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Mr. Owens, Jeffrey Esq.
Director
Centre for Tax Policy & Administration
OECD
2, rue Andre Pascal,
75775 Paris
France

Re: Issue Notes Concerning Transactional Profit Methods

Dear Mr. Owens,

Yulchon (or “we”), a law firm in Korea, is pleased to have the opportunity to provide comments on the recently announced draft issue notes on Transactional Profit Methods (the “Issue Notes”).

We are one of the most fast-growing and competitive law firms in Korea, providing a wide spectrum of advisory services to corporate clients with respect to international and local tax issues.

The comments herein, although very brief, are duly prepared and reviewed by our tax professionals who devote themselves in resolving general transfer pricing issues arising particularly in the Korean tax jurisdiction.

Should you have any comments or questions regarding the contents of this letter, please do not hesitate to contact us by phone or by email.

Respectfully Yours,

Tea Heun “Daniel” Kim (Transfer Pricing Consultant, Yulchon)

Access to the information for tax administrators

We believe that the documentation requirements for taxpayers with respect to transfer pricing should not be burdensome in all cases. However, due to the last resort status, the use of the transactional profit methods was broadly discriminated by tax administrators as producing less reliable and less objective results than the ones produced by applying the traditional transaction methods. Hence, in a number of cases, tax administrators' requests for information in the context of the transactional profit methods had, in many cases, been excessively onerous because the requests frequently required submission of highly sensitive operational and marketing information without due regard to its confidentiality, and also required participation of foreign related parties in preparation and submission of the information requested.

In that regard, we agree with the Working Party on its conclusion (Paragraph 52 (i)) that irrespective of whether the transfer pricing method is one sided or two sided, information should be made available *(i) on the five comparability factors and (ii) on the functional and factual aspects of all parties to the transaction under review, including foreign related parties*. These two elements, we believe, would set the conceptual boundary to the types of information that could be requested by tax administrators in the context of the transactional profit methods.

However, the conceptual boundary now needs to be developed into a more concrete and specific guidelines. That is because the mere need for an access to the information on foreign related parties for the purpose of comparability and functional analyses should not be exploited as a license for unlimited access to taxpayers' information. Above all, tax administrators should refrain from requesting any information that is deemed superfluous when considering the nature of the case in review and the proper manner of application for the transfer pricing method selected, especially in cases where the transactional net margin method ("TNMM") has been applied.

TNMM, as with any other one-sided, profit-based methods i.e., the resale plus and the cost plus methods, is the method for which the selection of a 'tested party' is required. In case a resident entity is selected as a tested party (which is usually the case in many tax jurisdictions), care should be taken by tax authorities to request for information on the foreign related party (ies) only to the extent that it may support sound judgment on

the functions performed and risks assumed by the relevant parties to the transaction in review.

However, in a number of audit cases we have dealt with, we noted that some of the requests for information were not precisely aligned with the purpose of the functional and comparative analyses in the context of TNMM. For instance, there were some incidences where the requests had been made specifically to collect specific pricing and royalty rate information with respect to the foreign related party's controlled or uncontrolled transactions with companies in tax jurisdictions totally unrelated to the transaction in review. Such is far from being acceptable.

Hence, we believe that the Working Party needs further effort to effectuate their conclusion, possibly by determining the types of information that are usually requested by tax administrators in the TNMM context (in various scenarios associated with the choice of tested party), and providing a list of specific items that can or cannot be requested by tax administrators where the tested party is either a resident or a foreign entity.

Furthermore, in order to protect taxpayers from the pressure of unreasonable documentation requests from tax administrators, **Chapter V. B. "Guidance on documentation rules and procedures"** of the OECD Guidelines may need some additional provisions. For instance, in order for the request for information that cannot be deemed as one of the requirements for the reliable application of TNMM, tax administrators should be required to provide valid and reasonable ground for the relevance of the requested information to the case in review, as well as any proof that they have done everything in their power to acquire the information prior to the request. One example of such proof would be the use of hotlines established between relevant tax administrations (possibly in accordance with a tax treaty or its equivalents) for the purpose of sharing taxpayer-related information on a real-time basis. We noted that there have been inter-tax governmental efforts during the recent years to establish cooperative networks (such as "Joint International Tax Shelter Information Centre" established by the respective tax authorities in the U.S., U.K., Canada, and Australia) among regional tax authorities for active sharing of information in order to prevent tax evasion attempts by multinational enterprises.

We believe that these measures, along with the specific guidelines on the types of



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information accessible by tax administrators, would help reduce the taxpayers' burden of transfer pricing documentation requirements, and in turn promote the wider use of the transactional profit methods.