

Overview

Taxhouse, Taxand Romania

Taxhouse is a tax advisory firm based in Romania, and is the local member of Taxand Global, offering a comprehensive and integrated range of tax consultancy and related compliance services in domestic corporate and international direct tax, indirect tax, transfer pricing, tax representation, tax litigation, etc.

Our transfer pricing services include, but not limited to:

- ❖ Design and preparation of transfer pricing policies at group or company level;
- ❖ Preparation of transfer pricing files (master file, country file);
- ❖ Country by Country reports and notifications, public Country by Country reporting;
- ❖ Review of existing transfer pricing and documentation or guidance in preparing the required files;
- ❖ Preparation of the benchmarking studies for local purposes and Group purposes;
- ❖ Drafting and negotiation of Advance Pricing Agreements (APA); and
- ❖ Dispute resolution services: representation and assistance during fiscal audits, assistance during the administrative appeal stage and judicial expertise services,
- ❖ MAP procedures.
- ❖ Review of the supply chain and business and advise on transfer pricing matters, in direct correlation with the indirect tax consequences;

General: Transfer Pricing Framework

The Romanian transfer pricing legislation follows the OECD Transfer Pricing Guidelines ("OECD TPG") and requires that transactions between related parties be carried out at arm's length. The rules apply to both domestic and non-domestic transactions. The obligation to comply with the arm's length principle and the general documentation requirements are provided by the Romanian Fiscal Code and Order no. 442/2016 issued by the President of the National Agency for Tax Administration ("Order 442/2016").

Order 442/2016 establishes: (i) thresholds for each category of taxpayer for the value of intra-group transactions above which taxpayers may be required to prepare transfer pricing documentation demonstrating that the intra-group transactions have been carried out at market value, and (ii) the rules on the content of the transfer pricing documentation file, as well as the procedure for adjusting/estimating transfer prices.

If the intra-group transactions are not set at arm's length, the Romanian tax authorities ("RTA") have the right to adjust the taxpayer's income and expenses to reflect the market conditions. Such adjustments could lead to additional corporate income tax liabilities and related late payment interest and penalties.

Accepted Transfer Pricing Methodologies

The Romanian TP legislation follows the OECD TPG in applying the arm's length principle and contains specific regulations regarding the transfer pricing methods provided by OECD TPG (i.e., comparable uncontrolled price method, resale price method, cost plus method, profit split method, transactional net margin method). Also, there is a direct provision related to "any other method" provided by OECD TPG.

There is no hierarchy in choosing one specific method, as the generally accepted standard is to choose the most appropriate method, as described in the OECD TPG. The taxpayer, however, must be able to substantiate why the chosen method is appropriate in light of the relevant facts and circumstances.

In practice, the CUP method is the preferred method by the RTA. However, as comparable uncontrolled transactions are usually difficult to find, TNMM method is the most popular transfer pricing method.

Transfer Pricing Documentation Requirements

The Romanian TP legislation follows the OECD TPG and provides specific regulations on the content of the TP file, which is comprised of: (i) a group section (containing information regarding the group as a whole) and (ii) a taxpayer section (containing information regarding the taxpayer and each related party transaction).

Reporting requirements

- ❖ Large taxpayers, identified as such by the Romanian tax authorities, based on specified criteria, are obliged to have their TP documentation ready by the time of submission of the annual corporate income tax return. This date is currently the 25th of June of the year following the reporting one. Compliance requirements exist should their intra-group transactions exceed certain annual thresholds: EUR 200,000 for interest on financial services, EUR 250,000 for services and EUR 350,000 for acquisition or sale of tangible or intangible assets. The TP file is not to be submitted to the tax authorities, but it can be requested at any point, not only during a tax audit, and the deadline for provision is within 10 calendar days.

- ❖ Large taxpayers that do not meet the above thresholds, as well as medium or small taxpayers, are obliged to prepare the TP documentation if they carry out transactions with related parties exceeding the following annual thresholds: EUR 50,000 for interest on financial services, EUR 50,000 for services, and EUR 100,000 for acquisition or sale of tangible or intangible assets. Different from the rule mentioned above for large taxpayers, the RTA have the right to request the TP file only during a tax inspection and to grant the taxpayer 30 to 60 calendar days to prepare and submit the file. This term may be extended upon request of the taxpayer and the approval of the tax authorities with another 30 calendar days.

The CbCR requirements apply to MNE groups having consolidated income reported in the last fiscal year prior to the reporting period equal to or exceeding EUR 750 million. An entity with tax residence in Romania is required to file a CbCR with respect to its reporting fiscal year if the entity is: (i) the ultimate parent entity of the MNE group, (ii) the surrogate parent entity, being appointed by the MNE group as a sole substitute for the ultimate parent entity or (iii) a constituent entity of the MNE group, having the obligation under certain conditions of filing the CbCR in Romania on behalf of such MNE group (e.g., the CbCR for the MNE group is submitted in a non-EU jurisdiction). The filing term of the CbCR is within 12 months since the last day of the reporting fiscal year of the MNE Group.

The Romanian resident entity that does not fulfill the criteria mentioned above (i.e. not being the final parent entity or the surrogate parent entity or the designated constituent entity), but is part of a MNE Group that has consolidated group revenue over EUR 750 million during the fiscal year preceding the reporting fiscal year, has the obligation to notify the relevant Romanian authorities with regard to the identity and residence of the reporting entity until the last day of the reporting fiscal year of the MNE Group at the latest, but not later than the submission deadline of the tax statement of the respective constituent entity for the previous year.

In September 2022, Romania became the first EU member state to publish legislation transposing the Directive 2021/2101/EU on **public Country-by-Country reporting** ("EU Public CbCR Directive") and to choose to implement the reporting early, as the rules entered into force on 1 January 2023. The provisions of EU Public CbCR Directive have been implemented by Order no. 2048/2022 issued by the Ministry of Public Finance. Also, recent amendments have been introduced by Order 1730/2023 which provides further clarifications to the existing rules which are applicable as from 1 January 2023.

The first publication will take place within 12 months from the date of the balance sheet of the first financial year and will need to be made available for five years. The first publication will take place no later than 31 December 2024, for a financial year that ends on 31 December 2023.

The reporting obligations are applicable to: (i) Romanian

ultimate parent entities of MNE Groups with a total global consolidated revenue exceeding EUR 750 million for each of the last two consecutive financial years, (ii) medium and

large Romanian subsidiaries that are controlled by an ultimate parent company that is not governed by an EU Member State law, (iii) branches set up in Romania by entities that are not governed by the law of an EU member state and whose ultimate parent entity is also not subject to the law of an EU Member State.

No specific non-compliance penalties have been introduced to date in the Romanian legislation. It is expected that such penalties will be introduced through an update to the Romanian accountancy law.

Local Jurisdiction Benchmarks

The generally accepted standard in Romania is to choose the most appropriate method, in line with the OECD TPG. In practice, the CUP method is the preferred method by the RTA. However, as comparable uncontrolled transactions are usually difficult to find, TNMM method is the most popular transfer pricing method.

The Romanian transfer pricing legislation provides the following specific rules in respect of benchmarking studies:

- ❖ Territorial search requirements: the search has to be carried out first on the Romanian territory and if no/insufficient comparable companies are found, the search is to be extended to EU/pan-European/international territory;
- ❖ Independence requirements:
 - Only companies where shareholders – legal entities have a stake of less than 25% are accepted;
 - Companies where (i) the individual shareholder which owns more than 25% in that company is also known to have, as per the information included in public databases, shareholdings and/or management positions in other companies and (ii) any person that (presumably) has control (given its position) in that company is also known to have, as per the information included in the databases, management positions/ shareholdings in other companies as well, are rejected.

The OECD TPG provides the framework for tax administrations to accept for a benchmark to be performed once every three years with financials updated on an annual basis provided that the operating conditions, including market conditions, remain unchanged. This is a fact which has to be documented in the transfer pricing file. There are no specific Romanian rules in this respect. In practice, the preference of the RTA is to have a benchmark performed every year.

Advance Pricing Agreement "APA"/Bilateral Advance Pricing Agreement "BAPA" Overview

Taxpayers engaged in transactions with related parties have the possibility to apply for an APA. The Romanian legislation regulating the APAs is Law no. 207/2015 regarding the Fiscal Procedural Code and the Order of the President of the Romanian Tax Administration no. 3735/2015 regarding the approval for issuing or amending an APA, as well as the content of the application for issuing or amending an APA.

Unilateral, bilateral and multilateral APAs can be issued as per the Romanian law. APAs are issued for a period of up to five years, with possibility of extension in case of long-term contracts. The terms for issuing APAs are 12 months for unilateral APAs and 18 months for bilateral and multilateral. Currently, the Romanian legislation is not allowing roll-back for APAs issued.

The fees charged by the RTA for the APA procedure are as follows:

- ❖ 20.000 Euro for issuing an APA and 15.000 Euro for modifying it, in case of large taxpayers.
- ❖ 10.000 Euro for issuing an APA and 6.000 Euro for modifying it, in case of small and medium size taxpayers.

Also, if the consolidated value of transactions covered in APA exceeds the equivalent of 4.000.000 Euro or if the taxpayer is classified as "large taxpayer" within the period of validity covered in APA, the issuing fee becomes 20.000 Euro.

We note that in practice, the RTA have issued a very limited number of APAs and the process is very time consuming and bureaucratic on account of the limited resources involved by the RTA in this process.

Transfer Pricing Audits

The RTA are performing risk assessments for transfer pricing purposes of various taxpayers and industries. The RTA are preparing list of potential companies which are subject for transfer pricing audits. The following financial or tax aspects could trigger a transfer pricing audit:

- ❖ tax accounting or operating losses/small profit margins/significant fluctuations in profitability;
- ❖ significant share of intra-group transactions in total transactions;
- ❖ transactions with entities located in jurisdiction with low taxation;
- ❖ expiration of the prescription tax period;
- ❖ VAT refund claims made by taxpayers;
- ❖ business restructuring;
- ❖ voluntary transfer pricing adjustments recorded by the taxpayer;
- ❖ CbC Reports;
- ❖ significant management consultancy or intra-group services received from above;
- ❖ non correlation of the amounts declared in various tax returns
- ❖ late payment of the corporate income tax or other taxes;
- ❖ late submission or not submission of the tax returns;

In case of transfer pricing adjustments, there are the following alternatives for avoidance of double taxation:

- 1) Tax appeal and Court litigation when a Romanian judge is going to issue a final decision in respect of the approach of the RTA during a transfer pricing audit;
- 2) MAP - As an alternative to local court litigation, the MAP can be applied to adjustments done on transactions performed with non-resident and resident affiliated parties.

Burden of Proof in Transfer Pricing: Theory versus Practice

According to the Romanian legislation, the supporting documents and accounting records of the taxpayer serve as evidence in determining the taxable base. If there are other supporting documents, these shall also be considered when establishing the taxable base. The taxpayer has the burden of proving the acts and facts that form the basis of their declarations and any requests submitted to the tax authority.

However, in practice RTA are making an aggressive approach and they are preparing their own benchmarking studies and trying to find all kind of ways to deny or to reject benchmarking studies prepared by the taxpayer. In Romania, OECD action 14 BEPS is fully implemented, meaning that you have Masterfile documentation, local file documentation and CbC reporting and even more, the public CbC reporting. Transfer pricing aspect and issues together with other taxes, such as VAT, customs, deductibility of the services received from the Group are now elevated from the Romanian Litigation Courts through an European Court of Justice.

Transfer Pricing Penalties

Non-presentation / incomplete presentation of the **local TP file** within the deadline provided by the law is sanctioned with a fine ranging between RON1 12,000 (approx. 2,400 EUR) and RON 14,000 (approx. 2,800 EUR) for

large and medium size taxpayers, respectively between RON 2,000 (approx. 400 EUR) and RON 3,500 (approx. 700 EUR) for small size taxpayers. Separately, adjustment of tax base plus late payment interest and penalties may be applicable.

Interest and penalties related to additional corporate income tax caused by transfer pricing adjustments done by the RTA:

- ❖ late payment interest (i.e. 0.02%/ day late);
- ❖ late payment penalties (i.e. 0.01%/ day late);
- ❖ non-declaration penalties (i.e. 0.08%/ day late).

The penalties presented above are significant for a long audited period. The penalties are related to the transactions performed with non-resident related parties or Romanian related parties. If the additional corporate income tax assessed from transfer pricing adjustments is paid, the non-declaration penalty decrease with 70%.

For failing to file a CbC report, the penalty ranges from RON 70,000 (approx. 14,000 EUR) to RON 100,000 (approx. 20,000 EUR). For late filing of a CbC report or for incomplete/incorrect data in a CbC report, the penalty ranges from RON 30,000 (approx. 6,000 EUR) to RON 50,000 (approx. 10,000 EUR). For failing to file the CbC notification, the penalty ranges from RON 500 (approx. 100 EUR) to RON 1,000 (approx. 200 EUR) for small size taxpayers, while the penalty ranges from RON 1,000 (approx. 200 EUR) to RON 5,000 (approx. 1,000 EUR) for medium size and large taxpayers. There is no clear information from the Romanian authorities which is the penalty for not respecting the legal requirements for public CbCR but our opinion is that the penalty is approximately EUR 1,000 according to the accounting law.

Local Hot Topics and Recent Updates

Mutual Agreement Procedure (MAP)- there is the legal possibility to apply the MAP procedure for avoidance of double taxation for transfer pricing adjustments done by the RTA. As an alternative to local court litigation, the MAP can be applied to adjustments done on transactions performed with non-resident and resident affiliated parties. The MAP procedure should be very easy to be applied for adjustments derived from transaction with EU related parties because Romania implemented the Directive 2017/1852. However, in practice we observe defensive approach in the RTA in avoiding the involvement in discussions with other tax authorities under the umbrella of MAP. The RTA are trying to find all kind of justification in order to reject de applicability of MAP or to exit from the MAP opened by the Romanian taxpayers.

Documentation threshold

Master file	N/A
Local file	Annual thresholds for large taxpayers: EUR 200,000 in the case of interest for financial services, EUR 250,000 in the case of services and EUR 350,000 in the case of acquisitions or sales of tangible or intangible assets. Annual thresholds for other taxpayers (including large taxpayers whose intra-group transactions do not meet the above thresholds): EUR 50,000 in the case of interest for financial services, EUR 50,000 in the case of services, EUR 100,000 in the case of acquisitions or sales of tangible or intangible assets
CbCR	EUR 750 million Group consolidated annual turnover

Submission deadline

Master file	N/A
Local file	For large taxpayers: the TP file is not submitted to the tax authorities, but it can be requested at any point (not only during a tax audit) and the deadline for provision is between one and 10 calendar days. Other taxpayers (including large taxpayers whose intra-group transactions do not meet the above thresholds): the RTA have the right to request the TP file only during a tax inspection and to grant the taxpayer 30 to 60 calendar days to prepare and submit the file. The term may be extended with another 30 calendar days depending on the decision of the RTA.
CbCR	12 months since the last day of the reporting fiscal year of the MNE Group

Penalty Provisions

Documentation – late filing provision	RON 12,000 (approx. 2,400 EUR) and RON 14,000 (approx. 2,800 EUR) for large and medium size taxpayers, respectively between RON 2,000 (approx. 400 EUR) and RON 3,500 (approx. 700 EUR) for small size taxpayers
Tax return disclosure – late/incomplete/no filing	N/A
CbCR – late/incomplete/no filing	For failing to file a CbC report, the penalty ranges from RON 70,000 (approx. 14,000 EUR) to RON 100,000 (approx. 20,000 EUR). For late filing of a CbC report or for incomplete/incorrect data in a CbC report, the penalty ranges from RON 30,000 (approx. 6,000 EUR) to RON 50,000 (approx. 10,000 EUR).



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