

[1275] Is an overhaul of Australia's transfer pricing laws on the cards?

In the recent *SNF (Australia) Pty Ltd* case (reported at 2010 WTB 29 [1153]) before the Federal Court, a company was able to rely upon its evidence of the use of the comparable uncontrolled price (CUP) method and that losses made from commercial operations over a 7 year period were justifiable. The court allowed the taxpayer's objections and overturned transfer pricing adjustments raised by the Commissioner rejecting the use of the Transactional Net Margin Method (TNMM).

Cameron Allen, Partner at WTS Australia Consulting & Advisory Pty Ltd, says the Court's rejection of the TNMM will cause some issue for the ATO as the TNMM is widely used as an acceptable pricing method and many taxpayers rely upon the method due to the lack of publicly available benchmarking data in Australia. He said the

decision sends a clear message to the ATO that it will be forced to look beyond its risk matrix in contending that sustained losses is indicative of shifting profits from Australia.

While the Court held that the OECD transfer pricing guidelines were there to assist it, Mr Allen said they did not dictate to the Court any one or more appropriate methods for the purposes of determining arm's length consideration in Australia's transfer pricing laws contained in Div 13. He considers that taxpayers may now be in a better position in transfer pricing litigation where they are able to use the CUP method where the Commissioner seeks to challenge their pricing using a transactional profit method such as the TNMM.

The Commissioner may understandably seek to appeal the decision in a higher court if circumstances permit. However, Mr Allen noted that untested in this decision was the Commissioner's assertion that the Associated Enterprise articles of Australia's Double Tax Agreements provide the ATO with the power to make transfer pricing adjustments. The Court found possible merit in this approach.

In Mr Allen's view, should this decision stand, it may trigger a major overhaul of Australia's transfer pricing laws to incorporate the respective OECD transfer pricing methods into the legislation so as to provide greater certainty.

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