Tax Insights

from Transfer Pricing

Portugal: Deadlines near for TP documentation, filing APA requests

May 26, 2022

In brief

Portugal introduced changes to its Advance Pricing Agreement (APA) regime and transfer pricing (TP) documentation requirements on November 26, 2021. Following these amendments, TP documentation must be prepared by July 15 of the year following the tax calendar year (or the 15th day of the 7th month of the year following the taxpayer's fiscal year-end). Most large taxpayers also are obliged to deliver the TP documentation file to the Portuguese Tax Authorities.

Furthermore, taxpayers filing a request for an APA must do so with the Portuguese Tax Authorities before July 1 of any tax year to be applicable as of January 1 of the following year.

Action item: In light of the upcoming deadlines, taxpayers should now review and update their TP documentation in accordance with the new TP rules to meet the deadline of preparing TP documentation before July 15, 2022 (for 2021 tax calendar year), and in some cases to file with the Portuguese tax authorities. Also, taxpayers intending to file an APA request must keep in mind the changes to the APA regime and timing requirements.

In detail

Amendments to the TP legislation

On November 26, 2021, two Ministerial Orders — Ministerial Orders 267/2021 and 268/2021 — were published in Portugal, which introduced changes to the APA regime and TP legislation, respectively. Ministerial Order 267/2021 entered into force on November 26, 2021, and Ministerial Order 268/2021 entered into force on November 27, 2021, except for Chapter IV, concerning the requirements for the preparation of the TP documentation file, which is applicable to tax years starting on or after January 1, 2021.

Ministerial Order 268/2021 revoked Ministerial Order 1446-C/2001, of December 21, 2001, having amended the TP rules applicable to transactions between a taxpayer subject to personal income tax or to corporate income tax (CIT) and any other entity, following Article 63 of the CIT Code. The Ministerial Order introduces several amendments pertaining to the preparation of TP documentation, including:

- The applicable threshold to prepare TP documentation changed to EUR 10 million (previously EUR 3 million) of the total revenues with reference to the tax year to which the obligation concerns. Taxpayers that exceed EUR 10 million of total revenues are not required to prepare TP documentation if the controlled transactions do not exceed EUR 100,000 per entity and EUR 500,000 globally, considering their market value. However, in case of a TP audit, all taxpayers must be able to prove that the terms and conditions of the controlled transactions are in accordance with the arm's-length principle.

- The above-mentioned exemptions are not applicable if transactions are carried out with taxpayers subject to a more favorable tax regime, as provided in paragraphs 1 or 5 of Article 63-D of the General Tax Law.
- A two-tier structure — aligned with the OECD TP Guidelines — now is expressly in place that includes the preparation of a Master File ('*Dossier Principal*') and a Local File ('*Dossier Específico*'). Taxpayers that are small- or medium-size companies (per Decree-Law 372/2007 of November 6, 2007) and that are not monitored by the Large Taxpayers Unit ('*Unidade dos Grandes Contribuintes*' or 'UGC'), must prepare and maintain a simplified documentation file ('*Dossier Simplificado*') concerning the TP policies adopted.

Ministerial Order 268/2021 also introduces, among others, supplementary guidelines regarding the application of the arm's-length principle for cost sharing agreements, intragroup services, and transactions with intangibles and business restructurings, including new rules with detailed requirements and necessary actions in respect of the mutual agreement procedure.

Finally, and importantly, Ministerial Order 268/2021 provides that any positive adjustments proposed by Tax Authorities will have the median value of the arm's-length range as reference.

Changes to APA rules

Ministerial Order 267/2021 revokes Ministerial Order 620-A/2008 of July 16, 2008 and amends the rules on the procedures related to the conclusion of APAs, as provided in Article 138 of the CIT Code.

This Ministerial Order is aligned with the amendments introduced in Article 138 of the CIT Code and updates the rules applicable to APAs, after a period of 10 years of practical experience. The main objective remains unchanged — to provide legal certainty regarding a correct use of TP rules, while at the same time avoiding double taxation where an APA is bilateral or multilateral, following the APA guidelines issued by the OECD, as well as by the European Union Joint Transfer Pricing Forum.

Note: Bilateral or multilateral APAs can only be concluded with jurisdictions with which Portugal concluded a convention for the avoidance of double taxation that includes a provision on the mutual agreement procedure (either a convention based on the OECD model tax convention or through the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, commonly known as MLI).

Some of the main changes introduced include:

- The request for a preliminary assessment must be filed in writing up to three months prior to the term to deliver the proposed APA.
- The maximum duration of an APA is set at four years in all cases. In addition, an APA can include prior tax years, provided that the relevant facts and circumstances of those years are identical/similar and, with reference to the date of conclusion of the APA, a period of not more than two years has elapsed as from the deadline for delivery of the respective CIT returns.
- If an APA results in a reduction of the taxable income already reported in Portugal, the tax authorities of other jurisdictions should be consulted in advance. In Portugal, any adjustments shall be made by means of an amended CIT return.
- There is the possibility of a reduction of the applicable fees in case the taxpayer qualifies as a micro-, small- or medium-size company, as per the applicable legislation, and carries out mainly international transactions.

- The UGC is responsible for monitoring and verifying the compliance with the terms of the APA. This responsibility lies with the Tax Department of International Affairs, together with the UGC, in case of bilateral and multilateral APA.
- There is an increased focus on the presentation of information regarding the Group's activity, including its business areas, relevant economic and market conditions, and its value chain, with reference to key functions, main assets used, and central risks assumed, in line with the original OECD BEPS project.
- Clarifications were made in respect of a waiver of the corresponding adjustment (in case of unilateral APA).

The takeaway

Since the actions of the OECD Base Erosion and Profit Shifting (BEPS) project — which aimed at providing governments with rules and additional national and international instruments to deal with tax avoidance, ensuring the taxation of profits where the economic activities that generate these profits are carried out and where value is created — Portugal has published new TP legislation to accommodate these international developments. The Ministerial Orders reflect these developments almost 20 years after TP legislation was first published in Portugal.

In respect of TP obligations for the year 2021, the amendments seek to reduce the compliance burden on some taxpayers in preparing a set of TP reporting obligations. However, the taxpayer always needs to support and document its controlled transactions in case of notification by the tax authorities. At the same time, TP documentation requirements are much more demanding; this reinforces the need for more robust TP documentation for controlled transactions, in line with the state of the art of the OECD TP Guidelines.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

Portugal – Transfer Pricing

Leendert Verschoor, *Lisbon*
+ 351 213 599 631
leendert.verschoor@pwc.com

Diogo Tavares Castro, *Lisbon*
+351 213 599 646
diogo.tavares.castro@pwc.com

Mariana Pizarro Santos, *Oporto*
+ 351 912 927 391
mariana.pizarro.santos@pwc.com

Transfer Pricing Global and US Leaders

Horacio Peña, *New York*
Global Transfer Pricing Leader
+1 917 478 5817
horacio.pena@pwc.com

Paige Hill, *New York*
US Transfer Pricing Leader
+1 917 923 841
paige.hill@pwc.com