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Edited by Eduardo Baistrocchi and Ian Roxan

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RESOLVING TRANSFER PRICING DISPUTES

Via a global analysis of more than 180 transfer pricing cases from 20 representative jurisdictions, *Resolving Transfer Pricing Disputes* explains how the law on transfer pricing operates in practice and examines how disputes between taxpayers and tax administrations are dealt with around the world.

It has been designed to be an essential complement to the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, which focus on transfer pricing issues but do not refer to specific transfer pricing disputes. All of the transfer pricing cases discussed in the book are linked to the relevant paragraphs of the OECD Guidelines by means of a 'Golden Bridge', i.e., a table listing the cases according to the paragraphs of the Guidelines to which they refer. It therefore provides examples of the application of the arm's length principle in many settings on all continents.

EDUARDO BAISTROCCHI is a Lecturer in Law in the Law Department at the London School of Economics and Political Science, and an Adjunct Professor at Universidad Torcuato Di Tella, Buenos Aires.

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A Global Analysis

Edited by

EDUARDO BAISTROCCHI

and

IAN ROXAN



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To our families,
B, J, A and J; K and M

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The OECD has generously given permission to use the Table of Contents of the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (Paris: OECD Publishing, 2010) in order to make the content of the book as transparent as possible. Over 180 transfer pricing cases analysed in the book are linked to the relevant paragraphs of this key OECD document in order to provide worldwide examples of the issues it identifies. The Universidad Torcuato Di Tella Law School in Buenos Aires has also been a source of inspiration for the book. Alejandro Chehtman, Hernán Gullco, Martín Hevia, Eduardo Rivera Lopez, Celia Lerman, Sergio Muro, Ezequiel Spector and Horacio Spector have provided important feedback to key sections of the book. Last but not least, we thank the enthusiastic contribution offered by our

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THE GOLDEN BRIDGE: ANALYTICAL TABLE OF CASES BY TOPICS IN THE OECD GUIDELINES

The Golden Bridge aims to link each transfer pricing dispute discussed in the book with the relevant paragraphs of the OECD Guidelines. It lists the disputes according to the headings in the Table of Contents of the 2010 edition of the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*. Each entry shows: (i) the specific paragraph number(s) of the OECD Guidelines referred to in the dispute (where relevant); (ii) the country; (iii) the number or name of the transfer pricing dispute as referred to in the country chapter; (iv) the page(s) where the case is referred to in the country chapter.¹ The Table of Cases by jurisdiction includes a complete list of the cases referred to in the book, including those that do not relate to any specific entry in the OECD Guidelines, or that do not concern a transfer pricing dispute.

The example below illustrates the structure of the Golden Bridge:

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A. Introduction

[...]

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¶1.70–172 – Australia – *Roche Products v. Commissioner of Taxation* [2008] AATA 639, (2008) 70 ATR 703 371–4, 378, 381

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¶6 – UK – *Test Claimants in the Thin Cap Group Litigation v. HMRC* [2011] EWCA Civ 127; [2011] STC 738 329

¹ This book focuses on both OECD and non-OECD member countries. Although the OECD Guidelines are not necessarily applied in non-OECD countries, there are key common concepts in the domestic transfer pricing law of all countries explored here which will make the link offered by the Golden Bridge mechanism helpful in understanding how these concepts are being interpreted in all the countries considered.

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- ¶19 – UK – *Ametalco UK v. IRC, Ametalco Ltd v. IRC* [1996] STC (SCD) 399 327
- ¶19 – UK – *Waterloo plc v. IRC* [2002] STC (SCD) 95 327

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- ¶1.1, 1.5 – Germany – Bundesfinanzhof, Judgment of 5 December 1990, I R 94/88 200
- ¶1.1, 1.5 – Germany – Bundesfinanzhof, Judgment of 19 February 2002, I R 4/01 228
- ¶1.1, 1.5 – Germany – Bundesfinanzhof, Judgment of 29 April 2009, I R 26/08 228
- ¶1.1, 1.5 – Germany – Bundesfinanzhof, Judgment of 27 August 2008, I R 28/07 200
- ¶1.1, 1.5 – Germany – Bundesfinanzhof, Judgment of 29 November 2000, I R 85/99 200
- ¶1.1, 1.5 – Germany – Bundesfinanzhof, Judgment of 30 May 1990, I R 97/88 200
- ¶1.1, 1.5 – Germany – Bundesfinanzhof, Judgment of 23 June 2010, IR 37/09 200
- ¶1.1, 1.5 – Germany – Bundesfinanzhof, Judgment of 28 April 2004, I R 5, 6/02 222
- ¶1.1, 1.5 – Germany – Bundesfinanzhof, Judgment of 6 December 1995, I R 88/94 220
- ¶1.1, 1.5 – Germany – Bundesfinanzhof, Judgment of 17 May 1995, I R 147/93 220
- ¶1.2, 1.5 – Russia – *Niva-7*, Ruling of the Constitutional Court no. 441-O, 4 December 2003 574
- ¶1.2, 1.5 – Russia – *BAO-T*, Ruling of the Constitutional Court no. 442-O, 4 December 2003 574
- ¶1.2 – India – *Mazagaon Dock Ltd*, Supreme Court of India (1958) 34 ITR 368 586
- ¶1.2 – UK – *Petrotim Securities Ltd v. Ayres* [1964] 1 All ER 269; 41 TC 389 (CA) 311

B. Statement of the arm's length principle

B.1 Article 9 of the OECD Model Tax Convention

- ¶1.6–1.13 – Canada – *GlaxoSmithKline Inc. v. The Queen* 2008 D.T.C. 3957 (T.C.C.), rev'd 2010 D.T.C. 7053 (FCA) 108, 144, 146
- ¶1.6–1.13 – Canada – *General Electric Capital Canada Inc. v. The Queen* [2010] 2 C.T.C. 2198, 2010 D.T.C. 2521 (T.C.C.), aff'd 2010 FCA 344 144