Transfer Pricing

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GETTING THE DEAL THROUGH

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Japan

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Overview

1 Identify the principal transfer pricing legislation.

The principal Japanese transfer pricing legislation is article 66-4 of the Special Tax Measures Law (Law) and article 39-12 of the Enforcement Order thereof (Order). For a taxpayer who files a consolidated tax return, article 68-88 of the Law and article 39-112 of the Order are applicable. While they are not legislation, the National Tax Agency of Japan (NTA) published detailed interpretations of these statutory provisions in Chapter 12 of the Basic Circular of the Law (Circular) and in the Commissioner's Directive on the Operation of Transfer Pricing (Directive), under which the transfer pricing legislation is enforced.

2 Which central government agency has primary responsibility for enforcing the transfer pricing rules?

The NTA has primary responsibility for enforcing the transfer pricing rules.

3 What is the role of the OECD Transfer Pricing Guidelines?

The Law and Order spell out a set of transfer pricing methodologies, which basically follow those prescribed in the OECD Transfer Pricing Guidelines (OECD Guidelines). Specifically, the Japanese transfer pricing rules were overhauled in 2011 in response to the amendments to the OECD Guidelines in 2010, confirming the prevalence of the transactional net margin method (TNMM) as well as introducing the 'most appropriate method' rule and the 'range' concept in line with the OECD Guidelines. The 2013 amendment to the Law has adopted the Berry ratios as another net profit indicator in line with the OECD Guidelines. As for enforcement, the Directive sets forth that a tax examination or advance pricing agreement (APA) review will be conducted in an appropriate manner by referring to the OECD Guidelines as necessary. In addition, the OECD Guidelines have played an important role in the interpretation of the transfer pricing rules in cases where the language of the Law or Order is ambiguous.

4 To what types of transactions do the transfer pricing rules apply?

The transfer pricing rules apply to any transaction between a Japanese corporation and its 'foreign-affiliated corporation' (as defined in the Law), including a foreign subsidiary. The 'foreign-affiliated corporation' is defined, in essence, as a foreign corporation controlling, controlled by or under common control with a Japanese corporation, as measured by 50 per cent or more direct or indirect ownership, or by effective control through officers, business dependency or finance.

5 Do the relevant transfer pricing authorities adhere to the arm's-length principle?

The NTA adheres to the arm's-length principle as codified in the transfer pricing rules.

Pricing methods

6 What transfer pricing methods are acceptable?

The following are acceptable methods applicable to tangible property transactions including inventory transactions:

- the comparable uncontrolled price (CUP) method;
- the resale price method;
- the cost-plus method;
- the TNMM;
- the quasi-CUP, resale price, cost-plus method or TNMM; and
- the profit split method.

Methods equivalent to those listed above are acceptable methods applicable to transactions other than tangible transactions, including intangible property transactions, services transactions, and loans or advances. Specifically, for intangible property transactions, the TNMM is applicable if only one party contributes creation, maintenance or development of intangible property, and the profit split method (especially the residual profit split method) is applicable if both parties so contribute. For service transactions, the cost-plus is often used if it involves no significant intangible property. For loans or advances, the quasi-CUP method is often applicable by referring to the terms and conditions of similar transactions under similar conditions.

7 Are cost-sharing arrangements permitted? Describe the acceptable cost-sharing pricing methods.

Cost-sharing arrangements are permitted under the Japanese transfer pricing rules. The basic principle of acceptable cost-sharing is that each participant (who may directly enjoy the benefits of the results of, amongst other things, R&D activities) must bear the expenses in proportion to the ratio of its anticipated benefits to the total anticipated benefits. The appropriate buy-in payment must be made based on an appraisal of the fair value of the intangible at that time. If there is a significant difference between the original anticipated benefits ratio and the ratio of increased profits or decreased costs that are realised in fact, it needs to be examined whether the anticipated benefits ratio was appropriate.

8 What are the rules for selecting a transfer pricing method?

The most appropriate method rule, which is equivalent to the best-method rule, has been employed.

Transfer pricing rules identify the following factors as relevant in selecting the most appropriate method:

- the respective strengths and weaknesses of the transfer pricing methods codified in the rules;
- the appropriateness of the transfer pricing method considered in view of the nature of the controlled transaction at issue, determined in particular through a functional analysis;
- the availability of information needed to apply the transfer pricing method; and
- the degree of comparability between the controlled transaction at issue and comparable transactions (including the reliability of comparability adjustments).

9 Can a taxpayer make transfer pricing adjustments?

Under transfer pricing rules, taxpayers are deemed to conduct any affiliated transaction at an arm's-length price for corporate income tax purposes. Accordingly, taxpayers are required to make transfer pricing adjustments in the tax returns to reflect the arm's-length prices if actual prices are different from the arm's-length prices. However, in practice, since it is difficult for taxpayers to know the accurate arm's-length prices in many cases, apart from the context of APAs, when any amounts different from the actual prices (which would ultimately be considered by the tax authority to be the

arm's-length prices) for transactions between a Japanese company and its foreign-affiliated corporation are paid by or to the Japanese company, the difference might be treated as non-deductible donation or taxable amount.

10 Are special 'safe harbour' methods available for certain types of related-party transactions? What are these methods and what types of transactions do they apply to?

No special 'safe harbour' methods are available.

Disclosures and documentation

11 Does the tax authority require taxpayers to submit transfer pricing documentation? What are the consequences for failing to submit documentation?

Generally, yes. The Japanese transfer pricing rules introduced the Japanese version of documentation requirements in 2010. Under the Japanese version of the documentation requirements, taxpayers must maintain certain documents and records to show that transfer pricing is consistent with the statutory arm's-length standard. However, the Japanese version of the documentation requirement does not mandate contemporaneous documentation (see question 13). The Law does not provide any specific sanctions for a taxpayer's failure to submit the appropriate documentation, although it will lead to the presumptive taxation by the tax authority (see question 12).

12 Other than complying with mandatory documentation requirements, describe any additional benefits of preparing transfer pricing documentation.

Preparing transfer pricing documentation will have the effect of avoiding 'presumptive taxation' as allowed under the Law. The Law does not provide any specific sanctions for a taxpayer's failure to submit the appropriate documentation. However, if a taxpayer fails to do so during the tax audit (see question 13), the Law grants the tax authority the power to presumptively decide an arm's-length price, which is calculated under a standard looser than the usual transfer pricing methods and based on third party transactions engaged by secret comparables identified by the tax authority.

13 When must a taxpayer prepare and submit transfer pricing documentation to comply with mandatory documentation requirements or obtain additional benefits?

Taxpayers have to prepare transfer pricing documentation and present it to the tax authorities during a tax audit 'without delay', but do not necessarily have to produce it contemporaneously with the filing of the relevant tax return. The transfer pricing rules set forth that whether the documentation is presented 'without delay' is determined by considering the time usually necessary to present or prepare the relevant documentation, and provides for no specific time or safe harbour.

14 What content must be included in the transfer pricing documentation? Will the tax authority accept documentation prepared on a global or regional basis or must it conform to local rules? What are the acceptable languages for the transfer pricing documentation?

The Japanese documentation requires a taxpayer to set forth, among other things, a detailed description of the relevant controlled transaction, the adopted transfer pricing method and the reasons why the taxpayer regards the adopted method as the most appropriate. The key element of the documentation is functional analysis, which should describe the roles of each entity of a group, such as research and development, manufacturing or distribution. Once the functions of each entity are defined, how each entity serves to originate income should be substantiated. The documentation should not only be factually true, but also consistent with the adopted transfer pricing method. Close collaboration between a taxpayer's personnel and a transfer pricing professional is of vital importance.

The documentation must conform to the Japanese transfer pricing rules. In practice, taxpayers must coordinate the documentations for each jurisdiction in order to conform to the rules of each jurisdiction and make them mutually consistent on a global basis.

The language for the documentation to be presented to the Japanese tax authority must be Japanese.

As per the OECD project on base erosion and profit shifting, the Japanese government is expected to introduce new legislation or regulations in which it adopts the three-tiered documentation approach consisting of a country-by-country report, a master file and a local file, which could be applicable as early as the tax year commencing on or after 1 April 2016. See 'Update and trends'.

Adjustments and settlement

15 How long does the authority have to review a transfer pricing filing?

The tax authority's corrections, if any, based on the Japanese transfer pricing rules must be made within six years from the deadline of the filing of the relevant tax return. Within such period, the tax authority may review a transfer pricing filing without any other timing limitations. Generally speaking, the transfer pricing audit takes a significant amount of time, such as one year and even two or three years in some cases.

16 If the tax authority proposes a transfer pricing adjustment, what initial settlement options are available to the taxpayer?

Under Japanese law, the tax authority is not supposed to make a settlement with taxpayers. However, in practice, the tax authority may suggest that a taxpayer voluntarily correct the original tax return to make the tax amount what the tax authority indicates. If the taxpayer agrees with the tax authority and makes a corrective filing, it will effectively close the case. Although this is not a settlement, it may work in a similar manner.

17 If the tax authority asserts a final transfer pricing adjustment, what options does the taxpayer have to dispute the adjustment?

Broadly speaking, the taxpayer has two options. The first is to seek administrative remedies, followed by judicial reviews (which can be initiated before the final resolution of the administrative remedies under certain conditions). The second is to seek competent authority relief from double taxation if a relevant tax treaty so provides. Generally speaking, with respect to a transaction involving the country where competent authority relief is effective (see question 22), taxpayers tend to seek it. However, with respect to a transaction involving a country where competent authority relief is not effective (even if a relevant treaty allows such relief) or not available in the first place, administrative remedies and judicial reviews will be the only option that the taxpayer may seek.

Relief from double taxation

18 Does the country have a comprehensive income tax treaty network? Do these treaties have effective mutual agreement procedures?

Yes. Japan has entered into 53 tax treaties for the avoidance of double taxation (applicable to 64 jurisdictions); and 10 tax information exchange agreements (as of 1 June 2015). These tax treaties for the avoidance of double taxation cover major trading partners with Japan, and most of them have mutual agreement procedures. Countries that do not have a tax treaty for the avoidance of double taxation with Japan include some European countries (such as Iceland, Greece and Slovenia), some Central and South American countries (such as Argentina and Chile) and some Caribbean nations (such as the Cayman Islands, the Bahamas and Bermuda), while some of them have an agreement with Japan for tax information exchange or mutual administrative assistance in tax matters.

19 How can a taxpayer request relief from double taxation under the mutual agreement procedure of a tax treaty? Are there published procedures?

The NTA has published procedures under which a taxpayer may request competent authority relief.

20 When may a taxpayer request relief from double taxation?

A majority of the tax treaties have a statutory limitation of two or three years running from the first notice of the relevant tax corrections. Unless the statutory limitation expires, a taxpayer may request competent authority relief when the correction results or the audit is likely to result in taxation not in accordance with the provisions of the applicable tax treaty. The taxpayers may make such requests when some prescribed conditions are met without the payment of the tax. It is not practical to seek competent authority relief after judicial resolution (because the tax authority cannot make a decision that is contrary to the judicial decision).

Update and trends

On the legislative side, in response to the OECD's project on base erosion and profit shifting (BEPS), the Japanese government is expected to introduce or amend the domestic tax laws in line with the recommendations or guidelines adopted under the BEPS project. Specifically, under Guidance on Transfer Pricing Documentation and Country-by-Country Reporting published on 16 September 2014, which contained revised standards for transfer pricing documentation and a template for country-by-country reporting of income, earnings, taxes paid and certain measures of economic activity, the Japanese government is expected to introduce new legislation to adopt the three-tiered documentation approach consisting of a country-by-country report, a master file and a local file, which could be applicable as early as the tax year commencing on or after 1 April 2016.

Enforcement, corrections or amendments on account of transfer pricing imposed or suggested by the Japanese tax authority numbered 222 and amounted to ¥97.4 billion in total in 2012, and 170 and ¥53.7 billion in 2013, representing a significant increase in number and a considerable decline in amount compared to 119 and ¥283.6 billion in 2005. This shows that the investigations are directed to a wider range of companies, encompassing not only large companies and but also small to medium-sized companies, while the amount involved in each case has become smaller, possibly due to the tax authority's more prudent approach.

Turning to the judicial side, the Japanese tax authority had tended to apply the residual profit split method to cases involving valuable intangibles, resulting in corrections being made to a huge amount of income. However, the courts have taken a stringent position in finding comparability between a tested party and comparables for the purpose of calculating routine contributions under the residual profit split method, which was shown in the recent Tokyo District Court decision dated 28 August 2014 which was further affirmed by the Tokyo High Court decision dated 13 May 2015, where Honda Motor Company Limited, a major Japanese automobile manufacturer, achieved cancellation of the correction of ¥25.4 billion in taxable income. In the decision, the court held illegal the tax authority's selection of comparables to the tested party (taxpayer's foreign affiliate), based on the finding that the tested party was doing business where the tax incentives were offered, specifically, in the Free Economic Zone of Manaus in Brazil, whereas the alleged comparables identified by the tax authority were located outside the zone. The decision is significant in indicating that market conditions (including governmental regulations and interventions) are material in comparability analysis.

21 Are there limitations on the type of relief that the competent authority will seek, both generally and in specific cases?

Although no specific type or method is promulgated in the rules or treaties, generally speaking, the competent authorities will negotiate so that one country will cancel a part of a correction and the other country will accept the correlative reduction in the tax return in order to avoid double taxation. Both countries appear to usually agree upon the applicable transfer pricing methods as well as the arm's-length prices, while they may sometimes agree only upon the 'arm's-length price' without explicitly agreeing upon the applicable transfer pricing method.

22 How effective is the competent authority in obtaining relief from double taxation?

The Japanese tax authority has received a number of requests for competent authority relief (including APAs) with OECD member countries. Particularly with Australia, Germany, Korea, the United Kingdom and the United States, most of the requests have been successfully resolved by agreements between both relevant governments. In addition, the Japanese government has had APAs with non-OECD member countries including China, Hong Kong, India, Singapore and Thailand, although with respect to competent authority relief with non-OECD member countries, precedents are relatively few (23 per cent of newly applied competent authority reliefs in 2013).

Advance pricing agreements

23 Does the country have an advance pricing agreement (APA) programme? Are unilateral, bilateral and multilateral APAs available?

Japan has an APA programme. Unilateral and bilateral APAs are available, and in practice, multilateral APAs are scarcely available.

24 Describe the process for obtaining an APA, including a brief description of the submission requirements and any applicable user fees.

A taxpayer must submit to the relevant regional tax bureau a proposed methodology to calculate the arm's-length price and relevant materials to support the proposed methodology, for review by the relevant section of the regional tax bureau. The taxpayer needs to pay no user fees for the application of an APA. In the case of a bilateral APA, the competent authority department of the NTA will also review the proposed methodology and then forward the same to the counter-party of the tax treaty for the consultation.

25 How long does it typically take to obtain a unilateral and a bilateral APA?

It is different depending on the case, but roughly speaking, it often takes approximately two years to obtain a bilateral APA. According to the NTA, it took 20.9 months on average for a bilateral APA in 2013, representing a decrease compared with the 29.6 months it took in 2012.

26 How many years can an APA cover prospectively? Are rollbacks available?

In practice, APAs often cover five years prospectively. Rollbacks are available.

27 What types of related-party transactions or issues can be covered by APAs?

In general, any types or issues of transactions with foreign-affiliated corporations can be covered by APAs.

28 Is the APA programme widely used?

The APA programme is widely used. According to the NTA's publicly available information, more than 100 bilateral APAs have been filed each year since 2006. Specifically, during the 2013 business year, the NTA received 197 competent authority relief or mutual agreement procedure cases, of which 152 were on bilateral or multilateral APAs that accounted for approximately 80 per cent of total competent authority relief cases.

29 Is the APA programme independent from the tax authority's examination function? Is it independent from the competent authority staff that handle other double tax cases?

The APA programme is independent from the tax authority's examination function, but not independent from the competent authority staff that handle other double tax cases.

30 What are the key advantages and disadvantages to obtaining an APA with the tax authority?

The key advantage to obtaining an APA with the tax authority is the avoidance of transfer pricing disputes in the future. The key disadvantages to obtaining an APA are that it is time-consuming and often costs a significant amount of money.

Special topics

31 Is the tax authority generally required to respect the form of related-party transactions as actually structured? In what circumstances can the tax authority disregard or recharacterise related-party transactions?

Generally, yes. However, the tax authority can conduct its own fact-finding in accordance with the substance of the transaction if the evidence and circumstances sufficiently substantiate it.

32 What are some of the important factors that the tax authority takes into account in selecting and evaluating comparables? In particular, does the tax authority require the use of country-specific comparable companies, or are comparables from several jurisdictions acceptable?

Under the selected transfer pricing method, Japanese transfer pricing rules take into account the following factors in selecting and evaluating comparables:

- categories of inventory, nature of services, etc;
- the functions performed by a seller or purchaser;
- the terms and conditions of a relevant contract;
- market conditions; and
- the business strategy of a seller or purchaser.

In respect of the jurisdictions, as a general rule, comparables should be located in the same jurisdiction as the tested party. However, if a sufficient number of comparables are not identified, the jurisdictional scope can be widened. For example, with respect to a tested party located in a certain Eastern European country, a set of Eastern European countries could be permissible if they are deemed to be within the same market and under similar economic conditions.

33 What is the tax authority's position and practice with respect to secret comparables? If secret comparables are ever used, what procedures are in place to allow a taxpayer to defend its own transfer pricing position against the tax authority's position based on secret comparables?

The Japanese tax authority is allowed by law to use secret comparables when a taxpayer fails to comply with the documentation requirement (see question 11). From a taxpayer's standpoint, preparing and presenting appropriate documentation without delay is the first and primary defence against the tax authority's potential use of secret comparables. When the Japanese tax authority uses secret comparables, it must explain to the taxpayer the conditions for selecting the relevant comparables and particulars of the relevant transactions, among others, in detail. Accordingly, the taxpayer may utilise such limited information to argue that the secret comparables are not appropriate. The taxpayer might also argue that such use of the secret comparables would make it very difficult for the taxpayer to make effective defence and thus it is illegal.

34 Are secondary transfer pricing adjustments required? What form do they take and what are their tax consequences? Are procedures available to obtain relief from the adverse tax consequences of certain secondary adjustments?

Generally, no. If a cross-border payment of interest or royalties is recalculated and decreased as a result of a transfer pricing correction, the transfer pricing correction has no effect on the underlying substantive transactions. Therefore, for example, even if a royalty payment from a Japanese licensee to its foreign-affiliated corporation as a licensor is decreased for Japanese transfer pricing purposes, it will not obligate the Japanese licensee to receive the difference back from its foreign-affiliated corporation (licensor), and the Japanese licensee is not eligible for a refund of any part of the withholding tax that was paid based on the original royalty amount notwithstanding the decreased amount of the royalty for the corporate income tax purposes. In addition to this, a reduced rate under a relevant tax treaty may not be available to the amount in excess of the arm's-length price, which will result in additional withholding tax. In the case that the Japanese licensee chooses to receive back the difference, under a certain Circular, provided that a certain report is filed with the relevant tax office, the amount which the Japanese licensee so receives back will not be subject to the Japanese income tax, while the analysis for the withholding tax set forth above will not be changed.

35 Are any categories of intercompany payments non-deductible?

Generally, no categories of expenses are denied deductibility solely because they are intercompany payments. However, the Japanese tax authority tends to scrutinise whether the subject transactions have substance and whether the amount of consideration is arm's-length in case of the intercompany payments, especially in case of service transactions, and such intercompany payments to foreign-affiliated corporations may be viewed by the tax authority as non-deductible donations.

Please note that the Japanese tax law has the thin capitalisation rules in which deductibility of interest expenses paid to foreign affiliates is denied when the taxpayer's ratio of debt to equity exceeds three to one subject to certain additional conditions. Japan also has the earnings stripping rules that deny the deductibility of interest expenses paid to affiliates that are disproportionate in relation to the payer corporation's before-interest income; specifically, deduction of a corporate taxpayer's net interest paid to its affiliates is limited to 50 per cent of the income with certain deductible or excluded items added back including, among others, subject net interest payments, depreciation expenses and dividends received from Japanese and non-Japanese subsidiaries.

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36 How are location savings and other location-specific attributes treated under the applicable transfer pricing rules? How are they treated by the tax authority in practice (if different)?

Japanese transfer pricing rules do not specifically provide for the treatment of location savings (which includes benefits derived from lower production costs and lower tax rates). In practice, the general view is that location savings should be taken into account in the selection of comparables as a factor of market conditions. As a general proposition, the Japanese court made clear in the *Honda* case that the market conditions surrounding comparables, including governmental regulations and interventions, must be similar to those for the tested party. See 'Update and trends'.

37 How are profits attributed to a branch or permanent establishment (PE)? Does the tax authority treat the branch or PE as a functionally separate enterprise and apply arm's-length principles? If not, what other approach is applied?

The 2014 Tax Reform amended Japanese tax law to make it consistent with new article 7 in the revised Model Tax Convention published by the OECD, thereby adopting the authorised OECD approach. The amendments will be applicable in the case of corporate taxpayers from the fiscal year beginning on 1 April 2016 and thereafter. Under the amendments, the income attributable to a PE will be calculated based on a functional analysis on an arm's-length basis, as if it were a separate and independent enterprise (which should be documented). This means that the Japanese branch of a foreign company needs to recognise income or loss from the internal dealings with its head office in substantially the same manner as transfer pricing.

38 Are any exit charges imposed on restructurings? How are they determined?

The Japanese tax authority has been paying attention to restructurings, where risk and functions originally assumed by Japanese entities are transferred to non-Japanese entities. The Japanese tax authority lost a case where a correction was made on a Japanese subsidiary service provider which used to be an ordinary 'buy-sell' company before the restructuring (Tokyo High Court decision dated 20 October 2008). Based on this experience, the Japanese tax authority might try to identify transfer of any valuable intangibles from a Japanese company to its foreign-affiliated corporation as a result of restructurings in applying the transfer pricing rules notwithstanding difficulties in identifying and quantifying them.

39 Are temporary special tax exemptions or rate reductions provided through government bodies such as local industrial development boards?

In the Global Strategic Special Zones, which began in 2012, a special depreciation or tax credit for certain capital expenditures, or a 20 per cent income exclusion for up to five years, is available.

Further, as one of the main aspects of the Abe administration's growth strategy, special economic zones named 'the National Strategic Special Zones' were launched in 2014. The National Strategic Special Zones include nine wards in Tokyo, and Kanagawa, Osaka, Hyogo, Kyoto and Okinawa, among others. Special depreciations or certain tax credits on capital expenditures and research and development expenses are available in these zones.

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