

Transfer Pricing

Contributing editor
Jason M Osborn



2019

GETTING THE
DEAL THROUGH

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Mayer Brown LLP

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This article was first published in August 2018
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Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

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First published 2014
Fifth edition
ISBN 978-1-78915-079-7

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Preface

Transfer Pricing 2019

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Transfer Pricing*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our new coverage this year includes Korea.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Jason M Osborn of Mayer Brown LLP, for his continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
July 2018

Albania

Andi Pacani

Boga & Associates

Overview

1 Identify the principal transfer pricing legislation.

Albanian transfer pricing legislation is covered by article 2 (for the definitions) and articles 36-36/7 of the Income Tax Law (ITL). The minister of finance has further issued Instruction No. 16, dated 18 June 2014, on Transfer Pricing concerning general rules on transfer pricing and Instruction No. 9, dated 27 February 2015, on Advance Pricing Agreements (APAs).

2 Which central government agency has primary responsibility for enforcing the transfer pricing rules?

The responsibility for the enforcement of transfer pricing rules lies with the General Tax Directorate (GTD).

3 What is the role of the OECD Transfer Pricing Guidelines?

Instructions mentioned above are based on the principles of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD TPG 2010). However, in the case of differences or conflicts between the OECD TPG 2010 and Albanian Income Tax Law and Instructions, the Albanian legislation prevails.

4 To what types of transactions do the transfer pricing rules apply?

As defined by the ITL, transfer pricing rules will apply to all types of transactions between associated parties that may impact the taxable income of a taxpayer, including transactions involving:

- tangible goods, such as raw materials;
- finished goods;
- services transactions;
- transactions involving intangible property, such as:
 - royalties;
 - licences;
 - payments for the use of patents, trademarks, know-how, etc; and
 - any other intellectual properties;
- financial transactions;
- capital transactions, including the purchase or sale of shares or other investments; and
- the purchase or sale of long-term tangible and intangible assets.

Associated parties are deemed to be two persons where one of them is considered to 'effectively control the business decisions of the other person'. Namely, the term 'associated parties' will apply if the first-mentioned person:

- holds, or can control, 50 per cent or more of the voting rights than the other (legal) person;
- can control the composition of the board of directors of the other (legal) person;
- has the right to share in 50 per cent or more of the profits of the other person; or
- based on evidenced facts and circumstances, controls the business decisions of the other person.

The term also applies if the other person is a relative, or associated party of a relative, or the first-mentioned person. It is to be noted

that the burden of proof for demonstrating that a person 'effectively controls the business decisions of the other person' falls on the tax administration.

5 Do the relevant transfer pricing rules adhere to the arm's-length principle?

Yes.

6 How has the OECD's project on base erosion and profit shifting (BEPS) affected the applicable transfer pricing rules?

Albanian legislation on transfer pricing makes reference to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (TPG 2010). No automatic application of the revisions to the OECD Transfer Pricing Guidelines made by the final reports on BEPS Actions 8 to 10 is possible. For the new rules to be applicable, Albanian law must be amended accordingly.

Pricing methods

7 What transfer pricing methods are acceptable?

The law provides for an approved list of methods, namely:

- the comparable uncontrolled price method;
- the resale price method;
- the cost plus method;
- the transactional net margin method; and
- the transactional profit split method.

However, taxpayers are allowed to apply a transfer pricing method other than the above-mentioned, in the case that it can be proved that none of the above methods can be reasonably applied to determine consistency with the market principle for the controlled transaction, and such other method yields a better result.

8 Are cost-sharing arrangements permitted? Describe the acceptable cost-sharing pricing methods.

There are no special provisions regarding the cost-sharing arrangements. However, those between the non-resident and its permanent establishment in Albania are considered controlled transactions.

9 What are the rules for selecting a transfer pricing method?

The legislation does not provide for any hierarchy of the methods. However, the taxpayer using a method other than the approved methods mentioned above should bear the burden of demonstrating that the method used yields a result consistent with the market principle.

10 Can a taxpayer make transfer pricing adjustments?

Pursuant to the Tax Procedure Law, taxpayers are allowed to adjust any tax return within 36 months of the initial filing. The specific transfer pricing legislation provides for two types of adjustments related to transfer pricing:

- where the financial indicators derived from the controlled transactions fall outside the market range (as defined in the Tax Procedure Law), the tax authority (with the written approval of

- the General Tax Director) may make an adjustment to the taxable income of the taxpayer; and
- where an adjustment related to the conditions of a controlled transaction is made by a tax administration in another country with which Albania has a double tax treaty, an adjustment to reflect such condition may be made by the taxpayer with the written approval of the General Tax Director.

11 Are special 'safe harbour' methods available for certain types of related-party transactions? What are these methods and what types of transactions do they apply to?

There is no safe-harbour method available.

Disclosures and documentation

12 Does the tax authority require taxpayers to submit transfer pricing documentation? Regardless of whether transfer pricing documentation is required, does preparing documentation confer any other benefits? What content must be included in the transfer pricing documentation? Are a separate 'master file' and 'local file' required? What are the acceptable languages for the transfer pricing documentation?

All taxpayers should submit to the Regional Tax Directorate before or on 31 March of each year (starting from 2015) the annual controlled transactions form for the transactions of the previous year. Subject to such requirement are those taxpayers engaged in controlled transactions (including loan balances), which in aggregate, within the reporting period, exceed 50 million leks.

In the form, the taxpayer must disclose:

- the amount of controlled transactions for each associated party;
- classification of transaction;
- residency of the associated parties;
- method used for transfer pricing; and
- a simple confirmation whether the transfer pricing documentation has been prepared or not.

Failure to submit the annual controlled transactions form on time is subject to a penalty of 10,000 leks per month. In the case that the tax obligations are reassessed by tax authority, but the taxpayer has complied with the transfer pricing documentation, there will be no penalty (ie, the taxpayer has to pay only the additional tax obligation and interest).

Transfer pricing documentation should be provided to the tax administration at its request within 30 days of receiving the request. The documentation should be prepared based on the approach detailed in the code of conduct on transfer pricing documentation for associated enterprises in the European Union and the Annex thereof, approved by Resolution 2006/c176/01 of 27 June 2006 from the EU council and government representatives of member states.

The taxpayer should submit the transfer pricing documentation within 30 days (which is 10 days more than the general rule for submission of information required from the tax authorities). Failure to submit the documentation gives tax authorities the right to reassess the taxable base of the taxpayer using alternative methods. Given that the transfer pricing legislation is new, no practice has yet been established in this regard.

- an overview of the taxpayer's business operations (history, recent evolution and general overview of the relevant markets of reference) and organisational chart (details of business units or departments and organisational structure);
- a description of the corporate organisational structure of the group that the taxpayer is a member of (including details of all group members, their legal form and their shareholding percentages) and the group's operational structure (including a general description of each the group member's role with respect to the group's activities, as relevant to the controlled transaction or transactions);
- a description of the controlled transaction or transactions, including analysis of the comparability factors, explanation of the selection of most appropriate transfer pricing method or methods, comparability analysis, including a description of the process undertaken to identify comparable uncontrolled transactions;
- an explanation of the basis for the rejection of any potential internal comparable uncontrolled transactions (where applicable);

- a description of the comparable uncontrolled transactions;
- analysis of comparability of the controlled transaction or transactions and the comparable uncontrolled transactions, and explanation of any economic analysis and projections relied on; and
- a conclusion as to consistency of the conditions of the controlled transactions with the market principle, including details of any adjustment made to ensure compliance and any other information that may have a material impact on the determination of the taxpayer's compliance with the market principle with respect to controlled transactions.

The above-mentioned information should be presented in two separate files: a master file and a local file.

Transfer pricing documentation may be submitted in the Albanian or English language. However, the tax authority may require the translation of documents even if prepared in English. An additional 30 days is given to the taxpayer to translate the documentation.

The preparation and the submission of the transfer pricing documentation will avoid the penalties (taxpayer will pay only the tax obligation assessed and the respective interest) in the case of price adjustments.

13 Has the tax authority proposed or adopted country-by-country reporting? What are the differences between the local rules adopting country-by-country reporting and the consensus framework of BEPS Action 13?

There is no a country-by-country reporting in place. Tax authorities have not proposed or initiated any discussion regarding the changes in relation with BEPS.

14 When must a taxpayer prepare and submit transfer pricing documentation?

Transfer pricing documentations is submitted upon request of tax authorities. Instead, the annual controlled transactions form should be filed before or on 31 March of the next year.

15 What are the consequences for failing to submit documentation?

Taxpayers failing to submit the annual controlled transactions form are subject to a penalty of 10,000 lek for each month of delay. Failure to submitted the transfer pricing documentation when required by the tax authorities will waive the protection from penalties in case of price adjustments.

Adjustments and settlement

16 How long does the tax authority have to review an income tax return?

There is no deadline for reviewing the transfer pricing filing. However, the statute of limitation generally is five years, so no reassessment can be enforced after such time.

17 If the tax authority asserts a transfer pricing adjustment, what options does the taxpayer have to dispute the adjustment?

Any adjustment that will result in a tax obligation increase may be challenged in administrative proceedings within the GTD, and if the decision is not accepted then it may be challenged in an administrative court.

Relief from double taxation

18 Does the country have a comprehensive income tax treaty network? Do these treaties have effective mutual agreement procedures?

Albania does not have a wide tax treaty network – only 40 are in force. The treaties are based on the OECD model and generally have a mutual agreement procedure (MAP).

19 How can a taxpayer request relief from double taxation under the mutual agreement procedure of a tax treaty? Are there published procedures?

There are no procedures yet published or set by practice on how a taxpayer can request relief under a MAP.

20 When may a taxpayer request assistance from the competent authority?

Generally, taxpayers may request assistance at any time from tax authorities.

21 Are there limitations on the type of relief that the competent authority will seek, both generally and in specific cases?

There are no limitations under domestic law. Double tax treaties will set out time limits for making a claim (these usually provide for three years).

22 How effective is the competent authority in obtaining relief from double taxation?

The effectiveness of GTD has not been tested in practice. There has been no case of a MAP used for transfer pricing issues yet.

Advance pricing agreements

23 Does the country have an advance pricing agreement (APA) programme? Are unilateral, bilateral and multilateral APAs available?

In February 2015, the Minister of Finance released an instruction governing the process of APA. Based on this instruction, unilateral, bilateral and multilateral APAs are possible.

24 Describe the process for obtaining an APA, including a brief description of the submission requirements and any applicable user fees.

The process is structured in six phases: pre-filing meeting, APA application, assessment, negotiation, drafting and execution, and annual compliance reporting.

An initial non-refundable fee of 50,000 leks is paid before the pre-filing phase and after that 300,000 leks for unilateral APAs and 1.2 million leks for bilateral and multilateral APAs.

25 How long does it typically take to obtain a unilateral and a bilateral APA?

There is no official practice showing how long it takes; however, based on the time limits of each phase mentioned above it should take between 260 to 350 days.

26 How many years can an APA cover prospectively? Are rollbacks available?

An APA may cover a maximum of five years with the exemption of APAs related to the application of agreements ratified by the Albanian parliament. No rollbacks are allowable. In addition, only the requests for controlled transactions exceeding €30 million will be considered.

27 What types of related-party transactions or issues can be covered by APAs?

There is no limitation on types of transactions.

28 Is the APA programme widely used?

There are no APAs in place currently in Albania.

29 Is the APA programme independent from the tax authority's examination function? Is it independent from the competent authority staff that handle other double tax cases?

The APA programme is handled within the GTD under the Transfer Pricing Sector, as part of the Operational Directorate. The staff who handle double tax treaties report to the technical director.

30 What are the key advantages and disadvantages to obtaining an APA with the tax authority?

As indicated above, the advantages of an APA are not yet tested in practice. Theoretically, the advantage will be the clarity on applying the transfer pricing.

Special topics

31 Is the tax authority generally required to respect the form of related-party transactions as actually structured? In what circumstances can the tax authority disregard or recharacterise related-party transactions?

There is no official practice, but it is expected that TPG 2010 will apply.

32 What are some of the important factors that the tax authority takes into account in selecting and evaluating comparables? In particular, does the tax authority require the use of country-specific comparable companies, or are comparables from several jurisdictions acceptable?

Theoretically, the following factors should be considered important factors:

- the characteristics of the property or services transferred;
- the functions undertaken by each party with respect to the transactions, taking into account assets used and risks assumed;
- the contractual terms of the transactions;
- the economic circumstances in which the transactions take place; and
- the business strategies pursued by parties in relation to the transactions.

33 What is the tax authority's position and practice with respect to secret comparables? If secret comparables are ever used, what procedures are in place to allow a taxpayer to defend its own transfer pricing position against the tax authority's position based on secret comparables?

There is no practice, but it is expected that TPG 2010 will apply.

34 Are secondary transfer pricing adjustments required? What form do they take and what are their tax consequences? Are procedures available to obtain relief from the adverse tax consequences of certain secondary adjustments?

There are no requirements regarding secondary adjustments. In addition, current tax legislation does not provide for any special relief or penalties in this regard.

35 Are any categories of intercompany payments non-deductible?

There are no special provisions related to intercompany payments. The management fees and interest payments are considered deductible (or not) without taking into consideration the provider or beneficiary of the payment.

36 How are location savings and other location-specific attributes treated under the applicable transfer pricing rules? How are they treated by the tax authority in practice?

There are no location savings incentives per se, but the new incentives granted to economic zones aims, inter alia, to create an effective administrative process to provide essential government services and provide tax incentives.

37 How are profits attributed to a branch or permanent establishment (PE)? Does the tax authority treat the branch or PE as a functionally separate enterprise and apply arm's-length principles? If not, what other approach is applied?

In practice, branches (which are the only possible way to register a PE) are considered as a separate enterprise, and the tax authority applies the arm's-length principles.

38 Are any exit charges imposed on restructurings? How are they determined?

No, there are no such regulations. Albania is usually a host country, and no exit charges are seen as necessary.

39 Are temporary special tax exemptions or rate reductions provided through government bodies such as local industrial development boards?

Other than the tax incentives granted to economic zones, there are no tax exemptions or reductions available.

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