

# TRANSFER PRICING GUIDE

# TABLE OF CONTENTS

GOWLING WLG – TRAFER PRICING TEAM .....	1
OVERVIEW OF TRANSFER PRICING IN CANADA.....	4
BASE EROSION AND PROFIT SHIFTING (BEPS)— IMPLICATIONS FOR TRANSFER PRICING.....	9
IP MIGRATION STRATEGIES – PRE AND POST BEPS .....	12
A TYPICAL EXAMPLE OF BEPS – THE MARZEN DECISION .....	16
TRANSFER PRICING - REDUCING AUDIT CONTROVERSY .....	20
TRANSFER PRICING PENALTIES IN CANADA SUBSECTION 247(3) .....	23
THE IMPACT OF RESTRUCTURING IN A TRANSFER PRICING SETTING.....	27
CUSTOMS VALUATION AND TRANSFER PRICING.....	31
DISPUTE RESOLUTION PROCEDURES IN CANADA .....	34



**GOWLING WLG –  
TRANSFER  
PRICING TEAM**



## GOWLING WLG – TRANSFER PRICING TEAM

Unique among Canadian law firms, Gowling WLG's Transfer Pricing and Competent Authority Group works with organizations to optimize their global tax position and reduce their exposure to unfavourable audit assessments through proper tax planning and implementation strategies. It includes senior partners with over 50 years of combined experience working for the Canada Revenue Agency (CRA) — experience that enables the team to provide efficient solutions to clients' complex legal matters.

Based in Ottawa near the CRA's headquarters, the firm's transfer pricing team is the pre-eminent group of its kind in Canada, having achieved strong results for clients in matters related to both the CRA and foreign tax authorities. Multinationals seek out the firm's specialized expertise in the areas of advanced pricing agreements and audit defence.

Dale Hill, partner and national leader of Gowling WLG's Transfer Pricing & Competent Authority Group, is an internationally recognized and sought-after speaker, and has been named as a pre-eminent practitioner in the *Guide to the World's Leading Transfer Pricing Advisors*. Prior to joining Gowling WLG in 2005, Dale spent 16 years as a CRA senior manager responsible for settling disputes on behalf of the CRA (relating to GAAR and transfer pricing at the CRA's head office) with other taxing authorities.


Gowling WLG is the only Canadian law firm that has a PhD economist with CRA experience dedicated solely to its transfer pricing practice. This allows the firm to conduct complex economic analysis that goes above and beyond traditional comparability analysis, which is often needed to settle client matters in a favourable manner.

Gowling WLG's Transfer Pricing and Competent Authority Group is an integral part of the firm's tax practice, which has been ranked as a leading Canadian firm in the areas of International Tax Transactions and International Tax Planning Excellence by *International Tax Review* (ITR).



Gowling WLG was also recognized as ITR's Transfer Pricing Firm of the Year three times in five years (2011, 2013, 2015).

Our expertise and knowledge is well recognized in the greater transfer pricing community in Canada. In addition to a vast number of public speaking events our team is involved in, we have been asked to develop curricula for several organizations, including CPA Canada's in-depth course on transfer pricing. Dr. Jamal Hejazi holds faculty positions at the Telfer Executive MBA Program as well as the Asian Business and Management Program at York University, where he teaches transfer pricing. He also serves as academic head of the University of Toronto's School of Continuing Studies special program, which offers specialized training to international businesses. Our team has also been on the forefront of educating the business community on the impact of OECD's project on Base Erosion and Profit Shifting (BEPS).



“Gowling WLG was also recognized as ITR's Transfer Pricing Firm of the Year three times in five years (2011, 2013, 2015.)”



# **OVERVIEW OF TRANSFER PRICING IN CANADA**

# OVERVIEW OF TRANSFER PRICING IN CANADA

## Introduction

Transfer pricing issues arise whenever any goods, services (i.e., marketing, R&D, management) or intangibles (i.e., patent, trade name or trade-mark rights) are transferred between related parties across an international border. The underlying issue of concern to governments relates to the rational desire of multinational entities (MNEs) to minimize their overall tax expenditures. Absent transfer pricing rules, MNEs could take advantage of differing tax rates to shift the profits of the global entity to a lower tax (or more tax preferred) jurisdiction.

For example, if a company earns \$100 in profits and is forced to pay tax on the entire amount in Canada, its tax expenditure will be approximately \$25. If, on the other hand, the enterprise was able to transfer the profits to a lower tax jurisdiction, that business entity could have an overall financial savings. Absent transfer pricing rules, an MNE could simply inflate or deflate the value of any transaction passing between its Canadian corporation and foreign entities. Most industrialized countries, including Canada, have responded to the risk of tax base erosion by introducing rules requiring that international transactions between related parties be valued on an arm's length basis.

## Regulatory Basis for Transfer Pricing

Since 1979, the Organisation of Economic Co-operation and Development (OECD) has published the "*Transfer Pricing Guidelines for Multinational Enterprise and Tax Administrations*" (OECD guidelines). The OECD guidelines are constantly updated and updates in support of the OECD's project on Base Erosion and Profit Shifting ("**BEPS**") will be included in the next release of the OECD guidelines. The guidelines are aimed at getting developed countries to apply transfer pricing principles in a consistent manner. The OECD guidelines are premised on the arm's length standard which bases related party transactions on

the value by which two unrelated parties would transact under similar circumstances.

Section 247 was introduced into the Canadian *Income Tax Act* in 1998 and essentially codifies the OECD guidelines. The application of Canadian transfer pricing rules and the policies relied upon by Canadian Revenue Agency (CRA) are provided in various Information Circulars, Interpretation Bulletins, and transfer pricing memoranda's.

## *How Do Transfer Pricing Issues Arise?*

Every taxation year corporations are required to file federal tax returns, which are subject to review and audit. International auditors with specialized training in transfer pricing issues support the audit function and will review the tax returns of selected companies to evaluate the international audit risk. As part of the audit process, the international auditor will typically request the taxpayer's section 247(4) contemporaneous documentation establishing the manner in which related party transactions were valued.

### (i) [Contemporaneous documentation](#)

Contemporaneous documentation serves as a blueprint for explaining the rationale for the prices of goods, services or intangibles established by the related parties. If the documentation is not provided to the CRA within 90 days of a request, transfer pricing penalties may be applicable if there is an adjustment to the company's transfer prices.

*Subject to certain thresholds, Canadian Transfer Pricing penalties are 10 per cent of the upward transfer pricing adjustments.*

Contemporaneous documentation typically includes a transfer pricing study, which includes as a minimum the following:

- overview of the businesses involved and the corporate structure;
- description of the industry and competitors;
- identification of the related party transactions;

- functional analysis - assessing functions, assets, risks;
- choice of transfer pricing methodology, reasons for selection and exclusion of others; and
- economic analysis including selection of comparables and applying the OECD factors of comparability.

Contemporaneous documentation must be provided to auditors within 90 days of a request and must demonstrate that reasonable efforts were taken to substantiate the transfer prices used. Preparing documentation in advance of a CRA audit, i.e., contemporaneously, is crucial to effective tax management and avoiding the imposition of transfer pricing penalties.

In the absence of the required documentation, the CRA may apply a 10 per cent penalty on a transfer pricing adjustment. Prior to applying a transfer pricing penalty, the question of “reasonable efforts” is examined by the transfer pricing review committee (“**TPRC**”) comprised of senior CRA officials. Given that penalties are not deductible, it is in the interest of the taxpayers to prepare documentation demonstrating reasonable efforts have been made relating to transfer pricing policy.

## (ii) [Country-By-Country Reporting](#)

On October 5, 2015 the OCED released its final reports under its Action Plan on BEPS. In the OECD’s final report on Acton #13 it was recommended that countries should be expected to adopt a standardised approach to transfer pricing documentation. The final reports recommended a three-tiered structure consisting of:

- 1) a master file containing standardised information relevant for all MNE group members;
- 2) a local file referring specifically to material transactions of the local taxpayer; and
- 3) a country-by-country (“**CbC**”) report containing certain information relating to the global allocation of the MNE’s income and taxes paid together with certain indicators of the location of economic activity within the MNE group.

On July 29, 2016 Canada issued draft legislative proposals to implement CbC reporting, in accordance with the OECD’s recommendations for large MNEs with total annual consolidated group revenue of €750 million or more. Such MNEs will be required to file a CbC report with the MNE’s parent entity’s tax administration. A CbC report will include the global allocation, by country, of key details of the MNE, including: revenue, profit, tax paid, stated capital, accumulated earnings, number of employees and tangible assets, as well as the main activities of each subsidiary.

Where the parent entity of a qualifying MNE is resident in Canada, it will be required to file a CbC report with the CRA within one year of the end of the relevant fiscal year. CbC reporting will be required for taxation years that begin after 2015.

## (iii) [The audit adjustment](#)

At the conclusion of the audit, the international auditor may disagree with the transfer prices set by the taxpayer. In such a case, the auditor will raise an adjustment. It is likely that taxes were paid in another jurisdiction on the revenue associated with the adjustment and therefore, double taxation may exist unless the adjustment is somehow rectified. Additionally, interest will be imposed upon the value of the adjustment from the date when the taxes were initially due.

Faced with an adjustment, the taxpayer has a number of alternatives. Options include: filing a notice of objection with the CRA’s Appeals Division; filing a competent authority request, as outlined below; requesting an Advance Pricing Agreement (APA), to set the transfer price into the future with a rollback to an unaudited period or the least preferred, to pay the additional taxes owing as well as any interest and penalties.



## *Dispute Resolution Procedures*

### (iv) *The appeals procedure*

The taxpayer can object to the CRA assessment by filing an objection with the Appeals Division of the local tax services office conducting the audit. The taxpayer is entitled to make oral and written representations. While the case is under appeal collection action against smaller companies and individuals will be deferred however large corporations are required to make an up-front payment of 50 per cent of the adjustment.

The Appeals Division will determine whether the amount assessed is reasonable based on the supporting documentation provided by the auditor. Even after an Appeal decision is issued, it is still possible to have the file considered by competent authority, assuming that the time limits stipulated in the applicable treaty have been met. However, it may be more difficult to have the adjustment reversed after an unsuccessful appeal. Unless the taxpayer believes that a majority of the adjustment will be overturned by the Appeals Division, it may be more appropriate to begin with a competent authority request.

### (v) *The competent authority process*

The competent authority process, also known as the Mutual Agreement Procedures, is set out in the various tax treaties between Canada and its significant trading partners. The Competent Authority Services Division (CASD) within CRA is designated by the Minister of Revenue to be responsible for the Canadian competent authority program. Within CASD are analysts and economists specializing in transfer pricing issues. A request for consideration by CASD can be made by a taxpayer after an adjustment is proposed which could result in double taxation (i.e., pursuant to a tax treaty). This process is voluntary and at any point the taxpayer can exit the program and pursue other venues for relief, such as the appeals procedure. The program operates on a case-by-case basis and the factors which affect resolution of the double tax include taxpayer cooperation and reciprocity of foreign tax jurisdictions. Keep in mind, the underlying issue is generally whether profits should be taxed in Canada or in another

jurisdiction. Consistent with this approach, CASD representatives can negotiate with foreign governments to achieve particular tax results in respect of that taxpayer. In order to file a competent authority request double taxation must exist and the applicable treaty time restrictions for notifying and filing such request must be respected in both Canada and the foreign jurisdiction. Details of what should be included in a competent authority request are outlined in CRA's Information Circular 87-2R.

### (vi) *Advance Pricing Arrangements*

Another option relates to entering into an agreement with CRA for specified tax consequences for up to five years in advance of a transaction. Such an agreement is known as an Advance Pricing Arrangement (APA). Depending on the nature of the tax solutions sought, an APA can be set unilaterally (i.e., with Canada alone), bilaterally (i.e., with Canada and one other country), or multilaterally (i.e., with Canada and a number of other foreign jurisdictions). Obviously, the more countries involved, the more difficult it will be to actually arrive at an APA. Substantial documentation is required to support a request for an APA, but it will count as the company's section 247(4) contemporaneous documentation. When filing an APA, the CRA may also accept a rollback of the agreed methodology to previous years not under audit.

## *Transfer Pricing Methodologies*

The OECD has developed various methods, which have been accepted by Canada and other countries, to assist in establishing arm's length prices between related parties.

In order to apply the various methods, the functions, assets and risks of the related corporations must be considered against comparable transactions or entities. In 2010 selection of the transfer pricing method using the hierarchy of methods was replaced by the "most appropriate transfer pricing method to the circumstances of the case." The criteria outlined by the OECD, in 2.2 of the Guidelines, to consider in determining the most appropriate method are:

“ (...) the respective strengths and weaknesses of the OECD recognised methods; the appropriateness of the method considered in view of the nature of the controlled transaction, determined in particular through a functional analysis; the availability of reliable information (...) needed to apply the selected method and/or other methods; and the degree of comparability between controlled and uncontrolled transactions, including the reliability of comparability adjustments that may be needed to eliminate material differences between them.”

Paragraph 2.3 of the Guidelines further refines this criteria by stating that “ (...) where, taking account of the criteria described at paragraph 2.2, a traditional transaction method and a transactional profit method can be applied in an equally reliable manner, the traditional transaction method is preferable to the transactional profit method. Moreover, where, taking account of the criteria described at paragraph 2.2, the comparable uncontrolled price method (CUP) and another transfer pricing method can be applied in an equally reliable manner, the CUP method is to be preferred.”

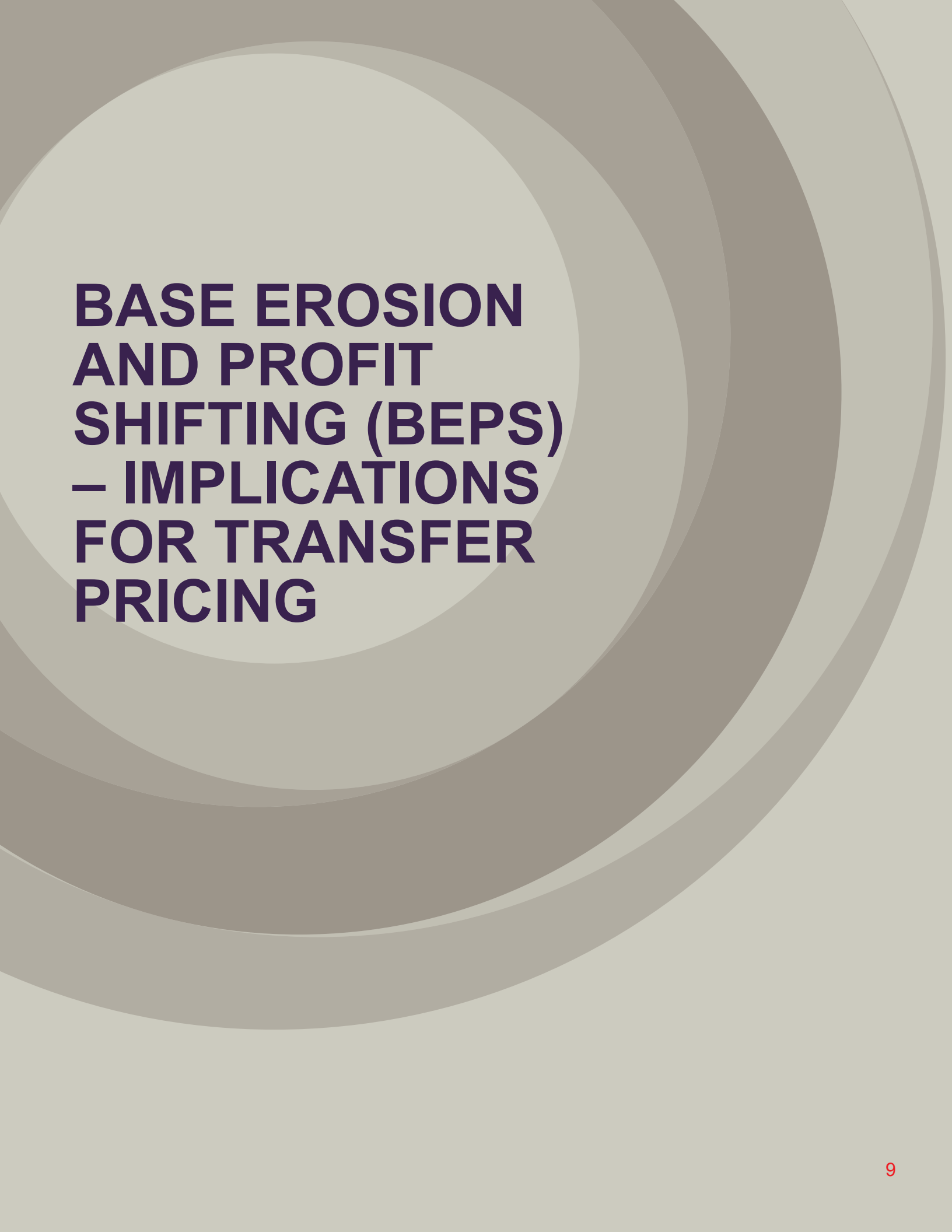
The changes in 2010 were significant in that there is no longer a strict hierarchy to be applied to the selection of a transfer pricing method. The focus is now on finding the best available data in the particular circumstances under examination. While a natural hierarchy exists, see IC87-2R, the CRA accepts that focus “of determining the method to use should be the method that will provide the most direct view of arm’s length behaviour and pricing”.

The OECD methodologies are broken down into traditional methods and transactional profit methods. The traditional methods include: 1) the comparable uncontrolled price (CUP) method; 2) the resale price method; and 3) the cost plus method. The transactional profit methods include the profit split method and the transactional net margin method (TNMM). A summary of the methodologies can be found in paragraph 48 of the CRA’s IC 87-2R - International Transfer Pricing.

## References

- Section 247 of the Canadian *Income Tax Act*
- IC 87-2R – International Transfer Pricing
- IC 71-17R5 – Guidance on Competent Authority Assistance under Canada’s Tax Conventions
- IC 94-4R – Advance Pricing Arrangements
- IC 94-4R (Special Release) – Advance Pricing Arrangements for Small Businesses
- CRA transfer pricing memorandums

All of these circulars and other information about international transactions can be found on the CRA’s website.



**BASE EROSION  
AND PROFIT  
SHIFTING (BEPS)  
– IMPLICATIONS  
FOR TRANSFER  
PRICING**

# BASE EROSION AND PROFIT SHIFTING (BEPS) – IMPLICATIONS FOR TRANSFER PRICING

In late 2015, the Organization of Economic Cooperation and Development (“**OECD**”) released the final report of its 15-point Action Plan on BEPS. The BEPS Action Plan is an ambitious multi-lateral plan that addresses a number of concerns relating to international corporate tax planning. The combined efforts of the G20 and the OECD on base erosion and profits shifting (“**BEPS**”) have attracted considerable attention in the international business and tax community as there will be material changes in the way that, and in which jurisdiction, international transactions are reported.

Given that tax regimes are national in character, multi-national enterprises (“**MNEs**”) face a myriad of regimes, bilateral treaties, and conflicting rules. Implementing consistent national laws and bilateral tax treaties adds certainty and consistency to the tax planning process. Reforming the international web of tax regimes gives MNEs the ability to engage in international tax planning with greater certainty, thereby managing their tax planning structures and tax costs.

## *Background: The Core Principles of BEPS*

The core principles of the BEPS project are Coherence, Substance, and Transparency.

- Coherence seeks to ensure that tax rules are sufficiently similar to ensure that profit is taxed only once in the jurisdiction it was earned. Lack of coherence creates situations of double taxation.
- Substance seeks to ensure that the MNEs profits are taxed in the country where the economic activity occurs. Legal ownership is no longer enough to justify a significant level of profits especially as it relates profits tied to intangibles. “People functions” and

where value is created will determine, in part, where profits will reside.

- Transparency occurs when MNEs and other taxpayers disclose to tax authorities sufficient information about their business and tax planning activities. Transparency allows tax authorities to effectively plan their audit activities and use their resources efficiently. Country by Country reporting, as will be discussed shortly, will aim to increase this transparency.

Implementing the Action Plan requires OECD member nations to amend their domestic tax laws and bilateral treaties. Each member nation must assess the effects of each point in relation to its own economic wellbeing. This results in some actions being implemented sooner than others.

## *Immediate / Short Term Implementations*

### **New Approaches to Transfer Pricing as a Consequence of BEPS Action 8 to 10**

The OECD’s BEPS Action Plan was an enormous undertaking covering many areas of international tax and only time will tell what the collective impact will be as a consequence of all the final report recommendations. However, what is widely agreed upon in the international tax community is that the most immediate, and likely most significant, impact from the BEPS project will be in the world of transfer pricing and the amendments to the OECD’s “Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations” provide guidance on the application of arm’s length pricing.

The OECD’s work related to transfer pricing under the BEPS Action Plan focused on three key areas. Action 8 looked at transfer pricing issues related to transactions involving intangibles, Action 9 considered the contractual allocation of risks and the resulting allocation of profits to those risks and Action 10 focused on other high-risk areas including the possibility of re-characterizations where transactions were not commercially rational.



The amended Guidelines arising as a consequence of the OECD's work on Actions 8 to 10 are significant and amend several Chapters and Sections of the current Guidelines. The new version will not be published until 2017, however many MNEs, as well as taxing authorities such as the Canada Revenue Agency ("CRA") are starting to use material released during public consultations in approaching open cases.

The new approaches require that entities be able to control the risk that gives rise to potential rewards. Similarly, the legal ownership of an intangible asset, such as intellectual property, is not sufficient in itself to generate a significant return. As such, capital-rich entities will not be entitled to any excess profits absent any other relevant economic activities, such as sizable people functions. Intellectual property migration strategies will change significantly in light of the new Guidelines.

## Country-by-Country Reporting to Tax Authorities

The OECD has prescribed a fixed template for MNEs to use in reporting to tax authorities and has given clear guidance on its use. This will increase consistency in the data reported to tax authorities. The first reporting must be delivered to tax authorities by December 31, 2017, and those authorities will distribute the data by June 30, 2018.

This measure has been adopted by the major parent company countries, meaning that their respective tax authorities will receive the data. It also means that any country who has a treaty with one of those countries, or who has signed the Convention on Mutual Administrative Assistance in Tax Matters will also benefit.

## Conclusion

The BEPS Action Plan seeks to create a united response to the issue of base erosion and profit shifting and further the objectives of coherence, substance, and transparency. The BEPS initiative is one of the most expansive and more important piece of legislation that the transfer pricing community has seen in many years. Taxpayers and service providers alike will need to take note. BEPS will likely result in taxing authorities becoming more aggressive when raising audits, especially in countries like Canada (and other subsidiary based economies) where the CRA has always taken the view that "people functions" and not legal ownership was the key to capturing profits. Whether the BEPS initiative will prove successful in achieving their stated objectives will be a matter of interpretation that only time will tell.





# **IP MIGRATION STRATEGIES – PRE AND POST BEPS**

# IP MIGRATION STRATEGIES – PRE AND POST BEPS

## The OECD's BEPS Initiative

The largest initiative the transfer pricing world has seen, since the introduction of the Organization for Economic Cooperation and Development's (OECD) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (Current TP Guidelines), is in its final stages and will result in material changes in the way the global operations of corporate organizations are structured and international transactions are reported.

On October 5, 2015, the OECD released the final report of its 15-point Action Plan on Base Erosion and Profit Shifting (BEPS). The BEPS Action Plan was an ambitious project that addressed a number of concerns relating to international corporate tax planning, including transfer pricing issues related to transactions involving intangibles, the contractual allocation of risks and the resulting allocation of profits to those risks, and other high-risk areas including the possibility of re-characterizations where transactions were not commercially rational.

In brief, the OECD's BEPS initiative, as it pertains to transfer pricing, attempts to prevent aggressive profit shifting strategies by amending the Current TP Guidelines to better align transfer pricing outcomes with value creation (Amended TP Guidelines). This is accomplished by placing more emphasis on the allocation of profits to the jurisdiction where substantive functions are performed, including the control functions related to risks assumed and capital employed. The Amended TP Guidelines, intended to be clarifying in nature and not a departure from the arm's length principle as enshrined in the Current TP Guidelines, now provide the tools and support the Canada Revenue Agency (CRA), and presumably other tax administrations, need to successfully challenge tax motivated transfer pricing strategies where substantive people functions are not transferred with the intangible property (IP).

## What This Means for IP Migration

It is widely recognized that the primary objective of a multinational entity (MNE) is to maximize profits and as such MNEs are constantly evaluating their international operations in an effort to maximize revenues and minimize costs, including tax expenses. Historically, where the commercial opportunity existed, companies often adopted IP migration transfer pricing strategies that allocated significant profits to lower-tax jurisdictions. In the most extreme cases, no or minimal functionality (i.e., no employees) was transferred with the IP (e.g. cash box companies). Many of these strategies, and the tax savings that arose from them, whether rightfully or wrongfully, were thought to be legally effective. Such tax motivated IP migration cases have often come under careful scrutiny by tax administrations. Notwithstanding such scrutiny, there was a lack of clear guidance and policy application by the CRA's Audit Division, Appeals Directorate and Competent Authority. In many cases the CRA accepted these structures as they were generally thought to be tax efficient and in line with the arm's length principle regardless that significant profits were allocated to that lower tax jurisdiction. This is about to change.

The following is a brief summary of the new guidance dealing with intangibles:

- Legal ownership of intangibles by an associated enterprise alone does not determine entitlement to returns from the exploitation of intangibles;
- Associated enterprises performing important value-creating functions related to the development, enhancement, maintenance, protection and exploitation (DEMPE) of the intangibles can expect appropriate remuneration;
- An associated enterprise assuming risk in relation to the DEMPE of the intangibles must exercise control over the risks and have the financial capacity to assume the risks including the very specific and meaningful control requirement;
- Entitlement of any member of the MNE group to profit or loss relating to differences

between actual and expected profits will depend on which entity or entities assume(s) the risks that caused these differences and whether the entity or entities are performing the important functions in relation to the DEMPE of the intangibles;

- An associated enterprise providing funding and assuming the related financial risks, but not performing any functions relating to the intangible, could generally only expect a risk-adjusted return on its funding;
- If the associated enterprise providing funding does not exercise control over the financial risks associated with the funding, then it is entitled to no more than a risk-free return.

## An Example of the New Approach

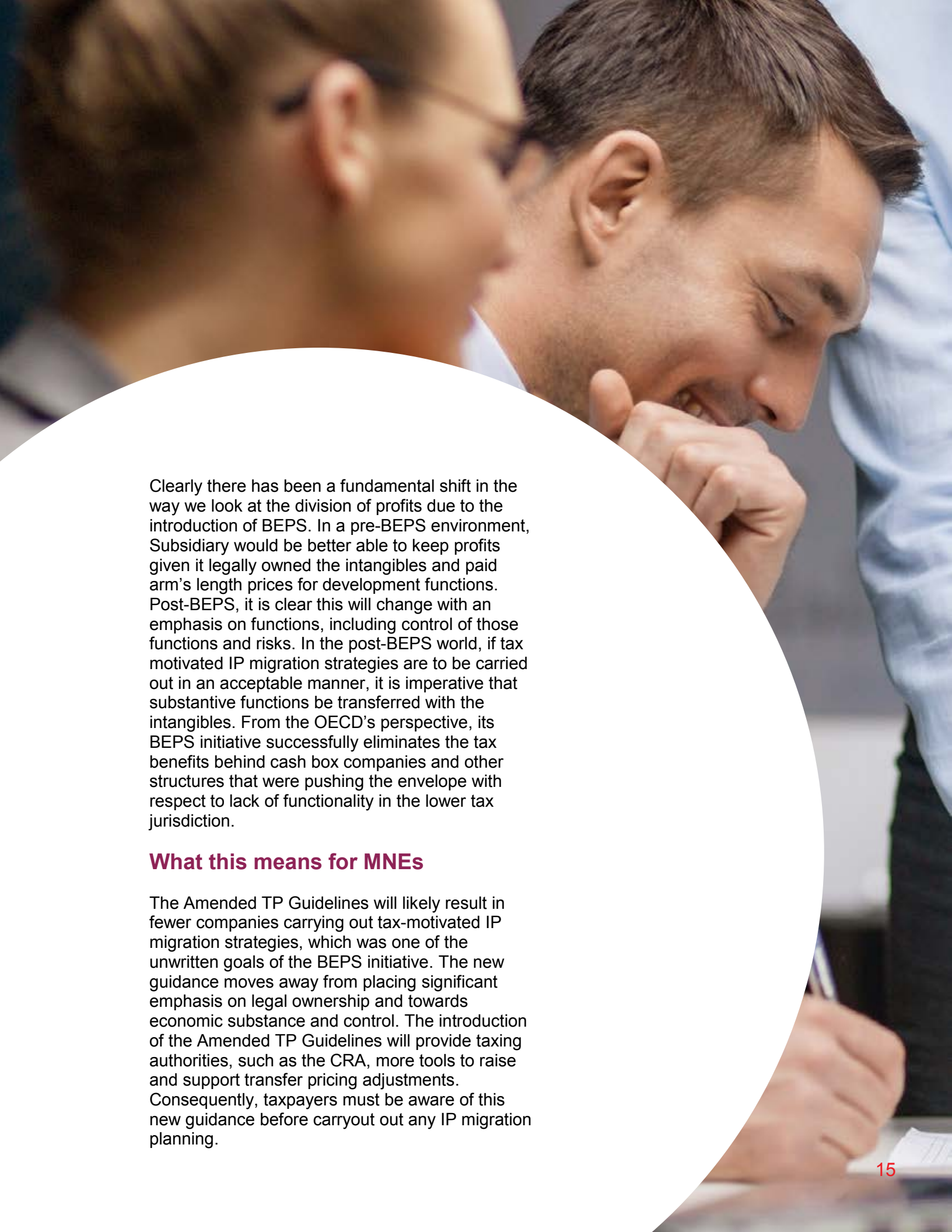
To see how the allocation of profits from IP transfers differ between a pre and post-BEPS world, consider Example 17 from the Amended TP Guidelines. In the example, the following facts/assumptions are assumed:

- 1) Parent is a large pharmaceutical company.
- 2) Parent conducts its operations in country X.
- 3) Parent regularly retains independent (unrelated) Contract Research Organizations (CROs) for research and development (R&D) activities, including designing and conducting clinical trials.
- 4) CROs are not engaged in the blue sky research to identify new compounds.
- 5) When retained, Parent actively participates with CRO engaged in clinical research activities.
- 6) CROs are paid a negotiated fee for services and do not have an ongoing interest in the profits.
- 7) Parent transfers patents related to Product to Subsidiary operating in country Y.
- 8) Product is early stage pharmaceutical drug (high risk, low probability of commercialization).
- 9) Payment based on anticipated future cash flows – expected cash flow discounted by appropriate discount rate.
- 10) Subsidiary has no technical personnel for ongoing research activities.
- 11) Subsidiary contracts with Parent to carry out research related to Product.
- 12) Subsidiary funds all Product research, assumes risk, and pays Parent based on cost plus margins earned by similar CROs.

This fact pattern is the classic example of an early stage pharmaceutical company wanting to realize future profits in a low tax jurisdiction. In the pre-BEPS world, a significant portion of the profits would have moved to Country Y. It was generally recognized that given the Subsidiary was the legal owner, it was entitled to any excess profit or loss after paying routine amounts for the R&D activities, even where the important value creating functions of the IP did not take place in the Subsidiary's country. The transfer of the IP would have been done at a low value (although arm's length) as the prospects of successful commercialization were very uncertain at the time of the transfer. In regards to future development of the intangible property, Parent, as a service provider, would have been entitled to a cost plus mark-up on costs incurred.

In a post-BEPS world, less emphasis is placed on legal ownership and more on economic aspects of substance. In the example above, Parent controls functions and manages patent risks owned by Subsidiary and is entitled to compensation. The Amended TP Guidelines, including the analysis to Example 17, will support that Parent's compensation is not appropriately recognized by the profits earned by a CRO. Parent's transactions with CROs are not comparable to the Subsidiary/Parent arrangement given that the functional profiles differ, i.e., parent is in control of function and is the more appropriate party to assume the risks of success or failure. While Subsidiary legally owns the patents it lacks the capability to control research risks while Parent performs key decision making functions and thus should be appropriately compensated.





Clearly there has been a fundamental shift in the way we look at the division of profits due to the introduction of BEPS. In a pre-BEPS environment, Subsidiary would be better able to keep profits given it legally owned the intangibles and paid arm's length prices for development functions. Post-BEPS, it is clear this will change with an emphasis on functions, including control of those functions and risks. In the post-BEPS world, if tax motivated IP migration strategies are to be carried out in an acceptable manner, it is imperative that substantive functions be transferred with the intangibles. From the OECD's perspective, its BEPS initiative successfully eliminates the tax benefits behind cash box companies and other structures that were pushing the envelope with respect to lack of functionality in the lower tax jurisdiction.

### **What this means for MNEs**

The Amended TP Guidelines will likely result in fewer companies carrying out tax-motivated IP migration strategies, which was one of the unwritten goals of the BEPS initiative. The new guidance moves away from placing significant emphasis on legal ownership and towards economic substance and control. The introduction of the Amended TP Guidelines will provide taxing authorities, such as the CRA, more tools to raise and support transfer pricing adjustments. Consequently, taxpayers must be aware of this new guidance before carry out any IP migration planning.



**A TYPICAL  
EXAMPLE OF BEPS  
– THE MARZEN  
DECISION**

# A TYPICAL EXAMPLE OF BEPS – THE MARZEN DECISION

In *Marzen Artistic Aluminum Ltd. v. The Queen*<sup>1</sup> (“**Marzen**”), the FCA upheld the Canada Revenue Agency’s (“**CRA**”) transfer pricing adjustment as well as the penalty under subsection 247(3) of Canada’s *Income Tax Act* (“**Act**”). The Marzen case provides an example of what would appear to be a tax-driven transfer pricing structure involving a low-tax jurisdiction where there is a clear separation between the location of substantive business activities and the jurisdiction where taxable profits are reported.

## Summary of the Marzen decision

### Facts

The Taxpayer was a company resident in Canada that designed, manufactured and sold aluminum and vinyl windows in Canada. Starline Windows Inc. (“**SWI**”), a United States tax resident in the Taxpayer’s group of companies, was set up in 1998 to expand the Taxpayer’s business in the U.S. SWI purchased window products from the Taxpayer at a price that provided a margin of 15% to 18%. SWI personnel solicited orders for window products from U.S. customers. SWI’s initial focus on the Washington residential market proved unsuccessful.

The Taxpayer was eventually referred to Mr. David Csumrik, a resident of Barbados, as a person who could help develop a marketing strategy. Mr. Csumrik determined that the Taxpayer was focused on the wrong U.S. market and advised it to shift its marketing efforts to certain Canadian developers who were active in the high rise market in southern California (“game-changing idea”). In 1999, following Mr. Csumrik’s advice, the Taxpayer set up the “Barbados Structure.”

Mr. Csumrik’s personal company, Longview Associates Limited (“**Longview**”), assisted the

Taxpayer in setting up a wholly-owned subsidiary in Barbados, an International Business Corporation (“**SII**”), to act as a marketing and sales company. SII had no assets or employees other than Mr. Csumrik, who served as a part-time managing director. Longview was engaged by SII to provide typical corporate services and was compensated US\$30,000 per year by SII for those services. In addition, Mr. Csumrik received an annual fee of US\$2,500 for his personal services as managing director of SII.

The related parties then entered into several intercompany agreements, the key agreement being a marketing and sales services agreement (“**MSSA**”) between the Taxpayer and SII, which set out the fee structure. The MSSA stated that the Taxpayer would pay SII the greater of \$100,000 or 25% of sales. In addition, the MSSA was ultimately amended to provide that the Taxpayer would pay SII a one-time bonus of 10% on all confirmed contracts in the California market on condition that SII achieve at least US\$10 million in net sales within a certain time period. These conditions were ultimately met and the bonus ultimately paid.

SII and SWI entered into two agreements, the first being a personnel secondment agreement (“**PSA**”) whereby SWI agreed to provide the services of personnel on an exclusive basis to be retained by SII in the marketing of the Taxpayer’s products. SWI’s compensation under the PSA was a monthly fee intended to cover SWI’s costs of the personnel plus a nominal service fee of 10%. The second agreement was an administrative and support services agreement (“**ASSA**”), whereby SWI agreed to provide secretarial and other administrative support services to SII for a monthly fee.

In effect, the arrangement allowed the Taxpayer to generate most of its profits from U.S. sales in Barbados (i.e., profit shifting from high tax jurisdiction to low tax jurisdiction). In 2000 and 2001, the Taxpayer paid in aggregate \$12,005,633 to SII under the MSSA. These payments were fully deducted by the Taxpayer in computing its Canadian business profits. SII, being an International Business Corporation, paid nominal income tax in Barbados on the profits. As a foreign affiliate of the Taxpayer, SII then declared

<sup>1</sup> *Marzen Artistic Aluminum Ltd. V. The Queen*, 2014 TCC 194.




dividends to the Taxpayer who received the dividends free of Canadian income tax.

The CRA issued notices of reassessment which disallowed the fees paid by the Taxpayer to SII under the MSSA that were in excess of the \$4,869,941 in fees paid by SII to SWI during this period on the basis that they were not in accordance with the arm's length principle.

## Parties' Submissions

Counsel for the Taxpayer argued that the TCC must consider both the direct services performed by SII under the MSSA and the indirect services performed by the SWI employees under the PSA in determining whether the compensation paid by the Taxpayer to SII under the MSSA was in accordance with the arm's length principle. The Taxpayer's counsel and expert witness argued that the TCC should be viewing the situation as an "amalgam," that is, SWI and SII should be viewed as a single entity. They also maintained that SII, through the efforts of Mr. Csumrik, undertook substantial collaborative efforts with SWI, through ongoing supervision and advice, to fulfill its obligations under the MSSA. Finally, the Taxpayer argued that "proof was in the pudding," in that the fees under the MSSA were justified because the Taxpayer achieved significant increases in U.S. sales shortly after the structure was put in place.

The Crown's position focused on the lack of services provided by SII to the Taxpayer that could warrant the significant compensation under the MSSA. The Crown seemingly conceded that Mr. Csumrik came up with the game-changing idea. However, as confirmed by the relevant parties, Mr. Csumrik was to be compensated for this idea under a separate "handshake" agreement with the Taxpayer's owner and therefore this should not be a relevant factor in determining the arm's length compensation for services rendered by SII to the Taxpayer under the MSSA. Fifteen years after sharing his game-changing idea, Mr. Csumrik had still not been paid under the handshake arrangement. The Crown noted that the Taxpayer's emphasis on the value of Mr. Csumrik's contribution to SII's marketing performance to justify the fees paid to SII by the Taxpayer supported the Crown's argument that it was



“The TCC found that the terms and conditions of the MSSA were not consistent with the arm's-length principle.”



unreasonable that Mr. Csumrik would accept minimal compensation, that is, \$2,500 per year, for such services. In addition, if, as the Taxpayer alleged, Mr. Csumrik's real incentive for creating such value for SII was a separate handshake agreement, that begs the question of what the Taxpayer paid SII the fees for.

## Decision

Even though Mr. Csumrik was credited with the game-changing idea, it was ultimately determined during the trial that Mr. Csumrik had no contacts or relationships with the Canadian developers. Therefore, any substantive contribution Mr. Csumrik made to the ultimate success of the Taxpayer's business expansion in the U.S. ended when he presented the game-changing idea.

The TCC's ultimate focus was on the substance of the activities performed by Mr. Csumrik in his role as managing director for SII in allowing SII to fulfill its obligations to the Taxpayer under the MSSA. The TCC recognized that Mr. Csumrik, on behalf of SII, "provided some on-going direction to the SWI sales team by way of reviewing sales reports and providing some strategic advice and suggestions to SWI on behalf of SII [...] However, the performance of most such services overlapped with the functions he performed in his capacity as managing director of SII through Longview." Ultimately, the TCC agreed with the Crown's argument that SII "was an empty shell with no personnel, no assets and no intangibles or intellectual property." Despite the Taxpayer's "proof is in the pudding" argument, the TCC found "that the financial results achieved under the Barbados Structure [...] do not, in themselves, justify the fees paid under the MSSA and the MSSA Bonus Payment Agreement."

Finally, the TCC found that the terms and conditions of the MSSA were not consistent with the arm's-length principle. The TCC held that the compensation paid by SII to Longview and Mr. Csumrik for corporate services and director fees was a comparable uncontrolled price ("**CUP**"), a transfer pricing methodology, for the services ultimately provided by SII to the Taxpayer. In other words, the Court concluded that an arm's length party would have paid an amount to SII that exceeded the fees paid by SII to SWI (i.e.,

\$4,869,941), but only in the amount of US\$32,500 per year. The TCC also upheld the penalty under the Act because the \$5-million threshold was met and the Taxpayer failed to make reasonable efforts to determine and use arm's-length transfer prices in 2001.

## Analysis

There are several principles or takeaways that can be gleaned from the Marzen decision. First, legally effective contracts are not, in and by themselves, justification for the compensation paid between related parties. It is imperative that contractual arrangements between related entities have substance and provide real value. It is a fundamental transfer pricing principle that a detailed analysis of the substantive nature of the functions performed by the service provider must be conducted before the arm's length compensation for those services can be determined. The current work by the OECD on BEPS only emphasizes the importance of identifying the substantive business activities being performed.

Another takeaway from the Marzen decision is the importance of maintaining proper contemporaneous documentation regarding intercompany transactions. In Marzen, the Taxpayer merely "ballparked" its transfer prices and made a superficial attempt at documenting the assumptions, strategies and policies that influenced its determination of the relevant transfer prices. Consequently, the TCC upheld the CRA's application of transfer pricing penalties.

The final takeaway from Marzen, and perhaps the most important from a tax advisor's perspective, is the importance of properly implementing tax driven arrangements. While simply altering a few characteristics of the Barbados structure may not have been sufficient to justify the magnitude of the profit shift from Canada or the U.S., as the case may be, to Barbados, it could have raised some interesting considerations for the TCC and potentially resulted in a different outcome for the Taxpayer.



**TRANSFER  
PRICING –  
REDUCING AUDIT  
CONTROVERSY**

# TRANSFER PRICING – REDUCING AUDIT CONTROVERSY

## Introduction

The primary goal of preparing transfer pricing documentation is to avoid costly transfer pricing penalties and reduce audit risk. In order to avoid transfer pricing penalties, reasonable efforts must be made. The term “reasonable efforts” is very subjective and is not defined anywhere in Section 247 of the Canadian *Income Tax Act*, although the Canada Revenue Agency (CRA) does provide some guidance in Transfer Pricing Memorandum (TPM) 09.<sup>2</sup>

*The CRA has issued several TPMs to explain their policies and views. Refer to the CRA website for details.*

What should a taxpayer do with respect to transfer pricing documentation? First, the taxpayer must ensure that those creating this documentation are skilled in covering off all transfer pricing issues, such that the auditor cannot logically conclude that reasonable efforts were not met. Secondly, the transfer pricing documentation must properly address the economic substance of each transaction. While some transactions will naturally increase the likelihood of audits, other factors must be properly managed.

## Common Transfer Pricing Audit Triggers

Quality documentation that describes the transaction, and sets the intercompany price according to the arm’s length standard, can mitigate the effect of these audit triggers. The

following are some common issues that can trigger a CRA audit.<sup>3</sup>

### (i) Persistent Losses and High Variances in Profits

Persistent losses experienced by the Canadian related party are often a trigger for a CRA audit. While it is entirely possible that one party in a transaction can experience recurring losses or increased volatility in profit levels, the fact that transfer pricing occurs between related parties raises the suspicions of tax authorities. If it is determined that one of the parties to the transaction should earn negative profits (i.e., a downturn in the economy should have the largest effect on the profits of the party assuming the most risks), those creating the transfer pricing documentation must sufficiently articulate this in order to show reasonable efforts, and to mitigate the risks of a full-blown audit and/or audit adjustments.

As a rule, profits attributable to a tested party (i.e., the less complex party to the transaction) should not be below industry norms. Depending on the characterization of the tested party, a risk-taking entity could incur negative and reoccurring losses, though this should be reversed in better economic times. If the tested party is routine in nature and assumes little risk, its profitability should be relatively stable and positive. If the returns attributable to a tested party are outside the realm of economic reasoning and below industry norms, this may increase the suspicion of tax authorities and raise a full-blown transfer pricing audit.

### (ii) Activities in Offshore or Low Tax Jurisdictions

MNE’s operating in low tax jurisdictions must be aware their operations will be under constant scrutiny by tax authorities. The fact that profits otherwise taxable in one country are now being taxed in another country with lower overall tax rates is sufficient for a taxing authority to closely examine the transactions and ensure that reasonable amounts are allocated for the functions, assets and risks assumed in the home country.

<sup>2</sup> For details on this memorandum and others related to transfer pricing please visit the CRA website at: [www.cra-arc.gc.ca/tax/nonresidents/common/trans/menu-e.html](http://www.cra-arc.gc.ca/tax/nonresidents/common/trans/menu-e.html)

<sup>3</sup> This statement would also apply to the foreign jurisdiction. Where the foreign related party to the transaction is losing money, the foreign government would be more likely to commence a transfer pricing audit.

### (iii) Royalty Payments

Royalties are generally paid when one party uses the trade-mark, trade-name, patents or other intangible assets of another party. Usually, a related party would be willing to pay a royalty if access to such intangible assets would result in it earning profits that are in excess of what it would have earned had it not had access to such intangibles. Utilizing a related party's intangible assets should result in the tested party being better off (even after the royalty payment is made). However, all too often, royalties are used to "strip" profits from a related party. This is contrary to what economic theory suggests should happen. In such circumstances, aggressive royalty payments often increase the suspicions of tax authorities. Properly structuring a royalty, based on sound economic principles, is required.

### (iv) Management Fees

Subsidiaries often pay management fees to a related parent company for the provision of services. Services that are considered ancillary in nature, but nevertheless are economically valuable, should be allocated at cost. Value-added services, such as marketing, must be allocated at arm's length, usually with a mark-up. Proper explanation of the benefits received from the services, and an economic comparables study to support any mark-up on the services, is key to reducing audit controversy.

### (v) Intangible Transfers

Firms have an incentive to structure their affairs in such a way that profits are migrated to tax jurisdictions imposing lower tax rates. This often involves the transfer of valuable intangible assets to low tax jurisdictions.

Tax authorities around the world have begun to target these structures and, as a result, multinational companies need to ensure that documentation is sufficient to support the migration of such intangible assets, and to ensure that they meet the arm's length standard. Failure to sufficiently document these transactions based on sound economic considerations will increase the risk of an audit.

## Conclusion

The CRA's auditors are gaining experience with respect to international transactions, and taxpayers must ensure that their analysis is sufficient to withstand an audit by the CRA. There are many issues in a transfer pricing study that must be dealt with effectively to reduce the need for a detailed transfer pricing audit. It is important to adequately compensate a related party so that profits are properly allocated within a related party setting, and that such profits fall within industry norms. Royalties or management fees that are aggressive and that strip too much profit out of a subsidiary will often be a red flag to auditors. Implementing transfer pricing strategies that are economically sound is the best way to reduce the chance of a transfer pricing audit.







**TRANSFER  
PRICING  
PENALTIES  
IN CANADA –  
SUBSECTION 247(3)**

# TRANSFER PRICING PENALTIES IN CANADA – SUBSECTION 247(3)

## Introduction

The demand for corporate reporting and compliance documentation in the world today is daunting. The financial reporting requirements imposed by Sarbanes Oxley are one example of such measures. Similarly, documentation with respect to transfer pricing transactions has also become a major concern for multinationals around the world. Most taxing authorities have revisited their transfer pricing legislation and have adopted revised positions requiring multinationals as well as medium and small business enterprises to prepare transfer pricing documentation in support of related party transactions. While this is an expensive and time consuming exercise for the entities involved, failure to comply with such requirements may prove to be extremely costly when taking into account potential penalties.

Since Canada's enactment of new transfer pricing legislation in 1997, and commencing in 1999, taxpayers have been required under subsection 247(4) to have available at the time of filing their respective tax returns in Canada a transfer pricing documentation package that is complete in every respect. Failure to do so may result in the application of penalties.

## Transfer Pricing Penalties in Canada

Section 247 of the Canadian *Income Tax Act (ITA)* incorporated under Part XVI.1 of the *ITA* was enacted by Parliament on September 11, 1997, applicable for taxation years starting after 1998. Subsection 247(4) requires that specific documentation be maintained by a taxpayer to support related party transactions. Failure to provide such documentation to the CRA when requested will be cause for computation of a penalty in accordance with the provisions of subsection 247(3).

When the Canada Revenue Agency (CRA) undertakes a transfer pricing audit, it will normally issue a letter at the outset requesting the contemporaneous documentation be provided within 90 days of the date of the letter. If the documentation is not completed by the time the return is to be filed (six months after year end) and is not made available within 90 days of a request by a CRA auditor, a subsection 247(3) penalty will automatically apply if the adjustment meets the threshold levels (i.e., 10 per cent of sales or \$5 million per year). There seems to be minimal tolerance in this respect should one fail to comply. In circumstances where a penalty is being considered, for the reasons mentioned above, the file will be submitted by the field auditor to the Transfer Pricing Review Committee (TPRC), situated in the International Tax Division (Ottawa Headquarters). A referral to the TPRC for transfer pricing penalties must be considered by the field office in all cases where the total of transfer pricing capital and income adjustments for a taxation year exceed \$5 million, or exceed 10 per cent of gross revenue for the year, as per subparagraph 247(3)(b)(i). The penalty is equal to 10 per cent of the transfer pricing adjustments. The penalty applies to the total income adjustments resulting in either an increase in operating income or, very surprisingly, a decrease in operating losses. Capital adjustments are also contemplated whereby the penalty calls for a 50 per cent reduction to the adjusted cost base of certain capital assets and similar reductions to the capital cost of depreciable property. The very punitive nature of the penalty is derived from the fact that the adjustment itself is the vehicle for the computation of the penalty and not the resulting additional tax that is imposed. In addition, downward adjustments are not netted against upward adjustments in determining whether the penalty applies. Although the CRA field auditor is responsible for determining the factual circumstances of the case, and whether the documentation was prepared contemporaneously, he/she is not responsible for determining if the penalty is applicable or not. According to the CRA's transfer pricing memorandum TPM-01, dated March 26, 2003:

“The CRA's policy on transfer pricing legislation is found in IC 87-2R, International Transfer Pricing. In the paragraphs reproduced below, the CRA states

that before any assessment under paragraph 247(2)(b) or subsection 247(3) is issued, the file will be referred to the TPRC for review to ensure that the law is applied fairly and consistently.

Taxpayers must be made aware of the transactions under review and the potential for a penalty under subsection 247(3). Before the files are referred to Field Advisory Services (FAS), taxpayers should be asked to submit any information they wish to have considered.”

Therefore, taxpayers should be advised in writing of transactions under review for possible penalty application. They will be requested by the CRA to submit representations prior to this initial referral to the TPRC to give their version of reasons for the non-application of the penalty. A taxpayer facing this situation should take the time to formulate solid arguments against such application, since failing to do so may exhaust your chances of future representations prior to the committee’s decision.

One must be sensitive to the fact that penalties and interest arising from transfer pricing adjustments are not negotiable issues with respect to competent authority resolution of double taxation cases under Canada’s tax treaties.

## **Penalty: Canada vs. U.S.**

For the sake of comparison, let us take as a hypothetical example the following scenario: Canco is a manufacturer and in 2005, sold \$100 million of tangible goods to its U.S. related subsidiary for distribution in the U.S. The CRA determines that the transfer price should have been \$110 million, and therefore a \$10 million upward transfer pricing adjustments is proposed. Although Canco provided the documentation within 90 days of a request to do so, the field auditor submits the file to TPRC. Following its review, the committee decides that the documentation is inadequate, and therefore “reasonable efforts” were not made. The Committee therefore considers a penalty under subsection 247(3) applicable.

The resulting tax consequences in Canada would be computed as follows:

- transfer price adjustment: \$10 million (247(2));
- assuming for purposes of illustration a 40 per cent tax rate, additional tax of approximately \$4 million;
- subsection 247(3) penalty of \$1 million (10 per cent of \$10 million); and
- approximate additional interest of \$560,000 (non-deductible in Canada).

Let us assume that the situation is reversed and that the Internal Revenue Service initiates the adjustment. The resulting tax consequences in the U.S. would be computed as follows:

- transfer price adjustment: \$10 million (S 482));
- assuming for purposes of illustration a 40 per cent tax rate, additional tax of approximately \$4 million;
- S 6662 penalty of \$800,000 (20 per cent of \$4 million); and
- approximate additional interest of \$560,000 (deductible in the U.S.).

Clearly, this example demonstrates that the effect of the penalty in Canada is more severe than one would expect in the U.S. under these circumstances. In addition, it is important to note that since the penalty in the U.S. applies to the additional tax generated, should a substantial adjustment be made whereby the U.S. company remains in a negative or loss position after the adjustment is processed, no additional tax would be generated and thereby no penalty would result. In Canada, although no additional tax would result from the adjustment, the penalty on the adjustment would nevertheless be computed and applied. This represents a significant difference that one should remember when contemplating the proper documentation package to present to the CRA.

## Reasonable Efforts: How Far Should One Go

The key to the establishment of defensible transfer pricing documentation in Canada is to ensure that one addresses, as clearly as possible, the requirements spelled out by subsection 247(4). In accordance with TPM-09, dated September 18, 2006, reasonable efforts are defined by the CRA as follows:

“The general determination of whether a taxpayer has made reasonable efforts to determine and use arm’s length transfer prices or allocations is a question of fact. The CRA will consider taxpayers to have made reasonable efforts if they have taken all reasonable steps to ensure that their transfer prices or allocations conform with the arm’s length principle.

The reasonable efforts test in both subsections 247(3) and 247(4) also refers to a dual obligation in that taxpayers must make reasonable efforts:

- 1) to determine arm’s length transfer prices or arm’s length allocations, and
- 2) to use those prices or allocations.

Therefore, in determining whether the transfer pricing penalty is applicable, it will be necessary to show that reasonable efforts were made both in establishing and using arm’s length pricing.

A reasonable effort means the degree of effort that an independent and competent person engaged in the same line of business or endeavour would exercise under similar circumstances. What is reasonable is based on what a reasonable business person in the taxpayer’s circumstances would do, having regard to the complexity and importance of the transfer pricing issues that arise in the taxpayer’s case.”

It is quite clear from TPM-09 that the TPRC, in determining if the penalty applies or not, will evaluate whether a taxpayer has:

- 1) complied with the documentation required in subsection 247(4);

- 2) made reasonable efforts to determine competently the appropriate price; and
- 3) consistently used that price accordingly.

This being said, the results of penalty recommendations by the committee to date seem to suggest that if essential ingredients in the documentation package are missing or poorly reported, a penalty under subsection 247(3) is a strong possibility, one that any taxpayer would be wise to avoid.

### Conclusion

Penalties are alive and flourishing in the transfer pricing arena and their application is increasing as tax authorities become more vigilant in their audits. Tax administrations, such as Canada as well as many other foreign jurisdictions, have equipped themselves well with respect to both legislation and policies to enforce compliance in this field. Although world organizations such as the Organisation of Economic Co-operation and Development (OECD), Pacific Association of Tax Administrators (PATA), and the EU Council are concerned with the aggressiveness of countries in this area, there is little that one may do to soften the domestic penalty blows that may be felt by those who underestimate their application. Therefore, a word of caution to all multinationals, as well as medium to small enterprises: ensure your documentation packages are well prepared with regard to each respective jurisdiction or you may face undesired and serious financial consequences.



# **THE IMPACT OF RESTRUCTURING IN A TRANSFER PRICING SETTING**



# THE IMPACT OF RESTRUCTURING IN A TRANSFER PRICING SETTING

## Introduction

As globalization impacts businesses around the world, companies are increasingly considering restructuring their operations as a means of enhancing efficiency. In times of economic downturn, decisions are often made to minimize excess capacity by eliminating or reducing operations in certain jurisdictions and shifting production to other, more profitable jurisdictions. Sometimes this requires that entities within a multinational setting be restructured to meet efficiency and profitability targets.

When operations are restructured between related parties, the question arises as to whether or not the entities that are closed or diminished in some fashion (due to this restructuring) should be compensated in some manner. This issue becomes particularly contentious when a highly profitable restructuring entity shifts its profits to another tax jurisdiction.

In Canada, the Canada Revenue Agency (the “CRA”), much like many other tax authorities around the world, takes no formal position on a business restructuring. Following a series of public consultations on business restructuring, the Organisation for Economic Co-operation and Development (the “OECD”) released its final guidance on July 22, 2010.<sup>4</sup> The guide addresses four main issues, including: the treatment of allocation and transfer of risk among related parties; whether restructuring requires arm’s length compensation; how to apply transfer pricing rules to a given restructuring; and lastly, whether the government has the ability to disregard a

<sup>4</sup> On July 4, 2016 the OECD issued a document titled: *Conforming Amendments to Chapter IX of the Transfer Pricing Guidelines* (Transfer Pricing Aspects of Business Restructurings). This is a document for public review which will replace the current 2010 version in a consolidated version of the Guidelines. The document is found at the following link: <https://www.oecd.org/tax/transfer-pricing/conforming-amendments-chapter-ix-transfer-pricing-guidelines.pdf>.

restructuring transaction. The discussions showed that differences exist between various governments on some of these key issues.

The following discussion focuses on Canadian issues related to business restructurings, however, since Canada’s position is very similar to that of the OECD much of this can also be applicable to other countries.

## OECD Definition

The OECD defines restructuring, as the “cross-border redeployment by a multinational enterprise of functions, assets and/or risks”[emphasis added].<sup>5</sup> In its Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (“Transfer Pricing Guidelines”), the OECD states that restructuring typically includes:

- The conversion of full-fledged distributors into limited-risk distributors for a foreign associated enterprise;
- The conversion of full-fledged manufacturers into contract manufacturers for a foreign associated enterprise; and
- The transfer of intangible property rights to a central entity.<sup>6</sup>

Restructuring can create large transfer pricing issues and the CRA is focussing on the transfer pricing aspects of restructuring when selecting companies for transfer pricing audits. Taxpayers who are contemplating a restructuring should be aware of the potential issues.

## Specific Tax Regulations for Business Restructurings in Canada

There are no regulations specifically under section 247 of Canada’s *Income Tax Act (ITA)* or within the various CRA Information Circulars (“ICs”) related to restructuring. However, enough guidance currently exists in Canada to provide a framework that can be used to determine an arm’s length price for

<sup>5</sup> Organisation for Economic Co-operation and Development, “Report on the transfer pricing aspects of business restructurings, chapter ix of the transfer pricing guidelines” (July 22, 2010), online: OECD<<http://www.oecd.org/tax/transfer-pricing/45690216.pdf>>.

<sup>6</sup> *Ibid*, at 4.

restructuring activity. Section 247 of the *ITA* as well as IC 87-2R lay out a framework for pricing related party transactions that deal with the transfer of goods, services, or intangible assets between non arm's length parties.

When planning a restructuring in Canada, the most important factor is to ensure that any restructuring complies with the arm's length principle. An international business restructuring requires rigorous analysis to determine whether there has been a transfer of functions, assets, and risks between related entities and if there has what the arm's length compensation is. In answering the compensation question it is imperative that a company thoroughly documents the economic substance and value of the transaction.

Any investigation of a transfer price assigned to a restructuring should be based on an analysis of the functions, assets, and risks transferred. In light of this, multinational firms operating in Canada should price restructuring transactions in such a way that firms are compensated at prices reflecting arm's length values. Failure to do so may result in the CRA raising significant transfer pricing adjustments.

## Practice in Canada

In cases of transfer pricing disputes involving restructuring, the CRA has a natural tendency to look at the economic substance of the transfer rather than legal form. This tendency will likely increase in time in light of the OECD BEPS initiative and the emphasis on where value is created over legal form. The contemporaneous documentation must clearly demonstrate the restructuring entity's functions, assets and risks assumed before and after the restructuring. If the contemporaneous documentation package does not adequately support any compensation, made as part of the restructuring, then there is risk of an adjustment.

It is important to remember that if profits are shifted out of Canada, as a result of a business restructuring, one should expect the CRA to scrutinize the transaction. Despite close examination by the CRA, there are many examples of the CRA allowing a restructuring to go ahead

because the entities demonstrated that the transfer occurred at a fair market price and was based on sound economic and business principles.

Generally speaking, the transfer of any functions, assets, or risks from one related party to another will result in a change of the profits earned if the transfer is a substantive change in the risk profile or functional intensity of the entity in question. The more functionally intensive a related party becomes, the more profits it is expected to earn in good years.

In today's economic environment, intangible assets are becoming a greater determinant of profits. Transfers of intangibles between related parties, due to restructuring, should result in a change in the manner in which intercompany profits are divided. Restructuring an entity such that functions and assets are transferred to other related parties should lead to compensation.

## BEPS

Going forward, the OECD's recommendations resulting from the BEPS Action Plan will have a pronounced impact. Consider, for example, the transfer of intangibles by a related party operating in a high tax jurisdiction to a related party operating in a low tax jurisdiction. In the past, a taxpayer could often support such a strategic transfer pricing decision by demonstrating that the transfer occurred at fair market value (often based on a discounted cash flow analysis). Now, however, it appears that G7 countries, including Canada, will be examining not only the arm's length nature of any price, but will also consider the reasonableness of any allocation of intercompany profits based on the related parties capacity to create and maintain the intellectual property being transferred. More profits will be allocated to the entities that generated and maintained the intellectual property and less profits are likely to be allocated to the entity that purchased the intellectual property via a migration of intangibles exercise.

## The Recognition of “Work Force – In Place” as an Intangible in Canada

Recognition by the CRA of “work force – in place” as an intangible will depend on the nature of the work force and the manner in which it contributes to the intercompany profits of the organization. An evaluation of this intangible will often be required in order to determine the value it brings to the organization being restructured. The transfer of work forces are often carried out in conjunction with transfers of other intangible assets. In such cases, the CRA attempts to unbundle the transaction to determine the arm’s length price of the specific intangible in question, in these cases work force – in place intangibles.

## The Importance of Other Commercial Justifications or Rationales

CRA may also attempt to disallow the restructuring by applying paragraph 247(2)(b) of the *ITA*. Paragraph 247(2)(b) allows the government to re-characterize a transaction if two key requirements are met. First, it must be shown that the transaction in question was driven strictly for tax savings. Second, it must be illustrated that such a transactions would not have been carried out had the parties been unrelated (i.e., if the transaction had no commercial justification). The impact of applying this section of the *ITA* is to reverse a transaction, resulting in the potential for double taxation. Also the guidance given by the OECD under BEPS Action 10 regarding recharacterization will also play a role in CRA’s ability to apply paragraph 247(2)(b).

## Canadian Challenges

The challenge for restructuring entities located in Canada is to thoroughly document the independent value of the Canadian subsidiary or the property being acquired. For example, consider a manufacturing and distributing subsidiary operating in Canada that has related parties in the United States that provide sales and technical support. Suppose that the US parent requires, as part of its global strategy, to close the Canadian subsidiary. One way of evaluating the arm’s length payment to close the Canadian subsidiary, that would be

required under section 247 of the *ITA*, is to perform a discounted cash flow analysis. A difficulty with this approach, however, is that there are many benefits that the Canadian subsidiary receives by being related to its US parent company. Since the US parent provides the Canadian subsidiary with valuable sales and technical support, it would be more accurate to remove these benefits—and the impact that the benefits have on the cash flow analysis—to determine the value of the Canadian subsidiary independent of its US parent. From a Canadian perspective, the valuation must be based on the attributes that the entity being restructured exhibits independently. The valuation should not include any synergies that a Canadian subsidiary may have with related parties.

Using the example above, what if the Canadian entity moved all of its manufacturing operations out of Canada but kept the distribution functions? The taxpayer would need to value only the manufacturing operations being moved. Separating the value of the manufacturing business from the distribution business would be difficult given that several subjective allocations would be required.

All changes should be evaluated from an arm’s length perspective to determine the amount of any payments that should be made as a result of the restructuring. Great care must be taken to ensure that any value generated by a Canadian subsidiary’s relationship with its parent company is removed from the discounted cash flow analysis. Section 247 of the *ITA* requires that all transactions—including the determination of a value for the purposes of restructuring—be valued in a way that meets the arm’s length standard.



# **CUSTOMS VALUATION AND TRANSFER PRICING**

# CUSTOMS VALUATION AND TRANSFER PRICING

For years, multinational corporations valuing goods for the purposes of customs and duties have asked why they are unable to use methodologies commonly employed to price goods in a transfer pricing setting. Recent developments will now make this desire a reality. The Canada Revenue Agency (CRA) and the Canada Border Services Agency (CBSA) respectively recognize not only their similar objectives and policies, but also their own unique interests. For example, both organizations attempt to satisfy the main objective of determining fair market value (in essence applying the arm's length principle). However, the interests inherent in each organization are different. There are conflicting objectives in the valuation of goods between the CRA and the CBSA. It is to the CRA's advantage to price goods entering into Canada in such a way that they increase the profits reported by the taxpayer, and therefore tax collected, by lowering the value of the taxpayer's costs. On the other hand, it would be in the CBSA's best interest to increase the valuation of these same goods entering Canada, therefore increasing the amount of duty paid when the goods enter into Canada. For transfer pricing issues, the main body of the legislation is found in Section 247 of the Canadian *Income Tax Act* and the CRA's guidelines as set forth in the IC 87-2R. For the purpose of customs valuation, the applicable sections of the Customs Act are sections 44-57. The CBSA's D-series memoranda also provide additional information with respect to the application of the valuation rules.

It appears that the CBSA has concluded that the breadth of expertise of the CRA, combined with private sector influence surrounding transfer pricing in recent years, eliminates the need to establish new valuation techniques. Consequently, when determining customs valuations, the CBSA will rely heavily on transfer pricing documentation and policies that determine the methodologies used for the valuation of goods in a transfer pricing setting. This transfer pricing documentation requires both a functional and economic analysis. The CBSA may therefore use the methodologies utilized to value

goods in a transfer pricing setting to determine the amount of duties to be paid. This seems to be the first step taken in determining customs valuations for duty purposes. The base amount now being paid and payable should equal the amount obtained from the CBSA's valuations used for tax purposes.

The CBSA's apparent acceptance of the methodologies used for tax purposes has been witnessed in practice. In the ever-changing environment of the international community, it has been determined that 60 per cent of all international trade is performed by international parties who are related to each other. In addition, as outlined by the CBSA, it has accepted 95 per cent of all the values that have been put on the Customs sheet. Given that a significant scope of international trade is related to intercompany transactions, the acceptance of the valuations of goods by the CBSA implicitly suggests that it has accepted the price determined by the methodologies used for tax purposes (or transfer pricing values). Consequently, whether attempting to value goods with respect to customs valuations or from a transfer pricing perspective, the starting point must be a functional analysis, which is a crucial element in determining a transfer price for the CRA's purposes.


One difficulty in relying on a functional analysis for customs purposes is the fact that a functional analysis and the corresponding transfer pricing report might not be segmented or detailed enough to provide the accurate information necessary to determine the value of those goods for duty purposes. The new approach taken by the CBSA is not without limitations. A significant issue surrounds what should happen when retroactive adjustments made by the CRA, with respect to intercompany pricing, significantly alters the value of the costs of goods coming into Canada. In particular, if the CRA raises an adjustment on a taxpayer by altering the methodologies used by the taxpayer, would this necessarily result in the CBSA allowing a reduction to the value declared under 485(c), thus giving a refund back to the taxpayer?

This will naturally create timing issues and refunding limitations. It is our opinion that under the new CBSA regime, a refund is possible and an



application for a refund should be taken into consideration, if a company has had a transfer pricing adjustment that has also changed its valuation for customs purposes.

In conclusion, it is important to remember that when preparing a company's transfer pricing documentation for tax purposes, the valuation for duty purposes must be taken into consideration. The fact that the CBSA has accepted the majority of valuations reported on the Customs sheet, a large proportion of which include related party transactions, suggests that the CBSA has implicitly accepted transfer pricing valuation for customs purposes.



“...when preparing a company's transfer pricing documentation for tax purposes, the valuation for duty purposes must be taken into consideration.”





# **DISPUTE RESOLUTION PROCEDURES IN CANADA**

# DISPUTE RESOLUTION PROCEDURES IN CANADA

Financial transactions, particularly those occurring between related parties across international borders, will often lead to disputes about value and reasonableness. As with many aspects of income tax, transfer pricing rules and policies established by governments around the world are not always clear and the interpretation of those rules can lead to disputes. In this article we will look at the more material issues related to dispute resolution in Canada as it relates to transfer pricing and international transactions.

## Tax Certainty and the Avoidance of Double Taxation

The Canada Revenue Agency (CRA) offers two services to taxpayers who wish to obtain certainty with respect to the Canadian tax consequences of entering into proposed transactions or undertaking multinational business activities: the advance income tax rulings program and the Advance Pricing Arrangement (APA) program.

### *Rulings*

Rulings are issued by the Income Tax Rulings Directorate of the CRA. The CRA is not legally required to issue rulings. Rather, they are intended to provide certainty with respect to the application of Canadian income tax law to proposed transactions. Provided there are no material omissions or misrepresentations in the information provided to the CRA and the transactions are implemented within a specified period of time, rulings are regarded as binding on the CRA with respect to the taxpayer and the transactions covered by the ruling. However, a ruling may cease to bind the CRA if a court decision is subsequently issued that contradicts the interpretation of the law on which the ruling is based.

### *APA program*

APAs are negotiated and administered by the CRA's Competent Authority Services Division (the "Competent Authority Division"). In general, the

program allows a Canadian resident taxpayer(s) and the CRA to resolve, in advance, potential transfer pricing disputes under the *ITA* and Canada's tax treaties by agreeing to an acceptable transfer pricing methodology for specified current and future transactions involving the taxpayer and non-arm's length non-residents.

### *Rollbacks*

An APA generally applies to future taxation years. A taxpayer may request, however, that the terms of the APA apply retroactively to prior taxation years that are not statute-barred. A "rollback" is only available for BAPAs and MAPAs and not for unilateral APAs. In general, the Competent Authority Division will usually consider a rollback of the APA where the facts and circumstances in the prior taxation years are the same as for the proposed APA term, the appropriate waivers are filed to extend the assessment period for such taxation years, and the prior taxation years have not been selected for audit by the CRA. The foreign tax administration(s) must also agree to a rollback.

## Domestic Remedies to Dispute Resolution

This section will provide a brief overview of: (1) the Minister's obligation to issue an assessment, (2) assessments that are proposed by the CRA at the audit stage, (3) the process of objecting to an assessment, (4) the procedure for appealing an assessment to the Tax Court of Canada, (5) when and how a settlement may be negotiated, and (6) how pursuing remedies domestically relates to seeking assistance under MAP.

### *The issuance of an assessment*

Pursuant to subsection 152(1) of the *ITA*, the Minister of National Revenue must, with all due dispatch, examine a taxpayer's return of income for a taxation year, and assess the tax for the year and the interest and penalties (if any) payable. There is no explicit time limit in the *ITA* for the Minister to discharge this obligation. Rather, as noted, the Minister is obligated to assess "with all due dispatch".

Under subsection 152(4), the Minister may issue either an “assessment” or a “notification that no tax is payable” for the year. The latter is frequently referred to as a “nil assessment”. In practice, the Minister typically issues either an initial assessment or a nil assessment very quickly after examining a taxpayer’s return. This starts the “normal reassessment period” for a taxpayer, which is four years after the day of sending the initial assessment or nil assessment in the case of a mutual fund trust or a corporation other than a Canadian-controlled private corporation, and is three years after the day of sending the initial assessment or nil assessment in all other cases.

The Minister may issue an assessment after the expiry of a taxpayer’s normal reassessment period in the circumstances set out in subsection 152(4). For instance, the Minister may issue an assessment within three years after the expiry of the taxpayer’s normal reassessment period if the assessment is made as a consequence of a transaction involving the taxpayer and a non-resident person with whom the taxpayer was not dealing at arm’s length. The Minister may also make an assessment at any time if the taxpayer has filed within the normal reassessment period a waiver with the Minister.

### ***Assessments proposed at the audit stage***

After an initial assessment or a nil assessment is issued, a taxpayer’s return may be selected by the CRA for an audit. In carrying out its audit function, the CRA has broad powers to request and examine a taxpayer’s books and records, including foreign-based information and documents. On the completion of an audit, if adjustments are proposed, the auditor will normally discuss the adjustments with the taxpayer and issue a written proposal letter to the taxpayer setting out the basis for the CRA’s proposed assessment. The auditor will usually provide the taxpayer with 30 days to provide a written response to the proposal letter. This provides the taxpayer with an opportunity to convince the CRA not to assess or to negotiate a settlement of the issues with the CRA before the assessment is issued.

### ***Objecting to an assessment***

In general, pursuant to subsection 165(1), a taxpayer who wishes to object to an assessment must file a notice of objection within 90 days after the day of sending of the notice of assessment. A taxpayer has no right to appeal a nil assessment. If the taxpayer has reported a loss in a taxation year, the taxpayer may be able to apply to the Minister for a loss determination for the year, thereby giving the taxpayer the same rights of objection and appeal that would have existed had an assessment been issued. If the Minister does not issue a loss determination, the taxpayer may file a notice of objection for a year in which the amount of the taxpayer’s taxable income is affected by the size of the loss that is available to be carried forward.

A notice of objection must set out the reasons for the objection and all relevant facts. More stringent rules apply to objections that are filed by large corporations. Subsection 165(1.11) provides that a notice of objection filed by a large corporation must reasonably describe each issue to be decided, specify the relief sought in respect of each issue (which is generally expressed as the amount of a change in income, taxable income or a loss for the year) and provide facts and reasons relied on in respect of each issue. If a large corporation subsequently appeals the assessment to the Tax Court, subsection 169(2.1) provides that the corporation may only appeal with respect to the issues (and the corresponding relief sought) that were raised by the corporation in compliance with subsection 165(1.11).

### ***Appealing an assessment to the Tax Court of Canada***

A taxpayer may appeal an assessment to the Tax Court by filing a notice of appeal in accordance with the Tax Court of Canada Act. A notice of appeal must set out the material facts, the issues to be decided, the statutory provisions and the reasons relied on, and the relief sought. Within 60 days of being served with the notice of appeal, the Department of Justice (DOJ) must file a reply setting out the facts that are admitted, denied or put in issue, the “assumptions” of fact made by the Minister when making the assessment, the issues



to be decided, the statutory provisions and the reasons relied on, and the relief sought. A taxpayer may file an answer, but this is rarely done. Following the close of pleadings, the parties will exchange documents and complete oral examinations for discovery. At any time, the Tax Court may order, either at the request of a party or on its own initiative, that a settlement conference be held. If a settlement is not reached or no settlement conference is held, the appeal will be set down for hearing.

### ***The impact of pursuing domestic remedies on the availability of MAP***

Where a taxpayer is subjected to taxation not in accordance with a treaty, the taxpayer will normally file a notice of objection to the assessment and also make a request for assistance under the MAP article of the relevant treaty. Alternatively, a taxpayer may decide to first file a notice of objection and pursue discussions with the CRA Appeals branch. If a favourable resolution is not obtained, the taxpayer may then apply for assistance under the MAP. However, a taxpayer may not pursue an objection or appeal and a MAP request simultaneously. As explained in part 4 of this report, while a matter is under competent authority consideration, a notice of objection (or appeal to the Tax Court) must be held in abeyance or the competent authority process may be terminated.

## **Bilateral Mechanisms for Dispute Resolution**

### ***MAP article***

All of Canada's tax treaties have a MAP article. The MAP article that is included in the majority of Canada's treaties departs from the OECD model in many important respects, particularly with respect to time limits. Article 25 of the OECD model convention provides that a case must be presented to the competent authority within three years from the first notification of the action resulting in taxation not in accordance with the treaty. In approximately 72 of Canada's treaties, the time limit for presenting a case is two years. In a small number of Canada's treaties, either no time limit is

specified or the time limit is three years (as in the OECD model). In the case of Canada's treaty with the United States, a case must be presented to the other country within six years from the end of the relevant taxation year.

### ***MAP requests***

The Competent Authority Division of the CRA assists taxpayers in resolving cases under the MAP article of Canada's treaties. To request competent authority assistance, a taxpayer must first notify the Canadian competent authority of an action of a treaty country that has resulted or will result in taxation not in accordance with the relevant treaty. This notification must take place within the time period specified in the relevant treaty. In the case of a Canadian-initiated adjustment, a taxpayer may notify the competent authority before receiving an assessment provided that it is probable, and not just possible, that taxation not in accordance with a treaty will result. However, the MAP process will not commence until an assessment is issued and a formal request for assistance is made.

The next step is for the taxpayer to submit an application to the competent authority requesting assistance under the MAP. There is no prescribed application form for this purpose, but the taxpayer is required to provide certain information, including the identity of the Canadian taxpayer, a summary of the facts and an analysis of the issues and, in transfer pricing cases, a copy of the taxpayer's contemporaneous documentation prepared in accordance with subsection 247(4) of the *ITA*. There is no fee for processing a MAP request. However, in practice, particularly in situations involving non-transfer pricing cases, the notification and application steps are done in one step.

### **Interest and Penalties**

The Canadian competent authority will not negotiate the cancellation or waiver of any interest and penalties that have been assessed. In the case of a transfer pricing penalty assessed under subsection 247(3) of the *ITA*, the CRA will adjust the amount of the penalty assessed if there is a change in the CRA's transfer pricing adjustments as a result of negotiations between the competent



authorities. In the case of interest, the CRA will consider a request by a taxpayer to waive or cancel interest that accrues while a MAP request is outstanding. The basis for such interest relief is that the time needed to resolve the issue may be largely outside the control of the taxpayer. Such requests are considered on a case-by-case basis.

## Arbitration

Canada has mandatory arbitration provisions in a number of its tax treaties. However, to date, Canada's experience with arbitration cases arises largely with MAP cases under its treaty with the United States. Accordingly, the discussion in this section will focus on the rules and procedures governing arbitration proceedings under the Canada-United States tax treaty.

Article XXVI(6) of the Canada-United States treaty provides that, where the competent authorities have endeavoured but are unable to reach an agreement in a case, the case shall be resolved through arbitration provided certain requirements are met. In general, these requirements are: (a) tax returns have been filed with at least one of the contracting states for the relevant taxation year(s); (b) either (i) the case involves an article of the treaty that the competent authorities have agreed shall be subject to arbitration and is not a case that the competent authorities agree is not suitable for determination by arbitration; or (ii) the competent authorities agree that the case is suitable for determination by arbitration; and (c) the taxpayers agree prior to the beginning of the arbitration process not to disclose any information received in connection with the arbitration, other than the arbitration decision. In general, the fees and expenses associated with arbitration are not charged to the affected taxpayer(s) and instead are borne equally by the competent authorities.

### *Time for commencing arbitration*

Pursuant to article XXVI(7)(c), the arbitration process is generally required to begin on the later of (i) two years after the "commencement date", unless both competent authorities have previously agreed to a different date (i.e., the competent authorities may agree to accelerate or defer

arbitration), and (ii) the date on which the non-disclosure agreements of the affected taxpayers and their representatives have been received by both competent authorities. In general, the "commencement date" is the earliest date on which the information necessary to undertake a substantive review under the MAP has been received by both competent authorities. Where the arbitration involves an issue related to an APA, the "commencement date" is the earlier of (i) the date the competent authorities have exchanged position papers, and (ii) two years from the earliest date on which the information necessary to process the MAP has been received by both competent authorities.

### *The arbitration board*

The arbitration board is composed of three members. Each competent authority appoints one member to the board, who must be impartial and independent and have significant international tax experience. The two members then choose the third member (who will act as chair) generally from a list of qualified persons that have been identified and agreed to by the competent authorities.

## Courts versus MAP

As noted above, where a taxpayer is subjected to taxation not in accordance with a treaty, the taxpayer will normally file a notice of objection to the assessment and also make a request for assistance under the MAP article of the relevant treaty. The main reasons a taxpayer will file a notice of objection in addition to making a MAP request are: (i) to prevent the relevant taxation year from becoming statute-barred, thereby ensuring that any agreement reached under MAP may be implemented; (ii) to allow the taxpayer to pursue a possible resolution of the issues with the CRA Appeals branch or in the Tax Court, if no agreement (or an agreement not considered acceptable by the taxpayer) is reached under MAP; and (iii) to suspend collection action by the CRA on a portion or all of the assessed amount (the issue of collection is discussed in further detail below).





## Conclusion

As noted above there are many ways that taxpayers can manage disputes (or potential disputes) arising from their transfer pricing and international transactions. In some cases a taxpayer may prefer to obtain approval prior to entering into the transaction (i.e. through an APA or ruling) and in other cases a disagreement may arise with either the Canadian government or the government of the other country which is party to the transaction. In either case there are several ways to manage the situation and to ultimately avoid double taxation.



# CONTACTS





## DALE HILL

Partner, Tax Services

T +1 (613) 786-0102  
F +1 (613) 788 3473  
Dale.hill@gowlingwlg.com



## JAMAL HEJAZI, PHD

Chief Economist

T +1 (613)-786-8660  
F +1 (613)-788-3448  
jamal.hejazi@gowlingwlg.com

Dale Hill is the national leader of the Gowling WLG Transfer Pricing and Competent Authority Group. As a partner in the Ottawa office, he works in conjunction with the Firm's National Tax Practice Group to help organizations optimize their global tax position, reduce exposure to unfavourable audit assessments, and eliminate double taxation. Since 1997, and before joining Gowling WLG in 2005, Dale was a manager in the Canada Revenue Agency, responsible for negotiating Audit settlements with foreign countries concerning international tax and transfer pricing adjustments.

Dr. Jamal Hejazi is a senior member of Gowling WLG's Transfer Pricing and Competent Authority team as well as the firm's China Group. Working in conjunction with the firm's Tax Group, Jamal helps organizations optimize their global tax position and reduce exposure to unfavourable audit assessments through proper tax planning and implementation strategies. He has been involved in work for a number of industries including automotive, pharmaceutical, energy, computer software, gaming, manufacturing and services. He also specializes in intangible valuation and has done work for both the technology and biochemical sectors.



## MARK KIRKEY

Partner

T +1 (613)-786-8688  
F +1 (613)-788-3407  
mark.kirkey@gowlingwlg.com



## PIERRE ALARY

Associate, Transfer Pricing & National Tax Group

T +1 (613)-786-0132  
F +1 (613)-788-3570  
pierre.alary@gowlingwlg.com

Mark Kirkey is a partner in Gowling WLG's Ottawa office, practising in the Transfer Pricing and Competent Authority Group. Working in conjunction with the firm's Tax Group, Mark helps organizations optimize their global tax position and reduce exposure to unfavourable audit assessments through proper tax planning and implementation strategies.

Pierre Alary is an associate in Gowling WLG's Ottawa office, practising in the area of taxation law. His practice focuses primarily on tax dispute resolution, international taxation and transfer pricing. He is a member of Gowling WLG's Transfer Pricing and Competent Authority Group.

Pierre has represented a wide variety of clients at the audit and appeals stage of their tax disputes with the Canada Revenue Agency on both domestic and international issues. Pierre's practice covers a wide range of international tax issues such as residence, cross-border employees, e-commerce, withholding tax and permanent establishments.



## **JIM WILSON**

**Partner, Transfer Pricing &  
National Tax Group**

**T** +1 (613)-786-0196

**F** +1 (613)-788-3519

[jim.wilson@gowlingwlg.com](mailto:jim.wilson@gowlingwlg.com)

---

Jim Wilson is a partner in Gowling WLG's Ottawa office, practicing in conjunction with the firm's Transfer Pricing Group and Tax Group. His practice focuses on tax dispute resolution, international taxation and transfer pricing. Jim's tax experience includes 32 years with the Canada Revenue Agency (CRA). During Jim's tenure with CRA as the manager of the International Section in the Income Tax Rulings Directorate, he participated in hundreds of Advanced Income Tax Rulings and Technical Interpretations on a wide range of international tax issues. As a manager with the Canadian Competent Authority Division, Jim was also successful in resolving a number of controversial international double tax cases through successful negotiations with tax authorities around the world.



As multinational organizations expand into global markets at an unprecedented rate, governments around the world are taking notice of the increased risk of fiscal erosion. Due to heightened awareness and enhanced enforcement activities related to transfer pricing, companies need to be mindful of, and compliant with, the requirements of multiple tax administrations if they want to avoid facing material penalties.

The complexity of the transfer pricing rules and the level of documentation required can overwhelm an organization's tax department. Proper planning, however, can position an organization to optimize its tax situation by placing the correct combination of functions, assets and risks in the desired jurisdiction. With our extensive knowledge of the transfer pricing rules and current government policies we can help your company establish favourable and defensible transfer pricing policies in advance of an audit, defend your company's current transfer pricing structure, or develop prospective plans through an Advance Pricing Arrangements. Our professionals have first-hand experience analyzing and negotiating hundreds of competent authority requests and advance pricing arrangements with competent authorities around the world.

Please contact Dale Hill at [Dale.Hill@Gowlingwlg.com](mailto:Dale.Hill@Gowlingwlg.com) or at (613) 314 1699 to discuss how we may be of assistance.



Gowling WLG (Canada) LLP  
[gowlingwlg.com](http://gowlingwlg.com)