

The End of Transfer Pricing?

The 17th David R. Tillinghast Lecture on International Taxation
NYU School of Law – September 14, 2012

Robert Couzin
Couzin Taylor LLP, allied with Ernst & Young LLP¹

Outline of the Presentation

- I. Introduction – a parable
 - a. The Copernican revolution, Kuhnian paradigms and paradigm shifts
 - b. Paradigms in science and transfer pricing
 - i. The sociological component
 - ii. Problem-solving within the paradigm
 - c. Is transfer pricing in for a paradigm shift?
- II. An analytical framework
 - a. Profit allocation, profit shifting and base erosion
 - i. Allocating “real” MNE profits versus countering aggressive tax avoidance
 - ii. Profit-shifting and transfer pricing
 - b. Ends and means: the allocation of tax revenues and transfer pricing
 - c. The arm’s length principle as one way to apply the concept of transfer pricing
 - d. The “methods” as the system chosen to implement the arm’s length principle
- III. Problems in practice and in theory
 - a. Problems with transfer pricing in practice
 - i. Cost and revenue
 1. The cost of administration and compliance; multiple jurisdictional compliance; economic costs
 2. Corporate income tax revenues in OECD countries; transfer pricing’s contribution
 - ii. Consistency

¹ It is hardly necessary to point out that these comments are personal.

- b. Problems with transfer pricing in theory
 - i. The nature of the firm
 - ii. The behaviour of the firm
 - iii. Business restructuring
- c. An historical postscript: why now?
- IV. The solutions on offer
 - a. Stay the course
 - i. Improve the methods
 - ii. Improve dispute resolution
 - b. Change the tax base by eliminating the corporate income tax
 - c. Two-sided and non-transactional approaches
 - i. Profit splits and principled profit splits
 - 1. How to judge the result
 - 2. The rule of law
 - ii. Formulary apportionment
 - 1. Global versus limited
 - 2. Formulary factors and flexible formulae
 - 3. Revenue and cost implications
- V. Conclusion: a gradual paradigm shift?

Not a bibliography

The transfer pricing literature, both practical and theoretical, is vast. Any list would be incomplete and misleading in its selectivity. None is attempted here.

My remarks are based primarily on personal experience as a tax practitioner and my participation in the activities of such international organizations as the International Fiscal Association, the International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD. It is influenced by many discussions with professional colleagues, academics and government officials too numerous to thank (many of whom would probably prefer to remain anonymous in any event). I owe a special acknowledgement to my Ernst & Young colleagues, who allowed me to return to the building even after hearing an earlier version of this paper at the Canadian IFA Seminar in May, 2012.

The following links do not purport to be comprehensive or even coherent but they may be useful to participants with little background in the issues.

- OECD: <http://www.oecd.org/tax/transferpricing/>. The site links to various discussion papers and press releases. The 2010 edition of the Transfer Pricing Guidelines is available in full view on GoogleBooks.
- Tax Justice Network:
http://www.taxjustice.net/cms/front_content.php?client=1&lang=1&parent=91&subid=91&idcat=139&idart=250. The TJN commentary on transfer pricing must be read with due caution but the site does include useful links, including some interesting papers presented at a conference in Helsinki in June, 2012.
- Kimberley A. Clausing and Reuven S. Avi-Yonah, "Reforming Corporate Taxation in a Global Economy: A Proposal to Adopt Formulary Apportionment," *The Hamilton Project* (Washington: The Brookings Institution, 2007). One of many such papers, it provides a good if brief summary of the issues and a number of other references.
http://www.hamiltonproject.org/files/downloads_and_links/Reforming_Corporate_Taxation_in_a_Global_Economy- A_Proposal_to_Adopt_Formulary_Apportionment.pdf.

- Transfer pricing surveys of MNEs and tax authorities conducted by Ernst & Young

[http://www.ey.com/Publication/vwLUAssets/Global_transfer_pricing_survey_-_2010/\\$FILE/2010-Globaltransferpricingsurvey_17Jan.pdf](http://www.ey.com/Publication/vwLUAssets/Global_transfer_pricing_survey_-_2010/$FILE/2010-Globaltransferpricingsurvey_17Jan.pdf)

[http://www.ey.com/Publication/vwLUAssets/2012-Global-TP-Tax-Authority-Survey/\\$FILE/2012-Global-TP-Tax-Authority-Survey.pdf](http://www.ey.com/Publication/vwLUAssets/2012-Global-TP-Tax-Authority-Survey/$FILE/2012-Global-TP-Tax-Authority-Survey.pdf)