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GLOBAL TRANSFER PRICING SERVICES

# Global Transfer Pricing Review

Colombia

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TAX



# Colombia



## KPMG observation

In 2013 Colombia received an invitation from the Organisation for Economic Co-operation and Development (OECD) to become a member of the organization. As a consequence changes in both transfer pricing and tax legislation were carried out, taking into account OECD guidelines and observations. The Base Erosion and Profit Shifting (BEPS) Action Plan has been mentioned by the Government as a flagship to ensure that multinational entities are contributing their fair share of taxes with regard to the activities they carry out in Colombia.

The Colombian Tax Authorities have continued their scrutiny of transfer pricing and are closely reviewing the Informational Transfer Pricing Return. They have assessed fines on those returns that have been filed incorrectly or contain inaccurate information. They have also changed the requirements for taxpayers that are obliged both to prepare and file transfer pricing documentation. The Tax Authorities have continued transfer pricing audits based on red flags detected in the informational return and the transfer pricing studies. It is expected that there will be more detailed audits and assessments due to the experience gained by the Colombian Tax Authority.

## Basic information

### Tax authority name

Dirección de Impuestos y Aduanas Nacionales, (DIAN – National Administration of Taxes and Customs).

### Citation for transfer pricing rules

- Tax Code, Chapter XI, Sections 260-1 to 260-11
- Law 222 of 1995, Section 28
- Economic Sanctions, Tax Code, Sections 260-11 and 647
- Decree 3030 of 2013
- Deadlines, according to an annual decree, issued at the end of the respective taxable year.

### Effective date of transfer pricing rules

1 January 2004.

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

- Ownership of greater than 50 percent, based on voting

power, share capital, and under common control.

- Even when an entity does not have a capital relationship, it is considered a related party when it is entitled to receive directly or indirectly more than 50 percent of the profits of a company.
- When an operation takes place between two subordinates, which are owned directly or indirectly by more than 50 percent by the same individual or corporation or non-corporate entities.
- When there are consortiums, temporary unions, account participations, and one of the entities carries out a transaction with any of its related parties or any of the members of the group in favor or on behalf of the consortium, joint venture or venture accounts.

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

The statute of limitations is 5 years from the filing date. Tax Code Article

260-5 and the Ruling Decree state that taxpayers which are obliged to prepare and file Transfer Pricing Documentation have to keep the documentation within their records for a period of at least 5 years, together with all the supporting documentation that proves compliance with the transfer pricing rules in Colombia.

## 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)?**

Disclosures have to be submitted on an annual basis within the dates established by an annual decree issued before the end of the taxable year under review.

Taxpayers are also required to annually prepare and submit a transfer pricing study for all transactions carried out with related parties overseas, and with tax havens. Transfer pricing studies are also required for taxpayers located in National

Customs Office Territory who have operations with related parties located in Free Zone, or if there is a triangulation in favor of the taxpayer, through a third party, with a related party located in Free Zone or tax havens.

Taxpayers have to submit the Transfer Pricing Report when the total amount of their intercompany transactions exceeds 61,000 Taxable Units Value (UVT<sup>1</sup>). In addition, Taxpayers are required to analyze those transactions which exceed 32,000 UVT in a kind or class of transaction, with related parties, within their Transfer Pricing Study.

Moreover, transactions carried out with related parties located in tax havens have to be analyzed when the total amount exceeds 10,000 UVT.

#### What types of transfer pricing information must be disclosed?

Colombian taxpayers are required to file an annual Informational Transfer Pricing Return and/or supporting transfer pricing documentation which contain information related to their intra-group transactions including the amounts, related parties, type of transactions, methods used to evaluate the compliance with the arm's length principle, interquartile ranges, amongst other information.

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

The transfer pricing penalties are included within Section 260-11 of the Tax Code.

## 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. The taxpayer is required to prepare a transfer pricing study that is requested every year by the tax authority. However, it is only necessary to include the analysis of the transactions which exceed 32,000 UVT.

Transfer pricing rules shift the burden of proof to the Taxpayers. There are formal penalties for late submission of either the Informational Transfer Pricing Return or the transfer pricing study.

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

The transfer pricing study provides taxpayers with a tool to mitigate transfer pricing risks by supporting its compliance with the arm's length principle, by correctly describing the facts and circumstances that surround the intra-group transactions.

#### 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 should be prepared and must be submitted within the dates established every year by the national government.

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

No. The transfer pricing study content must follow the requirements of the Colombian Tax Code and the regulatory decree, i.e. functional analysis (general information of the company and other specific information), industry analysis, company overview, selection of method, description of comparables, local economy overview and annex information. However, it is important to highlight that local transfer pricing regulation mirrors the OECD guidelines.

#### 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. However, the Colombian transfer pricing regulations recommend the use of internal comparables when possible.

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

No. Nevertheless, the selection of the method must be based on the characteristic of the transaction under analysis. The method selected should be the one that best reflects the economic reality of the transaction, provides the best information and requires the fewest adjustments. It is also important to note that if an internal comparable is available; the transfer pricing rules establish that it must be used.

## 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?

Taxpayers need to submit the documentation within dates established by the national government. However, if a request is issued by the Tax Authorities, Taxpayers have 15 days to provide the required information.

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

Yes. The taxpayer can dispute the adjustment of the Tax Authorities under administrative appeal and regular tax litigation.

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

There are not any specific transfer pricing penalties other than those mentioned in Section 260-11 of the Tax Code. Nevertheless, there are income tax penalties linked to a transfer pricing adjustment. Those penalties can be up to 160 percent of the underpayment in tax, plus additional penalties and interests.

#### To what extent are transfer pricing penalties enforced?

Always.

#### What defences are available with respect to penalties?

Litigation and settlements.

<sup>1</sup> Single UVT value for 2013 COP 26.840 and for 2014 COP 27.485.

### What trends are being observed currently?

Tax authorities have begun to perform audits in a more substantive way. The main challenges to taxpayers relate to transfer pricing on expenses for technical assistance, technical services, intragroup services and royalties.

## 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.

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

No. Tax authorities expect the taxpayer to provide sufficient information regarding identification and determination of comparable parties used, information sources, inquiry dates and indication of the rejection criteria of non-accepted comparable entities.

It is also important to present technical adjustment descriptions and, when needed, a generic description of the principal differences between Colombian accounting rules and the rules in those countries where the comparable parties are located.

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

High. Customs and tax authorities are part of the same organization (DIAN). Therefore, the officials of DIAN oversee both audits.

### Are management fees deductible?

Yes. Deductibility of management fees paid are subject to the limitation applicable to all expenses paid abroad and not subject to withholding tax; if such fees or expenses do not exceed 15 percent of the taxable income can be taken as a deduction.

### Are management fees subject to withholding?

When management fees do not contain a technical component or elements that might be considered as advisory, payments do not require the application of withholding tax, all other payments usually have a 10 percent withholding tax rate.

### Are year-end transfer pricing adjustments permitted?

The transfer pricing rules are silent upon this matter, therefore it is difficult to say whether they are permitted or not.

### Other unique attributes?

None.

## Other recent developments

None.

## Tax treaty/double tax resolution

### What is the extent of the double tax treaty network?

Extensive, currently there are treaties with Canada, Mexico, Chile, Spain, Switzerland and the member countries of the Andean Community (CAN).

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

Sometimes.

### When may a taxpayer submit an adjustment to competent authority?

No formal rules exist in this area.

### May a taxpayer go to competent authority before paying tax?

Yes.

## Advance pricing agreements

### What Advance Pricing Agreement (APA) options are available, if any?

Unilateral and multilateral.

### 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 information regarding APA data is published.

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

As of 31 December, 2013, one APA had been signed.

## Language

### In which language or languages can documentation be filed?

Spanish.

### KPMG in Colombia

#### Vicente Javier Torres

Tel: +57 618 8000

Email: [vjtorres@kpmg.com](mailto:vjtorres@kpmg.com)

As email addresses and phone numbers change frequently, please email us at [transferpricing@kpmg.com](mailto:transferpricing@kpmg.com) if you are unable to contact us via the information noted above.

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