Transfer Pricing Forum

Transfer Pricing for the International Practitioner

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Legislation

The transfer pricing milestone of 2020 was the enactment of the new transfer pricing regulations, namely the Argentine Revenue Service (ARS) general resolution 4717 ("GR 4717"). Those regs were aimed at aligning the compliance framework with the latest amendments to the Income Tax Law (Law 27,430). Since these new regs took so long, the ARS had to postpone the deadlines for filing the 2018 and 2019 transfer pricing reports until late 2020. COVID-19 further supported the deadline extension.

Next follows a brief summary of the main aspects of GR 4717:

1) **Tested Party**: GR 4717 provides that the tested party is the Argentine affiliate as the general rule. However, this standard may be overlooked when the profit split method is applied.

2) **Segmentation**: When the transfer pricing analysis does require performing a segmentation of the tested party's financial information, the local report should elaborate on the criterion followed to such extent. That analysis should indicate how margins were reached; the accounts selected and disregarded; the allocation mechanisms; the level of income and operating expenses computed in such calculations, etc.

3) **Cross-Border Business Restructurings**: During 2020, business restructurings were common, and the ARS took action from the regulatory viewpoint. GR 4717 regulates in detail the tax consequences of cross-border business restructurings within the affiliated group. The resident party is required to account for an arm's length remuneration when it undertakes new risks or functions or when it transfers a business line out of the country. In parallel, it is also required to account for an arm's length loss when the business restructuring results in the need to pay out an indemnification or a similar outlay. For benchmarking purposes, the new GR 4717 requires considering the effects of civil and commercial laws, market standards, and domestic case law whenever applicable. The economic analysis needs to be included in the annual transfer pricing report. Just to recall, the filing of such a report is mandatory every year, as are the CbC report (or an indication of the country where such filing is made by the MNE group) and the Master File.

4) **Triangular Transactions and Special Rules for "Intermediaries"**: Intermediaries are defined as any foreign counterpart to a resident affiliate who does not take physical possession of goods exported from Argentina. To prove the substance of such an intermediary, a detailed functional analysis is required by GR 4717, including the need to provide evidence as to the good standing of the intermediary in its jurisdiction of incorporation; submitting the intermediary´s financial statements, as well as a certification by and appropriate professional of the margins obtained for such intermediation, which includes the details of purchases, sales, and associated costs. This type of evidence is difficult to obtain but needs to be maintained by any resident MNE who purchases from or sells to related affiliates in the cross-border context. More cumbersomely, the new regs also require taxpayers to provide such evidence when the intermediary is not an affiliate but is part of a triangular transaction between related parties. This evidence should be maintained by the Argentine affiliate in case of an ARS audit. Under special circumstances, if the margins obtained by the intermediary go beyond market standards, the ARS may allocate the excess to the Argentine exporter that deals with the intermediary. These issues are a complex topic

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of current debate to ensure that the evidence is kept while no collateral damage is triggered by the MNE group.

5) **Exports of Oil & Gas Production and Related Derivatives**: GR 4717 provides that such transactions could be benchmarked in view of a "marked product" (i.e., a product whose price is used for setting international prices of the underlying goods) if such standards are commonly used for pricing formulas between unrelated parties. It is not required that the exported goods match the reference values as long as this pricing methodology is proved to be consistent with the arm's length standard. For example, if the exported goods and the marked product are similar but not identical, a reliable comparability adjustment should be made.

6) **Benefit Analysis for Cross border Services**: The transfer pricing analysis for services should consider compliance with the ordinary and necessary tests; the parties' conduct (i.e. whether it resembles the OECD's "delineation of the actual transaction"); the contractual terms, as well as a benefit analysis (i.e., it should evidence that the profit or value obtained by the tested party outweighs the price paid for the service). GR 4717 does not allow deducting any service fee performed for the benefit of the foreign affiliate or of any other affiliate, nor unrelated to the Argentine party's business. Cross-border services that are deemed duplicated may not be deducted, a test that should be analyzed in view of the arm's length standard on a case-by-case basis.

7) **Other Transfer Pricing Compliance Burdens**: Provisions addressing these burdens are all fully amended, including cumbersome reporting and documentation rules regarding cross-border, unrelated-party transactions with commodities. Related party transactions are also burdensome, and the regulations provide for new, detailed transfer pricing reports and associated filing forms (F. 2668). A special CbC filing is required from any local party that is a member of an MNE group. In addition, the Master File must be filed within twelve months after closing the financial statements of the Argentine affiliate.

Cases and Rulings

The Federal Supreme Court is yet to rule on a pending material case on commodity exports that concerns an ARS notice of deficiency made on deemed related party transactions (i.e., between an Argentine exporter and an unrelated counterpart resident in a low-tax jurisdiction) and set unrelated party transactions (commodity transactions with market prices arguably fixed below market standards). The ARS agreed with the taxpayer that the best method was the comparable uncontrolled price (CUP) but relied on the listed official price prepared (on a daily basis) by the Agriculture Secretariat for each commodity ("AG Listed Price"). Such prices consider daily fluctuations of the main commodities on major international boards of trade (e.g., Chicago, Rotterdam). The taxpayer proved the AG Listed Prices were not CUP prices but rather the result of averaging CUP prices from the opening to the close of the daily trade in the Chicago Board of Trade. Further, he provided witness expert opinion to evidence that the taxpayer's export prices fall within a standard deviation of the Board's daily prices from the mean (AG Listed Price), so the CUP method did sustain taxpayer's criteria. The case was decide in the taxpayer´s favor at the Tax Court and the Federal Court of Appeals, and it is now under review by the Federal Supreme Court. On June 6, 2020, the Attorney General opined on this case, upholding the taxpayer's criterion and recommending that the Supreme Court not overturn the Federal Court of Appeals decision.

Concerning transfer pricing on cross-border financings, the Federal Court of Appeals applied Supreme Court case law from December 2019 to set standards on debt to equity re-characterization. The Court expressly indicated the relevance of transfer pricing reports to create the required brightline and also noted that the ARS failed to consider properly that intra-group financing was suitably documented and benchmarked for transfer pricing purposes, meriting no challenge from an arm's length viewpoint. The ARS equity re-characterization was consequently dismissed.

Transfer Pricing Documentation

GR 4717 introduces new transfer pricing documentation requirements, including a TP Report, Master File and the annual transfer pricing form. The minimum requirements of the TP Report and the Master File are generally consistent with the OECD standards but with some deviations, such as the mandatory use of the local taxpayer as the tested party.

GR 4717 particularly focuses on transactions of imports and exports of goods carried out through international intermediaries. Taxpayers that carried out transactions involving imports or exports of goods through international intermediaries must obtain and keep the following documentation regarding such foreign intermediaries:

- Evidence providing the actual presence of the intermediary in its territory of residence according to the regulations of that jurisdiction, demonstration of registration as a legal entity, and commercial or similar registration in the country, and registration with the tax authorities of such jurisdiction.
- Audited financial statements.
- Certification issued by a competent professional in the jurisdiction of the international intermediary, certifying the detail of the direct taxes to which the entity is subject to in such jurisdiction, and the tax identification of the entity in the jurisdiction of residence.
- Certification issued by a competent professional in the jurisdiction of the international intermediary, certifying both the remuneration of the international intermediary related to its participation in the transactions and – if the international intermediary is a related party – also certifying the details of the purchase and selling prices, and expenses associated with the transactions.

GR 4717 increases the documentation burden for a greater number of taxpayers and the complexity of the required studies, as well as the process for submitting the documentation on an annual basis. The complex process of submitting transfer pricing documentation will require strong coordination between the local taxpayer, its advisors, and the parent company. Companies should consider increasing their resources as they strive to comply with local requirements.

Transfer Pricing Examinations/Audits

It is expected that pending MAP procedures will be reactivated, in view of the tax amendments made by Law N° 27,430. Historically, the ARS took the position that once a tax assessment was debated in court, the competent authorities could no longer intervene. Consequently, a number of transfer pricing adjustments that ended up in the MAP processes would face no reaction from the Argentine treaty competent authority. This outcome is expected to change.

Impact of COVID-19

In view of the economic downturn resulting from the pandemic, the author's view is that Argentine multinational enterprises (MNEs) will likely be required to make extraordinary loss adjustments like in past economic crises. Extensive bad debt write-offs are also expected, while the government puts in place limited counter measures (subsidies), with a view to mitigating the adverse effects of COVID-19. The pandemic raised new tax issues, like the need to assess the financial impact of abnormal expenditures that would not be incurred in the ordinary course of business (i.e., sanitizers, gloves, masks, and temperature measuring equipment, etc.), the effects of reduced employee mobility due to the pandemic and its associated permanent establishment risks, among others.

The ARS further mitigated pandemic concerns by extending the deadlines for filing transfer pricing reports and meeting associated compliance requirements.

What Can We Expect in 2021?

Some companies are restructuring their businesses in neighboring countries, such as Uruguay, which have lower tax burdens than does Argentina. Such strategies require careful scrutiny in view of the new regs, a topic that is undergoing ARS scrutiny. International triangular transactions will also be a focus of stricter audit, in view of the burdensome information standards required by GR 4717.

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