

SP02/10 - Advance Pricing Agreements Annex 2 – Sample Agreement
(instructions, explanations and comments in italics)

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 CTIS Business International (“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.

(For bilateral/multilateral cases this agreement replicates under UK statute on Advance Pricing Agreements the terms of an agreement reached under the Mutual Agreement Procedure Article of the relevant Tax Treaty covering the same transactions)

1. Identifying Information

Taxpayer(s): *(typically - a company registered in (country) , under registration number XXXXXXXX, Resident in (country), having a tax reference YYYYY YYYYY, (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 the 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:
Add succinct explanation of all Covered Transactions here.

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 Transfer Pricing Methodology (“TPM”) as defined in clause 5 below 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.

HMRC may also revoke this agreement if, after the date of the agreement, Part 4 TIOPA 2010 or the transfer pricing guidelines as defined in Section 164(4) TIOPA 2010 are either amended or repealed and this would have an effect on the approach to pricing within this agreement. Such a revocation would have effect from the start of the chargeable period from which that amendment or repeal has effect.

For PE cases: HMRC may revoke this Agreement if, after the date of this agreement, Chapter 4 of Part 2 CTA 2009, S43 TIOPA 2010, or Chapter 2 Part 24 CTA 2010 are amended or repealed and this would have an effect on the approach to pricing within this agreement. Such a revocation would have effect from the start of the chargeable period from which that amendment or repeal has effect.

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

Where the conditions of S.226 TIOPA 2010 (Annulment of agreement for misrepresentation) apply the agreement is to be treated as never made.

4. Term of the APA

Detail the rollback period too as relevant

5. Transfer Pricing Methodology

This is the “core” of the APA. This section may need to be very detailed, but it will always be highly tailored to the taxpayer’s particular circumstances. If necessary it can be done as a separate Appendix to the agreement.

In a bilateral or multilateral APA case it is necessary that the terms of the TPM are entirely consistent with the terms of any mutual agreement between HMRC and its

treaty partner(s) on the covered transactions for the same period. Where it is not feasible or appropriate to have identical wording the TPM will be interpreted as if it were expressed in identical terms to the methodology set out in the bilateral or multilateral agreement between the relevant treaty partners.

6. Critical Assumptions

Critical Assumptions will be specific to the case and require careful consideration but generally they will include 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 whether and when “new generation” Products are or are not covered by the APA and when this would breach the critical assumptions. In these kinds of situations there will generally be a requirement for relevant information to be automatically reported in Annual Reports, see below.

Other typical Critical Assumptions could include 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.

7. Annual Reports

Annual Reports will generally be required to confirm that the Critical Assumptions continue to have been met and clearly demonstrate that the Transfer Pricing Methodology required has been used/complied with. Commonly, unless this can be put very simply, the format of a one or two sheet or spreadsheet “proof” document is attached as an Appendix.

Some bilateral or multilateral agreements may require a standard report to be sent to all involved Tax Administrations. In that case any UK specific information required should be detailed in the APA agreement e.g. conversion into UK currency or UK accounts standards.

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. Tax Laws

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.

Signatories:

Responsible Officer or Director on behalf of Taxpayer:

Date:

Delegated Competent Authority on behalf of HMRC (*usually this will be the Delegated Competent Authority who negotiated the agreement*):

Date: