



cutting through complexity

Global Transfer Pricing Review

Belgium

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TAX



Belgium

KPMG observation

Multinational groups with subsidiaries or permanent establishments in Belgium should make sufficient efforts to support and document the arm's length nature of the pricing of their intra-group transactions. Being prepared for a transfer pricing audit with all intra-group transactions mapped and documented has become of key importance, as the Belgian special transfer pricing audit department has become increasingly aggressive in recent years. As an example of this, a new wave of approximately 300 transfer pricing audits was launched at the beginning of 2015 after the Belgian transfer pricing audit team doubled in size during 2013.

Transfer pricing documentation plays a critical role in tax planning in Belgium. When implementing structures that seek deductions for notional interest or patent income, for example, setting the correct transfer price is essential.

Transfer pricing study snapshot

The purpose of a transfer pricing study

	Not applicable	Applicable
Legal requirements	●	
Protection from penalties	●	
Reduce risk of adjustment		●
Shifts burden of proof		●

Basic information

Tax authority name

Federale Overheidsdienst Financiën;
Service Public Fédéral Finances (Belgian Tax Authorities).

Citation for transfer pricing rules

Domestic law provisions in relation to transfer pricing:

- Article 26 Belgian Income Tax Code (BITC)
- Article 49 BITC
- Article 54-56 BITC
- Article 79 BITC
- Article 185, Section 2 BITC
- Article 207 BITC

- Article 344, Section 2 BITC
- Circular of 28 June 1999 (Administrative Transfer Pricing Circular)
- Circular of 7 July 2000 and 25 May 2003 (Administrative Circular on the European Arbitration Convention)
- Circular of 14 November 2006 (Administrative Circular on Transfer Pricing Documentation and Transfer Pricing Audits) reporting obligation of certain material non-arm's length intra-group transactions in their annual accounts (Royal Decree dated 10 August 2009) reporting obligation for direct and indirect payments to tax havens (Article 307 BITC).

Effective date of transfer pricing rules

Effective July 2004. Reporting obligations in the annual accounts apply to financial years starting on or after 1 September 2008. New reporting obligations regarding certain payments to tax havens came into effect 1 January 2010.

What is the relationship threshold for transfer pricing rules to apply between parties?

Not specified in Belgian tax law. Article 26 of the BITC being one of the main transfer pricing articles refers to "a company which is situated directly or indirectly in any situation of mutual dependency". In order to assess whether entities are dependent, not only will legal criteria be

relevant, but factual elements such as common management and control are also likely to be considered.

The Royal Decree of 10 August 2009, which requires corporations to report non-arm's length transactions with related parties, makes reference to the International Accounting Standard 24 for the definition of related parties.

What is the statute of limitations on assessment of transfer pricing adjustments?

Three years from the year-end. In the case of fraud, seven years from the year-end, longer if a company is incurring losses (deferral to momentum losses being used).

Transfer pricing disclosure overview

Are disclosures related to transfer pricing required to be submitted to the revenue authority on an annual basis (e.g. with the tax return)?

No. Tax return disclosures on transfer pricing are not required. However, certain intra-group transactions must be reported in the company's annual accounts. These annual accounts must be included with the tax return. Furthermore certain payments to tax havens also must be reported in a specific document (form 275F) and enclosed with the tax return.

What types of transfer pricing information must be disclosed?

Certain material non-arm's length intra-group transactions and off-balance sheet arrangements must be disclosed in the annual accounts following the provisions of Royal Decree dated 10 August 2009. This reporting obligation applies to the following corporations those listed on a stock exchange whose shares are traded on a multilateral trading facility and those that meet more than one of the criteria to be considered a large group as defined in the Belgian Companies Code.

These corporations must report all non-arm's length transactions with related parties in the annual accounts and provide amounts, the nature of the relationship and all other information needed to ensure an accurate view of the financial position of the corporation. Transactions involving wholly owned subsidiaries are excluded from this reporting obligation. All direct and indirect payments to tax

havens must be reported in an appendix to the tax return, insofar as they amount to at least 100,000 euros (EUR) and are made to persons located in tax havens as defined in Royal Decree of 7 May 2010 and Administrative Circular of 30 November 2010.

What are the consequences of failure to submit disclosures?

Payments to tax havens which have not been reported or, if they have been reported, for which the taxpayer does not prove that they are made in the context of genuine and bona fide transactions and outside of artificial constructions, are non-deductible business expenses. Genuine and bona fide transactions are transactions that really satisfy an industrial, commercial or financial need and that normally find or must find compensation in the whole of the activity of the company. An artificial construction has no link with economic reality (development of a real activity) and is meant to evade the tax due in Belgium.

In the context of an investigation of the payments concerned, a transfer pricing investigation by the Belgian Tax Authorities is always possible and the general conditions for the deduction of expenses (mentioned in Article 49 and 54 BITC) remain applicable.

For payments to tax havens the simultaneous application of the tax on secret commissions (51,5 percent if paid to companies; 103 percent if paid to individuals) is also possible.

Transfer pricing study overview

Can documentation be filed in a language other than the local language? If yes, which ones?

Yes, English.

When a transfer pricing study is prepared, should its content follow Chapter V of the Organisation for Economic Co-operation and Development (OECD) Guidelines?

Yes, for all transactions.

Does the tax authority require an advisor/tax practitioner to have specific designation in order to prepare or submit a transfer pricing study?

No.

Transfer pricing methods

Does your country follow the transfer pricing methods outlined in Chapter II of the OECD Guidelines? If exceptions apply, please describe.

Yes.

Transfer pricing audit and penalties

When the tax authority requests a taxpayer's transfer pricing documentation, are there timing requirements for a taxpayer to submit its documentation? And if so, how many days?

Yes, 30 days.

When the tax authority requests a taxpayer's transfer pricing documentation, are there timing requirements for a taxpayer to submit its documentation? Please explain.

When requested by the Belgian Tax Authorities, supporting information and documentation must be submitted within 30 days of the request. However, in justified cases an extension can be requested. The administrative circular of 14 November 2006 recognizes that 30 days is a short period for the request of transfer pricing information and that granting an extension may be appropriate.

If an adjustment is proposed by the tax authority, what dispute resolution options are available?

Yes. Domestic procedures are available enabling the taxpayer to challenge the adjustment.

If an adjustment is sustained, can penalties be assessed? If so, what rates are applied and under what conditions?

Yes. General tax penalties apply. Penalties range from 10 percent to 200 percent of the additional tax assessed.

To what extent are transfer pricing penalties enforced?

Frequently.

What defenses are available with respect to penalties?

In case sound arguments are available, domestic procedures exist to (try to) reduce or remit the fines.

What trends are being observed currently?

The tax officers of the special transfer pricing audit department (of which the numbers doubled in 2013) have been very active in their sphere of operations, and have manifested themselves very actively within their client base with the help of data mining tools. They use more or less standardized, lengthy requests for information, through which they solicit detailed input from the taxpayer on all sorts of intra-group transactions and on any other information (e.g. legal and operational structure, business trends, etc.) that may be relevant to assess whether the taxpayer respects the arm's length principle. A wide variety of industries (e.g. companies incurring long start-up losses, undergoing business restructurings, showing fluctuating key performance indicators, hosting intra-group financing or cash pooling arrangements) have in the meantime been selected for a thorough transfer pricing audit. Experience from these audits shows that it pays to be well prepared and to proactively map all intra-group transactions and support the arm's length nature of the transfer prices being applied. Also adherence to the provisions and conditions laid down in intra-group agreements should be monitored with great care. Indeed, by not complying with the provisions of their own agreements, taxpayers are quite often a sitting duck for the special transfer pricing audit department of the Belgian Tax Authorities.

There is still a clear focus on loss-making companies and groups in Belgium which have undergone a business restructuring. The deductibility of losses and restructuring costs are challenged if it appears that they are not supported by the function and risk profile of the taxpayer. Furthermore, the Belgian Tax Authorities are also focusing on the correct application of the transfer pricing policy in the operational transfer prices at business line, product group or product level.

Special considerations

Are secret comparables used by tax authorities?

No.

Is there a preference, or requirement, by the tax authorities for local comparables in a benchmarking set?

No. The Belgian Tax Authorities accept the use of pan-European comparables.

Do tax authorities have requirements or preferences regarding databases for comparables?

Any comparables which pass the comparability test can be used. In practice, however, often Amadeus and Belfirst (a local database) are used.

Does the tax authority generally focus on the interquartile range in a TNMM analysis?

Yes, always.

Does the tax authority have other preferences in benchmarking? If so, please describe.

No other preferences besides a certain sensitivity for the presence or absence (rejection criteria) of Belgian comparables during transfer pricing audits.

What level of interaction do tax authorities have with customs authorities?

Low.

Are there limitations on deductibility of management fees beyond the arm's length principle?

Yes, in addition to being at arm's length, the management fees should relate to management services effectively rendered/received and related directly to the business, that enable the Belgian taxpayer to obtain or retain taxable income.

Are management fees subject to withholding?

No.

Are there limitations on the deductibility of royalties beyond the arm's length principle?

No.

Are royalties subject to withholding?

Yes.

Are taxpayers allowed to file tax return numbers that differ from book numbers?

Yes, transfer pricing adjustments are generally permitted in practice, although there is little specific guidance on making these adjustments. Consideration should also be given to potential customs implications arising from these year-end adjustments.

Other unique attributes?

No.

Tax treaty/double tax resolution

What is the extent of the double tax treaty network?

Extensive.

If extensive, is the competent authority effective in obtaining double tax relief?

Almost always.

When may a taxpayer submit an adjustment to competent authority?

An application for a Mutual Agreement Procedure (MAP) should be filed within two or three years (or a shorter period depending on the relevant treaty provisions) as from the first notification of the proposed transfer pricing adjustment communicated to the taxpayer in writing. For cases of double taxation within the EU, relief may be obtained by calling upon the European Arbitration Convention.

May a taxpayer go to competent authority before paying tax?

Yes. As long as the MAP is pending usually suspension of tax collection is granted.

Advance pricing agreements

What APA options are available, if any?

Unilateral, bilateral, multilateral.

Is there a filing fee for APAs?

No.

Does the tax authority publish APA data either in the form of an annual report or through the disclosure of data in public forums?

Yes.

Are there any difficulties or limitations on the availability or effectiveness of APAs?

No. Both the multi and bilateral ruling program (Service International

Agreements of the Central Tax Authorities) and the unilateral ruling program (Service for Advanced Decisions in Tax Matters, or the Ruling Commission) of the Belgian Tax Authorities are very successful. APAs in Belgium are therefore seen as a very workable and suitable tool to obtain certainty for the taxpayer over a given period.

KPMG in Belgium

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