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GLOBAL TRANSFER PRICING SERVICES

Global Transfer Pricing Review

Luxembourg

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TAX



Luxembourg

KPMG observation

Transfer pricing is now a hot topic in Luxembourg. The focus is currently on financing structures but it is rapidly expanding to include allocation of profits to branches, licensing, change of business models and restructuring. In this respect, the Luxembourg government has announced that having general provision on transfer pricing documentation is top on its list.

Basic information

Tax authority name

Ministère des Finances.

Citation for transfer pricing rules

Luxembourg Income Tax Code; General Tax Law, Article 56, Article 97 (1), Article 164; paragraph 5 and 6 StAG. Circular LIR 164/2 of 28.01.11. Circular LIR 164/2 bis of 08.04.11.

Effective date of transfer pricing rules

28 January 2011 for intra-group financing activities. Not applicable for all other cases.

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

Transactions with non-residents, whether directly or indirectly, which do not comply with the arm's length principle (Article 56 LIR) and such transactions with direct or indirect shareholders or persons close to them (Article 164 LIR). No thresholds apply. For intra-group financing transactions, threshold as defined by Article 9(1) of the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention for associated enterprises.

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

Five years from the issuance of the tax assessment by the tax authorities (10 years in the case of fraud).

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 intra-group financing activities. Not applicable for all other cases. In addition, the administrative practice requires more and more transfer pricing documentation for trading and intellectual property activities.

What types of transfer pricing information must be disclosed?

On a general basis, there is no specific required information to be disclosed. However, disclosures related to transactions of special interest to the tax authority or related to specific computations/tax treatment must be made in the tax returns in order to evidence that the pricing and/or tax treatment previously agreed is respected. These disclosures are not listed in any specific regulation and

are mainly based on the Luxembourg administrative practice. Where an Advance Pricing Agreement (APA) is submitted to the tax authorities (frequently for intra-group financing activities), a transfer pricing study must be enclosed.

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

Where no APA has been concluded, the tax authorities may consider readjusting the remuneration of a company, potentially leading to an increase of the taxable base and, thus, of the overall tax charge.

With regard to intra-group financing activities, there is a risk of exchange of information with the country of residence of the borrower and hence a potential non-application of the benefit of the double tax treaties with resultant withholding tax issues.

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.

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

For intra-group financing transactions, a transfer pricing study enclosed with an APA submission enables the taxpayer to obtain binding information from the Luxembourg 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?

Where an APA is requested by the taxpayer, the transfer pricing study needs to be done when the APA is filed with the tax authorities.

If no APA is requested, the transfer pricing study must only be prepared in case the tax authorities challenge the arm's length character of remuneration in the tax returns of the company and ask for a transfer pricing justification.

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

No.

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 Administrative Tax Office (ATO) practice is to expect documentation within 28 days of request.

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

No.

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

Yes. General tax penalties only, 25 percent of the tax avoided for transfer pricing adjustments and 50 percent of the tax avoided where the primary purpose was to pay minimal or no tax.

To what extent are transfer pricing penalties enforced?

Rarely.

What defences are available with respect to penalties?

Documentation.

What trends are being observed currently?

More and more transfer pricing documentation requests for trading activities 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.

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

None.

Are management fees deductible?

Yes.

Are management fees subject to withholding?

No.

Are year-end transfer pricing adjustments permitted?

Yes, but only upward adjustments in the corporate tax returns in order to restate market conditions that would not have been commercially respected.

Other unique attributes?

Not applicable.

Other recent developments

Transfer pricing documentation is still not required by law. However, the Luxembourg tax authorities issued on 28 January 2011 a Circular on intra-group financing companies, followed by a new Circular on 8 April 2011. This reinforces the administrative practice that has been evolving over the last few months in the sense that documentation of transactions and prices is recommended (and required for intra-group financing transactions in order to obtain binding agreement from the Luxembourg tax authorities).

This Circular gives taxpayers performing intra-group financing activities the opportunity to get an agreement from the tax authorities on the arm's length character of their remuneration, where they respect specific conditions of economic and organizational substance. Many taxpayers already comply with this Circular in order to get certainty on their financing transactions.

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?

After an adjustment is proposed to the taxpayer.

May a taxpayer go to competent authority before paying tax?

Permitted.

Advance pricing agreements

What APA options are available, if any?

APAs are available.

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?

Currently, APAs can be filed by the tax authorities without constraint. However, KPMG in Luxembourg is watching the administrative practice with interest as to how this will evolve.

Language

In which language or languages can documentation be filed?

The documentation can be filed in English, German and French.

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