



Transfer Pricing Pulse – Issue II

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, as well as select local and foreign case law. 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

- [SARS publishes Draft Taxation Laws Amendment Bill 2020](#)
- [The Australian Tax Office's guidance in respect of COVID-19 related considerations for transfer pricing](#)

- [Recent select transfer pricing case law:](#)
 - [Adecco vs Danish Revenue Authority](#)

SARS publishes Draft Taxation Laws Amendment Bill 2020

The South African Revenue Service (SARS) has published the Draft TLAB 2020, which is open for public comment until 31 August 2020. Two proposed amendments pertaining to South Africa's transfer pricing legislation are mentioned below:

Refining the scope of TP rules applicable to Controlled Foreign Companies (CFCs):

- An amendment is proposed to section 31(2)(b)(ii) in order to address the situation where there is a tax benefit derived by a South African resident entity from a transaction between its CFC and another foreign connected person. In terms of the proposed revised wording, section 31(2) will apply to the SA resident entity even though it is not a party to that transaction. The change could pull all transactions between CFCs and other offshore entities into the local file compliance obligation.

Postponement to extending the definition of "affected transaction":

- A further postponement of the amendment to the definition of "affected transaction" to include transactions between "associated enterprises" has been proposed. The amendment is proposed to become effective on 1 January 2022 instead of 1 January 2021.

The draft bill can be accessed [here](#)

The Australian Tax Office's guidance in respect of COVID-19 related considerations for transfer pricing

The Australian Tax Office (ATO) published guidance (the Guidance) that aims to assist those economically affected by the COVID-19 pandemic when preparing documentation to support the arm's length nature of their transfer pricing arrangements.

The guidance acknowledges that analyses of comparable company benchmarking, through the application of the Transactional Net Margin method (TNMM) method, may not reliably support arm's length outcomes of continuing transfer pricing arrangements where they are impacted by COVID-19, particularly in the short term. On this basis, ATO notes that it will seek to understand the financial outcomes taxpayers would have achieved 'but for' the impact of COVID-19. This analysis may include:

- A detailed profit and loss analysis showing changes in revenue and expenses, with an explanation for variances resulting from COVID-19 pandemic. This may include a variance analysis of budgeted (pre-COVID) versus actual results.
- Details of profitability adjusted to where the taxpayer's outcome would have been if COVID-19 had not occurred. This should consider all factors that have a positive or negative impact on profits and should be supported by evidence.
- The rationale and evidence for any increased allocation of costs or a reduction of sales (and subsequent changes in operating margins) to the local entity, taking into consideration its function, asset and risk profile.
- Evidence of any government assistance provided or affecting the local operations.

The guidance document can be accessed [here](#)

Recent select transfer pricing case law

Adecco A/S vs Danish Revenue Authority (June 2020)

The case provides guidance on, *inter alia*, the most appropriate transfer pricing method to apply to transactions for the use of intangible assets such as trademarks and know-how. The full case can be accessed [here](#)

Facts

Adecco Denmark was part of the leading international human resources (HR) services group, the Adecco group, with the parent company located in Switzerland (Adecco Switzerland).

Under a trademark licence agreement, Adecco Denmark paid a royalty based on net sales to Adecco Switzerland, a subsidiary that owned the group's intellectual property. The Danish tax authorities ruled that the

royalty was not at arm's length and denied the corresponding deduction of the royalty expense.

Issue

Whether the royalties charged by Adecco Switzerland to Adecco Denmark for the use of the group's intellectual property in Denmark were charged at arm's length.

Arguments

In defending its intercompany royalty rate, Adecco presented evidence from Adecco licenses to third party franchisees, which represented an internal application of the Comparable Uncontrolled Price (CUP) approach.

The Danish tax authority, on the other hand, asserted that the losses during the relevant three-year period implied that no royalties should be paid under the arm's length standard. The Danish tax authority's assertion was based on the view that an unrelated third party would not agree to persistent losses by paying royalties in return for the right to use trademarks and know-how, in addition to bearing the marketing expenses.

In response to this argument, Adecco referred to their local business strategy, which was to expand its operations to more cities and sectors. The strategy was expensive and did not generate the results that Adecco originally anticipated, resulting in the projected profits not being realised.

Court

In the appeal against the *court a quo's* findings, the supreme court upheld the taxpayer's appeal and found the taxpayer's application of CUP more convincing than the Danish tax authority's profits-based analysis, noting that the CUP method is considered the most reliable method.

Key contacts

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