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OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 1970
OECD Transfer Pricing Guidelines as a Quasi Source of Law in a Post-BEPS World: Legislative and Judicial Developments from a Polish Perspective

The Status of the OECD Transfer Pricing Guidelines in the Post-BEPS World: Legislative and Judicial Developments from a Polish Perspective

Despite the vast literature on the OECD Transfer Pricing Guidelines for Multinational Enterprises (OECD Guidelines), its status has received little consideration. The image in the literature is that the OECD Guidelines is a significant publication, given the substantial cross-border trade between associated enterprises. In the OECD/G20 BEPS Project, the Final Report on Actions 8-10, published in 2015, revised the OECD Guidelines as part of the ongoing measures to counter aggressive tax avoidance by certain multinational enterprises (MNEs) such as Google LLC, Facebook Inc., and Apple Inc. BEPS Actions 8-10, inter alia, revised the guidance on intangibles and cost contribution arrangements to prevent profits from intangibles being allocated to low-tax jurisdictions. As anticipated, the OECD has reported that transfer pricing disputes are on the rise. In particular, BEPS Action 14, on dispute resolution, requires tax treaties to include article 9(2) of the OECD Model Tax Convention, on corresponding adjustments, in tax treaties. Moreover, BEPS Action 14 (element 1.1) requires that countries implement a minimum standard of access to the mutual agreement procedure for transfer pricing cases. As a consequence of this new minimum standard, members of the Inclusive Framework are obliged to implement this measure, which further elevates the status of the OECD Guidelines, as resulting disputes will be resolved on the basis of the principles in the OECD Guidelines. The membership of the Inclusive Framework exceeds 135 countries. As there is a dearth of transfer pricing case law, courts have only established limited jurisprudence on the topic. One Australian transfer pricing case concluded that the OECD Guidelines had no formal status in treaty interpretation. It is asserted in this article that the OECD Guidelines are not a document in their own right. Instead, they are part of the Commentary accompanying the OECD Model Convention on Income and on Capital. The article argues that courts should not only use the OECD Guidelines as a guidance document in their domestic courts, but express a desire for the interpretation of the associated enterprises article. In addition, the article demonstrates the importance of the Commentary and the corresponding adjustments in tax treaties. The article asserts that the best way forward for the OECD to standardize the status of the OECD Guidelines is to include a clear statement in the Commentary on the intrinsic character of the OECD Guidelines and to specify which parts of the Guidelines are to be used for the interpretation of the associated enterprises article, adapting the approach taken in the Commentary on the business profits article incorporating the 2010 Report on the Attribution of Permanent Establishments.