



Transfer pricing documentation – be prepared at all times!

So far it is almost not recognized by the public that amendments to the Fiscal Code of Germany (Abgabenordnung) have been passed by the German Bundestag on the night of November 11, 2022.^{1,2} The new regulation entails considerable practical aggravation for companies engaged in cross-border activities with subsidiaries or permanent establishments in different countries³.

Extension of the obligation to submit transfer pricing documentation

Up to now, domestic companies only had to expect to be requested to submit transfer pricing documentation on the occasion of a tax audit. This was not mandatory but nevertheless provided for by law.⁴ In fact, experience shows that the request for such submission was almost always made in connection with an external audit.

This rule-exception-relationship has now been abolished. Instead, with the new regulation, the request for submission by the tax office - whether in the context of the assessment or even without any externally recognizable reason ("spot check") - will henceforth be of same importance as those related to external audit:

Shortening of the submission period

Previously, the taxpayer had a period of 60 days to submit the transfer pricing documentation following the notified request. Extensions of such period were possible. This period has now been shortened down to 30 days. It thus corresponds to the unchanged time period for recording the so-called extraordinary business transactions (außergewöhnliche Geschäftsvorfälle).

Bringing forward the deadline

Compliance with the deadline has been significant because the delay fine of up to 100,-euro per day can quickly add up to a painful sum. Therefore, the beginning of the time period is essential. Until now, the 90-day period began with the receipt of the explicit request for submission by the taxpayer. In the future, this will only apply in the case of a request for submission without cause. In cases of tax audits, however, the period already starts with the receipt of the order of the tax audit - even if the transfer pricing documentation is not even mentioned in such order! This is because the obligation to submit the documentation then already arises from the law.⁵

¹ Official: "Law on the implementation of Council Directive (EU) 2021/514 of March 22, 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation and modernizing tax procedural law", BT-Drcks.20/3436, 20/4228 and 20/4376 in the 66th session of the Bundestag of November 10, 2022.

² „Amendments are made, inter alia, in: Section 90 (3) of the Fiscal Code of Germany partially revised, paragraphs 4 and 5 inserted as well as Section 162 (4).

³ Section 90 (3) sentence 9 of the Fiscal Code of Germany

⁴ "As a rule, the tax authority shall only request the submission of records for the purpose of conducting an external audit", (Section 90 (3) sentence 5 of the Fiscal Code of Germany).

⁵ An increase of the surcharges in case of unusability (Unverwertbarkeit) and of the daily rate in case of late submission is not provided for in the new version

Request without cause – a sword of Damocles?

Practice will show, to what extent the tax authorities will make use of the tightening of the law to request without cause. It should not be forgotten that such a request on the part of the tax authority does not entail any real obligation to audit. The tax authority would not have to take any action (in contrast to, for example, the ordering of an external audit, which must be followed promptly by the commencement of audit activities). If the documentation is not (or no longer) audited by the tax office after submission, the taxpayer would presumably have no recourse against it, at least according to the legal situation under the DAC 7 Implementation Act ("no right to an audit opinion"). The chances of success of an action for failure to act are unlikely to be too high.

Some companies may be happy if the tax authorities do not get back to them. In view of the personal and material effort required to prepare the transfer pricing documentation, however, others may well be interested in having tax assessment clarified- even if this does not result in de jure legal certainty for future assessment periods.

In any case, there is a considerable potential threat inherent in the request for submission without any cause.

Effective date

The new regulation will take effect on January 1, 2024.

Summary

- » Companies shall streamline their entire documentation process and keep it constantly up to date in order to comply with the shortened 30-day submission requirement. Being "prepared" only with regard to the essential parts (in practice, only the so-called master file is already final) is no longer sufficient. Whereas under the previous legal situation it was possible to update the final passages - in particular the documentation of facts- in the remaining three months and adapt them to the circumstances prevailing at the time of submission, this will no longer be possible in the future.
- » Due to the reduction of the time period, in many cases the submission deadline will even have expired before the external auditor has begun his audit procedures.
- » Due to the separation of the external audit and the request for submission, fiscal years that are not (yet) subject to the external audit can also be requested. A chronological processing is therefore not possible.
- » Companies will have to make a considerable, ongoing effort to update their transfer pricing documentation. The remaining 12 months until the new regulation comes into force should be used to implement appropriate compliance.