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GLOBAL TRANSFER PRICING SERVICES

Global Transfer Pricing Review

France

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TAX



France

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In 2010, the French government introduced documentation requirements which are now contained in tax administrative doctrine. While the full ramifications of this legislative change remain to be seen as part of tax audits, multinational enterprises operating in France have certainly taken note and geared up in putting together transfer pricing documentation packages addressing specific French issues.

The French government also strives to implement regulations in line with the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) initiative. For example, transparency is strengthened with the new obligation to include in transfer pricing documentation rulings awarded to related parties by foreign tax authorities, even without direct link to transfer prices. Collection of transfer pricing data is also reinforced by the introduction of a compulsory annual submission of an abridged transfer pricing report. A limitation of base erosion has also just been implemented via a limit on interest deduction. Over the next months, further reinforcements are still expected, in particular concerning business restructurings.

Finally, the French Tax Authority (FTA) is giving increased attention to, and making increased allegations of, permanent establishments. These files have given rise to a number of search and seizures gaining some of the public attention also present in other European countries in respect of similar issues. New legislation should reinforce existing investigative powers against multinational enterprises keeping records on servers located outside of France.

Basic information

Tax authority name

Direction des Vérifications Nationales et Internationales (DVNI) (National and International Audit Department) for companies with a turnover higher than 152.4 million Euros (EUR) (higher than EUR76.2 million for service providers), subsidiaries of such companies, and headquarters.

Directions Interrégionales de Contrôle Fiscal (DIRCOFI) (Interregional Tax Audits Department) for companies with a turnover ranging from EUR1.5 million to EUR152.4 million (up to EUR76.2 million for service providers).

Directions des Services Fiscaux (DSF) (Departmental Tax Services Department) for small companies with turnover lower than EUR1.5 million.

Citation for transfer pricing rules

CGI (Code general des impôts (CGI) or French General Tax Code), Articles 57, New Article 223 *quinquies* B, 238A and 238-OA; LPF (French Tax Procedure Code), Articles L 13 AA, L 13 AB, L 13 B, L 188A, L 80 B 7° (APA).

Effective date of transfer pricing rules

Transfer pricing regulation, 1933 (CGI Article 57).

Reversal of the burden of proof in certain audit situations, April 1996 (LPF Article L13 B).

Transfer pricing documentation requirement, 2010 (LPF Article L 13 AA and L 13 B with tax administrative doctrine (Bofip BOI-BIC-BASE-80-10-20-20140218)).

Transfer pricing annual disclosure requirement, 2013 (CGI Article 223 *quinquies* B).

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

Ownership of more than 50 percent considered for companies to be under common control. De facto control can also be applicable.

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

Three years, based on calendar year-end. Three years also when the FTA uses the international administrative assistance procedure (Article L 188A of the French procedure code). When the FTA demonstrates the existence of tax fraud, it can also extend the statute

of limitations from 3 to a maximum of 5 years (Article L 187). In the case of tax loss carry forwards, the statute of limitation is extended under certain limits and conditions.

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, for large taxpayers (falling under the scope of Article L 13AA) whose tax return filing deadline falls after December 8th 2013 (New Article 223 *quinquies* B). An abridged transfer pricing documentation must be submitted to the French tax administration within 6 months following the corporate income tax return filing deadline (in practice this is within 9 months of the end of the fiscal year or 10 months for enterprises with fiscal years ending on 31 December).

What types of transfer pricing information must be disclosed?

The annual transfer pricing information return, under the new law, consists of an 'abridged' version of existing transfer pricing documentation that large taxpayers would have to present during a tax audit. It includes both general information on the group of associated enterprises (general description of the activity, list of main intangibles assets owned and general description of the group's transfer pricing policy) and specific information on the French taxpayer (description of the activity, presentation of intragroup transactions including the nature and the amount when the aggregate amount per transaction type exceeds EUR100,000, and a presentation of the transfer pricing method(s) in accordance with the arm's length principle). Specific guidelines and practical comments from the French tax authorities are expected during 2014 with respect to his new obligation.

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

For the moment, there is no specific penalty. As such, the general EUR150 penalty shall apply, in addition of inaccuracies or omissions subject to a EUR15 penalty per inaccuracy or omission (with a minimum penalty of EUR60 and a maximum up to EUR10,000).

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:

- the transfer pricing documentation requirement, codified as Article L 13 AA, was enacted into law in France in December 2009 and incorporated in the tax administrative doctrine (Bofip BOI-CF-IOR-60-50-20120912). The scope of the transfer pricing documentation requirements is limited to entities established in France that meet a turnover or gross assets threshold (set at EUR400 million for both) or that own (or are owned by), directly or indirectly, more than half of a corporate entity's capital or of a corporate entity's voting shares, established in France or outside of France, meeting this EUR400 million threshold. These requirements apply to financial years commencing on or after 1 January 2010
- all intra-group transactions which affect the audited company's profit and loss account and/or balance sheet are within the scope of the law
- if the taxpayer does not respond or only partially responds to the requirement, it may face a penalty of up to 5 percent of the gross amount reassessed with a minimum of EUR10,000 per audited financial year.

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

The benefits of complying with the requirement are mainly penalty protection.

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 documentation should be made available to the FTA at the outset of a tax audit. If not, the FTA may require that the taxpayer provides or completes the documentation within 30 days, with a possible additional 30 days delay upon specific request.

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

Yes, with some additional specific items. The transfer pricing study will include information on the group of which the French taxpayer is part (including but not limited to, general business overview, general description of the legal and operational group structure, general description of the functions performed and risks assumed by group entities that transact with the audited company, list of the main intangible assets owned or used by the French entity, a general description of the group's transfer pricing policy) and information on the French company itself (activities, functional analysis, intra-group transactions, list of cost sharing, Rulings or Advance Pricing Agreements (APAs), selection of transfer pricing methods and description of comparables), as well as rulings awarded to related parties by foreign tax authorities for transfer pricing documentation covering financial years ending as from 1 January 2014.

French entities that enter into transactions with related companies located in 'non-cooperative' states or territories will need to provide additional information (balance sheet and profit and loss account of those related parties).

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?

The revised OECD Guidelines are generally followed by FTA inspectors. Therefore, the most appropriate method should be chosen based on – among others – comparability factors. In practice, the transactional net margin method is used quite often by the FTA.

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

No. However, in accordance with the OECD Guidelines, the FTA will search for the most appropriate method.

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?

Normal FTA practice is to expect receipt of the documentation within 30 days of a request. When the FTA applies the L 13 B procedure, the documentation should be provided within 2 months, although a 1 month extension may be granted upon request.

However, as previously mentioned, companies that fall within the remit of Article L 13 AA have 30 days to comply

with a (written) request from the FTA to provide transfer pricing documentation, with possible additional 30 days delay upon specific request to FTA. Article L 13 AA applies for financial years starting on or after 1 January 2010.

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

Yes.

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

Yes. There are two types of penalties potentially applicable: general, and transfer pricing-specific penalties.

General penalties

General tax penalties only (in limited cases, 40 percent of the tax avoided in case of bad faith behavior (where the purpose was to pay no or less tax), or 80 percent of the tax avoided in case of acts of fraud) can be payable, in addition to interest on late payments.

In addition, transfer pricing reassessments are considered to be deemed transfers of a benefit, which attract the same treatment as a deemed distribution of a dividend. Therefore, if the relevant double tax agreement allows for it, withholding taxes will be calculated on the reassessed amounts.

Transfer pricing penalties

For companies falling within the ambit of Article L 13 AA: the penalties range from a minimum of EUR10,000 per year audited for which no (or insufficient) transfer pricing documentation is available to a maximum of 5 percent of gross amounts reassessed.

To what extent are transfer pricing penalties enforced?

In the framework of the Draft Finance Bill for 2014, the French government proposed to strengthen the penalty to 0.5 percent of the turnover of the audited enterprise. The French Constitutional Council invalidated this modification because of the disproportionate severity of this penalty. Nonetheless, an automatic (i.e. even in case of no reassessment) and higher penalty is expected soon.

What defences are available with respect to penalties?

The exact amount of the 5 percent penalty described above depends on the level of insufficiencies in the documentation. Although it has been judged that tax penalties cannot be, in general, revisited by the tax courts, the fact that the penalties for insufficient documentation may vary could open possibilities to have the degree of insufficiencies, and hence of penalties, being revisited by French tax courts.

What trends are being observed currently?

Recent audits have focused on transfer of intangibles resulting from group reorganizations, financial services (namely guarantee fees) and unidentified embedded transactions in complex services agreements.

There also seems to be a trend whereby transfer pricing reassessments are alternatively associated with permanent establishment reassessments of activities such as ecommerce, where the activities are not physically performed on French territory but utilize a client base situated there.

The new obligation to include rulings awarded to related parties by foreign tax authorities, even without direct link to transfer pricing, illustrates the

strengthening of the FTAs' investigative powers. For penalties and transfer pricing documentation, additional rules are still expected probably for 2014.

Special considerations

Are secret comparables used by tax authorities?

Yes, but in specific situations and very rarely. Tax auditors use their knowledge of other cases they have audited and may refer to industry standards. However, such secret comparables cannot be used in the context of court cases.

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

Yes. FTA inspectors generally prefer French comparables, where available because of the consistency of the generally accepted accounting principles (GAAP) used.

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

No specific requirements have been officially requested. However, the FTA does make use of the French Diane database.

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

Low, but trend is to increase relationships.

Are management fees deductible?

Yes. Management fees paid by a French company are deductible for corporate tax purposes provided they meet the following tax deductibility conditions:

- I. the French entity must actually benefit directly from the services rendered and

- II. the amount charged (costs and relevant markup, if appropriate) to the French company should be consistent with the services rendered and should not be excessive.

Are management fees subject to withholding?

No, unless it is demonstrated that the management fees lead to a transfer of profit abroad (please refer to deemed distribution comment earlier).

Are year-end transfer pricing adjustments permitted?

Yes. They are permitted and commonly used for low-risk distributors. Nonetheless, taxpayers must also take into consideration customs and VAT issues related to these adjustments (subsequent customs regulations are especially heavy).

Other unique attributes?

None.

Other recent developments

During the preparation of the Finance Bill for 2014, the business restructuring issue was highly debated. The related provision was controversial and was finally rejected as unconstitutional by the Constitutional Court. The proposed provision was requiring 'compulsory remuneration' for the transfer of risk(s) or function(s) that stem from a French entity's transfers to a foreign related entity. Subject to a tight definition of the notions of 'risks' and 'functions' and a better approach of restructuring, the French government should reintroduce these measures soon with specific legislation.

Higher and systematic penalties should also be incorporated soon in French regulations for non-compliance with transfer pricing documentation requirements (during tax audits and annually).

A limit on the tax deductibility of interest on related-party loans was enacted as from financial years ending 25 September 2013. Interest is not deductible in situations when the tax, at the lender level, is not equal to at least 25 percent of the amount of corporate income tax that would have been due in France under ordinary circumstances.

The Finance Bill for 2014 also included a requirement for the mandatory supply of 'analytical accounts' to the French tax authorities during a tax audit (1) if the taxpayer has total gross assets of at least EUR400 million, or (2) if the taxpayer's turnover exceeds a threshold amount of EUR152.4 million and the taxpayer's main activity is selling goods, or turnover of EUR76.2 million for other taxpayers.

Tax treaty/double tax resolution

What is the extent of the double tax treaty network?

Extensive (France has concluded approximately 120 double tax treaties). A mandatory arbitration clause has been introduced in the US-French double tax treaty and with all EU member states except Denmark.

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

The 2006-2012 OECD statistics in respect of France's mutual agreement procedure (covering approximately the 2000 to 2012 period) indicate that very few cases result in double taxation.

When may a taxpayer submit an adjustment to competent authority?

It depends on the double tax treaty involved, but usually within 3 years after an adjustment leading to double taxation is proposed by a tax authority.

May a taxpayer go to competent authority before paying tax?

Permitted. Nonetheless, automatic postponement of tax collection does not apply anymore to mutual agreement procedures introduced as from 1 January 2014.

Advance pricing agreements

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

Unilateral (under strict conditions), bilateral, 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.

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

The APA program is successful in France (at least 50 agreements were granted since the creation of this program).

On average, the FTA is reporting that it processes approximately 20 APAs per year.

Language

In which language or languages can documentation be filed?

By statutes, for procedural purposes, all documents provided to the FTA are required to be drafted or translated in French. However in practice, tax auditors may prove to be more flexible and accept English versions of documents provided by the group or a foreign affiliate.

Nevertheless, it should be noted that the FTA has the right to demand a translation and that, from a practical standpoint, DIRCOFI is less familiar with foreign language documents than the DVNI and is consequently more inclined to request translations.

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