



WTS Alliance Network

The Transfer Pricing Guide to Asia



Disclaimer

The information contained in this booklet can neither be exhaustive nor can it reflect the individual circumstances of a specific case. The information provided does not constitute advice or any other form of legally binding information and solely expresses our interpretation of the relevant transfer pricing regulations as of June 2010. Any changes in transfer pricing and tax regulations, business practices, or any other conditions impacting the companies involved subsequent to this date can naturally not be reflected. Since tax laws are continually being revised, subsequent legislation and interpretations could significantly affect the transfer pricing and tax consequences. Neither WTS AG nor any other company that has been contributing to this booklet can therefore guarantee the accuracy and completeness of the contents of this booklet.

The Transfer Pricing Guide to Asia

Foreword

The abundance of existing regulations in national tax laws and their frequent changes can be challenging. Especially in transfer pricing where two (or more) jurisdictions are involved in every cross-border transaction.

The Transfer Pricing Guide to Asia ("TP Guide") has been created by the companies of WTS Alliance as a reference book for practitioners who are looking for an overview about the transfer pricing regulations of the countries in the Asian region. It contains transfer pricing relevant information about taxing authority and tax law, national regulations, documentation requirements, methods, penalties, special considerations, opportunity of advance pricing agreements as well as information about recent and anticipated developments covering 8 countries in Asia.

In many of the Asian countries, transfer pricing regimes are still developing. Uncertainty prevails where regulations have not been issued yet or where best practice rules still have to emerge. Taxpayers with cross-border business relations should be aware that the regulations issued by national tax authorities may not (or not yet) be in line with the provisions of the OECD-Guidelines. Local documentation requirements as well as the availability of certain transfer pricing methods, benchmarking and advance pricing agreements vary from one country to the other.

In case you have any further questions with regard to transfer pricing in your jurisdiction(s) after reading the information contained in this booklet, please do not hesitate to contact us.

We would like to thank our local Alliance members and cooperation partners for their contributions and their cooperation in the creation of this booklet.

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Introduction

1.1 About WTS Alliance

WTS Alliance ("Alliance") is a global network of subsidiaries of WTS AG ("WTS") and tax experts around the globe. WTS is the coordinating body of the Alliance. Based upon strong quality criteria, one partner per country only is selected. In countries where the Alliance is not yet represented, clients' requests are handled by tested cooperation partners.

Table 1: WTS global network of Alliance members and cooperation partners:



The expertise and the high quality standards of each firm's personnel combined with proven working relationships within the network yield a consistent level of excellence and outstanding client service. WTS Alliance makes it possible to present fast and consistent cross-border solutions to our clients. In the field of transfer pricing, WTS has Alliance members and cooperation partners in over 90 countries worldwide.

As transfer pricing issues naturally involve two or more jurisdictions, the members of our transfer pricing teams have many years of experience in international cooperation within the Alliance, covering all relevant aspects of transfer pricing ranging from the gathering of relevant country specific information for our clients over full-blown international documentation projects to the negotiation of international mutual agreement procedures.

As the Alliance mainly consists of small and midsize tax consulting firms, we are able to offer a competitive range of fees for a highly diverse portfolio of professional international transfer pricing services.

1.2 About WTS AG

WTS AG ("WTS") is a rapidly expanding tax consultancy headquartered in Munich, and with further representation in Germany and abroad. In Germany, WTS has offices in Duesseldorf, Erlangen, Frankfurt am Main, Hamburg, Munich and Raubling.

Our consulting activities focus on the area of national and international corporate tax law. In addition to ongoing tax consulting and training services, we focus in particular on transfer pricing services, transaction support, global financial services, and advising companies and groups on VAT issues, as well as expatriate consulting and looking after delegates on an individual basis.

WTS is a pure tax consulting company that does not provide audit services in order to avoid possible conflicts arising between consulting and audit.

Today, WTS has more than 400 employees. Our team combines a wealth of experience from corporate tax departments of multinational enterprises. Former employees of the "Big4" companies and former employees of the tax authorities complete our team.

Our experts in the field of transfer pricing have gained many years of experience in international consulting firms as well as in tax departments of renowned international groups. We have a practice-oriented approach and develop creative and pragmatic solutions. Finding practical solutions also means keeping an eye on future developments and the resulting requirements in this field. We support you with the determination of appropriate transfer prices and the preparation of the necessary transfer pricing documentation, starting with the development of internal transfer pricing guidelines to the coaching of employees in charge of transfer pricing and documentation. For benchmark studies, process control for documentation systems and the preparation of documentation we can provide you with IT-based solutions. When relocating company functions we assist you with the analysis, evaluation, contractual arrangements and the documentation required. When dealing with cross-border intercompany transactions we also take into account related topics such as secondments, value added tax and customs duties. We defend your existing systems in external tax audits as well as in mutual agreement and arbitration procedures.

Our clients are leading international corporations and large, global, mid-sized companies as well as their subsidiaries in Germany and abroad.

We are working for your future... wherever you are.

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Table of Abbreviations

(Additional abbreviations may be introduced in the country specific profiles. These additional abbreviations only apply to the respective country profile).

Alliance	WTS Alliance Network
APA	Advance Pricing Agreement
C+M	Cost Plus Method
CA	Competent Authority
CIT	Corporate Income Tax
CPM	Comparable Profit Method
CSA	Cost Sharing Agreement
CUPM	Comparable Uncontrolled Pricing Method
DTT	Double Taxation Treaty
ITA	Income Tax Act
MNE	Multinational Enterprise
MOF	Ministry Of Finance
OECD	Organisation for Economic Cooperation and Development
OECD-Guidelines	OECD: Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
OECD-MC	OECD Model Tax Convention
PE	Permanent Establishment
PSM	Profit Split Method

RPM	Resale Price Method
TNMM	Transactional Net Margin Method
TP	Transfer Pricing
TP Guide	The Transfer Pricing Guide to Asia 2010
VAT	Value Added Tax
WTS	WTS Aktiengesellschaft Steuerberatungsgesellschaft

Transfer Pricing in **China**

1. Basic Information

1.1 Taxing Authority and Tax Law

The state authorities responsible for the tax legislations mainly include the National People's Congress ("NPC"), its Standing Committee ("NPCSC") and the State Council which includes the Ministry of Finance ("MOF"), the State Administration of Taxation ("SAT") and the General Administration of Customs. The Ministry of Finance also contains the Tariff and Classification Committee of the State Council.

Tax laws are enacted by the NPC, e.g. the Corporate Income Tax ("CIT") Law, or enacted by the NPCSC, e.g. the Tax Collection and Administration Law.

The administration regulations and rules regarding taxation are formulated by the State Council, e.g. the Implementation Rules of the CIT Law.

The department rules on taxation are formulated by the Ministry of Finance, the SAT, the Tariff and Classification Committee of the State Council and the General Administration of Customs, e.g. the Implementation Measures for Special Tax Adjustment promulgated by the SAT.

Besides, within the framework of the national tax laws and regulations, some local tax regulations and rules may be formulated by the State Tax Authority or the Local Tax Authority at the provincial level.

Chapter 6 in the CIT Law (effective from Jan. 1st, 2008) is the basic law covering transfer pricing, addressing the arm's length standard (Art. 41), the Advanced Pricing Agreement (Art. 42), the Related Party Transaction Disclosure Requirement (Art. 43 and Art. 44) and the Thin Capitalization (Art. 46).

1.2 Transfer Pricing Regulations

The prevailing rulings related to transfer pricing published by the SAT and the MOF are as follows

- Implementation Measures for Special Tax Adjustment -- Guoshuifa[2009]No.2 (Effective from Jan. 1st, 2008), addressing the detailed rules on Transfer Pricing, General Anti-avoidance and Controlled Foreign Corporations.
- SAT Strengthened Monitoring and Investigation on Cross-border Affiliated Transactions -- Guoshuihan[2009]No.363.
- Thin Capitalization Rule --Caishui[2008]No.121(Effective from year 2008).
- Payment of Service Fee between Parent Company and Subsidiaries -- Guoshuifa[2008]No.86 (Effective from year 2008).

1.3 Adherence to OECD-Guidelines

Generally the Chinese regulations on transfer pricing are in line with the provisions of the OECD Guidelines.

2. Documentation

2.1 Documentation Requirements

According to Guoshuifa[2009]No.2, enterprises are required to prepare contemporaneous transfer pricing documentation unless one of the following exceptions applies:

- Annual amount of related party purchase and sales is lower than RMB 200 million (for toll manufacturing activities, the amount is calculated based on the import or export customs declaration prices) and annual amount of other related party transaction is lower than RMB 40 million (for related party financing, the amount is calculated based on the interest received or paid). The determination of the above mentioned related party purchase and sales or other transactions should exclude those amounts already covered by Cost Sharing Agreements (hereinafter "CSA") or Advance Pricing Agreements (hereinafter "APA") that are in effect during the relevant year;
- Related party transactions are covered by an APA; or
- Foreign shareholding in the enterprise is less than 50% and the enterprise only concluded transactions with domestic related parties (not including Hong Kong, Taiwan and Macau).

In principle, for the enterprise falling out of the exceptions, all its related party transactions, both national and international, should be documented.

The documents should be prepared in Chinese. In case the source materials are provided in a foreign language, a Chinese translation shall be attached.

The Chinese transfer pricing rules define a 25% direct or indirect ownership threshold. Where an entity owns more than 25% of an intermediary entity, its indirect ownership of the lower tier entity will be deemed to be the same as the intermediary's direct ownership of the lower tier entity. As a result, two entities could be treated as being related even if their legal shareholding proportion has not reached the 25% related party threshold.

In addition, an entity with significant control over the taxpayer's loan, senior management, purchases, sales, production and the intangibles and technologies required for the business is defined as a related party under the Guoshuifa [2009] No.2. These conditions could cause two transacting enterprises without a legal ownership relationship potentially to be deemed as associated enterprises and therefore subject to transfer pricing assessment and investigation according to the rules.

An enterprise shall complete the documentation before May 31st of the year following the fiscal year in which related party transactions took place and shall submit the documentation within 20 days upon the request of the competent tax authority.

2.2 Components

According to Art. 14 of Guoshuifa[2009]No.2, a transfer pricing documentation should be composed of five parts:

- Organization Structure;
- Description of business operations including “Function and Risk Analysis Form”;
- Description of related party transactions including “Financial Analysis Form”;
- Comparable analysis of affiliated transactions;
- Selection and application of the transfer pricing method.

Additional information is required in special cases, e.g. when the intercompany debt to equity ratio falls out of the standard ratio defined by the thin capitalization rulings Caishui[2008]No. 121, detailed conditions of the financing transactions are required to be documented.

2.3 Purpose

The main purpose of the documentation is to avoid punishment and decrease the possibilities of a tax audit. An additional 5% on interest of the tax evaded can also be avoided in case the documentation is prepared. There’s also the purpose to shift the burden of proof to the tax authority.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

As in the OECD-Guidelines, transfer pricing methods allowed in China include the comparable uncontrolled price method, the resale price method, the cost plus method, the transactional net margin method and the profit split method. Other methods may also be accepted if they are considered as complying with the arm’s length principle.

There is no priority within the methods. The “Best Method Rule” does apply.

3.2 Availability of Benchmarking

Benchmarking is required to support the documentation.

The Chinese Tax Authority would firstly prefer local comparables, i.e. Chinese comparables. If no appropriate Chinese comparable can be found, the search could be broadened to other countries in Asia, such as Hong Kong, Taiwan, India and Malaysia. In some cases, world-wide companies may also be accepted.

The Chinese Tax Authorities are encouraged by the SAT to use the databases of Bureau Van Dijk (BVD) and the databases of the National Statistics Bureau. In practice, other databases can also be accepted such as the ones of Standard & Poor's. The tax authority may also choose secret comparables from their internal income tax return system or exchange information with banks or customs.

4. Penalties

4.1 Rates and Conditions

If an enterprise refuses to submit information with regard to its related party transactions, or provide false and incomplete information that does not accurately reflect its related party transactions, the penalty will amount up to RMB 50,000 and the competent tax authority has the right to assess taxable income using deemed profit rate in accordance with laws and regulations.

For the transactions taking place after January 1st, 2008, interest will be levied on the tax evaded at the basic lending rate published by the People's Bank of China plus 5%, calculated from June 1st of the year following the tax year in which the transactions took place to the date when the tax is paid.

Both the penalties and interest cannot be deducted before income tax.

4.2 Extent of Enforcement

As the transfer pricing documentation requirements have been recently introduced in China (in 2008), practical experience about the actual extent of enforcement has yet to emerge

4.3 Reduction or Cancellation of Penalties

In practice, whether penalties may be reduced or avoided depends on the competent tax authorities' judgment for each case.

The statute of limitations on assessment for transfer pricing adjustments amounts to 10 years from the tax year during which the transactions occurred.

5. Special Considerations

5.1 Business Restructurings

China has no special tax regulation concerning the relocation of business functions.

5.2 Tax Return Disclosures

Pursuant to the new CIT Law and Guoshuifa[2008]No.114, the enterprise shall submit the Annual Report of Related Party Transactions (“RPT Report”) to its competent tax authority together with its annual income tax return package by May 31st of the following year. The RPT report mainly includes nine forms respectively on information about related parties, summary of related party transactions, detailed transaction data on sales and purchases, services, intangible assets, fixed assets, financing, outbound investment and outbound payments.

5.3 Competent Authority

According to Art. 43 of Guoshuifa[2009]No.2, if a transfer pricing adjustment is made by the tax authority, the tax authority shall issue a “Preliminary Special Tax Investigation Adjustment Notice” to the enterprise based on the assessment determinations. The enterprise shall give a written response within seven days upon receiving the notice if it disagrees with the preliminary adjustment, otherwise it will be deemed to have agreed. Upon receipt of the enterprise’s response in disagreement with the notice, the tax authorities shall further assess the case and negotiate with the enterprise. Then, tax authorities shall make a final conclusion on the adjustment, and issue a “Special Tax Investigation Adjustment Notice” to the enterprise. Upon receiving the notice, the enterprise shall pay the taxes and interests due within the specified period.

According to Art. 98 of Guoshuifa[2009]No.2, when a transfer pricing adjustment has been made to one party under a transfer pricing investigation, the other party shall be allowed to a corresponding adjustment to eliminate double taxation. When a corresponding adjustment involves related parties in a country (region) which has a tax treaty with China, on the taxpayer's request, the SAT shall engage in discussions and negotiations with the competent authority of the other treaty party in accordance with the mutual agreement procedures in the relevant tax treaty.

5.4 Other Considerations

Enterprises fulfilling one of the following conditions must submit their documentation before June 20th of the following year no matter whether the threshold is met or not.

- Enterprises in the five follow-up administration years after a transfer pricing adjustment;
- Loss making enterprises who perform a single function; or
- Enterprises who concluded a cost sharing agreement.

According to Guoshuifa[2009]No.2, the tax authorities can use both public and secret information to perform the analysis, which gives them more flexibility to choose the comparables.

According to Guoshuifa[2008]No.86, management fees cannot be deducted before income tax. Due to the foreign exchange control in China, such foreign payments for management fees are not allowed.

The interaction between tax authorities and customs is not very active, but both authorities can exchange information whenever needed.

6. Advance Pricing Agreements

6.1 APA Opportunity

Unilateral, bilateral and multi-lateral arrangements are available in China. Application for bilateral and multi-lateral APA should be submitted to the SAT and the competent tax authority simultaneously. Once an APA is approved, it can apply to three or five consecutive years following the application year and also the prior years if the condition and type of the transactions are identical to the ones covered by the APA.

Based on experience, it usually takes nearly two years to conclude a bilateral APA.

6.2 APA Filing Fees

The Chinese tax authorities do not charge a fee for the APA process.

7. Developments

In recent years, the tax authorities at all levels have setup their own anti-avoidance teams to enforce the transfer pricing regulations and perform review and adjustment. For example, in 2009, the SAT has selected 11 state-owned enterprises and 10 foreign-invested enterprises for tax auditing purposes. The SAT required the 10 foreign-invested companies to complete self-examination, i.e. the companies were required to audit their own tax, find and report potential problems. To encourage such self-audit, underpaid taxes found by the company itself can be exempted from penalty. The 10 foreign-invested companies had to submit relevant information to the SAT before July 5th, 2010 and also had to simultaneously provide a copy to the local competent tax authorities. Transfer pricing is a key aspect of this tax audit.

Without a doubt, transfer pricing investigations will be continuously strengthened by the tax authorities in the near future. However, with more professional knowledge and practical experiences accumulated by the tax authorities, the transfer pricing legislations in China are expected to become more clarified and systematic.

Transfer Pricing in **Hong Kong**

1. Basic Information

1.1 Taxing Authority and Tax Law

In Hong Kong, the Inland Revenue Department ("IRD") is the supreme authority for finance issues.

Relevant regulations on transfer pricing are mostly contained in the Inland Revenue Ordinance ("IRO"), and in the Departmental Interpretation and Practice Notes ("DIPN"). The DIPN are explaining the circumstances under which audit action is normally initiated. The IRD also maintains an internal database that contains financial and transactional information collected from taxpayers to identify high risk transactions. Since Hong Kong is a common law country, there are also a number of recent court cases which show that the IRD attacked non-arm's length transactions of certain taxpayers.

1.2 Transfer Pricing Regulations

There are no specific transfer pricing regulations in Hong Kong other than the above mentioned IRO, the DIPN, and from time to time case law.

Some of the salient provisions in the IRO include:

- Section 20: profits earned by a related non-resident from non-arm's length transactions with local associates are deemed taxable;
- Section 61: artificial or fictitious transactions can be disregarded;
- Section 61A: transactions entered into for the sole or dominant purpose of obtaining a tax benefit may be disregarded and/or an adjustment made.

1.3 Adherence to OECD-Guidelines

Hong Kong's tax authorities consider Hong Kong's laws to be in line with the OECD-Guidelines. Because Hong Kong does not currently have detailed transfer pricing rules, many tax practitioners rely on the OECD Guidelines for substantive guidance in applying the arm's length principle. The fact that the IRD relies on the OECD Guidelines as persuasive on this point may suggest that it is reasonable to rely on the Guidelines for a transfer pricing analysis undertaken for Hong Kong companies.

2. Documentation

2.1 Documentation Requirements

There are no specific documentation requirements in Hong Kong. However, it is recommended, that the taxpayer documents related party transactions, and the taxpayer is required to make these documentations available to the IRD and submit them to the IRD upon request (Article 51 IRO).

In Hong Kong, entities are considered as related when they are closely connected through common control. However, no prescribed threshold has been set for defining associated enterprise in term of percentage of ownership. The term "associated enterprises" has been given a very wide meaning in terms of direct or indirect participation in management, control or capital. It also applies to both domestic and cross-border related party transactions.

2.2 Components

n/a

2.3 Purpose

n/a

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

In general, Hong Kong's tax authorities accept the transfer pricing methods as described in the OECD-Guidelines. There is neither a priority rule among the acceptable methods nor a best method rule. The IRD will seek to apply the principles in the OECD Guidelines, except where they are incompatible with the express provisions of the IRO. This allows the IRD to reallocate profits or adjust deductions by substituting an arm's length consideration.

3.2 Availability of Benchmarking

For Hong Kong's tax authorities, a mere database screening itself would not be sufficient for a documentation of adequacy. The relevant circumstances have to be substantiated with all the information that is available to the taxpayer or that the taxpayer can make available with reasonable effort (e.g. information from the website of the comparable enterprises). The tax authority has to be able to verify the search process.

Therefore, a benchmarking analysis alone cannot replace an argumentation of adequacy. Still, benchmarking may be used as a means for supporting the documentation. Pan-Asian benchmarking studies are usually accepted by Hong Kong's tax authorities. For example, the Osiris database is often used when performing a benchmarking study.

4. Penalties

4.1 Rates and Conditions

If the IRD concludes that the transfer price is not arm's length, it can raise additional tax assessments based on the profits underreported for the past six years. In addition, the IRD can:

- impose penalties up to treble the tax undercharged;

- in serious cases, prosecute, under which a penalty of HK\$10,000 to HK\$50,000 plus treble the tax undercharged may be charged in addition to possible imprisonment.

Additional penalties for tax evasion may apply.

4.2 Extent of Enforcement

Since Hong Kong relies on the rule of law, and has a reliable legal system, transfer pricing penalties will be enforced.

4.3 Reduction or Cancellation of Penalties

In the absence of fraud, the penalties might be reduced, but this lays in the discretion of the IRD, respectively the judge.

The statute of limitations on assessment for transfer pricing adjustments amounts to 6 years from the filing date. In case of tax evasion, extended periods apply.

5. Special Considerations

5.1 Business Restructurings

No specific regulations regarding business restructurings have been introduced in Hong Kong.

5.2 Tax Return Disclosures

The taxpayer is required to make these documentations available to the IRD and submit them to the IRD upon request. (Article 51 IRO).

5.3 Competent Authority

There are no formal rules in internal legislation regarding the possibility to submit an adjustment to a competent authority. This matter is subject to the applicable double tax agreements.

Because the issue of transfer pricing is just starting to come up in Hong Kong, there are no formal rules regarding the possibility to go to a competent authority before paying taxes. However, it is possible for the taxpayer to contact the IRD prior to making a pricing arrangement to get a preliminary evaluation. This will not become binding, but it will give a guideline to the taxpayer, and indicate how the IRD might assess its case in the future.

5.4 Other Considerations

Generally no secret comparables are used by Hong Kong's tax authorities.

Management fees are generally deductible. They are deductible only if the provision of management services is incurred in relation to the production of Hong Kong source income. Management fees are not subject to withholding tax.

The level of interaction between tax authorities and customs is usually considered as high, since Hong Kong's authorities are working quickly and efficiently.

Documents in English or Cantonese language are usually accepted.

6. Advance Pricing Agreements

6.1 APA Opportunity

Advance rulings are available in Hong Kong, but no formal APA process has been established yet.

6.2 APA Filing Fees

When filing for an advance ruling, no fee is incurred.

7. Developments

Hong Kong is expanding its DTT network quickly at the moment and it is expected that a couple of DTTs will be signed until the end of the year 2010. This requires that also the issue of Transfer Pricing will become more important in Hong Kong. Until now, Transfer Pricing in Hong Kong was not very established and was seen by the local authorities as something that is in contrast to the status of Hong Kong as international financial center in Asia.

However, due to the increase of Hong Kong's DTT network, the authorities are required to establish Transfer Pricing Rules in Hong Kong to comply with the international requirements.

Transfer Pricing in **India**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Ministry of Finance (hereinafter "MOF") and the Government of India are the supreme authorities for taxation issues.

All transfer pricing regulations are enclosed in Chapter X of the Income Tax Act, 1961.

1.2 Transfer Pricing Regulations

Transfer pricing provisions have come into force with effect from April 1st, 2002 and are accordingly applicable to assessment year 2002-2003 and subsequent years.

Provisions relating to Transfer Pricing are mentioned in sections 92, 92A, 92B, 92C, 92CA, 92D, 92E, 92F and 93 of Chapter X of Income Tax Act 1961 (in short "I.T. Act") and the relevant Rules for Transfer Pricing are Rule 10A, 10B, 10C, 10D and 10E of Income Tax Rules 1962 (in short "I.T. Rule").

1.3 Adherence to OECD-Guidelines

Generally the Indian regulations on transfer pricing are in line with the provisions of the OECD Guidelines.

2. Documentation

2.1 Documentation Requirements

In India, every person who has entered into international transactions of an amount exceeding INR 10 million in a financial year is required as per 92D to keep and maintain such information and document in respect thereof as prescribed in Rule 10D.

Only international transactions are covered and only those between two or more associated enterprises, either or both of whom are non-residents, in nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.

English language is allowed and no other foreign language.

Parties are considered related if they are "associated enterprise". An associated enterprise in relation to another enterprise is defined in section 92A of the Indian Income Tax Act, to mean an enterprise-

- Which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or
- In respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

The section further states that the two enterprises shall be deemed to be associated enterprises if, at any time during the financial year:

- One enterprise holds, directly or indirectly, shares carrying not less than twenty-six percent of the voting power in each such enterprise; or
- Any person or enterprise holds, directly or indirectly, shares carrying not less than twenty-six percent of the voting power in each of such enterprises; or
- A loan advanced by one enterprise to the other enterprise constitutes not less than fifty-one per cent of the book value of the total assets of the other enterprise; or
- One enterprise guarantees not less than ten percent of the total borrowings of the other enterprise; or
- More than half of the board of directors or members of the governing board, or one or more executive directors or executive members of the governing board of one enterprise, are appointed by the other enterprise; or
- More than half of the directors or members of the governing board, or one or more of the executive directors or members of the governing board, of each of the two enterprises are appointed by the same person or persons; or
- The manufacturing or processing of goods or articles or business carried out by one enterprise is wholly dependent on the use of know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights; or
- Ninety per cent or more of the raw materials and consumables required for the manufacture or processing of goods or articles carried out by one enterprise, are supplied by the other enterprise, or by persons specified by the other enterprise, and the prices and other conditions relating to the supply are influenced by such other enterprise; or
- The goods or articles manufactured or processed by one enterprise, are sold to the other enterprise or to persons specified by the other enterprise, and the prices and other conditions relating thereto are influenced by such other enterprise; or
- Where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual; or
- Where one enterprise is controlled by a Hindu undivided family, the other enterprise is controlled by a member of such Hindu undivided family or by a relative of a member of such Hindu undivided family or jointly by such member and his relative; or
- Where one enterprise is a firm, association of persons or body of individuals, the other enterprise holds not less than ten per cent interest in such firm, association of persons or body of individuals; or
- There exists between the two enterprises, any relationship of mutual interest, as may be prescribed.

The documentation needs to be prepared and shown to the practicing chartered accountant for his report on the transfer pricing transactions and the report must be obtained before the due date of filing the Income tax Return which is September 30th following the financial year ended March 31st. The report from an accountant required to be furnished under section 92E by every person who has entered into an international transaction during a previous year shall be in Form No. 3CEB.

2.2 Components

Information and documents to be kept and maintained under section 92D is provided in Rule 10D. Every person who has entered into an international transaction shall keep and maintain the following information and documents, namely:-

- A description of the ownership structure of the assessee enterprise with details of shares or other ownership interest held therein by other enterprises;
- A profile of the multinational group of which the assessee enterprise is a part along with the name, legal status and country of tax residence of each of the enterprises comprised in the group with whom international transactions have been entered into by the assessee, and ownership linkages among them;
- A broad description of the business of the assessee and the industry in which the assessee operates, and of the business of the associated enterprises with whom the assessee has transacted;
- The nature and terms (including prices) of international transactions entered into with each associated enterprise, details of property transferred or services provided and the quantum and the value of each such transaction or class of such transaction;
- A description of the functions performed, risks assumed and assets employed or to be employed by the assessee and by the associated enterprises involved in the international transaction;
- A record of the economic and market analyses, forecasts, budgets or any other financial estimates prepared by the assessee for the business as a whole and for each division or product separately, which may have a bearing on the international transactions entered into by the assessee;
- A record of uncontrolled transactions taken into account for analyzing their comparability with the international transactions entered into, including a record of the nature, terms and conditions relating to any uncontrolled transaction with third parties which may be of relevance to the pricing of the international transactions;
- A record of the analysis performed to evaluate comparability of uncontrolled transactions with the relevant international transaction;
- A description of the methods considered for determining the arm's length price in relation to each international transaction or class of transaction, the method selected as the most appropriate method along with explanations as to why such method was so selected, and how such method was applied in each case;
- A record of the actual work carried out for determining the arm's length price, including details of the comparable data and financial information used in applying the most appropriate method, and adjustments, if any, which were made to account for differences between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions;
- The assumptions, policies and price negotiations, if any, which have critically affected the determination of the arm's length price;

- Details of the adjustments, if any, made to transfer prices to align them with arm's length prices determined under these rules and consequent adjustment made to the total income for tax purposes;
- Any other information, data or document, including information or data relating to the associated enterprise, which may be relevant for determination of the arm's length price.

2.3 Purpose

The documentation serves as the basis on which the practicing chartered accountant will give his report which is a statutory requirement under the Income tax Act, 1961 and also saves the enterprise from being levied penalty for non maintenance. Also the documentation can be called upon by the Income tax authorities to substantiate the arm's length transactions.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

The following methods are prescribed under Transfer Pricing Rules in India:

- Comparable uncontrolled price method;
- Resale Price Method;
- Cost plus method;
- Profit split method;
- Transactional net margin method.

The most appropriate method ("MAM") shall be the method which is best suited to the facts and circumstances of each particular transaction, and which provides the most reliable measure of an arm's length price in relation to the international transaction. The burden of selecting the MAM is on the taxpayer.

3.2 Availability of Benchmarking

Benchmarking is allowed but Indian Income Tax authorities require the comparables or benchmarks to be adjusted to the transactions of the enterprise on the basis of the FAR analysis ("FAR": Functions performed, Assets employed and Risks assumed). This is the biggest challenge in the benchmarking analysis, the exercise of making adjustments to comparables.

Pan-European benchmark study can be accepted by the tax authorities when transactions are involving European countries. Acceptance is facilitated if the respective European tax authority has already accepted the benchmarking study. However, as discussed above, the FAR analysis will have to be carried out and adjustments will have to be made to make the benchmark more comparable to the Indian conditions relevant to the particular transaction.

There is no specific Indian database which is generally used to perform the benchmark study.

4. Penalties

4.1 Rates and Conditions

The penalty that can be levied amounts to 2% of the related party transaction value. Penalty for failing to furnish a report from an accountant as required under section 92E amounts to INR 100,000/-.

4.2 Extent of Enforcement

Show cause notices are issued in all cases where reports from chartered accountants are not filed for want of documentation and also documentations are not furnished to the income tax authorities in the course of assessment proceedings.

4.3 Reduction or Cancellation of Penalties

Penalties can be reduced or avoided if the taxpayer shows that he cannot be held responsible for the non maintenance of the documentation, as it was not in his power to do so.

Regarding the statute of limitations, when a case comes up for audit before an Income tax Officer ("ITO"), the ITO has three years from the end of the financial year to which the transaction relates to make an adjustment. If the transactions concerned exceed USD 3 million, the ITO has to refer to the Transfer Pricing Officer ("TPO") before making the adjustment. The TPO may then perform the adjustment, if any. Where reference is made to the TPO, the assessment order by the TPO must be made at the latest sixty days prior to the end of the three-year delay.

5. Special Considerations

5.1 Business Restructurings

India has no special tax regulation concerning the relocation of business functions.

5.2 Tax Return Disclosures

No specific disclosure is required but the Auditor's report in Form 3CEB (which gives details of international transactions in brief) is required to be filed with the Return of Income.

5.3 Competent Authority

With effect from October 1st, 2009, the Finance Act has introduced a Dispute Resolution Mechanism for all Indian taxpayers subjected to transfer pricing adjustments and all foreign companies for orders passed on or after October 1st, 2009. The Dispute Resolution Panel ("DRP") composed of 3 Commissioners of income tax has been constituted in 8 metropolitan cities across India.

Since the approach to the DRP requires the issuance of a draft order by the assessing officer, it is before paying tax.

5.4 Other Considerations

Income tax authorities collect relevant information and data regarding international taxation and transfer pricing in a central database. The data contained therein is confidential and access is exclusively granted to the tax administration only. The tax officer may order a review of the information received during the scrutiny, which is then conducted by the TPO using this source of statistical data.

Management fees are generally deductible. Management fees are usually subject to withholding tax.

6. Advance Pricing Agreements

6.1 APA Opportunity

As of now APAs are not available in India. However the Direct Taxes Code Bill, 2009 which is likely to come into effect from April 1st, 2011 has proposed to introduce the APA. As per the Code, the APA will be initiated before the actual transaction takes place and shall be valid for a maximum period of five years.

At this stage the Code proposes to introduce unilateral APAs.

6.2 APA Filing Fees

The code as of now does not contain any guidelines as to the procedure to be followed to obtain an APA and thus it is silent on the amount of fees, if any.

7. Developments

With a view to reduce uncertainty on the taxpayer's front, the Finance 9No.2) Act, 2009 introduced safe harbor regulations in India effective from April 1st, 2009. Safe Harbor regulations shall define the circumstances in which the IRA shall accept the transfer price declared by the taxpayer.

The other recent development is the Dispute Resolution Panel set up by the Income tax Authorities with an aim to make the dispute resolution more time efficient.

The anticipated development concerns the introduction of the APA wherein the taxpayer and the tax authorities shall determine upfront the arm's length price of an international transaction.

Transfer Pricing in **Indonesia**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Ministry of Finance of the Republic of Indonesia ("MOF") is the supreme taxing authority in Indonesia. The Directorate General of Taxes ("DGT"), one of Directorate Generals under the Ministry of Finance, is the Government Body who is responsible for all taxation issues in Indonesia.

Transfer pricing provisions are governed in Law Number 17 Year 1983 as several times amended by Law Number 36 Year 2008 ("Income Tax Law 1984").

1.2 Transfer Pricing Regulations

Provisions regarding transfer pricing have been implemented on January 1st, 2000 and are accordingly applicable for assessment purposes to fiscal year 2000 as well as the subsequent years. The transfer pricing provisions are stipulated in Article 18 of Income Tax Law 1984.

1.3 Adherence to OECD-Guidelines

Indonesia is not a member of the OECD group, and therefore does not accept the OECD Guidelines. However Indonesia considers its regulations as being in line with the UN Guidelines.

2. Documentation

2.1 Documentation Requirements

In Indonesia, every taxpayer who has entered into related party transactions, either national or international is required to keep documentations. The method used by the taxpayer to determine the price in related party transactions shall be stated in the annual income tax return.

Transfer pricing documentation shall be written in Indonesian. English documentations may be filed if the MOF gave its approval.

Parties are considered as being related if:

- a taxpayer owns directly or indirectly at least 25% of the capital of another taxpayer; or a taxpayer owns 25% or more of the capital of two taxpayers, in which case these two taxpayers are also considered to be related;
- a taxpayer controls other taxpayers, or two or more taxpayers are directly or indirectly controlled by the same taxpayer; or
- there is a family relationship either through blood or through marriage within one degree of direct or indirect lineage.

The documentation on the transfer pricing transactions needs to be prepared and attached to the annual income tax return that should be filled at the latest by April 30th following the end of the fiscal year.

2.2 Components

The following information and documents are required to be kept and maintained based on the Decree of Director General of Taxes Number KEP-01/PJ.7/1993. Description of the activities in order to determine:

- the ownership structure of the assessed enterprise including who determines the financial budget of the group, makes investment planning and decision;
- who is responsible for setting the price policy, purchasing the raw material or the finished goods, controlling the purchase and the stock of raw materials or finished goods, and supplying the finished goods;
- who is responsible for insurance issues, assuring the result of the products, handling patent and/or trade mark;
- who is responsible for choosing and implementing an accountancy system/ computer software, keeping accountancy data;
- who is responsible for handling customers' claims, billings and collections, as well as matters in connection with government regulations;
- who is responsible for maintaining statistic and financial report, controlling sale employees, contacting customers;
- who is responsible for composing budget for general administration expenses and sale expenses, determining salaries and other incentives;
- who is responsible for handling economic and market analyses.

2.3 Purpose

The purpose of the documentation is to prove that related party transactions are in accordance with the arms' length principle.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

Indonesia is not a member of OECD. Hence Indonesia does not accept the OECD guidelines. However, Indonesia tends to accept the UN guidelines.

The following methods may be applied as per Article 18 of the Indonesian Income Tax Law 1984.

1. Comparable uncontrolled price method;
2. Resale Price Method;
3. Cost plus method;
4. Profit split method;
5. Other methods.

The choice of the most appropriate method is left to the taxpayers themselves. However, the comparable uncontrolled price method is the most selected method by taxpayers.

3.2 Availability of Benchmarking

Benchmarking is determined by tax authorities. In some cases, to determine the arms' length price of the related party transaction, the tax authorities shall use a benchmarking which is officially determined by tax authorities. Some companies also perform benchmarking studies, however during a tax audit the tax auditor shall only use an official benchmarking made by the DGT.

There is no specific Indonesian database which is generally used to perform the benchmark study.

4. Penalties

4.1 Rates and Conditions

The penalty that can be levied shall be fully based on the calculation made by the tax auditors. The calculation of tax due will be based on the price determined by the tax authorities, besides on the difference amount there will be an administrative penalty of 50% and interest amounting to 2% per month calculated from the time the difference amount should be paid, not exceeding a maximum of 24 months.

4.2 Extent of Enforcement

The penalties apply if the taxpayer cannot provide data or documentation as required by the tax authorities.

If the audited taxpayer has not maintained the required documentation, the tax authorities shall grant the taxpayer a delay of two weeks to complete the required TP documentation.

4.3 Reduction or Cancellation of Penalties

Penalties can be reduced or avoided if the taxpayer shows that he cannot be held responsible for the non maintenance of the documentation, as it was not in his power to do so.

Based on the Law Number 28 Year 2007, the statute of limitation in Indonesia was reduced from 10 to 5 years from fiscal year end.

5. Special Considerations

5.1 Business Restructurings

Indonesia has no special tax regulation concerning the relocation of business functions.

5.2 Tax Return Disclosures

No specific disclosure is required. The only requirement is that the taxpayer shall state the pricing method applied in a special column of the annual tax return.

5.3 Competent Authority

There is no such rule. In most cases an adjustment can be made during the tax audit conducted by tax authorities. Besides, the taxpayer can make an adjustment by revising their annual tax returns provided that the revision is made within a period of two years after the annual tax returns were filed to the tax office.

5.4 Other Considerations

Income tax authorities collect relevant information and data regarding international taxation and transfer pricing in their central database. The data contained therein is confidential and access is exclusively granted to the tax administration only.

Management fees are only tax deductible when they are paid by a daughter company to its parent. Such management fees are subject to withholding tax at the rate of 20% of the gross fee. However management fees paid by a permanent establishment to its head office are not tax deductible.

6. Advance Pricing Agreements

6.1 APA Opportunity

APA is governed in Article 18 paragraph (3a) of Income Tax Law whereby the Director General of Taxes is authorized to conclude an agreement with a taxpayer and with a tax authority from another country concerning the transfer pricing method applied to related party transactions which may cover a certain period and to evaluate it as well as to renegotiate it after the agreement has expired.

6.2 APA Filing Fees

The Indonesian tax authorities do not charge any fee for the APA process.

7. **Developments**

The new amendment of Income Tax Law was promulgated on September 23rd, 2008 and the Law became effective on January 1st, 2009.

Transfer Pricing in **Japan**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Ministry of Finance (okura sho - "MOF") is responsible for the administration of all national taxes, including the drafting of new tax regulations for the Cabinet to propose to the Diet.

The National Tax Agency ("NTA") is in charge of the actual tax administration. Under the NTA's direct control are 11 regional tax bureaus and a special tax district for Okinawa. The relevant regional tax bureaus control approximately 500 tax offices (zeimu sho), each in charge of a specific area.

The Corporate Tax Law ("CTL") and the Corporate Tax Law Enforcement Order ("CTL-EO") regulate general tax matters for corporations.

The Special Taxation Measures Law ("STML") and the Special Taxation Measures Law Enforcement Order ("STML-EO") regulate more specific matters.

The Commissioner of the NTA releases directives (tsutatsu) to its officials. The directives should provide for a uniform enforcement of the laws. They are the interpretation of the tax laws by the tax authority and are not binding for taxpayers. However, it is very rare for courts to reach an opinion different from the directives issued by the tax authorities.

1.2 Transfer Pricing Regulations

The transfer pricing legislation is codified in Art. 66-4 STML. Details are regulated in Art. 39-12 STML-EO. In addition, the NTA released in 2001 a detailed directive with "Instructions for the Administration of Transfer Pricing Matters", which has already been amended several times.

1.3 Adherence to OECD-Guidelines

Japanese transfer pricing regulations are usually considered to be in line with the OECD-Guidelines, though there are still several unique features in Japanese transfer pricing regulations and administrative practices. Additionally the Japanese regulations are often not as clear as the regulations of other countries.

2. Documentation

2.1 Documentation Requirements

There is no explicit regulation requiring the preparation of a transfer pricing documentation.

However, corporations with foreign related party transactions have to attach a schedule 17-3 with their corporate tax return. Furthermore various documents related to transfer pricing

may be requested during a tax audit and taxpayers are expected to provide such information.

A foreign related party means any foreign corporation or individual which has a relationship in which either the foreign party or the Japanese corporation directly or indirectly owns 50% or more of the issued share or the paid in capital of the other party. Even if there is no shareholding relationship, two parties could be considered to be related parties under the transfer pricing regulations if one party is able to control the business policies of the other party.

2.2 Components

Schedule 17-3 which has to be filed together with the corporate tax return should contain the following information:

- Name and location of foreign related parties;
- Type of relationship with the foreign related party;
- Percentage of shares owned;
- Basic financial data of the foreign related parties;
- Amounts of the transactions concluded with the related parties based on the transaction type (e.g. sales, purchase, loan);
- Transfer pricing methods applied.

2.3 Purpose

Schedule 17-3 enables the tax office to receive basic information about foreign related parties and transactions involving these parties.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

In general Japanese tax authorities accept the transfer pricing methods as described in the OECD-Guidelines. However, Art. 66-4 STML defines a priority rule and requires that one of the three standard methods (CUPM, RPM or CPM) has to be applied whenever possible. Only when none of these methods can be applied, may the taxpayer apply alternative methods (other methods similar to the three standard methods, PSM or TNMM).

3.2 Availability of Benchmarking

The tax authorities use “secret comparables”. Secret comparables refer to information collected from other taxpayers that is used by the tax authorities for comparison purposes or assessments. The tax office does not disclose any identifying details on such comparables, even if it is used for a transfer pricing assessment.

Benchmarking studies may be used by the taxpayer as supporting evidence. Discussions during tax audits often focus on whether the data of a benchmarking study is really comparable.

4. Penalties

4.1 Rates and Conditions

Despite an obligation to file schedule 17-3 along with the corporation tax return, there is no penalty for failing to file or for filing only a partially completed schedule.

Similarly even if the taxpayer is required to submit certain documents to the tax officers during a transfer pricing audit, there is no penalty for failing to do so. However, failure to supply requested documents can have a negative effect on the result of a transfer pricing audit.

In case of additional tax payments resulting from a transfer pricing audit a penalty of 10% to 15% of the additional tax payment will be assessed. In case of tax fraud the penalty can increase up to 35%.

Additionally, interest will be assessed. The present interest rate amounts to 4.3% per year.

4.2 Extent of Enforcement

Penalties are always enforced.

4.3 Reduction or Cancellation of Penalties

A reduction of penalties or interest is usually not possible. The statute of limitations for transfer pricing matters is six years from the tax return filing due date.

5. Special Considerations

5.1 Business Restructurings

Japan has no special tax regulation concerning the relocation of business functions. However, Japanese companies are subject to anti tax haven regulations.

5.2 Tax Return Disclosures

Apart from the filing of schedule 17-3 along with the annual tax return, no specific tax return disclosure is required from the taxpayer.

5.3 Competent Authority

Most tax treaties contain regulations for resolving a possible double taxation caused by transfer pricing adjustments (competent authority procedures). The NTA has issued a directive concerning these procedures, which specifies the circumstances, the filing procedures,

and the necessary documents that must be submitted to the NTA. The proceeding and negotiation processes are often very slow.

5.4 Other Considerations

Management fees are usually deductible expenses for tax purposes if the services have been actually rendered and if the amounts were charged in accordance with the arm's length principle. Depending upon the type of service rendered the management fees may be subject to withholding tax in accordance with Japanese tax regulations or with a tax treaty.

6. Advance Pricing Agreements

6.1 APA Opportunity

An APA is an agreement between a taxpayer and a tax authority regarding the transfer pricing during a certain period. The NTA released directives concerning APA procedures. The Japanese system allows for unilateral and bilateral APA. Once an APA is granted the taxpayer must file an annual report to verify the compliance with the APA.

6.2 APA Filing Fees

The Japanese tax authorities do not charge a fee for the APA process.

7. Developments

The number of transfer pricing audits in Japan has increased over the years. The audits have not only focused on the sale and purchase of goods, but also on royalties, management fees and financial transactions. In particular the review of service fees increased recently. Most likely the number of transfer pricing audits will increase further in the future.

The APA applications showed a significant increase in recent years.

A large number of transfer pricing cases have been reported by newspapers. Some were disclosed by the companies themselves because of reporting requirements, while others were disclosed by unnamed sources. It can be expected that the documentation requirements will intensify in the future especially for big companies.

Transfer Pricing in **Taiwan**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Ministry of Finance (“MOF”) is the supreme authority. The National Tax Administrations (“NTA”) are the responsible tax authorities in Taiwan.

Article 43-1 of the Income Tax Act (“ITA”) states that “a profit-seeking enterprise which has an affiliated relationship with, or is directly or indirectly owned or controlled by another enterprise within or without the territory of Taiwan (ROC), whereof, if it is found that arrangement of their mutual income, cost, expense, profit or loss distribution does not conform with the regular business practice, hence, results in a tax evasion or reduction, the collection authority-in-charge for the purpose of computing the accurate income of the enterprise may report it to the Ministry of Finance for approval in effecting an adjustment in accordance with the regular business practice”. This is the only article with regard to transfer pricing in Taiwan’s tax law.

1.2 Transfer Pricing Regulations

The MOF issued “Regulations Governing the Assessment of Profit-seeking Enterprise Income Tax on Non-Arm’s-Length Transfer Pricing” (also called “TP Assessment Regulations”), effective from December 28th, 2004, which enclose the most important regulations governing the applicable scope, arm’s-length Methods, APA, adjustment, penalty, etc. The TP Assessment Regulations are governed by Article 80 of the ITA. The court may check whether the regulations are out of the scope of the law. If not, the regulations have legally binding effect.

1.3 Adherence to OECD-Guidelines

Generally speaking, the Taiwan TP regulations are considered as being in line with the provisions of the OECD Guidelines.

2. Documentation

2.1 Documentation Requirements

In Taiwan, international transactions with related entities have to be documented. The taxpayer is considered to be related to an entity in the following situations:

- if a company directly or indirectly holds 20% or more of the voting shares or capital stock in another company; or
- 20% or more of the voting shares or capital stock in both companies are directly or indirectly owned or controlled by the same person; or
- a company directly or indirectly controls the personnel, finance, or business operation of another company.

According to Article 22 (V) of the TP Assessment Regulations, a Chinese translation shall be attached if the documents are provided in a foreign language, unless otherwise agreed by the tax authorities, i.e. English documents may be accepted if so approved by the MOF.

With regard to the deadline, Article 22 (IV) of the TP Assessment Regulations provides that “when the tax authorities conduct the investigation pursuant to these Assessment Regulations, the profit-seeking enterprises shall produce the required documentation within one month after receipt of a notice of investigation sent by the tax collection authorities. In the event that the required documentation cannot be produced within the prescribed time limit, the taxpayer should apply for an extension prior to the deadline. The extension can only be granted once and cannot exceed one month.”

2.2 Components

In accordance with Article 22 (I) of the TP Assessment Regulations, a TP report should include the following content:

- Analysis of the industry and economic circumstances;
- Functional and risk analysis of all the parties involved;
- A description of compliance with the arm's length principle (Article 7);
- A description of the search for comparables and presentation of the relevant data selected as per Article 8 (Comparability analysis);
- Comparability analysis based on the principle of Subparagraph 1 of Article 9;
- A description of the selected best method and rationale, as well as an explanation on why alternative methods were not selected;
- Transfer Pricing methods chosen and applied by the other related parties to the inter-company transaction;
- The presentation of the results of the application of the method selected by the best method rule, including the relevant data of the selected comparables, the adjustments performed to eliminate any difference as required by Subparagraph 1 of Article 9, the assumptions used, the arm's length range, the conclusion of this evaluation with regard to compliance with the arm's length principle and the potential adjustments performed if the related party transactions were not deemed as being arm's length.

2.3 Purpose

In case of documentation default the tax authority may estimate the adjustment at its own discretion. Article 33 (II) of the TP Assessment Regulations states that, “provided that the profit-seeking enterprises have not or cannot produce the documentations pursuant to Article 22 hereof, the competent tax authorities may make an assessment in light of available data. In the event that no available data and the documentations which the profit-seeking enterprises failed to produce are relevant to the costs or expenses, the competent tax authorities may compute the taxable income according to the profit standard of the same trade concerned pursuant to Article 83 of the Income Tax Act and Article 81 of the Enforcement Rules of the Income Tax Act “.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

The pricing methods provided in the TP Assessment Regulations correspond to the transfer pricing methods presented in the OECD-Guidelines. Other TP methods shall be approved by the MOF. No priority or Best Method is provided in the TP Assessment Regulations.

3.2 Availability of Benchmarking

Benchmarking is required to support the documentation. The databases generally used to perform the benchmark in Taiwan are TEJ, GS and Osiris.

4. Penalties

4.1 Rates and Conditions

If TP documentation is not provided, the competent tax authorities may make an assessment in light of available data or compute the taxable income according to the profit standard of the same trade concerned.

If TP documentation is not provided, and the tax authorities conclude that tax omission or under-report occurred, a fine amounting up to twice the amount of the evaded tax is charged.

4.2 Extent of Enforcement

Practical experience about the actual extent of enforcement has yet to emerge.

4.3 Reduction or Cancellation of Penalties

The statute of limitations on assessment for transfer pricing adjustments is 5 years from the end of the year in which the return was filed. In case of evasion or fraud, the period is extended to 7 years.

5. Special Considerations

5.1 Business Restructurings

Taiwan has no special tax regulation concerning the relocation of business functions.

5.2 Tax Return Disclosures

Related parties and related party transactions are required to be disclosed when filing income tax returns, if the taxpayer's turnover and the amount of the related party transactions exceed a specific threshold.

5.3 Competent Authority

There are no formal rules regarding the possibility to submit an adjustment to a competent authority.

5.4 Other Considerations

Management fees are usually deductible.

6. Advance Pricing Agreements

6.1 APA Opportunity

APA may be obtained from the tax authorities.

6.2 APA Filing Fees

The Taiwanese tax authorities do not charge a fee for the APA process.

7. Developments

In the near future, no specific transfer pricing development is expected.

Transfer Pricing in **Thailand**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Thailand Ministry of Finance ("MOF"), is the supreme authority for finance issues and the overall policy directions are determined by the Minister of Finance with assistance from his deputy ministers. Recently there has been a significant increase in transfer pricing audits performed by the MOF through one of its eight main governmental agencies, the Thai Revenue Department ("TRD"), Krom Sumpakorn. For this purpose, the TRD created a special transfer pricing team of tax auditors a few years ago.

There are no detailed transfer pricing provisions in Thailand. However there is under the Thai tax law a general requirement that companies respect the arm's length principle.

General transfer pricing relevant regulations are contained in the Thai tax code. The following paragraphs are concerned: §65 bis (4), §70 ter, §65 bis (7); §65 ter (13), (14) and (15) and §79/3.

1.2 Transfer Pricing Regulations

The above mentioned regulations are completed by the Departmental Instruction ("DI") No. Paw. 113/2545 introduced on May 16th, 2002. Under this form, the TRD published its transfer pricing guidelines, which provides guidance to tax officials for tax audit purposes.

This DI is not legally binding on the taxpayers but only on the tax authorities. As a result, there is no effective date concerning their application. However, in practice the Thai tax authorities expect the taxpayers to follow the indications enclosed in the DI No. Paw. 113/2545.

1.3 Adherence to OECD-Guidelines

Thailand is not a member of the OECD. However, Thailand has introduced the arm's length principle and Thailand's DI is generally considered as being in line with the OECD guidelines. Only as far as the transfer pricing methods are concerned Thailand deviates from the OECD Guidelines. Indeed in Thailand the so-called standard methods have priority over any other methods. Other methods (transactional profit methods) may only be used if the application of any of the standard methods would not yield satisfying results.

2. Documentation

2.1 Documentation Requirements

As indicated above, in practice the Thai tax authorities expect the taxpayers to follow the indications enclosed in the DI No. Paw. 113/2545.

During recent tax investigations, domestic as well as cross-border related party transactions have been challenged by the TRD.

In Thailand, according to Clause 39 of the Revenue Code, entities are considered as related in the following cases:

- when they are closely connected through common control;
- when one company owns more than 50% of the other company's voting rights;
- when one company owns directly or indirectly more than 50% of the other company's capital;
- when both parties have at least 50% of their equity or property held directly or indirectly by a third party.

The DI No. Paw. 113/2545 indicates that the documentation should be prepared contemporaneously. However, it does not indicate any submission deadline. In case of a tax audit, the taxpayer is generally required to submit the documentation within one month upon request of the tax auditor.

The documentation should be provided in Thai. However, generally English documentation will be accepted by the authorities but a translation into Thai will be requested in case of matters that appear complicated or unclear for the assessing official.

As maintaining transfer pricing documentation is not mandatory, there is no deadline for its preparation. However, in case of an assessment only documentation that is actually prepared during each stage of a transaction will be considered. It is therefore crucial to ensure that all documentation reflects the actual transactions and recommendable to prepare the documentation without delay.

2.2 Components

The DI No. Paw. 113/2545 lists the contemporaneous documentation that is required to be kept at the office of the taxpayer:

- ownership structure and nature of activities carried out by each entity;
- budgets, strategy, business plans and financial projections;
- detailed information about the taxpayer's related party transactions;
- financial performance;
- pricing policies, product profitability, relevant market information and profit sharing for any related business entity;
- functional analysis;
- documents substantiating the negotiating positions taken by the taxpayers as far as intercompany transactions are concerned;
- any other relevant information supporting the transfer price applied.

2.3 Purpose

The main purpose of the documentation is to shift the burden of proof. In case of documentation default the tax authority may estimate the adjustment necessary at its own discretion and the burden of proof changes from the tax authority to the taxpayer.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

In general, the Thai tax authorities accept the transfer pricing methods as described in the OECD-Guidelines. The so-called standard methods have priority in Thailand over any other method. Other methods (transactional profit methods) may only be used if the application of any of the standard methods would not lead to satisfying results.

There is no best method rule in Thailand.

3.2 Availability of Benchmarking

For the Thai tax authorities, a mere database screening itself would not be sufficient for a documentation of adequacy. The relevant circumstances have to be substantiated with all the information that is available to the taxpayer or that the taxpayer can make available with reasonable effort (e.g. information from the website of the comparable enterprises). The tax authority has to be able to verify the search process.

Therefore, a benchmarking analysis alone cannot replace an argumentation of adequacy. Still, benchmarking may be used as a means for supporting the documentation. Pan-Asian benchmarking studies are usually accepted by the Thai tax authorities. For example, the Osiris database is often used when performing a benchmarking study.

4. Penalties

4.1 Rates and Conditions

As there are no specific transfer pricing requirements, only the general tax law penalties may be applied. These include a surcharge which may amount to from 1.5% per month up to 100% of additional tax as well as a penalty which may amount up to 100% of the tax adjustment.

4.2 Extent of Enforcement

Under the current penalty regime, transfer pricing penalties seem to be enforced severely in practice. However, Thai authorities do not have the capacity to reveal and enforce every case being subject to transfer pricing penalties. Anyhow, it becomes an increasingly high source of capital for the authorities and enforcements are expected to be elevated.

4.3 Reduction or Cancellation of Penalties

Surcharges are a form of interest and cannot be reduced or waived. However, penalties may be reduced by 50% or even waived if the taxpayer cooperated fully during the tax audit and had no intention of evading taxes.

The Thai tax authorities must issue summons for tax examination within 2 years of the filing date. The statute of limitations on assessment for transfer pricing adjustments amounts to 10 years from the filing date. In case of tax evasion, extended periods apply.

5. Special Considerations

5.1 Business Restructurings

No specific regulations regarding business restructurings have been introduced in Thailand.

5.2 Tax Return Disclosures

No specific tax return disclosure is required from the taxpayer.

5.3 Competent Authority

There are no formal rules in internal legislation regarding the possibility to submit an adjustment to a competent authority. This matter is subject to the applicable double tax agreements.

There are no formal rules regarding the possibility to go to a competent authority before paying taxes.

5.4 Other Considerations

Secret comparables are used by the Thai tax authorities.

Management fees are generally deductible. The Thai company has to prove that it derives a benefit from the management services. Management fees are usually subject to 15% withholding tax.

The level of interaction between tax authorities and customs is usually considered as low but certainly still depends on the person in charge.

Documents in English are usually accepted. However, the Thai tax authorities may request a translation. All documents submitted with an Advance Pricing Agreement (“APA”) request must be in Thai.

6. Advance Pricing Agreements

6.1 APA Opportunity

Unilateral or bilateral APAs are available in Thailand, as indicated in Clause 5 of DI 113/2545.

6.2 APA Filing Fees

When filing for an APA, no fee is incurred.

7. Developments

In the near future, no major transfer pricing developments are expected.

Transfer Pricing in **Vietnam**

1. Basic Information

1.1 Taxing Authority and Tax Law

The Ministry of Finance ("MOF") is the supreme authority for finance issues. The MOF issues regulations and circulars while the General Department of Taxation ("GDT") is the Vietnamese tax authority.

Relevant regulations for general transfer pricing are contained in the Law on Business Income Tax ("BIT"), which was introduced in 2003 and requires that related party transactions comply with the arm's length principle. Several circulars issued by the MOF are exclusively dedicated to transfer pricing issues and complete this law.

1.2 Transfer Pricing Regulations

The above mentioned regulations are completed by circular no. 95/1997/TT-BTC dated December 19th, 1997. This circular provides guidance for the implementation of double tax treaties.

Circular no. 13/2001/TT-BTC contains guidance on transfer pricing methods applicable to related party transactions (traditional transactional methods). This circular failed to indicate any guidelines on the application of these methods and on documentation requirements.

The first proper transfer pricing regulations were introduced at the end of 2005, when the MOF issued the circular no. 117/2005/TT-BTC ("Circular 117"), which provides guidance on the calculation of arm's length prices in intercompany transactions. Circular 117 became effective at the beginning of 2006 and applies to both cross-border and national related party transactions. Circular 117 has since been amended by Circular 01/2009/TT-BTC, which clarified the definition of "related party" and shortens the delay granted for the submission of the documentation to the tax authorities.

1.3 Adherence to OECD-Guidelines

Vietnamese transfer pricing guidelines are generally considered to be in line with the OECD Guidelines.

2. Documentation

2.1 Documentation Requirements

The documentation should account for all related party transactions. In Vietnam, entities are considered as related in the following cases:

- when they are closely connected through common control;
- when one company owns directly or indirectly more than 20% of the other company's capital or total property;

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- when both parties have at least 20% of their equity or property held directly or indirectly by a third party;
 - when one company owns directly or indirectly more than 10 % of the other company's voting rights;
 - when one company sells more than 50% of any one single products to the other company;
 - when one company purchases more than 50% of the production material of any single product to the other company; or
 - when the two companies have entered into a business cooperation agreement on a contractual basis or a significant amount of transactions (at least 50%) is undertaken between the two parties;
 - when either party directly or indirectly provides more than 50% of the total value of raw materials or any input products used for production or trading of relevant output products of the other party.

Circular 117 does not indicate a deadline for the preparation of the documentation. However, as the documentation must be provided to the tax authorities within 10 days upon request. An extension can be granted once upon request. Thus, a contemporaneous transfer pricing documentation is required to fulfill these requirements and must include e.g. general information on the related party relationships, transactional descriptions and diagrams, product detail and contractual terms and conditions and pricing methodology.

The documentation has to be computed in Vietnamese. Documents in other languages have to be translated.

2.2 Components

Based on the regulations, the following information and documents are required for transfer pricing documentation purposes:

- general information on the activity carried out as well as on the parties involved;
- a description of the related party transactions; and
- a presentation of the methods used to calculate arm's length transfer prices.

2.3 Purpose

The main purpose of the documentation is to shift the burden of proof. In case of documentation default the tax authority may estimate the adjustment necessary at its own discretion and the burden of proof changes from the tax authority to the taxpayer.

3. Transfer Pricing Methods

3.1 Pricing Methods and Priority

In general, the Vietnamese tax authorities accept the transfer pricing methods as described in the OECD-Guidelines. The taxpayer has to use the most appropriate method under the regulations.

There is no hierarchy among the methods.

3.2 Availability of Benchmarking

For the Vietnamese tax authorities, a mere database screening itself would not be sufficient for a documentation of adequacy. The relevant circumstances have to be substantiated with all the information that is available to the taxpayer or that the taxpayer can make available with reasonable effort (e.g. information from the website of the comparable enterprises). The tax authority has to be able to verify the search process.

Therefore, a benchmarking analysis alone cannot replace an argumentation of adequacy. Still, benchmarking may be used as a means for supporting the documentation. The Vietnamese tax authorities usually prefer the use of local benchmarks. Foreign comparable companies may however be accepted by the tax authorities if no or only limited local comparable companies are available. In this case, pan-Asian benchmarking studies may be accepted by the Vietnamese tax authorities.

4. Penalties

4.1 Rates and Conditions

Circular 117 does not indicate specific penalties applying to transfer pricing issues. Failure to fill out the required tax return or any of the required tax forms may trigger a penalty amounting up to 3 times the undeclared tax.

4.2 Extent of Enforcement

Under the current penalty regime, transfer pricing penalties seem to be enforced severely in practice. However, Vietnamese authorities do not have the capacity to reveal and enforce every case being subject to transfer pricing penalties. Anyhow, it becomes an increasingly high source of capital for the authorities and enforcements are expected to be elevated.

4.3 Reduction or Cancellation of Penalties

There is no provision in the Vietnamese tax law regarding a reduction or a cancellation of penalties in transfer pricing issues. Adequate disclosure of the related party transactions as well as the timely preparation and submission of the transfer pricing documentation may however contribute to avoid penalties.

The general statute of limitations apply to transfer pricing issues and amounts to five years from fiscal year end.

5. Special Considerations

5.1 Business Restructurings

No specific regulations regarding business restructurings have been introduced in Vietnam.

5.2 Tax Return Disclosures

The taxpayer is required to disclose all related party transactions. To this end, the taxpayer has to fill out form no. GCN-01/TNDN along with its annual tax return.

5.3 Competent Authority

There are no formal rules in internal legislation regarding the possibility to submit an adjustment to a competent authority.

There are no formal rules regarding the possibility to go to a competent authority before paying taxes.

5.4 Other Considerations

Management fees are not deductible unless they correspond to specific services rendered by the foreign entity. Most of the time management fees do not qualify as specific services.

The foreign contractor withholding tax generally applies to management fees paid to foreign entities. This withholding tax is composed of a VAT and a corporate income tax element. The specific rate depends on the circumstances.

Since the merger of the custom authorities into the MOF in 2002, the cooperation between tax authorities and customs has significantly improved. Both administrations are now working on enhancing information exchange.

6. Advance Pricing Agreements

Advance Pricing Agreements are not available in Vietnam.

7. Developments

In the near future, no transfer pricing developments are expected.

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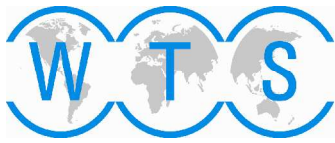
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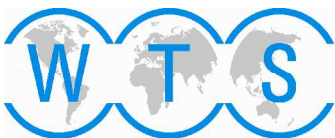
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