

Transfer Pricing Country Summary Malawi

August 2018

Legislation

Existence of Transfer Pricing Laws/Guidelines

The Malawian TP regulations that was contained in Chapter 41:01(Taxation Act) of the Income Taxation Act, 'Taxation Transfer pricing regulation 2009', was replaced by new legislation on transfer pricing on 1 July 2017. This regulation provides guidelines for determining the arm's length price for supply and transfer of goods and services; administrative rules, including the types of records and documents required by the commissioner general of taxes. Per the new requirements, taxpayers have to prepare a contemporaneous transfer pricing documentation. The TP regulation applies to domestic and cross-border transactions between related persons, and are based on OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines).

The updated regulations are contained in two Government notices:

- Transfer pricing documentation regulations (Government Notice No. 36), and
- Transfer pricing regulations (Government Notice No. 37).

Definition of Related Party

There is no relationship threshold for Transfer Pricing regulations in the Act to apply. The regulations simply applies to the sale or purchase of goods; and lease of tangible assets; the transfer, purchase or use of tangible assets; the provision of services; the lending or borrowing of money; and any other transaction that may affect the profit and loss of the enterprises involved.

The regulations include a number of paragraphs that specifically concern intra-group services. In line with the OECD guidance on intra-group services, an intra-group service charge shall be considered consistent with the arm's length principle where:

- It is charged for a service that is actually rendered;
- The service provides, or was expected to provide, the recipient with economic or commercial value to enhance its commercial position;
- It is charged for a service that an independent party in comparable circumstances would have been willing to pay for or would have performed in-house; and
- Its amount corresponds to that which would have been agreed upon between independent parties in comparable circumstances.

Transfer Pricing Scrutiny

In a bid to scrutinize and enforce its TP regulation, the Malawian Revenue Authority (MRA) has a service with 500 employees in more than 15 field offices. This aggressive enforcement of the TP regulations revealed that many MNCs are not fully compliant with the transfer pricing rules. The MRA has equally demonstrated an efficient and proactive interest in capacity building geared at educating

staffs capable of handling transfer pricing issues, hence its active participation at the African Tax Administration Forum (ATAF).

Transfer Pricing Penalties

Any person who fails to comply with the transfer pricing documentation requirements shall be liable to an initial penalty not exceeding the Malawi Kwacha equivalent of 1,400 US Dollars at the prevailing exchange rate. Subsequent penalties will be imposed in an amount not exceeding the Kwacha amount equivalent of 2,100 US Dollars at the prevailing exchange rate for every month while the failure continues.

Advance Pricing Agreement (APA)

There is currently no APA applicable in the Malawian TP rules.

Safe Harbor

In Malawi, a deemed dividend tax may be imposed where the debt-to-equity ratio exceeds 3:1. The anti-avoidance rules cover every aspect of tax avoidance, from thin capitalization to transfer pricing and to any transaction deemed conducted for the purpose of tax avoidance or reduction of the tax liability for any tax year.

Documentation And Disclosure Requirements

Tax Return Documentation

The Malawian tax authorities' reserve the right to request for the submission of tax documentation. The annual tax return must be filed and any balance paid within 180 days of the company's year-end. On the other hand, provisional tax is due quarterly, within 30 days of each quarter. The commissioner may also require a return filed within a short notice of 30 days, upon receipt of notice by the taxpayer. Consolidated returns are not permitted and each company within a group must file its own taxes when due.

Level of Documentation

The level of documentation is high but flexible for compliance. In this respect a Malawian company may adopt any date as its accounting year-end. The taxable income is generally taxed in the fiscal year in which the accounting year ends, usually from 1 July to 30 June.

Although there is no requirement to file the transfer pricing documentation, documentation must be submitted within 45 days after a written request issued by the Commissioner General of the MRA.

According to the regulation, taxpayers are required to conform to contemporaneous documentation requirements for controlled transactions. The following items are to be included in the documentation:

- An overview of the taxpayer's business operations and organizational chart;
- Description of the corporate organizational structure of the group of which the taxpayer is a member and the group's operational structure;
- Details of controlled transactions including analysis of the comparability factors;
- Details of the functions undertaken by the connected parties in relation to the controlled transaction;
- An explanation of the selection of the most appropriate transfer pricing method;
- Financial statements for the parties to the controlled transaction;
- A comparability analysis, including a description of the process to identify comparables, basis for rejection of any comparables, any adjustments made, etc.;
- Details of any industrial analysis, economic analysis, budgets, or projections relied on;
- Details of any relevant Advance Pricing Agreements or similar arrangements in other countries;
- Conclusions as to the consistency of the conditions of controlled transactions with the arm's length principle, including any adjustments made to ensure compliance; and
- Any other documentation or information for the determination of compliance with the arm's length principle.

Record Keeping

The Malawian Taxation Act requires businesses/persons to maintain sufficient records of their income and expenditure in order to enable income and allowable deductions readily ascertained. Records must be retained for at least 7 years, after completion of the transaction and acts or operation to which they relate except notified by the Commissioner that its preservation is not required.

Language for Documentation

The language of Transfer Pricing documentation in Malawi is the English language.

Small and Medium Sized Enterprises (SMEs)

There is currently no special regime in the Taxation Act for Small and Medium sized companies.

Deadline to Prepare Documentation

There is no statutory deadline for the preparation of TP documentation.

However, depending on the accounting and financial year adopted by the company, the deadline to file general tax returns is 180 days after the end of the company' accounting year. Or, such longer time as the Commissioner may allow for Income Tax return to be prepared and delivered, in a form approved by him.

Statute Of Limitations

According to the Malawian Tax Act, proceedings for the recovery of any penalty incurred in connection with or in relation to the assessment of income tax made by the Commissioner may be commenced at any time within 6 years after the date on which it incurred. Thus, the Statute of limitation is 6 years.

Transfer Pricing Methods

The taxpayer may therefore choose amongst the OECD Transfer Pricing Methods in determining the arm's length nature of the transaction, thus:

- The Comparable Uncontrolled Price method;
- The Resale Price method;
- The Cost Plus method;
- The profit split method;
- The TNMM and;

The Commissioner General under circumstances may accept other methods, where the approved smethods (listed above) are regarded as less appropriate and the alternative method does provide a better arm's length price.

Comparables

Per the Act, taxpayers are required to provide comparables to justify their TP policy and the arm's length standard of the taxable transaction. Taxpayers involved in intercompany transaction are urged to include the market value of such goods, property or services in their assessable income during tax filing.