



# Highlights of the UAE Transfer Pricing Guide



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## Foreword

The UAE Federal Tax Authority ('FTA') has been gradually introducing guides and publications to the various aspects covered in the UAE Corporate Tax Law ('CT Law').

In the most recent publication dated 23 October 2023, the FTA issued an extensive 140-page Transfer Pricing Guide (the 'Guide').

The Guide offers insights and illustrative examples on various aspects of the UAE Transfer Pricing ('TP') regime, such as the application of the arm's length principle, TP Documentation, considerations for specific transactions like financial transactions, intra-group services, intangibles and cost contribution arrangements, as well as TP audits and risk assessments.

The Guide takes into consideration the guidance provided by the 2022 Organization of Economic Cooperation and Development Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ('OECD TP Guidelines').

As such, taxpayers should rely primarily on the CT Law, Ministerial Decision No. 97 of 2023, Cabinet Resolution No. 44 of 2020 and the Guide for TP matters involving the UAE. To the extent any aspect/issue is not covered, taxpayers are encouraged to refer to the OECD TP Guidelines.

Although the Guide is not a legally binding document, it will be the primary source of guidance for TP related matters going forward and can be used as an indication of how the FTA will consider the regime.



In this publication, we provide an overview of the Guide in the context of the UAE TP rules and key takeaways for UAE businesses to address their TP framework going forward.

Click [here](#) to read the full Guide and [here](#) for KPMG Tax Flash on the Ministerial Decision No. 97 of 2023.

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# Key highlights of the TP Guide

## 1. Arm's length principle and Controlled Transactions

The Guide defines the arm's length principle in line with the OECD TP Guidelines. The arm's length principle states that the prices charged by Taxable Persons (hereinafter referred to as 'taxpayers') for transactions or arrangements between Related Parties or Connected Persons (hereinafter referred to as 'Controlled Transaction(s)') should be equivalent to the prices that would be charged between unrelated, independent entities under similar economic circumstances.

Common transaction classes generally include the supply or transfer of tangible goods, provision and receipt of services, funding and other financial transactions, and commercial exploitation of intangible assets such as patents, brands and know-how.

### Key impact for taxpayers:

*The arm's length principle needs to be applied with respect to all domestic (including mainland and free zones) as well as cross-border Controlled Transactions irrespective of any thresholds or conditions.*

## 2. Related Parties and Connected Persons

The definitions for Related Parties and Connected Persons in the Guide are aligned with the definitions noted in Articles 35 and 36 of the CT Law. The Guide offers multiple examples to demonstrate how the definitions of Related Parties or Connected Persons may be applied by taxpayers in respect of their operations in the UAE. Through various illustrations provided in the Guide, it becomes apparent that the determination of 'Control', is not solely reliant on a specified 50% ownership threshold. Instead, 'Control' can be established when one person exercises 'significant influence' over another Person.

### Key impact for taxpayers:

*Taxpayers must monitor and assess their relationship with other persons (any natural person or juridical person as defined under Article 1 of the CT Law) to determine the applicability of any of the related party or connected persons definitions either via Kinship or Ownership or Control (and exercise of significant influence) as well as the applicability of the Connected Persons definitions.*

*It is the responsibility of taxpayers to conduct a self-assessment to determine whether a Person exercises 'significant influence,' thus potentially classifying that Person as a related party. This assessment must involve considering various factors and circumstances that are specific to the scenario/relationship under examination.*

## 3. Application of the arm's length principle

This section provides guidance on the three key steps in applying the arm's length principle for Controlled Transactions.

### 3.1. Comparability analysis

A comparability analysis refers to the comparison of a Controlled Transaction with comparable uncontrolled transaction(s). A Controlled Transaction and uncontrolled transaction are comparable if none of the differences between the transactions could materially affect the factor being examined in the methodology, or if reasonably accurate adjustments can eliminate the material effects of any such differences.

The Guide emphasized the importance of the accuracy in delineating the Controlled Transactions. "Accurate delineation" refers to the recognition of the actual Controlled Transaction based on actual conduct over contractual form by analyzing the functions performed, risks borne, and assets used by each party to the transaction.

### 3.1.1. *Identification of the commercial and financial relations*

The following comparability factors are required to be assessed as part of the first aspect of the comparability analysis as economically relevant characteristics and circumstances can impact the conditions of a transaction between independent parties:

- The contractual terms of the transaction or arrangement
- The characteristics of the transaction or arrangement
- The economic circumstances in which the transaction or arrangement is conducted
- The functions performed, assets employed, and risks borne by the related parties entering the transaction or arrangement
- The business strategies employed by the related parties entering the transaction or arrangement

All the above factors are consistent with the guidance provided under the OECD TP Guidelines.

### 3.1.2. *Functional analysis*

The Guide has highlighted the importance of the functional analysis and provides detail guidelines in this regard.

The functional analysis exercise is one of the critical elements for determining the arm's length price of Controlled Transactions and it is undertaken to identify the economically significant activities performed, assets used or contributed, and risks borne by the respective transacting parties.

The Guide also highlights the importance of understanding the relative value and contributions of each party to the overall value chain of the business.

In line with the OECD TP Guidelines, a six-step framework has been provided in the Guide for analyzing the risks under the functional analysis.

While analyzing the risks, the FTA expects taxpayers to undertake thorough functional analysis to determine what risks have been borne, what is the impact of these risks and which party bears these risks. Further, the pricing of the Controlled Transaction should consider the financial and other consequences of risk bearing, as well as the remuneration for

risk management. Taxpayers need to control and have the financial capacity to assume the risk.

The Guide offers practical guidance to taxpayers by presenting a comprehensive illustration of how to conduct functional interviews. It includes sample questionnaires and guidance on documenting the functional analysis.

### 3.1.3. *Other considerations*

Additionally, a taxpayer must take into account the following other important considerations for undertaking the comparability analysis:

- The taxpayer must assess the comparability of the market which includes geographic location, size, competition level of supply and demand etc.
- Other economic factors such as government policies, cost savings attributable to operating in a particular market, a unique assembled workforce, the impact of customs valuations, and Multinational Enterprise ('MNE') group synergies can also be considered while evaluating the comparability of the Controlled Transactions
- Special considerations should be made when a taxpayer consistently incurs losses while the MNE Group as a whole is profitable. As per the Guide, upon request from the FTA, a taxpayer is required to submit documentation which demonstrates that the losses are not due to the impact of non-arm's length Controlled Transactions. Wherever losses are incurred at an entity level whereas the profits are earned at the group level, then appropriate supporting documents/working are maintained to justify the arm's length price of the Controlled Transactions.

## 3.2. TP methods

The TP methods mentioned in the Guide are aligned with the OECD TP Guidelines and Article 34(3) of the CT Law.

The TP methods provide clear guidelines for taxpayers and the tax authority in determining the appropriate pricing of Controlled Transactions. The methods apply the findings from the comparability analysis to evaluate the

arm's length nature of the Controlled Transactions.

A brief description of these methods is provided below:

### 3.2.1. *Traditional transaction methods*

- **Comparable Uncontrolled Price ('CUP') Method**

The CUP method compares the price charged for property or services transferred in a Controlled Transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances. It involves a comparison of prices charged in a Controlled Transaction and in comparable third-party transactions. It is typically the most direct way to apply the arm's length principle where such data is available.

- **Resale Price Method ('RPM')**

The RPM is based on the price at which a product that has been purchased from a related party, is resold to an independent party. The resale price would then be reduced by the gross 'Resale Price Margin', as well as any other costs associated with the transaction to provide an arm's length price in respect of the purchase transaction.

- **Cost Plus Method ('CPM')**

The CPM considers the direct and indirect costs incurred by a supplier in supplying goods or services in a Controlled Transaction and applies an appropriate mark-up to these costs based on the functions performed by the supplier and the profit that would have been earned from an arm's length transaction depending on the market conditions.

### 3.2.2. *Transactional profit methods*

- **Transactional Net Margin Method ('TNMM')**

The TNMM examines the net profit earned from a Controlled Transaction relative to an appropriate base, such as the costs, sales or assets. In applying this method, the net profit margin earned in the Controlled

Transaction is compared with the net profit margin earned in internal or external comparable uncontrolled transactions depending on the circumstances.

- **Profit Split Method ('PSM')**

The PSM is applied to determine the division of profits that independent parties would have expected to realize from engaging in comparable transactions. PSM is particularly relevant in the cases where the related parties engage in highly integrated business operations for which a one-sided method would not be appropriate or where each of the parties to a Controlled Transaction make unique and valuable contributions or use unique and valuable intangibles in relation to the Controlled Transaction or where each party to the Controlled Transaction shares the assumption of one or more of the economically significant risks in relation to that transaction.

### 3.2.3. *Other Methods*

The Guide also provides guidance for instances where none of the five methods can be applied and 'Other Methods' can be considered for the purpose of determination of the arm's length price in line with Article 34(4) of the CT Law. Where an alternative TP method has been used, adequate supporting documentation must be provided explaining the reason(s) for selecting the method including reasonable sufficient economical and commercial rationale, as well as clear disclosures of analysis performed in applying the method.

### 3.2.4. *Other considerations*

The arm's length result of a Controlled Transaction must be determined by applying one or a combination of the above-mentioned TP methods.

For the purpose of selecting the most appropriate method, the Guide provides that taxpayers should consider the nature of transactions, functional analysis, availability of reliable comparable information, degree of comparability of Controlled Transactions and uncontrolled transactions etc.

The Guide provides that the FTA's preferred approach is for TP methods to be applied at the respective transaction level where possible.

The Guide provides that the taxpayer may opt to apply the TNMM, or any other method, on a company-wide basis to corroborate the results obtained from the separate analyses performed on a transactional basis.

Further, there may be situations where the activities/transactions are sufficiently interlinked from a commercial and economic standpoint, and in those cases, it may be possible to rely on an analysis where the taxpayer aggregates the transactions by adopting a 'company-wide' analysis to test the arm's length nature of the Controlled Transactions.

### 3.3. Determination of the arm's length price/range

The Guide provides steps for determining the arm's length price in line with the OECD TP Guidelines. We have provided the key takeaways below:

#### 3.3.1. Selection of the tested party

- The use of certain TP methods requires a decision on which party to apply the TP method. The choice of the tested party should be consistent with the Functional Analysis of the Controlled Transaction. The party with the least complex x Functional Analysis (i.e., performing a smaller scope of functions and less complex operations) should be used as the tested party.

#### 3.3.2. Identifying comparable uncontrolled transactions

Key considerations to identify potentially comparable transactions to the Controlled Transaction are as follows:

- **Internal comparables:** whenever reliable internal comparables exist, the taxpayer may rely on such internal comparables instead of searching for external comparables as these transactions may have a more direct relationship to the Controlled Transaction.

- **Database for external comparables**

**search:** the FTA does not have a preference for any commercial database as long as it provides a reliable source of information. The information obtained from commercial databases may need to be refined and reviewed to enhance the reliability of the underlying data used in the comparability analysis.

Whichever database the taxpayer chooses to select comparables from, adequate documentation should be maintained to demonstrate the results of the comparability analysis. Where a taxpayer has used a private database, the FTA may request access to the database in line with Article 55(4) of the CT Law to review the taxpayer's results and to better understand the conclusions.

- **Domestic/foreign comparables:** as far as possible, taxpayers should use domestic comparables in their comparability analysis. Where sufficient data is not available at the domestic level, taxpayers can consider regional or global comparables. Geographical order for searching for external comparables is as follows: comparables in the local market, comparables in the regional (Middle East) markets, then comparables in other regions' markets.
- **Selection of potential comparables:** taxpayers should adopt a consistent and analytical process to identify potential comparables. Furthermore, taxpayers must maintain appropriate supporting documentation that describes the criteria used to select potential comparables and the reasons for excluding some of the potential comparables. Such information can be used by the FTA to assess the reliability of the comparables used.

#### 3.3.3. Undertaking comparability adjustments (if required)

- There may be a need to adjust the potential comparables on account of adjustments for differences in capital, functions, assets and risks. Comparability adjustments should be

considered if they are expected to increase the reliability of the results. An example of comparability adjustments would be undertaking working capital adjustments to adjust for the differing levels of accounts receivable, payable and inventory.

#### 3.3.4. *Determining the arm's length price/range*

It is generally difficult to arrive at a single price or margin that is the most reliable to establish whether the conditions of a Controlled Transaction are at arm's length. The taxpayer must consider the following guidance to arrive at a range of results which establish the arm's length result of a transaction:

- The **interquartile range** is considered an appropriate approach to determine an arm's length range of financial results or indicators earned by external comparables. The FTA will take into consideration the functional profile of the taxpayer/Controlled Transaction when assessing the most appropriate point within the range. A point closer to the lower interquartile may be appropriate for a company performing very limited functions and a point closer to the upper quartile may be appropriate for a company performing high value functions.
- In cases where the comparable companies have **extreme results** (losses or unusually high profits), further examination should be done to understand the reasons behind such variances/outliers. A comparable with extreme results may be excluded only on the basis of a significant difference in the comparability (for instance, where the losses incurred by a comparable reflects a level of risks that is not comparable to the risks assumed by the taxpayer in its Controlled Transaction) and not merely because of difference in the results.
- Generally, a **loss-making** uncontrolled transaction or loss-making company should be reviewed in **further detail** to establish whether or not it can be comparable to the Controlled Transaction. In case the losses do not reflect the normal business

conditions, or the risks borne by the third party comparable is significantly high, then the comparable should be excluded from the list of the comparable companies.

- The examination of **multiple-year data** is typically done to improve the understanding of long-term arrangements, provide insights into relevant business and product life cycles of the comparables. While using multiple-year data, the taxpayer can include a 3-year period, inclusive of the year in which the transaction is undertaken where at least 2 years of data should be available to accept a comparable company.
- **Frequency of updating the external comparables search:** searches for comparables should be fully updated every three years with an annual financial update of the comparables in the interim years as a minimum requirement. In case of a change in circumstances of the Controlled Transaction or transacting parties, the full analysis on the selection of comparables needs to be undertaken in the year of the change in circumstances.

#### *Key impact for taxpayers:*

*Taxpayers are required to ensure that all Controlled Transactions (cross border and domestic) adhere to the arm's length principle irrespective of any threshold or conditions.*

*Taxpayers should follow the three-step process outlined in the Guide to ascertain the arm's length price for all Controlled Transactions.*

*Appropriate analysis should also be done with the respect to considerations such as contractual terms, characteristics, market, economic circumstances, business strategies as noted above.*

*A detailed and accurate analysis of the functions performed, risks borne, and assets used by each party to the Controlled Transaction should be undertaken.*

*Moreover, a detailed methodical and consistent approach to the economic analysis and benchmarking analysis must be adopted and documented to justify the arm's length price for*

*the Controlled Transactions with appropriate comparability adjustments wherever required.*

## 4. TP documentation

The purpose of TP documentation is to provide the FTA with a clear and comprehensive understanding of the taxpayer's TP policies and their application to test the TP outcome.

Taxpayers are required to maintain/undertake the below five TP documentation requirements for each tax period, subject to the prescribed thresholds and conditions.

### 4.1. TP disclosure Form

All taxpayers undertaking Controlled Transactions which are above a **materiality threshold** (to be prescribed) are required to prepare and submit this form, alongside their Tax Return (within 9 months from end of the relevant tax period).

The form will be available in due course on the FTA's website and is expected to include information such as the nature of Controlled Transactions, their value, details of related parties or connected persons and the TP method used to determine the arm's length price.

### 4.2. Master File ('MF')

The MF provides a high-level overview of the Group's business and the allocation of income and economic activity within a Group which primarily includes organization structure, description of business, intangible, inter-company financial arrangements, financial positions, etc.

The MF content follows the requirements under Annex I to Chapter V of the OECD TP Guidelines.

The Ministry of Finance ('MoF') published Ministerial Decision No. 97 of 2023 providing the threshold conditions and other details with respect to the preparation and maintenance of the MF and Local File ('LF') by taxpayers. It provides that a taxpayer that meets either of the following two conditions is required to maintain an MF, as well as an LF, for the relevant tax period:

- Where the taxpayer, for any time during the relevant tax period, is a Constituent Company of a MNE as defined in the Cabinet Decision No. 44 of 2020 that has total consolidated group Revenue of AED 3.15 billion or more in the relevant tax period; or
- Where the taxpayer's revenue in the relevant tax period is AED 200 million or more

Refer to KPMG Tax Flash which summarizes the applicability and requirements as provided in the Ministerial Decision No. 97 of 2023.

The Guide provides an exemption to a taxpayer who is part of a UAE headquartered group which is not a MNE Group (i.e., a group that does not have business establishments outside the UAE) from maintaining an MF.

### 4.3. Local File

The LF provides detailed information on operations of the local entity and TP analysis and conclusions/outcomes of the Controlled Transactions considering the arm's length principle. The LF content noted in the Guide is in line with requirements under Annex II to Chapter V of the OECD TP Guidelines.

LF compliance applies to large businesses as set out in the Ministerial Decision No. 97 of 2023 and the taxpayer may provide cross references to the information contained in the MF.

### 4.4. Country-by-country report ('CbCR')

The UAE introduced CbCR requirements through the Cabinet Resolution No.44 of 2020. The CbCR follows the Standard Template attached in Annex (3) to Chapter (V) of the OECD TP Guidelines. The Guide has highlighted the key provisions contained in the Cabinet Resolution No. 44 of 2020.

### 4.5. Additional supporting information

As per Article 55(4) of the CT Law, the FTA may request certain information from taxpayers in addition to the information not covered in the LF and MF.

This includes any information that FTA deems necessary to assess the arm's length nature of the Controlled Transaction and information used for the application of the TP method.



Such additional supporting information includes intercompany agreements, meeting minutes, evidence of decisions taken, emails, invoices, workpapers computing the transfer prices, among others.

These additional supporting documents are required to be maintained and submitted by all taxpayers including those taxpayers which are not required to maintain LF and MF.

*Key impact for taxpayers:*

*It is important to note that the exemption to maintain an MF has been provided only with respect to the MF to taxpayers which are part of a UAE headquartered group which is not a MNE Group. These taxpayers would be required to maintain the LF as per the prescribed threshold.*

*Further, while there are certain categories of transactions (Refer KPMG Tax Flash [here](#)) which are not required to be documented in a LF, those Controlled Transactions should be undertaken on an arm's length basis.*

*Overall, taxpayers are required to maintain appropriate supporting documents to justify the arm's length nature of the Controlled Transactions even though the prescribed thresholds/conditions to maintain TP documentation is not met.*

*The FTA may request the taxpayer to provide additional supporting documentation (which include information to support the arm's length nature of the transaction, information considered for the application of TP method, or any other information deemed necessary by the FTA) to support the arm's length nature the Controlled Transactions when requested.*

*The FTA expects that documentation is maintained either at the time of the Controlled Transaction or, by the time the taxpayers submit their Tax Return for the relevant tax period.*

## 5. Special considerations for specific cases

Recognizing the UAE's position as a financial and investment hub, the Guide offers useful guidance for specific TP areas commonly encountered by businesses operating in the UAE. Broadly, the guidance is consistent with the OECD TP Guidelines.

The key takeaways for some of these areas are listed below.

### 5.1. Financial transactions

Taxpayers are expected to conduct all financial Controlled Transactions in line with the arm's length principle. The main areas addressed in the Guide are determining the arm's length remuneration for the treasury function, intra-group loans, cash pooling, hedging, financial guarantees and captive insurance. Broadly, the guidance is consistent with Chapter X of the OECD TP Guidelines.

Some key points for specific financial transactions are noted below:

**Treasury functions** – to determine the arm's length remuneration for the central treasury function, the taxpayer must characterize the transaction accurately and evaluate the nature of the service considering the risk profile (including currency risk, contingent liability risk etc.). For instance, in case of routine services, the taxpayer may rely on the guidance provided under the intra-group services section (refer 5.3 below). An appropriate arm's length remuneration would have to be ascertained based on the functional and risk profile of the taxpayer (for instance, the remuneration may need to consider whether the treasury function arranges for hedging contracts or acts as an in-house bank, etc.).

**Intra-group loans** – the Guide provides that the arm's length interest rate for an intra-group loan can be benchmarked against publicly available data for other borrowers/third-party loans with the same credit rating by applying the CUP method. Other factors to be considered by a taxpayer while determining the arm's length price includes terms of the loan, currency, tenor, borrower's country, borrower's credit rating or implicit support by virtue of being part of a Group, types of rates, etc. The Guide provides that taxpayers may undertake comparability adjustments to enhance comparability and reliability of the third-party loan.

**Cash pooling** – the Guide provides that the level of remuneration for a cash pool arrangement (physical pooling or notional pooling) should be directly linked to the functional profile of the cash pool leader. The remuneration of the cash pool members will be calculated through the determination of the arm's length interest rates applicable to the debit and credit positions within the pool.

**Financial guarantees** – the Guide suggests that it is necessary to understand the economic benefit received by the borrower beyond the one that results from any potential implicit support and accordingly determine the remuneration with appropriate approach.

Key impact for taxpayers:

*Taxpayers are recommended to revisit existing financial transactions and consider how their historical pricing analysis reconciles to the Guide, as well as taking it into account for new transactions.*

*Moreover, immediate steps should be undertaken to put in place an appropriate pricing mechanism which aligns with the arm's length principles for both existing and future financial transactions.*

## 5.2. Settlement for the Controlled Transactions

Any outstanding amount arising out of a controlled transaction should be settled within a reasonable period. If the actual settlement period exceeds what was agreed upon on a regular basis, the extended credit period could be regarded as an advancement of loan and accordingly compensation in the form of a fee or interest would be required to be charged.

Key impact for taxpayers:

*Taxpayers should ensure that the outstanding balance on account of Controlled Transactions are settled within a reasonable time and the credit policy for Controlled Transactions is in line with what is offered in third-party contracts.*

*Steps should be taken to settle any outstanding balance which is due to/from related parties or connected persons.*

## 5.3. Intra-group services

The analysis of TP considerations for intra-group services, involves two main areas:

- Whether intra-group services have been provided
- Whether the charge for the intra-group service is in accordance with the arm's length principle

The Guide provides comprehensive guidance, largely in line with Chapter VII of the OECD TP Guidelines.

Specifically, in the context of businesses in the UAE, the Guide recognizes the following two kinds of intra-group services:

- **Intra-group services arising from several layers of management** – this covers the case where an MNE Group decides to perform an allocation of the cost of its global and regional business leadership teams across all the countries of operations. The FTA also expects that there should not be any duplication in the allocation of costs or a clear rationale for suffering any duplicative costs of intra-group services.
- **Centralized services** – these pertain to the services centralized in the parent entity, or in one or more Group service centres (such as a regional headquarters) and generally comprise of administrative services, shared support services, etc.

The Guide underscores the importance of conducting the "benefits test" for all services, which primarily aims to determine whether a particular activity contributes economic or commercial value to a specific member within the group to enhance or maintain its business position.

An obligation to pay for an intra-group service arises only where the benefits test is satisfied, which is determined by evaluating whether independent parties in comparable circumstances would have been willing to pay for the activity if performed by an independent service provider or would have performed the activity in-house.

The Guide elaborates on the various aspects required to be considered like shareholder activities, treatment of pass-through cost/reimbursement of expenses, duplication of activities, incidental benefits and use of appropriate allocation keys etc. to arrive at the cost base.

Finally, to determine the arm's length charge, the service provider should apply a mark-up to all costs that are not pass-through in nature. The mark-up should be determined using comparable data.

However, to reduce the compliance burden on taxpayers, the Guide adopts the simplified approach provided under Chapter VII of the OECD TP Guidelines, whereby certain low value-adding intra-group services may be charged out at a safe harbour cost-plus 5%

mark-up without the need for a detailed benchmarking analysis.

In general, low value-adding intra-group services are of a supportive nature and are not part of the core business of the MNE Group (i.e., not creating the profit-earning activities or contributing to economically significant activities of the MNE Group).

Key impact for taxpayers:

*MNEs operating in the UAE are recipients of service transactions from their foreign affiliates. Similarly, UAE headquartered companies also render service transactions to their affiliates.*

*The FTA expects that taxpayers would prepare and maintain supporting documentation with details of the benefits provided, service beneficiaries, the approach adopted for cost pool workings and allocation key(s) used, and the support for any mark-up applied. This should form part of the supporting TP documentation for each relevant Tax Period.*

*It is important for taxpayers to put in place the internal mechanism/systems to ensure that the required information is prepared and the benefit test evidence is maintained on a real time basis, and available to taxpayers.*

#### 5.4. Intangibles

TP analysis for intangibles is complex considering the unique characteristics, difficulty in undertaking comparability analysis, evaluating the role of intangibles in generating revenues for businesses, etc.

Broadly, the guidance is consistent with Chapter VI of the OECD TP Guidelines.

The Guide provides detailed guidelines regarding intangibles, which involves their identification and determination of the arm's length price. Broadly, the summary of the same is as under:

- The legal owner of the intangible would be only entitled to the arm's length compensation, if any, for holding the title.
- Group members which contribute to Development, Enhancement, Maintenance, Protection and Exploitation ('DEMPE') functions are entitled to receive proportionate remuneration from intangibles.

- The FTA expects the TP analysis to identify the relevant intangibles and determine the arm's length conditions as set out in the Guide.

Key impact for taxpayers:

*Taxpayers should undertake appropriate DEMPE analysis to identify any intangible existing within the group for which appropriate remuneration should be charged.*

*Further, considering the unique nature of intangibles and complexities around their valuation and economic benefits, it is recommended appropriate supporting documentation is maintained.*

#### 5.5. Business restructuring

Business restructuring refers to the reorganization of the commercial or financial relations between related parties, which are typically accompanied by the reallocation of profit potential among the members of the MNE Group, either immediately after the restructuring or over a period.

Taxpayers typically have the flexibility to structure their business operations, provided that they ensure pricing arrangements adhere to the arm's length principle.

Broadly, the guidance is consistent with Chapter IX of the OECD TP Guidelines.

The Guide provides detailed guidance in relation to the application of the arm's length principle to the business restructuring transactions which is in line with the OECD TP Guidelines.

Key impact for taxpayers:

*In cases where taxpayers are evaluating the option to undertake restructuring within the group, it would be critical for them to evaluate the TP implications and take appropriate steps to ensure that the appropriate documents/workings are maintained to support the arm's length remuneration of such transactions.*

#### 5.6. Permanent Establishment ('PE')

Article 14 of the CT Law contains the conditions where a Non-Resident person will be considered to have a PE in the UAE. Similar conditions for qualifying as a PE may exist in the respective tax laws of foreign jurisdictions.



While determining the income and associated expenditure of a PE, a Resident person/Non-Resident person and its respective PEs should be treated as a separate and independent entities. This approach is known as the ‘separate entity approach’.

Further, the Resident person/Non-Resident person and its respective PEs will be considered as related parties as per Article 35 of the CT Law. The FTA expects taxpayers to attribute the appropriate amounts of profits and associated costs to PEs in accordance with the arm’s length principle.

The Guide provides detailed guidance and steps in relation to determination of the arm’s length attribution of profits and associated costs to a PE.

The first step involves conducting a functional analysis (taking into consideration the assets used and risks borne) to identify the activities performed by the PE and Resident person/Non-Resident person, using the “separate entity” approach.

The second step is to determine the compensation of any transactions between the Resident person/Non-Resident person and the PE which should be in line with the arm’s length principle.

The above-mentioned approach is aligned with the ‘Additional Guidance on the Attribution of Profits to Permanent Establishments’ issued by the OECD. Further, the FTA expects taxpayers to follow the above approach when attributing profits to PEs and contemporaneous documentation supporting the application of the approach should be maintained and provided to the FTA upon request. This is also expected to form part of the TP documentation.

Additionally, the Guide provides that profits may be attributed to a PE even though the enterprise as a whole has never made profits, and vice versa, the application of the separate entity approach may result in nil profits being attributed to the PE even though the head office may have made profits.

*Key impact for taxpayers:*

*A Resident person/Non-Resident person must treat their branch/PE in the UAE as a separate legal entity (rather than treating them as merely an extension of the head office) and ensure that appropriate TP analysis and PE attribution*

*exercise is undertaken to determine the remuneration to be earned by the PE/branch.*

## **5.7. Reliance on global TP policy**

A taxpayer may rely on the global TP policy established by the Group for standard transactions and arrangements, considering the specified parameters relevant to the UAE’s perspective.

*Key impact for taxpayers:*

*A taxpayer that utilizes the Group TP policy, must evaluate the adequacy of the Group TP policy in adhering to the arm’s length principle prescribed in the CT Law. The taxpayer must assess whether this is supported using local or regional comparables and keeping a record for any delay or unavailability of comparable data.*

## **6. TP audit and risk assessment**

The FTA will review filings and submissions made by taxpayers and undertake tax audits as prescribed under the Tax Procedures Law.

The Guide provides the following points in relation to the TP audit and risk assessment.

### **6.1. Burden of proof**

It is the responsibility of the taxpayer to maintain and submit sufficient supporting documentation to demonstrate the arm’s length nature of the Controlled Transactions and provide them upon request by the FTA.

### **6.2. TP adjustments**

Given that the TP analysis is based on self-assessment of the taxpayer, there may be cases where TP adjustments are required where the Controlled Transaction is not as per the arm’s length principle. These adjustments can be made either by the FTA or by the taxpayer.

#### *6.2.1. TP adjustments by the FTA*

As per Article 34 of the CT Law, the FTA can adjust the taxable income contained within the Tax Return to achieve the arm’s length result for Controlled Transactions which do not fall within the arm’s length range. The FTA will reflect the adjustments made in the taxable income for a taxpayer for any other UAE entity that is party to the relevant transaction or arrangement.

In cases where a TP adjustment is made by a foreign competent authority, the taxpayer can request the FTA to make a corresponding adjustment to its taxable income under the applicable provisions of the relevant Double Taxation Agreement. The FTA will review the foreign tax authority's position and where appropriate may proceed with a corresponding adjustment.

#### **6.2.2. TP adjustment by the taxpayer**

It is recommended that taxpayers constantly monitor the arm's length price of the Controlled Transactions. The taxpayer can make real time adjustments before submitting their Tax Returns.

In case an adjustment is not made before submitting the Tax Return, the taxpayer may make TP adjustments that result in increased taxable profits or reduced allowable losses. A taxpayer could also make adjustments that result in decreased taxable profits or greater allowable losses.

However, a decrease in the taxable profits or increase in allowable losses may only be affected through the operation of the FTA procedures.

#### **6.2.3. Other considerations**

**International agreements for the avoidance of double taxation** – the Guide notes that in the event of differences between the UAE TP regulations and an international agreement (double tax agreement/treaty) in force in the UAE, the provisions of the international agreement will prevail.

**Double taxation resulting from TP adjustments** – the Guide indicates that the procedure of the Mutual Agreement Procedure ('MAP') will be further detailed in separate guidance. The MAP article in Double Tax Agreements allows competent authorities in partner jurisdictions to interact with the intent to resolve international tax disputes involving cases of double taxation where the same profits have been taxed in two jurisdictions as a result of a TP adjustment undertaken by tax administrations.

### **6.3. Non-recognition**

As per the CT Law, the FTA may take action to change the outcome of a Controlled Transaction if the main purpose of a transaction is to obtain a CT advantage that is not consistent with the intention or purpose of the CT Law.

In cases, where the arrangements made in relation to the Controlled Transaction differ from those which would have been adopted by independent parties, the FTA may, if deemed appropriate, adjust or disregard the Controlled Transaction and replace it with an alternative transaction.

#### **Key impact for taxpayers:**

*Taxpayers must ensure that sufficient and appropriate supporting documents are maintained with respect to the Controlled Transactions which not only substantiate the commercial nature but also cover the economic relevant characteristics. Moreover, Article 56 of CT Law provides that records should be maintained for 7 years following the end of the Tax period.*

*Taxpayers must constantly monitor the arm's length price of their Controlled Transactions backed by sufficient documentation to avoid any subsequent TP adjustments. Moreover, taxpayers will have the option to seek clarifications on a point of law from the FTA.*

### **Looking ahead**

**It is important for taxpayers to revisit their existing TP policies and take appropriate steps to align them with the arm's length principle.**

**In cases where taxpayers do not have a TP policy for the Controlled Transactions, it is imperative to undertake analysis to put in place an appropriate TP policy.**

**Further, it is recommended that taxpayers also put in place the mechanism to prepare and maintain comprehensive TP documentation, backed by additional supporting information to demonstrate the arm's length nature of the Controlled Transactions.**



## How we can help



KPMG has a dedicated team of TP professionals with expertise in the subject, combined with vast experience working for various industry sectors and key regional and global clients.

KPMG's TP team's deep knowledge, combined with familiarity with local and regional legal frameworks, allows us to help you navigate the requirements set out in the TP provisions as contained in the CT Law and the OECD TP Guidelines.

We are happy to discuss your specific requirements and determine the way forward. Should you have any questions, please get in touch with your usual KPMG contact or any of the tax professionals mentioned below.



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