

## Chapter B.8

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**B.8.1.6.** It is important that drafters of transfer pricing legislation take into account the outcomes of the BEPS Project, especially regarding Actions 8, 9, 10 and 13 (8 – Intangibles; 9 - Risks and capital; 10 - Other high-risk transactions, and 13 - Transfer pricing documentation).<sup>32</sup> These issues tend to have a more harmonized legal approach in a post-BEPS Project

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**B.8.2.4.2.** The second legislative approach stipulates that, based on the self-assessment system, any foreign affiliated transaction shall be deemed to have been conducted on an arm's length basis for tax purposes if that transaction is not in fact conducted at arm's length.<sup>34</sup> In other words, a non-arm's length transaction is reconstructed as an arm's length transaction for the purposes of calculating taxable income and taxing such income. This legislative approach effectively requires taxpayers to conduct their initial tax accounting based on the arm's length principle.

**B.8.2.5.** A country's choice between the two above alternatives will depend on the basic principles of domestic tax law in that country. This will, for example, include issues such as the form of anti-avoidance legislation and where to place the burden of proof. However, the choice of styles of domestic legislation has made no substantial difference in the legal procedure of structuring the arm's length principle. The manner in which arm's length methodologies are stipulated in each country's legislation differs to some extent, as described below.

**B.8.2.6.** Depending on the legal system of the country concerned, tax laws may set out in great detail issues such as the definition of related parties, transfer pricing methodologies, documentation, penalties and the procedures for Advance Pricing Agreements/Arrangements (APAs). Other countries might opt only to identify the basic structure of tax base allocation among the related parties under the arm's length principle. In the latter case, detailed practical guidance should normally be available in subordinate legal materials, such as regulations, administrative rules and public notices. Therefore, even if such matters are defined in great detail in the primary tax law, there is a need to provide clear operational guidance. Users of this Manual should consider the level of guidance available in their countries, and determine if further detail is needed. e



rather than taxation laws. Many countries have followed the OECD Transfer Pricing Guidelines in developing their domestic legislative frameworks, and have preferred the traditional transaction methods over transactional profit methods as a means of establishing whether a transfer price was at arms' length.

requirements were very basic under Japanese domestic legislation at that time; examiners had to exercise their ordinary domestic investigation powers to inquire from taxpayers about international related party transactions. They soon identified that not all relevant information was necessarily kept by the Japanese unit. Japan therefore started a process of adjusting documentation requirements to reflect the actual international business practice of multinational groups by ensuring effective compliance but also taking into consideration the taxpayers' compliance burden. See Chapter C.2 on documentation for specific country practices.

#### **B.8.6. Burden of Proof**

**B.8.6.1.** The burden of proof in tax litigation refers to

of proof that: (1) an amount, transaction, event or item is exempt or otherwise not taxable, (2) an amount or item is deductible or may be set-off, (3) an amount qualifies as a reduction of tax payable, or (4) a valuation is correct, rests with the taxpayer.





recognized as necessary for computing the arm's length price, the taxpayer does not provide those materials in a timely fashion. The meaning of the terms "relevant materials" and "in a timely fashion" has caused some disputes, when taxpayers have insisted that they have performed all their minimum obligations on the disclosure of basic information to support their methodologies. The focal point of discussions has been whether the burden of proof is on the tax administration or on taxpayers. The question of whether presumptive taxation has been properly applied will determine whether the burden of proof has shifted from

can provide predictability and ease of administration of the transfer pricing regime by a simplified method of establishing taxable profit. Supporters of this type of rule point to the advantages of simplifying compliance, lowering compliance costs and providing certainty for taxpayers, as well as administrative simplicity for tax a

Republic of Korea represents a relevant example. Before joining the OECD the Republic of Korea's national tax authority, the National Tax Service (NTS), employed a so-called "standard offer-commission rate of 0.275% (1/360) for the period from 1995 to 2005. The rate was 0.3% (1/333) from 2006 to 2010 and 0.25% (1/400) from 2011 onwards.

cases depending on all the facts and circumstances.

The OECD Transfer Pricing Guidelines strongly endorse APAs as a supplement to the traditional administrative, judicial and treaty mechanisms for resolving transfer pricing issues.<sup>45</sup>

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relation to past taxation. The roll-back system for APAs is accepted by many countries, where the tax authority decides that the agreed transfer pricing method is also appropriate for past open years, considering all the facts and circumstances. Thus, dispute resolution based upon the MAP provision in tax treaties (usually based upon Article 25 of either the UN or OECD Model) has become one of the most important procedures for taxpayers.

**B.8.11.2.** Article 25 of the OECD Model Tax Convention was revised in 2008 to introduce the possibility of arbitration of unresolved MAP issues. In addition to guidance on how to reach a conclusion when dealing with these issues, it ensures that the Competent Authorities seek to resolve issues within a reasonable period of time, something which has not always happened in practice. Some issues for developing countries