



Transfer Pricing Pulse – Issue I

Keeping you up to date on disputes and controversy

Transfer Pricing Pulse provides you with an update on the latest developments in the transfer pricing arena from the Organisation for Economic Co-operation and Development (OECD), South African Revenue Service (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 transfer pricing team (details below) for further details.

Highlights

<ul style="list-style-type: none">• OECD updates<ul style="list-style-type: none">○ OECD publishes its reports on the Pillar One and Pillar Two blueprints
<ul style="list-style-type: none">• National Treasury and SARS updates<ul style="list-style-type: none">○ Taxation Laws Amendment Bill: Refining the scope of the transfer pricing rules applying to CFCs○ CbC Reporting: Upload functionality
<ul style="list-style-type: none">• Other African transfer pricing and related legislative updates<ul style="list-style-type: none">○ Zambia proposes to amend its transfer pricing legislation○ Rwanda approves new transfer pricing rules○ Tanzania publishes transfer pricing guidelines○ Nigeria amends its exchange control regulations
<ul style="list-style-type: none">• Recent select transfer pricing case law<ul style="list-style-type: none">○ Canada vs Cameco

OECD updates

On 12 October 2020, the OECD released a package consisting of the [Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint](#) and the [Report on Pillar Two Blueprint](#). These blueprints reflect the convergent views on many of the key policy features, principles and parameters of both pillars, and identify remaining technical and administrative issues as well as policy issues where divergent views, among Inclusive Framework members, remain to be bridged.

The OECD welcomes stakeholder input on the two blueprints and will hold public consultation meetings in January 2021. This will assist members of the Inclusive Framework in further refining the package and addressing remaining issues.

Interested parties are invited to email their written comments by 14 December 2020 to cfa@oecd.org in Ms Word format. They should be addressed to the "OECD Centre for Tax Policy and Administration".

National Treasury and SARS updates

National Treasury's response to public comments on refining the scope of the transfer pricing rules applying to CFCs

The 2020 Taxation Laws Amendment Bill (TLAB) now stipulates that a transfer pricing adjustment is required where a transaction between a Controlled Foreign Company (CFC) and its non-resident connected person results in a tax benefit for a resident in relation to that CFC.

The public comments on the draft amendment expressed that it was unclear whether the resident would be required to increase its taxable income by adjusting the CFC's "net income", or instead through a transfer pricing adjustment in terms of section 31.

National Treasury accepted that there was a lack of clarity in this regard and the wording of the amendment in the TLAB has been reviewed such that it is clear that it refers to a CFC contemplated in paragraph (iv) in the definition of "affected transaction" contained in section 31. While the additional wording is welcomed, it does not effectively resolve the question referred to above. On balance, it appears the resident will have to make a transfer pricing adjustment under section 31.

Update on CbC Reporting: Upload functionality

On 22 June 2020, SARS has confirmed that it will be accepting Country-by-Country ("CbC") Reporting information in the XML format. This file upload functionality is open for submissions from Friday 19 June 2020.

The CbC XML Schema is the format that has been recommended by the OECD with a view to accommodating the electronic preparation and submission of CbC Reporting data to tax authorities, which has been adopted by many tax authorities worldwide.

Previously, where certain South African taxpayers were considered to be the Reporting Entity for the group, the CbC Reporting information was required to be captured on a CBC01 form. The CBC01 form required manual capturing of the CbC Reporting data which many taxpayers found cumbersome, tedious and time consuming to complete – especially for those who had extensive cross border operations and many subsidiaries and branches. It is therefore encouraging to see that SARS has adopted a reporting format that should streamline the CbC Reporting process which is also aligned with how other jurisdictions are reporting this data to tax authorities.

The notification on SARS' website can be accessed [here](#).

Other African transfer pricing and related legislative updates

Zambia proposes to amend its transfer pricing legislation

On 25 September 2020, the Zambian Minister of Finance unveiled the 2021 budget to the National Assembly. The minister has proposed two amendments to the regulations which govern transfer pricing. The first proposed amendment to the regulations is the introduction of the requirement to prepare CbC reports, and the second proposed amendment is an increase in the turnover threshold for local companies that are exempt from the requirement to prepare documentation (the turnover threshold is proposed to increase from ZMK20m to ZMK50m).

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

Rwanda approves new transfer pricing rules

On 25 September 2020, the cabinet approved the ministerial order establishing the general rules on transfer pricing. The new rules will repeal the existing transfer pricing rules that have been in force since 2005.

The new transfer pricing rules will enter into force following their publication in the Official Gazette of the Republic of Rwanda. Once published, the document will be available for download [here](#).

Tanzania publishes transfer pricing guidelines

The Tanzania Revenue Authority (TRA) issued the [Transfer Pricing Guidelines, 2020](#) on 1 July 2020. The guidelines have been issued two years after the Tax Administration (Transfer Pricing) Regulations, 2018 (“the Regulations”) came into force; which were issued by the Minister of Finance and Planning on 7 February 2018.

The guidelines aim at clarifying the TRA’s interpretation and provide guidance with respect to the Transfer Pricing Regulations. The TRA is clear that these guidelines are not a substitute for laws or regulations, however, should serve as non-prescriptive but practical guidance as well as enhance certainty on the part of taxpayers.

The guidelines can be accessed [here](#).

Nigeria amends its exchange control regulations

On 25 August 2020, the Central Bank of Nigeria (CBN) directed all authorised dealers to process Form M and letters of credit in favour of the ultimate supplier of product and service. This directive cuts out procurement entities and buying houses which typically handle procurement of raw materials, machinery and equipment on behalf of their related entities or principal in Nigeria. The aim of the directive is to curb incidences of price manipulation,

transfer pricing, over-invoicing, cost duplication and double handling charges.

Also, the directive stated that the CBN will introduce a product price verification mechanism to forestall overpricing and mispricing of products and services imported into Nigeria.

The directive can be accessed [here](#)

Recent select transfer pricing case law

Canada vs Cameco (26 June 2020)

The case provides guidance on, *inter alia*, the rules pertaining to the recharacterisation of transactions.

Facts

Cameco Corporation (Cameco) was part of a corporate group that formed one of the world's largest uranium producers and suppliers of uranium conversion services.

Cameco entered into a number of long-term contracts with a Swiss subsidiary (CEL) wherein it transferred certain rights to purchase and sell uranium to CEL. In general terms, inter-company purchases from Cameco were priced based on the published long-term price for uranium at the time the contracts were concluded (as is common in the industry).

In subsequent years, CEL realised substantial profits from buying and selling uranium. The profits resulted from a steep rise in the market price for uranium after 2002, which the parties could not anticipate when they signed the agreements.

The tax authorities subsequently reassessed the taxpayer's 2003, 2005 and 2006 taxation years to make transfer pricing adjustments under section 247 of the Canadian Income Tax Act (the Act). The Act entitles the revenue authority to recharacterize the transaction if the transaction would not have been entered into between persons dealing at arm's length and the transaction was not entered into primarily for a *bona fide* commercial reason other than to obtain a tax benefit.

Issue

The issue in appeal was whether the Canadian Revenue Authorities (CRA) were entitled to re-characterise the transaction.

Arguments

In its appeal, the CRA largely restricted itself to challenging the *court a quo's* findings regarding the recharacterisation provisions, in paragraphs 247(2)(b) and (d) of the Act. The CRA argued for a broad interpretation of paragraph 247(2)(b) and submitted that Cameco would not have entered into any transactions with its Swiss subsidiary if they had been dealing at arm's length. Therefore, requiring Cameco to be treated as if it had not entered into any transactions with CEL, in effect resulting in the separate existence of CEL being ignored or effectively CEL being amalgamated with Cameco."

The taxpayer argued that the revenue authorities were not entitled to recharacterise the transaction because the profits deriving from the

transaction was based on future price increases that the parties did not know would occur at the time of entering into the transaction (as opposed to the profits deriving due to non-arm's length terms being agreed to).

Court

If the CRA's interpretation is correct, then whenever a corporation in Canada wants to carry on business in a foreign country through a foreign subsidiary, the condition in subparagraph 247(2)(b)(i) of the Act would be satisfied. The Act is not as broad as the CRA suggests, it does not allow the minister to simply reallocate all of the profit of a foreign subsidiary to its Canadian parent company, on the basis that the Canadian corporation would not have entered any transactions with its foreign subsidiary if they had been dealing with each other at arm's length.

Key takeaway

The Cameco decision further reinforces that the OECD guidelines, which are required to be considered under South African transfer pricing rules, do not support speculative reconstruction exercises by revenue authorities on the basis of speculation about what the contracting parties might have known. Actual transactions and business decisions made should only be disregarded or substituted in exceptional cases.

The full case can be accessed [here](#).

Key contacts

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