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Transfer Pricing Cases of 2021: A Country-by-Country Review and Identifiable World Trends

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AUSTRALIA

Glencore Investment Pty Ltd, High Court of Australia (Case No. [2021] Trans 98)

On May 20, 2021, the High Court of Australia announced its refusal to hear the appeal by the Australian Tax Office (ATO) against the Federal Court of Australia's November 6, 2020 decision that reversed the ATO's rejection of the taxpayer's pricing methodology in the case of *Glencore Investments Pty Ltd*.[1] On September 28, 2021, the ATO released a Decision Impact Statement, explaining that it would continue to consider all of the evidence when deciding what an arm's-length price should be. In particular, while an expert opinion was relied upon by the Federal Court, the ATO continues to believe that the taxpayer group's policies and risk appetite were relevant factors which were not properly considered (and which may have led the parties to agree to a different contract). In other words, an expert may state that the actual agreement was a feasible one, but it is necessary to move on to the next step and ask whether it is the one that would have been entered into by the parties in question, and in the conditions at that time.

Singapore Telecom Australia Investments Pty Ltd, Federal Court of Australia (Case No. [2021] FCA 1597)

On December 17, 2021, the Federal Court of Australia published its decision in the case of *Singapore Telecom Australia Investments Pty Ltd*. The taxpayer had borrowed from a Singapore company in the same group by issuing a loan note which was amended three times, the first two times changing the interest rate with effect from the date of the original agreement and third setting the interest rate at 13.2575%. The tax administration denied interest deductions in respect of four years of income.

The court upheld the assessment issued by the tax administration and dismissed the taxpayer's appeal. It did not accept the taxpayer's benchmarking of the effective interest rate against Debt Capital Market (DCM) bond yields, concluding that the benchmarks were not sufficiently comparable, the terms of the loan note were not the same as those of a typical DCM bond issue, and benchmarking of the *effective* outcome was not the same as confirming that the terms agreed to were those that independent parties would have agreed to at the time.

The court ruled that in an arm's-length agreement a parental guarantee would have been provided and that

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In this article, the key transfer pricing cases of 2021 are summarized and analysed in the context of each other and of earlier cases in order to identify themes and trends. Some conclusions are included at the end of the article.

[1] *See* Beeton, Transfer Pricing Cases of 2020: Case Summaries, DTR Insights (Jan. 15, 2021).

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no amendment of the agreement would have been accepted. In doing so it relied on *Chevron Australia Holdings Pty Ltd*[2] and *Glencore Investment Pty Ltd* (see above).

CANADA

Cameco Corporation, Supreme Court of Canada (Case No. 39368)

On February 18, 2021, the Supreme Court of Canada dismissed the Canada Revenue Agency's (CRA) application for leave to appeal with regard to the case of *Cameco Corporation*. This appeal was in respect of the Federal Court of Appeal's June 26, 2020 decision not to allow a CRA appeal of the Tax Court of Canada's 2018 decision accepting the taxpayer's methodology.[3] The CRA's reasons for recharacterising the actual transaction continued to be viewed as insufficient.

CHILE

Avery Dennison Chile S.A., Tax Court of Chile (Case No. RUT° 96.721.090-0)

On March 31, the Tax Court of Chile published its decision in the case of *Avery Dennison Chile S.A.*, in which the taxpayer carried out distribution and marketing activities for related parties and also transferred its surplus funds to the group's financial centre via loans. The court found that the use of the interquartile range was not required by the OECD Transfer Pricing Guidelines and that the taxpayer's distribution and marketing margin was inside the full arm's-length range, unless the tax administration could show that the rejected 50% of benchmarks were insufficiently comparable. This conclusion was similar to the one in *Blackstone/GSO Debt Funds Europe S.à.r.l.* (see Luxembourg below).

With regard to the interest rates on the loans, the court decided that the taxpayer's methodology was appropriate and that no adjustment was merited. The taxpayer only received Libor with no risk spread, but this was reasonable because the loans should be compared to short-term deposits between banks, the court said. It was considered important in this respect that the term of the loans was capped at six months.

DENMARK

H Borrower and Lender A/S, National Tax Tribunal of Denmark (Case No. SKM2021.33.LSR)

On January 18, 2021, the National Tax Tribunal of Denmark published its decision in the case of *H Borrower and Lender A/S*. The taxpayer made an acquisition with the help of a related-party loan. Subsequently, it placed its surplus funds on short-term deposit in the group cash pool. It paid a margin on its loan but received no margin on its deposits. The tax administration argued that a margin should have been earned on the deposits in order to reflect the credit risk of the group treasury company. Notwithstanding that argument, the administration further argued that the group treasury company, having performed few functions, should have charged (instead of an interest margin) a cost plus fee — which in any case the taxpayer should not even have paid, because (not needing access to occasional additional liquidity) it did not actually need the cash pooling service. This was accepted by the court.

Tetra Pak Processing Systems A/S (formerly Tetra Pak Hoyer A/S), Supreme Court of Denmark (Case No. BS-19502/2020-HJR)

On April 26, 2021, the Supreme Court of Denmark published its decision in the case of *Tetra Pak Processing Systems A/S (formerly Tetra Pak Hoyer A/S)*. This was an appeal against the Western High Court's decision that a local loss-making subsidiary had not been able to show why it should not be the tested party or that there were extraordinary circumstances which could explain its losses.[4] The Supreme Court upheld the Western High Court's decision, concluding that, although the group sales companies may have been the simpler parties, the fact that their related-party and third-party business financial results could not be segmented meant that it would be more reliable to benchmark the taxpayer (relying on paragraph 3.18 of the OECD Transfer Pricing Guidelines). It also decided that the taxpayer had not identified any extraordinary costs which should be excluded when benchmarking its profit margin.

This was the third transfer pricing case to be heard by the Supreme Court, following its decisions for the

[2] *See* Beeton, *Transfer Pricing Cases of 2017*, 47 Tax Mgmt. Int'l J. 120 (Feb. 9, 2018).

[3] *See* Transfer Pricing Cases of 2020 (full citation above); Beeton, *INSIGHT: Transfer Pricing Cases of 2018*, 28 Transfer Pricing Rpt. 16 (Jan. 10, 2019).

[4] For precedence, see *Ice Machine Manufacturer A/S*, Danish Western High Court (Case No. SKM2020.224.VLR) in Transfer Pricing Cases of 2020 (full citation above).

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taxpayer in *Microsoft Danmark ApS*[5] and *Adecco A/S*.[6]

EUROPEAN UNION

Luxembourg & Amazon, General Court of the European Union (Case No. T-816/17 and T-318/18)

On May 12, 2021, the General Court of the European Union annulled the 2017 decision of the European Commission that Luxembourg granted illegal state aid to Amazon through a tax ruling which allowed royalty expense to be deducted without taxation of the royalty income. On July 22, 2021, the European Commission appealed the decision before the European Court of Justice (Case No. C-457/21P), on the basis, *inter alia*, that the court had erred in ignoring the Commission's functional analysis and the consequent choice of tested party, and in deciding that there were no suitable comparables.

Grand Duchy of Luxembourg and Engie Global LNG Holding and Others, General Court of the European Union (Case No. T-516/18 and T-525/18)

On May 12, 2021, the General Court of the European Union published its decision favoring the taxpayer in the joined cases *Grand Duchy of Luxembourg and Engie Global LNG Holding and Others*. Subsequently, on July 21, 2021, Luxembourg appealed to the European Court of Justice (for the European Commission, on the basis that the ''economic and fiscal reality'' should be considered, rather than each transaction in isolation) because, *inter alia*, the General Court had defined the relevant Luxembourg tax rules too narrowly and even then did not show selectivity robustly in terms of a derogation from that reference framework (in particular, that companies in a similar factual and legal situation were discriminated against).

Fiat Chrysler Finance Europe (FFT), Advocate General of the Court of Justice of the European Union (Case No. C-885/19 P) and Ireland v Commission (Case No. C-898/19 P)

On December 16, 2021, the Advocate General of the Court of Justice of the European Union published his opinion on the appeals against the linked decisions of the General Court of the European Union that FFT had received illegal state aid via a Luxembourg tax ruling.[7] The Advocate General opined that the decisions of the General Court should be set aside because the arm's-length principle had been used incorrectly as the benchmark for ''normal'' taxation in Luxembourg at that time.

The Court of Justice is said to accept 80% of the Advocate General's opinions.

Nike European Operations Netherlands BV and Converse Netherlands BV, General Court of the European Union (Case No. T-648/19)

On July 14, 2021, the General Court of the European Union published its decision in the case of *Nike European Operations Netherlands BV and Converse Netherlands BV*. The court upheld the European Commission's decision that the Netherlands had granted illegal state aid to the companies in question through unilateral Advance Pricing Agreements (APAs). These APAs accepted that the local group distribution companies were the simpler parties and that their residual profits from licensing intellectual property could be extracted via variable royalty payments. However, the court agreed with the European Commission that the sub-licensors of the IP were in fact the simpler parties, and therefore that either the royalty rates should have been benchmarked or the profit split method should have been used.

FINLAND

A Oyj, Supreme Administrative Court of Finland (Case No. 3275/2/19)

On May 21, 2021, the Supreme Administrative Court of Finland published its decision in the case of *A Oyj* (an anonymous company). The taxpayer borrowed externally and then made loans to a subsidiary at 1.1 times the interest rate which it was paying, with no regard to the creditworthiness of the borrower. The Supreme Administrative Court overturned the Helsinki Administrative Court's decision that the interest rate should reflect the credit rating of the borrower, on the basis that the taxpayer was providing a service of borrowing on behalf of the subsidiary for which it should have only received a cost plus service fee, and if the interest rate was viewed as the cost then the effective 10% mark-up was sufficiently generous. It was

[5] *See* Beeton, *INSIGHT: Transfer Pricing Cases of 2019*, 38 Tax Mgmt. Wkly. Rpt. 17 (Jan. 6, 2020).

[6] *See* Transfer Pricing Cases of 2020 (full citation above).

[7] *See* Transfer Pricing Cases of 2019 (full citation above).

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also relevant that the subsidiary offered collateral to the external lender, thereby sharing the risk with the taxpayer, and that there could have been some equalization of the credit ratings of the taxpayer and the subsidiary because of implicit group support. However, these calculations were not made.

FRANCE

SAS SKF Holding France, Supreme Court of France (Case No. 443133)

On October 4, 2021, the Supreme Court of France published its decision in the case of *SAS SKF Holding France*. The taxpayer had appealed to the court to annul the judgment of the Versailles Administrative Court of Appeal (Case No. 18VE02849), which itself had annulled the decision of the Montreuil Administrative Court (Case No. 1608787). The issue in question was whether the prices charged by a subsidiary of the taxpayer to other related parties were too low.

The subsidiary — a manufacturer of very large custom bearings — had reported significant operating losses in two consecutive years. The tax administration assessed it for tax by reference to the profit margins of independent manufacturers of similar products. However, the taxpayer argued that the subsidiary bore additional development and commercial risk compared to the benchmark companies (it could choose to develop new products and it was liable for any inefficient production processes). Furthermore, it had used this discretion to choose to concentrate solely on the wind power sector, which turned out to be an unsuccessful strategy. The court accepted these explanations and annulled the earlier decision.

There are similarities between this case and *Adecco A/S* (Denmark) and *A Oy* (Finland)[8] and to some extent *Anon* (Italy).[9]

GERMANY

A GmbH, Federal Constitutional Court of Germany (Case No. 2 BVR 1161/19)

On March 4, 2021, the Federal Constitutional Court of Germany published its decision in the case of *A GmbH* (an anonymous company). The taxpayer waived a loan to its subsidiary and claimed a tax deduction when it wrote off the receivable. The Federal Tax Court had decided that no such deduction was merited because if the parties had not been related, the borrower would have provided collateral such that the lender would not have suffered a loss. In order to reach this conclusion, the court interpreted the arm's-length principle to include the terms and conditions as well as the price of a loan. However, the Federal Constitutional Court ordered that the case should be referred to the Court of Justice of the European Union, for two reasons: first, there could have been economic reasons for waiving the loan (e.g., a need to inject more capital because of under-capitalisation); and second, it cannot be assumed that that there would have been full collateralisation (for example, if the lender would have accepted lower collaterisalisation in return for a higher interest rate).

The acceptance that arm's-length pricing includes arm's-length terms and conditions follows *Chevron Australia Holdings Pty Ltd.*[10] and is similar to *Singapore Telecom Australia Investments Pty Ltd* (see Australia above).

A GmbH, Federal Fiscal Court of Germany (Case No. I R 62/17)

On May 18, 2021, the Federal Fiscal Court of Germany published its decision in the case of A GmbH (an anonymous company). The taxpayer had financed an acquisition with a senior, secured bank loan and a subordinated, unsecured shareholder loan. Having first satisfied that there was a market for unsecured, subordinated loans, the court decided that it was incorrect for the tax administration to have used the interest rate on the bank loan as a benchmark for the shareholder loan without any comparability adjustments.

This decision appears to contradict that of the Federal Constitutional Court in *A GmbH* (March 2021) above.

ITALY

E.I. S.r.l., Administrative Court of Italy (Case No. 12/02/2021 n. 546)

On February 12, 2021, the Administrative Court of Italy published its decision in the case of *E.I. S.r.l.* The court ruled for the taxpayer, finding that the tax administration should have made a comparability adjustment for different sales volumes when using an internal comparable uncontrolled price to benchmark the price in a related-party transaction (for example, to allow for the possibility of volume discounts).

[8] *See* Transfer Pricing Cases of 2020 (full citation above).

[9] *See* Transfer Pricing Cases of 2019 (full citation above).

[10] *See* Transfer Pricing Cases of 2017 (full citation above).

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This decision has similarities to Germany's *A GmbH* (May 2021) above.

GI Group S.p.A., Supreme Court of Italy (Case No. 13850/2021)

On May 20, 2021, the Supreme Court of Italy published its decision in the case of *GI Group S.p.A.*, in which the taxpayer had granted an interest-free loan to a related party. The arrangement was accepted by the Regional Tax Commission on the basis that there could be commercial (i.e., non-tax) reasons for it. The Supreme Court accepted this concept, although it concluded that insufficient commercial reasons had been shown so far and referred the case back to the Regional Tax Commission.

The Court's thinking can be compared to that in *KEC International Ltd.* (India), in which it had found that the necessary commercial reasons and allowed an interest-free loan.[11]

LUXEMBOURG

Blackstone/GSO Debt Funds Europe S.à.r.l., Administrative Tribunal of Luxembourg (Case No. 43264)

On July 13, 2021, the Administrative Tribunal of Luxembourg published its decision in the case of *Blackstone/GSO Debt Funds Europe S.à.r.l.* The court decided it was acceptable to benchmark the yield on a profit participating loan (PPL) against the interest rates on plain vanilla fixed interest rate loans, that the use of the interquartile range is not mandatory under the OECD Transfer Pricing Guidelines (paragraph 3.62), and therefore that the effective yield on the PPL, being within the full range of benchmark interest rates, should be accepted by the tax administration.

This decision is similar to the one in *Avery Dennison Chile S.A.* (see Chile above).

NORWAY

Distributor A AS, Tax Appeals Board of Norway (Case No. 01-NS 131/2017)

On March 15, 2021, the Tax Appeals Board of Norway published its decision in the case of *Distributor A AS* (an anonymous company), in which a related-party distributor paid for goods based originally on a cost plus for the manufacturing companies and then on a profit split method. The tax administration argued that the Transactional Net Margin Method (TNMM) would be a more reliable one (using the taxpayer as the tested party) and identified an arm's-length range on that basis. The taxpayer argued that its losses (over a period of eight years) could be attributed to a variety of economic factors including reorganisations, downsizing, failed investments and large marketing expenses to introduce new brands to the local market.

The court decided that that the taxpayer's transfer pricing methods might properly reflect its functions and risks (appearing to the court to be at first high and then medium), while the economic factors might explain its losses. It therefore asked the tax administration to carry out a more detailed functional analysis and then to apply the most reliable transfer pricing method or methods on that basis.

The court's decision that the tax administration could not automatically benchmark the profits of a taxpayer using the TNMM is similar to the decisions in *Adecco A/S* (Denmark), *A Oy* (Finland) and *Orange Business Norway AS*,[12] as well as a number of other decisions in recent years.

Petrolia Noco AS, Borgarting Court of Appeal, Norway (Case No. LB-2020-5842)

On March 19, 2021, the Borgarting Court of Appeal, Norway, published its decision in the case of *Petrolia Noco AS*. The taxpayer had received a shareholder loan to fully finance its oil exploration costs, on which the interest rate had been increased significantly between the transfer of the funds and the formalisation of the loan agreement. The taxpayer attempted to justify the higher interest rate on the basis of the criminal charges against the company's indirect shareholder (creating a greater reputational risk of lending to the taxpayer).

The court noted that banks normally funded no more than 70% of oil exploration costs so that part of the shareholder loan should be treated as equity and those interest payments disallowed. Furthermore, the court decided that the interest rate should be reduced to on comparable arm's-length loan agreements (without making a reputational risk adjustment). On the latter point, the court reasoned that as the lender had the same indirect shareholder it was already exposed to the same reputational risk and so would not have taken that into account when setting the interest rate.

[11] *See* Transfer Pricing Cases of 2020 (full citation above).

[12] *See* Transfer Pricing Cases of 2020 (full citation above).

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SPAIN

Biomerieux España SA, National Court of Spain (Case No. 416:2021)

On February 4, 2021, the National Court of Spain published its decision in *Biomerieux España SA*. In this case, the taxpayer's operating margin fell at the same time that its group had outstanding results. The taxpayer's prices for purchasing related-party products were set so as to leave it with an arm's-length operating margin on sales. However, it used benchmarks from years after the year in question, which was not accepted by the court. The court also noted that several Spanish benchmarks were available, but had not been included in the taxpayer's European benchmark set. Using the amended benchmark set for more relevant years, the court noted that the taxpayer's operating margin was below the lower quartile of observations. The court concluded that it was legitimate to refer to the interquartile range on this occasion because there were no reasons to doubt that the observations outside the interquartile range were any less comparable.

This decision can be compared with those in *Avery Dennison Chile S.A.* and *Blackstone/GSO Debt Funds Europe S.à.r.l.* (see above).

Varian Medical Systems Iberica, S.L., National Court of Spain (Case No. 361:2018)

On October 13, 2021, the National Court of Spain published its decision in the case of *Varian Medical Systems Iberica, S.L.* The court had heard an appeal by the taxpayer against the decision of the Central Economic Administrative Court of February 8, 2021 (Case No. R.G.: 1520/15).

The taxpayer carried out distribution and after-sales activities. The tax administration decided that the taxpayer's arm's-length range was unreliable because it was based on a three-year rolling average and market conditions had improved; the tax administration therefore (a) used a new arm's-length range (only including the latest year's figures) and (b) used the figure at the top of the range.

The court noted that the taxpayer's profit margin was also inside the tax administration's arm's-length range and on that basis it should not have been adjusted. There are similarities between this decision and that in the Luxembourg case of *Blackstone GSO Debt Funds Europe S.à.r.l.* above.

UNITED STATES

The Coca-Cola Company and Subsidiaries, United States Tax Court (Case No. 31183-15)

On December 2, 2021, the U.S. Tax Court published its decision in the case of *Coca Cola Co. and Subsidiaries*. The court decided not to reconsider its decision of 2020,[13] partly because there had been no substantial error of fact or law. It therefore held for the tax administration, which had benchmarked the net margins of the taxpayer's subsidiaries rather than accepting that they were risk-taking manufacturers under licence.

CONCLUSIONS

The decisions in the transfer pricing cases of 2021 suggest the following themes:

(1) Comparability adjustments are required when using an internal CUP such as a senior, secured bank loan as a benchmark for a subordinated and/or unsecured loan, unless it can be shown that there was no market for such loans.

(2) The arm's-length price includes the terms and conditions but the economic factors that are specific to the transaction should determine which terms and conditions are imputed for any particular related-party transaction.

(3) Long-term losses can be justified by economic factors.

(4) The full arm's-length range can be used unless the observations outside the interquartile range have been shown to be unreliable.

(5) Deviations from the arm's-length range (e.g., interest-free loans) can be justified by the economic considerations of the parties.

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[13] *See* Transfer Pricing Cases of 2020 (full citation above).

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