TAX MANAGEMENT

TRANSFER PRICING REPORT

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HIGHLIGHTS

Pricing Regimes Strengthen Worldwide as U.S.-Canada Arbitration Begins
Countries around the world continue to strengthen their transfer pricing regimes in 2011, leading to more double tax disputes. However, arbitration provisions in a growing number of treaties—particularly the U.S.-Canada protocol—should limit the time some of those disputes spend in competent authority. . . . Meanwhile, a U.S. official attributes the recent drop in the U.S. inventory of double tax cases more to added resources than to the effect of arbitration provisions. **Outlook 2011, Page 901; Page 913; Text, Page 930**

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China Reports Concluding 53 APAs, with Bilaterals Increasing
China's first-ever report on advance pricing agreements says the country has concluded a total of 53 APAs, according to practitioners, who note that bilateral agreements overtook unilaterals in 2009. **Page 914**

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UNITED STATES: Transfer pricing issues revealed in December filings with the Securities and Exchange Commission include a half-billion-dollar assessment to a Boston medical device manufacturer. **Page 915; Text, Page 928**

UNITED KINGDOM: The United Kingdom releases a final statement of practice updating its 1998 advance pricing agreement application procedures. **Page 916; Text, Page 921**

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Outlook 2011

As Transfer Pricing Regimes Strengthen Worldwide, U.S. to See Arbitration with Canada, Final Cost Sharing Rules

As 2011 begins, countries around the world continue to strengthen their transfer pricing regimes, leading to more audits and consequently more double tax disputes. However, arbitration provisions in a growing number of treaties—particularly the U.S.-Canada protocol that entered into force in 2008—should limit the time some of those disputes spend in competent authority.

In addition to arbitration of U.S.-Canada disputes, which under the recent protocol began Dec. 15 for cases pending two years or more by that date, U.S. practitioners this year can look forward to finalization of temporary cost sharing provisions, which sunset on the last day of 2011. Bilateral advance pricing agreements, as well as double tax cases, also may move along more quickly as U.S. Competent Authority personnel become more involved in them.

From a global perspective, taxpayers should see some progress by the Organization for Economic Cooperation and Development on the rewrite of its guidance on intangibles. As the organization grapples with the question of how to determine the existence of those assets, companies will continue to move them to low-tax jurisdictions. However, new Chapter IX added to the OECD guidelines last July gives governments the tools to impose exit taxes when such a move occurs as part of a restructuring.

In the developing world, China will work to address fragmentation at local and provincial tax offices and build a more harmonized transfer pricing regime, and no decline in litigation is foreseen in India despite the recent introduction of dispute resolution panels. Other nations, particularly in Africa and Latin America, are building and strengthening international tax regimes, partly through the help of United Nations training courses.

Arbitration

Even as the United States is seeing more double tax disputes than ever before, arbitration provisions in recent treaties—as well as recent hiring in the U.S. Competent Authority office—will facilitate quicker settlements in those disputes.

Robert Green of Skadden, Arps, Slate, Meagher & Flom in Washington, D.C., said Jan. 7 that the threat of arbitration in U.S.-Canada cases is speeding up the mutual agreement process by encouraging both sides to ''do the substantive analysis of the issues and find their last best position earlier.''

An Internal Revenue Service official said in December that the United States and Canada since August have resolved 80 percent of the cases that would have been eligible for arbitration Dec. 15, but still expect some portion of the remaining 20 percent will be arbitrated (19 *Transfer Pricing Report* 877, 12/16/10).

Now that arbitration is a reality, the following recent documents from the IRS and the Canada Revenue Agency outline the process and address logistics:

- a memorandum of understanding on the arbitration process, released Nov. 26;
- operating guidelines for the arbitration board, also released Nov. 26;
- three authorization forms—a taxpayer consent to MAP arbitration and nondisclosure statement, a nondisclosure statement of the taxpayer's authorized representative, and taxpayer authorization to disclose tax information for purposes of treaty MAP arbitration proceedings—released Dec. 8;
- an IRS statement on the process for identifying arbitrators, released Dec. 8; and
- a solicitation from the CRA describing qualifications for arbitrators.

Taxpayer Influence

Unlike the arbitration provision in the treaty between the United States and France, ratified in December 2009, the provisions in U.S. treaties with Belgium, Canada, and Germany do not contemplate having the taxpayer, as well as the competent authorities, submit a position paper to the arbitration board. However, a Canadian practitioner said a taxpayer still may be able to get its position before the board if it employs some strategic thinking—and takes a reasonable approach.

James Gatley of KPMG LLP in Toronto said Dec. 21 that he has a case now in arbitration. About six months ago, he said, ''we understood the competent authorities were not getting anywhere on the case,'' which has only one issue.

Gatley said that after further discussions with the competent authorities, ''we determined what the sticking point was about the issue in dispute.'' When the firm gained a better understanding of why the issue was not being resolved, he said, ''we undertook additional analysis on that particular point to assist them to conclude the competent authority negotiations, and ended up proposing a solution that was between the two competent authorities' positions.''

Gatley said only one government was willing to accept the proposed solution. Now that the case is in arbitration, he said, ''we think the competent authority that was in agreement might submit [the taxpayer's solution] as its position paper.''

A competent authority also has the option of referring to a taxpayer's resolution as an annex, Gatley pointed out.

The arbitration board operating guidelines at paragraph 5 b. allow the competent authorities to submit annexes along with their proposed resolutions and supporting position papers. While the proposed resolution must not exceed five pages and the supporting position paper is limited to 30 pages, no page limit is listed for annexes.

Arbitration of APAs

According to the Nov. 26 MOU, the United States and Canada agreed to apply arbitration broadly in APAs, allowing the process for prospective APA years as well as those for which returns have been filed (19 *Transfer Pricing Report* 839, 12/2/10).

However, practitioners in the United States said arbitration may be causing the CRA's APA Program to be more selective in the cases it agrees to take on.

Steven Wrappe of Ernst & Young LLP in Washington, D.C., said Jan. 6 that arbitration ''has affected the posture of the CRA with respect to the acceptability of cases for the APA process.'' Just as APAs have had an impact on taxpayer and government attitudes toward transfer pricing, he added, ''the addition of arbitration as an alternative procedure is going to have an impact on the existing procedures.''

Sean Foley of KPMG LLP in Washington, D.C., said Jan. 6 that the CRA recently declined to consider an APA for the buy-in part of a cost sharing transaction. Canadian APA officials ''said it was a one-time transaction and APAs should deal with recurring transactions, Foley explained, adding that ''resource limitations was part of their rationale.''

U.S. APA Program

Meanwhile, IRS Deputy Commissioner (International) Michael Danilack has announced changes to the way APAs will be handled in the United States—although he said the process should not change from a taxpayer's perspective. Competent authority analysts, who traditionally have conducted bilateral negotiations after the APA Program has developed a position, now will be working cases in their entirety, the official said (19 *Transfer Pricing Report* 840, 12/2/10).

Wrappe said this is not the first time the IRS APA function has relied on those from outside the program to work on cases. ''Taxpayers and practitioners really applaud that there will be more people to lead on APAs,'' he said.

Revising the current APA revenue procedure—Rev. Proc. 2006-9, 2006-2 I.R.B. 278, as amended by Rev. Proc. 2008-31, 2008-23 IR.B. 1133—is one of the items listed on the IRS's priority guidance plan for 2011.

Cost Sharing

U.S. practitioners said that with Republicans in control of the House, revenue raisers such as the two transfer pricing proposals in the Obama administration's 2011 budget—taxing excess returns from the transfer of intangibles to low-tax jurisdictions and defining goodwill, going concern, and workforce in place as intangibles—are unlikely to gain traction. Thus, ''the cost sharing regulations are the one line of defense against income shifting that the administration controls,'' according to John Peterson of Baker & McKenzie in Palo Alto, Calif.

Peterson said Jan. 7 that it was ''highly unlikely'' the IRS will back down from its investor model approach in finalizing the temporary cost sharing provisions, which sunset at the close of 2011. However, he said the Service may clarify some technical matters, such as:

- when to use pre-tax versus after-tax discount rates;
- whether a change in the geographical area covered by the cost sharing arrangement, versus a change in the scope of the research, constitutes a material change in scope of the arrangement; and
- the circumstances under which the useful life of a platform contribution can be established as ''something less than forever.''

As for pending cases, Peterson said that given the IRS's loss in *Veritas Software Corp. v. Comr.*, 133 T.C. No. 14, settlements in cost sharing cases likely will continue to favor taxpayers. ''Appeals will continue to resolve cases as they have been—assigning a big hazard,'' the attorney said.

The IRS decided not to appeal *Veritas*, in which the Tax Court found the government substantially overvalued the company's buy-in payment, but in an action on decision issued Nov. 10 cautioned taxpayers against inappropriately relying on some of the court's assertions in planning future transactions (18 *Transfer Pricing Report* 843, 12/17/09; 19 *Transfer Pricing Report* 793, 11/18/10).

New OECD Project

The OECD's new intangibles initiative will gather steam in 2011 as Working Party No. 6 gets down to the hard work of rewriting the organization's guidance on intangibles.

Given the vast topic matter landscape before it, including soft intangibles such as goodwill and workforce in place, early signs are that the OECD is likely to settle on an analytical framework for determining the existence of intangibles, disappointing those taxpayers who favor a definitive, comprehensive list.

The U.S. delegate to the working party said in December that it would be difficult for the working party to develop an explicit list of items constituting intangibles (19 *Transfer Pricing Report* 880, 12/16/10).

And during the OECD's November meeting with business representatives in Paris, a former OECD official suggested the working party look to the nine-step process for analyzing comparability issues in fashioning a new analytical framework to address the transfer pricing aspects of intangibles (19 *Transfer Pricing Report* 801, 11/18/10).

The new OECD intangibles project also is likely to address how to value intangibles and include new methods for pricing intangibles.

Business Restructuring

2011 will see more transfer pricing disputes, of greater acrimony, between tax administrations and multinational taxpayers over related-party transfers of valuable intellectual property.

Taxpayers have been moving IP offshore for years and will continue to do so given the inescapable logic of moving such property from high-tax to low-tax jurisdictions. However, tax administrations in 2011 will have at their disposal a new took kit that will allow them to im-

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pose exit taxes when taxpayers move such valuable intangibles offshore as part of a restructuring.

The OECD in July added a new Chapter IX to the organization's transfer pricing guidelines that further defines the exceptional circumstances in which a tax administration may refuse to recognize a taxpayer's business restructuring in its entirety and rewrite it to comport with the arm's-length standard.

The new chapter explains how the transfer pricing guidelines apply to the cross-border redeployment of functions, risks, and assets, and the attached potential profit, when a multinational group restructures, thus giving tax administrations the ability to challenge payments for valuable IP on the grounds that the related-party recipient has failed to pay arm's-length compensation. However, the final guidance evinces a greater preference for a pricing solution (19 *Transfer Pricing Report* 358, 7/29/10).

Moreover, given the complexity of the modern multinational organization, as a threshold matter, it remains to be seen whether auditors will be successful in obtaining the necessary documents to bring the particulars of complex business restructuring transactions to light.

Germany

One OECD member, Germany, has taken a go-it-alone approach to business restructurings and created its own set of transfer pricing rules for restructurings.

The final details emerged in October when Germany's Federal Ministry of Finance issued final guidance on how related-party taxpayers should allocate income when they restructure their businesses and gave examples of how to calculate the nation's exit tax. According to German practitioners the guidance requires taxpayers to use an overall capitalized earnings or discounted cash flow evaluation for business restructurings when they transfer valuable functions out of the nation (19 *Transfer Pricing Report* 841, 12/2/10).

A question for taxpayers with German related parties is to what extent the OECD and German business restructuring rules are in conflict.

China

China's State Administration of Taxation also has business restructurings firmly on its radar, and the tax agency in July issued new documentation requirements directing taxpayers to provide information including valuation reports to show that a restructuring has a reasonable commercial purpose (19 *Transfer Pricing Report* 465, 8/12/10).

China will continue in 2011 to address the challenges of building a sophisticated transfer pricing regime. One of China's main problems, a SAT official said in October, is fragmentation at local and provincial tax offices, which results in different approaches to transfer pricing cases. For example, on the issue of documentation, some of the Chinese tax authorities favor a more comprehensive, and others a more selective, approach (18 *Transfer Pricing Report* 1055, 2/11/10).

The SAT official said the country will continue to make strides toward harmonization in 2011.

Another problem that the SAT will continue to address is compliance deficiencies by large taxpayers. The director of the SAT's Large Taxpayer Department recently said that although foreign-funded enterprises have improved their transfer pricing compliance, audits have revealed numerous problems at domestic companies. The official went on to say that domestic enterprises have much to learn from their foreign counterparts regarding how to create an appropriate corporate tax compliance culture (19 *Transfer Pricing Report* 736, 11/4/10).

The SAT in July directed the nation's local tax authorities to review at least 10 percent of taxpayers' 2008 and 2009 transfer pricing documentation and grade it either unsatisfactory, below average, average, or good (19 *Transfer Pricing Report* 366, 7/29/10).

In addition to directing the local and provincial tax offices to more rigorously analyze taxpayers' transfer pricing documentation in 2011, the SAT is likely to continue its pitch to taxpayers to consider advance pricing and cost sharing arrangements in appropriate cases.

India

In India, the new dispute resolution panels seem unlikely to stem the tide of transfer pricing litigation. A recent roundup of Indian transfer pricing litigation unearthed two cases—involving an engineering firm and an affiliate of The Gap Inc.—in which the courts rejected transfer pricing assessment orders upheld by the DRP without examining the taxpayer's objections or delineating its reasons for doing so. (See the related article this issue.)

As transfer pricing litigation continues to increase in India, the courts are grappling with increasingly complex issues and will begin to go beyond the nuts and bolts of proper transfer pricing analysis.

In *Maruti Suzuki India Ltd. v. Addl. Comr. of Income Tax*, a Supreme Court procedural ruling addressed the lower court's tackling of the important issue of marketing intangibles, finding that the court below overstepped its bounds in observations it made on how to account for marketing intangibles in a transfer pricing analysis before remanding the case to the transfer pricing officer (19 *Transfer Pricing Report* 697, 10/21/10).

In another decision involving the pharmaceutical industry, the Mumbai International Tax Appellate Tribunal recently upheld a transfer pricing officer's substitution of the Indian taxpayer's method with another method under the facts and circumstances of the case even though there were no apparent defects in the taxpayer's analysis.

India also continues to ramp up its international tax enforcement and investigative efforts, with the Ministry of Finance's Central Board of Direct Taxes Jan. 5 issuing an internal call for applicants for newly created Income Tax Overseas Units. The positions will be located in the United States, the United Kingdom, the Netherlands, Cyprus, Germany, France, Japan, and the United Arab Emirates. Applicants must have at least one year of experience in the Tax and Research Division of CBDT or at least two years of experience in the international tax or transfer pricing divisions of the Income Tax Department. The CBDT also in 2010 filled ITOU posts in Mauritius and Singapore.

Other Developing Countries

The issue of transfer pricing will become more prominent for developing nations, particularly in Africa and Latin America. They are obtaining more assistance from international organizations to create and

strengthen the international tax regimes in those countries, while multinationals are coming under increasing pressure by international nongovernmental organizations dedicated to economic justice to change the way they do business in these countries.

Two U.N. groups have funded international tax courses attended by tax officials in at least nine African nations and the U.N.'s international tax committee recently released a draft transfer pricing manual for developing countries (19 Transfer Pricing Report 744, 11/4/10; 19 *Transfer Pricing Report* 548, 9/9/10).

ActionAid U.K. issued a report targeting multinational brewer SAB miller for its business structure and practices that allows it to avoid paying tax in Africa (19 *Transfer Pricing Report* 843, 12/2/10).

An attorney in Kenya who represents two clients in the beverage an manufacturing industries said that for the first time in his experience, multinationals are undergoing audits simultaneously in several African countries—something he said is a ''direct consequence'' of international tax courses attended in London by African tax officials. (See the related article in this issue.)

BY KEVIN A. BELL, TAMU N. WRIGHT, AND MOLLY MOSES

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In the Courts

India

Recent Indian Cases Show Taxpayer CUP For Drug Ingredients Rejected, Impact of DRP

A roundup of recently decided Indian transfer pricing cases reveals that the Mumbai International Tax Appellate Tribunal has ruled on a transfer pricing case that highlights the application of the country's transfer pricing regulations to the pharmaceutical industry, while two other cases point to the impact of the country's use of dispute resolution panels one year after the DRP process was put into place.

In *Serdia Pharmaceuticals (India) Private Ltd. v. Asst. Comr. of Income Tax*, the Mumbai ITAT held that a transfer pricing officer could reject the taxpayer's choice of the comparable uncontrolled price method and substitute it with the transactional net margin method without delineating any defects in the taxpayer's analysis. [***Serdia Pharmaceuticals (India) Private Ltd. v. Asst. Comr. of Income Tax,*** **Mumbai ITAT, ITA No. 2469/ Mum/06, decision filed 12/31/10**]

Two other cases, *AIA Engineering Ltd. v. Dispute Resolution Panel* and *Gap International Sourcing India Pvt. Ltd. v. Dep. Comr. of Income Tax*, show that taxpayers who chose to use the DRP process following its enactment in November 2009 have encountered difficulties and resorted to litigation—something the panels were designed to prevent (18 *Transfer Pricing Report* 772, 12/3/09).

Practitioners have warned that taxpayers are losing confidence in the process and may eventually abandon it as an option for overturning improper transfer pricing assessments (19 *Transfer Pricing Report* 645, 10/7/10).

Serdia Pharmaceuticals. In *Serdia*, the tribunal noted that even though the Indian transfer pricing regulations do not set out a hierarchy of methods, the CUP method was the most appropriate in the context of Serdia's purchase of generic active ingredients from its parent—Les Laboratoires Servier France—because the transactions had available comparables even though the generic was manufactured by the original patent holder.

According to the tribunal, ''the selection of [the] most appropriate method of determining [the] arm's-length price, under Section 92C(1) read with Rule 10C, essentially requires the methods of determining the arm's-length price to be ranked, on a sound and rational basis, in an order of preference vis-a-vis the facts of every case.''

In its analysis upholding the use of the CUP method, the tribunal relied on the Tax Court of Canada's decision in *GlaxoSmithKline Inc. v. The Queen*, 2003 TCC 258. The judge in *Glaxo* approved of the taxpayer's use of the CUP method, but found that Glaxo's Canadian subsidiary overpaid its Swiss affiliate for the active ingredient of ulcer medication Zantac from 1990-93 by more than five times the arm's-length price (17 *Transfer Pricing Report* 122, 6/19/08).

Canada's Federal Court of Appeal later reversed the decision. While the appeals court did not take issue with CUP as the choice of method, it found the Tax Court improperly disregarded a licensing agreement in place between Glaxo Canada and its Swiss affiliate (19 *Transfer Pricing Report* 367, 7/29/10).

Vispi T. Patel of Vispi T. Patel & Associates in Mumbai said the decision in *Serdia* ''brings out the superiority of the CUP method, but if transfer pricing is viewed only one-dimensionally—from the perspective of determining the price for the transfer of goods and services without its interlink with business—then many unresolved issues may lie.''

DRP Cases. In *AIA Engineering Ltd. v. Dispute Resolution Panel*, the High Court of Gujarat sided with the taxpayer, who petitioned the court after the DRP rejected the taxpayer's position without looking at the merits of the transfer pricing assessments levied against the firm.

AIA Engineering had contended that it was slapped with the finalized assessment in error by the DRP, which had not examined the merits of the case. AIA filed its objections with the DRP because it originally believed that the DRPs, which became effective in November 2009, were mandatory for all taxpayers seeking to appeal a transfer pricing assessment. However, the Central Board of Direct Taxes later clarified that taxpayer use of the panels was optional (18 *Transfer Pricing Report* 1056, 2/11/10).

After the clarification was issued, AIA requested that the assessing officer permit it to pursue the regular litigation process with the Commissioner of Income Tax (Appeals). However, the DRP found that the taxpayer had withdrawn its objections to the assessment, and finalized the AO's draft order.

The high court set aside the DRP final order as well as the assessment order and ordered the DRP to consider the taxpayer's objections to the assessment on the merits.

In another DRP case involving the Indian subsidiary of San Francisco-headquartered retailer The Gap Inc., the Delhi ITAT remanded Dec. 12 an assessment order to the DRP, which had rejected the taxpayer's objections to the assessments without adequate reasons.

A chart accompanying this article details the *Serdia Pharmaceuticals, Gap, and AIA Engineering* rulings as well as three other transfer pricing opinions.

By Tamu N. Wright

India Transfer Pricing Case Roundup

Case Name/No.	Assessment Years	Taxpayer Activity	Legal Issue(s)	Status
AIA Engineering Ltd. v. Dispute Resolution Panel SCA No. 8179 of 2010	2006-07	Manufacturer of products used in the cement, mining and utility industries	Whether the DRP improperly finalized a transfer pricing assessment order objected to by the taxpayer who asked the AO to file an appeal before the Commission of Income Tax after a CBDT clarification that the DRP process was optional, saying that the taxpayer had withdrawn its objections to the DRP process.	The High Court of Gujarat ruled Aug. 31 in favor of the taxpayer.
Asst. Comr. of Income Tax v. Foster Wheeler India Pvt. Ltd. ITA No. 1126/Mds/ 2010	2002-04	Provider of engineering design services to affiliates	Whether a penalty for failure to maintain transfer pricing documentation can be levied even though taxpayer submitted accountant's certificate of compliance and the TPO made no transfer pricing adjustment.	The Chennai ITAT found 11/16/10 in favor of the taxpayer.
Cordys R&D (India) Pvt. Ltd. v. Asst. Comr. of Income Tax ITA No. 212/Hyd/ 2006	2002-03	Provider of software development services to foreign affiliate	Whether the TPO's failure to take into account the lack of risk involved in the taxpayer's transaction was improper; whether the TPO improperly excluded the foreign exchange gain earned in computing the arm's-length price.	The Hyderabad ITAT held in favor of the taxpayer 10/15/10.
Deputy Comr. of Income Tax v. Kyungshin Industrial Motherson Ltd. ITA No. 1396/Del/ 2009	2003-04	Manufacturing and assembling of wiring harness for Hyundai Motors Ltd.	Whether the sales to the taxpayer made by its supplier-affiliate should be determined arm's-length because of low profitability; whether a transfer pricing adjustment for purchases of raw materials must be made only for imports from foreign affiliates rather than total purchases.	The Delhi ITAT remanded the case 10/21/10 to the AO for more findings of fact.
Gap International Sourcing India Pvt. Ltd. v. Dep. Comr. of Income Tax ITA No. 4073/Del/ 2010	2006-07	Apparel sourcing	Whether the DRP gave the taxpayer adequate opportunity to be heard by rejecting the taxpayer's objections to its transfer pricing assessments without comment.	The Delhi ITAT remanded the case 12/10/10 to the DRP to pass a new order.
Serdia Pharmaceuticals (India) Pvt. Ltd. v. Asst. Comr. of Income Tax, ITA No. 2469/ Mum/06	2002-05	Importer of active ingredients, drug manufacturer	Whether the TPO can reject the taxpayer's use of CUP method and substitute it with TNMM without pointing to defects in taxpayer's transfer pricing analysis.	The Mumbai ITAT 12/31/10 found in favor of the government.

Canada

Canada's Federal Court of Appeal Upholds Landmark Ruling in GE Capital

OTTAWA—Canada's Federal Court of Appeal Dec. 15 upheld a landmark transfer pricing ruling that permitted General Electric Capital Canada Inc. to deduct from its income a C$136.4 million ($136.4 million) fee paid to its U.S. parent for a guarantee that boosted its credit rating. [***The Queen v. General Electric Capital Canada Inc.,*** **Federal Court of Appeal, No. A-1-10, 12/15/10**]

The three-member appellate panel unanimously rejected the Canada Revenue Agency's argument that an arm's-length party would not have paid the guarantee fee because it provided no value. It also rejected the CRA's claim that Tax Court Justice Robert Hogan showed bias.

GE Capital Canada's lead lawyer in the case, Al Meghji of the Toronto law firm Osler, Hoskin & Har-

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court LLP, told BNA Dec. 29 that the company has no comment on the appellate court ruling.

A Canada Revenue Agency spokesman, meanwhile, said Dec. 30 that the government has 60 days to seek leave from the Supreme Court of Canada to appeal the ruling. ''Officials are currently reviewing the decision, and should a decision to appeal be made, it will be made public at that time,'' public affairs officer Philippe Brideau told BNA.

The Tax Court's Dec. 4, 2009, ruling upheld GE Capital Canada's deduction for a fee paid to its U.S. parent firm for a guarantee that boosted its credit rating. The ruling concluded that the implied value of the explicit guarantee provided by the parent was at least 183 basis points, significantly larger than the 1 percent fee GE Capital Canada paid for the guarantee.

The Tax Court ruling clarified the arm's-length method to be used in analyzing transfer pricing disputes involving fees paid for credit guarantees. It accepted as appropriate the CRA's use of a ''yield'' approach to assess the value of the guarantee, but found that proper application of that approach favored GE Capital Canada. Despite the taxpayer-favorable outcome, practitioners said they were troubled by the Tax Court's consideration of the U.S. parent company's ''implicit support'' in determining the value of the guarantee (18 *Transfer Pricing Report* 845, 847, 12/17/09).

No Impact from Tax Court's Error. The appellate court agreed that Justice Hogan erred in removing the explicit guarantee provided by GE Capital Canada's U.S. parent in identifying the relevant transaction, but found the error would not have affected the overall ruling. The Tax Court correctly found that the explicit guarantee had to be notionally removed to determine the difference between the credit rating that an arm's-length party would have obtained and the credit rating GE Capital Canada would have obtained without the guarantee, but then improperly considered the impact of removing the guarantee, the ruling said.

''The Tax Court judge lost sight of the fact that the purpose of the yield approach which he adopted was to measure the benefit which the explicit guarantee brought to the respondent in comparison with implicit support. He could not re-cast the transaction on the basis that the explicit guarantee had, in fact, been removed and assess the impact of the removal,'' it said. ''[But] the error committed by the Tax Court judge had no impact on his finding that a gap existed between the credit rating which the respondent would have obtained with and without the explicit guarantee, and that the 1 percent guarantee fee was within this gap.''

The appellate court rejected the other errors alleged by the government's lawyers, including failure to consider four relevant characteristics in assessing the value of the explicit guarantee, failure to conduct a ''reasonableness'' check, improper reliance on the assessment of a GE Capital Canada witness that the explicit guarantee was necessary, and a finding that GE Capital Canada would be unable to obtain backup lines of credit in the absence of an explicit guarantee from its U.S. parent.

The government alleged that Justice Hogan preferred the evidence of GE Capital Canada's expert, who did not rely on four of the characteristics used to assess the value of the guarantee. However, the ruling said, any such preference does not mean the Tax Court failed to consider those characteristics. The judge, in fact, highlighted the importance of at least three of those factors in his ruling, so the government's real complaint appears to be that the judge should have preferred the evidence of its experts, it said.

''The evidence amply justifies the decision of the Tax Court judge,'' it said. ''As to the 'reasonableness' check, the [government] itself recognizes that there is no legal principle that requires such a check to be conducted in every case.''

Fairness Allegations Rejected. As for reliance on the business judgment of a senior executive of GE Capital Canada's U.S. parent that the explicit guarantee was necessary, the Tax Court ruling clearly showed that the judge was mindful of the distinction between objective and subjective evidence of the need for the guarantee, the ruling said. The judge considered the executive's business judgment only after already finding, based on objective evidence, that the explicit guarantee was necessary, it said.

And Justice Hogan was open to find, based on the evidence, that GE Capital Canada would not have had access to backup lines of credit without the explicit guarantee, the ruling said. The government placed great emphasis on quotes obtained from two banks about potential lines of credit for GE Capital Canada, but those quotes were purely exploratory in nature, it said. ''They fall substantially short of establishing that the respondent had available to it the backup facilities necessary for an unguaranteed debt issue for the required amounts in its sole name without parental support,'' it said.

The appellate court also rejected the allegations by the government's lawyers that Justice Hogan showed clear bias by developing his own theory of the case, specifically by finding that removal of the explicit guarantee was relevant and would have had a negative impact on GE Capital Canada's credit rating and then eliciting the relevant evidence from witnesses and relying on that evidence to rule in favor of GE Capital Canada.

The Tax Court judge clearly did not introduce the notion that the potential withdrawal of the explicit guarantee was a relevant consideration in assessing GE Capital Canada's credit rating, and his finding that it was a relevant consideration did not play a critical role in the outcome, the ruling said. In fact, the record shows that Justice Hogan's questions showed an excessive pursuit of that issue that made counsel for both parties uncomfortable at times, it said.

''However, this line of questioning does not establish that bias could reasonably be apprehended against the [government]. What it shows is that the Tax Court judge became overly concerned about an issue that had no substantial connection with the outcome,'' it said.

Review of Applicable Legislation. The Court of Appeal's ruling said it was necessary to address the fundamental dispute between the parties on the scope and application of Section 69(2) of the Income Tax Act, which has been repealed, and paragraphs 274(2)(a) and (c) that replaced it to the facts of the case at hand, despite the fact that the government's appeal could not succeed even if the Tax Court judge's view of the legislation was found to be incorrect.

GE Capital Canada argued that affiliation benefits it enjoyed as a result of its non-arm's-length relationship

with its U.S. parent cannot be considered in assessing the reasonable arm's-length price under the Act, the appellate court noted. The company further argued the implicit support relied on by the government for its allegation that the explicit guarantee had no value could not be considered as it was a by-product of the non-arm's-length relationship, the ruling said.

The government maintained, and the Tax Court agreed, that the arm's-length principle requires a comparison of the transaction at issue between related parties and the same transaction between independent parties and that, as such, affiliation benefits such as an implicit guarantee are relevant and must be considered in determining the arm's-length price, it said.

Implicit Support Properly Considered. ''In the present case, it is common ground that in the context of the yield method, implicit support is a factor which an arm's length person would find relevant in pricing the guarantee. It follows that it had to be considered. The suggestion that implicit support should be ignored would require the court to turn a blind eye on a relevant fact and deprive the transfer pricing provisions of their intended effect,'' it said.

That view is supported by the Organization for Economic Cooperation and Development's *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, which indicate that the concept of independent parties is used to adjust profits by reference to conditions that would have existed between independent enterprises in comparable transactions in comparable circumstances, it said. The Tax Court properly noted that this concept is similar to the arm's-length concept in that both presuppose that neither party controls the other or is subject to common control, it said.

Approach Consistent with Precedent. The Tax Court's approach also is consistent with the Federal Court of Appeal's recent finding in *Glaxosmithkline Inc. v. Canada*, on which the Supreme of Canada is currently considering leave to appeal, the ruling said. In that case, the Canada Revenue Agency's assessments were based on the assumption that Glaxo paid more than an arm's-length price for bulk active ingredients purchased from a foreign, non-arm's length supplier, and the Tax Court found that only the bulk purchase transactions were relevant, it said.

In *Glaxo*, the appellate court held the Tax Court improperly disregarded a licensing agreement in place between the Canadian company and its Swiss affiliate (19 *Transfer Pricing Report* 367, 7/29/10).

The *GE Capital* appellate court said Glaxo successfully argued on appeal that all relevant circumstances should be taken into account in determining the arm's-length price, including the existence of a parallel licensing agreement with another entity within the Glaxo group. ''In the words of [Justice Marc] Nadon, the relevant circumstances are those which 'an arm's length purchaser, standing in the shoes of [Glaxo], would consider relevant in deciding whether it should pay the price paid'. Applying this test, there is no doubt that the existence of the implicit guarantee is relevant to the inquiry and must be considered in identifying the arm's length price,'' it said.

In addition, the ruling said there is no merit in the government's argument that Justice Hogan's approach was flawed because it identified the benefit obtained through the explicit guarantee rather than the arm's-length price GE Capital Canada would have to pay for the guarantee. ''No doubt, the method seeks to identify the benefit which the explicit guarantee provides. However, it necessarily follows that if the explicit guarantee provides no benefit, an arm's length person, standing in the shoes of the respondent, would not have paid anything towards it. The assessment of the benefit is but a means to ascertain whether a guarantee fee would have been paid by an arm's length party,'' it said.

By Peter Menyasz

☐ *The ruling is available at http://decisions.fca-caf.gc.ca/en/2010/2010fca344/2010fca344.html.*

Brazil

Administrative Court in Brazil Says Taxpayer Must Follow 2002 Norm's Formula for Pricing

RIO DE JANEIRO—Multinational companies in Brazil suffered a major setback Dec. 31 when a tax department administrative court ruled against Semp Toshiba, requiring it to use a pricing formula that a Brazilian federal court recently held was prejudicial to companies.

The Dec. 31 ruling said Semp Toshiba must use the resale price minus profit formula as set forth in Normative Instruction 243, issued in 2002. That norm altered the previous formula—set forth in Norm 32 of 2001—for companies importing inputs for the manufacture of final products domestically.

The previous legislation had stated that the maximum import cost would be determined as the average of resale prices less a 60 percent profit margin calculated after deducting items such as discounts, taxes, and commissions. But according to Normative Instruction 243, the maximum import cost should be calculated as the percentage of the imports in the sales price for the finished product (13 *Transfer Pricing Report* 701, 10/27/04).

A Brazilian federal court Aug. 16 ruled that the government exceeded its authority in issuing Norm 243 (19 *Transfer Pricing Report* 797, 11/18/10).

Semp Toshiba's Case. After Norm 243 was issued, Semp Toshiba, like many multinationals, continued to use the formula set by Law 9959—which established Brazil's transfer pricing rules—and Norm 32. Facing a multi-million dollar assessment including fines of 75 percent, the company appealed to the tax department's administrative court system in what became known as the leading case on this issue.

Semp Toshiba argued that it had the right to follow the legislation prior to Norm 243. ''Using the calculation of [Norm] 243, the company would have to make adjustments, paying more income taxes and CSLL [Brazil's social contribution on net profit, which amounts to a second income tax]. The difference is brutal,'' the company's attorney, Priscilla Versatti, said.

However, the administrative court in its decision voted four to three in favor of requiring Semp Toshiba to use the formula of Norm 243. The head prosecutor of the tax department, Paulo Riscardo, stated that the in-

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structive norm did not alter the basic concept of the previous legislation ''which is to prevent tax evasion.''

Case Contradicts Federal Court Ruling. For companies, the disappointment of the ruling was aggravated by the third federal district court's Aug. 16 ruling against Norm 243 in a similar case. The court, based in the state of São Paulo, Brazil's business and financial center, held that the tax department had exceeded its authority in issuing the norm because department norms cannot change laws. The court said the disputed norm did this by creating a new formula for calculating transfer pricing taxation that was prejudicial to companies.

The Aug. 16 ruling was the first important judicial decision in favor of companies on the Norm 243 issue and was hailed by tax attorneys as a major precedent. But attorneys also expressed caution, pointing out that the question had not yet been ruled on by the tax department's administrative courts.

As for the Dec. 31 decision, attorneys told BNA there is little chance of an appeal within the administrative court system of the tax department. They noted that for the case to be appealed, a conflicting ruling by another department court would have to occur, which is considered highly unlikely.

''The only alternative is to appeal to the judicial system to force the application of the law,'' said attorney Demes Britto of the law firm DBritto Attorneys.

By Ed Taylor

Finland

Finnish Ruling Limits Interest Deduction; Court Looks to Company, Not Group, Rating

COPENHAGEN—A Finnish Supreme Administrative Court decision (KHO:2010:73), which maintains that interest rates on company loans must reflect the credit rating of an individual company as opposed to a group to which the company belongs, likely will prove a landmark in domestic transfer pricing law, a Finnish tax expert has told BNA.

The decision, published Nov. 3, 2010, was the culmination of a number of lower court appeals concerning a claim by a company (Company A) for a tax deduction on a loan taken out in the 2005 financial year. In August of that year, as part of a major financial restructuring, the company paid off two external loans totaling €36 million (US$47 million) and subsequently took a new €38 million (US$49 million) loan from Company B, a Swedish entity that was a member of the same group. Company A provided collateral of €300 million (US$389 million) on behalf of itself and other group companies, and was charged interest at 9.5 percent.

According to the group's lawyers, this figure was a realistic arm's-length intragroup rate because the group as a whole had previously taken out external loans at an average rate of just over 7 percent when financial conditions were slightly better. The 9.5 percent figure, they said, was calculated at the prevailing market rate given the cost of external loans and additional factors such as a 17 percent interest rate charged on subordinated shareholder loans.

However, the tax deductibility of the interest was disputed by the Finnish Tax Authority, which noted that prior to refinancing, the company was paying just 3.135 percent and 3.25 percent interest on its former loans, while providing collateral of €41 million (US$53 million). The more favorable rate was due in part to Company A having a better credit rating than the group as a whole.

Lower Rate Found More Realistic. In its assessment, the Supreme Administrative Court determined that the lower rate was the more realistic because the company's financial position had not deteriorated at the time the new loans were taken out, and Company B did not provide any additional service that would have justified a higher rate. The court thus ruled that Company A could deduct interest at only 3.25 percent.

Outi Ukkola, a tax expert at the Helsinki branch of accountancy firm Deloitte, told BNA Jan. 11 that the ruling would have a significant effect on future domestic transfer pricing cases as it identified an important principle related to arm's-length refinancing.

''The Finnish company did not independently review its financial position and then take decisions on lending,'' he said. ''Instead, the whole refinancing arrangement was group-led. The capital structure in itself did not change as a result of the arrangement nor did the company have any plans of its own that required additional financing. The purpose of the refinancing was to make the group more lucrative for potential buyers to purchase, and there was a significant shareholder interest embedded in the arrangement.''

''If Company B, the party that organized the financing, had provided value-added services, then these would have been observed when analyzing whether the interest was at arm's length or not,'' Ukkola said. ''This is part of the fact pattern of the case. [Company] B in Sweden was a mere intermediary in the financing and it did not have a service provider role.''

The court concluded the market rate interest could not be directly assessed on the basis of the price for external financing for the group when, on a stand-alone basis, the group company would have received significantly better terms given its own credit rating and other circumstances, Ukkola explained. The court, he added, ''referred to the old interest level as a benchmark and [also referred to] the collateral available to support the single entity credit rating.''

However, Ukkola added, such a ''facts and circumstances-based'' ruling would not apply to all company refinancing situations. ''When financial restructures take place it is critical that the objectives are clearly documented, including the benefits of Finnish participants and their potential stand-alone financing needs'' he said. ''The tax administration should not, as a rule, impose obligations to perform credit ratings on single entities. Instead, the relevant facts and circumstances should be observed.''

Landmark Ruling. Tomi Viitala, a spokesman and tax expert at the Finnish Chamber of Commerce, agreed Jan. 10 that the ruling was a ''landmark'' in domestic transfer pricing case law, as Finland had not witnessed a definitive ruling of this nature in recent times. However, the decision was in keeping with the arm's-length principle as usually defined internationally, he added.

''The case is significant in the sense that so far there has only been scarce and very old case law on the tax

treatment of intragroup financing in Finland,'' he said. ''However, the outcome is not surprising and . . . is in line with the practice in other OECD countries.''

The significance of the ruling is demonstrated by the fact that it has been nominated as a ''year book decision,'' which is the strongest guidance the Supreme Administrative Court can offer to taxpayers and the Tax Administration.

Company A is not allowed to appeal the ruling further, Viitala said.

BY MARCUS HOY

☐ *The ruling is available in Finnish at http://www.kho.fi/paatokset/52464.htm.*

Russia

Arbitration Court Finds Bloomberg Has Permanent Establishment in Moscow

MOSCOW—The Arbitration Court in Moscow has ruled that Bloomberg LP had a permanent establishment in Moscow, according to a practitioner.

Roustam Vakhitov, head of International Tax Services at Pepeliaev Group, said the decision should prompt representatives of nonresident companies in Russia to reassess their activities so as to mitigate the risk of PE creation.

Vakhitov said the ruling concerned a dispute between Bloomberg and the Russian tax authorities on whether information gathering should be deemed PE under the domestic law and the 1992 tax treaty between Russia and the United States.

The tax authorities argued that the news-gathering bureau of Bloomberg LP in Moscow constitutes a PE and hence is subject to Russia's taxation. The Inspectorate of the Federal Tax Service No. 47, in Moscow-issued Decision No. 285, dated May 20, claimed the company failed to fully pay profit and property taxes and ordered it to pay back taxes and fines totaling 120 million rubles ($3.95 million).

The company argued that information gathering was explicitly mentioned in the list of exclusions from general PE definition under the bilateral tax treaty and appealed Decision No. 285 of the tax authorities in court.

Tax Authorities' Finding Upheld. In Ruling No. A40-94391/10-142-134, dated Dec. 8 and released Dec. 17, the court found that Bloomberg LP has a PE in Moscow and upheld Decision No. 285 of the tax authorities.

The court cited the OECD Commentary to the Model Tax Treaty, despite the fact that Russia is not an OECD member, Vakhitov noted. ''The ruling may be reviewed by higher courts, as it appears that a significant part of revenues relates to sales outside the country and should not be taxed in Russia,'' he told BNA. It remains to be seen whether ''the bilateral tax treaty's provision may be disregarded or reinterpreted on the basis of the OECD Commentary,'' Vakhitov said.

BY SERGEI BLAGOV

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Around the World

International

BNAI Transfer Pricing Forum Examines Treatment of Goodwill in 26 Countries

As the Organization for Economic Cooperation and Development embarks on its ambitious project to foster greater uniformity in the transfer pricing treatment of intangibles worldwide, practitioners from 26 countries recently examined how their governments treat goodwill.

The survey by BNA International's Transfer Pricing Forum asked leading practitioners in 26 countries how their tax administrations treat intangibles for transfer pricing purposes, including goodwill, which is not specifically addressed by the OECD transfer pricing guidelines.

Some practitioners said it would be helpful for both taxpayers and tax administrations if the OECD could provide guidance on the appropriate treatment of goodwill for transfer pricing purposes as part of its ongoing project to rewrite the organization's guidance on intangibles.

The BNAI survey covered Argentina, Austria, Belgium, Brazil, China, Denmark, France, Germany, Hong Kong, India, Ireland, Israel, Italy, Luxembourg, Mexico, the Netherlands, New Zealand, Poland, Russia, Singapore, South Africa, South Korea, Spain, Switzerland, the United Kingdom, and the United States.

The U.S. delegate to OECD Working Party No. 6, tasked with updating the organization's guidance on intangibles, has said it would be difficult for the working party to develop an explicit list of items constituting intangibles (19 *Transfer Pricing Report* 880, 12/16/10).

Different Approaches. The majority view among those surveyed is that goodwill constitutes an intangible for transfer pricing purposes, and so a related party should provide arm's-length compensation to its associated enterprise when it purchases goodwill from it.

According to the practitioners, Argentina, Austria, Belgium, Brazil, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Poland, South Korea, Switzerland, the United Kingdom, and the United States consider goodwill an intangible for transfer pricing purposes. However, the countries' differing analytical approaches to goodwill, a fundamental intangibles concept, illustrates the difficulties ahead for the OECD.

China, Germany, New Zealand, and Russia do not consider goodwill an intangible, and whether the item constitutes an intangible for transfer pricing purposes in Hong Kong, India, Israel, Mexico, Singapore, South Africa, and Spain is unclear.

Argentina. The courts in Argentina define goodwill to mean those rights that are capable of creating value.

From a transfer pricing viewpoint, practitioners said a related party must pay compensation for goodwill if it is a nonroutine intangible capable of creating a distinctive value in the context of the related party's business.

Austria. Goodwill is an asset under Austrian tax law. It is the value of a company that may not be allocated to single business assets but rather the additional value over the net value of all tangible and intangible assets arising from the operation of a business. In general, goodwill may be booked as an asset only if it is acquired derivatively.

The Austrian Ministry of Finance transfer pricing guidelines, published Oct. 28, require a taxpayer to consider non-booked goodwill in its risk analysis because it may be subject to a decrease in value. Regarding the allocation of goodwill between different parts of the enterprise, the goodwill must be allocated to the part that incurred the marketing expenses that developed the goodwill. The guidelines also provide that goodwill may be subject to economic joint ownership between different parts of the enterprise if such costs were borne together.

Belgium. Although Belgian law does not specifically provide that goodwill constitutes intangible property, the Commentary to the Belgian Income Tax Code refers to the general definition of goodwill under the accounting law.

The accounting law defines goodwill as the price paid for the acquisition of a company, or a line of business, to the extent the price is higher than the net worth of the assets minus the liabilities of the acquired company or line of business. Under Belgian generally accepted accounting principles, goodwill is treated in the same way as other intangible assets, being amortized over a maximum of five years. In some cases, goodwill may consist only of client lists.

Brazil. In Brazil, practitioners said goodwill falls within the definition of intangible assets if it is identifiable and controlled and has the potential to generate future economic benefits.

An asset is identifiable if it is capable of being separated from the entity and sold, or it arises from contractual or other legal rights regardless of whether those rights are transferable. An entity controls an asset if the entity has the power to obtain the future economic benefits flowing from the underlying resource and to restrict the access of others to those benefits. Future economic benefits flowing from an intangible asset may include revenue from the sale of products or services, cost savings, or other benefits resulting from the use of the asset by the entity.

China. Chinese practitioners explained that under Article 12 of the Corporate Income Tax Law (CIT), the amortized expenses of self-developed goodwill are not deductible before tax.

Consistent with this provision, the practitioners said it generally is difficult to reliably measure and segregate

the value of self-developed goodwill from the business enterprise value, and considering the minimal impact that self-developed goodwill may have on the financial statements, the transfer of self-developed goodwill generally is not considered a taxable transfer of intangibles in China.

The practitioners said purchased goodwill typically will be recognized on the acquirer's balance sheet as an intangible. Under Article 67 of the Implementation Rules of the CIT Law, expenditures for purchased goodwill are deductible when the enterprise is in liquidation or being transferred as a whole.

Also, the practitioners said the value of purchased goodwill is more readily ascertainable because the acquisition costs of the goodwill either are supported by contracts or specified in purchase price allocation analyses prepared by certified appraisers.

Denmark. The Tax Depreciation Act states that intangible property includes goodwill.

France. Under French tax, legal, and accounting law, goodwill is treated as an intangible asset.

Generally, the French practitioner said goodwill is identified through the existence of clientele and other intellectual property such as a trademark that has not been accounted for, or has not been accounted for at its market value, in the company's accounts.

In order for an asset to be characterized as goodwill, it must be disposed of by its owner or if the owner carries out certain restructuring with another taxpayer using market valuation—for example, mergers or spin-offs.

Germany. German practitioners said goodwill is not treated as an intangible asset, and, in general, should be contributed to other intangibles for which accounting rules do not allow booking.

However, they said there is still some debate on whether the transfer of such goodwill to a foreign corporation should be taxed on the basis of those intangible values that could not be booked due to accounting rules.

Hong Kong. The Inland Revenue Ordinance does not define what constitutes intangible property from a Hong Kong transfer pricing perspective.

India. Goodwill in India is the residual value of the business, which is over and above the value of the tangible and intangible assets.

Practitioners said that based on existing case law, in the hands of the transferee goodwill is not considered an intangible asset for computing tax depreciation. However, in the hands of the transferor, capital gains tax is payable on the transfer of such goodwill.

Ireland. Irish tax law does not define intangible property for transfer pricing purposes and goodwill has not been specifically identified as constituting intangible property by the tax authorities in the context of transfer pricing.

Nonetheless, goodwill is recognized as an asset or form of property for Irish tax purposes based on U.K. case law, which is of persuasive authority in Ireland.

The Irish practitioner said an element of going concern value and market reputation often is recognized as constituting goodwill, but this will be a question of fact in each case. Whether profit potential, group synergies, and marketing intangibles constitute goodwill will be a question of fact in each case.

Israel. Israel's transfer pricing legislation does not specifically define tangible and intangible property, but the legislation's broad definition of assets allows the tax authorities to approach intangible assets on a case-by-case basis.

Italy. Practitioners in Italy said goodwill is regarded as a specific intangible by law and administrative practice and therefore should be adequately compensated.

A taxpayer may successfully maintain that a business conversion requires related-party compensation only to the extent that the restructuring gives rise to a transfer of assets, including intangibles, rights, contracts, know-how, and going concern, or to the interruption of contracts that require an arm's-length indemnification. The mere flight of functions, not connected to the transfer of a going concern or other assets and rights, in theory should not give rise to any exit taxation in Italy (19 *Transfer Pricing Report* 533, 9/9/10).

Luxembourg. Although Luxembourg does not have specific legislation governing the transfer pricing aspects of intellectual property, when a related party transfers goodwill, it has to identify it, value it, and justify that valuation in the discussion with the tax administration.

Mexico. Mexico's tax law does not specifically define the different types of intangible assets, nor do the financial reporting standards address the issue of goodwill.

Netherlands. In the Netherlands, practitioners reported that higher-than-average earnings will have an influence on the transfer price if part of the taxpayer's business generating the earnings is transferred to an associated enterprise. The latter enterprise probably will be required to pay a certain amount for the transfer of goodwill, which is the going concern value of the business over and above the sum of all assets that can be valued more precisely.

Goodwill may be the result of synergy effects, such as size or scale of benefits, and benefits resulting from centralized procurement, customer lists, market reputation, and marketing channels.

New Zealand. The Inland Revenue generally considers, based on case law, that goodwill exists only in connection with business activities and cannot be assigned or licensed separate from the business itself.

Poland. The Polish tax regulations explicitly provide that goodwill constitutes intangible property for tax purposes. The related party must purchase the valuable goodwill and be entitled to the depreciation write-offs.

Russia. Practitioners said goodwill is not recognized as intellectual property under the Russian Civil Code. Therefore transactions involving transfers of customer relationships or functions do not give rise to a taxable transfer of goodwill in Russia.

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Singapore. Singapore has no specific guidance addressing the transfer pricing aspects of intangible property. However, the Inland Revenue Authority takes the position that the arm's-length principle applies to transfers of intellectual property.

South Africa. Practitioners said it is unclear whether goodwill in South Africa constitutes an intangible for transfer pricing purposes, so the determination of whether a particular item constitutes an intangible will have to be made on a case-by-case basis.

South Korea. Goodwill is considered an intangible under Korean financial accounting standards.

Spain. Goodwill is not specifically addressed in the Spanish transfer pricing legislation and the Spanish Tax Administration has issued no opinions on this issue—nor does any case law exist.

Switzerland. Practitioners said the treatment of goodwill in Switzerland is related to the question of how to capture the value of certain factors that would be characterized as neither tangible nor as intangible assets, including workforce in place, network effects, location savings, business opportunity, and ''first mover advantage.''

The consideration of goodwill as part of the transferred value depends on the facts and circumstances of the specific transaction. In practice, the practitioners said whether goodwill will be assessed in a transaction depends on the valuation method and generally results if the total value attributed to a transfer of a business exceeds the sum of the individual values attributed to each of the tangible and intangible assets transferred.

United Kingdom. Practitioners from the United Kingdom explained that the definition of goodwill, which is regarded as a capital asset for U.K. tax purposes, stems from practice and case law.

In *IRC v. Muller & Co. Margarine Limited* ([1901] AC 217), the court described goodwill as ''the benefit or advantage of the good name, reputation and connections of the business. It is the attractive force which brings in custom. It is the one thing that distinguishes the old established business from a new business at its first start.''

If a restructuring entails a disposal of all or part of a company's goodwill, the practitioners said that the disposal will be a taxable event, typically regarded as being for consideration equal to the market value of the goodwill disposed of. Goodwill has the meaning it has for accounting purposes, which is essentially the same as going concern value.

United States. Surveyed practitioners in the United States pointed out that the definition of goodwill for transfer pricing purposes is a matter of substantial disagreement between the Internal Revenue Service and taxpayers.

An IRS official said in December that when a U.S. related party transfers valuable goodwill, its foreign related-party recipient must pay for the transferred intangible because a transaction resulting in ''a transfer of value,'' including valuable goodwill, needs arm's-length compensation. The official said it is irrelevant whether an item of intangible property actually is listed by the Section 482 regulations as constituting intangible property because a related-party transferee of goodwill must compensate the transferor if the transfer of goodwill has a measurable value (19 *Transfer Pricing Report* 881, 12/16/10).

However, the U.S. practitioners noted that the transfer of foreign goodwill to a foreign corporation through a Section 351 or Section 361 transaction is not subject to the compensation requirements of Section 367(d).

BY KEVIN A. BELL

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United States

U.S. Inventory of Double Tax Cases Drops; O'Donnell Points to Hiring, Not Arbitration

The U.S. Competent Authority disposed of 271 double tax cases in the 2010 fiscal year—the highest number ever recorded—and saw a reduction in its inventory for the first time since 2005, according to statistics released Dec. 27.

Douglas O'Donnell, IRS director of Competent Authority and International Coordination, attributed the improvement to increases in competent authority staff rather than to recent efforts by U.S. and Canadian officials to reduce the number of cases eligible for arbitration on Dec. 15, 2010. Those efforts, he told BNA Tax Management Dec. 28, would not yet be reflected in the statistics, which cover years ending Sept. 30.

While the 705 cases pending at the close of fiscal 2010 are an improvement over the 724 that were pending in 2009, they still far exceed inventories recorded between 2001 and 2008, which never reached 600 (See the statistics published in the Text section of this issue and 14 *Transfer Pricing Report* 688, 12/21/05).

Foreign Adjustments, Processing Time. As in previous years, double tax cases arising from foreign-initiated adjustments exceeded those arising from U.S. adjustments. In 2010, 815 cases were from U.S.-initiated adjustments, while 886 stemmed from adjustments by a foreign tax authority.

Cases took longer to process in 2010 than in prior years. It took the IRS 903 days on average to close an ''allocation,'' or transfer pricing, case compared with 795 days in 2009, and 787 days for other types of cases compared with 576 days in 2009.

Recent Hiring. Despite the longer processing times, recent rounds of hiring allowed the IRS to keep on top of its double tax case load. For the first time since 2005, the U.S. Competent Authority in 2010 closed more cases than it received, disposing of 271 cases as 252 entered the system.

In August 2009, a U.S. Competent Authority official said the office would hire 10 analysts and expand from three to four groups, and further hiring has occurred under Michael Danilack, who became IRS Deputy Commissioner (International) in April 2010 (18 *Transfer*

Pricing Report 279, 8/6/09 19 *Transfer Pricing Report* 622, 9/23/10).

Arbitration Not a Factor. O'Donnell said earlier in December that the United States and Canada since August had closed 80 percent of the double tax cases that would have been eligible for arbitration by Dec. 15—the two-year deadline for resolving all cases that have been pending with Canada since Dec. 15, 2008, when the latest treaty protocol entered into force (19 *Transfer Pricing Report* 877, 12/16/10).

However, he said the recent push to close those cases had minimal impact on the 2010 totals for two reasons:

- the rounds of negotiations that occurred in November and December would have been too late to affect the totals for the fiscal year; and
- even for disputes resolved in August and September, enough lag time occurs between when agreement is reached in principle and when a case is formally disposed of that those cases would not be reflected in the totals either.

By Molly Moses

China

China Reports Concluding 53 APAs From 2005-09, Says Bilaterals Increasing

China concluded a total of 53 advance pricing agreements between Jan. 1, 2005, and Dec. 31, 2009, the government said in its first-ever report on APAs, issued Dec. 30, 2010, according to practitioners.

Spencer Chong of PricewaterhouseCoopers in Shanghai, Qisheng Yu of the firm's office in Beijing, and Steven Tseng of PwC in New York noted several key trends from the report, including:

- the rise in the number of bilateral APAs, which overtook unilateral agreements for the first time in 2009;
- the rise in applications for APAs covering intangibles transactions, which now exceed applications for agreements covering tangibles; and
- the popularity of the transactional net margin method, which was used in 60 percent of signed APAs.

Increase in Bilateral Accords. Chong, Yu, and Tseng noted that of the 14 APAs concluded in 2005, 13 were unilateral. By contrast, in 2009, five of the 12 APAs concluded were unilateral and seven were bilateral.

APAs by Year

Year	Unilateral	Bilateral	Total
2005	13	1	**14**
2006	10	0	**10**
2007	7	3	**10**
2008	6	1	**7**
2009	5	7	**12**
Total	**41**	**12**	**53**

Source: PricewaterhouseCoopers Consultants (Shenzhen) Ltd.

Agreements in Process. Another table listed the agreements at various stages of the APA process. As of Dec. 31, 2009, 51 APAs were at the pre-acceptance stage, with a proposal or letter of intent submitted in 20 of them—all bilateral cases—and a pre-filing meeting having occurred in 31. Most of the APAs in which a pre-filing meeting occurred—26 of 31—were unilateral.

Of the 15 in-process agreements for which the taxpayer's application has been accepted, five bilateral cases were listed as being in the ''examination and evaluation'' stage, and two unilateral and eight bilateral cases were listed as undergoing negotiation.

APAs by Phase

Phases		Unilateral	Bilateral	Total
Pre-Acceptance	Proposal/letter of intent	0	20	**20**
	Pre-filing meeting	26	5	**31**
Accepted	Examination and evaluation	0	5	**5**
	Negotiation	2	8	**10**
	Subtotal	2	13	**15**
Concluded	Agreed but not signed	0	1	**1**
	Executed and monitored	18	11	**29**
	Expired	23	1	**24**
	Subtotal	41	13	**54**
	Total	**69**	**51**	**120**

Source: PricewaterhouseCoopers Consultants (Shenzhen) Ltd.

Transaction Type. Of the concluded APAs, 62 percent involved the purchase and sale of tangible assets, while the remaining 38 percent was evenly split between intangibles and services transactions.

However, a majority of the agreements still in the pipeline—54 percent—were listed as involving either the transfer and use of intangible assets (33 percent) or the provision of services (21 percent). Tangibles transactions were at issue in the remaining 46 percent.

Countries Involved. Of the 12 bilateral APAs signed in 2009, nine were concluded with other countries in Asia, two with European countries, and one with North America, the statistics said.

A Danish biotechnology company, Novozymes, in 2009 reported being the first European company to finalize a bilateral APA with China (18 *Transfer Pricing Report* 654, 11/5/09).

Processing Time, Methods. Of the 53 completed APAs, all but two took two years or less to process, and more than half of those—30 of 51—took one year or less.

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As for methods, Chong and Yu said:

- comparable uncontrolled price was used in four APAs;
- cost plus was used in 15;
- TNMM with a full cost markup was used in 15;
- TNMM with a return on sales was used in 15;
- profit split was used in two; and
- an ''other'' method was used in two.

The practitioners noted that more methods were used than the number of APAs reported because some APAs used more than one method.

BY MOLLY MOSES

☐ *The report is available in Chinese at http://www.chinatax.gov.cn/n8136506/n8136608/-n9947993/n9948014/10517889.html.*

APAs by Transaction Type

Accepted Applications			Concluded APAs		
Transaction Type	Number of APAs	Percentage	Transaction Type	Number of APAs	Percentage
Purchase and sale of tangible assets	11	46%	Purchase and sale of tangible assets	42	62%
Transfer or use of intangible assets	8	33%	Transfer or use of intangible assets	13	19%
Provision of services	5	21%	Provision of services	13	19%
Financing	0	—	Financing	0	—
Total	**24**	**100%**	**Total**	**68**	**100%**

APA Processing Time

Type	Less than one year	One-to-two years	Two-to-three years	More than three years	Total
Unilateral	23	18	0	0	**41**
Bilateral	7	3	1	1	**12**
Total	**30**	**21**	**1**	**1**	**53**

Source: PricewaterhouseCoopers Consultants (Shenzhen) Ltd.

United States

December SEC Filings Show Big Tax Bill For Massachusetts Medical Device Maker

Securities and Exchange Commission financial reports filed by companies in December show that the Internal Revenue Service has hit medical device manufacturer Boston Scientific Corp. with a transfer pricing assessment in a deficiency notice alleging the company owes more than half a billion dollars in taxes and interest.

Of the remaining seven companies reporting transfer pricing issues, two—Wal-Mart Stores Inc. and Toro Co.—attributed the reduction in their effective tax rates to transfer pricing issues. Computer company Dell said the IRS had sent its transfer pricing assessments back to exam from the administrative procedure process, and Hewlett Packard described U.S. Tax Court litigation that involved transfer pricing adjustments for transactions covered under advance pricing agreements that was later resolved.

Below is an alphabetical listing of the December SEC taxpayers with transfer pricing disclosures.

Excerpts from the SEC filings appear in the Text section of this issue.

Agilent Technologies Inc. The company disclosed in its annual report that it has settled with the Internal Revenue Service regarding transfer pricing issues for 2003-07.

Agilent, based in Santa Clara, Calif., manufactures electronic and bio-analytical measurement and evaluation equipment.

Boston Scientific Corp. Boston Scientific Dec. 17 said it received IRS deficiency notices asserting that the company owes $525.1 million in taxes and interest, most of it stemming from a transfer pricing dispute involving technology license agreements.

The license agreements were between some of the domestic and foreign subsidiaries of Guidant Corp., acquired by Boston Scientific in 2006, according to the company's 8-K filing. The document said the asserted liability was based on an audit of Guidant's 2001-03 tax years.

Boston Scientific, a developer of minimally invasive medical devices headquartered in Natick, Mass., previously reported obtaining an advance pricing agreement between the United States and Japan and receiving a favorable court decision in Japan for 1995-98 (17 *Transfer Pricing Report* 831, 3/19/09).

Dell Inc. Computer manufacturer Dell disclosed that the IRS has recently remanded proposed transfer pricing assessments for 2004-06 back to examination for

further review. The company had been contesting the assessments, which it originally disclosed in 2009, through administrative procedures (17 *Transfer Pricing Report* 938, 4/16/09)

Donaldson Co. Minneapolis-based air and liquid filtration systems provider Donaldson said in its quarterly report that as of Oct. 31, it had unrecognized tax benefits totaling $17.6 million, $900,000 of which is related to disputes with taxing authorities related to transfer pricing and expense deductibility.

Hewlett Packard. The company's annual report said it may resolve transfer pricing disputes within the next 12 months. It also mentioned U.S. Tax Court petitions the company filed in 2007 and 2008.

According to documents filed with the Tax Court, the company protested Section 482 adjustments involving foreign third-party royalty licenses—transactions that were covered in an advance pricing agreement for 1999-2000—that would have increased the company's income by $436.3 million. In a 2008 settlement, the adjustments were not sustained, but the settlement disallowed HP's Section 482 setoff adjustments for research and development expenses and marketing costs.

Other Section 482 allocation issues are still under settlement talks, and the parties expect the discussion to last at least until February, according to an August 2010 status report filed by the parties. The report also noted that it had been notified of a Competent Authority resolution of transfer pricing adjustments proposed by India's taxing authority for HP subsidiaries, which resulted in a correlative decrease of HP's taxable income and affected its foreign tax credits for 2003.

The company reiterated a prior disclosure that it had received an IRS deficiency notice for 2004-05 stating that the firm owed a total of $97 million in taxes and penalties (18 *Transfer Pricing Report* 590, 10/22/09).

Toro Co. Toro said in its annual report that its effective tax rate for 2010 was 34 percent, which was slightly lower the 34.4 percent rate the company reported for 2009. The company attributed the reduction in the effective tax rate to the favorable resolution of a transfer pricing issues and a $1.5 million foreign subsidiary valuation allowance for 2009.

Bloomington, Minn.-based Toro company is a manufacturer of lawnmowers, snow blowers, and irrigation systems.

Visant Corp. The S-4 form filed by Visant Corp. revealed that the company agreed to IRS adjustments for 2005-06, but disagreed with certain transfer pricing adjustments in order to preserve its right to seek double tax relief with the Competent Authorities for the United States and France.

The company also reported that in February, the Canada Revenue Agency withdrew a transfer pricing assessment for 1996-97 and will refund approximately $700,000 in taxes and interest previously paid by the company.

Wal-Mart Stores Inc. The Bentonville, Ark.-based retailer reported that its effective tax rate for the three and nine months ended Oct. 31, 2010, was 29.5 and 32.9 percent, respectively. The rates were down from the 34.3 percent and 34.1 percent rates that it reported for the same time periods in 2009. The company said the declines in its effective tax rate are largely related to changes in transfer pricing policies in a foreign jurisdiction during the quarter ended Oct. 31.

By Tamu N. Wright

United Kingdom

United Kingdom Updates APA Procedures, Encourages Pre-Application Discussions

The United Kingdom Dec. 17 released a final statement of practice updating its 1998 advance pricing agreement application procedures, which includes a bilateral APA time line and a biolerplate agreement. **[Advance Pricing Agreements, Statement of Practice, SP2/10, HMRC, 12/17/10]**

SP2/10 says taxpayers can expect that a bilateral APA application will take 21 months to complete from the date of the initial application, though this does not include ''pre application scoping discussions.'' H.M. Revenue and Customs also said the new statement of practice provides ''more transparency about the APA process to businesses and advisors'' and incorporates legislative changes since 1999.

The new statement of practice appears in the Text section of this issue.

HMRC released a draft APA statement of practice in September with few substantive changes to the prior procedure, SP 2/99, but a practitioner said subtle modifications indicate slightly more willingness by HMRC to consider both unilateral agreements and requests by smaller taxpayers (19 *Transfer Pricing Report* 661, 10/7/10).

Pre-Application Discussions. The new statement of practice acknowledges that it is up to taxpayers to initiate an APA application but ''strongly recommend[s] that an enterprise interested in applying for an APA contacts [HMRC] first to informally discuss its plans before presenting a formal application.''

This approach, the guidance says, will ensure a taxpayer does not waste resources on an unsuitable application and that the application is ''focused on relevant issues,'' and also allows HMRC to make a realistic timetable for processing the application.

OECD Guidelines. The statement of practice says the taxpayer's proposed transfer pricing method must satisfy U.K. tax legislation and any relevant tax treaty as well as be consistent with Organization for Economic Cooperation and Development transfer pricing guidelines.

Specifically, the taxpayer's proposed method should satisfy the transfer pricing rules at Part 4 of the Taxation (International and Other Provisions) Act 2010, which are to be construed in accordance with the OECD guidelines.

The statement of practice also should be interpreted in accordance with the OECD's recent report on the attribution of profits to permanent establishments, HMRC said.

By Kevin A. Bell

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☐ *U.K. taxpayers interested in applying for an APA should contact Ian Wood, APA Co-ordinator for HMRC's Business International, at ian.wood.@ hmrc.gsi.gov.uk. Those interested in APAs involving oil taxation should contact Susan New at the Competent Authority, Large Business Service Oil and Gas, at susan.new@hmrc.gsi.gov.uk.*

France

Change to French Thin Cap Rules Seen Raising Questions, Borrowing Costs

PARIS—A new French anti-abuse measure that significantly widened the scope of the country's thin capitalization rules beginning Jan. 1 will sharply raise groups' borrowing costs linked to leveraged buyouts and real estate investments, a Paris-based attorney told BNA Jan. 11.

Published Dec. 30, the country's 2011 budget act (Law 2010-1657, 12/29/2010) modified the French tax code to extend rules aimed at limiting the tax deduction that a thinly capitalized company—one whose debt is considered excessive in relation to its equity—can claim on loans from a related party.

Until Dec. 31, the tax deductibility restriction applied only to interest paid on loans between related parties. The new measure extended that limit to include third-party loans secured by a related party, including bank loans, although it included several exemptions.

Experts called the measure complex and vague and said companies will have to carefully determine which of their loans are affected. Enforcement is likely to be strict, they said. Jérôme Delaurière, a Paris-based attorney at Gibson, Dunn & Crutcher, said the new rules reduce companies' tax leverage and consequently will raise their borrowing costs.

Tax Code Changes. The 2011 budget act was one of two major budget laws France published Dec. 30 that included several major changes to the tax code that affect businesses—such as increasing the taxable portion of dividends that parent companies earn from subsidiaries, changing the way a new value-added business tax is calculated, and reducing research tax credits. Among these changes, the 2011 law modified the code's article 212 to widen the scope of thin capitalization rules.

Nicolas Jacquot, a Paris-based attorney for Arsene-Taxand, said the modification was aimed at preventing groups from getting around the rules limiting interest deductibility for related companies. ''Under the old text, it was fairly easy for companies to beat the rules by spreading [leveraged buyout]-related debt among several subsidiaries of the group,'' he said. Among other things, companies could acquire loans provided by third parties but guaranteed by related parties. Now such loans are covered by the rules.

Jacquot said the changes also were a response, by the government and Parliament, to concerns that the country's business tax breaks were too generous, especially as France's massive budget deficit is forcing tax hikes and steep cuts in public services and welfare benefits.

The government has pledged to reduce tax breaks by 10 percent across the board, for a savings of some €10 billion ($13 billion) in 2011.

Exceptions. Article 212 states that interest paid on a related-party loan cannot be deducted for tax purposes if the borrower company's debt during the fiscal year exceeded 150 percent of its net equity; if the interest the borrower company paid on the related-party loans exceeded 25 percent of its before-tax operating profit; or the interest paid exceeded interest income it received itself from related parties.

According to the tax code, two companies are related when one holds, directly or through an intermediary, the majority of the other's capital, or it actually manages that company; or a third company manages both of them.

The new law extended the deductibility restrictions to also include loans secured by a third party, but there are several exceptions. First, a grandfathering clause states that loans contracted in a stock acquisition before Jan. 1, 2011, are exempt.

There are also three ''permanent'' exemptions, including for guarantees of a bond issued in a public offer, and when the guarantee is based exclusively on a collateral pledge of shares of the borrower, Jacquot said.

A guarantee linked to refinancing of an existing debt required due to a takeover of the borrower is also exempt, he said.

According to Delaurière, loan interest is also exempt from the restriction when the related-party lender is head of the integrated tax group. However, the head of the tax group must be a French company, he noted.

Exemptions Limited. Delaurière said the exemptions are limited and unlikely to provide relief in many situations, and as a result will increase the debt financing costs of French companies.

Groups use tax leverage to increase their return on investment in leveraged buyouts and real estate investments by minimizing their tax on those earnings. Anything that restricts their ability to borrow will reduce their tax leverage, he noted.

Because of the new rules, ''You will be able to borrow less money in a tax-deductible way,'' he said, adding, ''If you want to borrow and avoid the new thin cap rules, you will not be able to give the same guarantee, so banks will either raise the interest rate or reduce the amount you can borrow.'' This, Delaurière said, restricts companies' abilities to invest.

Questions. Jacquot said that because the new rules are labeled an anti-abuse measure, he expects ''a very strict interpretation by the administration.''

At the same time, the text of the rules is ''quite broad. One of the big questions will be to determine what a guarantee really is, because that's what the new measure targets,'' he said.

Jacquot said loan guarantees are legally diverse under French law, including personal guarantees, deposits, pledges, mortgage liens, and other forms. ''One tax question posed by this is if a comfort letter granted to a subsidiary is covered by this change. The text is not clear on that point and we hope the tax authority will clarify on this and other vague areas.''

In the meantime, Jacquot advised companies to carefully examine the loan guarantees offered to subsidiaries within their group to determine whether they are affected.

BY RICK MITCHELL

☐ *The budget law for 2011 and revised budget law for 2010 are available, in French, at http:// www.legifrance.gouv.fr/.*

France

France Publishes Official Commentary On Transfer Pricing Documentation Rules

PARIS—The French Ministry of Economy, Finance and Industry Jan. 4 published official commentary on transfer pricing documentation rules that took effect one year earlier and impose a 5 percent penalty for taxpayers failing to produce documentation within 30 days.

The commentary, *Instruction 4 A-10-10 relative à l'obligation documentaire en matière de prix de transfert* (Instruction 4 A-10-10 concerning transfer pricing documentation requirements), notes that the 5 percent maximum penalty will be reserved for cases in which companies lack any documentation at all.

Published Dec. 20, 2009, as part of France's 2010 budget act, the actual documentation rules require French companies with over €400 million ($518 million) in revenue to maintain transfer pricing documentation that they must provide to the French tax authorities at the start of a transfer pricing audit (18 *Transfer Pricing Report* 954, 1/14/10).

The rules, which took effect Jan. 1, 2010, give companies 30 days to produce the documentation. Taxpayers failing to produce the documentation are subject to a penalty of 5 percent of the amount of any transfer pricing adjustment.

Unanswered Questions. The government circulated a draft of the commentary in April 2010. According to the Paris-based law firm Arsene-Taxand, the new definitive version of the commentary, among other things, specifies to what degree permanent establishments of foreign companies in France are subject to the rules.

''However, it still leaves in doubt certain questions raised by the rules, in particular those concerning the necessity to document transactions between a French company and its permanent establishment abroad,'' said Arsene-Taxand.

The Paris-based Arsene-Taxand is a member of the Taxand network, which bills itself as the world's largest independent global network of specialist tax advisers to multinational businesses.

Sanctions. The commentary details how penalties will be applied. In addition to specifying that the 5 percent maximum penalty will be reserved for cases of no documentation, it also states that authorities will avoid applying the penalty where the authority and taxpayer disagree on the calculation method, according to Arsene-Taxand.

According to the law firm, the commentary stipulates that although a recovery procedure can be suspended under the documentation rules as a result of the opening of a mutual agreement procedure or arbitration, application of any penalty for lacking documentation will not be suspended.

However, Arsene-Taxand said, the commentary said the penalty in these cases will be reduced in proportion to the outcome of the procedures.

The law firm noted that the government's publication of the commentary coincided with companies' closing fiscal years ending Dec. 31. ''This very probably demonstrates the administration's intention to see requirements of the rules to be implemented in companies' tax declarations for their 2010 results,'' Arsene-Taxand said.

BY RICK MITCHELL

☐ *The government's commentary on its transfer pricing rules is available in French at http:// www11.minefi.gouv.fr/boi/boi2011/4fepub/textes/ 4a1010/4a1010.pdf.*

Japan

'Taxpayer Rights Charter' Included In Japan's Fiscal 2011 Tax Reforms

TOKYO—As a key revision of fiscal 2011 tax reforms, Japan would implement a ''taxpayer rights charter'' aimed at improving services, clarifying tax code definitions, and promoting consistency in tax administration, according to the 2011 tax reform plan released Dec. 17.

A significant aspect of the charter, which would clarify tax administration procedures by amending Article 1 of the National Tax Code, is that it would give taxpayers prior notice of an audit. In transfer pricing cases, where the government relies on information from third parties for its analysis, the charter instructs the tax authority to keep the taxpayer's information confidential.

More generally, the tax reform plan said the charter also is intended to improve tax audit procedures, allow taxpayers to demand declared tax reductions, and further modernize the National Tax Tribunal.

Notice of Audits. On tax audits, the plan said that ''in principle,'' the National Tax Administration would give notice to the taxpayer before conducting an audit. Exceptions to this proposed change would be when the concern arises that issuing prior notice may:

- make it difficult for the authority to obtain accurate facts;
- accommodate illegal or unjust acts by the taxpayer or make it difficult for the authority to establish such acts; or
- affect the authority's examinations on national taxes, including taxes of tax treaty counterpart countries.

Prior notice would be issued to the taxpayer and the representative that has submitted its tax documents, including attorneys, certified public accountants, and tax accountants, the plan said.

Details of Prior Notice. The plan said prior notice of audits shall include:

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- the date and the place where the audit commences;
- the purpose of the audit;
- tax items in question, such as income tax of specific years and taxable periods;
- ledgers and other materials related to tax items subject to the audit; and
- items such as requests for a change in the commencement, the possibility that the examination will encompass items beyond those named in the prior notice, and the name and address of the taxpayer to be audited, as well as the name and affiliation of officers conducting the audit.

Transfer Pricing Disclosure Issues. Notice shall be sent to the taxpayer in written form. In cross-examinations, such as when calculating comparable transactions in transfer pricing audits, neither the name of the taxpayer under audit nor its transactions shall be disclosed to the ''cross'' parties—the companies used to benchmark the taxpayer's results—and the taxpayer shall not be informed that cross-examinations are being conducted.

However, in the rare cases in which the cross parties agree, documents may be issued on the date of the audit about cross-examinations.

No Prior Notice. In the exceptional cases in which prior notice shall not be performed, documents describing audit items, excluding the date and location, shall be issued to the taxpayer after the audit commences and before the audit is concluded.

Audits would be conducted at the taxpayer's location, business offices, and other locations, the plan said.

Conclusion of Audits. At the conclusion of the audit, the audit officer would explain to the taxpayer the details of the tax law and code violations, the amount of underreported taxes, and the reason for the assessment. In addition, the audit officer would explain that the taxpayer shall not be allowed to file grievances when it has filed an amended tax return or has filed the tax return after the legal filing period.

The local tax office head would be required to issue documents to the taxpayer on the details of the assessment as well as on any inability to file grievances.

'Objection' Process. The plan said the current process of filing a grievance shall be discontinued. For taxpayers seeking corrections to tax authority assessments resulting from an audit, instead of the grievance process:

- the ''assessment objection claim'' period, which currently is one year, shall be extended to five years;
- the period during which the tax authority can increase the (deficiency) assessment tax amount shall be extended to five years from the current three years; and
- in submitting the assessment objection claim, the taxpayer must attach documents that certify the taxpayer's claims as facts. False claims shall be subject to a fine of no more than ¥500,000 ($5,500).

The reform plan also called for raising the maximum fine on the tax officer that violates confidentiality requirements to ¥1 million ($11,500) from ¥300,000 ($3,600).

On National Tax Tribunal reform, the plan said the Japanese government would consider extending the current two-month window for the taxpayer to file objections with the tribunal, as well as the perusal and copying of documents used as evidence.

By Toshio Aritake

☐ *More details about the fiscal 2011 tax reforms are available in Japanese at http://www.mof.go.jp.*

Japan

Japan's 2011 Tax Reform Plan Includes Best Method Framework

TOKYO—As part of fiscal 2011 tax reforms, Japan would streamline its transfer pricing tax codes and adopt a best method framework, according to the reform plan released Dec. 16.

The plan called for abolishing the current framework that authorizes the NTA to decide which arm's-length calculation method should be used with priority over other methods. In its place, a framework that uses the most suitable method for both the taxpayer and the authority would be adopted, it said.

In other important changes, the plan:

- would articulate definitions of some arm's-length calculation methods;
- calls for respecting companies' transfer pricing when prices fall within the arm's-length range;
- would shed light on situations when the NTA uses secret comparables;
- would pave the way for including arbitration in future tax treaties.

Calculation Methods. The plan said that as part of the ''most suitable method'' framework, Japan would articulate definitions of the calculation methods currently recognized for use as branch methods of the profit split method—the comparable profit split, contribution profit split, and residual profit split methods. Those methods would be applicable from taxpayers' business years after Oct. 1, 2011.

In the second major revision, the plan called on the NTA not to impose transfer pricing taxes when prices for transactions with foreign affiliates are within arm's-length ranges. It also said that, when arms-length prices are outside the calculation ranges, the average price of comparable transactions plus arms-length pricing calculations that use rational prices according to allocation conditions can be accepted.

Secret Comparables, Arbitration. In the third important revision, the plan said the Japanese authority would provide further articulation about its policy on using secret comparables, an approach that has drawn complaints from foreign taxpayers for years.

The plan said that when using secret comparables, the NTA would clarify its enforcement by citing concrete examples and explain details of such cases used in the past within the limits of the tax authority's confidentiality requirements.

In revising its transfer pricing guideline in June, the NTA instructed auditors to ''pay special care'' to related-party negotiations and thoroughly consider comparables provided by the taxpayer before using confidential third-party data to calculate arm's-length

prices. The change was part of fiscal 2010 tax reforms (19 *Transfer Pricing Report* 291, 7/15/10).

The 2011 reform plan also said the Japanese government would amend legislative and other administrative revisions on arbitration with the anticipation that arbitration systems would be employed in tax treaties that Japan revises or signs anew with its trading partners.

The plan said the revisions are in line with OECD transfer pricing guideline revisions.

BY TOSHIO ARITAKE

Kenya

Kenyan Practitioner Decries Government's Aggressive Tactics in Transfer Pricing Audits

Kenya's Revenue Authority has become more aggressive in its transfer pricing audits of multinationals while lacking a comprehensive transfer pricing regime that would allow a taxpayers to properly defend its transfer pricing, according to a practitioner.

Daniel Erasmus of Tax Risk Management Services, who represents two clients in the beverage and manufacturing industries in Kenya, said that the KRA is overstepping its authority by asking multinationals for documentation it is unauthorized to examine and also in using secret comparables.

Erasmus also said that for the first time in his experience, multinationals are undergoing audits simultaneously in several African countries, which is a ''direct consequence'' of international tax courses attended in London by African tax officials.

Establishing a Regime. Two United Nations organizations released a statement in September announcing that they had arranged for 30 tax officials from several African nations to take online international tax courses. The participants included a senior tax auditor and three revenue officers from the Kenya Revenue Authority (19 *Transfer Pricing Report* 548, 9/9/10).

Another practitioner, in referring to the KRA's aggressive pursuit of transfer pricing audits, said the tax agency recently established a team of 12 dedicated transfer pricing professionals, which is expected to expand to 25 individuals (19 *Transfer Pricing Report* 19, 5/6/10).

Secret Comparables. Erasmus said the KRA takes the position that the comparables found in Belgium-based Bureau van Dijk databases are not applicable in African countries. So, he argued, the question becomes, ''What is?'' If the KRA rejects the comparables contained in Bureau van Dijk and other available financial databases, then the taxing authority should have its own database ''and share it [with multinational taxpayers] to help them become compliant,'' according to Erasmus. Instead, he said, the KRA uses comparables that it will not share with taxpayers—something the practitioner called a ''bit of a catch-22'' for the multinational companies, which essentially are facing an ''entrapment situation.''

Erasmus also pointed out that the KRA unsuccessfully contended in a 2005 transfer pricing case, *Unilever Kenya Ltd. v. Comr. of Income Tax*, that the Organization for Economic Cooperation and Development's transfer pricing guidelines do not apply in determining whether the taxpayer's pricing was arm's-length.

In *Unilever*, two of the European firm's affiliates, based in Kenya and Uganda, entered into an agreement for 1995-96 in which Unilever Kenya manufactured and supplied goods to Unilever Uganda. On audit, the KRA made an assessment based on its finding that the company's transfer pricing was not arm's-length. Noting the absence of detailed transfer pricing guidance on determining arm's-length prices, the court overturned the assessment and upheld Unilever Kenya's use of the cost plus method to determine its transfer prices with Unilever Uganda.

Erasmus noted that in response to *Unilever*, Kenya introduced rules in 2006 to supplement Section 18(3) of the Income Tax Act, which requires that transactions between a resident and nonresident taxpayer be arm's-length. However, according to Erasmus, the rules have problems because ''some definitions are not consistent.''

The KRA also recently issued a form that would require companies in Kenya to report transactions with foreign related parties (19 *Transfer Pricing Report* 19, 5/6/10).

Historically in Kenya, the KRA conducted transfer pricing audits when red flags are raised that a multinational's transfer pricing practices differ from its policies.

Erasmus said that under the new reporting rule, the KRA is attempting to force Kenya's companies to make available pricing information—such as markups, profit ratios, and other financial data—of foreign related parties and will make an assessment if the information is not handed over. However, he contended that the KRA ''has absolutely no jurisdiction'' to obtain information that is not in the possession of the Kenyan entity. He said that if such data is in the possession of the Kenyan entity, it would be ''difficult to argue that [the data] shouldn't be handed over.'' However, if the KRA then raises an assessment based on the Kenyan entity's refusal to submit the extrajurisdictional data, ''it could be contrary to the rule of law,'' he said.

Constitutional Underpinnings. Erasmus said that in representing clients in Kenya, he looks to the country's constitution, which was redrafted and recently ratified in August. Chapter 1 of Kenya's constitution states that ''any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.'' Therefore, Erasmus said, if a taxpayer is able to show that the conduct of the taxing authority is inconsistent with the constitution, it can challenge the validity of the audit, which gives multinationals ''a measure of comfort.''

The practitioner also said the administrative law provisions of the country's constitution indicate how it will go about enforcing its international tax rules because they are ''paramount to the manner in which the taxing authority will conduct a transfer pricing audit.''

BY TAMU N. WRIGHT

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Text

U.K. Statement of Practice on Advance Pricing Agreements [H.M. Revenue and Customs, SP2/10, released 12/17/10]

SP2/10 – Advance Pricing Agreements

GENERAL INTRODUCTION

This Statement of Practice (''SP'') updates an earlier Statement on Advance Pricing Agreements (''APAs''), published in 1999. The legislation that relates to APAs, formerly found at Section 85, Finance Act 1999, now appears at Sections 218 -230 of the Taxation (International and Other Provisions) Act 2010 (''TIOPA 2010''). This SP is intended to provide guidance about how H.M. Revenue and Customs (''HMRC'') interprets the APA legislation and applies it in practice.

Key Paragraphs in this SP

- *What is an APA? - para 1*
- *What issues can be covered? - para 3*
- *Unilateral and bilateral APAs distinguished - para 8*
- *Who may apply? - para 13*
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APAs – WHAT ARE THEY AND WHEN MIGHT BUSINESSES CONSIDER ONE?

1. An APA is a written agreement between a business and the Commissioners of HMRC which determines a method for resolving transfer pricing issues in advance of a return being made. When the terms of the agreement are complied with, it provides assurance to the business that the treatment of those transfer pricing issues will be accepted by HMRC for the period covered by the agreement. A bilateral APA – as discussed below – will provide a similar assurance in respect of the tax administration (''Administration'') dealing with the entity at the other end of the transaction.

2. An APA enables businesses to achieve certainty that the transfer pricing issues covered by the agreement will not be part of any enquiry into their self-assessment tax returns for the relevant period and so provides greater certainty over their tax liabilities. HMRC has also found that where there is considerable difficulty or doubt in determining the method by which the arm's length principle should be applied, the transfer pricing issues can be more efficiently dealt with in real time as they arise rather than retrospectively years later when, for example, key personnel in the business may have moved on.

3. Sub-section 218(2), TIOPA 2010, sets out the transfer pricing issues which can be the subject matter of an APA. An APA can be used to resolve questions relating to the following broad situations giving rise to transfer pricing issues:
   a. Transfer pricing between separate business enterprises where questions may arise as to the determination of the arm's length provision under the rules in Part 4 TIOPA 2010.
   b. Attribution of income or profit between parts of a business enterprise which operates in more than one country where questions may arise as to the taxable income to be recognised in any such part. (Note – this is conceptually a similar problem to transfer pricing and any references to ''transfer pricing issues'' in the remainder of this document should be read as including such attribution issues.)
   c. Across the UK oil-related ring-fence.

4. The potential scope of an APA is flexible. It may relate to all the transfer pricing issues of the business or be limited to one or more specific issues although Thin Capitalisation issues will generally be dealt with via a separate Advance Thin Capitalisation Agreement (''ATCA''). There is no requirement that the commencement of an APA should coincide with the commencement of the arrangements which it addresses so it may apply to pre-existing issues.

5. The APA legislation does not specifically provide for a determination that a permanent establishment (''PE'') does not exist however it may be possible for the APA to include a determination that the income to be attributed to a potential PE is nil.

6. HMRC's Business International Directorate (''BI'') has responsibility for all applications except enterprises operating in the North Sea (for which the Large Business Service's Oil and Gas Sector is responsible). Otherwise, BI will involve such specialists and delegated competent authority officials as is necessary, and will ensure the business' Customer Relationship Manager (''CRM'') is involved.

7. HMRC do not levy any charge on the business for their assistance during the APA process but potential applicants need to be aware that some other Administrations may do. HMRC can advise on this at the Expression of Interest stage (see below).

UNILATERAL, BILATERAL or MULTILATERAL AGREEMENT

8. A binding agreement between a UK business and HMRC in accordance with Section 218, TIOPA 2010, is referred to as a ''unilateral APA''. Although this agreement confirms the tax treatment in the UK, it does not determine how the issues are to be resolved in any other country involved. Consequently, it does not normally eliminate the risk of double taxation in relation to the transfer pricing issues it addresses. In order to achieve that comprehensively in the case of cross-border transfer pricing issues where a Double Taxation Agreement (''DTA'') exists between the UK and the other country containing a Mutual Agreement Procedure article, HMRC would have to reach

agreement also with the Administration of the other country: this is referred to as a ''bilateral APA''.

9. Businesses operating in several countries may wish to seek APAs that involve all the relevant Administrations affected by the transfer pricing issues. The term, ''multilateral APA,'' has been used to describe such agreements, but there is no discrete mechanism for reaching multilateral agreements, and multilateral APAs are strictly multiple and complementary bilateral APAs.

10. Multilateral agreements may be more appropriate where there is essentially only one activity, but several enterprises or parts of enterprises contribute to it. For example, where an enterprise of the UK is engaged in global financial trading through branches in countries X and Y, it may be appropriate for similar agreements to be reached between HMRC and country X and HMRC and country Y in order to determine how the profits from the activity are to be allocated to each of the three countries in order to eliminate double taxation. In such a situation HMRC will adapt the bilateral framework in order to reach agreement on a trilateral basis, subject to the acquiescence of the other Administrations and any constraints on exchanging information imposed by the relevant DTAs.

11. HMRC generally recommends that APA applications are bilateral rather than unilateral except where:

    a. Applicants are able to persuade HMRC that the extension to a bilateral APA would unnecessarily complicate and delay the process; or
    b. The other party to the transaction is resident in a jurisdiction with which HMRC has no treaty or where HMRC is aware that the treaty partner has no APA process; or
    c. There is considered to be little extra to be gained by seeking a bilateral agreement. For example where the UK is at the hub of arrangements with associated enterprises in many different countries and where the trade flows involved with any one particular country are relatively modest in scale.

12. Where there is an appropriate DTA in place, and HMRC considers that a bilateral APA would be more appropriate, HMRC may communicate with the other Administration if a unilateral is sought, to ascertain whether that Administration would consider entering into a bilateral APA process. Alternatively, (see Section 229(2), TIOPA 2010), HMRC's ability to give effect to a mutual agreement reached with a treaty partner to eliminate double taxation under the terms of a treaty will not be restricted by the terms of a unilateral APA.

WHO MAY APPLY FOR AN APA?

13. An APA may be requested by

    a. any UK business, including a partnership, with transactions to which the provisions of Part 4 TIOPA 2010 apply;
    b. any non-resident trading in the UK through a Permanent Establishment;
    c. any UK resident trading through a Permanent Establishment outside the UK.

14. Every APA request will be considered on the basis of its particular facts and features, but generally HMRC will be looking for one or more of the following characteristics:

    a. The transfer pricing issues are complex rather than straightforward. To HMRC ''complex'' means there is doubt as to how the arm's length standard should be applied. Conversely, where reliable market comparables can be readily identified for the transaction(s) in point, that should enable transfer pricing methods to be employed in accordance with the OECD Transfer Pricing Guidelines, and HMRC is likely to regard such a situation as ''straightforward''.
    b. Without an APA, it is likely that the taxpayer's transfer pricing policies or issues would not be regarded as ''low risk'' and/or there is a high likelihood of double taxation.
    c. The taxpayer seeks to implement a method which is highly tailored to its own particular circumstances. HMRC will be willing to consider an innovative proposal providing it is compliant with OECD Guidelines, and not one that HMRC considers Treaty Partners would regard as being overtly tax aggressive.

15. APAs will not be declined solely by reference to the size of the transactions giving rise to the transfer pricing issues because HMRC recognises that complex transfer pricing issues can be encountered by smaller businesses as well as by large multinationals. However many small and medium enterprises are exempt from the UK transfer pricing legislation by virtue of Section 166 TIOPA 2010 and so there may be limited occasions where the APA process will be appropriate for smaller businesses.

16. Since April 2004 UK-to-UK transactions have been subject to transfer pricing legislation: but, HMRC does not generally see such transactions as likely to warrant an APA. However some UK-to-UK transactions, for example oil-related ring fenced trades, are specifically provided for in legislation.

17. When a UK business does obtain an APA and the provision in question is made or imposed with a related UK business Section 222 TIOPA 2010 enables the other UK business to claim to have their profits adjusted in line with the APA where they are disadvantaged. However, HMRC seeks to avoid such issues by encouraging the business to agree wherever possible that the transfer pricing methodology will determine the commercial charge for the provision as well as the charge for tax purposes.

THE INITIAL CONTACT – THE EXPRESSION OF INTEREST PROCESS

18. The APA process is initiated by the business but HMRC always strongly recommend that an enterprise interested in applying for an APA contacts it first to informally discuss its plans before presenting a formal application. This is to ensure that the resources of the business are not wasted on an unsuitable application and to ensure that the detailed work that will need to be undertaken by the business in finalising its application is focused on relevant issues. It also gives HMRC an opportunity to outline a realistic anticipated timetable for agreeing an APA based on past experience, or to discuss other practical ''process'' issues with the business.

19. The contact details for an Expression of Interest in an APA and for making an APA application in all cases except those involving oil taxation, is:

    APA Co-ordinator (Ian Wood)
    Business International
    3rd Floor, 100 Parliament Street, London SW1A 2BQ

    Telephone: 0207 147 2715
    Fax: 0207 147 2649
    e-mail: ian.wood.@hmrc.gsi.gov.uk

20. For APAs involving North Sea and other offshore operations, the contact address is:

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Competent Authority, Large Business Service Oil and Gas (Susan New)
3rd Floor, 22 Kingsway, London WC2B 6NR

Telephone 0207 438 7570
Fax 0207 438 6910
e-mail: susan.new@hmrc.gsi.gov.uk

21. Any business uncertain as to which contact point is appropriate in their circumstances is welcome to approach either.

22. The Expression of Interest should generally cover:

    a. The nature of the transfer pricing issues intended to be covered by an APA.
    b. Details of the tax residence of the parties involved and the importance to the wider business of the transactions intended to be covered.
    c. If decided upon, a description of the proposed transfer pricing method.
    d. An indication of the nature of any current transfer pricing enquiries, competent authority claims, and any other relevant issues that the business is aware of in the context of the suggested APA.

    HMRC's experience is that discussion of these issues at a meeting is much speedier and more productive than correspondence.

23. An Expression of Interest can best be evaluated where the identity of the business is known. However, if a business wishes to preserve anonymity until a decision in principle is made to proceed with the application, HMRC will be prepared to enter discussions without knowing the identity of the business providing all other information relevant to the proper evaluation of the request is supplied. However, HMRC will not make any commitment over acceptance into the APA Programme until the identity of the business is known. Otherwise, HMRC is usually able to indicate at the conclusion of an Expression of Interest discussion whether it will be prepared to consider an application for an APA.

24. In the event that HMRC considers that an application should not be admitted into the APA Programme, HMRC will advise the business of the reasons why HMRC takes that view, and will allow the business the opportunity to make further representations.

TERM OF THE AGREEMENT AND "ROLL-BACK"

25. An APA will be operative for a specified period from the date of entry into force as set out in the agreement. The business should propose an initial term for the APA taking into account the period over which it is reasonable to assume that the method for dealing with the relevant transfer pricing issues will remain appropriate. Typically the term is from three to five years.

26. It is possible that a chargeable period to which the APA relates may have ended before agreement is reached. Section 224, TIOPA 2010, allows the APA to be effective for that chargeable period and the agreement may set out any adjustments to be made for tax purposes as a consequence of the agreement.

27. The agreed transfer pricing methodology may be relevant for an earlier period and to the resolution of any transfer pricing enquiries raised for earlier periods if the particular facts and circumstances surrounding those years are substantially the same. Consequently, in such circumstances, the business may wish to consider using the agreement as a basis for amending a self assessment return or to request that the method for dealing with transfer pricing issues contained in the APA should be considered for resolving any transfer pricing enquiries to which it is relevant for earlier years. HMRC may also suggest that the "roll-back" of the APA is an appropriate means of a resolving a transfer pricing issue in earlier years although, in bilateral or multilateral cases, the possibility of doing so will also be dependent on the ability or willingness of the Administration of the other country or countries involved to do so.

28. Except where "roll-back" is being considered, the request for an APA in respect of future years will not in itself affect any transfer pricing enquiry into earlier years. However, to the extent such an approach is appropriate and feasible, HMRC will co-ordinate the APA request in respect of future years with any transfer pricing enquiry in respect of prior years in order to improve overall efficiency and reduce duplication of enquiries.

THE FORMAL APA APPLICATION

29. Where, following HMRC's indication that it is willing to consider the APA proposal, the business wishes to proceed, it should submit a formal written application. This APA application should also be copied to the business' primary business contact at HMRC – usually the business' Customer Relationship Manager.

30. Annex 1 to this document contains full details of the information that should generally be incorporated in the formal application. HMRC may, in practice, be flexible with such requirements where the circumstances of the particular case mean that a different approach will make for a better process. In a bilateral case, HMRC is often able to agree to work from the same format application as is mandated by the other Administration's procedures. These are issues best discussed with HMRC at the Expression of Interest stage. Annex 2 contains a diagram showing a timeline of the typical APA process for a bilateral case.

31. The application should ideally be made before the start of the first chargeable period proposed to be covered by the APA, but HMRC may exercise discretion over this, for instance, when a bilateral is sought and the other Administration is prepared to allow the business more time to lodge its' application.

32. In the case of a bilateral APA the business will be asked to ensure that all information provided in the application supplied to one Administration is made available at the same time to the other Administration involved.

33. APA information is subject to the same rules of confidentiality as any other information about taxpayers. Information exchanged with treaty partners—for instance, in the course of reaching agreement on bilateral APAs—is also protected from disclosure by the terms of the Exchange of Information Article in the relevant DTA.

EVALUATION

34. On receipt of an application HMRC will evaluate its contents and will seek clarification and further information from the business as necessary. The examination of the application should be a co-operative process in which the transfer pricing issues are discussed openly and access to relevant supporting information and documentation is made available. Lack of co-operation in these respects may result in HMRC declining to give any further consideration to the application.

35. Where a bilateral APA is being sought, HMRC will expect the business to continue to make relevant in-

formation available at the same time to each Administration involved, and in turn will itself keep the treaty partner informed about the progress of its examination of the APA request, will seek to discuss with the treaty partner key issues arising at the earliest opportunity and will keep the business informed about the progress of the bilateral process. Whilst the finalising of a bilateral agreement with a treaty partner is a government-to-government process, HMRC is generally prepared to participate in joint meetings involving the business and the other Administration(s) to assist in the exploration and evaluation of key factual issues.

REACHING AGREEMENT

36. The agreement between HMRC and the business will be made subject to its terms being observed. The terms will include:

    a. a commitment from the business to demonstrate adherence to the agreed method for dealing with the transfer pricing issues during the term of the APA in the form of a regular compliance report (an ''Annual Report'') as required by Section 228 TIOPA 2010 and

    b. the identification of Critical Assumptions bearing materially on the reliability of the method and which, if subject to change, may render the agreement invalid.

37. A sample ''plain vanilla'' agreement is included as an annex to this Statement (Annex 3). Normally the person responsible for signing the agreement on behalf of the business would be the person responsible for signing a tax return, subject to that person having authority within the multinational group to commit the group to the terms of the APA.

38. HMRC aims to complete the APA process within 18-21 months from the date of the formal submission. It may well be possible to complete unilateral APAs much more quickly than that. This objective is dependent on the complexity of the case and, in the case of bilateral or multilateral applications, may be dependent on the working practice of the Administration(s) in the other country or countries. It is also, of course, dependent on co-operation from the applicant. HMRC may view significant and repeated delay on the part of the business as indicative of a lack of co-operation and may then terminate the APA process as a result.

39. HMRC expects the business to facilitate an efficient process by providing timeously all the information necessary to consider the application properly and reach agreement. This extends to the enterprise's co-operation in ensuring that the formal APA agreement and any associated procedural paperwork are finalised shortly after the finalisation of the transfer pricing method and/or, in a bilateral or multilateral process, the concluding of agreements with treaty partner(s).

40. If agreement on the terms of an APA cannot be reached with the business, HMRC will issue a formal statement recording the reasons. HMRC does not consider it has any obligation to continue discussion beyond the point at which it has determined that agreement cannot be reached.

41. A business may withdraw an APA request at any time before final agreement is reached.

APA MONITORING AND REVIEW - ANNUAL REPORTS

42. The Annual Report will generally accompany the business' tax return. The report should be sent to the HMRC office responsible for the business' tax affairs.

43. The particular requirements of each report will be set out in the finalised agreement and will focus narrowly on the issue covered by the APA. The broad intention is that Annual Reports should demonstrate in a concise format whether the business has complied with the terms and conditions of the APA.

NULLIFYING AND REVOKING APAs AND PENALTIES

44. In accordance with Section 225, TIOPA 2010, an APA may be revoked by HMRC in accordance with its terms, where the business does not comply with the terms and conditions of the agreement, or where the identified critical assumptions cease to be valid. In practice, when considering nullifying or cancelling a bilateral APA HMRC will consult with the business and with the Competent Authority of the treaty partner involved. In some cases, a change in the agreement may be possible – see also Paragraph 47 below.

45. Where false or misleading information is supplied fraudulently, or negligently, in connection with an application for, or in the process of monitoring, an APA, penalties may be applied, and the APA might be nullified (see Sections 226 and 227 TIOPA).

46. In accordance with existing appeal procedures, the business has the right to appeal against the amount of any additions to profits arising as a result of the revocation or cancellation of an APA.

REVISING AND RENEWING APAs

47. In some cases the APA may provide for modification of its terms in specific circumstances; for example, a particular agreement may provide that where there has been a change which makes the agreed methodology difficult to apply, but which does not go as far as to invalidate a critical assumption, the agreement may be modified with the consent of the parties to resolve that difficulty. In such cases the APA may be revised in accordance with Section 225, TIOPA 2010 after consultations between the business and HMRC and, in the case of bilateral agreements, the Competent Authority of the other country involved.

48. The business may request renewal of an APA ideally not later than six months before the expiry of its current term, but HMRC will not rule as out of time requests made before the end of the first chargeable period affected by the renewal or, in the case of bilateral cases, later, if the other Administration is prepared to allow further time. The renewal application should expressly consider any changes or anticipated changes in facts and circumstances since the existing agreement was reached, whether any amendments are required to the agreement on renewal as a result, and should demonstrate that the proposed methodology is, or is still, appropriate.

49. HMRC will conduct a review of the renewal application, taking into account whatever revisions to the existing APA are necessary and appropriate in the light of any changed facts and circumstances. Where it is agreed that the transfer pricing issues under consideration remain the same and the existing transfer pricing methodology can continue as before but with details updated to ensure continued adherence to the arm's length principle, the agreement will simply be amended and extended for a further term. Where, however, the transfer pricing issues have changed, or a different method is being proposed, the business

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will be required to make a fresh APA application. A fresh application may also be necessary in a bilateral context where the processes of the other Administration require that.

THE BACKGROUND TO THIS SP

50. HMRC has run an APA Programme since 1999 to assist businesses in identifying solutions for complex transfer pricing issues.

51. This Statement updates the original SP on APAs (SP3/99) and is intended as general guidance as to how HMRC interprets the APA legislation and how HMRC operates the UK APA Programme. HMRC is taking the opportunity to incorporate best practice identified since SP3/99 was published, but the publication of this Statement does not mark a material change in HMRC's approach to APAs.

52. Although the same legislation is used as the basis for Advance Thin Capitalisation Agreements (''ATCAs'') HMRC has published a separate document, SP 04/07, to provide detailed guidance about its practice in reaching advance agreements over thin capitalisation issues. These cases have their own distinctive features and are therefore negotiated under an entirely separate process. This Statement consequently has no impact on the existing guidance on ATCAs in SP 04/07.

ANNEX 1 – INFORMATION TO SET OUT IN THE FORMAL APPLICATION

1. The application should fulfil the requirements of Section 223, TIOPA 2010 and set out:

   a. the applicant's understanding of the effect of the relevant legislation including the effect of any DTA in relation to the transfer pricing issues under consideration;
   b. the areas where, because of the difficulty of the transfer pricing issues, clarification of that effect is required; and
   c. a proposal for clarifying the effect of the legislation in accordance with the applicant's understanding.

2. The intention is to ensure that any agreement about the practical treatment of specified transfer pricing issues is formed from a proper understanding of the relevant principles of the Taxes Acts. Thus, where the transfer pricing issue concerns, for example, pricing between associated enterprises, the application might include an explanation of why the transfer pricing rules at Part 4 TIOPA 2010 are applicable, and would acknowledge that the effect of those rules, which are to be construed in accordance with OECD Transfer Pricing Guidelines, is to require the substitution of the arm's length provision for tax purposes. The application might then go on to explain in what ways the establishing of the arm's length provision requires clarification, and submit a proposal for establishing the arm's length provision in accordance with the requirements of the effective provisions. This guidance should be adapted to attribution issues involving Permanent Establishments (where OECD has latterly issued separate guidance in the form of Parts 1-4 of the Report on the Attribution of Profits to Permanent Establishments) in accordance with the general intention of ensuring that there is a proper understanding of the relevant principles of the applicable law from which an agreement about the practical treatment of a specified issue can be formed.

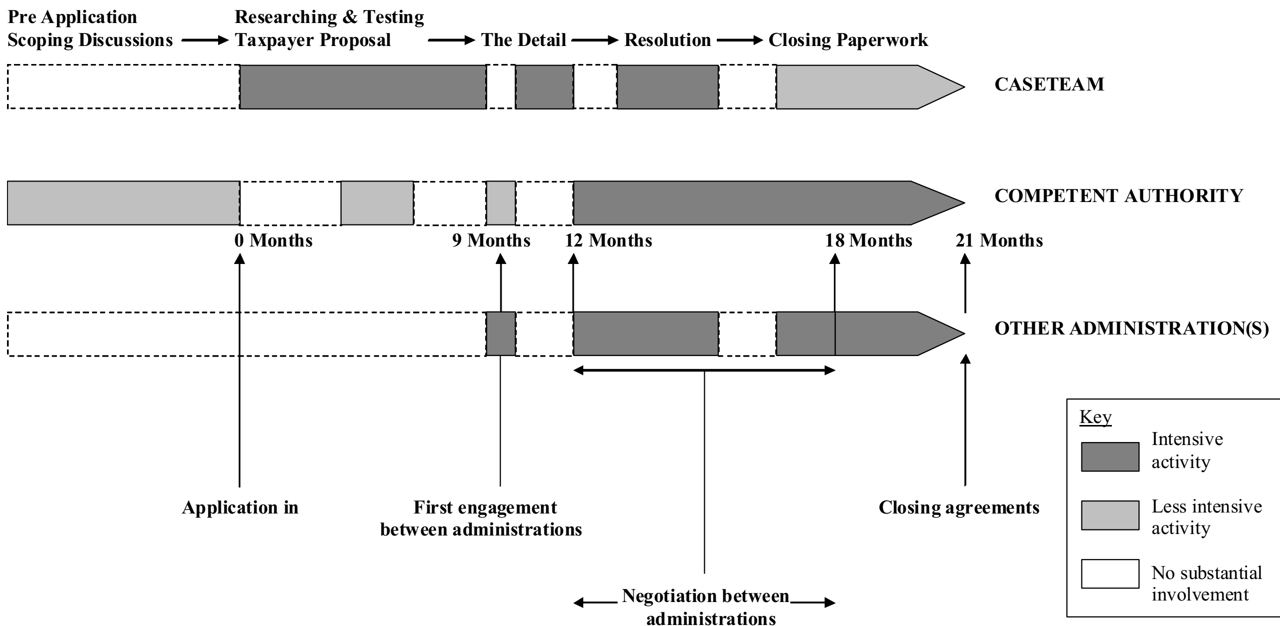
3. The centre-piece of the proposal will be a description of the method by which it is proposed to determine the transfer pricing issues in accordance with the arm's length principle, and an analysis demonstrating how the application of that method satisfies the terms of the UK's legislation, including the effect of any DTA, and is consistent with the OECD Transfer Pricing Guidelines. The nature of the detailed information supporting the proposal should be tailored to the specific features of the business and of the transfer pricing issues and should take into account discussions with HMRC at the Expression of Interest stage.

4. All proposals will also generally need to be supported by the following information:

   a. the identification of the parties and recent accounts (generally for the previous 3 years);
   b. a description of the transfer pricing issues proposed to be covered in the APA and analysis of the functions and risks of the parties and actual and projected financial data of the parties in relation to the issues;
   c. a description of the world-wide organisational structure, ownership, and business operations of the group to which the company in question belongs, the place or places where such operations are conducted, and all the major categories of transaction flows of the parties to whom the APA is intended to apply;
   d. a description of the records which will be maintained to support the transfer pricing method proposed for adoption in the APA and the information which it is proposed will be supplied each year to demonstrate that the tax return conforms to the terms of the APA;
   e. a description of any current tax enquiries or competent authority claims that are relevant to the issues covered by the proposed APA;
   f. the chargeable periods to be covered by the APA;
   g. the identification of assumptions made in developing the proposed transfer pricing method which are critical to the reliability of its application under the arm's length standard; and
   h. where appropriate, a request for competent authority assistance in reaching a bilateral or multilateral APA.

5. The formal proposal should identify the assumptions made in proposing the method for dealing with the transfer pricing issues and which are critical to the reliability of that method. The method should be sufficiently robust to accommodate some changes in the commercial and economic climate from that reasonably foreseeable when the proposals were made and still be capable of replicating an arm's length outcome. However, the accuracy of the method is likely to be predicated on assumptions in respect of particular factors fundamental to its application, such as the continuing nature of the functions performed, accounting policies and practices, the terms of contractual agreements impacting upon the covered transactions, or levels of market share. Critical assumptions are designed to protect both the business and the HMRC from the risk that the agreement may become inappropriate, but they should not be so tightly drawn that the certainty provided by the agreement is jeopardised. Setting parameters for acceptable divergence for some assumptions can help to retain flexibility. Where there is a change, or a change greater than any relevant parameters set, to circumstances that both parties have identified as critical to the agreement, a reconsideration of the agreement is then activated and may lead to its cancellation or modification depending on the terms of the agreement.

ANNEX 2 – A TYPICAL BILATERAL APA TIMELINE:



ANNEX 3 – SAMPLE AGREEMENT

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 Business International Directorate (''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.

(*This agreement replicates under UK statute on Advance Pricing Agreements the terms of a bilateral/multilateral agreement reached under the Mutual Agreement Procedure Article of the relevant Tax Treaty covering the same transactions between HMRC and (fisc(s))*

1. Identifying Information

Taxpayer (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 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 *(succinct explanation of all Covered Transactions)*

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 TPM (as defined in Appendix A) 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.

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

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4. Term

Term of APA.

(Rollback period if relevant)

5. Financial Statements and APA Records

(typically – in accordance with S 228 TIOPA 2010 - the taxpayer is required to provide, in addition to Corporation Tax Returns and Audited Financial Statements: Submission of APA information set out by Clause 6 and 7 below.

Compliance with this will constitute compliance with the record maintenance provisions of Section 12B Taxes Management Act 1970 and paragraph 21, Schedule 18 Finance Act 1998 with respect to the Covered Transactions during the APA term.)

6. Critical Assumptions

(with respect to the Covered Transactions are set out in Appendix B)

7. Annual Reports

(*unless this requirement can be very simply put are typically set out in a separate Appendix C. Note that some bilateral or multilateral agreements may require a standard report to be sent to all involved tax Administrations and in that case Appendix C may have to cover the same ground and also any specific information - e.g. (say) conversion into UK currency or UK accounts standards so that the HMRC tax team can readily track the numbers through the relevant UK tax computations.)*

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. Treatment of Allocations under the TPM

(typically – this may cover the treatment of ongoing or end-of-year adjustments which may be required under the TRM to align the results on Covered Transaction business with the APA terms.

11. Professional Fees

(as relevant – deductibility)

12. Tax Laws

(typically – general statement along the lines of – 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).

13. Governing Law and Effective Date

(typically - laws of England and effective from the later date below)

Signatories

Responsible Officer or Director on behalf of Taxpayer, and dated.

Except in Oil cases (when it will usually be signed by the Competent Authority at Large Business Service Oil and Gas), usually Deputy Director responsible for APA Programme, or APA Coordinator, BID, HMRC, and dated.

Notes

Appendix A (the TPM) – see paragraph 3 - is the ''core'' of the APA. This section may need to be detailed, but it will always be highly tailored to the taxpayer's particular circumstances. HMRC will try and ensure where there is a bilateral or multilateral agreement that Appendix A is expressed in wording which is identical or near-identical with the wording of the transfer pricing methodology in that agreement. If that is not possible, Appendix A will be operated as if it were expressed in identical terms to the methodology set out in the bilateral or multilateral agreement.

Appendix B (Critical Assumptions) – see paragraph 6 - will generally have 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 how it will be clear that ''new generation'' Products are or are not covered by the APA. In these kinds of situations there will generally be a requirement for relevant information to be automatically reported in Annual Reports, see below. In practice, other Critical Assumptions that have on occasion been agreed with taxpayers have included 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.

Appendix C (Annual Reports) – see paragraph 7. Ideally Annual Reports will include, in addition to any required or mandated information on the Covered Transactions (see, for instance, comment above) a one or two sheet or spreadsheet ''proof'' document demonstrating that all the conditions of the APA have been met for the Covered Transactions. Where it is agreed that such a ''proof'' will be provided, its format should be set out in the APA agreement.

These notes are for guidance only and reflect the position at the time of writing. They do not affect any right of appeal.

Issued by HMRC

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17 December 2010

Securities and Exchange Commission Financial Statements Detailing Transfer Pricing Issues Filed During December 2010

Agilent Technologies Inc., 10-K

On August 31, 2010 we reached an agreement with the Internal Revenue Service (''IRS'') for tax years 2000 through 2002. The adjustments were offset by applying available net operating losses and had no material impact on our Statement of Operations. Our U.S. federal income tax returns for 2003 through 2007 are under audit by the IRS. In December 2010, we reached an agreement with the IRS for tax years 2003-2005. In addition, Agilent and the IRS reached an agreement on transfer pricing issues covering years 2003-2007. Tax adjustments resulting from these agreements will be offset with net operating losses and tax credit carryforwards

Boston Scientific Corp., 8-K

On December 17, 2010, we received Notices of Deficiency from the Internal Revenue Service (IRS) claiming that we owe additional taxes, plus interest based on an audit of the 2001, 2002, and 2003 tax years of Guidant Corporation, which we acquired in April 2006, and its subsidiary businesses as they existed in that time-frame. The incremental tax liability asserted by the IRS with regard to the Guidant claim is $525.1 million plus interest. We previously disclosed the receipt in 2008 of a Revenue Agent's Report for Guidant containing significant proposed adjustments and our expectation that we would not be able to resolve the matter through applicable IRS administrative procedures. These Notices of Deficiency are materially consistent with the 2008 Revenue Agent's Report.

The primary issue under dispute relates to transfer pricing in connection with technology license agreements between certain domestic and foreign subsidiaries of Guidant. We do not agree with the transfer pricing methodologies applied by the IRS or its resulting assessment. The Company believes that the IRS positions with regard to these matters are inconsistent with the applicable tax laws and the existing Treasury regulations and that the previously reported income tax for the years in question is appropriate. We believe that we have meritorious defenses for our tax filings and we intend to file a timely petition to the Tax Court to contest the assessment.

No payments on the assessment would be required until the dispute is definitively resolved, which, based on experiences of other companies, could take several years. We believe that our income tax reserves associated with this matter are adequate and that the final resolution will not have a material impact on our financial condition or results of operations. However, both the final resolution and potential impact of that resolution are uncertain and could have a material impact on our financial condition or results of operations.

Dell Inc., 10-Q

Dell's effective income tax rate was 23.6% and 34.5% for the third quarters of Fiscal 2011 and Fiscal 2010, respectively. The decrease in Dell's effective income tax rate for the third quarter of Fiscal 2011, as compared to the third quarter of Fiscal 2010, was primarily attributable to a cumulative catch up of tax expense in the third quarter of Fiscal 2010, due to a change in estimate related to the amount and geographical distribution of Fiscal 2010 income, and to an increase in the third quarter of Fiscal 2011, as compared to the third quarter of Fiscal 2010, in the proportion of taxable income attributable to lower tax jurisdictions. Dell's effective income tax rate for the first nine months of Fiscal 2011 and Fiscal 2010 was 23.2% and 29.3%, respectively. The decrease in Dell's effective income tax rate for the first nine months of Fiscal 2011 as compared to the same period in the prior year was primarily due to an increase in the proportion of taxable income attributable to lower tax jurisdictions during the first nine months of Fiscal 2011, as compared to the first nine months of Fiscal 2010, and to an increased benefit resulting from the favorable settlement of examinations in certain foreign jurisdictions. The differences between the estimated effective income tax rates and the U.S. federal statutory rate of 35% principally result from Dell's geographical distribution of taxable income and differences between the book and tax treatment of certain items. The income tax rate for the fourth quarter of Fiscal 2011 will be impacted by the actual mix of jurisdictions in which income is generated.

Dell is currently under income tax audits in various jurisdictions, including the United States. The tax periods open to examination by the major taxing jurisdictions to which Dell is subject include fiscal years 1997 through 2010. As a result of these audits, Dell maintains ongoing discussions and negotiations relating to tax matters with the taxing authorities in these various jurisdictions. Dell's U.S. federal income tax returns for fiscal years 2007 through 2009 are under examination. The Internal Revenue Service (''IRS'') has issued a Revenue Agent's Report for fiscal years 2004 through 2006 proposing certain assessments primarily related to transfer pricing matters. Dell disagrees with certain of the proposed assessments and has contested them through the IRS administrative procedures. The IRS has recently remanded the audit for the tax years 2004 through 2006 back to examination for further review. Dell believes that it has provided adequate reserves related to all matters contained in tax periods open to examination. However, should Dell experience an unfavorable outcome in the IRS matter, such an outcome could have a material impact on its results of operations, financial position, and cash flows. Although the timing of income tax audit resolutions and negotiations with taxing authorities is highly uncertain, Dell does not anticipate a significant change to the total amount of unrecognized income tax benefits within the next 12 months.

Dell takes certain non-income tax positions in the jurisdictions in which it operates and has received certain non-income tax assessments from various jurisdictions. These jurisdictions include Brazil, where Dell has been in litigation with a state government over the proper application of transactional taxes to warranties and software related to the sale of computers, as well as over the appropriate use of state statutory incentives to reduce the transactional taxes. Dell has also negotiated certain tax incentives with the state that can be used to offset potential tax liabilities should the courts rule against it. The incentives are based upon the number of jobs Dell maintains within the state. Recently, Dell settled two cases related to warranties and software under a taxpayer amnesty program utilizing the incentive credits instead of cash to minimize the impact to its consolidated financial statements. The third outstanding case, in which Dell has pledged its manufacturing facility in Hortolandia, Brazil to the government, remains pending.

Dell believes its positions in these non-income tax litigation matters are supportable, that a liability is not probable, and that it will ultimately prevail. In the normal course of business, Dell's positions and conclusions related to its non-income taxes could be challenged and assessments may be made. To the extent new information is obtained and Dell's views on its positions, probable outcomes of assessments, or litigation change, changes in estimates to Dell's accrued liabilities would be recorded in the period in which such determination is made.

Donaldson Co., 10-Q

At October 31, 2010 the total unrecognized tax benefits were $17.6 million, and accrued interest and penalties on

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these unrecognized tax benefits were $2.0 million. The Company recognizes interest accrued related to unrecognized tax benefits in income tax expense. If the Company were to prevail on all unrecognized tax benefits recorded, substantially all of the unrecognized tax benefits would benefit the effective tax rate. With an average statute of limitations of about 5 years, up to $3.6 million of the unrecognized tax benefits could potentially reverse in the next 12 month period, unless extended by audit. It is reasonably possible that quicker than expected settlement of either current or future audits and disputes would cause additional reversals of previously recorded reserves in the next 12 month period. Currently, the Company has approximately $0.9 million of unrecognized tax benefits that are in dispute with various taxing authorities related to transfer pricing and deductibility of expenses. Quantification of an estimated range and timing of future audit settlements cannot be made at this time.

Hewlett Packard Co., 10-K

[Ed. Note: the company's tabular reconciliation of the balance of unrecognized tax benefits was $2.1 billion as of Oct. 31, 2010.]

HP engages in continuous discussion and negotiation with taxing authorities regarding tax matters in various jurisdictions. HP does not expect complete resolution of any IRS audit cycle within the next 12 months. However, it is reasonably possible that certain federal, foreign and state tax issues may be concluded in the next 12 months, including issues involving transfer pricing and other matters. Accordingly, HP believes it is reasonably possible that its existing unrecognized tax benefits may be reduced by an amount up to $442 million within the next 12 months.

HP is subject to income tax in the United States and approximately 80 foreign countries and is subject to routine corporate income tax audits in many of these jurisdictions. In addition, HP is subject to numerous ongoing audits by state and foreign tax authorities. HP has received from the IRS Notices of Deficiency for its fiscal 1999, 2000, 2003, 2004 and 2005 tax years, and Revenue Agent's Reports (''RAR'') for its fiscal 2001, 2002 and 2006 tax years. The IRS began an audit of HP's 2007 income tax returns in 2009, and began its audit of HP's 2008 income tax returns during 2010. With respect to major foreign and state tax jurisdictions, HP is no longer subject to tax authority examinations for years prior to 1999. HP believes that adequate accruals have been provided for all open tax years.

On July 30, 2009, HP received a Notice of Deficiency from the IRS for its fiscal 2004 and 2005 tax years. The Notice of Deficiency asserted that HP owes additional tax of $92 million and penalties of $5 million. In addition to the proposed deficiency for fiscal 2004 and 2005, the IRS's adjustments for both years, if sustained, would reduce the tax benefits of net operating loss and tax credit carryforwards to subsequent years by approximately $563 million. HP plans to contest certain of the adjustments proposed in the Notice of Deficiency. HP believes that it has provided adequate reserves for any tax deficiencies or reductions in tax benefits that could result from the IRS actions.

Tax years of EDS through 2002 have been audited by the IRS, and all proposed adjustments have been resolved. The IRS is currently auditing EDS's tax years 2005, 2006, 2007 and the short period ended August 26, 2008. On December 5, 2008, EDS received a RAR for exam years 2003 and 2004, proposing a tax deficiency of $82 million. This deficiency includes a $12 million effect on carrybacks to 2000 and 2001. HP is appealing certain issues and believes adequate reserves have been provided for all years.

On January 30, 2008, HP received a Notice of Deficiency from the IRS for its fiscal 2003 tax year. The Notice of Deficiency asserted that HP owes additional tax of $21 million. At the same time, HP received an RAR from the IRS for its fiscal 2002 tax year that proposed no change in HP's tax liability for that year. In addition to the proposed deficiency for fiscal 2003, the IRS's adjustments for both years, if sustained, would reduce tax refund claims HP has filed for net operating loss carrybacks to earlier fiscal years and reduce the tax benefits of tax credit carryforwards to subsequent years, by approximately $249 million. This amount reflects certain transfer pricing adjustments that were settled during fiscal 2008. HP plans to contest certain remaining adjustments proposed in the Notice of Deficiency and the RAR. Towards this end, HP filed a petition with the United States Tax Court on April 29, 2008. HP believes that it has provided adequate reserves for any tax deficiencies or reductions in refund claims that could result from the IRS actions.

On June 28, 2007, HP received a Notice of Deficiency from the IRS for its fiscal 1999 and 2000 tax years. The Notice of Deficiency asserted that HP owes additional tax of $13 million for these two years. At the same time, HP received a RAR from IRS for its fiscal 2001 tax year that proposed no change in HP's tax liability for that year. In addition to the proposed deficiencies for fiscal 1999 and 2000, the IRS's adjustments, if sustained, would reduce tax refund claims HP has filed for foreign tax credit and net operating loss carrybacks to earlier fiscal years and reduce the tax benefits of carryforwards to subsequent years, by approximately $80 million. HP plans to contest certain of the adjustments proposed in the Notice of Deficiency and the RAR. Towards this end, HP filed a Petition with the United States Tax Court on September 25, 2007. HP believes that it has provided adequate reserves for any tax deficiencies or reductions in refund claims that could result from the IRS actions.

HP has not provided for U.S. federal income and foreign withholding taxes on $21.9 billion of undistributed earnings from non-U.S. operations as of October 31, 2010 because HP intends to reinvest such earnings indefinitely outside of the United States. If HP were to distribute these earnings, foreign tax credits may become available under current law to reduce the resulting U.S. income tax liability. Determination of the amount of unrecognized deferred tax liability related to these earnings is not practicable. HP will remit non-indefinitely reinvested earnings of its non-US subsidiaries for which deferred U.S. federal and withholding taxes have been provided where excess cash has accumulated and it determines that it is advantageous for business operations, tax or cash management reasons.

Toro Co., 10-K

The effective tax rate for fiscal 2010 was 34.0 percent compared to 34.4 percent in fiscal 2009. The realization of deferred tax assets is assessed and a valuation allowance is recorded to the extent it is more likely than not that any portion of the deferred tax asset will not be recognized. The decrease in the effective tax rate was due to a valuation allowance recorded in fiscal 2009 of $1.5 million for foreign subsidiaries' net operating loss carry-forwards that was not duplicated in fiscal 2010 and the favorable resolution of a transfer pricing issue. This decrease was somewhat offset by the expiration of the domestic research tax credit on December 31, 2009.

We anticipate our tax rate for fiscal 2011 to be lower than fiscal 2010 due to the extension of the domestic research tax credit in mid-December 2010.

Visant Corp., S-4

The Company's income tax filings for 2005 to 2008 are subject to examination in the U.S federal tax jurisdiction. During 2009 the Company agreed to certain audit adjustments in connection with the Internal Revenue Service (''IRS'') examination of the Company's tax filings for 2005 and 2006. The settlement resulted in only minor adjustments. The IRS also proposed certain transfer price adjustments for which the Company disagreed in order to preserve its right to seek relief from double taxation with the applicable U.S. and French tax authorities. During 2008 the IRS concluded its examination of two pre-acquisition tax filings for one of the Company's subsidiaries for 2004,

resulting in only minor adjustments. The Company is also subject to examination in state and foreign tax jurisdictions for the 2004 to 2008 periods, none of which was individually material. During 2009 the Company filed a notice of objection with the Canadian Revenue Agency (″CRA″) in connection with the CRA's reassessment of tax years 1996 and 1997 for issues related to transfer pricing. The Company was notified in February 2010 that the CRA withdrew its original assessment for both tax periods and will refund approximately $0.7 million of tax and interest previously paid by the Company. The effect of the CRA's decision will be recorded in the Company's results of operations during its first fiscal quarter of 2010. The Company's Canadian income tax filings for 2007 and 2008 are currently under examination by the CRA. Though subject to uncertainty, the Company believes it has made appropriate provisions for all outstanding issues for all open years and in all applicable jurisdictions. Due primarily to the potential for resolution of the Company's current U.S. federal examination and the expiration of the related statute of limitations, it is reasonably possible that the Company's gross unrecognized tax benefit liability could change within the next twelve months by a range of zero to $9.0 million.

Wal-Mart Stores Inc., 10-Q

Our effective income tax rate was 29.5% and 32.9% for the three and nine months ended October 31, 2010, respectively, as compared to 34.3% and 34.1% for the three and nine months ended October 31, 2009, respectively. These declines in the effective tax rate are primarily due to a $191 million tax benefit related to changes in transfer pricing policies in a foreign tax jurisdiction during the three months ended October 31, 2010. We expect the fiscal 2011 annual effective tax rate to be approximately 33% to 34%. Significant factors that may impact the annual effective tax rate include changes in our assessment of certain tax contingencies, settlement of tax contingencies and the mix of earnings among our U.S. and international operations.

U.S. Competent Authority Statistics for 2006-2010 [Released 12/27/2010 by IRS Deputy Commissioner (International), LB&I]

Section 1

SUMMARY OF YEAR END INVENTORY

Includes the Following Cases Only: Allocation (A), Non Allocation (N), Permanent Establishment (E), Limitation on Benefits (L) and Advance Pricing Agreement (P)

FISCAL YEAR	CASES RECEIVED	CASES DISPOSED	YEAR END INVENTORY
2006	240	234	430
2007	257	187	500
2008	308	230	578
2009	326	180	724
2010	252	271	705

Section 2

PROCESSING TIME ON CLOSED CASES (AVERAGE DAYS)

Section 2 includes types A, N, E & L cases only. Refer to Section 9 for Advance Pricing Agreement cases

FISCAL YEAR	US INITIATED	FOREIGN INITIATED	COMBINED
2006	646	756	732
2007	397	654	570
2008	424	791	649
2009	699	738	722
2010	815	886	868

Section 3

COMPETENT AUTHORITY RELIEF FY 2006 through FY2010

Section 3 includes Allocation and Non-allocation cases only. Figures represent a percentage of the total dollar adjustment. Amounts do not include taxpayer withdrawals.

RELIEF	2006	2007	2008	2009	2010	5-YR AVERAGE FY 2006-2010
Correlative Adjustment	53.80%	35.61%	56.45%	34.76%	33.03%	42.73%
Adjustment Withdrawn	28.60%	60.14%	32.81%	60.83%	63.59%	49.19%
Partial Relief	4.42%	0.23%	3.34%	3.40%	1.78%	2.63%

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RELIEF	2006	2007	2008	2009	2010	5-YR AVERAGE FY 2006-2010
No Relief	13.18%	4.02%	7.40%	1.01%	1.60%	5.44%

Section 4

INVENTORY – ALLOCATION CASES ONLY

FISCAL YEAR	US INITIATED		FOREIGN INITIATED		YEAR ENDINVENTORY
	RECEIVED	DISPOSED	RECEIVED	DISPOSED	
2006	31	38	78	97	176
2007	28	13	93	57	227
2008	23	22	98	70	256
2009	24	30	134	55	329
2010	23	31	77	115	283

Section 5

PROCESSING TIME ON CLOSED ALLOCATION CASES (AVERAGE DAYS)

FISCAL YEAR	US INITIATED	FOREIGN INITIATED	COMBINED
2006	634	797	750
2007	687	646	653
2008	857	804	816
2009	893	740	795
2010	779	937	903

Section 6

INVENTORY – NON ALLOCATION CASES (N), PERMANENT ESTABLISHMENT (E), And LIMITATION ON BENEFITS (L)

FISCAL YEAR	US INITIATED		FOREIGN INITIATED		YEAR ENDINVENTORY
	RECEIVED	DISPOSED	RECEIVED	DISPOSED	
2006	19	21	41	42	86
2007	40	28	37	27	108
2008	60	49	62	42	139
2009	45	22	41	20	183
2010	31	23	48	41	198

Section 7

PROCESSING TIME ON CLOSED NON-ALLOCATION CASES (N), PERMANENT ESTABLISHMENT (E), And LIMITATION ON BENEFITS (L) (AVERAGE DAYS)

FISCAL YEAR	US INITIATED	FOREIGN INITIATED	COMBINED
2006	631	662	651
2007	262	673	464
2008	230	771	479
2009	435	732	576
2010	864	743	787

Section 8

INVENTORY – ADVANCE PRICING AGREEMENTS

FISCAL YEAR	CASES RECEIVED	CASES DISPOSED	YEAR END INVENTORY
2006	71	39	168
2007	59	62	165
2008	65	47	183
2009	82	53	212
2010	73	61	224

Section 9

PROCESSING TIME ON ADVANCE PRICING AGREEMENTS

FISCAL YEAR	AVERAGE DAYS IN TAX TREATY OFFICE	TOTAL TIME TO CLOSE AN APA
2006	599	1,103
2007	516	1,141
2008	412	898
2009	515	1,039
2010	593	1,229

Authorization Forms for Arbitration Under U.S. Treaties [Posted to IRS website 12/8/10]

TAXPAYER CONSENT TO MAP ARBITRATION AND NONDISCLOSURE STATEMENT

____
NAME OF TAXPAYER

____
ADDRESS

____
CITY STATE COUNTRY POSTALCODE(ZIPCODE)

The above-named taxpayer hereby consents to the competent authorities of the United States and **[Name of treaty partner]** undertaking an arbitration proceeding described in paragraphs **[5]** and **[6]** of Article **[25]*** (Mutual Agreement Procedures) of the income tax convention between the United States and **[Name of treaty partner]**, as necessary in order to reach a mutual agreement under Article **[25]** regarding the request filed with the United States Competent Authority on _[date]__.

This consent and nondisclosure statement also covers the following concerned persons[1] that the taxpayer has the legal authority to bind:

[Enter name and address of each such concerned person. If none, enter ''Not Applicable.'']

The following concerned persons, if any, are not covered by this consent and nondisclosure statement (and therefore must submit a separate consent and nondisclosure statement on their own behalf):

[Enter name and address of each such concerned person. If none, enter ''Not Applicable.'']

In making this consent, the taxpayer and, if applicable, each of the concerned persons covered by this consent and nondisclosure statement, agrees not to disclose to any person (other than the taxpayer's authorized representative or agent, another concerned person, its authorized representative or agent, or one of the competent authorities or its authorized representative[2]) any information received during the course of the arbitration proceeding from either Contracting State or the arbitration board, other than the determination of such board.

The following persons are all of the representatives or agents of the taxpayer or, if applicable, the specified concerned person, who have been authorized to assist the taxpayer or specified concerned person in the mutual agreement procedure to which this consent and nondisclosure statement applies. Attached to this consent and nondisclosure statement are the nondisclosure statements of each of these representatives and agents, as is required by **[paragraph 6 of Article 25]**.

[Enter name and address of each such representative or agent and the concerned person(s) for which each is acting. If none, enter ''Not Applicable.'']

Under penalties of perjury, I declare that I have examined this consent and nondisclosure statement and any accompanying attachments and to the best of my knowledge and belief, they are true, correct, and complete. Furthermore, I certify that I have the legal authority to execute this consent and nondisclosure statement on behalf of each concerned person covered by it and to bind each concerned person to its terms.

______________ ______________________________
Date Signature

____
Printed Name

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Position

* modify citations as appropriate to particular treaty
[1] As defined in the relevant treaty provisions, the term ''concerned person'' means the taxpayer requesting mutual agreement procedure assistance from a competent authority under Article [25] and any other person whose tax liability to either the United States or the treaty partner may be directly affected by the mutual agreement arising from that request. A concerned person that has the legal authority to bind any other concerned person(s) on this matter may do so in a comprehensive statement.
[2] The U.S. Competent Authority has authorized the International Centre for Dispute Resolution (ICDR), a division of the American Arbitration Association, to act on its behalf with respect to certain designated matters concerning the arbitration proceeding.

* * * * * * *

NONDISCLOSURE STATEMENT OF TAXPAYER'S AUTHORIZED REPRESENTATIVE

I hereby agree that neither I nor any member of my firm's office staff nor any other person who may assist me or the firm in the mutual agreement proceeding requested in the letter of __[date]__ submitted by ___[name of taxpayer]__- to the competent authorities of the United States and ___[name of treaty partner]___ will disclose to any person (other than the taxpayer, another concerned person,[1] its authorized representative or agent, or one of the competent authorities or its authorized representative[2]) any information received during the course of the arbitration proceeding from either Contracting State or the arbitration board, other than the determination of such board.

Date Signature

Printed Name

Position

[1] As defined in the relevant treaty provisions, the term ''concerned person'' means the taxpayer requesting mutual agreement procedure assistance from a competent authority under the MAP article [e.g., Article 25] and any other person whose tax liability to either the United States or treaty partner may be directly affected by the mutual agreement arising from that request.
[2] The U.S. Competent Authority has authorized the International Centre for Dispute Resolution (ICDR), a division of the American Arbitration Association to act on its behalf with respect to certain designated matters concerning the arbitration proceeding

* * * * * * *

TAXPAYER AUTHORIZATION TO DISCLOSE TAX INFORMATION FOR PURPOSES OF TREATY MAP ARBITRATION PROCEEDINGS

NAME OF TAXPAYER

U.S. TAX IDENTIFICATION NUMBER (e.g., EIN)

ADDRESS

CITY STATE COUNTRY POSTALCODE(ZIPCODE)

The above-named taxpayer, in accordance with its request of *[date]* that the competent authorities of the United States and **[Name of treaty partner]** undertake an arbitration proceeding described in paragraphs **[5]** and **[6]** of Article **[25]*** of the income tax convention between the United States and **[Name of treaty partner]**, consents to the disclosure by the U.S. Competent Authority of any and all returns and return information with respect to the taxpayer's mutual agreement procedure (MAP) request submitted to the U.S. Competent Authority on *[date]* , to the individuals appointed (or identified for potential appointment pending clearance) by the respective competent authorities to arbitrate the MAP case, the individual appointed (or identified for potential appointment pending clearance) as the Chair of the arbitration panel, and the following representatives, if any, of the respective competent authorities who are authorized by the competent authority to act on its behalf with respect to certain designated matters concerning the arbitration proceeding:

In the case of the United States: International Centre for Dispute Resolution (ICDR), a division of the American Arbitration Association

In the case of **[Name of treaty partner]:** ____________

In the case of a consolidated group of U.S. corporations, this consent is made in regard to all such information concerning the following members of the consolidated group, who are the subjects of the mutual agreement request:

[Enter name and address of each consolidated group member, if any, who is a concerned person.[1] If none, enter ''Not Applicable.'']

I certify that I have the legal authority to execute a request for or consent to disclose a return or return information to disclose information to third parties (as described in Treas. Reg. §301.6103(c)-1(e)(4)) and I hereby make this consent on behalf of the taxpayer, including each of the members of the consolidated group listed above.[2]

Date Signature

Printed Name

Position

* modify citations as appropriate to particular treaty
[1] As defined in the relevant treaty provisions, the term ''concerned person'' means the taxpayer requesting mutual agreement procedure assistance from a competent authority under Article [25] and any other person whose tax liability to either the United States or the treaty partner may be directly affected by the mutual agreement arising from that request.
[2] *Each taxpayer or concerned person* (as defined in footnote 1) whose U.S. tax liability may be directly affected by the mutual agreement procedure request *must sign a consent*. In the case of a consolidated group (as defined in Treas. Reg. 1.1502-1(h)), a person authorized by law to act for the common parent should execute the consent on behalf of the group. See Treas. Reg. §1.1502-77(a).

IRS Statement on Process for Identifying Arbitrators [Posted to IRS website 12/8/10]

Mandatory Tax Treaty Arbitration

The United States has entered into new treaties and protocols with Belgium, Canada and Germany to allow for a mandatory arbitration process to supplement the historic negotiation process used in the Mutual Agreement Procedure.

Mandatory Arbitration Documents with Germany, Belgium and Canada

Taxpayer Agreements for MAP Arbitration

Identification of Arbitrators

The Internal Revenue Service (IRS) has entered into an agreement with the International Centre for Dispute Resolution (ICDR) to provide administrative services in support of arbitration under the Mutual Agreement Procedure (MAP) article of United States income tax treaties. The ICDR carries out the international operations of the American Arbitration Association (AAA), a not-for-profit public service organization. The ICDR's headquarters are in New York City, and it is supported by a network of cooperative agreements with institutions and key alliances covering over 40 countries.

The administrative services provided by the ICDR will include training and selection of arbitrators along with case management for cases sent to arbitration. In providing these services, ICDR draws on its institutional experience, international expertise, multilingual case management staff, flexibility and a commitment to service along with cultural sensitivity.

Persons interested in serving as arbitrators must have significant international tax experience, preferably with extensive involvement in the development and resolution of transfer pricing matters. Persons interested in serving as arbitrators for unagreed MAP cases should contact Luis Martinez, Vice President of ICDR, at *MartinezL@adr.org*.

Solicitation for Arbitrators of Canada-U.S. Double Tax Disputes [Canada Revenue Agency, October 2010]

International Tax Treaty Arbitrators

Disclaimer

Header

Reference Number	206166
Solicitation Number	1000264725
Organization Name	Canada Revenue Agency Agence du revenu du Canada
Source ID	FD.DP.ON.111106.C72868
Associated Components	Yes

Dates

Published	2010-10-18
Revised	2010-10-20
Closing	2010-12-17 05:00 PM Eastern Standard Time EST

Details

Category	Professional, Administrative and Management Support Services
GSINS	R0: Professional Services
Region of Delivery	Canada
Region of Opportunity	Canada
Agreement Type	None
Tender Type	Request for Qualification
Estimated Value	
Solicitation Method	

Notice Description

International Tax Treaty Arbitrators

Please note that the information included in the attached document is duplicated in the description provided in the text below; therefore downloading of the attachment is not required.

Request for Qualification (RFQ)
For the Provision of International Tax Treaty Arbitrators to the Canada Revenue Agency (CRA)

Purpose Of This RFQ

The purpose of this Request for Qualification (RFQ) is to seek expressions of interest from individuals with significant expertise in international taxation that would be able to provide tax treaty arbitration services in an effort to resolve tax disputes in compliance with the arbitration provision added by the 5th Protocol to Canada's tax treaty with the United States.

Background Information

The 5th Protocol to Canada's tax treaty with the United States includes a provision to resolve certain international tax disputes (''mutual agreement procedure cases'' or ''MAP cases'') through a process of mandatory arbitration. The basic rule for arbitration is: if the two countries cannot reach a negotiated settlement within 2 years, the MAP case maybe decided by an arbitration board established for that particular case. The treaty partners would be bound by the board's decision.

General Description of the Requirement

The arbitration board would consist of three persons with significant experience in international tax law. Canada would designate one arbitrator, the United States another arbitrator and the two country-appointed arbitrators would in turn designate a third person to be the Chair of the arbitration board.

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The selected individuals would be required to sign a confidentiality/nondisclosure agreement to disclose all possible conflicts of interest as well as to protect the privacy of all interested parties.

Fees and expenses would be set in accordance with the International Centre for Settlement of Investment Disputes (ICSID) Schedule of Fees for arbitrators, in effect on the date the arbitration begins. It is anticipated that it would require about 3-5 working days for the board to make its decision.

Qualifications

All interested parties should submit the following information in response to this notice:

1. Curriculum vitae with a description of past and current employment.
2. Your capabilities or experience in arbitration specifically with regard to taxation matters.
3. A description of your experience (including number of years) in planning or resolution of taxation issues that primarily concern corporate taxpayers.
4. A description of your experience (including number of years) in each of the following:

a. International taxation
b. International transfer pricing
c. Any other experience related to determination of residence of a natural person, determination of permanent establishments and issues related to royalties, especially valuation issues.

Please note that individuals will not necessarily be contacted. This RFQ will be used as one tool to identify potential individuals but Canada may also use other means to identify appropriate individuals. The CRA is responsible for administering the arbitration proceedings and is under no obligation to choose individuals from this solicitation.

Disclaimer

Responding to this Request for Qualification (RFQ) is not a prerequisite to receiving or being eligible to bid on any Request for Proposal (RFP) for this requirement nor receive any contracts. Any RFP will be advertised on the Government Electronic Tendering Service (GETS) commonly referred to as MERX.

This RFQ is not to be construed as a solicitation for tenders or proposals. No contract or other form of commitment will be entered into based on responses to this RFQ. This RFQ is not considered as authorization by the CRA to undertake any work that would result in costs to the CRA.

Nothing in this RFQ shall be construed as a commitment from the CRA to issue an RFP for this requirement. The CRA may use non-proprietary information provided in the RFQ process and/or in the preparation of any formal RFP. All responses will be held by the CRA on a confidential basis (subject to applicable federal legislation) and remain the property of the CRA once they have been received. The CRA may reproduce or photocopy or transcribe the response and any non-proprietary supporting documentation for the purpose of its review and/or inclusion in any resulting RFP document. Contractors responding to this RFQ may be invited to a meeting to further clarify their responses to the qualifications provided above.

The CRA shall not be bound by anything stated herein. The CRA reserves the right to change, at any time, any or all parts of the requirements, as it deems necessary. The CRA also reserves the right to revise its procurement approach, as it considers appropriate, either based upon information submitted in response to this RFQ or for any other reason it deems appropriate.

Suppliers are invited to submit information in response to the qualifications stated above.

Respondents are required to send their responses to this RFQ via e-mail no later than 5:00PM EST, December 17, 2010, at the address below:
michael.yaehne@cra-arc.gc.ca

Respondents to this RFQ are required to insert the following text in the subject line of their e-mail:

''International Tax Treaty Arbitrators RFQ'',

Contact(s)

Contracting Authority

Name	Michael Yaehne
Address	8th Floor 250 Albert Street
City	Ottawa
State / Province	ON
Country	Canada
Postal Code	K1A 0L5
Phone	(613)995-4672
Fax	(613)948-2459
Email	*michael.yaehne@cra-arc.gc.ca*
Website URL	

Italian Rules on Documenting Transfer Prices [Ref. 2010/13765; government's unofficial translation]

Unofficial Translation of the Decision of the Commissioner of Italy Revenue Agency dated September 29, 2010 (ref.2010/137654 29.09.2010)

Implementation of the provision endorsed in Article 1, paragraph 2-ter of Legislative Decree No. 471 of 18 December 1997, regarding the documentation requirements in order to verify the consistency of the transfer prices set by multinational enterprises (hereinafter, ''MNEs'') with the arm's length principle and approval of the technical specifications concerning the electronic filing of the communication regarding the adoption of the documentation requirements as provided for by article 26 of the Law Decree No. 78 of may 31, 2010 implemented - with amendments – by Law No. 122 of 30 July 2010.

THE COMMISSIONER OF AGENZIA DELLE ENTRATE

In order to allow enterprises resident for tax purposes in Italy - qualified as such according to the existing provisions in force within the Income Tax Code for direct tax purposes- falling within the scope of paragraph 7 of Article 110 of the Presidential Decree No. 917 of 22 December 1986 – to opt to the regime endorsed in article 1, paragraph 2-ter of the Legislative Decree No. 471 of 18 December 1997, and on the basis of the powers granted to him by the specific provisions herewith reported,

PROVIDES AS FOLLOWS:

1. Definitions

The following definitions are provided for in order to apply the articles included herewith:

a) the term ''holding enterprise part of a multinational group of companies'' shall mean an enterprise resident for tax purposes in Italy that:

– is not controlled by any other enterprise, company or any other legal entity carrying out a commercial activity, wherever resident for tax purposes;
– controls, also by means of a sub-holding, one or more enterprises nonresident for tax purposes in Italy;

b) the term ''sub-holding part of a multinational group of companies'' shall mean an enterprise resident for tax purposes in Italy that:

– is controlled by any other enterprise, company or any other legal entity carrying out a commercial activity, wherever resident for tax purposes;
– controls one or more enterprises non-resident for tax purposes in Italy;

c) the term ''subsidiary enterprise part of a multinational group of companies'' shall mean an enterprise or company resident for tax purposes in Italy that:

– is controlled by any other enterprise, company or any other legal entity carrying out a commercial activity, wherever resident for tax purposes;
– does not control other enterprises or companies not resident for tax purposes in Italy;

d) the taxpayers referred to sub letters from (a) to (c) are qualified as ''small or medium-sized enterprises'' in the event their total turnover or revenue does not exceed the threshold of fifty million Euros. Notwithstanding this definition, the taxpayers referred to sub letters (a) and (b) do not fall within this definition should they control directly or indirectly at least one entity not qualified as a ''small or medium sized enterprise'' on the basis of the current decision;

e) the term ''OECD Transfer Pricing Guidelines'' shall mean the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, approved by the OECD Council on 22 July 2010;

f) the term ''Code of Conduct'' shall mean the Code of Conduct on transfer pricing documentation for associated enterprises in the European Union and the Annex thereof, approved by Resolution 2006/c176/01 of 27 June 2006 from the EU Council and government representatives of Member States;

g) the term ''traditional transactional method'' refers to one of the transfer pricing methods described in Chapter II, Part II of the OECD Transfer Pricing Guidelines;

h) the term ''transactional profit method'' refers to one of the transfer pricing methods described in Chapter II, Part III of the OECD Transfer Pricing Guidelines.

2. Documentation allowing to verify that the transfer prices set by MNEs are consistent with the arm's length principle as endorsed by article 1, paragraph 2-ter of Legislative Decree No. 471 of 18 December 1997

The documentation allowing to verify that the transfer prices set by MNEs are consistent with the arm's length principle (hereinafter ''Proper Documentation'') is the documentation that, if delivered during an audit process or any other fiscal activity, allows the taxpayer to access to the regime provided for by article 1, paragraph 2-*ter* of the Legislative Decree No. 471 of 18 December 1997. Notwithstanding the provisions included from Article 3 to 7 of the current Decision, the Proper Documentation is made of:

a) a document called Masterfile;

b) a document called Country Specific Documentation

2.1. Masterfile

The Masterfile collects information regarding the Multinational Group and it shall be organized in the following chapters, paragraphs and sub-paragraphs, each of them containing the information stemming from the corresponding heading and from the potential further indications included within square brackets. The submission of more than one Masterfile is allowed insofar as the Multinational Group carry out several industrial and commercial activities different from each other and regulated by specific transfer pricing policies.

1. a general description of the multinational group (history, recent developments, business sectors in which it operates and overview of relevant markets of reference)

2. Multinational Group Structure

2.1 Organizational Structure [*including an organization chart, a list of group members, their legal nature, including reference to their shareholding percentages*]

2.2 Operational Structure [*this paragraph contains a general description of the role that each of the associated enterprises carries out with respect to the multinational group's activities*]

3. Business strategies pursued by the Multinational Group [*with specific reference to its development and consolidations strategies*] including potential changes to the overall business strategies if compared to the previous tax year

4. Transaction flows [*in this paragraph an overview of the general transaction flows as described in the following chapter 5 must be provided for, including the invoicing flows and the amounts thereof and describing the underlying legal and economic reasons on the basis of which the activity has been structured as shown in the transaction flows. The transaction flows will have to be described in a flow-chart encompassing also those pertaining transactions not falling into the ordinary management activity*]

5. Intra-group transactions

5.1 Sale of tangible or intangible assets, provision of services, financial services transactions [*each of the following paragraphs shall provide, for each set of transactions, (i) a description of the underlying nature of the intragroup transactions, with the option of excluding those involving transfer of goods or services between associated enterprises both resident for tax purposes in countries other than the European Union; (ii) a list of the entities part of the multinational group, between those indicated in the previous chapter 2, amongst which the transactions involving the above described goods and services were carried out. Similar categories of goods and services may be aggregated in accordance with the guidance provided for by the OECD Transfer Pricing Guidelines*]

5.1.1 Transactions type 1

5.1.2 5 Transactions type 2

5.1.n. Transactions type n

5.2 Intra-Group Services [*each of the following paragraphs shall provide in detail the features of intra-group services carried out by one or more associated enterprises to the benefit of one or other associated enterprises and the entities part of the multinational group, between those listed at chapter 2, between which the said services are carried out*]

5.2.1 Services type 1

5.2.2 Services type 2

5.2.n. Services type n

5.3 Cost contribution arrangements [*in this chapter a list regarding the actual cost contribution arrangements shall be provided, with an indication, for each arrangements, of the scope, duration, members of the arrangement, areas of activity and projects covered*]

6. Functions performed, assets used and risks assumed [*in this chapter the taxpayer will have to provide a general description of the functions performed, assets used and risks assumed by each of the enterprises involved in the transactions and of potential changes occurring in the functions, assets and risks if compared to the prior taxable year, with specific reference to changes triggered by business restructuring transactions*]

7. Intangible assets [*in this chapter a list of the intangible assets owned by each associated enterprise will have to be provided for, with a separate identification of any royalty payment, separated per recipient or payer respectively, and paid as a result of the exploitation of them*]

8. Transfer Pricing policy of the Multinational Group [*in this chapter a description of the multinational group's*

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transfer pricing policy will have to be provided for, and of the underlying rationale that should support its consistency with the arm's length principle. In order to substantiate this information, it will be necessary to briefly refer to the contractual arrangements underlying the above mentioned transfer pricing policy]

9. Relationships with the tax administrations of the Member States of the European Union regarding the *Advance Pricing Arrangements* (APAs) and transfer pricing rulings [*in this paragraph a brief description of the APAs and rulings signed by or released from the tax administrations of the countries in which the multinational group operates will have to be submitted, by describing the scope, content and duration of each agreements. The paragraph should be structured per country*].

2.2. Country Specific Documentation

The Country Specific Documentation contains information regarding the enterprise and it must be organized in the following chapters, paragraphs and sub-paragraphs, each of them containing the heading and the information stemming from the corresponding heading and from the potential further indications placed under square brackets:

1. General description of the enterprise (history, recent evolution and general overview of the relevant markets of reference)

2. Business Sectors

2.1 Sector 1

2.2 Sector 2

2.n Sector n

3. Enterprise's organization chart [*the paragraph contains a general overview of the role that each of the enterprise's business units carries out within the general activity*'']

4. General business strategies pursued by the enterprise and potential changes compared to the previous tax year's [*the paragraph contains information regarding also specific strategies on specific sectors or markets*]

5. Controlled transactions (sale of tangible or intangible goods, provision of services, financial services transactions) [*the current chapter can be divided in a number of paragraphs (from 5.1. to 5.n and corresponding subparagraphs) corresponding to the different type of transactions carried out between members of the multinational group. Consistent categories of transactions may be aggregated in a manner consistent to the guidance endorsed by the OECD Transfer Pricing Guidelines. In each of these paragraphs the nature of transactions involving goods and/or services above mentioned will have to be described in detail, including the intra-group services. In the introductory part of the chapter a list of the transactions described in the following paragraphs together with a detailed chart of the transactions' flows have to be submitted, including the amounts, describing the underlying economic and legal reasons on the basis of which the activity has been structured as described in the flowchart.*]

5.1 Type 1 transactions

5.1.1 Description of the transactions [*this section shall also indicate a list of the group members counter-part in the transactions. It will have to be expressly mentioned the circumstance whereby the same or similar transactions have been taking place between independent parties*]

5.1.2 Comparability analysis

a) Characteristics of property or services

b) Analysis of the functions performed, risks assumed and assets used [*in this section an indication of potential changes in the functions performed, assets used and risks assumed compared to the previous tax year will have to be provided for, with specific reference to changes if occurred in the context of a business restructuring*]

c) Contractual terms [*this section requires to report the key elements of written contracts regarding the transactions, specifying if they have general validity among the group]*]

d) Economic circumstances [*this section shall contain references to the general features of the relevant markets, irrespective if they are relevant for supply, transit or distribution]*

e) Business strategies

5.1.3 Selection of the transfer pricing method

a) description of the selected transfer pricing method and of the underlying reasons determining its consistency with the arm's length principle [*this section shall also report the outcome of the comparability analysis that has determined the selection of the transfer pricing method deemed to be the most appropriate to the circumstances of the case. Should a transactional profit method be selected when a traditional transactional method could be applied in an equally reliable manner, it should be explained why the latter had been excluded. The same explanation applies in case of a selection of a method other than the CUP method, in the event the latter could potentially be chosen by the taxpayer*]

b) Criteria for the application of the selected transfer pricing method [*within this section an accurate description of the procedure followed by the taxpayer for the selection of comparable transactions will have to be provided for and, if needed, a clear description of the underlying reasons for identifying a specific arms' length range*]

c) Results deriving from the application of the selected transfer pricing method

5.n Type n transactions [*additional paragraphs and following subparagraphs at 5.1., if needed, will have to be structured according to the above mentioned scheme*]

6. Intra-group transactions (Cost Contribution Arrangements or ''CCAs'' to which the enterprise is part of)

6.1 Participants, scope and terms

6.2 Activities' framework and projects covered

6.3 Method used for the determination of the expected benefits for each participant, including expected results, partial outcomes and divergences

6.4 Form and amount of each participant's contribution to the arrangement, including methods and criteria to determine them accordingly

6.5 Formalities, procedures and consequences arising from the entry and withdrawal from the CCA by associated enterprises participating to it, including the termination thereof

6.6 Contractual arrangements concerning balancing payments or amendments to the CCA stemming from a change of circumstances

6.7 Changes occurred during the validity period of the CCA

ANNEX 1 Flowchart describing the transaction flows, including those falling out of the scope of the ordinary management activities.

ANNEX 2 Copy of written contracts on the basis of which the transactions referred to at chapters 5 and 6 are regulated

3. Proper Documentation for holding enterprises part of a multinational group of companies

For holding enterprises part of a multinational group of companies the proper documentation referred to in article 1, paragraph 2-*ter* of the Legislative Decree No. 471 of 18 December, 1997, is made of:

a) a document named Masterfile, consistent with the same structure and contents as listed in article 2.1.; and of

b) a document called Country Specific Documentation, consistent with the same structure and contents as listed in article 2.2.

4. Proper documentation for sub-holding enterprises part of a multinational group of companies

For sub-holding companies part of a multinational group of companies the proper documentation set referred to in article 1, paragraph 2-*ter* of the Legislative Decree No. 471 of 18 December, 1997, is composed of:

a) a document named Masterfile, consistent with the same structure and contents as listed in article 2.1, although the information therein contained can be referred only the sub-group at the top of which the sub-holding is placed; and of

b) a document called Country Specific Documentation, consistent with the same structure and contents as listed in article 2.2.

In lieu of the Masterfile mentioned in the previous paragraphs, the Masterfile regarding the entire multinational group can be adopted, even though it is prepared by a taxpayer resident in another State Member of the European Union, subject to the condition that it is consistent with the Code of Conduct.

In the event the Masterfile regarding the entire multinational group includes less information with respect to those indicated in this Decision, it will have to be integrated by the sub-holding accordingly.

5. Proper documentation for subsidiaries part of a multinational group

For subsidiaries part of a multinational group, the proper set of documentation referred to by article 1 paragraph 2-*ter* of the Legislative Decree No. 471 of 18 December, 1997, is composed only by a document entitled Country Specific documentation, that includes the same structure and contents as those listed at article 2.2.

6. Proper Documentation for permanent establishments in Italy of non-resident enterprises

For the permanent establishments in Italy of non-resident enterprises paragraphs 3, 4 and 5 apply, depending whether the non-resident taxpayer of which the permanent establishment is part qualifies as, respectively, holding, sub-holding or subsidiary part of a multinational group.

7. Proper documentation for small and medium-sized enterprises

Small and medium sized enterprises are entitled not to update the data referred to in paragraphs 5.1.3 of Article 2.2 with respect to the two taxable periods following the one the said documentation relates to, in case the comparability analysis is based on publicly available information sources, and insofar as the factors listed from paragraphs a) to e) of paragraph 5.1.2 of article 2.2. do not incur substantial changes during the above mentioned taxable periods.

8. Form, extension and conditions of the proper documentation

8.1. Form of the Masterfile and of the Country Specific Documentation

The Masterfile and the Country Specific Documentation must be drafted in Italian.

However, in the event the taxpayer submits the Masterfile regarding the entire multinational group as stated in article 4, it can be drafted in English.

It is allowed to include information in the Masterfile rather than in the Country Specific Documentation, to the extent that the said information are consistent to those set out sub Article 2.2 of the current Decision.

The Masterfile and the Country Specific Documentation must be signed on each page by the legal representative or by a delegate representing the taxpayer and officially signed on the last page by the same legal counsel or certified by means of electronic signature.

In the event an enterprise part of a multinational group having its holding company resident in one State Member of the European Union that has adopted the Code of Conduct submits the Masterfile regarding the entire multinational group as stated in article 4, the signature by the legal representative of the taxpayer certifies that the copy delivered to the tax authorities is consistent with the original document.

The Proper Documentation must be submitted in electronic format. The submission of the said documentation on paper version does not prevent the application of article 1 paragraph 2-*ter* of the Legislative Decree No. 471 of 18 December, 1997, insofar as the taxpayer will submit it in electronic format within a reasonable time frame assigned by the officials in charge of the audit activity.

8.2. Terms of delivery of the Proper Documentation

The submission of the Proper Documentation to the tax authorities must be executed within and not beyond 10 days upon request. In case, during an audit or any other assessment activity, supplementary information is needed if compared with that included in the documentation already submitted to the tax authorities and prepared according to the current Decree, the said supplementary information must be provided either within 7 days upon request or in a longer time period depending on the complexity of the transactions under analysis, to the extent that the above period is consistent with the time of the audit. Once these terms are elapsed, the tax authorities are not bound by the application article 1 paragraph 2-*ter* of the Legislative Decree No. 471 of 18 December, 1997,

8.3. Extent and conditions of validity of the Proper Documentation

The Proper Documentation must be drafted on a yearly basis with respect to the transactions carried out by the taxpayer falling into the scope of paragraph 7 of Article 110 of the Presidential Decree No. 917 of 22 December 1986 and it must be available in each of the taxable periods subject to audit according to the ordinary provisions.

The filing of the Documentation does not bind the tax authorities to the application of Article 1, paragraph 2-*ter* of the Legislative Decree No. 471 of 18 December, 1997, when:

- notwithstanding the compliance with the formal structure referred to in articles 2.1. and 2.2., the documentation delivered in the course of an audit is not complete and consistent with the provisions endorsed by the current Decision; or when
- the information provided for in the delivered documentation are not consistent, wholly or partly, with the reality.

Omissions or partial inaccuracies that do not hamper neither the activity carried out by the auditors nor the accuracy of the outcome of such analysis, do not impede the application of Article 1, paragraph 2-*ter* of the Legislative Decree No. 471 of 18 December, 1997. The same applies in case of omissions of the Annexes listed in article 2.2.

9. *Communication of the availability of the Proper Documentation*

9.1. *Communication stating the availability of the Proper Documentation on the basis of article 1 paragraph 2-ter of the Legislative Decree No. 471 of 18 December, 1997*

Taxpayers shall communicate to Italy Revenue Agency the availability of the Proper Documentation in the yearly income tax return.

9.2. *Communication stating the availability of the Proper Documentation concerning past taxable years*

For taxpayers having prepared the Proper Documentation relating to taxable years prior to that in force at the time the Law Decree No. 78 of 31 May 2010 was implemented, the communication to Italy Revenue Agency is electronically filed on the basis of the technical specifications included in Annex A of the current Decision. The data transfer to Italy Revenue Agency must be carried out through the electronic service Entratel or through the authorized intermediaries listed by article 3, paragraph 2-bis and 3, of the Presidential Dcree No. 322/1998, so as to the respect the term of 90 (ninety) days elapsing from the publication of the current Decision. Communications executed after the expiration of the said term, will also be deemed valid insofar as they have been transmitted prior to audits, inspections or other administrative procedures of which the taxpayer has been formally notified of.

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Annex 1

Decree-Law No 78 of 31 May 2010, as amended by Law No 122 of 31 July 2010

Article 26

Implementation of the OECD guidelines on transfer pricing documentation

1. In order to implement the guidelines issued by the Organization for Economic Cooperation and Development on transfer pricing documentation and the principles of cooperation between taxpayers and tax authorities, in Article 1 of Legislative Decree No 471 of 18 December 1997, after paragraph 2-bis, the following letters shall be added: ''2-b. In case of adjustments under the arm's length principle of the transfer prices charged for transactions referred to in Article 110, paragraph 7 of Presidential Decree No 917 of 22 December 1986, resulting in a higher tax or in a difference in the tax credit, the penalty referred to in paragraph 2 shall not apply if, during the access to the premises, the inspection or the audit or any other investigation activity, the taxpayer delivers to the Tax Authorities the documentation provided for by a specific Decision of the Director of the *Agenzia delle Entrate* (Revenue Agency) allowing to control that the transfer prices charged are consistent with the arm's length principle. The taxpayer holding the records under the Decision mentioned in the above sentence, shall notify the Tax Authorities according to the terms and conditions herein specified. Failing such notification, paragraph 2 shall apply.''.

2. In order for the provisions under paragraph 1 to be immediately effective, the Decision of the Director of the *Agenzia delle entrate* shall be issued within sixty days from the date of entry into force of the law converting this decree. Notifications concerning tax years prior to that of the date of entry into force of ((this decree,)) shall in any case be sent within ninety days from the publication of the Decision of the Director of the *Agenzia delle entrate*.

In Practice

U.K. Transfer Pricing Audits: Focus and Process

The authors give an update on the transfer pricing audit process in the United Kingdom, noting the tax authority's recent shift toward a risk-based approach.

BY DANNY BEETON, MURRAY CLAYSON AND JEAN NG, FRESHFIELDS BRUCKHAUS DERINGER LLP

Since 2008, there has been a considerable increase in the revenue generated from transfer pricing enquiries pursued by H.M. Revenue and Customs. This change has coincided with HMRC's shift of focus towards a risk-based approach to transfer pricing enquiries. There is also pressure on HMRC to reduce the perceived gap between actual tax revenues and the anticipated tax yield and transfer pricing is known to be an area of high priority.

This article provides a broad overview of the procedural and practical aspects of the transfer pricing audit process in the United Kingdom, in particular what a taxpayer should expect when faced with the prospect of a transfer pricing enquiry. The authors also note the most likely areas of challenge.

Recent Developments

HMRC has implemented a wide range of policies to ensure the consistent application of its approach to transfer pricing cases. This includes the setting up of an overarching transfer pricing group with specialist knowledge and skill, and specialist panels in local tax offices and within the Large Business Service.[1] There is also now a Transfer Pricing Board, which monitors the work of HMRC in relation to transfer pricing.

Audits or ''enquiries'' into transfer pricing issues have also been standardised by the instigation of a new structured process with five ''stage gates'' (discussed below) for dealing with such enquiries. In particular, a risk assessment will be carried out in determining whether an enquiry is necessary. The relevant officers will also need to have a business case to support an enquiry, which means that any enquiry that has been launched is one that HMRC is taking seriously.

[1] HMRC's Large Business Service is responsible for working with and the taxation of around 770 of the largest businesses in the United Kingdom.

Danny Beeton is head of transfer pricing economics, Murray Clayson is a partner, and Jean Ng is an associate in Freshfields' tax practice.

Perceived Areas of Risk

HMRC tends not to focus on particular industries or geographic locations for its enquiries. Rather, as stated above, the approach adopted by HMRC is risk-based. During a risk assessment, HMRC analyses all types of transactions and will categorise some transactions to have a higher risk than others, depending on the facts and circumstances.

The geographic location of counterparties to a transaction (for example, in tax havens) may be one factor amongst many others that feed into the risk assessment. However, this factor would not necessarily trigger a transfer pricing enquiry by itself. Additionally, some industries (such as pharmaceuticals, consumer goods, and technology) may be more prone to enquiries as a result of the accumulation of knowledge and experience by individual tax inspectors, but this is not due to a policy of focus on particular industries.

HMRC has also highlighted other areas of concern that are likely to lead to enquiries, including where a taxpayer has recently made structural changes to its business or the way in which its business, or a part of it, is characterised in its tax return. Following HMRC's increased investment in transfer pricing investigation resources since early 2008, it is likely that the level of scrutiny will continue to grow.

More generally, HMRC's anti-avoidance group has stated that, under the risk-based approach, various ''signposts,'' including the transactions or arrangements listed below, generally would indicate that a transaction or arrangement might merit investigation:

- those bearing little or no pre-tax profit that rely wholly or substantially on an anticipated tax reduction for significant post-tax profit;
- those resulting in a mismatch (for example, between the legal form or accounting treatment and the economic substance, between the tax treatment of different parties or entities, or between tax treatments in different jurisdictions);
- those exhibiting little or no business, commercial, or non-tax rationale;
- those involving contrived, artificial, transitory, preordained, or commercially unnecessary steps or transactions; and
- those in which the income, gains, expenditure, or losses falling within the U.K. tax net are not proportionate to the economic activity taking place or the value added in the United Kingdom—especially when the transactions or arrangements are between associates

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within the same economic entity and would not have occurred between parties acting at arm's length and/or add no value to the economic entity as a whole.[2]

Process and Milestones

HMRC has the power to enquire into a tax return under paragraph 24, Schedule 18 of Finance Act 1998. Within HMRC, such enquiries are under the oversight of the relevant customer relationship manager—the designated point of contact for each large taxpayer—or the local office with specialist guidance from a member of HMRC's transfer pricing group. The makeup of teams involved in transfer pricing enquiries varies depending on the needs of the specific case and the transfer pricing group can, when appropriate, call on dedicated transfer pricing economists or even external advisors whether specialist or not in the transfer pricing sector.

Audit Procedures

The United Kingdom does not have a specific transfer pricing audit system. Instead, enquiries into transfer pricing issues are made through the mechanism of enquiries into company self-assessment tax returns in accordance with the procedures in Schedule 18 of the 1998 Finance Act (FA). The U.K. system for corporation and income tax returns operates on a self-assessment basis. When a self-assessment return is submitted to HMRC, it includes a declaration that the return is, to the best of the taxpayer's knowledge, correct and complete.[3] Thus, this declaration implicitly includes confirmation that transfer pricing legislation has been complied with.

Since transfer pricing enquiries take place within the U.K. system of tax self-assessment, the audit procedures in relation to a transfer pricing issue are the same as for any other corporation tax audit. Corporation tax returns generally are required to be filed on or before the first anniversary of the end of the accounting period to which they relate.[4] Once a tax return has been filed, HMRC may enquire into a company tax return by giving notice within 12 months from the day on which the return was delivered. [5] An enquiry will be formally completed when HMRC issues a ''closure notice'' informing the taxpayer that the enquiry is at an end and stating HMRC's conclusions.[6] The closure notice must state either that no amendment is required of the company's return or make such amendments of the return as are required. If the return is amended, the company has up to 30 days to appeal this by giving HMRC notice in writing.[7]

The above assumes that the taxpayer has assessed its tax correctly in the first place. If HMRC later discovers loss of tax or that the taxpayer's determination of the amount assessable to tax was incorrect, the tax authority may make an assessment (a discovery assessment) of an amount that it feels should to be charged to make good the loss of tax.[8] It is worth noting that a discovery assessment may be made by HMRC after the one-year window for making enquiries has expired (or, where enquiries have been made, after these have been completed) if HMRC could not have been reasonably expected, on the basis of the information made available to it before that time, to be aware of the inaccuracy.[9] A discovery assessment may also be made if the loss of tax was brought about ''carelessly or deliberately.''[10]

Discovery assessments can be raised four years after the company's accounting period ends. Where the mistake was caused by the carelessness of the company, this period is extended to six years and where the loss of tax was brought about deliberately, the time limit is 20 years.[11]

Management of Enquiries

In the context of transfer pricing, HMRC has adopted a five-stage process for the management of enquiries, set out in HMRC's International Manual at INTM453000.

Stage Gate 1—risk assessment and business case. At this stage, the case team must determine whether, following a risk assessment, the enquiry is justified. If it is, the case team must develop a business case for the enquiry. This decision is based on the value and importance of the issue to HMRC and the expected resources required to undertake the enquiry.

Stage Gate 2—decision. At this point, a decision is made whether, in light of the business case, an enquiry should be opened. If an enquiry is opened, HMRC will commit resources to the enquiry and will work with the taxpayer to develop an agreed timetable and action plan.

Stage Gate 3—timetable. The key decision at this stage is whether the enquiry timetable and action plan are acceptable. A usual timetable would involve the enquiry being completed within 18 months. However, at this stage it must be determined whether the enquiry is ''particularly complex and high risk,'' in which case the timetable may extend beyond 18 months.

Stage Gate 4—six-month reviews. A review should normally be held every six months during the enquiry to determine how the enquiry should continue.

Stage Gate 5—resolution. When sufficient information is available, and sufficient analysis has been carried out, HMRC will form a view about the acceptability of the pricing under enquiry and what adjustments, if any, are necessary. If adjustments are necessary, they may at this stage proceed toward a negotiated settlement with the taxpayer or progress toward litigation.

The decisions at each of these stages are taken by the relevant HMRC case team but are subject to the review of the transfer pricing group.

Following a transfer pricing enquiry, HMRC has the power to amend a tax return in accordance with the findings of the enquiry. The taxpayer may then pay any further tax due and the applicable penalty (see the sec-

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[2] See guidance from HMRC anti-avoidance group on avoidance indicators at http://www.hmrc.gov.uk/avoidance/aag-risk-assessing.htm.
[3] Schedule 18, paragraph 3(3), FA 1998.
[4] Schedule 18, paragraph 14, FA 1998.
[5] Schedule 18, paragraph 24, FA 1998.
[6] Schedule 18, paragraph 33, FA 1998.
[7] Schedule 18, paragraph 34, FA 1998.
[8] Schedule 18, paragraph 41, FA 1998.
[9] Schedule 18, paragraph 44, FA 1998.
[10] Schedule 18, paragraph 43, FA 1998. The previous phrase in paragraph 43 was ''fraudulent or negligent conduct.'' This change is not expected to make any significant difference in practice.
[11] Schedule 19, paragraphs 41 and 46, FA 1998, as amended by Schedule 39, Finance Act 2008.

tion on penalties below) or appeal against the amendment.

Taxpayer Rights and Obligations

Under Part III of Schedule 18, the only explicit documentation requirements are that a company keep such records in relation to transfer pricing to enable it to deliver a correct and complete company tax return. HMRC provides guidance in its International Manual (at INTM433030) regarding what documents the taxpayer should keep to evidence and support its arm's-length approach. This information generally falls into four categories: primary accounting records, records of transactions with associated business, tax adjustment records, and evidence to demonstrate an arm's-length result.

Primary accounting records, or records of transactions occurring in the course of a business, generally would be created at the time the information entered the business accounting system—that is, before a tax return was made for the period in question.

Records of transactions with associated businesses (which would be those subject to the transfer pricing rules) as well as records of adjustments to tax on taxable profits would need to be created before a tax return was made for the period in question.

Evidence to demonstrate an arm's-length result—essentially company background, functional and economic analysis type of evidence—would need to be made available to HMRC in response to a ''legitimate'' and ''reasonable'' request.

There is no requirement in the United Kingdom to submit the arm's-length documentation when the tax return is filed every year. However, a U.K. taxpayer needs to ensure that the evidence supporting the figures included in the tax return is available, albeit not necessarily in a form that could be immediately made available to HMRC. The documentation needs to be submitted in response to a legitimate and reasonable request from HMRC.

Information and Inspection Powers

Under Schedule 36 of Finance Act 2008, an officer of HMRC is given significant powers to extract information from (and about) taxpayers. These general rules are equally relevant in the transfer pricing context.

HMRC may issue a notice requiring documentation and information from the taxpayer if it is reasonably required by the officer for the purpose of checking the taxpayer's tax position.[12] In addition, HMRC may obtain information from third parties about a taxpayer by issuing a notice (a third-party notice) requiring a person to produce information and documents relating to a known taxpayer, if the information or document is ''reasonably required'' by the officer for the purpose of checking that taxpayer's tax position.[13] Note that a third-party notice may not be issued without the agreement of the taxpayer or the approval of the Tribunal.[14] HMRC's powers also allow an officer to obtain information or documents that are reasonably required for the purpose of checking the U.K. tax position of:

- a person whose identity is not known; or
- a class of persons whose individual identities are unknown to the relevant officer (such a notice may be given only with the prior approval of the Tribunal).[15]

Finally, HMRC is afforded powers to enter a person's business premises and inspect the premises, assets, and documents if the inspection is reasonably required for the purpose of checking that person's tax position.[16]

It is apparent that HMRC regards the aim of any initial information request as an exercise to fully understand how the company and its group trade, to identify which entity carries out what functions, to understand the nature, scope, and volume of any intercompany transactions, to see what profit accrues where, and only then to make a judgement about whether the U.K. share is arm's-length. HMRC published guidance sets out a list of documents that may be requested in an initial information trawl (note that this list is neither exhaustive nor definitive). These are:

- everything the company has prepared for corporation tax self-assessment transfer pricing requirements;
- any further evidence the company has of arm's-length pricing;
- the company's own transfer pricing manual;
- budgets for each function (such as research and development and distribution);
- any divisional management accounts or general management accounts;
- a volume breakdown of each type of intercompany transaction; and
- a functional analysis of the company and a narrative of the functions carried out by affiliates with which it trades.[17]

It is worth noting that HMRC guidance makes clear that it ''is not compulsory'' for officers to see a transfer pricing report. The guidance notes that there will inevitably be other ways in which evidence may be presented to officers with the intention of demonstrating arm's-length trading. However, the guidance given to officers is that if a transfer pricing report exists, it is important to see it as early as possible. Therefore, HMRC encourages its officers to engage with the taxpayer before the initial information request, with a view to obtaining a transfer pricing report. HMRC takes the view that such a report will provide much of the factual information it needs and will allow it to target any subsequent information request more precisely. Note also that HMRC has issued specific published guidance to its officers on the handling of transfer pricing reports, which is found in HMRC's International Manual at INTM466000.

Recommended Approach for Taxpayers

It is almost always in the taxpayer's best interests to be actively involved and co-operate with HMRC in order to resolve an enquiry at ''field level'' without the need for recourse to litigation. This may require, amongst other things:

- management of information flow to the tax authorities;

[12] Schedule 36, paragraph 1, FA 2008.
[13] Schedule 36, paragraph 2, FA 2008.
[14] Schedule 36, paragraph 3, FA 2008. This means the First-tier Tribunal or, where determined by or under the Tribunal Procedure Rules, the Upper Tribunal.
[15] Schedule 36, paragraph 5, FA 2008.
[16] Schedule 36, paragraph 10, FA 2008.
[17] INTM462050, *Working a transfer pricing case*.

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- identification of issues;
- management of deadlines; and
- management of any communication with the company's employees.

Co-operation should, however, be tempered by an awareness that the issues may not be resolved without the need for matters to become more formal and, potentially, litigious. While co-operating, therefore, it is necessary to be careful not to make concessions to HMRC or give copies of materials (for example, privileged documents) that might have an adverse impact if the matter ultimately proceeds down the Tribunal route.

Penalties

The penalty regime for transfer pricing is the same as for other direct tax infringements. There is therefore no specific penalty regime for transfer pricing. HMRC Business International and the Transfer Pricing Board are involved in all cases potentially involving penalties as part of an overall settlement so as to ensure consistency in approach. HMRC provides guidance on how these penalties are applied to transfer pricing in the International Manual (at INTM434040).

For accounting periods ending on or after 1 April 2009, the penalties regime is set out in Schedule 24 Finance Act 2007 as amended by Schedule 40 Finance Act 2008. The penalty provisions are for inaccuracies in a company tax return. A penalty will be chargeable if the inaccuracy causes a loss of tax or an increased claim to a loss or repayment and the inaccuracy is careless, deliberate, or both deliberate and concealed. All penalties are payable in addition to the outstanding tax owed.

The level of penalty depends on the degree of culpability of the company in relation to the underpayment. Where the incorrect return is caused by careless action (that is, a failure to take reasonable care) the penalty is 30 percent of the potential lost revenue. Where it is caused by deliberate but unconcealed action, the penalty is 70 percent of the potential lost revenue, and when deliberate actions are concealed, this penalty rises to 100 percent.

These penalties can be reduced by disclosure of the inaccuracy to HMRC. HMRC at INTM434040 provides guidance on what sort of behaviours are classified as careless and deliberate and on what it regards as the hallmarks of concealment. Where taxpayers can show that they have made "an honest and reasonable" attempt to comply with the legislation, no penalty is levied even if an adjustment is made.

In addition, paragraph 23 Schedule 18 Finance Act 1998 imposes a penalty of £3,000 for a failure to maintain adequate records. However, an absence of relevant documentation is likely to constitute at least careless action and may trigger further penalties as set out above.

Moreover, HMRC has the power to publish information about a deliberate tax defaulter, which may give rise to obvious reputational concerns for the taxpayer.[18]

Access to Foreign-Based Information

Through an extensive network of double tax agreements and an additional layer of taxation information exchange agreements, HMRC has the ability to obtain a wide range of foreign source information in relation to any enquiry. This is coupled with its powers (discussed above) to require documentation to check the taxpayer's position. This may include foreign-based information to which the taxpayer has access.

Solicitor-Client Privilege

Solicitor-client privilege in the United Kingdom is known as "legal professional privilege." Documents to which the privilege attaches may be withheld from disclosure to HMRC whether such disclosure is sought either formally or informally and whether in the context of a tax enquiry or a Tribunal dispute.

There are two categories of legal professional privilege: legal advice privilege and litigation privilege. Legal advice privilege will apply only to communications between a lawyer and his client for the purpose of giving or receiving legal advice. The concept of "legal advice" is widely construed and extends to any client-lawyer communications that take place in a "relevant legal context" (see *Three Rivers District Council & Ors v. The Governor and Company of the Bank of England*, [2004] UKHL 48). Litigation privilege will, in contrast, apply to *all* communications related to litigation and not only to communications between a client and his lawyer. However, litigation privilege applies only where litigation is pending or reasonably in contemplation. For communications to be protected by litigation privilege, they must come into existence for the dominant purpose of giving or receiving legal advice in relation to the litigation.

The application of legal professional privilege is particularly pertinent in the context of transfer pricing disputes and tax enquiries generally because documents are often disclosed to HMRC under informal enquiries or formal requests for documentation without proper consideration of privilege issues. This can lead to inadvertent disclosure of privileged material. It is important for taxpayers to appreciate that communications with non-lawyer tax specialists (for example, tax accountants) who have been brought in to advise on an enquiry and seek a resolution with HMRC will not be protected by legal advice privilege even if such persons have advised on technical tax issues, much as a lawyer would.[19]

One potentially difficult privilege issue to deal with in the context of a transfer pricing enquiry is the stage at which litigation becomes in "reasonable contemplation" for the purposes of litigation privilege. Various formulations of this phrase have been advanced by the courts. In a recent Court of Appeal decision, it was held that the test would be satisfied where litigation "may happen," in the sense that there was a real prospect of litigation rather than a mere possibility, although that prospect did not necessarily have to be more than 50 percent (see *Westminster International BV and Others v. Dornoch Limited and Others*, [2009] EWCA Civ 1323). Transfer pricing enquiries can often be drawn-out processes and the majority will be resolved without

[18] Section 94, Finance Act 2009.

[19] The case of *R (on the application of Prudential PLC & Anor) v. Special Commissioner of Income Tax & Another*, [2010] EWCA Civ 1094, established that legal professional privilege is not extended to advice given by accountants. At the time of writing, Prudential had filed an application for permission to appeal to the Supreme Court

litigation. It is not possible to identify a particular event or stage at which it can be said with certainty that litigation will always be treated as being ''in contemplation'' because each case will turn on its facts. However, generally speaking, where it has become apparent to the taxpayer or HMRC that there is an issue in the enquiry that may not be capable of resolution between themselves, there would be a good argument that litigation privilege has become applicable.

Conclusion—Key Messages

Since 2008, there has been a considerable increase in the revenue generated from U.K. transfer pricing enquiries, despite the reduction in the number of open enquiries. Taxpayers thus are urged to take proper care when entering into and documenting these arrangements. To that end, several points made earlier are worth repeating:

- Penalties of 30 percent, 70 percent, or 100 percent of the potential lost tax revenue can be levied in the context respectively of carelessness, deliberate misreporting or deliberate misreporting with concealment.
- HMRC focuses on business restructurings and arrangements that appear to point to tax avoidance, but will otherwise look across all types of transaction and industry.
- An enquiry is launched only after a careful risk assessment and business case review, so that any subsequent enquiry will be taken seriously and will involve transfer pricing specialists, economists, industry specialists and even external advisers.
- Taxpayers should expect to agree a timetable of up to 18 months for completion of the enquiry; HMRC will then review whether to continue with the enquiry every six months.
- HMRC has substantial powers to obtain information from taxpayers, from their premises, and even from third parties; the tax authority will seek to obtain a full understanding of the taxpayer's business before forming a view on the pricing of any one transaction.
- It is in a taxpayer's interest to co-operate fully but to actively manage such issues as information flows, the issues in point, deadlines and communication with the taxpayer's employees.
- While no privileged documents should be handed over (given the possibility of litigation), penalties can be reduced by early disclosure of any mistakes the taxpayer has made in its transfer pricing calculations.

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Analysis

Italy's Guidelines on the Documentation Regulations: A Rigorous, Formalistic Approach to Penalty Avoidance

The author, in examining recent guidance by the Italian tax authorities on applying the documentation regulation issued in September, notes that to protect against penalties, documentation must follow a strict format as well as include the relevant information.

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Since Italy published its first transfer pricing documentation regulation Sept. 29, 2010,[1] taxpayers and practitioners have eagerly awaited comprehensive, detailed instructions on applying the rules.

The Dec. 15, 2010, guidelines,[2] which replace those issued 30 years ago,[3] are something of a disappointment. They mainly reiterate the content of the regulation[4] with a more extensive narrative, but unfortunately contain nothing about important areas of dispute such as choice of comparables and method, business restructuring, and exit charges.

That said, taxpayers ignore the new guidelines at their peril. They set forth a detailed and specific format, outlined below, and clarify that taxpayers must comply with both the form and the substance of the documentation regulation to avoid penalties in the event of a transfer pricing adjustment.

Compliance

The guidelines clarify when transfer pricing documentation can be considered in compliance with the Italian regulation for the purpose of relieving taxpayers of administrative penalties in case of transfer pricing adjustments.

The judgment regarding the compliance of the documentation will have to be made in terms of both form and substance. In fact, the transfer pricing documentation must provide all the relevant information and data to allow the Italian tax authorities to verify the consistency of the transfer prices applied by the taxpayer with the arm's-length principle.

Furthermore, the transfer pricing documentation must be consistent with the principles stated by the European Union Code of Conduct[5] and the new guidelines released by the Organization for Economic Cooperation and Development.[6] Specifically, the Italian guidelines state that when in doubt about the substantial aspects of the documentation, taxpayers must apply the principles outlined by the OECD guidelines.

The Italian guidelines state that the format of the transfer pricing documentation, for both the masterfile and the country-specific documentation, cannot deviate by the formal structure indicated by the Sept. 29 regulation. In other words, the structure of the chapters, paragraphs, and sub-paragraphs, as well as the respective title and numbering, cannot change, except when partial modifications and additions allow a more comprehensible representation of the documentation.

This formal requirement likely will require taxpayers—mainly foreign multinational companies—that already have drafted transfer pricing documentation under a different structure to re-edit the documentation to meet the Italian format exactly. Following the Italian format appears to be a requirement for complying with the Italian regulation.

Italian Format

The guidelines refer to Articles 2(1) and 2(2) of the Sept. 29 regulation regarding the format of the documentation. The structure of the masterfile and the country-specific documentation (or ''national documentation'' according to the language of the regulation) can

[1] Decision of the Commissioner of Italy Revenue Agency, dated Sept. 29, 2010, no. 2010/137654. For prior coverage, see 19 *Transfer Pricing Report* 717, 10/21/10.

[2] Circular Letter no. 58/E.

[3] The former guidelines on transfer pricing were released with Circular Letter no. 32/9/2267 of Sept. 22, 1980.

[4] The tax authorities' translation of regulation no. 2010/137654 appears in the Text section of this issue. For an earlier translation provided by Baker & McKenzie, see 19 *Transfer Pricing Report* 705, 10/21/10.

[5] The Conduct of Conduct was approved by the European Union Council June 27, 2006 with resolution 2006/c176/01. See 15 *Transfer Pricing Report* 165, 7/5/06; 14 *Transfer Pricing Report* 603, 610, 11/23/05.

[6] The new OECD guidelines, available at http://www.oecd.org/document/4/0,3343,en_2649_33753_45690500_1_1_1_1,00.html, were approved July 22, 2010.

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be summarized as follows.

Masterfile – Art. 2(1)	***National Documentation – Art. 2(2)***
1. General description of the multinational group 2. Multinational group structure 2.1 Organizational structure 2.2 Operational structure 3. Business strategies pursued by the multinational group 4. Transaction flows 5. Intragroup transactions 5.1 Sale of tangible or intangible assets, provision of services, financial services transactions 5.1.1 Type 1 transactions 5.1.2 Type 2 transactions 5.1.3 Type 3 transactions 5.1.n Type n transactions 5.2 Intragroup services 5.2.1 Type 1 services 5.2.2 Type 2 services 5.2.3 Type 3 services 5.2.n Type n services 5.3 Costs sharing agreements 6. Analysis of functions performed, assets used and risks undertaken 7. Intangible assets 8. Transfer pricing policies of the multinational group 9. Relationships with the tax administrations of the Member States of the EU regarding advance pricing agreements and transfer pricing rulings	1. General description of the company 2. Industries in which the company operates 3. Operative structure of the company 4. Business strategies pursued by the company and changes compared to the prior year 5. Intragroup transactions 5.1 Type I transactions 5.1.1 Description of the transactions 5.1.2 Comparability analysis a) Products and services characteristics b) Analysis of functions performed, assets used and risks undertaken c) Contractual terms d) Economic conditions e) Business strategies 5.1.3 Transfer pricing method a) Selection of the method and reasons b) Criteria for applying the selected method c) Results from the application of the selected method 5.n Type n transactions 6. Intragroup transactions and cost contribution arrangements 6.1 Participants, scope and terms 6.2 Activities framework and projects covered 6.3 Determination of benefits 6.4 Nature and amount of contributions 6.5 Terms for entering and withdrawing from the CCA 6.6 Terms regarding balancing payments 6.7 Changes occurred during the validity of the agreements ATTACHMENTS 1 – Flowchart of transaction flows 2 – Copy of the written agreements

The guidelines state that the transfer pricing documentation should respect this format and, in terms of actual content, should note the regulation's specific clarifications to each paragraph and sub-paragraph in square brackets.

The structure and the content of both the masterfile and the country-specific documentation are similar to those included in the annex to the EU Code of Conduct at paragraph 4(2) for the masterfile and paragraph 5(2) for the country-specific documentation. However, the Italian tax authorities have included further requirements in square brackets and comments in italics for the items listed in Articles 2(1) and 2(2) of the regulation.

For example, according to the clarifications to paragraph 6 of the masterfile and paragraph 5(1)(2)(b) of the country-specific documentation, the analysis of functions, risks undertaken, and assets invested must describe the changes that occurred in the previous fiscal year, with particular reference to those from business restructuring.

Judgment Regarding Compliance

A chief concern raised by practitioners about the regulation relates to the discretionary powers granted to tax inspectors in verifying the consistency of the transfer pricing documentation. Specifically, paragraph 8(3) allows the tax authorities to apply penalties for transfer pricing adjustments if the documentation does not include complete information, if it is not consistent with the regulation, or if the information provided is partially or entirely false.

Tax Inspector Analysis

The guidelines provide a precise pattern regarding the analysis to be made by tax inspectors about the compliance of the documentation:

- First, this judgment will be made on the format of the documentation according to Articles 2(1) and 2(2) of the regulation, and on how consistent the information is with both the regulation's requirements and the principles stated by the EU Code of Conduct and the OECD guidelines.
- Under paragraph 8(2), the transfer pricing documentation must be given to the tax authority *within 10 days* of the request (which could occur during a tax audit, inspection, or other inquiry).
- Partial inaccuracies and incompleteness of the information—such as the omission of the attachments

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listed in paragraph 2(2) (flowchart of transactions and copy of the contracts) or other information—if they do not impair the analysis of the inspectors or the correctness of the results of the analysis, will not cause penalties to be applied in case of transfer pricing adjustments.

■ However, the tax inspectors will be able to require supplementary information, which taxpayers must provide *within seven days*. Depending on the complexity of the transactions under scrutiny and the timing of the audit, tax inspectors can grant additional time for providing this information.

Supplementary information is information that relates to the ordinary content of the documentation as stated by the regulation. Therefore, failure to timely provide this supplementary information can impair a taxpayer's compliance with the documentation requirements and result in application of penalties in case of transfer pricing adjustments. On the other hand, failure to provide information not related to the ordinary content of the transfer pricing files cannot by itself cause penalties to be applied.

Notably, the guidelines state that only the lack of documentation regarding residual transactions—that is, transactions that do not alter the transfer pricing tax audit—would not impair a taxpayer's compliance.

Thus, both the regulation and the guidelines essentially require documentation of all intercompany transactions other than those that are residual and immaterial. Taxpayers cannot limit the documentation to certain transactions in order to claim the penalty protection only for them and disregard other intercompany transactions; in fact, this approach would impair compliance with the entire set of documentation and thus could jeopardize the penalty exemption for all of the taxpayer's intercompany transactions.

Five-Step Process

The guidelines describe a five-step process for determining a taxpayer's compliance with the documentation regulation:

1. Tax inspectors performing the audit assess whether the taxpayer has complied with the regulation and record their judgment in the tax audit report. This is the preliminary report that includes the outcome of the tax audit and the respective remarks and tax adjustments.

2. The tax office having jurisdiction for issuing the formal tax assessment (embedding higher taxes and penalties, where applicable) can review the assessment made by the tax inspectors regarding the compliance of the transfer pricing documentation.

3. The taxpayer has the opportunity to defend its transfer pricing documentation and argue that it is consistent with the Italian regulation and the OECD guidelines.

4. In case of disagreement or in situations of particular complexity, the tax office must promptly refer the matter to the judgment of the regional tax office. The tax office must draft its own report about its assessment, with explanation about the complexity of the analysis, the arguments raised by the taxpayer, and any other information regarding the controversy.

5. If the transfer pricing adjustment exceeds €10 million, the regional tax office must promptly refer the matter to the Central Revenue Agency and also must draft a report including all the relevant information and its own judgment on the matter.

According to both Article 26 of decree no. 78 of May 31, 2010, and Article 9 of the regulation, penalties do not apply in case of transfer pricing adjustments if the taxpayers have proper transfer pricing documentation available in case of tax audit and have notified the tax authorities within the fixed deadlines about the availability of such documentation (that is, within the same deadline for filing the annual tax return for 2010 and following years, or the December 28, 2010, deadline for prior fiscal years).[7]

The guidelines also envisage situations where the tax authorities could apply harsher penalties. If following the notice sent by the taxpayer under Article 9 of the regulation, the tax authorities ascertain that the documentation is not, in fact, available, the tax authorities will apply penalties on the transfer pricing adjustment and also can consider increasing the penalties (which generally range between a minimum of 100 percent to a maximum of 200 percent of the higher taxes assessed).

The Italian authorities are concerned that taxpayers may send the notice regarding documentation to reduce the likelihood of an audit; precisely, the regulation states that the tax audit program will increase its focus on taxpayers that have sent notice but have not drafted the documentation.

Temporary Provisions

For prior years still open to tax audit, Article 9(2) of the regulation grants protection from penalties to taxpayers having transfer pricing documentation consistent with the new requirements to the extent that these enterprises notified the tax authority about the availability of the documentation on or before Dec. 28, 2010. Notices received after this deadline will be valid as long as no tax audit or inspection has begun.

The guidelines also provide the conditions for applying the new penalty relief with regard to tax violations committed before the enactment of the new rules, according to the principle of *favor rei* stated by Article 3 of the law ruling on administrative penalties.[8]

For tax audit and tax controversies already in progress but for which taxpayers have not yet been given a formal tax assessment, taxpayers must notify the tax authorities of the availability of the transfer pricing documentation on or before Dec. 28, 2010. In these circumstances, the taxpayer will be required to promptly provide the documentation to allow the assessment of its compliance with the regulation.

When a formal tax assessment has occurred, penalty relief also may be granted. To that end, the tax authorities will consider the taxpayer's level of cooperation during the audit in allowing the inspectors to verify the arm's-length terms of the intercompany transactions. Because the tax assessments include the charge of higher taxes and penalties, the unpaid penalties could be discharged, but it will not be possible to obtain a refund for penalties already settled.

On the other hand, the guidelines grant some flexibility in the case of tax audits beginning after Dec. 28, 2010, but before June 30, 2011. When notice has been sent to the tax authorities, the transfer pricing docu-

[7] See 19 *Transfer Pricing Report* 194, 6/17/10.
[8] Legislative Decree no. 473 of December 18, 1997.

mentation for prior years will be considered in compliance with the regulation even if it is lacking paragraph 5(1)(3) of the country-specific documentation. This paragraph includes the entire economic analysis, such as the choice of method, the comparables analysis, and the result of the method applied. Therefore, taxpayers can consider sending the notice when this analysis has not been entirely completed. However, they should be aware that tax inspectors starting an audit will grant a period of only 15 days to complete and provide the economic analysis.

Conclusion

The recent guidelines contain rigorous requirements about the format of transfer pricing documentation, forcing multinational enterprises to re-edit documentation already drafted following a different format and group policy.

The guidelines also set forth a process for the tax authorities to apply before ascertaining noncompliance with the regulation, therefore limiting in some manner the tax inspectors' discretionary powers to disregard the documentation and apply penalties on adjustments.

Although the guidelines provide some additional time to complete the economic analysis of paragraph 5(1)(3) of the country-specific documentation, the time frame in which taxpayers must prepare the documentation and send the notice for prior years is tight.

It is clear that the new regulation will increase the level of tax compliance for multinational enterprises, mainly for the so-called large taxpayers that already are subject to yearly tax audits. Furthermore, the new rules can enhance the risk of transfer pricing adjustments, even without penalties, because of the increased level of transfer pricing information that the Italian tax authorities will be able to gather among its taxpayers.

Of course, the decision to prepare transfer pricing documentation and notify the tax authorities about its availability should not enhance *per se* the likelihood of a tax audit. On the contrary, the regulation states that the new rules should guide the tax authority in analyzing the tax risk mainly for taxpayers that will not implement the documentation.

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CONFERENCES, HEARINGS, AND MEETINGS

Jan. 21-22	First Annual Institute	Palo Alto	Pacific Rim Tax Institute; see http://www.pacificrimtaxinstitute.com.
Jan. 20-22	2011 Midyear Meeting	Boca Raton, Florida	American Bar Association Tax Section; see http://meetings.abanet.org/meeting/tax/MID11/.
Jan. 24-25	U.S. Transfer Pricing Planning & Controversies	San Diego	BNA Tax & Accounting Council for International Tax Education (CITE); see www.citeusa.org or call (914) 328-5656.
Feb. 17-18	Advanced Forum on Transfer Pricing Compliance	Toronto	Canadian Institute; see http://www.canadianinstitute.com/transferli.htm or call (877) 927-7936.
March 21-22	China: Legal, Tax & Accounting Update	San Francisco	BNA Tax & Accounting Council for International Tax Education (CITE); see www.citeusa.org or call (914) 328-5656.

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