



Overview

Corrs Chambers Westgarth, Taxand Australia

Taxand Australia is the leading independent full service commercial law firm in Australia. Our team provides full service, end-to-end tax transactional support on domestic and cross-border mandates, starting with tax due diligence and structuring advice, through to legal documentation and post-merger implementation advice.

Taxand Australia provides general tax advisory services in relation to the application of Australian transfer pricing law and related international related party tax issues.

Transfer Pricing Framework

Australia has generally adopted the OECD approach to transfer pricing, including the application of the arm's length principle. Australian transfer pricing rules are set out in Division 815 of the Income Tax Assessment Act 1997 (Cth). Under those rules, where an entity obtains a transfer pricing benefit from conditions that operate between it and another entity in connection with their "commercial or financial relations", those actual conditions are taken not to operate and instead arm's length conditions are applied. In addition, Australian transfer pricing rules require the form of actual commercial relations between parties to be disregarded if they are inconsistent with the substance of those arrangements. Australian thin capitalization rules apply in addition to transfer pricing rules to reduce or further reduce debt deductions.

An entity is required to disclose certain details of its international related party dealings in its corporate income tax return. Where the value of those dealings exceeds certain thresholds, an entity is required to prepare and file an International Dealings Schedule that includes further details of those dealings (such as the extent to which transfer pricing documentation has been obtained and the degree to which it covers the dealings disclosed).

Accepted Transfer Pricing Methodologies

Australian transfer pricing rules require arm's length conditions to be identified by reference to OECD transfer pricing guidelines. Acceptable transfer pricing methods include the comparable uncontrolled price method, the resale price method, the cost plus method, the transactional net margin method and the profit split method. The Australian Taxation Office has published guidance regarding the factors that should be taken into account when choosing an appropriate methodology.

Transfer Pricing Documentation Requirements

Australia has country-by-country (CBC) reporting obligations for entities that are CBC reporting entities. In general terms, a CBC reporting entity includes an entity that has annual global income of AUD 1 billion or more, or is a member for a group that has annual global income of AUD 1 billion or more.

Australian CBC reporting requirements include a CBC report, a master file and a local file that is submitted as an XML file with the Australian Taxation Office. A reporting concession may be available where a CBC report or master file is submitted in another country. Reports must generally be filed within 12 months of the end of the income year to which the reports relate.

The Australian local file may require the inclusion of further details to those that are required in other countries. All Australian entities (whether subject to CBC reporting or not) are required to prepare valid transfer pricing documentation in respect of their international related party dealings by the time that the income tax return is due to be filed for that entity. Any transfer pricing adjustment that arises from a dealing that is not covered by transfer pricing documentation available at the due date for lodgement is subject to increased penalties. Australian transfer pricing documentation must address all requirements under Australian law to be valid. The documentation requirements are generally based on the OECD guidelines and allow the benchmarking methods permissible under those guidelines. There are additional obligations that must be addressed under Australian law (eg, reconstruction of transactions is allowable in all circumstances and not just the exceptional circumstances under the OECD guidelines).

There are significant uplifts in penalties that apply to significant global entities (SGEs) if additional tax is imposed in relation to any transfer pricing benefit and for failure to lodge returns, notices or statements on time (refer below).

Entities are required to include disclosures in income tax returns relating to its international related party dealings. Detailed disclosures (including dealing value, transfer pricing methodology and level of documentation prepared) may be required where the value of the dealings exceeds AUD 2 million.

Local Jurisdiction Benchmarks

Australian transfer pricing benchmarking and documentation requirements are generally based on the OECD guidelines and allow the benchmarking methods permissible under those guidelines. As noted above, the circumstances in which a transaction can be reconstructed for the purpose of benchmarking is significantly expanded under Australia law. The Australian Taxation Office has sought to assert rights to reconstruct transactions and this approach has received a degree of endorsement by Australian courts.



Advance Pricing Agreement "APA"/Bilateral Advance Pricing Agreement "BAPA" Overview

Australia has a unilateral and bilateral advance pricing agreement program. An APA request from a taxpayer will be considered having regard to the particular facts and circumstances, but the Australian Taxation Office is more likely to enter into an APA where certain factors are present. These include consistency with the OECD transfer pricing guidelines, a high level of assurance of the taxpayer's compliance with tax laws, the presence of significant complexity, the arrangement the subject of the request has been, or is highly likely to be, entered into, and where there is a high probability of economic double taxation. Based on published statistics, the average length of time to negotiate an APA is approximately 2 years.

Transfer Pricing Audits

The Australian Taxation Office has an active and well resourced transfer pricing audit function and has litigated a number of transfer pricing disputes. Details of routine audit activities are not made public but the focus of its audit activity seems directed towards large multinational groups. The Australian Taxation Office has published statements that it is focussed upon cross border financing arrangements.

Transfer Pricing Penalties

Penalties are imposed for a failure to comply with Australian transfer pricing rules. These penalties may take the form of an administrative penalty or prosecution of an offence. Where a failure to comply with transfer pricing rules results in a shortfall of tax, an administrative penalty equal to 25%-75% of the shortfall in tax may apply (plus a general interest charge of approximately 11% per annum on the amount underpaid). The Australian Taxation Office has the discretion, but not an obligation, to reduce penalties based on the particular circumstances. However, the administrative penalty would be a minimum of 25% of the shortfall where a taxpayer does not have complying transfer pricing documentation.

Penalty amounts are doubled for significant global entities (SGEs). An entity will be an SGE if it is a global parent entity with annual global income of AUD 1 billion or more, or is a member of group that is consolidated for accounting purposes where the global parent entity has annual global income of AUD 1 billion or more. In addition, there are also significantly increased penalties for SGEs where certain documents are not lodged on time (including income tax returns and CBC statements). These increased penalties may be between AUD 156,500 - 782,500, depending on the number of days after the due date that the documents are lodged.

Local Hot Topics and Recent Updates

Australia has proposed amendments to its thin capitalization rules and new legislation to deny deductions for payments attributable to a right to exploit an intangible asset of an owner resident in a low tax jurisdiction. Both measures are intended to broadly take effect from 1 July 2023, notwithstanding the measures are yet to be passed as law. While not strictly transfer pricing matters, these rules will impact the way in which transfer pricing rules may operate in Australia. For example, it is possible for interest deductions to be denied under both thin capitalization rules and transfer pricing rules and this could lead to a different result under transfer pricing rules.

AUSTRALIA



Documentation threshold

Master file	Group revenue of AUD 1 billion or more
Local file	Group revenue of AUD 1 billion or more
CbCR	Group revenue of AUD 1 billion or more

Submission deadline

Master file	Generally 12 months after income year end
Local file	As above
CbCR	As above

Penalty Provisions

Documentation – late filing provision	Up to AUD 782,500 (i.e., for SGEs)
Tax return disclosure – late/incomplete/no filing	Penalty depends on circumstances but may be up to AUD 782,500 plus potential further penalties calculated as a percentage of tax shortfall
CbCR – late/incomplete/no filing	Up to AUD 782,500



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