

TRANSFER PRICING REGULATIONS, 2012 (L.I. 2188)

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TRANSFER PRICING REGULATIONS, 2012

IN exercise of the power conferred on the Minister responsible for Finance by section 114 (1)(d) of the Internal Revenue Act, 2000 (Act 592), these Regulations are made this 27th day of July 2012.

Application and the arm's length principle

Regulation 1—Application

- (1) These Regulations apply to
 - (a) a transaction between persons who are in a controlled relationship;
 - (b) dealings between a permanent establishment and its head office;
 - (c) dealings between a permanent establishment and other related branches of that permanent establishment;
 - (d) a transaction between a taxpayer and another taxpayer who are in a controlled relationship; and

(e) a transaction between a taxpayer and another taxpayer who are in an employment relationship.

(2) For purposes of regulations 1(a), (d) and (e), transaction includes

(a) the purchase and sale of goods;

(b) the purchase, sale, lease or use of a tangible asset;

(c) the purchase, sale, lease or use of an intangible asset;

(d) the provision of management services, technical services and other intra group services;

(e) the provision of finance and other financial arrangements;

(f) rent and hire charges; and

(g) any other transaction that may affect the profit or loss of the entity.

(3) For purposes of regulation 1(b) and (c), a permanent establishment is deemed to be a separate legal entity.

Regulation 2—Transaction between associated persons to be at arm's length

(1) A person who engages in a transaction with another person with whom that person has a controlled relationship, shall compute the profit or loss arising from that transaction on the basis that it is conducted at arm's length.

(2) A transaction is conducted at arm's length between persons in a controlled relationship, if the terms of the transaction do not differ from the terms of a comparable transaction between independent persons.

(3) The Commissioner-General shall, in selecting a comparable transaction, consider

(a) whether there exists economically relevant characteristics of the transactions to be compared, in relation to

(i) the characteristics of the goods, property or services transferred;

(ii) the relative importance of functions performed;

(iii) the contractual terms and conditions of the transactions;

(iv) the assets used;

(v) the relative risk assumed by the associated persons and any independent party, where the independent party is considered as a possible comparable;

(vi) the economic and market circumstances in which the transaction takes place;

(vii) the business strategies pursued by the connected persons in relation to the transactions; and

(b) whether significant difference do not exist between the transactions being compared that can materially affect the financial indicator being examined and if a difference exists, what reasonable

comparability adjustment can be made to the uncontrolled transaction to eliminate the effect of the difference on the comparison.

Regulation 3—Transfer pricing methods

(1) For purposes of these Regulations, the transfer pricing methods approved by the Commissioner-General are

- (a) the comparable uncontrolled price method;
- (b) the resale price method;
- (c) the cost-plus method;
- (d) the transactional profit split method; and
- (e) the transactional net margin method.

(2) A transfer pricing method specified in sub regulation (1) shall be computed as specified in the Schedule.

(3) Despite sub regulation (1), the Commissioner-General may

(a) use a method other than a method stated in sub regulation (1), or

(b) in writing permit a person to use a method other than a method stated in sub regulation (1),

if the Commissioner-General is of the opinion that considering the nature of the transaction, the arm's length price cannot be determined by use of a method specified in sub regulation (1).

(4) Where the application of the most appropriate method identifies a range of relevant indicators which are of equal reliability, then the terms of the transaction is at arm's length if the relevant indicator falls within that range.

Regulation 4—Choice of appropriate transfer pricing method

(1) A person who intends to engage in a transaction with another person in a controlled relationship shall, ensure that the price of the goods to be sold or the service to be rendered is computed by the use of a method specified in regulation 3.

(2) Despite sub regulation (1), the person who intends to enter into the transaction may apply to the Commissioner-General for permission to use a method other than a method specified in regulation 3, if considering the nature of the transaction, the arm's length price cannot be determined by that person by the use of any of the methods specified in regulation 3.

(3) A person who makes an application to the Commissioner-General under sub regulation (2) shall prove to the Commissioner-General that

(a) none of the specified methods can reasonably be applied to determine arm's length conditions for the transaction, and

(b) the method proposed to be used yields a result consistent with that which would be achieved by independent persons engaged in a comparable independent transaction.

Regulation 5—Services between persons in a controlled relation

(1) The Commissioner-General shall consider a service charge between persons in a controlled relationship to be consistent with the arm's length principle, if

- (a) the charge is for a service that is actually rendered,
- (b) the service provides economic or commercial value to the recipient of the service, and
- (c) an independent person in a comparable circumstance will pay that charge for the service.

(2) A charge for a service paid by a person to another person who is in a controlled relationship with that person is not consistent with the arm's length principle, if it is paid by that person

- (a) for a service specified in sub regulation (3), and
- (b) because of the ownership interest of the shareholder of the person in one or more of the companies in the group.

(3) The service referred to in sub regulation (2) (a); includes

- (a) a service rendered in relation to the juridical structure of the parent company of the person, for example meetings of shareholders of the parent company, issuing of shares in the parent company and costs of the supervisory board of the parent company;
- (b) a service rendered in relation to reporting requirements of the parent company of the person, including the consolidation of reports; and
- (c) 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 the person or is expected to benefit the person.

(4) Subject to these Regulations, where it is possible for the Commissioner-General or a taxpayer to identify

- (a) specific services rendered by the taxpayer to other persons with whom that taxpayer is in a controlled relationship, or
- (b) specific services rendered to the taxpayer is in a controlled relationship

the Commissioner-General shall determine whether the charge for each service rendered is consistent with the arm's length principle.

(5) The Commissioner-General shall use a reasonable allocation criterion to allocate among the persons in a controlled relationship, the total charge for a service rendered by a person to other persons in the controlled relationship, where the Commissioner-General cannot identify the specific service rendered to each of the persons in the controlled relationship.

(6) For purposes of sub regulation (5), an allocation criteria is reasonable if it is based on a variable that

(a) takes into account

(i) the nature of the services;

(ii) the circumstances under which the services are provided; and

(iii) the benefit derived or expected to be derived by the persons in the controlled relationship, from the service;

(b) relates exclusively to a transaction between independent persons, and allows cost to be shared at arm's length; or

(c) is capable of being measured in a reasonably reliable manner.

Regulation 6—Transactions involving intangible property

(1) In respect of a transaction that involves an intangible property, the Commissioner-General shall, in determining the arm's length conditions between persons who are in a controlled relationship, take into account

(a) the perspective of both the transferor of the property and the transferee, including the price a comparable independent person will pay for the transfer of that property, and

(b) the usefulness of that intangible property to the business of the transferee.

(2) The Commissioner-General shall in applying the comparability principle to a transaction, consider special factors relevant to the comparable transaction, including

(a) the benefit expected from the intangible property;

(b) any geographical limitation on the exercise of a right to the intangible property;

(c) the character of the right transferred, whether exclusive or non-exclusive; and

(d) whether the transferee has a right to participate in a further development made by the transferor to the intangible property.

Information, documentation and penalties

Regulation 7—Associated persons to file details of transactions

(1) A person who engages in a transaction with another person with whom that person has a controlled relationship shall maintain contemporaneous documentation of the transactions engaged in by that person for each tax year.

(2) That person shall for purpose of these Regulations file returns on income in accordance with section 72 of the Act.

(3) The form prescribed by the Commissioner-General for purposes of filing returns on income shall include a requirement to provide information

(a) on the transfer pricing method selected by the person, including information on

(i) any adjustment made as a result of applying that method;

(ii) any assumption made in applying that method;

(iii) the justification for the use of that method;

(iv) the comparables chosen and the screening criteria for choosing the comparables; and

(v) the comparability analysis of the associated party transactions and the comparables;

(b) on the calculations made and price adjustment factors considered necessary for purposes of achieving the comparability;

(c) on any arm's length range determined by the person who is under examination and any reasons in support of that determination and the use of that range;

(d) on the organisational structure of the person globally, showing the location and ownership linkages amongst associated persons;

(e) describing the nature of the business in which the relevant transaction took place, the property used and the extent of any other commercial or financial relationship;

(f) that provide details of transactions between a person and other associated persons, including

(i) any contracts or agreements that specifies the terms of the transactions; and

(ii) segmented financial accounts with respect to the transactions and explanations on the assumptions made to derive the segmented information;

(g) on strategies and policies applied and information analysis relied on by the person to determine and ensure that the transaction is at an arm's length;

(h) on the identity of that person and the relation between that person and other persons in the controlled relationship;

(i) kept as a record of transactions between that person and other persons;

(j) that provides the details of

(i) the principal business activities of each person in the group; and

(ii) the business relationships amongst the associated persons, including services provided, goods sold, intangible use;

(k) on the consolidated financial statement of the group;

(l) on each associated party, including

- (i) information on the line of business of the associated person, industry dynamics; market, regulatory and economic conditions in which the associated person operates;
 - (ii) information on the functions and risks of the associated person, and assets employed by the associated person; and
 - (iii) financial statements; and
 - (m) that the Commissioner-General considers relevant.
- (4) Where the Commissioner-General makes a request for information under section 72(9) of the Act, the Commissioner-General shall, in the request, specify the time within which the information should be submitted and the information shall be submitted within that time.
- (5) The Commissioner-General shall apply section 141 to 145 of the Act to a person who does not comply with a request made by the Commissioner-General under sub regulation (4).
- (6) Without limiting sub regulation (4), that person shall upon a request made by the Commissioner-General in the course of the tax year, submit contemporaneous documentation regarding the transactions engaged in by that person in that tax year.

Regulation 8—Transfer pricing audit

- (1) The Commissioner-General may on receipt of returns filed under regulation 7(2) in respect of a transaction, examine the amount
- (a) charged to the final accounts, or
 - (b) credited to the final accounts
- of the person who filed the returns, in respect of that transaction to determine whether the amount is within arm's length.
- (2) The Commissioner-General shall, after the examination mentioned in sub regulation (1), use a transfer pricing method the Commissioner-General considers appropriate.
- (3) The transfer pricing method shall be selected from among the methods specified under regulation 3(1).
- (4) The Commissioner-General shall adjust the taxable profit of a person if the Commissioner-General is satisfied after the examination that the amount
- (a) charged to the final accounts, or
 - (b) credited to the final accounts
- of the person in respect of that transaction is not within the arm's length range and that person shall pay tax on the adjusted profit.
- (5) Despite sub regulation (1), the Commissioner-General may conduct an audit of a person even though the person has not filed a return.

Regulation 9—Penalties

(1) A tax due and unpaid as a result of an adjustment made by the Commissioner-General under regulation 8(4) is deemed to be an additional tax for purposes of section 79 of the Act.

(2) The provisions of the Act on fraud, failure to file returns, penalty for under-payment of tax and offences, apply to these Regulations.

Regulation 10—Interpretation

In these Regulations, unless the context otherwise requires,

"arm's length range" means a range of relevant indicator figures which are of equal reliability, produced by applying the most appropriate transfer pricing method to a number of comparable uncontrolled transactions;

"comparable transaction" means a commercial transaction engaged in by an independent person, in respect of which

(a) there is no significant difference between that transaction and a transaction engaged in by a person in a controlled relationship that could materially affect the financial indicator being examined by use of the most appropriate transfer pricing method; and

(b) differences exist between that transaction and a transaction engaged in by a person in a controlled relationship, but a reasonably accurate adjustment may be made to the relevant financial indicator being examined in order to eliminate the effect of the differences on the comparison;

"controlled relationship" means a relationship between one person and another person by the terms of which, the relationship is able to influence the transfer price set in a transaction, and in which that other person is

(a) an associate of the first person;

(b) a relative of the first person;

(c) a person in a trust relationship with that first person;

(d) a person who is in a partnership relationship with that first person;

(e) a holding company, a subsidiary or a subsidiary of a holding company to which that first person is a subsidiary;

(f) a member of a closed corporation together with that first person; and

(g) a relative of a person who is member of a closed corporation together with that first person;

"independent persons" in relation to a transaction, means persons who are not associates or are not in relation to each other;

"intangible property" includes licences, sales and any other transfer of an intangible property;

"property" means tangible and intangible property;

"relative" includes in the case of an individual, a child, parent, grandchild, grandparent, brother, sister, great-grandchild, great-grandparent, uncle, aunt, nephew, niece, spouse, and the extended family relations of a spouse;

"relevant indicator" includes the price, profit margin and profit-sharing ratio; and

"transaction" means a commercial transaction

SCHEDULE

TRANSFER PRICING METHODS AND THEIR COMPUTATION

(Regulation 3(2))

1. Comparable Uncontrolled Price Method is used to determine the arm's length range by comparing the price charged for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction.
2. Resale Price Method is used to determine the arm's length range by comparing the resale margin that a purchaser of property in a controlled transaction earns from reselling that property in an uncontrolled transaction with the resale margin that is earned in comparable uncontrolled purchase and resale transactions.
3. Cost Plus Method is used to determine the arm's length range by comparing the mark up on those costs directly and indirectly incurred in the supply of property or services in a controlled transaction with the mark up on those costs directly and indirectly incurred in the supply of property or services in a comparable uncontrolled transaction.
4. Transactional Net Margin Method is used to determine the arm's length range by comparing the net profit margin relative to an appropriate base (e.g. costs, sales, assets) that an enterprise achieves in a controlled transaction with the net profit margin relative to the same base achieved in comparable uncontrolled transactions.
5. Transactional Profit Split Method is used to determine the arm's length range by allocating to each associated enterprise participating in a controlled transaction the portion of common profit (or loss) derived from the transaction that an independent enterprise would expect to earn from engaging in a comparable uncontrolled transaction.

N.B. When it is possible to determine an arm's length remuneration for some of the functions performed by the associated enterprises in connection with the transaction using one of the approved methods described in paragraphs 1 to 4, the transactional profit split method shall be applied based on the common residual profit that results once the functions are so remunerated.

HON. (DR.) KWABENA DUFFUOR

Minister responsible for Finance and Economic Planning

Date of Gazette Notification: 31st July 2012.

Entry into force: 14th September 2012.