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WTS Transfer Pricing Newsletter

Editorial

Dear Reader,

It is our pleasure to present to you the third edition of our WTS Global Transfer Pricing Newsletter for 2021.

In the latest edition of the WTS Global Transfer Pricing Newsletter, our colleagues from 15 countries provided an update on recently introduced Transfer Pricing legislations and cases, in particular the adoption of certain OECD Guidelines. Additionally, global developments like the Pillar 1 and Pillar 2 initiative, global minimum tax and new control mechanisms to ensure the correct taxation of corporate profits are presented.

Europe

Our **Austrian** colleagues summarize the changes in the final version of the Austrian Transfer Pricing Guidelines 2021 and highlight the most important aspects (see Newsletter issue #2.2021).

The **Belgian** contribution sheds light on a decision of the Court of Appeal of Ghent in favor of the taxpayer, which provides rare insights into the legal opinion on the application of the OECD Guidelines and other elements.

In **France,** our colleagues discuss the Engie SA case and highlight the ambitious new approach proposed by the French Tax Administration here.

In **Germany,** a new tax law as well as new administrative guidance governing transfer pricing aspects in the country have been published. In two articles, the "Withholding Tax Relief Modernization Act" and the "Administrative Principles Transfer Pricing" are presented and discussed in more detail.

In **Ukraine,** the State Tax Service is strengthening Transfer Pricing controls in three stages. The article provides more details and the impact on taxpayers.

Further Countries

In **Argentina,** the Argentine Revenue Service published a new document listing recommendations for Transfer Pricing in financial years, which are influenced by the COVID-19 crisis.

Our colleagues in **Benin** explain recent updates in local tax law that affect Transfer Pricing and outline the contents of the newly established Transfer Pricing declaration.

In **Chile,** the focal point of the local Tax Administration has recently shifted to specific fields of Transfer Pricing. Our colleagues from Chile elaborate on this.

In September 2021, the Tax Administration in **China** gave feedback on five practical questions on Transfer Pricing issues in connection with the COVID-19 pandemic. The article provides a brief overview on the proposed implications.

Our colleagues in **Nigeria** provide an update on a Transfer Pricing case of the local Tax Appeal Tribunal (see Newsletter issue #1.2021).

Senegal has adopted – among others – action 12 of the BEPS project in its tax system so as to automatically obtain information on financial accounts and the ownership of companies.

The **Taiwanese** Supreme Administrative Court decides on one-time Transfer Pricing adjustments. Our colleagues present the specifics concerning the development, the background and the decision of the court.

In **Thailand,** recently, major changes have been made in view of local Transfer Pricing disclosure regulations. The article gives a summary of the newly established focal points as well as practical insights.

The **US** contribution highlights the role of the United States within the ongoing changes in the global tax world due to the Pillar 1 and Pillar 2 deals.

In **Vietnam,** the Tax Administration has announced that it will pay particular attention to Transfer Pricing compliance issues, specifically to highlighting deficiencies in the identification of related party transactions.

Yours sincerely,

WTS Global Transfer Pricing Team

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Austria

New Austrian Transfer Pricing Guidelines 2021

On 7 October 2021, the Austrian Federal Ministry of Finance published the final version of the Austrian Transfer Pricing Guidelines (Austrian Guidelines 2021). In 2010, the Austrian tax authorities published the transfer pricing guidelines based on the OECD Guidelines from 2010 for the first time. The recent changes are mainly due to international developments as a result of the OECD's Base Erosion and Profit Shifting (BEPS) project and the subsequent OECD update of the transfer pricing guidelines in 2017 (OECD Guidelines 2017).

The recent revision should serve as an aid for the interpretation of the arm's-length principle which is laid down in Article 9 of the Double Taxation Treaties and in par. 6 (6) (a) of the Austrian Income Tax Act. The structure of the Austrian Guidelines 2021 is divided into five parts:

Part 1: Multinational group structures
Part 2: Multinational permanent establishment structures
Part 3: Documentation and reporting requirements
Part 4: Transfer Pricing audits
Part 5: Appendix with reference documents (Austrian Federal Ministry of Finance; OECD and EU)

The main changes of the Austrian Guidelines 2021 are listed below:

- The main changes based on BEPS have been transferred: risk analysis, DEMPE concept, value creation considerations, profit split method, chapter X (financial transactions), OECD concepts "hard-to-value-intangibles" as well as "low value-adding intragroup services", and chapter IX on group structure.
- Intra-group services may only be charged if an independent enterprise would pay for the service or provide itself. This so-called benefit test is now expressly included in the Austrian Guidelines 2021 (Rz 87).
- Furthermore, the Austrian Guidelines 2021 validate that the cost-plus method with a net profit mark-up within 3% to 10% will often be used for intra-group routine services. This new net profit mark-up will be applied from 1 January 2022 (see Rz 90). To simplify, low-value-adding intra-group services should be valued at a cost mark-up of 5% (Rz 95).
- The year-end adjustment has been reworded in a restrictive way – existing agreements must be adjusted accordingly. In particular, monitoring during the year is necessary to prove that an adjustment during the year is not possible (Rz 73).
- It is no longer required to carry out a compulsory median correction as part of the net margin calculation. Only if it can be demonstrated that a particular value within the range is the most reliable, this value can be used (Rz 75).
- The cost contribution agreements were significantly restricted (Rz 159 ff).
- The documentation requirements of small and medium-sized enterprises were adapted to those of large enterprises (Rz 412).
- The annual update of the financial data of the database study is no longer required, provided that the conditions of business activity haven't changed. It is sufficient to renew the database studies every three years (Rz 426).

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- Documentation like the Master File, Local File and Country-by-Country Reporting (CbCR) and contracts, which are written in English, have no longer been translated into German (Rz 431).
- The annual CbCR notification requirement does not apply to fiscal years after 1 January 2022 if there have not been any changes compared to the notification submitted in the previous year (Rz 447).

Belgium

Belgian Transfer Pricing court case: a rare occurrence

In a recently published decision of the Court of Appeal of Ghent relating to TP (no. 2016/AR/455), the Court decided in favour of the taxpayer. The case originated from an audit initiated by the Special Investigation Squad (BBI/ISI) in 2009. Considering TP cases in Belgium are scarce, it is interesting to see the court's point of view.

An important element from this decision concerns, amongst others, the legal discussion on the application of the appropriate version of the OECD Guidelines 2017. In the case at hand, the Belgian Tax Administration based certain argumentation on the OECD Guidelines 2017. However, this version of the OECD Guidelines was not yet available in the relevant tax years. Therefore, the court correctly states that the OECD Guidelines 1995 should have been considered, and later versions should only be used to the extent that they relate to clarifications, and do not impact in any way, even implicitly, whatsoever the content thereof. It was decided by the court that the Belgian Tax Administration should not have based its argumentation on elements that were introduced only by the 2017 version, in case DEMPE and ex-post price adjustments for hard-to-value intangibles. It should be noted that the Court made this statement relating to the use of the DEMPE concept in view of implementing the relevant OECD Guidelines version, whereas - further in the decision – it states that a functional analysis is relevant for assessing TP matters (as it was already included in the OECD Guidelines from 1995).

Additionally, the decision highlights other interesting elements. Relating to the burden of proof, as the Belgian Tax Administration invoked Article 26 ITC92, the burden of proof rested with the Belgian Tax Administration. The court decided that the Belgian Tax Administration did not provide sufficient proof to justify its position, i.e. that the main functions were performed/key risks were incurred by the Belgian entity, and no results were presented of a comparability analysis. Furthermore, the case demonstrates the importance of internal documents, as the lack of proof of the Belgian Tax Administration was countered by documents of the taxpayer, such as intercompany agreements, invoicing, contracting of sub-contractors and board of directors' meeting notes. The court ruled that the content of certain documents demonstrated that relevant functions were performed by the foreign entity. The value of written documents should hence not be underestimated. A last interesting element relates to the rejection of tax losses. The Belgian Tax Administration rejected the deduction of carried forward tax losses by arguing that the losses must have originated from the Belgian company being under-remunerated in view of its functionality. In the case at hand, the losses originated from a financial year after the period challenged by the Belgian Tax Administration, as demonstrated by the taxpayer. Also, the Belgian Tax Administration cannot reject carried forward tax losses on the grounds of additional income that would have been earned at arm's length in previous tax years, as it must be assessed on a year-by-year basis. Therefore, the court rejected the position of the Belgian Tax Administration and labelled it arbitrary. This last element is frequently used by the Belgian Tax Administration in practice and therefore it is crucial to address the relevant procedural aspects to prevent the Belgian Tax Administration (unlawfully) attempting to reject carried forward tax losses in one go without an in-depth analysis of the losses.

A key takeaway for Belgian TP audits is that, in practice, it is crucial to raise procedural and TP argumentation together during all phases of the audit to decrease the chance of the case going to court.

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France

The Engie Case[1]: an ambitious new approach by the French Tax Administration

Facts

In 2011/2012, Engie SA (Engie) provided services to two affiliates in Luxembourg and in the US who purchased and sold Liquid Natural Gas. Engie SA was contractually authorized by its affiliates to act on their behalf to make spot (as opposed to term) sales. Engie SA compared its functional profile to that of a broker, and noting that it incurred no significant risks in providing these services, concluded that it acted as a routine services provider and applied the Cost Plus method, with a 10% mark-up on full costs (supported by a benchmarking study). It also provided shipping and scheduling services to the affiliates in Luxembourg and the US to assist them with the actual deliveries of gas.

The French Tax Administration challenged this approach: for them, the fact that Engie SA could set up a spot sale on behalf of its affiliates without receiving any instructions from them, combined with the fact that it was also involved in the later steps of the sale (scheduling and shipping), meant that its functional profile far exceeded that of a simple services provider. Moreover, the French Tax Administration considered that the Master Sales and Purchases Agreements signed with clients constituted valuable intangible assets. As a result, the French Tax Administration considered Engie SA and both affiliates in Luxembourg and the US to be co-entrepreneurs, meaning Engie SA should not be remunerated via a Cost Plus, but via a profit split (50% to Engie SA, 50% to its affiliates).

Engie SA challenged these assertions, for example highlighting that Master Sales and Purchases Agreements are in fact standard industry documents with little inherent worth, however the court sided with the French Tax Administration and approved the profit split method.

An ambitious new approach

This case is notable in that the French Tax Administration has shown a new and ambitious approach in which it did not hesitate to conduct its own counter functional analysis to challenge the taxpayer's approach, going so far as to even provide comparables to substantiate the 50-50 profit split.

1 TA Montreuil, 14/01/2021, n.1812789

This is an interesting development because in French transfer pricing jurisprudence, barring limited exceptions, the burden of proof lies with the French Tax Administration. Whether it actually met this burden, and if so whether the tax payer successfully challenged the French Tax Administration's arguments, is still a matter of debate, yet to be resolved in appeals: the first judgment, in favour of the French Tax Administration, may be seen as somewhat debatable, insofar as, per the *rapporteur public's*[2] own admission, there are strong arguments both ways.

Conclusion

The French Tax Administration has grown bolder and has deployed new, ambitious approaches both proposing a different Transfer Pricing method and providing an economic analysis to support the profit allocation. Whereas in the past it would mostly only perform basic reassessments – e.g. if a Limited Risk Distributor is outside of the arm's-length range – it no longer balks at more advanced ones such as challenging functional profiles. It highlights more in-depth analyses by the French Tax Administration and a desire to see profit splits. With facts still uncertain and other debatable elements, it will fall to the court of appeal to clarify what the French Tax Administration must provide in order to meet the burden of proof, and what arguments from the taxpayer may overturn it. In any case, it is more advisable than ever before for companies to have an in-depth Transfer Pricing documentation in case of a tax audit in France.

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Germany

German Federal Ministry of Finance: Administrative Principles 2021 on Transfer Pricing published

On 14 July 2021, the administrative principles "Verwaltungsgrundsätze Verrechnungspreise" (Administrative Principles Transfer Pricing, in the following "administrative principles 2021") were published. Although not binding for taxpayers and courts, the new administrative principles outline the **tax authority's view** on the principles for the adjustment of income pursuant to section 1 Foreign Tax Act (FTA). The administrative principles 2021 are to be applied to all open cases.

In the first chapter, information is presented among other things on the relationship to other adjustment rules (e.g. hidden profit distributions), on the German controlled foreign corporation regime rules and on the terms "related party" and "business relationship". According to the administrative principles 2021, conditions such as discounts, terms or securities agreed as part of a business transaction are also subject to the arm's-length principle, so that reductions in income due to conditions not in line with the arm's-length principle can be subject to a correction in accordance with section 1 FTA.

The significance of the OECD Guidelines 2017 for the analysis of cross-border business relationships is explained in the second chapter. In this context, the OECD Guidelines 2017 are explicitly referenced and included as an annex, thereby intended to serve as a guidance for the German tax authorities. It should be noted, however, that the administrative principles 2021 provide further concretizations which have priority over the OECD Guidelines 2017 and which, in the opinion of the tax authorities, are necessary to ensure equal taxation.

2 the rapporteur public is a civil servant in charge of presenting an independent analysis of the case's facts to the court; their position is not binding.

Furthermore, reference is made to the guidance of the EU Joint Transfer Pricing Forum and the Transfer Pricing Manual of the United Nations, which, however, are not included as an annex.

The third chapter provides further information e.g. on the arm's-length principle, Transfer Pricing methods, comparability analysis, intangible assets, supplies of goods and services, cost allocations, transfers of functions, financing relations and international mutual agreement and arbitration proceedings. The administrative principles 2021 still refer to the administrative guidance on international mutual agreement and arbitration proceedings dated 9 October 2018. This guidance has meanwhile been replaced by a new administrative guidance dated 27 August 2021, which now also contains explanations on the dispute resolution procedure under the EU directive on tax dispute resolution mechanisms in the European Union.

Additionally, information on IC financing is provided. It is the opinion of the tax authorities that the first step is to check whether the financing represents debt or equity for tax purposes. For a loan to be qualified as debt for Transfer Pricing purposes, (i) the financing must be economically required by the borrower; (ii) an appropriate return on investment covering the financing costs would usually be expected by the borrower; and (iii) the use of the loan should be in line with the business purpose of the borrower.

The administrative principles 2021 also address the issue of implicit group support, stating that implicit group support merely describes the legal and economic framework of the corporate relationship and is therefore neither a legally enforceable security nor a proxy for it. Nevertheless, implicit group support is of significance in the assessment of the borrower's subjective default probability and thus has a de facto effect on the credit rating. Therefore, the extent and impact of implicit group support shall be examined appropriately in each individual case. Secured loans are generally considered to be at arm's length, whereas non-secured loans may be at arm's length depending on the facts and circumstances of the case. According to the administrative principles 2021, this assessment should consider, among other things, the extent to which liabilities are secured in relation to third parties, the economic benefit of the security or options realistically available.

Due to the publication of the administrative principles 2021, several other administrative guidelines are repealed (a complete list can be found in point 6.1 of the administrative principles 2021). The administrative principles 2021 are to be applied to all open cases. Therefore, existing Transfer Pricing cases should be analyzed, taking into account the new guidance and the new tax law changes (please see our other article for the new tax law changes).

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Germany

Recent changes on German Tax Law concerning Transfer Pricing

There have been several changes to German Transfer Pricing rules in the past months. 8 June 2021 saw the publication of the "Withholding Tax Relief Modernization Act" ("Abzugsteuerentlastungsmodernisierungsgesetz", WTRMA). Furthermore, the Act on the Implementation of the Anti-Tax Avoidance Directive (ATAD Implementation Act) was published on 30 June 2021. For Transfer Pricing, this mainly results in changes to section 1 of the Foreign Tax Act

(FTA). Additionally, new administrative principles representing the view of the German tax authority were recently released, which are discussed in a separate article. The following provides a brief overview of the main amendments to German tax law.

Transfer Pricing methods

The previously applicable hierarchy of Transfer Pricing methods and priority of the OECD standard methods over profit-based methods are abandoned. According to the new section 1 (3) FTA, the most appropriate Transfer Pricing method is to be applied instead ("best method rule"). That said, if the comparable uncontrolled price method and another Transfer Pricing method are equally reliable, the legal justification still prefers the comparable uncontrolled price method in line with the OECD Guidelines 2017.

Narrowing of ranges

The **interquartile range method** for narrowing a range of comparable values with limited comparability is now regulated by law in new section 1 (3a) FTA. It stipulates that if the values themselves do not provide any indications of how they could be narrowed down, the interquartile range method is to be applied. If the transfer price used by the taxpayer is outside the (whole or narrowed) range, a correction shall be made to the median, unless the taxpayer can prove that another value within the range is in line with the arm's-length principle.

Transfer of functions

The rules on the transfer of functions are now regulated in section 1 (3b) FTA. If no comparable data can be found for the transfer of the function as a whole, the area of agreement is to be determined on the basis of the transfer package. The three escape clauses previously applicable have been removed. That said, another escape clause has been added, specifying that outsourcing cases requires no valuation of a transfer package. The criteria for the existence of a transfer of functions has been tightened. It is now sufficient for the existence of a transfer of functions that assets or (compared to "and" previously) other benefits are transferred.

Intangibles and DEMPE

Particularly noteworthy are the new provisions in section 1 (3c) FTA. For the first time, "intangibles" are defined by law in line with the guidance described in the OECD Guidelines 2017. Likewise, the OECD DEMPE (Development, Enhancement, Maintenance, Protection and Exploitation) concept entered German tax law. Exercise and control of functions in connection with the development, enhancement, maintenance, protection and exploitation of IP shall be remunerated at arm's length based on a functional, asset and risk analysis. Legal ownership of an intangible serves only as a starting point for determining the arm's-length remuneration and does not constitute a claim to the residual income. The mere financing connected with the development, enhancement, maintenance or protection of an intangible does not entitle the financing entity to claim the residual income resulting from the exploitation of the intangible. The legal justification of the WTRMA emphasizes that the economic approach established by the OECD has always been and still is the basis for Transfer Pricing audits in Germany such that in theory DEMPE should have been applicable all along.

Price Adjustment Clause

The previous period for possible price adjustments due to significant deviations has been shortened from ten to seven years in section 1a FTA.

Advance Pricing Agreements

Also new is the now introduced legal basis for advance pricing agreements in section 89a German Tax Code. APAs can only be requested for facts that have not yet been realized at the time of application for a certain period of validity. The latter should not exceed five years. A signed APA may be extended beyond the specified period of validity or may be applied to assessment periods preceding the period of application of the APA upon request. The application requirements are also regulated by law. The rules on APAs apply to applications submitted on or after 9 June 2021.

The amendments to German tax law presented above essentially represent an update to existing Transfer Pricing rules in light of changes at an international level. The new tax law is generally to be applied from assessment period 2022 onwards.

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Ukraine

State Tax Service intensifies TP control

In 2021, the State Tax Service of Ukraine notably intensified control over TP matters.

Thus, according to the Tax Code of Ukraine, TP control consists of three stages.

The first stage is the monitoring of controlled transactions. At this stage, the State Tax Service of Ukraine studies tax and TP reporting as well as customs information for identifying TP risks. The Tax Service has the right to file requests to taxpayers for obtaining information, explanations and data on the TP matters.

Many Ukrainian taxpayers received requests where the State Tax Service of Ukraine asked specific questions on the controlled transactions and TP methodology applied by the taxpayer to ensure that the transactions were at arm's length. The requests usually cover the period for several years, for example from 2015 to 2019, and require extensive work to collect the data.

Given the scope of information and data, the requests were especially problematic for those taxpayers who did not prepare TP documentations or when TP documentation covered only part of controlled transactions.

At the monitoring stage, the State Tax Service of Ukraine decides whether to take further steps for TP control. Therefore, it is recommended to provide confident answers evidencing that the taxpayer has conducted proper TP analysis, which confirm that the transactions are at arm's length. Such responses may help to avoid further stages of TP control.

The second stage is the request for submission of TP documentation, which should be annually prepared and kept by taxpayers conducting controlled transactions. Such requests are filed by the central office of the State Tax Service of Ukraine. The Tax Code stipulates that the taxpayer shall submit TP documentation within 30 calendar days following the request. Special COVID-19 related rules on suspension of the statutory terms for answering the requests of the State Tax Service of Ukraine do not cover requests for TP documentations.

Receipt of such a request means that the State Tax Service of Ukraine already suspects that TP matters of the taxpayer require special attention. Often, after studying the TP documentation, taxpayers receive the second request, where the State Tax Service of Ukraine describes the points with which it disagrees and requests additional substantiation that conditions of the transaction were at arm's length.

The third stage is the TP audit. TP audit is the final step in TP control and is usually initiated if the State Tax Service of Ukraine is confident that it has arguments to challenge the taxpayer's approach to TP.

In February 2021, the government lifted the moratorium on TP audits. The moratorium was introduced in 2020 for most types of tax audits as part of COVID-19 related tax measures. Consequently, the focus of tax control shifted to TP.

The Tax Office reports that as of July 2021 it has renewed 18 TP audits and has started 27 new TP audits. It has finished 10 TP audits resulting in material TP adjustments for taxpayers. Such statistics evidence a notable increase in the pace of TP control.

In conclusion, as the TP audits temporarily remain one of the principal instruments of control over corporate profits taxation in Ukraine, the State Tax Service of Ukraine is accelerating the development of its capability in this field. This raises the level of the risks associated with TP in Ukraine.

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Argentina

Transfer Pricing developments in Argentina

The Argentine Revenue Service has made available a document with recommendations and suggestions for the Transfer Pricing analysis (the "document") to be conducted for the fiscal years impacted by the COVID-19 pandemic. In general, the document could be considered aligned with the OECD "Guidance on the Transfer Pricing implications of the COVID-19 pandemic".

In brief, the document states that a robust functional analysis is required, which duly documents the consequences of the pandemic on a taxpayer's business, its value chain, and risk-taking functions. The unusual results generated by the pandemic that affected business profit must be properly identified, by means of a thorough economic analysis, without being able to invoke the impact of COVID-19 as a mere force majeure cause.

In addition, the document sustains that taxpayers should identify and quantify all extraordinary results linked to the pandemic and use public information available regarding the effects of COVID-19 on the business, industry and transactions subject to analysis.

In principle, and in line with the historical criterion sustained by the Argentine Revenue Service, the document states that multi-year analyses would not be acceptable, because they could lead to distortions of results from pre- and post-pandemic periods. Thus, it recommends using financial information from comparable companies for the same fiscal period under study. Comparable companies with recurring losses would not be considered valid, from the Argentine Revenue Service's perspective. This issue is always controversial, and historically the Argentine Revenue Service has not been successful before the courts when taxpayers prove that losses are a comparable feature of a duly comparable set. This much is acknowledged by recent regulations, discussed below.

The Argentine Revenue Service also warns that situations, in which losses are attributed to a low-risk or limited-risk distributor because of the pandemic, should be scrutinized. In this scenario, it must be considered whether the positions adopted are coherent with the original functional analysis. Moreover, the document states that the analysis should consider the terms and conditions of any pandemic assistance provided to the taxpayer by the Argentine government.

Also, the Argentine Revenue Service has issued General Resolution 5010, which adds a new rule stating that taxpayers cannot use an entity with operating losses as a comparable for Transfer Pricing purposes, unless the taxpayer: (i) adequately justifies that the losses are a characteristic of the business, due to market circumstances, industry, or other comparability criteria; and (ii) demonstrates that the conditions leading to the losses are not the result of factors affecting comparability.

Notwithstanding the fact that the aforementioned measures provide some helpful guidance for taxpayers on the one hand, the Argentine Revenue Service's recommendations prove restrictive on the Transfer Pricing economic analysis on the other hand, thus increasing the difficulties to perform the analysis in a context of great economic crisis and uncertainty.

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Benin

Transfer Pricing Update Benin

The concepts of permanent establishment and transfer prices were included in the 2020 and 2021 finance laws, thus filling the void that has prevailed for a long time.

New conditions for the deductibility of costs subject to the transfer prices (article 21.f amended in 2021) introduced in the fiscal law of Benin in 2021

The 2021 finance law capped the deductibility of these costs at 5% of taxable profit before deduction of the costs in question; in the event of a deficit, this provision shall apply to the results of the last non-prescribed profit year.

Methods of establishing corporation tax and determining indirectly transferred profits (article 37 of the Benin Tax Code amended in 2020)

Since 2020, the profits indirectly transferred to companies which are under the dependence or which have the control of companies located outside Benin, either by the increase or the reduction of the purchase or sale prices, or by any other means, are incorporated in the results recognized by the accounts for the establishment of the corporation tax due by these companies.

These benefits are determined by comparison with those that would have been realized in the absence of arm's length or control.

These provisions also apply for the determination of the taxable profit in Benin of a legal person exercising its activity both in Benin and abroad.

Determination of the taxable profit of a permanent establishment in Benin of a foreign legal person (article 37 of the Benin Tax Code amended in 2020)

For these branches, no deduction is allowed for the sums which would be, if applicable, paid or due, for other purposes than the reimbursement of costs incurred, by the permanent establishment at the head office of the legal person or at any of its offices, as royalties, fees or other similar payments, for the use of patents or other rights, or as commissions for specific services rendered or for management activity or, except a case of banking enterprise, as interest on amounts loaned to the permanent establishment.

Annual Transfer Pricing declaration (article 34.4 amended in 2020)

Since 2020, companies that are dependent on or have control of companies established outside Benin whose annual turnover excluding taxes or gross assets is greater than or equal to one billion francs are subject to an annual declaration of transfer prices before 1 May each year.

This declaration has three parts:

- **Part 1: General information on the group of associated companies**
  - Information on the ultimate parent company of the group
  - Main activities of the group
  - General description of the Transfer Pricing policy applied by the group in relation to the reporting company
  - Intangible assets held by the group and used by the reporting company
  - Impact of any restructuring carried out within the group on the reporting company
- **Part 2: Specific information concerning the reporting company**
  - Transactions with affiliated companies and Transfer Pricing determination methods applied
  - Nature of transactions with associated companies
  - Company name, state or jurisdiction concerned by Transfer Pricing flows
  - Nature of the relationship with the related company
  - Transfer Pricing method applied
  - Change in method made during the year
  - Specific information on loans and borrowings with related persons
  - Information on prior price agreements and tax rulings
- **Part 3: Additional information**

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Chile

Migration of the approach of the Chilean Revenue Service to segments with greater fiscal impact

In the last five years, we have witnessed Latin American and Caribbean countries undergoing extensive reforms to their Transfer Pricing regulations to achieve standardization for the internationally proposed BEPS measures, such as Action 8 (Ecuador, Mexico, Argentina, Costa Rica and Honduras); Action 9 (Ecuador, Mexico, Argentina Costa Rica, and Honduras); Action 10 (Colombia, Ecuador, Mexico, Peru, Honduras, Argentina and Costa Rica); and Action 13 (Argentina, Colombia, Costa Rica, Mexico, Peru, Brazil, Chile, Panama, Bermuda, Belize and Uruguay)[1].

In addition to this scenario, Chile is also one of the 130 countries and jurisdictions that have subscribed to the OECD's Inclusive Framework. Thus, the Chilean Revenue Service seeks to focus its actions on segments with the greatest tax impact and high risk of non-compliance.

Proof of this is that within its 2021 Tax Compliance Management Plan the aim is "to generate actions that allow taxpayers to comply with their tax responsibilities, and direct control actions towards those groups that have the greatest impact on collection or that erode tax collection bases of the tax system by promoting actions contrary to ethics and tax justice". Therefore, the plan aims to intensify control actions on those segments with the greatest impact on the tax system. Nowadays, the most relevant in Chile are those related to digital economy and intangible/finance services.

Consider that only the latest Tax Modernization Law (law 21.120 dated 2020) has allowed the Chilean Revenue Service to collect close to USD 2 billion. These actions include, among others, the control of the declaration and payment of VAT to digital services, the ISFUT, the electronic ticket and the real estate surcharge tax. Regarding the specific case of digital services, as of June 2021 the Chilean Revenue Service has collected around USD 200 million from just over 199 registered platforms since June last year (with the highest collection coming from Google, Netflix, Apple, Facebook and Spotify), numbers that more than validate the "not so new" focus on the digital economy's control.

Another important objective under Chilean Revenue Service's interest on segments with the greatest impact on the tax system is regarding the audit of intangible contracts with related parties. This year was the first in which the new transfer pricing requirements (local file F1951 & master file F1950) have been filed, and the volume of information to be assessed will involve several hours of virtual screening; although in principle faster and more efficient.

Finally, it is worth mentioning that to date, the approach regarding the evaluation of intragroup financing operations and its express addition on Chilean Revenue Service's circulars of the procedure to determine market conditions for interest rates based on the credit rating of its participants is still under discussion. Although COVID-19 imposed a series of restrictions on the Chilean economy in general and the financial system with biases in the information to be obtained, this would be one of the last issues to standardize with respect to the international practice and be considered the cornerstone of transfer pricing tax collection processes for the next years.

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1 https://www.ciat.org/beps-monitoring-database/?lang=en

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China

Responses to practical questions on the Transfer Pricing implications of the COVID-19 impacts

On 30 September 2021, the China State Taxation Administration responded to five hot questions regarding the Transfer Pricing implications of the COVID-19 impacts:

→ Focus of the Transfer Pricing investigation
During the pandemic period, many enterprises have faced the impacts of the virus. However, the extent to which various industries are affected by the pandemic differs drastically– while it posed huge challenges for some of the industries, it also brought new opportunities to others. Tax authorities will follow the arm's-length principle during the Transfer Pricing investigation in light of the impact of the pandemic on intercompany transactions.

→ Losses of the COVID-19 pandemic
When evaluating the impact of the pandemic, tax authorities will consider all relevant factors, such as function and risk profile, characteristics of intercompany transactions, characteristics of the industry to which the enterprise belongs, and situations of its comparable entities etc.

Regarding the additional operation costs incurred due to the pandemic, tax authorities will consider an adjustment on costs for differences between intercompany transactions and third-party transactions. Companies are recommended to prepare a detailed and quantitative analysis of incurred losses and maintain supporting documents for potential inspection in the future.

→ Sizable fluctuation of profit level
In 2020, the profitability of many companies fluctuated significantly due to the pandemic. In the local TP file, companies should explain in detail about the impact of the pandemic on intercompany transactions, the value chain and industry etc. Furthermore, in comparable analysis, companies should focus on the multi-dimensional data of comparable entities so that the benchmark result can reflect the impact of COVID-19 on the profit level of the industry.

→ Government assistance
2020 saw the Chinese government offer a series of relief measures to companies, which needs to be considered in the TP file preparation, particularly in the comparable analysis. Where arrangements on Transfer Pricing are affected by government assistance, companies should provide relevant information and supporting analysis in the local TP file. Tax authorities should identify comparable factors to ensure the fairness and consistency of the benchmarking result.

→ Advance pricing agreement
If the changes due to the pandemic have affected the application of existing APA, companies should prepare documents to explain to tax authorities the specific changes induced by the pandemic and negotiate with them on how to deal with and respond to these

changes in terms of implementing arrangements on advance pricing. Tax authorities will evaluate the extent of the changes. The APA might be cancelled or revised based on further negotiation.

The China State Taxation Administration provided the above principles which companies and tax authorities could follow when dealing with the Transfer Pricing implications of the COVID-19 pandemic. In the TP work for year 2020, the impact of COVID-19 should be fully considered and analyzed to ensure the reliability and accuracy of the TP reports.

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Nigeria

Transfer Pricing Update on Nigerian TP case

Following the maiden decision (Newsletter #1.2021) on Transfer Pricing of the Nigerian Tax Appeal Tribunal in the case of **Prime Plastichem Nigeria Limited v. Nigerian Federal Inland Revenue Service (2020),** awareness and compliance with Nigeria's Income Tax (Transfer Pricing) Regulations 2018 has gained increased momentum and attention among associated taxable persons and tax professionals. In the case in question, the Nigerian Tax Appeal Tribunal's judgement affirmed the Nigerian Federal Inland Revenue Service's imposition of penalties and its revision of the tax liability of Prime Plastichem Nigeria Limited (a connected taxable person) to pay N1.7 billion (EUR 4,282,439.48 at January 2020).

Accordingly, associated taxable persons have sought to comply with the requirements of the regulations, including the CbCR Regulations of qualified associated taxable persons. Compliance with the regulations has been with particular emphasis on the correctness of returns and applicable Transfer Pricing method and also the accuracy and completeness of Transfer Pricing disclosure, documentation and filings to forestall penalties or trigger a Transfer Pricing audit by the Nigerian Federal Inland Revenue Service (which is the relevant taxation authority for Transfer Pricing in Nigeria). It will be recalled that in a bid to propel the compliance of taxpayers to Transfer Pricing regulations, the Federal Inland Revenue Service made steep penalties for non-compliance with the regulations, some of them running into tens of millions of Naira for default in filing TP documentation or making incorrect disclosures. The penalties contained in the regulations remain contentious as questions abound about the power of the Nigerian Federal Inland Revenue Service to impose such penalties and the proportionality of such penalties.

Notwithstanding the above, research shows that the Nigerian Federal Inland Revenue Service maintains an aggressive policy to ensure that transactions between related parties comply with Transfer Pricing regulations. This aggressive policy of the Nigerian Federal Inland Revenue Service has led to further Transfer Pricing audit exercises among associated taxable persons in Nigeria in this year 2021. For instance, the prevailing trend is for the Nigerian Federal Inland Revenue Service to demand further TP documentation, conduct interviews and investigate TP transactions with a view to disallow royalty payments for trade and marketing intangibles. It has been observed that the Nigerian Federal Inland Revenue Service is wont to query the payment of royalties to related entities with DEMPE functions especially where the substance of such intangible is not established by the associated taxable person. Associated taxable persons are often forced into a situation where they defend their positions on intangible transactions with related entities and end up compromising their position because they face an uncertain and likely unfavourable fate in litigation before the Tax Appeal Tribunal. The new procedure for the Nigerian Tax Appeal Tribunal requires an appellant (taxpayer) to pay 50% of the disputed tax liability into a designated account before an appeal can be commenced.

Conclusion

Associated taxable persons are therefore advised to determine by critical examination the value of any transaction with a related entity to its corporate endeavours. It is also essential for tax professionals to be engaged by associated taxable persons at the origination of transactions with related entities and through to their conclusion in Nigeria.

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Senegal

Implementation of Action 12 of BEPS project: a strengthened internal tax system

In Senegal, the Transfer Pricing provisions, largely inspired by the OECD Guidelines 2017, have been incorporated into the Senegalese General Tax Code. The recent reforms, in particular the transposition of action 12 of BEPS project by the 2021 finance law were extended by the amending finance law of the same year, in order to strengthen the provisions governing automatic exchange information relating to financial accounts and the obligation to identify the beneficial owners of companies.

It is established for financial institutions, credit establishments and similar organizations:

- an obligation to transmit information relating to the tax residences of all holders of financial accounts and, where applicable, of all individuals who control them,
- an obligation, from 1 January 2022, for individuals or entities that open financial accounts with financial institutions to submit self-certification to establish their tax residences and, where applicable, to establish the tax residences of individuals who control them, except when financial institutions are not required to collect them.

The information collected by the tax authorities from those individuals or entities may be communicated to the tax authorities of countries which have concluded agreements with Senegal allowing an automatic exchange of information regarding financial accounts.

Failure to comply with these two obligations is sanctioned by respectively a fine of XOF 5,000,000 or EUR 7,622.45 per account and XOF 10,000,000 or EUR 15,244.90 per account holder.

From now, all legal persons are required to:

- identify their beneficial owners and keep a register for this purpose at their head office in Senegal.
- keep accurate and up-to-date information relating to the identity of the beneficial owners, the nature, methods and extent of the control exercised over the legal person, and the date on which the individual(s) became or ceased to be the beneficial owners of the legal person.

Individuals or legal persons residing in Senegal who hold an administrators' role or manager of trusts, or other similar legal structures with headquarters outside Senegal, are required to declare to the Head of the Tax Department of their tax domicile, within 20 days following their appointment:

- the existence, terms and content of legal arrangements of this type that they manage or administer,
- the identity of the persons mentioned in the legal structure and the identity of the beneficial owners.

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Failure to comply with these obligations is punishable by a fine of XOF 10,000,000, or EUR 15,244.90 due as many times as there are documents or information requested and not produced, omitted, incomplete or inaccurate.

Taiwan

Supreme Administrative Court decides on one-time Transfer Pricing adjustments

On 23 December 2020, the Taiwanese Supreme Administrative Court issued judgement in case (109) Pan Tzu No. 661, concerning one-off adjustments to sales prices. The court denied that a one-time Transfer Pricing adjustment (Tai Tsai Shui No. 10804629000, announced on 15 November 2019) is eligible for a "one-time" sales allowance granted by the taxpayer to its subsidiary, due to a lack of supporting documents.

Development of one-time TP adjustments in Taiwan

In the past, one-time downward Transfer Pricing adjustments were recognized only under strict conditions,[1] including causes for adjustment beyond the control of the parties, e.g. an act of God or financial crisis.

To mitigate the risk of double taxation for multinational corporations and to reflect the economic substance of a controlled transaction, Taiwan's Ministry of Finance released a new tax ruling on one-time TP adjustments in November 2019, which accepts broader causes for adjustment. Enterprises now can make such adjustments before the year-end provided four criteria are met:

1. The parties have concluded transaction terms and all price-relevant factors in a prior bilateral agreement.
2. The adjusted accounts (accounts receivable & accounts payable) have been recorded for financial accounting purposes.
3. The counterparty in the controlled transaction has made a corresponding adjustment at the same time.
4. All taxes associated with the one-time adjustments are paid.

Background

The taxpayer, a Taiwanese company, claimed that the factors affecting market prices hadn't been fully considered while it sold products to its overseas subsidiary, which caused the subsidiary major losses. At the end of 2015, the taxpayer reviewed their quotation and

1 See the private tax ruling (Tai Tsai Shui No. 09704135400) issued by the Taiwanese Ministry of Finance on 31 March 2009.

made a reduction of transaction price, which was reported as a "sales allowance" on the tax returns. The tax authority denied their contra revenue account and required the taxpayer to file back taxes. The case was appealed to the Supreme Administrative Court in 2019, where the taxpayer claimed that a one-time TP adjustment should be applicable to their "one-time" sales allowances granted to the subsidiary prior to the end of 2015.

The decision

The court held that the one-time TP adjustment cannot be applied in this case for the following reasons:

1. A one-time TP adjustment is a mechanism provided to MNEs to achieve an arm's-length result when the agreed terms and conditions pertaining to the price-relevant factors are changed. Documents must demonstrate the reasons for making the adjustment, the method for the adjustment, and the terms and conditions of the adjustment.
2. The taxpayer provided only internal approvals and debit notes. There were no documents showing conditions or terms, whether price-relevant factors had been concluded by both parties, or how the adjustment would occur for each transaction. The record showed only a "one-time" sales allowance to reallocate the revenue between the subsidiary and the taxpayer. Without proper documents, the one-time TP adjustment could not apply to this case.

Observations

One-time TP adjustment allows taxpayers to adjust their accounting records by the year-end before closing the accounting. However, each adjusted account must have been recorded with supporting documents that show the reason for the adjustment. Contemporaneously reviewing intercompany prices for controlled transactions and keeping documentation for each affected transaction is the key for adopting a one-time TP adjustment.

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Thailand

TP legal framework and practical insights

1. Legal framework

By joining the Inclusive Framework on Base Erosion and Profit Shifting on 2 June 2017, Thailand committed itself to the implementation of the BEPS minimum standards.

As a consequence, the Act Amending the Revenue Code on Transfer Pricing ("Transfer Pricing Act") was announced on 18 November 2018 and came into effect on 1 January 2019, requiring any company with annual revenue of over THB 200 million (approx. EUR 5 million) to submit a Transfer Pricing disclosure form together with its annual tax return.

Furthermore, Thailand signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters on 3 June 2020, becoming its 137th signatory state. Although the local laws regarding the automatic exchange of information requirements known as the Common Reporting Standard ("CRS") and CbCR are yet to be implemented, they will enable the automatic exchange and reporting of certain taxpayer information with other country revenue departments.

2. Practical insights

Although the power of tax officials to adjust intercompany prices to arm's length existed before the introduction of the Transfer Pricing Act, recent tax audits show that the Thai Revenue Department increasingly focusses on Transfer Pricing, and it has a growing number of TP experts in its specialized audit teams. This may partially be attributed to the increased international focus on BEPS but also to Thailand's economic situation and the burden on the government to boost tax revenue to finance its annual budget, which is particularly under pressure due to the substantial COVID-19 relief measures.

Therefore, the tax audits also target fiscal years prior to the implementation of the Transfer Pricing Act in 2020 and may even target companies that had previously undergone tax audits that did not focus on TP matters.

Apart from the scrutiny of the Thai Revenue Department itself, taxpayers should also be aware of increasing cooperation between domestic agencies.

In particular, it should be noted that the Thai Revenue Department shares information provided in the Transfer Pricing disclosure form, amongst other things, with the Customs Department. The Customs Department can then use the provided information on intercompany payments (such as royalties, license fees, technical service fees, commissions etc.) to determine whether such intercompany payments meet the conditions prescribed under the customs regulation for inclusion into the customs value of imports. Together with other available information, the Customs Department gains extensive insight into a company's operations. Thai customs officers are highly incentivized to audit or investigate companies for customs offences because they are rewarded with substantial rewards for uncovering certain offences.

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United States

The US' role in global adoption of Pillar 1 and Pillar 2/ ongoing conversations in the US on tax reform/ a status update on US tax reform

US tax reform is linked to the ongoing conversations at the OECD. On 8 October 2021, the OECD announced that 136 Inclusive Framework members signed onto its Pillar 1 and Pillar 2 deals. Among other provisions, this includes: a special purpose nexus rule granting the right to tax a portion of digital profits in the absence of a traditional taxable presence (i.e. Amount A), reallocation of 25% of profits above a 10% profit before tax margin to market jurisdictions and a 15% global minimum tax (GMT) rate.

The Biden Administration's initial tax reform proposal differed from that of the OECD. It proposed raising global intangible low-taxed income (GILTI) to 21% and specifies it should be calculated on a country-by-country basis. It also eliminates the exemption of the 10% return on tangible investment abroad and repeals deductions for foreign-derived intangible income (FDII). In response, three Democratic Senators introduced a draft bill overhauling GILTI and FDII entirely, as well as Base Erosion and Anti-Abuse Tax (BEAT). The bill equal-

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izes the GILTI minimum rate with the FDII rate and switches to country-by-country calculations for GILTI. It also alters the calculation method for FDII to a percentage of R&D and worker training expenses.

The Biden Administration later conceded on the 15% GILTI provision. US Treasury Secretary Yellen stated on 10 October that she is "confident that what we need to do to come into compliance with the minimum tax will be included in a reconciliation package." Prior to 8 October, the Department of the Treasury had called for a 21% minimum tax citing the need to fund improvements in infrastructure, education, research, and clean energy. Now, Biden and Congressional Democrats are seeking alternatives to fund such initiatives, including a wealth tax or a tax on stock buybacks, but no official statements have been made.

Congressional opposition is that the benefits under Pillar 2 don't offset the compromises under Pillar 1 where the US cedes much of its tax base to market jurisdictions. Almost half of the multinationals (MNEs) subject to Amount A are US-headquartered and as the future revenue threshold decreases, more US MNEs will be subject to Amount A.

The US is expected to benefit from Pillar 2. The Global Anti-Base Erosion (GloBE) rules are designed to co-exist with President Biden's GILTI updates and a GMT rate would decrease the differential between US and foreign tax rates, reducing the incentive for profit shifting. However, the 15% rate coupled with US state taxes have lessened this differential. Moreover, the Biden Administration had been pushing for 20% profit reallocation under Amount A, lower than the 25% agreed by the OECD Inclusive Framework.

Thus, the treaty could hit a blockade in the US. Democrats maintain a Senate majority via a tie-breaker vote by Vice President Harris. This slim majority could be enough to pass the 15% GILTI provision. On the other hand, Pillar 1 would be implemented via treaty ratification, which requires a super-majority of 67 Senate votes. Some have suggested legislation as a workaround if a super-majority is not reached.

14 October saw the French Finance Minister announce that the US had reached an agreement with certain European countries to withdraw unilateral digital services taxes (DSTs). The US has not made an official statement, but this is a necessary step to adopt Pillar 1. A decision on Pillar 2 is possible by the end of this year or early next, but several aspects of Pillar 1 have yet to be agreed.

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Vietnam

Transfer Pricing Update Vietnam

The Vietnamese tax authorities are paying special attention to TP compliance, especially to identifying deficiencies in ascertaining related party transactions. They must be reported with every CIT finalization, also in cases not reaching the threshold for the requirement of having a TP documentation. No TP documentation must be provided if the enterprise has:

- sales in the tax year below VND 50 billion (around USD 2.2 million); or
- a value of related-party transactions in the tax year not exceeding VND 30 billion (around USD 1.3 million)

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If the related party transactions are not identified carefully, the threshold of not exceeding VND 30 billion might be used incorrectly.

The TP documentation must be present at the enterprise at the time of filing the CIT finalization but will not be filed to the Vietnamese tax authorities. During a regular tax audit, the Vietnamese tax authorities will usually request receipt of the TP documentation, which must be presented promptly.

If, during the tax audit, the Vietnamese tax authorities see that the report on the related party transactions is missing important transactions, a TP audit will probably follow.

This is particularly the case if the correction in identifying the related party transaction will cause the sum to exceed the threshold. In this case, the enterprise normally cannot present the TP documentation because it was wrongly assumed that it had not exceeded the threshold.

Decree 132/2020/ND-CP (Decree 132) is effective beginning with the tax year 2020. It broadens the definition of related parties that includes:

→ Parties that are directly or indirectly involved in the management, control, or capital contribution of the other party. This includes especially these cases:
→ A party holds directly or indirectly at least 25% of the equity in the other party.
→ A third party holds directly or indirectly at least 25% of the equity in each of the parties.
→ A party holding the greatest ownership interest but at least 10% in a joint stock company.
→ A party granting or guaranteeing a loan in any form if the loan(s) equals at least 25% of the equity of the borrowing party and constitutes more than 50% of the total medium- and long-term debts of the borrowing party.
→ A party appoints members of the executive board of the other party with certain powers or exceeding 50% of the members.
→ Both parties are managed or controlled by members of the same family.
→ Loans or certain transfers of equity with executive managers or controllers or their family members.
→ Both parties are under the effective control of the same person.
→ The party is de facto managed or controlled by the other party.

For the financial year 2020, the definition of the related party transactions should be checked early before a possible audit, so that either the TP documentation can be made or adjusted before the audit. It should be avoided that the enterprise wrongly assumes that no TP documentation is required.

Decree 132 also changed the benchmarking requirements. The requirements now are very detailed and emphasize the importance of using internal comparables along with those from Vietnam and - if they are not available - the region. Priority must be given to data from economic sub-sectors with the closest similarities.

If the TP documentation has not been provided according to the benchmarking requirements or is missing because of the incorrect identification of the related party transaction, the Vietnamese tax authorities will fix the amount of CIT payable according to its considerations. If not prepared well, the taxpayer will have a very weak position here.

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Glossary

Adminis-trative Principles	Administrative Principles Transfer Pricing
APA	Advance Pricing Agreement
ATAD	Anti-Tax Avoidance Directive
BEAT	Base Erosion and Anti-Abuse Tax
BEPS	Base Erosion and Profit Shifting
CbCR	Country by Country Reporting
CIT	Corporate Income Tax
CRS	Common Reporting Standard
DEMPE	Development, Enhancement, Maintenance, Protection and Exploitation
DST	Digital Services Tax
EU	European Union
FDII	Foreign-derived Intangible Income
FTA	German Foreign Tax Act (AStG)
FY	Fiscal Year
GILTI	Global Intangible Low-taxed Income
GloBE	Global Anti-Base Erosion
GMT	Global Minimum Tax
IC	Intercompany
ISFUT	Electronic ticket and the real estate surcharge tax
LF	Local File
LNG	Liquid Natural Gas
LRD	Limited Risk Distributors
MF	Master File
MNE	Multinational Enterprise
OECD	Organization of Economic Cooperation and Development
OECD Guide-lines	OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
PSM	Profit Split Method
TP	Transfer Pricing
VAT	Value Added Tax
WTRMA	Withholding Tax Relief Modernization Act

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