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# When It Rains, It Pours: Changes to TP Documentation in Canada May Create a Perfect Storm for Taxpayers

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New transfer pricing documentation rules arising from the BEPS initiative and recent components of the Canadian transfer pricing jurisprudence on the use and the relevance of expertise look set to challenge taxpayers. The following article examines these developments and proposes next steps for the Canadian tax administration.

## I. Introduction

Several developments without any apparent connection have occurred on the Canadian transfer pricing stage in the last 18 months. Considered as a whole, they likely indicate that Canadian taxpayers involved in controlled transactions subjected to section 247 of the *Income Tax Act* (“the Act”)<sup>2</sup> may soon face a perfect storm. This text analyzes these events and suggests some changes to the Canadian transfer pricing tax provisions aimed at minimizing the compliance burden on taxpayers without diminishing the intent expressed by the OECD countries.

Canada, like all the other OECD countries, has already associated its transfer pricing policy with the arm’s length principle as defined by the *OECD Trans-*

*fer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (“OECD TP Guidelines”). Indeed, during the 1997 budget speech, the Honourable Paul Martin, Minister of Finance at the time, stated that the *Income Tax Act* would be revised in order “to harmonize the standard contained in section 69 of the Act [i.e., “fair market value”] with the arm’s length principle as defined in the revised OECD guidelines and ensure that, in selecting the most appropriate pricing method, all the various methods described in the OECD guidelines are available to taxpayers [. . .].”<sup>3</sup> Information circular *IC 87-2R International Transfer Pricing* reminds us that this initiative received Royal Assent on June 18, 1998. The entry into force of section 247 of the Act was fait accompli.<sup>4</sup> We might therefore be led to believe that the Canadian legislative landscape is in good spirits regarding transfer pricing.

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In all matters concerning transfer pricing documentation in Canada, subsection 247(4) of the Act is being invoked by the Canada Revenue Agency (“CRA”). Nowadays, subsection 247(4) is included in any *Requests for contemporaneous documentation* at the onset of a transfer pricing audit.<sup>5</sup> Specifically, subparagraphs 247(4a)(i)-(vi) of the Act must now be included in the contemporaneous documentation letter “at the stage of initial contact with the taxpayer in all audits” which involve controlled transactions.<sup>6</sup> The transfer pricing audit in Canada is first and foremost about compliance with the *Income Tax Act*. It is an administrative process. Nonetheless it can generate tax disputes. The taxpayer may then file an objection which will be treated informally.<sup>7</sup> Where there is no resolution to a disagreement, the taxpayer can appeal first to the Tax Court of Canada, then the Federal Court of Appeal and, with permission from the court, the Supreme Court of Canada.

Again, the Canadian legislative landscape seems to be remarkably stable regarding transfer pricing. Or is it? Well, maybe not anymore. In contrast to the judicial activity seen in the United States, transfer pricing court cases in Canada have been few and far between over the years.<sup>8</sup> However, transfer pricing cases never go unnoticed in Canada, and since 2002, the relatively arid TP landscape has seen green shoots of life. The recent decision in *McKesson Canada Corporation v. The Queen*<sup>9</sup> did not, therefore, fly under the radar screen.

## II. Expertise and Transfer Pricing Documentation

In *McKesson Canada Corporation*, on several occasions the court directly called into question the validity of the contemporaneous documentation obtained by the taxpayers from their consultants to document its controlled transactions. However, this challenge of the court pertaining to the relevance and impartiality of the expert reports was not simply about the content but also about the form of these reports. Justice Patrick Boyle stated that

[. . .] it appears to me that CRA may need to review its threshold criteria with respect to subsection 247(4). I would not have expected last minute, rushed, not fully informed, paid advocacy that was not made available to the Canadian taxpayer and not read by its parent, could easily satisfy the contemporaneous documentation requirements.<sup>10</sup>

Justice Boyle added further: “The [expert #1] Report was qualified with soft opinion language. That indicates to me that it was written by [expert #1] and understood by McKesson Group to be primarily advocacy.”<sup>11</sup> Obviously determined to be clearly heard by the legislator, Justice Boyle tore down the expert report of another tax consultant [expert #2] on two different instances in the same decision. Commenting on the method used to identify comparables, Justice Boyle wrote: “[. . .] the [expert #2] Report was primarily a piece of advocacy work, perhaps largely made as instructed.”<sup>12</sup> Further, Justice Boyle supplemented: “[. . .] This picking and choosing, mix and match as it suits approach to the relevance of the actual performance of the receivables pool makes for transparently poor advocacy, and even more questionable valuation opinions.”<sup>13</sup>

Should we worry about these open challenges of the court with regard to the relevance and impartiality of these expert reports which are, after all, the products of highly knowledgeable professionals? On the one hand, as far as transfer pricing goes, the fact that we ask that question is more than likely answer enough. Transfer pricing transactions are usually complex, rarely black and white issues. In fact they are mostly comprised numerous shades of grey that must be interpreted. But on the other hand, on a gloomier note, it should be noted that Justice Boyle ultimately chose to recuse himself from the two remaining issues that had to be settled in that case following the taxpayer’s astounding allegations of partiality in its appeal filed at the Federal Court of Appeal.<sup>14</sup>

Obviously, one case does not a trend make. However, as it stands, this case is not the sole source of uncertainty on the matter of expert reports in transfer pricing. *Marzen Artistic Aluminum Ltd. v. The Queen*<sup>15</sup> has likewise recently called into question the value of expert reports in transfer pricing. In *Marzen Artistic Aluminum*, Justice G.A. Sheridan started by acknowledging the value and necessity of expert reports in transfer pricing.<sup>16</sup> The court stated numerous times<sup>17</sup> that the taxpayer could in fact have called in even more expert opinions to determine its arm’s length transfer pricing, that is, in the Canadian context as stated in paragraph 247(2)a) of the Act to ensure that “the terms or conditions made or imposed, in respect of the transaction or series, between any of the participants in the transaction or series [do not] differ from those that would have been made between persons dealing at arm’s length.”

But then followed a ritual slaughter of the expert reports submitted to the court by the taxpayer. First, the court had little or no choice but to remark accurately that the expert opinion was surprisingly based on the alleged usefulness of global formulary apportionment to establish an arm’s length price.<sup>18</sup> That position was obviously untenable in light of the OECD TP Guidelines.<sup>19</sup> However, Justice Sheridan went further and devoted what may be considered an unwarranted amount of space to thoroughly rip apart the expert report.<sup>20</sup>

Both *McKesson Canada Corporation* and *Marzen Artistic Aluminum* were rendered in 2014 by the Tax Court of Canada. Are they marking the start of a new trend as to the willingness and openness of the court to accommodate expert opinions in transfer pricing cases? To the credit of the Tax Court of Canada, maybe we should only read into this state of facts a pendulum swing which was required to address the endless parades of witnesses and experts in some previous transfer pricing court cases, one of the main features in *GlaxoSmithKline*<sup>21</sup> and *General Electric Capital Canada*.<sup>22</sup>

In *GlaxoSmithKline*, the taxpayer did indeed produce 17 witnesses and the CRA called to the stand 18 more. Of these 35 witnesses, ten were given the status of expert-witness. In *General Electric Capital Canada*, the court explained that “[3] The Appellant called 13 witnesses, seven of whom were qualified as expert witnesses. The Respondent called seven witnesses, five of whom were qualified as expert witnesses.” These two cases definitively stand out when compared to older transfer pricing cases such as *J. Hofert Limited v. Min-*

*ister of National Revenue*<sup>23</sup>, heard in 1962, where the taxpayer produced two witnesses and the tax administration none at all. Other days, other ways as we might say. . . However, it is worth noting that each of these three last cases related to the proper application of the comparable uncontrolled price method or its predecessor; obviously as it was then defined in 1962 in *J. Hofert Limited* (i.e., the “fair market value” concept) for cross-border controlled transactions.

### III. BEPS and Transfer Pricing Documentation

This apparent pendulum swing of the Canadian courts’ criticism regarding the relevance of expert reports in transfer pricing is far from innocuous. After all, controlled transactions have never been so complex and so diverse. Moreover, tax administrations have never been so voracious, all searching for a bigger slice of a finite taxation pie. There are numerous forces at work that could magnify this new-found uneasiness of the Canadian tax courts with respect to expert reports in transfer pricing cases.

First and foremost, the OECD Base Erosion and Profit Shifting Action Plan (“BEPS plan”) clearly stated as far as documentation is concerned that the time has come to “develop rules regarding transfer pricing documentation to enhance transparency for tax administrations, taking into consideration the compliance costs for business.”<sup>24</sup> Action #13 of the BEPS plan, a predestined number from a taxpayer’s perspective, added that “work to improve the effectiveness of the mutual agreement procedure (“MAP”) will be an important complement to the work on BEPS issues. The interpretation and application of novel rules resulting from the work described above could introduce elements of uncertainty that should be minimised as much as possible.”<sup>25</sup> At the OECD level, it is worth mentioning at this time that Canada has acted as a leader in the work and consultations related to these upcoming changes.

These OECD BEPS statements have indeed provided a source of uncertainty and international tax anxiety in the transfer pricing world. The *White Paper on Transfer Pricing Documentation*<sup>26</sup>, thereafter cosmetically revised in January 2014 as a 21-page document titled *Discussion Draft on Transfer Pricing Documentation and CbC Reporting*<sup>27</sup>, gave birth to over 1,400 pages of comments from taxpayers, consultants and various organizations.<sup>28</sup> For instance, the Canadian Bankers Association (“CBA”) suggested that “The draft country-by-country template contemplates very detailed information reporting and as currently drafted will result in a significant increase in reporting obligations as the template asks for much more information than what is currently collected to meet Canadian information reporting requirements and what is readily available.”<sup>29</sup>

Considering that this hindsight comes from the representatives of one of the healthiest and biggest industries in Canada, we can only imagine the extraordinary compliance burden that these changes will, without the shadow of a doubt, impose on small and medium-sized Canadian businesses. These new transfer pricing documentation requirements will ex-

acerbate the compliance burden and pressure on every Canadian taxpayer involved in controlled transactions.

But ultimately, to no avail, these comments and concerns were simply ignored. The OECD recently released the *Guidance on Transfer Pricing Documentation and Country-by-Country Reporting*.<sup>30</sup> It replaces Chapter V of the OECD TP Guidelines, as was we knew it, with the newly minted “three tier approach” that is the CbC [country-by-country] template, Masterfile and Local File.<sup>31</sup> Sadly for taxpayers all around the world, 1,400 pages of comments were insufficient to demonstrate the inadequacies of these changes which, we must contend, are going to lead to an explosion of double taxation cases in years to come, as each country unilaterally implements its own version and applies its own interpretation of these new rules.

In fact, we dare ask: why could the tax administrations not exchange all the information required in the new Chapter V through the specific provisions included in bilateral tax treaties and tax information exchange agreements (“TIEAs”) instead of shifting the compliance burden on the taxpayers? Once again, the fact that we ask that question is more than likely answer enough.

In order to “enhance transparency for tax administrations”, as suggested above by the OECD, it is worth noting one more time that the implementation of these new transfer pricing documentation requirements will have to take place domestically, in each OECD member country. Like most of the OECD countries, Canada has been chomping at the bit on that matter for quite some time.<sup>32</sup> As announced in its Federal Budget on February 11, 2014<sup>33</sup>, the Canadian government recently conducted two separate consultations on tax planning by multinational enterprises and on treaty shopping.<sup>34</sup> That latest consultation was first announced in the Federal Budget on March 21, 2013.<sup>35</sup> The Department of Finance Canada recently stated that changes would come following the OECD recommendations on the latter issue in 2015: “After engaging in consultations on a proposed anti-treaty shopping measure, the Government will instead await further work by the Organisation for Economic Co-operation and Development and the Group of 20 (G-20) in relation to their Base Erosion and Profit Shifting initiative.”<sup>36</sup>

With respect to the former consultation on tax planning by multinational enterprises, the Canadian government has, so far, been quiet. But there is now little doubt that things will change soon, following the official release of the “three-tier approach” embedded in the new Chapter V of the OECD TP Guidelines with regard to transfer pricing documentation.<sup>37</sup>

### IV. Canadian Transfer Pricing Documentation: the “Reasonable Efforts” Test

At the moment, paragraph 247(4)a) of the Act prescribes that a taxpayer must make or obtain:

“[. . .] records or documents that provide a description that is complete and accurate in all material respects of

(i) the property or services to which the transaction relates,

- (ii) the terms and conditions of the transaction and their relationship, if any, to the terms and conditions of each other transaction entered into between the participants in the transaction,
- (iii) the identity of the participants in the transaction and their relationship to each other at the time the transaction was entered into,
- (iv) the functions performed, the property used or contributed and the risks assumed, in respect of the transaction, by the participants in the transaction,
- (v) the data and methods considered and the analysis performed to determine the transfer prices or the allocations of profits or losses or contributions to costs, as the case may be, in respect of the transaction, and
- (vi) the assumptions, strategies and policies, if any, that influenced the determination of the transfer prices or the allocations of profits or losses or contributions to costs, as the case may be, in respect of the transaction; [ . . . ]”

In essence, this is the Canadian legal categorization of the five comparability factors used to carry out the comparability analysis as described in paragraphs 1.33-1.63 of the OECD TP Guidelines. In other words, approximately 400 pages of OECD guidance have been translated into half a page in the Canadian *Income Tax Act*. With the release of the new Chapter V of the OECD TP Guidelines, the legislative provisions may now have to be revised, as happened in the late 1990s.

At that time, in 1998, the former section 69 of the Act was repealed with the entry into force of the new section 247. When section 247 of the Act came into force, the CRA issued the aforementioned information circular *IC 87-2R International Transfer Pricing*, which added much-needed meat to the bone. New circular *IC 87-2R* provided Canadian taxpayers with valuable guidance on the meaning of section 247 of the Act and on the relevance of the OECD TP Guidelines in Canada. In short, the CRA indicated that the OECD TP Guidelines were to “be consulted for a more detailed discussion of the principles contained in Parts 2 to 6 of this circular”.<sup>38</sup> But with regard to that specific development, there is more than meets the eye.

New information circular *IC 87-2R International Transfer Pricing* was in fact a comprehensive update of information circular *IC87-2 International Transfer Pricing*, originally published in 1987.<sup>39</sup> Whereas former *IC 87-2* was composed of 56 paragraphs, new *IC 87-2R* contained 225 paragraphs and much more detail on the Canadian transfer pricing provisions included in the *Income Tax Act*. On the one hand, *IC 87-2* was first and foremost about the notion of “reasonable arm’s length price” with the use of a “fair market value”. This was of paramount importance to the dealings of parties in any given controlled transaction. On the other hand, *IC 87-2R* abides by the notion of “reasonable efforts to determine and use arm’s length transfer prices or allocations”. The main focus of every Canadian taxpayer subjected to section 247 of the Act has now been shifted to the concept of “reasonable efforts”.

The notion of “reasonable efforts” is explicitly included in the preamble of subsection 247(4) of the Act. It is irremediably linked to the production of “records or documents” as prescribed by subparagraphs 247(4)a(i)-(vi) of the Act. Even more important for Canadian taxpayers, the notion of “reasonable efforts” intervenes in the calculation of the transfer pricing penalties as prescribed by subsection 247(3) of the Act when transfer pricing adjustments result from “terms or conditions made or imposed, in respect of the transaction or series, between any of the participants in the transaction or series differ from those that would have been made between persons dealing at arm’s length”, as prescribed by subsection 247(2) of the Act.

As years went by, various *Transfer Pricing Memoranda* (“TPM”) were issued by the CRA to supplement the various CRA administrative positions enclosed in *IC 87-2R*. To that effect, *TPM-09 Reasonable efforts under section 247 of the Income Tax Act* was issued on September 18, 2006 to provide “guidance as to what constitutes reasonable efforts to determine and use arm’s length transfer prices or arm’s length allocations”. *TPM 09* expanded on Part 7 of *IC 87-2R* which states at paragraph 180:

“180. Subsection 247(4) of the Act deems a taxpayer not to have made reasonable efforts to determine and use arm’s length transfer prices or allocations unless the taxpayer has prepared or obtained records or documents which provide a description that is complete and accurate in all material respects of the items listed in subparagraphs 247(4)(a)(i) through (vi) of the Act. [ . . . ]”

However, these CRA administrative positions which include, by extension, the OECD TP Guidelines, do not have force of law in Canada. Nonetheless, they have been of great use to the Canadian tax courts who have, on more than one occasion, stated that they are indeed “[ . . . ] intended as tools to assist in determining what a reasonable business person would have paid if the parties to a transaction had been dealing with each other at arm’s length.”<sup>40</sup>

With that in mind, the author therefore fails to see how the substantial changes to Chapter V of the OECD TP Guidelines would not lead to changes to the administrative position of the CRA on what constitute reasonable efforts. But changes to the administrative position of the CRA may not be sufficient this time around. Without legislative changes, subsection 247(3) [transfer pricing penalties] would in the author’s view be rendered ineffective, since Canada has not in any way suggested that the link between the OECD TP Guidelines and the Canadian transfer pricing provisions will disappear.

At the core of the author’s argument is the decision *Marzen Artistic Aluminum*, where Justice G.A. Sheridan had to decide if the taxpayer had met the reasonable efforts threshold.<sup>41</sup> It must be pointed out that this determination was made by the court solely with consideration for subsections 247(3) [penalties] and 247(4) [documentation] of the Act. At no time, did the court look at the CRA administrative position on the matter.

As briefly seen, the symbiosis in the Canadian *Income Tax Act* between transfer pricing documentation [247(4)], adjustments [247(2)] and penalties

[247(3)] will actually necessitate modifications to section 247 of the Act to accommodate the transfer pricing changes as per the new Chapter V of the OECD TP Guidelines. To be more specific, the annexes I, II and III of Chapter V (i.e., the three-tier approach templates) require changes to the Canadian *Income Tax Act* to maintain legal cohesiveness as to what constitutes reasonable efforts.

On the one hand, in Canada changes can be envisioned to the *Income Tax Act* that may literally swamp taxpayers under a tidal wave of new transfer pricing compliance requirements. On the other hand, as already seen, there may also be an emerging trend in Canada as the courts express more reserve with regard to the use of expert opinions in transfer pricing cases. Nonetheless, more than ever, the latest OECD changes will likely magnify the use of experts by taxpayers anxiously trying to comply with the new rules. This set of facts may render transfer pricing court litigations even more contentious than they are today.

## V. Where Next?

It is with all these risks in mind that the author suggests some Canadian *Income Tax Act* changes. These proposals will minimize the negative impacts of the upcoming new transfer pricing documentation requirements on taxpayers, but without compromising on the intent of the BEPS initiative as translated into new Chapter V of the OECD TP Guidelines.

To start with, paragraph 247(4)c of the Act [three-month deadline to provide TP documentation] would become paragraph 247(4)d, with minor changes, since new paragraph 247(4)c would read as follows:

“247(4) [. . .] a taxpayer or a partnership is deemed not to have made reasonable efforts to determine and use arm’s length transfer prices or arm’s length allocations [. . .], unless the taxpayer or the partnership, as the case may be, [. . .] (c) makes or obtains, one year after the documentation-due date for the taxation year or fiscal period, at the latest, as the case may be, in which the transaction is entered into, the prescribed information to be presented in the prescribed form.”

New paragraph 247(4)c of the Act warrants a few comments. First, through the “prescribed form”, these new transfer pricing documentation requirements would enable the efficient implementation of annexes I, II, and III of the new Chapter V of the OECD TP Guidelines in Canada. The new “prescribed form” would be directly modeled on the OECD Masterfile, Local File Template and CbC Reporting Template to ensure full harmonization of the *Income Tax Act* with the OECD TP Guidelines.

To be more precise, annexes I and II of the new Chapter V would in fact lead to minor changes to paragraphs 247(4)a and 247(4)b of the Act which already both pertain to “records or documents” to be provided by the taxpayer in answer to the *Request for contemporaneous documentation*. Annex III of new Chapter V would justify new paragraph 247(4)c as worded above. The “prescribed form” in new paragraph 247(4)c would reproduce the “CbC Report” (i.e., Annex III) without the unnecessary requirements contained in that latter document. It is the author’s point of view that in its entirety, Annex III is more con-

ducive to the design of a global formulary apportionment (“GFA”) than the application of the arm’s length principle (“ALP”). Indeed, as one examines Table 2 of Annex III, it is difficult to disregard the eerie feeling that the designers had GFA in mind instead of the ALP.

Second, in practice, taxpayers do not have access to the records and documents required in Annex III in real time. New paragraph 247(4)c includes the excerpt “one year after the documentation-due date” to account for the OECD recommendation to that effect. Paragraph 5.31 of new Chapter V suggests that “the date for completion of the country-by-country report described in Annex III to Chapter V of these Guidelines may be extended to one year following the last day of the fiscal year of the ultimate parent of the MNE group.”<sup>42</sup> The CRA would hence require the previous year’s documentation through the *Request for contemporaneous documentation* as per new paragraph 247(4)c of the Act.

However, since the new paragraph 247(4)c would also create an unnecessary compliance burden for small and medium-sized businesses in Canada, a safe harbor is mandatory. As such, new paragraph 247(4)e suggests a safe harbor provision. This would relieve small and medium-sized businesses, with gross business sales under \$30 million, from the new transfer pricing documentation requirements prescribed by new paragraph 247(4)c. This recommendation is in line with the new Chapter V and the revised Section E of Chapter IV of the OECD TP Guidelines.<sup>43</sup> New paragraph 247(4)e of the Act would read as follows:

“247(4)e For the purpose of paragraph 247(4)c, a taxpayer or a partnership is not required to provide the prescribed information unless its gross business sales, for the taxation year or fiscal period, exceed \$30,000,000.”

A subsidiary change to the *Income Tax Act* is also suggested. In layman’s terms, section 233.1 of the Act states that a taxpayer must report its controlled transactions with a non-resident on the prescribed form (i.e., T106) provided that they exceed a certain amount. Subsection 233.1(4) of the Act should be modified to increase the amount that triggers the reporting obligations from \$1 million to \$5 million. This would take into account the substantial international trade increase of the last 15 years. New subsection 233.1(4) would read as follows:

“233.1(4) A reporting person or partnership that, but for this subsection, would be required under subsection 233.1(2) or 233.1(3) to file an information return for a taxation year or fiscal period is not required to file the return unless the total of all amounts, each of which is the total fair market value of the property or services that relate to a reportable transaction in which the reporting person or partnership and any non-resident person with whom the reporting person or partnership, or a member of the reporting partnership, does not deal at arm’s length in the year or period, or a partnership of which such a non-resident person is a member, as the case may be, participated in the year or period, exceeds \$5,000,000.”

These changes to sections 233.1 and 247 of the Canadian *Income Tax Act* would not come into force prior to January 1, 2017 to enable taxpayers to properly prepare for the increased compliance burden that they will create.

#### NOTES

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- <sup>2</sup> RSC 1985, c. 1 (5th Supp.), as amended.
- <sup>3</sup> Canada, *Building the Future for Canadians. Budget 1997. Budget Plan*, February 18, 1997, p. 203.
- <sup>4</sup> Canada, *IC 87-2R International Transfer Pricing*, Canada Revenue Agency, September 27, 1999, par. 1.
- <sup>5</sup> See Canada, *TPM-05R Requests for Contemporaneous Documentation*, Canada Revenue Agency, March 28, 2014, Appendix A for a "Sample Contemporaneous Documentation Letter".
- <sup>6</sup> *Ibid.*, par. 9.
- <sup>7</sup> See Canada, *P148 Resolving your dispute: Objection and appeal rights under the Income Tax Act*, Canada Revenue Agency, June 3, 2014.
- <sup>8</sup> See, *SmithKline Beecham Animal Health Inc. v. Canada*, 2002 FCA 229; *Glaxo SmithKline Inc. v. The Queen*, 2003 TCC 258; *HSBC Bank Canada v. The Queen*, 2007 TCC 307; *GlaxoSmithKline Inc. v. The Queen*, 2008 TCC 324, partially confirmed by *GlaxoSmithKline Inc. v. Canada*, 2010 FCA 201, and sent back to the Tax Court of Canada (file 98-712(IT)G, ongoing) by *Canada v. GlaxoSmithKline Inc.*, 2012 SCC 52; *General Electric Capital Canada Inc. v. The Queen*, 2009 TCC 563 (and, on ancillary issues, *General Electric Capital Canada Inc. v. The Queen*, 2009 TCC 246, and *General Electric Capital Canada Inc. v. The Queen*, 2008 TCC 256), afterwards confirmed by *Canada v. General Electric Capital Canada Inc.*, 2010 FCA 344 (and, on ancillary issues, *Canada v. General Electric Capital Canada Inc.*, 2010 FCA 290, and *Canada v. General Electric Capital Canada Inc.*, 2010 FCA 92); *Alberta Printed Circuits Ltd. v. The Queen*, 2011 TCC 232.
- <sup>9</sup> *McKesson Canada Corporation v. The Queen*, 2013 TCC 404 (appeal filed at the Federal Court of Appeal on 10 January 2014; files A-48-14 and A-49-14).
- <sup>10</sup> *Ibid.*, footnote #20 in support of par. 50.
- <sup>11</sup> *Ibid.*, par. 199.
- <sup>12</sup> *Ibid.*, par. 202.
- <sup>13</sup> *Ibid.*, par. 208.
- <sup>14</sup> *McKesson Canada Corporation v. The Queen*, 2014 TCC 266, see par. 12-21 among others.
- <sup>15</sup> *Marzen Artistic Aluminum Ltd. v. The Queen*, 2014 TCC 194 (appeal filed at the Federal Court of Appeal on 5 September 2014; file A-387-14).
- <sup>16</sup> *Ibid.*, par. 179.
- <sup>17</sup> *Ibid.*, par. 58, 174, 227, and 228.
- <sup>18</sup> *Ibid.*, par. 180-188.

<sup>19</sup> See par. 1.6 and 1.32.

<sup>20</sup> *Op. cit.*, see par. 135, 139, 158-174, 180-194, 209, and 212-215.

<sup>21</sup> *Op. cit.*, 2008 TCC 324.

<sup>22</sup> *Op. cit.*, 2009 TCC 563.

<sup>23</sup> *J. Hofert Limited v. Minister of National Revenue*, 62 DTC 50, CCH online, Wolters Kluwer Canada Ltd.

<sup>24</sup> OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, July 19, 2013, p. 25.

<sup>25</sup> *Ibid.*, p. 25.

<sup>26</sup> OECD, *White Paper on Transfer Pricing Documentation*, July 30, 2013.

<sup>27</sup> OECD, *Discussion Draft on Transfer Pricing Documentation and CbC Reporting*, January 30, 2014.

<sup>28</sup> OECD, *Comments received on Discussion Draft on Transfer Pricing Documentation and Country-by-Country Reporting Published Today*, March 3, 2014, <http://www.oecd.org/tax/transfer-pricing/comments-discussion-draft-transfer-pricing-documentation.htm>.

<sup>29</sup> *Ibid.*, Volume 1, p. 213.

<sup>30</sup> OECD, *Guidance on Transfer Pricing Documentation and Country-by-Country Reporting*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, September 16, 2014.

<sup>31</sup> *Ibid.*, see pp. 25-43 for more details.

<sup>32</sup> The United States have obviously demonstrated as much if not more eagerness on BEPS than any other OECD country. See also, for example, 2257-SD *Déclaration de la politique de prix de transfert* issued by the French government which virtually replicates the three tiers approach and Swire, Mary, "Australia Talks Anti-BEPS Initiatives", *Tax-News.com*, May 23, 2014.

<sup>33</sup> Canada, *The Road to Balance: Creating Jobs and Opportunities. Budget Plan*, February 11, 2014.

<sup>34</sup> *Ibid.*, pp. 347-49 and pp. 349-57 respectively.

<sup>35</sup> Canada, *Jobs, Growth, and Long-Term Prosperity. Economic Action Plan 2013*, March 21, 2013, p. 373.

<sup>36</sup> Canada, "Department of Finance Consults on Draft Tax Legislation", *News Release 2014-113*, August 29, 2014.

<sup>37</sup> *Guidance on Transfer Pricing Documentation and Country-by-Country Reporting*, op. cit.

<sup>38</sup> *Op. cit.*, par. 4.

<sup>39</sup> Canada, *IC 87-2 International Transfer Pricing*, Canada Revenue Agency, February 27, 1987.

<sup>40</sup> *Marzen Artistic Aluminum*, par. 177; in reference to *Canada v. GlaxoSmithKline*, 2012 SCC 52, par. 20-21.

<sup>41</sup> *Ibid.*, par. 217-231.

<sup>42</sup> See new par. 5.29-31 in *Guidance on Transfer Pricing Documentation and Country-by-Country Reporting*, op. cit., pp. 20-21, for more details.

<sup>43</sup> *Ibid.*, par. 5.32-5.34. See also OECD, *Revised Section E on Safe Harbours in Chapter IV of the Transfer Pricing Guidelines*, May 16, 2013, par. 4.95, 4.97 and 4.105-4.107.

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