

## Spain's Ministry of Finance publishes new transfer pricing regulations

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### In brief

On July 11, 2015, Spain's Ministry of Finance published the Royal Decree 634/2015, of July 10, 2015 approving Corporate Income Tax Regulations (the Regulations) that mandate new transfer pricing documentation requirements, which now incorporates the need for a Country-by-Country Report (CbC Report) in addition to the Master File and Local File.

This is a significant development for Spain in the context of transfer pricing, and a direct result of the recent guidance set forth by the Organisation for Economic Co-operation and Development (OECD) as part of its base erosion and profit shifting (BEPS) initiative with respect to *Action Plan 13: Guidance on the Implementation of Transfer Pricing Documentation and Country-by-Country Reporting*.

### In detail

#### General transfer pricing documentation requirements

In general, any taxpayer subject to Spanish Corporate Tax, being either a Spanish head office or a Spanish subsidiary of a foreign group, is obliged to prepare and have at the disposal of the Spanish Tax Administration a package of information containing:

- information on the multinational enterprise (MNE) group to which the taxpayer belongs (the "Master File"), and
- information on the taxpayer, itself (the Local File).

The Regulations set forth new informational requirements, as further described below, which

will enter into force for tax periods starting on and after January 1, 2016.

#### "Country-by-country report"

Pursuant to the Regulations, the "CbC Report" is a new filing requirement for the Spanish parent company of an MNE group, provided that the parent company is not itself owned by a foreign related party.

Furthermore, and consistent with the OECD's Action 13, this information must be filed for those entities that are tax residents in Spain, but are not the "Ultimate Parent Entity" of a MNE group, if any of the following criteria is satisfied:

- The Ultimate Parent Entity has designated the Spanish

entities to file the CbC Report.

- The Ultimate Parent Entity of the MNE Group is not obligated to file a CbC Report in its jurisdiction of tax residence.
- The jurisdiction in which the Ultimate Parent Entity is resident for tax purposes does not have an agreement of exchange of information with Spain.
- The Ultimate Parent Entity has an agreement of exchange of information with Spain, but there has been a "systemic failure" (e.g., automatic exchange has been suspended between competent authorities) of the jurisdiction of the tax

residency of the Ultimate Parent Entity pursuant to notification from the Spanish Tax Administration.

This new CbC Report will be required for tax periods starting on or after January 1, 2016 and should be filed within 12 months of the end of every tax period in a model format, which will be published to this effect. Note that, unlike the Master and Local Files that will need to be “at the disposal” of the Tax Administration, the CbC Report has to be filed every year.

Any Reporting Entity of an MNE group that is tax resident in Spain must notify the Spanish Tax Administration of its identity and tax residence before the end of the fiscal year for which the information will be prepared.

The threshold for being subject to the CbC Report is the same as that suggested by the OECD; that being, EUR 750 million in turnover at the MNE group level (for the previous 12 months).

The information to be provided is analogous to the BEPS model template (Annex III to Chapter V) and should be presented on an aggregate basis in euros for each jurisdiction as follows:

- The MNE group’s gross income (revenues), differentiating between that obtained with related entities and that obtained with unrelated parties.
- Profit (Loss) before income tax or taxes having an identical or analogous nature.
- Income tax paid (on cash basis), including withholdings incurred.
- Income tax accrued, including withholdings.

- Capital and other shareholders’ funds at the end date of the tax period.
- Average number of employees.
- Tangible assets and investment property other than cash and cash equivalents.
- List of resident entities, including Permanent Establishments (PE) and core activities carried out by each entity.
- Other information considered relevant and an explanation, if warranted, of the data included.

#### **Master File**

The Regulations expound upon the information to be provided with respect to the MNE group in the Master File, which is in accordance with the Action 13 deliverable of the OECD’s BEPS Action Plan (Annex I to Chapter V). Specifically, the information to be included in the Master File is as follows:

- Organisational structure.
- Business description.
- Intangibles.
- Financial activities.
- Financial and tax positions.

Noteworthy is the fact that the MNE group’s information must also include information on PEs.

#### **Local File**

In this case of the Local File, the Regulations require more detailed information on specific intragroup transactions to evaluate the arm’s length nature of material transfer pricing positions in the relevant jurisdiction.

The information to be included in the Local File is the information

contained in Annex II to Chapter V of the Action 13 deliverable.

Spanish PEs of foreign resident taxpayers are also obligated to prepare a Local File for Spain.

#### **Comparability analysis**

In addition to verifying the arm’s length nature of a transaction, the new Regulations empower the Spanish Tax Administration to recharacterize the transaction and correspondingly adjust the value of transfer prices.

Further, the Regulations warn that statistical measures can be used to minimise the risk of error due to unknown or unquantifiable comparability defects. The Regulations, however, do not establish what appropriate measures should be applied to improve comparability.

#### **Simplified documentation requirements**

Companies belonging in MNE groups with revenues under EUR 45 million are now only required to prepare documentation that is inclusive of the following:

- Description and amount of the controlled transactions.
- Information on the taxpayer and the related-parties.
- Transfer pricing method selected.
- Comparable data used and the arm’s length range thereof.

This simplified documentation requirements enter into force for the tax periods starting on and after January 1, 2015.

#### **Other requirements**

##### **Restitution**

The new Regulations formally acknowledged the possibility of restitution (referred to as repatriation by the OECD) following a transfer

pricing adjustment to avoid a secondary adjustment. This is subject to the taxpayer justifying that restitution has taken place before the Spanish Tax Administration proceeds with the secondary adjustment.

### *Special advance pricing agreement (APA) procedure for the patent box regime*

The Regulations also provide for a special kind of APA procedure for patent box regimes. Pursuant to this procedure, the taxpayer is entitled to ask the Spanish Tax Administration whether the intangibles to be exploited pertain to the categories specifically included in the patent box regime, and if so, the proper arm's length remuneration for those intangibles.

### **The takeaway**

The new transfer pricing regulations enter into force for tax periods

starting on and after January 1, 2015. That said, the new informational requirements to be included in the Master File and Local File and CbC Report will take effect for taxpayers with consolidated revenues exceeding EUR 45 million for tax periods starting on and after January 1, 2016 (for prior tax periods the current standards apply). In practical terms, the new documentation requirements will work as follows:

- New Master and Local File to be at the disposal of Spanish Tax Administration by July 26, 2017 for fiscal year 2016 (assuming natural fiscal year).
- Country-by-country report to be filed by December 31, 2017 for fiscal year 2016.

The impact of these new Regulations is significant in terms of the amount and type of information to be collected and included in transfer pricing

documentation. Accordingly, taxpayers should start assessing their ability to comply with these new requirements. It is important to note that large formalistic penalties may be assessed to the extent a taxpayer does not prepare proper documentation.

Taxpayers should also take notice of the other transfer pricing-related topics addressed by the new Regulations, such as comparability analysis standards, restitution procedures, and more detailed guidance on advance pricing agreements in the context of intangibles under the patent box regime.

### **Let's talk**

For more information, please contact:

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