



**BEPS TRANSFER PRICING WORKSHOP**  
**TRANSFER PRICING DOCUMENTATION –**  
**RISK ASSESSMENT AND SAFE HARBOURS**

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**10. Introduction to Safe Harbours**



## Background of revision of Section E of Chapter IV of OECD TPG

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- Part of project to improve administrative aspects of transfer pricing
- Previous guidance did not accurately reflect the practice of countries
  - a number of countries have adopted safe harbour provisions
- There was no consideration of bilateral safe harbours
- Revised new guidance was adopted and released in May 2013



# Introduction

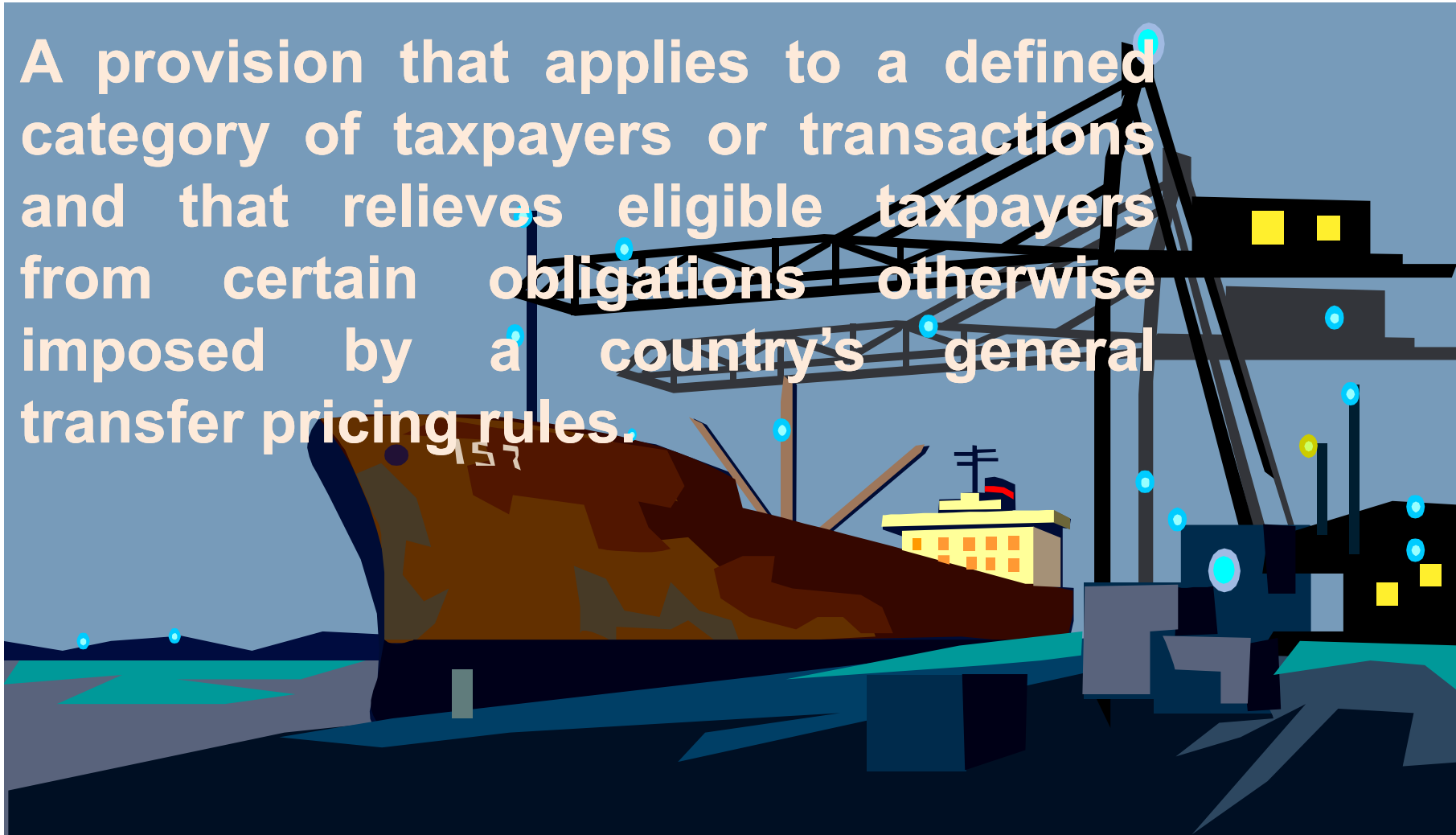
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- Transfer pricing can be resource intensive and complex
- Heavy administrative burden on taxpayer and tax authorities
- Consider emerging economies and their transfer pricing capacity



## What is a safe harbour?

A provision that applies to a defined category of taxpayers or transactions and that relieves eligible taxpayers from certain obligations otherwise imposed by a country's general transfer pricing rules.





## What does it do?

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- Could substitute simpler obligations otherwise imposed by a country's general transfer pricing rules
- Could exempt a defined category of taxpayers or transactions from the application of all or part of the general transfer pricing rules.



## Types of Safe Harbours in Practice

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- ✓ Full or partial exemption from transfer pricing rules
- ✓ Optional proxy for arm's length pricing
- ✓ Mandatory proxy for arm's length pricing
- ✓ Safe harbours providing relief from administrative requirements



## Types of Safe Harbours in Practice

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### ✓ *Full or partial exemption from transfer pricing rules*

For example, enterprises below a certain size (measured, for example, in terms of turnover) may be totally exempted from the transfer pricing rules.



## Types of Safe Harbours in Practice

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### ✓ *Optional proxy for arm's length pricing*

In such cases, the taxpayer is free to choose whether or not to adopt the transfer price or margin (or range of prices or margins), or a transfer pricing method, specified in the safe harbour. Where the taxpayer elects not to adopt the parameters contained in the safe harbour, the safe harbour assurances are denied.





## Types of Safe Harbours in Practice

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- ✓ *Safe harbours providing a mandatory proxy for arm's length pricing*

In such cases, the application of the safe harbour is mandatory and, where the safe harbour applies, taxpayers do not have the option to adopt a transfer price, or a transfer pricing method, that does not conform to the specified requirement. Such safe harbour is most commonly seen in respect of thin capitalisation.



## Types of Safe Harbours in Practice

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### ✓ *Safe harbours providing relief from administrative requirements*

This type of safe harbour provides relief from specific administrative requirements where specified conditions are met. For example, enterprises below a specified size might be exempted from all or part of transfer pricing documentation requirements.



## When can we use a safe harbour?

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- For taxpayers and for transactions that involve low transfer pricing risks
- However: other tax authorities are not bound by a unilateral safe harbour provision
- Its best use is on a **bilateral or multilateral basis**



## When can we use a safe harbour?

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- Primarily **benefits taxpayers**
  - Certainty
  - Lower compliance burden

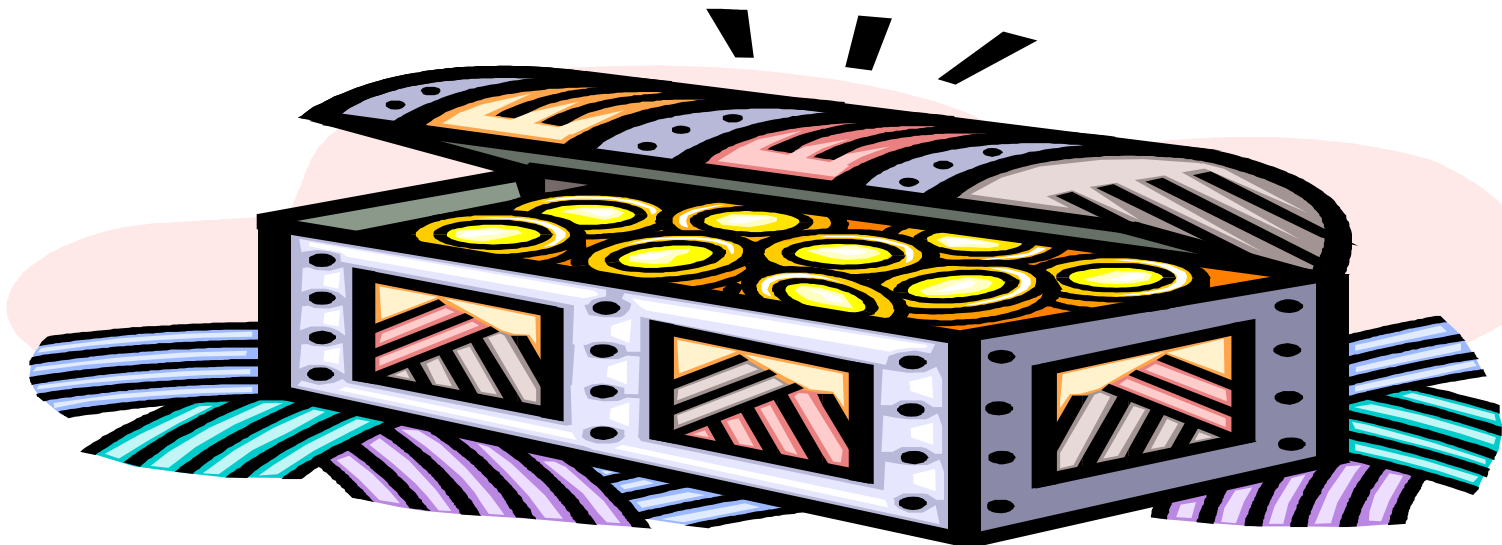




## When can we use a safe harbour?

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- **Benefits tax authorities**
  - Optimal use of resources
  - Shift resources from low risk or less complex transactions to high risk or complex transactions





## Design of a safe harbour

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- Careful attention needed
  - Defining the safe harbour
  - Updating the safe harbour
  - Not create tax planning opportunities
  - Potential for double taxation
    - Non arm's length
    - Practices of other countries





## And what is a 'Rebuttable presumption'?

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- Is not fully a safe harbour
- Simplification measure that uses presumptions to reach benefits
- Taxpayer may demonstrate his pricing is consistent with the arm's length principle
- Taxpayer should not bear a higher burden to demonstrate



## Rebuttable presumption

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- **Example 1** – facts of the case
  - Assume the domestic law regulations provide that qualifying ‘commissionaire distributors’ earn **0.50 % to the sales** in which the commissionaire has intervened
  - Assume the taxpayer **meets the conditions** for being a qualifying ‘commissionaire distributor’
  - Assume the taxpayer earns a **percentage of sales of 0.35 %**.





## Rebuttable presumption

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- Example 1 – **Solution 1**

Assume the taxpayer cannot justify the lower return on sales in which he has intervened

→ The **tax authorities will adjust automatically to 0.50 pct. of sales** in which the commissionaire has intervened.



## Rebuttable presumption

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- Example 1 – Solution 2

Assume the taxpayer justifies the lower return on sales in which he has intervened

→ The tax authorities will not adjust to 0.50 pct. of sales in which the commissionaire has intervened, provided the justification shows that under the same or similar circumstances at arm's length a commissionaire would have realised the same return

→ This proof may not be more burdensome than under normal arm's length situations.



## Rebuttable presumption

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- **Example 2**

- Assume the domestic law regulations provide that management fees are deductible up to a limit of 0.20 % of turnover of the enterprise, unless evidence that the actual services rendered represent a higher amount.



## Rebuttable presumption

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- Example 2 – **Solution 1**

Assume the taxpayer does not justify the higher management fees

→ The tax authorities **will reject automatically the excess part of the management fees** when applicable.



## Rebuttable presumption

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- Example 2 – **Solution 2**

Assume the taxpayer does justify the higher management fees

→ The tax authorities **will accept the management fees**

→ This proof **will not be more burdensome** than under normal arm's length situations.



## Rebuttable presumption issues

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- Acceptance by the other state?
- Double taxation?
- Access to MAP?



# Q & A

