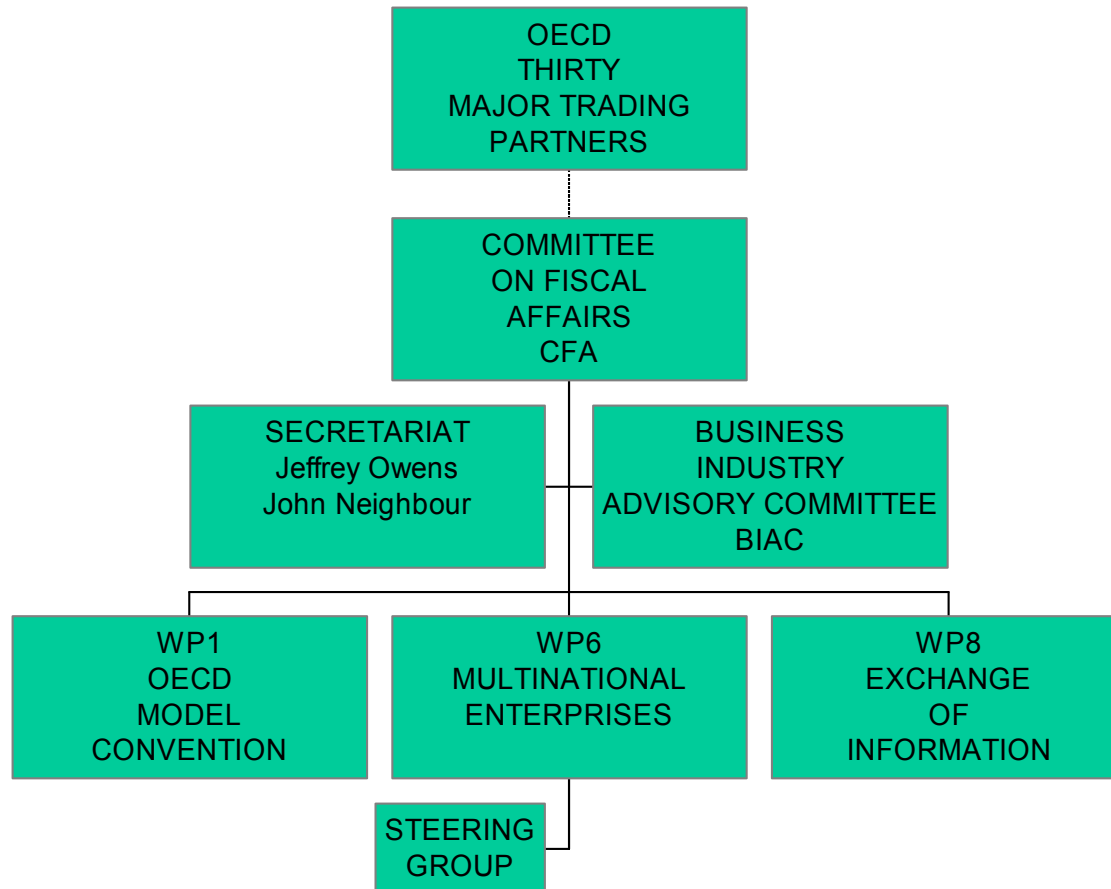


OECD TRANSFER PRICING
GUIDELINES FOR
MULTINATIONAL ENTERPRISES
AND TAX ADMINISTRATIONS

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OECD – WHERE TRANSFER PRICING FITS IN



MNE's AND GLOBAL ECONOMY



- Greater portion of world economy housed within MNE's.
- Problem of dividing tax jurisdiction over internal value-added within MNE, before realization in 3d party transactions.

MNE's AND GLOBAL ECONOMY



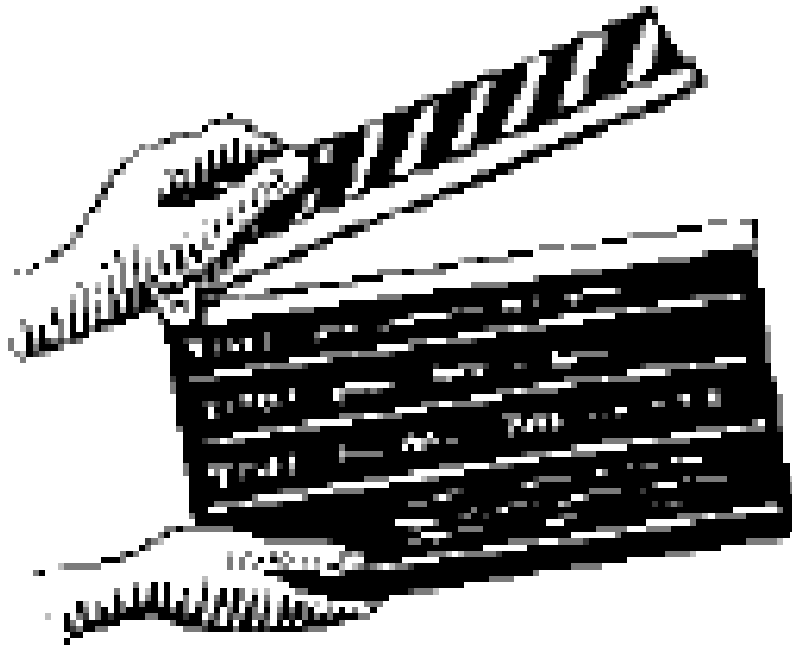
- Decades old commitment to resolve on the basis of the arm's length principle.
- Art. 9 in virtually all of our 53 income tax treaties, and other OECD bilateral income tax treaties.

INTERNATIONAL CONSENSUS



- OECD Transfer Pricing Guidelines are a watershed.
- Adopt arm's length principle (Par. 1.13 – 1.14).
- Reject formulary apportionment (Par. 3.74).

ROLE OF TP GUIDELINES



- Resolution of Art. 9 cases in CA (Preface Par. 17; Treasury Press Release, 7/28/95).
- Domestic law model
- ALP guidance.
- T/P responsibility to document ALP.

GUIDANCE ON APPLICATION OF ALP



- Functional analysis and comparability (Par. 1.15 et seq.)
- Property or services transferred
- Functions, assets, risks
- Contractual terms
- Economic circumstances
- Business strategies

GUIDANCE ON APPLICATION OF ALP



- Selection of TPM
- Best estimation of an arm's length price (Par. 1.69).
- Traditional transaction methods – CUP, RP, CP
- Preferable if quality data (Par. 2.49).

SELECTION OF TPM



- Transactional profit methods – P/S and TNMM, “last resort”
- If traditional method cannot be reliably applied alone/at all
- Or, by agreement
- See Pars. 3.50-51

SELECTION OF TPM



- Methods not described
- Provided satisfy ALP
- See Par. 1.68

ARM'S LENGTH RANGE



- Transfer pricing not an exact science
- ALR, relatively equal reliable values
- Inside ALR, no adjustment
- Outside ALR, adjust to most appropriate point (Pars. 1.45-48)

RECOGNITION OF TRANSACTIONS



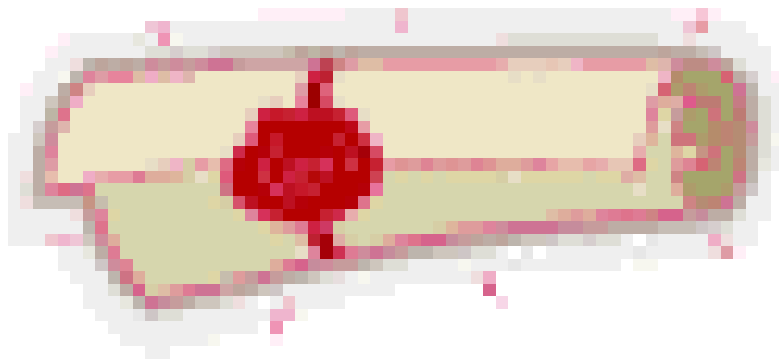
- CONDUCT MUST CONFORM TO TERMS
- DEDUCE UNWRITTEN TERMS BASED ON CONDUCT AND ECONOMIC PRINCIPLES

RECOGNITION OF TRANSACTIONS



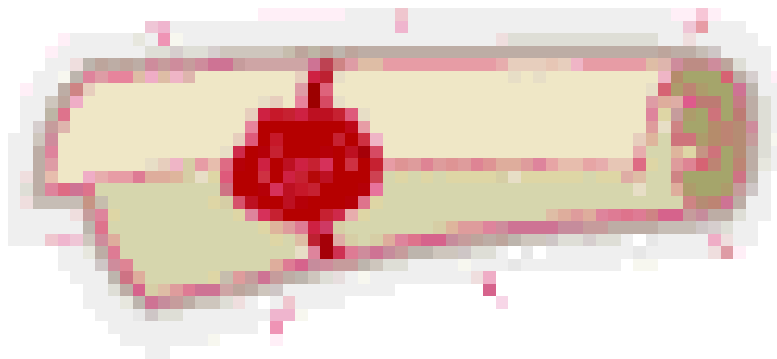
- Recognize actual transactions, unless
- Substance different than form
- Tax administration impeded and not arm's length overall
- Pars. 1.28-29, 1.37

GUIDANCE ON INTANGIBLE PROPERTY



- Trade or marketing
- Bundling or “packaging” with other items (Pars. 1.42-43, 6.17-18)
- Cost and value, no necessary link (Par. 6.27)

GUIDANCE ON INTANGIBLE PROPERTY



- ALP where value is highly uncertain (compare CWI)
- Projections, price adjustment clauses, renegotiation
- Pars. 6.28-35

GUIDANCE ON INTANGIBLE PROPERTY



- Marketing services vs. intangible owner
- Who bears expense
- Extraordinary marketing expenses may justify return
- Product quality role
- Pars. 6.36-39

INTRA-GROUP SERVICES



- Independent enterprise willing to pay for, or perform for itself (compare benefit test) Par. 7.6
- Shareholder activity not justify charge
- Direct charge vs. allocation

INTRA-GROUP SERVICES



- Cost vs. markup
- ALP not always profit – Par. 7.33
- Practical reasons of tax administration may allow allocation of cost of services in appropriate cases – Par. 7.37

COST CONTRIBUTION ARRANGEMENTS



- Sharing costs/risks of acquiring assets, services, rights
- ALP - consistency of contribution share and expected benefits share
- Participant must reasonably expect to benefit
- Pars. 8.3-12

COST CONTRIBUTION ARRANGEMENTS



- Contribution value – cost vs. market (Par. 8.15)
- Allocation keys (Par. 8.19)
- Balancing and buy-in payments, not royalty unless only right to use (Pars. 8.23, 8.33)

COST CONTRIBUTION ARRANGEMENTS



- Adjustments normally to balancing payments (Par. 8.27)
- Disregard, e.g., if not reasonable to expect benefit
- Or, if over time contribution and benefit shares diverge (Pars. 8.29-30)

GUIDANCE ON T/P COMPLIANCE WITH ALP



- Reasonable t/p efforts, contemporaneously, to determine if pricing in accord with ALP
- Documentation of –
- Info, factors, method on which pricing is based

DOCUMENTATION



- Including relevant info from foreign affiliates
- Tax authority may obtain to verify ALP compliance
- Prudent business management principles (Pars. 5.3 et seq.)

GUIDANCE ON PENALTIES



- Overall tax compliance system
- Not give incentive to overstate income
- T/P reasonable effort to comply with ALP should mitigate
- Par. 4.18 et seq.

GUIDANCE ON APA's



- Advance determination, e.g., of method, comparables, adjustments, critical assumptions (Par. 4.124)
- Reliability of APA predictions, TPM vs. results (Par. 4.125)

GUIDANCE ON APA's



- Bilateral APA's preferred over unilateral APA's (Pars. 4.131, 4.163)
- Guidelines for Mutual Agreement Procedure (MAP) APA's - Annex

MONITORING



- Transactional profit methods concerns
- Monitor application of TP Guidelines to clarify and update them, as necessary
- Business community input
- Par. 3.55, Annex

ATTRIBUTION OF PROFITS TO PE's



- Working hypothesis
- HO and PE's of single enterprise hypothesized as associated enterprises
- Apply Art. 9 TP Guidelines by analogy to Art. 7

ATTRIBUTION OF PROFITS TO PE's



- Testing the WH
- Banking (Part II), attribution of capital, risk weighting, Basle
- Global trading
- Insurance
- E-tailing, TAG
- Discussion drafts