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GLOBAL TRANSFER PRICING SERVICES

Global Transfer Pricing Review

Portugal

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TAX



Portugal



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The Portuguese transfer pricing legislation has been in force since 1 January 2002, covering both cross border and domestic transactions. The original rules experienced some changes over the years, typically because of increasing scope. One of the most significant changes was the introduction in 2008 of an Advanced Pricing Agreement (APA) provision.

Currently, taxpayers can significantly reduce transfer pricing risk in Portugal through unilateral, bilateral or multilateral APAs. On the enforcement side, the tax authorities have increased transfer pricing audits across virtually all industries and transaction categories. Nowadays, given the present economic scenario, transfer pricing has been pointed out as one of the Portuguese Government's top priorities for the next couple of years in line with the European Union (EU) Commission measures against the tax fraud and evasion (e.g. Base Erosion and Profit Shifting (BEPS)).

Transfer pricing documentation is required in Portugal for certain taxpayers with net sales and other revenues equal or above 3 million Euros (EUR). There are some tax forms that require specific transfer pricing information, including a statement of whether or not the taxpayer has adequate transfer pricing documentation at the time of filing the company's tax return.

After a discussion period during 2013, the Corporate Income Tax Reform was finally implemented with effect from 1 January 2014. This reform aims to significantly increase the competitiveness of Portugal for foreign investments and investors, therefore creating a number of challenges and opportunities from a Portuguese transfer pricing perspective.

Basic information

Tax authority name

Autoridade Tributária e Aduaneira (ATA).

Citation for transfer pricing rules

Article 63 of the IRC Code; Ministerial Order (Portaria) n. 1446-C/2001 of 21 December 2001; and Ministerial Order (Portaria) n. 620-A/2008 of 16 July 2008.

Effective date of transfer pricing rules

1 January 2002

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

As of 2014, any of the following conditions would define the relationship as related party:

- one entity participates directly or indirectly in at least 20 percent of the share capital or voting rights of another entity (10 percent until 2013 – inclusively)
- both entities are at least 20 percent owned, directly or indirectly, by the same legal entity (10 percent until 2013 – inclusively)
- an entity and the members of its corporate bodies, or any administration, direction, management or supervising boards
- entities in which the majority of the board of directors are constituted by the same persons

- entities related under a subordination agreement under article 486 of Commercial Companies Code
- special relationship between entities whose legal relationship allows, by its terms and conditions, the control of the management decisions of the other, arising from facts outside the commercial or professional relationship itself
- transactions between a resident entity and entities resident in a clearly more favourable tax regime (as listed in Ministerial Order (Portaria) n.º 150/2004).

Moreover it should be noted that transfer pricing rules apply not only to transactions established between a permanent establishment located in

the Portuguese territory and its foreign headquarters or other foreign permanent establishments, but also to transactions established between resident entities in Portugal and all its permanent foreign establishments.

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

Generally, 4 years from the last day of the tax year-end (in cases where tax losses exist, it may vary, depending of the year being considered).

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.

What types of transfer pricing information must be disclosed?

Taxpayers usually need to disclose the following information in addition to that prepared for the contemporaneous transfer pricing documentation:

- selected transfer pricing methods on cross border transactions
- amounts of related party transactions, per transaction category, including Portugal-to-Portugal transactions
- any increase (if applicable) in taxable income related to a transfer pricing adjustment
- whether or not the taxpayer has contemporaneous transfer pricing documentation when filing the income tax return.

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

General penalties apply, namely for providing incorrect or incomplete information in tax disclosures or other documents relevant for tax purposes. Penalties of up to EUR150,000 apply for refusal to provide such information by the taxpayers.

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 certain taxpayers. Contemporaneous transfer pricing documentation is required for Portuguese taxpayers with net sales and other revenues equal or above EUR3 million in the fiscal year previous to the one under consideration. Specific penalties up to EUR10,000 per fiscal year may apply, in case of refusal to present transfer pricing documentation within the time limit set upon request by the ATA.

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

Besides providing penalty protection, a transfer pricing study simultaneously shifts the burden of proof to the ATA. It also mitigates the risk of unexpected positive transfer pricing adjustments to the taxpayer's taxable income.

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

Transfer pricing documentation must be prepared by the 15th day of the seventh month following the tax year-end (deadline to send the Annual Declaration of Simplified Corporate Information (IES/DA)). Although being part of the company's Annual Tax Dossier, the transfer pricing study should only be sent upon request by the ATA.

It is nevertheless advisable to have the conclusions on the transfer pricing study by the deadline to deliver the annual tax return (last day of the fifth month following the tax year-end), as eventual positive transfer pricing adjustments in respect of transactions with a foreign related party must be done by the taxpayer in the tax return.

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?

Taxpayers must adopt the most appropriate method. Transaction-based methods are preferred to profit-based methods. Other unspecified methods are permitted in certain cases. Reasons for selecting a method as the most appropriate and for rejecting the remaining methods should be explained in the transfer pricing study.

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

The most appropriate method rule is applicable.

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?

The normal practice is 10 days after request.

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?

Transfer pricing adjustments are regulated by the general tax penalty regime. If an adjustment is sustained, general penalties may be assessed namely for providing incorrect or incomplete information in tax disclosures (e.g., tax return or IES/DA). In addition, compensatory interest will be accrued at a 4 percent annual rate for late payment.

To what extent are transfer pricing penalties enforced?

With the expected increase of transfer pricing audits, a broader enforcement of transfer pricing penalties is also expected as foreseen in the Law.

What defences are available with respect to penalties?

The preparation of transfer pricing documentation.

What trends are being observed currently?

Given the current economic scenario in Portugal, the tax authorities are concentrating efforts on transfer pricing audits, as transfer pricing adjustments tend to result in larger tax assessments and tax collection.

Recent audits have focused more on: adjusting operating losses (disregarding the effect of the global economic crisis); payment for intra group services (when insufficient evidence of benefit received or inadequate support in terms of documentation is provided); financial transactions, especially those relating to complex financial transactions and cash-pooling arrangements, valuation and transfer of intangible assets, as well as business restructuring processes.

Special considerations

Are secret comparables used by tax authorities?

No. In principle secret comparables are not allowed; nevertheless, tax authorities may use them in practice to benchmark a taxpayer's return in relation to its peers.

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

Yes. Local comparables (Portuguese and to a certain extent Spanish) are preferred, but others may be allowed whenever these are not available. If a pan-European search is used, it is expected that ATA will screen the Portuguese comparables in the rejected list and could possibly create a Portuguese subset of the final comparables.

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

The ATA use both the SABI (with Iberian companies) and the Amadeus (with European companies) databases. Their preference falls on Portuguese (or Iberian) independent comparables, regardless of the database. Other databases may be used (and accepted by the ATA) for specific categories of transactions or industries.

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

Low, although increasing. The taxpayer is sometimes required to deliver its transfer pricing documentation under customs tax inspections.

Are management fees deductible?

Yes, if the management fees reflect the economic benefit and the arm's length principle. Specific transfer pricing rules apply to intra-group services.

Are management fees subject to withholding?

Yes, except when a tax treaty applies and certain formal requirements are met.

Are year-end transfer pricing adjustments permitted?

Yes, but will probably be highly scrutinized by the ATA. Thus, for transfer pricing purposes, a clear end-to-end understanding of how controlled transactions are executed is very important, as it helps to avoid

errors in the financial statements, as well as eventual tax liabilities and associated penalties.

There could be VAT or customs implications, which should also be carefully evaluated on a case-by-case basis.

If not reflected in the financial statements, positive transfer pricing adjustments in respect of transactions with a foreign related party must be done by the taxpayer in the tax return. On the other hand, negative transfer pricing adjustments are not permitted after the year end. That is why the regular monitoring of the transfer pricing policies during the year is important.

Other unique attributes?

No.

Other recent developments

By the end of 2013, The Portuguese Corporate Income Tax Reform was implemented in order to boost competitiveness for foreign investors and includes, among others changes, the reduction of the standard CIT rate (now 23 percent), extension of the tax losses carry forward period (currently 12 years), adoption of a broader participation exemption regime, reduction of the minimum holding requirement to apply for the group taxation (now 75 percent), additional limitation of the deductibility of interest and other financing expenses, a patent box regime (for certain intellectual property), a tax amortization of certain intangible assets, an option to disregard PE profits and some transfer pricing changes. The new rules will be applicable to tax events occurring after 1 January 2014.

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 having been notified of an additional tax assessment.

May a taxpayer go to competent authority before paying tax?

Permitted by providing a guarantee or a similar measure.

Advance pricing agreements

What APA options are available, if any?

Taxpayers can apply for unilateral, bilateral and multilateral APAs in Portugal, in addition to advance rulings. As of 2014 unilateral APAs are now possible in Portugal (previously limited to cases where Double Taxation Agreement (DTA) between Portugal and the home country of the counterpart did not exist). In terms of bilateral and multilateral APAs, it is always necessary for a signed DTA between Portugal and the others tax authorities to exist. Detailed requirements and conditions for submitting the request for an APA are defined in Ministerial Order (Portaria) n. 620-A/2008, of 16 July 2008 and in article 138 of CIT Code.

Is there a filing fee for APAs?

The submission of the request in respect of the preliminary phase is free of charge. The submission of the proposal implies the payment of a fee that may vary between approximately EUR3,150 and EUR35,000, depending on the revenue of the taxpayer. Renewals or reviews of APAs require a filing fee, calculated in a similar way, but with a discount of 50 percent of the initial fee.

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. The Portuguese Government released in June 2012 a report on the activities carried out during 2011 to combat tax and customs fraud and evasion in Portugal. This report also gives the statistics on the number of APAs established with the ATA.

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

The most recent statistics on the number of APAs indicate that there is two APAs concluded, five under negotiation (as at 31 December 2012).

The ATA tend to be very favorable to APAs and consider that it is an area in which taxpayers should put additional effort in order to increase the certainty of taxation (especially in areas with a history of adjustments). Given this, it is expected that the number of successful APAs will increase in the near future.

Language

In which language or languages can documentation be filed?

The relevant transfer pricing information should be prepared in Portuguese.

Reports in English tend to be accepted. Notwithstanding, the tax authorities have the right to accept or refuse it and they may request a translation of any relevant document written in a foreign language into Portuguese.

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