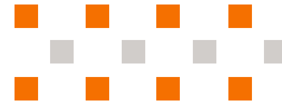

ALFERY
Audit Tax & Legal Services
Member of WTS Alliance

wts TAX LEGAL CONSULTING

NEWS 1/2015

News Nr. 1/2015

WTS Newsletter zum Thema Verrechnungspreise

Verrechnungspreise (Transfer Pricing) stellen in den letzten Jahren eines der wichtigsten Themen dar, die die Steuerverwaltungen der einzelnen Länder oft unter die Lupe nehmen.

Der Wichtigkeit der Verrechnungspreise ist sich auch die WTS Alliance, deren Bestandteil unsere Kanzlei WTS Alfery als unabhängiges Mitglied ist, völlig bewusst.

WTS Alliance hat ein spezielles Team gebildet, das sich mit Verrechnungspreisen beschäftigt (WTS Global Transfer Pricing Team), und veröffentlicht einen speziellen Newsletter, der sich ausschließlich Verrechnungspreisen widmet (WTS Transfer Pricing Newsetter).

Wir übersenden Ihnen die erste Ausgabe 2015, welche über die aktuelle Entwicklung und die Änderungen der die Verrechnungspreise regelnden Gesetze in 15 ausgewählten Ländern weltweit, zum Beispiel Deutschland oder Frankreich, informiert. Der Newsletter wird in englischer Sprache veröffentlicht.

Wir möchten Sie insbesondere auf den Artikel über die Tschechische Republik aufmerksam machen, den unter dem Titel „Sogenannte freiwillige Fragebogen und neue Anlage zur Steuererklärung zu Verrechnungspreisen" Jana Alfery und Roman Pecháček erstellt haben und den Sie auf **Seite 7** des beigefügten Newsletters finden.

Václavské nám. 40, 110 00 Praha 1
Fax: +420 221 111 788
Tel.: +420 221 111 777
E-mail: info@alferypartner.com
www.alferypartner.com

Hinweis: Die vorstehend aufgeführten Angaben haben lediglich allgemeinen informativen Charakter und stellen keine komplexe erschöpfende Erörterung der jeweiligen Themen dar. Ihr Zweck ist es lediglich, auf die wichtigsten Punkte der Novellierungen und Änderungen hinzuweisen. Jedwede Schadenersatzansprüche für aufgrund dieser Ausführungen unternommene Schritte sind ausgeschlossen. Die Verwendung der in diesem Text enthaltenen Informationen erfolgt nur auf eigene Gefahr und Verantwortung.
Verwenden Sie, bitte, die Informationen in diesem Material nie als Grundlage für Ihre Entscheidungen, nehmen Sie die professionellen Dienstleistungen unserer qualifizierten Spezialisten in Anspruch.

February 2015
1.2015

wts TAX LEGAL CONSULTING

WTS Transfer Pricing Newsletter

Editorial

Dear Reader,

It is our pleasure to present to you the first WTS Transfer Pricing Newsletter for 2015.

Transfer pricing between related parties – and their significant impact on profits reported in different tax jurisdictions – has become the hot topic to international tax authorities in an effort to protect their respective country's tax base over the last years.

Given the OECD action plan on "Base Erosion and Profit Shifting (BEPS)" it is clear that transfer pricing continues to be the number one tax issue for tax directors globally. The public comments, progress and current level of agreement across OECD countries and the G20 states highlights the continuing political will and pressure to implement new rules worldwide with a special focus on international relationships between related parties of multinational groups.

However, it is also evident that local differences in the interpretation of the international standards will remain and multinational companies are still exposed to significant penalties and double taxation risks if a local tax authority reassesses income as a result of a transfer pricing adjustment.

Consequently, continuous access to information on most recent developments and changes in the legislation on transfer pricing from a local country perspective is key to mitigate transfer pricing risks before they arise. With this WTS Transfer Pricing Newsletter you will be informed about the latest developments in transfer pricing.

Yours sincerely
WTS Global Transfer Pricing Team

wts TAX LEGAL CONSULTING

Contents

Australia: “Reconstruction provisions” – Australia’s taxation office equipped with high transfer pricing power 3

Burkina Faso: Transfer Pricing in Burkina Faso – Developments from 2010 to 2015 4

China: Actual transfer pricing developments in China – Changes in TP legislation and recent trends in transfer pricing audits 6

Czech Republic: So-called “voluntary” transfer pricing questionnaires and new transfer pricing annex to the tax return 7

France: Detailed information on new transfer pricing rules – Penalties and documentation requirements increased 8

Germany: Final Decree regarding the “Authorized OECD Approach“ published – Compulsory for fiscal years beginning January 1, 2015 9

Ghana: General information on transfer pricing in Ghana and actual developments 11

Hungary: New transfer pricing rules in 2015 – Related party definition and benchmarking studies affected 12

India: India signs first bilateral APA with Japan and announces principles on transfer pricing 13

Indonesia: Actual controversies in Indonesian transfer pricing audits with regard to benchmarking studies 14

Norway: Norway introduces new rules for limiting deductions for interest paid to related parties 15

Poland: Major changes in CIT law and Polish transfer pricing legislation in 2015 16

Spain: Spain introduced significant changes in transfer pricing legislation 17

Ukraine: Improved Transfer Pricing Rules in Ukraine with effect from 2015 18

United Kingdom: Diverted Profits Tax – A New UK Tax? 22

Please find the complete list of all contacts at the end of the newsletter.

wts TAX LEGAL CONSULTING

Australia

"Reconstruction provisions" – Australia's taxation office equipped with high transfer pricing power

On November 12 2014, just 2 days before the Brisbane G20 meeting, the Australian Taxation Office (ATO) released Taxation Ruling TR 2014/6, outlining its position on the application of the 'reconstruction provisions' in Australia's new transfer pricing rules. While the ruling was eagerly awaited, it merely confirmed what taxpayers already knew: that the provisions apply widely and provide the ATO with significant powers to reconstruct transactions where it has deemed that the transactions would not have occurred under the same terms had they occurred between parties operating at arm's length.

1. ATO power to reconstruct actual transactions

The 'reconstruction provisions' allow the ATO to revise, re-design or even disregard a transaction when evaluating the transfer price, and require that the taxpayer hypothesize what independent parties might or might not have done.

In broad terms, the provisions apply where the form and substance of the transaction are inconsistent with each other, or independent parties dealing independently with each other would have either applied different conditions or would not have entered into the transaction at all. Where this is the case, the ATO may hypothesize an outcome for the transaction based on what may have transpired between two parties operating independently of each other, and effectively allows the ATO to re-design business decisions (without necessarily fully understanding the premise of the business and the decision-making process). We can only imagine how taxpayers will react to the ATO telling them how they should have run their businesses.

Keeping in mind that transfer pricing audits can occur years after a transaction is undertaken, these provisions along with the benefit (or risk) of hindsight make having contemporaneous transfer pricing documentation to support transactions more important than ever.

2. Practical risks to taxpayers

- The ruling states that the reconstruction provisions will apply automatically where the arm's length conditions differ to actual conditions. This seems inconsistent with the OECD Guidelines which suggest that such provisions be applied only in exceptional circumstances and increases the risk of the provisions being applied in circumstances not contemplated by the OECD (for example, where the substitution of one or more arm's length conditions may have resulted in a larger taxable profit in Australia but would otherwise not constitute exceptional circumstances).
- In addition to when the actual conditions differ from the arm's length conditions, the ruling also contemplates the application of the provisions to omissions of behaviours that would otherwise have been seen in independent party dealings, i.e. failure to act. This would put at risk taxpayers who simply allow service or purchase contracts to roll-over at the end of the term instead of seeking to renegotiate pricing.
- The ruling still doesn't indicate what documentation the ATO expects from taxpayers to support their positions and demonstrate why these provisions do not apply, so taxpayers are still unclear about what documentation is required to satisfy the contemporaneous documentation requires and mitigate penalties.

3. What can taxpayers do to mitigate ATO transfer pricing reconstruction risk?

- Make sure the form and substance of transactions are in agreement. This is an area of particular importance for inbound related party financing – the terms under which the financing is provided should be reviewed and documented from both a quantum and cost point of view (this area is particularly important for interest-free loans given the introduction of the withholding tax benefit provisions).
- Review the conditions under which related party transactions are undertaken to ensure that the terms and conditions under which the transactions are undertaken is consistent with those that would be in place between parties operating at arm's length.
- Review and update existing transfer pricing policies and documentation to ensure compliance with the new rules. Having transfer pricing documentation created or maintained overseas (say, by the parent entity) is no longer sufficient; such documentation will need to be reviewed (and amended, if necessary) from an Australian transfer pricing standpoint.
- Taxpayers may wish to consider preparing a Reasonably Arguable Position (RAP) paper (in addition to formal transfer pricing documentation noted above) to support particularly contentious or materially significant transactions, if there is a risk that the ATO may review these transactions.

Sharon Arasu-Koh
sharon.arasu-koh@wtsaustralia.com.au

Burkina Faso

Transfer Pricing in Burkina Faso – Developments from 2010 to 2015

Before the year 2010, Burkina Faso tax legislation had few specific provisions which were dealing with the subject of transfer pricing. But since the fiscal reform of 2010, more attention is paid by the tax authorities to transfer pricing.

Therefore, since 2010, some provisions have been inserted in the tax law to give power to tax authorities to control transfer pricing.

During fiscal reform of 2010, three provisions were inserted in the tax system. Two provisions in the Corporate Income Tax Act (article 22 and article 82) and the third one in the Tax Procedures Book (article 4).

1. Article 82 of the Corporate Income Tax Act: An article which instituted the principle of transfer pricing control by tax authorities

This article provides that for the assessment of the corporate income tax payable by companies in Burkina Faso which depend on companies outside of Burkina Faso (the head office is out of Burkina Faso) or by companies in Burkina Faso which have the control of companies outside of Burkina Faso (the head office is in Burkina Faso in this case), profits indirectly transferred by any means will be taken into the taxable profits.

The same treatment will be applicable for companies under the control of a company or a group which also have the control of companies outside of Burkina Faso.

Especially constitute indirect transfers of profits:

- The increase of purchases costs (purchases overpriced)
- The decrease of sales value (sales under-priced)
- The payment of excessive royalties or the payment of royalties without consideration

- Loans without interests our with high or low interests rate
- Unjustified debts abandonments
- Advantages out of proportion with the service provided.

The matter with this provision is how to prove that some transactions are made at inappropriate prices. To make things easy for the Tax officials, another article has been inserted in the Tax Procedures Book which transfers the charge to prove that transactions are made on market prices or at arm's length to the taxpayers.

2. Article 4 of Tax Procedures' Book: Obligation for the taxpayer to justify or to produce supports for the transactions made with associated companies.

Indeed, when, during a tax field audit or tax investigation, the tax authorities has gathered evidences suggesting that an enterprise has made an indirect transfer of profits within the meaning of Article 82 of the Corporate Income Tax Act, they may request from the taxpayer information and documents specifying:

- The kind of relations existing between the associated companies
- The methods used to determine their transactions prices
- The businesses carried out by the companies
- The fiscal regime of these transactions for the companies outside of Burkina Faso.

With the year 2015 finance act, it has been added in the article 53 and 54 of the Tax Procedures' Book an extension of the duration of the possibility for the tax authorities to check transactions which incur transfer pricing. Generally, the tax authorities have the possibility to go three years back to check that a taxpayer has been well assessed. Now for transfer pricing matters, they can go three and an half years back.

3. Limitation of the deductibility of management fees (Article 21 of CITA)

When a foreign company opens a subsidiary in Burkina Faso, the management fees charged by the head office to the subsidiary are deductible from the corporate income tax assessment basis under a limit. The deductible amount cannot exceed 10% of the taxable profit of the tax period.

4. Limitation of the deductibility of payments to foreign suppliers resident in tax havens or non-cooperative countries (Article 22 of CITA).

All transactions payable by resident taxpayers to companies resident in a country with a privileged or non-cooperative tax regime will be deductible in the calculation of corporate income tax if the debtors (the resident taxpayers) give the proof that the transactions are not fictitious and do not appear abnormal or exaggerated.

In this case the question is how a country may be considered as a tax haven or non-cooperative. The article gives also the answer.

A country may be considered as a tax heaven if the standard rate of its income tax is lower by more than the half of the standard rate of income tax in Burkina Faso.

A country may be considered as uncooperative when it doesn't comply with international transparency and information exchange standards in tax matters between tax authorities. A list of so called countries shall be yearly published by the ministry of finances.

5. Limitation of the deductibility of interests (Article 28 of CITA)
The introduction of this article is to fight against transfer pricing manipulation by the mean of thin capitalization.

This certainly due to the fact that the tax authorities have noticed that some companies are heavily financed by debt instead by equity. In such situations, the proportion of the company capital is more of debt than equity.

The taxpayers generally make this choice (debt financing) because of interests on loan are deductible for corporate income tax calculation whereas dividends are not.

To combat or reduce transfer pricing through thin capitalization, the article 28 of the CITA has fixed two rules:

- → An arm's length measure for interest rate. The interest rate may not exceed the legal interest rate establish by the West Africa States Central Bank (BCEAO in French) or this legal rate plus 2%
- → A limitation of the ratio on debt to equity: 2/1.

Marie Herman Zoungrana
zmarieherman@yahoo.fr

China

Actual transfer pricing developments in China – Changes in TP legislation and recent trends in transfer pricing audits

1. TP legislation development
China has been actively participating in discussing and designing the action plan for Base Erosion and Profit Shifting (BEPS) initiated and tasked by OECD since 2013. China's State Administration for Taxation (SAT) has declared its determination to improve its international tax administration following the issuance of the first batch of BEPS action plan deliverables. In particular, SAT has expressed its clear stance in 15 areas that cannot be accepted under China's current environment, including bilateral / multilateral tax exemption, tax planning lacking substance, abusing of tax treaty benefits, function vs. contribution mismatch arrangements, low return to high-tech enterprises, etc. In December 2014, SAT issued the administrative regulations on implementation of general anti-tax avoidance rule (GAAR), defining GAAR scope, adjustment methods and investigation procedures. They serve as operational directives to two major GAAR legislations, the CIT Law (2008) and the Special Adjustment Regulations (2009). It is expected that the SAT is planning to issue further enforcement regulations on anti-tax avoidance.

In mid-2014, SAT affirmed its intention to adopt a similar framework to the OECD TP Guideline to assess cross-border intra-group services provided by overseas corporations to their Chinese subsidiaries. This issue has always been a controversy in China as the current CIT Law disallows the deduction of management fees but allowing the deduction of service fees. In reality, the lack of clear distinction between the two has led to inconsistent treatments by local tax authorities and abusing of service fee mechanism by tax payers. A senior SAT official has indicated the plan to impose criteria check on intra-group services from six perspectives: identity of beneficiary, necessity, uniqueness, value, compensation and authenticity.

In late 2014, SAT announced substantial amendments to the current annual CIT filing return package, basically adding more appendices to it (from 16 to 41 pages). Take "Tax Adjust-

wts TAX LEGAL CONSULTING

ment Form" as an example, it used to be 1 page and now is increased to 15 pages. The new forms require more detailed disclosure and breakdown for taxation data and foreign tax credits of overseas investees and more elaboration on various types of offshore and domestic expenses. The new return package is required to be adopted for the 2014 annual CIT filing, due for submission by 31 May 2015.

2. APA development

China SAT just announced its annual APA statistics report for APA status for 2013: a total of 19 APAs concluded in 2013, including 11 unilateral and 8 bilateral APAs, reflecting a mild but steady increase of 7 APAs from 2012. Transactional net margin method (TNMM) is still the most popular TP method adopted in APAs. Although the number of overall APAs concluded has been gradually growing, SAT has indicated the shortage of TP specialized tax officers (6 officers at SAT level) in processing APAs. The report has indicated four major factors in prioritizing APA applications, being its application time, documentation quality, sector representation, and likelihood of APA acceptance in counterpart countries. SAT has expressed its intention to focus on the quality of the APAs in its consideration of APA applications. In other words, those APA applications with innovative TP methods, quality analysis, and effective saving in compliance cost will be processed with priority.

3. TP audit development

In late 2014, besides regular TP audits, SAT has required a national investigation on dividends paid to overseas shareholders and also substantial payments to overseas related parties. It signals SAT's continuous dedication to reinforcing TP audits and anti-tax avoidance investigation.

The Chinese tax authorities have been making more efforts in TP administration in recent years. An increasing number of multi-national enterprises in China are scrutinized by tax authorities regarding their cross-border related party transactions. In 2013, over RMB 47 billion of taxes were collected via TP audits, comparing to RMB 35 billion in 2012. The collection in 2014 is not yet disclosed but is expected to be on a growing trend.

Xiaojie Tang
xiaojie.tang@worldtaxservice.cn

Martin Ng
martin.ng@worldtaxservice.cn

Czech Republic

So-called "voluntary" transfer pricing questionnaires and new transfer pricing annex to the tax return

1. So-called "voluntary" transfer pricing questionnaires and new transfer pricing annex to the tax return

There is no legal obligation to prepare transfer pricing documentation in the Czech Republic. At the same time, however, the Czech Tax Administration realizes the importance of this issue and the risks of substantial tax evasions.

In August 2014, questionnaires concerning transfer pricing were therefore sent to all taxable entities falling within the competence of the Specialized Tax Office (companies with annual turnover exceeding 2 billion CZK (approx. 70 million EUR) and all financial institutions). Taxable entities should fill in data relating to 2013.

The Tax Administration repeated this campaign in October 2014, sending similar questionnaires to selected taxable entities that fall within the competence of ordinary tax offices.

Completing questionnaires was, of course, on a voluntary basis. The Tax Administration pointed this out in its cover letter. However, it was stated in the press release issued in this respect that the Tax Administration "would proceed with great caution if taxable entities did not reply to the questionnaire".

Our experience has shown, indeed, that tax inspections were initiated relating to taxable entities that had not completed the voluntary questionnaire.

Following the "voluntary" questionnaire campaign, a new mandatory annex to tax return has been introduced with effect from 1 January 2015. For the first time, this annex shall be included in tax returns for 2014.

This annex contains an overview of transactions with related parties – purchase and sale of fixed assets, inventories and services, licence fees, loans and interests, share in profits, receivables and liabilities.

The annex reproduces, in principle, the previous questionnaire. However, the questionnaire was to be completed cumulatively whereas the new annex is to be filled in for each related party separately.

All companies that meet at least one out of three criteria for mandatory audit in the Czech Republic, i.e. assets exceeding 40 million CZK (1,4 million EUR) or net turnover exceeding 80 million CZK (2,9 million EUR) or number of employees exceeding 50, are obliged to complete the annex.

If the company shows a loss or is recipient of investment incentives in the form of a tax credit, it shall fill in the annex for all related parties which it has made any transaction with in the relevant period.

In other cases, only transactions with foreign related parties are to be stated.

To sum up, the so-called "voluntary questionnaires" substituted the obligation to prepare transfer pricing documentation in 2014, and mandatory annexes to the tax return replace such obligation as from 2015.

The issue is how the Tax Administration will handle the data and if it will be able to assess them correctly. There is no doubt that we can expect inspections aimed at taxable entities that fail to fill in the annex or in cases in which the annex will contain unusual transactions.

Roman Pecháček
roman.pechacek@alferypartner.com

Jana Alfery
jana.alfery@alferypartner.com

France

Detailed information on new transfer pricing rules - Penalties and documentation requirements increased

1. A new annual obligation: the transfer pricing return

As from fiscal year beginning after December 8, 2013, entities fulfilling the following criteria have to file a "light" transfer pricing documentation within six months following the filing delay of the CIT return (Article L13 AA of the French tax proceedings code):

→ having a gross annual turnover or gross assets equal to or exceeding € 400 million,
→ if more than 50% of their capital or voting rights are owned, directly or indirectly, by French or foreign entities meeting the € 400 million criteria,

- that directly or indirectly own at least 50% of companies meeting the € 400 million criteria, or,
- tax consolidated French companies (with at least one tax consolidated entity meeting the € 400 criteria within the perimeter).

The transfer pricing return (form n°2257-SD) has to include intercompany transactions if the aggregated amount per type of transaction exceeds EUR 100,000.

2. New requirement applicable to the "full" transfer pricing documentation: Disclosure of tax rulings granted to affiliated companies

The obligation to have an annual "full" transfer pricing documentation to be provided to the French Tax Administration in case of a tax audit for companies fulfilling the criteria above remains in place. Nevertheless, as from fiscal year ending after January, 1st 2014, the "full" documentation has to include rulings concerning the related foreign company(ies) granted by Foreign tax administrations even if there is no direct relation with intra-group transactions.

3. Transfer pricing tax reassessment: New regularization procedure

In case of transfer pricing tax reassessment, the audited company could request the relief of the withholding tax on a deemed distribution subject to the following conditions:

- The audited company files a written request in which he accepts the transfer pricing reassessment and penalties.
- The request is filed before the French tax administration claims the payment of the withholding tax.
- The amounts classified as deemed dividends have to be included in the profit of the French company within 60 days from the request
- The recipient of the income is not located in a Non-Cooperative State (ETNC).

4. Transfer pricing documentation requirements: Increase of the penalty incurred

Until now, if the full Transfer Pricing documentation is missing or incomplete, French companies were subject to a fine of EUR 10,000 per audited year or 5% of the transfer pricing reassessments. As from January 1st 2015, in case of failure to provide the required documentation within 30 days of the formal notice of the French Tax administration, the penalty will be the higher of:

- €10,000 per audited year
- 0.5% of the amount of the transactions not correctly documented
- 5% of reassessed profits.

Hélène Mazeau-Fourel
helene.mazeaufourel@wts.fr

Christoph Seseke
christoph.seseke@wts.fr

Germany

Final Decree regarding the "Authorized OECD Approach" published – Compulsory for fiscal years beginning January 1, 2015

1. Recent Changes in national TP legislation / jurisdiction

The main topic in the German TP legislation was the introduction of the "Authorized OECD Approach" to German tax law (German Foreign Tax Act) regarding the taxation of permanent establishments ("PEs") for fiscal years beginning January 1, 2013 onwards followed by a decree regarding the execution of this new legislation published in October 2014. The decree has to be applied for fiscal years beginning January 1, 2015, for the years 2013 and 2014 a transition period was granted. The new German legislation is based on the

OECD "Report on the Attribution of Profits to PEs" from 2010 and clearly outlines that the "separate legal entity approach" has to be applied for the income allocation to PEs and all transactions and dealings between Headquarter and PE have to be executed applying the arm's length principle. Additionally, the new regulations contain a more detailed approach to the profit allocation as well as additional documentation requirements for the taxpayers resulting in significant additional tax compliance efforts. However, many issues are still not clearly outlined and should be solved by administrative principles expected for end of 2015.

2. Practical experiences from actual TP audits

Transfer pricing remains the key tax challenge for German multinational companies and German tax authorities. In short, transfer pricing issues are of highest priority in German tax audits. German tax auditors have become more trained and specialised over the last years since the implementation of the legal documentation requirements and the audit approach on transfer pricing issues is getting more aggressive and demanding.

Especially management services and licence fees are often in the focus of the auditors. On the one hand the documentation requirements regarding the deductibility of management service fees charged to German subsidiaries of foreign groups are very high, whereas on the other hand, the auditors expect that a significant share of the central cost of German headquarters is charged out to the foreign subsidiaries. Furthermore, according to our experience, German tax auditors more and more tend to request a license fee to be paid by foreign subsidiaries of a German group for the use of the so called "umbrella brand", which should constitute a compensation for the bundle of different services and intangibles, which German tax auditors assume to be rendered respectively granted to foreign subsidiaries by the German headquarters (e.g. consisting of global reputation, various know-how and expertise, quality standards, running organisation, etc). Finally, although there is a strict penalty regime on non-compliance with the transfer pricing documentation rules under German law, the actual assessment of penalties during tax audits is in practice relatively conservative until now. However, we expect that the assessment of penalties related to missing or insufficient transfer pricing documentation will increase during the next years.

3. Local view on BEPS discussion, especially considering proposed changes on TP documentation and Country-by-Country

Generally, a master file documentation approach as proposed by the OECD is already accepted in Germany. Therefore, it can be expected that the German tax authorities would accept the OECD's proposals and adopt the new OECD standards also for the German legal documentation requirements. However, the proposed extent of relevant information, especially regarding the so called "Country-by-Country-Reporting (CbC)", is seen very critical also by the German tax administration. It is acknowledged, that the disclosure obligations proposed by the OECD could contradict the legally protected tax secrecy and that significant additional tax compliance efforts have to be expected for the taxpayers, whereas the relevance of the additional information provided could be challenged. Also it is discussed whether the CbC-Reporting proposed by the OECD may be seen as the starting point for the introduction of a formula apportionment of profits rather than a transaction based setting of transfer prices in line with the arm's length principle which has been the common standard of the OECD over the last decades.

Maik Thomas Heggmair
maikthomas.heggmair@wts.de

TAX LEGAL CONSULTING

Ghana

General information on transfer pricing in Ghana and actual developments

1. Recent changes in transfer pricing legislation

Since the introduction of Transfer Pricing Regulations into law in 2012 (LI 2188) and the subsequent issuance of Practice Notes (which are an interpretation of the provisions of the regulations) by the Commissioner-General of the Ghana Revenue Authority in January 2013, there has been no major change in transfer pricing legislation in Ghana.

The transfer pricing regulations require persons who engage in transactions with related parties to maintain contemporaneous documentation of these transactions and file returns at the end of the basis period of the taxpayer.

2. Revision of Transfer Pricing Annual Return Form

One key development in the transfer pricing issues in the Ghana is the introduction of a revised Annual Return Form for filing transfer pricing transactions. In addition, a detailed guidance (Completion Notes) to assist taxpayers in filling and completing the Annual Return has been designed by the Ghana Revenue Authority.

The previous Transfer Pricing Annual Returns Forms although detailed in content was not structured in a way that made it easy for most taxpayers to complete. Consequently, taxpayers submitted insufficient and in some cases inaccurate information thus rendering the risk assessment of companies which had filed their returns burdensome.

The revised Annual Return Form and its accompanying Completion Notes are aimed at obtaining relevant information from taxpayers to enable the officials of the Ghana Revenue Authority to conduct the transfer pricing audit. The new Annual Return Form requires the taxpayers who are submitting transfer pricing returns for the first time to provide detailed information about their ownership structure. Taxpayers whose ownership structures have changed are also required to provide details of the changes. A column is provided in the form for detailed contact information of the authorized representative of the taxpayer who is filing the return.

In providing information about related party information, the Completion Notes for the transfer pricing return state that the taxpayer must provide an organogram of members within the group and a schedule of shareholding structure within the group. Details of the nature of relationships between the parties, the countries of incorporation as well as the places of residence of the related parties and the nature and monetary value of the transactions are required to be submitted by the taxpayer.

3. Risk assessment manual

The Transfer Pricing Unit has also developed a risk assessment manual, which will be used as a basis for determining whether the Transfer Pricing Return submitted by a taxpayer should be selected for Transfer Pricing Audit. The content of the manual is yet to be discussed with the taxpayers to enable them to know whether their operations may or may not pose transfer pricing risk, thus making them candidates for Transfer Pricing Audits.

4. Practical experiences from actual Transfer Pricing audits

The Transfer Pricing Unit of the Ghana Revenue Authority is currently conducting audits on the various returns filed by taxpayers to determine whether these transactions are in accordance with the arm's length principle.

WTS TAX LEGAL CONSULTING

The modifications contained in the new Annual Return Form have addressed the issue of taxpayers furnishing insufficient information to the Transfer Pricing Unit making risk assessment difficult.

Ghana, like most developing and middle income countries, lacks a national transfer pricing comparability database at the moment, which can be used as a benchmark for determining appropriate transactional prices between related parties. This undoubtedly imposes a huge burden on tax administrators in their attempt to determine appropriate transactional prices. Efforts are however being made to get a database to address this problem.

Training and capacity building of staff of the Ghana Revenue Authority is still ongoing, both in-house and external hands-on practical audit training with proposed country visits yet to be scheduled.

William Kofi
Owusu Demitia
info@wts.com.gh

Hungary

New transfer pricing rules in 2015 – Related party definition and benchmarking studies affected

Similarly to previous years, transfer pricing audit still qualifies as a key issue in the life of the companies and there is a shift from pure documentation review to inspections where the tax base is modified and major penalties are levied.

It is still a challenge for the tax authority to explore and take actions against international group structures that apply aggressive tax planning techniques resulting in the decrease of the national tax revenues. Nevertheless, the basic principle of the Act on the Rules of Taxation is to change from 2015, whereby the differing legal interpretation by states of legal relationships affecting double tax treaties cannot result in avoiding tax in the countries concerned (this rule was mainly applied but not written in the Hungarian tax laws).

By way of the OECD's Action Plan on BEPS, the Hungarian tax authority will probably get a clearer global picture on the transfer pricing of international group companies consisting Hungarian entities. For example, the Country-by-Country Reporting (Action 13) would enable the tax authority to have more detailed information on the transfer pricing of these international group companies and to evaluate transfer pricing risks more precisely.

The tax authority's experience shows that most of the audited taxpayers fulfilled the administration liability and prepared transfer pricing documentation. However, in many cases it was stated that the type of the documentation prepared was not in line with the legal requirements, e.g. consolidated transfer pricing documentation was prepared in cases where the transactions could not have been consolidated and therefore the consolidation jeopardized the proper determination of the arm's length price. It also happened that simplified documentation with limited information content was prepared in cases where the transaction value did not provide a justified reason for that.

It is important to highlight that non-compliance with the documentation rules qualifies as a violation of taxation obligations and often results in significant amount of penalties. The upper limit of the applicable default penalty in Hungary is HUF 2 million (approx. EUR 6,250) per documentation and HUF 4 million (approx. EUR 12,500) in the case of a repeated default.

wts TAX LEGAL CONSULTING

Additionally, on 18 November 2014 the Parliament adopted new tax law amendments being effective from 2015 with an impact on transfer pricing rules.

- The related party concept is to be broadened, whereby parties shall also qualify as related parties if there is controlling influence over business and financial policy between the parties based on overlaps in the respective management teams. Deadline for reporting the related parties is within 15 days from the first business transaction between the parties. If a taxpayer had business transactions before 2015 with such a party qualifying as related party as per the amendment, the reporting deadline was 15 January 2015. In the case of non-compliance with the reporting liability, the Hungarian tax authority may impose default penalty up to HUF 500,000 (approx. EUR 1,560) upon a tax inspection.
- Additionally, the rules on transfer pricing documentation have been tightened in that the use of statistical methods (interquartile ranges) is compulsory during database filtering. This rule has to be applied first for the transfer pricing documentation liability for tax year starting in 2015. The application of the interquartile range is required if some additional conditions listed in the regulating Decree of the Finance Ministry are met (e.g. the comparable analysis includes the data of at least 10 companies for at least three financial years).

In summary, the Hungarian tax authority pays greater and greater attention to transfer pricing issues. Due to the proposed BEPS Action Plan and in the light of recent tax law changes, it is suggested that the companies should prepare for the additional administrative tasks and be aware of possible tax consequences for non-compliance in advance.

Andrea Lakatos
andrea.lakatos@klient.hu

Tamás Gyányi
tamas.gyanyi@klient.hu

India

India signs first bilateral APA with Japan and announces principles on transfer pricing

1. India signs first bilateral APA with Japan

India has signed the first bilateral Advance Pricing Agreement (APA) with a Japanese company on December 19, 2014. The APA has been signed for a period of five years. This bilateral APA appears to be in the case of mitsui, which is one of the largest trading companies in Japan operating in diverse business including infrastructure and energy. It will provide certainty to the company operating in India and avoids conflict over sharing of taxes between India and Japan, thereby reducing transfer pricing disputes. The APA programme was introduced to bring certainty and uniformity in transfer pricing matters of multinational companies and reduce litigation. APAs will improve investment climate in the country.

On March 31, 2014 the income tax department of India has also signed the first batch of five unilateral APAs that cover a range of international transactions, including interest payments, corporate guarantee, binding investment advisory services, and contract manufacturing. These agreements were pertaining to different industrial sectors including telecommunication, financial services, and pharmaceuticals.

In the context of the growing economic ties between Japan and India, especially after the visit of prime minister of India, the bilateral APA is expected to generate positive sentiments among Japanese investor in India.

wts TAX LEGAL CONSULTING

2. Only income that arises out of international transactions and chargeable to tax will be subject to transfer pricing provision in India.

The Shell India Markets Private Ltd belongs to the Shell group of companies headquartered in Holland, allotted shares to its nonresident associated enterprises at a price which was lower than the arms' length price of issue of shares. This results in short receipt of consideration and accordingly tax authority charged interest, on the amount of short received, resulting in a transfer pricing adjustment.

The taxpayer contested this adjustment before the court and the court did decide in favour of the taxpayer on this issue.

In this connection the court has laid down two important principles on international transactions:

- "Transfer pricing principles should not be applied in absence of any income arising from particular transactions."
- "The transfer of share at a premium is capital in nature and therefore not be subject to tax."

The Attorney General (AG) has advised the government not to file an appeal against the issue at the Supreme Court. It would be helpful if the Central Board of Direct Taxes (CBDT) issues a circular on the aforesaid judgment, to provide guidance to the field officers on the applicability of the transfer pricing provisions for transactions where no taxable income arises in the hands of tax payers. It would certainly restore the much needed confidence in global investors.

Subhasis Banerjee
subhasis.banerjee@wts.co.in

Indonesia

Actual controversies in Indonesian transfer pricing audits with regard to benchmarking studies

Transfer pricing is becoming a key focus area in tax audits of multinational companies operating in Indonesia. Moreover in current tax audits, tax auditor could set their audit scope merely on affiliated transaction and disregard other transactions. Whereas previously they had to cover all transactions they now can deplete their focus only on affiliated transaction.

In current transfer pricing audits there are some potential disputes due to interpretation and different regulations. The tax auditor could refer to DGT Regulation No. PER-22/PJ/2013, meanwhile the tax payer could refer to DGT Regulation No. PER-32/PJ/2011 or vice versa. This could result in the following:

1. Arm's Length Range

The arm's length range pursuant to DGT Regulation No. PER-32/PJ/2011 is a range between quartile-1 (Q1) and quartile-3 (Q3). Meanwhile in a tax audit, if the tax auditor disagree with tax payer's transfer pricing documentation and re-generate their arm's length range, he will only consider quartile-2 as the arm's length price or profit. Therefore, even though the tax payer's price or profit falls in quartile-1 (Q1) to quartile-2 (Q2), which should be considered as arm's length, such a price or profit would be adjusted by the tax auditor. His opinion is merely based on an example mentioned in DGT Regulation No. PER-22/PJ/2013.

2. Multiple Years Data

Both the DGT Regulation No. PER-22/PJ/2013 and the DGT Regulation No. PER-32/PJ/2011 do not explicitly determine how many years of comparable data should be used to calculate an arm's length range. In general, a documentation made by the tax payer has an average of 3 years of comparable data. Since it is allowed to use either single year comparable data or multiple year comparable data, whatever the tax payer used in his documentation still could be challenged by a tax auditor and result in an adjustment during a TP audit.

3. Determination of The Net Profit

In case the profit level indicator used is net profit there could some definition problems arise as both regulations do not provide descriptions of net profit and what kind of accounts should be accounted as net profit. For example, gain or loss from foreign exchange derived from sales receivable and purchase payable, can either be accounted to determine net profit or not, if the tax payer recognizes these accounts as other income / expense in his income statement.

The implication of the points stated above for tax payer is that even though he has undertaken a detailed benchmarking analysis and identified a set of comparable uncontrolled transactions or companies in his transfer pricing documentation, this might be adjusted by a tax auditor easily. To face this condition, a tax payer should establish his transfer pricing documentation on the general accepted principles including OECD TP Guidelines to convince the tax auditor that his transactions comply with the arm's length principles.

Sri Wahyuni Sujono
sri.wahyuni@sfconsulting.co.id

Norway

Norway introduces new rules for limiting deductions for interest paid to related parties

There have not been significant changes in transfer pricing (TP) rules over the last year. However from 1.1.2014 new general rules for limiting deductions for interest paid on loans to related parties were introduced. These rules apply regardless if creditor is situated in Norway or abroad. From a cross-border perspective the rules in fact acts as a thin capitalization regulation.

The rules state that tax deduction for interest paid to related parties, if exceeding a threshold of MNOK 5,0 per income year, are capped at 30 % of debtors income/deficit with the addition of net financials, depreciation and amortization. The deduction cannot be capped above net interest on debt towards related parties. Interest capped can be carried forward for maximum 10 years. Related parties are defines as entity, company or person that directly or indirectly own or control at least 50 % of the debtor, or similar that the debtor own or control with at least 50 %.

From 1.1.2015 a new specialist TP unit is operational within the Norwegian Tax Authorities (NTA). This office will be responsible for TP cases in general (on its own and as advisor to local tax offices), and especially for MAP- and APA-cases involving NTA. The office is organized as a section under the Central Tax Office for Large Enterprises, and has recruited the former head of the MAP-department at the Ministry of Finance as its leader.

The TP unit is planned up scaled during 2015. The establishment of a specialized TP unit within NTA is by time expected to professionalize and streamline the TP work, increasing

TAX LEGAL CONSULTING

both the capacity and knowledge about TP issues in the NTA. An increased capacity for TP audits must also be expected.

As for case law, the Norwegian Supreme Court has during 2014 accepted one TP-related case. The case regards the use of secret comparables when pricing sale of natural gas. The tax payer was given access to the internal documents of the NTA regarding the tax assessment, to the degree that they did not contain confidential information about competitor prices. This in order to able the taxpayer to control what facts the NTA has based its assessment on (i.e. to control that NTA has compared "apples with apples"), as part of a lawsuit where the taxpayer argued that NTA had built the case on incorrect facts. It must be observed that the oil and gas sector is subject to special tax regulations, hence limiting the significance of the decision on to other sectors.

Ulf Sørdal
ulf.sordal@steenstrup.no

Vegard Østlid Bagstevold
vob@steenstrup.no

Poland

Major changes in CIT law and Polish transfer pricing legislation in 2015

1. Major changes in CIT law and Polish TP legislation in 2015

The year 2015 brought important changes into the Polish tax legislation, especially with respect to TP or tax evasion issues.

As of 1 January 2015, the following major amendments to the Polish TP/ CIT legislation have entered into force:

- introduction of Controlled Foreign Company (CFC) Rules imposing on Polish taxpayers an obligation to tax in Poland income generated by its CFC's;
- changes to thin capitalization tightening the deductibility of interest on related party loans;
- refinement of the 'related party' definition to cover also unincorporated organisations, such as registered partnerships, limited liability partnerships and limited partnerships;
- extension of the TP documentation requirements to:
  - joint venture agreements, partnership agreements and similar agreements between related parties;
  - transactions (i.e. allocation of revenues and expenses) between Polish taxpayer and its foreign Permanent Establishment (PE);
- possibility of making corresponding adjustments to eliminate double taxation with respect to transactions between domestic related parties, where one of the transaction parties has had transfer pricing income assessed.

The above changes are in a great extent an outcome of the last few years of efforts made by the Polish legislator to tighten the tax legislation and eliminate the existing tax evasion driven optimization structures.

The next step in the battle with tax evasion will be the introduction of specific anti-avoidance provisions that are planned to come into force as of 1 January 2016.

In should be noted, that despite the fact that neither Polish Ministry of Finance nor representatives of the Polish Government have expressed publicly their position with respect to BEPS or admitted that BEPS could define the coming changes in Polish tax legislation, from observing the overall tax legislation evolution, the further implementation of the OECD concepts resulting from BEPS is highly possible.

TAX LEGAL CONSULTING

It could be presumed that the next change in the Polish TP legislation will concern the proposed changes on TP documentation and Country-by-Country Reporting as well as the new approach to intangibles developed under BEPS works.

2. Experiences from actual TP audits

In 2015, for another consecutive year, transfer pricing issues remain the key issue for tax controls. The main focus is on business restructurings and management services.

In regard to transfer pricing, the Polish Tax Administration is becoming more and more experienced. The taxpayers should expect that the level of expertise of tax auditors will further increase in the upcoming years, particularly due to the fact that a specialized team responsible for transfer pricing audits, appointed in the structures of the Ministry of Finance, is working on the guidelines for the effective conduct in transfer pricing audits.

Maja Seliga-Kret
maja.seliga@wtssaja.pl

Paulina Bzymek-Iwanowicz
paulina.bzymek@wtssaja.pl

Spain

Spain introduced significant changes in transfer pricing legislation

1. Changes in the Spanish transfer pricing legislation

A new Corporate Income Tax Law (Act 27/2014 dated 27 November 2014) has been enacted by the Spanish Government, and it includes some changes in transfer pricing rules coming into force for the tax years beginning as from 1 January 2015. This new rules have established a more rational and consistent regulation following the EU and the OECD. In the following, the most relevant changes will be summarized:

2. Related-party definition

The shareholder interest in an entity is raised from 5% (1% for listed companies) to 25% to be considered as related party. Thus, the perimeter shareholder-entity in order to be considered as related party has been restricted and brought closer to rules applicable in most OECD countries. Although transactions between a company and its directors remain to be considered as a transaction between related parties, the remuneration of directors is excluded from being considered as a controlled transaction.

3. Selection of appropriate Transfer Pricing Methods

The new Law has removed the restriction to apply transactional profit-based methods only when none of the traditional transactional methods (CUPM, CPM and RPM) can be applied. Thus, the hierarchy between these two types of methods is no longer applicable.

Additionally, when none of the OECD transfer pricing methods can be applied, the new Law now allows using other generally accepted methods or valuation techniques as far as they are consistent with the arm's length principle.

4. Transfer Pricing Documentation requirements

The new Law provides simplified transfer pricing documentation requirements for corporations or entities with a turnover lower than 45 million euros.

Transactions excluded of documentation requirements are mainly those made with one single related party not exceeding the amount of 250,000 euros.

Spanish government has announced the new corporate tax regulation shall probably include the obligation for multinational companies to report on their activities in other countries ("country by country report" according to OECD/G20 BEPS Project). This obligation shall enter into force in 2016 so information should be included in the documentation to be kept in year 2017 when corporate income tax return is filed.

5. Secondary Adjustment rules
The application of the secondary adjustment rule may be excluded when the funds corresponding to the primary adjustment are restored between the related parties involved in the transaction.

6. Penalty regime for infringement of Transfer Pricing Documentation rules
The penalties for a formal infringement of the transfer pricing documentation requirements are reduced to 1,000 euros (currently 1,500 euros) per data and 10,000 euros per omitted, inaccurate or misleading group of data (currently 15,000 euros).

Advance Pricing Agreements:
APAs may also be applicable to non-statute-barred tax years.

7. Permanent establishments
Foreign companies having a permanent establishment in Spain are allowed to deduct royalties, interests or commissions paid in exchange for technical assistance or for the use or assignment of other items or rights derived from operations with its head office for Non-Resident Income Tax purposes (provided that a Double Tax Treaty is applicable). Nevertheless, this expenses are considered as income obtained by the foreign company without an intermediary permanent establishment and liable to subsequent witholding taxes. These operations carried out by the head office with the permanent establishment must be valued at arm's length as well.

Victor Macías
victormacias@arcoabogados.es

Mariano Blanco
marianoblanco@arcoabogados.es

Ukraine

Improved Transfer Pricing Rules in Ukraine with effect from 2015

In the end of 2014, Verkhovna Rada (parliament) of Ukraine adopted the set of laws on comprehensive tax reform. Among other things, the parliament has introduced major amendments into the transfer pricing (TP) rules, which had been applied in Ukraine since September 2013. The law # 72-VIII of 28 December 2014 that has introduced these amendments is effective since 1 January 2015.

The principal features of the improved system of TP control are as follows:

1. Arm's length principle
The arm's length principle is now explicitly stated and defined in Article 39 of the Tax Code of Ukraine setting forth the system of TP control. These rules follow the OECD standard approach. Namely, the focus of the transfer pricing is in ensuring payment of the tax out of the results of business transactions computed at arm's length.

It is assumed that the taxable profit complies with arm's length principle if terms and conditions of the transaction are not different from the terms and conditions that would be applied between independent parties in comparable uncontrolled transactions.

wts TAX LEGAL CONSULTING

2. Controlled transactions

According to the improved rules, the following transactions are deemed to be controlled:

- transactions with non-resident related parties;
- transactions on sale of goods through non-resident commercial agents;
- transactions with non-residents registered in low tax jurisdictions according to the list, adopted by the Cabinet of Ministers of Ukraine;
- the transactions between related parties with the involvement (as intermediaries) of the independent persons provided that such persons (1) do not perform any significant functions and (2) do not use significant assets and/or do not bear significant risks in transactions between related parties.

Thus, according to the new rules the transactions between Ukrainian related parties could not be regarded as controlled for the TP purposes. Earlier such transactions may fall under TP control in some cases.

The transactions according to the list are deemed controlled under the following conditions:

- income of a taxpayer and/or its related parties from any sources that is reported for the corporate profit tax purposes exceeds UAH 20 million as per results of respective year, and
- the value of such transactions of a taxpayer and/or its related parties with one counterparty exceeds UAH 1 million or three percent of the income reported for the profit tax purposes as per results of respective year.

3. Related parties

The improved rules supplement the definition of the related parties by additional technical details about the indicators of control of one entity over the other one.

The new indicator of control has been introduced. Namely, the persons are recognized as related if the overall value of loans, credits, interest-free loans, provided by one person to the other one, exceeds equity capital of the borrower in more than 3.5 times (in 10 times for financial institutions and lease companies). This rule applies also to the cases when financing is provided by various institutions but under guarantee of one person.

The definition of the related parties also envisages the right of the Ukrainian fiscal authorities to prove in the court that an entity implemented practical control over decisions of another entity, though formally independent.

4. Transfer pricing methods.

The TP methods are the same as earlier and are similar to those defined by OECD Transfer Pricing Guidelines.

At the same time, the new rules set forth the criteria following which a taxpayer should chose the method for establishing the correspondence of the price in a transaction to the arm’s length principle.

The general rule (sub-para. 39.3.2.1. of Article 39 of the Tax Code of Ukraine) provides that a taxpayer may choose any TP method which he deems appropriate with due regard to the mentioned criteria. However, in case it is possible to use comparable uncontrolled price (CUP) method and any other method such taxpayer should apply CUP method.

5. Information Sources

According to para. 39.5.3 of Article 39 of the Tax Code of Ukraine a taxpayer may use the following information for establishing that the prices are in line with arm's length principle:

- → information on uncontrolled comparable transactions of a taxpayer and of the entity, which is the party to controlled transaction;
- → any information sources that are open to general use and provide information on comparable transactions and entities.

In case a taxpayer proves the correspondence of the price to arm's length principle with the use of data from the above mentioned sources, the fiscal authority is required to use the same sources of information. The only exception is the case when it is proved that other information sources ensure higher level of comparability.

This rule is probably the most significant improvement of the TP legislation. Thus, the previous system implied that the state-controlled "official" sources of information had priority over any other sources.

6. Transfer pricing reporting.

Taxpayers that have conducted controlled transactions during the reporting year are required to submit information on such transactions as an annex to corporate profit tax return.

Taxpayers with the volume of controlled transactions with one counterparty exceeding UAH 5 million (VAT excluding) are required to submit the separate report on controlled transactions to the central fiscal authority. Taxpayers should submit such report according to the established form by electronic means by 1 May of the year following the reporting year.

According to the law that introduced the amendments, the TP report as per results of 2014 shall be submitted until 1 May 2015 taking into account the rules effective before 1 January 2015.

7. Transfer pricing documentation

The new rules of the Tax Code of Ukraine (para. 39.4.3 of Article 39) stipulate the obligation of the taxpayers, engaged in controlled transaction, to compose and keep TP documentation.

The TP documentation should contain detailed information on the controlled transactions, including details of the parties, description of TP policy of the group, conditions of each controlled transaction, description of goods (works, services), functional and economic analyses of controlled transactions and results of comparability analysis.

Taxpayers are required to submit TP documentation within a month from the day of receipt of the request from the central fiscal authority. The central fiscal authority may request such information after 1 May of the year next to the one, when respective controlled transactions were carried out.

8. Transfer Pricing Audits

The fiscal authority controls compliance with the arm's length principle by way of conducting the special tax audits on TP matters. Such tax audit may last for the period not exceeding 18 months with possible extension up to additional 12 months.

wts TAX LEGAL CONSULTING

9. Penalties

New TP rules envisage penalties for non-submission of TP report and/or mandatory TP documentation as well as for non-reporting of the controlled transactions. These penalties are as follows:

- 100 amounts of the minimum wage, set forth as of 1 January of the reporting year – in case of non-submission or late submission of the report on controlled transactions [In accordance with the law # 80-VIII of 28 December 2014 "On State Budget on 2015" a minimum wage is fixed as UAH 1378, thus this penalty makes UAH 137800];
- five percent of the value of controlled transaction that were not reported;
- three percent of the value of controlled transactions regarding which a taxpayer failed to provide the mandatory documentation. The maximum amount of such penalty is limited by 200 amounts of the minimum wage [UAH 275600, accordingly]. Yet, the wording of this cap is somewhat ambiguous and we expect practical issues in application of such cap.

10. Self-adjustment and proportional adjustment

If a taxpayer completes transactions, which do not comply with the "arm's length" principle, such taxpayer has the right to make self-adjustment of the prices and tax liabilities (sub-para. 39.5.4.1 of Article 39 of the Tax Code of Ukraine) so that to ensure that they are at arm's length. Such self-adjustment should not result in less tax payable to the budget. The new rules of the Tax Code of Ukraine clarify the procedure of "proportional adjustment" available to counteragents of the parties, whose tax liabilities were adjusted in line with arm's length principle either by the way of self-adjustment or during the tax audit. At the same time, it is not clear for the moment how this procedure would work in practice given that such counteragents may only be non-residents of Ukraine following the new definition of the controlled transactions.

11. Advance agreements

Para. 39.6 of Article 39 of the Tax Code of Ukraine provides the improved rules on advance agreements on prices. Such advance agreements are available to taxpayers deemed to be large.

A large taxpayer and the central fiscal authority can agree on the following matters:

- the types and list of goods (works, services) that are subjects of the controlled transactions;
- the methods of establishing compliance of the controlled transactions with the arm's length principle;
- the list of pricing information sources planned for the use in establishing that the conditions of the controlled transactions are at arm's length;
- the period for which the prices are agreed;
- admitted deviations from the established economic conditions of controlled transactions;
- procedure, terms of submission and the list of documents, which will be required to confirm compliance with the agreed prices in the controlled transactions.

12. Conclusion

The new transfer pricing legislation has changed "rules of the game" which by themselves were still a novelty in Ukraine. Thus, before September 2013 there were no comprehensive transfer pricing rules in Ukraine at all. Compliance with the new reporting rules requires an extensive effort on the part of taxpayers. Yet, the recent changes significantly improve the system introduced in September 2013 and bring it closer to the OECD standard.

Ivan Shynkarenko
I.shynkarenko@wts.ua

wts TAX LEGAL CONSULTING

United Kingdom

Diverted Profits Tax – A New UK Tax?

Draft legislation has been issued for a new tax named the Diverted Profits Tax ("DPT"). The new rules are aimed at two scenarios:

- Overseas companies avoiding UK corporation tax by structuring themselves so as not to have a permanent establishment in the UK;
- UK companies or UK permanent establishments which reduce their UK corporation tax by using transactions or entities that lack substance.

The proposed DPT would be charged at 25% which is higher than the usual UK corporation tax rate and would apply from 1 April 2015. A company must notify the UK tax authorities (HMRC) if it is potentially within the scope of DPT within 3 months of the end of the relevant accounting period.

Given the energy and progress made by the OECD's BEPS (Base Erosion and Profit Shifting) project there is some surprise that the UK government has taken this unilateral action and concern that the rules will prove complex and burdensome. In partial recognition of these concerns, the rules will not apply to small or medium enterprises.

HMRC contend that DPT is not covered by the UK's double tax treaties. They have also stated that the existence of a pre-1 April 2015 Advance Pricing Agreement will not, of itself, exclude a potential re-characterisation or deemed Permanent Establishment DPT charge.

Ruth Steedman
ruth.steedman@fticonsulting.com

About WTS

WTS International is a global network of selected consulting firms represented in about 100 countries worldwide. The WTS network includes experienced transfer pricing specialists and international tax professionals in various countries and provides our multinational clients with global resources and transfer pricing expertise. The WTS Global Transfer Pricing Team has extensive experience in structuring and documenting intercompany transactions on a global level. Our highest aim is to provide best possible transfer pricing solutions which are line with your company's global tax strategy and operational model so that you can focus on your core business objectives.

Publisher

WTS Alliance
P.O. Box 19201 | 3001 BE Rotterdam | Netherlands
T +31 (10) 217 91 71 | F +31 (10) 217 91 70
www.wts.de | info@wts.de

The above information is intended to provide general guidance with respect to the subject matter. This general guidance should not be relied on as a basis for undertaking any transaction or business decision, but rather the advice of a qualified tax consultant should be obtained based on a taxpayer's individual circumstances. Although our articles are carefully reviewed, we accept no responsibility in the event of any inaccuracy or omission. For further information please refer to the authors.

TAX LEGAL CONSULTING

Contact/Editors

Australia
Sharon Arasu-Koh
sharon.arasu-koh@wtsaustralia.com.au
T +61 407 595044

WTS Australia Consulting & Advisory Pty Ltd.
34 Queen Street
Level 10
3000 Melbourne
Australia
www.wtsaustralia.com.au

Burkina Faso
Marie Herman Zoungrana
zmarieherman@yahoo.fr
T +226 50 3628-49

Elites Multi Conseils International Sarl
01 BP 5911
Ougadougou 01
Porte 439
Rue 29 – 53
Burkina Faso

China
Martin Ng
martin.ng@worldtaxservice.cn
T +86 21 50478665-0

WTS Consulting (Shanghai) Ltd.
Unit 031,29F, Hang Seng Bank Tower
1000 Lujiazui Ring Road
Pudong New Area, Shanghai
200120 PRC
China
www.wts.cn

Czech Republic
Jana Alfery
jana.alfery@alferypartner.com
T +420 221 111-777

WTS Alfery s.r.o
Václavské námestí 40
11000 Praha 1
Czech Republic
www.alferypartner.com

France
Christoph Seseke
christoph.seseke@wtsf.fr
T +33 142 2705-38

WTS SELARL
57 avenue de Villiers
75017 Paris
France
www.wtsf.fr

Germany
Maik Heggmair
maik.heggmair@wts.de
T +49 89 28646-212

WTS Steuerberatungsgesellschaft mbH
Thomas-Wimmer-Ring 1-3
80539 Munich
Germany

Ghana
William Kofi Owusu Demitia
+233 302 232655
info@wts.com.gh

WTS Ghana
H/No. 904/15 Olusegun Obasanjo Way
Second Floor, Geoman House
Accra
Ghana
www.wts.com.gh

TAX LEGAL CONSULTING

Contact/Editors

Hungary
Tamás Gyányi
tamas.gyanyi@klient.hu
T +36 188 73736

WTS Klient Adótanácsadó Kft.
Stefánia út 101-103
1143 Budapest
Hungary
www.klient.hu

India
Subhasis Banerjee
subhasis.banerjee@wts.co.in
T +91 22 61471095

WTS India Private Ltd.
1 F Vandhna, 11,
Tolstoy Marg
New Delhi 110 001
India
www.wts.co.in

Indonesia
Sri Wahyuni Sujono
sri.wahyuni@sfconsulting.co.id
T +62 21 57944549

SF Consulting
Menara Karya, 21st Floor
Jl. HR. Rasuna Said Blok X-5 Kav. 1-2
Jakarta 12950,
Indonesia
www.sfconsulting.co.id

Norway
Ulf Sørdal
ulf.sordal@steenstrup.no
T +47 55 3010-17

Steenstrup Stordrange DA
P.O. Box 1150 Sentrum
5811 Bergen
Norway
www.steenstrup.no

Poland
Maja Seliga-Kret
maja.seliga@wtssaja.pl
T + 48 61 643 45 50

Doradztwo Podatkowe WTS&SAJA
Al. Jerozolimskie 81
Orco Tower Building, 22nd floor
02-001 Warszawa
Poland
www.wtssaja.pl

Spain
Mariano Blanco
marianoblanco@arcoabogados.es
T +34 934 8710-20

ARCO Abogados y Asesores Tributarios
C. Roger de Llúria, 119 4 2a
08037 Barcelona
Spain
www.arcoabogados.es

Ukraine
Ivan Shynkarenko
admin@km-partners.com
T +38 044 490 71 97

WTS Tax Legal Consulting, LLC
5, Pankivska bul., Fifth floor
01033 Kyiv
Ukraine
www.wts.ua