

Chapter7 Documentation

7.1. Introduction

7.1.1. Adequate documentation will make it easier for tax authorities to review a taxpayer's transfer pricing analysis and thereby contribute to avoiding a dispute or to a timely resolution of any transfer pricing disputes that may arise. Adequate documentation is characterised by (i) the sufficiency of the details well as to show clearly that such analysis has been actually conducted. Activities undertaken to prepare and maintain appropriate documents with a view to conforming to the arm's length principle can be referred to as the "arm's length documentation".

7.1.3. This Chapter first introduces some existing

international guidelines on transfer pricing documentation, which will be helpful in browsing general issues on documentation. It is then followed by a more in depth discussion on several topical issues frequently raised in the process of transfer pricing documentation, with the goal of providing practical guidance on such issues. An annex to this Chapter will set forth selected countries' legislation examples on transfer pricing documentation and a sample transfer pricing study.

7.2. International Guidelines on Transfer Pricing Documentation

7.2.1. OECD Transfer Pricing Guidelines (2010)

7.2.1.1 The OECD's guidance on documentation is well summarized in the following paragraphs of the 2010 version of the OECD Transfer Pricing Guidelines¹:

"5.28 Taxpayers should make reasonable efforts at the time transfer pricing is established to determine whether the transfer pricing is appropriate for tax purposes in accordance with the arm's length principle. Tax administrations should have the right to obtain the documentation prepared or referred to in this process as a means of verifying compliance with the arm's length principle. However, the extensiveness of this process should be determined in accordance with the same prudent business management principles that would govern the process of evaluating a business decision of a similar level of complexity and importance.

Moreover, the need for the documents should be based on the facts and circumstances. Taxpayers should not be required to prepare or maintain documents that would not otherwise be prepared or maintained for other tax considerations. Documentation requirements should not be so burdensome that the costs and burdens disproportionate to the circumstances.

¹ The 2010 OECD Transfer Pricing Guidelines reproduce the 1995 OECD Transfer Pricing Guidelines on the documentation issues.

Outline of the business structure of the organization, including the associated enterprises and ownership linkages within the MNE group;
Information

compendium of local documentation requirements in the four PATA countries that may be a useful reference point for countries setting up a transfer pricing system.

7.2.2.4. The Package has also been criticised in that it contains no guidance as to the nature of the comparable transactions (which would depend on the law of the PATA countries). In other words, no guidance is provided as to whether local comparables must be used, or whether some form of blended (foreign with local elements) comparable is required. As noted in Chapter 5 in Comparability, however, the reality is that for most developing countries, there will be no local comparables and some form of adjustment to foreign comparables will often be necessary. As many developing countries do not have

7.2.3.5. The “Master file” provides a “blue print” of the company and its transfer pricing system that would be relevant for all EU Member States concerned. The Master file should contain general descriptions of the group’s business strategy, organizational structure, general description of the controlled transactions

7.2.4.5. Instead of a list of required documentation an alternative could be developed in the form of a kind of disclosure form. The disclosure form should be based on the same assumptions as mentioned above and strike a balance between the effort required by a taxpayer to obtain information and its usefulness for tax authorities to make a proper assessment. The form should only be completed in relation to significant intercompany transactions. Completing the form should be sufficient to comply with transfer pricing documentation requirements as a full transfer pricing analysis is required to complete the form. However only upon request a further detailed transfer pricing report may need to be produced but this should not be required on a contemporaneous basis. By introducing such a form the compliance burden and compliance costs for MNE's may be reduced while not compromising on the available information for tax authorities. An example of a form is attached in Annex A.

7.2.4.6. Developing countries that consider the introduction of TP documentation rules should note that European MNEs, j /TT5 1 Tf 3.9147 0 TD 0 Tc <0003>Tj /TT6 1 Tf .2439 0 2197 TD <0003>T3>T3>Tj /T /TT5

proof shifts to the tax administration if a taxpayer has fulfilled a reasonable level of obligations required by such documentation rules.

7.4.1.4. It is therefore important that the documentation rules are broad enough to give a true

administration's interest is satisfied if the necessary documents were submitted in a timely manner when requested in the course of a tax assessment the document storage process is therefore left to the taxpayer's discretion under the OECD TP Guidelines.

7.4.2.5. Further, the OECD TP Guidelines provide some guidance on the amount of information to be submitted to the tax administration at the time of tax return filing. Paragraph 5.15 of OECD TP Guidelines recommends limiting the amount of information requested by a tax administration at the stage of tax return filing.

7.4.2.6. The basis for this is that at the time of filing, no particular transaction has been identified for transfer pricing review and that all that is needed at that stage is enough information to know if a further examination is needed of particular taxpayers.

7.4.2.7. The OECD TP Guidelines

7.4.3.2. However, a number of countries also have incentive measures exempting penalties against underpayment of taxes in cases where obligations for proper documentation (frequently contemporaneous documentation) have been fulfilled by taxpayer even in cases where the amount of taxable income turns out to be increased as a result of a tax audit. The principle governing these incentive measures is often called the “no fault, no penalty principle”.

7.4.3.3. In general, penalties can entail civil (or administrative) or criminal sanctions. Penalties imposed for failure to meet TP documentation requirements are usually monetary sanctions of a civil or administrative, rather than a criminal, nature. Tax audit or discretionary application of TP methods⁶ by tax authorities using a secret comparable or so called “deemed income”⁷, are sometimes seen as a type of penalty for noncompliance with TP documentation rules. These cases are more closely scrutinized, and can equally be seen as resulting in greater risks of non compliance in such cases.

7.4.3.4. It would be unfair to impose sizable penalties on taxpayers that exerted reasonable efforts in good faith to undertake a sound transfer analysis to ascertain arm's length pricing, even if, they did not fully satisfy TP documentation requirements. In particular, it would be unfair to impose penalties on taxpayers that

www.oecd.org/tax/transfer-pricing/tp-requirements/tp-requirements-2013-v83-0

on which SME taxpayers or taxpayers without heavy involvement in international transactions can be exempted from the TP documentation requirements.

7.4.4.2. The following countries have been selected as a sample to demonstrate special considerations for TP documentation in the case of SMEs:

France

France has issued guidance for SMEs with the effect that the mandatory TP documentation requirements in the legislative proposal will only apply to large enterprises. Thus, SMEs should only undertake TP documentation upon a specific request of the French tax authorities (FTA) in the course of a tax audit. In principle, such requests may occur only under exceptional circumstances if the FTA has gathered sufficient evidence suggesting a transfer of profit to related foreign entities. However, small companies are also encouraged to prepare contemporary TP documentation.

Germany

SMEs do not have a duty to issue TP documentation. However, they are obliged to provide further information and documents about the foreign business transactions when requested by tax authorities. In this case, issuance of TP documentation less detailed than that required for larger companies is provided for.

Netherlands

There are no specific rules applicable to SMEs; all enterprises are obliged to prepare and keep TP documentation. However, in practice, the TP documentation obligation is applied in a flexible manner; small companies are often permitted to provide less detailed TP documentation as compared to large companies.

Poland

Enterprise size does not have an influence on TP documentation requirements. However, the volume of the

There could be several types of documentation compliance burdens depending on the characteristics of the parties involved. Relevant factors include a turnover of EUR8 million or more, which may trigger a requirement to provide further and more thorough information. Another factor is whether transactions are undertaken with entities or individuals based in tax haven jurisdictions.

China

There are three kinds of enterprises that are exempt from the contemporaneous documentation obligation:

- Entities with annual related party sales and purchases of less than 200 million RMB¹⁰ and other related party transactions of less than 40 million RMB;

- Entities within the coverage period of an APA; or

- Entities with less than 50% foreign invested shares that only have transactions with domestic related parties.

Korea

The method

7.4.6.4. First of all, information as to the related parties that are involved in the controlled transactions at issue needs to be documented. Such information includes *i)* an outline of business with transaction parties *ii)* the structure of the organization, *iii)* ownership linkage within the MNE group, *iv)* the amount of sales and operation outcome from the last few years preceding the transaction; *v)* the level of the taxpayer's transactions with foreign

