

The Dawn of a New Transfer Pricing Regime in Ghana: Ghana TP 2.0



Part 1 of 3

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Kingsley Owusu-Ewli is a Partner in PwC Ghana and the Transfer Pricing and International Tax Services Leader in Ghana. He is a regular speaker on tax matters and a facilitator at the PwC Business School in Ghana.



Compliments of the season to you dear reader.

The New Year is very much upon us. Looking back at the diverse challenges we contended with last year, I am pretty sure that we are all happy we survived these challenges and are ready for what 2021 brings. One thing for sure is that while the level of volatility, uncertainty, complexity and ambiguity we witnessed will continue, so are the many opportunities that came our way. I urge you to remain steadfast and true to the personal principles and value systems which have served you well.

This article is part of a three-part series of publications on the new Transfer Pricing ('TP') Regulations recently enacted by the Government of Ghana ('GoG') to regulate mainly the pricing of related party transactions of entities in Ghana.

Eight years after the entry into force of Ghana's first TP Regulations ('Old TP Rules'), the GoG in November 2020 repealed and replaced the Old TP Rules with a new Transfer Pricing Regulations, 2020, (L.I. 2412) hereinafter referred to as the 'New TP Rules'.

Per article 11(7) of the 1992 Constitution of the Republic of Ghana, Legislative Instruments such as the New TP Rules become law after it has been gazetted and laid in Parliament for 21 Parliamentary sitting days. The New TP Rules therefore entered into force in November 2020 after it was gazetted and laid in Parliament in August 2020.

The New TP Rules have been enacted to simplify the administration of the law, reduce compliance burden for some eligible taxpayers, and provide clarity on key technical terms. The intention is also to incorporate some of the significant action plans emanating from the work of the Organisation for Economic Co-operation and Development ('OECD') on Base Erosion and Profit Shifting ('BEPS') schemes by Multinational Enterprises ('MNEs').

The Ghana Revenue Authority ('GRA') is at the heart of the administration of all tax statutes including the old and new TP Regulations. The GRA has been building a solid TP Unit and administering the Old TP Rules since 2012. The deep insights and experiences the GRA gained while administering the Old TP Rules also informed the need to repeal and replace them with the New TP Rules.

The New TP Rules in a nutshell

The New TP Rules (and in fact TP Regulations worldwide) apply to transactions or arrangements between persons who qualify as associates or are in a controlled relationship. The New TP Rules also apply to: persons doing business together as partners; individuals and their relatives and trustees, beneficiaries and settlor in a trust relationship; as all these classes of persons are deemed to be in a controlled relationship.

The next point to consider is at the very heart of TP: that persons in a controlled relationship must ensure that the terms and pricing of arrangements or transactions with their associates or persons in a controlled relationship reflect the terms and pricing of arrangements or transactions existing between independent (third or unrelated) parties. The technical term underlying this rule is called the arm's length standard or arm's length principle ('ALS' or 'ALP') and it is to ensure that persons in a controlled relationship are not 'controlling' the price to achieve a purpose that in substance leads to a tax advantage.

The New TP Rules therefore define the ALP and provide broader guidance on the pricing of matters such as financing transactions, business restructuring, cost contribution arrangements and low value-adding services. For example, certain services considered as low value-adding services will be deemed to be arm's length if the mark-up over their relevant cost does not exceed 3%.

Apart from the requirement for transactions to be done at ALP, there is a requirement for persons affected by the New TP Rules, to prepare and file an annual TP return within four months from their financial year-end. While this requirement existed under the Old TP Rules, the information required to be disclosed in the TP return is now more extensive.

There is also the requirement for persons affected by the New TP Rules to prepare a TP documentation and file an electronic copy with the GRA within four months after the end of the person's financial year. The key change introduced with respect to TP documentation relates to the contents, which are now in twofold: a Master File ('MF') and a Local File ('LF') report. The good news, however, is that

the New TP Rules exempt some persons engaged in certain eligible transactions from the preparation and electronic filing of the TP documentation with the GRA.

Another key requirement for a person deemed as an Ultimate Parent Entity or a Constituent Entity is for such an Ultimate Parent Entity or Constituent Entity to file, in Ghana, an extensive report known as the Country-by-Country Report ('CbCR') annually. Lastly, the New TP Rules provide sanctions for noncompliance with the law. Any dispute arising from a TP audit, if not satisfactorily resolved by the taxpayer at the GRA level, may first be referred to the Independent Tax Appeals Board ('ITAB') created by the Revenue Administration (Amendment) Act, 2020 (Act 1029) when it becomes operational, and then to the High Court, Court of Appeal and the Supreme Court of Ghana progressively.

What is the way forward?

I will be releasing subsequent publications to delve into some of the key notable provisions introduced by the New TP Rules including its practical implications. For now, taxpayers are expected to focus on the compliance requirements – TP returns, MF/LF Documentation and simplified documentation, which could be effective for some MNEs as early as 31 March 2021 (for MNEs with 30 November 2020 financial year end). We expect the GRA to issue templates for all mandatory compliance requirements and practice notes in order to provide guidance on the implementation and their interpretation of certain matters in the New TP Rules. Taxpayers are expected to be on the lookout for the release of any of these administrative materials and our publications on the same.

Want to know more? Let's talk.

You can contact me by sending an email to kingsley.owusu-ewli@pwc.com and copying in Saviour Nusetor (saviour.s.nusetor@pwc.com).



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