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Salles, Sainz – Grant Thornton, S.C.
Periférico Sur 4348
Col. Jardines del Pedregal 04500
México, D.F.
T +52 55 5424-6500
F +52 55 5424-6501
www.ssgt.com.mx

Joseph L. Andrus
Head of Transfer Pricing Unit
Centre for Tax Policy and Administration
Organization for Economic Cooperation and Development
2 Rue André Pascal
75775 Paris, Cedex 16
France,

Dear Mr. Andrus:

We appreciate the opportunity given by the Working Party No. 6 of the Committee on Fiscal Affairs to comment on the current White Paper on Transfer Pricing Documentation. Below you will find our comments:

Comments on the White Paper of Transfer Pricing Documentation

In general, the intention of the document is to provide a basis for the standardization of the information to be included in the Transfer Pricing Documentation, so it can be useful in different tax jurisdictions.

The first section describes, based on a survey of different countries and shown in Annex 1, the requirements of each local jurisdiction regarding Transfer Pricing Documentation. Although almost all countries require the taxpayer to obtain the documentation, there are significant differences between the requirements of each legislation, making an additional burden for taxpayers with multinational presence to adequately comply with their tax obligations and also to the Tax Authorities to exercise their faculties to review.

On the other hand, the paper specifies that the documentation is mostly prepared with a merely local approach, without giving due importance to the international perspective. Although it is suggested to include certain points of the organizational structure and functions of the Multinational Group, this would result in an increased administrative burden for taxpayers, in order to obtain its Transfer Pricing Documentation.

This diverges with several releases issued by the OECD, and even differs with the document itself, which addresses the simplification of the supporting documentation, in order to minimize time and costs to the taxpayers. In this context, OECD Transfer Pricing Guidelines states that excessive documentation to comply with the Arm's Length Principle should be avoided, and on the other hand it mentions that the amount of information needed for this purpose cannot be defined, and it varies according to each case.

This situation is repeated in some guidelines proposed by international organizations such as the Transfer Pricing Documentation for Associated Enterprises in the European Union (EUTPD), Pacific Association of Tax Administrators (PATA), International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee (BIAC), which seek to have a common basis on the information enclosed in the Transfer Pricing Documentation of the taxpayers of its member countries through " Master Files" or checklists which includes the necessary information to analyze and document an intercompany transaction. Despite this situation, it is widely recognized that there are several topics that may reduce its acceptance by multinational taxpayers such as:

The list of requirements is more extensive than the obligations listed on any of the Tax Laws of the countries involved, with the increase of the administrative burden for the taxpayers.

- It is recognized that changes between legislations generates uncertainty about the acceptance of the Transfer Pricing Documentation in most of the countries. This involves different levels of information details, materiality of operations, time of information used, among others.

- It provides uncertainty to taxpayers since the dissemination of the information in the reports, generates greater control and reviews by the Tax Authorities and, as a result of the different approaches between jurisdictions, it does not protect Multinational Taxpayers from possible Transfer Pricing adjustments.

It is worth mentioning that the document itself neither provides, nor suggests a guide that would effectively achieve the objective of providing a brief guidance on requirements that Transfer Pricing Documentation must include and it is limited to only describe the different approaches considered by International Organizations.

On the other hand, the paper mentions the differences regarding the correct timing to document an intercompany transaction, with its consequences on the information included in the reports. This issue becomes relevant since some countries require documentation with the data available at the time of the filing of the tax return, while others use data at the end of the year or at the date of request by the Tax Authority. These differences may affect the results of the analysis, which can lead to differences at the time of issuing the conclusions. Despite this, the paper only states the timing issues, without suggesting possible solutions or specifying what the best time to document an intercompany transaction is (ex-ante vs. ex-post).

After reviewing the document, we can conclude the following:

- While addressing key issues in Transfer Pricing, such as the standardization of the data included on a transfer pricing study and the timing issues, the paper itself does not discuss its possible solutions and it is only limited to evaluate these issues from a very general perspective. In this sense, we suggest to the OECD to specify which the best practice is, in order to achieve a possible standard criteria between its members and other countries.

- There are differences between this paper and other documents issued by OECD. Some papers state an effort to simplify the documentation, while others expresses several points to be included on the transfer pricing documentation, which significantly increases the administrative burden for the taxpayers. So, our suggestion to OECD is to include the most important criteria to document a transaction between related parties, which should consider not involving an excessive burden for Multinational Groups.

- Another topic arises on the definitions of several main concepts in Transfer Pricing such as: related parties, control, etc., given that each legislation has its own and it may not concur with the others. Since they are not integrated, this document may not have the same impact in all countries. In our opinion, OECD should start an effort to express its own definitions of such concepts, which meet with most of the legislations of its members and other countries, in order to have a common basis to discuss this document.

- The document issued would not be compatible in several jurisdictions, since diversity in the requirements of the Tax Laws and the criteria of the Tax Authorities should be considered. Thus, the OECD should make an effort to issue a document supported by most Tax Authorities, in order to provide comments that may be more useful and have a greater impact on the OECD Transfer Pricing Guidelines.

We want to express our gratitude for the opportunity to express our comments and hope that our observations will help to improve the Draft.

Sincerely,

Ricardo Suárez David

Salles, Sainz – Grant Thornton, S. C.
Transfer Pricing Partner