



Tax Court of Canada

Transfer Pricing: The Treatment of the OECD Guidelines
by the Tax Court of Canada, the Federal Court of Appeal
and the Supreme Court of Canada

International Association of Tax Judges 4th Assembly
Amsterdam - August 29, 2013,

Notes by
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Section 69(2) of the *Income Tax Act* (Repealed for taxation years beginning after 1997)

- **Section 69(2) of the *Income Tax Act***

69(2) Where a taxpayer has paid or agreed to pay to a non-resident person with whom the taxpayer was not dealing at arm's length as price, rental, royalty or other payment for or for the use or reproduction of any property, or as consideration for the carriage of goods or passengers or for other services, an amount greater than the amount (in this subsection referred to as 'the reasonable amount') that would have been *reasonable in the circumstances if the non-resident person and the taxpayer had been dealing at arm's length*, the reasonable amount shall, for the purpose of computing the taxpayer's income under this Part, be deemed to have been the amount that was paid or is payable therefore.

Paragraph 247(2) of the *Income tax Act* (applicable to taxation years beginning after 1997)

247(2) Transfer pricing adjustment

(2) Where a taxpayer or a partnership and a non-resident person with whom the taxpayer or the partnership, or a member of the partnership, does not deal at arm's length (or a partnership of which the non-resident person is a member) are participants in a transaction or a series of transactions and

(a) the 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*, or

(b) the transaction or series

- (i) *would not have been entered into between persons dealing at arm's length*, and
- (ii) *can reasonably be considered not to have been entered into primarily for bona fide purposes other than to obtain a tax benefit*,

any amounts that, but for this section and section 245, would be determined for the purposes of this Act in respect of the taxpayer or the partnership for a taxation year or fiscal period shall be adjusted (in this section referred to as an "adjustment") to the quantum or nature of the amounts that would have been determined if,

(c) where only paragraph 247(2)(a) applies, the terms and conditions made or imposed, in respect of the transaction or series, between the participants in the transaction or series had been those that would have been made between persons dealing at arm's length, or

(d) where paragraph 247(2)(b) applies, the transaction or series entered into between the participants had been the transaction or series that would have been entered into between persons dealing at arm's length, under terms and conditions that would have been made between persons dealing at arm's length.

The Canadian Jurisprudence on Transfer Pricing

- *Indalex Ltd. v. Canada*, [1987] F.C.J. No. 1150 (QL), 86 D.T.C. 6598 (Federal Court of Appeal) — no reference to Guidelines
- *Safety Boss Ltd. v. Canada*, [2000] A.C.I. n° 18 (QL), 2000 D.T.C. 1767 (Tax Court of Canada [General Procedure]) — no reference to Guidelines
- *GlaxoSmithKline Inc. c. Canada*, 2012 CSC 52, [2012] 3 S.C.R. 3 (Supreme Court of Canada) — s. 69(2)
- *General Electric Capital Canada Inc. v. Canada*, 2010 FCA 344, 2011 D.T.C. 5011 (Eng.) (Federal Court of Appeal) — post 1997 – s. 247
- *Alberta Printed Circuits Ltd. v. Canada*, 2011 TCC 232, 2011 D.T.C. 1177 (Tax Court of Canada [General Procedure]) — post 1997 – s. 247

Transfer Pricing Methods

Approach before 2010

Hierarchy between the methods:

In the prior version of the Transfer Pricing Guidelines, there were two categories of OECD-recognized transfer pricing methods: the traditional transaction methods and the transactional profit methods.

Transactional profit methods (the transactional net margin method and the profit split method) had a status of last resort methods, to be used only in the exceptional cases where there was no or insufficient data available to rely solely or at all on the traditional transaction methods

The OECD Approved Transfer Pricing Methods

- **Comparable Uncontrolled Price Method**
- **Resale Price Method**
- **Cost Plus Method**
- **Transactional Net Margin Method**
- **Transactional Profit Split Method**

Transfer Pricing Methods

Approach Post 2010

On July 22 2010, OECD published a revision of chapters I-III of the Transfer Pricing Guidelines (2010-TPG).

The most significant change in the revised guidance is the substitution of the hierarchy of transfer pricing methods with the principle of the “most appropriate method to the circumstances of the case. (Paragraph 2.2)

The Supreme Court of Canada regarding the OECD Guidelines

Canada c. GlaxoSmithKline Inc., 2012 CSC 52, Justice Rothstein, for the Supreme Court of Canada, at paragraphs 20 and 21:

20 In the courts below and in this Court, there has been reference to the 1979 *Guidelines* and the 1995 *Guidelines* ("the *Guidelines*"). The *Guidelines* contain commentary and methodology pertaining to the issue of transfer pricing. However, the *Guidelines* are not controlling as if they were a Canadian statute and the test of any set of transactions or prices ultimately must be determined according to s. 69(2) rather than any particular methodology or commentary set out in the *Guidelines*.

21 Section 69(2) does not, itself, offer guidance as to how to determine the "reasonable amount" that would have been payable had the parties been dealing at arm's length. However, the *Guidelines* suggest a number of methods for determining whether transfer prices are consistent with prices determined between parties dealing at arm's length

CONCLUSION

Guidelines are guidelines

Law is law