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OECD Centre on Tax Policy and Administration
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The Confederation of Swedish Enterprise Comments on the OECD *White Paper on Transfer Pricing Documentation*

Dear Mr. Andrus,

The Confederation of Swedish Enterprise represents some 60,000 companies in Sweden, equivalent to more than 90 per cent of the private sector. We are pleased to respond to the OECD draft *White Paper on Transfer Pricing Documentation*, published on 30 July 2013 (hereafter referred to as "The White Paper").

We have participated in the comments submitted by BIAC. We endorse their comments but would in addition like to highlight the following issues.
We would be supportive of a two tier approach, provided it meets the objectives of real simplification, rather than additional tiers on top of existing complex and differing local requirements. We are concerned that whilst the additional requirements to produce high level "country by country" data and a masterfile (to consolidate information useful to multiple tax authorities) could theoretically reduce the compliance burden, without stricter limitations on the TPD requirements that can and should be included in the local files, there is a significant risk that the local TPD requirements will remain as varied and extensive as they are today. In addition, there is a risk that even the local country data required could increase if tax authorities interpret the entire list of information in Chapter V as a checklist of documents to request, because it appears to include all of the information that tax authorities may currently require for even the most complex of businesses.

We find the reference in The White Paper to the EUTPD somewhat misleading. Many countries have implemented the EUTPD in such a way that either local requirements must be fulfilled OR the common European format may be used. Sweden is a good example in this respect. The White Paper suggests an additive process. This should be made clear.

The link between the work in The White Paper and the work in BEPS needs to be clarified. Action Point 13 in the BEPS report of July 19, 2013 is rather unclear. Is the aim to achieve a high level risk assessment as a tool for audits; to enhance existing TP documentation; or to identify low level of taxation in other countries? We believe it should be to enable a proper high level risk assessment. If it is too identify tax incentives or low level of taxation in other countries, with the aim of levying a compensatory tax, we strongly object. Individual countries tax sovereignty must be respected and another country must not undermine another states deliberate tax policy. Unintended so called double non-taxation is a different matter, but there governments must act in a coordinated manner.

We would like to comment on paragraphs 47, 71 and 72. They all include the need and incentives to undertake audits. In this regard, we would like to emphasise the need for not only businesses but also governments to adhere to rules, regulations and underlying principles in international taxation. It is important to influence the incentive structure of businesses not to deviate from the ALP. It is however equally important to influence the incentives for governments when actual pricing undertaken by businesses should be challenged and when it should not be challenged.

There are few, if any, negative consequences for the tax authorities of a country to question the actual pricing made by businesses. There is of course a negative impact on growth and investment in the country, but often tax authorities do not consider macro-economic consequences in their deliberations and audit strategy. It is however important that governments and their revenue authorities internalize such effects in their day to day operations in the transfer pricing area.

In the enclosed appendix, we outline how the government incentive structure for TP audits could be improved, better taking into account the need for initiating tax audits. The scope in the appendix could easily be extended to OECD countries in a global context.

The Confederation of Swedish Enterprise would also like to comment on paragraph 49. It is of utmost importance for the legitimacy of the tax system and for the tax authorities, that businesses are treated in an open, transparent and equal manner. Small and medium-sized businesses must not face worse treatment than large MNE's.

We would also like to stress the need to review penalties in TP matters (paragraph 54 etc.).Given the complexity of TP transactions and audits, we question the application of penalties pursued by many countries. We believe the OECD could play a vital role in addressing this issue.

The Confederation of Swedish Enterpriser would very much like to continue a constructive dialogue in this area with the OECD and Member States.

On behalf of the Confederation of Swedish Enterprise

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Annex:

A New Method for Resolving Transfer Pricing Cases in the EU, SvSkT 2003:10 pp. 783- 787

By Krister Andersson

1. Background

International transfer pricing (TP) is an issue of strategic importance for Multinational enterprises (MNEs). TP examinations usually cover a number of business years and may lead to large unilateral tax adjustments. To avoid double taxation, the tax authorities of the other State must agree to make a corresponding adjustment. In many cases double taxation remains and even if single taxation is eventually achieved, the costs involved for legal assistance and early, and excessive, tax payments are often substantial.

Besides the financial factors, an unresolved transfer pricing dispute has other negative effects for the business of the enterprise: it creates uncertainty for the tax years that have not yet been audited, and it can have a negative impact on pending investment decisions. In addition, the conflict may become a matter of public knowledge, which in turn can have adverse effects on the reputation of the company or group, etc.

An enterprise that is confronted with TP adjustments in a country has several choices: it can accept the adjustments, it can discuss the result with the tax authority, it can object to the final assessment before the local tax courts, it can request that a Mutual Agreement Procedure (MAP) is introduced based on a tax treaty or, within Europe, it can proceed under the European Arbitration Convention.

A recent favourable innovation in the MAP process has been the use of MAPs in connection with Advance Pricing Agreements (APAs) and other procedures that MNEs can utilize to resolve transfer pricing matters before disputes arise.

However, there are a multitude of reasons why MNEs find the MAP unsatisfactory:

1. – it is time-consuming
2. – it is costly and resource-consuming
3. – it is not an open procedure
4. – it does not oblige tax authorities to come to a solution
5. – there are other weaknesses of the existing MAP.(1)

2. An illustration of the tax problem at hand

Since transfer pricing disputes involve an increase in assessed taxes in one country, and lower taxes in another, we use a stylized example. Consider a MNE active in only two countries, A and B. The corporate tax rate is 30 % in country A and 40 % in country B. The total group profit is 150, with 100 in country A and the remaining 50 in country B. The total tax liability is then 50 (se table 1):

Table 1:

	A	B	Total
Profit	100	50	150
Tax rate %	30 %	40 %	
Tax payment	30	20	
Total taxes			50

However, assume that country B claims that the net profit should be 75 in country B (see table 2).

Table 2:

	A	B	Total
Profit	75	75	150
Tax rate %	30 %	40 %	
Tax payment	22,5	30	
Total taxes			52,5

Assuming that country B is correct, the total tax liability would increase from 50 to 52.5. However, the enterprise would most probably face a tax bill of 30 in country A and also 30 in country B, i.e. of 60.

3. A solution to the problem

A possible approach to solving this situation could be for the MNE to pay 2.5 in additional taxes. That would represent the ”worst case” without any double taxation. Country B, however, should not be the recipient of the extra tax payment. Instead, the payment should be made to an independent institution or bank, like the EIB, ECB or BIS.

The countries would then have to settle the tax dispute between themselves. They would have incentives to reach an agreement. There would be a potential extra tax revenue to be obtained from the MNE through the tax prepaid to the financial institution.

Assume that country B has reasons to be dissatisfied with the transfer pricing used by the MNE and that the final outcome between country A and B shows that the net profit in country A should be reduced from 100 to 90. The tax situation would then be the following (see table 3):

Table 3:

	A	B	Total
Profit	90	60	150
Tax rate %	30 %	40 %	
Tax payment	27	24	
Total taxes			51

The MNE has by now paid 52.5 and would therefore be repaid the difference between 52.5 and 51, i.e. 1.5. Since the MNE considered the appropriate split to be 100 in country A versus 50 in country B, but has paid 2,5 in extra taxes, it has an incentive to co-operate and get a tax refund.

It could perhaps be optional for the MNE to provide further information in the transfer pricing dispute between the two countries. In such a case, however, if the MNE chose not to cooperate, it should not be given any tax refund it the countries agreed in such a way that the final tax bill were below 52.5.

What will the happen if it is the low tax country that challenges the transfer pricing arrangement? Then the situation for the MNE will be (see table 4):

Table 4:

	A	B	Total
Profit	125	25	150
Tax rate %	30 %	40 %	
Tax payment	37,5	10	
Total taxes			47,5

Taxes paid are still 50 and therefore no extra tax payment is due. In this case, there is accordingly no extra incentive for countries to agree, but the MNE will not have to face an extra tax payment and the extent of double taxation is therefore limited.(2)

However, if the countries agree that the correct allocation should have been 110 in country A (instead of 100) and 40 in country B, the following tax liability situation emerges (see table 5):

Table 5:

	A	B	Total
Profit	110	40	150
Tax rate %	30 %	40 %	
Tax payment	33	16	
Total taxes			49

Country B has to pay 3 to country A and the MNE should get 1.(3)

4. Concluding remarks

The purpose of proper transfer pricing rules is to avoid double taxation. However, many corporations face double taxation and countries have limited interest in achieving a correct and timely decision. It is therefore important to find new approaches to how to avoid the risk of double taxation, since it hinders economic growth.

Within the European Union, the European Arbitration Convention tries to resolve tax disputes between countries. If would promote the single market with its objectives of achieving the Lisbon Accord if double taxation in transfer pricing issues was mitigated as much as possible. I therefore propose that the responsibility for settling transfer pricing disputes within the EU is lifted from the corporate level and handled at the level where the claims are made, i.e. at the Member State level. The method outlined above could perhaps serve as a starting point for such a discussion.

Footnotes

1 On October 31, 2003, BIAC presented a discussion draft, ”Mutual Agreement Procedure in Transfer Pricing: Practical Experiences of Multinational Enterprises”, with the following additional reasons why the MAP is unsatisfactory:

2 Since the MNE has made another assessment, it agrees with the higher tax payment made and can not possibly consider itself being faced with double taxation.

3 If it is made optional to provide information, and if the MNE has chosen not to co-operate, country B will end up with 17 rather than 16 in final tax revenue.