OECD TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS

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MNE’s AND GLOBAL ECONOMY

• Greater portion of world economy housed within MNE’s.
• Problem of dividing tax jurisdiction over internal value-added within MNE, before realization in 3d party transactions.
MNE’s AND GLOBAL ECONOMY

- Decades old commitment to resolve on the basis of the arm’s length principle.
- Art. 9 in virtually all of our 53 income tax treaties, and other OECD bilateral income tax treaties.
INTERNATIONAL CONSENSUS

- OECD Transfer Pricing Guidelines are a watershed.
- Adopt arm’s length principle (Par. 1.13 – 1.14).
- Reject formulary apportionment (Par. 3.74).
ROLE OF TP GUIDELINES

- Resolution of Art. 9 cases in CA (Preface Par. 17; Treasury Press Release, 7/28/95).
- Domestic law model
- ALP guidance.
- T/P responsibility to document ALP.
GUIDANCE ON APPLICATION OF ALP

• Functional analysis and comparability (Par. 1.15 et seq.)
• Property or services transferred
• Functions, assets, risks
• Contractual terms
• Economic circumstances
• Business strategies
GUIDANCE ON APPLICATION OF ALP

- Selection of TPM
- Best estimation of an arm’s length price (Par. 1.69).
- Traditional transaction methods – CUP, RP, CP
- Preferable if quality data (Par. 2.49).
SELECTION OF TPM

• Transactional profit methods – P/S and TNMM, “last resort”
• If traditional method cannot be reliably applied alone/at all
• Or, by agreement
• See Pars. 3.50-51
SELECTION OF TPM

- Methods not described
- Provided satisfy ALP
- See Par. 1.68
ARM’S LENGTH RANGE

- Transfer pricing not an exact science
- ALR, relatively equal reliable values
- Inside ALR, no adjustment
- Outside ALR, adjust to most appropriate point (Pars. 1.45-48)
RECOGNITION OF TRANSACTIONS

• CONDUCT MUST CONFORM TO TERMS
• DEDUCE UNWRITTEN TERMS BASED ON CONDUCT AND ECONOMIC PRINCIPLES
RECOGNITION OF TRANSACTIONS

- Recognize actual transactions, unless
- Substance different than form
- Tax administration impeded and not arm’s length overall
- Pars. 1.28-29, 1.37
GUIDANCE ON INTANGIBLE PROPERTY

- Trade or marketing
- Bundling or “packaging” with other items (Pars. 1.42-43, 6.17-18)
- Cost and value, no necessary link (Par. 6.27)
GUIDANCE ON INTANGIBLE PROPERTY

- ALP where value is highly uncertain (compare CWI)
- Projections, price adjustment clauses, renegotiation
- Pars. 6.28-35
GUIDANCE ON INTANGIBLE PROPERTY

- Marketing services vs. intangible owner
- Who bears expense
- Extraordinary marketing expenses may justify return
- Product quality role
- Pars. 6.36-39
INTRA-GROUP SERVICES

• Independent enterprise willing to pay for, or perform for itself (compare benefit test) Par. 7.6

• Shareholder activity not justify charge

• Direct charge vs. allocation
INTRA-GROUP SERVICES

• Cost vs. markup
• ALP not always profit – Par. 7.33
• Practical reasons of tax administration may allow allocation of cost of services in appropriate cases – Par. 7.37
COST CONTRIBUTION ARRANGEMENTS

- Sharing costs/risks of acquiring assets, services, rights
- ALP - consistency of contribution share and expected benefits share
- Participant must reasonably expect to benefit
- Pars. 8.3-12
COST CONTRIBUTION ARRANGEMENTS

- Contribution value – cost vs. market (Par. 8.15)
- Allocation keys (Par. 8.19)
- Balancing and buy-in payments, not royalty unless only right to use (Pars. 8.23, 8.33)
COST CONTRIBUTION ARRANGEMENTS

• Adjustments normally to balancing payments (Par. 8.27)
• Disregard, e.g., if not reasonable to expect benefit
• Or, if over time contribution and benefit shares diverge (Pars. 8.29-30)
GUIDANCE ON T/P COMPLIANCE WITH ALP

• Reasonable t/p efforts, contemporaneously, to determine if pricing in accord with ALP
• Documentation of –
• Info, factors, method on which pricing is based
DOCUMENTATION

• Including relevant info from foreign affiliates
• Tax authority may obtain to verify ALP compliance
• Prudent business management principles (Pars. 5.3 et seq.)
GUIDANCE ON PENALTIES

- Overall tax compliance system
- Not give incentive to overstate income
- T/P reasonable effort to comply with ALP should mitigate
- Par. 4.18 et seq.
GUIDANCE ON APA’s

- Advance determination, e.g., of method, comparables, adjustments, critical assumptions (Par. 4.124)
- Reliability of APA predictions, TPM vs. results (Par. 4.125)
GUIDANCE ON APA’s

- Bilateral APA’s preferred over unilateral APA’s (Pars. 4.131, 4.163)
- Guidelines for Mutual Agreement Procedure (MAP) APA’s - Annex
MONITORING

- Transactional profit methods concerns
- Monitor application of TP Guidelines to clarify and update them, as necessary
- Business community input
- Par. 3.55, Annex
ATTRIBUTION OF PROFITS TO PE’s

• Working hypothesis
• HO and PE’s of single enterprise hypothesized as associated enterprises
• Apply Art. 9 TP Guidelines by analogy to Art. 7
ATTRIBUTION OF PROFITS TO PE’s

- Testing the WH
- Banking (Part II), attribution of capital, risk weighting, Basle
- Global trading
- Insurance
- E-tailing, TAG
- Discussion drafts