



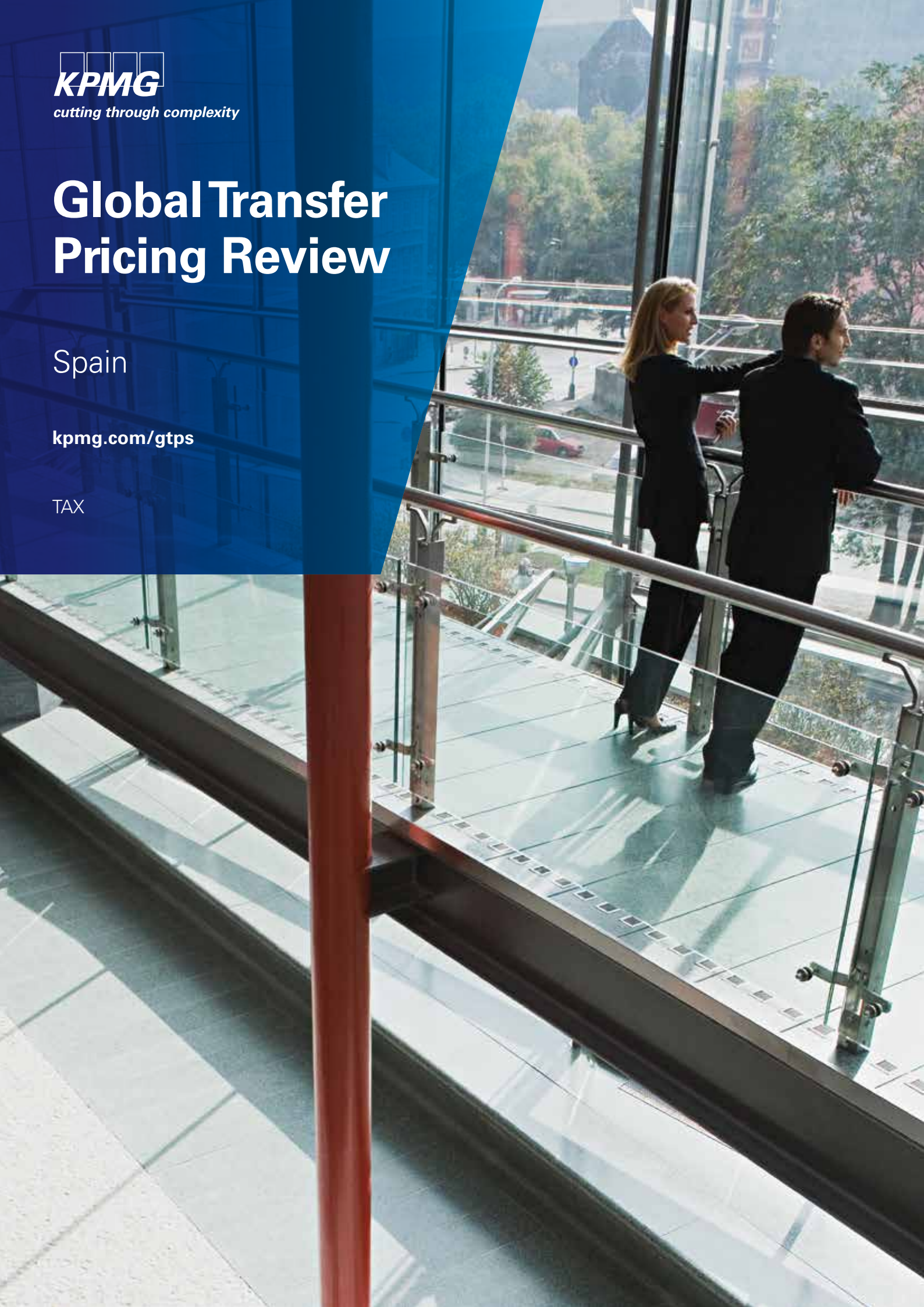
cutting through complexity

Global Transfer Pricing Review

Spain

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TAX



Spain



KPMG observation

The Spanish Tax Administration has participated in every Base Erosion and Profit Shifting (BEPS) Focus Group and has actively followed the discussions. The Tax Administration is supportive of the BEPS Action Plan, and legislation is already in place regarding the treatment of hybrid instruments or hybrid income and limitations on the deductibility of financial expenses. In addition, the Tax Administration has announced new documentation requirements, which focus on transparency and Country-by-Country reporting (CbyC), as of 2016.

There are some areas, such as the permanent establishment definition, where Spain has a quite aggressive position — not only due to Court Decisions, but also to some general rulings and administrative practices in the last three or four years.

Additionally, taxpayers are also required to disclose specific information with respect to their intra-group transactions when filing their corporate income tax return, such as the type of transaction, the relationship of the parties involved, the transfer pricing methodology applied and the amount of each type of transaction disclosed.

Transfer pricing study snapshot

The purpose of a transfer pricing study

	Applicable	Required to be contemporaneous	Thresholds apply/exist
Legal requirements	●	●	●
Protection from penalties	●	●	●
Reduce risk of adjustment	●	●	
Shifts burden of proof	●	●	

Basic information

Tax authority name

Spanish Tax Agency (Agencia Estatal de Administración Tributaria – AEAT).

Citation for transfer pricing rules

Legislation: Article 18 of the Corporate Income Tax Law (Law 27/2014 of 27 November; hereinafter referred to as CITL)

Recent legislation:

Regulation developing Law 27/2014

- Royal Decree 634/2015 of 10 July.

Additional Regulations:

- Royal Decree 1794/2008, on MAPS, 18 November 2008.

Effective date of transfer pricing rules

New transfer pricing legislation is applicable to fiscal years that commenced on or after 1 January 2015.

Regulations developing the CITL approved by Royal Decree 1777/2004 of 30 July, modified by the regulation approved by Royal Decree 1793/2008 of 18 November and by Royal

Decree 897/2010 of 9 July, are partly applicable, especially on documentation requirements, during 2015.

Notwithstanding this, it should be highlighted that a new CIT draft Regulation is expected to be passed in the following months, and will be effective as of January 2016.

What is the relationship threshold for transfer pricing rules to apply between parties?

The relationship threshold is as follows:

- companies that belong to the same group
- at least 25 percent direct or indirect participation in another related entity.

Also considered related parties in Spain:

- partners, shareholders, board members, directors, and their immediate, collateral, third-degree consanguinity or affinity spouses or relatives, and the company and their cross relations with other companies of the group.

What is the statute of limitations on assessment of transfer pricing adjustments?

Four years from the due date of the tax return (same as general tax regime).

Transfer pricing disclosure overview

Are disclosures related to transfer pricing required to be submitted to the revenue authority on an annual basis (e.g. with the tax return)?

Yes. Taxpayers are required to disclose, in their corporate income tax returns, information regarding the intra-group transactions performed during the fiscal year.

What types of transfer pricing information must be disclosed?

Taxpayers are required to disclose, in their corporate income tax returns, the following information with respect to their intra-group transactions (with certain limitations and exemptions): the identification of the related parties, the type of relationship between them, the type of intra-group transaction carried out, the volume of the same, and the transfer pricing methodology applied to test the intra-group price applied.

What are the consequences of failure to submit disclosures?

A penalty of 150 euros (EUR) per data missing. Chances of being audited are much higher.

Transfer pricing study overview

Can documentation be filed in a language other than the local language? If yes, which ones?

Documentation must be prepared in Spanish in principle. In an ordinary tax audit, the tax auditor may accept the transfer pricing documentation in other languages (e.g. English), but a translation into Spanish may still be requested.

When a transfer pricing study is prepared, should its content follow Chapter V of the Organisation for Economic Co-operation and Development (OECD) Guidelines?

Yes, for all transactions. Similar to requirements of the OECD Guidelines and European Union Joint Transfer Pricing Forum (EUJTPF) — master file and country-specific concepts are required.

Taxpayers' documentation, when requested to be disclosed, should include the identification of the companies involved in the related transactions, legal, organizational and operational structure of the group, nature and volume of the intra-group transactions carried out, functional analyses of such transactions, transfer pricing policy applied to set the prices of the transactions and transfer pricing methodologies and economic analyses used to test such prices.

Does the tax authority require an advisor/tax practitioner to have specific designation in order to prepare or submit a transfer pricing study?

No.

Transfer pricing methods

Does your country follow the transfer pricing methods outlined in Chapter II of the OECD Guidelines? If exceptions apply, please describe.

Yes.

Transfer pricing audit and penalties

When the tax authority requests a taxpayer's transfer pricing documentation, are there timing requirements for a taxpayer to submit its documentation? And if so, how many days?

Yes, 10 days.

When the tax authority requests a taxpayer's transfer pricing documentation, are there timing requirements for a taxpayer to submit its documentation? Please explain.

Upon tax audit, the tax inspector will determine the submission deadline on a case-by-case basis with a minimum period of 10 business days counting from the business day subsequent to the request.

If an adjustment is proposed by the tax authority, what dispute resolution options are available?

The taxpayer has the following options for claiming against the adjustment proposed:

- "recurso de reposición": Appeal before the same administrative body that issued the final assessment
- claim before the Economic-Administrative Courts: Appeal before an independent administrative body
- claim before judicial Spanish Courts (First Instance; National High Court; Supreme Court)
- MAP; and
- Arbitration Convention (EU).

If an adjustment is sustained, can penalties be assessed? If so, what rates are applied and under what conditions?

For transfer pricing adjustments based on the legislation that came into force on 19 February 2009, penalties could amount to 50 percent to 150 percent of the additional tax due, although they have very seldom been applied.

Based on the penalty regime foreseen in Law 27/2010, (which may be applied retroactively to fiscal years previous to 1 January 2015), penalties linked to the formal requirements of the documentation are also enforceable

and may apply to both (i) the lack of documentation supporting the related party transactions carried out by the taxpayer and (ii) adjustments imposed by the tax authorities when the arm's length price supported on the documentation does not match with the amounts declared in the CIT Form, thus establishing the following two types of penalties:

- when there is no transfer pricing adjustment, a fixed fine of EUR1,000 per data and EUR10,000 per group of omitted or misleading data might be imposed on the taxpayer due to faults in the documentation provided. There is a limit which cannot exceed one percent turnover
- when a transfer pricing adjustment is proposed by the tax authorities, a penalty of 15 percent of the additional tax base is applicable in addition to the tax due and the corresponding interest associated with the delayed payment of the additional tax.

To what extent are transfer pricing penalties enforced?

In principle, the existence of solid transfer pricing documentation (in accordance with the Spanish Regulations) will protect from documentation related penalties.

What defenses are available with respect to penalties?

Where the taxpayer has a sound documentation requirements, penalties should not be levied. If imposed high chances to be eliminated at Court level.

What trends are being observed currently?

An increasing number of audits and a more aggressive approach is being observed, especially regarding:

- financial expenses
- leveraged acquisitions
- reorganizations
- management services (reality and benefit test); and
- loss-making companies.

Sectors being audited: electronics, chemicals, pharmaceuticals and new technologies, large distributor.

Special considerations

Are secret comparables used by tax authorities?

Secret comparables are not used.

Is there a preference, or requirement, by the tax authorities for local comparables in a benchmarking set?

Normally pan-European comparables are accepted although there are not specific written guidelines.

Do tax authorities have requirements or preferences regarding databases for comparables?

The tax authority uses Bureau van Dijk's pan-European Amadeus database to perform its own analyses using external comparables.

Does the tax authority generally focus on the interquartile range in a TNMM analysis?

Yes, sometimes.

Does the tax authority have other preferences in benchmarking? If so, please describe.

- tax authorities very normally focus on the interquartile range in a TNMM analysis
- Spanish or European comparables are used
- independence threshold: lower than 25 percent
- multiple year averages are normally used.

What level of interaction do tax authorities have with customs authorities?

There is little communication between the income tax and the customs authorities, but such communication is increasing and there is a plan to undertake joint audits.

Are there limitations on deductibility of management fees beyond the arm's length principle?

No. However, taxpayers must provide very sound evidence on:

- whether in fact the services have been provided
- whether the services rendered provide the entity with economic or commercial value; and

- the arm's length nature of the transaction.

Are management fees subject to withholding?

Yes.

Are there limitations on the deductibility of royalties beyond the arm's length principle?

No. However, taxpayers must provide very sound evidence on:

- whether in fact the services have been provided
- whether the services rendered provide the entity with economic or commercial value; and
- the arm's length nature of the transaction.

Are royalties subject to withholding?

Yes.

Are taxpayers allowed to file tax return numbers that differ from book numbers?

No. There is no clarity around this issue but in some occasions it is accepted if soundly explained. It is recommended that in order to ensure that the adjustments will be respected by the tax authority, transfer pricing adjustments (i) should be made prior to the end of the fiscal year, and (ii) should be carried out via rectifying invoices, which should include the reason for the change in price and should specifically reference the previously issued invoice(s) to be modified.

Other unique attributes?

- Management fees are not subject to withholding when there is a double tax convention in place.
- Royalties are subject to withholding except when the EU Directive on interest and royalty payments applies.

Tax treaty/double tax resolution

What is the extent of the double tax treaty network?

Extensive.

If extensive, is the competent authority effective in obtaining double tax relief?

Frequently.

When may a taxpayer submit an adjustment to competent authority?

On 18 November 2008, the Spanish Ministry of Economy and Finance officially published the Royal Decree 1794/2008 of 3 November, which regulates mutual agreement and arbitration procedures.

When a transfer pricing adjustment affects transactions between a Spanish entity and a non-resident, the mechanisms established in the relevant double taxation treaty should be applied. When the non-resident is within the EU, the provisions of the Arbitration Convention regarding the elimination of double taxation can also be applied.

The Royal Decree establishes different regimes, depending on whether the procedures for double taxation are initiated by the Spanish or the foreign competent authorities and depending on which tax administration has made the evaluations.

The timing for competent authority assistance requests varies depending on the applicable tax treaty between Spain and the other country in question.

May a taxpayer go to competent authority before paying tax?

Yes, however, if the taxpayer applies for a suspension of collection of taxes it should provide a guarantee in the same terms as if it were appealing to internal courts.

Advance pricing agreements

What APA options are available, if any?

Unilateral, bilateral, multilateral.

Is there a filing fee for APAs?

No.

Does the tax authority publish APA data either in the form of an annual report or through the disclosure of data in public forums?

No.

Are there any difficulties or limitations on the availability or effectiveness of APAs?

No. Although the Spanish APA program does not publish an annual report with statistics regarding the program's success rate, the process has a generally high rate of success, for both unilateral and bilateral agreements. Unilateral APAs are routinely concluded between 12 and 18 months, while bilateral agreements generally require closer to 24 months.

The success rate and duration of an APA are closely linked with the nature and complexity of the underlying transactions. In particular, transactions involving the sale or licensing of intangible property tend to present more of a challenge. One can expect an in-depth discussion.

KPMG in Spain

Juan Ignacio Marrón

Tel: +34 91 451 33 54

Email: jmarron@kpmg.es

Montserrat Trapé

Tel: +34 93 253 29 36

Email: mtrape@kpmg.es

José Díaz-Faes

Tel: +34 91 451 30 23

Email: jdfaes@kpmg.es

Elisenda Monforte

Tel: +34 93 254 23 11

Email: emonforte@kpmg.es

As email addresses and phone numbers change frequently, please email us at transferpricing@kpmg.com if you are unable to contact us via the information noted above.

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