

ORDER No. 3735/2015 of 23 December 2015

on the approval of the procedure of issuing and modifying an advance pricing agreement, as well as the contents of the application for issuing and modifying an advance pricing agreement

Based on provisions of art. 5 par. (4), art. 11 par. (4), art. 19 par. (6), art. 36 par. (3) of Law no. 227/2015 on the Fiscal Code, as later amended and expanded, and the provisions of art. 52 par. (22) and art. 342 par. (1) of Law no. 207/2015 on the Fiscal Procedure Code, as later amended and expanded,

based on the provisions of art. 11 par. (3) of Government Decision no. 520/2013 on management and operation of the National Agency for Tax Administration, as later amended and expanded,

the President of the National Agency for Tax Administration hereby issues the following order:

ART. 1

(1) The procedure for the issuing and modification of the advance pricing agreement, provided in annex 1 is approved.

(2) The advance pricing agreement can be modified by prolonging its availability, extension or, according to case, revision, at the written request of the taxpayer/payer.

ART. 2

The contents of the application for issuing or modifying an advance pricing agreement, supporting documentation, as well as the procedure for submitting them are provided in annex no.2.

ART. 3

(1) The provisions of this order are applicable to the advance pricing agreement applications submitted after 1st of January 2016.

(2) For the advance pricing agreement applications submitted before 1st of January 2016, the legal provisions in force at the date of their submission are applicable.

ART. 4

This order shall be supplemented with the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations issued by the Organisation for Economic Co-operation and Development, as later amended and expanded.

ART. 5

Annex no. 1 and 2 are an integrated part of the present order.

ART. 6

The General Directorate for the Coordination of Tax Audits, the Legal General Directorate, the Regional General Directorate of Public Finances and their subordinate units and the General Directorate for the Administration of Large Taxpayers shall carry out the provisions of this order.

ART. 7

This order shall be published in the Official Gazette of Romania, Part I and enters into force starting with 1st of January 2016.

ANNEX 1

PROCEDURE

for issuing and modifying the advance pricing agreement

1. This procedure is applicable for the issuing/modification by the central tax authority of an administrative document, in order to establish the conditions and means in which the transfer prices are to be determined, for a fixed period of time, in case of transactions performed between related parties, defined by art. 52 of Law no. 207/2015 on the Fiscal Procedure Code, as later amended and expanded, as "advance pricing agreement" and called agreement hereinafter.

2. The taxpayers/payers that have transactions with related parties and are registered at Romanian tax authorities can apply at the National Agency for Tax Administration for the issuing or modification of an agreement.

3. Preliminary meeting

3.1. Prior to submitting an application for issuing/modifying an agreement, the taxpayer/payer can request, in writing, to the competent fiscal authority for a preliminary meeting.

3.2. The request for a preliminary meeting shall be submitted at the National Agency for Tax Administration and contains information regarding the identification data of the applicant taxpayer/payer and of its legal representative, as well as a short presentation of the subject of the discussion.

3.3. The National Agency for Tax Administration shall communicate, in writing, to the taxpayer/payer the date, time and place where the preliminary meeting shall take place.

4. Providing further data/information or documents

4.1. Depending on the case, the taxpayer/payer must provide further information/data/documents, at the written request of the competent fiscal authority.

4.2. The applicant taxpayer/payer shall respond to all the requests for further information/data/documents, as well as in the situation that these pertain to the related parties.

5. In the cases in which the competent fiscal authority requests clarifications regarding the subject of the application and/or information/data or documents relevant for decision making, the term for issuing/modification of the agreement is suspended and prolonged with the period starting with the date in which the application was submitted and ending with the date in which they are obtained.

6. The application for issuing/modifying an agreement is rejected by order of the president of the National Agency for Tax Administration in the following cases:

- a) the submitted application and documentation do not contain at least one of the elements provided at point 1.1 letter a) - x) and point 1.2 of annex no. 2 of the order for the approval of the procedure for issuing and modifying of the agreement, as well as the content of the application for the issuing and modification of the agreement;

- b) the application and documentation have not been submitted according to the provisions of point 2 of annex no. 2 of the order for the approval of the procedure for issuing and modifying of the agreement, as well as the content of the application for the issuing and modification of the agreement or have not been remade, after submitting them, according to the previously mentioned provisions;
- c) the application for modifying the agreement by prolonging the availability, extension or, depending on the case, revision has not been submitted at least 30 days prior to the end date of availability of the issued agreement;
- d) if there is a pending fiscal, administrative or juridical procedure related to the presented case or the presented case is the subject of a criminal investigation, including for tax evasion, and relates to the applicant taxpayer;
- e) if it is noticed that the submitted application and documentation contain information that is not correct and according to reality or that hide a different situation;
- f) the taxpayer/payer that applies for the issuing of an agreement does not send the clarification/documents requested by the competent fiscal authority, regarding the submitted application and/or documents, within the term provided by law, or has not filled in the documentation according to legal provisions;
- g) in other situations aside from those provided at letters a) - f) when it is noticed that the request does not cover the necessary aspects that need clarification, according to the conditions provided at article 52 of Law no. 207/2015 on the Fiscal Procedure Code, as later amended and expanded.

7. Transactions between related parties shall be done according to the arm's length principle if the financial indicator of the transaction/the value of the transaction (price/margin/result) is within the interquartile range. In order to establish the interquartile range, the following shall be taken into account:

1. the benchmark study shall take into account the territorial criteria in the following order: national, European Union, pan-European, international;
2. the reasonable availability of data at the moment of setting the transfer prices or at the moment of documenting them, for which the verified taxpayer/payer presents the supporting documents for the data used at the moment of establishing the transfer prices;
3. the comparable margin represents the value interval of the price or the margin/result of the comparable transactions between independent comparable parties, after the elimination of extreme results from the comparable margin;
4. in order to determine extreme values, the comparable interval shall be divided into 4 segments. The maximum and the minimum segments represent extreme results. The comparable interval is the interval of values of the price or margin/result of the comparable transactions between independent comparable parties, after the elimination of extreme results from the comparable interval.

8. Presenting the agreement draft or the request for further clarification

8.1. Prior to issuing, or to the rejection of the application for issuing of the agreement, the competent fiscal authority presents to the taxpayer/payer the draft of the concerned administrative document, offering him the possibility to express his point of view, according to the provisions of art. 9 par. (1) of Law no. 207/2015 on the Fiscal Procedure Code, as later amended and expanded, with exception to the case in which the taxpayer/payer waives this right and notifies the fiscal authority thereof.

8.2 The taxpayer/payer may submit the clarification provided by art. 52 par. (6) of Law no. 207/2015 on the Fiscal Procedure Code, as later amended and expanded, or may express his point of view provided at point 8.1 within a 60 work days term from the date of the request for further clarification or from the date of communicating the draft of the agreement.

9. The agreement is approved by and is annex to the order of the president of the National Agency for Tax Administration issued for solving the application for issuing or modification submitted by the applicant taxpayer/payer and contains:

- a) the name of the issuing tax authority;
- b) in case of a bilateral/multilateral agreement, the name and identification data of the tax authority or authorities involved in the issuing of the agreement;
- c) the identification data of the taxpayer/payer of the agreement;
- d) the identification data of the related party/permanent establishment with who the transaction carried out by the agreement shall be carried out;
- e) the date in which the agreement has been issued and the date of effect of the agreement;
- f) the subject of the agreement, respectively the transaction that is covered by it;
- g) the reason in the fact, the methodology for calculating transfer prices, the method of setting the transfer price, the comparison interval or the fixed margin of the comparison interval, established according to the arm's length principle, respectively the criteria and the argumentation of their selection, as presented and proposed by the taxpayer/payer in the submitted documentation;
- h) the legal basis;
- i) the terms, conditions, method of setting the transfer price, the comparison interval or the fixed margin of the comparison range, established according to the arm's length principle, approved by the agreement;
- j) critical assumptions that may affect the agreement;
- k) the period of availability of the agreement;
- l) in the case of bilateral or multilateral agreements, the language that prevails in the event of a dispute must be mentioned;
- m) requirements regarding the content of the annual report to be submitted by the taxpayer/ payer of the agreement;
- n) the opinion of the applicant taxpayer/payer on the draft agreement, communicated according to the law, during the issuance period;
- o) mentions of the possibility of modification by prolonging the validity, extension or, as the case may be, revision;
- p) mentions of the conditions in which the agreement loses its availability;
- q) mentions whether the issued agreement is available only to the applicant taxpayer/payer and for the covered transaction;
- r) references to additional documentation/clarification requests that occurred during the period of issuance of the agreement;
- s) in the case of bilateral/multilateral agreements, other information pertaining to the other tax administrations/related parties that are part of these agreements and that derive from the specifics of the respective states legislation.

10. In case the taxpayer/payer does not agree with the issued agreement, he shall submit, within 30 days from its communication, a notification to the issuing tax authority. The agreement for which the taxpayer/payer has submitted a notification does not produce any legal effect.

11. The rejection of the application for the issuing or the modification of the agreement is approved by and is annexed to the issued order of the president of the National Agency for Tax Administration and contains the following:

- a) identification data of the applicant taxpayer/payer of the agreement;
- b) the subject of the agreement;
- c) a presentation of the subject of the agreement and the transaction covered by the application, respectively of the relevant legal basis;
- d) presentation of the reasons for rejecting the application for issuing the agreement, respectively of the relevant legal basis.

12. The period covered by the agreement

12.1. The agreement is issued for a maximum 5 year period. As an exception, agreements can be issued for a longer period, in case of a long term contract.

12.2. Only one agreement shall be issued for each transaction with a related party.

13. The agreement only takes effect for the future, starting with the fiscal year following the one in which the transaction was concluded. By way of exception, the agreement may also cover the fiscal year in which the application was submitted or the agreement was issued, provided that the application would be submitted prior to the application of the transfer pricing policy, respectively prior to applying the conditions and means in which the transfer prices are to be determined, in the case of the transactions with related parties, for the transaction that is covered by the agreement.

14. In case the availability of the bilateral or multilateral agreement expires, this fact shall be notified in writing to the tax authority or authorities from the signatory states that are part of the agreement.

15. Annual report

15.1. The taxpayer/payer, owner of the agreement, has the obligation to file, annually, a report on meeting the terms and conditions of the agreement for the reported year to the issuing tax authority of the agreement. The report shall be submitted by the statutory deadline for submission of the annual financial statements, respectively the annual accounting reports.

15.2. The annual report shall be submitted on paper at the registry of the issuing tax authority or sent by post in two copies, with the pages filed and accompanied by a table of contents, signed by the legal representative.

15.3. Not filing the annual report within the legal term results in the cancellation of the agreement.

16. In case of doubts whether the transaction that is covered by the application for the issuing, modification by prolonging availability, extension or, depending on the case, revision of the agreement may be an artificial cross-border transaction, according to the provisions of art. 11 para. (3) of Law no. 227/2015 on the Fiscal Code, as later amended and expanded, the competent tax authority may request the taxpayer/payer that submitted an application for a unilateral agreement to modify it into a bilateral or multilateral agreement, according to case.

17. Payment of the issuing/modification of the agreement

17.1. The payment of the issuing or modification of the agreement, respectively the difference in the tariff in case the taxpayer/payer is classified during the issuing period as a "large taxpayer" shall be made in lei in the account 20.33.01.29 of the National Agency for Tax Administration, IBAN code RO56TREZ70020330129XXXXX, opened at the Operative Treasury of Bucharest.

17.2. Not paying the difference of the tariff for the issuing or modification, respectively of the difference of the tariff in case the taxpayer/payer is classified during the issuing period as a "large taxpayer" in accordance with the conditions established by art. 52 para. (17) of Law no. 207/2015 on the Fiscal Procedure Code, as later amended and expanded, results in the cancellation of the agreement.

18. The agreement is sent to the taxpayer/payer to whom it is intended, as well as to the competent tax authority for the administration of the tax receivables due by the taxpayer/payer.

19. The agreement is opposable and obligatory to the tax authority only if the terms and conditions have been followed by the taxpayer/payer.