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WTS Transfer Pricing Newsletter

Editorial

Dear Reader,

It is our pleasure to present to you the second edition of our WTS Global Transfer Pricing Newsletter for 2022.

In this latest edition of the WTS Transfer Pricing Newsletter, our colleagues from 14 countries provided an update on recently introduced legislations and cases.

Europe

Our **Austrian** colleagues present the new information of the Austrian Tax regarding Mutual Agreement Procedures as well as Arbitration Procedures.

In **Denmark**, new rules governing the submission of local TP documentation were established. Our colleagues provide a brief overview.

Our team in **France** discusses recent case law regarding intercompany cash pool interest rates in a decision involving the SAP Group.

Hungarian TP rules are to change significantly in accordance with the bill submitted to the Hungarian Parliament in the summer of 2022. Our local colleagues provide some details.

The **Irish** Tax Institute has published its opinion on the upcoming ATAD3 directive by the EU. Our local colleagues present the topic in more detail.

The **Italian** Tax Agency recently issued a ruling analyzing the application of the DAC6 legislation with respect to TP adjustments. The article sheds some light on this ruling.

Our team in the **United Kingdom** took part in the recent TP Minds Conference and in this article discusses the statements published by the UK Tax Authorities.

Rest of the world

In **Argentina**, the Argentinian Tax Administration has published a new version of its list on tax havens or low-tax jurisdictions.

Our colleagues in **Brazil** report on the latest development in the alignment of the Brazilian Tax Authorities and the OECD in terms of Transfer Pricing.

Out team in **Chile** presents a summary as well as practical insights from recent transfer pricing audits in Chile.

In **China**, the Customs and Taxation Department introduced a pilot mechanism targeting the solution of double taxation issues through interdepartmental cooperation. Our local colleagues provide some details on that development.

Our **Indian** colleagues present some measures taken by the Indian Tax Authorities to facilitate effective and robust dispute resolution with respect to MAP, APA and Safe Harbour Rules.

The **Kenyan** Tax Authorities issued amended provisions regarding income tax law and transfer pricing. Our colleagues in Kenya describe the most notable changes.

More than 5 years after the signing of the Multilateral Instrument, **Senegal** deposited its instrument of ratification, which is a huge step forward in the battle against tax evasion & avoidance.

Yours sincerely,

WTS Global Transfer Pricing Team

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Austria

New Info from the Austrian Ministry of Finance – Mutual Agreement Procedure and Arbitration Procedure

The new info from May 5, 2022 presents the current legal opinion of the Austrian tax authorities with regard to bilateral MAP and AP. It provides an overview of the formal and substantive framework of these procedures in Austria and is designed as a guideline. This current information replaces the former info of July 24, 2019. **For the first time, this information also contains explanations on the procedure according to the EU-BStbG.**

Four legal institutions are available to avoid double taxation (free choice):
- Mutual Agreement and Arbitration Procedure under the DTA
- Mutual Agreement and Arbitration Procedure under the MLI
- Procedure under the EU Arbitration Convention
- Procedure under the EU-BStBG

Austria has implemented the Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the European Union (EU-Streitbeilegungsrichtlinie) by means of the EU-Besteuerungsstreitbeilegungsgesetz (EU-BStbG), which is applicable as of the 2018 taxation period.

The EU-BStbG provides for a **binding dispute resolution** in a **two-stage procedure** for **intra-European taxation disputes** arising from differences in the interpretation or application of DTAs or the EU Arbitration Convention (convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 90/463/EEC):
- Mutual agreement procedure – MAP (§§ 22 – 25 EU-BStbG)
- If necessary, subsequent arbitration procedure (§§ 32 – 65 EU-BStbG)

Procedures under the EU-BStbG are initiated by means of a dispute resolution complaint (Streitbeilegungsbeschwerde). The complaint must be filed within **three (3) years** from the date of receipt of the notice of assessment relevant to the double taxation. The application must be submitted together with the **minimum information** required under § 9 EU-BStbG.

The dispute resolution complaint in accordance with the EU-BStbG must be filed in both member states concerned. In Austria, this is the **tax office for large companies.** The dispute resolution complaint must be submitted electronically via **FinanzOnline.** The decision on the admissibility of the dispute resolution complaint must be made within **six months** of receipt (or receipt of the complete remedy of defects or receipt of complete additional information). If the MAP under the EU-BStbG has ended without agreement, the person concerned may submit a written request for the establishment of an **arbitration tribunal within 50 days** of receipt of this notice to launch the AP.

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Denmark

Mandatory Submission of Transfer Pricing Documentation in Denmark during 2022

Denmark has introduced new rules which stipulate an obligation for all Danish companies meeting certain criteria to submit TP documentation for FY 2021 to the Danish Tax Authority during 2022.

The TP documentation must be submitted to the Danish Tax Authority no later than 60 days after the deadline for filing the corporate income tax return. Danish companies with the calendar year as their fiscal year must submit the income tax return no later than June 30, which means that the TP documentation must be submitted by the end of August.
In case of non-compliance of the formal TP documentation requirements or late filing, penalties of DKK 250,000 per company and year plus 10 percent of a potential income adjustment may be imposed. In addition, the burden of proof may shift to the taxpayer in the event of a tax audit relating to transfer pricing.

Danish companies are required to prepare TP documentation if they belong to a multinational group that:

- → has 250 or more employees, or
- → has a turnover (revenue) exceeding DKK 250 million and a balance sheet total exceeding DKK 125 million.

The above thresholds are measured on a group level. Permanent establishments are also covered by the TP documentation requirements.

The TP documentation to be submitted consists of two documents: a Master file and a Local file. The Master file is prepared for the group's operations and a Local file for each country where the group operates.

- → The Master file contains, e.g. an overview of the group's operations, Transfer Pricing policy, information on important agreements, financing and financial information such as consolidated accounts.
- → The Local file contains, e.g. detailed information about the local operations and the cross-border transactions in which the companies in the relevant country are a party. In addition, the transfer pricing method for each transaction must be documented and financial information such as the annual report must be attached.

To support the alignment of pricing of intra-group transactions with the arm's length principle (i.e. market price), relevant benchmarking analyses should be prepared.

Our comments

Groups that conduct business in Denmark should review their routines for preparing and updating TP documentation, as well as benchmarking analyses, as soon as possible to ensure that these meet the Danish legal requirements. If no TP documentation has yet been prepared for FY 2021, it is essential to initiate the work of preparing the TP documentation and finalizing it in due time before the deadline for submitting it to the Danish Tax Authority later this year.

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France

The SAP Case: The Difficulty for Tax Courts when Handling Negative Interest Rates

Facts

SAP France, a French affiliate of the German group SAP, signed a cash pooling contract with SAP SE (German-based parent company), according to which all cash advances would be remunerated at EONIA -0.15%. During the years 2012 and 2013, which were audited by the French Tax Administration, SAP France deposited between EUR 132 million and EUR 432 million into the cash pool. However, at that time, EONIA was such that EONIA -0.15% would have been a negative rate – meaning that SAP France would have had to pay interest on the amounts deposited. To prevent this, the contract contained a flooring mechanism, by which interest rates would be floored at 0%. SAP France therefore deposited its cash at 0%.

This was challenged by the French Tax Administration, which considered that SAP France should have perceived interest on the amounts deposited. The reassessment was subsequently confirmed by both the administrative court of Montreuil and the administrative court of appeal of Versailles[1].

A debatable reassessment

The reassessment appears debatable on at least two grounds: in principle to begin with, and in how it was calculated too.

Generally speaking, the administrative court of appeal of Versailles acknowledged that the 0% interest applied should be viewed as an uncompensated advantage granted by SAP France to SAP SE. By acknowledging that the 0% interest rate constituted an uncompensated advantage granted by SAP France to SAP SE, the administrative court of appeal of Versailles is concluding that the FTA has correctly furnished the required proof. This is debatable for several reasons, mainly in that:

- 1) the 0% rate is actually an exception to the contractual rule, according to which a negative rate should have been applied: flooring the rate at 0% is therefore an advantage granted by SAP SE to SAP France, and not the other way round;
- 2) even though SAP France is not remunerated on its deposits, the fact remains that it draws several advantages by participating in the cash pool and depositing its excess cash, such as better cash management and better access to funds should the need arise. Therefore, even if the 0% rate were to be seen as an advantage (which it should not), it is hardly uncompensated.

Moreover, the way the reassessment was calculated also seems highly debatable: the French Tax Administration considered that the proper remuneration for these cash deposits was the official rate for overnight deposits as published by the *Banque de France*, which was between 0.15% and 0.18% during the audited years. This is also questionable insofar as, to the best of our knowledge, this rate is not used by any major financial institutions in calculating market rates for loans or advances, whereas the EONIA rate is a widely-used reference for this exact purpose. It is therefore unclear why the Banque de France rate, which is mainly used for individual persons (e.g.: for an overdraft fee if a person's banking account goes negative) would be judged as more relevant than EONIA for an intragroup loan.

1 Administrative court of appeal of Versailles 17-12-2021 n° 20VE01009, SAP Holding

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While it is not clear yet if other courts will take similar positions, it can only be recommended that any company having dealt with similarly floored rates should prepare an in-depth justification of them. Moreover, this may lead to complicated situations of double taxation as it seems doubtful whether, in this case for example, the German tax authorities would agree that the German company should have paid interest to the French company when the contractually agreed interest rates were negative.

Hungary

TP Update

Hungarian TP rules are to change significantly in accordance with the bill submitted to the Hungarian Parliament in the summer of 2022.

Definitions

By modifying the Hungarian Corporate and Dividend Tax Act, the proposal clarifies the definition of the arm's length price and the arm's length range in connection with Transfer Pricing. The newly introduced concepts are in line with the definitions of the OECD Guidelines, which were already considered authoritative anyway, so their introduction only represents a technical, not a substantive change.

Reporting obligation

As a brand-new reporting rule, taxpayers subject to the Transfer Pricing documentation obligation must also report data in connection with determining arm's length prices in their corporate tax returns. Taxpayers have already had to prepare their Transfer Pricing documentation parallel to their corporate tax returns in any case, but this documentation did not have to be submitted together with the tax return. The data reporting obligation shall apply to tax returns submitted after December 31, 2022.

Use of interquartile range – modifications to median

The use of the interquartile range will be compulsory or expected more widely than at present (in certain cases a minimum-maximum range was acceptable).

Based on the new provisions, if the price applied falls into the arm's length range, there is no scope for a Transfer Price adjustment, the consideration should be deemed the arm's length price. If the consideration applied is outside the arm's length range, as a rule, only the median can be considered as the arm's length price, and the Transfer Pricing adjustment must be made to this point. The exception to this is if the taxpayer verifies that a value within the range other than the median reflects the transaction under review the best, in which case an adjustment should be made to that value instead of the median.

The provisions defining the amended interquartile rule and the adjustment point are first to be applied when establishing the tax liability for the fiscal year starting in 2022.

Changes in tax inspections

To prevent the tax authority from making findings contradicting the future resolution determining the arm's length price, the Act on Rules of Taxation excludes the ordering of tax inspections against taxpayers during the procedure for determining the arm's length price

(APA procedures). The amendment clarifies that this prohibition only applies to full scope tax inspections resulting in an audited period. The legislator also specifies an exception for checks prior to disbursements, to detect unauthorised tax claims and refunds and to make informed decisions on the legality of payments.

Default penalty and raising of APA fees

Based on the new Hungarian Transfer Pricing rules, the default penalty is to increase significantly. For missing or incomplete Transfer Pricing documentation, the maximum fine will increase from HUF 2 million to HUF 5 million, and for repeated infringements from HUF 4 million to HUF 10 million.

Because of the amendment of the Act on Rules of Taxation, the fee for the procedure to establish the arm's length price (APA) will also rise. It will be HUF 5 million in unilateral proceedings and HUF 8 million in bilateral or multilateral proceedings. Payment in instalments or deferred payments are not permitted.

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Ireland

The Irish Position on the proposed ATAD3 Directive

The European Commission is working on a proposed directive (ATAD3) which will bring measures to prevent the misuse of shell entities for tax purposes.

The directive is being developed and the European Commission has asked for feedback from countries with regard to the content of the proposed directive. The Irish Tax Institute, which is the representative body of tax advisors, has provided feedback that will hopefully be considered for legislative debate.

Amongst the various concerns that the Irish Tax Institute has brought to the attention of the European Commission are:

- 1. the overlap with existing measures, and;
- 2. the compatibility with fundamental freedoms and general principles of EU law.

The Irish Tax Institute's position is that recent reforms tackling tax avoidance and evasion have just been incorporated into domestic legislation and countries are not yet certain of the effectiveness of those measures. Several rules have been implemented by countries, such as but not limited to: CFC, exit tax, anti-hybrid, interest limitation and general anti-avoidance.

As an example, we look to CbCR, which has recently been enforced and must be incorporated into domestic legislation by June 2023. Countries are not yet aware of the issues that will arise, if any, in transposing the directive into their domestic legislation or if the introduction of this piece of legislation will suffice to guarantee anti-tax avoidance measures. The Irish Tax Institute believes that time should be afforded to countries to access the outcome of the introduction of such rules before increasing the administrative burden further on taxpayers. It further believes that care should be taken before introducing new measures to tackle the same matters, without knowing if the previous reforms were successful in solving issues or not, especially in circumstances where existing Transfer Pricing and CFC rules approach many of the same issues that ATAD3 intends to cover.

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The implementation of the ATAD3 will not prevent member states applying their own anti-tax avoidance rules when the substance of an undertaking is considered. This means that both ATAD3 and domestic rules will be applied to the same facts, which is likely to *"amplify tax and legal uncertainty for such business rather than reducing it"*, according to the Irish Tax Institute opinion on the matter.

The proposed directive also appears to conflict with principles of European law, particularly in relation to the freedom of movement of capital. ATAD3 requires that an undertaking should have an active EU bank account, further conflicting with the EU principle of fundamental freedom, in that the directive requires that employees should be resident in the member state where the undertaking is being carried out, disregarding scenarios that presented themselves during Covid-19 and which are now being incorporated into normal working patterns of remote working where such duties can be carried out remotely.

These are just two of the issues the Irish Tax Institute brought to the attention of the European Commission in the feedback provided to the EU Commission. There is of course no obligation to take the considerations on board, much less implement them. However, as we understand it the hope of the Irish Taxation Institute was that the feedback would be considered and would result in amendments to the envisaged directive to allow it to align with current working practices, the general principles of European Law and would furthermore not result in the hasty implementation of additional requirements without having yet seen the efficacy of previous measures in the attempts to tackle the ongoing problem of anti-avoidance.

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Italy

DAC6 Reporting: Year-End TP Adjustment

The Italian Tax Agency recently issued a ruling (No. 78/E dated December 31, 2021) analyzing the application of the DAC6 legislation with respect to TP adjustments.

In particular, Italian taxpayers have requested clarifications regarding year-end TP adjustments and if they should be interpreted as cross-border agreements (under hallmarks C1, points b.1 and b.2).

Based on EU Directive 2018/822 ("DAC6 Directive") as enacted in the Italian domestic law with decree no. 100/2020, such cross-border arrangements are reportable if at least one of the following conditions is met, i.e. the entity benefitting from the TP adjustment is a tax resident:

- i. in a jurisdiction which does not impose any corporate income tax or imposes a corporate income tax at the rate of zero or almost zero (less than 1%);
- ii. in a non-cooperative jurisdiction.

According to the taxpayers ruling request, since TP adjustments have the specific purpose of enabling subsidiaries to achieve a marginality in line with the arm's length principle, they should not qualify as "deductible cross-border payments" under the DAC6 framework and, therefore, they should not be relevant even if they are executed in favour of subsidiaries located in jurisdictions with characteristics listed in hallmark C.

The Italian Tax Agency, in the ruling, confirmed that TP policies are legally binding arrangements, even if not formalized, between associated entities, and as such they fall within the notion of "agreements" included in the DAC6 Italian Decree and they shall be reported should the above conditions be met.

The Italian Tax Agency also focused on the timing of the reporting obligations. The taxpayer shall report within 30 days after the cross-border mechanism takes place (performs the first act with legal effect) or the financial transaction occurs. For communications made after the initial one, the 30-day period runs from the date of approval of the financial statements of the parent company that has issued the TP adjustment.

Unfortunately, the ruling adds further obligations, requesting taxpayers (and intermediaries) to report pure business-driven transactions without any abusive purpose.

The Circular of the Italian Revenue Agency No. 2 of February 10, 2021, that provided clarifications on the application DAC6, always requires a comparison of the tax resulting from the mechanism with the effects that would occur in its absence.

It is not clear how the tax result can be determined in the absence of the "TP" mechanism. In addition, the resolution does not explain the way in which the main benefit test is to be verified in the case at hand. Considering that the TP policy must be in line with the arm's length principle, the year-end adjustments would aim at implementing this principle, as there is no purpose in obtaining a tax savings.

The Tax Agency also focused on the timing of the reporting obligations. The first disclosure must be made within 30 days after the cross-border mechanism takes place or the financial transaction occurs. For other communications, the 30-day period runs from the date of approval of the financial statements of the parent company issuing the adjustment.

Nevertheless, resolution 78/E seems to formally confirm for income tax purposes the common practice adopted by Italian taxpayers, who should be allowed to carry out year-end adjustments to comply with the arm's length principle, aligning with OECD guidelines.

It should be noted that in the last update (December 2021) of the OECD Italian Transfer Pricing Country Profile, the Italian Tax Agency, to the question *"does your jurisdiction allow/ require taxpayers to make year-end adjustments?"*, answered with a mere "no" without giving further indications. This information requires revision.

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United Kingdom

APAs, ATCAs and HM Revenue and Customs Statistics

At the TP Minds Conference which took place in June 2022 in London, senior tax officials and TP practitioners shared their experiences of dispute avoidance and resolution and other TP-related matters.

HM Revenue and Customs officials (active and former) observed that the interest in unilateral APAs/ATCAs appears to be diminishing and that in many situations a bilateral (or multilateral) APA will be preferable for the taxpayer as potential MAP issues can be avoided.

Over 40% of respondents to a poll question stated that they were currently seeking an APA. The primary motivation was to obtain tax certainty. More than half of the respondents identified "time to resolution" as their main concern related to the process.

These views and comments are borne out by the statistics recently published by HM Revenue and Customs and discussed below.

Transfer Pricing

124 enquiry cases were settled in the 12-month period to March 31, 2021. The additional tax revenue was GBP 2.162 billion - a substantial increase from GBP 1.454 billion raised in the previous year.

Advance Pricing Agreements

APAs are written agreements which are concluded between a business and a tax authority and provide businesses with greater certainty about their tax liabilities. In 2020/21, 24 APAs were agreed by HM Revenue and Customs, which is similar to the average number of APAs concluded over the preceding five years (24.8). However, the average time to conclude an APA increased from 33.0 months in 2015/16 to 55.5 months in 2020/21. It is therefore not surprising to see that the number of applications withdrawn also increased. 11 applications were withdrawn during 2020/21.

Advance Thin Capitalisation Agreements

An ATCA is an agreement concluded between a business and HM Revenue and Customs which sets out how TP rules apply to intra-group funding. The number of agreed ATCAs steadily declined from 164 in 2015/16 to 23 in 2020/21 while the average time to conclude an ATCA increased from 11.7 months in 2015/16 to 28.1 months in 2020/21.

ATCAs are unilateral agreements and TP issues can arise with the tax authorities in the jurisdiction where the counterparty is located (which is not covered by the agreement). In our recent conversation with HM Revenue and Customs, tax officials indicated that such issues were not frequent but that they had arisen in the past.

Mutual Agreement Procedures

MAPs allow taxpayers to resolve double taxation by means of consultation and agreement between the concerned tax administrations. HM Revenue and Customs resolved 62 MAP cases in 2020/21 which is similar to the average number of cases resolved over the preceding five years (64.6). The average time to resolve a case increased from 18.5 months in 2015/16 to 34.4 months in 2020/21.

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Diverted Profits Tax

The DPT regime targets contrived arrangements which MNEs might use to minimise their tax liabilities in the UK. Companies must notify HM Revenue and Customs if they have arrangements that potentially fall within the scope of the DTP legislation.

In 2020/21, HM Revenue and Customs received 25 DPT notifications and a DPT net amount of GBP 151 million. The additional tax from TP-settled investigations into DPT (primarily corporate tax) was considerably higher at GBP 1,467 million.

Closing comment

Tax authorities will need to ensure that their resource and capacity is sufficient to process APA, ATCA and MAP applications in a timely manner so that these remain as relevant and practically feasible tools for taxpayers in the future.

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Argentina

Deemed Affiliation: Cross-Border Transactions with Low-Tax Jurisdictions

The Argentine Income Tax law includes a large number of “deemed affiliated” companies. All of them must be scrutinized in the annual Transfer Pricing report, which needs to be filed mandatorily with the Argentine Revenue Service. Cross-border transactions performed by an Argentine-resident company with any counterpart located in a tax haven or a low-tax jurisdiction should be included in such cases of “deemed affiliation”, despite the parties possibly being far from the common concept of “affiliated” companies as defined under Article 9 of the OECD Model Tax Convention.

Last month, the Argentine Revenue Service published a new version of the low-tax jurisdictions blacklist, which is the second by-product of the latest tax reform, Law No. 27.430, effective as of January 1, 2018. Such a reform did not blacklist low-tax jurisdictions; it just defined them as jurisdictions with a corporate income tax burden that is less than 60% of the Argentine corporate income tax rate (25% to this extent). Thus, countries with an income tax rate of 15% or higher would not be considered low-tax jurisdictions. Notably, the definition of tax havens includes both “countries” and “special tax systems or territories” within a single country. The blacklist recently published provides some useful guidance, despite being far from comprehensive, as it is full of grey areas.

Transactions carried out with counterparts located in low-tax jurisdictions – in addition to being presumed not to be arm’s length – are subject to many other adverse tax consequences, like that payments resulting from Argentine sources to such parties are only deducted on a cash rather than an accrual basis. Furthermore, transactions carried out with low-tax jurisdictions shall be reported under General Resolution No. 4838/2020, which sets a mandatory disclosure framework for domestic and international tax planning arrangements aimed at producing a tax advantage or at avoiding a reporting obligation.

The list of low-tax jurisdictions published by the Argentine Revenue Service include, among others, the following countries or jurisdictions: Ireland, Paraguay, United Arab Emirates, Andorra, certain Switzerland cantons or locations (Appenzell Innerrhoden, Basel-Stadt,

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Fribourg, Geneva, Glarus, Graubünden or Grisons, Lucerne, Neuchâtel, Nidwalden, Obwalden, Schaffhausen, Schwyz, St. Gallen, Thurgau, Uri, Vaud, Zug), Lichtenstein, BVI, Bahamas, Bermuda, former Netherlands Antilles, Bosnia, Bulgaria, Cayman Islands, Estonia and Hungary, among others.

Since the list of low-tax jurisdictions is only illustrative, further scrutiny should be required in cases of cross-border transactions with counterparts either (i) located in countries with an effective income tax rate of less than 15%, or (ii) performing in a jurisdiction with a tax holiday or a tax incentive framework.

The same tax outcome applies to transactions carried out with counterparts located in jurisdictions with are considered not to be cooperative in the international exchange of tax information. However, this list is included in the income tax implementing decree, Section 24. The list currently includes 95 locations; although it may be amended over time. The definition includes those countries that have not signed a tax information exchange agreement with Argentina, or those which have denied exchanging tax information, as requested. The federal executive branch should monitor whether information exchange agreements are effective in practice. Consequently, it may well include or exclude a given country from the list over time, as is the case with the current list of low-tax jurisdictions.

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Brazil

Plan for Brazil's Accession to the OECD: Changes to Transfer Pricing Rules

April 2022 saw the Brazilian Federal Revenue Service and the OECD present a proposal for the new Brazilian TP system, the main objective of which would be to enable the alignment with the OECD Guidelines as one of the necessary steps for Brazil to join the OECD.

Brazil applied to join the OECD in 2017 and, in January 2022, OECD decided to begin accession talks with Brazil, which ultimately led to the publication of the roadmap for Brazil's accession in June. Although the alignment with OECD standards is only one of the items listed in the roadmap, it is of extreme relevance for the Brazilian tax environment and consequently for those companies operating in Brazil, as well as Brazilian companies investing abroad.

During 2018 and 2019, the Brazilian Federal Revenue Service and OECD developed a project to analyze the similarities and differences between the Brazilian current model and the OECD standards and concluded, in a report issued in 2019, that the Brazilian Transfer Pricing rules and practices deviate from the OECD Guidelines in several aspects.

In this context, the announcement of the main points of the proposal by the Brazilian Federal Revenue Service and the OECD represents the first step towards the effective implementation of the new rules aligned with OECD standards. Considering that the bill of law amending the legislation currently in force will still be finalized and presented to the National Congress, there is still no official wording or additional details about the changes aside from those provided by the Brazilian Federal Revenue Service.

As the rules currently in force are inspired by the arm's length principle but do not completely honour this principle, the main objective of the new rules shall be to meet the arm's length principle. Based on the announcement of Brazilian Federal Revenue Service and OECD, the main changes shall include the following:

Transfer Pricing methods	Introduction of profit-based methods (Transactional Net Margin and Profit Split Methods) and of the possibility to adopt methods not provided for in legislation (not currently allowed)
Comparability analysis	Current rules are mostly based on fixed profit margins. Effective comparability analysis will be introduced as well as the selection of the most appropriate method (currently, the method that leads to the lowest adjustment may be used)
Secondary adjustments	The funds transferred to related parties in excess to what is allowed by the Transfer Pricing rules would be deemed as loans
Introduction of Transfer Pricing rules for specific transactions (intangibles, intra-group services, cost sharing agreements (CCAs), business restructuring, and financial transactions)	
Advance Pricing Agreements	Possibility for the Brazilian Federal Revenue Service to enter into APAs
Revision of the rules limiting the tax deduction of royalties to ensure their use as anti-avoidance measures	

Once implemented, it is expected that the new rules will help eliminate the double taxation arising today from the overlapping of Transfer Pricing rules.

According to the timeline announced by the tax authorities, the bill of law would ideally be presented/approved in 2023 and would be in force as of 2024. No transition period is scheduled to take place.

Foreign companies doing business in Brazil and Brazilian companies operating abroad should follow this project closely and bear in mind that these changes will most likely require them to re-evaluate current Transfer Pricing policies and existing agreements.

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Chile

Practical Lessons learned from Transfer Pricing Audits in Chile

In the period 2020-2021, the Chilean Internal Revenue Service launched a new wave of tax audits with a focus on TP compliance and the substance of declared transactions. Most of these audits belong to FY 2018/2019 and are not yet closed. Based on observations regarding how the audits are being conducted, it is possible to describe some practical lessons learned that are relevant for taxpayers facing a TP audit in Chile. Last year, 3994 taxpayers submitted their Transfer Pricing tax returns, with operations close to 25% of Chilean GDP.

Some of these lessons may seem to be basic to other jurisdictions, especially regionally, where TP audits are a recurring practice. A tax-transfer pricing audit starts with an extensive list of information that the taxpayer must submit to allow the Chilean Internal Revenue Service to conduct an extensive investigation of the taxpayer's tax position. This part of the process assesses the taxpayer's ability to respond to such a request.

The pace at which the taxpayer can gather and submit the information and the completeness and quality of the data submitted, especially with regard to the records of the company; contractual and documentary support, provide an indication of the taxpayer's operational capabilities to run its financing or holding business under genuine business conditions.

We have witnessed a special interest from the Chilean Internal Revenue Service to request information regarding intercompany loans, corporate services and IP royalties. In the first case, a further area of focus of the tax administration is the completeness of the documentation with respect to the related party transactions under review. Lending transactions, even long-term ones, often evolve quickly and the interest's benchmarks may change dramatically. Currently, there is a debate if initial loan conditions may be useful to the entire loan term (e.g. use the original interest rate settled in 2018 in respect to interests accrued in 2021).

For the second case, the Chilean Internal Revenue Service is taking interest in the PLI selection of corporate services received and of the transaction's side (this aimed to prefer a C+ inverted and exhibit related parties' cost structure as a whole). And for the latter case, providing the analysis performed by the related party at the time of determining the royalty (market studies, similar contract CUP, etc.)

Finally, it is worth mentioning three useful recommendations when facing the Chilean Internal Revenue Service Transfer Pricing audit:

- Submitting documentation that covers only part of the transactions or that is outdated could give the impression to the Chilean Internal Revenue Service of a lack of documentation capabilities with respect to related party operations.
- Refer as much as possible to the OECD Guidelines, especially issues related to the choice of PLI based on the transaction profile type (income or expenses); and not according to the type of activities conducted by the taxpayer. Since Chile is a full member of the OECD this is mandatory in order to gain terrain in subsequent allegations.
- The authorities generally seek direct contact with the taxpayer's representative. The presence of external tax & TP specialists should not be viewed as a lack of internal capabilities but rather as a sign that the taxpayer is willing to address any technical questions that may arise in the audit process.

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China

First Chinese Customs and Tax Collaborative Transfer Pricing Management Mechanism

Related-party transactions are routine practices of Multinational Enterprises (MNEs) but sometimes present a recurrent headache due to the dilemma that a tax authority often holds a viewpoint opposite to that of a customs authority when it comes to assessing an import price.

- The customs authority focuses on assessing whether the import price is lower than the arm's length price; if yes, it would suspect an underpayment of import duty and VAT.
- The tax authority focuses on assessing whether the import price is higher than the arm's length price; if yes, it would suspect an erosion of the taxation base.

In practice, there is little room for MNEs to reconcile the sometimes conflicting opinions of the two authorities. Inevitably, they might have to accept the destiny of double taxation if a price adjustment is enforced by either authority.

Now there is an opportunity for reconciliation. On 18 May 2022, China's customs and tax authorities in Shenzhen jointly issued a circular named *"Implementation Measures for Collaborative Administration of Transfer Pricing of Related-Party Imports"*, introducing a pilot mechanism to address the double taxation issue via cross-departmental cooperation.

The circular has advocated the mutual recognition of the advance rulings issued by each other. Enterprises are permitted to apply for collaborative administration on Transfer Pricing matters, if they satisfy all the following criteria:

- 1) Being registered at a customs authority and handling import/export dealings; and
- 2) Having related-party transactions over RMB 40 million/year in the last three years.

Upon receiving an application, Shenzhen's Customs and Tax Bureau would jointly assess the import price concerned, carry out negotiations, reach a consensus, conclude a memorandum with the applicant and thereafter issue a customs advance ruling and an advance pricing agreement. The rulings will be valid for three years and renewable by an application within 90 days before its expiry date.

The collaborative arrangement between the customs and the tax authorities has established a long-awaited mechanism to address the double taxation issues in tax and customs regimes. It is aimed that cross-departmental collaborative administration will help reduce compliance costs, improve the level of certainty, and enhance administrative efficiency.

Currently, the said collaborative arrangement is only applicable to enterprises registered in Shenzhen. It is assumed that the practice may expand to other regions in the future, allowing more taxpayers to benefit from the administrative breakthrough.

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India

The Indian Revenue's Measures for effective Dispute Resolution

I. Making the MAP process robust and transparent

In its resolve to make the MAP process robust and transparent, the Indian Revenue continues to have the following key resolution parameters in its updated Guidance:

- **Uniformity in making a MAP application** – It has been proposed to make the time limit for making an application for MAP uniform across all Double Tax Avoidance Agreements that India has entered into, i.e. three years from the first notification of the action resulting in double taxation.
- **Time limit to resolve MAP** – The government has committed in its official MAP Guidance that the Competent Authorities shall endeavour to resolve MAP within 24 months of application → in conformity with the minimum standards recommended in the BEPS Action 14 final report.
- **Access to MAP in case of alternate resolution mechanism** – The Government clarified the stance that while accepting MAP applications in cases where the Indian taxpayer has already closed the dispute through an alternate resolution mechanism, i.e. APA, Safe Harbour provisions or through the normal litigation route, the outcome reached under the alternate resolution process shall not be modified. Instead, the Competent Authorities shall make all efforts to persuade Competent Authorities of other jurisdictions to provide correlative relief.

The Indian MAP process provides flexibility to taxpayers to pursue alternate resolution mechanisms simultaneously while pursuing MAP.

It has been observed in recent years that the Indian Revenue has been proactive in resolving matters under MAP with an intent to provide transparency, clarity and resolutions for taxpayers.

II. Fast Track APA process

With the impact of the pandemic reducing, the Indian Revenue has fast tracked its APA process to provide certainty to taxpayers in their Transfer Pricing disputes. The Indian Revenue has entered into 62 APAs (13 Bilateral APAs and 49 Unilateral APAs) in FY 2021-22. This is double the number of APAs entered into in FY 2020-21, i.e. 31 APAs.

In the past, the Indian taxpayers have witnessed aggressive scrutiny from the Transfer Pricing perspective which has resulted in protracted litigation. With the Indian APA programme introduced in 2012, the Indian Revenue has entered into 421 APAs to date, resulting in tax certainty and limiting Transfer Pricing litigation for the taxpayers.

III. Extending validity of existing Safe Harbour Rules for FY 2021-22

The applicability of safe harbour rules for specified transactions has been extended for FY 2021-22 to provide certainty to Indian taxpayers. Some of the commonly entered into international transactions and their applicable safe harbour rates are:

International transactions	Value (USD)	Cost-plus rate under Safe Harbour
Software development services and information technology-enabled services	Up to 13.33 million	17%
	13.33 million to 26.6 million	18%
Knowledge process outsourcing services	Up to 26.6 million	Ranges from 18%-24% depending on the ratio of employee cost to total cost
Contract R&D in relation to software development or generic pharmaceuticals	Up to 26.6 million	24%
Contract manufacturing of auto-components	–	Ranging from 8.5% to 12% depending upon type of component
Receipt of low-value added services	Up to 1.3 million	5%

The arm's length cost plus rate as determined through local benchmarking is reasonably lower than the cost-plus rate under the safe harbour rules. Taxpayers must undertake a thorough cost-benefit analysis before opting for the cost plus rate under the safe harbour rules over the arm's length rate as determined through local benchmarking, and pursue alternate active resolution mechanisms (i.e. APAs or a normal litigation route) if challenged by the tax officers to reach a conclusion.

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Kenya

A Fundamental Shift in the Transfer Pricing Regime in Kenya

Kenya's 2022 Finance Act amended various provisions of the income tax law. One of the most notable and significant changes was the introduction of new TP provisions, the main one being a widening of the scope of controlled transactions to include cross-border and domestic transactions between unrelated parties. It also introduced CbCR requirements and the filing of local and master files by entities that are part of a multinational enterprise.

Preferential Tax Regimes (PTR)

Historically, the TP regime in Kenya focused on cross-border dealings between related parties, specifically, between resident entities or permanent establishments and related non-resident entities, following traditional Transfer Pricing principles.

In 2018, there was an amendment to the law, which required resident entities in Kenya transacting with related resident entities operating in preferential tax regimes (PTRs) to price their transactions based on the arm's length principle. What was considered a PTR was

any legal or administrative regime providing a reduced rate of tax. This was the first time that TP rules were applied to domestic transactions and the purpose was to avoid the abuse of PTRs.

The new provision imposes a new requirement for arm's length pricing in transactions between resident entities and entities operating in PTRs, whether related or unrelated. For this purpose, the law has expanded the definition of PTRs to mean foreign jurisdictions which:

- do not tax income.
- tax income at a rate that is less than 20%.
- do not have a framework for exchange of information.
- do not allow access to banking information.
- lack transparency regarding corporate structure, ownership of legal entities, beneficial owners of income or capital, financial disclosure or regulatory supervision.

This law takes effect on 1 January 2023. The law will inevitably create complications and compliance is not likely to be straightforward. We expect that the government will issue regulations before the end of 2022 and address the questions arising around the benchmarking of transactions between unrelated entities.

Country-by-Country Requirements

Following the uptake of the OECD BEPS Action 13 documentation guidelines in numerous countries across Africa, Kenya has introduced an amendment that requires resident companies in an MNE group with a turnover of KES 95 billion (EUR 750 million) to adopt the three-tiered approach to Transfer Pricing documentation. They are required to file a CbCR, a master file and a local file with the Kenyan Revenue Authority.

The Income Tax (Transfer Pricing) Rules in 2006 previously obligated taxpayers to prepare Transfer Pricing documentation and provide the TP reports to the KRA only upon request. The rules did not require regular filing.

The CbCR should be filed with the Kenyan Revenue Authority within 12 months from the end of the entity's fiscal year end, while master and local files should be filed within 6 months of the company's fiscal year end. The requirement to file master and local files extends to all entities that are part of an MNE. Failure to prepare and file the three TP documents will attract penalties.

These requirements will affect entities with accounting periods ending after 1 July 2022.

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Senegal

After joining the Multilateral Convention, a Step forward in the Fight against Tax Evasion & Avoidance

More than 5 years after the signature of the Multilateral Instrument (MLI) on June 7, 2017, Senegal deposited its instrument of ratification of the Multilateral Convention on May 10, 2022. Overall, the ratification now covers 1,820 bilateral tax treaties around the world and 18 for Senegal.

With the ratification of this Multilateral Convention, which will enter into force on September 1, 2022, the block of tax conventions for Senegal will be modified to integrate the recommended provisions of the Convention.

The ratification of the Multilateral Convention by Senegal is, after all, the confirmation of a strong political will to support and apply the anti-BEPS measures. As a result, Senegal's tax arsenal has been strengthened for possible revenue optimization.

To know the real impact of the ratification of the Multilateral Convention on the bilateral Conventions against double taxation (DTC) signed by Senegal, it is necessary for a given bilateral convention to make a concordance analysis of the reservations and notifications of each of the two signatory states.

In this contribution, our approach is to have an overview of the various reservations made by Senegal. Indeed, Senegal has formulated some reservations notified to the OECD. These reservations concern 7 of the 39 articles of the MLI:

- i. One (01) full reservation on Article 3 applicable to all covered conventions signed by Senegal.
- ii. Three (03) reservations on provisions that Senegal considers already integrated in its signed conventions, namely: Article 6.1.a, Article 7.1.4 and Article 9.1.a of the multilateral convention.
- iii. One (01) reservation regarding the right not to apply the second sentence of Article 16.2 to its covered tax treaties under certain conditions.
- iv. One (01) reservation of the right not to apply Article 17 to its Covered Tax Treaties, considering the reservation in Article 16.5. c. ii, on the basis that it intends to adopt, through bilateral negotiations, a treaty provision along the lines of Article 17.1 and the Contracting Jurisdictions reach agreement on that provision and on Article 16.5.c.ii
- v. One (01) reservation regarding the right not to apply Article 35.4 to its Covered Tax Treaties.

These reservations are motivated by the desire to give the maximum geographic scope to the MLI and to target the clauses that constitute real progress towards the objectives of the BEPS project.

The reservations are also motivated by the desire to ensure consistency and homogeneity in the application of international taxation in accordance with the famous saying "level playing field". From this point of view, Senegal has decided not only to apply the Multilateral Convention extensively but also to replace the current clauses of its conventions with those of the MLI, which will facilitate the work of consolidating bilateral tax treaties.

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Glossary

AP	Arbitration Procedures
APA	Advance Pricing Agreement
ATCA	Advance Thin Capitalisation Agreements
BEPS	Base Erosion and Profit Shifting
CFC rules	Controlled Foreign Corporation Rules
DPT	Diverted Profits Tax
DTA	Double Tax Agreement
EONIA	Euro OverNight Index Average
EU	European Union
EU-BStbG	EU-Besteuerungsstreitbei-legungsgesetz (Austrian Taxation Arbitration Law applicable fort he EU)
FY	Fiscal Year
GDP	Gross Domestic Product
IP	Intellectual Property
MLI	Multilateral Instrument
MNE	Multinational Enterprise
MAP	Mutual Agreement Procedure
OECD	Organization of Economic Cooperation and Develop-ment
OECD Guide-lines	OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
PTR	Preferential Tax Regimes
TP	Transfer Pricing

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