JLD & MB LEGAL CONSULTANCY

OVERVIEW OF TRANSFER PRICING REGULATIONS IN GHANA

SEPTEMBER 2023

THELMA ASHLEY
Associate

Introduction

Today, a significant volume of global trade consists of transnational transfers of goods, services, capital and intangible assets within multinational enterprise ("**MNE**") groups. Lack of independence in these commercial relations may lead to the setting of prices that are inconsistent with market prices and may raise transfer pricing issues.

What is Transfer Pricing?

Transfer pricing refers to the determination of prices at which goods, services and intangible assets are transacted between persons in a controlled relationship[1] (that is, related parties)[2]. The price at which goods and/or services are sold by one entity to a related or associated entity is known as the transfer price.

It is not uncommon for related parties to manipulate the transfer price to impact their taxable profits on controlled transactions.[3] This manipulation of the transfer price is known as transfer mispricing or transfer pricing abuse and often results in tax evasion.

Transfer Pricing Unit

In light of increased incidents of transfer mispricing, the Ghana Revenue Authority ("**GRA**") established the Transfer Pricing Unit ("**TPU**") in 2013 under the Transfer Pricing Regulations, 2012 (L.I. 2188). This legislation has since been repealed and replaced by the Transfer Pricing Regulations, 2020 (L.I. 2412) (the "**TP Regulations**").

The Arm's Length Principle

In order to regulate the transfer price between parties in a controlled relationship, the Organisation for Economic Co-operation Development (OECD) member countries have agreed to use the arm's length principle as the international transfer pricing standard.

In Ghana, the Income Tax Act, 2015 (Act 896) (as amended) (“**ITA**”) and the TP Regulations adopt this principle and provide that the computation of income and tax payable from an arrangement[4] existing between persons in a controlled relationship must be in accordance with the arm’s length standard.

An arrangement between persons in a controlled relationship accords with the arm’s length standard if the terms of that arrangement do not differ from the terms of a comparable arrangement between independent persons.[5] In other words, the arm’s length standard requires persons who are in a controlled relationship to quantify, characterize, apportion and allocate amounts to be included in or deducted from income to reflect an arrangement that would have been made between independent persons.[6]

The Comparability Test

Pivotal to the application of the arm’s length principle is the determination of the issue “*whether an arrangement between controlled persons differs from the terms of a comparable arrangement between independent persons*”.

An arrangement is comparable to an arrangement between persons in a controlled relationship if:

- there are no differences between the arrangements that could materially affect the financial indicators being examined under the appropriate transfer pricing method; or
- differences exist between both arrangements, but a reasonably accurate adjustment can be made to the relevant ·financial indicators to eliminate the effect of the difference in the comparison.[7]

Transfer Pricing Methods

The TP Regulations set out the transfer pricing methods approved by the Commissioner General. These methods are:

Comparable Uncontrolled Price (CUP) Method

This method compares the price of goods, services or property transferred in a controlled transaction with those of a comparable uncontrolled transaction in comparable circumstances.

In the recent case of France vs ST Dupont[8], ST Dupont (a French entity) sold its products to ST Dupont Marketing, Hong Kong in which ST Dupont was the sole shareholder. Following an audit, the French tax authorities adjusted the prices using the CUP indicating that the prices at which ST Dupont sold the product to ST Dupont Marketing were below the arm’s length pricing standard. The Conseil d’État in France partly upheld an adjustment made by the tax administration using the CUP method as being the most appropriate method to be used considering the circumstances.

With respect to the CUP method the GRA, in its 2013 Practice Note on Transfer Pricing, advises that the most important of all the comparability factors to be considered are: (i) similarity of products, (ii) contract terms, (iii) economic circumstances and market conditions.

Resale Price Method

This method analyzes the price of a product that a sales company in a related party transaction charges an unrelated customer to determine an arm’s length gross margin. This resale price is reduced by the resale margin representing the amount the sales company retains to cover its sales, general and administrative expenses, and an

appropriate profit in light of the functions performed. The remainder (after subtracting the resale price margin) is regarded as the arm's length price for the previous sale between the related parties.

Cost-Plus Method

This method deals with the cost incurred by the supplier of goods, property or services in a controlled transaction for goods, property or services rendered to an associated purchaser. It compares the mark-up on those costs with the mark-up on the costs incurred in the supply of goods, property or services in a comparable uncontrolled transaction.

Transactional Profit Split Method

Under this method, the total operating profit or loss earned by the related entities involved in the controlled transaction is ascertained. It is then allocated among the entities in accordance with their respective contributions. This allocation is compared to the portion of profit or loss an independent enterprise would expect to earn from engaging in a comparable uncontrolled transaction.

Transactional Net Profit Margin Method

This method compares the net profit margin relative to an appropriate base (e.g. costs, sales, assets) that an entity achieves in a controlled transaction with the net profit margin relative to the same base achieved in comparable uncontrolled transactions.

Whilst the TP Regulations enjoin persons who intend to enter into controlled transactions to use the most appropriate transfer pricing method, we note that the Commissioner-General of the GRA (the "**Commissioner**") retains the discretion to use, or permit the use of, an alternative transfer pricing method if, considering the nature of the arrangement, the arm's length price cannot be determined by the use of any of the above-listed methods.

Re-characterisation and Risk of Double Taxation

Where a transaction fails to comply with the arm's length standard, the Commissioner may adjust the transaction to comply with the standards by:

- Re-characterizing the arrangement including re-characterizing debt financing as equity financing;
- Re-characterizing the source and type of any income, loss, amount or payment; and
- Apportioning and allocating expenditure, including those to be attributed to a permanent establishment.[9]

Additionally, where the Commissioner, is of the opinion that a person has secured a tax benefit under a tax avoidance arrangement[10], the tax liability of that person may be adjusted in a way that the Commissioner considers appropriate to counteract the tax benefit.

A re-characterization of the arrangement, apportionment or allocation of expenditure by the Commissioner may increase the risk of double taxation of the entities involved. However, if the other party to the transaction is tax resident in another country, and Ghana has a Double Taxation Agreement with that country, the taxpayer in that other country may be eligible to make a claim for a corresponding adjustment to relieve double taxation.

Obligations Under the TP Regulations

The TP Regulations impose some obligations on parties to a controlled transaction. These include the following:

File Transfer Pricing Returns

A person who is a party to a controlled transaction is required to file a Transfer Pricing return not later than four (4) months after the end of each basis period. On receipt of the Transfer Pricing return, the Commissioner may examine whether the amount is within the arm's length range.

Maintain Documentation

A person who enters into a controlled transaction is required to maintain contemporaneous documentation of the arrangements entered into in each year of assessment and must file electronic copies of the local and master files, with the GRA. These filings must be done no later than four (4) months after the end of each basis period.

Controlled transactions that do not exceed the Ghana Cedi equivalent of two hundred thousand United States Dollars (USD 200,000) are exempted from this requirement.

Country-by-Country Reporting

An Ultimate Parent Entity of an MNE resident in Ghana for tax purposes is also required to file with the GRA a Country-by-Country Report. This is to be filed not later than twelve (12) months after the financial year end of the MNE.

Conclusion

Considering the complications of transfer pricing mechanisms and the Commissioner's wide powers of re-characterisation, it is advisable to obtain expert legal and tax advice before entering into such related party arrangements. If after the exercise of all due diligence, a controlled transaction is re-characterized by the Commissioner, Section 42 of the Revenue Administration Act, 2016 (Act 915) (as amended) provides the taxpayer (entity) with a right to object.

In such circumstances, a person aggrieved by an assessment of the Commissioner based on the re-characterization may proceed to object to that assessment using the appeal procedure laid down by law as reiterated in the recent cases of Richard Amo-Hene v. Ghana Revenue Authority and Others; and Kwasi Afrifa v. Ghana Revenue Authority and Another both decided by the Supreme Court of Ghana on 30th November 2022.

References

[1] Under the Income Tax Act, 2015 (Act 896) as amended, controlled relationship includes relationship between two or more persons where the relationship between the persons is that of partners in the same partnership, an entity and an associate of that entity.
[2] Ghana Revenue Authority Practice Note on Transfer Pricing Regulations 2012 (L.I 2188) (Methodologies and Related Issues) PN/CG0001/2013
[3] A controlled transaction is a transaction between related parties.
[4] "Arrangement" means an action, agreement, course of conduct, dealing, promise, transaction, understanding or undertaking, whether express or implied, whether enforceable by legal proceedings and whether unilateral or involving more than one person.
[5] Regulations 2(2) of the Transfer Pricing Regulations, 2020 (L.I. 2412)
[6] Section 31(2) of the Income Tax Act, 2015 (Act 896), as amended.
[7] Regulation 3(1) of the Transfer Pricing Regulations, 2020 (L.I. 2412)
[8] France vs ST Dupont, July 2023, Conseil d'État, Case No 464928
[9] Section 31(5) of the Income Tax Act, 2015 (Act 896) as amended.
[10] Section 99(1) of the Revenue Administration Act, 2016 (Act 915) – "Tax avoidance arrangement" means an arrangement that has as a main purpose the provision of a tax benefit for a person; or an arrangement where the main benefit that might be expected to accrue from the arrangement is a tax benefit for a person.

DISCLAIMER

This publication is for information purposes only and is not intended to constitute legal advice. If you require further information on any matter discussed in this article, kindly contact the Firm.

JLD & MB Legal Consultancy is a top-tier corporate and commercial law firm with extensive experience advising global and local clients on some of Ghana's highest profile transactions. We provide innovative and solution-oriented advisory services across several practice groups and have received international recognition for our lawyers and our work in a number of sectors including Corporate and Commercial; Energy and Natural Resources; Banking and Finance; Capital Markets; Infrastructure, Construction and Real Estate.

CONNECT WITH US!

+233 (0)302 782711/784298

info@jldmblaw.net

www.jldmblaw.net

23 Nortei Ababio Street,
Airport Residential Area
Accra
Ghana