PT CONSULTORES

Santiago, April 11th, 2014

Messrs Task Force on Tax & Development-OECD

RE: Comments on “Transfer Pricing Comparability Data and Developing Countries”, document published on 11th March, 2014

I. Introduction

We welcome the opportunity to comment on “Transfer Pricing Comparability Data and Developing Countries” report published by the OECD on 11th March 2014 and prepared by the OECD Secretariat in conjunction with the Task Force on Tax and Development. Our comments will be about each of the possible actions specified in the report.

II. Comments about possibe actions

2.1. Expanding access to data sources for comparables

In order to evaluate the effect of expanding access to data sources (e.g. public information and/or commercial databases) is important to consider previously a cost-benefit analysis. We have to consider implicit costs in: (i) develop and encourage initiatives in developing countries to set mandatory filing of financial information to regulation entities[1]. Nevertheless, nothing guarantees that this measure would improve quality of information despite of differences in local GAAPs (for example, in LATAM there is still countries where for fiscal purposes neither IASB (IFRS) nor FASB are useful for tax/transfer pricing filings but hybrid systems called “tax purposes statements[2]”); and (ii) public information as an input for the application of CUP method not always gather all the necessary features to achieve reasonable comparability (we could dispose of same kind of transactions but face different market conditions or commercial momentum and opportunity), without considering that many companies in developing countries conduct their transactions only with its related parties and/or with reduced functions and hence, profitability and margins[3].

Initiatives in LATAM and some african countries regarding the so call “sixth method” certainly reflect the concern about availability and affordable price references. Most

---

[1] On April 27, 2012 the Peruvian regulator (SMV formerly known as CONASEV), issued resolution N° 011-2012-SMV/01 by which non-public filers in the local Stock Market must prepare financial statements under IFRS as issued by the IASB. This resolution is applicable in phases as follows: (a) companies with total assets and/or net revenues higher than US$ 40 million should have audited financial statements prepared under IFRS as issued by IASB for fiscal years ended December 31, 2013 with early application being optional. (b) companies with total assets and/or net revenues higher than US$ 4 million should have audited financial statements prepared under IFRS as issued by IASB for fiscal years ended December 31, 2014 with early application being optional.This effort aims to a local stock exchange deepening and to provide opportunities to raise equity capital.

[2] Basically, they differ in currency correction, assets and inventory valuation method and operating expenses deductibility.

[3] See as reference http://www.taxjustice.net/wp-content/uploads/2013/04/Durst_2010_developing_countries.pdf as a good approach to the problem.

important despite the fact that this OECD report considers as "… primary benefit (…) a clear and certain benchmark for transactions between related parties in the specified commodities is in place..." also is clear that differences in raw materials according source market and local legislations (e.g. Perú´s tax administration published law decree for mandatory fiscal year 2013 on called "sixth method" application but regulations about that law not yet. Hence the application of these "improved schemes" not regulated could mislead to interpretations where specific circumstances not taken into consideration[4]). This application of wrong called "sixth method" should be restricted to determine presumed elusion schemes with low tax jurisdictions rather than to set "reference market prices".

The brazilian experience regarding their hybrid system of safe harbours and convergence to OECD rules could be a solution. Brazilian methodology is far simpler than the OECD Transfer Pricing Guidelines. It is worth mentioning that the UN Manual on Transfer Pricing for Developing Countries follows the OECD Guidelines, however, it brings four country practices (Brazil, China, India and South Africa), which may be very useful too.

Another important issue is referred to the discretion of the tax authorities in the use of secret/hidden comparables. Tax regulation in some developed countries allows the use of secret comparables but this reality in developing countries only could lead to a potential abuse of regulation power by tax administrations, mainly due to differences in market maturity. Known is the fact that even within the same industry can coexist different levels of margins, and be equally at market value.

2.2. More effective use of data sources for comparables

Even in the case that accessibility of data sources is achieved, the new concern will be about their correct of more effective use. The most effective use implies that staff (both taxpayer and tax administration) are highly trained in determining aspects of comparability, which can be subjective and often tend to generate disputes. This also may lead to a growth in litigations and generate more bureaucracy, vulnerable to corruption, subject to political pressures or worst yet, highly trained public personnel shifting to private sector.

One suggested solution is to involve both sides in mutual agreement programs or advanced pricing agreements in order to avoid subjective costs of search and

[4] Anyway, between argentine and brazilian "sixth method", the latter with its safe harbour specifications would be more useful, transparent and recommended.

achievement of reasonable comparability. It is also true that these programs may involve high monitoring and coordination costs but the subsequent benefits will be for the taxpayer. One example of application of APA initiatives is referred to tourism and hotel sector in Dominican Republic[5] where the National Association of Hotels and Restaurants (ASONAHORES) and Dominican Tax Administration (DGII) set regulations about advanced pricing agreement and settlement of margins range (20%-25%) for tourism companies with its related parties abroad.

2.3. Approaches to reduce reliance on direct comparables

Clearly the way is being defined in taking a flexible approach and consider that even though the methods reported in the OECD Guidelines are a theoretical approximation in determining compliance of the arm's length principle, should also be considered ad hoc elements according to the different countries realities. It will be acceptable the approach to safe harbors and customize the type of common transactions performed.

An effort here will be the Country-by-Country (CbC) reporting template but with previous and necessary aggregation of some consolidated accounts. If initiatives regarding to obtain more detailed account information in the CbC reporting have success, hence the BEPS Project will be more feasible to deploy in developing countries.

Although the OCDE report calls the use of the wrong named “sixth method”, we insist that the way it is being regulated in some LATAM countries is not the best and rather than means a step forward in many instances is a step back.

2.4. Advance pricing agreements and mutual agreement proceedings

Nevertheless APA and MPA proceedings entails considerable costs when coordinating and monitoring transfer pricing margins and market conditions, these programs loom as a standardized solution both for taxpayer and tax administrations. For the first because it is posible to set and establish business predictability and for the latter against any –if exists- aggresive fiscal planning schemes[6] (final objetive of BEPS Project).

In that sense, it is importante to encourage the review of country approaches and experiences with respect to APA deployment programs as well as experiences with

[5] See www.dgii.gov.do

[6] See http://www.hsgac.senate.gov/subcommittees/investigations/hearings/caterpillars-offshore-tax-strategy

litigations and transfer pricing disputes in order to update and improve tax systems in developing countries.

III. Conclusions

After a brief review of the document, our findings and considerations:

3.1. The document fulfills in mention the main problems of the lack of comparability in developing countries. From LATAM point of view there´s still some pending details but is a first step to states differences in the transfer pricing practice. It is not necessarily the lack of information and/or accessing this, but available data does not prove what is looked for. In this regard, it is recommended to find out ways to fast convergence to programs as BEPS and brazilian experiences to avoid the hard learning of the developed countries.

3.2. The objective is not only access to more information, but the existing is sufficiently standardized to be used as reference by developing countries.

3.3. Dominican experience is also to consider when assessing implementation costs od advanced pricing agreements or mutual agreement procedures. It is more feasible to set this programs in a first stage with specific sectors, preferably with the more dynamism in the local economy. Then a second stage will consider related clusters.

3.4. Direct reliance on a perfect compability is an illusion and this is seen most clearly in developing countries. We should expect similar systems to brazilian experience which entails profit margins determined and regulated by law. Hence developing countries will be able to benefit from predictability and for this countries, predictability will mean tax efficiency.

3.5. APA and MPA programs despite its entailed costs will be in conjunction with BEPS programa an early warning system against tax litigations and problems still observed in developed countries referred to aggressive fiscal planning.

Yours sincerely,

Viviana Morales Morales
vmorales@ptconsultores.cl
Partner

Marcos Rivera Montoya
mrivera@ptconsultores.cl
Transfer Pricing Manager