially realistic. The ATO has developed a sophisticated risk engine that considers these factors, along with other financial and industry data, to determine which taxpayers to review. Related party transactions undertaken in connection with the following may receive particular attention by the ATO:

- ▶ Centralized business models with activity in low-tax jurisdictions, including principals, marketing hubs and procurement companies in low-tax jurisdictions
- ▶ Low levels of profitability, or losses
- ▶ Financing arrangements, including interest-free loans, interest-bearing loans and guarantee fees
- ▶ Companies undergoing supply chain restructurings
- ▶ Business restructuring (particularly where profitability is reduced, or valuable Intangible property is transferred)
- ▶ Transactions with recognized tax haven jurisdictions
- ▶ Royalties

## Australia (continued)

### Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

- ▶ Intangibles (both Australian and foreign-owned)
- ▶ Management services

The likelihood of an annual tax audit in Australia would be assessed as medium in general. However, if taxpayers exhibit the risk factors indicated above, the likelihood of a review or audit increases significantly. In addition, where the taxpayer enters into a material level or percentage of international related party transactions, the likelihood that transfer pricing would be reviewed as part of any general tax audit is very high.

More recently, the ATO has been also focusing on BEPS scenarios and has started to issue questionnaires to taxpayers. The risk of review for companies with these structures can be considered high.

### APA opportunity

On 23 July 2015, the ATO released their revised policies and procedures for the APA Program, PS LA 2015/4, which is administratively binding on the ATO. The practice statement reinforces the ATO's stated commitment to maintaining the APA Program as an effective part of Australia's transfer pricing regime.

The practice statement contains more detail on the ATO processes and includes references to a "whole of code" review of taxpayers before they are accepted into the APA. Such a whole of code review includes analysis of non-transfer-pricing-related tax issues, such as historical IP transfers, intercompany financing, permanent establishments and thin capitalization.

While maintaining the commitment to APAs in the "right circumstances," the ATO has pulled back from providing APAs for fact patterns that it regards as aggressive, including those with a BEPS element. It is also reluctant to consider APAs for fact patterns that it deems to be too simple. The landscape continues to evolve and taxpayers considering an APA would be well advised to check the latest state of play with their advisors before approaching the ATO.

# Austria

## **Taxing authority and tax law**

Taxing authority: Ministry of Finance (MF)

Tax law:

- ▶ Income Tax Act and Income Tax Guidelines
- ▶ Corporate Income Tax Act and Corporate Income Tax Guidelines
- ▶ Federal Tax Code (FTC)
- ▶ Double taxation treaties enacted by Austria

## **Relevant regulations and rulings**

- ▶ Transfer Pricing Guidelines (BMF-010221/2522-IV/4/2010, 28 October 2010)
- ▶ Section 6 (6), Income Tax Act
- ▶ Section 8, Corporate Income Tax Act
- ▶ Income Tax Guidelines 6.13.3, 2511-2513
- ▶ Corporate Income Tax Guidelines 14.8.2, 1147 Sections 115, 119, 124, 131 and 138, Federal Tax Code (FTC)
- ▶ Section 118, FTC regarding unilateral APAs
- ▶ Several opinions (public rulings called Express Answering Service) published by the MF regarding selected transfer pricing issues

## **OECD Guidelines treatment**

As an OECD member country, Austria recognizes the OECD Guidelines.

According to the Austrian Transfer Pricing Guidelines, the arm's-length principle contained in the income tax law has to be construed in line with the OECD Guidelines and any updates thereto.

In addition to the OECD Guidelines, the tax authorities also observe the OECD Report on the Attribution of Profits to Permanent Establishments (AOA), although the AOA is currently not fully applicable, as none of Austria's current double tax treaties include the new Article 7.

The Austrian Transfer Pricing Guidelines were released in the form of a ministerial decree. They are binding on the Austrian tax authorities but are not binding on Austrian courts or taxpayers.

## **Documentation requirements**

The Austrian Transfer Pricing Guidelines clearly state that taxpayers are obligated to prepare transfer pricing documentation based on the Federal Fiscal Code's general provisions concerning bookkeeping, recordkeeping and the disclosure requirement for tax purposes.

Regarding the content and scope, documentation must be in line with the documentation requirements according to the OECD Guidelines (in particular, according to Chapters V, VIII and IX). It is also permissible to prepare documentation that follows the Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the European Union. According to a published MF opinion, the country-specific transfer pricing documentation prepared in accordance with the EU Code of Conduct has to be prepared in the official Austrian constitutional language, which is German.

## Austria (continued)

### Priorities/pricing methods

Based on the OECD Guidelines and the Austrian Transfer Pricing Guidelines, the MF accepts the CUP, resale-minus, cost-plus, TNMM and profit split methods.

The MF follows the replacement of the hierarchy of transfer pricing methods, according to the 2010 update of Chapters I to III of the OECD Guidelines. Particularly, the TNMM and the profit split method are no longer considered methods of last resort. According to the Austrian Transfer Pricing Guidelines, the method that provides the highest degree of certainty for the determination of an arm's-length transfer price has to be selected.

### Return disclosures/related-party disclosures

No specific continuous disclosure is required in the annual tax return.

In case of a tax audit, the auditors usually ask for a description of major related-party transactions, as well as disclosure of all contracts in place with related parties and transfer pricing studies available. In an increasing number of cases, an extensive transfer pricing questionnaire is discussed.

### Transfer pricing-specific returns

No transfer pricing-specific returns have to be filed along with the annual tax returns.

### Documentation deadlines

According to a published opinion of the MF, transfer pricing documentation must be available when the tax returns are filed.

Therefore, documentation should be prepared contemporaneously and must be provided to the tax authorities upon request (which is usually during a tax audit).

Usually, the tax auditor will determine a submission deadline, which can vary greatly from case to case (e.g., from only one week to several weeks). Upon the tax auditor's consent, an extension of the deadline is possible. Given a clear statement contained in the Austrian Transfer Pricing Guidelines regarding the requirement to prepare transfer pricing documentation, short submission deadlines will likely become the norm.

### Transfer pricing penalties

There are currently no specific transfer pricing penalties in Austria.

If the taxable income is increased because the arm's-length criterion has not been met, nondeductible late-payment interest in the amount of 2 percentage points above the base rate (published by the European Central Bank) is levied on the corporate income tax payments for any additional prior year for up to 48 months.

Nonexistent or insufficient transfer pricing documentation does not lead to specific penalties. However, a lack of documentation increases the risk that the tax authorities will regard a transaction as noncompliant with the arm's-length criterion, which also increases the risk of a transfer pricing adjustment (any adjustments will be calculated by estimation).

### Penalty relief

There are no relief provisions available.

If the taxpayer provides insufficient documentation, the tax authorities nonetheless are obliged to base their consideration upon such documentation.

Late-payment interest will become due on any corporate income tax payments for an additional prior year, regardless of whether the documentation is sufficient.

### Statute of limitations on transfer pricing assessments

The statute of limitations on a transfer pricing adjustment is usually six years after the end of the calendar year in which the relevant fiscal year ends. The term may be extended up to 10 years.

## Austria (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

Tax authorities regularly examine related party transactions and transfer prices charged. There is a clear trend toward increased awareness of transfer pricing problems among tax auditors.

In general, the likelihood of an annual tax audit (i.e., every fiscal year being examined) is high, and transfer pricing is highly likely to be reviewed as part of that audit. The likelihood that the transfer pricing methodology will be challenged can be characterized as medium to high, depending on the specific circumstances of the case.

### **APA opportunity**

Based on Section 118 FTC, it is possible to apply for a unilateral, binding, appealable advance ruling issued by the competent tax office on the tax treatment of a particular (but yet-to-occur) transfer pricing issue. The fee for such a unilateral APA is up to EUR20,000.

Under specific circumstances, it is possible to ask the Austrian tax authorities to participate in negotiations of a bilateral or multilateral APA on the basis of Article 25 (3) of the respective double tax treaty.

# Azerbaijan

## **Taxing authority and tax law**

Taxing authority: Ministry of Taxes of the Republic of Azerbaijan

Tax law:

- ▶ Statutory tax regime applicable to oil and gas
- ▶ Companies and mining companies operating under production-sharing agreements (PSAs)
- ▶ Tax regime for companies working under the host government

## **Relevant regulations and rulings**

Currently, there are no local transfer pricing regulations in Azerbaijan.

## **OECD Guidelines treatment**

Not applicable.

## **Documentation requirements**

Not applicable.

## **Priorities/pricing methods**

Not applicable.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

Not applicable.

## **Penalty relief**

Not applicable.

## **Statute of limitations on transfer pricing assessments**

Not applicable.

## **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

Not applicable.

## **APA opportunity**

Not applicable.

# Bahrain

## **Taxing authority and tax law**

Taxing authority: Ministry of Finance

Tax law: The Income Tax Law<sup>1</sup> (ITL), ratified by the Amiri Decree No. 22/1979

## **Relevant regulations and rulings**

Currently, there are no transfer pricing regulations and rulings in Bahrain. However, Bahrain has entered into double taxation treaties (DTTs) with approximately 43 countries that contain an article that resembles the OECD's Article 9 Model Treaty on "Associated Enterprises."

Bahrain has DTTs in force with Algeria, Austria, Barbados, Belarus, Belgium, Bermuda, Brunei, Bulgaria, China, Czech Republic, Egypt, Estonia, France, Georgia, Iran, Ireland, Isle of Man, Jordan, Korea, Lebanon, Luxembourg, Malaysia, Malta, Mexico, Morocco, Netherlands, Pakistan, Philippines, Seychelles, Singapore, Sri Lanka, Syria, Thailand, Turkey, Turkmenistan, the United Kingdom, Uzbekistan and Yemen.

Bahrain has also entered into DTTs with Cyprus, Hungary, Sudan, Tajikistan and Portugal, which are not yet in force.

## **OECD Guidelines treatment**

Not applicable.

## **Documentation requirements**

Not applicable.

## **Priorities/pricing methods**

Not applicable.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

Not applicable.

## **Penalty relief**

Not applicable.

## **Statute of limitations on transfer pricing assessments**

Not applicable.

<sup>1</sup> The application of Bahrain's ITL is limited to the companies engaged in the exploration, production or refining of oil and other natural hydrocarbons in Bahrain.

## Bahrain (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

Not applicable.

### **APA opportunity**

Not applicable.

# Bangladesh

## **Taxing authority and tax law**

Taxing authorities: National Board of Revenue (NBR)

Tax laws:

- ▶ Income Tax Ordinance, 1984
- ▶ Income Tax Rules, 1984

## **Relevant regulations and rulings**

- ▶ Sections 107A to 107J of the Income Tax Ordinance, 1984
- ▶ Rules 70 to 75A of Income Tax Rules, 1984
- ▶ The transfer pricing regulations in Bangladesh became effective from 1 July 2014 by the Finance Act 2014. These regulations were originally introduced in the Finance Act 2012.

The pricing of any income or expense arising from international transactions between associated enterprises will need to be determined with regard to the arm's-length principle using methods prescribed under Bangladesh transfer pricing legislation. Associated enterprises are enterprises for which more than 25% voting power is held by the other or a common parent holds more than 25% of voting power in both such enterprises. Transfer pricing provisions are applicable to the following types of transactions between associated enterprises, with at least one of them being a nonresident:

- ▶ Purchase, sale or lease of tangible or intangible property
- ▶ Provision of services
- ▶ Lending or borrowing money
- ▶ A mutual agreement or arrangement for cost allocation/apportionment
- ▶ Any other transaction having a bearing on the profits, income, losses, assets, financial position or economic value of such enterprises

Transactions with a third party will be deemed transactions between associated enterprises if the third party has a prior agreement with the associated enterprise, or if the terms of the relevant transaction are determined in substance between the third party and the associated enterprise. "Enterprise" means a person or a venture of any nature and also includes a permanent establishment of such person or venture.

## **OECD Guidelines treatment**

Bangladesh legislation is broadly based on the OECD Guidelines.

Five of the six methods prescribed in the legislation to compute arm's-length prices are in conformity with the OECD Guidelines.

## **Documentation requirements**

### **A. TP documentation**

A detailed list of mandatory documents is listed in Rule 73. The categories of documentation required are:

- ▶ Profile of the multinational group, including the consolidated financial statements of the group
- ▶ Profile of each member of the group, including business relationships between each member
- ▶ Profile of each associated enterprise, including tax registration numbers and financial statements of any associated enterprise operating in Bangladesh
- ▶ Business description
- ▶ The nature and terms (including prices) of international transactions

## Bangladesh (continued)

### Documentation requirements (continued)

- ▶ Description of functions performed, risks assumed and assets employed
- ▶ Record of any financial estimates
- ▶ Record of comparability evaluation
- ▶ Description of methods considered
- ▶ Reasons for selection of method
- ▶ Details of transfer pricing adjustments
- ▶ Any other information or data relating to the associated enterprise that may be relevant for determination of the arm's-length price

The above documentation requirements shall not be applicable in the case of a taxpayer where the aggregate value of international transactions entered into during a financial year, as recorded in the books of accounts, does not exceed BDT30 million.

### B. Statement of International Transactions

Under Section 107EE of the Finance Act, every person who has entered into an international transaction shall file a Statement of International Transaction along with the tax return. The format is prescribed in Rule 75A of the IT rules duly signed by the taxpayer. Further, there is no threshold for filing.

### C. Accountant's Report

Under Section 107F of the Finance Act, the Deputy Commission (DC) may, by notice in writing, require a taxpayer who has entered into an international transactions, the aggregate value of which exceeds BDT30 million, to furnish the report certified by a chartered accountant or cost accountant within the time and format as prescribed.

### Priorities/pricing methods

Bangladesh legislation prescribes the following methods: CUP, resale price method, cost-plus, profit split, TNMM and any other method.

Where it can be demonstrated that none of the first five methods can be reasonably applied to determine the arm's-length price for an international transaction, Section 107C allows the use of any other method that can yield a result consistent with the arm's-length price.

To determine a comparable uncontrolled transaction, Rule 71(3) provides that data pertaining only to the relevant financial year should be used. However, the rule permits the use of data before the relevant financial year if it can be substantiated that such data bears facts that could influence the analysis of comparability.

### Return disclosures/related party disclosures

No specified disclosures, other than the ones prescribed above, are required to be filed with the income tax return.

### Transfer pricing-specific returns

Under Section 107F, an accountant's report certifying that the documents and information maintained by a taxpayer are in line with the transfer pricing regulations of Bangladesh is required to be provided by taxpayers entering into a transaction in which the aggregate value of the books of accounts exceeds BDT30 million.

### Documentation deadlines

#### A. TP documentation

There is no statutory deadline to submit the TP documentation. However, it needs to be prepared and maintained by every taxpayer on a contemporaneous basis. During a TP audit, the tax officer can request that the documentation be submitted.

#### B. Statement of International Transactions

This statement needs to be filed by every taxpayer, along with the tax return. Hence, the due date for filing the tax return is also the due date for filing the statement.

## Bangladesh (continued)

### Documentation deadlines (continued)

#### C. Accountant's report

The accountant report needs to be filed within the time specified in the notice issued by the DC.

### Transfer pricing penalties

- ▶ For failure to keep, maintain or furnish any information or documents as required by Section 107E, the taxpayer is imposed a penalty not exceeding 1% of the value of the international transaction.
- ▶ For a failure to comply with the notice or requisition under Section 107D of the ordinance by the Deputy Commissioner of Taxes, the taxpayer faces a penalty not exceeding 1% of the value of the international transaction.
- ▶ For a failure to file a Statement of International Transaction, there is a penalty of 2% of the value of the international transaction under Section 107H of the Finance Act.
- ▶ For not furnishing an accountant's certificate, the taxpayer is fined an amount not exceeding BDT300,000.

### Penalty relief

No penalty relief regulation has been provided to date.

### Statute of limitations on transfer pricing assessments

Where a transfer pricing assessment has been initiated, no order of assessment shall be made after three years have passed from the end of the assessment year in which the income was first assessable.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

Since the transfer pricing provisions have been made effective from 1 July 2014, the likelihood of scrutiny may be low in the initial years as there is no precedent to substantiate the nature of risks.

### APA opportunity

Bangladesh does not have a formal APA program.

# Belgium

## Taxing authority and tax law

Taxing authority: Belgian Administration of Direct Taxes, which is part of the Federal Public Service Finance

Tax law: Belgian Income Tax Code (ITC)

## Relevant regulations and rulings

No specific transfer pricing legislation exists in Belgium. The arm's-length principle was formally embedded into the Belgian ITC on 21 June 2004, through the introduction Article 185, §2 of the Belgian ITC (entered into force on 19 July 2004). This article's wording is similar to that of Article 9, §1 and §2 of the OECD Model Tax Convention. In addition, the ITC contains other provisions that directly or indirectly relate to transfer pricing, in Articles 26; 49; 54; 55; 79; 198, 10°; 207; 307, §1, s. 3; 344; and 345 of the Belgian ITC. These articles address items such as dealing with abnormal and gratuitous benefits (indirectly embodying the arm's-length principle), tax deductibility of expenses, nondeductibility of non-reported or insufficiently supported payments to tax havens, and avoiding profit shifting. The law of 23 December 2009 introduced a related tax deduction denial for payments to tax havens that are not reported or that are lacking underlying bona fide business purposes (Article ITC).

The general provisions of the Belgian ITC – for instance, those regarding penalties and late interest payments – also apply to transfer pricing matters.

The Royal Decree of 10 August 2009 requires Belgian companies to provide certain additional information regarding transfer pricing in the notes or annex section of their statutory annual accounts.

Furthermore, Belgium has implemented a regime that provides, for tax purposes, a deduction on risk capital (i.e., qualifying equity), also known as a "notional interest deduction," as well as a special tax deduction equal to 80% of the gross income derived from the use of patents. As a result of this deduction, income that is patent related is subject to an effective tax rate of 6.8% or less.

The tax administration has also issued various guidelines directly dealing with transfer pricing:

- ▶ Administrative guidelines about the offensive aspects of transfer pricing, issued in 1999
- ▶ Administrative guidelines about the defensive aspects of transfer pricing, issued in 2000 and 2003
- ▶ Administrative guidelines providing the tax authority's view of the interpretation of Article 185, §2 ITC, introducing the arm's-length principle into the Belgian tax law, issued in July 2006
- ▶ Administrative guidelines regarding the formal creation of a transfer pricing audit team within the tax authority, issued in July 2006
- ▶ Administrative guidelines about transfer pricing documentation, the transfer pricing code of conduct and transfer pricing audits, issued in November 2006

## OECD Guidelines treatment

In its administrative guidelines, the tax authority indicates that taxpayers generally should follow the guidance mentioned in the OECD Guidelines to implement the arm's-length principle (as embedded in Article 185, §2). Although the tax authorities have not directly communicated whether the 2010 version of the OECD Guidelines is acceptable, they have generally accepted it in practice. While Belgium considers its transfer pricing laws and regulations to be wholly consistent with OECD Guidelines through historical practice, coupled with case law, as many other countries do, the Belgian interpretation of certain transfer pricing elements may differ from other countries' interpretation.

## Documentation requirements

No legislative guidance regarding the nature and content of proper transfer pricing documentation exists in Belgium. However, the 1999 administrative guidelines state that documentation should demonstrate that the taxpayer's pricing complies with the arm's-length principle to avoid an in-depth transfer pricing audit. The 1999 guidelines recommend that documentation include, at a minimum:

## Belgium (continued)

### Documentation requirements (continued)

- ▶ Activities of the group, including competitive position, level of market, economic circumstances and business strategies
- ▶ Identification and characterization of intercompany transactions and contractual relationships among affiliates
- ▶ Functional analysis, including an overview of the functions, risks and intangibles
- ▶ Economic analysis sections regarding the transfer pricing methods used

In addition, the 2006 administrative guidelines on transfer pricing confirm Belgium's agreement with the principles outlined in the European Union Code of Conduct. Therefore, the information expectation contained in this Code of Conduct should also be considered from a Belgian transfer pricing documentation perspective. To encourage companies to maintain transfer pricing documentation, these administrative guidelines refer to the concept of a "prudent business manager."

### Priorities/pricing methods

In principle, taxpayers are free to choose any OECD transfer pricing method as long as it results in arm's-length pricing for the transaction. But conceptually, transaction-based methods are often preferred over profit-based methods.

Formally, taxpayers are not required to use more than one method or demonstrate that multiple methods were considered, but such documented reviews strongly support their position to apply a particular method upon an audit.

Also, with respect to business restructurings, the Belgian tax authorities generally expect a taxpayer to follow the guidance of Chapter 9 of the OECD Guidelines.

### Return disclosures/related party disclosures

No specific tax disclosure requirements exist for filing the tax return. However, in Belgium, the accounting rules introduced through the Royal Decree of 10 August 2009 require that companies provide certain additional information that relates to transfer pricing in the notes or annex section of their statutory annual accounts, as follows:

- ▶ Companies must provide information regarding the nature and business purpose of their relevant, off-balance-sheet arrangements; if underlying risks and benefits are considered material; and when the disclosure is necessary to correctly assess the financial position of the company. This requirement is applicable in cases of intragroup guarantees, pledges, factoring liabilities, transactions with special-purpose entities (whether transparent or not) and offshore entities.
- ▶ Companies must disclose their material transactions with affiliated parties that are considered not to be at arm's length. Depending on the type of company, a different scope of information is to be provided, ranging from merely listing such transactions to mentioning the amounts involved, alongside all other information necessary for a correct view of the company's financial position.

While this rule is not included in the Belgian Tax Code, it creates a requirement for the relevant entities to review and document the arm's-length nature of their intercompany transactions. Noncompliance may result in director liability. In addition, any such disclosures are an excellent source of information for a tax inspector to initiate a (targeted) transfer pricing audit.

In addition, the reporting requirement introduced through Article 307, §1, s. 3 relates to payments of more than EUR100,000 per taxable period made by resident or nonresident entities (Belgian permanent establishments) to persons established in tax havens on or after 1 January 2010, whereby tax havens are defined with reference to a "blacklist" determined through a Royal Decree (it currently contains around 30 jurisdictions that either do not levy corporate income tax or have a nominal corporate income tax rate that is lower than 10%). A mandatory form (No. 275 F) for reporting direct or indirect payments to persons established in tax havens is to be attached to the tax return. Failure to report payments results in nondeductibility of such payments. In addition, these tax deductions are acceptable only when proof is presented by the Belgian taxpayer that these payments relate to actual and bona fide transactions at arm's length with persons other than artificial constructions.

### Transfer pricing-specific returns

There are no specific transfer pricing returns in Belgium.

## Belgium (continued)

### Documentation deadlines

Given the absence of any formal transfer pricing documentation requirements, there is no statutory deadline for the preparation of transfer pricing documentation. However, upon a tax audit, a taxpayer has, in principle, only one month to provide all information requested (including all information that allows its taxable income to be verified and, thus, the arm's-length nature of the transfer prices). It is therefore recommended that each transaction be documented as executed. For valid reasons, the one-month period can be extended.

Additionally, the 1999 guidelines provide that if the taxpayer can demonstrate upon a tax audit that it has made sufficient efforts to prepare transfer pricing documentation, the tax inspector does not necessarily need to carry out an in-depth tax audit.

### Transfer pricing penalties

The general tax penalty framework applies to transfer pricing adjustments. These penalties vary from 10% to 200% (in exceptional cases) of additional tax. The rate depends on the degree of intent to avoid tax or the degree of the company's gross negligence.

Furthermore, for late payments, interest is due on additional tax assessments (including assessments resulting from a transfer pricing adjustment).

### Penalty relief

Although the burden of proof of non-arm's-length pricing lies with the tax authority, the taxpayer needs to provide its transfer pricing information so the tax authority can verify the company's tax position.

Therefore, since additional tax assessments largely depend on the degree of intent to avoid taxes or on the company's gross negligence, penalties are often reduced or eliminated if the taxpayer can demonstrate its intent to establish transfer prices in accordance with the arm's-length principle (e.g., through sufficient documentation and compliance efforts).

### Statute of limitations on transfer pricing assessments

The general rules regarding the statute of limitations apply to transfer pricing assessments. Therefore, the tax authority is entitled to make additional assessments for a period of three years, starting from the closing of the accounting year.

However, in the case of fraud being considered, the tax authority has the right to adjust the income during a seven-year period, provided that the taxpayer received prior notice of serious indications of fraud. In case of tax losses, the statutes of limitations do not run until these tax losses are effectively used to offset taxable income. Some other exceptional statutes of limitations also exist for specific situations.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

In Belgium, the likelihood of a tax audit may be regarded as medium to high.

Interest in transfer pricing has increased since the first circular letter on transfer pricing was issued in 1999. After the arm's-length principle was introduced in legislation in 2004, and a special transfer pricing audit team was organized in 2006, the focus on transfer pricing increased significantly. To drive a consistent and experienced approach, local tax audit teams are expected to inform the transfer pricing audit team about every transfer pricing investigation they perform.

The transfer pricing audit team has expanded significantly since its creation (now having some 25 specialized inspectors), and it is using data-mining techniques to select taxpayers for in-depth transfer pricing audits. As such, they initiate hundreds of detailed transfer pricing audits each year. While the initial step of the audit process is a standardized questionnaire, a very detailed and case-specific review typically is performed in later stages.

The 2006 administrative guidelines contain a list of events that are likely to trigger transfer pricing scrutiny during an audit, which, in practice, is observed to be the case with:

- ▶ Structural losses
- ▶ Business reorganizations
- ▶ Migration of businesses
- ▶ The use of tax havens or low-tax-rate countries

## Belgium (continued)

### Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

- ▶ Back-to-back operations
- ▶ Circular structures
- ▶ Invoices for services sent at the end of the year (i.e., management services)

In particular, business restructurings attract specific attention, as well as financial transactions, for example.

The transfer pricing audit team is also expected to be informed of local tax audit teams' transfer pricing investigations to make certain they are following a consistent and experienced approach. Occasionally, the transfer pricing audit team also participates in cross-border transfer pricing audits (e.g., with respect to business restructurings), which are held jointly with the tax authorities of (mostly) neighboring countries.

In addition to this special team's increased audit activity, tax field inspectors are also increasing their focus on transfer pricing during general tax audits. This is the case regardless of whether dedicated transfer pricing inspectors support the tax inspectors.

Accordingly, the likelihood that transfer pricing will be reviewed as part of an audit is considered medium to high. The likelihood that, if transfer pricing is reviewed as part of the audit, some part of the transfer pricing applied will be challenged is also considered medium. However, for certain types of transactions, this risk is significantly higher.

### APA opportunity

The 2003 corporate tax reform introduced a general (unilateral) ruling practice (also covering APAs) under the Belgian tax law. Additional guidance in this respect is provided through various Royal Decrees.

The Service for Advance Decisions became an autonomous department as of 1 January 2005 as a result of the law of 21 June 2004. More than 100 specialists in various domains of taxation, including transfer pricing, assist the committee. This service has made the ruling process more flexible and shortened the decision period, which is usually two to six months from the filing date in the case of unilateral APAs. This committee is also able to rule prospectively on corresponding downward profit adjustments under Article 185, §2, thus offering significant transfer pricing planning opportunities. While APAs are provided on an individual and fact-specific basis, they are published anonymously, allowing for an understanding of the latest positions of the Service for Advance Decisions.

In addition, Belgium taxpayers may request bilateral or multilateral APAs. The central tax authorities handle this process through the Service for Internal Affairs, supported by the Service for Advance Decisions.

# Bolivia

## Taxing authority and tax law

Taxing authority: *Servicio de Impuestos Nacionales*

Tax law: Bolivian Tax Code and double taxation treaties

## Relevant regulations and rulings

The transfer pricing regime has been enforced from fiscal year 2015 as per:

- ▶ Act No. 516 and 549
- ▶ Supreme Decree No. 2227
- ▶ Normative Resolution No. 10-0008-15

## OECD Guidelines treatment

OECD rules are not expressly accepted, but the current transfer pricing regime is based on the OECD Guidelines.

## Documentation requirements

Transfer pricing documentation is required by law, so taxpayers must fulfill a transfer pricing report within the Corporate Income Tax (CIT) due dates.

Based on Act No. 843 and Supreme Decree No. 2227, the required documents are:

- ▶ An overview of the taxpayer and a complete detail of related parties
- ▶ A description of transactions with related parties
- ▶ A description of pricing procedures between related parties
- ▶ An overview of the taxpayer from commercial and industrial points of view

## Priorities/pricing methods

The best method must be used (CUP, resale price, cost-plus or TNMM). For commodities, the price in transparent markets must be used.

## Return disclosures/related party disclosures

Not defined; Normative Resolution No. 10-0008-15 of April 2015 does not describe it.

## Transfer pricing-specific returns

Form 601.

## Documentation deadlines

Depending on the tax year-end and the line of business, the due date is 120 days after the following dates:

Line of business	Tax year-end
Industry (including oil and gas)	31 March
Agriculture and agribusiness	30 June
Mining	30 September
All other businesses	31 December

## Bolivia (continued)

### Transfer pricing penalties

US\$1.472 for not filing transfer pricing information or tax returns and US\$736 for uncompleted filing.

### Penalty relief

No defined procedures.

### Statute of limitations on transfer pricing assessments

A general statute of limitations applies in Bolivia. Until August 2012, the statute of limitations was four years, calculated from 1 January of the next year the tax payment was due. In September 2012, Act No. 291 (modification of Article 59 of the Bolivian Tributary Code) was issued, modifying the statute-of-limitations rules. The largely accepted position is that this new law is applied prospectively – that is, tax authorities may carry out tax audits and verify and supervise the fulfillment of formal and material tributary obligations with the following ranges of years:

- ▶ 4 years in 2012
- ▶ 5 years in 2013
- ▶ 6 years in 2014
- ▶ 7 years in 2015
- ▶ 8 years in 2016
- ▶ 9 years in 2017
- ▶ 10 years in 2018

Furthermore, transfer pricing audits can be performed within two years.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

There is no experience on this as the transfer pricing regime is being enforced from fiscal year 2015.

### APA opportunity

This is not defined in the current law.

# Botswana

## **Taxing authority and tax law**

Taxing authority: Botswana Unified Revenue Service

Tax law: Income Tax Act

## **Relevant regulations and rulings**

Currently, Botswana does not have local transfer pricing regulations but does have double tax treaties with Barbados, France, India, Mauritius, Mozambique, Namibia, Russia, Seychelles, South Africa, Sweden, the United Kingdom and Zimbabwe.

## **OECD Guidelines treatment**

Not applicable.

## **Documentation requirements**

Not applicable.

## **Priorities/pricing methods**

Not applicable.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

Not applicable.

## **Penalty relief**

Not applicable.

## **Statute of limitations on transfer pricing assessments**

Not applicable.

## **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

Not applicable.

## **APA opportunity**

Not applicable.

# Brazil

## Taxing authority and tax law

Taxing authority: Department of Federal Revenue of Brazil (*Receita Federal*)

Tax law: Internal Revenue Code by Decreto 3.000, 26 March 1999 (RIR99)

## Relevant regulations and rulings

- ▶ Law No. 9.430, enacted 27 December 1996, introduced transfer pricing rules in Brazil by providing three methods for imports and exports of assets, goods and services.
  - ▶ Imports:
    - ▶ Comparable independent price method (PIC), defined as the weighted-average sales price for similar products or services for unrelated parties or between unrelated parties
    - ▶ Resale price minus gross profit method (PRL), defined as the weighted-average sales price minus certain adjustments, less a statutory gross profit margin
    - ▶ Production cost-plus profit method (CPL), defined as the weighted-average actual costs incurred during the year to produce the same or similar products or services, plus taxes and a gross profit markup of up to 20%
  - ▶ Exports:
    - ▶ Export sales price method (PVEx), defined as the weighted-average sales price for other customers or between unrelated parties during the same year
    - ▶ Resale price method, defined as the weighted-average sales prices in the country of destination under similar payment terms, minus taxes imposed by that country and a gross profit margin of 15% (PVA) for wholesale or 30% (PVV) for retail
    - ▶ Purchase or production cost method (CAP), defined as the weighted-average cost of acquisition or production increased by taxes and duties imposed by Brazil, plus a gross profit markup of at least 15% on the sum thereof
- ▶ Normative Instruction 243/02 provided the most relevant interpretations and was valid until Normative Instruction 1.312/12 was issued in 2012, with further amendments by Normative Instructions 1.321/13, 1.322/13, 1.395/13, 1.431/13 and 1.498/14.
- ▶ Federal Law 12.715, published on 17 September 2012, introduced significant changes to the Brazilian transfer pricing rules. Among the changes, the amendments included:
  - ▶ Imports:
    - ▶ Introduction of a minimum requirement of 5% for applying the Brazilian PIC with internal comparables on imports
    - ▶ New minimum statutory gross profit margin of 20%, 30% or 40%, which is required when applying the PRL method for the import of goods, services or rights, depending on the company's industry sector
      - ▶ 40% profit margin industry sector:
        - ▶ Pharma chemicals and pharmaceutical products
        - ▶ Smoke products
        - ▶ Optical, photographic and cinematographic equipment and instruments
        - ▶ Machines, apparatuses and equipment for dental, medical and hospital use
        - ▶ Extraction of oil and natural gas and derivative products

## Brazil (continued)

### Relevant regulations and rulings (continued)

- ▶ 30% profit margin industry sector:
  - ▶ Chemical products
  - ▶ Glass and glass products
  - ▶ Pulp, paper and paper products
  - ▶ Metallurgy
- ▶ 20% profit margin industry sector:
  - ▶ Other industry sectors
- ▶ Free on board (FOB) price as basis for PRL calculation
- ▶ Transfer pricing methods for commodities:
  - ▶ Intercompany imports and exports of commodities will have to be tested using PCI (quotation on imports) and PECEX (quotation on exports), respectively. Additionally, the law authorizes the Brazilian tax authorities to determine what will be considered as commodities and which commodity exchange should be recognized for applying the newly introduced methods.
  - ▶ Safe-harbor rules no longer apply for importing and exporting commodities.
- ▶ Procedural changes:
  - ▶ The previously selected transfer pricing methodology can't be changed once the tax inspection has been initiated, unless the tax authorities disqualify the method.
- ▶ In December 2012, Law 12.766 introduced further changes to the Brazilian transfer pricing rules for interest paid to related parties.
  - ▶ When calculating the maximum amount of deductible expenses and minimal revenue arising from interest subject to transfer pricing regulations, taxpayers should observe the following:
    - ▶ In case of transactions in US dollars (US\$) at a fixed rate, the parameter rate is the market rate of the sovereign bonds issued by the Government on the external market, indexed in US\$.
    - ▶ In case of transactions in Brazilian real (BRL) at a fixed rate, the parameter rate is the market rate of the sovereign bonds issued by the Government on the external market, indexed in BRL.
    - ▶ In case of transactions concluded abroad in BRL at a floating rate, the Ministry of Finance will determine the parameter rate, and for all other cases the parameter rate is LIBOR.
- ▶ Normative Instruction (IN) 1.312/12 was also published in December 2012, and it consolidates Brazil's transfer pricing legislation and revokes all previous Normative Instructions related to transfer pricing (including IN 243/02). Moreover, IN 1.312/12 provides guidance on the application of the new Law 12.715/12 and how to exercise the power to determine certain rules, where the law provides the authority.
- ▶ On 18 January 2013, the Brazilian tax authorities issued IN 1.321/13 and IN 1.322/13, which provided further guidance on two issues related to the recently enacted changes to the Brazilian transfer pricing rules.
  - ▶ Safe-harbor provisions:
    - ▶ IN 1.322/13 clarified that for calendar year 2012, the former safe-harbor rules, as described by IN 243/02, should be applied. IN 243/02 established the profitability safe harbor, in which the Brazilian taxpayer must earn a net profit before income taxes of 5% on export revenues to related parties. IN 1.321/13 also allows the option of applying either a three-year analysis (current year and two previous years) or a one-year analysis using the relevant year under consideration.
    - ▶ Therefore, the changes to the safe harbor introduced by IN 1.312/12 are effective starting January 2013.

## Brazil (continued)

### Relevant regulations and rulings (continued)

- ▶ Interest-bearing intercompany agreements:
  - ▶ Intercompany agreements entered into before 31 December 2012 will follow the previous rules (Law 9,430/96), whereby the interest paid or received by Brazilian taxpayers with registration with the Brazilian Central Bank is not subject to transfer pricing rules. If the agreement is not registered, then taxpayers will be subject to the limitation of LIBOR for deposits in US\$ for six months plus 3%.
  - ▶ Intercompany agreements entered into as of 1 January 2013 or after will be subject to the new Law 12.766/12, which differentiates interest rates depending on the underlying currency of each agreement and also allows for a variable spread to be issued by the Brazilian Ministry of Finance. Please note that the renewal or renegotiation of existing agreements should be considered as a new transaction that is therefore subject to the new regulations.
  - ▶ Brazilian taxpayers that opt to apply the new transfer pricing rules of the Law 12.715/12 – e.g., reduced profit margins on the application of the Brazilian “resale-minus method” (PRL method) – should then, in the opinion of the Brazilian tax authorities, be subject to the limitation of six-month US\$ LIBOR plus a spread of 3%, regardless of the registration with the Brazilian Central Bank. This interpretation is not included in the law and is therefore subject to different interpretations.
- ▶ On 2 August 2013, the Brazilian Ministry of Finance issued Ordinance 427/2013, which provided the interest rate spread that was mentioned but not specified in Law 12.766/2012. Now the annual spread depends on the Brazilian taxpayer's position on the loan, as follows:
  - ▶ Brazilian entity as the borrower - Starting on 1 January 2013, the spread should be no more than 3.5%.
  - ▶ Brazilian entity as the lender - From 1 January 2013 to 1 August 2013, no interest rate spread is required on the transaction. Starting on 2 August 2013, the spread is required to be no less than 2.5%.
  - ▶ As specified in IN 1.322/13, intercompany agreements entered into as of 1 January 2013 or after will be subject to the new Law 12.766/12, whereas agreements previously entered into and registered with the Brazilian Central Bank will be grandfathered by the previous rules and will not be subject to the new requirements. Please note that the renewal or renegotiation of existing agreements should be considered as a new transaction and therefore be subject to the new regulations.
- ▶ IN 1.395/2013 provided further guidance regarding the application of the PCI and PECEX methods, as follows:
  - ▶ Defined that commodities subject to the application of the PCI and PECEX methods are products listed in Appendix I and products traded in the commodities and futures exchanges are listed in Appendix II.
  - ▶ Established the possibility of adjustments in relation to variations of quality, features and content of the substance of the product sold.
  - ▶ Established that in the absence of a quotation on the transaction date, the quotation to be used is the latest one available. In addition, in case it is not possible to identify the transaction date, the date to be used is that of the import documentation or the product ship date for export purposes.
  - ▶ Finally, the IN (SRF) established that, in the absence of a quotation for the goods in the commodities and futures exchanges (Appendix II), the prices of the imported and exported goods should be compared with those provided by the internationally recognized research institutions (Appendix III).
- ▶ IN 1.498/2014 brought back some commodities (copper, iron, tin, manganese) to Appendix I that had been removed by IN 1.395/2013 and added new commodities (lead, nickel, zinc, cobalt) to the list.
- ▶ In October 2013, the General Coordination of Taxation (COSIT) issued an administrative ruling (binding only for the taxpayer requesting the ruling)<sup>1</sup> advising taxpayers and tax auditors on the Corporate Income Tax (CIT) and PIS/COFINS rules applicable to shared services costs and expense apportionment.

<sup>1</sup> COSIT Conflict Resolution No. 23/2013 of 14 October 2013.

## Brazil (continued)

### Relevant regulations and rulings (continued)

- ▶ Deductibility guidelines on shared services costs and expenses.
- ▶ The COSIT Ruling<sup>2</sup> standardizes the Brazilian tax authorities' interpretation of CIT and PIS/COFINS rules applicable for shared services reimbursement.
- ▶ The ruling increases taxpayers' comfort level to execute cost-sharing agreements, clarifying that it is possible to concentrate, in a sole entity, on expenditures control related to core support services (e.g., human resources, accounting, legal).
- ▶ The ruling explains that the expenditures may later be apportioned to the group of entities that benefit from the services. It also clarifies that the deduction of said expenditures for CIT purposes is possible as long as the expenditures are:
  - ▶ Considered necessary, normal and usual for the group entities' business
  - ▶ Paid and properly supported by any available documentation
  - ▶ Calculated based on reasonable and rational apportionment criteria, previously set forth in a formalized instrument signed by the parties
  - ▶ Related to the actual expenditures incurred by each company, consistent with the global price paid by the goods or services acquired by the shared services center
- ▶ It should be mentioned that all companies should keep proper bookkeeping of all the acts directly related to the expenditures' apportionment.
- ▶ Additionally, the Brazilian tax authorities now recognize that reimbursements paid in accordance with the above provisions should not be considered as taxable revenues for PIS/COFINS purposes at the shared service center level, provided that no markup is included in the portion paid by each company.

### OECD Guidelines treatment

Brazil's transfer pricing rules deviate significantly from international standards, including the OECD Guidelines, as there are no profit-based methods and the concept of a functional and risk analysis is not included.

Intercompany transactions need to be documented on a strict transactional basis, and fixed statutory profit margins apply. The local entity will have to document its compliance with at least one of Brazil's statutory transactional methodologies (PIC, resale-minus or cost-plus) for each imported (or exported) product, service or right.

### Documentation requirements

Brazilian taxpayers are required to document their international intercompany transactions annually.

The corporate income tax return (DIPJ), replaced by an electronic income tax return (ECF) beginning in 2014, contains five specific forms that require taxpayers to disclose detailed information regarding their main intercompany import and export transactions.

As part of these contemporaneous documentation requirements, taxpayers need to disclose the total transaction values of the most traded products, services or rights; the names and locations of the related trading partners; the methodology used to test each transaction; the calculated benchmark price; the average annual transfer price; and the amount of any resulting adjustment.

Given the detailed transactional focus of the Brazilian regulations and the absence of any basket approach, taxpayers are required to document their transfer prices by each product, service and right. For products, the taxpayer should document each product using the company's internal product codes used for inventory management purposes and not the much broader fiscal nomenclature used for customs and indirect tax purposes.

Taxpayers are expected to have the calculations and documentation necessary to support the information filed as part of the annual tax declaration, and it should be ready for the tax authority to potentially inspect when the declaration is filed (i.e., usually the end of June of the following calendar year).

<sup>2</sup> COSIT Conflict Resolution n. 23/2013 of 14 October 2013.

## Brazil (continued)

### Priorities/pricing methods

As a first step in the transfer pricing documentation process, Brazilian companies importing from abroad usually apply the Brazilian PRL method (*Método do Preço de Revenda menos Lucro*) to document a company's transfer prices.

The PRL method is the starting point for most importers, mainly because the method relies entirely on import cost, local production cost and resale price information available in Brazil, relieving the company of the burden of soliciting data from its foreign related suppliers. This approach provides an estimate of the Brazilian taxpayer's potential transfer pricing exposure. As a second step, since the Brazilian transfer pricing regulations do not have a most-appropriate-method concept, taxpayers often apply one of the two other methods to reduce the potential transfer price exposure. Taxpayers may choose whichever method suits them best. This approach provides taxpayers with the opportunity to focus on those products and transactions that generate the highest adjustments under the PRL method and then apply one of the alternative methodologies (i.e., CPL or PIC for each of these products or transactions, reducing or avoiding the adjustment). The other methods often are more favorable, as the result is more likely to be in line with international expectations. The only condition is that taxpayers must be able to document the chosen method properly. The Brazilian tax authorities usually challenge the application of the CPL and PIC methods; consequently, it is crucial for the Brazilian taxpayer to prepare robust documentation to support the application of the PIC and CPL methods.

Brazilian companies exporting abroad – except for commodities under the new rules – often apply the safe-harbor rules to avoid applying additional transfer pricing methods. Exports are exempt from applying the transactional transfer pricing rules if they meet one of the three safe harbors, which apply (1) to small exports compared to the overall business (less than 5% of revenue is exported to parties located outside Brazil, related and unrelated), (2) when the average price of exports is at least 90% of the average domestic sales price and (3) when the net profit from exports on a three-year average is at least 10%. Additionally, to be eligible for the profitability safe harbor, intercompany export transactions cannot exceed 20% of total net export transactions starting in 2013. If the safe harbor is not met, usually the cost-plus method or the Brazilian resale-minus method is applied. For transactions of products considered to be commodities, the safe harbor is not applicable.

For intercompany import and export transactions, no adjustment will be required as long as the actual transfer price does not exceed the determined transfer price by more than 5% (divergence margin). However, in the case of commodity imports and exports (PIC and PECEX methods), the divergence margin is reduced to 3%.

It is important to note that, under the new rules introduced by Law 12.715, the taxpayer is bound to the transfer pricing method chosen, and a change of method during a tax audit is accepted only for years 2012 onward if the tax auditor applies a different method.

### Return disclosures/related party disclosures

The transfer pricing adjustments must be effectuated in December and reflected in the annual income tax return (usually due in June of the next calendar year), at which time the company will also have to disclose the transfer pricing methods chosen and any related information.

### Transfer pricing-specific returns

The ECF contains five specific forms that require taxpayers to disclose detailed information regarding their main intercompany import and export transactions. For more information, refer to the "Documentation requirements" section above.

### Documentation deadlines

The contemporaneous documentation required as part of the ECF usually has to be filed by the end of June of the following calendar year.

Taxpayers are expected to have the detailed calculations and documentation necessary to support the information filed as part of the ECF ready for potential inspection as of the declaration's filing date.

### Transfer pricing penalties

Since there are no special penalties for transfer pricing, general tax penalties are applicable.

The amount of the penalty may be up to 20% of the omitted tax (or 0.33% per day) if the taxpayer pays the related taxes late but before an audit. Meanwhile, if the tax authority assesses the taxpayer as part of a transfer pricing audit, the applicable penalties may range from 75% to 225% of the omitted taxes.

## Brazil (continued)

### **Penalty relief**

Currently, no penalty relief is available.

### **Statute of limitations on transfer pricing assessments**

A general statute of limitations applies, which is five years from the first day of the following fiscal year. In case of filing amended tax returns, the statute starts with the filing of the latest amended return.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

To expedite audits in Brazil's data-intensive transfer pricing documentation environment, Brazilian audit teams have been equipped with new computers and specialized software applications, including internally developed systems capable of analyzing and auditing large volumes of accounting and transaction data.

The Brazilian tax authority expects the International Affairs Special Office (DEAIN) and the regional audit groups to continue to increase their numbers of specialized transfer pricing auditors. It is believed that the DEAIN and the regional transfer pricing auditors are becoming increasingly sophisticated in their audit approaches as they grow in number and experience.

Although large companies are more likely to be audited than small ones, the likelihood of general tax audits in Brazil is generally characterized as medium. The likelihood of transfer pricing being reviewed as part of an audit is also characterized as medium, as is the likelihood of a challenge of the transfer pricing methodology. For certain industries – e.g., automotive, pharmaceutical, chemical, oil and gas, and intragroup services into Brazil (services, cost allocations) – the likelihood of a transfer pricing audit is high. The risk of a transfer pricing audit is high if the tax authorities identify inconsistencies in the information filed electronically (e.g., customs declaration, financial statements and other filing requirements like SISCOMEX/SISCOSERV).

### **APA opportunity**

Currently, there is no opportunity to pursue an APA.

In certain cases, unilateral rulings on the interpretation of law, not on the actual price to be applied, are possible.

Under Law 9.959, taxpayers may request altering the fixed statutory profit margins. However, nothing has been granted to date, due to the formal limitations imposed. The current Law 12.715/12 also provides the possibility to apply for alternative profit margins, but no regulations have been issued yet.

# Brunei

## **Taxing authority and tax law**

Tax authorities: Revenue Division and Ministry of Finance

Tax Law: Income Tax Act (Chapter 35) and Income Tax (Petroleum) Act (Chapter 119)

## **Relevant regulations and rulings**

Currently, there are no local transfer pricing regulations in Brunei, but Brunei has concluded around 12 income tax treaties that contain an article resembling Article 9 of the OECD Model Treaty on "Associated Enterprises."

For income tax purposes, the authorities usually ask questions to determine whether such transactions are concluded on an arm's-length basis. Questions that are frequently asked include details and information on the relationship of the parties; the basis of determining prices or charges; and policies on intercompany markups, prices, cost allocation and more.

## **OECD Guidelines treatment**

Not applicable.

## **Documentation requirements**

Not applicable.

## **Priorities/pricing methods**

Not applicable.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

Not applicable.

## **Penalty relief**

Not applicable.

## **Statute of limitations on transfer pricing assessments**

Not applicable.

## **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The likelihood of an annual tax audit in general is medium. The likelihood that transfer pricing will be reviewed as part of that audit and the likelihood that the transfer pricing methodology will be challenged are both medium.

## **APA opportunity**

Not applicable.

# Bulgaria

## Taxing authority and tax law

Taxing authority: National Revenue Agency (NRA)

Tax laws: Corporate Income Tax Act (CITA), Tax and Social Insurance Procedure Code (TSIPC), double taxation treaties

## Relevant regulations and rulings

- ▶ CITA, promulgated in the State Gazette (SG) Issue 105, 22 December 2006
- ▶ TSIPC, promulgated in SG Issue 105, 29 December 2005
- ▶ Ordinance N 9, 14 August 2006 (Ordinance N 9), about methods for determining market prices, promulgated in SG Issue 70, 29 August 2006
- ▶ Double taxation treaties enacted by Bulgaria

Bulgarian tax legislation does not explicitly articulate the arm's-length principle. According to Article 15 of the CITA, when related parties enter into transactions whose commercial and financial terms differ from those of unrelated party transactions, resulting in a different taxable base than what would have been achieved in unrelated party transactions, the tax authorities will adjust the taxable base accordingly.

Furthermore, under Article 16 of the CITA, when one or more transactions, including between unrelated parties, have been concluded under terms in which the fulfillment leads to lower or no taxation, the taxable base will be determined without taking notice of these transactions, certain terms or their legal form. Instead, the taxable amount that will be considered would be obtained in a market-customary way of the relevant type at market prices, and is intended to achieve the same economic result without leading to lower or no tax.

The methods applied in determining the arm's-length prices have been introduced by the TSIPC and Ordinance N 9.

The NRA released a Manual on Transfer Pricing Audits (the Manual) in 2008. By introducing a chapter on transfer pricing documentation requirements in the Manual early in 2010, the NRA approved the documents that transfer pricing auditors would require during their investigations.

The Manual is binding on tax auditors. However, it is not technically part of the law. Nevertheless, it is in the taxpayers' interest to comply with the Manual, since it defines what the NRA usually requires during a transfer pricing audit. Compliance with the Manual is expected to significantly narrow the scope of disputes over transfer pricing matters during tax audits.

## OECD Guidelines treatment

In general, the Bulgarian transfer pricing requirements follow the OECD Guidelines. However, the 2010 version of the OECD Guidelines, in which the hierarchy of methods is abolished, has not yet been introduced in the local transfer pricing legislation.

Furthermore, Bulgarian transfer pricing rules do not explicitly deal with business restructuring.

## Documentation requirements

Taxpayers bear the burden of proof regarding the arm's-length nature of the controlled price and must present all relevant evidence. If the taxpayer provides a transfer pricing documentation file, the tax authorities will be obliged to follow the approach or method used by the taxpayer to establish the transfer price. If they disagree with the transfer price applied, they should come up with evidence of the market price they consider appropriate, based on any readily available public information.

Based on the Manual, the documentation should contain information about:

- ▶ Presentation of the group:
  - ▶ Legal, functional, finance and management organization of the group (legal, functional, finance and management organizational charts of the group)

## Bulgaria (continued)

### Documentation requirements (continued)

- ▶ Economic role of the divisions within the group
- ▶ Allocation and financing of intellectual property
- ▶ Knowledge of the controlled company and its activity:
  - ▶ Object of the activity and market of the company (an economic analysis of the market, including structure, size, competitors, development, success factors and risks)
  - ▶ Functional analysis of the company
  - ▶ Use of intellectual property
  - ▶ Financing of the enterprise
- ▶ Analysis of associated transactions:
  - ▶ Presentation of the selected economic model with an explanation of the specific strategy of the enterprise (for example, the penetration policy to gain a share of a particular market)
  - ▶ Presentation of the associated transactions, including objects of transactions, distribution, services, financial transactions, contracts, countries involved, special terms and conditions
- ▶ Functional analysis:
  - ▶ Who plays what role in an associated transaction and an analysis of functions, risks and assets of each party in the transaction
  - ▶ Analysis of methods and a presentation of the transfer pricing method used
  - ▶ Economic and financial analysis of the transaction, including profits, analysis of the market, nature of the financial terms and conditions

The Manual recommends that taxpayers have the transfer pricing master file at their disposal and that the file contains information on a group level, as well as a country-specific file prepared in Bulgarian for each tax year, which is updated annually.

### Priorities/pricing methods

Under Bulgarian transfer pricing legislation, one of the following methods should be applied to determine the market price:

- ▶ CUP
- ▶ Resale-price or cost-plus
- ▶ Profit split or TNMM

The TSIPC introduced the methods applicable for determining the arm's-length price, while Ordinance N 9 regulates the order of consideration, and applying the traditional transfer pricing methods is preferred. Moreover, the CUP method is considered the most direct and reliable measure of an arm's-length price for controlled transactions. The TNMM and profit split methods are used only in cases applying the traditional methods that produce an unsatisfactory result.

### Return disclosures/related party disclosures

Related party transactions falling within the scope of Article 15 of the CITA could be disclosed in the annual tax return.

Furthermore, taxpayers are required by the National Accounting Standards (as well as by the International Accounting Standards) to disclose in their financial statements relationships between related parties, regardless of whether there have been transactions between them, as well as the related party transactions.

Bulgarian tax legislation provides for quite a broad definition of "related parties." For instance, for accounting purposes, related parties should be parties where one exercises control over the other, whereas for tax purposes, parties will be related not only in the case of control, but also even in a case where one of the parties holds directly 5% of the voting shares of the other party.

## Bulgaria (continued)

### Return disclosures/related party disclosures (continued)

Under Bulgarian legislation, related parties are:

- ▶ Spouses
- ▶ Certain types of relatives
- ▶ Employers and employees
- ▶ Shareholders and partners
- ▶ Persons where one of them participates in the management of the other or its subsidiary
- ▶ Persons in whose management or controlling body participates one and the same person (legal or natural person), including cases when the natural person is a representative of another person
- ▶ A company and a person, where the person owns more than 5% of the company's shares with voting rights
- ▶ Persons where one of them exercises "control" over the other
- ▶ Persons whose activity is controlled by a third person or its subsidiary
- ▶ Persons exercising joint control over a third person or its subsidiary
- ▶ Persons where one of them is a commercial representative of the other
- ▶ Persons where one of them has made a donation to the other
- ▶ Persons who participate (directly or indirectly) in the management, the control or the capital of another person or persons, thus being able to negotiate terms different from the regular ones
- ▶ A Bulgarian taxpayer or shareholders of a Bulgarian taxpayer and an entity established in or controlled from a blacklisted tax jurisdiction

Control, under the definition provided by the Bulgarian legislation, is present when the controlling party:

- ▶ Owns directly or indirectly, or under an agreement with another person, more than half of the votes at the general meeting of another person  
Or
- ▶ Has the possibility to determine directly or indirectly more than half of the members of the managing or controlling body of another person  
Or
- ▶ Has the possibility to manage, including through or together with a subsidiary, in accordance with a particular statute or contract, the activity of another person  
Or
- ▶ As a shareholder or a partner in an entity, controls independently, in accordance with a deal made with other partners or shareholders of the same entity, more than half of the votes at the general meeting of this entity  
Or
- ▶ Can by other means exert decisive influence over the decision-making, with respect to the activity of the entity

### Transfer pricing-specific returns

Effective from 1 January 2014, taxpayers are required to submit as part of their annual corporate income tax package summarized information about transactions with domestic and nonresident related parties, as well as with offshore companies.

## Bulgaria (continued)

### Documentation deadlines

Under the Bulgarian transfer pricing rules, taxpayers involved in controlled transactions are not obligated to file their transfer pricing documentation with the NRA. Transfer pricing documentation is submitted to the tax authorities only upon request (e.g., during a tax audit or tax documentation review when a tax refund or tax relief under a double tax convention is claimed). In the course of a transfer pricing audit, the tax authorities could request documents and information within a certain period. The information requested usually concerns the group's structure, the audited company and its activities, analysis of transactions involving related parties, the functions performed in relation to those controlled transactions, and proof and a written explanation with regard to the transfer pricing methods applied, among others. It is time-consuming to prepare and present the required documentation according to the NRA's requirements. Therefore, the NRA's time limit (i.e., usually 14 days) is unlikely to be sufficient. For that reason, taxpayers are encouraged to have their transfer pricing documentation available and prepared in compliance with the NRA's guidelines.

### Transfer pricing penalties

If the taxpayer fails to provide documentation when requested by the tax authorities, a fine for not cooperating could be imposed. However, this fine is insignificant (i.e., in the range of BGN250 to BGN500, or approximately EUR128 to EUR256). Therefore, the main consequence for the entity would be the adjustment of its taxable profit if the tax auditors conclude that the price applied in controlled transactions is not at arm's length.

Furthermore, a taxable person involved in a "hidden profit distribution" would be subject to an administrative sanction amounting to 20% of the expense and classified as a hidden profit distribution (unless voluntarily disclosed to the tax authorities). Both the expense classified as a hidden profit distribution and the sanction would be nondeductible for corporate income tax purposes. In addition, the expense would be considered a deemed dividend and, thus, subject to a 5% withholding tax.

Business expenses may be classified as a hidden profit distribution if an entity has:

- ▶ Accrued, paid or distributed to the benefit of the entity's shareholders or their related parties amounts that are:
  - ▶ Non-business related
  - Or
  - ▶ In excess of market price levels
- ▶ Accrued interest costs on debt financing if at least three of the following criteria are met:
  - ▶ The loan principal exceeds the equity of the borrower as of 31 December of the preceding year
  - ▶ The repayment of the principal or the interest on the loan is not limited by a fixed time period
  - ▶ The loan repayment or interest payment depends on whether the borrower ended on a profit position
  - ▶ The repayment of the loan depends on satisfaction of other creditors' claims or on payment of dividends

### Penalty relief

A voluntary disclosure of hidden profit distribution relieves taxpayers of the administrative penalty, which is 20% of the hidden profit. This allows taxpayers to self-adjust any overpriced group transactions with no threat of penalties.

### Statute of limitations on transfer pricing assessments

In Bulgaria, documentation may be required for any open tax year, as well as for tax obligations not covered by the statute of limitations period.

As a general rule, the statute of limitations period for CIT is five years from the year following the year of expiration of the statutory term granted for filing CIT returns.<sup>1</sup>

<sup>1</sup> The Bulgarian statutory term for both filing the annual CIT return and remittance of the amount due is 31 March of the following year. Thus, for example, fiscal year 2009 is open for tax audits until the end of fiscal year 2015, since the CIT return for fiscal year 2008 should have been filed by 31 March 2010.

## Bulgaria (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

In general, the likelihood of an annual tax audit is characterized as low. The likelihood that transfer pricing will be reviewed as part of that audit is characterized as high and the likelihood that the transfer pricing methodology will be challenged is characterized as medium.

### **APA opportunity**

No binding ruling or APA opportunities are currently applicable.

Taxpayers are allowed to file a request for a written opinion from the NRA or the Minister of Finance on the interpretation and application of the tax law with regard to a specific tax issue. However, the value of the position of the tax authorities on a particular tax aspect is very limited, since the tax authorities refuse to provide any opinion about transactions that have not yet been structured and documented.

# Cameroon

## **Taxing authority and tax law**

Tax authority: General Director of Taxation

Tax law: General Tax Code

## **Relevant regulations and rulings**

Circular on the Finance Law by the General Director of Taxation

Article 18-3 of the New Finance Law 2014 specifies the documentation requirements

## **OECD Guidelines treatment**

OECD Transfer Pricing Guidelines may be relied upon to determine the arm's-length nature of international transactions, and supporting documentation should be prepared.

## **Documentation requirements**

Article 18-3 of the New Finance Law 2014 stipulates that:

"Companies falling under the Department in charge of large enterprises shall also submit within the same deadline and using the form provided by the Administration, the statement of shares which they own in other companies where such shares do not exceed 25% of their share capital. They shall attach a detailed statement of transactions with the companies which control them or which are under their control, be they in Cameroon or abroad. For the application of this provision, the notion of control must be understood as used in Article M 19 (a) (2) of the Tax Procedures Manual."

The documents to be submitted, along with the annual tax return, are:

- ▶ A statement of ownership in other companies if the ownership exceeds 25% of their share capital. The statement should be accompanied by:
  - ▶ General information about the related parties of the group:
    - ▶ A general description of the activity carried out, including the changes that occurred during the year audited
    - ▶ A general description of the legal and operational organizations of the companies within the group of consolidated companies, including identification of related companies engaged in transactions with the company
    - ▶ A general description of the functions performed and risks assumed by the related companies, as they affect the company
    - ▶ A list of key intangible assets, including patents, trademarks, trade names and know-how related to the company
    - ▶ A general description of the transfer pricing policy of the group
  - ▶ Specific information concerning the company audited:
    - ▶ A general description of the activity carried out, including the changes that occurred during the year audited
    - ▶ A description of the transactions with the related companies, including the nature and amount of transfers, including royalties
    - ▶ A list of cost-sharing agreements and, if applicable, a copy of the preliminary agreements on transfer pricing and rescripts relating to the determination of transfer prices affecting the results of the company
    - ▶ A presentation of the method for determining transfer prices in accordance with the arm's-length principle, including an analysis of the functions performed, assets used and risks assumed, and an explanation of the selection and application of the method used
    - ▶ An analysis of the benchmarks considered relevant to the company when the chosen method requires

## Cameroon (continued)

### Priorities/pricing methods

Not applicable.

### Return disclosures/related party disclosures

Taxpayers must disclose related party transactions. Indeed, the provisions of Article 18-3 indicate that a company must provide a description of transactions with other affiliates, including the nature and amount of flows, such as fees. These disclosures are to be included in the transfer pricing documentation submitted with the return.

### Transfer pricing-specific returns

There are no specific templates for transfer pricing documentation, but the tax administration provided a template that relates to a specific declaration of information form that must be filed when submitting the report.

### Documentation deadlines

The transfer pricing documentation must be submitted each year, along with the annual tax return, no later than 15 March for companies under the department in charge of large enterprises.

### Transfer pricing penalties

There are no specific rules for transfer pricing adjustments, but all tax adjustments are generally subject to interest and penalties.

### Penalty relief

In case of partial or total failure to submit the required documentation, a notice to provide or complete the documentation will be served to the company within 30 days from the documentation submission deadline. This notice should remind the taxpayer of the penalties in case of failure to reply, including adjustments based on information available to the authority.

The taxpayer should make all attempts to submit the transfer pricing documentation within the provided deadline of 15 March of each year, except if the company obtains an extension of the deadline from the relevant authorities.

### Statute of limitations on transfer pricing assessments

There is no statute of limitation specific to transfer pricing matter issues. Nonetheless, pursuant to Section M34 of the Cameroonian Tax Procedure Handbook, the tax authorities may correct the statute of limitations applicable to total or partial omissions up to the end of the fourth year after the one in which the taxes were due. Thus, this limitation period should be applicable to transfer pricing assessments as well.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general is high. The likelihood that transfer pricing will be reviewed as part of that general tax audit is also high. The likelihood that the transfer pricing methodology will be challenged is low.

### APA opportunity

The relevant tax law in Cameroon is silent on APAs. However, before a contract is concluded or a transaction is performed, a taxpayer can request a tax ruling (*rescrit fiscal*) from the tax authorities to get their position on the potential tax implications.

# Canada

## Taxing authority and tax law

Taxing authority: Canada Revenue Agency (CRA)

Tax law: Section 247 of the Income Tax Act (Canada) (ITA) received Royal Assent on 18 June 1998 and is generally applicable to taxation years that began after 1997. It constitutes Canada's transfer pricing legislation and deals with the determination of transfer pricing adjustments; the re-characterization of transactions, penalties, records and documents required to be made or obtained; contemporaneous documentation requirements and timing of provisions to the minister, when requested; ministerial discretion regarding acceptance of downward tax adjustment requests; and the application of withholding tax to transfer pricing adjustments. For transactions after 28 March 2012, new §§247(12) to (15) were added to the transfer pricing provisions to streamline and rationalize the withholding tax implications of transfer pricing adjustments.

## Relevant regulations and rulings

The CRA does not set out its views and positions on transfer pricing issues by a legal doctrine or by providing detailed examples. The CRA prefers to outline its views in general principles.

It provides its administrative interpretations and guidance with respect to §247 and its application through the release of Information Circulars (IC), Transfer Pricing Memoranda (TPMs) and pronouncements at public conferences, symposia and conventions. ICs usually address major subjects from a general perspective, while TPMs typically provide supplementary, detailed explanations and guidance on specific issues related to the major subject.

The CRA's current key pronouncements on transfer pricing are:

- ▶ IC87-2R, International Transfer Pricing, 27 September 1999
- ▶ IC94-4R, International Transfer Pricing: Advance Pricing Arrangements (APAs), 16 March 2001
- ▶ IC94-4R (Special Release), Advance Pricing Arrangements for Small Businesses, 18 March 2005
- ▶ IC71-17R5, Guidance on Competent Authority Assistance Under Canada's Tax Conventions, 1 January 2005

Additional information and guidance on transfer pricing-related matters, including the TPMs, can be obtained from the CRA's website ([www.cra-arc.gc.ca/tx/nnrstdnts/cmmn/trns/menu-eng.html](http://www.cra-arc.gc.ca/tx/nnrstdnts/cmmn/trns/menu-eng.html)).

## OECD Guidelines treatment

While no mention is made of the OECD Guidelines in §247 of the ITA, the legislative provision is intended to reflect the arm's-length principle as set out in the OECD Guidelines. The CRA has also endeavored to harmonize its administrative guidance and approach to transfer pricing with the OECD Guidelines. As noted in IC87-2R, the "circular sets out the Department's views on transfer pricing and also provides the Department's position with respect to the application of the OECD Guidelines."

When dealing with transfer pricing issues domestically, the relevant Canadian statutory provisions are relied upon. The CRA's related ICs and other administrative guidance are considered instructive but not definitive. The OECD Guidelines and other OECD reports are not formally recognized as authoritative; however, courts and other dispute resolution channels (e.g., competent authority) will usually consider the OECD's international principles and standards in reaching a decision.

## Documentation requirements

Subsection 247(4) of the ITA requires that a taxpayer must have records or documents that, at a minimum, provide a complete and accurate description, in all material respects, of the following items:

- ▶ The property or services to which the transaction relates
- ▶ The terms and conditions of the transaction and their relationship, if any, to the terms and conditions of the transaction entered into between the persons or partnerships involved
- ▶ The identity of the persons or partnerships involved in the transaction, and their relationship at the time the transaction was entered into

## Canada (continued)

### Documentation requirements (continued)

- The functions performed, the property used or contributed, and the risks assumed by the persons or partnerships involved in the transaction. The data and methods considered and the analysis performed to determine the transfer prices, the allocations of profits or losses, or contributions to costs of the transaction
- The assumptions, strategies and policies, if any, that influenced the determination of the transfer prices, the allocations of profits or losses, or contributions to costs of the transaction

In addition, although its views are not law, IC87-2R notes that the CRA expects a taxpayer's documentation to include certain additional information (e.g., details of cost contribution arrangements, translations of foreign documents and other general guidance).

TPM-09 sets out the CRA's views of the meaning of "reasonable efforts" under §247 of the ITA. In practice, TPM-09 has not significantly enhanced clarity with respect to the reasonable efforts standard and thereby the potential application of transfer pricing penalties.

### Priorities/pricing methods

The CRA accepts the transfer pricing methods recommended in the OECD Guidelines when such methods are applied correctly and result in an arm's-length price or allocation. The transfer pricing methods specified in IC87-2 include CUP, resale price, cost-plus, profit split (residual and contribution) and TNMM methods.

Traditionally, the CRA considered that, even though §247 does not so stipulate, the above-noted transfer pricing methods form a natural hierarchy, with the CUP method providing the most reliable indication of an arm's-length transfer price or allocation and the profit split method providing the least reliable indication. Traditionally, the CRA did not require or impose a "best method" rule.

The CRA believes that the most appropriate method to be used in any situation will be that which provides the highest degree of comparability between transactions, following an analysis of the hierarchy of methods.

In 2012, following the 2010 revisions to the OECD Guidelines, which it endorsed, the CRA published TPM-14. While not wholly abandoning the concept of a natural hierarchy of methods, it indicated that accepting the preferred method in a particular circumstance would depend on the degree of comparability available under each of the methods and the availability and reliability of the data.

### Return disclosures/related party disclosures

Taxpayers are required to file a T106 information return annually, reporting the transactions undertaken with non-arm's-length nonresidents during the taxation year. The T106 is a separate information return, but it is usually filed together with the corporate tax return (although there are separate penalties if the T106 information return is filed late). Data from the T106 is entered into a CRA database and is used to screen taxpayers for international tax audits.

### Transfer pricing-specific returns

The T106 returns referred to above are essentially transfer pricing returns.

### Documentation deadlines

Taxpayers must prepare or obtain records and documents that provide a description that is complete and accurate in all material respects of the items listed in Subsection 247(4) of the ITA, and such documentation must exist as of the tax filing due date. For corporations, such documentation must exist six months after the year-end. For partnerships, the due date is five months after the year-end.

Taxpayers must provide documentation to the CRA within three months of the issuance of a written request under Subsection 247(4).

## Canada (continued)

### Transfer pricing penalties

Subsection 247(3) of the ITA imposes a penalty of 10% of the net upward transfer pricing adjustments. These penalties are applicable if such adjustments exceed the lesser of 10% of the taxpayer's gross revenue for the year or CAD5 million, and if the taxpayer has not made reasonable efforts to determine and use arm's-length transfer prices.

As set out in TPM-07, all proposed reassessments involving potential transfer pricing penalties are required to be referred to the Transfer Pricing Review Committee (TPRC) for review and recommendation for final action. The TPRC, after considering the facts and circumstances and the taxpayer's representations, will conclude whether a transfer pricing penalty is justified.

A taxpayer will be deemed not to have made reasonable efforts to determine and use arm's-length transfer prices or allocations unless the taxpayer has prepared or obtained records or documents that provide a description that is complete and accurate, in all material respects, for the items listed in Subsection 247(4) of the ITA (see above), and such documentation exists as of the tax filing due date. For corporations, such documentation must exist six months after the year-end. For partnerships, the due date is five months after the year-end. Further, a taxpayer will be deemed not to have made reasonable efforts to determine and use arm's-length transfer prices or allocations if the taxpayer does not provide the records or documents to the CRA within three months of the issuance of a written request to do so.

Transfer pricing related penalties are assessed without reference to the taxpayer's income or loss for the relevant reporting year and are not tax deductible.

### Penalty relief

If a taxpayer is considered to have made reasonable efforts to determine and use arm's-length transfer prices or allocations with respect to adjusted, non-arm's-length transactions, no penalty is assessed. No transfer pricing penalties under Subsection 247(3) of the ITA should arise with respect to transactions covered by an APA, as long as the APA remains in effect and the taxpayer complies with its terms and conditions.

When the CRA has reassessed a transfer pricing penalty and the Canadian competent authority and relevant foreign counterpart negotiate a change to the amount of the transfer pricing adjustment, the CRA will adjust the amount of the Canadian transfer pricing penalty accordingly. If the result of the change is that the adjustment no longer exceeds the penalty threshold, the penalty is rescinded.

### Statute of limitations on transfer pricing assessments

Under Subsection 152(4) of the ITA, the minister ordinarily cannot reassess a taxpayer after the normal reassessment period, as defined in Subsection 152(3.1) of the ITA. For most multinational taxpayers, that period is four years beginning after the earlier of the day of mailing a notice of an original assessment for the year or the day of mailing an original notification that no tax is payable for the year. The time limit applies unless the taxpayer has made misrepresentations, committed fraud or filed a waiver, in which case the minister may reassess a taxpayer at any time.

With respect to transactions involving non-arm's-length dealings with nonresidents, the reassessment period is extended by an additional three years, i.e., to seven years. This time period may be further extended if the taxpayer provides the CRA with a waiver (authorization from the taxpayer to the CRA to waive the time limit for reassessment). The taxpayer may provide waivers within the seven-year extended reassessment period. A number of Canada's tax treaties restrict the time for Canada to make an adjustment to a period less than the seven years allowed under the ITA.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The CRA continues to receive additional funding for its audit of international activities to focus its audit resources on the examination of international transactions, especially transfer pricing.

For large corporations, the likelihood of an annual tax audit is high, as is the likelihood of transfer pricing being reviewed as part of the audit. The likelihood of a transfer pricing methodology being challenged, if transfer pricing comes under audit, is also high.

Per TPM-05, it is mandatory for CRA auditors to issue a formal written request to the taxpayer for their transfer pricing documentation upon commencement of the audit, or as soon as cross-border, non-arm's-length transactions with nonresidents are identified during the course of an audit. This request triggers the three-month window to provide the contemporaneous documentation.

## Canada (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)**

The CRA has in recent years implemented a risk-rating approach called the Approach to Large Business Compliance, under which taxpayers are risk rated as "high," "medium" or "low" risk depending on the nature of transactions undertaken, past audit results and the taxpayer's governance structure. Higher risk ratings will prompt broader compliance actions by the CRA.

### **APA opportunity**

The CRA launched its APA program in July 1993. As set out in IC94-4R, it allows taxpayers to pursue unilateral, bilateral or multilateral APAs. In addition, the CRA has made a small business APA program available to Canadian taxpayers under certain conditions. The CRA charges taxpayers only travel costs it incurs in the completion of an APA.

An APA request can cover a taxation year if the request is made before the filing due date for that year. TPM-11 discusses the CRA policy with respect to rolling an APA back to prior years, with the main limitation being that APAs may not be rolled back to years for which a request for contemporaneous documentation under §247 has been issued. Effectively, this means that APAs cannot be rolled back to taxation years that are currently undergoing a transfer pricing audit.

# Chile

## Tax authority and tax law

Tax authority: Internal Tax Service (*Servicio de Impuestos Internos*, or SII)

Tax law:

- ▶ Chilean taxation rules are established in the Income Tax Law (ITL), enacted in 1974.
- ▶ Tax authority circulars issued every year provide interpretation of the articles of the ITL and are not modifications of the law.

## Relevant regulations and rulings

Article 41 E establishes that any cross-border transaction held with a related party, or with an unrelated entity domiciled in a tax haven, in a back-to-back transaction or any transaction resulting from a restructuring process is subject to transfer pricing regulations. The new regulation is applicable as of 1 January 2013 and applies to 2013 tax obligations and thereafter, thus affecting the intercompany transactions entered into during and after 2012.

For prior years, transfer pricing matters were regulated by Article 38, according to which the burden of proof was on the Internal Revenue Service (IRS), and no obligations relative to statements, studies or methods were set forth therein.

## Relationship rules

According to Article 41 E, parties are deemed to be related when:

- ▶ One or more parties participate directly or indirectly in the direction, control, capital, profits or revenues of another party
- ▶ An entity is a permanent establishment, agency or branch of a headquarter
- ▶ Transactions are carried out with residents in tax havens
- ▶ Individuals with their spouses, or relatives up to the fourth degree of consanguinity
- ▶ One of the parties carries out transactions with a third party that, in turn, carries out similar transactions with parties related to the latter (back to back)

On 29 September 2014, Law No. 20.780 was published in the Chilean Official Gazette, introducing changes to Chilean tax legislation. Notwithstanding the specific terms contained in this law for particular cases, these entered into force on 1 October 2014.

## Income taxation

### 1.1. Increase in First Category Tax (corporate tax)

The First Category Tax will progressively increase from 20% to 25% or 27% (depending on the type of regime under which the taxpayer has selected to use) as follows:

- ▶ Commercial year 2014: 21%
- ▶ Commercial year 2015: 22.5%
- ▶ Commercial year 2016: 24%
- ▶ Commercial year 2017: new taxation regimes discussed in 1.2. below will apply
  - ▶ Attributed regime: 25%
  - ▶ Distributed regime: 25.5%
- ▶ Commercial year 2018: 27% (applicable only to the distributed regime)

## Chile (continued)

### Relevant regulations and rulings (continued)

#### 1.2. New taxation regimes

From 1 January 2017, the law creates two alternative taxation regimes for taxpayers subject to the First Category Tax: (1) attributed regime (Article 14 A of the ITL), on which basis foreign shareholders will be subject to the Additional Tax (withholding tax on dividends) on the income of the entities in which they have interests in the same year such income is triggered; and (2) distributed regime (Article 14 B of the ITL), where foreign shareholders will be subject to the Additional Tax only on the effective dividends distributed by the company. Selecting one regime over the other depends on each taxpayer, who shall make a decision, considering the law's formalities. The option should be exercised in the last quarter of 2016. If the taxpayer does not select a regime, the law provides for a default rule, as follows:

- ▶ Individual entrepreneurs and individual limited liability companies: attributed regime
- ▶ Partnerships (Sociedades de Responsabilidad Limitada) where the partners are only Chilean individuals: attributed regime
- ▶ Partnerships where one or more partners are legal entities or taxpayers not resident or domiciled in Chile: distributed regime
- ▶ Taxpayers under the regime established in Article 58, No. 1 (permanent establishments): distributed regime
- ▶ Stock companies (Sociedades Anónimas y Sociedades por Acciones): distributed regime

Once the applicable regime is determined, by choice or the lack of it, a five-year holding period is required.

#### International tax rules

##### Changes in excess indebtedness rules

New excess indebtedness rules are introduced, as well as amendments to the existing rules, in connection with the following matters:

- ▶ The 3:1 debt-to-equity ratio remains unchanged; however, to determine the debt, all loans granted by local or foreign entities, whether related or not, shall be included (before this amendment, only loans granted by foreign related parties subject to 4% withholding were included).
- ▶ The 35% penalty tax applies only to payments to related entities subject to the 4% withholding tax or not subject to withholding taxes.
- ▶ The concept of related company now applies to all kinds of guarantees granted by group companies.
- ▶ These new rules will apply only to loans granted after 1 January 2015.

##### Recognition of foreign passive income (CFC rules)

In accordance with new Article 41 G of the ITL, foreign-source income will continue to be taxed on a cash basis, as a general rule. Additionally, from 1 January 2016, taxpayers domiciled in Chile will be taxed on an accrual basis on the passive income generated by their "foreign-controlled entities."

According to these new provisions, control will be deemed to exist over a foreign entity when:

- ▶ A Chilean taxpayer directly or indirectly owns 50% or more of the capital, profit or voting rights
- ▶ The foreign entity is domiciled in a country or territory with low or no taxation, unless proven otherwise

##### General Anti-Avoidance Rules (GAAR)

One year from the publication of the new Chilean tax reform (this means from 29 September 2015), new substance-over-form rules will become effective. These new rules give the IRS the authority to challenge a transaction due to abuse or simulation and request payment of the relevant taxes as if such abuse or simulation never occurred. Anti-abuse rules apply to transactions carried out after the entry into force of the same; therefore, all prior transactions will be subject to the rules currently in force.

According to the new rules, abuse will exist when taxpayers circumvent, totally or partially, a taxable event; reduce the tax base or tax obligation; or delay or defer the creation of such obligation without a reason different from purely tax motivation.

In turn, simulation will be deemed to exist when the legal acts or business activities of taxpayers conceal the occurrence of a taxable event or the nature of the elements of the tax obligation, or the real amount or creation of the same.

## Chile (continued)

### OECD Guidelines treatment

Although the ITL does not mention the OECD Guidelines, it is important to note that Chile was accepted as a full member of the OECD in 2010. Therefore, the guidelines should be treated as relevant when dealing with transfer pricing issues.

### Documentation requirements

Taxpayers must keep all the relevant information supporting the methods used to determine whether their transactions are in accordance with the arm's-length principle ready and available to be furnished upon the SII's request. The SII may also request that foreign authorities furnish information related to intercompany transactions.

### Priorities/pricing methods

The transfer pricing methods accepted are the same as those established by the OECD Guidelines. Additionally, a sixth, or "other," method is acceptable when applied in any reasonable economic analysis for a case where none of the other methodologies is viable.

It considers the "best method rule," which means that the taxpayers must choose the method that best reflects the transaction's economic reality to determine its market value. The taxpayer should be able to demonstrate or sustain the applicability of such a method over the others.

### Return disclosures/related party disclosures

From 2013 onward, it is mandatory for taxpayers to file a sworn transfer pricing statement (transfer pricing return) every year. It comprises all intercompany transactions held in the prior year, and it must disclose all transactions held with related parties, the transfer pricing method applied, the organizational structure of the economic group and other data derived from the transfer pricing economic analysis.

Taxpayers that meet any of the following conditions are obliged to file this return:

- ▶ Companies considered as mid or large size as of 31 December of the commercial year to be disclosed
- ▶ Companies that entered into transactions with parties domiciled in tax haven countries (according to the list in Article 41 D of the ITL)
- ▶ Companies that have entered into transactions of more than CLP500 million (approximately US\$725,000 or the equivalent in a foreign currency) with non-domiciled related parties as of 31 December of the commercial year to be disclosed

Transactions with related parties must be registered by the type of transaction and by the related entity. The IRS also requires technical aspects to be filed, such as:

- ▶ Transfer pricing method used
- ▶ Profit level indicator applied
- ▶ Global or segmented analysis
- ▶ Party analyzed
- ▶ Transfer pricing adjustments (if applicable)

### Transfer pricing-specific returns

The taxpayer is required to file Form No. 1907.

### Documentation deadlines

There are no deadlines to present a transfer pricing study.

The due date to file the transfer pricing return is the last business day of June. An additional three-month extension formally can be requested of the SII and in case it is granted, the taxpayer is informed.

## Chile (continued)

### Transfer pricing penalties

In case the taxpayer does not file the sworn statement by the due date, or files an incorrect or incomplete statement, it is subject to a fine of 10 Annual Tax Units (ATUs) to 50 ATUs (1 ATU is approximately US\$811).

Price, value or profit differences that result from applying these rules are subject to a fine of 35% of the difference, regardless of the type of company. If the SII makes the adjustment by means of an assessment, an additional 5% will be applied, unless the taxpayer furnished the information and documentation required during the inspection process by the SII, as determined by the former in a notification. It could also be subject to additional penalties and interest. By means of the new tax reform, the fine will increase to 40% from 2017 onward on top of which the 5% mentioned before can be added.

Additionally, taxpayers that do not comply by filing the transfer pricing return, are subject to fines according to Article 97 of the Tax Code (a fine of 20% to 100% of one ATU) or Article 41-E of the ITL (10 to 50 ATUs in December 2014 correspond with a range between US\$7,750 and US\$38,700, respectively, up to 15% of the equity capital or 5% of the real capital).

### Penalty relief

There currently is no penalty relief available. However, maintaining contemporary transfer pricing documentation would be accepted by the tax authority as proof of the taxpayer's "good faith." In these cases, the transfer pricing penalty may not be imposed.

### Statute of limitations on transfer pricing assessments

The general statute of limitations is three years starting from the latest date at which the tax was due. It could be extended to six years if no return is filed, or if the authorities consider that the returns are false. Based on Circular 49, there are distinct limits to conducting audits, depending on the size, complexity and other characteristics that can arise. In this sense, in the case of a certain set of transfer pricing audits, the applicable statute of limitations will be 12 months, during which the tax authority will test the proper application of the arm's-length principle. These special cases are:

- ▶ The determination of the taxpayer's net income, where there are taxable sales or revenues in excess of 5,000 monthly tax units (UTMs)
- ▶ A review of the tax effects of corporate reorganization
- ▶ A review of the accounting for transactions between related companies

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The taxpayer faces the burden of proof to show that transfer prices in transactions with related parties are consistent with the arm's-length principle.

Currently, there is a high probability that the tax authority will audit transfer pricing (there could be a preference in favor of retail, pharmaceutical and mining companies). Indeed, transfer pricing audit cases have significantly increased due to Chile's recent inclusion as a full member of the OECD. Many of the transfer pricing audits taking place in Chile are derived from a tax audit process. That is why Chilean companies face a high possibility of being subjected to an audit and a high likelihood that transfer pricing will be reviewed as a part of that audit. This is especially true in cases where the taxpayer has registered intercompany charges and these charges have been treated as deductible from taxable income.

It is important to highlight that when a taxpayer is subject to a tax or transfer pricing audit performed by the Chilean authorities, keeping a transfer pricing study will be considered a strong mechanism of defense.

Finally, taxpayers should realize that they are entitled to amend the price, value or profit related to their transactions on the basis of transfer pricing adjustments made in other countries that have entered into a convention with Chile for the avoidance of double international taxation. This adjustment may be applied within a term of five years from the fiscal year in which the transaction triggered tax effects in Chile, provided that the adjustment is final in the other country.

### APA opportunity

Taxpayers may propose price, value or profit advance agreements with regard to their transactions. To that end, a request and a transfer pricing study need to be filed. The SII may completely or partially accept the request or reject it within six months after the taxpayer has furnished the relevant information. The resolution to accept or reject the proposed agreement cannot be challenged by either an administrative or legal process. This agreement may last for up to four commercial years, at the end of which it can be extended by a prior agreement between the parties involved.

# China

## **Taxing authority and tax law**

Taxing authority: State Administration of Taxation (SAT)

Tax laws and regulations:

- ▶ People's Republic of China (PRC) Corporate Income Tax Law (CITL), Chapter 6, Articles 41 to 48
- ▶ CITL Implementation Regulations, Articles 109 to 123

## **Relevant regulations and rulings**

- ▶ Guoshuifa (2008) No. 114 (Guoshuifa 114) – Notice Containing Related Party Transaction Annual Reporting Forms
- ▶ Guoshuifa (2009) No. 2 (Guoshuifa 2) – Implementation Measures for Special Tax Adjustments
- ▶ Caishui (2008) No. 121 (Caishui 121) – Notice on the Tax Deductibility of Interest Expense Paid to Related Parties
- ▶ Guoshuihan (2009) No. 363 (Guoshuihan 363) – Notice on the Strengthening, the Monitoring and Investigation of Cross-border Related Party Transactions (for Single Function Entities)
- ▶ Guoshuihan (2009) No. 188 (Guoshuihan 188) – Notice on Intensifying the Transfer Pricing Follow-up Administration
- ▶ Guoshuihan (2010) No. 323 (Guoshuihan 323) – Notice on Guidance Given by the SAT to Tax Bureaus with respect to Contemporaneous Documentation Reviews
- ▶ Guoshuihan (2011) No. 167 (Guoshuihan 167) – The Annual Anti-tax Avoidance Work Report (reports the 2010 anti-tax avoidance enforcement work conducted by the SAT and the 2011 work plan)
- ▶ Guoshuihan (2011) No. 111 (Guoshuihan 111) – 2011 Annual Anti-tax Avoidance Work Report
- ▶ Guoshuifa (2012) No. 13 (Guoshuifa 13) – Regulation for Internal Procedures of Special Tax Adjustments (Trial Implementation)
- ▶ Guoshuifa (2012) No. 16 (Guoshuifa 16) – Notice regarding the "Procedural Guidelines for Joint Review of Significant Special Tax Adjustments Cases (Trial)"
- ▶ Announcement of the SAT (2013) No. 56 – Announcement on the Implementation Measures for Tax Treaty Mutual Agreement Procedures
- ▶ Guoshuibanca (2014) No. 146 (Guoshuibanca 146) – Investigation on related party service charges and royalties
- ▶ Announcement of the SAT (2014) No. 54 – Announcement on Monitoring and Administration of Special Tax Adjustment
- ▶ Announcement of the SAT (2015) No. 45 – Announcement on strengthening the follow-up monitoring of CSAs
- ▶ Announcement of the SAT (2015) No. 16 – Announcement on Corporate Income Tax treatment of certain overseas related party payments

## **OECD Guidelines treatment**

In principle, the SAT recognizes the OECD Guidelines and the transfer pricing methods named therein.

## **Priorities/pricing methods**

The SAT accepts reasonable methods, including CUP, resale price and cost-plus. Other methods, including profit split, and TNMM, are also considered. For the TNMM, the profit-level indicators most often used are operating margin and markup on total costs. Balance-sheet profit-level indicators such as return on assets or return on capital employed are also used when appropriate.

## China (continued)

### Transfer pricing penalties

Article 48 of the CITL stipulates that interest will be applied to the underreported tax resulting from special adjustments to tax payments, including transfer pricing adjustments. Article 122 of the CITL Implementation Regulations references Article 48 and states that the interest imposed on special tax adjustments is based on the base renminbi (RMB) lending rate published by the People's Bank of China, plus an additional 5% interest charge.

Additionally, per Article 106 of Guoshuifa 2, taxpayers that refuse to provide contemporaneous documentation, as well as those that file false and/or file incomplete related party reporting forms, are subject to monetary penalties pursuant to Article 70 of the PRC Tax Collection and Administration Law and Article 96 of the PRC Tax Collection and Administration Law Implementation Regulations, as well as Article 44 of the CITL and Article 115 of the CITL Implementation Regulations.

### Penalty relief

According to Article 122 of the CITL Implementation Regulations, the additional 5% interest charge (applied on the basis of Article 48 of the CITL) can be avoided if contemporaneous documentation has been prepared in accordance with the relevant law and regulations and can be provided within 20 days of a request.

### Documentation requirements

The CITL and the CITL Implementation Regulations imply that taxpayers are expected to maintain contemporaneous transfer pricing documentation. Articles 13 through 20 of Guoshuifa 2 formally introduce and clarify China's contemporaneous transfer pricing documentation requirements.

Article 14 of Guoshuifa 2 specifies five primary components of China's contemporaneous documentation:

- ▶ Organizational structure
- ▶ Information on business operations
- ▶ Information on related party transactions
- ▶ Comparability analysis
- ▶ Selection and application of transfer pricing methods

Article 15 states that certain enterprises can be exempted from the preparation, maintenance and provision of contemporaneous documentation:

- ▶ Those conducting CNY200 million or fewer in annual related party purchase and sale transactions and CNY40 million or fewer in annual related party "other" transactions (intangibles, services and interest from financing transactions)
- ▶ Those with transactions covered by an APA
- ▶ Those with a 50% or less share of foreign ownership that only conduct related party transactions within China

### Documentation deadlines

Article 16 of Guoshuifa 2 specifies that taxpayers should finish the preparation of contemporaneous documentation on or before 31 May of the following calendar year and that all documentation should be submitted to tax authorities within 20 days of a request.

### Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is 10 years.

Article 20 of Guoshuifa 2 states that contemporaneous documentation should be maintained for 10 years (starting from 1 June of the year following the transactions).

### Return disclosures/related party disclosures

Article 43 of the CITL and Guoshuifa 114 require that taxpayers complete and submit nine comprehensive Related Party Transaction Annual Reporting Forms along with their annual tax filing. Per Article 16 of Guoshuifa 2, these forms must be submitted on or before 31 May of the following calendar year, including related party transactions conducted during the fiscal year (e.g., Related Party Transaction Annual Reporting Forms for fiscal year 2011 are due on or before 31 May 2012).

## China (continued)

### Transfer pricing-specific returns

China does not have transfer pricing-specific returns. However, in their annual income tax returns, taxpayers are required to disclose certain transfer pricing information on the Related Party Transaction Annual Reporting Forms. On these forms, taxpayers are required to disclose the total amount of related party transactions involving either the purchase or sale of tangible goods, provision or receipt of services, transfer or licensing of tangible/intangible assets, or financing. If a given transaction involving either the purchase or sale of tangible goods, or the provision or receipt of services with any single overseas related party and the value of the transaction exceeds 10% of the total transactional category, then the name of the related party and the transfer pricing policies need to be specified on the forms.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as high, as is the risk of transfer pricing issues being reviewed under an audit. The SAT also initiates separate transfer pricing audits leading by the anti-avoidance department of the SAT. The likelihood of the transfer pricing methodology being challenged is characterized as medium.

In 2013, the Chinese tax authorities continued to focus on certain industries, such as automotive, pharmaceutical and retail. Additionally, topics such as market premium, location savings and local marketing intangibles remain focus areas, which are likely to give rise to transfer pricing scrutiny. In addition, intangible property and share transfer are targeted areas under the SAT's examination strategy. The Chinese tax authorities are arguing for the use of income method to be used when valuing intangible property or share transfer transactions. The first reported case involving the use of the income method to a share transfer was concluded resulting in an additional tax payment of CNY11 million.

In 2014, the transfer pricing audits continued to focus on certain industries, such as automotive, pharmaceutical, retail, real estate, transportation and logistics, and manufacturing. The topics of market premium and location savings were often discussed in the audit cases, and the Chinese tax authorities challenged the compensation to local entities, arguing that it may not be sufficiently accounting for the specific China market factors and local contributions.

In addition, besides the goods transactions, the Chinese tax authorities focused on investigating intragroup services and intangible transactions. In July 2014, the SAT requested all the local tax authorities to review the significant service fees and royalties payments to overseas related parties, especially those located in tax havens and the low-tax-rate jurisdictions alike.

Besides the formal transfer pricing audit, the SAT allows taxpayers to perform self-assessment adjustments under the Announcement of SAT (2014) No. 54. Notwithstanding these self-assessment adjustments, the Chinese tax authorities maintain the right to impose further transfer pricing adjustments on open years.

### APA opportunity

APAs are available in China. Guidance regarding the APA process and procedures is provided in Articles 46 through 63 of Guoshuifa 2.

The duration of an APA is generally three to five years. Enterprises no longer need to have 10 years of operating history before applying for an APA, and the ban on enterprises with major tax evasion history has been lifted as well. Annual related party transaction volumes must be greater than or equal to only CNY40 million, rather than the previously required CNY100 million. Applications for APAs involving more than one in-charge province can be submitted directly to the tax authority in Beijing.

The China Advance Transfer Pricing Arrangement Annual Report (2013) was published in December 2014. China signed 19 APAs in 2013, including 11 unilateral APAs and 8 bilateral APAs. In total, 104 APAs were concluded between 2005 and 2013.

From 2005 to 2013, the number of unilateral APAs signed continually decreased till 2011 and started to increase in 2013. The bilateral APAs signed demonstrate a trend of increase in bilateral cases. China has concluded 37 bilateral APAs since 2005, and more cases are in the application and negotiation process. However, it is becoming increasingly difficult with the lack of resources at the State Administration of Taxation level to push for APAs.

# Colombia

## Taxing authority and tax law

Tax authority: Directorate of National Taxes and Customs (*Dirección de Impuestos y Aduanas Nacionales*, or DIAN)

Tax law: Colombian Tax Code, Extraordinary Decree 624, enacted 1989

## Relevant regulations and rulings

- ▶ Law 788 (enacted December 2002) and Law 863 (enacted December 2003) establish transfer pricing rules, which are Articles 260-1 to 260-11 of the Colombian Tax Code.
- ▶ Tax reform: Law 1607, enacted in December 2012, included significant modifications to the transfer pricing regime. Under these modifications, permanent establishments (PEs) are considered Colombian taxpayers and must comply with Colombia's formal transfer pricing obligations. Additionally, transactions carried out between taxpayers in Colombia and their related parties located in free trade zones are also subject to transfer pricing rules and regulations as transactions are carried out with entities in tax havens.

Regulatory Decree 3030, published in December 2013, establishes transfer pricing guidelines, including the contents of the transfer pricing documentation and the informative return, use of financial information and the APA programs.

The definition of "related parties" is found in Article 260-1 of the Colombian Tax Code. The definition of "tax haven" is found in Article 260-7 of the Colombian Tax Code.

The tax reform mentions that it is not mandatory to use the interquartile range as the accepted measure to determine if the analyzed transaction complies with the arm's-length principle. Accordingly, other statistical measures can be used, including the total range. Additionally, one-year data of the tested party and comparable companies must be used in the transfer pricing analysis. If multiple-year data is used, it should be supported in the transfer pricing report.

Additionally, the tax reform established that an independent auditor must certify the financial information (whether it is segmented or not) used to carry out the transfer pricing analysis of an intercompany transaction. This rule applies even if the tested party is the related party abroad.

## OECD Guidelines treatment

Although Colombia is not a member of the OECD, the OECD Guidelines are generally followed in local regulations. According to Sentence C-690 of the Colombian Constitutional Court, issued on 12 August 2003, the OECD Guidelines and Commentaries are an auxiliary source of guidance and interpretation, but they are not mandatory for the Colombian tax authority. However, the OECD Guidelines have been mentioned and have been used as a reference in official audits.

## Documentation requirements

Taxpayers must prepare documentation that supports the assertion that each transaction with foreign related parties complies with the arm's-length principle. The transfer pricing documentation includes a functional analysis (organizational structure, business description, functions, assets, risks and detailed information about the intercompany transactions, among other areas), a macroeconomic analysis, an industry analysis and an economic analysis.

For supporting documentation purposes, those transactions exceeding US\$301,643 by type of transaction are subject to transfer pricing analysis only if the total amount of the transactions exceeds US\$575,006. Transactions engaged with residents or those domiciled in tax havens (related or independent parties) are subject to transfer pricing analysis if the total amount of the transactions exceeds US\$94,263. For financing operations, the amount of principal is the base to calculate these thresholds.

## Colombia (continued)

### Priorities/pricing methods

Colombian tax law has established five transfer pricing analysis methods: CUP, resale price, cost-plus, TNMM and profit split (which can be applied either in the form of a contribution analysis or a residual analysis).

Method selection should be based on the characteristics of the transaction under analysis. The selected method should be the one that best reflects the economic reality of the transaction, provides the best information and requires the fewest adjustments.

Some of the important changes in the transfer pricing regime relating to methods include:

- ▶ When internal comparables are available, they must be used as priority when carrying out the transfer pricing analysis.
- ▶ When using the CUP method to analyze the purchase of used fixed assets between related parties, the original purchase invoice issued by the third party to the related party abroad must be used to obtain the initial purchase value, thus taking into account the asset's depreciation since acquisition, in compliance with Colombian GAAP. If no original invoice is available, a third party's valuation must be performed to prove the arm's-length value of the acquired asset.
- ▶ The equity value cannot be used to analyze the purchase or sale of stocks that are not publicly traded on the stock market. Instead, financial valuation methods must be used, particularly those that calculate the market value through the discounted cash flow method.
- ▶ With regard to intragroup services, the taxpayer must demonstrate that the services were in fact received and that the Colombian entity benefited. Moreover, it is necessary to prove that the fee paid complies with the arm's-length principle.
- ▶ Company restructurings that include redistribution of functions, assets and risks must comply with the arm's-length principle.

### Return disclosures/related party disclosures

As part of the transfer pricing return, taxpayers must disclose information about related parties, such as whether it's a foreign or local related party (free trade zone), the country of residence and tax identification number. Information about transactions carried out in tax haven jurisdictions also must be disclosed.

Other information disclosed on the transfer pricing return includes the type of intercompany transaction, the amount of the transaction, the transfer pricing methodology applied, the company assessed, the price or margin obtained in the transaction and the arm's-length range.

It is also necessary to include information regarding comparability adjustments, the designation of the tested party, the amount of the adjustments made on the income tax return (if any) and the financial information that was used (segmented or complete information).

When performing transactions resulting in payments in favor of related parties located in tax haven jurisdictions, specific information about functions, assets, risks, and details about costs and expenses incurred by the foreign entity must be included in the transfer pricing documentation.

When the transaction is held with a third party located in a tax haven jurisdiction, supporting documentation must be included in the transfer pricing report to prove there is no economic relation between the parties, and the details about functions, assets, risks, and cost and expenses should not be included in the report.

### Transfer pricing-specific returns

The Colombian tax authorities require a transfer pricing informative return to be completed, as required by Article 260-9 of the Colombian Tax Code. This annual requirement must contain information about related parties, intercompany transactions completed during the previous fiscal year and transfer pricing analysis results.

## Colombia (continued)

### Transfer pricing penalties

The Colombian transfer pricing regime issues penalties stemming from the supporting documentation and the transfer pricing return.<sup>1</sup>

#### Transfer pricing documentation

- ▶ Late filing - US\$141 to US\$135,739
- ▶ Information inconsistencies - 1% of the value of the transactions reported with inconsistencies that were carried out with related parties, limited to US\$35,820
- ▶ Omitted information (transactions) - 2% of the value of the omitted transactions carried out with related parties, limited to US\$188,527; additionally, rejection of cost and expense related to omitted operations may apply
- ▶ Omitted information (related parties located in tax havens) - 4% of the total value of the transactions carried out with related parties, limited to US\$94,263; additionally, rejection of cost and expense related to omitted operations may apply
- ▶ Amendment of transfer pricing documentation - up to US\$188,527 if the amendment is performed after a pre-assessment has been issued by tax authorities

#### Transfer pricing return

- ▶ Late filing – US\$94 to US\$90,493
- ▶ Information inconsistencies - 0.6% of the total value of the transactions carried out with related parties, limited to US\$21,492
- ▶ Omitted information (transactions) - 1.3% of the total value of the transactions carried out with related parties, limited to US\$188,527; additionally, rejection of cost and expense related to omitted operations may apply
- ▶ Omitted information (related parties located in tax havens) - 2.6% of the total value of the transactions carried out with related parties, limited to US\$56,558; additionally, rejection of cost and expense related to omitted operations may apply
- ▶ Non-filing of transfer pricing return - 10% of the total value of the transactions carried out with related parties, limited to US\$188,527

The penalties mentioned above do not include additional fines and penalties that taxpayers incur for the amendment of income tax returns or transfer pricing adjustments.

### Penalty relief

The transfer pricing regime gives taxpayers in Colombia penalty relief, as mentioned below:

#### Transfer pricing documentation

- ▶ Reduced penalty (before the tax authority's penalty order):
  - ▶ When the taxpayer amends its transfer pricing documentation for inconsistencies or omissions before the tax authority issues its penalty order, the penalty will be reduced to 50% of the amount determined in the official assessment.

#### Transfer pricing return

- ▶ Reduced sanction (before the tax authority's penalty order):
  - ▶ When the taxpayer amends its transfer pricing return for inconsistencies or omissions before the tax authority issues its penalty order, the penalty will be reduced to 50% of the amount determined in the official assessment.
  - ▶ The transfer pricing return can be voluntarily amended for two years from the original date of the filing.

<sup>1</sup> The amounts in US dollars apply for taxable year 2015 and are subject to changes because of the exchange rate and the tax value unit. For the purposes of this guide, tax value unit for 2015 is COP28,279,485 and the exchange rate is COP3,000 per US dollar.

## Colombia (continued)

### **Penalty relief (continued)**

The tax authority has a period of five years from the original filing date to start an administrative process to impose penalties regarding noncompliance of formal transfer pricing duties.

### **Transfer pricing adjustments**

A penalty of up to 160% of the additional tax could apply. For a self-assessment or acceptance of the challenges made by the tax authorities, this fine could be decreased to 10%.

### **Documentation deadlines**

Regulatory Decree 3030 establishes the obligation to file the transfer pricing documentation with the tax authority every year via its electronic system. The due date is the same for filing both the transfer pricing documentation and the transfer pricing return.

Normally, due dates for complying with these obligations are in July of the following calendar year.

### **Statute of limitations on transfer pricing assessments**

The general statute of limitations for transfer pricing adjustments is two years from the date of filing the income tax return. In some cases (losses or setoff of losses), the statute of limitations is five years.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

Since 2004, the tax authorities have improved their audit processes, focusing on the hydrocarbon and mining industries, especially in the following aspects:

- ▶ The tax authorities challenge the benefits and actual rendering of general services (such as accounting, administrative and marketing). During an audit, the tax authorities have required companies to prove that the usefulness, non-duplication, benefits and more of the aforementioned services comply with Article 107 of the Colombian Tax Code.
- ▶ The tax authorities challenge extraordinary adjustments that taxpayers include in their transfer pricing analysis, such as exchange rate gains and losses, government regulations, and differences between Colombian GAAP and US GAAP.
- ▶ In the last year, the tax authorities have started to challenge, on a general basis, the sets of comparables developed by taxpayers and have prepared new sets by themselves.

From a general perspective, the likelihood of an audit is medium.

### **APA opportunity**

In 2012, the first APA was concluded in Colombia, and several are in the evaluation phase. The Colombian tax authorities promote them as a viable and advantageous option for taxpayers, as they consolidate the taxpayer's transfer pricing position across several years instead of on a year-to-year basis. The APA agreement will be valid for the year it is subscribed to, the year before and up to three taxable years after the year of the subscription.

# Costa Rica

## **Taxing authority and tax law**

Taxing authority: Tax Administration of Costa Rica (*Dirección General de Tributación*, or DGT)

Tax law: Income Tax Law (ITL)

## **Relevant regulations and rulings**

Executive Decree No. 37898-H (the TP Executive Decree), which adopts transfer pricing regulations applicable to individuals or business entities that conduct related party transactions, came into effect on 13 September 2013. The TP Executive Decree is in effect upon publication in the Official Gazette on 13 September 2013. Further regulation is expected to complement the TP Executive Decree.

## **OECD Guidelines treatment**

Currently, Costa Rica is not an OECD member but it is being evaluated for admission. There is no reference to the OECD Guidelines in the TP Executive Decree. Costa Rican transfer pricing provisions are mainly based on the OECD Guidelines and apply to all of the transactions conducted by Costa Rican taxpayers with related entities resident abroad and within Costa Rica. In addition, the OECD Guidelines have been mentioned and used as a reference in official audits and court resolutions.

## **Documentation requirements**

Contemporaneous transfer pricing documentation related to domestic and cross-border related party transactions must be maintained in Spanish. The documentation must include the name, address and tax residency of the related persons with whom transactions are carried out, as well as the correct application of an approved method, as stated in the TP Executive Decree. It is necessary to include information regarding the functions performed, assets used and risks borne by the taxpayer involved in each transaction. Information and documentation about comparable transactions or companies must also be included.

## **Priorities/pricing methods**

The TP Executive Decree requires the application of the most appropriate transfer pricing method. The specified methods are the CUP, resale price, cost-plus, profit split and TNMM, and the valuation of goods with international quotations method that can be applied as an alternative to the CUP method.

## **Return disclosures/related party disclosures**

Related party disclosures have to be made in specific transfer pricing returns. No related party disclosures need to be made on general income tax returns.

## **Transfer pricing-specific returns**

Taxpayers are obligated to file a Transfer Pricing Information Return annually when both of the following conditions are met: (i) the taxpayer conducts cross-border and local related party transactions and (ii) such taxpayer falls under the category of "large taxpayers" (*grandes contribuyentes*) or is an individual or entity operating under the Free Zone Regime.

The forms, mechanisms and due dates are pending, and will be issued by the DGT.

## **Documentation deadlines**

Taxpayers must prepare and maintain the transfer pricing documentation on an annual basis. The TP Executive Decree does not state a deadline. The documentation must be at the disposal of the DGT upon request.

## Costa Rica (continued)

### Transfer pricing penalties

No express monetary penalties are applied when taxpayers fail to maintain contemporaneous transfer pricing documentation or the transfer pricing information return. Nevertheless, the monetary penalties for noncompliance set forth in the Tax Code of Standards and Procedures should apply by default.

In the case of a transfer pricing income adjustment, surcharges and penalty interest apply, per the general provisions of the Tax Code.

### Penalty relief

No penalty relief regime is in place.

### Statute of limitations on transfer pricing assessments

The standard four-year statute of limitations on general tax assessments should apply. This statutory period is extended to 10 years for unregistered taxpayers, fraudulent returns filed and failure to file. The term is extended in cases of amended returns.

The statute of limitations starts January 1 following the due date of the tax return.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit is categorized as high, especially for taxpayers characterized as large taxpayers and multinational companies with related transactions. The likelihood of transfer pricing assessments as part of a general tax audit is considered high as well. In case transfer pricing is scrutinized, the likelihood that the transfer pricing methodology will be challenged is also high. As of today, the DGT aggressively has been trying to apply only the CUP method.

Although the TP Executive Decree was published recently, transfer pricing has been part of the Costa Rican tax environment for the past 10 years.

Before the TP Executive Decree, Costa Rica did not have official transfer pricing rules. To date, neither the ITL nor the Tax Code of Standards and Procedures technically include any specific transfer pricing provision. Not even the general arm's-length principle is codified. However, in an internal directive from 2003 (DGT-20-03), the DGT instructed its auditors to examine intercompany transactions under the general economic reality and substance-over-form principles defined under Sections 8 and 12 of the Tax Code of Standards and Procedures and apply general transfer pricing principles. Even though there were no official regulations or any kind of technical references or guidelines for taxpayers, tax auditors reviewed and challenged related party transactions primarily of multinational companies, as well as some large local companies in Costa Rica. This resulted in complex tax adjustments for companies doing business in the country. These DGT actions were endorsed by several rulings from administrative and judicial courts, as well as rulings from the Constitutional Chamber of the Supreme Court.

There was an attempt to pass transfer pricing legislation through Congress in 2012, but it was part of a larger tax reform package that was repealed after the Constitutional Court declared the whole law unconstitutional. However, despite lacking a law regulating transfer pricing, the Constitutional Court stated that the DGT could apply transfer pricing rules based on Sections 8 and 12 of the Tax Code of Standards and Procedures. A few months later, the TP Executive Decree was drafted and approved.

The TP Executive Decree is intended to formalize an administrative practice that has been in force for years and create a certain level of legal certainty in relation to this subject matter, while Congress passes more comprehensive legislation.

### APA opportunity

APAs are contemplated under the provisions of the TP Executive Decree. Taxpayers can request an APA for a maximum of three years. However, the corresponding regulations have not yet been enacted.

# Croatia

## **Taxing authority and tax law**

Tax authority: Ministry of Finance

Tax law:

- ▶ The Corporate Income Tax Act (the CIT Act)
- ▶ The Corporate Income Tax Bylaw (the CIT Bylaw)

## **Relevant regulations and rulings**

Article 13 of the CIT Act and Article 40 of the CIT Bylaw prescribe arm's-length pricing as the basic principle to be followed and define the methods allowed and the documentation required to support prices between related parties.

In general, arm's-length pricing is required only for cross-border transactions between related parties. However, in line with the amendments to the CIT Act (in force as of 1 July 2010), the obligation to comply with transfer pricing rules is extended to transactions between domestic entities if one of the entities is either in a tax-loss position or in a special tax status (paying tax at lower rate or exempt from paying corporate income tax). Note that this is in line with the non-binding, official opinion of the tax authorities issued before amendments to the legislation were introduced (i.e., the opinion governs prior to 1 July 2010). At present, neither the CIT Act nor the CIT Bylaw provides extensive guidance or instruction to taxpayers about meeting the transfer pricing requirements.

## **OECD Guidelines treatment**

Although Croatia is not an OECD member country, the provisions of relevant Croatian tax legislation are generally based on the OECD Guidelines. Furthermore, the Ministry of Finance issued instructions for the tax officials performing transfer pricing audits, which are also based on the OECD Guidelines.

## **Documentation requirements**

According to the CIT Bylaw, a taxpayer should prepare documentation to substantiate the arm's-length nature of the prices charged in transactions with any related parties, as follows:

- ▶ Collect information on the corporate group in which it operates and its position in the group, and provide analysis of related-party transactions and other details of the group and the taxpayer
- ▶ Identify the transfer pricing method applied; describe data, methods and analysis performed in the process of determining transfer prices; and provide reasons why the particular method was selected
- ▶ Document assumptions and evaluations used to determine transfer prices (in line with the principle of unbiased transactions), with reference to comparability, functional analysis and risk analysis
- ▶ Document all calculations of transfer pricing based on the selected method (such documentation should enable a comparison with the prices applied by other comparable taxpayers)
- ▶ Update transfer pricing documentation from previous years to reflect adjustments made due to changes in relevant facts and circumstances
- ▶ Make available documents that were prepared and based on the transfer pricing analysis, or to which references have been made
- ▶ Maintain the documentation concerning related parties and intercompany transactions

## **Priorities/pricing methods**

The Croatian CIT Act regulations do not provide detailed rules on how to arrive at the arm's-length price that should be applied in related-party transactions. However, the CIT Act prescribes the following methods that a taxpayer can use to determine the arm's-length price: CUP, resale-minus, cost-plus, profit split and TNMM. All five standard methods are allowed; however, traditional transactional methods (CUP, resale-minus and cost-plus methods) should have the priority when establishing whether the conditions imposed between related parties are at arm's length.

## Croatia (continued)

### Priorities/pricing methods (continued)

If possible, the CUP method should be applied. Other available methods – i.e., transactional profit methods (profit split and TNMM) – should be used on occasions when traditional methods cannot be reliably applied.

### Return disclosures/related party disclosures

No specific disclosures are required in the annual tax return. However, Croatian tax authorities regularly request information about transfer pricing methods used after the CIT return has been filed.

### Transfer pricing-specific returns

The Croatian CIT Act or CIT Bylaw does not prescribe specific requirements for separate returns (including information returns) for related party transactions.

### Documentation deadlines

There is no deadline for preparing the transfer pricing documentation prescribed by the legislation. The law requires the transfer pricing documentation to be readily available and provided to the tax authorities upon their request in a tax audit. The documentation should be in Croatian.

Although not prescribed by CIT legislation, in practice, the tax authorities started requesting, on a case-by-case basis, a statement of the transfer pricing method applied. The transfer pricing documentation is submitted as supporting documentation upon submission of the corporate income tax return (within four months of the taxpayer's fiscal year-end).

### Transfer pricing penalties

Fines of up to HRK200,000 (approximately EUR27,000) for a company and HRK20,000 (approximately EUR2,700) for the responsible individual within the company may be imposed for any underestimation of the corporate income tax liability. Penalty interest would also be calculated from the date the tax was due until the date the tax is paid.

### Penalty relief

There are no specific provisions concerning penalty relief.

### Statute of limitations on transfer pricing assessments

The general statute of limitations for determining tax liabilities and rights in a particular tax period expires at the end of the third year following the year in which a tax return should have been filed (e.g., since the 2012 corporate income tax return has to be filed by 30 April 2013, filings for 2012 become statute-barred on 1 January 2017). However, the general statute of limitations may be extended, and it restarts after each intervention by the tax authority concerning a tax return that has been filed. The absolute statute of limitations expires at the end of the sixth year following the year in which the tax return should have been filed. Therefore, filings for 2012 become statute-barred, regardless of the number of intervening events initiated by the tax authority, on 1 January 2020.

Note, however, that the law's provisions regulating the statute-of-limitations period of the right to assess tax have been amended, effective 1 January 2013. The statute-of-limitations period mentioned above now could be prolonged in cases when investigations are initiated concerning a director, shareholder or related party in connection with the abuse of rights (e.g., deliberate actions aimed at nonpayment of tax) or unexplained sources of assets.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

In the past few years, the tax authorities have increased their focus on prices applied in transactions with related parties and the frequency of transfer pricing audits. Initially, due to limited experience in transfer pricing, the tax authorities tended to dispute service charges between related companies. However, tax inspectors have become more knowledgeable about transfer pricing and are increasingly aware of the issues.

The tax authorities issued a manual containing instructions for tax inspectors to follow in transfer pricing audits. The manual also provides a translation of the OECD Guidelines. Therefore, the OECD Guidelines should represent a good theoretical basis for defining transfer prices and for preparing the documentation that supports them.

## Croatia (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)**

Generally, the tax authorities accept a transfer pricing file prepared in line with the OECD Guidelines.

Once a tax audit is initiated, there is a high risk of transfer pricing being reviewed within the audit, especially when related party transactions total significant amounts.

### **APA opportunity**

Croatia has not implemented legislation concerning APAs, but they are expected to be introduced in the near future.

# Republic of Cyprus

## **Taxing authority and tax law**

Taxing authority: Inland Revenue Department

Tax law: Income Tax Law

## **Relevant regulations and rulings**

Currently, Cyprus has no local transfer pricing regulations, but the arm's-length principle is codified in the tax law in a wording similar to that of Article 9 of the OECD Model Tax Convention on "Associated Enterprises." In addition, Cyprus has 44 double tax treaties that contain an article resembling Article 9.

## **OECD Guidelines treatment**

Not applicable.

## **Documentation requirements**

Not applicable.

## **Priorities/pricing methods**

Not applicable.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

Not applicable.

## **Penalty relief**

Not applicable.

## **Statute of limitations on transfer pricing assessments**

Not applicable.

## **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

Not applicable.

## **APA opportunity**

Not applicable.

# Czech Republic

## Taxing authority and tax law

Tax authority: Ministry of Finance (MF)

Tax law: The Czech Income Tax Act

## Relevant regulations and rulings

Directive D-332 discusses the application of international standards in the taxation of transactions between associated companies. D-332 confirms the applicability of the OECD Guidelines for both international and domestic transactions (with certain exceptions).

Directive D-333 outlines requirements concerning §38nc of the Income Tax Act and comments on the principles of binding assessments, the latter of which corresponds to the preliminary price agreement principles within the meaning of the OECD Guidelines.

Directive D-334 outlines requirements of the expected scope of documentation of a transfer pricing methodology agreed upon between related parties. It also comments on the scope and nature of documentation in accordance with the Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the European Union (EU) (Code of Conduct), created by the EU Joint Transfer Pricing Forum.

Directives D-332, 333 and 334 are not legally binding, but the tax authority usually follows them in practice.

## OECD Guidelines treatment

Based on D-334, the OECD Guidelines and the Code of Conduct generally are accepted in the Czech Republic.

This directive also mentions that transfer pricing documentation prepared in accordance with the Code of Conduct "should be sufficient" for substantiating the method of calculating the arm's-length price.

## Documentation requirements

There are no formal statutory documentation requirements in place. D-334 describes the documentation that is expected and may be required by the tax authority. The directive is not legally binding, but it is followed in practice. D-333 sets out documentation that should serve as the initial basis for filing the application for a binding assessment. The documentation supporting a request for a binding assessment should contain information on the group, the company, the business relationship, other circumstances affecting the business relationship and the transfer pricing method.

It is crucial for the taxpayer to have supporting documentation in case the tax authority audits the transactions, as the burden of proof rests with the taxpayer. The tax authority has great discretion in deciding what level and nature of documentation is sufficient. During the tax audit, the authority may request any documentation that reasonably substantiates the actual character and substance of the transaction, its benefits for taxpayers, the appropriateness of the level of fees and the transfer pricing method selected. The analysis of a controlled transaction and the identification of comparables could be useful. Therefore, a high level of formal evidence may be necessary to support various aspects of the transaction.

## Priorities/pricing methods

The MF follows the OECD Guidelines. Use of profit-based methods is acceptable, where substantiated.

## Return disclosures/related party disclosures

When preparing corporate income tax returns, taxpayers will be obliged to fill in the mandatory enclosure to the corporate income tax return that will include reporting intragroup transactions. Qualifying companies will have to submit information regarding related parties (name, registered office) and complete a list of selected transactions entered into with them in a special enclosure to their tax return. The transactions will be classified by type (such as sale of goods, provision of services, financial transactions and payment of royalties).

## Czech Republic (continued)

### Return disclosures/related party disclosures (continued)

In addition, all taxpayers have to disclose in the corporate income tax return whether they were engaged in transactions with related parties.

Effective 1 January 2001, the executives of a controlled entity are required to complete a memorandum with respect to relationships and transactions with companies in the group. This does not apply if a controlling agreement is concluded. Note that this is based on commercial legislation rather than on tax legislation, and the memorandum has no direct tax impact or tax aspects.

### Transfer pricing-specific returns

No specific transfer pricing return is required.

### Documentation deadlines

There is no specific deadline to prepare documentation, since no statutory documentation requirement exists.

In the event of a transfer pricing challenge, the taxpayer must file information before the statutory deadline for tax proceedings. This is generally within 15 days of the taxpayer's receipt of a request from the tax authority. This time limit may be extended at the discretion of the tax authority if the taxpayer so requests.

### Transfer pricing penalties

There are no specific transfer pricing penalties. Generally, when the tax authority successfully challenges transfer pricing, a penalty of either 20% of the unpaid tax or 1% of the decreased or reduced tax loss will be applied. Thereafter, interest is assessed at 14% above the "repo rate" (or repurchase agreement rate) of the Czech National Bank (for a maximum of five years).

### Penalty relief

No penalty relief regime is in place. It is at the discretion of the MF to decrease penalties; however, this is limited to specific situations.

### Statute of limitations on transfer pricing assessments

The general statute of limitations applies. Effective 1 January 2011, the limit set by the Tax Code is three years from the end of the period for filing the return for the taxable period in question (i.e., the period in which the tax liability arose). However, if the tax authority undertakes an act directed at the assessment of tax, then the three-year time limit begins again. The limit will also be prolonged if the supplementary tax return for the respective period is filed (should the taxpayer file an additional return in the 12 months before the current limit expires, the limit is extended by one year) or if a tax loss carryforward may be utilized in the particular period. However, tax may not be assessed after 10 years.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as medium, while the likelihood that transfer pricing is reviewed as part of that audit is high. The tax authority has adopted a global approach. Audit subjects are selected based on complex criteria, and transfer pricing is only one aspect among many others. Intangibles, royalties and service fees are seen as the most likely transfer pricing audit issues. Although no specific country is targeted for transfer pricing audits, transactions with tax haven countries are closely scrutinized. The scrutiny of transfer pricing will only intensify, and in press statements, the MF has directed that the tax authorities should particularly focus on transfer pricing. In addition, they have created specialized sections within the tax authority containing full-time specialists dedicated to transfer pricing issues.

### APA opportunity

APA regulations were established under §38nc of the Income Tax Act, which became effective 1 January 2006. Upon the taxpayer's request, the tax administrator decides whether the taxpayer has chosen a transfer pricing method that would result in a transfer price determination on an arm's-length basis. The binding assessment can be issued only for transactions effective in a particular tax period or that will be effective in the future. It is impossible to apply for a binding assessment of business relationships that have already affected tax liability. D-333 details the procedure for issuing binding assessments and the particulars for the application. Generally, the tax administrator should issue the decision within six months.

# Denmark

## Taxing authority and tax law

Taxing authority: SKAT (the Danish Customs and Tax Administration)

Tax law:

- ▶ Danish Tax Assessment Act
- ▶ Danish Tax Control Act

## Relevant regulations and rulings

Regulation Number 42, of 24 January 2006, sets forth the minimum requirements for transfer pricing documentation. The regulation is referred to as the Executive Order on Transfer Pricing Documentation.

The tax authorities have published guidelines on the application of the Executive Order on Transfer Pricing Documentation. These guidelines are binding only for the tax authorities and not the taxpayers.

In 2009, the tax authorities published additional documentation guidelines on valuation. The guidelines apply to the valuation of companies, shares and intellectual property rights. The guidelines include a description of valuation models, recommendations on the use of these and guidelines for the documentation of the valuation. The guidelines are referred to as the Guidelines of Valuation and the same was revised as on 15 January 2013.

SKAT issued the latest version of the transfer pricing guidelines on 24 January 2013.

## OECD Guidelines treatment

The OECD Guidelines are generally recognized as a source for interpretation of the Danish transfer pricing rules.

## Documentation requirements

The documentation must be made available to the tax authorities within 60 days upon the tax authorities' request. The earliest time that such a request can be made is the filing date of a company's tax return.

The transfer pricing documentation requirements include both domestic and foreign intercompany transactions. Under certain circumstances, the transfer pricing documentation requirements are reduced for small and medium-sized companies (i.e., companies that are classified according to the following thresholds measured at a group level):

- ▶ Fewer than 250 employees and either:
  - ▶ An annual total balance less than DKK125 million
  - ▶ Or
  - ▶ An annual revenue less than DKK250 million

The documentation requirements were tightened as of 2006. According to the Executive Order on Transfer Pricing Documentation, the documentation must include:

- ▶ A description of the group, including the legal group structure; history of the group, including a description of restructurings, organizational structure and primary business activities; and a description of the industry in which it operates
- ▶ A description of the Danish entity and the other entities involved in intercompany transactions with the Danish entity (primary business activities and three years of key financials for all entities involved)
- ▶ A description of each intercompany transaction, including:
  - ▶ Parties; types of products, services and assets transferred; and the volumes involved
  - ▶ An analysis of functions and risks undertaken and assets employed by the entities involved
  - ▶ Contractual terms

## Denmark (continued)

### Documentation requirements (continued)

- ▶ Economic circumstances
- ▶ Business strategies
- ▶ Comparability analysis for each intercompany transaction, including:
  - ▶ Information about the transfer pricing policy and method applied, and how the transfer pricing principles are implemented in practice (e.g., whether year-end adjustments are made)
  - ▶ An analysis of the arm's-length nature of the transactions
- ▶ A list of any written intercompany agreements in relation to the intercompany transactions and a copy of any written agreements that the Danish entity or the related parties have entered into with foreign tax authorities regarding intercompany transactions

Upon request from the tax authorities, a taxpayer is required to provide a benchmark study as part of the transfer pricing analysis within 60 to 90 days.

In addition, new rules as of January 2013 came into force, allowing the tax authorities to request entities that are subject to the transfer pricing documentation requirements to obtain an auditor's report under special circumstances. The auditor's report must state that the auditor has not, during the audit, become aware of any matters giving rise to a conclusion that the transfer pricing documentation (i) does not give a true and fair view of the intercompany transactions, (ii) does not meet the documentation requirements or (iii) is not in accordance with the arm's-length principle.

The tax authorities can request an auditor's report from the company if the company has had either:

- ▶ Intercompany transactions with physical or legal entities in countries outside the European Union or European Economic Area with which Denmark has not concluded a tax treaty
  - Or
- ▶ An average operating loss in four consecutive years according to the annual report, measured as the profit or loss before net financials, extraordinary items and tax (EBIT)

Further, the tax authorities can request an auditor's report only as an appropriate and relevant control measure. An auditor's report is expected to be requested only in a relatively limited number of instances every year.

The company will have a minimum of 90 days to prepare the auditor's report.

### Priorities/pricing methods

The following transfer pricing methods are accepted: CUP, resale price, cost-plus, profit split, TNMM and others. When selecting the most appropriate method, the taxpayer should consider the aspects regarding the application of methods stated in the OECD Guidelines.

### Return disclosures/related party disclosures

Not applicable.

### Transfer pricing-specific returns

Form 05.021 (Form 05.022 for the English version) discloses information on all intercompany transactions and whether the company qualifies for reduced documentation requirements.

### Documentation deadlines

A company subject to the documentation requirement is required to submit Form 05.021 on intercompany transactions, together with the tax return (Form 05.022 for the English version).

The tax authorities can request for the taxpayer to submit the transfer pricing documentation with 60 days' notice. The earliest time that such a request can be made is the filing date of a company's tax return.

## Denmark (continued)

### Documentation deadlines (continued)

In the past, the documentation requirements were met if the documentation was prepared within 60 days of the request from the tax authorities. However, the tax authorities have recently argued that the rules shall be interpreted such that the taxpayer is obliged to prepare contemporaneous documentation (i.e., that the documentation should be prepared as part of tax returns each year). At this point, case law does not support this interpretation.

If the documentation is not in place when the tax return is submitted, the tax authorities are of the opinion that discretionary adjustments can be made.

### Transfer pricing penalties

Penalties were introduced for income years commencing on or after 2 April 2006. Penalties are applicable if the transfer pricing documentation requirements are not observed due to the taxpayers' gross negligence or willful misconduct.

The penalty amounts to DKK250,000 per legal entity per year, for which insufficient transfer pricing documentation or no transfer pricing documentation is submitted. If the tax authorities increase the income, an additional fine of 10% may be imposed on the income adjustment. If proper documentation is prepared, no penalty can be imposed.

Where there is an income adjustment, a 4.6% nondeductible surcharge (3.9% in 2013, 4.3% in 2012, 4.8% in 2011, 5.1% in 2010 and 6.1% in 2009) will be levied on all prior-year adjustments of corporate taxes payable. Furthermore, nondeductible interest of 0.8% will be added (0.4% until 31 July and 0.7% from 1 August 2013, 0.5% for the income years 2010-12, and 0.6% for income year 2009) for each additional month after the corporate tax payable for the income year in question is due. The compound interest was introduced in 2013.

In addition, if the taxpayer does not fulfill the disclosure requirements as stated in Form 05.021 (please refer to the section titled "Transfer pricing-specific returns"), or if the information provided in Form 05.021 is not correct, the highest of the following penalties will apply:

- ▶ 0.5% of the revenue, up to DKK500 million; 0.1% of the revenue between DKK500 million and DKK1 billion; 0.05% of the revenue exceeding DKK1 billion
- ▶ A total of DKK250,000 for companies having a maximum of 50 employees, increasing by DKK250,000 for every additional 50 employees until a cap of 500 employees is reached; fixed penalty of DKK2.5 million applies for companies with more than 500 employees

### Penalty relief

If the taxpayer provides insufficient documentation or no documentation and subsequently provides documentation that meets the requirements, the fine will be reduced to half of the original amount (DKK125,000). However, the 10% penalty on any income adjustment still applies. As stated above, adequate transfer pricing documentation submitted in due time will provide penalty protection.

### Statute of limitations on transfer pricing assessments

The statute of limitations for a transfer pricing assessment is 1 May in the sixth year after the income year concerned (e.g., the statute of limitations for the income year 2010 is 1 May 2016).

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The risk of a general tax audit can be characterized as moderate. As the majority of audits carried out in Denmark are transfer pricing audits, the risk of transfer pricing being scrutinized during an audit is high. The likelihood that the transfer pricing methodology will be challenged is also high.

The tax authorities operate dedicated transfer pricing audit centers across Denmark solely to carry out transfer pricing audits independently of general tax audits. The Danish Government has launched initiatives with a focus on MNEs, including increasing the funds allocated to the tax authorities and tightening the penalty rules in transfer pricing cases. The tax authorities are particularly focused on:

- ▶ MNEs that are loss making
- ▶ Transfer of business or intangibles and restructurings
- ▶ Transactions with perceived low-tax jurisdictions

## Denmark (continued)

### Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

- Setup of procurement companies in Switzerland
- Financial transactions
- Large groups

The table below shows the income adjustments made by the Danish tax authorities during 2010-14:

Year	2010	2011	2012	2013	2014
No. of cases	40	47	67	77	76
Income adjustment in DKK billions	6.3	6.2	21.2	17.3	20.3

### APA opportunity

The Danish legislation provides for unilateral, bilateral and multilateral APAs. There is no APA regime in place, but the tax authorities have entered into up to seven bilateral APAs annually.

The tax authorities expect an increase in the number of APAs that will be initiated and finalized during the next few years.

# Dominican Republic

## Taxing authority and tax law

Taxing authority: Tax Administration of the Dominican Republic (*Dirección General de Impuestos Internos*, or DGII)

Tax law: Dominican Tax Code

## Relevant regulations and rulings

In January 2007, an amendment to Article 281 of the Dominican Tax Code introduced the arm's-length principle, allowing the DGII to adjust prices used in related parties' transactions that do not meet this standard. Transfer pricing regulations are in effect as of fiscal year 2011.

On 2 June 2011, the DGII enacted regulations through Revenue Ruling No. 04-2011 regarding the general guidelines and penalties. As of 9 November 2012, through the enactment of Law 253-12 (Law), these regulations were incorporated into Article 281 of the Dominican Tax Code. Revenue Ruling No. 04-2011 was revoked by Executive Decree No. 78-14, dated 6 March 2014, which, in general, implemented modifications made by Law No. 253-12 regarding transfer pricing material.

The decree broadened the scope of Article 281 of the Dominican Tax Code, which now states that transfer pricing regulations apply to transactions between:

- ▶ A resident and a nonresident related party
- ▶ A resident and a resident related party
- ▶ A resident and an individual, corporation or entity domiciled in a tax haven

Transfer pricing adjustments will apply only if the intercompany transaction results in a tax deferral or reduction of taxable income.

The DGII will assume that taxable income has been reduced or deferred when the intercompany transaction, as originally priced, results in (i) compensation of carryforward losses, (ii) base erosion in favor of another jurisdiction or (iii) arbitrage of tax rates among residents.

## OECD Guidelines treatment

Under Decree No. 78-14, the OECD Guidelines can be relied upon for interpretation of the rules, as long as they do not contradict the Dominican Tax Code or any rulings issued by the DGII.

## Documentation requirements

Contemporaneous transfer pricing documentation related to domestic and cross-border intercompany transactions must be maintained.

Article 18 of Decree No. 78-14 dictates that taxpayers must prepare a transfer pricing study and file an information return to prove their compliance with the arm's-length principle to the DGII.

A transfer pricing documentation study at least must cover:

- ▶ Relevant market conditions
- ▶ A detailed description of the nature of the transactions
- ▶ Information on the taxpayer, including financials and a detailed analysis of functions, risks and assets
- ▶ Comparability analysis
- ▶ Transfer pricing method employed, including the method selection process
- ▶ Specification of the price or margin, or range of prices or margins applied by the taxpayer to its intercompany transactions

## Dominican Republic (continued)

### Documentation requirements (continued)

Under Decree No. 78-14, taxpayers are exempt from preparing a transfer pricing study in certain situations:

- ▶ Taxpayers whose total amount of intercompany transactions does not exceed DOP10 million and that have no transactions with entities located in tax havens or under preferential tax regimes
- ▶ For related party transactions with entities resident in the Dominican Republic, provided that such intercompany transactions do not result in a tax deferral or overall reduction of tax revenues

Nevertheless, taxpayers excluded from the documentation requirements are still subject to complying with the arm's-length principle and are required to file the information return.

### Priorities/pricing methods

Article 281 of the Dominican Tax Code establishes the following methods to assess the arm's-length standard: CUP, resale price, cost-plus, TNMM, profit split and transparent market concept (the sixth method).

### Return disclosures/related party disclosures

There are no related party disclosures that are to be made on general income tax returns.

### Transfer pricing-specific returns

Article 18 of Decree No. 78-14 states that taxpayers should file an annual information return.

Information to be disclosed includes related parties' tax address and tax identification number, transaction classifications, amounts, invoices for each transaction, and methods to be applied for analysis and profit or loss obtained, among others. This return shall be filed within 180 days after the closing date of the fiscal year.

### Documentation deadlines

Documentation must be readily available by the due date of the annual income tax return and must be kept as part of the company's accounting books and records. If requested by the tax authorities, documentation should be provided within the period the tax authorities stipulate in the notice.

### Transfer pricing penalties

Article 257 of the Dominican Tax Code dictates that failure to provide transfer pricing documentation on time or failure to provide true, complete or accurate information could result in penalties of up to 0.75% of the previous year's income.

Furthermore, any additional tax generated by DGII price adjustments should be subject to surcharges and penalty interest.

### Penalty relief

Taxpayers can benefit from reductions of the surcharges assessed as a result of any DGII adjustment. For example:

- ▶ 40% reduction of the surcharges assessed if the company decides to voluntarily amend its tax return without any prior notice from the tax authorities
- ▶ 30% reduction of the surcharges if, after being audited, the difference between the estimated tax and the effectively paid tax represents less than 30% of the latter

### Statute of limitations on transfer pricing assessments

The statute of limitations is three years. The term is affected by amended returns. However, if a taxpayer fails to file a return, the period is extended to five years.

## Dominican Republic (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The likelihood of a general tax audit is currently categorized as medium. The likelihood of a transfer pricing assessments as part of a general tax audit is considered medium as well. Even though transfer pricing regulations are new in the country, the DGII has initiated tax audits regarding transfer pricing issues.

In case transfer pricing is scrutinized, the risk that the transfer pricing methodology will be challenged is medium.

### **APA opportunity**

APAs, bilateral or multilateral, are contemplated in Article 281bis of the Dominican Tax Code and in Decree No. 78-14.

#### *Timelines and general information*

- ▶ Taxpayers can request an APA for a certain time period and renew it for an additional three years.
- ▶ APAs should be requested within the first three months of the corresponding taxpayer's fiscal year and can be requested, among others, for financing transactions with third parties to exceed the thin capitalization rules.
- ▶ The DGII must issue a response within the first 24 months after the request was filed. If no response is issued, the request will be presumed to have been denied.
- ▶ The decree establishes the information that must be included in the APA request.

Furthermore, Article 281 of the Dominican Tax Code contemplates a protection regime (*regimen de protección*) oriented to specific industries or economic activities, even though the Law does not mention the specific industries or activities subject to this regime. The DGII could determine a minimum price or margin if the taxpayer agrees and reflects it in its income tax return. Such a price or margin could be calculated considering the total value of income, assets, costs and expenses, and other variables that may be justified. The DGII issues a corresponding resolution once the industry or economic activity is selected.

# Ecuador

## Taxing authority and tax law

Tax authority: Internal Revenue Service (*Servicio de Rentas Internas*, or SRI) and National Customs Service (*Servicio Nacional de Aduanas del Ecuador*, or SENAE)

Tax law: Internal Tax Regime Organic Law (*Ley Orgánica de Régimen Tributario Interno*, or LORTI) and its regulations

## Relevant regulations and rulings

The transfer pricing regime is part of the Corporate Income Tax (CIT) enacted in LORTI, and its application is prescribed in LORTI, tax administration resolutions and communications, and a Technical Guidelines document available on SRI's website.

In December 2014, significant changes affecting transfer pricing were enacted, modifying LORTI and its regulations, including:

- ▶ There are restrictive deductibility limits for royalties, technical services, management fees and consulting services paid to related parties.
- ▶ Certain indirect allocated expenses paid to related parties are restricted.
- ▶ The CIT exemption is eliminated for profit made when shares (or similar) of Ecuadorian entities are directly or indirectly transferred.
- ▶ Regulations for taxes are triggered when lending to related parties.
- ▶ The scope of relationship by proportion of transactions is reduced.
- ▶ CIT for banana exports became revenue-based where the taxable revenue derives from transfer prices calculated by SRI.

Also, tax rules on transfer pricing include certain particularities:

- ▶ Domestic transactions are affected by the transfer pricing regime.
- ▶ The use of the interquartile range, when more than one comparable is found, is compulsory for every applicable method. Also, the transfer pricing adjustment must be calculated to the median of the comparables set.
- ▶ The tax administration may use secret comparables.
- ▶ Traders, deemed as related parties, face restrictions when intervening in importing or exporting commodities.
- ▶ The sub-capitalization rule requires the amount of debt with foreign related parties not to exceed 300% of the equity.
- ▶ The Transfer Pricing Report content and the standardization of the TNMM and capital adjustments are defined in a Technical Guideline that is available on the tax administration website.

Taxpayers may obtain exemption from the transfer pricing regime when they comply with all these conditions concomitantly:

- ▶ Having a payable CIT greater than 3% of their taxable revenues
- ▶ Not performing transactions with tax havens
- ▶ Not having government contracts related to the exploration and exploitation of nonrenewable resources

Within one month after filing the tax return, the companies that adhere to the exemption must provide a spreadsheet that details the type and class of transaction, number of transactions, name of related party, address of related party, and the tax rate applicable to the related party.

## OECD Guidelines treatment

The tax transfer pricing legislation defines the 1995 edition of the OECD Guidelines as a technical reference for analyzing transactions between related parties. However, LORTI holds supremacy over the OECD Guidelines.

## Documentation requirements

The tax administration defined "relevant transactions" to exclude domestic (exceptions apply) and certain cross-border transactions in order to quantify the amount that trigger the transfer pricing formal obligations, as explained below:

- ▶ Taxpayers are required to file the Transfer Pricing Annex (TP Annex) if the relevant transactions exceed US\$3 million.
- ▶ Taxpayers are required to submit the Transfer Pricing Integral Report (TP Report) if the relevant transactions exceed US\$15 million.

## Ecuador (continued)

### Documentation requirements (continued)

The transfer pricing regulation requires a TP Annex to be filed using software provided by the tax administration, detailing:

- ▶ All transactions with domestic and cross-border related parties, including those affecting the P&L and the balance sheet
- ▶ The methods applied in analyzing each transaction
- ▶ Calculated adjustments for each transaction

The TP Report must substantiate the analyses made for all transactions reported in the TP Annex.

Notwithstanding the thresholds that trigger documentation submission, the SRI may require the TP Annex or the TP Report at any time, even though the company does not reach the threshold amounts and on transactions that did not accumulate for the threshold.

TP Report requires the following contents, among others:

- ▶ Full functional analysis of the multinational group and the local party
- ▶ Risk analysis of the local company and assets detail
- ▶ Detailed functional description of the intercompany transactions, as well as documents for the economic substance of the transactions, copies of contracts and specification of the tax jurisdiction for each related party
- ▶ A function, risk and assets analysis for each related party that the tested party held transactions with regarding the analyzed transaction
- ▶ Market analysis, including global and local descriptions and a demand analysis for both levels
- ▶ Economic analysis, including detailed reasoning for every methodological decision
- ▶ Comprehensive detail of the searching process of comparable companies, including the files that show the database filtering and its outcome
- ▶ Detailed comparability factors analysis
- ▶ Detailed reasons for rejection of non-comparable companies, including detailed information of such company
- ▶ Accepted comparable companies' activities description and financial statements
- ▶ Analysis description and conclusion

The TP Report should be submitted in digital format (PDF or text file) recorded on a CD.

In addition, the taxpayers must submit all working papers (digital files) and the digital copies of the information and documents relevant for its transfer pricing analysis.

### Priorities/pricing methods

The legislation accepts the following methods: CUP, resale, cost-plus, profit split, residual profit split and TNMM. There is a hierarchy of methods: LORTI has defined the CUP as a default method. If the CUP method cannot be applied, the resale or the cost-plus methods must be applied. If none of these methods can be reliably applied, due to the complexity of the transactions under analysis, the regulation accepts the other methods mentioned above as valid, leaving the TNMM as the method of last resort. All method rejections must be thoughtfully documented. There is a specific CUP method application (the so-called Argentinean sixth method) that implies that, for exports and imports of tangible goods between related and independent parties where there is an international price in transparent markets, the market price is used, unless there is evidence to the contrary. In addition, there is another application for companies operating through international intermediaries that are not the final consignees or producers of certain goods. Such goods include all products with well-known prices in transparent markets. In these cases, the price to be applied is the price in those markets at the day the goods are loaded for shipment, or the agreed-upon price, if higher. This method may not apply if the local exporter or importer can prove the substance of the operations of the consignee abroad and that this intermediary party held less than 20% of its operations with related parties.

The denominator in the PLI should be an item that does not reflect controlled transactions (the denominator should be independent from controlled transactions). Furthermore, the PLI for operations, segments or transactions analyzed as segments or comparable companies must be calculated only with the financial information for the year when transactions were held, unless there is no available comparable; in such case, the previous year's information may be used if a demonstration of similar conditions happening in both years is included.

The Technical Guidelines mention that to calculate the profitability indicator of the tested party and the comparable companies, taxpayers should use the financial information of the fiscal year under review. If the taxpayer uses more than one year of financial information to calculate the PLI, it must be objectively justified.

## Ecuador (continued)

### Return disclosures/related party disclosures

No specific related party information, aside from the documentation required by transfer pricing regulations, is required. Nonetheless, information regarding ownership of companies is required for all taxpayers for general tax purposes, including the CIT rate.

The definition of "related parties" is broad and includes:

- ▶ Companies domiciled in countries listed by SRI or with tax rates lower than 60% of the corresponding Ecuadorian tax
- ▶ Companies representing more than 50% of a taxpayer's purchases or sales, in cases where the tax administration notified the relationship to the taxpayer and the taxpayer has not been able to prove that there is no relationship on management, administration, control or capital

### Transfer pricing-specific returns

Transfer pricing regime requires a number of specific obligations to be fulfilled in terms of the information that is required by the Tax Administration, as well as by the external auditors because of Tax and Companies Laws compliance requests. The typical information that should be prepared and shared or submitted would be, as follows:

- ▶ Report on the external audit of the financial statements, which shall include transfer pricing-specific comments that make it compulsory to communicate the transfer pricing analysis outcome before the issuance of the audit report
- ▶ Income tax return, which includes transfer-pricing-specific fields
- ▶ TP Annex
- ▶ TP Report
- ▶ Tax Compliance Report, which must be filed by external auditors each year, including details of transfer-pricing-related information

### Documentation deadlines

Calculated transfer pricing adjustments and relevant intercompany transaction figures must be included in the CIT return form (due in April).

According to the changes in the scope and methodology included in the transfer pricing regulation, only for Fiscal Year 2014 reports, the TP Annex and TP Report must be filed by September 2015.

For the next fiscal years, the TP Annex and TP Report must be filed no later than two months after filing the CIT return.

### Transfer pricing penalties

Ecuador has a specific transfer pricing penalty regime. Penalties up to US\$15,000 could be applied if taxpayers do not submit the TP Report or the TP Annex, or where inaccuracies, mistakes, differences, lack of information or false data are detected.

In spite of the above, the tax administration issued a document (*Instructivo para el Establecimiento de Sanciones Pecuniarias*) that is used to establish the penalty amount, according to the seriousness of the fault or misdemeanor (late delivery or incomplete or erroneous information sent by the local taxpayers). Based on this document, late filing could imply a nominal penalty of up to US\$333.

Assessments of any kind, including transfer pricing adjustments, must charge interest (around 13% per year) for the time between the moment when the taxes were payable (typically, April of the year after the transactions were held) and the time when the tax is finally paid. In addition, a 20% surcharge on the assessment will be applied.

### Penalty relief

On 5 May 2015, the National Assembly enacted the *Ley Orgánica de Remisión de Intereses, Multas y Recargos*. This law establishes that the surcharges, interest on arrears and fines are waived when the taxpayer pays the whole tax obligation. This benefit is applicable for those overdue or outstanding liabilities, according these parameters:

- ▶ 100% until 60 days after the law was published
- ▶ 50% from day 61 until day 90 after the law was published

This penalty relief does not apply for tax obligations whose deadlines were until 1 April 2015.

## Ecuador (continued)

### Statute of limitations on assessments

The statute of limitations is three years from the date of the CIT return filing and six years if material information is missing from the return.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

In recent years, the number of cases involved in ongoing litigation and undergoing domestic appeals (preceding court action) has increased. Tax havens, royalties and commodities are frequently involved in disputes.

The likelihood of an annual tax audit in general can be characterized as high but depends on several factors, including revenues, the industry and compliance precedents. If a taxpayer is selected for a general tax audit, the likelihood that transfer pricing will be reviewed as part of that audit is high.

The likelihood that, if transfer pricing is reviewed as part of the audit, the transfer pricing methodology will be challenged is also high. For example, in audits where transfer pricing is a subject of the audit, the percentage of reviews where assessments are based on challenging the methodology (or at least the comparables set) is more than 75%.

On the other hand, there is a probability that for certain primary agricultural products, nonrenewable natural resources or any kind of commodity, the tax administration may use secret comparables or databases to make comparisons using the CUP method.

Certain taxpayers continuously face a high risk of tax administration audits. These taxpayers are usually defined by total revenue, or because of certain business activities in relevant industries.

A transfer pricing audit is triggered by a central decision-making body. To determine which taxpayers to audit, these elements are considered (ranked in order of importance):

- ▶ Risk assessment process run by SRI
- ▶ Nature of related party transactions undertaken by the taxpayer
- ▶ Risk assessment run by the local customs authority
- ▶ Previous tax audits of the taxpayer
- ▶ Low ratio of paid CIT/revenue
- ▶ Important changes in the operating structure of a company, like the application of a low-risk structure

### APA opportunity

The Ecuadorian tax administration recently issued an APA-like procedure that details the kind of information that would be requested to ask for a Transfer Pricing Ruling, and it includes an optional pre-ruling procedure where basic information may be submitted to get a preliminary answer. Transfer Pricing Rulings take the form of pricing or methodology consultations.

The ruling term includes the year previous to the answering date (in cases where the answer is issued before the CIT return filing for the previous year), the year where the answer is issued and the following three tax years. The SRI has up to two years to resolve the consultation, but the time will depend on the complexity and the number of consultations under the review of the local tax administration.

Transactions acquitted by a ruling will not be relevant for filing thresholds and should not be included in the TP Report and TP Annex; however, certain documentation regarding the compliance of the ruling and the validity of its key assumptions must be filed.

# Egypt

## Taxing authority and tax law

Tax authority: Egyptian Tax Authority (ETA)

Tax law: Income Tax Law No. 91 of 2005 (ITL) and its amendments

## Relevant regulations and rulings

In order to raise taxpayer awareness of transfer pricing principles and how to apply Article 30 of the ITL and Articles 38, 39 and 40 of its executive regulation, the ETA, with the assistance of the OECD, issued its transfer pricing guidelines in 2010. The ETA decided to issue its transfer pricing guidelines in a series of parts and to focus on the main concepts and issues in the first part. Accordingly, the first part provides taxpayers with guidance on the arm's-length principle, comparability analysis, transfer pricing methods and documentation requirements.

The upcoming parts of the transfer pricing guidelines will address other issues, such as the application of the arm's-length principle to transactions involving intangible property, intragroup services, cost contribution arrangements (CCAs) and APAs.

Taxpayers are able to submit their transfer pricing documentation in English. However, an Arabic version generally is requested during the inspection process.

According to Article 30 of the ITL, "If the associated persons set conditions in their commercial or financial dealings different from the conditions taking place between non-associated persons, which are liable to reduce the tax base or transfer its burden from a taxable person to another tax-exempted or non-taxable person, the Administration may determine the taxable profit on basis of the arm's-length pricing."

The head of the administration may conclude advance agreements with associated persons on one or more methods for determining the arm's-length price.

According to the transfer pricing guidelines, a related party is defined as any person who has a relationship with a taxpayer that may lead to an effect on that taxpayer's taxable profit. Based on the transfer pricing guidelines, related parties include:

- ▶ A spouse, ancestors and descendants (family members)
- ▶ Capital associations and a person who holds at least 50% of the value of shares or voting rights, whether directly or indirectly
- ▶ Partnerships, the joint partners and silent partners of those partnerships
- ▶ Any two or more companies where a third party holds 50% or more of the value of shares or of the voting rights in each company

### *Introducing the General Anti-Avoidance Rule (GAAR):*

The rule was introduced under Article No. 92bis in Law No. 53 of 2014, which was published by the Egyptian Government on 30 June 2014. The article provides that tax implications of transactions would not be acknowledged (upon determining a tax assessment) where it is proved that the purpose or one of the main purposes of such transaction is to avoid or postpone taxes.

The law exemplified aggressive tax planning, as in cases where:

- ▶ The expected profit from the transaction prior to tax deduction is minimal compared with the tax benefits attained from the examined transaction.
- ▶ The transaction resulted in obvious tax exemptions, which do not reflect the risks experienced by the taxpayer or their financials based on the transaction.
- ▶ The transaction includes some criteria having contradicting impacts, eliminating each other.

In all cases, the burden of proof lies upon the tax authority to demonstrate the abusive nature of the transaction. To ensure that the tax administration does not act abusively, the minister will issue a decree forming a committee to be led by the head of the Egyptian tax authority or his deputy to examine tax avoidance cases. The taxpayer would not be penalized for tax avoidance unless the committee offers its approval.

## Egypt (continued)

### **OECD Guidelines treatment**

Pursuant to the executive regulations of the ITL, if none of the three methods referred to in the law are applicable, any one of the methods mentioned in the OECD Guidelines, or any other acceptable method suitable for the taxpayer, may be followed.

### **Documentation requirements**

The Egyptian transfer pricing rules place the burden of proof on the ETA, provided that the taxpayer can produce sufficient transfer pricing documentation (and other supporting documents, including intercompany agreements, schedules and invoices) to support its declared transactions on the tax return. According to the rules, however, the burden of proof shifts to the taxpayer in the event that the tax return is not filed or the taxpayer fails to produce proper transfer pricing documentation to support its tax return positions.

The transfer pricing documentation does not need to be submitted with the tax return but should be available at short notice should it be requested by the ETA.

### **Priorities/pricing methods**

The executive regulations of the ITL establish, in Articles 39 and 40, the methods of calculating the arm's-length price. According to Article 39, the fair market price shall be determined according to the CUP, cost-plus or the resale price methods.

According to Article 40, the preferred method for determining the neutral price shall be the CUP method. In case the data necessary for applying this method is unavailable, any of the two other methods prescribed in Article 39 may be applied. In case of an inability to apply any of the three methods mentioned, any other method described by the OECD Guidelines or any other method appropriate for the taxpayer may be followed. Profit-based methods noted in the OECD Guidelines, such as the TNMM, are acceptable methods, provided the taxpayer can demonstrate it is the most appropriate method for the analysis and why the other methods are not appropriate.

### **Return disclosures/related party disclosures**

The corporate tax return, in the related party disclosure section, requires taxpayers to provide the following information:

- ▶ Name of the related party or parties, along with the group structure
- ▶ The nature of the relationship
- ▶ Type of related-party transactions, if any
- ▶ The value of the transactions
- ▶ The method used to determine the fair market price or arm's-length price and the reasons for selecting this method
- ▶ The country of origin for tangible and intangible goods
- ▶ The country of the supplier

### **Transfer pricing-specific returns**

There are no separate returns to be filed for transfer pricing. However, disclosure of related-party transactions is required on the corporate tax return.

### **Documentation deadlines**

Taxpayers are obliged to prepare transfer pricing reports beginning with fiscal year 2010. However, they do not need to submit the transfer pricing study with the annual tax return. The transfer pricing report will be required during the inspection process. From 2010 onward, Egyptian transfer pricing documentation is required to be ready upon request or upon receiving a notification from the ETA Department of CIT researches and DTT - TP sub department. However it is recommended to file the TP documentation contemporaneous with the tax return, in case there are any adjustments to be effected in the tax return. To avoid filling an amended tax return Egyptian tax returns are filed four months following the year-end of the company's fiscal year. Companies are allowed to file for a two-month extension. Hence, at the latest, transfer pricing documentation should be completed by June for companies with a December year-end (and in principle, by the end of April) to be contemporaneous.

## Egypt (continued)

### Transfer pricing penalties

According to the ITL, if the tax amount included in the tax return by the taxpayers is less than the amount of the final estimated tax, they shall be liable for a penalty based on the following:

- ▶ 5% of the tax payable on the non-included amount, if such amount is equivalent to 10% and up to 20% of the legally payable tax
- ▶ 15% of the tax payable on the non-included amount, if such amount is more than 20% and up to 50% of the legally payable tax
- ▶ 40% of the tax payable on the non-included amount, if such amount is more than 50% of the legally payable tax

### Penalty relief

There is currently no specific penalty related to transfer pricing; however, any adjustments based on related party transactions that cannot be defended due to the absence of a transfer pricing study or sufficient supporting documents will be subject to the normal penalties and interest mentioned in the ITL.

### Statute of limitations on transfer pricing assessments

The statute of limitations is generally five years from filing; in case of tax evasion, the same may be extended to six years.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

Transfer pricing is now part of the general corporate tax return audit. The Republic of Egypt indicated in its annual general budget – Taxation Chapter – that transfer pricing adjustments are a major and priority source of tax income for the country. Hence, the ETA has started paying extra attention to related party transactions during the corporate tax inspection for financial year 2005 onward. During the assessment, the ETA demands documents to support intercompany pricing.

Taxpayers that provide sufficient documentation proving that they exerted efforts to establish transfer prices that comply with the arm's-length principle are likely to be assigned a low-tax-risk rating by the ETA. However, taxpayers giving inadequate consideration to their transfer pricing practices will be assigned a high risk rating.

Taxpayers with high perceived risk are more likely to be audited by the ETA than those perceived to have low risk.

ETA started sending notices for submission of TP documentation supporting the intragroup transactions and commercial dealings from 2010-14 to taxpayers who have related party transactions disclosed either in their tax returns or in their financial statements.

### APA opportunity

APAs are available in Egypt, but none have been concluded to date, it is not active yet nor there is APA guidelines, framework or procedures to apply APA.

# El Salvador

## **Taxing authority and tax law**

Taxing authorities: *Dirección General de los Impuestos Internos* (DGII) and *Ministerio de Hacienda* (MH)

Tax law: Salvadorian Tax Code (TC)

## **Relevant regulations and rulings**

Effective as of 29 December 2009, the Salvadorian Congress passed a tax reform modifying the TC through Decree No. 233. Among the most relevant changes were the introduction of the principle of valuation at fair market value, the definition of related parties and the comparability concept.

### **Disclosure in the tax report**

Under the rules of the TC, when a taxpayer has assets with a value exceeding US\$1,142,857 or sales higher than US\$571,429 during the previous fiscal year, it must appoint an external tax auditor (certified public accountant) to perform a statutory tax audit and file the resulting tax audit report within the first five months following the tax year that was audited (deadline of 31 May or, when applicable, the next business day).

As part of the tax reform, subsection (f) was added to Section 135 TC to include an obligation for an external tax auditor to include a note in its report regarding transactions conducted by the taxpayer with its related parties or entities domiciled in tax haven jurisdictions, indicating whether the taxpayer complies with the transfer pricing legislation (mainly the arm's-length principle).

As of March 2012, the MH, on its website, published an Administrative Guideline, or *Guía de Orientación* (GO) No. 001/2012, intended to provide general guidance to taxpayers about the tax treatment of related party transactions or transactions with entities domiciled in tax haven jurisdictions.

The GO is intended to supplement the TC by defining guidelines for both taxpayers and tax auditors. For taxpayers, it provides guidance about topics such as the identification of related parties, transfer pricing methodology and documentation requirements, as well as the application of withholding tax and non-deductibility of costs and expenses in related party transactions and transactions with tax havens. For tax auditors, it provides guidance about disclosures in the tax report.

### **Recent changes**

By means of Legislative Decree No. 763 of 31 July 2014, the TC now recognizes the use of the OECD transfer pricing methods and guidelines when determining market prices of related party transactions.

## **OECD Guidelines treatment**

El Salvador is not a member of the OECD; however, via the GO and Decree No. 763, reference is made to the OECD Guidelines and the definitions contained therein. In this regard, tax authorities accept transfer pricing analyses made in accordance with OECD Guidelines.

## **Documentation requirements**

Currently, transfer pricing documentation is indirectly required in El Salvador through the GO, and it is advisable to document and adequately support all transactions made with related parties for the external tax auditor to verify and reflect in the tax audit report that said transactions comply with transfer pricing regulations. Furthermore, the tax authorities have already started transfer pricing audits. In case a taxpayer does not maintain contemporaneous transfer pricing documentation, no penalties apply, but there is an increased risk that the tax authorities will attempt to recalculate and adjust it according to their criteria.

In any case, taxpayers should have all supporting data and information to demonstrate that their intercompany transactions meet the arm's-length principle.

## El Salvador (continued)

### Documentation requirements (continued)

Among the documentation requirements imposed by the GO and the decree, information about the taxpayer and its multinational group should be included, as well as a complete functional analysis and criteria for the selection of comparables (transactions or companies) and the applicable transfer pricing methodology.

The GO and the Decree recognize the arm's-length standard, the comparability criteria, the transfer pricing methods and, implicitly, the overall OECD Guidelines as a valid reference for establishing transfer prices.

Even though there is no explicit documentation obligation for taxpayers in the TC, the fact that the external auditor has to issue an opinion on transfer prices as part of the Tax Audit Report (*Dictamen Fiscal*) effectively requires taxpayers to prepare and maintain transfer pricing documentation by 31 May of each year.

### Priorities/pricing methods

The law does not regulate specific transfer pricing methods, but it establishes that tax authorities are empowered to apply the CUP method when adjusting prices. The GO establishes that the following methods are acceptable: CUP, resale price, cost-plus, TNMM and profit split.

The introduction of Decree No. 763 clarifies that the OECD methods are acceptable for both taxpayers and the DGII when determining and assessing prices in related-party transactions.

### Return disclosures/related party disclosures

#### Disclosure in the Tax Audit Report

Under the rules of the TC, when a taxpayer has assets with a value in excess of US\$1,142,857 or sales higher than US\$571,429 during the previous fiscal year, it is required to appoint an external tax auditor (CPA) to perform a statutory tax audit and file the resulting tax audit report within the first five months following the tax year that was audited (deadline of 31 May or, when applicable, the next business day).

As part of the tax reform, subsection (f) was added to Section 135 of the TC to include an obligation for an external tax auditor to include a note in its report regarding transactions conducted by the taxpayer with its related parties or with entities domiciled in tax haven jurisdictions, indicating whether the taxpayer complied with the transfer pricing legislation (mainly, the arm's-length principle).

### Transfer pricing-specific returns

Article 124-A of the TC establishes an obligation for taxpayers to file an information return for transactions conducted with related parties (Form F-982) within the first three months that follow the fiscal year-end, when these transactions (individually or in the aggregate) are equal to or exceed US\$571,429 annually.

Among the information that is required by Form F-982 are:

- ▶ The name of the related party or of the tax-haven-domiciled party
- ▶ The tax identification number, if said party is domiciled in El Salvador
- ▶ The annual amount of the transactions
- ▶ The comparability criteria applied
- ▶ The methodology applied
- ▶ The comparability adjustments made
- ▶ The description of the transaction (listed are 19 operations of income, 20 of expense, 7 of assets and 5 of liabilities)

In case of noncompliance with the filing obligation of this information return, Article 244 literal (I) of the TC establishes a penalty of 0.5% of the taxpayer's equity, as reflected on the taxpayer's balance sheet, minus any surplus on the revaluation of assets, or at least three monthly minimum wages. When there is no balance sheet, or it is not possible to determine a taxpayer's equity, a penalty of nine minimum wages applies.

## El Salvador (continued)

### Documentation deadlines

It is recommended that taxpayers prepare and maintain contemporaneous transfer pricing documentation within the first five months following the close of the financial year (i.e., by 31 May).

### Transfer pricing penalties

Failure to maintain transfer pricing documentation leads to a penalty of 2% of the taxpayer's equity, as reflected on the taxpayer's balance sheet, minus any surplus on the revaluation of assets. This is imposed when the taxpayer does not have supporting documentation or fails to comply with the obligation to maintain all documentation for 10 years for transactions conducted with related parties, and those with individuals or legal entities domiciled, incorporated or resident in tax haven jurisdictions. Said penalty cannot be less than nine minimum wages.<sup>1</sup>

#### Failure to comply with Section 135-(f)

In case the external tax auditor fails to comply with the new requirement under Section 135-(f) of the TC, a penalty of five minimum wages is established for the tax auditor, regardless of any other penalty that may be imposed by the local certified public accounting council for not complying with the responsibilities of the profession.

Additionally, when the tax auditor's noncompliance is due to the fact that the taxpayer failed to provide the information and documentation requested and required by the tax auditor, a penalty of 0.1% of the taxpayer's equity (as reflected on the taxpayer's balance sheet), minus surplus on the revaluation of assets, would be imposed on the taxpayer. Said penalty is at least four monthly minimum wages.

#### Failure to file related parties information return

In case of noncompliance with the filing obligation of the information return, Article 244 literal (I) of the TC establishes a penalty of 0.5% of the taxpayer's equity (as reflected on the taxpayer's balance sheet), minus any surplus on the revaluation of assets, with a minimum of three monthly minimum wages.

When there is no balance sheet, or it is not possible to determine the taxpayer's equity, a penalty of nine minimum wages applies.

#### General penalties and interest in case of tax adjustments

In case of adjustments for underpayments either on income tax or VAT, a general penalty of 25% of the unpaid tax applies, with a minimum of US\$568.

Furthermore, late interest also applies. If the tax liability is paid within two months of the original payment term, the applicable annual interest rate is 7.62%. If the tax liability is paid more than two months after the original payment term, the applicable annual interest rate is 11.62%.

### Penalty relief

According to Article 261 of the TC, if there is voluntary disclosure and payment before any notice of an examination is received from the tax authorities, a 75% penalty reduction applies; if an examination is already ongoing, a 30% penalty reduction may still apply.

### Statute of limitations on transfer pricing assessments

Under the current legislation, and in particular the rules of the TC, the ordinary statute of limitations is three years; however, when no tax return has been filed, the statute of limitations is extended to five years.

<sup>1</sup> The minimum wage is established by the Salvadorian Labor Ministry. As of 16 May 2011, and according to Executive Decree No 56 published in the Official Gazette No. 391, the monthly commercial minimum wage to which the TC refers was established as US\$224.21.

## El Salvador (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The likelihood of a general tax audit currently is categorized as medium. As part of every general tax audit, the tax authorities review compliance with transfer pricing regulations. Thus, the likelihood that transfer pricing will be scrutinized as part of a general tax audit is high. The tax authorities have been investing in training personnel outside the country to implement transfer pricing audit programs. The tax authorities have already started scrutinizing the transfer pricing of some taxpayers in order to confirm that they are complying with the transfer pricing rules as established in the TC. In case transfer pricing is scrutinized, the likelihood that the transfer pricing methodology will be challenged is medium.

### **APA opportunity**

There is no APA program available.

# Equatorial Guinea

## **Taxing authority and tax law**

Taxing authority: Directorate General of Taxes and Contributions (*Direccion General de Impuestos y Contribuciones*)

Tax law: General Taxation Code (Law No. 4/2004 dated 28 October 2004) decrees, the Central Africa Economic and Monetary Community Double Tax Treaty, and other community acts

## **Relevant regulations and rulings**

Article 164 of the General Taxation Codes introduces the principle of the assessment of intercompany pricing.

## **OECD Guidelines treatment**

There is no reference to OECD Guidelines in the tax legislation.

## **Documentation requirements**

There is no specific documentation required.

## **Priorities/pricing methods**

There is no priority on pricing methods. Any relevant and reliable method is accepted.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

There is no specific return regarding transfer pricing.

## **Documentation deadlines**

There is no specific deadline applicable to the presentation of documents. Usually, their presentation might be required during audits.

## **Transfer pricing penalties**

There are no specific transfer pricing penalties, just general penalties of 50% of the undeclared amount of corporate income tax resulting from the adjustment by the tax authorities.

## **Penalty relief**

Penalties may be avoided by proving the objectivity of the pricing.

## **Statute of limitations on transfer pricing assessments**

There are no specific statutes of limitations on transfer pricing assessments. Thus, the general statute of limitation of five years applies.

## **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The likelihood of an annual tax audit is high and the likelihood that transfer pricing will be reviewed as part of that audit is low, unless the company claims for the deduction of TP adjustments made. The likelihood that transfer pricing methodology will be challenged is high.

## Equatorial Guinea (continued)

### **APA opportunity**

There is no APA regime in place.

# Estonia

## Taxing authority and tax law

Tax authority: The Estonian Tax and Customs Board

Tax law: Estonian Income Tax Act

## Relevant regulations and rulings

The following articles of the Estonian Income Tax Act relate to transfer pricing:

- ▶ Article 8 – Associated Persons
- ▶ Article 50, Sections 4–8
- ▶ Article 53, Section 46 – Permanent Establishments
- ▶ Article 14, Section 7 – Sole Proprietors
- ▶ Article 50, Section 7 – Documentation Requirements

Current Estonian transfer pricing legislation is effective as of 1 January 2007, amended as of 1 January 2011.

The Ministry of Finance issued a transfer pricing regulation on 10 November 2006 (No. 53), which came into force on 1 January 2007. The regulation sets out in more detail the principles for determining the arm's-length price and also establishes documentation requirements. There have been a few court rulings and an increasing number of tax proceedings on transfer pricing issues in Estonia.

## OECD Guidelines treatment

The tax authorities follow the OECD Guidelines. However, domestic legislation is the prevailing law.

## Documentation requirements

All entities must be able to prove that transactions with related parties take place at arm's length. Yet there is an additional documentation requirement if the taxpayer is:

- ▶ A resident credit institution, finance institution, insurance agency or a listed company
- ▶ A resident of a low-tax-rate territory
- ▶ A resident legal person or a nonresident with a permanent establishment in Estonia conforming to the following:
  - ▶ Number of employees (including associated persons) is at least 250
  - ▶ Turnover of the financial year preceding the transaction with associated persons was at least EUR50 million
  - ▶ Consolidated balance sheet net assets were at least EUR43 million

Categories of documentation required:

- ▶ Company analysis
- ▶ Industry analysis
- ▶ Functional analysis
- ▶ Economic analysis

## Priorities/pricing methods

The Tax and Customs Board accepts the CUP, resale price, cost-plus, profit split and TNMM or, if necessary, any other suitable method. There is no hierarchy of methods; all are treated as equal. However, if available, internal and Estonian domestic data is preferred for determining the arm's-length price.

## Estonia (continued)

### Return disclosures/related party disclosures

An annual report, including a description of transactions with related parties, must be filed within six months of the end of the relevant financial year. If the taxpayer has the obligation to prepare the transfer pricing documentation, such documentation must be completed every financial year.

The documentation does not have to be filed with the tax return or annual report.

### Transfer pricing-specific returns

Currently, the Estonian tax laws do not require a separate return for related party transactions.

### Documentation deadlines

There is no deadline for preparing transfer pricing documentation. However, taxpayers are obliged to submit the documentation within 60 days of the tax authority's request.

### Transfer pricing penalties

If the required documentation or the relevant tax return is not submitted on time, the fine may be as high as EUR3,200. When a taxpayer intentionally submits wrong information on its tax return that reduces the tax paid, a criminal penalty may be imposed, and the fine may be as high as EUR16 million.

If the price of a transaction concluded between a resident company and a person associated with this company differs from the market value of the transaction, income tax shall be imposed on the amount that the company would have received as income, or the amount that the company would not have incurred as expenses if the transfer price had conformed to the market value of the transaction. The income tax rate is 20% on the gross amount of the taxable difference (i.e., 20/80 of the net amount) and is payable even if a company has losses.

If tax is assessed, interest on the tax amount at the rate of 0.06% per day, up to the principal tax amount, will be imposed retroactively as of the date when the tax was supposed to be paid until actual payment (here, interest is subject to income tax at the rate of 20/80 as a non-business-related expense).

### Penalty relief

There is no penalty relief if a taxpayer has the necessary documentation but the transfer pricing is determined to be non-arm's-length and there is an income tax adjustment. However, imposing a fine is probably more the exception than the rule. Interest for the delay of the tax payment is always assessed.

### Statute of limitations on transfer pricing assessments

The statute of limitations for making an assessment of tax is three years. In the event of intentional failure to pay or withhold an amount of tax, the limitation period for making an assessment of tax is five years. The statute of limitations begins to toll as of the due date of submission of the tax return that was either not submitted or contained information leading to an incorrect determination of the tax due.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as medium. There is a high likelihood that transfer pricing will be reviewed as part of a general tax audit. Further, the likelihood that the transfer pricing methodology will be challenged is characterized as medium.

### APA opportunity

Currently, the Estonian tax laws do not provide any opportunity to conclude APAs.

# Fiji

## Taxing authority and tax law

Tax authority: Fiji Revenue and Customs Authority (FRCA)

Tax law:

- ▶ Income Tax Act
- ▶ Fiji's double tax agreements

## Relevant regulations and rulings

The final Fiji Transfer Pricing Guidelines (FRCA Guidelines) were issued in 2012 and provide guidance on how Section 34 of the Income Tax Act and Income Tax (Transfer Pricing) Regulations 2012 are applied. These guidelines are intended to provide an overview of the framework within which the transfer pricing rules operate.

## OECD Guidelines treatment

The FRCA adopts the positions outlined in the OECD Guidelines for multinational enterprises and tax administrations, and it proposes to follow the OECD Guidelines in administering Fiji's transfer pricing rules. Consequently, the FRCA Guidelines supplement the OECD Guidelines, rather than supersede them, and the OECD Guidelines should be referred to if more detail is required.

## Documentation requirements

There are no explicit requirements under Section 34 or any other provisions of the Income Tax Act for any particular category of information to be included in transfer pricing documentation.

The Income Tax (Transfer Pricing) Regulations 2012 requires a taxpayer to record, in writing, sufficient information and analysis to verify that its controlled transactions are consistent with the arm's-length principle.

The FRCA Guidelines indicate that a taxpayer's main purpose in preparing and maintaining documentation should be to place the taxpayer in the position where it can readily demonstrate to the FRCA that a transfer pricing method has been used to establish that the taxpayer's transfer prices are consistent with the arm's-length principle in light of the relevant facts and circumstances.

## Priorities/pricing methods

The FRCA accepts the most reliable method or methods chosen from the following:

- ▶ CUP
- ▶ Resale price
- ▶ Cost-plus
- ▶ Profit split
- ▶ TNMM

TNMM and the profit split methods are the most commonly used in Fiji. Because Fiji is in a developing state, most transactions are cross-border and are performed by multinationals.

## Return disclosures/related party disclosures

There are no specific disclosure requirements. However, it is advisable to provide details of the following, together with the income tax return, otherwise the FRCA may disallow a deduction for the same:

- ▶ Payments to nonresidents, such as dividends, interest, management fees, "know-how" payments, royalties or contract payments made

In some instances, the FRCA may require additional details before assessing an income tax return.

## Fiji (continued)

### Transfer pricing-specific returns

There is no separate transfer pricing return required to be filed in Fiji.

### Documentation deadlines

Documentation for transactions undertaken in a tax year must be in place prior to the due date for filing the income tax return for that year.

### Transfer pricing penalties

In accordance with the Income Tax (Transfer Pricing) Regulations 2012, the following penalties apply:

- ▶ Failure to keep required transfer pricing documentation is an offense, and upon conviction the person is liable for a fine of at least FJD100,000.

In accordance with the Tax Administration Decree, the following penalties apply:

- ▶ For failing to keep, retain or maintain accounts, documents or records as required under a tax law:
  - ▶ If the failure is knowingly or recklessly made, the taxpayer faces a penalty equal to 75% of the amount of tax payable for the tax period to which the failure relates.  
Or
  - ▶ In any other case, the taxpayer faces a penalty equal to 20% of the amount of tax payable for the tax period to which the failure relates.
- ▶ For making false or misleading statements:
  - ▶ If the statement or omission was made knowingly or recklessly, the taxpayer faces a penalty equal to 75% of the tax shortfall.
  - ▶ In any other case, the taxpayer faces a penalty equal to 20% of the tax shortfall.
  - ▶ The amount of penalty imposed under the abovementioned cases is increased by 10 percentage points if this is the second application of the penalties relating to making false or misleading statements, or 25 percentage points if this is the third or a subsequent application.

### Penalty relief

Shortfall penalties may be reduced by 10 percentage points if the person voluntarily discloses the shortfall prior to the earlier of:

- ▶ Discovery by the FRCA of the tax shortfall  
Or
- ▶ The commencement of an audit of the tax affairs of the taxpayer

Shortfall penalties may also be reduced if a taxpayer has a historical good compliance record.

### Statute of limitations on transfer pricing assessments

There is no specific statute of limitations applying only to transfer pricing assessments. Accordingly, the statute of limitations applying to all assessments will also apply to transfer pricing assessments.

In accordance with the Tax Administration Decree, the amendment of a tax assessment may be made:

- ▶ In the case of fraud, willful neglect or serious omission by or on behalf of the taxpayer, at any time  
Or
- ▶ In any other case, within six years of the date the FRCA served the notice of assessment on the taxpayer

## Fiji (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

Tax audits are undertaken at the discretion of the FRCA. The FRCA selects audit targets based on certain criteria and risk profiling, including:

- ▶ Company incurring ongoing losses
- ▶ Lower than expected profitability
- ▶ Dealings with associates in tax haven jurisdictions
- ▶ Dealings with associates in special-purpose tax haven jurisdictions – these jurisdictions have relatively high headline tax rates but offer significant tax savings for specified activities
- ▶ Those who offer special reduced tax rates for a particular activity
- ▶ Poor compliance processes and records
- ▶ Intragroup charges, e.g., management and technical fees
- ▶ Large royalty payments and excessive debt levels (i.e., interest payments)
- ▶ Transfer of intangibles
- ▶ Business restructurings

### **APA opportunity**

APAs are not available in Fiji currently but may be considered later in the context of introducing a binding rulings process. Currently, there is one APA in existence in Fiji.

However, the FRCA does encourage taxpayers to discuss related-party transactions with the FRCA prior to entering into the same, with a view to eliminating any transfer pricing implications of the same, even though such discussions are not binding on either party.

# Finland

## **Taxing authority and tax law**

Tax authority: Finnish Tax Administration

Tax law: Finnish Tax Act on Assessment Procedure §§14 a-c, 31, 32, 75 and 89

## **Relevant regulations and rulings**

Transfer pricing legislation came into effect on 1 January 2007. The provisions contained in the law apply to financial periods beginning 1 January 2007, or later.

Regarding business restructurings, the Finnish Tax Administration's guidelines state that from a transfer pricing perspective, business restructurings should be examined as a whole. However, the guidelines state that the specific circumstances and effects of the restructuring on the material functions of parties should be taken into account, and the arm's-length principle has to be utilized. Nevertheless, the guidelines are general in nature and do not specifically state how the tax authorities should consider individual cases.

There is no established case law on business restructurings in Finland. However, there have been some advance rulings relating mainly to the transfer and valuation of intangibles. In July 2014, the Supreme Administrative Court ruled that transactions concluded between affiliated parties cannot be re-characterized based on Section 31 of the Finnish Tax Act on Assessment Procedure (as a part of a transfer pricing adjustment).

## **OECD Guidelines treatment**

The Finnish regulations and tax practice in general follow the OECD Guidelines.

## **Documentation requirements**

The transfer pricing documentation aims to prove that the prices used in cross-border intragroup transactions are acceptable from the perspective of the tax authority. According to the law, the documentation obligation applies to the following entities:

- ▶ Group companies, if the group employs at least 250 employees, regardless of the amount of turnover or assets
- ▶ Group companies, if the group employs fewer than 250 employees and if the company's turnover exceeds EUR50 million and their assets are worth more than EUR43 million
- ▶ The Finnish branches of a foreign company, if the above conditions are met by this company
- ▶ Companies that are not small and medium-size enterprises, as defined by criteria (related to, for example, a company's independence) contained in the European Commission's Recommendation on the definition of micro, small and medium-sized enterprises (2003/361/EC)

When calculating the amount of employees, turnover or assets of an enterprise, or a branch owned by a foreign company, information regarding the foreign owners is also taken into account on a pro rata basis. Group companies are required to prove the arm's-length nature of cross-border intragroup transactions by preparing transfer pricing documentation.

According to the law, the documentation should contain the following information:

- ▶ A description of the business
- ▶ A description of associated enterprises
- ▶ Information on transactions between associated enterprises
- ▶ A functional analysis regarding transactions between associated enterprises
- ▶ A comparability analysis, including available information on comparables
- ▶ A description of the transfer pricing method and its application

Less extensive documentation is required if the total amount of transactions between two parties during a fiscal year does not exceed EUR500,000.

## Finland (continued)

### Priorities/pricing methods

Taxpayers may choose any of the OECD transfer pricing methods, as long as the chosen method results in an arm's-length pricing for the intragroup transaction. In its selection of the method, a taxpayer should consider the aspects regarding the application of methods stated in the OECD Guidelines.

### Return disclosures/related party disclosures

Based on paragraph 26.4 of the Finnish Tax Act on Assessment Procedure, if the other party to the transaction is a nonresident, and if the tax authorities cannot obtain adequate information on the transaction by using an appropriate international treaty, the taxpayer is responsible for presenting such information.

### Transfer pricing-specific returns

If a taxpayer (including a Finnish branch of a foreign company) is obligated to prepare transfer pricing documentation in Finland, the Finnish tax authorities also require Form 78 to be completed and disclosed with the annual corporate income tax return. Information regarding cross-border intragroup transactions, which normally cannot be directly found in the company's financial statements, is reported on Form 78.

However, information regarding the transfer pricing method applied is not reported in this form.

### Documentation deadlines

A taxpayer has to submit the transfer pricing documentation for a specific fiscal year within 60 days of a request by the tax authorities, but not earlier than six months after the end of the financial period. The additional clarifications concerning the documentation have to be submitted within 90 days of a request by the tax authorities.

### Transfer pricing penalties

A tax penalty of up to EUR25,000 can be imposed for failure to comply with the transfer pricing documentation requirements, even if the pricing of intragroup transactions has been at arm's length. In addition, a possible adjustment of taxable income may result in a separate tax penalty of up to 30% of the adjusted amount of income, as well as penalty interest.

### Penalty relief

Penalties can be reduced or removed if the taxpayer presents supplementary transfer pricing documentation that supports the arm's-length nature of the intragroup transactions. The determination of penalties will be made on a case-by-case basis.

According to a decision issued by the Finnish Supreme Administrative Court in 2014, penalties should not be assessed in transfer pricing cases where the taxpayer has adequately tried to follow the arm's-length principle in its intragroup pricing.

### Statute of limitations on transfer pricing assessments

The time limit for the adjustment of income due to the failure to apply arm's-length principles to the pricing of a transaction is five years from the beginning of the following year during which the taxation was finalized.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as low. There is a high likelihood of transfer pricing being reviewed as part of an audit, and the likelihood of a challenge to the transfer pricing methodology similarly is high.

### APA opportunity

Advance rulings are available in Finland. There is no legislation for APAs; however, the tax authorities have indicated their willingness to utilize them.

# France

## Taxing authority and tax law

Tax authority: Generally referred to as the French tax authorities (FTA) (*Direction Générale des Finances Publiques*, or DGFiP; formerly, *Direction Générale des Impôts*, or DGI). The *Mission d'Expertise Juridique et Economique Internationale* (MEJEI) Department is responsible for both MAPs and APAs.

Tax law: French Tax Code (FTC)

## Relevant regulations and rulings

- ▶ French Tax Code (FTC) Articles 57 (arm's-length principle), 223 quinquies B (annual declaration of related-party transactions), 238A (reversal of burden of proof in case of tax haven) and 209B (CFC regulation) and 1735 ter (transfer pricing documentation penalty regime)
- ▶ French Procedural Tax Code (FPTC) Articles L 10, L 13AA, L 13AB, L 13B, L47A-1, L62A, L 80B and L 188A
- ▶ Case law about application of the theory of Abnormal Act of Management and Article 57 of the FTC
- ▶ Thin capitalization rules also covered by Articles 212 and 39-1 of the FTC

Administrative doctrine pertaining mainly to Articles 57 and 238A of the FTC, and Articles L 13B and L 80B of the FPTC (main administrative guidelines BOI-BIC-BASE-80-10-20-20141117, BOI - CF - IOR - 60-50 and BOI - INT - DG - 20-50).

## OECD Guidelines treatment

The French tax authorities consider the French transfer pricing regulations to be consistent with the OECD Guidelines and are following the BEPS development very closely.

There is no specific French transfer pricing-related regulation pertaining to business restructuring (just under certain circumstances about burden of proof) or attribution of profits to permanent establishments.

Experience in tax audits dealing with business restructurings shows that tax auditors often consider a decrease in profit or sales as an indicator of a *de facto* transfer of something of value, which should be taxed. In addition, special attention should be paid to restructuring operations (e.g., site closure, layoff and transfer of going concerns), as well as the value contribution of the French taxpayer to the supply chain of the group before and after the business restructuring. French tax inspectors are also paying more attention to financial transactions (e.g., loans, guarantees), as well as continuing discussions around intellectual property rights.

## Documentation requirements

### General transfer pricing documentation requirements (Article L 13B of the FPTC) where Article L 13AA does not apply

The FTA may require information pertaining to transfer pricing in the course of an audit (based on Articles L 13 B and L 10 of the FPTC). The nature of required information, and the short deadline under which a taxpayer may have to provide it, leads to a *de facto* documentation requirement covering any French-based company. The following main documents are usually expected:

- ▶ Business and organizational structure overview
- ▶ Functional analysis, contracts, legal and management account information
- ▶ Method selected and economic analysis (including identification of competitors and comparables, depending upon the transfer pricing method)

### Special transfer pricing documentation requirement (Articles L 13AA and L 13AB of the FPTC)

Pursuant to Article L 13AA of the FPTC, and for fiscal years 2010 and after, companies that satisfy the criteria listed below must provide their transfer pricing documentation upon the tax inspector's request (thus, in the context of a tax audit), as follows:

- ▶ Have total net sales (before taxes) or total gross assets equal to or greater than EUR400 million

## France (continued)

### Documentation requirements (continued)

- ▶ Hold, directly or indirectly, at the closing date of the fiscal year, more than 50% of the capital or voting rights in a legal person having such turnover or gross assets
- ▶ Be, on the closing date of the fiscal year, more than 50% held, directly or indirectly, by such legal person
- ▶ Belong to a French tax consolidated group that includes at least a legal person that meets one or more of the aforementioned criteria

If the documentation is not immediately provided to the FTA, it should be delivered within 30 days of the FTA's request. If documentation is missing, or if the taxpayer fails to provide exhaustive and comprehensive documentation within 30 days of a formal notice from the FTA, a penalty of up to either 5% of the transfer pricing reassessment or 0.5% of the volume of transactions (see above) would be applied, with a minimum of EUR10,000 per fiscal year under audit.

The contents of the transfer pricing documentation to be made available to the FTA are twofold:

- ▶ **General information concerning the related enterprises (economic, legal, financial background of the group):**
  - ▶ General description of the activity carried out, including changes that occurred during the audited period compared with previous years
  - ▶ General description of the legal and operational structures (with identification of the entities involved in controlled transactions)
  - ▶ General description of the functions carried out and risks borne by the related entities, to the extent that they impact the audited company
  - ▶ List of the main intangible assets held in relation to the audited company
  - ▶ General description of the transfer pricing policy of the group
- ▶ **Specific information pertaining to the audited company:**
  - ▶ General description of the activity carried out, including changes that occurred during the audited period compared with previous years
  - ▶ General description of the transactions carried out with related enterprises, including the amount and nature of the flows, including royalties
  - ▶ List of the cost-sharing agreements
  - ▶ Copy of transfer pricing rulings
  - ▶ Presentation of the methods used to determine the transfer prices (including an analysis of the functions, risks and assets, and with an explanation of the choice of applied method(s))
  - ▶ Where necessary, an analysis of the comparables used (including characteristics of the goods and services, functional analysis, contract clauses, economic situation and specific strategies of the comparable companies)

The 2014 French Finance Bill requires taxpayers that fall within the scope of Article L 13AA of the FPTC to include in their transfer pricing documentation tax rulings (as defined in French tax law) obtained by all related parties from foreign tax authorities even if such rulings are not transfer pricing related and do not impact the results of the French taxpayer. This documentation requirement entered into force from 1 January 2014 onwards. In practice, the requirement does not cover documents obtained from foreign tax administrations that are not in the possession of the French taxpayer.

Furthermore, the fight against the Tax Evasion and Financial Criminality Bill that entered into force on 8 December 2013 introduced an Article 223 quinque B in the FTC that substantially reinforces the French transfer pricing documentation requirements.

Taxpayers filing their Corporate Income Tax (CIT) return from this date and that are subject to the abovementioned provisions of Article L 13AA of the FPTC, must – in addition to the preparation of an Article L 13AA report – file a “light” transfer pricing documentation. This Transfer Pricing Statement will have to be filed every year within a six-month period after the filing deadline of the tax return by French taxpayers that fall under the scope of the “full” transfer pricing documentation requirement (as codified in Article L 13AA of the FPTC), already in force since 2010. It is important to note that the requirement to provide full transfer pricing documentation in case of a tax audit remains in force and that this new obligation to file a Transfer Pricing Statement is an additional, cumulative transfer pricing documentation requirement

## France (continued)

### Documentation requirements (continued)

implemented by the French Government in the context of its stated objective to combat BEPS. The transfer pricing-related information that needs to be provided in the Transfer Pricing Statement takes the form of two tables:

- The first table deals with the general information about the group. The reporting entity has to report the main activities of the group, including the intangible assets held by the group and used by the reporting entity (e.g., patents, trademarks and know-how). The reporting entity shall report the nature of the asset and the country where the entity owning the asset resides. Furthermore, the reporting entity has to mention a general description of the transfer pricing policy applied by the group and related to the reporting entity.
- In the second table, for all intra-group transactions (including income and expenses and purchase and disposal of assets) with an aggregate amount by type of transaction that exceeds EUR100k, the entity is required to indicate the total aggregate amount for the year, the transfer pricing method applied, the country(ies) in which the related party at the other end of the transaction(s) is/are incorporated, and any change in the transfer pricing policy or the nature and location of the assets. In addition, the French taxpayer is also required to disclose any change that may have occurred in the transfer pricing method being applied and provide additional information when a transfer pricing method is used that falls within the "other method" category, as defined by the OECD Guidelines, and the taxpayer also needs to describe any change in the activity of the entity. The latter requirement is specifically aimed at identifying business restructuring situations.

No detailed functional analysis or economic analysis is required in this light documentation report, and the penalty for a breach of this provision is minimal (i.e., EUR150). However, the purpose of this new provision is understood to enhance the FTA's capability to identify taxpayers with the highest transfer pricing exposure and allocate governmental audit resources accordingly. Such an approach – where taxpayers failing to file the report would of course be highly scrutinized – is in line with the latest OECD developments. Accordingly, the preparation of this light documentation report should therefore be seen as an important extension to the overall – already existing – obligation of documenting intragroup transactions in France.

This Transfer Pricing Statement has to be filed in French (even if the "full" transfer pricing documentation has been drafted in English).

Pursuant to Article L 13AB of the FPTC, all French companies involved in transactions with companies located in non-cooperative jurisdictions (as defined by Article 238-0 A of the FTC) have to provide, in addition to the documentation described in Article L 13AA of the FPTC, supplementary documentation, including all documents normally required by the FTA from companies subject to CIT, and such requirement notably includes a French accounting-compliant balance sheet and the profit and loss statement of the foreign company.

French taxpayers that do not meet the conditions set out in Articles L 13AA and L 13AB of the FPTC nevertheless remain bound by the general transfer pricing documentation requirements set out in Article L 13B of the FPTC and the general information sharing rule set out in Article L 10 of the FPTC (see above).

### Priorities/pricing methods

The tax authorities accept the following methods: CUP, resale price, cost-plus, profit split and TNMM; yet, tax inspectors usually prefer the TNMM, based on French comparables when the tested party is French.

### Return disclosures/related-party disclosures

In the event of a specific request from the tax authorities at the time of an audit (on the basis of either Articles L 13AA and L 13AB of the FPTC, or Article L 13B of the FPTC), the taxpayer is obligated to disclose the nature of its relationship with the related parties (i.e., the links of dependence between the French audited entity and the related parties). These legal provisions also provide an obligation to disclose the activities of the related parties.

### Transfer pricing-specific returns

See information above about the light documentation to be submitted to the FTA, provided by new Article 223 *quinquies* B of the FTC, for companies that satisfy specific criteria.

## France (continued)

### Documentation deadlines

#### General transfer pricing documentation requirement (Article L 13B of the FPTC)

Upon the FTA's request, documentation must be submitted within 60 days, though it may be possible to obtain a 30-day extension in exceptional circumstances. Exceeding such deadline may trigger penalties mentioned previously.

#### Special transfer pricing documentation requirement (Articles L 13AA and L 13AB of the FPTC)

Upon the FTA's request, documentation must be submitted immediately upon the first request made by the tax inspector in the course of an audit. If not, the FTA will send a formal claim for the documentation, which will provide for a 30-day deadline, after which penalties for documentation failure will apply.

The annual transfer pricing declaration mandated by Article 223 quinque B of the FPTC must be filed within six months following the filing of the CIT return with the corporate tax office to which the declaring company has been assigned.

### Transfer pricing penalties

Penalties specific to a failure to comply with the transfer pricing documentation requirements apply, in addition to the fiscal penalties generally applied as a consequence of a transfer pricing reassessment. Transfer pricing reassessments from the FTA trigger an adjustment of the taxable profit for corporate income tax purposes (and other taxes, depending on the case).

Specific transfer pricing penalties apply when the taxpayer fails to answer the tax authorities' request for documentation, either on the basis of Article L 13B of the FPTC (which relates to general transfer pricing documentation requirements, provided the FTA can evidence a transfer pricing issue before it applies this article), or on the basis of Articles L 13AA and L 13AB of the FPTC (which relate to special transfer pricing documentation requirements).

- ▶ Failure to provide complete information in the framework of Article L 13B of the FPTC may result in:
  - ▶ A reassessment of the company's taxable profit based on information the tax authorities possess
  - ▶ The application of a EUR10,000 penalty for each year audited
- ▶ Failure to provide sufficient transfer pricing documentation under the framework of Articles L 13AA and L 13AB of the FPTC will trigger penalties. This penalty regime is enshrined in Article 1735 ter of the FTC and was amended by French Parliament on 18 December 2014. The current transfer pricing penalty regime therefore only applies to reassessment notices that were issued by the FTA after that date and states that the penalty will be the higher of the following:
  - ▶ EUR10,000 per entity and per the period under audit
  - ▶ 0.5% of the volume of transactions relating to the documents that failed to be provided to the tax authorities
  - ▶ 5% of the reassessments based on Article 57 (arm's-length principle) of the FTC, including transactions mentioned in the above point

Penalties generally applied as a result of a transfer pricing reassessment, regardless of compliance with transfer pricing documentation requirements, are as follows:

- ▶ After a transfer pricing reassessment is made, the additional profit is qualified as a deemed distribution of a benefit. The tax treatment of such "benefit" transfer may trigger the same consequences as a deemed transfer of a dividend, depending on the definition of "dividend" in the applicable tax treaty. Accordingly, a withholding tax on the reassessed amounts is often imposed by the FTA. When the double tax treaty permits the FTA to treat the transfer pricing reassessment as a deemed dividend distribution, the actual withholding tax applied of course depends on the relevant tax treaty provisions.<sup>1</sup> In the absence of a specific tax treaty, the withholding tax rate applied is 30% and increases to 75% when the foreign entity is based in a "non-cooperative" jurisdiction. Note that the effective rate can be grossed up.
- ▶ If the transfer is treated as a deemed dividend, the tax authorities also usually apply a 10% penalty for not declaring the withholding tax. Such penalty is applied regardless of the good faith of the taxpayer.

<sup>1</sup> See the Dividends or the Other Income clauses of the relevant tax convention.

## France (continued)

### Transfer pricing penalties (continued)

- ▶ However, if certain cumulative conditions are met, at the request of the taxpayer, the withholding taxes may be waived. These cumulative conditions are enshrined in Article L62 A of the FPTC but basically require that (i) the taxpayer files, before the FTA issues the tax bill, a written request to apply Article L62 A, and (ii) the amounts classified as deemed dividends are repatriated to the benefit of the French taxpayer within 60 days from the request. However, the taxpayer cannot have recourse to Article L62 A if the non-French related party that entered into the reassessed transaction with the French entity is located in a noncooperative state or territory.
- ▶ Late interest payments are applied in the case of tax reassessments made on the grounds of Article 57 of the FTC. The ordinary late payment interest rate is 0.40% per month (i.e., 4.8% per year).
- ▶ Supplementary penalties apply if the taxpayer committed a willful offense (formerly referred to as "bad faith" penalties) (40%) – this is much more frequently applied by the tax authorities – or acted fraudulently (80%). In these cases, taxpayers are denied recourse to the European Arbitration Convention and often also from MAP through the applicable double tax treaty (possibly subject to discussion however depending on treaty provisions).

In addition, the adjustment may result in a reassessment of other taxes and contributions, such as business or local taxes and employee profit-sharing regimes.

Prior to 1 January 2014, French regulations provided that in cases where MAP relief is sought (to avoid double taxation on the grounds of a tax treaty or the European Arbitration Convention), tax collection could currently be suspended during the entire mutual agreement process, and postponed until the competent authorities reach an agreement (Article L 189A of the FPTC). This measure has been terminated, so companies can no longer defer the payment of the French transfer pricing reassessment by opening a MAP.

### Penalty relief

During a tax audit and before the tax authorities send the notice of reassessment, taxpayers, under the framework of Article L 62 of the FPTC, are allowed to correct their errors or omissions in consideration of a reduced late payment interest rate (3.36% per year), which is equal to 70% of the ordinary late payment interest rate. In this respect, taxpayers must file a complementary tax return and pay the corresponding additional taxes at the same time.

Following a tax reassessment, taxpayers can request MAP relief (on the grounds of a tax treaty and/or the European Arbitration Convention) to avoid double taxation resulting from the reassessment. Administrative guidelines (BOI - INT - DG - 20 - 30) specify the scope and the conditions to be met when such a procedure commences (e.g., timing, absence of penalties).

Assessment of a transfer pricing documentation penalty under L 13AA (transfer pricing documentation penalty regime) does not prevent the taxpayer from seeking recourse under MAP provisions.

### Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is the same as for all French corporate tax assessments, generally three years following the year for which the tax is due (it might be longer under certain circumstances, e.g., permanent establishment qualifications, loss carryforwards). A special extension can apply in the case of a request for international tax assistance (Article L 188A of the FPTC).

The general three-year statute of limitation can also be extended in specific cases, such as when an asset (e.g. going concern/clientele) was transferred but not declared on time (extension from three to six years in this particular case). An effective extension to ten years applies in cases where Permanent Establishments are deemed to exist by the FTA, but the non-French entity never declared any activities in France to the FTA.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The risk of a general tax audit is high, as is the risk that transfer pricing issues will be scrutinized during the audit. Similarly, if transfer pricing is reviewed as part of the audit, the likelihood that the transfer pricing methodology will be challenged is high. The number of tax audits in transfer pricing is increasing considerably, and the FTA is becoming more extensive and accurate in its queries, since it now uses economic bases as well as legal bases.

## France (continued)

### Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

In particular, after the FTA announced that it will scrutinize business restructuring operations in a systematic manner going forward, tax audits focusing on this topic are on the rise, and it is becoming common to see valuation experts (engaged by the FTA) involved in these audits to determine the arm's-length exit charge. Recent business restructuring cases to date indicate that the tax office tends to focus on matters such as the value contribution of the French taxpayer to the supply chain of the group before and after the business restructuring; the internal communication between the group entities to determine, for example, the authorization and negotiation power retained by the French entity, as well as who performed the development, enhancement, maintenance, protection and exploitation (or DEMPE functions, discussed in the OECD Guidelines) and who bears these costs. If any of the information obtained supports it, the FTA will not hesitate to reassess the taxpayer based on an alternative transfer pricing method (potentially increasing the exit tax consequences), such as applying the profit split or otherwise insisting that the French entity should have been entitled to a higher return for its non-routine functions previously or to be performed.

Moreover, based on our experience, the new article 223 quinque B of the FTC enables the FTA to identify French taxpayers with the most significant potential transfer pricing exposure and thereby allocate their transfer pricing audit resources accordingly. Indeed, the FTA is using this new requirement as a programming tool to launch new tax audits on French taxpayers that either (i) have failed to file the new transfer pricing document, or (ii) have filed information that do not appear compliant with the arm's-length principle or coherent with the taxable position of the company.

**From an overall perspective, transfer pricing issues that receive the greatest scrutiny are:**

- ▶ Business restructurings (e.g., transfer of intangibles and clientele, conversion of a distributor into an agent) or a sudden decrease in the operating margin, likely to hide a change in the transfer pricing policy applied
- ▶ Product sale prices (underestimated or overestimated prices), especially (but not only) in case of losses
- ▶ Management fees
- ▶ Permanent establishments
- ▶ Closure and conversion costs
- ▶ Intangibles and economic ownership (including questions about royalties)
- ▶ Benchmarking exercises (the FTA expects local comparables obtained typically from French company databases when the tested party is French, and it usually rejects pan-European searches)
- ▶ Financial transactions

As an alternative to a transfer pricing dispute, the FTA today is keen on making a permanent establishment characterization and does not hesitate to resort to judicial searches in instances where the FTA feels that auditors cannot access information via normal investigative procedures.

**Other tax audit trends:**

- ▶ There's been a significant increase in the execution of police tax raids led by the FTA (based on Article L 16B of the FPTC).
- ▶ There's been the development of computerized tax audits, where IT specialists assist tax inspectors in extracting the required information from accounting systems.
  - ▶ For most taxpayers: There is a new obligation to provide a file detailing all accounting entries (Article L 47 A 1), i.e., accounting records in the form of an accounting entry file (AEF). The obligation includes the provision of compulsory fields, and nondisclosure of AEF complying with French requirements may imply specific penalties. This obligation also weighs on branches and not only on subsidiaries.
  - ▶ Communication of the analytical and consolidated accounts in case of a tax audit: After the enactment of the French 2014 Finance Bill (i.e., 31 December 2013), companies in the scope of L 13AA of the FPTC or with a turnover exceeding EUR152.4 million or EUR76.2 million, depending on their business activity, will have to communicate their management accounting in case of an audit. The precise definition of the management accounting should be further clarified in future additional regulatory guidance.

## France (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)**

French holdings will also have to disclose the detail of their consolidated accounts, allowing the FTA to identify the tax provisions, for instance.

Few court decisions in France go into detailed transfer pricing issues. One of the main questions relates to the burden of proof, which usually is said to rest with the tax inspectors.

### **APA opportunity**

Bilateral and, under certain circumstances, unilateral APAs are available (Article L 80 B 7° of the FPTC). No fees are required to enter into the APA program. This section was provided by the Finance Amendment Act for 2004 and came into force 1 January 2005. It incorporates existing procedures as described by the French administrative guideline #4 A-8-99, dated 7 September 1999. A specific procedure also exists for certain activities (e.g., headquarter profile).

### **APA opportunity (continued)**

On 28 November 2006, the tax authorities released a new administrative guideline (formerly 4 A-13-06 referred under BOI - SJ - RES - 20-20 from September 2012), adding a simplified APA procedure for small and medium-sized enterprises and presenting an online guide pertaining to transfer pricing methods.

In theory, the process requires that the request be submitted at least six months before the beginning of the first fiscal year covered. There is no rollback possibility.

# Former Yugoslav Republic of Macedonia

## **Taxing authority and tax law**

Tax authority: Revenue Office and Customs Office

Tax law: Corporate Income Tax (CIT) Law, Tax Procedures Law and Customs Law

## **Relevant regulations and rulings**

Tax laws and ministerial instructions that govern transfer pricing are:

- ▶ CIT Law
  - ▶ Article 13, paragraph 1 – correction of prices applied between related parties; reference to transfer pricing methods
  - ▶ Article 14, paragraph 1 – correction of the interest rate applied between related parties
  - ▶ Article 16 – “related party” definition
- ▶ Tax Procedures Law
  - ▶ Article 60 – obligation of the taxpayer to justify, upon a tax authority’s request, any tax position taken
- ▶ Customs Law
  - ▶ Article 28, paragraph 2 – definition of “fair market price” for customs purposes
- ▶ Double taxation treaties enacted by Macedonia
- ▶ 135/2011 – administrative guideline on the obligation of the taxpayer to provide, upon a tax authority’s request, analysis of why the transfer prices applied were considered to be at arm’s length
- ▶ 135/2011 – administrative guideline – a safe-harbor rule for intercompany interest charges
- ▶ 39/2005 – administrative guideline – defining “related party” for customs purposes

## **OECD Guidelines treatment**

No reference is made in the law or in the administrative guidelines to the OECD Guidelines. However, in the absence of any guidance outlining what the contents of adequate documentation should look like, the OECD Guidelines can effectively serve as a model.

There are no specific tax regulations on business restructurings in Macedonia.

## **Documentation requirements**

No specific transfer pricing documentation requirement exists under the current tax legislation. The first transfer pricing guidance formally issued by the Ministry of Finance on 15 December 2011 stipulates that a taxpayer that is involved in intercompany transactions is obligated to present, upon the tax authority’s request, sufficient information and analysis for proving that the prices applied are in line with the arm’s-length principle. In practice, a transfer pricing analysis prepared in line with the OECD Guidelines should be sufficient for the taxpayer to comply with the tax authority’s request.

## **Priorities/pricing methods**

The CIT Law makes explicit reference to the CUP and the cost-plus methods, although preference is for the CUP method. No reference is made to the other transfer pricing methods of the OECD Guidelines. However, using one of the other OECD transfer pricing methods should be acceptable, as long as no CUPs are available and the taxpayer’s analysis demonstrates that the method chosen is the most appropriate one, in line with the OECD Guidelines.

## **Return disclosures/related party disclosures**

There are currently no specific disclosure requirements.

## Former Yugoslav Republic of Macedonia (continued)

### Transfer pricing-specific returns

There are no transfer pricing-specific return requirements.

### Documentation deadlines

There are currently no specific provisions for documentation deadlines. In the tax authority's request, the time frame is specified. However, in practice, the time frame is very short; hence, it is advisable that the documentation is compiled as soon as practicable after the close of the tax year.

### Transfer pricing penalties

Failure to report the correct amount of tax liability results in a penalty of up to 10 times the amount of the understatement of tax. Additionally, default interest of 0.03% applies on the amount of the additional tax liability for each day of delay in settling such liability. Penal prosecution may not be ruled out if there are sufficient indications that tax evasion is in place. For not providing the tax authority with transfer pricing documentation upon its request, a fine of EUR2,500 to EUR3,000 is imposed. For the same offense, tax authorities are entitled to suspend the taxpayer's business activity for 3 to 30 days.

### Penalty relief

Currently, no penalty relief is available.

### Statute of limitations on transfer pricing assessments

There is a five-year statute of limitations for all taxes, after which the tax authorities may not audit the taxpayer's reported position and reassess tax liabilities. Audited tax periods can be re-audited further to the decision of the tax authority as long as the five-year time period has not elapsed.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

There is no mandatory frequency for performing tax audits. The tax authority has the discretion to initiate a tax audit in accordance with the audit plans. In general, the likelihood of an annually recurring tax audit is high. Likewise, the likelihood that transfer pricing will be reviewed as part of that audit is also high. This is due to the reforms of the corporate income tax regime in 2009, under which the annual tax base of a taxpayer includes expenses not recognized for tax purposes and additional income resulting from any transfer pricing adjustments, whereas any reported profits are subject to taxation only upon distribution. The likelihood that the transfer pricing methodology will be challenged is medium.

### APA opportunity

The tax legislation does not provide for a binding APA. However, companies are entitled to file an application to the tax authority for a ruling with respect to the tax position they intend to take, to which the tax authority is obliged to reply. Due to a lack of training in tackling transfer pricing issues, the responses are often ambiguous. In any case, the request should be accompanied by a transfer pricing analysis and a request to the tax office for its opinion on the compatibility of the methodology followed in setting the transfer prices in accordance with domestic law requirements. Although the tax authority's opinion is not binding, it represents the tax administration's position and should be considered by a tax auditor, unless the factual or regulatory background has changed.

# Gabon

## **Taxing authority and tax law**

Taxing authority: Gabonese Tax Administration

Tax law: General Tax Code (GTC)

## **Relevant regulations and rulings**

Section 12 and Section P 860 of the GTC contain the main legislative provisions concerning transfer pricing.

Section 12 of the GTC provides that transactions between group companies should be conducted as if the transaction were undertaken with third parties. The profit level of the transactions undertaken would also be taken into account.

## **OECD Guidelines treatment**

The tax administration accepts the OECD Guidelines.

## **Documentation requirements**

Section P 860 provides that the company is required to provide transfer pricing documentation that should detail the transfer pricing policy adopted by the head office. This document should include legal, economic, tax and accounting details and the methodology used to validate the transfer pricing policy. The document should also include details about the relationship that the company has with other group companies with which transactions would be undertaken.

## **Priorities/pricing methods**

The tax administration should accept the methods prescribed by the OECD (i.e., CUP, resale price, cost-plus, TNMM and profit split).

## **Return disclosures/related party disclosures**

There are no disclosure requirements.

## **Transfer pricing-specific returns**

No guidance is currently available on transfer pricing-specific returns.

## **Documentation deadlines**

Transfer pricing documentation should be provided at the start of the fiscal year of operation.

The Finance Act 2014 also specifies that the transfer pricing documentation should also be provided at the start of an audit account. In the case of a violation, a warning is sent to the company requiring payment within 15 days.

## **Transfer pricing penalties**

Any excessive charges would be regarded as distributions of income and be subject to withholding taxes as the case may be.

Tax adjustments for transfer pricing are subject to the normal penalty rules. In case of an audit by the tax authorities, an incorrect corporate tax return is subject to a penalty of 1.5% on the basis of the amount recovered, capped at 50%. In case of willful neglect, the penalty is increased by 100%. In case of fraud, the penalty is 150% over and above the penalty for an incorrect tax return as detailed above.

For failure to submit the transfer pricing documentation, the taxpayer is subject to a penalty of 5% of the profits transferred abroad (a minimum penalty of XAF5 million per year), according to the Finance Act 2014.

## **Penalty relief**

Remission from penalties is possible on special request to the tax administration.

## Gabon (continued)

### **Statute of limitations on transfer pricing assessments**

The statute of limitation is four years after the payment of corporate tax is due. Taxes are due by 30 April following the calendar year-end.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The transfer pricing legislation is relatively new. However, tax audits are increasingly focusing on related party transactions, especially when the taxpayer is in a recurrent loss position.

### **APA opportunity**

Gabon has just introduced an APA program for transfer pricing in the Finance Act 2014.

# Georgia

## Taxing authority and tax law

Taxing authority: The Revenue Service of Georgia (RS)

Tax law: Georgian Tax Code, effective from 17 September 2010 (GTC)

## Relevant regulations and rulings

The transfer pricing general principles are provided in Articles 126-129<sup>1</sup> of the GTC.

Additionally, transfer pricing in Georgia is regulated by Instruction on Pricing International Controlled Transactions<sup>2</sup> (Instruction).

Georgian transfer pricing rules generally follow the OECD Guidelines. They apply to cross-border transactions between a Georgian resident company and a related foreign company. In certain cases, these rules may also apply to transactions between a Georgian resident company and an unrelated foreign company, where the latter is a resident of a low-tax jurisdiction or offshore country. The Georgian Government determines the list of low-tax jurisdictions and offshore countries.<sup>3</sup>

## Related parties

The definition of "related parties" in transfer pricing law includes a list of criteria defining when companies and individuals can be declared related parties. The main criterion defining the relationship is the ownership threshold (i.e., if one party directly or indirectly controls, or factually controls, more than 50% of another party). The definition of the factual control broadens the application of transfer pricing rules and covers situations when one party (i) provides financial instruments (credit, loan, guarantee) or securities that separately or in the aggregate exceed 50% of another party's capital, (ii) has the power to control a board of directors of another party or to participate in its profit or (iii) holds more than 50% of the voting shares directly or through its relative.

## OECD Guidelines treatment

Georgia is not a member of the OECD; however, the transfer pricing law is largely based on the OECD Guidelines. The Instruction contains direct reference to the OECD Guidelines 2010 and sets forth that issues that are not regulated by the GTC or the Instruction shall be regulated by the OECD Guidelines.

## Documentation requirements

The transfer pricing documentation does not have any predefined format; rather, it should contain the following types of information:

- ▶ Overview of the business operations of the Georgian enterprise
- ▶ Analysis of the economic factors affecting the prices
- ▶ Organizational structure
- ▶ Description of the controlled transactions
- ▶ Analysis of the comparability factors
- ▶ Details of the group's transfer pricing policy
- ▶ Transfer pricing method applied and reasons for selection of a particular method
- ▶ Comparability analysis
- ▶ Details of APAs relevant to the controlled transaction (if any)

<sup>1</sup> Approved by Decree #423 of the Minister of Finance of Georgia.

<sup>2</sup> Ibid.

<sup>3</sup> Decree #132 of 30 May 2013.

## Georgia (continued)

### Documentation requirements (continued)

- ▶ Conclusion on compliance with the arm's-length principle and, where relevant, on adjustments made by the Georgian enterprise to its transfer prices or taxable income
- ▶ Other information that may have a material effect with regard to compliance of the arm's-length principle

### Priorities/pricing methods

The transfer pricing law includes five methods similar to those used in the international transfer pricing practice. The CUP method has first priority, whereas the profit split is a method of last resort.

The three traditional methods prevail over the TNMM and profit split method. Some other method can be used if none of the approved methods can provide reliable results and such other method yields a result consistent with that which would be achieved by independent enterprises engaging in comparable uncontrolled transactions under comparable circumstances. In such cases, a taxpayer shall bear the burden of demonstrating that the above requirements have been satisfied.

Taxpayers should select the most appropriate method according to the nature of their business, comparability factors and the availability of relevant information. If there is a lack of internal comparables or information (or if these internal comparables or information are not accurate or reliable enough), the taxpayer may use external comparables from the foreign market.

### Return disclosures/related party disclosures

Disclosure of transactions with related parties, and also other types of third-party transactions that would remain subject to transfer pricing control (e.g., transactions with parties located in low-tax jurisdictions), will be required during the filing of corporate income tax returns.

### Transfer pricing-specific returns

Not applicable.

### Documentation deadlines

The transfer pricing documentation must be complete by the date when the taxpayer files its corporate tax return. Upon request by the tax authority, the documentation has to be submitted within 30 days.

### Transfer pricing penalties

No specific penalties are defined for when a taxpayer does not submit transfer pricing documentation. The standard penalties for under reporting of tax will apply if the tax authorities subsequently reassess the Georgian entity's amount of taxable profit.

### Penalty relief

No specific penalty relief is available.

### Statute of limitations on transfer pricing assessments

There is no specific statute of limitations on transfer pricing assessments. The general statute of limitations in Georgia is five years. It is automatically extended to 11 years when a taxpayer chooses a 10-year carryforward of losses. Tax cannot be reassessed after this period has elapsed.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as high, as is the likelihood that transfer pricing will be reviewed as part of an audit. The likelihood that the transfer pricing methodology will be challenged during the course of an audit is high. Since 2014 tax authorities have a heightened interest in the tax effects of intercompany transactions. They are more focused on a taxpayer's business activities, supply chain operations and transfer pricing strategies than ever before.

## Georgia (continued)

### **APA opportunity**

A unilateral APA (between a resident taxpayer and the RS) is available only for transactions that separately or in the aggregate exceed GEL50 million. In principle, the agreed-upon method is binding throughout the APA term, which is three years, with the possibility of extension.

The law also introduces the possibility for a taxpayer to conclude multilateral APAs where the transactional counterparties are in a jurisdiction with which Georgia has a double tax treaty. However, because there are no special regulations in this regard yet, it is impossible to conclude multilateral APAs at this stage.

# Germany

## Taxing authority and tax law

Taxing authority: German taxes are administered either by the German Federal Central Tax Office (*Bundeszentrалamt für Steuern*) or by German state authorities

Tax law: Tax acts, executive order laws, double taxation treaties and supranational norms

## Relevant regulations and rulings

The tax authorities assess intercompany transactions by following the arm's-length principle (§1 of the Foreign Tax Act). The German interpretation of the arm's-length principle generally follows the definition in Article 9 of the OECD Model Tax Convention. However, a relevant intensification, §1 (1) Sentence 3 of the Foreign Tax Act, stipulates that for the interpretation of the arm's-length principle, it is assumed that both parties involved in an intercompany transaction have full knowledge about all facts and circumstances (information transparency).

Detailed transfer pricing regulations concerning the cross-border transfer of functions were incorporated into §1 of the Foreign Tax Act on 1 January 2008. An Executive Order Law providing details on how the new transfer pricing provisions relate to business restructurings and function transfers is effective from 2008 onward.

In October 2010, new Administration Principles were released that include 81 pages of clarifications on applying §1(3) of the Foreign Tax Act and the Executive Order Law on Transfer of Business Functions. The Administration Principles detail, for example, circumstances under which a business restructuring and function transfer would be exempt from the taxable valuation of the "transfer package". In such cases, the receiving entity of a function exclusively performs the transferred function for the transferring entity and receives a cost-based remuneration (i.e., based on the cost-plus method or a cost-based TNMM), in accordance with the arm's-length principle. In such cases, it is assumed that the transfer package did not include any significant intangible property or other advantages and, thus, a valuation of the transfer package is not required. This exemption from examination of the transfer package generally affects the transfer of routine functions for which execution is connected with low risks and that, as a consequence, are usually remunerated on the basis of the cost-plus method.

As of 1 January 2013, a law amending §1 of the Foreign Tax Act is in effect that incorporates the authorized OECD approach (AOA) on the allocation of profits to permanent establishments into German law. The AOA treats a permanent establishment as a (nearly) fully separate entity for tax purposes. This includes the recognition of internal dealings between the head office and a foreign permanent establishment, such as the supply of goods, a service provision and even licensing arrangements. These dealings have to be priced in accordance with the arm's-length principle (i.e., including a profit element). Due to the lack of legally binding contracts between the different parts of one enterprise, contemporaneous transfer pricing documentation becomes crucial to defend the transfer prices applied for internal transactions. The new domestic rules stipulate that Germany will not tax the profits of the permanent establishment that are determined based on the AOA if the AOA is not yet implemented in the applicable double tax treaty. However, for the treaty relief, the taxpayer has to "prove" that the other contracting state does not apply the AOA and that this will lead to double taxation.

Other relevant provisions for transfer pricing issues in German tax law are:

- ▶ §8(3) German Corporate Income Tax Act (hidden profit distribution)
- ▶ §4(1) German Income Tax Act with Directive R40 of the German Corporate Tax Directives (hidden capital injection)
- ▶ §§90(3), 162(3) and 162(4) German General Tax Code and the Executive Order Law to §90(3) German General Tax Code

To help interpret the above outlined provisions, the German tax authority issued a circular, "Principles Governing the Examination of Income Allocation between Multinational Enterprises," in 1983, known as the Administration Principles. The Administration Principles do not constitute binding law for taxpayers or the courts but are binding for the tax authority and therefore indicate how the tax authority will treat specific intercompany transactions between related parties. The purpose of the Administration Principles is to provide a directive concerning the tax audit treatment of transfer pricing cases and to ensure the uniform application of rules and methods.

In addition to the two Administration Principles mentioned above, administration circulars concerning income allocation with regard to cross-border secondment of personnel, cost contribution arrangements and procedural guidance have been published since 1999.

## Germany (continued)

### OECD Guidelines treatment

The OECD Guidelines provide support for domestic use but do not constitute binding law in Germany. German transfer pricing regulations and practices do differ from those of the OECD Guidelines with regard to certain issues (e.g., the application of transactional profit methods, documentation requirements and the treatment of transfers of functions). The German tax authorities consider the German transfer pricing laws and regulations to be generally consistent with the OECD Guidelines.

### Documentation requirements

Section 90 of the German General Tax Code contains transfer pricing documentation requirements. For the documentation of transfer pricing issues, an Executive Order Law (effective 30 June 2003) prescribes general requirements and the documentation required in special circumstances. A circular (Administration Principles – Procedures) dated 12 April 2005 provides the tax authority's interpretation of the requirements set out in the General Tax Code and in the Executive Order Law.

**General documentation requirements are:**

- ▶ General information: shareholder relationships, organizational and operative group structure and operations
- ▶ Description of intercompany transactions: nature and extent of transactions, intercompany contracts, and a list of important intangibles
- ▶ Functions and risks analysis: description of functions and risks the taxpayer bears within the intercompany transaction, contractual terms, business strategies and value chain
- ▶ Transfer pricing analysis: selection of the transfer pricing method, appropriateness of the method selected, calculation of the transfer price, list of comparables and documentation of adjustment calculations

### Special documentation requirements

The taxpayer has to document any special circumstances used to substantiate the arm's-length nature of the price determined, including special business strategies, business restructurings, cost contribution agreements, overview of APAs and mutual agreement procedures, information on transfer price adjustments and causes of losses from intercompany transactions, and countermeasures (if losses occur in more than three consecutive financial years).

### Priorities/pricing methods

The application of transfer pricing methods is dependent on the availability and quality of third-party comparable data. Three situations are distinguished: full comparability of the data, limited comparability of the data and non-availability of third-party comparable data.

When full comparability of third-party data exists (after making appropriate adjustments with regard to the functions exercised, the assets used, and the associated opportunities and risks), the law prioritizes the traditional transaction methods: CUP, resale price and cost-plus. Any price within the full range of fully comparable third-party data meets the arm's-length principle.

If limited comparability exists, all OECD methods (whose application is appropriate in the case under review) are allowed, i.e., the aforementioned traditional methods and the transactional profit methods (TNMM and profit split). In case of limited comparability, the range of available third-party comparable data must be limited by applying statistical measures (e.g., the interquartile range).

If no comparable data exists, the law stipulates that taxpayers have to conduct a hypothetical arm's-length analysis to derive arm's-length transfer prices. Accordingly, in compliance with the so-called prudent and diligent business manager principle, and based on the functional analysis and internal projections, the taxpayer has to establish a range of hypothetical arm's-length prices. The range of negotiation is defined by the minimum price a hypothetical seller would accept and by the maximum price a hypothetical purchaser would pay. The taxpayer must use the value within the range of negotiation that has the highest probability of complying with the arm's-length principle. If the taxpayer provides no reasoning behind choosing that value, the arithmetic mean of the range of values is assumed to be the arm's-length transfer price for the transaction under review.

### Return disclosures/related party disclosures

Apart from transfer pricing documentation requirements, there are currently no specific disclosure requirements.

## Germany (continued)

### Transfer pricing-specific returns

Apart from transfer pricing documentation requirements, no separate returns for related party transactions are currently required.

### Documentation deadlines

In Germany, contemporaneous documentation requirements exist only for exceptional business transactions. For such extraordinary business transactions (e.g., restructuring within the group), the documentation must be contemporaneous (i.e., prepared within six months of the end of the business year in which the transaction has occurred). However, the preparation of contemporaneous documentation is strongly recommended for all cross-border transactions.

Documentation must be submitted within 60 days upon receipt of the tax authority's request. In the case of extraordinary business transactions (e.g., transfer of functions), documentation must be submitted within 30 days of the tax authority's request. In general, the request is made in the course of a tax audit.

### Transfer pricing penalties

If a taxpayer does not comply with the transfer pricing documentation requirements to the extent outlined in §90(3) of the German General Tax Code, a rebuttable presumption applies under which the taxpayer's income had been reduced by the amount of inappropriate transfer prices, thereby forming the basis of a transfer pricing adjustment.

The tax authorities may apply §162(3) of the German General Tax Code if the taxpayer submits insufficient or no documentation, or if exceptional transactions have not been recorded contemporaneously. In all three cases, the tax authority is authorized to estimate the income, provided that the taxpayer does not rebut the presumption. This also holds true when a taxpayer does not disclose relevant data available only from the foreign related parties. If estimation by the tax authorities is indicated in such cases and it is possible to determine the relevant income only within a certain range, the range may be fully exploited to the taxpayer's detriment.

The legislation takes into consideration that a single appropriate transfer price does not exist and that comparable third-party prices may vary within price ranges. Under the tax law effective 1 January 2008, in the event that the taxpayer's transfer price falls outside the full range (in case of full comparability of third-party data) or the interquartile range (in case of limited comparability of third-party data) of arm's-length prices, the transfer price is adjusted to the median of the range.

Penalties can be assessed based on the taxpayer's noncompliance with the documentation requirements. An actual income adjustment is not subject to penalties, but interest is assessed on the additional tax payments (6% per annum, which is nondeductible for tax purposes). Interest starts accruing 15 months after the end of the calendar year in which the tax liability arose.

If the taxpayer fails to submit transfer pricing documentation or if the documentation provided is unusable or insufficient, a penalty of 5% to 10% on the income adjustment will be applied, with a minimum penalty of EUR5,000.

For late filing, the taxpayer faces a penalty of up to EUR1 million (minimum penalty of EUR100 per day of delay). Penalties are imposed after the closing of a tax audit. The aforementioned penalties constitute nondeductible expenses for tax purposes. Section 146(2b) of the German Federal Tax Code further allows the assessment of penalties of up to EUR250,000 in case documents are not provided to tax auditors in a timely manner upon request.

### Penalty relief

The taxpayer is required to present utilizable documentation to the German tax authority. Accordingly, no penalty relief applies.

### Statute of limitations on transfer pricing assessments

The assessment period for taxes (§169 of the General Tax Code) is four years. For customs duties it is shorter, and in cases of grossly negligent evasion of taxes or tax fraud, it is much longer (10 years in the case of tax fraud). These periods commence at the end of the calendar year in which the tax liability arose. No special time limit provisions apply if intercompany transactions are involved. The general regime of the statute of limitations applies in accordance with the General Tax Code. Accordingly, each case has to be carefully considered to determine the specific statute of limitations. Most taxes are levied by way of assessment. Assessments can be made only within the statutorily prescribed assessment period, which is subject to the statute of limitations for assessments.

## Germany (continued)

### Statute of limitations on transfer pricing assessments (continued)

The assessment period, however, does not start before the end of the calendar year in which the taxpayer has submitted the tax return (but also does not start later than three years after the year the tax liability arose). There are a number of statutory exceptions to the statute of limitations for assessments (e.g., it should be kept in mind that the limitation period is interrupted when a tax audit begins).

Section 175a of the General Tax Code stipulates that tax assessments can be amended due to the result of a MAP or European Union (EU) arbitration procedure up to one year after the effective date of such agreement, regardless of whether the aforementioned statutes of limitations have expired before.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a tax audit in Germany is high for domestic and foreign groups of companies. Usually, a tax audit covers a three to four year period on a continuous basis. The likelihood of transfer pricing issues being scrutinized during a tax audit is also high and continuously rising. It is expected that transfer pricing issues will continue to attract significant attention in tax audits, in particular, with respect to transactions qualifying as exceptional business transactions under the documentation provisions, such as the transfer of functions. Further, many tax audits increasingly focus on (brand) royalty charges and financing transactions. The likelihood that, if transfer pricing is reviewed as part of the audit, the transfer pricing mechanism will be challenged is also high.

### APA opportunity

APAs generally are available. The German Ministry of Finance issued an APA circular on 5 October 2006 that defines the APA procedures and provides guidance with regard to the negotiation of APAs. Additionally, the Annual Tax Act 2007 introduced fees for APAs. The administrative competence for APAs is centralized in the Federal Central Tax Office. From application to conclusion, the APA process can take 18 months to several years. An agreement reached between two competent authorities will be made conditional in two regards: the taxpayer must consent to the intergovernmental agreement and must waive its right to appeal tax assessments, to the extent that they are in line with the content of the APA.

# Ghana

## Taxing authority and tax law

Taxing authority: Ghana Revenue Authority (GRA)

Tax law: Internal Revenue Act

## Relevant regulations and rulings

The Finance Minister has, in accordance with the provisions of Section 114(1)(d) of the Internal Revenue Act of 2000, enacted the Transfer Pricing Regulations, 2012 (L.I 2188), which are effective from 14 September 2012.

The rules apply to transactions between:

- ▶ Taxpayers in a controlled relationship
- ▶ A permanent establishment and its head office
- ▶ A permanent establishment and other related branches of the permanent establishment
- ▶ A taxpayer and another taxpayer who are in an employment relationship

The regulations apply to the following intercompany transactions between affiliated companies:

- ▶ The purchase and sale of goods
- ▶ The purchase, sale, lease or use of a tangible asset
- ▶ The purchase, sale, lease or use of an intangible asset
- ▶ The provision of management services, technical services and other intragroup services
- ▶ The provision of finance and other financial arrangements
- ▶ Rent and hire charges
- ▶ Any other transaction that may affect the profit or loss of an entity

Thin capitalization: an exempt-controlled resident entity, such as a nonresident person, other than a financial institution, is deemed to be thinly capitalized if the ratio of the offshore related party, interest-bearing debt-to-equity ratio exceeds 2:1. Interest deductions or exchange losses arising on debt in excess of the 2:1 ratio are disallowed. An exempt-controlled resident entity is a resident entity of which at least 50% of the underlying ownership or control is held by a nonresident.

## OECD Guidelines treatment

The rules follow the OECD Guidelines.

## Documentation requirements

The rules state that a person who engages in a transaction with another person with whom it has a controlled relationship shall maintain contemporaneous documentation detailing the transactions engaged in by that person for each tax year. The regulations provide guidance about the nature of documentation to be retained. Generally, this follows the OECD requirements.

The taxpayer shall, for purposes of these regulations, file returns on income in accordance with Section 72 of the Act. The form prescribed by the commissioner-general for purposes of filing returns on income shall include a list of disclosures relating to the taxpayer's transfer pricing study.

## Ghana (continued)

### Priorities/pricing methods

The transfer pricing rules require the use of the most appropriate method to price related party transactions.

Similar to the OECD Guidelines, the transfer pricing methods approved by the commissioner-general include:

- ▶ CUP method
- ▶ Resale price method
- ▶ Cost-plus method
- ▶ Transactional profit split method
- ▶ TNMM

Notwithstanding the transfer pricing methods stated, the commissioner-general may use a different method or, in writing, permit a taxpayer to use another method. The commissioner-general may do this when, considering the nature of the transaction, they deem that the arm's-length price cannot be determined by the use of any of the five stated transfer pricing methods. A taxpayer who intends to use an unspecified method may have to apply to the commissioner-general for permission. The taxpayer has to prove that none of the specified methods can reasonably be applied to determine the arm's-length nature of the intragroup pricing and that the unspecified method yields a result consistent with the arm's-length principles.

### Return disclosures/related party disclosures

A transfer pricing-specific form must be submitted.

### Transfer pricing-specific returns

Filing an annual return on transfer pricing transaction is required and forms part of the Corporate Income Tax Return (Form 22a or Form 22b). The return must be filed no later than four months after the end of the taxpayer's financial year. The return requires disclosure of intercompany transactions, related parties to the transactions and the transfer pricing methods applied.

### Documentation deadlines

The commissioner-general may request additional information from the taxpayer, who would be required to comply with the request within the required time frame. No guidance is currently available about the time frame.

### Transfer pricing penalties

The provisions of an act of fraud, failure to file returns, failure to maintain records, penalty for underpayment of tax and offenses may also apply to the transfer pricing regulations.

### Penalty relief

Under Ghanaian law, any tax due and payable resulting from an adjustment performed by the commissioner-general will be deemed as additional tax. Additional penalties can be issued under the act for offenses of fraud, failure to file, refund or the underpayment of tax.

### Statute of limitations on transfer pricing assessments

There is no guidance available about the statute of limitations on transfer pricing assessments.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The commissioner-general may, upon the receipt of returns filed, examine if the amounts charged to the final accounts, or credited to the final accounts, are within the arm's-length range.

The commissioner-general may also conduct a transfer pricing audit any time during the year, even when the person has not filed a return.

## Ghana (continued)

### APA opportunity

There is no APA available for multinationals operating in Ghana.

# Gibraltar

## **Taxing authority and tax law**

Taxing authority: The Commissioner of Income Tax

Tax law: Income Tax Act 2010 and rules and regulations adopted pursuant to that Act

## **Relevant regulations and rulings**

Section 40 of the Income Tax Act 2010 refers to transfer pricing.

Section 40 of the Income Tax Act 2010 gives the Commissioner of Income Tax the power to counter tax avoidance. The legislation states that this is to be construed in such manner as best secures consistency between:

- ▶ The powers granted in Section 40(1)
- ▶ Internationally accepted principles for the determination of profit in respect of activities within a multinational group of companies, notably the rules that, at 1 January 2011, were contained in Article 9 of the Model Tax Convention on Income and on Capital published by the OECD
- ▶ All documents published by the OECD, at any time before 1 January 2011, as part of its Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, together with such documents issued by the OECD on or after 1 January 2011, which are designated by the minister and published in the Gibraltar Gazette

## **OECD Guidelines treatment**

There is a requirement to be consistent between the internationally accepted principles for the determination of profit in respect of activities within a multinational group of companies, notably the rules that, at 1 January 2011, were contained in Article 9 of the Model Tax Convention on Income and on Capital published by the OECD.

## **Documentation requirements**

Transfer pricing documentation is not required by law.

However, in practice, it is recommended that taxpayers maintain contemporaneous documentation in areas of subjectivity. The existence of documentation need not be disclosed in or provided with the return. In practice, due to Gibraltar's relatively low rate of corporate tax (10% for most companies), the requirement to document transfer pricing is more likely to arise from the jurisdiction in which the Gibraltar-taxable entity's counterparty is taxable. This would not apply when the counterparty is based in a zero-tax jurisdiction.

## **Priorities/pricing methods**

There is nothing specific in the legislation, other than the reference above to documents published by the OECD.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Not applicable.

## Gibraltar (continued)

### Transfer pricing penalties

There are no specific transfer pricing penalties. If tax is underpaid, or paid late, a surcharge of 10% of the underpaid amount is due immediately after the date at which the tax was due. A further surcharge of 20% of the underpaid amount is due if the amount remains underpaid after another 90 days. Additional penalties are payable for failing to comply with specific provisions in the Income Tax Act 2010, though none specifically relate to transfer pricing.

### **P**enalty relief

There is no specific provision in the legislation for relief from surcharges. Penalties may be removed at the discretion of the Commissioner of Income Tax.

### Statute of limitations on transfer pricing assessments

The Commissioner of Income Tax has one year from the date that a return is received to make inquiries about a return. After that date expires, for up to six years from the end of the relevant accounting period or tax year, the Commissioner of Income Tax may raise an assessment upon discovery that a person has not been assessed tax or was assessed at a lesser amount than ought to have been assessed. There is no time limit for additional assessments to be raised when any form of fraudulent or willful default or negligent conduct has been committed.

### **F**requency of tax audit and transfer pricing scrutiny by the tax authority

Although queries are frequently raised by the Income Tax Office on behalf of the Commissioner of Income Tax, queries relating to transfer pricing are relatively uncommon.

In practice, due to Gibraltar's relatively low rate of corporate tax (10% for most companies), the requirement to justify transfer pricing is more likely to arise from the jurisdiction in which the Gibraltar-taxable entity's counterparty is taxable. This would not apply when the counterparty is based in a zero-tax jurisdiction.

### **APA opportunity**

Taxpayers may request advance tax rulings from the Commissioner of Income Tax. Such rulings generally do not have a fixed expiry date, but the rulings state that they are given on the basis of the facts and circumstances as described by the taxpayer in the request and on the basis of the tax law in force at the time of the ruling.

# Greece

## Taxing authority and tax law

Taxing authority: General Secretary of Public Revenues

Tax law: The Income Tax Code and the Tax Procedures Code

## Relevant regulations and rulings

Transfer pricing in Greece is driven by the Income Tax Code (L. 4172/2013) and the Tax Procedures Code (L. 4174/2013), double taxation treaties and supranational norms. Other Decisions and guidelines issued are provided below.

- ▶ Issued by the General Secretary of Public Revenues, Decision 1097/2014, as amended by Decision 1144/2014, provides the mandatory contents of the Transfer Pricing Documentation File for intercompany transactions referring to fiscal years starting on or after 1 January 2014.
- ▶ Decision 1284/2013 of the General Secretary of Public Revenues determined the procedures for the conclusion, amendment, revocation and annulment of an APA. The decision refers to the procedures of both unilateral and bilateral APAs for cross-border intercompany transactions that take place in financial years starting 1 January 2014 onward.
- ▶ APA guidelines and templates from the Ministry of Finance were issued in October 2014.

## OECD Guidelines treatment

The aforementioned legislative framework confirms the application of the OECD Guidelines. More specifically, according to the Income Tax Code, the provisions regarding intercompany transactions are interpreted and implemented in accordance with the OECD Guidelines.

## Documentation requirements

The transfer pricing file per Decision 1097/2014, as amended by Decision 1144/2014, consists of both a master file and a local file, per the OECD BEPS initiative:

- ▶ The master file is common for all group companies and contains common, standardized information for the group affiliates as well as for the branches.
- ▶ The local file (Greek file) contains additional information regarding the Greek companies.

Furthermore, companies are obliged to electronically submit a Summary Information Table (SIT) of their intercompany transactions to the tax authorities by the end of the fourth month following the financial year-end (i.e., 30 April 2015 for companies with a financial year-end of 31 December 2014).

## Priorities/pricing methods

Greek regulations follow the OECD Guidelines. More specifically, Decision 1097/2014, as amended by Decision 1144/2014, adopts the OECD methods. However, the traditional transaction methods (CUP, resale price and cost-plus) are preferred, while transactional profit methods are allowed when the traditional methods do not lead to reliable results. In particular, transactional profit transfer pricing methods, such as the TNMM and profit split, can be used only in cases where the above traditional transfer pricing methods are considered ineffective due to the absence of available or sufficient comparables, provided that a detailed justification is included in the documentation files.

## Return disclosures/related party disclosures

Taxpayers disclose their intragroup transactions by annually filing a SIT of transfer pricing information. For fiscal years ending 31 December 2014 and after, a SIT must be filed within four months from the year-end.

## Transfer pricing-specific returns

Companies must submit a SIT of their intercompany transactions to the tax administration within four months from their fiscal year-end.

## Greece (continued)

### Documentation deadlines

There is no specific deadline to prepare the transfer pricing documentation file. However, after the relevant fiscal year-end, the taxpayer should be able to present the transfer pricing file to the audit authorities within 30 days following their request. Within four months from their fiscal year-end, companies must submit a SIT of their intercompany transactions to the tax administration.

Decision 1144/2014 introduces the contemporaneous documentation obligation so that the TP documentation obligation is not handled as a post-event validation of the arm's-length nature of intercompany transactions performed during the year. To this respect, the decision stresses that the taxpayer should test the arm's-length nature of the intercompany transactions immediately when entering into them.

### Transfer pricing penalties

For fiscal years starting 1 January 2014 and onward, late filing of the SIT or inadequate or incomplete documentation triggers a fine amounting to 0.1% of the turnover of the company, which cannot be lower than EUR1,000 or higher than EUR10,000, whereas non-filing or inaccuracy of the SIT or the non-submission of the transfer pricing documentation file, upon the tax auditor's request, triggers a penalty of 1% of the turnover of the company, which cannot be less than EUR10,000 or more than EUR100,000.

The transfer pricing file of the company needs to be prepared on a contemporaneous basis and, in any event, no later than the deadline for submitting the SIT because in the event of inconsistencies, the penalties for inaccuracy are imposed.

Penalties are triggered when the deficiencies detected do not enable the verification by the tax administration of the appropriate application of the arm's-length rule and such deficiency cannot be eliminated by any additional information supplied in the course of the tax audit.

In case of violation of the relevant provisions, the difference in taxable profits shall increase the gross revenue of the company. In addition, penalties ranging from 10% to 100% of the tax underpayment will apply, as well as default interest.

### Penalty relief

No penalty relief is available.

### Statute of limitations on transfer pricing assessments

Taxpayers must keep documentation files for a period equal to the statute of limitations for performance of a tax audit, as specified by the provisions of the tax legislation for the said financial year.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

In the course of the statutory audit, certified auditors are obliged to issue a tax certificate to the companies they audit by performing a special audit of their tax affairs, which takes place in parallel with the statutory audit. Based on this, the transfer pricing documentation file should be available to the certified auditors before the tax certificate is issued.

### APA opportunity

The Tax Procedures Code, along with the implementing decision, provides the possibility of an APA from 1 January 2014. An APA will cover any relevant criteria used for the intragroup pricing.

These criteria mainly include the transfer pricing method, the comparable data to be used and any relevant adjustments to be made, as well as the critical assumptions under which the approved transfer pricing methodology will remain valid.

An APA term cannot exceed four years, and a retroactive effect is not possible.

# Guam

## Taxing authority and tax law

Taxing authority: Department of Revenue & Taxation (DRT)

Tax law: Internal Revenue Code (IRC)

## Relevant regulations and rulings

- ▶ Treasury Regulations (Treas. Regs.) §§1.482, 1.6662, 1.6038A, 1.6038C.
- ▶ Revenue Procedure (Rev. Proc.) 99-32, Rev. Proc. 2006-9, Rev. Proc. 2006-54 and Rev. Proc. 2007-13.
- ▶ On 22 November 2013, the IRS issued Notice 2013-78, which contains a proposed revenue procedure that would update and supersede Rev. Proc. 2006-54, 2006-2C.B 1035, providing guidance for requesting assistance from the US competent authority acting through the Advance Pricing and Mutual Agreement (APMA) Program. The proposed revenue procedure intends to substantially improve the clarity, readability and organization of Rev. Proc. 2006-54. The Internal Revenue Service (IRS) sought taxpayer comments in March 2014; a final revenue procedure is pending.
- ▶ On 22 November 2013, the IRS issued Notice 2013-79, which contains a proposed revenue procedure that would update and supersede Rev. Proc. 2006-9 and 2008-31. The revenue procedure aims to provide guidance and instruction on APAs, as well as provide guidance and instruction on the IRS' administration of APAs. The IRS sought taxpayer comments in March 2014; a final revenue procedure is pending.
- ▶ In April 2007, the IRS designated cost-sharing arrangement (CSA) buy-ins as a "Tier I" issue and thus susceptible to intensified audit scrutiny. While the IRS' tier process was officially eliminated in August 2012, it was replaced by knowledge networks known as Issue Practice Groups (IPGs) for domestic issues and International Practice Networks (IPNs) for international issues. CSA buy-ins is expected to continue to be an issue upon which the IPNs will focus.
- ▶ A coordinated issue paper (CIP) was released on 27 September 2007, providing internal IRS guidance for examiners in developing CSA exam positions. However, the CIP was withdrawn on 26 June 2012.

The CSA regulations were issued in final form on 16 December 2011. Additional temporary and proposed regulations were published on 19 December 2011. The final CSA regulations closely follow the temporary CSA regulations that were issued in January 2009, and the additional temporary and proposed regulations make only minor changes to the final regulations. The final regulations provide the IRS with the discretion to make periodic adjustments and formalize other proposed requirements for compliance.

Finalized services regulations were issued on 31 July 2009. These regulations provided for only minor modification of the temporary regulations that had been in effect as of 1 January 2007. The new services regulations explicitly require stock-based compensation to be considered as part of total costs. Guidance regarding the list of "specified covered services," as defined in Treas. Reg. 1.482-9(b)(3)(i), can be found in Rev. Proc. 2007-13.

## OECD Guidelines treatment

The DRT considers its transfer pricing laws and regulations to be wholly consistent with the OECD Guidelines.

For domestic purposes, the OECD Guidelines do not provide support and would not be directly relevant to the application of any pricing methods. However, if taxpayers pursue competent authority relief from double taxation or a bilateral APA, the OECD Guidelines are relevant and may be used to demonstrate compliance with international principles.

## Documentation requirements

Transfer pricing documentation is not required by law. However, in practice, it is recommended that taxpayers maintain contemporaneous documentation to avoid the penalties described above. The existence of documentation need not be either disclosed on, or provided with, the return.

For penalty avoidance purposes, a taxpayer is considered to have satisfied the documentation requirement if it maintained certain documentation (further described below) that substantiates the taxpayer's assertion that it reasonably concluded that, given the available data and the applicable pricing methods, the method (and its application) provided the most reliable measure of an arm's-length result under the principles of the best-method rule.

## Guam (continued)

### Documentation requirements (continued)

The principal documents required by the regulations are:

- ▶ An overview of the taxpayer's business and an analysis of the legal and economic factors affecting pricing
- ▶ A description of the organizational structure
- ▶ Any documents explicitly required by regulations (e.g., CSA documents)
- ▶ A description of the pricing method and reasons why the method was selected (a best-method analysis)
- ▶ A description of alternative methods and why they were not selected
- ▶ A description of controlled transactions and any internal data used to analyze them
- ▶ A description of comparables used, how comparability was evaluated and any adjustments that were made
- ▶ An explanation of any economic analysis and any projections used to develop the pricing method
- ▶ Any material data discovered after the close of the tax year but before filing the tax return
- ▶ A general index of the principal and background documents and a description of the recordkeeping system

### Priorities/pricing methods

The regulations provide a "best-method rule" for determining the appropriate method to be applied by the taxpayer for each intercompany transaction.

- ▶ For tangible goods, the DRT accepts the CUP, resale price, cost-plus, profit split and unspecified methods.
- ▶ For intangible goods, the DRT accepts the CUT, cost-plus, profit split and unspecified methods.
- ▶ For services, the DRT accepts the services cost, comparable uncontrolled services price, gross services margin, cost of services plus, cost-plus, profit split and unspecified methods.
- ▶ For CSA buy-ins, the DRT accepts the CUT, income, acquisition price, market capitalization, residual profit split and unspecified methods.

### Return disclosures/related party disclosures

Under new regulations issued in 2010, certain taxpayers must also disclose their uncertain tax positions (UTPs) on Schedule UTP and provide information such as the ranking of the positions by the sizes of their reserves and concise descriptions of the tax positions. There is a phase-in period so that by 2014, the UTP disclosures will be required for corporations with assets of US\$10 million or more.

### Transfer pricing-specific returns

Taxpayers are required to file Forms 5471, 5472 and 8865 regarding transactions with related parties.

### Documentation deadlines

If documentation is prepared to help protect against penalties, then it must be in place by the filing date of a timely filed Guam tax return. Taxpayers must provide documentation to the DRT within 30 days of an examiner's request.

### Transfer pricing penalties

Pursuant to IRC §6662, taxpayers may be liable for either a 20% or 40% penalty for an underpayment of tax attributable to a substantial or gross valuation misstatement, respectively. The penalties are calculated as a percentage of the underpayment, or the penalty may apply to a valuation misstatement. There is no penalty for failure to have documentation; however, documentation may help avoid a penalty.

### Penalty relief

Penalties may be avoided by establishing reasonable cause and good faith via the preparation of documentation of the taxpayer's application of IRC §482, as described below.

## Guam (continued)

### **Statute of limitations on transfer pricing assessments**

A general statute of limitations applies in Guam, which is three years from the later of either the tax return due date or the date the return was actually filed. The statute is extended to six years for substantial understatements of income. There is no statute of limitations for fraud-related adjustments. Most treaties with trading partners provide the IRS access to closed years to provide relief from double taxation pursuant to a mutual agreement procedure. Note that Guam is not party to US tax treaties.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The likelihood of an annual tax audit is dependent on the facts and circumstances. The introduction of what the OECD refers to in their Action Plan on BEPS as "high-risk transactions" increases the likelihood of a tax audit.

Guam does not have the same human and material resources available to the IRS. Therefore, the likelihood of a transfer pricing scrutiny from Guam is basically the same as the likelihood of a general tax audit.

### **APA opportunity**

Taxpayers may request unilateral, bilateral or multilateral APAs. The APA process is administered by the IRS' APMA Program. Guidance regarding APAs can be found in Rev. Proc. 2006-9. The revenue procedure has strict case management procedures, disclosure requirements and detailed guidance regarding the submission and processing of APA requests. Additional competent authority guidance is provided in Rev. Proc. 2006-54. Updates to both revenue procedures are pending.

# Guatemala

## **Taxing authority and tax law**

Taxing authority: Tax Administration Superintendence (*Superintendencia de Administración Tributaria*, or SAT)

Tax law: Tax Legislation Update Law (TLUL)

## **Relevant regulations and rulings**

Guatemala issued transfer pricing rules in 2012 and they are included in the TLUL of the Congress Decree 10-2012. By means of such TLUL, the rules are effective from 1 January 2013 onward. However, Decree 19-2013, approved by the Congress on 20 December 2013, changed the effective date of the regulations to tax year 2015 and onward. Decree 19-2013 states that the SAT is still entitled to request information regarding the content of Chapter VI of the TLUL. Chapter VI of the TLUL includes, among other items, the definition of "arm's-length principle" and "related parties," the criteria that taxpayers must follow to perform a comparability analysis, the methods to apply when assessing the arm's-length principle, the taxpayer's obligation to prepare and maintain the transfer pricing documentation necessary to support the arm's-length nature of intercompany pricing, and the empowerment of the tax authorities to adjust prices. On 11 March 2014, the SAT issued an announcement in the *Publinews* gazette, affirming the obligation of taxpayers to comply with the transfer pricing regulations for the period from 1 January 2013 to 20 December 2013. This clarifies the requirements in the wake of the issuance of Decree 19-2013.

## **OECD Guidelines treatment**

Guatemala is not an OECD member, and there is no specific reference to the OECD Guidelines in the TLUL.

However, the transfer pricing provisions in the TLUL are mainly based on the OECD Guidelines and apply to all of the transactions conducted between Guatemalan taxpayers and their related parties abroad. The transfer pricing rules also present an additional non-OECD method (the import and export valuation method, or sixth method), which is intended to be used for transactions involving imports or exports of goods with well-known prices in international markets.

## **Documentation requirements**

Contemporaneous transfer pricing documentation must be maintained. The documentation must include:

- ▶ Taxpayer corporate group information that affects the relationship with the taxpayer:
  - ▶ General information regarding the corporate group's legal and organizational structure
  - ▶ Description of the intercompany transactions performed by the companies of the corporate group
  - ▶ Description of the functions performed and risks assumed by the companies of the corporate group
  - ▶ Information regarding the intangible assets of the corporate group
  - ▶ Description of the transfer pricing policy of the corporate group
  - ▶ Intercompany service agreements subscribed by the companies of the corporate group
  - ▶ APAs subscribed to by the companies of the corporate group
  - ▶ Annual report of the corporate group
- ▶ Taxpayer information:
  - ▶ Identification of the taxpayer and its related parties
  - ▶ Description of the intercompany transactions performed by the taxpayer

## Guatemala (continued)

### Documentation requirements (continued)

- Comparability analysis
- Description of the transfer pricing methodology applied

### Priorities/pricing methods

Acceptable transfer pricing methods are the CUP, resale price, cost-plus, profit split, TNMM, and the imports and exports valuation method (the sixth method).

The CUP, resale price and cost-plus methods take priority over the transactional methods. In addition, the sixth method is preferred for transactions involving imports or exports of goods with well-known prices in international markets.

### Return disclosures/related party disclosures

Taxpayers are required to attach their audited financial statements (expressed in IFRS from FY2013 onward), which will include information regarding their intercompany transactions, to the annual tax return.

### Transfer pricing-specific returns

Regulations to Chapter VI of the TLUL were enacted in 2013. The main provision of these regulations is the filing obligation in the form of a transfer pricing information return.

From FY2015 onward, taxpayers are required to file a transfer pricing information return in the form of an appendix to the annual tax return, which must be presented by 31 March 2016.

### Documentation deadlines

As of FY2015, documentation must be readily available by the due date of the annual income tax return (which must be presented by 31 March 2016) and must be kept as part of the company's accounting books and records. If requested by the tax authorities, documentation should be provided within 20 days from the receipt of the notice.

### Transfer pricing penalties

According to Article 66 of the Regulations to the TLUL, penalties for failure to comply with the transfer pricing obligations correspond to the general tax penalties. Penalties for failure to present the transfer pricing documentation, upon request of the tax authority, would be GTQ5,000 for the first time, GTQ10,000 for the second time and GTQ10,000 plus 1% of the taxpayer's gross income from then on.

In addition, any additional tax generated by price adjustments made by the SAT is subject to surcharges and penalty interest.

### Penalty relief

There are currently no provisions for reductions in penalties.

### Statute of limitations on transfer pricing assessments

The statute of limitations on assessments is four years from the date of filing the tax return.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit is categorized as medium. The likelihood of transfer pricing assessments as part of a general tax audit is low. The SAT has not yet initiated any tax audits regarding transfer pricing issues because the transfer pricing regulations are relatively new.

When transfer pricing is scrutinized, the likelihood that the transfer pricing methodology will be challenged is medium.

## Guatemala (continued)

### **APA opportunity**

APAs are contemplated in Article 63 of the TLUL. Taxpayers can request an APA for a maximum of four years. The procedures for establishing an APA are established in Articles 57 to 63 of the Regulations to the TLUL.

# Honduras

## **Taxing authority and tax law**

Taxing authority: Tax Administration of Honduras (*Dirección Ejecutiva de Ingresos*, or DEI)

Tax law:

- ▶ Decree No. 232-2011, that establishes Transfer Pricing Law, Articles 1 to 22
- ▶ Executive Decree No. 027-2015, with its regulations on transfer pricing, Articles 1 to 40

## **Relevant regulations and rulings**

Honduran transfer pricing provisions apply to all the transactions conducted by Honduran taxpayers with related entities and with entities operating under a special tax regime in Honduras. The regulations also apply to transactions conducted by taxpayers with entities domiciled in tax havens.

The transfer pricing provisions also include an additional non-OECD method (the import and export valuation method, or sixth method), which is intended to be used for transactions involving goods with well-known prices in international markets.

Transfer Pricing Law is in force from 1 January 2014.

## **OECD Guidelines treatment**

The OECD Guidelines can be relied upon for interpretation of the rules, as long as they do not contradict the Honduran Tax System.

## **Documentation requirements**

Contemporaneous transfer pricing documentation regarding related party transactions is mandatory and must be maintained. Documentation must include:

- ▶ The functions performed, assets used and risks borne by the taxpayer in its related party transactions
- ▶ A detailed description of the nature, characteristics and amount of all intercompany transactions of the taxpayer
- ▶ Identification of the related parties with whom the taxpayer conducts intercompany transactions
- ▶ The factors determining comparability
- ▶ The method(s) and method selection process
- ▶ Specification of the price or margin, or range of prices or margins, applied by the taxpayer in its intercompany transactions
- ▶ Explanation about adjustments, if any
- ▶ Details of comparable transactions or companies and sources of information

## **Priorities/pricing methods**

The provisions require the application of the most appropriate transfer pricing method. The specified methods are the CUP, resale price, cost-plus, profit split, TNMM and the import-export valuation method.

## **Return disclosures/related party disclosures**

Taxpayers must report on the income tax return whether they conducted related-party transactions and disclose the total amount of such related-party transactions, depending on their nature – that is, if they are income, purchases or other expense items.

## Honduras (continued)

### Transfer pricing-specific returns

An information return on the transactions conducted with related parties should be filed annually, as follows:

- For fiscal years ended in December, taxpayers must file the TP return between 1 January and 30 April.
- For special fiscal years not ended in December, taxpayers must file the TP return within three months after the fiscal year-ends.

### Documentation deadlines

Taxpayers are required to document information annually about their transactions with related parties upon filing their income tax returns. The documentation should be filed only if requested by the DEI.

### Transfer pricing penalties

If taxpayers fail to provide or provide false, incomplete or inaccurate information under a request from the DEI, a penalty of US\$10,000 applies.

If taxpayers report a taxable income less than it should have been under arm's-length conditions, a penalty of 15% on the corresponding adjustment applies.

### Transfer pricing penalties (continued)

If taxpayers fail to provide the correct information or fail to declare a correct taxable income, then the penalties will be the greatest of 30% or US\$20,000.

If taxpayers fail to comply with any other provision of the Transfer Pricing Law, a penalty of US\$5,000 applies.

### Penalty relief

There is currently no penalty relief regime in place.

### Statute of limitations on transfer pricing assessments

The statute of limitations on general tax assessments is 5 to 10 years. The term is extended with the filing of an amended return.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit is categorized as high. The likelihood of transfer pricing assessments as part of a general tax audit is considered low. The DEI has not yet initiated any tax audits regarding transfer pricing because the regulations come into force as of tax year 2014. In case transfer pricing is scrutinized, the likelihood that the transfer pricing methodology is challenged is unknown.

### APA opportunity

APAs are contemplated under the provisions of Decree 232-2011 and 027-2015. Taxpayers can request an APA for a maximum of five years. However, the corresponding regulations have not yet been enacted.

# Hong Kong (SAR)

## Taxing authority and tax law

Tax authority: Inland Revenue Department (IRD)

Tax law: Inland Revenue Ordinance

## Relevant regulations and rulings

- ▶ Section 16 of the IRO about deductibility of expenses in arriving at assessable profits
- ▶ Section 17 of the IRO about prohibited deductions
- ▶ Section 20 of the IRO about basis for taxation of closely connected, nonresident persons
- ▶ Section 61A of the IRO about transactions designed to avoid tax liability

Departmental Interpretation Practice Note (DIPN) 48: Advance Pricing Arrangement, issued in March 2012

DIPN 46: Transfer Pricing Guidelines – Methodologies and Related Issues, issued in December 2009

DIPN 45: Relief from Double Taxation due to Transfer Pricing or Profit Reallocation Adjustments, issued in April 2009

## OECD Guidelines treatment

DIPN 46 is largely based on the OECD Guidelines, and the IRD generally will not differ from the transfer pricing methodologies recommended by the OECD Guidelines.

## Documentation requirements

There is no contemporaneous transfer pricing documentation requirement. However, Section 51C of the IRO requires taxpayers to maintain sufficient records about the transacting parties and other details of goods and services transactions. In addition, upon an audit or investigation, the taxpayer is expected to have maintained records that have details about intercompany transactions with regard to the nature of transactions and payments made or received.

Per DIPN 46, upon an inquiry, audit or investigation, the IRD will look for the following documentation:

- ▶ Details of any relevant commercial and financial relations that fall with the scope of "closely connected, nonresident persons" or "transactions designed to avoid tax liability"
- ▶ The nature, terms, prices and quantum of relevant transactions, including transactions that form a series and any relevant offsets
- ▶ The method by which the nature, terms and quantum of relevant transactions were arrived at, including any study of comparables undertaken
- ▶ The manner by which the selected method has resulted in arm's-length terms or where it has not, the computational adjustment required, and how it has been calculated; this usually includes an analysis of market data or other information about third party comparables
- ▶ The terms of relevant commercial arrangements with both third party and group customers; these include contemporaneous commercial agreements (e.g., service or distribution contracts, loan agreements) and any budgets, forecasts or other papers containing information relied upon in arriving at arm's-length terms, etc.

In addition, DIPN 46 also refers to the OECD Guidelines for further guidance about documentation requirements.

## Hong Kong (SAR) (continued)

### Priorities/pricing methods

The IRD recognizes the methods outlined in the OECD Guidelines, which include the traditional transaction methods (CUP, resale price and cost-plus) and profit methods (profit split and TNMM). Other methods are also allowed, to the extent the OECD-recognized methods are not applicable. The most appropriate method should be selected. Although the IRD may prefer the traditional transaction methods, as they are seen to be the most direct means of establishing the arm's-length price, the TNMM is accepted in circumstances where traditional transaction data is not available, comparable or reliable.

### Return disclosures/related party disclosures

The IRD requires taxpayers to disclose in their annual profits tax return whether they have transactions with nonresident persons, fees paid for royalties, fees paid to nonresidents for services rendered in Hong Kong and the location of the nonresident person.

### Transfer pricing-specific returns

There are no specific returns that have to be filed for transfer pricing purposes.

### Documentation deadlines

Documentation is generally required only upon request.

### Transfer pricing penalties

The IRO does not impute penalties targeted specifically at transfer pricing, and there are no provisions to apply penalties for a lack of transfer pricing documentation by itself. However, the IRD is empowered to take punitive action under Sections 80(1), 80(1A), 80(2), 82 and 82A of the IRO for noncompliance. Offenses can include any person who, without a reasonable cause or with willful intent to evade tax, fails to comply with record-keeping requirements of Section 51(C) of the IRO; files an incorrect tax return; furnishes any incorrect information; fails to furnish a return in time; fails to inform chargeability for tax; makes any false statement in connection with a claim for any deduction of the allowance; gives any false answer to any question or request for information asked or made in accordance with the provisions of the IRO; or makes use of any fraud, art or contrivance to evade tax, among others.

Offenses can be subject to a fine of HKD10,000, plus up to three times the amount of tax undercharged. In the case of willful intent, the taxpayer can be subject to a fine of HKD50,000, plus up to three times the amount of tax undercharged and three years of imprisonment.

### Penalty relief

The scale of the penalty to be imposed on a taxpayer in Hong Kong is determined based on the nature of the omission, the quantum of understatement of income or profits, the scale of the business, the degree of the taxpayer's cooperation or disclosure, and the length of the offense period. Penalties can be scaled upward or downward based on such facts of the case.

### Statute of limitations on transfer pricing assessments

The statute of limitations in Hong Kong is six years after the end of the assessment year. In the case of fraud or willful evasion, the statute of limitations is extended to 10 years from the end of the assessment year.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The risk of an annual tax audit in Hong Kong may be triggered by a variety of situations, such as where the accounts of a business are heavily qualified, profits or turnover are deemed unreasonably low, filing of tax returns is persistently delayed or omitted, business records are not properly maintained or requested information is not provided.

## Hong Kong (SAR) (continued)

### Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

While there are no field auditors, and there is no separate division within the IRD that deals specifically with transfer pricing cases, transfer pricing may be reviewed as part of an audit if the IRD suspects that transactions have not been carried out on an arm's-length basis (e.g., goods sold or purchased at a deflated or inflated price, service or royalty fees are not commensurate with the benefits received, or transactions are with tax haven locations). An audit related to transfer pricing will be aimed at reviewing the intercompany pricing policies and any analysis prepared to support the pricing, considering the facts of the business and the transactions. Transfer pricing inquiries typically arise as part of general field audits, with the deductibility of expenses or payments to related parties being a common line of inquiry. The risk of audit or transfer pricing scrutiny is dependent on the facts and circumstances of the taxpayer.

### APA opportunity

The IRD introduced an APA program in March 2012. The IRD issued guidelines in the form of DIPN 48, which details the key features of the APA program. APAs will be limited to bilateral or multilateral agreements and generally not to unilateral agreements. Unilateral agreements may be considered if a treaty partner does not wish to participate in an APA, where the Hong Kong competent authority is unable to reach an agreement with the relevant treaty partner, or where a non-treaty partner is prepared to give a unilateral APA regarding transactions integrally linked to the transactions covered by a bilateral or multilateral APA.

# Hungary

## Taxing authority and tax law

Tax authority: National Tax and Customs Administration (NTCA)

Tax laws:

- ▶ Corporate Income Tax (CIT) and Dividend Tax (Act on CIT)
- ▶ Tax Procedure (Act on Tax Procedure)

## Relevant regulations and rulings

- ▶ The following sections are relevant to transfer pricing:
  - ▶ Act LXXXI of 1996 on Corporate Income Tax (CIT) and Dividend Tax (Act on CIT)
  - ▶ Act XCII of 2003 on Tax Procedure (Act on Tax Procedure)
  - ▶ Section 259.13 within Act CXXVII of 2007 on Value Added Tax (Act on VAT) defines a non-independent party for VAT purposes
  - ▶ Section 3.69 within Act CXVII of 1995 on Personal Income Tax (PIT) defines an independent party for PIT purposes
  - ▶ Ministry of Finance Decree 38 of 2006 on the administrative procedure for obtaining an APA
  - ▶ Ministry of Finance Decree 22 of 2009 (Decree 22) on the fulfillment of transfer pricing documentation obligations effective 1 January 2010, amended with an effective date of 21 June 2013;<sup>1</sup> under special circumstances, amended version is optionally applicable to compliance liabilities pertaining to 2012 as well
- ▶ The following sections of the Act on CIT are relevant to transfer pricing:
  - ▶ Section 4.23 - definition of related party for CIT purposes
  - ▶ Section 18 - adjustment of prices applied between related parties
  - ▶ Section 31.2 - reference to the OECD Guidelines
- ▶ The following sections of the Act on Tax Procedure are relevant to transfer pricing:
  - ▶ Section 1.3a - prohibition of the different classification for the same legal relationship audited and classified previously, amended and effective 1 January 2015
  - ▶ Section 1.8 - definition of fair market price
  - ▶ Section 23.4b - reporting related parties to the tax authority
  - ▶ Sections 132/B and 132/C - provisions on the Hungarian APA
  - ▶ Section 172.16 - penalties related to documentation
  - ▶ Section 178.17 - definition of "related party"
- ▶ 37/2004 - guideline issued by the tax authority on the fulfillment of the transfer pricing documentation requirement
- ▶ 55/2006 - guideline issued by the tax authority on the application of the TNMM
- ▶ 48/2007 - guideline issued by the tax authority on the preparation of simplified transfer pricing documentation and default penalties
- ▶ 77/2007 - guideline issued by the tax authority on the preparation of consolidated transfer pricing documentation
- ▶ 139/2007 - guideline issued by the tax authority on the application of transfer pricing methods in practice
- ▶ 16/2010 - guideline issued by the tax authority on changes to the definition of related parties from 2010

<sup>1</sup> This contains provisions with regard to the European Union (EU) master file concept.

## Hungary (continued)

### Relevant regulations and rulings (continued)

- ▶ 21/2010 - guideline issued by the tax authority on the adjustment of related party items in connection with the assumption of loan and waiver of receivables
- ▶ 41/2010 - guideline issued by the tax authority on the adjustment of the prices for in-kind contributions
- ▶ 19/2013 - guideline issued by the tax authority on suretyship provided by related entities

### OECD Guidelines treatment

The Act on CIT contains specific reference to the OECD Guidelines. If the Hungarian tax laws do not include regulations on specific issues, the OECD Guidelines may be used as a primary reference.

### Documentation requirements

The Act on CIT states that companies that do not qualify as small enterprises (small enterprises are defined as employing less than 50 persons and having less than EUR10 million in total turnover on a consolidated basis) must document the methods they used to determine the fair market prices, as well as the facts and circumstances supporting them.

The detailed documentation obligation must be applied for all related party agreements in effect in the tax year. The details of the documentation obligation are regulated by Decree 22. Foreign entities (usually foreign taxpayers engaged in business activities through a Hungarian permanent establishment) are also subject to the documentation obligation. However, transfer pricing rules are not required to be observed where the CIT base would not change even if a non-arm's-length price were applied (i.e., if the income attributable to the foreign permanent establishment is exempt from Hungarian tax, based on the applicable double tax treaty).

Overall, the Hungarian transfer pricing documentation requirements are consistent with the OECD Guidelines. The following list outlines the mandatory elements of the Hungarian full-scope transfer pricing documentation:

- ▶ Name, registered seat (official location) and tax number (or company registration number and the name and seat of the registering authority) of the related parties participating in the related party transaction under review
- ▶ Content of the agreement with the related party, which includes:
  - ▶ Subject of the agreement
  - ▶ Signing date (amendment date) of the agreement
  - ▶ Period during which the agreement is effective
  - ▶ Characteristics of the service provided or goods sold (functional analysis)
  - ▶ Method and terms of the fulfillment of the agreement
  - ▶ Analysis of the relevant market (industry analysis)
  - ▶ The method applied for establishing the arm's-length price
  - ▶ Reasons for selecting the method applied
  - ▶ Description of comparable services and goods transactions
  - ▶ Factors affecting the arm's-length price, margin or profit, and the extent of any necessary adjustments
  - ▶ The arm's-length price, margin or range
  - ▶ Information about tax rulings or official and court procedures in progress relating to the given transaction
  - ▶ Preparation and amendment date of the documentation
  - ▶ If consolidated transfer pricing documentation is prepared (single documentation covering several similar or strongly interrelated transactions), reasons for consolidation have to be provided

According to Decree 22, a taxpayer can choose to prepare "separate" or "joint" documentation. By introducing the joint transfer pricing documentation option, Decree 22 essentially adopted the regulations regarding the Master File concept included in the EU's Code of Conduct on transfer pricing documentation. The joint documentation consists of two parts: common documentation containing standard information about the members of the group within the EU (i.e., Master File)

## Hungary (continued)

### Documentation requirements (continued)

and specific documentation describing the agreements concluded between the Hungarian taxpayer and its related parties. Taxpayers must declare to the tax authority (on the CIT return) which type of transfer pricing documentation they would like to prepare (either the single documentation or the joint documentation).

The common document has to be prepared with respect to the Member States of the EU and should also include the controlled transactions carried out between third-country companies and EU group companies.

**The obligatory elements of the common documentation are the following:**

- ▶ A general description of the business and the business strategy of the enterprise, including the changes from the previous year
- ▶ A general description of the organization, and the legal and operational structure of the group (including an organizational chart, a list of the group members and a description of the parent company's participation in the operation of its subsidiaries)
- ▶ A list of the related parties carrying out controlled transactions with group members within the EU
- ▶ A general description of controlled transactions (list of significant controlled transactions, e.g., sale of tangible fixed assets, provision of services, development of intangible assets and provision of financial services, including the values of these transactions)
- ▶ A general description of the functions and risk and the changes in these compared with the previous year
- ▶ Information about the ownership of intangible assets and royalties paid and received
- ▶ A description of the group's transfer pricing policy or transfer pricing system
- ▶ Cost contribution agreements (CCAs) and APAs relating to the determination of the arm's-length price and court decisions about the arm's-length price
- ▶ Date of preparation and modification of the documentation

**The country-specific documentation must include the following information:**

- ▶ Name, registered seat (official location) and tax number (or company registration number and the name and seat of the registering authority) of the related party
- ▶ Description of the business enterprise and the strategy of the business enterprise, including the changes compared with the previous year
- ▶ Subject of the agreement, description of the transactions, value of the transactions, signing date (amendment date) of the agreement and the period during which the agreement is effective
- ▶ Comparable search (characteristics of the service provided or goods sold, functional analysis, contractual conditions and economic circumstances)
- ▶ Description of the comparable data
- ▶ Transfer pricing policy of the group
- ▶ Preparation date and modification date of the documentation

Based on the work of the European Union Joint Transfer Pricing Forum, in 2012, Decree 22 introduced low-value-added intragroup services in the Hungarian transfer pricing regulations. Low-value-added intragroup services typically are routine services provided between related parties outside the scope of main business activity (e.g., information technology services or administration services). For these services, taxpayers may prepare transfer pricing documentation encompassing a relatively less-detailed technical analysis. According to the amendment of Decree 22 in 2012, this type of documentation is applicable if the value of the transactions does not exceed HUF150 million or 5% of the service provider's net income and 10% of the recipient's operational costs and expenditures in the given tax year. In this case, the cost-plus method is accepted without a separate analysis and the law considers markups chosen from the range between 3% and 7% to be at arm's length. With the last amendment of Decree 22 in 2013, the arm's-length range of markups applicable without further analysis in the case of low-value-adding service transactions was modified to between 3% and 10%. While the above provision came into

## Hungary (continued)

### Documentation requirements (continued)

force on 21 June 2013, it is important to note that these rules – under special circumstances<sup>2</sup> – can be applied for documentation due with respect to financial year 2012 as well.

Exemptions from the documentation obligation according to Decree 22 are as follows:

- ▶ Taxpayers are not obligated to prepare transfer pricing documentation for transactions where the arm's-length value of contractual performance during the tax year in question (without value-added tax) does not exceed HUF50 million
- ▶ When costs are recharged without applying any markup, provided that the service provider is not a related party from the perspective of the taxpayer or the cost-bearing entity
- ▶ Where the tax authority established the applicable arm's-length price in a resolution (APA)
- ▶ Cash transfers
- ▶ Transactions carried out between a Hungarian resident taxpayer's foreign permanent establishment and its related party, if the taxpayer's CIT base does not include the income attributable to the foreign permanent establishment

For 2009 and onward, the documentation can also be prepared in a foreign language. However, at the tax authority's request, the taxpayer has to prepare a Hungarian translation (an exception applies for English, French and German language documentation).

### Priorities/pricing method

The traditional methods (CUP, resale price and cost-plus) and the profit-based methods recommended by the OECD (i.e., TNMM and profit split) are acceptable. Other methods can also be used only after the five major methods have been rejected.

As an important new requirement in a relatively wide array of cases, taxpayers are required by law to apply the interquartile range in their pricing and assess their Hungarian tax liabilities accordingly.

### Return disclosures/related party disclosures

Within 15 days of concluding its first contract with a related party, the taxpayer must report the name, registered seat and tax number of the contracting party to the tax authority. Cessation of the related party status must also be reported.

In the CIT return, the tax base should be adjusted if the price used in the related party transaction differs from the fair market price. In their year-end corporate tax returns, taxpayers must declare which type of transfer pricing documentation they have elected to prepare.

According to Hungarian transfer pricing regulations, the taxpayer is not required to file the transfer pricing documentation with the tax authority; however, the taxpayer needs to present the documentation during a tax audit.

Companies' financial statements include certain compulsory disclosures about related party transactions.

### Transfer pricing-specific returns

Not applicable.

### Documentation deadlines

The transfer pricing documentation for contracts effective in a given tax year has to be prepared by the deadline for filing the annual CIT return (the last day of the fifth month following the closing of the given tax year).

### Transfer pricing penalties

In relation to a tax base adjustment, a penalty of 50% of the unpaid tax may be imposed, as well as a late payment interest charge at double the prime rate of the National Bank of Hungary, in line with general rules.

<sup>2</sup> The amendments of Decree 22 practically are applicable only for taxpayers whose fiscal year does not coincide with the calendar year and the deadline for the preparation of the transfer pricing documentation is not before 21 June 2013.

## Hungary (continued)

### Transfer pricing penalties (continued)

A default penalty of up to HUF8 million may be levied for not fulfilling, or not properly fulfilling, the content and formal documentation requirements. As a general rule, the default penalty is levied for each set of documentation per fiscal year under tax audit.

### Penalty relief

Currently, no penalty relief is available.

### Statute of limitations on transfer pricing assessments

In the absence of a tax return or appropriate reporting, the statute of limitations lapses on the last day of the fifth calendar year calculated from the tax year in which taxes should have been declared, reported or paid. However, within the framework of the Arbitration Convention, it is possible to request a tax base adjustment even after the statute of limitations has expired.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The risk of transfer pricing issues being scrutinized during a tax authority audit is steadily growing. The tax authority now routinely checks the existence and completeness of the documentation (i.e., whether all transactions are covered).

For larger transactions, the tax authority usually inspects whether the content and formal requirements are fulfilled in the documentation. Since the beginning of 2007, the tax authority has started to train transfer pricing specialists. Consequently, the tax authority's knowledge of the application of transfer pricing methods has increased significantly. Since 2009, targeted transfer pricing audits have been commonplace; the number of audits and the amount of assessments are growing at a rate of roughly 50% each year. Since 2012, there are two groups within the tax authority dedicated to transfer pricing issues. One group specialized mainly in transfer pricing audits of large taxpayers, while the other deals solely with APA and transfer pricing-related MAP requests.

The likelihood of comprehensive tax authority audits is characterized as medium; however, large taxpayers are reviewed every two to three years.

For medium and large taxpayers, the risk of an audit with a transfer pricing focus can be characterized as high. In particular, the tax authority places significant focus on loss-making taxpayers and the enforcement of the interquartile range, especially at limited-risk entities.

The tax authority challenges the transfer pricing methodology, especially:

- ▶ Where the profitability of the Hungarian party is not tested in the documentation
- ▶ Where the taxpayer came to an unusual conclusion regarding the transfer prices
- ▶ If the pricing method is unusual
- ▶ Where the transactions themselves can be regarded as unusual or unique (especially hybrids, CCAs and certain royalty arrangements)

The tax authority continuously cooperates with other countries' tax authorities and follows the international transfer pricing auditing practices as well, through which it constantly develops its dedicated transfer pricing experts and their auditing practices. Based on experience, the tax authority is now rather knowledgeable about matters concerning method selection; therefore, the risk of the taxpayer's application of a particular transfer pricing methodology being challenged is characterized as medium to high.

### APA opportunity

On 1 January 2007, a formal APA regime was introduced in Hungary. Unilateral, bilateral and multilateral APAs are available according to the provision.

Anonymous pre-filing consultation with the tax authority's APA team is free. APAs may be requested for ongoing and future transactions and can be relied on for three to five years, and they can be extended for a further three years. The application

## Hungary (continued)

### **APA opportunity (continued)**

fees for APAs range from HUF500,000 to HUF10 million<sup>3</sup> depending on the type of APA and the transaction value. Starting in the year of filing a valid APA request, the taxpayer does not have to prepare transfer pricing documentation for the transactions covered by the APA.

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<sup>3</sup> For unilateral APAs, the application fee is between HUF500,000 and HUF7 million. If a request is submitted for an arm's-length range, the application fee is HUF500,000 in the case of traditional transfer pricing methods and HUF2 million in the case of profit-based methods.

# Iceland

## **Taxing authority and tax law**

Tax authority: Directorate of Internal Revenue

Tax law: Income Tax Act

## **Relevant regulations and rulings**

The Government has issued a regulation (No. 1180/2014) with additional guidelines on documentation and pricing. On 15 June 2015, Iceland Parliament passed a bill amending Article 57 of the Iceland Income Tax Act No. 90/2003.

## **OECD Guidelines treatment**

Tax authorities recognize the OECD Guidelines. According to the law, tax authorities may assess and adjust pricing between related parties based on the OECD principles.

With regard to the treatment of business restructurings in light of the recent addition of Chapter IX of the OECD Guidelines, it is unclear what effect it will have since the domestic transfer pricing rules came into effect recently.

## **Documentation requirements**

Legal entities that have turnover or total assets exceeding ISK1 billion in the previous year are required to document the nature and extent of transactions with related parties, including the reasoning for transaction prices and other terms. The duty exists as of the beginning of the next operational year. The documentation requirements do not apply to local transactions.

## **Priorities/pricing methods**

The pricing methods are based on the OECD Guidelines. The provision does not specify any one method or prioritize the methods.

## **Return disclosures/related party disclosures**

Legal entities must confirm that the documentation requirement has been fulfilled in the yearly tax return. Tax authorities have extensive authority to claim information. There is no specific disclosure requirement besides the documentation requirement.

## **Transfer pricing-specific returns**

There are no such requirements.

## **Documentation deadlines**

Legal entities that are required to fulfill the documentation duty must start in the beginning of the next operational year after the turnover or total assets exceed ISK1 billion.

Documents must be provided to the tax authorities within 45 days of a request. Documents must be kept for seven years.

## **Transfer pricing penalties**

There is no penalty for failure to provide documentation.

The provision states that tax authorities may assess and adjust pricing between related parties, as they are defined in the provision based on the OECD principles. These adjustments can be performed within the domestic statute of limitation period (i.e., for the six previous years from the date of the adjustment).

A 25% penalty can be applied to the adjustment of pricing in case of underpayments.

## Iceland (continued)

### **Penalty relief**

According to Article 108 of Act 90/2003 on Income Tax, the general rule is that a penalty can be avoided if the taxable party is not responsible for the situation causing the adjustment of pricing, or if the situation is caused by force majeure.

Failure to comply with documentation rules does not provide penalty relief.

### **Statute of limitations on transfer pricing assessments**

The statute of limitations period is six years prior to the year of assessment.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The likelihood of an annual tax audit in general depends on several factors, such as the surveillance plan of the tax authorities, the type of business, revenue and compliance. The risk can therefore be defined as medium.

There is a high likelihood that transfer pricing will be reviewed as part of a tax audit.

Due to the fact that transfer pricing rules just came into effect, it is hard to assess the likelihood of transfer pricing methodology being challenged.

### **APA opportunity**

Icelandic tax authorities do not issue APAs. It is uncertain if tax authorities will provide binding opinions on transfer pricing.

# India

## Taxing authority and tax law

Taxing authorities:

- ▶ Central Board of Direct Taxes (CBDT)
- ▶ Income Tax Department

Tax law: Income Tax Act, 1961

## Relevant regulations and rulings

- ▶ Sections 92-92F, 144C, 271, 271AA, 271BA and 271G of the Income Tax Act, 1961
- ▶ Rules 10A to 10TG and Rule 44GA of the Income Tax Rules, 1962

The pricing of international transactions between associated enterprises will need to be determined with regard to the arm's-length principle using methods prescribed under Indian transfer pricing regulations. Associated enterprises are enterprises for which 26% of the voting power in one is held by the other or a common parent holds at least 26% of the voting power in both such enterprises. Transfer pricing provisions apply to the following types of transactions between associated enterprises:

- ▶ Purchase, sale or lease of tangible or intangible property
- ▶ Provision of services
- ▶ Lending or borrowing money or capital financing, including any type of long-term or short-term borrowing, lending or guarantee; purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable; or any other debt arising during the course of business
- ▶ A mutual agreement or arrangement for cost allocation or apportionment
- ▶ A transaction of business restructuring or reorganization
- ▶ Any other transaction having a bearing on the profits, income, losses or assets of such enterprises

Transactions with a third party will be deemed transactions between associated enterprises if the third party has a prior agreement with the associated enterprise, or if the terms of the relevant transaction are determined, in substance, between the third party and the associated enterprise, even if the taxpayer and third party are both domestic entities.

## Safe-harbor provisions

On 18 September 2013, the CBDT introduced safe-harbor provisions. The provisions provide minimum operating profit margins in relation to operating expenses a taxpayer is expected to earn for certain categories of international transactions – such as provision of software development services, information technology-enabled services, knowledge process outsourcing services, contract research and development services, and manufacture and export of automotive components – that will be acceptable to the tax authority. Further, the provisions also cover transactions pertaining to lending money and providing a guarantee by an Indian entity to its wholly owned subsidiary.

The transfer price contained in the safe-harbor rules shall be applicable for five years, beginning from financial year 2012-13. The safe-harbor rules, optional for a taxpayer, contain the conditions and circumstances under which the tax authority would accept the norms and margins and the related compliance obligations. The taxpayer has the flexibility in electing the years to be governed by the safe-harbor rules within a five-year period. When the tax authority accepts a taxpayer's transfer price under the safe-harbor rules, the taxpayer shall not be entitled to invoke the MAP under an applicable tax treaty.

## Specified domestic transactions

Effective in financial year 2012-13, the transfer pricing provisions are applicable to "specified domestic transactions" if the aggregate value of such transactions exceeds (approximately) US\$3,333,333.

Specified domestic transactions include payments to related parties; inter-unit transfer of goods or services of profit-linked, tax-eligible units; transactions of profit-linked, tax-holiday-eligible units with other parties; and any other transaction for which an entity may be notified by the CBDT.

## India (continued)

### Relevant regulations and rulings (continued)

By extending transfer pricing provisions to specified domestic transactions, the pricing of these transactions will need to be determined with regard to the arm's-length principle using methods prescribed under Indian transfer pricing regulations.

### OECD Guidelines treatment

Indian legislation is broadly based on the OECD Guidelines. Five of the six methods prescribed in the legislation to compute arm's-length prices are in conformity with the OECD Guidelines.

Further, the tax authorities generally recognize the OECD Guidelines and refer to them for guidance, to the extent that they are consistent with domestic law.

### Documentation requirements

A detailed list of mandatory documents is listed in Rule 10D(1). The categories of documentation required are:

- ▶ Ownership structure
- ▶ Profile of the multinational group
- ▶ Business description
- ▶ Nature and terms (including prices) of international transactions
- ▶ Description of functions performed, risks assumed and assets employed
- ▶ Record of any financial estimates
- ▶ Record of uncontrolled transaction with third parties and a comparability evaluation
- ▶ Description of methods considered
- ▶ Reasons for rejection of alternative methods
- ▶ Details of transfer pricing adjustments
- ▶ Any other information or data relating to the associated enterprise that may be relevant for determining the arm's-length price

A list of additional optional documents is provided in Rule 10D(3). The taxpayer is required to obtain and furnish an Accountant's Certificate (Form 3CEB) regarding the adequacy of the documentation maintained.

### Priorities/pricing methods

Indian legislation prescribes the following methods: CUP, resale price, cost-plus, profit split and TNMM. In addition, effective from financial year 2011-12, the legislation also provides a sixth method – namely, any other method that considers the price charged or paid for a similar uncontrolled transaction. No hierarchy of methods exists; rather, the most appropriate method should be applied.

To date, the Indian legislation has considered the arithmetic mean of various data points to be equivalent to the arm's-length price and has allowed a prescribed percentage of variation between the arm's-length price determined using the arithmetic mean and the transfer price. Recently, the CBDT proposed changing its approach to using the median as the arm's-length price and computing the range by using the 40th and 60th percentiles instead of the internationally accepted practice of the interquartile range. This proposal is, however, still in the draft stage.

### Return disclosures/related party disclosures

The taxpayer needs to file an accountant's report (Form 3CEB), along with the return of income by the due date. The taxpayer is required to provide information such as the nature and value of the transaction, details about the associated enterprise with which the transaction was undertaken and the method used to benchmark the transaction.

In accordance with Indian Accounting Standard 18, a company is required to disclose related party transactions in its financial statements.

## India (continued)

### Transfer pricing-specific returns

Under Section 92E, an accountant's report is required to be provided with the tax return. The accountant certifies whether the taxpayer maintains proper documentation.

### Documentation deadlines

The information and documentation specified should, as far as possible, be contemporaneous, and they should exist on the filing date of the income tax return, which is 30 November following the close of the financial year.

Although an accountant's report must be submitted along with the tax return, the taxpayer is not required to furnish the transfer pricing documentation with the accountant's report at the time of filing the tax return. Transfer pricing documentation must be submitted to the tax officer within 30 days of the notice during assessment proceedings.

### Transfer pricing penalties

- ▶ For inadequate documentation, failure to report the transaction, or maintenance of or furnishing inaccurate particulars, the taxpayer is fined 2% of the transaction value.
- ▶ For a failure to furnish sufficient information or documents requested by the tax officer, the taxpayer is fined 2% of the transaction value.
- ▶ If the taxpayer has not made due diligence efforts to determine the arm's-length price, then the tax officer may levy 100% to 300% of incremental tax on the transfer pricing adjustments for concealment of income.
- ▶ For not furnishing an Accountant's Certificate (Form 3CEB) with the income tax return, the taxpayer is fined approximately INR100,000.

### Penalty relief

Penalties for concealing income may be avoided if the taxpayer can demonstrate that it exercised good faith and due diligence in determining the arm's-length price. This is also demonstrated through proper documentation and timely submission of documentation to the tax authorities during assessment proceedings.

### Statute of limitations on transfer pricing assessments

Transfer pricing assessments (where a matter has been referred to the transfer pricing officer) are to be completed within 46 months of the close of the financial year (1 April to 31 March). However, if the tax authorities determine that income has escaped assessment, an assessment may be reopened within seven years of the close of the financial year.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

Previously, tax authorities issued internal guidelines pursuant to which companies with related party transactions in excess of US\$2.5 million were being compulsorily scrutinized. Cases with lesser transactional values were also often picked up for audit.

However, the tax authorities recently removed this numerical benchmark for selecting cases for transfer pricing audits. This is seen as a move to shift the approach of selecting cases for transfer pricing audits based on the facts and circumstances of the cases. However, regardless of the approach for selecting cases for audit, the risk of transfer pricing audit continues to remain high. In addition, audits are carried out annually, and once a case is selected for a transfer pricing audit, there is a high likelihood of recurring audits thereafter.

In most cases, the tax authorities do not seem to have adopted a centralized or coordinated approach to audits, with officers in different locations taking divergent positions in cases with similar fact patterns. Substantial documentation is being requested in the course of the audit proceedings.

The likelihood of a general tax audit is characterized as high. Further, the likelihood that transfer pricing will be reviewed as part of a general tax audit is also characterized as high. Finally, if transfer pricing is reviewed as part of the audit, the likelihood that the transfer pricing methodology will be challenged is also high.

The information technology, business process outsourcing, banking and pharmaceutical sectors have received particular attention. Additionally, the tax authorities are increasingly scrutinizing intragroup services received and royalty payments made by Indian taxpayers. The taxpayer is required to demonstrate that the intragroup services were actually rendered or

## India (continued)

### Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

the intellectual property was actually provided and that such rendering or provision resulted in a tangible benefit to the taxpayer. In recent audits, there has also been a significant focus on marketing intangibles. In many cases, brand promotion expenses incurred by Indian subsidiaries have been held as excessive when compared with industry standards and, thus, disallowed.

The tax authorities have sought an updated analysis using data that may not be available to the taxpayer when contemporaneous documentation is prepared.

Furthermore, officers have insisted on disaggregating transactions where the taxpayer has adopted an aggregate or combined approach to its transfer pricing documentation. During recent audits, tax authorities have paid considerable attention to the approach adopted by the taxpayer when selecting comparable data.

Transfer pricing additions in India go through the regular appellate proceedings. In many cases, the appeals were pending at the first appellate authority for three to five years. Hence, to fast-track transfer pricing issues, the Indian Government introduced an alternative dispute resolution process in 2009. Under this process, the taxpayer may choose to approach a dispute resolution panel when a tax officer proposes a transfer pricing adjustment. The panel should dispose of the matter within nine months. The panel's decision, which was binding on the tax officer until two years ago, is now appealable. This process is expected significantly to expedite the first stage of the litigation process in India, which usually takes much longer.

### APA opportunity

An APA regime has been introduced in India, effective 1 July 2012. The APA rules provide an opportunity for taxpayers to opt for a unilateral, bilateral or multilateral APA. The APA can be valid for up to five years and requires payment of a specified fee. Rollback provisions were also introduced during the Union Budget 2014. A rollback would be available to taxpayers that have applied for an APA for a period of four consecutive previous years. The rules related to the rollback provisions have also been released by the CBDT, outlining the rules and procedures applicable to the rollback. The APA filing process includes a pre-filing submission, filing the APA request itself, negotiating the APA, execution and monitoring. Taxpayers are required to prepare and file an annual compliance report for each year under the APA, which the tax authorities do not subject to a compliance audit.

# Indonesia

## **Taxing authority and tax law**

Taxing authority: Director General of Tax (DGT)

Tax law: Income Tax Law, General Taxation Provisions and Procedures, and Value Added Tax of Goods and Services and Sales Tax on Luxury Goods Law

## **Relevant regulations and rulings**

Tax laws that govern transfer pricing in Indonesia are:

- ▶ Law Number 7 Year 1983 regarding Income Tax (amended by Law Number 36 Year 2008) (PPh Law)
- ▶ Law Number 6 Year 1983 regarding General Taxation Provisions and Procedures (amended by Law Number 16 Year 2009 (KUP Law)
- ▶ Law Number 8 Year 1983 regarding Value Added Tax of Goods and Services and Sales Tax on Luxury Goods (amended by Law Number 42 Year 2009) (PPN Law)

Indonesia's primary transfer pricing provisions are contained in Article 18 of the PPh Law. Article 18(3) authorizes the DGT to re-determine the amount of taxable income and deductible expenditures for transactions between taxpayers where a "special relation" exists. Article 18(3) also allows a redetermination of debt as equity. The redetermination should be made in accordance with equity and common practice of business for independent parties (i.e., in accordance with the arm's-length principle). A special relation is deemed to exist where:

- ▶ A taxpayer has direct or indirect ownership of 25% or more in another taxpayer or two or more other taxpayers
- ▶ A taxpayer controls another taxpayer or two or more other taxpayers
- ▶ There is a family relation, biologically or by marriage, in the first degree

DGT Regulation PER-22/PJ/2013 (PER-22) also extends the ambit of Article 18 to domestic related party, production-sharing contracts; contracts of work or cooperative agreements for oil and gas extraction; and mining. PER-22 states that Article 18 will apply where transfer pricing between related parties is not specified in the production-sharing contract, the contract of work or the cooperative agreement.

The DGT issues regulations that provide guidance on the application of the tax law, rather than being binding on taxpayers. Regulation PER-43/PJ/2010 (PER-43) provides guidance on the application of the arm's-length principle. In 2011, this regulation was amended by regulation PER-32/PJ/2011 (PER-32). Under these regulations, taxpayers should:

- ▶ Conduct a comparability analysis and determine comparable transactions
- ▶ Determine the appropriate transfer pricing method
- ▶ Apply the arm's-length principle based on the results of the comparability analysis and the most appropriate transfer pricing method
- ▶ Document the steps taken in determining the fair price or fair profit in accordance with the provisions of the prevailing tax regulations

PER-43, as amended by PER-32, can apply to domestic related party transactions as well as international related party transactions. The regulations may be applied when there are transactions between a taxpayer and another domestic taxpayer or permanent establishment, and when the related parties are subject to different tax rates caused by items such as:

- ▶ The imposition of final and non-final income taxes within a specific sector
- ▶ The imposition of the sales or luxury goods tax
- ▶ Transactions conducted with taxpayers of oil and gas production-sharing contractors

## Indonesia (continued)

### **OECD Guidelines treatment**

Indonesia is not a member of the OECD, although it has been granted "enhanced participation" status. The DGT largely endorses the principles of the OECD Guidelines in its regulations. However, it should be noted that the DGT's practical application of the arm's-length principle in an audit context regularly diverges from the principles endorsed by the OECD Guidelines.

### **Documentation requirements**

Under PER-43, transfer pricing documentation is mandatory. In 2011, PER-32 limited the documentation requirement to transactions with a total value of IDR10 billion or more for each counterparty in a fiscal year.

Taxpayers are required to indicate whether transfer pricing documentation has been prepared when they file the transfer pricing schedule to the corporate income tax return (Form 3A/3B), as well as disclose the transfer pricing method that has been used to price their related party transactions during the year.

Documentation requirements are largely prescriptive and should also address key points that the DGT will raise on audit based on the transfer pricing audit regulations that have been introduced. Recent transfer pricing audit regulations were released at the end of 2013.

### **Priorities/pricing methods**

PER-32 states that the most appropriate transfer pricing method should be selected. The decision for the most appropriate method should regard:

- ▶ The advantages and disadvantages of each method
- ▶ The suitability of the method based on the functional analysis
- ▶ The availability of reliable information to apply the method
- ▶ The level of comparability between the tested transaction and potential comparable data, including the reliability of potential adjustments

### **Return disclosures/related party disclosures**

The disclosure of domestic and international related party transactions with the corporate income tax return is required in Form 3A/3B. The information required includes the counterparty, the type of transaction, the value of the transaction, the transfer pricing method applied and the reason for the application of the method. Additionally, taxpayers are required to disclose whether they have transfer pricing documentation prepared.

### **Transfer pricing-specific returns**

There are no transfer pricing-specific returns required until a transfer pricing audit commences, at which point the taxpayer is required to complete forms specific to the audit process.

### **Documentation deadlines**

As noted above, taxpayers are required to indicate whether transfer pricing documentation has been prepared when they file the transfer pricing schedule to the corporate income tax return in Form 3A/3B. Following a formal request for transfer pricing documentation from the DGT, taxpayers are requested to submit their documentation within 7 days, but they have 30 days under the regulation.

### **Transfer pricing penalties**

Inappropriate disclosure of information relating to related party transactions by a taxpayer in a corporate income tax return may be construed as an act of fraud that could lead to an administrative penalty of up to 400% of the tax underpayment. There is a penalty of 2% per month – up to 48% – on any tax underpayment arising from adjustments of income and costs corresponding to related party transactions as a result of the tax audit process.

## Indonesia (continued)

### **Penalty relief**

There are no provisions for penalty relief.

### **Statute of limitations on transfer pricing assessments**

There is no separate statute of limitation for transfer pricing. Under Indonesian tax law, the DGT is permitted to conduct a tax audit, which includes assessments of the arm's-length nature of related party transactions, within five years of the relevant fiscal year.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

In general, the likelihood of an annual tax audit is characterized as high given recent changes in tax audit revenue targets. In addition, in the event taxpayer applies for a tax refund then it will trigger an automatic tax audit which must be finished within one year since the submission of the tax return.

The likelihood that transfer pricing will be reviewed as part of a regular and special tax audit is characterized as high, and the likelihood that the tax authority will challenge the transfer pricing methodology is medium. The DGT's national tax audit revenue target for fiscal year 2015, in accordance with the letter of the Director General of Tax Number SE-09/PJ/2015, was set at IDR 73.5 trillion. This approximately triples the previous year's tax audit revenue target. The DGT has been aggressively conducting audits to achieve this target, with a key focus being transfer pricing.

Generally tax auditors typically commence transfer pricing cases in the taxpayer's relevant tax office, with the exception of the special audit cases. The DGT has a central transfer pricing team that is assigned to cases as needed. The central transfer pricing team might also involve in assisting a tax auditor team in respective tax office in performing transfer pricing audit.

In practice, taxpayers that exhibit the following characteristics are at a higher risk of a transfer pricing audit:

- ▶ In the oil and gas and coal mining industry as it is specifically mentioned as focus in SE-09
- ▶ A large number of related party transactions with offshore entities
- ▶ Multinational company with continuous operating loss and/or has significant related party transactions; this is apparent with the recent issuance of regulation on thin capitalization rule in Indonesia PMK 169/PMK-010/2015 which stated the maximum debt to equity ratio is 4:1 and in the event that the taxpayer has zero balance of equity or less than zero, the entire costs of loan (i.e. interest expense) is not deductible for tax purposes; the regulation will be effective starting fiscal year 2016
- ▶ Lower net profit in comparison with other similar enterprises or with the industry average; DGT issues circular letters that provide benchmarking ratios for various industries, and under these circular letters, those taxpayers whose profits fall below the range of profit ratios are exposed to increased transfer pricing audit risk
- ▶ Increasing gross revenue and receipts but no change or decrease in net profit
- ▶ Related parties in tax havens

The role of taxpayer's account representative ("AR") (each taxpayer is assigned with an AR to assist with its tax matters) has also increased this year with regards to confirming transfer pricing compliance. AR's have been actively risk profiling taxpayer's transfer pricing audit by audit teams.

In undertaking transfer pricing audits, tax auditors will follow guidance contained in PER-22 and Circular Number SE-50/PJ/2013 (SE-50), which provides detailed guidance on transfer pricing audit processes and technical transfer pricing positions to be adopted by tax auditors.

### **APA opportunity**

Under PER-43, APAs are available. The specific DGT guidance covering APAs is PER-69/PJ/2010 (PER-69). PER-69 states that APAs may be unilateral or bilateral. Subsequently the Government issued Ministry of Finance Regulation No.7/PMK.03/2015 (PMK-7) on 12 January 2015 regarding the formation and implementation of an Advance Pricing Agreement (APA). This regulation will be effective from 90 days after the enactment date (i.e. 12 April 2015) and applicable for all outstanding and future APA applications.

## Indonesia (continued)

### **APA opportunity (continued)**

Under PER-43, MAP is also available, in accordance with the provisions of an applicable tax treaty. The specific DGT guidance covering APAs is PER-48/PJ/2010. Subsequently the Government issued Ministry of Finance Regulation No. 240/PMK.03/2014 (PMK-240) regarding the implementation of the MAP which provide a refinement to the guidelines has been stipulated in previous regulation. PMK-240 is effective from 22 December 2014 and applicable for all outstanding and future MAP implementation under tax treaties that are effective prior to, on, or after this date.

# Iraq

## **Taxing authority and tax law**

Taxing authority: General Commission for Taxes (GCT)

Tax law: Law No. 113 of 1982, as amended

## **Relevant regulations and rulings**

Currently, there are no transfer pricing regulations in Iraq. However, the GCT expects that all transactions with related parties should be entered under the usual commercial rates that apply to contracts with unrelated third parties.

The GCT conducts a tax audit of each annual tax filing (audited financial statements prepared under the Iraqi Unified Accounting System and a tax return form) and will ask for any supporting documentation it deems necessary.

The GCT actively employs a deemed tax mechanism based on its own estimation of a reasonable profit (a deemed profit); this is the GCT's default position, despite the requirement to file audited financial statements. Consequently, the Iraqi tax authorities rely on the simplified method of applying a deemed tax to ensure that at least a minimum level of tax is paid in Iraq.

Iraq has entered into a bilateral double taxation treaty with Egypt and a multilateral double taxation treaty with the states of the Arab Economic Union Council. In practice, and with respect to Iraq taxation, it is not recommended to rely on a position based on a tax treaty between Iraq and another country as the GCT does not look to the treaties, nor does it apply their provisions.

## **OECD Guidelines treatment**

Not applicable.

## **Documentation requirements**

Not applicable.

## **Priorities/pricing methods**

Not applicable.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

Not applicable.

## **Penalty relief**

Not applicable.

## **Statute of limitations on transfer pricing assessments**

Not applicable.

## Iraq (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

As per the practice of the Iraqi tax authority, a tax audit is conducted for each annual tax filing.

### **APA opportunity**

Not applicable.

# Ireland

## **Taxing authority and tax law**

Tax authority: The Irish Revenue Commissioners (IRC)

Tax law: Taxes Consolidation Act (TCA) 1997

## **Relevant regulations and rulings**

Section 835C TCA 1997 (Section 835C), Part 35A, sets out the primary transfer pricing regulations in Ireland.

The regulations apply to any arrangement between associated enterprises involving goods, services, financing or intangible assets, but only where those transactions meet the definition of being an Irish trading (Case I/II) transaction for one or both of the parties, and only where those arrangements are entered into or amended on or after 1 July 2010. The regulations apply to both domestic and cross-border transactions where Irish trading receipts are understated or trading expenses are overstated.

There are exemptions from these regulations for small and medium enterprises where a company has fewer than 250 employees and either turnover of less than EUR50 million or assets of less than EUR43 million. This is an annual test that is applied at a group level.

Section 835F TCA 1997 (Section 835F) imposes an obligation on companies to have such records available as may reasonably be required for determining whether the company's trading income has been computed in accordance with the requirements of Section 835C. Transfer pricing documentation is fundamental to validating and explaining the pricing of the intragroup transactions and, if requested, has to readily establish that the transfer prices are consistent with the arm's-length requirements of Section 835C to the IRC's satisfaction.

## **OECD Guidelines treatment**

The regulations adopt the OECD Guidelines into the domestic legislation. The IRC's application of the regulations in relation to documentation will accept both the European Union (EU) Transfer Pricing Documentation guidance and Chapter V of the OECD Guidelines (the OECD rules apply only insofar as they relate to trading transactions).

## **Documentation requirements**

The documentation must be sufficient to demonstrate a company's compliance with the transfer pricing regulations according to guidance issued by the IRC in their Tax Briefing Issue 07 in June 2010. The actual documentation required will be dictated by the facts and circumstances of the transactions. The cost of producing the documentation should be commensurate with the risk involved. It would be expected that complex and high-value transactions generally would require more detailed documentation than simple, high-volume transactions.

The transfer pricing documentation may be kept in the form of the company's own choosing, and the company is not required to prepare the documentation itself. The documentation does not need to be prepared or kept in Ireland, but must be in a language of the State (i.e., English or Irish).

The documentation is required to contain the following:

- ▶ The associated parties involved in the transaction
- ▶ The nature and terms of the transaction
- ▶ The terms of relevant transactions with both third parties and associates
- ▶ The method, or methods, by which the pricing of the transactions was derived, including any comparability analysis and any functional analysis undertaken
- ▶ The application of the transfer pricing method
- ▶ Any budgets, forecasts or other relevant papers relied on in arriving at an arm's-length result

## Ireland (continued)

### Documentation requirements (continued)

This documentation should be reviewed at regular intervals to determine whether the pricing remains at arm's length. The IRC has stated that they will be guided by Chapter V of the OECD Guidelines and by EU transfer pricing documentation guidance in applying the documentation requirement.

### Priorities/pricing methods

Ireland accepts the arm's-length principle as set out in Article 9 of the OECD Model Tax Convention and also in the respective Associated Enterprises article in Ireland's double taxation treaties. To establish an arm's-length price, the OECD Guidelines will be referenced. The arm's-length principle asserts that intragroup transfer prices should be equivalent to those that would be charged between independent persons dealing at arm's length in otherwise similar circumstances.

Transfer prices should be reviewed at regular intervals to determine that pricing remains at arm's length.

### Return disclosures/related party disclosures

There are currently no requirements on return disclosures or related party disclosures.

### Transfer pricing-specific returns

Not applicable.

### Documentation deadlines

Documentation must be available for in-scope transactions for accounting periods beginning on or after 1 January 2011. While there is no statutory deadline with respect to documentation, a separate guidance note issued by IRC states that it is considered best practice that some transfer pricing analysis is prepared when the terms of the transaction are agreed to, and that for a company to be in a position to make a correct and complete return, transfer pricing documentation should exist when the return is filed. The tax return is due nine months after the end of an accounting period.

The documentation requirements do not apply to a transaction, the terms of which were agreed to before 1 July 2010, if:

- ▶ The terms of the agreement clearly envisage the transaction.
- ▶ Application of these terms delivers the price of the transaction.
- ▶ An agreement to enter into a further agreement would not meet these conditions.

However, intercompany arrangements that were agreed to prior to 1 July 2010, and that are renegotiated and re-signed after 1 July 2010, are within the scope of the regulations.

### Transfer pricing penalties

There is no separate statutory regime for transfer pricing penalties. However, standard tax-gearied corporate tax penalties that apply to the Irish self-assessment regime may be applied to transfer pricing assessments by the IRC.

### Penalty relief

There are currently no penalty protection or relief rules in the regulations, but the IRC has guidance that the existence and quality of transfer pricing documentation will be a key factor in determining the level of penalties applicable to a transfer pricing adjustment, if any.

### Statute of limitations on transfer pricing assessments

The statute of limitations is currently four years after the end of the tax year or the accounting period in which the return is made.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

Compliance with the transfer pricing regulations will be subject to audit. The new provisions delegate transfer pricing auditing to officers authorized for that purpose by the IRC. This ensures that the audits concerned will be undertaken by officers who appreciate and are equipped to deal with the complexities involved in applying the arm's-length principle.

## Ireland (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)**

The IRC released further guidance on 26 November 2012, setting out their proposed approach to monitoring compliance with the Irish regulations.

The guidance released as "Revenue eBrief 62/2012" introduced a new procedure referred to as the Transfer Pricing Compliance Review (TPCR), which is a self-review carried out by a company or a group of its compliance with the Irish regulations. The IRC will request a selection of companies to conduct a TPCR in any given year. The IRC has said that their initial focus will be on a number of large companies, but this is expected to be expanded in the coming years.

TPCRs will not be considered revenue audits, but certain cases may be escalated to a transfer pricing audit based on a risk assessment by the IRC. TPCR selection and transfer pricing audit activity commenced in 2013.

### **APA opportunity**

There is currently no formal APA program in Ireland, but the IRC continues to enter into bilateral and multilateral APAs on a case-by-case basis.

# Israel

## Taxing authority and tax law

Taxing authority: Israeli Tax Authority (ITA)

Tax law: Income-tax Act, 1961

## Relevant regulations and rulings

The ITA Income Tax Regulations (Determination of Market Terms) were drafted pursuant to §85A of the Israeli Income Tax Ordinance. Final regulations were adopted in November 2006. The Israeli Transfer Pricing (ITP) Regulations apply to all international intercompany transactions carried out after the regulations were validated on 29 November 2006. The ITP Regulations are based on a combination of the OECD Guidelines and the US transfer pricing regulations.

In Israel, taxpayers are required to comply with the proper timing for submission of documentation (i.e., 60 days from the official demand of a tax inspector), which shifts the burden of proof to the taxing authority if the latter challenges the transfer pricing.

In the last few years, the ITA has released several publications about issues that affect transfer pricing, including:

- ▶ Restructuring - The ITA provides guidance to its local assessing officers about how to deal with post-acquisition restructuring and intellectual property (IP) migration following such restructurings.
- ▶ Capital notes - Capital notes enable Israeli taxpayers to finance their foreign subsidiaries with non-interest financial debt instruments.
- ▶ Inclusion of stock option expenses by Israeli cost-plus companies - The ITA asserts that these expenses should be included and points out that two cases addressing this issue are currently being litigated.

## OECD Guidelines treatment

The ITA considers its transfer pricing rules and regulations to be consistent with the OECD Guidelines.

However, usually a local adaptation is necessary, mainly with respect to the interquartile range when the CUP method is used and the decision of whether to use local, European or US comparables.

## Documentation requirements

A taxpayer is required to file a transfer pricing report with the tax assessing officer, at the tax assessing officer's request, within 60 days of the application date. Documentation must include:

- ▶ Taxpayer's group structure, the parties to the international transaction, their residency, and any special relations between the taxpayer and the other parties
- ▶ The contractual terms, including specifications of the asset, the service granted, the price paid, the loan and credit terms, and related guarantees
- ▶ The taxpayer's area of activity and any relevant developments
- ▶ The economic environment in which the taxpayer operates and the related risks
- ▶ Details of all transactions entered into by the taxpayer with a related party
- ▶ An economic analysis

The taxpayer is also required to attach additional documents that corroborate the data submitted, such as transaction contracts and any other contracts between the related parties and tax returns filed with foreign taxing authorities.

## Priorities/pricing methods

To determine whether an international transaction is at arm's length, the ITP Regulations require the taxpayer to apply one of the following methods, in order of preference:

- ▶ CUP or CUT

## Israel (continued)

### Priorities/pricing methods (continued)

- ▶ Comparable profitability
  - ▶ Cost-plus or resale price
  - ▶ CPM or TNMM
  - ▶ Profit split
- ▶ Other methods

An international transaction is at arm's length if, through the application of the selected method, the result falls within a defined interquartile range.

As an exception, the entire range of values will apply when the transfer pricing method applicable is CUP or CUT and no adjustments are performed. If the international transaction's result is outside the range, the median should be applied as the arm's-length price for the transaction.

Additionally, the ITP Regulations stipulate the use of several profit-level indicators (PLIs), depending on the particular industry and environment. For example, when appropriate, the following PLIs may apply:

- ▶ A cost-plus markup may be applied to a company's direct costs
- ▶ A gross profit margin may be applied to:
  - ▶ The operating profit or loss applicable for comparable transactions
  - ▶ The profit or loss derived as a proportion of the firm's assets, liabilities or capital
- ▶ Other measures considered appropriate under the circumstances

### Return disclosures/related party disclosures

Commencing with the fiscal year ended 2007, taxpayers must attach to the annual tax returns a specific transfer pricing form (#1385), in which the following should be disclosed:

- ▶ A short description of the intercompany transaction details of the other party and its residency
- ▶ Transaction volume and residency of other party
- ▶ Signatures on all declarations (forms) that the international transactions were conducted at arm's length

According to the taxing authority, such declaration must be supported by documentation that meets the requirements.

### Transfer pricing-specific returns

Refer to the "Return disclosures/related party disclosures" section.

### Documentation deadlines

Taxpayers in Israel must provide documentation within 60 days of a tax assessing officer's request.

### Transfer pricing penalties

The ITA has not specified any penalties with regard to its transfer pricing regulations. However, general tax penalties applied by the ITA, with regard to a tax deficit, will also apply to transfer pricing adjustments. In addition, a false declaration on Form #1385 may expose the signing officer to criminal charges.

### Penalty relief

There is no penalty relief regime applicable in Israel.

## Israel (continued)

### Statute of limitations on transfer pricing assessments

The Israeli Income Tax Ordinance has general rules for auditing a tax return. As such, the statute of limitations usually is three years (or four if the commissioner extends the time period), beginning at the end of the fiscal year in which the tax return was filed.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit in general is high. Traditionally, taxpayers operating in the international arena or subsidiaries of foreign companies have a higher likelihood of being audited.

The likelihood that transfer pricing will be reviewed as part of that audit is high, while the likelihood that the transfer pricing methodology will be challenged in a transfer pricing review is moderate, if supported by robust transfer pricing documentation. When no documentation exists, the methodology is more likely to be challenged.

Following the recent circulars on restructuring and the stock option expenses as described above, these issues are more likely to be challenged, as well as the transfer of intellectual property and financial transactions.

### APA opportunity

Section 85A of the Israeli Income Tax Ordinance, which governs the ITP Regulations, stipulates in Article 85A(d) the conditions under which an APA may be concluded and delineates the scope of an APA.

The process starts with a detailed application that includes all of the relevant details. Under the APA process, the ITA must respond to the taxpayer's application within 120 days (though the time can be extended up to 180 days), otherwise the application will be approved automatically and the intercompany policy will be deemed as providing reasonable arm's-length prices. In practice, a complete APA procedure may take 12 months.

# Italy

## Taxing authority and tax law

Taxing authority: Administration of Finance and Revenue Authority (*Amministrazione Finanziaria*, or AFRA)

Tax law and decrees: Embedded within the Presidential Decree No. 917 of 22 December 1986 (Decree 917 or Consolidated Corporate Income Tax Code) and Presidential Decree No. 600 of 29 September 1973 (Art. 31-ter introduced with Law Decree No. 147, dated 14 September 2015)

## Relevant regulations and rulings

Transfer pricing is regulated in Article 110 (7) and Article 9 (3)-(4) for Corporate Income Tax (IRES).

On 23 December 2013, the Italian Parliament passed the budget law for 2014 (2014 Stability Law, published in the Official Gazette No. 302 of 27 December 2013), which includes clarifications on how transfer pricing rules are applied to determine the Regional Tax on Productive Activities (IRAP) taxable base (which is regulated by Legislative Decree No.446 of 15 December 1997) for the tax years following the one in progress at 31 December 2007.

Legislative Decree No. 78 of 31 May 2010 (Decree 78) introduced an optional transfer pricing documentation provision in the Italian tax law. Article 26 outlines that if the taxpayer provides tax authorities with proper transfer pricing documentation during a tax assessment, no tax penalties (currently 100% to 200% of the additional taxes) will be applied on possible tax adjustments if the tax authority determines that the intercompany transactions do not comply with the arm's-length standard.

On 29 September 2010, the Commissionaire of the Italian Revenue Agency released the operational instructions (*provvedimento*) to implement the provisions endorsed in Article 1, paragraph 2-ter of Legislative Decree No. 471, which was enacted on 18 December 1997 (Decree 471). The new documentation regime is discussed on in Circular Letter 58/E, dated 15 December 2010 (Circular 58/E), which provides interesting insights.

The documentation regime innovates the way Italy traditionally looked at transfer pricing. However, gray areas remain. Compliance with the Italian transfer pricing documentation regime is not mandatory. In this respect, taxpayers are expected to make a strategic management decision, taking into consideration that the penalty protection is afforded only if complete and appropriate transfer pricing documentation is in place. If not, maximum penalties apply. The transfer pricing documentation format must follow the one provided by the law, it must be in Italian, and its contents must be detailed enough to provide officers with a substantial view of the intercompany flows and related policies.

The instructions basically implement the European Union (EU) Code of Conduct on transfer pricing by also following the OECD approach, but they also contain very specific requirements for properly assembling the transfer pricing file. Compliance with the instructions will protect taxpayers from tax penalties on adjustments arising from transfer pricing audits. Current provisions provide for very high penalties, ranging from 100% to 200% of any additional taxes. Among the most significant implications of the new requirements are that taxpayers must:

- ▶ Assess the Italian entity's type to determine the proper documentation to be prepared for penalty avoidance
- ▶ Advise the tax authority as to the existence of current transfer pricing documentation for the current tax year with the filing of the tax return by ticking the specific box
- ▶ Advise the tax authority as to the existence of transfer pricing documentation for open tax years before 29 December 2010
- ▶ Have country-specific documentation prepared, regardless of whether there is a master file
- ▶ Take steps to avoid a challenge by the tax authority based on incomplete or inappropriate documentation, which could jeopardize penalty protection

The taxpayer's notice to the tax authority, indicating that transfer pricing documentation exists for fiscal year 2010 (and subsequent fiscal years), must be filed annually, along with the tax return. For prior fiscal years subject to tax audits, a similar notice should have been provided by 28 December 2010. Late notices will only be deemed effective as long as they are filed before a tax inspection begins.

## Italy (continued)

### Relevant regulations and rulings (continued)

Each taxpayer needs to make strategic risk management decisions, possibly in coordination with central management.

It is not clear whether and to what extent previous Circular Letter Nos. 32/9/2267 of 22 September 1980 (Circular No. 32/9/2267) and 42/12/1587 of 12 December 1981 (Circular No. 42/12/1587) are still valid (at least as internal administrative guidelines).

Circular Letter No. 1 of 20 October 1998 outlines general methods for tax audits and includes transfer pricing in the framework of regular audits of multinational enterprises.

Italian Supreme Court (*Corte di Cassazione*) Decision No. 22023 of 13 October 2006 notes that the burden of proof rests on the tax authority for transfer pricing issues. According to the Supreme Court, and subsequently confirmed by the 2010 OECD Guidelines, where the burden of proof is on the tax authority, the taxpayer is not obliged to give evidence that the transfer prices comply with the arm's-length principle unless the tax authority has already proved (*prima facie*) that the taxpayer has not complied with the arm's-length principle.

Several recent rulings have identified and challenged domestic transfer pricing issues, even though the wording of the relevant regulation refers exclusively to cross-border transactions. New clarifications are provided with Law Decree No. 147, dated 14 September 2015. Under this decree, it is specified that transfer pricing rules do not apply to intercompany transactions involving group companies located in Italy.

### OECD Guidelines treatment

The Italian transfer pricing rules are mainly encompassed in the tax law provisions of Decree 917, Circular 32/9/2267 and Circular 42/12/1587. These rules are largely consistent with the OECD Guidelines.

Italian representatives participated in the OECD discussion on business restructuring, as well as in the approval process for the new version of the OECD Guidelines released in July 2010.

### Documentation requirements

Proper documentation for penalty protection purposes (optional regime) must be drafted on a yearly basis if the taxpayer falls within the scope of paragraph 7 of Article 110 of Decree 917, and it must be available in each of the taxable periods subject to audit.

The filing of the documentation does not bind the tax authorities to the application of Article 1, paragraph 2-ter of Decree 471, when:

- ▶ Notwithstanding compliance with the formal structure referred to in Articles 2.1 and 2.2, the documentation delivered during the course of an audit is not complete and consistent with the provisions endorsed by the operational instructions.
- ▶ The information provided in the documentation is not consistent, wholly or partly, with the reality. Omissions or partial inaccuracies that do not hamper either the activity carried out by the auditors or the accuracy of the outcome of such analysis do not impede the application of Article 1, paragraph 2-ter of Decree 471.

### Priorities/pricing methods

Traditional methods, such as CUP, resale price and cost-plus, are preferred over profits-based methods.

Under the new transfer pricing documentation rules, taxpayers are expected to perform an industry, group and company analysis, as well as a detailed functional and risk analysis. These analyses should include an indication of potential changes in the functions performed, assets used and risks assumed compared with the previous tax year, with specific reference to changes that occurred in the context of a business restructuring.

The selection of the transfer pricing method entails an explanation of the reasons for using a particular method that produces results consistent with the arm's-length standard. Should a profit method be selected when a traditional transactional method could be applied in an equally reliable manner, the taxpayer should explain why the latter had been excluded. The same explanation applies when a method other than the CUP method is selected, in the event the latter could have been applied to achieve equally reliable results.

An accurate description of the taxpayer's procedure for selecting comparable transactions will have to be provided, as well as a clear description of the underlying steps in arriving at an arm's-length range, if needed.

## Italy (continued)

### Priorities/pricing methods (continued)

Small and medium-sized companies are not required to refresh the benchmarks every year.

The 2014 Stability Law provides important changes for groups involved in certain online businesses. From a transfer pricing perspective, the new rules provide that entities involved in the collection of online advertisement and in related auxiliary services on behalf of foreign group companies must use profit-level indicators other than those applicable to the costs incurred in the conduct of their business. However, the 2014 Stability Law does not provide any guidance about an alternative transfer pricing method to be used. Exceptions apply for companies that reach an APA with the tax authority by way of the International Standard Ruling procedure (outlined in the following sections).

### Return disclosures/related party disclosures

Italian companies must officially communicate (in documents, correspondence, a register of companies) whether they are managed and controlled by another company and the name of the related company (Article 2497-bis of the Italian Civil Code). Financial statements should include essential data from the managing or controlling company's financial statements and relations with related parties (Articles 2424, 2427, 2428 and 2497-bis of the Italian Civil Code). The tax return should disclose transactions with tax havens concerning costs and expenses. The same disclosure is also valid for taxpayers with intercompany flows that are to be grouped in costs versus revenues.

### Transfer pricing-specific returns

In Italy, there are no specific transfer pricing returns. As already mentioned, for the purposes of the optional penalty protection regime, taxpayers that intend to adhere to such regime shall communicate the availability of proper documentation on the annual income tax return (i.e., in a dedicated box) to the Italian Revenue Agency.

### Documentation deadlines

Taxpayers shall communicate to the Italian Revenue Agency the availability of proper documentation on the annual income tax return (i.e., in a dedicated box) in case they decide to opt for the penalty protection regime.

The submission of the proper documentation to the tax authorities must be executed within 10 days from the specific request. If supplementary information is needed during an audit or any other assessment activity, it must be provided within seven days of a request (or in a longer time period, depending on the complexity of the transactions under analysis), to the extent that the period is consistent with the time of the audit. Once the time periods have elapsed, the tax authorities are not bound by the application of Article 1, paragraph 2-ter of Decree 471.

### Transfer pricing penalties

If and when the abovementioned optional transfer pricing documentation regime for penalty protection purposes is deemed inapplicable (with various degrees of judgment), general penalties for underpayment apply (Decree 471). In particular, when the tax return has been filed, standard administrative penalties apply in an amount equal to 100% to 200% of the additional taxes or the minor tax credit assessed by Italian tax authorities (both for IRES and IRAP purposes). According to Circular Letter 58/E, higher penalties may be, in principle, applicable when the documentation is not deemed complete and appropriate.

Penalties apply when:

- ▶ The taxable income declared is lower than assessed.
- ▶ The taxes declared are lower than those due.
- ▶ The tax credit declared is greater than that due to the taxpayer.

The same penalties apply where undue tax allowances or deductions from the taxable income have been declared in the tax return. Interest on taxes or additional taxes due also applies.

Because of the relatively high amount of potential tax revenue in a transfer pricing audit, tax officers often refer assessments to public prosecutors to explore possible criminal tax law ramifications, as permitted under Legislative Decree No. 74 of 10 March 2000. Some mitigation is provided by Article 7, whereby taxpayers are supposed to disclose their transfer pricing policy in their financial statements. Hopefully, the new transfer pricing documentation will not only reduce administrative penalties but also help demonstrate taxpayers' good faith in case of possible tax criminal ramifications.

## Italy (continued)

### Transfer pricing penalties (continued)

The administrative and criminal penalty systems are currently under review and will likely be mitigated for transfer pricing adjustments.

Circular 58/E provides some steps to be followed to escalate issues related to the penalty protection for tax assessments in excess of EUR10 million from local to regional tax offices and, eventually, to the central tax offices (*Direzione Centrale Accertamento*).

### Penalty relief

Please refer to the section above for the application of the new penalty protection regime.

Following the clarifications and changes included in the 2014 Stability Law, with reference to any value adjustments that result from the application of transfer pricing rules for IRAP purposes, ordinary penalties provided by law do not apply; however, this benefit is limited to tax years following the one in progress at 31 December 2007 through those for which, at the date of entry into force of the new provision, the tax return filing deadline has elapsed. Notwithstanding the above, penalties will apply if the relevant legal measure (e.g., court decision) became final before the 2014 Stability Law entered into force.

### Statute of limitations on transfer pricing assessments

There is no specific statute of limitations on an assessment for transfer pricing. The general statute of limitations period for tax purposes applies. Therefore, taxpayers must receive notice of tax assessments by 31 December of the fourth year following the year for which the tax return has been filed. If the tax return has been omitted or is treated as null and void, the assessment period for the relevant year is extended by an additional year.

In case of a potential criminal tax allegation, tax officers may invoke a specific law that allows the standard five-year statute of limitations to be doubled.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The risk of a general tax audit is high, as is the risk of being audited specifically for transfer pricing. The Italian tax authorities usually challenge the price of intercompany transactions that they deem noncompliant with the arm's-length principle or that result in a mismatch between the characterization of entities and their remuneration. The likelihood of the transfer pricing methodology being challenged is also high, as tax officers often try to challenge all of the various aspects of transfer pricing, i.e., not only the methodology, but also the functional analysis and comparables. There appears to be a tendency toward challenging transfer pricing in combination with issues related to tax havens, permanent establishments and abuse of law.

Circular 58/E provided an interim penalty regime. Italy is particularly active in challenging taxpayers on deemed permanent establishments. Following the Italian Supreme Court's Philip Morris case, additional case law is available in this respect. Despite the general pressure put on commissionaire arrangements, there has been a recent favorable Supreme Court decision (the Boston Scientific case).

In addition, the Italian tax authorities generally pay particular attention and direct greater tax audit activity to large taxpayers, and they are devoting greater resources in intelligence and monitoring the activities of multinationals.

Likewise, Circular Letter No. 6/E issued by the Central Revenue Agency on 25 January 2008 provides operating guidelines for tax authorities in relation to preventing and combating tax avoidance, and among the most crucial areas to be assessed, it mentions intercompany transactions and transfer prices according to the provisions of Article 110 (7) of Decree 917. Legislative Decree No. 185 issued on 29 November 2008 introduced the category of "large" taxpayers, stating that "in relation to the corporate income tax and VAT returns of relevant size companies, the Central Revenue activates substantial controls in the year following the one of the filing [where] relevant size companies are the ones which achieve a (yearly) turnover not lower than EUR300 million. Such threshold was reduced to EUR100 million by 31 December 2011."

Starting in 2012, in implementing the provisions of paragraph 10 of Article 27 of Legislative Decree No. 185 of 2008, Circular Letter 18/E, dated 31 May 2012, provides that the "tutorship" activities shall cover all of the large taxpayers (then about 3,200 companies, compared with about 2,000 tutorials in 2011). As part of the tutorship activities, the need to maintain a high level of attention is reaffirmed, for the purpose of identifying a number of phenomena related to important risk factors that the OECD has also carefully considered. Transfer pricing is expressly mentioned among such phenomena.

## Italy (continued)

### Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

Similar operating instructions on transfer pricing scrutiny are contained in the Circular Letter No. 25/E issued on 31 July 2013 and 2014, where compliance with the optional regime on transfer pricing documentation is identified as a positive factor of transparency and cooperation with the tax administration within the risk-monitoring activities.

In addition to all of the above, the Italian Supreme Court is developing a broad concept of "abuse of law," deemed to be inspired by the Italian Constitution Law, to try to introduce a general anti-avoidance principle potentially applicable to all of the operations that appear to be carried out for tax reasons only, without real business purposes.

### APA opportunity

With Article 8 of Legislative Decree No. 269, enacted 24 November 2003, the Italian Government introduced a unilateral ruling system mainly relating to transfer pricing, dividends and royalties. The law was enacted with the *Provvedimento del Direttore dell'Agenzia delle Entrate*, dated 23 July 2004. This document provides a number of practical guidelines for the ruling program.

On 19 March 2013, the Central Directorate for Tax Assessment released the second Italian International Standard Ruling Report. This provides a brief description of the procedure and a number of statistical details that may be useful for taxpayers interested in exploring an APA, including pre-filing.

Although the relevant APA law still refers only to unilateral APAs, since 2010, the Revenue Agency is open to enter into bilateral and multilateral APAs under the relevant tax treaties.

On 23 December 2013, the Italian Government issued Law Decree No. 145/2013 (the Destination Italy Decree), which extends the scope of the International Standard Ruling procedure to preliminary assessments of Italian permanent establishment of foreign entities and provides that the validity of agreements reached through the International Standard Ruling (e.g., including APAs) is increased from three years to five.

The Law Decree No. 147, dated 14 September 2015, has introduced the new Article 31-ter of the Presidential Decree No. 600 of 29 September 1973, which expands the scope of the APA. It will also be available to determine asset tax bases in the case of inbound and outbound migrations. The ruling is valid for five years. Nonetheless, under the Draft Legislation, taxpayers will be able to use ruling results (e.g., in the case of an APA) to adjust past years but not beyond the year in which the ruling request was submitted (rollback system).

On 29 July 2015, the Italian Government signed a decree that implements the patent box provisions introduced by the 2015 Budget Law (Law No. 190 of 23 December 2014) and subsequently amended by Law Decree No. 3 of 24 January 2015. The said provisions introduce an elective regime that grants an exemption from corporate income tax and local tax on income derived from qualifying intangible assets (such as patents, brands, know-how and other intellectual properties). The regime is eligible for taxpayers that perform research and development activities (also if outsourced to any third parties) and is characterized by a five-year lock-in period. An advanced ruling is specifically required to determine the relevant income attributable to the qualifying intellectual property when it is directly exploited by the taxpayers. New operational instructions will be published soon.

### Mutual agreement procedures

On 5 June 2012, the Italian tax authorities issued a Circular Letter pertaining to the settlement of international tax disputes and, more specifically, clarifying some of the procedures involved in using the MAP process. In addition, the roles in the management of the MAP process and the involvement of both the Italian tax authorities and the Italian Ministry of Economy and Finance are described in the circular.

The circular clarifies the relationship between MAPs and Italian litigation procedures. It states that the existence of a litigation procedure does not affect the course of the MAP until a tax court decision is issued. In such a case, the circular clarifies that the decision of the tax court becomes final for the Italian tax authorities and the Ministry of Economy and Finance, having the same effect on MAPs as under the settlement procedures. As far as the Arbitration Convention is concerned, access to the advisory commission phase is allowed only if the taxpayer renounces the option to pursue the domestic litigation procedure.

# Japan

## Taxing authority and tax law

Taxing authority: National Tax Agency (NTA)

Tax law:

- ▶ Corporation tax
- ▶ Business Tax
- ▶ Prefectural and municipal inhabitant taxes (local tax)

## Relevant regulations and rulings

- ▶ Special Taxation Measures Law (STML) Article 66-4/66-4-2 - Special Provisions for Taxation of Transactions with Foreign Related Persons
- ▶ STML Article 68-88/66-88-2 - Special Taxation Measures of Transactions between Consolidated Corporations and Foreign Related Persons
- ▶ STML - Enforcement Orders 39-12, 39-12-2/39-112, 39-112-2
- ▶ STML - Enforcement Regulations Articles 22-10, 22-10-2/22-74, 22-75
- ▶ STML - Circulars 66-4-(1)-1 to 66-4-(9)-2, 68-88(1)-1 to 68-88(9)-2
- ▶ Commissioner's Directive on the Establishment of Instructions for the Administration of Transfer Pricing Matters (Administrative Guidelines)
- ▶ Commissioner's Directive on the Establishment of Instructions for the Administration of Transfer Pricing Matters for Consolidated Corporations (Administrative Guidelines for Consolidated Corporations)
- ▶ Commissioner's Directive on Mutual Agreement Procedures

## OECD Guidelines treatment

The NTA refers to the OECD Guidelines for direction, and the Japanese transfer pricing Administrative Guidelines contain the following statement in Paragraph 1-2(3): "In light of the importance of a common understanding regarding transfer pricing by each country's tax authorities for the resolution of international double taxation that arises due to taxation pursuant to the transfer pricing tax system, appropriate administration shall be carried out by referring to the OECD Guidelines to the extent necessary in examinations and in reviews of requests for APAs."

## Documentation requirements

The 2010 tax reform effective 1 April 2010, clarified expectations around documentation, by amending the STML to state that documents listed in the ministerial ordinance should be provided without delay when requested during an examination. The ministerial ordinance in question (STML Enforcement Regulations Articles 22-10 and 22-74) was, in turn, amended to include a detailed list of documents to be submitted. The previous version of the STML required that "documents or accounting books" be rendered, without specifying what types of documents and books were required. The substance of the new list in the ministerial ordinance is largely identical to a list previously disclosed in the Administrative Guidelines (an advisory document), but the promotion to the ministerial ordinance, coupled with the citation in the STML, gives this list the force of regulation.

The list of documents is now formally linked to existing language in the STML stipulating that failure to provide appropriate materials in a timely manner upon request can trigger the tax examiner's authority to collect transactional data from comparable firms to use as "secret comparables" for the taxpayer. That is, the comparables are not disclosed to the taxpayer because the transactional data of the companies is confidential. Alternatively, an examiner can resort to "presumptive taxation," presuming an arm's-length price with reference to profit ratios of other corporations in the industry that carry out similar activities.

## Japan (continued)

### Priorities/pricing methods

Historically, Japanese tax authorities have required that the CUP, resale price and cost-plus methods be used whenever possible, allowing the use of other methods (e.g., profit split and TNMM) only after the first three have been discounted. However, triggered by similar changes in the OECD Guidelines, STMLs 66-4 and 66-4-2 were amended to eliminate the hierarchy of methods in favor of the most-appropriate-method approach for tax years beginning on or after 1 October 2011.

### Return disclosures/related party disclosures

The taxpayer must file Schedule 17-4 (previously Schedule 17-3), Detailed Statement Concerning Foreign Affiliated Persons and Related Party Transactions. Schedule 17-4 requires that taxpayers disclose the transfer pricing methods applied in calculating the arm's-length prices of foreign related party transactions. This requirement implies that taxpayers are expected to identify the appropriate transfer pricing methods for their related party transactions and be able to demonstrate the appropriateness of those methods. Therefore, this rule can be interpreted as a *de facto* transfer pricing documentation requirement, since taxpayers are expected to maintain documents in support of any tax return disclosure.

Schedule 17-4 requires taxpayers to disclose the following three additional information items:

- ▶ The number of employees of the foreign related party
- ▶ The amount of retained earnings of the foreign related party for the preceding year
- ▶ Any APA between the taxpayer and the foreign competent authority

### Transfer pricing-specific returns

Schedule 17-4 must be attached to the regular annual tax return when the taxpayer has foreign related party transactions during the fiscal year.

### Documentation deadlines

The taxpayer is required to provide the tax authority with documentation (i.e., information and records) relevant to the establishment of the arm's-length price in a timely manner upon request. There is no exact deadline specified.

### Transfer pricing penalties

Transfer pricing assessments are subject to the same penalties that apply to general corporate tax assessments. There are two types of penalties:

- ▶ The underpayment penalty tax is computed as either 10% of the additional assessed tax (up to JPY500,000), or 15% of the additional tax, depending on the amount of underpayment.
- ▶ Delinquency tax (interest) accrues in two parts:
  - ▶ The first part of delinquency tax accrues for one year following the due date of the original tax return at a rate of 4% per year plus the official discount rate as of 30 November of the prior fiscal year. However, for the time period commencing 1 January 2014, the rate is determined by adding 1% to the average contractual interest rate on short-term bank loans for the period from October (two years prior) to September of the prior year, as announced by the Minister of Finance on 15 December of the prior year. As a specific example, this translates to a delinquency tax rate of 2.9% for the period from 1 January 2014 to 31 December 2014.

The second part of delinquency tax accrues from the date following the date of the assessment notice until the date the additional tax is paid. For the first three months following the date of the assessment notice (including the one-month period from the date of the notice until the payment deadline, and two months following the deadline), the rate of delinquency tax is 4% per year plus the official discount rate as of 30 November of the prior fiscal year. However, for the time period commencing 1 January 2014, the new rate explained in the above paragraph applies. For any delinquency tax accruing after this period, the rate increases to the lower of 14.6% or the rate computed by adding 7.3% to the average contractual interest rate on short-term bank loans for the period from October (two years prior) to September of the prior year, as announced by the Minister of Finance on 15 December of the prior year. As a specific example, this translates to a delinquency tax rate of 2.9% for the period from 1 January 2014 to 31 December 2014.

## Japan (continued)

### Transfer pricing penalties (continued)

There is no separate penalty for failure to prepare and maintain transfer pricing documentation. However, unlike in many other countries, preparation of sufficient documentation does not lead to penalty relief in the case of an assessment.

### Penalty relief

There are no specific provisions for reductions of underpayment penalties.

However, the 2007 tax reforms allowed for the provision of a grace period for the payment of assessed taxes – including penalty taxes – for taxpayers submitting an application for mutual agreement procedures. The taxpayer must submit a separate application to be entitled to the grace period. The grace period is the period starting on the initial payment due date of assessed taxes (if the application submission date is later than the initial payment due date, the submission date is applicable) and ending one month after the day on which the “correction,” based on the mutual agreement, has been made (or the day on which a notification was issued that an agreement could not be reached). Any delinquency taxes accrued during the grace period will be exempted. However, under STML Article 66-4-2(2) (which grants a postponement of tax payment), the tax authority requires the taxpayer to provide security equivalent to the amount of the tax payment (i.e., collateral). This new transfer pricing rule applies to applications for a grace period made on or after 1 April 2007.

### Statute of limitations on transfer pricing assessments

The statute of limitations in Japan on transfer pricing assessments is six years from the deadline for filing tax returns for a fiscal year (STML Article 66-4(16)).

A corporation must maintain corporate tax records for seven years from the fiscal year-end (Corporation Tax Law Articles 126 and 150-2 and Corporation Tax Law Enforcement Regulation Articles 59 and 67).

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a specific company being audited depends on the company’s profile. In general, however, the likelihood of a general tax audit in Japan is medium to high, compared with other jurisdictions. The Japanese tax authorities have a robust and aggressive enforcement mechanism, and tax audits are a regular tool of enforcement. Medium to large taxpayers can expect a tax audit on a regular basis, especially given the recent need for enhanced government revenue.

Tax examinations usually include a review of transfer pricing issues, even if the examination team lacks specialized transfer pricing expertise. A tax examiner may challenge transfer pricing directly, or may refer the file to a specialized transfer pricing team for follow-up. Thus, the likelihood that transfer pricing will be part of a general tax audit is similarly characterized as medium to high. This likelihood has increased with the introduction of the New General Tax Law, which prohibits two or more separate tax audits of the same taxable period, except in cases where the taxpayer’s written consent has been obtained. The effect of this new law is to incentivize the simultaneous conduct of a transfer pricing audit along with the general tax audit.

Taxpayers may also be audited for transfer pricing only (not part of a tax audit) when they consent to a separate transfer pricing audit. In general, the Japanese tax authorities request that taxpayers provide written consent prior to the start of an extensive transfer pricing audit. The NTA and the major regional tax bureaus together employ a large corps of dedicated transfer pricing specialists to enforce Japan’s transfer pricing rules. Transfer pricing audit risk is generally medium to high for large taxpayers with significant related party transactions. The risk is increased for taxpayers that meet any of the following criteria:

- ▶ In industries targeted by the NTA
- ▶ Low profits or losses in Japan
- ▶ High profits in foreign affiliates as disclosed in Schedule 17-4 (relative to profits reported in Japan)
- ▶ Fluctuating profitability
- ▶ Significant transactions with low-tax jurisdictions
- ▶ In industries with high margins (the NTA is likely to seek applying its own comparables, including possibly secret comparables available only to the NTA, although secret comparables have become less common in recent years)

Regardless of whether the transfer pricing review arises from a general tax audit or a transfer pricing audit, once the review is under way, the likelihood that the transfer pricing methodology will be challenged is high if the taxpayer appears unprepared to defend its transfer pricing policies and methods.

## Japan (continued)

### **APA opportunity**

Unilateral and bilateral APAs are available and very common; however, the NTA prefers bilateral APAs.

APA guidelines are included in the Administrative Guidelines. A rollback of up to six years is possible in the case of a bilateral APA; however, a rollback is not permitted in unilateral cases.

The NTA regularly accepts profit-based methods, such as the TNMM.

The APA filing deadline is the first day of the first fiscal year to be covered by the proposed APA.

# Jordan

## **Taxing authority and tax law**

Taxing authority: Income and Sales Tax Department (ISTD)

Tax Law: The Income Tax Law No. (34) of 2014 (Income Tax Law)

## **Relevant regulations and rulings**

Jordan's Income Tax Law does not currently follow OECD transfer pricing guidelines. The only guidance regarding transfer pricing rules in Jordan is provided under Article 20(d). This article does not set rates or specifications to calculate the profit margin in regard to related parties' transactions; it specifies only that related-party transactions should be entered into under similar commercial terms and rates as in contracts with unrelated third parties based on the standard market practice.

Jordan has entered into double tax treaties with a number of foreign countries wherein the language contains an article that resembles Article 9 of the OECD Model Treaty on "Associated Enterprises." However, the ISTD does not usually honor or consistently apply the treaties.

## **OECD Guidelines treatment**

Not applicable.

## **Documentation requirements**

Not applicable.

## **Priorities/pricing methods**

Not applicable.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

Not applicable.

## **Penalty relief**

Not applicable.

## **Statute of limitations on transfer pricing assessments**

Not applicable.

## **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

In Jordan, the sampling method is applied by the tax authority to select which files will undergo a tax audit. However, as per the practice of the Jordanian tax authority, a tax audit will be conducted for each for all taxpayers who are labeled as large taxpayers (those with revenues of JOD4 million and above).

## Jordan (continued)

### **APA opportunity**

Not applicable.

# Kazakhstan

## **Taxing authority and tax law**

Taxing authority: State Revenue Committee of the Ministry of Finance

Tax law: The Law of the Republic of Kazakhstan

## **Relevant regulations and rulings**

The Law of the Republic of Kazakhstan, No. 67-IV on Transfer Pricing of 5 July 2008, regulates transfer pricing. Additionally, transfer pricing in Kazakhstan is regulated by the following subordinate legal acts:

- ▶ Rules for monitoring transactions (No. 176 of 16 March 2015)
- ▶ Rules for concluding agreements on the application of transfer pricing (No. 1197 of 24 October 2011)
- ▶ Rules on the procedure for cooperation with authorized bodies in examining transfer pricing issues (No. 129 of 26 March 2009)
- ▶ List of goods (including work and services) in international business transactions that are subject to transaction monitoring (No. 194 of 19 March 2015)
- ▶ List of officially recognized sources of information on market prices (No. 292 of 12 March 2009)
- ▶ List of exchange-quoted goods (No. 638 of 6 May 2009)

## **OECD Guidelines treatment**

Although Kazakhstan is not a member of the OECD, the transfer pricing law currently in effect has some features in common with the OECD Guidelines. However, one of the principal differences is that the Kazakhstan transfer pricing legislation targets all international business transactions, regardless of whether the parties are related.

## **Documentation requirements**

Documentation requirements are established for two categories of transactions in Kazakhstan:

- ▶ Transactions with goods (including work and services) that are subject to monitoring
- ▶ All other transactions with goods (including work and services) subject to transfer pricing control

Taxpayers involved in transactions subject to monitoring are required to prepare and submit monitoring reports annually. Monitoring reports include information on the applied prices, relationships of the parties, industries and market conditions, business strategy, transfer pricing methodology, functional and risk analysis, tangible and intangible assets, method, source of information used for determination of a market price, and other related information.

Transaction participants executing transactions with other goods (including work and services) that are subject to transfer pricing control should also maintain documentation supporting the applied prices, but this documentation must not be as detailed as that required for monitoring reports.

## **Priorities/pricing methods**

The transfer pricing law supports five pricing methods, given in the order of priority: CUP, cost-plus, resale price, profit split and TNMM. Although the methods have similar names, their application may differ from that described in the OECD Guidelines.

## **Return disclosures/related party disclosures**

Currently, no related party disclosure is required on tax declarations, though both National Accounting Standards and International Financial Reporting Standards (IFRS) require such disclosures in financial statements.

## Kazakhstan (continued)

### Transfer pricing-specific returns

Apart from the general transfer pricing documentation requirements, no other transfer pricing return is required to be filed. Taxpayers involved in transactions subject to monitoring are required to prepare and submit reports on an annual basis. The deadline for filing such reports is 15 May of the year following the reporting year. Reports are submitted to State Revenue Committee of the Ministry of Finance of the Republic of Kazakhstan.

### Documentation deadlines

Monitoring reports must be submitted to the tax authorities no later than 15 May of the year following the reporting year.

The documentation supporting the applied transaction prices must be submitted within 90 days of the date of the competent authority's request.

### Transfer pricing penalties

Special penalties are in place for failure to comply with the documentation requirements established by the transfer pricing legislation (i.e., monitoring reporting and documentation supporting the transaction price). The maximum amount of penalty is set at approximately US\$2,600 (KZT693,700).

The penalty for an understatement of tax resulting from a transfer pricing adjustment is up to 50% of the additional accrued tax amount. In addition, interest for the delayed payment of the additionally assessed tax resulting from the transfer pricing adjustment is calculated at 2.5 times the National Bank refinancing rate.

Transfer pricing penalties are also imposed on individuals for personal liability of an administrative violation, including criminal liability if the tax amount misreported exceeds approximately US\$214,500 (KZT3,964,000). Such violations can result in an investigation by the Agency of the Republic of Kazakhstan on Civil Service Affairs and Anti-Corruption and in the prosecution of individuals who are held responsible for violations.

### Penalty relief

The legislation in Kazakhstan considers cases for penalty relief when an entity may be exempt from administrative liability. These cases, among others, include exemption from administrative liability in connection with active repentance, an insignificant violation, expiration of the statute of limitations and exemption on the basis of an act of amnesty. Despite legal provisions allowing for exemption, implementation is quite rare in practice.

### Statute of limitations on transfer pricing assessments

There is no specific statute of limitations on transfer pricing assessments. The general statute of limitations period for the assessment of penalties for underpayments of tax, understatements of income or overstatements of expenses is five years from the date of the relevant violation. Within the same statute of limitations period, the taxpayer has the right to introduce amendments and additions to its tax reporting.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a tax audit depends on the tax risk level assigned to a particular taxpayer. There are several criteria for determining the level of tax risk. The main criterion is the coefficient of the tax burden of the taxpayer. Depending on the level of risk, the tax authorities determine the frequency of tax audits to be conducted:

- ▶ For high level of risk – not more than one tax audit per annum
- ▶ For medium level of risk – not more than one tax audit in three years
- ▶ For low level of risk – not more than one tax audit in five years

The likelihood of transfer pricing issues being scrutinized during an audit and the tax authority challenging the transfer pricing methodology is high. The export of goods from Kazakhstan receives greater scrutiny. A review of the method, its use and the interpretation of information on market prices often results in transfer pricing adjustments that are often contested by taxpayers.

There are two types of tax audits in Kazakhstan that can cover transfer pricing issues: complex and thematic. A complex audit is aimed at checking whether tax obligations for all types of taxes and other obligatory payments for the fiscal year, including those related to transfer pricing, have been fulfilled or not. A complex tax audit can take place only once a year,

## Kazakhstan (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)**

while a thematic tax audit can be conducted once every six months and reviews only tax obligations on specific issues or taxes (e.g., transfer pricing issues).

### **APA opportunity**

Transaction participants are allowed to conclude an agreement on the application of transfer prices. The procedure for requesting such an agreement is included in the rules for concluding agreements on the application of transfer pricing,<sup>1</sup> and it discusses the following:

- ▶ List of documents required for concluding the agreement
- ▶ Procedure for consideration of a request by the authorized bodies (tax and customs authorities)
- ▶ Duration of the agreement (e.g., not more than three years from the date of signing)
- ▶ Other

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<sup>1</sup> Rules for concluding agreements on the application of transfer pricing, No. 1197 of 24 October 2011.

# Kenya

## **Taxing authority and tax law**

Taxing authority: Kenya Revenue Authority (KRA)

Tax law: Income Tax Act

## **Relevant regulations and rulings**

Section 18(3) of the Income Tax Act and the Income Tax (transfer pricing) Rules, 2006 (amended rules 2012) articulates the arm's-length principle and provides guidance about the definition of related persons. The transfer pricing guidelines apply to:

- ▶ Transactions between associated enterprises within a multinational company where one enterprise is located in, and is subject to tax in, Kenya and the other is located outside Kenya
- ▶ Transactions between a permanent establishment and its head office or other related branches in which the permanent establishment shall be treated as a distinct and separate enterprise from its head office and related branches

## **OECD Guidelines treatment**

The Income Tax (transfer pricing) Rules provide for the application of the OECD methods in determining the arm's-length pricing.

## **Documentation requirements**

The Commissioner for Domestic Taxes may, where necessary, request information, including books of accounts and other documents relating to transactions where transfer pricing is applied. Such documents shall include information relating to:

- ▶ The selection of the transfer pricing method and the reasons for the selection
- ▶ The application of the method, including the calculations made and price adjustment factors considered
- ▶ The global organization structure of the enterprise
- ▶ The details of the transaction under consideration
- ▶ The assumptions, strategies and policies applied in selecting the method
- ▶ Other background information regarding the transaction

The books of accounts and other documents shall be prepared in, or translated into, English at the time the transfer price is established.

When a taxpayer avers the application of arm's-length pricing, such taxpayer shall:

- ▶ Develop an appropriate transfer pricing policy
- ▶ Determine the arm's-length price as prescribed under the guidelines provided by these rules
- ▶ Furnish documentation evidencing their analysis upon request by the Commissioner for Domestic Taxes

## **Priorities/pricing methods**

Rule 4 of the aforementioned rules provides that a taxpayer may choose from among six methods when determining the arm's-length price: CUP, resale price, cost price, profit split, TNMM and any other method as the Commissioner for Domestic Taxes may prescribe.

In 2012, the transfer pricing rules were amended to give the Commissioner for Domestic Taxes power to prescribe the application of the above methods. The practice notes that the application of the methods is yet to be released by the KRA.

## Kenya (continued)

### Return disclosures/related party disclosures

According to the corporate tax return format, the taxpayer is required to declare the names and addresses of related parties outside of Kenya.

### Transfer pricing-specific returns

There are no specific transfer pricing returns for taxpayers.

### Documentation deadlines

The deadline for preparing documentation is the same as the deadline for filing the tax return (i.e., within six months after year-end). Appropriate documentation must be provided upon request.

### Transfer pricing penalties

There are no specific transfer pricing penalties. However, the Commissioner for Domestic Taxes can conduct an audit and make adjustments in the taxable profit and demand taxes, where applicable. Any tax due and unpaid in a transfer pricing arrangement is deemed to be an additional tax for the purposes of Sections 72D, 94 and 95(1) of the Income Tax Act.

- ▶ Section 72D of the Income Tax Act provides that a penalty of 20% shall immediately become due and payable on the unpaid tax after the due date.
- ▶ Section 94 of the Income Tax Act provides that a late payment interest of 2% per month – or part thereof – shall be charged on the tax amount, including the penalty remaining unpaid for more than one month after the due date, until the full amount is recovered.
- ▶ Section 95(1) provides that if the tax assessed on the total annual income of a person is greater than 10% of the estimated amount of chargeable tax on the taxpayer's provisional income tax return for that year, interest at the rate of 2% per month shall be payable on the entire difference between the tax assessed and the tax estimated.

### Penalty relief

Currently, there is no penalty relief available.

### Statute of limitations on transfer pricing assessments

According to Section 56(3) of the Income Tax Act, the statute of limitations for transfer pricing assessments is seven years after the relevant year of income, unless the Commissioner for Domestic Taxes has reasonable cause to believe that fraud or gross or willful neglect has been committed in connection with, or in relation to, tax for a year of income.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The taxing authority has intensified transfer pricing audits and has been issuing communications challenging already filed transfer pricing policies. The likelihood of occurrence of tax audits is high, as is the likelihood of a transfer pricing review as part of a general tax audit. The likelihood of the transfer pricing methodology being challenged in a transfer pricing review is high.

### APA opportunity

No specific APA rules are applicable.

# Kosovo

## **Taxing authority and tax law**

Tax authority: Tax Administration of Kosovo

Tax laws and ministerial instructions: Corporate Income Tax (CIT) law and Tax Administration and Procedures (tax procedures law)

## **Relevant regulations and rulings**

Tax laws and ministerial instructions that govern transfer pricing include:

- ▶ Law No. 03/L-162, dated 29 December 2009, on CIT law
  - ▶ Article 2, paragraph 1.18 – definition of related persons for CIT purposes
  - ▶ Article 27 – transfer pricing definition, transfer pricing methods
- ▶ Law No. 03/222, dated 12 July 2010, on tax procedures law
  - ▶ Article 1, paragraph 1.27 – definition of related persons
  - ▶ Article 1, paragraph 1.45 – definition of market value
  - ▶ Article 46 – tax authorities' right of transfer pricing adjustments
- ▶ Double taxation treaties enacted by Kosovo
- ▶ Administrative Instruction No. 14/2010, dated 19 November 2010, of the Ministry of Economy and Finance on CIT law
  - ▶ Section 20, paragraph 1 – transfer pricing application
  - ▶ Section 20, paragraph 1-8 – transfer pricing methods priority application
  - ▶ Section 20, paragraph 9 – transfer pricing documentation

## **OECD Guidelines treatment**

The Kosovan legislation on transfer pricing makes reference to the OECD Guidelines. The relevant regulatory framework for transfer pricing includes provisions of the CIT law and tax procedures law and the related instructions.

## **Documentation requirements**

Taxpayers that perform transactions with related parties must maintain sufficient supporting documentation to justify their transfer price determination method and to show that it is in line with the arm's-length principle. Such documentation should explain in detail the methodology used in arriving at the transfer prices applied.

## **Priorities/pricing methods**

The tax authorities generally follow the OECD Guidelines in examining related party transactions and transfer prices charged. However, contrary to the OECD best-method approach, the three traditional transactional methods are preferred, especially the CUP method. When profit split is more appropriate, because the activities of the transacting entity are highly integrated and the use of intangibles is incurred, the tax authorities may allow it to be used. A method of last resort is the TNMM.

## **Return disclosures/related party disclosures**

The current legislation does not provide for any return disclosures or related party disclosures. According to the Kosovan tax legislation, the taxpayer is not required to file any transfer pricing documentation with the tax authority.

Companies' financial statements include certain compulsory disclosures of related party transactions.

## Kosovo (continued)

### **Transfer pricing-specific returns**

Not applicable.

### **Documentation deadlines**

Not applicable.

### **Transfer pricing penalties**

The current legislation does not provide for specific penalties in case of transfer pricing adjustments. Therefore, in case of an adjustment, the general tax penalties would apply. Hence, a penalty of 50% would apply on the amount of unpaid tax liability due to the lower declared taxable profit. If the taxpayer decides to amend the transfer pricing position taken previously by filing an amended tax return, before a tax audit is initiated, then the penalty for the late filing imposed will be 5% of the unpaid liability for each month of delay, capped at 25%. Moreover, a penalty for late payment of the tax liability will apply at 1% thereof for each month of delay, capped at 12%. Both penalties do not apply cumulatively; rather, the late payment penalty starts applying to the extent that the unpaid liability has not been paid by the time the late-filing penalty reaches its ceiling. In both cases, default interest would apply, which should be, at a minimum, 0.5% higher than the bank lending interest rate in Kosovo.

### **Penalty relief**

Currently, no penalty relief is available.

### **Statute of limitations on transfer pricing assessments**

The statute of limitations on transfer pricing assessments is six years from the income tax return filing due date.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

Transfer pricing is audited in the general course of a corporate income tax audit. The likelihood of a tax audit in Kosovo is high for domestic and foreign groups of companies. Usually, a tax audit covers the last three to four years. Laws and relevant guidelines do not provide details on the contents of the documentation required to be kept by the taxpayer to substantiate the grounds on which the transfer prices applied are in line with the arm's-length principle. The tax administration is unlikely to challenge the methodology applied. In principle, in examining the arm's-length character of a transaction, the tax administration should use the same transfer pricing method applied by the taxpayer, to the extent that it is the most appropriate one for that transaction.

### **APA opportunity**

Kosovan legislation does not provide for the possibility of an APA.

# Kuwait

## Taxing authority and tax law

Taxing authority: Director of the Department of Inspections and Tax Claims (DIT)

Tax law: Kuwait Income Tax Decree

## Relevant regulations and rulings<sup>1</sup>

This includes Executive Bylaws of Law No. 2/2008 and Executive Rules and Instructions of Kuwait Income Tax Decree No. 3 of 1955, as amended by Law No. 2/2008. The Executive Rule No. 49, Concerning the tax treatment of related companies:

- ▶ Sets out the definition of "related parties"
- ▶ Incorporates the arm's-length standard into Kuwaiti domestic regulations
- ▶ Provides a clear basis for the tax authority to inspect companies dealing with related parties and verify whether the arm's-length standard was observed
- ▶ Gives the authorities effective rights to assess the respective profits of related parties in cases of "dividing the tax burden," tax avoidance, tax evasion or "reduction" of taxes

The definition of related parties is broad when compared with international standards. It covers companies that are "legally or financially associated, thus creating common interest." Further, the regulations provide for a non-exhaustive list of examples of related parties, covered by the definition (holding – subsidiary, head office – branch, associate companies). It needs to be stressed here that the definitions refer to "effective control" (whether resulting from shareholding or contractual arrangements) and "substantial influence" criteria.

The regulations do not provide any specific procedures to follow in transfer pricing inspections, implying that the general regulations pertaining to tax assessments apply.

The regulations do not list the methods that the tax authorities should follow, other than the general guidance that related party transactions should have "a sound base" and be "compared with what is usually conducted among companies which are not legally or financially associated."

In addition to the general framework described above, the domestic tax laws provide many specific, although provisional, anti-avoidance and safe-harbor regulations applicable in related party transactions. The mechanisms applied by the legislature here vary. A clear trend to tighten the tax system is observed. The measures adopted include fixed profitability ratios (deemed profit margins) and limitations on deducting costs.

For example, the executive regulations provide for the following with respect to related party transactions:

Material cost: The DIT deems the following profit margins (computed on the revenue from imported materials and equipment) on imported material cost:

- ▶ Imports from head office: 15%
- ▶ Imports from related parties: 10%
- ▶ Ratio for imports from third parties set at 5%

Design and engineering fees incurred abroad: The DIT deems the following profit margins (computed on the design revenue) for design expenses incurred outside Kuwait:

- ▶ Design work carried out by head office: 25%
- ▶ Design work carried out by the related parties: 20%
- ▶ Design work carried out by third parties: 15%

<sup>1</sup> Unless stated otherwise, all quotes and terms used herein are based on EY's translation from Arabic.

## Kuwait (continued)

### Relevant regulations and rulings (continued)

Consultancy fees incurred abroad: The DIT deems the following profit margins (computed on the consultancy revenue) on consultancy fees incurred outside Kuwait:

- ▶ Consultancy work carried out by head office: 30%
- ▶ Consultancy work carried out by related parties: 25%
- ▶ Consultancy work carried out by third parties: 20%

Related party leases: Lease expenses arising from assets rented from related parties are allowed as a deductible expense only after customs documents evidencing the value of the assets are presented to the DIT. The lease expenses will be limited to the amount of depreciation normally charged on the asset for its use in Kuwait.

The deduction of interest allocated by the head office may be disallowed for tax purposes in certain cases. Head-office cost allocation can be capped.

Intellectual property: The DIT would determine the reasonableness of charges from related parties for intellectual property based on supporting documents.

All of the above rules contain clauses allowing certain flexibility. The tax authority may decide on a different treatment upon consultation, depending on the circumstances of the case. These clauses, although rarely applied to the benefit of taxpayers so far, can be revoked in conjunction with the tax treaty regulations.

### OECD Guidelines treatment

The domestic regulations do not explicitly refer to the OECD Guidelines.

In practice, however, the likelihood of controversy and tax assessment decreases if the taxpayer refers to internationally accepted standards and the proper application of the method in a particular case is well documented.

### Documentation requirements

Currently, Kuwaiti tax regulations do not set any formal transfer pricing documentation requirements. Transfer pricing documentation should be drawn up and updated to limit the controversy exposure.

### Priorities/pricing methods

Domestic laws do not regulate the pricing methods. As mentioned above, the regulations offer general guidance in this respect. In practice, it may be useful in discussions with the DIT if the transfer pricing method used is based on internationally accepted principles and standards and the transfer pricing documentation shows that the taxpayer adhered to the method.

### Return disclosures/related party disclosures

The International Financial Reporting Standards are followed in Kuwait. This sets the basic related party disclosure standard and implies transparency in this regard.

The disclosure duties based on tax laws are very broad under the Kuwaiti regulations. There is a general obligation to disclose the transactions (obviously, including the related party transactions) in connection with tax retention duties. This implies that the tax authorities have access to a broad base of information pertaining to the level of prices agreed upon locally, both between related and non-related parties. In addition, the taxpayers are obliged to disclose some of the related party transactions as part of the annual corporate income tax return with respect to material cost, design and consultancy fees incurred; related party leases; intragroup financing; intellectual property; and other items. A special template must be used.

### Transfer pricing-specific returns

Kuwait does not require a separate return for related party transactions. A specific template covering selected related and non-related party transactions must be disclosed, together with the annual tax return.

## Kuwait (continued)

### Documentation deadlines

Currently, Kuwait does not have any formal documentation requirements and, hence, deadlines.

In practice, it is advisable to prepare and update the documentation before the annual inspection so that it can be admitted as evidence in the proceedings in a timely manner.

### Transfer pricing penalties

There are no specific penalties applicable in transfer pricing adjustments. Kuwait does not have specific penalties for failure to present the appropriate documentation. Penalty interest (1% per month) is imposed in the case of transfer pricing adjustments resulting in an assessment of additional income.

### Penalty relief

Kuwaiti tax regulations do not offer any penalty relief mechanisms.

### Statute of limitations on transfer pricing assessments

General regulations apply. Law No. 2 of 2008 provides a statute of limitations period of five years (generally, calculated from the date of filing the annual tax return, unless a tolling or discovery rule can be applied).

### Frequency of the tax audit and transfer pricing scrutiny by the tax authority

The Kuwaiti tax system is based on initial self-assessment followed by the mandatory audit of the tax return by the tax authority. This implies that, in essence, the DIT audits every submitted tax return, including any related party transactions.

The taxing authority adds special scrutiny for intercompany transactions relating to material supply cost, design and consultancy fees incurred abroad; related party leases; intragroup financing; and intellectual property. Here, the likelihood of challenging the transfer price or methodology is characterized as particularly high. Similarly, transactions pertaining to material assets disposal usually trigger the attention of the tax authority. The same applies when entities declare mid-term and long-term losses from their Kuwaiti operations.

### APA opportunity

There are no specific provisions allowing APAs in Kuwaiti domestic regulations.

# Laos

## **Taxing authority and tax law**

Tax authority: Tax Department

Tax law: Amended Tax Law No 21/NA, dated 20 December 2011

## **Relevant regulations and rulings**

There are no transfer pricing regulations in Laos.

Laos has concluded double tax treaties that are in effect with Brunei, China, Korea, Malaysia, Myanmar, Thailand and Vietnam.

## **OECD Guidelines treatment**

Not applicable.

## **Documentation requirements**

Not applicable.

## **Priorities/pricing methods**

In regulations, there are no specified pricing methods in Laos. In practice, the Tax Department may adopt a different pricing method, such as averaged or market prices.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

Not applicable.

## **Penalty relief**

Not applicable.

## **Statute of limitations on transfer pricing assessments**

Not applicable.

## **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The Laos Tax Department conducts annual tax audits and assessments after the corporate taxpayers submit their annual profits tax returns and financial statements in March of the following year. There is no specific transfer pricing audit in Laos.

## **APA opportunity**

Not applicable.

# Latvia

## **Taxing authority and tax law**

Tax authority: State Revenue Service

Tax law: Law on Corporate Income Tax and Law on Taxes and Duties

## **Relevant regulations and rulings**

The arm's-length principle is established in the Law on Corporate Income Tax. Article 12 of the Law on Corporate Income Tax determines that the taxable income of the taxpayer may be adjusted upward if related party transactions are not at arm's length. Transfer pricing documentation requirements are laid down in Article 15<sup>2</sup> of the Law on Taxes and Duties.

Cabinet Regulation No. 556, promulgated on 4 July 2006, set the transfer pricing methods applicable for determining arm's-length prices in related-party transactions. Additionally, specific Cabinet Regulations set requirements regarding the conclusion of APAs.

## **OECD Guidelines treatment**

Latvian transfer pricing legislative acts contain a reference to the OECD Guidelines in applying the transfer pricing methods. In most cases, the State Revenue Service accepts the principles stipulated in the OECD Guidelines regarding the structure of transfer pricing documentation.

## **Documentation requirements**

Taxable persons with an annual net turnover exceeding EUR1.43 million are obliged to prepare transfer pricing documentation for all related party transactions with an annual value of more than EUR14,300.

According to the Law on Taxes and Duties, transfer pricing documentation should contain:

- ▶ General overview of the industry - brief description of taxpayer's operations in recent years
- ▶ Organizational and legal structure of the taxpayer and related entity - description of internal relations
- ▶ Information about taxpayer's business strategy - market strategy, product distribution strategy and supply chain, as well as sales and management strategy that may affect the pricing policy of intercompany transactions
- ▶ Description of intangibles - any that may affect the transfer price, if any
- ▶ Information identifying operations between related companies - functions of the group members, including associated risks and assets employed; the role and responsibility of each group member involved in the transactions; and information regarding restructuring the taxpayer's operations resulting in the transfer (acquisition) of business functions, assets or risks to (from) a related party for a price compliant with the market price
- ▶ Description of the goods or services in the transactions - those between the taxpayer and related party
- ▶ Terms and conditions of the agreement - those concluded between the taxpayer and related party
- ▶ Forecast of taxpayer's operating activities - in relation to the agreement concluded with related entity
- ▶ Description of the selected transfer pricing method for testing compliance - for the price (cost) applied with a controlled transaction with the market price (cost)
- ▶ Depending on the selected transfer pricing method - financial analysis of comparable unrelated companies or analysis of price (cost) applied to comparable transactions between unrelated companies and compliance with the market price (cost)
- ▶ Other documents supporting the price (cost) applied to transactions between the taxpayer and related party - concluded agreements; documents justifying expenses; written resolutions; and decisions made in board, council, shareholder and other internal meetings

## Latvia (continued)

### Documentation requirements (continued)

For non-qualifying taxpayers (with net turnover and related party transaction with an annual value less than the statutory threshold), preparation of transfer pricing documentation is optional. However, they still should comply with the statutory requirement that controlled prices are at arm's length. In practice, it means that the taxpayer may provide the State Revenue Service with limited-scope transfer pricing documentation substantiating that prices applied to intercompany transactions are at arm's length.

### Priorities/pricing methods

Five methods are accepted: CUP, resale price, cost-plus, profit split and TNMM. If the CUP method may be appropriately applied, then it is deemed as the preferential transfer pricing method.

### Return disclosures/related party disclosures

Related party transactions must be disclosed in Appendix 2 of the Corporate Income Tax return. The taxpayer should disclose the related parties involved, the types of transactions (e.g., purchase or sale of goods, services or fixed assets), the volume of transactions and the transfer pricing methods applied.

### Transfer pricing-specific returns

There are no transfer pricing-specific returns in Latvia; however, related party transactions must be disclosed in Appendix 2 of the Corporate Income Tax return.

### Documentation deadlines

There is no deadline set for the preparation of the transfer pricing documentation, but the relevant documentation could be required during the State Revenue Service's tax audit. The tax audit may be initiated throughout the year; however, taxable income adjustments may take place after the corporate income tax return is filed (i.e., four to seven months after the end of the financial year). Transfer pricing documentation should be submitted within 30 days following a request by the State Revenue Service.

### Transfer pricing penalties

There is no specific penalty for not having transfer pricing documentation. When the prices applied in transactions between related parties are not at arm's length, the taxable income of the taxpayer may be adjusted upward and a penalty of approximately 20% to 30% and a late payment penalty (annual rate of 18%) on the additionally payable corporate income tax may be applied.

### Penalty relief

There is no specific penalty relief with respect to transfer pricing adjustments. Per ordinary procedure, a penalty imposed as the result of a tax audit may be reduced by 50%. In practice, having proper transfer pricing documentation reduces the risk of transfer pricing adjustments.

### Statute of limitations on transfer pricing assessments

The State Revenue Service has the right to assess the tax of local transactions within three years and cross-border transactions within five years after the tax becomes due.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

Small and medium taxpayers in Latvia have a medium risk that they will be subject to a general tax audit, while large taxpayers have a high risk of audit. All taxpayers are exposed to a high risk that transfer pricing will be reviewed as a part of an audit. In addition, there is a medium risk for all taxpayers that if transfer pricing is reviewed as a part of the audit, the transfer pricing methodology will be challenged.

## Latvia (continued)

### **APA opportunity**

A taxpayer has an opportunity to conclude an APA between the taxpayer and the State Revenue Service for cross-border transactions with a related foreign company when the transactions exceed EUR1.43 million during a period of 12 months.

There are specific Cabinet Regulations regarding an APA that specify the information to be included in an APA application, describe the procedure and time frame for concluding an APA, and set the fee for filing an APA.

# Lebanon

## **Taxing authority and tax law**

Tax authority: Ministry of Finance

Tax law: Law 44 tax procedure law dated 11 November 2008/Income tax law dated 12 June 1959

## **Relevant regulations and rulings**

The Lebanese tax regulation regarding transfer pricing is still not elaborated and clear.

Article 15 of the Income Tax Law states that, if it appears that establishments belonging to establishments located outside Lebanon transfer part of their profits abroad either by increasing or decreasing purchase or sale prices, or otherwise, the profits so transferred shall, for taxation purposes, be added to the profits shown in the accounts. Without sufficient evidence to enable the real profits to be determined, the profits of a similar establishment shall be taken as a basis for comparing and determining the profit, in addition to the apparent indications and particulars gathered by the competent financial authorities.

In addition, the Parliament raised the tax procedures law in 2008. Article 10 of that law states that the tax authority has the right to reclassify certain transactions in the following instances:

- ▶ Virtual transaction for the purpose of tax evasion
- ▶ Legal transaction in form but for the purpose of tax evasion
- ▶ Transactions between related parties if these transactions are not at arm's length

### **Virtual transaction**

According to Article 12 of the legislative decree no 2488 dated 3 July 2009 which determines the application of article 10 mentioned above, a transaction is considered virtual, when its value differs by 20% from the arm's-length value of similar transaction occurring between two non-related parties with the same competing conditions.

### **Arm's-length value**

"Arm's-length value" is defined by the tax authorities under Decision No 453/1, dated 22 April 2009, as the value of a similar transaction that occurs between independent persons and under complete competitive conditions that took place on the day of the transaction.

Individuals are considered related if any of them hold the authority of supervision, management or control over the other or if they are related by other means such that one party is an employee of the other or if any one of them is a guardian for the other.

Individuals and entities are considered related when any one of them has the authority of supervision and management over the other.

Entities are considered related if one entity has the authority of supervision and management over one or several other entities.

### **Tax evasion**

The tax authorities defined "tax evasion" as each action a taxpayer takes to reduce or eliminate the tax due, to postpone the tax due dates, or to increase the amount of deductible or refundable tax when it is prohibited.

## **OECD Guidelines treatment**

Not applicable.

## **Documentation requirements**

Not applicable.

## Lebanon (continued)

### **Priorities/pricing methods**

Not applicable.

### **Return disclosures/related party disclosures**

Not applicable.

### **Transfer pricing-specific returns**

Not applicable.

### **Documentation deadlines**

Not applicable.

### **Transfer pricing penalties**

Not applicable.

### **Penalty relief**

Not applicable.

### **Statute of limitations on transfer pricing assessments**

Not applicable.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

Not applicable.

### **APA opportunity**

Not applicable.

# Libya

## **Taxing authority and tax law**

Taxing authority: Tax Department of the Ministry of Finance

Tax law: Income Tax Law (Law 7/2010)

## **Relevant regulations and rulings**

Currently, there are no local transfer pricing regulations in Libya, but Libya has concluded around 17 tax treaties that contain an article resembling Article 9 of the OECD Model Treaty on "Associated Enterprises."

## **OECD Guidelines treatment**

Not applicable.

## **Documentation requirements**

Not applicable.

## **Priorities/pricing methods**

Not applicable.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

Not applicable.

## **Penalty relief**

Not applicable.

## **Statute of limitations on transfer pricing assessments**

Not applicable.

## **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

Not applicable.

## **APA opportunity**

Not applicable.

# Lithuania

## Taxing authority and tax law

Taxing authority: Ministry of Finance of the Republic of Lithuania and the State Tax Inspectorate

Tax law: Law on Corporate Income Tax of Lithuania

## Relevant regulations and rulings

The arm's-length principle is established in the Law on Corporate Income Tax of Lithuania and its implementation rules, introduced in 2004.

- ▶ Article 40 of the Law on Corporate Income Tax of Lithuania
- ▶ Order of the Minister of Finance No. 1K-123 as of 9 April 2004 on transfer pricing evaluation and documentation rules
- ▶ Order of the Head of the State Tax Inspectorate No. VA-27 as of 22 March 2005 on the associated party transaction disclosure in the annual corporate income tax return

## OECD Guidelines treatment

The use of the OECD Guidelines is explicitly advocated in the regulations and rulings applicable in Lithuania.

Other OECD papers, such as those regarding business restructurings and profit allocation to permanent establishments, are not explicitly implemented in the Lithuanian legislation.

## Documentation requirements

The transfer pricing documentation requirements are binding for resident and nonresident legal entities registered as corporate income taxpayers in Lithuania whose revenues in Lithuania in the year before the transactions were conducted exceeded EUR2.9 million.

In addition, transfer pricing documentation requirements apply to credit institutions, such as banks and entities providing financial services (e.g., insurance companies), regardless of their revenue amount.

The transfer pricing documentation has to contain:

- ▶ Details of the transactions
- ▶ Terms and conditions of the transactions
- ▶ Participants in the transactions, including their legal and organizational structure
- ▶ Functions performed, property used or contributed, and the risks assumed by the parties
- ▶ Data and methods considered and the analyses performed to determine the transfer prices
- ▶ All relevant assumptions, strategies and policies that influenced the determination of the methods applied

In general, the principles in the OECD Guidelines are to be followed.

## Priorities/pricing methods

The CUP method is preferred over other pricing methods. In cases where the CUP method cannot be reliably applied, other transaction-based methods, such as resale price or cost-plus, shall be used.

Taxpayers are encouraged to use profit-based methods only if transaction-based methods are not sufficient. Taxpayers are not required to use more than one method; however, a combination of methods may be used in all cases, provided the decision to apply any particular method is adequately supported.

## Lithuania (continued)

### **Return disclosures/related party disclosures**

An associated-party disclosure annex (Form FR0528) to the annual corporate income tax return has to be submitted when the taxpayer's associated-party transactions exceed an annual value of approximately EUR90,000. On Form FR0528, taxpayers are required to provide information about the transactions between associated parties related to fixed tangible and intangible assets, stocks and goods, financial and other services, securities and derivatives, rent of property and loans. The taxpayers are also required to inform the tax authorities whether any transfer pricing method prescribed in the transfer pricing rules have been used in the transactions disclosed.

### **Transfer pricing-specific returns**

The rules for completing the associated-party disclosure form (Form FR0528) are set forth in the Order of the Head of the State Tax Inspectorate No. VA-27 as of 22 March 2005. Form FR0528 must be submitted within six months of the end of each tax period. No other transfer pricing-specific returns shall be provided to the Lithuanian tax authorities.

### **Documentation deadlines**

There are no specific requirements or schedules for preparing transfer pricing documentation. Taxpayers must submit the transfer pricing documentation within 30 days of the corresponding notice by the tax authorities.

### **Transfer pricing penalties**

There are no specific transfer pricing penalties. General tax penalties of 10% to 50% of the additional tax are applicable in the case of taxable income adjustments. Moreover, penalty interest will apply.

There are no special penalties related to not providing transfer pricing documentation at the request of the tax authorities.

### **Penalty relief**

Transfer pricing penalties are subject to general penalty relief rules.

### **Statute of limitations on transfer pricing assessments**

Transfer pricing assessments may occur during the five years prior to the year in which the assessment takes place.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

In general, the likelihood of a tax audit is characterized as medium. General tax audits are conducted at the discretion of the tax authorities. The likelihood that transfer pricing will be reviewed as part of an audit is characterized as high. Transfer pricing is high on the agenda during the tax audit. Transfer pricing documentation is always requested and analyzed. The likelihood that the transfer pricing methodology will be challenged is characterized as high. Tax authorities make an independent analysis of a taxpayer's tax position and analyze both documentation and factual results. Adjustments have been applied much more frequently than in previous years.

### **APA opportunity**

As of 1 January 2012, taxpayers may conclude unilateral APAs with the Lithuanian tax authorities on prospective transactions. Bilateral or multilateral APAs may be concluded based on existing tax treaties for avoiding double taxation.

# Luxembourg

## Taxing authority and tax law

Tax authority: Luxembourg Tax Authority (*Administration des Contributions Directes*)

Tax law: Income Tax Law (ITL), General Tax Law

## Relevant regulations and rulings

The Luxembourg ITL contains two articles relating to transfer pricing: Article 56 ITL on the Arm's-Length Principle and Article 164(3) ITL on Hidden Profit Distribution. Both articles provide for the application of the arm's-length standard for transactions between related parties.

The previous legislation (Article 56 ITL) enables the tax authorities to adjust the taxable income of a Luxembourg enterprise in case of profit shifting abroad. Furthermore, Article 164(3) ITL allowed for the assessment of a hidden dividend distribution when abnormal advantages are granted to shareholders, members or interested parties. The aforementioned provisions did not, however, directly reflect the arm's-length principle. A specific definition closely linked to Article 9, Paragraph 1 of the OECD Model Tax Convention became necessary, given the increased importance of transfer pricing in the current international context. Article 56 ITL was reworded and is now entirely dedicated to the arm's-length principle. In its new wording (applicable 1 January 2015), profits of associated enterprises entering into transactions that do not meet the arm's-length principle will be determined according to normal market conditions and taxed accordingly. Based on this wording, both upward and downward adjustments are possible. Furthermore, this provision applies to domestic and cross-border transactions.

The commentaries of the law specify that the arm's-length principle is applicable to any taxpayer, regardless of the legal form under which it exercises its activities in Luxembourg. Therefore, not only will this provision cover tax opaque collective undertakings and tax transparent partnerships, but also individual and collective undertakings without legal form.

Since Article 56 ITL grants the possibility to adjust the profits declared by a taxpayer, it is necessary to determine if the conditions of a controlled transaction (i.e., a transaction between associated enterprises) are consistent with the arm's-length principle and what quantum of adjustment has to be made to achieve the arm's-length principle. To assess this, a comparability analysis may be required, which consists of comparing controlled transactions with uncontrolled transactions (i.e., transactions between independent parties). The commentaries to the law also refer to the OECD Guidelines, designed to be observed by multinationals as well as tax authorities in matters of transfer pricing between related parties involved in cross-border transactions.

The Luxembourg Tax Authority had already issued two circulars, on 28 January 2011 (Circular LIR No. 164/2) and on 8 April 2011 (Circular LIR No. 164/2 bis), regarding the tax treatment applicable to companies carrying out intragroup financing activities.

Circular LIR No. 164/2 clarifies, in broad terms, that the OECD Guidelines should be used as a reference when determining the arm's-length remuneration to be realized by companies carrying out intragroup financing activities. Moreover, it explains the substance requirements to be met by these entities and defines the procedure to follow to obtain clearance from the Luxembourg Tax Authority on the arm's-length remuneration of the financing activities. Circular LIR No. 164/2 bis clarifies the effect of Circular LIR No. 164/2 on intragroup financing transactions set up prior to its issuance. Notably, it provides a grandfathered period up through 31 December 2011 for clearances issued prior to 28 January 2011, and for companies to comply with the requirements of Circular LIR No. 164/2.

## OECD Guidelines treatment

The OECD Guidelines are not officially incorporated into Luxembourg tax law. Nevertheless, the commentaries to the 2015 Budget Law modifying Article 56 of the Income Tax Law refer to the OECD Guidelines being designed to be observed by multinationals, as well as tax authorities in matters of transfer pricing between related parties involved in cross-border transactions. The reference to the OECD Guidelines for assessing the arm's-length character of intercompany transactions had already been confirmed in Circular LIR No. 164/2 about intragroup financing transactions.

Considering that OECD Guidelines are not incorporated into Luxembourg's income tax law, the arm's-length nature of intercompany transactions may also be established with reference to other generally accepted transfer pricing guidelines or regulations.

## Luxembourg (continued)

### **OECD Guidelines treatment (continued)**

Luxembourg tax law includes general documentation requirements but does not provide specific transfer pricing documentation regulations. The General Tax Law has been amended to extend the existing general obligation of taxpayers so they can justify the data contained in their tax returns with appropriate information and documentation (codified in §171 of the General Tax Law) for transfer pricing matters. This provision is reinforced by a third paragraph clarifying that the general documentation requirements set forth by this provision also apply to transactions between associated enterprises.

In the absence of further guidance, one could rely on the OECD Guidelines (referred to in the commentary to the law) and the Practical Manual on Transfer Pricing for Developing Countries issued by the United Nations to get an indication of what types of documentation a taxpayer may be required to provide. Reference is also made to the European Council's Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the European Union, dated in 2006, aimed at harmonizing the transfer pricing documentation that multinationals have to provide to tax authorities.

### **Priorities/pricing methods**

There are no specific pricing methods mentioned in the ITL. All methods advocated by the OECD are acceptable under the current administrative practice, such as the CUP, resale price, cost-plus, TNMM and profit split methods. There are no priorities established between the different methods.

### **Return disclosures/related party disclosures**

There are no specific disclosures required when filing tax returns. It is, however, a common practice that transactions with related parties are detailed by nature and by related party in a schedule attached to the tax returns.

### **Transfer pricing-specific returns**

Currently, there are no specific requirements for transfer pricing-specific returns.

### **Documentation deadlines**

As a general rule, contemporaneous documentation should exist when transactions are carried out. That rule also applies to transfer pricing documentation. Since the tax law does not contain specific transfer pricing documentation regulations, Luxembourg's tax law does not include a deadline to produce transfer pricing documentation. As mentioned above, taxpayers must be able to justify the data contained in their tax returns with appropriate information and documentation. The tax authority may request, in the context of assessing the tax return or in the context of a tax audit, that transfer pricing documentation be provided within a certain time frame. Such time frame may be as short as 14 days, but may be extended upon request.

### **Transfer pricing penalties**

To the extent that the arm's-length standard is not respected, the tax authority may reassess or adjust the taxable result, but no penalties are set forth in the tax law for cases in which such adjustments are made.

### **Penalty relief**

Since there are no specific transfer pricing penalties in the tax law, there are no specific provisions for penalty reductions.

### **Statute of limitations on transfer pricing assessments**

There are no specific limitations on transfer pricing adjustments; rather, the general rules apply. The statute of limitations is, in principle, five years starting from 1 January of the calendar year following the relevant tax year. In cases where no tax return or an incomplete tax return is filed, as well as in cases of fraud, the statute of limitations is extended to 10 years. Moreover, once a Luxembourg company has been assessed for income and net wealth tax purposes for a particular year, the tax authority may not reassess the relevant tax year, unless they have obtained new information and the statute of limitations has not yet expired. As long as the tax authority has issued a provisional tax assessment, the taxable base may still be adjusted after the provisional assessment is issued, until the statute of limitations has expired.

## Luxembourg (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

There are no specific rules regarding transfer pricing audits in Luxembourg. Transfer pricing normally should be reviewed as part of a regular tax audit. The risk of transfer pricing being reviewed under a tax audit is characterized as medium.

The tax authority has the right to carry out an audit during the statute of limitations period until final income tax assessments are issued.

### **APA opportunity**

The General Tax Law (*Abgabenordnung*) includes a provision (Paragraph 29a) dedicated to the tax ruling practice (*procédure des décisions anticipées*). This provision reflects and formalizes the administrative practice applied in the past, enabling taxpayers to obtain up-front legal certainty. The aim is also to provide a harmonized and uniform application of the tax laws across the various taxation offices and increased transparency toward foreign tax authorities.

The Circular Letter LIR No. 164/2, dated 28 January 2011, further formalizes the issuance of APAs for intragroup financing transactions (i.e., activities consisting of granting loans or advances to associated enterprises funded through the issuance of public or private loans, advances or bank loans).

In the current context of tax transparency and considering the various European and OECD projects and actions, it is also understood that tax rulings and APAs may be subject to an exchange of information, in particular with tax authorities of other European Union Member States.

# Malaysia

## **Taxing authority and tax law**

Taxing authority: Inland Revenue Board (IRB)

Tax laws: Income Tax Act, 1967 (ITA)

## **Relevant regulations and rulings**

### **Transfer pricing provision**

- ▶ Section 140A of the ITA: Power to substitute the price and disallowance of interest on certain transactions
- ▶ Section 138C of the ITA: Advance pricing arrangement
- ▶ Income Tax (Transfer Pricing) Rules 2012 (P.U. [A] 132)
- ▶ Income Tax (Advance Pricing Arrangement) Rules 2012 (P.U. [A] 133)

### **General anti-avoidance provision**

- ▶ Section 140 of the ITA: Power to disregard certain transactions if not deemed arm's length

### **Transactions by nonresident**

- ▶ Section 141 of the ITA: Powers regarding certain transactions by nonresidents

### **Time bar period**

- ▶ Section 91(5) of the ITA: Time bar for income tax assessment in relation to transfer pricing adjustments

The IRB released the 2012 Malaysian transfer pricing guidelines in May 2012, superseding the original Malaysian transfer pricing guidelines issued in 2003. The transfer pricing guidelines set out further guidance in relation to applying the transfer pricing legislation in Malaysia (i.e., Section 140A and the transfer pricing rules).

In addition, the IRB issued the Malaysian APA guidelines in July 2012 to provide guidance on applying APAs in Malaysia. The APA rules set out the legal provisions pertaining to applying for unilateral and bilateral APAs in Malaysia.

These 2012 transfer pricing and APA rules had a retroactive effective date of 1 January 2009.

## **OECD Guidelines treatment**

The 2012 Malaysian transfer pricing guidelines are largely based on the governing standard for transfer pricing, which is the arm's-length principle as established in the OECD Guidelines. The IRB respects the general principles of the OECD Guidelines.

## **Documentation requirements**

Contemporaneous documentation pertaining to transfer pricing need not be submitted with the tax return, but it should be made available to the IRB upon request. All relevant documentation must be in, or translated into, Bahasa Malaysia (the national language) or English.

Contemporaneous transfer pricing documentation should include records and documents providing a description of:

- ▶ Organizational structure, including an organization chart covering persons involved in a controlled transaction
- ▶ Nature of the business or industry and market conditions
- ▶ The controlled transaction
- ▶ Strategies, assumptions and information regarding factors that influenced the setting of any pricing policies
- ▶ Comparability, functional and risk analysis
- ▶ Selection of the transfer pricing method
- ▶ Application of the transfer pricing method

## Malaysia (continued)

### Documentation requirements (continued)

- ▶ Documents that provide the foundation for, or otherwise support or were referred to in, developing the transfer pricing analysis
- ▶ Index to documents
- ▶ Any other information, data or document considered relevant by the person to determine an arm's-length price

### Priorities/pricing methods

The IRB accepts CUP, resale price, cost-plus, profit split and TNMM. However, the Malaysian transfer pricing rules state that the traditional methods are preferred over the profit methods and advise that the profit methods should be used only when the traditional methods cannot be reliably applied or cannot be applied at all.

### Return disclosures/related party disclosures

Taxpayers are required to disclose in a tax return if transfer pricing documentation has been prepared. This compliance requirement is effective from the year of assessment in 2014.

Disclosure of arm's-length values is required in the tax return for the following transactions:

- ▶ Sales to related companies
- ▶ Purchases from related companies
- ▶ Other payments to related companies, lending to and borrowing from related companies
- ▶ Receipts from related companies

### Transfer pricing-specific returns

In July 2011, the IRB started requiring a form related to information on cross-border transactions, from selected corporate taxpayers, requesting the following information for a given year:

- ▶ Names of ultimate holding company; holding companies; subsidiaries, both local and foreign; and affiliates in Malaysia
- ▶ A chart of the global corporate structure to which the taxpayer belongs, including ultimate holding companies, direct and indirect subsidiaries, associated companies and other related parties, indicating the companies with whom the taxpayer conducts related party transactions
- ▶ Information about cross-border intercompany transactions, such as:
  - ▶ Sales and purchases of stock in trade, raw materials and other tangible assets
  - ▶ Royalties and license fees and other payments for the use of intangible assets
  - ▶ Management fees, including fees and charges for financial, administrative, marketing and training services
  - ▶ Research and development
  - ▶ Rent and lease of assets
  - ▶ Interest
  - ▶ Guarantee fees
  - ▶ Other services not falling under any of the above categories
- ▶ Particulars of financial assistance (showing balances during the year and the ending balance) with related companies outside Malaysia, such as:
  - ▶ Interest-bearing loans
  - ▶ Interest-bearing trade credit
  - ▶ Interest-free loans

## Malaysia (continued)

### Transfer pricing-specific returns (continued)

- ▶ Description of the taxpayer's business activity:
  - ▶ Manufacturing (toll, contract, full-fledged)
  - ▶ Distributor (commissionaire, limited risk, full-fledged)
  - ▶ Service provider
  - ▶ Others (taxpayer to specify)
- ▶ Specification of the industry in which they operate and associated industry code
- ▶ Confirmation of whether they have prepared transfer pricing documentation for the relevant year

The issuance of Form MNE 2012 is an indication of the IRB's increasing attention to transfer pricing. The purpose of the form is to assess taxpayers' risk profiles, as well as their level of compliance with the transfer pricing provisions. The form initially will be issued to selected corporate taxpayers to gather information about the basis period for the 2009 year of assessment, and taxpayers will be given 30 days to complete and return the form to the IRB. In the future, it is expected that the form will be issued to selected corporate taxpayers before they file their annual income tax returns.

### Documentation deadlines

Contemporaneous transfer pricing documentation is defined as transfer pricing documentation brought into existence:

- ▶ When a person is developing or implementing any controlled transaction
- ▶ Where in a basis period for a year of assessment the controlled transaction is reviewed and there are material changes, the documentation shall be updated prior to the due date for furnishing a return for that basis period for that year of assessment

Transfer pricing documentation should be made available for submission to the IRB upon request.

### Transfer pricing penalties

There are no specific penalties for transfer pricing. However, the existing legislation and penalty structure under Section 113(2) of the ITA, *Penalty for incorrect return, incorrect information*, is applied with penalties that are 100% of the undercharged tax.

### Penalty relief

There are no specific transfer pricing documentation penalties in the legislation. However, the guidelines stipulate penalties of 35% on the balance of tax undercharged where no transfer pricing documentation is prepared, 25% where documentation is not prepared in accordance with the guidelines, and no penalties apply where contemporaneous transfer pricing documentation is prepared.

### Statute of limitations on transfer pricing assessments

There is a seven-year statute of limitations for additional assessment issued pursuant to transfer pricing adjustments, and documentation must be kept for seven years. There is no statute of limitations in instances of fraud, willful default or negligence.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

Tax audits, including transfer pricing audits, are normally conducted to cover a period of three to five years (transfer pricing audits increased to seven years under Section 91(5) of the ITA). As such, the risk of a taxpayer being subjected to an annual audit could be characterized as medium.

For companies with related party transactions, the likelihood that transfer pricing will be reviewed is characterized as high; every multinational corporation that was audited during the last 12 months had its transfer pricing policy scrutinized.

## Malaysia (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)**

As mentioned above, the IRB has indicated via the transfer pricing rules and guidelines that the traditional methods are preferred over the profit methods, and it advised that the profit methods should be used only when the traditional methods cannot be reliably applied or cannot be applied at all. Accordingly, if a profits-based method is applied without substantiation, the risk of the methodology being challenged is high.

### **APA opportunity**

The introduction of Section 138C of the ITA effectively formalizes the availability of unilateral and bilateral APAs in Malaysia. Additionally, formal APA rules and guidelines in relation to APAs have been issued, and a specific unit in the IRB to oversee the APA applications and negotiations has been established.

# Maldives

## **Taxing authority and tax law**

Taxing authority: Maldives Inland Revenue Authority (MIRA)

Tax law: Business Profit Tax Act

## **Relevant regulations and rulings**

The Maldives Law No. 5 of 2011 (Business Profit Tax Act) contains transfer pricing provisions under the Tax Avoidance section. This section applies when the computation of the taxable profits of a person for a tax year takes into account a transaction entered into directly or indirectly between that person and another person and those two persons are associated with each other.

MIRA either may disregard or apply arm's-length terms in assessing tax.

In the Business Profit Tax Act, persons are associated if:

- ▶ One controls the other or both are controlled by the same person
- ▶ One is relative of the other

A person is relative of another if he or she is:

- ▶ The individual's spouse
- ▶ A brother, sister, parent, grandparent or child of the individual or the individual's spouse
- ▶ A spouse of a person listed above, and a child includes a stepchild

## **OECD Guidelines treatment**

In general, the transfer pricing requirements follow the OECD Guidelines.

## **Documentation requirements**

There are no specific documentation requirements.

## **Priorities/pricing methods**

The arm's-length price is determined on the basis of a comparison with similar goods or services provided between unrelated parties.

## **Return disclosures/related party disclosures**

The following information should be disclosed in the final business profession tax (BPT) return:

- ▶ Related party expenses other than directors' remuneration
- ▶ Loan interest payable to related parties for the period

In addition to the above, related party disclosures must be made in the notes to the audited financial statements, which are filed with the MIRA in support of the tax declaration.

## **Transfer pricing-specific returns**

There currently is no requirement to prepare a separate tax return for related party transactions.

## **Documentation deadlines**

There are no documentation deadlines.

## Maldives (continued)

### Transfer pricing penalties

Financial penalties in the form of interest and fines shall be imposed for noncompliance with business profit tax rules and may apply in the case of a deficiency assessment due to transfer pricing adjustments.

### Penalty relief

There are no penalty relief provisions in place.

### Statute of limitations on transfer pricing assessments

The MIRA may serve a notice of inquiry to the taxpayer within 12 months from the date of submission of the return for business profits taxes and could conduct tax assessments up to three years from the date of the service of the notice of inquiry.

A transfer pricing assessment is part of the regular business profits tax assessments conducted by the MIRA. The MIRA may conduct a tax audit for all taxes or certain types of taxes only (i.e., withholding tax (WHT), goods and services tax (GST) or BPT). The tax audit covers a "tax period," which may be annual (usually the case for BPT) or monthly (usually the case for WHT and GST). After an audit is completed, a tax assessment is issued. However, if new relevant data or information subsequently is discovered after an assessment has been issued, the MIRA may revisit a tax period that previously has been audited. Data or information that was not previously disclosed during the tax audit process would be considered new data or information.

In cases where a taxpayer has deliberately or fraudulently evaded tax, a notice of inquiry may be served within three years of the date on which sufficient information becomes available to the MIRA.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The MIRA conducts a tax audit of tax returns that are submitted, and the likelihood of a review of transfer pricing as part of the regular audit is medium to high. The likelihood of a challenge to the transfer pricing methodology, however, is characterized as low to medium, provided that sufficient documentation is available.

During the income tax review process, the MIRA will likely demand the documentation supporting the transfer prices of intercompany transactions.

### APA opportunity

There is no APA program available.

# Malta

## **Taxing authority and tax law**

Taxing authority: Commissioner for Revenue (CfR)

Tax law: Main tax laws transpire from Income Tax Act (ITA) and Income Tax Management Act (ITMA)

## **Relevant regulations and rulings**

The transfer pricing concept is recognized in a number of articles in the ITA and ITMA, notably sub-articles 5(6) and 5(7) of the ITMA.

## **OECD Guidelines treatment**

Agreements between associated enterprises must be entered into at arm's length, but Malta's transfer pricing rules are not very detailed.

## **Documentation requirements**

Not applicable.

## **Priorities/pricing methods**

The Government has no specified preference as to the priority of methods. However, the cost-plus method is an acceptable pricing method.

## **Return disclosures/related party disclosures**

Such information is required to be disclosed as part of the income tax return of the taxpayer.

## **Transfer pricing-specific returns**

Malta does not require a separate return for related party transactions. Each company is required to file a income tax return, including information about related party transactions.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

An incorrect transfer pricing structure could result in a tax assessment. Please refer to the section below for more details regarding penalties for omission.

## **Penalty relief**

When a taxpayer amends an omission from a return by delivering a further return (i.e., an adjustment) before that taxpayer is notified by the CfR that an inquiry will be conducted into the taxpayer's tax declarations and liabilities, and the further return is delivered to the CfR within 12 months after the relative tax return date, such taxpayer is not subject to any additional tax other than the interest payable on the late settlement of the endangered tax.<sup>1</sup>

If a further return is delivered to the CfR 12 months after the relative tax return date, but the CfR has not yet issued a notification in writing, the rate of additional tax for that omission shall be 0.1% per month of the endangered tax.

<sup>1</sup> Endangered tax means the difference between the tax declared to be chargeable by the taxpayer after taking into account any exemption, relief, allowance or tax credits to which the taxpayer may be entitled and the tax actually chargeable after considering the same, but shall not include any additional tax.

## Malta (continued)

### **Penalty relief (continued)**

If a further return is delivered to the CfR after it issues a notification in writing, and the taxpayer is not notified with an assessment in which additional tax is charged for that omission, the rate of additional tax for that omission shall be 0.75% per month of the endangered tax.

If a further return is not delivered to the CfR after it issues a notification in writing, and the taxpayer is notified with an assessment in which additional tax is charged for that omission, the rate of additional tax for that omission shall be 1.5% per month of the endangered tax.

### **Statute of limitations on transfer pricing assessments**

The time limit of when the tax authority can assess tax and any applicable penalties for transfer pricing is six years. But in cases of evasion or fraud, the time limit for raising an assessment is open-ended.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The likelihood of an annual tax audit in general is low. The likelihood that transfer pricing will be reviewed as part of that audit and the likelihood that the transfer pricing methodology will be challenged are low.

### **APA opportunity**

Malta does not have an APA process.

# Mauritius

## **Taxing authority and tax law**

Taxing authority: Mauritius Revenue Authority (MRA)

Tax law: Income Tax Act 1995 (ITA 1995)

## **Relevant regulations and rulings**

There are no relevant transfer pricing regulations. Under Section 159 of the ITA 1995, any person may apply for an advanced ruling. The MRA should issue the ruling within 30 days of the receipt of the application.

## **OECD Guidelines treatment**

Since Mauritius does not have any specific transfer pricing laws, this question is not applicable. Based on experience with the MRA, the OECD Guidelines have been used to determine the arm's-length price.

## **Documentation requirements**

As Mauritius does not have any transfer pricing laws, there is nothing specific that the MRA prescribes or requests through its statement of practice. It is recommended that all supporting documents, such as comparable data and basis of allocation of profits, be maintained.

## **Priorities/pricing methods**

Not applicable.

## **Return disclosures/related party disclosures**

The taxpayer should advise only if related party transactions have been made at arm's length.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

The MRA has up to five years from the submission of the tax return to issue a notice of assessment. The time frame to keep any documents under the Mauritian corporate laws is seven years. At a minimum, it is suggested to maintain records for seven years. The time limit of five years will be reduced to four years further to the amendment made by the Finance (Miscellaneous Provisions) Act 2015 (FMPA 2015). To date, the amendment made by the FMPA 2015 has not yet been proclaimed.

## **Transfer pricing penalties**

Even though Mauritius does not have any transfer pricing laws, the MRA can challenge intercompany transactions. The penalty for any late payment of tax is 5%, and monthly interest at the rate of 1% applies.

## **Penalty relief**

The Director-General of the MRA is empowered to waive any interests and penalties when he is satisfied that the error is attributable to a just or reasonable cause.

## **Statute of limitations on transfer pricing assessments**

While there is no transfer pricing laws in Mauritius, the MRA may challenge intercompany transactions and has up to five years from the submission of the tax return to issue a notice of assessment. In the case of fraud and willful neglect, the time limit of five years does not apply.

## Mauritius (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The likelihood of an annual tax audit is medium. The likelihood that transfer pricing will be reviewed as part of that audit is also medium. The likelihood that the transfer pricing methodology will be challenged is high.

### **APA opportunity**

Under the Mauritian tax laws, an advance ruling is possible.

# Mexico

## Taxing authority and tax law

Tax authority: Servicio de Administracion Tributaria (SAT)

Tax law: Income Tax Law (ITL)

## Relevant regulations and rulings

A single Central Transfer Pricing (Audits) Administration, within SAT, is responsible for enforcing the transfer pricing rules in Mexico for both (a) audits and (b) transfer pricing rulings (APAs) and MAP relief.

The Ministry of Finance issues tax legislation, the Congress approves it. The SAT regularly publishes administrative regulations and administrative rules. Increasingly, more regulations deal with intercompany transactions.

- ▶ ITL, Articles 27-V, 28 (XVII, XVIII, XXVII and XXIX): deductibility requirements and limitations for payments to domestic or foreign related parties under specific circumstances
- ▶ ITL, Article 76 (IX, X and XII): taxpayer obligations for arm's-length pricing (all), contemporaneous transfer pricing documentation (cross-border), transfer pricing disclosure (cross-border), ITL (Article 180) method application (all), accounting records (all)
- ▶ ITL, Article 184: statement of the arm's-length principle, right of the tax authority to adjust to arm's-length result, related party definition (OECD)
- ▶ ITL, Article 179: comparability, business cycles, permanent establishments and transfer pricing, tax havens and OECD Guidelines
- ▶ ITL Article 180: transfer pricing methods, ranges and selection of the most appropriate method
- ▶ ITL, Article 182: transfer pricing options for *maquiladoras*
- ▶ ITL, Article 184: transfer pricing adjustments under ITTIC
- ▶ FFC, Articles 32A and 32F: information about tax compliance and option of third party certification
- ▶ FFC, Article 34-A: transfer pricing ruling (unilateral), bilateral APA under treaty
- ▶ FFC, Articles 83 and 84 XV: fines for failure to maintain intercompany transactions (transfer pricing documentation) as part of accounting records
- ▶ MTR, TR: domestic transaction documentation (threshold) obligation

## OECD Guidelines treatment

The ITL states that the OECD Guidelines can be relied upon for interpretation of the rules as long as they do not contradict the ITL or international tax treaties.

## Documentation requirements

Contemporaneous transfer pricing documentation related to cross-border intercompany transactions must be maintained. Documentation must include the name, address and tax residency of the nonresident related persons with whom transactions are carried out, as well as evidence of direct and indirect participation between related parties and correct application of an approved method as stated in Article 180 of the ITL, following the hierarchy established therein. It is necessary to include in the documentation information regarding the functions performed, assets used and risks borne by the taxpayer involved in each transaction. Information and documentation of comparable transactions or companies by type of transaction must also be included.

Taxpayers are required to identify related party transactions clearly on their accounting records. Also, domestic intercompany transactions are required to be documented by demonstrating that an accepted pricing method (i.e., one that is listed in the ITL) has been applied and that the arm's-length standard has been met.

## Mexico (continued)

### Documentation requirements (continued)

Mexican taxpayers performing intercompany transactions with foreign related parties are not required to maintain formal transfer pricing documentation following the requirements stated in Article 76 (IX), as long as companies do not cover the threshold of revenues within the previous fiscal year (\$13 million Mexican pesos for distribution and manufacturing activities, or \$3 million Mexican pesos for the provision of professional services). As for Mexican taxpayers performing transactions with domestic related parties, as of 12 November 2012, temporary Rule I.3.8.3 allowed entities that conduct intercompany transactions with domestic related parties to opt out of preparing contemporaneous transfer pricing documentation, based on the same threshold amounts considered in Article 76 (IX).

### Priorities/pricing methods

The transfer pricing methods in Mexico, established in Article 180 of the ITL, are the CUP, resale price, cost-plus, profit split, residual profit split and TNMM. Effective since 2006, the ITL specifically requires a hierarchical consideration of transfer pricing methods, with a particular preference for the CUP method, and then the traditional transactional methods over the transactional profit methods.

### Return disclosures/related-party disclosures

Mexican taxpayers must submit a transfer pricing return (Exhibit 9 of the Multiple Annual Tax Return) to the SAT, which is due contemporaneously with the submission of the annual tax return. Such an informative return includes an appendix with the disclosure of information related to intercompany transactions with foreign related parties, including information by type of transaction and by related party, as follows:

- ▶ Names, countries and tax identification numbers of affiliates
- ▶ Types of transactions and corresponding amounts
- ▶ Transfer pricing methods applied
- ▶ Gross or operating margins earned on each transaction (applicable only for certain types of transactions)
- ▶ Withholding rates and fiscal year during which deductions for the intercompany transaction were registered

Also, according to Article 182 of the ITL, an informative return must be filed by *maquiladora* companies (DIEMSE). Both informative returns must be filed by 30 June of the following year and require the same information to be submitted by Mexican taxpayers.

When filing the Tax Report or the Alternative Information to the Tax Report, the auditor or the taxpayer must indicate, among other things, that the company's transfer pricing documentation is in place and the transfer pricing tax return was filed for the fiscal year under review and that it complies with the requirements stated in the ITL. Further, the auditor or the taxpayer must complete and file a large number of detailed questionnaires, including the ones described below, which deal with intercompany transactions:

- ▶ Attachment 32 - information regarding related party transactions, such as:
  - ▶ Tax identification
  - ▶ Tax name
  - ▶ Country of residence
  - ▶ Type of intercompany transaction
  - ▶ Amount of intercompany transaction
  - ▶ Transfer pricing methodology applied
  - ▶ Assessment regarding transfer pricing compliance

This information is required for all intercompany transactions (i.e., with foreign and domestic related parties for each related party and type of transaction). This questionnaire is intended to verify compliance with the ITL, not only with respect to transfer pricing aspects, but also with respect to the deductibility requirements of all tax positions.

## Mexico (continued)

### Return disclosures/related-party disclosures (continued)

- Attachment 33 - questionnaire on related-party transactions. This questionnaire includes, among others, the following sections:
  - APAs (if applicable)
  - Transfer pricing documentation compliance and filing date of informative tax return
  - Application of primary or corresponding adjustments
  - Tax identification of the advisor or preparer of the transfer pricing documentation
  - Confirmation of deduction for pro rata charges
  - Information regarding financial derivative operations
  - Information regarding thin capitalization
  - *Maquiladora* rules compliance
- Transfer pricing questionnaire related to the review conducted by the external auditor (not included in the Alternative Information to the Tax Report file):
  - Questions regarding the confirmation of all aspects related to cross-border and domestic intercompany transactions

Transfer pricing documentation must be readily available as part of the accounting records by 31 March. An aggressive interpretation of the ITL, taken by the SAT and confirmed by a tax court, in this case is that failure to comply with the documentation requirements results in nondeductibility of the payments to related parties.

### Transfer pricing-specific returns

Exhibit 9 of the Multiple Informative Return (DIM) for transactions carried out with foreign related parties, as well as Manufacturing, Maquiladoras and Export Services' Informative Return (DIEMSE) for transactions carried out under the *maquiladora* regime, and Tax Report questionnaires.

### Documentation deadlines

Transfer pricing documentation must be in place when the company files its annual income tax return (by the end of March of the following year) and must be kept, along with the company's accounting records, for at least five years after the filing of the last tax return for each year. For those companies that chose to have a Tax Report based on their financial statements prepared by an external auditor (*Dictamen Fiscal*), the taxpayer's external auditor is required to disclose the company's compliance with all tax obligations, including those related to transfer pricing. This disclosure is made through the Tax Report, which must be filed by 30 June every year. As of 2014, taxpayers are obliged to file an Information Return on the State of Tax Affairs and may choose to have a Tax Certification (*Dictamen Fiscal*) conducted by an external auditor if they do not want to file the Return on the State of Tax Affairs themselves. According to the FFC, the Return on the State of Tax Affairs is due by July 15 and the Tax Certification is due by the end of June.

### Transfer pricing penalties

There are specific penalties for failure to file or the untimely filing of the transfer pricing information return. A penalty of \$61,000 to \$122,010 in Mexican pesos can be imposed if the information return for foreign related party transactions is not filed, or is incomplete or incorrect.

If the SAT decides that a transfer pricing adjustment is needed, and unpaid contributions are determined as a consequence, penalties could vary from 55% to 75% of the omitted taxes, plus surcharges and inflation adjustments. Also, if a transfer pricing adjustment reduces the net operating loss (NOL), the penalty ranges from 30% to 40% of the difference between the determined NOL and the NOL in the tax return, plus surcharges and inflation adjustments.

There are no penalties if the taxpayer self-corrects its tax results before an audit, and reduced penalties apply if self-correction is made during the audit but before the tax assessment. Waivers and abatements are possible under limited circumstances.

## Mexico (continued)

### Transfer pricing penalties (continued)

Starting in 2014 and in anticipation of the OECD's BEPS Action Plan, the ITL establishes in Article 28 (XXIX) that payments to foreign or domestic related parties will not be deductible as long as these amounts also are deductible for the taxpayers' counterparts. Moreover, Article 28 (XXIX) limits the deduction of payments made to foreign related parties for interest, royalties or technical assistance if the related party receiving the payment is transparent for tax purposes, the payment is not considered taxable revenue for the counterpart or it is treated as nonexistent for the foreign related party.

### Penalty relief

Contemporaneous documentation might reduce tax penalties by 50%, as long as the taxpayer complies with the formal requirements established in Article 76 (IX). The unpaid taxes could be reduced to 27.5% to 37.5% of the unpaid tax, and in the case of overdetermined NOLs, penalties could be reduced to 15% to 20% of the overstated NOL.

### Statute of limitations on transfer pricing assessments

The statute of limitations for an assessment in Mexico is five years from the date of filing the tax return. The term is affected by amended returns with respect to items changed, and it is suspended by an audit. The SAT has two years to complete a transfer pricing audit.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

There is a high audit risk focusing on business restructuring (limited risk structures, migration of intangible property, and centralization of functions and risks in favorable tax jurisdictions), highly leveraged structures, cost-sharing agreements and pro rata-based charges in general, including management fees.

SAT's internal criteria related to tax positions, which include transfer pricing comments, are still valid. Most of these rules regarding transfer pricing are related to formal documentation requirements for Mexican taxpayers carrying out intercompany transactions with both domestic and foreign related parties. These criteria are some of the areas upon which SAT focuses during transfer pricing audits, in addition to substantive and technical issues regarding compliance, planning and transfer pricing documentation.

### APA opportunity

Unilateral and bilateral APAs are available under Article 34-A of the FFC and Mexico's tax treaties, respectively. Unilateral APAs can cover the fiscal year of the application, the three subsequent fiscal years and a one-year rollback.

Starting in 2014, the self-assessment option for *maquiladoras* is no longer be available. As such, Mexican contract manufacturers with an IMMEX program will have to choose between pursuing an APA and applying safe-harbor rules (with taxable profit being the greater of applying a 6.5% return over total costs or a 6.9% return over total assets, including assets and inventories of consignment property of foreign parties but used in the manufacturing activity). More unilateral and bilateral APAs are expected to be derived from this new obligation.

# Mongolia

## Taxing authority and tax law

Taxing authority: General Department of National Taxation (GDNT)

Tax law: General Tax Law (GTL), Corporate Income Tax (CIT) Law and VAT Law

## Relevant regulations and rulings

There is no single, all-encompassing transfer pricing legislation in Mongolia. Transfer pricing rules are contained in the GTL, CIT Law and VAT Law. In addition various implementation guidelines by the Government of Mongolia, Ministry of Finance or GDNT govern transfer pricing in Mongolia.

Various sections in Mongolian tax laws refer to the need for transactions between related parties to be conducted at an arm's length. Failing this, the tax authorities may seek to adjust the transaction to a fair market value.

- ▶ Article 11 of Mongolia's CIT Law indicates that the transfer of goods and services between related parties should be made at a "market price." If the price charged is below or above the market price, then the value of the transaction will be determined with reference to the benchmark price used in transactions between non-related parties.
- ▶ Article 48.1 of Mongolia's GTL separately indicates that taxable income should be based on fair market prices (prices that are used between unrelated parties, Article 48.2 of the GTL) and allows for the tax office to apply an "indirect assessment method" (i.e., actual or standard price method) to be used if this is not the case.
- ▶ Article 48.5 of the GTL notes that if market prices cannot be applied, then returns earned by comparable independent companies with similar business operations should be used to determine the appropriate return to be earned in related party transactions.
- ▶ Both transfer pricing provisions in the CIT Law and GTL have clauses that explain related parties, including entities that are connected in terms of management of control or ownership, as follows:
  - ▶ Article 48.4 of the GTL law states that "related party" shall mean "bodies who are authorized to participate directly or indirectly in the management, control or ownership" of other entities.
  - ▶ Article 6.1 of the CIT states that if the following relation is present with a taxpayer, it shall be a related party: it (1) owns 20% or more of the common stock of the other entity, (2) has the right to receive 20% or more of the dividends or distributions from the other entity, or (3) has the right to appoint 20% or more of the management of the other entity or is otherwise able to determine its policies.
- ▶ As an implementing guideline, the Ministry of Finance released guidelines setting out the pricing methodologies (often referred as Benchmarking Guideline 2007) that taxpayers can use for documentation requirements for related party transactions. There is also a supportive guideline to the Benchmarking Guideline 2007 adopted by the GDNT that establishes sources of information for certain goods and services.
- ▶ In addition, the GDNT has published, comprehensive transfer pricing guidelines (approved by the GDNT Board, dated 25 December 2014) as an internal transfer pricing reference guideline for GDNT use with the intention of replacing Benchmarking Guideline 2007. Taxpayers should use this new guideline implicitly for transfer pricing purposes.

## OECD Guidelines treatment

Mongolia is not a member of the OECD. However, the Benchmarking Guideline 2007 allows use of the OECD Guidelines. For domestic purposes, the OECD Guidelines may provide support for applying any pricing methods demonstrating compliance with international principles.

## Documentation requirements

According to the Benchmarking Guideline 2007, taxpayers are required maintain contemporaneous documentation in order to comply with the arm's-length standard. The documentation should be prepared in Mongolian.

The transfer pricing documentation should substantiate a taxpayer's assertion that it reasonably concluded that, given the available data and the applicable pricing methods, the chosen method (and its application) provided the most reliable measure of an arm's-length result under the principles of the best-method rule.

## Mongolia (continued)

### Documentation requirements (continued)

The principal documents required by the regulations are:

- ▶ Name of the related parties, relationships between the transacting parties, incorporation documents thereof
- ▶ Group ownership and legal structure
- ▶ Overview of group and company profile
- ▶ Description of the goods or services
- ▶ Key terms and conditions of the contractual agreements
- ▶ Functions performed and risks borne by each party
- ▶ Comparability analysis
- ▶ Pricing method for the allocation of profits or losses and a description of the pricing method and reasons why the method was selected (a best-method analysis)
- ▶ Analysis and evaluation of external and internal economic and legal factors, including considerations of market conditions, economic circumstances and business strategy

### Priorities/pricing methods

The regulations provide a “best-method rule” for determining the appropriate method to be applied by the taxpayer for each intercompany transaction.

### Return disclosures/related party disclosures

A list of related party transactions for the relevant tax year concerned must be disclosed in corporate income tax returns, including information about the name of the related parties, property or goods and services, and value of the transaction.

### Transfer pricing-specific returns

There are no specific transfer pricing returns.

### Documentation deadlines

According to the Benchmarking Guideline 2007, documentation should be prepared at the time of executing related party transactions and must be provided to the GDNT upon request.

### Transfer pricing penalties

General noncompliance penalty rules apply to transfer pricing adjustments. Transfer pricing adjustments are subject to a 30% penalty of tax payable (Article 74.1 of the GTL). In addition, a fine at a specified rate per day on the outstanding balance of the tax payable is imposed (the Government-approved interest rate for 2015 is 0.052% daily, or 18.98% per annum). However, the fine imposed should not exceed 50% of the tax payable amount (Article 74.3 of the GTL).

### Penalty relief

Generally, there is no penalty relief available in Mongolia for transfer pricing adjustments made by the GDNT.

### Statute of limitations on transfer pricing assessments

There is a five-year statute of limitations in Mongolia for tax purposes, including transfer pricing adjustments. Comprehensive tax audits usually occur every two to three years for domestic companies, which include transfer pricing audits. During this time, multiple open years are often investigated simultaneously.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, comprehensive tax audits and transfer pricing usually occur every two to three years in Mongolia. Tax authorities are increasingly focusing on transfer pricing investigations.

## Mongolia (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)**

It is expected that in the near future the MTA will pay greater attention to transfer pricing issues as the MTA is being rapidly educated by international donors, such as the IMF and World Bank, about various technical assistance projects aiming to strengthen transfer pricing audit skills.

In addition, Mongolia intends to have a significant tax reform enhancing the transfer pricing legal framework and is preparing to establish a special group of transfer pricing specialists, developing a more OECD-based transfer pricing framework.

### **APA opportunity**

An APA regime is not available at the moment.

# Montenegro

## **Taxing authority and tax law**

Tax authority: Tax Administration of Montenegro

Applicable tax legislation: Corporate Income Tax Law (CIT Law)

## **Relevant regulations and rulings**

Article 38 of the CIT Law Bylaw on corporate income tax

## **OECD Guidelines treatment**

Montenegrin transfer pricing provisions are only loosely based on the OECD Guidelines, but do not refer to their application.

## **Documentation requirements**

The Montenegrin CIT Law does not prescribe any transfer pricing documentation requirements.

## **Priorities/pricing methods**

The CUP method has priority in the selection of the transfer pricing method. If CUP cannot be applied, the CIT Law also allows two other traditional transaction methods, the cost-plus and resale minus. Montenegrin transfer pricing regulations do not recognize transactional profit-based methods (i.e., the TNMM and profit split method).

## **Return disclosures/related party disclosures**

According to Article 38 of the CIT Law, taxpayers are obliged to disclose in their annual CIT return the revenues and expenses resulting from the transactions with related parties, as well as present and compare these with revenues and expenses that would have been realized in the same transactions if they were conducted with unrelated parties. Any difference between the two should be included in the taxable basis.

## **Transfer pricing-specific returns**

There is no specific transfer pricing return in Montenegro.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

There are no specific penalties if a taxpayer fails to disclose related-party transactions in the annual CIT return.

## **Penalty relief**

Not applicable.

## **Statute of limitations on transfer pricing assessments**

The general statute of limitations period of five years for taxes in Montenegro would also apply to transfer pricing assessments. The five-year period starts at the beginning of the year following the year in which the respective tax liability was to be assessed.

## **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

Montenegrin tax authorities conduct random audits. Typically, audits take place no more often than once in three to five years, and they cover all taxes (no tailor-made transfer pricing audits are going on). Given the lack of specific audit

## Montenegro (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)**

practice in this area, a material level of sophistication should not be expected at this stage with respect to reviewing related party transactions.

### **APA opportunity**

Advance rulings and APAs are not available in Montenegro.

# Morocco

## Taxing authority and tax law

Tax authority: Moroccan Tax Administration (*Direction Générale des Impôts*, or DGI)

Tax law: Moroccan Tax Code (MTC)

## Relevant regulations and rulings

Transfer pricing aspects are regulated by Articles 213-II and 214-III of the MTC.

- ▶ Article 213-II of the MTC: The Moroccan Tax Administration is authorized to adjust the taxable income and the declared turnover of the Moroccan enterprises that depend, directly or indirectly, on enterprises located inside or outside of Morocco. In this case, the tax authorities are entitled to predetermine the profits that have been indirectly transferred. These adjustments are performed by way of comparison with similar independent enterprises or by way of direct appreciation based on the information available to the Moroccan Tax Administration.
- ▶ Article 214-III of the MTC: For operations involving foreign companies, the Moroccan Tax Administration is entitled to request from local entities all documents and information related to:
  - ▶ The nature of relations linking the Moroccan company to the foreign company
  - ▶ The nature of the services provided or the products sold
  - ▶ The method of determining the prices for the operations realized between the Moroccan and foreign companies
  - ▶ The foreign company's tax regime and tax rates

There are no tax regulations and rulings in Morocco that deal with transfer pricing aspects.

However, note that Morocco has an Exchange Control regulation pursuant to which the Control Exchange Office can challenge excessive, unduly transfer of payments abroad.

## OECD Guidelines treatment

Morocco is not an OECD member; however, the Moroccan Tax Administration generally accepts references to the OECD Guidelines regarding transfer pricing.

There is no specific Moroccan transfer pricing regulation pertaining to business restructuring or attribution of profits to permanent establishments.

## Documentation requirements

Currently, there are no provisions in the MTC binding companies to submit or present transfer pricing documentation.

However, according to Article 214-III of the MTC, for operations involving foreign companies, the Moroccan Tax Administration is entitled to request from local entities all documents and information related to:

- ▶ The nature of relations linking the Moroccan company to the foreign company
- ▶ The nature of the services provided or the products sold
- ▶ The method of determining the prices for the operations realized between the Moroccan and foreign companies
- ▶ The foreign company's tax regime and tax rates

## Priorities/pricing methods

According to the Moroccan Tax Law, the TNMM should be applied.

## Morocco (continued)

### Return disclosures/related party disclosures

As mentioned above, in the event of a request from the tax authorities at the time of an audit (on the basis of Article 214-III of the MTC), there is an obligation to disclose the nature of the relationship between the taxpayer and the related parties (i.e., the links of dependence between the Moroccan audited entity and the related parties), the nature of the services provided or the products sold, the method of determining the prices for the operations realized between the Moroccan and foreign companies, and the foreign companies' tax regimes and tax rates.

### Transfer pricing-specific returns

There is no transfer pricing-specific return to be filed.

### Documentation deadlines

The documents and information should be provided within 30 days of a request.

### Transfer pricing penalties

Currently, there are no provisions in the MTC binding companies to submit or present transfer pricing documentation.

However, according to Article 214-III of the MTC, for operations involving foreign companies, the Moroccan Tax Administration is entitled to request from local entities all documents and information related to:

- ▶ The nature of relations linking the Moroccan company to the foreign company
- ▶ The nature of the services provided or the products sold
- ▶ The method of determining prices for the operations realized between the Moroccan and foreign companies
- ▶ The foreign company's tax regime and tax rates

If no information is provided, a dependent relationship is deemed between the Moroccan company and the foreign company.

Generally, penalties apply as a result of a transfer pricing reassessment (regardless of compliance with any transfer pricing documentation requirement), as follows:

- ▶ In terms of corporate income tax (CIT), the amounts reassessed are reinstated in the taxable income of the company and taxed at the applicable CIT rate. In addition, penalties apply as follows:
  - ▶ 15% for late filing or incomplete filing and a 100% penalty applies in cases where bad faith is demonstrated
  - ▶ 10% for late payment
  - ▶ 5% for the first month of late payment and 0.5% for each month thereafter
- ▶ In terms of withholding tax, after a transfer pricing reassessment is made, the additional profit is usually qualified as a deemed dividend. Accordingly, a withholding tax is required (when a double tax treaty applies, the withholding tax depends on the relevant tax treaty provisions). In the absence of a specific tax treaty, the withholding tax nominal rate is 15%. In addition, penalties regarding CIT, as described above, apply.
- ▶ In terms of value-added tax (VAT), when reassessing transfer pricing, the Moroccan Tax Administration also reassesses the corresponding VAT. In addition, penalties regarding CIT, as described above, apply.

### Penalty relief

In the case of a reassessment regarding penalties, a reduction might be granted to taxpayers that introduce a tax claim before the Moroccan Tax Administration.

Having transfer pricing documentation does not grant taxpayers with a penalty any relief. However, it could help frame the tax audit in support of the company's pricing policy and demonstrate to the Moroccan Tax Administration that the transfer policy adopted is rational, from an economic perspective, and is not arbitrary.

## Morocco (continued)

### Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is the same as all other tax assessments – generally, four years following the year for which the tax is due (it might be longer when loss carries forward or a VAT credit exists).

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of transfer pricing issues being raised within a tax audit is high. In fact, the number of tax audits raising transfer pricing issues is increasing considerably, and the Moroccan Tax Administration is focusing on:

- ▶ Product sale prices (underestimated or overestimated prices), especially (but not only) in case of losses
- ▶ Management fees
- ▶ Cost allocations
- ▶ Business restructurings (e.g., transfer of intangibles and of clientele indemnity) or a sudden decrease in the operating margin likely to hide a change in the transfer pricing policy applied

### APA opportunity

The Finance Act Draft for fiscal year 2015 introduced, as of 1 January 2015, an advanced transfer pricing agreement procedure in the Moroccan tax law.

Such procedure is provided by Articles 234 bis and 234 ter of the MTC, as follows:

- ▶ Article 234 bis: Taxable companies in Morocco, which are directly or indirectly related to companies situated outside Morocco, can request from the administration the conclusion of an APA on the method used to determine the prices of transactions mentioned in Article 214-III for a period that does not exceed four fiscal years. The modalities of that agreement will be determined by decree.
- ▶ Article 234 ter: The administration is not entitled to challenge the method used to determine the prices of transactions mentioned in Article 214-III if such transaction is covered by an advanced transfer pricing agreement in accordance with the above-mentioned Article 234 bis.

However, the agreement will be deemed void from its date of inception in the following cases:

- ▶ Misrepresentation of the situation or concealment of information errors or omissions attributable to the company
- ▶ Noncompliance with the methodology and obligations set out in the agreement by the company, or the use of fraudulent means

The cases referred to above may be invoked by the administration only in the context of a tax audit within the frame of Articles 220 and 221, as provided by the MTC. The modalities of concluding an APA have not yet been set up. A decree would be published defining precisely such a procedure.

# Myanmar

## **Taxing authority and tax law**

Tax authority: Internal Revenue Department (IRD)

Tax law: Income Tax Law

## **Relevant regulations and rulings**

There are currently no transfer pricing regulations and rulings in Myanmar.

## **OECD Guidelines treatment**

Not applicable.

## **Documentation requirements**

Not applicable.

## **Priorities/pricing methods**

Not applicable.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

There is no explicit penalty for transfer pricing assessments, nor is there an explicit penalty for not having transfer pricing documentation.

However, for tax shortfalls in general, a penalty not exceeding 10% of the tax may be imposed.

## **Penalty relief**

Not applicable.

## **Statute of limitations on transfer pricing assessments**

In Myanmar, the IRD will review the annual tax returns filed annually before an assessment is made. Once the final assessment letter is issued, the taxpayer can settle the amount of tax assessed by the IRD. The IRD retains the right to reassess the company backdated for three years, but this period can be extended in case any tax evasion is suspected. However, there is no precedent case where the IRD has revisited a company with the Myanmar Investment Commission permit.

## **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The likelihood of an annual tax audit in general is low. This is because corporate income tax in Myanmar is based on an "annual agreed-upon" approach. In other words, the IRD will send an assessment letter to the taxpayer at the end of the year if they do not agree with the corporate income tax return filed by the taxpayer. The taxpayer has options to either comply with an additional assessment or appeal such assessment. Hence, a tax audit of the past year rarely happens.

## Myanmar (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)**

Currently, the likelihood that transfer pricing will be reviewed as part of that audit is quite low. So far, there has not been any challenge to the transfer pricing methodology in Myanmar.

### **APA opportunity**

Not applicable.

# Namibia

## **Taxing authority and tax law**

Taxing authority: Directorate Inland Revenue (Inland Revenue)

Tax law: Income Tax Act 24 of 1981 (the Act)

## **Relevant regulations and rulings**

Section 95A authorizes Inland Revenue to adjust the consideration for goods or services to an arm's-length price for the purposes of calculating the Namibian taxable income of a person.

There are no specific regulations or rulings; however, Practice Note 2 of 2006, dated 5 September 2006, contains guidance on the application of Section 95A.

## **OECD Guidelines treatment**

Although Namibia is not a member of the OECD, Inland Revenue accepts the OECD Guidelines and has largely based its practice on them. Practice Note 2 provides as follows:

"This Practice Note is based on and acknowledges the principles of the OECD Guidelines. Nothing in this Practice Note is intended to be contradictory to the OECD Guidelines and in cases where there is conflict, the provisions of the OECD Guidelines will prevail in resolving any dispute.

"Any amendments made to the OECD Guidelines will be deemed to be incorporated into this Practice Note."

Inland Revenue also accepts the principal methods referred to in the OECD Guidelines.

## **Documentation requirements**

Currently, there is no statutory requirement to prepare transfer pricing documentation.

Furthermore, the income tax return does not require confirmation that cross-border related party transactions are entered into at arm's length. Practice Note 2 of 2006, however, encourages taxpayers to prepare documentation should Inland Revenue request such information.

## **Priorities/pricing methods**

Inland Revenue accepts the methods prescribed by the OECD (i.e., CUP, resale price, cost-plus, TNMM and profit split).

According to Practice Note 2, "the suitability and reliability of a method will depend on the facts and circumstances of each case. The most reliable method will be the one that requires fewer and more reliable adjustments."

## **Return disclosures/related party disclosures**

Currently, there are no disclosure requirements.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Currently, there is no obligation to submit transfer pricing documentation.

## **Transfer pricing penalties**

No specific transfer pricing penalties are imposed in the Act. With this said, taxpayers face the following penalties:

- ▶ Additional tax of up to 100% of the provisional tax amount underpaid

## Namibia (continued)

### Transfer pricing penalties (continued)

- 200% of the additional tax resulting from an adjustment (in the event of default, omission, incorrect disclosure or misrepresentation)
- Interest of 20% per year

### Penalty relief

When taxpayers have made conscientious efforts to establish transfer prices that comply with the arm's-length principle and have prepared documentation to evidence such compliance, Inland Revenue will likely take the view that the taxpayer's transfer pricing practices represent a lower tax risk. Such evidence may provide some mitigation against the 200% additional tax.

### Statute of limitations on transfer pricing assessments

Namibia does not have a statute of limitations. Inland Revenue may indefinitely conduct reviews and audits. However, in terms of the Act, records must be maintained for five years, so it is unlikely that periods older than five years will be reviewed.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

Inland Revenue is not conducting transfer pricing reviews or audits currently, nor does it have a dedicated transfer pricing team.

### APA opportunity

Namibia does not currently have an APA program.

# Netherlands

## Taxing authority and tax law

Tax authority: Dutch Tax Administration (*Belastingdienst*)

Tax laws:

- ▶ Dutch Income Tax Act 2001
- ▶ Dutch Corporate Income Tax Act 1969

## Relevant regulations and rulings

- ▶ Articles 3.8 and 3.25 of the Dutch Income Tax Act 2001
- ▶ Articles 8 and 8b of the Dutch Corporate Income Tax Act 1969
- ▶ Effective 1 January 2002, Article 8b codified the arm's-length principle and introduced transfer pricing documentation requirements

Besides the articles in Dutch tax law mentioned above, the Dutch Under-Minister of Finance issued several decrees in August 2004, which both updated and expanded the decrees published in 2001, including adjustments and improvements in the rules for obtaining advance certainty. In November 2013, the Dutch Under-Minister of Finance issued a new decree on transfer pricing and the application of the arm's-length principle, which combines and replaces two previous decrees on transfer pricing (i.e., IFZ 2001/295M and IFZ 2004/680M). This decree provides important insights into the Dutch tax administration's position in applying the arm's-length principle in general and into specific types of common intercompany transactions, such as financial transactions, captive insurance companies, intangible and tangible fixed assets, centralized procurement companies, and intercompany services. The decrees provide the tax authority's formal position but do not legally bind the taxpayer. The 2004 decrees, which clarified how the fiscal rules within the APA and Advance Tax Ruling (ATR) practice should function, have been replaced and updated by decrees of 12 June 2014.

The decrees published are:

- ▶ Implementation decree regarding the coordination group transfer pricing, DGB2004/1339M
- ▶ Mutual agreement procedure decree, IFZ2008/248M
- ▶ Decree on profit allocation to permanent establishments (PEs), IFZ2010/457M
- ▶ Decree on transfer pricing and the application of the arm's-length principle and the OECD Guidelines, IFZ 2013/184M
- ▶ APA decree, DGB2014/3098
- ▶ ATR decree, DGB2014/3099
- ▶ Decree regarding financial service activities, DGB2014/3101
- ▶ Questions and answers on the decree regarding service entities and grandfathering regime ruling policy, DGB2014/3102
- ▶ Decree on APAs, ATRs, financial services entities, interposed holdings, contact point potential foreign investors, organization and competency rules, DGB2014/296M
- ▶ Per January 2014, legislation with respect to the application of safe-harbor rules on substance of group financing and licensing companies and holding companies, and exchange of information, has been amended; the impact of the changes has been dealt with in the decrees DGB2014/3101 and DGB2014/3102

## OECD Guidelines treatment

The tax authority generally follows the OECD Guidelines.

## Netherlands (continued)

### **OECD Guidelines treatment (continued)**

The Dutch transfer pricing decree (as published by the Under-Minister of Finance in the decree of November 2013) provides further guidance regarding how the arm's-length principle is interpreted and applied. According to this decree, the OECD Guidelines leave room for interpretation or require clarification on several issues. The goal of the decree is to provide insight into the position of the tax authority regarding these issues.

The transfer pricing decree of November 2013 is an excellent source for transfer pricing guidance. It provides specific guidance on intragroup services and shareholder activities, support services, contract research, cost contribution arrangements, arm's-length price determination when the value at the time of the transaction is uncertain, financial transactions, captive insurance companies, intangible and tangible fixed assets, centralized purchasing companies, and other topics. With respect to business restructurings, no specific guidance has been issued to date. However, the tax authority generally follows the OECD guidance on this subject.

### **Documentation requirements**

Taxpayers are obligated to prepare documentation that describes how the transfer prices have been established, and this must be included in the accounting records. Furthermore, the documentation needs to include sufficient information that would enable the tax authority to evaluate the arm's-length nature of the transfer prices applied between associated enterprises. The parliamentary explanations to Article 8b do not provide an exhaustive list of information that should be documented.

Transfer pricing documentation could include:

- ▶ Information about the associated enterprises involved
- ▶ Information about the intercompany transactions between these associated enterprises
- ▶ A comparability analysis describing the five comparability factors as set forth in Chapter I of the OECD Guidelines
- ▶ A substantiation of the choice of the transfer pricing method applied
- ▶ A substantiation of the transfer price charged
- ▶ Other documents, such as management accounts, budgets and minutes of shareholder and board meetings

### **Priorities/pricing methods**

There is no "best method" rule. Taxpayers are, in principle, free to choose any OECD transfer pricing method, as long as the method chosen results in arm's-length pricing for the transaction.

Since the 2010 revision of the OECD Guidelines, which establishes the most appropriate method rule for selecting the transfer pricing method, there is no longer a hierarchy among the methods. Nevertheless, the OECD Guidelines do state that where a CUP method and another transfer pricing method can be applied in an equally reliable manner, the CUP method is preferred. Taxpayers are not obligated to test all of the methods, though they must substantiate the method chosen.

### **Return disclosures/related party disclosures**

Dutch corporate income taxpayers are required to confirm in the corporate income tax return (by checking a separate box) whether they have been involved in cross-border related party transactions involving tangible and intangible fixed assets during the fiscal year. Furthermore, Dutch corporate income taxpayers are required to confirm in a separate appendix whether they have conducted financial services on a group level without having any substance in the Netherlands or without assuming any risks during the fiscal year.

### **Transfer pricing-specific returns**

Dutch corporate income taxpayers are not required to file a specific transfer pricing return in addition to the regular corporate income tax return.

## Netherlands (continued)

### Documentation deadlines

Documentation is generally expected to be complete when the taxpayer enters into a transaction. However, if the transfer pricing documentation is not available upon the request of the tax authority, taxpayers are granted four weeks to prepare it. This period may be extended up to three months, depending on the complexity of the intercompany transactions in which the taxpayer is engaged.

### Transfer pricing penalties

The lack of transfer pricing documentation will shift the burden of proof regarding the arm's-length nature of the transfer price used by the taxpayer.

During the parliamentary discussions regarding the introduction of the arm's-length principle and transfer pricing documentation requirements (i.e., Article 8b) into the Dutch Corporate Income Tax Act, a question was raised regarding the Dutch policy in connection with the levy of administrative penalties in case of a transfer price adjustment. The Dutch Under-Minister of Finance declared that penalties in such instances should be limited to cases in which it is plausible that the agreed-upon transfer price is not regarded as arm's length as a result of a purely intentional act. Therefore, an administrative penalty will not be imposed, even in the event of gross negligence or a conditional intentional act under this policy announcement.

In case of a purely intentional act, as set forth above, the tax may be increased with a maximum penalty of 100% of the (additional) tax due, plus interest.

In addition to the above-described penalties, so-called administrative fines might be applicable (e.g., for not meeting filing a deadline).

### Penalty relief

Transfer pricing penalties are unlikely if the taxpayer prepares proper transfer pricing documentation that adequately substantiates the arm's-length nature of the taxpayer's intercompany transactions.

### Statute of limitations on transfer pricing assessments

The statute of limitations on transfer pricing assessments is the same as the statute of limitations on tax assessments (as covered by the General Tax Act). The statute of limitations for making an assessment is three years from the end of the taxpayer's fiscal year. If the tax inspector has granted an extension for filing the tax return, the assessment period is extended to the end of the extension period. Once a final assessment for a financial year is imposed, additional assessments relating to that financial year can still be issued for up to five years after the end of the financial year (respectively 12 years in the case of foreign-source income). Similarly, this period is extended with the extension of the filing period granted to file the Dutch corporate income tax return. However, an additional assessment can be imposed only if either:

- ▶ The Dutch tax authority discovers a new fact that the Dutch tax authority reasonably should not have known at the moment the final assessment was issued.
- ▶ The taxpayer acted in bad faith.

An additional assessment is possible only up to two years after the tax assessment has been issued in case of a mistake, which is recognized if (i) no tax assessment has been issued at all or (ii) the tax assessment is too low, while the taxpayer reasonably should have known that the final tax assessment was incorrect (if the difference amounts to at least 30% of the total taxes due, the taxpayer is deemed to have been aware of the mistake).

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of being audited by the tax authority is considered moderate. However, during an audit, the likelihood of transfer pricing issues being scrutinized is high, and consequently the controversy risk is high as well. In particular, there it is highly likely that the transfer pricing methodology will be assessed relative to the specific facts and circumstances.

Transfer pricing is a key issue in any tax audit, and many companies are subject to separate transfer pricing audits. A functional analysis is incorporated into many of these audits and forms the basis of the transfer pricing risk analysis of taxpayers.

## Netherlands (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)**

The tax authority has, among others, shown interest in performing head-office audits (which include intragroup services and other activities performed by the head office) and in analyzing the economic substance of transactions, in terms of alignment of functions and risks. Next to head-office activities, intangible transactions are often evaluated, as well as business reorganizations, centralized purchasing companies, captive insurance companies and financial services transactions (including loans and guarantees). During these transfer pricing audits, the tax authority appears to have a particular interest in potential internal CUPs and the economic substance of a transaction.

The tax authority has also focused, as a natural result of the risk analysis, on transactions with entities in countries with low effective tax rates.

### **APA opportunity**

Unilateral, bilateral and multilateral APAs with rollback features are available. The APA process works very efficiently in the Netherlands.

A number of specific features enable an efficient and transparent process, including the option to hold pre-filing meetings, the opportunity to develop a case management plan with the APA team to agree upon timing and key steps, and even specific support regarding economic analysis that is available to small taxpayers.

There are specific (unilateral) APA options for Dutch financial services entities. Financial services entities consist of both financing (mere receipt and payment of intercompany interest) and licensing (mere receipt and payment of intercompany royalties) companies.

The Dutch tax authorities process many unilateral and bilateral APAs on annual basis. The Dutch competent authority has bilateral APA experience across all continents.

### **Mutual Agreement Procedure**

On 29 September 2008, a decree (IFZ2008/248M) describing the Mutual Agreement Procedure (MAP) process under bilateral treaties and the European Union (EU) Arbitration Convention was published. The decree aligns the MAP process in the Netherlands with the OECD Memorandum on Effective Mutual Agreement Procedures (MEMAP), making the route to obtaining relief from double taxation more accessible and transparent for taxpayers. Key features of the new decree are formally introducing an Accelerated Competent Authority Procedure (ACAP), endorsing arbitration to resolve MAP cases, targeting a reduction of MAP-related expenses, introducing transparency into the process by providing regular feedback and updates to the taxpayer, encouraging use of Article 9(2) of the OECD Model Tax Convention (MTC), and committing to tackle resolution of double taxation in cases "not provided for in the Convention" (Article 25(3) of the OECD MTC), in addition to the more traditional double taxation cases.

### **Attribution of profits to permanent establishments**

On 27 January 2011, a decree (IFZ2010/457M) was published in the *Government Gazette* concerning the attribution of profits to permanent establishments (PE Decree). This PE Decree provides further insights into the tax authority's position on permanent establishments, following the publication of the 2010 OECD Report on the Attribution of Profits to Permanent Establishments (PE Report) and the OECD work on Article 7 of the OECD MTC, including commentary, in recent years. The PE Decree, effective 28 January 2011, provides that the Dutch policy concurs with the conclusions established in the PE Report. Furthermore, it clarifies the tax authority's position regarding the dynamic approach to interpreting tax treaties; the preference for the capital allocation approach when allocating "free" capital to a permanent establishment; the preference for the fungibility approach when allocating the amount of interest; certain issues regarding dealings involving group services, intangible assets and financial assets; and certain specific topics, including advance certainty.

# New Zealand

## Taxing authority and tax law

Taxing authority: Inland Revenue Department (IRD)

Tax law:

- ▶ Sections YD 5, GB 2 and GC 6 to GC 14 of the Income Tax Act 2007 (ITA)
- ▶ Tax Administration Act 1994 (TAA)
- ▶ New Zealand's double tax agreements are also relevant tax laws in New Zealand

## Relevant regulations and rulings

The final New Zealand Transfer Pricing Guidelines (IRD Guidelines) were issued in October 2000. While the IRD Guidelines are still relevant, the IRD is now applying the latest 2010 OECD Guidelines, which are broadly consistent with New Zealand's transfer pricing legislation and double taxation treaties.

## OECD Guidelines treatment

The IRD fully endorses the positions set out in Chapters I to IX of the OECD Guidelines and generally follows those positions in administering New Zealand's transfer pricing rules. Consequently, the IRD Guidelines should be read as supplementing the OECD Guidelines, rather than superseding them. This applies to the domestic application of the New Zealand rules, as well as in relation to issues raised under New Zealand's double tax agreements.

In addressing business restructuring issues, the IRD will seek to ensure that there is a commercial case for any restructuring and that the economic substance aligns with the legal form of the arrangement. The IRD has released some high-level guidance in the form of 10 questions that should be addressed by companies undertaking cross-border business restructurings. These questions aim to help ascertain the commercial rationale of the restructuring.

## Documentation requirements

There are no explicit requirements in New Zealand's transfer pricing legislation (§§GC 6 to GC 14 ITA) for any particular category of information to be included in transfer pricing documentation. Section GC 13 requires taxpayers to select and apply an appropriate transfer pricing method for tax return purposes. The IRD Guidelines indicate that a taxpayer's main purpose in preparing and maintaining documentation should be to place the taxpayer in a position where it can readily demonstrate to the IRD that a transfer pricing method has been used to establish that the taxpayer's transfer prices are consistent with the arm's-length principle, in light of the relevant facts and circumstances.

## Priorities/pricing methods

The IRD accepts the most reliable method (or combination of methods) chosen from CUP, resale price, cost-plus, profit split and comparable profit (or TNMM).

## Return disclosures/related party disclosures

A company's income tax return requires disclosure of:

- ▶ Payments to nonresidents, such as dividends, interest, management fees, "know-how" payments, royalties or contract payments made
- ▶ Whether the company is controlled or owned by nonresidents
- ▶ Whether the company holds an interest in a controlled foreign company (CFC)

More detailed disclosure of various financial information and other data is now required for interests held in CFCs.

## New Zealand (continued)

### Transfer pricing-specific returns

There is no separate transfer pricing return required to be filed in New Zealand (notwithstanding the disclosures outlined above).

However, the IRD does require that multinational companies and branches complete detailed transfer pricing questionnaires as part of its transfer pricing risk assessment activities (see the next section for further details).

### Documentation deadlines

Although there is no explicit legislative requirement for a taxpayer to document its transfer pricing policies and practices, the IRD Guidelines indicate that taxpayers that prepare and maintain transfer pricing documentation are more likely to ensure that the burden of proof (that prices are not at arm's length) remains with the commissioner. The IRD will generally request a copy of a taxpayer's transfer pricing documentation as part of an income tax audit or transfer pricing risk assessment. While each case is different, a taxpayer generally is given 20 working days to submit the documentation upon request.

### Transfer pricing penalties

Under §141A-K of the TAA, the following penalties are imposed:

- ▶ A 20% penalty for not taking reasonable care
- ▶ A 20% penalty for an unacceptable tax position
- ▶ A 40% penalty for gross carelessness
- ▶ A 100% penalty for an abusive tax position
- ▶ A 150% penalty for evasion or a similar act

### Penalty relief

Shortfall penalties may be reduced upon voluntary disclosure to the Commissioner of the details of the shortfall, as follows:

- ▶ If disclosure occurs before notification of an investigation, the penalty may be reduced by 100% (only for lack of reasonable care or unacceptable tax position categories) or 75% for other shortfall penalties.
- ▶ If disclosure occurs after notification of an investigation, but before the investigation commences, the penalty may be reduced by 40%.

Shortfall penalties may be reduced by a further 50% if a taxpayer has past good compliance records.

### Statute of limitations on transfer pricing assessments

The Commissioner's power to issue amended assessments is subject to a four-year time limit from the end of the year in which the tax return is filed. A taxpayer can extend the applicable statute of limitations by an additional six months by signing a waiver, which generally arises when a dispute is not resolved, and more time would allow either completion of the dispute process by mutual agreement of both parties or where another case before the court is likely to resolve the issue in current dispute.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The risk of an annual tax audit is characterized as medium to high. Tax audits are undertaken at the IRD's discretion. The IRD selects audit targets based on certain criteria, such as low profitability or losses, industry performance, transaction types (e.g., large, intercompany finance arrangements) and media reports. However, most large companies can typically expect to be audited every five years.

The risk of transfer pricing scrutiny during a tax audit is characterized as high. Risk assessment review questionnaires relating to transfer pricing and thin capitalization are typically issued to companies during general income tax audits or risk reviews and as part of the IRD's specific transfer pricing review process. The questionnaires request detailed information, including financial details of the New Zealand taxpayer and consolidated group, types and values of related party transactions, methodologies used, details of any business restructures, and whether transfer pricing documentation has been prepared. A further "International Questionnaire" is also used by IRD to provide information regarding certain BEPS-related risks specific to inbound multinational companies.

## New Zealand (continued)

### Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

The IRD also uses questionnaires in respect of interest, guarantee fees and royalties. In addition, there is a separate transfer pricing questionnaire for branches.

The likelihood of the transfer pricing methodology being challenged depends on the complexity of the cross-border associated-party transaction. Transactions involving provision of intangibles, financing and intragroup services tend to receive higher scrutiny during a transfer pricing risk review. New Zealand subsidiaries that provide sales/marketing services to an offshore principal can expect a more detailed transfer pricing review.

### APA opportunity

Section 91E of the TAA allows a unilateral APA to be issued in the form of a binding ruling. Bilateral or multilateral APAs may be entered into pursuant to New Zealand's double tax agreements under the mutual agreement procedure provisions. The IRD has not established any formal guidelines for APAs, as each case is considered to be different, depending on a taxpayer's specific facts and circumstances. The IRD encourages pre-application conferences to make the APA application process less time-consuming.

# Nicaragua

## **Taxing authority and tax law**

Taxing authority: *Dirección General de Ingresos (DGI)*

## **Relevant regulations and rulings**

Currently, there are no local transfer pricing regulations in Nicaragua. However, regulations will be in effect as of 2016.

## **OECD Guidelines treatment**

Not applicable.

## **Documentation requirements**

Not applicable.

## **Priorities/pricing methods**

Not applicable.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

Not applicable.

## **Penalty relief**

Not applicable.

## **Statute of limitations on transfer pricing assessments**

Not applicable.

## **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The likelihood of a general tax audit is categorized as high. The likelihood of transfer pricing assessments as part of a general tax audit is considered low. The DGI has not yet initiated any tax audits regarding transfer pricing because the regulations come into force as of tax year 2016. In case transfer pricing is scrutinized, the likelihood that the transfer pricing methodology will be challenged is unknown.

## **APA opportunity**

Not applicable.

# Nigeria

## Taxing authority and tax law

Taxing authority: Federal Inland Revenue Service (FIRS)

Tax law: Companies Income Tax Act, Petroleum Profits Tax Act, Personal Income Tax Act

## Relevant regulations and rulings

The Income Tax (Transfer Pricing) Regulations No. 1, 2012, govern transfer pricing in Nigeria.

The Transfer Pricing Regulations apply to transactions between connected taxable persons and require that the taxable profits resulting from such transactions are consistent with the arm's-length principle.

Affected transactions specifically, but not exclusively, include the following:

- ▶ Sale and purchase of goods and services
- ▶ Sale, purchase or lease of tangible assets
- ▶ Transfer, purchase, license or use of intangible assets
- ▶ Provision of services
- ▶ Lending or borrowing of money
- ▶ Manufacturing arrangements
- ▶ Any transaction that may affect profit and loss or any other matter incidental to the foregoing

For purposes of applying the regulations, permanent establishments are treated as separate entities, and any transaction between a permanent establishment and its head office or other connected taxable persons is considered a controlled transaction subject to the transfer pricing rules.

## OECD Guidelines treatment

The Transfer Pricing Regulations are to be applied in a manner consistent with the OECD Guidelines and Article 9 of the UN and OECD Model Tax Conventions. The Transfer Pricing Regulations explicitly recognize the five methods accepted by the OECD Guidelines as being appropriate.

There is no guidance in the Transfer Pricing Regulations on treatment of business restructuring. Chapter 9 of the OECD Guidelines can be expected to apply.

## Documentation requirements

Taxpayers are required to prepare contemporaneous transfer pricing documentation, which must be in place at the time of filing their tax returns. The tax returns are due six months after year-end. The transfer pricing documentation can be requested with 21 days' notice after the tax return is filed. The FIRS may extend this time frame at its discretion. The regulations provide that the documentation should be prepared taking into account the complexity and volume of the applicable transactions.

## Priorities/pricing methods

The regulations require the most appropriate transfer pricing method to be selected based on the facts and circumstances relating to the intercompany transactions being analyzed. The regulations prescribe the following methods to be used in determining whether the result of a transaction or series of transactions is consistent with the arm's-length principle:

- ▶ CUP method
- ▶ Resale price method
- ▶ Cost-plus method
- ▶ TNMM

## Nigeria (continued)

### Priorities/pricing methods (continued)

- ▶ Transactional profit split method
- ▶ Any other method that may be prescribed in the regulations made by the FIRS from time to time

A taxpayer may apply a transfer pricing method outside of the specified methods if it can be established that (i) none of the listed methods can be reasonably applied and (ii) the method used gives rise to a result that is consistent with the arm's-length principle.

### Return disclosures/related party disclosures

Taxpayers are required to complete and attach a Transfer Pricing Declaration Form to the annual tax return as well as a Transfer Pricing Disclosure Form. The Transfer Pricing Declaration Form requires the taxpayer to indicate whether it has complied with the Transfer Pricing Regulations and prepared Transfer Pricing Documentation. The Transfer Pricing Disclosure Form requires disclosure of information about intercompany transactions and business restructuring.

### Transfer pricing-specific returns

Transfer Pricing Declaration and Transfer Pricing Disclosure Forms, as noted above.

Taxpayers are required to complete Transfer Pricing Declaration and Disclosure Forms, which are to be submitted as part of an annual transfer pricing return (TP return), due at the same time as the tax return is filed. The tax return will be deemed incomplete without the TP return. For clarity, the TP return consists of (i) the Transfer Pricing Disclosure Form, (ii) the Transfer Pricing Declaration Form (for the first annual filing only), (iii) a copy of audited financial statements, (iv) a copy of the income tax self-assessment and (v) the income tax computation and all relevant schedules.

The FIRS has also requested that taxpayers submit transfer pricing policy documents along with their first TP return. The transfer pricing policy documents are a unique requirement of the Nigerian regime and should include information such as the name of members of the group and organizational structure, ownership or control linkages of connected entities, outline or a brief description of the business activities of the group and its members, types of intercompany transactions that may occur, the flow or anticipated flow of controlled transactions, and the transfer pricing method that may be adopted for the pricing for each type of controlled transaction. For clarity, the transfer pricing policy document is not the same as transfer pricing documentation, but rather is a condensed form of key information about the company's transfer pricing policies.

### Documentation deadlines

Transfer pricing documentation should be in place at the due date for filing the income tax return for the year in which the documented transactions occurred.

The Transfer Pricing Declaration and Transfer Pricing Disclosure Forms, as well as the transfer pricing policy documents, should be submitted when the income tax return is filed.

### Transfer pricing penalties

A taxable person who fails to comply with any of the provisions of the regulations will be liable for a penalty as prescribed in the relevant provisions of the applicable tax laws (Companies Income Tax Act, Petroleum Profits Tax Act and Personal Income Tax Act).

For example, under the Companies Income Tax Act, the penalty for filing corporate income tax returns late is NGN25,000 in the first month in which the failure occurs and NGN5,000 for each subsequent month. Late payment of taxes due attracts a penalty of 10%, plus interest at the bank lending rate.

It should be noted that the regulations are silent with regard to accrued interest on the underpayment of tax. Generally, the FIRS applies interest at the prevailing interest rate on the underpayments of tax.

### Penalty relief

There is no specific penalty relief in the regulation. However, it is envisaged that a taxpayer would mitigate the risk of penalties through appropriate documentation of controlled transactions. In this regard, the burden of proof lies with the taxpayer.

## Nigeria (continued)

### Statute of limitations on transfer pricing assessments

No statute of limitations exists in the Transfer Pricing Regulations, but under the principal tax regulations, all supporting documentation for the taxpayer's returns has to be retained for six years. In cases of fraud, there is no statute of limitations.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The first transfer pricing audits and requests for submission of transfer pricing documentation under the new regulations have commenced in the first half of 2015. As the audits are still at preliminary stages there is limited information available on specific audit risks or areas of transfer pricing scrutiny in Nigeria.

### APA opportunity

The regulations indicate that a connected taxable person may request that FIRS enter into an APA to establish an appropriate set of criteria for determining whether the taxpayer has complied with the arm's-length principle for certain future controlled transactions over a fixed period. The taxpayer may request either a unilateral, bilateral or multilateral APA.

Current indications are that the FIRS will not accept APA applications in the initial period of application of the Transfer Pricing Regulations as it is building capacity.

# Norway

## Taxing authority and tax law

Taxing authority: Norwegian Tax Authority (NTA)

Tax law:

- ▶ Taxation Act (1999)
- ▶ Tax Administration Act (1980)

## Relevant regulations and rulings

The arm's-length principle is stated in Taxation Act (1999) §13-1, and the transfer pricing filing and documentation requirements are stated in Tax Administration Act (1980) §4-12.

In June 2007, the Norwegian Parliament adopted transfer pricing regulations (Tax Administration Act §4-12). The requirements became effective in January 2008. The transfer pricing requirements consist of filing and documentation requirements.

The Ministry of Finance also published the guidelines to the Norwegian documentation requirements in 2007. These guidelines outline specific requirements of what to include in the Norwegian documentation.

Effective in 2014, new interest deductibility restrictions on related party debt came into effect. According to the new legislation, the net interest expense paid to a related party can be deducted only to the extent that internal and external interest expense combined does not exceed 30% of the taxable earnings before interest, taxes, depreciation and amortization (EBITDA). The restriction also covers third party interest expenses, where a related party has provided a guarantee. Certain exemptions are expected to apply in relation to external debt guaranteed by a related party. Exemptions to the interest deductibility restrictions rule apply if the total amount of net interest expense does not exceed NOK5 million during the fiscal year.

## OECD Guidelines treatment

The NTA has a long history of following the OECD Guidelines. The Norwegian regulations follow OECD principles, and documentation prepared in line with the OECD Guidelines will generally meet the Norwegian requirements.

The Taxation Act (1999) §13-1 gives the OECD Guidelines a strong and formal status under Norwegian tax law. However, OECD Guidelines Chapter IV (Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes) and Chapter V (Documentation) are not included. The status of the OECD Guidelines is limited to that of guidance, and they do not constitute binding rules.

The NTA seems to be applying the principles outlined in OECD Guidelines Chapter IX (Transfer Pricing Aspects of Business Restructurings). Recent tax audits and court cases have shown that the principles described in OECD Guidelines Chapter IX are applied in practice.

## Documentation requirements

In Norway, the transfer pricing requirements consist of filing and documentation requirements.

The filing requirement is an attachment to the annual tax return (RF-1123), which includes a listing of all intercompany transactions. The form will serve as a basis for the NTA when targeting transfer pricing tax audits. The filing requirements are applicable for all transactions reported in the tax return.

In addition, covered taxpayers are obliged to prepare transfer pricing documentation that describes how the transfer prices have been established between associated enterprises. The documentation needs to include sufficient information that would enable the NTA to evaluate the arm's-length nature of the transfer prices applied between associated enterprises. Both cross-border and domestic transactions are covered. Specific requirements worth mentioning with respect to the Norwegian documentation rules are as follows:

- ▶ Key financial figures for the last three years for the Norwegian entity, and all group entities that undertake transactions with the Norwegian entity during the covered income year, must be included and any losses incurred by the Norwegian entity must be explained.

## Norway (continued)

### Documentation requirements (continued)

- ▶ Agreements for the related party transactions must be attached to the documentation.
- ▶ A description of how the transfer price in a transaction is actually computed must be provided.
- ▶ The level of detail required depends on the complexity of the transaction and, in particular, if the transaction is of high value, intangibles are involved or if there may be a tax motivation for pricing the transaction at non-arm's-length conditions, the level of detail required is higher.
- ▶ A description of material changes to the enterprise of the group during the income year thereunder, an explanation of reorganizations and material changes to the functions performed by the enterprise, and the property it uses in its business activities and the risk it assumes must be included.

### Priorities/pricing methods

The NTA accepts the pricing methods contained in the OECD Guidelines. The traditional transactional methods (CUP, resale price and cost-plus) are generally preferred to the profit-based methods (TNMM and profit split). However, support for applying the profit-based methods under certain circumstances is increasing. The NTA generally does not accept the use of Pan-European searches anymore because the tax authorities believe that the Norwegian market, in general, has higher profit margins since Norway has not been affected by the financial crisis in the same way as many other European countries.

There is no specified priority of methods under the Norwegian tax law. As stated by the Norwegian Supreme Court, the Taxation Act (1999) §13-1 allows for the use of several transfer pricing methods, including methods not described in the OECD Guidelines, provided those methods provide arm's-length results.

### Return disclosures/related party disclosures

The filing requirement is an attachment to the annual tax return (RF-1123), which includes a listing of all intercompany transactions. The form serves as a basis for the NTA when targeting transfer pricing tax audits. The filing requirements are applicable to all transactions reported in the tax return.

### Transfer pricing-specific returns

There are no transfer pricing-specific returns, except for the attachment to the annual tax return (RF-1123). It is generally recommended taxpayers provide a description of significant intercompany transactions with the tax return.

### Documentation deadlines

The transfer pricing documentation must be submitted within 45 days of a request by the NTA. All documentation must be retained for 10 years. The tax authority assumes that documentation is made on a contemporaneous basis and, accordingly, does not allow for extensions.

### Transfer pricing penalties

The transfer pricing penalty (surtax) is 30% of the tax adjustments, provided that the tax authority concludes that the taxpayer provided incomplete or incorrect information when submitting the tax return. If sufficient and correct information is provided, no penalty will be imposed. In the case of gross negligence, a surtax of up to 60% may be levied. However, the normal surtax rate is 30%. Additionally, a nondeductible annual interest charge will apply.

Failure to comply with the filing requirement (described below) carries the same penalties as failure to complete the annual tax return. The same is applicable if the documentation is not submitted by the deadline.

### Penalty relief

A 30% penalty is normal; however, the risk of a penalty being imposed may be reduced if proper documentation is prepared. Disclosure in the tax return may, in principle, relieve penalties since the tax authority technically will have been informed and may further investigate the transfer pricing case. The assessment of penalties is becoming increasingly common.

## Norway (continued)

### Statute of limitations on transfer pricing assessments

The general statute of limitations for tax assessments in Norway states that issues regarding the tax return cannot be raised after 10 years from the end of the income year. Transfer pricing documentation must, therefore, be retained and stored for at least 10 years.

The statute of limitations is three years if the amendment is based on the tax authority's discretionary assessments or the interpretation of the tax legislation if the tax return filed is correct and complete.

The statute of limitations is two years if any tax adjustment is against the taxpayer, provided that the taxpayer has not given incorrect or incomplete information in the tax return.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a full corporate tax audit is, in general, low. However, the likelihood of a separate transfer pricing tax examination is considered high. For both separate transfer pricing tax examinations and full corporate tax audits, the taxpayer's related party transactions will likely be scrutinized and challenged. In case transfer pricing is reviewed, the likelihood of the transfer pricing methodology being challenged is considered high.

The NTA has a strong focus on intercompany transactions and has established a national transfer pricing project composed of all of the major tax offices to further its focus on transfer pricing. This focus continues to increase, in line with the rising number of dedicated transfer pricing tax inspectors within the NTA.

The NTA selects companies for audit based on the submitted Form RF-1123 and the tax return. Companies are also selected through initiatives by the NTA targeting specific transactions (e.g., business restructurings or transactions involving IP). If selected, the first step is the taxpayer submitting its transfer pricing documentation for review.

Based on the initial review, the company is selected for audit if the documentation does not provide sufficient information and answers about the internal transactions and the profitability of the company.

Currently, any company with a low or negative margin transacting with a foreign related party has a high risk of a tax audit. In addition, year-end adjustments are often challenged. The NTA often uses this as an argument to claim that the result is not at an arm's length.

### APA opportunity

APAs are in their infancy in Norway, and a separate MAP or APA unit will be established in 2015. Further, a transfer pricing exemption exists on the sale of gas under the Petroleum Taxation Act.

# Oman

## **Taxing authority and tax law**

Taxing authority: Secretariat General for Taxation (SGT), a part of the Ministry of Finance

Tax law: Income Tax Law (ITL) issued by Royal Decree 28/2009 and the Executive Regulations, clarifying certain provisions of the ITL, issued by Ministerial Decision 30/2012; all tax legislation enacted by Royal Decree; provisions that implement the tax law introduced by Ministerial Decisions and Executive Regulations

## **Relevant regulations and rulings**

Articles 126 to 128 of the ITL contain the transfer pricing regulations.

## **OECD Guidelines treatment**

OECD Guidelines are not binding in Oman. However, in the past, the SGT has taken OECD Guidelines into account.

## **Documentation requirements**

The law has not provided any specific documentation requirements. Therefore, documentation requirements are determined on a case-by-case basis. Global transfer pricing reports, adequately localized for the region, could help demonstrate the arm's-length basis of pricing for related party transactions.

## **Priorities/pricing methods**

No pricing methods have been prescribed in the law or under the existing regulations. The law mentions that pricing shall be taken into account, assuming the terms upon which transactions would have been entered into by independent persons. This suggests the CUP method may be preferred. The SGT is expected to enact more rules and publish more guidance in the coming years.

## **Return disclosures/related party disclosures**

Oman follows International Financial Reporting Standards (IFRS). Therefore, the SGT expects taxpayers to disclose related party transactions in their financial statements in accordance with IFRS. Introduction of e-filing of tax returns in the near future may augment additional related party transaction disclosures, along with the tax returns.

## **Transfer pricing-specific returns**

Under the new Executive Regulations, which were issued in 2012, formats of the tax returns have been modified to collect information from the taxpayer about related party transactions. The disclosure requirement has been effective since 2012.

## **Documentation deadlines**

No documentation deadlines are currently applicable since there is no specific transfer pricing documentation filing requirements.

## **Transfer pricing penalties**

Currently, there is no specific transfer pricing penalty prescribed in the law.

## **Penalty relief**

Since there are no specific transfer pricing penalties, no penalty relief is currently applicable. While there are no specific provisions for relief, the SGT does look at each case independently and has waived the delay penalty on late submissions of tax returns.

## Oman (continued)

### **Statute of limitations on transfer pricing assessments**

There are no separate transfer pricing assessments conducted in Oman. The transfer pricing assessment will be conducted as part of the regular tax assessment for a tax year. The statute of limitations to complete the regular tax assessment is five years from the end of the year for which a tax return is submitted.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The likelihood of an annual tax audit in general is high, and tax assessments are conducted annually. A review of transfer pricing is one of the main processes during the annual tax assessment. Therefore, related party transactions, from a transfer pricing perspective, are highly likely to be reviewed as part of the tax assessment. Since there is no specific methodology prescribed in the tax law, the appropriate transfer pricing methodology used is determined on a case-by-case basis. Accordingly, the likelihood of the methodology being challenged in a transfer pricing audit is also high.

### **APA opportunity**

There is no opportunity to conclude an APA.

The provision of advance rulings is not mentioned in the ITL; therefore, the SGT is not legally bound to grant an advance ruling. However, as a matter of practice, the SGT has been responding to advance ruling requests. These responses are binding on the SGT for that particular case and cannot be applied generally to any other case.

# Pakistan

## Taxing authority and tax law

Taxing authority: Federal Board of Revenue (FBR)

Tax law: Income Tax Ordinance of 2001 (the Ordinance)

## Relevant regulations and rulings

Section 108 of the Income Tax Ordinance deals with the powers of the commissioner with respect to transactions between associates.

The commissioner may distribute, apportion or allocate income, deductions or tax credits between the persons as is necessary to reflect the income that the persons would have realized in an arm's-length transaction. While making any adjustments, the commissioner may determine the source of income and the nature of any payment or loss as revenue, capital or otherwise.

Section 109 of the Ordinance empowers the commissioner to re-characterize the transaction for determining the taxable amount or tax liability. The commissioner may:

- ▶ Re-characterize a transaction or an element of a transaction that was entered into as part of a tax avoidance scheme
- ▶ Disregard a transaction that does not have substantial economic effect
- ▶ Re-characterize a transaction where the form of the transaction does not reflect the substance

A statement from the FBR in December 2014 announced that it created a transfer pricing unit and will develop the technical knowledge of the field officers, including developing a database of comparables.

## OECD Guidelines treatment

The methods used by the commissioner to determine the arm's-length result are identical to the methods available under the OECD Guidelines.

Pakistan has concluded approximately 63 income tax treaties containing an article that resembles Article 9 of the OECD Model Tax Convention on "Associated Enterprises."

## Documentation requirements

Transfer pricing documentation is not required by law. However, in practice, it is recommended that taxpayers maintain contemporaneous documentation to avoid re-characterization of transactions between associates, as described above.

## Priorities/pricing methods

The Income Tax Rules of 2002 (the Rules) state that the following methods may be applied by the commissioner to determine the arm's-length result.

- a. CUP method: The price quoted in a transaction between uncontrolled parties on similar terms and conditions will be considered.
- b. Resale price method: The difference in the resale gross margin of the two transactions would be considered and compared for determining whether the transaction between controlled parties is on an arm's-length basis.
- c. Cost-plus method: The cost-plus markup realized in an uncontrolled transaction will be considered as a basis to determine whether a similar transaction between controlled parties is on an arm's-length basis.
- d. Profit split method: Where a group of associates is formed and the transactions are so interrelated that a separate basis is not possible to identify the arm's-length results for a similar transaction between uncontrolled persons, the profit-sharing basis agreed to between independent persons forming an association would be considered.

The method among a., b. and c. that provides the most reliable measure of an arm's-length result with regard to all of the facts and circumstances, in the opinion of the commissioner, shall be applied. The method in d. shall apply only where the a., b. and c. methods cannot be reliably applied.

## Pakistan (continued)

### **Return disclosures/related party disclosures**

Pakistan follows International Financial Reporting Standards (IFRS). Therefore, the FBR expects taxpayers to disclose related party transactions in their financial statements in accordance with IFRS.

### **Transfer pricing-specific returns**

Transfer pricing-specific returns are not required in Pakistan.

### **Documentation deadlines**

Since no specific transfer pricing documentation requirements have been provided, no documentation deadlines are currently applicable.

### **Transfer pricing penalties**

Currently, there is no specific transfer pricing penalty prescribed in the law.

### **Penalty relief**

Since there are no specific transfer pricing penalties, no penalty relief currently is applicable.

### **Statute of limitations on transfer pricing assessments**

There are no separate transfer pricing assessments conducted in Pakistan. A transfer pricing assessment, if any, will be conducted as part of the regular tax assessment for a tax year.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The FBR recently established an internal Transfer Pricing Division, and a database for comparative analyses and audit methodology is being developed. Generally, the transfer pricing aspect is covered in the tax audit proceedings conducted by the commissioner once the return of income is selected for a tax audit.

### **APA opportunity**

There is no opportunity to conclude an APA. However, an advance ruling is possible.

Per the provisions of Section 206A, a nonresident taxpayer may file an application with the FBR seeking confirmation of taxability, or otherwise of the proposed transaction, by providing complete details and documentation. The ruling issued by the FBR shall be binding on the tax authorities regarding the application of the transaction and according to the law as it stood at the time of such ruling. The prescribed time limit for issuance of the ruling by the FBR is three months after such application is received, along with necessary details and documents.

# Panama

## **Taxing authority and tax law**

Taxing authority: Tax Administration of Panama (*Dirección General de Ingresos*, or DGI)

Tax law: Panama Tax Code

## **Relevant regulations and rulings**

- ▶ Law No. 33, enacted in 2010 (Law 33) and applicable as of fiscal year 2011, established the transfer pricing provisions in the Tax Code (Chapter IX of Title I of the Fourth Book) in Articles 762-A to 762-K.
- ▶ Law No. 52 (Law 52), which modified Law 33 and related sections of the Tax Code, was enacted in August 2012 and is applicable to fiscal years ending after August 2012.
- ▶ Executive Decree No. 958, with its regulations on transfer pricing, is in the related sections of the Tax Code (Chapter IX of Title I of the Fourth Book).

Prior to fiscal year 2011, Law 33 introduced norms to adapt the Tax Code to international double tax treaties (DTTs) that applied only to taxpayers with transactions conducted with affiliates resident in countries with which Panama had signed a DTT.

With Law 52, all cross-border intercompany transactions conducted by Panamanian taxpayers are now subject to transfer pricing obligations, according to modified Section 762-D of the Tax Code.

## **OECD Guidelines treatment**

The OECD Guidelines can be relied upon for interpretation of the rules, as long as they do not contradict the Panamanian Tax Code or international tax treaties.

## **Documentation requirements**

Contemporaneous transfer pricing documentation related to cross-border intercompany transactions must be kept and maintained in Spanish. Documentation must include:

- ▶ The complete identification of the taxpayer and of the nonresident related parties with whom transactions are carried out, as well as evidence of direct and indirect participation between related parties
- ▶ A detailed description of the nature, characteristics and amount of all intercompany transactions of the taxpayer, including the transfer pricing method employed

It is also necessary to include the method selection process and specify the price or margin, or a range of prices or margins, applied by the taxpayer in its intercompany transactions. In addition, it is necessary to include in the documentation information regarding the functions performed, assets used and risks borne by the taxpayer involved in each transaction. Information and documentation about comparable transactions or companies by type of transaction must also be included. Internal comparables are preferred over external comparables, and the reasons for not applying internal comparables must be duly documented.

The documentation must be prepared considering the complexity and volume of the transactions and should include the information that the taxpayer used in its evaluation of the intercompany transactions, consisting of information pertaining to both the multinational group to which the taxpayer belongs and the taxpayer itself.

The information regarding the multinational group contained in the documentation should include:

- ▶ A general description of the organizational, legal and operating structure of the group, with any relevant changes
- ▶ Identification of the related parties with whom the taxpayer conducts intercompany transactions
- ▶ The transfer pricing policy of the multinational group, if any

## Panama (continued)

### Priorities/pricing methods

The transfer pricing methods in Panama are the CUP method, resale price method, cost-plus method, profit split method, residual profit split method and TNMM. The selection of the method should be based on the characteristics of the transaction under analysis and the circumstances of the case and should aim to be the one that best respects the arm's-length principle.

### Return disclosures/related party disclosures

Taxpayers must report on the income tax return whether they conducted related-party transactions and disclose the total amount of such related-party transactions, depending on their nature – that is, if they are income, purchases or other expense items.

### Transfer pricing-specific returns

An information return (Form 930) on the transactions conducted with related parties resident abroad should be filed within six months of the close of the fiscal year.

### Documentation deadlines

Documentation must be readily available by the date on which the transfer pricing information return is due and must be kept along with the company's accounting books and records. If requested by the DGI, documentation should be provided within 45 days of notification.

Taxpayers should file an information return on cross-border intercompany transactions annually, and it should be filed within six months of the close of the fiscal year.

### Transfer pricing penalties

Failure to file the transfer pricing information return results in a penalty of 1% of the total amount of intercompany transactions. However, the penalty will not exceed PAB1 million. For the penalty calculation, the gross amount of the transactions will be considered regardless of their nature (i.e., regardless of whether they are items of income, expense or deduction).

In addition, transfer pricing income adjustments imposed by the DGI can result in surcharges and penalty interest.

### Penalty relief

There is currently no penalty relief regime in place.

### Statute of limitations on transfer pricing assessments

The statute of limitations on assessments is three years from the date of filing the income tax return. The term is extended with the filing of an amended return.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit currently is categorized as medium. The likelihood of a transfer pricing assessment as part of a general tax audit is low. In the past year, the DGI has requested transfer pricing documentation from taxpayers regarding fiscal year 2013, and has initiated tax audits regarding transfer pricing issues. For the last couple of years, the DGI has worked on creating a specialized transfer pricing unit.

In case transfer pricing is scrutinized, the likelihood that the transfer pricing methodology will be challenged is low.

### APA opportunity

Currently, no APA program has been established.

# Papua New Guinea

## Taxing authority and tax law

Tax authority: Internal Revenue Commission (IRC)

Tax law: Income Tax Act 1959 (the Act)

## Relevant regulations and rulings

Division 15 of the Act, Transfer Pricing: Determination of the taxable income of certain persons from international transactions and Papua New Guinea's double tax agreements (Division 15).

IRC – Taxation Circular No. 2011/2 – Commissioner General's interpretation and application of the Taxation Laws on Division 15 of the ITA 1959 (the Circular).

## OECD Guidelines treatment

The Circular acknowledges the OECD Guidelines, as well as guidance provided by the United Nations.

Although Papua New Guinea (PNG) is not a member country of the OECD, the OECD Guidelines are acknowledged as an important, influential document that reflects unanimous agreement among the member countries and that was reached after extensive consultation with industry and tax practitioners in many countries. The Circular states that the OECD Guidelines should be followed in the absence of guidance in terms of the Circular, the provisions of Division 15 or the double tax agreements entered into by PNG.

The Commissioner General considers the guidance provided on business restructurings contained in Chapter IX of the OECD Guidelines to be relevant and recommends that taxpayers follow the guidance in establishing arm's-length conditions in international agreements with associated entities involving business restructurings. Where appropriate, the Commissioner General will publish future guidance on this issue.

## Documentation requirements

The general requirements of the Act require taxpayers to keep proper records relating to their transfer pricing. However, there is no specific statutory requirement to prepare and maintain transfer pricing documentation.

## Priorities/pricing methods

Division 15 and the double tax agreements entered into by PNG do not prescribe any particular methodology for ascertaining an arm's-length consideration. Given that there is no prescribed legislative preference, the Commissioner General generally would seek to use the most appropriate method, per the OECD Guidelines.

## Return disclosures/related party disclosures

The IRC requires an International Dealings Schedule (IDS) to be filed with each tax return when the international related-party dealings exceeded Papua New Guinean kina (PGK) 100,000 in value (excluding the capital value of any related party loans) or when loans with related parties have an aggregate capital value exceeding PGK2 million at any time during the year.

Information to be disclosed on the IDS includes:

- ▶ International related-party transaction types and quantum
- ▶ Countries with which the taxpayer has international related-party transactions
- ▶ Percentage of transactions covered by contemporaneous documentation
- ▶ Transfer pricing methodologies selected and applied for each international related-party type
- ▶ Details of branch operations

## Papua New Guinea (continued)

### Transfer pricing-specific returns

As stated above, the IRC requires an IDS to be filed with each tax return when the international related-party dealings exceed PGK100,000 in value (excluding the capital value of any related-party loans) or when loans with related parties have an aggregate capital value exceeding PGK2 million at any time during the year.

### Documentation deadlines

As a general rule, the Commissioner General considers that taxpayers should contemporaneously document the process they have followed and their analysis in determining transfer prices in their efforts to comply with the arm's-length principle. This should include some justification of why those transfer prices are considered to be consistent with the arm's-length principle.

The IRC recommends preparing contemporaneous documentation for all future transactions that are entered into after the release of the Circular by no later than the date of lodgment of the tax return affected by those transactions.

### Transfer pricing penalties

The Act does not impose specific penalties in respect to non-arm's-length pricing practices and the general additional tax and penalty provisions will apply to default, evasion or omission relating to transfer pricing.

The penalty, additional tax and offense provisions applicable in the event of default or omission in the completion of the tax return or evasion of taxation contained in the Act stipulate a liability for additional tax or penalty of double the difference between the tax properly payable and the tax that would be payable based on the return as lodged. The Commissioner General has the discretion to remit the additional tax either in whole or in part. If an incorrect return is lodged, the taxpayer may be prosecuted and liable for a fine not less than PGK1,000 and not exceeding PGK50,000. In addition, the court may order the taxpayer to pay to the Commissioner General a sum not exceeding double the amount of income tax or dividend (withholding) tax that would have been avoided if the statement in the return had been accepted as correct. Where additional tax is imposed under prosecution, the amount of that additional tax will reduce the amount of additional tax imposed by the Commissioner General.

### Penalty relief

The Commissioner General has the discretion to remit the penalty amount for any reasons considered sufficient.

### Statute of limitations on transfer pricing assessments

There generally is no statute of limitations with respect to transfer pricing adjustments.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

Given the low level of resources available to the IRC, the likelihood of an annual tax audit is low. If an audit is conducted, the likelihood that transfer pricing will be reviewed as part of the audit is high. If transfer pricing is reviewed as part of the audit, the likelihood that the methodology will be challenged would depend on the documentation available and the appropriateness of the methodology chosen.

The Commissioner General, as a rule, allocates resources for transfer pricing cases according to the perceived risk to revenue from taxpayer noncompliance with the arm's-length principle. The more significant and the broader the scope of the dealings, the more likely it is that a taxpayer will be subject to a transfer pricing review. Businesses with significant levels of international dealings that are constantly returning losses are at the greatest risk of a transfer pricing review.

Taxpayers should be aware that the Commissioner General may pay closer attention to a transaction involving an associated entity resident in a country with lower tax rates than PNG. The perception exists that transactions involving low-tax jurisdictions are often motivated by tax, rather than strictly commercial reasons. This will be the case particularly when the PNG entity has ongoing tax losses as a result of its dealings with a related party in a lower-tax jurisdiction.

### APA opportunity

The Commissioner General supports having an APA program operating in PNG but no current APA program exists.

# Paraguay

## **Taxing authority and tax law**

Taxing authority: Paraguay Tax Authority (*Subsecretaría de Estado de Tributación*)

Tax law: Tax Law No. 125/91, modified by Law No. 2.421/04 and Law No. 5.061/13

## **Relevant regulations and rulings**

Paraguay does not have a specific transfer pricing law; however, in October 2013, the National Congress enacted a new tax law that states a general disposition related to sale price adjustment (Law No. 5061/13). This new disposition is considered as a kind of transfer pricing regulation and allows the Paraguay Tax Authority to amend prices related to exportation operations for corporate income tax purposes only. Decree No. 1.832/2014 establishes the sale price adjustments on soybeans and their derivatives. The Paraguayan Tax Authority could include other products in the future.

## **OECD Guidelines treatment**

Not applicable.

## **Documentation requirements**

Not applicable.

## **Priorities/pricing methods**

Not applicable.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

Not applicable.

## **Penalty relief**

Not applicable.

## **Statute of limitations on transfer pricing assessments**

Not applicable.

## **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

Not applicable.

## **APA opportunity**

Not applicable.

# Peru

## Taxing authority and tax law

Tax authority: National Superintendency of Tax Administration (*Superintendencia Nacional de Administración Tributaria*, or SUNAT)

Tax law: Peruvian Income Tax Law (PITL)

## Relevant regulations and rulings

Article 32 (Item 4) and Article 32-A of the PITL and Article 24 and Chapter XIX (Articles 108 to 119) of the PITL govern transfer pricing regulations in Peru.

Transfer pricing rules have been effective in Peru since 1 January 2001. Over the years, these rules have undergone several changes with amendments to the PITL and Tax Code.

Transfer pricing rules apply both to cross-border and domestic transactions between related parties and all transactions with residents in tax haven jurisdictions.

The transfer pricing adjustments are applicable solely when (1) the value agreed upon by the related parties determines a lower taxable income than the one at arm's length or (2) in any other case, if the tax authority considers that the transfer pricing adjustment affects the tax determined in Peru for another related party transaction. The regulations consider that a lower amount of income tax is determined, among others, when:

- ▶ A deferral of income is evidenced.
- ▶ Higher tax losses have been determined than those that would have accrued at arm's length.

## OECD Guidelines treatment

The PITL refers to the OECD Guidelines as a source of interpretation for transfer pricing analysis, as long as they do not contradict the PITL.

## Documentation requirements

Since 2006, taxpayers have been required to maintain a transfer pricing study if they fall within the scope of the transfer pricing rules contained in Article 32-A of the PITL and if they meet any of the following conditions:

- ▶ The company's income exceeds PEN6 million and the amount of its intercompany transactions exceeds PEN1 million.
- ▶ The company has been engaged in transactions from, to or through a low-tax jurisdiction.

From 30 June 2012, formal transfer pricing obligations (transfer pricing studies and transfer pricing returns) will apply only to transactions that involve taxable income or acceptable tax expenses.

## Priorities/pricing methods

Peruvian law implicitly adopts a "best method" rule, unless the transaction being evaluated is a sale or purchase of commodities or their derivatives. Under Peruvian legislation, the transfer pricing methods identified are CUP, resale price, cost-plus, profit split, residual profit split and TNMM.

A forced CUP method should be applied in cross-border transactions of commodities and their derivatives in which the counterparty is a trading company. A comprehensive list of the products that should be evaluated using this method is not available yet; however, it does include metals and its derivatives, agricultural goods and their derivatives, hydrocarbons and their derivatives, and fish meal. The method has to be applied by adding or deducting the internationally listed commodity price, or certain common industry price adjustments, including treatment charges, premiums or discounts. Specific regulations are pending issuance.

If the trading company meets certain conditions, the forced CUP method cannot be applied. A third party should certify compliance with such conditions.

## Peru (continued)

### Return disclosures/related party disclosures

The main details to be disclosed in the transfer pricing information return include the amount of the transactions, the transfer pricing method selected and the related party with whom the transactions were made, as well as (from fiscal year 2012) the results of the tested party, the interquartile range of selected comparables and the amount of the transfer pricing adjustments.

### Transfer pricing-specific returns

An annual transfer pricing informative return should be filed by taxpayers in June, if they meet the following conditions:

- ▶ The amount of intercompany transactions exceeds PEN200,000.
- ▶ The company has been engaged in transactions from, to or through a low-tax jurisdiction for which the market value is less than the computable cost.

### Documentation deadlines

The deadline for filing the transfer pricing return for fiscal year 2010 and afterward was June of the calendar year following the close of the fiscal year of the corresponding transfer pricing return.

From fiscal year 2012, the transfer pricing technical study should be filed alongside the transfer pricing informative return. The deadline for filing both formal transfer pricing requirements for fiscal year 2012 was October 2013. In other years, the deadline for filing both formal requirements is June of the following fiscal year.

Prior to 2012, there was no deadline to present the transfer pricing study to the tax authority. Nevertheless, as provided in Ruling No. 167-2006-SUNAT, the tax authority could request a transfer pricing study from taxpayers after the fiscal year closes.

### Transfer pricing penalties

Noncompliance with the obligation to file a transfer pricing technical study, or documentation and information supporting the calculation of the prices agreed to in transactions with related parties, is penalized with a fine of 0.6% of the company's net income for the year preceding that which is under scrutiny. The penalty cannot be less than 10% of a Tax Unit or more than 25 Tax Units.<sup>1</sup> Likewise, noncompliance with the obligation to file the transfer pricing return according to the dates established by SUNAT subjects the taxpayer to a fine of 0.6% of the company's net income for the year preceding that which is under scrutiny. The penalty cannot be less than 10% of a Tax Unit or more than 25 Tax Units.

The adjustments to annual taxable income resulting from the tax authority's application of the transfer pricing provisions will be subject to additional penalties of up to 50% of the resulting tax deficiency (income misstatement penalties).

### Penalty relief

The penalty reductions that a taxpayer can be subjected to for not complying with the obligation to have a transfer pricing technical study or present the transfer pricing information return are:

- ▶ A 100% penalty reduction if the taxpayer files the transfer pricing informative return after the due date but before it is detected and compelled to do so by SUNAT
- ▶ A 80% (with a transfer pricing study) or 90% (with a transfer pricing return) penalty reduction if the taxpayer rectifies the infraction and pays the corresponding fine within the time established by SUNAT
- ▶ A 50% (with a transfer pricing study) or 80% (with a transfer pricing return) penalty reduction if the taxpayer rectifies the infraction but does not pay the corresponding fine within the time frame established by SUNAT

### Statute of limitations on transfer pricing assessments

According to Articles 87-7 and 43 of the Peruvian Tax Code, the statute of limitations for income tax assessments is four years after 1 January of the year that follows the year the annual income tax return is due (generally, 31 March) and six years if returns were never filed.

<sup>1</sup> One Tax Unit is the equivalent of approximately US\$1,320.

## Peru (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The likelihood of an annual tax audit is characterized as medium, as is the likelihood of transfer pricing issues being reviewed as part of a general audit.

The Peruvian tax administration has already initiated transfer pricing audits. Also, it has issued letters requesting that taxpayers amend their tax returns based on the results of the transfer pricing studies previously presented. The likelihood that the transfer pricing methodology will be challenged during a transfer pricing review is characterized as high.

It is expected that SUNAT will significantly increase its transfer pricing audits during the coming years.

### **APA opportunity**

Since 2013, unilateral and multilateral APAs are available for all transactions (cross-border and domestic transactions between related parties and with tax haven residents). Multilateral APAs will be available only for countries that have entered into double tax avoidance treaties with the Peruvian fiscal administration. Draft regulations detailing the procedures to be followed were recently issued.

# Philippines

## Taxing authority and tax law

Taxing authority: Bureau of Internal Revenue (BIR)

Tax law: Section 50, National Internal Revenue Code of 1997, as amended (Tax Code)

## Relevant regulations and rulings

The Commissioner of Internal Revenue has the power under Section 50 of the Tax Code to allocate income and expenses between or among related parties and taxpayers or make transfer pricing adjustments to reflect the true taxable income of taxpayers.

Revenue Memorandum Circular (RMC) No. 26-08 formally adopted the OECD Guidelines as interim transfer pricing guidelines in the Philippines. The RMC specifically states that the BIR, as a matter of policy, subscribes to the OECD Guidelines, and until the draft regulations are issued, all concerns of transfer pricing shall be resolved in accordance with them.

On 23 January 2013, the BIR issued transfer pricing regulations. These are found in Revenue Regulation No. 2-2013, which implements Section 50 of the Tax Code. The transfer pricing regulations apply to cross-border transactions between associated enterprises and domestic transactions between associated enterprises.

Transactions entered into before the transfer pricing regulations became effective shall be governed by the laws and other administrative issuances prevailing at the time the controlled transactions were entered into.

The transfer pricing regulations shall take effect 15 days after publication in a newspaper of general circulation. The regulations were published on 25 January 2013.

In July 2009, the BIR issued Revenue Memorandum Order (RMO) No. 23-2009, mandating that the National Investigation Division (NID) of the BIR audit related companies and conglomerates, including their officers and related individual taxpayers, to make certain that such taxpayers are clearly reflecting income and expenses that are attributable to controlled transactions. The RMO further states that various schemes being employed by conglomerates and groups of companies to reduce the amount of taxes shall be identified, such as the use of tax-exempt entities or those with special tax privileges, intercompany loans and advances, cost sharing, and the supply of goods and services. In the conduct of an audit, particular attention shall be given to transfer pricing issues, which will be factored into the taxpayer's audit findings.

RMO No. 36-2010 was issued in March 2010 and prescribes the rules and procedures governing the conduct of special investigation and enforcement activities of related companies, conglomerates, their affiliates and subsidiaries for taxable year 2009. The RMO amended RMO No. 23-2009 and now directs the Large Taxpayers Service and the Enforcement Service to identify conglomerates consisting of related companies (parent company, affiliates and subsidiaries) that will be subject to an audit under the program. The investigation covers all internal revenue taxes for taxable year 2009 and has to be completed no later than six months from the issuance of the letter of authority.

In March 2012, the BIR issued RMO No. 5-2012, prescribing the guidelines and policies in the conduct of the Performance Benchmarking Method. Under this RMO, benchmarking shall be done separately for individual and corporate taxpayers. The BIR will categorize taxpayers into high risk (more than 30% below the benchmark), medium risk (16% to 30% below the benchmark) and low risk (15% or less below the benchmark). Taxpayers classified as high risk shall be the top priority for enforcement actions, such as an audit.

## OECD Guidelines treatment

The transfer pricing regulations are largely based on the OECD Guidelines and refer to them for further guidance and examples.

## Philippines (continued)

### Documentation requirements

The transfer pricing regulations require contemporaneous documentation to be maintained and retained. It is contemporaneous if it exists or is brought into existence at the time the associated enterprises develop or implement any arrangement that might raise transfer pricing issues. These arrangements should be reviewed when preparing tax returns.

The documentation should be retained and preserved within the period specifically provided in the Tax Code as the retention period. It will, however, be in the best interest of the taxpayer to maintain documentation for purposes of a Mutual Agreement Procedure (MAP) and possible transfer pricing examination.

The details of the documentation shall include, but not be limited to, the following:

- ▶ Organizational structure
- ▶ Nature of the business or industry and market conditions
- ▶ Controlled transactions
- ▶ Assumptions, strategies, policies
- ▶ Cost contribution arrangements (CCAs)
- ▶ Comparability, functional and risk analysis
- ▶ Selection of the transfer pricing method
- ▶ Application of the transfer pricing method
- ▶ Background documents
- ▶ Index to documents

### Priorities/pricing methods

The transfer pricing regulations adopt the methods to determine the arm's-length price under the OECD Guidelines (i.e., CUP, resale price, cost-plus, profit split and TNMM).

There is no specific preference for any one method. In determining the arm's-length result, the most appropriate method for a particular case shall be used.

### Return disclosures/related party disclosures

Related party disclosures are required only in the notes to the audited financial statements, which must be filed along with the annual income tax return.

### Transfer pricing-specific returns

There is no requirement for filing transfer pricing-specific returns.

### Documentation deadlines

Under the transfer pricing regulations, the documentation is not required to be submitted when the tax returns are filed. However, the taxpayers should retain such documentation and submit it to the authorities when required to do so.

### Transfer pricing penalties

The transfer pricing regulations adopt the provisions of the Tax Code and other applicable laws in the imposition of penalties on any person who fails to comply with or violates the provisions and requirements of the regulations. In case of a deficiency assessment due to a transfer pricing adjustment, the general penalties apply: a 25% surcharge (50% in fraud cases) and 20% interest per annum.

### Penalty relief

There is no penalty relief regime in the transfer pricing regulations.

## Philippines (continued)

### Statute of limitations on transfer pricing assessments

The general statute of limitations applies, which is three years after the last day prescribed by law for filing the return, except in cases of fraud with the intent to evade tax, in which case the statute of limitations is 10 years from the discovery of fraud.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit, in general, is high. With the issuance of the transfer pricing regulations, the likelihood that transfer pricing will be reviewed as part of an audit is high. The likelihood is also high that if transfer pricing is reviewed, then the transfer pricing methodology will be challenged.

### APA opportunity

The transfer pricing regulations give taxpayers the option to avail an APA for their controlled transactions and MAP relief as prescribed under the Philippines' bilateral tax treaties. The BIR will issue separate guidelines for the application of an APA and for MAP relief.

# Poland

## Taxing authority and tax law

Taxing authority:

- Tax Inspection Department in the Ministry of Finance, which coordinates and supervises the work of the local Tax Inspection Offices and Bureaus
- Income Tax Department in the Ministry of Finance, with regard to APA and MAP

Tax law:

- Corporate Income Tax Act (CIT Act)
- Personal Income Tax Act (PIT Act)
- Tax Ordinance Act
- Decrees

## Relevant regulations and rulings

Tax laws and decrees that govern transfer pricing in Poland are:

- CIT Act, dated 15 February 1992: Articles 9a, 11 and 19 §4 (Journal of Laws 2011, No. 74, Item 397, as amended)
- PIT Act, dated 26 July 1991: Articles 25, 25a and 30d (Journal of Laws 2012, Item 361, as amended)
- Tax Ordinance Act, dated 29 August 1997: Articles 20a-20r (Journal of Laws 2012, Item 749, as amended)
- Ministry of Finance Decree of 9 April 2013, regarding the countries and territories applying harmful tax competition rules for the purpose of corporate income tax (Journal of Laws 2013, No. 494)
- Ministry of Finance Decree of 9 April 2013, regarding the countries and territories applying harmful tax competition rules for the purpose of personal income tax (Journal of Laws 2013, No. 493)
- Ministry of Finance Decree of 10 September 2009, regarding the method and procedure for assessing corporate taxpayers' income by estimating the prices in transactions conducted by these taxpayers, and regarding the method and procedure for eliminating double taxation of taxpayers in case of related parties' income adjustment (Journal of Laws No. 160, Item 1268, as amended)
- Ministry of Finance Decree of 10 September 2009, regarding the method and procedure for assessing personal taxpayers' income by estimating the prices in transactions conducted by these taxpayers, and regarding the method and procedure for eliminating double taxation of taxpayers in case of related parties' income adjustment (Journal of Laws No. 160, Item 1267, as amended)

Article 11 of the CIT Act and Article 25 of the PIT Act introduce the arm's-length principle, providing a definition of "affiliation" and the criteria for determining the size of direct and indirect shares held in another entity. Documentation requirements can be found in Article 9a of the CIT Act and Article 25a of the PIT Act. Transfer pricing penalties are defined in Article 19, Clause 4 of the CIT Act and Article 30d of the PIT Act.

Article 9a of the CIT Act and Article 25a of the PIT Act provide detailed guidance regarding transactions that are subject to documentation requirements, including the value limits and categories of such transactions.

According to Articles 9a of the CIT Act and 25a of the PIT Act, the documentation requirements also encompass transactions in which payment is made directly or indirectly to an entity considered to be in a tax haven. The list of these territories and countries is presented in the Ministry of Finance Decree of 9 April 2013, regarding the countries and territories applying harmful tax competition rules. The decree was issued separately for personal and corporate taxation purposes.

As of 1 January 2007, documentation requirements also apply to Poland-based permanent establishments of foreign companies.

Since January 2015, documentation requirements also apply to partnerships, joint-venture agreements and agreements establishing partnerships.

## Poland (continued)

### Relevant regulations and rulings (continued)

*New transfer pricing regulations, introducing BEPS Action 13 guidelines to Polish legislation, will come into force in January 2017 (new requirements regarding country-by-country reporting (CbCR) will be binding as of January 2016). The respective regulations will result in increased transfer pricing requirements (as mentioned below).*

The pricing methods recognized by the tax authorities are described in the Ministry of Finance Decrees of 10 September 2009. These decrees describe the transfer pricing methods (more precise description) and introduce the corresponding adjustment procedure (based on the OECD Guidelines), the Arbitration Convention and Code of Conduct for Arbitration Convention. Provisions of the decrees also apply to Polish permanent establishments of foreign companies and Polish taxpayers' foreign permanent establishments.

The amended decrees implemented in July 2013:

- ▶ Give traditional methods priority for the purpose of assessing income in related party transactions (previously only the CUP method was indicated as the first-choice method)
- ▶ Provide specific criteria for the selection of the transfer pricing method
- ▶ Underline the significance of a comparability analysis
- ▶ Introduce a definition of low-value-added services and set out guidelines for tax authorities in respect to examining intragroup services of that type
- ▶ Expressly indicate that the cost base used for estimating the fee for low-value-added services should exclude shareholder expenses
- ▶ Introduce a definition of a business restructuring (transfer of commercially significant functions, assets or risks between related entities)

The APA regulations are specified in Articles 20a-20r of the Tax Ordinance Act. The introduction of APAs has brought with it special reporting requirements. According to the Ministry of Finance Decree of 31 May 2006, taxpayers that have agreed to an APA must submit, along with their annual CIT return, a progress report on the implementation of the method stipulated in the APA decision. APAs may also be concluded by permanent establishments of foreign companies in Poland, as well as permanent establishments of Polish taxpayers based abroad.

Definition of "related parties"

Polish regulations recognize related entities in the following situations:

- ▶ The domestic entity participates directly or indirectly in managing or controlling the foreign entity or has a share in its capital.
- ▶ The foreign entity participates directly or indirectly in managing or controlling a domestic entity or has a share in its capital.
- ▶ The same legal and natural persons participate directly or indirectly at the same time in managing or controlling a domestic entity and foreign entity or have shares of their capital.
- ▶ The domestic entity participates directly or indirectly in managing or controlling another domestic entity or has a share of its capital.
- ▶ The same legal and natural persons participate at the same time directly or indirectly in managing or controlling domestic entities or have shares of their capital.

Capital relations exist if one of the entities or contracting parties holds at least a 5% share of the other entity's capital, directly or indirectly. Domestic entities are also considered related for tax purposes by virtue of family, property or employment relations between them or between their management, supervision or control personnel, or if the same person carries out management, supervision or control functions in both of these entities.

*New transfer pricing regulations (binding from January 2017) modify the definition of related parties, which includes an increased capital relations threshold from 5% to 25%.*

If the parties to a transaction, due to their relationship, agree to or impose terms and conditions that differ from those that would be agreed to by unrelated parties, resulting in the domestic entity not reporting income from the transaction or reporting lower income than would be expected if the relationship did not exist, the taxing authorities may assess additional income and determine the tax due on such income for the domestic entity.

## Poland (continued)

### Relevant regulations and rulings (continued)

The above rules also apply to the allocation of taxable profit to the permanent establishment of a foreign entity in Poland and to polish taxpayers carrying out transactions with their permanent establishments abroad.

Domestic entities transacting with foreign related parties are allowed to adjust their income if the foreign tax authorities assert that the transactional prices do not meet the arm's-length principle. Consequently, additional income of the foreign entity is assessed, and the tax due on such income is determined (the so-called corresponding adjustment). However, the Polish tax authorities must justify and accept prerequisites for making the adjustment.

Adjustments to the domestic entities' income will be allowed on the basis of the agreement for the avoidance of double taxation between Poland and the country (i.e., country of the domestic entity's related party), or on the basis of the convention of 23 July 1990 for the elimination of double taxation in connection with the adjustment of profits of related entities. An application regarding such adjustments should be filed within three years of receiving the decision about assessing the additional income of the taxpayer or the contracting related party.

In addition, regulations relating to income adjustment also apply to permanent establishments.

Polish regulations do not allow for analogous elimination of double taxation in transactions between domestic related entities.

### OECD Guidelines treatment

The Polish transfer pricing regulations do not refer to the OECD Guidelines directly. Nevertheless, the tax authorities sometimes refer to the OECD Guidelines when applying transfer pricing principles (e.g., during APA negotiations). Also, reference to the OECD Guidelines is made with respect to tax havens. According to Article 9a, Clause 6 of the CIT Act (and Article 25a, Clause 6 of the PIT Act), the list of countries recognized as tax havens is issued in regard to settlements made by the OECD. At the same time, the transfer pricing methods presented in the Polish rules are based on the authorized OECD approach.

The amended decrees also introduce specific rules regarding business restructuring and guidelines for tax authorities during tax inspections. These rules are based on Chapter IX of the OECD Guidelines (Business Restructurings) and include a definition of a business restructuring, which covers not only firmwide supply chain changes but also less extensive restructurings involving shifts of risks among group companies (the regulations are designed to implement the OECD Guidelines in the local legislation and cover not only foreign but also local restructuring projects).

### Documentation requirements

Taxpayers carrying out transactions with related parties and permanent establishments of foreign companies functioning in Poland, as defined in the Polish CIT Act and PIT Act, are required to prepare transfer pricing documentation. Requirements for such transactions apply where the total transaction amount in a tax year exceeds the following limits:

- ▶ EUR100,000 if the transaction value does not exceed 20% of the share capital
- ▶ EUR30,000 if the transaction refers to services or intangibles
- ▶ EUR50,000 for other types of transactions between related entities

Taxpayers carrying out transactions in which payments are made directly or indirectly to an entity in a territory or country recognized as a tax haven are obligated to prepare tax documentation for such transactions when the total transaction amount in a tax year exceeds EUR20,000.

*New transfer pricing regulations (binding from January 2017) introduce liquidation of value thresholds for transactions but provide an exemption from the documentation requirement for entities with revenues or costs of less than EUR2m. Other entities will be obliged to prepare transfer pricing documentation covering significant transactions, following the below scheme:*

*(a) For entities with revenues of EUR2m, but not more than the equivalent of EUR20m: significant transactions or events are regarded as transactions and events of value equivalent to EUR50,000 increased by EUR5,000 for each EUR1m of income more than EUR2m.*

## Poland (continued)

### Documentation requirements (continued)

(b) For entities with revenues of EUR20m, but not more than the equivalent of EUR100m: significant transactions or events are regarded transactions and events of value equivalent to EUR140,000 plus EUR45,000 for each EUR10m of revenue in excess of EUR20m.

(c) For entities with revenues of EUR100m: significant transactions or events are regarded as transactions and events of value equivalent to EUR500,000.

As there is no specific form required for transfer pricing documentation, the CIT Act and PIT Act regulations instead determine the extent of the documentation. The statutory transfer pricing documentation should cover at least the following elements:

- ▶ Functions performed by the parties to the transaction (with consideration of assets employed and risks borne)
- ▶ Expected transactional costs and the method and payment due dates
- ▶ Method and manner of calculating profits and the transaction value
- ▶ Business strategy, if it influenced the transaction value
- ▶ Other factors influencing the transaction value
- ▶ Expected benefits from intangible performances or services – this element applies only to the purchase of intangibles or services

These elements are mandatory, so if the documentation does not meet one of these requirements, the tax authorities may disregard it.

In addition, taxpayers are obligated to prepare statutory Polish transfer pricing documentation and provide it to the Polish tax authorities at their request.

Moreover, according to the amended decrees, tax authorities should first examine low-value-adding services by reference to the documents the taxpayer has provided. The taxpayer may additionally prepare the documentation, which should include, in particular:

- ▶ A description of the type of supply, together with the reason justifying the classification of the service as a low-value-adding service
- ▶ Confirmation that a given service has been supplied and information showing that its acquisition was reasonable, including a description of the service acquirer's benefits
- ▶ A description of and a justification for the supply
- ▶ A list providing the description and analysis of the related parties' expenses arising from the service
- ▶ A list of shareholder expenses
- ▶ A description of the cost-sharing key
- ▶ A list of services available on demand
- ▶ A description of and a justification for the fee calculation formula
- ▶ Documentation of a given service, which can be submitted to the tax authorities

New transfer pricing regulations (binding from January 2017, and from January 2016 for CbCR) introduce fundamental changes to the scope of the mandatory transfer pricing documentation reflecting the guidelines of BEPS, Action 13 as outlined below:

- ▶ Local File and the Master File, requiring the presentation in the transfer pricing documentation:
  - ▶ Group transfer pricing policy, information about local transactions, but with the justification for the adopted methods of calculating remuneration and confirmation of the arm's-length character of prices, including benchmarking analyses, detailed financial data showing the impact of the transactions on the P&L and income of the company, organizational and reporting structures, and other information, but:
  - ▶ Benchmarking analyses mandatory for entities with revenues or costs more than EUR10 million
  - ▶ Obligation to prepare Master File only for entities with revenues or costs more than EUR20 million

## Poland (continued)

### Documentation requirements (continued)

#### ► *CbCR:*

- *For capital groups with consolidated revenues or costs more than EUR750 million, the parent company will have to prepare the CbCR report*

### Priorities/pricing methods

Generally, the transfer pricing methods accepted by the tax authorities are based on the OECD Guidelines. These methods are CUP, resale price, cost-plus, profit split and TNMM. The most appropriate method for assessing income should be chosen.

The amended decrees give traditional methods priority for the purpose of assessing income in related party transactions (previously, only the CUP method was indicated as the first-choice method). When the transfer price is determined by the tax authorities, the application of traditional methods is verified in the first instance.

Additionally, the amended decrees provide specific criteria for selecting the transfer pricing method. During the selection process, tax authorities will consider:

- The specifics of the transaction, including the parties' contribution to the transaction
- Access to reliable data about similar transactions and companies in the market
- Comparability of the respective transactions and companies

If a taxpayer has determined the arm's-length value of a transaction by applying one of the three accepted traditional methods (i.e., CUP, resale price and profit split) and there is no doubt about the objectivity in choosing the method, the method is also binding on the tax authorities.

### Return disclosures/related party disclosures

Information about related party transactions is one of the elements of the annual income tax return. The taxpayer is required to indicate in the return whether it was required to prepare transfer pricing documentation.

Taxpayers transacting with related entities are subject to the following reporting and information requirements:

- Disclosing in annual tax income returns whether the taxpayer was required to prepare statutory transfer pricing documentation of transactions with related entities
- Reporting to the Polish tax authorities agreements with nonresidents; such information should be submitted within three months of the end of a tax year (by filing ORD-U form), and this reporting requirement applies to agreements where:
  - A one-off amount of receivables or liabilities resulting from the agreement with a nonresident exceeds EUR5,000 and the nonresident owns an enterprise, branch or representative office in Poland
  - The total amount of liabilities or receivables resulting from all agreements concluded with the same nonresident in the tax year exceeds EUR300,000
  - One party to the agreement participates directly or indirectly in the management or control of the other party to the agreement or has a share in its capital entitling it to at least 5% of all voting rights
  - Another entity, not being party to an agreement, at the same time participates directly or indirectly in the management or control of each party to the agreement or has a share in their capital entitling it to at least 5% of all voting rights in each of the parties to the agreement
- Preparing information about payments to nonresidents from which withholding tax is collected and submitting it to the tax office responsible for taxation of foreign persons and to the beneficiary of the payment by the end of the third month of the year following the tax year in which withholding tax was paid (IFT-2/IFT-2 form); moreover, taxpayer is required to (at the related party's request) prepare and send information to the taxpayer and competent tax office within 14 days of date when the request is submitted

## Poland (continued)

### Return disclosures/related party disclosures (continued)

Those taxpayers that have obtained an APA decision from the Polish Minister of Finance must submit, along with their annual CIT return, a progress report on the implementation of the method stipulated in the APA decision. The format of this report is detailed in the Ministry of Finance Decree of 31 May 2006, which contains the model report on the implementation of a selected transfer pricing method for corporate income tax purposes (Journal of Laws No. 99, Item 687).

#### Transfer pricing-specific returns

Polish tax law does not require any transfer pricing-specific returns.

*New transfer pricing regulations (binding from January 2017) introduce an additional obligation to attach the simplified report on intragroup transactions to the CIT return for entities with revenues or costs more than EUR10m.*

#### Documentation deadlines

There is no deadline for preparing the transfer pricing documentation; however, taxpayers are required to submit the documentation within seven days of the tax authorities' request.

*New transfer pricing regulations (binding from January 2017) introduce a deadline for preparation of the documentation no later than the date for filing the annual CIT return. Fulfillment of the requirement should be confirmed by the board statement attached to the CIT return.*

#### Transfer pricing penalties

If the taxpayer does not submit transfer pricing documentation at the request of the Polish tax authorities, a 50% tax rate penalty is applied for income assessed by these authorities, instead of the standard tax rates that generally apply. Moreover, the taxpayer will be required to pay interest on tax in arrears and fiscal penalties resulting from personal responsibility.

#### Penalty relief

If the taxpayer provides the required transfer pricing documentation on time as specified by the tax authorities (i.e., within seven days of the date of a request), the penalty rate for income assessed can be reduced to the normal tax rate (i.e., 19%).

#### Statute of limitations on transfer pricing assessments

There are no special time limit provisions applicable to intercompany transactions. The general statute of limitations for tax assessment applies, in accordance with the Tax Ordinance Act. Under Article 70, Section 1 of the Tax Ordinance Act, tax liability shall expire after five years from the end of the calendar year in which the tax fell due.

#### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit, in general, is medium; however, it's increasing significantly considering the current fiscal needs of the Polish Government. However, it may differ depending on a number of factors, such as the taxpayer's financial position, the income tax paid in prior years versus the current fiscal year, related party transactions and claims for an overpaid tax refund.

The likelihood that transfer pricing will be reviewed as part of that audit depends on the subject and scope of the transfer pricing review, but the likelihood that the taxing authorities will request the statutory transfer pricing documentation (based on Article 9a of the CIT Act) is high. In general, transfer pricing is on the agenda for tax control (audit) – the likelihood that the tax authorities will review the transfer pricing policy is medium, but certain factors can increase the likelihood to high. These factors include losses (especially, if incurred in transactions with related parties); substantial intercompany charges for intangibles, services or financing; changes in the business model; sudden reduction in profitability (e.g., as a result of business restructurings); and year-end adjustments (especially if they are one-off profit transfers). Transfer pricing audits in Poland focus on the asset management; automotive; banking and capital markets; consumer products; pharmaceuticals; oil and gas; power and utilities; technology; and real estate industries.

## Poland (continued)

### Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

During a tax control, detailed regulations for business restructuring require the tax authorities to focus on:

- ▶ Whether the restructuring agreement would have been acceptable to independent companies
- ▶ Business reasons and commercial justification for the restructuring
- ▶ Benefits from the restructuring (including synergy effects)
- ▶ Options realistically available to the restructured parties

Whether the allocation of risks properly reflects a given entity's capability to make risk management decisions or its financial ability to bear the cost of the risk that has materialized.

The likelihood is high that the transfer pricing methodology will be challenged if transfer pricing is reviewed as part of the audit. The tax authorities usually engage in a dedicated transfer pricing audit if they notice irregularities in intercompany settlements or believe that the financial result is biased by transfer pricing. In such cases, they often challenge the transfer pricing methodology applied.

Although the acceptance of the OECD Guidelines and international practices has increased, the local approach tends to prevail during audits. Local benchmarks are preferred over pan-European ones (however, the Minister of Finance recently declared that pan-European benchmarks also should be accepted). The pricing information from cross-controls in the industry is used for benchmarking. Moreover, the tax authorities have increased cooperation in the exchange of information with tax authorities in other countries.

In 2014, a special task force in the Ministry of Finance was established to increase the efficiency of transfer pricing controls. In addition, this task force should analyze and define the risk areas that should be treated as a priority of tax authorities during transfer pricing audits. This may lead to an increase of transfer pricing controls. A 2015 audit of efficiency of the Polish administration regarding tax audits, in particular, covering transfer pricing, was conducted by the Supreme Chamber of Control. The results of the audit were recommendations aiming at the increased efficiency of transfer pricing audits:

- ▶ Implementation of solutions to counter the erosion of taxes
- ▶ Typing entities to be inspected based on the strategic approach (database purchased by Polish administration)
- ▶ Use of tools for more accurate selection of entities to be audited
- ▶ Improvement in preparation of tax bodies for controlling entities operating on an international scale
- ▶ Purchase of tools for transfer pricing audits
- ▶ Intensification of control measures against entities with foreign capital, in which a high risk of irregularities was identified

As a result of those activities, the draft regulation implementing the recommendations of OECD under Action 13 was prepared.

The compliance regime is still rigorous in Poland. Court rulings focus mainly on legal rather than economic issues. The most frequently audited types of transactions are limited risk structures, such as limited risk distributors or contract manufacturers; intangible services (including cost-sharing arrangements); financial transactions; and, recently, business restructurings.

### APA opportunity

The APA regulations came into force on 1 January 2006. The APA procedures are described in Articles 20a-20r of the Tax Ordinance Act.

An APA concluded for a particular transaction is binding on the tax authorities with regard to the method selected by the taxpayer. APAs in Poland may apply to transactions that have not yet been executed or transactions that are in progress at the time the taxpayer submits an application for an APA. Under Polish rules, three types of APAs are available:

- ▶ Unilateral: This type of an APA is defined in the Tax Ordinance Act as an agreement about the method for setting transfer prices between

## Poland (continued)

### APA opportunity (continued)

- ▶ Two domestic entities – those without foreign capital links
- ▶ A domestic entity and its related foreign party
- ▶ A domestic entity related to a foreign entity and another domestic entity related to the same foreign entity
- ▶ Bilateral: This is an agreement concerning cross-border transactions that can be given by the Polish Ministry of Finance upon the request of a domestic entity, but only after consultations and upon obtaining consent issued by the tax authorities of the related foreign entity.
- ▶ Multilateral: If the agreement concerns a transaction concluded by a domestic entity with foreign entities from more than one country, the consent of all foreign entities' tax authorities is required to conclude such an agreement.

There are no transaction value limits to be covered by the APAs. To submit an application for an APA, the taxpayer must pay a fee, usually 1% of the transaction value. However, the Tax Ordinance Act sets the following fee limits:

- ▶ Unilateral APA: PLN5,000 to PLN50,000
- ▶ Unilateral APA concerning a foreign entity: PLN20,000 to PLN100,000
- ▶ Bilateral or multilateral APA: PLN50,000 to PLN200,000

The mandatory elements of an APA application are:

- ▶ The suggested method for determining prices and an indication of the pricing method recognized by the tax authorities
- ▶ A description of the manner of application of the suggested method, with an indication of the principles for price calculation, forecasts and analyses upon which the calculation is based
- ▶ A description of the circumstances that may affect the prices
- ▶ The documents that may determine the transaction price (agreements, arrangements and other documents indicating the intentions of the parties to the transaction)
- ▶ The suggested length of the APA arrangement
- ▶ A list of entities with which the transaction will be concluded, including their agreement to submit to the taxing authorities all documents and provide necessary explanations with regard to the relevant transaction; the application must be submitted in Polish

The Tax Ordinance Act precisely defines the terms under which the APA procedure is to be completed:

- ▶ The unilateral APA must be issued without unnecessary delay within six months of the start of the APA application procedure.
- ▶ The bilateral APA must be issued without unnecessary delay within 12 months of the start of the APA application procedure.
- ▶ The multilateral APA must be issued without unnecessary delay within 18 months of the start of the APA application procedure.

The APA is issued by the Ministry of Finance in the form of an administrative decision, and the general administrative procedure resulting from the Tax Ordinance Act applies to the APA. In consequence, the above time limits for the APA procedure may be extended, if necessary.

The period for which the APA may be concluded is no longer than five years. The APA may be extended for another five years if the criteria applied in concluding the APA have not changed, or the entity applies for an extension of the APA no later than six months before it expires. The decision is valid from the date of its delivery to all parties (including Polish and foreign, if applicable, tax authorities).

*Starting from January 2016, APA regulations will be amended. Changes cover mainly:*

- ▶ *Possibility to apply for APA for a few transactions covered by one application (fee is proportionally increased depending on the number of transactions)*

## Poland (continued)

### APA opportunity (continued)

- ▶ *APA covering Cost Contribution Agreements*
- ▶ *Elimination of a strict definition of unilateral APA*
- ▶ *In case of the withdrawal of APA application (based on remarks and obstacles presented by the Ministry of Finance), confirmation of discontinuance of the proceedings is to be provided to tax authorities*
- ▶ *Upon taxpayer's request, APA decision may be binding from the date of application (roll back) instead of the date of delivery*
- ▶ *Renewal of APA instead of extension with modified requirements for the respective application*

# Portugal

## Taxing authority and tax law

Taxing authority: Portuguese Tax and Customs Authority (*Autoridade Tributária e Aduaneira*)

Tax law: Corporate Income Tax Code

## Relevant regulations and rulings

Article 63 of the Corporate Income Tax Code articulates the arm's-length principle and provides guidance about transfer pricing in Portugal. An updated write-up of Article 63 of the Corporate Income Tax Code came into force on 16 January 2015 following the publication of Law No. 2/2014.

Ministerial Order 1446-C/2001 of 21 December 2001 (Transfer Pricing Ministerial Order), issued by the Minister of Finance, implements Article 63 of the Corporate Income Tax Code regarding the application of the transfer pricing methods, cost-sharing agreements, intragroup services agreements, documentation requirements and the corresponding adjustments procedure.

A detailed APA procedure, setting out the APA submission requirements, process and fees, was implemented by Ministerial Order 620-A/2008 on 16 July 2015 (which came into force on 17 July) and is currently foreseen in Article 138 of the Corporate Income Tax Code.

Furthermore, a general anti-avoidance provision applies to all simulated transactions, and the rules embodied in the thin capitalization, controlled foreign corporations (CFCs) and anti-tax-haven regimes may be used in the general context of transfer pricing.

## OECD Guidelines treatment

The Portuguese regulations and tax practice follow the OECD Guidelines.

Business restructurings are specifically addressed in the Portuguese transfer pricing regulations as activities that must rely on the arm's-length principle; however, the approaches stated in Chapter IX of the OECD Guidelines are likely to affect the transfer pricing audit activity.

The master file concept established in the European Union Code of Conduct on transfer pricing documentation for associated enterprises is not yet adopted in the Portuguese legislation; however, the transfer pricing documentation prepared locally addresses all of the relevant topics contained therein and is more rigorous in terms of the content.

## Documentation requirements

The Portuguese transfer pricing rules require taxpayers with turnover and other income in excess of EUR3 million in the prior year to prepare contemporaneous documentation in the Portuguese language, which should provide evidence of market parity regarding the terms and conditions agreed to, accepted and practiced in the operations made with related parties, as well as selecting and using the best method.

The regulations divide the documentation between relevant, supporting documentation and that which is applicable to cost contribution arrangements and intragroup services. The transfer pricing documentation shall include:

- ▶ Related party status, according to the definition presented in Article 63 of the Corporate Income Tax Code (a company subject to a substantially favorable tax regime or included in the Portuguese offshore blacklist is also considered to be a related party, regardless of any other related party criteria)
- ▶ Characterization of a taxpayer's activity and that of the related parties with which it engages in commercial or financial transactions
- ▶ Identification of all intercompany transactions (volumes, terms and conditions) for the year under analysis, as well as for the previous two years, or for the period in which they occurred (if less)
- ▶ A functional analysis of each relevant transaction
- ▶ Technical studies focusing on essential areas of business

## Portugal (continued)

### Documentation requirements (continued)

- ▶ A description of the method used and evidence of how the prices are calculated
- ▶ Information about Portuguese comparables (geographical comparability requirement)
- ▶ The legal entity's organizational structure
- ▶ All intercompany contractual agreements and unrelated party agreements

### Priorities/pricing methods

The transfer pricing methods described in the Portuguese legislation are based on the OECD Guidelines and therefore do not introduce significant changes to the widely accepted methods recognized among transfer pricing administrators and practitioners.

In fact, Portuguese rules also state (in paragraphs 1 and 2 of Article 4 of the Transfer Pricing Ministerial Order) that the most appropriate method should be applied to a controlled transaction or to a series of transactions to determine whether those transactions comply with the arm's-length principle.

This principle reflects a "best method" rule. This implies that a taxpayer is expected to use the method or methods most suitable to each case, explaining not only the reason why a certain method is considered as the most appropriate to test whether the controlled transactions comply with the transfer pricing rules, but also why other methods are rejected.

Hence, the Portuguese tax authority recognizes both the traditional and profit-based methods in the OECD Guidelines and, theoretically, any method is acceptable provided that it can be justified and that the traditional transactional or profit-based methods are not applicable.

### Return disclosures/related party disclosures

The main disclosure requirements at this level are contained in annexes A, B, C and H (transfer pricing annexes) of the Annual Tax and Accounting Information Return (*Informação Empresarial Simplificada*, hereinafter called IES), which include (on a yearly basis) the following information:

- ▶ Identity of the related entities
- ▶ Amount of transactions conducted with each of the related parties
- ▶ Confirmation that proper contemporaneous (annual) transfer pricing documentation is prepared on a timely basis and is currently retained

The deadline for the submission of such return corresponds to the 15th day of the 7th month after the corresponding tax year-end. Taxpayers have to state in good faith in this annual return that they have complied with the contemporaneous documentation requirements and their preparation. Misleading information may result in tax penalties and criminal proceedings.

### Transfer pricing-specific returns

There are no specific transfer pricing returns. As mentioned above, transfer pricing information is disclosed in the IES in its transfer pricing annexes.

### Documentation deadlines

In Portugal, the documentation must be prepared by the 15th day of the 7th month after the corresponding tax year-end. However, the tax authority may, and does, ask for documentation of transactions at any time after they take place.

### Transfer pricing penalties

Failure to comply with documentation requirements may result in a possible shift of the burden of proof and the application of secret comparables.

## Portugal (continued)

### Transfer pricing penalties (continued)

Transfer pricing rules were extended by the publication of specific legislation on penalties for noncompliance with the documentation obligations in 2012. The General Regime on Tax Infractions (RGIT) addresses the following penalties:

- ▶ The taxpayer stated in the IES that transfer pricing documentation is prepared and, despite being notified by the tax authority to submit, it was late in its delivery. The penalty related to late delivery can reach EUR20,000 per year and per company.
- ▶ The taxpayer does not state in the IES that transfer pricing documentation was prepared, but was notified by the tax authority to submit it. The penalty for noncompliance related to an omission or lack of evidence in the IES can reach EUR45,000 per year and per company.
- ▶ The taxpayer stated in the IES that transfer pricing documentation is prepared and it was notified by the tax authority to submit it, but the documentation was not prepared. The penalty for noncompliance related to improper fulfillment can reach EUR75,000 per year and per company.
- ▶ The taxpayer stated in the IES that transfer pricing documentation is prepared but refused to submit it to the tax authority (when duly requested). The penalty for noncompliance related to the refusal to submit transfer pricing documentation can reach EUR150,000 per year and per company.

Transfer pricing adjustments are subject to the general tax penalty regime. Penalties for noncompliance with mandatory contemporaneous documentation rules may reach EUR150,000 per year and per company. A late payment interest penalty is also applicable for transfer pricing adjustments at the rate of 4% per year.

### Penalty relief

The general tax penalty regime applies in Portugal. The determination of penalties will be made on a case-by-case basis.

### Statute of limitations on transfer pricing assessments

In Portugal, assessment is possible during the four years after the end of the assessment year. All Portugal-based companies have a statutory obligation to keep their transfer pricing documentation available (at the Portuguese establishment or premises) and in good order for the relevant year for a 10-year period.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit, in general, is medium, as is the likelihood that transfer pricing will be reviewed as part of that audit. The likelihood is high that the transfer pricing methodology will be challenged if transfer pricing is reviewed as part of the audit.

Since January 2004, entities resident in blacklisted offshore countries or territories are deemed related parties for transfer pricing purposes. Additionally, in 2007, the Portuguese tax authority began making positive adjustments to taxpayers' taxable profits as a result of tax audits. These adjustments are based on a benchmark computed from the financial information available in an internal database called MGIT.

With respect to the comparables analysis performed by the tax authority, the following issues are relevant:

- ▶ Entities with a recurrent loss situation are excluded from the final comparables sample.
- ▶ Comparables' identification is not disclosed in the final sample.
- ▶ A transaction is considered arm's length only if it is within the computed interquartile range.
- ▶ Only the median of the interquartile range of the benchmark is considered when tax adjustments are made.

More recently, special emphasis is being put on the quality of comparables, namely, on the royalty CUP analysis. Head office interest charged to branches is the most recent area of scrutiny and adjustment. Cross-border restructurings are also under intense scrutiny, as well as intercompany financial transactions.

### APA opportunity

An APA program was included in the Portuguese Corporate Income Tax Code in 2008 (Article 138).

## Portugal (continued)

### APA opportunity (continued)

Ministerial Order 620-A/2008 allows taxpayers to negotiate the following types of APAs:

- ▶ Unilateral: When the parties to an agreement are the Portuguese Tax and Customs Authority and one or more of the taxpayers of individual income tax (IRS) or corporate income tax (IRC) are mentioned in Article 2 of the Ministerial Order
- ▶ Bilateral or multilateral: Besides entering into an agreement between the Portuguese Tax and Customs Authority, IRS and IRC taxpayers (i.e., Portuguese tax authorities), taxpayers now also may choose to sign an agreement with one or several tax authorities in jurisdictions where a double taxation convention is in place with Portugal, under the mutual agreement procedure foreseen in the convention, and must ask that the request for a unilateral APA be filed with the corresponding tax authorities

#### APA negotiation time frame

The Portuguese legal time frame foresees the following phases:

- ▶ Pre-filing phase – entails a preliminary evaluation of the initial taxpayer proposal and may involve joint meetings with the tax authorities
- ▶ Submission phase – involves analysis and negotiation of the APA proposal, which, in any case, should be presented at least 180 days before the beginning of the applicable tax year; tax authorities' time frame to evaluate the content of an APA proposal is within 180 days in the case of unilateral agreements and extends to a 360-day period in case of bilateral and multilateral agreements
- ▶ Conclusion of the APA process

APAs may not exceed a three-year period, which may be renewable upon a written request to the tax authority.

#### Application fee

An APA is subject to a filing fee of EUR3,150 to EUR35,000 and is paid to the tax authority, depending on the taxpayer's average turnover (fees are reduced by 50% for renewals or revisions of existing APAs).

#### APA compliance responsibility

Upon the conclusion of an APA, the taxpayer is responsible for ensuring compliance with the policies, methodologies and terms that are agreed to in the proposal.

Whenever any of the conditions are altered, the taxpayer should formally inform the tax authority or face the penalty of the APA being invalidated.

However, it should also be noted that the burden of monitoring the compliance of the terms agreed to in the APA rests with the tax authority.

In this context, the taxpayer is required to prepare an annual report on the implementation of the agreement, envisaging the validation and verification of compliance with the methods used and the terms of the agreement. This annual report shall be sent to the Portuguese Tax and Customs Authority upon the deadline established for the submission of an annual tax and accounting return.

#### APA public data

Portuguese tax authorities do not disclose information about APAs submitted or concluded. Despite the fact that some information is publicly known, tax authorities are keen to increase the transparency of the APA process in Portugal. Hence, taxpayers are encouraged to submit proposals.

# Qatar

## Taxing authority and tax law

Taxing authorities:

- State tax regime: Qatar Public Revenues and Taxes Department (PRTD)
- Qatar Financial Centre (QFC) tax regime: QFC Authority (QFCA) Tax Department

Tax laws:

- State tax regime – The Income Tax Law No. 21 of 2009 (Qatar Income Tax Law) and its related Executive Regulations should be applied to Qatar taxpayers, except those registered in the Qatar Financial Centre (QFC) (see below).
- QFC tax regime – This is a tax regime separate and distinct from the state tax regime. The QFC Regulations, which were enacted pursuant to Law No. 7 of 2005 on the promulgation of the law for the QFC, and the QFCA Tax Manual (TP Manual) should be applied to QFC-registered entities.

## Relevant regulations and rulings

### *State tax regime*

The Qatar Income Tax Law introduced transfer pricing provisions within the general anti-tax-avoidance framework, which states that, "where the taxpayer enters into arrangements or carries on operations or transactions and one of the main purposes of which is to avoid the payment of the tax due, the PRTD may counteract the tax advantage the taxpayer obtained because of such arrangements, operations or transactions, in accordance with the provisions of the Executive Regulations of the Qatar Income Tax Law." The Qatar Income Tax Law aims to make certain that related party transactions are conducted under arm's-length conditions. As such, the PRTD may:

- Apply the arm's-length value to a deed or an economic event subjected to a different value by the taxpayer
- Re-characterize the contract where the form of such a deed does not reflect the substance thereof
- Adjust the amount of the tax due by the taxpayer or any other person involved in the type of arrangements, operations or transactions

Under the Executive Regulations of the Qatar Income Tax Law, a person shall be deemed to be related to another person in any of the following cases:

- For natural persons, where one of them is a spouse, an in-law or a relative of the other, up to the fourth degree
- For natural and legal persons, where the natural person owns, alone or with another related person or persons, directly or indirectly, more than 50% of the capital, voting rights or income rights of the legal person
- For legal persons, where one of them owns, alone or with another related person or persons, more than 50% of the capital, voting rights or income rights of the other, or where another person or other related persons own, directly or indirectly, more than 50% of the capital, voting rights or income rights of both legal persons

### *QFC tax regime*

The QFC Regulations and the ITP Manual should be applied to QFC-registered entities. The TP Manual provides guidance about the application of the transfer pricing rules of the QFC Tax Regulations. Chargeable profits and tax losses must be calculated on an arm's-length basis.

- Part 8 of the QFC Tax Regulations has a one-way adjustment approach and will be applied only where the resulting transfer pricing adjustment would result in an increase in the amount of chargeable profits or a reduction in tax losses.
- The TP Manual specifies that the arm's-length capacity of a QFC taxpayer is the amount of debt that it could and would have financed for its operations, as a stand-alone entity, from a non-related, independent lender. The TP Manual has outlined safe-harbor debt and equity ratios as follows:
  - 2:1 for a nonfinancial institution
  - 4:1 for a financial institution

## **Qatar (continued)**

### **OECD Guidelines treatment**

#### *State tax regime*

Pursuant to the Executive Regulations to the Qatar Income Tax Law, where the data required to apply the CUP method is not available, the taxpayer should submit to the PRTD an application to adopt other transfer pricing methods approved by the OECD.

#### *QFC tax regime*

The following methods noted under the OECD Guidelines may be used: CUP method, resale price method, cost-plus method, profit split method and TNMM.

### **Documentation requirements**

#### *State tax regime*

The Qatar Income Tax Law does not provide specific documentation requirements; however, since the Qatar Income Tax Law requires the use of the CUP method, or other transfer pricing methods also authorized by the OECD, there is an implied requirement to have documentation in place. Written approval to use an OECD-authorized transfer pricing method other than the CUP method may be obtained from the PRTD before the related party transactions take place. In the application, a transfer pricing study should be submitted, along with an explanation of why it is not possible to use the CUP method and why an alternative OECD-approved method is appropriate.

#### *QFC tax regime*

The burden of proof is on the QFC-registered taxpayer to establish that the actual conditions are consistent with the arm's-length conditions. There are four classes of records or evidence that will need to be considered, including:

- ▶ Primary accounting records
- ▶ Tax adjustment records
- ▶ Records of transactions with an associated business
- ▶ Evidence to demonstrate an arm's-length result (this includes a description of the intercompany transactions and a functional analysis)

A transfer pricing study is specifically recommended when there is a risk that it may be perceived that the QFC-registered taxpayer's intercompany transactions are not based on the arm's-length principle (e.g., the taxpayer is incurring losses during the taxable year or profits appear lower than previous years or compared with competitors in the industry, among other exceptional circumstances).

### **Priorities/pricing methods**

#### *State tax regime*

Under the Executive Regulations to the Qatar Income Tax Law, the arm's-length price should be determined using the CUP method. This price is determined on the basis of a comparison with similar goods or services provided between unrelated parties, particularly accounting for the:

- ▶ Characteristics of the goods or service
- ▶ Contractual terms
- ▶ Functions performed, assets used and risks incurred
- ▶ Economic circumstances

#### *QFC tax regime*

Where the CUP method is available as evidence, the QFCA Tax Department is likely to consider it the preferred method. A discussion should be included in the documentation about the appropriateness of the selected method.

## **Qatar (continued)**

### **Return disclosures/related party disclosures**

#### *State tax regime*

Related-party disclosures must be disclosed in the notes to the audited financial statements, which are filed with the PRTD in support of the tax declaration.

#### *QFC tax regime*

Related-party transactions must be disclosed in the notes to the audited financial statements, which are filed with the QFC Tax Department, along with the income tax return. A QFC branch is not mandated to submit full financial statements.

### **Transfer pricing-specific returns**

For both the state tax and QFC tax regimes, there currently is no requirement to prepare a separate tax return for related party transactions.

### **Documentation deadlines**

#### *State tax regime*

Currently, there is no requirement for contemporaneous transfer pricing documentation or for documentation to be submitted to the PRTD, together with the filing of a tax declaration. A transfer pricing study should be submitted along with the preapproval application submitted to the PRTD to use a transfer pricing method other than the CUP method. The PRTD may also require the study during the tax review process.

#### *QFC tax regime*

The TP Manual does not state that the taxpayer must file or have completed transfer pricing documentation when filing its tax return. However, the QFCA Tax Department assumes that the QFC taxpayer will assess its intercompany transactions to be at an arm's length before completing its tax return, essentially requiring an analysis of its intercompany pricing to be prepared.

### **Transfer pricing penalties**

#### *State tax regime*

Currently, there are no specific transfer pricing penalties for failure to properly document intercompany transactions. However, financial penalties, in the form of interest imposed for noncompliance with income tax rules under the Qatar Income Tax Law, may apply in the case of a deficiency assessment due to transfer pricing adjustments.

Interest on any additional income tax due resulting from a transfer pricing adjustment may be levied at a rate of 1.5% per month of delay (capped at the amount of income tax due).

#### *QFC tax regime*

Where the QFC-registered taxpayer fraudulently or negligently files a tax return, the QFC-registered taxpayer may be exposed to a financial sanction of an amount not exceeding the tax understated. The late payment of tax is subject to a delay payment charge of 5% per annum, calculated for the period from the due date of the tax to the actual payment date.

If a QFC-registered taxpayer fails to maintain adequate records to support the pricing of transactions with associates, or claims in their return that no adjustment is required under the transfer pricing regulations without being able to substantiate that claim, then there may be a penalty liability for failure to maintain adequate records (not exceeding QR20,000) or for filing an incorrect return (financial sanctions not exceeding the tax understated).

### **Penalty relief**

No penalty relief regime is in place for the state tax or QFC tax regime.

### **Statute of limitations on transfer pricing assessments**

#### *State tax regime*

Transfer pricing assessment is a part of the regular corporate income tax audit by the PRTD. The statute of limitations to complete a regular tax audit is five years following the year in which the taxpayer submitted the tax return. When the

## **Qatar (continued)**

### **Statute of limitations on transfer pricing assessments (continued)**

taxpayer fails to submit the tax return, the right of the PRTD to assess the tax and financial penalties related thereto shall expire 10 years after the taxable year in respect of which the taxpayer was due to file the return. When the taxpayer fails to register with the PRTD, the 10-year period shall start from the date of discovering the activities of the taxpayer by the PRTD.

#### *QFC tax regime*

The time limit for the QFCA Tax Department to conduct a tax assessment is six years after the end of the accounting period to which it relates.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

#### *State tax regime*

During the income tax review process, the PRTD will likely demand the documentation supporting the transfer prices for intercompany transactions to be produced, with a general requirement that any information request is dealt with in a period of two weeks.

The PRTD conducts a tax audit of all tax declarations that are submitted.

The likelihood of a review of transfer pricing as part of the regular audit is medium to high.

The likelihood of a challenge to the transfer pricing methodology, however, is characterized as low to medium, provided that sufficient transfer pricing documentation is available.

The PRTD launched an electronic tax filing system effective in October 2014. With this development, the PRTD will raise analytical tax assessments and reasonableness types of questions, utilizing the auditing functionality of the electronic system. Eventually, we expect that the PRTD may move toward risk-based audits.

#### *QFC tax regime*

In general, the QFC Tax Department conducts a tax audit of income tax returns that are submitted (the likelihood being medium to high). The likelihood of a review of transfer pricing as part of the regular audit is high.

The likelihood of a challenge to the transfer pricing methodology is medium.

The QFC Tax Department regularly challenges the deductibility of interest expenses when the debt-to-equity ratio of taxpayers exceeds the prescribed safe-harbor ratios.

### **APA opportunity**

#### *State tax regime*

Currently, there is no APA procedure in place.

#### *QFC tax regime*

The QFCA Tax Department has an advance ruling regime and welcomes QFC-registered entities to apply for an APA to obtain certainty about their tax position.

The PRTD deals with mutual agreement procedures (MAP) involving both the state and the QFC tax regimes.

# Romania

## Taxing authority and tax law

Taxing authority: Ministry of Finance, National Agency for Fiscal Administration (ANAF)

Tax law:

- ▶ Law 571/2003 regarding the Fiscal Code as subsequently completed and amended
- ▶ Government Decision 44/2004 for the approval of the norms for the application of Law 571/2003 regarding the Fiscal Code, as subsequently completed and amended

## Relevant regulations and rulings

- ▶ ANAF Order 222/2008 on the content of the transfer pricing documentation file
- ▶ Decision 529/2007, approving the procedure for the issuance of advance individual rulings and APAs
- ▶ Government Ordinance 92/2003, regarding the Fiscal Procedure Code, as subsequently completed and amended

## OECD Guidelines treatment

The Romanian Fiscal Code and the related norms provide that the tax authority should also consider the OECD Guidelines when analyzing the prices applied in related party transactions. In addition, the legislation on transfer pricing documentation requirements in Romania also refers to the European Union Code of Conduct on Transfer Pricing Documentation (C176/1 of 28 July 2006).

## Documentation requirements

Even though the documentation requirements were introduced in the Romanian regulations in 2006, the specific content of the transfer pricing documentation file was only formally detailed by the tax authority in February 2008.

Romanian entities having transactions with related parties should make the transfer pricing documentation file for such transactions available upon the request of the tax authority and within the required term.

Taxpayers that entered into APAs for related party transactions are not required to prepare and submit a transfer pricing documentation file for the periods and transactions covered by the APA.

The transfer pricing documentation file should comprise information regarding the taxpayer, the group and the related party transactions (including an analysis of the functions performed and the risks assumed by the related parties), as well as information about the transfer pricing methods used for determining the value of related party transactions. Finally, it should contain a set of relevant statistical comparables.

## Priorities/pricing methods

The tax authority accepts transfer pricing methods provided by the OECD Guidelines. The traditional methods (CUP, resale price and cost-plus) are generally preferred to the profit-based methods (TNMM and profit split).

When its application is appropriate, the CUP method is preferred for assessing the market value of related party transactions.

## Return disclosures/related party disclosures

Generally, information about related party transactions undertaken by a Romanian entity is disclosed only upon the specific request of the Romanian tax authority. For statutory accounting reporting purposes, Romanian companies are required to disclose the transactions undertaken with related parties.

Separately from the above, the Romanian legislation provides for the following general disclosure requirements:

- ▶ Disclosure of transactions performed by Romanian entities with nonresident companies for which the Romanian company has an obligation to withhold taxes
- ▶ Disclosure or registration of contracts concluded by Romanian entities with nonresident companies and individuals performing services in Romania that may trigger Romanian permanent establishment exposure

## Romania (continued)

### Return disclosures/related party disclosures (continued)

- Disclosure of long-term financing contracted by a Romanian entity with nonresident companies or individuals

### Transfer pricing-specific returns

No specific transfer pricing returns for related party transactions are currently in place under the transfer pricing rules.

### Documentation deadlines

The tax authority sets the term for providing the transfer pricing documentation file, depending on the complexity of the transactions. It can be up to three months from the date of the tax authority's request (such term may be extended only once, for a period equal to the initial period). The tax authority may request transfer pricing documentation during any tax audit (e.g., audits for VAT reimbursement requests). There is no specific requirement to submit transfer pricing documentation to the Romanian tax authority along with the annual tax returns.

Separately, taxpayers that have an APA must include in the annual report and submit the observance of the APA terms and conditions to the ANAF. This report deadline is similar to that of the submission of annual financial statements, normally at the end of May. Noncompliance with the documentation deadline provisions leads to cancellation of the APA.

### Transfer pricing penalties

Failure to provide the authorities with transfer pricing documentation upon request and within the required time period is sanctioned with a fine of up to RON14,000 (approximately EUR3,200).

Additionally, not presenting the transfer pricing documentation file or presenting an incomplete file could prompt the tax authority to estimate the transfer prices simply by using the arithmetic average of prices for any three transactions it deems to be similar. The resulting adjustments would trigger a profits tax liability of 16% (the standard profits tax rate) and late payment interest and penalties according to the provisions of the legislation. Currently, the late payment interest is 0.03% per day of delay. In addition, late payment penalties of 0.02% per day of delay can also be imposed.

### Penalty relief

No specific penalty relief provisions currently are in place under the Romanian transfer pricing rules.

### Statute of limitations on transfer pricing assessments

No specific statute of limitations exists for transfer pricing assessments. However, general rules for statutes of limitations are applicable, i.e., the Romanian tax authority may normally review tax-related matters retroactively for 5 years (or 10 years in the case of fiscal evasion or fraud).

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit, in general, can be characterized as medium. The likelihood is high that transfer pricing will be reviewed as part of that audit, and the likelihood is medium that the transfer pricing methodology will be challenged if transfer pricing is reviewed as part of the audit.

### APA opportunity

Comprehensive APA procedures and requirements have been in effect in Romania since June 2007. An APA may be unilateral, bilateral or multilateral.

By means of an APA, the ANAF approves the specific transfer pricing method utilized by a multinational entity prior to the actual transaction. APAs are binding on the tax authority as long as taxpayers observe their terms and conditions. Unilateral APAs are issued for a term of 12 months, while bilateral and multilateral APAs are issued for a term of 18 months.

## Romania (continued)

### **APA opportunity (continued)**

The fees payable to ANAF for the issuance or amendment of an APA are:

- ▶ EUR20,000 (issuance), EUR15,000 (amendment) - in case of large taxpayers or for agreements on transactions with a consolidated value exceeding EUR4 million
- ▶ EUR10,000 (issuance), EUR6,000 (amendment) - in all other cases

As a general rule, APAs are issued for a period of up to five years; however, this term may be extended in certain cases.

# Russia

## Taxing authority and tax law

Taxing authority: The Federal Tax Service of the Russian Federation (FTS)

Tax law: Russian Tax Code

## Relevant regulations and rulings

Law 227 reduces the types of transactions subject to transfer pricing control by focusing more on related party transactions and includes only certain types of third-party transactions, compared with transfer pricing legislation in place before 2012.

In relation to cross-border transactions, the following will be subject to transfer pricing control:

- ▶ All related party transactions (no threshold)
- ▶ Third-party transactions involving goods traded on global commodity exchanges, such as oil and oil products, ferrous metals, nonferrous metals, fertilizers, precious metals and precious stones if the annual income, as a result of all transactions between the parties, exceeds RUB60 million
- ▶ Third-party transactions where the counterparty is located in a certain low-tax jurisdiction (same threshold as above)<sup>1</sup>

In the domestic market, only related party transactions can be subject to transfer pricing control, and a RUB60 million threshold applies for the following transactions:

- ▶ The subject of the transaction is an object of assessment to mineral extraction tax calculated at an ad valorem tax rate
- ▶ One of the parties to the controlled transaction is exempt from paying profit tax, or pays the tax at a 0% rate
- ▶ One of the parties to the controlled transaction is registered in a special economic zone (such transactions are controlled as of 2014)
- ▶ One of the parties operates drilling or holds a license to explore oil and gas deposits on the continental shelf (except for transactions between license holders and operators, which may be exempt from Russian transfer pricing rules subject to several additional criteria)

For all other domestic related party transactions, a RUB1 billion threshold applies in order for them to become subject to transfer pricing control. Also, certain domestic transactions of this type are exempt from transfer pricing control, e.g., transactions between members of a domestic consolidated group of taxpayers, or if the following criteria are met:

- ▶ Both parties are registered within the same region of Russia.
- ▶ None of the parties have economically autonomous subdivisions in other regions of Russia or pay income tax used in the budgets of other regions.
- ▶ None of the parties have tax losses.
- ▶ There are no other grounds for the transaction to be controlled (same criteria that are applicable for the RUB60 million threshold outlined above).

## Related parties

The transfer pricing law includes a list of criteria defining when companies and individuals can be declared related parties.

The main criterion defining the relationship remains the same: the ownership threshold, i.e., if one party directly or indirectly controls more than 25% (the previous threshold was 20%) of another party.

Courts can declare that companies or individuals are related on other grounds if it is proven that the relationship between the parties influenced the terms and the results of the transactions.

## OECD Guidelines treatment

Russia is not a member of the OECD; however, the new transfer pricing law is largely based on the principles stipulated by the OECD Guidelines.

<sup>1</sup> The list of jurisdictions is determined by the Ministry of Finance.

## Russia (continued)

### Documentation requirements

The law envisages that taxpayers must prepare and maintain a certain set of documents, in any suitable form, justifying the pricing method used in controlled transactions.

Documentation is not required for transactions in which prices conform to a regulated price or a price that is prescribed by the anti-monopoly authorities, transactions involving securities and derivatives traded on an organized equity market, and transactions covered by an APA.

### Priorities/pricing methods

The transfer pricing law includes five methods similar to those used in international transfer pricing practice. The resale-minus method has first priority for a routine distributor. In all other cases, the CUP method prevails, whereas the profit split is a method of last resort.

### Return disclosures/related party disclosures

Disclosure of transactions with related parties and also other types of third-party transactions that would remain subject to transfer pricing control (e.g., transactions with parties located in low-tax jurisdictions and cross-border sales of oil and oil products or minerals) is required by way of filing a transfer pricing-specific return. Such return for each year is due by May 20 of the following year (e.g., by 20 May 2015 for 2014).

### Transfer pricing-specific returns

Disclosure of transactions with related parties and also other types of third-party transactions that would remain subject to transfer pricing control is required by way of filing a transfer pricing-specific return.

### Documentation deadlines

Transfer pricing documentation must be presented within 30 days of the tax authorities' request. The request can be issued no earlier than 1 June of the year following the year in which the controlled transaction took place.

### Transfer pricing penalties

In 2012 and 2013, penalty provisions were not applicable. In 2014, transfer pricing penalties of 20% of the additional tax payable have been introduced. In 2017, the penalties will be increased to 40%.

### Penalty relief

Penalties will be imposed if a taxpayer's income is adjusted as a result of a transfer pricing audit, and if the taxpayer did not provide the transfer pricing documentation supporting the prices in a controlled transaction. Penalties cannot apply if prices were established in accordance with an applicable APA.

### Statute of limitations on transfer pricing assessments

The general rule is that the tax authority may audit the taxpayer for up to three years preceding the year when the audit was conducted.

As part of the transition to the new rules, transfer pricing audits of transactions performed in 2013 can be initiated no later than 31 December 2015. The statute of limitations in relation to transfer pricing audits for 2012 expired on 30 June 2014, which means that 2012 is now closed for transfer pricing audits.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

Transfer pricing matters in controlled transactions are subject to special transfer pricing audits, which are separate from general tax audits. Transfer pricing audits are generally focused on cross-border transactions with emphasis on loss-making transactions, transactions involving low-tax jurisdictions, exports in resource-oriented industries, service fees and royalties. Some domestic transactions may also be regarded as high risk if they involve entities resident in special economic zones or they are subject to advantageous tax regimes or are loss-making entities. Transactions that may be regarded as leading to an unjustified tax benefit may also be scrutinized for transfer pricing purposes.

## Russia (continued)

### **APA opportunity**

The APA program has been available since 1 January 2012 and is only for "major taxpayers." A non-Russian company cannot apply for an APA. The law also introduces the possibility to conclude multilateral APAs when the transactional counterparties are located in a jurisdiction with which Russia has a double tax treaty, although in practice, only unilateral APAs have been signed to date.

# Saudi Arabia

## Taxing authority and tax law

Taxing authority: Department of Zakat and Income Tax (DZIT)

Tax law: Saudi tax law

## Relevant regulations and rulings

Under Saudi tax law, there are no specific transfer pricing regulations governing transactions between related parties. However, the tax law contains certain provisions in respect to measures against tax avoidance, which may support the DZIT when challenging transactions between related parties. In addition, on 19 March 2014, a ministerial resolution was issued that states that in respect of transactions with related parties, the DZIT will issue rules for determining the "fair value" or "arm's-length value" of those transactions in accordance with the agreed international standards.

In determining the tax liability, the DZIT is empowered to:

- ▶ Disregard a transaction that has no tax effect, or reclassify a transaction whose form does not reflect its substance
- ▶ Reallocate income or expenses between related persons or persons under common control as is necessary to reflect the income that would have resulted from a transaction between independent persons

Per the Saudi tax law, companies are considered related if they are owned or controlled 50% or more by the same interest. In respect to capital companies, control is defined as ownership of the voting power, or value in the company, held directly or indirectly through one or more subsidiary of any type of company.

## Withholding tax

Generally, the withholding tax rates range from 5% to 20% for transactions between unrelated parties. Except for transactions with specified withholding tax rates under Saudi tax regulations, transactions between related parties are subject to a 15% withholding tax.

## Thin capitalization rules

Saudi tax law does not contain any specific provision for thin capitalization. Further, the DZIT generally does not challenge the capital adequacy of a company. The level of capital for each entity is determined by the Saudi Arabian General Investment Authority (SAGIA) and the Ministry of Commerce and Industry (MOCI), based on the nature of the underlying project or the company's activity.

However, in accordance with Saudi tax law, the deductibility of interest expense is capped as follows:

The lower of the interest charged for the year and income from loan fees (interest income) plus 50% of (A-B), where A and B are defined as:

- A: Income subject to tax, less income from loan fee (interest income)
- B: Expenses allowable for tax purposes, less loan fee (interest expense)

Interest (or loan fee) in excess of the deductibility limit set out above is a permanent disallowance under the tax law and its bylaws.

Banks are excluded from applying the above regulations. Further, an interest payment by a branch to the head office is not allowed as a deduction in the branch's tax declaration.

## OECD Guidelines treatment

The OECD Guidelines are not binding on the Saudi tax authority, but the DZIT does expect that transactions between related parties to be in accordance with the arm's-length principle.

## Saudi Arabia (continued)

### Documentation requirements

There is currently no legislative requirement for Saudi taxpayers to submit a transfer pricing document to the DZIT when filing tax declarations. However, it is highly recommended that the taxpayer maintain adequate documents to support the arm's-length nature of intercompany transactions.

### Priorities/pricing methods

No specific transfer pricing methods have been prescribed in the tax law and, as such, there is no hierarchy or priority for which transfer pricing methods should be applied. If a taxpayer in Saudi Arabia adopts and properly implements a global transfer pricing policy that is based on the commonly accepted transfer pricing methods set out in the OECD Guidelines, then it may be possible for the DZIT to accept the methodology that has been applied, although this has not been tested extensively.

### Return disclosures/related party disclosures

The tax law does not require taxpayers to submit a return disclosure, with respect to related party transactions.

### Transfer pricing-specific returns

There is currently no requirement to prepare a separate tax return for related party transactions.

### Documentation deadlines

Not applicable.

### Transfer pricing penalties

There is currently no specific transfer pricing penalty prescribed under the law. However, penalties as prescribed under the general provisions of Saudi tax law apply in cases of a deficiency assessment relating to a transfer pricing adjustment.

### Penalty relief

No penalty relief is currently applicable under Saudi tax law.

### Statute of limitations on transfer pricing assessments

There is no specific statute of limitations set out in Saudi tax law regarding transfer pricing assessments.

The general statute of limitations for the Saudi tax authority to make or amend a tax assessment is five years from the end of the deadline specified for filing the tax declaration for the taxable year. The DZIT may, however, make or amend an assessment within 10 years of the deadline specified for filing the tax declaration for the taxable year in cases when the tax return was not filed, or if filed, was found to be incomplete or incorrect with the intent of tax evasion.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

Transactions involving related parties are reviewed in considerable depth by the DZIT to verify if the transaction was made on an arm's-length basis.

### APA opportunity

Currently, there is no APA procedure in place.

# Senegal

## Taxing authority and tax law

Taxing authority: Senegalese tax authorities

Tax law: Senegalese Tax Code

## Relevant regulations and rulings

Articles 17, 18, 570, 638 and 639 of the General Tax Code contain the Senegalese transfer pricing regulations, effective since 1 January 2013 (and with retroactive effect to 2012).

The transfer pricing rules follow the arm's-length principle and require the use of the most appropriate method to determine the price applied in related parties' transactions.

These rules apply to transactions between:

- ▶ Local companies controlling or under the control of foreign companies
- ▶ Companies that are under the common control of a company or part of a group of companies controlling or under the control of foreign companies

Dependence (shareholding) relationships presumably exist between two companies if:

- ▶ One company holds, directly or indirectly, the majority of the shares of the other or has therein the effective decision-making power
- ▶ Both companies are placed under the control of the same entity, according to the conditions provided in the point above

Basically, the obligation for a Senegalese company to maintain transfer pricing documentation is applicable if:

- ▶ The local entity realizes an annual net turnover (excluding VAT and taxes) more than or equivalent to XOF5 billion
- ▶ The local entity holds at the end of the concerned fiscal year, directly or indirectly, more than 50% of the share capital or voting rights of a local or foreign affiliated company, meeting the turnover condition mentioned above
- ▶ More than 50% of the share capital and voting rights of the local entity is held directly or indirectly at the end of the fiscal year by a company meeting the turnover condition mentioned above

## OECD Guidelines treatment

Senegal is not a member of the OECD. In general, the Senegalese tax rules follow the OECD Guidelines.

## Documentation requirements

Upon request, the Senegalese entity that is subject to maintain transfer pricing documentation has to provide the Senegalese tax authorities with documentation that supports the prices applied in transactions of any nature realized with foreign affiliated companies, in accordance with Article 17 of the Tax Code.

The required documentation includes at least the following information:

- ▶ General information relating to the group:
  - ▶ A general description of activities, including changes during the years concerned or under audit
  - ▶ A general description of legal and operational structures of the group, with identification of the companies involved in the intragroup transactions
  - ▶ A general description of the functions and risks assumed by the affiliated companies involved in the intragroup transactions, provided that such risk and function affect the audited company
  - ▶ A list of the main intangible assets held (namely patents, brands, commercial names and know-how) in connection with the audited company
  - ▶ A general description of the group's transfer pricing policy

## Senegal (continued)

### Documentation requirements (continued)

- ▶ Specific information relating to the audited company:
  - ▶ A description of activities, including changes during the years concerned or under audit
  - ▶ A description of transactions realized with other affiliated companies, including the nature and the money flows (such as royalties)
  - ▶ A list of the cost-sharing agreements, and a copy of prior agreements in respect to transfer pricing or documents relating to the determination of transfer prices, affecting the profits and losses (taxable profits) of the audited company
  - ▶ An introduction to the methodology used to determine the arm's-length character of the transfer prices, including an analysis of functions assumed, assets utilized and risks assumed, and an explanation of the selection and application of the methodology chosen
  - ▶ If the chosen methodology requires so, an analysis of comparables considered relevant by the company

If, in the course of a tax audit, the tax authorities have an indication that a company has made an indirect transfer of profits, pursuant to Article 17 of the Tax Code, they can request documents indicating:

- ▶ The nature of the relationship between the audited company and the foreign company
- ▶ The methodology of the calculation of prices relating to industrial, commercial and financial operations realized with foreign group companies; supporting elements that justify the applied prices; and, if applicable, agreed-upon compensation
- ▶ The activities developed by intragroup companies quoted in the first point above, with respect to operations quoted in the second point above
- ▶ The fiscal treatment reserved for operations quoted in the second point above and realized by companies outside of Senegal by the audited company, or by companies quoted in the first point above whose major share capital or voting rights are held by the audited company

### Priorities/pricing methods

Senegalese transfer pricing regulations require that concerned companies provide documentation that supports the arm's-length character of the prices applied in related party transactions. The tax law does not provide methods for pricing related party transactions.

### Return disclosures/related party disclosures

Currently, the corporate income tax return does not include a transfer pricing schedule to be completed or specific transfer pricing-related questions.

### Transfer pricing-specific returns

There is no specific transfer pricing return.

### Documentation deadlines

The company has to provide the transfer pricing documentation upon the tax authorities' request. However, if the documentation is not provided when requested or is incomplete, the tax authorities can ask the audited company, by means of a formal request, to provide or to complete the documentation within 15 days.

### Transfer pricing penalties

There are no specific transfer pricing penalties, but the general rule applies.

Under Senegalese law, any tax due and payable resulting from an adjustment performed by the tax authorities will be deemed an additional tax. An additional penalty can be issued for the underpayment of tax.

Furthermore, intragroup payments are deductible only if the debtor can prove to the tax administration that the transactions are real and remunerations are not excessive.

## Senegal (continued)

### Penalty relief

Not applicable.

### Statute of limitations on transfer pricing assessments

The general statute of limitations applies to transfer pricing assessments. The period for the tax authorities to assess tax and any applicable penalties regarding transfer pricing matters is four years.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The tax authorities may conduct a transfer pricing audit any time during the year. In general, the tax authorities frequently audit transfer pricing.

### APA opportunity

Not applicable.

# Serbia

## Taxing authority and tax law

Taxing authority: Serbian Ministry of Finance

Tax laws: Corporate Income Tax Law (CIT Law)

## Relevant regulations and rulings

Articles 59 through 61a of the CIT Law define the arm's-length principle, the acceptable methods, and the obligation to prepare and file transfer pricing documentation. The Rule Book on transfer pricing and methods for the determination of arm's-length prices in intragroup transactions (Rule Book) provides further details about these, as well as prescribes obligatory content of the transfer pricing documentation.

## OECD Guidelines treatment

Serbian transfer pricing provisions and documentation requirements are generally based on the OECD Guidelines.

## Documentation requirements

Starting in fiscal year 2013, all taxpayers are obligated to prepare transfer pricing documentation that must contain mandatory elements and file it along with the annual CIT return. The prescribed elements of the transfer pricing documentation are:

- ▶ Analysis of the group
- ▶ Industry analysis
- ▶ Functional analysis
- ▶ Selection of transfer pricing method
- ▶ Conclusions reached
- ▶ Appendices

Transfer pricing regulations allow taxpayers to submit a so-called "short transfer pricing report" (containing only information about the related party and the type and amount of the transaction) for all transactions (except loans) that meet one of the following conditions:

- ▶ The transaction is of an ad hoc nature, and its value does not exceed the threshold amount for VAT registration purposes (approximately EUR70,000) in the tax period
- ▶ The total value of transactions with one related party does not exceed the threshold amount for VAT registration purposes (approximately EUR70,000) in the tax period

## Priorities/pricing methods

There is no priority in the selection of methods; the priority is to use internal comparable data. If there is no internal comparable data available, taxpayers may choose any of the defined traditional transaction methods (CUP, cost-plus and resale-minus) and transactional profit-based methods (TNMM or profit split method).

The taxpayer is also allowed to use any other unspecified method that is reasonable to apply in a given circumstance, assuming that the specified methods cannot be applied.

## Return disclosures/related party disclosures

Taxpayers are obligated to disclose in their annual CIT return revenues and expenses resulting from transactions with related parties, as well as disclose tax-based adjustments based on the transfer pricing analysis.

In addition, related-party disclosures and details of transactions are to be documented through obligatory transfer pricing documentation, which needs to be prepared and filed along with the CIT return.

## Serbia (continued)

### **Transfer pricing-specific returns**

There is no specific transfer pricing return in Serbia.

### **Documentation deadlines**

Transfer pricing documentation is to be filed within six months of the reporting period date.

### **Transfer pricing penalties**

A penalty of up to approximately EUR17,000 can be imposed if the taxpayer fails to prepare and file transfer pricing documentation by the prescribed deadlines. In addition, the possible adjustment of taxable income on a transfer pricing basis may result in a penalty of up to 30% of the understated tax liabilities and may further result in increased interest for late tax payments.

### **Penalty relief**

There is no penalty relief available; however, taxpayers may be approved for an additional period of up to 90 days to comply with the transfer pricing documentation requirements (i.e., to submit to the tax authorities the prescribed transfer pricing document).

### **Statute of limitations on transfer pricing assessments**

The general statute of limitations period of five years for taxes in Serbia also applies to transfer pricing assessments. A five-year period starts from the beginning of the year following the year in which the respective tax liability arose.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

Audits by Serbian tax authorities are not conducted on a regular basis, and audited periods are not considered irrevocably closed. Typically, audits take place only once every three to five years, and they cover all taxes. Transfer pricing is likely to be within the scope of most tax audits. Given the lack of practice, a limited level of sophistication can be reasonably expected from the Serbian tax authorities reviewing related party transactions.

### **APA opportunity**

Advance rulings and APAs are not available in Serbia.

# Singapore

## Taxing authority and tax law

Taxing authority: Inland Revenue Authority of Singapore (IRAS)

Tax law: Singapore Income Tax Act

## Relevant regulations and rulings

Section 34 D of the 2009 Singapore Income Tax Act relates to transfer pricing and empowers the IRAS to make transfer pricing adjustments in cases where a Singapore taxpayer's transfer pricing practices are not consistent with the arm's-length principle.

On 6 January 2015, the IRAS issued the second edition of its transfer pricing guidelines (revised Singapore Transfer Pricing Guidelines). The revised Singapore Transfer Pricing Guidelines provide in detail the IRAS' transfer pricing compliance program and positions regarding transfer pricing matters. It consolidates four previous e-tax guides:

- ▶ Transfer pricing guidelines, published 23 February 2006
- ▶ Transfer pricing consultation, published 30 July 2008
- ▶ Supplementary administrative guidance on APAs, published 20 October 2008
- ▶ Transfer pricing guidelines for related party loans and related party services, published 23 February 2009

## OECD Guidelines treatment

The revised Singapore Transfer Pricing Guidelines are generally consistent with the OECD Guidelines. The principles and transfer pricing methods set out in the OECD Guidelines are acceptable in Singapore.

However, there are certain differences between the OECD Guidelines and the revised Singapore Transfer Pricing Guidelines. In particular, if related parties have a cost-pooling arrangement, the IRAS is only prepared to accept that services are charged without a markup provided that:

- ▶ Each participant's share of the costs must be borne in the form of cash or other monetary contributions.
- ▶ The services are not provided to any unrelated party.
- ▶ The provision of the services is not the principal activity of the service provider. If the cost of providing the services does not exceed 15% of the total expenses of the service provider for that financial year, the services will not be treated as the principal activity.
- ▶ The services are listed in Annex C of the revised Singapore Transfer Pricing Guidelines.
- ▶ There is documentation showing that the parties intended to enter into the cost-pooling arrangement before the provision of the service.

In line with the Master File and Local File approach under Action 13 of the OECD Action Plan on BEPS, the revised Singapore Transfer Pricing Guidelines also contain a two-tiered approach where both group- and entity-level documentation is required. There is no specific requirement for country-by-country reporting (CBCR), as proposed by the OECD, although the group-level information required by the IRAS includes some extraterritorial items, such as the business activities and functions of each party in the group for the group's business that is relevant to the Singapore taxpayer.

## Documentation requirements

The revised Singapore Transfer Pricing Guidelines indicate that taxpayers should prepare and keep contemporaneous transfer pricing documentation to substantiate the taxpayer's transfer pricing instead of justifying positions only after the event. Contemporaneous transfer pricing documentation refers to documentation and information that taxpayers have relied upon to determine the transfer price prior to, or at the time of, undertaking the transactions. The IRAS has further clarified that it would also accept, as contemporaneous transfer pricing documentation, the documentation prepared at any time no later than the time of completing and filing the tax return for the financial year in which the transaction takes place.

## Singapore (continued)

### Documentation requirements (continued)

Specifically, there are Singapore dollar value thresholds for related party transactions that will warrant the preparation of transfer pricing documentation when these thresholds are exceeded. These thresholds are:

Category of related party transactions	Threshold (SGD) per financial year
Purchase of goods from all related parties	15 million
Sale of goods to all related parties	15 million
Loans owed to all related parties	15 million
Loans owed by all related parties	15 million
All other categories of related party transactions. Examples: ► Service income ► Service payment ► Royalty income ► Royalty expense ► Rental income ► Rental expense	1 million per category of transactions

In addition, documentation is not required in the following four situations:

- When the taxpayer transacts with a related party in Singapore and such local transactions (excluding related party loans) are subject to the same Singapore tax rates
- When a domestic loan is provided between the taxpayer and a related party in Singapore and the lender is not in the business of borrowing and lending
- When the taxpayer applies the safe harbor 5% cost markup for routine services
- When the related party transactions are covered under an APA, although annual compliance reports are still required under an APA

### Priorities/pricing methods

The IRAS generally does not have a specific preference for any of the five prescribed methods outlined in the OECD Guidelines, and it stipulates that the transfer pricing method that produces the most reliable results should be selected and applied. However, there is an exception for loan transactions, and the revised Singapore Transfer Pricing Guidelines state that the CUP method is the preferred method for substantiating the arm's-length nature of interest charges.

To apply the arm's-length principle, the revised Singapore Transfer Pricing Guidelines recommend a three-step approach:

- Step 1: Conduct a comparability analysis
- Step 2: Identify the most appropriate transfer pricing method and tested party
- Step 3: Determine the arm's-length results

### Return disclosures/related party disclosures

No specified disclosures are required on Form C, the Singapore Income Tax Return.

### Transfer pricing-specific returns

There is no transfer pricing return required to be filed, either separately or along with the Singapore Income Tax Return.

### Documentation deadlines

Taxpayers are not required to submit their transfer pricing documentation when they file their tax returns. However, taxpayers should keep their transfer pricing documentation and submit it to the IRAS within 30 days upon request.

Taxpayers are encouraged to update their transfer pricing documentation at least once every three years, while related party transactions should be tested annually against the arm's-length results.

## Singapore (continued)

### Transfer pricing penalties

There are no specific penalties regarding transfer pricing adjustments. Under general tax provisions relating to understatements of income, the penalty range is 100% to 400% of the underpaid tax.

Penalties may also apply if taxpayers fail to provide adequate transfer pricing documentation upon request by the IRAS. Such penalties will be invoked under Section 94(2) of the Singapore Income Tax Act for not complying with statutory record-keeping requirements.

### Penalty relief

Adequate and contemporaneous transfer pricing documentation to support the pricing of the taxpayer's related party transactions will help in mitigating penalties, particularly record-keeping requirements for tax.

### Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is as follows:

- ▶ If the year of assessment is 2007 or earlier, the statute of limitations is six years from the end of the year of assessment to which the transfer pricing issue relates.
- ▶ If the year of assessment is 2008 or later, the statute of limitations is four years from the end of the year of assessment to which the transfer pricing issue relates.

Singapore corporate taxpayers are required to file tax returns by 30 November of the following year after the applicable financial year. For example, a Singapore corporate taxpayer that had a 31 March 2014 financial year-end will be required to file its Singapore corporate tax return by 30 November 2015. The applicable year of assessment in this case is 2015, which corresponds with the basis period that is the financial year ended 31 March 2014.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as medium. If an audit is conducted, the likelihood of transfer pricing being reviewed is characterized as medium. The likelihood that the transfer pricing methodology is challenged as part of an audit is also characterized as medium.

With the passing of Section 34D of the Singapore Income Tax Act in 2009, the IRAS has clearly increased its audit focus on transfer pricing. Consequently, the number of transfer pricing consultations (TPCs) and transfer pricing queries has increased. The TPC is a process whereby the IRAS selects taxpayers for review of their compliance with the revised Singapore Transfer Pricing Guidelines. Taxpayers are selected based on risk indicators, such as the value of related party transactions, the performance of the taxpayer's business over time and the likelihood that taxable profits may be understated by inappropriate transfer pricing. The IRAS has stated examples of circumstances with high transfer pricing risks, namely:

- ▶ Transactions with cross-border related parties that are of a high value relative to the taxpayer's other transactions
- ▶ Transactions with related parties subject to a more favorable tax treatment
- ▶ Recurring losses or large swings in operating results, which may be unusual given the functions and assets of the taxpayer and the risks it assumed
- ▶ Operating results that are not in line with businesses in comparable circumstances
- ▶ Transactions involving research and development or marketing activities, which could lead to development or enhancement of intangibles
- ▶ Use of intellectual property, proprietary knowledge or other intangibles in the business
- ▶ Indications (such as through engagement with tax authorities, a country's audit focus, etc.) that the transactions are likely to be subject to transfer pricing audit by tax authorities

## Singapore (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)**

In addition to TPCs, transfer pricing audits could also develop from transfer pricing queries raised by the IRAS as part of the IRAS' annual review of the taxpayer's tax return. In a recent trend, the IRAS is making detailed information requests during the early stages of a transfer pricing audit, including a request for transfer pricing documentation up front upon the commencement of an audit.

### **APA opportunity**

Unilateral, bilateral and multilateral APAs are available, and requests for APAs have markedly increased in recent years. The revised Singapore Transfer Pricing Guidelines outline the procedures for applying for an APA. Guidance is provided for the following:

- ▶ Taxpayers ideally should approach the IRAS 10 months prior to the first day of the APA period to initiate discussions regarding the APA request
- ▶ Content requirements for pre-filing materials and formal APA submission
- ▶ The process following the filing of the formal APA submission, including regular updates with the taxpayer
- ▶ The circumstances under which the IRAS may reject a taxpayer's APA request
- ▶ The nature of taxpayer resources and commitments that should be made when an APA is requested
- ▶ Rollbacks being limited to bilateral and multilateral APAs

# Slovak Republic

## Taxing authority and tax law

Taxing authority: Slovak Financial Directorate, local tax authorities and Ministry of Finance

Tax law: Income Tax Act and Act on Tax Administration (Tax Code)

## Relevant regulations and rulings

Transfer pricing rules in Slovak Republic are stipulated by:

- ▶ Sections 2, 17 (5, 6, 7) and 18 of the Income Tax Act
- ▶ Relevant sections of the Act on Tax Administration (Tax Code)

The Slovak transfer pricing rules established in the Income Tax Act generally conform to the OECD Guidelines. The OECD Guidelines were published in the *Slovak Financial Newsletter* but are not legally binding. Nevertheless, the tax authorities generally follow them in practice.

Since 2009, taxpayers are obliged to prepare and keep transfer pricing documentation supporting the transfer pricing method used in transactions with foreign related parties. In May 2015, the Slovak Ministry of Finance released new guidance (No. MF/011491/2015-724) on the contents of transfer pricing documentation.

As of 2015, the scope of transfer pricing rules was extended to transactions between domestic related parties. Previously, they applied only to transactions with foreign related parties.

## OECD Guidelines treatment

The tax authority usually follows the provisions of the OECD Guidelines (e.g., the acceptable methods listed in the Income Tax Act correspond with the methods listed in the OECD Guidelines). As of 1 January 2014, the Slovak Income Tax Act reflects the updated version of the OECD Guidelines (e.g., elimination of preference in applying the selected transfer pricing method).

## Documentation requirements

The required content of transfer pricing documentation is stipulated in Guidance No. MF/011491/2015-724 of the Slovak Ministry of Finance. The Guidance aims to conform to the European Union Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the European Union (No. 2006/C 176/01).

Transfer pricing documentation must be prepared for related party transactions when an amount exceeds the level of materiality for accounting purposes (as defined by International Financial Reporting Standards (IFRS)). Documentation must be prepared separately for each transaction or homogenous group of transactions and with respect to each related party. Aggregation of transactions requires explanation in the documentation.

For taxpayers obligated to use IFRS (banks, insurance companies, pension funds, companies exceeding a certain size), the guidance prescribes the required contents of "full" transfer pricing documentation, which generally is in line with the master file approach set out by the EU Code of Conduct on Transfer Pricing Documentation. The documentation should consist of global (master file) and local documentation. The master file has to contain information with regard to the whole group of related parties (overview of the industry; business strategies; and general overview of functions, risks and assets of the members of the group). The local documentation should contain information regarding the Slovak taxpayer. Moreover, the documentation should cover the approach to transfer pricing, the methods used and the description of transactions with related parties. The local documentation should also include an analysis of the comparability of the transactions. As of 2015, the "full" transfer pricing documentation is also required to contain information about intragroup financial transactions, regardless of their materiality.

For natural persons and very small taxpayers qualifying as micro-entities under the Slovak Act on Accounting, the guidance prescribes only very limited contents of transfer pricing documentation under the concept of "shortened documentation." The extent of requirements under this documentation category corresponds to the extent of disclosure of related party transactions in the notes to financial statements.

## Slovak Republic (continued)

### Documentation requirements (continued)

The rest of the taxpayers that do not fall into the categories of full or shortened documentation are obligated to keep transfer pricing documentation to a "basic" extent. Similarly to the full documentation, the basic documentation also consists of global and local documentation. The contents of basic documentation are less extensive than full documentation. Most importantly, the basic documentation does not require proving compliance with the arm's-length principle (e.g., a benchmarking analysis is not in the stipulated contents of basic documentation).

The Guidance, applicable for the periods starting by 1 January 2015 and after, introduced several novelties, such as documentation requirements for domestic related party transactions, general requirements to include intragroup financial transactions irrespective of their significance, minimum level of materiality at the level of EUR1 million, as well as specific documentation requirements for pharmaceutical sector. Documentation requirements for domestic transactions between Slovak related parties depend on the tax position of the entities with regard to tax losses and tax relief.

For the 2014 period, the previous guidance (No. MF/8120/2014-721) applies. For periods starting before 1 January 2014, the previous guidance refers to the very first guidance (No. MF/8288/2009-72) of the Slovak Ministry of Finance, additionally stipulating contents of the documentation for taxpayers not obligated to use IFRS, under the concept of "simplified documentation." Such documentation should include a basic overview of controlled transactions, along with their important characteristics. The simplified documentation does not require proving compliance with the arm's-length principle (e.g., a benchmarking analysis is not in the stipulated contents of the simplified documentation).

The language of the documentation should be Slovak, unless otherwise approved at the taxpayer's request. The tax authorities have stated that documentation presented in English, German or French may also be accepted. There has been positive experience in submitting documentation in English.

### Priorities/pricing methods

The Slovak Income Tax Act is in line with the OECD Guidelines. A combination of methods is permitted. Non-listed methods may be used if they comply with the arm's-length principle.

### Return disclosures/related party disclosures

The taxpayer should state (on a specific row of the tax return) the difference (if any) between the prices charged in transactions with related parties and the arm's-length prices that decreased the tax base. The tax base must be increased by this difference at the same time. The corporate income tax return includes a summary table where the amounts of various types of related party sales and purchases must be stated (regardless of whether they diverge from arm's-length prices).

Transfer pricing documentation does not need to be enclosed with the tax return.

### Transfer pricing-specific returns

There are no transfer pricing-specific returns in Slovakia.

### Documentation deadlines

Transfer pricing documentation does not have to be disclosed unless the tax authorities request it, in which case it must be submitted within 15 days upon the request. As of January 2014, submission of documentation may be required without opening a tax audit prior to the request.

### Transfer pricing penalties

No penalties specific to transfer pricing exist. The penalty rate for an unpaid (or understated) tax liability is the highest of either three times the basic interest rate of the European Central Bank (at the date of issuance,  $3 \times 0.05\% = 0.15\%$ ) or 10%. The penalty is not at a per annum rate, but at a multiple of this rate and the under-declared tax, regardless of the time of the tax underpayment. In addition, a penalty for the breach of non-monetary obligations (e.g., nonexistent or insufficient supporting documentation) of an amount up to EUR3,000 can be imposed. In assessing the penalty for the breach of non-monetary obligations, the tax authorities have to take into account all of the circumstances that led to the breach of the non-monetary obligations (e.g., importance, duration and consequences of the breach).

As of 1 January 2016, a new system of penalties, also with respect to transfer pricing, is being introduced in Slovak tax legislation.

## Slovak Republic (continued)

### Penalty relief

There are no specific penalty reductions. Generally, a penalty is reduced by half if the taxpayer submits a supplementary income tax return when the tax base is adjusted upward. When the tax authorities successfully challenge transfer prices, no specific penalty reduction is available.

### Statute of limitations on transfer pricing assessments

The statute of limitations in Slovakia in the case of applying a double tax treaty is 10 years from the end of the year in which the tax return is filed.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of a corporate income tax audit in Slovakia is high, while the likelihood that the taxpayer's related party transactions will be reviewed as part of that audit is medium to high.

Based on experience with transfer pricing audits in Slovakia, if transfer pricing is reviewed as part of the tax audit, the risk of a challenge by the Slovak tax authorities of the taxpayer's methodology is also medium. After the obligation to prepare and keep transfer pricing documentation was introduced, the tax authority has intensified its activity on transfer pricing and is increasingly focused on the transfer pricing and related documentation when auditing companies that form part of a multinational group. In 2013, a group specializing in transfer pricing was established within the structure of the tax authorities, and the first audits focused solely on the transfer pricing issues that have been commenced.

Notwithstanding the focus of documentation rules on taxpayers using IFRS, transfer pricing audits do not focus only on such taxpayers. The likelihood of a transfer pricing audit is roughly the same for companies falling in the basic documentation scope (i.e., for midsize companies).

### APA opportunity

According to Section 18(4) of the Slovak Income Tax Act, in cases of related party transactions, the taxpayer may request that the tax authority approve the selected transfer pricing method. If approved, the method should be applied for a maximum of five tax periods. The Income Tax Act does not explicitly stipulate that the tax authority may approve the particular price or margin percentage used. Nevertheless, the Slovak tax authority may approve the practical application of the transfer pricing method (e.g., process of identifying comparable transactions or entities). Given this, an APA should provide a reasonable level of comfort for taxpayers.

Despite the above, given the wording of the Income Tax Act, the use of APAs in Slovakia has been limited so far.

The request for an APA must be filed at least 60 days before the start of the tax period in which the proposed method should apply. As of 1 September 2014, an APA request is subject to a fee of EUR4,000 to EUR30,000 (based on the value of the related transaction).

# Slovenia

## Taxing authority and tax law

Taxing authority: Financial Administration of the Republic of Slovenia (*Finančna Uprava Republike Slovenije*, or FURS)

Tax law:

- ▶ Corporate Income Tax Act (*Zakon o davku od dohodkov pravnih oseb*)
- ▶ Regulation on Transfer Prices (*Pravilnik o transfernih cenah*)
- ▶ Regulation on the Acknowledged Interest Rate (*Pravilnik o priznani obrestni meri*)
- ▶ Tax Procedure Act (*Zakon o davčnem postopku*)

## Relevant regulations and rulings

Articles 16 and 17 of the Corporate Income Tax Act provide the definition of “related party” and the general requirements with which related parties need to comply. These requirements are explained in more detail in the Regulation on Transfer Prices and provide further rules on transfer pricing methods, comparability analysis, use of a range, grouping of transactions, service and royalty charges, cost contribution agreements and related party relationships.

Article 18 of the Corporate Income Tax Act sets the basis for documentation requirements, which are then elaborated upon in the Tax Procedure Act.

Article 19 of the Corporate Income Tax Act provides the general rules on the acknowledged interest rate on intercompany loans. The rules are defined in more detail in the Regulation on the Acknowledged Interest Rate. The acknowledged interest rate rules establish a safe harbor for interest rates on intercompany loans.

Article 382 of the Tax Procedure Act provides general information on transfer pricing documentation requirements.

Articles 397 and 398 of the Tax Procedure Act provide regulations with respect to transfer pricing penalties.

## OECD Guidelines treatment

As the Slovenian transfer pricing regulations follow the principles established in the OECD Guidelines, the tax authority, in the absence of guidance in Slovenian legislation, will also consider the OECD Guidelines during tax audits.

## Documentation requirements

The Slovenian transfer pricing documentation requirements are based on the master file concept. Under this concept, as recommended by the European Community (EC) Council, as well as the European Union (EU) Joint Transfer Pricing Forum, the transfer pricing documentation should consist of a master file and a country-specific file. Disclosure of any related party transaction amounts should be provided with the tax return when it is filed with the tax authority.

The local legislation sets the following documentation requirements:

### The master file

The master file normally includes documentation common to the whole group. The group's headquarters may prepare it, and it should include a general description of the way that the group companies conduct business. The file should include:

- ▶ A description of the taxable person
- ▶ A description of the global organizational structure of the group
- ▶ An explanation of the type of connections between the companies in the group
- ▶ An explanation of the method used in the determination of transfer prices
- ▶ A description of the business activities and business strategies (including any general economic and other factors, an assessment of the competitive environment, and more)

## Slovenia (continued)

### Documentation requirements (continued)

#### Country-specific documentation

The local documentation should describe the company's course of business, but on a local level. The country-specific documentation should normally include:

- ▶ A description of transactions between affiliated persons
- ▶ A functional analysis determining the main functions performed and risks undertaken by the taxpayer and outlining which adjustments may need to be made in relation to comparable situations
- ▶ A description of any comparables search performed
- ▶ A description of business strategies
- ▶ A description of goods and services transferred or rendered
- ▶ A description of the method applied for establishing the arm's-length price
- ▶ Any other information that might be relevant from a transfer pricing perspective should also be included in the documentation

### Priorities/pricing methods

Following the changes to the OECD Guidelines with respect to the hierarchy of transfer pricing methods, Slovenian Regulation on Transfer Prices introduced the "best-method rule" in the beginning of 2012. The best-method rule replaced the previous hierarchy, which preferred traditional transactional methods over transactional profit methods.

However, to some degree, the preference for transactional methods over profit methods still exists; when both can be applied in an "equally reliable manner," the traditional transactional method should be selected. There is a similar conclusion regarding the application of the CUP method, which will trump any other method if both can be applied in an equally reliable manner.

### Return disclosures/related party disclosures

Related party transactions are reported as a component of the annual corporate income tax return.

### Transfer pricing-specific returns

As mentioned above, related-party transactions must be reported as part of the information included on the annual corporate income tax return. In addition, if certain conditions are fulfilled, specifically prescribed attachments must be enclosed with the corporate income tax return. Such conditions include:

- ▶ Where the cumulative amount of given or received loans from a particular related party exceeds EUR50,000 in a tax period, the taxpayer must disclose the name of the related party, its state of residence and tax number, and the cumulative amount of the loan given or received and the relationship with the related party.
- ▶ Similarly, where the cumulative amount of other intercompany receivables or liabilities toward a particular related party exceeds EUR50,000 in a tax period, the taxpayer must disclose the name of the related party, its state of residence and tax number, and the cumulative amount of receivables or liabilities toward the related party and the relationship with the related party.

A similar attachment is required if the resident taxpayer has tax losses generated from previous periods, if it is taxed at a 0% corporate income tax rate or at a lower rate than the general one, or if the resident related party is tax exempt.

### Documentation deadlines

The documentation should be provided to the tax authority upon request, usually made in the course of a tax audit. If it is impossible to submit the documentation immediately, an extension of up to 90 days (depending on the extent and complexity of the information) may be granted. If the master file is not kept in the Slovenian language, the tax authority may request that it be translated before submission, with an extension of 60 days granted to do so.

## Slovenia (continued)

### Transfer pricing penalties

A taxpayer may be fined up to EUR30,000 if the transfer pricing documentation is not submitted in the prescribed manner; additionally, the individual responsible for preparing the documentation on behalf of the taxpayer may also be fined up to EUR4,000. In case of a tax adjustment, late payment interest and penalties for offenses may be charged. If the additional tax exceeds EUR5,000, the tax offense qualifies as severe, and fines in the amount of 45% of the additional tax may be levied.

### **P**enalty relief

Penalties (fines) for a tax offense may be avoided if the taxpayer makes a voluntary disclosure before receiving the notice at the beginning of a tax audit or the notice at the beginning of a tax offense procedure or criminal procedure. When making a voluntary disclosure, the taxpayer should adjust the tax liability accordingly.

When making the voluntary disclosure, the taxpayer also must pay the amount of tax due and late payment interest. When tax and late payment interest are paid simultaneously while making the disclosure, the taxpayer avoids facing penalties for a tax offense.

### Statute of limitations on transfer pricing assessments

The statute of limitations on corporate income tax assessments is generally five years.

If the tax authorities intervene with any official action against the taxpayer with a purpose to assess or collect tax, the relevant period is reset, without taking into account any previous lapse of time. Nevertheless, the right of the tax authorities to assess and collect tax will cease after 10 years. The transfer pricing documentation must be archived for 10 years.

### **F**requency of tax audit and transfer pricing scrutiny by the tax authority

In general, the risk of an annual tax audit is medium. The likelihood that transfer pricing will be reviewed as part of the audit is high. Also, the likelihood that the transfer pricing methodology will be challenged during the tax audit is high.

The tax authority mainly initiates a transfer pricing audit where a Slovenian taxable person is part of a multinational group. The tax authority is currently putting the following transactions under increased scrutiny:

- ▶ Intragroup services
- ▶ Intangible goods (e.g., royalties and licensing)
- ▶ Financial transactions (e.g., loans and cash pooling)

Additional risk factors are the profitability of the local taxpayer, business restructurings, the nature and volume of related party transactions, transfer pricing issues identified in previous tax audits, and information available from the media.

### **APA opportunity**

Unilateral APAs currently are not possible in Slovenia. According to the recent implementation of the Financial Administration Act, FURS handles the advanced pricing procedures. Draft legislation on APA has been published in June 2015.

# South Africa

## **Taxing authority and tax law**

Taxing authority: Commissioner of the South African Revenue Services (SARS)

Tax law: Income Tax Act 58 of 1962 (the Act)

## **Relevant regulations and rulings**

Tax law: Section 31 of the Act contains the main legislative provisions concerning transfer pricing. Guidance about the application of Section 31 is currently contained in Practice Note 7 (6 August 1999) and the addendum to the Practice Note (29 September 2005).

Section 31 previously authorized the tax authority to adjust the consideration for goods or services to an arm's-length price for the purposes of computing the South African taxable income of a person.

For years of assessment commencing on or after 1 April 2012, the legislation changed, allowing the tax authority to consider whether any term or condition imposed as part of any transaction, operation, scheme, agreement or arrangement differed from the terms and conditions that would have been agreed to if the parties to the transaction were independent. Any difference in price between what was charged between the connected persons and what would have been charged between independent parties needs to be adjusted in the tax return of the taxpayer. This is often referred to as the primary adjustment. To the extent that the taxpayer has not recovered the difference between the arm's-length charge and the actual charge from the foreign related party, a deemed loan will arise. This is often referred to as the secondary adjustment. Deemed interest will accrue on the deemed loan.

On 22 March 2013, SARS published a draft Interpretation Note (draft IN) indicating the analysis and documentation that SARS would expect to see in relation to cross-border financial assistance and thin capitalization. The final IN is binding only for SARS and not for taxpayers and courts.

SARS has also contributed to the United Nations' Practical Manual on Transfer Pricing for Developing Countries.

From 1 January 2015, the deemed loan will be replaced by a dividend in specie and a dividend tax of 15% will be applied to the dividend.

Therefore, the application of transfer pricing provisions has been widened. Two key changes affecting financial assistance arrangements and thin capitalization have also been incorporated under the new legislation. The first is the inclusion of finance arrangements between South African branches of foreign companies and another foreign company in the group. The second, perhaps a more radical change, is the move from a debt-to-equity ratio test for assessing thin capitalization to an arm's-length test to determine an appropriate level of the debt and interest rate to be charged.

## **OECD Guidelines treatment**

Although South Africa is not a member of the OECD, SARS accepts the OECD Guidelines and has largely based its practice on them. By the same token, SARS recognizes the five methods accepted by the OECD Guidelines. The new changes to the legislation will provide closer alignment with the OECD Guidelines and with the approach adopted by the OECD member countries.

## **Documentation requirements**

Currently, there is no statutory requirement to prepare transfer pricing documentation; however, the income tax return does require confirmation of whether any cross-border related party transactions were entered into, and it also requests specific information regarding cross-border related party transactions. In addition, the Income Tax Return (ITR) 14 asks whether a taxpayer has prepared a transfer pricing policy document supporting the arm's-length nature of transactions with connected parties in the respective fiscal year. Therefore, SARS is able more easily to identify high-risk taxpayers and will know if they have transfer pricing documentation in place.

## **Priorities/pricing methods**

SARS accepts the methods prescribed by the OECD (i.e., CUP, resale price, cost-plus, TNMM and profit split) and has indicated that it will subscribe to the OECD's view of accepting a best-method approach as long as it is substantiated. SARS

## South Africa (continued)

### Priorities/pricing methods (continued)

may require that adjustments be made to foreign comparable company results used for benchmarking the results of the South African entity to compensate for differences in risks assumed by entities operating in a different jurisdiction. We note that SARS has a preference for comparable companies from emerging markets.

### Return disclosures/related party disclosures

ITR 14 asks for specific information pertaining to cross-border transactions with connected parties. In particular, taxpayers are required to provide the values of individual cross-border transactions entered into with foreign-connected persons. In addition, taxpayers are required to provide certain financial ratios that indicate the level of borrowings and the overall performance of the South African entity.

### Transfer pricing-specific returns

There are no transfer pricing returns. All transfer pricing-related questions are in ITR 14.

### Documentation deadlines

Although there is no statutory requirement to prepare documentation, SARS recommends that taxpayers with cross-border related party transactions prepare appropriate documentation. When a taxpayer indicates in ITR 14 that it has prepared transfer pricing documentation, such documentation should be available at the request of SARS.

### Transfer pricing penalties

From 1 January 2015, the difference between the price actually paid and received and the arm's-length amount will give rise to a dividend in specie. As noted above, a dividends tax of 15% will be applied to this.

There are no other specific penalties for transfer pricing, but general penalty rules are applicable, which could reach 200% of the additional tax resulting from an adjustment (in the event of default, omission, incorrect disclosure or misrepresentation).

### Penalty relief

It is unlikely that a double tax agreement (DTA) will reduce the dividends tax applied to the dividend in specie, although SARS has not specifically indicated this.

With respect to other penalties that may be imposed under Tax Administration Act No. 28 of 2011, where taxpayers have made conscientious efforts to establish transfer prices that comply with the arm's-length principle and have prepared documentation as evidence of such compliance, SARS will likely take the view that the taxpayer's transfer pricing practices represent a lower tax risk. Such evidence may provide some mitigation against the maximum penalty for the underpayment of income tax of 200%, as provided by the Tax Administration Act.

### Statute of limitations on transfer pricing assessments

The normal statute of limitations is three years from the date of assessment. Under the new Tax Administration Act, self-assessment provisions have an extended statute of limitations of five years. Since transfer pricing is now a self-assessment provision, the statute of limitations is arguably now five years. This can be extended or removed in cases of fraud, misrepresentation or nondisclosure of material facts.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

SARS follows a risk approach in assessing the level of transfer pricing risk. If risk is found to exist, SARS will proceed with conducting an audit. In particular, the information that is provided as part of ITR 14 enables SARS easily to identify companies that are more likely to have a high-risk profile. The last few years have seen an increased focus on transfer pricing audits, with some significant assessments being raised. SARS has a specialized transfer pricing team, which has experienced significant growth in the last few years.

The likelihood of a general annual tax audit is currently assessed as medium, and the likelihood of transfer pricing forming a part of such an audit is high. The major focus from an audit perspective under the existing legislation has been implementing stated policies, determining the cost base and examining the comparables used by the tested party to justify that its prices are at arm's length. Recently, audit activity has increased and taxpayers are required to provide evidence to support many of

## South Africa (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)**

the areas scrutinized. The likelihood that the transfer pricing methodology will be challenged is high, especially in a situation in which the taxpayer's transfer pricing methodology is considered not to be the most appropriate methodology, or in which the pricing methodology has been selected but practically cannot be tested or implemented.

### **APA opportunity**

South Africa currently does not have an APA program, although one is being considered. The legislation also currently prohibits SARS from providing an advance ruling to establish a price.

# South Korea (Republic of Korea)

## Taxing authority and tax law

Taxing authority: National Tax Service (NTS)

Tax law: South Korean Corporate Tax Act (in South Korea, general tax regulations are provided in the Corporate Tax Act and transfer pricing regulations in the Law for Coordination of International Tax Affairs)

## Relevant regulations and rulings

- Presidential Enforcement Decree (PED)
- Ministerial Decree and Interpretations

## OECD Guidelines treatment

The Law for Coordination of International Tax Affairs (LCITA) takes priority over the OECD Guidelines. The NTS recognizes the OECD Guidelines, but they have no legally binding effect. Hence, if a taxpayer's argument is based only on the OECD Guidelines and not on the LCITA, the NTS or regional tax offices may not accept it in practice.

## Documentation requirements

At the time of filing the corporate income tax return, a taxpayer is required to submit certain transfer pricing reporting forms (refer to the "Return disclosures/related party disclosures" section below for more details).

Under the contemporaneous transfer pricing documentation rules, to receive relief from the underreporting penalty, taxpayers are required to prepare and maintain transfer pricing documentation by the due date to file the annual corporate income tax returns. Also, documents are required to be submitted in Korean, unless preapproval is provided to submit them in English.

## Priorities/pricing methods

The South Korean transfer pricing regulations prescribe the following five transfer pricing methods: CUP, resale price, cost-plus, profit split and TNMM. Other reasonable methods can only be used if the five methods are not applicable. Of the aforementioned transfer pricing methods, the taxpayer is to select the most reasonable method based on the availability and reliability of data.

## Return disclosures/related party disclosures

At the time of filing the corporate income tax return, the LCITA requires a taxpayer to submit the following transfer pricing reporting forms:

- A form stating the transfer pricing method selected and the reason for selecting the method for each related party transaction; there are different forms for tangible property transactions, intangible property transactions, service transactions and cost-sharing arrangements
- A summary of cross-border transactions with foreign related parties
- A summary income statements of foreign related parties having cross-border transactions with the South Korean entity

There are certain minimum threshold exemptions for the first and third forms mentioned above.

## Transfer pricing-specific returns

The transfer pricing reporting forms discussed above form part of the corporate income tax return that is filed with the tax authority.

## South Korea (Republic of Korea) (continued)

### Documentation deadlines

A taxpayer must submit documents and information, including transfer pricing documentation, requested by the NTS within 60 days of the NTS' request. A one-time extension of 60 days may be granted if reasonable circumstances specified in the LCITA exist. For the taxpayer to be eligible for an underreporting penalty waiver for preparing the contemporaneous transfer pricing documentation, the transfer pricing documentation should be prepared by the tax filing due date and submitted to the NTS within 30 days of the request.

The NTS may also request that a taxpayer submit certain information (including transfer pricing documentation) during a tax audit. In that case, the taxpayer may be given a shorter notice (e.g., 10 days) to submit the information.

### Transfer pricing penalties

There are two types of penalties associated with a transfer pricing adjustment: an underreporting penalty and an underpayment penalty.

- The underreporting penalty is approximately 10% of the additional taxes resulting from a transfer pricing adjustment.
- The underpayment penalty, which is an interest payment in nature, is calculated as 0.03% of the additional taxes on a transfer pricing adjustment per day (10.95% per annum) on the cumulative days. Counting the cumulative days of the underpayment starts from the day after the statutory tax filing due date, which is three months after the fiscal year-end and ends on the date that a payment for the tax assessment is made.

There are certain penalties for failing to comply with information or documentation requests issued by the NTS. A taxpayer must submit information and documents requested by the NTS within 60 days of the NTS' request. A one-time extension of 60 days may be granted if reasonable circumstances specified in the LCITA exist. For failure to provide documentation requested by the NTS by the required due date, there is a penalty of up to KRW100 million.

A penalty of KRW10 million shall be imposed on the taxpayer for omitting a "Summary of cross-border transactions with foreign related parties" at the time of filing a corporate income tax return.

### Penalty relief

Under Article 13 of the LCITA, if the taxpayer has prepared and maintained contemporaneous transfer pricing documentation for the transfer pricing methods applied to the cross-border intercompany transactions reported in the corporate income tax return, and such documentation supports the reasonableness of the transfer pricing methods reported, the penalty for underreporting will be waived if a transfer pricing adjustment is made. To be eligible for an underreporting penalty waiver, the transfer pricing documentation must be submitted within 30 days upon a request by the NTS.

PED Article 23 of the LCITA provides regulations on the contents of the contemporaneous transfer pricing documentation. In general, contemporaneous transfer pricing documentation should include information about the taxpayer's business (including functions performed and factors that can affect the pricing of intercompany transactions with related parties), details about cross-border intercompany transactions, an explanation of the transfer pricing method selected and reasons for not selecting other transfer pricing methods prescribed in the regulations, and details about the comparable company or transaction data used.

The regulations also stipulates that the comparable data used should be representative and should not have been selectively chosen to favor the taxpayer's position (i.e., no cherry-picking). When a taxpayer applies a transfer pricing method different from that agreed to in an APA or selected by tax auditors in a tax audit, the taxpayer needs to justify the use of the different transfer pricing method.

The underreporting penalty may also be waived in a mutual agreement procedure (MAP) if the result confirms that the taxpayer is not guilty of negligence. In the case of a unilateral APA, the NTS may decide whether the taxpayer is guilty of negligence. If the taxpayer can show that it (i) selected and reported the most reasonable transfer pricing method specified in the LCITA, (ii) actually applied the selected method and (iii) maintained supporting documentation, then there is no negligence.

## South Korea (Republic of Korea) (continued)

### Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing adjustments is generally five years from the day after the income tax return filing due date. It extends to 10 years in the case of fraud or another wrongful act and 7 years if a taxpayer does not submit the tax filing on the due date.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

Companies should expect to be audited every four to five years, depending on the size of the company, or more frequently if other special factors exist. The likelihood of transfer pricing being reviewed during a tax audit is high. The NTS, as a matter of policy, requests transfer pricing documentation, and such requests can be made separately from a tax audit. The NTS closely monitors companies whose profitability suddenly drops and companies whose profits fluctuate substantially over a number of years. These companies are likely to be subject to tax audits.

Also, the NTS will likely scrutinize companies paying high royalties abroad or receiving high management service fee charges or cost allocations from overseas related parties. Generally, if transfer pricing is reviewed as part of a tax audit, the tax auditors are likely to challenge the method used by the taxpayer and may propose alternate methods that are less favorable to the taxpayer.

### APA opportunity

Unilateral, bilateral and multilateral APAs are available under the LCITA. To encourage the use of APAs, the NTS does not require an application fee, and documents submitted to the NTS with regard to an APA are to be kept confidential, in accordance with the LCITA. In addition, the APA officials of the NTS are making efforts to shorten the APA processing period.

The NTS implemented the Simplified APA (SAPA) program in fiscal year 2015 to reduce the burden of undergoing tax audits for small and medium-sized enterprises (SMEs). With the implementation of the SAPA program for SMEs in 2015, the burden of tax audits will be minimized for those foreign SMEs that operate business earnestly. The SAPA program is expected to make APAs more accessible to foreign SMEs with annual revenue of less than KRW50 billion by simplifying the documentation required to be submitted and making certain of completion within one year. The NTS releases annual reports on APAs, which include information such as statistics about the type of APAs being concluded, the countries that are counterparties to APAs, the time taken to process APA applications and other related information. The 2013 NTS APA annual report showed that a total of 405 APAs were applied for and 261 APAs were concluded as of the close of 2013. The annual report also showed that 47 APAs were applied for in 2013. As for processed APAs in 2013, 18 were bilateral APAs and 20 were unilateral APAs.

In recent developments, establishing an Advance Mediation Process between the customs value and transfer pricing (income tax) has been proposed for the LCITA as Article 6 (3). A resident who applies for a unilateral APA may also apply for an advance customs valuation arrangement (ACVA) with the NTS simultaneously. In this case, the commissioner of the NTS will discuss and decide, together with the commissioner of the South Korea Customs Service, the calculation method for transfer pricing and the customs value so that the results from transfer pricing align with the results from customs.

This applies only if the transfer pricing method declared for a unilateral APA uses the CUP method, resale price method or cost-plus method, and the customs method declared for the ACVA uses the transaction value of identical goods or the transaction value of similar goods method, the deductive method or the computed method. The NTS shall notify the taxpayer of the availability of the Advance Mediation Process within 90 days of the date of receipt of the taxpayer's application.

# Spain

## Taxing authority and tax law

Taxing authority: State Agency of Tax Administration (AEAT) and General Directorate of Taxation (DGT)

Tax law: Spanish Corporate Income Tax Law (CITL)

## Relevant regulations and rulings

The transfer pricing regulations are contained in Law 27/2014, approved on 27 November 2014, Article 18 of the CITL.

On 18 November 2008, by Royal Decree, the Spanish Government approved and published regulations that specify transfer pricing documentation requirements (Royal Decree 1793/2008) applicable to persons or entities participating in related party transactions.

Transfer pricing documentation requirements have been in effect in Spain since 2006 (following Law 36/2006, applicable to tax periods beginning after 1 December 2006). This includes a shift of the burden of proof to the taxpayer and a change in the penalty regime. However, the law did not include a detailed description of what the documentation should contain, except to say that it had to reflect the arm's-length principle and that the arm's-length test should be based on one of the methods specified in the law (i.e., CUP, cost-plus, resale price, TNMM and profit split). On 11 July 2015, by Royal Decree 634/2015, the Spanish Government approved new regulations on documentation requirements based on full implementation of OECD BEPS Action 13.

Regarding transfer pricing penalties, the Royal Decree-Law 6/2010 (approved on 9 April 2010) introduces amendments modifying the penalty amounts for companies that meet certain criteria. The Royal Decree 897/2010 (approved 9 July 2010) and the Royal Decree-Law 13/2010 (approved 3 December 2010) introduce certain amendments consisting of exemptions to transfer pricing documentation requirements.

## OECD Guidelines treatment

Spanish transfer pricing legislation explicitly endorses the application of the OECD Guidelines and those of the European Union Joint Transfer Pricing Forum (EUJTPF).

## Documentation requirements

The documentation requirements are in line with those of the EUJTPF. However, it should be noted that documentation requirements changed for periods starting on or after 1 January 2016, based on full implementation of OECD BEPS Action 13. For tax periods beginning 1 January 2015, the documentation requirements continue the same as in 2014. Accordingly, two types of documentation must be maintained: one global document for the group (master file) and one document for each group entity (local file).

The documentation will cover domestic and international transactions. However, transactions within the same fiscal unit are exempted from the documentation requirements. The master file documentation requirements establish the necessity of:

- ▶ General descriptions of the organizational, legal and operative group structure, and any change thereof
- ▶ Identification of the group entities that enter into related party transactions, to the extent that they affect the operations of the Spanish corporate taxpayer, directly or indirectly
- ▶ General descriptions of the nature, amounts and flows of related-party transactions completed by corporate group entities, to the extent that they affect the operations of the Spanish corporate taxpayer, directly or indirectly
- ▶ General descriptions of the functions performed and the risks assumed by the different group entities, to the extent that they affect the operations of the Spanish corporate taxpayer, directly or indirectly, including any changes since the last fiscal year
- ▶ List of intangibles (including patents, trademarks and commercial brands) owned by the group, to the extent that they affect the operations of the Spanish corporate taxpayer, directly or indirectly, as well as the considerations derived from the use of these intangibles
- ▶ Description of the group's transfer pricing policies, including the pricing methodology used to justify the group policy's compliance with the arm's-length principle

## Spain (continued)

### Documentation requirements (continued)

- ▶ List of cost-sharing and services agreements between group entities relevant to the Spanish corporate taxpayer
- ▶ List of APAs and agreements entered into relevant to the Spanish corporate taxpayer
- ▶ Corporate group's annual report or equivalent

On the other hand, the local documentation requirements establish the necessity of:

- ▶ A detailed description of the taxpayer's business and business strategy, including changes in the business strategy compared with the previous tax year
- ▶ A description and explanation of the specific controlled transactions, including the transactions (tangible and intangible assets, services, financial, etc.), invoices and amounts of the transactions
- ▶ A comparability analysis, including:
  - ▶ Amounts of the transactions
  - ▶ Characteristics of property and services
  - ▶ Functional analysis (functions performed, assets used, risks assumed)
  - ▶ Contractual terms
  - ▶ Economic circumstances
  - ▶ Specific business circumstances
- ▶ An explanation about the selection and application of the transfer pricing methods, why the methods were selected and how they were applied
- ▶ Any other relevant information used by the taxpayer to value related party transactions, as well as any agreement entered into with shareholders that may affect the transaction valuation

The tax administration could require further information during a tax audit in regard to the related party transactions.

There are some exemptions for documenting related party transactions, including:

- ▶ Exemptions by volume:
  - ▶ For those corporate income tax taxpayers whose transactions carried out with the same related party do not exceed EUR250,000 at market value (taking into account the total transactions carried out with the same related party)
  - ▶ Entities whose net sales do not exceed EUR10 million in the period and related party transactions that do not exceed EUR100,000 (excluding listed tax haven jurisdictions)
- ▶ Exemptions by transaction characteristics:
  - ▶ Performed between entities within tax consolidation groups
  - ▶ Performed between economic interest groupings or temporary business alliances and their shareholders
  - ▶ Carried out within the scope of an initial public offering
  - ▶ Carried out between savings banks integrated in a vehicle approved by the Bank of Spain

### Priorities/pricing methods

To determine the market value, the law establishes that one of the following methods should be applied: CUP, cost-plus, resale price, profit split and TNMM.

All of these methods have the same preferential level. The selection of the transfer pricing methods should be based on the nature of related party transactions, the availability of information and the comparability analysis.

### Return disclosures/related party disclosures

Specific disclosure rules exist for transactions with tax havens, even with unrelated parties (as per a blacklist).

## Spain (continued)

### Transfer pricing-specific returns

The related party transactions have to be included in the corporate income tax return. There are no specific transfer pricing returns for taxpayers.

### Documentation deadlines

Companies will have to maintain documentation once the corporate income tax return is filed.

### Transfer pricing penalties

Failure to comply with the documentation requirements specified in the regulations may result in major penalties. These penalties can result from not having correct documentation or from not applying the arm's-length principle (market value).

When the assessment does not produce a tax adjustment, the penalty will be EUR1,000 per fact or EUR10,000 per group of omitted, inaccurate or false facts.

When the tax authorities adjust the pricing of a transaction, the penalty may be up to 15% of the gross adjustment.

There will be no penalties where the obligation of documentation has been complied with, even if the tax authorities reassess the value of the transactions.

The regulations also include the applicability of "secondary adjustments" (i.e., in those transactions where both values will have, for the related parties, the tax treatment that corresponds with the nature of the profit realized). The law makes a clarification for cases where the link is defined in light of the relationship between the shareholder and the entity, and the difference shall (in proportion to the entity's degree of participation) be considered as:

- ▶ Dividends, whenever such difference is in favor of the shareholder
- ▶ Contributions by the shareholder to the entity's equity, whenever the difference is in favor of the entity

Secondary adjustment does not apply if parties agree to repatriate the excess of profits as assessed by the Spanish Tax Administration (para. 4.72 of OECD Guidelines).

The above sanctions are compatible with aggravating circumstances, such as resisting, obstructing, excusing or negating the tax authorities' actions.

### Penalty relief

Some reductions are applicable to penalties. Penalties do not apply with the complete fulfillment of the documentation requirements, even if the tax authorities propose a reassessment.

### Statute of limitations on transfer pricing assessments

A general statute of limitations of four years applies. The term will be interrupted in case of a tax audit. If a new income tax return is filed with the tax authorities, the four-year period is suspended and a new one begins.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit varies from one industry to the other and depends on the taxpayer's size. Very large companies (annual revenues in excess of EUR60 million) normally come under audit on a yearly basis, hence the likelihood of a tax audit for such companies is high.

The likelihood of a general audit for large companies (annual revenues between EUR6 million and EUR60 million) is medium, while the likelihood of audit for others is low. However, the Spanish tax authority establishes its annual audit plans based on the risk assessment of each taxpayer, so companies for which risk factors apply may be exposed to an increased risk.

The likelihood that transfer pricing will be reviewed as part of an audit is high if the taxpayer regularly enters into cross-border related party transactions. For all other cases, the likelihood of a transfer pricing review during a general audit is medium.

When the transfer pricing policy is under review, the likelihood of a challenge to the transfer pricing methodology is high. In particular, authorities more often aggressively challenge the comparability analysis by applying the most recent OECD guidance to the nine-step process and interquartile range application. The tax authorities have stated that transfer pricing audits are an area of major attention, particularly with regard to business restructurings and intangible transactions.

## Spain (continued)

### **APA opportunity**

Taxpayers may request the tax authority to issue rulings on related party transactions before they are carried out. This request has to be filed with a proposal based on the arm's-length principle. On the other hand, the tax authority may also settle agreements with other tax authorities to determine the market value of the transactions jointly (i.e., bilateral APAs).

The new regulation has improved the previous regime on APAs by extending the valid term to a six-year period (encompassing the previous year, when the time limit for filing the tax return has not yet expired, the current year and the next four years). Also, an APA can be rolled back to tax periods for which a tax return has already been filed, even in a case in which the tax administration has produced a reassessment. This way, the APA may bring taxpayers an opportunity to settle disputes with the tax administration.

# Sri Lanka

## **Taxing authority and tax law**

Taxing authority: The Department of Inland Revenue (IRD)

Tax law: Inland Revenue Act (IRA)

## **Relevant regulations and rulings**

Transfer pricing regulations are contained in Extra Ordinary Gazette No. 1823/5 issued on 12 August 2013 under and in terms of Sections 104 and 104A of the IRA.

## **OECD Guidelines treatment**

Although Sri Lanka is not a member of the OECD, the IRD generally refers to the OECD Guidelines to resolve matters of interpretations of its own transfer pricing regulations. By the same token, the IRD broadly recognizes the pricing methods stipulated in the OECD Guidelines.

## **Documentation requirements**

Transfer pricing regulations require extensive contemporaneous documentation. Taxpayers are required to keep all of it in English, evidencing that related-party transactions have been established on an arm's-length basis. However, such documentation is required only if the international and other transaction values exceed Sri Lankan rupee (LKR) 100 million and LKR50 million, respectively, for any year of assessment.

## **Priorities/pricing methods**

The IRD recognizes the methods outlined in the OECD Guidelines, which include the traditional transaction methods (CUP, resale price and cost-plus) and profit methods (profit split and TNMM). The process of selecting a method should be aimed at finding the most appropriate method to ascertain the arm's-length price. However, the profit split method is accepted as appropriate when unique intangibles or interrelated transactions exist.

## **Return disclosures/related party disclosures**

The IRD requires taxpayers to disclose in their returns the details of persons receiving fees, interest, royalties, etc., and their location.

Transfer pricing regulations require the disclosure of a transfer pricing policy statement, management perception of risk factors and more in the Directors' Report.

In accordance with Sri Lankan accounting standards, the company is required to disclose related party transactions in its financial statements.

## **Transfer pricing-specific returns**

Under the IRA, there is no specific tax filing requirement for transfer pricing purposes up to the year of assessment 2014-15. However, the IRD issued a new Gazette on 25 March 2015 requiring taxpayers to file summarized details of their related-party transactions at the time of filing income tax returns. The Gazette also requires the approved accountant (i.e., the auditor) to certify that all transactions with associated undertakings are carried out on an arm's-length basis and that the necessary documentation has been checked by the auditor. This new requirement will be effective from the year of assessment 2015-16, and therefore the first filing will have to be made on or before 30 November 2016.

## **Documentation deadlines**

Documentation is generally required and to be furnished upon request. The regulations require taxpayers to retain documents for a period of five years.

## Sri Lanka (continued)

### Transfer pricing penalties

The IRA does not impose penalties targeted specifically at transfer pricing, and there are no provisions for applying penalties for a lack of transfer pricing documentation by itself. However, the IRD is empowered to take punitive action under the IRA against any person who without a reasonable cause files an incorrect tax return, furnishes any incorrect information, fails to furnish a return in time, fails to inform chargeability of tax or makes an incorrect statement. Offenses can be subject to a fine, imprisonment or both.

### Penalty relief

Penalties may be avoided by establishing reasonable cause and good faith via preparation of documentation of the taxpayer's application of the arm's-length principle.

### Statute of limitations on transfer pricing assessments

The statute of limitations for assessment is 18 months if the return is duly filed within the deadline of 30 November. In case of fraud or willful evasion, the statute of limitations will not apply.

A bill presented to the Parliament on 22 September 2015 amending the IRA contains provisions to extend the time-bar period from the existing 18 months to five years in cases related to transfer pricing.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit depends on the facts and circumstances. In general, the likelihood of transfer pricing scrutiny during a tax audit is high.

The IRD has now initiated a number of transfer pricing audits as part of its first audit cycle. During these audits, a significant increase in the level of scrutiny of transactions with related parties has been observed.

### APA opportunity

The APA rules provide an opportunity for taxpayers to opt for a unilateral, bilateral or multilateral APA, available for a fixed period.

# Sweden

## Taxing authority and tax law

Taxing authority: Swedish Tax Agency

Tax law: Swedish Income Tax Act

## Relevant regulations and rulings

- ▶ Sections 14:19-20 of the Income Tax Act include arm's-length principle
- ▶ Sections 39:15-16 of the Tax Procedures Act (*Skatteförfarandelagen (2011:1244)*) include documentation requirements regarding transfer prices
- ▶ Advance Pricing Agreements Act (*Lag (2009:1289) om prissättningsbesked vid internationella transaktioner*)

The Swedish Tax Agency has issued regulations (SKVFS 2007:1) regarding the documentation of the pricing between associated enterprises. It also issues general taxation guidelines and opinions, including information about transfer pricing.

## OECD Guidelines treatment

The Swedish tax laws on transfer pricing refer to the OECD Guidelines, and the courts and tax authorities apply the OECD Guidelines.

Chapter IX of the OECD Guidelines (about business restructurings) significantly has increased the Swedish Tax Agency's focus on restructurings.

## Documentation requirements

Multinational enterprises are required to document transactions with related companies.

The documentation shall include:

- ▶ A description of the company, organization and business operations
- ▶ Information regarding the characteristics and scope of the transactions
- ▶ A functional analysis
- ▶ A description of the chosen pricing method
- ▶ A comparability analysis

In addition to identifying the functions performed, the functional analysis should reveal the risks assumed and assets used, as well as describe which functions, risks and assets contribute to the company's ability to generate profit. Moreover, the importance of the comparability factors described in the OECD Guidelines is highlighted.

Documentation prepared in accordance with the Code of Conduct regarding European Union Transfer Pricing Documentation (EU TPD) is deemed to comply with the Swedish documentation requirements. The documentation should be prepared in Swedish, Danish, Norwegian or English.

For transactions of limited value, simplified documentation can be prepared. Transactions of limited value for fiscal year 2015 include the sale or purchase of goods amounting to approximately SEK28 million or less per counterparty on a yearly basis, or other transactions amounting to approximately SEK5.5 million or less per counterparty on a yearly basis. Simplified documentation is not possible for transactions involving the sale of intangible assets.

The simplified documentation shall include:

- ▶ The group's legal and organizational structure and a description of the business operations
- ▶ The counterparty to the transaction and information about that entity's business operations

## Sweden (continued)

### Documentation requirements (continued)

- ▶ Information about the intercompany transactions, including the type of transaction, amounts and value
- ▶ The method applied to the transaction to comply with the arm's-length principle
- ▶ Information about comparable transactions, if utilized

### Priorities/pricing methods

One of the methods described in the OECD Guidelines should be applied. With all things being equal, transaction-based methods are preferred over profit-based methods.

### Return disclosures/related party disclosures

No specific disclosure requirements currently exist for filing the tax return. However, submitting the documentation when filing the tax return may eliminate the risk of penalties.

### Transfer pricing-specific returns

There are no specific returns that have to be filed for transfer pricing purposes.

### Documentation deadlines

The underlying analysis should, in principle, be prepared in connection with the transaction. The final documentation should be available upon request from the Swedish Tax Agency. Such a request is possible from the date the income tax return is filed.

### Transfer pricing penalties

Sweden has no specific transfer pricing penalties; however, general penalties apply, ranging from 10% to 40% of the additional tax imposed. In transfer pricing cases, penalties at a rate of 40% are generally imposed.

### Penalty relief

Penalties are imposed on taxpayers for supplying the Swedish Tax Agency with inaccurate or insufficient information. The risk of penalties may be eliminated if there is full disclosure of the transactions undertaken, the methods used and all other relevant information is provided. In the preparatory work for the law that introduced transfer pricing documentation requirements, it is stated that if an income adjustment is made because the taxpayer's prices are not deemed to be at arm's length, the penalties might be reduced or eliminated if the taxpayer has prepared proper transfer pricing documentation.

### Statute of limitations on transfer pricing assessments

A general statute of limitations applies, which is five years from the year of assessment.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit, in general, is medium to high. The likelihood depends on a number of factors, such as the industry in which the company operates, the occurrence of certain transactions, the outcome of previous tax audits and the changes in turnover or profit levels compared with prior years.

The likelihood that transfer pricing will be reviewed as part of that audit is high. The Swedish Tax Agency's focus on transfer pricing-related issues has increased significantly since formal documentation requirements were introduced in 2007. In some cases, tax audits focus only on transfer pricing.

## Sweden (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)**

The likelihood is low to high that the transfer pricing methodology will be challenged if transfer pricing is reviewed as part of the audit. The likelihood depends, for example, on the transactions involved, the transfer pricing methods applied, whether documentation and agreements have been prepared, and whether the documentation and agreements are adhered to in practice.

### **APA opportunity**

In Sweden, formal APA procedures have existed since 1 January 2010.

# Switzerland

## **Taxing authority and tax law**

Tax authority: Cantonal Tax Administrations (tax assessments) and Federal Tax Administration (SFTA, competent authority)

Tax law: Federal Direct Tax Act and Federal Law on the Harmonization of the Cantonal and Communal Taxes

## **Relevant regulations and rulings**

There are no specific references to transfer pricing in Swiss tax law. However, legal support for adjusting a taxpayer's taxable profits is derived from the arm's-length principle in Article 58 of the Federal Direct Tax Act on a federal level, as well as in Article 24 of the Federal Law on the Harmonization of the Cantonal and Communal Taxes on a cantonal level. These two articles reject a tax deduction for non-commercially-justifiable expenditures. This, in turn, provides the legal background for an adjustment to taxable profits in cases of deviations from the arm's-length principle.

In addition, for intercompany loans, there are administrative directives regarding "safe-harbor regulations," which allow for interest rates to be set without any specific documentation.

A number of administrative directives (including circulars and circular letters) implicitly or explicitly refer to the determination of transfer prices, including:

- ▶ Circular Letter No. 6 from 6 June 1997 regarding hidden equity
- ▶ Circular Letter No. 8 from 18 December 2001 regarding international profit allocation of principal companies
- ▶ Circular Letter No. 4 from 19 March 2004 referring to the taxation of service companies
- ▶ Circular from 12 February 2015 regarding interest payments between related group entities (updated yearly)

## **OECD Guidelines treatment**

The SFTA instructed the Cantonal Tax Administrations, in its Circular Letter of 4 March 1997, to unconditionally adhere to the OECD Guidelines for transfer pricing matters. There are no specific tax regulations for business restructurings in Switzerland (i.e., Switzerland follows the OECD view).

## **Documentation requirements**

Switzerland does not have specific documentation requirements, but if challenged by the SFTA, taxpayers must demonstrate that the transfer prices applied were based on sound economic and commercial reasoning on an arm's-length basis. Moreover, it can be concluded from the Federal Direct Tax Act that, in principle, upon request of the Swiss tax administration, a taxpayer should prepare transfer pricing documentation to support positions taken. With that said, there is little guidance on the structure of such documentation. However, based on the references to the OECD Guidelines in the 1997 Circular Letter, the SFTA accepts OECD-compliant documentation in one of the official languages of Switzerland.

Due to the lack of sufficient independent comparable companies in the Swiss market, pan-European comparables are generally accepted.

## **Priorities/pricing methods**

The SFTA adheres to the OECD Guidelines and the application of the respective methods therein.

According to Circular Letter No. 4 from 2004, the profit margin for service companies must be determined in accordance with the arm's-length principle (i.e., for each individual taxpayer on the basis of comparable uncontrolled transactions considering appropriate margin ranges). The circular letter also implicitly states that the cost-plus method is the most appropriate method for service companies to price their services, based on a functional and risk analysis. However, concerning the provision of financial and management services, the cost-plus method shall be accepted only in exceptional cases.

In principle, the SFTA uses a full-cost approach, including all direct and indirect costs. In exceptional cases, the SFTA can allow for a lower margin if the taxpayer can prove, based on appropriate documents and records, that the applied margin is too high.

## Switzerland (continued)

### **Return disclosures/related party disclosures**

There are no formal related party disclosure requirements. However, in the case of a tax audit or request from competent authorities, the taxpayer must provide the requested information, to a reasonable extent.

### **Transfer pricing-specific returns**

There are no specific returns that have to be filed for transfer pricing purposes.

### **Documentation deadlines**

There currently are no special provisions for documentation deadlines.

### **Transfer pricing penalties**

There are no specific transfer pricing penalties, but general penalty rules apply. However, (non-tax-deductible) penalties are imposed only in cases of fraud or negligence. Although no penalties apply in the event of adjustments, interest charges for late payments are due in such a case.

### **Penalty relief**

There are no special provisions for penalty reductions.

### **Statute of limitations on transfer pricing assessments**

The general rule provides for up to 10 years from the end of the tax year if the tax administration discovers new facts or circumstances.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The SFTA is more frequently performing tax audits and increasing its scrutiny of transfer pricing arrangements. In particular, the remuneration for transfers of intangibles, services, intercompany financing and business restructurings are being scrutinized more often. Indeed, transfer pricing is now often reviewed as part of an audit, and the likelihood of reassessment is increasing.

### **APA opportunity**

Despite the fact that there are no specific formal APA procedures, tax rulings are a common practice in Switzerland. Hence, unilateral APAs can be obtained in due time and with reasonable efforts. Regarding multilateral APAs, the SFTA has already participated in several cases. APA procedures are carried out in accordance with the applicable rules for MAPs. All Swiss-signed double tax treaties usually contain a provision for the MAP, under which the SFTA can launch an APA process.

# Taiwan

## Taxing authority and tax law

Taxing authority: National Tax Administration (NTA)

Tax laws: Income Tax Law (ITL)

## Relevant regulations and rulings

- ▶ Articles 43-1 of ITL
- ▶ Article 50 of the Financial Holding Company Law (FHCL)
- ▶ Article 42 of the Business Mergers and Acquisitions Law (BMAL)

The Regulations Governing Assessment of Profit-Seeking Enterprise Income Tax on Non-Arm's-Length Transfer Pricing (transfer pricing guidelines) became effective 30 December 2004.

## OECD Guidelines treatment

The tax authority recognizes the OECD Guidelines.

## Documentation requirements

Except for immaterial related party transactions, extensive contemporaneous documentation is required. According to the transfer pricing guidelines, the enterprise must have the transfer pricing report and relevant documentation prepared when the annual income tax return is filed.

If the enterprise meets the safe-harbor threshold and does not prepare a transfer pricing report, the tax authority may still request "other supporting documents" as evidence of the arm's-length nature of the intercompany transactions. One example of other supporting documents is the parent's or headquarters' transfer pricing report, as long as it does not significantly vary from the concepts presented in the transfer pricing guidelines.

The Ministry of Finance (MOF) released a letter ruling<sup>1</sup> to further relax the safe-harbor criteria. The rule applies for fiscal years ending December 2008 and afterward. The ruling states that the enterprise is not required to prepare a transfer pricing report if any of the following criteria are met:

- ▶ The total annual revenue (including operating and non-operating) of the enterprise does not exceed TWD300 million
- ▶ The total annual revenue (including operating and non-operating) of the enterprise exceeds TWD300 million but does not exceed TWD500 million, and additionally:
  - ▶ The enterprise does not utilize tax credits of more than TWD2 million in a particular year or a loss carryforward of more than TWD8 million for the preceding 10 tax years to reduce the income tax or undistributed earnings surplus tax
  - ▶ The enterprise, under the FHCL or BMAL, has no transactions with any overseas related parties (whether a company or an individual), or the enterprise has no transactions with overseas affiliated companies
  - ▶ The total annual controlled transactions amount is less than TWD200 million
- ▶ The total annual revenue (including operating and non-operating) of the enterprise exceeds TWD500 million, but the total annual controlled transactions amount is less than TWD200 million

<sup>1</sup> Tax Letter Ruling No. 09704555160, issued in November 2008.

## Taiwan (continued)

### Documentation requirements (continued)

If the taxpayer does not qualify for the safe harbor, its documentation file must contain:

- ▶ Business overview
- ▶ Organizational structure
- ▶ Description of controlled transactions
- ▶ Transfer pricing report, including:
  - ▶ Industry and economic analysis
  - ▶ Functions and risks analysis
  - ▶ Application of the arm's-length principle
  - ▶ Selection of comparables and related information
  - ▶ Comparability analysis
  - ▶ Transfer pricing methods selected by the enterprises
  - ▶ Transfer pricing methods selected by related parties under the same control
  - ▶ Result of comparables search under the best method of transfer pricing
- ▶ Report of affiliated enterprises under Article 369 of the Republic of China (ROC) Company Law
- ▶ Any other documents that have significant influence over pricing between the related parties

### Priorities/pricing methods

In accordance with the OECD Guidelines, the pricing methods are as follows: CUP, resale price, cost-plus, profit split, comparable profit and other methods prescribed by the MOF. However, the MOF does not follow the changes in the hierarchy of the methods in favor of the most-appropriate-method approach within the OECD Guidelines.

### Return disclosures/related party disclosures

Beginning in 2004, a taxpayer must disclose related party transactions and include the disclosure with the annual income tax return (pages 18–21), pursuant to the transfer pricing guidelines. The disclosure generally includes:

- ▶ The investing structure
- ▶ Identification of related parties
- ▶ The related party transaction amounts by type
- ▶ The related party transaction balances
- ▶ The related parties' financial information, including total revenues, gross margins, operating margins and net margins
- ▶ Whether the enterprise has prepared transfer pricing documentation for that fiscal year

The tax authority has issued safe-harbor rules for related party transaction disclosures in two rulings.<sup>2</sup> Both rulings provide that the enterprise must disclose related party transactions on its income tax return if the sum of its annual operating and nonoperating revenue (total annual revenue amount) exceeds TWD30 million and meets one of the following criteria:

- ▶ The enterprise has related parties outside the territory of the ROC (including the headquarters and branches)

<sup>2</sup> Tax Letter Ruling Nos. 09404587580 (for tax year 2005) and 09604503530 (for tax year 2006 and afterward).

## Taiwan (continued)

### Return disclosures/related party disclosures (continued)

- The enterprise utilizes tax credits of more than TWD500,000, or utilizes loss carryforwards of more than TWD2 million to reduce the income tax or undistributed earnings surplus tax
- The enterprise has total annual revenue exceeding TWD300 million

### Transfer pricing-specific returns

Other than the information specified in the "Return disclosures/related party disclosures" section above, the NTA does not currently require transfer pricing-specific returns.

### Documentation deadlines

According to the transfer pricing guidelines, the taxpayer must have the transfer pricing report and relevant documents prepared when the annual income tax return is filed. If the tax return meets the requirements for certification, the tax certified public accountant has to note on the return whether the enterprise has prepared a transfer pricing report in accordance with the transfer pricing guidelines. The report is not required to be attached to the return upon filing.

In accordance with the transfer pricing guidelines, upon audit, the enterprise has to provide the NTA with the report within one month. With the approval of the NTA, the submission deadline can be extended for one month under special circumstances.

### Transfer pricing penalties

Pursuant to the transfer pricing guidelines, up to 200% of the tax shortfall could be imposed if assessed by the tax authority, under certain circumstances.

### Penalty relief

Currently, there is no penalty relief regime in place.

### Statute of limitations on transfer pricing assessments

The statute of limitations is five years (commencing from the date following the expiration date of the period for payment of said tax) if the tax return was timely filed, and seven years if not.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The MOF has issued a ruling<sup>3</sup> that sets forth circumstances under which a transfer pricing audit will be triggered, as follows:

- The gross profit ratio, operating profit ratio and net-income-before-tax ratio are below the industry average
- The parent or headquarters reports profit on the global consolidated level, but the local affiliate reports loss or much less profit than the industry average
- The enterprise reports significant fluctuations in profit during the transaction year and in the two preceding years
- The enterprise fails to disclose related party transactions in accordance with the related party transactions disclosure requirements
- The enterprise fails to determine whether its related party transactions are within an arm's-length range and fails to prepare documents in accordance with the transfer pricing guidelines

<sup>3</sup> Tax Letter Ruling No. 09404540920, issued 2 August 2005.

## Taiwan (continued)

### Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

- ▶ The enterprise fails to charge related parties in accordance with the transfer pricing guidelines or charges an abnormal amount
- ▶ The enterprise fails to provide the transfer pricing report upon a tax audit
- ▶ The tax authority adjusted the transfer pricing of the enterprise, in which case the tax years preceding and subsequent to the year of a transfer pricing audit are likely to be selected for audit
- ▶ The enterprise has significant or frequent controlled transactions with related parties in tax havens or low-tax jurisdictions
- ▶ The enterprise has significant or frequent controlled transactions with related parties entitled to tax incentives
- ▶ Any other transaction fails to meet the arm's-length requirements in accordance with the transfer pricing guidelines

In general, the likelihood of an annual tax audit is characterized as high because the NTA is conducting corporate income tax audits with a high frequency.

The likelihood that transfer pricing will be reviewed as part of the annual corporate income tax audit is also characterized as high. All corporate income tax audits may include a request and review of the documentation, as well as related supporting materials. In the past year, there has been increased activity by the NTA, especially with respect to requests to see documentation reports. In particular, companies conducting business through tax havens have attracted more scrutiny, along with those making losses.

The likelihood that the transfer pricing methodology will be challenged during the audit is high if any of the factors or circumstances listed below are present:

- ▶ Whether the tested party is the least-complex entity in a transaction
- ▶ Why different transactions are tested on an aggregate basis
- ▶ Whether the denominator for calculating the profit-level indicator is one of the variables in the controlled transaction
- ▶ Whether the use of intangible assets by related parties is remunerated accordingly and fairly
- ▶ Whether services provided to related parties are remunerated accordingly and fairly
- ▶ When the payment terms for accounts receivable are significantly longer between related parties than third parties, or when overseas deferred expenses are significant or out of the ordinary; in each case, Taiwan's tax authority considers these transactions a type of loan and expects interest income to be paid to the lender
- ▶ Whether reasonable fee income is received for acting as the guarantor for a related party

### APA opportunity

APAs are available under Articles 23 through 32 of the transfer pricing guidelines.

If the transactions undertaken by a profit-seeking enterprise with related parties satisfy the following criteria, the enterprise may file an application for an APA with the tax collection authorities pursuant to the following provisions:

- ▶ The total amount of the transactions being applied for APAs shall be no less than TWD1 billion, or the annual amount of such transactions is no less than TWD500 million
- ▶ No significant tax evasion was committed in the past three years
- ▶ Documentation, as required under Subparagraphs 1 to 4 and Subparagraphs 6 to 10, Paragraph 1 of Article 24, has been well prepared
- ▶ A transfer pricing report, as prescribed under Subparagraph 5, Paragraph 1 of Article 24, has been prepared
- ▶ Other criteria approved by the MOF

## Taiwan (continued)

### APA opportunity (continued)

On 6 March 2015, the MOF amended the transfer pricing guidelines to reduce the threshold to promote the APA application as follows:

- The total amount of the transactions being applied for APAs shall be no less than TWD500 million, or the annual amount of such transactions is no less than TWD200 million

In addition, the taxpayer may file an application for a pre-meeting with the tax authority, per the amendment.

According to Tax Letter Ruling No. 9404540920, under an APA, a tax return is not subject to a transfer pricing audit except when:

- The enterprise fails to provide the tax authority with the annual report regarding the implementation of the APA
- The enterprise fails to keep the relevant documents in accordance with transfer pricing guidelines
- The enterprise fails to follow the provisions of the APA
- The enterprise conceals material facts, provides false information or conducts wrongful acts

# Tanzania

## **Taxing authority and tax law**

Taxing authority: Tanzania Revenue Authority (TRA)

Tax law: Income Tax Act, 2004 (ITA 2004); subsequently revised, with the latest edition being in 2008

## **Relevant regulations and rulings**

Section 33 of ITA 2004 emphasizes the arm's-length principle of transactions between associates. Transfer pricing regulations were issued on 7 February 2014, and transfer pricing guidelines were published in May 2014.

## **OECD Guidelines treatment**

Tax authorities and the Commissioner recognize the OECD Guidelines and the United Nations (UN) TP Manual.

Nevertheless, the ITA 2004 and the regulations prevail if there are any inconsistencies between them and the OECD and the UN's documents.

## **Documentation requirements**

The transfer pricing regulation stipulates that documentation should provide a description of the following:

- ▶ Organization structure, including an organization chart covering persons involved in a controlled transaction
- ▶ Nature of the business or industry and market conditions
- ▶ The controlled transactions
- ▶ Strategies and assumptions regarding factors that influenced the setting of any pricing policy
- ▶ Comparability, functional and risk analysis
- ▶ Selection of transfer pricing method
- ▶ Application of transfer pricing method
- ▶ Documents that provide the foundation for or otherwise support or were referred to in developing the transfer pricing analysis
- ▶ Index and any other information, data or document considered relevant by the Commissioner

## **Priorities/pricing methods**

Despite the fact that transfer pricing methods are based on the OECD Guidelines and the UN TP Manual, taxpayers must first apply traditional transactional methods. Transactional profit methods can be applied if traditional transactional methods cannot be reliably applied.

Notwithstanding the above, the transfer pricing regulations reiterate that the most appropriate method should be applied with regard to the nature and specific features of the transaction in question.

## **Return disclosures/related party disclosures**

The taxpayer is required to disclose the amount of sales, purchases and loans made or received from associates in and outside of Tanzania in its tax return.

## **Transfer pricing-specific returns**

Not applicable.

## Tanzania (continued)

### Documentation deadlines

The documentation should be in place prior to the due date for filing the income tax return for the year and must be, upon request, submitted to the tax authority within 30 days.

### Transfer pricing penalties

The general rules of penalties for noncompliance and interest for underpayment of tax under the ITA 2004 apply.

### Penalty relief

The Commissioner may grant relief for interest and penalties if he or she is satisfied that the noncompliance or underpayment of tax has reasonable cause.

### Statute of limitations on transfer pricing assessments

A general rule of three years from the date of filing the tax return applies.

The tax authorities can ignore the three-year limitation when they suspect fraud or intent to evade payment of tax.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

There are no special transfer pricing audits stated in the law. However, the tax authority stated that the intercompany transactions will be audited in the general tax audits, but a special transfer pricing team will be involved during the audit.

### APA opportunity

The transfer pricing regulations provide for an opportunity to enter into unilateral, bilateral or multilateral APAs. In a seminar for taxpayers on transfer pricing, the tax authorities have indicated that, until further notice, no APAs will be stipulated until local expertise has been built.

# Thailand

## **Taxing authority and tax law**

Taxing authority: Thai Revenue Department (TRD)

Tax law: Thai Tax Code (TTC)

## **Relevant regulations and rulings**

Tax law provisions, agreements and standards related to transfer pricing are:

- ▶ Provisions of the TTC dealing with exchanges at below-market prices:
  - ▶ Sections 65 bis (4) and (7)
  - ▶ Section 70 ter
  - ▶ Sections 65 ter (13), (14), (15) and (19)
  - ▶ Section 79/3
- ▶ Double tax agreements between Thailand and other countries
- ▶ Thai Accounting Standards No. 18 and No. 24
- ▶ Transfer pricing guidelines: Departmental Instruction No. Paw. 113/2545 (DI 113)

On 16 May 2002, the TRD issued its guidelines specifically addressing transfer pricing. DI 113 is written in the form of an internal departmental instruction, which provides guidance to tax officials for tax audit purposes.

On 23 April 2010, the TRD issued the bilateral Advanced Pricing Arrangement (bilateral APA) guidelines stipulating the rules governing the bilateral APA process, including procedures for applications, the level of information required, circumstances under which the TRD may discontinue a bilateral APA and taxpayer compliance after a bilateral APA is concluded.

On 7 May 2015, the cabinet approved in principle the draft Transfer Pricing Act to add relevant matters as additional sections to the TTC. The Transfer Pricing Act is expected to become effective after the draft Act is refined and approved again by the cabinet in late 2015 or early 2016.

## **OECD Guidelines treatment**

The Thai transfer pricing guidelines generally follow the OECD Guidelines, including allowing all of the methods acceptable under the OECD Guidelines. This includes supporting material beyond the scope of the OECD Guidelines. The OECD Guidelines are not binding on the TRD; however, they may be persuasive in areas not addressed by DI 113.

## **Documentation requirements**

The following elements of contemporaneous documentation are specified:

- ▶ The structure and relationships between business entities within the same group, including the structure and nature of business carried on by each entity
- ▶ Budgets, business plans and financial projections
- ▶ Taxpayers' business strategies and the reasons for adopting those strategies
- ▶ Sales and operating results and the nature of transactions between business entities within the same group
- ▶ Reasons for entering into international transactions with business entities in the same group
- ▶ Pricing policies, product profitability, relevant market information and profit sharing of each business entity
- ▶ Functions performed, assets utilized and risks assumed by the related business entities should all be considered
- ▶ Support for the particular method chosen

## Thailand (continued)

### Documentation requirements (continued)

- Where other methods have been considered, details of those methods and the reasons for their rejection (contemporaneously documented)
- Evidence supporting the negotiation positions taken by the taxpayer in relation to the transactions with business entities in the same group and the basis for those negotiating positions
- Other relevant documentation (if any) supporting the transfer prices

### Priorities/pricing methods

The TRD, by default, accepts TNMM, although it would also accept the CUP, resale price, cost-plus and other commercially used methods, such as the profit split method, as specified in the OECD Guidelines.

### Return disclosures/related party disclosures

Currently, there is neither disclosure of the existence nor nonexistence that transfer pricing documentation is required to be submitted with a tax return, nor does any documentation need to be filed with a tax return.

Under the Thai Federation of Accounting Professions and Securities and Exchange Commission (SEC) regulations, the related party transactions of companies listed by the SEC must be disclosed in the company's financial statements and annual report. Non-listed companies are not required to disclose related party transactions in their financial statements.

### Transfer pricing-specific returns

Not applicable.

### Documentation deadlines

The taxpayer is required to submit the transfer pricing documentation as and when requested by the TRD by the submission date stipulated in the request letter. However, the taxpayer may request an extension, if necessary. Such a request must be a formal letter submitted to the TRD. In general, the maximum extension is one month after the TRD has received the letter.

On 7 May 2015, the cabinet also approved in principle, as part of the draft Transfer Pricing Act, that taxpayers are required to prepare and file transfer pricing documentation within 150 days after the accounting year close. Filing incomplete documentation or false statements will be subject monetary penalties of not exceeding THB400,000.

### Transfer pricing penalties

There is no explicit penalty for transfer pricing assessments, nor is there an explicit penalty for not having transfer pricing documentation.

However, for tax shortfalls in general, if the TRD assesses a company, a penalty of 100% or 200% of the tax shortfall and a 1.5% per-month surcharge may be imposed. The 1.5% monthly surcharge is capped at 100% of the tax shortfall amount.

### Penalty relief

In the event of a transfer pricing adjustment, there is no formal penalty relief for having transfer pricing documentation in place.

Penalties may be reduced to half, or waived, if the taxpayer voluntarily files a return and accounts for the tax shortfall. Surcharges are a form of interest and cannot be reduced. Contemporaneous documents cannot be used to reduce the penalty for a transfer pricing shortfall. However, documentation is an important tool in the defense of transfer pricing, should a tax audit take place.

### Statute of limitations on transfer pricing assessments

Under Section 19 of the TTC, the statute of limitations is two years from the date of filing the tax return. This period may be extended to five years upon suspicion of tax evasion or fraud.

## Thailand (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

In general, the likelihood of an annual tax audit is characterized as medium. The likelihood of transfer pricing being reviewed as part of an audit is characterized as high, as is the likelihood of a challenge of the transfer pricing methodology.

Scrutiny of transfer pricing during a tax audit or inquiry in Thailand is common, and the likelihood of an audit of the average multinational company is moderate to slightly high. The TRD expects taxpayers to cooperate in providing relevant transfer pricing supporting documentation. Failure to do so will likely lead to a tax audit.

Since the corporate income tax was reduced from 23% to 20% in 2013, and the government has spent large amounts of money to improve Thailand's infrastructure, the level of tax enforcement has been increasing, especially in the area of transfer pricing.

The TRD does not focus on a specific country or industry, but rather it focuses on multinational corporations of various industries that incurred intercompany fees, cost allocations, consecutive losses and fluctuations of profitability.

Generally, the TRD makes transfer pricing adjustments to the deductibility of expense items during its annual routine visits to taxpayers to review their business operations. During such checks, if officials find any transactions warranting further scrutiny (including deductibility of expenses arising from intercompany transactions), a further investigation will be conducted.

In most cases, the taxpayer under investigation will be required to add the expenses (to the extent deemed excessive) back to its taxable income and pay the resulting additional tax. The final tax adjustments are then generally settled by way of negotiations.

### **APA opportunity**

Given that bilateral APA guidelines were issued in April 2010, the TRD encourages taxpayers to enter into an APA to obtain a greater degree of certainty and eliminate double taxation, as provided in double tax treaties between Thailand and other jurisdictions. Currently, the TRD is very active in negotiating APAs with Japan and is also working to negotiate APAs with other countries.

Since the Thai transfer pricing and bilateral APA guidelines were issued in 2002 and 2010, respectively, 17 bilateral APAs have been concluded between Thailand and Japan to date. Currently, 20 bilateral APAs are being reviewed and negotiated.

# Turkey

## Taxing authority and tax law

Taxing authority: Ministry of Finance

Tax law: Corporate Tax Code

## Relevant regulations and rulings

Transfer pricing is regulated by Article 13 of the Corporate Tax Code numbered 5520, published 21 June 2006. Article 13 of the Corporate Tax Code states:

"Income shall be considered to have been wholly or partially distributed in a disguised manner through transfer pricing, if the company engages in purchase of goods and services with related parties at prices or at amounts which they determine do not comply with the arm's-length principle."

Transfer pricing provisions have been effective since January 2007. There are two cabinet decrees, published in December 2007 and April 2008. Further, two communiqués have been issued by the Ministry of Finance titled, the General Communiqué on Disguised Profit Distribution by Means of Transfer Pricing Serial Nos. 1 and 2. Additionally, the Revenue Administration issued guidance in 2009 regarding mutual agreement procedures and in 2010 regarding disguised profit distribution through transfer pricing.

There are some rulings related to the indirect tax aspect of transfer pricing adjustments. Additionally, a court case highlights the tax court's position with respect to the use of databases for transfer pricing documentation purposes. The tax court rejected the use of the Amadeus database for benchmarking studies on the grounds that the database does not contain any Turkish comparable companies, but only provides information about companies located throughout Europe (or a Pan-European comparable set). The court decision is limited to the specific facts of the case; however, it has raised questions about whether it is appropriate to use the Amadeus database in transfer pricing documentation (Rep. of Turkey, Istanbul, 11th Tax Court Decision, E. 2009/3169, K. 2010/2091).

A large number of court cases exist on the subject of disguised profit distribution. They are mostly conflicting and fail to establish a body of case law binding for all the parties. Moreover, during transfer pricing inspections, tax auditors focus mostly on intercompany payments in the form of royalties, management fees and cost allocations. At the end of these inspections, tax auditors either reject the deductibility of these payments, claiming that they are, in fact, distributions of profit, or regroup these payments as royalties so that they may assess withholding taxes.

## OECD Guidelines treatment

The preamble to the law states that the provisions of international regulations, especially the OECD Guidelines, are taken as a reference. However, there is no particular reference to the OECD Guidelines in the actual content of the regulations, including Article 13 of the Corporate Tax Code, the related decrees and communiqués. In addition, the law diverges from the OECD approach on two major points: (1) the term "related party" is broadly defined (e.g., it includes all shareholders, regardless of their level of interest) and (2) it also applies to domestic related party transactions.

In local transfer pricing rules, business restructurings are not referenced. However, there are strict provisions in local tax codes regarding anti-abuse rules and the substance-over-form principle.

In general, transfer pricing rules place significant documentation and disclosure requirements on Turkish taxpayers, but during transfer pricing inspections, it seems that fulfilling these requirements does not provide any assurance to taxpayers. It would not be wrong to state that the tax auditors are still not fully aligned with the OECD Guidelines and that there is a very strong tendency toward using the CUP method despite the difficulties in comparability, as well as the fact that the regulations endorse all of the transfer pricing methods listed in the OECD Guidelines.

## Documentation requirements

Taxpayers are required to submit, as an attachment to the corporate income tax return, a transfer pricing form detailing related party transactions.

## Turkey (continued)

### Documentation requirements (continued)

In addition to the transfer pricing form, taxpayers are required to prepare (and submit upon request by the tax authority) an annual transfer pricing report, which requires:

- ▶ Corporate taxpayers that are registered with the Large Taxpayers Tax Office to prepare the report covering all domestic and foreign related party transactions
- ▶ Corporate taxpayers having activities in the Turkish Free Trade Zones to prepare the report covering domestic transactions conducted with related parties
- ▶ Other taxpayers to prepare the report for purposes of disclosing transactions conducted with foreign related parties

This documentation report should include a company analysis, an industry analysis, related parties, each transaction conducted with related parties and its value, a functional analysis and an economic analysis (selection of transfer pricing method, benchmarking studies and financial analysis).

### Priorities/pricing methods

Taxpayers can use the following methods to prove that the prices charged in their transactions with related parties are at arm's length: CUP, resale price and cost-plus.

There is no priority among the traditional methods. However, there is a priority among comparables, and if there are internal comparables, they should be analyzed first. Only if there is a lack of internal comparables (or if these internal comparables are not accurate or reliable enough) can external comparables then be used.

If it is not possible to reach the arm's-length price through one of these traditional methods, profit-based methods determined by the taxpayers can be used, such as profit split, TNMM and others.

Taxpayers should select the most appropriate method according to the nature of their business, comparability factors and the availability of relevant information.

### Return disclosures/related party disclosures

Taxpayers are required to disclose information about all related party transactions (domestic and cross-border), regardless of the magnitude, on their transfer pricing forms. In addition, taxpayers are required to prepare an annual transfer pricing report, which should include the following information in detail:

- ▶ Name or title of the local related party
- ▶ Taxpayer identification number
- ▶ Name of the foreign related party and the country in which it resides

Other required disclosures include the sale and purchase of commodities, both in the form of raw material and finished goods; the lease of any property; construction, research and development, and commission-based services; all related party financial transactions, including lending and borrowing funds, marketable securities, insurance and other transactions; and intragroup services. Taxpayers must also disclose the transfer pricing methods applied in the related party transactions.

### Transfer pricing-specific returns

Taxpayers are required to submit a transfer pricing form detailing related party transactions. This form should be submitted as an attachment to the corporate income tax return.

On the transfer pricing form, the taxpayer has to disclose information about its related parties (both domestic and international) that engage in intercompany transactions with the taxpayer, the nature (purchase of raw materials, licensing of intangible assets, etc.) and amounts of the transactions, and the total amount of intercompany transactions priced according to each transfer pricing method applied by the taxpayer.

### Documentation deadlines

Documentation must be complete by the date that the taxpayer files its corporate tax return. Upon request by the tax authority, the documentation has to be submitted within 15 days of the request.

## Turkey (continued)

### Transfer pricing penalties

There are no specific transfer pricing penalties, but a disguised income distribution is assumed to exist if the transfer prices applied in related party transactions do not meet the arm's-length standard. If such a disguised distribution is assessed during a tax audit:

- ▶ For corporate income tax purposes, 20% corporate income tax is recalculated as if the disguised distribution had not been made.
- ▶ Dividend withholding tax of 15% is calculated for the net amount of the disguised distribution.

Additionally, a late-payment interest penalty (1.4% monthly) and a tax loss penalty (which is the same as the tax loss amount) are charged to the taxpayer.

### Penalty relief

There are no special provisions for penalty relief. Having transfer pricing documentation does not provide taxpayers with penalty relief or protection. However, it is possible to come to a settlement regarding the tax loss amount and the tax penalty assessed. In settlement negotiations, taxpayers may assert a good-faith defense.

### Statute of limitations on transfer pricing assessments

There is no specific statute of limitations on transfer pricing assessments. Rather, the general rule for the statute of limitations is applicable, which is five years from the accrual of the tax payment.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

For medium- and large-sized multinational firms, the likelihood of an annual tax audit is high. Most large-sized multinationals are handled by a specific tax office (Large Taxpayers Tax Office), which requests information from these taxpayers throughout the year. Also, taxpayers in sectors including pharmaceuticals, telecommunications, banking and finance, and automotive are often continuously audited. Moreover, most of the tax revenue in Turkey is generated through indirect taxes; thus, companies subject to excise taxes are usually subject to closer examination.

The risk of transfer pricing scrutiny during a tax audit is high, as tax inspectors generally focus on related party transactions. The frequency of transfer pricing audits has increased, and these audits are mainly focused on intragroup charges, such as management fees and cost allocations. Tax inspectors often look to find out whether specific services or projects were provided to the recipient under management services (e.g., preparation of a procurement agreement, redesign of a compensation policy or legal advisory for a court case). If the service charges are not documented with specificity about the type of service being provided to the Turkish entity, then they are likely to be treated as royalties (and therefore subject to withholding tax), based on the claim that industrial or commercial experience is used.

The likelihood of a challenge to the transfer pricing methodology is similarly high. Among tax inspectors, there is a strong tendency for using the CUP method, regardless of the inherent difficulties based on comparability. It has also been common practice to use secret comparables, which the taxpayer can challenge if the case is taken to litigation.

### APA opportunity

APA applications are allowed only for cross-border intercompany transactions, and the Revenue Administration has concluded only five APAs as of October 2015.

A bilateral, unilateral or multilateral APA is possible upon the request of the taxpayer. In principle, the agreed-upon method is binding throughout the APA term, which is three years, with the possibility of a three-year extension.

# Uganda

## Taxing authority and tax law

Taxing authority: Uganda Revenue Authority (URA)

Tax law: Income Tax Regulations

## Relevant regulations and rulings

Uganda's transfer pricing legislation is contained in the Income Tax (transfer pricing) Regulations 2011, under Sections 90 and 164 of the Income Tax Act, Cap 340 and were effective 1 July 2011.

Uganda's transfer pricing regulations apply to a controlled transaction if one party is subject to tax in Uganda and the other party is either located in Uganda or outside of Uganda. A controlled transaction is defined as a transaction between associates. Further, the regulation makes reference to the definition of the term "associates" enshrined in the domestic Income Tax Act as follows:

*"Where any person, not being an employee, acts in accordance with the directions, requests, suggestions, or wishes of another person whether or not they are in a business relationship and whether those directions, requests, suggestions, or wishes are communicated to the first-mentioned person, both persons are treated as associates of each other."*

Regarding thin capitalization, when a nonfinancial services, offshore related party intends to fund its Ugandan operations with interest-bearing debt, the foreign debt-to-equity ratio cannot be in excess of 1:1 at any time during a year of income. A deduction is disallowed for the interest paid by the company during the year on that part of the debt that exceeds the 1:1 ratio. An interest deduction will be allowed on all interest generated from local financial assistance.

## OECD Guidelines treatment

Ugandan regulations adopt the arm's-length standard and recognize the OECD Guidelines. However, where the OECD Guidelines are in conflict with Domestic Taxing Acts, the provisions in the Domestic Taxing Acts take precedence.

## Documentation requirements

Taxpayers are required to maintain sufficient information and analysis to verify that the pricing, terms and conditions attached to the controlled transactions are consistent with the arm's-length standard. The URA came up with a practice note detailing the minimum information that should be included in transfer pricing documentation.

## Priorities/pricing methods

Uganda accepts the five methods specified in the OECD Guidelines. The most appropriate method is selected based on the circumstances and data available.

## Return disclosures/related party disclosures

The following transfer pricing information needs to be disclosed:

- ▶ The group organization structure of the entity
- ▶ The details of the transaction under consideration
- ▶ The transfer pricing method, including the reasons for its selection
- ▶ The assumptions, strategies and policies applied in selecting the method
- ▶ The application of the method, the calculations made and the price adjustment factors considered
- ▶ The transfer pricing policy agreement
- ▶ Such other background information as may be necessary

## Uganda (continued)

### Transfer pricing-specific returns

There are no specific transfer pricing returns required to be filed with the tax authority. However, most recently, the tax authorities have come up with a related party disclosure form that has been circulated to most multinational entities as part of the initial transfer pricing audit procedure.

### Documentation deadlines

Transfer pricing documentation must be in place at the time the income tax return is filed, with an effective date of 1 July 2011. Failure to adhere to this could result in imprisonment or commercial penalty or both, as highlighted above.

### Transfer pricing penalties

Specific transfer pricing penalties apply for failure to comply with transfer pricing documentation requirements. Where one fails to put in place transfer pricing documentation under the transfer pricing regulations, the person is liable, upon conviction, to imprisonment for a term not exceeding six months or a fine not exceeding 25 currency points (currently, UGX500,000) or both. In addition to the above, in the event the URA raises an upward transfer pricing adjustment, a 20% penalty on the shortfall will be imposed if the provisional tax paid is less than 90% of the actual tax liability. The penalty for late payment is 2% per month of the shortfall and 2% of the gross tax liability for the year for which the return is filed late. Other civil and criminal penalties may be applied in specific circumstances.

### Penalty relief

There is no specific penalty relief. However, there is room for objection and where such objection is ruled in favor of the taxpayer or on appeal to a tribunal or a court of law where such appeal is ruled in favor of the taxpayer.

### Statute of limitations on transfer pricing assessments

The Income Tax Act gives the URA the authority to make adjustments, but it does not indicate a time limit for such adjustments. Under the Income Tax Act, the URA can revisit assessments going back five years, but this period is unlimited in cases of fraud or any gross or willful neglect by or on behalf of the taxpayer or upon the discovery of new information.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The URA has stated that it considers transfer pricing to be a major area of tax leakage and, as such, is expected to focus its resources on monitoring cross-border transactions going forward. The URA has already instigated transfer pricing audits under its previous anti-avoidance rules.

### APA opportunity

Applications for unilateral and bilateral APAs are allowed.

# Ukraine

## Taxing authority and tax law

Taxing authority: State Fiscal Service of Ukraine

Tax law: Ukrainian Tax Code

## Relevant regulations and rulings

Article 39 of the Ukrainian Tax Code<sup>1</sup> does not specify a number of fundamental procedures and data sources related to transfer pricing, but these are determined in the subsequent laws and decrees (some of these are still being developed), as follows:

- ▶ Law of Ukraine No. 609 - VIII (July 2015) about amendments to the Ukrainian Tax Code regarding transfer pricing
- ▶ Law of Ukraine No. 1636-VII (12 August 2014) about creating a free economic zone of "Crimea" and about special conditions of economic activity on temporarily occupied territory of Ukraine (entities in Crimea zone are considered nonresidents for purposes of transfer pricing)
- ▶ Decree of the Cabinet of Ministers of Ukraine No. 381 (4 June 2015) defines the new algorithm for the interquartile range calculation
- ▶ Decree of the Cabinet of Ministers of Ukraine No. 764 (17 October 2013) defines procedures and requirements for APAs between the tax authorities and the taxpayer (bilateral and multilateral APAs are permissible); time frame for the review and signing of the APA and its duration not specified
- ▶ Order of the Cabinet of Ministers of Ukraine No. 977-p (16 September 2015) provides the list of countries (territories) that match the criteria specified by subparagraph 39.2.1.2 of Article 39 of the Tax Code of Ukraine

The tax authorities provide their administrative interpretation and guidance with respect to the law via the release of decrees, orders and pronouncements at public conferences and events.

## OECD Guidelines treatment

Ukrainian law incorporates the main standards of the OECD Guidelines. A taxpayer taking part in the controlled transaction shall determine the amount of their taxable income pursuant to the arm's-length principle. The array of methods and documentation requirements closely follows the OECD Guidelines.

However, Ukrainian tax authorities are not obliged to follow OECD Guidelines since Ukraine is not an OECD member country.

## Documentation requirements

### For reporting years starting from 1 January 2015:

Documentation is required for Ukrainian entities conducting controlled transactions with:

- ▶ Nonresident persons who are recognized as related parties. Transactions with an unrelated nonresident person also can be recognized as controlled if this unrelated person is acting as an intermediary in a transaction between related parties and does not perform any significant functions and does not use significant assets or take significant risks in this transaction.

Sales of goods transactions through nonresident commissionaire entity:

- ▶ Nonresident persons registered in states (territories) approved by the Order of the Cabinet of Ministers of Ukraine No. 977-p (16 September 2015)

<sup>1</sup> Further referred to as the Law or Article 39 and used interchangeably.

## Ukraine (continued)

### Documentation requirements (continued)

Transactions listed above are recognized as controlled if both of the following conditions hold simultaneously:

- ▶ Total income of the taxpayer derived from all types of activities, which are accounted for when determining the object of corporate tax, exceeds UAH50 million during the corresponding tax (reporting) calendar year
- ▶ Transactions with one counterparty exceeds UAH5 million

#### For reporting years 2013 and 2014:

Documentation is required for Ukrainian entities conducting controlled transactions with:

- ▶ Nonresident related parties
- ▶ Any residents of low-tax jurisdictions (with a corporate profit tax rate lower than that in Ukraine by 5 percentage points)
- ▶ Resident related parties if they are loss making, do not pay regular Corporate Profits Tax and VAT (or pay these taxes at a lower rate), or use single tax or agricultural tax regimes

Transactions listed above are subject to control if the annual amount of all transactions between two counterparties is at least UAH50 million.

The transfer pricing documentation is generally based in OECD principles and should contain the following information:

- ▶ Comprehensive information about related parties
- ▶ Information about the group (structure, description of activities, group transfer pricing policies)
- ▶ Description of the transaction (terms and conditions)
- ▶ Description of goods (work, services), including physical characteristics, quality and reputation in the market, country of origin and manufacturer, trademarks, etc.
- ▶ Terms and conditions of the payments
- ▶ Factors that impact the price
- ▶ Functional analysis and risk analysis
- ▶ Economic analysis (transfer pricing method applied, its substantiation, amount of income or expenses, profitability level, calculation of the arm's-length price and profitability range, approach to selection of comparables, sources of information)
- ▶ Comparability analysis of commercial and financial conditions of selected transactions
- ▶ Information about corresponding adjustments made by the taxpayer (if any)

Transfer pricing documentation must be submitted in Ukrainian. English and any other languages are not acceptable.

### Priorities/pricing methods

The transfer pricing law includes five methods similar to those specified by the OECD Guidelines.

The CUP method has the priority. In cases when the resale price method, cost-plus method, net margin or profit split methods may be applied by the taxpayer with the same reliability, the resale price or cost-plus method shall be used. Profit-based transfer pricing methods may be used without specific restrictions.

For controlled transactions with nonresidents registered in states (territories) approved by the Order of the Cabinet of Ministers of Ukraine No. 977-p (16 September 2015) involving export and import of goods quoted on a stock exchange, the CUP method shall apply. To apply another method, a taxpayer shall submit to the supervising body in which it is registered, written information in arbitrary form, which shall include data about all taxpayers' related parties that took part in the purchase and sale of the goods supply chain (up to the first unrelated counteragent) by 1 May of the year following the reporting period.

## Ukraine (continued)

### Return disclosures/related party disclosures

Taxpayers carrying out controlled transactions with the same counterparty in the amount exceeding UAH5 million (excluding VAT) shall submit the controlled transactions report by 1 May of the year following the reporting year.

### Transfer pricing-specific returns

Ukrainian transfer pricing rules require the submission of a transfer pricing report disclosing all controlled transactions of a taxpayer for the reporting period, provided that controlled transactions with the same counterparty exceed UAH5 million. Refer to the section above for more details.

### Documentation deadlines

Taxpayers are obligated to submit transfer pricing documentation within one month from the day following the date of receipt of a request from the tax authorities. The tax authorities may request the documentation no earlier than 1 May of the year following the reporting period.

### Transfer pricing penalties

The Controlled Transactions Report is due 1 May every year following 2013 and is mandatory. Starting from 1 January 2015, the Controlled Transactions Report should be submitted if the amount of controlled transactions with one counterparty exceeds UAH5 million.

The penalty for not filing the Controlled Transactions Report is 300 minimum wages (approximately UAH365,400).

The penalty for not including all of the controlled transactions in the Controlled Transactions Report is 1% of the total amount of transactions not included, but not more than 300 minimum wages (approximately UAH365,400).

Tax authorities may request transfer pricing documentation for the previous fiscal year starting 1 May of the next year, and the taxpayer has one calendar month to comply. The penalty for not submitting the transfer pricing documentation is 3% of the sum of the controlled transactions for which transfer pricing documentation was not submitted, but not exceeding 200 minimum wages (approximately UAH243,600).

The penalty for understatement of tax liabilities as a result of noncompliance with transfer pricing rules is up to 50% of the understated tax (not applicable for 2013, 2014 and 2015 reporting years).

### Penalty relief

Penalty relief is provided for the transition period starting 1 September 2013 until the end of 2014, during which the penalty for the understatement of tax liabilities will be UAH1. Additionally, there is penalty relief for all understatements of corporate tax liabilities in 2015.

No special penalty relief is provided for submitting transfer pricing documentation and a Controlled Transactions Report.

### Statute of limitations on transfer pricing assessments

The statute of limitations for transfer pricing assessments is seven years (2,555 days, as specified by the Tax Code) from the last date of filing the Controlled Transactions Report, or from the actual day of filing the Controlled Transactions Report if it later.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

According to the law, transfer pricing audits should be performed independently from other tax audits. The supervisory body shall not have the right to conduct more than one audit of a controlled transaction of the taxpayer during a calendar year. In general, the likelihood of an annual tax audit may be assessed as high, and so is the likelihood of a transfer pricing review. The likelihood that the transfer pricing methodology will be challenged during the course of an audit is currently unknown due to the novelty of the legislation and absence of practical experience in Ukraine.

## Ukraine (continued)

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)**

Self and corresponding adjustments are possible. Self-adjustments are the upward adjustments of tax liabilities performed by taxpayers resulting from applying the transfer pricing rules and have to be recorded in the Corporate Profit Tax (CPT) return. Deadlines for filing the transfer pricing report are not aligned with the deadlines for filing the CPT return.

### **APA opportunity**

An APA may be concluded between large taxpayers and the State Fiscal Service. Currently, there is no established program for APAs in Ukraine.

# United Arab Emirates (UAE)

## **Taxing authority and tax law**

Taxing authority: Ministry of Finance

## **Relevant regulations and rulings**

Currently, there are no local transfer pricing regulations, but the UAE concluded around 60 income tax treaties, which contain an article resembling Article 9 of the OECD Model Treaty on "Associated Enterprises."

## **OECD Guidelines treatment**

Not applicable.

## **Documentation requirements**

Not applicable.

## **Priorities/pricing methods**

Not applicable.

## **Return disclosures/related party disclosures**

Not applicable.

## **Transfer pricing-specific returns**

Not applicable.

## **Documentation deadlines**

Not applicable.

## **Transfer pricing penalties**

Not applicable.

## **Penalty relief**

Not applicable.

## **Statute of limitations on transfer pricing assessments**

Not applicable.

## **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

Not applicable.

## **APA opportunity**

Not applicable.

# United Kingdom

## Taxing authority and tax law

Taxing authority: Her Majesty's Revenue and Customs (HMRC)

Tax law: Taxation (International and Other Provisions) Act 2010 (TIOPA 2010)

## Relevant regulations and rulings

HMRC publishes its internal guidance manuals on its website, and this provides taxpayers and their advisors with insight into how HMRC applies the legislation. HMRC also publishes technical notes and statements of practice concerning a number of transfer pricing topics.

The UK's domestic transfer pricing legislation is now consolidated and set out in Part 4 of the TIOPA 2010. This covers cross-border and UK-to-UK transactions.

The UK's basic transfer pricing rule requires that "provisions" made or imposed between parties by means of a "transaction or series of transactions" are consistent with the arm's-length principle so as to not create a UK tax advantage.

The term "provision" covers all of the terms and conditions attached to a transaction or series of transactions, including arrangements, understandings and mutual practices. The term series of transactions is defined to make it difficult to structure business arrangements in a way that will prevent there being transactions for transfer pricing purposes, even when a third party is included in the chain.

**Small and medium-sized enterprises (SME) exemption:** For the calculation of profits arising on or after 1 April 2004, the legislation provides an exemption from transfer pricing rules for the vast majority of transactions carried out by a business that is a small or medium-sized enterprise. The exemption applies only to transactions with territories for which there is a full nondiscrimination article in the relevant treaty. What constitutes a small and medium-sized enterprise for this purpose is a modification of the European recommendation (2003/361/EC). An entity qualifies as either small or medium if it meets the staff headcount ceiling for that class (i.e., 50 or 250, for small and medium, respectively) and one (or both) of either the annual turnover limit or the balance sheet total limit. The annual turnover limit for small enterprises is GBP10 million and for medium entities it is GBP50 million. The balance sheet limit is GBP10 million and GBP43million for small and medium enterprises, respectively. Reference to the characteristics of whole group of associated enterprises, and not the UK entity alone, determines whether the SME exemption applies.

**Change to compensating adjustment rules:** HMRC has published draft legislation to restrict the use of the compensating adjustment mechanism in the transfer pricing legislation. The draft legislation prevents a claim for a compensating adjustment being made by a person (other than a company) within a charge for income tax, where the counterparty to the transaction is a company.

The UK does not have a rulings process for transfer pricing outside of an APA, although some comfort may be gained through discussions with HMRC under its Real-Time Working initiative. In this case, teams may, with input from HMRC's Transfer Pricing Specialists, provide some comfort of the methodology as part of an overall risk assessment.

However, as noted above, HMRC's practice in a number of areas is set out in manuals that it publishes on its website.

## OECD Guidelines treatment

The OECD Guidelines are effectively imported into the UK transfer pricing rules because the Guidelines are required to be used in interpreting the rules. Finance Act 2011 included provisions confirming that for accounting periods ending on or after 1 April 2011, the 2010 version of the OECD Guidelines is to be used in reinterpreting the UK Transfer Pricing Statutory Code. In this regard, Section 164 of the TIOPA 2010 confirms that the UK's transfer pricing provisions are to be construed in alignment with Article 9 of the OECD Model Tax Convention and its associated transfer pricing guidelines. For these purposes, "transfer pricing guidelines" means all of the documents published by the OECD at any time before 1 May 1998 "as part of their Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations" and any other documents designated as such by Treasury order. Currently, as noted above, the 2010 version is to be used for accounting periods ending on or after 1 April 2011, while the 1998 version applies to earlier periods.

## United Kingdom (continued)

### OECD Guidelines treatment (continued)

In addition, HMRC actively participates in OECD committees and generally tries to apply the most recent OECD guidance and pronouncements to the interpretation of double taxation agreements that are based on the OECD Model Convention.

### Documentation requirements

The legal requirement is to have documentation to confirm compliance with the statutory provisions regarding the arm's-length principle.

Small and medium-sized enterprises (as defined above) to the extent exempt in relation to transactions with companies in territories having a tax treaty including a full nondiscrimination article do not need to document compliance with the arm's-length principle for those transactions.

HMRC has published guidance in this regard that sets out the types of documents that it might expect to be kept. This guidance is stated as building upon that published by the OECD, but, as of yet, no mention is made of the BEPS-published revisions to Chapter V. The UK guidance divides documentation into primary accounting records, tax adjustment records and, most importantly, evidence. Documentation relating to evidence of compliance with the arm's-length principle is to follow the OECD Guidelines, and HMRC has set out some suggestions of what this should or may include, such as:

- ▶ An identification of the associated enterprises with whom the transaction is made
- ▶ A description of the nature of the business
- ▶ The contractual or other understandings between the parties
- ▶ A description of the method used to establish or test the arm's-length result, with an explanation of why the method is chosen
- ▶ An explanation of commercial and management strategies, forecasts for the business or technological environment, competitive conditions and regulatory framework

HMRC applies a risk-based approach under which it would expect the level and depth of analysis to be dictated by the perceived risk of tax loss through incorrect and non-arm's-length pricing. This typically allows a light-touch approach to most UK-to-UK transactions.

### Priorities/pricing methods

The OECD Guidelines are followed with regard to pricing methods. All of HMRC's guidance is based around adherence to the OECD Guidelines.

Following a tax case in 2010, HMRC now more routinely challenges the robustness of external CUP data (particularly in relation to IP licenses), unless there has been an analysis around the relevant parties' bargaining positions in agreeing to the third-party license arrangements.

HMRC has also expressed concern over the use and reliance on the historic CUP analysis in relation to procurement. HMRC's view is that there is little support for the high level of commissions and fees often seen paid in outbound transactions. HMRC has commissioned a third-party consultancy to analyze procurement contracts, which will be used as a risk assessment tool, and returns outside of the expected range will require persuasive analysis not reliant on historic CUP data.

In addition, HMRC often challenges the use of the cost-plus method for high-value-added services, where it looks to substitute some form of value-based fee using the profit split or a similar method.

### Return disclosures/related party disclosures

There are no return disclosure requirements, except those required in statutory accounts and in annual reports filed in compliance with any current APAs. The absence of specific requirements typically will leave prior years open to discovery assessments as there will not be sufficient disclosure for HMRC to form a view about the compliance with the arm's-length principle.

### Transfer pricing-specific returns

Not applicable.

## United Kingdom (continued)

### Documentation deadlines

Under the current guidance, evidence of arm's-length pricing should exist when the relevant tax return is submitted.

### Transfer pricing penalties

For accounting periods ending on or after 1 April 2008, the provisions for neglect penalties are set out in Schedule 24 of Finance Act 2007. These provisions are couched in terms of careless or deliberate inaccuracies, rather than neglect. They are tax-gearred at up to 100% of the potential lost revenue figure. However, this is now calculated without adjustment for the availability of loss relief and, where the adjustment affects losses only, the lost revenue figure to which the penalty percentage is applied is calculated at 10% of the loss adjustment.

HMRC has recently published revised guidance setting out examples of negligence and carelessness, which carry lower tax-gearred penalties (up to 30%), and deliberate inaccuracies, where the penalties will be higher (up to 70%).

**Examples of negligence and carelessness include:**

- ▶ No attempt to price the transaction
- ▶ Shared service center overseas, cost based, allocation key applied, turnover, modest markup, but no consideration of benefits test for UK entity
- ▶ Policy, otherwise arm's length, not properly applied in practice

**Examples of deliberate inaccuracies include:**

- ▶ A clear internal CUP has been omitted with no reasonable technical analysis to support why it has been disregarded
- ▶ A cost-plus return to a company that has in reality controlled the development of valuable intangibles (not demonstrable as a subcontractor to group members)
- ▶ Material factual inaccuracies in the functional analysis upon which the pricing analysis has been based

### Penalty relief

The best protection against neglect penalties is to demonstrate sufficient due diligence with regard to compliance. This is best shown through transfer pricing documentation that fully evidences that the application of the arm's-length principle was considered properly in preparing the relevant tax return.

### Statute of limitations on transfer pricing assessments

Effective 1 April 2010, assessments may be made four years following the end of the relevant accounting period for instances of carelessness, and this is extended to 20 years if there have been deliberate understatements. This is on the basis that the error was not fully disclosed in the body of the tax return or other documents submitted.

The legislation applicable before 1999 operated in a different manner, and, as a result, an investigation started now would not lead to transfer pricing adjustments for periods before 1999.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

In general, the likelihood of an annual tax audit is characterized as low. There is no system for annual tax audits, as HMRC operates a risk assessment approach to audits and inquiries. The likelihood that transfer pricing will be reviewed as part of an audit is characterized as medium. Most multinational companies will have transfer pricing considered as part of their overall risk assessment, but only those seen as high risk in this area will then be subject to an audit. However, the likelihood of a challenge to the transfer pricing methodology is characterized as high. Most risk assessments have, at their core, a challenge regarding the methods and the appropriateness of their application.

HMRC has developed a "stage gate" process for transfer pricing inquiries, which is set out in the internal guidance published on its website. This process requires a transfer pricing specialist in HMRC to be assigned, where a case team identifies a transfer pricing issue that may necessitate an inquiry. The specialist helps the case team prepare a risk assessment and a business case for submission to one of two panels before an inquiry is commenced. The responsible panel is then required to

## United Kingdom (continued)

### Frequency of tax audit and transfer pricing scrutiny by the tax authority (continued)

sanction, or not, the opening of an inquiry as the initial stage gate. The panels also then regularly review progress during the inquiry and sign off on all settlement proposals.

HMRC considers that this process leads to more targeted and focused inquiries in areas warranting specialist transfer pricing resources. The risk of a transfer pricing audit is therefore high where there are red flags present in the accounts or tax return, such as:

- ▶ UK company's profits or losses appear inconsistent with its business activities or worldwide group results over a cycle
- ▶ UK company provides intangibles but does not generate an entrepreneurial reward for its research and development (through royalties or otherwise)
- ▶ Borrowing appears disproportionately high in relation to shareholders' funds, or interest appears high in relation to the business's ability to service the debt (acquisition of a UK group by a private equity firm, which may rely on heavy debt funding, may be a red flag)
- ▶ Transactions do not appear to have a commercial purpose
- ▶ Transaction with related parties in low-tax territories
- ▶ Notes in UK accounts, or other forms of information such as press or internet articles, that mention restructuring, acquisition or merger activity; transfer of UK activities to related parties; or changes to the way in which the company is rewarded
- ▶ Significant decline in stock on the balance sheet

In context, a number of these factors taken together may provide a compelling risk assessment and, where the sums warrant, a business case for opening an inquiry.

Under the general risk-based approach to compliance, most multinational companies will have had their transfer pricing considered as part of HMRC's general risk assessment process, which will cover all aspects of tax compliance. These risk assessments are undertaken in real time and before the relevant return is filed. The use of panels and stage gates in transfer pricing inquiries will, however, mean that only those multinational companies rated high risk for cross-border matters (thus warranting a transfer pricing inquiry beyond a risk assessment) will be subject to a full inquiry when the relevant return is submitted. As such, the number of actual inquiries has fallen over recent years, but high-risk cases are subject to a detailed and extensive inquiry.

### APA opportunity

APA opportunities are available, and admissions to the program are expected to increase. The legislation governing the APA process is set out in Part 5 of the TIOPA 2010. A statement of practice governing the application of the statutory provisions for APAs was first published in 1999, and a revised statement was published at the end of 2010 (in SP2 2010). For APAs to be admitted to the program there needs to be sufficient complexity in approaching compliance with the arm's-length standard. Limited resources have historically kept the UK to around 20 new admissions to the program each year, although additional resources in 2011 confirm a stated intention to increase this number substantially, and a total of 35 were agreed to in that year, although this has fallen slightly in 2012 and 2013, when 32 and 27, respectively, were agreed to.

The UK also operates a thin capitalization agreement system, which uses the APA legislation. These are known as advance thin capitalization agreements (ATCAs). Agreements in this regard are typically couched around covenants similar to that of third-party lenders.

The UK operates a risk-based approach to inquiries and in relation to compliance obligations. Most multinational companies will have had a risk assessment in the UK and may approach HMRC for a real-time working initiative discussion around the risks associated with their transfer pricing on a prospective basis. Historically, agreements reached following such discussions were couched solely in terms of risk (i.e., transfer pricing was seen as low risk). More recently, following changes to their procedures at the end of 2011, risk assessment agreements may now also confirm the method used in determining or testing pricing as compliant with the arm's-length principle. Although still short of an APA and its contractual terms, such agreements nevertheless provide up-front comfort as to meeting compliance obligations and the robustness of intragroup pricing. Such discussions are encouraged by HMRC.

## United Kingdom (continued)

### **APA opportunity (continued)**

HMRC recently made amendments to its Statement of Practice on APAs. Most significantly, HMRC has included a clause to enable an APA to be revisited if there are changes to the transfer pricing legislation or practices that have a direct impact on the APA.

# United States

## **Taxing authority and tax law**

Taxing authority: Internal Revenue Service (IRS)

Tax law: Internal Revenue Code (IRC)

## **Relevant regulations and rulings**

- ▶ Treasury Regulations (Treas. Regs.) include Sections 1.482, 1.6662, 1.6038A and 1.6038C
- ▶ Revenue Procedures (Rev. Procs.) include Rev. Proc. 99-32, Rev. Proc. 2006-9, Rev. Proc. 2006-54 and Rev. Proc. 2007-13
- ▶ On 22 November 2013, the IRS issued Notice 2013-78, which contains a proposed revenue procedure that would update and supersede Rev. Procs. 2006-54 and 2006-2C.B 1035, providing guidance for requesting assistance from the US competent authority acting through the Advance Pricing and Mutual Agreement (APMA) Program. The intent of the proposed revenue procedure is to improve substantially the clarity, readability and organization of Rev. Proc. 2006-54. The IRS sought taxpayer comments in March 2014 and a final revenue procedure is pending.
- ▶ On 22 November 2013, the IRS issued Notice 2013-79, which contains a proposed revenue procedure that would update and supersede Rev. Procs. 2006-9 and 2008-31. The goal of the revenue procedure is to provide guidance and instruction on APAs, as well as provide guidance and instruction on the IRS' administration of APAs. The IRS sought taxpayer comments in March 2014 and a final revenue procedure is pending.
- ▶ In April 2007, the IRS designated cost-sharing arrangement (CSA) buy-ins as a "Tier I" issue and, thus, they are susceptible to intensified audit scrutiny. While the IRS' tiering process was officially eliminated in August 2012, it was replaced by knowledge networks known as Issue Practice Groups (IPGs) for domestic issues and International Practice Networks (IPNs) for international issues. CSA buy-ins are expected to continue to be an issue upon which the IPNs will focus.
- ▶ A Coordinated Issue Paper (CIP) was released on 27 September 2007, providing internal IRS guidance for examiners in developing CSA exam positions. However, the CIP was withdrawn on 26 June 2012.

The CSA regulations were issued in final form on 16 December 2011. Additional temporary and proposed regulations were published on 19 December 2011. The final CSA regulations closely follow the temporary CSA regulations that were issued in January 2009, and the additional temporary and proposed regulations make only minor changes to the final regulations. The final regulations provide the IRS with the discretion to make periodic adjustments and formalize other proposed requirements for compliance.

Finalized services regulations were issued on 31 July 2009. These regulations provided for only minor modification of the temporary regulations that had been in effect as of 1 January 2007. The new services regulations explicitly require stock-based compensation to be considered as part of the total costs. Guidance regarding the list of "specified covered services," as defined in Treas. Reg. 1.482-9(b)(3)(i), can be found in Rev. Proc. 2007-13.

## **OECD Guidelines treatment**

The IRS considers its transfer pricing laws and regulations to be wholly consistent with the OECD Guidelines. For domestic purposes, the OECD Guidelines do not provide support and would not be directly relevant to the application of any pricing methods. However, if taxpayers pursue competent authority relief from double taxation or a bilateral APA, the OECD Guidelines are relevant and may be used to demonstrate compliance with international principles.

## **Documentation requirements**

Transfer pricing documentation is not required by law. However, in practice, it is recommended that taxpayers maintain contemporaneous documentation to avoid the penalties described above. The existence of documentation need not be either disclosed on, or provided with, the return.

## United States (continued)

### Documentation requirements (continued)

For penalty avoidance purposes, a taxpayer is considered to have satisfied the documentation requirement if it maintained certain documentation (further described below) that substantiates the taxpayer's assertion that it reasonably concluded that, given the available data and the applicable pricing methods, the method (and its application) provided the most reliable measure of an arm's-length result under the principles of the best-method rule.

The principal documents required by the regulations are:

- ▶ An overview of the taxpayer's business and an analysis of the legal and economic factors affecting pricing
- ▶ A description of the organizational structure
- ▶ Any documents explicitly required by regulations (e.g., CSA documents)
- ▶ A description of the pricing method and reasons why the method was selected (a best-method analysis)
- ▶ A description of alternative methods and why they were not selected
- ▶ A description of controlled transactions and any internal data used to analyze them
- ▶ A description of comparables used, how comparability was evaluated and any adjustments that were made
- ▶ An explanation of any economic analysis and any projections used to develop the pricing method
- ▶ Any material data discovered after the close of the tax year but before filing the tax return
- ▶ A general index of the principal and background documents and a description of the record-keeping system

### Priorities/pricing methods

For tangible goods, the IRS accepts the CUP, resale price, cost-plus, CPM, profit split and unspecified methods. For intangible goods, the IRS accepts the CUT, CPM, profit split and unspecified methods.

For services, the IRS accepts the services cost, comparable uncontrolled services price, gross services margin, cost of services plus, CPM, profit split and unspecified methods. For CSA buy-ins, the IRS accepts the CUT, income, acquisition price, market capitalization, residual profit split and unspecified methods.

The regulations provide a best-method rule for determining the appropriate method to be applied by the taxpayer for each intercompany transaction.

### Return disclosures/related party disclosures

Under new regulations issued in 2010, certain taxpayers must also disclose their uncertain tax positions (UTPs) on Schedule UTP and provide information such as the ranking of the positions by the size of their reserves and concise descriptions of the tax positions. There is a phase-in period so that as of 2014, the UTP disclosures are required by corporations with assets of US\$10 million or more.

### Transfer pricing-specific returns

Taxpayers are required to file Forms 5471, 5472 and 8865 regarding transactions with related parties.

### Documentation deadlines

If documentation is prepared to help protect against penalties, then it must be in place by the filing date of a timely filed US tax return. Taxpayers must provide documentation to the IRS within 30 days of an examiner's request.

### Transfer pricing penalties

Pursuant to IRC Section 6662, taxpayers may be liable for either a 20% or 40% penalty for an underpayment of tax attributable to a substantial or gross valuation misstatement, respectively. The penalties are calculated as a percentage of the underpayment, or the penalty may apply to a valuation misstatement. There is no penalty for failure to have documentation; however, documentation may help avoid a penalty.

## United States (continued)

### **Penalty relief**

Penalties may be avoided by establishing reasonable cause and good faith via the preparation of documentation of the taxpayer's application of IRC Section 482, as described below.

### **Statute of limitations on transfer pricing assessments**

A general statute of limitations applies in the US, which is three years from the later of either the tax return due date or the date the return was actually filed. The statute is extended to six years for substantial understatements of income. There is no statute of limitations for fraud-related adjustments.

Most treaties with trading partners provide the IRS access to closed years in order to provide relief from double taxation pursuant to a MAP.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The likelihood of an annual tax audit depends on the facts and circumstances. The introduction of what the OECD refers to in its Action Plan on BEPS as high-risk transactions increases the likelihood of a tax audit.

In general, the likelihood of transfer pricing scrutiny during a tax audit is high. Transfer pricing is extensively regulated in the US, and the IRS has recently taken a number of administrative steps to increase its ability to focus on international transactions, with a particular emphasis on transfer pricing. New positions have been created within the IRS' Large Business and International Division for a deputy commissioner (international) and a director of transfer pricing operations, and a significant number of transfer pricing professionals have been hired. As a result of this emphasis, documentation frequently is requested at the outset of any examination of taxpayers transacting with foreign related parties.

The overall likelihood that the transfer pricing methodology will be challenged during the initial stages of any audit, where there are international transactions, is high. However, experience has shown that well-reasoned documentation reduces the likelihood of further scrutiny.

### **APA opportunity**

Taxpayers may request unilateral, bilateral or multilateral APAs. The APA process is administered by the IRS' APMA Program. Guidance regarding APAs can be found in Rev. Proc. 2006-9. The revenue procedure has strict case management procedures, disclosure requirements and detailed guidance regarding the submission and processing of APA requests. Additional competent authority guidance is provided in Rev. Proc. 2006-54. Updates to both revenue procedures are pending.

# Uruguay

## Taxing authority and tax law

Taxing authority: General Tax Direction (*Dirección Nacional Impositiva*, or DGI)

Tax law: Income Tax Law and Regulations ("IRAE" is the name of the Income Tax in Uruguay)

## Relevant regulations and rulings

Transfer pricing documentation requirements have been in effect in Uruguay since 1 July 2007 (following Law No. 18.803), but they were not regulated until 26 January 2009, with the publication of Decree No. 56/009. No. 392/009 made additional modifications.

The DGI issued Resolution No. 2.084/009 on 1 December 2009 (with the modifications introduced by Resolutions No. 819/010 and No. 2.098/009), which defined concepts and established requirements for the transfer pricing report.

## OECD Guidelines treatment

Uruguay is not an OECD member, and the OECD Guidelines are not mentioned in Uruguay's Income Tax Law and Regulations. As transfer pricing practice is relatively new in Uruguay, there is no background in that regard, if any, given to the OECD Guidelines.

## Documentation requirements

Point 10 of Resolution No. 2,084/009<sup>1</sup>, as amended by Resolution No. 745/011, states that taxpayers falling under Section 1 of Presidential Decree No. 56/009 shall be required to submit information on a yearly basis when meeting any of the following circumstances:

- ▶ When they engage in transactions included under the transfer pricing rules for an amount exceeding 50 million indexed units in the related tax period; exempted from this section are transactions carried out by users of free trade zones, according to Law No. 15,921 of 17 December 1987, provided that they are not taxed by Income Tax of Economic Activities (*Impuesto a las Rentas de las Actividades Económicas*, or IRAE)
- ▶ When they would have been notified by the DGI

The above-mentioned information should contain:

- ▶ An informative, sworn statement, including the breakdown and quantification of the transactions for the period included in the transfer pricing system
- ▶ A copy of the financial statements for the related fiscal year, when not required to submit them under other provisions
- ▶ The transfer pricing report

The term within which to submit this documentation shall expire on the ninth month from the end of the fiscal year in question, according to the expiry schedules provided for each group of taxpayers.

Point 11 of the resolution states that the transfer pricing report should contain at least the following:

- ▶ A breakdown of activities and duties performed
- ▶ The risks undertaken and assets used to perform those activities and duties
- ▶ The breakdown of the elements, documentation, circumstances and events valued for the above-mentioned report
- ▶ Breakdown and quantification of the transactions included in the transfer pricing system
- ▶ Identification of the entities with which transactions were performed, included in the transfer pricing system
- ▶ The method used to determine the transaction prices, indicating the reasons and grounds justifying it as the most appropriate price, as well as the reasons for ruling out prices that were not used

<sup>1</sup> References to Resolution No. 2.084/009 are made to the text after the amendments provided by Resolution No. 745/011.

## Uruguay (continued)

### Documentation requirements (continued)

- ▶ The identification of each one of the selected comparables to support the transfer prices used
- ▶ Identification of the information sources from which the comparables have been obtained
- ▶ Details of the comparables selected and subsequently rejected, specifying the rejection bases
- ▶ Detail, quantification and methodology used to make the necessary adjustments to the comparables selected
- ▶ Determination of the median and the interquartile range
- ▶ A description of the business activity, business characteristics and other relevant elements of comparable entities
- ▶ Study conclusions

### Priorities/pricing methods

The law establishes that one of these methods should be applied to determine the market value: CUP, resale price, cost-plus, profit split or TNMM. For the application of the transfer pricing methods, the comparability analysis and justification for such prices may be performed using the local or foreign party as the tested party. If the foreign party is the tested party, certified documented evidence will be required in the country of origin, issued by a firm of well-known independent auditors, duly translated and authenticated.

Uruguayan law does not prioritize methods. However, for transactions involving imports or exports of goods with well-known prices in transparent markets, those prices must be used. If the transactions are performed through international intermediaries that are not the final consignees of the goods, the applicable price is the price in the respective market. The price to be used is the one in the respective market on the day of the shipment or, if it was registered in the Mercantile Office, the price on the day of the contract.

### Return disclosures/related party disclosures

Taxpayers are required to file:

- ▶ The transfer pricing study, including the key elements, such as the functions and activities of the company, risks and assets used, the methods used, the interquartile range, and details of the comparables
- ▶ Annual tax return Form 3001

### Transfer pricing-specific returns

Only those taxpayers that are obligated to file the transfer pricing study must file the transfer pricing annual return (Form 3001) with the tax authorities.

In that annual return, the company must provide information about the related-party transactions.

### Documentation deadlines

The income tax return is due within four months of the close of the fiscal year-end. In that filing, the company must disclose whether a transfer pricing adjustment is required to achieve an arm's-length result in its transactions with both related parties and unrelated parties located in tax havens. In such cases, the transfer pricing analysis should be performed by that time, even though the documentation is not due until nine months after the fiscal year-end.

The deadline for providing the required documentation is nine months after the end of the fiscal year if:

- ▶ The transfer pricing annual return (Form 3001), including detailed information regarding all cross-border intercompany transactions and all transactions with unrelated entities located in tax havens, has been filed.
- ▶ Transfer pricing study (Resolutions No. 2.084/009) is to be filed along with Form 3001.

## Uruguay (continued)

### Transfer pricing penalties

The penalty for those that breach the formal requirements established in the transfer pricing framework (i.e., failure to timely file a transfer pricing report and tax return) will be applied on a graduated scale, in accordance with the severity of the breach. The maximum fine is 6.090.000 Uruguayan pounds.

When there is an underpayment due to transfer pricing, the taxpayer is penalized with a tax omission fine that is 5% of the amount of the underpayment if it is paid before 5 days after the deadline, 10% if it is paid between 5 and 90 days after the deadline, and 20% if it is paid more than 90 days past the deadline. In each case, corresponding surcharges are added.

It is important to note that if the DGI requires the transfer pricing study and a company does not file it, the DGI can suspend the certificate that shows that the taxpayer fulfilled its tax obligations. The immediate consequence of this is that it bars the taxpayer from being able to import goods or obtain a bank loan.

### Penalty relief

There currently are no provisions for reductions in penalties.

### Statute of limitations on transfer pricing assessments

There is no specific statute of limitations for transfer pricing adjustments; rather, the general regime applies. Assessments can be raised 5 years after the company's accounting period ends, but this is extended to 10 years when the difference is due to fraudulent or negligent conduct by the taxpayer.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of an annual tax audit, in general, is medium, while the likelihood that transfer pricing will be reviewed as part of that audit is high. The likelihood that, if transfer pricing is reviewed as part of the audit, the transfer pricing methodology will be challenged is high. Transfer pricing practice is new in Uruguay; therefore, there is not a lot of background for such audit practices. However, in the cases known, the taxing authority has challenged the methodology and the companies' comparables sets.

The tax authority relies on a special team of professionals who have focused on performing tax audits for the biggest companies, known as "Great Taxpayers." However, they have not focused on specific industries.

The focus is mainly on:

- ▶ Functional analysis
- ▶ Segmentation criteria revision
- ▶ Comparison between the financial information of the company considered for the transfer pricing analysis and the financial statements, identifying internal and external comparables

General observations pointed out in inspections are:

- ▶ Comparability adjustments made to the stated party
- ▶ Rejection of the selected comparable companies
- ▶ Observations of companies that have continuous losses for many years

### APA opportunity

Currently, no APA regime specifically is published in Uruguay, but the tax authority recently signed the first one.

Uruguayan transfer pricing rules have an APA regime. However, there are no specific procedures defined yet. Therefore, in case an APA process is initiated and no agreement is finally reached, there are no rules about how the local tax authorities should proceed with the already provided information.

As of today, only one APA case has been announced publicly, and it was related to a chemical company that was going to start conducting business in Uruguay.

# Vietnam

## Taxing authority and tax law

Taxing authority: General Department of Taxation (GDT)

Tax law: Law on Tax Administration

## Relevant regulations and rulings

- ▶ Article 37 of the Law on Tax Administration<sup>1</sup> articulates the arm's-length principle, which empowers tax authorities to adjust the value of purchases, sales, exchanges and accounting records of goods and services of taxpayers if that value is not in accordance with market prices.
- ▶ The Amended Law on Tax Administration No. 21/2012/QH13 (Amended Law) was officially enacted on 3 December 2012 and took effect on 1 July 2013. Decree 83/2013/NĐ-CP, issued on 22 July 2013, stipulates in detail the implementation of a number of Articles of the Amended Law on Tax Administration No. 21/2012/QH13 (Decree 83/2013) and took effect on 15 September 2013. Decree 83/2013 also includes Article 34, stipulating the arm's-length principle.
- ▶ The Amended Law on Tax Administration No. 71/2014/QH13 was officially enacted on 26 November 2014 and took effect on 1 January 2015.
- ▶ Detailed transfer pricing regulations are included in Circular 117/2005/TT/BTC (Circular 117)<sup>2</sup> and Circular 66/2010/TT/BCT (Circular 66).<sup>3</sup> Circular 66 provides guidelines for the calculation of market prices in business transactions between related parties.
- ▶ Circular 156/2013/TT-BTC (Circular 156)<sup>4</sup> provides guidance about some articles of the Law on Tax Administration, the Amended Law on Tax Administration and Decree 83/2013/NĐ-CP.
- ▶ Circular 201/2013/TT-BTC (Circular 201)<sup>5</sup> provides detailed guidance about the APA application process.

Circular 117 still applies to transactions that took place in financial years between 2006 and 2009. Circular 66 governs transactions between related parties that took place from 1 January 2010.

Circular 66 sets forth formal and comprehensive guidelines for many significant issues related to the interpretation and application of the arm's-length principle. In addition to articulating the arm's-length principle, Circular 66 provides definitions of "market prices," "material differences" and "associated parties"; lists acceptable transfer pricing methods; and addresses the "most appropriate method" rule. In addition, it provides guidance about the arm's-length range, benchmarking principles and acceptable databases and reiterates the two mandatory transfer pricing compliance requirements – preparation and submission of the annual declaration of related party transactions, and maintenance and submission (if requested) of the contemporaneous transfer pricing documentation.

The Ministry of Finance released the revised annual Transfer Pricing Disclosure Form 03-7/TNDN (Form 03) attached to Circular 156 (replacing Form GCN-01/QLT in Appendix 1-GCN/CC of Circular 66), which is applicable from the 2014 tax year and afterward. As a practical matter, taxpayers will now be required to perform an annual benchmarking study. This is so actual transfer prices used during the year can be compared with the outcome of the benchmarking. Any difference must be disclosed, as required by Form 03. Failure to perform such a study will result in much increased exposure to transfer pricing adjustments and high penalties. The introduction of Form 03 with additional disclosure requirements reaffirms that contemporaneous transfer pricing documentation is required; that the burden of proof rests with the taxpayer; and that the only effective defense rests with up-to-date documentation, including benchmarking.

The National Action Plan for 2012 to 2015, which aims to have at least 20% of the annual tax audit cases devoted to transfer pricing audits, has been implemented strictly by the central authority, and cascading to the provincial level. The purposes of this program are to create a stronger legal framework for transfer pricing and tax administration, provide training to build

<sup>1</sup> This law was enacted by the National Assembly on 29 November 2006 and has been effective since 2007.

<sup>2</sup> This circular was issued by the Ministry of Finance on 19 December 2005.

<sup>3</sup> This circular was issued by the Ministry of Finance on 22 April 2010 and supersedes Circular 117.

<sup>4</sup> This circular was issued by the Ministry of Finance on 6 November 2013.

<sup>5</sup> This circular was issued by the Ministry of Finance on 20 December 2013.

## Vietnam (continued)

### Relevant regulations and rulings (continued)

human resources capabilities, develop and enhance reliable databases, and promote international cooperation to enhance the Vietnam tax authority's capacity for transfer pricing administration.

Furthermore, the tax authorities noted some inadequacies in the documentation provided by the taxpayers (i.e., the documents provided or made available by taxpayers were seen as not compliant with Circular 66, specifically the sections relating to company analysis, industry analysis and benchmarking). Notably, though tax regulations allow valid invoices and intercompany agreements as supporting documents for corporate income tax or VAT purposes, they are not sufficient or equivalent to required transfer pricing documentation under Circular 66.

### OECD Guidelines treatment

Circulars 117 and 66 are generally based on the OECD Guidelines. How the GDT will apply the OECD Guidelines in interpreting the principles under the circulars remains to be seen during the first few years of implementation of the circulars.

### Documentation requirements

Contemporaneous documentation is required by Circular 66. Documentation must be provided to the tax authority within 30 working days upon request. The documents exist when the transaction occurs and must be updated during the performance of the transaction. For penalty purposes, a taxpayer is considered to have satisfied the documentation requirement if it maintained documentation showing the taxpayer reasonably concluded that, given the available data and the applicable pricing methods, the method (and its application) provided the most reliable measure of an arm's-length result under the principles of the most appropriate method rule.

The principal information and documents required by the regulations are:

- ▶ Information about transactions between affiliated parties and the taxpayer
- ▶ Information and updated reports about the strategy for development, administration and control between affiliated parties
- ▶ The pricing policy for transactions in relation to each group of products in accordance with the general guidance of affiliated parties and the taxpayer
- ▶ Documents and reports about the process of development, business strategy, projects, production, business or investment plans
- ▶ Regulations and procedures for financial statements and internal control reports of the company and of affiliated parties to the transactions
- ▶ A diagram of transactions and documents describing transactions, including information about parties to transactions and orders and procedures for payment and delivery of products
- ▶ Documents specifying properties and technical specifications of products, breakdown of costs (or cost) of one product, selling price of products, total amount of products produced or traded and sold in the period (specifying such items on the basis of the related transaction and an independent transaction, if any), and quantity of products
- ▶ Information, documents and source documents concerning the process of negotiating, signing, performing and liquidating economic contracts and agreements related to transactions (usually, including a description of products, place of transaction, form of transaction, value of transaction, terms of payment, payment documentation, period of performance, minutes of meetings or instructions of management regarding the process of negotiation and signing, and performance of a transaction)
- ▶ Information, documents and source documents related to economic conditions of the market at the time of the related transactions affecting the method of calculation of a price for transactions (for example, changes in exchange rates and policies of the government affecting prices in transactions and financial incentives)
- ▶ The pricing policy for selling and purchasing products and the procedures for control and approval of prices
- ▶ Information, documents and source documents used to select the most appropriate method, including data used for comparative analysis and adjustment of significant differences
- ▶ Other information or documents used to select and apply the methods

## Vietnam (continued)

### Priorities/pricing methods

Circular 66 permits the use of the following methods: CUP, resale price, cost-plus, comparable profits (or TNMM) and profit split. Taxpayers must use the most appropriate method under the regulations. There is no hierarchy among the methods, although recent practice shows that the Vietnam tax authority has a growing preference for the CUP method.

### Return disclosures/related party disclosures

Taxpayers are required to file Form GCN-01/TNDN (under Circular 117 and applied for the period from 2006 to 2009), Form GCN-01/QLT (under Circular 66 and applied for the period from 2010 to 2013) and Form 03-7/TNDN (under Circular 156 for the tax year 2014 forward) to disclose their transactions with related parties, the details of these transactions and the transfer pricing methods used to calculate the prices in these transactions. The disclosure form must be submitted together with the corporate income tax return, which must be filed within 90 days of the close of the fiscal year.

### Transfer pricing-specific returns

Please see the discussion in the "Return disclosures/related party disclosures" section above.

### Documentation deadlines

The documentation must exist at the time of the transaction. Taxpayers must provide documentation to the tax authorities within 30 working days of a written request. When enterprises have plausible reasons, a one-time 30-day extension may be granted. The transfer pricing documentation must be submitted in Vietnamese.

### Transfer pricing penalties

The tax authorities may make adjustments to corporate income tax liability in the following cases:

- ▶ Failure to disclose, or incomplete disclosure of, related party transactions
- ▶ Failure to produce information, documents or source documents within 30 working days after a request by the tax authority
- ▶ Intentional erroneous application of the provisions of the circulars and failure to produce required documentation within 90 calendar days after the date of request by the tax authority

Administrative penalties ranging from VND500,000 to VND5 million may be imposed for failure to comply with transfer pricing disclosure requirements, and an interest penalty of 0.05% of the outstanding tax due may also be imposed if a transfer pricing adjustment is made. Taxpayers are also subject to a tax penalty of 20% of additional tax in case of an incorrect declaration. Additional penalties of up to three times the outstanding tax due may be imposed if there is a finding of tax evasion or fraud.

Vietnamese law allows for criminal proceedings against taxpayers if it is proven that there is significant tax evasion. According to the Vietnamese Criminal Law, if the underpaid tax amount is VND100 million or more, the taxpayer may be subject to tax penalties under criminal proceedings.

### Penalty relief

Penalties may be mitigated by timely and adequate disclosure of the related party transactions on Form GCN-01/TNDN (Appendix 1-GCN/HTQT of Circular 117), Form GCN-01/QLT (Appendix 1-GCN/CC of Circular 66), Form 03-7/TNDN (attached to Circular 156) and by the preparation and timely production of transfer pricing documentation.

### Statute of limitations on transfer pricing assessments

There is no statute of limitations that specifically applies to transfer pricing in Vietnam. Hence, general principles of the statute of limitations for tax apply:

- ▶ For violations of tax procedures, administrative penalties can be imposed within two years of the date when the violation was committed to the date when the violation was discovered and recorded in writing.
- ▶ For acts constituting tax evasion or tax fraud not serious enough for penal liability examination, acts of late tax payment and declaration of inadequate tax amounts, administrative penalties may be imposed only within five years from the date when the violation was committed to the date when the violation was discovered and recorded in writing.

## Vietnam (continued)

### Statute of limitations on transfer pricing assessments (continued)

The date of commission is the statutory deadline for submitting the required tax return, or the date when the tax authority issues a tax refund, exemption or reduction decision in the case of a tax refund, exemption or reduction. Note that beyond the above periods (two and five years), a violator will no longer be subject to the imposition of the above-described administrative penalties, but will still be asked to pay the insufficient, evaded or fraudulent tax amount. Hence, it can be said that the statute of limitations does not apply with respect to the recovery or collection of taxes. Under the Amended Law on Tax Administration No. 21/2012/QH13, the statute of limitations applicable for tax collection is 10 years.

### Frequency of tax audit and transfer pricing scrutiny by the tax authority

The likelihood of a general tax audit is characterized as high, while the likelihood that transfer pricing will be reviewed as a part of the general tax audit is medium to high. The likelihood that the transfer pricing methodology will be challenged if transfer pricing is a subject of the general audit is characterized as medium.

In recent years, the Vietnamese tax authorities have tended to focus on auditing transfer pricing issues of companies in specific industries, including the clothing, footwear, garments and light manufacturing industries. In 2014 and beyond, however, the tax authorities have indicated that they intend to widen their transfer pricing audit focus by reviewing and auditing taxpayers across other sectors and industries of the Vietnamese economy.

In addition, the GDT has also issued Decisions 1574/QĐ-TCT and 1575/QĐ-TCT, both dated 1 September 2015, establishing the dedicated transfer pricing inspection divisions at both the GDT and Provincial tax department levels (i.e., Hanoi, Ho Chi Minh City, Binh Duong and Dong Nai).

These recent developments with respect to enhanced legislation, the tax authority's capacity building, the establishment of dedicated transfer pricing inspection divisions at both the GDT and local tax departments, as well as the increasingly sophisticated evidence in transfer pricing audits, shows that transfer pricing continues to be the national focus of Vietnam's tax authority going forward.

### APA opportunity

After APAs were introduced in the Amended Law on Tax Administration No. 21/2012/QH13, its implementation regulations were issued (Decree 83 dated 22 July 2013) and the Draft APA Circular was released for public comments, the Ministry of Finance issued Circular No. 201/2013/TT-BTC, providing detailed guidance about the APA application process (Circular 201), which took effect on 5 February 2014.

The guidance about APAs and standardized processes and procedures for applying for an APA included in Circular 201 are generally in line with the OECD's APA guidelines and effective APA regimes in other taxing jurisdictions. Below is a summary of the key features of the APA regime and application processes included in Circular 201:

- ▶ APA definition: an APA is a binding agreement between the taxpayer and tax authority that determines in advance the basis of the tax calculation, transfer pricing methods and arm's-length prices of the covered related party transactions for a specific period.
- ▶ Scope of application: an APA is available to corporate taxpayers that undertake domestic or overseas related party transactions.
- ▶ Types of APA: unilateral, bilateral and multilateral APAs are all accepted.
- ▶ APA period: an APA can be effective for up to five years, with renewal for a maximum of five years.
- ▶ Competent authorities: the Ministry of Finance gives final approval of APAs, with the GDT in charge of signing off on APA applications. Provincial tax departments help negotiate, process and monitor APA applications within their authority.
- ▶ Database: data and database use for price and profit margin analysis must be publicly recognized with the specified hierarchy of preference.
- ▶ Confidentiality: both the taxpayer and tax authorities must observe information confidentiality. All information and documents provided during the APA application process shall not be used as evidence for further tax audit, tax inspection or tax imposition on the taxpayers.
- ▶ Compliance after APA sign-off: taxpayers should file follow-up annual reports on the APA's terms of compliance.

## Vietnam (continued)

### APA opportunity (continued)

- ▶ Flexibility: revision options are available in case material assumptions established in the APA change, and the APA can also be used as a benchmark to revise declared prices and profit margins for past years to avoid tax penalties, in accordance with the Law on Tax Administration.
- ▶ Independent consultants: both taxpayers and tax authorities are entitled to hire independent consultants to assist them during the APA process.

Under Circular 201, the APA application process covers the following steps:

- ▶ Application for consultation prior to official application for an APA (i.e., pre-filing consultation): this is required with a prescribed form, along with an exhaustive list of documents to be submitted. There is no specific timeline. The GDT issues the official result of consultation within 30 working days of the end of the consultation process.
- ▶ Formal application for APA: an eligible taxpayer may make an official application for an APA in the prescribed form, along with documents required and a processing fee. An official application for an APA must be submitted within 120 days of receipt of written approval from the GDT. An extension of 30 calendar days is available for reasonable circumstances.
- ▶ Evaluation of APA application dossier: a meeting to discuss the working schedule between the GDT and the taxpayers is organized within 15 calendar days of the official application. The maximum period for the GDT to evaluate the application is 90 calendar days, with a possible extension of 60 calendar days under reasonable circumstances.
- ▶ Negotiation between tax authorities and taxpayers: there is no specific timeline for the negotiation process.
- ▶ Sign-off and implementation of the APA.

# Zimbabwe

## **Taxing authority and tax law**

Taxing authority: Zimbabwe Revenue Authority

Tax law: Income Tax Act (*Chapter 23:06*)

## **Relevant regulations and rulings**

Section 16(1)(q) provides for a thin capitalization rule where the safe harbor is a debt-to-equity ratio of 3:1. Interest on the excess debt is disallowed and is also treated as a dividend whether the payee is local or offshore.

Section 16(1)(r) provides for the restriction of the amount deductible for income tax purposes in respect of general administration and management expenditures paid by a subsidiary to the holding company or by a holding company to a subsidiary or by a branch to its foreign parent company to 1% of the rest of the company's expenditure qualifying for deduction. The disallowed amount is also treated as a dividend whether the payee is local or offshore.

Section 23 deals with determining the taxable income of persons buying and selling property at a price in excess of or less than the fair market price and of nonresident persons exporting products from Zimbabwe without prior sale.

Section 24 deals with determining the taxable income in accordance with double taxation agreements if conditions are created between related parties, which, in the opinion of the commissioner, differ from those that would be made between two persons dealing with each other at arm's length.

Section 98 deals with determining the taxable income of persons involved in tax avoidance:

- ▶ Where transactions, operations or schemes are entered into
- ▶ That have the effect of avoiding, postponing or reducing the liability for income tax
- ▶ That have been entered into by abnormal means or in an abnormal manner
- ▶ Creating abnormal rights and obligations that would not normally be created by persons dealing at arm's length
- ▶ Of which the commissioner is of the opinion that avoidance, postponement or reduction of the liability was the sole or one of the main purposes of the transaction, operation or scheme

Section 98A deals with income splitting on transfers of income by an individual to an associate or transfers of property to an associate in which the associate receives or enjoys income from that property.

Section 98B empowers the Commissioner to reallocate and adjust income on any transaction (including the income accruing from any transfer or license of intangible property) between associates or people in an employer-employee relationship, as they consider necessary to reflect the taxable income that would have accrued to them in an arm's-length transaction.

## **OECD Guidelines treatment**

Zimbabwe does not have comprehensive transfer pricing rules yet. It is understood that the Zimbabwe Revenue Authority is working on comprehensive transfer pricing rules, which may be released in the near future. Meanwhile, guidance is taken from the OECD Guidelines.

## **Documentation requirements**

There are no specific documentation requirements yet.

## **Priorities/pricing methods**

There are no specific guidelines about the preferred methods yet. The OECD methods can be used.

## **Return disclosures/related party disclosures**

No specific separate disclosure is required.

## Zimbabwe (continued)

### **Transfer pricing-specific returns**

No specific transfer pricing return is required.

### **Documentation deadlines**

There are currently no clear documentation deadlines.

### **Transfer pricing penalties**

There are no specific transfer pricing penalties. The general corporate tax penalties (for noncompliance, late filing or non-filing) apply. Penalties range up to 100% of the tax payable.

### **Penalty relief**

Penalties can be waived or reduced through negotiation with the tax authority.

### **Statute of limitations on transfer pricing assessments**

The statute of limitations is six years from the relevant year or date of the assessment.

### **Frequency of tax audit and transfer pricing scrutiny by the tax authority**

The audit program is risk based, concentrating on nonresident controlled and significantly thinly capitalized Zimbabwean companies and branches. There is no audit cycle.

### **APA opportunity**

There is currently no APA program in place.

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