

Order no. 442/2016 on conditions surrounding the amounts of transactions, submission of the transfer pricing documentation file, content and conditions of requesting the preparation of the transfer pricing documentation file and application of transfer pricing adjustment/estimation procedure

Based on art. 11 par. (3) of Decision of Government of Romania no. 520/2013 on management and operation of National Agency for Tax Administration, as later amended and expanded and further based on art. 5 par. (4), art. 11 par. (4), art. 19 par. (6), art. 36 par. (3) and art. 37 par. (3) of Law no.227/2015 on Fiscal Code, as later amended and expanded, read in conjunction with art. 58, art. 64, art. 108 par. (2), art. 283 and art. 342 par. (1) of Law no. 207/2015 on Tax Procedural Code, as later amended and expanded,

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

Art. 1

In order to document compliance with arm's length principle surrounding transfer prices charged in inter-company transactions, taxpayers/payers must prepare the transfer pricing documentation file subject to the terms and conditions established herein.

Art. 2

(1) Taxpayers/payers categorised as major taxpayers so determined under the relevant order by the President of National Agency for Tax Administration which conduct inter-company transactions of an aggregate annual value reached by adding up the values of transactions with all their related parties, exclusive of VAT, which is higher than or equal to the relevant materiality thresholds, must prepare on an annual basis their respective transfer pricing documentation files. Time limit for preparation of the transfer pricing documentation file is the legal time limit allowed to submit the annual corporate income tax returns, in respect of every fiscal year. The applicable values of a materiality threshold, for the taxpayers/payers mentioned above, based on the specific type of a transaction, are as follows:

- EUR 200,000 in case of interest costs incurred for financial services, to be determined based on the exchange rate announced by the National Bank of Romania prevailing at the last date of the relevant fiscal year;
- EUR 250,000 in case of provisions of services, to be determined based on the exchange rate announced by the National Bank of Romania prevailing at the last date of the relevant fiscal year;
- EUR 350,000 in case of transaction involving purchases/sales of tangible or intangible assets, to be determined based on the exchange rate announced by the National Bank of Romania prevailing at the last date of the relevant fiscal year.

(2) Taxpayers/payers qualifying for the provisions of par. (1) must submit, based on art. 108 par. (2) of Law no. 207/2015 on Tax Procedural Code, as later amended and expanded, further to a request in writing by a competent tax inspector, during a tax inspection, their relevant transfer pricing documentation file as prepared in accordance with the provisions hereof. Form and substance of such request are provided as annex no. 1.

(3) The transfer pricing documentation file prepared as per par. (1) may also be requested by a competent tax inspector in other circumstances beside a tax inspection, based on art. 58 and 64 of Law no. 207/2015 on Tax Procedural Code, as later amended and expanded. Form and substance of such request are provided as annex no. 2.

(4) Both taxpayers/payers categorized as major taxpayers not meeting the requirements under par. (1) and taxpayers/payers categorized as small and medium-sized taxpayers that conduct intercompany transactions of an aggregate annual value reached by adding up the values of transactions with all their related parties, exclusive of VAT, which is higher than or equal to the relevant materiality thresholds, must prepare and submit their respective transfer pricing documentation files only to a request in writing by a competent tax inspector

during a tax inspection. Form and substance of such request are provided as annex no. 1.

The applicable values of a materiality threshold, for the taxpayers/payers categorised as major taxpayers not meeting the requirements under par. (1), as well as for the taxpayers/payers categorised as small and medium-sized taxpayers, based on the specific type of a transaction, are as follows:

- EUR 50,000 in case of interest costs incurred for financial services, to be determined based on the exchange rate announced by the National Bank of Romania prevailing at the last date of the relevant fiscal year;
- EUR 50,000 in case of provisions of services, to be determined based on the exchange rate announced by the National Bank of Romania prevailing at the last date of the relevant fiscal year;
- EUR 100,000 in case of transaction involving purchases/sales of tangible or intangible assets, to be determined based on the exchange rate announced by the National Bank of Romania prevailing at the last date of the relevant fiscal year.

(5) Taxpayers/payers qualifying for the provisions of par. (4) that conduct inter-company transactions of an aggregate annual value reached by adding up the values of transactions with all their related parties, exclusive of VAT, which is lower than the materiality thresholds mentioned under par. (4), must prepare documents that attest to the compliance with the arm's length principle, in case of a tax inspection, according to the effective provisions of the general accounting and tax regulations.

Art. 3

Content of the transfer pricing documentation file as per art. 2 is provided as annex no. 3.

Art. 4

(1) Time limit allowed for submission of a transfer pricing documentation file prepared as per art. 2 par. (1) requested based on art. 2 par. (2) and par. (3), shall be no later than 10 calendar days of the date of such request, but not earlier than 10 days of expiry of the time limit afforded for its preparation.

(2) In respect of taxpayers/payers which must prepare their respective transfer pricing documentation file under art. 2 par. (4), the competent tax inspector shall determine the time limit afforded for its submission by taxpayers/payers in the applicable request form. The time limit afforded for submission of the transfer pricing documentation file requested under art. 2 par. (4) shall be between 30 and 60 calendar days, with a one-off option, upon a request in writing of taxpayers/payers, to extend for a maximum 30 calendar days. Under such circumstances, if enforced, a tax inspection may be suspended by the time of expiry of the time limit afforded to submit the relevant transfer pricing documentation file, based on art. 127 par. (1) letter b) of Law no. 207/2015 on Tax Procedural Code, as later amended and expanded.

Art. 5

(1) To a request in writing by a competent tax inspector, to complement its transfer pricing documentation file, the taxpayer/payer shall provide further relevant information that attest to the compliance with the arm's length principle.

(2) Where a taxpayer/payer complements its transfer pricing documentation file with additional documentation, to a request in writing by a competent tax inspector, such documentation must be accompanied by references to the original documentation, as applicable.

(3) Transfer pricing documentation file and its later amendments being requested, as applicable, shall be submitted to the requesting tax inspector at their respective offices or at the place where the applicable tax inspection is conducted, within the timeframe determined by same.

(4) The sheets must be duly filed away, numbered and accompanied by the applicable list of

documents. Any documents in a foreign language shall be accompanied by translations thereof into the Romanian language certified by translators duly licensed by the Ministry of Justice, as required by the law.

(5) Any annexes attached to a transfer pricing documentation file being available also in electronic format shall be submitted to the competent tax inspectors in an editable format.

Art. 6

The transfer pricing documentation file shall not be requested or prepared, as applicable, by any taxpayer/payer that entered into an advance pricing agreement, in respect of any transactions and periods not being covered under such advance pricing agreement issued by the National Agency for Tax Administration, or of any transactions in respect of which there has been issued a decision to adjust/estimate the income or expenses of any of the relevant related parties, as required by art. 283 of Law no. 207/2015 on Tax Procedural Code, as later amended and expanded.

Art. 7

(1) In case of any taxpayer/payer having conducted inter-company transactions outside the arm's length principle, as required by art. 11 par. (4) of Law no.227/2015 on Fiscal Code, as later amended and expanded, the competent tax inspectors shall adjust the amount of such transfer prices as charged therein. An adjustment shall be made in respect of any inter-company transactions for which taxpayer/payer failed to support the fact that the relevant transfer prices were charged in compliance with the arm's length principle.

(2) Any taxpayer's/payer's failure to produce, during a tax inspection, as required by art. 2 par. (2) and (4), the required transfer pricing documentation file within the agreed time limit shall entitle competent tax inspectors to consider that such taxpayer's/payer's inter-company transactions are conducted without a justification for the amounts of the transfer prices charged therein.

(3) Any incomplete submission of a transfer pricing documentation file, as required by art. 2 par. (2) and (4), shall be deemed as a failure to provide the information required by tax inspector in order to determine whether or not relevant transfer prices as charged in inter-company transactions are of an arm's length nature.

(4) In case of any failure to provide/incomplete submission of a transfer pricing documentation file, as required by art. 2 par. (2) and (4), the competent tax inspectors shall proceed to estimate the amounts of the relevant transfer prices. Such estimation shall only be made in respect of any inter-company transactions in respect of which the relevant taxpayer/payer failed to submit its transfer pricing documentation file or for which such transfer pricing documentation file is submitted in an incomplete form, with the amount of the determined transfer prices failing therefore to be justified under the applicable arm's length principle. As a result of said estimation, the amount of either income or expense associated to the fiscal result of any of the related parties shall be adjusted based on the level of the central trend of the market.

Art. 8

An inter-company transaction shall be deemed to have taken place in compliance with the arm's length principle providing that the financial indicator of such transaction (markup/result/price) falls within the duly identified arm's length range. In determining the arm's length range the following requirements shall be met:

1. benchmarking study shall treat the territorial criteria in the following sequence: national, European Union, pan-European, international;
2. reasonable availability of data at the moment of the identification or documentation of transfer prices in respect of which the inspected taxpayer/payer provides supporting documentation for the data used at that precise moment in determining the chargeable transfer prices;
3. the arm's length range is such range as including values of price or mark-up/result

associated to comparable transactions conducted between third party comparable companies;

4. in identifying the relevant extreme values, the range shall be split into 4 quartiles. Both maximum and minimum quartiles shall be deemed to contain extreme results. The interquartile range is deemed to contain the range of price values or mark-up/result for comparable transactions conducted between third party comparable companies, after excluding the extreme results;

5. in identifying and computing the required estimation/adjustment the extreme results in the inter-quartile range shall not be used;

6. where the median value cannot be identified (the median value is that value which is to be found in the middle of the inter-quartile range), the weighted average of the two middle values of the inter-quartile range identified shall be used.

Art. 9

(1) Any adjustment/estimation of transfer prices conducted in order to account for an arm's length price of goods or services supplied in a given transaction shall be made by the competent tax inspectors using the value provided by the central trend of the market.

(2) Central trend of the market shall consist in the median value of an inter-quartile range of the financial indicators of the identified comparable companies/transactions. Alternatively, where a sufficient number of comparable companies/transactions are not available to be able to determine an inter-quartile range, i.e. with no more than three comparable companies or transactions having been identified, the weighted average of the financial indicators of such companies or of the identified transactions shall be used.

(3) In case of any transfer pricing adjustment/estimation the required comparable transactions/companies shall be identified based on the general data about similar transactions or financial indicators associated to the business activities to be subjected to such adjustment/estimation, and which are available to both tax inspector and relevant taxpayer/payer .

Art. 10

This Order shall be read in conjunction with the Transfer Pricing Guidelines issued by the Organization for Economic Co-operation and Development for multinational companies and fiscal administrations, as later amended/changed and expanded, and the Code of Conduct on transfer pricing documentation published in the Official Journal of the European Union no. C176/1 of 28 July 2006.

Art. 11

General directorate for tax inspection supervision, general directorates of regional public finance, structures reporting thereto and general directorate for administration of major taxpayers shall procure that the provisions hereof are duly enforced. Art. 12 Annexes no. 1 - 3 attached hereto are integral part hereof.

Art. 13

(1) Provisions of art. 2 par. (1) shall be applicable to any inter-company transactions being conducted starting from 2016.

(2) Provisions hereof shall be applicable to such tax inspection procedures as having commenced after 01.01.2016.

(3) In respect of any tax inspection procedures having commenced prior to 01.01.2016, such legal provisions are enforceable at the time of such inspection procedures being initiated.

Art.14

This order shall be enforceable at the time of it being published in the Official Journal of Romania, Part I.

NATIONAL AGENCY FOR TAX ADMINISTRATION

General Directorate
Tax Administration
No. /dd.mm.yy

REQUEST

to prepare and submit the transfer pricing documentation file, in case of taxpayers/payers that must prepare and submit same under art.108 par. (2) of Law no.207/2015 on Fiscal Procedural Code, as later amended and expanded

Name of taxpayer/payer

Tax registration number:

Tax domicile:

Dear Madame/Dear Sir,

In light of the ongoing inspection, based on the provisions of art. 1 and art. 2 par. (2) and (4) of O.P.A.N.A.F. no. 442/2016 on surrounding the amounts of transactions, submission of the transfer pricing documentation file, content and conditions of requesting the preparation of the transfer pricing documentation file and application of transfer pricing adjustment/estimation procedure, you are required to submit no later than _____ your transfer pricing documentation file to tax inspector / at the venue of said tax inspection at the following address: _____ Period and transactions in respect of which your transfer pricing documentation file will be prepared/submitted will be as follows:

1. _____
2. _____

The transfer pricing documentation file requested hereunder shall not cover either the transactions or periods covered under an existing advance price arrangement or any transactions in respect of which there has been issued a decision to adjust/estimate the income or expenses associated to any of your related parties, for which you are bound to provide the relevant documents.

Please be advised that, as set forth in art. 4 par. (2) of O.P.A.N.A.F. no. 442/2016 on surrounding the amounts of transactions, submission of the transfer pricing documentation file, content and conditions of requesting the preparation of the transfer pricing documentation file and application of transfer pricing adjustment/estimation procedure, you are entitled to request a one-off extension of the time limit for submission of your transfer pricing documentation file, on solidly justified grounds. This request is issued based on art. 108 par. (2) of Law no. 207/2015 on Fiscal Procedural Code, as later amended and expanded.

Tax inspector,
(title, full name, signature)

NATIONAL AGENCY FOR TAX ADMINISTRATION

General Directorate

Administration

REQUEST to submit transfer pricing documentation file, in case of taxpayers/payers that must prepare and submit same under art.108 par. (2) of Law no.207/2015 on Fiscal Procedural Code, as later amended and expanded

Name of taxpayer/payer

Tax registration number:

Tax domicile:

Dear Madame/Dear Sir,

Please be advised that, based on art. 1 and art. 2 par. (3) of O.P.A.N.A.F. no. 442/2016 on conditions surrounding the amounts of transactions, submission of the transfer pricing documentation file, content and conditions of requesting the preparation of the transfer pricing documentation file and application of transfer pricing adjustment/estimation procedure, you are required to submit/send no later than _____ to the tax inspection office at the address _____ your transfer pricing documentation file covering Financial Year(s) 20_____.

The transfer pricing documentation file requested hereunder shall not cover either the transactions or periods covered under an existing advance price arrangement or any transactions in respect of which there has been issued a decision to adjust/estimate the income or expenses associated to any of your related parties, for which you are bound to provide the relevant documents.

This request has been issued based on art. 58, art. 64 and art. 108 par. (2) of Law no. 207/2015 on Fiscal Procedural Code, as later amended and expanded.

Tax Inspection Supervisor,

(title, full name, signature, seal)

Contacts: _____, telephone no. _____

ANNEX No. 3

THE CONTENT OF THE TRANSFER PRICING DOCUMENTATION FILE

The transfer pricing documentation file should include:

A. Information on the group:

1. the organizational, legal and operational structure of the group (list of all entities within the group, including the permanent establishments and their identification data), the geographical location of the component entities specifying the shareholdings at the level of the group, during the period for which the transfer pricing documentation file has been prepared;
2. overview of the group's activities, its business strategy, including the changes in the business strategy within the period for which the transfer pricing documentation file has been prepared;
3. description of any transfer pricing policy at the level of the group, if the case;
4. general description of transactions carried out between related parties;
5. general description of functions performed, risks assumed and assets employed in the transactions carried out between related parties (functional analysis), including the changes in the functional profile of the entities within the group, during the period for which the transfer pricing documentation file has been prepared;
6. general description of functions performed, risks assumed and assets employed, at the level of the group, that contribute significantly and definitively to the value-adding processes undertaken, taking into consideration each entity part of the group;
7. description of owners of intangibles and property rights pertaining, within the group (patent, license, trade name, brand, logo, know-how, etc.), if the case;
8. general description of transfer pricing policy regarding financial arrangements (intra-group financing services) between related parties, if the case;
9. description of any business restructuring within the group, during the period for which the transfer pricing documentation file has been prepared;
10. general description of research and development activities within the group, if the case;
11. description of advance pricing arrangements entered into by the taxpayer/payer or by other entities part of the group, except for those issued by the National Agency for Tax Administration.

B. Information on the taxpayer/payer

1. the organizational, legal and operational structure of the taxpayer/payer (a list of its related parties, including their permanent establishments and identification data), the geographical location of the related parties, specifying the direct and indirect affiliation relations of the taxpayer/payer, during the period for which the transfer pricing documentation file has been prepared, highlighting the occurred changes;
2. general description of activities performed by the taxpayer/payer, business strategy, including any changes within the business strategy during the period for which the transfer pricing documentation file has been prepared;
3. general description of transactions carried out between each related party as well as the context surrounding them;
4. description of the transfer pricing policy established at the level of the taxpayer/payer;
5. description of the implementation procedure when applying the transfer pricing methodology for the transactions carried out between the taxpayer/payer and its related parties;
6. description of research and development activities at the level of the taxpayer/payer, if the case;

7. general description of the transfer pricing policy regarding the intra-group financing services of the taxpayer/payer with related parties, along with the presentation of financing agreements concluded both with related parties and independent lenders, if the case;
8. description of the agreements concluded between the taxpayer/payer and its related parties, regarding cost contribution arrangements;
9. description of intra-group transactions consisting in provision of services, detailing the allocation keys, if the case, describing the services which have a significant and definitive contribution to the value-adding processes undertaken;
10. presenting the main outlets for tangible goods delivery/services provision of the taxpayer/payer with its related parties;
11. description of transactions related to any business restructuring that involve the taxpayer/payer, during the period for which the transfer pricing documentation file has been prepared;
12. detailed description of the transactions carried out with related parties:
 - a) flow of transactions;
 - b) invoicing flow;
 - c) amount of transactions carried out with the related party/parties;
 - d) amount of payments/receipts associated with each transaction performed by the taxpayer/payer with each related party.
13. detailed presentation of the functional analysis and comparability analysis:
 - a) characteristics of tangible and intangible goods or services, including the financing services subject to the transaction/transactions with related parties;
 - b) specific business strategies (e.g. market penetration strategies, extraordinary events, etc.);
 - c) functions performed, risks assumed and assets employed by the taxpayer/payer and by the related party/parties within the transaction(s) carried out;
 - d) contractual terms of the transaction(s), with attached copies of the contracts/agreements acting as legal framework of the transaction(s) carried out with related parties;
 - e) particular economic circumstances of the transaction(s);
 - f) comparability analysis: information regarding the external or internal comparable transactions (description of search strategy for comparable companies and of the information sources, presenting the values of the financial indicators used for the comparability analysis, description of possible comparability adjustments that were made, presenting the comparable entities list as well as the list of rejected entities from the comparable sample as a result of the manual search, with the provision of the rejection reasons, etc.). Justification of the arm's length principle shall be based on reasonable availability of data for the taxpayer/payer at the moment the identification/preparation of the transfer pricing documentation, by presenting documents which support the justification;
 - g) presentation of critical assumptions that formed the basis for establishing the transfer pricing policy;
 - h) presentation of reasons for using a multiannual or annual analysis of data, as the case;
14. description of the method used for determining the transfer prices for each transaction and validation of the selection criteria; if using transfer pricing methods that involve the selection of the tested party, the rationale for its selection shall be presented;
15. presentation of unilateral or bilateral/multilateral advance pricing agreements, related to the transaction(s) carried out, for which the National Agency for Tax Administration does not take part;
16. description of other relevant information for the taxpayer/payer.