

Transfer Pricing Country Summary Portugal

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Legislation

Existence of Transfer Pricing Laws/Guidelines

Provisions regarding transfer pricing matters are incorporated in Article 63 of the Corporate Income Tax Code (CITC), approved in December 2000 and amended in July 2009. The Transfer Pricing in Portugal is also ruled by Article 121-A of the CITC. They mainly concern general rules on the definition of related parties, transactions covered, transfer pricing methods, the possibility of making adjustments to taxable profits, and documentation requirements. On 14 January 2002, a transfer pricing legal ruling ("Portaria 1446-C/2001, December 21") was published, giving taxpayers guidance on the application of the Portuguese transfer pricing legislation. The ruling applies to taxation periods beginning on or after 1 January 2002. On 16 July 2008, a transfer pricing legal ruling ("Portaria 620-A/2008, July 16") was published, giving taxpayers guidance on the application of the Advance Pricing Agreements (APA) decree.

Transfer Pricing Scrutiny

The Portuguese tax authorities have created a specific, autonomous transfer pricing team, which has received training in countries with more experience in transfer pricing audits. So there is a significant risk of transfer pricing audits. Areas that receive particular attention are transfer pricing year-end adjustments, financial operations, intangibles and intragroup services.

This Transfer Pricing Audits performed by PTA can occur during a general audit or in a specific transfer pricing audit.

The relevant risk areas are:

- Significant transactions with related parties resident in a more favorable tax regime;
- Cross border restructurings processes;
- Entities with a recurrent loss situation;
- Financial transactions;
- Intra-group services, among others.

Definition of Related Party

It is considered that a special relationship exists between two entities when one has the power to exercise, directly or indirectly, significant management influence over the decisions of another, which happens, among other situations, when:

- An entity and the respective capital owners, or spouses, ascendants or descendants of these, holding, directly or indirectly, no lower participation than 20% of the capital or voting rights;
- Entities in which the same capital holders, their respective spouses, ascendants or descendants hold, directly or indirectly, no lower participation than 20% of the capital or voting rights;

- An entity and the members of its governing bodies, or any administrative, direction, management or supervision bodies and their respective spouses, parents, children;
- Entities in which most members of the governing bodies, or members of any administrative, direction, management or supervision, are the same people or, being different people are connected to each other by marriage, that are legally recognized as marriage or kinship or straight;
- Entities linked by a subordination agreement, the joint working party or by equivalent effect;
- Companies in a controlling relationship, under Article 486 of the Commercial Companies Code;
- Entities whose legal relationship allows, by its terms and conditions, that a conditional management decisions is made over the other, due to facts or circumstances unrelated to the business or professional relationship;
- A resident or non-resident entity with a permanent establishment situated in Portuguese territory and an entity subject to a more favourable tax regime resident in a country, territory or region part of the list approved by order of the Government member responsible for finance (as listed in the Ministerial Order 292/2011).

Transfer Pricing Penalties

Penalties up to €10,000 (per year and per taxpayer) are applied for failure in presenting the TPD and/or Country-by-Country Reporting, within the deadline provided by PTA plus 5% for each day of delay in fulfilling this obligation.

Penalties up to €150,000 are applied for refusal to provide information.

Penalties up to €45,000 are applied for provide incorrect of incomplete information.

The non-compliance with transfer pricing rules may lead to corrections in the assessment of the taxable income, which may result in additional CIT liabilities over which compensatory interest at 4%, per year, should be charged. Furthermore, possible income tax adjustments and compensatory interest can also be assessed if applicable.

Cost Contribution Agreements (CCA's)

Article 11 of the December 2001 ruling devotes special attention to cost contribution agreements and cost sharing agreements and addresses a number of issues such as:

- A cost contribution arrangement is defined as the situation where two or more related entities agree to share the costs and risks of producing or developing goods, rights or services, in proportion to the advantages or benefits that each participant expects to obtain from its participation in the cost contribution arrangement;
- The proportionate share of the overall contributions for which each participant is liable, should be consistent with the participant's proportionate share of the overall benefits to be received under the arrangement, as assessed from estimates of additional income to accrue in future or

expected cost savings. If a direct or individual assessment of these compensations is not possible, an appropriate allocation key can be applied, taking into account the nature of the activity and the relationship with the expected benefits (specifically sales), labour costs or the value of capital invested;

- Consequently, the contribution required of each of the participants in the agreement should be equal to the value of the contribution that would be required of, or accepted by, an independent entity under comparable conditions;
- Cost sharing agreements are implicitly defined as joint purchases of goods, rights or services. In this case, the entity responsible for their purchase should add a mark-up to cover the costs incurred while acting as a purchaser on account of other entities.

Advance Pricing Agreement (APA)

As foreseen in the preamble to the transfer pricing legal ruling Portaria 1446-C/2001, in 2008 a new instrument was published for establishing the arm's length principle in controlled transactions through the publication of the Advance Pricing Agreements (APA) decree. This decree intends to provide a basis of legal security and certainty by fixing in advance the methods used for determining transfer pricing in respect of the arm's length principle, while ensuring the elimination of double taxation in the presence of bilateral or multilateral relations.

Detailed APA rules were introduced by the Ministerial Order 620-A/2008, which entered into force on July 16, 2008.

Some considerations:

- APA's can be Unilateral, Bilateral or Multilateral;
- The APA request or proposal should be sent to the PTA up to 180 days prior to the beginning of the first fiscal year covered by the agreement;
- The APA is valid for a maximum of three years with the possibility for renewal;
- The filing fee for an APA application is between €3,150 and €35,000, depending on taxpayer's average turnover. The fees are reduced by 50% for renewals or revisions of existing APA's.

Since 2014, was introduced the possibility of taxpayers entering into unilateral APA with the PTA.

Documentation And Disclosure Requirements

Tax Return Disclosures

Portuguese law requires all Portuguese corporate taxpayers to disclose, on a yearly basis, whether they have entered into transactions with related parties. The following items are required to be disclosed on the Annual Declaration of Tax and Accounting Information:

- Identification of the related entities with which the taxpayer has special relations;
- Identification of the amount of each transaction realized with related entities;

- Declaration on whether transfer pricing contemporaneous documentation was (and still is) available.

Level of Documentation

Taxpayers with net sales and other operating income exceeding Euro 3 million must prepare and maintain extensive contemporaneous documentation that supports and records the process of setting transfer prices. The outcome of those transactions should be verified against the arm's length standard, including a detailed analysis of business functions performed, assets used and risks assumed, as well as selection and application of the most appropriate transfer pricing methodology.

Content of the Transfer Pricing documentation

The Master file and Local file concepts established by OECD on transfer pricing documentation for associated enterprises is not yet adopted in the Portuguese legislation; however, the TPD prepared locally addresses all of the relevant topics contained therein.

In summary, the tax authorities are expecting taxpayers to prepare and maintain Transfer Pricing documentation that:

- Identifies related party transactions falling within the scope of the legislation presented in Article 63 of the CITC;
- Identifies the products, services and rights which are the subject of the related party transactions;
- Describes the taxpayer's activity and that of the other party to the transaction(s) being considered;
- Describes the functions performed, assets employed and risks borne by the taxpayer and the other party to the transaction(s) being considered;
- Includes a sector or industry analysis;
- Discloses internal transfer pricing guidelines;
- Includes contracts, and other relevant agreements or information;
- Describes the chosen transfer pricing methodology and explains why this is the "best method" for the transaction or transactions in question;
- Justifies the choice of comparable transactions and their selection criteria. Identifies the data sources;
- Includes a financial analysis showing the impact of the transfer pricing policy used;
- Explains relevant business strategies and policies; and
- Discloses other relevant information.

Portuguese Transfer Pricing Legislation broadly follows the Organisation for Economic Co-operation and Development (OECD) Guidelines.

Taxpayers with net sales and other income exceeding €3,000,000 in the previous year, must prepare the Transfer Pricing Documentation (TPD) (among others, providing evidence of the market parity practice in the transactions established with related parties).

Also, specific information on transfer pricing, including types of transactions, yearly amount and transfer pricing methods applied, must be disclosed on the designated forms of the Annual Tax and Accounting Statement (IES).

Exemption from documentation obligation

Taxpayers with net sales and other operating income under €3,000,000 in the previous year have no the obligation to prepare the TPD.

Notwithstanding, such taxpayers can be requested by the Portuguese Tax Authorities (PTA) to prove arm's length principle in intragroup transactions.

There is no limited transfer pricing documentation in the current law.

Implementation of BEPS-related documentation requirements

Portuguese resident entities should submit annually for each tax period a CbC report where all of the following conditions apply:

- Required to prepare consolidated financial statements;
- Hold or control, directly or indirectly, one or more entities whose tax residence or permanent establishment is located outside Portugal;
- Amount of income in the financial consolidated statements for the previous annual accounting period is at least €750M;
- Not held by one or more Portuguese resident entities that are required to submit the CbC report, or by one or more non-resident entities which are required to submit the CbC report in a jurisdiction which has an effective agreement with Portugal to exchange the report.

Additionally any company that is a Portuguese resident and is part of a group in which any entity is required to submit a CbC report, must communicate electronically the identification and jurisdiction of the reporting entity.

Record Keeping

Transfer pricing documentation must be retained for a period of 12 years after the end of the year it relates to.

Language for Documentation

As a rule, the supporting documentation to transfer pricing information must be in the Portuguese language. The Portuguese transfer pricing regulations require that the documents in foreign languages must be translated into Portuguese before being presented to the tax authorities. However, the translation requirement can be dispensed from on request. However, for the documentation submitted in English the PTA not always requests translation.

Small and Medium Sized Enterprises (SMEs)

Taxpayers with net sales and other operating income not exceeding Euro 3 million are not obliged to prepare and maintain transfer pricing documentation

Deadline to Prepare Documentation

Documentation must be prepared by the 15th day of the seventh month following the tax-year end.

Deadline to Submit Documentation

Usually 10 days upon request by PTA.

Entities included in the Special Register of Taxpayers and entities to which the special regime of taxation of groups of companies (RETGS) apply, must deliver the TPD to the PTA within the already mentioned deadline to prepare the documentation.

Statute Of Limitations

General provisions apply. Tax assessments may only be issued within a 4-year period following the last day of the tax year concerned.

Transfer Pricing Methods

The transfer pricing methods specified by the Portuguese transfer pricing regime are the same as in the OECD Guidelines: CUP, resale price, cost plus, profit split and Transactional Net Margin Method. Portuguese tax authorities expect the most reliable method to be applied, although more than one method may be applied to confirm the application of a primary method. Transaction-based methods are preferred over profit-based methods. Other methods may be applied when one of the specified methods cannot be applied, or when they do not result in the most reliable arm's length measure.

Priority of methods

In Portugal there is a hierarchy in which method should be used, namely the best-method rules applies in Portugal. This implies that a taxpayer is expected to use the method or methods most suitable to each case, thus explaining not only the reason why a certain method is considered as the most appropriate to test whether or not the controlled transactions comply with the transfer pricing rules, but also why other methods are rejected.

Comparables

Local comparable are preferred but regional comparable are permitted in the case of limited availability of local comparable. Hence, both the SABI (with Iberian companies) and the Amadeus (with European companies) databases are used.

Mutual Agreement Procedure

In Portugal, Mutual Agreement Procedure is comprised in Double Taxation Treat, as a special disposition.