PRACTICAL OPTIONS FOR GHANA IN TERMS OF TRANSFER PRICING ABUSE & OTHER TAX AVOIDANCE SCHEMES
Introduction

• Tax avoidance and tax evasion have been said to be two sides of the same coin. On one side is legality and on the other, illegality but to a developing country both result in loss of revenue and consequent loss of development.
Introduction

• For MNEs, an effective tax avoidance scheme satisfies their shareholders while keeping them within the technical boundaries of legality. Any attempt to plug the loopholes that prevent tax avoidance is met by cries from MNEs that it would lead to job cuts.
Introduction

• A case in point is Ghana’s attempt to introduce windfall profit tax in Mining Companies. Since the beginning of this year, all the mining Companies have threatened to lay off workers.
Introduction

• So what is the way forward? Do we fold our arms and watch helplessly?
Ghana’s Previous Efforts at tackling these abuses.

• Within the period up to 2000, section 9 of Ghana’s Tax Law, SMCD5 (now repealed) conferred power on the Commissioner to disregard transactions deemed to be artificial/fictitious.
Practical Options In Terms of Tax Avoidance Methods

- In 2000, a new tax law, The Internal Revenue Act 2000, Act 592 came into force which in a much broader sense, dealt with a number of anti-avoidance schemes.
Practical Options In Terms of Tax Avoidance Methods (Continued)

• Section 69 of Act 592 deals with Income Splitting and states that where a person attempts to split income with another person, the Commissioner may adjust the Chargeable Income of both persons to prevent a reduction in tax payable as a result of the splitting of the income.
Practical Options In Terms of Tax Avoidance Method(s Continued)

• Under Section 70 (which is our provision on Transfer Pricing), the Commissioner – General is empowered to distribute, apportion, or allocate inclusions in income, deductions, credits or personal reliefs between persons as is necessary to reflect the chargeable income or tax payable which would have arisen if the transaction had been conducted at arms length.
Practical Options In Terms of Tax Avoidance Methods

• Section 71 takes care of Thin Capitalisation and provides for debt to equity ratio of 2:1 as allowable deduction. The ratio of a company’s interest bearing exempt debt to its exempt equity contribution held by the Parent or associate of the parent should be 2:1. Any interest charges or exchange losses in excess of the ratio is disallowed in assessing the Ghanaian company.
Practical Options In Terms of Tax Avoidance Methods

• In addition, a general anti-avoidance provision in section 112 as amended gives the Commissioner-General discretionary power to recharacterise or disregard an arrangement or part thereof that is entered into as part of a tax avoidance scheme which is fictitious or doesn’t reflect its substance.
Practical Options In Terms of Transfer Pricing abuse.

• In September 2012, Ghana’s TP Regulation was passed to give effect to the Transfer Pricing provision under section 70 of Act 592. In addition, Practice Notes have been developed together with the TP Annual Return Form.
Practical Options In Terms of Transfer Pricing abuse (Cont’d).

• Development of Risk Assessment hand book for Audit purposes currently under way.
Practical Options In Terms of Transfer Pricing abuse (Cont’d).

• One major area of abuse we concentrate on is mispricing of goods especially machinery used in the extractive industry where machinery used by the enterprise in one country and has exhausted its capital allowance deduction is shipped to the branch in Ghana at a higher price.
Practical Options In Terms of Transfer Pricing abuse.

• This was fuelled by the general capital allowance regime where the company was allowed to technically write off 110% of the cost of the machinery in 2 years.
Practical Options In Terms of Transfer Pricing abuse.

• Remedy – effective 2012, the capital allowance regime has been changed to 20% annual depreciation allowance over a 5yr period.
Practical Options In Terms of Transfer Pricing abuse.

- Ring fencing of development expenses. From March 2012, in determining the CI of a basis period, mining companies are no longer allowed to deduct expense incurred in one mining area against revenue derived from another mining area.
Practical Options In Terms of Transfer Pricing abuse.

• In Ghana, MNEs are allowed to transfer Management and Technical Services fees where there’s an agreement with the Ghana Investment Promotion Centre. Major companies have it. This is an area of abuse for MNEs because the fees is transferred whether or not the service has been rendered since WHT of 15% on the transfer is lower than the 25% corporate tax.
Practical Options In Terms of Transfer Pricing abuse.

• Remedy – a mere agreement is not enough. The Functions, Assets and Risks under our TP Regulations is now used and under this, the function must have actually been performed.
Practical Options In Terms of Transfer Pricing abuse.

- Intellectual Property – we have had instances where Ghanaian companies are said to have paid royalty on patents originally developed in Ghana.

- Remedy – The Transfer Pricing Regulations.
Conclusion

• I believe that these measures described above, combined with a vibrant Tax Administration that is able to implement the tax laws correctly will ensure that MNEs satisfy their legitimate tax obligations.
Practical Options In Terms of Transfer Pricing abuse.

• THANK YOU.