TRANSFER PRICING IN BRAZIL

Seminar: Transfer Pricing – Fairness in Taxing Multinationals and Extractive Industries
Dar es Salaam, 03 e 04 de outubro de 2013
Instituto Justiça Fiscal – IJF
Dão Real Pereira dos Santos
TRANSFER PRICING

Problems with transfer pricing are not new in Brazil. In 2000, the CPI (parliamentary investigation commission) of pharmaceuticals products discovered that some industries were practicing up to 5,000% overpricing in the import of inputs.

- Transfer of profits
- Abusive Increase of prices - 300% increase in company revenue without raising the quantity (Years 90 – from US$ 3.4 to US$10.3 billions)
- Inefficiency in the application of current control methods
In 2011 Brazilian foreign trade registered US$ 482.3 billion in its flow. Exports reached US$ 256.0 billion, and imports were US$ 226.2 billion.

Imports: In the imports side, the acquisitions of raw materials and industrial supplies and materials represented 45.1% of the total, and capital goods imports, 21.2%, showing strong correlation with productive investments. Consumer goods represented 17.7% and fuel and oil, 16.0%.

Exports: In the exports side, the basics products represent 47.8% of the total, while the manufactured is 36.1%, and the semimanufactured is 14.1%. The sale volume of commodities is very high and has been growing in recent years.
The large enterprise represents 25% of the total enterprises.
The volume of intracompany trade is very high too, but it is possible to observe that it is decreasing, since 2006. This may show that the relation may be being hidden. It is difficult to determine the relation between companies when the transaction is registered by a third person who works under the orders of the importer or exporter. Customs legislation in Brazil provides that goods can be retained when the declaration of the operation is done with concealment of the real buyer or seller.
TAX HAVEN – IT IS THE REAL PROBLEM

• Normal situation: the quantity traded with one country is the same of the quantity exported to, or imported from this country. The physical flow is similar than the financial flow.

• Traders are located in countries which are predominantly tax havens – In 2012, for example, the exports (sales) to Cayman Island were 16,000% higher than the volume shipped to that country.
TAX HAVEN – IT IS THE REAL PROBLEM

Ten largest volumes of trade (buyer and seller) are: Switzerland, EUA, Netherland, Cayman Island, Argentina, UK, Cingapura, Uruguai, Turkey Island and Hong Kong.

Ten larges volumes, considering origin and destiny of goods: China, EUA, Argentina, Netherland, Japan, Germany, Niger, India, Italy and South Korea.
Favorable Taxation Jurisdiction and Privileged Tax Regimes (Tax Havens)

• In 2011, Brazil exported US$ 256 billion – 30% was trade to Switzerland and Cayman Island, but just 3% was shipped to those countries.
• On the other hand, 30% was shipped to USA and China.
• The cash flow does not match the physical flow of goods.

TP RULES ARE APPLIED INDEPENDENT ON THE BINDING
TRANSFER PRICING RULES

- Jurisdiction with favorable taxation (low or no taxation)?
  
a) country where the income is not taxed or tax is less than 20% (federal law 9.430/1996).
  
b) When the local law don't allow access to the informations about corporate structure and identification of the effective beneficiaries (benefical owner).
Country with Privileged Tax Regimes

Should have one or more of following caracteristics
I- no taxation or taxation below 20%;
II- grants tax advantages to non-residents:
   a) without having to make substantial economic operations in the country
   b) cannot performe the economics activities in the country;
III- no tax income or income tax rate below 20%, when obtained outside its territory;
IV – do not allow access to information related to shareholding of the companies and the identification of the actual beneficiaries.
Favorable Taxation and Privileged Tax Regimes

• A Normative Instruction nº 1.037/2010, presents:
  I. A list of 65 jurisdictions with no or low taxation and/or no transparency;
  II. A list of countries that have privileged tax regimes, for example: the holding companies of Netherland and Denmark; International Trading Company of Iceland; Limited Liability Company of EUA; Financial Society of Inversion of Uruguay;
  III. Switzerland was included in the list, but requested a review and was suspended.
Tax Haven – It is The Real Problem

Exp. DE $ 

Goods

Imp. DI $$$

Tax Haven

$ 

$$$

$
Transaction with intangible goods are subject to transfer pricing rules in Brazil, but a set of operations is excluded (for import operations) such as: transfer of technical, scientific and administrative and royalty payments (royalties). These expenses are subject to a specific regulamentacion previous with restrictions. The payments of theses kind of costs are also subject to withholding tax.
-- Questions and problems

- The large concentration of intracompany transactions makes it very
difficult to obtain bases of comparison independent. In some
sectors, the volume of intracompany operations reach 90%. We do
not have independent market in this cases. No comparables! The
method most comonly used is the PRL.

- When the free price manipulation could be considered fraudulent?

- Tax laws are very subjectctive or involving several possibilities of
interpretation tending to be decided against the tax administration.
The fixed margins have been quite claimed. The Brazilian justice is
quite formalistic.
PRINCIPLES AND RELATED PARTIES

• Questions and problems
  - The audit of transfer pricing involves great technical expertise of inspectors and adequate technological resources for data crossing. In Brazil we have two offices specializing in this kind of work (SP and RJ).
  - Although the volume of exports intracompany or through tax havens is very high, most of the audits is limited to imports of goods.
  - The effects of legal changes (2012) will appear only the next fiscal year. Then there is a great expectation about possible adjustments resulting from the obligation to observe the prices of commodities exported (large part of our exports).
TAXPAYER OBLIGATIONS

• Taxpayers must inform in their annual income tax declaration if they made transactions with related parties or with residents in tax havens.

• They must perform the calculations according the rules for determining the necessity of adjustments in its taxable basis.
TAXPAYER OBLIGATIONS

- They must keep all documentation that support their operations, demonstrating prices paid or received and the evidences demonstrating the calculations performed to determine the transfer price adjustments, which must be made by product (no basket approach).
## Adjustments of Transfer Pricing

**Value of adjustments made voluntarily by taxpayers:**

<table>
<thead>
<tr>
<th>Year</th>
<th>Adjustments in Reais</th>
<th>Value of Tax (34%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>2,969,204,832.68</td>
<td>1,009,529,643.11</td>
</tr>
<tr>
<td>2009</td>
<td>3,259,149,655.98</td>
<td>1,108,110,883.03</td>
</tr>
<tr>
<td>2008</td>
<td>2,156,990,182.27</td>
<td>733,376,661.97</td>
</tr>
<tr>
<td>2007</td>
<td>1,644,257,907.26</td>
<td>559,047,688.47</td>
</tr>
<tr>
<td>2006</td>
<td>1,393,172,968.79</td>
<td>473,678,809.39</td>
</tr>
<tr>
<td>2005</td>
<td>1,238,928,894.20</td>
<td>421,235,824.03</td>
</tr>
</tbody>
</table>
Adjustments of Transfer Pricing

- Amount of taxes and adjustments made by the Tax Administration. Values en R$:

<table>
<thead>
<tr>
<th>Year</th>
<th>Adjustments</th>
<th>Taxes+Penalties+Interest</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>2,725,831,563.89</td>
<td>1,962,598,726.00</td>
</tr>
<tr>
<td>2010</td>
<td>1,942,743,087.50</td>
<td>1,398,775,023.00</td>
</tr>
<tr>
<td>2009</td>
<td>1,473,689,625.00</td>
<td>1,061,056,530.00</td>
</tr>
</tbody>
</table>
# BRAZILIAN IMPORTS IN EN 2011

<table>
<thead>
<tr>
<th>Country</th>
<th>Seller country</th>
<th>Origin country</th>
</tr>
</thead>
<tbody>
<tr>
<td>EUA</td>
<td>51,150,019,660</td>
<td>42,579,200,181</td>
</tr>
<tr>
<td>Netherland</td>
<td>23,699,545,114</td>
<td>3,754,307,649</td>
</tr>
<tr>
<td>Germany</td>
<td>17,683,952,051</td>
<td>17,100,109,659</td>
</tr>
<tr>
<td>China</td>
<td>15,924,384,542</td>
<td>36,632,915,100</td>
</tr>
<tr>
<td>Argentina</td>
<td>14,904,075,398</td>
<td>17,055,509,939</td>
</tr>
<tr>
<td>Cingapura</td>
<td>13,817,904,644</td>
<td>2,518,185,298</td>
</tr>
<tr>
<td>Switzerland</td>
<td>12,599,513,167</td>
<td>3,104,524,095</td>
</tr>
<tr>
<td>Country</td>
<td>Buyer country</td>
<td>Destiny country</td>
</tr>
<tr>
<td>---------------</td>
<td>-----------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>Switzerland</td>
<td>84,766,546,386</td>
<td>1,657,139,534</td>
</tr>
<tr>
<td>Cayman Island</td>
<td>45,056,713,478</td>
<td>406,207,824</td>
</tr>
<tr>
<td>EUA</td>
<td>40,952,024,435</td>
<td>25,613,428,484</td>
</tr>
<tr>
<td>Argentina</td>
<td>31,685,703,745</td>
<td>22,370,250,374</td>
</tr>
<tr>
<td>Netherland</td>
<td>24,036,436,749</td>
<td>13,619,109,864</td>
</tr>
<tr>
<td>Reino Unido</td>
<td>16,136,799,977</td>
<td>5,187,327,579</td>
</tr>
<tr>
<td>Portugal</td>
<td>12,207,954,241</td>
<td>2,043,886,312</td>
</tr>
</tbody>
</table>
BRAZILIAN EXPORTS IN 2012

TANZANIA
Shipped to: US$ 45,236,855.95
Sold to: US$ 7,447,209.86
OBRIGADO!

GRACIAS!

THANK YOU!

Dão Real Pereira dos Santos
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