## XII. Inter-Company Pricing

### A. *In General*

Under the Single Unified Text of the Income Tax Law approved by Supreme Decree 179-2004-EF, published on December 8, 2004, as amended (ITL), transfer pricing rules apply in the case of:[1030] (i) transactions between related parties; transactions carried out from, to or through non-cooperating countries or tax havens; and (iii) transactions carried out with parties whose income and earnings were subject to a preferential tax regime.[1031] However, the Peruvian tax authorities will only proceed to adjust the value agreed to by the parties when the amount of income tax determined as a consequence of such value is lower than the amount of income tax that would have been calculated if the transfer pricing rules had been applied.[1032] The Regulations approved by Supreme Decree 122-94-EF, published on September 21, 1994, as amended (ITR) state that a lower amount of income tax is determined when, among other things: (i) there is income deferral; or (ii) the calculated losses are higher than those that would have accrued under arm's-length terms.[1033]

### B. *Related Parties*

In general terms, the ITL provides that two or more entities are related parties (domestic and foreign) when:[1034] (i) one of the entities is involved directly or indirectly in the management, control or capital of the other(s); or (ii) the same individual or group of individuals participates directly or indirectly in the management, control or capital of the two or more entities. Parties that are related will continue to be regarded as related even when a transaction between them is carried out using third parties so as to disguise it.[1035]

Individuals and entities who are engaged in the following ownership structures, among others, are deemed to be related parties as a result:

(i) An individual or legal entity and another legal entity: where the individual or legal entity owns more than 30% of the capital of the other legal entity, either directly or through third parties;[1036]

(ii) Two or more legal entities: where more than 30% of the capital of the two or more legal entities is owned by the same individual or legal entity, whether directly or through third parties;[1037]

(iii) Two or more legal entities: where more than 30% of the capital of each of the two or more legal entities is owned by people who are related by marriage, or are related up to the second degree of consanguinity or affinity;[1038]

(iv) Two or more legal entities: where more than 30% of the capital of each of the two or more legal entities is owned by the same shareholders;[1039]

(v) A nonresident entity and its one or more permanent establishments (PEs) in Peru;[1040] and

(vi) A resident entity and its permanent establishments abroad.[1041]

### C. *Transfer Pricing Methods*

Various transfer pricing methods are permissible under Peruvian law, including:[1042]

(i) The comparable uncontrolled price:[1043] this method compares the pricing of goods and services charged between related parties against the pricing of goods and services charged among third parties in comparable transactions, under comparable conditions.

Additionally, the ITL provides that, in the case of imports and exports of goods quoted in the international market, local market or the destination market, including those quoted for derivative financial instruments, or at prices that are established taking as reference the quotations of the relevant markets, the market value is determined based on such quotation.[1044]

(ii) The resale price: the resale price is calculated by subtracting the appropriate gross profit margin from the applicable resale price of the property concerned in the controlled transaction;[1045]

(iii) The cost plus: the cost-plus price is calculated by adding the appropriate gross profit to the controlled taxpayer's cost of producing the property concerned in the controlled transaction;[1046]

(iv) Profit split: the profit split is calculated by apportioning the global profit arrived at by aggregating the profits obtained on each of the transactions between related parties. The global profit figure is then apportioned in proportions that it would have been apportioned between independent third parties, taking into account, among other things, the sales, expenses, costs, risks assumed, assets and functions performed by the related parties;[1047]

(v) Residual profit split: this method determines the market value of goods and services using the profit split method but apportions the global profit as follows: (a) the minimum profit attributable to each related party is first determined using any accepted method, excluding the

[1030] ITL, art. 32-A(a).
[1031] See XIII.A., below, for further information regarding non-cooperating countries and tax havens for Peruvian income tax purposes.
[1032] ITL, art. 32-A(c).
[1033] ITR, art. 109.
[1034] ITL, art. 32-A(b).
[1035] ITL, art. 32-A(b), para. 2.
[1036] ITR, art. 24(1).
[1037] ITR, art. 24(2).
[1038] ITR, art. 24(3).
[1039] ITR, art. 24(4).
[1040] ITR, art. 24(10).
[1041] ITR, art. 24(11).
[1042] ITL, art. 32-A(e).
[1043] ITL, art. 32-A(e)(1).
[1044] ITL, art. 32-A(e)(1), para 2.
[1045] ITL, art. 32-A(e)(2).
[1046] ITL, art. 32-A(e)(3).
[1047] ITL, art. 32-A(e)(4).



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utilization of significant intangibles; and (b) the residual profit is determined by subtracting the minimal profit from global profit. The residual profit is apportioned among the related parties, taking into account, the significant intangibles used by each of party, in the proportions that it would have been apportioned among independent parties, among other attributes;[1048]

(vi) Transactional net margin: this method determines the profit that would have been obtained by independent parties in comparable transactions, taking into account the profitability relative to an appropriate base, such as assets, sales, expenses, costs, cash flows, etc.[1049]

### D. *Comparability Criteria*

Transactions are comparable to transactions carried out between independent parties when, under the same or similar conditions, at least one of the following conditions is met:[1050]

(i) None of the existing differences among the transactions subject to comparability or among the characteristics of the parties materially affects the price, the amount of the consideration or the profit margin;[1051] or

(ii) Even when there are differences among the transactions subject to comparison or among the characteristics of the parties that may materially affect the price, the amount of the consideration or the profit margin, such differences can be eliminated with appropriate adjustments.[1052]

To determine whether the transactions are comparable, those elements or circumstances that best reflect the economic reality of the transaction, depending on the method used, will be considered, for example the following:[1053]

(i) The characteristics of the transactions;

(ii) The functions or economic activities, including assets used and risks borne in the transactions, of each of the parties involved;

(iii) The contractual terms;

(iv) The economic or market circumstances; and

(v) Business strategies, including those related to the penetration, permanence and expansion of the market.

When, for purposes of determining comparable transactions, no local information is available, taxpayers may use information from foreign companies, making the necessary adjustments to reflect market differences.[1054]

### E. *Benefits Test for Services*

As a requirement for their deduction as costs and/or expenses for tax purposes, all services rendered between related parties must meet the benefits test for services. Furthermore, taxpayers are required to keep and provide supporting documentation and information related to such services.[1055]

For Peruvian transfer pricing purposes, the benefits test for services is met whenever the service provides commercial or economic value to the service recipient, enhancing or maintaining its commercial position. The latter is in turn determined by evaluating whether an independent entity would have performed the service by itself or through a third party.[1056]

As mentioned before, taxpayers are required to provide supporting documentation and information related to the services, in particular supporting the actual provision of the services; the nature of the services; the necessity for acquiring the services; as well as the costs and expenses incurred by the service provider and the allocation criteria used.[1057]

In the case of low value-adding services, the costs and/or expenses for tax purposes are assessed by adding all costs and expenses incurred by the service provider and the applicable mark-up which cannot exceed 5%.[1058] Low value-adding services have the following characteristics:[1059]

(i) They are of a supportive nature;

(ii) They are not part of the core business of the taxpayer or the multinational group, as applicable;

(iii) They do not require the use of unique and valuable intangibles, and do not lead to the creation of unique and valuable intangible; and

(iv) They do not involve the assumption or control of a high or significant risk, and do not give rise to a significant risk for the service provider.

The following are not regarded as low value-adding services:[1060]

- Core business services;
- Research and development services;
- Manufacturing and production services;
- Sales and distribution activities;
- Financial transactions;
- Exploration or exploitation of natural resources;
- Insurance and reinsurance;
- Senior management services.

### F. *Documentation Requirements*

In Peru, there are now three types of transfer pricing documentation to be submitted by taxpayers, which were introduced by an amendment to the ITL pursuant to Legislative Decree 1312. The type of report and the information to be reported varies depending on the amount of annual income of the taxpayer in the fiscal year and on whether the taxpayer belongs to a local or a multinational group of companies, as follows:

1048 ITL, art. 32-A(e)(5).
1049 ITL, art. 32-A(e)(6).
1050 ITL, art. 32-A(d) and ITR, art. 110.
1051 ITL, art. 32-A(d)(1).
1052 ITL, art. 32-A(d)(2).
1053 ITL, art. 32-A(d), para. 2.
1054 ITL, art. 32-A(d), para. 3.
1055 ITL, art. 32-A(i), para. 1.
1056 ITL, art. 32-A(i), para. 2.
1057 ITL, art. 32-A(i), para. 3.
1058 ITL, art. 32-A(i), para. 5.
1059 ITL, art. 32-A(i), para. 6.
1060 ITR, art. 118-A(e).



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| Documentation | Taxpayer | Annual Income | Information |
|---|---|---|---|
| **Local Report** [1061] | All taxpayers | Annual income accrued is > 2,300 TUs[1062] (PEN 11,385,000) | Organizational structure; descriptions of intercompany transactions; benefits test for services; transfer pricing methods used; financial statements corresponding to the related tax period, etc.[1063] |
| **Master File** [1064] | Taxpayers belongs to a local group[1065] | Local group's annual income accrued is 20,000 TUs[1066] (PEN 99,000,000,000) | Among other information: organizational structure; a descriptions of the business or businesses developed; a description of the transfer pricing policies regarding intangible assets and group financing; finance and fiscal status.[1067] |
| **Country by Country Report** [1068] | Taxpayers qualified as headquarters of multinational group[1069] or appointed as the representative headquarters.[1070] | Multinational group's annual income accrued is > PEN 2.7 billion.[1071] | Among other information: global distribution of the income; losses; taxes paid; business activities regarding each of the entities belonging to the multinational group.[1072] |

Entities are required to keep the related supporting documentation, duly translated into Spanish, for the longer of a five-calendar year term or during the statute of limitations period of the corresponding tax.[1073]

## G. Advance Pricing Agreements

### 1. In General

The ITL allows the Peruvian Tax Administration (*Superintendencia Nacional de Aduanas y de Administración Tributaria* or SUNAT) to enter into advance pricing agreements (APAs) with resident taxpayers to determine the value of transactions under the transfer pricing regime.[1074]

Taxpayers that subscribed an APA are obliged to submit the Local Report as well as an annual report describing the operations carried out in the year, and proving compliance with the conditions of the agreement.[1075]

### 2. Application Procedure

A resident taxpayer interested in entering into an APA may hold preliminary meetings with SUNAT to explain its position and evaluate the viability of an APA.[1076]

A taxpayer that decides to enter into an APA must file with SUNAT (prior to carrying out the relevant transactions) a valuation proposal regarding its future transactions with related parties, or transactions from, through or to countries or territories

[1073] ITL, art. 32-A(g), para. 9.
[1074] ITL, art. 32-A(f).
[1075] ITR, art. 118.
[1076] ITR, art. 118(b), para. 1.

[1061] Resolution of Superintendence 014-2018/SUNAT regulates the form, terms and conditions of the filing of the Local Report.
[1062] ITL, art. 32-A(g), para. 1 and Resolution of Superintendence 014-2018-SUNAT, art. 2.
[1063] ITL, art. 32-A(g), para. 1 and ITR, art. 117(a).
[1064] Resolution of Superintendence 163-2018/SUNAT regulates the form, terms and conditions of the filing of the Master File.
[1065] For this purpose, the term "group" has been defined as the group of persons, companies or entities related by way of property or control, obliged to formulate consolidated financial statements in accordance with the generally accepted accounting principles, or that would be obliged to do it if the shares issued by them where negotiated through a centralized negotiation mechanism. ITR, art. 116(a)(1).
[1066] ITL, art. 32-A(g), para. 3.
[1067] ITL, art. 32-A(g), para. 3 and ITR, art. 117(b).
[1068] Resolution of Superintendence 163-2018/SUNAT regulates the form, terms and conditions of the filing of the Country-by-Country Report. Resolution of Superintendence 188-2019/SUNAT amended Resolution of Superintendence 163-2018/SUNAT by adopting the Integral System of Automatic Reception and Exchange of Information (Sistema IR-AOEI) for taxpayers to file the Country-by-Country Report.
[1069] For this purpose, the term "Multinational group" has been defined as a group composed by one or more persons, companies or entities with residence in Peru and one or more persons, companies or entities with foreign residence; or a group composed by one or more persons, companies or entities with tax residence in a jurisdiction but taxed in a different jurisdiction on the activities carried out through a permanent establishment. ITR, art. 116(a)(2). Note that taxpayers belonging to a multinational group, not qualified as the headquarters of the group may also be obliged to submit the Country-by-Country Report if certain conditions are met. For instance, they are obliged to submit the Country-by-Country Report when the multinational group's annual income accrued is equal or higher than PEN 2.7 billion and the foreign headquarters of the group is not obliged to submit a Country-by-Country Report in their residence jurisdiction. ITR, art. 116(b).
[1070] Taxpayers members of a multinational group were not required to submit a Country by Country Report for the fiscal years 2017, 2018 and 2019, among other cases, provided their non-domiciled parent company had its residence or domicile in any of the following jurisdictions with which Peru has entered into an Agreement between Competent Authorities (AAC) within the framework of the Convention on Mutual Administrative Assistance in Tax Matters: Andorra, Anguilla, Argentina, Australia, Austria, Belgium, Belize, Bermuda, Brazil, British Virgin Islands, Bulgaria, Canada, Cayman Islands, Chile, China, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Gibraltar, Greece, Guernsey, Hong Kong, China, Iceland, India, Indonesia, Ireland, Isle of Man, Japan, Jersey, Kazakhstan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Macau (China), Malaysia, Malta, Mauritius, Mexico, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Panama, Poland, Portugal, Qatar, Romania, Russia, San Marino, Singapore, Saudi Arabia, Seychelles, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Turks and Caicos Islands, United Arab Emirates, United Kingdom, and Uruguay.
[1071] ITR, art. 116(b).
[1072] ITL, art. 32-A(g), para. 4 and ITR, art. 117(c).



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with no or low taxation.[1077] In general terms, the proposal must provide information and documentation to support the relevant facts, the method to be used and the price determined, and must demonstrate that the transactions concerned will be entered into under conditions that would have been agreed to between independent parties under comparable conditions. The proposal must be submitted by all related parties involved in the transactions.

SUNAT has 24 months within which to approve or reject a proposal. This period may be extended for an additional 12 months. The approval or rejection of the proposal must be duly supported.[1078]

If and when a proposal is approved, the taxpayer and SUNAT will subscribe to the corresponding APA.[1079] The APA will apply with effect from the taxable year in which it is approved and the following three taxable years.[1080]

*3. Termination*

SUNAT is allowed to terminate an APA unilaterally in the following circumstances:[1081]

(i) The taxpayer or any related party involved in the transactions covered by the APA are effectively convicted for tax-related crimes;[1082] or

(ii) The terms and conditions established in the APA are breached.[1083]

1077 ITR, art. 118(b), para. 2.
1078 ITR, art. 118(d).
1079 ITR, art. 118(e).
1080 ITR, art. 118(g).
1081 ITR, art. 118(i).
1082 ITR, art. 118(i)(1).
1083 ITR, art. 118(i)(2).



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