

Interdisziplinäres Zentrum
für Internationales Finanz-
und Steuerwesen (IIFS)



Sanctions and penalties in Transfer Pricing. The German Perspective.

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Agenda

Prerequisites of inappropriateness

- Transfer pricing documentation
- Overview
- Useless documentation

Legal consequences

- Overview
- Estimation of tax base
- Surcharges
- Tax fraud / Negligent tax evasion

Case study

Transfer pricing documentation

Formal requirements

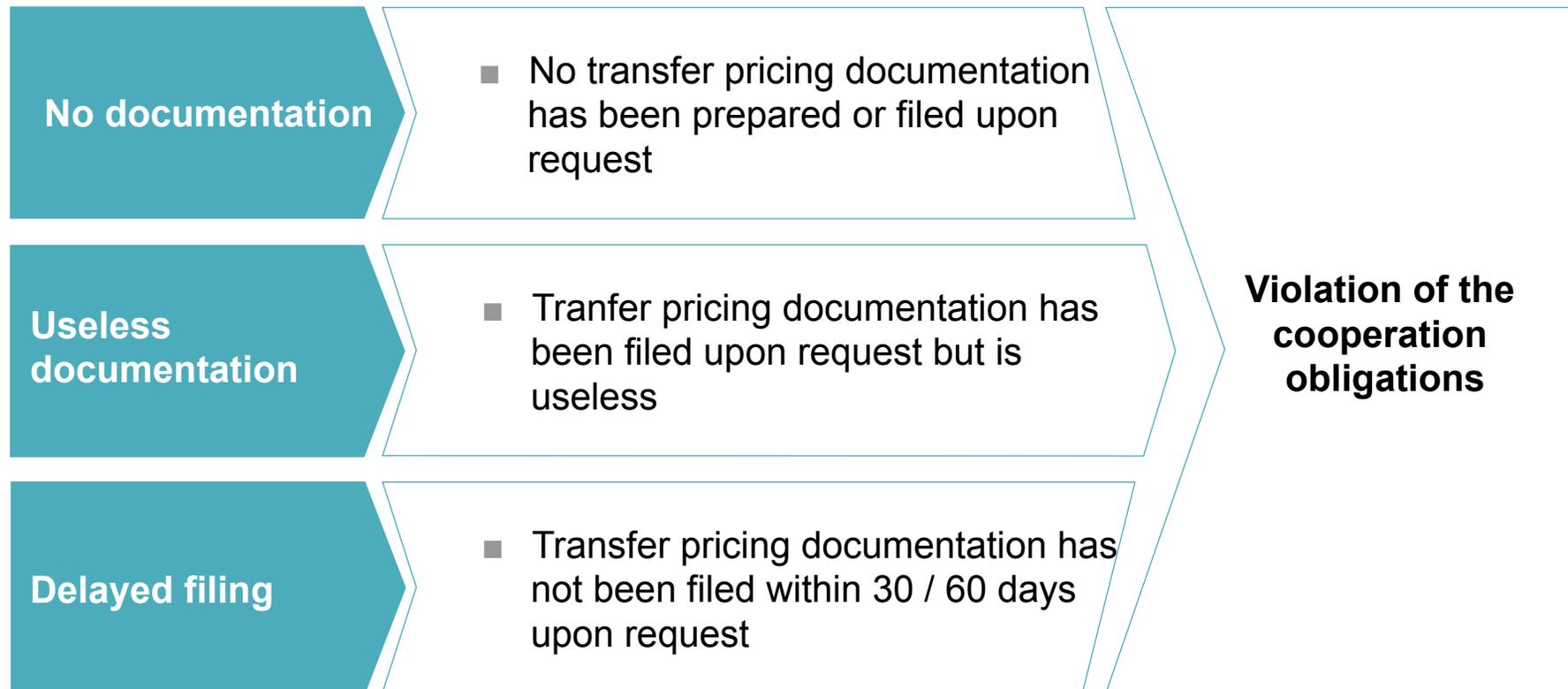
- Electronically or in written form
- German language
- Needs to be handed over within 60 days / 30 days upon request
- Extraordinary business transactions: needs to be prepared within six month after the end of the financial year in which the transaction took place

Content

- General information on ownership relationships, the business, and the organizational structure
- Business relationships with related parties
- Functional and risk analysis
- Transfer pricing analysis
- Additional information in case of specific circumstances

Prerequisites of inappropriateness

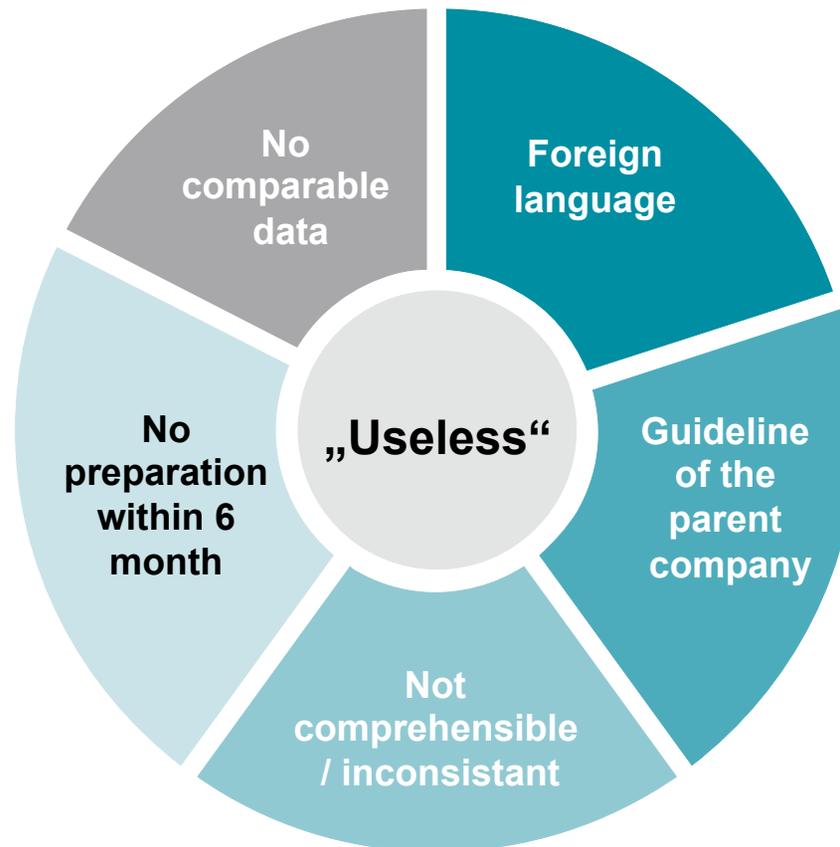
Overview



Prerequisites of inappropriateness

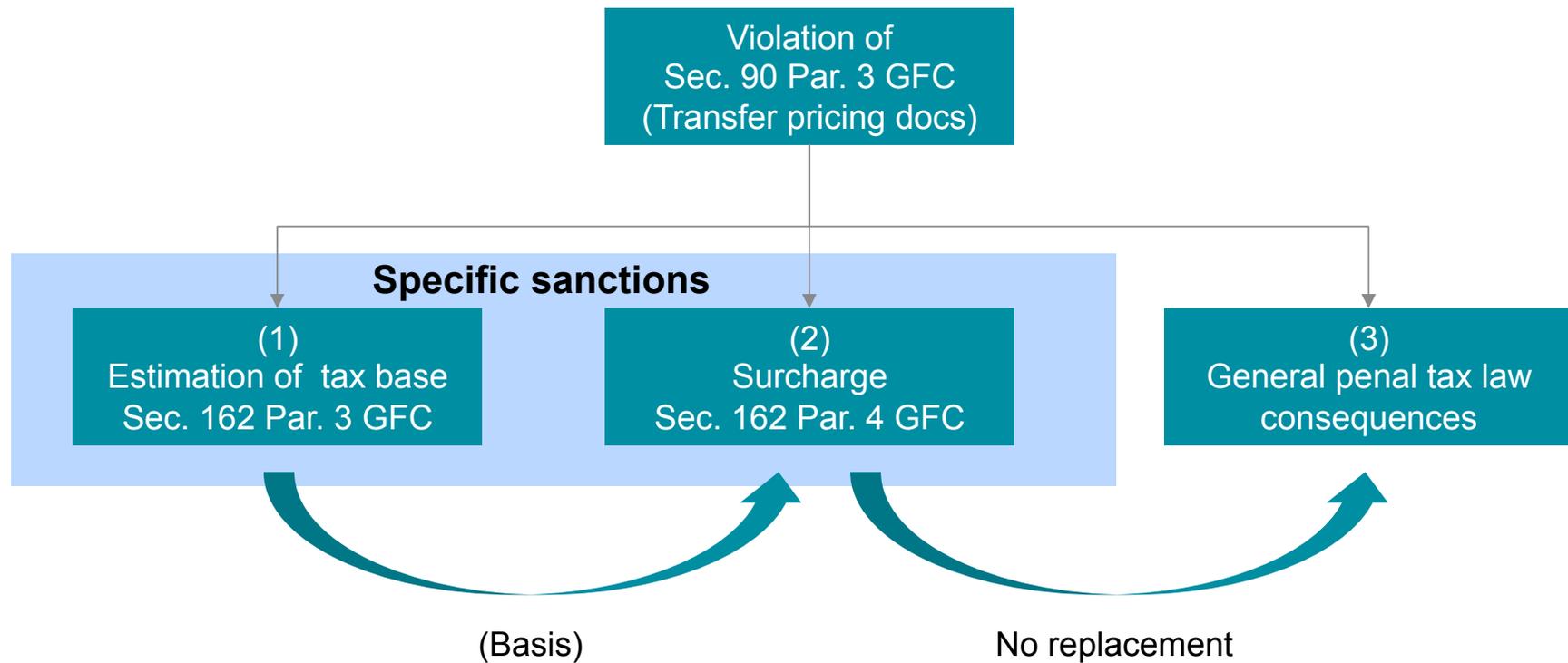
Useless documentation

- There is no legal definition of an useless documentation
- Documentation is regarded to be proper when an independent expert can comprehend which transactions have been realized and if the arm's length standard has been adhered to.



Legal consequences Overview

- Consequences arising from a violation of TP documentation requirements:



Legal consequences

Estimation of tax base

No documentation

Sec. 162 Par. 3 GFC:

*“...a **rebuttable presumption** shall arise that the taxpayer’s income subject to domestic taxation, the determination of which is facilitated by the documentation required under Sec. 90 Par. 3 GFC, exceeds the income declared by the taxpayer.”*

- Existence of adverse transfer price implied by law
- Taxpayer’s burden of proof that no income reduction occurred

Useless documentation

No contemporaneous preparation

*“If estimation by the tax authorities is indicated in such cases and it is only possible to determine the relevant within a certain range, in particular only on the basis of price ranges, the range may be **fully exploited to the taxpayer’s detriment.**”*

- (Usually) estimation of feasible price range with best probability of being accurate and closest to reality (settled case-law)
- Most detrimental transfer price within the estimated price range

No cooperation of foreign related party

Legal consequences

Surcharge (1/3)

Surcharge Sec. 162 Par. 4 GFC

No delivery or unusable documentation

- EUR 5.000 minimum surcharge
- ↓ If adjustment and percental surcharge higher
- 5% to 10% of additional positive income derived by estimation within responsible discretion of the fiscal authorities

Late delivery of usable documentation

- EUR 100 minimum surcharge per day
- ↓ Responsible discretion of the fiscal authorities
- EUR 1.000.000 maximum surcharge per assessment period
- Assessment of surcharge independent from transfer pricing adjustment

Legal consequences

Surcharge (2/3) – Points of interest

- Appropriate assessment
 - Unified assessment per group member & fiscal year
 - Separate business transactions subject to separate surcharges?
 - Documentation within the meaning of Sec. 90 Par. 3 GFC „as a whole“?
 - Usability of parts of the documentation?
 - Sec. 162 Par. 4 Sent. 4 GFC: „...the factors to consider...include...the benefits derived by the taxpayer and ... the extent of the lateness.“
 - Increased losses/TLCF? Hidden distributions within fiscal unity?
 - Sec. 162 Par. 4 Sent. 7 GFC: „The surcharge shall be assessed as a rule after conclusion of the tax field audit.“
 - Tax appeals/court proceedings? (adjustment doesn't obtain legal force as at conclusion)
 - Waiver of assessment, if violation appears excusable or degree of fault is minimal

Legal consequences

Surcharge (3/3) – Points of interest

- Overall (tax) burden of additional income
 - Non-deductibility of surcharges for German (corporate) income tax purposes
 - Nominal burden: 16.66% to 33.33% of the additional tax charge (30% tax rate assumed)
- International double taxation
 - Surcharges not necessarily subject to double tax treaty relief (OECD MTC/Commentary)
 - As a rule not eligible for mutual agreement procedure if not explicitly agreed
- EU law compliance (prevailing opinion)

Restriction



No
proportional
justification

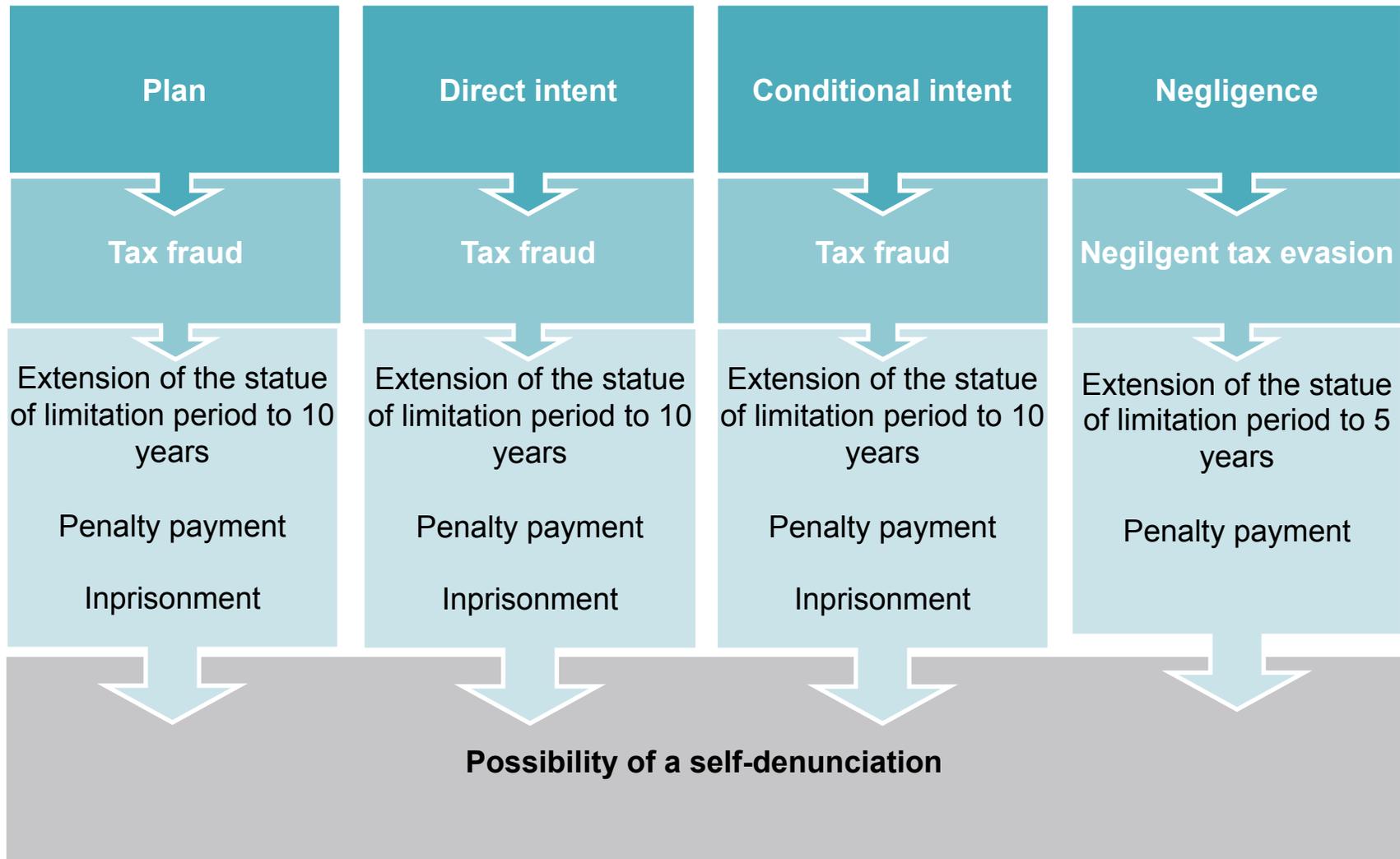


Non-
compliance
with EU law

- Surcharge only on cross-border cases -> Restriction of freedom of establishment (Art. 49 TFEU)
- Not justifiable by need to safeguard effectiveness of fiscal supervision, since not proportional (in comparison to a maximum late-filing charge of EUR 25.000 for pure national cases)
- Implications for EEA member states and potential DTT's with most-favoured-nation clauses (Art. 24 Par. 4 OECD-MTC)

Legal consequences

Tax fraud / Negligent tax evasion



Case study

Facts

Year 01:

- A-GmbH (Germany) delivers goods to its subsidiary B-Ltd. (UK). The transfer price for the whole delivery amounts to **€150.000**. A transfer pricing documentation has not been prepared.

Year 05:

- A tax audit covering the financial years 00 to 02 examines the transfer pricing situation and requests a transfer pricing documentation for the issue above. A-GmbH prepares and files a transfer pricing documentation **within 80 days** after the request of the tax audit. The documentation is prepared in English language without (permission of the tax authorities). The tax audit wants A-GmbH to translate the transfer pricing documentation. **After 20 days** A-GmbH files the translated version of the transfer pricing documentation.
- The tax audit determines that the transfer pricing documentation is **completely useless** as A-GmbH settled uncomparable data.
- The correct transfer price amounts are estimated between **€450.000 and €500.000**.
- The tax rate of A-GmbH is 30 %.
- A-GmbH receives an amended tax assessment notice for the financial year 01 in December 05.

Case study

Answer

Calculation of additional payments due to the useless transfer pricing documentation

€	
Adjustment of the taxable income of A-GmbH in year 01	350.000
Additional tax burden (30%)	105.000
Interest (circa 6% per year)	16.800
Penalty for the useless documentation (10%)	35.000
Penalty for the delayed filing (100 per day)	2.000
Total	158.800

**Thank you
for listening!**