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Global Tax Alert

News from Transfer Pricing

Portugal amends transfer pricing regulations

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Executive summary

Portugal published Law no. 119/2019 on 18 September 2019, which revises several tax code articles and introduces changes to the Portuguese Transfer Pricing (TP) regime. Specifically, the new law amends articles no. 63, 130 and 138 of the Corporate Income Tax Code (CIT Code), and article no. 117 of the General Regime for Tax Infractions.

The new regime came into force on 1 October 2019 with immediate effect, and clarifies and strengthens the TP rules and taxpayer's reporting obligations, namely:

- Taxpayers under the authority of the Large Taxpayers Unit will now have to submit TP documentation within the deadline for submission of the Annual Tax and Accounting Return (IES), in which the TP disclosure form is included.
- The concept of intragroup transactions was clarified and broadened, to explicitly include categories of transactions such as corporate restructurings and reorganizations.
- Significant penalties were introduced for taxpayers that do not comply with the delivery of the Country-by-Country (CbC) Report, the CbC reporting (CbCR) notification or the submission of the TP documentation.

Portugal has also extended the maximum period for which an advance pricing agreement (APA) can be concluded.

Building a better working world

These amendments were preceded by the introduction of a new TP disclosure form on 28 January 2019 (details below) that requires taxpayers to state if their business model was subject to any changes during the reporting tax period. The new TP disclosure form is applicable for fiscal years starting on or after 1 January 2019.

Detailed discussion

The following details are relevant for multinational groups operating in Portugal.

Mandatory submission of TP documentation

Taxpayers under the authority of the Large Taxpayers Unit (a list of more than 1500 entities, as per Order no. 977/2019) are now required to submit their annual TP documentation within the deadline for the submission of the IES (which includes the TP disclosure form), which is the 15th day of the 7th month after the fiscal year-end.

The Large Taxpayers List includes entities operating in diverse industries, however a significant number are entities: (i) under the supervision of the Bank of Portugal; (ii) under the supervision of the Insurance and Pension Funds Supervisory Authority (except those conducting insurance mediation); or (iii) which are collective investment entities under the supervision of the Securities Market Commission.

Taxpayers not included in the Large Taxpayers List are still required to prepare TP documentation by the same date and to submit it upon request. Considering this legislative change, it is important that transactions are documented as contemporaneously as possible.

Clarification and broadening of the intragroup transactions concept

Intragroup transactions comprising commercial transactions, including any transaction or series of transactions that address tangible or intangible assets, rights or services, are subject to documentation and TP analysis. These requirements apply under any agreement, including cost-sharing arrangements and intragroup service provisions, as well as financial transactions.

Additionally, intragroup transactions now explicitly cover corporate restructuring or operations involving changes in business structures, the termination or substantial renegotiation of existing contracts, where they involve the transfer of tangible, intangible assets, rights on intangible assets, or compensation for emerging damages or ceasing profits.

TP methods

The TP methods hierarchy was removed from the Portuguese TP legislation, aligning it with the Organisation for Economic Co-operation and Development TP Guidelines for Multinational Enterprises and Tax Administrations. The taxpayers are entitled to use any of the accepted TP methods. Furthermore, it is also important to highlight the possibility of adopting other methods, techniques or models of economic assets valuation, when the traditional methods are not viable.

TP adjustments to the taxable income

If the Portuguese Tax Authorities (PTA) perform, during the assessment of the taxable income, TP adjustments, these should be booked to the tax period or periods in which the effects of the transactions were relevant for the purposes of determining the taxable income.

Penalties

Failure to submit the (i) TP documentation, as well as failure to submit, within the deadline; (ii) the CbCR notification; and/or (iii) the CbC report, is subject to a penalty ranging from €500 to €20,000, plus 5% for each day of delay in fulfilling these obligations. This penalty can be increased substantially in certain cases specified in the applicable laws, such as when there is an intention to omit information relevant for the PTA assessments. Penalties are levied per company and per year.

APAs

Further to the amendment of its TP regulations, Portugal introduced an extension of the term of an APA to a maximum of four years (prior law allowed a term of three years maximum).

TP disclosure form

In parallel with this legislative revision, due to the need to obtain detailed disaggregated information for tax control purposes, in particular regarding TP matters, Portugal had already reviewed the IES model which introduced a new TP disclosure form. The new TP disclosure form introduced by Ministerial Order no. 35/2019 of 28 January 2019 is applicable for fiscal years starting on or after 1 January 2019.

The changes introduced will, on the one hand, facilitate the disclosure of transactions by the taxpayer, given the standardization of the reporting model, but will also simplify the identification by the PTA of some TP fundamental issues. For example, taxpayers will now have the obligation to:

- Identify, for each operation, by counterparty, which TP method was used to price the individual transaction and if the method changed from 2018 to 2019.
- Identify the amount in guarantees or collaterals granted or obtained from related parties.
- Provide information regarding changes in the business model that may have happened.

Implications

Following these amendments, it is expected that the Ministerial Order no. 1446-C/2001 (published 18 years ago), that regulates the application of the TP rules provided by the CIT Code, will be revised in the near future. In this regard, it is important to note that the Master/Local File approach has not yet been formally adopted in Portugal.

These legislative changes (i) place emphasis on the importance for the PTA to have access to the most contemporary TP documentation, to closely monitor if intragroup transactions are being carried out at arm's length, particularly in case of business restructurings or reorganizations; and (ii) provide the PTA with more effective legal instruments to perform corrections to the taxable income in cases where the applicable TP rules are not followed.

Therefore, taxpayers should (i) safeguard if the CbCR notifications are being correctly and timely submitted; and (ii) prepare for the information that will have to be submitted in the new TP disclosure form (regarding the current fiscal year), as incomplete or inconsistent filings or documentation could attract the attention of the PTA and lead to transfer pricing audits.

Finally, taxpayers should take the necessary steps to proactively examine if there are transactions or events that will now have to be individually disclosed, for example operations related to restructurings or reorganizations. These transactions should be documented and supported by specific TP economic studies and analyses and taxpayers may consider concluding an APA for such transactions.

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