

I. Issue One

Paragraph 1.57 of the proposed revised TPG appears to allow regional searches but with certain qualifications. Are regional searches accepted by the tax authorities in Austria? In the affirmative case, under which conditions? If not or rarely, what reasons are put forward by the Austrian tax authorities to disallow the use of regional searches?

There is no statutory legislation on the possible regional scope for searches for comparables. In practice, this has been seen as the basis for a rather flexible approach of the Austrian tax authorities which seem to have allowed both local and regional (i.e. international searches). This should not be understood as a guarantee that local and international search results should necessarily be given equivalent weight (as this would depend on the actual comparability of the respective cases), in this guidance, as the authorities require the taxpayer who is actually using foreign markets data for comparison purposes to provide the tax authorities with sufficient reasoning on the actual comparability of the respective foreign market with the domestic market. From this draft guidance, it may well be concluded that the tax authorities will, in the future, also support in principle the use of regional or international searches. Notably, in this point the draft tax authorities' guidance is not restricted to foreign EU markets but seems to be applicable on a global basis (i.e. also allowing searches in non-EU markets).

II. Issue Two

Paragraph 2.1 of the proposed revised TPG states that "the selection of a transfer pricing method always aims at finding the most appropriate method for a particular case". Does Austrian legislation, administrative guidance and/or case law require taxpayers and/or tax authorities to select and use the "most appropriate method"? Or does the selection and use of "an appropriate method" suffice?

There is no statutory legislation as to whether there is a choice for the taxpayer to choose one out of more "appropriate methods" or whether the taxpayer has to apply what is believed the "most appropriate method". However, in practice the Austrian tax authorities have typically taken the view that, at least in theory, there is a "most appropriate method" available in a given case, which is then to be applied on a mandatory basis. Ob-

viously, the discussion on such a "most appropriate method" is a typical scenario in tax audits.

The authorities' view has now been confirmed in recently published draft transfer pricing guidelines of the Austrian Ministry of Finance. In this guidance, the tax administration takes the view that indeed such a method is to be chosen that offers "most security" for determining an arms-length transfer price. In line with paragraph 2.49 of current OECD Transfer Pricing Guidelines, the Austrian tax authorities' guidance gives priority to standard methods over profit methods (the latter including the transactional net margin method), if the various methods should be equally appropriate.

III. Issue Three

Would a taxpayer in Austria be allowed to default to a TNMM (OECD)/CPM (US) method without performing an extensive search for, evaluation of, and rejection of potential CUPs when the taxpayer is certain that the CUP method would not result in a correct arm's length price, while applying a TNMM (OECD)/CPM (US) would result in an arm's length price that is consistent with the taxpayer's facts and circumstances?

There is no default application to the transactional net margin method foreseen in Austrian law. Neither is such a default use accepted by the tax authorities as the result of an assumed hierarchy of the various TP methods. By contrast, the profit methods (including the transactional net margin method) are of a subsidiary use only in relation to traditional methods.

However, in many cases the Austrian tax authorities have in fact accepted the use of the transactional net margin method if this method provides for the best result in competition with the other TP methods. This is in line with the tax authorities' general approach that the "most appropriate" TP method should be used. Accordingly, at least in theory the taxpayer would have to demonstrate in a sufficiently transparent manner that the transactional net margin method is indeed the "most appropriate" method, including providing information to the tax authorities as to why the other methods are less appropriate in a given case. In practice, the Austrian tax authorities have allowed the use of the transactional net margin method even without providing specific evidence on the less appropriate outcome of other methods in cases where the

use of the transactional net margin method is widely recognised in a specific market or sector. In such a case, the taxpayer is often not asked in detail to provide information on the theoretical outcome of an application of the other methods.

From experience, it is seen as rather unlikely that the Austrian tax authorities would indeed ask for such detailed profit data on other participants to the transaction, if the information provided by the taxpayer seems to be sufficient for applying the transactional net margin method leading to an appropriate result. In other words, there should be no obligation to present such profit data on other transaction participants as a matter of principle, i.e. in cases where no additional value would be derived from such other participants' profit data for determining an appropriate transfer price for the taxpayer. Obviously, this might be different in the case of an international co-ordinated tax audit where not only the Austrian resident taxpayer (on whom the Austrian tax audit is conducted) but an entire multinational enterprise is audited by various tax administrations in a number of countries. In such case, a more co-ordinated approach of tax authorities may well take place, leading to an in depth profit data analysis not only of the Austrian resident taxpayer but the entire multinational enterprise.

IV. Issue Four

Paragraph 2.108 of the proposed revised TPG states that "... it might be useful in some circumstances to corroborate the conclusion of a TNMM with a transactional profit split method, in order to avoid having a disproportionate amount of an MNE's overall profit from the controlled transactions accruing to the tested party". Do you see the Austrian tax authorities requesting detailed profit data on all participants to the transaction even in cases where the taxpayer's facts and business arrangements indicate that such profit information is not needed?

Usually, in routine tax audits the Austrian tax authorities do not ask for such specified information as to profit data of parties involved in a transaction other than that of the Austrian taxpayer, if there is no apparent additional benefit of such profit data information (i.e. if the taxable income of the Austrian taxpayer is seen to be assessed reasonably based on its own data). In particular, their request to also disclose such profit information for other taxpayers is typically not seen as a matter of principle.

However, there might be an increasing interest of tax authorities in TP audits that involve the cross border activities of a multi national enterprise being under (simultaneous) audit in more than one country. In such an international audit case, it might well be that the tax administration may require a detailed profit data information on all taxpayers involved in the transaction to be presented in order to better assess the overall picture of a TP case.

V. Issue Five

The proposed revised TPG list (paragraph 1.38 – 1.62) the following factors determining comparability: 1) characteristics of property or services; 2) functional analysis; 3) contractual terms; 4) economic circum-

stances; and 5) business strategies. What comparability factors need to be analysed and up to which level of detail when a taxpayer in Austria has selected the TNMM as being an appropriate method?

Under Austrian statutory law or tax practice, there is no fixed hierarchy of the comparability factors. Nevertheless, from practical experience it can be taken that the tax authorities put much emphasis on the functional and risk analysis of the tested party. In particular, available TP guidance issued by the Austrian Ministry of Finance states that it is absolutely necessary to determine the type of function that the Austrian taxpayer in question actually has assumed as part of a multinational enterprise (i.e. to what extent the Austrian taxpayer has assumed an entrepreneurial function or a routine function only). Therefore, the level of assumed function is typically scrutinised in detail and is often the subject of discussions in a tax audit.

VI. Issue Six

Paragraph 2.135 of the proposed revised TPG discusses the treatment of pass-through costs with respect to their inclusion/non-inclusion in the computation of net costs while applying the cost-based transactional net margin method. Does your Austrian legislation, administrative guidance and/or case laws require taxpayers/ tax authorities to exclude such pass-through costs for tested party and comparables or otherwise?

When using the transactional net margin method, the Austrian tax authorities have accepted in some cases the exclusion of pass-through cost in the cost base. However, it is currently unclear whether this favorable outcome could be maintained in the future (or in future cases), as current draft TP guidance issued by the Austrian Ministry of Finance apparently requires the inclusion of *all* cost in the cost base upon the application of the transactional net margin method. This guidance of the Austrian Ministry of Finance provides for exclusion of some specified groups of cost (interest and taxes, amortisation of fixed assets if not material, expenses for pension and employee participation programmes if not material). There is no such exclusion foreseen for pass-through cost.

VII. Issue Seven

Paragraph 2.138 of the proposed revised TPG discusses the valuation of assets e.g. at book value or market value in case where net profit is weighted to assets in application of the transactional net margin method and recommends the use of market value of the assets as against the book value. In this case, would a taxpayer in Austria be required to determine the market value of the assets not only of the tested party but also of the comparables considering a like-to like comparison? In the affirmative case, under which conditions?

There is little experience as to this issue in Austrian TP practice. Existing TP guidance of the Austrian tax authorities apparently has not covered it. From general income tax principles of Austrian law, which is based largely on accounting, one might conclude that a reference to book values (rather than market values) should be acceptable from a conceptual point of view. On the other hand, for TP purposes there is obviously

a valid argument to use market values where available in order to achieve a better reflection of economic reality when setting a transfer price.

However, from a practical point of view it appears unlikely that a taxpayer will be required by the tax administration to present market values not only for the tested party but also for comparables, as in most cases the taxpayer will have limited, if any, access to the necessary information on such market values.

VIII. Issue Eight

The proposed revised TPG still seem to suggest in paragraph 3.35 that tax authorities could use secret comparables as long as they disclose the information to the taxpayer. Does Austrian legislation, administrative guidance and/or case law permit tax authorities to use secret comparables? And disregarding the answer to the previous question, do the Austrian tax authorities tend to use secret comparables during tax audits?

Currently, there is no specific TP guidance issued by the Austrian Ministry of Finance as to the use of secret comparables. Generally, the use of “secret” evidence is prohibited under section 166 of the Austrian General Tax Code. With regard to tax assessments of tax authorities made on the basis of estimates (which generally is allowed under section 184 of the Austrian General Tax Code as an instrument of last resort, in cases where the tax base cannot be determined by other means), there also exists jurisprudence of Austrian Courts saying that estimates which are based on economic results of secret comparables are not in line with procedural law requirements, since in such cases the taxpayer has no possibility to verify whether the data are actually comparable, the underlying are representative for the respective sector and the data was properly collected etc. Hence, the taxpayer has no chance to bring forward concrete objections against

the accuracy of the data and his right to be heard has therefore been violated.

However, although the use of secret comparables under Austrian domestic legislation is not permitted, it cannot be excluded that domestic tax authorities tend to use secret comparables during tax audits. In particular, probably as a reaction to the above mentioned court jurisprudence, in practice tax auditors often apply average values of the investigated sector (without disclosing the underlying comparables that have been in taken into account when determining the average value) instead of comparing the audited company with specific comparable companies of the sector. However, it appears unclear as to whether such an approach is actually in line with Austrian law and jurisprudence.

IX. Issue Nine

Does the TNMM have a (de facto) status of method of last resort in Austria? Do you believe that the proposed revised TPG will alter the status of the TNMM in Austria?

Under current Austrian TP practice, from a legal perspective there is clearly no such status of method of last resort for the transactional net margin method. Nevertheless, as a matter of fact it is applied in many instances, taking into account that this method provides for results that are relatively easy to achieve without doing a comprehensive transfer pricing study on the respective international transaction. It is expected, that this de facto status may well continue in the future, however only on a de facto (rather than legal) basis.

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