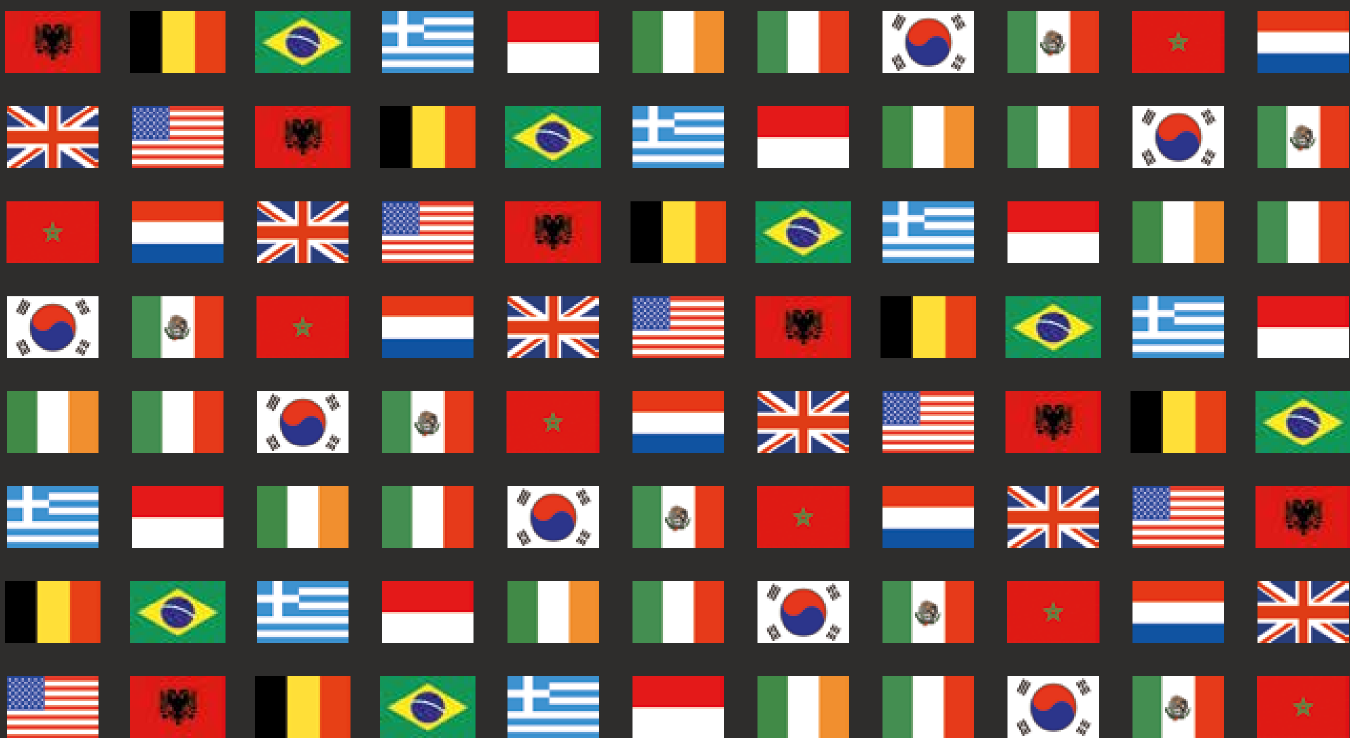
Transfer Pricing

Contributing editor
Jason M Osborn



2019

GETTING THE DEAL THROUGH

GETTING THE
DEAL THROUGH

Transfer Pricing 2019

Contributing editor
Jason M Osborn
Mayer Brown LLP

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2014
Fifth edition
ISBN 978-1-78915-079-7

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Preface

Transfer Pricing 2019

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Transfer Pricing*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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 **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our new coverage this year includes Korea.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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.

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 editor, Jason M Osborn of Mayer Brown LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
July 2018

Greece

Fotodotis Malamas
Bernitsas Law

Overview

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); and
- Law 4174/2013 (the Tax Procedures Code).

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

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

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

The central government agency is the Ministry of Finance. However, up to 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 Ministry of Finance (MoF). In this case, the certified auditors request the transfer pricing documentation file in order to examine possible transfer pricing violations. In the event that a violation is evidenced, they report this finding to the tax authorities in order for the latter to 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.

It should be noted that the transfer pricing documentation file has to 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 have to 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.

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 have to 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.

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 1142/2.7.2015, provided clarifications 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.

As regards 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 ministerial 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 transfer pricing filing requirements.

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

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.

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 (Law 4172/2013) there is direct reference to the OECD Guidelines, therefore any change in the guidelines of BEPS Actions 8–10 impact the intra-group transactions of Greek companies. The code also provides for intra-group restructurings and the valuation of related intangibles. However, the MoF has not issued circulars relating to the implementation of the code. 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 should be provided by way of ministerial circulars.

Pricing methods

7 What transfer pricing methods are acceptable?

All the OECD transfer pricing methods are accepted by the Income Tax Code (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, the legal persons may apply the transactional methods. However, in the latter case, the legal persons have to justify the application of the transactional methods instead of the traditional methods.

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. In order 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. In order 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 has to 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, etc), 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).

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

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

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 they increase the taxable income. It is noted that debit or credit invoices for adjustments are not viewed positively by the Greek tax auditors, especially if issued at year end and result in a reduction of the taxpayer's profits or increase tax losses. In this case, such invoices are thoroughly scrutinised by the tax auditors.

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 these 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, as per the OECD Guidelines.

Disclosures and 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? What content must be included in the transfer pricing documentation? Are a separate 'master file' and 'local file' required? What are the acceptable languages for the transfer pricing documentation?

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

As regards the first requirement, Greek companies and branches of foreign multinational legal entities have to 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 has to 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 has to 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 has to prepare the documentation file and the summary information table within four months after the balance sheet date.

Legal persons exempted from the Greek Income Tax Code are also exempted from the documentation file requirements. Furthermore, foreign legal persons earning income from real estate property in Greece also have to comply with the transfer pricing requirements.

The ministerial 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 has to 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 they are 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 the 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

- 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, 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 should also be included;
- 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 (APA) concluded with foreign tax authorities, a list of CCAs, as well as any court rulings with regard to 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 such data as comparable.

Local file

- 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 is required;
- for the comparability analysis special factors should be taken into consideration 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 they 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 which are non-deductible for tax purposes and are adjusted upon submission of the income tax return (accounting adjustments), are not subject to compliance with the arm's-length principle for the purposes of transfer pricing documentation. Such expenses must, however, be included in the transfer pricing documentation file and in the relevant list of intra-group 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.

As per the Country-by-Country Reporting (CbCR), explicit reference is made in question 13.

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 BEPS Action 13?

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 CbCR will apply. The Law provides for CbCR notification and submission of the Report. The CbCR notifitication 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.

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

Moreover, by way of Law 4484/2017 Greece transposed Council Directive 2016/881 on mandatory automatic exchange of information in the field of taxation. In order to minimise costs and administrative burdens both for tax administrations and MNE groups, Directive 2016/881 provides rules that are in line with action 13 of the BEPS Action Plan and the standards set by the OECD on 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 with respect to 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 allocation of income, taxes and business activities on a tax jurisdiction-by-tax jurisdiction basis.

The 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 it 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 Directive 2016/881 and are not an ultimate parent entity, have to 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.

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 ins principle is within six months after year-end. It is filed with the tax authorities only upon request by the competent authority.

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 equal to 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 equal to 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 the transfer pricing documentation file within 30 days from the notification served by the tax authorities, a penalty amounting to € 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 the CbC report the penalty is set at €10,000 and in the case of non-filing the CbC report the penalty is set at €20,000.

Adjustments and settlement

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

The law does not provide for a specific time period within which the tax authorities have to review the transfer pricing documentation file. However, the statutory limitation period for auditing the fiscal year that the documentation file pertains to is five years after the end of the respective year.

Moreover, legal entities audited by certified auditors (see question 2) were audited up to 2017 for their compliance with the transfer pricing rules each fiscal year, within the framework of the tax certificate.

17 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 has to issue a decision within 120 days of the filing of the appeal. In order to appeal before the special committee, the taxpayer has to pay 50 per cent of the tax due in advance. For this advance payment, the taxpayer may file a petition to suspend its payment before the same committee.

In the event that the appeal is rejected or the 120 days 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

18 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 MoF is not very insistent on reviewing such issues except in cases that relate to substantial amounts.

19 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, when the taxpayer considers that the actions of one or both of the countries involved result in taxation which 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 case. The competent authority will examine the request and it will either resolve it or it 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 have to closely cooperate in order 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.

20 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 in order 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).

21 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.

22 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

23 Does the country have an advance pricing agreement (APA) programme? 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 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.

24 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 in order 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 has to 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 in order 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, then 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 have also to 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.

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

The maximum time period in order 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 the foreign tax authorities and negotiations are required.

26 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.

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

Almost all transactions can be covered by the APA to the extent that they were included in the application and in the approval decision.

28 Is the APA programme widely used?

Since it is newly introduced, the APA programme is not yet widely used.

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 from 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.

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 a certainty of the avoidance of double taxation or the increase of its effective tax rate. The administration 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 without a certain outcome, since the application may be rejected.

Update and trends

Over the past decade, commencing in 2008, Greece has aimed to rein in transfer pricing violations in an effort to protect domestic tax revenues channelled to other jurisdictions under various arrangements. Exchange of information and CbC reporting will be the starting point for transfer pricing in Greece in the following years. Although there have been notable developments in terms of both legislation and enforcement, there are still administrative obstacles and mismanagement that to an extent prevent the proper implementation of the OECD rules. Despite the fact that the OECD rules and the BEPS project have been endorsed by Greek legislation, there seems to be insufficient progress in its application by policymakers and tax administrators.

Special topics

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 in order 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 have to scrutinise the transaction in order to examine possible transactions of a different nature than the one described in the agreement.

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 CUP 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 are usually accepted assuming that outliers (ie, extreme values) are excluded from the margin measurement.

To reduce the risk of misleading data, the MoF through its Ministerial Circular POL 1097/2014, and the recently issued 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 have to 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 1227/1.10.2015) 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.

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 in order to justify the transfer pricing violation. However, it can use widely used databases in order 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.

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 in order 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.

35 Are any categories of intercompany payments non-deductible?

Ministerial Circular POL 1037/2015 provided clarifications 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 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 of 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.

Recently the MoF clarified that the deductibility of expenses recharged to affiliate legal entities is examined by the tax authorities under the general provisions of the Income Tax Code and that the deductibility of such expenses cannot be challenged by the mere fact that they pertain to intra-group charges.

36 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 the Greek tax legislation. Consequently there are no guidelines on the issue. However, although OECD in Action 8 of BEPS considers the local savings as a comparability factor, it does not include it in the concept of intangibles.

37 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 have to 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 for the allocation of these expenses.

38 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.

39 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).

BERNITSAS

Fotodotis Malamas **fmalamas@bernitsaslaw.com**

5 Lykavittou Street
GR-10672 Athens
Greece

Tel: +30 210 339 2950
Fax: +30 210 364 0805
www.bernitsaslaw.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

ISBN 978-1-78915-079-7