

EU JOINT TRANSFER PRICING FORUM DOCUMENTATION REQUIREMENTS

Issues for Discussion

I. Purpose of a “good” documentation package

1. Allow the tax administration to identify the relevant inter-company transactions
2. Allow the tax administration to assess transfer pricing risks
3. Frame further enquiries into matters of detail
4. Provide for a maximum of transparency in the companies transactions
5. More ... ?

(limiting the purpose to 1. – 3. means the documentation “package” is rather un-ambitious:(i) identifying relevant inter-company transactions should be straightforward now, (ii) assessing transfer pricing risks ditto., and (iii) framing further enquiries – is it really the purpose of agreeing a common documentation package to simply assist tax administrations in coming up with further enquiries?)

II. General Approach

Should tax administrations make a choice between following two approaches which are at the outsides of the existing legislative spectrum:

- a) a prescriptive approach, i.e. exhaustive, detailed list
main advantage for taxpayer: certainty (helps to protect from penalties)
main disadvantage: burdensome and difficult to prepare
main advantage for tax administration: certainty, facilitates tax audit
main disadvantage: discourages compliance
- b) a more general approach: i.e. illustrative documentation
main advantage for taxpayer: flexibility and more suitable for SMEs
main disadvantage: uncertainty
main advantage for tax administration: incentive for taxpayer to comply;
main disadvantage: more uncertainty, more difficult for examination

III. Rights and obligations of the taxpayer

1. “Prudent Business Management Principle”
 - does the “prudent business management principle” limit the taxpayer’s obligation to prepare or refer to written materials that would not otherwise be prepared or referred to in the absence of tax considerations?
2. Can a company be required to ask information/documentation from its parent or other group company? In case the taxpayer claims to have no access to data abroad should the taxpayer be obliged to provide this information and should there be consequences in case of non-compliance? *[it should be undisputed that a parent company can request information from its subsidiaries]*

IV. Rights and obligations of the tax administration

1. “Prudent Business Management Principle”
 - does the “prudent business management principle” limit the tax administration’s right to request information/documentation?
1. Use of secret comparables
2. Consequences of insufficient documentation
 - a) shift of burden of proof if documentation requirements are not fulfilled?
[differences in Member States as regards the burden of proof are reflected in documentation requirements; i.e. if burden of proof is on tax administration, documentation requirements tend to be more prescriptive]
 - b) estimation of income/the arm’s length transfer price?
 - c) transfer pricing adjustment based on the least favourable assessment of the arm’s length range from the taxpayer’s perspective?
 - d) penalties?
3. Enforcement/Penalties
 - a) link between documentation and penalties
 - b) no-fault penalties
 - c) should there be provisions to make it non-beneficial for companies not to comply with documentation requirements ?
[For information: A specific penalty regime in relation to transfer pricing adjustments exists in only a few countries. In all other countries, the general penalty regime applies. The criminal nature of those penalties depends in most cases on the circumstances, except in one country, where transfer pricing penalties are always considered to be of a criminal nature. So-called “monetary no-fault” penalties, do not seem to be common practice in Member States nor Acceding States. The rules for interpretation and specification of the amount of penalties are somewhat mixed; some countries regulate these issues in detail whereas other countries leave the application of general penalty principles to the discretion of the tax authorities.]

V. Content of documentation

1. Which basic information about the taxpayer and the group as a whole, should be included?
2. Comparability analysis (functions and risks, intangible property)
3. Transfer pricing questionnaire (business proposal)
4. Should there be specific documentation requirements for extraordinary transactions (e.g. transfer of intangibles, substantive change of the functions of a company)?
5. Transaction-by-transaction approach vs. aggregation of transactions as proposed by business for practical reasons (aggregation level of documentation; how detailed or general to be useful for tax administrations?)
6. Size or materiality of the transactions that should be subject to certain documentation requirements (link to the question of relief for SMEs)

VI. Time and Form of Documentation

1. When should documentation be prepared?
 - a) at the time of the transaction (contemporaneous obligation - discouraged by OECD)
 - b) within a “reasonable” time after the transaction
 - c) when filing the tax return
 - d) upon request of the tax administration
2. When should documentation be submitted to the tax administration?
 - a) upon filing of the tax return (all documentation or only part of it?)
 - b) at the beginning of a tax examination
 - c) upon request of the tax administration
3. Time period to retain documentation
4. The form of the documentation recording evidence (processed, e.g. electronically?)
4. Updating/adjustment of documentation (as a consequence of which external or internal changes?)
5. Time limit to answer to tax administration's request for information/ documentation (30 – 90 days?)

VII. “Masterfile” Concept

1. What is a “masterfile”?: A set of information supplied by an enterprise that would be sufficient to influence a decision by a tax administration whether a full transfer pricing investigation would be justified. *(something more than a set of objectively identifiable facts, such as the identity of the enterprise, the nature of its transactions with associated enterprises etc., but something less than the totality of the evidence that would be required to demonstrate that an arm's length result had been recorded satisfactorily)*
2. Relationship between “masterfile” and “code of best practice”
(Should both include conforming descriptions of the content of documentation, i.e. the same information twice? Or is one of the two descriptions redundant?)
3. Content of the “masterfile”, i.e. which elements of information should be included ?
4. Where should the “masterfile” be accessible?
 - (i) only at parent company / head office
 - (ii) also at all relevant associated enterprises
 - (iii) in whatever place as long as available within a reasonable timeframe
5. Additional documentation to be prepared for each subsidiary
6. When should the “masterfile” be prepared ?
7. What should be the language in which the “masterfile” is prepared ?
8. How to apply the concept of “masterfile” in case the company is located/has operations in a country outside the EU?
9. How to apply the concept of “masterfile” in case the parent company is located in a country outside the EU?

VIII. Other Issues

1. Language/translation
2. Simplifications for SME (scope for reduction of compliance burden for SMEs)
3. Documentation requirements also applicable to PE
4. Documentation requirements specifically for cross-border transactions or also for domestic situations? *(ECJ; e.g. the “Lankhorst-Hohorst”, “Futura” and “Singer” cases)*