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Transfer pricing

The global transfer pricing environment has undergone significant changes over the past decade, with a number of complex challenges at the forefront. Multinationals need to stay abreast of tax guidelines for each jurisdiction in which they operate, document all related-party transactions and adopt appropriate business rationale to determine the most appropriate remuneration policy. Amid heightened tax transparency and scrutiny, policies need to be reviewed annually – striking a balance between maximising tax efficiency and meeting compliance requirements. ■



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Shahzeb Panhwar is a managing director with Alvarez & Marsal Tax in Melbourne. Leading the firm's transfer pricing team, he advises clients on inbound and outbound flows of debt, business restructuring, management of intangibles and helps clients navigate the dispute landscape. With more than 18 years of experience, he has assisted clients in various industries ranging from capital-intensive industries such as oil and gas, mining and infrastructure to intangible-driven industries such as technology and consumer goods.



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Amit Chadha is a seasoned tax professional with over 23 years of experience, specialising in transfer pricing. He has a proven track record of advising medium and large multinational corporations across diverse industries and geographies. He has been at the forefront of transfer pricing since the inception of the Indian regime in 2001. His 13-plus years of experience in South Africa further strengthens his multijurisdictional and multisector perspective and practical approach.



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Sahil Seth has 15-plus years of experience in the field of transfer pricing. He is a commerce and law graduate with a post-graduate diploma in management (finance & marketing). He has been assisting various clients in developing appropriate intercompany transfer pricing policies, undertaking detailed diagnostic reviews of different intercompany transactions and business models, highlighting the potential red flags and suggesting appropriate arm's length prices while conducting robust economic analyses for various related-party transactions.



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Sarah Howarth is a director at Price Bailey. She has been with the firm for six years, having trained with EY. She is a corporate and international tax specialist, primarily focusing on advising large businesses that operate internationally. She is Price Bailey's transfer pricing specialist, but also advises on topics including the UK's interest restriction regimes, permanent establishment, corporate residence and tax governance.



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FW: COULD YOU PROVIDE AN OVERVIEW OF THE MAIN TRENDS CURRENTLY SHAPING THE TRANSFER PRICING (TP) ENVIRONMENT?

LUXEMBOURG

Hoor: A significant proportion of the controlled transactions involving Luxembourg companies are financial transactions, so the single most important development impacting transfer pricing (TP) over the last few years was the interest rate policy of the Western world's central banks. The numerous interest rate hikes adopted in 2022 and 2023 completely transformed the interest rate environment at record speed. Since the second half of 2023, the European Central Bank

(ECB) and the Federal Reserve have ceased increasing interest rates, and more recently, the Federal Reserve, the ECB and other central banks worldwide have begun decreasing interest rates. As a tendency, arm's length interest rates remain significantly higher today than at the end of 2021. However, interest rates are generally determined at the time a debt instrument is granted and should not be updated throughout the term of the financing instrument unless the contract provides for a specific interest rate adjustment clause. Consequently, the changed conditions may not generally be reflected in debt instruments granted in the past but must be considered with respect to new

instruments. With regard to the financing of new investments, investors must consider the future interest rate policy of central banks when deciding on optimal financing instruments, such as fixed interest versus floating rate interest rates.

CANADA

Kurjanowicz: Canada represents an advanced jurisdiction when it comes to the TP environment. Canadian TP legislation has been in place for decades. We have a significant volume of TP tax court case precedents, and the Canada Revenue Agency (CRA) is one of the most capable authorities globally when it comes to TP examinations. The Canadian government has also invested heavily in the CRA's

capability in recent years. For perspective, the CRA now employs close to an equivalent number of TP examiners as does the US Internal Revenue Service (IRS), despite Canada's economy being one tenth the size of the US. The resources at the CRA's disposal have allowed the authority to enforce TP regulations across a broad spectrum of industry sectors and multinational enterprise (MNE) business sizes. Whereas in the past, TP was of concern only to the largest MNEs, today any business with significant international operations – whether inbound or outbound – will likely be subject to TP examination by the CRA.

AUSTRALIA

Panhwar: The TP landscape in Australia post base erosion and profit shifting (BEPS) is almost unrecognisable to the pre-BEPS world. The main drivers of that change are environmental, social and governance (ESG), and regulatory as well as industry development. From an ESG perspective, tax and 'profit shifting' have found their way to the forefront of public consciousness. There is now a real social consequence for multinationals being seen as 'profit shifters' or 'tax evaders'. This shift in public consciousness, combined with federal budgetary concerns, has emboldened consecutive governments to target multinationals and profit shifting with a series of new laws as well as several rounds of significant

funding for the Australian Taxation Office (ATO), which have all resulted in a much tougher regulatory environment for all taxpayers, particularly multinationals. Lastly, from a business perspective, there is a continued shift away from trade in tangible goods, which dominated cross-border dealings for decades, to more unique, hard to value and highly mobile intangibles.

JAPAN

Mori: The main TP trends in Japan can be identified by analysing the number of requests for mutual agreement procedures (MAPs). Most companies in Japan request MAP or bilateral advance pricing agreements (APAs) to avoid double taxation. According to the National Tax Agency of Japan, APA requests per year account for about 80 percent of all requests and MAP requests about 20 percent. As not all MAP requests are requests for imposed tax initiated by the Japanese tax authority, APA requests are relatively large in number compared to MAP requests. This trend is not exclusive to the past tax year but consistent with recent years. This is a reflection of the tendency in Japan for companies to proactively utilise bilateral APAs in advance to avoid double taxation caused by TP taxation.

SOUTH AFRICA

Chadha: The TP landscape in South Africa is evolving rapidly, driven by several key trends. The Organisation for Economic Co-operation and Development's

(OECD's) BEPS project has significantly impacted global TP developments, and South Africa is no exception. The increasing digitalisation of the economy creates challenges in valuing and pricing intangible assets, crucial with the rise of M&A activity. The South African Revenue Service (SARS) has prioritised TP, leading to increased audits and investigations. SARS emphasises 'substance', requiring companies to demonstrate that their South African operations have the resources and functions to justify reported returns. Comprehensive TP documentation explaining policies and methodologies is crucial. Collaboration between tax authorities on TP issues is increasing across the continent, with initiatives undertaken by the African Tax Administration Forum and Tax Inspectors Without Borders facilitating information exchange and common approaches to audits. Technology plays a vital role in managing TP risks, with companies using data analytics and other tools. The coronavirus (COVID-19) pandemic has led to supply chain restructuring, creating new TP challenges as companies determine efficient pricing between different parts of their chains. APAs, providing certainty on TP arrangements, have been introduced in South Africa. Final rules are awaited, offering taxpayers a valuable tool for obtaining certainty and managing TP risks. These trends highlight the dynamic nature of the TP environment in

South Africa. Companies must stay informed and adapt their strategies to comply with evolving regulations and address emerging challenges.

UNITED KINGDOM

Howarth: From a UK perspective, the October 2024 Budget announced a consultation to reduce the scope of the current small and medium-sized enterprise (SME) exemption from the TP rules, such that it would only be available to the smallest taxpayers. The SME exemption has, to date, been generous compared to many other regimes, and the UK government sees this as an opportunity to align with international peers. If adopted, this change will drag many more businesses within the scope of the UK TP rules and its associated administrative requirements. However, for completeness, it is worth noting that the profit fragmentation regime, introduced in 2019, has required SMEs with a certain fact pattern to comply with the arm's length principle from that time. Conversely, larger businesses continue to wrestle with the dual data requirements of TP and Pillar Two, the latter being implemented in the UK for accounting periods beginning on or after 31 December 2023. Consequently, we are seeing many artificial intelligence-driven solutions coming to market to assist both in-house teams and professionals with increased reporting obligations.

It can be difficult for companies to overturn a decision by the examiner at the examination stage, so it is important for them to refute a decision early and firmly if any objections are raised.

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SINGAPORE

Sahil: Over the past decade, the global TP environment has undergone key changes due to the emergence of new business models and supply chains, digitalisation of economies and business transactions, greater mobility of resources, increased sharing and transfer of human capital and external pandemics. As a result, there are a number of key TP trends currently shaping the landscape. First, a tightening of local rules and regulations by tax authorities to ensure greater TP compliance and transparency. Second, an enhanced focus on preparation and maintenance and submission of correct TP documents by taxpayers to ensure compliance with the local laws. Third, greater scrutiny of both cross-border and domestic related-party transactions, financial transactions and arrangements, management fees and intragroup

services, and the sharing and transfer of intangibles. Fourth, an increasing use of technology to improve the efficiency and effectiveness of TP processes, policies and outcomes. Lastly, a closer alignment of TP policies and processes with the BEPS 1.0 action plan and the upcoming BEPS 2.0 programme.

UNITED STATES

Armitage: The IRS 'Advance Pricing and Mutual Agreement (APMA) Program', which handles MAP and APA cases, has become more selective about accepting APAs. We now have experience with the types of cases that are not being accepted. They largely are unilateral APAs that do not involve a material existing dispute. APMA's decision not to accept these cases seems counterproductive. In the first instance, it is often the unilateral

APA that prevents non-US disputes. Unilateral US APAs show non-US exam teams that the taxpayer's TP memoranda has been challenged and survived the rigours of an APA due diligence process. In our experience, these presentations are generally successful. Without the APA, countries are more likely to make an adjustment, thus defeating the purpose of the IRS not accepting the case – that is, to reduce its inventory.

FW: WHAT CHALLENGES FACE MULTATIONALS IN THEIR EFFORTS TO MAXIMISE TAX EFFICIENCIES WHILE MEETING COMPLIANCE REQUIREMENTS?

CANADA

Kurjanowicz: Canadian TP reporting requirements are relatively simple in comparison

to other developed-nation jurisdictions. In Canada, there is no requirement to submit TP documentation unless the CRA specifically requests it. From the perspective of annual forms and filings, form T-106 – an annual information return which specifically reports TP information – applies only to taxpayers with cross-border related-party transactions, on aggregate, greater than C\$1m for the year. Form T-106 is also a relatively simple form in comparison to TP forms required in other jurisdictions. Canadian country-by-country reporting and Pillar Two global minimum tax legislation follows the same, greater than €750m threshold as adopted by the OECD. From a TP effective tax rate management perspective, with a corporate tax rate of approximately 26.5 percent, Canada represents a middle-ground

jurisdiction regarding the tax cost of doing business. The most notable factor to consider when planning TP structures involving Canada is that the CRA generally follows a 'substance' over 'form' approach to TP. Taxpayers are cautioned to ensure that functional intensity – boots on the ground – and value creation are aligned with legal contracts and TP policies.

AUSTRALIA

Panhwar: A decade ago, any multinational wanting to do some cross-border tax planning had two main tax provisions to concerns themselves with – TP and the general anti-avoidance rules (GAAR). As a general rule, GAAR did not easily apply to most TP arrangements given its needs for a sole or dominant purpose of obtaining only Australian tax benefits. That left TP, which everyone accepts and appreciates as a reality of multinational existence. Today, we have added complications such as the multinational anti-avoidance law (MAAL), the diverted profits tax (DPT) and the announced, but yet to be enacted, changes to GAAR. The MAAL and DPT are both provisions targeting TP arrangements but in the guise of anti-avoidance. Their lower 'principal purpose' thresholds mean it is difficult to see many circumstances where they will not apply. In addition to the increased penalties and challenges of these new laws, their other effect is to take TP disputes out of the realm



The increased use of technology by businesses for TP implementation and reporting should assist taxpayers in collating information requested by tax authorities.

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of MAPs as contained in double tax agreements.

JAPAN

Mori: Although MNEs have an obligation to retain contemporaneous documentation under the TP tax system, they also have the administrative burden of the controlled foreign corporation tax system. It is therefore advisable for MNEs to streamline their tax operations as costs are expected to increase. Helping to reduce the tax burden on MNEs is the safe harbour rule, along with the OECD's Pillar One, Amount B 'simplified and streamlined approach', which applies standards such as 'baseline marketing and distribution activities'.

SOUTH AFRICA

Chadha: South Africa's TP regulations are intricate and constantly evolving, aligning with international standards like the OECD's BEPS project. The commercial fruition of transactions is further dependent on whether or not the correct regulatory approvals have been sought. Keeping up with these changes and ensuring compliance across various jurisdictions can be challenging. SARS emphasises comprehensive TP documentation, requiring MNEs to invest significant resources in preparing and maintaining detailed records. This can be time consuming and costly. Furthermore, SARS is actively focusing on TP, leading to increased audits and investigations. This can be disruptive and resource

intensive for MNEs. The pandemic, the economic downturn and South Africa's grey listing forced many MNEs to restructure their organisations, including resources and supply chains, creating new challenges. At the same time, it is important for MNEs to keep up with technological advancements in data analytics and automation tools, which are crucial for managing risks and ensuring compliance.

UNITED KINGDOM

Howarth: Most economies in which MNEs operate subscribe to the OECD TP guidelines. However, individual territories may potentially have a subtly different interpretation of those guidelines, local safe harbours, as well as domestic documentation and reporting requirements. Therefore, a policy designed at group level may still result in a level of double taxation, or the need to prepare

TP remuneration policies must only be set after understanding and considering the nitty-gritty of the local compliance obligations of each jurisdiction.

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duplicate documentation to satisfy certain domestic legislation. Despite increased international cooperation and alignment, particularly as a result of the BEPS project, these issues prevail. Increasingly, public perception also plays a part – consumer-facing MNEs in particular are no longer willing to court the bad publicity an 'aggressive' tax structure may attract. The UK, for example, places an obligation on the largest taxpayers to publish their tax strategy annually, which means such information is readily accessible.

SINGAPORE

Sahil: The key challenges for any MNE are to stay abreast of current tax and TP guidelines for each of their operating tax jurisdictions, document all related-party transactions and the commercial business rationale and determine the most appropriate

TP remuneration policy for each group entity. Thus, every value-creating entity – whether low risk, medium risk or high risk – must be remunerated appropriately as per its functional analysis and contributions made to the overall group value chain, to achieve and maximise overall tax efficiency. TP remuneration policies must only be set after understanding and considering the nitty-gritty of the local compliance obligations of each jurisdiction, as well as the position of all related parties, especially entities that are loss-makers or newly set up, and not only the headquarters or holding entities.

UNITED STATES

Armitage: The 2017 reduction of the US corporate income tax rate – from 35 percent to 21 percent – and introduction of the global intangible low-taxed income

(GILTI) regime, which increased the current taxation of foreign income of US MNEs from as low as 0 percent to at least 10.125 percent, did much to discourage US MNEs from shifting income offshore. The contemporaneous introduction of the foreign-derived intangible income (FDII) regime, providing for a 13.125 percent rate on certain US activities targeted at foreign consumers, further discouraged rate arbitrage. These rate incentives come with their own compliance requirements, which, particularly for FDII, can be difficult to meet. Beyond those requirements, the US corporate income tax rate structure has the effect of largely divorcing compliance considerations from tax rate considerations.

LUXEMBOURG

Hoor: The international tax environment for MNEs is

increasingly complex. In addition to the correct application of domestic tax laws and tax treaties, it is essential that intragroup transactions are conducted at arm's length. Moreover, the new Pillar Two system, which operates somewhat like a shadow tax system to be run in parallel, makes managing the overall tax position an exercise like solving a Rubik's cube.

FW: HAVE YOU SEEN A NOTICEABLE INCREASE IN TP DISPUTES BETWEEN COMPANIES AND TAX AUTHORITIES IN RECENT TIMES? WHAT OPTIONS ARE AVAILABLE TO RESOLVE SUCH DISPUTES AS EFFICIENTLY AS POSSIBLE?

AUSTRALIA

Panhwar: The ATO has received significant funding – over \$4.6bn has been announced for the Tax Avoidance Taskforce (TAT) since the 2019-20 Budget. One of the key focus areas for the TAT is TP assurance. As part of the ATO's findings report for the Top 1000 population, it stated that TP was the most common assurance area reviewed with approximately one in four taxpayers being low assurance or 'red flagged' and less than one in five being considered 'high assurance'. As such, there will continue to be significant review activity in relation to TP. Resolving a dispute efficiently requires two things. First, know what the preferred resolution pathway is – be it a settlement, litigation, alternative



SARS emphasises 'substance', requiring companies to demonstrate that their South African operations have the resources and functions to justify reported returns.

SOUTH AFRICA AMIT CHADHA
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dispute resolution or MAP – and then have strategies in place to direct the dispute to those channels. Second, ensure the evidence is ready to go. Evidence is not just TP documentation, but the source material that underpins the factual assertions in that document.

JAPAN

Mori: In Japan, we have not seen a noticeable increase in TP disputes between companies and tax authorities. During TP examinations, as Japanese tax authorities examine the function and risks of each related party, I believe disputes are unlikely to arise. Regarding APAs, while the so-called development, enhancement, maintenance, protection and exploitation function for intangible assets is now on the agenda, the solution is to be found by analysing the function and risks of related parties.

SOUTH AFRICA

Chadha: South Africa, like many countries, is facing a confluence of challenges that are putting pressure on government finances. Recent global economic downturns have resulted in a decline in tax collections, while rising government expenditure, driven by factors such as the war in the northern hemisphere, political instability, and the severe impact of climate change, exacerbate the situation. This necessitates a significant improvement in tax collection efforts to ensure fiscal sustainability. Across the world,

therefore, revenue authorities have increased their focus on ensuring tax compliance and increasing collections. Based on a recent survey, this has led to more and increasing tax audits, often resulting in disputes. In the area of TP, disputes are highly technical, and the outcome of a tax authority challenge is often uncertain and unlikely to result in a complete victory for the taxpayer even if the TP function is run by the book. In South Africa, year on year external challenges like economic downturns and the pandemic have made it even more difficult to achieve results compared to arm's length ranges that are based on historic data. Taxpayers also need to note that a TP adjustment performed by SARS is an expensive exercise given the secondary adjustment that applies in South Africa in the event that the arm's length test is not met.

Due to the complex nature of TP, examinations can often turn on a key factor or nuance. An unclear, incomplete or inaccurate response can be very damaging to a taxpayer's position.

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UNITED KINGDOM

Howarth: HMRC continues to have a specialist team assigned to TP cases. While the number of annual investigations may be significantly lower than in other territories, typically around 150, HMRC's approach means it is focused on the cases where it considers the loss of tax to be significant, and risk factors have been identified. An assigned specialist inspector means such enquiries have the potential to progress more quickly than one being dealt with by a general caseworker, assuming the taxpayer is cooperative. However, where resolution requires the taxpayer to enter into the MAP to avoid double taxation, this can introduce significant delays in bringing matters to a conclusion as it is then dependent on how quickly the second tax authority responds. For smaller businesses, therefore, it is

often not cost or time effective to enter a MAP.

SINGAPORE

Sahil: Over the past years, there has been a substantial increase in disputes, especially after recent amendments were made to TP regulations across different regions, leading to a BEPS-like situation. Moreover, disputes are now pertaining to varied aspects that include non-maintenance and timely submission of TP documentation or inaccurate or incomplete information captured in TP documentation, lack of supporting documents evidencing the actual occurrence and performance of the transaction, a mismatch between the value created and contributed by the group entity and its corresponding remuneration policy, as well as insufficient commercial expediency

for transactions lacking economic and commercial substance or complex financial arrangements or hybrid intangibles. To address these issues, groups can consider options such as value chain alignment, price-setting and updating exercises, APAs and MAPs, operational TP and filing safe harbour applications.

LUXEMBOURG

Hoor: In the context of heightened scrutiny on TP, disputes between companies and tax authorities are becoming more prevalent. These disputes tend to arise primarily from a lack of proper documentation surrounding material intragroup transactions. Conversely, the thorough preparation of TP documentation provides a robust defence against challenges from the Luxembourg tax authorities.

TP necessitates a delicate balance between ensuring adequate security and the associated costs of preparing documentation. In practice, Luxembourg companies should screen major intragroup transactions in order to identify specific issues that could raise the suspicion of tax authorities and assess the magnitude of related tax risks. On this basis, taxpayers can perform a cost-benefit analysis and weigh the costs of TP documentation against the amount of potential tax risks. However, it should be noted that when TP documentation is prepared following an investigation by the Luxembourg tax authorities or to support a case before the Luxembourg courts, there is a significantly higher probability that TP documentation may not be taken into consideration.

UNITED STATES

Armitage: The IRS continues to focus on TP issues during audit and has recently begun asserting not only that the taxpayer's transactions were improperly priced, but also lacked economic substance and so should not be respected as transactions. The assertion of economic substance claims has been encouraged by the IRS national office and is sometimes used to disregard the existence of non-US legal entities that were properly formed and are part of the taxpayer's structure. These challenges can be improper and will soon be challenged in US courts.



In recent years, we are seeing a more free-wheeling IRS that may start by auditing identified issues but add other issues as the audit progresses.

UNITED STATES J. CLARK ARMITAGE
CAPLIN & DRYSDALE

CANADA

Kurjanowicz: The CRA, the CRA Appeals Division, the Canadian courts and Canadian competent authorities have all been highly active with respect to TP issue resolution for decades. The CRA commences TP audit proceedings by issuing a formal '247(4) Contemporaneous Transfer Pricing Documentation Request Letter' in which taxpayers are afforded three months to submit their TP documentation. Following that submission, the CRA will often issue written queries, review taxpayer financial data, and conduct taxpayer interviews for months, and often years, before reaching an audit conclusion and, potentially, reassessment. Following a TP reassessment by the CRA, taxpayers are afforded 90 days to submit an appeal to the CRA's Appeals Branch. If resolution is not achieved, taxpayers may then escalate the issue to the Tax Court of Canada, then the Federal Court of Appeal, and then, potentially, even the Supreme Court of Canada. Taxpayers may also pursue dispute resolution, or double taxation relief, through the competent authority and MAP. Due to the high costs of pursuing litigation in Canada, a MAP often represents the most efficient mechanism to pursue resolution.

FW: IF A COMPANY FINDS ITSELF SUBJECT TO A TAX AUDIT OR INVESTIGATION, WHAT ADVICE WOULD YOU OFFER ON HOW IT SHOULD RESPOND?

UNITED KINGDOM

Howarth: Unless the enquiry is clearly unfounded – which should not be the case for an HMRC-led investigation, given the stage gate process required to open a TP investigation – cooperation is always encouraged. HMRC's penalty framework is based in part on the taxpayer's willingness to 'tell, help, give'. Therefore, should an adjustment ultimately be imposed, the penalty position can be mitigated considerably by taxpayer behaviour during the enquiry. The increased use of technology by businesses for TP implementation and reporting should assist taxpayers in collating information requested by tax authorities. MNEs should, however, be mindful that tax authorities now share information more than ever. If they are aware a particular aspect of their TP design is susceptible to challenge in another territory, it would be

TP necessitates a delicate balance between ensuring adequate security and the associated costs of preparing documentation.

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prudent to take advice on that promptly.

SINGAPORE

Sahil: Principally, a company must prepare and maintain a primary defensible document – a TP document or memo on a contemporaneous basis along with the correct benchmarking analysis. Other key supporting documents include valid intercompany agreements with appropriate clauses, group or master TP policy documents, sample invoices and debit and credit notes, a detailed cost-benefit analysis and cash flow projections, as well as all relevant email correspondence, even if not requested by the tax authority, as adequate analyses and documentations are very strong defence mechanisms before any tax authority. Specifically, the functions, assets and risks contribution

analysis and benchmarking analysis must be fully robust and appropriately conducted to defend and validate the arm's length prices concluded by the taxpayer. In addition, specific answers must be provided to tax audit questions, along with adequate commercial rationale for each question.

UNITED STATES

Armitage: Taxpayers should avoid unscripted conversations with the IRS and hire competent counsel to advise on how best to respond. The IRS has historically targeted a small number of issues on audit, worked those issues to completion and resolved the case. In recent years, we are seeing a more free-wheeling IRS that may start by auditing identified issues but add other issues as the audit progresses. In the TP space, the IRS has become much more willing to

assert penalties even if the taxpayer has documentation supporting its pricing. If the adjustment is large or the IRS changes the TP method, it almost certainly will ignore the documentation and impose penalties. The advice of counsel will be helpful to mitigating these risks.

CANADA

Kurjanowicz: It is crucial to provide accurate, comprehensive and well-organised documentation within the CRA's specified three-month timeframe as well as to respond to further queries on a timely basis. Before any submission, all information should be carefully reviewed to ensure consistency and accuracy, including across years. The CRA will usually conduct TP examinations for multiple taxation periods concurrently, so it is important for all representations to the CRA to be internally

consistent year over year. The CRA has advanced capabilities and significant audit resources, so it is recommended that taxpayers engage professional TP specialists early in the audit process to ensure they are fairly and accurately represented. Due to the complex nature of TP, examinations can often turn on a key factor or nuance. An unclear, incomplete or inaccurate response can be very damaging to a taxpayer's position. In a TP audit context, professional assistance can go a long way to mitigate costly consequences.

LUXEMBOURG

Hoor: Ideally, taxpayers should take a proactive approach to TP by preparing documentation at the time of entering into a controlled transaction. This is preferable to waiting until a transaction is picked up during a tax audit. While TP documentation may also be prepared at the moment of a tax audit, the level of scrutiny regarding the assumptions, the TP approach and the benchmarking that may be expected is unequally higher. After all, it might be considered as a coincidence if the TP analysis confirms the pricing of the intragroup transaction. However, if Luxembourg tax authorities can reasonably demonstrate that the TP of an intragroup transaction does not adhere to the arm's length principle, it is the responsibility of the taxpayer to disprove this rebuttable presumption. In the absence of appropriate TP documentation, it is difficult to



The key to effectively managing disputes is to remember this reality – the company is in possession of every page of a story of which it can give the ATO only a few pages.

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substantiate the arm's length character of intragroup pricing. When TP documentation is prepared for the purposes of a tax audit, potentially years after a transaction has been entered into, it might also be difficult to trace back all relevant information and relevant comparables data.

SOUTH AFRICA

Chadha: Receiving a notice of a tax audit or investigation can be unnerving. In such a situation, time is of the essence to respond promptly to any requests from the authorities. Submissions and information provided to the revenue authorities must be honest and accurate. TP audits are highly technical and complex and hence it is always advisable to seek timely professional guidance before responding to any notices, as soon as possible in the process. When submitting information, reviewing all substantiating evidence to ensure that it is correct and provides clarity is essential. It is important to accurately and comprehensively articulate TP methodology and rationale. Potential follow-up questions should be anticipated and supporting evidence needs to be considered. It is important to remain patient and persistent – tax audits and investigations can be lengthy and complex.

JAPAN

Mori: A company should clearly outline the nature of its products or services. The TP examination will be

based on this information. It is also advisable for companies to explain their tax situation quantitatively rather than qualitatively to the examiner. This makes it easier for the authorities' decision to be accepted at examination stage, even if the company refutes it at the MAP or trial stage. In certain countries, it can be difficult for companies to overturn a decision by the examiner at the examination stage, so it is important for them to refute a decision early and firmly if any objections are raised.

AUSTRALIA

Panhwar: There is no single correct approach to responding to the ATO. The correct approach will depend on two main things. First, understanding the organisation's priorities. If a company were to consider a triangle with three axes – time, cost and ATO relationship – where in that paradigm does it sit? There is a different strategy and approach for an organisation that does not care about time compared to one that does. Second, what is the company's optimal resolution path? Its approach will differ depending on which final resolution pathway it selects. Aside from that, the key to effectively managing disputes is to remember this reality – the company is in possession of every page of a story of which it can give the ATO only a few pages. It should be no surprise if the ATO does not appreciate the story the same way the company does. Companies should keep communication open with the ATO and try and ensure

they know what story they are reading.

FW: HOW IMPORTANT IS IT FOR COMPANIES TO REGULARLY REVIEW AND UPDATE THEIR TP POLICIES? WHAT CONSIDERATIONS SHOULD THEY MAKE WHEN DOING SO?

CANADA

Kurjanowicz: The CRA expects, at least, annual internal procedures with respect to TP compliance. Examinations of TP processes, procedures and controls have become an important dimension of CRA audits. It is often informative for the CRA to examine TP governance as a first step – to risk-assess and inform which transactions require detailed examination. In terms of best practices, TP governance should include formally documented TP policies or legal agreements governing cross-border related-party transactions. Documented internal procedures and controls for TP are also important. Moreover, with business facts changing throughout the year, contemporaneous implementation or updating of policies is essential. Companies should also have a year-end process to analyse TP positions prior to closing books for the year, and the booking of year-end TP adjustments, as necessary. Lastly, robust TP documentation, prepared ahead of the statutory tax filing deadline, is advisable to provide TP penalty protection.

LUXEMBOURG

Hoor: Taxpayers should not consider the preparation of TP documentation as a mere compliance exercise. Instead, in the current international tax environment of heightened transparency and scrutiny, it would be prudent for Luxembourg companies to adopt a more comprehensive approach by integrating the documentation of transfer prices into their overall tax strategy. This would allow them to reflect the underlying business rationale behind their investment structures and intragroup transactions. It is also important that TP policies are not disregarded after their implementation. As a matter of best practice, taxpayers should review their TP documentation at least once a year to assess whether the fact pattern remains consistent with reality and to determine whether an update is necessary.

SOUTH AFRICA

Chadha: South African regulations require contemporaneous TP documentation, ideally updated annually. This aligns with TP disclosures required in terms of the annual income tax return. The documentation rules introduced after adopting the BEPS Action 13 plan recommendations mandate submitting a master file and a local file annually if the prescribed thresholds are met. However, TP documentation should not be viewed solely as a compliance

exercise. It should be an annual articulation of TP practices integrated into the day to day operations of the business. This ensures that the documentation accurately reflects the company's current practices and facilitates efficient responses to potential audits or investigations. As business evolves, TP policies need to adapt to reflect changes in operations, structure or industry.

UNITED STATES

Armitage: The IRS is increasingly willing to assert penalties in TP cases. This may reflect recent IRS court wins and an expectation of continuing IRS success. The prototypical case involves a US MNE that has offshored its intangibles to a lower tax jurisdiction. While that fact pattern is increasingly less common after the 2017 statutory changes – lower rate, GILTI and FDII – any company that has developed intangibles in the US and offshored them has material audit and penalty risk. Those companies should review their TP to determine whether some other structure may be more defensible, such as relying on the US FDII rate for US activities targeting foreign markets.

SINGAPORE

Sahil: Considering the rapidly evolving TP environment, it is extremely important for companies to annually review and update their TP policies. From a time-cycle perspective, TP documentation must be prepared for each financial year. That said, if there are no

material changes to the overall business operations and activities and no changes to the related-party transactions, a new benchmarking analysis should be conducted every three years. However, companies must update the financial data for comparable companies every year to apply the arm's length principle reliably and appropriately reflect actual market conditions. Since business and commercial conditions and realities differ each year in either macro terms, such as the industry, local economy or geographical region, or micro terms, which are specific to the company or its group, it is very important that the arm's length prices are reflective of actual market conditions and circumstances.

JAPAN

Mori: Even if a company formulates its TP policy, it is not possible to apply it indefinitely because changes which affect the transaction, as well as the function and risks of related parties, will evolve as technologies progress. In terms of benchmarking, it is expected that an update will be needed for the calculated profit rate, among other things. So, even if a company formulates its TP policy, it should not be left unattended. Rather, it is necessary to regularly review such a policy, perhaps every few years, to ensure there are no material changes to the transaction.

AUSTRALIA

Panhwar: There is an old military saying that the best laid

plans only survive until the first arrow is let loose. Similarly, the best TP model or policy survives until the first day of implementation. New products get launched, key employees are promoted, move jurisdictions, leave the organisation or change roles, and new executive leadership comes in and changes the entire organisational strategy. TP policies need to evolve and adapt as business evolves and adapts. One of the key things a company needs to keep in mind while refreshing is that it cannot eliminate risk – the task is to manage it as best it can. If one revenue authority sees risk, it generally means the other

sees all risks. However, it may be strategically optimal to have risk in one jurisdiction versus another if the resolution pathway of that jurisdiction is clearer.

UNITED KINGDOM

Howarth: TP policies should be reviewed and refreshed with regard to the OECD guidance around the frequency of documentation updates, together with any local requirements. In the UK, if documentation is clearly out of date and no longer relevant to a business' current operating or corporate structure, it will likely be viewed as irrelevant and the

taxpayer should reasonably expect a penalty for failure to maintain adequate documentation. Where a material related-party transaction is anticipated, or is of a type which is particular susceptible to challenge – for example, if it involves intangibles – MNEs may wish to consider an APA with the tax authorities concerned, rather than taking a 'file and defend' approach. Clearly, however, this must be a commercial decision given the time and cost associated with such applications. ■

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