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国际税务合作专家委员会

第五届会议

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项目6(k)

讨论与税务事情上国际合作有关的
实质性问题：转让定价，包括为发
展中国家编写一本手册和检查单

发展中国家转让定价实用手册

秘书处的说明*

摘要

本说明总结了编写《联合国发展中国家转让定价实用手册》的进展情况，以及做这项工作的目标和指导原则。附件中载有《手册》的大纲草稿，供委员会讨论(附件未经正式编辑，仅以提交的原文印发)。

* 本文件中表示的看法不一定代表联合国或联合国税务委员会的看法。



一. 引言

税务条约拟订过程和分组

1. 委员会第四届年会注意到拟议的《联合国发展中国家转让定价实用手册》。¹ 开展这项工作，是由于秘书处收到反馈表示，在对多国公司一些交易进行转让定价分析的政策和行政方面问题上，发展中国家缺少明确贴切的指导。

二. 2008 年阿姆斯特丹会议

2. 联合国经济和社会事务部发展筹资办公室筹办了一次“转让定价问题特设专家组会议”来讨论发展中国家的实际问题，于 2008 年 8 月 27 日和 28 日在阿姆斯特丹国际财政文献局总部举行。² 共有 22 位专家参加了会议，包括发达国家和发展中国家的政府官员、私人从业人员、学术界人士和非政府组织。

3. 会议上有人指出，正确处理转让定价，是多国企业运营的特有问题，因为在这种交易中，市场定价条件一般并不适用，可是在它们与税收征管部门之间的事务上，通常又要求把价格定得接近基于市场的价格（“正常计价”）。税收征管部门这样做，是为了确保这种企业不致利用不当的转让定价，把利润或损失从集团或公司的一部分转移到另一部分，而这从纳税者的角度来说，也许是便于处理税务问题的一种做法。

4. 例如，可以使利润看来好像是在低税或无税的地区赚的（从而降低对应纳税利润或收入课税的税率和该纳的税），并使扣除额或损失看来好像是在高税地区招致的（从而提高课税的容许扣除额），其净效果就是让有关集团或法人实体尽量少交税，因而影响到不同税收管辖权地区的合法税收。

5. 会议指出：

(a) 转让定价对发展中国家和发达国家都是重大的税务问题，但大多数发展中国家还因为评估转让定价的能力和 information 不足而有特别的问题，它们需要制定有效的国内规则来恰当地处理转让定价的问题，并且需要有具备能力的人员和足够的信息来具体实施这些规则；

(b) 对很多发展中国家来说，就像对很多发达国家一样，困难在于如何在既要落实其合法课税权利，又要确保为投资者提供一个公开、透明、有利于投资、

¹ 见《经济及社会理事会正式记录，2008 年，补编第 25 号》(E/2008/45-E/C.18/2008/6)，第 80 段。

² 见 www.un.org/esa/ffd/tax/。

公平的环境这两者之间取得平衡。许多发展中国家由于具备能力的人员和信息不足，这些困难显得更为严重；

(c) 另一个困难是，税务机关所能得到的关于如何处理转让定价问题的分析和咨询意见，大多数是理论性而不是实用性的。例如，有人指出，在转让定价理论中，“可比自由价格办法”占着非常显著的地位，但是在实践上却很少得到实际采用，绝大多数用的是“交易净利润率法”（交易净利法），尽管理论把它视为非首选的方法。经济合作与发展组织目前正在对这种情况进行重新评估；

(d) “利润分割法”³是会议上一些人主张采用的另一种方法，特别是用来处理无形财产的转让等问题；

(e) 缺少数据来计算货物和服务的成本或零售价格，在很多发展中国家都是一个严重的问题。一些发展中国家采用来自发达国家（例如欧洲和美国）数据库的数据，但是另一些国家认为这样做可能有问题，因为市场条件、包括地域或地点因素（例如“地点节省”⁴）有很大不同。关税数据一般花费较少就能得到，但是为了帮助对纳税人进行审计，需要进行比较精确的分析，而且这仍然只是解决了一部分的问题；

(f) 在进行转让定价分析时采用不同的办法，例如可比自由价格法、成本加利润法、交易净利法和利润分割法，可能得出不同的结果，有时候是显著地不同，而到底哪一种办法比较适宜，目前只有有限的、往往是过分理论性的指导。实施这些办法时所遇到的行政困难往往未受到充分考虑；

(g) 单单考虑价格可能会引起误导，因为从价格比较本身，并不能看到例如在销售或推销方面不同的成本结构，因此也不知道什么才是“正常”利润率。一种提议是，联合国或可发挥作用，协助制定导则，为各类不同产品订出何谓表面上可接受的利润率。

6. 会议指出，提供有特定目标但是非规定性的指导，可以大大有助于处理这一情况，而为此目的，联合国可以发挥有益的作用，为发展中国家的决策和行政管理人员编写一本关于转让定价问题的实用《手册》，包括一份或多份列出需要考虑的问题的检查单，和有助于理解的流程图。这样一套材料将有助于对这些问题的理解、轻重先后的排序和解决。

³ 采用这个办法的企业，往往是因其各个部门结合得太密切，无法分开来计算，所以根据各个参与部门所作贡献的大小，把从营业活动得到的利润予以分割。

⁴ 在由于地点原因而得到节省的地方（例如一些发展中国家同发达国家相比，生产成本或是信息技术服务费用较低），问题是所节省的钱应当只算在货物或服务的购买方，还是也应当算在货物或服务的提供方？

三. 《手册》的处理方式

7. 这本《手册》采取一步步进行的处理方式，以供发展中国家的税务决策和行政管理人员用于下列和其他方面：

- 了解转让定价所牵涉到的基本问题，包括分析这些问题时通常采用的正常计价标准，以及不同行业和情况下最常遵循的处理正常价格幅度问题的方法
- 起草监管转让定价的立法，包括国内法框架的各个有关方面，如“关联方”的定义、保留和提供资料的规定，和对违反者的惩罚；要认识到任何这种立法都必须适合和适应于当地的环境
- 设立转让定价单位，包括明确那些具有法律、经济、会计和其他技能的人的作用、与审计小组和法律顾问的关系、“税收文化”问题，和税务机关和纳税者之间的关系（不过也认识到，这些问题需要在更广泛的范围内来处理，而不是仅仅针对转让定价）
- 确定哪些数据库具有相关性，加以利用，包括探讨用非本地材料作出推断以得出关于本地市场的结论所牵涉的问题
- 制定简单明了的、与正常计价原则的基本主旨相符的战略，以供确定哪些是正常交易、哪些是非正常交易
- 制定转让定价合规策略，包括针对不同规模的企业
- 确定在哪些方面需要更多的资料，以及如何获得这些资料
- 确定应向纳税者提供什么资料，以帮助它们符合规定
- 确定和讨论一些“示警”问题，例如在处理合同和委托制造的问题时，在所有权的查明和确定以及对无形资产的计价方面，在公司结构调整中，以及在公司和集团内部提供服务时的转让定价问题上
- “地点节省”在转让定价中可能起的作用
- 其他国家的看法对转让定价所起的作用（避免双重征税），和利用争端解决机制
- 信息交换在转让定价调查中所能起的正面或负面作用，包括这个程序往往造成的拖延等实际问题，语言问题，和可能的替代办法，例如将信息交换列作相互协议程序的一部分
- 与关税估价问题的关系，并就拟订综合处理办法提出建议

- 与虚性资本化问题的关系
- 使用“安全港”⁵之类来更有效地利用有限的审计能力的可能性
- 一套转让定价领域的词语汇编。

四. 阿姆斯特丹会议之后

8. 各相关利益攸关方——包括政府代表、民间社会和工商界——广泛同意，认为在这方面做出清楚、实用、技术上稳当的工作，对系统内所有利益攸关方都有好处。
9. 秘书处已经在非正式地就《手册》的结构进行磋商，参考一些现有的关于转让定价的手册和书籍，并同专家合作，这些专家非常慷慨地为这方面的工作献出了时间和专门知识。这个过程难免比较缓慢，一定要细致地进行。
10. 在这方面接触了许多政府、学术界和私营部门的人，请他们开始协助起草工作。今年的年会将会看到一些章节的样本文稿。
11. 特别应对“南南成功税务做法交流项目”⁶为这项工作提供的协助表示致谢，尤其是协助找出发展中国家的成功做法，这些做法可以帮助其他发展中国家处理转让定价问题。

五. 起草《手册》的指导原则

12. 起草《手册》时所依循的一些指导原则如下：
 - 只要主题内容允许，尽量把文字写得简单明白
 - 虽然《手册》以后可能会翻译出来，但其初稿将只用英文，不过所采用的文风将会顾及一个事实，就是英文并非大多数使用者的第一语文，而只是联合国6种正式语文之一。将尽量采用简单明快的文风
 - 这个《手册》的“增值”在于它的实用性——解决发展中国家的实际问题，所以应当反映现实情况，并且其作用之一是指出转让定价在理论和现实之间的不同

⁵ 国际财政文献局《国际税务词语汇编》的定义如下：“安全港可定义为一种客观标准或措施，例如一个幅度、百分率或绝对值，纳税者可依赖用来替代基于较为主观或判断性的因素或者基于不明确的事实和状况的规则。安全港的使用通常不会令纳税者处于不利地位。……”

⁶ 这是由联合国开发计划署(开发署)南南合作特别股同秘书处经济和社会事务部和两个非政府组织——全球财务新规则联盟和税务正义网密切合作开展的项目。它的意图是通过交流经验，增强发展中国家在税务问题上的合作，并且帮助找出需要在哪些方面加强发展中国家之间的合作，以确保从发展中国家的视角、经验和现实情况出发来拟订和应用国际税务规范时。

- 要适当顾及一些国家的税收征管部门难免存在的局限，以及许多国家在这方面信息和技能的不足。《手册》所采取的做法应特别认真考虑到各国应付有限资源的能力、重点和效率等问题
- 切合发展中国家情况的实际例子尤其有用。在阿姆斯特丹会议上讨论过的“可能的示警问题”和流程图的概念，从实用上来说可能有很大的潜在好处，不过也认识到，为了不致引起误导，必须谨慎地将这些概念放在适当背景上，加以详细说明(就如《手册》本身一样)；
- 这个项目与委员会同另一些合作伙伴在“南南成功税务做法交流项目”中所做的工作是相关的，所以本着同样的精神，特别期望在这个领域具有多方面不同经验的发展中国家专家提供投入。委员会将会跟进来自发展中国家的进一步线索，或者同对发展中国家的问题和优先事项有特别认识的发达国家专家联系
- 最后，在这项工作中，还会考虑到“生命周期”的问题——对一个刚刚开始搞转让定价的国家适宜的做法，通常在较后阶段对它就不再适合，反之亦然。

六. 今后的步骤

13. 本文件附件内是《手册》的大纲草稿。随着这个项目的进展，对草稿将会作出较大的修订，目前可以用它作为提出评论意见和起草《手册》初稿的基础。

14. 在撰写本说明的时候(2009年8月)，供讨论的初稿正待完成，将会提交给委员会，作为磋商和修订过程的一部分。委员会将继续同各种政府、学术界、工商界和税务从业人员网络密切合作，将《手册》各章加以修订和充实，并探讨同各种合作伙伴一起，加快这项工作，并努力制作一个附有超链接的在线版本。

Annex

Transfer Pricing Manual

for

Developing Countries

2009 Draft Concept¹

Ver 2

¹ This draft should not be taken as representing the views of the United Nations or its Secretariat or of the UN Committee of Experts on International Cooperation in Tax Matters. The document draws on various publicly available materials from tax authorities and others and from the input of the Ad Hoc Experts on Transfer Pricing organised by U.N. Department of Economic and Social Affairs Financing for Development Office, August 2008. [N.B. authors and others assisting will, of course be acknowledged appropriately]

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Introduction and Purpose

This Manual is intended to be used as a point of reference by tax administrations to address, in a fair and informed manner, the complex matters that may arise when dealing with transfer pricing issues. It is only a guide to some possible avenues of enquiry and approaches, and must be considered in the context of a specific country's legal requirements and business practices. This Manual is designed especially to respond to the needs of developing countries and draws on, in particular, transfer pricing experiences from these countries.

This Manual is premised upon the application of the arm's length standard which determines whether the prices between parts of a multinational enterprise (MNE) properly reflect the functions and assets of, and the risks incurred by, the local part of the MNE. It is acknowledged that there is an issue of whether the arm's length standard is always an appropriate one, especially for developing countries, and whether alternative approaches need to be considered. Whilst the importance of this issue is acknowledged and will be discussed later, it is not the central theme of this manual. It is intended to focus on the most effective, efficient and transparent ways of applying internationally accepted transfer pricing concepts and rules.

In view of the current widespread acceptance and usage of the **“arm's length standard”** (or “arm's length principle” ALP), included in the UN Model Tax Convention (UN MTC), and the benefit, in avoiding double taxation, of common approaches across countries, this Manual addresses currently accepted approaches of applying this standard in a developing country context. The larger issues of alternative approaches to addressing transfer pricing question is left for separate consideration as an important but parallel issue which is merely informed by the content of this manual.

The issues addressed and suggestions made in this Manual draw widely upon guidance made available by tax authorities and others experts, as well as relevant publications. It is envisioned that in a later version of this document there will be more hyperlinks to relevant public documents available on the internet, and more extensive direct citation. The Manual remains a practical document, however, not an academic treatise.

This Manual acknowledges the importance of investment to the development plans of most countries, and the importance to most developing countries, therefore, of an attractive investment climate. It also recognises, however, that such a favourable investment climate is entirely consistent with a robust but fair defence of revenues properly due to a country, in accordance with its law. It also recognises the advantages to business interests of a thoughtful, targeted, transparent, service oriented and not unduly burdensome and costly approach by tax administrations to the taxation of activities of investors, including multinational enterprises (MNEs) in their jurisdiction.

At this stage the Manual does not deal with the special case of banking in any detail. The Manual also does not separately address issues of branches and permanent establishments, nor deals with the Mutual Agreement Procedure (MAP) in any great detail, although the MAP is frequently relied on in transfer pricing cases, it has a broader application. These subjects may either be addressed in a later version of the Manual, or may be the subject of special specific guidance.

Chapter 1: Basics of Transfer Pricing

What is Transfer Pricing

“Transfer pricing is the area of law, accounting and economics that is concerned with ensuring that prices charged between associated enterprises [such as companies in the same group] for the transfer of goods, services and intangible property are in accordance with the arm’s length principle. Transfer pricing principles may also be applied in the context of transactions – or dealings – between different parts of a single enterprise, e.g. between a head office and permanent establishment and between different permanent establishments of the same enterprise.”²

..... [More explanation plus examples]

[including addressing issue of whether the reference to “pricing” can be misleading]

Transfer Pricing and the UN and OECD Model Tax Conventions

- *History*
- *Relevance for Developing Countries*
- *transfer pricing and double taxation - the role of the UN and OECD Double Tax Conventions and treaties based upon them*
- *the role of the OECD Transfer Guidelines OECD Transfer Pricing Guidelines and their relevance to treaties based on the United Nations Model Tax Convention?*

Transfer Pricing as an area of Taxation Law

- *Relationship to other domestic and international issues*
- *The relationship to other tax laws*
- *Relationship to customs issues (brief outline of issue – differences)*

The Arm’s Length Standard

Transfer pricing is important because of its impact on the allocation of profits and losses (and therefore the corresponding tax bases) of different parts of a multinational group across different jurisdictions. If the pricing of transactions between parts of an MNE located in different jurisdictions is incorrect, a jurisdiction may be denied its legitimate tax revenues. However, if jurisdictions take different views on a transfer pricing matter, the MNE involved may be subject to unrelieved economic double taxation.

A common concern is that dealings between parts of an MNE might be manipulated to shift profits to low tax jurisdictions, with losses and attendant deductions, moved to or retained in high tax jurisdictions. Transfer pricing and the arm’s length standard seek to counter such practices, however the scope of transfer pricing is however broader than just anti-avoidance, and is as applicable to dealings without tax motivation.

The arm’s length standard is internationally widely accepted as the preferred basis for determining the transfer prices for transactions between related parties, and is found in the UN and OECD Model Tax Conventions. This Manual

² IBFD International Tax Glossary (words in parentheses added)

seeks to assist developing countries by exploring what the application of this standard means in practical terms, and how it can be most effectively administered within applicable resource and other constraints.

An important initial question for any country is: has the arm's length standard been accepted as the governing principle in that country? In most cases, the answer will be, "at least for the present, yes". In theory, the wide acceptance of the arm's length standard should minimise the possibility for economic double taxation, as other countries are more likely to accept an arm's length adjustment and give relief from double taxation by way of corresponding adjustment.

According to the arm's length standard, a transfer price is acceptable if a transaction between related parties takes place at an arm's length price. With an arm's length price quite simply defined as the price which would have prevailed if the transaction had taken place between independent enterprises acting under the same or similar circumstances.

In applying the arm's length standard there is a comparison of "conditions" made or imposed between related parties with those which would be made between independent enterprises. This comparison is undertaken in order to determine whether these conditions have affected the prices used, and hence whether that a transfer pricing adjustment needs to be made - recalculating the profits which would have accrued to the enterprise in the absence of such conditions, or adjusting the conditions themselves to replicate those which would be made between independent enterprises.

Under Article 9 of the UN and OECD Model Tax Conventions, two enterprises are related parties with respect to each other if (in general) one of them participates directly or indirectly in the management, control or capital of the other enterprise; or they are under common control. This includes the relationship of separate legal entities in a group, such as a subsidiary and its parent company, or two parts of a single legal entity, being a branch (permanent establishment) and head office. Domestic legislation will often contain a more prescriptive definition of related parties, for the purposes of application of domestic transfer pricing rules.

In some countries, even without specific transfer pricing rules, the administration is empowered to disregard certain transactions altering the incidence of tax, and make adjustments to counteract the effects of such transactions. These provisions often allow the application of arm's length methodologies and the computation of an arm's length price or range.

Introduction and Explanation of the Annexed Flowcharts

- *There are several possible flowcharts:*
 - *the transfer pricing process for price setting or evaluation by a multinational*
 - *Flowcharts for different industries might also be possible.*
 - *A flowchart of the tax administration process (starting with identification of taxpayers – related party transactions – risk assessment etc).*
 - *A flowchart on possible documentation requirements [at least in one sample developing country with successful practices, might also be useful]*

Chapter 2: Establishing Transfer Pricing Capability in a Tax Administration

The Relationship Between Policy and Administration Issues

- *include issues of coordinating cross-ministerial responsibilities*

Setting up Policy Capacity

- *.....*

Assessing Administrative Capability

- *Assessing the level of development/ capability of the Tax Administration:*
 - *level of education and expertise*
 - *legal environment,*
 - *tax treaties (exchange of info)*
 - *availability of information in country/tax administration*

Setting up a Transfer Pricing Unit

- *Types of structure:*
 - *Centralised*
Advantage: coordination, easy in start-up phase, fast building up of knowledge
Disadvantage: risk of being in ivory tower

- *Decentralised*
Advantage: short lines of communication with tax inspectors, easy spread of knowledge, combined industry and TP knowledge, more fit for later phase
Disadvantage: coordination problems
- *Elements of organisation*
- *The legal framework*
- *Administrative policy making*
- *Coordination*
- *Staffing*
 - *Economists*
 - *Lawyers*
 - *Accountants*
 - *Auditors*
 - *Database-experts*
 - *Project management skills*
- *Budget and Funding*
- *Also: management information, registration/recording of TP-cases and adjustments*

Chapter 3: Policy and Administration Considerations

Overview

- *Transfer Pricing Phases/Stages/Life Cycle of the tax administration [Setting the scene]*
- *Influence of stages of an organisation on the organisation, but also on topics to be targeted and knowledge to be developed. For example: in first stage start with small number of industries of key importance and tackle most common problems. Also relevant for legislation- for example: start with general legislation and not with trying to tackle very complex issues.*
- *Elements discuss in this chapter are processes in the organisation. They could be structured in separate units or could be combined. At least the interfaces and interrelations between the elements should be taken care of. Not in all phases all the processes should be equally important (e.g. in start-up no APA)*
- *Transfer Pricing for Small and Medium-sized Enterprises (SMEs) – special issues? Streamlined compliance and administration?*

- *Acceptance and understanding of arm's length principle in domestic law*
- *Domestic Definition of related parties (who is covered legally, and in practice)*
- *Documentation and tax filing requirements*
- *Approach to comparability (process etc)*
- *Determining ALP (methods etc)*
- *TP-database use*
- *Dispute resolution and avoidance (including APAs, MAP etc)*
- *Adjustments (types: primary, secondary, corresponding) and penalties (types/scope)*
- *Attribution of profits to a PE – related issue*
- *TP-intelligence (detection of cases, knowledge centre etc)*
- *TP education/instruction (refer to heading below)*
- *Links to stakeholders – business and others*
- *Specific Country practices – [would be best integrated into the topics above rather than as a free-standing list, with links to more detailed “local explanations” where appropriate].*

Compliance Strategies and Policies

- *More or less the caveat: think before you leap.*
 - *Specific Focus:*
 - *Decide whether to set up coordination or separate TP groups per industry*
 - *Analysis of the importance of industries in the country - develop knowledge on top% of industries.*
 - *Develop solutions (administrative, legislative etc) for typical problems (see for example Mexican example of dealing with maquiladores)*
 - *Internal process: role of TP-unit - Options (also depending on life cycle):*
 - *advice only*
 - *compulsory consultation*
 - *TP-unit will take over case handling*

- *Case selection process, some options:*
 - *risk rating system (refer to chapter on risk assessment)*
 - *random*
 - *based on internal information*
 - *building up knowledge of your most important clients (international structure, global stream of transactions, high level idea of functions performed, financial statement analysis)*
- *Additional issues and attitude-shifting:*
 - *retrospective: audit focused on adjustments with risk of lot of MAPs (especially with transactions with large number of countries)*
 - *prospective: adjustments limited to clear cut cases, in other situation strive for good future solution together with taxpayer. High level of transparency: TP is not exact science. Open attitude towards taxpayer may help a lot in reaching a solution. Look to APAs program in time.*
- *Developing transparency as a value– relationship of regulation and transparency.*
- *Contacts with TP-consultants - A strategy could be to have informal meetings periodically to discuss both process and substantive issues*
- *Voluntary Compliance – options for MNEs*
- *SME and Large Taxpayer Approach (distinguish – thresholds?)*
- *Simplified Approaches*
 - *Optional Safe Harbours? Pros and cons in policy and administration terms –including treaty issues and potential economic double taxation if not in accordance with ALS*
 - *Fixed Rates or Ranges of Return*
 - *General*
 - *Industry Specific*
 - *Transaction Specific*

Compliance Programs

- *Documentation requirements – a variable geometry (SMEs/ MNCs)?*
- *Filing requirements, Questionnaires and Risk Rating/Statistical Tools*
- *Enforcement powers*

- *Tax inspectors (general)*
- *TP-audit - Introducing the idea of an iterative process (e.g. risk analysis, high level functional analysis, initial interview, initial audit (high level), thorough audit etc):*
 - i. *Initial risk/documentation review*
 - *Criteria for Selection – (see compliance strategies and policies above)*
 - *Industry Approach*
 - i. *Selecting Cases to proceed to Audit*
 - *Criteria for Selection*
 - ii. *Undertaking an Audit*
 - *Timing, process etc*
 - iii. *Country specific practices*
 - *Benchmarking/Pre-determined Rates of Return (e.g. Brazil)*
 - iv. *Typical cases – examples*
 - v. *Specific industries - examples*

Transfer Pricing Adjustments and Penalties

- *Refer to specific chapter covering this topic, but provide summary of:*
- *Use/type of adjustments*
 - *Primary*
 - *Secondary*
 - *Corresponding*
- *Penalties*
 - *Base - shortfall (tax or taxable income)?*
 - *Documentation*
 - *Taxpayer size/category*

Dispute Resolution and Avoidance

- *Refer to specific **chapter** covering this topic, but provide summary of concepts/tools:*
 - *Settlement*

- *Litigation*
- *Procedure for MAP access – relationship to domestic law rights*
- *Competent authority - Some “best” practices to be found at OECD site (MEMAP) – relevance to developing countries explored.*
- *Advance Pricing Agreements (APAs)*

Education and Information Strategies

- *Internal:*
 - *Organisation of education (in-house or external - e.g. international organisations)*
 - *Diversification of education: experts, TP-network, general tax inspectors and industry experts. Focus different depending on moment in lifecycle (start with small group of experts etc)*
 - *Strategy: focus on practical education directly followed by practical application in practice to increase effect, instead of educating large groups that don't use the material in practice.*
 - *Education not only on theoretical framework but also on audit strategy, practical considers, industry specific etc*
- *External*
 - *working with stakeholders, tax culture issues and the relationship(s) between informational strategies and compliance*
- *Sources of Information*

Chapter 4: Legal Framework

Domestic Approaches

- *Definition of related parties*
 - *Article 9*
 - *Domestic law (with examples)*
- *Types of transfer pricing rules: Legislation, Regulations, Rulings, and other Guidance*
- *Discuss use of different types to achieve different objectives*

Tax Treaties

- *Limits Domestic Law*

- *Scope of treaty (i.e. can a TP adjust be made under treaty in absence of domestic legislation?)*

Legislative and Regulatory - Country Specific Examples

- *Relevant elements (and common points) of Country Transfer Pricing Legislation and Regulations [more to be added – this will have to be fairly basic to be manageable, especially with updates occurring – possibly more material in appendices]*

- *Argentina*

- *Australia*

Australia has specific transfer pricing legislation, found in Division 13 of the Income Tax Assessment Act 1936. Division 13 prescribes the application of the arm's length standard, but does not have automatic application as it is applicable at Commissioner's discretion. There are however significant penalties for taxpayers who do apply the arm's length standard voluntarily.

The application of Division 13 by the Commissioner merely requires; a supply or acquisition of property (defined to include services) under an international agreement (broadly defined) between two or more parties; that the Commissioner be satisfied that the parties to the transaction were not dealing at arm's length; and, that the Commissioner exercise his discretion to apply it. Notably, the application of Division 13 does *not* require the parties to be related (or associated), only that they have not dealt at arm's length.

- *Brazil*

- *China*

- *Egypt*

- *France*

- *Germany*

- *Hungary*

- *India*

- *Indonesia*

- *Italy*

- *Japan*

- *Kazakhstan*

- *Kenya*

- *Malaysia*

- *Mexico (new rules interesting to discuss)*

- *Netherlands*
 - *New Zealand*
 - *Nigeria*
 - *Norway*
 - *Pakistan*
 - *Singapore*
 - *South Africa*
 - *Thailand*
 - *United Kingdom*
 - *United States of America*
- > [US Code of Federal Regulations \(Transfer Pricing – refer to Reg. 1482\)](#)

Guidance and Rulings - Country Specific Examples

- *Relevant elements of Transfer Pricing Guidance/Rulings/ Examples of application of methods, country rulings etc*

Australia

Under its public ruling program, the Australian Taxation Office (ATO) has released numerous rulings on transfer pricing and related subjects. These rulings are binding on the Commissioner insofar as they are relied on by, and are applicable to, a taxpayer. The topics covered by these rulings include: Transfer Pricing Methodologies; Intra-Group Services; Cost Contribution Agreements; Loan Arrangements; and, a number of other practical and interpretive matters.

- > [Australian Taxation Office: Transfer Pricing Rulings and Determinations](#)

Notably, the ATO has issued public ruling TR98/11, which provides comprehensive practical guidance on the preparation of transfer pricing documentation, and the process for setting and reviewing international transfer prices, for Australian tax purposes.

- > [Australian Taxation Office: Taxation Ruling TR 98/11](#)

In addition to the rulings and determinations, the ATO has also issued a number of transfer pricing specific papers, covering issues ranging from a basic introduction to transfer pricing concepts and risk assessment through to more specific issues such as marketing intangibles. The ATO continues to be active in this area, recently releasing a draft paper on business restructures (May 2007) and a draft paper on intra-group finance guarantees and loans (June 2008).

- > [Australian Taxation Office: Transfer Pricing Papers](#)

Relevant Case Law

Non Transfer Pricing Considerations

- *Description of the issues and caveat to regard cases not only from one perspective, but also the other issues (for example intensive TP audit of a cases where all operational profit is eroded by interest is not very valuable):*
 - *Taxing Natural Resources*
 - *Thin Capitalisation*
 - *Anti-Earning Stripping Rules*
 - *Erosion of the Tax Base*
 - *CFC Rules*
 - *Permanent Establishment (existence)*
 - *General Anti-Avoidance Rules*

Chapter 5: Transfer Pricing Analysis in Practice

Introduction

Flowchart

Functional Analysis

- *Introduction (purpose and importance)*
- *Fact finding process*
- *Analysis of functions, assets and risks*
- *Industry analysis*
- *Entity classifications*

Comparability

- *Determination of comparable companies and performing comparability analysis (determines an arm's length return for the functions assets and risks attributed). Dealing with outlying companies – highly profitable/ loss-making*
- *The arm's length "range" – arithmetical mean vs. inter-quartile range or other statistical tools*
- *How comparable are proposed comparables? Possible differences on the basis of:*

- *Quantity differences*
- *Geographical differences*
- *End-use differences*
- *Quality / characteristic differences*
- *Difference in the lifecycle of the product*
- *Differences in terms of trade*
- *Different channels of distribution*
- *Other relevant economic differences*
- *Location savings – how does the concept operate – how are they valued and to whom do they belong [Refer to special issues chapter]*
- *Market Penetration strategies and transfer pricing (e.g. reduced prices. higher marketing costs etc) [Refer to special issues chapter]*

Corporate Level Issues and Understanding Corporate Compliance Strategies

- *Related Party Dealings*
- *Associate Enterprises/Related Parties – definition and identification*
- *MNEs Transfer Pricing Global Policies and Strategies*
- *Financial*
 - *Profit Level Indicators*
 - *Link to materials such as the IRS APA guide*
 - *Ranges*
 - *Link to materials such as the IRS APA guide*

Transaction Specific Issues

- *[Introduce/highlight issues, but elaborate in later chapter]*
- *Intra-Group Services*
- *Intra-Group Finance*
- *Intangibles*

- CCAs

Industry Specific Issues

- *Oil & Gas*
 - *Resource Tax Regimes*
- *Mining*
- *High technology industries*
- *Services sector*

Chapter 6: Transfer Pricing Methods

Introduction

- *Use of Methods*
- *Selection of method(s) (how, why and use of more than one method)*
- *Is it any longer useful to think in terms of a hierarchy of methods?*

Current Methods

- *[Include examples for each method?]*
- *Comparable Uncontrolled Price (and its derivatives – CUT etc)*
- *Resale Price Method*
- *Cost-Plus Method*
- *Transactional net Margin Method*
- *Profit Split Methods*
- *Comparable Profits Method*
- *Other (i.e. modified resale price and use of any method, provided AL price)*

Alternatives

- *Global Formulary Apportionment – an introduction (alternative method for applying the ALS or alternative to the ALS?)*

Case Studies

- [include a case study that highlights issues that may arise, i.e. Use of CPM v TNMM by two different countries]

Chapter 7: Transfer Pricing Analysis and Methods - Special Issues

Location Savings

- what are they and to whom do they belong (how to allocate)

Market Penetration Strategies

Business Restructuring

Tax Holidays and transfer pricing

Accounting and Corporate Governance developments

- E.g. Fin 48
-

Customs valuation issues

VAT/GST/Withholding Tax Issues

Foreign Investments

Treatment of Intangibles

- *Defining & Identifying Intangibles*
- *Ownership*
 - *Legal*
 - *Economic*
- *Transfer of Intangibles*
 - *Know How*
 - *“Mixed bundles”*
- *Valuation*
- *Functions, Assets and Risks*

- *Research & Development*

- *Other cost contribution*

- *Transfers and licensing*

- *Royalties Rates*

Intra-Group Services and Commodities Trading

- *Technical Services*

- *Administrative services*

- *[Practical application of methods]*

- *Administrative concessions (non-core, de minimis etc)*

Cost Contribution Arrangements (CCAs)

- *Research & Developments*

- *Other cases*

Intra-Group Finance

Chapter 8: Documentation

Introduction

- *What is it?*
- *[Developing country examples???*
- *Burden of proof/legal requirements*
- *SME v Large Business / other thresholds*
- *PATA*
- *EU Joint Transfer Pricing Forum*
- *Documentation related penalties*

Chapter 9: Risk Assessment (RESTRICTED ACCESS? - to be determined)

Selecting Cases for initial Risk/Documentation Review

- *Criteria for Selection – see strategies & policies above*
- *Industry Approach*

Selecting Cases for Audit

- *Existence/quality of TP documentation*
- *Commercial reality check*
- *Presence of Specific transactions*

Examples of Country Specific Practices

- *Benchmarking/Pre-determined Rates of Return (e.g. Brazil)*
- *.....*

Safe Harbours

- *Policy issues*
- *Tax Treaty, Corresponding Adjustment issues and Economic Double Taxation*

Administration

Chapter 10: Audit – Processes and Procedures (RESTRICTED ACCESS? - to be determined)

Strategy

Simultaneous Tax Audits

Country Specific Best Practices

Effective Use of Resources

Chapter 11: Adjustments, Disputes and Dispute Resolution and Avoidance

Introduction to dispute avoidance and resolution in a domestic and international context

Transfer Pricing adjustments, including corresponding adjustments

- *Primary*
- *Secondary*
- *Corresponding (who/when and Article 9(2))*

Penalties

The Mutual Agreement Procedure (MAP) under tax treaties

Settlements and alternative dispute resolution

The Role of Courts and Tribunals in Transfer Pricing Dispute Resolution

- *The role of courts and tribunal*
- *Dealings with taxpayers, administrators and possible impact on policy makers*
- *The domestic law setting*
- *The international context*
- *Dealing with skilling up and consistency issues*
- *Dealing with workloads*
- *Are there possibilities for greater cooperation or at least greater sharing of experiences internationally?*

Advance Pricing Agreements (APAs) – policy and administrative considerations

Developing an APA program – practical considerations

Chapter 12: Government to Government (RESTRICTED ACCESS? - to be determined)

- *Governance*
- *Enforcement Powers*

Chapter 13: Sources of Information

Relevant Bodies (with hyperlink where available):

- AATA – *Association of African Tax Administrators*
- ATAIC – *Association of Tax Authorities of Islamic Countries*
- CATA – *Commonwealth Association of Tax Administrations*
- CIAT – *The Inter-American Center of Tax Administrations/Centro Interamericano de Administraciones Tributarias*
- COTA – *Caribbean Organization of Tax Administrators*
- CREDAF – *Centre de Rencontres et d'Etudes des Dirigeants des Administrations Fiscales*
- EUJTPF – *EU Joint Transfer Pricing Forum*
- IBFD – *International Bureau of Fiscal Documentation*
- IOTA – *Inter-European Organisation of Tax Administrations*
- OECD – *Organisation for Economic Co-operation and Development*
- PATA – *Pacific Association of Tax Administrations*
- PITAA – *Pacific Islands Tax Administrators Association*
- SADC – *Southern African Development Community*
- SGATAR – *Study Group on Asian Tax Administration and Research*
- *[others]*

Research

-

Chapter 14: Training and Capacity Building Resources

South – South Experience

CATA, CIAT, CREDAF, IOTA, SGATAR, SADC

UN - Related

OECD

Organisation for Economic Co-operation and Development

IMF, World Bank etc

IBFD

- Open Courses
- In-house Courses
- On-line Courses

Funding

APPENDICES

Glossary of Terms

Frequently Asked Questions (FAQs)

Checklist [and possibly also a flowchart] for a transfer pricing set-up

Checklist of possible transfer pricing issues – General

- *Checklist for (non-financial) services industries*
- *Checklist for financial services industries*
- *Checklist for commodities trading*
- *Checklist for Pharmaceuticals industries*
- *Checklist[s] for Oil and Gas/ Mining industries*
- *Checklist for transactions involving intangible property*
- *Checklist for telecommunications Industry*
- *Checklist for the Media and entertainment*

Table of main differences and possible uses of different Methods

Flowchart of a typical transfer pricing scenario (with non-typical extensions)

Current Databases – a Survey

Checklist [and possibly also flowchart] on documentation

Bibliography
