



Guidance on the application of Advance Pricing Agreements (APAs)

1. Background

More than 10 years after the initial regulation of the procedures for the conclusion of Advance Pricing Agreements (APA), the Portuguese Government, on 26 November, carried out a review of this regulation through the publication of [Ministerial Order no. 267/2021](#), including not only the changes historically introduced in article 138 of the Corporate Income Tax (CIT) Code, dedicated exclusively to this matter, but also all the experience acquired with the application of these agreements.

The APA's main objective is to provide companies with a basis of legal certainty and assurance, by establishing in advance the methods to be used in determining transfer prices in transactions carried out with related entities, respecting the arm's length principle, while avoiding, at the same time, double taxation when they are bilateral or multilateral.

Additionally, please note that the negotiation of the agreement and its content, in terms of substance, remains subject to strict compliance with the transfer pricing rules contained in article 63 of the CIT Code, as well as the international law rules, namely the bilateral conventions aimed at mitigating double taxation in force, also following the guidelines published both by the Organization for Economic Cooperation and Development (OECD) and by the European Union Joint Transfer Pricing Forum.

Therefore, we will describe below, in greater detail, the changes introduced in the APA regulations, as well as the procedures and deadlines currently in force.

2. Brief description of the main changes introduced

Specifically, this review covered mainly:

- i. The clarification and detail of the several stages of the process of concluding an APA (two stages: preliminary stage and proposal stage)

- ii. The **establishment, for the preliminary assessment request, of a maximum period of three months** before the end of the deadline for submission of the proposal for an agreement, which must correspond to a period of six months before the beginning of the first taxation period that is intended to be seen. covered by the agreement;
- iii. The introduction of the **possibility of extinguishing the evaluation procedure of the APA** proposal in cases duly listed in the text of the Ministerial Order. In some of these cases, the Portuguese Tax Authorities (PTA) may be required to reimburse the taxpayers in 25% of the fee for entering into the agreement;
- iv. The proposed agreement is signed by the entities involved in the operations covered, which cannot claim or appeal the content of the agreement;
- v. Harmonization of the maximum term of validity of APAs with the changes introduced in article 138 of the CIT Code (**four years**);
- vi. The **provision of the possibility of APA covering previous tax periods** provided that the facts and relevant circumstances of these periods are identical or similar and the date of execution of the agreement has not elapsed more than two years after the deadline for the respective delivery;
- vii. A **25% reduction in the rate of signing the agreement** for micro, small and medium-sized companies;
- viii. In cases of renewal, the process of concluding an APA follows the same procedures as for the initial proposal, **with the waiver of the preliminary assessment stage now being clarified.**

3. Procedure of concluding an APA

Purpose

An APA intends to guarantee to a Personal Income Tax (PIT) or CIT taxpayer, the acceptance by the tax administration of the method(s) for determining the transfer prices (TP) of the related transactions, respecting the arm's length principle, for a certain period.

Types of APAs

The types of APAs are as follows:

- (i) **unilateral** – when the parties to the agreement are the PTA and one or more PIT or CIT taxpayers; or
- (ii) **bilateral or multilateral** - when, in addition to the agreement established between the PTA and the PIT or CIT taxpayers (unilateral agreement), an agreement is also signed with another or other tax administrations of States that have signed a tax convention with Portugal that includes a provision concerning the friendly procedure.

Thus, the process of concluding an APA is developed in two stages, the **preliminary stage** - which involves the summary assessment of the terms and conditions under which the agreement can be signed and, on its effects, - and the **proposal stage** - which involves its presentation by the taxpayer, and its acceptance or rejection by the PTA, followed by its evaluation and negotiation with a view to the conclusion of the agreement.

It should be noted that after the signing of the agreement, its application is subject to monitoring and verification of the application of the agreement by the PTA.

Procedure

i. Preliminary assessment stage

In the **preliminary stage**, the **request must be submitted in writing up to 3 months** before the deadline for submitting the agreement proposal and addressed to the director of the Large Taxpayers Unit (LTU), which must correspond to a period of six months before the beginning of the first taxation period that is intended to be covered by the agreement.

If, within **60 days**, the PTA does not expressly comment on it, the taxpayer may submit the proposal under the terms defined in the following section.

ii. Agreement proposal stage

Presentation of the agreement proposal

The APA proposal is addressed to the PTA director-general and must be signed by the entities involved in the operations covered, which will be bound by the PTA to comply with the agreement and **must be sent up to 6 months before the beginning of the first taxation period** that is intended to be seen covered by the agreement, for the LTU.

In the case of a proposal for a **bilateral or multilateral agreement**, the LTU will inform the International Relations Services Directorate (IRSD), as the competent authority for the establishment of the friendly procedure under the conventions aimed at avoiding double taxation, so that it informs the competent authority of the other States of the submission of the APA proposal.

Acceptance or rejection of the proposal

Upon receipt of the proposal, the competent PTA services must notify the taxpayer, in writing, within 60 days and, when necessary, request the provision of information or presentation of additional documents, in which case the counting of that period is interrupted until receipt of the requested elements.

In **bilateral or multilateral agreements**, the LTU communicates the acceptance or refusal referred above to the IRSD, which proceeds to notify the competent authority of the other State.

Proposal evaluation

After acceptance of the proposal, the competent PTA services analyze the elements provided by the taxpayer.

Concerning **bilateral or multilateral agreements**, it should be noted that:

- The beginning of the negotiation process and the conclusion of the agreement always depends on the prior acceptance of the competent authorities of the other States for the beginning of friendly procedure;
- The result of the assessment of the method proposed by the taxpayer must be sent to the IRS, so that it can be transmitted to the competent authorities of the other States involved;
- If the competent authorities of the other States conclude that they are not able to give their agreement to the submitted proposal, the friendly procedure is closed and the applicant is informed by the PTA of the decision taken, which may request it, within 60 days from the date of the notification of the decision, the conversion into a proposal for a unilateral agreement. As a result of the request for conversion, the taxpayer must waive any correlative adjustments determined by corrections to the TP of the operations covered;
- A period of **360 days is set for the evaluation procedure**, counted from the date of formal acceptance of the proposal by the PTA.

Regarding **unilateral agreements**, it should be noted that:

- A period of **180 days is established for the evaluation procedure**, counting from the date of formal acceptance of the proposal by the PTA.

The procedure for evaluating an APA proposal may be extinguished under certain circumstances, namely:

- If, after 60 days of notification of the non-existence of an agreement between the PTA and another or other competent authorities, as to the terms of a bilateral or multilateral agreement, the requesting taxpayer does not submit a request for convolvement in a proposal for a unilateral agreement. In this case, the extinction of the procedure implies the **reimbursement of 25%** of the agreement signing fee;
- If the requesting taxpayer does not provide the information necessary for the assessment of the proposal, under the terms and within the deadlines set by the PTA;
- If the assessment procedure is stopped for more than 90 days for reasons attributable to the requesting taxpayer; or
- If the period set out above (360 and 180 days depending on the agreements) elapses, the taxpayer and the PTA do not reach an agreement, nor is there a firm expectation of reaching one, regarding the characterization of the operations intended to be covered, the respective methodology determination of TP's or the documentation requirements to be maintained in order to demonstrate the adequate fulfillment of the terms foreseen in the agreement. In this case, the extinction of the procedure implies the **reimbursement of 25%** of the agreement signing fee.

Signing and term of the agreement

Agreement conclusion procedures

In **unilateral agreements**, as soon as the LTU accepts the method proposed by the requesting taxpayer or another methodology that both parties may define as appropriate, it submits the draft text of the agreement to the top manager of the service and, in if a decision of agreement is issued, it must be communicated by letter to the taxpayer, so that a declaration of acceptance of the agreement can be placed on it.

In **bilateral or multilateral agreements**, when a duly formalized agreement is reached between the PTA and each of the other competent authorities, the respective draft text must be submitted by the LTU to the sanctioning decision of the top manager of the service, and subsequently sent to the taxpayer.

Duration and periods covered by APA

The agreement enters into force on the date established therein, producing merely declarative effects, and **its duration cannot exceed 4 years**.

Notwithstanding the foregoing, the agreement may cover taxation periods for which the taxpayer has already submitted the *Modelo 22* provided that certain facts and circumstances are verified (by way of example, they cannot have elapsed more than 2 years after the stipulated period for the respective delivery).

The agreement can be renewed by written request of the taxpayer, up to 6 months before the expiration date, following the same procedures foreseen for the initial proposal and the preliminary assessment stage being waived.

Additionally, it should be noted that the taxpayer must keep the necessary documentation to enable the monitoring and verification of the agreement by the PTA.

Agreement termination

The resolution of the agreement is declared by PTA in the following cases:

- Provision of erroneous data, omission, concealment or tampering with relevant information and false statements attributable to the taxpayer; and
- Failure to comply with the terms and conditions established in the agreement and other obligations arising therefrom.

Agreement review

The agreement may be subject to review at the initiative of either party, in the event of any event that substantially changes the circumstances in which they founded the acceptance of the methodology for determining the TPs.

The taxpayer is obliged to communicate to PTA, within 30 days, all significant changes verified in the context economic circumstances or others and in the critical assumptions on which the agreement is based, which are likely to affect the continuity of the application of the method of determination of TP not to lead to results in accordance with the arm's length principle.

Miscellaneous provisions

The conclusion of an APA is subject to the payment of certain fees, **which may be reduced by 25%** when borne by a taxpayer who meets the requirements for classification as a micro, small and medium-sized company.

Enter into force

The Ministerial Order enters into force on **November 27, 2021**.

How can we help?

As transfer pricing service providers, Nexia will be able to support your Company or Group, not only in the preparation of your documentation and fulfilment of your declarative tax obligations, but also in the negotiation of APA with the Competent Authorities, on a local or global basis, benefiting for this purpose from Nexia International network, to which we belong.

If you wish to sign an APA or you have any questions about the application or implications of these changes, please do not hesitate to contact our tax experts.

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