



SALANS

VOX TAX SUMMER 2009

**Salans Vox Tax
Transfer Pricing
Documentation
Survey**

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Salans Vox Tax Transfer Pricing Documentation Survey

For this special edition of Vox Tax, we produced a survey of 21 questions relating to cross-border transfer pricing (“TP”) documentation for our tax experts worldwide to answer. The questions are in this foldout cover, with individual country responses contained in the following pages of this report.

- #1** Is there an obligation to submit TP documentation in your local jurisdiction?
- #2** How often does the transfer pricing documentation need to be updated? What is the first financial year which can be covered by TP documentation? Can TP documentation be adopted with retrospective effect?
- #3** Is a parent company subject to different TP documentation requirements than a subsidiary company?
- #4** Are small and medium-sized enterprises concerned by mandatory TP documentation? If so, are their documentation compliance requirements identical to those of larger enterprises?
- #5** Do transfer pricing documentation requirements apply also to transactions between a permanent establishment and an associated entity? If so, are their documentation compliance requirements identical to those of larger enterprises?
- #6** Are there transfer pricing documentation requirements for domestic transactions? If so, are their documentation compliance requirements identical to those of larger enterprises?
- #7** Does TP documentation protect taxpayers from transfer pricing adjustments?
- #8** Does your jurisdiction have an APA procedure to protect against TP adjustments? If so, can APAs be concluded on a unilateral, bilateral or multilateral basis? What is the legal force of an APA?
- #9** How does a taxpayer prepare and store TP documentation: paper, electronic, other?
- #10** What is the timeframe to produce TP documentation? Is there an obligation which exists at the time the pricing is determined? Or can the TP documentation be produced for review by a tax administration after the tax audit has begun/upon specific request?
- #11** Do TP documentation requirements affect every intra-group transaction or only extraordinary transactions eg. transfer of intangibles or a substantive change of the functions and risks of the company?
- #12** In which language should TP documentation be presented? Are translations considered valid documentation?
- #13** If TP documentation exists, who has the burden of proof that the arm's length principle was respected: the enterprise or the tax administration? Is the burden of proof shifted to the taxpayer if they do not (sufficiently) fulfil their TP documentation requirements?
- #14** Does the tax system in your jurisdiction require a detailed list of documents to be submitted by the taxpayer, or is it an open case-by-case obligation (as recommended by the OECD)?
- #15** Is it possible to centralise the core part of TP documentation at group level?
- #16** Is the use of database searches for comparables (national / international) recognised by your jurisdiction as valid independent transactions?
- #17** When applying traditional methods ("Cost plus", "Resale minus") and the TNMM ("Transactional net margin method"), are internal comparables considered as valid comparable uncontrolled transactions? Or should external comparables be preferred?
- #18** Searching for comparables: does your local jurisdiction require for a local search for comparable transactions? Or are regional (eg. European) or international comparables accepted?
- #19** What are the penalties applicable where there is no TP documentation? What are the penalties applicable in cases of insufficient or non compliant TP documentation?
- #20** What legal resources are applicable in your jurisdiction to mitigate/eliminate potential double taxation related to TP adjustments?
- #21** What is the corporate tax rate in your jurisdiction?

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Note from Editors

As companies do more business overseas and develop more sophisticated methods for reducing their taxes, transfer pricing disputes between multinational companies and tax regulatory agencies are a hot topic.

In practice, the objectives of one national tax administration in assessing a multinational's transfer pricing policy are opposed to those of another tax administration. This situation can easily generate an intolerable double taxation situation. To prevent those situations, tax administrations around the world are imposing stringent new documentation requirements and increasing the scrutiny on taxpayers.

Transfer pricing documentation is an analysis under the arm's length principle. It is generally based on information about the associated enterprises involved in the controlled transactions, the transactions at issue, the relevant functions, assets and risks, and information derived from independent enterprises engaged in similar transactions or businesses. A company is in general required to prepare and maintain the documentation for transactions or arrangements between itself and an associated enterprise resident in another jurisdiction, to demonstrate compliance with the arm's length principle. This documentation needs to be of sufficient quality to establish compliance in accordance with the taxpayers' own local transfer pricing rules, with the relevant tax treaty, and to be consistent with OECD Guidelines.

It is possible that one day in the future, taxpayers around the world may be able to rely on a standardised set of transfer pricing documentation that is valid for all jurisdictions in which their companies operate. There has been some progress in that respect. Following the example of the Pacific Association of Tax Administrators

(PATA), its members being Australia, Canada, Japan and the United States, the European Union approved the Transfer Pricing Documentation Code of Conduct on 27 June 2006 to prevent groups having to take a country-by-country approach to documentation, with all its inherent downsides. European Union Member States are currently integrating the code of conduct's principles into their own local regulations.

Until there is a common international approach, companies involved in cross-border transactions must comply with different arrangements in place on an individual country basis. This special edition of Vox Tax aims to provide you with a comparative analysis of transfer pricing documentation requirements across multiple jurisdictions. We produced a survey of 21 questions relating to cross-border transfer pricing for our tax experts worldwide to answer. The result is a unique across-the-board view of the differing approaches of developed and emerging market economies to transfer pricing as reflected in their documentation requirements.

With almost 80 lawyers practicing in 16 jurisdictions across the globe and our recognised Transfer Pricing Practice, Salans' Global Tax Group continues to offer a full range of advisory services for all intra-group transactions. These include assessment of risks involved, sector-by-sector pricing assessment, defence of transfer pricing policy before the tax authorities, litigation, as well as arbitration procedures to remedy double taxation situations.

In addition to this, the Global Tax Group wishes to announce that it is establishing a dedicated service to clients of preparing transfer-pricing documentation for major jurisdictions. This new service offering

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completes the palette of transfer pricing services available from Salans.

We trust that you will find this special edition of Vox Tax informative and useful as an ongoing source of reference.

China

By Yun Wei, Fang Liu and Fei Yang

#1 Yes. From 2008, an enterprise with related party transactions must prepare annual TP documentation, and submit it to the tax authorities on request. Exempt are enterprises with:

- annual related party sales and purchases totalling less than RMB 200 million and other annual related party transactions total less than RMB 40 million;
- related party transactions covered by an existing advanced pricing agreement; or
- foreign shareholding of less than 50% and only domestic party transactions.

#2 TP documentation must be updated every year.

2008 is the first financial year in which TP documentation is required.

It is not yet clear whether TP documentation can have retroactive effect.

#3 No. The requirements are the same for parent companies and subsidiaries.

#4 Small and medium-sized enterprises have the same TP documentation requirements and burdens as large enterprises.

#5 It is not clear whether a permanent establishment needs to prepare the TP documentation in China. If it does, the documentation compliance burdens are identical to other enterprises.

#6 TP documentation requirements cover domestic transactions unless the enterprise is exempt, i.e. its foreign shareholding is below 50% and it only has domestic party transactions. The documentation compliance burdens for domestic transactions are the same.

#7 Not completely. A tax authority may adjust transfer pricing if, by following established tax audit methodology, it finds that related party transactions do not comply with the arm's length principle. A taxpayer who has prepared TP documentation, can be exempt from a 5% penalty interest rate charge if the transfer pricing is adjusted.

#8 Yes, in China, generally speaking, an applicant for an APA must have had annual aggregate related party transactions of more than RMB 40 million, have disclosed all related party transactions, and prepared, maintained and provided the relevant TP documentation.

It is possible to conclude APAs unilaterally, bilaterally or multilaterally. If an APA is concluded with tax authorities and the enterprise complies with the APA, the enterprise can be protected from transfer pricing adjustments for a period of three to five years. With tax authority approval, the same methodology agreed in the APA may also be applied to the current and prior years. The tax authorities have the right to supervise the performance of APAs by the taxpayer.

#9 The regulations are silent on the exact form but TP documentation submitted to tax authorities must be on paper with the tax payer's company chop and its legal representative's signature.

#10 For all related transactions occurring in a calendar year, the enterprise must produce relevant TP documentation before 31st May of the next year. The enterprise has no contemporaneous obligation when the pricing is determined. At the request of the tax authority, the enterprise must submit TP documentation within 20

days. Hence, it seems impossible for an enterprise to prepare its TP documentation after the tax audit or request is made.

#11 The TP documentation requirements hit every intra-group transaction.

#12 The TP documentation must be prepared in Chinese. If the original materials are in a foreign language, a Chinese translation can be submitted to the tax authority.

#13 The law and regulations do not specify who has the burden of proof. However taxpayers should in good faith demonstrate that their determinations of transfer pricing are consistent with the arm's length principle, and the tax authorities should follow the arm's length principle in their audits and adjustments.

#14 The Chinese tax administration can require an enterprise to submit documents, in addition to the annual TP documentation materials, supporting its TP policy on a case-by-case basis.

#15 The Chinese tax regulations require each enterprise to prepare TP documentation separately. However at group level, it is recommended to take a group transfer pricing review to identify issues and to establish the degree of potential exposure for each subsidiary and each type of transaction. Of course the subsidiaries can share common information within the group such as group organisational structure, market and competition analysis, and the group's supply chain.

#16 Yes, according to current practice.

It is not clear whether a permanent establishment needs to prepare TP documentation in China.

#17 Theoretically, internal comparables can be valid comparable uncontrolled transactions. However, our experience reveals that the tax authorities prefer external comparables.

#18 The tax regulations do not prohibit regional or international comparables, but in practice, the tax authority prefers local comparable transactions.

#19 In case of absence of TP documentation, the taxpayer may face a penalty of up to RMB 10,000 and more significantly, a higher risk of audit by the tax authorities.

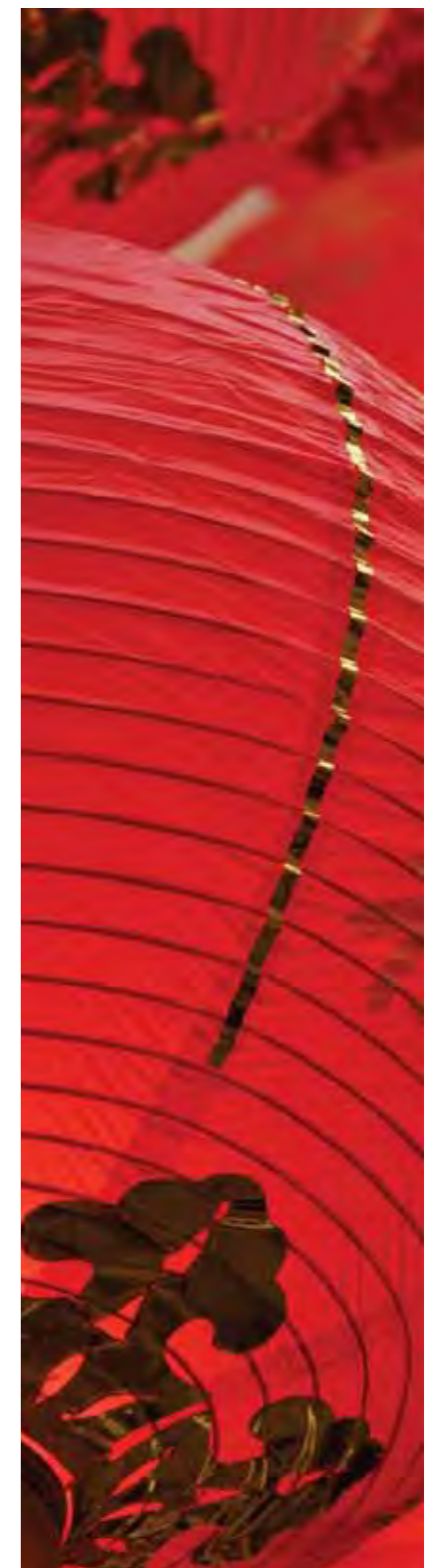
If an enterprise submits false or incomplete information to the tax authorities, it faces a penalty of up to RMB 50,000. The more critical consequences could be a tax audit:

- the authorities may assess the taxable income of the enterprise on reasonable "deemed income"; and
- any tax found to be unpaid by an enterprise will be penalised at interest of 5% plus a corresponding RMB lending rate on the amount of tax unpaid.

#20 The Trial Implementing Measures on Special Tax Adjustment (*Guo Shui Fa* [2009] No. 2) stipulates that if a related party is subject to tax adjustment, the other related party should be allowed to make a corresponding adjustment to eliminate double taxation. If any related parties are in a country/region that has a tax treaty with China, both tax authorities should negotiate the adjustment according to the tax treaty.

An enterprise should apply to the Chinese tax authorities for the corresponding adjustment within three years after it or its overseas affiliate receives an adjustment notice.

#21 Standard tax rate is 25%.



Czech Republic

By Radovan Bernard and Petr Kotab

#1 Czech tax laws do not require taxpayers to prepare and submit TP documentation to the financial authorities. However, as the burden of proof falls in most cases on the taxpayer rather than on the financial authority, it is in the interest of the taxpayer to diligently maintain any evidence that shows transfer pricing was established at arm's length.

For such purposes, the Czech Ministry of Finance issued various guidelines on transfer prices and TP documentation (e.g., Guideline D-293 on the scope of documentation on establishing prices between the related parties). Such guidelines are not legally binding on taxpayers, but enjoy a high level of respect as the tax authorities commonly use them in tax proceedings.

The rules set forth in OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (although not legally binding) are also taken into account by Czech financial authorities when interpreting Article 9 (Associated Enterprises) of tax treaties and also when interpreting TP provisions of Czech tax laws.

The Czech Republic also adopted the Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the EU. The Code, however, has not been implemented into Czech laws and it merely serves as a basis for guidelines of the Czech Ministry of Finance (see above) and uniform interpretation of TP provisions of Czech tax laws.

#2 As mentioned above, there is no requirement in the Czech Republic to maintain TP documentation so Czech tax laws do not set out rules concerning updates, retroactive effect and the date of commencement of the maintenance

of TP documentation. Therefore, the only principle that applies is that such documentation needs to be maintained in a way that will allow the taxpayer to demonstrate and prove in a clear and undisputed way adherence to the arm's length principle when setting transfer prices in its intra-group transactions.

#3 No.

#4 There is no mandatory TP documentation in the Czech Republic. The guidelines of the Czech Ministry of Finance regarding TP documentation do not distinguish between small, medium-sized and large enterprises. Usually only large enterprises that are part of a multinational group recognise the importance of TP documentation. It is not common for small and medium-sized enterprises to put much emphasis on TP issues.

#5 There is no mandatory TP documentation in the Czech Republic. The guidelines of the Czech Ministry of Finance regarding TP documentation do not distinguish between permanent establishments and large enterprises. It can be determined from general principles and rules of Czech tax law that the same requirements including transfer pricing issues apply to permanent establishments as they apply to other (i.e., domestic) enterprises.

#6 There is no mandatory TP documentation in the Czech Republic. The guidelines of the Czech Ministry of Finance regarding TP documentation suggest that the identical rules are obeyed when maintaining TP documentation in domestic transactions and large cross-border transactions.

There is no mandatory TP documentation in the Czech Republic and the burden of proof regarding intra-group transactions lies with the taxpayer.

#7 No, because there is no mandatory TP documentation in the Czech Republic. However, solidly maintained TP documentation can help as a procedural tool when fighting transfer pricing adjustments made by tax authorities in tax proceedings.

#8 Since January 1, 2006, Czech tax laws have implemented a procedure similar to the Advance Pricing Agreements concept entitled "binding assessment of transfer prices between related parties". Such assessment is issued by the local tax authority upon the application by a taxpayer and it is binding on all Czech tax authorities. The assessment is delivered to the applicant, and, in addition, to persons involved in the pertinent intra-group transactions of the applicant.

#9 How does a taxpayer prepare and store the TP documentation: on paper; in electronic form or in any other system?

Since there is no mandatory TP documentation in the Czech Republic, no specific rules are set forth by Czech law in this respect. Generally, a taxpayer is entitled to submit tax evidence (such as TP documentation) to financial authorities in any form, including electronic.

#10 Generally, the documentation does not have to be prepared until a tax audit commences.

#11 There is no mandatory TP documentation in the Czech Republic. Based on guidelines of the Ministry of Finance, TP documentation should address all the intra-group transactions.

#12 No specific rules apply as to the language of TP documentation. Generally, all the evidence submitted to Czech financial authorities must be in Czech or Slovak. If the document was prepared in another language, it needs to be submitted along with its translation into Czech or Slovak by a certified translator.

#13 There is no mandatory TP documentation in the Czech Republic and the burden of proof regarding intra-group transactions lies with the taxpayer. Even if a taxpayer prepares TP documentation in compliance with suggestions included in the Guidelines of the Ministry of Finance (see Q.1), the taxpayer still has the burden of proof.

#14 Since there is no mandatory TP documentation in the Czech Republic and the burden of proof lies with the taxpayer, the taxpayer is free as to the scope and kind of documents submitted. The guidelines of the Ministry of Finance (please refer to Q.1) contain a list of documents that should be included in the TP documentation but this is not intended to be a conclusive list.

#15 Czech tax laws do not prohibit doing so. In such an event, however, a Czech taxpayer needs to have access to such documentation when necessary and also the rules as to the language of such documents (please refer Q.12) should be adhered to.

#16 The use of database searches could be handy, for example, when applying a "comparable uncontrolled price" method for assessing whether the prices are arm's length. Czech tax laws do not prohibit using databases but in case of doubt, a taxpayer must be able to prove that the database is sufficiently broad and reliable. Even if the taxpayer proves this, the financial authorities may put into question the results of the database but in such event they have to provide their own evidence.

#17 The guidelines of the Ministry of Finance prefer to take into account external variables when assessing the profit (in case of the TNMM method), resale price (in case of the Resale minus method) or cost (in case of the Cost plus method).

#18 Czech tax laws do not have specific rules in this respect and also the guidelines of the Ministry of Finance (see Q.1) do not favour local searches over searches covering broader regions. Therefore, the general rule applies that the comparables obtained within the search have to be reliable and applicable to the given transaction.

#19 As there is no mandatory TP documentation in the Czech Republic, there are no specific penalties in this respect. On the other hand, the lack or limited scope of TP documentation can result in the inability of a taxpayer to prove compliance with the arm's length principle in intra-group transactions. This usually results in tax base adjustments, outstanding tax payment requests and penalties for late assessment.

#20 If the Czech financial authority re-evaluates transfer prices in the intra-group transactions of a taxpayer and demands

outstanding tax, this does not entitle the other related party in the transaction to decrease their tax base by the corresponding amount. Therefore, double taxation occurs.

Where prices in intra-group transactions correspond to arm's length principle pursuant Article 9 (Associated Enterprises) of a relevant tax treaty which is binding on the Czech Republic, double taxation is prevented by operation of the treaty itself.

Also, further legal remedies may be available under the convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (the "Arbitration Convention" 90/436/EEC) to which the Czech republic acceded from 1 October 2006.

#21 The corporate income tax rate was reduced several times over the past few years in the Czech Republic. Currently, the general corporate tax rate is 20% and it is scheduled to be decreased to 19% as from January 1, 2010.



France

By Fabrice Korenbeusser and Jessie Gaston

#1 Under current legislation, the French tax authorities (FTA) may request that enterprises, in the course of a tax audit, supply TP documentation provided that the FTA gathers beforehand sufficient evidence of a transfer of profit to related foreign entities.

Under new proposals, large enterprises will be subject to TP documentation requirements, irrespective of whether the business will be run in the form of a company or permanent establishment, under the following alternative criteria:

- a) Companies with a turnover or net assets (total amount of the balance sheet) higher than EUR 400 million, or
- b) Which hold directly or indirectly more than half of the share capital or the rights in an entity stated under point a), or
- c) Where share capital or rights are directly or indirectly held by an entity stated under point a), or
- d) Which are part of a tax consolidation group, within which there is at least one entity stated under point a)

#2 The law proposal requires that TP documentation be available to the FTA from the starting date of a tax audit.

The TP documentation should be implemented or updated during the course of the financial year during which the intra-group transactions occurred. Given that the TP documentation must be available on the first day of the tax audit, the intra-group transaction should be documented in as soon as it occurs. So, in principle, the TP should not be considered as having a retroactive effect.

EU recommendations are that the French tax authorities' draft guidelines allow for

comparable transaction data to be updated every three years¹.

#3 No, the TP documentation requirements are similar for each eligible enterprise (see response #1, irrespective of its status or form).

#4 The TP documentation mandatory requirements in the legislative proposal will only apply to large enterprises (see Q, I). So, SMEs should only set up TP documentation upon specific request of the FTA, in the course of a tax audit. In principle, such requests may occur only under exceptional circumstances if the FTA has gathered sufficient evidence suggesting a transfer of profit to related foreign entities. However, small companies are also being urged to prepare contemporary TP documentation².

#5 French PEs of foreign entities which fall within the scope of mandatory TP documentation (see response #1) are subject to similar requirements to those of large companies or SMEs.

#6 No, by virtue of article 57 of the French Tax Code ("FTC") TP documentation requirements only apply in the case of transactions between French and foreign related enterprises.

#7 If the TP documentation were considered as insufficient by the FTA, the enterprises would then be exposed to penalties (see response #19) and potential reassessments. However, even if the TP documentation is sufficient, the FTA could challenge the method or the appropriateness and accuracy of the comparable analysis.

#8 Any multinational enterprise may request a bilateral agreement between the FTA and a foreign tax administration, in order to determine an appropriate TP method. This multilateral APA should protect the taxpayer from any adjustments within its scope.

A taxpayer may also request a unilateral APA, under which the FTA certifies that the transfer pricing utilised by the enterprise will not be adjusted in France in the course of a TP tax reassessment. This unilateral APA will not protect the enterprise against potential double taxation of the same income in the foreign jurisdiction.

#9 In accordance with the EU code of conduct on transfer pricing documentation³, there is no specific requirement for TP documentation form. French tax regulations recognise, under certain conditions, the validity of electronic data for a tax audit procedure.

#10 The mandatory TP documentation for large companies must be available to the FTA at the date when the tax audit begins. The FTA is required to notify the taxpayer of the date when the tax audit is scheduled to begin.

SMEs are required to produce TP documentation within a minimum 2 months period from the date of a FTA request.

#11 The TP documentation must describe all intra-group transactions⁴ including the nature of the cash flows and royalties. Such information may be limited to global flows for each type of transaction⁵.

#12 The TP documentation may be drafted in a language other than French. However, all information and vouchers

presented to the FTA should be translated into French⁶.

#13 In principle, the burden of proof is always on the tax administration when it tries to establish:

- that the transaction occurs between two linked enterprises;
- that the pricing of any particular transaction does not satisfy the arm's length principle (with or without TP documentation);
- the amount of presumed profit transfer to the linked foreign enterprise⁷.

But in practice, the taxpayer bears the burden of proof and is the one to provide justifications to combat the FTA's position.

In the absence of any TP documentation, the FTA can simply make presumptions and the taxpayer will need to prove that the presumptions of the FTA are inaccurate.

#14 The French project guidelines refer to the "masterfile" approach, set up by EU code of conduct on transfer pricing documentation, under which taxpayers are required to implement TP documentation at two levels:

1) general information on the group of associated enterprise – this sets out a general description of the business, a general description of the group's organisational, legal and operational structure, the general identification of the associated enterprises, the ownership of intangibles, the group's inter-company transfer pricing policy

2) specific information on the audited enterprise – this describes the taxpayer's activities and business, the transactions with related parties (including nature and amount of flows), list of agreements and APAs, an explanation about the selection



¹ FTA project guidelines, n°15.

² "Transfer pricing: guide for small businesses" issued by the FTA in 2006.

³ EU Code of conduct on transfer pricing documentation, §2.4

⁴ FTA project guidelines n°6.

⁵ FTA project guidelines n°11.

⁶ FTA guidelines 4 A-1214 n°22.

⁷ FTA guidelines 4 A-1214 n°52.

and application of the transfer pricing method, and any other relevant information (spontaneously or upon FTA request).

#15 Yes, in accordance with the EU code of conduct on transfer pricing documentation on general information (see response #15). However, the FTA project guidelines do not allow for one company's TP documentation to be implemented at group level.

#16 Yes, the use of database searches for comparables (national / international) recognised by the FTA as valid independent transactions. There are no provisions as to the source of the comparable analysis but experience shows that the FTA usually bases its own analysis on the data issued by the Amadeus or Diane databases, or alternatively uses its own record. In such cases the names of companies on the panel will not be divulged.

#17 The analysis may be based on internal comparable transactions (ie. transactions between the enterprise and an independent company) as well as on external comparable transactions extracted from a data base. As is recommended by the OECD, the FTA recognises that the most appropriate comparable may be often the internal one⁸.

#18 The comparable transactions may be extracted from national, regional (European) or international data, depending on the type of company assessed and its geographical interaction.

#19 If no TP documentation is provided by SMEs upon FTA request (see response #11), or if the TP documentation provided by SMEs is insufficient the FTA will issue

a formal request to provide complying TP documentation within 30 days.

Failing to provide sufficient TP documentation within this period could result in maximum penalties for each audited year⁹ of EUR 10 000.

In the absence of the mandatory TP documentation for large enterprises, or if the TP documentation is considered as insufficient, the FTA formally requests the taxpayer to produce or to complete the TP documentation within a 30-day period.

Failing to provide a satisfactory TP documentation could result in penalties for each audited year of whichever is the highest:¹⁰ EUR 10 000 for each financial year audited; or 5% of the profits considered as transferred abroad by the FTA.

These penalties have been highly criticised. The FTA draft guidelines on assessing the quality of TP documentation have also been criticised as extremely subjective.

#20 Under most of the double tax treaties signed by France, and under the EU Arbitration Convention France accepts to correct the "corresponding adjustments" of French companies when a foreign linked enterprise is the object of a primary adjustment. France also accepts to correct "secondary adjustments" subsequent to primary adjustments of French companies, provided that the corresponding deemed divested funds are paid back by the foreign linked entity to the assessed French entity. In such cases, the FTA accepts not to levy any withholding taxes on the deemed divested funds.

#21 The French common corporate income tax is 34.43% for large companies.

⁸ "Transfer pricing : guide for small businesses" issued by the FTA

⁹ FTC, article 1735, II

¹⁰ FTC, article 1735, ter as provided by the law proposal

*In principle, the burden of proof is always on the tax administration...
But in practice, the taxpayer bears the burden of proof...*

Germany

By Michael Helm and Markus Thewes

#1 TP documentation is related to the type, the content and the legal and economic basis of their business connections with foreign related persons, as per Sec. 90 para. 3 German General Tax Act (GGTA).

An executive order law has also been issued with effect of 1st July 2003 (Gewinnabgrenzungsaufzeichnungsverordnung – GAufzV).

The Ministry of Finance has put the duty of TP documentation into concrete terms with decree of 12 April 2005 (cf. decree of Federal Ministry of Finance dated 12 April 2005, published in the German Federal Tax Gazette I 2005, page 570, et seq.).

#2 TP documentation has to be issued in paper or in electronic form for every foreign related business transaction. In general, taxpayers are not required to issue TP documentation within very short timeframes. Extraordinary business transactions, e.g. reorganisations of the group have to be issued within six months after they have occurred.

Several new TP documentation regulations apply for financial years after 31 December 2002, as per Sec. 90 para. 3 GGTA. Before 1 January 2003 no regulations existed but a decree dated 23 February 1983 had to be observed by taxpayers (cf. decree of Federal Ministry of Finance dated 23 February 1983, published in the German Federal Law Gazette I 1983, page 218, et seq.).

In 2001 the Federal Court of Finance held against the Federal Ministry of Finance that on the basis of the decree dated 23 February 1983 taxpayers are not obliged to issue TP documentation but only have to cooperate with the fiscal authorities and explore the facts regarding the sufficiency

of transfer pricing. A Federal Court of Finance decision from the beginning of 2003 (Sec. 90 para. 3 GGTA) establishes a duty to issue TP documentation by law.

TP documentation regulations cannot be adopted with retroactive effect except where a contract performs continuous obligations that comply with an extraordinary business transaction within the meaning of the TP documentation regulations, and the business transaction began before 1 January 2003.

#3 In Germany all taxpayers have to fulfil the same TP documentation requirements.

#4 Small and medium-sized enterprises do not have a duty to issue TP documentation. However, they are obliged to provide further information and documents about the foreign business transactions when requested by the fiscal authorities. In this case, issuing a less detailed TP documentation than that required for larger companies is recommended.

#5 Yes, TP documentation requirements have to be fulfilled also with regard to transactions between a permanent establishment and associated entities. Adequate and orderly bookkeeping for the permanent establishment does not fulfil the requirements for sufficient TP documentation.

#6 In general domestic transactions are not subject to TP documentation. However, domestic business relations may be subject to TP documentation to prove that the arm's length principle is met. Therefore, internal transfer prices can be subject to comparison with those transfer pricing matters that must be documented.

Small and medium-sized enterprises do not have a duty to issue TP documentation.

#7 In general, the TP documentation protects a taxpayer from adjustments if it demonstrates that the dealing at arm's length principle was adhered to.

#8 German law does not cover unilateral, bilateral or multilateral APAs.

Unilateral APAs can be obtained via an advance ruling by the competent fiscal authority (verbindliche Auskunft). This is binding for the fiscal authorities only due to the principle of good faith. Please note that an advance ruling does not protect from double taxation.

The regional fiscal offices of the Federal States in Germany have set out an administration order whereby the fiscal authorities have to decide by using equitable discretion whether a bilateral advanced transfer pricing agreement is appropriate (cf. State Ministry of Finance of Baden-Württemberg dated 28 November 1994, published in IStR 1994, 34). Due to tight fiscal authority budgets they are instructed only in exceptional cases to issue an APA. The Federal Ministry of Finance has affirmed this opinion with decree of 12 April 2005 (cf. decree of Federal Ministry of Finance dated 12 April 2005, published in the German Federal Tax Gazette I 2005, page 570, et seq.).

Finally, in Germany multilateral APAs are not covered by regulations and obviously multilateral APAs would have not be issued by the German fiscal authorities. However, as per Sec. 178a GGTA the German legislator has stated fees for multilateral

APAs so that it would be possible to apply for multilateral APA but fees are very high (EUR 20 000 per proceeding per country involved).

#9 The taxpayer can issue TP documentation in paper or electronic form. If the taxpayer chooses electronic form, further regulations regarding the adequate and orderly documentation have to be observed (Sec. 147 para. 6 GGTA). The taxpayer has to comply with the basic rules of storage of tax relevant data in electronic systems.

#10 There is no requirement to issue TP documentation within a short timeframe.

TP documentation usually has to be passed to the fiscal authorities after a specific request within a tax audit. But fiscal authorities might also request the TP documentation using equitable discretion without disposal of a tax audit. If so, TP documentation has to be submitted within 60 days, and within 30 days for extraordinary business transactions.

TP documentation which is based on documents that have been compiled a long time after the business transaction has taken place might not prove dealing at arm's length.

#11 TP documentation has to be issued for every intra-group transaction. TP documentation for extraordinary business transactions has to be issued within a short time period (see Q. 10).

#12 TP documentation has to in German. The fiscal authorities can request translations of documents that have been issued in foreign languages. If documents have been issued in English the fiscal

authorities shall request for translations only for essential elements of the document.

On request the fiscal authorities can admit documentation in another living language.

Taxpayers unable to supply documents to the fiscal authorities in German should apply to issue documents in a foreign language. Otherwise, the foreign language documents may not be fully admitted by the authorities.

#13 In principle, the fiscal authorities have the burden of proof that the arm's length principle was not respected. But the taxpayer has the duty to issue proper and sufficient TP documentation. If taxpayers fail their duty the fiscal authority's burden of proof lessens. If the TP documentation is proper and sufficient the fiscal authorities can amend the taxpayer's profit assessment if they are able to prove that the dealing at arm's length principle has not been observed. (see response #7).

#14 The tax system requires a detailed list of documents that have to be issued to with TP documentation.

#15 Written documentation for tax purposes does not have to be stored abroad. Electronic documentation might be allowed by the taxpayers' application to store abroad but only in another European Union member state.

#16 Database searches for comparables are not valid, as a rule.

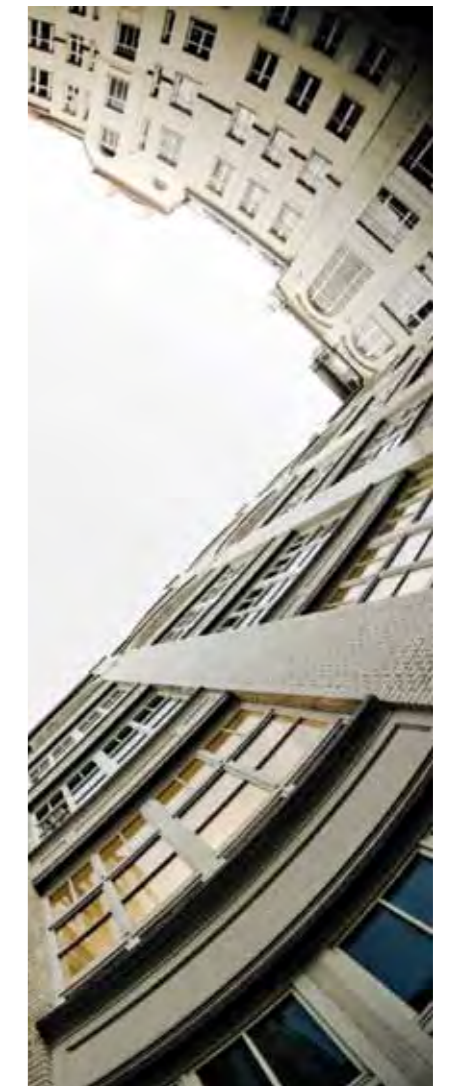
#17 In this case no preferences exists.

#18 For dealings with third parties, all comparables are accepted.

#19 In these cases penalties between EUR 5 000 and EUR 1 000 000 apply.

#20 A tax assessment can be changed within four years from the first assessment.

#21 The German corporate income tax rate is 15% with an additional 5.5% solidarity tax surcharge. Additionally, a local trade tax has to be paid, at an average of 15%. The total the tax burden for German based corporations is therefore about 30%.



Netherlands

By Richard Smeding and Thomas VanderVliet, Greenberg Traurig Amsterdam

#1 The Dutch General Tax Act stipulates that Dutch taxpayers are required to prepare and keep all documentation deemed relevant to establishing a company's taxable position and provide this if and when requested by the Dutch tax authorities. In addition, a statutory obligation to prepare and keep TP documentation applies. There is, however, no obligation to submit such documentation without a specific request to do so.

#2 A taxpayer is expected to update their TP documentation if the conditions under which a transaction is carried out change substantially. The TP documentation must cover the financial year in which the relevant transaction takes place. Moreover, under Dutch case law TP documentation is expected to be available from the moment that the transaction takes place. Upon request of the Dutch tax authorities, a taxpayer is obliged to provide the requested documentation information within 4 weeks after the request is made. In case of complex transactions, this deadline may be extended to 3 months.

#3 No.

#4 There are no specific rules for small, medium-sized or large enterprises; both are obligated to prepare and keep TP documentation. However, in practice the TP documentation obligation is applied in a flexible manner; small companies may often be permitted to provide less detailed TP documentation than large companies.

#5 TP documentation involving transactions between a permanent establishment and an associated entity should be retained. The documentation requirements are identical.

#6 Under Dutch law both international and domestic transactions require TP documentation. The documentation requirements are identical.

#7 In principle, having TP documentation on file does not protect a taxpayer from (possible) transfer pricing adjustments. However, the burden of proof lies with the Dutch tax authorities if a taxpayer is able to present documentation that sufficiently demonstrates that the transfer prices are consistent with the arm's length principle. Under these circumstances, the Dutch tax authorities will have to provide reasonable proof that the agreed transfer prices are not in line with the arm's length principle. It should be noted that the burden of proof will shift to the taxpayer if the taxpayer is unable to present sufficient information or documentation.

#8 The Netherlands has a well-known, extensive APA practice. The taxpayer may conclude an APA with the tax authorities on a unilateral, bilateral or multilateral basis. In the latter two situations the Dutch tax authorities will first negotiate country specific agreement with the other jurisdiction(s) involved and thereafter conclude the national APA with the Dutch taxpayer based on that bilateral or multilateral agreement. The APA is an enforceable settlement agreement subject to Dutch civil law just like any other form of agreement.

#9 A wide range of data carriers are accepted to prepare and keep TP documentation (eg, paper, electronic forms etc), provided that the taxpayer's taxable position can be established from the documentation at any time.

#10 TP documentation is expected to be available at the moment of the transaction. Upon request of the Dutch tax authorities a taxpayer is obliged to provide the required information within 4 weeks. In case of complex transactions this deadline may be extended to 3 months.

#11 Under Dutch case law every intra-group transaction requires TP documentation.

#12 Both Dutch and English are permitted. Translations are considered as valid documentation, provided that either of these languages are used to present the TP documentation.

#13 In principle, the burden of proof lies with the Dutch tax authorities if a taxpayer is able to present documentation that sufficiently demonstrates that the transfer prices used are consistent with the arm's length principle. However, the burden of proof will shift to the taxpayer if the taxpayer is unable to present sufficient supporting information.

#14 There is no exhaustive list of information that should be included in the TP documentation. The required information depends on the specific case at hand, and more specially, on the degree of complexity of the relevant transaction.

#15 In principle, an enterprise is obliged to prepare and keep TP documentation on an independent basis. This is also the case when an enterprise belongs to a consolidated group (e.g. a Dutch fiscal unity). In practice however, the Dutch tax authorities accept that the core part of the TP documentation is centralised at group level, as long as the relevant documentation

Under Dutch case law, every intra-group transaction requires TP documentation.

is also available at the level of the relevant Dutch company.

#16 Yes (for example Amadeus).

#17 In principle, both internal and external comparables are considered as valid comparable uncontrolled transactions.

#18 Regional comparables are accepted, subject to the relevant facts and circumstances.

#19 At first glance, the burden of proving the arm's length principle will shift in both cases to the taxpayer if the taxpayer is unable to present sufficient information. In addition, the absence of TP documentation could lead to penalties of up to 100% of the tax due.

#20 The taxpayer may request from the Dutch tax authorities a so called "corresponding adjustment", a transfer price adjustment corresponding with the transfer price adjustment of another jurisdiction.

Furthermore, all tax treaties which Netherlands has concluded contain a provision comparable with art. 25 of

the OECD model convention, a so-called "Mutual Agreement Procedure". This provision aims to assist taxpayers in eliminating double taxation by way of a consultation procedure between the relevant treaty parties.

Finally, an EU-member could use the Arbitration Convention, which obligates members to eliminate double taxation.

#21 The Dutch corporate income tax rate for the year 2009 is 25.5%, with lower brackets of 20% and 23% for the first EUR 40 000 and subsequent EUR 160 000 of taxable income respectively.



Poland

By Pawel Sylwestrzak and Mateusz Serafinski

#1 Polish CIT and PIT regulations stipulate that a formal transfer pricing documentation should be prepared if annual volume of the transactions exceeds the given thresholds. Possessing the TP documentation is obligatory. It can prevent tax authorities from applying a penal 50% CIT / PIT rate if they question the applied price levels.

#2 As a rule, the TP documentation needs to be prepared separately for each tax year, provided that the volume of transactions exceeds the given threshold for that year. TP documentation must be provided to the tax authorities within 7 days after request. If the documentation is not presented within the above timeline, tax authorities are entitled to apply a 50% CIT / PIT rate to the adjusted tax result.

#3 No, documentation requirements are the same for all companies.

#4 Enterprise size does not have an influence on TP documentation requirements. However, the volume of the transaction does: the TP documentation refers only to transactions where the annual turnover in a given tax year exceeds the PLN equivalent of:

EUR 100,000 – if the value of the transaction does not exceed 20% of the share capital of the company,

EUR 30,000 – in the case of rendering services or sale of intangible values,

EUR 50,000 – in all other cases,

EUR 20,000 – for all payments made to tax havens.

#5 Transactions between a PE and other group companies should be regarded in the same manner as transactions between companies.

#6 There are identical requirements for TP documentation documenting domestic and cross border transactions.

#7 No, it only protects taxpayers from a penal 50% CIT / PIT rate to these adjustments.

#8 Poland has an APA procedure, it can be concluded on a unilateral, bilateral and multilateral basis. As a result of the APA procedure, the tax authority issues a decision on the APA. The decision is binding for a period of maximum 5 years and may be renewed for the following periods.

#9 This is not regulated but in practice the TP documentation is usually stored on paper.

#10 The TP documentation must be provided to the tax authorities within 7 days from their request. No other timeframes have been provided. In practice, since it is difficult to produce TP documentation within 7 days, taxpayers should prepare such documentation immediately after the end of the tax year.

#11 Every intra-group transaction is hit provided that the value of the transaction exceeds given thresholds.

#12 The TP documentation should be prepared in Polish or translated into Polish by a certified translator.

#13 The tax authorities are required to prove that the arm's length principle has not been respected.

#14 TP documentation is a formal document that should include all elements stipulated in the CIT / PIT Act.

#15 It should be possible.

#16 This jurisdiction does not indicate database search for comparables as an obligatory element of a TP document, but it may be included as an appendix to the documentation.

#17 External comparables are preferred.

#18 Searching for comparable transactions is not an obligatory element of TP documentation.

#19 The only penalty is the application of a penal 50% CIT / PIT rate to the adjusted profit. Tax authorities may also choose to prosecute personnel responsible for preparing the company's tax position.

#20 There is a provision allowing correction of the price level where the tax authorities in another EU country have adjusted the price level of the related party with whom the transaction was made.

#21 19%

TP documentation must be provided to the tax authorities within 7 days after request

Romania

By Cosmin Petru-Bonea

#1 Taxpayers who carry out transactions with affiliated persons are liable to prepare and provide TP documentation, at the request and within the terms granted by the relevant tax authority.

The tax authority's request to prepare and provide the TP documentation shall be in writing on a special form signed and stamped by the head of the relevant tax authority.

#2 Applicable Romanian regulations require the TP documentation to be prepared at the request of the relevant tax authority, the documentation shall be up to date as of the date of preparation.

#3 The same TP documentation requirements are applicable to parent companies and subsidiary companies.

#4 There is no difference in TP documentation compliance between small and medium-sized companies and large companies.

#5 Transfer pricing regulations apply also to transactions between a permanent establishment and an associated entity. TP documentation requirements are similar to those applicable to affiliated parties.

#6 TP documentation requirements are applicable to all transactions carried out between affiliated persons, irrespective of their place of residence, so that identical documentation compliance requirements are applicable to all such transactions.

#7 Although there is no specific provision expressly stating this, the preparation of proper TP documentation protects the taxpayers from transfer pricing adjustments made by the relevant tax authority.

#8 Under Romanian law, the National Agency of Fiscal Administration is the authority authorised to issue APAs.

The APAs may be concluded on a unilateral, bilateral and multilateral basis, but bilateral or multilateral APAs may be issued only for transactions with taxpayers from countries with which Romania has concluded double taxation treaties.

The APAs are opposable and mandatory for the relevant tax authorities provided that their terms and conditions have been fully observed by the taxpayer. Otherwise, the APA is no longer valid from the fiscal year when the terms and conditions were breached by the taxpayer.

#9 In general, TP documentation should be prepared and provided to the relevant tax authority on paper. However, an electronic format agreed on between the taxpayer and the relevant tax authority is permitted.

#10 The TP documentation has to be provided at the request and within the time frame specified by the relevant tax authority. This may not exceed 3 calendar months from the date of the request. The taxpayer can request a time extension for a period equal to the one initially established by the relevant tax authority.

#11 The TP documentation requirements are applicable to all transactions carried out between affiliated parties.

#12 Generally, the TP documents should be presented in Romanian, but a certified translation in Romanian should also be provided with documents in other languages.

#13 On a general note, the refusal to provide TP documentation or the submission of incomplete documentation is regarded as a transaction between affiliated parties without a justified transfer price. This will trigger a transfer price estimation by the relevant tax authority.

The taxpayer is then liable to prepare and provide complete TP documentation within the time frame communicated by the relevant tax authority. Otherwise, the relevant tax authority may proceed with the transfer price estimation based on the procedure regulated by the Romanian law.

#14 The information to be included in the TP file is described in general terms (eg. information about the group; information about the taxpayer).

#15 Considering that under Romanian regulations, the TP documentation should be presented only at the request of the relevant tax authority, this is the taxpayer's decision. It is however essential that the taxpayer can provide the TP file within the time frame established by the relevant tax authority.

#16 Romanian law is rather lacking in this respect, having a general provision that the comparative analysis shall consider the territorial criterion in the following order: national, European Union, international. However, Romanian law makes express reference to the OECD Transfer Pricing Guidelines as a supplementation of the rules provided by domestic legislation.

#17 Romanian law stipulates that information regarding external or internal comparable transactions must be included in the TP documentation. From a reasonable interpretation of the specific legal provision, it appears that either internal or external comparables may be considered when preparing the TP file.

#18 As mentioned in response #16, Romanian law has a general provision that the comparative analysis shall consider the territorial criterion in the following order: national, European Union, and international.

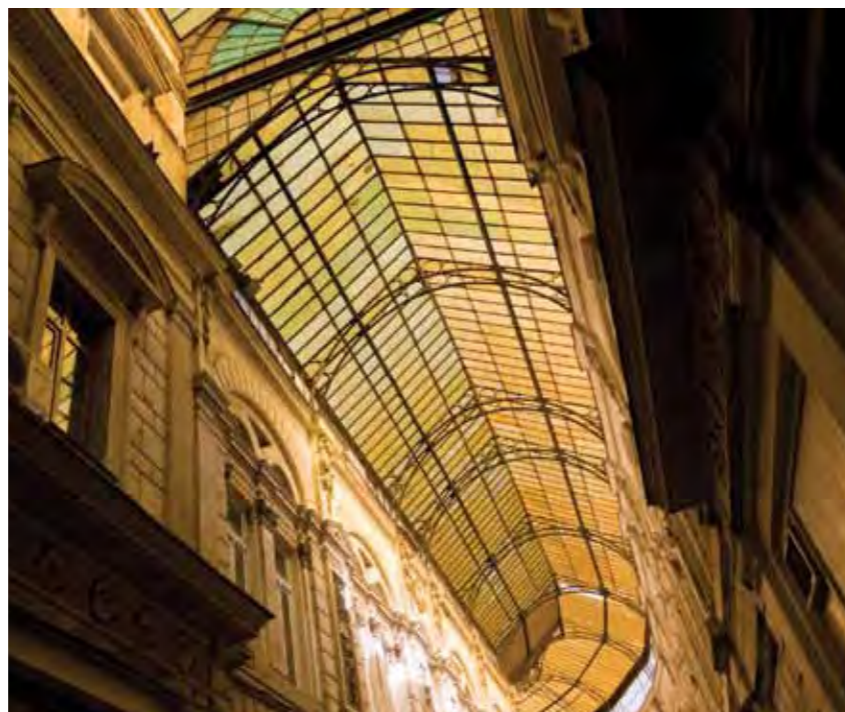
#19 According to the Romanian Fiscal Procedure Code, taxpayers who carry out transactions with affiliated parties are obliged, at the request of the relevant tax authority, to prepare and submit the TP file in view of establishing the transfer price. Failure to comply with this legal obligation is deemed a misdemeanour, sanctioned by fines ranging between RON 12 000 and RON 14 000 (equivalent of EUR 2850 – 3300).

Failure to present or presenting insufficient TP documentation within the time frame granted by the tax authority entitles the tax authority to estimate the transfer price, which may lead to transfer pricing adjustments.

#20 Romanian law is silent concerning specific procedures to mitigate/eliminate potential double taxation related to TP adjustments. Such matters are dealt with in terms of the mutual agreement procedure stipulated in the double taxation treaty between the two countries involved in transactions, if such a treaty exists.

...the refusal to provide TP documentation or the submission of incomplete documentation is regarded as a transaction between affiliated parties without a justified transfer price.

#21 Currently, the standard corporate income tax rate in Romania is 16% subject to minimum tax payable based on the company's total income. The minimum tax provision was recently approved to prevent companies registering losses for indefinite periods of time.



Russia

By Boris Bruk

#1 Current Russian TP rules do not require preparation and submission of any specific documentation to the tax authorities. Russian law introduces a rebuttable presumption stating that the price applied by a taxpayer is a fair market price.

Should the tax authorities decide to challenge the price applied by the taxpayer, they will have to prove that this price is not in line with the TP statutory principles. The tax authorities must use official sources of information (eg. statistics, data received from the customs authorities) in order to support their estimate of what they believe to be the fair market price. In practice, the tax authorities have started using authoritative expert appraisals (eg. expert appraisals of the RF Academy of Science) more and more frequently and the courts have accepted such appraisals as evidence.

Although there is no statutory obligation to submit any TP documentation, Russian companies and foreign companies doing business in Russia are nowadays increasingly concerned about potential attacks on their prices (both intra-group and prices applicable to trade with external customers / suppliers) by the Russian tax authorities. As a possible countermeasure, they develop comprehensive TP or marketing policies describing their intra-group pricing and external trading methodology and the factors affecting such methodology (including marketing strategies, system of discounts etc). It is believed that such documentation laid down on paper in advance could provide additional support in disputes with the tax authorities and for persuading a court.

It should also be noted that the Russian Government is currently considering amending the Russian TP rules to make them more efficient. The TP draft bill¹

(not yet submitted to the parliament but expected to become the law from January 1st, 2010) introduces a number of novelties, including special documentation requirements. In particular, companies and individual entrepreneurs will have to file (together with the respective annual profit tax (CIT) returns, personal income tax returns and returns filed under the special tax regimes) special forms describing the terms of their qualifying transactions (i.e. the transactions, which could be subject to TP review). The forms will have to be filed, if income and expenses incurred in connection with the qualifying transactions with the same counterparty (or same counterparties) will exceed RUR 10 million (app. EUR 229 000) per year (the RUR 10 million criterion)².

The information to be included in the forms should cover:

- Description of the type and the subject matter of the qualifying transactions;
- Information about foreign individuals and foreign companies which were a party to the qualifying transaction (including information about their respective jurisdictions);
- Information about the prices applied in the qualifying transactions;
- Description of TP methods applied by a taxpayer to ensure that the prices applied in the qualifying transactions are fair market prices;
- Description of information (including sources of this information) used by the taxpayer to ensure that the prices applied in the qualifying transactions are fair market prices;



¹ The below analysis is based on the latest publicly available text of the bill, which may be subject to significant changes before it becomes the law and is provided for information purposes only. Therefore, you should not consider this analysis of the draft bill as guidance for any subsequent action.

- Information about income / expenses incurred by the taxpayer from the qualifying transactions.

The company / individual entrepreneur will have to sign the TP forms attached to the tax returns and will therefore be held personally liable for the correctness of the information provided.

#2 As discussed in response #1, Russian tax law does not currently address TP documentation issues.

The draft TP bill implies that the TP documentation has to be provided at least once a year. In addition to the information about qualifying transactions, which has to be submitted by the taxpayers to the tax authorities together with the tax returns, the tax authorities will be able to request additional information about the qualifying transactions in the course of a tax audit. This could include:

- Description of the terms of qualifying transaction, including the payment terms;
- Information about the parties of the qualifying transactions;
- Functional and risk analysis describing the roles of the taxpayer and its counterparties in the qualifying transactions, including information about the assets used by the taxpayer in the qualifying transactions and the risks assumed by each of the parties;
- Description of the methods and the information used by the taxpayer to verify whether the prices applied in the qualifying transactions are fair market prices;
- Calculation of income and profits arising from the qualifying transactions;

- Information about any other economic benefits received by the taxpayer from acquisition of information and IP rights (if applicable);

- Information about other factors that affected the applied prices, including information about the market strategies of the taxpayer.

The additional information will have to be submitted to the tax authorities within 5 days after requested by the tax authorities. The taxpayer may request an extension of the deadline. Taxpayers who submit the required information will not be subject to tax penalties for errors in tax accounting, underpayment of tax or tax agent penalties, if the errors in tax accounting, underpayment of tax and failure to withhold taxes arise out of TP review of the qualifying transactions.

Neither current Russian tax law nor the proposed draft TP bill directly addresses the issue of updating the TP documentation or retroactive effect thereof. Currently any TP documentation voluntarily drafted by the taxpayer may be updated by the taxpayer and may have retroactive effect. The draft TP bill implies that the TP documentation will be submitted on yearly basis (subject to the RUR 10 million threshold), so effectively the TP information will be updated annually. No retroactive effect of the TP information is envisaged by the draft law.

#3 Neither current tax law nor the proposed draft TP bill require different TP documentation for parent and subsidiary companies.

#4 The current Russian TP rules do not differentiate between small, medium-sized and large companies. Therefore, each type of company may find it useful to prepare TP documentation, as discussed in Q. 1.

It should be noted that the RUR 10 million threshold under the draft TP bill suggests that the TP documentation requirements will likely affect medium-sized and large enterprises. The bill does not differentiate TP documentation requirements for these two types of companies.

#5 Currently, Russian TP rules should equally apply to Russian companies and permanent establishments of foreign legal entities. So, both types of businesses may find it useful to draft TP documentation, as described in response #1.

We would expect that the TP documentation requirements (to be introduced by the draft TP bill) should apply equally to Russian companies and permanent establishments of foreign legal entities (where the permanent establishments fulfil the RUR 10 million threshold). No difference in TP documentation between permanent establishments and large companies is envisaged in the bill.

#6 Since both current Russian TP rules and the proposed draft TP bill cover cross-border and certain types of domestic transactions, TP documentation should be addressed in those cases where the domestic transactions qualify for the TP review.

The proposed TP draft bill does not require different documentation for domestic and cross-border transactions. Neither does it differentiate between the TP documentation requirements for qualifying enterprise size.

#7 No, the TP documentation does not and will not (under the draft TP bill) protect taxpayers from TP adjustments.

² It is expected that the TP draft law will introduce a five-year transitional period when the TP documentation requirements will be applying if income and expenses from qualifying transactions with a same counterparty (or same counterparties) will exceed RUR 100 million (app. EUR 2.2 million), RUR 80 million (app. EUR 1.8 million), RUR 60 million (app. EUR 1.4 million), RUR 40 million (app. EUR 917 000), RUR 20 million (app. EUR 460 000) per year respectively. The RUR 10 million threshold will apply from the start of the sixth year.

As discussed in response #1, currently the voluntarily-prepared TP documentation could be viewed as the source of additional arguments protecting the position of the taxpayer in disputes with the tax authorities, but it is not compulsory for either the tax authorities or for the courts.

Under the TP draft bill this information (a statement of the position of the taxpayer) will be the starting point for discussion with the tax authorities and may also protect the taxpayer from penalties.

#8 No APA is available at the moment.

The draft TP bill introduces APAs for “large taxpayers”. The following are the key terms proposed for the APAs:

- The APA may be concluded between a large enterprise and the tax authorities with regard to one or several similar transactions;
- The term of the APA will not exceed 3 years (but may be extended for not more than 2 years);
- The draft APA will be prepared by the taxpayer and signed by the taxpayer and the Chief Executive (Deputy Chief Executive) of the Federal Tax Service;
- Taxpayers applying for an APA will have to provide information regarding qualifying transactions, as described in response #2. The tax authorities may demand submission of any additional information they believe necessary for conclusion of the APA (not limited by the lists of information described in responses #1 and #2 above);
- The taxpayer will have to pay state duty for consideration of its APA application;
- The maximum term for consideration of the APA application is one year (may be extended by 3 months);

- The APA will become effective immediately after the parties sign the document;

- Once executed the APA will be sent by the Federal Tax Service to the local tax authorities (where the taxpayer is registered);

- The APA may be amended by application of the taxpayer or by decision of the Federal Tax Service (the grounds which may trigger such decisions are currently unknown);

- The APA may be terminated by the agreement of the parties, by court or by the Federal Tax Service (if the taxpayer fails to comply with the terms of the APA);

- Failure of the taxpayer to comply with the terms of the APA may trigger revision by the tax authorities of the qualifying transactions and potential recapture of underpaid taxes and assessment of late payment interest (if applicable).

#9 In practice both formats could be used (for example, currently the Russian tax authorities practice e-filing of tax returns).

#10 Currently the voluntarily prepared TP documentation is likely to come into play if and when the tax authorities start discussion about the prices used by a taxpayer.

Under the proposed draft TP bill the TP documentation will both have to be submitted together with the annual tax return and additional information may be demanded by the tax authorities.

#11 As a general rule, preparation of the TP documentation is only necessary for those transactions which may be subject to the TP review. Currently those are:

- Any transactions between the related parties;
- Barter (exchange of goods, works, services) transactions;
- International trade (cross-border) transactions;
- Transactions involving the same or similar goods (works, services), carried out within a short period and triggering more than 20% dispersal of prices up or down.

The proposed draft TP bill expands the scope of application of the TP rules by:

- Covering those transactions between the related parties carried out through a non-related party (eg. where the same items are sold by one related party to an independent purchaser and then the same items are sold by the independent purchaser to the second related party);
- Covering transactions involving offset of mutual claims;
- Expanding the scope of TP to transactions involving information, IP rights and other proprietary rights;
- Covering any transactions where one party is a resident in a state blacklisted by the Ministry of Finance.

It should be noted, however, that apart from the general TP rules, some special provisions of the RF Tax Code regarding calculation of the tax base for VAT [Art. 154], Profit tax (Art. 274 (4-6)) and Personal Income tax [Art. 211 (1) and Art. 212 (1-2 and 3)] purposes contain references to the principles laid down in

the TP rules or similar rules. This means that where the activities of the taxpayers fall under these specific rules the tax authorities may perform TP analysis even if the qualifying activities do not fall under the general TP rules.

Since there are no TP documentation requirements whatsoever at the moment, the taxpayers are left free to decide whether they would like to prepare the TP documentation with regard to any transactions which, although not being subject to general TP rules, may nevertheless be controlled under specific provisions of the RF Tax Code.

Although subject to further clarifications from the tax authorities and courts, it seems that the TP documentation requirements to be introduced by the draft TP bill will not be extended to transactions covered by the above listed specific provisions of the RF Tax Code, if the transactions do not fall under the general TP rules. The taxpayer could, nevertheless, be advised to prepare such documentation as it could still bolster their position should a dispute arise with the tax authorities.

#12 All TP documentation should either be prepared or translated into Russian.

#13 Currently, the burden of proof that the prices applied in a transaction are not fair market prices is shifted to the tax authorities. In practice, however, the courts expect that taxpayers will actively defend their pricing policies and bring forward counter arguments against the position of the tax authorities.

The draft TP bill retains the rebuttable presumption that prices applied by the taxpayer are correct. This implies that the tax authorities will have to prove this is



not the case if they decide to challenge. It seems, however, that the effective burden of proof will continue to be balanced between the parties (ie. each party will have to prove its position).

#14 As discussed above, currently there are no statutory requirements at all for TP documentation.

The draft TP bill provides that the information submitted to the tax authorities on an annual basis will be filed in forms to be developed by the Ministry of Finance as an attachment to tax returns. Taxpayers will be able to submit the additional TP information, which may be requested by the tax authorities in the course of a tax audit, in any format unless the tax authorities will request specific documents which have to be furnished under Russian law in a particular format.

#15 Preparation of TP documentation is currently optional and therefore a group of companies may choose to prepare unified TP documentation (eg, the group marketing policy). Establishing a unified intra-group TP policy could be beneficial for protection of the prices applied by the Russian companies of the group, as this will show that all entities of the group utilise the same TP principles (this should demonstrate that the group has no intention to use its TP policy in order to avoid Russian taxes). Nevertheless, it could still be necessary to take into account specifics of the market in particular countries / regions and the functions of particular companies of the group, so the general intra-group TP policy could be developed on per country / company level.

As discussed above, the TP documentation requirements to be introduced by the draft TP bill imply filing of the TP information

attached to the tax reporting package which will include information about the TP qualifying transactions of a particular company. It should be noted though that the Russian government is considering introduction of the consolidated group tax regime (the qualifying Russian companies of a group will be able to file tax returns on a consolidated basis). Should this regime become effective, it could be expected that consolidation of the TP documentation will be possible, at least at the level of the Russian entities of international company groups.

#16 Currently Russian TP rules require that the tax authorities use publicly available information about fair market prices, including statistics and exchange quotes when performing the TP study. No developed TP data infrastructure has been developed at the moment. State statistics (as well as information collected by other governmental authorities) are scarce and too general (may not take into account all the factors which affect the price, including the terms of the transactions), which makes the TP rules difficult to apply in practice in many cases. The taxpayers sometimes use the pricing information of their competitors to defend their own prices.

In principle, if a database contains the publicly available official information about comparable transactions between unrelated parties, the searches in such database could be used to perform the TP study both by the taxpayers and the tax authorities.

The proposed draft TP bill is more specific about the sources of information which may be used for a TP study. These include:

- World exchange quotes – for publicly traded goods;

- Customs statistics;
- Official statistics published by any regional or municipal authorities of the Russian Federation;
- Exchange quotes published in the mass media or information systems (this, most likely, covers databases);
- Valuations made by independent appraisers.

Therefore, to the extent the databases (information systems) contain information about comparable transactions between the unrelated parties, searches in these databases will have to be admitted as a valid source of information when performing the TP study.

#17 Currently the TP rules do not provide clear distinctions between internal and external comparables. The law is quite straightforward: the transactions of unrelated parties are the preferred comparables. The transactions between related parties may only exceptionally be used as comparables, if the relationship between the parties did not affect the terms of these transactions. It could, therefore, be concluded that both the internal and the external comparables could be acceptable in the TP analysis if these represent the transactions between unrelated parties. It should be noted that currently TNMM is not applicable under Russian tax law³.

The proposed draft bill reduces the possibilities for comparables. The bill clearly indicates that the fair market price is the price is the price established between unrelated parties. Again, no clear distinction is made between internal and external comparables. Therefore, where the TP study is performed either by a taxpayer or by the tax authorities, the transactions of the controlled taxpayer with unrelated

counterparties may be taken into account when establishing the fair market price.

#18 The current TP rules provide that the comparables should be searched based on the locality principle, ie. within a distance from the location of a controlled taxpayer (purchaser or supplier) not requiring significant additional costs to be incurred by the taxpayer in order to acquire or supply the goods, works or services. In practice this means that the comparables should be preferably identified within the territory where the controlled supplies (acquisitions) of the goods, works or services take place. Depending on the place (market) of acquisition or supply, the comparables could be Russian or foreign (international). If, for example, a Russian enterprise sells the goods in the EU market (from the warehouses located in a EU country), then the EU comparables in the same EU country should be acceptable.

#19 Currently there are no specific penalties for absence of TP documentation. The proposed draft bill is expected to introduce a RUR 5000 (app. EUR 114) penalty for failure to submit the required TP documentation on time or submission of incorrect TP information to the tax authorities.

#20 Currently there are no statutory requirements for the Russian tax authorities to make corresponding mirror adjustments for one party of a transaction if the TP adjustments were made for another party of this transaction (either with regard to domestic or cross-border transactions). In theory the first party may recalculate its tax liabilities based on the prices established by the tax authorities and file the amended tax returns. This party should, however, be

ready to defend its position in court, as the local tax authorities may disagree with this approach. The case should be strong enough if the primary TP adjustment is made by other local Russian tax authorities or is confirmed by the ruling of a Russian court. In cross-border transactions Russian tax authorities are unlikely to feel themselves bound by the decision of their foreign colleagues, if the latter decide to adjust the profits of the foreign counterparty of the Russian taxpayer. It is not clear whether such decisions will be honoured in Russian courts.

In theory, the taxpayer may invoke the mutual agreement procedure (if available under the respective double tax treaty) in cross-border transactions in order to avoid double taxation arising from TP adjustments, however, there is currently no extensive publicly available information about how to use this tool.

The proposed draft TP bill does not provide for mirror adjustments in case the prices applied by the parties are successfully challenged by the tax authorities, so the uncertainty about the mirror-TP adjustments will likely to remain in the future unless the bill is amended accordingly.

#21 The general Corporate Income tax (Profit tax) rate in Russia is 20%. Special rates apply to dividend income, Russian source income received by foreign legal entities (where such income is not attributable to Russian permanent establishment of the foreign legal entity) and to income from certain types of securities.

Although there is no statutory obligation to submit any TP documentation, both Russian and foreign companies doing business in Russia are increasingly concerned about potential attacks on their prices by the Russian tax authorities.

³ There are only three methods which are currently applicable under Russian TP rules: CUP (Comparable Uncontrolled Price), Resale Minus and Cost Plus. In practice the Russian courts consider CUP as a preferred method. Whenever Resale Minus or Cost Plus are utilised, the courts require that tax authorities or taxpayers prove they were unable to apply CUP.

Spain

By Iria Flavia Heredero Cruces

#1 Yes, there is an obligation for groups of companies involved in transactions to submit TP documentation.

TP documentation is compulsory under the Royal Decree 1793/2008, of November 3 2008 which came into force on the 19 February 2009.

The taxpayer does not need to file documentation at any particular time, but shall keep the documentation available for the tax authorities. Documentation is divided into that related to group (master file) and documentation related to the Spanish company of the group (local file).

The contents of these documents are to be in line with the OECD Transfer Pricing Guidelines and the recommendations of the European Joint Transfer Pricing Forum on transfer pricing documentation.

#2 Each company must prepare the TP documentation when the transaction is performed for the first time. It should be updated only if the circumstances change.

TP documents should be prepared and available as they may be required by the Spanish tax authorities at any time before the deadline for filing the Corporate Income Tax return of the tax period in which the transaction took place.

It is not possible to prepare TP documentation with retroactive effects. In practice, the file can be prepared during six months after closing of the accounts, but it is advisable to prepare it before this.

#3 As stated in response #1, taxpayers must prepare a master file for the group. It consists of a set of documents containing common standardised information relevant for all group members. The master file should cover a general overview of the



business and of the group, with special focus on transfer pricing policy, the risks assumed by all the entities and the functions performed by each member of the group.

The parent company usually prepares this documentation but the subsidiaries must keep a copy in case they are required to provide it to the tax authorities.

Moreover, there is a country-specific documentation (country or local file) which consists of several sets of standardised documents containing the specific data of the Spanish company, emphasizing the comparability analysis to prove the selected transfer pricing method and the criteria used for sharing costs among related entities.

#4 There could be several types of documentation compliance burdens depending on the characteristics of the parties involved. The elements to be taken into account are firstly a turnover of EUR 8 million or more, which may trigger a requirement to provide further and more thorough information. Secondly, transactions held with entities or individuals based in tax havens.

#5 Yes, it applies also to permanent establishments, their headquarters and any other related entities, as long as the transactions held between them fall within the scope of the TP documentation obligations.

The documentation compliance burdens mentioned in response #4 above apply to these transactions.

#6 Yes, transfer pricing documentation requirements apply to domestic transactions as far as such transactions are held by intra-group companies; these

obligations do not apply to individuals even when they close transactions with related companies.

#7 No. Even though TP documentation requirements are fulfilled, the tax authorities could make adjustments. Nevertheless, complying with TP documentary support obligations would prevent the taxpayer from being penalised.

#8 It is possible to conclude an Advance Pricing Agreement with the Spanish Tax Authorities and other Regional Tax Administrations. The procedure starts by filing an application form with all the relevant information (valuation proposal, description of the method proposed and proof that the arm's length principle is applied). All involved parties will have to file a single consistent application form. The tax authorities could request clarification of relevant information. Within a maximum 6-month period, the tax authorities must either (i) approve the valuation proposal filed; (ii) approve – with the acceptance of the taxpayer – a different proposal or; (iii) refuse the proposal. In all cases, the answer must be duly motivated. Failure of the tax authorities to respond within six months has to be understood as a refusal.

Tax authorities and taxpayers must apply the outcome of the approved proposal. If the taxpayer applies the resolution, no adjustments may be made by the Tax Authorities.

APAs can be concluded in a multilateral basis when the company or companies carrying out transaction with related entities are based in Spain. APAs can also be concluded in the countries where the related entities have their residence if the respective foreign tax authorities request or approve of this.

All the involved parties must agree with the terms of the APA before foreign tax authorities can sign it.

#9 There is no predetermined system for preparing and storing TP documentation. Any system could be considered as valid under Spanish tax law.

#10 The timeframe is the tax year in which the transaction within the group takes place. The obligation to prepare the TP documentation begins at the moment the pricing is determined. It is not possible to prepare TP documentation once the tax audit has started.

#11 It applies to all related transactions.

#12 Spanish legislation does not prescribe this but the Spanish tax authorities can require these documents be provided in Spanish.

#13 In some countries (such like the Netherlands, Belgium or the US) it is regular practice for the tax authorities to actively cooperate with taxpayers in the preparation of TP documentation by proposing agreements and "meeting points", or even supplying data and comparables to the company or companies that have proposed the APA. But in Spain the taxpayer is the one who assumes the whole burden of proof, with no cooperation with the Spanish tax authorities who only adopt a passive role of inspection and control.

#14 Documentary support that the taxpayer must supply to the Spanish tax authorities, if required, in order to set the arm's length value of transactions,

is contained in RD 1793/2008, dated November 3 which modified the Regulations of the Corporate Income Tax details The Regulations provide for two types of documentary support obligations, one referring to the whole group and the other to the single taxpayer.

#15 In pursuance of the Spanish legislation, if the documentary support obligation is referred to a group of companies, the ultimate parent company may opt to prepare and store the entire documentary support of the whole group.

If the ultimate parent company is not based within Spanish territory, a subsidiary company based in Spain shall be appointed to prepare and store the documentary support of the transactions held by such company and any other related entity. If required by the Spanish tax authorities, the Spanish-based entity will have to provide them with the true and thorough documentary support corresponding to the group of companies it belongs to.

#16 Yes, it is an acceptable procedure for searching for comparables but it is not compulsory to use it if there are other available sources like internal comparables.

#17 For CPM, RPM or TNMM method, internal comparables are preferred over external ones.

In the CPM, the profit mark-up is ideally determined by reference to the profit mark-up earned by the same supplier in a comparable dealing with an independent party.

The RPM takes the price at which the product is resold to an independent customer and deducting the gross profit margin that a reseller purchasing from an

independent supplier would have derived in comparable circumstances.

The TNMM is a transactional profit method that compares the net profit margin achieved by a company on its controlled transactions with the returns derived by a company engaging in uncontrolled transactions.

#18 The Spanish tax authorities do not require local searches for comparable transactions. Regional or international comparables are accepted. The relevant requirements are that market features and other economic factors associated with independent transactions have to be equivalent or similar to those closed between related parties.

#19 There are specific transfer pricing infringements and penalties. Defaults in the transfer pricing documentation attract a fine of EUR 1500 per data and EUR 15 000 per set of data. Defaults in the transfer pricing documentation attract a fine of 15% of the value of the transfer pricing adjustment with a minimum penalty of EUR 30 000.

#20 It is possible to evaluate the transactions and make adjustments in the Corporate Income Tax return, even if corporations may not have duly recorded the transaction's price in their financial statements. In that case, the companies involved should make the same adjustment in order to reduce or mitigate the tax impact.

#21 For SMEs, tax is levied at 25 % up to EUR 120 020 (taxable base) and 30 % above this. For large companies (over EUR 8 million annual turnover): 30 %

Defaults in TP documentation attract a fine of 15% of the value of the TP adjustment, with a minimum penalty of EUR 30 000.

Ukraine

By Sergiy Melnyk

#1 Ukrainian tax law provides different criteria for applying transfer pricing regulations for corporate profit tax (“CPT”) and value added tax (“VAT”) purposes.

For VAT purposes, the transfer pricing regulations apply to all VAT-able transactions. This means that the tax base of VAT-able supplies of goods or services (works) must be determined based on contractual prices, but not lower than arm’s length prices and not 20% higher than arm’s length prices.

For CPT purposes, the transfer pricing regulations apply mainly to transactions with related parties and non-residents. This means that a taxpayer’s taxable income from sales of goods or services (works) to related parties or non-residents must be determined based on contractual prices, but not on lower than arm’s length prices. On the other hand, the taxpayer’s deductible expenses for the acquisition of goods or services (works) from related parties or non-residents must be determined based on contractual prices, but not higher than arm’s length prices.

The comparable uncontrolled price method (“CUPM”) is the main method for determining arm’s length prices in Ukraine. Arm’s length prices are calculated based on prices for identical (or similar, if there are no identical) goods or services (works) being transferred between independent parties in comparable circumstances. Also one can refer to prices for identical (similar) goods or services (works) in the market in comparable circumstances.

If an arm’s length price cannot be determined under the CUPM, the resale price method and cost-plus method may be used. However, there is no clear methodology as to the application of such methods.

Ukrainian tax law does not contain any requirement to retain and produce TP documentation to the Ukrainian tax authorities. However, a taxpayer may provide tax authorities with substantiation of a price’s conformity with an arm’s length figure if, during a tax audit, the tax authorities request such substantiation from the taxpayer.

#2 Ukrainian tax law does not contain any requirement to keep and produce TP documentation to the Ukrainian tax authorities.

#3 Ukrainian transfer pricing regulations apply equally to a parent company and a subsidiary company.

#4 Ukrainian transfer pricing regulations apply irrespective of the size of an enterprise.

#5 For CPT purposes, transfer pricing regulations apply to all sales transactions (including those with associated entities) carried out by permanent establishments of non-residents in Ukraine.

Unlike other CPT payers, a permanent establishment is obliged to provide the tax authorities with substantiation of a price’s conformity with an arm’s length figure if, during a tax audit, the tax authorities request such substantiation from the permanent establishment.

#6 For CPT purposes, the transfer pricing regulations also apply to a number of domestic transactions, in particular, to those with related parties, barter transactions and transactions with persons who do not pay CPT (eg. individuals).

The burden of proof in challenging a price’s conformity with an arm’s length figure always rests with the tax authorities.

Ukrainian transfer pricing requirements are generally the same for domestic and cross-border transactions.

#7 Under the general rule, contractual prices are presumed to correspond to arm’s length prices unless otherwise is proved.

During a tax audit, the tax authorities may request the taxpayer to substantiate the contractual price figure. Should this be the case, the taxpayer may either (i) provide the tax authorities with substantiation of the price’s conformity with an arm’s length figure; or (ii) refer to the presumption of price conformity with an arm’s length figure.

In our experience, the first option has proved to be more efficient as it decreases the risk of conflict with the tax authorities. At the same time, even if the taxpayer provides such substantiation, the tax authorities may disagree with this and make a transfer pricing adjustment.

Ukrainian transfer pricing regulations do not specify which substantiating documents may be relied upon by taxpayers. In practice, the contractual price figure may be substantiated by information on official market statistics, public announcements, market research reports, the company’s internal pricing policies, price-lists, etc.

#8 No, Ukrainian tax law does not contain any APA mechanism.

#9 Ukrainian transfer pricing regulations do not specify in which form a taxpayer must prepare substantiating documents. In practice, the substantiating documents are produced in paper form.

#10 As mentioned above, may provide the tax authorities with substantiation of a price’s conformity with an arm’s length figure if, during a tax audit, the tax authorities request such substantiation from the taxpayer. There is no specific term for a response to the tax authorities’ request, but if the taxpayer decides to produce any substantiation, this should be done by the end of the tax audit.

#11 For CPT purposes, the transfer pricing regulations apply mainly to all transactions between related parties. From a tax perspective, a related party is a person falling into one of the following categories:

- a legal entity which exercises control over a taxpayer or is controlled by such taxpayer or is under the joint control with such taxpayer;
- an individual or family members of such individual who exercise control over a taxpayer;
- a taxpayer’s executive, authorised to conduct legal matters on behalf of the taxpayer giving rise to, changing or terminating legal relationships for the taxpayer, as well as the family members of such an executive.

#12 If a taxpayer decides to provide substantiation of a price’s conformity with an arm’s length figure upon request of the tax authorities, the substantiating documents must be produced in Ukrainian. If such documents are prepared in a foreign language, they should be accompanied by a certified Ukrainian translation.

#13 The burden of proof in challenging a price’s conformity with an arm’s length figure always rests with the tax authorities. The tax authorities can only apply transfer pricing adjustments to tax liabilities by court action.

#14 Ukrainian transfer pricing regulations do not contain any list of substantiating documents to be submitted by the taxpayer if, during a tax audit, the tax authorities request substantiation of the contractual price figure from such taxpayer. In practice, substantiating documents are produced by the taxpayer on a case-by-case basis.

#15 A taxpayer should personally provide the tax authorities with substantiation of price conformity with an arm’s length figure if, during a tax audit, the tax authorities request such substantiation from the taxpayer.

#16 In practice, database searches for comparables (particularly, official statistics databases) may be used to substantiate the contractual price figure although Ukrainian transfer pricing regulations do not provide clear guidelines in this respect.

#17 As mentioned above, the comparable uncontrolled price method (“CUPM”) is the main method for determining arm’s length prices in Ukraine. When applying the CUPM, one can have recourse to internal comparisons and external comparisons (none of these comparisons prevail per se). If an arm’s length price cannot be determined under the CUPM, the resale price method and cost-plus method may be used. However, there is no clear methodology as to the application of such methods.

#18 Ukrainian transfer pricing regulations do not rule out the possibility of referring to comparables in international markets, but in practice comparables in the Ukrainian market are analysed in the first instance.

#19 No penalties apply for an absence of transfer pricing documentation, as it is the taxpayer’s choice (and not an obligation) whether to provide the tax authorities with substantiation of price conformity with an arm’s length level.

#20 Ukrainian tax regulations do not provide measures designed to mitigate/eliminate potential double taxation resulting from transfer pricing adjustments.

#21 The Ukrainian corporate profit tax rate is 25%.



USA

By Robert G. Rinninsland, The Ruchelman Law Firm (New York)

#1 Yes IRC 6662 and the resulting Treasury Regulations require taxpayers to support their transfer pricing methodology for “controlled transactions” as defined under US transfer pricing law and regulations.

#2 US transfer pricing rules call for “contemporaneous” documentation to support transfer pricing methodology for controlled transactions entered into for each taxable year. The documentation must be kept with the file for that year’s tax return. Documentation requirements apply for the first taxable year of the controlled transaction. Retroactive documentation might be appropriate or necessary in some circumstances. While this will be accepted by the IRS it is given less weight than contemporaneous documentation. As a practical matter, detailed transfer pricing documentation can persuade the IRS that a transfer pricing adjustment is not necessary. Accordingly, the practice is that even if a taxpayer previously failed to contemporaneously document their transfer pricing, for an open (to audit) tax year, it should consider preparing documentation if it expects an examination of that year.

#3 No

#4 The IRS has informally said that (a) companies with intercompany transactions in excess of USD 5 million can expect to have an IRS international examiner review their intercompany transactions and (b) companies with sales in excess of USD 10 million can expect to have an IRS economist review their intercompany transactions.

The economist is brought into a case at the request of the international examiner. Therefore, a taxpayer can face a transfer

pricing adjustment that may or may not have been derived by an economist. An economist entering a case will have responsibility for either drafting, or reviewing the international examiner’s draft of the proposed transfer pricing adjustment.

If the audit is in the domain of the large and mid-size business division (“LMSB”) and there is a transfer pricing issue, then international examiners are instructed that it is mandatory to request the IRC 6662 documentation.

For non-LMSB cases, a referral for economic assistance is mandatory if the issue has a potential deficiency of over USD 500 000 or will have significant precedential value.

#5 US transfer pricing rules in general, including documentation requirements, apply to all “controlled transactions”. In this regard, the concept of control is broadly construed to mean any type of control, however exercisable or exercised, including control resulting from actions of two or more taxpayers acting in concert or with a common goal (profit making) or purpose. Thus any transactions between a permanent establishment and an associated enterprise that are considered “controlled transactions” will be subject to normal US transfer pricing scrutiny.

#6 As a general matter US state and local tax authorities are concerned about the creation of tax-motivated corporate structures employing related-company transactions to reduce corporate income tax liabilities. This concern has caused these jurisdictions to adopt legislation and foster other administrative and judicial initiatives to deny deductions for certain related company expenses. However, application of transfer pricing rules in the state and local context has been inconclusive from the

state and local tax authority perspective. They have thus focused on other means of dealing with controlled transactions most notably in expansion of their definition of a “unitary” business subject to state tax nexus in general and calculation of state taxable income by reference to the apportionment of property, sales and payroll in particular. Where transfer pricing principles are applicable in a given state and local tax jurisdiction, the federal documentation requirements apply as a practical matter.

#7 No proper transfer pricing documentation protects taxpayers from penalties that could be imposed with respect to material transfer pricing adjustments. The adjustments themselves can still be made.

#8 A basic APA is an agreement between the IRS and the taxpayer whereby at the request of the taxpayer the IRS reviews and agrees to WisCo’s transfer pricing methodology.

The APA describes the factual nature of the related party transactions, the appropriate pricing methodology and the expected range of results from applying the methodology to the transaction.

If the taxpayer applies the agreed upon methodology, the IRS will not adjust transfer prices for the term of the APA.

The APA will include a set of critical assumptions that, if followed, will not result in an examination of transfer pricing in the future.

The IRS’s APA team will grant a pre filing meeting to the taxpayer to receive any input from the IRS before filing for an APA.

Although APAs have traditionally been the purview of large companies, the IRS has

issued streamlined procedures to make the process more cost efficient for smaller companies.

Practical issues with the APA program relate to administrative expense and reluctance of taxpayers to voluntarily provide the necessary information to the IRS to obtain an APA. The first concern should be weighed against the expense of providing annual contemporaneous documentation. The latter concern should be weighed against the ultimate requirement for the taxpayer to provide this information anyway if it is a large enough taxpayer to be a target of the IRS’s LMSB.

The APA is binding on the IRS and the taxpayer as long as facts and circumstances do not materially change.

Multi-lateral APA’s between the IRS and other governmental authorities are possible either pursuant to applicable tax treaty provisions or as an exercise of IRS administrative discretion. Success of the multi-lateral APA procedures has been subject to the same concerns as for other tax authorities.

#9 There are no specific requirements as to the means of storage of TP documentation. It can be in any form as long as it is readily available to the IRS upon request.

#10 Transfer pricing documentation must be submitted to the IRS within 30 days of their request.

#11 Transfer pricing documentation requirements apply to all “controlled” transactions. This would include transactions involving sales of tangible property, making of loans, performing of services, and sales or licenses of intangible property. In

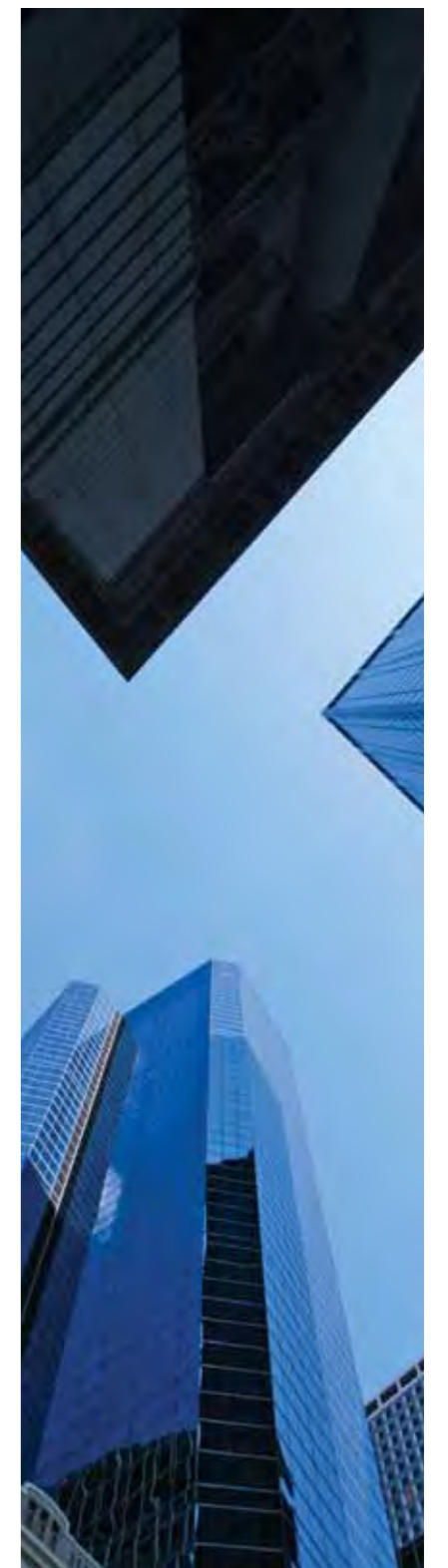
addition certain extraordinary transactions, most notably actual or deemed transfers of intangible property or shares of subsidiaries are subject to “fair market value” treatment which in turn is based on transfer pricing methodology and documentation.

#12 Transfer documentation should be provided in English. If documentation is not in English, a certified translation into English must be made.

#13 The burden of proof is on the taxpayer to demonstrate proper transfer pricing for the “controlled” transactions.

#14 Proper transfer pricing documentation is set forth in US tax law. The documentation must provide a business description, a thorough analysis of the intercompany transactions, a detailed functional analysis of the relevant parties, a review of the transfer pricing methods resulting in the method chosen, and an economic analysis showing the arm’s length nature of the transfer pricing. More specifically, the documentation must show:

- (a) an overview of the business, including an analysis of the economic and legal factors impacting the pricing of its intercompany transactions;
- (b) a description of the organisational structure covering all parties involved in the intercompany transactions;
- (c) a description of the pricing method selected and an explanation of why that method was chosen.
- (d) a description of the alternative methods that were considered and an explanation of why they were not selected.



- (e) a description of the control transactions and any internal data used to analyse those transactions.
- (f) for any comparables used, a description, an explanation of evaluation comparability and an explanation of any adjustments made; and
- (g) the economic analysis.

#15 From a tax administration standpoint, it is desirable to centralise transfer pricing policy and related documentation. This insures timely and accurate responses to the IRS audit questions.

#16 The IRS is aware of the recognised databases and in fact expects them to be used in the economic analysis required as part of the transfer pricing documentation.

#17 External comparables are generally preferred but internal comparables may be acceptable depending on facts and circumstances.

#18 US transfer pricing rules focus on the application of the proper method of pricing to the “tested party” as defined but usually the related party who is the least complex in nature and thus, presumably the easiest to benchmark. If the tested party is a non-US entity, the IRS will expect the appropriate non-U.S. comparables to be used. If the tested party is a US entity, US comparables should be used.

#19 The US transfer pricing documentation rules include specific penalty provisions.

If the IRS determines that (a) an intercompany transfer price was less than 50% or more than 200% of arm’s length

price or (b) the transfer pricing adjustment increases taxable income by USD 5 million or more, the penalty equals 20% of the additional tax.

The penalty increases to 40% if (a) the intercompany transfer price was less than 25% or more than 400% of an arm’s length price or (b) the transfer pricing adjustment is \$20 million or more.

The penalties apply automatically whenever IRS adjustments exceed the numerical thresholds. The 20% penalty applies to adjustments of income by USD 5 million or more, while the 40% penalty applies to adjustments of income of USD 20 million or more.

There is statutory authority to avoid the penalties. The only authority is to satisfy certain safe harbour requirements of reasonable cause and good faith.

Reasonable cause and good faith can be met only if the taxpayer can demonstrate, by contemporaneously documenting its transfer pricing practices, that they acted reasonably in selecting and applying a transfer pricing method.

#20 US treaty policy attempts to mitigate double taxation of transfer pricing adjustments by seeking mutual agreement provisions and associated enterprises articles that permit the Competent Authorities to resolve issues of double taxation without time limits regarding notification.

US transfer pricing tax law contemplates correlative adjustments within a US multinational group to reflect transfer pricing adjustments for earnings and profits purposes even if such adjustments are not recognised by the other relevant tax authority.

US taxpayers are allowed, within limitations provided within the US foreign tax credit tax regime, to re-claim as foreign tax credit, additional taxes that would be imposed on a foreign related party as a result of a transfer pricing adjustment.

#21 The top marginal US federal corporate tax rate is 35%. Additional state and local income taxes (after benefit for deduction of federal taxes) generally result in a combined US federal, state and local tax rate of about 40%.

US taxpayers are allowed, within limitations provided within the US foreign tax credit tax regime, to re-claim as foreign tax credit, additional taxes that would be imposed on a foreign related party as a result of a transfer pricing adjustment.

Newsflashes

China

- After several drafts, the enterprise income tax treatment for enterprise restructuring was published on 30 April 2009.
- The amended Interim Regulations on the Business Tax of the PRC and its implementation rules came into force on 1 January 2009. A significant change is that regardless of the place where a service is rendered, Chinese business tax must be paid if either the service provider or receiver is in China.
- China has strengthened the tax administration of non-resident service providers. Non-resident enterprises with permanent establishments in China are required to make annual enterprise income tax filing and clearance from 2008.

Czech Republic

The Czech Parliament adopted an amendment to the Czech VAT Act excluding the purchase of passenger cars used for business activities from VAT. The changes apply from 1 April 2009 until 30 March 2009. The initiative is an economic stimulus measure for the Czech economy, now suffering the effects of the global recession. Previously, VAT exemptions applied to commercial transport vehicles.

France

- The tax treaty between France and the USA was amended by a Protocol signed in January 2009, and will probably enter into force before the end of the year. The major change is the abolition of withholding tax applicable to certain intra-group dividend distributions (under conditions) and to royalties (art. 10 and 12). Other reforms concern the residence criteria of see-through entities.

- France recently concluded a tax Protocol with Switzerland (11 June). The Protocol includes an exchange of information clause modelled on the OECD model clause (art. 26). This contains an administrative assistance provision, leading observers to comment that this signifies the end of Swiss bank secrecy with France. Upon entry into force (planned for 1 January 2010) tax administrations can exchange information about the implementation of the tax treaty dispositions and the application of internal tax laws. The relevant tax authorities can also, under certain procedural conditions, demand details from Swiss banks of individuals investing in their institutions.

- Following the OECD's condemnation of harmful tax practices and the inclusion of notorious tax havens in a "grey zone" list, France successfully put pressure on Gibraltar, British Virgin, Jersey, Guernsey, Monaco and Luxembourg and signed exchange of information agreements. Similar agreements are being negotiated with Singapore and Austria.

Poland

- Amendments to the Polish CIT Act came into force on 1 January 2009. They bring into Polish law the OECD convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profit of associated enterprises and also the OECD Code of Conduct on the same subject. Under the amended Article 11 of the Polish CIT Act domestic entrepreneurs making transactions with foreign related business partners will now be able to adjust their income where transaction prices were questioned by foreign tax authorities for non-compliance with the arm's length principle (so called "corresponding adjustment"). The above rules are also applicable to the permanent establishment of foreign

companies. Corresponding adjustment applies provided that the double taxation treaty with a given country anticipates such possibility.

- The Ministry of Finance published guidelines for the Tax Inspections Offices for 2009. The guidelines provide that tax inspectors should pay particular attention to transactions between related parties, the current experience of the tax authorities showing that "taxpayers are avoiding taxation by transferring profits between relating parties".

- Since January 1 2009, additional information attached to financial statements must include details of every related party transaction that does not meet the arm's length principle. The term "related parties" has a broad meaning in this case. It includes other members of management and supervisory boards. It is noteworthy that the above requirements also apply to financial statements for the year 2008. It should be emphasised that taxpayers must analyse transactions in detail in order to comply with the new requirements. Information gathered for the purpose of preparing standard TP documentation may not be sufficient in this respect, as Polish CIT regulations do not require the TP documentation to directly indicate whether the transactions meet the arm's length principle. The new regulation significantly increases the tax risk connected with transactions with related parties, as the tax authorities can now use the information disclosed in the financial statements during tax inspections.

Spain

- The Spanish government recently enacted the Royal Decree 3/2009, governing several urgent tax and financial measure which also introduced new insolvency procedures. The measures were introduced in the context of the economic downturn. The most significant of these reduces the statutory interest rate from 5.5% to 4%. Similarly, the approved reduction scheme to gradually waive research and development deductions has been repealed.

- Law 3/2009 also introduces new structural measures for companies planning to transform their legal form into a different one (i.e. a corporation into a limited liability company) or planning to carry out restructuring transactions (ie. mergers, spin off, global assignment of assets and liabilities).

- The Spanish Official Gazette published (April 11) the Double Taxation Treaty concluded between Spain and Moldova Republic for the avoidance of tax evasion and double taxation on income and wealth tax.

Ukraine

- **Taxation of Funds Received by a Representative Office from its Head Office**

In letter 326/7/16-1517 dated 12.01.2009 the State Tax Administration of Ukraine confirmed its previous position regarding the taxation of funds received by a representative office (being a permanent establishment) in Ukraine from its head office. Specifically, such funds must be treated as taxable income for the representative office for corporate profit tax purposes.

- **Ukrainian Parliament Grants Tax Incentives for Industries Producing and Utilising Biofuels**

On 21 May 2009 the Ukrainian parliament passed the law "On Amending Certain

Ukrainian Laws with respect to Encouraging the Production and Use of Biofuel" (signed by the President on 16 June). The law, in particular, provides for the following tax incentives, starting from 1 January 2010:

- 10-year corporate profit tax exemption.
- Bonus tax depreciation for new fixed assets.
- 9-year VAT and customs duty exemption for alternative energy equipments and biofuel producing equipments.
- Until 1 January 2014, a zero excise duty rate for ethyl spirit used in bioethanol production and bioethanol used in biofuel production, zero excise duty rate for the production of bio motor fuel and for biofuels that form a component of motor fuel.

Please note that to become effective the law will need to be signed by the Ukrainian President.

USA

- **President Obama released the details of his international tax reform proposals**

On May 4 2009, President Obama and Treasury Secretary Geithner unveiled two components of the Administration's plan relating to US international tax reform. The first component relates to certain changes to the deferral of foreign earnings and the foreign tax credit rules. The second component generally relates to abusive uses of accounts located in tax havens. The reforms to come will include:

- Closing Foreign Tax Credit Loopholes
- Using Savings To Make Permanent The Tax Credit for Investing in Research and Experimentation at Home
- Eliminating Loopholes for "Disappearing" Offshore Subsidiaries
- Cracking Down on the Abuse of Tax Havens by Individuals

- Devoting New Resources for IRS Enforcement to Help Close the International Tax Gap

- **Foreign Bank Account Reporting Form**

Substantive tax law in the US took a back seat in Q2 to a filing requirement that, until this year, was little known by many tax advisers and most taxpayers. The form, Form TD F90-22.1 (Report of Foreign Bank and Financial Accounts), is commonly referred to as the "FBAR Form" and is used by US persons to report ownership of, a financial interest in, or signatory authority over, a foreign bank account or a foreign financial account. In October 2008, the FBAR Form was revised to broaden the web of the filing obligation and the scope of information that must be reported. The form must now be used for all filings beginning 1 January 2009.

The Internal Revenue Service announced a uniform voluntary compliance program that will allow noncompliant taxpayers to come forward and face a uniform penalty structure. FBAR forms for 6 years must be filed, if income in those accounts for that 6-year period is unreported, amended tax returns are required. The additional tax will be subject to interest and a 20% penalty. Finally, in lieu of all other penalties that could be imposed, a penalty equal to 20% of the highest amount in the account during the 6-year period will be imposed. The voluntary disclosure period ends 23 September 2009. Without the voluntary compliance program, noncompliant taxpayers face significant penalties. These include a civil penalty of up to USD 10 000 for non-wilful failures to file the form and a stiffer penalty equal to the greater of USD 100 000 or 50% of the amount of the balance in the account each year for wilful failures. Criminal penalties are also provided.

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