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and Marc M. Levey*

# Transfer Pricing and Dispute Resolution

*Aligning strategy and execution*

IBFD

# Transfer Pricing and Dispute Resolution

## Why this book?

Transfer Pricing and Dispute Resolution addresses the complexity, valuation and administrative nuances, and cultural impacts of resolving this significant cross-border issue when tax disputes arise.

This book sets out in detail not only the general laws in each tax jurisdiction impacted by the multinational companies' transfer pricing practices, but also the ancillary concerns of how the issue is interpreted locally as well as related to the OECD Guidelines; the varied approaches to administrative resolution of these issues, including specific alternative dispute resolution mechanisms and the effective uses of Advance Pricing Agreements; correlative adjustment procedures in the event of transfer pricing adjustments; cross-border exchange of information concerns; and how to proceed to litigation if all else fails administratively.

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<b>Foreword</b>	v
-----------------	---

<b>Acknowledgements</b>	vii
-------------------------	-----

<b>Chapter 1. Introduction to Transfer Pricing and Dispute Resolution</b>	1
---	---

*Steven C. Wrappe*

1. Transfer pricing risk management	1
2. Basics of transfer pricing compliance	5
2.1. General	5
2.2. The transfer pricing report	6
3. Dispute process	10
4. Audit landscape	11
4.1. Tax planning that involves transfer pricing	11
4.2. Interest rate determination: GE Capital	12
4.3. Pharmaceutical industry: GlaxoSmithKline Inc.	13
5. Conclusion	14

<b>Chapter 2: Dispute Channels</b>	15
------------------------------------	----

*Suzan Arendsen*

1. Overview of common dispute process	15
2. Description of procedures	16
2.1. Audit	16
2.2. Appeals and litigation	19
2.3. Mutual agreement procedure and arbitration	21
2.3.1. Mutual agreement procedure	22
2.3.2. EU Arbitration Convention	26
2.4. Advance pricing agreement	29
2.4.1. What is an advance pricing agreement?	29
2.4.2. Advance pricing agreement process	30
2.4.3. Benefits and advantages	33
2.4.4. Considerations for deciding to seek an advance pricing agreement	34
2.4.5. Advance pricing agreements in times of economic downturn	34

## Table of Contents

---

3.	Advantages and disadvantages of means of dispute resolution	35
3.1.	Advantages and disadvantages of the mutual agreement procedure	35
3.2.	Advantages and disadvantages of arbitration under the EU Arbitration Convention	36
3.3.	Advantages and disadvantages of an advance pricing agreement	36
4.	Commentary on discussions and negotiations with tax authorities	37

## **Chapter 3: International Developments** 39

*Monique van Herksen*

1.	OECD Guidance	39
1.1.	Mutual agreement procedure, new Art. 25 of the OECD Model Convention and Commentary to Art. 25	40
1.2.	Arbitration provision	43
1.3.	Exchange of information	53
2.	EU-specific requirements	56
2.1.	EU Arbitration Convention	56
2.1.1.	Historical background	56
2.1.2.	Strengths and weaknesses of the Arbitration Convention	59
2.1.3.	Procedure to obtain arbitration under the Arbitration Convention	60
2.1.4.	Code of Conduct on implementation of the Arbitration Convention of July 2006	62
2.1.5.	Revised Code of Conduct on Arbitration Convention	63
2.2.	Intra-group services	64
2.3.	Triangular transfer pricing cases	67
2.3.1.	Introduction	67
2.3.2.	EU triangular cases	71
2.3.3.	Non-EU triangular cases	72
2.3.4.	EU Joint Transfer Pricing Forum	75
2.4.	Commercial arbitration	77
2.4.1.	World Trade Organization	78
2.4.2.	UN Commission on International Trade Law	79
2.4.3.	Applicable rules and procedures	80

---

**Chapter 4: Australia** 83

*Reynah Tang and Don Spirason*

1.	Introduction	83
1.1.	Transfer pricing legislation	83
1.2.	Interaction between legislation and tax treaties	85
1.3.	Administrative process	87
1.4.	Key transfer pricing issues in Australia	88
1.4.1.	Determination of the appropriate methodology	89
1.4.2.	Recharacterization of transactions by the tax authorities	90
1.5.	Management of transfer pricing: administrative and legal dimensions	91
2.	Audit	92
2.1.	Historical background	92
2.2.	Primary current controversies	93
2.3.	Audit process and milestones	94
2.3.1.	Authorities involved	94
2.3.2.	Audit time line	94
2.3.3.	Rights and obligations of taxpayers	98
2.3.4.	Rights and obligations of tax authorities	98
2.3.5.	Information used in tax audits	98
2.3.6.	Confidentiality of information	99
2.3.7.	Right of access to information	99
2.3.8.	Penalties	99
2.3.9.	Access to foreign-based information	99
2.3.10.	Burden of proof	100
2.3.11.	Statute of limitations	100
2.3.12.	Information requests	100
2.3.13.	Solicitor-client privilege	100
2.4.	Recommendations for taxpayers during a tax audit	101
3.	Appeals and litigation	101
3.1.	Historical statistics	101
3.2.	Appeals and litigation process	102
3.3.	Notable court decisions	104
3.3.1.	Carpenter: relevance of anti-avoidance purpose?	104
3.3.2.	Re Roche: methodology	105
3.3.3.	SNF: methodology and relevance of sustained losses	107
3.3.4.	Themes from the cases	108
3.4.	Recommendations	110

## Table of Contents

---

4.	Mutual agreement procedure and arbitration	111
4.1.	Historical statistics	111
4.2.	Mutual agreement procedure	111
4.3.	Arbitration	114
4.3.1.	Baseball arbitration	115
4.3.2.	Not precedent setting	115
4.4.	Advantages and disadvantages	115
5.	Advance pricing agreements	116
5.1.	Historical statistics	116
5.2.	Advance pricing agreement process	118
5.2.1.	Governmental agencies involved	118
5.2.2.	Domestic regulations; bilateral and multilateral	118
5.2.3.	Coverage	118
5.2.4.	Process	118
5.2.4.1.	Step one: pre-lodgement meetings	120
5.2.4.2.	Step two: lodgement of formal application	120
5.2.4.3.	Step three: analysis and evaluation	121
5.2.4.4.	Step four: negotiation and agreement	121
5.2.4.5.	Step five: concluded advance pricing agreement	121
5.2.5.	Fees	122
5.2.6.	Timing for filing requests for advance pricing agreements	122
5.2.7.	Timeline for unilateral advance pricing agreements	123
5.2.8.	Timeline for bilateral advance pricing agreements	123
5.2.9.	Critical assumptions	123
5.2.10.	Withdrawals	123
5.2.11.	Agreement with taxpayer	123
5.2.12.	Revocation, revision and renewal	123
5.2.13.	Annual compliance reporting	123
5.2.14.	Public disclosure of advance pricing agreements	124
5.3.	Practical experience with advance pricing agreements and advance tax rulings	124
5.4.	Advance pricing agreements in times of economic downturn	124

5.5.	Special advance pricing agreements	124
5.6.	Advantages and disadvantages	125
6.	Recommendations	126

## **Chapter 5: Brazil** 129

*Marcelo Natale and Carlos Nicacio*

1.	Introduction	129
1.1.	Terms and definitions	129
1.2.	Transfer pricing documentation	136
1.2.1.	Requirements and deadlines	137
1.2.2.	Applicable taxes, penalties, interest and other fees	138
1.3.	Local dispute procedure	138
1.4.	Availability of international procedures and relief from double taxation	139
1.5.	Tax authorities	140
1.5.1.	Organizational structure	140
1.5.2.	Other relevant players	140
1.5.3.	Programmes to ensure consistent application of transfer pricing policies and penalties	140
1.5.4.	Downward transfer pricing adjustments	141
1.5.5.	Contact information	141
1.5.6.	Profile and aggressiveness	142
2.1.	Historical background	143
2.2.	Primary current controversies	144
2.3.	Audit process and milestones	146
2.3.1.	Authorities involved	146
2.3.3.	Rights and obligations of taxpayers	147
2.3.4.	Rights and obligations of authorities	147
2.3.5.	Information used in tax audits	147
2.3.6.	Confidentiality of information	148
2.3.7.	Right of access to information	149
2.3.8.	Penalties	149
2.3.9.	Access to foreign-based information	150
2.3.10.	Burden of proof	150
2.3.11.	Statute of limitations	151
2.3.12.	Information requests	151
2.3.13.	Solicitor-client privilege	152
2.4.	Recommendation for taxpayers during a tax audit	152

## Table of Contents

---

3.1.	Historical statistics	152
3.2.	Appeals and litigation process	153
3.2.1.	Administrative Council of Tax Appeals	153
3.2.2.	Judicial courts	153
3.3.	Notable court decisions	154
3.4.	Advantages and disadvantages	156
<b>Chapter 6: Canada</b>		<b>177</b>
<i>David Francescucci and Shiraj Keshvani</i>		
1.	Introduction	177
1.1.	Transfer pricing documentation	177
1.1.1.	Background, requirements and deadlines	177
1.1.1.1.	Transfer pricing documentation requirements	178
1.1.1.2.	Transfer pricing methodologies	181
1.1.1.3.	Services	182
1.1.1.4.	Intangibles	182
1.1.2.	Applicable taxes, penalties, interest and other fees	183
1.2.	Local dispute procedure	184
1.3.	Availability of international procedures and relief from double taxation	188
1.4.	Tax authorities	189
1.4.1.	Organizational structure	189
1.4.2.	Other relevant players	190
1.4.3.	Programmes to ensure consistent application of transfer pricing policies and penalties	191
1.4.4.	Downward transfer pricing adjustments	193
1.4.5.	Contact information	194
1.4.6.	Profile and aggressiveness	194
2.	Audit	195
2.1.	Historical background	195
2.2.	Primary current controversies	197
2.3.	Process and milestones	199
2.3.1.	Authorities involved	199
2.3.2.	Audit timeline	199
2.3.3.	Rights and obligations of taxpayers	200
2.3.4.	Rights and obligations of authorities	201
2.3.5.	Information used in tax audits	202



	2.3.6.	Confidentiality of information	203
	2.3.7.	Right of access to information	204
	2.3.8.	Penalties	205
	2.3.9.	Access to foreign-based information	208
	2.3.10.	Burden of proof	210
	2.3.11.	Statute of limitations	210
	2.3.12.	Information requests	210
	2.3.13.	Solicitor-client privilege	211
	2.4.	Recommendations for taxpayers during a tax audit	211
3.		Appeals and litigation	212
	3.1.	Historical statistics	212
	3.2.	Appeals and litigation process	212
	3.3.	Notable court decisions	213
	3.3.1.	GlaxoSmithKline Inc. v. Her Majesty the Queen	214
	3.3.2.	General Electric Capital Canada Inc. v. Her Majesty the Queen	216
	3.3.3.	J. Hofert Ltd v. The Minister of National Revenue	217
	3.3.4.	Indalex Ltd v. Her Majesty the Queen	218
	3.4.	Advantages and disadvantages	219
4.		Mutual agreement procedure and arbitration	219
	4.1.	Historical statistics	219
	4.2.	Mutual agreement procedure	220
	4.2.1.	Notification process and conditions to request	220
	4.2.2.	Time limits	224
	4.2.3.	Penalties and interest	225
	4.3.	Arbitration	226
	4.3.1.	History	226
	4.3.2.	Mandatory arbitration under the Canada–United States treaty	226
	4.3.3.	Not precedent setting	228
	4.4.	Advantages and disadvantages	228
5.		Advance pricing agreements	229
	5.1.	Historical statistics	229
	5.2.	Advance pricing agreement process	230
	5.2.1.	Government agencies involved	230
	5.2.2.	Domestic regulations; bilateral and multilateral	230
	5.2.3.	Coverage	231
	5.2.4.	Process	231

## Table of Contents

---

5.2.5.	Fees	231
5.2.6.	Timing for filing requests for advance pricing agreements	232
5.2.7.	Timeline for unilateral advance pricing agreements	232
5.2.8.	Timeline for bilateral advance pricing agreements	233
5.2.9.	Critical assumptions	233
5.2.10.	Withdrawals	234
5.2.11.	Agreement with taxpayer	234
5.2.12.	Revocation, revision and renewal	234
5.2.13.	Annual compliance reporting	235
5.2.14.	Public disclosure of advance pricing agreements	235
5.2.15.	Mandatory arbitration under the Canada–United States treaty	235
5.3.	Practical experience with advance pricing agreements and advance tax rulings	236
5.4.	Advance pricing agreements in times of economic downturn	237
5.5.	Special advance pricing agreements	238
5.6.	Advantages and disadvantages	239
6.	Recommendations	240

## **Chapter 7: China** 243

*Cheng Chi and Ho Yin Leung*

1.	Introduction	243
1.1.	Transfer pricing documentation	243
1.1.1.	Requirements and deadlines	244
1.1.2.	Applicable taxes, penalties, interest and other fees	247
1.2.	Local dispute procedure	248
1.3.	Availability of international procedures and relief from double taxation	248
1.4.	Tax authorities	249
1.4.1.	Organizational structure	249
1.4.2.	Other relevant players	250
1.4.3.	Programmes to ensure consistent application of transfer pricing policies and penalties	250

---

	1.4.4.	Downward transfer pricing adjustments	250
	1.4.5.	Contact information	250
	1.4.6.	Profile and aggressiveness	251
2.	Audit		252
	2.1.	Historic background	252
	2.2.	Primary current controversies	253
	2.3.	Audit process and milestones	254
	2.3.1.	Authorities involved	255
	2.3.2.	Audit time line	255
	2.3.3.	Rights and obligations of taxpayers	255
	2.3.4.	Rights and obligations of authorities	256
	2.3.5.	Information used in tax audits	256
	2.3.6.	Confidentiality of information	256
	2.3.7.	Right of access to information	257
	2.3.8.	Penalties	257
	2.3.9.	Access to foreign-based information	257
	2.3.10.	Burden of proof	257
	2.3.11.	Statute of limitations	258
	2.3.12.	Information requests	258
	2.3.13.	Solicitor-client privilege	258
	2.4.	Recommendations for taxpayers during a tax audit	258
3.	Appeals and litigation		259
	3.1.	Historical statistics	259
	3.2.	Appeals and litigation process	259
	3.3.	Notable court decisions	259
	3.4.	Advantages and disadvantages	260
4.	Mutual agreement procedure and arbitration		260
	4.1.	Historical statistics	260
	4.2.	Mutual agreement procedure	261
	4.2.1.	Notification process and conditions to request	261
	4.2.2.	Time limits	261
	4.2.3.	Penalties and interest	261
	4.3.	Arbitration	262
5.	Advance pricing agreements		262
	5.1.	Historical statistics	262
	5.2.	Advance pricing agreement process	264
	5.2.1.	Governmental agencies involved	264
	5.2.2.	Domestic regulations; bilateral or multilateral	264
	5.2.3.	Coverage	264
	5.2.4.	Process	265

## Table of Contents

---

5.2.5.	Fees	268
5.2.6.	Timing for filing requests for advance pricing agreements	268
5.2.7.	Timeline for unilateral advance pricing agreements	268
5.2.8.	Timeline for bilateral advance pricing agreements	268
5.2.9.	Critical assumptions	269
5.2.10.	Withdrawals	269
5.2.11.	Agreement with taxpayer	270
5.2.12.	Revocation, revision and renewal	270
5.2.13.	Annual compliance reporting	270
5.2.14.	Public disclosure of advance pricing agreements	271
5.3.	Practical experience with advance pricing agreements and advance tax rulings	271
5.4.	Advance pricing agreements in economic downturn	272
5.5.	Special advance pricing agreements	272
5.6.	Advantages and disadvantages	272
6.	Recommendations	273
<b>Chapter 8: France</b>		<b>277</b>

*Bruno Gibert*

1.	Introduction	277
1.1.	Transfer pricing documentation	277
1.1.1.	Requirements and deadlines	277
1.1.2.	Applicable taxes, penalties, interest and other fees	280
1.2.	Local dispute procedure	280
1.3.	Availability of international procedures and relief from double taxation	281
1.4.	Tax authorities	282
1.4.1.	Organizational structure	282
1.4.2.	Other relevant players	284
1.4.3.	Programmes to ensure consistent application of transfer pricing policies and penalties	284
1.4.4.	Downward transfer pricing adjustments procedure	284
1.4.5.	Contact information	284
1.4.6.	Profile and aggressiveness	285

2.	Audit	285
2.1.	Historical background	285
2.2.	Primary current controversies	286
2.3.	Audit process and milestones	286
2.3.1.	Authorities involved	286
2.3.2.	Audit timeline	286
2.3.3.	Rights and obligations of taxpayers	288
2.3.4.	Rights and obligations of authorities	289
2.3.5.	Information used in tax audits	290
2.3.6.	Confidentiality of information	291
2.3.7.	Right of access to information	291
2.3.8.	Penalties	292
2.3.9.	Access to foreign-based information	292
2.3.10.	Burden of proof	293
2.3.11.	Statute of limitations	294
2.3.12.	Information requests	294
2.3.13.	Solicitor-client privilege	294
2.4.	Recommendations for taxpayers during a tax audit	295
3.	Appeals and litigation	295
3.1.	Historical statistics	295
3.2.	Appeals and litigation process	295
3.3.	Notable court decisions	296
3.4.	Advantages and disadvantages	298
4.1.	Historical statistics	299
4.2.	Mutual agreement procedure	299
4.2.1.	Notification process and conditions to request	299
4.2.2.	Time limits	302
4.2.3.	Penalties and interest	303
4.3.	Arbitration	304
4.3.1.	Baseball arbitration	304
4.3.2.	Not precedent setting	305
4.4.	Advantages and disadvantages	305
5.	Advance pricing agreements	306
5.1.	Historical statistics	306
5.2.	Advance pricing agreement process	306
5.2.1.	Governmental agencies involved	306
5.2.2.	Domestic regulations; bilateral and multilateral	307
5.2.3.	Coverage	307
5.2.4.	Process	308
5.2.5.	Fees	308

## Table of Contents

---

5.2.6.	Timing for filing requests for advance pricing agreements	309
5.2.7.	Timeline for unilateral advance pricing agreements	309
5.2.8.	Timeline for bilateral advance pricing agreements	310
5.2.9.	Critical assumptions	311
5.2.10.	Withdrawals	311
5.2.11.	Agreement with taxpayer	311
5.2.12.	Revocation, revision and renewal	312
5.2.13.	Annual compliance reporting	312
5.2.14.	Public disclosure of advance pricing agreements	312
5.3.	Practical experience with advance pricing agreements and advance tax rulings	313
5.4.	Advance pricing agreements in times of economic downturn	313
5.5.	Special advance pricing agreements	314
5.6.	Advantages and disadvantages	315
5.7.	Recommendations	315
<b>Chapter 9: Germany</b>		<b>319</b>

*Werner Stuffer, Roman Lang and Christian Reichardt*

1.	Introduction	319
1.1.	Transfer pricing documentation procedure	319
1.1.1.	Requirements and deadlines	319
1.1.2.	Applicable taxes, penalties, interest and other fees	323
1.2.	Local dispute procedure	324
1.3.	Availability of international procedures and relief from double taxation	325
1.4.	Tax authorities	325
1.4.1.	Organizational structure with relevant areas of jurisdiction	325
1.4.2.	Other relevant players	326
1.4.3.	Programmes to ensure consistent application of transfer pricing policies and penalties	327
1.4.4.	Downward transfer pricing adjustments	328
1.4.5.	Contact information	329
1.4.6.	Profile and aggressiveness	329

---

2.	Audit	329
2.1.	Historical background	329
2.2.	Primary current controversies	330
2.3.	Process and milestones	331
2.3.1.	Authorities involved	331
2.3.2.	Audit time line	331
2.3.3.	Rights and obligations of taxpayers	332
2.3.4.	Rights and obligations of tax authorities	333
2.3.5.	Information used in tax audits	333
2.3.6.	Confidentiality of information	334
2.3.7.	Right of access to information	334
2.3.8.	Penalties	335
2.3.9.	Access to foreign-based information	335
2.3.10.	Burden of proof	336
2.3.11.	Statute of limitations	337
2.3.12.	Information requests	338
2.3.13.	Solicitor-client privilege	338
2.4.	Recommendations for taxpayers during a tax audit	338
3.	Appeals and litigation	339
3.1.	Historical statistics	339
3.2.	Appeals and litigation process	341
3.3.	Notable court decisions	343
3.4.	Advantages and disadvantages	345
4.	Mutual agreement procedure and arbitration	345
4.1.	Historical statistics	345
4.2.	Mutual agreement procedure process	346
4.2.1.	Notification process and conditions to request	346
4.2.2.	Time limits	347
4.2.3.	Penalties and interest	348
4.3.	Arbitration procedure	348
4.4.	Advantages and disadvantages	350
5.	Advance pricing agreements	351
5.1.	Historical statistics	351
5.2.	Advance pricing agreement process	351
5.2.1.	Government agencies involved	351
5.2.2.	Domestic regulations: bilateral and multilateral APAs	352
5.2.3.	Coverage	353
5.2.4.	Process	353
5.2.5.	Fees	356
5.2.6.	Timing for filing advance pricing agreements	356

## Table of Contents

---

5.2.7.	Timeline for unilateral advance pricing agreements	356
5.2.8.	Timeline for bilateral advance pricing agreements	357
5.2.9.	Critical assumptions	357
5.2.10.	Withdrawals	358
5.2.11.	Agreement with the taxpayer	358
5.2.12.	Revocation, revision and renewal	358
5.2.13.	Annual compliance reporting	359
5.2.14.	Public disclosure of APAs	359
5.3.	Practical experience with APAs and advance tax rulings	360
5.4.	APAs in times of economic downturn	360
5.5.	Special APAs	360
5.6.	Advantages and disadvantages	361
6.	Recommendations	362

## **Chapter 10: India** 363

*Rajendra Nayak and Srinivasa Rao*

1.	Introduction	363
1.1.	Transfer pricing documentation	364
1.1.1.	Requirements and deadlines	366
1.1.1.1.	Generally	366
1.1.1.2.	Safe harbours	368
1.1.1.3.	Timing and period of documentation	369
1.1.2.	Applicable taxes, penalties, interest and other fees	371
1.2.	Local dispute procedure	374
1.3.	Availability of international procedures and relief from double taxation	375
1.4.	Tax authorities	375
1.4.1.	Organizational structure	375
1.4.2.	Other relevant players	377
1.4.3.	Programmes to ensure consistent application of transfer pricing policies/penalties	377
1.4.4.	Downward transfer pricing adjustments	378
1.4.5.	Contact information	379
1.4.6.	Profile and aggressiveness	379



2.	Audits	380
2.1.	Historical background	380
2.2.	Primary current controversies	381
2.2.1.	Selection of comparable data	381
2.2.2.	Treatment of losses	383
2.2.3.	Royalty and management fees	384
2.2.4.	Marketing intangibles	384
2.2.5.	Contract research and development and business process outsourcing services	387
2.2.6.	Procurement and sales support services	387
2.2.7.	Attribution of profits to a permanent establishment	388
2.3.	Process and milestones	393
2.3.1.	Authorities involved	393
2.3.2.	Audit time line	393
2.3.3.	Rights and obligations of taxpayers	395
2.3.4.	Rights and obligations of tax authorities	396
2.3.5.	Information used in tax audits	397
2.3.6.	Confidentiality of information	397
2.3.7.	Right of access to information	398
2.3.8.	Penalties	398
2.3.9.	Access to foreign-based information	398
2.3.10.	Burden of proof	398
2.3.11.	Statute of limitations	399
2.3.12.	Information requests	399
2.3.13.	Solicitor-client privilege	400
2.4.	Recommendations for taxpayers during a tax audit	400
3.	Appeals and litigation	401
3.1.	Historical statistics	401
3.2.	Appeals and litigation process	401
3.3.	Notable court decisions	403
3.3.1.	Marketing intangibles	403
3.3.2.	Interest-free loans	405
3.3.3.	Importance of functional analysis	407
3.3.4.	Selection of comparable data	406
3.3.5.	Adjustment for differences	407
3.3.6.	Recognition of actual transactions	408
3.4.	Advantages and disadvantages	408
4.	Mutual agreement procedure and arbitration	408
4.1.	Historical statistics	409
4.2.	Mutual agreement procedure	409

## Table of Contents

---

4.2.1.	Notification process and conditions to request	409
4.2.2.	Time limits	410
4.2.3.	Penalties and interest	410
4.3.	Arbitration	411
4.4.	Advantages and disadvantages	411
5.	Advance pricing agreements	413
6.	Recommendations	413

## **Chapter 11: Japan** 415

*Toshio Miyatake*

1.	Introduction	415
1.1.	Japanese transfer pricing legislation	415
1.1.1.	Legislative history	415
1.1.2.	Foreign related transactions	415
1.1.3.	Transfer pricing methodologies	416
1.1.4.	Intangibles	417
1.1.5.	Effect	418
1.1.6.	Repatriation	418
1.1.7.	Additions to tax	419
1.1.8.	Statute of limitations	419
1.1.9.	Transfer pricing disputes	419
1.1.10.	Suspension of tax payments	420
1.2.	Transfer pricing documentation	420
1.2.1.	Requirements and deadlines	420
1.2.2.	Applicable taxes, penalties, interest and other fees	421
1.3.	Local dispute procedure	421
1.4.	Availability of international procedures and relief from double taxation	423
1.5.	Tax authorities	423
1.5.1.	Organizational structure	423
1.5.2.	Other relevant players	424
1.5.3.	Programmes to ensure consistent application of transfer pricing policies and penalties	425
1.5.4.	Downward transfer pricing adjustments	425
1.5.5.	Contact information	426
1.5.6.	Profile and aggressiveness	426

2.	Audit	427
2.1.	Historical background	427
2.2.	Primary current controversies	427
2.3.	Audit process and milestones	427
2.3.1.	Authorities involved	429
2.3.2.	Audit timeline	429
2.3.3.	Rights and obligations of taxpayers	430
2.3.4.	Right and obligations of tax authorities	431
2.3.5.	Information used in tax audits	432
2.3.5.1.	Information requests	432
2.3.5.2.	Supply of information during tax audits	432
2.3.6.	Confidentiality of information	433
2.3.7.	Right of access to information	433
2.3.8.	Penalties	433
2.3.9.	Access to foreign-based information	434
2.3.10.	Burden of proof	435
2.3.11.	Statute of limitations	435
2.3.12.	Information requests	435
2.3.13.	Attorney-client privilege	436
3.	Appeals and litigation	436
3.1.	Introduction	436
3.1.1.	Request for reinvestigation	436
3.1.2.	Request for reconsideration	437
3.1.3.	Advantages and disadvantages	438
3.2.	Litigation and appeals process	439
3.2.1.	Introduction	439
3.2.2.	Court procedure	439
3.3.	Notable court decisions	441
3.3.1.	Imabari Zosen: Takamatsu High Court, 13 October 2006, appealed from Matsuyama District Court, 14 April 2004	441
3.3.2.	Thai Bahts Loan: Tokyo District Court, 26 October 2006	442
3.3.3.	Adobe: Tokyo High Court, 30 October 2008, appealed from the Tokyo District Court, 7 December 2007	442
3.3.4.	Nippon Asshuku Tanshi: Osaka District Court, 11 July 2008	443
3.4.	Advantages and disadvantages	444
4.	Mutual agreement procedure and arbitration	444
4.1.	Introduction	444

## Table of Contents

---

	4.1.1.	Taxation not in accordance with the treaty	444
	4.1.2.	Corresponding adjustment	445
4.2.		Mutual agreement procedure	447
	4.2.1.	Notification process and conditions for requesting	447
	4.2.2.	Mutual agreement procedure application	448
	4.2.3.	Relationship to remedies under Japanese domestic law	448
	4.2.4.	Payment of tax and the mutual agreement procedure	449
	4.2.5.	Mutual agreement procedure process	449
	4.2.6.	Consent of the taxpayer to the mutual agreement	450
	4.2.7.	Implementation of mutual agreement procedure	450
	4.2.8.	Interest on tax refunds and delinquency tax	451
4.3.		Arbitration	451
4.4.		Advantages and disadvantages	451
4.5.		Options for transfer pricing dispute resolution	452
	4.5.1.	Audit stage	452
	4.5.2.	Correction notice stage	452
	4.5.3.	Administrative appeals and court procedure	452
	4.5.4.	Mutual agreement procedure	452
5.		Advance pricing agreements	453
	5.1.	Introduction	453
	5.2.	APA application	457
	5.2.1.	Due date of filing a request for an advance pricing agreement	457
	5.2.2.	Supporting documents	457
	5.2.3.	Fees	458
	5.2.4.	Timing for filing a request for advance pricing agreement	458
	5.2.5.	Timeline for unilateral advance pricing agreements	458
	5.2.6.	Timeline for bilateral advance pricing agreements	458
	5.2.7.	APA period	459
	5.2.8.	Rollback period	459
	5.2.9.	Effect of advance pricing agreement application	459

5.2.10.	Non-acceptance of advance pricing agreement application	459
5.2.11.	Withdrawals	460
5.2.12.	Review of advance pricing agreement request	460
5.3.	Advance pricing agreement	461
5.3.1.	Agreement with taxpayers	461
5.3.2.	Confirmation by tax authorities	461
5.3.3.	Effect of advance pricing agreement	461
5.4.	Critical assumptions	462
5.5.	Revocation, revision and renewal	462
5.6.	Annual compliance reporting	462
5.7.	Compensating adjustments	463
5.8.	Public disclosure of advance pricing agreements	463
5.9.	Advantages and disadvantages	463
6.	Conclusion	464

## **Chapter 12: Mexico** 465

*Moisés Curiel García*

1.	Introduction	465
1.1.	Transfer pricing documentation	465
1.1.1.	Requirements and deadlines	465
1.1.1.1.	Related-party transactions	465
1.1.1.2.	Transfer pricing methods	466
1.1.1.3.	Best-method rule	466
1.1.1.4.	Generally accepted accounting principles	466
1.1.1.5.	Related parties	466
1.1.1.6.	Required documentation	467
1.1.1.7.	Information return	467
1.1.1.8.	Compliance deadlines	467
1.1.1.9.	Maquiladoras	468
1.1.1.10.	Corporate flat tax	469
1.1.2.	Applicable taxes, penalties, interest and other fees	469
1.2.	Local dispute procedure	471
1.3.	Availability of international procedures and relief from double taxation	471
1.4.	Tax authorities	472

## Table of Contents

---

	1.4.1.	Organizational structure and relevant areas of jurisdiction	474
	1.4.2.	Other relevant players	473
	1.4.3.	Programmes to ensure consistent application of policies and penalties	474
	1.4.4.	Downward transfer pricing adjustments	474
	1.4.5.	Contact information	475
	1.4.6.	Profile and aggressiveness	475
2.	Audit		476
	2.1.	Historical background	476
	2.2.	Primary current controversies	476
	2.3.	Audit process and milestones	477
	2.3.1.	Authorities involved	477
	2.3.2.	Audit timeline	478
	2.3.3.	Rights and obligations of taxpayers	478
	2.3.4.	Rights and obligations of tax authorities	479
	2.3.5.	Information used in tax audits	480
	2.3.6.	Confidentiality of information	480
	2.3.7.	Right of access to information	480
	2.3.8.	Penalties	481
	2.3.9.	Access to foreign-based information	481
	2.3.10.	Burden of proof	482
	2.3.11.	Statute of limitations	482
	2.3.12.	Information requests	483
	2.3.13.	Solicitor-client privilege	484
	2.4.	Recommendations for taxpayers during a tax audit	484
3.	Appeals and litigation		485
		Procedure to challenge notices	485
	3.1.	Historical statistics	485
	3.2.	Appeals and litigation process	486
	3.3.	Notable court decisions	486
	3.4.	Advantages and disadvantages	487
4.	Mutual agreement procedure and arbitration		488
	4.1.	Historical statistics	488
	4.2.	Mutual agreement procedure	489
	4.2.1.	Notification process and conditions to request	489
	4.2.2.	Time limits	489
	4.2.3.	Penalties and interest	490
	4.3.	Arbitration	490
	4.3.1.	Baseball arbitration	490
	4.3.2.	Not precedent setting	490
	4.4.	Advantages and disadvantages	491

5.	Advance pricing agreements	491
5.1.	Historical statistics	491
5.2.	Advance pricing agreement process	491
5.2.1.	Government agencies involved	492
5.2.2.	Domestic regulations; bilateral and multilateral	492
5.2.3.	Coverage	492
5.2.4.	Process	493
5.2.5.	Fees	493
5.2.6.	Timing for filing requests for advance pricing agreements	493
5.2.7.	Timeline for unilateral advance pricing agreements	494
5.2.8.	Timeline for bilateral advance pricing agreements	494
5.2.9.	Critical assumptions	494
5.2.10.	Withdrawals	494
5.2.11.	Agreement with taxpayer	494
5.2.12.	Revocation, revision and renewal	495
5.2.13.	Annual compliance reporting	496
5.2.14.	Public disclosure of advance pricing agreements	496
5.3.	Practical experience with advance pricing agreements and advance tax rulings	496
5.4.	Advance pricing agreements in times of economic downturn	496
5.5.	Special advance pricing agreements	497
5.6.	Advantages and disadvantages	497
6.	Recommendations	497

**Chapter 13: Netherlands** 499

*Eduard Sporken, Jeannette van der Vegt and Harald Dols*

1.	Introduction	499
1.1.	Transfer pricing documentation	500
1.1.1.	Requirements and deadlines	500
1.1.2.	Penalties, interest and other fees	501
1.2.	Local dispute procedure	502
1.3.	Availability of international procedures and relief from double taxation	502
1.4.	Tax authority	503

## Table of Contents

---

	1.4.1. Organizational structure	503
	1.4.2. Other relevant players	504
	1.4.3. Programmes to ensure consistent application of transfer pricing policies and penalties	504
	1.4.4. Downward transfer pricing adjustments	504
	1.4.5. Contact information	504
	1.4.6. Profile and aggressiveness	504
2.	Audit	506
2.1.	Historical background	506
2.2.	Primary current controversies	506
2.3.	Audit process and milestones	507
2.3.1.	Authorities involved	507
2.3.2.	Flow chart	507
2.3.3.	Rights and obligations of taxpayers	508
2.3.4.	Rights and obligations of the tax authorities	509
2.3.5.	Information used in tax audits	510
2.3.6.	Confidentiality of information	511
2.3.7.	Right of access to information	511
2.3.8.	Penalties	512
2.3.9.	Access to foreign-based information	512
2.3.10.	Burden of proof	512
2.3.11.	Statute of limitations	513
2.3.12.	Information requests	514
2.3.13.	Solicitor-client privilege	514
2.4.	Recommendations for taxpayers during a tax audit	515
3.	Appeals and litigation	515
3.1.	Historical statistics	515
3.2.	Appeals and litigation process	516
3.3.	Notable court decisions	517
3.4.	Advantages and disadvantages	520
4.	Mutual agreement procedure and arbitration	521
4.1.	Historical statistics	521
4.2.	Mutual agreement procedure	523
4.3.	Arbitration procedure in the European Union	527
4.3.1.	The EU arbitration procedure	527
4.3.2.	Baseball arbitration	533
4.3.3.	Not precedent setting	533
4.3.4.	Arbitration clause in tax treaty	534
4.4.	Advantages and disadvantages	534



5.	Advance pricing agreements	537
5.1.	Historical statistics	537
5.2.	Advance pricing agreement process	538
5.2.1.	Government agencies involved	538
5.2.2.	Domestic regulations; bilateral and multilateral	538
5.2.3.	Coverage	539
5.2.4.	Process	540
5.2.5.	Fees	541
5.2.6.	Timing for filing request for advance pricing agreements	541
5.2.7.	Timeline for unilateral advance pricing agreements	541
5.2.8.	Timeline for bilateral advance pricing agreements	543
5.2.9.	Critical assumptions	544
5.2.10.	Withdrawals	544
5.2.11.	Agreement with taxpayer	545
5.2.12.	Revocation, revision and renewal	545
5.2.13.	Annual compliance reporting	546
5.2.14.	Public disclosure of advance pricing agreements	546
5.3.	Practical experience with advance pricing agreements and advance tax rulings	546
5.4.	Advance pricing agreements in times of economic downturn	547
5.5.	Special advance pricing agreements	547
5.6.	Advantages and disadvantages	547
6.	Recommendations	548

**Chapter 14: South Africa** 549

*Wally Horak and Johan Kotze*

1.	Introduction	549
1.1.	Transfer pricing documentation	549
1.1.1.	Requirements and deadlines	549
1.1.2.	Applicable taxes, penalties rest and other fees	552
1.2.	Local dispute procedure	555

## Table of Contents

---

1.3.	Availability of international procedures and relief from double taxation	563
1.4.	Tax authorities	565
1.4.1.	Organizational structure	565
1.4.2.	Other relevant players	565
1.4.3.	Programmes to ensure consistent application of transfer pricing policies and penalties	565
1.4.4.	Downward transfer pricing adjustments	565
1.4.5.	Contact information	566
1.4.6.	Profile and aggressiveness	566
2.	Audit	566
2.1.	Historical background	566
2.2.	Primary current controversies	567
2.3.	Audit process and milestones	567
2.3.1.	Authorities involved	567
2.3.2.	Audit timeline	568
2.3.3.	Rights and obligations of taxpayer	568
2.3.4.	Rights and obligations of tax authorities	570
2.3.5.	Information used in tax audits	571
2.3.6.	Confidentiality of information	571
2.3.7.	Right of access to information	572
2.3.8.	Penalties	574
2.3.9.	Access to foreign-based information	574
2.3.10.	Burden of proof	575
2.3.11.	Statute of limitations	575
2.3.12.	Information requests	575
2.3.13.	Solicitor-client privilege	575
2.3.14.	Recommendations for taxpayers during tax audits	576
3.	Appeals and litigation	577
3.1.	Historical statistics	577
3.2.	Appeals and litigation process	577
3.3.	Advantages and disadvantages	578
4.	Mutual agreement procedure under tax treaties and arbitration	578
4.1.	Historical statistics	578
4.2.	Mutual agreement procedure	578
5.	Advance pricing agreements	578
6.	Recommendations	579
	Appendix A – Official text alternative dispute resolution	579
	Appendix B – Flowchart illustrating the dispute resolution process	588

---

**Chapter 15: United Kingdom** 589

*Philip Croall and Murray Clayson*

1.	Introduction	589
1.1.	Transfer pricing documentation	589
1.1.1.	Requirements and deadlines	589
1.1.2.	Applicable taxes, penalties, interest and other fees	590
1.2.	Local dispute procedure	590
1.3.	Availability of international procedures and relief from double taxation	591
1.4.	Tax authorities	591
1.4.1.	Organizational structure	591
1.4.2.	Other relevant players: tribunal and court system	591
1.4.3.	Programmes to ensure consistent application of transfer pricing policies and penalties	592
1.4.4.	Downward transfer pricing adjustments	592
1.4.5.	Contact information	593
1.4.6.	Profile and aggressiveness	593
2.	Audits	593
2.1.	Historical background	593
2.2.	Primary current controversies	594
2.3.	Audit process and milestones	595
2.3.1.	Authorities involved	595
2.3.2.	Audit time line	595
2.3.3.	Rights and obligations of taxpayers	596
2.3.4.	Right and obligations of tax authorities	597
2.3.5.	Information used in tax audits	597
2.3.6.	Confidentiality and privilege	597
2.3.7.	Right of access to information	598
2.3.8.	Penalties	598
2.3.9.	Access to foreign-based information	599
2.3.10.	Burden of proof	599
2.3.11.	Statute of limitations	599
2.3.12.	Information requests	599
2.3.13.	Solicitor-client privilege	600
2.4.	Recommendations for taxpayers during a tax enquiry	601

## Table of Contents

---

3.	Appeals and litigation	601
3.1.	Historical statistics	601
3.2.	Appeals and litigation process	603
3.3.	Notable court decisions	606
3.4.	Advantages and disadvantages	608
4.	Mutual agreement procedure and arbitration	610
4.1.	Historical statistics	610
4.2.	Mutual agreement procedure	610
4.2.1.	Notification process and conditions to request	611
4.2.3.	First Notification	613
4.3.	Arbitration	614
4.3.1.	“Baseball arbitration”	615
4.3.2.	Not precedent setting	615
4.4.	Advantages and disadvantages	615
4.4.1.	Advantages	615
4.4.2.	Disadvantages	616
5.	Advance pricing agreements	616
5.1.	Historical statistics	616
5.2.	Advance pricing agreement process	616
5.2.1.	Governmental agencies involved	617
5.2.2.	Domestic regulations; bilateral and multilateral	617
5.2.3.	Coverage	617
5.2.4.	Process	618
5.2.5.	Fees	619
5.2.6.	Timing for filing request for an advance pricing agreement	619
5.2.7.	Timeline for unilateral advance pricing agreements	619
5.2.8.	Timeline for bilateral advance pricing agreements	619
5.2.9.	Critical assumptions	618
5.2.10.	Withdrawals	621
5.2.11.	Agreement with taxpayer	621
5.2.12.	Revocation, revision and renewal	621
5.2.12.1.	Renewal of advance pricing agreements	621
5.2.12.2.	Revision of advance pricing agreements	622
5.2.12.3.	Revocation of advance pricing agreements	622

5.2.13.	Annual compliance reporting	622
5.2.14.	Public disclosure of advance pricing agreements	622
5.3.	Practical experience with advance pricing agreements	623
5.4.	Advance pricing agreements in times of economic downturn	623
5.5.	Special advance pricing agreements	623
5.6.	Advantages and disadvantages	624
5.6.1.	Advantages	624
5.6.2.	Disadvantages	624
6.	Recommendations	624

**Chapter 16: United States** 627

*Lawrence M. Hill*

1.	Introduction	627
1.1.	Transfer pricing documentation	627
1.1.1.	Requirements and deadlines	627
1.1.2.	Applicable taxes, penalties, interest and other fees	629
1.2.	Local dispute procedure	630
1.3.	Availability of international procedures	632
1.4.	Tax authorities	633
1.4.1.	Organizational structure	633
1.4.2.	Other relevant players	634
1.4.3.	Programmes to ensure consistent application of transfer pricing policies and penalties	635
1.4.4.	Downward transfer pricing adjustments	636
1.4.5.	Contact information	636
1.4.6.	Profile and aggressiveness	637
2.	Audit	638
2.1.	Recent events	638
2.2.	Primary current controversies	639
2.3.	Audit process and milestones	640
2.3.1.	Authorities involved	640
2.3.2.	Audit timeline	640
2.3.3.	Rights and obligations of taxpayers	641
2.3.4.	Rights and obligations of authorities	641
2.3.5.	Information used in tax audits	642

## Table of Contents

---

	2.3.6.	Confidentiality of information	642
	2.3.7.	Right of access to information	642
	2.3.8.	Penalties	642
	2.3.9.	Access to foreign-based information	644
	2.3.10.	Burden of proof	644
	2.3.11.	Statute of limitations	645
	2.3.12.	Information requests	645
	2.3.13.	Solicitor-client privilege	646
	2.4.	Recommendation for taxpayers during a tax audit	649
3.	Appeals and litigation		649
	3.1.	Historical statistics	649
	3.2.	Appeals and litigation process	649
	3.3.	Notable court decisions	651
	3.3.1.	Xilinx, Inc. v. Commissioner	651
	3.1.2.	Veritas Software Corp. v. Commissioner	652
	3.4.	Advantages and disadvantages	655
4.	Mutual agreement procedure and arbitration		656
	4.1.	Historical statistics	656
	4.2.	Mutual agreement procedure	657
	4.2.1.	Notification process and conditions to request	657
	4.2.2.	Time limits	658
	4.2.3.	Penalties and interest	659
	4.3.	Arbitration	659
	4.3.1.	Baseball arbitration	659
	4.3.2.	Not precedent setting	660
	4.4.	Advantages and disadvantages	661
5.	Advance pricing agreements		662
	5.1.	Historical statistics	662
	5.2.	Advance pricing agreement process	663
	5.2.1.	Government agencies involved	664
	5.2.2.	Domestic regulations; bilateral and multilateral advance pricing agreements	665
	5.2.3.	Coverage	665
	5.2.4.	Process	666
	5.2.5.	Fees	667
	5.2.6.	Timing for filing request for an advance pricing agreement	667
	5.2.7.	Time line for unilateral and bilateral advance pricing agreements	668
	5.2.8.	Critical assumptions	668
	5.2.9.	Withdrawals	668

5.2.10.	Agreement with taxpayer	668
5.2.11.	Revocation, revision and renewal	669
5.2.12.	Annual compliance reporting	670
5.2.13.	Public disclosure of advance pricing agreements	670
5.3.	Practical experience with advance pricing agreements	670
5.4.	APAs in times of economic downturn	671
5.5.	Special advance pricing agreements	671
5.6.	Advantages and disadvantages	672
6.	Recommendations	672
	Appendix A – US transfer pricing dispute procedure flowchart	673
<b>Chapter 17:</b>	<b>Case Study</b>	<b>675</b>
	Australia – Case Study	676
	Brazil – Case Study	679
	Canada – Case Study	688
	China – Case Study	697
	France – Case Study	703
	Germany – Case Study	714
	India – Case Study	719
	Japan – Case Study	726
	Mexico – Case Study	730
	Netherlands – Case Study	735
	South Africa – Case Study	741
	United Kingdom – Case Study	744
	United States – Case Study	750

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## Chapter 2

### Dispute Channels

Suzan Arendsen\*

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This chapter is based on information available up to 1 October 2010.

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#### 1. Overview of common dispute process

Authorities worldwide increasingly consider transfer pricing as an area to focus on. As a result, tax authorities are increasing the resources that they can bring to bear on transfer pricing issues, and are improving their knowledge in this area.

According to a global transfer pricing survey, the majority of tax authorities focus on the following aspects of transfer pricing:<sup>1</sup>

- transactions with perceived tax havens and “blacklisted countries”;
- service transactions;
- financial transactions; and
- intangibles.

On the other hand, in the current economic climate, taxpayers are faced with reduced profits or (substantial) losses and have decreased budget and resources to meet tax requirements.

As a consequence of this increasing focus on transfer pricing and the current economic climate, taxpayers have been more likely to be the subject of tax audits. Events mentioned by authorities as the most common reasons for launching an audit are:<sup>2</sup>

- a sudden reduction in taxable profits;
- business restructuring; and
- indirect tax challenges.

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\* Tax Director Europe, Nike.

1. Ernst & Young, 2009, Global Transfer Pricing survey, available at [www.ey.com/GL/en/Services/Tax/2009-Global-Transfer-Pricing-survey---Survey-findings-by-country](http://www.ey.com/GL/en/Services/Tax/2009-Global-Transfer-Pricing-survey---Survey-findings-by-country).

2. Ernst & Young, 2009, Global Transfer Pricing survey, at 8.



For example, the Australian Tax Office published a booklet in which they present a checklist of issues that will attract the attention of the ATO.<sup>3</sup>

This chapter considers the following options for resolution of transfer pricing disputes:

- audit;
- appeals and litigation;
- mutual agreement procedure (MAP) and arbitration; and
- advance pricing agreements (APAs).

The advantages and disadvantages of each procedure are considered, and commentary is provided on discussions and negotiations with tax authorities.

## 2. Description of procedures

### 2.1. Audit

Tax audits can be a useful tool for the raising of revenues. For example, in Germany, in 2009 approximately 26% of total tax revenues were collected through tax audits.<sup>4</sup> In most countries, during audits the tax authorities show an increased focus on transfer pricing .

A tax or transfer pricing audit can be triggered by several circumstances. Circumstances external to the taxpayer may include the fact that some tax authorities perform audits on a regular basis (e.g. every 5 years), or information received by the tax authorities through a (spontaneous) exchange of information between tax authorities of different countries. However, audits can also be triggered by a taxpayer's internal changes, such as a change in profits, implementation of a royalty structure or a reorganization or restructuring.

The approach taken by the tax authorities in an audit may differ from one country to the next. Some countries take a legalistic approach (e.g. Germany, Italy and France), while others take a more economic approach (e.g. the United States).

Transfer pricing audits are governed by domestic procedures and legislation. The discussion here therefore deals only with some common

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3. Australian Tax Office, Large Business and Compliance, at 7, available at [www.ato.gov.au/content/downloads/bus33802nat8675092010.pdf](http://www.ato.gov.au/content/downloads/bus33802nat8675092010.pdf).

4. Deloitte, EMEA Dbrief (27 October 2010).

denominators in the process and does not deal with any specific country issues.

Transfer pricing audits are very fact-intensive and may include difficult assessments of comparability, judgement of industry, market and financial information, analysis of intangible property ownership and interpretation of intercompany agreements. As a consequence, transfer pricing audits and disputes may become very complex and, as transfer pricing is not a science, somewhat subjective.

During an audit, it is therefore essential for a taxpayer to maintain control of the critical facts underlying each transaction. Central points to achieve this include the following:

- as audits can take place years after the fact, it is necessary that the knowledge regarding transfer prices not be dependent on only one or a few persons. In this regard, the taxpayer should ensure that it has documentation available. Documentation may consist of agreements, transfer pricing documentation, economic studies, policies, invoices, etc.;
- the taxpayer should consider appointing one person or a distinct team of persons to manage the audit process. Only this person or team should answer questions from the tax authorities, in order to avoid providing contradicting or incorrect information. All interviews, plant tours and company information given to the tax authorities must be carefully planned and choreographed;
- it is important to make sure management is involved. Mostly, the timeframe in which questions must be answered is short, so management support is essential. A large part of the information requested will be available within the company, but people in the company should be able to properly prioritize the information requests and be able to free up time to dig up the information needed; and
- the taxpayer should establish an audit plan, both internally and, if possible, with the tax authorities, for the audit procedure, including what protocol to follow and who the contact person(s) is/are.

When the tax auditors present their findings and proposed adjustment (if any) following the audit, it is time to settle the audit. This can be done by negotiation through whatever administrative vehicles may exist or, ultimately, through litigation and arbitration. The latter two are discussed in depth at 2.2. and 2.3.

However, the first step – negotiations – is a critical step in the audit process. One of the main things to keep in mind at this stage, is a clear understanding

of the financial risks of reaching or not reaching an agreement. It is in this regard, it is also critical to have a strategy at hand regarding the issues at stake, and on which issues to compromise and on which to stand firm.

Also, the timeline must be considered. In most countries litigation can take years, which would mean an uncertain position for several years regarding the outstanding issue(s).

If one comes to an agreement during the negotiation stage, it is important to plan for the implications of the agreement for the relevant parties in the other countries; the impact on prior years (if they are not yet closed) and future years; and any consequences for indirect taxes. Most important is ensuring that the statutory limits are held open so that correlative adjustments can be made to avoid issues of double taxation.

Accepting the adjustment of taxable profit in one country (the primary adjustment) may have the following consequences:

- *a secondary adjustment.* A secondary adjustment is an adjustment on a secondary transaction relating to the primary transaction. Consider the following example: Company A, resident in Country A, bought goods from Company B, resident in Country B. The tax authorities in Country A make an adjustment by increasing the taxable profits of Company A. Therefore, Company B, the seller of the goods, should have received less income according to this adjustment. Because generally no real payments take place in accordance with the adjustment made in Country A, Company B still holds the (higher amount of) money received from the transaction. This money can subsequently be considered to be transferred by way of a loan, dividend distribution or (informal) capital contribution, depending on the relationship between the companies. The related secondary adjustment can take the form of additional interest charges or withholding taxes; and
- *double taxation.* A part of the profits (amounting to the adjusted profit) is taxed in both countries where the relevant parties are established, provided that no corresponding adjustment can be made. Corresponding adjustments are not mandatory, and therefore a corresponding adjustment will be made only when the tax authorities in the counterparty's country agree to the adjustment. The possibility to make a corresponding adjustment is provided for under Art. 9(2) of the OECD Model Tax Convention on Income and on Capital (OECD Model Convention).

If the taxpayer cannot come to an agreement with the tax authorities, the next step would be litigation, mediation and/or arbitration.

## 2.2. Appeals and litigation

The chances of success in court can vary widely from one country to the next. Also, judgements sometimes seem to reflect certain trends and attitudes (e.g. public concern around multinationals that appear to shift profits from high-tax jurisdictions to low-tax jurisdictions). Therefore, taxpayers should consider the risks and benefits of litigation carefully. One significant risk is the cost of litigation. Expert witnesses, forensic costs, document production and depositions and interviews lead to significant costs, besides the substantial costs of counsel.

The allocation of the burden of proof is a noteworthy factor to consider. The burden of proof is generally allocated according to domestic legislation. The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines) mention that the burden of proof is generally initially borne by the tax authorities.<sup>5</sup> If the taxpayer does not fulfil certain requirements (e.g. making available transfer pricing documentation), the burden of proof will be reversed and shifted to the taxpayer. However, in some countries the burden of proof is initially borne by the taxpayer. In the United States, for example, one must prove that the assessment by the US tax authorities is unreasonable, arbitrary and capricious before the burden of proof is shifted from the taxpayer to the tax authorities.

The following table gives a global indication of the burden of proof for transfer pricing issues in the various countries:<sup>6</sup>

Country	Party bearing burden of proof	Comments
Argentina	taxpayer	
Australia	taxpayer	at all stages, taxpayer must prove arm's length price
Austria	party claiming an advantageous position	for deductions claimed, the taxpayer; for increase of profits, the tax authorities
Argentina	taxpayer	
Belgium	tax authorities	
Canada	taxpayer	

5. OECD Transfer Pricing Guidelines, Para. 4.11.

6. IBFD online, available at <http://online.ibfd.org/highlight/collections/tp>.

## Chapter 2 - Dispute Channels

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Country	Party bearing burden of proof	Comments
China (People's Rep.)	taxpayer	tax authorities may use secret comparables
Denmark	tax authorities, in first instance	supporting transfer pricing taxpayer must provide documentation
France	tax authorities	in practice, the taxpayer must prove arm's length nature of transactions
Germany	party claiming an advantageous position	taxpayer must provide documentation
Greece	taxpayer	taxpayer in case of cross-border transactions; tax authorities in domestic transactions
Hungary	tax authorities	
Israel	tax authorities	documentation must be provided by taxpayer, also from foreign related party
Italy	tax authorities	documentation strongly advised
Japan	tax authorities	taxpayer must provide documentation
Luxembourg	party claiming an advantageous position	
Netherlands	party claiming an advantageous position	taxpayer must provide documentation
Poland	tax authorities	
Portugal	tax authorities	taxpayer must provide documentation
Russia	tax authorities	
Spain	taxpayer	taxpayer must provide documentation
Sweden	tax authorities	taxpayer must provide documentation
Switzerland	tax authorities	
Taiwan	taxpayer	
United Kingdom	taxpayer	if position is reasonable and well documented, burden of proof shifts to tax authorities

Country	Party bearing burden of proof	Comments
United States	taxpayer	documentation is required and allows taxpayer to avoid certain penalties
Vietnam	taxpayer	documentation is advised

### 2.3. Mutual agreement procedure and arbitration

An alternative means of resolving tax disputes can be found in the MAP, provided for under Art. 25 of the OECD Model Convention<sup>7</sup> or the mutual agreement and arbitration procedure under the EU Arbitration Convention.<sup>8</sup>

The MAP under Art. 25 of the OECD Model Convention is placed outside domestic law, so that the usual legal remedies remain available to the taxpayer and may be invoked for the elimination of economic<sup>9</sup> and/or juridical<sup>10</sup> double taxation not in accordance with the applicable treaty. Generally, in practice the MAP process is used in cases to resolve disputes on withholding tax issues, the attribution of profits to a permanent establishment, transfer pricing or dual residency.

In 2008, Para. 5 was added to Art. 25, affording the opportunity to submit any unresolved issues to arbitration.

Arbitration had already been in place within the European Union since 1 January 1995 for an initial period of 5 years through the EU Arbitration Convention. Several months before expiration of the first period, the Council adopted a Protocol to the Convention, which provides for an automatic extension by periods of 5 years, unless a contracting state objects.

The EU Arbitration Convention generally is used only to address transfer pricing adjustments.

7. OECD Model Tax Convention on Income and on Capital (2008).

8. Convention 90/436/EEC of 23 July 1990 on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (Arbitration Convention).

9. Economic double taxation means the inclusion of the same income in the tax base of different taxpayers.

10. Juridical double taxation means the imposition of income taxes in two (or more) states on the same taxpayer and on the same income.

In 2004, the European Council adopted a communication on the work of the EU Joint Transfer Pricing Forum (JTPF) on a proposal for a Code of Conduct for the effective implementation of the EU Arbitration Convention.<sup>11</sup> On 22 December 2009, the EU Council adopted a revised Code of Conduct.<sup>12</sup> For further details, see Chapter 3 (International Developments).

### 2.3.1. Mutual agreement procedure

The discussion of the MAP is based on its definition in Art. 25 of the OECD Model Convention. Taxpayers should revert to the text of the MAP article of the applicable tax treaty in order to determine the applicability of the following discussion.

The OECD has published helpful guidance on how the MAP should ideally work – the “Manual on Effective Mutual Agreement Procedures” (MEMAP). The latest available version was issued in February 2007, i.e. before the release of the updated 2008 Model Convention.

#### *Initiation of the mutual agreement procedure*

The initiative to commence a MAP rests with the taxpayer, which may submit a request to the competent authority. The period to initiate a MAP is limited: within 3 years from the first notification of the action resulting in taxation not in accordance with the applicable treaty. In most cases, the first notification is clear in the form of an assessment or an official demand for collection or levy of tax. If the tax is levied by deduction at source, the 3-year period commences at the moment the income is paid, unless the taxpayer can prove that it learned of this deduction only later.

The Commentary on Art. 25 notes that the request may also be submitted by the taxpayer even before the tax has been charged or even notified to the taxpayer.<sup>13</sup> Therefore, a MAP request may already be submitted where the taxpayer assumes it is probable that an issue will result in taxation not in accordance with the applicable treaty.

The person or entity to which the request may be addressed is defined in Art. 25 as the “competent authority of the Contracting State of which [the taxpayer] is a resident or, ... of which [the taxpayer] is a national”. For transfer pricing adjustments, which have an effect on related parties in two (or more)

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11. Official Journal C 176 of 28 July 2006, at 8.

12. Official Journal C 322 of 30 December 2009.

13. OECD Commentary on Art. 25, Paras. 14 and 15.

jurisdictions, the MEMAP recommends the submission of separate requests to the competent authorities of all relevant countries by the taxpayers involved.

The competent authority is typically defined in the Definitions article of the applicable treaty. In addition, the OECD publishes country profiles that indicate who the competent authority is for a certain country.

The OECD country profiles on MAPs also include guidance on how to make a MAP request. For cases where no such guidance is provided, the MEMAP indicates the relevant information that should be provided by the taxpayer.<sup>14</sup> The recommended relevant information includes:

- tax treaty article(s) that are claimed not to be applied correctly and the taxpayer’s interpretation of the application of those articles;
- the relationship, situation and structure of the transactions or related parties involved;
- a summary of the facts and analysis of the issues;
- documentation as described in domestic law of the taxpayer’s home country;
- a copy of any other relevant competent authority requests and related documents filed;
- a schedule of the statutes of limitations in each jurisdiction in respect of the years under review; and
- a statement as to whether the taxpayer has filed a notice of objection, notice of appeal, refund claim or something comparable in the relevant jurisdictions.

Obviously, the provision of complete, accurate and timely information to the competent authorities should facilitate the process.

### *Role of the competent authorities*

After receipt of the MAP request, the competent authority to which the request was submitted will consider the request’s acceptability. Aspects that may be considered by the competent authorities are (1) whether the issue or transaction is covered by the applicable treaty, (2) whether the request is submitted within the time limits specified and (3) whether the issue or objections seem to be justified.

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14. OECD, Manual on Effective Mutual Agreement Procedures (MEMAP) (February 2007), at 14.



The competent authority should in first instance try to resolve the issue unilaterally. If this is not possible, the competent authority will engage the other competent authority and the second phase of the MAP commences. At this point, the MAP foremost concerns dealings at the level of both states, with no or very limited interaction with the taxpayer. As the competent authorities may communicate directly and in different ways (e.g. by telephone or in-person meetings), it is not necessary to go through diplomatic channels.

The MEMAP describes in the Annex the ideal timeline and procedure for a typical MAP process. For example, it recommends for a timely procedure that the competent authority to which the request was filed, issue a position paper within 4–6 months after it was agreed by the two competent authorities to enter into a MAP. The other competent authority should then review and respond to the position paper within 6 months after receipt thereof. In the following 12 months, a solution should be sought for the issues at hand. Although the competent authorities should use their best efforts to come to a solution, they are not obliged to come to a result.

### *Arbitration*

The MAP does not guarantee that an agreement will be reached. However, due to the addition of the new Para. 5 of Art. 25, it is now possible to submit unresolved issues of the case to arbitration, if so requested by the taxpayer. Para. 5 also provides the period when this is possible, namely 2 years after the case is presented to the competent authority of the other state.

The addition of Para. 5 is a major improvement on the previous Art. 25, as it specifies a deadline for the MAP (i.e. 2 years after the case has been presented to the competent authorities), and it provides the taxpayer an opportunity to obtain a solution for unsolved issues by arbitration and consequently a mutual agreement, whereas a mutual agreement was not an evident outcome before the implementation of Para. 5.

In some countries, the arbitration procedure as described in Art. 25(5) is not allowed or is restricted to certain cases due to national law or policy or administrative considerations.<sup>15</sup> Also, in the United States, arbitration is available only under its tax treaties with Canada and Germany, and has seldom been used.

The arbitration process is not dependent upon a prior authorization by the competent authorities and is an extension of the MAP (and not an alter-

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15. OECD Model Convention, Commentary on Art. 25, Paras. 65 and 66.

native or additional recourse).<sup>16</sup> It focuses only on particular unresolved issues that stand in the way of a mutual agreement and is not an automatic process. The latter means that it is also possible for the taxpayer to wait until after the end of the 2-year period or not to pursue arbitration at all.

Art. 25(5) does not indicate who the arbitrators should be; this is to be defined in mutual agreement between the countries involved. The OECD provides in a Sample Mutual Agreement on Arbitration (which is taken up as an annex to the Commentary on Art. 25) a suggested basis for a mutual agreement to implement the arbitration process. According to this Sample Agreement, the competent authorities must each appoint one arbitrator. Two months later, the two arbitrators will appoint a third one who will function as chair.<sup>17</sup>

The arbitration decision should be considered and communicated within 6 months after the chair has informed the relevant parties that he or she has received all required information. The Sample Mutual Agreement on Arbitration also foresees a simplified, alternative process which would only take 3 months after appointment of the arbitrator – the “Streamlined Arbitration Process”.<sup>18</sup>

The decisions taken on the particular issues submitted to arbitration, whether under the Streamlined Arbitration Process or otherwise, are binding, unless the person directly affected does not accept the mutual agreement that implements the arbitration decision.<sup>19</sup>

EU Member States must coordinate the scope of Para. 5 of the OECD Model Convention with the obligations under the EU Arbitration Convention, as discussed below.

### *Domestic law*

To avoid conflicting positions on the same (unresolved) issues, it is recommended in the OECD Commentary not to pursue domestic legal remedies and a MAP at the same time.<sup>20</sup>

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16. OECD Model Convention, Commentary on Art. 25, Para. 63.

17. Sample Mutual Agreement on Arbitration, point 5.

18. Sample Mutual Agreement on Arbitration, point 6.

19. OECD Model Convention, Commentary on Art. 25, Para. 81.

20. OECD Model Convention, Commentary on Art. 25, Para. 76.

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