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GLOBAL TRANSFER PRICING SERVICES

Global Transfer Pricing Review

Belgium

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TAX



Belgium



KPMG observation

Multinational groups with subsidiaries or permanent establishments in Belgium should make sufficient efforts to support and document the arm's length nature of the pricing of their intra-group transactions. Being prepared for a transfer pricing audit with all intra-group transactions mapped has become of key importance, with the Belgian special transfer pricing audit department's activity surging over the past years. A new wave of approximately 300 transfer pricing audits were launched at the beginning of 2014 after the Belgian transfer pricing audit team doubled in size. Furthermore transfer pricing documentation plays a critical role in tax planning in Belgium. When utilizing tax features such as the notional interest deduction, the patent income deduction or hosting an entrepreneur or principal entity in Belgium, setting the correct transfer price is essential.

Basic information

Tax authority name

Federale Overheidsdienst Financiën; Service Public Fédéral Finances (Belgian Tax Authorities).

Citation for transfer pricing rules

Domestic law provisions in relation to transfer pricing:

- Article 26 Belgian Income Tax Code (BITC)
- Article 49 BITC
- Article 54-56 BITC
- Article 79 BITC
- Article 185, Section 2 BITC
- Article 207 BITC
- Article 344, Section 2 BITC
- Circular of 28 June 1999 (Administrative Transfer Pricing Circular)
- Circular of 7 July 2000 and 25 May 2003 (Administrative Circular on the European Arbitration Convention)
- Circular of 14 November 2006 (Administrative Circular on Transfer Pricing Documentation and Transfer Pricing Audits)

- reporting obligation of certain material non-arm's length intra-group transactions in their annual accounts (Royal Decree dated 10 August 2009)
- reporting obligation for direct and indirect payments to tax havens (Article 307 BITC).

Effective date of transfer pricing rules

Effective July 2004. Reporting obligations in the annual accounts apply to financial years starting on or after 1 September 2008. New reporting obligations regarding certain payments to tax havens came into effect 1 January 2010.

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

Not specified in Belgian tax law. Article 26 of the BITC being one of the main transfer pricing articles refers to "a company which is situated directly or indirectly in any situation of mutual dependency". In order to assess whether entities are dependent, not only will legal criteria be relevant, but factual elements such as common management and control are also likely to be considered.

The Royal Decree of 10 August 2009, which requires corporations to report non-arm's length transactions with related parties, makes reference to the International Accounting Standard 24 for the definition of related parties.

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

Three years from the year-end. In the case of fraud, 7 years from the year-end, longer if a company is incurring losses (deferral to momentum losses being used).

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)?

No, tax return disclosures are required. However, certain intra-group transactions must be reported in the company's annual accounts. These annual accounts must be included with the tax return. Certain payments to tax havens also must be reported in a specific document (form 275F) and enclosed with the tax return.

What types of transfer pricing information must be disclosed?

Certain material non-arm's length intra-group transactions and off-balance sheet arrangements must be disclosed in the annual accounts following the provisions of Royal Decree dated 10 August 2009. This reporting obligation applies to the following corporations:

- those listed on a stock exchange
- those whose shares are traded on a multilateral trading facility
- those that meet more than one of the criteria to be considered a large group as defined in the Belgian Companies Code.

These corporations must report all non-arm's length transactions with related parties in the annual accounts and provide amounts, the nature of the relationship and all other information needed to ensure an accurate view of the financial position of the corporation. Transactions involving wholly owned subsidiaries are excluded from this reporting obligation. All direct and indirect payments to tax havens must be reported in an appendix to the tax return, insofar as they amount to at least 100,000 Euros (EUR) and are made to persons located in tax havens as defined in Royal Decree of 7 May 2010 and Administrative Circular of 30 November 2010.

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

Payments to tax havens which have not been reported or, if they have been reported, for which the taxpayer does not prove that they are made in the context of genuine and bona fide transactions and outside of artificial constructions, are non-deductible business expenses. Genuine and bona fide transactions are transactions that really satisfy an industrial, commercial or financial need and that normally find or must find compensation in the whole of the activity of the company. An artificial construction has no link with economic reality (development of a real activity) and is meant to evade the tax due in Belgium.

In the context of an investigation of the payments concerned, a transfer pricing investigation by the Belgian Tax Authorities is always possible and the

general conditions for the deduction of expenses (mentioned in Article 49 and 54 BITC) remain applicable.

The simultaneous application of the tax on secret commissions (309 percent) is also possible, but only if the conditions of Article 219 BITC are met. However, in case the 309 percent tax is levied, the costs which have not been justified by individual statements will be considered as deductible business expenses.

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?

No. However, it is noted that the absence of a transfer pricing study increases substantially the risk of taxpayers being unable to survive a transfer pricing audit without adjustments.

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

Preparing a transfer pricing study in advance is strongly recommended as the special transfer pricing audit department expects it (or at least the kind of information included in a transfer pricing study) to be present and the preparation of such a study forces the Belgian taxpayer to proactively reflect on his position and arguments to put forward to the audit department. Having a transfer pricing study in place may also shift the burden of proof to the tax authorities.

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

When requested by the tax authorities, supporting information and documentation must be submitted within 30 days of the request. However, in justified cases an extension can be requested from the tax authorities.

When a transfer pricing study is prepared, should its content follow Chapter V of the Organisation for Economic Co-operation and Development (OECD) Guidelines?

Yes.

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.

Is there a priority among the acceptable methods?

No.

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

The most appropriate method should be used. Belgium follows the OECD Guidelines. Profit-based methods (in particular transactional net margin method (TNMM)) are commonly accepted by the Belgian Tax Authorities.

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?

When requested by the Belgian Tax Authorities, supporting information and documentation must be submitted within 30 days of the request. However, in justified cases an extension can be requested. The administrative circular of 14 November 2006 recognizes that 30 days is a short period for the request of transfer pricing information and that granting an extension may be appropriate.

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

Yes. Domestic procedures are available enabling the taxpayer to challenge the adjustment.

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

Yes. General tax penalties apply. Penalties range from 10 percent to 200 percent of the additional tax assessed.

To what extent are transfer pricing penalties enforced?

Frequently.

What trends are being observed currently?

The tax officers of the special transfer pricing audit department (of which the numbers doubled in 2013) have been very active in their sphere of operations, and have manifested themselves very actively within their client base with the help of data mining tools. They use more or less standardized, lengthy requests for information, through which they solicit detailed input from the taxpayer on all sorts of intra-group transactions and on any other information (e.g. legal and operational structure, business trends, etc.) that may be relevant to assess whether the taxpayer respects the arm's length principle. A wide variety of industries (e.g. companies incurring long start-up losses, undergoing business restructurings, showing fluctuating key performance indicators, hosting intra-group financing or cash pooling arrangements) have in the meantime been selected for a thorough transfer pricing audit. Experience from these audits shows that it pays to be well prepared and to proactively map all intra-group transactions and support the arm's length nature of the transfer prices being applied. Also adherence to the provisions and conditions laid down in intra-group agreements should be monitored with great care. Indeed, by not complying with the provisions of their own agreements, taxpayers are quite often a sitting duck for the special transfer pricing audit department of the Belgian Tax Authorities.

There is still a clear focus on loss-making companies and groups in Belgium which have undergone a business restructuring. The deductibility of losses

and restructuring costs are challenged if it appears that they are not supported by the function and risk profile of the taxpayer. Furthermore, the Belgian Tax Authorities are also focusing on the correct application of the transfer pricing policy in the operational transfer prices at business line, product group or product level.

Special considerations

Are secret comparables used by tax authorities?

No.

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

No. The Belgian Tax Authorities accept the use of pan-European comparables.

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

Any comparables which pass the comparability test can be used. In practice, however, often Amadeus and Belfirst (a local database) are used.

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

Low.

Are management fees deductible?

Yes, if the fees are at arm's length and relate to management services effectively received and related directly to the business.

Are management fees subject to withholding?

No.

Are year-end transfer pricing adjustments permitted?

Yes, transfer pricing adjustments are generally permitted in practice, although there is little specific guidance on making these adjustments. Consideration should also be given to potential customs implications arising from these year-end adjustments.

Other unique attributes?

No.

Other recent developments

A special transfer pricing audit department of the Belgian Tax Authorities is auditing a wide range of industries. The number of transfer pricing inspectors has been doubled in 2013. The selection of audit targets has also recently been facilitated by the use of data-mining tools by the tax authorities. Recent audits have also been conducted on companies in a wide variety of industries incurring long start-up losses, as well as on Belgian companies hosting intra-group financing or cash pooling arrangements.

Transfer pricing rulings are very popular and are often used to obtain certainty for existing and intended business structures. Also for Belgian tax features (such as notional interest deduction, patent income deduction, and excess profit rulings) transfer pricing plays a key role.

Tax treaty/double tax resolution

What is the extent of the double tax treaty network?

Extensive.

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

Almost always.

When may a taxpayer submit an adjustment to competent authority?

An application for a Mutual Agreement Procedure (MAP) should be filed within 2 or 3 years (or a shorter period depending on the relevant treaty provisions) as from the first notification of the proposed transfer pricing adjustment communicated to the taxpayer in writing.

May a taxpayer go to competent authority before paying tax?

Yes. As long as the MAP is pending usually suspension of tax collection is granted.

Advance pricing agreements

What advance pricing agreement (APA) options are available, if any?

Unilateral, bilateral, multilateral, and advance rulings.

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?

Yes. Most unilateral rulings are published (in Dutch or French) on the Belgian Tax Authorities' website.

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

Both the multi and bilateral ruling program (Service International Agreements of the Central Tax Authorities) and the unilateral ruling program (Service for Advanced Decisions in Tax Matters, or the Ruling Commission) of the Belgian Tax Authorities are very successful. APAs in Belgium are therefore seen as a very workable and suitable tool to obtain certainty for the taxpayer over a given period.

Language

In which language or languages can documentation be filed?

Official language depends on the company's location in Belgium. Therefore, in principle, Dutch or French is acceptable. In practice, documentation in English may be accepted.

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