

1. What are the main changes brought by Order 442/2016?

- in terms of documenting the transactions carried out with related parties, taxpayers are divided into three categories, as follows:

Taxpayer type	Requirement to prepare the transfer pricing documentation file	Requirement to submit the transfer pricing documentation file
<p>I. Large taxpayers performing annual transactions with all affiliates related parties in amounts greater than or equal to any of the following thresholds:</p> <ul style="list-style-type: none"> 200,000 EUR, excluding VAT, for interest received / paid for financial services; 250,000 EUR, excluding VAT, for services received / rendered; 350,000 EUR, excluding VAT, for purchases / sales of tangible or intangible goods. 	<p>Annually (starting with the transactions carried out in 2016), within the legal deadline for submitting annual tax returns (currently March 25th for the taxpayers reporting on a fiscal year coinciding with the calendar year).</p>	<p>No later than 10 calendar days from the request of the authorities, but not earlier than 10 days after the legal deadline for preparing the file.</p> <p>The request can occur not only in case of a tax audit but also in other situations (e.g. during an unannounced tax audit).</p>
<p>II. Large taxpayers which do not fulfill the criteria in the above category, as well as small and medium taxpayers performing annual transactions with all related parties in amounts greater than or equal to any of the following thresholds:</p> <ul style="list-style-type: none"> 50,000 EUR, excluding VAT, for interest received / paid for financial services; 50,000 EUR, excluding VAT for services received / rendered; 100,000 EUR, excluding VAT, for purchases / sales of tangible or intangible goods. 	<p>Only at the request of the tax authorities in the case of a tax audit.</p>	<p>Within 30-60 calendar days from the date of the request. The deadline can be extended once, at the written request of the taxpayer, for a period of maximum 30 calendar days.</p>
<p>III. Taxpayers which do not fall into any of the categories above</p>	<p>Preparing a transfer pricing documentation file is not required. However, during a tax audit, this category of taxpayers should be able to provide documents that attest to the compliance with the arm's-length principle. The documentation should be prepared according to the provisions of the general accounting and tax regulations.</p>	

- the content of the transfer pricing documentation file becomes more complex. For example, information such as *"the description of the main functions performed, risks assumed and assets used at group level, which contribute significantly and in a definite manner to creating added value, presented individually for each of the participating group entities"* or *"the amounts of the payments / receipts for each transaction carried out by the taxpayer / payer with each related party"* is requested;
- the focus will be on analyzing intra-group financial services (clearly, primarily intra-group loans);
- the use of a unique procedure for estimating and performing transfer pricing adjustments: the estimate / adjustment will be done to the median value resulting from the benchmarking study. When the sample of comparables contains less than 4 items, the weighted average will be used;
- a new territorial criterion must be considered when preparing the benchmarking analysis - the Pan European (the new sequence is the following: national, EU, Pan European, international);
- the transfer pricing documentation file should not be prepared and will not be requested for transactions for which an adjustment / estimation decision on the income or expense of any related party was issued. It remains valid the provision that the transfer pricing documentation file will not be requested and should not be prepared by the taxpayer recipient of an advance pricing agreement for the transactions and the periods covered by it;
- the analysis of the transfer pricing documentation file by the tax authorities will be based on the data available at the time when the transfer prices were set or when they were documented. The taxpayer should be able to provide the supporting documents.

2. When does the new order come into force?

The new order applies to the procedures (tax audits) initiated after 1 January 2016. For the tax audits initiated before this date, the provisions in force at the time of their initiation are applicable.

3. What happens with the transfer pricing documentation files already prepared and which have not yet been audited by the Romanian tax authorities?

It remains one of the biggest questions so far. The ad litteram interpretation of the new order states that the transfer pricing documentation files already prepared by taxpayers in accordance with the provisions of the Order 222/2008 (which have not yet been audited as part of a tax inspection) need to be adjusted as to comply with the content of the new order.

4. Which are the main points that might lead to misunderstandings and possible disputes?

- the concept of incomplete file is not yet clarified;
- defining the practical approach of documenting the arm's length nature of transfer prices according to the provisions of the general accounting and tax regulations (applicable to taxpayers who are not required to prepare a transfer pricing documentation file).

5. What are the main consequences of not preparing / the absence of the transfer pricing documentation file?

According to the Fiscal Procedure Code, if the transfer pricing documentation file is not prepared or presented to the tax authorities, the following fines apply:

- from 12,000 RON to 14,000 RON for companies falling within the category of medium and large taxpayers; and
- from 2,000 RON to 3,500 RON for the other companies and for the individuals.

In addition to the fine, if the transfer pricing documentation file is not prepared / presented, the tax authorities are entitled to estimate the transfer prices applied by the taxpayer in transactions carried out with related parties. This may lead to additional amounts to be paid to the state budget.

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Once again it becomes clear that transfer pricing transcends the borders of a basic analysis of the market price, turning into a political issue.

Therefore, BEPS! **Be Prepared to Switch!**

In case of further questions, please don't hesitate to contact us. You can count on our help!

Best regards,
TPS Team