

South African Transfer Pricing System

Presenter:

GERDI VAN DER WESTHUYSEN

STATUTORY POSITION

- South Africa's transfer pricing legislation (section 31 of the Income Tax Act) has been in effect since 1995 - earnest TP audit activity started around 8 years ago.
- Adopted the arm's length principle (ALP).
- Reliance placed on OECD TPG for guidance on application of ALP – OECD TPG not incorporated in section 31;

STATUTORY POSITION

- South Africa has recently amended section 31 and the amendments came into effect for years of assessment commencing on or after 1 April 2012.
- The primary driver for change was to amend s31(2) to bring its wording more in line with Article 9 of the MTC.
- The time was also opportune to change the old thin capitalisation provisions which did not embody the ALP and had more of an anti-avoidance flavour and thus had to be changed.

STATUTORY POSITION

In summary, the new section 31:

- is wider in scope;
- wording of new legislation aligned to Article 9 of the MTC – now focus on profits rather than the price
- requires the taxpayer to calculate its taxable income on an arm's length basis as opposed to the Commissioner making that determination;
- changes the test for thin capitalisation to an arm's length test
- specifically precludes downward adjustments

CHALLENGES

The challenges South Africa faces in effectively concluding transfer pricing audits include:

- Lack of resources and expertise;
- Difficulty in applying ALP due to lack of local comparables/ databases;
- Difficulty in obtaining relevant information on the offshore entity that is party to the transaction;

CHALLENGES

- “Bullying” and delaying tactics of taxpayers in co-operating and providing relevant information;
- The “power” and access of MNE’s to advisors;
- Extremely challenging to “measure” the tax gap due to transfer pricing

IMPROVEMENT TO OECD TPG

- Helpful if guidance could be provided on;
 - How to effectively administer the ALP in absence of local databases/ comparables;
 - Use of other methods as potential solution to resolve transfer pricing dispute;
- Helpful if more practical examples are provided, e.g. recognition and compensation for local marketing intangibles.
- OECD TPG takes too legalistic approach in applying ALP – needs to address commercial reality/ substance

WOULD BRAZILIAN TP SYSTEM BE APPROPRIATE FOR SOUTH AFRICA

- South Africa would need to determine the strength and weakness of the Brazilian TP approach relative to the SA economy e.g.
 - Upside: can alleviate the resource and admin burden and comparables problem
 - Downside: possible hindrance to direct foreign investment, economic growth and job creation.

Questions?