October 2016
2.2016

TAX LEGAL CONSULTING

WTS Transfer Pricing Newsletter

Editorial

Dear Reader,

It is our pleasure to present to you the second WTS Transfer Pricing Newsletter for 2016 on recent international developments in the area of transfer pricing.

In October 2015, the OECD has published its final reports in relation to the fifteen action points of the "Base Erosion and Profit Shifting (BEPS)" project. Now, one year later, the work is still ongoing on the OECD level. In addition, the world's national governments are at the edge of finalizing the implementation of the first BEPS'-recommendations into national legislation, especially regarding the new TP documentation approach defined by BEPS Action 13. Following this development, this Newsletter focuses on the implementation of the three-tired transfer pricing documentation approach (Master File / Local File / Country-by-Country Reporting) for various selected countries. Overall, it becomes obvious that local differences in the local implementation and interpretation of the international standards still exist and it is becoming clear that the national governments have no intention to align these differences. This will significantly increase the complexity for international transfer pricing compliance in the future.

Further changes are likely to arise from the OECD's BEPS recommended Actions 8, 9 and 10. These will be aimed at aligning more closely transfer pricing outcomes with the substance of value creation across the different parts of a multinational business.

Consequently, our WTS Transfer Pricing Newsletter shall provide you with an overview on current transfer pricing developments in this rapidly changing legal environment.

We hope you find it useful and welcome your feedback and suggestions.

If you have any questions regarding any aspects of this Newsletter, please do not hesitate to contact us.

Yours sincerely
WTS Global Transfer Pricing Team

TAX LEGAL CONSULTING

Contents

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

TAX LEGAL CONSULTING

Austria

Transfer Pricing Documentation Law (VPDG) in force

VPDG as part of EU-AbgÄG 2016 was announced on 01.08.2016 (BGBI I Nr. 77/2016). This leads to Austria now following the three-tiered OECD-proposal consisting of: "Master File", "Local File" and "Country-by-Country-Reporting" (CbCR). The contents of Master File and Local File are regulated in a draft implementing provision (VPDG-DV) which corresponds to a large extent with chapter V of the OECD-guidelines.

1. When is the documentation required?

→ Multinational corporations have to create a Country-by-Country report (CbCR), if they have total consolidated group revenue of at least € 750 Mio during the preceding financial year.

→ Entities of multinational corporations, which are resident in Austria, are obligated to create a Master File and Local File, if the revenues of the last two preceding calendar years exceeded € 50 Mio.

An Austrian entity is also obligated to hand in a Master File on request of the competent tax authority, when there is an obligation to create a Master File in another country. Master File and Local File may have to be submitted, even when the revenue has not exceeded the threshold of € 50 Mio according to existing Austrian laws, e.g. BAO and Austrian Transfer Pricing Guidelines 2010.

2. When do the documents have to be submitted?

The first documentation has to be provided for financial years beginning after 01.01.2016. The CbCR has to be transmitted no later than 12 months after the last day of the financial year of the MNE Group. Master File and Local File have to be filed within 30 days upon request by the tax authorities.

3. Are there any penalties?

Penalties are only foreseen in respect of the CbCR, which are in case of intent up to € 50.000, and in case of negligence up to € 25.000. However, bear in mind that transfer pricing documentation is often driven by foreign documentation and penalty regulations.

4. Which information has to be provided and when?

Each entity, which is resident in Austria and which is part of a multinational business group, has to inform its competent tax authority electronically and annually, whether it is the ultimate parent company. If this is not the case, the company has to inform the tax authority about the identity and residence of its ultimate parent company. First filing in this regard is due on 31.12.2016 (in cases where the fiscal year equals the calendar year).

Martin Hummer
martin.hummer@icon.at

Belgium

Mandatory TP Documentation Requirements introduced into law

Whereas Belgium did not have any formal TP documentation requirements yet, recently, the Belgium government adopted a law introducing such statutory requirement. Accordingly, when certain criteria are fulfilled, TP documentation will be mandatory in Belgium for financial years starting after 1 January 2016.Generally, the 3-tiered documentation approach as provided under the OECD's BEPS action 13 is followed. Yet, certain specific attention points are definitely worth to note. Failing to satisfy the new TP documentation requirements will result in penalties ranging from EUR 1.250 to EUR 25.000 as from the second violation.

wts TAX LEGAL CONSULTING

Country-by-Country Report

We start with the one least deviating from OECD BEPS guidance. Every Belgian constituent entity that is the ultimate parent entity of a MNE group with "gross" consolidated group revenues (operational, financial and extra-ordinary according to the explanatory memorandum) that exceed EUR 750 million, is required to submit a CbC Report (in line with the OECD template) to the Belgian tax authorities within 12 months after the closing date of the reporting period of the group. Also 'surrogate parent' rules were introduced in line with the OECD.

Master file and Local file

Next we will look into the requirements for qualifying Belgian entities or Belgian permanent establishments ("PE") of multinational groups to draft Master File / Local File TP documentation. This now has become a statutory requirement in Belgium when, on a non-consolidated basis, such Belgian tax payer in the prior year exceeded one of the following criteria (on non-consolidated basis):

→ Balance sheet total of EUR 1 billion;
→ "Gross" operational and financial revenues (excluding extra-ordinary) of EUR 50 million; or
→ Annual average number of employees of 100 (full-time equivalents)

Furthermore, whoever qualifies is required to submit the Master and Local file to the Belgian tax authorities, and not just keep this on their shelves. Whereas the Master file needs to be filed within 12 months after the close of the reporting period of the group, the Local file is required to be submitted together with the tax return (hence, potentially before the Master File).

The precise filing formats for the Master file and Local file are yet to be published in a Royal Decree, whereby it may be expected that the content of the Master file will be in line with the content provided by OECD's BEPS Action 13 Final Report (new Chapter V of the OECD TP Guidelines). The content of the Local file, however, is expected to deviate from the content suggested by the OECD.

From the law it is clear that the Local file consists of 2 parts, where the first part must contain information related to the local entity. Whereas the first part needs to be submitted by all taxpayers qualifying under the above criteria, the second (detailed) part of the Local file only needs to be completed when at least one of the Belgian taxpayers business units (any part, division, department of the Belgian company or PE grouped around a particular activity, product group or technology) has cross-border intragroup transactions in excess of EUR 1 million in the last financial year. The detailed Local file form will need to be completed for each business unit exceeding aforementioned threshold.

Initially, the Royal Decrees were expected to be published by late September, ultimately end of October 2016. However, because of the strong opposition of the Belgian business community against what they call a 'gold plating' standard that the Belgian government at first intended to require (going beyond OECD-based requirements in view of content and extent), today (as per 16 September 2016, when this article has been written) there are rumors suggesting that (at least) Local File requirements would be postponed to become effective only as per 1 January 2017. This would require an adaptation of the law.

Multinationals active in Belgium that fall under aforementioned TP documentation requirements are therefore advised to further monitor the developments, as we do so.

Andy Neuteleers
andy.neuteleers@tivalor.com

TAX LEGAL CONSULTING

China

New China TP reporting rule finalized

On 29 June 2016, China's State Administration of Taxation (SAT) issued SAT Notice 2016 No. 42 to introduce new transfer pricing (TP) reporting requirements.

Please see below the summary on the reporting requirements.

Country by country (CbC) reporting

Threshold	→ China resident enterprise being the group ultimate parent of a multinational enterprise group with consolidated revenue over RMB 5.5 billion in the last fiscal year; or → China resident enterprise nominated by the multinational group as the CbC reporting entity
Content	→ The CbC reporting forms are consistent with those in BEPS Action 13.
Submission deadline	→ 31 May of the following year

TP master file

Threshold	→ Enterprises in China having transactions with overseas related parties and belonging to a group which has prepared the master file, or → Enterprises having related party transactions over RMB 1 billion.
Preparation deadline	→ Within 12 months after the fiscal year end of the group's ultimate holding company

TP local file

Threshold	→ RMB 200 million for tangible assets transfer; or → RMB 100 million for financial assets transfer; or → RMB 100 million for intangible assets transfer; or → RMB 40 million for other related party transactions.
Preparation deadline	→ 30 June of the following year

Special file

Threshold	→ Enterprises having concluded a cost sharing agreement (CSA); or → Enterprises with a debt-to-equity ratio exceeding the official requirements
Submission deadline	→ 30 June of the following year

Taxpayers are advised to manager the TP compliance risks under the new TP reporting requirements:

1. Assess if the threshold for the TP reporting is met.
2. Conduct health check on its current related party transactions.
3. Communicate with overseas headquarters for TP reporting preparation.

Martin Ng
martin.ng@wts.cn

Maggie Han
maggie.han@wts.cn

TAX LEGAL CONSULTING

Germany

Government Draft regarding the implementation of OECD BEPS's three-tired documentation concept was published on July 13, 2016

A Government Draft Bill regarding the implementation of the three-tired transfer pricing documentation was published in Germany on July 13, 2016. No final statutory requirements regarding the OECD BEPS's documentation concept have therefore implemented in Germany yet. Nevertheless, it is expected that the rules stated in the draft bill are close to final and only minor changes (if any) will be made in the final law. Unfortunately, it is still unclear when the final wording of the law will be published, but in any case it is expected to be finalized within this year. The draft bill has also announced the publication of further transfer pricing (documentation) related guidance in Germany, in particular an ordinance providing details about the information that need to be provided, when the new law is to be applied.

The regulations stated in the Government Draft Bill and its explanations basically state that Germany will follow the OECD BEPS recommendations as delivered in BEPS Action 13. Therefore, German documentation rules within the BEPS environment are expected as follows (taking into account the existing legal obligations):

Local File

Entities obliged to prepare Local File:
- Taxpayers conducting transactions with related parties (direct/indirect shareholding ≥ 25%)
- Taxpayers conducting dealings with their foreign Permanent Establishments
- Simplifications for small entities (transaction volume for the sale/purchase of goods to/from related parties < EUR 5 million or transaction volume of all other transactions with related parties < EUR 500,000
- Additional documentation for extraordinary business transactions (e.g. relocation of functions, business restructurings, transfer of intangible assets incl. future profit potential)

Deadline for preparation/submission:
- No formal deadline is established to complete the Local File
- Local File should be submitted within 60 days upon formal request of the tax authorities
- Documentation for extraordinary business transactions should be prepared within 6 months after business year end and submitted within 30 days upon formal request

Transactions covered:
- All transactions with the related parties (direct/indirect shareholding ≥ 25%)
- Dealings with Permanent Establishments

Content:
- OECD BEPS requirements + further specific information (e.g. Information about the time transfer prices have been set should be included, reasons for ongoing losses)
- Almost all information required by OECD BEPS is already covered by existing legal obligation
- Upcoming ordinance to be issued by Federal Tax Office will provide further information

wts TAX LEGAL CONSULTING

Master File

Entities obliged to prepare Local File:

- Taxpayers that are part of a multinational group with group consolidated turnover of at least EUR 100 million

Deadline for preparation / submission:

- Expected to be identical to Local File requirements

Content:

- General information about the Group according to BEPS recommendations
- Upcoming ordinance will provide further information

The submission of Master and Local File will be enforceable with penalty:

- Increase of tax base / shift of burden of proof
- Penalties based on income adjustment
- Fine of EUR 100 per day for delayed submission

Country-by-Country Reporting (CbCR)

Germany also signed the MCAA regarding the exchange of the CbCR and started to implement CbCR obligations for an domestic ultimate parent company with declared revenues of at least EUR 750 million in the consolidated financial statement. The content should be identical with OCED BEPS's recommendations, i.e. the same items are covered. Nevertheless the exact wording of the items in German language could lead to different interpretations by the (German) taxpayer.

The obligation to file the CbCR applies for all financial years beginning after December 31, 2015. The deadline to file the report is one year, a late submission leads to a fine of up to EUR 5,000.

Maik Heggmair
maik.heggmair@wts.de

Hungary

New domestic regulations introduced on royalties in the light of BEPS

Although we still do not have too much information on the implementation of the country by country reporting system in Hungary, the Government introduced new rules with reference to BEPS which could strongly impact intragroup royalty benefits. Being in force as of 16 July 2016, the rules of Act on Corporate Income Tax (hereinafter: CIT Act) has been amended in connection with the taxation of royalties with regards to the requirements of the BEPS Project. As the Hungarian tax administration reported, the new rules provide that the taxpayers become entitled for CIT base allowance to the extent their value added to the intangible assets in question in order to avoid profit shipment based tax planning.

Looking back to the near past, Hungary had a friendly tax regime for companies with considerable revenue deriving from intangible assets, also providing a good tax planning opportunity for MNEs. The Hungarian corporate income tax rate is reduced to 10% up to a tax base of HUF 500 million (approximately EUR 1,600,000) which is applicable without any conditions, while 19% is payable on the rest of the tax base. The tax base could be reduced by 50% of the revenue generated from royalties under certain conditions resulting in an effective CIT rate of 5% for companies collecting royalties. Royalties were exempted under local business tax regime as well.

Now, the Hungarian Government narrowed the above favorable opportunities in many aspects (mostly applicable to newly acquired or produced intangible assets).

- **Change in the definition of royalty.** The revenue deriving from know-how, trade-marks is excluded in order to be considered as royalty in terms of CIT and local business tax. The favorable tax treatment remained e.g. for patent, utility model protection, microchips (rights are listed exclusively in the CIT Act and in Act on Local Taxes respectively).
- **Tightening tax base erosion.** 50% of the profit from the royalty transactions is deductible instead of 50% of the revenue generated.
- **Necessity of value creation with own resources.** If a company orders R&D from a related party for the purposes of acquiring or producing an intangible asset entitling a royalty, generally the items adjusting the tax base can/shall be taken into account only at the proportion of direct R&D costs arising within its own sphere of activity relative to total R&D costs.
- **Documentation liability.** The above ratio (direct R&D costs/total R&D costs (including R&D provided by related company) has to be substantiated in writing to qualify for tax base allowance. The CIT Act does not specify the source and content of this documentation; even a modified TP documentation may be eligible for this.

All in all, we recommend MNEs allocating royalties to their Hungarian member firms should review their contractual relations and any intangible asset transfers that took place recently also in the light of the current transitional rules determined simultaneously with the creation of the new regulations.

Béla Kovács
bela.kovacs@klient.hu

Tamás Felsmann
tamas.felsmann@klient.hu

India

India implements Action 13 Plan of OECD

Ease of doing business in India is a key focus of the Indian government as it is pushing hard the 'Make in India' theme. In October 2015, OECD as a part of BEPS project had issued the final report on Action 13 which recommended three tiered approach [i.e. Master File, Local File and Country-by-Country Reporting (CbC reporting)] for the Transfer Pricing (TP) documentation. Indian government, in line with Action 13, through its Finance Act 2016 has introduced 'CbC reporting' and 'Master file' norms for TP documentations.

The essential elements of CbC reporting in India are:

- CbC reporting is effective from Financial Year 2016-17 (01 April 2016 to 31 March 2017)
- The due date for filing the first CbC report will be 30 November 2017
- The threshold for filing the CbC report has been maintained at EUR 750 million. Thus, all taxpayers having an annual group turnover of more than EUR 750 million in the immediate proceeding financial year shall have to file the CbC report
- The format/ template for the CbC report is yet to be prescribed. It is anticipated that, the format/ template will be in line with Action 13. Therefore, the information for each entity in the CbC report includes Revenue, Profit/loss before tax, taxes paid, taxes accrued, stated capital, accumulated earnings, No. of employees, Tangible assets not being cash or equivalents, details of each group entity including residential status, and main business activity etc.
- In order to verify the accuracy of the contents of the CbC report, prescribed authority can call for documents/ information from the entity which has filed the CbC report

wts TAX LEGAL CONSULTING

As far as the **Master File** is concerned, the Finance Bill 2016 states that same will have to be maintained and detailed rules regarding the same will be notified at a later date. However, no such rules are notified as on date. Further, no threshold for preparation of the master file is prescribed as yet. As far as the Local File is concerned, existing regulations already contain sufficient safeguards and same may continue or may be aligned to the recommendations of BEPS report. However, same will be clear only once the government issues detailed Rules in this regard. Significant **penalties have also been prescribed** for non filing of Master File, CbC report and for providing inaccurate information.

India crosses "100 plus"-mark in APA signings

The total number of APA signed by India's Central Board of Direct Taxes is 103 as on 30 September 2016. Out of 103 APAs signed, 4 are bilateral APAs. The progress in 4 year's span is commendable and demonstrates Indian government's commitment to foster a non-adversarial tax regime.

Sudhir Nayak
sudhir.nayak@
dhruvaadvisors.com

Nigeria

Nigeria Gets Set for the Full Implementation of Country-by-Country Report Framework

On the 5th of October, 2015, the Organization for Economic Cooperation and Development (OECD) released the final report of the 15-point Base Erosion and Profit Shifting (BEPS) action plans. The underlying purpose of the 15-point BEPS action plan is to combat tax avoidance strategies and to ensure that profits are taxed where economic activities take place. Over 100 countries, including Nigeria, are actively collaborating on a global front to tackle BEPS.

The Federal Inland Revenue Service (FIRS) – the body saddled with the responsibility of administering federal tax laws in Nigeria - has shown tremendous interest in the implementation of the BEPS action plans with emphasis on Actions 8 to 10 and 13. Since the Nigerian Transfer Pricing Regulations are to be applied in a manner consistent with the OECD guidelines, as may be updated from time to time, Actions 8 to 10 which focus on updates to the OECD Transfer Pricing Guidelines can be adopted automatically.

Action 13 requires Multi-National Enterprises (MNEs) to have a three layered Transfer Pricing Documentation consisting of the Master File, Local File and Country-by-Country (CbyC) Report. The CbyC Report will contain, amongst other things, a summary of income earned, tax paid, and number of employees across the different jurisdictions of operation of an MNE in a tax reporting period. The CbyC Report is to be filed in the country of the MNE's ultimate parent and shared with tax administrators of other countries under an exchange of information framework/agreement.

On the 27th of January 2016, Nigeria joined 30 other countries to sign the Multilateral Competent Authority Agreement (MCAA) for the Exchange of CbyC Reports. As displayed on the OECD's website, the list of signatory countries to the MCAA has risen to 44 countries (as at 30th June, 2016). The Federal Executive Council (FEC) of Nigeria, on the 3rd of August, 2016, announced its approval of the MCAA. With the FEC approval, Nigeria is now more set for the full implementation of the CbyC Report framework.

TAX LEGAL CONSULTING

However, for the MCAA to have legal effect in Nigeria, it must be ratified by the National Assembly in accordance with Section 12 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (the Constitution). We therefore expect the Executive arm of Government to forward a bill to the National Assembly for the ratification of the MCAA. This process may take many months or even years, depending on the priorities of the National Assembly.

In the meantime, FIRS seems to have "creatively" incorporated some of the information contained in the CbyC Report into its transfer pricing audit process by requesting that MNEs shall provide relevant information contained in the CbyC template. Although, the legality of this request by FIRS has not been challenged, in our opinion, it is doubtful whether FIRS can legally compel an MNE to provide information on all countries within its group. The information that FIRS can legally request for are those relating to transactions carried out between the Nigerian branch/subsidiary and other affiliated entities. The situation will be different once the MCAA is ratified in accordance with the Constitution. Once this is done, FIRS would be entitled to receive the CbyC Reports of MNEs.

Olaleye Adebiyi
olaleye.adebiyi@wtsnigeria.com

Norway

Implementation of BEPS-Actions

The Norwegian government has been an active participant in the BEPS project. Implementation of some of the suggested changes will require new legislation, while other will require changes in the existing tax treaties. Changes to the OECD Guidelines will come into effect immediately in Norwegian tax practice as the Norwegian Tax Act section 13-1 (4) set forth that the OECD Guidelines are to be considered in transfer pricing cases.

The Ministry of Finance has been working with implementation of actions on a continuous basis throughout the BEPS project. The following actions have already been implemented:
- Action against hybrid mismatch arrangements was introduced in 2016; tax exemption method for dividends will not apply if the distributing entity has received a deduction for the same amount in taxable income in its jurisdiction (Action 2)
- CFC-rules are implemented and have a broader application than OECD recommendations (Action 3)
- Interest deduction limitations rules for related entities was implemented in 2014 and tightened in 2015 (Action 4)

In a tax reform paper released by the government in late 2015, there are ongoing discussions on further implementations of
- Further actions against hybrid mismatch arrangements (Action 2)
- CFC rules and low-tax-jurisdiction definitions adapted to OECD recommendations (Action 3)
- Expanding interest deduction limitation rules to include unrelated entities (Action 4)
- Withholding tax on royalties
- Withholding tax on interests to non-treaty countries
- Country by Country reporting rules (Action 13). A legislation process is ongoing and new regulations are expected to be in effect from 1 January 2017.

Torgeir Fjeldskaar
tfj@steenstrup.no

Ulf Sordal
ulf@steenstrup.no

TAX LEGAL CONSULTING

Poland

Update on the implementation of CbC Reporting in Poland

As we have informed you in WTS TP Newsletter #3.2015 Poland has been at the forefront of implementing BEPS measures with respect to transfer pricing. Just three weeks after OECD released the final BEPS reports on 5 October 2015, the President of the Republic of Poland signed amendments to Income Tax Laws implementing the outcome of the BEPS Action 13.

The above amendments introduced Country-by-Country Reporting (CbCR) for Polish holding companies of multinational groups having consolidated revenues over EUR 750 million. The qualifying taxpayers will be required to submit the CbCR for the first tax year starting after 31 December 2015 within 12 months from the end of this year. This means that the first reports shall be filed in December 2017.

Following that, Poland signed the Multilateral Competent Authority Agreement for the exchange of CbCR on 27 January 2016.

Although CbCR is already in force, there was no official publication of a decree setting out a form of that report (the draft released in 2015 followed strictly the OECD template). Additionally, Ministry of Finance plans to repeal Article 27 (6) of the CIT Act (which requires CbCR to be filed on paper) and introduce a new regulation forcing taxpayers to make these filings electronically. The new regulation is contained in the draft act on the exchange of tax information with other countries and currently under public consultations.

The draft law seeks to enlarge the range of entities that could be liable to file CbCR. The above requirement will affect Polish taxpayers if:

- the ultimate parent is not required to file CbCR in its home country;
- the ultimate parent is established or has its place of management in a jurisdiction which has not entered with Polish authorities into a relevant agreement on the exchange of CbCR;
- the ultimate parent is established or has its place of management in a jurisdiction which has suspended automatic exchange of information or has persistently defaulted in providing such information automatically to Polish tax authorities.

The above regulations will not be enforced upon Polish taxpayers providing that the ultimate parent will appoint a specific entity to file the CbCR for the group. However, such appointed entity has to have its seat in an EU country or non-EU country applying the exchange of the tax information.

Moreover the draft law requires the Polish taxpayers to make a formal statement on which company is the reporting entity for CbCR in the group and indicate a country in which CbCR will be filed. Such statement shall be made until the last day of the tax year subject to CbCR requirement (for some taxpayers on 31 December 2016 at the latest).

Taxpayers in breach of their CbCR obligations or taxpayers that fail to make the statement on CbCR reporting entity will be subject to a fine. The Ministry of Finance will assess each time a fine on case by case basis. The maximum amount of the fine is one million zloty.

To conclude, the Polish taxpayers operating within domestic or the multinational capital groups could be required to file within the next 3 months the statement on CbCR reporting entities depending on the pace of agreeing new law.

Maja Seliga-Kret
maja.seliga@wtssaja.pl

United States

Proposed Section 385 Regulations

On October 13, 2016, the U.S. Treasury Department and Internal Revenue Service ("IRS") issued final and temporary regulations under Internal Revenue Code Section 385 (the "Regulations") dealing with the characterization of certain instruments issued by a U.S. corporation to an affiliated entity as debt or equity.

Historically, the characterization of instruments as debt or equity has been grounded in case law and has been based on all of the facts and circumstances, including the legal rights and economic position of the parties. The case law did not generally articulate absolute requirements that must be fulfilled in order for an instrument to be treated as debt, nor did it exclude tax-driven financing arrangements from qualifying as debt. The Proposed Regulations would materially alter the current landscape in three certain key respects.

1. Documentation
In order to avoid stock treatment, taxpayers will be required to prepare and maintain certain documentation. This documentation must provide for four essential characteristics of indebtedness: i) a legally binding obligation to pay; ii) creditors' rights to enforce the obligation; iii) establishing a reasonable expectation of repayment; and iv) an ongoing relationship during the life of the instrument consistent with arm's length relationships between unrelated debtors and creditors. These rules only apply to a U.S. corporation where it or a memeber of its group: (i) is publicly traded; (ii) has assets in excess of $100 million; or (iii) has revenue in excess of $50 million. The documentation must be completed by the filing of the corporation's tax return (with extensions). The rules are effective for debt instruments issued on or after January 1, 2018.

2. Recharacterization of Certain Transactions
The Regulations provide that certain related-party financing transactions are automatically treated as stock. These include certain distributions of debt instruments and the issuance of debt instruments in connection with the acquisition of stock or assets from a related party in certain transactions. There is an exception to the extent of the group's earnings and profits generated in years ending on or after April 4, 2016. Further, under a "funding rule," any debt instrument issued within 36 months before or after a taxpayer's implementation of a "tainted" transaction is automatically recharacterized as stock to the extent of the amount of the "tainted" transaction. There is an exception to the funding rule for debt issued in the ordinary course of business.

The Regulations are generally effective October 21, 2016. Importantly, the provisions that recharacterize certain transactions as stock would apply to transactions taking place on or after April 16, 2016, subject to a grace period to unwind such transactions.

The Regulations will require companies to significantly rethink their approach toward intercompany loan transactions including certain common leveraging transactions. Timely arm's-length documentation requirements must be fulfilled as a threshold matter. This includes reasonably establishing and documenting the borrower's ability to service the debt. This may lead to more robust audit scrutiny of related party debt arrangements. Although benchmarking of interest rates would remain a key element of a transfer pricing analysis, a holistic and more comprehensive approach will be warranted in many cases.

Francis Helverson
fhelverson@wtsus.com

Andrea Adler
aadler@wtsus.com

wts TAX LEGAL CONSULTING

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

Contact/Editors

Austria

Martin Hummer
martin.hummer@icon.at
T +43 732 69412 9894

ICON Wirtschaftstreuhand GmbH
Stahlstraße 14
A-4020 Linz
Austria
www.icon.at

Belgium

Andy Neuteleers
andy.neuteleers@tivalor.com
T +32 471 89 23 16

Tivalor
Brussels / Antwerp / Luxembourg
Havenlaan 86C / 419
1000 Brussels
Belgium
www.tivalor.com

China

Martin Ng
martin.ng@wts.cn
Maggie Han
maggie.han@wts.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

Germany

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

WTS Germany / WTS Steuerberatungs-gesellschaft mbH
Thomas-Wimmer-Ring 1 – 3
80539 München
Germany
www.wts.de

TAX LEGAL CONSULTING

Contact/Editors

Hungary
Béla Kovács
bela.kovacs@klient.hu
Tamás Felsmann
tamas.felsmann@klient.hu
T +36 1 887-3700

WTS Klient Tax Advisory Ltd.
101-103.
Stefánia
1143 Budapest
Hungary
www.klient.hu

India
Sudhir Nayak
sudhir.nayak@dhruvaadvisors.com
T + 91 22 61081099

Dhruva Advisors LLP
1101 & 1102, One Indiabulls Centre,
Tower 2B, 841, Senapati Bapat Marg
Elphinstone Road (West)
Mumbai 400 013
India
www.dhruvaadvisors.com

Nigeria
Olaleye Adebiyi
olaleye.adebiyi@wtsnigeria.com
T +234 803 402 1038

WTS ADEBIYI & Associates
House 20, Wema Terrace
Udi Street, Osborne Estate
Ikoyi, Lagos
Nigeria
www.wtsnigeria.com

Norway
Torgeir Fjeldskaar
tfj@steenstrup.no
T +47 55301049
Ulf Sordal
ulf@steenstrup.no
T +47 55301017

Advokatfirmaet 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 Sp. z o.o.
Towarowa 35
61-896 Poznan
Poland
www.wtssaja.pl

United States
Francis Helverson
fhelverson@wtsus.com
Andrea Adler
aadler@wtsus.com
T +1 973 871 2040

WTS LLC
67 East Park Place 6th Floor
Morristown, New Jersey 07960
USA
www.wtsus.com