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Transfer pricing methods in multinational enterprises

Identifying challenges to determine the arm's length price

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Preface

This master's thesis is the end of our master's degree in economics and administration, specialising in finance and accounting. This paper is a result of a well-functioning cooperation between the two authors. We have both fulltime jobs and children, so the research process has been thoroughly heavy, especially because of time constraints.

Because of our finance, accounting and law backgrounds, it was it easy to decide on the research theme. Reform of the international tax system, followed by the dynamic development of the tax legislation, regulating transactions between related parties, arose our interest in the topic.

Thanks to professor and supervisor Muhammad Azeem Qureshi. We are thankful to have been able to learn from all the experience and good ideas you have given us throughout this process.

We will also send a big thanks to associate professor Erik Friis Fæhn for constructive input and advice.

Bærum 26. November 2021.

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Abstract

Based on the court case analysis and expert interviews, we identify the key challenges in implementing international transfer price regulation in Norway, which relate to difficulties with the interpretation and application of the statutory wording in section 13-1 (1) of the tax act (Tax act, 1999, section13-1). We make the following observations: A fundamental issue is if the tax office can disclose contracts used to compare transfer prices when determining the arm's length price or confidentiality restrictions prevail. Transactions used in the comparison cannot be completely comparable, the problem resides in lack of discretionary additional information on levels, industries, and risks. Necessary calculations, tax assessment and valuation cannot be made by using only database dumps and mathematical models. Disagreement on certain factors occurs when determining and application of the arm's length range.

Sammendrag

Basert på rettssaksanalyse og ekspertintervjuer identifiserer vi de sentrale utfordringene ved implementering av internasjonal internprisregulering i Norge, som knytter seg til tolkning og anvendelse av lovteksten i skatteloven § 13-1 (1) (Skatteloven, 1999, §13-1). Vi gjør følgende observasjoner: En fundamental utfordring er taushetsbegrensninger og hvorvidt skattekontoret kan opplyse om kontrakter som ble brukt til sammenligning av internpriser ved fastsettelse av armlengdes pris. Det oppstår utfordringer ved manglende bruk av skjønnsbasert tilleggsinformasjon slik som nivåer, bransjer og risiko i transaksjoner som sammenlignes. Nødvendige beregninger, skatteligninger og verdivurdering kan ikke anvendes ved kun database dumps og matematiske modeller. Det oppstår uenighet omkring valg og bruk av armlengdes intervall.

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Abbreviation list

BEPS	Base erosion and profit shifting
CUP	Comparable uncontrolled price
EY	Ernst and Young
MNEs	Multinational enterprises
OECD	Organization for Economic Co-operation and Development
PSM	Profit split method
PWC	PricewaterhouseCoopers
TNMM	Transactional net margin method

1. Introduction

World trade is an important development tool in the national economy of each country because it influences the economic benefits of the country. As a result of world trade, the global economy reaches a higher level of people's welfare and the efficient allocation of resources (Berthou et al., 2018, p.1). Multinational enterprises find it economically advantageous to transfer profits and costs in order to reduce their taxable income.

According to data from Statistics of Norway (Statistics of Norway, 2021) on import and export of goods, excluded services, imports amount to NOK 762, 8 billion, and exports amount to NOK 773,2 billion in 2020 (Statistics of Norway, 2021). It should be noted that because of the Covid-19 pandemic, there was a global downtrend in turnover. A considerable part of those transactions is between the multinational enterprises that own and control goods and services in at least one country other than Norway. These companies are influential because of the promotion of innovation and technologies transfer worldwide. At the same time, such technological innovation has given rise to legal disputes and administrative procedures with the tax offices.

Upon examining the transfer pricing cases from 2009 to 2016, the tax administration issued 240 decisions to increase taxable income, which amounted to NOK 57.6 billion (Auditor General of Norway, 2018, p. 65). As the Auditor General of Norway recommends, the tax administration should impose additional tax on its practice more often given the observance of specified terms. As advised by the Auditor General of Norway, preventive function and due monitoring in the sphere of transfer pricing can be achieved under the condition of more frequent impose of the additional tax. In its practice, the examination of transfer pricing cases, tax administration was guided by the arm's length principle applied to domestic and cross-border transactions between related parties.

The practical application of the arm's length principle became an issue reflected in the State budget draft in 2020 (Government, State Budget, 2020, p.7). In its budgetary chapter related to the Tax Administration was prescribed that because of the importance of the transfer pricing cases for the state budget, the tax administration will undertake further work on monitoring transfer pricing in transactions between multinational enterprises. International trade is important for the economy, and globalization creates challenges when multinational companies have incentives to invest profits in the countries with the lowest tax rates. Therefore, transfer pricing is an important political framework to ensure multinational enterprises pay taxes and

fees under all laws, regulations, and guidelines. The determination of an appropriate price must be in line with the arm's length principle. This determination will affect the amount of taxable income.

The Organization for Economic Co-operation and Development (OECD) has developed international guidelines for their member countries (OECD, 2017, p.97). These guidelines are recommendations from the government to all member countries as an aid to following key transfer pricing principles (OECD, 2017, p. 97). One key principle is the arm's length principle. Besides, guidelines that discuss transfer pricing methods contain comparability analyses, refer to transfer pricing documentation and administrative approaches to avoid and resolve disputes (OECD 2017, p. 97). These guidelines were published in 1995 and revised in 2010 and 2017 (Choi et.al., 2020, p. 2).

The OECD's guidelines for transfer pricing define two main categories of methods that should be used when determining the arm's length price, the traditional transaction method and the transaction profit method. According to the OECD, it is the traditional transaction method that is the preferred method. These methods aid in finding the appropriate arm's length price, whereas it is the result and the use of the methods that are important, not the method itself. The business taxpayers are not obliged to use these five methods, but the result of the price must be in accordance with the arm's length principle (Bjerke, 1997, p. 157).

The empirical literature shows that it has been the focus of research to investigate challenges of determining an appropriate price after the arm's length principle (Higinbotham & Levey, 1998, p. 235), (Dean et al., 2008, p. 9), (Schön, 2011, p. 6). In their study, Higinbotham and Levey (Higinbotham & Levey, 1998, p. 235) mention that the relationship between controlled transactions can differ fundamentally from potentially comparable transactions between unrelated parties. In the search for a comparable transaction, they argue that this selection may not be possible in specific contexts. They suggest that greater clarity of laws, regulations and guidelines since related the party's transactions often have unique characteristics (Higinbotham & Levey, 1998, p. 235).

According to Borkowski, in empirical research on transfer pricing, a substantial divergence occurs when it comes to the application of actual methods in practice and based on theoretical approach recommendations on application of methods (Borkowski, 1988, abstract), (Ainswarth &Shact, 2012, p. 1). It leaves the companies with the choice of the most appropriate method rather than the recommendation on the correct use of the method based on theory (Borkowski,

1988, abstract), (Ainswarth &Shact, 2012, p. 1). According to Borkowski, firms prefer to use the full-cost method even when a market price is available (Borkowski, 1988, abstract).

Ainsworth and Shact (Ainswarth &Shact, 2012, p. 1) investigated if the traditional transaction method is preferred by judges arbitrating disputes around transfer pricing methods. They conclude that the traditional method is preferable for the courts. They have also investigated the use of database dumps for potential comparison. They conclude that they are presented to the tax authority "as they are". Any further analysis is not conducted in the disputes. This database dump is often based on a specific range. The authors refer to the OECD, which indicates that commercial databases "*should not encourage quantity over quality" (*Ainsworth & Shact, 2012, p. 31).

Pfeiffer, Schiller and Wagner (Pfeiffer et al., 2010, p.4) point out that previous research has not managed in a good way to get the studies practically oriented enough. Therefore, we attempt to make a practice-oriented study limited to the analysis of the traditional or non-traditional methods and focus on detecting the challenges arising when the court makes decisions on behalf of business taxpayers and the tax authorities. Based on those decisions, business taxpayers apply concrete methods when determining the transfer price in their transactions.

The existing contributions show that the focus has been on the challenges between the traditional transaction method versus untraditional methods. Several studies only focus on challenges with one of the five methods and what challenges these methods give. Therefore, this study takes an interesting closer look at the challenges reviewed in a court with discussion and conclusion from the judges including discussions with a specialist who frequently works with cases seen in the court. We directly uncover the challenges of determining an appropriate price in a more practically oriented study in a more optimal way than the many theoretical studies that already exist.

Because of the number of disputes, Norwegian court cases, and empirical research, there are some challenges in finding the appropriate transfer price according to the arm's length principle. Challenges connected to transfer prices have long been sources of conflicts between the tax authority and business taxpayers (Li, 2005, p. 59). By scrutinizing the parties' arguments in the court disputes and the conclusions of the courts of first, appeal and Supreme courts, we demonstrate that the court has challenges in determining the arm's length price. We discuss these challenges during individual interviews with specialists in the transfer pricing sphere,

both representatives of the tax office and lawyers representing international companies appealing decisions of the tax office.

In chapter 2, we discuss the application of the arm's length principle, transfer pricing methods recommended by OECD, provisions of the Norwegian law regulating community of interest between the parties to transactions and reduction of income or property consequently to it. Chapter 3 provides a methodological approach and research process. In chapter 4, we present court cases, analyze arguments of the parties and presentation of the court's opinion. In chapter 5, we introduce presenting and discussions with the specialists. Results of our study and conclusions will be presented in chapter 6, including a statement of limitations, contributions and further research.

2. Transfer pricing theory

Because of globalization, growth in global trade, and the establishment of group corporations, the focus on transfer pricing has increased during the last two decades. Increased integration of national economies and technological progress brought the complex taxation issues actuality for tax administrations and multinational enterprises (OECD, 2010, p. 17).

Pricing different transactions between enterprises associated with each other and having common interests is one of many explanations of transfer pricing. The determination of transfer pricing is important in taxation, especially given the importance of price, affecting the amount of taxable income. Because of taxation issues a company can allocate profit to other associated companies by increasing or decreasing the price for a product sold or services provided between these companies (Prop. nr 62 (2006-2007), p. 5).

In this theoretical chapter, the theoretical framework for understanding the complex transfer pricing area will be presented. The chapter includes references to relevant guidelines, Norwegian Law, and research articles and literature in the transfer pricing sphere.

2.1. The OECD's arm's length principle

The OECD's arm's length principle is the consensus on transfer pricing and must be used in determining transfer prices for tax purposes (OECD, 2017, p. 23).

The authoritative statement of the arm's length principle is found in paragraph 1 of article 9 of the OECD Model Tax Convention. Article 9 provides:

[Where] conditions are made or imposed between the two [associated] enterprises in their commercial or financial relationships which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of the enterprises and taxed accordingly (OECD, 2017, p. 35).

The arm's length principle implies comparing the price, margin, or profits from comparable transactions between independent enterprises (OECD, 2010, pp. 33-34). Application of the principle when scrutinizing the terms and conditions on the price in the contracts between related parties implies a disregard of the community of interest between them.

It could be difficult to apply the arm's length principle in the same way for both tax administrations and taxpayers. Difficulties arise when obtaining transactional information from independent enterprises and then using this information for comparison with the transactions

between associated enterprises. This information could often be incomplete, impossible to obtain or have confidentiality concerns (OECD, 2010, p.35).

2.2. The OECD's deposition in the Norwegian tax Act, section 13-1 (4)

OECDs (2010) guidelines mention that each multinational enterprise must be seen as a separate unit for tax purposes (OECD, 2010, p. 17). In accordance with the Norwegian Tax Act section 13-1 (4) (Tax act, 1999, section 13-1 (4)), when considering transfer pricing cases, it shall be "taken into account" the OECD ' s guidelines for transfer pricing.

This information is specified in the legal text. This principle shall only be applied to the extent that Norway has acceded to the guideline unless the Ministry of Finance has decided otherwise. Because of this specification, the OECD hierarchy of transfer pricings method may have a more important role in Norwegian law than previously (Andal &Slåtta, 2007, p.1).

2.3 BEPS: Action 13

The political agenda on international tax issues has never been so high as it is today (OECD, 2015, p. 4). Current rules have shown weaknesses, which has created opportunities for Based Erosion and Profit Shifting (BEPS). The main purpose of BEPS is to ensure that profits are taxed where economic activity takes place and value is created (OECD, 2015, p. 4). BEPS is developed on a series of projects that refer to a set of transfer pricing issues. It was issued and approved by G20 and OECD in October 2015. It refers to tax planning strategies used by multinational enterprises that exploit gaps and mismatches in tax rule to avoid paying tax (Andrus & Oosterhuis, 2017, p. 89). The reform of transfer pricing is considered a necessity because transfer pricing planning is the hallmark of BEPS (Brauner, 2014, p. 114). The action plan on Base Erosion and Profit Shifting ("BEPS action plan") identifies 15 measures to tackle tax avoidance and to ensure a more transparent tax environment (OECD, 2020, p. 7).

Under BEPS Action 13 (OECD, 2020, p. 7) from 2017, all large multinational enterprises with annual income above 6,5 billion NOK must prepare and submit country-by-country reports on economic activity among tax jurisdictions and paid taxes and global allocation of income and profit (Tax administration act, 2016, section 8-12).

2.4. Transfer pricing: A complex area from an ethical and political point of view

The concept of capitalism is primarily to increase profits and benefits. For the sake of these benefits, companies sharpen their competitive advantages by developing new products, services, and niches and squeeze a variety of stakeholders (Sikka & Willmot, 2010, pp. 6-7).

With this view in societies, taxations are seen as an avoidable cost, rather than a return on investment of social capital (Sikka & Willmot, 2010, p. 7).

In their article Sikka and Wilmot (Sikka & Willmot, 2010, pp. 6-7) cited the opinion of Ernst & Young: "*tax is the cost of doing business, so naturally, a good manager will try to manage this cost and the risk associated with it (Irish Times, 7 May 2004). Companies are constantly looking to save cost, and tax is a major cost"* (Sikka & Willmot, 2010, p. 7).

All companies are attracted by the opportunity to reduce or eliminate taxes because this will boost shareholder value, post-tax earnings, and returns to shareholders (Sikka & Willmot, 2010, pp. 7-8). Because of the implications for taxations, transfer prices are not just used to estimate the performance of corporate divisions, subunits, departments and subsidiaries. Taxations of corporate profits collected by the authority of domestic and foreign governments will be used for public and social investments (Sikka & Willmot, 2010, p. 8).

The political concept of transfer pricing has added new complexities in recent decades because increased globalization. Corporations are free from the limitations of territorial jurisdiction, joint ventures, special purpose entities and trust in geographical locations to take advantage of taxation (Sikka & Willmot, 2010, p. 9). Global production creates new opportunities by allowing companies to shift profits to other locations and thereby avoid taxes (Sikka & Willmot, 2010, p. 9).

Apple, Google and Amazon are all highly profitable international companies that pay very low rates of taxation around the world. These worldwide companies have strategically taken advantage of favorable tax conditions. This example is one of many cases when highly profitable companies increasingly divert their profits to favorable tax jurisdictions rather than in the countries where their value is created (Christians & Apeldoorm, 2018, pp. 2, 39).

2.5. Requirements for comparability

The OECD's five requirements for comparability are applicable with respect to certain transactions, and they can impact the condition in the comparison of the price. These characteristics must be evaluated in each concrete case. It could be characteristics related to products or services, functions such as the risk for the parties, external circumstances of the transaction and business strategy for the companies (Bjerke, 1997, p. 189).

Product comparability can be divided into two categories, objective and subjective character. Objective characteristics are quality, quantity, durability and availability of a product. For

services, comparison relates to nature and scope of services, and for intangibles assets, it implies comparability around contract type, license or purchases, knowhow, brands etc. Subjective characteristics could be the place of the production. Handmade products rater mass production. When comparing transactions on goods or services, is it important to take these factors into consideration. They must be included in the analysis because these characteristics will affect different market prices (Bjerke, 1997, pp. 189-190).

Function analysis must be done based on marketing, distribution, procurement, research and development, management, services, financing etc. It is important to evaluate the parties' circumstances regarding assets. All these characteristics will have an impact on the price of the transaction because of the controlled and uncontrolled transactions (Bjerke, 1997, pp. 190-191).

Risk for the parties must also be evaluated in the analysis of the function. Differences in risk will influence the price or profit of the product. Different types of risk must be considered, such as market risks connected with changes in price on products or raw materials. Some manufacturers are dependent on raw materials such as crude oil, investment in dependable equipment can suffer from financial risk related to currency and interest rate changes. The risk picture is wide and should also be based on other factors such as the group's risk type, company's ability to handle risk, etc. (Bjerke, 1997, pp. 190-192).

Contract terms are agreed upon between independent parties and are written in the agreement. These contracts and agreements must be used to compare the transaction, but with caution since the parties could have agreed on something that independent parties would not have done (Bjerke, 1997, p. 193).

Business strategies and market offensive. It is important to analyze the overall business, and pay attention to the new products, the development of new solutions, and its operational profile. These factors can influence the value of a transaction (Bjerke, 1997, pp. 194-195).

2.6. Methods for determining transfer prices

Chapter II in the OECDs (OECD, 2010, p. 59) guidelines describes five different transfer pricing methods to find the right arm's length prices. The first three methods are based on traditional transaction methods such as comparable uncontrolled price method, resale price and cost-plus. The two last methods are the transactional net margin method (TNMM) and the transactional profit split method see figure 1 (OECD, 2010, pp. 61-63).

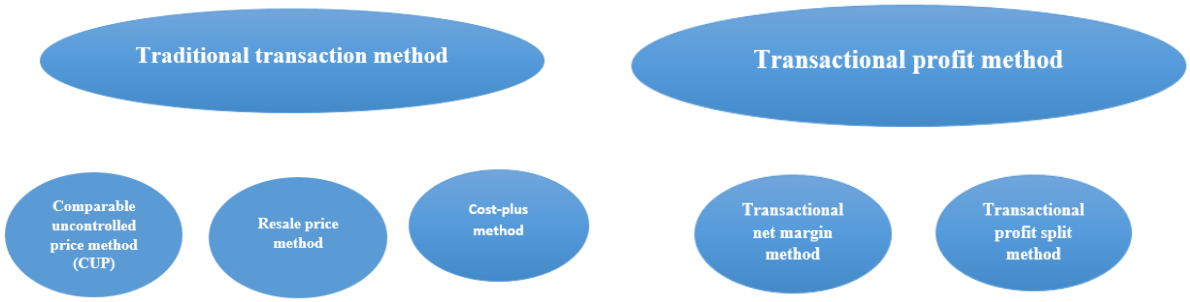

Figure 1: The OECD's five transfer pricing methods

Sources: Own produced

These methods are established in the OECD guidelines. The Norwegian tax act section 13-1 (4) (Tax act, 1999, section 13-1) refers to them in the OECD guidelines and in the American law and regulations. None of these methods are absolute, but rather a recommendation to apply when companies must find the right arm's length price or range. There is room for companies to form and use other methods. The only thing is that the result must be in line with the arm's length principle (Bjerke, 1997, p. 220).

The traditional transaction method is most appropriate when the commercial and financial relations between associated enterprises are arm's length (OECD, 2010, p. 60). The price of a controlled transaction versus the price in a comparable uncontrolled transaction can be traced directly to the enterprises. The arm's length condition will substitute the price of comparable uncontrolled transactions for the price of the controlled transaction (OECD, 2010, p. 60).

The traditional methods have high condition for comparability, and in some cases, this method has proved to be unsuitable because of their high demands for comparability (Bjerke, 1997, p. 220). The transactional profit method is mostly used in cases where differences exist in the cost

choice that should be included in the analysis. Transactional profit methods are based on net profit instead of gross profit, for the traditional transaction methods (Bjerke, 1997, p. 293).

Illustration of the selection of the most appropriate method to the circumstances of the case			
If CUP and another method can be applied in an equally reliable manner	⇒ CUP		
If not:			
Where one party to the transaction performs "benchmarkable" functions (*e.g.* manufacturing, distribution, services for which comparables exist) and does not make any valuable, unique contribution (in particular does not contribute a unique, valuable intangible)	⇒ One sided method ⇒ Choice of the tested party (seller or purchaser): generally the one that has the less complex functional analysis.		
*The tested party is the seller (*e.g.* contract manufacturing or provision of services)	✓ Cost plus ✓ Cost-based TNMM (*i.e.* testing the net profit / costs) ✓ Asset-based TNMM (i.e. testing the net profit /assets)	⇒	If cost plus and TNMM can be applied in an equally reliable manner: cost plus
*The tested party is the buyer (*e.g.* marketing / distribution)	✓ Resale price ✓ Sales based TNMM (i.e. testing the net profit/sales)	⇒	If resale price and TNMM can be applied in an equally reliable manner: resale price
Where each of the parties makes valuable, unique contributions to the controlled transaction (*e.g.* contributes valuable unique intangibles)	⇒ Two-sided method ✓ Transactional profit split		
MNEs retain the freedom to use "other methods" not listed above, provided they satisfy the arm's length principle. In such cases, the rejection of the above-described methods and selection of an "other method" should be justified.	⇒ Other methods		

Figure 2: Selection of the most appropriate method

Sources: OECD transfer pricing methods 2010, p.16

2.6.1. The comparable uncontrolled price method (The CUP method)

The comparable uncontrolled price method hereafter CUP is based on a comparison of a price in the controlled transaction with the price in a comparable uncontrolled transaction (Bjerke, 1997, p. 222).

The OECD defines the CUP method as:

The CUP method compares the price charged for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances (OECD, 2010, p. 65).

The difference in these two prices may indicate that commercial and financial relations of the associated enterprises are not arm's length (OECD, 2010, p. 63).

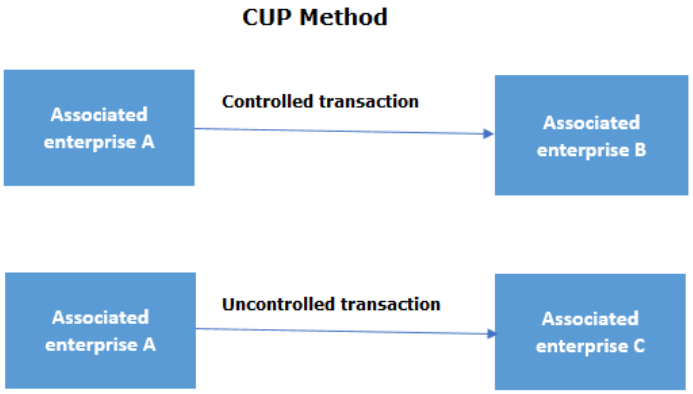

Figure 3: CUP method

Sources: Own adjustment based on OECD transfer pricing methods (OECD, 2010, p.3)

The CUP method is described as the most reliable because the arm's length principle in situations where there are possibilities to identify comparable uncontrolled transactions. The method is especially reliable if the product is traded between related companies and sold by independent companies (Prop. nr 62 (2006-2007), pp. 21-22).

In the early US regulations of 1968, the CUP method was seen as the most prioritized method. In both the American regulations and the OECD's guidelines, this method is equal to other transaction methods. The choice of method shall just be based on which method is most suitable (Bjerke, 1997, p. 224). But, according to Bjerke (Bjerke, 1997, p. 224) the Norwegian courts and tax practices prefer the direct comparison method even with adjustment (Bjerke, 1997, p. 224).

The choice of methods requires different comparability. The CUP method, where direct comparison methods compare transaction prices, require a higher degree of comparability in quality and scope because we must examine all factors that may affect the price (Bjerke, 1997, p. 225).

2.6.2. Resale price method

The resale price method is also one of the traditional transaction methods (Bjerke, 1997, p. 252).

According to the OECD, the resale price methods is defined as:

The resale price method begins with the price at which a product that has been purchased from an associated enterprise is resold to an independent enterprise. This resale price is then reduced by an appropriate gross margin on this price. This price represents the amount out of which the reseller would seek to cover its selling and other operational expenses and an appropriate profit (OECD, 2010, p. 65).

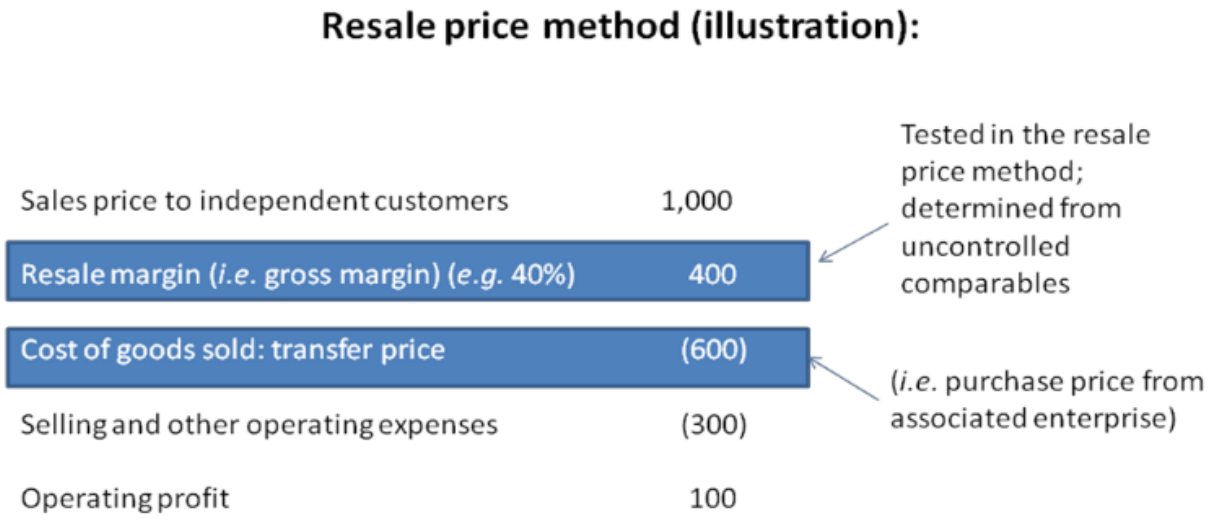

Figure 4: Resale price method

Sources: OECD transfer pricing methods 2010, p.4

According to Bjerke (Bjerke, 1997, p. 252) the resale price method is based on the price of a product or service purchased form an associated company and resold to an independent company. Out of this price, it is possible to pull out an appropriate gross profit margin that

corresponds with the price the independent resellers achieve. The gross profit margins shall cover the reseller's cost in addition to the purchase price and a profit for the resellers. Any fees, special taxes and duties will be deducted. This calculation will be the correct arm's length price for the associated transaction (Bjerke, 1997, p. 252).

The resale price method needs less adjustment for product differences since the gross margin is less sensitive than the product price. The guidelines tell us to see more after performed function and economic circumstances. The method fits best for marketing activities (Prop. nr 62 (2006-2007), p. 22).

The method should be used in those cases where it will give the most reliable answer to the arm's length price, not just the resale method's reliability. It will also depend on choice related to other available methods. It is important to ask the question of some factors that could influence the gross profit margins. It is also important to define who is responsible for the marketing. The risk will also be an important connection, for example, currency risk and unsold products (Bjerke, 1997, pp. 251-255).

2.6.3. Cost plus method

The cost-plus method is the last of the three traditional transaction methods. This method is based on the actual cost which the seller has, and by adding a gross profit margin, which will give us the arm's length price (Bjerke, 1997, p. 258).

The OECD defines the cost-plus method as:

This method starts with the costs incurred by the supplier of property (or service) in a controlled transaction for property transferred or service provided to an associated purchaser. An appropriate cost-plus markup is added to this cost to make an appropriate profit in light of the functions performed and the marked conditions. What is arrived at after adding the cost plus mark up to the above cost may be regarded as an arm's length price of the original controlled transaction (OECD, 2010, pp. 70-71).

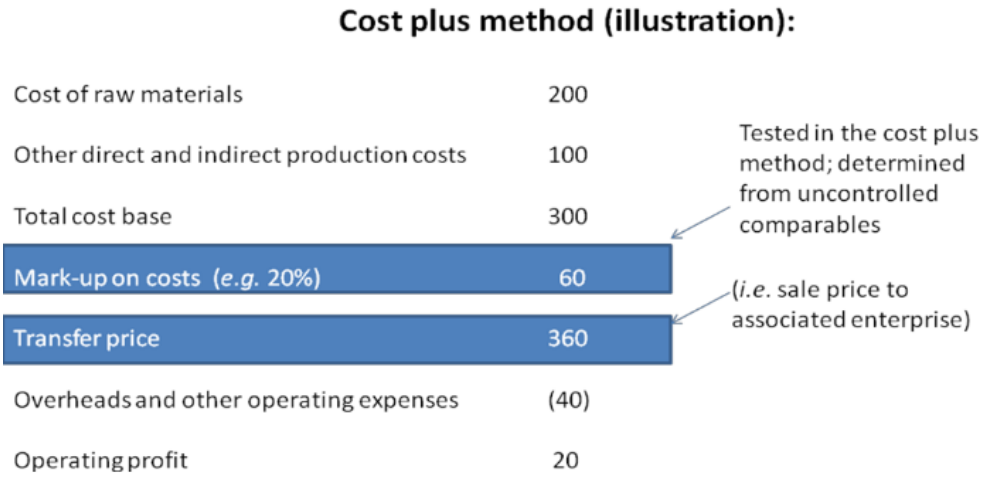

Figure 5: Cost plus method

Sources: OECD transfer pricing methods 2010, p. 5

This method is most useful in cases where semi-finished goods are sold between associated parties, where related parties have entered into an agreement on a common facility, or on long term purchased and delivery order, or where the controlled transaction is a service provision (Prop. nr 62 (2006-2007), p. 23).

If this method should be appropriate as a basis for comparison after the cost-plus method, there must not be differences between the controlled and the independent transactions that could affect the gross profit margins (the cost-plus markup). Determine cost is also challenging in this method (Bjerke, 1997, p. 258).

2.6.4. Transactional net margin method (TNMM)

Both profit-based methods use the net profit in calculating the arm's length price. This method uses the net profit on transactions for the companies. The net profit margins are based on what the company is left with after all the costs are deducted from the income (Bjerke, 1997, p. 270).

The OECD uses this sentence to define the transactional profit method:

The transactional profit method examines the net profit relative to an appropriate base such as costs, sales, and assets that a taxpayer realizes from a controlled transaction. This method operates in a manner similar to the cost plus and resale price method (OECD, 2010, p. 77).

We will show two examples below to better understand how the company's financial information will be used for finding the right arm's length price. The illustration shows the differences between a resale price and a TNMM. See figure 6.

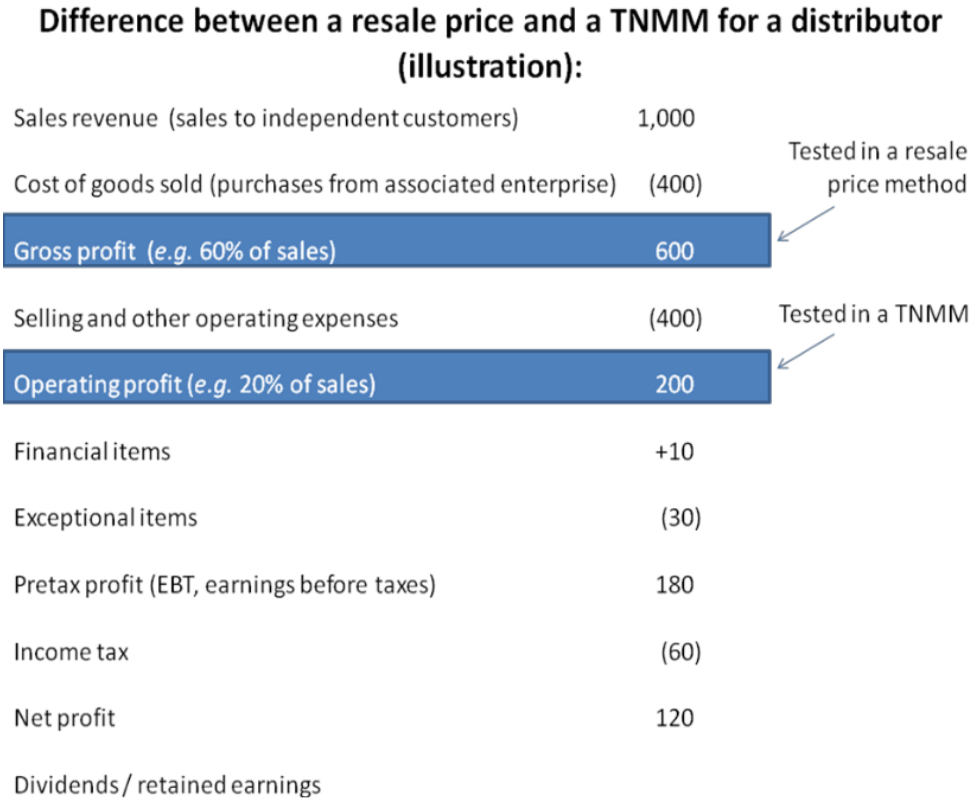

Figure 6: Difference Between a resale price and a TNMM for a distributor (illustration).

Sources: OECD transfer pricing methods 2010, p. 7

The last example illustrates the differences between a resale price and a TNMM, see figure 7.

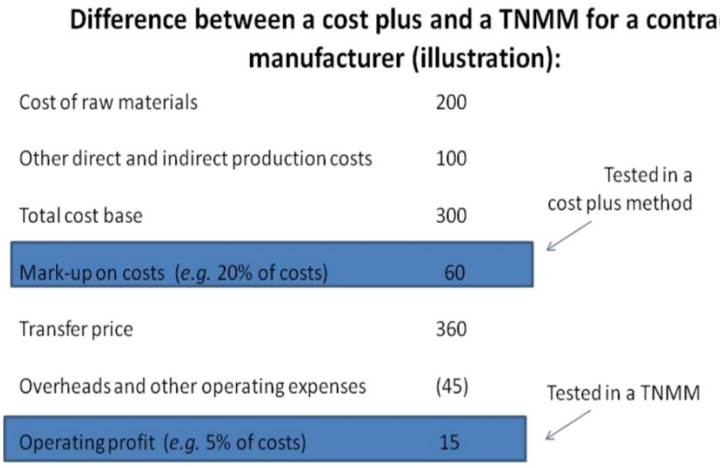

Figure 7: Difference Between a resale price and a TNMM for a distributor (illustration).

Sources: OECD transfer pricing methods 2010, p. 7

The guidelines conclude that it is preferable to use the traditional transaction method rather than the transactional profit method. At the same time, the guidelines mention that these methods are a good alternative in combination with the traditional transaction method (Prop. nr 62 (2006-2007), p. 24). The transactional profit method is also preferred when the traditional methods cannot be applied at all (Bjerke, 1997, p. 272).

2.6.5. Transactional profit split method

The transactional profit-split method is seen as a more appropriate method than the transactional profit method. The method considers if the different assessments whether the various related parties have been arm's length on the terms in the evaluation of the income, and if the transaction has been reasonable contribution between them. The profit-split method looks at how the parties performed in functions, tasks, risk levels and assets used in the transaction (Bjerke, 1997, p. 272).

OECD define the profit-split method as:

The transactional profit split method seeks to eliminate the effects on profits of special conditions made or imposed in a controlled transaction by determining the division of profits that independent enterprises would have expected to realis from engaging in the transaction or transactions (OECD, 2010, p. 93).

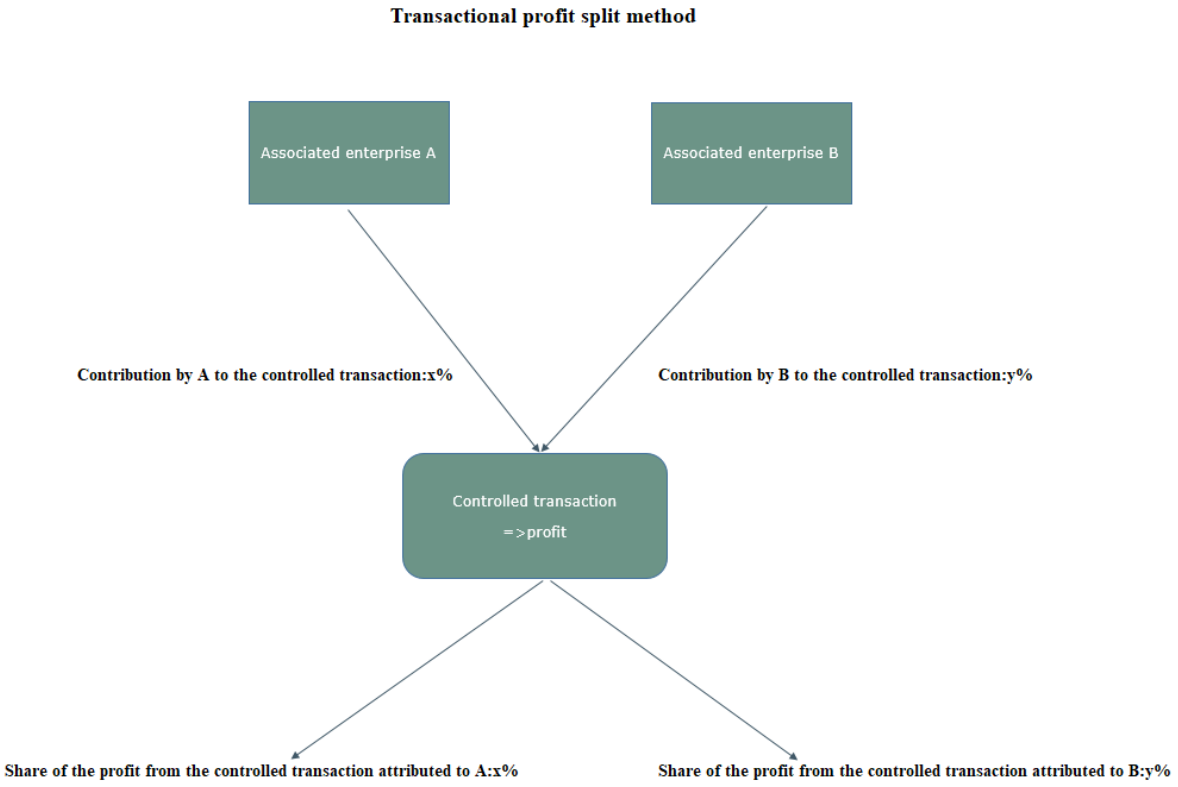

Figure 8: Transactional profit Split

Sources: Own adjustments based on OECD transfer pricing methods 2010, p. 8

This method identifies profits to be split for the associated enterprises from the controlled transaction. It is all about how the associated enterprises are engaged (OECD, 2010, p. 93). See figure 8.

One of the biggest advantages of the profit-split method is that the method builds on a lower extent than the traditional method in finding comparable transactions. So, when this scenario is the case, it will be appropriate to use this method (Bjerke, 1997, p. 281).

2.6.6. Selection of transfer pricing method to the circumstances of the case

The selection of transfer pricing method is based on the valuation of the internal transaction according to arm's length principle (Prop. nr 62(2006-2007), p. 21). The guidelines state that no single methods fit in every situation. It is important to find the most appropriate method for the right case. The guidelines do not operate with strong hierarchy but grading of the preferred methods is mentioned. The guidelines express a preference for the traditional transaction methods which is described in chapter II. The transfer pricing methods are a starting point for

determining the arm's length price and are fundamental in setting the price (Bjerke, 1997, p. 281).

According to the OECD's guidelines, the selection process of finding the right method includes four criteria. The selection process should include the evaluation regarding (OECD, 2010, p. 59):

1. Strengths and weaknesses of the methods
2. The appropriateness of the method is because of the controlled transaction, by using functional analysis.
3. Investigate the availability of reliable information.
4. Investigate the degree of comparability between controlled and uncontrolled transaction.

These four points are discussed below.

When identifying which method should be used, it is important to discuss the strengths and weaknesses of the different methods.

The comparable uncontrolled price method (CUP) is one of the most recommended methods because it is the most direct and reliable way to use the arm's length principle (OECD transfer pricing method, 2010, p. 9). This method applies in situations where it is possible to find comparable uncontrolled transactions (OECD transfer pricing method, 2010, p. 9). In practical examples, this method has proved challenging. In real cases, it is difficult to find a transaction between independent enterprises with good enough similarity to a controlled transaction (OECD transfer pricing method, 2010, p. 9).

The resale price method is most useful in marketing operations. Compared with the CUP method, the resale method needs fewer adjustments to account for product differences. It is more likely to have a less material effect on profit margins than on price (OECD transfer pricing method, 2010, p. 10).

The cost-plus method fits best where semi-finished goods are sold between associated parties, where the parties have agreed joint facility agreements or long term buy and supply arrangements. Because the cost-plus method might be necessary with fewer adjustments than the CUP to account for product differences, it could be challenging to determine the cost and differences in accounting practices in the controlled transaction versus the uncontrolled

transaction. It is important that the same type of cost is used to ensure consistency (OECD transfer pricing method, 2010, p. 10).

Transactional net margin (TNMM) indicators such as return on assets and operating income to sales are less affected by transactional differences than using prices. This method also uses net profit indicators that are more tolerant of functional differences between controlled and uncontrolled transaction than gross profit margins. This results in a wide range of profits margins in the operating expenses. You get a wide range of gross profit margins but still similar levels of net operating profit indicators (OECD transfer pricing method, 2010, p. 10).

One strength of this method is the lack of clarity in public data according to the classification of expenses in gross or operating profits. This evaluation will be difficult because of a comparison of gross margins, while net profit indicators do not have this problem (OECD transfer pricing method, 2010, p. 11). The TNMM is a one-sided method. This fact means that it is necessary to examine financial indicators for only one of the associated enterprises. This approach is important when you have complex transactions, many interrelated activities or difficultly obtaining reliable information (OECD transfer pricing method, 2010, p. 11).

One of the weaknesses of this method is to make accurate and reliable determinations of arm's length. Net profit indicators can give zero effects or have a less substantial or direct effect on the price or gross margins for independent parties (OECD transfer pricing method, 2010, p. 11). The need for information on the uncontrolled transaction may not be available at the comparison moment.

Taxpayers could also have minimum access to specific information about profit to the comparable uncontrolled transaction to make a valid and appropriate arm's length range (OECD transfer pricing method, 2010, p. 11). It is challenging to determine a corresponding adjustment, particularly when it is not possible to get back to a transfer price (OECD transfer pricing method, 2010, p. 11).

The transactional profit split method can deliver a result that can offer a solution for highly integrated operations. This method is the most appropriate in cases where both parties make unique and valuable contributions to the transaction. This method offers flexibility by using specific, unique facts and circumstances related to the arm's length approach.

This method will not be a good match where one party to the transaction performs only simple functions and does not make unique contributions. This method depends on a difficulty

regarding information from foreign affiliates, especially when the foreign affiliates is the parent company or a sister company rather a subsidiary of the taxpayer. It is difficult to measure between these related parties (OECD transfer pricing method, 2010, p. 12).

The different method tests financial indicator to check if the parties are intrinsically linked. The **appropriateness** will impact if the selected transfer pricing method should be consistent with the tested functional analysis of the controlled transaction (OECD transfer pricing method, 2010, p. 13).

- Cost-plus method: The tested party is the seller. The tested financial indicators are the mark-up of the seller.
- Resale price method: The tested party is the buyer. The tested financial indicators are the resale margin/gross margin.
- Transactional net margin: The tested party, either the seller or the buyer. The tested financial indicators can be net profit on cost, net profit on assets and net profit on sales.
- Transactional profit split: The tested party is both parties on the transaction. The tested financial indicators are the division of profit between parties (OECD transfer pricing method, 2010, p. 13).

In accordance with the **investigation of the availability of reliable information,** will this impact which method should be selected. The CUP method is most reliable to apply the arm's length principle. In practice, it is difficult to find similar enough transactions to compare to find an appropriate price. When it comes to the availability of reliable, comparable data, it could be difficult to choose a gross profit method or a net profit method. It will not be correct to choose a traditional transaction method based on the lack of data or if the data is difficult to obtain. All the methods must be considered and weighted to find the most appropriate method with focus on finding a realistic price or range (OECD transfer pricing method, 2010, p. 13).

The importance of investigating the **degree of comparability between controlled and uncontrolled transactions** is discussed because it identifies the most objective, reliable, comparable data. It is important to remember that this data will rarely be perfect, so the professional judgment must decide whether the available data are reliable (OECD transfer pricing method, 2010, p. 14).

2.7. Norwegian law

Before starting to analyze Norwegian court practice in the sphere of transfer pricing, it is advisable to scrutinize Norwegian legislation related to the taxation of multinational enterprises. Companies residing in Norway, including companies within the international group of companies, are obliged to observe Norwegian legislation.

In this chapter, the reader will get an introduction to the Norwegian law applied to transactions between related parties in terms of the application of the arm's length principle. The transactions of Norwegian companies with international companies with a common interest are applicable current tax act and OECD guidelines. It should be noted that Norwegian legislation does not contain any specific reference to any specific transfer pricing method. Therefore, the most appropriate method shall be applied to each transaction.

2.7.1. Tax Acts

The Norwegian Tax Act (LOV-1999-03-26-14) and The Company Acts (LOV-1997-06-13-44 and LOV-1997-06-13-45)

Under the Norwegian Tax Act (provisions in sections 2 and 10 of the act LOV-1999-03-26-14) (Tax act, 1999), multinational enterprises are those which fall into the following categories:

- Norwegian companies with business units outside of Norway.
- Residing in Norway subsidiaries of foreign holding companies.
- Norwegian companies which hold at least 50 % shares in an associated foreign enterprise.
- Norwegian companies where one foreign shareholder holds at least 50 % shares.

The Norwegian Tax Act section 13-1 (Tax act, 1999) stipulates three terms that must be fulfilled if the tax authority could do a discretionary assessment of commercial and financial investigations of transactions:

Revenue Reductions: reduction of welfare or income compared with the economic situation where parties are non-related.

Community of interest: the parties involved in the transaction must have a direct or indirect community of interest.

Causal connection: reduction of welfare or income occurs because of the relationship between the parties (community of interest).

Subsection 4 of section 13-1 (Tax act, 1999), added in 2007, includes the incorporated provision of OECD guidelines. The law and guidelines are applicable when determining whether the welfare or income of the related parties, resided in Norway and abroad are reduced. Between these states, there are signed tax treaties. Account shall be taken of transfer pricing guidelines for multinational enterprises together with all relevant tax acts in Norway (Prop. nr 62(2006-2007), p. 6).

The Company Acts' section 3-9 (Company act, 1997) is the primary legal basis for the arm's length principle for the public and limited companies registered and operated in Norway. It authorizes the tax administration to estimate based on a transaction with related companies' reduction of income of companies operating in Norway. Such assessment is calculated on tax is payable to the state.

International companies are included in intra-firm transactions across borders, whereas corporate tax rates differ from country to country. Considering this situation, the companies within the group have an incentive to manipulate internal transfer prices when elaborating tax planning. Companies tend to shift their profit from high tax countries to low tax countries (Choi et.al., 2020, p. 3). If the governments do not control transfer pricing, many companies will shift a large profit away from their countries to law tax or no tax jurisdictions (Choi et.al., 2020, p. 2).

Norway is one of the 134 countries (by November 2021) (OECD, newsroom, 2021) which joined the Statement on a two-Pillar plan to reform taxation rules internationally, which will secure those multinational enterprises pay a fair share, at least 15 per cent rate as a global corporate tax. It is expected that tax will be imposed from 2023, and it will affect companies with global sales above 20 billion euro and profit margins above 10 per cent (Milliken, 2021, p.1)

Among 71 court cases in the transfer price method application category, a certain number of disputes arose about the deduction of expenses on royalty, interest, and lease payments. From 2021 it is introduced in Norway tax rate of 15 per cent on interest, royalties and lease payments paid by Norwegian companies to related companies within the group, which will reduce profit shifting to low tax jurisdictions (Tax act, 1999, sections 10-80, 10-81). We assume that withholding such tax will influence the settlement of disputes around the taxation of cross-border transactions involving royalty, interest and lease payments to related companies.

2.7.2. Tax Administration Act

For duly control of tax payments, it is incumbent that all taxpayers in Norway will send tax statements on their income and welfare.

The importance of tax control in transfer pricing made reporting incumbent on transactions between related parties. Under section 8-11 (2) of the Norwegian Tax Administration Act, (Tax act, 1999, section 8-11) it is prescribed that related parties will report and document the type and volume of all transactions between them. Section 8-11 (4) stipulates (Tax act, 1999, section 8-11) that related parties directly or indirectly control more than 50 per cent of the company's outstanding shares. Are those which directly or indirectly control more than 50 per cent of the outstanding shares of the company.

Parent company residing in Norway shall submit for each its subsidiary company, residing abroad, annual financial reports and reports on allocation of profits and tax payments (Tax administration act, 2016, sections 8-12). Such reports, as well as reports on transactions between Norwegian holding companies and foreign subsidiaries, shall be filed by the companies with realized annual earnings over NOK 6.5 billion (Tax administration act, 2016, section 8-12 (4)) given that:

These companies have entered into agreements valued at more than NOK 10 million with related parties and if intercompany loans are valued at more than NOK 25 million (Regulation to the Tax Administration Act FOR-2016-11-23-1360, 2016, section 8-11-1).

International companies with affiliated companies residing in Norway (having more than 250 employees or having a return on sales over NOK 400 million or having assets for over NOK 350 million) (Tax Administration Act, 2016, section 8-11) are obliged to present cost and price estimation documents and agreements on general terms between them and related parties. We observe a world upward trend in tax legislation requiring submission of the cost and price estimation documentation and a comprehensive approach to comparative analysis of the transaction estimation.

Under section 14-3 (1) (Tax Administration Act, 2016, section 14-3) if evasion of giving accurate and complete tax report leads to benefits of the taxpayer, tax administration shall impose additional tax to such taxpayers. In this case, according to section 12-2 of the Tax Administration Act (Tax Administration Act, 2016, section 12-2), the tax administration shall calculate the basis for taxation based on its professional expertise.

2.7.3. The Accounting Act

Under the accounting act (Accounting act, 1998, section 1-3) holding company together with subsidiary or subsidiaries represent a group of companies, where a holding company is responsible for the preparation and submission of annual reports, consisting of income statement (with the specification of operating revenues) and balance sheet (Accounting act, 1998, section 6). Further to section 7-15 (Accounting act, 1998, section 7-15) the holding company shall report on its subsidiaries, equity, and profit or loss with the latest annual report.

Under section 7-36 (Accounting act, 1998, section 7-36) subsidiary, resided in Norway shall report on corporate name and location of holding company resided abroad. The holding company that does not prepare and submit a consolidated annual report for the group shall report on transactions with subsidiaries and intercompany profit.

3. Method

This paper uses a two-part design, document analysis, and individual structured specialist interviews based on qualitative research. We investigate challenges for business taxpayers and the Norwegian tax authority to find the most appropriate arm's length price. The document analysis is based on public reports and includes presentation, analysis of arguments of parties to the court cases and analysis of conclusions in court decisions on 9 court cases. The second part is the individual structured specialist interview. We have interviewed five tax specialists in the transfer pricing field.

Decisions of which method the researcher should use of qualitative and quantitative research should be determined by the research question, not after preferences from the researcher (Marshall, 1996, p. 522). According to Ghauri and Grønhaug (Ghauri & Grønhaug, 2005, p. 56) research design plans to relate the conceptual research problem to relevant and practical empirical research (Ghauri & Grønhaug, 2005, p. 56).

This approach means that the research design provides a framework for data collection and analysis. Empirical research is conducted to answer the research questions (Ghauri & Grønhaug, 2005, p. 56). *A research design should be effective in conducting the wanted information within the constraints of the researcher* (Ghauri & Grønhaug, 2005, p. 56).

	Quantitative	Qualitative
Philosophical foundation	Deductive, reductionalist	Inductive, holistic
Aim	To test pre-set hypothesis	To explore complex human issues,
Study plan	Step-wise, predetermined	Iterative, flexible
Position of researcher	Aims to be detached and objective	Integral part of research process
Assessing quality of outcomes	Direct tests of validity and reliability using statistics	Indirect quality assurance methods of trustworthiness
Measures of utility of result	Generalizability	Transferability

Figure 9: Comparison of quantitative and qualitative methods

Source: Based on Marshall, 1996, p. 524

Methodological choice of the qualitative and quantitative methods must be seen in the context of differentiating the two methods up against each other. A good tool is to use Marshall (Marshall, 1996, p. 524) figure 9 to compare qualitative and quantitative methods. Quantitative research is based on numeric data and is synonym with data collection techniques or data analysis procedures. Qualitative research is often used as a synonym for any data collection technique such as the interview or data analysis procedure that uses non-numerical data, especially categorizing the data (Saunders et al., 2016, p. 165).

The best methodological choice for this paper is to use a qualitative method. We need to go deeply into the phenomena (every court case) and sort out appropriate cases. We will use a non-numerical method to categories our data, both with case study design and individual structured specialist interviews. We will categorize our non-numerical data in a big excel sheet and use an interview guide for the interview process.

3.1. The research processes

According to Johannessen et al. (Johannessen et al, 2020, p. 23) the research processes normally have four phases (Johannessen et al., 2020, pp. 23-24). We have followed each step throughout this paper, and the detailed presentations can be seen in chapter 3.3.

1. Preparation
2. Data collection
3. Data analysis
4. Reporting

Preparation: Research always starts with an interest in diving into some reality that we wish to know more about, such as transfer pricing in our cases. In this stage, it is also important to ask questions about the purpose of the research and find out which method will answer the research question in the best possible way. In this stage it will be necessary to do a literature review and decide on the research design.

Data collection: Research must be collected by documentation or collected data which reflect the real world. The researcher must find relevant sample size and numbers of informants that will contribute to helping answer the research question in the best possible way with the right competence.

Data analysis: The main task is further to analyze and interpret the collected data. Whether qualitative or quantitative research design, no matter which method will be used, the method

needs to be interpreted. In this stage, is it also important to reduce data and perform a quality assured.

Reporting: The final research will normally be presented in written reports (Johannessen et al., 2020, p. 23-24).

3.2. Case study

Because of our research questions, we decided to use a case study method. The case study is much used in business administration because it gives the researcher large possibility to decide how to conduct the survey. According to Johannessen et al. (Johannessen et al., 2020, p. 211) the case as a research design is a process that includes research question, case selection, selection of informants, data collection and different criteria for analyzing and interpreting the data (Johannessen et al., 2020, p. 211).

We have used a two-part design in this case study, document analysis and specialist interviews. It was important to search for common theme experiences, and strategies from court cases and specialist interviews. We could then divide this information into categories and then use this information to sort out selected court cases and find relevant questions to the interview guide.

3.2.1. Document analysis

In qualitative research, is it normal to use primary data, but sometimes it is necessary to use secondary data. Secondary data can be defined as where the researcher must use data collected by others (Jacobsen, 2016, p. 171). According to Jacobsen (Jacobsen, 2016, p.170) a document analysis should be used in cases where it is impossible to select primary data or when we wish to find out what the people have said and done (Jacobsen, 2016, p.170).

We were interested in investigating argumentation and decisions made by the court and experienced tax specialists in transfer pricing. We could nearly find out what has been said because of the well documented public report of the whole argumentation for the courts parties, and decisions made by the judges in the Norwegian internet site “Lovdata.no”.

Document analysis differs from the interview because document analysis shows what the people mainly have done and do not have said, as in an interview. Jacobsen (Jacobsen, 2016, p. 170) says that document analysis is more like a form for observations (Jacobsen, 2016, p.170).

3.2.2. Interview as method

Interview as method tries to bring out the nuanced picture of the situation that the interviewer has knowledge about or is in (Dalland, 2010, p. 134). Qualitative interviews should be the

preferred research method when we need comprehensive and detailed descriptions from the informant due to understandings, feelings, experiences, perceptions, opinions, and reflection referring to the phenomena (Johannessen et al., 2020, p. 106).

To answer our research questions, we needed to collect information from people with knowledge, experience, and reflections about the challenges because of determining appropriate price after arm's length principle. It is important to prepare before starting the interview process and choosing which interview methods to use.

3.2.3. Individual structured specialist interviews

According to Jacobsen (Jacobsen, 2016, p. 146) can the individual structured interviews take place either face to face or by telephone, e-mail or over the internet (Jacobsen, 2016, p. 146). All our respondents were getting questioned if they wanted to have face to face interviews or video internet interviews.

Just one interviewee wanted to have a face-to-face interview. The rest preferred a video interview via the internet. We decided to use an individual structured specialist interview with an interview guide. We had a clear list of questions about which we needed to get more knowledge. It was also important to freely could ask questions more in-depth and follow-up questions through the interview.

Jacobsen (Jacobsen, 2016, p. 192) claims that we need to continue with the interview until we get data saturation. The choice of numbers of informants will depend on the research question and research design. It does not exist any upper or lower limit (Jacobsen, 2016, p. 192-193). We experienced a saturations point, and in total, we were sampling information from five interviews and nine court cases.

3.3. The research processes

According to Yin (Yin, 2003, p. 50), the research process of case designs has five phases: research questions, theoretical assumption, analysis units, data and suggestions and criteria for interpreting the findings (Yin, 2003, p. 50), (Johannessen et al., 2020, p. 215). Figure 10 shows our customized research process based on Yin (Yin, 2003, p. 50), and (Johannessen et al., 2020, p. 215).

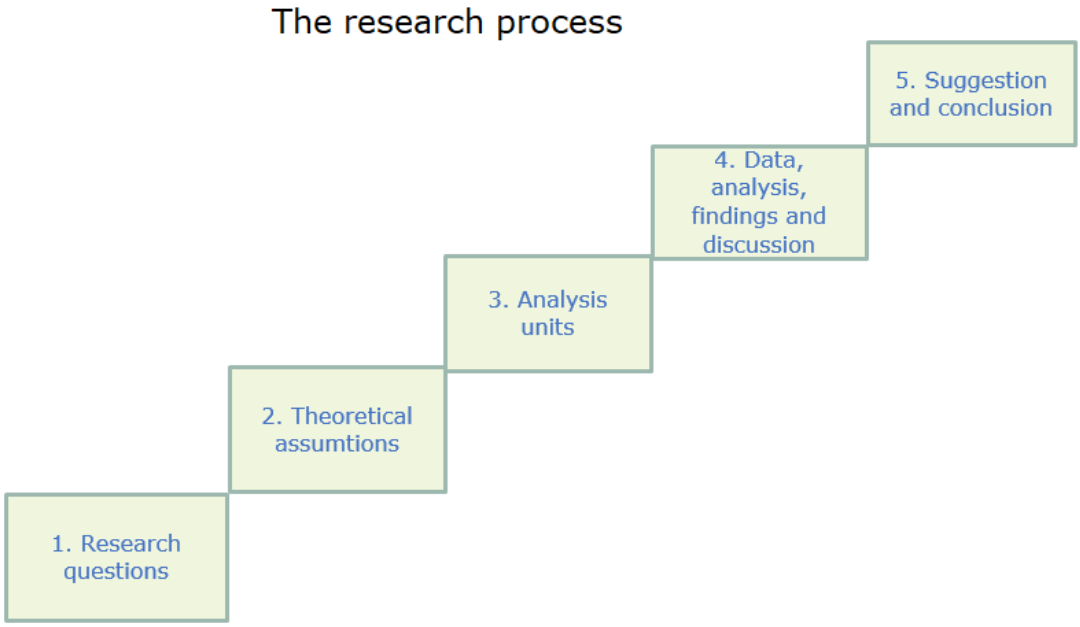

Figure 10: Case designs five phases

Source: Based on Yin 2003, p. 50

Research question

A qualitative case study normally starts with a practical problem. The design should contain questions that start with "how" or "why" (Johannessen et al., 2020, p. 215-216). Before we started this process, we were booth interested in the transfer pricing thematic. Our finance, accounting and law backgrounds gave us some idea to include a deep dive into court cases related to transfer pricing. We spent plenty of time reading academic articles in professional journal, governmental reports and books to get a solid fundament for choosing an interesting research question for this paper.

Theoretical assumptions: Two parts design

The researcher will do some theoretical assumptions after defining the research questions. These assumptions will help the researcher further in the survey (Johannessen et al., 2020, p. 215-216). The next step for us was to decide research design. Because of the public documents analysis, it was it clear that this paper fits best with the qualitative method. Since we have a two-part design, each part will be discussed separately below.

The process regarding the selection of the court cases

After many hours of reading relevant literature and analyzing the selected court cases, it was found that there are some challenges with pricing of transaction pursuant to the arm's length principle. We sorted out decisions of the courts related to the transfer pricing from 1991-2021, and there appeared over 120 court decisions on 71 transfer pricing cases. Based on these filters, we decided to analyze nine cases.

Specific challenges up against company, sectors, law, transfer pricing method argumentation or not, which method had been used, and if the result of the judge was representative from the empirical research. Among these cases, only nine court cases were chosen for a deeper analysis. The selection was based on different factors.

Among the industries that the tax administration more often monitors, the financial services sphere, software and IT sphere, pharmaceutical sphere, and oil and gas industry should be noted.

Because of its incorporation in the Tax Act subsection 13-1 (4) in 2007 (Tax act, 1999, section 13-1) should facilitate formalizing the status of OECD guidelines with respect to transfer pricing issues in general, particularly the most appropriate method when determining transfer pricing. The subsection took effect from January 2008. Our selection is thus based on the incorporation into the tax act brought the split of the court practice on transfer pricing cases before and after 2008.

We consider it advisable to analyze court cases related to transfer pricing where judgements were rendered after 2008. We decided to analyze some judgements related to cases before 2008 as a special interest because they best reflected the opinions of the courts or the tax authorities or choices of the multinational enterprises when determining transfer prices in transactions between related parties. The choice of such cases was determined by the references of judges in their decisions to conclusions or opinions in the older cases.

Some of the cases we decided to analyze refer to the period when the local trial courts rendered their decisions before the incorporation of the subsection 13-1 (4) (Tax act, 1999, section 13-1) and courts of the appellate jurisdictions or the Supreme court rendered their decisions in 2008 or after 2008.

So, the starting point for selecting the nine cases is incorporated in subsection 13-1 (4) (Tax act, 1999, section 13-1) reference to the OECD guidelines (OECD, 2017) when determining transfer prices. The second selection criteria are contrariety of opinions on methods used by the

multinational enterprises and opinion of the tax administration on which method was the most appropriate in certain cases. The third criteria are connected to the industry in which the multinational enterprises are operating. All nine court cases will be presented and analyzed in chapter 4.

The interview processes

The second part of the data collection is based on individual structured specialist interviews. When we were finished with selection the court cases, it was time to prepare the interview-guide questions. The question is based on transfer pricing guidelines, transfer pricing methods, challenges regarding each method, challenges related to sampling information used for finding the price, ethically and politically views of transfer pricing.

Decisions regarding the choice of informants are based on the court's parties. We have interviewed three specialists from the Norwegian tax authority and two tax law specialists who represent business taxpayers in court cases. All representatives know several of our selected court cases. Some of the representatives participate often the court disputes. We have in total five interviews. After the third interview with the tax administration, we did not get any new information. We experienced the same after interviewing the second private lawyer. We experienced a saturations point. In total, we were sampling information from five interviews and nine court cases.

The interviews lasted from 40 minutes to one hour. After the interview, all the content was transferred into text in a transcription process. The transcription process helped us compare the same answers from different representatives through analyzing parts from the interviews and using many quotes from the interviewees.

Data, analysis, findings and discussion

This stage includes presenting, argument analyzing, conclusions of the nine selected unique court cases and presenting and analyzing the interviews with five specialists.

Suggestions and conclusions

In the last chapter, we will give the reader a conclusion of the main research questions and conclude if this research should be continued from other angles and contributions, and tips to further research (Johannessen et al., 2020, p. 215-230).

3.4. Reliability

Jacobsen (Jacobsen, 2016, p. 173) mentions various factors that depend on the connection between methods and reliability for document analysis and individual interviews. When it comes to the reliability of the document analysis, it is important to ask questions regarding access to documents, how the sampled data fits the research question, and if we could trust the sources where the data comes from (Jacobsen, 2016, p. 173).

Because of the research question, we needed to use court cases from the first courts, appeal courts, and the supreme court. All these documents are publicized on public internet sites and are seen as highly qualified documents.

Because the individual structured specialist interview is the reliable phenomenon focused on if the interview is present, this will impact the result, not just the interview effect, but also the context effect. The context where the researcher will be interviewed could have an impact on the result (Jacobsen, 2016, p. 173). We used team's meetings for nearly all interviewees except for one where we used face to face at the interviewee's office. The interviewees were safe and in their own workplaces during the interviews and were not affected by unfamiliar contexts.

The two-part design process is well documented in chapter 3.3. to strengthen our reliability.

3.5. Validity

According to the research literature, there are different concepts of validity. Jacobsen (Jacobsen, 2016, p. 173) use the words: *are we measuring what we want to measure?* (Jacobsen, 2016, p. 173). The internal validity concerns about if we have described a phenomenon correctly (Jacobsen, 2016, p. 237). We used both individual specialist interviews and documents analysis. This process will help us obtain information from several angles. Multiple angels will strengthen our understanding of the concept, and better control of validity throughout the paper.

We have used a lot of time to investigate the field before starting the text processing. This information was needed in preparing the interview guide and in the analysis of the court cases. We were then prepared to develop well-formulated and relevant questions that helped to answer our research questions.

Because of the external validity concerns about how generalizable our result in cases other than those we have examined (Jacobsen, 2016, p. 237).

We achieve individual people professionals' competence and view on the phenomena by using individual specialist interviews. In addition, we also measure the actual result of the court case

based on public documents, direct reports from the courts argumentations, discussions, and conclusions. Our research phenomena are also based on international guidelines and following other empirical studies from abroad.

3.6. Ethical issues

How you plan, design and perform your research will concern different aspects of ethics (Saunders et al., 2016, p. 239). In our research, it has been important for the interviewed specialist to be anonymous. We have done this by deidentifying personal information such as name, age, positions, office place, and other personal factors. We used a text recorder in each interview, but this information was deleted right after the transcribing process.

We have also removed all documentation from the transcribed interviews. In Chapter 5, where the interview information is used, it referred to "a representative from the tax authority" or "one of the private tax specialists said". All the interviews were asked about the referring in the paper, and they all accepted this anonymity solution throughout the paper.

We used document analysis from information that is already public. With secondary source, we must perceive the information correctly according to court cases and empirical research. Understanding of the public documents will also depend on the dissemination of the result.

According to Dalland (Dalland, 2010, p. 249) do *research consists of searching for truth and new knowledge*. Using secondary sources must we manage disseminate this knowledge to put together the interview question and convey the information throughout the interviews (Dalland, 2010, p. 249).

All the questions in the interview guide are written in English, but all of the interviewees preferred to answer in Norwegian. All the quotes are translated from Norwegian into English. We have tried our best to translate the text without misinterpreting the content.

4. Presentation, argument analysis and conclusions of the court case

Throughout this chapter, the reader will be introduced to a short presentation of each court case. We decided to include the presentation, argument analysis and conclusions of the courts in this chapter. Presentation of the case will reflect decision of the final judicial authority.

We will present a table that answers different questions about the content of each court case. These questions will help to better understand the content of each different court case in a clear overview before reading the presenting, argument analysis and conclusion of all the nine court cases. Figure 11 consists of table with answer questions regarding the industry, transfer pricing method choice and use of the method, and the result of the court cases.

Table consists of the answers to the following questions:

1. To which industry does the claimant's company belong?

   O&G: Oil and Gas
   C: Consulting
   I: Insurance
   P: Production
   T: Telecom
2. Did the company use the traditional transactional method?
3. Did the tax office consider the most applicable method the same method as the company when determining transfer price?

Court's opinion related questions

4. Is the CUP method which is the most suitable for this transaction?
5. Did the court accept the arguments of the claimant?

Conclusion: outcome of the court proceeding for the claimant

No.	Case	1	2	3	4	5	Conclusion
1.	Fina Exploration	O&G	yes	Not completely	no	no	Lost case
2.	Accenture ANS	C	no	yes	no	yes	Won case
3.	Total E&P Norge AS	O&G	yes	yes	yes	no	Lost case
4.	Normet Norway AS	P	no	no	yes	no	Lost case
5.	Saipem Drilling Norway AS	O&G	yes	yes	yes	no	Lost case
6.	VingCard Elsafe AS	P	no	no	yes for 2004 /no for 2005	No for 2004/yes for 2005	Lost/win
7.	Orange Business Norway AS	T	no	no	no	yes	Won case
8.	Stanley Black&Decker Norway AS	P	no	yes	no	no	Lost case
9.	Petrolia Noco and Petrolia SE	O&G	yes	no	yes	no	Lost case

Figure 11: The main content of each of the selected court cases

Source: Own produced

4.1. Fina Exploration Norway S.A, LB-2000-1080

The parties in this dispute are Fina Exploration Norway S.A and the Ministry of Finance of Norway. The dispute was raised and resolved before 2008 (incorporation of subsection 13-1 (4) into Tax Act). This case is of interest due to the absence of a rule on the selection of the most appropriate method when determining transfer price between related parties. The subject in the contest is the application to the transaction method, which follows the arm's length principle. The application of the method relates to the insurance premium, which was paid in the period from 1981- 1989 to the captive insurer, where the deductible amount was around MNOK 300. Arguments of the lawyer presenting the Ministry of Finance of Norway on the choice of the appropriate method were considered by the court as solid.

Argument analysis: The CUP method is not recommended

The Fina case was concerned about tax deductions after the old tax Act section 54 (1) (Tax act, 1911, section 54 (1). This case relates to the income years 1981 – 1989. Fina initiated this dispute to get the deduction of paid insurance premiums. The case is mainly about what the

Norwegian company Fina alone should have paid in the market, an independent insurance company, against what Brittany offered.

Court of appeal mentioned that the OECD guidelines discuss several methods to find the right arm's length price or range. Choosing the right method depends on the concrete assessment. One must choose a method for the specific case that gives you the most reliable basis for a conclusion if the price is market-based or not. In this case, The Norwegian Tax authority has used a cost-plus method, including the CUP method, while the Norwegian Fina Company has used the CUP method. Fina argues that a cost-plus method is not appropriate in this case because of the deficient size.

When it comes to the decisions about choice of method and finding the right arm's length price, the Norwegian tax authority refers that it is important to have a flexible approach such as the court in Rt-2001-1265 (Norsk Agip AS) case. To choose right method is a practical question. In difficult cases, you may have to use several methods. The Norwegian tax authority has also used the CUP method in this case based on police comparisons.

Judgment of court: Court of appeal concluded that in accordance with the facts of the dispute, the CUP method is not applicable for this case. The police comparison mentioned in the court of appeal that there was a big difference in insurance terms between oil companies because of complexity. The court also concluded that the cost-plus based method was a tool to search for the market price. The market price is set based on a discretionary element and not estimations and calculations. The court concluded that the numbers from Fina and Brittany are larger than the market-based range and arguments of the tax office were convincing.

4.2. Accenture International, LB-2011-190854

The parties to the court case are Accenture ANS, a company belonging to the Accenture group specializing in consulting, having subsidiaries in over 50 countries with holding company registered in Bermuda, and the tax office. The dispute arose around the profit of the Norwegian company in 2006 and 2007. In the opinion of the tax office in 2006 and 2007, Accenture ANS deducted too high an amount on royalty payments made in favour of the companies within the Accenture group. Shortly after that period, the company merged with the holding company.

The case was considered in two instances, and the court has satisfied the claim of Accenture International on appeal.

The royalty payments concerned intellectual property rights registered in the name Accenture Global Services GmbH (Swiss company), whose business operation relates to entering into license agreements on the intellectual property in general, and particularly trademark "Accenture" and complex of standard methods and processes and ICT based tools, which all the companies use within the group. According to the license agreement, all the companies within the group have the right to use trademarks and utilize complex standard methods and processes and ICT- based tools.

Argument analysis: Transactional residual profit split method

Under the license agreements for the right to use, the licensees should pay 9 per cent of their revenue from external sales. In case of lower revenues (lower than stipulated revenue), the licensor should pay less royalty. The lowest return for the period 2006-2007 was 4, 45 per cent of the revenue. In order to secure that amount of the paid royalty is marked-based and is accordance with the arm's length price as between independent exchanging parties, did the group companies decide to apply the residual profit split method under the OECD guidelines (OECD library.org., 2009, section 3.19).

As it follows from section 3.19: "*A residual analysis divides the combined profit from the controlled transactions under examination in two stages...*" Under the transactions the companies are engaged in participants allocate sufficient profit to provide profit with a basic return. This basic return corresponds to the return achieved by irrelated parties for similar types of transactions. Further, in the second stage, "*any residual profit (or loss) remaining after the first stage division would be allocated among the parties based on an analysis of the facts and circumstances that might indicate how this residual would have been divided between independent enterprise*s".

With reference to section 3.21. of the guidelines (OECD library.org., 2009, section 3.21), "*one approach to a residual analysis would seek to replicate the outcome of the bargaining between independent enterprises in the free market".* In practice, such a basic return will correspond to *"the lowest price an independent seller reasonably would accept...and the highest price that the buyer would be reasonably willing to pay. Any discrepancy between these two figures could result in the residual profit over which independent enterprises would bargain".*

The group decided to draw up an annual TP report on transfer pricing using the intellectual property by subsidiaries within the group. The report reviews the only method used for the transfer pricing in each country and includes results of the group, where surplus in 2006 was

12. 21 per cent and in 2007 12 per cent based on the average profit of the group in the period for three last years. For the years 2006 and 2007, it set 4. 45 per cent royalty rate depending on the revenue. In case if gained profit is a minimum of 11. 45 per cent, it is 7 per cent royalty to be paid for the use of the intellectual property. The company earned more than 11.45 per cent profit is sitting with that profit. Following the report, the Norwegian company attributed the basic return because the licensor did not carry out on consulting business.

The tax office argued about the use of such a principle. Under the tax office report (Tax office report, 2011, p. 12), in 2006, it was paid royalty amounting to 72. 2 million NOK, and in 2007 was paid 102,1 million NOK, which the company fully deducted. The estimation of the tax office deducted license payments amounting to 44. 9 million NOK for 2006 and 22. 9 million NOK should be reversed, and consequently, the taxable income increases by this amount.

The claimant stated that basic return on 4.45 per cent of revenue, which was used in the contract with the licensor is in accordance with the arm's length range. It was opposed against the tax office's estimation of 7.68 per cent basic return on revenue generated. The tax office percentage is based on presumption on the mathematical correlation between basic return and royalty rates, which the claimant doubts.

Also, the claimant disputed the tax office's assumption that the royalty rate is set before the basic return rate is set. In other words, basic return is the result of royalty rate. It was also argued that the tax office did not evaluate if independent parties would set a 7. 68 per cent rate of basic return.

In the claimant's opinion, such a calculation conflicts with OECD guidelines, when independent parties could agree on the rate of 4.45 per cent of revenue. It was argued that the tax office disregards profit based on the unique factors connected with the local market. It is disregarded retained profit, which exceeds the sum of basic return and maximum royalty.

The profit which exceeds the basic return of 4.45 per cent is allocated in compliance with rules for stage 2 (OECD guidelines, 2009, section 3.19), and same as between independent parties it could be allocated 7 per cent in favour of licensor a royalty payment and the rest will be allocated to the company. The claimant stated that the royalty rate at 7 per cent of profit which is higher than basic return, is compatible with the market price paid for the use of intellectual property.

The claimant concluded that the mathematical model on the calculation of 7.68 per cent and subtraction of numbers used by the tax office is not in compliance with the method used by the claimant's group of companies and is in conflict with the OECD guidelines.

The tax office agreed on the chosen method and argued about the application of the method. It was stated that the 4.45 per cent rate used by the company is not correlated with the market rates, that 7, 68 per cent rate should be used for calculation as it is within the global range. The tax office casts doubt that in transactions between irrelated parties, the licensee would agree on 7 per cent royalty given that basic return would be set at a 4.45 per cent rate. The tax office argued that the calculations of the claimant were wrong because of the wrong application of its own model.

Judgment of court: Court found the arguments of the claimant as satisfactory and agreed on the correct allocation of residual profit under the OECD guidelines for the profit split method. It was noted that the tax office misinterpreted that value-added intellectual property is identical to the royalty. Therefore, it was decided that only 77.5 per cent of such expenses are deductible.

4.3. Total E&P Norge AS, LB-2018-156796

Disputes arouse between Total E&P Norge AS and the tax office. The claimant is a Norwegian company having business activity in the oil sphere. The case was considered in all three courts in Norway. The tax office was the prevailing party in each instance. Claimant disputes the tax office decision on additional tax imposition of the income earned on the sale of wet gas between sister companies.

Argument analysis: CUP method from tax office and claimant's perspectives

The claimant is a company producing oil- and gas products on the Norwegian continental shell. During 2002-2007 Total E&P Norge AS sold its products to three sister companies resided abroad (trading companies). In accordance with case materials, information on the price of the deal is not transparent due to confidentiality. For valuation purposes, there was used pricing tool Argus CIF ARA, which together with BPAP/ANSI (index provided by British Petroleum), which buyers use, sellers, and traders of imported crude oil for use in long-term contracts. In this case, the Argus index is used as the benchmark price for oil sales and is based on CIF prices (Cost, Insurance, Freight).

In transactions between the claimant and related parties, the price was deducted for the freight element of CIF-price. The freight index, deducted from the CIF-price, was based on the freight

price for small and medium skip loader LPG (liquefied petroleum gas). Consulting firm Porten & Partners calculated the price.

Upon assessing the tax reports for the period 2002-2007 by the tax office, it was decided to increase taxable income by 141 million NOK. Total E&P Norge AS disagreed with the decision of the tax office and filed a legal claim to the court.

The claimant raised doubts about the representativeness of the prices on similar contracts that the tax office examined and referred to in their assessment.

In return, the tax office required that Total E&P Norge AS submits resale contracts, Total E&P Norge AS refused to disclose the price for those deals.

When assessing tax reports and increasing taxable profits, the tax office has used the CUP method and considered arm's length prices to the deals between other market players. Because of the duty of confidentiality of these contracts, it appears impossible to disclose those contracts and prices used as benchmark prices.

Confidentiality issue of the benchmarking prices used by the tax office gave rise to disputes between parties to the court proceeding.

In the case of materials, Total E&P Norge AS has used the CUP method when determining the price of deals between sister companies. Pricing tool Argus was used to settle the price following index for a 3–15-day period with daily updates.

The court has heard the evidence of the witness (Breivik), which had doubts that the resale price method could be applicable when setting the price. The resale price method requires another basis for comparison of prices (resale price subject to sale to the independent and irrelated party), therefore in his opinion, the tax office should make their estimation based on the existing data, LPG contracts, given the failure of the claimant to present resale contracts.

The tax office agreed with the claimant on the application of the CUP method. The only discrepancy arose around the freight cost (fob-price, free on board), which the claimant excluded from the calculation. In tax office opinion, price should be adjusted by adding freight expenses.

Judgment of court: Formal review of the claimant's calculations revealed deviation from prices set by Total. The majority of the judges agreed that the claimant's calculation does not

conform to the arm's length principle. The court accord arguments of the tax office, agreeing that they are based on the objectivity and special competence of the tax office.

4.4. Normet Norway AS, LB-2017-202539

The courts have considered this case in two instances, and the cassation instance rejected the case. The dispute arose around the valuation of the intellectual property rights sold to the sister company within the holding group (Finnish holding company) in 2013. The Norwegian company sold rights to the intellectual property such as patents and trademarks to a Swiss sister company for 3,7 million NOK. Same year Swiss sister company acquired shares in two daughter companies to the claimant for 82 million NOK. Shortly after, the Norwegian acquisition company, party to the transactions, merged with the claimant, Norwegian company Normet Norway AS.

Argument analysis: CUP vs "Relief from royalty" method

Under the Norwegian tax law section, 5-1 (Tax act, 1999, section 5-1), further to the main rule, income on sale is taxable. At the same time, in accordance with section 2-38 of the Tax Act (Tax act, 1999, section 2-38), there is a tax exemption for gains on shares. In other words, corporate shareholders are exempt from taxation of dividends and gains on shares in Norway, except for a 3 per cent clawback on dividends. The distribution of values between transactions regulated by specified provisions of the law became a matter of dispute between the claimant and the tax office. Further to the opinion of the tax office value of the property involved in the deal was incorrectly distributed, where intellectual property rights were underestimated, and the share price was overcharged. Consequently, increased tax office income of the seller company by 54,5 million NOK, which was taxable with 30 per cent of additional tax.

The claimant did not contest the argument of the tax office on related parties' transactions. It disputed the method of the determination for the transactions price used by the tax office. The tax office applied the CUP method to transactions on the sale of intellectual property rights by comparing the price on shares sold to the price on intellectual property rights. The claimant argued that these transactions are incomparable. Therefore, the CUP method is inapplicable to them. And upon the opinion of the claimant, it is impossible to make reasonably precise adjustments of the share price applicable to the price on the intellectual property rights sold later so that the CUP method would apply to the determination of the price. Therefore, the value of the intellectual property rights was determined by the "relief from royalty" method.

This method implies the combination of the market and income valuation approaches. It estimates the present value of the hypothetical payments company would save by owing the intellectual property asset compared with licensing from the third party. The market approach implied the use of similar licensing deals when calculating the royalty rate applicable by a certain company to certain intellectual property objects. The income approach implies the use of growth rates, revenue estimates, tax rates, and discount rates when establishing the basis for value by reference to present income value.

In accordance with the OECD report on meeting with business commentators (OECD, 2010, p. 3), given that the "intangibles are traded rarely", and it is a challenge full to compare prices due to the lack of market prices on them. It seems advisable to use existing license agreements for the "relief from royalty" method under the condition that comparability issues shall be solved.

The claimant engaged the company "Alder&Sound" for asset valuation. It should be noted that when valuating intellectual property objects, many factors such as duration of patent rights, royalty rates influence price range for the lowest and the highest arm's length price. The legal opinion of the "Alder&Sound" contained a conclusion on price which was within the price range.

The parties to the dispute argued that further to the transaction on sale of intellectual property rights, there was more than rights to patents, trademarks, and know-how. The claimant asserted that this transaction could not assign goodwill but is separately attached to the subsidiaries.

As noted, the court dispute arose about what was sold, and which price would be negotiated if the deal had gone through independent and irrelated parties. It seemed obvious to the court that the claimant would not do a deal on the sale of intellectual property rights estimated at a low rate of 0.5 million NOK.

The tax office referred to the contract on the sale of intellectual property rights and interpreted that it was assigned rights to the patent and trademarks and everything of economic importance connected to technology. Used by tax office CUP method in this situation required from the office to make reasonably precise adjustments. Therefore, used the tax office value of shares in two daughter companies sold the earlier same year, given that sale price was marked price reduced by the value of the daughter companies, where difference appears as the market price for intellectual property assets. Such use of the CUP method contributes to the elimination of the most significant consequences of differences between comparable controlled and uncontrolled transactions (Government, Ot.prp.nr.62 (2006-2007), p.22). Following

calculations of the tax office difference between market value and book value for assets of the daughter companies, reduced by debt was 62 million NOK. Such a difference in opinion of the tax office relates to the value of intellectual property and daughter companies, where only 58 million NOK was the value of the intellectual property asset (as a residual consideration). The court stated that the valuation of the daughter companies was made based on arm's length term. Application of the CUP method by the tax office was made following the OECD guidelines, namely with section 6.147 of OECD guidelines 2017: "*in some situations, intangibles acquired by an MNE group from independent enterprises are transferred to a member of the MNE group in a controlled transaction immediately following acquisition"* and "*depending on the facts and circumstances, the third party acquisition price in such situations will have relevance in determining arm's length prices and other conditions for the controlled transactions...even if the price paid to the third party exceeds the book value of the acquired assets*" (OECD, 2017, section 6.147).

Judgment of court: Regarding the use of the "relief from royalty" method, the court stated that this method in a given transaction cannot be applied because of failure to correctly value intellectual property assets, assigned to a related party. Valuation of the asset was made incorrectly and had a basis on facts that differ from those that existed at the time of transfer of the rights.

The court referred to the OECD guidelines (OECD, 2017, section 6.147) "*however, there are often situations where separate transactions are so closely liked or continuous that they cannot be evaluated adequately on a separate basis*", which reasserts arguments of the tax office on linking of both transactions and determining the price of the later transaction based on the first transaction.

The court concluded that the tax office made reasonably precise adjustments, actual assumptions were taken when discretionary assessed facts of the transactions, daughter companies were valued correctly, and relevant variables were considered. It should be noted that the court members did not have a complete consensus of opinion on dispute questions. The opinion of the majority formed the basis of the court's decision in the dispute.

4.5. Saipem Drilling Norway AS, LB-2018-55099

Dispute between Saipem Drilling Norway AS (business in oil and gas industry) and tax office was considered in two instances and was dismissed for hearing in the cassation instance. The parties argued about the transaction price on the drilling rig bought by the claimant from the

sister company it was set according to the arm's length principle. The point of contention was about determining the price of the drilling rig, which was set in the contract around USD 1. 364 billion. At the same time, the tax office estimated the most anticipated price should be USD 990 million, which is around 38 % higher than estimated. Court has dismissed the claim and appellate complaint of the claimant and affirmed the arguments of the tax administration.

Argument analysis: The CUP method

This dispute concerns if the equation for Saipem Drilling Norway for the income year 2012, 2013, 2014 and 2016 must be repealed. Saipem stated value was about 8 billion NOK, while the Norwegian Tax authority value with discretion to around 6 billion NOK.

This dispute has shown us that it is not easy to define the value of an object measured in money. Different methods and combinations of methods could affect different valuation prices. If it is possible to define the exact price or value of the object, then all deviations must be relevant after section 13-1 (1) of the Tax Act (Tax act, 1999, section 13-1 (1)). If it is not possible to define the price/value on the object exact, it must be defined by a range. The court of appeal refers here to the comment of Fredrik Zimmer regarding court decision Rt-1999-1087 (*Baker Hughes)* (Lovdata, LB-2018-55099, 2019, p. 6).

The evaluation of it exists an income reduction depends on whether one is within or outside the range. But this rang could also be unsure. How should the court and the Norwegian tax authority handle such types of cases? If they use too big a range, it is risky to undetermined the purpose, and if they use too small a range is risky to damage legal certainty.

The court of appeal argued that the OECD guidelines do not prohibit taxpayers from using other valuation methods if they align with the arm's length principle. But the court and the Norwegian tax authority must relate to the OECD's guideline methods for transfer pricing. The guidelines must be used with a reasonable degree of discretion and flexibility and consider actual circumstances for the different transactions.

The parties agreed that a CUP method should be used in this case. The parties did not agree about which prices should be taken to get the right controlled transaction with relevant uncontrolled transaction. This impact the parties view on how they should look at the case and compare after right transfer pricing method and supplement with other factors to find the right arm's length range.

With the CUP method, we must assume that the transaction is comparable, but, in this case, it is not possible to compare. The Norwegian tax authority states that the difference must rely on the transferred asset, or the characteristics of the service, economic circumstances, contracts terms etc. In this case, the rig is not standardized, but an ultra-deep-water rig specially built to withstand climatic conditions. It is illuminated that this case has significant differences from the rigs to which it has been compared. It is important to think twice before making any decisions. The CUP method must be supplemented and corrected to find the right arm's length range after section 13-1 (1) or the discretion level after section 13-1 (3) (Tax act, 1999, section 13-1).

Judgment of court: The court concluded that the Norwegian tax authority had used the correct method to compare the controlled transaction (Scarabeo 8) with the uncontrolled transaction in the market (Akser transaction). The rig marked is volatility, so it is important to remember that this conclusion will include some uncertainty, and it was not important to find a correct arm's length range.

4.6. VingCard Elsafe AS, LB-2011-36941

Two courts considered this claim. The claimant used Transactional Net Margin Method when determining price in distributional contract with Assa Abloy Hospitality Inc, the American distributor of locking systems, electronic in-room safes and energy management systems. The dispute arose around the company's tax reports in 2004 and 2005. The company's income was reported because of lower product prices in the USA (reduced by 39 million NOK) and higher cost of goods manufactured. Under the distribution agreement, the company guaranteed that the annual arm's length net operating margin shall be in the range of 1 to 5 per cent. PWC conducted later research on transfer pricing, and its result range was amended to 1.1 to 2.9 per cent, and prices were changed accordingly.

Argument analysis: Transactional Net Margin Method vs. CUP method

Claimant stated that TNMM method is the one which is used when determining transfer price with American distributor for all transactions on all services, included assembly and services as a part of the same transaction. It was stated that independent companies operating in the same market are offering the same set of services. Therefore, according to the claimant's opinion, the benchmarking used by PWC in their research was correct. Given that the corporate tax in the USA was 38 per cent, while in Norway, it was 28 per cent, the claimant mentioned that the company had carry-forward losses, which could be applied to the company's taxable income.

In the opinion of the claimant, the Applied method was the one, that would satisfy the requirements of the tax office in both the USA and in Norway (The TNMM method is called the Comparative profit method) in the USA.

The tax office argued that the distribution agreement also relates to a set of services (marketing, distribution, and technical) rendered together with goods sold, where its goods should be priced. Coverage of extraordinary costs such as warranty costs (amounting to 16 million NOK), which led to income reduction in 2004 and were not documented by the company, raised doubts of the tax office. In the opinion of the tax office paid in favour of the related party in the USA, marketing expenditures, which also reduced income in 2004, were not determined under the arm's length principle.

Judgment of court: The court noticed that when applying the TNMM method, the comparison was made on an aggregated basis. All functions performed were integrated, and no single operation could be separated from the whole set. In other words, the comparison was made on the group's level rather than on the market's level between independent parties. Besides, the net margin used for comparison was applied to other transactions between the claimant and related parties in the USA. Further, the importance of allocating net margin to a specific transaction was noticed when applying the TNMM method, even if it seems impossible to split a complex of transaction in practice. The court pointed out that allocation of the margin should be done according to the OECD guidelines. All the factors influencing net margin should be taken into consideration when applying TNMM.

The transfer pricing mechanism that secures that the American distributor will have a positive net profit margin implies a Norwegian company that assumes risk associated with marked volatility, including American marked. Therefore, under the court's opinions, it should be advisable to allocate risks between both parties in the transaction.

4.7. Orange Business Norway AS, LB-2018-84331

Two courts considered the claim. The prevailing party is the claimant, Orange Business Norway AS. Claimant is the contracting party to the Norwegian clients with mobile broadband solutions as agreement scope. In contrast, the related parties rendered the services to the clients to the claimant. The dispute was raised around the method used with respect to transfer prices of the group deals between the claimant and its holding company and subsidiaries on services for Norwegian clients and transactions on services rendered by the claimant to foreign clients of

the holding. The dispute arose about the application of the right method to the global transactions between the claimant and its related parties.

This court case applies to the validity of the tax authority's decision for Orange Business Norway AS (OBN) in June 2016, for the income years 2006, 2007 and 2008. The main question, in this case, is whether the company's income in Norway has been reduced due to common interests with related companies. The company Orange has two divisions: The Orange consumer division and the Orange enterprise division, to which this case applies.

From 1 January 2004, the group of companies utilized a new strategy, where the affiliations were to be included in a new global integrated strategy. This approach includes all the affiliate companies worldwide, Equant Denmark AS, Equant Finland OY and Equant Norway that this case is about, but was renamed after acquisition to orange business Norway AS.

Price Waterhouse Coopers LLP (PWC) was engaged as an advisor for developing a new worldwide transfer pricing agreement for the group. After PWCs analyzed the whole group, was concluded that the residual profit split method is considered the most reliable transfer pricing methodology because of establishing intercompany pricing for an integrated global business.

Throughout the first and appeal courts, the courts concluded that the Norwegian tax authority decision on the imposition of additional tax must be revoked due to lack of sufficient evidence for Orange Business Norway's income reduction for the years 2006 - 2008. The court concluded that the income was not reduced due to community of interest with the affiliates in the group, and the recommended by the tax office transfer pricing method was not following the OECD's guidelines for transfer pricing.

Argument analysis: TNMM vs PSM

The Norwegian tax authority stated that the TNMM was the best alternative to a well-functioning method for the determinations for Orange business Norway's intra-group transactions. This method makes it possible to do a comparison analysis when finding the right arm's length price between independent parties and comparable circumstances. Orange business Norway relies on the use of the PSM method to find the right arm length price.

The tax office explained its choice for this method as most appropriate because it is not possible to find uncontrolled and comparable transactions in Orange businesses in Norway, given that OBN is “highly integrated operations” with group companies cf. OECD (OECD, 2010, section

2.109) point 2.109. The court of the appeal instance rejected arguments of the tax office on the applicable transfer pricing method. The TNMM method is not applicable for this case, especially because the Norwegian tax authority did not manage to find independent companies that can be comparable in analysis.

When commenting method used by the claimant, the Norwegian tax authority disagreed about the application of the method. They pointed out that OBN did not use a functional analysis and did not use a comparative analysis of internal pricing with an uncontrolled transaction. They also argued that the transfer pricing is against the principle "single entity approach" in OECD 2010 points 1.6 (OECD, 2010, section 1.6).

Judgment of court: The court of appeal rejected this argument and stated that OBN function analysis and the pricing of the uncontrolled transaction are not in conflict with the "single entity approach". According to the guidelines, each participant in a transaction must be evaluated separately and must be customizable to the concrete transaction and the character of the single business. Because OBN is a part of an integrated group where it is impossible to evaluate OBN contribution in each single transaction isolated from the Group total delivering to the customer.

This structure also makes it impossible to sort out one single transaction delivered by OBN and then compare the price with an uncontrolled transaction. The court referred to the OECD guidelines from 2010 section 2.109 (OECD, 2010, section 2.109). It was stated that the PSM method could be used as an alternative to the TNMM method with respect to highly integrated operations of the company and regarding complex and highly integrated transactions of the claimant. In its decision, the court referred to the report of PWC, which confirmed that it was impossible "*to identify sufficiently comparable uncontrolled transactions to evaluate the aggregated activities performed by each of the entities"* (Lovdata, 2020, p. 23).

The court concluded that profit reduction in 2005-2008 was not connected with the application of the PSM method as the tax office claimed. The court admitted that it was caused by the change of the market situation and a change of the transfer pricing method on the advice of PWC.

4.8. Stanley Black & Decker Norway AS, LB-2016-105694

Parties to the case are Stanley Black & Decker Norway AS against tax authority. The case was considered in two instances and was dismissed for hearing in the cassation instance. Stanley Black & Decker Norway AS is the Norwegian distributor of electrical tools supplied by its related party, a holding company in Luxembourg. Under the agreement, flat prices were set on

the suppliers for Europe, where the transactional net margin method was applied to transfer prices. The dispute arose around the acknowledgement of profit reduction in Norway due to low margins in Norway in the light of higher product prices in Norway compared to the pan-European market. The court considered arguments brought by the tax administration a higher sales volume and higher profits in Norway as forceful.

Argument analysis: Basis for comparison

This case is about the taxation for the income year 2005 – 2008, evaluation of reduction in income of the transfer pricing of power tools between Stanley Black and Decker European trading companies and the Norwegian companies. Ernst & Young (EY) analyzed transfer pricing in the company, called "Black & Decker European Distribution Activities Transfer pricing master file". This study was common for all the European markets and concerned arm's length price. The study consisted of the selection of independent companies which were seen as comparable with Black & Decker company.

Both The Norwegian tax authority and Black & Decker have used the Transactional Net Margin Method/TNMM. This method prescribes that the net profit margin in the controlled transaction compares with a corresponding margin in comparable transaction cf. OECD's guidelines (OECD, 2017, section 117). In this case, where the taxpayer buys all the goods through controlled independent transaction, it is unnecessary to compare margins in comparable independent transaction.

The dispute arose around the range of the following criteria: industry, geographical markets and income years. The tax office compared the net profit margin between the wholesalers and retailers on the Norwegian market, irrespective of industry, in 2004-2012. The Norwegian Tax authority argued that Black & Decker EYs comparative analysis did not represent the Norwegian market. The geographical center for the use of companies from Mediterranean countries where the operating margins are far lower than in the Norwegian market. There has also been a need to look at the products that were used in the comparison.

In its report for the claimant, EY has set an interquartile range for the highest and lowest ranges of the transfer pricing to enhance the reliability of the analysis. The tax office did the same when conduction statistical research.

Judgment of court: The court of appeal agreed with the tax office that there were market differences between the Norwegian and the European market, which EY has used as a basis.

The court of appeal also mentioned that Black & Decker emphasized income from far back in time, which is not their actual income when applying the method, especially since power tools operate in a very volatile market.

The court of appeal concluded that the claimant's comparable analysis has weaknesses and should not be added as an indicator for finding the right arm's length price. This finding was especially related to the difference in geographical markets and which income year they compare. The court of appeal also mentioned weaknesses with the Norwegian tax authority's comparable analysis because of the few companies, just eight, used in the respective analysis. At the same time, the court agreed with the claimant that it should be given reasons for limitations of the research conducted by the tax office and a basis for comparison made with the application of the TNMM method.

4.9. Petrolia Noco AS, LB-2020-5842

This case is a recent one dealing with transfer pricing in Norway. The second instance decision was rendered in 2020. Currently, it is unknown if the non-prevailing party has appealed in cassation decision of the appeal instance. Parties involved in the dispute are an oil company Petrolia Noco AS and Petroleum Tax Office (Oljeskattekontoret). Regulatory changes in the Tax Act connected with the withholding tax rate at 15 % on rental income do not apply to the transactions, as changes did not take effect upon completing the transaction. Disputes arouse around interest deduction between related parties and recognition of intra-group loan to the holding company Petrolia SE (Cyprus), which became a main issue of the dispute.

Argument analysis: CUP vs Cost-plus

The court of appeal decision is based on the related interest community between Petrolia SE and Petrolia Noco, which led to an income reduction due to the high-interest rates of a group internal loan in 2012 and 2013.

The dispute arose around internal interest rates in comparison with rates between independent parties in similar transactions. The Norwegian Tax Act is considered the most appropriate CUP method, while Petrolia Noco applied the cost-plus method.

Petrolia Noco stated that they did not get an exploration loan from an external bank and that loan in the capital market at a higher interest rate was the only realistic option.

The court of appeal did not agree with the Petrolia Nocco's evaluation. The court stated that all the internal group transaction characteristics shall be maintained in a price assessment. It is important to disregard the common interest between the parties.

The court of appeal expressed the opinion that the CUP method should be applicable when determining transfer price where there is a possibility to identify comparable transactions between related parties and make reliable adjustments to any relevant differences. If a transaction depends on a loan of money which is a service that independent companies also perform, and it exist in market relations, is it the CUP method that is especially reliable. The court of appeal refers to the OECD's guidelines point C.1.2.1 paragraph 10.90(OECD, 2020, point C.1.2.1 paragraph 10.90).

For the observed, tax office transaction, market interest rates were used to finance exploration activities on the Norwegian continental shelf, the same type of exploration activity as conducted by Petrolia Noco. Petrolia SE has full insight into and control over Petrolia Noco as a wholly-owned subsidiary company and has not taken a bigger credit risk with the loan to Petrolia Noco than the banks did in the observable transaction. The court of appeal agreed on the observed uncontrolled transaction is comparable due to the argumentation from the Norwegian Tax authority.

Judgment of court: The court of appeal agreed with the Norwegian tax authority that the cost-plus method cannot be considered applicable in this case as it does not determine the arm's length price. The court of appeal refers to the decision of the appeal court LB-2016-160306 (Lovdata, Exxonmobile Production Norway Inc, 2016), where it was concluded that for loans with existing market relations, the margin on loans with similar risk factors is considered as available comparative prices. For determining the internal interest rate, the CUP method is considered the most appropriate.

5. Presentation and discussion of the interviews

In this chapter, the reader will get a presentation and discussion in the interviews with key respondents. This chapter includes many quotes from the interviewed people. This information will give the reader a much deeper understanding of the information, hearing real meanings from tax specialists in the field. When we first started to prepare the questions for the interviewees, we decided to prepare an interview guide. This approach worked well as a tool helping us to categorize the questions. Questions' set regarding each interviewed specialist is attached in appendix 1.

We have, in total, interviewed five specialists from the tax field. Two representatives from the Large Business Departments in the Norwegian tax authority Section for transfer pricing, one representative from the Norwegian tax authority's Transfer pricing valuations group, and two private tax lawyers from some of the most prestigious tax law firms.

Transfer pricing is not an exact science. It includes discretionary assessments. The transfer pricing concept is close to the concept of valuation.

Interviewees from the Norwegian tax administration defined transfer pricing with these words:

It is to find what independent parties would take as the price for either goods or services when they are related parties.

Another representative from the Norwegian tax administration used these words:

The art of finding independent prices between intra-group companies when they are a transaction member.

5.1. Finding the appropriate price following the arm's length principle

International companies face some challenges when they deal with the concept of transfer pricing. We have, throughout this paper, investigated challenges to determine an acceptable price for the tax administration and the respective international companies who face these challenges. According to the Norwegian tax authority, there are some challenges related to the application of complicated law, regulations and guidelines. Transfer pricing rules can be difficult to follow because the standard and the rules are unclear. Because of this lack of clarity, the theory is also difficult to carry out in "real" cases (Prop. nr 89 (1997), p. 98), (Andrus & Oosterhuis, 2017, p. 95).

Our analysis of the court cases revealed problems with attitudes of the courts toward the discretionary assessment of the tax office, which makes that companies meet with difficulties in understanding the tax office's practice in this sphere and difficulties with interpretation and application of the methods on transfer pricing.

Interviewees from the Norwegian tax administration confirmed the complexity of the regulation:

The law, regulations and guidelines are too complicated. I have experienced from courses and seminars that some real experienced advisers said that transfer pricing has been so complicated for us, even with many years of experience. It is difficult to interpret everything.

The OECD's guidelines result from a consensus solution among many countries, which makes some of the formulations a bit vague, not concreate enough. It is like an elastic band. It is easy to interpret it differently, allowing those who engage in aggressive tax planning to stretch the elastic band.

Another representative from the tax administration confirmed:

I have seen a lot of TP documentations. The TP documentation that I get from one of the Big Four companies is much better than the TP documentation I get from companies that try this out on their own. I do not remember seeing any very good TP analysis made from companies who try this on their own.

The reason is:

1. *They want to save money*
2. *They do not know how complicated this is*

One of the private tax's specialists said:

The guidelines have become so sophisticated that it is completely unrealistic to believe that a court will use the analysis tools and the taxpayer and the tax authorities. It has gotten way too complicated. Too much text.

Finding the arm's length price also has some challenges because of obtaining necessary and correct data. The cases around the choice of transfer pricing method and use are often built on discretionary and have various thematic issues. As we can see from the different court cases and the in-depth specialist interviews, finding the appropriate price is often a source for conflict between the parties.

A representative from the valuation group in the Norwegian tax authority said:

It is to have available information that is often complicated. We must often gather extra information from the company, which is challenging. It is not cool to base a valuation on little information.

One of the private lawyers said:

We in the private sector, "believe" that the Norwegian tax authority only uses these databases completely schematically instead of interpreting individual data. And the biggest thematic issue is intangible assets.

Among the cases we analyzed was a case with Accenture ANS participation. The claimant won the dispute against the tax office on assessing the right transfer price applied to royalties paid to the related company. Both parties in the dispute had a consensus on the very transfer pricing method as the most appropriate. The gap in opinions was about the application of the method. The court agreed with the claimant that it was not enough to use only the mathematical model when calculating royalty rates depending on revenue. The same refers to the allocation of profit which should not be based only on the mathematical models.

Another lawyer from the Norwegian tax authority stated:

The most difficult is finding independent information that is good enough when you can manage to get one of these five transfer pricing methods to be good enough for you to pass.

As we could learn from the parties' arguments both tax administration and business taxpayers struggle to find a good enough basis for comparison. It is challenging to find comparable uncontrolled transaction for both parties. It is even more challenging for businesses to get access to the transaction documentation of the competitors when justifying their transfer prices applied to intra-group transactions.

One of the private lawyers confirmed this:

There is no basis for comparison. It is not a comparable uncontrolled transaction. The comparable transactions are entered into other group corporations that are competitors, and they are, by definition, not relevant.

It is about finding a good enough basis for comparison. Where appears a problem is individual in each case. Often the case will not be decided based on any specific basis for comparison.

I usually distinguish between an empirical arm's length test and a hypothetical one. In an empirical test, you compare what you have found in the market and enter into the transaction. A hypothetical test is you trying to think of something about what you think an independent party would do under comparable circumstances. Without comparing with anything concrete but more based on evaluations alternatives this independent party would have had, and which of those alternatives would be best.

A dispute arose around the confidentiality of the documents used by the tax office for comparison. In the court case, Total E&P Norway AS requested that the tax office discloses contracts used for comparison to evaluate if they were represented and to calculate benchmark. All the interviewed representatives agreed that comparability, adjustments, finding comparable companies, and challenges due to objectivity to assess which companies are enough comparable were some of the most challenging tasks with which to work.

There are several reasons why it is difficult to obtain information. For example, companies hold back information, and another example is that there is no information to compare with in some cases.

As presented in chapter 4, the court decision LB-2018-55099 (Lovdata, court case Saipem Drilling Norway AS, 2018) illustrates how challenging it could be to value any object in monetary terms. In this court case, the parties tried to valuate a rig that was not a standardized rig but an ultra-deep-water rig specially built to withstand climatic conditions. It was clear that these rigs were not possible to find any comparability. This rig was special and totally different from the rigs used in the comparative analysis.

A representative from the valuation group in the Tax administration explained this:

The valuation of a special ship is difficult to look for other transactions. You get a certain idea when looking at the cash flow, income or expenses, but then it becomes a little more discretionary. You must make some choices along the way, but ultimately, the price you came to in the end will justify.

As we can see in the court case Total E&P Norge AS, it was stated that transaction prices between companies operating in the oil & gas industry are confidential due to competitiveness on the market. The tax office required that the company submits resale contracts with the related party. Total E&P Norge AS refused to disclose the price for those deals.

Another challenge appears when both parties to the court proceeding operate with identical data and even use the same transfer pricing method.

We also wanted to find out why some companies give incorrect financial information to the tax authorities. This problem relates to how the arm's length price is interpreted, estimated and determined. This background based on the attempt for aggressive tax planning. Do the companies struggle to interpret and apply legal sources such as the law, regulation and guidelines in practice.

Interviewees from the Norwegian tax administration answered this:

Both and... It is difficult for small companies with this problem because there are complicated regulations, and thy have very few employees working with accounting and tax. For the biggest companies, it is more likely to look with a magnifying glass to find holes that exist. But this does not apply to each company.

The private lawyer said:

Most people want to avoid conflict because there is so much noise afterwards. If you have a fantastic company in Switzerland or Luxemburg, you will end up in trouble in Norway and Sweeden or vice versa. They try to do the right thing. But of course, you have a span you can manipulate yourself. It lies in the system. Then you will try to place income with the lowest tax and expenses with high tax.

The private lawyer continued:

Tax planning gives the opportunity to adapt the international structure for minimum possible tax, which is good. But on the other hand, all these discussions and arguing. It is a plus and a minus.

During our work on this thesis, a press release published that G7 finance ministers agreed on the global minimum tax of at least 15 per cent, and over 300 countries adopted this agreement. It would be interesting to observe the impact this decision makes on the practices of the largest international companies.

It was mentioned that the biggest weakness of the updated guidelines is that the latest version is not better adapted to the situation in reality. It is still a large distance between theory and practice. Even if the OECD's guidelines are improved over the last decades, it is still challenging to achieve an appropriate price or range after the arm's length principle. The guidelines set

recommendations that are not possible to reach in real cases. It is so difficult to obtain independent information sufficiently to follow the guidelines and apply them strictly.

During interviews, it was also mentioned as a challenge if you got a case to the court, you would meet judges who do not have strong competence in the transfer pricing field. When they meet such cases, they read the guidelines as if it was the legal text. Then the taxpayers and tax administration got problems because some of the things the guidelines stipulate were quite challenging. The interviewed representatives agreed that there is no possibility to get the required independent information in certain cases.

One of the respondents from the tax administration said:

This is my personal point of view... Sometimes even in the Supreme court, I get the impression that what the court cases end up with is a bingo. This area of law relies on the complexity of transfer pricing. It will take many years to build up such expertise. It is quite a pedagogical task for the lawyers to explain the facts and the current regulations to a judge who does not have in-depth knowledge. Sometimes our lawyers and we scratch our heads a little about what the court ends up with.

The private tax lawyer confirmed this:

Many of them have no idea. They get these cases in their heads. They always refer the decisions to the discretions. But get judges who are economists can understand this well and explain this to the judge. It is a built-in problem that we do not have a court with specific competence in Norway.

The most complicated in a transfer pricing case is to explain why the price is right. The database says that it is a fruit but says nothing at all about what type of fruit it is, and this is what we try to find out.

The other private tax specialist stated:

The court does not understand this, a bit like the problem sometimes that the court thinks these are court cases or legal disputes, but they are not. You cannot use legal methods, i.e., go to the rigore juris, law drafts, and case law to find the solution. You will find the solution in looking at empirical data and making financial and commercial assessments. Which is not what a court really "well aquept to do".

The lack of necessary qualifications can also influence arguments' reasonability, in the dispute around the insurance premium paid by Fina Exploration Norway AS. The claimant stated that the tax office should apply the expert's opinion on insurance type cases for better foundations for its arguments.

The court considered research conducted by PWC company for VingCard AS, a claimant in the court case against the tax office. VingCard AS made necessary amendments into distribution agreements with the American distributor company, also within the group of companies, and changed net profit margin as it was advised by PWC company. Court partially revoked the decision of the tax office on the imposition of additional tax for that year.

In their conclusions, the first and appeal courts found that arguments of the PWC company were strong when advising the Orange company on the application of the most appropriate method to its intra-group transactions.

The practice of large international companies is to engage one of the Big Four accounting firms to assist in the determination of the transfer prices, or they have their own developed transfer pricing departments inside the organization. In those cases, have they all the prerequisites to deliver a product that is in line with the guidelines. But as we have found throughout this paper following the analyzes of the court cases, the big four accounting companies also challenge determining transfer price and finding appropriate methods following the arm's length principle.

We have seen this in the case LB-2016-105694 (Lovdata, LB-2016-105694 case Black & Decker, 2016), where Ernst & Young whit its respective master file, delivered transfer pricing study to *"Black & Decker European Distribution Activities Transfer pricing master file", w*here the court concluded that it was market differences between the Norwegian and the European market which EY has used as a basis in the analysis.

One of the lawyers from the tax administration said:

Sometimes you feel that you have done what is possible but that you are still not good enough. Those times when we did not analyze well enough were probably times when it happened a combination of not having enough information and our handling of this information's we actually have.

One of the private tax specialists stated:

I have the impression that both the tax authorities and private advisers also use such big data. You can tweak these search criteria a bit, and you get what you want. Both taxpayers and tax authorities do this.

All the interviewed participants agreed that it is quite challenging to determine a price after arm's length standard. The cases that concern transfer pricing are so numerous and varied that managing each unique case has become incredibly difficult. Each individual case must be seen as an individual case that must be resolved on information obtained based on individual circumstances.

5.2. What works well today?

This paper investigates challenges about how the arm's length price is affected based on the arm's length principle. But it is also important to keep an eye on what works well.

The Norwegian tax authority assumes that the transfer pricing field is given political priority. Over the last decades, the Norwegian government has prioritized the Norwegian tax authority so that the tax authorities have been able to build up a solid competence in the transfer pricing area. One of the interviewees from the tax administration mentioned that they had enough available resources to handle daily tasks and possibilities for development. Throughout the analyzing parts of the court cases, we have seen that the Norwegian tax administration gets recognition from the court for good valuation techniques and interpretation of the law.

Interviewees from the Norwegian tax administration said:

In the position I have been in for the last 15 – 20 years, have we been working to make the area a higher priority in the Norwegian tax authority, and I feel we have managed this. We have got the management to set aside resources and allow us to build a higher level of competencies.

Both the private tax specialists confirmed that the Norwegian tax authority has well-developed competencies and that they are both professional and good at acquiring new up-to-date information.

It has also been pointed out that there is more and more agreement internationally with the OECD guidelines, and the guidelines are getting better and better every time a new version comes out. The representative from the tax authority stated that BEPS has contributed to progress in the transfer pricing field.

The representative from the tax authority stated:

I think TPG in 2017 was a big step forward.

When I started with transfer pricing, it was the guidelines from 1995 that were relevant. The next version came in 2010, 15 years later. The last version came in 2017. But we have received guidelines for financial transaction and the profit split method, which has also changed a bit.

There were mixed opinions about whether the guidelines had been improved after several updated versions and if the BEPS improvements had worked as intended.

One of the private tax specialists told us about his opinions on BEPS:

There has been more focus on substance that I think is important.

But on the other hand. I think that there has been too much text in those guidelines. There are so many different concepts, analyzes and criteria etc. The problem is often that they are written with a special situation in mind, but they are formulated generally. They are also used in cases that are far beyond what was intended to. Then it can go really wrong.

I do not know about these BEPS, that it has become better, there have been more supervisors, but it brings more questions and disputes with it.

Both the private tax lawyers did not agree that BEPS had led to any improvement, rather more extensive due to more text and guidelines, which means more questions, ambiguities, and disputes.

5.3. Traditional transaction method vs transactional profit methods

According to transfer pricing literature, the traditional transaction method is the preferred transfer pricing method to use. But it is not always possible to use this method.

A representative from the Norwegian tax authority explained this with an example:

If we determine the price of a distributor, who has external sales and buys in from a group company, the resale method is appropriate. It is not possible in a general way to say which price is best suited. It is all depending on the facts and circumstances.

One method fits not all cases. It depends if it is a goods or services which will be priced. The cost-plus method is used for simple services, and with more complex transaction cases, the profit-split method will be a good solution.

According to the private lawyer:

In the US, they have many more methods. And they are much more statutory guidance than they have in Norway on which methodology you should use.

Different parties in the court, such as private lawyers for international companies and on the other side, the Norwegian tax authority use different strategic analyses to find the most appropriate arm's length price. But some of the procedures are also similar. Common methods are to use benchmarking databases to find price margins or range.

One of the private tax lawyers said:

We hire data-base search services from other companies. If we, for example, have a distributor in Europe. What margins do they have?

The Norwegian tax authority's procedures for finding the right price depending on a reasonable range or price for the controlled transaction/assets. This price is difficult to define because the range is not an exact science, and it is impossible to tell the companies the exact price. The Norwegian tax authority operates with an acceptable range. If the companies are within this range, the tax administration does nothing. If they are above this range, The Norwegian tax authority contacts the respective companies for further dialogue.

The private tax lawyer expressed his thought on this.

But not to prove anything, but to make it work better, in our view, when pricing from the tax administration part. They always say... We have a database and a range on cost-plus between 4-8. Then we go for 5. Then we think, "Come on! These are totally different companies you are trying to compare".

The Private tax lawyer continued:

For the Norwegian tax authority, this is complex. They do not have all the information. It is difficult. It is tempting for them to pour against schematic methods based on database search and then be finished with it. Transfer pricing is extremely resource-intensive. I have been working on one case for seven - or eight years now.

Companies trying to find the right price must decide on which method they will use based on which method is the most suitable for the current type of transaction. This factor depends on which type of transactions they could find of comparable transaction that allow them to use traditional method or, if this does not exist, end up with a more untraditional profit-based meted. Bothe the tax administration and international companies can use more than one method to search for the right price or range.

Because of the question about what is the most difficult to price, the market-based transaction or the cost-based transaction answered nearly everyone the marked based. It is easy when the market-based price between independents, is market-based, but as we can see from both the court cases and the interview in this paper, this price does not exist most often. A lack of market-based transactions should use a transactional profit method, for example, the cost-based method.

But if the cost-based is not correct, if you use irrelevant costs, this calculation brings larger consequences in terms of amount rated than the companies which have selected a profit margin which is contrary to the arm's length principle, either too high or too low depending on which way the transaction goes. It will depend on whether we have a Norwegian or foreign company.

A representative from the Norwegian tax authority said:

When we control subsidiaries with foreign mothers, it is challenging to get access to the cost-base. We do not have tax returns reported by the foreign company. We can go into different data-bases, for example, ORBIS and search online for possible additional information. If it is a Norwegian mother, it is easier to control the cost-based environment.

5.4. Why a preferring method?

Why does the OECD's guideline announce that the traditional transaction method is the preferred method when choosing the right price or range, not focusing on which method to use?

A representative from the Norwegian tax authority answered:

I have participated in several OECD meetings and other information forums for many years. My impression is that the OECD is very traditionally conservative, and they hold on to the arm's length principle. It has been the traditional transaction methods that have been applicable.

The same representative from the Norwegian tax authority continued:

Also, the United States has been a leader in thinking a bit newer, and it is they who first introduced other alternative methods, such as profit-based methods. They have gradually influenced the OECD to also follow this. The traditional methods are very good, especially from a theoretical point of view, they are best... But in practice, it turns out that the transacting-based method is in just a few cases. It is impossible to make it works as intended.

When it comes to the standpoint in the court, one of the interviews from Norwegian tax authority stated:

When it comes to the courts' decisions, it is no surprise that lawyers and the people in the judicial system may be conservative as well.

While the private lawyer answered:

We have long practice on it. And they are quite closely related to accounting, so it is relatively easy to find the numbers, people recognize themselves in this method, and we have much practice with it.

The Tax administration in Norway is open to using both traditional transaction methods and transactional profit methods. They have focused on not the method but how we find the right price mentality that was important. According to Ainswars and Shact (2012) (Ainswars & Shact, 2012, p. 32), "*Transfer pricing: The CUP – Case Study: Australia, US, UK, Norway and Canada* are some other OECD's members countries more conservative on the choice of methods, and other members countries are more offensive than Norway.

Previous guidelines were very negative to profit-based methods, but after the upgraded 2010 and 2017 versions, the guideline is much more positive on the profit-based method.

The private lawyers said:

The big debate internationally is whether to switch to a more distribution (allocation) method instead of the more traditional transaction method. But it does not matter what prices you have, as long as it works. If you have the data, then you can use all the methods you want.

Words from a lawyer in the tax administration:

When the judge gets TP guidelines as a legal source, it should not mean that they seek traditional methods rather than the profit-based methods if it is challenging to use the traditional methods because of lack of information.

But yes! When you read the guidelines, you have a feeling that they still prefer the traditional transaction method.

In the HR-2003-622-1 (Lovdata, case Fina Exploration Norway S.A, HR-2003-622-1, 2003), the court of appeal mentioned that the OECD guidelines discuss several methods to determine the right arm's length price or range. Choosing the right method depends on the concrete

assessment. One must choose a method for the specific case that gives you the most reliable basis for a conclusion if the price is market-based or not. The market price must be based on a discretionary element and not just estimations and calculations.

A representative from the valuation group stated:

The untraditional methods are more on the way in, especially the use of the profit split method.

In court disputes, the judges often choose one of the methods neither the taxpayers nor the tax authority's suggestion. The court does not invent the third method. If they disagree with the choice of method, they choose to either accept the tax authority's method or the taxpayer's method. In the case (Fina Exploration Norway S.A), the court also concluded that the Norwegian tax authority's cost-plus-based method was just a tool used for searching for the market price.

5.5. Challenges

The biggest challenges with the traditional transaction method lie in finding the basis of comparison of transactions. It is not exact. It is too schematic. The transaction is not equal enough and cannot be easily adjusted. It must be a market-based transaction between related parties, and as we could see from the analysis of the court cases, there is no prevailing of such cases. The court check if the different traditional transactional methods are “good enough”.

One tax specialist said:

The problem with CUP is that you do not find a good enough basis for comparison, but you can do so in certain areas, such as the sale of petroleum products. Then you can find good CUPs. But usually, you do not.

In the court case Total E&P, we could see an example where both parties had a consensus of the CUP method, which is the most appropriate to the transaction. AT the same time, a discrepancy arose around the freight cost, which the company excluded from the calculation.

When it comes to a cost-plus method, it does not say anything about active mergers and risk pictures between companies. It depends on a cost-based method, not reflecting on the underlying value creations or risk pictures. The methods are missing some links between the methodology and the underlying economic rationales. It is difficult to find enough information.

The opinion of the representative of the tax authorities:

Suppose you are searching for accounting information, for example, in large databases such as Amadeus or Orbis. In that case, the corresponding information is not based on the gross profit level, making it difficult with the traditional transaction method.

According to one of the private lawyers:

If you have a controlled and independent price to compare with, and this price is comparable. Let us take an example.

If you have an orange similar to an orange, which we shall compare, you use that. Of course, we prefer that...

The problem is that it is usually a different size orange, or it is an apple.

The positive with the profit-based methods is that you could search in the databases and bring out consistent, and especially independent data over many years. The disadvantage with the transactional profit method is that you often get a discussion about data basics (underlying data) and methodology. The Transactional profit method is seen as a very developed and functional theoretical method, but it is still challenging in practice.

The TNMM method is not a good alternative if the company has unique intangible assets. One will never be able to manage, even with information from databases, to find companies exactly like the company you are studying. It is always some differences. The challenge is to find enough numbers that are equal enough to be used in the analysis.

Because of the challenges to both the traditional transaction method and the transactional profit method, it becomes a global problem to prevent double taxation. A representative from the Norwegian tax authority explained this with an example:

It is very heavy to sit in such meetings. We can sit for several hours just discussing one sentence in the document.

But something happened when the BEPS came. They tried to speed things up. They have these action points that were carried out in record time. It was an improvement, but it is just a small step in the right direction of the scope.

It is important to understand the complex scope for so many countries on which this depends. Countries must practice the same guidelines, and if we should change these regulations, it cannot only be changed nationally in Norway. According to the OECD's guidelines on internal rules and regulations in other leading countries, these changes must be carried out.

5.6. Courts decisions influenced by different circumstances of the case

Finding the right price or range is dependent on understanding the different additional points in each specific court case.

The tax lawyer said:

Those times we get upholding of the claim, there are additional facts in the cases that support the result of the analysis. The judge will never get a completely perfect TP analysis. That is completely impossible.

In the LB-2018-84331 (Lovdata, case Orange Business Norway AS, LB-2018-84331, 2018) decision, the judge states straight out whether you go for a profit split method or a transactional net margin method (TNMM), is it the result that is crucial. The court decided that the TNMM method was unsuitable in this case, especially because the Norwegian tax authority did not manage to find comparable independent companies to use in their respective analysis.

One of the representatives of the tax administration said:

We thought that the Orange case used a global allocation method to handle the TP, while they claimed they used a profit split method. The court concludes that it was not a global allocation method. It was a profit split method.

If you work with TP and read the guidelines, it is obvious that Orange Business had used a global allocation method. But the court does not care about this approach.

They accepted the line of argument they came up with, and the court said we were wrong. They also thought our TNMM analysis was terrible. None of the companies we included in our range was comparable. We disagreed.

Additional details were also crucial in, for example, the Black and Decker case. In the dispute, decision no. LB-2016-105694 (Lovdata, case Black and Decker, LB-2016-105694, 2016), where the Norwegian tax authority just made their comparative analysis on eight companies. In this case, the judge confirmed that the eight companies were enough for analysis, but it was a crucially low minimum size. The court was more concerned about the quality aspect rather than the statistical manoeuvre, which is more used in the USA, where many companies are buffed into statistical data.

A representative from the valuation group said:

The number of companies in a comparability analysis is very important. The problem is usually quantity versus quality. The more company's you take in, the worse would be the comparability on the company's overall. But you get a little better statistic. The standard deviations are a little smaller.

One of the tax lawyers from the Norwegian tax authority stated:

We found out that the Norwegian market for Black and Decker was better than the other countries they sold tools. Because we in Norway have a very strong audience, and we love to buy equipment. We were able to calculate the ratio between the profit of this company. I think it was in Luxembourg. They had 80% of the profit associated with the transactions in Norway and out to end customers. What happened down there was not wary sophisticated and was just a central purchasing office. Norway was left with 20% of the profits.

It tended to look more like a profit split method, but the analysis was not so detailed that it satisfied all the requirements of the guidelines. The judge was noting this.

The combination of the distribution of profits between the foreign companies and Norway and that Norway was a wary good market that came as an additional factor for the judges, which also confirmed that we achieved this in our argumentation.

As we could see in the findings above, each transfer pricing case was a concrete application of all the circumstances in the case. A discretionary assessment was made all the way, both in the choice of method and how the method has been used. It is important to find the additional points in each unique case and use this to strengthen own argumentation.

One of the tax lawyers said:

It is very important to find additional facts of the case in order to win in the court.

The same lawyer continued:

Black & Decker had a weak TP analysis because they had used many southern European companies in their benchmarking. This error is not unusual because many of these southern European companies are often poor in profit margins. Hence, it is popular to use to defend a bad margin for the group. We, the tax administration managed to do, was to give the judge a focus on that Norway is completely different from the market the Earnst and Young (EY) had found in its TP analysis.

With specifications around countries, different market situations and comparison objects, additional information can also be support calculations, use of other methods, valuation, and multiple calculations. The more the parties know about these additional aspects of each unique case, the more they build strong arguments around their own analysis.

5.7. Improvements

Due to the complexity of the OECD's guidelines, there is no simple solution to just cut some of the methods.

According to one of the representatives of the Norwegian tax authority:

It is ok to have these five transfer pricing methods that exist today. It is not a solution to cut some of these methods. Sometimes I disparage in the church. Due to the arm's length principle, what is in the OECD's guidelines today being challenged by methods depends on just calculations of what the income should be, based on several parameters such as turnover, numbers of employees, operating assets etc. And those who are believers in the principle of arm's length see this as a "devil's work".

I am probably not a big believer in the arm's length principle. I think more mathematical formula-based things might be the solution. We see this more and more in the digital economy with pilar 1 and pilar 2.

When we investigated suggestions for improvements by, for example, more complementary law or guidelines, the private lawyers answered:

Under section 13-1 of the Tax Act (Tax act, 1999, section 13-1), the OECD's guidelines are applicable in Norway. You can look at the OECD guidelines as a dynamic "set of rules" that changes over time. Because of the complexity.

I think we should have it as it is today.

The questions around improvements of the guidelines, regulations and laws answered one of the private specialist lawyers this as a point for improvement:

Remove Transfer pricing... In California, they have a global allocation methodology that allows us to allocate using formulas. And that is what we in Norway try to do with these new international guidelines for large companies. Transfer pricing is very discretionary, and it involves so many countries. This complexity results in a lot of work, and that is good for the advisers. But it is still so complicated, and it is difficult to find common solutions and

agreements between the parties. Transfer pricing cases last for many, many years. But the development around more agreement due to the principles is very good improvements.

The questions regarding improvement and how the Norwegian government could develop and support the Norwegian court, tax administration, and private companies to prevent the complexity in the law and guidelines are some proposals to see how the United States works with transfer pricing.

The private tax lawyers said:

The OECD pretends that everyone agrees, but if the United States does not want to, yes, we could forget about it. Part of these methods we have is American. The OECD fought against several principles that they now take for granted, but the United States forced them. The United States is very influential. There will be no OECD without the United States.

They have 50 different states and are used to handling Cross-border transactions. They have specialized in the court tax law, so the people who make decisions know what they talk about. The judges are very good.

When I argue for the state or the court, I use American law to look at similar cases. It is the same with the OECD's principle. These decisions are from people with heavy experience. I have won cases against the state simply by highlighting cases resolved in American Law.

In the question regarding improvements, one of the tax lawyers said:

Adapt the guideline to the information needed to meet the guideline. I experience that much of the theory in the guidelines is a good theory but is not practicable.

The interviewees had different opinions about measures for improvement. But one of the private tax lawyers stated:

What I think would have been a great advantage is if Norway could introduce a regime with an advance Pricing agreement. Norway does not have this regime, and it is a big weakness. Then you get disputes. If you come to court with a dispute, the price are wrong, at least in some cases. The court does not say what should have been right. They say that this is wrong, we know nothing about what would have been right, you must try again.

The same tax specialist continued:

It would have been an advantage if Norway had had special courts for tax, not just transfer pricing.

The two private tax specialists answered that one of Norway's biggest improvements was implementing specialized case law on tax disputes. Norway would have had too few cases to be able to have a pure transfer pricing court. They both argued that it must be for the tax field and not only transfer pricing cases.

5.8. Critical attitude of the court towards arguments of the Norwegian tax administration

In its LB-2018-55099 (Saipem Drilling Norway AS) decision, the court should not be restrained in valuing which methods are the most appropriate in each case. This phenomenon is directly regulated in the Norwegian Tax Act section 13-1 (1) cf. (4) (Tax act, 1999, section 13-1). When it comes to the assessment of evidence, especially economic and marked based assessment of transactions, there may be a good reason for the court to try to override the Norwegian tax authority discretionally continuation. The court refers to different points of view (LB-2018-55099):

First, the court and the Norwegian Tax authority have different roles and specializations. The Norwegian tax authority is more competent in performing financial and market-based valuation and frequently works on transfer pricing cases. The court must add this type of expertise into each specific case. It is not easy where there are real professional disagreements. Based on the Norwegian tax authority's competence on transfer pricing, the court must show restraint in reviewing and setting aside assessments, as can affect an equal treatment of cases with much and inaccuracies (LB-2018-55099).

It is also a close connection if an income reduction exists after section 13-1 (1) (Tax act, 1999, section 13-1) and the discretionary pricing after section 13-1 (3). Both aspects will depend on the comparisons between the prices or the conditions in the controlled transaction and the price/conditions in the uncontrolled transaction. This fact is important for the cases related to economic and market-based conditions to find the right arm's length price. A court trial after the first paragraph will significantly undermine the discretion that is assumed that the public tax authority shall have after the third paragraph (LB-2018-55099).

Both parties were very clear on their own point of view due to questions regarding if the court showed restraint in reviewing and setting aside the claims from tax administrations.

One of the private tax specialists stated:

Norwegian Judges are often recruited from public positions. So, there is a bias. The state will normally get right in cases of doubt. I think that is a problem. It would have been better if we had a tax court with experts from both public and private. The Judge is partly public-friendly, and they are not economists. Getting sharp lawyers to understand pure finances is not easy.

The other private tax lawyers said:

They have an advantage, and they know it too. They take full advantage of the benefits. I would say that. They go to court with the state's hat on, but they behave completely like a private party. I experience that they come up with arguments. I do not think they even believe in it themselves. But they argue with it because it is beneficial to their case. Then they win this case. In the next case, they would not have argued with it. They are a bit unprincipled. It matters who prosecutes the case for the state, but I experience that they are concerned with winning the case.

Opposite view from one of the tax specialists in the tax administration:

The remark from this case has also attracted attention in public. I do not remember seeing a similar statement in any other court decision. But according to case law, there are stricter requirements set for us, the tax administration, than for the taxpayers when justifying the method. According to the regulations, the taxpayer escapes a little "cheaper". We must make it more than 50% probable that our TP analysis is better than the taxpayers.

I experience the exact opposite. I feel that the court often ends up with the result that is in the taxpayers' favor precisely because we must prove that our method is best

In another example from the dispute between Richard Norland against the tax office in 2012, the Supreme Court stated in its decision (Lovdata, HR-2012-1296A, 2012) that in accordance with section 13-1 of the Tax Act tax (Tax act, 1999, section 13-1) tax authority could do a free discretionary assessment of pricing of shares sold to a wholly-owned company and court did not refer to the OECD guidelines as a tool for determining of the most appropriate transfer pricing method.

Even though the tax authorities have come a long way in keeping up with the untraditional method, due to the private tax lawyers, there are still some reasons ways they choose the more traditional method.

The private lawyers argue:

We can refer to the court case Norland against the tax office when the Supreme Court says that it is ok if the assessment in reasonable and not unreasonable. This finding means that the tax authorities can do what they want. Only the court finds it is ok. This attitude is a challenge for us on the other side of the table. We must then make sure that whenever I observe such an assessment either in the appeal decision of the tax administration or before because then you can go to the court. The tax administration has been forced to use the comparison steps in the guidelines. They must go into every point, this makes them work hard, and they do not like it. It is such a heavy job, so they prefer simple methods, for example, Cost plus etc.

5.9. Transfer pricing Ethics

Because the ethical perspective of determining the right arm's length price is mainly a cost-benefits decision for the companies, they could add many resources internally to the field, but this will not be the reality, especially for the smaller companies with scarce resources.

Interviews from the tax administration said:

Many people write nice documents that they do, but do not always do this in practice. "Cash is King". For some, only money matters. But this does not apply to everyone. Reputation is also important.

The private tax lawyer confirmed this:

Most companies wish not to come into trouble. But you have a few very rich in Norway that gives full speed on turns. They lose some tax cases, win some cases. But mostly, they win a lot. This advantage pays off for them. They are willing to risk a lot of disputes.

Being a little on edge pays off.

But most of the big companies with professional management are not interesting in having lots of controversies.

It has become more inflamed to stand in the newspaper in recent years even though it is 100% legal. A company I have been working with got a lot of media attention, and they feel that it

cost too much PR. In recent years, the price of utilizing the system has become too high in terms of PR for most companies.

In the question regarding the biggest ethical challenges because of transfer pricing, one of the Norwegian tax's authorities stated:

It must be the temptation to manipulate prices, so they get minimum tax. And then go too far. I do not know why we feel that the price is wrong, and Norway is losing tax revenue. It can be proven tax planning, otherwise, it can be poor workmanship.

A representative from the transfer pricing valuation group said:

In some cases, they are 100% above what is the normal market price. Then they should know this is quite wrong.

One of the private tax specialists stated:

I think it is a mix. I will not sit here to say that there is never anyone who tries to push the price in a favourable direction, but I think it is a good mix, and often it is simply based on... Had it been easy to find the price, it would not have been so easy to adopt either. It is very discretionary in what is the right price. Then the business taxpayers push prices in one direction, and the tax administration pushes it completely in the other direction, perhaps too high. Both parties have their incentives and can use them.

According to both parties, the ethical perspective on transfer pricing cases is related to companies trying to find opportunities to fool the system, companies that do not understand the complexity of transfer pricing regulations, and companies that want to do the right thing.

5.10. Transfer pricing political view

From the political point of view, BEPS is the cause of a political change. The politicians went together to work through some of the biggest challenges related to transfer pricing. Such political decisions lead to change, and force companies to adopt new ways of working.

One of the lawyers from the tax administration said:

A lot is going on in Europe related to solving challenges with the companies that pay no tax at all and have a high turnover, such as Apple and Google. Now leaders of the European countries begin to focus on TP and understand that it has enormous influence and importance on each individual country's tax base. There has been more and more focus on this, and the reason for that is that these technology companies have become so big, huge, and have a lot of turnover

in Europe, much more than earlier. The tax expenses limits will be much larger and the loss of income in each individual country bigger.

According to one of the tax specialists, there has been increased political focus on transfer pricing in an international context in the tax administration. They see that there is a lot of tax evasion, which affects the tax revenue in different respective countries.

As we noticed above, it would be interesting to observe the consequences of the introduced minimum tax at 15 per cent agreed by more than 300 countries (OECD, 2021).

6. Conclusions

This topic has been a compelling international issue over many years, given the international element of the transactions. This finding confirms that the challenges under discussion existed before the incorporation of the Tax Act subsections 13-1 (4) (Tax act, 1999, section 13-1) in 2007 when the OECD guidelines were getting formalized status concerning transfer pricing issues in general, and particularly the use of the most appropriate method when determining transfer pricing in Norwegian law.

Seeing several court cases after 2007 involving disputes over the determination of the transfer price, we assume that multinational enterprises still face problems connected with the insufficiency of the application mechanisms stipulated in the guidelines. The companies still struggle with applying the OECD's regulations in the updated versions from 2009, 2010 and 2017.

We have compared the judges' opinions with the specialists from the tax office and law firms on the disputable issues around the application of the arm's length principle. We have investigated the challenges in determining the transfer price in accordance with the arm's length principle between the Norwegian tax administration and business taxpayers.

Business taxpayers also face challenges when the tax administration uses database dumps as a source in uncritical ways. The specific details in each case are given too little attention. The challenge also compounds when a confidentiality obligation binds the tax administration. The companies are denied the opportunity to access the contracts used by the tax office to compare the price under the application of the CUP method. In addition to this challenges, the courts' opinion stated in the Norland case allows us to claim that tax administration can decide on the most applicable method by applying free discretionary assessment. Another challenge multinational enterprises face is determining the range, which would be considered acceptable and reasonable by the tax office. Besides that, the multinational enterprises find difficulties determining the transactions price by applying the external CUP method. The challenge arises concerning levels, risks, industries, and especially certain transaction that are sufficiently comparable to their own.

Viewing recommendations of the OECD guidelines, the Norwegian judges emphasize that quality is preferable to quantity. Each substantive detail can influence judgements, while database dumps and mathematic models should be used more just as a tool to search for the right market price. On the other hand, it becomes problematic for the tax office and courts when

multinational enterprises refuse to submit documentation related to intra-group transactions. It is difficult to make conclusions and take decisions based on incomplete information related to transactions and prices.

When business taxpayers and the tax administration do not agree on a taxable basis, disputes arise. Some of such disputes conclude in court. To avoid litigation, which is costly and time-consuming, we hope that our findings will help to get off these challenges. We hope that further amendments to the guidelines would secure easier enforcement of the regulation for the users and secure the disputes around the appropriateness of the method applied to the intra-group transactions.

The OECD guidelines are a standard for the member-countries tax administrations to the Organization for Economic Co-operation and Development and multinational enterprises. The analyzed information and findings in this paper could be relevant for researchers in other countries due to its generality for such countries. Limitation concerns analysis of the court cases, which refer to the application of the Norwegian laws to procedural issues. We would consider it interesting to continue research on this topic focusing on the CUP method and problems of getting access to the contracts and data used by the tax office in their assessment on the comparable price.

The generalizability of this paper could have been strengthened by analyzing more court cases and interviewing even more specialists. In the ideal case, it would be analysis of the arguments brought in certain cases and interviews with representatives of both parties of each court case. Such a thorough (certain case) and spacious (numerous cases) study would increase the quality of the research.

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Figures

Figure 1: The OECD's five transfer pricing methods

Sources: Own produced

Figure 2: Selection of the most appropriate method

Sources: OECD transfer pricing methods (OECD, 2010, p.16)

https://www.oecd.org/ctp/transfer-pricing/45765701.pdf

Figure 3: CUP method

Sources: Own adjustment based on OECD transfer pricing methods (OECD, 2010, p.3)

https://www.oecd.org/ctp/transfer-pricing/45765701.pdf

Figure 4: Resale price method

Sources: OECD transfer pricing methods 2010, p. 4

https://www.oecd.org/ctp/transfer-pricing/45765701.pdf

Figure 5: Cost plus method

Sources: OECD transfer pricing methods 2010, p. 5

https://www.oecd.org/ctp/transfer-pricing/45765701.pdf

Figure 6: Difference Between a resale price and a TNMM for a distributor (illustration).

Sources: OECD transfer pricing methods 2010, p. 7

https://www.oecd.org/ctp/transfer-pricing/45765701.pdf

Figure 7: Difference Between a resale price and a TNMM for a distributor (illustration).

Sources: OECD transfer pricing methods 2010, p. 7

https://www.oecd.org/ctp/transfer-pricing/45765701.pdf

Figure 8: Transactional profit Split

Sources: Own adjustments based on OECD transfer pricing methods 2010, p. 8

https://www.oecd.org/ctp/transfer-pricing/45765701.pdf

Figure 9: Comparison of quantitative and qualitative methods

Source: Based on Marshall, 1996, p. 524

https://academic.oup.com/fampra/article/13/6/522/496701?login=true

Figure 10: Case designs five phases

Source: Based on Yin 2003, p. 50

https://iwansuharyanto.files.wordpress.com/2013/04/robert_k_yin_case_study_research_design_and_mebookfi-org.pdf

Figure 11: The main content of each of the selected court cases

Source: Own produced

Appendix 1

Interview questions to the Norwegian tax authority

Used during the interview

- Teams' meeting with camera
- Voice recorder
- All the questions must be seen in a transfer pricing perspective
- Interview guide

General questions

1. Name:
2. Age:
3. Education:
4. Job title:
5. Department:
6. Work experience:
7. Experience related to transfer pricing:

General Transfer pricing

8. How would you define transfer pricing?
9. What do you think are the biggest challenges international companies face when it comes to transfer pricing?
10. What do you think works very well today?
11. What do you think is the biggest weakness of the legislation both law and guidelines on Transfer pricing when it comes to choose of the methods?
12. What would you suggest as a change to improve the regulatory framework of transfer pricing?
13. Do you think that companies have financial or tax benefit motivation when dealing with transfer pricing?

Transfer pricing methods

14. Which methods are the most used for pricing?
15. Are there any pricing methods which are more suitable for certain types of transactions?
16. Does your team have some working methods/tools to find the right methods?

17. What is most difficult: market-based or cost-based pricing between related parties?
18. Why do you think traditional transactional method is the preferred transfer pricing method?
19. What do you think is the biggest weakness with the traditional transactional method?
20. What is your opinion about this statement? “Norwegian court prefer the CUP method”.
21. What are the biggest challenges with the transactional profit method?
22. What is the advantage of the transactional profit method?
23. In points, what do you think could be an improved version of the Norwegian Law and guidelines related to using the “appropriate” method? Or to find the right price?
24. Do you think that the transfer pricing law and guidelines related to the choice of appropriate method is too complicated?
25. Do we need some action from OECD related to update the guidelines?
26. Does the choice of which transfer pricing method affect the result of the arm's length price, and the question about discretion?

Transfer pricing court law related questions

27. Do you agree with the opinion of the court on the method which should be used in certain case?
28. What is the biggest reason when multinational enterprises appeal decisions of the tax office on imposition of the additional tax?
29. Is there a special case you remember which is connected to difficulties of the Norwegian tax office when determining the right arm's length price or range?
30. Do you think that opinion of the court will impact on future choice of method by multinational enterprises in similar transactions?
31. What are the key lessons in winning/loosing court?
32. Do you feel that the court confirms or rejects evaluations from the Norwegian tax authority?
33. What are the biggest challenges for transfer pricing cases considered by the tax office?

Transfer pricing Ethics

34. Do you think that companies face with challenges when applying the arm’s length principle (due to high cost, complex paperwork, control routines, internal guidelines, motivation)?

35. Do you think that the companies take into consideration their social responsibility when pricing transactions between related parties?
36. Do you think that the companies take into consideration reputational risk when it comes to pricing of transactions between related partied, given the political pressure and interest among media?
37. Is there any ethical question involved due to the appropriate transfer pricing methods?
38. What are implications on Norwegian business environment?
39. Which factor are decisive when price setting of transaction between related parties (functional role of the related party, character of the goods or services delivered in accordance with contract, terms of contract, business strategy, commercial opportunities)?

Transfer pricing political point of view

40. Do you think that the companies assess and take into consideration political changes when pricing transactions between related parties?
41. Are there any political questions involved due to the choice of finding the right methos?
42. Do multinational enterprises win in the transfer price cases in the Norwegian courts because of the choice of transfer pricing method?
43. Do multinational enterprises lose in the transfer price cases in the Norwegian courts because of the choice of transfer pricing method?

<u>Interview question to the transfer pricing specialist lawyers</u>

Used during the interview

- Teams' meeting with camera
- Voice recorder
- All the questions must be seen in a transfer pricing perspective.
- Interview guide

General questions

1. Name:
2. Age:

3. Education:
4. Job title:
5. Department:
6. Work experience:
7. Experience related to transfer pricing:

General Transfer pricing

8. Can the tax office disclose contracts which were used for benchmarking when determining the arm' length price or confidentiality restrictions prevail?
9. Which factors should be considered when determining arm's length range and how determined arm's length range should be applied in certain disputes?
10. Should comparison be made on the market level, rather than on a group of companies' levels, and benchmarking should apply to certain type of transactions, rather than a complex of transactions of the group of companies?
11. How would you define transfer pricing?
12. What do you think are the biggest challenges international companies face with when
13. it comes to find the arm's length price or range?
14. What do you think works very well today?
15. What do you think is the biggest weakness of law, regulations and guidelines on Transfer pricing, related to methods?
16. What would you suggest as a change to improve the regulatory framework of transfer pricing?
17. Do you think companies have financial or tax benefit motivation when determining transfer pricing?

Transfer pricing methods

18. Which methods are the most used for pricing?
19. Are there any pricing methods which are more suitable for certain types of transactions?
20. Are you using any form for databases to find the comparable transaction?
21. What is most difficult: market-based or cost-based pricing between related parties?
22. Why are the traditional transaction methods the preferred transfer pricing methods?
23. What do you think is the biggest weakness with the traditional transaction method?
24. What is your opinion about this statement? "Norwegian courts prefer the CUP method".
25. What are the biggest challenges with the transactional profit method?

26. What is the advantage of transactional profit method?
27. What would your advice for improvement for the law, regulations and guidelines be?
28. Do you think the transfer pricing law and guidelines related to the method is too week?
29. Do we need some action from OECD related to updating of the guidelines?

Transfer pricing court law related questions

30. Do you agree with the opinion of the court on the method which should be used in certain case (in case if court did not sustain arguments of the tax administration with respect use of the certain method)?
31. Do you think that opinion of the court will impact on future choice of method by multinational enterprises in similar transactions?
32. Do you agree with the court when it confirms or rejects evaluations from the Norwegian tax authority?
33. What do you think is the biggest error the Norwegian Tax authority does in transfer pricing cases?
34. What is the typical error the court makes when weighting arguments of the parties on appropriate transfer pricing method?

Ethics

35. Do you think companies face with challenges when applying the arm's length principle (due to high cost, complex paperwork, control routines, internal guidelines, motivation)?
36. Do you think companies take into consideration their social responsibility when pricing transactions between related parties?
37. Do you think the companies take into consideration reputational risk when it comes to pricing of transactions between related partied, given the political pressure and interest among media?

Transfer pricing political points of view

38. Do you think that the companies take into consideration political changes when pricing transactions between related parties?
39. Do you think that companies can easily step over borderline between lawful transfer pricing and criminality?

Interview question to the representative in Norwegian tax authority valuation department

Used during the interview

- Teams' meeting with camera
- Voice recorder
- All the questions must be seen in a transfer pricing perspective.
- Interview guide

General questions

1. Name:
2. Age:
3. Education:
4. Job title:
5. Department:
6. Work experience:
7. Experience related to transfer pricing:

General Transfer pricing

8. How would you define transfer pricing?
9. In which way are you involved in finding price or range due to transfer pricing cases.
10. Can you tell me about the proses regarding support to the tax administration in finding an appropriate price or range in accordance with the arm's length principle?
11. What are the most challenges in finding an appropriate price or range?
12. What do you think are the biggest challenges international companies face with when it comes to find the arm's length price or range?
13. What do you think is the biggest weakness of law, regulations and guidelines on Transfer pricing, related to finding right price or range?
14. What would you suggest as a change to improve the regulatory framework for finding the right price or range?
15. Do you think companies have financial or tax benefit motivation when determining transfer pricing?
16. Do companies misuse value distribution opportunity when conclude two transactions shortly after each other on sale of shares (exemption method in accordance with section

2-38 of the Tax Act in transactions with Swiss contractors, case Normet Norway AS 2017) and intellectual property?

17. Which difficulties face tax office and companies when applying royalty relief method when determining transfer prices?
18. Are these difficulties common for both parties to the dispute?
19. Which difficulties face tax office when valuating businesses in share sale transactions?

Appendix 2

All court cases between 1991-2021.

Year	Company	Q-ty
2020	Shell	1
2020	Orange Business Norway	1
2020	AS Norske Shell	1
2020	Bankruptsy in Business 1 AS	1
2020	Petrolia Noco AS	1
2019	New Wave Norway	1
2019	Saipem Drilling Norway	1
2019	Firm A and B	1
2019	Normet Norway	1
2019	Firm A and B, rental	1
2019	Klingel Norge AS	1
2018	Tgs Nopec Geophysical Company ASA	1
2018	Time Critical Petroleum Resources AS	1
2018	Stanley Black & Decker Norway AS	1
2018	Total E&P Norge	1
2018	PRA Group Europe Portfolio AS	1
2018	Time Critical Petroleum Resources AS	1
2018	Exxonmobil Production Norway Inc	1
2017	Statoil Petroleum AS	1
2017	Hess Norge AS	1
2017	Grunder, share sale	1
2017	Allnex Norway AS	1
2017	Lekolar Holding Norge AS	1
2017	Jebo AS	1
2017	Statoil Petroleum AS	1
2017	Total E&P Norge	1
2016	Ikea Handel og Eiendom AS	1
2016	Statoil Petroleum AS	1
2016	Canica AS	1
2015	Healthcare AS	1
2015	Investors	1
2015	Statoil Petroleum AS	1
2015	Ericsson Television AS	1
2015	Saint Global Ceramic Materials AS	1
2015	A/S Norske Shell	1
2015	Swedish Match Norge AS	1
2014	Goodyear Dunlop Tires Norge AS	1
2014	Conocophillips Skandinavia AS	1
2014	Total E&P Norge	1
2014	Barcode 115-125 Holding AS	1
2014	Brønnøy Kalk AS	1

2014	Awilco AS Awillhelmsen AS	1
2013	Accenture International SARL	1
2013	Vikholmen AS	1
2013	X AS , A and B renting of yacht	1
2012	Bayern Gas Norge AS	1
2012	VingCard Elsafe AS	1
2012	Statoil ASA	1
2011	Dell Products NUF	1
2011	Allseas Marine Contractors SA	1
2011	Viking Maritime Inc Veritas DGS Ltd	1
2011	Exxonmobil exploration and Production Norway Inc	1
2011	Eksportconsult AS and Force Capital Partners AS	1
2011	Kaefer Energy AS	1
2011	Enterprise oil british holding company	1
2010	Scientific Drilling Controls Ltd	1
2010	Conocophillips Skandinavia AS, Norske Conocophillips AS	1
2010	Telecomputing AS	1
2009	Dynea AS	1
2009	Thule Drilling ASA	1
2008	Cytec Norge GP AS	1
2008	Intrum Justicia AS	1
2007	Norsk Hydro Production AS	1
2007	Statoil Norway ASA, Statoil Angola, Statoil Belgium	1
2007	Tandberg ASA	1
2003	Fina Exploration Norway S.A.	1
2003	IS Statpipe with participation of Statoil ASA	1
2001	Amoco Corporation	1
2001	Norsk Agip AS	1
1999	Baker Hughes	1
1991	Elkem AS, SISO Kraftverk, Salten Verk	1
	Total:	71