



INDEPTHFEATURE

TRANSFER PRICING

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Introduction

Issues around transfer pricing (TP) are top of mind for the tax departments of many multinational organisations. In light of increasingly stringent and complex regulatory developments, with the Organisation for Economic Co-operation and Development's (OECD's) base erosion and profit shifting (BEPS) project in the vanguard, organisations must dedicate sufficient resources to ensuring they achieve compliance with TP rules.

But compliance is an increasingly resource-intensive activity – at a time when multinationals may face challenges allocating sufficient resources to tax planning. However, failure to reach these exacting standards can have serious repercussions and leave organisations in dispute with tax authorities across multiple jurisdictions.

With this in mind, companies benefit from conducting periodic reviews of their TP policies. As companies grow and evolve, so too will their TP transactions and processes, which can quickly become outdated. The aim is to compile consistent supporting documentation for transactions, and build out comparables. Ultimately, preparing TP documentation is a compliance exercise that should be embedded in the company's tax strategy.

Technology is also playing a role in TP arrangements. New automation tools can help companies streamline and standardise processes, which is useful in a resource-constrained environment.

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Financier Worldwide
canvasses the opinions of leading
professionals on current trends in
transfer pricing.

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Elizabeth Stevens is a member at Caplin & Drysdale, where her practice centres on transfer pricing and international tax planning and advocacy for corporate clients. In addition to advising on transfer pricing planning, documentation and compliance, she regularly represents companies in the negotiation of advance pricing agreements and in mutual agreement procedure cases. In the broader international tax context, she assists clients in the structuring of US inbound and outbound investment and business activities and cross-border transactions. She also frequently advises on income tax treaty issues.

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Q. Could you outline some of the significant developments in the transfer pricing arena over the last 12 to 18 months? In what ways have these developments impacted how organisations go about implementing their tax planning strategies?

A. A key US transfer pricing (TP) development is the publication of the 3M Tax Court decision. That decision, which was joined by the slimmest possible majority of Tax Court judges, found in favour of the Internal Revenue Service (IRS) in a Brazilian blocked income case. The court required the US taxpayer to include in income arm's length royalties from its Brazilian subsidiary rather than the lower maximum royalties permitted to be paid under Brazilian law. The decision stands for the proposition that TP trumps inconsistent foreign law. This can have both positive and negative implications for taxpayers, depending on the impact of the local law on the taxpayer's global reporting position.

Q. To what extent are the tax authorities in the US placing greater importance on the issue of transfer pricing? Have

they increased their monitoring and enforcement activities?

A. For more than a decade, the IRS has focused closely on TP enforcement. In 2012, it created the Treaty and Transfer Pricing Operations office, which has authority over the competent authority process and, through its Transfer Pricing Practice (TPP) unit, issue control in TP audits. The TPP has 170 employees whose sole focus is identifying and making TP adjustments. The US Inflation Reduction Act dedicated some \$80bn to providing additional IRS resources. One focus of the increased budget is international enforcement. TP enforcement can be expected to grow.

Q. Could you outline the challenges that companies face as they try to maximise their tax efficiencies while staying within the bounds of transfer pricing regulations? Is it becoming tougher to balance the drive for efficiency with compliance requirements?

A. A significant and relatively new TP challenge is uncertainty in the law of TP. The OECD's introduction of the

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development, enhancement, maintenance, protection and exploitation (DEMPE) concept has led countries to adopt varying views on what functions play key roles in developing intangibles. This has produced numerous controversies, including litigation in many countries, and challenges to achieving resolution in the competent authority process. Many companies, especially those whose residual profits are driven by something other than product patents, are hard-pressed to know how to predict what types of positions countries might take.

Q. What kinds of challenges arise in calculating appropriate transfer prices, both for tangible and intangible assets? How crucial is it to have consistent supporting documentation?

A. Method selection and application are now more challenging due to uncertainties in the law of TP and its application. This uncertainty makes it critical for taxpayers to document their facts, and method selection processes and applications, in a manner that is both robust and consistent across their main countries of operation. Taxpayers with relatively weak

documentation may be more vulnerable to adjustments and should strive to improve their TP support with each passing year.

Q. Have you seen an increase in transfer pricing disputes between companies and tax authorities in the US?

A. The IRS continues to review US companies' TP approaches as a matter of first order. At the start of each IRS audit, companies can expect to see a request for TP penalty documentation and, in some cases, background information. One benefit of the IRS's focus on TP is that its audit personnel are generally well-trained. Our experience has been that, once apprised of the taxpayer's TP approach and provided with supporting documentation, the IRS will cease an audit that lacks the probability of an adjustment.

Q. What steps should companies take if they become the subject of a tax audit or investigation?

A. As with any investigation, taxpayers should not respond before consulting with their professional advisers, should be conscious of the potential for waiving

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attorney-client and other privileges, and should preserve documentation that supports or harms their positions. For TP audits, the taxpayer also should ensure that any available path to a competent authority process is kept open. For example, under the US-Canada and US-Mexico double tax treaties, the taxpayer will have access to mutual agreement procedures (MAP) only if it provides notice of a potential adjustment within a fixed period after the close of the relevant taxable year or the filing of the return.

Q. In general, what advice would you give to companies on reviewing and amending their transfer pricing policies and structures?

A. When amending TP policies, US and other taxpayers should evaluate the potential for retrospective TP adjustments. A method change that produces more income in Country A and less in Country B may be challenged prospectively by Country B, and Country A may challenge lower results from pre-change years. Also, a change in method that coincides with, or even causes, changed facts can be a taxable event, for example if US intangible



Method selection and application are now more challenging due to uncertainties in the law of TP and its application.

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property is treated as transferred to a foreign subsidiary. Care should be taken to avoid that outcome or, if desirable, to price it properly. □

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Q. Could you outline some of the significant developments in the transfer pricing arena over the last 12 to 18 months? In what ways have these developments impacted how organisations go about implementing their tax planning strategies?

A. On 28 March 2023, the Canadian government introduced its most recent budget which reaffirms its intention to implement the two-pillar plan for international tax reform agreed to by the members of the Organisation for Economic Co-operation and Development (OECD)/Group of 20 (G20) Inclusive Framework on Base Erosion and Profit Shifting (BEPS) in October 2021. Pillar One ensures that the largest and most profitable multinational enterprises (MNEs) pay income tax based on the location of their users and customers. Pillar Two introduces a minimum effective tax rate of 15 percent on the profits of large MNEs, regardless of where their profits were earned. The budget provided further clarity on the parameters of implementation. It discussed the Income Inclusion Rule (IIR), which will allow the jurisdiction of the parent entity of an

MNE to impose a top-up tax on that entity with respect to income from the MNE's operations in any jurisdiction where it is taxed at an effective tax rate below 15 percent. However, if the jurisdiction of the parent of an MNE has not implemented the IIR, the Undertaxed Profits Rule (UTPR) will allow jurisdictions in which the MNE operates to impose the top-up tax on the group entities located in their jurisdiction, with the top-up tax to be allocated among those jurisdictions on a formulaic basis. The dates for the next implementation milestones announced in the 2023 budget make it clear that one of the most significant global tax reforms in decades is imminent. The Canadian government is working with its international partners and the OECD to establish this new multilateral tax framework. However, if the multilateral convention to implement Pillar One does not come into force by 1 January 2024, the government is prepared to impose the Digital Services Tax (DST), payable as of 2024 in respect of revenues earned as of 1 January 2022.

Q. To what extent are the tax authorities in Canada placing greater importance

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on the issue of transfer pricing? Have they increased their monitoring and enforcement activities?

A. The Canada Revenue Agency (CRA) has always maintained strong monitoring and enforcement activities on transfer pricing (TP) issues. This is probably a result of the large number of subsidiaries that operate in Canada and a willingness by the CRA to ensure, for example, subsidiaries earn a fair return and intangibles remain in Canada. However, where they will focus these activities may change. For example, the CRA has recently been focused on related-party loans and arm's length levels of interest, whereas they may have been more focused on tangible goods transactions five to 10 years ago. Over the past couple of years, the CRA had been tasked with supporting the Canadian government's coronavirus (COVID-19) relief measures, moving resources away from monitoring and enforcement activities on TP. With these measures expired, TP enforcement has scaled up and we have seen increased requests to support companies in responding to TP audit queries.

Q. Could you outline the challenges that companies face as they try to maximise their tax efficiencies while staying within the bounds of transfer pricing regulations? Is it becoming tougher to balance the drive for efficiency with compliance requirements?

A. Canadian companies generally pay attention to TP regulations, but we have noted that it may prove easier and more efficient for larger companies to comply with these than smaller ones. For example, large companies generally have dedicated TP teams who regularly monitor changes to domestic legislation and policies, and ongoing work at the OECD. Small and medium-size enterprises (SMEs) may have simpler related-party structures but may lack the tools to monitor these changes as closely and could fall out of compliance. Foreign-based companies setting up in Canada may struggle to understand and comply with TP regulations and requirements, and other tax matters in general. Section 247 of Canada's Income Tax Act (ITA) does not set a minimum threshold for preparing contemporaneous documentation on a yearly basis and, as a result, a company could be penalised

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Any change to TP policies and structures which result in changes to the profit or loss reported could raise a red flag.

if it is determined that it has not made reasonable efforts to determine an appropriate transfer price subsequent to a TP audit. Generally, we believe most companies pay attention to the TP policies in their jurisdictions and make an effort to navigate changes to TP policies to remain compliant.

Q. What kinds of challenges arise in calculating appropriate transfer prices, both for tangible and intangible assets? How crucial is it to have consistent supporting documentation?

A. It is important to have consistent supporting documentation as the ITA requires companies to prepare and maintain such documentation on a yearly basis. When transfer prices are consistent, year-over-year, the company sets up an approach which the CRA would have more difficulty to argue is not appropriate versus if the company adopted contradictory approaches year-over-year. Calculating transfer prices for intangibles is generally more challenging than tangibles. While there are means of determining how related parties contribute to an intangible and who reaps the benefits, it is an art to

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measure and allocate profits. However, even these methods depend on consistent data to support any margin analysis. The impact of COVID-19, the rise of inflation and the increase in interest rates may create difficulties in building a comparables set using data from 2020 through 2022 that appropriately measures an arm's length range to set transfer prices.

Q. Have you seen an increase in transfer pricing disputes between companies and tax authorities in Canada?

A. We have recently seen an increase in TP disputes. Now that COVID-19 relief measures have expired, the CRA has turned its focus to TP audits, leading to more audit disputes. This is a direct result of the Canadian government's commitment in the 2022 budget to increase the CRA's enforcement budget.

Q. What steps should companies take if they become the subject of a tax audit or investigation?

A. In Canada, the first step for any TP audit or investigation is a request for contemporaneous documentation, which

is often referred to as a TP report, under subsection 247(4) of the ITA. This report outlines the company structure, the functional profile of the related entities and the economic analysis which support the arm's length prices. If a TP report is not provided, the CRA could assess a TP penalty equal to 10 percent of any adjustment if the CRA determines that adjustments are warranted and the \$5m adjustment threshold is surpassed. Upon review of the report, an auditor may have subsequent questions of clarification and may request interviews with key personnel as they validate the company's approach. We recommend companies cooperate with the CRA's audit process and, when in doubt as to what should be provided, seek support to help navigate responses and pertinent information to be provided.

Q. In general, what advice would you give to companies on reviewing and amending their transfer pricing policies and structures?

A. Many companies will continue to optimise and amend their structures for different reasons, with potential impacts on their related-party transactions.

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However, with the data systems available to many tax agencies, including the CRA, any change to TP policies and structures which result in changes to the profit or loss reported could raise a red flag. It is important that companies reviewing or amending their TP policies properly document the changes made and demonstrate that these changes continue to comply with TP policies in that jurisdiction. □

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Q. Could you outline some of the significant developments in the transfer pricing arena over the last 12 to 18 months? In what ways have these developments impacted how organisations go about implementing their tax planning strategies?

A. UK businesses face a perfect storm of regulatory changes, greater scrutiny from stakeholders, and a challenging macroeconomic environment. These all directly impact transfer pricing (TP). Tax authorities globally are becoming increasingly coordinated in their approach, which is playing out through the base erosion and profit shifting (BEPS) 2.0 project, and are being more forensic in their enquiries – HM Revenue and Customs (HMRC) is no different. New legislation effective from April 2023 means UK taxpayers that are part of a multinational group must prepare TP documentation – the first codification of the rules in the UK. The rules broadly follow the Organisation for Economic Co-operation and Development (OECD) standard with one noticeable and delayed point of difference – the Summary Audit Trail (SAT). Increasingly, other

stakeholders are scrutinising TP policies. Statutory auditors and due diligence providers want to see TP documentation when assessing TP risk within the financial statements and on deals, respectively.

Q. To what extent are the tax authorities in the UK placing greater importance on the issue of transfer pricing? Have they increased their monitoring and enforcement activities?

A. TP remains a key focus of HMRC for both UK headed and UK inbound businesses. Diverted profits tax (DPT), introduced in 2015, remains a potent tool at HMRC's disposal to tackle the perceived diversion of profits out of the UK. It is still being very actively used. HMRC's yield from DPT cases in 2022 was £198m, the highest since 2018. Similarly, the data on the profit diversion compliance facility (PDCF) continues to demonstrate the success of this initiative for HMRC in resolving cases. The bar has been raised on the standard of compliance in the UK. The level of detail and quality of evidence expected by HMRC, to test how TP reports reflect reality, has increased. HMRC is using all available data to target companies



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with hallmarks it considers to be high risk, for example companies with UK employees performing global, regional or strategic management roles. Tax leaders need to focus on these higher risk areas and be prepared to respond to the challenge.

Q. Could you outline the challenges that companies face as they try to maximise their tax efficiencies while staying within the bounds of transfer pricing regulations? Is it becoming tougher to balance the drive for efficiency with compliance requirements?

A. TP is more about risk management that amplifies the value within the organisation. Tax leaders need to focus on having robust and sustainable TP models that can withstand scrutiny, are commercially aligned, and can be implemented properly. Organisations of all sizes face these challenges. For example, fast-growing companies can change their strategy often and quickly. These companies need to make sure their TP policies can keep up. Couple this with M&A activity and business combinations, which introduce integration factors. Larger, more established organisations face similar



Tax leaders need to focus on having robust and sustainable TP models that can withstand scrutiny, are commercially aligned, and can be implemented properly.



issues. Working from anywhere may, for example, erode the concentration of decision makers, vital to the sustainability of TP models. The environmental, social and governance (ESG) agenda also creates new revenue streams and business models which must be viewed through a TP lens. Tax leaders need to consider how these changes impact their TP models. The compliance requirements are becoming more burdensome. This makes a well-defined strategy which harnesses people, process and technology critical.

Q. What kinds of challenges arise in calculating appropriate transfer prices? How crucial is it to have consistent supporting documentation?

A. HMRC is equally focused on how taxpayers implement TP, and this is an area ripe for disputes and penalties. Problems arise, for example, where there is overreliance on spreadsheets, poor controls and governance, lack of process ownership, multiple systems and data sources, and misalignment in the system's implementation and supporting documentation. We often ask businesses a very simple question: do you trust your

numbers? As much as it is important to have consistent supporting documentation, businesses also need to think about how to embed their TP policies, creating processes, controls and governance, working collaboratively with the broader finance organisations, defining roles and responsibilities, and deploying technology to effectively operationalise their TP.

Q. Have you seen an increase in transfer pricing disputes between companies and tax authorities in the UK?

A. HMRC statistics illustrate the continued focus on TP. In the year to 5 April 2022, HMRC settled 175 TP enquiry cases, including real-time interventions, a significant increase on previous years. The PDCF has been a successful tool for HMRC to encourage taxpayers to adopt different, more sustainable TP policies, and HMRC continues to issue more 'nudge letters' to businesses of varying sizes. HMRC is also deeply engaged in the bilateral programmes that exist between the UK and other tax authorities to proactively resolve TP disputes. This is borne out by the highest number of applications for advanced pricing



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agreements (APA) since 2016, and the reduction in time for the resolution of mutual agreement procedure (MAP) cases, with the average case now taking 21 days. The likelihood of disputes will only increase as treasuries look to close post-coronavirus (COVID-19) fiscal gaps and with greater information sharing between tax authorities.

Q. What steps should companies take if they become the subject of a tax audit or investigation?


A. Plan in advance. For international businesses, it is becoming increasingly likely that someone, be it tax authorities, auditors, diligence providers or other stakeholders, will scrutinise their policies. The question should be ‘when’ rather than ‘if’. Tax functions should focus on identifying their key risk areas and develop a dispute management strategy ahead of time. Businesses need to invest in quality TP documentation that defends material and higher risk transactions. The standard of documentation expected by stakeholders is clear and increasing. Being able to evidence factual statements is critical. The PDCF guidance points to the types of

evidence expected by HMRC, including meeting notes, emails, and policy and process documents. Thinking about how to gather this evidence contemporaneously, when decisions are being made in the business, will help later down the line.

Q. In general, what advice would you give to companies on reviewing and amending their transfer pricing policies and structures?

A. TP policies need to be commercially aligned. Profits should be aligned with value creation and risk control – understanding the industry, the business and how decisions are made across the organisation is key. Changes to the business strategy that could impact TP must be understood and assessed. Companies should put in place processes and build internal stakeholder relationships to capture any changes to business strategy. Policies need to be robustly implemented. Understanding your stakeholders and having a clear data and technology strategy is imperative. A TP policy that can be understood by other internal teams and implemented accurately and efficiently is the end goal. Finally,

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develop a compliance strategy that works for the organisation in terms of people, process and technology. Once the policies have been designed and implemented, supporting them with compliance documentation and contemporaneous evidence is key to managing any tax authority scrutiny. 

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Q. Could you outline some of the significant developments in the transfer pricing arena over the last 12 to 18 months? In what ways have these developments impacted how organisations go about implementing their tax planning strategies?

A. A large part of the controlled transactions involving Luxembourg companies are financial transactions. Therefore, the single most important development impacting transfer pricing (TP) over the last 12 to 18 months was the interest rate policy of central banks in the Western world. Numerous interest rate hikes adopted since 2022 completely changed the interest rate environment at a record speed. Arm's length interest rates are significantly higher today than they were at the end of 2021. However, interest rates are generally determined when a debt instrument is granted and should not be updated throughout the term of the financing instrument unless the contract provides for a specific interest rate adjustment clause. Hence, the changed conditions may generally not be reflected in debt instruments that have been granted in the past but must be considered

with respect to new instruments.

Depending on expectations regarding the future development of interest rates, associated enterprises may consider the implementation of variable interest rates or fixed interest rates. While according to the official narrative interest rates should remain high in order to counterbalance inflationary tendencies, the question arises whether such high interest rates can be reasonably upheld for an extended period of time. Considering contemporary debt levels of countries and the issues the current interest rate policy presents for the banking and other sectors – putting the valuation of bonds under massive pressure – this seems more than questionable. The current inverse interest rate curve also suggests lower interest rates in the not-so-distant future. Moreover, a recent draft bill provides for certain TP documentation requirements for multinational enterprise groups that are subject to country-by-country reporting (CbCR). In general, Luxembourg tax law does not provide for explicit TP documentation requirements. The draft bill further aims to introduce the possibility of concluding bilateral and multilateral advance pricing agreements (APAs).

*ATOZ Tax Advisers S.A.*

Q. To what extent are the tax authorities in Luxembourg placing greater importance on the issue of transfer pricing? Have they increased their monitoring and enforcement activities?

A. Over the last few years, tax audits are now performed more systematically by the Luxembourg tax authorities since the creation of a new tax audit division. As tax assessments in Luxembourg may generally be revised for a period of five years, potential tax risks may span several years, which requires an appropriate and active tax risk management function. Experience shows that TP is frequently put under the microscope during tax audits. Tax authorities can more easily challenge TP when no TP documentation has been prepared: how can taxpayers make informed decisions if no TP analysis was performed before the pricing of intragroup transactions was determined? Therefore, TP should be considered before agreements are concluded.

Q. Could you outline the challenges that companies face as they try to maximise their tax efficiencies while staying within the bounds of transfer pricing

regulations? Is it becoming tougher to balance the drive for efficiency with compliance requirements?

A. Opportunities to maximise tax efficiencies have decreased considerably over the last few years, with more severe tax rules and anti-abuse legislation being implemented in domestic tax laws and bilateral tax treaties. However, for optimal achievement in this new environment, TP is key and must be considered an integral part of each and every tax analysis. As such, TP and related documentation can be an important factor to unlock planning opportunities and mitigate tax risks.

Q. What kinds of challenges arise in calculating appropriate transfer prices, both for tangible and intangible assets? How crucial is it to have consistent supporting documentation?

A. Luxembourg is a prime fund location and the jurisdiction of choice for many multinational groups when implementing a regional investment platform. As such, TP is often focused on financial transactions such as intragroup debt funding, financing activities and guarantees where arm's

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The single most important development impacting transfer pricing (TP) over the last 12 to 18 months was the interest rate policy of central banks in the Western world.

length interest rates, finance margins and guarantee fees have to be determined. Moreover, intragroup services such as administrative services and, in a fund context, fund management services are of great importance. With regard to the transfer of assets, the fair market value of participations, debt instruments and intangibles are essential in Luxembourg TP. Luxembourg taxpayers are under a duty to cooperate with the Luxembourg tax authorities and are required to evidence facts and provide information in regard to statements made in the tax returns. As a matter of principle, the arm's length pricing of material intragroup transactions should always be substantiated in sound TP documentation.

Q. Have you seen an increase in transfer pricing disputes between companies and tax authorities in Luxembourg?

A. With the increased focus on TP, disputes between companies and the tax authorities are becoming more common. Nevertheless, TP disputes are most likely to occur in situations where companies did not prepare appropriate TP documentation with regard to material

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intragroup transactions. Conversely, the preparation of robust TP documentation is generally an efficient protection against challenges by Luxembourg tax authorities. TP inevitably compels taxpayers to find a balance between a comfortable level of security and the costs of preparing relevant documentation. In practice, Luxembourg companies should screen major intragroup transactions in order to identify specific issues that could raise suspicion on the part of the tax authorities and assess the magnitude of related tax risks. On this basis, taxpayers can perform a cost-benefit analysis and weigh the costs of TP documentation against the amount of potential tax risks.

Q. What steps should companies take if they become the subject of a tax audit or investigation?

A. Taxpayers should ideally adopt a proactive attitude toward TP and prepare documentation, where appropriate, at the time they enter into a controlled transaction rather than waiting until a transaction is picked up during a tax audit. While TP documentation may also be prepared at the moment of a tax

audit, the level of scrutiny regarding the assumptions, the TP approach and the benchmarking that may be expected is unequally higher. After all, it might be considered as a coincidence if the TP analysis confirms the pricing of the intragroup transaction. When Luxembourg tax authorities can reasonably evidence that the TP of an intragroup transaction does not adhere to the arm's length principle, it is the responsibility of the taxpayer to disprove this rebuttable presumption. However, in the absence of appropriate TP documentation, it is difficult to substantiate the arm's length character of intragroup pricing. When TP documentation is prepared for the purposes of a tax audit, potentially years after a transaction has been entered into, it might also be difficult to trace back all relevant information and relevant comparables data.

Q. In general, what advice would you give to companies on reviewing and amending their transfer pricing policies and structures?

A. Taxpayers should not consider the preparation of TP documentation as a

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mere compliance exercise. Instead, in the current international tax environment of heightened transparency and scrutiny, Luxembourg companies would be wise to take it one step further and to integrate the documentation of transfer prices in their wider tax strategy, using it as a means to reflect the business rationale behind their investment structures and intragroup transactions. It is also important that TP policies are not disregarded after their implementation. As a matter of best practice, taxpayers should review their TP documentation at least once a year in order to assess whether the fact pattern is still consistent with reality and to determine whether an update is necessary. □

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ATOZ TAX ADVISERS, founded in 2004, is a high-end independent advisory firm based in Luxembourg offering a comprehensive and integrated range of tax, asset management and corporate services. The firm advises on and delivers solutions for sophisticated local and global professional clients. With over 150 highly skilled professionals, the firm's team has in-depth experience of serving very demanding businesses and institutional clients in need of tailor-made advice. ATOZ is the Luxembourg member of the Taxand network which provides high quality, integrated tax advice worldwide.

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Vanja Podinic is a tax controversy partner with over 14 years of experience practising in both Australia and the UK, specialising in international tax and transfer pricing. She has acted across all stages of dispute and litigation in relation to issues such as intragroup financing, movement of intangibles, pricing of cross-border agreements and permanent establishment considerations for the technology and digital sector. She acts for a broad range of multinational clients across key industry sectors, including mining, hospitality, automotive and pharmaceuticals. She helps her clients with managing relationships and dealings with global tax authorities to reach appropriate and consistent outcomes and resolutions.



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Colin Little is a leading tax partner in Sydney with over 25 years experience in the taxation field. For the past 19 years he has focused on assisting both public and private sector clients with complex advice and dispute work, ranging from audit negotiation and resolution through to litigation in the Federal, Supreme and High Court. He assists clients from all industry sectors including a range of multinational, large corporate and high net worth clients.

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Q. Could you outline some of the significant developments in the transfer pricing arena over the last 12 to 18 months? In what ways have these developments impacted how organisations go about implementing their tax planning strategies?

A. We have seen several significant developments affecting transfer pricing (TP) and impacting how organisations implement tax planning strategies. These include the continued implementation of the Organisation for Economic Co-operation and Development’s (OECD’s) Pillar One recommendation, which aims to reallocate income to market jurisdictions, and an increased focus from the Australian Taxation Office (ATO) on TP enforcement, through compliance guidance on matters such as intragroup financing and the movement of intangibles. The ATO is also taking an anti-avoidance approach to TP matters, requiring organisations to articulate and document a commercial purpose in order to justify the appropriateness of its supply chain and organisational arrangements. Recent draft legislative proposals have had a TP focus, including amendments to the interest

limitation rules and public country-by-country reporting (CbCR) requirements that increase Australia’s transparency agenda. Domestic case law has seen the emergence of a ‘commercial rationality’ principle and a strong preference by Australian courts for pragmatic TP evidence over detailed economic analyses.

Q. To what extent are the tax authorities in Australia placing greater importance on the issue of transfer pricing? Have they increased their monitoring and enforcement activities?

A. The ATO has ramped up its monitoring and enforcement activities on TP issues amid concerns about tax avoidance, profit shifting and the need to protect the country’s revenue base. Some of the key issues that the ATO has particularly focused on are intangibles migration, and licensee and royalty arrangements, cross-border and intragroup financing, and the use of offshore marketing hubs. This has resulted in increased TP disputes and the ATO’s increased monitoring and enforcement is evident through the implementation of stricter compliance measures, such as issuing new guidance




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documents. Last year's federal budget considerably increased the funding for the Tax Avoidance Taskforce, which increases the resources that will be dedicated and focused on significant tax risks, such as TP and profit-shifting. The ATO is also engaged in cross-border cooperation with global tax authorities to combat tax evasion and profit shifting by participating in joint and multilateral audits.

Q. Could you outline the challenges that companies face as they try to maximise their tax efficiencies while staying within the bounds of transfer pricing regulations? Is it becoming tougher to balance the drive for efficiency with compliance requirements?

A. Balancing the drive for tax efficiency with compliance requirements has become increasingly difficult due to the growing complexity of regulations, heightened scrutiny from the ATO and evolving international tax landscape. Organisations must ensure that their intragroup pricing arrangements align with value creation and functional analysis, and are supported by robust documentation. Furthermore, they must remain agile in the face of



TP presents distinct challenges for both tangible and intangible assets, making it crucial for organisations to have consistent and contemporaneous documentation to mitigate the risk of a challenge.

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global regulatory and legislative changes and proactively address potential risks. Tax authorities are demanding greater transparency and substance in corporate structures. The challenge for organisations is to continuously ensure that tax strategies are aligned with business operations, while adhering to more onerous documentation requirements to mitigate the risk of disputes and penalties. The growing prevalence of digitalisation and the impact on new operating models has resulted in additional TP complexity, as organisations grapple with the allocation of profits to different entities and jurisdictions.

Q. What kinds of challenges arise in calculating appropriate transfer prices, both for tangible and intangible assets? How crucial is it to have consistent supporting documentation?

A. TP presents distinct challenges for both tangible and intangible assets, making it crucial for organisations to have consistent and contemporaneous documentation to mitigate the risk of a challenge. With respect to tangible assets, this will include accurately determining arm's length pricing amid fluctuating market conditions

and diverse global supply chains, especially in the current economic environment. Intangible assets represent challenges in valuing intellectual property (IP) and allocating profits across jurisdictions. The key here for organisations is to ensure that they have consistent documentation across all jurisdictions – for example, the increase in recent case law confirms the importance of the development, enhancement, maintenance, protection and exploitation (DEMPE) analysis. Consistent supporting documentation is crucial for mitigating risks of double taxation and compliance penalties, while reducing the opportunity for differing approaches taken by tax authorities and courts globally.

Q. Have you seen an increase in transfer pricing disputes between companies and tax authorities in Australia?

A. There has been a significant increase in TP disputes in Australia in recent years, reflecting the ATO's heightened scrutiny of multinational enterprises and the growing complexity of TP regulations. The resolution of disputes is typically taking longer given the complexity of the transactions and the increased information

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required to support the TP position. This is also influenced by the ATO's collaboration with other tax authorities through information sharing and joint audits which has led to the identification of more potential TP issues and discrepancies, resulting in a higher number of disputes. The ATO has also publicly mentioned several times recently that it will more frequently review taxpayers' pricing positions from both a TP and general anti-avoidance rule, both Part IVA and the Diverted Profits Tax, perspective. This is a trend that is reflected in several current, high profile court cases between multinationals and the ATO.

Q. What steps should companies take if they become the subject of a tax audit or investigation?

A. As TP audits and disputes are highly fact dependent, the first step is to determine the available evidence to support the TP positions taken historically, including supplementing with lay evidence, properly informed expert evidence and any necessary valuation reports. We have seen a greater number of tax audits in TP being launched as a direct result of the exchange

of information between countries, and consistency of data is therefore becoming more important. Taxpayers should assume that information submitted in one jurisdiction is quickly and efficiently shared with others. As a response to these approaches, organisations need to consider strategy and evidence on a regional and global basis to make sure that it is consistent and to avoid instances where revenue authorities leverage any inconsistencies in an organisation's global controversy strategy. This highlights the need to have a common theory of the case across disputes in multiple jurisdictions.

Q. In general, what advice would you give to companies on reviewing and amending their transfer pricing policies and structures?

A. Organisations should regularly assess the appropriateness of their TP policies in light of evolving regulations, operating models and global developments. For example, supply chains have been transformed as a result of global economic changes affecting organisations across all industries. For multinationals, it is more important than ever to use this

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time to review their TP assessments and documentation. In undertaking that exercise, organisations should ensure they have an awareness of the key TP issues subject to increased scrutiny by tax authorities, such as value creation, substance and risk allocation in accordance with the arm's length principle. Against a heightened expectation of increased transparency from taxpayers, organisations should also ensure that any updated TP policies should clearly support their filing positions over time but also withstand the rigours of periodic assurance reviews. This should include documenting and evidencing the commercial purpose to substantiate the TP arrangements in place.



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Stefan El Khouri is one of the pioneers of transfer pricing in the Middle East. He has over 13 years of transfer pricing experience in the region. He began his career in transfer pricing with another Big 4 company in Germany. Overall, he has more than 15 years of tax consulting experience. He has advised clients in the Middle East, Europe and Africa on transfer pricing matters and helped clients with establishing transfer pricing policies, documentation and managed tax controversies in multiple jurisdictions. He has advised several tax authorities on legislative matters. He is a regular speaker and moderator in international tax forums.

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Q. Could you outline some of the significant developments in the transfer pricing arena over the last 12 to 18 months? In what ways have these developments impacted how organisations go about implementing their tax planning strategies?

A. Transfer pricing (TP) regulations were introduced in the Kingdom of Saudi Arabia in February 2019. However, these regulations only applied to corporate taxpayers. Companies that are subject to zakat have been excluded from the TP regulatory scope. In recent months, however, the Saudi tax authorities have expanded the scope of the TP regulations. In September 2022, it was announced that financial funds would be included, starting in 2023. Furthermore, in March 2023, the TP regulations were modified to include zakat-paying entities, beginning in 2024. Funds managers are setting up tax compliance teams and zakat groups have begun to conduct impact assessments to understand how TP would affect them operationally.

Q. To what extent are the tax authorities in Saudi Arabia placing greater

importance on the issue of transfer pricing? Have they increased their monitoring and enforcement activities?

A. Following the initial introduction of TP regulations in February 2019, few TP audits were conducted. However, this has changed over the last 18 months. Today, there is increased tax audit activity, and we are seeing more and more TP assessments. Most tax audits start with a request to provide TP documentation, namely the local file and master file, in addition to TP policies and any relevant intercompany agreements.

Q. Could you outline the challenges that companies face as they try to maximise their tax efficiencies while staying within the bounds of transfer pricing regulations? Is it becoming tougher to balance the drive for efficiency with compliance requirements?

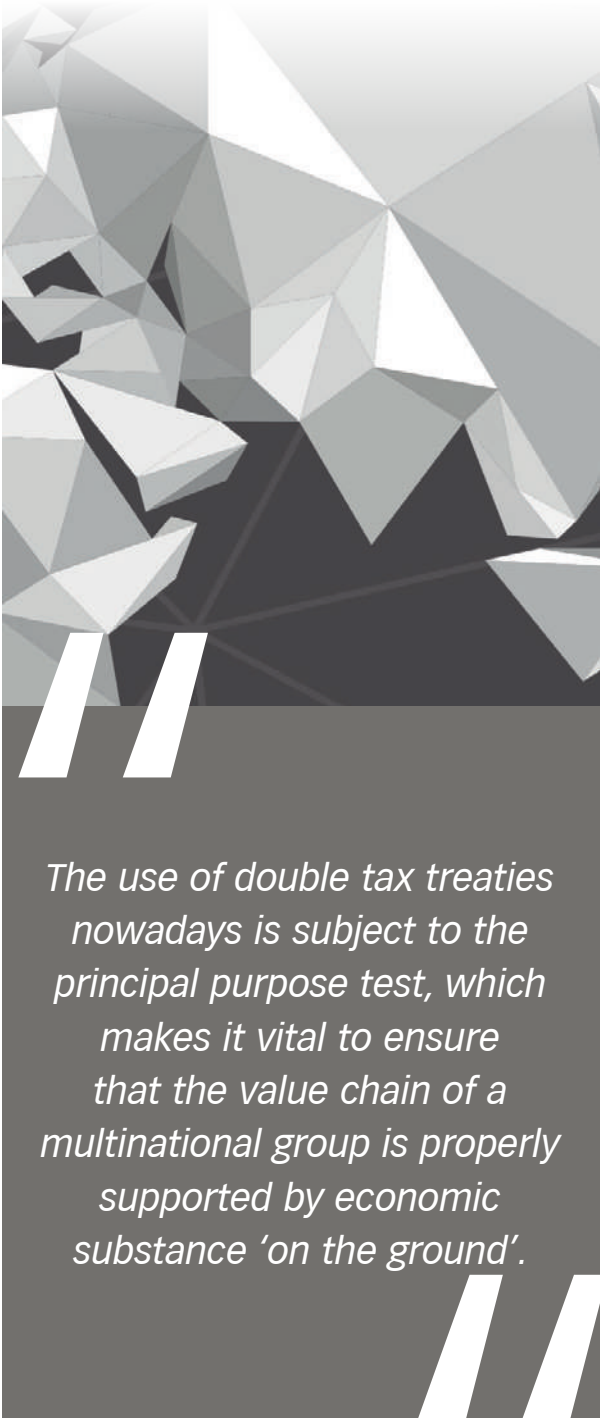
A. From an operational perspective, many companies still rely heavily on manual TP processes. Cost allocations, management fees and profit margins are calculated using spreadsheets. And while spreadsheets are useful, they do

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have certain limitations which must be considered. Complex models are difficult to monitor and audit, especially when shared among multiple users. Companies should think about how technology can help them automate their TP policies. Ideally, only transactions that lie outside of a company's TP policy should be handled manually.

Q. What kinds of challenges arise in calculating appropriate transfer prices, both for tangible and intangible assets? How crucial is it to have consistent supporting documentation?

A. The TP regulations in Saudi Arabia are fully aligned with the Organisation for Economic Co-operation and Development (OECD) guidelines. As such, there is no 'structural' challenge. However, given the limited experience of the Saudi tax authorities with TP matters, it is crucial that all related-party transactions are properly documented. Intangible assets play a major role in today's business environment. The transfer or license of any intellectual property (IP) should be undertaken with proper due diligence from a legal and tax perspective. This



The use of double tax treaties nowadays is subject to the principal purpose test, which makes it vital to ensure that the value chain of a multinational group is properly supported by economic substance 'on the ground'.

KPMG in Saudi Arabia

may require external valuations and benchmarking to ensure that the arm's length principle has been observed.

Q. Have you seen an increase in transfer pricing disputes between companies and tax authorities in Saudi Arabia?


A. The number of TP audits has increased over the last 18 months. Based on that experience, there are a few red flags that companies should be aware of. Loss makers or low profit margins are always problematic, especially if they have a significant TP footprint. Also, the use of 'marketing & support' companies has been challenged on multiple occasions. The Saudi tax authorities will assume that local personnel are also involved in the sales process and consequently the sales revenue should be allocated to the Saudi entity.

Q. What steps should companies take if they become the subject of a tax audit or investigation?

A. Given the increased scrutiny from the Saudi tax authorities on TP matters, documentation is key. Given that a tax audit typically happens three to five years

after the transactions have been conducted, this means that transaction-relevant data, outside of enterprise resource planning (ERP), may be difficult to access or even no longer be available. A proper retention policy is therefore vital to ensure that all data is available and can be used in discussions with the tax authorities.

Q. In general, what advice would you give to companies on reviewing and amending their transfer pricing policies and structures?

A. Saudi Arabia is a G20 country and as such it is fully aligned with global developments in the tax landscape. When companies are looking at their TP policies, they should focus on economic substance to ensure that the TP policy leads to results that are aligned with value creation. Multiple countries in the Middle East have already introduced economic substance requirements. Also, the use of double tax treaties nowadays is subject to the principal purpose test, which makes it vital to ensure that the value chain of a multinational group is properly supported by economic substance 'on the ground' to substantiate the TP arrangements in place. 



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KPMG in Saudi Arabia was established through its member firm KPMG Professional Service, and has operated in the Kingdom of Saudi Arabia since 1992. This early commitment to the Saudi Arabian market, together with the support of a wide network of international experts, has been the foundation of the firm's accumulated industry experience, and is reflected in KPMG's appointment by the Kingdom's leading organisations.

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Amadou Barry, managing director of Grant Thornton Guinea and Grant Thornton Audit & Advisory Ivory Coast, is registered with the professional bodies in Guinea as well as in France.

After eight years of experience in audit and consulting at the Grant Thornton Paris office, he has been in charge of the development of audit and consulting activities in Guinea since 2010 and since 2018 in Ivory Coast. He currently manages both firms. He has developed a strong expertise over the years in various areas, including the mining, financial services and public sectors, as well as the private equity space.



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Kana Diallo holds a master's degree in business law with a specialisation in tax expertise and advice from the Institute Superior of Management (ISM) in Dakar. He has more than five years of experience and has participated in important legal and tax missions. Having assisted many mining, industrial, service and public companies during tax audits, and having provided legal and tax advice in the development of their activities in Guinea, Mr Diallo has a perfect knowledge of the rules, both substantive and procedural, applicable to labour law, business law (OHADA) and taxation.

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Q. Could you outline some of the significant developments in the transfer pricing arena over the last 12 to 18 months? In what ways have these developments impacted how organisations go about implementing their tax planning strategies?

A. No significant changes have been made to Guinean transfer pricing (TP) legislation in the past 18 months. The latest reforms date back to 2019 through the Finance Law for 2019. However, since the new tax law applicable from 1 January 2022, we have seen the introduction of several limitations on the deductibility of expenses related to royalties, headquarter costs and so on, within related entities.

Q. To what extent are the tax authorities in the Republic of Guinea placing greater importance on the issue of transfer pricing? Have they increased their monitoring and enforcement activities?

A. The Guinean tax authorities first introduced the TP documentation requirement in their tax provisions in 2014 and revised it in 2019, in order to prevent multinational companies

from locating their tax base in countries with more favourable tax regimes. This documentation must be written in French and must demonstrate that intercompany transactions respect the arm's length principle recommended by international standards, such as the Organisation for Economic Co-operation and Development (OECD). Currently, the tax authorities are strengthening their skills in this area and are increasingly checking intercompany transactions, especially in the mining sector.

Q. Could you outline the challenges that companies face as they try to maximise their tax efficiencies while staying within the bounds of transfer pricing regulations? Is it becoming tougher to balance the drive for efficiency with compliance requirements?

A. TP documentation allows companies to demonstrate compliance with applicable TP provisions. As the concept of TP is currently not widely used in local tax matters, any sophisticated and non-explicit manipulation of TP could be a tax risk. In this respect, where the documentation is clear enough to indicate to the tax

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authorities that that company's TP system is in line with the arm's length principle, it would be easy to reach a balance between tax efficiency and legal requirements. Finally, the fact that tax disputes in Guinea are not currently dealt with in the courts also constitutes a risk because they are not examined by a third party who would arbitrate between the company and the tax authorities.

Q. What kinds of challenges arise in calculating appropriate transfer prices, both for tangible and intangible assets? How crucial is it to have consistent supporting documentation?

A. First, it should be noted that Guinean legislation sets a ceiling for the deductibility of charges between related companies when they are paid by an entity established in Guinea for the use of a trademark, trade name or a similar right, but also for head office expenses. Thus, these expenses are deductible up to 2 percent of turnover, excluding tax, for royalties relating to the use of a trademark, trade name or similar right, 10 percent for other operating expenses, technical assistance and management costs, such as

accounting, financial and legal assistance services or, and 10 percent for head office overheads. Also, the existence of consistent supporting documents and the arm's length price may prevent the tax authorities from questioning the reality of the transaction and the price charged by the audited entity.

Q. Have you seen an increase in transfer pricing disputes between companies and tax authorities in the Republic of Guinea?

A. The tax authorities' hostility to TP transactions is well documented, which is why their justifications are the subject of heated debate between tax authorities and companies during tax audits. However, in practice there are almost no disputes in this area, which can be explained by the fact that the tax authorities lack a tried and tested legal, technical and administrative framework for carrying out an audit commensurate with the issues at stake. For example, the tax authorities do not have a database of comparables.




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Q. What steps should companies take if they become the subject of a tax audit or investigation?

A. Companies should establish procedures to explain their pricing practices between related entities. This is the first step toward establishing solid documentation to justify the pricing policy practiced.

Q. In general, what advice would you give to companies on reviewing and amending their transfer pricing policies and structures?

A. We often recommend companies set their pricing policy by having clear documentation to justify the transactional policy between parent company and subsidiaries, such as technical assistance agreements or the supply of goods and services, and to prove the validity of past operations and the normality of various remunerations. It is necessary to provide all elements likely to establish that the reciprocal commitments which are the counterpart of the sums paid have been effectively carried out, such as, for example, time sheets that match the time spent on tasks. 



Currently, the tax authorities are strengthening their skills in this area and are increasingly checking intercompany transactions, especially in the mining sector.

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Donasia Massambo is the founder and managing director of TP&Tax. She has over 10 years of experience in offering transfer pricing services such as advisory, planning, documentation, dispute resolution and benchmarking, to a wide range of clients in various industries. She also assists mid-tier accounting and law firms that do not have internal expertise, in providing transfer pricing services to their clients. She has advised the National Audit Office of Tanzania on controls over transfer pricing in the Tanzania business sector and assisted in building transfer pricing capacity to various private and public organizations.

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Q. Could you outline some of the significant developments in the transfer pricing arena over the last 12 to 18 months? In what ways have these developments impacted how organisations go about implementing their tax planning strategies?

A. The laws governing transfer pricing (TP) in Tanzania include the Income Tax Act, 2004 and the Tax Administration (Transfer Pricing) Regulations, 2018. Over the last 18 months, there have been several changes to these laws with a focus on minimising the potential loopholes for base erosion and profit shifting (BEPS) outside Tanzania, such as the percentage of shareholding in the definition of associate changing from 50 percent to 25 percent to widen the net for taxpayers falling within the scope of TP. The penalty for non-compliance with the arm's length principle was reduced from 100 percent of the TP adjustments to 100 percent of the tax effect from the TP adjustments. This was a positive measure to enforce voluntary compliance by taxpayers and minimise the number of TP disputes, as the initial penalty was punitive to taxpayers. The thin capitalisation rules were also amended by

defining equity to only include paid-up share capital. This change may pose a risk for thinly capitalised companies, where the current trend by the Tanzania Revenue Authority (TRA) is to capitalise the excessive shareholder loans to equity.

Q. To what extent are the tax authorities in Tanzania placing greater importance on the issue of transfer pricing? Have they increased their monitoring and enforcement activities?

A. The TRA has a special unit within the Large Taxpayers Department, called the International Taxation Unit (ITU), which is responsible for conducting TP audits for large taxpayers and providing support to the domestic revenue departments. A few years ago, a greater focus on TP matters was placed on large taxpayers. In recent years, TP audits from the domestic revenue departments and key sectors of the economy such as agribusiness and the mining industry, to name just two, have significantly increased. The queries presented in recent audits also focus more on the group's value chain and how value is created in Tanzania, and whether

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the entity in Tanzania is appropriately remunerated.

Q. Could you outline the challenges that companies face as they try to maximise their tax efficiencies while staying within the bounds of transfer pricing regulations? Is it becoming tougher to balance the drive for efficiency with compliance requirements?

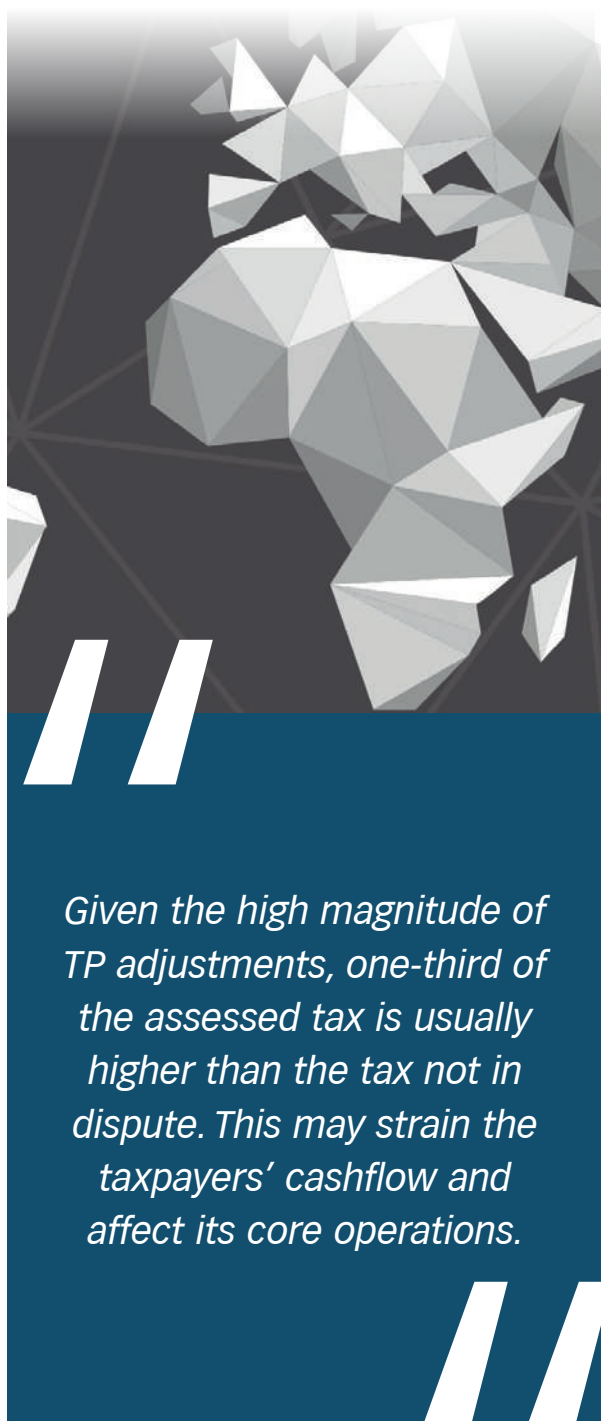
A. The main challenge is balancing compliance requirements and the cost of compliance. The TP regulations do not provide any safe harbours and therefore, companies with domestic and cross-border intercompany transactions, irrespective of their magnitude, are required to comply with the regulations. Failure to do so will result in penalties. This may be expensive for companies with lower intragroup activities and local groups of companies, where the risk of profit shifting might not be substantial. Furthermore, the TP regulations allow taxpayers to apply for advance pricing agreements (APAs), but so far, none has been approved by the TRA. The TRA also has a time limit of five years to conduct an audit and adjust a company's tax return, from the date

of filing the return. Due to a shortage of resources, transfer pricing audits would be initiated almost at the expiry of the time limit, which by then, interest and penalties for late payment have accumulated if there are upward TP adjustments. This, coupled with non-approval of APAs, increases uncertainty to taxpayers when undertaking transactions, irrespective of their level of compliance.

Q. What kinds of challenges arise in calculating appropriate transfer prices, both for tangible and intangible assets? How crucial is it to have consistent supporting documentation?

A. The TP regulations require the selection of the appropriate TP method in hierarchical order, with the comparable uncontrolled price (CUP) being the most preferred method. There are also certain transactions such as commodity, intragroup services and intercompany loan transactions, where the laws have specified the TP methods to be used. This has caused various challenges to taxpayers because not all transactions can be sufficiently analysed by the methods stipulated in the TP

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regulations. In several instances, the TRA has also challenged taxpayers for applying the methods stipulated in the TP regulations. Another challenge is the lack of African comparables. However, the TRA is cognisant of the limited availability of African comparables in TP databases and therefore, tends to accept other geographical locations that are comparable to Africa. It is very crucial for a taxpayer to have consistent supporting documentation, for its TP policies to be accepted by the TRA. The TP regulations provide a list of information required to produce compliant TP documentation and emphasise that the functional analysis for controlled transactions should be justified by documentary evidence.

Q. Have you seen an increase in transfer pricing disputes between companies and tax authorities in Tanzania?

A. The number of TP audits in Tanzania has increased, which means an increase in TP disputes between companies and the TRA. TP audits are typically lengthy, complex and expensive. For instance, when the TRA issues a tax assessment after completion of an audit, the taxpayer

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is allowed to file an objection if it is aggrieved by the assessment. The objection is to be reviewed by the technical unit within the TRA, other than the audit team. However, for the objection to be admitted, the taxpayer is required to pay the higher of the tax not in dispute or one-third of the assessed tax. Given the high magnitude of TP adjustments, one-third of the assessed tax is usually higher than the tax not in dispute. This may strain the taxpayers' cashflow and affect its core operations.

Q. What steps should companies take if they become the subject of a tax audit or investigation?

A. A company with controlled transactions should maintain a robust TP report with supporting documentation on a contemporaneous basis. The TP document should be in place by the time the final tax return is filed. If the total magnitude of intercompany transactions is TZS 10bn, approximately US\$4.26m, or more, then the TP document needs to have been submitted to the TRA along with the tax return, six months after the financial year end. This is the first step to take before a company is subject to a TP audit. An audit

is initiated by the TRA through issuing an audit notification letter and a request for submission of TP documentation, among other things. The taxpayer is then required to submit contemporaneous TP documents for the years under audit, within 30 days. Failure to do so attracts a penalty of TZS 52.5m per year.

Q. In general, what advice would you give to companies on reviewing and amending their transfer pricing policies and structures?

A. We advise companies to proactively review and monitor their TP policies during the year to ensure that they are within the arm's length range. The company should also prepare documentary support on a real-time basis, to justify the arm's length of their transactions as they take place. If this is done proactively, it significantly minimises the risk for additional tax liabilities in the future. Regulation 7 of the TP regulations provides a list of information required to form a compliant TP document from a Tanzanian TP perspective. Therefore, companies should ensure that TP documents are prepared to comply with

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the requirements of the local regulations as opposed to globally applied guidelines. □

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TP&TAX is a boutique professional services firm based in Dar es Salaam, Tanzania. The firm provides transfer pricing, tax and accounting services to local and multinational corporations of all sizes. TP&Tax was established to assist organisations in ensuring that they undertake their day-to-day operations in a tax compliant manner without losing focus on their core operations. The firm works hand in hand with its clients to provide timely world class service with a personal touch. With leaders having Big 4 accounting firm experience, the firm's clients should expect to receive quality deliverables that maximise value for money.

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