Almost 20 years ago the Organisation for Economic Co-operation and Development (OECD) put forward safe harbour guidelines for adoption by Member countries.

According to the OECD, the tone of the guidelines was somewhat negative. In light of this, and with safe harbours being of key importance to both taxpayers and tax authorities in reducing compliance burdens, the OECD has now taken several important steps forward, including the recent 21 May release. This release reported that the OECD Council has approved a revision concerning safe harbours contained in the OECD Transfer Pricing Guidelines.

The revision of Section E on safe harbours within Chapter IV of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations includes new guidance that:

- provides opportunities for countries to offer relief from compliance burdens and greater certainty for situations involving smaller taxpayers or less complex transactions
- provides a basis for countries – especially developing countries – to design a transfer pricing compliance environment that makes optimal use of the limited resources available.

In particular, the OECD recognizes that previous guidance did not accurately reflect the practice of OECD Member countries, a number of which have adopted transfer pricing safe harbour provisions. The OECD further noted that “the previous guidance was found to be ‘largely silent’ with regard to the possibility of a bilateral agreement establishing a safe harbour, even though some countries have favourable experience with such bilateral agreements.”

KPMG submissions and comments

KPMG’s Global Transfer Pricing Services (GTPS) practice welcomes this new guidance and contributed to the OECD’s requests for comments (see sidebar on KPMG GTPS OECD submission, 13 September 2012). Separately, but connected, KPMG’s GTPS practice also contributed to the US Internal Revenue Service’s (IRS) request for comments on the same topic (see sidebar on KPMG US Transfer Pricing Practice submission, 30 April 2013).

On 15 March 2013, the IRS announced that it was seeking public comments that discuss bilateral safe harbours with regard to arm’s length compensation for routine distribution functions, because such routine distribution functions are frequently an issue in transfer pricing cases. US-based professionals in KPMG’s GTPS practice welcomed the opportunity to provide comments around the benefits of, and potential structure for, these safe harbours.

KPMG’s GTPS practice is of the view that safe harbours should always be elective on the part of the taxpayer. If not, the taxpayer could be at risk of double taxation. As documented in the KPMG GTPS submission to the OECD unilateral safe harbours only protect taxpayers from adjustments by one of the two or more tax authorities with an interest in a transfer pricing transaction. In KPMG’s experience, many tax authorities will simply not respect or give any weight to the safe harbours offered by other tax authorities.

Safe harbours can be a successful part of any sound tax administration with benefits to both the taxpayers and the tax authority. Effective safe harbours could allow the taxpayer and the tax authority to eliminate a material portion of the cost and time in complying with the rules that would otherwise govern the controlled transaction. Thus, tax administrations, and taxpayers, could focus their efforts on more significant and important issues.

A welcome discussion

KPMG’s GTPS practice congratulates the OECD for circulating the Discussion Draft as quickly as it did and now this new guidance. The release and revisions show a clear commitment on the part of the OECD to engage and listen to the business community.
Find out more

For more information on KPMG’s GTPS practice and access to thought leadership, please visit: http://www.kpmg.com/gtps

For a listing of KPMG GTPS contacts from around the world, please visit: http://www.kpmg.com/gtpscontacts

For the latest transfer pricing news from KPMG member firms around the world, please visit: http://www.kpmg.com/taxnewsflash