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# CANADA UPDATE: RECENT CHANGES TO CANADA'S IMMIGRATION LAWS; R v. PROKOFIEW: ARE FUNDAMENTAL RIGHTS REALLY FUNDAMENTAL RIGHTS?; CANADA v. GLAXOSMITHKLINE INC.: TRANSFER PRICING AGREEMENTS

*David Paulson*

**T**HIS article begins by briefly considering some of the recent changes to Canada's immigration laws and their collateral effects. Next, the case of *R. v. Prokofiew* is discussed. This recent case involves an accused's fundamental right to silence. Lastly, through the lens of *Canada v. GlaxoSmithKline*, the problematic gray area created by the current regulations on transfer pricing will be addressed.

## I. RECENT CHANGES TO CANADA'S IMMIGRATION LAWS

On June 29, 2012, numerous changes to Canada's Immigration and Refugee system were passed and received Royal Assent.<sup>1</sup> The changes include provisions designed to stop foreign criminals and human traffickers from abusing Canada's immigration system and to expedite the refugee claim process.<sup>2</sup>

Many of these changes focus on reducing the timeline on several components of the immigration system.<sup>3</sup> The goal of the changes is ensure that Canada has a "fair and generous" immigration and refugee program, while at the same time ensuring "the safety and security of Canadians will be protected."<sup>4</sup>

While the goal of these changes is noble and necessary, there are some collateral effects. For example, tougher conditions, like a two-year co-

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1. News Release, Citizenship & Immigration Canada, Legislation to Protect Canada's Immigration System Receives Royal Assent (June 29, 2012), <http://www.cic.gc.ca/english/department/media/releases/2012/2012-06-29.asp>.

2. *Id.*

3. See *Backgrounder – Summary of Changes to Canada's Refugee System*, CITIZENSHIP & IMMIGR. CAN. (June 29, 2012), <http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-06-29b.asp> (last modified June 29, 2012).

4. News Release, Citizenship & Immigration Canada, *supra* note 1.

habitation requirement, have been enacted to help curb marriage fraud.<sup>5</sup> Clear evidence of widespread marriage fraud necessitated the stricter requirements.<sup>6</sup>

A more controversial collateral effect involves the backlog of applications. Over the past several years, more applications have been submitted than can be processed.<sup>7</sup> As a result, the number of unprocessed applications has been steadily increasing.<sup>8</sup> The backlog is largely caused by applicants utilizing the Federal Skilled Worker program.<sup>9</sup> This is the group of applicants that will likely suffer the most as a result of collateral changes to the immigration system.

The reality is clear, but it is also unfortunate. Canada cannot process all of the applications in its backlog in a reasonable amount of time, and these backlogged applications are diverting attention from more recent applicants who may be better qualified under the Federal Skilled Workers program.

The response was simply to delete all applications submitted before February 27, 2008.<sup>10</sup> This change was made through a massive budget bill, which received Royal Assent on June 29th, 2012.<sup>11</sup> Any fees that the applicants have paid can be returned, and the applicants may reapply.<sup>12</sup> Citizenship and Immigration Canada expects that this reduction in the backlog will affect about 280,000 applicants.<sup>13</sup> While this rather draconian approach alleviates the backlog problem, whether it was the best method remains to be seen.

## II. *R. V. PROKOFIEW*: ARE FUNDAMENTAL RIGHTS REALLY FUNDAMENTAL RIGHTS?

In this case, only one codefendant of two testified. Counsel for the testifying codefendant asked the jury to consider the silent codefendant's choice not to testify as evidence of his guilt. In short, he suggested that innocent people testify and guilty people do not.

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5. Ian Robertson, *Newlyweds Face Tougher Immigration Measures*, *TORONTO SUN* (Oct. 26, 2012, 1:37 PM), <http://www.torontosun.com/2012/10/26/tougher-immigration-measures-for-newlyweds-introduced>.

6. *Id.*

7. *STANDING COMM. ON CITIZENSHIP & IMMIGRATION, 41ST PARLIAMENT, 1ST SESS., CUTTING THE QUEUE: REDUCING CANADA'S IMMIGRATION BACKLOGS AND WAIT TIMES 5-8* (Feb. 2012) (authored by David Tilson, M.P.).

8. *Id.*

9. *Id.*

10. Bill C-38, S.C. 2012, c. 19 (Can.) (adding section 87.4 to the Immigration and Refugee Protection Act).

11. *Id.*

12. Immigration and Refugee Protection Act, S.C. 2001, c. 27, 87.4(3)-(4) (Can.); Notice – Questions and Answers: Bill C-38 and Changes to Federal Skilled Worker Applications, Citizenship and Immigration Canada (Aug. 17, 2012), <http://www.cic.gc.ca/english/department/media/notices/notice-qa.asp> [hereinafter Notice—Questions and Answers].

13. Notice – Questions and Answers, *supra* note 12.

This case interprets a poorly worded provision in the Canada Evidence Act and finally sheds light on what it really means. But more importantly, it raises a question. The dissent is not arguing over the meaning of the Canada Evidence Act, but rather whether these improper arguments that mislead the jury should result in a new trial for the accused that chose not to testify.

#### A. THE FACTS

Before jumping into an analysis of the Court's reasoning, a deeper look at the facts is necessary. This case was initially brought against three men charged with a fraudulent tax scheme.<sup>14</sup> They were accused of generating sales tax through fictitious sales of heavy machinery and not remitting the tax to the government.<sup>15</sup> The question for the jury was not whether this was a fraudulent scheme, but rather "whether [the] accused were *aware* of the fraudulent nature of the scheme."<sup>16</sup>

This is important to understand because, of the three original defendants, one defendant, Mr. Tulloch, pleaded guilty prior to trial, and another defendant, Mr. Solty, chose to go to trial and testify.<sup>17</sup> The third defendant, Mr. Prokofiew, chose not to testify.<sup>18</sup> Mr. Tulloch was a witness for the Crown, and both Mr. Tulloch and Mr. Solty testified that Mr. Prokofiew was the mastermind behind the scheme.<sup>19</sup> The testimony of the coconspirators provided evidence that Mr. Prokofiew was conducting this scheme with fraudulent intent, and the strength of the Crown's case depended on their credibility.<sup>20</sup>

The real problem in this case arose when counsel for Mr. Solty argued that the jury should consider Mr. Prokofiew's silence as evidence of guilt. Specifically, Mr. Solty's counsel stated,

Peter Solty took the stand and told his story, warts and all. Ewaryst Prokofiew did not. Mr. Solty accused him of massive monetary fraud, and backed up that accusation with the hand-written invoices and other documentation that he provided to the police. What was Mr. Prokofiew's response? Ask yourself why Ewaryst Prokofiew did not testify. Did he have something to hide or did he simply have no response that could help him since there is no point in trying to contradict the truth?<sup>21</sup>

The trial judge felt these comments undermined Mr. Prokofiew's right to a fair trial. He believed there was a "significant risk" that the jury would consider this argument and interpret Mr. Prokofiew's silence as

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14. *R. v. Prokofiew*, [2012] 2 S.C.R. 639 at para. 1 (Can.).

15. *Id.*

16. *Id.* (emphasis added).

17. *Id.* at para. 107.

18. *Id.* at para. 1.

19. *Id.* at para. 107.

20. *Id.* at para. 106.

21. *Id.* at para. 51.

evidence of his guilt.<sup>22</sup> The trial judge initially stated that he would provide the jury with a strong remedial instruction.<sup>23</sup>

The following day the trial judge found himself in a conundrum. Fully aware that there was a significant risk the jury would listen to Mr. Solty's counsel and use Mr. Prokofiew's silence as evidence of guilt, the judge determined he was constrained by section 4(6) of the Canada Evidence Act.<sup>24</sup> Section 4(6) states: "The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution."<sup>25</sup>

The confusion is easy to understand. The pertinent section states that the judge cannot comment on the accused's right to silence. The Court ruled that the Act does not prohibit the trial court from affirming the right to silence, but merely prohibits the trial judge from suggesting the jury consider the silence as evidence of guilt.<sup>26</sup> Fully conceding the fact that a remedial instruction would have been proper in this case, the majority explained why this was not reversible error.

#### B. WHY THE MAJORITY ERRONEOUSLY CONCLUDED THIS WAS HARMLESS ERROR

The majority arrived at its conclusion through a string of assumptions. First, the majority considered it significant that no one raised the prospect of severance.<sup>27</sup> The assumption here was that if Mr. Prokofiew's counsel, or the judge, thought that the risk was so great that the jury would consider the improper argument, they would have severed Mr. Prokofiew's case from Mr. Solty's.<sup>28</sup>

Second, the majority drew the assumption that the reason for not severing the case was that Mr. Prokofiew's counsel and the trial judge believed that they could give a proper instruction without actually telling the jury not to consider Mr. Prokofiew's silence as evidence of guilt.<sup>29</sup> Part of this assumption recognized that the counsel for Mr. Prokofiew argued in his closing that the Crown bore the burden of proof.<sup>30</sup>

The majority then drew from these facts the assumption that the jury understood that the Crown bore the burden of proof and therefore also understood that one's silence is not evidence of guilt.<sup>31</sup> Then it followed this up with a final assumption. The majority recognized that the instruction advised the jury they should ask the judge if they have any questions.<sup>32</sup> The majority assumed that the jury, which was faced with two

22. *Id.* at para. 52.

23. *Id.* at para.13.

24. *Id.*

25. Canada Evidence Act, R.S.C. 1985, c. C-5, 4(6) (Can.).

26. *Prokofiew*, [2012] 2 S.C.R., at paras. 3-4.

27. *Id.* at para. 14.

28. *Id.* at paras. 14-15.

29. *Id.*

30. *Id.* at paras. 16, 19, 23-24.

31. *Id.* at paras. 21, 24.

32. *Id.* at para. 17.

conflicting statements of law, would have asked the judge for clarification if it was confused.<sup>33</sup> The reasoning assumes that, because the jury did not ask the judge for clarification, the jury must not have been confused and understood that silence is not evidence of guilt.

The majority's conclusion overlooks the fact that there is no evidence to suggest this line of reasoning is correct, and that the conclusion is wholly based on assumption and speculation. Moreover, common sense requires one to view the statement made by Mr. Solty's counsel as logical. An ordinary jury would likely consider persuasive the logical fallacy that if Mr. Prokofiew were innocent he would have said something. The only thing that might dissuade the jury is a strong remedial instruction from the judge telling them they cannot consider his silence as evidence of his guilt.

The dissent's opinion is based upon the simple fact that no one knew what the jury considered because it was free to consider Mr. Prokofiew's failure to testify as evidence of guilt.<sup>34</sup> As the dissent pointed out, trial judges "must take care to ensure that the right to silence becomes neither a snare nor a delusion."<sup>35</sup>

This is not merely a case of an accused being stripped of a fundamental constitutional right; the right was used to further the case against Mr. Prokofiew. An erroneous admission of hearsay evidence compounded this error.<sup>36</sup> While this article has not addressed this portion of the case, the effect of multiple errors was significant as to why a new trial should have been granted. But the lack of a remedial instruction was, by itself, grounds for a new trial.<sup>37</sup> Not only did the majority get this wrong, its opinion had the collateral effect of overruling longstanding precedent that holds "a trier of fact may not draw an adverse inference from the accused's failure to testify and that the accused's silence at trial may not be treated as evidence of guilt."<sup>38</sup>

### C. CONCLUSION

The trial judge was aware of the "significant risk" posed by a lack of a remedial instruction. Substituting its own judgment, the majority found the jury probably did not consider Mr. Prokofiew's silence as evidence of his guilt. The Canadian Charter of Rights and Freedoms provides:

Any person charged with an offence has the right . . . not to be compelled to be a witness in proceedings against that person in respect of the offence . . . [and] to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and

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33. *Id.* at paras. 18-19.

34. *Id.* at paras. 92.

35. *Id.* at para. 94 (citing *R. v. Noble*, [1997] 1 S.C.R. 874, para. 72).

36. *Id.* at para. 112.

37. *Id.*

38. *Id.* at paras. 64-65 (citing *Noble*, [1997] 1 S.C.R. 874).

impartial tribunal.<sup>39</sup>

Interestingly, the majority did not cite to Canadian Charter of Rights and Freedoms in its entire opinion, it is only cited to by the dissent.<sup>40</sup>

The question of what rights an accused really has remains unanswered. It is ironic that the majority interpreted a poorly worded section in the Canada Evidence Act to be consistent with the Canadian Charter of Rights and Freedoms, while simultaneously ignoring the Charter's plain language.

### III. *CANADA V. GLAXOSMITHKLINE INC.*: TRANSFER PRICING AGREEMENTS

Recently, the Supreme Court of Canada decided the case of *Canada v. GlaxoSmithKline Inc.* While this case is about a vague concept of tax law called "titled transfer pricing," it is nonetheless quite interesting. This case demonstrates two things: it shows how simple concepts can be very difficult to put into practice, and it illustrates how some economic theories are very elusive when an attempt is made to ground them in reality.

#### A. TRANSFER PRICING

The case involves a transfer pricing agreement. While the various methods that are used to calculate a transfer pricing agreement can be complex and require a fairly adept understanding of economics, the concept itself is simple. Transfer pricing is merely a term used to describe the prices that related parties use to trade "services, tangible property, and intangible property . . . across international borders."<sup>41</sup> For example, if Amcar, an American car manufacture, is selling cars to its Canadian subsidiary, Cancar, the price that the cars are sold for would be called the transfer price.<sup>42</sup>

The implications of such a transaction are obvious. Because the transaction is not an arm's length transaction, the entities could be less focused on negotiating a reasonable price. Instead, they may be focused on setting up the transaction to ensure that, together, they pay the lowest tax possible.

The purpose of transfer pricing legislation is to ensure that parties to a transfer pricing agreement "report substantially the same amount of in-

39. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11, ss. 11(c)-(d) (U.K.).

40. *Prokofiew*, [2012] 2 S.C.R. at para. 66.

41. CAN. CUSTOMS & REVENUE AGENCY, INTERNATIONAL TRANSFER PRICING, INFORMATION CIRCULAR NO. 87-2R, at para. 2 (1999), *available at* <http://www.cra-arc.gc.ca/E/pub/tp/ic87-2r/ic87-2r-e.pdf> [hereinafter INFORMATION CIRCULAR NO. 87-2R].

42. This article cannot, in the limited space provided, explain in any amount of detail the nuances of transfer pricing. For a more in-depth introduction to Canadian Transfer Pricing, see Mark Kirkey, *An Introduction to Transfer Pricing in Canada: Avoiding Double Taxation*, GOWLINGS 76-80, [http://www.gowlings.com/resources/PublicationPDFs/Kirkey\\_IntroTransfer.pdf](http://www.gowlings.com/resources/PublicationPDFs/Kirkey_IntroTransfer.pdf) (last visited Feb. 26, 2013).

come as they would if they had been dealing with each other at arm's length."<sup>43</sup> Canada's legislation embraces the arm's length principle. The reasonableness of the transaction is judged by whether the agreement would be substantially the same if the parties would not have been related entities and the transaction had, instead, been an arm's length deal.<sup>44</sup>

The concept is not new. Since 1939, Canada's Income Tax Act has provided that a company involved in transfer pricing may be reassessed the difference between the price paid and the price that would have been paid if the transaction had been made at arm's length.<sup>45</sup> The statute that was applicable to the reassessment years in *Canada v. GlaxoSmithKline Inc.* states:

Where a taxpayer has paid or agreed to pay to a non-resident person with whom the taxpayer was not dealing at arm's length as price, rental, royalty or other payment for or for the use or reproduction of any property, or as consideration for the carriage of goods or passengers or for other services, an amount greater than the amount (in this subsection referred to as "the reasonable amount") that would have been reasonable in the circumstances if the non-resident person and the taxpayer had been dealing at arm's length, the reasonable amount shall, for the purpose of computing the taxpayer's income under this Part, be deemed to have been the amount that was paid or is payable therefor.<sup>46</sup>

While the concept of transfer pricing regulation is simple, the mechanics of these types of transactions are extremely complex. Dealing with the potential enforcement of transfer pricing regulations can be very costly for companies that are selected for examination.<sup>47</sup> This is widely regarded as a gray area of tax law.<sup>48</sup> The Canada Revenue Agency recognizes this and states, "transfer pricing is not an exact science."<sup>49</sup> Despite the difficulty and seeming subjectivity of auditing a transfer pricing agreement, audits do occur and cases like *GlaxoSmithKline* arise.

Ever since the global recession began, the number of these audits appears to be on the rise.<sup>50</sup> With less tax revenue available, countries appear to be growing more aggressive in auditing transfer pricing agreements and seeking to increase their tax revenue through these

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43. INFORMATION CIRCULAR NO. 87-2R, *supra* note 41, at para. 7.

44. *Id.*

45. *Canada v. GlaxoSmithKline, Inc.*, [2012] 3 S.C.R. 3, para. 1 (Can.).

46. *Id.* at para. 18 (quoting Section 69(2) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)). While applicable to this case, Section 69(2) has since been repealed and replaced by Section 247(2) of the Income Tax Act.

47. See, e.g., Michael C. Durst & Robert E. Culbertson, *Clearing Away the Sand: Retrospective Methods and Prospective Documentation in Transfer Pricing Today*, 57 TAX L. REV. 37, 113 (2003).

48. See, e.g., Tammy Whitehouse, *Tax Collectors Start Circling on Transfer Pricing*, 7 COMPLIANCE WEEK 73 (Feb. 2010).

49. INFORMATION CIRCULAR NO. 87-2R, *supra* note 41, at para. 34.

50. Whitehouse, *supra* note 48.



audits.<sup>51</sup>

Canada recognizes several different methods to determine if the transfer price is what would have resulted from an arm's length agreement.<sup>52</sup> While there is not an explicit hierarchy of the methods, it is generally recognized that the taxpayer must use the most appropriate method in determining whether the transfer price is substantially the same as an arm's length price would have been.<sup>53</sup> This is a main cause of confusion. As the following case illustrates, the methods can be manipulated not only by the taxpayer, but also by the auditor.

B. THE FACTS OF *CANADA V. GLAXOSMITHKLINE INC.* AND THE SUPREME COURT'S RULING

In this case, Glaxo Group was selling a licensing agreement to GlaxoSmithKline Inc. ("Glaxo Canada") and requiring the Canadian subsidiary to purchase the active ingredient for Zantac from an approved supplier.<sup>54</sup> The approved supplier was also a subsidiary of Glaxo Group.<sup>55</sup> Other generic pharmaceutical companies purchased the active ingredient in the drug in arms-length transactions from other suppliers.<sup>56</sup>

The contention arose when the tax assessor realized that the non-affiliated companies who were purchasing the active ingredient were doing so in arm's length transactions for between \$194 and \$304 per kilogram. But Glaxo Canada was purchasing the active ingredient from a related company for \$1,500 per kilogram.<sup>57</sup> Superficially, Glaxo Canada's transfer price would appear to be an artificially inflated price that would not have resulted if they were dealing at arm's length with the supplier. But this is only the case if the supply price is considered in isolation.

In reality, Glaxo Canada was required to purchase the active ingredient in accordance with the licensing agreement.<sup>58</sup> The licensing agreement, among several other things, granted Glaxo Canada the right to market the drug under the name Zantac.<sup>59</sup> The tax assessor did not agree that this was a factor that should be considered, but instead argued that the transaction should be viewed in isolation.<sup>60</sup> The Tax Court largely agreed with the assessor and upheld the reassessment.<sup>61</sup>

The specific methods are beyond the scope of this paper, but an understanding of these different methods is not necessary to comprehend that the tax assessor was wrong in this case. It is common knowledge that Zantac, like all name brand pharmaceuticals, sells for a higher price than

51. *Id.*

52. INFORMATION CIRCULAR NO. 87-2R, *supra* note 41, at para. 48.

53. *Id.* at para. 49.

54. *GlaxoSmithKline*, [2012] 3 S.C.R. 3 at para. 2.

55. *Id.*

56. *Id.* at paras. 4, 9.

57. *See id.* at paras. 8, 9.

58. *Id.* at paras. 49, 50.

59. *Id.* at para. 7.

60. *GlaxoSmithKline*, [2012] 3 S.C.R. at para. 11.

61. *Id.* at para. 12.

its generic counterpart. The rights conferred by the licensing agreement are without question a part of the price at which the active ingredient was being sold to Glaxo Canada.

The Supreme Court of Canada understood this, as did the Federal Court of Appeal, and held that the licensing agreement should be considered in determining whether the transfer price was reasonable.<sup>62</sup> The Supreme Court offered a small amount of guidance before remanding the matter to the Tax Court for reassessment.

The Court reminded the tax court that this was not an “exact science” and the reassessment should reflect business realities.<sup>63</sup> While conducting the reassessment, the tax court should consider a broad range of circumstances as well as the respective roles of Glaxo Canada and Glaxo Group.<sup>64</sup> Glaxo Group is the owner of the intellectual property, and Glaxo Canada is a secondary manufacturer.<sup>65</sup> The Court appeared to be suggesting that, if Glaxo Group bore more risk in developing the product, this risk may be reflected in a higher profit margin and this should be taken into consideration.

The Court also pointed out that the statute uses the term “reasonable amount.”<sup>66</sup> The statute allows for reassessment only when the transfer price is higher than what a “reasonable amount” paid would have been had the transaction been an arm’s length deal.<sup>67</sup> The only question should be: could this be a reasonable price if this were an arm’s length deal.

### C. CONCLUSION

The decision was correct, and the advice the Court gave should not be ignored, but the advice of the Court lacks specificity. This is not a failing by the Court, but rather an indication of just how uncertain this area of taxation is. Further, this case reveals a significant factor in transfer pricing. Specifically, that it is not realistic for one to ascertain an arm’s length price in a non-arm’s length deal. Alternatives need to be developed. Canada does offer the ability for a company to enter into an advance pricing agreement, whereby the transfer price would essentially be preapproved by the Canada Revenue Agency. But the average time required to complete a bilateral advance pricing agreement is currently reported to be forty-nine months.<sup>68</sup>

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62. *Id.* at paras. 14-16, 60.

63. *Id.* at para. 61.

64. *Id.* at paras. 61, 62.

65. *Id.* at para. 62.

66. *Id.* at paras. 61, 64.

67. *Id.* at para. 18 (quoting Section 69(2) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)).

68. *Global Transfer Pricing Review*, KPMG 35 (April 2012), <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/2012-global-transfer-pricing-review.pdf>.

Companies incur a number of costs to ensure compliance with transfer pricing regulations, and those costs rise sharply if the company is audited.<sup>69</sup> But these costs are not just allocated to the company. The government also incurs heavy costs to prosecute cases involving transfer pricing violations.<sup>70</sup> The end result is economists arguing over something that is, to a large extent, subjective.

As the number of multinational companies continues to increase, the idea of tax dollars going to pay for an army of government economists grows more unappealing. Despite the seeming impossibility, a safe harbor should be considered, for the benefit of both companies and taxpayers.

The problems with transfer pricing regulations are not confined to Canada, and the issues implicated by the current system of transfer pricing need to be addressed on a global level. Thankfully, a system of safe harbors may soon be coming from the Organization for Economic Cooperation and Development (OECD).<sup>71</sup> This possibility is partially motivated by the increasing enforcement costs of the various statutory regimes.<sup>72</sup> Until the safe harbors are in place, every multinational company should aggressively fight reassessments. Perhaps by keeping enforcement costs high, a better and more reasonable method will emerge.

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69. See, e.g., Durst & Culbertson, *supra* note 47.

70. *Id.*

71. Patricia Gimbel Lewis, *United States: Safe at Last? Transfer Pricing Safe Harbors On The Horizon*, 21 TAX MGMT. TRANSFER PRICING REP. 9, 1 (2012).

72. *Id.*