

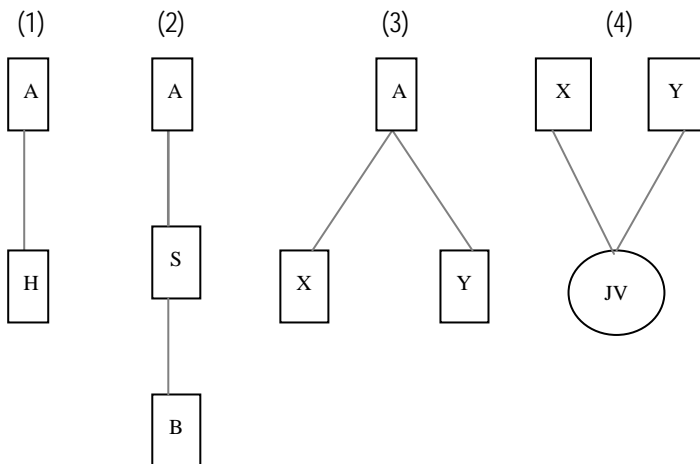
Transfer Pricing

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What is transfer pricing?

It concerns transactions between associated companies (or enterprises) 有關連的公司或企業: one company participates in the management, control or capital of the other (directly or indirectly) or same people control both companies.

Examples of associated companies:



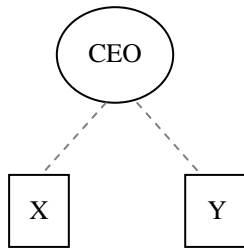
Example 1: A company is controlled by H company.

Example 2: S company is controlled by A company and B company.

Example 3: A company controls X company and Y company.

Example 4: X company and Y company together form a joint venture JV.

Another type of associated companies:



CEO is an individual who controls X company and Y company.

Associated companies should be distinguished from independent companies. The transactions between independent companies are determined by market forces; whereas the transactions between associated companies are Not necessarily so clear cut although it cannot simply assume that they must deviate from open market conditions.

Why the transactions between associated companies cause tax problems?

- There is an absence of full market forces.
- They may involve tax avoidance.
- There may be other motives: customs duties, price and exchange controls, dividend policy

For the transactions between associated companies, the basis for tax assessment is Arm Length Pricing (ALP), which refers to dealing at arm's length: the price one which would have been agreed upon between unrelated parties engaged in the same or similar transactions under the same or similar conditions.

Deviation from ALP distorts tax liabilities of both the companies and therefore it affects the revenues of the tax administrations concerned. This causes problems to Hong Kong IRD.

The generally accepted assessing guideline of ALP is: "If conditions made or imposed between associated enterprises in their commercial or financial relations differ from those which would have been made between independent enterprises, then profits that, but for those conditions, would have accrued to one of the enterprises may be included in the profits of that enterprise and taxed" – by OECD. Put it simply, the conditions unlikely to be existed between independent companies should be disregarded for tax assessment purpose.

The practical difficulties in assessing transfer pricing cases are:

1. Allocation of the benefits in respect of (a) economy of scale or (b) integration or (c) functions or (d) risk between the companies is contentious.
2. Associated companies may undertake transactions which would never be performed between independent companies.
3. IRD has problems in determining arm's length pricing.
4. IRD has difficulties in getting relevant information even though such information exists.

Comparability analysis

This is the basic guide for assessemnt in transfer pricing cases. The analysis has the following features:

1. Compare conditions in controlled and uncontrolled transactions.
2. Presumably there are truly comparable or identical conditions and transactions.

3. Practically there are differences in conditions and transactions but such differences may be immaterial.
4. Conditions can still be comparable if they are adequately adjusted for the differences.
5. Analysis is made by comparing how independent companies evaluate differences and then choose the options by reference to various factors.

In doing comparability analysis, the following factors are considered:

1. Characteristics of the property or service
2. Functional Analysis
3. Contractual Terms
4. Economic Circumstances
5. Business Strategies

Features of ALP tax assessment:

1. There is a range of arm's length prices or margins; rather than one single absolutely correct arm's length price.
2. Any price within the ALP range is acceptable for tax assessment: No adjustment needed
3. If the price in question is not within the ALP range, then tax dispute can arise as to what price in the range should be adopted for tax assessment? In practice, this dispute is solved by negotiation between the taxpayer and the Revenue based on the facts ascertained and the arguments put forward by the taxpayer.

The tax assessment methods for transfer pricing cases are:

1. Traditional Transactional Methods
 - Comparable Uncontrolled Price (CUP)
 - Resale Price Method
 - Cost Plus Method

2. Transactional Profit Methods
 - Transactional Net Margin Method (TNMM)
 - Profit Split Method

CUP METHOD

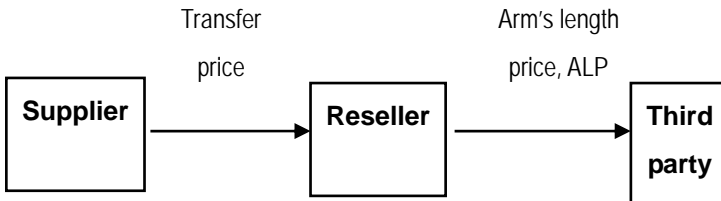
This method assumes a comparable uncontrolled price CUP exists for the product in question. Put it simply, there is a open market price for the product in question. As such, the CUP should be adopted for assessing transfer pricing transactions.

Features of CUP method:

- It is the “most direct and reliable way to apply the arm’s length principle” - by OECD.
- It is preferred where Comparable Uncontrolled Products CUP can be found.
- It is focused on product.
- The main dispute under CUP method is: How can the differences between the product in question and the comparable product be adjusted?

RESALE PRICE METHOD

Features of Resale Price Method:

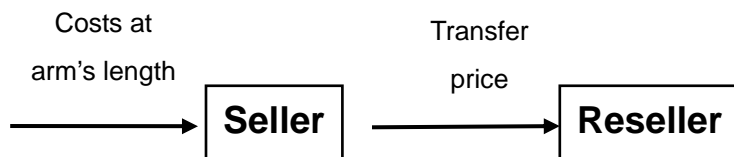


- Calculate gross margin for reseller. Then, deduct the gross margin and the value added by the reseller from the ALP to determine the fair resale price which is compared with the transfer price.
- It is easy to apply if the reseller does not add substantially to value of product.

Difficulties in applying resale price method are:

1. The reseller employs reasonably valuable and possibly unique intangibles. So, it is difficult to determine the value added or the gross profit margin by the reseller.
2. The reseller adds significant value to product. High value added make the comparison inaccurate.
3. Exclusive license exists for the product. In such case, no fair open market value (i.e. ALP) is available.

COST PLUS METHOD



Features of Cost Plus Method:

- Determine the costs at arm-length. Calculate gross mark-up for seller. Compare the marking-up of cost with the transfer price.
- It is easy to apply when: (a) semi-finished goods are sold or (b) services are provided.

Difficulties in applying cost plus method are:

1. Measurement of cost base: (a) Direct costs (b) Indirect costs. Disputes arise on how such costs are determined.
2. Adjustment for the inconsistencies in accounting treatment of various costs.

PROFIT METHODS

What is a "profit method"?

- It uses net profitability to judge transfer pricing.
- It is transactional - Global profit comparisons are used to select cases.
- It does not use pre-set formulas: Neither industry averages nor fixed percentages are used.

Transactional Net Margin Method (TNMM):

This is a profit method set out in OECD's Guidelines 3.26 as: "It examines the net profit margin relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realizes from a controlled transaction (or transactions that are appropriate to aggregate under the principles of Chapter I). " This method is applied in a manner consistent with the Resale Price Method or the Cost Plus Method.

TNMM Comparability Analysis

The first question for the analysis is to consider: What factors influence net profit? In practice, such factors may be affected by factors unrelated to transfer pricing.

Secondly, examine all factors affecting operating expenses, including:

- management efficiency
- competitive position
- business experience
- varying cost structures

This method requires consistent measurement for:

- items included in calculating net profit
- timing (e.g. depreciation)
- allocation (e.g. overhead, research & development, general & administrative costs)

Types of Net-profit Margins

(1) Return on sales = net profit / sales

This margin method is often used for industries involving services and distribution e.g. where personnel rather than capital assets are important.

(2) Return on costs = net profit / total costs

This margin is often used for industries involving manufacturing.

Then, determine the profit attributable to the companies concerned with the above profit margins determined.

When should TNMM be used? It should be used as:

- A method of last resort
- Where gross margins cannot be identified
- Where net margins can overcome difficulties in adjusting for functional differences or measurement consistency
- Where it is hard to apply to taxpayer with unique intangible property

The Profit Split Method:

It is a transactional method set out in OECD's Guidelines 3.5 as: "The profit split method seeks to eliminate the effect on profits of special conditions made or imposed in a controlled transaction (or in controlled transactions that are appropriate to aggregate under the principles of Chapter I) by determining the division of profits that independent enterprises would have expected to realize from engaging in the transaction or

transactions.” Put it simply, it is a method of apportionment of global profit to the companies concerned.

How to split profit?

It is usually done by Functional Analysis:

- Compute global profit (i.e. the combined net profit)
- Examine functions of the companies concerned
- Determine relative value (i.e. the value added) – pay regard to the factors such as: expenses incurred, assets used, payroll etc.
- Examine external data (i.e. market information)
- Work out a profit split percentage for the companies
- Work back a transfer price for the product in question

Cautions for using Profit Split methods:

- Difficulties in determining global taxable income
 - different measurement & accounting treatments
 - difficulty in allocating costs & operating expenses
- Pay attention to the risks of each company
- Pay regard to substance of contribution, not form

When should Profit Split methods be used?

- When traditional methods cannot be used.
- When the companies make use of intangibles.
- When functions of both companies are highly integrated.
- When dealing with advanced pricing arrangements.



公司向內地附屬公司買貨，要小心釐定價格，如果價格定得大幅高於市價，稅局會質疑是否涉及避稅安排，減少了香港公司的利潤，為免日後的稅務爭議，公司最好擬備價格計算基礎，提供理據及證明定價是按市場規律而制定的 arm-length price。

轉讓定價 transfer pricing 的評稅準則

當納稅人與其關連公司 associated company 進行交易，包括貨物轉售，知識財產(例如商標、專利權)轉讓，或者互相提供服務(例如銷售業務、外判加工、財務管理)，基於兩者關係密切，稅局會質疑交易的轉讓價 transfer price 是否合理，會否減少香港的應收稅款。

廣義來說，轉讓定價的稅務爭議可以發生在一切關連公司 associated companies 間的交易，包括本地關連公司間的交易。對於兩間皆是位於香港的關連公司間的交易，如果稅局認為它們間的交易價涉及避稅，稅局可援引反避稅的稅例及案例予以打擊。

一般在稅務上談及的轉讓定價 transfer pricing，是針對本地公司與外地關連公司間的交易，本節論述亦是以此為中心。



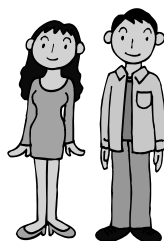
關於轉讓定價，稅局有執行指引第46號，長達55頁(A4)，指引只有英文版，沒有中文版，兼且內容艱深，一般市民未必能讀懂。

香港的轉讓定價評稅政策，主要參照 OECD (即經濟合作與發展組織 Organization for Economic Cooperation and Development) 公佈的準則，所以香港的政策與國際上通用的大致相同。OECD 是以西方國家 (尤其是美國) 為主導的國際組織，總部設在法國，有 34 個成

國（中國是合作夥伴，不是成員國，香港只是觀察員）。經合組織的宗旨主要是幫助成員國實現可持續性的經濟增長和就業，提高生活水準上升，以及保持金融穩定，為世界經濟發展作出貢獻。

關於轉讓定價的評稅政策，香港稅務局在其執行指引 DIPN 46 有詳細說明，讀者可到稅局網站下載。

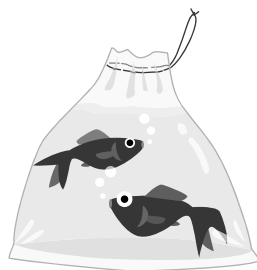
我地賣俾外國公司比本地公司平三成，怕唔怕俾稅局查架？



我地同外國公司又有關連，查都唔駛怕啦！

按照 DIPN 46，關連公司 associated company 是指一方參與另一方的管理 management、控制 control、或資金 capital，或是雙方受同一人或同一公司管理、控制、或提供資金。

香港註冊的 H 公司與 BVI 註冊的甲公司，皆由賈先生控制，按照 DIPN 46，這兩間公司屬於關連公司，對於這兩間公司間的交易，稅局會考慮是否涉及避稅行為。



根據 OECD 指引，在判定轉移價是否合理，應按照「臂長原則 arm-length principle」，那是指以兩間獨立無關的公司在公開市場的定價為基準，來檢測關連公司間的交易價是否合理。這項原則亦稱作「受控之外的定價原則 uncontrolled price principle — 即兩個沒關連人士在不受某一方控制情況下的交易定價」。簡而言之，就是稅局會參照「市場公開價 open market price」，來考慮是否接納帳目內的交易價作為計算應評稅利潤。



長官好，臂長原則 arm length principle，就係轉讓定價既最高指示！

一般而言，基於香港的利得稅率較外地的低，香港公司與其關連公司在跨境貿易中所得的利潤應不會低於其合理利潤。即使香港公司的帳目中的利潤較其應得的合理利潤為高，稅局必會根據這帳目中的利潤評稅，而不會按納稅人的要求作向下調整，除非外地關連公司當地的稅務機關按照與香港簽訂的雙重課稅協議內的聯屬企業條款 Associated Enterprises Article 作出適當的稅務調整 appropriate adjustment，以消除雙重徵稅。若然，香港稅局就會按照協議作適度的稅務調整，見 DIPN 44 Article 9。什麼是適當地調整香港的稅負？實務上，香港稅務局不會將外地稅務機關（或內地稅務機關）多徵的稅款在香港的徵稅內扣減，也不會用當地稅務機關評算的轉讓價來計算應評稅利潤，而是按照 DIPN 46 內所頒佈的稅務原則，來重新釐定香港的稅負。

DIPN 46 的稅務原則

如上面提過，DIPN 46 的稅務原則大致上跟從 OECD 的「臂長原則 arm-length principle」。衡量貨物轉移定價的方法有多種，常見的有：比較不受控制的同類貨物價格 CUP Method、按公開轉售價推算轉讓價 Resale Price Method、按成本加利潤推算轉讓價 Cost Plus Method。另外，稅局也會用功能分析法 functional analysis 來檢測香港公司的利潤在其集團內是否合理的分配 whether there is reasonable allocation of profits between the associated companies。

CUP 比較不受控制的同類貨物價格

CUP (Comparable Uncontrolled Price) 的評稅準則，是將轉讓價與不受控制的同類貨物價格比較。不受控制的價格，是指該價格不受別人或公司影響，即市場夠大並且公開的同類貨物價格。

要用這個方法來衡量貨物轉移定價是否合理，稅局先要找到「不受控制的同類貨物價格」。但對於某些貨品，由於市場小，或者市場中沒有同類貨品，稅局便難以採用這個方法，那時，稅局便會考慮「Resale Price Method 按公開轉售價推算轉讓價」。

例子解說

20013/14 課稅年度

香港公司向外地關連公司支付購貨款總額：\$12,000,000

每件貨品的市場公開價：\$1,000

香港公司向外地關連公司的每件採購價：\$1,200

按市場公開價的購貨開支： $\$12,000,000 \times 1,000 / 1,200 = \$10,000,000$

購貨開支的差額： $\$12,000,000 - \$10,000,000 = \$2,000,000$

報稅表上的應評稅利潤：\$20,000,000

修正後的應評稅利潤： $\$20,000,000 + \$2,000,000 = \$22,000,000$

OECD 認為 CUP 的方法是最直接的及最可靠的轉讓定價方法，因為它最能反映「臂長原則 arm-length principle」。如果能找到 CUP，就應以它為定價及計稅的基準。

公開市場上賣既同類產品，啲質量點及我响德國母公司買啲啲喎，我地做既係高檔貨，成本同價錢梗係高好多啦！你用同類產品既市價黎做基準，唔公道嘅，我認為應該將市價至少調高百份之二十，才可以同我買啲貨作比較。



Resale Price Method 按公開轉售價推算轉讓價

按公開轉售價 resale price 推算轉讓價。何謂公開轉售價？那就是有關貨物在市場上的公開銷售價，倘若它不在市場公開銷售，調查員便在市場上找一些相近的或處於不同工序的貨物，然後將它們的市場價格按情況調整至受查中貨物，看看兩者價格是否相差很大。如果受查的是半製成品 work in progress，而市場上找到的是製成品 finished goods，那麼，所謂調整就是把製成品的市價減去加工成本及合理利潤，來跟受查貨物的轉讓價作比較。假若稅局找不到一些相近的或處於不同工序貨物的公開價，這個方法便不合用，那麼，稅局就會考慮以成本來衡量有關貨物或服務的轉讓價。

例子解說

20013/14 課稅年度

香港公司向內地關連公司支付購貨款總額：\$40,000,000

香港公司向內地公司的每件採購價為 \$100

有關貨品沒有在公開市場發售，但市場上有類似貨品，但質量較差，每件平均售價為\$60，與稅局協商後，每件貨品的公平採購價為 \$80

經調整後的購貨開支總額： $\$40,000,000 \times 80 / 100 = \$32,000,000$

購貨開支差額： $\$40,000,000 - \$32,000,000 = \$8,000,000$

報稅表上的應評稅利潤： $\$50,000,000$

修正後的應評稅利潤： $\$50,000,000 + \$8,000,000 = \$58,000,000$

對於服務既定價，基於獨特性難與市場上的市價作比較，所以一般會採用成本加利潤的推算法。稅局會審閱服務公司的會計報告，釐定有關服務的實際總成本，然後在總成本上加上合理利潤，作為服務定價的合理價格。



Cost Plus Method 按成本加利潤推算轉讓價

以成本來衡量貨物轉移定價 cost plus method: 那是根據納稅人提供的帳目來釐定貨物的成本，然後就其貨物性質及風險，再加上一個合理利潤值 mark-up profit margin，以計算其合理轉讓價。在釐定合理利潤值時，調查員會參考市場上的資料，如「不受控制的同類貨物價格」。當然，釐定利潤值有時頗具爭議，因為納稅人會提出以下論點，以爭取稅局接納他所訂的貨物轉讓價格為合理價格：

- 公司運作及生產的模式、效率與市場的不同
- 公司擁有購買上或銷售上的優勢或劣勢
- 稅局所用的合理利潤率與市場上的不同
- 調查員用的成本計算的方法，與有關行業所用的有別

例子解說

20013/14 課稅年度

香港公司向內地關連公司支付外判加工費總額： $\$60,000,000$

香港公司是內地公司唯一客戶，據內地公司的會計報告，內地公司的全年總開支（不計董事酬金）為 $\$40,000,000$ 。

對於服務費，稅局一般認為合理的利潤率為 10%，即合理外判利潤為\$4,000,000。

合理的外判加工費為 $\$40,000,000 + \$4,000,000 = \$44,000,000$

外判加工費的差額： $\$60,000,000 - \$44,000,000 = \$16,000,000$

報稅表上的應評稅利潤： $\$30,000,000$

修正後的應評稅利潤： $\$30,000,000 + \$16,000,000 = \$46,000,000$

功能分析 Functional Analysis

除了上述幾種評稅方法，稅局還會考慮以有關集團的全球利潤 world-wide profits 為評算基準，然後按香港公司的功用 function 於全球貿易的貢獻比率 contribution ratio 來推算香港公司的應評稅利潤（即功能分析法 functional analysis），見香港 Asia Master Ltd 案例。



由於功能分析基於許多假設，而每項假設都頗具爭議性，所以一般只會用作檢測前述方法計算利潤的可信性，或作為談判工具，而不會用作計算納稅人的應評稅利潤。

這個分析法是按香港公司於集團內的角色及功用 role and function、投資規模 asset backing、公司規模及僱員人數 company size / employee number、風險承擔 risk bearing 等因素來推算香港公司在集團內應該分配到的利潤。

怎樣釐定「全球利潤」？一般來說，稅局會參照有關集團的綜合會計帳目 consolidated accounts，找出集團的全球利潤及其會計準則，

然後按香港的評稅原則及慣例作調整。

怎樣釐定「香港公司的功用於全球貿易的貢獻比率」？當然，這一個是事實問題，而且頗具爭議，一般來說，稅局會考慮香港公司在集團的業務角色、性質、資產、工序、僱員人數等因素，如果在公開市場中有同類公司、業務或產品可供比較，稅局會參考市場資料；如果沒有，就會透過談判解決，倘若稅局與納稅人不能達成協議，稅局就會按自己的計算方法向納稅人發出估稅，那麼，如果納稅人不滿估稅，就只得循反對程序上訴，那時，納稅人須提出理據，推翻稅局的計算方法。

什麼功能最能賺錢？香港公司有什麼功能？外地公司有什麼功能？如何計算香港公司應佔利潤比率？對這些問題稅局與納稅人往往不能取得共識，即使取得共識，對於如何按香港稅例及案例調整所屬集團的總利潤亦十分困難，所以在實務上用功能分析來計算香港公司的應評稅利潤並不常見。



為避免引起稅局挑戰，納稅人最好自己事先釐定一套合理的貨物轉讓定價準則。如何釐定合理準則？一些國家，如中國、美國有既定指引，如果納稅人的關連交易涉及這些國家，最好遵從有關指引，以避免利潤被重覆徵稅。如果沒有既定指引，最穩當的做法就是按功能及風險來定價。什麼功能最能賺錢呢？當然要視乎個案情況而定，一般來說，以最賺錢排先的功能依序為：生產、技術、貿易、物流、會計。至於風險，即市場起落的幅度和速度，按市場規律來說，當然是哪間公司承受的風險愈大，它要求的回報（即轉移售價）就應該愈高了。

例子解說

20013/14 課稅年度

在稅局與納稅人多番協商後，雙方達成以下利潤分配比率：

	<u>香港公司</u>	<u>外地公司</u>
公司資產及功能比重因子	3	2
公司規模及僱員人數比重因子	2	2
市場風險比重因子	4	2
	---	---
應佔利潤比例	9	6
	==	==

香港公司與外地關連公司的會計利潤總和為 \$14,000,000

稅局按香港評稅原則調整的集團應評稅利潤總和為 \$15,000,000

香港公司應佔的應評稅利潤： $\$15,000,000 \times 9 / 15 = \$9,000,000$

香港公司報稅表上的應評稅利潤為：\$8,000,000

香港公司的應評稅利潤修改為：\$9,000,000



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