

SP02/10 - Advance Pricing Agreements Annex 3 – Sample Agreement

ADVANCE PRICING AGREEMENT

Between

TAXPAYER

And

H.M. REVENUE AND CUSTOMS

This Advance Pricing Agreement (“APA”) is made between

Taxpayer, and

HM Revenue and Customs acting through Business International Directorate (“HMRC”)

The Taxpayer and HMRC (collectively “The Parties”) wish to enter into an APA, and to include in it an appropriate Transfer Pricing Methodology (“TPM”) to be applied to the transactions between the Taxpayer and the related party (or parties) identified below.

(This agreement replicates under UK statute on Advance Pricing Agreements the terms of a bilateral/multilateral agreement reached under the Mutual Agreement Procedure Article of the relevant Tax Treaty covering the same transactions between HMRC and (fisc(s))

1. Identifying Information

Taxpayer (typically - a company registered in (country) , under registration number XXXXXXXXX, Resident in (country), having a tax reference YYYYYY YYYYYY, (with a Permanent Establishment in (country)) and a Registered Office at (address) (or place of business at (address))

Related Party (similar information as for the taxpayer above – there may be a number of related parties)

Set out relationship between Taxpayer and Related Party – e.g. one a subsidiary of the other or both companies members of the multi-national group Z headquartered in (country)

2. Covered Transactions

The transaction(s) covered by this APA (the “Covered Transactions”) comprise (succinct explanation of all Covered Transactions)

3. Legal Effect

This APA is made pursuant to and for the purposes of S218 Taxation (International and Other Provisions) Act 2010 (“TIOPA 2010”) and binds the Parties, for the term of this APA, to determine questions relating to the transfer pricing (or branch or PE attribution) matters covered by the APA in accordance with its terms.

If the Taxpayer complies with the terms and conditions of this APA then HMRC will not contest the application of the TPM (as defined in Appendix A) to the Covered Transactions and will not make or propose any reallocation or adjustment that would be necessary in order for effect to be given to the provisions of Part 4 TIOPA 2010 with respect to the Taxpayer concerning the transfer prices for the APA term (this will have to be amended or extended if we are/are also looking at a PE issue....and also refer to Rollback years if relevant).

If, for any year during the APA term, the Taxpayer does not comply with the terms and conditions of this APA, or the Critical Assumptions (as defined in Clause 6 below) cease to be valid, HMRC may (subject to clause 9 below) revoke this APA and S.221 TIOPA 2010 shall apply.

(The terms and conditions of this APA may also be modified or amended upon the agreement of the Parties, subject also to the terms of any bilateral/multilateral agreement)

4. Term

Term of APA.

(Rollback period if relevant)

5. Financial Statements and APA Records

(typically – in accordance with S 228 TIOPA 2010 - the taxpayer is required to provide, in addition to Corporation Tax Returns and Audited Financial Statements:

Submission of APA information set out by Clause 6 and 7 below

Compliance with this will constitute compliance with the record maintenance provisions of Section 12B Taxes Management Act 1970 and paragraph 21, Schedule 18 Finance Act 1998 with respect to the Covered Transactions during the APA term.)

6. Critical Assumptions

(with respect to the Covered Transactions are set out in Appendix B)

7. Annual Reports

(unless this requirement can be very simply put are typically set out in a separate Appendix C. Note that some bilateral or multilateral agreements may require a standard report to be sent to all involved tax Administrations and in that case Appendix C may have to cover the same ground and also any specific information - e.g. (say) conversion into UK currency or UK accounts standards so that the HMRC tax team can readily track the numbers through the relevant UK tax computations.)

8. Disclosure

This APA and the information, data and documents related to this APA, are subject to the same rules of confidentiality as any other taxpayer's information provided to HMRC, and any unauthorised disclosure of information by HMRC will be a breach of those rules.

9. Revocation

HMRC will not revoke this APA unless and until it has explained in detail to the Taxpayer why and from when it is considered the taxpayer is in breach of the terms and conditions of this APA and the taxpayer has been given a reasonable opportunity to rectify any breach.

(Note - this clause may need to be aligned with any relevant requirements in a bilateral or multilateral agreement. In a multilateral for instance the possibility of the taxpayer no longer being felt to satisfy the terms of the APA in one territory only may be considered. Or, similarly, the consequences for the agreement between the other Administrations of there no longer being Covered Transactions in one territory may be tackled. HMRC may also want to emphasise that it will be working from the standpoint of seeking the continuance of the APA in the event of any such difficulty.)

10. Treatment of Allocations under the TPM

(typically – this may cover the treatment of ongoing or end-of-year adjustments which may be required under the TRM to align the results on Covered Transaction business with the APA terms.

11. Professional Fees

(as relevant – deductibility)

12. Tax Laws

(typically – general statement along the lines of – notwithstanding any statement in this APA agreement, the taxpayer remains subject to all applicable taxation laws not directly affected by this APA. The Taxpayer is entitled to any benefits or relief otherwise available under all such laws).

13. Governing Law and Effective Date

(typically - laws of England and effective from the later date below)

Signatories

Responsible Officer or Director on behalf of Taxpayer, and dated.

Except in Oil cases (when it will usually be signed by the Competent Authority at Large Business Service Oil and Gas), usually Deputy Director responsible for APA Programme, or APA Co-ordinator, BID, HMRC, and dated.

Notes

Appendix A (the TPM) – see paragraph 3 - is the “core” of the APA. This section may need to be detailed, but it will always be highly tailored to the taxpayer’s particular circumstances. HMRC will try and ensure where there is a bilateral or multilateral agreement that Appendix A is expressed in wording which is identical or near-identical with the wording of the transfer pricing methodology in that agreement. If that is not possible, Appendix A will be operated as if it were expressed in identical terms to the methodology set out in the bilateral or multilateral agreement.

Appendix B (Critical Assumptions) – see paragraph 6 - will generally have a clause to the effect that there should be no major commercial changes governing the Covered Transactions. In volatile, dynamic or cyclical businesses this may need some elaboration. Similarly, in cases involving trading or managing portfolios of Financial Products, consideration may be needed at the time of negotiating the agreement as to how it will be clear that “new generation” Products are or are not covered by the APA. In these kinds of situations there will generally be a requirement for relevant information to be automatically reported in Annual Reports, see below. In practice, other Critical Assumptions that have on occasion been agreed with taxpayers have included clauses relating to changes of control, the possibility that acquisitions might impact upon the APA, to profit share and competition issues, and those involving Regulation, or arising from Government Policy or Laws.

Appendix C (Annual Reports) – see paragraph 7. Ideally Annual Reports will include, in addition to any required or mandated information on the Covered Transactions (see, for instance, comment above) a one or two sheet or spreadsheet “proof” document demonstrating that all the conditions of the APA have been met for the Covered Transactions. Where it is agreed that such a “proof” will be provided, its format should be set out in the APA agreement.