

Notes for Guidance - Taxes Consolidation Act 1997

Finance Act 2018 edition

PART 35A TRANSFER PRICING

December 2018



The information in this document is provided as a guide only and is not professional advice, including legal advice. It should not be assumed that the guidance is comprehensive or that it provides a definitive answer in every case.

PART 35A Transfer Pricing

835A Interpretation

835B Meaning of associated

835C Basic rules on transfer pricing

835D Principles for construing rules in accordance with OECD Guidelines

835E Small or medium-sized enterprise

835F Documentation and enquiries

835G Elimination of double counting

835H Capital allowances

PART 35A

TRANSFER PRICING

Overview

This Part contains transfer pricing rules for transactions between associated persons to ensure that appropriate pricing is applied in calculating income for tax purposes. The rules apply as regards both cross-border and domestic transactions. The legislation ensures that trading transactions between associated parties will not result in a loss of Irish tax through the application of non-arm's length pricing.

835A Interpretation

Summary

This section is the interpretation section for the Part. Most of the definitions are self-explanatory.

Details

Definitions

“arrangement” means any agreement or arrangement of any kind (whether or not it is, or is intended to be, legally enforceable). (1)

“Commission Recommendation” means Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

“relevant activities” is defined so as to exclude activities which are not activities of the person's trade.

“relevant person” in relation to an arrangement means a person who is within the charge to tax under Case I or II of Schedule D in respect of profits or gains or losses, the computation of which profits or gains or losses takes account of the results of the arrangement.

The term “control” is construed in accordance with the provisions of *section 11*. (2)

835B Meaning of associated

Summary

This section deals with the meaning of “associated”.

Details

Two persons are associated if one controls the other or both are controlled by the same person. The controlled person in each case must be a company. (1)

A company will be treated as controlled by an individual if the individual together with relatives of that individual control it. For this purpose relative means husband, wife, ancestor, lineal descendant, brother or sister. (2)

835C Basic rules on transfer pricing

Summary

This section sets out the main transfer pricing rules. The arrangements to which the section applies are set out.

Details

These are arrangements between associated parties which – (1)

- involve the supply and acquisition of goods, services, money or intangible assets, and
- form part of the trading activities of either party.

Where under an arrangement to which these provisions apply an amount receivable in respect of a sale is understated or the amount payable in respect of an expense is overstated, then the arm's length amount will be substituted in each of the cases. (2)

The term "arm's length amount" is the amount that would have been agreed between independent parties. (3)

835D Principles for construing rules in accordance with OECD Guidelines

Summary

This section references the OECD guidelines.

Details

The definitions of the various terms used in the section are set out. (1)

The transfer-pricing rule in *section 835C* is to be construed in such a way as to ensure, as far as possible, consistency with the OECD Guidelines. This effectively introduces into Irish law the OECD Transfer Pricing Guidelines so far as they relate to trading transactions. (2)

The Minister for Finance may by order designate any additional guidance published by the OECD as being comprised in the transfer pricing guidelines as defined. (3)

835E Small or medium-sized enterprise

This section excludes small and medium-sized businesses ("SME") from the scope of this Part. (1)

An SME is defined for the purposes of the section. This definition is closely based on the definition of enterprises, which fall within the category of micro, small and medium-sized enterprises as defined in the EU Commission Recommendation of 6 May 2003. Broadly, this comprises groups of companies where the group employs less than 250 employees **and** *either* has a turnover of less than €50m *or* assets of less than €43m. (2)

835F Documentation and enquiries

Summary

This section contains documentation requirements. (Tax Briefing No. 7 of 2010 also provides guidance on transfer pricing documentation obligations.)

Details

A person involved in a transaction which is within the scope of the transfer pricing legislation is obliged to have available such records as may reasonably be required for (1)

the purposes of determining whether the income of that person has been computed in accordance with the transfer pricing legislation.

The general rules that apply to records apply also to transfer pricing records i.e. they must be prepared in written form in an official language of the State or by means of any electronic, photographic or other process as permitted for accounting records. (2)

The provisions relating to the making available of records generally are extended to the making available of transfer pricing records to an authorised officer. (3)

The auditing of transfer pricing is reserved to officers authorised for that purpose by the Revenue Commissioners. (4)

835G Elimination of double counting

Summary

This section eliminates double counting in cases where domestic transactions only are involved.

Details

Adjustments

Where the profits of a person are increased and the counter party is resident in the State then a corresponding downward adjustment will be available to the counter party to the transaction. (1)

Trading stock

This subsection ensures that a transfer pricing adjustment will not adversely affect cash flow within a group. Where relief is being given to the counter party to a transaction by way of an increase in the cost of purchases, this subsection provides that, should any of those purchases remain in stock at the end of the accounting period, the closing stock value of that stock is unaffected by these provisions. (2)

Relief

Relief will be available under *subsection (1)* once tax in relation to the upward adjustment has been paid. (3)

Where the profits of a foreign branch are adjusted downwards, credit for foreign tax will be available by reference to the branch profits as so reduced. (4)

The practice that profits on development land acquired by a group as trading stock are taxed when the land is sold outside the group is maintained. Where such land is transferred within a group the companies involved can elect that the existing treatment continues to apply. (5)

835H Capital allowances

The provisions relating to transfer pricing will not apply for the purposes of computing any capital allowance.