Notes for Guidance - Taxes Consolidation Act 1997

Finance Act 2024 edition

Part 35A
Transfer Pricing

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Finance Act 2024 edition

PART 35A Transfer Pricing

PART 35A

TRANSFER PRICING

Overview

This Part contains transfer pricing rules that apply the arm's length principle to transactions between associated persons.

Transfer pricing describes the process by which parties to a transaction set a price at which they pass goods, services, finance, assets or anything else of commercial value between each other. Transfer pricing rules concern transactions between associated persons and ensure that taxable profits or gains cannot be understated, or allowable losses overstated, because the prices charged in such transactions are not at arm's length.

In computing profits or gains or losses that are chargeable to tax, transfer pricing rules require that transactions between associated persons are priced in accordance with the arm's length principle. The arm's length principle is an internationally agreed standard which requires that related party transactions are priced as if they were carried out by unrelated parties dealing at arm's length. In practice, the application of this principle is based on guidance contained in the OECD Transfer Pricing Guidelines.

Transfer pricing rules were first introduced by section 42 of Finance Act 2010 and originally applied only in relation to the computation of profits or gains or losses chargeable to tax under Case I or II of Schedule D (trading income) and only in respect of arrangements the terms of which were agreed on or after 1 July 2010. The scope and application of the rules was expanded by Finance Act 2019, with section 27 of that Act substituting this new Part 35A. The transfer pricing rules were further updated by Finance Act 2021 which inserted a new section 835E, which provides for an exclusion from the application of the transfer pricing rules to the computation of non-trading income in certain circumstances. Finance Act 2022 amended the definition of 'transfer pricing guidelines' in section 835D to refer to the updated Transfer Pricing Guidelines published by the OECD in January 2022.

This Part, as substituted by Finance Act 2019, applies for chargeable periods commencing on or after 1 January 2020 and, in relation to the computation of capital allowances (other than balancing allowances), where the related capital expenditure is incurred on or after 1 January 2020. In relation to the computation of balancing allowances and balancing charges, this Part applies where the event giving rise to the balancing allowance or balancing charge occurs on or after 1 January 2020 irrespective of when the related expenditure was incurred.

The main features of the transfer pricing rules are as follows—

1. The rules are to be construed, as far as practicable, in accordance with the 2022 OECD Transfer Pricing Guidelines ("**2022 OECD Guidelines**");

2. The arm's length principle applies, subject to certain exceptions, to the computation of non-trading income, capital allowances and chargeable gains relating to transactions between associated persons. There is an exclusion from the application of transfer pricing rules to the computation of non-trading profits or gains or losses (but not chargeable gains) where they relate to a transaction between certain associated persons who are chargeable to tax in the State on the profits or gains or losses arising from the transaction (or would be so chargeable but for the fact that Irish dividends are not chargeable to tax). In relation to the computation of capital

allowances and chargeable gains, the transfer pricing rules apply in respect of transactions relating to assets that have a market value of over €25 million;

3. Larger companies are obliged to prepare, and have available upon request by a Revenue officer, a master file and local file in line with Annex I and II of Chapter V of the 2022 OECD Guidelines;

4. A higher rate of penalty applies for larger taxpayers who fail to comply with a request to provide transfer pricing documentation to Revenue;

5. Protection from tax-geared penalties, in the careless behaviour category, applies where a taxpayer prepares transfer pricing documentation on time and provides it on a timely basis to Revenue when requested, and the documentation demonstrates reasonable efforts have been made to comply with this Part;

6. The rules apply to previously grandfathered arrangements, being arrangements the terms of which were agreed before 1 July 2010, in respect of chargeable periods commencing on or after 1 January 2020;

The transfer pricing rules respect the outcome determined under the Amount B rules (contained in the OECD's Pillar One – Amount B report), where such an approach is applied by a covered jurisdiction with which Ireland has a bilateral tax treaty in effect.

835A Interpretation

Summary

This section is the interpretation section for this Part. Most of the definitions are self-explanatory.

Details

Definitions

Key definitions include:

"arrangement" is defined broadly to include any transaction, action, course of action, course of conduct, scheme or plan, agreement, arrangement of any kind, understanding, promise or undertaking, whether express or implied and whether or not it is, or is intended to be, legally enforceable. An arrangement also includes any series of, or combination of, the foregoing; ***(1)***

"chargeable asset" is defined as an asset which, if it were disposed of, the gain accruing to the person disposing of it would be a chargeable gain;

"Commission Recommendation" means Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises;

"relevant activities", is defined, in relation to a person who is a party to an arrangement, as that person's activities in the course of which, or with respect to which, that arrangement is made. Relevant activities also include, where applicable, activities involving the disposal and acquisition of an asset or assets;

"relevant person", in relation to an arrangement, means a person who is within the charge to tax in respect of profits or gains or losses and the computation of those profits or gains or losses takes account, or would take account, of the results of the arrangement;

"tax" means income tax, corporation tax or capital gains tax.

The term "control" is construed in accordance with the provisions of ***section 11***. ***(2)***

This subsection provides that references throughout this Part to losses that are chargeable to tax are references to losses arising from an arrangement or relevant activities a profit or gain arising from which would be chargeable to tax. ***(3)***

835B Meaning of associated

Summary

Transfer pricing rules apply to certain arrangements between persons who are associated. This section deals with the meaning of "associated".

Details

Persons are associated if one person participates in the management, control or capital of another person or the same person is participating in the management, control or capital of both persons. The controlled person in each case must be a company. Associated persons are mainly companies but, for example, an individual who is a controlling shareholder of a company could be an associated person of that company. ***(1)***

A company will be treated as controlled by an individual if it is controlled by the individual and persons connected with the individual. A person is connected with an individual if that person is a "relative" of that individual within the meaning of ***section 433(3)(a)***. ***(2)***

835C Basic rules on transfer pricing

Summary

This section sets out the main transfer pricing rules and the arrangements to which the rules apply.

Details

An arrangement is within the scope of transfer pricing rules where – ***(1)***

- it involves the supply and acquisition of goods, services, money, assets (including intangible assets) or anything else of commercial value, ***(1)(a)***
- the supplier and acquirer are associated at the time of the supply and acquisition, and ***(1)(b)***
- either or both the supplier and acquirer are within the charge to tax in respect of the relevant activities. ***(1)(c)***

Main transfer pricing rules

If the actual amount of consideration payable under an arrangement is above the arm's length amount, or the amount of consideration receivable under the arrangement is below the arm's length amount, profits or gains or losses chargeable to tax are computed as if an arm's length amount of consideration were payable or receivable. ***(2)***

The 'arm's length amount' of consideration for a supply or acquisition refers to the amount that would have been agreed between independent parties dealing at arm's length. This is determined, subject to section 835DA, by - ***(3)***

- identifying the actual commercial or financial relations between the supplier and acquirer and the economically relevant circumstances attaching to those relations (the "identified arrangement"), and ***(4)(a)***
- applying the most appropriate transfer pricing method set out in the 2022 OECD Guidelines. ***(4)(b)***

Where the substance of the commercial or financial relations between a supplier and an acquirer is inconsistent with the form of the arrangement then, for the purposes of ***(5)(a)***

determining the arm's length amount of consideration, the identified arrangement will be based on the substance of the arrangement rather than its form.

Where independent parties acting in a commercially rational manner in comparable circumstances would not have entered into the identified arrangement then, in line with the principles in Chapter I, D.2 of the 2022 OECD Guidelines, the identified arrangement will be disregarded (and the profits, gains or losses that are chargeable to tax computed as if no consideration were payable under that arrangement) or substituted with another arrangement that achieves a commercially rational expected result (and the arm's length amount of consideration will be determined by reference to that alternative arrangement). ***(5)(b)***

Construction of 'supply' and 'disposal'

The reference to a supply and acquisition of an asset in ***subsection (1)(a)*** also includes the disposal and acquisition of a chargeable asset and references to the disposal of a chargeable asset in ***section 835HB*** are, for the purposes of this Part, construed as being a supply of that asset. ***(6)***

Interaction with provisions treating certain amounts as a distribution

Where the actual amount of consideration payable under an arrangement exceeds the arm's length amount and any part of that excess is treated as a distribution under any other provision of the TCA 1997 then, in applying the transfer pricing rule in ***subsection (2)(a)*** in relation to profits or gains or losses chargeable to tax under Schedule D, the actual amount of consideration payable will be taken as that amount net of the amount treated as a distribution. Any amount of an expense that is treated as a distribution will already not be deductible in computing taxable profits. ***(7)***

Transfers of trading stock on a discontinuance of a trade

The transfer pricing rules do not apply to a sale or transfer of trading stock on a discontinuance of a trade in circumstances where an election referred to in ***section 89(4)*** is made. ***(8)***

835D Principles for construing rules in accordance with OECD Guidelines

Summary

This section provides that the transfer pricing rules are to be construed in accordance with the 2022 OECD Guidelines and certain other OECD guidance. The section effectively ensures that the OECD guidance is applied in Irish law.

Details

The transfer pricing rules contained in section 835C are to be construed in such a way as to ensure, as far as possible, consistency with the 2022 OECD Guidelines and any additional guidance published by the OECD on or after the date of the passing of the Finance Act 2022 as the Minister for Finance may designate by order. ***(2), (3)***

835DA OECD Pillar One - Amount B

Summary

This section provides for the political commitment in respect of Amount B of Pillar One of the OECD's two-pillar solution to address the tax challenges arising from the digitalisation of the economy. In broad terms, Amount B sets out a simplified approach to determine the arm's length amount for certain marketing and distribution arrangements. In February 2024, members of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (including Ireland) agreed a political commitment in relation to 'covered jurisdictions' in respect of Amount B from 1 January 2025. This commitment respects the outcome determined under Amount B rules (contained in the OECD's Pillar One – Amount B report), where such an approach is applied by a covered jurisdiction with which Ireland has a bilateral tax treaty in effect.

Details

Definitions

Key definitions include: ***(1)(a)***

'covered jurisdiction' means a jurisdiction listed in the document entitled Statement on the definition of covered jurisdiction for the Inclusive Framework political commitment on Amount B, published by the OECD on 17 June 2024;

'OECD' has the same meaning as in ***section 835D(1)***;

'OECD Pillar One Amount B guidance' means the document entitled OECD (2024), Pillar One - Amount B: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, published by the OECD on 19 February 2024, supplemented by the document entitled Statement on the definitions of qualifying jurisdiction within the meaning of section 5.2 and section 5.3 of the simplified and streamlined approach, published by the OECD on 17 June 2024;

'one-sided transfer pricing method' and 'tested party' must be construed in accordance with the transfer pricing guidelines (within the meaning of ***section 835D***);

'qualifying arrangement' must be construed in accordance with ***subsection (2)***.

A word or expression which is used in this section and is also used in the OECD Pillar One Amount B guidance has, unless the context otherwise requires, the same meaning in this section as it has in the OECD Pillar One Amount B guidance. ***(1)(b)***

Subsection (2) sets out the conditions for an arrangement to be considered a "qualifying arrangement" for the purposes of the section. These follow the requirements set out in the OECD's Pillar One – Amount B report published in February 2024.

In order for an arrangement to be a qualifying arrangement it must either be: ***(2)(a)(i)***

(i) a buy-sell marketing and distribution arrangement where the distributor under the arrangement purchases goods from one or more than one associated company for wholesale distribution to independent parties, or

(ii) a sales agency or commissionaire arrangement where the sales agent or commissionaire under the arrangement contributes to one or more than one associated company's wholesale distribution of goods to independent parties and where those goods are sold by the associated company without either it, or the sales agent or commissionaire, engaging other associated parties as intermediaries between it and the independent party customers.

In addition, it must exhibit the economically relevant characteristics that mean it can be reliably priced using a one-sided transfer pricing method where the distributor, sales agent or commissionaire, as the case may be, is the tested party. ***(2)(a)(ii)***

An arrangement will not be a qualifying arrangement where- ***(2)(b)***

(i) the arrangement involves the distribution of non-tangible goods, services or the marketing, trading or distribution of commodities, ***(2)(b)(i)***

(ii) the distributor, sales agent or commissionaire, as the case may be, that is the tested party, carries out non-distribution activities and the arrangement cannot be adequately evaluated and reliably priced separately from those non-distribution activities, or ***(2)(b)(ii)***

(iii) the distributor, sales agent or commissionaire, as the case may be, that is the tested party has incurred annual operating expenses which are lower than 3 per cent, or greater than 30 per cent, of its annual net revenues. ***(2)(b)(iii)***

Subsection (3) provides additional conditions to ensure that this section only applies in specific circumstances. These conditions are:

(i) The supplier is a company resident in the State and the acquirer is- ***(3)(a)(i)***
- the distributor, sales agent or commissionaire, as the case may be, under the qualifying arrangement, and
- a company resident, by virtue of the law of the covered jurisdiction, for the purposes of a tax which corresponds to corporation tax in the covered jurisdiction,

or vice versa in respect of the supplier and the acquirer. ***(3)(a)(ii)***

(ii) Under the tax law of the covered jurisdiction, the arm's length amount of consideration for the supply and acquisition under the qualifying arrangement may be determined in accordance with the OECD's Pillar One - Amount B report. ***(3)(b)***

(iii) The profits of the distributor, sales agent or commissionaire, as the case may be, relating to that qualifying arrangement have been determined in accordance with the OECD's Pillar One – Amount B report. ***(3)(c)***

(iv) The covered jurisdiction is a jurisdiction with which Ireland has a bilateral tax treaty in place which has force of law by virtue of ***section 826(1)***. ***(3)(d)***

Subsection (4) clarifies the meaning of arm's length consideration for the purposes of ***subsection (3)***. ***(4)***

Subsection (5) provides that where this section applies to a qualifying arrangement for a chargeable period, ***section 835C***, ***section 835D*** and ***section 835G*** shall apply as if certain modifications were made to them. ***(5)***

Section 835C will apply as if it provided that the transfer pricing method that is the most appropriate to determine the arm's length amount of consideration for a qualifying arrangement should be determined in accordance with the OECD Pillar One Amount B guidance. ***(5)(a)(i)***

Section 835D will apply as if the definition of 'transfer pricing guidelines' which is contained in ***section 835D*** were supplemented with the OECD Pillar One - Amount B report to ensure that when section 835D is being applied the OECD Pillar One - Amount B report is also taken into account. ***(5)(a)(ii)***

Section 835G will apply with additional documentation and notification requirements: ***(5)(b)***

- Where this section applies the meaning of 'local file' in ***section 835G*** is to be read as requiring that certain specified additional documentation be maintained on the local file.

- Further, it provides that section 835G shall be read as containing an additional subsection requiring that the Irish resident party to the arrangement notify Revenue that this section has applied to an arrangement for the chargeable period.

Subsection (6) contains an anti-avoidance provision which ensures that the section only applies in respect of arrangements that have been entered into for bona fide commercial reasons. It further provides that the section will not apply where the main purpose, or one of the main purposes, of the arrangement is the avoidance of tax. ***(6)***

835E Modification of basic rules on transfer pricing for arrangements between qualifying persons

Summary

This section provides for an exclusion from the application of the transfer pricing rules in ***section 835C*** to the computation of non-trading profits, gains or losses in certain circumstances. Provided certain conditions are satisfied, the exclusion will apply in respect of a transaction between certain associated persons who are both chargeable to tax in the State on the profits or gains or losses arising from the transaction, or who would be so chargeable if there were any profits or gains or losses. Where the supplier meets this requirement but the acquirer does not, the exclusion will only apply where the acquirer is chargeable to tax on any profits or gains or losses arising from its relevant activities, or would be so chargeable if there were any, and they are resident in the State.

Details

Subject to the exclusion in this section, transfer pricing rules in ***section 835C*** apply in computing profits or gains or losses of a relevant person relating to both domestic and cross border transactions. Provided the necessary conditions are satisfied, this section provides that transfer pricing rules in ***section 835C*** will not apply in computing profits or gains or losses chargeable to tax under Case III, IV or V Schedule D (non-trading income) where those profits or gains or losses arise from an arrangement between "qualifying persons".

Arrangements between qualifying persons

Provided certain conditions are satisfied, the section applies to an "eligible person" (either a supplier and an acquirer) in respect of an arrangement involving a supplier and an acquirer who are both "qualifying persons".

A "qualifying person", in relation to a chargeable period, means a person who - ***(1)***

- is a supplier in relation to an arrangement and who is chargeable to income tax or corporation tax under Case III, IV or V of Schedule D, in respect of the profits or gains or losses arising from that arrangement, or ***(1)(a)(i)***

- is an acquirer in relation to an arrangement and who is chargeable to income tax or corporation tax under Schedule D, in respect of the profits or gains or losses arising from that arrangement. ***(1)(b)(ii)***

Where the qualifying person is within the charge to income tax in respect of the profits or gains or losses arising from the arrangement, they must also be resident in the State. ***(1)(b)***

The qualifying person cannot be a qualifying company under ***section 110***. ***(1)(c)***

Meaning of chargeable to income tax or corporation tax

Subsection (2) clarifies when a person will be regarded as chargeable to income tax or corporation tax under Schedule D (other than under Case I or II of Schedule D in the case of a supplier) in respect of the profits or gains or losses arising from the arrangement.

For the purposes of ***subsection (1)(a)(i)***, a supplier, in relation to an arrangement, will, for the chargeable period, be regarded as chargeable to income tax or corporation tax under Schedule D, other than under Case I or II of Schedule D, in respect of the profits or gains or losses arising from the arrangement concerned only where the consideration receivable by the supplier under that arrangement – ***(2)(a)***

- is directly taken into account in computing the amount of profits or gains or losses of the supplier chargeable to income tax or corporation tax under Case III, IV or V of Schedule D, or
- would be so taken into account if any consideration were receivable by the supplier under the arrangement.

For the purposes of ***subsection (1)(a)(ii)***, an acquirer will, subject to ***subsection (2)(b)(ii)***, for the chargeable period, be regarded as chargeable to income tax or corporation tax under Schedule D, in respect of the profits or gains or losses arising from the arrangement concerned only where the consideration payable by the acquirer under that arrangement – ***(2)(b)(i)***

- is directly taken into account in computing the amount of profits or gains or losses chargeable to income tax or corporation tax under Schedule D, or

would be so taken into account if any consideration were payable by the acquirer under the arrangement.

In the case of an acquirer where the consideration payable under the arrangement does not fall within ***subsection (2)(b)(i)***, the acquirer will, for the chargeable period, be regarded as chargeable to- ***(2)(b)(ii)***

- income tax under Schedule D in respect of the profits or gains or losses arising from the arrangement concerned, where any profits or gains or losses of the acquirer arising directly or indirectly from its relevant activities are, or, if there were any, would be chargeable to income tax under Schedule D, or
- corporation tax under Schedule D in respect of the profits or gains or losses arising from the arrangement concerned, where the acquirer is resident in the State and any profits or gains or losses of the acquirer arising directly or indirectly from its relevant activities are, or, if there were any, would be chargeable to corporation tax under Schedule D, or would be chargeable to corporation tax but for section 129 or section 831B.

Exclusion

Subsection (3) provides for the application of the exclusion. The exclusion provides that where- ***(3)***

(a) a supplier or an acquirer, in relation to an arrangement, is chargeable to tax for a chargeable period, under Schedule D, other than under Case I or II of Schedule D, in respect of the profits or gains or losses arising from that arrangement (the 'eligible person'), and

(b) the supplier and the acquirer are both qualifying persons, in relation to that arrangement, for the chargeable period of the eligible person,

then, ***section 835C*** shall not apply in computing the amount of profits or gains or losses arising to the eligible person from the arrangement for the chargeable period.

Subsection (4) clarifies when a supplier or an acquirer, as the case may be, will be regarded as chargeable to income tax or corporation tax under Schedule D, other than under Case I or II of Schedule D in respect of the profits or gains or losses arising from an arrangement in the chargeable period. This will be the case where the consideration receivable or payable is directly taken into account in computing the amount of profits or gains or losses chargeable to income tax or corporation tax under Schedule D, other than under Case I or II, or would be taken into account if any consideration were receivable or payable. ***(4)***

Subsection (5) provides that where a person is an eligible person for a chargeable period, the other party to the arrangement is required to be a qualifying person throughout that chargeable period. ***(5)***

Anti-avoidance provisions

Subsections (6) to (8) contain anti-avoidance provisions.

Subsection (6) contains an anti-avoidance provision which ensures that the exclusion in ***subsection (3)*** only applies in respect of arrangements that have been entered into for bona fide commercial reasons. It further provides that the exclusion will not apply where the main purpose, or one of the main purposes, of the arrangement is the avoidance of tax. ***(6)(a) & (b)***

Subsection (7) provides that the exclusion will not apply in circumstances where a deduction or some form of relief for the purposes of domestic tax or foreign tax (as defined in ***section 835Z(1)***), would be available to the acquirer, which exceeds the actual consideration payable under the arrangement. ***(7)***

Subsection (8) provides that the exclusion in ***subsection (3)*** cannot apply in the case of an arrangement between qualifying persons ("the first arrangement") where it is entered into as part of a back-to-back arrangement involving the acquirer or a person associated with the acquirer entering into an arrangement with a person who is not a qualifying person ("the second arrangement") and the sole or main purpose of the first arrangement is to obtain a tax advantage in connection with the second arrangement. ***(8)***

For the purposes of ***subsection (8)***, "tax advantage" has the same meaning as in ***section 811C***. ***(8)(b)***

Maintenance of records

A qualifying person is obliged to keep such records as may reasonably be required for the purposes of determining whether the requirements of the section are met. ***(9)***

835EA Small or medium-sized enterprise

Summary

This section excludes small and medium-sized enterprises ("SMEs") from the scope of this Part. This section will remain in operation until such time as ***section 835F*** is commenced by Ministerial order and SMEs are brought within the scope of transfer pricing rules.

Details

Transfer pricing rules do not apply in computing the profits or gains or losses of a person who is an SME for the chargeable period. ***(1)***

An SME is defined for the purposes of the section. This definition is closely based on the definition of enterprises which fall within the category of micro, small and medium-sized enterprises as defined in the EU Commission Recommendation of 6 May 2003. Broadly, this comprises groups of companies where the group employs less than 250 employees **and** *either* has a turnover of less than €50m *or* assets of less than €43m. ***(2)***

Certain modifications to the definitions contained in the Annex to the Commission Recommendation apply for the purposes of defining SMEs in an Irish context.

835F Small or medium-sized enterprise

Summary

This section is not yet in operation and will commence on such date, and in respect of such chargeable periods, as the Minister may appoint by order. The section sets out the transfer pricing documentation requirements for SMEs.

Details

Definition of medium and small enterprises

Definitions of "medium enterprise" and "small enterprise" are set out for the purposes of the section. These definitions are closely based on the category of micro, small and medium-sized enterprises as set out in the Annex to the EU Commission Recommendation of 6 May 2003. A small enterprise is an enterprise that, on a group basis, employs fewer than 50 employees and whose annual turnover and/or annual total assets does not exceed €10 million. A medium enterprise is an enterprise that, on a group basis, employs fewer than 250 employees and which has an annual turnover not exceeding €50 million and/or annual total assets not exceeding €43 million and which is not a small enterprise as defined. Certain modifications to the definitions contained in the Annex apply for the purposes of defining a medium enterprise and a small enterprise in an Irish context. ***(1) & (2)***

Small enterprises – Transfer pricing documentation exclusion

A relevant person who is a small enterprise in a chargeable period is excluded from the transfer pricing documentation requirements set out in ***section 835G***. ***(3)***

Medium enterprises – Transfer pricing documentation requirements

A relevant person who is a medium enterprise in a chargeable period is only required to provide transfer pricing documentation in respect of relevant arrangements. An arrangement is a relevant arrangement where - ***(4)***

- it involves a medium enterprise and an associated person who is not a qualifying person (as defined in ***section 835E***) and the aggregate consideration arising under the arrangement in the chargeable period exceeds €1 million, or ***(5)(a)***
- in the case of an arrangement that constitutes a disposal or acquisition of an asset for the purposes of chargeable gains, it involves a medium enterprise and an associated person who is not resident in the State and the arrangement relates to an asset with a market value above €25 million and the asset ceases to be a chargeable asset (in the case of a disposal) or was not a chargeable asset before its acquisition (in the case of an acquisition). ***(5)(b)***

A relevant person who is a medium enterprise is required to provide specified information in satisfaction of that person's obligation to provide transfer pricing documentation under ***section 835G***. The transfer pricing documentation requirements for medium enterprises are simplified and reduced as compared to enterprises that are not SMEs. ***(6)***

835G Documentation and enquiries

Summary

This section sets out transfer pricing documentation requirements, including the requirement to prepare a local file and master file in certain cases.

Details

Definitions

Definitions of the various terms used in the section are set out. Definitions for master file and local file are based on Annex I and II to Chapter V of the 2022 OECD Guidelines. The section provides that the 'master file revenue threshold' is €250 million and the 'local file revenue threshold' is €50 million. ***(1)***

Transfer pricing documentation requirements

A relevant person is obliged to have available such records as may reasonably be required for the purposes of determining whether the profits or gains or losses of the relevant person have been computed in accordance with this Part. ***(2)***

A relevant person is required to prepare and have available a **master file** where the relevant person is part of an MNE group and the total consolidated global revenue of the MNE group is at, or above, the master file revenue threshold (€250 million) in the chargeable period. ***(3)(a)***

A relevant person is required to prepare and have available a **local file** where the relevant person is part of an MNE group and the total consolidated global revenue of the MNE group is at, or above, the local file revenue threshold (€50 million) in the chargeable period. ***(3)(b)***

Certain arrangements entered into before 1 July 2010 are excluded from the transfer pricing documentation requirements. The exclusion applies where the supplier and the acquirer in relation to the arrangement are qualifying persons (as defined in ***section 835E***). ***(4)***

Transfer pricing documentation must be prepared by a relevant person no later than the date on which a tax return for the chargeable period is required to be delivered and must be provided to a Revenue officer within 30 days of a request made in writing. ***(5)***

Penalties

Where a relevant person fails to comply with a request to provide transfer pricing documentation within 30 days of a written request, a fixed penalty of €4,000 will apply. ***(6)(a)***

Where the relevant person is of such a size that the person is required to prepare a local file for the chargeable period, the fixed penalty is increased from €4,000 to €25,000 plus €100 for each day that the failure continues. ***(6)(b)***

A relevant person will be protected from tax-geared penalties in ***section 1077E(5)*** or ***section 1077F(2)(d)***, as appropriate, which relate to careless but not deliberate behaviour, in respect of additional tax due in the event of a transfer pricing adjustment in circumstances where the relevant person – ***(7)***

- has fulfilled the requirements of the section to prepare, and provides upon request, transfer pricing documentation within the specified timeframe; and ***(7)(c)(i), (ii)***
- the records provided are accurate and demonstrate that notwithstanding the transfer pricing adjustment, the relevant person has made a reasonable effort to comply with the requirements of this Part in setting the actual consideration payable or receivable, as the case may be, under an arrangement. ***(7)(c)(iii)***

The general rule in ***section 886(3)*** that applies to records also applies to transfer pricing records i.e. they must be prepared in written form in an official language of the State or by means of any electronic, photographic or other process. ***(8)***

835H Elimination of double counting

Summary

This section eliminates double counting in the case of domestic transactions.

Details

Adjustments

Where the profits or gains or losses of a person that are chargeable to tax are adjusted by virtue of ***section 835C*** and the counterparty to the transaction is within the charge to tax under Schedule D in respect of the relevant activities, that other person may claim a corresponding downward adjustment to that person's profits or gains or losses. ***(1)***

Trading stock

Where relief is being given to the counterparty to a transaction by way of an increase in the cost of purchases, this subsection provides that, should any of those purchases remain in stock at the end of the accounting period, the closing stock value of that stock is unaffected by these provisions. This ensures that a transfer pricing adjustment will not adversely affect cash flow within a group. ***(2)***

Relief

Relief will be available under ***subsection (1)*** once tax in relation to the upward adjustment has been paid. ***(3)***

Where the profits of a foreign branch are adjusted downwards, credit for foreign tax will be available by reference to the branch profits as so reduced. ***(4)***

The practice that profits on development land acquired by a group as trading stock are taxed when the land is sold outside the group is maintained. Where such land is transferred within a group the companies involved can elect that the existing treatment continues to apply. ***(5)***

835HA Interaction with capital allowances provisions

Summary

This section deals with the interaction between the transfer pricing rules contained in ***section 835C*** and capital allowances provisions. The section provides that transfer pricing rules apply only in respect of transactions relating to assets that have a market value of over €25 million. For assets with a market value up to the €25 million threshold, the market value/open market price rules contained in provisions dealing with capital allowances will continue to apply instead of transfer pricing rules. The section also sets out a number of other exclusions from the application of transfer pricing rules in connection with capital allowances.

Details

In general, transfer pricing rules in ***section 835C*** apply in computing the amount of any deductions or additions to be made in respect of capital expenditure on an asset (capital allowances) where they relate to transactions between associated persons. The section sets out a number of circumstances in which the transfer pricing rules will not apply in computing the amount of allowances due to an acquirer of an asset or in computing the

amount of any balancing allowance or balancing charge to be made to, or on, a supplier in respect of the supply and acquisition of an asset.

Circumstances where transfer pricing rules do not apply

Transfer pricing rules do not apply in computing the amount of allowances due to an **acquirer** in respect of the acquisition of an asset where -

- the amount of capital expenditure incurred on the asset does not exceed a materiality threshold of €25 million; ***(1)(a)***
- the asset is a specified intangible asset to which ***section 291A*** applies and, by virtue of ***section 288(3C)***, the amount of allowances due to the acquirer is based on the amount still unallowed; ***(1)(b)***
- the asset is acquired (and supplied) in such circumstances that, in accordance with a relief in the Act, the asset is regarded as having been supplied and acquired for an amount other than market value (or equivalent) or the arm's length amount. These include – ***(1)(d)(i) – (vi)***
  - where the acquirer and supplier make a joint election under ***section 289(6)*** or ***section 312(5)(a)*** to treat an asset as having transferred at the lower of the amount of expenditure still unallowed and the open market value of the asset, ***(1)(d)(i)***
  - where the supply and acquisition of the asset occurs as part of the transfer of the whole or part of a trade to which ***section 308A(3)***, ***section 310(3)***, ***section 400(6)***, ***section 631(2)*** or ***section 670(12)*** applies and under the relevant provision a balancing allowance or a balancing charge does not arise for the supplier and/or unallowed allowances may be made to the acquirer, ***(1)(d)(ii)***
  - where the supply and acquisition of the asset occurs in the course of a merger to which ***section 633A*** applies and under that provision a balancing allowance or a balancing charge does not arise for the supplier and any unallowed allowances may be made to the acquirer SE or SCE, ***(1)(d)(iii)***
  - where the supply and acquisition is of an interest in farm land to which ***section 658(9)*** applies and under that provision the acquirer is entitled to claim the remaining allowances following the transfer, ***(1)(d)(iv)***
  - where the supply and acquisition of the asset occurs in the course of a conversion of a building society to a company, to which ***paragraph 1*** of ***Schedule 16*** applies and, in accordance with that paragraph, a balancing allowance or a balancing charge does not arise for the building society and any unallowed allowances may be made to the new company, ***(1)(d)(v)***
  - where the supply and acquisition of the asset occurs in the course of a transfer, to which ***paragraph 2*** of ***Schedule 17*** applies, from a trustee savings bank to a successor company and, in accordance with that paragraph, a balancing allowance or a balancing charge does not arise for the bank and certain unallowed allowances may be made to the successor company. ***(1)(d)(vi)***

Transfer pricing rules do not apply in computing the amount of any balancing charge or balancing allowance of the **supplier** of an asset where -

- the market value of the asset at the time of the balancing allowance or balancing charge event does not exceed €25 million; ***(1)(c)***
- the asset is supplied (and acquired) is such circumstances that in accordance with a relief in the Act the asset is regarded as having been supplied and acquired for an amount other than market value (or equivalent) or the arm's length amount. [see above]. ***(1)(d)(i) – (vi)***

Anti-avoidance provisions

The section contains an anti-avoidance provision designed to guard against the parcelling of assets as part of a scheme to avoid exceeding the €25 million threshold referred to in ***subsection (1)(a)***. Where the asset on which capital expenditure is incurred by the acquirer had at any time formed part of another asset (the 'other asset') and that asset and the other asset were acquired under separate arrangements as part of a scheme to avoid exceeding the €25 million threshold, the expenditure incurred on both assets will be taken into account for the purposes of determining whether the €25 million threshold is exceeded. ***(2)(a)***

A similar anti-avoidance provisions applies for the purposes of the €25 million threshold referred to in ***subsection (1)(c)***, and which applies in connection with the computation of a balancing allowance or balancing charge arising to a supplier. ***(2)(b)***

Interaction with other provisions of the TCA 1997 that deal with the computation of allowances and charges relating to capital expenditure

The section provides that, where the relevant conditions for the application of the transfer pricing rules in ***section 835C*** are met, the rules will apply notwithstanding certain other provisions in the TCA 1997 which deal with the computation of allowances and charges relating to capital expenditure. This provision ensures that, where the relevant conditions are met, the arm's length principle and transfer pricing rules will apply instead of market value rules specified in capital allowance provisions and, therefore, the associated transfer pricing documentation requirements in ***section 835G*** will apply. ***(3)(a)***

Where transfer pricing rules apply in computing a balancing charge to be made on a supplier in respect of an asset, the amount of the balancing charge cannot exceed the amount of capital expenditure incurred by the supplier on that asset. ***(3)(b)***

The section provides that the transfer pricing rules in ***section 835C*** will not apply instead of certain other provisions of the TCA 1997 where their application would result in higher allowances being claimed or in a lower balancing charge arising than under those other provisions. This provision ensures that anti-avoidance provisions in the TCA 1997 are not dis-applied where their application would result in a higher tax liability than would be the case if transfer pricing rules apply. ***(4)***

Interaction with section 291A(3)

The section provides for any necessary modification to be made to the application of ***section 291A(3)*** to ensure that the amount of any allowances claimed in respect of a specified intangible asset in each chargeable period is compatible with ***section 835C(2)(a)***. ***(5)***

835HB Interaction with provisions dealing with chargeable gains

Summary

The section provides that transfer pricing rules apply only in respect of the computation of chargeable gains and allowable losses relating to assets that have a market value of over €25 million. For assets with a market value up to the €25 million threshold, the market value rules contained in provisions dealing with chargeable gains will continue to apply instead of transfer pricing rules. The section also sets out a number of other exclusions from the application of transfer pricing rules in connection with the computation of chargeable gains and allowable losses.

Details

The section provides that transfer pricing rules in ***section 835C*** will apply for the purposes of computing any chargeable gain or allowable loss arising to a supplier on the disposal of a chargeable asset. In relation to the acquisition of a chargeable asset, the section provides ***(1)***

for the application of transfer pricing rules for the purposes of determining the amount of consideration for the acquisition of the asset (base cost), which will be taken into account in computing the amount of any chargeable gain arising on a subsequent disposal of the asset.

Circumstances where transfer pricing rules do not apply

The section provides that the transfer pricing rules in ***section 835C*** will not apply for the purposes of computing the amount of any chargeable gain or allowable loss arising to a **supplier** on a disposal (supply) of a chargeable asset where - ***(2)***

- the market value of the asset at the date of disposal does not exceed €25 million. ***(2)(a)***
- the asset is disposed of in such circumstances that, in accordance with a relief in the TCA 1997, the asset is regarded as having been disposed of for an amount of consideration that would give rise to neither a gain nor a loss. The relevant reliefs that provide for this treatment are contained in ***section 606(2)***, ***section 615(2)***, ***section 617(1)***, ***section 632(1)***, ***section 633***, ***section 633A***, ***section 702(2)*** or ***paragraph 5(2)*** of ***Schedule 17***, ***(2)(b), (d)***
- the asset is transferred in the course of a conversion of a building society into a successor company to which ***paragraph 3(1)*** of ***Schedule 16*** applies, or ***(2)(c)***
- the asset is disposed of by an individual to a company and, immediately after its acquisition by the company, the asset remains a chargeable asset. ***(2)(e)***

The transfer pricing rules in ***section 835C*** will not apply for the purposes of determining the base cost of an **acquirer** -

- where the market value of the asset acquired does not exceed €25 million, or ***(3)(a)***
- in circumstances where the acquirer is treated by the provisions mentioned in ***subparagraphs (i)*** to ***(vi)*** of ***subsection (2)(b)*** or ***paragraph 5(3)*** of ***Schedule 17*** or ***section 631(3)*** as having acquired the asset at the same time and for the same cost as the supplier from whom the asset is acquired. ***(3)(b)***

Anti-avoidance provision

The section contains an anti-avoidance provision designed to guard against the splitting of assets as part of a scheme to avoid exceeding the €25 million threshold referred to in ***subsection (2)(a)***. Where the asset being disposed of by the supplier had at any time formed part of another asset (the 'other asset') and that asset and the other asset were supplied under separate arrangements as part of a scheme to avoid exceeding the €25 million threshold, the market value of both assets will be taken into account for the purposes of determining whether the €25 million threshold is exceeded. ***(4)***

A similar anti-avoidance provision applies for the purposes of the €25 million threshold referred to in ***subsection (3)(a)***, which relates to the application of transfer pricing rules to the computation of the base cost of a chargeable asset acquired by an acquirer.

Corresponding adjustment

The section provides for a corresponding adjustment to the base cost of a chargeable asset of an acquirer in circumstances where, by virtue of ***section 835C***, the amount of the gain of a supplier that is chargeable to tax is computed based on the arm's length amount rather than the actual consideration receivable. ***(5)(a)***

A corresponding adjustment to the base cost of an acquirer will not be made until such time as tax due and payable for the chargeable period by the supplier has been paid. ***(5)(b)***

Interaction with other provisions of the TCA 1997 that deal with the computation of chargeable gains and allowable losses

(6)(a) The section provides that, where the relevant conditions for the application of the transfer pricing rules in ***section 835C*** are met, the rules will apply notwithstanding certain other provisions in the TCA 1997 which deal with the computation of chargeable gains and allowable losses. This provision ensures that, where the relevant conditions are met, the arm's length principle and transfer pricing rules will apply instead of market value rules specified in provisions dealing with chargeable gains and, therefore, the associated transfer pricing documentation requirements in ***section 835G*** will apply.

(6)(b) The section provides that the transfer pricing rules in section 835C will not apply instead of certain other provisions of the TCA 1997 where their application would result in (i) a lower chargeable gain or higher allowable loss arising to the supplier on the disposal of a chargeable asset, or (ii) the acquirer of a chargeable asset having a higher acquisition cost than would be the case under those other provisions. This provision ensures that anti-avoidance provisions in the TCA 1997 are not dis-applied where their application would result in a higher tax liability than would be the case if transfer pricing rules apply.