Funding the Future

Tax Justice Network statement on Transfer Pricing

Published: January 13, 2026, 5:09 pm

In view of my last post it seems important to note that the Tax Justice Network recently issued an important statement on transfer pricing. It was as follows:

David Spencer, a New York attorney and senior adviser to the Tax Justice Network, has prepared the following statement about transfer pricing, which he presented at the meeting on Transfer Pricing sponsored by the UN Financing for Development Office at the UN in New York on March 14th, and which we mentioned in our blog about India's strong statements about the OECD's dominance of transfer pricing issues.

Statement by the Tax Justice Network

I. The Tax Justice Network Suggests an Objective Analysis of Transfer Pricing Issues.

The Tax Justice Network calls for objective analysis of Transfer Pricing issues, especially in the context of the needs of developing countries.

The Tax Justice Network ("TJN") does not agree with the OECD about several transfer pricing issues, including for example the following:

First, the OECD continues to assert that the arm's-length principle developed decades ago is still "sound in theory." TJN believes that the OECD's theory of the arm's-length principle no longer applies to multinational enterprises which are highly integrated, and that comparables in many if not most cases can not be found.

Second, the OECD is asserting orthodoxy, as evidenced by (a) its deletion of Article 7(4) of the OECD Model Income Tax Treaty, (b) the OECD's continued opposition to the Brazilian transfer pricing method, and (c) the OECD's continued insistence on imposing the OECD's Transfer Pricing Guidelines on developing countries. As U.N. Assistant Secretary General Jomo K. Sundaram pointed out quite clearly in his presentation at the meeting on transfer pricing here at the UN in June 2011, the OECD Guidelines have been developed by a small group of countries, which are rich.

Third, the OECD Transfer Pricing Guidelines are so complex that even the tax administrations of many developed countries can not adequately administer those rules. Therefore, how can developing countries, especially the least developed countries, be expected to administer adequately those rules?

Fourth, in effect the OECD continues to assert that there are only two options: (1) the OECD's arm's-length principle, or (2) global formulary apportionment which the OECD rejects. TJN believes that the arm's-length principle is broader than the OECD's Transfer Pricing Guidelines, and also that there is a spectrum of transfer pricing methods, including for example, combinations of (a) an arm's-length principle when comparables can easily be determined and (b) formulary apportionment concepts in other situations.

Therefore, Tax Justice Network calls for an objective analysis of modifications of the OECD's Transfer Pricing Guidelines and an alternatives to the OECD's Transfer Pricing Guidelines.

II. Comments by Experts about Transfer Pricing Rules

Some distinguished experts have commented about transfer pricing rules:

(1) Vito Tanzi:

Vito Tanzi, Formerly Director of the IMF's Fiscal Affairs Department has written:

"Through the manipulation of transfer prices, the multinational enterprises can shift profits to subsidiaries in jurisdictions with low taxes. These actions reduce the total liabilities of the multinational enterprises and cause some reallocation of tax money among the countries involved, with some countries losing revenue and others gaining from these actions. In the views of various tax administrators, this has become a significant problem and has led to an erosion of tax revenue. The technical characteristics of many modern products (airplanes, automobiles, electronics, and intangibles) make the control of transfer prices particularly difficult. Tax jurisdictions are allocating increasing administrative resources to what may be a futile attempt, over the long run, to deal with this [transfer mispricing] problem.... For corporate income, formula-based taxation may eventually replace account-based taxation as a method for dealing with the problem of transfer prices, as mentioned earlier."

(Vito Tanzi, "Is There a Need for a World Tax Organization," in The Economics of Globalization, 1998)(2) Martin Sullivan:Martin Sullivan, the economist, has stated that

"The problem with the arm's-length method is that it does not work well in theory or in practice."

("Combining Arm's-length and Formulary Principles," Tax Notes, January 25, 2010).(3) Stephen Shay:Stephen E. Shay, then Deputy Assistant Secretary (International Tax

Affairs), U.S. Department of the Treasury, testified before the U.S. House Committee on Ways and Means (July 12, 2010). Shay stated, in summary:

"Chairman Levin, Ranking Member Camp and members of the Committee, thank you for the opportunity to testify on the important topic of transfer pricing. I will focus my testimony today on [US] Treasury's analysis of the available data relating to the issue of whether profits are being shifted abroad out of the United States for tax purposes through the mechanism of related party transactions or, as the mechanism is more commonly known in the tax policy community, through transfer pricing. We conclude, based on our analysis of available data, that there is evidence of substantial income shifting through transfer pricing."

(4) David Rosenbloom:

H. David Rosenbloom, formerly International Tax Counsel at the U.S. Treasury Department, and now a partner in Caplan and Drysdale and Director of the International Tax Program at New York University Law School, has been quoted as follows:

"H. David Rosenbloom called the arm's-length system as it operates today fundamentally unworkable. Nevertheless, citing treaty obligations and problems of international continuation — he had to admit we are stuck wit it. But he does not believe there must be a dichotomy between the arm's-length and formulary methods. He suggested a midway position whereby the IRS would presume a formulary assignment of profits but taxpayers would be allowed to rebut the presumption with reference to arm's-length principles. Rosenbloom pointed out that this could be a variant of the Brazilian system, adopted in 1997, that relies heavily on formulary methods and fixed-markup safe harbors. Brazil's approach is not compliant with the OECD's arm's-length standard."

(Martin A. Sullivan, "Combining Arm's-Length and Formulary Principles," Tax Notes, January 25, 2010, page 314).Clearly, the message from these experts is that the OECD Transfer Pricing Guidelines should be closely scrutinized.**III. What has the OECD Done about the Shifting of Profits to Low Tax / No tax Jurisdictions?**

The OECD in its 1998 seminal Report, "Harmful Tax Competition: An Emerging Global Issue," mentions (page 61) the relationship of transfer pricing issues and low-tax and no-tax jurisdictions. Of course, one essential element of transfer mispricing is the efforts of multinational enterprises to shift profits to low tax or no tax jurisdictions. That 1998 OECD report states:

166. Measures that constitute harmful tax competition often result in significant income being attributed to a foreign entity which performs few, if any, real activities. The application of transfer pricing rules, which typically start from an analysis of true functions performed by each part of a group of associated enterprises, does, in that respect, constitute a useful counteracting measure.

167. It may be appropriate, however, that the [OECD Fiscal Affairs] Committee develop procedural rules that would address the specific circumstances of tax havens and regimes that constitute harmful tax practices. Rules effecting a reversal of onus of proof in certain cases .... would fall in that category. One action that could be taken in that respect would be for the [OECD Fiscal Affairs] Committee to supplement [the OECD Transfer Pricing Guidelines] with more guidance on the application of the [OECD] Guidelines in relation to tax havens and regimes constituting harmful tax competition.

I cannot find in the OECD's Transfer Pricing Guidelines modified in July 2010 any such focus by the OECD.

The Brazilian transfer pricing system which the OECD rejects, does focus on transactions with entities in a specified list of (a) tax havens and (b) jurisdictions with "privileged fiscal regimes", whether those transactions are with related or unrelated parties.

IV. Country-by-Country Reporting to Help Solve the Information Deficiency Problem

The draft Transfer Pricing Manual being prepared by the Subcommittee on Transfer Pricing of the UN Tax Committee refers in numerous places to the information deficiency problem. That is, the problem faced by developing countries in getting sufficient information, including comparables, about the activities of multinational corporations.

Tax Justice Network, and other civil society groups strongly support country-by-country reporting, including for example, section 1504 of the Dodd-Frank Act (although limited in scope), and also the relevant provision of the proposed U.S. Stop Tax Haven Abuse Act.

We believe that country-by-country reporting will substantially improve compliance with applicable tax law, especially in developing countries, and that such benefit for developing countries will far outweigh the very marginal increase in the compliance cost for multinational corporations.

TJN calls for country-by-country reporting whether countries adopt the OECD's Transfer Pricing Guidelines, or a modified arm's-length principle, formulary apportionment, or a mixed system.

And the G-20 at Cannes referred specifically to improving the transparency of multinationals through country-by-country reporting.

V. Vested Interests

A significant source of support for the OECD Transfer Pricing Guidelines and its Arm's Length Principle comes from people who have a significant vested interest in the continued use of those Guidelines and the Arm's Length Principle: auditing firms and

law firms and economic consulting firms which derive substantial income from advising and consulting about those Guidelines. The more complex those rules are and the more difficult to administer those rules, the more money those firms make. And employees of governments and international organizations who have developed expertise in the OECD Guidelines and whose careers depend to some significant degree on the OECD Guidelines also have a vested interest in the continuance of the OECD Guidelines. To quote Martin Sullivan, a distinguished economist: “There is the small but influential army of private-sector pricing consultants, many of them former [U.S.] Treasury officials and U.S. Internal Revenue Service Officials, who have built careers around the arm’s length method.”

Michael Durst formerly a U.S. Treasury Department official responsible for the Advanced Pricing Agreements about transfer pricing issues, has emphasized that transfer pricing rules based on the arm’s-length principle are inherently unenforceable. Indeed, he implies that the arm’s length method exists because it is unenforceable, and that is why business lobbyists have supported it so energetically.

VI. Modifications of the OECD’s Guidelines

The OECD’s Transfer Pricing Guidelines state explicitly that “the use of safe harbors is not recommended” (Chapter IV, section E, paragraph 4.122). However, the OECD has recently woken up and is now willing to consider safe harbors. That evidences that the OECD’s Transfer Pricing Guidelines are not cast in stone and can be substantially improved.

Similarly, TJN expects more critical, objective analysis by the OECD and certainly by others, of the OECD’s Transfer Pricing Guidelines in general. The Tax Justice Network is organizing a Seminar on June 13th -14th, 2012 about proposed modifications of, and alternatives to, the OECD Transfer Pricing Guidelines.

David Spencer
Senior Adviser
Tax Justice Network