

ITSG Annual Conference

October 2018

Transfer Pricing Leading Case Laws and Recent Developments

转让定价主要案例法和法律
近期发展

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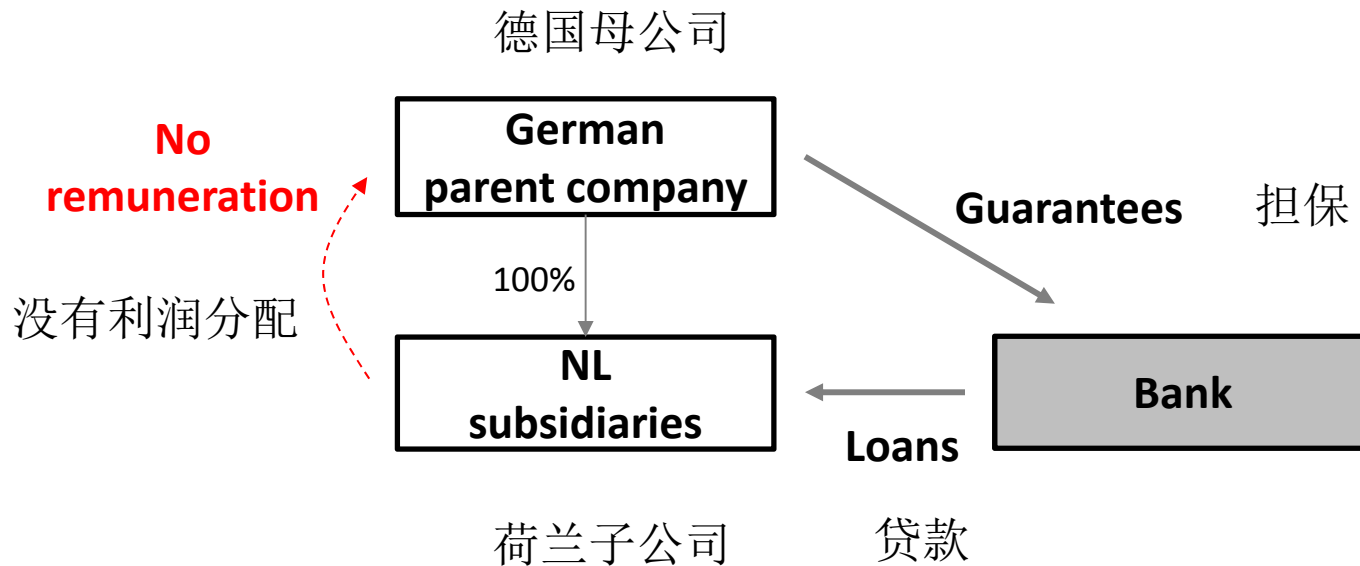
Agenda

- Update on TP Developments within the EU (focus on Germany and the Netherlands) 欧盟内部TP发展的最新情况（关注德国和荷兰）
- Update on TP Developments in Israel 关于以色列TP发展的最新情况
- World- Wide Leading TP Cases –全球领先的TP案例 -
 - The Chevron Case in Australia 澳大利亚雪佛龙案
 - The Coca Cola case in the US 美国的可口可乐案
- Discussion on the implementation of BEPS TP reporting in several jurisdictions 关于在若干司法管辖区实施BEPS TP报告的讨论

Leading Cases within the EU

欧盟主要案例

- CJEU 31 May 2018, Hornbach-Baumarkt (C-382/16)



Leading Cases within the EU

- **CJEU 31 May 2018, Hornbach-Baumarkt (C-382/16)**

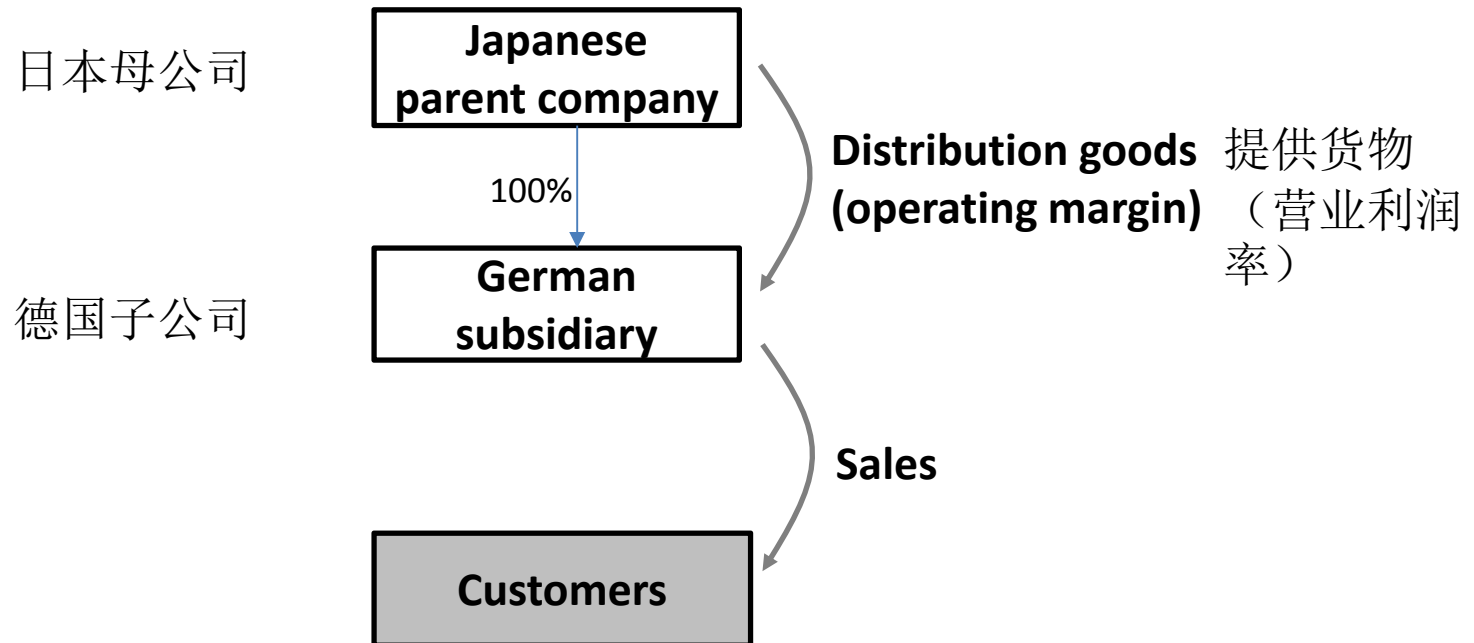
- German parent guarantees loans affiliates without any remuneration 德国母公司保证贷款关联公司没有任何报酬
- German tax authorities argue unrelated third parties would have agreed remuneration for guarantees and hence tax fictitious income 德国税务机关认为，不相关的第三方会同意担保的报酬，从而对虚拟收入征税
- Taxpayer argues before Rheinland-Pfalz Finance Court (*Finanzgericht*): 纳税人在 Rheinland-Pfalz Finance Court (Finanzgericht) 之前辩称：
 1. German TP legislation conflicts with EU freedom of establishment as it leads to unequal treatment of transactions with other Member States (no similar corrections for domestic transactions) 德国的TP立法与欧盟的成立自由相冲突，因为它导致与其他成员国的交易处于不平等待遇（对国内交易没有类似的修正）
 2. German legislation is disproportionate as it provides no opportunity to present commercial justification 德国立法不成比例，因为它没有机会提出商业理由

Leading Cases within the EU

- CJEU 31 May 2018, Hornbach-Baumarkt (C-382/16)
 - CJEU rules German TP legislation is consistent with EU law:欧洲法院规定德国TP立法符合欧盟法律:
 - TP legislation inherently restricts freedom of establishment; **BUT** TP立法固有地限制了建立自由;
 - Such restriction is justified by need to preserve balanced allocation of taxing rights between Member States这种限制是合理的，因为需要保持会员国之间平衡的征税权利分配
 - CJEU also confirms right to provide counter evidence:欧洲法院还确认提供反证的权利:
 - Position as shareholder of non-resident company may be taken into account in determining whether there is sufficient commercial justification for not non-arm's length related-party transaction在确定是否有足够的商业理由不与非公平交易关联方交易时，可以考虑作为非居民公司股东的位置
 - Case referred back to German court案件转回德国法院

Leading Cases within the EU

- CJEU 20 December 2017 Hamamatsu Photonics (C-529/16)



Leading Cases within the EU

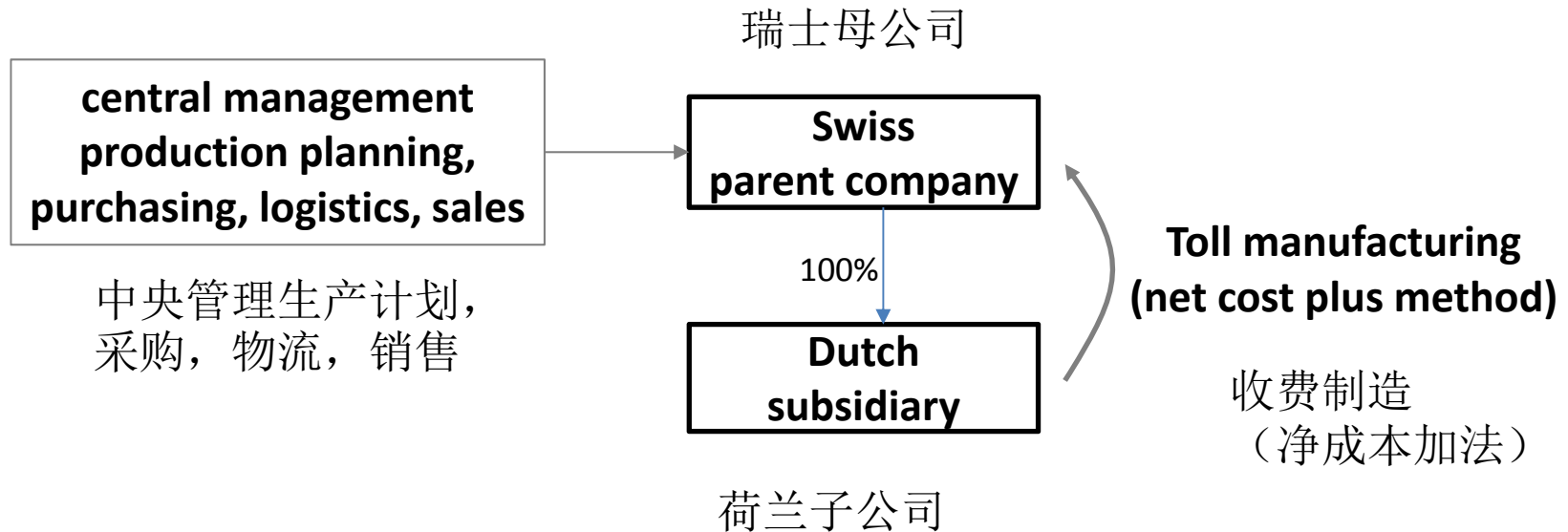
- **CJEU 20 December 2017 Hamamatsu Photonics (C-529/16)**
 - German subsidiary reports target profit based on APA德国子公司根据APA报告目标利润
 - German authorities refuse refund of custom duties on year end adjustments since these cannot be allocated to individual imported goods德国当局拒绝退还年终调整的关税，因为这些不能分配给个别进口货物
 - Munich Finance Court (*Finanzgericht*) requests preliminary ruling on whether transfer price can be used as customs value if composed of:慕尼黑金融法院（*Finanzgericht*）要求初步裁定转让价格是否可用作海关价值，如果包括：
 1. amount initially invoiced (and declared); plus or minus最初开具发票（并宣布）的金额;加或减
 2. year end adjustment using allocation key (flat-rate) without subsequent debit charge or credit年末调整使用分配关键（统一费率），没有后续借记费用或信贷

Leading Cases within the EU

- **CJEU 20 December 2017 Hamamatsu Photonics (C-529/16)**
 - CJEU confirms:欧洲法院证实:
 1. transaction method forms basis for customs valuation, unless actual price cannot be determined交易方法是海关估价的基础，除非实际价格无法确定
 2. adjustment of transaction value is limited to specific circumstances, such as defected or damaged goods交易价值的调整仅限于特定情况，例如货物缺陷或损坏
 - CJEU rules that absent a debit charge or credit, EU Customs Code does not allow year end adjustments using allocation key (flat-rate) to be taken into account for determining customs valueCJEU规定，如果没有借记费用或信用证，欧盟海关法规不允许使用分配密钥（统一费率）进行年终调整以确定海关价值
 - CJEU adds that this may be different if customs authorities can verify whether adjustment must go up or down欧洲法院补充说，如果海关当局可以核实调整是否必须上升或下降，这可能会有所不同

Leading Cases within the EU

- Court Zeeland-West Brabant (NL), 19 September 2017



Leading Cases within the EU

- **Court Zeeland-West Brabant (NL), 19 September 2017**
 - Swiss principal (HQ with app. 100 employees) takes on management of production planning, purchasing, logistics and sales, so that operating companies are no longer exposed to related financial risks 瑞士负责人（总部拥有100名员工）负责生产计划，采购，物流和销售的管理，使运营公司不再承担相关的财务风险
 - Previous legal arrangement is terminated, for which NL operating company receives compensation payment of EUR 28 million 以前的法律安排终止，NL运营公司收到2800万欧元的赔偿金
 - Taxpayer prepares several reports to evaluate compensation 纳税人准备了几份报告以评估薪酬
 - Toll manufacturing agreement is concluded between Swiss principal and operating companies (including NL) based on cost plus 10% 瑞士本金和运营公司（包括NL）签订了收费制造协议，基于成本加10%
 - Taxpayer had also adequately substantiated net cost plus method used to remunerate its (toll) manufacturing function 纳税人还充分证实了净成本加上用于支付其（收费）制造功能的方法

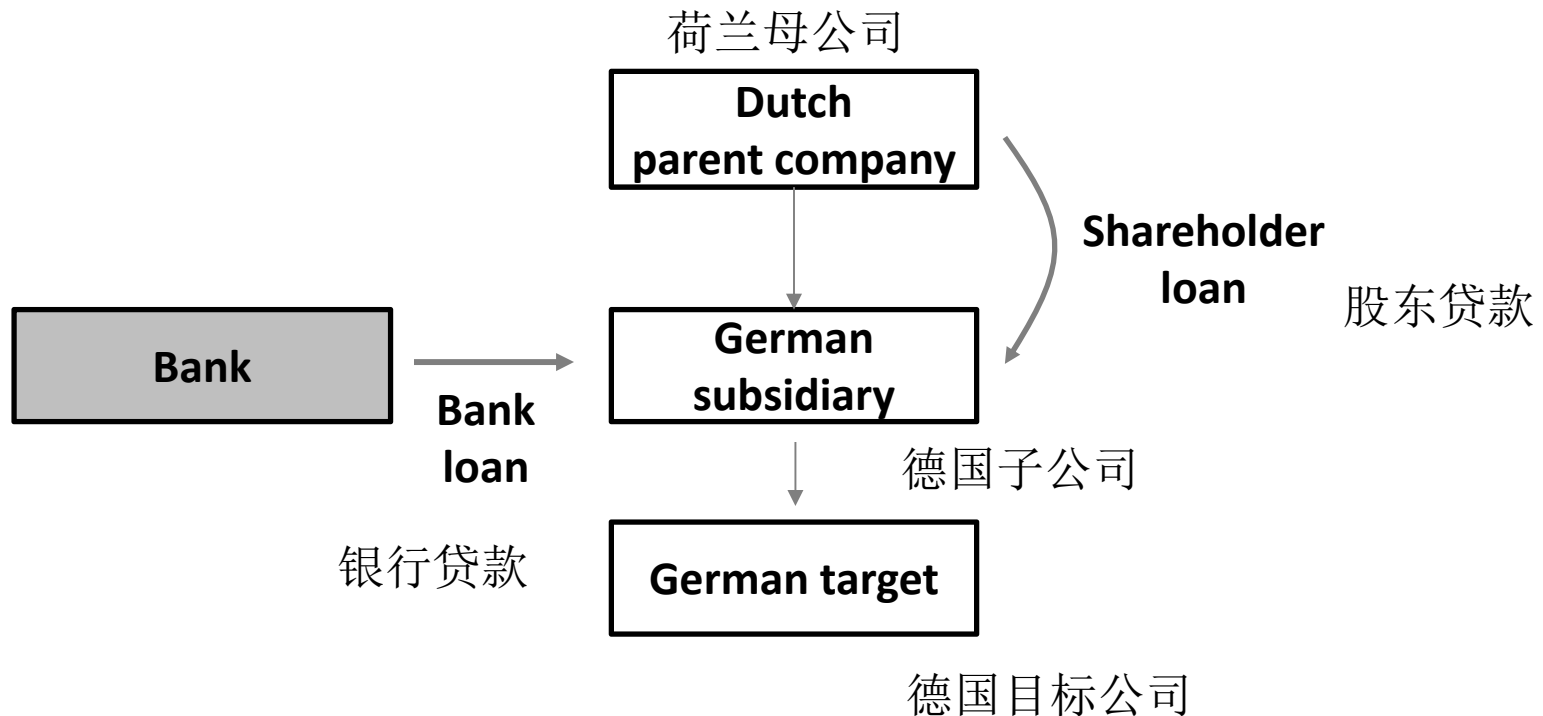
Leading Cases within the EU

- **Court Zeeland-West Brabant (NL), 19 September 2017**

- Dutch tax authorities argue key core functions in the Netherlands have not substantially changed upon moving headquarters to Switzerland, meaning that amount of compensation payment must be adjusted to EUR 185 million (*i.e.*, almost a factor 7) 荷兰税务机关认为荷兰的主要核心职能在将总部迁至瑞士时没有实质性改变，这意味着补偿金额必须调整为1.85亿欧元（即几乎是7倍）
- The Court rules that since applicable TP documentation requirements were met, there is no ground for reversal of burden of proof 法院裁定，由于符合适用的TP文件要求，因此没有理由撤销举证责任
- The Court also rules that even if TP documentation requirements had not been met, reversal of burden of proof would require identification of specific defects in taxpayer's administration 法院还裁定，即使没有达到TP文件要求，撤销举证责任也需要确定纳税人管理中的具体缺陷。
- Dutch tax authorities have appealed against the Court's decision 荷兰税务机关对法院的裁决提出上诉

Leading Cases within the EU

- Finanzgericht Köln (Cologne, Germany), 29 June 2017



Leading Cases within the EU

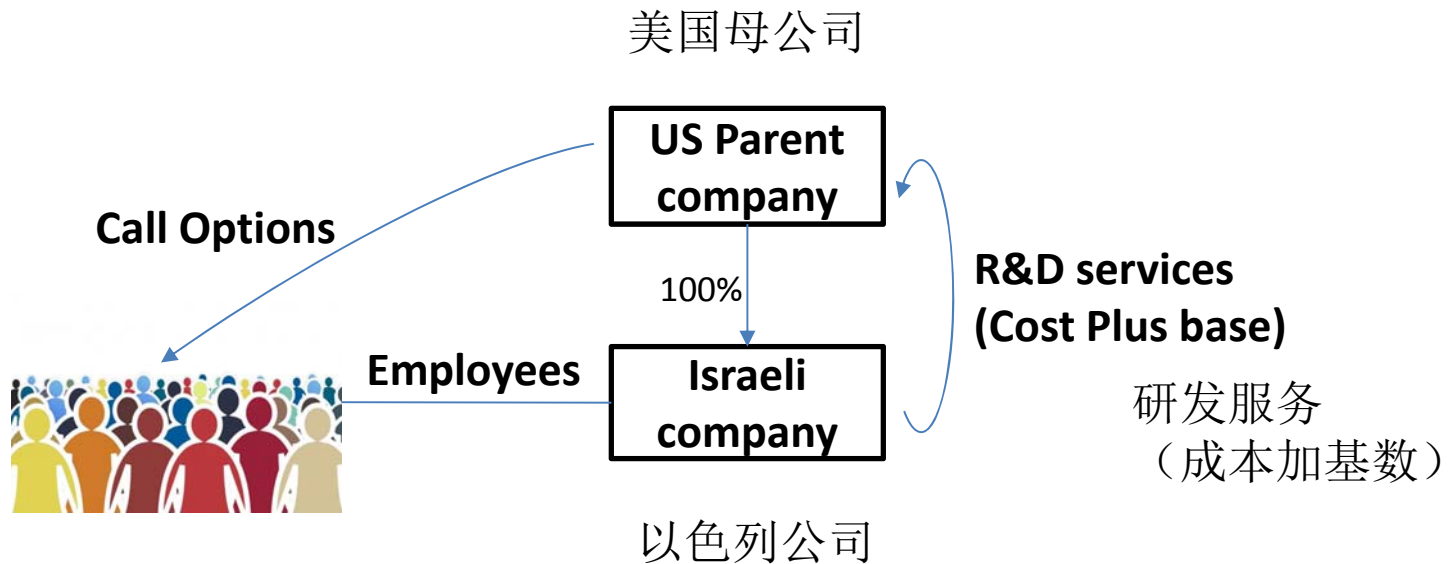
- **Finanzgericht Köln (Cologne, Germany), 29 June 2017**
 - German company finances (domestic) acquisition with mixture of:德国公司财务（国内）收购与以下混合：
 1. bank debt银行债务
 2. shareholder loan from Dutch parent荷兰母公司的股东贷款
 - Taxpayer performs benchmark study to determine interest on shareholder loan纳税人进行基准研究以确定股东贷款利息
 - German tax authorities ignore outcome of benchmark study arguing external CUP (read: Bloomberg search for comparable instruments) used for TP report is not desirable / necessary in situations where internal CUP (bank loan) is also available德国税务机关忽视基准研究的结果，认为在内部银联贷款（银行贷款）也可用的情况下，用于TP报告的外部银联（读：彭博搜索可比工具）是不可取/必要的

Leading Cases within the EU

- **Finanzgericht Köln (Cologne, Germany), 29 June 2017**
 - Taxpayer argues that T&C of bank debt are not sufficiently similar to T&C of shareholder loan, meaning that internal CUP cannot be used 纳税人辩称，银行债务的T&C与股东贷款的T&C不够相似，这意味着内部银联不能使用
 - The Finance Court confirms tax authorities' view that maximum interest deductible on shareholder loan is equal to bank interest, although possibly adjusted for differences in terms of security rights 财务法院确认税务机关认为股东贷款的最大利息扣除额等于银行利息，尽管可能根据担保权的差异进行调整
 - Query whether German practice is in line with OECD TP guidelines 询问德国的做法是否符合OECD TP指引
 - Query whether using corporate bonds (rather than syndicated loans) as external CUP for interest benchmarks would change outcome 质疑使用公司债券（而不是银团贷款）作为利率基准的外部银联将改变结果

Leading Cases in Israel

- Kontera and Fnisar, April 2018 (Israeli Supreme Court)



Leading Cases in Israel

- **Kontera and Finisar, April 2018 (Israeli Supreme Court)**
 - The Court addressed the question whether companies using the cost plus method should include stock-based compensation costs in the cost plus base calculation.法院解决了使用成本加成法的公司是否应在成本加基数计算中包括基于股票的补偿成本的问题。
 - The Court accepted the ITA's position that stock-based compensation costs are an integral part of the business operation and accordingly should be included in the cost plus base calculation.法院接受了ITA的立场，即基于股票的补偿成本是业务运营的一个组成部分，因此应包括在成本加基数计算中。

Leading Cases in Israel

- **Stock-based compensation costs**

- Similar dispute was discussed in the US Court of Appeals in the **Xilinx case**, which addressed the question whether Stock-Based Compensation (SBC) should be included in the costs shared under a cost sharing arrangement (CSA). 美国上诉法院在Xilinx案件中讨论了类似的争议，该案件解决了股票补偿（SBC）是否应纳入成本分摊安排（CSA）下共享的成本的问题。
- The Court held that a CSA did not have to include SBC costs under the applicable regulations at that time, based on the fact that arm's length parties do not share SBC costs. 法院认为，根据公平交易双方不分享SBC成本的事实，CSA当时不必在适用法规下包括SBC成本。

Leading Cases in Israel

- **Stock-based compensation costs**

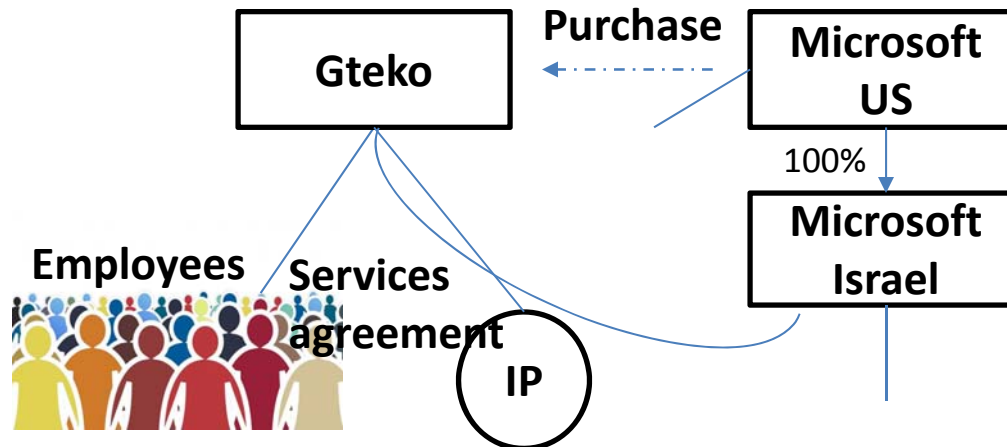
- Following the Xilinx case, the regulations were amended so that CSA's must include SBC costs. The new regulations were challenged in the **Altera case**, which addressed the inclusion of SBC costs under a CSA according to the new regulations. The Court held that the new regulations validly require SBC to be included under a CSA.

遵循Xilinx案例，对法规进行了修订，以便CSA必须包含SBC成本。新法规在Altera案件中受到质疑，该案件根据新规定解决了CSA在SCA下的成本问题。法院认为，新规定有效地要求将SBC纳入CSA。

Leading Cases in Israel

- Gteko Ltd (Microsoft), June 2017 (Israeli District Court)

- The Court addressed the question whether a transfer of IP by an Israeli company to a US company, soon after the US company acquired the Israeli company, should be determined as a stand alone transfer or as a sale of the entire activity (as stated by the ITA). 法院解决了以下问题：在美国公司收购以色列公司后不久，以色列公司向美国公司转让知识产权是否应被视为独立转让或出售整个活动（如ITA）。



Leading Cases in Israel

- **Gteko Ltd (Microsoft), June 2017 (Israeli District Court)**
 - The court ruled with the ITA's approach that the value of the transferred IP asset should reflect the entire value of the selling company, which is significantly higher.法院根据ITA的方法裁定，转让的知识产权资产的价值应该反映销售公司的全部价值，这个价值要高得多。

Recent Developments

- **“Safe Harbor” Rules**

- The ITA recently published two safe harbor circulars stating the ITA's expected profit levels for marketing services and for low-risk distributorship activities carried out in Israel by Multinational Entities ("MNE"), as well as providing guidance on non-value-added services. ITA最近发布了两份安全港通告，说明ITA预期的营销服务和跨国实体（“MNE”）在以色列开展的低风险经销活动的利润水平，以及提供非增值服务的指导。

Recent Developments

- **“Safe Harbor” Rules**

- Circular 11/2018 details the expected transfer pricing methods to be used for different distributorship and marketing services transactions. 11/2018号通知详述了用于不同经销和营销服务交易的预期转让定价方法。
- Circular 12/2018 is of more importance since it details the safe harbor rules for several types of transactions, based on the OECD Transfer Pricing Guidelines. 12/2018号通知更为重要，因为它根据经合组织转让定价指南详细说了几类交易的安全港规则。
 - 5% markup for low-value-added services.低附加值服务加价5%。
 - For marketing services, 10-12% cost plus rate. 对于营销服务，10-12%的成本加费率。
 - An operating margin of between 3-4% for the low-risk distributor model.低风险分销商模型的营业利润率在3-4%之间。

Recent Developments

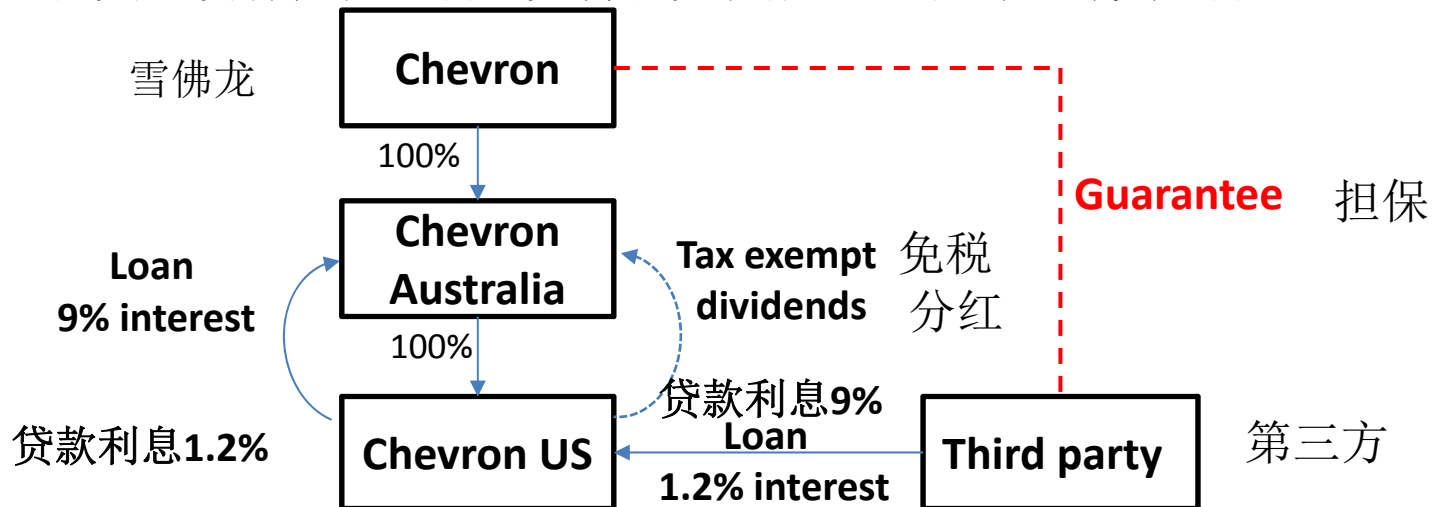
- **The Importance of a supporting TP Study**

- This issue was addressed by the Israeli Supreme Court in the Kontera and Finisar case.以色列最高法院在Kontera和Finisar案中处理了这个问题。
- The burden of persuasion rests on the taxpayer to establish that the terms of the transaction are arm's length terms.说服的负担在于纳税人确定交易条款是公平交易条款。
- The burden of proof will be with the tax authority only if the taxpayer have submitted all required documentation, including a TP study, supporting his claim that the intercompany prices are in accordance with the arm's length principle.只有纳税人提交了所有必需的文件，包括TP研究，证明公司间价格符合公平交易原则时，举证责任才由税务机关负责。

World- Wide Leading TP Cases

- Chevron, April 2017 (Federal Court of Australia)

- Chevron US borrowed money at an interest rate of 1.2% and then made a loan at 9% to the Australian parent company. The loan increased Chevron Australia's costs and reduced taxable profits. The interest payments, which was not taxed in the US, came back to Australia in the form of tax free dividends.雪佛龙美国以1.2%的利率借入资金，然后以9%的比例向澳大利亚母公司贷款。这笔贷款增加了雪佛龙澳大利亚的成本并减少了应税利润。在美国没有征税的利息支付以免税股息的形式回到澳大利亚。



World- Wide Leading TP Cases

- **Coca Cola Co v. Commissioner (USA)**

- In 2015 Coca Cola received a notice of deficiency for \$3.3 billion in additional taxes for an 2007 – 2009 audit. 2015年，可口可乐公司收到了一份关于2007年至2009年审计的额外税收33亿美元的缺陷通知。
- The IRS argues that the comparable profit method is the best method to be used. 美国国税局认为，可比利润方法是最好的方法。
- The CPM method would result in a transfer pricing adjustment of almost \$10 billion. CPM方法将导致转让定价调整近100亿美元。
- IRS and Coca Cola agreed to the method used – the 10-50-50 method – in a 1996 audit closing agreement. 美国国税局和可口可乐公司在1996年的审计结束协议中同意采用的方法 - 10-50-50方法。
- No formal “advance pricing agreement” was requested. 没有正式的“预先定价协议”被要求。



World- Wide Leading TP Cases

- **Coca Cola Co v. Commissioner (USA)**
 - The closing agreement covered 1987 – 1995.截止协议涵盖1987年至1995年。
 - 5 Subsequent audits covering the next 11 years (until 2006) resulted in the IRS concluding: “the continuing application of the closing agreement’s terms and conditions to post 1995 years seems appropriate”. 5对未来11年（至2006年）的后续审计导致美国国税局得出结论：“关闭协议的条款和条件在1995年后继续适用似乎是合适的”。

Implementation of BEPS TP Reporting

- **Preparing for Country-by-Country (CbC) Reporting**

- The OECD has adopted a 3-tiered approach for TP documentation, targets to result in more information disclosure on Multinational Enterprises (MNEs) (BEPS Action 13). 经合组织对TP文件采用了三层方法，目标是在跨国企业（MNEs）上发布更多信息（BEPS行动13）。
- 71 countries already implemented the CbC reporting. 71个国家已经实施了CbC报告。



Implementation of BEPS TP Reporting

- **Preparing for Country-by-Country (CbC) Reporting**

- The disclosed information under the CbC reporting will be shared amongst all the jurisdictions in which the MNE operates, giving the relevant tax authorities unprecedented accesses to high-level information regarding MNEs' global business operations and TP policies. CbC报告中披露的信息将在跨国公司运营的所有司法管辖区之间共享，使相关税务机关能够前所未有地获取有关跨国公司全球业务运营和TP政策的高级信息。
- While preparing their TP policies, MNEs will need to take into account worldwide consideration and articulate consistent TP positions from a global perspective.在制定其TP战略时，跨国公司需要考虑全球的因素，并从全球角度阐明一致的TP目标。