Curbing Illicit Financial Flows from Resource-rich Developing Countries: Improving Natural Resource Governance to Finance the SDGs

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Transfer Pricing (TP) Rules, Procedures and Documentation: A perspective on Ghana

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Atupare Atudiwe, Peter

ISSER, Ghana

Kpebu, Martin

ISSER, Ghana

With inputs from **Irene Musselli** and **Elisabeth Bürgi Bonanomi**

CDE, University of Bern

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ABSTRACT

Our primary claim in this paper is that the legal rules pertaining to transfer pricing in Ghana are potentially effective but there exists inherently weak links within the general tax system that may undermine success and sustainability. This predicament provides a little systemic muscle or institutional mechanism for the recovery and retention of revenue to the state. Multi-national corporate bodies have seen this as an economic valve to erode the efforts of the state in tax collection. This basic predicate of the paper is built on the idea that the legal tax regime in Ghana fails to adopt an approach to transfer pricing that recognizes the peculiar circumstances of the Ghana Revenue Authority (GRA) and also that the discretion the Commissioner General of the GRA has in such matters might be an avenue for abuse. This is exacerbated by weak human resource capacity of the institutions responsible for tax collection in the country and in particular, adequate trained personnel on transfer pricing are inadequate. Above all, there is lack of certainty in respect of the methodology usually deployed in the few selected cases for calculating the liability of a person on transfer pricing. There is no reliable database for comparables on the account of which taxpayers liability on transfer pricing are calculated. This gap sometimes leads to delays and arbitrary decisions on the part of tax officers. It is thus suggested that appropriate targeted legislative and administrative measures are required to bring the tax regime of Ghana on transfer pricing up to date and to facilitate efficiency in revenue mobilisation through effective tax administration in the country. It is also recommended that the Ghana should take a second look at its current transfer pricing methods and adopt a simplified approach that ensures a more effective use of resources.

1. Overview

This paper reviews Ghana's law and practice as regards transfer pricing – the rules and principles for pricing transactions between related parties within a multinational enterprise. Our primary claim in this paper is that the legal rules pertaining to transfer pricing in Ghana are potentially effective but there exists inherently weak links within the general tax system that may undermine success and sustainability. We propose pragmatic ways to tackle shortfalls in the currents system and strengthen revenue mobilization.

The analysis proceeds as follows. In chapter 2 we set the background stage, by providing and overview of the legal system of Ghana and its tax system in particular. In chapter 3, we clarify what is meant by transfer pricing, consider concerns about transfer mispricing, and introduce the standard OECD–sponsored approach to address transfer mispricing. Chapter 4 describes the legal and institutional framework on transfer pricing in Ghana. Chapter 5 considers critical regulatory gas and shortfalls in the implementation of transfer pricing law in Ghana. Chapter 6 focuses on pragmatic ways to address these shortfalls, with a focus on solutions that can be implemented in the short to mid-term. The paper then concludes with some summary observations.

2. Background Information on Ghana's Legal System and the Tax System

Ghana is a low middle income country located in West Africa. The country has experienced relatively high rates of economic growth and poverty reduction in the past two decades (World Bank, 2013, 9) and the trend seems to continue according to recent data[1]. Children's nutritional status has improved in recent years, though stunting rate remains at 19%.[2] Ghana also lags on key SDG issues, such as maternal and infant mortality and access to improved sanitation methods, with large disparities in access to key health and education services between the north and south and between income quintiles[3]. Women are actively involved in agriculture and about 49.3% of them are employed in this sector.[4] Ghana's population stood at 28.96 million as at 2017 with a GDP per capita (USD) of 1,654. In 2013 agriculture employed 53.6% of Ghana's total labour force.[5] Public lands are vested in the President in trust for the people of Ghana and apart from land, the major economic natural resources in Ghana include gold, bauxite, manganese, diamond, rubber, timber, petroleum and salt. The GDP growth rate in 2017 was 8.5 percent compared to 3.7 percent in 2016[6]. Though Ghana is an oil exporting country

[1] https://www.worldbank.org/en/country/ghana/overview Accessed on 23 Jan. 2019 @ 20:45 hours GMT; https://data.worldbank.org/country/ghana Accessed on 23 Jan. 2019 @ 20:45 hours GMT

[2] GSS, Ghana Demographic and Health Survey, various editions cited in NDPC, GSS (2018) Ghana Sustainable Development Goals (SDGs): Indicator Baseline Report (NDPC) 17

[3] Ibid .

[4] Ibid, at 5.

[5] FAO (2015), Food and Agriculture Policy Decision Analysis, *Country Fact Sheet on Food and Agriculture Policy Trends* (FAO) Retrieved on 28 January 2019 @ 19:34 hours GMT

[6] https://www.worldbank.org/en/country/ghana/overview. Accessed on 23 Jan. 2019 @ 20:45 hours GMT; https://data.worldbank.org/country/ghana Accessed on 23 Jan. 2019 @ 20:45 hours GMT

since 2010, she remains somewhat dependent on international financial and technical assistance as well as the activities of a considerable number of Ghanaians in the diaspora. Under British colonial rule, Ghana was officially named the Gold Coast for its large quantity of gold resources and Ghana remains one of the world's top gold exporters. Other large sectors include cocoa and timber production, mining, and electricity production. The agriculture sector expanded from growth rate of 3.0 percent in 2016 to 8.4 percent in 2017. Crops remains the largest activity with a share of 14.2 percent of GDP (Ghana Statistical Service, 2017).

A. Ghana's Legal system

The Ghana legal system is anchored on a common law tradition. This is the tradition mostly associated with the Commonwealth of Nations. Understandably, Ghana's fate is pitched with this group because she was colonised by the British for over a century[7] and during the period of colonialism, the British introduced and applied the English common law in Ghana.[8] In the colonial context, the key historical instrument for the identity of law in Ghana was the Supreme Court Ordinance, 1876, which introduced English law and affirmed the continuity of local customary laws in the Gold Coast Colony. Section 14 introduced the common law and equity as well as English statutes of general application. Section 17 provided that these English laws were to be applied subject to local conditions and circumstances, and such laws could be altered by local legislation. And section 19 provided that, where appropriate, courts were to apply local laws and customs so long as they were not "repugnant to justice, equity and good conscience." This basic legal duality—an English-based common law system plus local customary law—continued after independence with each successive constitution.[9]

But aside this major reception ordinance, it was the *Colonial Laws Validity Act* of 1865 which provided the colonial systems a proper fit into their larger imperial constitutional context. The basic point of the Colonial Laws Validity Act was to confirm that a law made in the colonies that was repugnant to an Act of the imperial (or U.K.) Parliament, or an order made under such an Act, that extended to the colony, was of no force or effect (section 2). But it also confirmed that colonial laws that were repugnant to the "Law of England" were *not* void, unless, in violating the Law of England, they also violated an Act of Parliament or order made there under extending to the colony (section 3). In fact, the 1865 Act was intended to dispel the notion that colonial legislative authority was in some sense bound by vague notions of humanity or equity associated with the Laws of England. The Act confirmed that the

[7] The Bond of 1844, marks the beginning of the colonial period and Ghana attained independence in 1957.

[8] See section 11 of the Gold Court Supreme Court Ordinance of 1876. See also the Supreme Court of the Gold Coast Ordinance (CAP. 4 of the Laws of the Gold Coast, 1951) which provided that there should apply in the Gold Coast '… the common law, the doctrines of equity and the statutes of general application which were in force in England on 24th July, 1874…'

[9] See in general S.Y. Bimpong-Buta, "Sources of Law in Ghana" (1983-86), 15 Review of Ghana Law 129, at 131-32. It should be noted that in the colonial period, this country had extensive systems of so-called Native Courts for the application of local customary laws, which were integrated into a regional system of appeals, with a common West African Court of Appeal, and, ultimately, an appeal to the Judicial Committee of the Privy Council in London. See R.E. Robinson, "The Administration of African Customary Law" (1949), 1 Journal of African Administration 158, at 170-172

only legal limitation on colonial legislative authority was the express terms of Acts of the imperial Parliament, or orders made there under, that extended to the colony in question.[10]

In the post-independence period, this duality of legal norms did not fade off.[11] There has been a sustained attempt to recognize the customary law constitutions of the various ethnic groups as part of the corpus of constitutional law in Ghana. Article 11(2) and (3) of the Constitution, 1992 provide that the "common law of Ghana" includes not only the rules of law generally known as the common law, but also "rules of customary law" or "rules of law which by custom are applicable to particular communities…." That is, it is no longer the "English Common Law" but rather the *common law of Ghana* which embraces both general common law and particular local customary norms. It is inescapable that the multiplicity of customary rules operating within a network of common law, equitable, statutory and constitutional codes and principles make a strong case for the assertion that legal pluralism is a legal reality in Ghana. Here, rules of customary law are valid and enforceable if properly held so as rules of law which are by custom applicable in a particular community.

At present, the preeminent political classification or categorisation of the system of government practised in Ghana is that it is a unitary system. At best, the country is not federated with autonomous power holders at the provincial or regional levels. There is concentration of power at the centre with executive President operating under a unicameral Parliament. But we should note that it is not an absolute or exclusive concentration as some powers have been delegated or decentralised to the local government units- which can be likened to counties but called metropolitan, municipal or district assemblies, in a descending order depending on their population size[12] among others.[13] These local government units have the power to levy some small sums as taxes in their area of authority. Some of the taxes are property taxes, business operating permit, and market tolls (taxes paid by traders who sell merchandise in physical markets, often built solely by the metropolitan authority or jointly with a private company).

At the more normative level of constitutional practice and arrangement, there is, in Ghana, a tradition of separation of powers across legislative, executive and judiciary functions.[14] Such a tradition is much more clear and neater under written constitutional rules than under military regimes. We should note that since independence, there have been about five (5) spells of military interventions, covering a period of about twenty one years (21) during which periods, the legislative and executive functions were exercised by the military governments.[15] The system of separation of powers envisaged under the present Ghana's Constitution is

[10]For a summary of the history of the 1865 Act, see Mark D. Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001), 51 University of Toronto Law Journal 91.
[11] See Marouf A., Jr. Hasian, *Colonial Legacies in Postcolonial Contexts: A Critical Rhetorical Examination of Legal Histories* (Peter Lang Pub Inc, 2002).
[12] Local Governance Act, 2016 (Act 936); Section 1(4) *(a) (i)*.
[13] Ibid at Section 1(4) *(b)*.
[14] Constitution of the Republic of Ghana (1992), articles 57, 92 and 125, Ghana Publishing Company.
[15] A.M. Ocquaye, *Politics in Ghana, 1982-1992: Rawlings, revolution and populist democracy* (Accra and New Delhi: Tornado Publications and Thomson Press India ltd).

however not one that dictates that the arms of government should live in water-tight compartments from one another[16]. For instance, until amended, the Constitution requires that majority of the ministers must come from Parliament. This requirement takes Ghana's separation of powers conceptual framework outside the tradition of the United States of America where there is a strict separation between the personnel who form the executive and congress.

In respect of the relationship between international law and municipal or national law, we should observe here that Ghana is a dualist country. As a matter of both principle and practice, Ghana places great emphasis on the distinction between international law and municipal law.[17] As a result, international law can be implemented domestically only when it has been formally incorporated into the laws of Ghana by parliamentary approval.[18] This parliamentary approval can be done either by a resolution or through a substantive Act. It is not clear however, which treaty or international agreement will be adopted or received by a resolution or an Act of parliament. In any case, the primary rule is that mere signature on a treaty by the President is not in itself sufficient for the direct application of such a treaty in a court of law. An international agreement or treaty even if properly signed by the President or his authorized agent can neither be enforced nor applied in Ghana if it has not been converted into domestic law by legislative action. Without this domestic translation, international law does not exist as law in the Ghanaian context. Lastly, where there is a conflict between the demands of international law and domestic law, the conflict is to be resolved in favour of the latter.

B. Ghana's Tax system

Until the passage of the current Income Tax Act, 2015 (Act 896) Ghana used to tax its residents (companies and individuals) on their worldwide income; however, income sourced outside Ghana was taxed in Ghana only if it was brought into or received in Ghana. Non-resident persons were taxed only on Ghana-source income. A company is resident in Ghana if it is incorporated under the laws of Ghana or its management and control are exercised in Ghana at any time during the year of assessment. Under Act 896 however, a resident person is liable to pay tax on all income no matter the source, whether or not the income is brought into or received in Ghana[19]. There is however credit for taxes paid in other jurisdictions on income which have sources outside Ghana[20].

The country has various legal instruments and institutions that form the framework for taxation throughout the country. These include the Constitution, (1992), Ghana Revenue Authority Act, 2009 (Act 791), Income Tax Act, 2015 (Act 896) and a host of legislative instruments, including Transfer Pricing Regulations, 2012 (LI 2188)

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[16] See generally *Asare v. Attorney General* [2003-2004] SCGLR 823.

[17] Office of the Attorney General & Minister for Justice, 'The Republic of Ghana Treaty Manual' (2009) p. 5.

[18] Constitution of the Republic of Ghana (1992), article 75.

[19] https://home.kpmg/xx/en/home/insights/2015/08/ghana-thinking-beyond-borders.html. Accessed on 24 Jan. 2019 @ 12:22 hours GMT; http://taxsummaries.pwc.com/ID/Ghana-Individual-Taxes-on-personal-income Accessed on 24 Jan. 2019 @ 12:22 hours GMT; https://www.ceditalk.com/2016/04/a-guide-to-taxes-on-income-earned-outside-ghana/. Accessed on 24 Jan. 2019 @ 12:22 hours GMT

[20] See section 112 of Act 896.

among others. The Constitution of the Republic of Ghana (1992) is the supreme law of Ghana.[21] That is, at the apex of Ghana's hierarchy of legal norms, is the Constitution of which all other laws must be consistent with its provisions.

In the face of multiple legislative instruments on taxation in the country, article 174 of the Constitution imposes the rule that there cannot be taxation without priori parliamentary approval or authorisation. Flowing from this, no person and or enactment shall have the power to impose or waive a tax without the authority of Parliament.[22] Any waiver, variation or imposition of tax arising from the exercise of statutory authority shall be subject to the prior approval of Parliament by resolution. An example of the exercise of this power of waiver can be found in the National Pensions Act, 2008 (Act 766) under section 112, which exempts up to 16.5% of a person's income from taxation where such income is contributed towards pensions. In order to prevent the use of this waiver as a tax avoidance tool, the law further provides under sub-section (5) that a withdrawal of all or part of a contributor's accrued benefits under a provident fund or personal pension scheme shall be subject to the appropriate income tax for contributors in the formal sector before ten years of contributions and before retirement. At the more general level, citizens are enjoined to declare their income honestly to the appropriate and lawful agencies and to satisfy all tax obligations[23] with the exception of pension income[24]and the income of the President or an ex-President (Article 68(3) to (5)). A person who has not paid all his taxes or made arrangements satisfactory to the appropriate authority for the payment of same, shall not be eligible to be elected into certain positions, including election as a member of parliament[25]. Similar provisions are contained in section 7 of the Local Governance Act, 2016 (Act 936) with respect to persons seeking election or appointment to a District Assembly.

Parliament, in accordance with the power conferred on it under article 174 of the Constitution, has enacted a number of laws that govern the tax regime in Ghana.

The *Ghana Revenue Authority Act, 2009 (Act 791)* is one of these. This Act is a product of a series of reforms in the administration of taxes and customs duties in Ghana. This led to the creation of the *Ghana Revenue Authority (GRA)*,[26] which replaced the *Internal Revenue Service*[27], the *Customs, Excise and Preventive Service*[28] and the *Value Added Tax Service*[29], and is the main agency mandated to collect national taxes and custom duties, as well as combat tax fraud and tax evasion among others.[30]As noted above, the tax and custom institutions were largely independent

[21] Constitution, 1992 article 1(2).
[22] Constitution, 1992 article 174 (1).
[23] Constitution, 1992 article 41 (g).
[24] Constitution, 1992 article 199(3).
[25] Constitution, 1992 article 91(1)(c).
[26] Act 791 s 1(1).
[27] Act 791 s 30 (1) (*b*).
[28] See the Schedule to Act 791.
[29] Ibid.
[30] Ghana Revenue Authority Act, 2009 (Act 791) s 3.

of each other.[31]The main reason for bringing together these hitherto independent bodies under one umbrella was to provide a holistic approach to tax and customs administration,[32] to improve information linkage and sharing of information among the Divisions of the Authority[33]. This mechanism is aimed at eliminating the practice among taxpayers where they could make different declarations to different tax institutions with the view to avoiding tax. It must however be pointed out that to achieve this goal, there must be the extra steps of ensuring the free flow of information among the various units and sections and across departments. Secondly, tax officials must insist on the consistent use of taxpayer identification number (TIN) when filling customs declarations. Indeed there is some progress with respect to information sharing among the various units and also between the GRA and other state institutions like the Registrar General's Department (RGD)[34]. The Act also prescribes criminal sanctions for persons who fail to co-operate with the Authority to ensure the assessment and optimum collection of revenue[35].

Though Parliament may create other divisions, the Authority presently has three main divisions, namely the Domestic Tax Revenue Division, the Customs Division, and the Support Services Division.[36] The Domestic Tax Revenue Division collects all internal national taxes such as income tax, value added tax, and excise tax. The Customs Division collects custom duties on the imports of some merchandise into Ghana and export of merchandise outside Ghana. The tax officers are usually stationed at the various points of entry and exit from Ghana, such as the air and sea ports, and road border check points. The Support Services Division undertakes procurement of goods, and services to help the GRA fulfil its mandate.

The *Income Tax Act, 2015 (Act 896)* as amended provides among others for a "[G]eneral anti-avoidance rule" under its section 34 by empowering the Commissioner General of the Ghana Revenue Authority to re-characterise or disregard any arrangement that is entered into or carried out as part of a tax avoidance scheme "*which is fictitious or does not have a substantial economic effect; or whose form does not reflect its substance*[37]." Tax avoidance is defined to include any arrangement which has the main purpose of avoiding or reducing tax liability. It would appear these provisions were in response to cases like *Multichoice Ghana Limited v. Commissioner*, Internal Revenue Service[38] where the Supreme Court of Ghana held that the arrangement by which the Respondent had prepared its financial statement and thereby reduced its tax liability did not breach the then Income Tax Decree, 1975

[31] See the long title to Act 791.
[32] Act 791 s 2 *(a)*.
[33] Act 791 s 2 *(e)*.
[34] See generally OECD (2014), *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Ghana 2014: Phase 2: Implementation of the Standard in Practice*, OECD Publishing. http://dx.doi.org/10.1787/978926422878-en; See also KPMG (2015) *Global Transfer Pricing Review - Ghana* (KPMG International) 4.
[35] Act 791 s 20.
[36] Act 791 s 17.
[37] See the Seventh Schedule to Act 896 s 34(1).
[38] [2011] 2 SCGLR 783 at 789-790.

(SMCD 5). This much was recognized by Wood C.J. (as she then was) when she stated that "[t]he passage of the new law, Act 592, was intended to plug any legal loopholes that this dispute may have unearthed."

Note also that there are specific anti-tax avoidance provisions as in paragraphs 31, 32, 33 of the Seventh Schedule to Act 896. Paragraph 31(1) in particular deals with transactions between or among persons in a controlled relationship, which is a fertile ground for transfer mispricing, by providing that persons in a controlled relationship shall calculate their income, and tax payable, according to the arm's length standard. Section 32 provides against income splitting, by empowering the Commissioner General to adjust or re-characterize the incomes for the purposes of taxes. Finally, paragraph 33 limits the debt-to-equity ratio of exempt persons to three-to-one.

Similar provisions can be found in the *Customs Act, 2015 (Act 891*). For example, sub-sections (1), (2) and (3) of section 3 empower the Ghana Revenue Authority to conduct customs controls including random checks and to collaborate with foreign customs administrations to carry out joint control activities with the aim of ensuring security in shipment and combatting transnational crime. The Act also mandates vessel owners, importers and exporters among others to keep stipulated records and to make same available to the Authority for examination, inspection and audit purposes.[39] In addition, section 7 empowers the Authority to conduct a post-clearance audit after the release of goods with the goal of ensuring that the right amount of duty has been paid.

The Act also prescribes various penalties and charges as well as other deterrence regimes to ensure that the provisions of the Act are complied with.[40] Section 139 deals with bribery. It provides that a person who gives, offers, or agrees to give or procure to give, a bribe, gratuity, recompense reward to an officer, or gives, offers, or agrees to give an unauthorized fee or reward to an officer, or induces or attempts to induce an officer to connive to evade a provision of the law or otherwise to neglect the duty of that officer, commits an offence and is liable on summary conviction to a fine of not more than two hundred per cent of the total loss that would have been occasioned by the offence or to a fine of not more than two thousand five hundred penalty units whichever is higher or to a term of imprisonment of not more than five years or both.

In a similar vein, an officer who demands or takes a bribe, gratuity, recompense or reward for the neglect or non-performance of the duty of the officer; or delivers up or agrees to deliver up or not to seize anything liable to forfeiture; or commits an offence under the law or conspires or connives with any person for the purpose of committing an office under this Act, shall, on proof to the satisfaction of the Commisioner-General, be dismissed from office. An officer who commits an offence is liable on summary conviction to a penalty of not more than two thousand five hundred penalty units or a term of imprisonment not more than five years or both.

[39] Act 891 s 9 (1) & (2).

[40] See ss 23, 41, 100, 121 etc.

The *Value Added Tax Act, 2013 (Act 870)* imposes taxes on goods and services supplied in Ghana. These include goods and services that are sourced locally as well as imported goods and services.[41]An important provision is section 16 of Act 870 which provides that an unregistered, non-resident person who provides telecommunication services or electronic commerce to persons for use or enjoyment in the country, other than through a Value Added Tax registered agent must register if that person makes taxable supplies exceeding the threshold under subsection (1) or (2) of section 6. Electronic commerce covers business transactions that take place through the electronic transmission of data over communications networks like the internet. This provision is based on the the source of income[42]rule as the basis of taxation and is a very forward looking intervention in the face of developments in technology such as WhatsApp, Facebook and Twitter among others and their gradual venture into financial services[43].

In fact, the CEO of WhatsApp is reported to have singled Ghana out for commendation that the country was using the App in ways he never envisioned[44]. It is obvious that the business man is raking in a decent amount of revenue from these creative ways in which Ghanaians are using the App but the question is, how will the Ghana Revenue Authority determine whether or not this revenue has reached the threshold set under section 6 of the Act? Can it compel such multi-nationals to submit returns on their activities when in fact, they are not registered in Ghana? These are some of the gaps that require urgent attention. There are a number of offences under the Act including a failure to issue tax invoice[45]and the evasion of tax payment.[46]

The *Excise Tax Stamp Act, 2013 (Act 873)* provides that specified excisable products which are imported or locally produced are required to be affixed with tax stamps, which have specific features before they are released unto the market. The benefits of this approach to tax include: increased tax collection without raising tax rates, deterrence to smuggling and illicit activity, and creation of level playing field for all legitimate enterprises[47]. It is estimated that the absence of a stamp policy attracts a 30% rate of fraud[48] amounting to approximately US$

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[41] Act 870 s 1.

[42] Mills J. E. A., 'The Basis of Liability to Ghana Income Tax: Setting the Record Straight after Republic v. Commissioner v. Commissioner of Income Tax: Exparte Maatschappij de Fijnhouthandel N.V. (Fynhout)' [1978-81] Vol XV UGLJ 1 – 16.

[43] Hannah Kuchaler, 'WhatsApp Launches Service to Help Business Talk to Clients' *Financial Times* (San Francisco, 5 September 2017) <www.ft.com/content/35a5cae6-924d-11e7-ddfa-eda243196c2c> accessed on 10-03-18.

[44]'WhatsApp CEO commends Ghanaians'<www.citifmonline.com/2014/03/04/whatsapp-ceo-commends-ghanaians/#sthash.RJnUddy3.dpbs> cited in Maame A.S. Mensa-Bonsu, 'The old order changeth and giveth way to the new: WhatsApp debuts as a means of substituted service in Ghana', (2015) Vol. 15 Issue 1 Oxford University Commonwealth Law Journal <http://dx.doi.org/10.1080/14729342.2015.1108121> accessed 10 March 2018.

[45] Act 870 s 58.

[46] Act 870 s 59.

[47] Government of Ghana (2018) *MOF/GRA Launch Tax Stamp Policy.* Accra. Accessed from <www.ghana.gov.gh/index.php.media-centre/news/3953-mof-gra-aunch-tax-stamp-policy> on 20th March, 2018.

[48] Ibid.

49,090,909.1[49] of uncollected taxes annually while Ghana loses US$ 134, 571,363.63[50] each year in unrecoverable revenue in products alone[51].

Another important tax law is the *Local Governance Act, 2016 (Act 936).* The Act empowers District Assemblies under section 124 to impose taxes and rates on the income of persons specified in the Twelfth Schedule to the Act. In addition, section 145 to 146 impose a duty on District Assemblies to levy rates, including property rates on premises located within their jurisdictions. The *Anti-Money Laundering (Amendment) Act 2014*, introducing changes to the AML regime, was passed by Parliament and received presidential assent in April 2014, effectively broadening the scope of the AML regime. All accountable entities are now also obliged to conduct ongoing due diligence and update the records of all clients for whom they act. In August 2013, the Ghanaian Judiciary set up a separate "Tax Court" which is mandated to deal specifically with tax cases. This initiative has been undertaken both to ensure the level of specific expertise required for dealing with complex tax cases and also to expedite the hearing of tax related cases. In May 2014, the GRA conducted a sensitisation programme for the tax court judges and is finalised other aspects, such as the logistical support for the Tax Courts, which are now operational since the latter half of 2014.

A number of legislative instruments have been passed under the Acts identified above. First is the *Income Tax Regulations, 2016 (LI 2244)* which is one of the regulations passed in 2016 with the goal of providing clarity to and for the more effective implementation of the provisions of Act 896. The Regulations which came into force on 3rd August, 2016, revoked the *Internal Revenue Regulations, 2000 (LI 1675).* It introduced a number of reforms including those on overtime, casual workers, temporary employee, loan benefit and provident fund. Others are, Installment Sale, Finance Lease, Capital Allowance and Withholding Certificate. Within the Petroleum sector, a sub-contractor who enters into an agreement with a non-resident person to provide works or services must notify the Commissioner-General within 30 days after entering into the contract.

The Transfer Pricing Regulations, 2012 (LI 2188) was originally passed under the now repealed *Internal Revenue Act, 2000 (Act 592*). It deals basically with the implementation of the *arm's length* principle in transactions between persons in a controlled relationship, both locally and internationally[52]. The *Practice Note on* LI 2188 in its introduction provides that the commentaries in the OECD Transfer Pricing Guidelines may assist where necessary in the interpretation of LI 2188[53]. Additionally, the *Value Added Tax Regulations, 2016 (LI 2243)* which

[49] The local currency figure is 216 Million Ghana Cedis but converted to US$ for clarity.
[50] The local currency figure is 592, 114 Million Ghana Cedis but converted to US$ for clarity.
[51] Ibid.
[52] PricewaterhouseCoopers (2012) *Transfer Pricing in Ghana; The Application and Practice.* 10th Edition, Accra: Ghana. Accessed from www.pwc.com.gh on 5th March, 2018 @ 23:03 GMT.
[53] See paragraph 1.1.4 of the Practice Note on Transfer Pricing Regulations, 2012 (LI 2188).

revoked the *Value Added Tax Regulations, 1998 (LI 1646)* came into force on 3rd August, 2016. It clarifies certain rules and provides for some matters necessary for the effective implementation of Act 870[54].

The *Excise Duty Regulations, 2016 (LI 2242)* came into force on 3 August, 2016, purposely to provide for the administration and carrying into effect the provisions of Act 878[55]. Under the regulation, registered manufacturers and importers are mandated to maintain accurate records in a form approved by the Commissioner General (C-G) of the GRA that supports the determination of excise duty liabilities and preparation of excise duty returns. These records must at a minimum, provide evidence of the manufacture, storage, removal, delivery and any other information the C-G may request.

There are other minor tax legislations including the *Airport Tax Act, 1963,* as amended by the *Airport Tax (Amendment) Act, 2013, Act 858*, which imposes on all passengers departing from an airport by an aircraft, a tax payable to the Commissioner General of the Ghana Revenue Authority[56]. In respect of gaming and the operation of casinos, the *Casino Revenue Tax Act, 1973 (NRCD 200)* and the *Gaming Act, 2006 (Act 721)* regulate the activities of persons licensed to operate in the sector. Sections 4 and 26 of NRCD 200 and Act 721 respectively mandate licensees to keep records of their operations for the purposes of determining their tax obligations. It is important to add that under the Anti-Money Laundering Act, casinos are accountable institutions and have the responsibility, as discussed earlier, of maintaining records on their customers and to report unusual transactions to the Financial Intelligence Centre.

3. The General Context of Transfer Pricing Law

A. Defining transfer pricing

The term transfer pricing refers to the price assigned to goods and services that are exchanged between or among related business entities of a multinational enterprise (MNE). It is the price paid in a business transaction for tangible goods, intellectual property, or service provision within affiliated companies.[57] *Taxmann,* an online blog, describes it as the value attached to transfer of goods or services between related parties[58]. Thus, transfer pricing can be defined as the price paid for goods transferred from one economic unit to another, assuming that the two units involved are situated in different countries, but belong to the same multinational firm[59].

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[54] Ayesha Bedwei, 'A Look at the New Tax Regulations – Value Added Tax Regulations 2016', (2016) *Graphic Online* (08 Nov. 2016) <https://www.graphic.com.gh/business/business-news/a-look-at-the-new-tax-regulations-the-value-added-tax-regulations-2016.html> accessed 20 March 2018.

[55] Ayesha Bedwei, 'A Look at the New Tax Regulation – The Excise Duty Regulations 2016', (2016) *Graphic Online* (22 Nov. 2016) <https://www.graphic.com.gh/business/business-news/a-look-at-the-new-tax-regulations-the-excise-duty-regulations-2016.html> accessed 10 March 2018.

[56] Act 290 as amended s 1.

[57] Abdallah, W.M. (2004), Critical Concerns in Transfer Pricing and Practice, London, Praeger Publishers.

[58] <https://www.taxmann.com/blogpost/2000000197/transfer-pricing-meaning-objective.aspx> accessed 25 January 2019 at 12:50 hours GMT.

[59] Ibid.

The Ghana Revenue Authority (GRA), like most tax administrations, has taken a keen interest in transfer pricing because it is a potential avenue for tax evasion. In other words, the potential for MNEs to assign fictitious values to the goods and services that are exchanged within their network is quite high and is a matter of concern to the GRA. For the GRA "the situation creates opportunities for these MNEs to put in place a transfer pricing mechanism to ensure that they maximise their global profit at the detriment of tax revenue to Ghana in the absence of a transfer pricing regime adhering to international standards"[60]. This is generally referred to as transfer mispricing. However, some studies have established that tax avoidance is not the sole factor MNEs consider when fixing their transfer prices[61]. For example, in performance evaluation, transfer price can used as a tool within large segmented firms[62]. Transfer pricing may therefore be analysed from two main perspectives: the economic perspective[63] and the fiscal perspective[64].

The economic approach - this perspective involves a technical analysis of prices, differentiating them from the political-economic sector in which they are used. According to this perspective, these transfer prices are used by multinational companies to achieve fixed targets, to assess the individual performance of subsidiaries, but also to allocate resources within the group.

The fiscal approach - the tax perspective wants to create tools that allow transfer pricing not to deviate from market values in order not to inflate competition and the level of taxation in the different jurisdictions where the multinational company operates[65]

Tax authorities appear to adopt the latter perspective. The GRA estimates that over 70 percent of cross border business activities are transacted through Multinational Enterprises[66] and therefore its interest in the phenomenon is quite justified.

B. Motivation for Transfer Pricing Rules

Transfer pricing may become abusive when related parties seek to distort the price as a means of reducing their overall tax bill. In these instances the practice may be referred to as "transfer mispricing." For example,

60 GRA, Transfer Pricing Regime – Ghana. Available at <http://www.oecd.org/ctp/tax-global/Ghana-Transfer-Pricing-Regime.pdf> accessed 26 March 2019 at 18:50 hours GMT.
61 Shantanu J. Pendse (2012). *International transfer pricing: A review of non-tax outlook,* Precedia- Social and Behavioural Sciences 37 (2012) 337 – 343. https://www.sciencedirect.com/science/article/pii/S096959319600042X accessed 25 January 2019.
62 Langfield-Smith, K., Smith, D. (2005), Performance Measures in Supply Chains, Australian Accounting Review, 15(1), pp. 39-54.
63 Jose Rafael Monsalve (2017) *The economists' approach to transfer pricing analysis* (Inter-American Center of Tax Administrations) www.ciat.org/the-economists-approach-to-transfer-pricing-analysis/?lang=en accessed 26 March 2019 at 18:50 hours GMT.
64 Andreea- Lavinia Cazacu, Gheorghe Matei, Transfer Pricing Instrument of Fiscal Planning, at 12.
65 Andreea- Lavinia Cazacu, Gheorghe Matei, Transfer Pricing Instrument of Fiscal Planning, at 12.
66 GRA, Transfer Pricing Regime – Ghana. Available at <http://www.oecd.org/ctp/tax-global/Ghana-Transfer-Pricing-Regime.pdf> accessed 26 March 2019 at 18:50 hours GMT.

when a business enterprise domiciled in Nigeria transfers goods or services to a related entity in Ghana, the price charged by the Nigerian company are referred to as the "transfer price".[67]

Before the enactment Ghana's regulations on transfer pricing, the Minister of Finance in the 2012 Budget Statement made the following observation about tax revenue loss to the country:

> *'Madam Speaker, it is estimated that developing countries lose about US$160 billion every year through transfer pricing fraud. Recent studies in the mining sector showed that Ghana loses about US$36 million a year through transfer pricing. Together with the Ghana Revenue Authority we have drafted regulations to strengthen existing tax legislation to deal with taxation of multinational companies and minimize the incidence of abuse of transfer pricing. The regulation will soon be presented to Parliament'.*[68]

Similarly, at the launch of the 2012/13 GHEITI report in Accra, the Minister of Finance was quoted as saying: "transfer pricing in the extractive sector is one major challenge our revenue institutions must overcome because of its negative effect on revenue collections." Ghana was ranked 93rd out of 145 developing countries in terms of illicit financial flows in 2013.[69] Addo, et al[70] observes that a great number of MNEs take advantage of their size and complexity of structure to influence and subsequently deprive many developing nations of tax revenues that could be used to advance their development agenda of accelerated and sustainable economic growth. Ghana for example is reported to have lost GBP 74 million between 2005 and 2007 to multinationals of US and EU residence.[71]The case of SABMiller Plc., the majority shareholder of Accra Brewery Limited provides a telling example as it established complex structures that enabled the company avoid paying the required taxes, estimated at GHS2.2 million per annum.[72]

The Global Financial Integrity Report of 2014 indicated that the cost of fraudulent trade invoicing in five African countries amounted to $14.4 billion in revenue in the 10 years to 2011. The tax authorities in the five countries studied by Global Financial Integrity (GFI) - Ghana, Kenya, Mozambique, Tanzania and Uganda – lacked the trade, and tax and deals data to curb the illicit flows. The report further stated that over-invoicing

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[67] Addo E.B, Salia H, & Ali-Nakyea A, Transfer Pricing Abuse: the Ghanaian Perspective and the Role of the Accountant in Tax Compliance' International Journal of Accounting and Taxation, December 2017, Vol. 5, No. 2, pp. 83-91 Published by American Research Institute for Policy Development
URL: https://doi.org/10.15640/ijat.v5n2a6.

[68] Addo E.B, Salia H, & Ali-Nakyea A, Transfer Pricing Abuse: the Ghanaian Perspective and the Role of the Accountant in Tax Compliance' International Journal of Accounting and Taxation, December 2017, Vol. 5, No. 2, pp. 83-91 at p 83,published by American Research Institute for Policy Development
URL: https://doi.org/10.15640/ijat.v5n2a6.

[69] Kar D and Spanjers J, Illicit Financial Flows from Developing Countries: 2004–2013. (Global Financial Integrity, 2015), p 29.

[70] Addo E.B, Salia H, & Ali-Nakyea A, Transfer Pricing Abuse: the Ghanaian Perspective and the Role of the Accountant in Tax Compliance' International Journal of Accounting and Taxation, December 2017, Vol. 5, No. 2, pp. 83-91 at p 83,published by American Research Institute for Policy Development
URL: https://doi.org/10.15640/ijat.v5n2a6.

[71] McNair & Hogg, 2009, cited in Emmanuel Budu Addo, Hussein Salia & Abdalla Ali Nakyea, 'Transfer Pricing Abuse: the Ghanaian Perspective and the Role of the *Accountant* in Tax Compliant' (2017) Vol. 5.

[72] Hearson, M., & Brooks, R. (2012). Calling Time: Why SABMiller should stop dodging taxes in Africa. ActionAid UK. 1-40.Retrieved on June 19, 2017 from: https://www.actionaid.org.uk/sites/default/files/doc_lib/calling_time_on_tax_avoidance.pdf.

and under-invoicing in the five countries facilitated the illegal inflows or outflows of more than $60 billion during the 10-year period.[73] As reported, advanced countries such as the US have decreased the incidence of transfer mispricing through transfer pricing rules, enhanced recovery and an apprised citizenry who are supportive.[74]It has been argued that transfer mispricing has been applied to shift profit from one jurisdiction to another - usually from tax jurisdictions where the effective tax rates are higher to tax jurisdiction where the effective tax rates are significantly lower.[75]

These unfortunate occurrences arising from institutional and legislative gaps on general tax rules and particular rules on transfer pricing provide the specific case for transfer pricing legislation. The apparent loss of revenue from these legislative crack constitutes a denial of social capital and general development to the country. It is thus essential for specific legal rules on transfer pricing to be enacted in order to regulate tax deals of corporate bodies and eligible persons in a similar category. Such rules will curb the despicable acts of transfer mispricing by multinational corporations which drains nations of the much needed revenue.

C. Standard Approach to Transfer Pricing: The OECD Transfer Pricing Regime

The international transfer pricing system forms an essential part of the global tax regime, which was established under the auspices of the League of Nations in order to address the issue of double taxation and thus foster international trade and investment.[76] At the general level, transfer pricing is a phenomenon studied in developed countries since the second half of the 20th century[77]. Though in Ghana this is an area of relatively recent importance as it originally appears in the tax regime in 2000s, it has been observed that this area of study 'existed since antiquity since the emergence of the first multinational groups, starting in the 1600s, by the establishment of the British East Indies Company'.[78] In 1984, the OECD issued its report on transfer pricing, and in 1995 issued the first version of the OECD Transfer Pricing Guidelines, updated later in 2010.

The OECD Transfer Pricing Guidelines have enshrined the 'arm's length' principle as the basic principle of transfer pricing theory. Under the 'arm's length' principle, related parties should sell goods at services to each other at the prices that unrelated parties would set. The principle of market value or full competition is the international standard of transfer pricing and is used for tax purposes by multinational companies and tax authorities. The reason for adopting this principle is that it ensures a parity of treatment between independent and multinational companies, thus avoiding the creation of tax advantages or disadvantages that could distort

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[73] N 144 p.86
[74] Op cit.
[75] Holzmann, C. M. 2016,' Transfer pricing as tax avoidance under different legislative schemes, Beiträge zur Jahrestagung des Vereins für Socialpolitik 2016: Demographischer Wandel - Session: Taxation and firm productivity, No. C10-V3. Retrieved from http://hdl.handle.net/10419/145929, Nielsen, S. B., Schindler, D., & Schjelderup, G. (2014). Abusive transfer pricing and economic activity. Cesifo Working Paper No. 4975.
[76] Rixen, T. (2011). From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance. Review of International Political Economy, 1First pp. 1-31.
[77] Andreea- Lavinia Cazacu, Gheorghe Matei, Transfer Pricing Instrument of Fiscal Planning, (2017) vol. 16 Scientific Bulletin – Economic Sciences, at 11-12.
[78] Ibid.

the competitive positions of each type of entity. Most countries require multinational companies to demonstrate that their intra-firm transactions respect the market value principle or the "arm length" principle. OECD member countries are encouraged to comply with the OECD Guidelines in their national transfer pricing practices and taxpayers are encouraged to follow it when assessing for fiscal purposes whether pricing is in line with the principle of full competition. The "OECD Guidelines analyse the assessment methods to see if the commercial and financial relationships of multinational companies respect the principle of full competition and discuss the practical application of these methods" (OECD, 2009, p.14).

The Guidelines contain five methods that are recognised for computing transfer prices. In practice, the OECD's five transfer pricing methods form the bases for calculating transfer pricing, to ensure that they are consistent with the arm's length principle[79]. These include the comparable uncontrolled price method, the resale price method, the cost-plus method, the transactional profit split method, and the transactional net margin method. These are divided into two categories: *traditional transactional methods*, requiring higher comparability and *methods based on transactional profit*.

The traditional transactional methods include comparable uncontrolled price, the resale price, and the cost-plus methods. The comparable uncontrolled price (CUP) method draws a comparison between the price charged in a controlled transaction and the price charged in a comparable uncontrolled transaction (OECD 2010a: 2). The OECD Transfer Pricing Guidelines entreats taxpayers to apply the CUP where this method and any other transfer pricing method can equally be reliably adopted.

The next method is the resale price method (RPM), where the resale price margin (i.e. the gross margin) that the reseller earns from the controlled transaction is compared with the gross margin from comparable uncontrolled transactions[80]. This method commences with the price at which goods and or services are resold to non-associated third parties after they have been purchased from associated parties[81]. The resale price is then reduced by an appropriate gross margin, which is arrived at by reference to uncontrolled transaction[82]. The amount that is left after subtracting the gross margin can is regarded as an arm's length price for the original transfer of property between the associated enterprises, subject to adjustment for other expenses associated with the purchase of the product[83].

The third method is the cost plus method (CPM). The OECD Transfer Pricing Guidelines explains the cost plus method thus:

"The cost plus method begins with the costs incurred by the supplier of property or services in a controlled transaction for property transferred or services provided to an associated enterprise. An appropriate mark-up,

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[79] OECD (2010), *Transfer Pricing Methods* (OECD Publishing) 2.
[80] OECD (2010), *Transfer Pricing Methods* (OECD Publishing) 4.
[81] Ibid.
[82] Ibid.
[83] Ibid.

determined by reference to the mark-up earned by suppliers in comparable uncontrolled transactions, is then added to these costs, to make an appropriate profit in light of the functions performed and the market conditions."[84] In other words, in this method, the mark-up on costs that the manufacturer or service provider earns from the transfer of goods and services in a related party transaction is compared with the mark-up on costs from comparable uncontrolled transactions[85].

The final method that the OECD recognizes is the transactional profit split method (TPSM). The method begins by identifying the combined profits to be split among the various related entities from the controlled transactions in which the associated enterprises are engaged[86]. The method then divides the combined profits between or among the associated entities using an economically viable basis that approximates the division of profits that would have been reasonably expected between or among unrelated enterprises[87].

So by way of recap, transfer pricing refers to the pricing of transactions between related legal entities within the same multinational enterprise (MNE). It can be legitimate (if the transfer price matches the arm's length price between unrelated parties) or abusive (also called, transfer mispricing, if the related parties distort the price to evade taxes.

4. The Legal Framework on Transfer Pricing in Ghana

To deal with transfer mispricing, the GRA has adopted legislative mechanisms that incorporate the OECD's transfer pricing methods as a way of streamlining the activities of entities that engage in related party transactions, while keeping flexibility to implement alternative methods, as discussed below.

A. The Legal Rules on Transfer Pricing

The rules that govern the transfer pricing regime of Ghana are interrelated but have varied statuses and binding effects. Some take precedence over others; while some are binding on both the taxpayer and CG of the GRA but others only on the CG of the GRA.

The hierarchy of legislation in respect of transfer pricing in Ghana per the principles enshrined under article 11 of Ghana's Constitution is as follows:

The Income Tax Act, 2015 (Act 896)[88] is the main parent legislation on transfer pricing[89]. Act 896 is binding on both the taxpayer and the CG of the GRA. The same applies to the Transfer Pricing Regulations, 2012 (LI 2188) and the Technology Transfer Regulations, 1992 (LI 1547) which are the next in the hierarchy. LI 2188

[84] Ibid at 5.
[85] Ibid.
[86] Ibid at 8.
[87] Ibid.
[88] This replaced the now repealed Internal Revenue Act, 2000 (Act 592).
[89] Other Acts of Parliament that are later in time might amend Act 896 subject to the principle that the provisions in a special legislation take precedence over those contained in a general one where there exists irreconcilable differences in the two pieces of legislation on the same subject matter.

will however take precedence over LI 1547 where there is a conflict between the two regulations because the former is later in time; unless it can be shown that on a particular matter, LI 1547 is a special legislation.

The next in the hierarchy is the Commissioner General's Practice Notes. Generally, these notes provide a guidance to taxpayers on the interpretation the CG assigns to the binding provisions on transfer pricing. They are not binding on taxpayers but are binding on the CG. A Private Ruling has the same status as the Practice Note but is restricted to a particular taxpayer to whom the ruling was made. It generally states the position of the CG on a particular transaction and is binding on both the CG and the taxpayer to whom the ruling is addressed.

The *Transfer Pricing Regulations, 2012 (LI 2188)* was originally passed under the now repealed *Internal Revenue Act, 2000 (Act 592).* The LI which now derives its validity from section 136 (2) of Act 896 deals basically with the implementation of the arm's length principle in transactions between persons in a controlled relationship,[90] both locally and internationally. Ghana's transfer pricing regulations, adopted substantially the OECD Guidelines on transfer pricing (2010) by adopting a modified version of the Most Appropriate Method analysis.[91] This approach allowed Ghana to align with international standards, while keeping flexibility to adopt locally adapted methods.

In some detail, Ghana adopted the 'arms' length' principle as the method for determining transfer pricing, and endorsed the five approved methods under the OECD Transfer Pricing Guidelines – namely, the comparable uncontrolled price method, the resale price method, the cost-plus method, the transactional profit split method, and the transactional net margin method. The Practice Note on LI 2188, in its introduction provides that the

[90] Controlled relationship is explained under section 128 (1) & (2) as:
1) For the purposes of this Act, two or more persons are in a controlled relationship where the relationship between the persons is
(a) that of an individual and a relative of the individual;
(b) that of partners in the same partnership;
(c) that of an entity and a person referred to in subsection (2);
(d) that of a settlor, trustee and beneficiary; or
(e) in a case not covered by paragraph (a) to (d), such that a person, not being an employee, acts in accordance with the directions, requests, suggestions, or wishes of another person whether or not the persons are in a business relationship and whether or not those directions, requests, suggestions, or wishes are communicated to that other person.
(2) A person and an entity are in a controlled relationship where
(a) the person controls the entity or may benefit from fifty percent or more of the voting power or rights to income or capital of the entity,
(i) either alone or together with persons who, under another application of this section, are associated with the person; and
(ii) whether directly or through one or more interposed entities; or
(b) the person, under another application of this section, is an associate of a person referred to in paragraph *(a).*

[91] OECD (2010c). Review of Comparability Analysis and Profit Methods: Revision of Chapters I-III of the Transfer Pricing Guidelines. Paris: OECD. Retrieved from: https://www.oecd.org/ctp/transfer-pricing/45763692.pdf.

commentaries in the OECD Transfer Pricing Guidelines may assist where necessary in the interpretation of LI 2188.

However Ghana also made provision for the use of other methods not excluding the formulary approach/unitary tax system, where the tax payer can justify that the use of the formulary approach/unitary tax system is the best method under the circumstances of the transactions it is engaged in.[92] Specifically, Transfer Pricing Regulations, 2012 (LI 2188) entitles the Commissioner-General to apply or authorize the use of other methods if 'considering the nature of the transaction, the arm's length price cannot be determined by use of a method specified'.[93]

Price Waterhouse Coopers asserts that in 2012, a taxpayer that was to be audited under the rules, had the option to choose a preferred method of calculating the arm's length transactions and that availability of choices gives some form of comfort to professionals including accountants working with the MNEs[94]. Such a choice requires a justification that:

1. none of the approved methods in the LI can be reasonably applied to determine arm's length conditions for the controlled transaction;
2. such other method yields a result consistent with that which would be achieved by independent persons engaging in comparable uncontrolled transactions under comparable circumstances;
3. the taxpayer asserting the use of a method other than the approved methods shall bear the burden of demonstrating that the requirements listed above have been met.[95]

According to officials at the Transfer Pricing Unit of the GRA, the generality of business entities adopts and uses the five methods outlined in the Transfer Pricing Regulations. There have however arisen situations where some businesses have sought to use other methods besides the five that have been outlined in the Regulations.

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[92] Transfer Pricing Regulations 2012 (L.I. 2188), **Transfer pricing methods**

3. (1) For purposes of these Regulations, the transfer pricing methods approved by the Commissioner-General are

(a) the comparable uncontrolled price method;

(b) the resale price method;

(c) the cost-plus method;

(d) the transactional profit split method; and

(e) the transactional net margin method.

(2) A transfer pricing method specified in subregulation (1) shall be computed as specified in the Schedule.

(3) Despite subregulation (1), the Commissioner-General may

(a) use a method other than a method stated in subregulation (1), or

(b) in writing permit a person to use a method other than a method stated in subregulation (1),

if the Commissioner-General is of the opinion that considering the nature of the transaction, the arm's length price cannot be determined by use of a method specified in subregulation (1).

(4) Where the application of the most appropriate method identifies a range of relevant indicators which are of equal reliability, then the terms of the transaction is at arm's length if the relevant indicator falls within that range.

[93] Transfer Pricing Regulations 2012 (L.I. 2188), Art. 3(3).

[94] PricewaterhouseCoopers, Transfer Pricing in Ghana: The application and practice. (2012) 10th Edition, Accra: Ghana.

[95] Op cit.

The reasons that have been given have been that the use of the preferred methods has had the potential of negatively affecting the competitiveness of some local branches of MNEs as compared to independent businesses within the same sector. An example that was cited was involved multinational vehicle and spare parts dealers. They claimed that the preferred methods placed them at a disadvantage in comparison with their purely local counterparts in terms of pricing. Some of them therefore proposed to use other methods for particular items. In principle, this was not a problem for the GRA, provided it did not result in less tax to the GRA.

Ghana's adoption of the OECD Guidelines is not peculiar as many other countries have done same.[96] It would however appear that Ghana is more flexible in its approach. It follows therefore that the debate among proponents and supporters of each approach as to the superiority of one approach over the other[97] may not affect Ghana's current regime.

As indicated above, Ghana's regulations came at the wake of perennial loss of revenue to Ghana due to gaps on the existing tax legislation. Prior to the passage of LI 2188, section 17 of Act 592 contained some provisions against transfer mispricing, but it was not vigorously enforced. The law gave considerable discretion to the head of the Ghana Revenue Authority (GRA) in the assessment of transactions subject to transfer pricing adjustments.

The *Technology Transfer Regulations, 1992 (LI 1547)* of the Ghana Investment Promotion Centre (GIPC) is another precursor to LI 2188. The GIPC made those rules among others to curb transfer pricing.

The *Income Tax Act, 2015 (Act 896)* provides for a "general anti-avoidance rule" under section 34. The section empowers the Commissioner General of the Ghana Revenue Authority to re-characterise or disregard any arrangement that is entered into or carried out as part of a tax avoidance scheme "*which is fictitious or does not have a substantial economic effect; or whose form does not reflect its substance*[98]."

Again, section 31(3) of Act 896 empowers the Minister to make Regulations on matters relating to transfer pricing and the application of the arm's length standard. Sub-section (4) of the same section gives the Commissioner General the power to adjust the tax payable where in his or her opinion, there has been a failure to comply with the arm's length standard. Section 32 provides against income splitting, by empowering the Commissioner General to adjust or re-characterize the incomes for the purposes of taxes. Finally, section 33 limits the debt-to-equity ratio of exempt persons to three-to-one. This means that where in respect of the source of funding of a company, the debt-to-equity ratio exceeds the statutory ratio, the deductible income for interest

[96] Clifton, J. and Díaz-Fuentes, D. (2014). The OECD and "The Rest": Analyzing the Limits of Policy Transfer. Journal of Comparative Policy Analysis: Research and Practice, 16(3), pp. 249-265 at 251.

[97] Curbing Illicit Financial Flows (IFFs) from Resource-rich Developing Countries: Improving Natural Resource Governance to Finance the SDGs, Discussion Paper Literature review: The current international transfer pricing regime pp 3-4, 12.

[98] The Seventh Schedule to Act 896 s 34(1).

in excess of this ratio may be disallowed. This is to prevent the situation where taxpayers take advantage of debt financing as a means of avoiding tax.

Another important mechanism by which the Ghana Revenue Authority is empowered to deal with transfer pricing and other tax avoidance schemes is the power to access, at all times and without prior notice, any premises, place, property, book, record, computer or other electronic storage device[99]as well seize any book, record, other document, computer or other electronic storage device that in the opinion of the Commissioner-General or authorized officer, affords evidence which may be material in determining the liability of a person to tax.[100] Similar provisions can be found in the *Customs Act, 2015 (Act 891*). For example, section 3 (1), (2) and (3) of Act 891 empowers the Ghana Revenue Authority to conduct customs controls including random checks and to collaborate with foreign customs administrations to carry out joint control activities with the aim of ensuring security in shipment and combatting transnational crime. The Act also mandates vessel owners, importers and exporters among others to keep stipulated records and to make same available to the Authority for examination, inspection and audit purposes.[101] In addition, section 7 empowers the Authority to conduct a post-clearance audit after the release of goods with the goal of ensuring that the right amount of duty has been paid.

B. Institutional Framework

The Transfer Pricing Unit of the Ghana Revenue Authority (GRA) like most Tax administrations is faced with finite resources and limited time[102]. There is therefore the need to determine the potential tax revenue at stake and to select the most suitable audit cases[103]. This principle was described by Adam Smith as one of the attributes of an effective tax[104]. To ensure the most productive use of resources and limit compliance costs, tax authorities need to develop and use risk-based assessment systems for selecting taxpayers for transfer pricing audits[105].

The approach most tax administrations adopt is to create either a large taxpayer office (LTO) or a large business and international (LB&I) division, to host the transfer pricing team. The LTO or LB&I is predominately organized along industry specialization, which reflects the country's main economic activities. Most taxpayers in the scope of transfer pricing legislation will be classified as large taxpayers, although in some countries with domestic transfer pricing legislation[106], which encompasses a very broad definition of associated enterprises,

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[99] Ibid s 18(1) *(a)*.
[100] Ibid s 18(1) *(c)*.
[101] Act 891 s 9 (1) & (2).
[102] International Bank for Reconstruction and Development / The World Bank (2016), Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners, page 349.
[103] Ibid.
[104] Ali-Nakyea Abdullah (2014), Taxation in Ghana; Principles, Practice and Planning (3rd Ed. page 7).
[105] Op cit page 234.
[106] Ghana is one of such countries (See Transfer Pricing Regulations, 2012 (L.I. 2188). See also paragraph 1.1.3 of the Commissioner General's Practice Note on L.I. 2188 provides in part "although provisions of arm's length principle are applicable to persons who are separate legal entities, the contents of this Practice Note will also apply to determine the arm's length consideration for tax purposes of dealing concluded by:

a. a transaction between persons who are in a controlled relationship;

even taxpayers classified as small can have their transactions subjected to scrutiny under the transfer pricing rules[107].

After the passage of LI 2188, the GRA set up the Transfer Pricing Unit (TPU) at the Large Taxpayer Office in 2013. The office is part of the Domestic Tax Revenue Division of the GRA. The Unit is responsible for all transfer pricing issues across the ten (10) regions of Ghana. It works closely with the other departments and units, including the legal department in order achieve its goals.

C. Documentation: Tax Filing and Transfer pricing

Starting 14 September 2012 when the Transfer Pricing Regulations came into force, all taxpayers in Ghana are required to file, as part of their annual returns, information on transactions involving associated persons that are undertaken during the year to which the returns relate[108]. These should be submitted within four months after the end of the business' financial year.

The Commissioner General of the GRA also has power under Regulation 7(4) of LI 2188 to require a person or any other person to produce within a specified time any document or information that will enable the GRA obtain full information with respect to the income of a person. Such a request should not be difficult to respond to because the Regulations impose a duty on all taxpayers who engage in a transaction with another person with whom that person has a controlled relationship to maintain contemporaneous documentation of the transaction engaged in by that person for each tax year[109].

By way of documentation, the taxpayer has to obtain and fill in the necessary forms (returns) and present same to the TPU. The following documents may also be required.

a) A general description of the organisational, legal, and operational structure of the group of associated enterprises of which the taxpayer is a member, as well as any relevant change therein during the taxable period.

b) The group's financial report or equivalent annual report for the most recent accounting period.

c) A description of the group's policy in the area of transfer prices, if any.

d) A general description of the nature and value of the controlled transactions in which the taxpayer is involved or which have an effect on the income of the taxpayer.

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b. dealings between a permanent establishment and its head office;
c. dealings between a permanent establishment and other related branches of that permanent establishment;
d. a transaction between a taxpayer and another taxpayer who are in controlled relationship; and
e. a transaction between a taxpayer and another taxpayer who are in an employment relationship

[107] Op cit page 341.

[108] See Regulation 7(3) of LI 2188; see also https://www.ey.com/Publication/vwLUAssets/Ghana_publishes_Transfer_Pricing_Return_and_Practice_Notes_on_transfer_pricing_regulations/$FILE/2013G_CM3820_TP_Ghana%20publishes%20TP%20Return%20and%20Practice%20Notes%20on%20TP%20regs.pdf. Retrieved 29 January 2019 @ 11:59 hours GMT

[109] Regulation 7(1) of LI 2188.

e) A description of the functions, assets and risks of group companies to the extent that they affect or are affected by the controlled transactions carried out by the taxpayer, including any change compared to the preceding period.[110]

In addition, the taxpayer must show with respect to each material controlled transaction carried out by the taxpayer, the following:

a) A description of the transfer pricing method used by taxpayer to demonstrate that the prices and other financial indicators associated with the transaction satisfy the requirements of the arm's length principle and a description of why such methods are the most appropriate transfer pricing methods within the meaning of Regulation 3 of Transfer Pricing Regulation 2012 (LI 2188).

b) A comparability analysis supporting the taxpayer's application of the most appropriate transfer pricing method prepared in accordance with the provisions of Section 3.

c) Financial data showing the results of controlled transactions sufficient to demonstrate the taxpayer's compliance with section 1 applying the most appropriate transfer pricing method within the meaning of Section 4, paragraph 1.[111]

5. An Assessment of Ghana's Transfer Pricing Law in Practice

From these rules stated above, we may observe that that Ghana has made a sufficient legislative effort to introduce the tax and accounting concept of transfer pricing into the legal landscape of the country. The existence of rules merely underscore the reception and acceptance of their core idea into Ghana. Nonetheless, their existence is not to suggest that they are detailed and at all material times applied across board by the state of Ghana. Besides, their statutory existence is not in itself sufficient to suggest that the rules are at all cost consistent with the international transfer pricing regime nor they are well within best practice in respect of transfer pricing as an area of study within tax law and accounting. Some gaps and shortfalls in implementation are discussed below.

A. Discretionary Post-filing Audit Process

The World Bank underscores the need, following the enactment of transfer pricing legislation, for tax administrations to develop, implement, and continuously update an effective transfer pricing audit program. Ghana is yet to develop its own guidelines which will provide the basis for the selection of companies for transfer pricing audit but relies on guidelines contained in the OECD's Guidelines[112] as well as the UN Transfer Pricing Manual. We may concede that the TPU does a lot of serious preparatory work (risk assessment), in order to identify which companies to select for the audit. The TPU uses the OECD and UN Manuals on the selection

[110] Commissioner General's Practice Note to the Transfer Pricing Regulations, 2012 (LI 2188), http://www.drtp.ca/wp-content/uploads/2015/02/Ghana_Transfer_pricing_regulations_-2012L.I2188.pdf p.15 (last accessed April 4, 2018).
[111] Op cit. p.16.
[112] Commissioner General's Practice Note on L.I. 2188. Paragraph 1.1.4 at pages 4 and 5.

criteria. But in practice only the high risk companies are selected for the audit- for example companies that have 80% of their transactions with related parties.

There is no specific legislation that mandates or serves as a guide to the GRA on when to conduct a transfer pricing audit. The decision is left to the discretion of the officers of the TPU. The absence of a binding set of guidelines to serve as a basis for identifying which entities should be selected for transfer pricing (TP) audit has meant that TP audits have not been done in an organised coordinated manner. At best, a transfer pricing audit is ***only*** carried out at the instance of the GRA. Where the GRA decides to undertake TP audit, it will accordingly inform the tax payer well ahead of time. In addition, the TPU will hold a series of consultative meetings with the tax payer to plan the audit exercise in order to make the exercise successful.

We must note that this discretion selectively exercised by the tax authorities may lead to loss of revenue. It reduces the potential revenue to be generated through transfer pricing returns to only cases decided as such by the tax authorities. For the fact that the corporate world is large in Ghana and the fact that this discretion to select cases for transfer pricing returns is centralised, the system does have a real challenge in dealing comprehensively with the "transfer pricing constituency" within the tax administration. For instance, certain genuine cases with potential revenue to the state may be overlooked. Besides, the exercise of the discretion to select a case may be final but the determination of the selected case is not final as such a determination can be challenged on a number of grounds including the fact that the method adopted is not the most appropriate. Overall, the tax regime is still operating with a less aggressive and non-country specific guideline for selecting cases that require transfer pricing audit which in effect narrowed the scope of revenue collection in the country.

The above discussion must however not be understood to mean that the TPU does not use guidelines at all. Be this as it may, the tax authorities have in the past exercised their discretion to ensure that some taxpayers are held accountable for transactions that fell within the rules. As of 2015, the GRA had undertaken 250 cases of transfer pricing audits.[113] As of April 2018, the audits, had resulted in extra assessment of taxes to the tune of about fifty seven million United States Dollars (USD 56,818,181.8)[114] out of which about eighteen million United States Dollars has been paid. The rest of the assessments are still being contested by the tax payers. However, recently, the biggest defaulting company, Ghana Telecommunication Company Ltd (popularly called 'Vodafone', that is its trade name), has abandoned its legal challenge. Vodafone was assessed to pay about US$ 36,363,636.4.[115] Vodafone will pay up now, considering that the legal battle is over.

Yet, an effective, non-discretionary transfer pricing audit programme is not in place, also as a result of staff constraints, as discussed below.

[113] https://home.kpmg.com/content/dam/kpmg/pdf/2015/10/tp-review-ghana-v2.pdf (last accessed April 4, 2018)
[114] The local currency equivalent is two hundred and fifty million Ghana Cedis (GHC 250,000,000.00).
[115] The local currency equivalent is one hundred and sixty million Ghana Cedis (GHC 160,000,000.00).https://www.ghanabusinessnews.com/2017/09/19/vodafone-ghana-sues-gra-over-gh%C2%A2160m-transfer-pricing-assessment/ (last accessed April 4, 2018).

B. Understaffed Units

It is important to state that the effectiveness of the TP unit is blunted by understaffing.

At the most substantive level, according to a recent needs assessment of the GRA, the Transfer Pricing Unit needs about 40 trained personnel to be able to handle the workload of that unit. Of this number, the current personnel number about 15 out of which 5 are recent recruitments. Though there a further requisition for 3 more, about 2 of the 15 trained personnel to handle transfer pricing issues have recently been transferred to another unit (training) thereby reducing the number to 13. This is a reduction in the human resource capacity. But this reduction of personnel does not lead to reduction in the scope of the activities expected of the unit. The unit is expected to deal with the countrywide issues on transfer pricing with this negligible number of staff. With a vibrant corporate world and demonstrated need for revenue, efficient and effective staff on transfer pricing is indispensable in Ghana. On that account since this is a highly centralised body operating principally in Accra for the whole country, this recorded and contemplated number of staff is woefully unsatisfactory.

The volume of work even with the exercise of guided discretion to select cases for review on transfer pricing is huge such that this number of personnel cannot practically deal with the work within a reasonable time. The technical complexity of some of the cases especially decoding and applying a particular method in determining the tax liability of a person or the selection of a comparable transaction for the purposes of calculating the tax liability of a taxpayer may not be without retrogressive hurdles. The overall effect is to claw back the administrative efficacy of the unit in revenue mobilisation in the country. This will not only lead to loss of revenue from multinational enterprises, but also serves as a mockery to the statutory goals on the anti-transfer mispricing project. Besides, at the state level, it highlights a negative practical political mood in dealing with transfer pricing and non-preparedness of the government to embrace international standards or best practices.

C. Methodological Hurdles

Finally, staff face acute methodological hurdles in the search for comparables and in making comparability adjustments for purposes of transfer pricing analysis. This problem is not specific to Ghana. It is inherent to the standard transfer pricing methods embedded in the OECD Transfer Pricing Guidelines. In the United States, the 1990 transfer pricing hearings held by the Subcommittee on Oversight, House Committee on Ways and Means, the Joint Committee on Taxation cases found that suitable comparables could not be found in order to successfully apply one of the three traditional methods[116]. This is instructive for Ghana which is faced with a similar problems. Difficulties with finding comparables has always been a challenge to tax administrations. In the United States, the Joint Committee on Taxation found that "...regardless of which method is used for tangible assets, much controversy arises between IRS and taxpayers in establishing proper comparables". The Commissioner for the IRS illustrated the extent of the challenge using plastic hubcaps:

[116] General Accounting Office, *International Taxation Problems Persist in Determining Tax Effects of Intercompany Prices*, (GAO/GGD 92-89, 1992) 36.

"How does anyone determine and value comparable hubcaps if no other company manufactures a similar part and no other company's distributors sell the part?"[117]

In the face of these rules, it has been posited that although the transfer pricing rules are commendable, they are not designed to achieve optimal results. This is because among others, the arm's length methodology adopted in the rules for determining the value of a comparable contract for use in assessing whether a contract between companies within MNEs represents an arm's length contract, is not fool proof. That methodology is subject to weaknesses such as difficulty in finding a contract that qualifies as a comparable arm's length contract for the purposes of comparison, requiring an enormous amount of time to find comparable contracts for the large volumes of contracts that MNEs undertake, and the failure of the GRA to provide guidance on the meaning of 'a contract that provides value' to a company. The requirement of 'a contract that provides value' is one of the threshold requirements for determining whether a company within an MNE network has entered into a contract with another company within the network, and must be answered in the affirmative together with the other requirements, for such a contract to qualify for comparison with an arm's length contract.

The GRA itself has seen the need to revise the TP rules to make them more efficient as such and is in the process of engaging stakeholders for their input into the revision of the law. Sometime ago, the head of the Mining Audit Desk at the GRA, stated that 'the new regulations are not sufficiently specific to the extractive industries, nor does the relevant mining and petroleum legislation explicitly address the requirement for arm's length pricing.[118]

But the overall effect of the methodological hurdle is much more biting because the Authority failed to develop and maintain a data base of comparable transactions which database can always serve as a ready source of information for evaluating the tax liabilities of taxpayers. Without this database, the obviously strained staff of the TPU may find it difficult to get a fitting and true comparable transaction for the purpose. This lack of ready data at the disposal of tax officials often leads to arbitrariness in the calculations as wrong methods and principles are adopted and more often than not the results obtained from such calculations by tax authorities are vigorously contested by taxpayers. Such contestations often take time to be resolved through more vigorous assessments of the applicable method, documents and the particular transaction which necessitated the adoption of the contested method. The period of time required for this exercise is often long and within that period it puts beyond reach potential revenue to the state or deny taxpayers their much needed liquidity.

6. Moving Forward: Pragmatic Options

Every good tax system depends on an efficacious tax administration. The effectiveness and efficiency of a tax administration will, in part, depend upon the quality of the personnel deployed there. It is thus reasonable to

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[117] Ibid.

[118] Redhead A, Transfer Pricing in the Extractive Sector in Ghana, Natural Resource Governance Institute, 2016), https://resourcegovernance.org/sites/default/files/documents/nrgi_ghana_transfer-pricing-study.pdf., (last accessed March 6, 2018).

suppose that the quality of the personnel in tax administration is evaluated within the specific context of the scope of work and the technicality of that work. More detailed and technical work requires a highly trained personnel. In the light of this, to deal with transfer pricing returns within Ghana's tax administration requires more technical personnel. This is not only required in terms of numbers but the requisite training of such persons.

Even more importantly, the authority must begin to consider a simplified approach to dealing with transfer pricing issues that reduce the burden of fact-intensive, transactional transfer pricing analysis. Some options are outlined below.

A. Advance Pricing Arrangements and Safe Harbours

Procedures have been introduced in many countries that allow taxpayers and tax authorities to agree in advance on certain sets of criteria (transfer pricing methods, comparables and appropriate adjustment thereto, critical assumptions as to future events, etc.) and confirm the arm's length result.[119] Labelled as Advance Pricing Arrangements (APAs), Enhanced Engagement Approach etc., such schemes have advantages and disadvantages. As argued below with specific reference to Ghana, while a system of case-specific rulings targeted at individual taxpayers will not bring certainty and administrative simplicity, a well-designed APA programme that sets the parameters for a sectoral Safe Harbour may contribute towards those objectives. The following analysis briefly reviews some APA-related schemes, considers if a legal basis exists in Ghana to implement such schemes, weighs the advantages and disadvantages of APAs in the Ghana context, and considers a balanced and strategic way to move ahead.

A few countries have partially moved away from post-filing examination to ex ante disclosure and agreement. This approach is perceived to be a more efficient method. For example, The Netherlands' approach to transfer pricing audit is a proactive one. They use the enhanced engagement approach[120]. In short, the approach can be described as "certainty in exchange for transparency"[121]. The prompt disclosure of significant tax risks is critical to the success of this approach. In addition, businesses have the responsibility of ensuring that there is a "tax control framework in place to ensures that they are 'in control' and to ensure timely discovery of these risks"[122].

The UK and USA have also adopted variants of this approach. It appears this is the new way to go especially because "[t]raditional post-filing examinations for large corporations tend to be time-consuming and resource-intensive for both taxpayers and the [tax administrations] ... Additionally, the further back in time an exam is focused, the greater the administrative and financial burdens on the taxpayer and the [tax administrations]… In particular, when issues under examination remain unresolved for extended periods, taxpayers may be obliged to

[119] United Nations, *United Nations Practical Manual on Transfer Pricing for Developing Countries*, 2nd ed. (New York: United Nations 2017), p. 375.
[120] OECD, *Draft Handbook on Transfer Pricing Risk Assessment* (2013) 34.
[121] Ibid.
[122] Ibid.

maintain tax reserves on their books in anticipation of an exam outcome."[123] The challenges associated with post filing audit may extend to other matters other than cost to a business and this includes "a corporation's financial statements and share price'[124]

In the United States, the Internal Revenue Service (IRS) introduced a pilot program in March 2005 to assess the feasibility of an alternative approach to large corporate tax administration[125]. "Th[e] approach – known as the "Compliance Assurance Program" ("CAP") – was structured to leverage new, non-tax corporate governance and financial reporting requirements brought about by the Sarbanes-Oxley Act of 2003."[126] (OECD Draft Handbook). Even though the phrase "transfer pricing" did not appear anywhere in the original Act, neither did compliance assurance program (CAP) there are several provisions that imposed obligations on companies for disclosure[127]. Beginning in 2015, amendments were introduced to cater for transfer pricing and advance pricing agreement (see subsection 4.51.8.5.1, 4.51.8.3 (3) and 4.51.8.6 (1))[128].

The approach under CAP is for a taxpayer to work cooperatively with revenue agents "in a contemporaneous, pre-filing environment to resolve issues of potential controversy and to determine the appropriate tax treatment of all events and items that could have a material effect on the taxpayer's liability"[129]. A defining feature of the program is that at the very beginning of the CAP cycle, the taxpayer enters into a Memorandum of Understanding (MOU) with the IRS[130] which spells out the duties of each party to the program as well as outlines the process to be followed[131].

The program appears to be quite popular among taxpayers. It has grown from a total of 17 corporate taxpayers to 181 since it began.[132] In 2011, the CAP was made permanent, and expanded to include the Pre-CAP and Compliance Maintenance phases. The IRS was however compelled to announce a freeze effective 1st October 2016[133]. The freeze meant that the IRS was accepting no new applications. The popularity of the program is explained by one observer thus:

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123 Ibid at 35.
124 Ibid.
125 OECD, *Draft Handbook on Transfer Pricing Risk Assessment* (2013) 35; See also https://www.irs.gov/businesses/corporations/compliance-assurance-process
126 OECD, *Draft Handbook on Transfer Pricing Risk Assessment* (2013) 35
127 For example, Title IV-Enhanced Financial Disclosures (sections 401-409) imposes a duty to disclose transactions involving management and principal stockholders among others.
128 https://www.irs.gov/irm/part4/irm_04-051-008#idm139704850343520
129 OECD, *Draft Handbook on Transfer Pricing Risk Assessment* (2013) 35
130 Ibid
131 A copy of the MOU is available at https://www.irs.gov/pub/irs-utl/capmou-final.pdf.
132 https://www.bloombergtaxtech.com/resources/articles/irs-compliance-assurance-program-cap-freeze-impact-on-corporate-taxpayers. Last accessed on 23 December 2018 @ 20:18 Hours GMT
133 https://www.bloombergtaxtech.com/resources/articles/irs-compliance-assurance-program-cap-freeze-impact-on-corporate-taxpayers. Last accessed on 23 December 2018 @ 20:18 Hours GMT

“In a nutshell, taxpayers who participate in CAP have IRS auditors review and agree to their tax positions prior to filing their tax return. In other words, CAP reduces tax audit risk and removes the uncertainty surrounding tax positions.”[134]

However, on August 27, 2018, the Internal Revenue Service (IRS) announced that the Compliance Assurance Process (CAP) program will continue, with some modifications[135]

Another jurisdiction that is gradually moving away from the traditional approach is Australia. The Australian Tax Office (ATO) is now moving to a product that is less onerous yet retains the goal of being current and having greater certainty[136]. ATO is presently testing a product called the Annual Compliance Arrangement (ACA)[137]. This product is similar to the CAP and is about continuous disclosure and an annual discussion to ensure the tax return is correct. The ATO would then provide a list of risks and a forward plan to deal with those risks. Just like in the United States, early indications are that the corporate groups are very interested in this approach.[138]

The Canada Revenue Agency (CRA) has provided Real Time Audits (RTA) since 1997. This allows taxpayers to request a CRA review of possible contentious issues prior to a corporation filing its income tax return. There are few RTA requests in Canada.

A country wishing to grant APAs needs to have the legal basis for it in its domestic tax legislation. In the case of Ghana**,** it appears the legal basis already exists for the adoption of APAs under an Enhanced Engagement Approach**.** As discussed above, this approach will allow early engagement between the Ghana Revenue Authority 9GRA) and taxpayers and ensure that transfer pricing risks are identified and discussed between the parties before the taxpayer files returns or even engages in a transaction. Under the Income Tax Act, 2015 (Act 896), a taxpayer is entitled to apply to the Commissioner-General for a private ruling before entering into any transaction:[139]

“Private ruling

4. (1) The Commissioner-General may, on an application in writing made by a person, issue to that person a private ruling setting out the position of the Commissioner-General regarding the application of this Act to that person with respect to a transaction proposed or entered into by that person.

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[134] https://www.bloombergtaxtech.com/resources/articles/irs-compliance-assurance-program-cap-freeze-impact-on-corporate-taxpayers. Last accessed on 23 December 2018 at 20:18 Hours GMT.

[135] OECD, *Draft Handbook on Transfer Pricing Risk Assessment* (2013) 35; See also https://www.natlawreview.com/article/irs-announces-cap-will-continue. Last accessed on 23 December 2018 at 20:28 Hours GMT.

[136] OECD, *Compliance Management of Large Business Task Group; Guidance Note-Experiences and Practices of Eight OECD Countries* (CTPA, 2009) 28.

[137] Ibid.

[138] Ibid.

[139] See paragraph 4 of the Seventh Schedule to the Income Tax Act, 2015.

(2) Where prior to issuing a ruling under subparagraph (1),

(a) the person in respect of whom the ruling is issued makes, a full and true disclosure of all aspects of the transaction relevant to the ruling to the Commissioner-General, and

(b) the transaction proceeds in all material respects as described in the application of that person for the ruling, the ruling is binding

(c) on the Commissioner-General with respect to the application of this Act at the time of the ruling, and

(d) on that person with respect to the transaction."

Without waiting for the Commissioner General, MNEs can take advantage of the above provisions to initiative this approach to transfer pricing audit.

However, Ghana needs to carefully weigh the pros and cons of the APA approach, and take a balanced and strategic position, as discussed below.

APA schemes have significant advantages. They provide an opportunity for both tax administrations and taxpayers to exchange constructively in a non-adversarial way, through transactional exchanges and hands-on practice. The TPU would have the opportunity to gain insight into complex international transactions undertaken by MNEs. This will favour a deep understanding of business structures and operations, which can be used to inform the TPU general guidance and examination processes.[140] Furthermore, APAs may prevent costly and time-consuming examinations and litigation, and free the manpower employed towards tax auditing procedures. They will also eliminate uncertainty: the GRA would be able to forecast how much tax revenue can be collected as a result of the application of transfer pricing rules in any given year, while the company would know in advance if its tax arrangement is acceptable to the tax administration.

However, APAs also entail significant risks. As mentioned, the TPU faces severe resource limitations. There are legitimate concerns that the Unit will be at a disadvantage in negotiating APAs with MNEs whose well-staffed tax departments will largely prevail in technical expertise and capacity over the TPU. APAs may also give rise to integrity concerns and associated equity issues. The concern is corporate capture of the APA process by the MNE, including through collusion and corruption. Note also that the TPU will need to divert substantial resources to the APA programme, to the detriment of general audit capabilities. The TPU needs to weigh the advantages of APAs against other resource needs.

One way to address these concerns is to have a robust APA review process in place, but this implies that the tax administration diverts staff to the review process, notwithstanding its severe resource limitations. Another option is to involve third parties that second the TPU and contribute technical expertise, so as to rebalance the asymmetry between the TPU and the MNE. The GRA may consider leveraging research partnerships and collaborations with the academia, strategic links with the African Tax Administration Forum, and technical

[140] United Nations, *United Nations Practical Manual on Transfer Pricing for Developing Countries*, 2nd ed. (New York: United Nations 2017), p. 486.

assistance to set up a strong negotiating team without diverting substantial resources from the general audit process.

Within such a negotiating framework, APAs can be useful on an interim basis as a means of setting the parameters of sectoral safe harbours in concertation with the private sector. In practice, safe harbours define circumstances in which the tax administration shall accept the figures declared by the taxpayer. Safe harbour rules may for example legislatively fix operating profit margins deemed acceptable (not subject to ordinary audit process), or specify acceptable price ranges. The normal tax audit process would not apply, and the taxpayers would be entitled to acceptance of their declared prices or margins if within a specified safe harbour range or rate. Safe harbour rules could be an attractive option for Ghana, particularly if targeted at large-revenue sectors, high value transactions and large taxpayers – departing from the OECD Transfer Pricing Guidelines.[141] They increase taxpayer certainty, and provide administrative and simplification benefits for the tax administration. Differently from APAs, safe harbours are not private targeted arrangements between the tax administration and a taxpayer. They are regulatory schemes that apply to all eligible taxpayers.

To sum up, proactive engagement with taxpayers is certainly an option, including through APAs. However, this should not lead to a system of non-transparent, case-specific rulings that raise integrity and equity concerns. It should instead set up an appropriate operational framework to consult and cooperate with taxpayers in setting the parameters of safe harbours. APAs can then be used strategically as an interim measure to build capacities and a knowledge base. In particular, the tax administration may strategically use APAs to set benchmark prices and margins in a non-confrontational way, through an active dialogue with taxpayers. As regards commodity transactions, through the APA process, the taxpayer may provide extensive information in advance regarding the price setting policy for commodity transactions such as quoted prices used, pricing date, premia/discounts applied, and netback adjustments for costs.[142] The tax administration would also access specialist industry knowledge and documentation on profit margins and mark-ups on costs prevalent in a line of business or sector. This information can be effectively used to legislate safe harbour prices and margins. A key concern, as discussed above, is to avoid corporate capture of the negotiating process, including trough that taxpayer lobbying efforts for too generous safe harbour rules. The involvement of independent mediators, as discussed above, may partially mitigate this risk.

B. Valuation Databases and Simplified Methods

The analysis above brings attention to a second aspect that has been previously discussed: the need to build and maintain a database of comparable transactions. As mentioned, the tax authority has failed to develop such database and cannot properly assess if the transfer pricing documentation submitted by the taxpayer is accurate.

[141] See in this direction, Alexander Ezenagu, 'Safe Harbour Regimes in Transfer Pricing: An African Perspective', ICTD Working Paper 100 (Brighton: International Centre for Tax and Development, 2019).

[142] See Irene Musselli, 'Curbing Commodity Trade Mispricing: Simplified Methods in Host Countries', R4D-IFF Working Paper Series, April 2019, at 17, available at https://curbingiffsdotorg.files.wordpress.com/2019/08/r4d-iff-wp08-2019.pdf

Building on APAs the tax administration and taxpayers can constructively engage to set up a valuation and comparability database in a non-adversarial spirit and environment. Constructive dialogue with the private sector can be an effective way for the tax administration to gain insights into prices, costs and margins prevalent in a line of business and sector – to be fed into the database. Relevant information may guide in the assessment of premia or discounts in relation to quality or specific contract terms, transport and insurance costs, smelting and refining costs and rates of recovery in smelting and refining operations, the prevailing contract terms in a line of business, and so on. The RGA may in principle also use taxpayer-lodged information to establish the net profit margins and profitability ratios prevalent in a relevant industry, sector or line of business. By compiling, processing and maintaining this information, the tax administration can build up a strategic repository of commercially relevant information for benchmarking and comparability purposes.

The database could be used for a variety of purposes, but primarily in risk assessment, to flag suspicious transactions and arrangements. It would frame and guide the selection of cases for transfer pricing audits, thus limiting the discretion that the CG has in such matter.

One step further, the information can be used to set the parameters of safe harbour rules in transfer pricing regimes, or in the design of simplified transfer pricing methods that revolve around the use of reference prices and legislatively fixed margins and mark-ups, as discussed elsewhere.[143]

C. Focusing on Accountants

A third strategic area to harvest low-hanging fruits is accountants and accounting practices. The successful implementation of transfer pricing regulations essentially depends, in part, on the commitment of accounting firms and accountants. Accountants working with MNEs are required to provide additional information on the measures and data on financial transfers to subsidiaries of a multinational group of companies. Tax authorities require this data as part of the measures for addressing Base Erosion and Profit Shifting (BEPS). In this regard, accountants have a duty to ensure full compliance with the transfer pricing regulations.[144] The LI places a crucial role on accountants to keep accounts in a manner that makes it easy to undertake a transfer pricing audit. Professional accountants are therefore expected to account for profits in a way that aligns with economic activities and value creation otherwise they will face scrutiny and pose a financial risk to the MNEs. Initiatives to strengthen oversight and regulation of accountants may be taken in any of the following areas: the role of self-regulatory bodies in supervising and monitoring; corporate social responsibility to foster and promote a culture of legal compliance as a core business value; legal requirements to verify and keep records, perform client due diligence and report suspicious activity; and the enactment of penalties for accountants who facilitate the design of profit shifting arrangements ('enabler' penalties).

[143] For a discussion, R4D-IFF Working Paper Series, April 2019, at 17, available at https://curbingiffsdotorg.files.wordpress.com/2019/08/r4d-iff-wp08-2019.pdf.
[144] Ibid

7. Conclusion

There exist in Ghana the right legal framework to ensure that the GRA can embark on an aggressive implementation of a transfer pricing regime that serves as a disincentive to transfer pricing abuse. There is also evidence on the ground to support the effectiveness of these rules. It is also quite encouraging to note that through Ghana's collaboration with the OECD and other organisations, there is continuous training to ensure that the skills of the tax officials are updated to ensure that MNEs do not exploit the current rules through more aggressive tax planning and tax evasion schemes.

This, we think, is the most appropriate first *a priori* level for an effective tax regime on transfer pricing; the second level being the quality of commitment on the part of both taxpayers and tax authorities to leave up to expectation of such rules of mandatory disclosure.

There are however systemic issues that threaten to undermine the potential of rules and the existing institutional framework. The first is the non-existence of a Ghana specific set of guidelines that forms the basis for selecting cases for transfer pricing audit. This exposes the country to the potential loss of revenue from genuine cases that might not fall within the parametres of guidelines the TPU currently relies on.

Closely related to the above challenge is the wide discretion the CG has in such matters. This in our view exposes the authority to political patronage and cronyism. This is particularly important in the light of the fact that the CG reports directly to the Minister of Finance who is an appointee of the President.

Finally, the volume of work that the TPU is expected to do relative to their number is a potential source of inattention, which is a key requirement for effective TP monitoring. It is even more worrying that some of the experienced hands have been moved to other units without being first replaced.

We recommend based on the foregoing observations that it is critical to take a second look at Ghana's approach to TP. An approach that eliminates the need to review large documents as the traditional methods require will auger well for both taxpayers and the GRA. This will also eliminate the need to bring in large numbers of experts and free the TPU to focus of very technical and sensitive cases.

It is also critical to formulate a country specific set of guidelines that takes into account the peculiar circumstances of Ghana. This will ensure that as much as possible, all cases of transfer mispricing are identified and the appropriate adjustments made. This will also reduce if not eliminate the scope of issues on which the CG has discretion. This will also reduce the number of litigation that the GRA will be engaged in with taxpayers because there guidelines would not only serve as a guide to the GRA, but also to MNEs.