

The Transfer Pricing Provisions Regain Force in Guatemala for the year 2015

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The domestic entities that carry out commercial transactions with foreign entities and the non-resident foreign entities that carry out sales or provide services through permanent establishments or to linked entities in Guatemala must consider the force of the regulations regarding transfer pricing.

“Transfer pricing” refers to the valuation on whether the value or the prices and compensations of assets and services in operations between related or linked entities was made under the free competition principle.

The transfer pricing provisions in Guatemala not only force the resident entities but also the non-resident ones with a permanent establishment to prepare and present a transfer pricing study, when it is required from them, and they also empower the Tax Administration to check if the operations between related parties have been valued at market prices, and to make adjustments when it considers that the valuation would result in less taxation or in a tax deferral.

These transfer pricing provisions intend that the price or value of the transactions between related entities is freely determined in accordance with the market, with the intent of not reducing the taxable income. Otherwise, the legislation allows the Tax Administration to make adjustments, if it results in less taxation in Guatemala.

Book I of Decree 10-2012 of the Tax Updating Law, -TUL-, in force since January 1, 2013, contains the legal provisions regarding the Income Tax. Even though it is a new law, these provisions maintain the territoriality character of the income generated in the territory of the Republic of Guatemala.

The incorporation of the Valuation between Related Parties Special Provisions, contained in Chapter VI of Title II, in the Income of Lucrative Activities, is among the innovations of this legislation. These provisions are based on the free competition principle, which presents the premise that the compensation value of transactions between related entities must be within a commercial margin, as if each one of them were independent, under which they will be forced to declare a cost or value similar to the transactions that independent companies generate, based on market prices.

This principle is regulated in article 55 of the provisions and it empowers the Tax Administration to check if the operations made between related parties have been valued according to the above, as well as to make adjustments if the value agreed on between the parties would result in less taxation in the country or in a tax deferral.

Regarding the application scope of the valuation provisions of the operations between related parties, in accordance with article 57 of the TUL, these provisions reach any operation made between a person resident in Guatemala and another one resident abroad, and that has effects in the determination of the taxable income of the period in which the operation is made or even in the subsequent periods.

Regarding the information and documentation, article 65 of the TUL states that the taxpayers must have, upon presenting the income tax return, the sufficient information and analysis to prove and justify the correct determination of the prices, the amounts of the compensations or the profit margins in their operations with related parties, in accordance with the provisions of Book I (Income Tax), and that they must present the documentation that the Tax Administration may request within a 20-day term following the receipt of the request.

The information that the taxpayer may have used to determine the valuation of the operations between related parties will be composed of the one related not just to the taxpayer, article 67 of the TUL, but also of the one related to the corporate group to which the taxpayer belongs to, in accordance with article 66 of the TUL.

Regarding this issue, article 65 of the Regulations establishes that the sufficient information and analysis to which articles 65, 66 and 67 of the law refer to, must be contained in a sole report called 'Transfer pricing study'.

Notwithstanding the above, Decree 19-2013 entered into force on December 21, 2013; Transitory article 27 of this Decree stated:

“Article 27. Transitory. Suspension of the force of the valuation between related parties special provisions. The force of the valuation between related parties special provisions contained in Chapter VI, articles 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66 and 67 of the Tax Updating Law, Decree Number 10-2012 of the Congress of the Republic of Guatemala, are suspended of their application and force. Such provisions will enter into effect and application again on January one (1) of the year two thousand and fifteen (2015). Notwithstanding the above, starting on the entry into force of this Decree, the Tax Administration may request information regarding the contents of the referred to Chapter VI, to form the necessary databases.” (The underlined part is not underlined in the original).

Therefore, the obligations related to the information and documentation established from articles 65 to 67 of the Tax Updating Law; which should have been included in the “Transfer pricing study”, in accordance with article 65 of the Regulations were temporarily suspended until the 2015 tax year.

Likewise, the obligation established in article 64 of the Regulations, of enclosing an attachment to the annual income tax return with the information that the Tax Administration may order, was also suspended, since enclosing the attachment arises from what is provided in article 65 of the TUL, which temporarily stopped having force starting on the 2013 year; thus, such obligation was exempted for the 2013 and 2014 tax years; but not for the ongoing 2015 tax year.

Since the obligation to provide information established from article 65 to article 67 states as compliance date the moment when the annual income tax return is presented, which must be presented within the first 3 months of the calendar year, and since the force of these provisions was suspended, in accordance with Decree 19-2013, in the date in which the income tax return corresponding to 2013 and 2014 must have been presented, thus the provisions contained in articles 65, 66 and 67 of the TUL are not applicable for these periods.

Notwithstanding the above, it is important to consider that article 27 of Decree 19-2013 of the Congress states that “the Tax Administration may request information regarding the contents of the referred to Chapter VI, to form the necessary databases”; i.e., the provision expressly left open the possibility for the Tax Administration to request information regarding the contents of the valuation between related parties special provisions. But if there is no request, there is no obligation to have the study for the 2014 year.

Derived from the above, the Guatemalan entities linked with or related to one or several entities resident abroad or with non-resident entities with a permanent establishment in Guatemala, and which have commercial relationships that may change or have effects in the determination of the taxable income of the period in which the operation is made and in the subsequent periods, must only present information regarding the related parties during the 2013 and 2014 tax years, only provided that the Tax Administration expressly requests it to them; request that must be duly notified.

Thus, summarizing:

1. For the 2014 tax year, the valuation between related parties special provisions have not regained force yet, since these provisions contained in Chapter VI of the Tax Updating Law, Decree 10-2012 of the Congress of the Republic are suspended in their application and force by Decree 19-2013.
2. The suspension provision leaves expressly open the possibility for the Tax Administration to request information regarding the contents of the valuation between related parties special provisions but just to form databases; but this obligation is only born if it is expressly required to a taxpayer; thus, there is no obligation either to make the transfer pricing study.
3. The regulations will be applied again to the Guatemalan entities linked with one or several persons or entities resident abroad as well as with permanent establishments of non-resident entities, and that also have commercial relationships that may change or have effects in the determination of the taxable income of the tax period in which the operation is made and in the subsequent periods, and they must present information regarding the valuation between related parties starting on the 2015 tax year and in the subsequent tax years.
4. Based on the above, the Guatemalan entities and companies and the non-resident entities that operate through a permanent establishment must make technical studies to determine the possible existence of relationships or links with persons or entities resident abroad, and determine that, because of the values or prices of these relationships, there are links or commercial operations that may change or affect the taxable income of the tax year, and determine in this manner the obligation to prepare and present the transfer pricing study with information about the valuation between related parties for the 2015 tax year.