

GHANA REVENUE AUTHORITY

GHEITI WORKSHOP ON TRANSFER PRICING
RISK IN THE EXTRACTIVE SECTOR

DATE: 21-23 OCTOBER AT FOREST HOTEL
DODOWA.

TOPIC

TRANSFER PRICING PROVISIONS UNDER INCOME
TAX LAW AND REGULATIONS(2012)

CHALLENGES TO IMPLEMENTATION AND
ENFORCEMENT OF TRANSFER PRICING
LEGISLATION IN GHANA'S EXTRACTIVE SECTOR.

BY : Edward A. Gyambrah

(Acting Deputy Commissioner Policy and
Programmes- DTRD)

OUTLINE

- INTRODUCTION
- ARM'S LENGTH PRINCIPLE
 - Why the arm's length
 - How to achieve the arm's length price
- Other information
- Challenges
- Conclusion

INTRODUCTION

- Governments all over the world are clamping down on tax evasion as they battle to raise the required tax revenue for national development. The increasing globalization has made it easier for corporate bodies to hold and manage their activities in a way that a greater proportion of their income is not taxed and those that are tax are at a very low rate. This phenomenon is not peculiar to the third world countries such as Ghana but also applies to the developed economies.

- In the Google tax tussle with United Kingdom Revenue authority (HMRC) it came out that the company paid only \$16million as taxes for \$18billion revenue for the period 2006 to 2011 representing 0.09%. The company's defense that its sales of advertising space to UK clients take place in Ireland was found to be unconvincing by the Public Accounts Committee Chaired by Rt. Hon Margret Hodge.
- It has been recommended that Google establishes its corporate structure to ensure that they pay taxes where it generates profit.

- Tax authorities are working harder than before to reduce perceived shortfall in tax revenue. The clampdown has seen a lot of reforms in the general anti- avoidance rules in many jurisdictions and also increase in international cooperation between tax authorities in different countries.

- Anti-avoidance rules have been in the tax statute books of Ghana for some time.
- Between 1975 and 2000 there was a provision to deal with “artificial transactions”. These were transactions not conducted at arm’s length with Associated persons.
- From 2001, three anti- avoidance provisions namely Income Splitting, Transfer Pricing and Thin Capitalization were included in the income tax law Internal Revenue Act 2000, Act 592, Sections 69 to 71.

- Section 31 of the Income Tax Act 2015 Act 896 provides that arrangement between persons who are in controlled relationship should be done in accordance with the arm's length standard.

- In addition General Anti- avoidance Rule is also included in the Tax laws to empower the Commissioner-General to re-characterize or disregard an arrangement or part of an arrangement that is entered into or carried out as part of a tax avoidance scheme which is, fictitious or does not have a substantial economic effect, or the form of which does not reflect its substance.

- The transfer pricing provisions did not have any regulations to guide companies in the determination of arm's length price and therefore GRA were unable to administer the provisions.
- It is at this background that Ghana passed Transfer Pricing Regulations (L.I 2188) in the last quarter of 2012 to assist businesses to determine an arm's length price.

The arm's length principle

Article 9 (1) of OECD Tax Convention model states that:

- “If **conditions made or imposed** between **associated enterprises** in their **commercial or financial relations** differ from those which would have been made between **independent enterprises**, then profits that, but for those conditions, would have accrued to one of the enterprises may be included in the profits of that enterprise and taxed”

- Article 9(1) states the arm's length principle.
- Taxable profit is to be computed on the basis that transactions between related parties take place on the same terms as those between unrelated parties.

WHY THE ARM'S LENGTH

The use of the arm's length will ensure;

- Consistent basis for profit allocation.
- Help prevent taxpayers from suffering economic double taxation- that is taxation of the same profit by more than one tax administration.
- It puts associated and independent enterprises on a more equal footing for tax purposes- it avoids the creation of tax advantages or disadvantages that would otherwise distort the relative competitive positions of either type of entity

- The arm's length principle allows GRA to make an adjustment to the profits of a taxpayer where the terms of the transactions between associated enterprises differ from terms that would be agreed between independent enterprise in a similar circumstances.

How to achieve the arm's length principle

- To achieve the arm's length principle the Regulation has outlined the following for taxpayers who transact business with persons in a controlled relationship to comply. These include:

- 1. To conduct comparability analysis taken into account the factors stated in the Regulations.**
- To be comparable means that “none of the differences (if any) between the situations being compared could materially affect the condition being examined in the methodology (price or margin), or that reasonably accurate adjustments can be made to eliminate the effect of any such differences”

Factors used in determining comparability

- Characteristics of property
- Functional analysis
- Contractual terms
- Economic circumstances
- Business strategies

2. How services between persons who are in controlled relationship should be evaluated.

There are three main issues that must be determined when analyzing intra-group services:

- whether intra-group services have been rendered and,
- the service provides economic or commercial value to the recipient of the service and
- an independent person will pay the same for same service.

TP Methods

3. Choose the method that is appropriate to a particular transaction.

The methods approved in the Regulations are the :

- Comparable uncontrolled price (CUP)
- Resale price
- Cost-plus
- Transactional profit split
- Transactional net margin.

- A taxpayer could be allowed to use a method other than what is stated above if the Commissioner-General is of the opinion that the arm's length price could not be determined by using any of the methods.

The selection of a method should include;

- Strengths and weaknesses of each method
- The nature of the controlled transaction
- The availability of reliable information needed to apply the selected method
- The degree of comparability between the controlled and uncontrolled transactions

information and Documentation

4. Documentations requirement to satisfy the arm's length principle.

A person who engages in a transaction with another person in a controlled relationship shall maintain contemporaneous documentation.

- Adequate documentation will make it easier for a review of transfer pricing analysis and will contribute to:
- avoiding a dispute and
- timely resolution of any transfer pricing disputes that may arise.

Adequate documentation is characterised by:

- (i) the sufficiency of the details demonstrating compliance with the arm's length principle, and
- (ii) the timely manner in which such details are prepared and submitted upon request.

Other information

To achieve consistency in the administration of the Regulation,

- Practice Notes has also been prepared to provide taxpayers with;
 - Guidelines about the procedure to be followed in the determination of the arm's length prices.
 - The Commissioner-General's views on documentation and other practical issues that are relevant in setting and reviewing transfer pricing transactions.
- In addition to this a return has also been designed for taxpayers who engage in a transaction with persons in a controlled relationship during the year to complete.

- Companies in the extractive are required to completed their documentation and make all adjustment where necessary and report same on their annual Transfer Pricing Returns.
- Adjustments made by taxpayer will not attract any penalty but
- if the adjustment is made after review by the GRA then the necessary sanctions will be applied.

Challenges

It is envisaged that the TP Regulation will have some challenges on businesses, these include;

- Capacity to deal with the documentation requirement in the regulation.
- How to conduct comparability analysis especially when there are no data bases.
- Expeditious resolution of tax disputes when there are no specialized tax courts in Ghana.

- Increase and prolong audits will negatively affect the business processes.
- The financial cost implication for tax advisors.
- It must be noted that these challenges are not peculiar to businesses alone but also to GRA.

CONCLUSION

- For companies in the extractive sector this constitutes an increase in tax risk and can lead to reputational damage.
- Companies are therefore required to conduct their affairs in a transparent manner to erase the perception that companies in the extractive sector engaged in excessive tax avoidance schemes.

- The Transfer Pricing Regulations are not laws to increase taxes for companies but rather they are laws for companies to conduct their tax affairs in a transparent manner.
- Taxpayers need to think about how they handle their tax affairs and note that arrangement that were seen as routine may now attract attention of tax authorities.
- Companies need to review their tax planning strategies to ensure that taxes are paid in the jurisdiction the revenues were derived.

- tax advisors for companies in the extractive sector also have a role to play in the management of transfer pricing risk.
- Tax advisors are seen by the public as part of the problem when it comes to tax avoidance. Advisors are therefore required to focus the structure of their clients on the economic substance and try to avoid artificial structures which serve only to avoid tax. Advisors are to ensure transparency in their clients' tax structures and payments.

- Thank you