

COMMENTS TO THE WHITE PAPER ON  
TRANSFER PRICING DOCUMENTATION  
(July 30<sup>th</sup>, 2013)

As indicated in the draft document of Documentation, released by the OECD in late July 2013 for public comments, hereby the Transfer Pricing Committee of the Mexican Institute of Certified Public Accountants, formed by almost all of the recognized transfer pricing practitioners in Mexico, provides some comments hoping they contribute to the ongoing analysis carried on by WP6. Our comments are the following:

Section III.A. Transfer pricing risk assessment

With the objective of promoting tax compliance, we consider it would be useful that the document addresses the convenience and the usefulness for Tax Administrations to publicly disclose their expectations on “reasonable documentation practices” applicable in each jurisdiction to their taxpayers, taking into account legal practices, limitations, relevant accounting and tax principles, statute of limitations implications, tax consequences, etc. Such types of disclosure measures may be implemented by means of official tax alerts, memorandums or public criteria disclosed in Government’s webpages. By having access to such detailed guidance, any taxpayer in each jurisdiction may increase its legal certainty in terms of understanding and weighting possible exposures to double taxation if its transfer pricing documentation is determined as non-adequate to support tax compliance; may decrease the areas of tax controversy during the course of tax examinations and, more importantly, if taken into account on a timely basis, it may increase the quality standards in the preparation of transfer pricing supporting documentation.

Although in this section reference is made to successful risk-assessment measures implemented in developed economies such as Australia, UK, the USA and Canada, in which recurring informal dialogue is promoted between tax authorities and multinational taxpayers to enhance compliance and to provide greater certainty, we consider that in this section a more realistic and balanced approach in this respect should be addressed. These approaches need to take into account the specific facts and circumstances of all OECD member Countries, especially those in which such forms of “informal” and recurring contacts are not possible to be formalized or implemented due to limitations imposed by the Country’s legal system (e.g. Roman Law-systems, such as the Mexican case).

In any case, we understand that there is an increasing need for sufficient and reliable transfer pricing documentation worldwide; however, such approach needs to keep the necessary balance of usefulness for the Tax Administrations and reasonableness for the Multinational Groups and transfer pricing practitioners. We welcome any initiative along these latter lines or courses of action, especially if the new documentation principles deal with greater levels of legal certainty, however, we still consider that documentation requirements worldwide need to be simplified; reasonable; consistent with internal administrative practices; relevant to provide indicators to tax examiners

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and available for taxpayers, as provided for in paragraphs 5.3 through 5.15 of the current version of Chapter V of the OECD Transfer Pricing Guidelines.

### Section III.B. Tax payer's assessment of its compliance with the arm's length principle

We recommend adding at the end of Section III.B., the following comments:

*"On the other hand, the identification of the relevant information to be used by the taxpayer for testing the controlled transaction for transfer pricing compliance purposes is essential for documentation and risk assessment purposes. Since many transfer pricing methodologies rely on the identification of economic transactions, and many disputes arise between the tax authorities and the taxpayer in the identification and quantification of the relevant information to be used for transfer pricing purposes, tax authorities are encouraged to enact reasonable and clear transfer pricing guidance in terms of segmented or bundled transactions, as the case may be, so that taxpayers are able to take such principles into account at the time of preparation of the relevant transfer pricing supporting documentation. The existence of such guidance will assist the tax authorities in their prior risk-assessment evaluations as well as mitigate grey areas of dispute during the course of tax examinations."*

### Section V. Development of a Coordinated Approach to Documentation

We observed in the Documentation draft contradictory comments and support for the use of master files for transfer pricing documentation purposes, since at the beginning of the document reference is made to theoretical benefits for the adoption of said approach based on the PATA and EU experiences, but at the same time there are explicit references to the scarce progress and benefits generated by both initiatives as of today. We believe that the information to be requested under the Masterfile Approach, can become an administrative burden for taxpayers, because it may not provide additional value to understand the business of the taxpayer, an even could potentially increase the number of audits and transfer pricing adjustments against the taxpayer, with the real possibility that the tax authorities would have more elements or avenues to assume or to presume unfounded risky postures through the use of this kind of information.

Therefore we suggest eliminating the following information of the Masterfile approach, included in Table 1:

***"A written functional analysis showing the principal contributions to value creation by individual entities within the Group"***. Removal justification: the request of this functional analysis would involve administrative burden for the taxpayer, as each related party must develop specific functional analysis for review in their local country. Furthermore, the functional analysis of the related parties that is already included in the local transfer pricing documentation should be enough to show the tax authorities what to expect when looking at the economic analysis.

***"A description of the MNE's strategy for the development, ownership and exploitation of intangibles, including location of principal R&D facilities and location of R&D management"***. Removal justification: This information would

involve administrative burden for the taxpayer, as each related party must develop specific functional analysis for review in their local country, which would include intercompany intangible transactions. We also believe that sometimes the local subsidiaries may not use all of the Groups intangibles, so this information may not be available. Also MNEs usually do not like to disclose their intangibles or information related to the intangibles to its subsidiaries.

***“A description of the Group’s transfer pricing policies related to R&D and intangibles”***. Removal justification: This information would involve administrative burden for the taxpayer, as each related party must develop specific functional analysis for review in their country of origin, which would include intercompany intangible transactions.

***“The MNE’s intercompany transfer pricing policy or a description of the Group’s transfer pricing system for its financial activities”***. Removal justification: This information would involve administrative burden for the taxpayer, as each related party must develop specific functional analysis for review in their local country, which would include financial operations.

***“MNE’s consolidated accounts for the prior year’s”***. Removal justifications: This information may be misinterpreted by the tax authorities, to the detriment of the taxpayer, and make made unfounded adjustments or transfer pricing audits. As previously stated, this information may be difficult to obtain by a local subsidiary, sine MNE’s are not very keen of showing this information to local management.

***“A list and brief description of the MNE group’s applicable unilateral or bilateral/multilateral APAs and ruling related to income allocations with various countries”***. Removal justification: As mentioned before, this foreign information may not be available to the local subsidiary. Also, it may not provide enough information to the tax administration to perform a risk assessment, since it will involve transactions between parties that are not in its jurisdiction.

***“A copy of the company’s consolidating income statement for the most recent year”***. Removal justification: This information could be misinterpreted for fiscal authorities, on taxpayer prejudice, and make unfounded adjustments or transfer pricing audits.

The removal of these Masterfile elements described above will allow decreasing the taxpayer burden, and will decrease the risk of creating unfounded and controversial audits and adjustments for the transfer pricing by the tax authorities, that would jeopardize the legal certainty of the taxpayer.

The Draft document does not specify that the adoption of the Coordinated Approach by the tax authorities and taxpayers should lead to transfer pricing audits with clear and specific objectives. So it would not be right that the tax authorities, having extensive information on the taxpayer's risk assessment, conduct transfer pricing audits broad and thorough, without specific targets and could even lead to revisions or different adjustments to transfer prices, which reduce the legal certainty for taxpayers.

Annex 1 and Annex 2

Unfortunately, the Annex 1 and Annex 2 do not provide “**up to date**” information on the transfer pricing documentation and disclosure requirements from a Mexican perspective. The OECD should revise the source of information to make sure they present an accurate and true picture of the transfer pricing requirements in Mexico. For your reference, we are attaching an up to date version of the documentation and disclosure information for Mexican tax purposes.

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**ANNEX. MEXICAN TRANSFER PRICING DOCUMENTATION AND DISCLOSURE REQUIREMENTS.**

		MEXICO
TP Documentation	No statutory obligation for TP Documentation	
	Statutory obligation for TP documentation	X
Broad-based analysis of MNE group and taxpayer	Legal and organizational structure of the group	X <sup>1</sup>
	Business and business strategy of the group (including changes compared to previous years)	
	Operational structure of the group	X
	Description of any changes in the business in current or past years	X
	Economic circumstances and market analysis	X
Analysis of taxpayer and controlled transactions	Business and business strategy of the taxpayer (including changes compared to previous years)	
	Identification and description of controlled transactions	X
	Identification and information on foreign associated enterprises engaged in controlled transactions with taxpayer; relationship with taxpayer at the time of transaction	X
	Identification and description of other associated enterprises or controlled transactions that can affect directly or indirectly the pricing of the taxpayer's controlled transaction	
	Intangible property relevant for controlled transactions	X <sup>2</sup>

<sup>1</sup> Article 86, ITL. XII. **a)** The names or legal names, addresses, and residencies for tax purposes of the related parties with whom they enter into transactions, as well as supporting documentation **demonstrating the direct and indirect interest among the related parties.**

<sup>2</sup> Article 215 ITL. I. The characteristics of the transactions, including: d) if a license to use an intangible asset is granted or an intangible asset is transferred, factors such as whether a patent, brand, trade name or technology transfer is involved, as well as the duration and the degree of protection.

		MEXICO
	Overall transfer pricing policy of the group and implementation at company level	
TP methods	Explanation of selection of the most appropriate transfer pricing method	X
	Reasons for rejection of other pricing methodologies.	X
Comparability analysis and selection of comparables	Characteristics of property and services	X <sup>3</sup>
	Functional analysis (functions, risks and assets)	X
	Contractual terms	X <sup>4</sup>
	Economic and market conditions circumstances	X <sup>5</sup>
	Business strategies	X <sup>6</sup>
	Aggregation of transactions analysis and/or details of each transaction aggregated	X <sup>7</sup>

<sup>3</sup> Article 215 ITL. I. The characteristics of the transactions, including: **b)** In the case of the provision of services, factors such as the nature of the service and whether or not it requires experience or technical knowledge; **c)** In the case of the use, enjoyment, or sale of tangible assets, factors such as the physical characteristics, quality, and availability of said assets.

<sup>4</sup> Article 215 ITL: **II.** The functions or activities of each of the parties involved in the transaction, including the assets used and risks assumed therein; **III.** The contractual terms; **IV.** The economic context; and **V.** The business strategies, including those related to market share, permanence, and growth.

<sup>5</sup> Article 215 ITL: **II.** The functions or activities of each of the parties involved in the transaction, including the assets used and risks assumed therein; **III.** The contractual terms; **IV.** The economic context; and **V.** The business strategies, including those related to market share, permanence, and growth.

<sup>6</sup> Article 215 ITL: **II.** The functions or activities of each of the parties involved in the transaction, including the assets used and risks assumed therein; **III.** The contractual terms; **IV.** The economic context; and **V.** The business strategies, including those related to market share, permanence, and growth.

<sup>7</sup> Article 86 ITL: **XII** When taxpayers enter into transactions with foreign resident related parties, they are required to obtain and keep the supporting documentation, demonstrating that the amount of their income and deductions were determined in accordance with the prices or amounts that would have been used by independent parties in comparable transactions. Said documentation must contain the following information: **b)** Information on the functions or activities performed by, assets used by, and risks assumed by the taxpayer for each type of transaction. **c)** Information and supporting documentation on transactions with related parties and the amounts thereof, for each related party and for each type of transaction, in accordance with the classification and with the data set forth in Article 215 of this Law.

		MEXICO
	Reasons of multiple-year analysis	X <sup>8</sup>
	Identification, analysis and selection of internal comparables	
	Identification, analysis and selection of external comparables	
	Financial information (e.g. profitability) of selected comparables	X <sup>9</sup>
	Comparability adjustments and justification	X <sup>10</sup>
Determination TP and adjustments	Determination of transfer price (e.g. process, calculation tables, assumptions)	
	Document outcomes of arm's length range and selection of the point in the range	
	Evidence of price negotiation position.	
Financial & accounting data	Financial and/or accounting statements of current year and	X <sup>11</sup>

<sup>8</sup> Article 215 ITL. **V.** The business strategies, including those related to market share, permanence, and growth. When the business cycle or trade acceptance of a product of the taxpayer covers more than one fiscal year, corresponding comparable transactions lasting two or more years, either before or after, may be considered.

<sup>9</sup> Article 86 ITL, XII. When taxpayers enter into transactions with foreign resident related parties, they are required to obtain and keep the supporting documentation, demonstrating that the amount of their income and deductions were determined in accordance with the prices or amounts that would have been used by independent parties in comparable transactions. **d)** The method applied in accordance with Article 216 of this Law, including the information and the supporting documentation on comparable enterprises or transactions, for each type of transaction.

Article 216, ITL. Last paragraph: **APPLICATION OF ACCOUNTING PRINCIPLES:** For the purposes of this Article and Article 215 of this Law, income, costs, gross profit, net sales, expenses, operating profit, assets, and liabilities will be calculated based on generally accepted accounting principles.

<sup>10</sup> Article 217 ITL. If, in accordance with an international tax treaty to which Mexico is a party, the competent authorities of a country with which Mexico entered into such a treaty adjust the prices or consideration amounts of a taxpayer residing in that country, the Mexican resident related party may file an amended tax return reflecting the corresponding adjustment, provided that said adjustment has been accepted by Mexican tax authorities. This amended tax return will not be taken into account regarding the limit set forth in Article 32 of the Federal Fiscal Code.

<sup>11</sup> Article 86 ITL, XII. When taxpayers enter into transactions with foreign resident related parties, they are required to obtain and keep the supporting documentation, demonstrating that the amount of their income and deductions were determined in accordance with the prices or amounts that would have been used by independent parties in comparable transactions. **d)** The method applied in accordance with Article 216 of this Law, including the information and the supporting documentation on comparable enterprises or transactions, for each type of transaction.

		MEXICO
	past years (segmented or consolidated)	
	Financial and/or accounting relevant information of current and /or past years	
	Budgets, business plans and financial projections	
	Country-by-country sales	
	Country-by-country operating income	
	Country-by-country tax paid	
Information on the foreign related-party	TP documentation and tax reporting of controlled transaction in other country	
	Advanced rulings or APAs obtained with foreign tax authorities	X <sup>12</sup>
	Financial and accounting statements of current year/year under review (segmented or company-wide)	
	Financial and accounting data of previous years (segmented or company-wide)	
Specific documentation	Transactions involving intangible property	X <sup>13</sup>

Article 216, ITL. Last paragraph: APPLICATION OF ACCOUNTING PRINCIPLES: For the purposes of this Article and Article 215 of this Law, income, costs, gross profit, net sales, expenses, operating profit, assets, and liabilities will be calculated based on generally accepted accounting principles.

<sup>12</sup>Article, 34-A, Federal Tax Code: The tax authorities may answer inquiries regarding the methodology taxpayers have used for determining prices or consideration amounts in transactions with related parties, in accordance with Article 215 of the Income Tax Law, provided that the taxpayer submit the information, data, and supporting documentation needed for the corresponding resolution. These rulings may stem from an agreement with the competent tax authorities of a country with which Mexico has entered into a convention to avoid double taxation.

Rulings issued in accordance with this Article may be valid regarding the fiscal year in which they are requested, the immediately preceding year, and for up to three fiscal years following that in which they are requested. Rulings may be valid regarding a longer period when they stem from a mutual agreement procedure in accordance with an international convention to which Mexico is a party.

The validity of rulings may be contingent on the fulfillment of requirements demonstrating that the transactions to which they refer are conducted at prices or consideration amounts that would have been used by independent parties in comparable transactions.

		MEXICO
requirements	Transactions involving centralized intra-group services	X <sup>14</sup>
	CCAs/CSAs	
Other information <sup>15</sup>	Copies of inter-company agreements	X <sup>16</sup>
	Tax audits or disputes (of any of the associated enterprises)	
	List of CCAs/CSAs	
	List of APA/rulings obtained by taxpayer	
	Information which could affect TP obtained between end of tax year and filing of the tax return	
	Accounting standards applied by associated enterprises	X <sup>17</sup>
	Background documentation supporting	
	Tax authorities can request supplementary information	X <sup>18</sup>
	Tax return disclosure information on taxpayer's controlled	X <sup>19</sup>

<sup>13</sup> Article 215 I.T.L. I. The characteristics of the transactions, including: d) if a license to use an intangible asset is granted or an intangible asset is transferred, factors such as whether a patent, brand, trade name or technology transfer is involved, as well as the duration and the degree of protection.

<sup>14</sup> Article 215 I.T.L. I. The characteristics of the transactions, including: **b)** In the case of the provision of services, factors such as the nature of the service and whether or not it requires experience or technical knowledge

<sup>16</sup> Article 215. III. The contractual terms.

<sup>17</sup> Article 216, I.T.L. Last paragraph: APPLICATION OF ACCOUNTING PRINCIPLES: For the purposes of this Article and Article 215 of this Law, income, costs, gross profit, net sales, expenses, operating profit, assets, and liabilities will be calculated based on generally accepted accounting principles.

<sup>18</sup>Article 42, Federal Tax Code: In order to verify that taxpayers, parties jointly and severally liable with them, or third parties related to them have complied with the tax provisions and, as applicable, to assess tax deficiencies or unpaid contributions, as well as to determine if any tax offenses have been committed and to provide information to other tax authorities... Article 42-A. The tax authorities may request that taxpayers, parties jointly and severally liable with them, or third parties related to them provide the data, reports or documents needed to plan and schedule review procedures. In the case of such a request, Article 48(IV) through (IX) of this Code need not be complied with.

When the tax authorities solely request the data, reports, and documents referred to in this Article, they will not be considered to have begun to exercise their review authorities, and they may exercise such authorities at any time.

<sup>19</sup> Formal requirements: questionnaires related to the tax records reviewed by an external registered audit (external CPA) as part of the Tax Audit Report, or by the taxpayer itself as part of the Alternative Information Filing, were published in the

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		MEXICO
	transactions.	

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Miscellaneous Tax Resolution. Three of such questionnaires relate almost exclusively to intercompany transactions and require a great deal of detail. Mexican taxpayers must submit: 1) Exhibit 9 of the Multiple Annual Tax Return; 2) Attachment 32; and 3) Attachment 33.

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