- SARS should prioritise updating Practice Note 7 in line with the OECD transfer pricing documentation guidelines and provide taxpayers with much more specific guidance on what information is actually required;
- preparation of a local file, a master file and country by country (CbC) reporting should be a compulsory requirement for South African groups with turnover in excess of R1 billion;
- a strengthening of the confidentiality provisions of the Tax Administration Act;
- SARS must balance requests for documentation against the expected cost and compliance burden to the taxpayer of creating it;
- SARS should clarify its expectations with respect to the timing of preparation and filing of the master file, local file and CbC Report;
- it is not necessary for SARS to provide additional requirements with respect to the general retention of documents as this is already

In conclusion, after review and evaluation, SARS has implemented certain of the DTC recommendations relating to documentation, tax returns and building capacity in the transfer pricing division.

D.5.4. The G20/OECD BEPS Project

South Africa is not a member of the OECD but has the status of being a participant in the Committee on Fiscal Affairs. However, as part of the G20/OECD BEPS Project, South Africa was an associate on equal footing alongside OECD countries.

For South Africa, the BEPS Project was a welcome initiative and created a platform for many developing countries to bring to the fore their challenges with the positive prospectt w20/tions.

One of the key challenges in any transfer pricing analysis is access to information. This is a widespread problem not unique to South Africa and indeed was also acknowledged in the BEPS project. Over the past two years SARS has been challenged on a number of fronts regarding its information requests including, *inter alia*:

- SARS's right to certain categories of information. Taxpayers have argued for the non-submission of information on the basis that such information is commercially sensitive, irrelevant and out of scope, not accessible, or legally privileged;
- Taxpayers requesting numerous extensions of time within which to comply with a SARS information request to the point that the statute of limitation runs out for SARS or that it becomes almost impossible for SARS to review such information before the statute of limitations runs out; and
- Taxpayers have challenged SARS's powers to interview persons and personnel that may have information relevant to the transaction under audit.

To address these challenges, the following legislative amendments have been effected to the Tax Administration Act:

a)

audit. Important to this amendment is the existing requirement in terms of section 49 of the TAA, that allows SARS to request such persons to be interviewed under oath or solemn declaration; and

d) A record keeping notice in terms of section 29 of the Tax Administration Act was issued on [?? October 2016[1] - *to be updated when final notice is published*], requiring specified persons to keep and retain the records, books of account or documents prescribed in the schedule to the notice. That public notice sets out additional record-keeping requirements for transfer pricing transactions.

The obvious problem this gives rise to has no simple or definitive solution. Instituting comparability adjustments to account for geographical differences (for example, market, economic and political differences) in order to improve the degree of reliability of the comparable data, is often extremely complex and can in some instances have the reverse effect, i.e. where the comparable data is no longer comparable.

In practice, SARS has attempted to make comparability adjustments, for example country risk adjustments based on publicly available country risk ratings and government bond rates (sometimes referred to as the risk free rate). However, these have been applied with caution and in specific circumstances.

Whilst South Africa may be worse off than some countries for not having any domestic comparable data, many other countries are likely to be in a similar position. As

As a result of an increase in globalisation, in order to achieve economies of scale and optimise efficiencies, it is becoming commonplace for multinationals to centralise the provision of certain services in a single entity, generally in a tax favourable jurisdiction.

are frequently classified as limited risk distributors or limited risk manufacturers when in actual fact they assume much more than just limited risk. Furthermore, there are many instances where unique dynamics exist within the South African market that enable South African subsidiaries to realise higher profits than their related party counterparts in other parts of the world or than is evidenced by comparable data obtained from foreign databases. For instance, the South African pharmaceutical and manufacturing industries are still unsaturated and offer ample opportunities for multinational companies to increase their profits. The increased participation and spending power of the middle class segment in the economy also offers a new market opportunity for certain industries.

Building on the practice followed in India and China, SARS is currently considering its approach to location savings, location specific advantages and market premiums within certain industries and those factors will be addressed when conducting audits.

D.5.

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royalties). Furthermore, if such intangible property were ever sold outside of the group, the South African entity would have no participation in any profits that may be realised.

In this regard the SARS will be applying the guidance arising from Action 8 of the BEPS Project.

D.5.10. Safe harbours and Advance Pricing Agreements (APAs)

In SARS the view is held that the use of safe harbours and APAs should be considered with caution. For developing countries the introduction of safe harbours is perhaps best considered when the tax authorities have established a high degree of understanding of certain transaction types with low risk. Most often, the benefits of safe harbours are considered to include ease of audit administration, without due consideration to the resultant quantum of the possible tax leakage that can arise from the application of safe harbours. For this reason, it is important that countries give careful consideration to what they will be sanctioning when introducing safe harbours.

With respect to an APA program, despite its obvious benefits such as co-operative compliance and resolution, there are also significant pitfalls. For any tax regime considering an APA regime there must be a balance between providing certainty to taxpayers and ensuring effective administration and tax collehf,oM[(l)2.6 6.5 (gi)2.6 (m)t1E

have transpired had they been independent can be difficult and as stated, finding reliable comparables and making comparability adjustments is easier said than done.

For now there is no disagreement that the arm's length standard is the most workable solution despite some of its limitations which can be overcome. In the South African context, whilst taxpayers may seek to exploit the limitations of the arm's length principle to their advantage, SARS remains undeterred. The arm's length principle does not ignore basic principles such as the perspective of the prudent business man, commercial rationale and good business practice. It is with this understanding that SARS applies the arm's length principle.