Transfer Pricing 2021

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Transfer Pricing*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Canada, Israel and Japan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Wendy Abkin, Barton WS Bassett, Sanford W Stark and Drew A Cummings of Morgan, Lewis & Bockius LLP, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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Greece

Fotodotis Malamas

Bernitsas Law

OVERVIEW

Principal legislation

1 | Identify the principal transfer pricing legislation.

The legislation in Greece, applicable as of 1 January 2014, comprises:

- Law 4172/2013 (the Income Tax Code) as amended and in force; and
- Law 4174/2013 (the Tax Procedures Code), as amended and in force.

For the years up to 31 December 2013, the applicable legislation is Law 2238/1994 (replaced in 2013 by Law 4172/2013).

For transactions executed in the 2008, 2009 and 2010 financial years, Law 3728/2008 also applies.

Enforcement agency

2 | Which central government agency has primary responsibility for enforcing the transfer pricing rules?

The central government agency is the Ministry of Finance (MoF). However, up until the 2015 fiscal year, certified auditors that audit legal entities are obliged to issue a tax certificate on an annual basis. This certificate verifies the compliance of the legal entity with the tax legislation. Any item evidencing non-compliance should be notified by the certified auditors to the MoF. In this case, the certified auditors request the transfer pricing documentation file to examine possible transfer pricing violations. In the event that a violation is evidenced, they report this finding to the tax authorities so that the latter can commence a thorough tax audit.

In this way, legal entities audited by certified auditors are also audited for their compliance with the transfer pricing rules on an annual basis.

The transfer pricing documentation file must be provided to the certified auditors before the issuance of the tax certificate. If the legal entity does not comply with this time limit, the certified auditors must report this to the MoF.

As of 1 January 2016, the provision allowing tax audits to be conducted by certified auditors has become optional for corporations, limited liability companies and Greek branches of foreign legal entities. Furthermore, legal entities that will continue to be audited by certified auditors are under an obligation to assign tax audits to different certified auditors every five years. Ministerial Decision POL 1124/2015, as amended by POL 1067/2018, provides guidelines for the procedure on the issuance of tax certificates.

OECD guidelines

3 | What is the role of the OECD Transfer Pricing Guidelines?

The transfer pricing provisions of the Income Tax Code and the Tax Procedures Code are applied and interpreted in line with the principles and the guidelines of the OECD. Consequently, the tax authorities and the courts must take into consideration the OECD Transfer Pricing Guidelines before ruling on transfer pricing cases. Although not directly binding, the OECD Guidelines should be followed to determine the transfer pricing justification.

Covered transactions

4 | To what types of transactions do the transfer pricing rules apply?

The transfer pricing rules apply to transactions between related parties. Two legal entities are considered 'related parties' in the following cases:

- one legal entity participates in the share capital of another legal entity, through direct or indirect holding of shares or stocks or other participation rights, of at least 33 per cent, based on the value or the number;
- when they relate to another undertaking that directly or indirectly owns stock, shares, voting rights or participation in the share capital of at least 33 per cent, based on value or number, or is entitled to the profits or voting rights; and
- when there is a relation to another legal entity with which a material direct or indirect administrative dependence or control exists, or the legal entity exercises decisive influence in relation to an undertaking's decision-making.

Also, the definition of related parties is satisfied if both entities have a relation of direct or indirect control or administrative dependence, or there is a possibility of material influence by a third party.

On 2 July 2015, Ministerial Circular POL 1142/2015, provided clarification on the definition of related parties, in particular, that indirect participations are calculated based on the multiplication of the direct holdings in each holding level.

Moreover, the Circular provided the following examples in interpreting the notion of direct or indirect administrative dependence:

- more than half of the board of directors or one or more managing directors or directors are appointed by the other person;
- the same person or persons participating in the administration of one legal person as managing directors or directors participating in the administration of the other person under the same capacity; and
- a third person appoints more than half the board of directors or one or more of the managing directors or directors of both the other persons.

In respect of the direct or indirect control with regard to the 'decisive influence', the following examples were provided by the Circular:

- one person lends or provides guarantees for credits of the other person, and the capital loaned or the guarantee provided exceeds, on an aggregate basis, 50 per cent of the borrower's total assets (credit and financial institutions are exempted from this provision);

- a third person lends or provides guarantees for the credit of two persons, and the capital loaned and guarantee provided exceed 50 per cent of the borrower's total assets on an aggregate basis (credit and financial institutions are exempted from this provision); and
- one person supplies or appoints the supplier or suppliers of the other person, with reference to at least 90 per cent of the raw and secondary materials that are required for the manufacturing of the finished products of the latter, while the former determines the sale price of these products. The above situation should derive from a written or oral agreement.

The franchisor–franchisee relationship does not imply that the parties are affiliates.

The same Circular clarifies that the transfer pricing filing requirements do not apply to individuals, irrespective of the nature of the counterparty (individual, legal person, etc).

However, joint ventures fall within the scope of the transfer pricing filing requirements.

Real estate investment companies are exempted from the requirement to file transfer pricing documentation.

Arm's-length principle

5 | Do the relevant transfer pricing rules adhere to the arm's-length principle?

The tax authorities, which are the competent authorities, continue to endorse the arm's-length principle.

Base erosion and profit shifting

6 | How has the OECD's project on base erosion and profit shifting (BEPS) affected the applicable transfer pricing rules?

In the Income Tax Code, there is direct reference to the OECD Guidelines; therefore, any change in the guidelines of BEPS Actions 8–10 or the 2017 OECD Transfer Pricing Guidelines impacts the intragroup transactions of Greek companies. The Code also provides for intragroup restructurings and the valuation of related intangibles.

On 21 June 2018, the OECD issued guidelines on hard-to-value intangibles (BEPS Action 8) and on the transactional profit split method (BEPS 10). However, the MoF has not issued circulars relating to the implementation of these new guidelines. In this respect, the revisions made by the final reports on BEPS Actions 8–10 may be considered as currently effective. Nevertheless, it is expected that further guidelines will be provided by way of ministerial circulars.

PRICING METHODS

Accepted methods

7 | What transfer pricing methods are acceptable? What are the pros and cons of each method?

All the OECD transfer pricing methods are accepted by Law 4172/2013.

According to Ministerial Circular POL 1097/2014, as amended by POL 1144/2014, there is a preference for the traditional methods over the transactional methods. The traditional methods provide the most direct approach to estimate whether the transactions between affiliate entities comply with the arm's-length principle. Only in the event that there is no sufficient or available data for the application of the traditional methods may the legal persons apply the transactional methods. However, in the latter case, the legal persons must justify the application of the transactional methods instead of the traditional methods.

The comparable uncontrolled price (CUP) method appears to be the most appropriate for controlled transactions. However, in the absence of controlled transactions, alternative methods should be used. The resale price method may be used where controlled and uncontrolled transactions are comparable in all characteristics (functions performed, economic circumstances, etc) except for the product itself. The same applies for the cost-plus method. However, material differences in the way the companies perform their activities may bias the accuracy of the profit margin index between the companies. The cost-plus method is useful for the suppliers of goods and services, especially when markups are examined. However, the difficulty with this method is the measurement of the cost and the items that comprise the direct and indirect cost. Some companies may treat a payment as part of the cost of goods sold and other companies may treat it as an operating expense.

With regard to the transactional methods, the transactional net margin method (TNMM) is broadly used when the contributions of the party in the transaction are not unique. This method is less affected by transactional differences, and it may be used for only one party (the 'tested' party). However, the net profit indicator may be influenced by factors that would have an effect on the price or the gross margin between independent parties. Timing is another factor that may affect the TNMM. At the time the company has available internal comparables, the external comparables may not be available. In these cases, the profit split method may be more appropriate. This last method is difficult to apply since it uses as a basis the operating profit that derives from operating expenses. These expenses may not be known or other companies may include them in the cost of goods sold. Nevertheless, it may prove useful in cases where comparables data is available, and it may be supported by the division of profits that would have been achieved between independent enterprises.

Restructurings

In the case of restructurings, article 51 of Law 4172/2013 favours the CUP method unless its use is not feasible. In this case, a valuation of the business is required, taking into consideration the discounted cash flow method on future profits expected from the restructuring.

Tangible property

The preferred method for transfer of tangible property is the CUP method. For marketing and sales operations, the methods usually used are the resale price method or the TNMM. For products and semi-finished goods, the CUP method is the preferred method. Alternatively, the TNMM and cost-plus methods may be used.

Intangible property

For intangible property transactions, the preferred method is the CUP method. In the absence of controlled transactions, the TNMM and the profit split method may be accepted. In practice, the TNMM is usually used rather than the profit split method.

Service transactions

For service transactions, the CUP method is the most appropriate. Alternatively, the cost-plus method is used for the pricing of services, which may comprise either full cost plus a markup or direct cost plus a markup. The use of indirect costs alone is not viable since they do not include costs attributed directly to the service, and indirect costs may prove misleading as they are calculated on the basis of cost drivers.

Loans and advances

Loans or advances are usually examined under the CUP method since the main driver – the interest rate – may be compared to publicly available information. However, the specific terms and conditions of the loan or the advance payment should always be taken into account.

Cost-sharing

8 | Are cost-sharing arrangements permitted? Describe the acceptable cost-sharing pricing methods.

The cost contribution arrangements (CCAs) are acceptable under the tax legislation. There are no specific guidelines regarding the acceptable cost-sharing pricing methods, and there are no specific provisions for the tax treatment of payments to a contributor of existing intangibles to a CCA. For a CCA to satisfy the arm's-length principle, it is required that the contribution of the participants is equivalent to the contribution that the legal person would agree with an independent third party in a comparable situation. The contribution actually relates to the benefit that the legal person (the contributor) expects to have from its participation in the CCA.

To determine whether the cost contribution meets the requirements of the arm's-length principle, the basic principle is that the cost contributed to the CCA should reflect the share of the participant in the expected benefit. The drivers that can be used to measure the distribution are sales, the materials used for the production, the products sold, the gross or operation margin, the number of employees or capital invested, etc.

The contribution payments are tax-deductible, subject to general deductibility provisions (they must be incurred for the benefit of the legal person, they must correspond to actual payments, the expense must be posted in the accounting books of the legal person within the accounting year in which it was incurred, and it must be supported by the proper documentation).

Depending on the nature of the CCA (eg, royalties or services), withholding tax at the rate of 20 per cent may apply (this rate may be reduced or eliminated depending on the applicability of double tax treaties or the Interest and Royalties Directive).

Best method

9 | What are the rules for selecting a transfer pricing method?

There are no specific rules for selecting a transfer pricing method. As stated in Ministerial Circular POL 1097/2014, the preference of the legislation is for traditional methods. In general, the CUP method is considered the most accurate. However, depending on the nature of the transactions and the availability of comparables data, the general best method rule may apply, to the extent that this method is justified by the taxpayer.

Taxpayer-initiated adjustments

10 | Can a taxpayer make transfer pricing adjustments?

In general, transfer pricing adjustments are allowed, and they can be posted either in the books of the legal person or directly to the tax return. Self-initiated adjustments are allowed to the extent that they increase the taxable income. Debit or credit invoices for adjustments are not viewed positively by Greek tax auditors, especially if they are issued at year end and result in a reduction of the taxpayer's profits or increase tax losses. In this case, those invoices are thoroughly scrutinised by the tax auditors.

Safe harbours

11 | Are special 'safe harbour' methods available for certain types of related-party transactions? What are these methods and what types of transactions do they apply to?

There are no 'safe harbour' methods available per se. However, there are services of small value for which a follow-on charge may apply (covering only the cost of these services). Although there is no official monetary threshold for the application of 'safe harbour' methods, in practice the value of transactions for which there is no requirement for documentation is used as a threshold. In particular, Greek legal persons and branches of foreign multinational legal entities with intra-group transactions of a total value of less than €200,000 or €100,000 (depending on whether their turnover is more or less than €5 million) are not required to submit transfer pricing documentation. For those transactions, and depending on the gross revenues of the legal person, the tax auditors may accept charges on a cost recovery basis. Also, in special cases, and only for short periods of time, below-cost sales may be accepted for transfer pricing purposes, in accordance with the OECD Guidelines.

DISCLOSURES AND DOCUMENTATION

Documentation

12 | Does the tax authority require taxpayers to submit transfer pricing documentation? Regardless of whether transfer pricing documentation is required, does preparing documentation confer any other benefits?

There are two types of documentation requirements. The first one pertains to the filing of data with the Ministry of Finance (MoF) for transactions between related parties. The second pertains to the transfer pricing documentation, justifying compliance with the arm's-length principle.

Regarding the first requirement, Greek companies and branches of foreign multinational legal entities must submit a summary information table electronically to the MoF. This summary information table includes the intercompany transactions, general information about the group, the profile of the business and the transfer pricing method applied to each type of transaction. The summary information table must be submitted to the MoF within the time period provided for the submission of annual income tax returns (currently within six months of the end of the tax year).

With regard to the second requirement, legal entities operating in Greece are required to prepare a transfer pricing documentation file for their transactions with Greek and foreign-related entities. Not all transactions have to be documented. Transactions between related parties that do not exceed the value of €100,000 annually are exempted from the documentation requirement provided that the gross revenues do not exceed the amount of €5 million. In the event that the gross revenues exceed the amount of €5 million, the threshold for transfer pricing documentation increases to €200,000.

If the threshold requirement is met, every single transaction must be documented and justified, irrespective of its value.

In the case of mergers under the special regime of Law 2166/1993, the absorbing legal entity is obliged to prepare the documentation file and file the summary information table for transactions realised by the absorbed entity after the transformation balance sheet date and up to the date the merger was officially concluded, which is the date of its registration in the General Commercial Register. Transactions between the merging legal entities are not included in the above requirement.

For transactions concluded by the absorbed entity up to the date of the transformation balance sheet, the latter must prepare the documentation file and the summary information table within four months after the balance sheet date.

Legal persons exempted from Law 4172/2013 are also exempted from the documentation file requirements. Furthermore, foreign legal persons earning income from real estate property in Greece must also comply with the transfer pricing requirements.

The applicable circular also clarified that for loans, facilities or credits provided by affiliates, only the accrued interest should be documented. Similarly, it is only the guarantee fee that is required to be documented and not the capital itself.

Dividends and board of directors' fees do not fall within the scope of transfer pricing documentation.

The transfer pricing documentation file must be prepared every fiscal year, within four months after the end of the fiscal year. For the fiscal years up to 2015, for companies audited by certified auditors, the documentation file should be prepared before the issuance of the tax compliance report issued by the certified auditors.

The transfer pricing documentation file should be made available to the tax authorities within 30 days of a request.

The taxpayer that prepares the transfer pricing documentation file is in a better position to justify the transfer pricing of its intercompany transactions. Moreover, the 30-day time period does not usually suffice for the full preparation of the documentation file. The taxpayer is protected against a possible fine in the case of outdated preparation of the documentation file. The most important benefit for the taxpayer is that it is in position to better control the time required for the optimum preparation of the documentation file.

The transfer pricing documentation file should be prepared within four months of the end of the fiscal year. For legal entities audited by certified auditors, the documentation file should be prepared before the issuance of the tax compliance certificate by the certified auditors. For transactions performed after 1 January 2015, the documentation file must be submitted within the time period provided for the submission of annual income tax returns (currently within six months of the end of the tax year). Possible findings by certified auditors of infringements of tax legislation may trigger an audit by the tax authorities.

In the case that the tax authorities request the transfer pricing documentation file, it should be made available within 30 days of the request.

Greece has adopted the three-tier approach (master file, local file and country-by-country reporting). Greek companies are required to file a master file and a local file with the tax authorities.

Master file

The master file should contain:

- a description of the taxpayer's group;
- a description of the strategy and the activities of the group, as well as any changes related to these two items;
- a description of the nature of the transactions (sale of goods, supply of services, intangible assets and financial activities);
- a description of the flow of invoices and the value of transactions;
- a description of the group's transfer pricing policy;
- a functional analysis and risk analysis for the risks undertaken by the related parties;
- any changes compared to the previous fiscal year;
- a list of the intangible assets owned by the group and the royalties related to these assets;
- details of changes to the ownership of intangible assets;
- a list of the advance pricing agreements concluded with foreign tax authorities and a list of cost contribution arrangements, as well as any court rulings with regard to the group entities pertaining to transfer pricing issues; and
- transactions performed within the year with legal entities prior to becoming or after discontinuing being related parties; this provision aims to examine the use of the data as comparable.

Local file

The local file should contain:

- a description of the taxpayer's group;
- a description of the strategy and the activities of the group, as well as any changes related to these two items;
- a detailed description of the transactions performed between the Greek legal entity and its foreign-related legal entities, including the nature of the transactions (eg, sale of goods, supply of services, intangible assets or financial activities, the flow of invoices, transaction values and a report of any extraordinary transactions, including business restructuring);
- in the case of transfer of intangible assets between related parties, additional information regarding compliance with the arm's-length principle;
- for the comparability analysis, special factors, such as expected benefits, geographical limitations, transfer of exclusivity rights and participation of the purchaser in any future exploitation of the asset;
- a comparative analysis (eg, characteristics of the assets and services, additional information regarding comparable data, functional analysis, contractual terms, financial environment or special strategies of the company);
- a detailed analysis of the transfer pricing method used and justification for its selection;
- a detailed analysis of the transfer pricing policy used and justification for its selection;
- a commitment by the taxpayer that it will provide any additional information required by the tax authorities within a reasonable period of time, in particular in the case of a tax audit;
- a justification of any tax adjustments to the profits that aim to comply with the arm's-length principle;
- additional information with regard to transactions performed with parties established in non-cooperative jurisdictions;
- a flow chart of all transactions, including extraordinary ones; and
- copies of the contracts pertaining to the documented transactions.

In general, the documentation prepared must conform to local rules. However, the acceptance of documentation prepared on a global basis cannot be excluded, assuming that it is based on the OECD Guidelines.

The MoF held the view that expenses that are non-deductible for tax purposes, are adjusted upon submission of the income tax return (accounting adjustments) and are not subject to compliance with the arm's-length principle for the purposes of transfer pricing documentation. The expenses must, however, be included in the transfer pricing documentation file and in the relevant list of intragroup transactions in support of the summary information table, along with a reference to the fact that they have been adjusted in the annual income tax return.

As stated in Ministerial Circular 1097/2014, as amended by POL 1144/2014, the transfer pricing documentation file that relates to the foreign-related entities, and pertains to group-related information, may be written in an internationally accepted language, preferably English. However, if requested by the tax authorities, a translation into Greek should be available within 30 days of the request. The transfer pricing documentation file that relates to the Greek entity and all the analysis of the intercompany transactions should be in Greek.

Country-by-country reporting

13 | Has the tax authority proposed or adopted country-by-country reporting? What are the differences between the local country-by-country reporting rules and the consensus framework of Chapter 5 of the OECD Transfer Pricing Guidelines?

Greece is one of the 31 countries that signed the Multilateral Competent Authority Agreement for the Automatic Exchange of Country-by-Country Reports (MCAA on CbCR) in January 2016. Law 4490/2017 transposed into Greek legislation the MCAA on CbCR and Ministerial Circulars POL 1184/2017 and 1111/2018 into Greek legislation, provided guidelines for its implementation and the list of jurisdictions to which the country-by-country reporting (CbCR) will apply. The Law provides for CbCR notification and submission of the report. The CbCR notification must be effected on the last day of the reference year.

With regard to the submission requirement, the ultimate parent entity of a multinational enterprise (MNE) group or any other reporting entity established in Greece, must submit the CbC report for each fiscal year electronically to the competent authority within 12 months from the end of the MNE group's reporting fiscal year. If the application for submitting the CbC report is not operational because of a technical failure, the deadline will be extended by seven working days. Ministerial Circular 1124/2020 (Government's Gazette B2328/15.06.2020) provides the list with the jurisdictions to which the CbCR applies for the first time in 2020 (with the reference year being the fiscal year 2018).

Law 4490/2017 is in line with the OECD implementation package.

Moreover, by way of Law 4484/2017, Greece transposed Council Directive (EU) 2016/881 on mandatory automatic exchange of information in the field of taxation. To minimise the costs and administrative burdens both for tax administrations and MNE groups, the Directive provides rules that are in line with Action 13 of the OECD's Action Plan on Base Erosion and Profit Shifting and the standards set by the OECD on country-by-country (CbC) reports. MNE groups that include two or more enterprises (the tax residences for which are in different jurisdictions), or an enterprise that is subject to tax in respect of business carried out through a permanent establishment in another jurisdiction and with total consolidated group revenues of more than €750 million, must submit a CbC report on an annual basis. This should include information on the allocation of income, taxes and business activities on a tax jurisdiction-by-tax jurisdiction basis.

Communication between member states will take place within 15 months of the last day of the fiscal year of the MNE group to which the CbC report relates. Exceptionally, for the fiscal year commencing on or after 1 January 2016, the first CbC report will take place within 18 months of the last day of the fiscal year.

Greek tax-resident legal entities required to file CbC reports should file them with the Greek tax authorities within 12 months of the last day of the reporting fiscal year.

On condition that specific criteria are met, Greek tax-resident legal entities, which are constituents within the meaning of Council Directive (EU) 2016/881 and are not an ultimate parent entity, must file a CbC report to the Greek tax authorities.

Greek tax-resident legal entities not required to file a CbC report must notify the Greek tax authorities of the identity and tax residence of the reporting entity.

The Annex of the Directive providing guidelines for the CbC report templates and definitions is also included in the enacted law.

Greece adheres to the consensus framework of Chapter 5 of the OECD Transfer Pricing Guidelines.

Timing of documentation

14 | When must a taxpayer prepare and submit transfer pricing documentation?

The taxpayer must prepare the transfer pricing documentation file before the end of the time period for submission of the annual income tax return, which, in principle, is within six months after year end. It is filed with the tax authorities only upon request by the competent authority.

Failure to document

15 | What are the consequences for failing to submit documentation?

The main consequence for failing to submit documentation is the imposition of penalties. However, penalties vary depending on the tax provision infringement.

- In the event of late filing of the summary information table, there is a penalty of 0.1 per cent of the taxpayer's revenues. The same penalty applies in the event of non-submission of the transfer pricing documentation file to the tax authorities within 30 days. The penalty cannot be less than €500 or exceed €2,000. In the case of filing an amended summary information table, no penalty applies as long as the amendments do not exceed the amount of €200,000. Otherwise the above penalties apply.
- In the event of non-filing or inaccurate filing of the summary information table, a penalty is imposed of 0.1 per cent of the taxpayer's revenues. This penalty cannot be less than €500, and it cannot exceed €2,000.
- In the event of a second instance of non-compliance with the filing requirements within five years of the first violation, the penalty is doubled. In the case of a third instance within these five years, the penalty is quadrupled.

In the event of non-filing of the transfer pricing documentation file within 30 days from the notification served by the tax authorities, a penalty of €5,000 applies. This penalty increases to €10,000 if the transfer pricing documentation file is filed within 90 days and to €20,000 if it is not filed or is filed after the 90-day period.

In the event of late filing of the CbC report, the penalty is set at €10,000, and for non-filing of the CbC report, the penalty is set at €20,000.

ADJUSTMENTS AND SETTLEMENT

Limitation period for authority review

16 | How long does the tax authority have to review an income tax return?

The Tax Procedure Code (Law 4174/2013) does not provides for a specific time period within which the tax authorities must review the transfer pricing documentation file. Transfer pricing is examined within the framework of an ordinary tax audit. In this respect, the main document audited is the annual income tax return. The audit must take place within five years commencing from the end of the year within which the income tax return should have been filed. This time period is extended to 20 years in cases of tax evasion.

Moreover, legal entities audited by certified auditors were audited up to 2018 for their compliance with the transfer pricing rules each fiscal year, within the framework of the tax certificate. However, the tax certificate issued by certified auditors is not binding for the tax authorities that may audit legal entities within the statutory time limitation period.

Rules and standards

17 | What rules, standards or procedures govern the tax authorities' review of companies' compliance with transfer pricing rules? Does the tax authority or the taxpayer have the burden of proof?

There is no specific procedure governing the tax authorities' audit of companies for compliance with transfer pricing rules. Transfer pricing is examined in the framework of the ordinary audit and is part of it. The tax audit commences by way of issuance of a mandate for its performance by the tax auditor, which is served on the taxpayer. The tax auditor will request the transfer pricing documentation file to scrutinise the validity of the data and the methodology used for the transactions between related parties. Upon completion of the audit, the tax authorities draft the preliminary audit report and serve it on the taxpayer. The taxpayer has the right to respond within 20 days, within which they must provide sufficient evidence supporting the methodology and the comparables used for the transfer pricing file. Within 30 days after the response of the taxpayer, the tax authorities must issue the final tax report and assessment act, accepting or rejecting (partially or entirely) the taxpayer's objections.

From a technical aspect, the tax auditor must examine the comparables used by the company (focusing on the external ones) and the methodology used per type of transaction, as well as the supporting documentation, such as statistical analysis or feasibility studies. The tax auditor also has the right to ask for additional documentation or clarification depending on the completeness of the file. The taxpayer has the burden of proof for compliance of the tax pricing with the OECD rules. Nevertheless, the report of the tax auditor with regard to the transfer pricing documentation file must be detailed and its conclusion fully justified.

Disputing adjustments

18 If the tax authority asserts a transfer pricing adjustment, what options does the taxpayer have to dispute the adjustment?

Where a final assessment for the transfer pricing adjustment is served on the taxpayer, the latter may appeal before a special committee, presenting all the facts and reasons refuting the assessment. The special committee must issue a decision within 120 days of the filing of the appeal. To appeal before the special committee, the taxpayer must pay 50 per cent of the tax due in advance. The taxpayer may file a petition before the same committee to suspend this advance payment.

In the event that the appeal is rejected or the 120-day period elapses (which is considered a 'silent' rejection of the appeal), the taxpayer may appeal before the First Instance Court within 30 days of the servicing of the decision of the special committee.

RELIEF FROM DOUBLE TAXATION

Tax-treaty network

19 Does the country have a comprehensive income tax treaty network? Do these treaties have effective mutual agreement procedures?

Greece has a comprehensive income tax treaty network with approximately 58 countries. Most of the double tax conventions for the avoidance of double taxation provide for a mutual agreement procedure.

In general, the mutual agreement procedure is effective although very rarely used, since it is time- and cost-consuming, with uncertain results. In addition, the competent authority within the Ministry of Finance (MoF) is not very insistent on reviewing those issues except in cases that relate to substantial amounts.

Requesting relief

20 How can a taxpayer request relief from double taxation under the mutual agreement procedure of a tax treaty? Are there published procedures?

Usually, the procedure is broadly described in the respective tax treaty. In general terms, if the taxpayer considers that the actions of one or both of the countries involved result in taxation that is not in accordance with the provisions of the convention for the avoidance of double taxation, the taxpayer may notify or request from the competent tax authority of his or her residency to present his or her case. The competent authority will examine the request, and it will either resolve it or may ask for the mutual agreement of the competent authority of the other contracting country. The aim is to avoid double taxation.

The competent authorities of both countries must cooperate closely to resolve the issue by mutual agreement, even if the case is not provided for in the double tax convention. The communication between the tax authorities of the contracting countries may be oral or in writing.

By way of Ministerial Decision POL 1049/2017, the MoF issued guidelines for implementation of the mutual agreement procedure (MAP) provided for by double tax treaties. The MAP is used for resolving difficulties with the application of double tax treaties. These guidelines address procedural issues arising from the implementation of the double tax treaty, such as the competent authority and time limitation to file complaints.

When relief is available

21 When may a taxpayer request assistance from the competent authority?

The taxpayer may request relief from double taxation prior to the close of the audit and, more specifically, before the tax assessment. However, this will not prevent the competent authority from proceeding to the assessment and activating the MAP after the assessment and at the request of the taxpayer.

In practice, the taxpayer will adopt the administrative procedure by filing an appeal before the special committee to challenge the assessment. If the appeal is rejected, court proceedings will follow.

Moreover, under the MAP, the taxpayer may request assistance from the General Directorate of the Independent Authority of Public Revenues (Department D of the Special Tax Audits). The taxpayer's petition may be filed after the tax assessment or the filing of recourse before the First Instance Court, but before the discussion of the case before the court. In any case, the taxpayer cannot file a petition before the lapse of the limitation period provided for by the relevant double tax treaty (usually two to three years).

Limits on relief

22 Are there limitations on the type of relief that the competent authority will seek, both generally and in specific cases?

In general, there is no limitation on the type of relief that the competent authority will seek. A possible limitation is the case where the taxpayer has already settled with the tax auditor or a court ruling has already been issued.

Success rate

23 How effective is the competent authority in obtaining relief from double taxation?

Following the issuance of Ministerial Decision POL 1049/2017, it is expected that the tax authorities will effectively apply the provision for relief from double taxation.

ADVANCE PRICING AGREEMENTS

Availability

24 Does the country have an advance pricing agreement (APA) programme? If so, is the programme widely used? Are unilateral, bilateral and multilateral APAs available?

As of 1 January 2014, there are specific provisions regarding APAs. APAs are regulated by the Tax Procedure Code (Law 4174/2013) and Ministerial Circular POL 1284/2013. The Ministry of Finance (MoF) has issued sample templates for the application form for the APAs and for the preliminary consultation. The competent authority that examines the APA applications is the General Directorate of Tax Audits and Public Revenues.

An APA can be unilateral, bilateral or multilateral and is always based on the arm's-length principle. However, a unilateral APA cannot exclude the risk of double taxation. The tax authorities are not bound by an APA that the taxpayer has concluded with another country. Up to now, the programme has not been widely used, although no statistics have been publicly issued.

Process

25 Describe the process for obtaining an APA, including a brief description of the submission requirements and any applicable user fees.

Before the official filing of an APA, the taxpayer may file a request for preliminary consultation to estimate the possibility of acceptance by the tax authorities.

To this end, a request can be filed with the Directorate of Tax Audits, which settles the data for commencement of the preliminary consultation procedure.

During this procedure, the taxpayer may file all the necessary documentation that provides solid reasoning for the acceptance of the application. This documentation must describe the business activities, the transactions and the requested duration of an APA and the countries involved. After the filing of the documentation, negotiations are held that do not bind the parties.

Upon completion of the negotiations, the taxpayer may file the application for an APA within 30 days.

If the procedure of the preliminary consultation is not adopted, the taxpayer may file the application for an APA approval directly to the MoF (General Directorate of Tax Audits and Public Revenues).

This application should include at least:

- the data of the applicant;
- the data of all the legal entities involved;
- the group structure;
- the description of the intercompany transactions for the invoicing of which the APA is requested;
- detailed analysis for the proposed methodology to evidence compliance with the arm's-length principle; and
- the time period requested for the APA implementation.

The taxpayer may also request consultation with foreign tax authorities.

The competent authority may ask for additional data from the taxpayer, or further information from the foreign tax authorities.

After the conclusion of this first negotiation phase, the competent authority issues its preliminary decision on the application. Within 10 days of this preliminary decision, the applicant is invited for further discussion. At this second phase, all the proposals by the competent authority and the applicant are discussed. If both parties reach an agreement, the minutes of the APA approval are edited. Otherwise minutes for the rejection of the APA are issued.

After the elapse of 20 days from the issuance of the minutes, the competent authority issues its official decision, which is served on the applicant.

Duties must also be paid by the applicant during the preliminary consultation procedure and the pre-approval procedures. In particular:

- for the preliminary consultation procedure, duties amounting to €1,000 are payable with the submission of the application;
- for the pre-approval APA procedure, duties amounting to €5,000 are payable with the submission of the application; and
- for the request for consultation by foreign tax authorities, duty amounting to €10,000 is payable for each of the countries involved.

Time frame

26 How long does it typically take to obtain a unilateral and a bilateral APA?

The maximum time period for the MoF to decide on an APA application is 18 months, starting from the submission of the APA application, and can be extended to 36 months. The above time period may be extended in cases in which contact with foreign tax authorities and negotiations are required.

Duration

27 How many years can an APA cover prospectively? Are rollbacks available?

The duration of an APA cannot exceed four years. Moreover, it cannot relate to a year prior to the submission of the APA application. No rollbacks are available.

Scope

28 What types of related-party transactions or issues can be covered by APAs?

Since it has been recently introduced, the APA programme has not yet been widely used.

Independence

29 Is the APA programme independent from the tax authority's examination function? Is it independent from the competent authority staff that handle other double tax cases?

The APA programme is independent of the tax authority's examination function. However, during a tax audit, the tax auditors are restricted to examining whether the terms, requirements and assumptions under which the approval for the APA was provided are adhered to.

Moreover, the competent authority staff handling other double tax cases are not directly related to the APA programme. However, the two teams within the MoF may coordinate since APAs relate to foreign tax authorities.

Advantages and disadvantages

30 What are the key advantages and disadvantages to obtaining an APA with the tax authority?

The key advantage of obtaining an APA is that the taxpayer has certainty of the avoidance of double taxation or the increase of its effective tax rate. The administrative cost is reduced since there is no further requirement for annual full documentation of the transfer pricing for APA transactions.

The disadvantages are that the APA procedure is time- and cost-consuming, with an uncertain outcome since the application may be rejected.

SPECIAL TOPICS

Recharacterisation

31 Is the tax authority generally required to respect the form of related-party transactions as actually structured? In what circumstances can the tax authority disregard or recharacterise related-party transactions?

In principle, the tax authority is required to respect the form of related-party transactions, assuming that the parties have honoured the contractual terms and have not discovered any deviation between the agreement and the actual transactions. However, if the terms of the agreement are kept, and the tax authority evidences that the arm's-length principle is not adopted, it may proceed to adjust the value of the transaction to comply with the arm's-length principle. In practice, this is realised when the tax authorities have to increase the taxable income of the taxpayer. In either case, the tax authorities must scrutinise the transaction to examine possible transactions of a different nature than the one described in the agreement.

Selecting comparables

32 What are some of the important factors that the tax authority takes into account in selecting and evaluating comparables? In particular, does the tax authority require the use of country-specific comparable companies, or are comparables from several jurisdictions acceptable?

The tax authorities are not restricted or required to use country-specific comparables. Comparables from the same country and from comparable companies contribute significantly to support the arm's-length principle, especially if the comparable uncontrolled price method is used. Moreover, internal comparables may contribute to justify the transfer pricing.

Comparables from other jurisdictions may be used, especially in export companies. In this case, other parameters (such as geographical area of activity, political conditions and seasonality) should be taken into consideration.

If the transactional net margin method or another method based on margins is used, comparables from different jurisdictions may be used to support the transfer pricing. Such margin-related data is usually accepted assuming that outliers (ie, extreme values) are excluded from the margin measurement.

To reduce the risk of misleading data, the Ministry of Finance (MoF), through Ministerial Circulars POL 1097/2014 and POL 1142/2015, has explicitly stated that the data between the quartiles of the profit or price margin is used, discarding the lowest 25 per cent and the highest 25 per cent to leave the interquartile range. Also, for methodologies that use margins, comparable data must be used, namely the time series data of the last three years, excluding the year that the transaction took place.

As clarified by the MoF (Ministerial Circular POL 1227/2015), taxpayers should use the most recent database version for comparable data (ie, the one in use two months before the closing of the audited fiscal year) and any other version circulated up to the filing of the income tax return. Previous or later versions cannot be used to document transactions.

Secret comparables

33 What is the tax authority's position and practice with respect to secret comparables? If secret comparables are ever used, what procedures are in place to allow a taxpayer to defend its own transfer pricing position against the tax authority's position based on secret comparables?

The MoF does not use secret comparables to justify the transfer pricing violation. However, it can use widely used databases to challenge the taxpayer's data and evidence that the arm's-length principle is not applied. Unofficially, the tax authorities usually have secret comparables, and they attempt to use them indirectly through the use of public information or databases.

Secondary adjustments

34 Are secondary transfer pricing adjustments required? What form do they take and what are their tax consequences? Are procedures available to obtain relief from the adverse tax consequences of certain secondary adjustments?

Secondary transfer pricing adjustments are not required. Any adjustment required to comply with the arm's-length principle is treated as business profit. However, if the adjustment pertains to passive income, such as royalties, management fees or interest, additional withholding tax will be required.

Non-deductible intercompany payments

35 Are any categories of intercompany payments non-deductible?

Ministerial Circular POL 1037/2015 provided clarification with regard to the application of thin capitalisation rules by legal entities. In particular:

- interest from loans granted by third parties, with the exception of interest on bank, interbank and bond loans granted by public limited companies, is not deducted from the gross income of the company to the extent that it exceeds certain limits or other requirements set by the law on tax;
- subject to the above, if the interest expenses paid annually by the company are lower than the threshold of €5 million for each of the 2014 and 2015 tax years, and €3 million for the tax years after 1 January 2016, any surplus interest expenses (ie, the amount of interest expenses exceeding the amount of interest income) are fully deductible from the company's gross income, even if they exceed 60 per cent, 50 per cent, 40 per cent or 30 per cent of the earnings before interest, taxes, depreciation and amortisation (EBITDA) for the tax years beginning on 1 January 2014, 2015, 2016 or 2017 respectively; where the interest expenses exceed the threshold of €5 million or €3 million respectively, the deductible interest expenses cannot exceed the ceiling as above the surplus interest expenses as a percentage of EBITDA; and
- the amount of interest expenses that can be carried forward in each tax year cannot exceed the amount resulting from the percentage of EBITDA reduced by the surplus interest expenses of the same year.

In recent years, the MoF clarified that the deductibility of expenses recharged to affiliate legal entities is examined by the tax authorities under the general provisions of Law 4172/2013 (the Income Tax Code) and that the deductibility of those expenses cannot be challenged by the mere fact that they pertain to intragroup charges.

Anti-avoidance

36 What legislative and regulatory initiatives (besides transfer pricing rules) have the government taken to combat tax avoidance with respect to related-party transactions? What are the penalties or other consequences for non-compliance with these anti-avoidance provisions?

Law 4174/2013 introduced (article 38) a general anti-abuse rule in accordance with which the tax authorities may ignore any arrangement or series of arrangements aimed or mainly aimed at obtaining a tax advantage by negating the object or purpose of the tax provisions (non-genuine arrangement). Before concluding on the examined arrangements, the tax authorities must take into consideration all the actual facts and circumstances.

In recent years, by way of adopting the EU Anti-avoidance Directive, article 38 adopted the main purpose test for the characterisation of an arrangement as genuine or non-genuine. The burden of proof for the scrutinised arrangements lies with the tax authorities. On condition that transactions are proved to be non-genuine, the tax authorities will have to assess the tax due (including interest and penalties) by applying the respective tax provisions that would have been applied in the case that the arrangements were genuine.

Other tax provisions that aim to combat tax evasion are:

- the controlled foreign corporation (CFC) rule (article 66 of Law 4172/2013): this rule stipulates that undistributed profits earned by a CFC are added to the revenues of the shareholder under certain conditions;
- transactions with legal entities or persons established in non-cooperative or low-tax regime jurisdictions: payments to those legal entities or persons are not deductible for tax purpose unless the payer provides sufficient evidence that the payment is made in the ordinary course of business;
- limitations to deductibility of borrowing costs: in an effort to prevent earnings stripping, article 49 of Law 4172/2013 stipulates that net borrowing costs (eg, interest) are deductible for tax purposes only up to 30 per cent of EBITDA. The net borrowing cost is calculated as the difference between the borrowing costs and the interest receivable; and
- article 4 of Law 4172/2013: this article introduces the effective place of management to conclude the actual tax residence of a legal entity.

The sanctions that can be imposed are the recalculation of the income tax due, interest on that tax at an annual rate of 8.76 per cent and a fine of up to 50 per cent of the income tax assessed.

In April 2019, Greece transposed Council Directive (EU) 2016/1164 (the Anti-tax Avoidance Directive I (ATAD I)), into national legislation by way of Law 4607/2019.

Greece had already introduced tax avoidance rules by virtue of articles 38 of Law 4174/2013 and articles 49 and 66 of Law 4172/2013 (applicable from 1 January 2014). In this regard, the tax anti-avoidance rules include thin capitalisation rules, CFC and the general anti-avoidance rule (GAAR).

However, the Law did not embed the provisions of ATAD I regarding hybrid mismatches and exit taxation.

CFC rules (article 66 of law 4174/2013)

The amended rules apply to natural persons and legal entities (including listed legal entities) targeting CFC income from transactions between affiliates that have no economic value. Under the reformed rules, all foreign companies fall within the scope of the CFC rules, whereas legal entities established in jurisdictions in the European Economic Area may be exempted on condition that the substance criteria are met (ie, premises, employees, assets and actual economic activity).

GAAR (article 38 of Law 4174/2013)

Under the amended provisions, GAAR applies not only to income tax but to other taxes as well, including VAT, stamp duty taxation and inheritance tax.

Moreover, influenced by the Multilateral Instrument, the new provision introduced the principal purpose test in an effort to capture arrangements where the main purpose, or one of the main purposes of which, is to obtain a tax advantage that defeats the object or purpose of the applicable tax law (article 6 of ATAD I). Such an arrangement or a series thereof is regarded as non-genuine to the extent that it is not put into place for valid commercial reasons that reflect economic reality.

In accordance with the explanatory report of Law 4607/2019, the 'non-genuine' arrangements should have the same meaning as the 'wholly artificial' arrangements mentioned in the previous GAAR.

Finally, the GAAR should be applied in a uniform manner. This entails that the tax authorities have the burden of proof for the existence of an artificial structure.

Thin capitalisation rules (article 49 of Law 4172/2013)

The interest deductibility limitation rules have not changed. Excess borrowing costs are tax deductible up to 30 per cent of the taxpayer's EBITDA, whereas amounts exceeding this threshold can be carried forward to be deducted in the following tax years indefinitely. However, excess borrowing costs up to €3 million can be fully deductible.

Location savings

37 How are location savings and other location-specific attributes treated under the applicable transfer pricing rules? How are they treated by the tax authority in practice?

Location savings are not regulated by Greek tax legislation. Consequently there are no guidelines on the issue. However, although the OECD, in Action 8 of its project on base erosion and profit shifting, considers local savings as a comparability factor, it does not include it in the concept of intangibles.

Branches and permanent establishments

38 How are profits attributed to a branch or permanent establishment (PE)? Does the tax authority treat the branch or PE as a functionally separate enterprise and apply arm's-length principles? If not, what other approach is applied?

The Income Tax Code treats a branch or a PE of a foreign legal entity as a separate business unit and applies the transfer pricing rules. All the expenses incurred by the branch or the PE must match with its revenues. In the case of allocated expenses, they can be deducted to the extent they are real and there are solid grounds for justifying the allocation of these expenses.

Exit charges

39 Are any exit charges imposed on restructurings? How are they determined?

In restructurings, exit charges are imposed in the event that the tax authorities determine that the compensation for the disposal is not adequate (at arm's length). In this case, the deemed income of the taxpayer may be assessed in accordance with the arm's-length principle.

Temporary exemptions and reductions

40 Are temporary special tax exemptions or rate reductions provided through government bodies such as local industrial development boards?

Under specific tax incentive laws, there are tax exemptions or partial financing available for the purchase of assets, but only at central government level (ie, at state level).

UPDATE AND TRENDS

Tax authority focus and BEPS

41 What are the current issues of note and trends relating to transfer pricing in your country? Are there particular areas on which the taxing authority is focused? Have there been any notable legislative, administrative, enforcement or judicial developments? In particular, how is the OECD's project on base erosion and profit shifting affecting both policymakers and tax administrators?

The BEPS project affects both policymakers and tax administrators. The Ministry of Finance and, in particular, the Independent Authority of Public Revenues closely monitor all the developments related to BEPS Actions. Over the past couple of years, the tax authorities have taken a more qualitative approach during the tax audit than previously. They focus on the quality of the data, comparables and adjustments, as well as on whether the transfer pricing method used was the appropriate one. In this respect, it is expected that this change in the quality of the audit will also be reflected in the court judgments that will be issued in the years to come.

The proceedings in respect of advance pricing agreements (APAs) do not seem to be well accepted. The main reason appears to be that companies are not yet convinced of their treatment by the tax authorities after the adoption of the APAs.

Coronavirus

42 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Not applicable.

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