Transfer Pricing in Ghana

The application and practice

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Overview

Ghana's quest to put in place Transfer Pricing Regulations before the end of year 2012 has almost become a reality. On 31 July 2012, the Transfer Pricing ("TP") Regulations, 2012(L.I.2188) was gazetted and laid before the Parliament of Ghana. The TP Regulations is now awaiting the customary twenty one Parliamentary sitting days required for it to become law.

L.I. 2188 deals with the application of the arms length principle in transactions between connected persons and also information, documentation and penalties that will apply once the regulations become law. L.I. 2188 also gives greater clarity to the application of the arms length principle contained in the Internal Revenue Act of 2000 (Act 592) ("IRA"). The LI also appears to give considerable discretionary powers to the Commissioner General ("C-G") of the Ghana Revenue Authority ("GRA") in the assessment of transactions subject to TP adjustments.

Application of the arm's lenth principle

As indicated in our first publication on TP, the TP Regulations apply to transactions between parties in a controlled relationship both locally and internationally. Specifically, these are:

- A transaction between persons who are in a controlled relationship;
- Dealings between a Permanent Establishment ("PE") – a separate legal entity - and its head office;
- Dealings between a PE and other related branches of that PE;
- A transaction between a tax payer and another taxpayer who are in a controlled relationship; and
- A transaction between a tax payer and another taxpayer who are in an employment relationship. This means that interest free loans or highly subsidized loans and benefits given to an employee by an employer at non-market interest rate will become subject to TP adjustments

A transaction referred to in the above paragraphs include:

- The purchase and sale of goods;
- The purchase, sale, lease or use of tangible and intangible assets;
- Provision of management, technical and other intra group services;
- Provision of finance and other financial arrangements;
- Rent and hire charges; and
- Any other transaction that may affect the profit and loss of the entity.

A person who engages in transactions with another person with whom they have a controlled relationships are required to compute the profit or loss arising from that transaction on the basis that the transaction is conducted at arm's length.

A transaction is considered to be at arms length if the terms of the transaction do not differ from the terms of a comparable transaction between two independent persons. A comparable transaction will be selected by the C-G of the GRA in consideration of certain factors specificed in the regulations.

TP methods and choice of a TP method

The TP Regulations provides the following widely used TP methods as approved TP methods to be used in determing the price of transactions between parties in a controlled relationship:

- The comparable uncontrolled method;
- The resale price method;
- The cost-plus method;

- The transactional profit split method; and
- The transactional net margin method.

In choosing an appropriate transfer pricing method, a person should defer to one of the methods listed above as prescribed by the LI.

Nonetheless, an application can be made to the C-G by a person who intends to enter into a transaction whose arm's length price cannot be determined by the methods specified above. In making the application, the person is required to prove that none of the existing methods can be reasonably applied and also the proposed method will result in a price that will be considered to be arms length.

Also, the C-G is mandated to use a method other than the methods provided for under the regulations. A transaction can be deemed to be at arms length if the method used for evaluation yields a range of indicators which are of equal reliability within which the relevant indicator of the transaction falls.

Services between persons in a controlled relationship

For a good number of multinationals operating in Ghana, one of the most significant expenses on their financial statements could be management and technical fees and unlike in the past where no TP adjustments were made by the GRA, payment for services will now be a subject of transfer pricing adjustments. The LI 2188 attempts to address this issue by applying the arms length principle to services between persons in a controlled relationship.

Where a taxpayer renders services to or receives services from other parties in a controlled relationship, the C-G may determine the charge for the service by using the arms length principle. The servicecharge will be deemed to be consistent with the arms length principle if:

- It is a charge for a service that was actually rendered;
- The service provides economic or commercial value to the recipient; and
- An independent person in a comparable circumstance will pay that charge for the service.

The service charge will be deemed to be inconsistent with the arms length principle if it is paid by a person:

- For a service: rendered in relation to the juridical structure of the parent company of the person; rendered in relation to reporting requirements of the parent company of the person; and a service rendered in relation to the raising of funds for the acquisition of participation, except where the participation is directly or indirectly acquired by the person and the acquisition benefits or is expected to benefit the person;
- Due to the ownership interest of the shareholder of the person in one or more companies of the group.

Further, the C-G is empowered to use a reasonable allocation criterion to allocate the total charge for a service rendered by one person in a group to other persons in the group where the specific services rendered to each member of the group is not easily identifiable. The allocation criteria are deemed to be reasonable if it is based on certain prescribed variable.

Are you a multinational who frequently engages in significant service related transactions with your associated entities which might result in management fees? Tell us what matters to you.

Transactions involving intangible property

Intangible property is defined to include licenses, sales and any other transfer of intangible property.

The C-G shall consider the following in determining the arms length conditions between parties in a controlled relationship who are transacting on intangible property:

- Price to be paid by a comparable independent person will be considered together with other factors from the perspective of both parties; and
- Usefulness of the intangible property to the business of the transferee.

The comparability principle will be applied after consideration of certain pre-determined factors expected benefit from the intangible property, geographical limitation, character of the right transferred (inclusive or non-inclusive) and whether or not the transferee has a right to participate in a further development made by the transferor.

Information, documentation and penatlties

Filing details of transactions

Persons who engage in transactions with controlled parties are required to maintain documentation of the transaction for that period. In addition to this, the person is required to file returns on income in accordance with section 72 of the IRA.

In our last publication on TP sent in February 2012, we reviewed the annual TP documentation form put out by the GRA. An evaluation of that form and the form now prescribed by the C-G for purposes of filing returns on income shows that the two are comparable i.e. the information required is almost the same. However in addition to the initial documentation requirements set out by the C-G, the following additional information in required to be furnished by the person who engages in transactions with a controlled party.

- The arms length range as determined by the person under examination and the rational for the use of that range;
- Details of transactions between the person and other associated persons;
- Information on the principal activities of each person in the group and the business relationships existing amongst the associated persons;
- The consolidated financial statements of the group;
- Information on each associated party including business related information and functions, risks and assets employed by that associated person; and
- What the C-G considers relevant.

The C-G may make a request for information and the taxpayer is required to comply with the request within the required time frame. Upon the request, a person shall provide contemporaneous documentation regarding the transactions under scrutiny.

The appropriate sanctions may be applied by the C-G if the request is not complied with.

Transfer pricing audit

On receipt of the returns filed, the C-G may examine the amount charged or credited to the final accounts in respect of a transction to determine whther the amount is within arms length.

The C-G may adjust the taxable profit of a person if he is satisfied after the examination that the amount charged or credited to the final accounts of that person is not within the arms length range. In his examination, the C-G may select a transfer pricing method that he considers appropriate. Presumably, this may lead to objections and counter objections between the C-G and that person or entity until a final assessment is raised.

It is possible to avoid this by seeking a ruling as to the most appropriate method to determine the pricing of a transaction before a contract is finalized between controlled parties.

The filing of an annual TP return is not a prerequisite for an audit of an entity's TP related transactions by the C-G. The C-G may conduct an audit of a person even though the person has not filed a return.

Penalties

A tax due and payable resulting from an adjustment by the C-G is deemed to be an additional tax.

The penalties due on offences under the Act on fraud, failure to file retuns and underpayment of tax are also applicable under this LI.

TP is now a reality, are you ready? We are ready to help you navigate the maze of administrative procedures and analysis required to comply with the TP regulations.

The issues identified in our earlier publication are still unresolved. Issues such as timing of implementation, technical preparedness, tax havens and interaction between the TP regulations and the provisions of the technology and transfer regulation set out by the Ghana Investment Promotion Council ("GIPC") etc.

We are hopeful that in due course, a clear practice guideline will be put forward to guide both tax payers and the GRA in assessment of TP related transactions.

In the interim however, we anticipate that decided cases in other jurisdictions are likely to be reference points for the practical application in Ghana.

How PwC can assist your business

PwC Ghana has taken an active interest in the unfolding developments in the fiscal landscape on TP and is ready to assist your business in the preparation of the TP returns, review of the supporting TP documentations and your TP training needs.

Please contact the underlisted persons if you wish to discuss any of the matters contained in this publication or if you require our professional tax advice on any transactions:

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