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EY

LUIS CORONADO AND JOW LEE YING
EY

MICHAEL FREUDENBERG AND FELIX BUSSMANN
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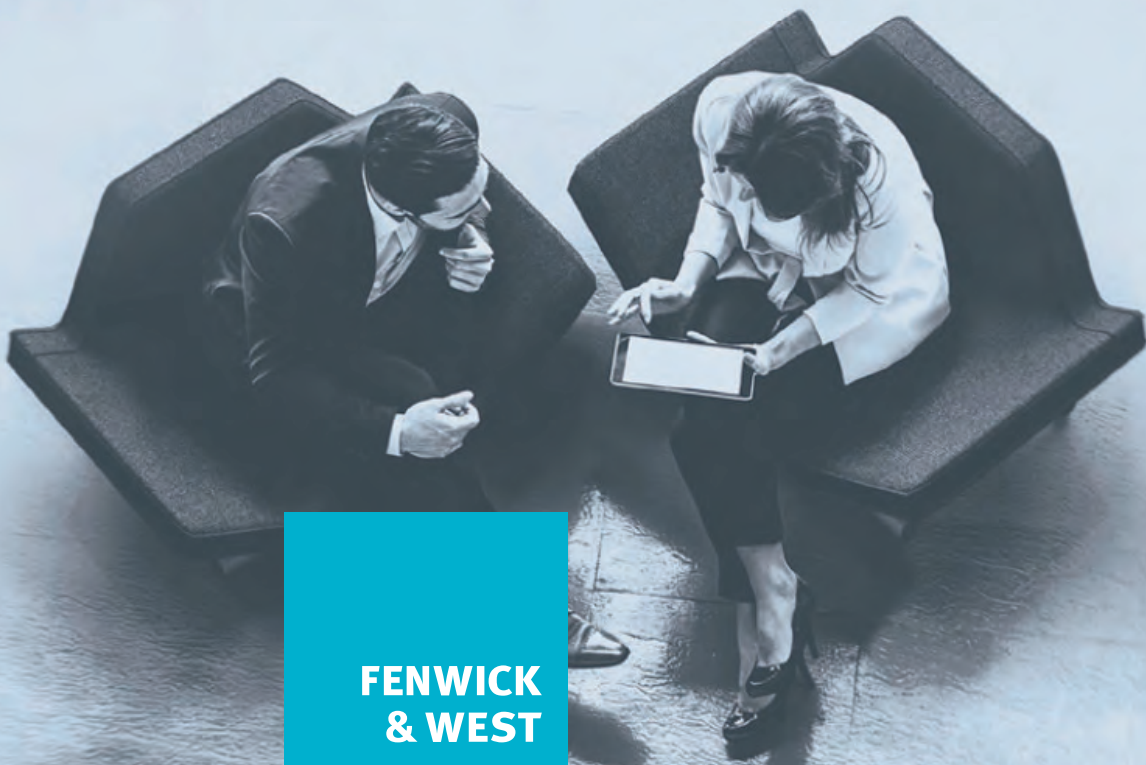
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Research manager

Tatiana Hlivka

Project managers

Raquel Ipo

Alexandra Strick

Margaret Varela-Christie

Production manager

Luca Ercolani

Production editor

Josh Pasanisi

Managing director, LMG Research

Tom St Denis

Managing director, LMG

Tim Wakefield

CEO, Specialist Information

Jeff Davis

To order extra copies or reprints
please contact:

Tatiana Hlivka

Expert Guides

Legal Media Group

8 Bouverie Street

London EC4Y 8AX

United Kingdom

Tel: (44) 20 7779 8418

Fax: (44) 20 7779 8678

Email: thlivka@legalmediagroup.com

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Methodology

Welcome to the 2019 edition of the *Guide to the World's Leading Transfer Pricing Advisers*, the international legal market's leading guide to the top legal practitioners advising on transfer pricing law.

When first published in 1994, the Expert Guides were the first-ever guides dedicated to leading individuals in the legal industry. Since then we have continued to focus on individuals considered by clients and peers to be the best in their field.

Our research process involves sending over 4,000 questionnaires to senior practitioners or in-house counsel involved in each practice area in over 60 jurisdictions, asking them to nominate leading practitioners based on their work and reputation. The results are analysed and screened for firm, network and alliance bias. The list of experts is then discussed and refined with advisers in legal centres worldwide.

Our researchers have compiled a list of specialists in 56 jurisdictions for this guide. These specialists have been independently offered the opportunity to enhance their listing with a professional biography. The biographies give readers valuable, detailed information regarding each lawyer's practice and, if appropriate, their work and clients.

We owe the success of this guide to all the in-house counsel and firms that completed questionnaires and met our researchers. Thank you. We hope you find the guide to be a useful tool. All information was believed to be correct at the time of going to press.

EXPERT GUIDES RESEARCH

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Each guide is also reprinted in full at www.expertguides.com



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ASIA PACIFIC

Q&A with Fiona Craig

Partner
Deloitte

What was the significant trend you have noticed in transfer pricing practices over the past 12 months?

One of the newer developments in transfer pricing follows the digital trends we see in other areas of commerce – i.e., a continual striving for better use of available data, quicker solutions with more sophisticated analytics, and automation of manual processes. This is a trend for multinationals and Revenue Authorities alike in the area of transfer pricing, and one that has certainly accelerated over the last year.

What are the effects of that change?

Revenue Authorities have access to far more taxpayer data than they used to, both from their local taxpayers and from international information exchanges with foreign Tax Administrations. This has prompted new approaches to Tax Administrations' compliance activities, including investment in analytics capabilities. Transfer pricing risk-based compliance is on the increase by governments as risk assessments can increasingly be made with greater certainty. Where Revenue Authorities may previously have focussed on large value flows or particular transaction types, such as royalty payments or loan arrangements, data analytics can now be run over the full population of a multinationals related party transactions, facilitating scrutiny on areas that appear out of line with benchmarks or prior reporting periods.

Where is the market moving in this practice area?

The market is definitely moving towards more real time transfer pricing. It won't happen immediately as taxpayers have embedded systems and processes, but when multinationals upgrade finance systems and processes, the Tax function is increasingly at the front of the queue with its asks of the CFO, CIO and CTO. As the scale of related party dealings within multinationals continues to grow, and the complexity of business models increases, the benefits to the overall business of accuracy and consistency in the calculation of transfer prices is increasingly understood by those investing in systems upgrades.

What kind of impact will this have on your work?

The work we are doing at Deloitte is already increasingly focusing not only on our core transfer pricing compliance and advisory services, but also on finding solutions for clients to the way in which transfer pricing information is collected, screened, analysed, reported and stored. There is a spectrum of work in this space. For some clients, we are helping them with long standing processes and streamlining the way in which transfer pricing calculations are performed — this could be a simple upgrade to existing spreadsheets to remove the potential for manual errors, or producing exception reports so the efforts of the tax function can be focused in higher risk areas. For other clients, we have been automating the entire transfer



pricing process including the information flows between systems, the analysis of financial data and preparation of calculations, and the reporting of transfer pricing outcomes in user-friendly dashboards and reports.

Do you anticipate any significant legislative changes in the future with a material impact on transfer pricing in Asia Pacific?

Most of the larger countries in the region have TP legislation and practices in place. There have been, and it is likely that there will continue to be, changes to ensure that the countries are compliant with the 2017 OECD TP Guidance and Base Erosion Profit Shifting (BEPS) requirements or correspondingly the UN TP Guidance as well as verifying that they are using best practice. Some of the smaller countries are going through legislative processes to make them reach minimum standards but still have a bit of work to do to address all issues, specifically with respect to documentation, transparency and improving Mutual Agreement Procedure (MAP) dispute processes. Developing countries are looking to use Advanced Pricing Agreements' (APAs) as a means of mitigating TP risk. Penalties relating to transfer pricing are also increasing in the region, including in as Australia, Indonesia, Malaysia, and Vietnam.

We are also expecting more countries to become parties to the Multilateral Instrument and as such opening up the opportunity for mandatory binding arbitration for unresolved MAP disputes.

If these come into force, how will the industry look in the future?

We expect the growing trend of increasing international tax disputes to continue across the region as more countries begin to adopt transfer pricing legislation and look to administer it through increased compliance activity in the transfer pricing space.

We are seeing revenue administrations such as the Philippines and Indonesia looking to develop their TP capability in terms of numbers, skills, and systems.

ASIA PACIFIC

We also expect continued sharing of information between revenue administrations requiring multinationals to pay closer attention to the results being achieved in each country. We expect that there will need to be greater consistency in TP documentation to ensure that the results being achieved across all parts of the Global Supply Chain are supportable from a TP perspective.

With time, we may see more reasonable positions being negotiated by revenue administrations given the exposure to possible mandatory binding arbitration.

How would you describe the MAP landscape in Asia Pacific?

The MAP landscape varies across Asia Pacific with 2017 OECD MAP statistics indicating:

- increases in the number of cases in some countries such as China, Hong Kong, Singapore, India, and Vietnam;
- reductions in case numbers in others including Australia, Indonesia, New Zealand, and Thailand

We expect the number of TP disputes to escalate as more countries rate their TP risk as high. Armed with stronger TP laws, greater transparency and cooperation between revenue administrations, as seen through the International Compliance Assurance Programme (ICAP) and Joint International Tax Shelter Information Centre (JITSIC) programs, multinationals will be asked to justify their global supply chain individual country performances.

Do you expect transfer pricing procedures in Asia Pacific to move towards common standards or diverge in the future?

We are seeing a convergence of approaches with countries sharing practices and procedures across the region. Developed Revenue administrations still support the Study Group for Asian tax administra-

tions (SGATAR) program and resource training programs on better practices. As a result, we are seeing some degree of consistency in approach. However, the countries are at different levels of capacity, capability, and experience and so, there is still a long way go to get consistency. Whilst there is a degree of convergence on approach, practice, and process, we are seeing some divergence on interpretation of the how the arms length principle is being applied specifically regarding benchmarking and comparability. Specifically, the use of secret comparables, overseas comparables, and approaches to comparability that seem to be at odds with the OECD guidance. An example would be the Australian Taxation Office's recent publication of Practical Compliance Guide 2019/1.

Is the global drive towards regulation going to affect TP practice? If yes, in which areas?

Certainly yes. The areas that it will affect for multinationals will be tax compliance with a requirement for more consistency in countries' documentation and we also expect an increase in company restructuring required to address some of the BEPS changes, such as the anti-hybrid rules as well as profit attributions.

The increase in TP documentation requirements and the global transparency measures will cause multinationals to look closely at their Global supply chain results to confirm that they have supporting documentation. All aspects of the multinationals business will need to be reviewed to verify that there are no anomalies from a Functions, Assets, Risks (FAR) and return perspective.

Finally, multinationals will want to have confidence that any local country dispute resolutions in the future, do not have unhelpful global precedent implications, e.g., ensuring that solving a small problem in one country does not cause a bigger problem in larger jurisdictions.

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AUSTRALIA

**Natalya Marenina****BDO**

Level 10, 12 Creek St

Brisbane QLD 4000

Australia

Tel: (61) 7 3237 5853

Mobile: (61) 436 621 821

Email: natalya.marenina@bdo.com.au

Website: www.bdo.com.au

Natalya is a partner in the Brisbane transfer pricing practice at BDO in Australia.

Over the past 15 years, Natalya was advising companies on the transfer pricing matters both in Australia and UK.

Experience

Natalya frequently assists companies with planning their overseas expansion, or companies entering the Australian market. The focus is on ensuring that the tax payers achieve and defend the compliant transfer pricing structures, that meet their commercial needs.

Natalya also has extensive experience advising companies on the transfer pricing aspects of financial transactions, from planning to compliance and defence.

She is experienced in dealing with the tax authorities, in both Australia and the UK, including successfully concluding transfer pricing risk reviews and audits, and negotiations of Advance Pricing Arrangements.

Sectors

Natalya has extensive experience advising companies in a variety of industries, including Agriculture, Real Estate, Pharma and Technology & Telecommunications as well as groups in the strong growth phase.

Qualifications

- Master of Business Administration
- Bachelor of Economics

Professional qualifications

- Chartered Accountant, ICAEW
- Chartered Tax Advisor



INDIA

Draft profit attribution rules by India – Emergence of new controversy or end of it?

Parikshit Datta (left) and Nikhil Choudhary (right)
EY
Kolkata

The concept of Permanent Establishment has as much history as the history of double tax conventions itself. The concept has seen subjected to all sort of controversies around the world ranging from its very existence to the profit that is required to be allocated once its existence has been established. Recognising the significance of such issues relating to profit attribution to PEs as well as the need to bring clarity and predictability, the Central Board of Direct Taxes in India had formed a committee to recommend changes to the existing profit attribution rules. The committee has released its report for public consultation on April 2019.

Key contentions of the Committee

The primary contention of the committee is around the Authorised OECD Approach (AOA) which places reliance on the FAR analysis for profit attribution to PEs. In the draft report the committee has contended that OECD approach completely ignores the demand side factors and that it contributes to the business profits as such as the supply side factors does. Building up on the premise, the report recommends a “fractional apportionment”, which is more akin to a “formulary apportionment” in true sense, based on three equally weighted factors namely sales (representing demand), employees (manpower & wages) and assets (representing supply including marketing activities).

In case of a digital economy business, the committee considered the option of assigning users the same weight as the other three. However, the committee noted that different weights are to be assigned to different categories of digital businesses depending upon the level of user intensity. Based on these factors, the committee finally prescribed formulas for derivation of the profits taxable in India.

Requirement for revised attribution rules from the Government perspective

In the report the committee has cited uncertainty and unpredictability associated with application of exiting attribution rules as of the one primary reasons for the need of revised attribution rules. The report recognises that existing rules lacks specificity and accords broad discretion to the AO without any specific guidance. Though one can hardly deny that the primary reason cited in the report is true and existing attribution rules



needed revision to provide better clarity and predictability for investors and MNCs, it is also true that CBDT have long disagreed with FAR based AOA approach for profit attribution to PEs. The committee observed that the AOA is tilted towards the supply side approach by determining profits exclusively for supply side factors with reference to FAR analysis and thereby ignores the role of demand side factors. By using a “Fractional apportionment” using apportionment of the profits derived from India based on three equally weighted factors, the committee believes a balance can be achieved.

Need for a more ‘balanced approach’

The approach of attributing profits based on “arm’s length principle” is not a new concept which has emerged in 2010 from OECD, but a concept which is in line with Indian TP rules and has also withstood the judicial scrutiny in India including that from the Supreme Court of India. There is plethora of judgements in India which has upheld the significance of TP principles for profit attribution to PE and a formulary apportionment has generally been preferred in case of inadequate TP analysis. In fact, the tax authorities in the past have also initiated transfer pricing assessment proceedings for a PE or an alleged PE to determine the attribution of profits.

The fact of the matter is that the “formulary apportionment” as proposed usually fails in aligning the economic outcome with value creation in contrast to the arm’s length approach which applies a symmetric principle of functions, assets and risks as determinants for arm’s length remuneration for both demand and supply side factors. Thus, the contention of CBDT in the draft rules that TP

WE MIGHT WELL BE
USHERING INTO NEW
ERA OF LITIGATIVE
ISSUES

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principles does not represent the demand side factors is flawed. In fact the formulary approach which uses factors such as manpower, assets, wages are essentially proxies for functions but blatantly ignores the risk parameters that is associated with functions and asset ownership. Therefore, there is no need for the proposed formula and India may resort to TP mechanism which is now revamped pursuant to the recommendations of BEPS standards, more particularly Action plan 8-10 i.e. Aligning Transfer Pricing Outcomes with Value Creation. The recommendations have been endorsed by India and once imported and applied in Indian context may have adequately considered all the key concerns in relation to attribution of profits to a PE.

The draft rules also recommend that in case of losses a deemed global operational profit margin will be considered at 2%. The proposal may have adverse effect on certain sectors wherein the margins are lower owing to various economic factors. It would be prudent to undertake a detailed analysis and carve out few specific industries such as Banking, Insurance which are highly regulated and exhibits unique characteristics in terms of its complex business model, profits and associated risks. It may also be prudent to allow offsetting of losses incurred in one year against the profit of future years to avoid double taxation arising from deemed profit. A mechanism to allow credit for the taxes paid based on such deemed profit, against the taxes payable on actual profits in the subsequent year may also be considered.

In relation to the digital economy, the draft rules provide that “User participation” contributes to business profits and thereby must be assigned weightage similar to other three factors. It is pertinent to note international consensus is still evolving around taxation of digital economy and action by any country must be after an international consensus is reached on the issue. However, if India goes ahead with the proposition, since the large portion of revenues of major MNEs in digital economy space come from advertising activities which are already subject to Equalization Levy in India, the rules must specifically exclude income from advertisement revenues from the proposed formula or there must be simultaneous withdrawal of Equalisation Levy in the hands of the payer.

Conclusion – Impact on the litigation scenario

It is true that the existing profit attribution rules lack specificity and accord arbitrary powers in the hands of AO. Consequently, during the course of assessment proceedings the field officers are often inclined to apply the existing provisions to make an ad-hoc and arbitrary tax adjustment. Even though in majority of cases adjustments are deleted by higher forums, it leads to unnecessary outlay of resources as well as lead to an environment of tax uncertainty. Thus, it might be reasonable to contend that existing attribution rules needed a complete

overhaul. The intention of the CBDT of providing an objective formula which may lead to simplicity and certainty is well placed. However, the pertinent question is that whether the proposed rules, in its current form and structure, is holistic enough to provide tax certainty and at the same time ensure that economic outcomes are aligned with value creation. The probability of the response in positive is quite remote.

As the attribution rules proposes a formula which is driven by factors, there may always be litigation around the substance and location of the production factors used in the formula (employees, assets, wages). Uncertainty may also prevail in situations where a PE or business connection is established due to captive services including BPO, KPO, Contract R&D, procurement function etc but their presence does not lead to any receipt or revenue from sales in India.

In terms of tax treaty practice, including in the India treaty network, business profits are allocated to a PE based on arm’s length basis. The concept of “arm’s length principle” is embedded in the Indian treaties and the proposed formulary approach for profit attribution may not be accepted by the treaty partners leading to double taxation.

Other potential issue could be around complexities around data required for the formula. As the numerator requires India related information and denominator include factors from outside of India, there might be litigative issues on account of different financial year end, valuation methodologies for assets etc.

Considering the above factors, it may be reasonable to assume that litigation might be far from over and we might well be ushering into new era of litigative issues. The government may however take pragmatic steps to reduce litigation involved around the proposed approach and provide the much-required tax certainty for MNCs. One of the possible approaches that the government may adopt is to propose the same formulary approach as optional to the tax payer or rather as a “Safe harbour benchmark”. The tax payer may be extended an option to either opt for such formula or follow the AOA of analysing the FAR of the participating entities and determine profits to be attributed to a PE. Such an approach will be consistent with many presumptive taxation provisions that are currently there in the Act and will meet the obligations of the treaties while providing requisite clarity and objectivity to the determination of the PE profits.

It is interesting to note that APA rules provide that it can be filed for the purposes of profit attribution to a PE. The government must now make an endeavour to encourage the APA route to obtain certainty on profit attribution. Such an approach would provide fresh impetus to the APA program and ensure that unnecessary and prolonged litigations are avoided through alternate dispute resolution process.

INDIA

**Parikshit Datta****EY**

22, Camac Street | Block C | 3rd Floor
Kolkata 700016, West Bengal
India
Tel: (91) 33 6615 3400
Email: parikshit.datta@in.ey.com
Website: www.ey.com

Parikshit has over 20 years of experience in International Tax & Transfer Pricing (TP). He is the Outbound Transfer Pricing Leader and also advises clients on BEPS.

Parikshit has been recognized as a leading Transfer Pricing Adviser in India by Euromoney since 2012.

Parikshit has been advising various Multinational companies in alternate dispute resolution strategies through 'Mutual Agreement Procedure' and 'Advance Pricing Agreements' (APAs) including multi-lateral APAs.

He has experience in advising on Transfer Pricing issues in Permanent Establishment situations, in developing TP policy and implementing the same for Indian Outbound Multinationals and supply chain restructuring.

He also advises Indian as well as global multi-nationals on managing their TP compliance from India.

Parikshit is actively involved with CBDT on tax policy matters to resolve industry issues.



INDIA

**Maulik Doshi****SKP group**

7th Floor, Urmi Axis, Dr. E Moses Road,
Mahalaxmi
Mumbai 400 056
India
Email: maulik.doshi@skpgroup.com
Website: www.skpgroup.com

Maulik leads the Global Transfer Pricing practice at SKP group. With experience of nearly two decades and deep technical skills, he has been advising companies from wide range of industry on transfer pricing and cross border taxation related matters.

At SKP, Maulik is responsible for expanding its domestic and international footprint while ensuring SKP's transfer pricing expertise remains indispensable to its clients as they navigate complexities around the globe.

He is also global leader of transfer pricing business group within Nexia International (9th largest accounting network) and has been very actively working with Member Firms to expand Global transfer pricing practice in their respective jurisdictions.

He has been a regular invitee to train the Indian tax officials on latest developments on the transfer pricing front. He actively participates in conferences pertaining to transfer pricing and international taxation in India and overseas. He also delivered lectures at the Frankfurt School of Finance as a part of their LLM Curriculum.

Maulik has authored various, thought leadership pieces and articles in Indian as well as international print media on various topics relevant to Transfer pricing and Cross border taxation.

Maulik's areas of expertise include planning for cross border transactions and M&A, Supply chain strategies, defence strategies for transfer pricing audits, Advance Pricing Agreements (APA) and keen focus on Marketing Intangible related controversies. Maulik has assisted clients in sailing across the BEPS proposals and helping to make appropriate strategic decisions in response to a post-BEPS landscape.

He is a member of the Institute of Chartered Accountants of India and mentor to a team of over 40 people, including Chartered Accountants, Lawyers, MBAs, and Economists.



INDIA

**Rahul Mitra****Dhruva Advisors LLP**

101 & 102, 1st Floor, Tower-4 B
DLF Corporate Park, M G Road
Gurgaon 122002
India
Tel: (91) 98300 55281
Email: rahul.mitra@dhruvaadvisors.com
Website: www.dhruvaadvisors.com

Rahul Mitra is a Partner with Dhruva Advisors LLP, the largest tax boutique advisory firm in India.

Rahul has over 25 years of experience in handling taxation matters in India. He specialises in transfer pricing, supply chain management projects, international taxation, profit attribution to permanent establishments, etc.

Prior to joining Dhruva Advisors LLP, Rahul was a tax partner with PwC and KPMG for an aggregate period of 19 years, between 1999 and 2018, including having served both the organisations as their national transfer pricing leader.

Rahul independently handles litigation for top companies at the level of Tax Tribunals; and has won several landmark rulings before Tax Tribunals in the field of transfer pricing, creating precedents, both nationally and globally, in matters relating to Berry Ratio, Marketing Intangibles; Selection of Tested Party; Corporate Guarantee; Profit Split Method; Supply Chain nuances etc.

Rahul has handled several APAs in India, involving clients from across industries, covering complex transactions, e.g. industrial franchise fees under non-integrated principal structures; contract R&D service provider model; distribution models, with related marketing intangible issues; financial transactions; profit split models for royalties; etc.

Rahul was the country reporter on the topic, “Non-Discrimination in international tax matters”, for the IFA Congress held in Brussels in 2008.

Rahul was invited by the OECD to speak in the 2012 Paris roundtable conference on developing countries’ perspective on APAs.

Rahul was invited by President of the Tax Tribunal in 2012 and the Indian Revenue Board in 2015 to impart training on the topic of transfer pricing to Members of the Tax Tribunal and Senior Officials of the Indian Revenue respectively.

Rahul has been consistently rated as a leading transfer pricing professional and tax litigator in India by Euromoney and International Tax Review, since 2010.

Rahul is a member of the global editorial board of the international web-based tax magazine, Bloomberg BNA Transfer Pricing Forum”.



INDIA

**Vispi T. Patel****Vispi T. Patel & Associates (Chartered Accountants)**

121, 12th Floor, B-Wing, Mittal Court
224 Nariman Point
Mumbai – 400 021
India
Tel: (91) 22 2288 1091
Email: vispitpatel@vispitpatel.com
Website: www.vispitpatel.com

Vispi T. Patel founded the firm Vispi T. Patel & Associates, Chartered Accountants.

A Chartered Accountant by profession, Vispi brings on the table expertise in the areas of Transfer Pricing (TP), International Tax, Global Structuring and other allied fields of professional work relating to direct taxation and transfer pricing, and an experience spanning of over 35 years in the profession.

Vispi has been closely associated with the development of Transfer Pricing law in India since its inception. He has represented before various government, business and professional committees.

He is a well-known speaker and has addressed many conferences both in India and abroad. He has also written many articles relating to Taxation, Transfer Pricing, International Tax, Mutual Agreement Procedure and other allied fields, published in India and abroad, in international tax publications like Tax Analyst USA, International Tax Review UK, IBFD, etc. and in business newspapers. He has also co-authored books on the same subjects.

He is a Fellow member of the Institute of Chartered Accountants of India. He has successfully represented the clients before various forums viz. the tax authorities, first appellate authority and the Income-tax Appellate Tribunal.

Vispi advises on corporate structuring, international taxation issues and transfer pricing issues relating to various industries like Automobile, Engineering, Financial Services, IT/ITeS, Infrastructure, Oil & Gas and Pharmaceuticals to name a few.

Vispi was nominated as India’s leading Transfer Pricing and Tax Consultant by International Tax Review – World Tax and by Euromoney Legal Media Group. He has also been nominated as a Transfer Pricing Expert by Expert Guides in 2017 and 2018, Legal Media Group, Euromoney Institutional Investor PLC.



INDIA

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Vispi T. Patel & Associates, Chartered Accountants, founded by Vispi T. Patel in 2009 is a boutique tax firm specialising in direct tax, especially, transfer pricing, international tax, litigation and exchange control regulation matters.

The driving force of the firm is innovation and the zeal to excel in professional practice. The firm's founding ethics are the principles of integrity, sincerity and loyalty. Firm consists of a team of professionally qualified and experienced persons who are committed to add value and optimize the benefits accruing to the clients.

The firm was rated by International Tax Review as one of the Best Newcomer Tax Firm in Asia. Vispi was nominated as India's leading Transfer Pricing and Tax Consultant by International Tax Review – World Tax and by Euromoney Legal Media Group. The firm has also been selected as the “**Transfer Pricing Advisory Firm of the Year in India**” by Corporate INTL Global Awards 2014, UK. The firm has also been nominated as an Expert Transfer Pricing Firm by Expert Guides in 2017 and 2018, Legal Media Group, Euromoney Institutional Investor PLC.

Brief Overview of Services Offered / Areas of Expertise of firm: Transfer Pricing (TP)

Attaining Management Objectives

- Assisting business organizations to attain value potential as per the management vision
- Mitigating TP risk by attributing correct profit to the economic substance of a transaction
- An end-to-end analysis of the entire value chain and correct demonstration of the actual conduct of business to tax authorities
- Assisting in formulating & evaluating the global transfer pricing policy
- Mitigating transfer pricing and permanent establishment risk
- Evaluation of value addition to be made by each group entity and ascribing income to such entities

Tax Litigation

- Representing before the Income-tax Appellate Tribunal for various income-tax related matters
- Assisting the clients in preparation and representation for stay of demand matters

- Representing clients before revenue authorities, appellate authorities and Dispute Resolution Panel
- Assistance in drafting of Appeal Memo, e-filing of appeal, preparation of submissions, preparation of paperbook, etc.
- Evolving a defence strategy to depict the true substance of the transaction
- Briefing Senior Counsels for the matters at High Court and Supreme Court

Corporate Tax Advisory

- Domestic tax advisory for various business alternatives
- Assisting in tax advisory and restructuring
- Advisory for various transactions
- Withholding tax analysis, compliance and certification
- Tax Due Diligence
- Diagnostic review of existing operations
- Due Diligence of the proposed transactions

International Taxation

- Business Restructuring / Inbound and Outbound Operations
- Designing an entry strategy
- Evaluating alternative intermediate holding company jurisdictions
- Strategy on international tax
 - Tax Treaty Interpretation
 - Permanent Establishment (PE) exposure
 - Attribution of profits to a PE
 - Structuring of revenue / capital flows e.g. Royalty, FTS, Dividend, Interest, Capital gains etc.
- Exit planning
- Understanding the link between Transfer Pricing and Permanent Establishment

Economic Consultancy

- Economic profiling the multinational entity
- Setting the transfer price for the transactions
- Linking core business strategy with the conduct and functionality of the transactions
- Monitoring the pricing policy with the various risk factors like, economic, finance, political, etc.

INDONESIA

**Danny Septriadi****DDTC**

Menara DDTC
Boulevard Barat Raya Street,
XC 5-6 B, West Kelapa Gading,
North Jakarta, 14240
Indonesia
Tel: (62) 21 2938 2700
Email: danny@ddtc.co.id
Website: ddtc.co.id

Danny Septriadi is the Senior Partner of DDTC and a lecturer at Graduate Program in Tax Policy and Administration Science and a Master in Accounting Program at the University of Indonesia. His main research area is international taxation, focused primarily on transfer pricing and he has vast experience in its dispute resolution. Further, he is acknowledged as an expert witness on transfer pricing disputes at the Indonesian Tax Court. He was experienced in Arbitration Disputes as an expert at the Indonesian Chamber of Commerce in London, United Kingdom.

He received a Master's degree in Tax Policy and Administration from the University of Indonesia, and a second Master's degree (LLM) in International Taxation from Vienna University of Economics and Business Administration, Austria, with a master thesis on tax treaty policy. In 2012, he attended "Summer School of Transfer Pricing Programme" held by Universidade Católica Portuguesa, in Lisbon, Portugal. In 2014, he attended "Advanced Course in Transfer Pricing" held by Maastricht Centre for Taxation, Maastricht University, in the Netherlands. Then, in 2015, he attended "Transfer Pricing: Policy and Practice" held by Duke Center International Development (DCID), Duke University North Carolina, USA. In 2017, he attended "2nd International Conference on Taxpayers Rights" held by WU (Vienna University of Economics and Business), Austria. Also in 2017, he attended "Value Chain Analysis – Functional Analysis post BEPS" held by Maastricht University and TPA Global, in the Netherlands.

Danny Septriadi has published several books and numerous articles on transfer pricing and international taxation. He is a source for print media (Kompas, Bisnis Indonesia, and Kontan), and also a speaker at several institutions (Directorate General of Taxes, Fiscal Policy Agency, Secretariat of Tax Supervisory Committee, Secretariat of Tax Court, USDIKLAT Pajak, Indonesian Institute of Accountants, University of Indonesia, Bina Nusantara University).



JAPAN

**Daisuke Miyajima****PwC**

Kasumigaseki Bldg 15F
2-5 Kasumigaseki 3-chome
Chiyoda-ku
Tokyo 100-6015
Japan
Tel: (81) 3 5251 2552
Email: daisuke.miyajima@jp.pwc.com
Website: www.pwc.com

Mr Miyajima is a partner in the International Tax Services (Transfer Pricing) group of PwC Tax Japan. During his more than twenty-five years career at the firm, he spent several years with the Transfer Pricing Group in the Washington DC and New York offices.

In the transfer pricing area, Daisuke has provided advice towards numerous Japanese and foreign clients on their inter-company transactions with related parties and its effect on Japanese and foreign transfer pricing rules. He has also assisted in preparing studies for presentation to the appropriate tax authorities and has successfully defended several well-known Japanese and foreign companies in transfer pricing audits. He is also an expert in the area of competent authority negotiations and advance pricing agreements. While his experience includes clients in virtually every industry, he particularly specializes in the high-tech, automotive, entertainment, and luxury goods industries.

Daisuke has also written extensively on the above areas in various publications and is a frequent speaker at seminars held by PricewaterhouseCoopers and outside organizations.



JAPAN



Toshio Miyatake
Adachi Henderson Miyatake & Fujita
 Kojimachi HF Building 3rd Floor
 3-2-4 Kojimachi, Chiyoda-ku
 Tokyo 102-0083
 Japan
 Tel: (81) 3 3556 1031
 Email: miyatake@ahmf.jp

Toshio Miyatake is an attorney-at-law and a partner of Adachi Henderson Miyatake & Fujita in Tokyo. He has more than 30 years' experience in international tax practice. His tax practice ranges from tax planning to handling of tax audits, tax litigation and mutual agreement procedure in various tax fields. Especially, he handles a considerable number of transfer pricing cases.

Toshio is a graduate (LLB) of Kyoto University and holds an MCL from the University of Washington School of Law. He taught Japanese international taxation at Harvard Law School as a visiting professor in 1983, and taught at the Law Faculty of Sophia University and the Chuo University Graduate Course of Accounting for a number of years. He also writes and lectures extensively. His writings include the textbook *Kokusai Sozei Ho* (International Tax Law) in Japanese and various tax articles in Japanese and English.

Toshio is a member of the Second Tokyo Bar Association and the Federation of Japanese Bars. He is a former chairman of the Japanese Branch of the International Fiscal Association (IFA) and served on the executive committee of the IFA from 1994 to 2006. He is also a former chairman of the Tax System Committee of the Federation of Japanese Bars, the Taxation and Legislation Committee of the American Chamber of Commerce in Japan and the Tax Law Committee of the Inter-Pacific Bar Association. He is a member of the International Fiscal Association, the International Bar Association, the Inter-Pacific Bar Association, the Japan Tax Association, the Japanese Society for Tax Law, the Japan Tax Accounting Association and the Tax System Committee of the Federation of Japanese Bars.

JAPAN



Koji Noda
PwC
 Grand Front Osaka Tower A 36F
 4-20 Ofukacho, Kita-ku
 Osaka 540-0011
 Japan
 Tel: (81) 80 1114 4564
 Email: kouji.noda@jp.pwc.com
 Website: www.pwc.com

Mr Noda joined the PwC Tax Japan Osaka office and has been providing international corporate tax and transfer pricing consulting services for more than 10 years.

Mr Noda was on a one-year assignment with the Transfer Pricing Group in PwC Tax Japan Tokyo office in 2007. Subsequently, he returned to Osaka office in July 2008, when the Transfer Pricing Group was established in the PwC Tax Japan Osaka office. He has been providing advice to companies mostly from Kansai to the West. Now, he is providing tax consulting services mainly to the Japanese multinational companies located in all the area.

Mr Noda assists his clients with international tax matters in cross-border tax structuring and transfer pricing policymaking, based on its knowledge on anti-tax havens taxation, withholding taxation, PE (permanent establishment) taxation, Japanese reorganization/consolidation taxation and etc, leveraging his strong expertise in transfer pricing field such as transfer pricing investigation, mutual agreement procedures (MAPs), advance pricing agreements (APAs), and base erosion and profit shifting (BEPS) related documentation. His strength is managing almost all of the tax issues seamlessly for the Japanese multinationals by himself, and it will result in providing high-value advice to the clients without inconsistencies in plural tax areas.

Mr Noda is in charge of Osaka and Nagoya offices and is a licensed Japanese certified public accountant and a licensed Japanese certified public tax consultant.

Project Results and Achievements

- Advisory services including transfer pricing investigations, domestic legal proceedings, MAPs, and APAs.
- M&A advisory services in tax due diligence, structuring, global business restructuring, post-merger integration (PMI)
- Tax compliance for consolidated groups and for corporations and individuals.

Publications / Seminars / Other Activities

- Tax magazine author for "Kokusaizeimu", "T&A Master" etc.
- Speaker for PwC Tax Japan seminar and outside resources.



SINGAPORE

How the Singapore transfer pricing landscape has evolved over a decade

Luis Coronado (pictured) and Jow Lee Ying
Ernst & Young Solutions LLP
Singapore

The recent “10 year challenge” that went viral on social media saw people comparing photos of themselves in 2009 to those taken in 2019. If a snapshot of Singapore’s transfer pricing landscape in 2009 were juxtaposed with the current state, it would certainly show a marked difference, given the slew of developments that have taken place over the past 10 years.

2009: enactment of arm’s length principle

2009 was a landmark year in Singapore’s transfer pricing landscape as it was the year that the arm’s length principle was enacted explicitly for the first time under section 34D of the Income Tax Act (ITA). Prior to that, references to the arm’s length principle were made primarily in Singapore’s tax treaties. The Singapore Transfer Pricing Guidelines issued in 2006 provided detailed guidance on the arm’s length principle, but these were, arguably, guidelines that did not have the force of law.

While section 34D enacted in 2009 was kept succinct with wording largely similar to that of the Associated Enterprises Article of the OECD Model Tax Convention, its enactment provided the legal basis for the Comptroller of Income Tax to make upward adjustments on transfer pricing between related parties that is not conducted on an arm’s length basis. It signalled Singapore’s desire for detailed transfer pricing legislation to be put in place to ensure that its transfer pricing rules are adhered to, and heralded a series of legislative changes on transfer pricing over the next 10 years.

2015: contemporaneous transfer pricing documentation requirement

Fast forward to 2015 – the year Singapore’s Transfer Pricing Guidelines underwent a major revamp. Notably, the 2015 update to the Guidelines included – for the first time – the requirement for contemporaneous transfer pricing documentation. Alongside this requirement, the 2015 Guidelines introduced various categories and dollar value thresholds below which there would be no need for transfer pricing documentation.

The 2015 Guidelines also introduced the “group level” and “entity level” approach towards transfer pricing documentation, perhaps a hint on closer alignment with the impending OECD’s Base Erosion and Profit Shifting (BEPS) Project initiatives.

Suffice to say, the 2015 Singapore Transfer



Pricing Guidelines made many taxpayers sit up and take notice of the contemporaneous transfer pricing documentation requirement, in particular. However, it remained unclear how strictly the Inland Revenue Authority of Singapore (IRAS) would enforce the contemporaneous transfer pricing documentation requirement, since the question of penalties for the failure to prepare transfer pricing documentation was not addressed specifically in the 2015 Guidelines nor in the ITA. This question would eventually be addressed through legislation three years later.

SINGAPORE HAS MADE A COMMITMENT TO THE MINIMUM STANDARD UNDER BEPS ACTION 14: MAKING DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE, TO ENSURE THAT TAX TREATY DISPUTES, INCLUDING TRANSFER PRICING DISPUTES, ARE RESOLVED IN A TIMELY AND EFFICIENT MANNER

2016 – 2017: BEPS Project initiatives take centre stage

The next two years were largely dominated by the BEPS Project initiatives, which were moving globally at an unprecedented fast pace. The BEPS Project final reports were released by the OECD in October 2015 and within two years, the recommendations in the BEPS Project final reports on Actions 8-10: Aligning Transfer Pricing Outcomes with Value Creation and Action 13: Transfer Pricing Documentation and Country-by-Country Reporting were formally incorporated into the 2017 update of the OECD Transfer Pricing Guidelines.

SINGAPORE

With such rapid changes taking place globally, it would be unwise for Singapore to take a backseat and not be involved in the refinement of the BEPS Project initiatives that could impact its economy.

In June 2016, Singapore became one of the first jurisdictions to join the Inclusive Framework for the global implementation of the BEPS Project as a BEPS Associate. As a BEPS Associate, Singapore must adopt the four minimum standards under the BEPS Project. It also allows Singapore to partake in the further development of the BEPS Project initiatives on an equal footing with other participating jurisdictions. This move reiterated Singapore's commitment to combat tax evasion and adopt internationally accepted standards of tax policy, with the aim for the country to be seen as a reputable tax jurisdiction.

What followed shortly after was the implementation of Country-by-Country Reporting (CBCR) in Singapore. Singapore's CBCR requirements came into effect for financial years beginning on or after 1 January 2017 for Singapore-headquartered multinational enterprises, with voluntary filing allowed for financial year 2016. Besides the fact that CBCR is one of the four minimum standards under the BEPS Project that Singapore must adopt as a BEPS Associate, the secondary reporting mechanism of CBCR means that Singapore would be better positioned to adopt CBCR rather than be kept out of the loop on information shared by Singapore-headquartered multinational enterprises with other tax jurisdictions.

At the same time, it is observed that the IRAS started taking into account the BEPS Project Action 8-10 concepts on value creation and substance in their transfer pricing audits. More considerations seem to be made for unilateral Advance Pricing Arrangements (APAs) as well since they would now need to be shared with counterparty jurisdictions under the BEPS Project Action 5. All in all, the BEPS Project has left its mark on Singapore's transfer pricing landscape and the impact of its presence will only increase thereafter.

2017-2018: transfer pricing penalties and documentation rules

In tandem with its international commitments, Singapore took the next step in its domestic transfer pricing legislation in 2017 and substantially revised section 34D of the ITA to be aligned with the additional guidance on the arm's length principle arising from the BEPS Project. Furthermore, to quell any doubts on whether Singapore is serious about enforcing its transfer pricing rules, new sections 34E and 34F were introduced in the ITA to provide for specific transfer pricing penalties.

The transfer pricing penalties that have been passed into law and are effective from the Year of Assessment (YA) 2019 consist of a 5%

surcharge on transfer pricing adjustments as well as penalties for non-compliance with transfer pricing documentation requirements.

Since penalties now apply to non-compliance with transfer pricing documentation requirements, detailed transfer pricing documentation rules were gazetted in February 2018 and are similarly effective from

YA 2019. Documentation requirements are therefore no longer merely guidelines without the force of law.

These transfer pricing legislative changes in 2017 and 2018 were the logical next steps in the development of a transfer pricing regime and should come as no surprise to observers. To help the IRAS in its transfer pricing audit process, a disclosure form on related party transactions is now required to be submitted together with the corporate tax returns starting from YA 2018.

What remains to be seen is how tightly the IRAS will interpret and enforce the laws, although it would be unwise for taxpayers to treat the new transfer pricing penalties lightly.

Next 10 years: controversy is the name of the game

What lies ahead in the next 10 years of Singapore's transfer pricing landscape? With international and domestic transfer pricing measures in place, increased transparency on related party transactions and the continued need to raise revenues, transfer pricing audit activity is expected to increase globally and in Singapore.

At the same time, Singapore has made a commitment to the minimum standard under BEPS Action 14: Making Dispute Resolution Mechanisms More Effective, to ensure that tax treaty disputes, including transfer pricing disputes, are resolved in a timely and efficient manner. Singapore has also committed to mandatory arbitration under the BEPS Multilateral Instrument (MLI) and the Mutual Agreement Procedure.

In fact, mandatory arbitration may become a feature of Singapore's tax treaties earlier than anticipated. On 21 December 2018, Singapore deposited its instrument of ratification for the MLI and it enters into force for Singapore on 1 April 2019. As at 21 December 2018, Singapore listed a total of 86 tax treaties intended to be amended via the MLI. These tax treaties will only be amended if Singapore's treaty partners also choose to amend the tax treaties via the MLI and both treaty partners share the same position on the MLI provisions. In the course of this year, we therefore expect to see more developments on exactly which treaties will contain the mandatory arbitration clause.

To address the increasing scrutiny on transfer pricing while eliminating double taxation, dispute resolution will be key and will likely be the next phase of change in Singapore's transfer pricing landscape.

SINGAPORE

**Luis Coronado****Ernst & Young Solutions**

One Raffles Quay
Level 18 North Tower
48583 Singapore
Tel: (65) 6309 8826
Email: luis.coronado@sg.ey.com
Website: www.ey.com

Luis Coronado is a Partner based in Singapore and is the Asia Pacific Area Transfer Pricing Leader.

Luis has worked in Asia since 2005 as part of his almost 25 years advisory experience in international tax, controversy and transfer pricing issues.

Before relocating to Asia, Luis spent several years serving domestic and multinational companies in Latin America, namely Mexico, Brazil, Argentina, Colombia, Peru, and Venezuela. He has advised companies on the negotiation of bilateral advance pricing agreements and competent authority resolutions with Australia, Korea, Indonesia, Germany, Israel, Luxembourg, Singapore, Thailand, Canada, China, Japan, Malaysia, United Kingdom, Mexico, and the US. He has also served many German multinational companies and is fluent in German, having lived in Düsseldorf as a student. He has also worked in Tijuana, Mexico City, Amsterdam, Washington D.C. and Shanghai.

Luis is a frequent speaker at tax seminars and universities in the Americas, Asia, and Europe. He has been an instructor at the International Bureau of Fiscal Documentation's program for introducing transfer pricing to Latin American governments, as well as in their programs in Amsterdam, Kuala Lumpur and Singapore. He has also taught at the Yangzhou Taxation Institute of China's State Administration of Taxation. He frequently advises the Inter-American Development Bank on tax policy issues throughout Latin America, especially in the area of transfer pricing legislation, as well as the World Bank.

Luis has a Bachelor's degree in International Trade and Customs (Honors) from the Universidad Iberoamericana and a Masters in Business Administration from the University of Southern California. He has also taken courses at American University, IBFD's International Tax Academy, New York University, Harvard University, and Vienna University. He is a member of the International Fiscal Association and has been voted numerous times into Euromoney's Guide to the World's Leading Transfer Pricing Advisors and Best of the Best. He is also a member of Bloomberg BNA Transfer Pricing Advisory Board and was also recently awarded the Asia-Pacific Transfer Pricing Practice Leader of the Year by International Tax Review Asia Tax Awards 2019.



SOUTH KOREA

**Henry An****Samil PwC**

100 Hangang-daero
Yongsan-gu
04386 Seoul
South Korea
Tel: (82) 2 3781 2594
Email: henryan@samil.com
Website: www.samil.com

Henry An is a Senior Partner at Samil PricewaterhouseCoopers ("Samil PwC"), the Korean member firm of PricewaterhouseCoopers, and currently serves as Inbound Leader. As Inbound Leader, he has firm-wide oversight responsibility for Samil PwC's foreign-invested client base.

Henry has accumulated nearly 25 years of experience providing various types of consulting services in the US (Washington National Tax, Chicago, New York Metro) and Korea. He specializes in providing advice on complex business and tax issues and serves as an adviser to some of the leading multinational corporations in the world.

As a transfer pricing specialist, Henry has prepared analyses for the purposes of tax compliance, dispute resolution, tax planning, business restructuring, and advance pricing agreements. He has analyzed a full spectrum of inter-company transactions including buy-sell, commission rates, transfers of intellectual property, cost sharing and buy-in payments, service fees, and loans and has advised multinational clients across a wide range of industries. He has been selected for inclusion in Euromoney/Legal Media Group's *Guide to the World's Leading Tax Advisers* and *Guide to the World's Leading Transfer Pricing Advisers* every year since 2004. He has also been recognized in International Tax Review's *Tax Controversy Leaders* every year since 2013.

Henry has served as an external adviser to Korea's National Tax Service, Korea Customs Service, Ministry of Strategy and Finance, Office of the Prime Minister and President's Transition Committee. He is also Treasurer and Co-Chair of the Taxation Committee of the American Chamber of Commerce in Korea.

Henry received a Bachelor of Economics degree from the Wharton School of Business at the University of Pennsylvania. He obtained his Masters in Business Administration from the Kellogg School of Management at Northwestern University where he received recognition as a Jane Robertson Scholar and graduated Beta Gamma Sigma.



삼일회계법인

AUSTRALIA

Paul Balkus
EY
Sydney

Pete Calleja
PwC
Sydney

Jason Casas
Grant Thornton
Melbourne



Fiona Craig
Deloitte Australia
Grosvenor Place 225 George Street
Sydney, NSW 2000
Australia
Tel: (61) 2 9322 7770
Email: ficraig@deloitte.com.au
Website: www.deloitte.com

Helen Fazzino
PwC
Melbourne



Geoff Gill
Deloitte Australia
Grosvenor Place 225 George Street
Sydney, NSW 2000
Australia
Tel: (61) 2 9322 5358
Email: gegill@deloitte.com.au
Website: www.deloitte.com

Tony Gorgas
KPMG
Sydney

Kevin Griffiths
EY
Brisbane

Dixon Hearder
Baker McKenzie
Sydney

Julian Hine
EY
Melbourne

Nick Houseman
PwC
Sydney

Lyndon James
PwC
Sydney

Natalya Marenina See bio
BDO
Brisbane

Jock McCormack
DLA Piper
Sydney



Soulla McFall
Deloitte Australia
550 Bourke Street
Melbourne, VIC 3000
Australia
Tel: (61) 3 9671 7814
Email: smcfall@deloitte.com.au
Website: www.deloitte.com



Ockie Olivier
Deloitte Australia
Brookfield Place Tower 2 123 St
Georges Terrace
Perth, WA 6000, Australia
Tel: (61) 8 9365 7158
Email: oolivier@deloitte.com.au
Website: www.deloitte.com

Frank Putrino
KPMG
Melbourne



Paul Riley
Deloitte Australia
550 Bourke Street
Melbourne, VIC 3000
Australia
Tel: (61) 8 9671 7850;
(61) 416 002 516 (mobile)
Email: priley@deloitte.com.au
Website: www.deloitte.com

Zara Ritchie
BDO
Melbourne

Garrick Robinson
PwC
Melbourne

Jane Rolfe
KPMG
Melbourne

Anthony Seve
EY
Sydney

Shannon Smit
Transfer Pricing Solutions
Melbourne



Cameron Smith
Deloitte Australia
550 Bourke Street
Melbourne, VIC 3000
Australia
Tel: (61) 3 9671 7440
Email: camsmith@deloitte.com.au
Website: www.deloitte.com



Graeme Smith
Deloitte Australia
Eclipse Tower Level 19, 60 Station Street,
Parramatta, NSW 2150
Australia
Tel: (61) 2 9322 5632
Email: graesmith@deloitte.com.au
Website: www.deloitte.com

David Tracey
EY
Sydney



Jacques Van Rhyn
Deloitte Australia
Level 25 Riverside Centre, 123 Eagle Street
Brisbane, QLD 4000, Australia
Tel: (61) 7 3308 7226
Email: jvanrhyn@deloitte.com.au
Website: www.deloitte.com

CHINA

Cheng Chi
KPMG
Shanghai

Spencer Chong
PwC
Shanghai

Glenn R DeSouza
Dentons
Shanghai

Winnie Di
PwC
Beijing



Lian Tang He
Deloitte China
12/F, China Life Financial Center No.
23, Zhenzhi Road Chaoyang District,
Beijing 100026, China
Tel: (86) 10 85207666
Email: lhe@deloitte.com.cn
Website: www.deloitte.com



Xiaoli Huang
Deloitte China
12/F, China Life Financial Center No.
23, Zhenzhi Road Chaoyang District,
Beijing 100026, China
Tel: (86) 10 85207707
Email: xiaoli@deloitte.com.cn
Website: www.deloitte.com



Eunice Kuo
Deloitte China
9/F Bund Center 222 Yan An Road
East, Shanghai, 200002
China
Tel: (86) 21 61411308
Email: eunicekuo@deloitte.com.cn
Website: www.deloitte.com



Victor Li
Deloitte China
13/F China Resources Building 5001
Shennan Road East
Shenzhen, 518010, China
Tel: (86) 755 33538113
Email: vicli@deloitte.com.cn
Website: www.deloitte.com

Travis Qiu
EY
Shanghai



Dr. Wei Shu
Deloitte China
30/F Bund Center 222 Yan An Road
East, Shanghai, 200002
China
Tel: (86) 21 61411036
Email: wshu@deloitte.com.cn
Website: www.deloitte.com

Joanne Su
EY
Beijing

Paul Tang
PwC
Shanghai

Kevin Tsoi
PwC
Guangzhou

Qisheng Yu
PwC
Beijing

Jeff Yuan
PwC
Shanghai

Leonard Zhang
EY
Shanghai



Dr. James Zhao
Deloitte China
30/F Bund Center 222 Yan An Road
East, Shanghai, 200002
China
Tel: (86) 21 61411198
Email: jzhao@deloitte.com.cn
Website: www.deloitte.com

Rose Zhou
Grant Thornton
Shanghai

HONG KONG SAR

Steven Carey
Duff & Phelps
Hong Kong

Cecilia SK Lee
PwC
Hong Kong

Rhett Liu
PwC
Hong Kong

Martin Richter
EY
Hong Kong

Kenny Wei
EY
Hong Kong

INDIA



Tarun Arora
Deloitte Haskins & Sells LLP
7th Floor, Building 10 Tower B, DLF
Cyber City Complex, DLF City Phase II,
New Delhi 122022, India
Tel: (91) 124 679 2907
Email: tarunarora@deloitte.com
Website: www.deloitte.com



Anis Chakravarty
Deloitte Haskins & Sells LLP
Indiabulls Finance Centre, Tower 3,
30th Floor, Senapati Bapat Marg,
Elphinstone Road(W), Mumbai,
Maharashtra-400013, India
Tel: (91) 22 61854265
Email: anchakravarty@deloitte.com
Website: www.deloitte.com

Parikshit Datta See bio
EY
Kolkata

Maulik Doshi See bio
SKP group
Mumbai



Samir Gandhi
Deloitte Haskins & Sells LLP
Lotus Corporate Park, 1st Floor Western
Express Highway Ram Mandir Lane,
Goregaon, Mumbai
Maharashtra-400063, India
Tel: (91) 22 6245 1200
Email: sagandhi@deloitte.com
Website: www.deloitte.com



Manisha Gupta
Deloitte Haskins & Sells LLP
Indiabulls Finance Centre, Tower 3,
30th Floor, Senapati Bapat Marg,
Elphinstone Road(W), Mumbai,
Maharashtra-400013, India
Tel: (91) 22 6185 4288
Email: manishagupta@deloitte.com
Website: www.deloitte.com

Vijay Iyer
EY
New Delhi

Amit Maheshwari
Ashok Maheshwary & Associate
Gurgaon

Rahul Mitra See bio
Dhruva Advisors
Gurgaon



Vishweshwar Mudigonda
Deloitte Haskins & Sells LLP
Prestige Trade Tower, Level 19, 46,
Palace Road, High Grounds, Bengaluru,
Karnataka 560025, India
Tel: (91) 80 6188 6801
Email: mvishweshwar@deloitte.com
Website: www.deloitte.com

Shyamal Mukherjee
PwC
New Delhi

Vispi T Patel See bio
Vispi T. Patel & Associates (Chartered
Accountants)
Mumbai

Bipin Pawar
PwC
Mumbai



Rohan Phatarphekar
Deloitte Haskins & Sells LLP
Indiabulls Finance Centre, Tower 3,
30th Floor, Senapati Bapat Marg,
Elphinstone Road(W), Mumbai,
Maharashtra-400013, India
Tel: (91) 22 6185 5760
Email: rohankp@deloitte.com
Website: www.deloitte.com



Shuchi Ray
Deloitte Haskins & Sells LLP
Lotus Corporate Park, 1st Floor Western
Express Highway Ram Mandir Lane,
Goregaon, Mumbai
Maharashtra-400063, India
Tel: (91) 22 6245 1080
Email: shuchiray@deloitte.com
Website: www.deloitte.com

Sanjay Tolia
PwC
Mumbai

Kunj Vaidya
PwC
Chennai

INDONESIA



Balim Balim
Deloitte Indonesia
The Plaza Office Tower, 32nd Floor Jl.
M.H. Thamrin Kav 28-30, Jakarta, DKI
Jakarta 10350, Indonesia
Tel: (62) 21 5081 8807
Email: bbalim@deloitte.com
Website: www.deloitte.com



Roy David Kiantiong
Deloitte Indonesia
The Plaza Office Tower, 32nd Floor Jl.
M.H. Thamrin Kav 28-30, Jakarta, DKI
Jakarta 10350, Indonesia
Tel: (62) 21 5081 8900
Email: rkiantiong@deloitte.com
Website: www.deloitte.com

Jonathon D McCarthy
EY
Jakarta

Ay- Tjhing Phan
PwC
Jakarta

Permana Adi Saputra
pb Taxand
Jakarta

Danny Septriadi See bio
DDTC
Jakarta

JAPAN



Dr. Akira Akamatsu
Deloitte Japan
Marunouchi Nijubashi Building 3-2-3
Marunouchi Chiyoda-ku
Tokyo, 1008362, Japan
Tel: (81) 3 6213 3800
Email: akira.akamatsu@tohatsu.co.jp
Website: www.deloitte.com

Atsushi Fujieda
Nagashima Ohno & Tsunematsu
Tokyo

Koichiro Fujimori
KPMG
Tokyo



Samuel Gordon
Deloitte Japan
Marunouchi Nijubashi Building 3-2-3
Marunouchi Chiyoda-ku
Tokyo, 1008362, Japan
Tel: (81) 3 6213 3800
Email: samuel.gordon@tohatsu.co.jp
Website: www.deloitte.com

Karl Gruendel
EY
Tokyo



Dr. Kai Hielscher
Deloitte Japan
Marunouchi Nijubashi Building 3-2-3
Marunouchi Chiyoda-ku
Tokyo, 1008362, Japan
Tel: (81) 3 6213 3800
Email: kai.hielscher@tohatsu.co.jp
Website: www.deloitte.com

Makiko Kawamura
DLA Piper
Tokyo



Tetsuya Kawase
Deloitte Japan
Marunouchi Nijubashi Building 3-2-3
Marunouchi Chiyoda-ku
Tokyo, 1008362, Japan
Tel: (81) 3 6213 3800
Email: tetsuya.kawase@tohatsu.co.jp
Website: www.deloitte.com



Kei Maeda
Deloitte Japan
Marunouchi Nijubashi Building 3-2-3
Marunouchi Chiyoda-ku
Tokyo, 1008362, Japan
Tel: (81) 3 6213 3800
Email: kei.maeda@tohatsu.co.jp
Website: www.deloitte.com

Daisuke Miyajima See bio
PwC
Tokyo

Toshio Miyatake See bio
Adachi Henderson Miyatake & Fujita
Tokyo

Koji Noda See bio
PwC
Osaka



Timothy O'Brien
Deloitte Japan
Marunouchi Nijubashi Building 3-2-3
Marunouchi Chiyoda-ku
Tokyo, 1008362, Japan
Tel: (81) 3 6213 3800
Email: timothy.obrien@tohatsu.co.jp
Website: www.deloitte.com



Jun Sawada
Deloitte Japan
Marunouchi Nijubashi Building 3-2-3
Marunouchi Chiyoda-ku
Tokyo, 1008362, Japan
Tel: (81) 3 6213 3800
Email: jun.sawada@tohatsu.co.jp
Website: www.deloitte.com



Michael Tabart
Deloitte Japan
Shin Tokyo Building, 5F 3-3-1
Marunouchi Chiyoda-ku Tokyo,
1008305, Japan
Tel: (81) 3 6213 3800
Email: michael.tabart@tohatsu.co.jp
Website: www.deloitte.com

Teruyuki Takahashi
PwC
Tokyo

Jun Tanaka
KPMG
Tokyo

Ryann Thomas
PwC
Tokyo

Takeshi Yatsu
EY
Tokyo

MALAYSIA



Subhabrata Dasgupta
Deloitte Malaysia
Level 16, Menara LGB, 1 Jalan Wan
Kadir, Taman Tun Dr. Ismail
Kuala Lumpur, 60000, Malaysia
Tel: (60) 3 7610 8376
Email: sudasgupta@deloitte.com
Website: www.deloitte.com



Theresa Goh
Deloitte Malaysia
Level 16, Menara LGB, 1 Jalan Wan
Kadir, Taman Tun Dr. Ismail
Kuala Lumpur, 60000, Malaysia
Tel: (60) 3 7610 8837
Email: tgoh@deloitte.com
Website: www.deloitte.com

Bob LJ Kee
KPMG
Petaling Jaya

Sockalingam Murugesan
EY
Kuala Lumpur

NEW ZEALAND



Bart de Gouw
Deloitte New Zealand
Level 18 Deloitte Centre 80 Queen
Street, Auckland, 1010
New Zealand
Tel: (64) 93030889
Email: bdegouw@deloitte.co.nz
Website: www.deloitte.com

Kim Jarrett
KPMG
Auckland



Melanie Meyer
Deloitte New Zealand
Level 12, 20 Customhouse Quay,
Wellington, 6011
New Zealand
Tel: (64) 44703575
Email: melaniemeyer@deloitte.co.nz
Website: www.deloitte.com

Leslie Prescott-Haar
TP Equilibrium | AustralAsia
Auckland

PHILIPPINES



Carlo L Navarro
Deloitte Philippines
19th Floor Net Lima Plaza 5th Avenue
corner, 26th Street Bonifacio Global
City, Taguig, 1634
Philippines
Tel: (63) 2 581 9035
Email: canavarro@deloitte.com
Website: www.deloitte.com

SINGAPORE

Stephen Bruce
Ernst & Young Solutions
Singapore

Adriana Calderon
Transfer Pricing Solutions Asia
Singapore

Felicia Chia
KPMG
Singapore

Luis Coronado See bio
Ernst & Young Solutions
Singapore

Paul Griffiths
EY
Singapore

Stephen Lam
Ernst & Young Solutions
Singapore

Chérie Lehman
Aspect Advisory
Singapore

Sanjiv Malhotra
BM Tax and Economics Consulting
Singapore

Michael Nixon
Baker McKenzie.Wong & Leow
Singapore



Jee Chang See
Deloitte Singapore
6 Shenton Way #33-00 OUE
Downtown 2, Singapore, 068809
Singapore
Tel: (65) 6216 3181
Email: jcsee@deloitte.com
Website: www.deloitte.com

Geoffrey K Soh
KPMG
Singapore

Sowmya Varadharajan
IC Advisors
Singapore

SOUTH KOREA

Sang Min Ahn
EY
Seoul/New York

Henry An See bio
Samil PwC
Seoul

Seung Mok (William) Baek
KPMG
Seoul

Gil Won Kang
KPMG
Seoul

Kyung Geun Lee
Yulchon
Seoul

Tae-Yeon Nam
Kim & Chang
Seoul



Seong Kwon Song
Deloitte Korea
9F., One IFC, 10, Gukjegeumyung-ro,
Yeongdeungpo-g, Seoul 07326
South Korea
Tel: (82) 2 6676 2507
Email: sksong@deloitte.com
Website: www.deloitte.com

Dong Jun Yeo
Kim & Chang
Seoul

TAIWAN



Ming Chang
Deloitte Taiwan
20th Floor, Nan Shan Plaza No. 100,
Songren Rd. Xinyi Dist, Taipei
Taiwan
Tel: (886) 2 27259988
Email: mingchang@deloitte.com.tw
Website: www.deloitte.com

George Chou
EY
Taipei

THAILAND

Janaiporn Khantasomboon
PwC
Bangkok

Peerapat Poshyanonda
PwC
Bangkok



Stuart Simons
Deloitte Thailand
AIA Sathorn Tower, 23rd-27th Floor
11/1 South Sathorn Road, Yannawa,
Sathorn
Bangkok, 10120, Thailand
Tel: (66) 20340135
Email: ssimons@deloitte.com
Website: www.deloitte.com

Niphan Srisukhumbowornchai
PwC
Bangkok

VIETNAM

Duong Hoang
KPMG
Hanoi



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Q&A with André Schaffers

Partner, Global Leader Pricing & Economics

Deloitte

What was the most significant development in your region/jurisdiction's transfer pricing practice in the past 12 months?

The most important developments remain the consequences of the OECD Base Erosion and Profit Shifting ('BEPS') initiative, such as the recent draft paper on financial transactions, the OECD guidance on the application of the profit split, or the public consultation on the challenges of the digitalisation of the economy. Also noteworthy is the recent publication by the US Internal Revenue Service on the use of profit split. These developments emphasize the importance that both intellectual property and financial transactions have for transfer pricing. They also follow a wave of national regulations that more or less implemented the documentation guidance of the OECD into local legislation.

What was the most notable effect of that change?

First, we note that taxpayers are increasingly inclined to document in detail all intercompany transactions, across jurisdictions. Next, we observe increased field activity by tax auditors and a tendency to approach the selection of audit candidates more systematically. Then follow lengthy and in-depth transfer pricing audits with perhaps less likelihood of negotiated settlement/compromise than in the past.

After a few years, where mostly goods and services transactions were reviewed, we note a renewed attention for financial and intellectual property transactions.

Where is the market moving in this practice area?

Post-BEPS alignment, proactive documentation is surging in turn requiring more automated, system-embedded solutions. The increase in litigation too means that legal and economic talent are gaining importance on the market to address controversy in all its aspects. Finally, only slightly further in the future, (global) profit split, is likely to become of paramount importance, first by serving as reasonableness test, then later, as full-fledged transfer pricing method.

What kind of impact will this have on your work?

The changes outlined above will compel advisers to propose a broader, more specialized array of services that will include technology, legal and economics-related areas. The more 'routine' tasks associated to documentation and compliance are likely to be either internalised by taxpayers or subcontracted to advisers for greater automation.

Do you anticipate any significant legislative changes in the future with a material impact on transfer pricing in your region?

The OECD has produced a lot of guidance lately. There seems to be a convergence towards that OECD guidance in the different jurisdictions' own regulations. We however still see selected countries with



stricter requirements, generally going beyond the OECD recommendations. Further, other supranational regulatory frameworks like the guidance published by the United Nations seem to generally align positions with the OECD. Finally, if additional guidance comes, we expect it to be around how 'arm's length' can be split on a combined tax basis.

If these come into force, how will the industry look in the future?

The industry will still look the same. It is likely, however, to increasingly embed automatic 'arm's length' transfer pricing systems into Enterprise Resource Planning (ERP) systems that will then systematically produce transfer pricing compliance material.

How would you describe the transfer pricing controversy landscape in your region/jurisdiction?

Still in its infancy, as many disputes are settled out of court. However, it is becoming more difficult to settle on the basis of reasonable compromise. And, as jurisdictions continue to vie for tax share, transfer

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pricing disputes will increasingly require settling under the internationally accepted Mutual Agreement Procedures.

Do you expect transfer pricing procedures in your region to move towards common standards or diverge in the future?

We observe a general convergence to a common standard, the guidance developed by the OECD.

Is the global drive towards regulation going to affect TP practice? If yes, in which areas?

Yes, it will. With reference to the above: adjustment of transfer pricing structures the generally comply with BEPS, more systematic preparation of documentation, targeted audit and increased dispute resolution.

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Q&A with Clive Tietjen

Partner
Deloitte

What have been the most significant developments in transfer pricing compliance in the past 12 months?

There have been a number of significant developments as new transfer pricing rules are being introduced in different countries continually (countries such as Kazakhstan, Tunisia, Thailand, Hong Kong, and Saudi Arabia have introduced new rules while Poland and Singapore have changed their rules). Many countries now have documentation filing requirements (rather than just requiring documentation be in place) — whether this be the full local file or a form containing certain detail, and many local deadlines are significantly earlier than that of the parent company.

From a global perspective, the OECD’s “Handbook on Effective Tax Risk Assessment” was introduced in September 2017, which includes 19 factors that determine risk from analyzing data in a group’s country-by-country report. We can expect tax authorities to use these factors to help them interpret the data and raise questions leading to tax audits. From a tax audit perspective, we have also seen an upwards trend in the level of scrutiny of written documentation by tax authorities. The increase in collaboration between tax authorities and information sharing means they are looking at the master file and local file in the context of what they are hearing elsewhere, and challenging some of the detail included in the local file where it is inconsistent with what has been reported elsewhere. However, tax authorities are also challenging where the documentation does not accurately set out what is happening in the local country. In the UK, the tax authority has noted in its write-up of the Diverted Profits compliance facility that a transfer pricing risk factor is a generically prepared functional analysis, without sufficient determination as to whether UK facts and circumstances are sufficiently comparable.

What are the most notable effects of those changes?

There is a continued trend to managing transfer pricing compliance centrally in order to improve efficiency and consistency, and have a coordinated approach to managing the risk coming from analysis of data and scrutiny of the write-ups provided. However, there is also a need to have sufficient local input to make certain that the detail reflects local nuances. The impact of the continued introduction of new rules and deadlines was brought out in a recent Deloitte survey, which highlighted a need for project management – meeting deadlines, requirements, and coordinating better between files across countries. Project management skills are now required to manage the additional compliance requirements alongside the documentation (such as forms and notifications) in certain countries.

Where is the market moving in this practice area?

We are seeing a move towards more project management to take into consideration hard and soft deadlines, such as lodging/submission of forms and files versus the preparation of reports. The centralization



trend is continuing but with a tilt back to appropriate localization, and defence-ready, more detailed local files. Businesses are using data analytic tools to scrutinize their own country-by-country reports for risk to anticipate potential tax authority challenges.

Do you anticipate any significant legislative changes in the future with a material impact on transfer pricing in your practice area?

The longer-term trend is likely to be more real-time reporting. Tax authorities are likely to be looking at testing the arm’s length nature of transactions during the year, rather than just what is reported after the end of the year. This is likely to change the format of transfer pricing documentation. There is still likely to be a need to set out the detail on business operations, such as the value chain and analysis of comparability factors to implement the correct selection of transfer pricing method, but there is likely to be less focus on documenting and testing results.

How can companies address these changes?

It is important to develop a strategy upfront, which takes into consideration the local rules and nuances. Scope the project carefully before starting, and consider the various levels of reports that may be required. A balance is needed between centralization vs localization strategy. Companies also need to consider industry detail, rather than generic transaction-based reports. Data analytics and assessments can help to:

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- Identify anomalies and mitigate risk;
 - Focus efforts on the areas requiring risk management;
 - Drive efficiency and consistency (but with the expectation that some tailoring of modules or inclusion of local information would be needed);
- Enable efficient tailoring to common materials using technology.
In future, we expect greater confidence that systems will produce the right numbers, with less reliance on year-end corrections, which means a greater focus on how transfer pricing policies are operated during the year.

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Q&A with Shaun Austin

Partner
Deloitte

What was the most significant development in (the EMEA region's TP practice in the last 12 months) your region/jurisdiction's transfer pricing practice in the past 12 months?

The most significant development, which indeed is ongoing, is the substantial increase in the information available to tax authorities from a number of sources, combined with a similar increase in the resources they deploy to analyse such information. Such sources of information and data would include those from recently introduced reporting requirements, both on a group level (such as CBC data) and locally (eg. additional reporting in individual countries over and above documentation requirements); from enhanced and expanded interrogation techniques, using technology, often on a real-time basis; and from exchanges of information with other tax authorities.

What was the most notable effect of that change?

The above has clearly increased the depth and granularity of analysis and challenge by tax authorities. One particular aspect of this is general moves from requesting information and support for positions from taxpayers to directly sourcing such information and arriving at an interpretation from this. Another, driven by the significant expansion of information available regarding the broader multinational group, is that tax authorities are much slower to accept a narrower view based on a single country perspective, as opposed to understanding the interaction with, and relative levels of earning compared to, the broader global organisation.

Where is the market moving in this practice area?

Tax audits are becoming increasingly challenging in EMEA. The proximity of countries and collaboration within the EU has also led to tax authorities exchanging information perhaps more readily than in some other regions. Tax authorities in EMEA also tend to have greater use of computer interrogation techniques, and we see the level of detail that tax authorities ask for can be deeper than elsewhere. There are often additional issues such as State Aid (in the EU), challenges on the core deductibility of costs, and withholding tax questions – although these are not exclusive to EMEA, it is increasingly difficult to look at transfer pricing issues in isolation. In the past, companies could seek help from a lawyer to help with a controversy challenge – but with today's complexity, you need a broader skill set including data interrogation, technology, broader tax law, how rules differ between geographies, and much more.

The balance between planning, versus interaction with and reporting to tax authorities, is tipping firmly towards the latter. Companies are facing ever-increasing pressure from tax authorities for detail in reporting. This ultimately requires resources and technology to enable responding in an efficient way; and has heavy cost and time implica-



tions. Business “life events” such as Mergers and Acquisitions (M&A), rationalization etc., requires planning. What there is less of in the market is business change where tax is a key driver in itself, which is a continuing trend.

Another trend we see is real-time reporting in the evolution of digitalization of tax. Tax authorities are moving towards being able to see the data directly in a company's systems rather than companies having to file accounts, returns and reports.

What kind of impact will this have on your work?

The increase in reporting requirements from tax authorities means that our use of technology becomes more important, as well as our increasing breadth of skills, by joining up with transfer pricing practices within (and outside of) our region. The trend towards real-time reporting also implies that integrating technical (transfer pricing) knowledge with technology and advice on how to operationalize what's in a client's system, are becoming more important.

Do you anticipate any significant legislative changes in the future with a material impact on transfer pricing in your region?

On a macro level, the main point is that the OECD proposals on the “digital” aspect have become broader, with a reach beyond simply companies with digital business models. They are looking at elements relating to, for example, marketing intangibles, where the solutions could fall outside of the traditional arm's length standard of transfer pricing. It would be a substantial change to working practices having to consider the elements both within and outside of the arm's length standard, and how they all fit together without creating double taxation or additional uncertainty.

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On the digital side, and more broadly, individual countries are introducing their own rules in addition to evolving OECD guidelines. Some of these stretch transfer pricing in terms of local legislation, such as the diverted profits tax and the proposed digital tax in the UK, again going beyond the arm's length standard, which has been the basis for transfer pricing for a long time. The other main ongoing area of work is on transfer pricing in relation to financing – the changes and guidance in this area, that have been proposed in initial drafts, are likely to have implications for the vast majority of companies, and require specialist knowledge and skills.

If these come into force, how will the industry look in the future?

The balance between the use of technology and the need for technology skills is likely to increase materially. If we consider the issues of moving beyond the arm's length standard, the risks of double taxation are likely to be significant, leading to the need to redesign current transfer pricing policies in relatively short time frames, and to inevitable further challenges in the controversy area.

How would you describe the transfer pricing controversy landscape in your region/jurisdiction?

The transfer pricing controversy landscape in EMEA is challenging. As mentioned above, we've seen increasing pressure from tax authorities to provide more detail more quickly. A recent Deloitte survey* also confirmed these trends: a big increase in resources, and therefore capabilities, within countries' tax authorities; more intrusiveness in data requests (including direct access), and an increase in the interaction between different countries' tax authorities. In the International

Compliance Assurance Programme (ICAP) programme, tax authorities collaborate to provide more clarity and views on risk. The positive effect is greater comfort to companies, but it is potentially outweighed by other developments that increase the risk of double taxation.

Do you expect transfer pricing procedures in your region to move towards common standards or diverge in the future?

The OECD has been working towards standardization in the last four or five years, and made substantial changes to the guidelines that underpin transfer pricing rules. It has not yet led to consistency in how tax authorities implement these, even in some of the more basic elements such as reporting and documentation requirements. While there is a genuine desire from the OECD to have consistency, achieving this – given the pace at which the OECD is working – is very challenging. Recent history suggests that countries are likely to implement these in a way they feel most appropriate locally, and often go beyond OECD requirements, which may lead to a more challenging environment for taxpayers.

Is the global drive towards regulation going to affect TP practice? If yes, in which areas?

Undoubtedly, and we will need more technical skills to address the various additional challenges. The demands on transfer pricing practices have grown materially with the continual changes. With ongoing changes, I envisage that the pressure on Deloitte's TP practices will continue. We will need to increase our use of technology and depth and breadth of skills on a global basis. Fortunately, the member firm consolidation makes that a little easier!

* Survey: Trends in Transfer Pricing – Global Research Bulletin, August 2018

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Q&A with Willy De Molina

Partner
Deloitte

What was the most significant development in your region/jurisdiction's transfer pricing practice in the past 12 months?

There were a number of significant developments in our region in the last year – most notably the Multilateral Instrument (MLI), new rules to resolve tax disputes, the release of a paper on coordination of TP controls, and the mandatory exchange of information:

- The MLI came into force on 1 July 2018, covering 88 jurisdictions, and aims to implement a series of tax treaty measures to update international tax rules and reduce the opportunity for tax avoidance.
- The EU Tax Dispute Resolution Directive (2017/1852) comes into effect on 1 July 2019. It sets out rules on resolving disputes between EU member states when those disputes arise from the interpretation of the application of agreements and conventions that enables the elimination of double taxation of income, and where applicable, capital. It also specifies the rights and obligations of affected persons when such disputes arise.
- A paper was released – *the EU Joint Transfer Pricing Forum* – to establish a coordinated approach to transfer pricing controls within the EU, to avoid double taxation or non-taxation.
- Directive 2018/822 addresses the mandatory automatic exchange of information on tax relating to reportable cross-border arrangements. Areas relating specifically to TP were:
 - o An arrangement involving the use of unilateral safe harbour rules;
 - o An arrangement on the transfer of hard-to value intangibles; and
 - o An arrangement on intragroup cross-border transfers of functions and/or risks and/or assets.

What was the most notable effect of that change?

For MLI, the most notable change was the inclusion of mandatory binding arbitration in cases where there is no agreement amongst Competent Authorities on double taxation (e.g. Mutual Agreement Procedure or MAP). Mandatory information exchange will provide tax authorities with an additional source of information (on top of the Common Reporting Standard/Foreign Account Tax Compliance Act exchange mechanism and the Country-by-Country report), which in turn should improve data accuracy. We expect that the new rules to resolve tax disputes will have a positive effect on avoiding double taxation. On the other side, it could also lead to simultaneous audits from different tax authorities on potentially the same issues. Getting to grips with the new rules and regulations is standard practice for Deloitte, but our controversy network and credentials have been key in assisting companies to anticipate the impact of these changes, and take action to reduce any potential exposure.



Where is the market moving in this practice area?

There is a clear trend towards greater transparency, and this will have an impact on the quantity and quality of information available to tax authorities, enabling them to establish indicators on whether certain taxpayers or transactions may pose a greater risk of tax avoidance.

In addition, it improves taxpayers' awareness about the international tax system and the regulation of cross-border transactions, in particular. For example, faced with uncertainty and/or double taxation, the taxpayer could decide to pursue an Advanced Pricing Agreement (APA) or a Mutual Agreement Procedure (MAP). These are increasing significantly.

What kind of impact will this have on your work?

Deloitte firms in Europe have been helping multinational businesses navigate the increased expectation of transparency, and with how to anticipate increased controversy in transfer pricing.

We will also see an increase in dispute resolution (MAP) and dispute prevention (APA). Deloitte's coordinated controversy network along with the industry knowledge in each field of controversy has been key to providing a quick and quality response to client needs. Our clients are aware of our capabilities in the three main phases of Tax Controversy – pre-audit, during audit, and litigation, but their main requirement so far has been for help with preparing for the pre-audit phase.

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Do you anticipate any significant legislative changes in the future with a material impact on transfer pricing in your region?

The only constant has been change — and although we don't know what they will be, new rules and rule amendments are likely as a result of the OECD's quest to reform the international tax landscape. In the near term, however, the rules mentioned above are to be transposed into the national laws of the EU's member states and, consequently, these should level the playing field somewhat in the region.

If these come into force, how will the industry look in the future?

We have already seen a significant increase in tax controversy since the start of the Base Erosion Profit Shifting programme. Although it is difficult to tell whether the trend will continue, we do foresee that our controversy specialists will continue to provide advice to clients to anticipate changes and mitigate risks. We believe that in the future, our services will increase, not only in our assistance to the client during a TP Audit, but also in the proper use of the instruments available to the taxpayer in order to prevent conflicts or resolve possible double taxation. This includes planning and preparation to lessen disputes, documenting, and preparing evidence and defence files, developing global strategic controversy-aware TP policies, bilateral and multilateral APAs, advanced rulings and unilateral APAs, pre-transaction engagement with tax authorities, and ongoing proactive engagement with tax authorities. In addition, we believe that technology linked to Operational TP and managing Big Data will be key to helping clients proactively manage their controversy issues.

How would you describe the transfer pricing controversy landscape in your region/jurisdiction?

One word to describe the controversy landscape in EMEA is: "challenging!"

The revenue authorities are facing increased political and NGO pressure to become more active, and as a result, are conducting more in-depth transfer pricing audits. These audits could feature interviews, formal information requests, email exchanges and more. The region is also characterized by strong penalty regimes, and audits and litigation can be slow and time-consuming. BEPS principles are often applied retrospectively and we are already seeing the importance of MAPs and APAs for preventing or resolving tax disputes.

Do you expect transfer pricing procedures in your region to move towards common standards or diverge in the future?

The OECD, the EU, and the local country tax authorities are working to provide common standards in order to limit uncertainty and avoid double taxation. However, conflicts of interest are slowing down progress. Deloitte's controversy network monitor these divergences closely. We will also keep an eye on the pilot on cross-border joint audits — this project aims to reinforce international cooperation in tax matters and implement the recourse to joint audits by two or more tax administrations against groups or companies operating in multiple jurisdictions. Having been involved in simultaneous tax audits, we hope it will be the way to avoid double taxation and future discrepancies amongst Competent Authorities.

Is the global drive towards regulation going to affect TP practice? If yes, in which areas?

It is foreseeable that the global drive will affect the transfer pricing practice and result in a greater volume of controversy projects. Fortunately, Deloitte's controversy experience helps us partner with our clients and remain by their side throughout the process.

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BELGIUM

**Leslie Van den Branden****Grant Thornton**

Medialaan 50

1800 Vilvoorde (Brussels)

Belgium

Tel: (32) 476 80 90 71

Email: leslie.vandenbranden@be.gt.com

Website: www.gt.com

Leslie Van den Branden is a partner with Grant Thornton Belgium that acquired in October 2017 the Belgian independent niche advisory firm DWVA in Brussels where Leslie heads the tax and transfer pricing practice. DWVA has been established 25 years ago in order to offer both multinationals as midsize enterprises that are active internationally, a high quality preferred alternative to big four consulting firms. At Grant Thornton, Leslie is a member of the EMEA Transfer Pricing Leadership.

He specializes in the design, implementation and audit defense of tax efficient supply chain management projects and hard to value intangibles for clients in a wide range of industries.

Leslie has 25 years of extensive experience (14 years at KPMG and 11 years at DWVA – Grant Thornton) in performing and managing economic analyses and valuations, transfer pricing documentation projects, concluding APA's and assisting clients during transfer pricing audits and mutual agreement procedures in various European countries and industries (automotive, chemical, pharma, heavy industry, logistics, information technology, fashion, construction, oil & energy, banking & finance, food & beverage, etc.).

Additionally, Leslie is frequently dealing with intercompany financial transactions, going from credit rating analyses, debt/equity rationalization and optimization, pricing for cash-pooling to LT financing instruments.

He frequently speaks at Belgian and international transfer pricing seminars and is a regular contributor to various tax and transfer pricing journals. Leslie is also contributing to the OECD consultations on the revision of the OECD Transfer Pricing Guidelines and the BEPS action points concerning transfer pricing matters.



BELGIUM

**Natalie Reypens****Loyens & Loeff**

Woluwe Atrium Neerveldstraat 101-103

B-1200 Brussels

Belgium

Tel: (32) 2 743 43 43

Email: natalie.reypens@loyensloeff.com

Website: www.loyensloeff.com

Natalie Reypens (attorney-at-law) is a tax lawyer specialised in transfer pricing matters. She deals with all types of transfer pricing issues ranging from strategic advice, documentation, to negotiations with tax authorities and dispute resolution. She assists multinationals formulating sustainable transfer pricing strategies in blending her technical tax expertise with a thorough understanding of her clients' business, management control, and knowledge of the accounting systems used by clients. In this respect, she advises a.o. on transfer pricing policies, the set-up and conversion of business models, restructurings, profit allocation to permanent establishments and assists clients in defining a strategy on country-by-country reporting. She assists her clients in producing tailor-made transfer pricing documentation (local and global) that reflects their aims (local files, master files, country-by-country reporting and other documentation such as intercompany agreements). Natalie also assists taxpayers with audits and represents them before administrative or judicial authorities. She is active in resolving international transfer pricing disputes through mutual agreement procedures (MAPs), using arbitration under tax treaties, or through the EU Arbitration Convention. She regularly joins forces with her Dutch, Luxembourg and Swiss colleagues or best friends in other jurisdictions to work on cross-border matters. Furthermore, she has experience in successfully obtaining Advance Pricing Agreements.

She has developed particular experience in EU state aid advice and litigation. She represents multinationals as counsel in Belgian State aid litigation cases and advises on state aid risks.

She successfully set up the Belgium Transfer Pricing practice which she leads. Its members belong to the wider Benelux-Swiss Transfer Pricing Team which also comprises economists.

As transfer pricing is intertwined with most tax issues, Mrs Reypens' practice also covers matters related to corporate tax law as well as international tax law, including domestic and cross-border corporate restructuring, mergers & acquisitions, holdings and financial structures.

Mrs Reypens holds a law degree from the University of Leuven (1996) and a Master degree in tax law from the Antwerp University (1997). She has been registered at the Brussels Bar since 1997. She is a former teaching assistant in tax law at the Antwerp University. She is a member of the International Fiscal Association and the former national rapporteur of the 2014 annual congress (Mumbai). She is a sought after speaker on transfer pricing issues (eg, IBA panel, Forum on International Transfer Pricing organised by Cambridge Forums Inc., IFA Congress). She also regularly publishes on the topic (eg, Wolters Kluwer, Algemeen Fiscaal Tijdschrift, Tijdschrift voor Fiscaal Recht, CFO Magazine). She is the co-author of a book on international fiscal law.



FINLAND



Kirsi Hiltunen
Eversheds Sutherland
 Fabianinkatu 29 B
 FI-00100 Helsinki
 Finland
 Tel: (358) 40 831 4344
 Email: kirsi.hiltunen@eversheds.fi
 Website: www.eversheds-sutherland.com

Kirsi is a tax and transfer pricing professional with extensive experience in cross-border acquisitions, inbound and outbound investments, transfer pricing, IPR management, and tax-efficient supply chain management. She is a frequent speaker on transfer pricing.

Before joining Eversheds Sutherland, Kirsi was Director of Corporate Tax Management at Outotec Oyj, a Finnish-based technology group. Prior to that she was Partner and Head of Transfer Pricing Practice at EY Finland. She worked in EY's transfer pricing group in Chicago during 1998-2000.

Project Experience:

During the last 21 years, Kirsi has advised a broad range of clients in all areas of transfer pricing, including planning, documentation, controversy management, and litigation.

In her recent transfer pricing projects, she has assisted listed and private companies in preparing for transfer pricing reviews conducted by the Finnish Large Taxpayers' Office (KOVE), and she has supported them during the review process. She advises companies on meeting the BEPS requirements.

In recent large transactions, she structured cross-border acquisitions of Finnish targets, and in a domestic transaction, a simplification of the group structure outside of Finland.

She has advised high-tech and IT companies on how to structure their global operations tax-efficiently, and how to manage their IPRs.

She has assisted clients with permanent establishment issues in Finland and in other countries.

**EVERSHEDS
SUTHERLAND**

FRANCE



Xavier Daluzeau
CMS Francis Lefebvre Avocats
 2 rue Ancelle
 92522 Neuilly-sur-Seine
 France
 Tel: (33) 1 47 38 41 31
 Email: xavier.daluzeau@cms-fl.com
 Website: cms.law/fl

Xavier joined the tax department of CMS Francis Lefebvre Avocats in 1997. He was co-opted as partner in January 2012.

He specialises in international taxation and his main practice areas are transfer pricing, transactional operations, reorganisations and acquisitions. He, therefore, advises clients in several fields such as international / supply chain restructuring, transfer pricing planning and documentation, tax audit and litigation, double taxation cases (competent authorities / arbitration procedures) and advance pricing agreements.

He participated in the works of the EU joint forum on transfer pricing. He is a member of the International Fiscal Association (IFA) and of the Association Française des Avocats Conseils d'Entreprises (ACE). Xavier co-wrote the report for France on "Enterprise services" for the 2012 annual IFA congress.

He regularly publishes articles on international tax matters in French and international publications. He co-authored a book on transfer pricing: *Prix de transfert*, Editions Francis Lefebvre (3rd edition, 2016). He also co-authored a book on the impact of the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting on the French tax treaties (*Conventions fiscales bilatérales consolidées*, Editions Francis Lefebvre, 2018).

He holds a postgraduate degree of HEC (1997) and University of Paris XI (1997) in corporate law.

He is fluent in English and German. In the past, he was two years in secondment in the Berlin office of CMS Hasche Sigle.

C/M/S/ Francis Lefebvre
 Avocats

FRANCE



Pierre-Jean Douvier
CMS Francis Lefebvre Avocats
 2 rue Ancelle
 92522 Neuilly-sur-Seine
 France
 Tel: (33) 1 47 38 56 76
 Email: pierre-jean.douvier@cms-fl.com
 Website: cms.law/fl

Pierre-Jean joined CMS Francis Lefebvre Avocats in 1986 where he was co-opted as equity partner in 1991. He formerly has been with Coopers & Lybrand (1981-1984) and Ernst & Whinney (1984-1986).

He specialises in transfer pricing and private clients, having 30 years' experience in those areas. The support of the integrated team of 10-plus economists is invaluable when assisting clients in transfer pricing. His other practice areas are cross-border transactions, including M&A, financing, refinancing, restructuring, financial leasing, and European and international taxation. His second area of expertise is private clients: legal and tax regimes, including family law (international aspects), immigration law, assets protection, wealth transfer techniques, inheritance, assets protection and separation of assets, matrimonial status, real property investments, trusts impacts within civil jurisdictions, tax audit protection and litigation.

Pierre-Jean is a member of the Institute for Tax Advisers (IACF), the International Fiscal Association (IFA) and the International Bar Association (IBA). He is also the honorary vice president of the trusts committee of the IBA.

He is a lecturer on international taxation at the University of Paris II – Assas and also a speaker at conferences on topics such as transfer of domicile, trusts and assets reorganisation. He is the author of several publications edited by the IBFD, including *The Regime of Partnerships* and *The Regime of Permanent Establishments*, as well as others published by Editions Francis Lefebvre in English and French (e.g. *Monaco Tax and Legal Guide* and *Transfer Pricing Guide*) and Option Finance. He regularly contributes to reference books on International Transfer Pricing. He is a correspondent for the International Transfer Pricing Journal and regularly writes international articles in English.

Pierre-Jean is domiciled and based in Monaco where he has a licence of counsel in international taxation.

He holds a master's degree in business law from the University of Paris II Assas (1981) and is a graduate from the ESLSA Business School (1979).

He speaks English and German fluently, and Italian.

C/M/S/ Francis Lefebvre
 Avocats

FRANCE



Stéphane Gelin
CMS Francis Lefebvre Avocats
 2 rue Ancelle
 92522 Neuilly-sur-Seine
 France
 Tel: (33) 1 47 38 44 00
 Email: stephane.gelin@cms-fl.com
 Website: cms.law/fl

Stéphane joined the tax department of CMS Francis Lefebvre Avocats as a partner in June 2003. He has been advising French and foreign multinationals in the area of international tax and transfer pricing for more than 30 years. He has been involved in significant projects in international restructuring, global transfer pricing planning, supply chain projects, French and foreign transfer pricing documentation, domestic and international controversy (including competent authorities, arbitration procedures and APAs). He heads the CMS global tax practice group and is a member of the Supervisory Board of CMS Francis Lefebvre Avocats.

Before joining CMS Francis Lefebvre Avocats in June 2003, he was a tax partner with Ernst & Young where he headed the French transfer pricing practice and was a member of E&Y global advisory committee for transfer pricing. He spent five years in New York at the international tax services of the firm, where he was responsible for the French tax desk, assisting French and US clients involved in cross-border transactions.

Stéphane was the national reporter for the e-commerce topic at the 2001 IFA Congress and a panellist at the 2007 IFA Congress on Cost Sharing Agreements. He was a "special witness" during the 2012 IFA Conference in Boston concerning the OECD transfer pricing report on intangibles. He is a board member of the Chartered Institute of Taxation, European branch.

He is a frequent contributor to various French and international tax journals. He has co-authored three books on transfer pricing: *Prix de Transfert*, Editions Francis Lefebvre (2019); *Guide to International Transfer Pricing*, Kluwer (2011); and *Transfer Pricing Manual*, Bloomberg BNA (2008). He lectures on transfer pricing at the University of Burgundy in Dijon. He co-developed, for the Chartered Institute of Taxation, the transfer pricing syllabus for the advanced diploma in international tax. He is a Permanent Member of the editorial board of *Tax Management International Forum*, Bloomberg BNA.

Stéphane graduated from the Paris Institute of Political Studies in 1986 and obtained a *Maîtrise* and a *DESS* in business and tax law from the University of Paris V (1985). He is a registered lawyer.

A native French speaker, he is also fluent in English.

C/M/S/ Francis Lefebvre
 Avocats

FRANCE

**Bruno Gibert****CMS Francis Lefebvre Avocats**

2 rue Ancelle

92522 Neuilly-sur-Seine

France

Tel: (33) 1 47 38 42 19

Email: bruno.gibert@cms-fl.comWebsite: cms.law/fl

Bruno Gibert joined CMS Francis Lefebvre Avocats as an equity partner in 2001. He specialises in international taxation, with a particular focus on transfer pricing matters. On this last domain, he heads the transfer pricing group of CMS.

He has 16 years' experience in the government service, where he was in charge of international tax affairs (negotiation of tax treaties with foreign countries, OECD and EU work, and competent authority). He used to be co-chairman of the OECD Forum on Harmful Tax Practices (1996 to 2001). Chairman of the EU Joint Forum on Transfer Pricing since 2002, he also chairs the French Branch of the International Fiscal Association (IFA) and the Tax Committee of the Club des Juristes (French Lawyers Club).

In 2015, he has been appointed by the French government as an independent person of standing for the EU arbitration convention.

He is the author of a report to the French government on tax security in France in 2004 and co-author of two other reports to the French government, one on intangible assets (2006) and one on how to improve the commentary on French tax law (2010). He is also the co-author of the chapter on rulings of a book on French tax procedures (published in 2005 and updated in 2008), a book on transfer pricing in France (Editions Francis Lefebvre, 3rd edition 2016) and the author of the chapter on France of the book *Transfer Pricing and Dispute Resolution* published in 2011, last edition 2018, and of the chapter on the mutual agreement procedure of a book on the OECD Model Convention (Editions Francis Lefebvre 2013). He regularly publishes articles on international tax matters in French and international publications.

After graduating in political sciences at the IEP Paris (Sciences-Po) in 1979, Bruno Gibert completed his education with a Master in corporate and tax law at the University of Paris II (Assas) before entering the ENA.

He is fluent in French and English.

C/M/S/ Francis Lefebvre
Avocats

FRANCE

**Arnaud Le Boulanger****CMS Francis Lefebvre Avocats**

2 rue Ancelle

92522 Neuilly-sur-Seine

France

Tel: (33) 1 47 38 44 05

Email: arnaud.leboulanger@cms-fl.comWebsite: cms.law/fl

Arnaud Le Boulanger is a partner with CMS Francis Lefebvre Avocats and the chief economist of CMS. He joined the tax department of CMS Francis Lefebvre Avocats in October 2003 and heads the economic studies department of the firm, which provides specialist advice in the fields of transfer pricing and asset valuation issues.

As a specialist in transfer pricing issues for more than 20 years, Arnaud has carried out and led numerous studies in France and on a worldwide basis, in many fields such as transfer pricing planning and tax optimisation, transfer pricing alignment with business re-organisations, prominent asset transfers (some cases with orders of magnitude in bn EUR), documentation, advance pricing agreements and client defence during tax audits.

Before joining CMS Francis Lefebvre Avocats, Arnaud headed HSD Ernst & Young's team of economists in France from 1999 to 2003. He had similar responsibilities at Deloitte & Touche in Paris, from 1995 to 1999, after having spent two years in the firm's audit services (1993 to 1995).

Arnaud participates regularly in conferences in various countries, has written many articles and co-authored the various editions of two books on transfer pricing: *Prix de Transfert*, Editions Francis Lefebvre (2008-2016), *Guide to International Transfer Pricing*, Kluwer (2011-2018). He lectures on transfer pricing at the Sorbonne University (Paris).

Arnaud holds an engineering degree from Ecole Nationale Supérieure de l'Aéronautique et de l'Espace (1991) and an international MBA degree from Ecole Nationale des Ponts et Chaussées (1992-1993). He became an Attorney at Law in 2006.

He is fluent in French and English.

C/M/S/ Francis Lefebvre
Avocats

FRANCE

**Pascal Luquet****Grant Thornton**

29 rue du Pont

92200 Neuilly-Sur-Seine

France

Tel: (33) 1 41 16 27 41

Email: pluquet@avocats-gt.com

Website: www.avocats-gt.com

Attorney-at-law and Partner of Grant Thornton Société d'Avocats (the Tax Law firm member of the Grant Thornton network), Pascal Luquet is leading the International Tax and Transfer Pricing department within Grant Thornton in France.

Grant Thornton is an international, integrated and independent organization specialized in audit, advisory and tax services. Globally speaking, the Grant Thornton network is active in more than 135 countries, is employing more than 53,000 persons and its turnover amounts to + 1.3bn€.

Within this tax network, there is a specialized team for transfer pricing, VAT and indirect taxes, Global Mobility, Financial Services.

Pascal has extensive experience in transfer pricing and international tax services for multinational or national groups. He has led several important global engagements in the manufacturing and retail industries covering multiple countries and expertise (tax, legal, global mobility). Pascal is highly experienced in tax audit assistance, litigation and elimination of the double taxation (Dispute Resolution expertise, in particular, APAs, MAPs and EAC).

As far as APAs are concerned, Pascal has managed more than 30 APAs in his career and was the first advisor dealing with multilateral APAs in the FS sector or with bilateral APAs with Japan.

He has worked for 25 years within the KPMG Network, where he was leading a team of more than 20 economist and tax consultants in Paris, France. Then Pascal spent more than two years at Mazars to build the transfer pricing and international tax department.

Pascal is now developing the International Tax and Transfer Pricing department of Grant Thornton Société d'Avocats. He is focusing on high added value services and is assisted by a dedicated team with which he is working for years.

The activity of his team is growing rapidly (more than 25%) and Pascal and his team are in a position to assist clients all over the world in all aspects:

- Planning;
- Dispute resolution (tax audit assistance, Advance Pricing Agreements, Mutual Agreement Procedures, European Arbitration Convention);
- VCTC (Value Chain Transformation and Compliance) together with the IT consulting services of Grant Thornton;
- ChCR together with the consolidation team of Mazars;
- Global documentation (Masterfile and local files);
- Training of in house tax and finances teams





THE SEARCH IS OVER

A crossword puzzle is shown on a white card. The words 'INTERNATIONAL' and 'TAX REVIEW' are written in bold, black, uppercase letters. They are circled with a purple marker. A hand holding a black pen is visible on the right side of the puzzle, pointing at the word 'TAX REVIEW'. The puzzle grid is filled with various letters, and the words are placed horizontally. The background of the puzzle card is white, and the letters are black. The words 'INTERNATIONAL' and 'TAX REVIEW' are the most prominent features of the puzzle.

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GERMANY

Growing beyond borders – Multinationals are responding with virtual teams and matrix organizations – How to keep up from a transfer pricing perspective

Michael Freudenberg (left) and Felix Bussmann (right)
KPMG

Düsseldorf/Frankfurt am Main

The global war of talents and a new era of a digitally connected global economy – just to name two challenges multinationals are increasingly facing. To react to these trends, multinationals are forced to work more and more in virtual teams spread across the globe. Cross-border matrix organizations have become the new normal in many multinationals to better respond to these challenges. This is accompanied by shift in the global tax policy that puts more emphasis on allocating taxable income along the value chain based on value creation, the latter represented by (high-skilled) people located in different tax jurisdictions. Thus, transfer pricing policies and respective processes need to be established, so that the new way of interconnectivity beyond borders is properly reflected.

How can multinationals prepare best?

Global Trends

Individuals present their skills and find work using digital platforms such as LinkedIn. By doing so, they build a global personal network and participate in globalization directly. A huge pool of technical labor evolves in the emerging markets. In 2016, roughly eight million science, technology, engineering, and mathematics graduated in China and India.¹ In contrast, 568,000 graduated in the United States and 173,000 in Germany.² As an outcome, Western European and U.S. multinationals increasingly source the best talent globally. The great advantage is the flow of ideas, talent, and inputs that spur innovation and productivity.

The growing complexity in the world of multinationals make traditional hierarchical structures more problematic as they become more specialized and require employees with specific areas of expertise. Furthermore, agility has become a core virtue as organizations need to be able to respond quickly to new changes in the market environment. Hence, multinationals foster the change of their operational structures from divisional or functional structures to complex matrix structures.



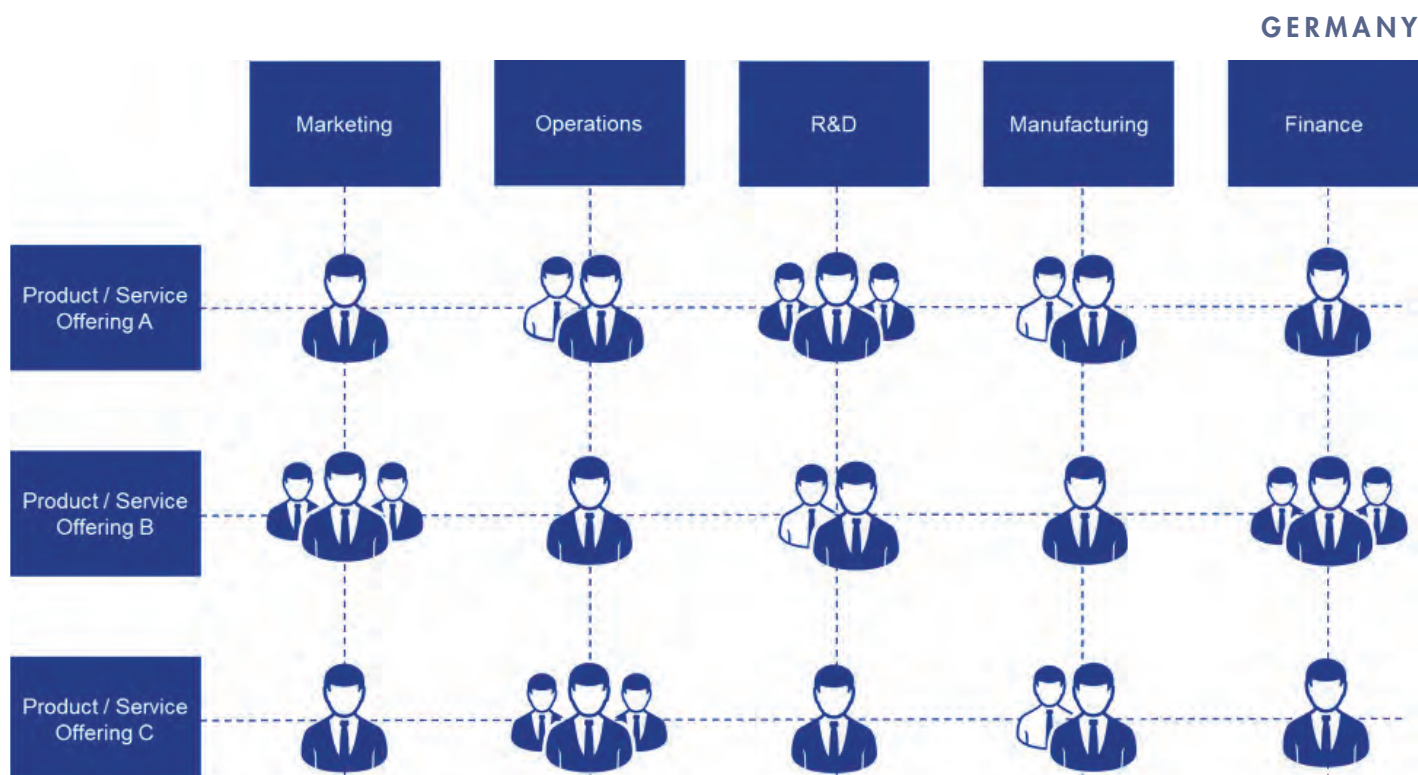
A matrix organization heavily affects individuals and teams working in the matrix, as information flow and decision-making are different and disregard traditional hierarchies as well as country borders. Individuals typically report to at least two managers, e.g. a functional manager and a product/service offering manager. (see diagram opposite)

Transfer pricing impacts

Working beyond borders in global or regional teams being responsible for a specific product range, service offering or global customer may be advantageous from a business perspective. From a transfer pricing perspective, an organizational structure beyond country borders – and especially beyond legal entity borders – significantly increases the complexity with regards to the delineation of intercompany transactions as well as to the proper allocation of taxable income.

Multinationals tend to implement a traditional intercompany service charge for cases in which individuals or teams work cross border in a cross-functional dimension. Often times, the above mentioned service charges are determined on a cost plus basis using the salary costs (and potentially some overhead costs) of the employees as well as an arm's length cost mark-up for low-value added services – often around 5%.³ This may be appropriate for cases in which only low value added

MATRIX
ORGANIZATIONS –
WHAT TO CONSIDER
FROM A TRANSFER
PRICING PERSPECTIVE?
ACTING INSTEAD OF
REACTING



services are rendered,⁴ but may not be sufficient for functions providing a competitive edge.

When implementing a matrix organization, multinationals should carefully consider the transfer pricing impacts with regards to a potential exit charge as it presumably leads to reshuffling and relocation of responsibilities. Following the new OECD's guidance, taxable income should follow the significant people who are key for value creation. If this is the case, the cross-border relocation of responsibilities and the corresponding taxable income might be considered as a transfer of "something of value"⁵ or a transfer of functions, which would require an arm's length compensation for forgone future profits. The exit tax trap also threat to existing matrix organization as any cross-border personnel change is suspected to lead in a shift of profits. For example, what would be the transfer pricing consequence if the head of R&D for a specific product group based in country A, who is deemed to be key for the allocation of income assigned to the R&D function, retires and the successor is hired in country B?

Another challenging question is, where intellectual property ("IP") is generated within a matrix structure. In local hierarchical structures, this question can easily be answered in many cases because a significant part (if not all) of the activities related to Development, Enhancement, Maintenance, Protection & Exploitation ("DEMPE") of IP is performed in the same country. This is definitely not the case within multinationals operating with a global matrix structure.

Finally, matrix structures tend to increase the risk of constituting artificial permanent establishments (agency, service or management permanent establishments). Exemplary, one could think of a matrix structure in which global responsibilities for certain customers (e.g. key account management) are established. Increased scrutiny from tax authorities can be expected and multinationals should be prepared to show that neither contracts are signed by a foreign employee nor should the foreign employee play the principal role leading to the conclusion of contracts that are routinely concluded locally without material modification. In this regard, we currently see a trend that tax

authorities (automatically) review in detail e-mail correspondence to identify potential permanent establishment matters within multinationals.

Statutory duties of local management

From a business perspective, main advantages of a well running and efficient matrix organization are i.a.

- a flexible, efficient allocation and sharing of resources
- an increased flow of information
- cultivating a culture of co operation, communication, openness and tolerance

However, matrix organizations require a redefinition of authority and flexible styles of management. A successful matrix organization strives to maintain equality on the vertical and horizontal axes of the matrix. In general, a matrix structure requires a new understanding of authority and the introduction of new systems and processes to set the right boundaries of accountability and responsibility.

In many cases this could contradict with the legal duties and obligations of the local managing director. Even though the respective manager within the matrix organization could be responsible for strategic and operational activities, the local managing director should have the right to intervene. In order to be able to adequately intervene, the local managing director needs to have access to relevant information.

In any case, it is highly advisable for the local managing director to introduce prevention measures as well as a monitoring system to ensure that important decisions are not taken and relevant measures are implemented without informing the local management respectively proper involvement of the local management.

Working in a matrix structure – what to consider from a transfer pricing perspective

The ground rule for every cross-border matrix organization is: acting instead of reacting.

GERMANY

To be able to implement proper measures from a transfer pricing perspective and avoid unpleasant surprises in the next tax audit, the tax department should make sure to be informed or have access to business decisions, which may have tax or transfer pricing impacts.

Considering the tax department is sufficiently informed, the following should be taken into account when entering into a matrix structure or running a matrix structure:

- Clear processes have to be implemented. This should include a profound and documentable approval process as well as a policy with regards to the delegation of authority. It should also include monitoring and communication processes for local management as well as a policy for the implementation of reporting lines.
- Sound legal agreements should be concluded, which specify rights

and obligations. Agreements should also consider the contractual definition of IP generating (DEMPE) activities and respective allocation.

- Transfer pricing impacts with regards to a potential exit charge should be considered. Starting point could be to compile information on which legal entity is potentially benefitting and which entity is losing when entering into the matrix organization.
- Robust documentation should be prepared and maintained.

Entering into a matrix structure is in most cases a pure business decision and not a decision taken by the tax department. However, this decision indeed could have diverse tax consequences. For multinationals, considering the above mentioned measures is highly recommendable and will put them in a better starting position for discussions with tax authorities.

1 World Trade Organization, 2019, "Global Value Chain Development Report 2019", p. 148.

2 Source: German Federal Office of Statistics.

3 See OECD (2017), OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, OECD Publishing, Paris, section 7.61.

4 OECD Guidelines 2017, section 7.45 ff.

5 OECD Guidelines 2017, section 9.10 ff.

GERMANY

Three Transfer Pricing Earthquakes – HTVI, DAC6, and ICAP

Alexander Voegelé (left) and Philip de Homont (right)
NERA Economic Consulting
Frankfurt am Main

Tax authorities in many countries are heavily investing in their field tax audit teams and systems. For example, Germany has hired more than 300 additional auditors for the Federal Tax Office, resulting in a total of more than 460 tax auditors – on the federal level alone. They are also increasingly investing in new IT systems that allow the identification of transfer pricing risks in the audit of supply networks and other audits fields.

The German federal audit team has also developed electronic tools to analyse the data of the accounting system, which they are successfully using to detect and analyse the value drivers for the profits of cross border transactions. This increased focus and the OECD concept of “Hard-to-Value Intangibles” leads to unexpected and extremely high tax adjustments.

The German field tax audit also prepares the IT-architecture to analyse the future DAC6-returns and estimates to receive 20 to 70 thousand of these returns per year. The data analytics may provide a bit of certainty in some cases, but in general highly increased risk for MNCs.

There are also positive developments for tax payers: The Federal Tax Office is actively developing ICAP procedures, which should provide an excellent alternative to APAs. Furthermore, Germany has increased its staff for competent authorities procedures to more than 60.

TP audits of intangibles

In practice, on the biggest trends in TP audits around the world has been that tax authorities are using the “DEMPE” concept that was established by the OECD: Field tax audits stipulate that local entities in their geographies have conducted development, enhancement, maintenance, protection or exploitation functions for intangibles that they license from group companies. Therefore, tax authorities argue, the royalties should be lowered – or disregarded entirely. In addition, tax authorities in high-tax countries, such as Germany, focus on the remuneration of manufacturing technologies.

This development requires a new approach by tax payers, both for setting their IP remuneration and for TP documentation and tax audit situations. One challenge is that, while DEMPE is becoming ubiquitous, the definition offered by the OECD is very open.

NERA has established a procedure to address the open points of the DEMPE analysis.



Our method follows a combination of qualitative economic reporting that shows who has developed these intangibles, and quantitative analysis of the value and the relative importance of these contributions. Over the past year, NERA has performed a series of DEMPE studies in tax audits and for TP documentation and planning, and applied the results to calculate profit splits or defend benchmarking studies of comparable licence agreements. In all cases, it was key to analyse the economic underpinning of the concrete DEMPE functions in order to see the overall value creation contribution.

TP audits on trademarks (US-Mexico)

In the first audit case, we were asked to defend a CUP analysis for a trademark licence agreement between a licensor in the US and a licensee in Mexico. For the audit period, which predated the new OECD guidelines, the Mexican tax authorities challenged the CUP studies and demanded a DEMPE analysis.

NERA analysed the facts and could show that the US company developed the brand originally and performed strategic management to enhance the brand (e.g., periodical rebranding activities and concepts for new online distribution channels). It also provided guidance for local marketing activities (e.g., branding material) and centrally registered the trademarks. On the other hand, the local licensor performed local marketing activities and exploited the brand value to generate sales.

In the next step, the insights of the DEMPE analysis were used to test if this contribution split is similar to contracts between unrelated third parties (i.e., we reviewed the functions and responsibilities assigned in third-party contracts). Many brand licensing contracts demand the licensee to perform certain marketing activities under the strategic guidance of the licensor. NERA demonstrated that the selected CUP benchmarks were comparable in the functional split between licensor and licensee.

ONE OF THE BIGGEST
TRENDS IN TP AUDITS
HAS BEEN THAT TAX
AUTHORITIES ARE
USING THE
“DEMPE” CONCEPT

GERMANY

TP audits on the use of Global trademarks (Switzerland – Germany)

In a second project, NERA performed a DEMPE study to support a profit split analysis and measure contributions of two entities to the joint creation of valuable technologies.

A multinational group had acquired a German company, and soon started to use both the umbrella brand of the group and the company's previous name. The TP audit started to question the brand royalty, stipulating that the value was primarily due to the local brand and that the international umbrella brand was essentially worthless.

NERA proceeded to undertake an interview-based survey of internal experts. Qualitatively, it was possible to establish the various forms of contributions to the respective brands, such as platform intangibles, trade fair exhibitions, and rebranding initiatives. More importantly, following a rigorous selection of interviewees, we collected a substantial number of responses. The analysis showed that the value was indeed derived from the combination of umbrella and local brands; the market-facing experts could identify the contribution of the umbrella brand in detail.

This allowed the establishment of a profit split methodology based on the relative contribution to the intangibles, and ultimately showed that the trademark royalty for the umbrella brand was arm's length.

Hard to value intangibles

An increasing focus of audits has been the OECD definition of HTVI's as intangibles that fulfil two criteria: (1) There is no reliable comparable; and (2) At the time of the transaction, the projected future income associated with the intangible is uncertain.

Unfortunately, this is true for nearly all intangibles, since intangibles are by definition unique. After-all, they are what sets a successful company apart from its competition, so one can rarely identify a transaction between independent parties where almost an identical intangible is transferred.

The OECD guidelines tackle this in two ways:

- 1) They reject cost-based valuations in favour of the discounted cash flow method, despite uncertainties prevailing at this stage of transfer; and
- 2) More critically, they prescribe to validate forecasts through ex-post actuals. If there is a significant difference, tax authorities are entitled to impose adjustments based on the actuals, even if the transacting parties have not agreed on price adjustments clauses.

Ex-ante uncertainties

Based on these rules, recent German tax audits start to challenge existing license agreements. Multinationals that do not want the valuation of their transactions to be open for ex-post adjustments must therefore provide evidence that they have properly considered ex-ante uncertainties. When these uncertainties are reflected in the original valuation, ex-post adjustment should simply not be justified, since deviations were then already accounted for.

TP audits on Digital Technology (Germany – Ireland)

As an example, we valued a software program in a continuing development stage that was transferred between German and Irish entities

based on five different scenarios. These scenarios were based on the actual business development plan regarding potential future software features and associated business strategies.

Today, several years later, it looks like the software will be successful. However, under a normal cash-flow valuation, the original buy-out would need to have been adjusted significantly. However, since very positive development was explicitly accounted for and incorporated into the valuation, there is no need for further adjustments, even in the new HTVI framework.

Methods that NERA used for this case consider the specific risks related to the development of HTVI and include real option pricing, which is supported by Monte Carlo simulations, and the binomial tree analysis. These methods are based on not just assuming a single prediction of a future income, but explicitly looking at different scenarios, which range from failure to better-than-expected.

Digitals in the Chemical Industry

Along with the mega trends in the digital industry, we conducted a central planning case of the digitalisation effects in the chemical industry. A producer of chemicals expanded its relatively traditional business into new digital offerings. The group already had well-known patents and brands, production technology, and customer relationships with clients around the globe. However, the group is now starting to offer field management software that allows clients to estimate yields to plan and target the use of the chemicals more efficiently.

All these activities are driven by different entities within the group and are highly intertwined. The software is developed by a new start-up within the group, which relies on the R&D experience by the group's laboratories and is advertised to the clients by the sales entities using local client relationships and the global brand.

On the other hand, the software sends back information to the groups data centres where it is then processed and structured by some of the group's data scientists and then used by both the R&D centres to improve the core products as well as by the sales entities to better target their campaigns. The software start-up development entity in the group also uses customer feedback to improve the software. While there are some direct revenues created from the licensing of the software to clients, much of the value creation happens in this network of effects.

As can be seen from this example, it is not only that new intangibles are created, but that intangibles are increasingly interlinked and influencing each other. For transfer pricing, this is a challenge, as it becomes more difficult to pinpoint the exact impact of one company within this value network and its appropriate remuneration. While many companies contribute to the business success, it is obvious that these contributions are very different, both in nature and likely in value.

Therefore, we had to interrelate these intangibles and DEMPE contributions and their economic impacts in detail by mapping and explaining their relations.

Finally – and remarkably – we could show that the results were identical to the old Non-Routine Principal / Routine sales company structure; we are curious what the field tax auditors will say.

GERMANY

**Ulf Andresen****PwC**

Friedrich-Ebert-Anlage 35 – 37
D-60327 Frankfurt am Main
Germany
Tel: (49) 69 9585 3551
Email: ulf.andresen@pwc.com
Website: www.pwc.com

Dr. Ulf Andresen is an international tax partner in PwC's Frankfurt office. He re-joined PwC in 2013 after having spent more than eleven years with another Big Four firm in Germany. Before, he worked with PwC in Hamburg and Sydney from 1996 through 2002.

Ulf has substantial experience in serving multinational groups of companies in structuring their cross-border activities, assisting with the implementation of such structures in particular in post-merger integration settings, evaluating the tax accounting impact, and defending these structures in tax audits. Such tax audit activity includes the negotiation of corresponding adjustments in bilateral tax audit situations, mutual agreement/arbitration procedures under both tax treaties and the European Arbitration Convention, and/or litigation in German tax courts. He is known for his excellence in transfer pricing controversy situations. In addition to Germany, his APA experience covers Denmark, Finland, France, Ireland, Japan, Korea, United Kingdom and United States where he was involved in the local negotiations with the local tax authorities. Moreover, he is a well-known expert with respect to the taxation of permanent establishments and financial services transfer pricing.

His expertise covers the following industries: asset management, automotive including suppliers, banking, chemical, consumer goods, engineering, information technology including software, insurance, and pharmaceuticals.

Ulf holds a PhD, MBA and BA in business administration from the European Business School, is a certified tax adviser in Germany, a chartered accountant in Australia and has been a member of the International Fiscal Association for many years.

He is the co-publisher and co-author of the Permanent Establishment Handbook (Betriebsstätten Handbuch) the leading publication on PE taxation in Germany the 2nd edition of which is published in 2017. His PhD-thesis on the arm's length standard received an honourable mention at the 2000 IFA Congress.



GERMANY

**Hubertus Baumhoff****Flick Gocke Schaumburg**

Fritz-Schäffer-Straße 1
53113 Bonn
Germany
Tel: (49) 228 95 94 0
Email: hubertus.baumhoff@fgs.de
Website: www.fgs.de

Prof. Dr. Hubertus Baumhoff is a partner with Flick Gocke Schaumburg in Bonn. He specialises in the taxation of groups and deals intensively with questions of international tax law, in particular group transfer pricing and the tax structuring of groups. He is particularly experienced in defending transfer prices and TP systems in the context of tax audits of enterprises operating internationally with tax attachment points in Germany. Hubertus Baumhoff studied economics in Münster and Hamburg (1980 Diplom-Kaufmann, 1985 Dr rer pol). He was admitted as a certified tax adviser in 1987 and as public auditor in 1991. He joined Flick Gocke Schaumburg in 1986 and was promoted to partner in 1991. Hubertus Baumhoff is an honorary professor at the University of Siegen, lecturer at the University of Zurich since 2010 (LL.M. programme) as well as a guest lecturer at the Bundesfinanzakademie (German Federal Finance Academy). He has authored numerous publications on German and international tax in leading professional journals, and is co-editor of the Flick/Wassermeyer/Baumhoff/Schönfeld commentary on foreign tax law. His most recent works are *Transfer Pricing in Germany* – compact (published in 2018) and *Transfer Prices between Internationally Affiliated Enterprises* (published in 2014).

Practice areas

Business model optimisation, economic modelling, cross-border project management, restructuring, cost-sharing arrangements, APAs, transactions, M&A, corporate taxes, technology, value chains, audit defence, audit support, dispute resolution, pre-litigation, MAPs/ADRs, controversy management, tax consulting, international tax advisory, supply chains

Sector specialisations

Accounting, automotive, aviation, banking, construction and materials, consumer goods and services, energy, financial services, food and beverage, healthcare, industrials, oil and gas, pharma and life sciences, real estate, tech and telecoms, tourism, transport, utilities

Association memberships

Member of the board of the Siegen Forum on Accounting, Auditing and Taxation (Siegener Forum für Rechnungslegung, Prüfungswesen und Steuerlehre e.V.), member of the administrative board and Chairman of the working group on foreign tax law of the German Institute of Public Auditors (Institut der Wirtschaftsprüfer in Deutschland e.V.), member of the International Fiscal Association



GERMANY

**Lorenz Bernhardt****PwC**

Kapelle-Ufer 4

D-10117 Berlin

Germany

Tel: (49) 30 2636 5204

Email: lorenz.bernhardt@pwc.com

Website: www.pwc.com

Lorenz Bernhardt is a senior transfer pricing partner at PwC Berlin.

Lorenz has over 20 years experience in tax consulting, in particular in planning, implementation and defense of transfer pricing systems as well as in international tax structuring. He advises large international clients (both German and foreign-headquartered) and has led many projects with a broad variety. He is also acting as a central European transfer pricing advisor for a number of multinational corporations. Additionally, Lorenz lectures on transfer pricing and international tax at professional seminars and at renowned universities. He is regularly named to be one of the top tier transfer pricing advisors in Germany.

Recent projects of Lorenz Bernhardt included:

- Advice on and implementation of large restructuring projects, including treatment under the German transfer of function rules;
- Negotiations and comprehensive filings relating to bilateral Advance Pricing Agreements matters for Blue Chip Groups; and
- Tax audit defense work with a focus on very large cases and high-end transfer pricing matters.

Lorenz is also co-heading the transfer pricing practice of PwC Europe (comprising Austria, Belgium, Germany, The Netherlands, Switzerland and Turkey) as well as the PricewaterhouseCoopers' EMEA TP practice.

Lorenz obtained a law degree from the University of Munich and an LLM from New York University School of Law. Before joining the tax practice of an international accounting firm in Germany, he had been working as a foreign associate with Fried, Frank in New York. Lorenz is a German certified tax advisor and has been admitted as attorney-at-law both to the German Bar as well as to the New York Bar.



GERMANY

**Thomas Borstell****EY**

Graf-Adolf-Platz 15

40213 Düsseldorf

Germany

Tel: (49) 211 9352 10601

Email: thomas.borstell@de.ey.com

Website: www.ey.com

Background

Thomas is a senior transfer pricing partner based in Düsseldorf, Germany.

Skills

Thomas has more than 30 years of experience in the design, documentation and defense of transfer pricing systems; IP migration, business restructurings and operating model conversions; structuring of cost allocation and cost sharing arrangements; resolving transfer pricing conflicts with the tax authorities in audits, mutual agreement and arbitration procedures, and by Advance Pricing Agreements; and in the implementation of transfer pricing concepts into the organisation, processes and systems landscape of companies from a transfer pricing point of view.

His clients include many of the largest German multinationals, including DAX 30 companies, as well as many of the largest global corporations investing into Germany.

Thomas has a focus on the automotive industry and is the transfer pricing leader for this industry specialisation in Germany/Switzerland/Austria.

Professional experience

From 2006 to 2014 Thomas led Ernst & Young's global transfer pricing practice. Previously to that, he was the tax managing partner for Germany from 2001 to 2007.

Thomas holds an MSc in Management from the University of Cologne and a PhD in taxation from the University of Aachen.

He is a Certified German Tax Consultant, a member of the Professional Institute of German Tax Consultants and an arbitrator for Germany under the EU Arbitration Convention.

He is a honorary professor at Cologne University for "International Tax Planning: Transfer Pricing and Supply Chain Planning" (in English language) and a regular lecturer at the LLM program at Cologne University and the MBA program of Mannheim University.

Thomas is the co-editor and co-author of the Handbook *Transfer Pricing* and author of various other publications.

International Tax Review and *Expert Guides* have recognized Thomas consecutively for many years as one of the "World's Leading Transfer Pricing Advisors" as well as one of the "Best of the Best Transfer Pricing Advisors in the World."



GERMANY

**Dirk Brüninghaus****EY**

Graf-Adolf-Platz 15

40213 Düsseldorf

Germany

Tel: (49) 211 9352 10606

Email: Dirk.Brueeninghaus@de.ey.com

Website: www.ey.com

Dirk is an international tax partner in EY's International Tax and Transaction Services service line. He holds an MBA, a PhD in taxation and is a certified German tax consultant. He joined EY in 1998 and is the strategy leader for EY's Tax practice in GSA. He is based in Düsseldorf and is specialized in the consumer products, retail and automotive sector. His main focus is on international taxation / transfer pricing. His main areas of expertise include transfer pricing planning, the structuring of permanent establishments, as well as supply chain restructuring, APA, mutual agreement and legal proceedings and tax risk management. The foresighted and preventive handling of tax (criminal) risks in the area of transfer pricing and permanent establishments is a particular focus of his work. Dirk is also a regular speaker at various seminars and conferences and is the author of numerous publications on transfer pricing, including the "Handbook of Transfer Pricing".

With his broad experience and deep understanding of clients businesses Dirk serves German Multinationals as a Global Client Service Partner and Global Tax Account Leader. As a senior advisory partner, he is leading global teams and heads multi-disciplinary project teams. He ensures the right initiatives to help clients manage their "global tax agenda" – in regard to regulatory changes, transformational aspects (e.g. Tax Function of the future) or other business matters (e.g. Matrix Organizations, Supply Chain, IT).



GERMANY

**Roman Dawid****PwC**

Friedrich-Ebert-Anlage 35 – 37

D-60327 Frankfurt am Main

Germany

Tel: (49) 69 9585 1336

Email: roman.dawid@pwc.com

Website: www.pwc.com

Roman Dawid is an international tax partner at PwC based in Frankfurt am Main with a specialization in transfer pricing. He has worked as an economist for over 20 years and is specialized in the analysis of complex business processes and intangible valuation.

Dr. Dawid has over 18 years of experience as a transfer pricing advisor at Big 4 audit firms. He has advised many large European, US, Canadian and Asian multinational enterprises in various industries in all areas of transfer pricing, including planning, documentation and tax audit defense. His main industry experience includes companies in the automotive and industrial products industry, consumer goods, and (renewable) energy.

Together with his clients, Dr. Dawid has developed and implemented global transfer pricing systems. His current focus is on the new OECD BEPS regulations, especially for intangibles (action items 8 – 10), and the transfer pricing for digital business models. He has supported clients in business restructurings and valuations of intangible property. Furthermore, Dr. Dawid has supported the successful negotiation of APAs.

Dr. Dawid has worked on several research projects and on a number of economic and business publications. He has a teaching assignment in the International Master of Taxation Program at the University of Göttingen. Dr. Dawid co-authored the leading German publication on transfer pricing, "Handbuch Internationale Verrechnungspreise", edited by Heinz-Klaus Kroppen. Moreover, he is editor of a book on transfer pricing for practitioners published by Springer-Gabler.

Prior to his career in transfer pricing, Dr. Dawid worked in the field of public finance and taxation at Bochum University. Dr. Dawid graduated with a PhD in economics from Bochum University and holds a master's degree in economics from Constance University. He also studied at the London School of Economics. He is member of the International Fiscal Association and Verein für Socialpolitik.



GERMANY



Xaver Ditz
Flick Gocke Schaumburg
 Fritz-Schäffer-Straße 1
 53113 Bonn
 Germany
 Tel: (49) 228 95 94 0
 Email: xaver.ditz@fgs.de
 Website: www.fgs.de

Dr. Xaver Ditz is a partner with Flick Gocke Schaumburg in Bonn. He specialises in international tax law and transfer pricing with a focus on planning and implementation of new TP approaches, the defence of TP mechanisms in tax audits, litigation, the documentation of TP systems, APAs, MAPs, and EU Arbitration Convention procedures. Xaver Ditz studied economics in Mannheim and Hamburg (Diplom-Kaufmann) and was admitted as a certified tax adviser in 2004. He joined Flick Gocke Schaumburg in 2000 and was promoted to partner in 2008. In addition to his tax practice he lectures at the University of Trier, the University of Zurich and the University of Lausanne (executive programme on transfer pricing). He is also a guest lecturer at the Bundesfinanzakademie (German Federal Finance Academy). Xaver Ditz is a frequent speaker on transfer pricing at tax seminars in Germany and abroad. He advises international organisations such as the OECD. He regularly publishes on recent developments in the field of transfer pricing including financial transactions, cash pooling, permanent establishments and cost and income allocations. His main publications include the commentary on *Double Taxation Treaties (Doppelbesteuerungsabkommen)*, and the *Handbook of the Taxation of Permanent Establishments (Betriebsstätten-Handbuch)*. He is co-editor of the journals "Internationale Steuer-Rundschau" and "International Tax Review" as well as member of the board of editors of the journal "Transfer Pricing International".

Practice areas

Business model optimisation, economic modelling, cross-border project management, restructuring, cost-sharing arrangements, APAs, transactions, M&A, corporate taxes, technology, value chains, audit defence, audit support, dispute resolution, pre-litigation, MAPs/ADRs, controversy management, tax consulting, international tax advisory, supply chains

Sector specialisations

automotive, aviation, consumer goods and services, energy, financial services, food and beverage, healthcare, industrials, pharma and life sciences, tech and telecoms, transport

Association memberships

Member of the Board of the International Fiscal Association German Branch (IFA Deutschland); member of the German Institute of Certified Tax Advisors; member of the Tax Committee of the International Chamber of Commerce

**Flick Gocke
Schaumburg**

GERMANY



Michael Dworaczek
EY
 Graf-Adolf-Platz 15
 40213 Düsseldorf
 Germany
 Tel: (49) 211 9352 16006
 Email: michael.dworaczek@de.ey.com
 Website: www.ey.com

Michael Dworaczek is a certified tax advisor and International Tax Partner of EY's transfer pricing team. He joined EY in 1999 and is based in the Düsseldorf office. In 2002, he spent six months in Stockholm, Sweden as EY German tax and TP desk. His practice area covers the full range of transfer pricing matters. In particular Michael integrates the relevant expertise in tax business matters relevant to lead and manage business transformation / operating model effectiveness ("OME") projects. Michael has developed and is familiar with the relevant tools used in OME projects, starting from IP valuation techniques, across Process Contribution Analyses and supply chain restructurings to additional tax planning. He is heading EY's strategic solution OME for GSA.

In transfer pricing, he operates as an interface between business, controlling, tax and legal matters. Michael has also great experience in the taxation of permanent establishments, and in particular the determination of their profits. As Michael responsibly lead numerous tax audits in TP matters he is very experienced in controversy.

His clients include large German multinationals, including several DAX 30 companies. Michael has numerous years of experience in providing transfer pricing advice to a wide variety of industry sectors. Michael is a frequent speaker at national expert transfer pricing seminars such as Management Circle and NWB seminars. He is author of various expert publications on up-to-date transfer pricing matters.



GERMANY

**Axel Eigelshoven****PwC**

Moskauer Straße 19

D-40227 Düsseldorf

Germany

Tel: (49) 211 981 1144

Email: axel.eigelshoven@pwc.com

Website: www.pwc.com

Axel Eigelshoven is a transfer pricing partner in PwC's Düsseldorf office and serves as head of the PwC's German transfer pricing practice. He has more than 20 years of experience in international taxation and transfer pricing.

Axel is working on wide variety of transfer pricing projects including tax audits, IP migration, tax effective supply chain management, permanent establishment issues, APAs and competent authority procedures under the tax treaty and the EU arbitration convention. His clients involve a number of DAX 30 companies, large multinationals and midsize companies. Axel is focused on the automotive, engineering and chemical industry.

Axel lectures at the Mannheim Business School, the Vienna University of Economics and Business and is frequent speaker on transfer pricing at national and international seminars. He is co-author of Vogel/Lehner, Doppelbesteuerungsabkommen, a leading commentary on tax treaties, co-author of Kroppen, Handbuch der Verrechnungspreise, a leading publication on transfer pricing and is contributing the German country chapter in IBFD's Global Transfer Pricing Explorer. Moreover, he has published numerous articles in national and international tax journals.

Axel holds a degree in Business Economics (Diplom-Kaufmann) from the University of Cologne. He is a Certified Tax Advisor (Steuerberater) and is a member of the Tax Advisors Association and the International Fiscal Association.



GERMANY

**Kati Fiehler****PwC**

Alsterufer 1

D-20354 Hamburg

Germany

Tel: (49) 40 6378 1304

Email: kati.fiehler@pwc.com

Website: www.pwc.com

Experienced, entrepreneurial and results-oriented Partner of PwC with core competencies in international transfer pricing.

Specialization and expertise

- Leader of the PwC transfer pricing practise in Northern Germany
- Advising multinational companies especially on transfer pricing issues related to restructurings of business models such as: assessment on exit charge risk, remodelling of business models and transactions, financial simulation of transfer pricing effects, assessment of permanent establishment risks
- Development of "end to end transfer pricing" concepts, meaning definition, implementation and monitoring of transfer pricing systems
- An Active member of the Global Core Team regarding the further development and adaptation of transfer pricing documentation systems
- Extensive experience in dispute resolution with a special focus in tax audit defence and multilateral agreement procedures
- Lead editor of PwC Germany's "Transfer Pricing Perspectives" (Quarterly editions on hot transfer pricing issues)

Employment history

- 18 years with PwC in Erfurt (Germany), London (UK) and Hamburg (Germany)

Education

- 2002: Certified German tax advisor
- 1998: Friedrich Schiller University, Jena in Germany
- Master of Business Administration

Languages spoken

- German
- English



GERMANY

**Julia Fischer****KPMG**

Theodor-Heuss-Str. 5

70174 Stuttgart

Germany

Tel: (49) 711 9060 41523

Email: jfischer1@kpmg.com

Website: www.kpmg.com

Dr. Julia Fischer is a transfer pricing partner with multiple years of professional experience in the area of transfer pricing. With projects covering controversy, transfer pricing planning, implementation and documentation, she provides transfer pricing services for multinationals from various industries.

Julia holds a PhD in Economics, a Diploma in Physics and a Bachelor degree in Economics. She is a certified German tax advisor (*Steuerberaterin*).

KPMG is a global network of professional service firms providing audit, tax and consulting services with more than 207,000 professionals in 152 countries. In Germany, KPMG belongs to the leading audit and consulting firms with about 11,700 professionals in more than 25 locations. About 100 transfer pricing specialists in Germany cover all aspects of transfer pricing from transfer pricing system design and planning to turnkey documentation solutions and controversy.



GERMANY

**Michael Freudenberg****KPMG**

Tersteegenstrasse 19-23

40474 Düsseldorf

Germany

Tel: (49) 211 475 7584

Email: mfreudenberg@kpmg.com

Website: www.kpmg.com

Michael Freudenberg is a partner in KPMG's Global Transfer Pricing Service Line in Düsseldorf. He joined KPMG's transfer pricing team in 2003 and has over 16 years of experience in transfer pricing as well as related economic analyses and valuation. His areas of expertise include planning, implementation and documentation of transfer pricing systems as well as transfer pricing controversy.

Michael is specialized in value chain management and business restructurings helping clients with the tax compliant reorganization and refinement of their operating models and value chains. He has vast experience in valuation of business transfers and intellectual property. Michael is engaged in the development and implementation of data analytics solutions and assists clients with the operationalization of their transfer pricing system including the development and implementation of governance and process models. Michael graduated in Bochum (*Dipl.-Ökonom*) and Frankfurt/Main (*Executive Master of Finance and Accounting*). He is a member of the transfer pricing working group of the Schmalenbach-Gesellschaft in Germany and has published various articles on transfer pricing planning and documentation as well as on operational transfer pricing.

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GERMANY

**Florian Gimmler****PwC**

Friedrich-Ebert-Anlage 35 - 37
D-60327 Frankfurt am Main
Germany
Tel: (49) 69 9585 6915
Email: florian.gimmler@pwc.com
Website: www.pwc.com

Florian Gimmler is an international tax partner in PwC's Frankfurt office. He has eleven years of experience in international taxation and transfer pricing.

As a core member of PwCs Global Value Chain Transformation Group Florian advises on tax-efficient supply chain and intellectual property structures, transfer pricing planning, implementation, defence and documentation.

Florian heads the transfer pricing implementation group of PwC Europe and has led various project assignments in the area of End-to-End Transfer Pricing - where transfer pricing or value chain transformation strategies have to be cascaded throughout all layers of a company's tax, controlling, HR and IT functions. These engagements touch upon accounting and system issues, control environment, training, communication, and process change management.

Florian is a frequent speaker on transfer pricing seminars, holds a German MBA (Diplom-Kaufmann), practices as a certified tax advisor (Steuerberater) and is a member of the Tax Advisors Association and the International Fiscal Association.



GERMANY

**Markus Greinert****Flick Gocke Schaumburg**

Brienner Straße 29
80333 Munich
Germany
Tel: (49) 89 80 00 16 0
Email: markus.greinert@fgs.de
Website: www.fgs.de

Dr. Markus Greinert is a partner with Flick Gocke Schaumburg in Munich. He joined the firm in 2003 and became a partner in 2010. He has been advising on transfer pricing matters and business restructurings for more than 18 years now. He assists multinationals in the development, implementation and documentation of global transfer pricing systems. Markus Greinert also represents multinationals in disputes, including tax audits, appeals and competent authorities procedures. Additionally, he has a broad experience in valuation matters for tax purposes. He has particular sector expertise in the automotive, consultancy and insurance industry. Markus Greinert is a certified tax adviser since 2003. He studied business administration in Marburg and Gießen (1997 Diplom-Kaufmann, 2001 Dr rer pol). In addition to his tax practice he is a well-known lecturer in Germany. Markus Greinert regularly publishes articles on transfer pricing and business restructurings in national and international journals.

Practice areas

Business model optimisation, restructuring, cost-sharing arrangements, APAs, corporate taxes, value chains, audit defence, dispute resolution, pre-litigation, MAPs/ADRs, controversy management, tax consulting, international tax advisory, supply chains

Sector specialisations

Accounting, automotive, construction and materials, consumer goods and services, food and beverage, healthcare, industrials, insurance, investment management, pharma and life sciences, transport

Association memberships

Board member of the Institut der Steuerberater in Bayern e.V.; member in the transfer pricing working group of the Schmalenbach-Gesellschaft für Betriebswirtschaft e.V.; member of the International Fiscal Association (IFA); member of the Licensing Executives Society (LES)

**Flick Gocke
Schaumburg**

GERMANY

**Jörg Hanken****PwC**

Bernhard-Wicki-Straße 8

D-80636 Munich

Germany

Tel: (49) 89 5790 5424

Email: joerg.hanken@pwc.com

Website: www.pwc.com

Jörg Hanken is a Transfer Pricing Partner based in Munich with more than 20 years of experience in international taxation and transfer pricing. He is a member of the PwC Global TP Leadership Team. In his role as Global Transfer Pricing Technology Solutions Leader he is responsible for the development and the roll-out of software solutions in the area of transfer pricing documentation, end-to-end transfer price setting (SAP), service charging, CbC reporting and data analytics. Before Jörg Hanken joined PwC he gained experience as a tax advisor at Arthur Andersen and EY as well as a Head of Tax Central Europe for a Fortune 500 multinational.

Professional experience

Jörg Hanken has significant experience with the analysis, planning, implementation, documentation and defence of transfer pricing structures. He focuses on the end-to-end implementation of transfer pricing which includes the interface between tax and controlling as well as the customization and implementation of software solutions to automate price calculations, margin monitoring, segmentation of P&Ls, dashboarding and tool-based preparation of TP documentation (master files, local files, CbCR).

Recent projects are:

- Several tool-based global TP documentation projects for DAX30, MDAX and smaller multinationals
- Several CbCR projects using tools for data collection & data mapping as well as data analytics and simulation
- Many successful proofs of concepts of a highly automated end-to-end TP management solution for SAP clients.
- Planning of contract manufacturing functions located in France, Germany, Hungary, Mexico, Poland, Romania, Thailand, US within the automotive and chemicals industry
- Development of a consistent TP model for construction permanent establishments for large groups including sounding and pre-filings with German and foreign tax authorities
- Development of simplified TP models for groups within the e-commerce business
- Currently, bilateral APAs regarding distribution functions (Germany with Switzerland/ USA), contract manufacturing functions (Germany with Poland/ Romania/ Czech Republic/ Hungary), co-entrepreneur profit split (Germany with Sweden)
- Currently, MAP's regarding distribution functions (France, Switzerland, USA), contract manufacturing (Romania), manufacturing and distribution (USA)
- Jörg Hanken has trained more than 600 controllers at the Controller Academy in intense 3-days transfer pricing seminars. Establishment of the ICV Working Group "Transfer Pricing Management". Co-author of the book "Transfer Pricing – Practice Guide for Controllers and Tax Experts" (2nd edition, 2016). Regular national and international TP workshops and seminars/lectures. One of the "Leading Tax Controversy Experts" (International Tax Review).



GERMANY

**Maik Heggmaier****WTS**

Thomas-Wimmer-Ring 1-3

80539 Munich

Germany

Tel: (49) 89 28646 – 212

Email: maik.heggmaier@wts.de

Website: wts.com/de

Maik Heggmaier is a transfer pricing partner at WTS located in the Munich office. He is the Head of the WTS Transfer Pricing team in Germany and co-leads the global TP group of WTS Global. In 2018 and 2019 the WTS TP team has been awarded as "German Transfer Pricing Firm of the Year" by International Tax Review.

Maik has more than 17 years of experience in transfer pricing working as in-house TP expert in industry and for other well-known consulting firms.

Maik has vast experience in international tax structuring and transfer pricing projects including value chain transformation, tax audit defense and global transfer pricing documentation. He specializes in TP technology and has successfully supported several international clients on their way to digitize their TP function. Within this context, data validation and data harmonization for transfer pricing purposes as well as the conception and introduction of IT-based processes and solutions is one of Maik's core areas of practical expertise. He has been the responsible project leader for various global projects concentrating on TP compliance processes and the automation of such TP compliance processes based on tool solutions.

Within the network of WTS Global, Maik constantly works with the WTS Global member firms in international teams for global clients from various industries. He has vast experience in coordinating international projects involving a significant number of different countries.

Maik graduated from the Munich University in economics in 2001 and then joined a Big4 tax consulting firm in Germany where he worked for several years. In 2004 he became a German certified tax advisor and he is a member of the Tax Advisors Association.

Maik has published various articles in national and international tax and transfer pricing journals and he is a frequent speaker at national and international seminars and TP workshops.



GERMANY



Yves Hervé
NERA Economic Consulting
 Meseturm
 Friedrich Ebert Anlage 49
 Frankfurt am Main 60308
 Germany
 Email: yves.herve@nera.com
 Website: www.nera.com

Dr. Yves Hervé is a Managing Director in NERA's Global Transfer Pricing Practice and is operating in NERA's Frankfurt office. Dr. Hervé has been a fully dedicated TP professional since 1999. Prior to joining NERA, he has been Transfer Pricing Partner at KPMG and German Tax Leader of the global Value Chain & Digital Transformation practice of PwC.

In the course of his professional career, Dr. Hervé has covered all major TP consulting issues for global clients, from integrated value chain structuring and TP planning to global TP compliance issues and documentation, TP economic solution design, IP valuation, cost contribution solutions, business restructurings, tax audit defence and dispute resolution. His client portfolio covers global multinationals across a broad segment of industries (in particular life sciences, chemical & industrial products, transportation & logistics, automotive, energy, consumer, high-tech).

In the course of his projects and as responsible promoter of broader solution platforms, Dr. Hervé has been particular active in designing innovative solutions for Value Chain Analysis (e.g. a solution approach to rank functional value contributions in a non-distortionary manner, as well as a peer group based analytical approach), Risk Economics (e.g. quantification and risk adjustments solutions for business restructurings and hybrid value functions), Profit Splits (e.g. solutions based on relative bargaining power), TP and tax impact simulation.

Dr. Hervé has provided expert opinion reports in relation to European tax audits and has assisted clients with economic analysis for advance pricing agreements with local authorities. In litigation, he has been involved in cases considering IP remuneration and related tax exit charges and their underlying business valuations. He has provided the economic analysis for international arbitrations.

Prior to becoming a TP professional, Dr. Hervé was lecturer in Economics at the European Institute of the University of Saarland in Germany. In that time, he was involved in economic consultancy work for diverse European institutions (European Commission, European Parliament and Council of Europe),

Dr. Hervé holds a summa cum laude PhD in economics from the University of Saarland in Germany. He holds a Master of Economics from the University of Bonn and a Master of European integration from the College of Europe in Bruges, Belgium. He is a Franco-German binational and fluent in English, German and French.

NERA
 ECONOMIC CONSULTING

GERMANY



Jörg Hülshorst
PwC
 Moskauer Straße 19
 D-40227 Düsseldorf
 Germany
 Tel: (49) 211 981 4345
 Email: joerg.huelshorst@pwc.com
 Website: www.pwc.com

Dr. Jörg Hülshorst is a Transfer Pricing Partner located in Düsseldorf with more than 16 years of experience in advising multinationals in the field of transfer pricing. Before joining PwC Jörg was a Transfer Pricing Partner with another Big Four firm, where he was heading an international expert group for financial transactions.

Jörg has worked as an economist for more than 20 years, assessing, developing and defending transfer pricing systems. Jörg has broad project experience in all economic aspects of transfer pricing, with a particular focus on financial transactions and intangible property valuation. With his economic background, he has also served clients in various international reorganisation or restructuring projects.

He serves multinational clients in all areas of transfer pricing, including planning, documentation, and audit defense. His clients include German Dax-30, European, Japanese, U.S. and other multinational corporations in a wide range of industries, including engineering, machinery, chemicals and financial services.

Jörg is the author/coauthor of various articles on transfer pricing, most notably the White Paper "Europe as One Market" for the European Joint Transfer Pricing Forum and a commentary on Chapter II of the OECD Transfer Pricing Guidelines. He has also published in the field of transfer pricing for financial transactions such as intercompany loans, guarantees and cash pooling.



GERMANY

**Svetlana Kuzmina****KPMG**

Tersteegenstrasse 19 – 23

40474 Düsseldorf

Germany

Tel: (49) 211 475 7790

Email: svetlanakuzmina@kpmg.com

Website: www.kpmg.com

Svetlana Kuzmina is a Director with KPMG's Global Transfer Pricing Service Line in Düsseldorf. She brings over 14 years' experience in the field of transfer pricing.

Svetlana's clients include leading German and international multinationals operating in a wide range of industries, including financial services, energy, retail & consumer, transportation, plain and train manufacturing as well as chemical sectors. Her projects especially include designing, documentation and implementation of transfer pricing systems, transfer pricing audit defense, negotiation of Advance Pricing Agreements and Mutual Agreement Procedures as well as economic analysis and documentation for business restructuring projects. A particular focus of her practice has been intercompany financial transactions. She assisted multinationals in developing and implementation of intercompany group policies for loans, cash pooling and guarantees as well as in tax controversy matters arising from financial transactions. Svetlana holds a Diploma in Business and Administration from the University of Siegen and a Diploma in Economics from the Gubkin Russian State University for Oil and Gas.

KPMG is a network of professional firms with around 207,000 employees in 152 countries and territories. In Germany too, KPMG is one of the leading auditing and advisory firms and has around 11,700 employees at 25 locations. The services are divided into the following functions: Audit, Tax, Consulting and Deal Advisory.

About 100 transfer pricing specialists in Germany cover all aspects of transfer pricing from transfer pricing system design and planning to turnkey documentation solutions and controversy.



GERMANY

**Katharina Mank****PwC**

Friedrich-List-Str. 20

45128 Essen

Germany

Tel: (49) 201 4382622

Email: katharina.mank@pwc.com

Website: www.pwc.com

Qualification and Education

Katharina is a transfer pricing partner with 14 years of experience in consulting multinationals in the field of transfer pricing and international taxation leading the transfer pricing team at PwC Essen. She is a certified tax lawyer ("Fachanwalt für Steuerrecht") and holds a Master of Laws in Taxation (LL.M.).

Professionell Experience

Katharina's projects consists in transfer pricing planning and documentation as well as tax audit defence, MAP, tax courts and APAS. She has also significant experience in permanent establishment projects including questions on respective profit attribution.

Katharina is author of several publications in different German and international tax journals and co-author of Chapter II, IV and V of the OECD-Guidelines in Kroppen, Handbuch Internationale Verrechnungspreise. In addition, she is frequently engaged as lecture for external and internal transfer pricing seminars.



GERMANY

**Axel Nientimp****WTS**Peter-Müller-Straße 18
40468 Düsseldorf

Germany

Tel: (49) 211 200 50-714

Email: axel.nientimp@wts.de

Website: wts.com/de

Prof. Dr. Axel Nientimp is a tax and transfer pricing partner in WTS's Düsseldorf office. He has more than 20 years of experience in international taxation and transfer pricing.

Over the years, he has delivered a broad range of transfer pricing solutions to companies in various industries. His projects cover all aspects of designing, implementing and documenting transfer pricing solutions including the attribution of profits to permanent establishments as well as large supply chain reorganisations. Axel has significant experience in defending multinationals in transfer pricing tax audits and Mutual Agreement Procedures as well as negotiating bilateral and multilateral APA's.

Axel holds a PhD in Business Taxation and a degree in Economics (Diplom-Ökonom) from the University of Bochum. He is a Certified Tax Advisor (Steuerberater), a Certified Tax Advisor for International Taxation (Fachberater für Internationales Steuerrecht) and a member of the Tax Advisors Association. Axel has published a volume on the profit allocation of multinational enterprises and a broad range of articles on transfer pricing and international taxation for professional journals. He is the co-editor of Germany's leading compilation of transfer pricing laws and regulations and commentator of the transfer pricing regulations in Germany's Foreign Tax Code. He is a honorary professor on international taxation at the University of Duisburg-Essen and a regular speaker at universities as well as at national and international conferences and seminars.

GERMANY

**Holger M Peters****KPMG**Ludwig-Erhard-Straße 11-17
20459 Hamburg

Germany

Tel: (49) 40 32015 5312

Email: holgerpeters@kpmg.com

Website: www.kpmg.com

Holger M Peters is a Transfer Pricing Partner of KPMG's office in Hamburg and heads KPMG's Global Transfer Pricing Services team in Northern Germany. In addition, Holger is the National Leader of KPMG's Global Transfer Pricing Dispute Resolution practise in Germany. Before joining KPMG in 2004 Holger has gained professional experience in the tax and legal practise of a Big Four firm in Dusseldorf.

Holger is a tax lawyer and business mediator. He is a member of the German Bar, International Fiscal Association, German Tax Law Society as well as of the Association of Tax Lawyers.

Over the past 17 years Holger has helped multinational companies across a range of industries to effectively manage their transfer pricing risk exposure by setting up comprehensive transfer pricing systems and by helping them documenting and defending their transfer prices.

Holger's main focus is on transfer pricing risk management and dispute resolution, i.e. setting up tax compliance management systems (Tax CMS), negotiating Advance Pricing Agreements (APA), Mutual Agreement Procedures (MAP) as well as tax settlements in local tax audits. His projects comprise dozens of bi- and multilateral APA (including renewals), MAP, and EU arbitration procedures as well as pan-European documentation projects and numerous tax audits, including pre-audit strategic consulting, joint audits, appeals and litigation in the German Tax Courts. Together these projects cover countries in Europe, the Americas and the Asia-Pacific region.

His wide industry experience includes projects in the Consumer Products & Retail business, Transportation & Logistics sector, Automotive industry, Healthcare & Pharmaceutical sector, Energy & Resources industry as well as in the Technology sector.

Holger is a frequent speaker at conferences and also regularly publishes nationally and internationally about transfer pricing topics. Due to his recognition as a leading German transfer pricing expert International Tax Review lists Holger as World's Leading Tax Controversy Adviser in Germany in its Fifth Edition of the Tax Controversy Leaders Guide (2015) and Legal Media Group's Expert Guides list him in the "Guide to the World's Leading Transfer Pricing Advisors – Germany" (2017, 2018, 2019). He studied at the University of Muenster and German University of Administrative Sciences Speyer. Holger received an Executive MBA in Accounting and Controlling for his postgraduate studies.

KPMG is a global network of professional service firms providing audit, tax and consulting services with more than 207,000 professionals in 152 countries. In Germany, KPMG belongs to the leading audit and consulting firms with about 11,700 professionals in more than 25 locations. About 100 transfer pricing specialists in Germany cover all aspects of transfer pricing from transfer pricing system design and planning to turnkey documentation solutions and controversy.



GERMANY



Michael Puls
Flick Gocke Schaumburg
 Dreischeibenhaus 1
 40211 Düsseldorf
 Germany
 Tel: (49) 211 6 18 22 0
 Email: michael.puls@fgs.de
 Website: www.fgs.de

Dr. Michael Puls is a partner with Flick Gocke Schaumburg in Düsseldorf. He rejoined the firm early 2018 after having already worked with Flick Gocke Schaumburg in Bonn from 2007 to 2013, the last three years as an associated partner. Prior to that, he had spent six years working for Big Four accounting firms. From 2014 to 2017 he was head of the transfer pricing practice at Deloitte in Düsseldorf.

Michael Puls' expertise covers international tax law and transfer pricing, with a focus on tax audit defense, global documentation, tax planning and structuring projects (including relocation of functions), and mutual agreements and arbitration proceedings as well as APA. Michael Puls is admitted as a lawyer since 2003 and as a certified tax adviser since 2006. He studied law and business administration in Osnabrück and Bonn (2004 Dr iur). He is a lecturer at the University of Augsburg as well as a frequent seminar speaker in the field of international tax law and transfer pricing.

Practice areas

Business model optimisation, technology services, cross-border project management, restructuring, cost-sharing arrangements, APAs, transactions, M&A, financial services, corporate taxes, technology, audit defence, dispute resolution, pre-litigation, MAPs/ADRs, controversy management, tax consulting, international tax advisory, US inbound, US outbound, supply chains

Sector specialisations

Accounting, automotive, aviation, banking, construction and materials, consumer goods and services, energy, financial services, food and beverage, healthcare, industrials, insurance, investment management, oil and gas, pharma and life sciences, real estate, tech and telecoms, transport, utilities

Association memberships

Member of the German-American Lawyers' Association; member of the managers' circle of the Friedrich Ebert Foundation (Friedrich-Ebert-Stiftung)

**Flick Gocke
Schaumburg**

GERMANY



Stephan Rasch
PwC
 Bernhard-Wicki-Straße 8
 D-80636 Munich
 Germany
 Tel: (49) 89 5790 5378
 Email: stephan.rasch@pwc.com
 Website: www.pwc.com

Prof. Dr. Stephan Rasch is a transfer pricing partner in PwC's Munich office. He has nineteen years of experience in international taxation and transfer pricing. Before joining PwC in December 2013, Stephan worked with another Big Four firm as transfer pricing partner. Stephan advises clients in tax matters associated with cross-border transactions, including permanent establishment issues and value chain transformations. He has worked on a broad variety of transfer pricing projects for various industries, including the automotive and automotive supplier industry as well as chemical and pharmaceutical industries, the machinery tool, and IT sectors. Stephan's clients include German-based DAX companies as well as European and US multinationals. He serves as Lead Partner for three Dax-30 companies.

Stephan has led numerous global documentation projects, inter alia for German-based multinational entities implementing and maintaining a modular global core documentation concept. He has also gained significant experience in VCT projects during the last two decades years. He is successfully involved in German and European tax/transfer pricing audits defending the restructuring and/or the transfer of intangible property in business model reorganizations, including particularly cases involving Switzerland as a principal location. Stephan's experience with Mutual Agreement Procedures include bilateral and multilateral cases as well as the negotiation of bi- and multilateral Advance Pricing Agreements. Finally, he is involved in tax court litigation relating to transfer pricing cases. He has been appointed as German national reporter on Subject 1 "Dispute Resolution" for the 70th International Fiscal Association (IFA) Congress in Madrid in 2016.

Stephan has published a volume on transfer pricing legislation in international German, bilateral and European tax law. He is co-editor and co-author of one of the leading transfer pricing publications in Germany, Handbuch Internationale Verrechnungspreise, and co-author of Gosch/Kroppen/ Grotherr, DBA-Kommentar, a leading commentary on double tax treaties. He is editor of the Internationale Steuer-Rundschau (ISR), a German international tax journal and contributes articles to national and international tax journals on a regular basis. Stephan is professor of international tax law at the University of Augsburg and is a frequent speaker on transfer pricing at national and international seminars.

Stephan is a member of the Munich Bar, the International Fiscal Association (IFA) and the IFA Bavaria board. Stephan holds a PhD in International Tax Law and a degree in law from the University of Bochum. He is a tax lawyer (Rechtsanwalt/Fachanwalt für Steuerrecht).



GERMANY

**Martin Renz****PwC**

Friedrichstraße 14

D-70174 Stuttgart

Germany

Tel: (49) 711 25034 3107

Email: martin.renz@pwc.com

Website: www.pwc.com

Martin Renz is a transfer pricing partner in PwC's Stuttgart office. He has 20 years of experience in international taxation and transfer pricing and leading the transfer pricing group at PwC in Stuttgart.

Martin has significant experience with the approach of German and foreign tax authorities towards transfer pricing and has been involved in several transfer pricing projects including dispute resolution, carrying out value chain transfer pricing studies, implementation of entrepreneur structures, licensing structures and tax consulting within Advance Pricing Agreement procedures (including the first APA between Germany and Switzerland). He has led many projects for multinationals to set up global transfer pricing structures including the BRIC countries. His clients involve mainly large multinationals and midsize companies. Martin is focused on the automotive, engineering and health care industry.

Martin is frequent speaker on transfer pricing seminars. He is co-publisher and author of Renz/Wilmanns Internationale Verrechnungspreise – Handbuch für Praktiker, co-author of Bernhardt, Verrechnungspreise and contributing the Transfer Pricing chapter in Beck's Handbuch der AG. Moreover, he has published numerous articles in tax journals.

Martin holds a German MBA (Diplom-Kaufmann) and practices as a certified tax advisor (Steuerberater).



GERMANY

**Achim Roeder****KPMG**

The SQUAIRE/Am Flughafen

60549 Frankfurt am Main

Germany

Tel: (49) 69 9587 1400

Email: achimroeder@kpmg.com

Website: www.kpmg.com

Dr. Achim Roeder is a transfer pricing partner with more than 20 years of experience in international taxation and transfer pricing. His clients include leading German and international multinationals from diverse industries with an emphasis on large German corporates. His projects cover transfer pricing planning in respect of European supply chain reorganisations as well as transfer pricing implementation and documentation. Achim is regularly involved in German-centric transfer pricing controversy and has been appointed as an expert witness in transfer pricing court cases.

Achim lectures on international tax law at the University of Bochum and is a frequent speaker at German and international conferences. His publications include a volume on the economics of anti-avoidance legislation in international German tax law as well as various other publications covering a broad range of transfer pricing and economic topics. Achim holds a PhD in Business Taxation, a Diploma in Business Economics, and a Master of Arts from the University of Bochum. He is a certified German tax advisor (Steuerberater).



GERMANY

**Christian Scholz****EY**

Arnulfstr 59
80636 Munich
Germany
Tel: (49) 14331 18607
Email: christian.marcus.scholz@de.ey.com
Website: www.de.ey.com

Christian Scholz is a frequent speaker at German and international transfer pricing seminars and has contributed publications to various tax journals including *IStR*, *Tax Management Transfer Pricing Report* and *International Tax Review*. Christian has more than 15 years' experience in structuring cross-border intercompany transactions. His project experience ranges from APA to tax efficient supply chain management. He has assisted clients in restructuring projects that involved transfer pricing issues with cross-border shifting of functions and risks. He has particular expertise in valuation and the pricing of financial intercompany transactions, which has become a major focus of his recent work. Christian has specific experience helping clients to set up global documentation systems and to defend transfer pricing systems in tax audits. He has developed transfer pricing systems and documentation systems for companies undergoing continuous restructuring. His special industry expertise covers software, chemicals and treasury transactions.



GERMANY

**Stephan Schnorberger****Baker McKenzie**

Neuer Zollhof 2
40221 Düsseldorf
Germany
Tel: (49) 211 3 11 16 152
E: stephan.schnorberger@bakermckenzie.com
Website: www.bakermckenzie.com

Stephan Schnorberger works for international businesses to:

- facilitate cross-border activity in today's tax environment;
- advocate and defend the rule of law in transfer price controversies.

Areas of particular expertise of Stephan are transfer pricing and business restructuring, supply chain modeling and tax planning, intangible valuations, high value audit defenses and complex tax litigation. Stephan also acts as an independent court expert in transfer price matters.

In addition, he supports businesses by economic analysis and advocacy in competition matters, such as business combinations, cartel damages cases, and questions of abuse of market power.

For numerous years Stephan has been recognized in the Euromoney Expert Guide survey among "The Best of the Best" Global Tax Advisors and Global Transfer Pricing Advisors.

Among his representative cases are:

- successful deflection of a multilateral tax audit by litigation;
- representing a global business in a bilateral tax audit on transfer prices;
- transfer price APAs with various countries including Switzerland;
- litigation against taxation of a transfer of functions;
- complex and high value transfer price audits;
- litigation against adjustment of IP valuation;
- reviews of IP structures from a BEPS perspective;
- tax litigations in transfer pricing matters;
- strategic reviews of business models to optimise customs and transfer pricing;
- tax planning, transfer pricing, and valuations for the outbound transfer of intellectual property;
- tax planning and implementation of an Irish principal structure for a German multinational;
- the valuation of compensation payments on pan-European restructuring of manufacturing and sales;
- competent authority procedures within Europe and with the U.S.

Stephan regularly writes articles and speaks at tax conferences and academic events.

Stephan co-heads the European and heads the German transfer pricing practice, which, in 2010 and 2012, won the prestigious 'German Transfer Pricing Firm of the Year' award from the *International Tax Review*.

As a certified tax advisor, Stephan is admitted to the German Tax Bar.

He holds a German doctoral and a master's degree in business administration as well as a US master's degree in economics.

**Baker
McKenzie.**

GERMANY

**Annette Schrickel****EY**

Mergenthalerallee 3-5
 Eschborn/Frankfurt am Main
 Germany
 Tel: (49) 6196 996 24807
 Email: annette.schrickel@de.ey.com
 Website: www.de.ey.com

Annette Schrickel is an international tax partner in the Frankfurt/Eschborn office of EY and the Regional Lead Partner for the EY tax practice in Frankfurt/Eschborn. She has more than 25 years of experience in advising multinational clients in international tax with a focus on transfer pricing services since the year 2000.

Annette's primary advisory activities involve transfer pricing planning and controversy, including development and documentation of transfer pricing structures as well as defense of transfer pricing structures in tax audits, mutual agreement procedures and advance pricing agreements. An additional focus is on the structuring of transfer pricing compliance and risk management related processes in multinational groups interfacing other tax and financial processes.

Annette has numerous years of experience in providing transfer pricing services to a wide variety of industry sectors, particularly in diversified industrial products and automotive.

Annette is a German certified tax advisor and Graduate Economist (University of Bonn). She is a frequent speaker at tax conferences and a lecturer for transfer pricing in the faculty of Economic Science at the University of Marburg.



GERMANY

**Susann van der Ham****PwC**

Moskauer Straße 19
 D-40227 Düsseldorf
 Germany
 Tel: (49) 211 981 7451
 Email: susann.van.der.ham@pwc.com
 Website: www.pwc.com

Susann has 20 years of experience in consulting multinationals in the field of transfer pricing. Her expertise encompasses transfer pricing structuring, operational implementation and transfer pricing process design, advise connected to Advance Pricing Agreements/Mutual Agreement Procedures, Joint Audits and tax audit defense.

Susann's clients include several DAX 30 multinationals, as well as other US, European and Asian corporations representing a wide range of industries. During the last years, Susann led a number of projects involving permanent establishments, complex restructurings including transfer of functions and post-merger integrations. Susann is a member of PwC's German Retail and Consumer Competence Team and the International Retail and Consumer Transfer Pricing Network. As such Susann has in-depth knowledge of industry-specific transfer pricing aspects.

Susann is a certified speaker on German Federal Certified Tax Consultant Association's seminars and events and regularly speaks on international tax and transfer pricing conferences. She is a co-author of one of the leading German publications Borberg Praxishandbuch Verrechnungspreise and publishes frequently in national and international tax magazines on transfer pricing. Her recent publications include articles about digital permanent establishments, articles about recent OECD developments regarding tax challenges of the digitalisation and an article about MAP regulations in Russia.

Susann studied business economics and tax law at the Dresden Technical University, Germany, and Japanese and International Tax Law at the KEIO University Tokyo, Japan. She later enrolled at Maastricht University for postgraduate studies of international tax law. She is a German certified tax advisor (Steuerberater).



GERMANY

**Alexander Voegele****NERA Economic Consulting**

Meseturm
Friedrich-Ebert-Anlage 49
60308 Frankfurt am Main
Germany
Tel: (49) 69 710 447 501
Email: alexander.voegele@nera.com
Website: www.nera.com

During more than 35 years of advising international corporations and leading law firms, Dr. Voegele has specialised in the defence of major international transfer pricing and IP cases. He has developed solutions for measuring value contributions and damages which have become the industry standard. He has led hundreds of large transfer pricing, IP and State Aid projects and defence cases for clients in a wide range of industries all over the world. In recent years, he has defended against transfer pricing audits and litigation in North America, Scandinavia, Europe and Germany.

In recent years, Dr. Voegele and his colleagues Dr. Yves Hervé and Philip de Homont have established new standards for the separation and quantification of IP, damages and the use of profit splits. They have developed value chain and value network analysis for digital business strategies and have advanced the discussion within the industry by frequently explaining their methods at conferences and in publications. Using economic reasoning, they lead arbitrations and testify as expert witnesses in court. Their insights have helped shape transfer pricing and audit standards in Germany and Europe, and they regularly exchange views with tax inspectors at conferences and seminars. In negotiations, they find well-structured and understandable arguments that are convincing and relatable.

Dr. Voegele and his colleagues Dr. Yves Hervé and Philip de Homont regularly publish articles and books on transfer pricing and international tax planning. Dr. Voegele is the author and editor of the two leading German commentaries on IP, transfer pricing, and economic consulting: *Transfer Pricing* and *Intellectual Property*. His publications have anticipated many aspects of the recent Base Erosion and Profit Shifting (BEPS) discussions, such as the use of profit split methods or the analysis and quantification of risk. He has spoken at more than 350 conferences and seminars on transfer pricing, IP and arbitration in Europe, the United States and Asia.

Dr. Voegele holds a PhD in economics and an MSc in tax and business administration from the University of Mannheim. He is a German Wirtschaftsprüfer, Steuerberater and French Commissaire aux comptes.

NERA
ECONOMIC CONSULTING

GERMANY

**Oliver Wehnert****EY**

Graf-Adolf-Platz 15
40213 Düsseldorf
Germany
Tel: (49) 211 9352 10627
Email: oliver.wehnert@de.ey.com
Website: www.ey.com

Oliver Wehnert is an international tax partner in the Düsseldorf office of EY and heads the international tax and transfer pricing practice in Germany, Switzerland and Austria. He joined EY 1998 after working for PwC for six years. He was named by *International Tax Review* numerous times as one of the “World’s Leading Transfer Pricing Advisers”.

Oliver Wehnert has vast experience in client services on intercompany pricing, international tax planning, transfer pricing controversy services and operating model effectiveness projects.

Oliver’s experiences include: global transfer pricing documentation projects, transfer pricing audit defense and operating model effectiveness projects. Oliver Wehnert has significant experience in TP Controversy including supporting clients with their applications to tax authorities of various countries in Europe, the Americas and Asia for mutual agreement procedures and Advance Pricing Agreements.

Oliver has numerous years of experience in providing transfer pricing services to a wide variety of industry sectors, particularly, the pharmaceutical, automotive and RCP sector.

Oliver is a German certified tax consultant and holds a MBA-degree of the University of Paderborn. He frequently speaks at German and international transfer pricing conferences and is a regular contributor to various tax journals including IStR and ISR and *International Tax Review*.



GERMANY

**Ludger Wellens****PwC**

Moskauer Straße 19
D-40227 Düsseldorf
Germany
Tel: (49) 211 981 2237
Email: ludger.wellens@pwc.com
Website: www.pwc.com

Ludger is a Tax/Transfer Pricing Partner of PwC in Germany. He coordinates PwC's TP activities in the region West. He has more than 20 years of experience in all aspects of transfer pricing and international tax planning.

Ludger is certified as German Tax Advisor (Steuerberater). He holds a Diploma in International Business from the University College Dublin (Ireland), an MBA from the University of Aachen and a PhD from the University of Bayreuth.

Ludger has worked for two of the Big 4 consulting firms in their tax and transfer pricing departments. He was also member of the board and head of the transfer pricing group of a German-based tax consulting firm. Furthermore, he worked as Tax Director Head of Global Transfer Pricing for a major German-based multinational company.

Both as an in-house consultant in industry and as an outside expert Ludger has planned and implemented numerous transfer pricing systems. He has worked extensively on Value Chain Transformation projects both inbound and outbound.

He has extensive experience solving controversies through defending tax audits and supporting mutual agreement procedures as well as advance pricing agreements (APAs).

Experience:

- Planning and Value Chain Analysis
- Dispute resolution (audits, MAPs and APAs)
- Business restructurings
- Documentation
- Implementation of TP systems

Industry of Specialization:

- Pharma and Life Science
- Chemical Industry
- Consumer Products
- Energy



GERMANY

**Dirk Wilcke****PwC**

Friedrich-Ebert-Anlage 35 – 37
D-60327 Frankfurt am Main
Germany
Tel: (49) 69 9585 6547
Email: dirk.wilcke@pwc.com
Website: www.pwc.com

Dirk Wilcke is a partner at PwC Frankfurt's transfer pricing team. Working in transfer pricing for 12 years, he has built a reputation for delivering complex and innovative assignments.

His main industry focus is in automotive, industrial products (including chemicals) and pharmaceuticals. Over the years he has managed various large scale transfer pricing projects, including projects in the realm of

- transfer pricing planning and implementation,
- intellectual property planning and valuations,
- value chain analysis and transformation,
- intragroup financing and pricing of debt,
- tax audits and dispute resolution.

He currently spends most of his time on supply chain transformations, global transactions/M&A, financial modelling and end-to-end aspects of transfer pricing.



ITALY

The Patent Box and the recent development under the Italian Tax Rules

Susanna Scapigliati
Bird & Bird
Milan

The Status of Regulations

The Patent Box Decree introduced in Italy an elective tax regime that will allow companies to benefit (starting from fiscal year 2017) from a 50% exemption from corporate income tax, IRES, and local tax, IRAP, on income derived from the direct/indirect exploitation of qualifying IP.

In detail, on 6 February 2018, the Ministerial Decree of 28 November 2017 was published in Official Gazette No. 30. The Ministerial Decree, issued by the Ministry of Economic Development and the Ministry of Economy and Finance, enacts implementing rules for the patent box regime introduced by Law No. 190 of 23 December 2014 (i.e. the Stability Law 2015) and recently amended by Law Decree No. 50 of 24 April 2017, converted, with amendments, by Law No. 96 of 21 June 2017. The Ministerial Decree replaces the Ministerial Decree of 30 July 2015.

Under the patent box regime, 50% of income derived from the exploitation or direct use of qualifying IPs is exempt from corporate income tax (imposta sul reddito delle società, IRES) and regional tax on productive activities (imposta regionale sulle attività produttive, IRAP). In addition, capital gains arising from the sale of qualifying IPs are not included in taxable income if at least 90% of the proceeds is reinvested, within the following 2 tax years, in R&D activities for the development, maintenance and improvement of other qualifying IPs.

Under article 2 of the Ministerial Decree, the following persons earning business income and carrying on qualifying R&D activities may opt for the regime:

- individuals carrying on business activities;
- resident companies, cooperatives and other public and private entities carrying on business activities;
- Italian commercial partnerships, with the exception of simple partnerships (società semplice, S.s.); and
- non-resident entities having a permanent establishment in Italy to which the qualifying IP may be attributed, where they are resident in a country that has a tax treaty in force with Italy and that allows an effective exchange of information.

The option can be exercised by the person holding the right to economically exploit the qualifying IP.



The option applies for a period of 5 years and is irrevocable and renewable. The exercise of the option must be communicated to the Italian tax authorities at the moment of submission of the tax return.

The Patent Box regime can be elected by taxpayers carrying out business activities including, among the others, Italian branches of non-resident entities provided that these entities are resident in a

country with which Italy has a bilateral tax treaty ensuring an effective exchange of information and that the qualifying IP is attributable to them (according to the OECD approach).

The Decree underlines that subjects which may elect for the regime are the holders of the economic right to use the IP (this makes the regime available not only to owners of the IP but also to licensees) provided they carry out R&D activities. Those who cannot elect for the regime are the companies subject to bankruptcy procedures, or being compulsory wound up or the extraordinary administration of large firms in crisis.

RECENT AMENDMENTS
TO THE PATENT BOX
REGIME MAKE IT EVEN
MORE ATTRACTIVE FOR
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The decree also defines the scope of the regime. In particular, income derived from the following IP is considered eligible:

- software protected by copyright;
- industrial patents, granted or in the process of being granted, including patents on inventions, including biotech inventions and related certificates, utility models, plant varieties and semiconductors' topographies;
- designs and models, which can be legally protected;
- processes, formulas and information related to business, commercial or scientific knowledge, which can be legally protected; and
- two or more listed IPs, where complementary and jointly exploited for the realization of a product or process.

The option of the elective tax regime (which is characterized by a 5 lock-in period, is irrevocable and renewable) has been communicated to the Italian Revenue Agency by the tax payer following the instructions stated by the Agency Revenue during the first three year period; starting from fiscal year 2017, the option will be communicated in the tax return.

If the qualified income is determined through the *ruling* procedure (that is, through *direct use* of the IP, compulsorily or, as for “*intercompany*” operations, optionally) the option is effective starting from the fiscal year in which the ruling was filed. It means that (with the aim of giving the opportunity to benefit of the regime starting from the moment of the filing) in the period between the filing of the ruling and the conclusion of the agreement with the Tax Authorities the income is determined by eligible taxpayers according to the ordinary rules and the income accrued is recognized in the tax return of this last fiscal year, notwithstanding the possibility of filing an income tax refund application or a supplementary tax return.

It also has been clarified that in the case of extraordinary transactions (mergers, demergers, contribution in kind) the transferee takes over the rights connected to the election made by the transferor, also with reference to the costs undertaken by the transferor.

In addition, among R&D activities performed for the development, maintenance and improvement of the value of IP (the condition for application of the so-called “Modified Nexus Approach”) are: fundamental research, applied research, design, creation and realization of a software protected by copyright, and preventive researches, tests, surveys and studies also aimed at obtaining protection rights and adopting systems against counterfeiting

In case of licensing for the use of the IP, income benefitting from the regime is equal to the royalties earned in the year net of direct and indirect expenditures related to IP assets being relevant for tax purposes. In case of direct use of the IP, income benefitting from the regime is the embedded IP income from the sale of products and the use of processes net of direct and indirect expenditures related to IP assets being relevant for tax purposes directly.

The need for a direct link between the R&D activities and the qualifying IP and between the IP and the qualifying income is underlined. Moreover, the qualifying income must derive from an adequate accounting or cost accounting system. The nexus approach requires an IP-asset-by-IP-asset tracking. The “nexus ratio” is the ratio between qualifying expenditures and overall expenditures of the IP. The qualifying expenditures represent R&D expenditures carried out by the taxpayer itself and R&D expenditures for unrelated party outsourcing, increased by those costs carried out with related parties and acquisition costs of the IP within 30% of the qualifying expenditures. The overall expenditures represent all the above-defined costs, without the 30% cap concerning the costs carried out with related parties and the acquisition cost of the IP. It all means that numerator and denomina-

tor of the ratio are not different for cost nature purposes. In compliance with the OECD report on Action 5, where a payment is made through a related party to an unrelated party without any margin the payment will be included in qualifying expenditures. In accordance with such principle, R&D activities-related expenditures referred to development, maintenance and improvement of the IP carried out by the tax payer in a cost sharing agreement within the limit of incomes arising from the same cost sharing agreement will be included in qualifying expenditures.

It should be noted that for the nexus ratio computation purposes interest expenses, expenses regarding immovable properties and any costs which can't be directly linked to any IP can't be taken into account.

With the aim to allow taxpayers to adopt proper cost accounting systems it is stated that relevant costs shall be allocated to the ratio as follows: for the first year in which the regime is in force (2015) and for the following two, relevant costs are those carried out in the year to which the relevant tax return refers to and the previous three. The nexus ratio is not calculated on an IP basis but on an overall basis, this possibility is given to taxpayers on the assumption of them not having on their disposal an adequate accounting system allowing them to prove the link existence between R&D activities, IP and income (i.e. *Modified Nexus Approach*). Starting from fiscal year 2018, however, costs to be considered are those carried out from 2015 and the ratio has to be calculated separately for each IP.

However, with the aim to make the regime adoption easier, if a product is strictly linked to the joint use of more than one IP, these IP assets incorporated into one product are considered as an only one.

The regime also foresees that capital gains arising from the sale of eligible IP are exempt provided that at least 90% of the amount received is reinvested within the end of the second fiscal year following the sale in R&D activities aimed at developing, maintaining and improving other IP.

Finally, in case of direct use of the IP, and with reference to embedded IP income from the sale of products and the use of processes, it should be noted that the Decree, apart from what stated in Legislative Decree n. 600/1973, art. 31-ter, concerning the “preventive ruling” (also known as International Standard Ruling) which states that the ruling procedure is compulsory in case of direct use of the IP or optional as for “intercompany” operations, doesn't provide further indications. The Decree only makes a general reference to the international Transfer Pricing standard released by the OECD in art. 12 (3) with regard to Small and Medium Enterprises.

By experience we can confirm that the reference to the OECD Transfer Pricing standard is generally followed by the Tax Agency and that in most cases a Transactional Net Margin Method is applied.

The recent developments and the “Decreto Crescita”

The first reference related to recent developments concerning Patent Box regime is to the law n. 96-2017 which has excluded the trade marks from the objective scope of the facilitated taxation of the Patent box starting from 2017, confirming all the options exercised in 2015 and 2016 and provided that once the five years period have passed, within the maximum limit of June 30, 2012, the benefit is no longer renewable.

To determine the amount of the subsidy, the law provided for a ruling procedure – mandatory or optional depending on the case – which sees the taxpayer concerned send a specific application to the Revenue Agency, followed by a comparison for the definition of prior agreements.

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However, to overcome the criticalities of the ruling procedure, on April 23, 2019 it was eventually approved the “Decreto Crescita” which includes a few important provisions about tax reliefs for companies. Among them, it has to be mentioned the new rules for the “Patent box” which simplifies the steps to determine the eligible income for the purposes of the Patent box. Starting from the tax period in progress on the date of entry into force of the decree-law, business income holders will in fact be able to choose, as an alternative to the ruling procedure, to determine and indicate directly the taxable income in the income tax return. Taxpayers will have to provide all the necessary information by preparing appropriate documentation, respecting the operational that will be provided by the Revenue Agency. The subjects who opt for this new procedure must divide the decrease in three annual quotas of the same amount to be indicated in the tax return and the regional tax on productive activities, relating to the tax period in which this option is exercised and in those relating the two subsequent tax periods.

In the event of adjustment of the income excluded from the competition of the formation of the business income, the administrative penalty from 90% to 180% envisaged for the unfaithful declaration does not apply if, during accesses, inspections, verifications of other

preliminary activity, the tax payer issues to the Financial Administrations the documentation necessary to allow verification of the correct determination of the income excluded from taxation.

The taxpayer who holds the documentation in question must notify the Revenue Agency in the declaration relating to the tax period for which the benefit is being granted. The new rules are also applicable in the event that a ruling procedure has already been activated, provided that the related agreement has not been concluded. Taxpayers must divide the sum of the decreasing variations, relative to the tax periods of application of the subsidy, into three annual installments of the same amount to be indicated in the tax return and Irap relating to the two subsequent tax periods. The options remains open for all taxpayers who wish to benefit from the Patent box regime to access the reward penalty system by submitting a supplementary declaration, in which the possession of the appropriate documentation must be indicated for each tax period subject to integration, provided that the declaration is presented before the formal knowledge of the beginning of any control activity.

It will be fundamental then to have in place a proper documentation attesting the economic value of the regime benefitting intangibles in compliance with the OECD principle and local transfer pricing regulations.

ITALY

**Giammarco Cottani****L&P - Ludovici Piccone & Partners**

Via Sant'Andrea, 19

20121 Milan

Italy

Tel: (39) 02 30 32 311

Email: giammarco.cottani@lptax.itWebsite: www.ludoviciandpartners.com

Giammarco currently holds the role of Head of Transfer Pricing and International Tax Practice at L&P-Ludovici Piccone & Partners, international tax law firm. Within this position, he coordinates the transfer pricing practice, with regard to both the prevention and resolution of domestic and international disputes and the assistance in complex audits of large multinational enterprise groups. Until August 2015, he acted as Advisor on International Tax to the Central Assessment Director of Italy Revenue Agency. In this role, he focused on international tax issues related to large multinational groups and SMEs, with a specific focus on audit of transfer pricing issues. He was one of the delegates for Italy involved in the OECD BEPS project, with a specific focus on Actions 8 to 10 (Transfer Pricing), 7 (permanent establishment) and 1 (tax challenges arising from the digitalization of the economy). Before joining the Agency, he worked as a Transfer Pricing Advisor in the Tax Treaty and Transfer Pricing Unit of the OECD, where he was involved in the introduction of the new Chapter IX of the OECD Transfer Pricing Guidelines concerning business restructurings. Giammarco has served as a Member of the Sub-Committee Group of the United Nations in charge of the Draft of the Practical Manual on Transfer Pricing for Developing Countries, where he drafted the chapters on intangibles and business restructurings within the 2017 update of the Manual.

During his tenure at both the OECD and with the Italian Revenue Agency, he provided technical assistance on transfer pricing issues and domestic legislation in OECD and Non-OECD Countries: Israel, Colombia, China, South Korea, Georgia, Mexico. He also acted on behalf of the World Bank for technical assistance projects in the following countries: Bosnia-Herzegovina, Georgia, Liberia, Honduras and Thailand. Lastly, in his role as Sub-Committee member of the United Nations on transfer pricing, he has been advising the governments of Ecuador, Honduras and Mexico, respectively, in improving their tax system for both direct and indirect tax purposes.

Between 2015 and 2018 Giammarco has been involved in a number of technical assistance projects for tax administrations in several LATAM countries on behalf of international and regional organisations: CIAT (Panama); SRI (Ecuador); Mexico (Colombia 2015).

Giammarco is a lecturer at Wien University – WU Transfer Pricing Centre and a lecturer at the Advanced LL.M. in International Tax Law, University of Leiden (the Netherlands).

Recent publications

- "Introduction to Transfer Pricing" in Fundamentals of Transfer Pricing: A Practical Guide (edited by) M. Lang, A. Storck, R. Petruzzi, G. Cottani; Wolters Kluwer, Vienna, 2019, pp. 3-34;
- "Italy – Transfer Pricing & Business Restructuring" in Transfer Pricing and Business Restructuring, IBFD, November 2018;
- "Transfer Pricing Developments at the United Nations" in Transfer Pricing Developments Around the World 2017, (edit by) Michael Lang, Alfred Storck, Raffaele Petruzzi - Wolters Kluwer, The Netherlands, 2017, pp. 101-123.

L&P**LUDOVICI PICCONI & PARTNERS**

ITALY

**Susanna Scapigliati****Bird & Bird**

Via Borgogna, 8

Milan 20122

Italy

Tel: (39) 02 3035 6000

Email: susanna.scapigliati@twobirds.comWebsite: www.twobirds.com

Susanna is Head of business line Transfer Pricing in the Tax practice, based in our Milan office.

She has broad experience in both the management and coordination of transfer pricing projects and has advised clients on complex projects, including assistance in supply-chain reorganisation, drafting and implementation of intercompany agreements as well as litigation against Italian Tax Authorities.

Susanna also deals with drafting transfer pricing documentation, preparation of filing of APAs as well as of EU MAP and for Arbitration procedures. She has significant experience in dealing with the Italian competent tax authorities in this field.

Her recent projects include:

- advising on the analysis and planning of intangible transactions for a business model optimisation project;
- advising on the design, implementation and project management of a supply chain reorganization;
- negotiating of an international APA involving intangible transactions;
- advising on planning and on a number of Patent Box procedures.

Before joining us in 2015 Susanna had been working in leading international tax firms where she advised on transfer pricing.

Susanna graduated in Economics cum laude from the Libera Università Internazionale degli Studi Sociali (LUISS) of Rome. Her education includes a Master's in Tax Law obtained from Il Sole 24 Ore Business School.

Susanna is an Italian chartered accountant and certified auditor.

Bird & Bird

LUXEMBOURG

**Antonio A Weffer****Baker McKenzie**

10 – 12 Boulevard Roosevelt

Luxembourg 2450

Tel: (352) 261844254

Email: antonio.weffer@bakermckenzie.com

Website: www.bakermckenzie.com

Antonio A Weffer is a tax principal in Baker McKenzie's Tax Practice Group and the head of the firm's transfer pricing practice in Luxembourg, which has won the International Tax Review's 'Luxembourg Transfer Pricing Firm of the Year' award four years in a row, between 2016 and 2019.

Recognized as a global leader in the field of transfer pricing, Antonio has over 20 years of international tax experience, dealing with complex financial and non-financial multinational enterprises' cross-border transactions, reorganizations and M&A in numerous industries. Within Baker McKenzie, he focuses his practice on transfer pricing and valuation documentation, benchmarks, and other economic compliance services for the worldwide business community. Antonio's expertise has also strengthened the global practice of Baker McKenzie's vast network dedicated to transfer pricing, regarded as one of the highest rated and renowned law firms in the world.

Among his representative cases are:

- Assisting the Luxembourg Management Company of an international asset management group licensed under the UCITS regulation, in the context of the tax audit of its intra-group transactions, concluded with related companies located in Switzerland, Germany, Italy, France and Austria.
- Assisted a New York-based distressed-focused hedge fund investment adviser in testing the arm's length nature of a total interest expense in the context of a multifactorial debt instrument, through which investments were mainly made in Western Europe.
- Assisted a leading European financial services firm, specialised in equity brokerage, equity capital markets and asset management, in the restructuring process of their asset management division, designing a new business model and functional structure for the entities involved.

Antonio is an active member of several international tax associations, such as the IBFD and the Luxembourg branch of the IFA. He is a regular contributor on international tax issues through articles, lectures in International Tax Programs and as a speaker at worldwide seminars and conferences on international tax. Notably he was the IFA reporter on subject 2 during the 2017 International Annual Congress.

Antonio has obtained a LLM in international taxation, a MBA and a Master's degree in tax law and public finance.

**Baker
McKenzie.**

NETHERLANDS

**Margreet Nijhof****Baker McKenzie**

Claude Debussylaan 54

1082 Amsterdam

Netherlands

Tel: (31) 20 551 7543

Email: margreet.nijhof@bakermckenzie.com

Website: www.bakermckenzie.com

Margreet Nijhof is a Partner in the Transfer Pricing Team of Baker McKenzie Amsterdam. Margreet has over 20 years of experience, during which she developed a transatlantic skillset, having spent 11 years working at Baker McKenzie San Francisco / Palo Alto, before transitioning to the Amsterdam office. She is praised by her clients for her in-depth understanding of tax and transfer pricing rules and issues in the US and Europe, which is a valuable asset when rendering European advice to US multinationals and US advice to European multinationals.

Margreet engages in international tax planning for multinationals with a focus on transfer pricing in the broadest sense, including transfer pricing planning, documentation, support and defense. She engages in APA and MAP discussions for her diverse client base. The APA discussions focus amongst other things on principal companies and restructuring planning. The MAP discussions have involved European and US MAP claims. In addition, Margreet is frequently engaged to lead multi-jurisdictional operational model reviews and restructuring exercises, working together with colleagues from multiple legal disciplines, addressing the need of our clients for integrated tax and legal advice. She works with a wide variety of industries, including established and emerging hi-tech companies and "traditional" retail and manufacturing companies. Margreet is the global tax liaison for Baker McKenzie's Consumer Goods & Retail industry group.

Margreet was twice individually recognized as "Best in Transfer Pricing" by IFLR at the Women in Business Law Awards Ceremony. The wider Amsterdam Transfer Pricing Team was awarded "Netherlands Transfer Pricing Firm of the Year" in 2005, 2006, 2007, 2010, 2012, 2014, 2015, 2018 and 2019. Margreet is a strong advocate for diversity and inclusion in the workplace in her capacity of member of Baker McKenzie Amsterdam's Diversity & Inclusion Committee.

Margreet was admitted to the Bar in California (1997) and worked as a US Tax Lawyer at Baker McKenzie Palo Alto (SF) between 1997/2008. In addition to her California bar membership, she is also a member of the Dutch Association of Fiscal Advisors (NOB). Finally, she is a frequent speaker and panel moderator at all of the important tax and transfer pricing forums e.g. BNA/Bloomberg, International Tax Review and Tax Executive Institute.

**Baker
McKenzie.**

NETHERLANDS

**Antonio Russo****Baker McKenzie**

Claude Debussylaan 54

1082 Amsterdam

Netherlands

Tel: (31) 20 5517 963

Email: antonio.russo@bakermckenzie.com

Website: www.bakermckenzie.com

Antonio Russo is a partner with Baker McKenzie Amsterdam, he is Chair of the EMEA Tax Practice, comprising 400+ practitioners, and heads the Amsterdam Transfer Pricing Team which has been awarded the *International Tax Review* Award for The Netherlands Transfer Pricing Firm of the year in 2005, 2006, 2007, 2010, 2012, 2014, 2015, 2018 and 2019. Antonio specializes in transfer pricing related design, implementation and valuation of companies and intangible assets.

Antonio's international experience covers advice relating to intercompany financial transactions, ranging from pricing fixed income securities, hybrids and derivatives to conducting credit rating and guarantee fee analyses to implement cash concentration and centralized treasury structures. He has extensive experience in tax planning and restructuring engagements and has performed transfer pricing studies for clients in a wide range of industries. He also provides assistance to clients with developing strategies for the conclusion of APAs as well as tax audit defense in multiple European countries, the Americas and Asia.

Antonio is contributing, and has in the past actively contributed, to the OECD consultations on the revision of the OECD Transfer Pricing Guidelines. Antonio lectures at various seminars and conferences in Europe, Americas and Asia. He is involved with training Tax Authorities on transfer pricing: Italian, Danish, Singaporean and Korean Tax Authorities among others. He is a Fellow of the International Tax Center of the University of Leiden where he regularly teaches transfer pricing. He has been visiting lecturer with other universities, such as the Nanyang Technological University (Singapore) University of Padova (Italy), the European Tax College at the University of Leuven (Belgium) and the Aarhus University (Denmark). Furthermore, Antonio regularly lectures at the IBFD International Tax Academy (ITA). He built up a diverse portfolio of publications from the IBFD to BNA publications, and contributes articles to *Intertax*, *International Tax Review*, *the Journal of International Taxation* and *Highlights & Insights on European Taxation*.

**Baker
McKenzie.**

NETHERLANDS

**Harmen van Dam****Loyens & Loeff**

Blaak 31

Rotterdam 3011

Netherlands

Tel: (31) 10 224 6348

Email: harmen.van.dam@loyensloeff.com

Website: www.loyensloeff.com

For a diverse group of clients, including Fortune 100 companies, Harmen van Dam avoids or resolves transfer pricing disputes by means of Advance Pricing Agreements, audits procedures, corresponding adjustments and mutual consultation procedures. Many projects involve the centralisation of activities. He heads the Loyens & Loeff NV Transfer Pricing team. Loyens & Loeff is a complete, independent, full-service law firm. It assists on tax matters within the context of mergers, acquisitions, restructurings, buyouts and similar transactions, and also in recurring tax matters such as filing tax returns and tax audits and litigation. As transfer pricing is intertwined with most tax issues, Loyens & Loeff has a fully integrated solution for transfer pricing issues that draws upon the various tax and legal practices. European or global projects are implemented together with renowned transfer pricing specialists and economists in the relevant jurisdictions.

Mr Van Dam holds a law degree from the University of Leiden (1991) and a degree from the New York University School of Law (LLM in taxation, 1996). He teaches regularly at the International Tax Center in Leiden and the IBFD. Reflecting the firm's own integrated approach, he also advises on Dutch corporate tax and dividend tax in international tax structures.

LOYENS & LOEFF

NETHERLANDS

**Gerben Weistra****ECTACON**

Wilgenweg 22E
1031 HV Amsterdam
Netherlands
Tel: (31) 20 210 7961
Email: gerben.weistra@ectacon.com
Website: www.ectacon.com

Gerben Weistra has over 20 years of professional consulting experience with a focus on international tax and transfer pricing. He has provided advice to companies, governments, tax advisory firms and law firms on a range of international tax, transfer pricing and valuation issues. He has performed and directed transfer pricing engagements in a variety of situations, including policy setting, implementation, compliance, tax audits and dispute resolution.

Gerben co-leads Ectacon, a modern, hands-on and fully independent transfer pricing consultancy. Ectacon, founded in 2015, connects tax and economics. Based in Amsterdam, Ectacon combines specialist knowledge and broad experience with a practical and pragmatic approach. Ectacon performs and supports all transfer pricing activities relating to setting, implementing, monitoring and defending transfer pricing, and preparing transfer pricing documentation and economic analyses. Ectacon's goal is to support clients with a carefully considered strategy in transfer pricing and related international tax and economic matters. Ectacon is fully independent and regularly works with transfer pricing specialists, tax advisors and economic experts worldwide.

Ectacon provides expertise on both a regular consulting basis and on a collaborative sourcing (co-sourcing) basis. Ectacon supports various in-house tax teams on a co-sourcing basis, enabling these corporate tax departments to maintain control of critical transfer pricing processes, while leveraging knowledge and experience from Ectacon. Examples of activities performed include working with in-house teams to prepare analyses and documentation, training in-house staff, and acting as trusted advisor addressing operational issues and strategic transfer pricing matters on a regular basis. Ectacon operates as an extension of these tax departments with expertise and quality, pragmatic solutions and cost control as important criteria of the work performed.

ECTACON
connecting tax and economics

NORWAY

**Svein G Andresen****KPMG**

Sørkedalsveien 6
Postboks 7000 Majorstuen
N-0306 Oslo
Norway
Tel: (47) 4063 9022
Email: svein.andresen@kpmg.no
Website: www.kpmglaw.no

Svein joined KPMG in 1995 and became a tax partner in 2001. Before joining KPMG he worked four years with the Directorate of Taxes and the Central Taxation Office for large businesses. Svein is an international tax specialist with focus on transfer pricing. He holds a law degree from the University of Oslo in 1990.

Svein serves at the country leader of KPMG's Corporate Tax Services in Norway. Svein is also the head of transfer pricing services in Norway.

He is the corporate tax and transfer pricing advisor for several Norwegian based and multinational enterprises. This includes strategic advices, compliance and international tax and transfer pricing co-ordinated services tax audit assistance, tax litigation, and financial analyses through his team members.

Svein is the author of several articles published in Norwegian and international publications. He frequently holds seminars and workshops for clients on tax and transfer pricing related issues.

Languages

Norwegian and English



SPAIN

**Jose Diaz-Faes****KPMG**

Edificio Torre Cristal. Paseo de la Castellana, 259 C
Madrid 28046
Spain
Tel: (34) 91 451 3023
Email: jdfaes@kpmg.es
Website: www.kpmgabogados.es

Jose is a partner within the international tax and global transfer pricing services department at KPMG in Spain, taking the lead of the transfer pricing team in Madrid office in October 2016.

He holds a law degree from the *Universidad Complutense de Madrid* (UCM) and a master's degree in tax law from the UCM and the *Centro de Estudios Financieros* (CEF).

Jose joined KPMG in 2005. Since then he has worked exclusively within the international tax and global transfer pricing services team.

He has more than 12 years of experience in tax planning, analysis and documentation of intercompany transactions for major multinational corporations as well as in international investment projects for Spanish Groups.

He also has led many projects related to tax audits and dispute resolution cases in transfer pricing issues for national and international companies. Additionally, he has helped companies negotiate advance pricing agreements (APAs) and coordinate MAPs within several countries.

Jose has broad experience leading projects on the design and implementation structures for licensing intangible assets within multinational groups, some of them listed companies.

He is a member of KPMG's value chain management global group (VCM) and a member of the firm's global TP dispute resolution team (GTPDR) area of expertise where he dedicates a significant portion of his time.

Jose is a professor teaching the master's course in international taxation at the *Instituto Superior de Derecho y Economía* (ISDE), as well as taxation courses at the *Centro de Estudio Financieros* (CEF). He is a regular speaker at international tax and transfer pricing seminars.

He is Author of some articles on CEF's International Taxation handbook as, "*Economía Digital y el entorno BEPS*" and "*Fiscalidad del comercio electrónico and Especial referencia a la atribución de beneficios a establecimientos permanentes*". (E-commerce – 4th ed. 2010).

As additional merits, he was selected as *Tax Controversy Expert* by the *International Tax Review* in 2016 and listed in *Best Lawyers* 2016 in the practice area of *Tax Law*.

Jose is Spanish native speaker and fluent in English and German.



SPAIN

**Montserrat Trapé****KPMG**

Torre Realia, Plaça d'Europa, 41-43
L'Hospitalet de Llobregat
Barcelona 08908
Spain
Tel: (34) 93 253 29 36
Email: mtrape@kpmg.es
Website: www.kpmgabogados.es

Montserrat is the head of the transfer pricing practice in Spain and former leader of KPMG's transfer pricing services for the EMA Region. In 2014, she became the Managing Partner of KPMG Tax and Legal in Catalonia.

Montserrat works closely with the transfer pricing and international tax global leadership, where she is involved in a variety of international tax projects for global clients. She closely follows and participates in EU and OECD projects on transfer pricing and related international issues. She also assists the local EMA transfer pricing teams in developing their practice.

Before joining KPMG, she had a distinguished career as a senior tax official in the Spanish Revenue Service. She was co-director of international and non-residents taxation having basically responsibilities in negotiating APAs, and also actively participated in the drafting of the Spanish transfer pricing legislation.

As tax official, Montserrat represented Spain at the OECD transfer pricing working party 6 for twelve years and participated in different subgroups. She was Vice Chair of the dispute resolution subgroup which reviewed Article 25 of the Model Tax Convention and introduced arbitration and was also an active member of the thin capitalization subgroup.

She was deeply involved in the EU Joint Transfer Pricing Forum being appointed Vice-Chair in 2002. In this role, she actively promoted the work on the Code of conducts on the arbitration convention and the European transfer Pricing documentation as well as other projects on APA and intra group services. She was selected as an advisor for the Inter American Development Bank in various projects on the modernization of international tax departments in several Latin-American countries as well as on the design of a transfer pricing Model for Central-American countries.

As a tax advisor, Montserrat has been distinguished by the European Chambers particularly for her work in APAs where she has assisted numerous clients from different sectors and negotiated with success both unilateral and bilateral APA with counterparts from Europe, US, and ASPAC. She also specializes in the litigation of complex transfer pricing cases and the resolution of double taxation. She has been included in the Best Lawyers list published in Spain consistently every year since 2008.

Montserrat is at present, member of the list of independent persons of standing appointed by the Spanish Government eligible to become a member of the Advisory Commission for the European Arbitration Convention. She has also been selected as standing Chairperson in a potential arbitration panel to eliminate the double taxation under the US/ German Double Tax Convention.

Montserrat is a visiting professor at Instituto de Estudios Fiscales and ESADE, a leading private university in business studies. She is also a frequent public speaker and contributor to articles and books(among others, BNA with bimonthly articles, *Convenios Fiscales Internacionales y Fiscalidad de la Unión Europea*, (in cooperation), *Manual de Fiscalidad Internacional* (in cooperation), *Fiscalidad de las operaciones vinculadas*, (in cooperation).



SWEDEN

**Annika Lindström****KPMG**

Vasagatan 16

SE-101 27 Stockholm

Sweden

Tel: (46) 8 7236171;

(46) 70 3776171 (mobile)

Email: annika.lindstrom@kpmg.se

Website: www.kpmg.se

Annika headed the Swedish transfer pricing practice from 2005 until 2018 and has managed and worked with a wide range of transfer pricing assignments in most major industries. She has more than 20 years of experience within the financial area, including auditing, accounting, process development, project management and transfer pricing.

Professional Experience

Annika has various sector experience within the automotive industry, logistics, retail and consumer markets, engineering, chemical, financial, IT and forestry industry. Annika has experience from many different areas within transfer pricing and is specialized within the following areas:

- Restructurings;
- Advance Pricing Agreements (APA) and Mutual agreement procedures (MAP);
- Tax audits;
- Establish defensible BEPS compliant pricing models; and
- Transfer pricing documentation.

Function and specialization

Annika is an experienced tax partner specialized in transfer pricing

Education, Certifications and Memberships

- Masters degree in Economics and Business Administration from Stockholm University
- Certified tax advisor – FAR, Sweden's professional institute for authorized public accountants



UNITED KINGDOM

**Andrew Cousins****Duff & Phelps**

The Shard, 32 London Bridge Street

London SE1 9SG

UK

Tel: (44) 207 089 4707

Email: Andrew.Cousins@DuffandPhelps.com

Website: www.DuffandPhelps.com

Andrew Cousins is a director in the London office and part of the Transfer Pricing practice. Andrew is an international tax practitioner with more than 20 years of cross-border experience gained in private practice, in industry and in government. He brings a comprehensive regulatory, commercial and advisory perspective to the fields of transfer pricing and business restructuring, with a focus on practical implementation.

Andrew spent eight years in the industry as a global head of transfer pricing. He has led the transfer pricing practice in two FTSE 100 multinationals, working in the tobacco industry for over five years at Gallaher plc (and subsequently, post-acquisition, on its integration into Japan Tobacco International); then at Cadbury plc (now Mondelez). He handled the development of transfer pricing policy, business restructuring, negotiation of APAs and ATCA, transfer pricing documentation, management of audits and controversy, the focus always being on practical solutions that were aligned with the business.

As an industry commentator, he contributed papers to the OECD's Working Party 6 business restructuring and intangibles discussion drafts and contributed to the debate at the associated public consultations. Andrew continued his interaction with the OECD as Deputy Comptroller of Taxes in the Jersey tax authority, acting as a competent authority for all of Jersey's international tax agreements, handling MAP and exchange of information with other tax authorities around the world. Andrew served as Jersey delegate and expert assessor for the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes, as well as representing Jersey at the OECD's Global Forums for Transfer Pricing and for Tax Treaties.

Andrew leads Duff & Phelps' response to the implementation of the BEPS Action 13 documentation requirements, including Country-by-Country reporting, master file and local file. Andrew has authored numerous books and articles on tax transparency and transfer pricing and serves on the Editorial Board of Transfer Pricing Forum. He continues to contribute to the OECD's ongoing BEPS work, through the submission of commentary and participation in public consultations.

Andrew originally qualified as a chartered accountant at Deloitte before focusing on transfer pricing at Ernst & Young, where he was a member of the Tax Effective Supply Chain Management (TESCM) team.

Andrew is a graduate of Oxford University and is a Fellow of the Institute of Chartered Accountants in England and Wales.

UNITED KINGDOM

**Ted Keen****Duff & Phelps**

The Shard, 32 London Bridge Street
London SE1 9SG

UK

Tel: (44) 207 089 4790

Email: Ted.Keen@DuffandPhelps.com

Website: www.DuffandPhelps.com

Ted joined Duff & Phelps in 2018 as a Managing Director in the London office and leads their European Transfer Pricing practice. He brings more than 25 years of experience, advising multinational clients on transfer pricing matters in the US, the UK, Europe, Africa and Asia, and in diverse sectors including life sciences, financial services, mining and minerals, hi-tech, media, engineering and consulting services, and industrial products. A PhD economist, Ted has also been engaged as an expert witness and specialises in developing pragmatic solutions to complex transfer pricing issues, often involving IP with a complicated history of development, including:

- The interaction between TP and Valuation methods;
- Supply chain and IP planning and compliance during post-merger integration;
- Transfers of IP in response to regulatory change;
- Cost-sharing buy-ins and buy-outs;
- Transfers of pension benefit obligations between related parties;
- Valuation of contractual provisions using option pricing methods;
- Head office intangibles;
- Arbitration involving minority shareholder claims of unfair treatment;
- Implications of bankruptcy and financial distress for transfer pricing.

Ted began his transfer pricing career in Los Angeles. He has been based in London since 1997, and has worked as a partner in two of the Big 4 accounting firms and as a managing director in an economics consulting firm. Prior to being recruited by Duff & Phelps, Ted established his own independent transfer pricing consultancy. He has contributed to numerous papers and guides on transfer pricing, has spoken at numerous conference around the world, and has been recognized as one of the World's Leading Transfer Pricing Experts. Ted graduated with a B.S.Ch.E. from Case Western University and received his PhD from the Claremont Graduate University.

DUFF & PHELPS

AUSTRIA

Sabine Bernegger
KPMG
Vienna

George Gottholmseder
KPMG
Vienna

Herbert Greinecker
PwC
Vienna



Gabriele Holzinger
Deloitte Austria
Renngasse 1/Freyung
Vienna, A-1010
Austria
Tel: (43) 1537005630
Email: gholzinger@deloitte.at
Website: www.deloitte.com

Clemens Nowotny
LeitnerLeitner
Linz

Florian Rosenberger
KPMG
Linz

BELGIUM

Patrick Boone
PwC
Brussels



Patrick Cauwenbergh
Deloitte Belgium
Gateway Building Luchthaven Brussel
Nationaal 1 J, Zaventem, 1930
Belgium
Tel: (32) 2 600 69 27
Email: pcauwenbergh@deloitte.com
Website: www.deloitte.com



Jeroen Lemmens
Deloitte Belgium
Gateway Building Luchthaven Brussel
Nationaal 1 J, Zaventem, 1930
Belgium
Tel: (32) 2 600 69 82
Email: jlemmens@deloitte.com
Website: www.deloitte.com

Astrid Pieron
Mayer Brown
Brussels

Natalie Reypens See bio
Loyens & Loeff
Brussels



André Schaffers
Deloitte Belgium
Gateway Building Luchthaven Brussel
Nationaal 1 J, Zaventem, 1930
Belgium
Tel: (32) 2 600 67 15
Email: aschaffers@deloitte.com
Website: www.deloitte.com

Sofie Stas
Aptis Global
Brussels

Leslie Van den Branden See bio
Grant Thornton
Vilvoorde

Kurt Van der Voorde
EY
Brussels

Dirk Van Stappen
KPMG
Antwerp

Isabel Verlinden
PwC
Brussels

CZECH REPUBLIC



Marek Romancov
Deloitte Czech Republic
Italska 2581/67
Prague, 12000
Czech Republic
Tel: (42) 0246042889
Email: mromancov@deloittece.com
Website: www.deloitte.com

DENMARK

Henrik Arhnung
EY
Copenhagen

Nikolaj Bjørnholm
Bjørnholm Law
Copenhagen

Justin Breau
EY
Copenhagen



John Henshall
Deloitte Denmark
Weidekampsgade 6 Postboks 1600,
Copenhagen C, 0900
Denmark
Tel: (44) 7778 266206
Email: jhenshall@deloitte.dk
Website: www.deloitte.com

Jørgen Juul Andersen
PwC
Copenhagen



Asger Mosegaard Kelstrup
Deloitte Denmark
Weidekampsgade 6 Postboks 1600,
Copenhagen C, 0900
Denmark
Tel: (45) 30 93 45 96
Email: akelstrup@deloitte.dk
Website: www.deloitte.com

Henrik Lund
KPMG Acor Tax
Copenhagen

Martin Nielsen
KPMG
Copenhagen

Klaus Okholm
PwC
Aarhus

Peder Reuther
EY
Copenhagen



Kasper Toftemark
Deloitte Denmark
Weidekampsgade 6 Postboks 1600,
Copenhagen C, 0900
Denmark
Tel: (45) 30 16 21 77
Email: ktoftemark@deloitte.dk
Website: www.deloitte.com

FINLAND



Jari Ahonen
Deloitte Finland
Porkkalankatu 24 P.O. Box 122,
Helsinki, 00181
Finland
Tel: (35) 8207555515
Email: jari.ahonen@deloitte.fi
Website: www.deloitte.com

Kirsi Hiltunen See bio
Eversheds Sutherland
Helsinki

Sanna Laaksonen
KPMG
Helsinki

Jarno Mäkelä
KPMG
Helsinki

Mikko Palmu
KPMG
Helsinki

Kennet Pettersson
EY
Helsinki

Merja Raunio

Roschier
Helsinki

Eric Sandelin

KPMG
Helsinki

Sari Takalo

PwC
Helsinki

FRANCE

Franck Berger

EY
Lyon/Paris

Michel Combe

PwC
Paris

Xavier Daluzeau

See bio

CMS Francis Lefebvre Avocats
Neuilly-sur-Seine

**Grégoire de Vogüé**

Taj, Société d'Avocats
Majunga - 6, place de la Pyramide,
Paris La Défense, 92 908
France
Tel: (33) 1 40 88 22 20
Email: gdevogue@taj.fr
Website: www.taj.fr

Laurence Delorme

SAS Laurence Delorme Avocat
Paris

Vincent Desoubries

Arsene Taxand
Paris

Pierre-Jean Douvier

See bio

CMS Francis Lefebvre Avocats
Neuilly-sur-Seine

Pierre Escaut

PwC Société d'Avocats
Paris

Stéphane Gelin

See bio

CMS Francis Lefebvre Avocats
Neuilly-sur-Seine

Bruno Gibert

See bio

CMS Francis Lefebvre Avocats
Neuilly-sur-Seine

Antoine Glaize

Arsene Taxand
Paris

Sébastien Gonnet

NERA Economic Consulting
Paris

Marie-Laure Hublot

PwC
Paris

Arnaud Le Boulanger

See bio

CMS Francis Lefebvre Avocats
Neuilly-sur-Seine

**Eric Lesprit**

Taj, Société d'Avocats
Majunga - 6, place de la Pyramide,
Paris La Défense, 92 908
France
Tel: (33) 1 40 88 86 75
Email: elesprit@taj.fr
Website: www.taj.fr

Emmanuel Linares

NERA Economic Consulting
Paris

Pascal Luquet

See bio

Grant Thornton
Neuilly-sur-Seine

**Marie-Charlotte Mahieu**

Taj, Société d'Avocats
Majunga - 6, place de la Pyramide,
Paris La Défense, 92 908
France
Tel: (33) 1 55 61 60 11
Email: mmahieu@taj.fr
Website: www.taj.fr

Jan Martens

EY
Paris

Cyril Maucour

Bignon Lebray
Paris

Richard Newby

Duff & Phelps
Paris

**Aymeric Nouaille-Degorce**

Taj, Société d'Avocats
Majunga - 6, place de la Pyramide,
Paris La Défense, 92 908
France
Tel: (33) 1 55 61 48 74
Email: aynouailledegorce@taj.fr
Website: www.taj.fr

**Julien Pellefigue**

Taj, Société d'Avocats
Majunga - 6, place de la Pyramide,
Paris La Défense, 92 908
France
Tel: (33) 1 55 61 79 72
Email: jpellefigue@taj.fr
Website: www.taj.fr

Nadia Sabin

EY
Paris

Sabine Sardou

BDO
Paris

Caroline Silberztein

Baker McKenzie
Paris

Terence Wilhelm

Cara Avocats
Lyon

GERMANY

Ulf Andresen

See bio

PwC
Frankfurt am Main

Hubertus Baumhoff

See bio

Flick Gocke Schaumburg
Bonn

Lorenz Bernhardt

See bio

PwC
Berlin

Axel Bödefeld

Oppenhoff & Partner
Cologne

Thomas Borstell

See bio

EY
Düsseldorf

Dirk Brüninghaus

See bio

EY
Düsseldorf

Arwed Crüger

Warth & Klein Grant Thornton
Frankfurt am Main

Roman Dawid

See bio

PwC
Frankfurt am Main

Xaver Ditz

See bio

Flick Gocke Schaumburg
Bonn/Düsseldorf

Michael Dworaczek

See bio

EY
Düsseldorf

Alexander Ebering

KPMG
Stuttgart

Axel Eigelshoven

See bio

PwC
Düsseldorf

Kati Fiehler See bio
PwC
Hamburg

Julia Fischer See bio
KPMG
Stuttgart

Michael Freudenberg See bio
KPMG
Düsseldorf

Florian Gimmler See bio
PwC
Frankfurt am Main

Markus Greinert See bio
Flick Gocke Schaumburg
Munich

Jörg Hanken See bio
PwC
Munich

Maik Heggmaier See bio
WTS
Munich

Rolf Heinrich
KPMG
Munich

Yves Hervé See bio
NERA Economic Consulting
Frankfurt am Main

Jörg Hülshorst See bio
PwC
Düsseldorf

Matthias Kaut
KPMG
Düsseldorf

Kerim Keser
Duff & Phelps
Munich

Manuel Koch
Questro International
Stuttgart

Stephanie Kohl
KPMG
Cologne

Carsten Kratzer
Baker Tilly
Düsseldorf

Christoph Kromer
Warth & Klein Grant Thornton
Frankfurt am Main

Svetlana Kuzmina See bio
KPMG
Düsseldorf

Christoph Ludwig
Warth & Klein Grant Thornton
Düsseldorf

Katharina Mank See bio
PwC
Essen

Axel Nientimp See bio
WTS
Düsseldorf

Holger M Peters See bio
KPMG
Hamburg


Michael Puls See bio
Flick Gocke Schaumburg
Düsseldorf

Stephan Rasch See bio
PwC
Munich

Martin Renz See bio
PwC
Stuttgart

Achim Roeder See bio
KPMG
Frankfurt am Main

Thorsten Schaus
Questro International
Mannheim

 **Dr. Richard Schmidtke**
Deloitte Germany
Rosenheimer Platz 4
Munich, 81669
Germany
Tel: (49) 89 290368690
Email: rschmidtke@deloitte.de
Website: www.deloitte.com

 **Martin Schmitt**
Deloitte Germany
Franklinstrasse 50
Frankfurt am Main, 60486
Germany
Tel: (49) 69 756956051
Email: martschmitt@deloitte.de
Website: www.deloitte.com

Stephan Schnorberger See bio
Baker McKenzie
Düsseldorf

Christian Scholz See bio
EY
Munich

Annette Schrickel See bio
EY
Eschborn

Susann van der Ham See bio
PwC
Düsseldorf

Alexander Voegelé See bio
NERA Economic Consulting
Frankfurt am Main

Oliver Wehnert See bio
EY
Düsseldorf

Ludger Wellens See bio
PwC
Düsseldorf

Dirk Wilcke See bio
PwC
Frankfurt am Main

 **Jobst Wilmanns**
Deloitte Germany
Franklinstrasse 50
Frankfurt am Main, 60486
Germany
Tel: (49) 69 756956243
Email: jwilmanns@deloitte.de
Website: www.deloitte.com

GREECE

 **Fotis Tsampanlis**
Deloitte Greece
3A Fragaklissias & Granikou Str,
Maroussi, Athens 15125
Greece
Tel: (30) 2106781271
Email: ftsampanlis@deloitte.gr
Website: www.deloitte.com

HUNGARY

 **Péter Gémesi**
Deloitte Hungary
Dozsa György ut 84/C
Budapest, 1068
Hungary
Tel: (36) 1 428 6722
Email: pgemesi@deloittece.com
Website: www.deloitte.com

 **Attila Kövesdy**
Deloitte Hungary
Dozsa György ut 84/C
Budapest, 1068
Hungary
Tel: (36) 1 428 6728
Email: akovesdy@deloittece.com
Website: www.deloitte.com

Zoltan Liptak
EY
Budapest

IRELAND

Joe Duffy
Matheson
Dublin



Gerard Feeney
Deloitte Ireland
29 Earlsfort Terrace Dublin 2
Dublin, D02 AY28
Ireland
Tel: (353) 14172403
Email: gfeeney@deloitte.ie
Website: www.deloitte.com

Catherine Galvin
Matheson
Dublin

Dan McSwiney
EY
Dublin

Eoghan Quigley
KPMG
Dublin

Gavan Ryle
PwC
Dublin

ITALY

Davide Bergami
EY
Milan

Stefano Bognandi
LED Taxand
Milan



Aldo Castoldi
Deloitte Italy
Via Tortona, 25
Milan MI 20144
Italy
Tel: (39) 0283324036
Email: acastoldi@sts.deloitte.it
Website: www.deloitte.com

Giammarco Cottani See bio
L&P - Ludovici Piccone & Partners
Milan

Gianni de Robertis
KPMG, Tax & Legal
Rome



Andrea Ferrario
Deloitte Italy
Via Tortona, 25
Milan MI 20144
Italy
Tel: (39) 0283324075
Email: aferrario@sts.deloitte.it
Website: www.deloitte.com

Guglielmo Maisto
Maisto e Associati
Milan



Marco Mazzetti di Pietralata
Deloitte Italy
Via XX Settembre
1 Rome RM 00187, Italy
Tel: (39) 0648990910
Email: mmazzetti@sts.deloitte.it
Website: www.deloitte.com

Andrea Musselli
Studio Musselli
Milan

Raul-Angelo Papotti
Chiomenti
Milan

Giuliana Polacco
Baker McKenzie
Milan

Susanna Scapigliati See bio
Bird & Bird
Milan

LUXEMBOURG

Danny Beeton
Arendt & Medernach
Luxembourg

Philippe Neefs
KPMG
Luxembourg

Marc Rasch
PwC
Luxembourg



Stephan Tilquin
Deloitte Luxembourg
560 Rue de Neudorf, Luxembourg
L-2220, Luxembourg
Tel: (352) 45145 2592
Email: stilquin@deloitte.lu
Website: www.deloitte.com

Antonio A Weffer See bio
Baker McKenzie
Luxembourg

NETHERLANDS

Peter Andersen
Questro International
Amsterdam

Marc Diepstraten
PwC
Amsterdam

Jeroen Dijkman
KPMG Meijburg & Co
Amsterdam



Sjoerd Haringman
Deloitte Netherlands
Wilhelminakade 1
Rotterdam, 3072 AP
Netherlands
Tel: (31) 882881269
Email: sharingman@deloitte.nl
Website: www.deloitte.com



Thijs Heijenrath
Deloitte Netherlands
Wilhelminakade 1
Rotterdam, 3072 AP
Netherlands
Tel: (31) 882881176
Email: theijenrath@deloitte.nl
Website: www.deloitte.com

Loek Helderman
KPMG Meijburg & Co
Amstelveen

Steeff Huibregtse
Transfer Pricing Associates
Amsterdam

Clive Jie-A-Joen
Simmons & Simmons
Amsterdam

Jens Karreman
KPMG Meijburg & Co
Eindhoven

Marthe Kleinjan
EY
Amsterdam

Jeroen Kuppens
KPMG Meijburg & Co
Amsterdam

Margreet Nijhof See bio
Baker McKenzie
Amsterdam

Danny Oosterhoff
EY
Amsterdam

Jaap Reyneveld
KPMG Meijburg & Co
Amsterdam

Antonio Russo See bio
Baker McKenzie
Amsterdam

Richard Slimmen
Quanter Global
Eindhoven

Eduard Sporken
KPMG Meijburg & Co
Amsterdam

Ágata Uceda
KPMG Meijburg & Co
Amsterdam

Harmen van Dam See bio
Loyens & Loeff
Rotterdam

Ronald van den Brekel
EY
Rotterdam

Michel van der Breggen
PwC
Amsterdam



Bert van der Klok
Deloitte Netherlands
Wilhelminakade 1
Rotterdam, 3072 AP
Netherlands
Tel: (31) 882881674
Email: bervanderklok@deloitte.nl
Website: www.deloitte.com

Arnout van der Rest
PwC
Amsterdam

Monique van Herksen
Simmons & Simmons
Amsterdam

Roderick Veldhuizen
Embridge Economics
Amsterdam

Eric Vroemen
PwC
The Hague

Gerben Weistra See bio
ECTACON
Amsterdam

NORWAY

Svein G Andresen See bio
KPMG
Oslo

Terje Arntzen
Arntzenlegal
Oslo

Morten Beck
PwC
Oslo

Joachim M Bjerke
BAHR
Oslo

Andreas Bullen
Wiersholm
Oslo

Mette Anett Granheim
EY
Oslo



Hans Martin Jørgensen
Deloitte Norway
Dronning Eufemias gate 14
Oslo, 0103
Norway
Tel: (47) 994 46 061
Email: hjorgensen@deloitte.no
Website: www.deloitte.com

POLAND

Jacek Bajger
KPMG
Warsaw

Aneta Blazejewska-Gaczynska
EY
Warsaw

Renata Dluska
MDDP
Warsaw



Iwona Georgijew
Deloitte Poland
Al. Jana Pawla II 22
Warsaw, 00-133
Poland
Tel: (48) 22 5110824
Email: igeorgijew@deloitte.com
Website: www.deloitte.com

Monika Laskowska
PwC
Warsaw

Sebastian Lebda
PwC
Warsaw



Rafal Sadowski
Deloitte Poland
Al. Jana Pawla II 22
Warsaw, 00-133
Poland
Tel: (48) 22 5110965
Email: rsadowski@deloitte.com
Website: www.deloitte.com

Piotr Wiewiorka
PwC
Warsaw

PORTUGAL

João Aranha
Baker Tilly
Lisbon

Catarina Breia
Nexia- Santos Carvalho & Associados
Porto



Filipe de Moura
Deloitte Portugal
Av. Eng. Duarte Pacheco, 7
Lisbon, 1070-100
Portugal
Tel: (351) 210427529
Email: fmoura@deloitte.pt
Website: www.deloitte.com

Jaime Carvalho Esteves
PwC
Lisbon



Patrícia Matos
Deloitte Portugal
Av. Eng. Duarte Pacheco, 7
Lisbon, 1070-100
Portugal
Tel: (351) 210427534
Email: pamatos@deloitte.pt
Website: www.deloitte.com

Paulo Mendonça
EY
Lisbon

Susana Pinto
KPMG
Lisbon

RUSSIA



Dmitry Kulakov
Deloitte CIS
5 Lesnaya St., Bldg. B Business Center
White Square, Moscow, 125047
Russia
Tel: (74) 957870600
Email: dkulakov@deloitte.ru
Website: www.deloitte.com

Svetlana Stroykova
PwC
Moscow

Natalia Valkovskaya
KPMG
Moscow

Evgenia Veter
EY
Moscow

SLOVENIA

**Andreja Škofic Klanjšček**

Deloitte Slovenia
Dunajska cesta 165
Ljubljana, 1000
Slovenia
Tel: (386) 1 307 28 41
Email: askofic@deloittece.com
Website: www.deloitte.com

Dénes Szabó
EY
Ljubljana

SPAIN

**Ignacio Box**

Deloitte Legal
Torre Picasso - Plaza Pablo Ruiz Picasso 1
Madrid 28020
Spain
Tel: (34) 911578596
Email: jboxgarcia@deloitte.es
Website: www.deloitte.com

David Cañabate
MAZARS
Barcelona

**Juan I (Willy) De Molina**

Deloitte Legal
Av. Diagonal, 654, 3ª Planta, Edificio C
Barcelona 08034
Spain
Tel: (34) 932304804;
(34) 608624064 (mobile)
Email: jdemolina@deloitte.es
Website: www.deloitte.com

José Diaz-Faes
KPMG
Madrid

See bio

Vicente Durán
EY
Madrid

Javier González
PwC
Madrid

Eduardo Gracia
Ashurst
Madrid

Joan Hortalà
Cuatrecasas
Barcelona

**Ramón López de Haro**

Deloitte Legal
Torre Picasso - Plaza Pablo Ruiz Picasso 1
Madrid 28020
Spain
Tel: (34) 914432953
Email: rlopezdeharo@deloitte.es
Website: www.deloitte.com

Mario Ortega Calle
Garrigues
Madrid

Ramón Palacín
EY
Madrid

Raúl Salas
Roca Junyent
Madrid

**Josep Serrano Torres**

Deloitte Legal
Av. Diagonal, 654, 3ª Planta, Edificio C
Barcelona 08034
Spain
Tel: (34) 932304984
Email: jserranotorres@deloitte.es
Website: www.deloitte.com

Montserrat Trapé
KPMG
Barcelona

See bio

SWEDEN

Maria Andersson
KPMG
Stockholm

**Elvira Barriga Allvin**

Deloitte Sweden
Box 33
Göteborg, 401 20
Sweden
Tel: (46) 76 827 10 95
Email: eallvin@deloitte.se
Website: www.deloitte.com

Mikael Hall
EY
Stockholm

Annika Lindström
KPMG
Stockholm

See bio

Mika Myllynen
PwC
Stockholm

Pär Magnus Wiséen
PwC
Stockholm

SWITZERLAND

Stephen Alleway
Questro International
Zürich

Jonathan Bernsen
KPMG
Zürich

Hendrik Blankenstein
Tax Partner AG
Zürich

Urs Brügger
PwC
Zürich

Salim Damji

Deloitte Switzerland
General Guisan-Quai 38 8022
Zürich, 8022
Switzerland
Tel: (41) 58 279 6217
Email: sdamji@deloitte.ch
Website: www.deloitte.com

**Hans Rudolf Habermacher**

Deloitte Switzerland
General Guisan-Quai 38 8022
Zürich, 8022
Switzerland
Tel: (41) 58 279 6327
Email: hhabermacher@deloitte.ch
Website: www.deloitte.com

Benjamin Koch
PwC
Zürich

Armin Marti
PwC
Zürich

David McDonald
PwC
Switzerland

**Dr. Raoul Stocker**

Deloitte Switzerland
General Guisan-Quai 38 8022
Zürich, 8022
Switzerland
Tel: (41) 58 279 6271
Email: rstocker@deloitte.ch
Website: www.deloitte.com

Chris Whitehouse
Questro International
Zürich

TURKEY

Ozlem Guc Alioglu
PwC
Istanbul

**Guler Hulya Yilmaz**

Deloitte Turkey
Eski Büyükdere Caddesi Maslak No 1
Plaza Maslak
Istanbul, 34398, Turkey
Tel: (90) 212 366 60 72
Email: hyilmaz@deloitte.com
Website: www.deloitte.com

Serdar Sumay
EY
Istanbul

UKRAINE



Alexander Cherinko
Deloitte Ukraine
48-50a Zhylyanska St. Business Center
Prime
Kyiv, 01030
Ukraine
Tel: (38) 0444909000
Email: acherinko@deloitte.ua
Website: www.deloitte.com

Ivan Shynkarenko
WTS Tax Legal Consulting
Kyiv

UNITED KINGDOM

Simon Atherton
EY
London



Shaun Austin
Deloitte LLP, the UK Deloitte member firm
2 New Street Square
London, EC4A 3BZ
UK
Tel: (44) 121 695 5011
Email: saustin@deloitte.co.uk
Website: www.deloitte.com

Vicki Bales
DLA Piper
London

Claire Blackburn
PwC
London



Sophie Brown
Deloitte LLP, the UK Deloitte member firm
2 New Street Square
London, EC4A 3BZ
UK
Tel: (44) 20 7007 8115
Email: sophiebrown@deloitte.co.uk
Website: www.deloitte.com



Brendan Burgess
Deloitte LLP, the UK Deloitte member firm
Four Brindley Place
Birmingham, B1 2HZ
UK
Tel: (44) 161 455 6437
Email: bburgess@deloitte.co.uk
Website: www.deloitte.com

Andrew Casley
PwC
London

Steve Cawdron
EY
London

Murray Clayson
Freshfields Bruckhaus Deringer
London

Joel Cooper
DLA Piper
London

Andrew Cousins **See bio**
Duff & Phelps
London

Paul Daly
BDO
London

Annie Devoy
PwC
London

Nigel M Dolman
Baker McKenzie
London

Ian Dykes
PwC
Birmingham

Steve Edge
Slaughter and May
London

Richard Fletcher
Baker McKenzie
London

Randall Fox
DLA Piper
London



Rafal Golaj
Deloitte LLP, the UK Deloitte member firm
2 New Street Square
London, EC4A 3BZ
UK
Tel: (44) 20 7303 8283
Email: rgolaj@deloitte.co.uk
Website: www.deloitte.com

Deborah Green
KPMG
London

Henrik S Hansen
EY
London



Giles Hillman
Deloitte LLP, the UK Deloitte member firm
2 New Street Square
London, EC4A 3BZ
UK
Tel: (44) 20 7007 3750
Email: ghillman@deloitte.co.uk
Website: www.deloitte.com

Anton Hume
BDO
London

Jukka Karjalainen
Baker McKenzie
London

Ted Keen **See bio**
Duff & Phelps
London

Steve Labrum
Baker McKenzie
London

Ellis Lambert
EY
London



Alison Lobb
Deloitte LLP, the UK Deloitte member firm
2 New Street Square
London, EC4A 3BZ
UK
Tel: (44) 20 7007 0497
Email: alobb@deloitte.co.uk
Website: www.deloitte.com

Fabrizio Lolliri
Hogan Lovells
London



Greg Martin
Deloitte LLP, the UK Deloitte member firm
2 New Street Square
London, EC4A 3BZ
UK
Tel: (44) 20 7007 6715
Email: gjmartin@deloitte.co.uk
Website: www.deloitte.com

Andy Martyn
EY
London

Tom McFarlane
Hogan Lovells
London

Gary Mills
EY
London

Steve Morgan
PwC
Manchester

**Edward Morris**

Deloitte LLP, the UK Deloitte member firm
2 New Street Square
London, EC4A 3BZ
UK
Tel: (44) 20 7007 6568
Email: edmorris@deloitte.co.uk
Website: www.deloitte.com

Wendy Nicholls

Grant Thornton
London

Stephanie Pantelidaki

PwC
London

Graham Poole

Hogan Lovells
London

Aamer Rafiq

PwC
London

Ben Regan

EY
London

Jonathan S Schwarz

Temple Tax Chambers
London

Jesper Solgaard

EY
London

Ruth Steedman

FTI Consulting
London

Richard Syrratt

Alvarez & Marsal
London

Henry Syrett

EY
London

**Clive Tietjen**

Deloitte LLP, the UK Deloitte member firm
Abbots House Abbey Street
Reading, RG1 3BD
UK
Tel: (44) 118 322 2904
Email: ctietjen@deloitte.co.uk
Website: www.deloitte.com

Loic Webb-Martin

PwC
London



LATIN AMERICA AND THE CARIBBEAN

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BRAZIL**Francisco Lisboa Moreira**

**Bocater, Camargo, Costa e Silva,
Rodrigues Advogados**
R. Joaquim Floriano, 100 – 16º andar
São Paulo/SP, 04534-000
Brazil
Tel: (55 11) 2198 2800
Email: fmoreira@bocater.com.br
Website: www.bocater.com.br

Francisco Lisboa Moreira practices in the areas of tax, social security and wealth planning. Tax professional with over 18 years of experience, including eight of them working for KPMG and ten as tax partner of renowned Brazilian law firms. Francisco has a wide experience in the tax structuring of corporate transactions and reorganizations, tax planning and international taxation of individuals and corporations. Francisco is a Master in Tax Law candidate at the University of São Paulo (USP) and holds an LLM in International Tax from the New York University School of Law (NYU, 2014). He serves as a member of the Society of Trusts and Estates Practitioners (STEP, LATAM chapter), the Brazilian Institute of Tax Law (IBDT), the Brazilian Association of Financial Law (ABDF) and IFA. He is also a guest lecturer at the International Tax Law Specialization at the IBDT. He served as Brazilian branch reporter for the Regional Congress of the International Fiscal Association Latin America (IFA LATAM), which took place in Lima (Peru) in 2016, with the topic 01 – “Influencia del Plan BEPS en las reglas de Precios de Transferencia de América Latina” (the influence of the BEPS plan in the Transfer Pricing rules in Latin America). Author of several articles in specialized tax publications, as well as co-author of the book: “Aspectos Contábeis e Tributários do Setor Elétrico”, (Lumen Iuris publishing house), and one of the coordinators of the following book compilations: i) “Manual de Preços de Transferência: Brasil, OCDE e BEPS, Volumes 01 and 02” (Quartier Latin publishing house); ii) Temas de Tributação Internacional (Gamma publishing house); and iii) Estudos de Tributação Internacional: Volume 01, (Lumen Iuris publishing house). Francisco is fluent in English and Spanish.

BOCATER
Bocater, Camargo, Costa e Silva,
Rodrigues Advogados

COLOMBIA**Gustavo Sanchez-Gonzales**

Baker McKenzie
Avenue 82 No. 10-62 6th Floor
Bogotá
Colombia
Tel: (57) 1 634 1500 ex 2790
E: gustavo.sanchez-gonzalez@bakermckenzie.com
Website: www.bakermckenzie.com

Gustavo Sanchez is a member of Baker McKenzie’s Tax Practice Group in Bogota. He joined the Firm in 2004 and was responsible for the transfer pricing practice in Baker McKenzie’s Caracas office, collaborating on local and regional consulting projects and transfer pricing compliance from 2004 to 2006. He has been awarded the Tlacaclael National Award for Economics Consulting, the Inter-American Award for Research on Social Security, and the Consuelo Maeyer Award in Economics Research. Gustavo is currently responsible for the transfer pricing practice in Colombia and the Andean Region.

Practice Focus

Gustavo counsels companies from different industrial sectors in South and Central America on transfer pricing, and advises on local and regional projects. In particular, he advises on compliance with formal obligations, establishes transfer pricing policies to improve tax efficiency, facilitates advance price agreement negotiations with tax authorities, assists in technical and legal defense on transfer pricing disputes, and performs financial and economic valuation of shares, businesses and intangible assets.

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MEXICO

Economic substance and arm's length – Mexico

Oscar Campero (left) and Yoshio Uehara (right)
Chevez Ruiz Zamarripa¹
Mexico City

Mexican taxpayers are obliged to determine their taxable income and authorized deductions derived from related party transactions considering the prices that would have been used in comparable transactions with or between independent parties. This is, in Mexico the arm's length principle is recognized for tax purposes.

In the previous administration², the transfer pricing department within Mexico's Tax Administration ("SAT" for its acronym in Spanish) had an important consolidation going from a mere documentation compliance matter to an strategic risk assessment tool for Multinational Companies ("MNEs").

The latter may be observed not only with the inclusion of new transfer pricing related provisions and obligations such as the local file, master file and country by country report, among others, but with the requirements regarding the economic substance and materiality that have been observed within tax audit procedures in the last years.

In connection with intercompany transactions, taxpayers have to demonstrate not only the compliance with the arm's length principle and with formal requirements such as having the transfer pricing contemporaneous documentation and have submitted the diverse informative tax returns to which they are obliged, but to demonstrate the economic substance and materiality of the transactions carried out with its related parties, both domestic and foreign.

There are certain related party transactions that the tax authorities have been paying special attention to, requiring taxpayers to demonstrate that such transactions have economic substance. In general, these transactions include payment for services rendered abroad, royalty payments and interest payments. Moreover, there are transactions carried out with unrelated parties such as advertising and promotion which also require this kind of documentation.

Specifically regarding the payment for services rendered abroad, elements such as the following have to be taken into consideration to analyze the economic substance of the transaction: i) demonstrate the economic benefit of the transaction for the Mexican taxpayer (either by demonstrating an increase in revenue or by an increase in profitability), ii) demonstrate the capabilities of the service provider, iii) analyze and prove the non-duplicity with other services received by the Mexican taxpayer or with activities per-



formed by the Mexican company, and iii) demonstrate that the services were effectively rendered.

Recently the Mexican tax court has determined that in connection with services transactions, in general, the economic substance is proven when the economic position of the taxpayer is significantly altered by means of entering into the analyzed transaction. This is, the presence of economic substance in a transaction should be understood as the reasonable potential to obtain profits or the possibility of sustaining a loss in circumstances beyond the control of the taxpayer.

For purposes of demonstrating the economic substance of transactions, the Mexican tax court has suggested a list of evidentiary documentation elements. Such elements include i) analysis of the need to receive the services, ii) documentation of the negotiation process previous to contracting the services, iii) documentation to prove the follow up on the agreements reached by the parties, iv) documentation that demonstrates the realization of the services and progress reports, v) deliverables, vi) advisors' opinions related with the analysis of the need to contract the services, vii) correspondence between provider and receiver and with advisors related with the services transaction, viii) demonstrate financial and accounting matters of the transaction such as profitability of the expense or investment, the rate of return, among others.

On the other hand, when dealing with advertising and promotion expenses, in general, the identification of value creation and

TRANSACTIONS CANNOT
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TAX DEDUCTIBILITY
PURPOSES

MEXICO

DEMPE activities (development, enhancement, maintenance, protection and exploitation of intangibles) of the parties involved in the transaction should be taken into consideration for purposes of determining the economic substance of the transaction.

It should be analyzed whether if such advertising and promotion expenses are related with the intangibles owned by a foreign based related party, if the advertising and promotion expenses are related with the sale activity performed by the Mexican entity, among diverse other elements to identify value creation and DEMPE activities for each party involved in the transaction and therefore, determine the economic substance of the transaction.

When dealing with advertising and promotion expenses transactions in conjunction with royalty payments, the DEMPE activities analysis becomes even more relevant and additional elements such as to prove which intangibles are related with the royalty payments, prove that the intangibles for which a royalty payment is made provide an economic benefit for the Mexican taxpayer, among diverse other elements, should be taken into consideration.

This analysis is crucial for income tax deductibility purposes since the lack of it may jeopardize the deductibility of royalties and/or advertising and promotion expenses, even though the latter might be carried out with non-related parties.

Another intercompany transaction that has been subject to economic substance analysis tests is the interest payments. The analysis or

information usually requested in related with analyzing the need of the loan, analysis of the proceeds of the loan that gave rise to the interest payments, the cash flows of the incoming loan and interest expense, analysis, description and supporting documentation related with the use of the loan, among other elements.

As it may be observed and derived from our experience dealing with transfer pricing audit procedures, demonstrating the economic substance of related party transactions is a crucial matter when dealing with such controversies.

This is, nowadays related party transactions cannot be analyzed exclusively from an arm's length nature perspective, but a thorough economic substance analysis should be performed for income tax deductibility purposes.

This economic substance analysis for related party transactions certainly will become even more important in the following years, not only due to increasingly complex transfer pricing systems worldwide, but because of the digital transformation that the global economy is going through.

The specific characteristics of the digital economy businesses, has resulted in changes in tax laws worldwide in order to address digital economy matters which will certainly impact the way the MNEs structure their global operations. This, in turn will have an impact on transfer pricing matters giving more importance to economic substance tests within different jurisdictions.

¹ The authors wish to thank Ignacio Mosquera, Associate at Chevez Ruiz Zamarripa for his collaboration in this article.

² In Mexico, the government executive branch has a 6-year term. On December 1st, 2018, the president office started its term.

MEXICO

**Oscar Campero****Chevez Ruiz Zamarripa**

Vasco de Quiroga 2121, 4° Piso

Col. Peña Blanca Santa Fe

C.P. 01210, Ciudad de México

Mexico

Tel: (52-55) 52-57-70-57

Email: ocampero@chevez.com.mx

Website: www.chevez.com

Oscar Campero is a transfer pricing consultant in the Mexico City office of Chevez, Ruiz, Zamarripa y Cia. He joined the Firm in 1998. Oscar Campero is part of the Transfer Pricing practice at Chevez, Ruiz, Zamarripa y Cia. in the advisory on the identification of the transfer prices applicable for intercompany transactions and international tax strategies. He focuses on advising clients in the context of global tax risks arising from dealings between related parties as well as in the negotiation of unilateral or multilateral authorizations when the transfer prices involve the participation of fiscal authorities of other countries. The scope of the services he focuses on includes the valuation of companies, stocks and intangible assets and dumping cases.

Oscar is member of the Transfer Pricing Commission of the Mexican Institute of Public Accountants (IMCP) as well as the Transfer Pricing Commission of the Economists National Federation. He has collaborated in several articles on transfer pricing matters which have been published by different recognized institutions. Oscar has also taught transfer pricing courses and seminars at his Alma Mater the Instituto Tecnológico Autónomo de México, as well as at the Universidad Iberoamericana, the Universidad La Salle, UNAM, among other Mexican institutions.

Oscar is a graduate of the Instituto Tecnológico Autónomo de México where he obtained his degree in Economics. He obtained an Executive Master's degree in Business and Administration in the University of Texas (UT) at Austin, and of the Instituto Tecnológico de Estudios Superiores de Monterrey. He has taken several taxation, transfer pricing and valuation courses, particularly in the Instituto Tecnológico Autónomo de México, the Council for International Tax Education (CITE) and the Financial Analyst Mexican Society (SOMAF).

He began his professional practice back in 1995 in Acer Computer Mexico's special projects department. He joined the Firm on 1998 where he was promoted to associate on 2002 and finally promoted to partner on 2009.

**CHEVEZ
RUIZ
ZAMARRIPA**

MEXICO

**Moisés Curiel García****Baker McKenzie**

Edificio Virreyes

Pedregal 24, 12th floor

Lomas Virreyes / Col. Molino del Rey

Mexico City, 11040

Mexico

Tel: (52) 55 5279 2992

Email: moises.curriel@bakermckenzie.com

Website: www.bakermckenzie.com

Moisés Curiel heads Baker McKenzie's Transfer Pricing and Valuation practice in Mexico. He has more than 26 years of experience in transfer pricing and international taxes. Moisés served as the transfer pricing audits and resolutions administrator of Mexico's Ministry of Finance and Public Credit for almost eight years. He helped to prepare and implement various transfer pricing rules in Mexico, including the Income Tax Law, the Temporary Tax Ruling and the Federal Tax Code. He also led the country's Advance Pricing Agreements Program and conducted the first transfer pricing audits in Mexico and in Latin America. He has also proposed amendments to legislation on various matters for Latin American countries, and represented Mexico before the OECD.

Since 2003, he has been recognized for his practice by International Tax Review. He is tax counsel for the maquiladora industry and the Employers' Confederation of the Mexican Republic. Moisés is also a professor and coordinator in the Transfer Pricing specialization in conjunction with the Universidad Anáhuac and European School of Business for five generations. Third-Party Expert on accounting and transfer pricing matters, approved by the Mexican Federal Court for Administrative Justice.

Practice focus

Moisés has gained extensive experience in transfer pricing and valuation matters from his years in governmental and private practice. Since joining Baker McKenzie in 2004, he has contributed to the development of the Firm's transfer pricing practice in Latin America, helping clients to accurately interpret and determine their tax obligations and their effects in other jurisdictions. He currently assists different clients in Mexico and throughout the Latin American region to keep them abreast of changes to the Base Erosion and Profit Shifting action plan (BEPS/OCDE/G20).

He has currently helped in negotiations with various clients in complex audits with the tax authorities. Also participates in anticipated bilateral price agreements and mutual agreement procedures.

**Baker
McKenzie.**

MEXICO**Carlos A Linares-García****Baker McKenzie**

Oficinas en el Parque
Torre Baker McKenzie, 10th floor
Blvd. Antonio L. Rodríguez 1884 Pte
Monterrey, N.L. 64650
Mexico
Tel: (52) 81 8399 1371
E: carlos.linares-garcia@bakermckenzie.com
Website: www.bakermckenzie.com

Dr. Carlos Linares Garcia is a tax partner in Mexico and the head of Baker McKenzie's Latin America Transfer Pricing practice. He is knowledgeable in the fields of transfer pricing, financial valuation and international taxation. His professional experience includes over 20 years in consulting and three years in the public sector. From 1993 to 1995, Dr. Linares was a deputy director with the International Tax Department of the Mexican Ministry of Finance in Mexico City. From 1996 to 1999, he was an associate economist at Houston-based Baker & Associates Energy Consultants and from 2000 and 2004, he was a senior manager and a partner in the energy economics and transfer pricing group at a big-four firm in Houston and Monterrey. For his research in economics and public finance, Dr. Linares received the Banamex Economics Award in 2000, as well as the Inter-American Social Security Award in 2002. He has lectured at various institutions such as the International Bureau of Fiscal Documentation, Rice University, Instituto Colombiano de Derecho Tributario, ITAM, Universidad Autónoma de Nuevo León and the Tecnológico de Monterrey.

Dr. Linares specializes in transfer pricing design and implementation with a focus on the manufacturing, oil & gas, and high tech industries. He has over 20 years of experience in coordinating tax and transfer pricing compliance, planning, and dispute resolution projects for multinational companies doing business across Latin America. He also coordinate projects in areas such as financial valuation, energy economics, antitrust and unfair foreign trade practices. He has assisted multinational companies in complex dispute resolution cases involving alternative mechanisms and Advance Pricing Agreements ("APA"), including the first APA ever signed by the Colombian government and numerous APAs for inbound manufacturing companies in Mexico.

Dr. Linares received his degree in Economics summa cum laude from Universidad Autonoma de Nuevo Leon in 1993 and his Masters and Ph.D. degrees in Economics from Rice University in 2000, specializing in public finance and tax policy. Also, he obtained a Diploma in International Taxation from Harvard University and a Diploma in Energy Law from Universidad de Monterrey. He is an active member the International Fiscal Association (Transfer Pricing Committee), the Instituto Mexicano de Ejecutivos de Finanzas, the Asociacion Nacional de Especialistas Fiscales, and Vice-President of the Colegio de Economistas de Nuevo Leon.

**Baker
McKenzie.**

MEXICO**Christian R Natera****NATERA**

Montes Pirineos 410
Lomas de Chapultepec
Mexico City 11000
Mexico
Tel: (52) 55 5249 44 00
Email: cnatera@natera.com.mx
Website: www.natera.com.mx

Christian R Natera is founding partner of NATERA, and currently heads the firm. Graduated *cum laude* in both, public accounting and law from the Mexican Autonomous Technological Institute (ITAM), Mr Natera is a complete tax attorney. Further, he received his degree in customs legislation from the Mexican International Trade Bank, and his degree in international trade from the Dutch School of Mexico.

Mr Natera has represented domestic and foreign entities in tax, customs and transfer pricing matters. Clients and peers praise his ability in finding business oriented solutions to complex tax problems and structures. He has sound experience in representing clients before tax and customs authorities, and in controversy procedures. His clientele includes different industries such as the automotive, chemical, pharmaceutical, retail, oil exploitation and mining, among others.

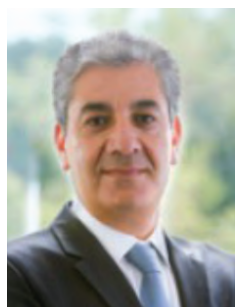
During his professional carrier, Mr Natera has developed a recognized prestige participating in many forums in the accounting, taxation and international trade & customs arenas. His professional memberships, among others, are: Member of the Mexican Institute of Public Accountants; Former president of International Trade Committee of the Association of Public Accountants of Mexico; Member of the Mexican Branch of the International Fiscal Association ("IFA"); Member of the Scientific Committee of the IFA Mexican Branch; Member of the National Association of Tax Specialists; Member of the International Trade Committee of the Public Finance and Tax Law Commission of the Mexican Bar; President of the Taxation Committee of the Mexican Chapter of the International Chamber of Commerce ("ICC"); Member of the Board of Directors of the Mexican Chapter of the ICC; Coordinator of the review of the Incoterms (2010 version) of the ICC; Member of the Executive Committee and Board of Directors of the IFA (Mexican Group); Member of the Tax Matters Committee of the American Chamber of Commerce.

His promotional activities involve his participation as author and co-author in several books; edited and published among others by: (i) The Mexican Institute of Public Accountants; (ii) The Mexican Institute of Financial Specialists; (iii) International Bureau of Fiscal Documentation and; (iv) Euromoney's Global and Corporate Tax Handbooks. Also, Mr Natera constantly presents papers and articles in taxation, financial and international trade topics, published by the following specialized editing houses: (i) Tax Editores Unidos, (ii) Mexican Association of Public Accountants, (iii) Mexican Institute of Public Accountants, (iv) ITAM, and (v) DoFiscal Editores, among others.

In addition, Mr Natera has lectured as professor in graduate and post graduate programs of the ITAM and other well recognized universities and institutions.

 **NATERA**

MEXICO

**Ricardo Rendón****Chevez Ruiz Zamarripa**

Vasco de Quiroga 2121, 4° Piso
Col. Peña Blanca Santa Fe
C.P. 01210, Ciudad de México
Mexico
Tel: (55) 5257-7019
Email: rendon@chevez.com.mx
Website: www.chevez.com

He is a Partner at Chevez, Ruiz, Zamarripa y Cía., S.C. in Mexico City. His main areas of specialization are merger and acquisitions, and cross-border transactions including transfer pricing. He has also been heavily involved in unilateral and bilateral advanced pricing agreements (APA's) and alternative dispute resolutions. He is a former professor of the Iberoamericana University. He currently teaches on taxation at the master program in law of the Panamericana University. He is a lawyer from the Universidad del Valle de Mexico. He is also a CPA from the Universidad Autónoma de Guadalajara and took a postgraduate program in tax law at Panamericana University.

Ricardo is a frequent speaker at international tax forums mainly at the International Fiscal Association (IFA) and former president of the IFA Mexico branch as well as the Latin America Regional Committee of said Institution. He has published several articles on taxation in international publications.

**CHEVEZ
RUIZ
ZAMARRIPA**

MEXICO

**Ricardo Suarez****Grant Thornton**

Periférico Sur 4348
Col. Jardines del Pedregal
04500 Ciudad de México
Mexico
Tel: (52) 55 5424 6500
Email: ricardo.suarez@mx.gt.com
Website: www.grantthornton.mx

Education

- Certified Public Accountant graduated from Instituto Tecnológico Autónomo de México (ITAM).
- Degree in International Taxation under the ITAM-Harvard Programme.
- Degree in Business Management from the Instituto Panamericano de Alta Dirección de Empresas (IPADE).
- Graduate, Business Perspectives Programme, IMD (Lausanne, Switzerland).

Professional Activities and Publications

- Founder and first Chairman of the Transfer Pricing Commission at the Mexican Institute of Public Accountants (IMCP).
- Vice-president of the International Trade Commission at the IMCP.
- Former Chairman of the International Tax Commission from the Mexico City's Public Accountants Bar.
- Author of several articles published by the most prestigious tax and business reviews in Mexico and abroad (El Financiero, Journal of International Taxation, Business México-American Chamber México, Ejecutivos de Finanzas, Dinero Hoy, International Tax Review).
- Contributor/Author of a Chapter for the "Transfer Pricing textbook" published by the IMCP.
- Contributor/Author of a chapter for the "Introduction to International Taxation", published by the IMCP.

Teaching Activities

- Teacher on subjects as "Tax", "International Tax", and "Transfer Pricing" at several Universities, such as the Universidad Iberoamericana, ITAM, Instituto Tecnológico y de Estudios Superiores de Monterrey, as well as at the National University of Mexico (UNAM).
- Instructor at the Mexican Tax Administration System (SAT).
- Frequent speaker on International Tax matters, and on Transfer Pricing seminars in Mexico, Central America, South America, the USA, Canada, Spain, and in the UK.

Awards

- Recognised for several years as one of the leading Transfer Pricing Practitioners in Mexico by the "International Tax Review", and was awarded in the 2009 edition of the "Expert Guides, The Best of the Best" as one of the best transfer pricing advisors in the World.
- In 2017, Grant Thornton Mexico, under Ricardo's leadership, was recognised by "Corporate International" as the Best Transfer Pricing Advisory Firm in Mexico.
- Also, in 2017 the International Tax Review, nominated GT's TP practice as one of the Best Transfer Pricing Firms of the year in Mexico. GT was awarded as the best TP Firm in Latin America.



MEXICO**Yoshio Uehara****Chevez Ruiz Zamarripa**

Vasco de Quiroga 2121, 4° Piso
Col. Peña Blanca Santa Fe
C.P. 01210, Ciudad de México
Mexico
Tel: (55) 5261-5678
Email: yuehara@chevez.com.mx
Website: www.chevez.com

Partner at Chevez, Ruiz, Zamarripa y Cia., S.C. Certified tax specialist focused on high-level tax and transfer pricing advisory and consulting. Has been engaged as advisor of multinational groups in several tax and transfer pricing controversies which involve deductibility issues related with unique and valuable contributions such as advertising and promotion expenses, intercompany transactions and arm's length determination, supply chain restructuring, among others. He has also been engaged as advisor in alternative dispute resolutions such as mutual agreement procedures between the Mexican tax authorities and foreign competent authority, as well as within the Acuerdo Conclusivo procedures.

For more than 19 years of experience, he has been engaged in diverse kind of projects with cross border transactions or involving mergers and acquisitions which require advisory and/or compliance on transfer pricing for tax, banking or pension fund purposes, financial valuations of equity and intangibles, as well as economist expert in anti-dumping controversies.

He also advises multinational groups in connection with contemporaneous transfer pricing documentation, including master file and country by country report as established by the OECD and already required in Mexican tax legislation.

He is an active member of the International Fiscal Association (IFA) and former chair of the transfer pricing committee of IFA Mexican Branch. He also participates in the transfer pricing committee of the Mexican College of Public Accountants (Colegio de Contadores Publicos de Mexico).

He has been a speaker in diverse tax and transfer pricing forums and seminars, including the annual seminar at IFA Mexican Branch, annual transfer pricing conference at University of San Diego, Mexican College of Public Accountants, among others. He was panellist regarding Actions 10 and 13 of the BEPS initiative at the IFA Latin-America Congress held in Lima, Peru. For 2019, he is the chair panellist of the Seminar BEPS actions 8,9 and 10 to be held at the IFA Latin-America Congress to be held in Panamá City, Panamá.

Master degree in Finance from Instituto Tecnológico y de Estudios Superiores de Monterrey (ITESM), Campus Santa Fe, and Bachelor degree in Economics from Instituto Tecnológico Autónomo de México (ITAM). He has collaborated in several publications such as Guide to International Transfer Pricing. Law, tax planning and compliance strategies published by Wolters Kluwer; Coordinator and co-author of the book "Temas selectos de precios de transferencia" published by Editorial Themis; Transfer Pricing and Customs Valuation by the International Bureau of Fiscal Documentation (IBFD).

**CHEVEZ
RUIZ
ZAMARRIPA**

VENEZUELA**Nelson Landaeta Contreras****NLC Asesoría**

Centro Lido, Tower D, 4th Floor, Suite 41-D
Av. Francisco de Miranda, El Rosal
Caracas 1060
Venezuela
Tel: (58) 212 905 82 15
Email: nelson.landaeta@nlc-asesoria.com
Website: www.nlc-asesoria.com

Nelson Landaeta Contreras is the founder partner of "NLC Asesoría"; an independent firm dedicated to the transfer pricing advisory in Venezuela. The Firm was founded on May 27th of 2009.

Previously he rendered his professional services during more than 12 years in the areas of transfer pricing and corporate tax in Pricewaterhousecoopers (1996-2002) and Ernst & Young (2002-2009) domiciled in Caracas, Venezuela.

Mr Landaeta throughout his professional career in transfer pricing, has assisted a wide range of local and regional documentations in diverse industry sectors including massive consumption, pharmaceutical, automotive, energy, petrochemical, mining, among others. He has achieved wide knowledge on the transfer pricing regulations included in the Venezuelan Income Tax Law (VITL) and the Organization for Economic Co-operation and Development (OECD) guidelines.

He has assisted as a planning advisor to multinational enterprises on its transactions regarding the transference of tangible goods, intangibles and services transactions. Additionally Mr Landaeta has being maintaining a proactive participation in transfer pricing audit process during the past three years in Venezuela. He has established direct contact with the transfer pricing management of the tax authority (SENIAT) during these processes, exchanging important criterias and positions with authorities' agents. He has successfully assisted some clients in the identification and implementing phase of the defense strategy, negotiations, preparation and documents review process.

Internationally during his duty in one of the big four firms, Mr Landaeta was engaged in the development and training process of the Colombian transfer pricing practice during 2004. At the same time, during the 2004-2005 period, he was directly engaged in conducting transfer pricing projects in Peru and Colombia. He has participated in a variety of transfer pricing training sessions performed in the United States, México, Argentina and Venezuela.

In his role as an independent consultant, Nelson Landaeta has been chosen among the leaders in transfer pricing advisors of Venezuela by the survey: "Euromoney's Expert Guide to the World's Leading Transfer Pricing Advisers" for 2012 and 2013.

In his role as an independent consultant, Nelson Landaeta has been chosen among the leaders in transfer pricing advisors of Venezuela by the survey: "Euromoney's Expert Guide to the World's Leading Transfer Pricing Advisers". During 2013, the Acquisition International Magazine recognized NLC Asesoría as "Venezuelan Private Client Services Firm of the Year" and "Venezuelan Transfer Pricing Firm of the Year". During 2015 the firm was recognized as the "Best of Best of Transfer Pricing" in Venezuela by "The Guide to the World's Leading Transfer Pricing Advisers" an annual publication of the Legal Media Group.

 **NLC ASESORÍA**
TRANSFER PRICING

VENEZUELA

Use of comparable with losses and its rejection by the Tax Administration in Venezuela: a controversy case

Nelson Landaeta Contreras
NLC Asesoría
Caracas

As it is known, and as set out in the OECD guidelines, when applying the Transactional Net Margin method, specifically in the process of searching for functionally comparable companies that may include comparable companies with losses for more than two years, it should be taken into account that the causes of such losses must be attributable to the normal operations or rotation of the sector or industry in which such comparables operate. In this opportunity I bring out the controversy case that took place a few years ago in Venezuela.

The Controversy Case

The tax authority in the audit notification made with the No. 193-10 (SNAT/INTI/GRTI/CE/RC/DF/2012/ISLR/00193-10) of October, 31th of 2012 to COCA-COLA FEMSA DE VENEZUELA, S.A., where is notified of the formulation of income tax surcharges for the 2006-2007 fiscal year, as a consequence adjustments made on transfer prices. The audit resulted in an inappropriate adjustment of the costs declared by COCA-COLA FEMSA DE VENEZUELA, S.A. for transactions referred to purchases of raw materials and fixed assets to related parties. In this regard, the difference in the tax amount that the tax authority argued was arising in terms of transfer prices, specifically, adjustments derived from the implementation of the Net Transactional Margin Method, by arguing adjustments (i) to the Arm's Length range calculated based on 1: exclusion from the set of comparable, those companies with losses for a period of more than 2 years.

As a result of the previous objections, according to the taxpayer, the tax action on the one hand (i) artificially built a new Arm's Length range and on the other (ii) artificially recalculated the the profit level indicator for COCA-COLA FEMSA DE VENEZUELA, S.A. (in this case the Operative Income on Total Costs indicator was applied). This resulted in an adjustment that decreased the costs that was declared originally by COCA-COLA FEMSA DE VENEZUELA, S.A., which in turn led the Audit to determine a tax difference in favor of the Venezuelan Tax Administration (SENIAT).

The Challenge to the Tax Authority

On May 6, 2015, the legal department officials of COCA-COLA FEMSA DE VENEZUELA, S.A. filed a Tax Appeal jointly against administrative acts imposed by the tax authority. A technical expertise was requested by the team



of Lawyers acting in defense of the taxpayer. In the technical expertise process, NLC Asesoría participated actively on behalf of COCA-COLA FEMSA DE VENEZUELA, S.A., and therefore, it was determined that the tax authority's position was wrong, in accordance with the OECD Guidelines. The technical position of NLC Asesoría argued that according to the established in the guidelines of the OECD Guidelines 1995, COCA-COLA FEMSA DE VENEZUELA, S.A. in the application of the Net Transactional Margin Method, could select and make use of comparable companies with legitimate and operational losses in order to be included in the calculation of the Arm's Length

range, as long as such losses (i) are subject to normal business and market circumstances of such comparable companies and (ii) that the situation of loss is maintained for a reasonable period of time."

This statement is based on the 1995 OECD Guidelines, in its paragraph 1.54 which states:

"A factor to consider in analyzing losses is that business strategies may differ from MNE group to MNE group due to a variety of historic, economic, and cultural reasons. Recurring losses for a reasonable period may be justified in some cases by a business strategy to set especially low prices to achieve market penetration. For example, a producer

THE TAX AUTHORITY IS
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VENEZUELA

may lower the prices of its goods, even to the extent of temporarily incurring losses, in order to enter new markets, to increase its share of an existing market, to introduce new products or services, or to discourage potential competitors. However, especially low prices should be expected for a limited period only, with the specific object of improving profits in the longer term. If the pricing strategy continues beyond a reasonable period, a transfer pricing adjustment may be appropriate, particularly where comparable data over several years show that the losses have been incurred for a period longer than that affecting comparable independent enterprises. Further, tax administrations should not accept especially low prices (e.g. pricing at marginal cost in a situation of underemployed production capacities) as arm's length prices unless independent enterprises could be expected to have determined prices in a comparable manner".

As can be seen in the quotation above, the guides enable the use of companies with losses when they arise as a result of normal business and market circumstances for a reasonable period of time. In any

event, it is necessary to analyze in detail the causes of such losses, without being a single cause of refusal to be considered as a comparable.

At the same time, according to the paragraph cited above, it infers that companies with losses should be excluded from the set of comparables selected companies only where losses do not arise from normal business conditions or where they reflect a non-risk level of risk comparable to that assumed by the tested party.

Case outcome

The decision of the case before the Seventh Court of Tax Litigation, after analyzing all the technical arguments evacuated in the process as the result of the technical expertise, ruled in favor of COCA-COLA FEMSA DE VENEZUELA, S.A. for errors made by the tax audit. This sets a legal precedent for the use of comparable companies that obtain legitimate and operational losses as long as the parameters and conditions set out by the OECD Guidelines are met.

ARGENTINA



Silvana Blanco
Deloitte Argentina
Florida 234. Floor 5th
Buenos Aires, C1005AAF
Argentina
Tel: (54) 11 43202700
Email: siblanco@deloitte.com
Website: www.deloitte.com

Marcelo A Castillo
KPMG
Buenos Aires

Sandra L Diaz
BaseFirma
Buenos Aires



Horacio Dinice
Deloitte Argentina
Florida 234. Floor 5th
Buenos Aires, C1005AAF
Argentina
Tel: (54) 11 43202700
Email: hdinice@deloitte.com
Website: www.deloitte.com

Juan Carlos Ferreira
PwC
Buenos Aires

Milton González Malla
Pistrelli Henry Martin y Asociados
Buenos Aires

Fernanda Laiún
Laiún Fernández Sabella & Smudt
Buenos Aires

Cristian E Rosso Alba
Rosso Alba Francia & Asociados
Buenos Aires

Daniel Rybnik
EnterPricing
Buenos Aires

Gustavo Scragliari
Pistrelli Henry Martin y Asociados
Buenos Aires

José María Segura
PwC
Buenos Aires

Manuel Val Lema
Pistrelli Henry Martin y Asociados
Buenos Aires

BRAZIL



Carlos Eduardo Ayub
Deloitte Brazil
Av. Dr. Chucuri Zaidan, 1.240
Sao Paulo, SP 04711-130
Brazil
Tel: (55) 11 5186 1227
Email: carlosayub@deloitte.com
Website: www.deloitte.com.br

Luiz Felipe Centeno Ferraz
Mattos Filho Veiga Filho Marrey Jr e
Quiroga
São Paulo

Clarissa Giannetti Machado
Trench Rossi e Watanabe
São Paulo

Francisco Lisboa Moreira See bio
Bocater Camargo Costa e Silva
Rodrigues Advogados
São Paulo



Marcelo Natale
Deloitte Brazil
Av. Dr. Chucuri Zaidan, 1.240
Sao Paulo, SP 04711-130
Brazil
Tel: (55) 11 5186 1003
Email: mnatale@deloitte.com
Website: www.deloitte.com.br



Fernando Pereira de Matos
Deloitte Brazil
Av. Dr. Chucuri Zaidan, 1.240
Sao Paulo, SP 04711-130
Brazil
Tel: (55) 11 5186 1179
Email: fmatos@deloitte.com
Website: www.deloitte.com.br

Luciana Rosanova Galhardo
Pinheiro Neto Advogados
São Paulo

Davi Santana
BaseFirma
São Paulo

Alexandre Siciliano Borges
Lobo & de Rizzo Advogados
São Paulo

CHILE

Gabriel Bernal
PwC
Santiago

Juan Pablo Guerrero Daw
KPMG
Santiago



Alejandro Paredes Maldonado
Deloitte Chile
Rosario Norte 407 Las Condes
Santiago, Santiago
Chile
Tel: (56) 227298216
Email: aparedes@deloitte.com
Website: www.deloitte.com

Roberto Carlos Rivas
PwC
Santiago

Claudio Salcedo
Salcedo & Cía
Santiago

COLOMBIA

José Guarán
EY
Bogotá

Carlos Mario Lafaurie Escorco
PwC
Bogotá

Andrés Parra
EY
Bogotá

Rafael Parra
PwC
Bogotá

Gustavo Sanchez-Gonzalez See bio
Baker McKenzie
Bogotá



Bruno Urrieta Farías
Deloitte Colombia
Cra. 7 #74-09
Bogota D.C.
Colombia
Tel: (57) 1 4262303
Email: burrieta@deloitte.com
Website: www.deloitte.com

COSTA RICA

Rafael Luna
Consortium Legal
San José

ECUADOR

Jorge Ayala Romero
TPA Global
Guayaquil

Alexis Carrera
EY
Quito/Guayaquil

GUATEMALA



Byron Martínez

Deloitte Guatemala
Euro Plaza World Business Center 5a.
Av. 5-55, Zona 14 Torre 4, Nivel 15,
Oficina 1503
Guatemala 01014
Tel: (502) 2384 6500
Email: bymartinez@deloitte.com
Website: www.deloitte.com/gt

MEXICO

Mauricio Ambrosi Herrera

Turanzas Bravo & Ambrosi
Mexico City

Juan Carlos Becerril

Élan Zaak
Mexico City

Adolfo Enrique Calatayud Vázquez

PwC
Mexico City

Oscar Campero

See bio

Chevez Ruiz Zamarripa
Mexico City



José Eduardo Campos Martínez

Deloitte Mexico
Av Paseo de la Reforma 505 P28 Col.
Cuauhtémoc,
Ciudad de México 06500, Mexico
Tel: (52) 55 50806628
Email: jcamposmartinez@deloittemx.com
Website: www.deloitte.com



David Cárdenas

Deloitte Mexico
Av Paseo de la Reforma 505 P28 Col.
Cuauhtémoc,
Ciudad de México 06500, Mexico
Tel: (52) 55 50806453
Email: dacardenas@deloittemx.com
Website: www.deloitte.com

Moisés Curiel García

See bio

Baker McKenzie
Mexico City

Iván Díaz-Barreiro

PwC
Mexico City

Mauricio Hurtado de Mendoza

PwC
Mexico City



Hernán Katz

Deloitte Mexico
Av Paseo de la Reforma 505 P28 Col.
Cuauhtémoc,
Ciudad de México 06500, Mexico
Tel: (52) 55 50806034
Email: herkatz@deloittemx.com
Website: www.deloitte.com

Ricardo León Santacruz

Sánchez DeVanny
Monterrey

Carlos A Linares-García

See bio

Baker McKenzie
Monterrey

Juan Gabriel Macías Villarreal

PwC
Monterrey

Eduardo Méndez-Ojeda

Baker McKenzie
Monterrey



Jorge Mesta Espinosa

Deloitte Mexico
Av Paseo de la Reforma 505 P28 Col.
Cuauhtémoc,
Ciudad de México 06500, Mexico
Tel: (52) 55 50807059
Email: jmesta@deloittemx.com
Website: www.deloitte.com

Marta Milewska

PwC
Mexico City



Miguel Morales

Deloitte Mexico
Av Paseo de la Reforma 505 P28 Col.
Cuauhtémoc,
Ciudad de México 06500, Mexico
Tel: (52) 55 50806410
Email: mimorales@deloittemx.com
Website: www.deloitte.com

Nora Morales

EY
Mexico City

Christian R Natera

See bio

NATERA
Mexico City

Luise E Natera

NATERA
Mexico City

Sergio Luis Pérez Cruz

PwC
Nuevo Leon

Maria Teresa Quiñones

KPMG
Mexico City

Antonio Ramirez

KPMG
Mexico City

Ricardo Rendón

See bio

Chevez Ruiz Zamarripa
Mexico City

Raúl Angel Sicilia

PwC
Guadalajara



Simón Somohano

Deloitte Mexico
Misión De Sn Javier 10643 P.8 Col.
Zona Urbana Río Tijuana
Baja California N 22010, Mexico
Tel: (52) 664 6227872
Email: ssomohano@deloittemx.com
Website: www.deloitte.com

Ricardo Suarez

See bio

Grant Thornton
Mexico City

Yoshio Uehara

See bio

Chevez Ruiz Zamarripa
Mexico City



Arturo Vela

Deloitte Mexico
Av Paseo de la Reforma 505 P28 Col.
Cuauhtémoc,
Ciudad de México 06500, Mexico
Tel: (52) 55 50806456
Email: avela@deloittemx.com
Website: www.deloitte.com

Gabriela Villavicencio

KPMG
Monterrey

PERU



Gloria Guevara

Deloitte Peru
Las Begonias 441 Piso 6 San Isidro,
Lima 27
Peru
Tel: (51) 12118585
Email: glguevara@deloitte.com
Website: www.deloitte.com

URUGUAY



Gonzalo Lucas Abad

Deloitte Uruguay
Juncal 1385, 11th floor
Montevideo 11000
Uruguay
Tel: (598) 2 9160756
Email: golucas@deloitte.com
Website: www.deloitte.com

VENEZUELA

Carlos M D'Arrigo

Kreston
Caracas

Nelson Landaeta Contreras

[See bio](#)

NLC Asesoría
Caracas



Iliana Salcedo

Deloitte Venezuela

Torre Corp Banca piso 21 Av. Blandin,
La Castellana, Caracas
Caracas, 1060

Venezuela

Tel: (58) 212 2068778

Email: isalcedo@deloitte.com

Website: www.deloitte.com



MIDDLE EAST AND AFRICA



ISRAEL



Guy Attias
Deloitte Israel
1 Azrieli Center, P.O.B 16593
Tel-Aviv, 61164
Israel
Tel: (972) 3 6086129
Email: guattias@deloitte.co.il
Website: www.deloitte.com

Yariv Ben-Dov
Herzog Fox & Neeman
Tel Aviv

Lior Harary Nitzan
EY
Tel Aviv

Jonathan Lubick
Jonathan Lubick Consulting
Raanaana

KENYA

Isaac Ireri
Transfer Pricing Partners (Altus Alliance)
Nairobi

NIGERIA



Taiwo Okunade
Deloitte Nigeria
Civic Towers Plot GA 1, Ozumba
Mbadiwe Avenue, Victoria Island
Lagos, Nigeria
Tel: (234) 19042134, 08177598421
Email: tokunade@deloitte.com.ng
Website: www.deloitte.com

SOUTH AFRICA

Jens Brodbeck
ENSafrica
Cape Town

Michiel Els
EY
Johannesburg

Michael Honiball
Werksmans
Johannesburg



Billy Joubert
Deloitte South Africa
The Woodlands 20 Woodlands Drive
Woodmead, Johannesburg, ZA 2052
South Africa
Tel: (27) 118065352
Email: bjoubert@deloitte.co.za
Website: www.deloitte.com

UNITED ARAB EMIRATES



Shiv Mahalingham
Deloitte UAE
DIFC, Currency House Building 1, Level
3 DIFC, Dubai 112865
United Arab Emirates
Tel: (971) 52 260 5120
Email: smahalingham@deloitte.com
Website: www.deloitte.com

Matthew Moriarty
The Cragus Group
Dubai

Guy Taylor
EY
Dubai



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NORTH AMERICA

Q&A with John Wells

Partner
Deloitte

What was the most significant development in your region/jurisdiction's transfer pricing practice in the past 12 months?

The Americas region is too diverse to generalize on trends, so the answers here are based on developments in the US only. The most significant development has been the regulatory changes brought about from the US Tax Reform — it had a number of elements impacting transfer pricing (TP) directly, and how our clients undertake TP, such as the Base Erosion and Anti-Abuse Tax (BEAT) regulations, the Global Intangible Low-Taxed Income (GILTI) regulations, and to a lesser extent, the foreign-derived intangible income (FDII) regulations. The US tax code also saw changes to Section 163J, which included business interest deductions, which heavily affected intercompany loans. Furthermore, the headline US corporate tax rate was decreased to 21 percent. All of these regulations had an impact on the US TP practice, as well all taxpayers with operations in the US.

What was the most notable effect of that change?

All multinational companies with operations in the US were impacted. The regulations are, in effect, the Base Erosion Profit Shifting (BEPS) promulgations for the US. The BEAT regulations, in particular, imposed a minimum tax on any taxpayers that have outbound payments to foreign related parties relating to things such as inter-company services and royalties that are greater than a certain threshold. BEAT could apply to any taxpayer, whether headquartered in the US or overseas. It therefore created a lot of planning and transactions designed to get taxpayers out of the BEAT tax.

Where is the market moving in this practice area?

Corporate taxpayers have been absorbing these regulatory changes brought about by US Tax Reform over the last year. As a result, they have been focusing less on TP planning and more on dealing with all these changes. What has happened is that Congress has layered on top of what is already a complex tax code even more complexity. This does not leave companies with much capacity to do anything other than deal with these changes. We are likely to see more planning in the future, but there has been a temporary halt while they deal with their compliance needs.

What kind of impact will this have on your work?

The changes have forced our TP practitioners to become more conversant with sections of the international tax code than ever before. It has driven closer alignment between TP and international tax practitioners. The next wave of transfer pricing opportunities are all likely to be around operational transfer pricing, focusing on people, processes, and technology. It's an ever-widening skill set that is required in order to advise our clients in line with market and regulatory developments. With all these changes, it has become even more important



for our TP practitioners to help companies stay compliant in order to stave off tax authority audits and disputes.

Do you anticipate any significant legislative changes in the future with a material impact on transfer pricing in your region?

In short, it is not possible to predict future changes in our current market. We don't know what will happen with Congress, nor what the outcome of the presidential elections might be in 2020. There are also question marks over how the World Trade Organisation will view the regulations (especially FDII). It is possible that there will be further regulations, but conversely, some regulations may be reversed.

If these come into force, how will the industry look in the future?

This is not clear. We do know that there is more alignment between transfer pricing and international tax. To put it into perspective — in the past, we used to advise almost any corporate taxpayer on the most appropriate transfer pricing and international tax approaches for them, based on their industry and some knowledge of their facts. However, since Tax Reform, because of the interaction between the regulations and their mutual dependencies, intuition is removed — we find that similarly situated taxpayers, with similar tax attributes, now may have very different needs and risks. It takes a detailed modelling exercise to understand all the implications for the taxpayer, and all their attributes before we are able to advise them efficiently.

NORTH AMERICA

How would you describe the transfer pricing controversy landscape in your region/jurisdiction?

The landscape has become more challenging – we’ve seen a lot more controversy, and a lot more focus on taxpayers’ transfer pricing. In particular, from an inbound perspective, there is a lot of risk. The changing rules, especially in the area of intangibles, have given the tax authorities more impetus to raise audits.

Do you expect transfer pricing procedures in your region to move towards common standards or diverge in the future?

We have seen the US move away from its traditional focus on the arm’s length standard; because of US Tax Reform, which has many

non-arm’s length promulgations (BEAT, GILTI, FDII) within it. We have had a divergence, and if the regulations stay in place, the divergence is likely to continue.

Is the global drive towards regulation going to affect TP practice? If yes, in which areas?

Between BEPS & US Tax Reform and the digital taxing initiatives, it is likely to increase the demands on taxpayers and transfer pricing professionals to navigate this landscape. It has become very difficult for taxpayers to plan their transfer pricing and their taxes as a result of these promulgations.

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CANADA

**Ed Kroft QC****Bennett Jones LLP**2500 Park Place, 666 Burrard Street
Vancouver, B.C., V6C 2X8

Canada

Tel: (1) 416 777 7494 (Toronto)
(1) 604 891 5335 (Vancouver)Email: krofte@bennettjones.comWebsite: www.bennettjones.com

Ed Kroft, QC, CPA (Hon.), FRPSC represents clients in domestic and international matters including transfer pricing, treaty interpretation and tax avoidance. Ed practices in the Vancouver, Toronto and Calgary offices of Bennett Jones LLP and regularly appears on behalf of clients before various Canadian courts, including the Supreme Court of Canada, the Tax Court of Canada, the Federal Court of Canada, the Federal Court of Appeal and the Supreme Court of British Columbia. Ed has been actively involved in competent authority /MAP disputes and the conclusion of advance pricing agreements and renewals. Ed is recognized as a leading lawyer in various directories. Ed was a member of the Rules Committee of the Tax Court of Canada for about 20 years and is a former member of the Federal Courts Bench and Bar Committee. Ed has received numerous practice awards including the Canadian Tax Foundation's Lifetime Contribution Award in 2016. For over 30 years, Ed has taught tax courses for the Canadian Chartered Professional Accountants Association and its predecessors and has served as an adjunct professor at the University of British Columbia Law School. Since 2008, he has been the course director of tax administration and litigation for the Osgoode Hall Law School LL.M. program. Ed is also Chair of the Tax Litigation Practice Group of The Advocates' Society and a Fellow of the Litigation Counsel of America.

**Bennett Jones**

CANADA

**Sean Kruger****EY**100 Adelaide St W
Toronto, ON M5H 0B3

Canada

Tel: (1) 416 941 1761

Email: sean.kruger@ca.ey.comWebsite: www.ey.com

Sean Kruger is a transfer pricing partner of EY LP, an Ontario limited liability partnership and is based in Toronto, Canada and leads the firm's Operating Model Effectiveness practice.

Sean relocated to Canada in 2008 having joined Ernst & Young in 1996. Sean has advised a wide range of multinational companies in a broad range of industries on transfer pricing, cross-border, and international tax issues. He is also responsible for the transfer pricing mining industry group in Canada. In his current role, he has experience in all areas of the transfer pricing lifecycle, including documentation, planning, and controversy projects. His transfer pricing knowledge together with his historic experience as an international tax partner enables him to assist clients on multi-country tax effective supply chain projects that integrate transfer pricing, business transformation, and international tax considerations. Before relocating to Canada, he was the tax managing partner for Ernst & Young's global member firm in South Africa and the leader of Ernst & Young's African Transfer Pricing Centre of Excellence.

Prior to joining Ernst & Young, Sean held a number of senior positions with multinational banks.

He has lectured extensively on international tax and transfer pricing both in Canada and South Africa and developed and lectured the International Tax Module for the Masters of Commerce at the University of the Witwatersrand in South Africa.

Sean has an MBA from Henley in the UK and an LLM in Tax Law from Osgoode Hall Law School in Canada.



CANADA

**Brad Rolph****Grant Thornton**

11th Floor, 200 King Street West, Box 11
 Toronto M5H 3T4
 Canada
 Tel: (1) 416 360 5021
 Email: Brad.Rolph@ca.gt.com
 Website: www.grantthornton.ca

Brad Rolph is one of Canada's leading transfer pricing advisers. His practice is focused on helping his clients plan, implement, document and defend their transfer pricing policies that strategically optimize their tax-efficient supply chains. He specializes at pricing complex transactions in particular intercompany financial transactions. He has successfully defended transfer pricing policies under audit, at appeals, and at competent authority. He has also negotiated unilateral Advance Pricing Arrangements (APAs) and coordinated bi-lateral APAs. Brad provides litigation support and expert witness reports to law firms representing clients with transfer price issues. He has been qualified as a transfer pricing expert and given testimony at the Tax Court of Canada.

Mr Rolph was the first economist hired by any of the Big Four accounting firms in Canada to practice exclusively in the area of transfer pricing. He has been advising multinational companies from a wide cross-section of industries for over 24 years. He has dealt with a variety of transfer pricing issues, including factoring discounts, guarantee fees on bank deposits, commodity and foreign exchange risk, performance guarantees, dividend yields on preferred shares, operating margin for limited risk/function distributors, and discounts off industry transaction prices for various grades of pulp.

He is a frequent speaker and author on transfer pricing matters. Recently, he has presented a workshop on financial transactions at a TP Minds conference and about the link between custom valuations and transfer pricing during a series of webinars with the Canadian Association of Importers and Exporters. He has also been published by the International Fiscal Association ("The Future of Transfer Pricing") *Euromoney* ('GlaxoSmithKline case: Legal form and economic relevance prevail', *International Tax Review*, April 2013; 'Canada: a year in review,' *Euromoney Yearbooks Transfer Pricing Review 2012-13*) and *Tax Management International* ('Limited-Function Distributors: Alternatives to the Canada Revenue Agency's Co-Distributor Approach,' *BNA Tax Management Transfer Pricing Report*, Vol. 19, No. 2, May 20 2010).

Before he joined Grant Thornton to lead its Canadian transfer pricing practice, Mr Rolph held senior positions at two transfer pricing boutiques and was a partner and the chief economist of the national transfer pricing group at a Big Four firm in Canada. Prior to being a pioneer in Canadian transfer pricing, he was a tax and fiscal policy adviser at the Ontario Ministry of Finance where he specialized in corporate tax, employment taxes, and tax expenditures.

He completed the course requirements and theory comprehensives for a PhD in economics at York University. He holds an honours BA in economics from Wilfred Laurier University and an MA in economics from Queens University.

He has previously been recognized in *Euromoney's Guide to the World's Leading Transfer Pricing Advisors* in 2001, 2011, 2013, 2015 and 2017.



UNITED STATES

Can the Arm's Length Standard be Used to Resolve Tax Challenges of Digitalisation of the Economy?

Michael F Patton (left) and Paul Flignor¹
DLA Piper
Los Angeles / Chicago

For the past several years the question of how to tax the digital economy, both for companies specializing in digital activities (search engines, on-line market places, social media) and the on-line activities of companies more broadly has been a key concern for tax administrators. Recently the European Union has considered numerous proposals, both collectively and unilaterally by member states for how to tax these activities. There is some momentum to have resolution of these issues by the end of 2019. This paper addresses one aspect of these efforts, reconciling a recent OECD proposal with the widely-accepted arm's length standard.

As part of the 2015 BEPS final reports, the OECD BEPS Task Force on the Digital Economy concluded in their Action 1 Report that the digital economy raised fundamental issues around countries' jurisdiction to tax digital transactions ("tax nexus"), the role of digital users' data in the digital economy, digital income characterization and allocation of digital economy income taxing rights among jurisdictions, especially digital user jurisdictions.

A subsequent OECD report issued in 2018 identified three attributes of the digital economy that complicate income taxation of digital-economy transactions:

- *Scale without mass*-the ability of a company to conduct business digitally in numerous jurisdictions while having a minimal physical (or agency) presence in only a few;
- *heavy reliance on intangible assets*- creating opportunities for taxpayer income shifting; and,
- *data and user participation*- whereby users create value to the company in jurisdictions in which the MNE has no traditional taxable presence.

More recently, the OECD issued a public consultation document on digital economy taxation, "*Addressing Tax Challenges of the Digitalisation of the Economy*" (the "Digital Discussion Draft"). The Digital Discussion Draft presented proposals for public comment which OECD's 128 Inclusive Framework members are considering in order to deliver a set of consensus-based solutions by 2020.

These most recent OECD proposals squarely place at issue whether the arm's length standard can be used to resolve the tax challenges that have been identified by OECD or whether a formulary approach is required. In this vein, a number of jurisdictions are adopting or considering a gross revenue based digital services approach as an alternative to income taxation of digital services income.

Recent OECD Proposals for Addressing Profit Allocation Issues

The Digital Discussion Draft "Pillar 1" proposals would broaden the taxation rights (tax nexus) of digital user jurisdictions beyond traditional permanent establishment restrictions and create a new category



of digital user country intangibles subject to the expanded taxation rights. Three alternative conceptual frameworks are suggested for dealing with the Pillar 1 nexus and profit allocation challenges.

The *User Participation* framework would only apply to a narrow set of companies in the search engine, social media, and online market place businesses. The *User Participation* proposal would enable a tax authority to assert taxation based upon local digital platform users' participation regardless of the physical (or other) presence of the companies maintaining or using the digital platform. The level of tax would be based on a residual profit split method ("RPSM"), driven by the level of user participation and the revenue generated through advertising or other transactions in a given jurisdiction. The proposal acknowledges there are many complexities to applying RPSM, and suggests a role for formulas and pre-agreed percentages to simplify computation and administration.

The second proposed digital tax framework is called *Marketing Intangibles*. This proposal would apply to all taxpayers regardless of the type of digital business being transacted. This proposal advocates a separate regime for taxing all forms of marketing intangibles, including a marketing intangible that is not owned exclusively by the legal entity that develops, funds and manages the intangible, but is rather ascribed to the jurisdiction where the digital-user intangible is exploited regardless of physical (or other) presence of the companies maintaining or using the digital platform. The *Marketing Intangible* proposal envisions application of RPSM to identify income associated with marketing intangibles; this residual income would be allocated among jurisdictions by certain metrics of value (for example, revenue), without regard to the DEMPE functions performed to create the intangible. This second framework envisions a role for formulary apportionment to simplify calculation and administration.

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The third proposal, the *Significant Economic Presence* proposal would establish a three-factor allocation model of global income if a company meets the threshold of significant digital presence. The Discussion Draft notes that this proposal was a late addition, and implementation discussions are still ongoing.

The three alternative conceptual frameworks for OECD's proposed Pillar 1 all envision a role for a formulary apportionment of income either as a simplification to an arm's length RPSM or as a primary income allocation method.

Public Reactions to the Digital Discussion Draft

OECD solicited written comments and hosted a public consultation to hear comments on the Digital Discussion Draft. In response, over 200 written comments were submitted and over 400 people from business, government, academia, and civil society attended the public consultation meeting.

The written and oral comments reflected a fairly broad acceptance by business taxpayers that some changes are needed to the nexus and profit allocation rules to allocate limited additional taxing rights to the digital transaction market jurisdiction. However, there was less acceptance of moving away from the arm's length standard. The consensus taxpayer view was that any movement away from the arm's length standard must be based on principles that are broadly accepted by OECD and Inclusive Framework member countries. Commentators feared that changes to existing rules without a broad based consensus on relevant taxation principles would likely lead to increased disputes, with a high likelihood for economic double taxation.

Consistent with the 2015 BEPS Action 1 report and the 2018 interim report, the message from nearly all commentators was that ring-fencing the digital economy is not possible due to the rapid digitalization of the global economy. There was a general view that new rules must be able to stand the test of time without the need to be readdressed in

10-15 years as new forms of digital economy transactions or digital platforms emerge. Other common comment themes were the need to have rules that could readily be understood and administered by taxpayers and tax authorities alike, coupled with efficient dispute prevention or dispute resolution procedures.

Although the complexity of residual profit split approaches was noted by many commentators, the general consensus of comments was that the marketing intangibles proposal was the most likely approach upon which an international consensus could develop.

Challenges for Arm's Length Approaches

Two of the Pillar 1 proposals rely upon some form of RPSM. In theory, application of RPSM is fairly straight-forward:

1. Identify the consolidated income to be split among the taxpayers and tax jurisdictions
2. Identify the routine functions performed by each of the related parties engaged in the digital transaction; value the routine contributions; and then subtract the aggregate routine profit contributions from the consolidated income identified in the prior step to arrive at the residual profit to be split.
3. Identify the non-routine functions performed, or intangible assets owned, by each of the related parties engaged in the digital trans-

action; value the non-routine contributions and intangible assets; and then allocate the residual income identified in the prior step based on the relative non-routine contributions or assets.

The User Participation and Marketing Intangible proposals assume that the entity that engages in the digital transaction at issue will be treated as having a taxable presence in the jurisdiction where the transaction has an effect (but is not necessarily where the transaction is conducted). In many instances, the MNE that developed, updates, maintains and legally protects (i.e., performs DEMPE functions) a digital platform (such as an internet search engine and the algorithms to organize digital user data) will not have a traditional PE in many countries where the digital platform is being used. In addition, the MNE may not have an affiliate selling advertising in a country where digital users are using the platform.

A typical digital transaction within the scope of the Pillar 1 proposals might be income derived from the sale of targeted digital advertising, such as the "pop-up" ads that commonly appear when internet users use an internet search engine. Assuming that the nexus/taxable presence rules are changed to permit a digital user country to assert an income tax on this transaction, can the arm's length standard be used by the digital user country and other countries to tax the income derived from the transaction using the RPSM or is a formulary method the only alternative?

In the transaction described above, the digital platform owning MNE or an affiliate will make a routine contribution (selling advertising) that can readily be valued. The digital platform owning MNE (possibly in combination with affiliates) makes non-routine intangible contributions by developing and maintaining the internet search engine and the personal data algorithms. The digital user country contribution (effectively treated as an additional intangible contribution by either the platform owning MNE or an advertising-selling affiliate) is the digital users' data. Assuming for purposes of simplicity that the income derived from the search engine, personal data algorithms and personal data is limited to advertising revenue, it would seem that a variation of the US "income method" could be used to define and split the residual income.

In this context, the value of the internet search engine and data algorithms might be determined by reference to relevant development and maintenance costs, while the personal data in the digital user country might be valued by reference to the value of customer lists, which have historically been valued as part of acquisitions of retail banks, newspapers, broadcasters and similar businesses.

So, in answer to the question posed above, while it is not simple to do so, the principles of the arm's length standard can be applied to value the digital transaction described above- and most likely the bulk of other digital economy transactions as well. Rules of thumb or formulas could be used to simplify administration of taxation of digital transactions. However, the international business community and tax authorities have regularly rejected similar rule of thumb or formulary approaches due to the arbitrary nature of "one size fits all" approaches applied to varying business patterns. There does not appear to be any reason why such approaches need to be used to tax digital economy transactions.

The arm's length standard has been the bedrock foundation for international taxation for the better part of a century, serving as a guid-

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ing principle for taxpayers and tax authorities to assess income taxes, plan transactions and to resolve disputes. Moving away from this principle risks a tax system based on arbitrary rules and formulas, creating confusion and uncertainty. Rather than signaling the end of the

arm's length standard, the Digital Discussion Draft provides the OECD and taxpayers an opportunity to demonstrate that the arm's length standard is flexible enough to accommodate changing business models in market driven economies.

¹ Mike Patton is a Tax Partner in the Los Angeles office of DLA Piper (US) LLP. Paul Flignor is a Principal Economist in DLA Piper's Chicago office. The views expressed in this article are the authors opinions and do not necessarily reflect the views of DLA Piper US) LLP.

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Global trends in transfer pricing

Guy Sanschagrin (pictured) and Doug Schwerdt
WTP Advisors
Minneapolis/Houston

Numerous, interrelated global trends in the transfer pricing landscape have emerged, including growth of the digital economy, challenges to the arm's length standard, increasing tax authority and taxpayer use of big data and discussions on the compensable value of data, and the increasingly favored profit split method. This article focuses on the following trends:

1. Globally converging corporate income tax ("CIT") rates and rules to diminish tax base erosion;
2. Intensifying focus on intangibles in transfer pricing-related legislation/rules and by tax authorities;
3. Increasing compliance and risk management burdens; and
4. Growing efforts by multinational enterprises ("MNEs") to improve their global transfer pricing processes using technology.

Converging CIT Rates and Rules

Globally converging CIT rates and rules to diminish tax base erosion are evidenced by changes to the CIT rate under the United States Tax Cuts and Jobs Act of 2017 ("TCJA"). In addition to a more competitive CIT rate, the TCJA has adopted provisions that resemble other countries' dual-rate innovation box regimes (e.g., the UK has a regular CIT rate of 19 percent and a 10 percent rate on patent boxes). Since the TCJA, additional OECD countries have competitively lowered CIT rates – and strengthened anti-BEPS¹ tax rule structures – in line with the new global norms.

Globally, tax competition among countries continues, with the majority of OECD countries now having CIT rates in the range of 19 to 25 percent. After the TCJA, Belgium, Luxembourg, Japan and Norway all reduced their CIT rates. The convergence of global tax rates is increasing the focus on transfer pricing risk management – to mitigate the risks of controversy, double taxation and penalties – and decreasing the focus on tax rate arbitrage-based transfer pricing planning.

Intensifying Focus on Intangibles

The passage of the TCJA resulted in a new sentence added to IRC § 482 that requires aggregation of intangible property ("IP") transactions when aggregation is the most reliable means of valuation, and contains an expanded definition of IP under IRC § 936(h)(3)(B) for purposes of Treasury Regulations §§ 1.482 and 1.367(d). The revised



definition of IP is now found in IRC § 367(d)(4), due to the Consolidated Appropriations Act, 2018, under U.S. Public Law ("PL") 115-141, which both repealed IRC § 936 and added subparagraph (d)(4) to IRC § 367, effective 23 March 2018.

Motivated by recurring controversies involving transfers of IP for purposes of Treasury Regulations §§ 1.482 and 1.367(d), both of which used the statutory definition of IP in IRC § 936(h)(3)(B), Congress utilized the TCJA (PL 115-97) to add a new, third sentence to IRC § 482. This sentence reads, "For purposes of this section, the Secretary shall require the valuation of transfers of intangible property (including

intangible property transferred with other property or services) on an aggregate basis or the valuation of such a transfer on the basis of the realistic alternatives to such a transfer, if the Secretary determines that such basis is the most reliable means of valuation of such transfers." PL 115-97 also added the new IRC § 482 content to IRC § 367(d)(2) as the new subparagraph (D).

IRS efforts to aggregate IP transactions for transfer pricing purposes have been repeatedly addressed by the U.S. Tax Court (e.g., *Amazon.com, Inc. v. Commissioner*, 148 T.C. No. 8 (2017)). In these cases, the Tax Court has held that aggregation of transactions is

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appropriate if an aggregated approach produces the most reliable means of determining the arm's length consideration for the controlled transactions.

The 2017 edition of the OECD Transfer Pricing Guidelines ("OECD Guidelines") state, (Chapter III: Comparability Analysis, paragraph 3.9) "[T]here are often situations where separate transactions are so closely linked or continuous that they cannot be evaluated adequately on a separate basis. Examples may include: ... b) rights to use intangible property ... when it is impractical to determine pricing for each individual product or transaction." Also, Chapter VI: Intangibles (paragraph 6.12) discusses the importance of: identifying relevant intangibles with specificity, the functional analysis and DEMPE² functions, the manner in which intangibles under analysis interact with other intangibles, and the appropriateness of aggregating intangibles for the purpose of determining arm's length conditions for the use or transfer of intangibles in certain cases.

The TCJA also resulted in an expansion of the IRC IP definition, bringing the U.S. statutory definition of IP for transfer pricing closer to the OECD Guidelines' definition of intangibles. In addition to the IP specified in IRC § 367(d)(4)(A – E), goodwill, going concern value, and workforce in place (including its composition and terms and conditions of employment) are now defined as IP within the meaning of IRC § 367(d)(4)(F), as is the residual category of "other item the value or potential value of which is not attributable to tangible property or the services of any individual." However, it is not the case that all aspects of the accounting value of goodwill, going concern value, and workforce in place are necessarily compensable.

Chapter VI (paragraph 6.13) of the OECD Guidelines also treats goodwill and ongoing concern as intangibles. The OECD's general definition of intangibles is widely-encompassing and does not necessarily preclude "workforce in place" as an intangible, stating in paragraph 6.6, "In these Guidelines, therefore, the word 'intangible' is intended to address something which is not a physical asset or a financial asset, which is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances."

Increasing Compliance and Risk Management Burdens

A considerably increased transfer pricing compliance burden (i.e., master file, local files and country-by-country ("CbC") reports) for MNEs under BEPS Action 13 has increased the transparency of MNE international tax structures. The increased transparency requires MNEs to carefully consider the appropriate location of high-value activities, intangible property, and intercompany financing. Also, tax authorities now have more information about taxpayers than ever before due to countries (77 countries as of 24 January 2019)³ signing the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports ("MCAA") and similar bilateral agreements for the automatic exchange of information ("AEOI"). For example, the U.S. has bilateral agreements with 44 countries.⁴ Expectations are for increased controversy as tax authorities utilize large amounts of taxpayer AEOI data. MNEs face the risk that tax authorities will misuse information taken out of context to justify aggressive adjustments to taxable income.

In addition to existing AEOI, the European Union's fifth amendment to its 2011 Council Directive on Administrative Cooperation in the Field of Taxation,⁵ "Council Directive (EU) 2018/822 of 25 May 2018"⁶ (the "Directive") introduces a new mandatory reporting regime in respect of certain "reportable cross-border arrangements".

The Directive is intended to increase transparency to tackle what the EU sees as aggressive cross-border tax planning. It requires intermediaries, such as an MNE's tax advisors and lawyers, to report cross-border arrangements that are considered by the EU to be potentially aggressive. Cross-border reportable arrangements where the implementation started on or after 25 June 2018 will need to be reported by 31 August 2020. A few examples of reportable cross-border arrangements include: fees contingent on tax advantages derived, "standardised" (e.g., boilerplate or generic) documentation and structures, the acquisition of a loss-making company to reduce tax liability, and transfers of hard-to-value intangibles (when a main benefit of the arrangement is to obtain a tax advantage). Under the Directive, reported information about the arrangements will be automatically exchanged between EU Member States. As such, it is more important than ever for MNEs operating in the EU to ensure careful and thorough documentation of the underlying business cases for reportable arrangements.

Global Transfer Pricing Management Technology Solutions

Many MNEs are having difficulty developing streamlined, well-organized transfer pricing processes. Companies are looking for cost-effective approaches to achieve compliance and address transfer pricing risks such as one-sided adjustments, which potentially result in double taxation and non-deductible penalties. At the same time, MNEs must balance global consistency with specific country compliance requirements.

Transfer pricing technology solutions have evolved in form, content and usability. Early offerings were CD-ROM databases of company information with minimal user interfaces, which were not necessarily designed for transfer pricing practitioners. The next technological step brought software applications that integrated company databases with user interfaces designed for research, analysis and report generation. Today, there are more than a dozen transfer pricing technology offerings, including SaaS platforms and applications.

Many transfer pricing technology solutions are designed to enable MNEs to create transfer pricing documentation in-house. These offerings have often fallen short due to software application rigidity and the inability to address many transfer pricing nuances that are specific to individual MNEs. Moreover, tax authorities become skeptical when they see reports with generic, boilerplate language – concluding in such cases that the MNE has demonstrated a lack of care.

While certain software products focus on limited aspects of transfer pricing, such as the analysis of financial transactions or the automation of CbC reporting, MNEs need a technology solution for the common operational challenges faced by their in-house global transfer pricing teams, including:

- Limited resources and time to complete large numbers of local files
- Inefficiencies with gathering and sharing information across departments and entities
- Difficulties organizing and tracking the status of projects
- Lack of an effective process to measure risk and prioritize transactions and reports
- Monitoring and adjusting transfer prices during the fiscal year to achieve target levels of profitability in accordance with transfer pricing policies
- Tracking the location of global IP owners and mapping them to the associated functions (i.e., DEMPE functions)
- Maintaining a state of readiness for transfer pricing audits in various countries

In response to these challenges, WTP Advisors has introduced

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Trans-Portal, which is a global transfer pricing management platform. Trans-Portal is designed to address the above “pain points” and provide a comprehensive solution to organize global documentation, au-

tomate data collection with collaborative templates and ERP integration, analyze risks, efficiently update master and local files, collaborate with colleagues, and validate results and documentation.

1 BEPS: Base Erosion and Profit Shifting

2 DEMPE: Development, Enhancement, Maintenance, Protection, Exploitation

3 “Signatories Of The Multilateral Competent Authority Agreement on the Exchange of Country-By-Country Reports (CbC MCAA) and Signing Dates”. *OECD.Org*, 2019, <https://www.oecd.org/tax/beps/CbC-MCAA-Signatories.pdf>. Accessed 7 June 2019.

4 “Country-By-Country Reporting Jurisdiction Status Table”. *IRS.Gov*, 2019, <https://www.irs.gov/businesses/country-by-country-reporting-jurisdiction-status-table>. Accessed 7 June 2019.

5 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

6 Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

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The IRS's new Transfer Pricing Examination Process manual: how it can be used by multinational taxpayers

Marc M Levey
Baker McKenzie
New York

The IRS on June 29 released a new manual for IRS personnel, the *Transfer Pricing Examination Process*, replacing the 2014 Transfer Pricing Audit Roadmap. The new guidance, prepared by the IRS's Large Business & International Division's (LB&I) Treaty and Transfer Pricing Operations, is designed to provide IRS agents with "best practices and processes" for conducting transfer pricing examinations.

Though designed as a tool for IRS agents, taxpayers can use the *Transfer Pricing Examination Process* to prepare for transfer pricing examinations, as they used the 2014 roadmap.

The new guidance states that, to use resources most efficiently, LB&I is using data analytics to identify issues for examination that have the most significant risk for non-compliance.

The transfer pricing examination process

Mirroring the former roadmap, the *Transfer Pricing Examination Process* divides transfer pricing examinations into three phases: the planning phase, the execution phase, and the resolution phase. For each phase, the manual describes the types of materials that agents should review, the personnel that should be staffed and/or consulted, and the types of analysis that should be completed.

The *Transfer Pricing Examination Process* is focused on the proper flow and review of documents provided by the taxpayer and the IRS's review of prior year work papers if the taxpayer's transfer pricing was previously examined. It provides for meetings with both the taxpayer and the issue team; however, those meetings may not take place until after the issue team has already completed most of the steps set forth in the "Planning Phase."

Planning phase

In the Planning Phase, the issue team analyzes materials, including the prior audit data; the income tax return; the Form 8975, country-by-country report; the taxpayer's websites; and any SEC-filed annual report, Form 10-K, or Form 20-F. Using this data, the IRS team prepares a financial ratio analysis of the US taxpayer and the foreign related parties to the intercompany transactions. The issue team will also develop a "preliminary working hypothesis" and complete its initial risk analysis.

Unfortunately, all these steps are taken before the opening conference with the taxpayer. This could lead the team to form

erroneous perceptions of the taxpayer's transfer pricing and to reach improper conclusions before the taxpayer has an opportunity to describe its business, its operations, and its significant transactions. These initial impressions and conclusions about a taxpayer's transfer pricing are part of what makes transfer pricing audits challenging. It can be very difficult to change an exam team's preconceived ideas, and teams often develop skepticism about a taxpayer where there are simply differences of opinion.

The issue team begins its review by analyzing a taxpayer's Annual Reports and SEC filings. These documents have a very specific focus and that focus is typically not on developing and describing the facts that ultimately impact transfer pricing issues. Accordingly, in an audit process that follows a checklist approach, where many of the items on the list are checked off before the taxpayer enters the room, it is extremely difficult to prevent the opening conference from starting in a contentious place.

Execution Phase

The "Execution Phase" of the *Transfer Pricing Examination Process* anticipates a number of meetings with both the issue team and the taxpayer present. In these meetings, the issue team is expected to confirm the material facts it developed in the Planning Phase of the examination and discuss its preliminary findings with the taxpayer.

The Execution Phase includes orientation meetings on the taxpayer's financial statements; geographic, legal entity, tax, and functional organizational charts; transfer pricing, including the history and background of its intercompany transactions, functional profile, supply chain analysis; and the profits and losses associated with each material, controlled transaction.

The new IRS guidance also instructs the issue team to hold periodic meetings throughout the Execution Phase with LB&I Division Counsel, IRS Practice Network members, and their respective managers to update or reassess the IRS's working theory of the case and, if necessary, further develop specific transactions or issues.

If the meetings are held with both the IRS and the taxpayer present, this process could be a productive opportunity for the IRS and the taxpayer to discuss the particular nuances of relevant transactions and to close issues that do not warrant additional analysis.

Resolution Phase

During the final phase of a transfer pricing audit, namely, the "Resolution Phase," the *Transfer Pricing Examination Process* anticipates additional meetings between the taxpayer and the issue team with the goal of reaching an agreement on the tax treatment of the issues examined.

THE IRS CREATED THE
TRANSFER PRICING
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EFFICIENT. BUT DOES IT
DO SO?

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The meetings during the Resolution Phase are expected to include discussions and an evaluation of the taxpayer's position, with a focus on identifying the remaining disputed facts and/or legal arguments.

The issue team is directed to include LB&I Division Counsel if any closing agreement will be entered. If no agreement is reached, the issue team will finalize the notice of proposed adjustment, the economist report, the revenue agent report, and the 30-day letter.

Protests

Taxpayers have an opportunity to file a protest after they receive the 30-day letter. If a protest is submitted, the issue team will review the protest, prepare a rebuttal, and finally begin preparing for the Appeals opening conference.

Taxpayers with US Competent Authority issues do not need to wait until the conclusion of their transfer pricing audit to file a request for Competent Authority assistance. A request can be made as soon as the taxpayer receives the amount of the proposed adjustment in writing on, e.g., a Form 5701, a notice of proposed adjustment, or a Form 4549.

Advancing the taxpayer's position

The opening conference and the financial statement, transfer pricing, and supply chain orientation meetings can be used as opportunities to distinguish facts the issue team may view in a negative light and to affirmatively present facts that may not have been adequately described in materials the issue team reviewed during the Planning Phase.

The taxpayer has additional opportunities to present its affirmative arguments during the meetings held during the Resolution Phase.

The *Transfer Pricing Examination Process* encourages the issue team to "conduct weekly or bi-weekly discussions with the taxpayer to support communication and ensure common expectations" on the audit progress and timelines. Taxpayers should stay in regular contact with the issue team to ensure that their voice is heard early and often during all phases of transfer pricing audits.

While I applaud the IRS for setting out a new *Transfer Pricing Examination Process*, the success or failure of this procedures will be highly dependent on a balanced implementation.

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Kenneth B Clark
Fenwick & West
 801 California Street
 Mountain View CA 94041
 US
 Tel: (1) 650 335 7215
 Email: kclark@fenwick.com
 Website: www.fenwick.com

Kenneth B Clark is a partner in the Tax Group of Fenwick & West LLP and chairs its Tax Litigation Practice. Fenwick has received numerous accolades for its tax controversy practice, including recognition by *International Tax Review* as US tax litigation firm of the year in four different years. Fenwick & West has worked on more than 75 federal tax litigations and Kenneth has been involved in many of those cases.

The principal focus of Mr Clark's practice is a complex federal tax controversies. He works extensively on transfer pricing matters, from assessing clients' strategies, to assisting through the audit phase and Appeals, and, if necessary, to handling cases in court. He regularly practices in the United States Tax Court and has published a number of articles relating to tax controversies.

Mr Clark has worked on numerous high profile matters, including numerous transfer pricing cases. He has worked for clients such as Xilinx, Inc; The Limited, Inc; Limited Brands, Inc; Textron Inc; Apple Inc; Daimler AG; GM Trading; Dover Corporation Adaptec, Inc; Analog Devices; CBS, and VF Corporation.

Mr Clark received a BA from the University of Redlands, where he graduated *summa cum laude*, and was first in his class. He received a JD from New York University School of Law, *cum laude*, and was a member of that school's *Law Review*. Mr Clark also received an MBA from the University of California at Berkeley. Mr Clark is a member of the state bars of California and New York and is admitted to practice in numerous federal courts.



UNITED STATES



David Forst
Fenwick & West
 801 California Street
 Mountain View CA 94041
 US
 Tel: (1) 650 335 7254
 Email: dforst@fenwick.com
 Website: www.fenwick.com

David Forst focuses on international corporate taxation. David is included in *Euromoney's* Tax Advisors Expert Guides (World's Leading Tax Advisors, World's Leading Transfer Pricing Advisors and was named one of the Top 30 U.S. Tax Advisors). He is also in the Legal 500 Hall of Fame and is regularly recognised in the Law and Business Research's International Who's Who of Corporate and Tax Lawyers. David is listed in *Chambers USA* America's Leading Lawyers for Business, and has been named a Northern California Super Lawyer in Tax by *San Francisco Magazine*.

David is a lecturer at Stanford Law School and UC Berkeley Law School where he focuses on international taxation. He is an editor of and regular contributor to the *Journal of Taxation*, where his publications have included articles on international joint ventures, international tax aspects of mergers and acquisitions, the dual consolidated loss regulations, and foreign currency issues. He is a regular contributor to the *Journal of Passthrough Entities*, where he writes a column on international issues. David is a frequent chair and speaker at tax conferences, including the NYU Tax Institute, the Tax Executives Institute, and the International Fiscal Association.

David graduated with an A.B. (*cum laude*) Phi Beta Kappa from Princeton University's Woodrow Wilson School of Public and International Affairs, and received his J.D., with distinction, from Stanford Law School.

David is a member of the State Bar of California.



UNITED STATES

**Jim Fuller****Fenwick & West**

801 California Street
Mountain View CA 94041
US
Tel: (1) 650 335 7205
Email: jpfuller@fenwick.com
Website: www.fenwick.com

Jim Fuller is a partner in the Tax Group at Fenwick & West LLP in Mountain View, California. He is one of the world's top 30 tax advisers, according to Euromoney.

Fuller appears in in Euromoney's "Best of the Best USA in Tax" and Euromoney's "Best of the Best USA in Transfer Pricing."

He is one of the three "most highly regarded" US tax practitioners according to Who's Who Legal, and is the only US tax adviser to receive a Chambers *star performer* rating (higher than first tier).

Legal 500 has Fuller in its Hall of Fame for Tax-Corporate and Tax-International.

Fenwick & West LLP has represented 6 of the Fortune Top 10 companies, well over 50 of the Fortune 100 companies, and over 100 of the Fortune 500 companies in federal tax matters.

Fuller and his firm have served as counsel in over 150 large-corporate IRS Appeals proceedings and over 75 federal tax court cases.

International Tax Review named Fenwick & West "Tax Firm of the Year for the San Francisco Area" nine times and "US (or Americas) Tax Litigation Firm of the Year" four times.



UNITED STATES

**Elizabeth King Rosenthal****Beecher Consulting**

44 Prince Street, Suite 1
Jamaica Plain MA 02130
US
Tel: (1) 617 730 8138
Email: eking@beecherconsultinggroup.com
Website: www.beecherconsultinggroup.com

Dr. Elizabeth King Rosenthal is the founder of Beecher Consulting, an independent firm specializing in transfer pricing and valuation issues. She has worked in these fields for over 25 years, first as an industry economist with the Internal Revenue Service, then as a senior manager with Price Waterhouse, and is now a principal with Beecher Consulting. She has prepared numerous documentation studies for large and small companies in traditional and emerging industries, assisted clients in a planning capacity, and represented Fortune 100 companies in APA negotiations. She has testified as an expert in the US federal courts, and has served as a mediator on a large disputed transfer pricing matter.

Dr. King Rosenthal has published extensively on transfer pricing and valuation issues. Her publications include 'Taxing Platform Businesses with Highly Digitized Business Models', 90 *Tax Notes International* 1279, June 11 2018; 'Rethinking the Border Adjustment Tax: The Role of Intra-Group Trade Flows', 46 *TM International Journal* 588, October 13 2017; 'Deconstructing the Income Method, Resurrecting Cost Sharing', 90 *TM Transfer Pricing Report* 10, September 22 2011; 'The Case Against the Income Method' (with C. Fanaroff), 126 *Tax Notes* 3, January 18 2010; *Transfer Pricing and Corporate Taxation* (New York: Springer Science + Media LLC 2009); 'Commodities Trading and Global Dealing: Transfer Pricing Challenges and Proposed Methods', in *Tax Director's Guide to International Transfer Pricing* (Newton: Global Business Information Strategies 2008); 'The Valuation of an Assembled Workforce Intangible' in *The Valuation of Intangible Assets in Global Operations* (Westport: Quorum Books 2001); 'The Role of Economic Analysis in Transfer Pricing' in Lowell, Cym H et. al., *International Transfer Pricing* (New York: Warren Gorham & Lamont 1994, 1997); and *Transfer Pricing and Valuation in Corporate Taxation* (The Netherlands: Kluwer Academic Publishers 1994). Elizabeth has held a post-doctoral position at the Harvard Business School, received her PhD in economics from New York University, and earned her BA from Sarah Lawrence College.



UNITED STATES

**Marc Levey****Baker McKenzie**452 Fifth Avenue
New York, NY 10018

US

Tel: (1) 212 891 3944

Email: marc.m.levey@bakermckenzie.com

Website: www.bakermckenzie.com

Marc Levey is a partner in the New York office of Baker McKenzie. He has over 40 years of experience in international taxation and is nationally recognized in his field, particularly in structuring and defending transfer pricing strategies. He has frequently been acknowledged by Euromoney as one of the "World's Leading Tax Advisors," included in its "Best of the Best" global tax experts. Mr Levey serves as the chair of the Firm's Luxury & Fashion Industry Group and was the past chair of the Firm's Global Transfer Pricing Steering Committee. Previously, he was a senior trial attorney with the US Department of Justice and a Special Attorney to the Attorney General. Mr Levey's practice focuses on transfer pricing and cross-border transactions, tax controversies and litigation, international taxation, and restructuring multinational company's global operations. Mr Levey represents a wide range of clients in proceedings before the IRS and federal courts and has substantial experience in handling tax controversies. He has worked in various industries such as pharmaceuticals and life sciences, financial institutions, energy, automotive, chemicals, electronics, consumer goods, fashion and luxury products.

Representative Legal Matters served as tax counsel on *Club Med Sales, Inc. v. Commissioner*, *Astra USA Inc. v. Commissioner*, *Saint Gobain Corporation et al. v. Commissioner*, *Frette SA v. Commissioner*, *Andres Courrage Inc. v. Commissioner*, *Framatome Connectors USA v. Commissioner*, *Brillembourg v. Commissioner*. He also served as tax counsel on the acquisition of PPC Broadband LLC and SKT International, B.V. by Belden, Inc. He has successfully negotiated conclusions to numerous IRS tax audits, appeals controversies, fast track appeals, competent authority matters and advance pricing agreements.

Professional Honors Albert Nelson Marquis Lifetime Achievement Award, Marquis Who's Who 2017, "Best of the Best" among international tax lawyers, Euromoney Legal Media Group, "Best of the Best among International Tax Lawyers" and "Leading World, Transfer Pricing Expert", International Tax Review, Listed lawyer, Madison's Who's Who, Listed lawyer, Best Lawyers in America, Listed lawyer, New York Area's Best Lawyers, Professional Associations and Memberships, India's Taxmann – Advisory Board Member, BNA Foreign Tax Portfolio – Advisory Board Member, International Tax Journal – Advisory Board Member, University of Cincinnati College of Law's Corporate Law Center Advisory Board Member and Adjunct Professor of Law, American Bar Association – prior vice chairman, Affiliated and Related Tax Party Committee, American Bar Association – founding chairman, Transfer Pricing Committee, Journal of International Taxation – Advisory Board Member. Co Author of Wolters Kluwer: CCH's "Transfer Pricing: Rules, Compliance and Controversy, 4th Edition and Editor and Author of Warren Gorham & Lamont's "US Taxation of Foreign Controlled Businesses." 2019.

**Baker
McKenzie.**

UNITED STATES

Barbara Mace**DLA Piper**1251 Avenue of the Americas
New York, NY 10020-1104

US

Tel: (1) 212 335 4719

Email: barbara.mace@dlapiper.com

Website: www.dlapiper.com

Barb is a Principal Economist in DLA Piper's US transfer pricing group and a PhD economist focusing on the financial services industry. She has more than 25 years of experience in financial services transfer pricing, and economic consulting, 23 of which were spent in Big Four accounting. She was named as a leading transfer pricing adviser by both the *International Tax Review* and by *Euromoney*.

She has extensive experience working with many of the largest global banks on numerous transfer pricing issues. Her most relevant experience includes extensive experience with global dealing operations including global profit splits on complex derivative transactions to reward capital risk and functions such as trading and risk management, and the decomposition and pricing of market risk and credit risk for derivatives portfolios. She has deep experience in pricing credit intermediation. Other relevant experience includes pricing intercompany loans and the provision of liquidity and guarantees, global cost allocations, income allocation for investment banking, asset management, stock lending, custody, splitting commission income between origination and execution functions, compensation of brokerage and marketing activities, loan syndication, and various international banking services.

Before specializing in financial services transfer pricing, Barb was an economic consultant in securities at the National Economic Research Associates, and an assistant professor of business economics at the school of business at the University of Michigan. She has also taught at the University of Chicago, the University of Rochester, and the American University in Moscow.

Ms Mace holds a PhD in economics from the University of Chicago (1988).



UNITED STATES

**Victor H Miesel****MAZARS**

135 West 50th Street
New York NY 10020

US

Tel: (1) 212 375 6579

Mobile: (1) 203 536 6598

Email: Victor.Miesel@MazarsUSA.com

Website: www.mazarsusa.com

Victor H Miesel, Partner and Chief Economist, is the US Practice Leader for Transfer Pricing Services and Economics Consulting at Mazars USA LLP, based in New York. Victor is also the US Representative on the Global Transfer Pricing Strategy Committee for Mazars Group, based in Paris. He has more than 30 years of transfer pricing and economic consulting experience with Big Four public accounting and management consulting firms. His areas of expertise include transfer pricing economics, value-chain analysis, valuations for tax purposes, BEPS, Masterfile, CbCr and business economics covering a wide variety of industries, corporate structures and tax planning initiatives. Victor has provided expert economic analysis for multilateral advance pricing agreements (APAs), cost sharing, tax planning exercises, domestic and international intangible property (IP) migrations, bankruptcy analysis, tax litigation and controversy support engagements. Victor also has extensive experience as a practice builder, and as a leader of organizational build-outs for economic consulting and transfer pricing practices based both in the US and in Europe.

Prior to joining Mazars, Victor was the Chief Economist and Global Transfer Pricing Practice Leader for Cherry Bekaert LLP, based in Atlanta. Victor also served as the Global Managing Director of Experis Finance's Transfer Pricing Center of Expertise based in New York. At Experis Finance (A Manpower Group Company), Victor formed the firm's first globally-managed transfer pricing practice. Victor previously was a Partner, and led A.T. Kearney's Northeast Region and PwC's Boston economic consulting practice. He also led the Eastern US Region (New York-based) and European (Belgium-based) transfer pricing practices for NERA Economics Consulting.

Victor received undergraduate degrees in Economics and Political Science from the University of Michigan, and Master's degrees in Applied Economics and Public Policy from The Gerald R. Ford School of Public Policy at the University of Michigan. Victor has been elected as one of the leading transfer pricing advisers by Euromoney magazine and peer review since 2004, and he is included in The Guide to the World's Leading Transfer Pricing Advisers, published by the Legal Media Group based in London. Victor continues to be widely published and quoted in tax journals and has several articles currently in process.

Industry Expertise: Professional Services; Consumer and Luxury Products; Manufacturing & Distribution; Financial Services; Insurance and Re-Insurance; Asset Management; Banking; Private Equity

Service Specialties: Transfer Pricing, BEPS, CbCr, Masterfile; Tax and Management Consulting, ASC 740-10; Business Economics

Memberships: Associate member of American Bar Association (ABA); ABA's Tax Subcommittee on Transfer Pricing; National Association for Business Economics (NABE); International Fiscal Association (IFA), and The University of Michigan, Life Time Alumni Member.



UNITED STATES

**Benjamin Miller****Bennett Thrasher**

Riverwood 200

3300 Riverwood Parkway, Suite 700

Atlanta GA 30339

US

Tel: (1) 678 302 1483

Email: Benjamin.miller@btcpa.net

Website: www.btcpa.net

Ben Miller is a partner at Bennett Thrasher. He leads the firm's Tax Specialty Services Division and Transfer Pricing Practice Area. Ben works with clients to design, implement and/or maintain transfer pricing policies that align strategic business objectives with local and foreign transfer pricing rules and regulations. Ben serves as DFK International's Vice Chair for Transfer Pricing, where he assists with the international coordination and advancement of tax advisory services among member firms.

Recent matter highlights

- **Transfer Pricing for REITs:** Designed and implemented an efficient approach for allocating shared expenses so the REIT and TRS can apply a single sharing ratio into perpetuity. This approach substantially reduced the administrative resources required to compute quarterly estimated tax payments (the company previously was managing three layers of sharing ratios) and resulted in large permanent tax savings.
- **Inbound Investment in Real Estate:** Advised European-based private equity on financing structure for inbound investments in U.S. real estate. Enabled client to use commercially reasonable terms for intercompany dealings rather than statutory safe harbours, which helps attract/engage co-investors and better manages tax liabilities associated with the investments.
- **Global TP Documentation:** Prepared transfer pricing documentation (Master File and Local Files) for historical transfer pricing positions in accordance with the current, dynamic regulatory environments of Malaysia, Singapore, the Netherlands and the U.S. When delivering the documentation to the client, BT presented transfer pricing planning opportunities that reduce the group's annual income tax burden by more than our fees.

Practice areas

Policy design, tax consulting, international tax advisory, US inbound, US outbound, supply chains

Sector specialisations

Consumer goods and services, industrials, pharma and life sciences, real estate, shipping, tech and telecoms

Association memberships

DFK International

LEA Global

American Economic Association

Academic qualifications

PhD (Economics), Georgia State University, 2008

MA (Economics), Georgia State University, 2006

BSBA (International Economics) and BA (Spanish Language), University of Florida, 2004

Languages

English, Spanish

UNITED STATES

**Larissa Neumann****Fenwick & West**

801 California Street
Mountain View CA 94041
US
Tel: (1) 650 335 7253
Email: lneumann@fenwick.com
Website: www.fenwick.com

Larissa Neumann focuses her practice on U.S. tax planning and tax controversy with an emphasis on international transactions. She has broad experience advising clients on mergers and acquisitions, restructurings and has extensive transfer pricing experience.

Larissa has successfully represented clients in federal tax controversies at the audit level, and in appeals, the U.S. Tax Court and other federal courts. She was counsel in the important taxpayer victory case *Analog Devices v. Commissioner* (2016), and the successful resolution for Sanofi in *Aventis v. United States* in the U.S. Court of Federal Claims. She is currently serving as counsel for VF Corporation/Timberland before the Tax Court in *TBL Licensing v. Commissioner*.

Larissa has a reputation as a leading tax advisor both in the Silicon Valley and nationwide due to her keen analytical skills coupled with a focus on providing clients practical solutions to complex tax issues. She appears in *Euromoney's* World's Leading Tax Advisers and *International Tax Review's* World's Tax Controversy Leaders. *Euromoney's* Women in Business Law named Larissa America's Best Transfer Pricing Lawyer in 2017 and 2018, and she is consistently named as one of the World's Leading Transfer Pricing Advisors. She was also named to the *Daily Journal's* 2017 list of Top Women Lawyers in California, and honored with the Women of Influence award by the *Silicon Valley Business Journal* in 2017.

Larissa teaches international tax at the University of California, Berkeley, School of Law. She frequently speaks at conferences for professional tax groups, including TEI, IFA, Pacific Rim Tax Institute and the ABA. Larissa also coauthors a monthly column on all recent developments in U.S. international tax for the *Tax Notes International*. She is also on the executive committee of the International Fiscal Association, serves as the chair of the Technology Committee and is the ABA International Law Tax liaison.

Fenwick has advised over 100 Fortune 500 companies on tax matters, and has served as counsel in more than 150 large-corporate IRS Appeals proceedings and more than 75 federal court tax cases. Fenwick is recognized by *ITR* as having one of the world's top tax planning and transactional practices, and is listed as a tier-one firm by *World Tax*. The firm is also consistently named San Francisco & Silicon Valley's Tax Firm of the Year by *ITR* and has been named U.S. Tax Litigation Firm of the Year. *ITR* has also recognized Fenwick as Americas M&A Tax Firm of the Year and West Coast Transfer Pricing Firm of the Year.

Larissa received her J.D. from the University of California, Berkeley, School of Law in 2005. She received her M.A. in public health from Yale University in 2002. She received her B.S. in molecular cell biology from the University of California, Berkeley in 2000.

Larissa is a member of the State Bar of California and the ABA Section of Taxation.



UNITED STATES

**Michael F Patton****DLA Piper**

2000 Avenue of the Stars, Suite 400
North Tower
Los Angeles California 90067-4704
US
Tel: (1) 310 595 3199
Email: mike.patton@dlapiper.com
Website: www.dlapiper.com

Mike Patton is a partner in DLA Piper's Tax practice, based in Los Angeles. He focuses his practice on international transfer pricing.

Mr Patton has assisted many multinational corporations in a variety of industries in resolving IRS or foreign tax authority transfer pricing and other tax disputes as well as in planning major cross-border transactions. He was instrumental in obtaining the world's first Advance Pricing Agreement and he has assisted clients in negotiating more than 100 APAs.

Mr Patton was previously an attorney in the IRS Chief Counsel's Office where he had national responsibility at IRS for technical issues, regulations and litigation of cases relating to transfer pricing. Mr Patton was editor of and a major contributor to the Treasury/IRS *Transfer Pricing White Paper*. The *White Paper* laid the theoretical ground work for the profit-based transfer pricing methods adopted by the US and the OECD.

Mr Patton has been named one of the *Best of the Best* US transfer pricing advisors as well as one of the leading Asia Pacific tax advisors by *Euromoney* and the Legal Media Group. He is an editorial advisory board member of Tax Management, Inc. and is the author of the BNA portfolio *Treatment of Advance Pricing Agreements*.

Education

University of Maryland J.D. with honors
Order of the Coif
Georgetown University Law Center LL.M.
University of Maryland B.A.

Admissions

California
New York



UNITED STATES

**Tim Reichert****Economics Partners**

1999 Broadway, Suite 3250

Denver CO 80202

US

Tel: (1) 303 297 1269

Email: timothy.reichert@econpartners.comWebsite: www.econpartners.com

Dr. Tim Reichert is the President and Founder of EP (Economics Partners) EP is a firm of economists who specialize in the application of economics and finance to complex tax questions, including transfer pricing and valuation in a tax context. Dr. Reichert holds a PhD in economics from George Mason University, an MA in International Political Economics from The Catholic University of America, and a BA in Political Philosophy from Franciscan University. Dr. Reichert's PhD in economics includes fields of concentration in Law and Economics and in Public Choice Theory. Dr. Reichert has specialized in transfer pricing for over 20 years, beginning his transfer pricing career in early 1995 at Economic Consulting Services Inc, in Washington, DC, where he was a Senior Economist in the firm's transfer pricing practice. Dr. Reichert later worked at Ernst & Young, LLP, where he was a Partner in the firm's transfer pricing practice; Analysis Group, where he was a Vice President in the firm's transfer pricing practice; and Duff & Phelps, LLC, where he was a Managing Director and leader of the firm's transfer pricing practice. In 2011, Dr. Reichert founded Economics Partners.

He has participated in over 500 transfer pricing engagements in his career, and over 100 valuation engagements. Dr. Reichert has provided transfer pricing advice and analysis in a broad range of industries. These include, among others, agriculture, automotive, banking, biotech, branded food and beverages, chemicals, cement and building materials, computer products, consulting services, consumer durables, consumer non-durables, distribution, gaming, healthcare, insurance, mining, oil and gas, pharmaceutical, pharmaceutical distribution, primary metals, primary metal inputs, restaurants and fast food, spirits and wine, servers and storage, software, semiconductor and telecommunications.

Dr. Reichert's role frequently includes designing and structuring his clients' intercompany arrangements, in addition to pricing or valuing these transactions. He is also frequently called upon to provide assistance as a testifier in litigation matters, and to resolve large transfer pricing or valuation-related controversies prior to litigation. In this capacity, Dr. Reichert has been retained by law firms, tax authorities and corporate taxpayers.



UNITED STATES

**Guy Sanschagrín****WTP Advisors**

601 Carlson Parkway, Suite 1050

Minneapolis MN 55305

US

Tel: (1) 866 298 7829 Ext. 702

Email: guy.sanschagrín@wtpadvisors.comWebsite: wtpadvisors.com

Guy Sanschagrín, CPA/ABV, MBA is a Principal at WTP Advisors, a boutique international tax services firm. He leads the firm's transfer pricing and valuation practice and is the CEO of Trans-Portal – a Global Transfer Pricing Platform technology solution. He has extensive experience providing transfer pricing, valuation, economics and business process improvement services. Guy's expertise includes supply chain, risk assessment, transfer pricing design, cost sharing, exit charge/intangibles valuation, APAs, OECD and local country/US documentation. He also provides business valuation for M&A transactions, buy in transactions, minority shareholder disputes and tax purposes. He completed a three-year assignment as Ernst & Young Belgium's national transfer pricing practice leader. Early in his career, Guy was an industrial engineer performing and leading dozens of business process improvement initiatives.

He is a frequent speaker at seminars and webinars. Guy is a published author on numerous transfer pricing topics, including "Review of and Insights on the IRS Transfer Pricing Examination Process" and "Assessing Value Creation for Transfer Pricing" for *Tax Notes International*.

Education and Certifications

- MBA in Finance and International Business, University of Chicago Booth School of Business
- BS in Industrial Engineering, Northeastern University
- CPA, Minnesota
- Certified as Accredited in Business Valuation (ABV) by the AICPA

Civic and Professional Organizations

- President of the Minnesota Association of Business Valuation Professionals (MABVP)
- AICPA, member
- Past president of the Twin Cities chapter of the American Society of Appraisers
- Former Board of Directors member and Treasurer/Finance and Audit Committee Co-Chair of Global Minnesota (FKA Minnesota International Center / MIC)



UNITED STATES

**Stan Sherwood****Sherwood Associates**

2 Columbus Avenue

New York NY 10023

US

Tel: (1) 212 489 0525

Email: info@sherwoodlaw.com

Website: www.sherwoodlaw.com

Stan Sherwood is an international tax, trade and corporate attorney, certified public accountant and transfer pricing adviser. He was an international tax partner at PwC in New York for many years.

Since 2000, he has been the adviser to many of the world's leading luxury brands and to sport and lifestyle brands – large, small and emerging. His experience spans many industries and he has a vast amount of global travel experience.

Sherwood Associates provides international tax, financial and business planning services to multinational businesses and investors on cross-border transactions including: advice on recent US tax reform; US and foreign transfer pricing planning and documentation; mergers and acquisitions; structuring international affiliates; integrating acquired companies; capitalization and financing; formation and re-organization of US holding companies; structuring trading companies; foreign investment in the US, including real estate; foreign country tax reduction and foreign tax credit planning; tax treaty planning; transfers of intellectual property; joint ventures; management of IRS audits and foreign country tax controversies; development of transfer pricing policies; related-party contracts; cost sharing; competent authority, APAs; global e-commerce planning; and US and foreign customs and import duties.

He is an adjunct professor of law at Fordham University Law School in New York where for 7 years he has taught a course on "Creating a Global Business, Legal, Financial Considerations."

Mr Sherwood speaks on international tax and business subjects and the author of many articles and publications on these topics. He has been: a national reporter for the International Fiscal Association (IFA); an expert witness in tax cases involving transfer pricing; and a consultant to the Chinese State Administration of Taxation, Beijing. He is one of the first people to analyze Chinese transfer pricing developments starting in the 1990s.

Mr Sherwood obtained his LLM from New York University Graduate School of Law, his law degree from Suffolk University Law School.

SHERWOOD ASSOCIATES

UNITED STATES

**Richard L Slowinski****Baker McKenzie**

815 Connecticut Ave NW

Washington DC 20006

US

Tel: (1) 202 452 7025

E: richard.slowinski@bakermckenzie.com

Website: www.bakermckenzie.com

Richard Slowinski is a Partner in Baker McKenzie's Washington, DC office, which was awarded *Band 1* or *Tier 1* recognition by *Chambers*, *International Tax Review* and other ranking firms. With more than 25 years of experience, he advises clients regarding tax matters, with a focus on transfer pricing. He counsels companies in the transportation, finance, hospitality, electronics, aerospace, e-commerce, pharmaceutical, retail and other industries. His experience with tax controversy and planning includes all phases of administrative dispute resolution and advance pricing agreements (APAs). Richard has served in Baker McKenzie leadership positions, including as Chair of the Washington Office Tax Practice, a member of the North American Transfer Pricing Steering Committee and the Washington Office Hiring Partner. He worked for one year in Baker McKenzie Tokyo.

Representative matters include:

- Obtained unilateral and bilateral APAs involving the IRS and other tax authorities.
- Resolved novel transfer pricing issues such as using foreign company segment data as the tested party for an APA, marketing intangibles, intangible property migration, foreign currency fluctuations, financing transactions, guarantees, plant start-up and shut-down situations, US domestic transfer pricing and customs implications.
- Secured competent authority agreements to eliminate double taxation involving the US, Canada, Japan, Mexico, the United Kingdom, etc.
- Advised numerous companies regarding supply chain restructurings involving Europe, Asia and the Americas.
- Counseled pharmaceutical company on strategies to address transfer pricing risks and reduce taxable permanent establishment concerns.
- Advised companies regarding tax and customs implications of cross-border transactions.

Richard has authored articles and given speeches sponsored by the ABA, Bloomberg/BNA, EEL, FBA, IFA, Japan Tax Association, OFII, TEI and other professional organizations. He co-chairs the FBA Tax Law Conference (International Tax) (since 2013). Selected recent presentations include:

- "Strategies for Managing Global Transfer Pricing and APAs," OFII, Palm Beach
- "New World for Resolving Transfer Pricing Disputes," FBA, Washington, DC
- "US Tax Reform & Transfer Pricing Developments," Japan Tax Association, Tokyo
- "Intersection of Transfer Pricing and Customs Valuations: Opportunities & Challenges," Transfer Pricing Conference, Washington, DC
- "Changing Face of International Tax Challenges," TEI, Washington, DC
- "Transfer Pricing: Enforcement & BEPS Developments," Washington, DC

Bar admissions include Maryland Bar, District of Columbia Bar and United States Tax Court. He received an LL.M. in Taxation from Georgetown University Law Center, a J.D. from Catholic University of America, and a B.A. from Bucknell University.

**Baker
McKenzie.**

UNITED STATES

**Perry Urken****Economics Partners**

1875 Eye Street, NW; Suite 810

Washington, D.C. 20004

US

Tel: (1) 202 621 7841

Email: perry.urken@econpartners.comWebsite: www.econpartners.com

Perry Urken is a Partner with Economics Partners, LLC and has provided economic consulting services in the fields of transfer pricing and tax valuation for approximately 20 years.

His practice focuses on the provision of transfer pricing and tax planning services to multinational firms and assistance in tax controversies, including advance pricing agreements, audit proceedings with a variety of tax authorities, and litigation matters before the US Tax Court and US District Court. In this context Mr Urken has performed a wide variety of economic analyses, including the valuation of technology, trademarks, and other types of intellectual property and the valuation of shares of controlled affiliates of a multinational group.

Mr Urken's transfer pricing practice also encompasses the pricing of intercompany transfers and licensing of intellectual property. In this context, he assists clients with intercompany sales of intellectual property portfolios, cost sharing arrangements, business restructurings, and intercompany licensing arrangements. Mr Urken has extensive experience designing and structuring the terms of these types of transactions as well as defending these terms as part of audits, advance pricing agreements, and other proceedings with tax authorities.

Mr Urken has provided transfer pricing and valuation services on behalf of clients in a wide range of industries, including the pharmaceutical, consumer product, automotive, financial services, building materials, digital media, telecommunications, retail, electronics, technology, drilling and exploration services, e-commerce, apparel, publishing, security services, mining, healthcare, and real estate industries.

He has authored numerous articles which have appeared in transfer pricing, valuation, international tax, and finance publications. In addition, Mr Urken is a frequent speaker at industry conferences and has also presented on transfer pricing matters before the Organization for Co-Operation and Development ("OECD") and the IRS' Advance Pricing and Mutual Agreement ("APMA") program.

In August 2012 Mr Urken opened Economics Partners' Washington DC office, which now includes a full complement of experienced transfer pricing professionals. Prior to joining Economics Partners, Mr Urken was a Vice President in the Transfer Pricing practice of Charles River Associates, where he was responsible for transfer pricing and tax valuation in its Washington DC office. Previously, Mr Urken was a Senior Manager with the Ballentine Barbera Group, LLC and, prior to that, a Manager with KPMG LLP.

Mr Urken received an MBA degree with a concentration in international finance and a MA degree in international affairs from George Washington University. He also received a BA from Brandeis University.



CANADA

**Hernan Allik****Deloitte Canada**

La Tour Deloitte 1190, Avenue des
Canadiens-de-Montréal Bureau 500,
Montréal, QC H3B 0M7, Canada
Tel: (1) 514 393 3643
Email: hallik@deloitte.ca
Website: www.deloitte.com

**Tony Anderson****Deloitte Canada**

1005 Skyview Drive Suite 200,
Burlington, ON L7P5B1
Canada
Tel: (1) 905 315 6731
Email: toanderson@deloitte.ca
Website: www.deloitte.com

Rebecca Coke

EY

Toronto

**Dr. Muris Dujic****Deloitte Canada**

Bay Adelaide Centre, East Tower 8
Adelaide Street West, Suite 200,
Toronto, ON M5H 0A9, Canada
Tel: (1) 416 601 6006
Email: mdujic@deloitte.ca
Website: www.deloitte.com

Stéphane Dupuis

DRTP Consulting

Montréal

David Francescucci

KPMG

Montréal

**Richard Garland****Deloitte Canada**

Bay Adelaide Centre, East Tower 8
Adelaide Street West, Suite 200,
Toronto, ON M5H 0A9, Canada
Tel: (1) 416 601 6026
Email: rigarland@deloitte.ca
Website: www.deloitte.com

James Gatley

KPMG

Toronto

Michael Glaser

KPMG

Vancouver

Larry Greer

EY

Calgary

Dale Hill

Gowling WLG

Ottawa

Michael D Hoffman

KPMG

Calgary

Gord Jans

PwC

Toronto

David Kemp

Baker Tilly WM

Toronto

Claire MC Kennedy

Bennett Jones

Toronto

Shiraj Keshvani

PwC

Toronto

Andrew Kingissepp

Osler Hoskin & Harcourt

Toronto

Mark Kirkey

Gowling WLG

Ottawa

Ed Kroft QC

Bennett Jones

Vancouver/Toronto/Calgary

See bio

Sean Kruger

EY

Toronto

Peter Kurjanowicz

Grant Thornton

Toronto

Andrew F McCrodan

PwC

Toronto

Al Meghji

Osler Hoskin & Harcourt

Toronto

Paul Mulvihill

EY

Ottawa

Blake Murray

Osler Hoskin & Harcourt

Toronto

**Markus Navikenas****Deloitte Canada**

850- 2nd Street S.W. Suite 700,
Calgary, AB T2P 0R8
Canada
Tel: (1) 403 267 1859
Email: mnavikenas@deloitte.ca
Website: www.deloitte.com

Greg Noble

EY

Vancouver

**Rob O'Connor****Deloitte Canada**

Bay Adelaide Centre, East Tower 8
Adelaide Street West, Suite 200,
Toronto, ON M5H 0A9, Canada
Tel: (1) 416 601 6316
Email: rooconnor@deloitte.ca
Website: www.deloitte.com

Emma Purdy

PwC

Toronto

Christopher Raybould

Baker McKenzie

Toronto

Sébastien Rheault

Barsalou Lawson Rheault

Montréal

Jeff Rogers

PwC

Toronto

Brad Rolph

Grant Thornton

Toronto

See bio

Jeffrey Shafer

Blake Cassels & Graydon

Toronto

Jennifer Shulman

KPMG

Toronto

Martin Skretkowicz

MPS Transfer Pricing Consulting

Toronto

Michelle Sledz

KPMG

Calgary

Wael Tfaily

EY

Calgary

Deborah Toaze

Bennett Jones

Vancouver

Thomas Tsiopoulos

EY

Toronto

Matthew Wall

MDW Consulting

Toronto

Lori Whitfield

Grant Thornton

Vancouver

Scott Wilkie
Blake Cassels & Graydon
Toronto

Ivan P Williams
PwC
Calgary

Alfred Zorzi
EY
Montréal

UNITED STATES



Darcy D Alamuddin
Deloitte Tax LLP
111 S. Wacker Drive
Chicago, IL 60606-4301
US
Tel: (1) 312 4862049
Email: dalamuddin@deloitte.com
Website: www.deloitte.com

Fabian Alfonso
BaseFirma
Miami

Robert Alltop
KPMG
Detroit

Marc Alms
Alvarez & Marsal
New York



Jeff Anderson
Deloitte Tax LLP
2200 Ross Ave Ste 1600
Dallas, TX 75201-6703
US
Tel: (1) 214 8401041
Email: xxx
Website: www.deloitte.com

J Clark Armitage
Caplin & Drysdale
Washington DC

Sherif Assef
KPMG
New York

Anthony Barbera
Charles River Associates
Washington DC

Richard Barrett
PwC
Washington DC

Brian C Becker
Precision Economics
Washington DC

Mary C Bennett
Baker McKenzie
Washington DC

Henry J Birnkrant
Alston & Bird
Washington DC



Shannon Blankenship
Deloitte Tax LLP
1601 Wewatta Street, Suite 400
Denver, CO 80202-6479
US
Tel: (1) 303 3124778
Email: sblankenship@deloitte.com
Website: www.deloitte.com

Stephen Blough
KPMG
Washington DC

Kara T Boatman
KPMG
Santa Clara

William E Bonano
Pillsbury Winthrop Shaw Pittman
San Francisco

Kim Marie Boylan
White & Case
Washington DC

Mark Bronson
Duff & Phelps
Boston

Kevin Burke
EY
Boston

Jay Camillo
EY
Atlanta

Mark Camp
EY
Houston

David J Canale
EY
Washington DC

Purvez F Captain
EY
Houston

Nathaniel Carden
Skadden Arps Slate Meagher & Flom
Chicago

Jorge E Castellón
PwC
Chicago

Clark Chandler
Valentiam Group
Washington DC

C Cabell Chinnis
Mayer Brown
Palo Alto

Kenneth Christman Jr
EY
Gaithersburg



Kerwin Chung
Deloitte Tax LLP
555 12th St Nw Ste 400
Washington, DC 20004-1207
US
Tel: (1) 202 8793108
Email: kechung@deloitte.com
Website: www.deloitte.com

Kenneth B Clark
Fenwick & West
Mountain View

[See bio](#)

Brian J Cody
KPMG
Chicago

Ward Connolly
PwC
San Jose

Rebel Curd
Charles River Associates
Pleasanton

Anthony Curtis
PwC
New York



Kaoru Dahm
Deloitte Tax LLP
7900 Tysons One Place Ste 800,
McLean, VA 22102-5971
US
Tel: (1) 202 3785274
Email: kdahm@deloitte.com
Website: www.deloitte.com



Jay Das
Deloitte Tax LLP
225 West Santa Clara Street
San Jose, CA 95113-2303
US
Tel: (1) 408 7044442
Email: abdas@deloitte.com
Website: www.deloitte.com

Michael Denning
EY
Irvine

Christopher Desmond
PwC
Chicago

Komal Dhall

KPMG
New York

**Jacqueline Doonan**

Deloitte Tax LLP
555 Mission Street
San Francisco, CA 94105-0920
US
Tel: (1) 415 7835651
Email: jdoonan@deloitte.com
Website: www.deloitte.com

Carol A Dunahoo

Baker McKenzie
Washington DC

David Ernick

PwC
Washington DC

Christopher Faiferlick

EY
Washington DC

Carolyn D Fanaroff

PwC
Washington DC

Sean Faulkner

Valentiam Group
Morristown

Rocco V Femia

Miller & Chevalier
Washington DC

Susan Fickling-Munge

Duff & Phelps
Chicago

Sean F Foley

KPMG
Santa Clara

David L Forst

Fenwick & West
Mountain View

See bio**Daniel J Frisch**

Horst Frisch
Washington DC

James P Fuller

Fenwick & West
Mountain View

See bio**Dr. Shanto Ghosh**

Deloitte Tax LLP
200 Berkeley Street
Boston, MA 02116
US
Tel: (1) 617 4373761
Email: shghosh@deloitte.com
Website: www.deloitte.com

Brian Gleicher

White & Case
Washington DC

Holly E Glenn

Baker McKenzie Consulting
Washington DC

Peter B Griffin

EY
Minneapolis

Timothy S Gunning

EY
New York

Bill Hahn

PwC
Detroit

Michael G Halloran

EY
New York

**Emiko Hashimoto**

Deloitte Tax LLP
30 Rockefeller Plaza
New York, NY 10112-0015
US
Tel: (1) 212 4366854
Email: emhashimoto@deloitte.com
Website: www.deloitte.com

**Dr. Aydin Hayri**

Deloitte Tax LLP
7900 Tysons One Place Ste 800
McLean, VA 22102-5971
US
Tel: (1) 202 8795328
Email: ahayri@deloitte.com
Website: www.deloitte.com

Thomas Herr

KPMG
Minneapolis

Harlow Higinbotham

NERA Economic Consulting
Chicago

Paige Hill

PwC
New York

Tobin Hopkins

EY
Chicago

Natalie Hoyer Keller

Kirkland & Ellis
Chicago

Michelle Johnson

Duff & Phelps
Chicago

Adam M Katz

PwC
New York

Kathrine A Kimball

Aptis Global
San Diego

Elizabeth King Rosenthal

Beecher Consulting
Jamaica Plain

See bio**Brian W Kittle**

Mayer Brown
New York

Thomas Kittle-Kamp

Mayer Brown
Chicago

Kevin Kiyan

Andersen Tax
Los Angeles

Jana S Lessne

KPMG
Washington DC

Marc M Levey

Baker McKenzie
New York

See bio**Patricia Gimbel Lewis**

Caplin & Drysdale
Washington DC

**Darrin Litsky**

Deloitte Tax LLP
30 Rockefeller Plaza
New York, NY 10112-0015
US
Tel: (1) 212 4365760
Email: dlitsky@deloitte.com
Website: www.deloitte.com

Barbara Mace

DLA Piper
New York

See bio**Mark Madrian**

Valentiam Group
Salt Lake City

John B Magee

Morgan Lewis & Bockius
Washington DC

Kash Mansori

WTP Advisors
Raleigh-Durham

Mark Martin

KPMG
Houston

Samuel M Maruca
Covington & Burling
Washington DC

Thomas R May
Baker McKenzie
New York

Patrick McColgan
Duff & Phelps
Washington DC



Dr. Peter P Meenan
Deloitte Tax LLP
191 Peachtree St Ste 2000
Atlanta, GA 30303-1749
US
Tel: (1) 404 2201354
Email: pmeenand@deloitte.com
Website: www.deloitte.com

Amparo Mercader
PwC
Washington DC

Victor H Miesel See bio
MAZARS
New York

Benjamin Miller See bio
Bennett Thrasher
Atlanta



Ella Mimo
Deloitte Tax LLP
111 S. Wacker Drive
Chicago, IL 60606-4301
US
Tel: (1) 312 4869402
Email: emimo@deloitte.com
Website: www.deloitte.com

Molly Minnear
KPMG
Philadelphia



Dr. Arindam Mitra
Deloitte Tax LLP
555 12th St Nw Ste 400
Washington, DC 20004-1207
US
Tel: (1) 202 8795670
Email: amitra@deloitte.com
Website: www.deloitte.com

W Joe Murphy
PwC
Washington DC



Mark Nehoray
Deloitte Tax LLP
555 West 5th St. Suite 2700
Los Angeles, CA 90013-1010
US
Tel: (1) 213 6884104
Email: mnehoray@deloitte.com
Website: www.deloitte.com



Boris Nemirov
Deloitte Tax LLP
30 Rockefeller Plaza
New York, NY 10112-0015
US
Tel: (1) 212 4363351
Email: bnemirov@deloitte.com
Website: www.deloitte.com

Larissa Neumann See bio
Fenwick & West
Mountain View

T Scott Newlon
Horst Frisch
Washington DC

Kathryn O'Brien
PwC
Washington DC

Jason M Osborn
Mayer Brown
Washington DC



Eva Parenti
Deloitte Tax LLP
111 S. Wacker Drive
Chicago, IL 60606-4301
US
Tel: (1) 312 4862292
Email: eparenti@deloitte.com
Website: www.deloitte.com

Michael F Patton See bio
DLA Piper
Los Angeles

Matias L Pedevilla
PwC
Miami

Horacio Peña
PwC
New York



Philippe G Penelle
Deloitte Tax LLP
555 12th St Nw Ste 400
Washington, DC 20004-1207
US
Tel: (1) 202 2202601
Email: ppenelle@deloitte.com
Website: www.deloitte.com

Dan Peters
Valentim Group
Morristown

John M Peterson Jr
Baker McKenzie
Palo Alto

Katherine Pinzón-Romero
EY
Houston



Robert W Plunkett Jr
Deloitte Tax LLP
30 Rockefeller Plaza
New York, NY 10112-0015
US
Tel: (1) 212 4365261
Email: rplunkett@deloitte.com
Website: www.deloitte.com

Nick Raby
PwC
Houston

Salim R Rahim
Baker McKenzie
Washington DC



Keith Reams
Deloitte Tax LLP
555 12th St Nw Ste 400
Washington, DC 20004-1207
US
Tel: (1) 202 2202623
Email: kreams@deloitte.com
Website: www.deloitte.com

Tim Reichert See bio
Economics Partners
Denver



Kristine Riisberg
Deloitte Tax LLP
30 Rockefeller Plaza
New York, NY 10112-0015
US
Tel: (1) 212 4367917
Email: kriisberg@deloitte.com
Website: www.deloitte.com

Ricardo Rosero
BaseFirma
Miami

Guy Sanschagrin See bio
WTP Advisors
Minneapolis

Mark Schuette
BDO
Atlanta

Richard Sciacca
Bates White
Washington DC

Rema Serafi
KPMG
New York

Craig A Sharon
EY
Washington DC

Stanley Sherwood See bio
Sherwood Associates
New York

Moiz Shirazi

Baker McKenzie Consulting
Chicago

Richard L Slowinski**See bio**

Baker McKenzie
Washington DC

Sanford W Stark

Morgan Lewis & Bockius
Washington DC

Scott M Stewart

Mayer Brown
Chicago

David Swenson

PwC
Washington DC

David Talakoub

Valentiam Group
Morristown

Mary K Thomas

Weaver
San Antonio

Gene Tien

Baker McKenzie Consulting
Palo Alto

Jessica W Tien

DLA Piper
East Palo Alto

**Rahul Tomar**

Deloitte Tax LLP
1700 Market St
Philadelphia, PA 19103-3984
US
Tel: (1) 215 2828946
Email: rahultomar@deloitte.com
Website: www.deloitte.com

Brian Trauman

KPMG
New York

Steven S Tseng

PwC
New York

Perry Urken**See bio**

Economics Partners
Washington DC

Theodor J van Stepoudt

Reed Smith
New York

Jared Walls

Valentiam Group
Morristown

Colleen Warner

EY
Chicago

A Duane Webber

Baker McKenzie
Washington DC

Simon Webber

Duff & Phelps
East Palo Alto

Jill Weise

Duff & Phelps
Miami

**Dr. John M Wells**

Deloitte Tax LLP
2200 Ross Ave Ste 1600
Dallas, TX 75201-6703
US
Tel: (1) 214 8407558
Email: johnwells@deloitte.com
Website: www.deloitte.com

Anne A Welsh

EY
Seattle

E Miller Williams Jr

EY
Atlanta

Joel V Williamson

Mayer Brown
Chicago

Steven Wrappe

Grant Thornton
Washington DC

**Bill Yohana**

Deloitte Tax LLP
30 Rockefeller Plaza
New York, NY 10112-0015
US
Tel: (1) 212 4365578
Email: byohana@deloitte.com
Website: www.deloitte.com

**Peter S Yoo**

Deloitte Tax LLP
50 S 6th St. Ste. 2800
Minneapolis, MN 55402
US
Tel: (1) 612 3974360
Email: pyoo@deloitte.com
Website: www.deloitte.com

Russell (Russ) R Young

Baker McKenzie
Chicago

**Dr. Firas Zebian**

Deloitte Tax LLP
1111 Bagby St. Ste 4500
Houston, TX 77002-2591
US
Tel: (1) 713 9824633
Email: fzebian@deloitte.com
Website: www.deloitte.com

Thomas M Zollo

KPMG
Chicago

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