

EY TAX Flash / Advance Pricing Agreements (APA)

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On July 14, 2016, the THIRD RESOLUTION OF MODIFICATIONS TO THE FISCAL MISCELLANEOUS RESOLUTION FOR 2016 AND ITS EXHIBITS 1, 1-A, 3, 11, 14, 15, 23 and 25-Bis was published in the "Diario Oficial de la Federación". Particularly, Rule 2.12.8 incorporates different changes and rulings that shall be followed by taxpayers that formulate inquiries referred to in article 34-A of the Federal Tax Code in terms of the procedure number 102/CFF "Consultas en materia de precios de transferencia" found in Exhibit 1-A.

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Article 34-A of the Federal Tax Code refers to inquiries about methodologies for pricing in transactions between related parties, which are commonly denominated Advance Pricing Agreements (APA) and can be unilateral, bilateral and multilateral, which may take effect in the fiscal year they are requested, in the immediate prior fiscal exercise and up to the three subsequent fiscal years.

Previously, in an APA request, in any of its previously mentioned variants, the taxpayer included documentation, information, data and other precedents of the transaction subject to consultation that were relevant to it. Subsequently to the filing of the request of the consultation in transfer pricing, the Mexican Tax Administration, in case of observations or to compile more information, communicated with the taxpayer and/or advisor for requesting it, with no on-site visits to the taxpayer's operating facilities.

However, in accordance with the modifications included in rule 2.12.8, in case more information is required to solve inquiries referred to by article 34-A of the Federal Tax Code, authorities

"...can perform a functional analysis as part of the study and evaluation processes of the information, data and documentation, for purposes of identifying and specifying performed functions, assets used and risks born in transactions under consultation.

The functional analysis referred to by this rule will take place in the fiscal address of the taxpayer; as well as in its establishments, branch offices, premises; warehouses, or in any other place or establishment, platform, shipment or area in which recognition activities or superficial exploration take place, as well as exploration or hydrocarbon extraction..."

As a consequence of the above, authorities can visit the taxpayer's facilities to compile information, data, and documentation on a quantitative and qualitative basis, additional to the one provided by the taxpayer, that is relevant with regards to the determination of the methodology subject to inquiry; as well to corroborate, evaluate and rate the truthfulness and consistency of the information, data and documentation filed by the taxpayer to prove facts, circumstances and elements, substantial and technical, involved in its inquiry.

Besides, in procedure number 102/CFF "Consultas en materia de precios de transferencia" found in Exhibit 1-A, in which guidelines and requirements for transfer pricing inquiries experienced important changes by now having a much more extensive list of the minimum information requirements that shall be included in the inquiry request made by the taxpayer. Among the principal addendums stand out, by level of importance, the following elements:

- Relevant factors that generate profits for the Multinational Group;
- Multinational Group's Policies relative to Transfer Pricing;
- Multinational Group's consolidated financial statements;
- Global funding schemes;
- Description, financial and accounting information of intangibles ;
- Organizational chart of people engaged in administrative and operative areas relative to the taxpayer's transaction;
- Financial information projected in the filing of the transfer pricing methodology subject to analysis; and
- Documentation that supports the compliance of transactions between the taxpayer and its related parties resident in Mexico and abroad for the fiscal year at issue and the previous three fiscal years.

On the other hand, it is important to mention that rule 2.12.8 states the following:

“At any moment, shall not be deemed the start of the verification faculties, the act of carrying out the functional analysis in terms of this rule”

As it can be observed, new requirements, are in accordance with the BEPS project, particularly with Action 13 that refers to transfer pricing documentation of the taxpayer, its related parties and of the Multinational Group to which it belongs, specifically the Masterfile and the Country by Country Report.

Following, is included the whole provision text:

Inquiries on transfer pricing 2.12.8.

For purposes of article 34-A of the Federal Tax Code, taxpayers that formulate inquiries referring to such precept, shall perform it, in terms of the procedure number 102/CFF “Consultas en materia de precios de transferencia” found in Exhibit 1-A.

When tax authorities make relevant that information, data or documentation provided by taxpayers, is insufficient, presents irregularities or inconsistencies, to get acquainted with the activities or functions performed by resident entities in the country or abroad related to them, in business or contractual terms; or, to corroborate such information, data or documentation provided by taxpayers; or to get acquainted with the assets and risks born by each one of the entities; or when tax authorities do not agree with the method or methods proposed by taxpayers to determine compensations in transactions carried out with domestic or foreign related entities, or to corroborate the application of such methods, the authorities, in a collaborative and cooperative atmosphere, in order to confirm the business reasons of the transactions celebrated between resident entities in the country and abroad; as well as the conciliation of comparison parameters applied by each of the parties, to reduce possible deviations and the diversity of applicable criteria and to be able to solve the inquiries to which article 34-A of the Federal Tax Code refers; authorities can perform a functional analysis as part of the study and evaluation processes of the information, data and documentation, for purposes of identifying and specifying performed functions, assets used and risks born in transactions under consultation.

The functional analysis referred to by this rule will take place in the fiscal address of the taxpayer; as well as in its establishments, branch offices, premises; warehouses, or in any other place or establishment, platform, shipment or area in which recognition activities or superficial exploration take place, as well as exploration or hydrocarbon extraction, to obtain information, data and documentation on a quantitative and qualitative basis, additional to the one provided by the taxpayer, that is relevant with regards to the determination of the methodology subject to inquiry; as well to corroborate, evaluate and rate the truthfulness and consistency of information, data and documentation filed by the taxpayer to prove facts, circumstances and elements, substantial and technical, involved in its inquiry.

For such purposes the taxpayer shall allow access to personnel assigned by the administrative unit of the Tax Administration Service to the places mentioned in the precedent paragraph, in order to resolve the inquiries referred to by article 34-A of the Federal Tax Code.

In the functional analysis referred to by this rule tax authorities shall execute the following:

- Make acknowledgment to the taxpayer, through the taxpayer’s tax inbox, the objective of the functional analysis sessions, place and term for its enactment.

The functional analysis shall take place in the presence of the legal representative and of the taxpayers’ personnel involved and related to the objective of the inquiry, including substantial issues and specific techniques.

- In each functional analysis session, tax authorities will draft a summary memorandum in which at least the following should be consigned:

- General information of the company.
- Names, tax identification numbers and positions of the legal representative and personnel which is present during the procedure.

- Names, tax identification numbers and positions of the tax officials or tax personnel which is present during the procedure.

- Account of events and manifestations, including in its case, a list including the information, data and additional documentation provided by the taxpayer.

- Agreements reached and commitments to track and further follow-up the functional analysis.

- When each functional analysis is concluded, the minute will be read, so parties can ratify its content, and sign to indicate their conformity.

- When for any reason attributable to the taxpayer there is an impediment for the fiscal authority to perform the functional analysis referred to by this rule, or when the taxpayer refuses to conduct a process among the described in it, tax authorities will draft an act of such circumstance and will continue with the inquiry procedure.

Fiscal authorities involved in the functional analysis will limit their performances to circumstances related with the formulated inquiry, when they support, facilitate or foment the processes subject of analysis, study and evaluation of

information, data and documentation necessary to emit and, if it is the case, to validate the compliance with the corresponding resolutions. Such performances may include, amongst others, visual inspections, interviews and meetings with the company's personnel related with transactions with related parties, including substantial matters and specific techniques.

At any moment, shall not be deemed the start of the verification faculties, the act of carrying out the functional analysis in terms of this rule.

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