

Ghana publishes Transfer Pricing Regulations 2020

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Executive summary

Ghana's Minister of Finance¹ submitted new Transfer Pricing Regulations (new Regulations) before Parliament on 10 August 2020. In accordance with Article 11(7) of the Constitution of the Republic of Ghana, 1992, the new Regulations² matured after 21 sitting days for Parliament. Thus, the new Regulations - which also repealed the Transfer Pricing Regulations, 2012 (L.I. 2188) (old Regulations) - entered into force on 2 November 2020.

The new Regulations incorporate many of the revisions introduced by the July 2017 edition of the Organisation for Economic Co-operation and Development (OECD)'s Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines), but with significant variations in certain cases.

The 19 paragraphs and two schedules of the new Regulations introduce significant changes in the compliance obligations for affected taxpayers as compared to the 10 paragraphs of the old Regulations.

This Alert summarizes the key provisions of the new Regulations.

Detailed discussion

Application

The new Regulations apply to "arrangements" between "persons who are {regarded as being} in a controlled relationship under...the Act³ and any other tax law."

Demonstrating arm's-length considerations

Allocation of risk

The definition of what constitutes an arm's-length transaction has not changed in accordance with the long-established global practice. In line with the new guidance in the OECD Guidelines, however, the new Regulations now specifically require the consideration of the allocation of the economically significant risks in determining the comparability of transactions. Assumption of risk, performance of mitigation functions and financial capacity to bear risk are explicitly required to be considered in determining transfer prices.

Aggregation of transactions

Recognizing the ways of modern business, the new Regulations explicitly permit the aggregation of "two or more controlled arrangements that are economically closely linked with one another or that form a continuum such that they cannot reliably be analysed separately."

This is a positive development that should both make compliance more certain for impacted businesses and also make compliance more cost effective.

Intangible property

While the old Regulations provided for transactions involving intangible property, the new Regulations enhance the factors that should be taken into account in determining whether the transactions comply with the arm's-length standard, including the so-called DEMPE factors - the arrangements regarding the Development, Enhancement, Maintenance, Protection and Exploitation of the intangible asset.

Financing transactions

One new Regulation is dedicated to financing transactions. It contains specific provisions guiding what factors need to be considered in determining an arm's-length price for a financing transaction.

Among these, it is interesting to highlight that the new Regulation requires interest to be charged on related party trade payables which remain unpaid for 12 months.

Business restructuring

The new Regulations cover business restructurings. The objective is to ensure that, in any transfer of functions, rights, interests, assets and risks between persons in a controlled relationship, the amount received for the transfer reflected the amount an independent person in comparable circumstances would pay.

Documentation

Ghana's new Regulations, a sequel of the OECD Guidelines, now define the "Documentation" to be maintained as (a) Master File and (b) Local File, and they are required to be maintained contemporaneously. This is a change from the requirement under the old Regulations to maintain only the "Local File" as documentation.

"Contemporaneous documentation" is defined as documentation which "...exists or is brought into existence at the time the person is developing or implementing any arrangement that might raise transfer pricing issues."

Safe Harbors

Taxpayers who are parties to a controlled arrangement with a value of up to US\$200,000 are automatically exempted from the requirement to maintain contemporaneous documentation.

Additionally, taxpayers involved in low value-adding intra-group services which satisfy the Commissioner General's (CG) set criteria may, by written notice to the CG, elect to be exempted from the requirement to maintain contemporaneous transfer pricing documentation.

The third safe harbor for documentation purposes is available by election to persons involved in controlled arrangements pursuant to a technology transfer agreement (TTA) which:

- a. Is registered with the Ghana Investment Promotion Centre (GIPC); and
- b. For which the applicable charges are less than or equal to 2% of net profit.

Mandatory disclosure filings

Similar to the old Regulations, the new Regulations require affected taxpayers to submit an annual transfer pricing return no later than four months after the end of each basis period.

The filing of a Country-by-Country (CbC) report is a new compliance requirement introduced by the new Regulations. This requirement will, however, only apply to multinational enterprise groups with annual consolidated group revenues of 2.9b Ghana cedis or above in the fiscal year immediately preceding the Reporting Fiscal Year. On 3 November 2020, when the new Regulations entered into force, the threshold amount was approximately equivalent to €420 million, significantly below the €750 million that is recommended by the OECD Guidelines.

Recharacterization of debt financing as equity financing

The Minister has provided guidance on the factors that the CG should consider in recharacterizing a debt financing as equity financing as he is authorized to do under section 31(5)(a) of the ITA 2015. This will, generally, be triggered during an audit.

No Advance Pricing Agreements (APAs)

The new Regulations, like the old Regulations, do not contain provisions on APAs. Private rulings, therefore, remain the only available route for entities requiring certainty for particularly sensitive or high value related party transactions.

Drafting error

It is important to note a drafting error in the new Regulations. Regulation 13(1) inadvertently refers to the "requirements of sub-regulation (6)" instead of sub-regulation (7) which contains the requirements for a CbC report. It is anticipated that the Treasury will address this soon.

Implications

The new Regulations introduce significant changes in the compliance obligations for taxpayers. Affected taxpayers should review their transfer pricing compliance procedures to ensure that they can demonstrate the requisite arm-length considerations and meet their documentation obligations.

Endnotes

1. The Minister exercised the power conferred on him by subsection (3) of Section 31 and paragraph (a) of subsection (1) of section 127 of the *Income Tax Act, 2015* (Act 896) (as amended).
2. Numbered as L.I. 2412.
3. *Income Tax Act, 2015* (Act 896) (as amended) (ITA).

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