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## TRANSFER PRICING IMPLEMENTATION PROVISIONS ISSUED

On 29<sup>th</sup> September 2010 Inland Revenue published the implementation provisions for art. 26 of Legislative Decree 78/2010 concerning removing the application of fines for untrue declarations when the tax payer audited documents the fact that the **transfer pricing** applied **corresponds** to the normal value.

As was to be expected, this is a provision that follows the lines of the directives issued by the **OECD** and the **Code of Conduct for the European Union** in this regard, and its main goal is to protect the good faith of Companies that engage in in-house processing of the criteria for determining the prices applied and clarification of the same if requested by the Administrations of the States involved.

In particular, in line with the OECD and the EU, it calls for **articulation of the documentation** in the so-called *Master File* for the Group, and national documentation that applies more specifically to resident companies.

However, the provision contains suitable articulation of the information depending on the **type of company** involved, distinguishing between holding companies, sub-holding companies, and subsidiaries or permanent establishments of a non-resident company.

This documentation must be provided **annually**: the only exception to this rule was made for **small and medium-sized businesses** (in the sense of industrial, commercial, or service companies with turnover or earnings that do not exceed Euro 50 million) that can exempt themselves from updating the data related to the comparability analysis for two years following that on which the documentation is provided.

This documentation must be drawn up in **Italian**, however, the provision **allows** – in line with the Community Code of Conduct – for a **foreign language** to be used for the *Master File*, although the provision limits this to English even if, for example, the group holding company is not based in an English speaking country.

**Each page** of both the *Master File* and the national documentation must be **initialed** by the legal representative or their delegate, and the **last page must be signed**, and this may also be done electronically.

In the case of *Master Files* for EU groups, the representative's signature declares that what is submitted to Inland Revenue agrees with what has been reported to the Tax Administration of the State of residence of the group holding company. Also as regards procedural aspects, the provision of 29<sup>th</sup> September 2010 states that the documentation must be provided in **electronic format** and not hard copy. However, where only hard copies exist the tax payer is allowed – within a “reasonable time allowed by the auditors” – to provide the documentation in electronic format, without this prejudicing setting aside of the fines.

The documents must be submitted to the auditors **within ten days** of the request. On this point the wording “by not later than” leads one to presume that this deadline is imperative (in the sense that, once this time expires, the Administration is free to apply the fines), without prejudice to the fact that **it is possible to add to the documentation** if requested by the Offices.

Removal of application of fines is subject to the **veracity** of the information contained in the documentation. In fact, the documentation states that the fines can be issued if the documents are incomplete, do not conform to the minimum content laid down, or do not correspond to the truth. It goes on to provide a guarantee clause for the tax payer that cannot be fined for **partial inaccuracy** or that, in any case, does not prejudice the audit.

A further guarantee is represented by the fact that the information contained in the documentation cannot be used for “purposes other than those institutionally pertaining to the audit during which it is provided”.

With reference, finally, to the terms for informing Inland Revenue of **possession of the documentation**, the provision states that:

- Normally, this is done along with the tax return.
- For tax periods prior to 31<sup>st</sup> May 2010, this can be done telematically via Entratel **by 28<sup>th</sup> December 2010**, although late submissions will be considered as valid, provided they are made prior to entries, inspections, or audits.

## DOCUMENTATION REQUIRED

As regards the **Master File** nine **elements** are **required**:

1. General description of the multinational group
2. Structure of the group (organisational and operational)
3. General strategies applied by the group
4. Flows of operations
5. Details of infra-group operations (transfer of tangible or intangible assets, provision of services, financial operations) and agreements for division of costs.
6. Functions carried out, instruments used, and risks assumed.
7. Intangible assets used.
8. Policy for determining transfer prices in the group.
9. Relations with Tax Administrations and details of any Advance Price Agreements.

As regards the “**national documentation**” there are six **qualifying elements**: General description of the company.

1. Sectors in which the company operates
2. Operating structure
3. General strategies adopted by the company and any changes compared to the previous year
4. Details of infra-group operations (transfer of tangible or intangible assets, provision of services, financial operations).
5. Analysis of comparability and methods used for determining the transfer prices.
6. Details of infra-group operations.

In terms of national documentation, particular importance is given to the **comparability analysis**, which details the **characteristics** of the assets and services included in the transactions, the **contractual terms** of the operations and the **financial conditions** under which the transactions themselves are done. This analysis is used to list the prices applied, following outlining of the method chosen previously.

This documentation must have the following attachments:

- Flow diagram used to describe the **flow of operations** including extraordinary operations.
- Copies of the **contracts** written that regulate infra-group **transactions**.

A summary description is given of the structure of the documentation that must be provided by the holding company (that is, by Italian group holding companies that hold stakes in non-resident companies).

## STUDIO ASSOCIATO DE VECCHI

For “**sub-holding**” companies (that is, Italian companies controlled by other companies – wherever they are resident – that control non-resident companies), the *Master File* can be limited to information on the **sub-group** headed by the *sub-holding* itself (therefore excluding the group holding company), although the *Master File* for the entire group may be submitted, even when the group holding company is resident abroad.

The situation is even simpler for “**subsidiaries**” (that is, Italian companies controlled by other companies – wherever they are resident – that do not in turn control non-resident companies). For these companies (that reasonably constitute the most representative of the subjects that can benefit from the new norm), the documentation is exclusively "national", and therefore there is no *Master File*.

Then there are particular rules for **permanent establishments** of **non-resident** subjects that are required to apply an “ordinary” regime, of a sub-holding or a subsidiary depending on whether the non-resident subject of which the permanent establishment is part is a *holding*, *sub-holding* or *subsidiary* respectively.

Our Firm is available to provide any further clarification and assistance in this matter.

Best regards,

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Studio Associato De Vecchi

Dr. Francesco Marconi

