TRANSFER PRICING APPLICATION AND ADVANCE PRICING AGREEMENTS: TURKISH APPLICATION

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1. ABSTRACT

Disguised profit distribution as part of Abolished 5422 number Corporate Tax Law has started to fall short in terms of national and international operations in time. Applications that are carried out in the systems of many developed countries were wanted to be included in Turkish Tax System. Being valid from 01.01.2007, "Transfer pricing" application has been included in Turkish Tax Law after being arranged in scope of 5520 numbered Corporate Tax Law. On the other hand, transfer pricing that was included in Income Tax Law with 5315 number Law, has gained significance not only in terms of corporations, but also for natural entities that have commercial earning.

Transfer pricing, that has been applied in many developed countries particularly America and Japan, is an issue that is as important as to require a special proficiency and it has a wide and detailed field of application. Transfer pricing is an application that is basically used and developed in order to take tax avoidances during operations of international entities between countries under control, and in order to prevent tax evasions.

Arm's Length Principle that is the focal point of the application is managed by various methods based on OECD regulations. In other words, some methods are applied in order to determine arm's length principle and calculations used during these methods creates a significant point. Taxpayers who transact with the methods have the chance to benefit from "Advance Pricing Agreements" in order to prevent any hesitations and comply with the instructions of tax administration. In this way, they guarantee preventing tax penalties and they can prepare their budgets by making price plannings easily.

In this study, by taking OECD arrangements into consideration, the concept of transfer pricing, its importance, application and especially Advance Pricing Applications will be analyzed and evaluated.

2. MULTINATIONAL CORPORATIONS AND TRANSFER PRICING CONNECTIONS IN SCOPE OF GLOBALIZATION

Globalization directed international structuring by causing proliferation and development of economic, politic and social relations besides increasing international relations (DPT, 1995: 1).

Importance and number of multinational corporations have increased with developments and changes in this context and they started to have significant roles in the world trade (OECD, 2010: 17). The number and significance of multinational corporations defined as commercial enterprises and are made up of economic entities that share information, source and responsibilities among their groups (Işık, 2005: 15), increased and gained more significance with globalization. These multinational corporations operate in two or more countries without being legal entity type or occupation field, they ensure determination of consistent and common policies between entity unit in order to create global strategy, they have a decision making system based on the effective control of one or more decision making center. Recent increase in the number and importance of these corporations brought along complicated taxing problems both for nations and for multinational corporations (İstanbul YMM, 2007: 72). In other words, this situation creates problems in the split of a value created in a country among other countries and sharing of taxes of this split; the most important of these problems in terms of taxes is that incorrect pricing occurs during product, service and money transaction among multinational corporation group (Işık, 2005: 3). The point that should be emphasized is that the prices that multinational corporations apply among their segments don't constitute a problem economically. Corporations make payments to independent companies when they buy, sell or make other operations under market conditions; similarly, they have to pay specific prices when they transact among their segments.

This price that is applied by dependent corporations among their segments while they buy and sell product, service or similar commercial transactions is called Transfer Pricing (TOBB, 2001: 22). Segmented nations define transfer price as the amount charged by one segment of an organization for a product or service that it supplies to another segment of the same organization." (UN, 2001:3).

It is seen that transfer pricing in transactions of multinational corporations among their allied companies, especially in cross-border transactions is, used for many purposes such as; decreasing tax load and shifting profit from countries that apply high taxes to the countries that apply lower taxes (Soydan, 1995, 293.), for performance audit, for inspecting cash flow in the branches at foreign countries, for minimizing currency risk, and decreasing inflation risk, for reflecting the real situations of costs and incomes and for planning global tax load (Çak, 2008: 37). The process of transferring profit and taxable income among pricing in Main Corporation and allied companies to the countries that apply lower taxes is a big problem for countries. In this way, manipulations in product and service pricing can become a kind of tax evasion if the process is used for bad purposes. In other words, transfer prices that are applied when an entity transfers product or intangible assets to associated entities or when it present service have a positive meaning. Negative meaning of transfer pricing that is forbidden by tax laws occur when prices that are used among associated entities are significantly higher or lower than the prices that are determined among independent individuals under the same or

similar conditions in free market. This situation is called "abusing transfer pricing" in literature (or "artificial transfer pricing" See. Yaltı, 1996: 107). This means breaking tax laws by countries.

Multinational corporations that have economic activities in countries with different taxing authorities use manipulated low or high transfer prices in order to benefit from taxing differences in these countries and they try to maximize their profits by decreasing their global tax loads (Çak, 2008: 37). In this context, the basic goal of artificial transfer pricing is to transfer tax-free profit from a specific real or legal entity or from a country to another through pricing; tax laws try to prevent these applications (Yaltı, 2007: 9). When a multinational corporation recreates or distributes its resources among countries to the detriment of other countries not only causes weakening of the power of related countries, but also negatively affects national income, unemployment rate, consumer prices, production input and balance of payments (TOBB, 2001: 22). Besides these negative effects, when a multinational company make transfer pricing applications different from market price in order to reach some economic goals causes erosion in taxable income; this situation caused many multinational corporations, especially OECD, make various studies and arrangements, create and suggest some directing and guiding principles and models.

In this context, OECD made its first study about international transfer pricing in 1977 as "OECD Model Tax Convention" and in 1979, OECD Financial Affairs Committee published the first international report named "OECD Report Transfer Pricing and Multinational Enterprises". Committee published reports in 1984 as "Three Taxation Issues" and in 1987 as "Thin Capitalization Rules", they were including special issues in terms of transfer pricing. The reports published in 1995 and 1979 were republished with the name Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration. In this report, significant additions were made in 1999, 2008 and 2009. Lastly, the report was republished on July, 22, 2010 (http://www.oecd.org/ctp/transferpricing/). It can be seen in the reports that applications in transfer pricing are extended and updated according to The Arm's Length Principle. In the second chapter of the report, under the title "transfer pricing methods" Traditional Transaction Methods and Transactional Profit Methods were rearranged (OECD, 2010: Chapter I-II-II). In the 1st and 3rd chapters of the report published in 2010, updates were made by taking The Most Appropriate Transfer Pricing Method to the Circumstances of the Case that were accepted in 2009 into consideration; additionally, updates about the application of transactional profit and comparableness analysis were carried out. On the other hand, a title named "Transfer Pricing Aspects of Business Restructurings" was added as the 9th chapter to the report published in 2010 (OECD, 2010:105. etc., 235 etc.).

Countries that take all of these problems into consideration prefer putting transfer pricing rules into practice in order to prevent aforementioned manipulations and to prevent multinational

corporations' taking their profits of out of the country through transfer pricing methods. Almost 70 countries started putting transfer pricing applications into practice in 2012 (PWC, 2012:1).

3. ARM'S LENGTH PRINCIPLE ACCORDING TO OECD TRANSFER PRICING REPORT

The arm's length principle was included in treaties concluded by France, the Segmented Kingdom and the Segmented States as early as the twenties and thirties of these centuries. In a multilateral context the arm's length principle was formulated for the first time in Article 6 of the League of Nations draft Convention on the Allocation of Profits and Property of International Enterprises in 1936. It was incorporated as Article VII in the Mexico Draft of 1943 and in the London Draft of 1946. These articles are substantially similar to Article 9 of the 1963 OECD Convention and Article 9, paragraph 1 of the present OECD and UN Model tax treaties. Articles 9 of the OECD and UN Models are identical (UN, 2001: 6).

In OECD report, arm's length principle is defined as an international standard to be applied in determining transfer prices for tax purposes by OECD member countries. In the report, for the definition of Arm's length principle, 9th article of OECD Model Tax Treatment is taken into consideration. In this article, it is said that: "Conditions are made or imposed between two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have occurred to one of the enterprises, but, by reason of those conditions, have not so occurred, may be included in the profits of that enterprise and taxed accordingly" (OECD, 2010: 23). When independent enterprises transact with each other, the conditions of their commercial and fiscal relations (e.g. the price of goods transferred or services provided and the conditions of the transfer or provision) ordinarily are determined by market forces. When associated enterprises transact with each other, their commercial and financial relations may not be directly affected by external market forces in the same way, although associated enterprises often seek to replicate the dynamics of market forces in their transaction with each other (OECD, 2010: 31). Arm's length principle is proper for being used in many fields of business. For example, it is possible to find a comparable transaction that is made by comparable independent enterprises under comparable conditions according to Arm's length principle during the transaction of product and services and making loan (OECD, 2010: 27).

There are several reasons why OECD member countries and other countries have adopted the arm's length principle. A major reason is that the arm's length principle provides broad parity of tax treatment for members of multinational enterprises (MNEs) groups and independent enterprises on a more equal footing for tax purposes; it avoids the creation of tax advantages or disadvantages that would otherwise distort the relative competitive positions of either type of entity. In so removing these

tax considerations from economic decisions, the arm's length principle promotes the growth of international trade and investment (OECD, 2010: 34). Problems that occur during the application of Arm's length principle are as such (UN, 2001: 34-35-36):

- The absence of good reference product in many cases is, therefore, the first, complication in practice.
- A second problem, also related to comparables, is the use of "secret comparables" by tax authorities. Secret comparables are obtained by tax authorities in audits.
- A third problem concerns the administrative burden.
- The fourth problem is the controversy between countries on the use of methods based on profit.
- The fifth problem in transfer pricing and the application of the arm's length principle is the development of so-called global trade, which has become possible because of the liberalization of trade, the abolition of restrictions on monetary exchange, new communication techniques and information technology.

In the application of arm's length principle, firstly arm's length range is determined. Arm's length range is defined in OECD transfer pricing guide as: "A range independence that is used while determining if a controlled transaction is in accordance with the arm's length principle and determined by applying the same transfer pricing method to more than one comparable data or by applying different transfer pricing methods" (OECD, 2010: 23).

While determining the transfer price of product and service transaction, parties have to apply arm's length principle. Below mentioned 3 traditional method that are determined according to arm's length principle take place in Transfer Pricing Guide for International Companies and Tax Administration: * Comparable Uncontrolled Price, * Resale Price Method, * Cost Plus Method.

In recent years, global split method has taken place in OECD guide besides transactional profit methods (profit split method and net profit margin based on transaction) and arm's length principle. Again, in 2009, OECD formed "The most suitable method for the conditions of the circumstance" which has a significant place in terms of hierarchy among transfer pricing methods. With this new method, OECD ended the discrimination in terms of traditional transaction methods and transactional profit methods, as a result of which, five different methods occurred.

Comparable Uncontrolled Price (CUP): 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: 63).

Comparable price method is the most reliable one among all of the methods in use and it always give correct results. For example, when the product in the transaction is a branded product, price arrangement can be differentiated as the producer differentiates the product for customer demand and as a result of this, sometimes it can be impossible to reach correct results with this method. This is why, companies make product differentiation, namely can adopt strategies in order to strengthen their positions against transfer pricing (Öz, 2005: 298-299).

Resale Price Method: A transfer pricing method based on the price at which a product that has been purchased from an associated enterprise is resold to an independent enterprise. The resale price is reduced by the resale price margin. What is left after subtracting the resale price margin can be regarded, after adjustment for other costs associated with the purchase of the product (e.g. custom duties), as an arm's length principle of the original transfer of property between the associated enterprises (OECD, 2010: 28-29). This method is probably most useful where it is applied to marketing operations (OECD, 2010: 65).

Cost plus Method: Cost Plus Method is a transfer pricing method using the costs incurred by the supplier of property (or services) in a controlled transaction. An appropriate cost plus mark up is added to this cost, to make an appropriate profit in light of the performed (taking into account assets used and risks assumed) and the market conditions. What is arrived ad after adding the cost plus mark up to the above costs may be regarded as an arm's length principle of the original controlled transaction (OECD, 2010: 26). This method probably is most useful where semi finished goods are sold between associated parties, where associated parties have concluded joint facility agreements or long-term buy and supply arrangements, or where the controlled transaction is the provision of services (OECD, 2010: 71).

Transactional Net Margin Method: A transaction profit method that examines the net profit margin relative to an appropriate bas (e.g. costs, sales, assets) that a taxpayer realises from a controlled transaction (OECD, 2010: 30).

Net profit share is affected less from the differences among transactions when compared to prices, this is the strong point of net profit margin. But it can be affected from the elements that either do not affect price margin or have minimum effect on prices while determining net profit from price margin, and this fact can complicate determination of net profit share. This is the weak point of the method (Öz, 2005: 302).

Transactional Profit Split Method: This method seeks to eliminate the effect on profits of special conditions made or imposed in a controlled transaction by determining the division of profits that independent enterprises would have effected to realise from engaging in the transaction or transactions.

This method first identifies the profits to be split for the associated enterprises from the controlled transactions in which that associated enterprises are engaged. The main strength of this method is that it can offer a solution for highly integrated operations for which a one-sided method would not be appropriate (OECD, 2010: 93).

4. TRANSFER PRICING REGULARIZATIONS IN TERMS OF TURKISH TAX LEGISLATION

"Application of disguised profit distribution" that was in 5422 number Corporate Tax Law that was abolished, was rearranged under the title "Concealed Gain Split through Transfer Pricing" which is in the 13th article of 5520 number Corporate Tax Law that was published in 2006. In this rearrangement, developments in international field and especially regularizations of OECD were taken into consideration.

The aim of this regularization is to prevent tax loss through the abuse of transfer pricing. Related parties and "arm's length principle" that form the basis of OECG guide were taken as the bases and the concept of concealed gain through transfer pricing is defined as: "Erosion of tax assessment by related parties by determining the cost or price of product or service transactions different from arm's length principle and transferring the income to other related parties or partners without taxing profit of company" (GİB, 2010: 2).

As can be understood from the definition, in order to talk about concealed gain split through transfer pricing: (a) Product or service transaction should have been done by an organization, (b) Said organization should have been carried out product or service transaction with related people, (c) In this product or service transaction, cost or price determination should have been carried out in defiance of "arm's length principle" (for detailed information please see GİB, 2010).

When Turkish Tax Regulations are taken into consideration, it is possible to see that real entities are in the scope of transfer pricing besides fully amenable and limited taxpayer organizations. In this context, the statement of: "If attempter carry out product or service transaction with related parties with price or cost that are contrary to arm's length principle, it is deemed that differences between the applied price or cost, to the detriment of the organization are considered withdrawn**"** (GVK artc. 41/5), was included with the provision of the article added to the Income Tax Law in 2007. With this addition, transfer pricing application is extended and it included partnerships between unincorporated

associations and real entities that are liable to income tax in terms of commercial and income from agriculture, partnership of unlimited companies and unlimited partnership of simple partnership and join stock company in commendams. In addition to this, by adding the statement that: "In the related parties and transactions with these people, in terms of the issues that are not included in this article, the provision of 13th article of Corporate Tax Law number 5520 is applied", it is ensured that issues about transfer pricing is valid for real entities liable to income tax law.

The concept of associated person in the context of 13th article of Corporate Tax Law is as such: "Real entities or corporations that are related to partners of corporations and partners and corporations; real entities or corporations that are directly or indirectly related to or under the supervision in terms of management, supervision or capital." Wife or husband of partners, lineal kinship of them and kinship in the collateral line including third degree relatives and brother-in-law kin are accepted to be related parties."

It is seen that in legislative arrangements, associated person, arm's length principle, arm's length range, methods that will be used in determination of transfer price and advance pricing agreements are in parallel with the OECD guide mentioned above.

5. ADVANCE PRICING AGREEMENTS IN TURKISH TAX SYSTEM

Concealed gain split through transfer pricing application has been applied in many developed countries, especially United States of America and advance pricing agreements is one of the significant issues in these processes. Advance pricing agreements about transfer pricing is a very technical issue; the agreement is based on agreeing of administration-liable beforehand about the determination of price determination methods that will be used between them.

5.1. Legal Character of Advance Pricing Agreement

An Advance Pricing Agreement (APA) (or "arrangements" – as referred to by the OECD in its 2010 Transfer Pricing Guidelines, and by various other countries) is a framework for the tax administration and a taxpayer to agree that, provided the taxpayer files its tax return in accordance with the agreed APA conditions for the APA covered years, the tax administration accepts the tax outcomes as being consistent with arm's length outcomes, and thereby refrains from auditing the taxpayer's international transaction(s) covered by the APA (OECD, 2010: 168).

The objective of an APA is to deliver certainty, for both the taxpayer and the tax authorities, of the tax outcomes of the taxpayer's international transactions by agreeing in advance the arm's length pricing methodology (ies) to apply to the taxpayer's international transactions covered by the APA. An APA may thus remove an audit threat (eliminate the need for an audit), deliver a particular tax outcome based on the terms of the agreement, and often substantially reduce compliance costs over

the term of the APA. This enables a more efficient and effective management of transfer pricing compliance requirements by bringing fairness, simplicity and efficiency, which may otherwise lead to protracted and disputed dealings between a taxpayer and the tax authorities, including difficulties involved in resolving economic double taxation. Thus, for a taxpayer, an APA can be an effective tool for better managing the tax risks arising from international transactions. For tax authorities, an APA can similarly be an effective tool for better and more efficient administration of the transfer pricing laws. Consequently, APAs provide a win-win situation for all the parties involved (OECD, 2010: 169).

Advance pricing agreement is an obligatory booking note about the pricing method that will be used in controlled transactions in a specific period, in order to determine corporation's internal pricing plan and accordingly determine tax liability. The agreement is made around the volunteer negotiations in a corporation that has allied entity can be single, double or more sided according to criterion of the number of tax administration that should be taken into consideration. The agreement can be made with one, two or more countries' tax administrations.

Transfer pricing refers to the prices at cross border transactions and application of the methods of transfer pricing are possible only in the transactions whose actors are in the same country; on the other hand, advance pricing agreements are completely planned for international transactions and can be applied in group transactions of corporations that operates in more than one country.

In the related clause of Corporate Tax Law, it is stated that advance pricing agreements can be prepared with Ministry of Finance, this shows that one sided agreements are accepted (Yaltı, December 2006, 13). Although they are partly similar to compromise and advance ruling by finance ministry**,** advance pricing agreements have specific differences and they are temporary agreements (Yaltı, Aralık 2006, 14-15). According to the regulation in Corporate Tax Law, they are valid for maximum three years. Rules about extending agreements are determined by Cabinet Decision (See. 2007/12888 number Cabinet Dec., R.G. 06.12.2007/26722).

Advance Pricing Agreements are evaluated by administration in the frame of legal regulations and cases explained above. Namely, administration has the full "authority". Whether or not administrative power is in accordance with legality is a controversial topic and has some question marks.

As advance pricing agreements are the results that are reached after the evaluation of best method (bargaining) on the basis of data that are shown to the administration, and as they come to a "certain" agreement as legal results, it will not be liable to judicial audit. When an advance pricing agreement isn't made, during audit, administration evaluates if the advance pricing method preferred by taxpayer gives results in accordance with arm's length principle and if it is lawful; and if transfer pricing method's results is not in accordance with arm's length principle, additional tax assessment

will be made and this process is under judicial control which shows that "discretionary decision" mechanism in advance pricing agreements is applied.

Administration that predetermines which transfer pricing rules will be used on individual taxpayer uses its authority of discretional power and set rule, it passes judgment while auditing if the same taxpayer keeps to the agreement or not, and it is opt out of judgment mechanisms. But after examining taxpayer in terms of taxpayers that don't make advance pricing agreements, it makes judgment, about if transactions are carried out with the correct method and if they are compatible with 13th clause of corporate tax law; and this judgment is under juridical control, it is impossible to talk about discretion here (For more information, please see. Yaltı, December 2006, p.19-27).

According to Council of Minister's Decision, information and idea exchange with taxpayer at every stage of advance pricing agreement should be carried out. On the other hand, each agreement is special to only related taxpayer and concerns this taxpayer. So, it is impossible to use these agreements in other transactions as precedents or as evidences for transactions.

5.2. Advance Pricing Agreement Beneficial Method

5.2.1. Who can benefit from APA?

According to the explanations under the title of "Agreement Method with 6th Ministry of Finance Revenue Administration" in the general communiqué serial number 1 Concealed Gain split through transfer pricing method published by the Ministry of Finance, corporate taxpayers are included in the advance pricing agreement. According to the arrangements;

- International transactions of taxpayers, registered in Large Taxpayers Office starting from 01.01.2008, with related party.

- Starting from 01.01.2009, it is possible for below mentioned taxpayers consult to Administration about the methods for below mentioned transactions: Overseas transactions of corporation taxpayers with related party, transactions of all corporation taxpayers with corporation taxpayers that transact in free zones within scope of related party, transactions of corporation taxpayers that transact in free zone with corporation taxpayers that don't transact in free zones within scope of associated people.

Although it is stated in both legal regulations and in Council of Minister's decision that the application will be valid for the entire limited and fully responsible taxpayers, giving the right to make advance pricing agreements to a limited group of people is against the principal of equality. The lawmaker aimed at validating the issues about transfer pricing for real entities who are income tax liable by stating in the Income Tax Law that: "In terms of the issues that are not included in this article

about related parties and transactions that are carried out with them, provision of 13th article of Corporations Tax Law number 5520 is applied". This situation should be revised and corrected as it can cause unfair competition in terms of real taxpayers; real entities that have commercial income may need advance pricing agreements. But unconstitutional present regulations don't allow these people make the agreements and it should be corrected as soon as possible.

5.2.2 Application Process

As mentioned above, with the provision of Corporations Tax Law's 13/5th article, it became possible to make agreements by applying to Ministry of Income, Revenue Administration about the method to be determined during transactions of taxpayer with related parties. It is stated that, when the method is settled over, it will become definite under the determined conditions and period which will not exceed three years, and it will not be criticized under determined conditions. So if a taxpayer has hesitations about the method he/she will apply, he/she can apply the Administration with necessary information and documents and can demand determination of method for a specific period of time. Advance pricing agreements periods are maximum 3 years and they enure starting from the time they were signed. For instance, the process that continues after the application of taxpayer on 17/03/2008 is ended on 22/06/2009 ended with the agreement signed by Administration and taxpayer. In this case, advance pricing agreement clauses will be valid starting from the date on which the agreement is signed, namely 22/06/2009.

Process of advance pricing agreement starts with the written application of taxpayer and taxpayer has to present minimum information and documents determined by the context of official statement to the Administration. Taxpayer that applies for advance pricing agreement has the right to demand bilateral and multilateral advance pricing agreement. Administration evaluates the application and if it is seen that advance pricing agreement concerns more than one country, it can make evaluation in the context of the agreements provided that there is agreement/agreements in related country/countries. Administration's evaluation of taxpayer's application about the method to be determined in the transactions of taxpayer with related parties is mentioned below:

Pre-Assessment: The application is evaluated firstly in terns of information and documents that are presented. This kind of a pre-assessment doesn't mean that there will definitely be an advance pricing agreement between taxpayer and Administration.

Basic information and documents that should be presented by taxpayers to Administration are shortly as below: * Written application, * Transfer pricing methods that are preferred to be applied (with all reasons and analysis) * Intangible assets and information about rights, * Different accountancy standards and methods of related parties (if there is any), * Product price lists and

production costs in the accounting period of application date, * Pricing policy between corporations that is applied on transactions among related parties, * Trading volume, invoice, bank receipt and such documents about the transactions with related and unrelated parties during accounting period including application date, * Related parties' financial statements, income or corporation tax statement examples of the last three years, examples of the agreements about foreign transactions, * Last three years' financial data and their documents that support the transfer pricing method that wanted to be applied, * In case of two or more comparable transactions, determined arm's length price and the method that is applied while determining it, * Other necessary documents for determining arm's length price.

In the light of these information and data, other additional information and documents that are determined to be necessary by the administration shall be presented by taxpayer. With the application of taxpayers about determination of method to be applied in the transactions with related parties, assessment process of administration starts.

Analysis: After completing necessary data, assessment of comparable transactions, used assets, other corrections, applicable methods, articles of agreement and other basic issues are carried out.

Acceptance or Declining of Agreement: As a result of the analysis by administration, application of taxpayer can be accepted without any change, it can be accepted on condition that some necessary changes are made or it can be declined. If administration accepts application, advance pricing agreement is signed between administration and taxpayer. Signing of advance pricing agreement doesn't mean that taxpayer or taxpayers will not be analyzed about the subject of agreement.

Administration pursuits if taxpayer comply with the terms and/or the terms are still valid through the annual report presented by taxpayer during period determined in agreement.

Renewal of agreement: Taxpayer can demand renewal of a present advance pricing agreement. In this case, taxpayer should apply Administration at least 9 months before the end of agreement. In the application, taxpayer should present information and document which show if any change occurred in the conditions and assumptions stated in the present agreement, if any change is necessary in case of the renewal of agreement besides documenting that determined method meet the most suitable arm's length principle according to the transactions' nature.

Revising of Agreement: An advance pricing agreement that is in force and signed between administration and taxpayer can be revised if below mentioned conditions occur:

* When a critical assumption in the agreement doesn't occur, * When a meritorious change in terms of agreement occurs or terms determined in the agreement lose validity, * When changes that will affect agreement in legal regulations, including agreements for preventing double taxation, occur, * When administration/administration of the other country revises, abolishes or abrogates bilateral or multilateral advance pricing agreements.

Abrogation of agreement: In below mentioned conditions, administration can unilaterally abrogates a present advance pricing agreement starting from the date in which it was signed or can say that it has never happened and forward taxpayer to tax audit:

* When taxpayer doesn't comply with the terms and conditions mentioned in advance pricing agreements, * When it is determined that information and documents, presented by taxpayer during application or in other stages (including annual report), are deficient, deceptive or wrong. On the other hand, an annual report about Advance Pricing Agreement is sent to Administration within the period of giving corporation tax statement annually; if this report is not presented on time, present agreement can be abrogated starting from the beginning of accounting period with which the report is related.

5.2.3 Fee Amount in Advance Pricing Agreements

According to the section with the title "XII-Fees of method determination agreement for transfer pricing" at the end of (8) number Tariff of Act of Fees number 492"; 1-Application Fee 38.147,30 TL, 2- Renewal Fee 30.517,75 (General Communiqué of Act of Fee serial number 65, R.G. 28159/31.12.2011).

In our opinion, application fees necessary for advance pricing agreements are very high for Turkey. When we make a research in order to compare fees, and ask that "Is there a specific amount of fee in countries that apply transfer pricing?" We see that there is not such an amount in most countries; and amount that are applied in other countries are much lower than Turkey. According to pronouncement, although it has been more than 5 years, only one taxpayer could benefit from advance pricing agreement in Turkey. (http://www.gib.gov.tr/). In 2012, only one taxpayer is about to complete advance pricing agreement.

In the table below, application fee amounts that are determined for making advance pricing agreement with financial administrations in foreign countries are presented. As can be seen in Table-1, there are totally 37 countries who don't apply fee, accept application without fee, or who don't have any regulation about fee. In other words, taxpayers in these countries don't have to pay any fee in order to benefit from advance pricing agreements.

TABLE-1: COUNTRIES THAT DO NOT PAY FEE IN ADVANCE PRICING AGREEMENTS IN SCOPE OF TRANSFER PRICING - YEAR 2011	
Not applicable	Argentina, Brazil, Chile, Ecuador, Finland, India, Indonesia, Kenya, Norway, Philippines, Russia, South Africa, Vietnam, Greece
No fee	Australia, Belgium, China, France, Ireland, Japan, Kazakhstan, Korean, Luxemburg, Holland, Singapore, Spain, Swiss, Taiwan, Thailand, United Kingdom (England), Hong Kong
Not Specified	Israel, Italy, Peru, Venezuela (Only expenses are covered by taxpayer), Malaysia (Fee is not specified yet in this country)
No Regulations To Date	Columbia

***Resource**: Transfer Pricing Country Profile, OECD (www.oecd.org/ctp/tp/countryprofiles)*

***2011 Global Transfer Pricing, Desktop Reference,**http://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Services/Tax%20services/Transfer%20pricing/TP_strategymatrix_2011.pdf.*

15 countries that have fee application are presented in table-2. Countries including Turkey determined fee amount according to their currencies.

TABLE-2: COUNTRIES THAT APPLY FEE IN ADVANCE PRICING AGREEMENTS IN SCOPE OF TRANSFER PRICING - YEAR 2011	
Country	**Fee amount**
Austria	- According to sales amount of taxpayer, between 1.500 EURO and 20.000 EURO
Germany	- 20.000 EURO
Canada	- Fixed fee amount for small business: 5.000 $ - Other taxpayers have to cover the entire cost for a new agreement and for works in order to renew agreement.

Czech Republic	- 10.000 Czech Koruna (Approximately 500 USD, 375 EURO)
Denmark	- Multilateral agreements 300 Denmark Crown Bilateral agreements: No fee.
Sweden	- Application Fee 15.000 EURO. - Renewal Fee 10.000 EURO
Hungary	- For bilateral agreements, 3-8 million Hungarian Forint - For multilateral agreements, 5-10 million Hungarian Forint
Poland	Generally, as %1 of transaction value, below mentioned numbers are accepted: - Domestic multilateral agreements 5.000-50.000 Poland Zloty - International multilateral agreements 20.000-100.000 Poland Zloty. - International Agreements (for bilateral or multilateral agreements) 50.000-200.000 Poland Zloty.
Portugal	- According to endorsement of taxpayer varies between Application Fee 3.150 EURO and 35.000 EURO - Renewal Fee is %50 of Application Fee.
Romania	- Application Fee varies between 10.000 EURO and 20.000 EURO - Renewal Fee is between 6.000 EURO and 15.000 EURO
Slovakia	- Fee is ass low as 10.000 EURO.
Turkey	- Application Fee 33.172,00 TL - Renewal Fee 26.537,00 TL (Approximately 15.200 USD)
Segmented States of America	- Application 50.000 USD - Routine Renewal 35.000 USD - Unusual Renewal 50.000 USD - For small businesses 22.500 USD (same for renewal) - Make an arrangement or completing agreements 10.000 USD

New Zealand	- No fee for bilateral agreements. Expenses are covered by taxpayer in unilateral agreements.
Mexico	- Application Fee: 780 USD, Report price during agreement 156 USD. Prices are increased in parallel with inflation.

***Reference**: 2011 Global Transfer Pricing, Desktop References, DELOITTE.*

http://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Services/Tax%20services/Transfer%20pricing/TP_strategymatrix_2011.pdf

As can be seen in Table-2, while in the countries which apply fee, application fees for advance pricing agreements are reasonable amounts, in Turkey and United States of America, fee amount are much higher than the average amount. According to 2011 data, taxpayers that make application and want to benefit from advance pricing agreements have to pay an amount between 22.500 dollars and 50.000 dollars; this amount is approximately 19.000 dollars in Turkey. In addition, these amounts are determined every year and they increase.

CONCLUSION

In Turkish Tax Legislation, borders of disguised profit distribution application is determined more clearly in 2007; it is related to transfer pricing and its name is changed into Disguised profit distribution by way of transfer pricing. The application basically includes issues of various transactions and tries to prevent tax loss; one of the significant titles of the application is advance pricing agreements. Although it is possible to benefit from advance pricing agreements in Turkey, there are some basic questions about the process. The first of these problems is that taxpayer groups are limited. The application only includes corporation taxpayers, so real entities that have commercial income and are subject to balance sheet basis are excluded from application. In addition, this situation which is against the principle of equality is not accepted by legal regulation; it is accepted by a sub-regulation, with the Council of Minister's Decision. This is also against the principal of legality. The second main problem is that the discretional power belongs to administration and it is a process that can not be resorted to the judgment. Administration has a discretional power that is based on regulations that are not precise, so arbitrary treatments are possible in these processes. This situation is legally problematic. On the other hand, it is not possible to object decisions, which is another controversial issue. But, it is stated the 125. article of constitution states that all kinds of transactions and processes have to be under judicial control. Another main problem is that fee amounts are very high. Turkey is one of the few countries that apply fee, and additionally, Turkey is one of the countries that apply highest amount of fees. In our opinion, except an income to treasury, neither taxpayers, nor

administrations have any benefit from this application. Taxpayers already have to pay various costs and they struggle for standing in the market under national and international competitions; so most of them don't want to pay such high amounts of fee. In addition, even having an agreement doesn't exclude taxpayers from inspection mechanism. For these reasons, taxpayers will not be able to benefit from advance pricing agreements effectively. Besides this, Administration of Finance will not be able to benefit from an instrument by which it will closely follow conditions in the market and it will not be able to have information about many taxpayers. But if fee amount was lower, many taxpayers would want to negotiate with Revenue Office. So, high amount of fees have no advantage except short-term profits for public treasury. While determining such high amount fee, multinational corporations and economically effective groups that have high endorsements are taken as basis, but what is the fault of taxpayers except the ones in these groups? It is also controversial that while in some countries, a special amount is determined for SMEs, in Turkey there is not such an application in Turkey. We think that after according a right and providing convenience to taxpayers, posing a serious actual obstacle (high fee amount) is inappropriate both in terms of fiscal and juridical goals. On the other hand, we want to state that aforesaid numbers are too high to be despised for many taxpayers, defined as SME who are very important in Turkish economy.

On the other hand, if application of taxpayer is not accepted in the stage of agreement assessment, fee amount that is paid becomes completely meaningless. Fee amounts are stated in the 8 number tariff of Act of Fees. This tariff's title is: "Charter, Certificate and Diploma Fee", but taxpayer doesn't get charter, certificate or diploma during application process. Namely, taxpayer has to pay fee neither for a service nor for benefiting from a privilege (Doğrusöz, 2008). In order to be encouraging, organizer or be productive for parties, low fees should be taken during application process and if parties come to an agreement, then higher but reasonable amount of fees can be taken according to our opinion.

Another important issue is the question if the obligation of paying such high amounts of fee is an obstacle to the "right to legal remedies". According to 36th article of Constitution, "everybody has the right to fair hearing with claim and defense as claimant or defendant in front of judicial authorities by benefiting from with legal ways. None of the courts avoid rule a case that is in its province or duty". Limiting and complicating the right to legal remedies deprives society and individuals from law-justice assurance which is the most important assurance. Taxpayers' obligation to pat high amount of fee is not a "deterrent factor". So, we think that this situation creates a big, significant obstacle to right to legal remedies and it is unconstitutional. So, we think that determined application fee amount for advance pricing agreements in transfer pricing application is very high and a different amount should definitely be determined for SMEs that are as significant as big companies in the market. Otherwise, it is obvious that these fees are significant obstacles.

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