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GLOBAL TRANSFER PRICING SERVICES

Global Transfer Pricing Review

Peru

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TAX



Peru



KPMG observation

The tax authority in Peru is informed about Organisation for Economic Co-operation and Development's (OECD) Base Erosion and Profit Shifting (BEPS) Action plan, and the United Nations (UN) Practical Transfer Pricing Manual for Developing Countries, but they have not made public their opinion.

The Peruvian tax authority was very active in 2013 with respect to transfer pricing audits. According to our experience they have focused in the primary sector and important local groups. Audits are very thorough and the gathering of experience by the audit team appears to be one of the aims.

Audits are triggered by size of transactions, continuous losses and analysis of industry ratios performed by the tax authority based on information they have of taxpayers they regard as comparable. The information provided by taxpayers in their transfer pricing return is also used to select taxpayers to be inspected.

The annual transfer pricing return and the transfer pricing study need to be presented to the tax authority in June of the following year.

Basic information

Tax authority name

Superintendencia Nacional de Administración Tributaria (SUNAT) (National Superintendency of Tax Administration).

Citation for transfer pricing rules

Market value and transfer pricing rules are defined in Articles 32 and 32-A of Income Tax Law.

More specific regulations are included in Articles 108 to 119 of Income Tax Law Rulings.

Penalties are defined in Article 176, numbers 2) and 4); Article 177, numbers 25) and 27); and Article 178 number 1) of the Tax Code.

Thresholds and exceptions issued with Superintendency Resolutions N° 175-2013-SUNAT.

Advance Price Agreement rules are defined by Superintendence Resolution N° 377-2013-SUNAT.

Effective date of transfer pricing rules

January 2001.

What is the relationship threshold for transfer pricing rules to apply between parties?

Direct or indirect ownership greater than 30 percent of capital. Companies can also be considered related if they share common directors, managers or executives with decision power. Additional criteria for determining economic relationships also exist.

What is the statute of limitations on assessment of transfer pricing adjustments?

Four years, counting from 1 January of the year following the date of presentation of the Income Tax Return.

Transfer pricing disclosure overview

Are disclosures related to transfer pricing required to be prepared or submitted to the revenue authority on an annual basis (e.g. with the tax return)?

Yes. A transfer pricing return is required for taxpayers based on certain thresholds (revenues and amounts transacted with related parties and/or existence of transactions with tax havens). The transfer pricing return is not submitted with the Income Tax Return, but it is submitted in June of the year following the fiscal year under analysis.

The transfer pricing study is required to be attached to the transfer pricing return.

What types of transfer pricing information must be disclosed?

The transfer pricing return has two main sections:

- the first section reports the identification of the taxpayer, the related parties with which transactions exist, and the types and amounts of transactions
- the second section must be completed when the taxpayer passes the thresholds and is required to have a transfer pricing study. In this second section, the taxpayer must report the methodologies used in the transfer pricing analysis and the adjustments made, if applicable.

What are the consequences of failure to prepare or submit disclosures?

In case the taxpayer fails to file its transfer pricing return, a fine of approximately 30,000 US dollars (USD) is applicable. In addition, failure to present the transfer pricing return may trigger an audit by the tax authority on the taxpayer.

Transfer pricing study overview

Is preparation of a transfer pricing study required – i.e. can the taxpayer be penalized for mere failure to prepare a study?

Yes, for all transactions with related parties and tax havens, taking into account that the obligation applies once certain thresholds regarding the company income and amount of transactions with related parties are exceeded.

The transfer pricing study needs to be submitted with transfer pricing return. If the taxpayer does not present the study required, it may be penalized (penalty is approximately USD30,000).

Other than complying with a requirement per the previous question, describe the benefits, if any, of preparing and maintaining a transfer pricing study?

Besides helping to avoid penalties, preparing and maintaining a transfer pricing study helps shift the burden of proof towards the tax authority and reduces the risk of unforeseeable adjustments.

For taxpayers that do not formally need to prepare a transfer pricing study it still can be desirable to do so since the tax authority can always require the submission of documentation that sustains the market value of transactions with related parties.

For minority shareholders, a transfer pricing study can provide some level of comfort that profit is not being extracted through pricing policies.

When working with related parties, a transfer pricing study can provide management with comfort that at arm's length transactions helps ensure there are no cross-subsidies between business units.

To satisfy the requirement and/or obtain the benefits, are there any requirements on when the transfer pricing study must be prepared and submitted?

The transfer pricing study must be included in the transfer pricing return, which has to be presented in June of the following year, 2 or 3 months after having presented the annual Income Tax Return.

When a transfer pricing study is prepared, should its content follow Chapter V of the OECD Guidelines?

No. Peruvian legislation is very specific on the issues a transfer pricing study should contain. Even though most of the issues are similar to what is outlined in Chapter V of the OECD Guidelines, the taxpayer is required to follow the more specific requirements detailed in Peruvian legislation.

Does the tax authority require an advisor/tax practitioner to have specific designation in order to prepare or submit a transfer pricing study?

No.

Transfer pricing methods

Are transfer pricing methods outlined in Chapter II of the OECD Guidelines acceptable?

Yes. However, Peruvian transfer pricing legislation considers six methods instead of five. The difference is Peruvian legislation differentiates the profit split method and the residual profit split method as independent methodologies.

In addition, Peruvian transfer pricing legislation includes a special way of applying the comparable uncontrolled price method when the transaction under analysis is the purchase or sale of commodities. In this case, the arm's length price needs to be estimated based on the international price of the commodity.

Is there a priority among the acceptable methods?

Although there is no clear priority it seems that in practice the tax authority prefers the comparable uncontrolled price as the initial method.

If there is no priority of methods, is there a "best method" rule?

There is no formal priority of methods. Most appropriate rule applies.

Transfer pricing audit and penalties

When the tax authority requests a taxpayer's transfer pricing documentation, how long does the taxpayer have to submit its documentation?

Formally, transfer pricing documentation needs to be provided within three working days of request. Nevertheless, the tax authority could set a time limit of 1 to 2 weeks, depending of the complexity of the information requested and the stage of the inspection process.

If an adjustment is proposed by the tax authority, are dispute resolution options available to the taxpayer outside of competent authority?

Yes. Once an adjustment is proposed by the tax authority, it can be challenged by the taxpayer through an administrative process within the same tax authority. After that, the case can be taken to a specialized fiscal court outside the jurisdiction of the tax authority. And after that, if there is still conflict with the decision, the case can be taken to regular Peruvian courts.

If an adjustment is sustained, can penalties be assessed? If so, what rates are applied and under what conditions?

Yes. 50 percent of the tax omitted, plus interest counting from the moment the tax should have been paid.

To what extent are transfer pricing penalties enforced?

There is little experience but some companies have already been assessed, adjusted and charged with penalties.

What defences are available with respect to penalties?

The main defense is the documentation i.e. the transfer pricing study. Related documentation, such as intra-group contracts, invoices, or other documents, can also be useful as a means of defense.

Penalties can also be reduced if, during an audit from the tax authority, the taxpayer agrees that the transfer pricing adjustment suggested by the tax authority during its review is correct and accepts to pay the omitted tax without further discussion. In this case, the penalties arising from having omitted tax payments can be reduced to 50 percent or 70 percent, depending on the timing of the payment.

In addition, penalties can be avoided if the taxpayer negotiates an Advance Pricing Agreement (APA) with the tax authority.

What trends are being observed currently?

Over the last year, the Peruvian Tax Authority has significantly increased the number of specific requests to taxpayers to present transfer pricing studies and related documentation. The number of transfer pricing audits has also increased, resulting in adjustments and penalties for some taxpayers.

Currently, the principal of SUNAT is a specialist in transfer pricing, and the transfer pricing team of SUNAT has been hiring professionals with experience in transfer pricing.

In addition, changes to the transfer pricing regulations have been issued during the last year, and it is expected that further changes will be issued soon, in order to increase transfer pricing enforcement.

It is expected that audits will focus on the imports/exports of commodities such as mineral, agricultural and other similar products. Intra-group services and financial transactions are also expected to be audited.

Special considerations

Are secret comparables used by tax authorities?

Secret comparables may be used to determine which taxpayers should be inspected. Nevertheless, there is no evidence that the tax authority uses secret comparables to perform adjustments.

Is there a preference, or requirement, by the tax authorities for local comparables in a benchmarking set?

Yes, there is a preference, but information about local comparables is scarce, so international comparables are also accepted.

Do tax authorities have requirements or preferences regarding databases for comparables?

The tax authority has a specific database, but does not require that taxpayers use the same database for their studies.

What level of interaction do tax authorities have with customs authorities?

Tax and customs authorities are part of the same institution (SUNAT). Over the last year, the customs team has been reviewing the transfer pricing reports in order to see if there are potential customs issues.

Are management fees deductible?

Generally yes, but proper documentary support is needed and special attention needs to be given to business necessity.

Are management fees subject to withholding?

Yes. The rule is that if services are rendered in Peru the rate is 30 percent. If the service qualifies as technical assistance, the rate is 15 percent (regardless of the place where services are rendered). If the service qualifies as digital services or royalties, the rate is 30 percent regardless of the place where services are rendered. In all other cases, when services are rendered abroad there is no withholding tax.

Withholding tax can also be adjusted if the price agreed between the two parties is not arm's length.

Are year-end transfer pricing adjustments permitted?

Yes. There is no explicit prohibition in the legislation about year-end transfer pricing adjustments. However, these kinds of adjustment need to be carefully analyzed in each case, in order to evaluate whether it would be accepted or not by the tax authority.

Other unique attributes?

Transactions with local related parties fall into the scope of transfer pricing rulings.

The tax authority usually expects the transaction analyzed to be tested against same-year data. In addition, complete information about comparable companies, including complete annual reports or 10-K's are necessary for the company to be regarded as a valid comparable.

Transactions involving commodities need to be analyzed taking into account the international price of the commodity, following specific rules detailed in Peruvian transfer pricing legislation.

Other recent developments

An increasing number of transfer pricing inspections are under way. Some taxpayers have already been adjusted in relation to transfer pricing. This trend is expected to continue, taking into account that the new tax authority principal is a specialist in transfer pricing, and the tax authority's transfer pricing team has been growing, with new hires from private companies.

Tax treaty/double tax resolution

What is the extent of the double tax treaty network?

Minimal. Peru currently has double tax treaties with Brazil, Canada, Chile, the Andean region and Korea. The Treaty

with Mexico beginning in 2015. This network is expected to grow in the short and medium term, including countries such as China, Finland, Portugal, Spain, Switzerland and others.

If extensive, is the competent authority effective in obtaining double tax relief?

Not applicable.

When may a taxpayer submit an adjustment to competent authority?

There is no experience or specific guidance on when a taxpayer may submit an adjustment to competent authority.

May a taxpayer go to competent authority before paying tax?

There is no experience or specific guidance on when a taxpayer may go to competent authority.

Advance pricing agreements

What APA options are available, if any?

The law considers APAs for international and domestic transactions.

Is there a filing fee for APAs?

No.

Does the tax authority publish APA data either in the form of an annual report or through the disclosure of data in public forums?

No.

Please provide some information on how successful the APA program is and whether there are any known difficulties?

No APAs have been filed yet, but taxpayers are expected to be interested in APAs. In 2013, the tax authority published the Superintendency Resolution N° 377-2013-SUNAT with specific rules about APAs.

Language

In which language or languages can documentation be filed?

All documentation, including the financial information of the comparables, needs to be formally translated into Spanish.

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