

I appreciate the opportunity to comment on the OECD's White Paper on Transfer Pricing Documentation that was issued on 30 July 2013. I am commenting in my personal capacity as a tax lawyer with more than 25 years of experience which includes transfer pricing projects (from conception to implementation, to documentation and to defense) in Asia, Australia, Europe and North America.

I agree with the OECD that transfer pricing documentation has become one of the top tax compliance priorities of a multinational business. I agree that business feels overburdened by the divergent local documentation rules. I agree that the compliance burden and costs for taxpayers can be substantial. However, I do not agree with the OECD's suggested course of action.

FALSE PREMISE

In paragraph 46 of the white paper, the white paper identifies three reasons why government requires the creation and submission of transfer pricing documentation.

One is ensure that taxpayers have given appropriate consideration to transfer pricing requirement in establishing transfer prices in transactions with related parties. This explanation seems reasonable and may be the underlying reason why the United States began to require transfer pricing documentation.

A second is to provide tax authorities with information to conduct an informed transfer pricing risk assessment. Once again this explanation seems reasonable and the number of countries adopting a risk assessment approach is steadily increased.

The third was to provide tax authorities with all the information they require in order to conduct a thorough audit of transfer pricing. After working in transfer pricing matters for over 20 years, I cannot recall a single tax professional who considered transfer pricing documentation to be the appropriate documentation for a thorough tax audit. A risk assessment yes, but a transfer pricing audit, no.

A transfer pricing audit is a dynamic and interactive process. The OECD white paper acknowledges the importance of facts and circumstances by reserving the right for tax authorities to seek additional documentation and information if the tax authorities believe such information may be relevant. The false premise that transfer pricing documentation should be the end all and be all documentation for a thorough transfer pricing audit would substantially increase the burden on taxpayers of trying to anticipate and answer in advance every question that a tax authority may ask. This is not reasonable.

The white paper should be modified to clarify and confirm that transfer pricing documentation might be suitable for a risk assessment but that transfer pricing documentation is not the appropriate basis for a thorough tax audit.

UNSTEADY FOUNDATION

The OECD's recommendation is built upon two pillars. The first is the European Union Guidance on Transfer Pricing Documentation. The second is the Pacific Association of Tax Administrators Documentation Package. While the white paper acknowledges the deficiency and ineffectiveness of both pillars, the OECD then goes on to build upon these unsteady pillars.

In regard to the European Union Guidance on Transfer Pricing documentation, in paragraph 28 of the white paper, the OECD clearly recognizes the fact that numerous taxpayers had chosen not to implement the optional system. Despite this caution, the OECD wants to immediately go farther and make the two elements (e.g., a masterfile and country specific documentation) of the EU optional system mandatory on a global basis. It would have been more prudent for the OECD to wait until the EU system had become a commonly adopted practice in the European Union before trying to expand the application of a similar system globally.

In its rush to coordinate global transfer pricing documentation the OECD's white paper ignores fundamental facts that underlie the European Union Guidance on Transfer Pricing Documentation.

First, and most importantly, the EU guidelines were adopted after several years of consultation and discussion directly among the concerned parties (e.g., tax authorities, businesses and tax professionals). The OECD's approach is a clear one side approach; a discussion only with the tax authorities. The OECD's white paper was prepared and issued without any reasonable attempt to gather comment or input from business and tax professionals.

Second, while the business environment, economic, legal principles, etc. in the European Union vary from country to country, there is convergence in many of the countries in the European Union in the effort to create a common market. A solution that may be relevant and useful in such an environment may not be sensible or practical on a global basis where the differences and disparities are much more significant.

In regard to the Pacific Association of Tax Administrators Documentation Package, in paragraph 35, the OECD's white paper acknowledges that adoption of the PATA documentation package has been fairly limited. The white paper then continues to recognize that this might be because the PATA documentation package demands everything that is required in the documentation requirements of each of the four member country.

With this background in mind, the OECD's white paper then goes on to make the same mistake that PATA made. Stated more clearly, the recommendations contained in the white paper appear to be nothing more than a compilation of every conceivable document that all the tax authorities could think of in auditing a taxpayer's transfer pricing policy. Even with this, the OECD white paper reserves the right for any tax authority to request whatever additional documentation that it deems might be relevant.

The OECD white paper does not appear to contain any hint of any real coordination or any real simplification. In article 42 of the white paper, the OECD acknowledges that "Other international efforts premised on compiling every participating country's documentation demands into one omnibus set of requirements provide little in the way of simplification and have therefore not

been widely used by taxpayers.” The current version of the work paper offers little in the way of simplification. Instead, the masterfile contained in Table 1 resembles more the type of documentation that might be required in a thorough tax audit or in the application for a bilateral APA.

UNBALANCED APPROACH

In paragraph 83 of the white paper, the OECD applauds itself for offering a proposal for transfer pricing documentation that offers a balanced approach. A taxpayer may have to search hard to find anything in the white paper that is a true indication of balance.

There has been no balance in the effort to prepare and issue the white paper. While there has been extensive input from tax authorities, in paragraph 39 of the white paper, the OECD acknowledges that the involvement by business has been limited to a conversation with a few members of BIAC. The white paper acknowledges that the conversations were neither comprehensive nor scientific.

Evidence of the lack of balance inherent in the OECD’s white paper can be found in other parts of the paper.

In paragraph 47, the white paper states that “tax administrations operated with limited resources.” This statement disregards the fact that taxpayer may also operate with limited resources.

The one sided approach inherent in the white paper can also be found in paragraph 72 where the white paper states that “It seems possible for businesses to provide without undue burden” additional information that no tax authority in the world currently requires. It appears inconsistent for the white paper to ask a reader to pity the poor tax inspector with limited resources yet ask taxpayers for ever more information since it is not an undue burden despite the fact that taxpayers may also have limited resources.

SUGGESTIONS FOR FUTHER CONSIDERATION

As the OECD continues consideration and work on transfer pricing documentation, one might suggest it consider other points.

First, the OECD should discourage the use of secret comparable. Despite denials, the use of secret comparable continues. The OECD should require tax authorities to disclose the comparable they use when an adjustment is proposed. This transparency by the tax authorities would make the audit process more transparent and give the taxpayer a fair opportunity to explain why the benchmark used by a tax authority may not be comparable.

Second, the OECD should continue tax authorities to create and implement a transparent advance ruling system where rulings are made public. While there has been some progress in this area, much greater progress is required.

Third, the OECD should continue to encourage tax authorities to appropriately staff their competent authorities so that mutual agreement proceedings can be completed in a timely and

orderly manner. One can envision a global environment where transfer pricing disputes become more common and more divisive. Steps should be taken now to provide an appropriate forum to resolving disputes.

CLOSING

In closing, I would again like to thank the OECD for providing the opportunity to comment on the white paper. My hope is that the OECD will now offer a meaningful opportunity for business to engage in a meaningful debate and discussion that will lead to real coordination and simplification of transfer pricing documentation.

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