

Alfonsea Tax & Legal

Spain

Transfer Pricing Aspects

Spain



Legislation

Existence of Transfer Pricing Laws/Guidelines

For tax years beginning as from 1 January 2015, the Spanish transfer pricing regime is regulated by the article 18 of the Law 27/2014, on Corporate Income Tax. This provision establishes that related-party transactions should be valued at arm's length for tax purposes.

Additionally, the comparability analysis and the most appropriate method rule are regulated by article 17 of the Spanish Corporate Income Tax Regulations, approved by Royal Decree 634/2015, on 10 July.

Finally, the Preamble of the Law also indicates that the interpretation of the Spanish transfer pricing rules should be consistent with the OECD Transfer Pricing Guidelines and the recommendations of the EU Joint Transfer Pricing Forum, insofar as they do not contradict what is expressly stated in the Spanish Law and Regulations.

Definition of Related Party

Spanish Corporate Income Tax Law provides a wide definition of related party. According to article 18.(2) of the Law, an individual or entity is a related party in any of the following cases:

- a) A company and a shareholder with a direct holding of 25% or more of its share capital;
- b) A company and its directors (except for director's fees);
- c) A company and the spouse or relatives, in direct or collateral line, by blood or affinity up to the third degree, of a related-party shareholder or a director;
- d) Two companies belonging to the same group of companies, irrespectively of the tax residency or the obligation to issue consolidated financial statements;
- e) A company and another group company's directors;
- f) A company and other company indirectly holding 25% or more of its share capital;
- g) Two companies with the same shareholders (jointly with their spouse and relatives, in direct or collateral line, by blood or affinity up to the third degree) holding, directly or indirectly, 25% or more of their share capital;
- h) A Spanish resident company and its permanent establishments abroad; and
- i) A non-resident company and its permanent establishments in Spain.

Transfer Pricing Scrutiny

Transfer Pricing scrutiny is one of the mandatory points in the working plan for Spanish tax inspectors when reviewing the tax obligations of a company. The review of the transfer prices is performed within the ordinary tax audit procedure by the in-the-field auditor, with the assistance of specialised auditors in complicated cases.



The Spanish general guidelines of the tax control plan states that transfer pricing is one of the key areas of focus in the review of multinational groups, especially transactions involving high value intangibles, intra-group services, corporate restructuring and intra-group financing transactions.

Transfer Pricing Penalties

Article 18.(13) of the Spanish Corporate Income Tax Law provides a specific tax penalty regime for infringements related with transfer pricing obligations. In this regard, the Law defines two separate cases of serious tax infringement, which implies the following tax penalties:

- 1) When there is no transfer pricing adjustment, but the transfer pricing documentation was not filed, or the documentation is incomplete or with wrong data, a tax penalty is calculated as the sum of 1,000€ per “data” and 10,000 € per “group of data” (“data” and “group of data” are defined in the documentation requirements for each item of the documentation) which is missing, incomplete or wrong.
The total amount of this penalty is capped to the lower of:
 - (i) 10% of the value of the transactions; or
 - (ii) 1% turnover.
- 2) When there is a transfer pricing adjustment made by the Tax Authorities and the transfer pricing documentation was not filed or the documentation is incomplete or with wrong data, a tax penalty is calculated as 15% of the transfer pricing adjustment;
- 3) When there is a transfer pricing adjustment made by the Tax Authorities and the value of the transaction is not consistent with the documentation filed, a tax penalty is calculated as 15% of the transfer pricing adjustment.

In order to obtain penalty protection, the company should have and file at Tax authorities’ request a complete set of transfer pricing documentation with accurate information, consistent with the value of the transactions included in the tax returns and prepared in accordance with the Spanish Corporate Income Tax Regulations.

Advance Pricing Agreement (APA)

Corporate Income Tax Law provides the possibility to apply for an Advanced Pricing Agreement based on the Arm’s Length Principle to the Spanish Tax Authorities. The APA requests may be unilateral, bilateral or multilateral.

An APA may be applied for an initial period of up to 4 tax years since its approval. However, it may also include the tax year in which the APA is approved and the previous tax years if they are not statutory-barred or the transactions have not an unappeasable re-assessment.

Royal Decree 1793/2008 regulates the tax procedure to file an APA request and its negotiation.



Documentation And Disclosure Requirements

Tax Return Disclosures

Since the tax years beginning as of 1 January 2016, related-party transactions and tax haven positions should be reported to the Spanish tax authorities by filing tax form 232. This reporting return should be filed by the Spanish resident companies and permanent establishments during the eleventh month after the year end and includes information about the counterparty in the transaction, the nature, the amount and the transfer pricing method applied.

Documentation Requirements

In order to evidence the arm's length nature of the related-party transactions, a Spanish company should prepare and keep in its files at the disposal of the Spanish Tax Authorities a transfer pricing documentation.

Spanish Regulations defines the contents of this transfer pricing documentation, which is consistent with the OECD TP Documentation Package approved in the BEPS Project.

This documentation package consists of two files:

1. Documentation relating to the controlled transactions within the group ("Masterfile");
2. Taxpayer's specific documentation ("Local file").

The content of each file is described as follows.

1. Documentation relating to the group ("Masterfile"):
 - a) Information relating to the structure and organization of the group:
 - General description of the group's legal, organizational and operating structure, as well as any relevant change;
 - Identification of the different entities forming the group.
 - b) Information relating to the group's business:
 - Group's main activities, including the description of the main geographical markets, important drivers of business profits and the supply chain for those products and services representing at least 10% of the net turnover in the tax year;
 - Group's functional analysis: general description of the functions performed, risks assumed and assets used by the different entities, including any change;
 - Description of the group's transfer pricing policy, including the method(s) used to set up the intercompany prices;
 - List and brief description of the relevant cost-contribution arrangements and services agreements within the group;



- Description of the business restructurings and acquisitions/cessions of relevant assets carried out during the tax year.
 - c) Information relating to the group's intangible assets:
 - General description of the group's global strategy for the development, ownership and exploitation of the intangible assets, including both the localization of the main R&D facilities and the management of the R&D activities;
 - List of the group's relevant intangibles, including legal entity owning them and a general description of the applicable transfer pricing policy;
 - Amounts of the intragroup payments derived from the use of intangible assets, indicating the involved legal entities and their tax residence countries/territories;
 - List of intragroup agreements relating to intangibles, including, cost-sharing arrangements, main R&D services agreements and license agreements;
 - General description of any relevant transfer of intangible assets carried out during the tax year, detailing the involved legal entities, their residence countries and the amounts paid.
 - d) Information relating to financing activities:
 - General description of the group's fund-raising activities, including the main financing agreements signed with external persons or entities;
 - Identification of the legal entities carrying on the main financing functions within the group, as well as their countries of incorporation and their place of its effective management;
 - General description of the group's transfer pricing policy relating to the intragroup financing agreements.
 - e) Group's tax and financial positions:
 - Group's consolidated financial statements for the tax year;
 - List and brief description of the advanced pricing arrangements in force and any other ruling issued by any tax authority affecting to the cross-border allocation of profits within the group.
2. Company's specific documentation ("Local file"):
- a) Company's information:
 - Description of the management structure, department chart and identification of the individuals/entities to which local managers must report, including the countries/territories where they reside for tax purposes;
 - Description of the company's activities, business strategy and, in any, business restructurings or transfers/cessions of intangibles in which it has participated during the tax year;
 - Main competitors.
 - b) Information on the related-party transactions:
 - Detailed description of the nature, characteristics and amount of the transactions with related-parties;



- Corporate name (or name and surname for individuals), tax address and tax identification number of the taxpayer and the involved related-parties;
 - Detailed comparability analysis, including:
 - i. Specific characteristics of the property and services object of the related-party transactions;
 - ii. Functional analysis: functions performed, risks assumed and assets used by the parties involved in the related-party transactions;
 - iii. Contractual terms applicable to the transactions, considering the responsibilities, risks and benefits assumed by each contracting party;
 - iv. Economic circumstances that may affect the related-party transactions, in particular, the characteristics of the markets in which the property is sold or the services are rendered;
 - v. Business strategies.
 - Explanation on the transfer pricing method selection, including the description of the reasons underlying the choice, the procedure for its application, the selected comparables, and the resulting value or range of values;
 - If any, the cost-allocation criteria applied to intragroup services jointly rendered to several recipients and the applicable legal agreements, and the cost-contribution arrangements;
 - Copy of the advance pricing agreements in force and any other ruling issued by any tax authority relating to the related-party transactions;
 - Any other relevant information used by the taxpayer when setting up the intercompany prices.
- c) Taxpayer's financial information:
- Company's separate financial statements for the tax year;
 - Conciliation between the data used to apply the transfer pricing methods and the separate financial statements (P&L segmentation), when applicable;
 - Financial information of the selected comparables and source.
- d) Information on the application of discounted free cash-flow methods:
- Detailed description of the selected valuation method or technique, as well as the reasons justifying the choice;
 - Magnitudes, percentages, ratios, interest rates, discount rates and other variables applied in the valuation;
 - Justification of the reasonability and consistency of the critical assumptions relating to historical data, business plans or any other essential element for the correct determination of the value and its consistency with the arm's length principle;
 - Reports, documents and computer files needed for the verification of the correct application of the valuation method and the resulting value.



Exemption from documentation obligation

Spanish Transfer Pricing documentation requirements are applicable to both domestic and cross-border transactions.

However, the following exemptions from the documentation obligation are provided by the Law:

- a) Those transactions carried on between companies forming the same tax consolidation group (“tax unity”). This exclusion does not apply to the intragroup cessions of intangible assets benefiting from the “patent box” regime;
- b) Those transactions carried on between an Economic Interest Grouping (EIG) or Temporary Consortium and its members (or other companies being part of the same “tax unity” of its members). However, this exclusion does not apply to the transactions with permanent establishments abroad of a Temporary Consortium;
- c) Those transactions carried on in the framework of a supervised public offering for sale or buy-out of securities;
- d) Those transactions carried on with the same person or entity, when they are worth less than 250,000 euros in total per year.

However, transactions carried with tax havens’ resident or domiciled persons are subject to tougher requirements.

Implementation of BEPS-related documentation requirements

BEPS-related documentation requirements, including the new OECD two-tier TP documentation package and the country-by-country reporting (tax form 231), are fully implemented and effective in Spain for the tax years beginning as of 1 January 2016.

Limited transfer pricing documentation

Simplified transfer pricing documentation requirements are provided for small and medium enterprises (SME’s), as described below.

Level of Documentation

Spanish companies should prepare specific transfer pricing documentation for their related-party transactions in addition to other tax, legal and commercial law formal requirements. This transfer pricing documentation is focused on the application of the arm’s length pricing to the related-party transactions and compliments the tax and legal documentation of the transactions.

The level of transfer pricing documentation depends of the size of the group to which the company belongs:



- 1) Companies belonging to groups with an annual turnover on or exceeding € 45 million, should prepare TP documentation in accordance with the new OECD TP documentation package, as described above;
- 2) Companies belonging to groups with an annual turnover below €45 million may be allowed for simplified transfer pricing documentation, except for certain types of transactions. See below the section related to SME's.

Record Keeping

Generally, TP documentation must be kept during the statute-of-limitations period: 4 years following the end of the tax return filing deadline (6 months and 25 days after the year-end).

However, if the company is offsetting tax losses, this record keeping period could be extended to the tax year in which the tax losses were generated.

Language for Documentation

Spanish Corporate Income Tax Regulations do not contain any provision relating to the language of the mandatory TP documentation. According to the recommendations of the EU Joint TP Forum and the recent amendments in the OECD Guidelines, documentation written in English should be acceptable.

Nonetheless, the tax auditor may request for a sworn translation into Spanish of any document (documentation, contract, invoices) written in a foreign language, as per the general administrative rules applicable also to tax procedure.

Small and Medium Sized Enterprises (SMEs)

Spanish Corporate Income Tax Regulations provides two simplified TP documentation regimes for SME's:

1) Simplified documentation for mid-size groups

A company belonging a group with a net turnover exceeding 10 million euros but less than 45 million, is allowed to prepare only the following documentation:

- Description of the nature, characteristics and amount of the related-party transactions;
- Corporate/full name, tax address and tax identification number of the taxpayer and the involved related-parties;
- Identification of the selected transfer pricing method;
- Selected comparables and the value or range of values.

2) Simplified documentation for small businesses

A company belonging a group with a net turnover under 10 million euros is just obliged to file a tax return with the following content:

- Description of the nature, characteristics and amount of the related-party transactions;



- Corporate/full name, tax address and tax identification number of the taxpayer and the involved related-parties;
- Identification of the selected transfer pricing method;
- Arm's length value or range of values.

3) Exceptions

Notwithstanding the above, the following "high-risk transactions" cannot benefit from the simplification and should be documented according to the ordinary requirements:

- Transactions between resident individuals carrying on economic activities taxed according to the simplified income tax regime and entities in which those individuals, their spouses, children or parents own at least 25% of the equity;
- On-going business transfers;
- Transfers of shares or participations in non-quoted companies or companies quoted in tax havens;
- Transfers of real estate property;
- Transactions relating to intangible assets.

Deadline to Prepare Documentation

Article 13.(2) of the Spanish Corporate Income Tax Regulations establishes that the TP documentation should be at the disposal of the Tax Administration since the deadline of corporate income tax return's filing period (six months and 25 days after the year end date).

Deadline to Submit Documentation

The TP documentation is not required to be automatically submitted to the Spanish Tax Authorities, but upon request.

Upon tax authorities' request, TP documentation should be generally provided within 10 working days. Extensions are allowed for only 5 days.

Statute Of Limitations

Generally, the statute of limitation is 4 years since the deadline to file the corporate income tax return.

However, if the company is offsetting tax losses carried forward, this record keeping period could be extended to the tax year in which the tax losses were generated.



Transfer Pricing Methods

Article 18.(4) of the Spanish Corporate Income Tax Law, provides that the following OECD-accepted methods can be applied for transfer pricing purposes in Spain:

- 1) Comparable Uncontrolled Price Method;
- 2) Resale Price Method;
- 3) Cost-Plus Method;
- 4) Profit Split Method;
- 5) Transactional Net Margin Method.

When none of these methods can be applied, the Law allows to use other generally-accepted valuation methods or techniques in a consistently manner with the arm's length principle.

Also, the Law establishes that the selection of the most appropriate method should be based on:

- The nature of the related-party transaction;
- The availability of reliable information on comparables; and
- The comparability analysis.

Comparables

Although tax auditors prefer Spanish comparables, Pan-European searches of comparables are generally accepted and even used by the Spanish Tax Authorities, based on the recommendations of the EU Joint TP Forum's reports.

Mutual Agreement Procedure

Spanish resident companies may access to Mutual Agreement Procedure through two ways:

- The EU Arbitration Convention (July 23rd, 1990 nr. 90/436/CEE), activated in the event of double taxation generated from transfer pricing adjustments practiced between associated enterprises residents in the European Union;
- The MAP clause in the Double Tax Treaties signed by Spain, and only applicable when the counterparty resides in a country with tax treaty with Spain.

In this regard, the access to the EU Arbitration Convention's MAP procedure is forbidden to those cases in which a tax penalty is imposed.

Procedural aspects of the MAP are regulated by Royal Decree 1794/2008, of 3 November.

Note: This document is for informative purposes only.