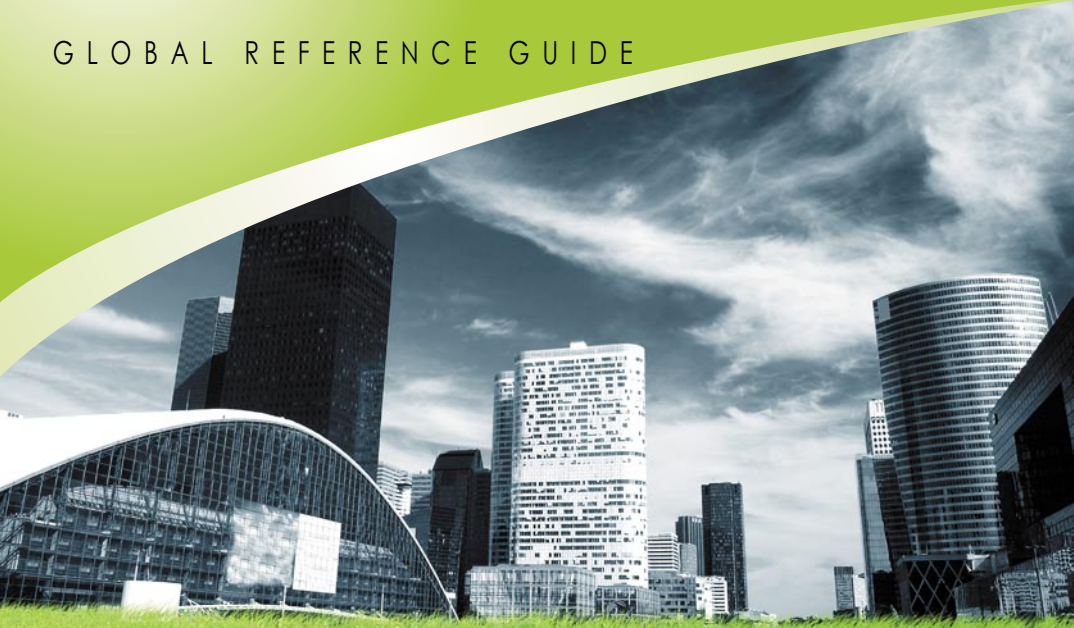


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2011

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NORTH AMERICA

**How transfer pricing disputes are resolved with tax authorities:
lack of publicly available information***by Brian C. Becker | Precision Economic, LLC*

PRACTITIONERS, REPORTERS, AND government officials offer significant amounts of information on transfer pricing. These sources typically provide news items, practitioner's opinions of general transfer pricing concepts, and documentations of new regulations in the field. While the overall availability of transfer pricing information has expanded in recent years, information regarding how a specific company and a tax authority analysed/resolved a specific transfer pricing issue remains limited.

The informational discrepancy described above is logical for several reasons. First, most transfer prices do not get challenged in a manner that would necessitate a public disclosure. That is, the details of contemporaneous documentation studies and/or APAs – the bulk of transfer pricing work for private sector practitioners – typically are not reported publicly. Second, while a challenge to transfer prices often includes a detailed analysis of a company's operations, the company and tax authorities have business and/or legal reasons to keep that proprietary information private.

With the above dynamics understood, some transfer pricing dispute information tends to become public in one of two ways. First, companies disclose material disputes to their investors. While such disclosures have become more common in recent years, often the description is so general that the details of the transfer prices at issue cannot be determined. For example, public disclosures have been made in recent years by Transocean and Amazon, among other companies. While the magnitude of the dispute is often stated in public filings, the competing economic and legal concepts are typically not made available.

Court decisions provide a second venue in which transfer pricing disputes are relayed to the public. Before the completion of trials, courts usually offer limited information on a dispute – for example, parties at issue, legal representation of both parties, identity of experts, court calendar, and so on. However, further information is typically made available following the court decision.

Court and trial information on transfer prices have both a 'good side' and a 'bad side'. On the good side, depending on venue and circumstance, much of the trial record can be made publicly available. For example, certain courts make expert reports and trial transcripts publicly available. Such documentation allows for an understanding of how issues are analysed and the points in the

analysis that were subjected to the highest levels of scrutiny.

Limitations on court documentation, however, provide a bad side to accessing information on transfer prices from trials. First, very few disputes get resolved in court. This is especially true in the US, where the *Veritas* matter represented the only major decision in the past five years, along with a major announced settlement with Glaxo. Canada has reported two significant court decisions – *Glaxo* and *General Electric* – during this time period. Australia has also reported the results of two cases – *Rocbe* and *SNF*. Even among these cases, there exists further bad news from a documentation perspective. The courts may provide varied/limited documentation of the trials, especially in ‘sealed’ cases like *Veritas*.

The limited public knowledge of transfer pricing disputes/resolutions creates an informational hole on the actual dispute resolution process. Articles try to close this hole by inferring details of the parties’ analyses from single page press releases – for instance, the *Glaxo* settlement in the US – or a public decision from an otherwise sealed case – *Veritas*, for example. While such articles can be entertaining, insightful, and thought-provoking, ultimately the lack of factual foundation creates a high level of speculation. While the relatively few private or government practitioners involved in specific trial or audit disputes know the details on such matters, they are typically unable to disclose such proprietary information. As such, the ‘tea leaves’ of information provided by summaries of new decisions and/or large settlements will – probably, slowly – continue to add to public knowledge of how transfer pricing disputes are resolved. ■