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Transfer Pricing Disputes: Big, Getting Bigger

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The impact of higher TP amounts in dispute in recent years is likely to result in uncertain tax positions in the financial reporting context and command C-suite attention to TP issues, says a Grant Thornton practitioner.

The amounts in transfer pricing disputes have always been larger than those in other tax disputes. As early as the 1980s, the Tax Court coined the term “jumbo cases” just to refer to transfer pricing cases where the amounts in issue and court efforts were outsized compared to other tax cases. Although transfer pricing cases represented less than one percent of Tax Court cases, they accounted for approximately one-third of all deficiencies. The amounts involved in those so-called “jumbo” cases from the 1980s pale in comparison to amounts in recent [§482](#) disputes.

In 1993, Tax Management found that taxpayers were challenging tax adjustments of nearly \$10 billion in [§482](#) allocations in 87 cases in federal courts (the 1993 numbers were particularly high for the time, as they include the “Aramco Advantage” petroleum pricing cases) ([Nearly \\$10 Billion in Allocations Disputed in 87 Transfer Pricing Cases](#), 2 Tax Mgmt. Transfer Pricing Rpt. 327 (Oct. 20, 1993)). However, the amounts in each of three recent transfer pricing disputes equal or greatly exceed the entire amount

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of all transfer pricing adjustments in those 1993 cases. In 2020, the Tax Court ultimately ruled that Coca-Cola underpaid its taxes for tax years 2007-2009 by \$2.7 billion and owed interest of \$3.3 billion (*Coca-Cola Co. & Subs. v. Commissioner*, 155 T.C. 145 (2020)). The taxpayer is expected to appeal (*Stakes High as Coca-Cola Preps Transfer Pricing Case Appeal*, Daily Tax Rpt. (Aug. 8, 2024)). In 2024, the IRS proposed to increase Amgen's taxable income by over \$23 billion for tax years 2010-2015, resulting in approximately \$10.7 billion of additional tax, penalties, and interest for that period (*Amgen Inc. v. Commissioner*, No. 16017-21 (T.C. July 3, 2024); [Amgen Inc. v. Commissioner](#), T.C. Memo. 2024-38). And currently, Microsoft is engaged in a long-standing transfer pricing dispute with the IRS over \$28.9 billion of additional taxes, plus penalties and interest for tax years 2004-13 (Mimi Song, *Microsoft's \$29 Billion Tax Bill Offers Transfer Pricing Lessons*, Daily Tax Rpt. (Feb. 7, 2024)). In the aggregate, these three cases represent an overall taxpayer transfer pricing exposure in excess of \$50 billion dollars of tax, penalties, and interest, and each of these taxpayers have subsequent years with the same transfer pricing issue.

Reasons Transfer Pricing Disputes Are Large

One fundamental reason that transfer pricing amounts in dispute are large is because transfer pricing is the largest issue for some of the world's largest multinationals on their cross-border transactions. According to U.S. Census Bureau statistics, imports and exports of goods between related parties accounted for 41.6% of all imports and exports in 2022; all of these transactions involve transfer pricing. Further, unlike many tax disputes, transfer pricing disputes generally are not limited to a single transaction for a single year; instead, U.S. transfer pricing disputes could address all cross-border transactions with related parties- tangibles, intangibles, services, and intercompany indebtedness over many years. Due to the factual development necessary to analyze transfer pricing issues and the time needed to analyze that information for multiple transactions, multiple years are generally included in the transfer pricing dispute, further adding to the amount of deficiency asserted. According to OECD statistics, transfer pricing cases in the mutual agreement procedure take nearly twice as long to resolve as non-transfer pricing cases. For example, Microsoft's dispute covers ten tax years from 2004 to 2013.

Reasons Amounts Are Getting Larger

Probably the major reason for the continuing increase in transfer pricing amounts in issue is the focus of transfer pricing examinations on intangibles transactions and the enormous increase in the value and importance of those intangibles in the global operations of multinationals. In recent years, more transfer pricing disputes have focused on intangibles transactions that have a large impact on company profits; intangibles are inherently difficult to value due to the lack of closely comparable transactions for unique intangibles. These problems are amplified by the increasing financial importance of intangibles in a modern business. In a [study](#) of the value of intangibles relative to the overall value of S&P 500 companies, the percentage in 1975 was 17%, increasing to 90% in 2020 (*Intangible Asset Market Value Study*, Ocean Tomo). Thus, to the extent more transfer pricing disputes focus on intangibles, it is not surprising that amounts in dispute have risen.

Penalties and Interest

The IRS has taken a more assertive stance regarding the imposition of [§6662](#) penalties, and the interest rates associated with tax underpayments has also recently increased. The combination of these factors has resulted in increased amounts in transfer pricing disputes.

[Section 6662\(e\)](#) and [\(h\)](#) provides for 20% and 40% penalties, respectively, for certain [§482](#) transfer pricing adjustments made by the IRS. Amounts are excluded from the calculation to the extent the taxpayer applied one of the transfer pricing methods in the [§482](#) regulations in a reasonable manner. If

the proposed net transfer pricing adjustment exceeds \$20 million, the 40% penalty may be applied. The IRS has recently embarked on an effort to apply [§6662](#) penalties more frequently than in the past, specifically stating that documentation must be of a sufficient quality to prevent imposition of the penalty. The IRS is asserting penalties in four recent high-profile cases —Amgen (\$10.7 billion of tax, penalties and interest), Newell Brands (\$90 million of taxes and \$34 million of penalties), Airbnb (\$1.3 billion of tax and \$573 million of penalties) and Microsoft (\$28.9 billion of taxes, plus penalties and interest) ([Newell Brands, Inc. v. Commissioner](#), T.C. No. 11897-24 (petition filed July 17, 2024); [Airbnb Inc. v. Commissioner](#), T.C., No. 12423-24 (petition filed July 31, 2024))).

There are no special interest rules for transfer pricing; however, the amounts of additional taxes and penalties combined with the long time for resolution of cases produces exceedingly large interest amounts. Further, interest rates have recently increased. The combination of large proposed adjustments, long examination periods and newly-increased interest rates will produce large amounts of interest.

Conclusion

Based on the above factors, it is not difficult to see why the amounts in issue in transfer pricing disputes are quite large and trending larger. The impact of these higher amounts in dispute is likely to result in uncertain tax positions in the financial reporting context and command C-suite attention to transfer pricing issues. The allocation of the material costs and benefits of achieving environmental, social, and governance goals may soon be added to the list of potential transfer pricing disputes.

The lingering question is how to deal with it.

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