



Transfer Pricing Pulse – Issue 1

Keeping you up to date on disputes and controversy

Transfer Pricing Pulse provides you with an update on latest developments in the transfer pricing arena from the Organisation for Economic Co-operation and Development (OECD), South African Revenue Services (SARS), foreign revenue authorities, foreign case law and select peer-reviewed articles. To read further on any of the matters listed below, click on the relevant links, or contact the dispute resolution team (details below) for further details.

Highlights

- [Despite COVID-19, the OECD is continuing working on its 2 pillar approach to address the tax challenges arising from the digitalisation of the economy](#)
- [SARS publishes new dispute resolution and map guides](#)

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| <ul style="list-style-type: none">• Recent select transfer pricing case law:<ul style="list-style-type: none">○ Nigeria vs Prime Plastics Nigeria Limited○ France vs SAS Groupe Lagasse Europe |
| <ul style="list-style-type: none">• Selected peer-reviewed articles |

OECD continues to work on 2 pillar approach to address tax challenges from the digitalisation of the economy

On 17 March 2020, the OECD announced a number of precautionary measures in view of the developing coronavirus (COVID-19) pandemic.

- With respect to the OECD's work on the tax challenges arising from the digitalisation of the economy, the OECD confirmed that it continues working full steam on the project and that meetings with delegates are being held remotely.
- All participants continue working towards reaching a political decision on the key components of a multilateral consensus-based solution at the G20/OECD Inclusive Framework on BEPS plenary meeting scheduled for 1-2 July 2020 in Berlin, Germany.

SARS publishes new guide on dispute resolution

On 20 March 2020, the South African Revenue Service (SARS) published a [dispute resolution guide \(Issue 2\)](#) (the Guide). The Guide provides general guidance on the resolution of tax disputes in South Africa.

The Guide deals, *inter alia*, with the following:

- the right to object and appeal;
- reduced assessments and withdrawals of assessments;
- reasons for assessment;
- objections, including the objection procedures;
- appeal against disallowance of objection, including the appeal procedure;
- alternative dispute resolution;
- settlements; and
- extensions of time periods and condonation.

SARS publishes new guide on the mutual agreement procedure

On 20 March 2020, SARS published a guide on [mutual agreement procedures \(MAP\) \(Issue 3\)](#) (the Guide).

The Guide deals, *inter alia*, with the following:

- the legal basis for a MAP;
- instances in which MAPs apply, including instances involving taxation not in accordance with the relevant tax treaty;
- circumstances in which a MAP request may be accepted or denied, including time limits for requesting MAP and time limitation in tax treaties;
- making a MAP request, including the format of a MAP request and minimum information requirements;
- concluding a MAP request; and
- other miscellaneous issues, including issues related to advance pricing arrangement programmes and South Africa's position on MAP arbitration.

Recent select transfer pricing case law

Nigeria vs Prime Plastichem Nigeria Limited

RE: Most appropriate transfer pricing method, most appropriate profit level indicator. [Request access to the full case here](#)

Facts

- Prime Plastichem Nigeria Limited (PPNL), a private limited company which engages in the business of trading in imported plastics and petrochemicals, purchased petrochemical products from its offshore related party, Vinmar Overseas Limited (VOL).
- In 2013, PPNL applied the Comparable Uncontrolled Price (CUP) method in determining whether the pricing with VOL was at arm's length.
- In 2014, due to a lack of comparable data, PPNL applied the Transactional Net Margin Method (TNMM) with an Operating Margin (OM) Profit Level Indicator (PLI) to test the arm's length nature of its affected transaction.

Arguments

Tax authority

In 2016, the Nigerian tax authority reviewed the pricing and disregarded the CUP analysis applied in the 2013 transfer pricing (TP) documentation, as well as the TNMM (OM) analysis applied in the 2014 TP documentation. Instead, the Nigerian tax authorities applied the TNMM with a Gross Margin (GM) PLI to the covered period and issued an additional assessment.

- The application of the GM was based on the functional characteristics of the controlled transaction.
- GM only considers direct trading elements and in this case, the relevant elements are PPNL's sales revenue and its cost of importing products up to the Nigerian ports.
- Applying GM eliminates factors that may introduce distortions arising from different incomes and cost profiles of the comparable entities because GM focuses on the item relating to the controlled transaction.
- Applying OM in this case would have resulted in the inclusion of income and costs that are not relevant to the controlled transaction.
- The OECD TP guidelines provides that the choice of the most appropriate PLI should take account the respective strengths and weaknesses of the various possible PLI's. The appropriateness of the indicator considered must consider the nature of the controlled transaction, particularly the functional analysis and availability of reliable information needed to apply the TNMM.

Taxpayer

- PPNL appealed the tax assessment to the Tax Appeal Tribunal. PPNL averred that the UN Practice Manual on TP for Developing

Countries provides that a TNMM analysis is based on the net return realised.

At issue

- Whether the use of a TNMM for the covered periods was valid in accordance with the Nigerian Transfer Pricing Regulations and the OECD/UN Guidelines.
- Whether Nigerian tax authorities' action of using the GM as the PLI was valid as opposed to PPNL's use of the OM.

Court

- The court held that PPNL did not provide a satisfactory explanation for the use of the CUP in 2013, and was not considered appropriate. The mere fact that the 2013 TP Documentation had shown that Vinmar International Limited (VIL), another related party, supplied petrochemical products to third parties at a similar price as VOL provided to PPNL did not discharge the onus of proving mispricing.
- The court further held that GM was the applicable PLI especially because the tax authorities were able to establish that the GM is in line with best practices and the fact that it also took into account the various factors enumerated by the OECD.

Key takeaways

- The taxpayer should maintain supporting evidence of all analyses performed for TP purposes (be it a CUP or any other method).
- The applicable PLI needs to be selected by considering the various factors enumerated by the OECD.

France vs SAS Groupe Lagasse Europe, (January 2020)

RE: Burden of proof, benefit test, disallowed deduction, service fee. [Access the full case here](#)

Facts

- A French subsidiary, SAS Groupe Lagasse Europe (FrenchCo), of the Canadian Legasse Group had paid service fees to another Canadian Legasse Group company, Gestion Portland Vimy (GPV).
- The services provided concerned assistance and advice in the areas of commercial prospecting and marketing, IT, finance, business development for the subsidiaries of FrenchCo and the general administration.

Arguments

Tax authority

- The French tax authority disallowed the deductibility of certain of FrenchCo's expenses (thereby increasing its income tax liability) due to FrenchCo's inability to show that it in fact received the

relevant services that FrenchCo's foreign holding company (GPV) was charging FrenchCo for.

- The French tax authorities held that there was no benefit to the French subsidiary.

Taxpayer

- FrenchCo has produced the written service agreement between FrenchCo and GPV.
- FrenchCo has also produced invoices issued by GPV relating to services provided for in the service agreement.

At issue

- Whether FrenchCo obtained any benefit in exchange for the service fees paid to GPV.

Court

- FrenchCo was unable to prove that it in fact received services that it was charged for by GPV and which it paid (despite the existence of a written service agreement between FrenchCo and GPV, as well as invoices issued by GPV to FrenchCo for services rendered).
- FrenchCo did not "... provide any element, such as, for example, diaries, meeting minutes, legal acts relating to the management and administration of [FrenchCo] or more generally any other document relating to the services in question, which would be such as to justify their actual performance."
- Without proving the existence of services rendered for the benefit of FrenchCo's subsidiary by GPV and the assumption of responsibility of the cost of such services by FrenchCo, the existence of a real counterpart to the sums paid by FrenchCo to GPV cannot be regarded as demonstrated.

Key takeaway:

- Clients need to document and retain documentary evidence of the benefit received from related party service providers. Written agreements and invoices may not be sufficient for this purpose. Diaries, meeting minutes, legal acts relating to the services or more generally any other document relating to the services in question, which would be such as to justify their actual performance, would be required.

Key contacts

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