

**THE ARM’S LENGTH STANDARD VS THE COMMENSURATE WITH
INCOME STANDARD:
TRANSFER PRICING ISSUES IN THE VALUATION OF INTANGIBLE
ASSETS**

NOTE

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I. INTRODUCTION

Transfer prices are “prices required to be reported in related-party transactions for tax purposes.”¹ During the past several decades, globalization has provoked multinational enterprises (hereinafter MNEs) to use or misuse transfer pricing rules in their international transactions. Even more, international transfer pricing rules for intangibles have represented a significant concern for both MNEs and tax authorities worldwide.

In light of recent developments, intangibles have been one of the main reasons for litigation and disputes between United States Congress, the United States Treasury Department and taxpayers. Moreover, the enactment of the commensurate with income standard has raised some serious issues with regard to its relationship with the arm’s length standard; the basic principle that permeates transfer pricing.

In this work, the connection between these two standards will be studied. First, we will describe briefly the importance of how intangibles are defined within the United States Treasury Department Regulations (hereinafter Treasury Regulations) and why their valuation is of utmost importance. Next, an analysis of section 482 of the Internal Revenue Code (hereinafter I.R.C.) and its regulations will be presented. Afterwards, the two

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¹ Yariv Brauner, *Value in the Eye of the Beholder: The Valuation of Intangibles for Transfer Pricing Purposes*, 28 VA. TAX REV. 79, 81 (2008).

standards will be explained and compared. Finally, conclusions will be drawn based on recent case law interpreting these standards.

II. INTANGIBLES AND THEIR VALUATION

Intangible assets are commonly the most difficult assets to appraise. From problems related to their development and protection, to valuation and regulation, they have become the most expensive assets to work with. Treasury Regulations have defined intangible assets to include: (1) patents, invention, secret processes and formulas, designs, patterns, and know-how; (2) copyrights and literary, musical, or artistic compositions; (3) trademarks, trade names, and brand names; (4) franchises, licenses, and contracts; (5) methods, programs, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, mailing lists, and technical data; (6) goodwill, related market position, customer acceptance, and distributing and servicing organizations; and (6) key employees.²

These intangibles often constitute the most important assets of MNEs. For this reason, any international transaction necessarily revolves around these assets and consequently their valuation. The need to assign a value to these nonphysical assets has always been challenge. Because of their unique characteristics and in many occasions the lack of comparable assets in the market, the valuation process can be very complicated.

In the next sections, the problems related to the valuation of these intangibles using the arm's length standard and/or the commensurate with income standard would be explored. But first, it is important to explain when and where did this controversy arise.

III. THE BEGINNINGS OF SECTION 482

In any case of two or more organizations, trades, or businesses . . . owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses. In the case of any transfer (or license) of intangible property . . . the income with respect to

² Treas. Reg. § 1.482-2(d).

such transfer or license shall be commensurate with the income attributable to the intangible.³

From the early days of multinational entities and international transactions, manipulation of transfer prices has been an issue for the United States Treasury Department (hereinafter Department). Throughout the years, they have tried to control the artificially priced transactions between related parties in order to strengthen the Department's oversight control of these transactions. These attempts go as far back as to the end of World War I with the War Relief Act of 1917, which tried to end these pricing abuses.⁴ This first regulation allowed the commissioner to "require related corporations to file consolidated returns 'whenever necessary to more equitably determine the invested capital or taxable income.'"⁵ These returns provided detailed information on the corporations' relationships with other affiliates.

The Act of 1921, the first direct predecessor of the current section 482, further enabled the Internal Revenue Service (hereinafter I.R.S.) to require consolidated accounts and authorized the Commissioner to prepare consolidated returns for commonly controlled trades or businesses to compute their "correct" tax liability.⁶ The principal reason for this legislation was the potential tax avoidance represented, to possessions corporations, who could not file consolidated returns with their domestic affiliates.⁷

Later in that decade, The Revenue Act of 1928 incorporated this provision under section 45. This section expressly "allowed the Commissioner to restate income to determine the 'true tax liability' of related domestic and foreign corporations"⁸ in order to "prevent tax avoidance and to ensure the clear reflection of the income of the related parties".⁹

As early as the 1930s the Treasury Regulations of 1935¹⁰ announced for the first time the arm's length standard as the fundamental principle behind current section 482: "[t]he standard to be applied in every case is that of an uncontrolled taxpayer dealing at arm's length with another

³ I.R.C § 482 (2011).

⁴ Arup K. Bose, The Effectiveness of Using Cost Sharing Arrangements as a Mechanism to Avoid Intercompany Transfer Pricing Issues with Respect to Intellectual Property, 21 Va. Tax Rev. 553, 557 (2002).

⁵ TREASURY DEPARTMENT & INTERNAL REVENUE SERVICE, A STUDY OF INTERCOMPANY PRICING 6 (1988) (Discussion draft) [hereinafter White Paper], available at, <http://www.archive.org/stream/studyofintercomp00unit#page/n21/mode/2up>.

⁶ *Id.*

⁷ *Id.*

⁸ GARY C. HAUFBAUER & ARIEL ASSA, U.S. TAXATION OF FOREIGN INCOME 244 (2007).

⁹ White Paper *supra* note 5, at 6.

¹⁰ *Id.* at 7.

uncontrolled taxpayer”.¹¹ Nevertheless, no specific guidance was given regarding allocation methods to be used. Instead, this decision was left to the courts to decide, who in turn interpreted the arm’s length standard using a variety of methods including: whether the related parties received full, fair value, a fair reasonable price, or a fair price including a reasonable profit.¹²

Before the 1960s, the IRS worked primarily with enforcement of domestic issues.¹³ It is not until the early 1960s when international transactions began to proliferate and section 482 began to gain popularity. The U.S. Treasury realized that section 482 was not effectively impeding the escape of U.S. income into other low tax jurisdictions where its foreign subsidiaries resided. In deliberations over the Revenue Act of 1966, the House of Representatives decided to adopt a proposal from the Ways and Means Committee to add a new subsection to section 482 that would require taxpayers to demonstrate the use of the arm’s length standard in pricing their transactions or else an apportionment formula based on relative economic activities would be used.¹⁴

The House’s version of the Bill was not ultimately adopted. Instead, the Conference Committee stated that section 482 already gave enough power to the Commissioner to allocate income and deductions to taxpayers. Nevertheless, prompted the Treasury to develop regulations which would “provide additional guidelines and formulas for the allocation of income and deductions in cases involving foreign income”.¹⁵

The Treasury took action and in its Regulations of 1968, which still remain today unchanged in great part, reaffirmed the arm’s length standard as a fundamental principle in transfer pricing transactions. These Regulations, contrary to the previous which only established the arm’s length standard, also presented taxpayers and the Service greater guidelines for transactions concerning services, the license or selling of intangibles, and the selling of tangible property.

Regarding the sale or license intangible assets, the Regulations stated that in order to find the arm’s length amount, “the standard to be applied is the amount that would have been paid by an unrelated party for the same intangible property under the same circumstances.”¹⁶ Where no unrelated

¹¹ *Id.*

¹² Cases inconsistently decided what the arm’s length standard meant, or if it even was necessary. *See* *Seminole Flavor Co. v. Commissioner*, 4 T.C. 1215 (1945); *Hall v. Commissioner*, 32 T.C. 390 (1959), *aff’d*, 294 F.2d 82 (5th Cir. 1961); and *Frank v. International Canadian Co.*, 308 F.2d 520 (9th Cir. 1962).

¹³ *Id.* at 6.

¹⁴ HAUFBAUER & ASSA, *supra* note 8, at 245.

¹⁵ White Paper *supra* note 5, at 10.

¹⁶ *Id.* at 11.

party transactions where available, the regulations provide a list of 12 factors to take into consideration: prevailing rates in the industry, offers of competitors, the uniqueness of the property and its legal protection, prospective profits to be generated by the intangible, and required investments necessary to utilize the intangible.¹⁷ However, no guidance was provided in the regulations regarding the use of these factors in finding the arm's length price.

These regulations are still today the fundamentals of international transfer pricing practices. In the next section, the arm's length standard will be discussed in more depth.

IV. ARM'S LENGTH STANDARD AND SOME CASE LAW INTERPRETATIONS

The arm's length standard is the principal underpinning of mostly all international transfer pricing regulations. The basic idea behind this principle is that transactions among related (controlled) parties should be valued as if the transaction was done between unrelated parties. However, the scope of the arm's length standard has not been clear cut, especially in the case of intangible assets. Contrary to what one could think, the 1968 Regulations did not quite solve this problem. This can be evidenced by a group of cases that involved the transfers from parent companies to subsidiaries in tax havens like Puerto Rico.

Beginning with The Revenue Act of 1921 to its appeal in 1996, the Internal Revenue Code (the "Code") provided U.S. corporations several incentives when doing business in U.S. possessions. From 100% tax exemption or credit for a U.S. corporation's source income to 100% dividend-received deduction on distributions, U.S. possessions became the principal place of business for multinationals looking for tax breaks.¹⁸ One of the first cases to be litigated was *Eli Lilly & Co. v. Commissioner*.¹⁹ Eli Lilly had taken advantage of the tax incentives herein mentioned and had created a subsidiary in Puerto Rico. The parent company had developed two manufacturing intangibles for which afterwards deducted research and development costs. Later, Lilly made a section 351 tax-free transfer of the patents and manufacturing know-how to its subsidiary in Puerto Rico, retaining no rights in these transferred intangibles. The subsidiary manufactured the drugs in Puerto Rico and later sold them to Lilly, meaning that the subsidiary made all the tax free income while Lilly deducted all expenses; effectively having manipulated transfer prices. The Commissioner

¹⁷ *Id.*

¹⁸ James M. O'Brien and Mark A. Oates, *Transfer Pricing: Puerto Rico Transfer Pricing Emerges ... Again ... As an Emerging Issue*, INT'L TAX J. 22 (March-April 2007).

¹⁹ 84 T.C. 996 (1985), *aff'd in part, rev'd in part* in 856 F.2d 855 (1988).

argued that the subsidiary's ownership of the intangible should be disregarded and the profits generated by the intangibles should be allocated completely to Lilly. The Court, rejecting this argument, concluded that Lilly in fact was able to do the intangibles transfer because of Code Section 351. It determined that the Commissioner's allocation was unreasonable but recognized that it could allocate some of the income to the parent company since the fact that there was no lump sum payment, royalty, or cost sharing agreement, created a distortion of income between Lilly and the Puerto Rican subsidiary (not making it an arm's length transaction).²⁰ It further concluded that a profit split method should be used to allocate adequately the income between both (ignoring the fact that regulations stipulated three methods for arm's length pricing).²¹ In conclusion, Lilly did get allocated some of the profits generated by the intangibles, but the Court came up with its own methods, making no deference to the Commissioner's arguments.

Similarly, the Commissioner was also prevented from allocating all intangible profits transferred to a subsidiary in *G.O. Searle & Co. v. Commissioner*.²² In this case, Searle, a U.S. parent corporation transferred ownership of U.S. patents and trademarks to a Puerto Rican subsidiary also pursuant to section 351. As a result of this agreement the taxpayer's income decreased by 50%. As in Lilly, the court accepted the non recognition transfer of the intangibles but determined that it did not receive an arm's length consideration and computed a royalty charge. The Court determined that a 25% rate of the subsidiary's net sales was reasonable but did not make any further analysis nor made any reference to the section 482 regulation methods or the comparables needed to determine the arm's length prices.

In Conclusion, these cases, among others,²³ are examples of how the courts tried to interpret the section 482 regulations and the arm's length standard. The courts did not follow the comparable methods mandated by the regulations and ended up determining what they thought was a "fair price" disregarding any analysis based on the methods on the Treasury

²⁰ In appeal, the court rejected this conclusion and determined the transfer was an arm's length one.

²¹ Section 482 regulations set out detailed rules for determining transfer prices of tangible property. It described three specific methods in order to find arm's length prices: comparable uncontrolled price method, resale price method, and the cost plus method. A fourth method should be used where none of the three methods can reasonably be applied. These methods should be used in the order set forth. In Lilly, the court rejected the use of the resale method (Lilly's argument) and the cost plus method (IRS argument) and used a fourth method. White Paper *supra* note 5, at 10.

²² 88 T.C. 252 (1987).

²³ *Hospital Corporation of America v. Commissioner*, 81 T.C. 520 (1983); *United States Steel v. Commissioner*, 617 F.2d. 942 (2d Cir. 1980); *Ciba-Geigy Corp. v. Commissioner*, 85 T.C. 172 (1985).

Regulations. These cases triggered the Treasury to incorporate new regulations in order to better clarify the use of the comparable and the arm's length standard mostly because of the problems that confronted the valuation of intangibles.

In the next section, the 1986 regulations will be discussed specifically the incorporation of the new commensurate with income standard and its implications.

V. COMMENSURATE WITH INCOME STANDARD OF THE 1986 REGULATIONS

Pre 1986 cases brought uncertainty problems due to the lack of consistency when allocating income. This, primarily due to the problem of the valuation of the intangibles that were transferred. Congress, recognizing the problems the IRS was having applying and enforcing the arm's length standard,²⁴ enacted the last sentence of section 482 in an effort to deal with the transfer of intangibles between a parent company and its tax haven subsidiaries. The commensurate with income standard, or also called the super royalty provision, states: "In case of any transfer (or license) of intangible property... the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible".²⁵ This new provision not only captured section 351 transfers but also included licensing of royalty agreements which had also been a problem.²⁶

This amendment requires taxpayers to consider the actual profit from the exploitation of the intangible. In other words, "each party earns the income or return from the intangible that reflects the economic activities undertaken by each party".²⁷ In determining the commensurate with income profit, two steps have to be followed. First it is required that the initial royalty agreement in the year of the transfer of the intangible be at arm's length.²⁸ This means that an analysis of the facts and circumstances at the time of the transfer should be made.²⁹ Moreover, the regulations introduced the concept of periodic adjustments after this initial assessment. This meant that the original transfer price would be adjusted periodically to reflect

²⁴ Robert G. Clark, *Transfer Pricing, Section 482, and International Tax Conflict: Getting Harmonized Income Allocation Measures From Multinational Cacophony*, 42 AM. U. L. REV. 1155, 1177 (1993).

²⁵ 26 U.S.C.A. § 482.

²⁶ Josh. O. Ungerman, *The White Paper: The Stealth Bomber of the Section 482 Arsenal*, 42 Sw. L. J. 1107, 1124 (1989).

²⁷ MONICA BOOS, INTERNATIONAL TRANSFER PRICING: THE VALUATION OF INTANGIBLE ASSETS 103 (2003).

²⁸ *Id.* at 104.

²⁹ *Id.*

unforeseen changes in the profitability of the intangibles transferred.³⁰ These rules allowed the IRS to make retroactive adjustments of the lump sum or royalty payments originally established.³¹ These “adjustments made ... [should too] be consistent with the arm's length standard”.³²

The enactment of these new regulations brought much controversy because of its apparent conflict with the already established arm's length standard. In the next section this controversy will be discussed and preliminary conclusions will be drawn.

VI. ARM'S LENGTH V. COMMENSURATE WITH INCOME

The fight between the arm's length standard and the commensurate with income standard had started. The first impressions were that “it evidence[d] a rejection of the arm's length standard in that unrelated parties typically do not deal with each other in such a matter”.³³ As a result of these controversies, the Department of Treasury released the *Study on Intercompany Pricing*, also known as “The White Paper” in 1988.³⁴ The purpose of this Study was to further “reexamine [] the theory and administration of section 482, with particular attention paid to transfers of intangible property”.³⁵ In this study, the Treasury acknowledged the fact the comparables are generally unavailable [in the case of intangible assets] and that “regulations fail[ed] to resolve the most significant and potentially abusive fact patterns”.³⁶ It further tried to create an solution to one of the principal which was the implementation of the commensurate with income standard for when comparables did not exist. These were called the basic arm's length return method (BALRM) and the profit split addition to the BALRM.³⁷ However, because both methods were to be used when no comparables were available, it was considered a violation of the arm's length standard³⁸ since the basic principle behind this standard IS the use of comparables.

Despite of the criticism, The White Paper defended the use of these methods and categorically stated that “periodic adjustments [were]

³⁰ 26 C.F.R. § 1.482-4(f).

³¹ MONICA BOOS, *supra* note 27, at 104.

³² 26 C.F.R. § 1.482-4(f)(2)(i).

³³ Marc M. Levey & Stanley C. Ruchelman, *Section 482-The Super Royalty Provisions Adopt the Commensurate Standard*, 41 TAX LAW 611, 636 (1988).

³⁴ White Paper *supra* note 5.

³⁵ *Id.* at 1.

³⁶ For a full discussion of these methods *see* White Paper *supra* note 5, at 34.

³⁷ *Id.* at 94-8.

³⁸ MONICA BOOS, *supra* note 27, at 98.

necessary in order to reflect the substantial changes in income...produced by a transferred intangible".³⁹ Moreover, it expressed that the period adjustments were consistent with the arm's length principle since "unrelated parties generally provide some mechanism to adjust for change in the profitability of transferred intangibles."⁴⁰ This last statement is, however, problematic. Some, following the White Paper's approach have agreed that between unrelated parties it is ordinary to enter into agreements where adjustment for royalties are provided depending on the profitability.⁴¹ On the other hand, others have disagreed on this point,⁴² rendering the commensurate with income inconsistent with the arm's length standard.

Those disagreeing on the fact that the new methods for adjustments were not quite consistent with the arm's length standard were not far from the truth. Controversy continued when the 1992 proposed regulations further moved away from the original BALRM and returned to the old comparable approach by "significantly broadening the concept of comparability as to ship around the problem of the lacking comparables".⁴³

Finally, in 1994, the Treasury released the most current regulations related to the valuation of intangibles. In these, the arm's length standard was re-emphasized as the leading standard to be followed in setting prices for controlled transactions, the best method rule was introduced⁴⁴ and the concept of an arm's length range was established.⁴⁵ Furthermore, The regulations created exceptions (safe harbors) where no adjustments are necessary. This is the case when: (1) comparable transactions exist (the same intangible was transferred to an uncontrolled taxpayer under substantially the same circumstances) and can be used to apply the uncontrolled transaction method (CUT);⁴⁶ (2) if transactions involving comparable intangibles exist (not necessarily the same intangible or exact circumstances) no adjustments would be necessary if some conditions are met (e.g. written agreement exists and no changes in the consideration can be made);⁴⁷ (3) other methods different from CUT have been used and certain facts are cumulatively established;⁴⁸ (4) extraordinary events have

³⁹ White Paper *supra* note 5, at 71.

⁴⁰ *Id.*

⁴¹ Clark, *supra* note 24, at 1184.

⁴² MONICA BOOS, *supra* note 27, at 104-5.

⁴³ *Id.* at 99.

⁴⁴ Contrary to the previous regulations that mandated a strict hierarchy of methods.

⁴⁵ Haufbauer & Assa, *supra* note 8, at 248.

⁴⁶ 26 C.F.R. § 1.482-4(f)(2)(i)(A).

⁴⁷ 26 C.F.R. § 1.482-4(f)(2)(i)(B).

⁴⁸ 26 C.F.R. § 1.482-4(f)(2)(i)(C).

occurred (e.g. natural disasters);⁴⁹ and (5) requirements under 2 and 3 have been followed for each year of the five-year period beginning with the first year in which substantial periodic consideration was required to be paid.⁵⁰

In conclusion, the commensurate with income was somewhat relaxed with the creation of these new regulations. Some even have said it has lost relevance.⁵¹ The fact that the commensurate with income standard has lost its relevance or not, can only be determined in the courts. As the next section explains, a court has been tempted to overrule decades of interpretations regarding the superiority of the arm's length standard in favor of the commensurate with income standard. The *Xilinx*⁵² case will demonstrate that courts are still having difficulty understanding the transfer pricing regulations for intangibles and what consequences could this have in the future.

VII. THE XILINIX V. COMMISSIONER CASE AND ITS MEANING

Xilinx is a company in the business of researching, developing, manufacturing, marketing and selling programmable logic devices, integrated circuit devices and other development software systems. Xilinx (petitioner) and subsidiary XI entered into an agreement that provided that all new technology developed by either of both would be jointly owned. The relevant issue in this case arises because of Xilinx's Stock Option plan and its cost allocation. In 2000 the Commissioner issued notices of deficiencies stating that petitioner was required, pursuant to the cost-sharing agreement, to share the costs of certain stock option plans.

The Commissioner in what could be called a desperate move, argued that for purposes of determining that arm's length result in cost sharing arrangements, Congress intended for the commensurate with income standard to replace the arm's length standard. To what the Court answered: "The commensurate with income standard was intended to supplement and support, not supplant the arm's length standard. Nothing in section 482, its accompanying regulations, or its legislative history indicates that internal measures of cost and profit should be used to the exclusion of the arm's length standard."⁵³

⁴⁹ 26 C.F.R. § 1.482-4(f)(2)(i)(D).

⁵⁰ 26 C.F.R. § 1.482-4(f)(2)(i)(E).

⁵¹Yariv Brauner, *Value in the Eye of the Beholder: The Valuation of Intangibles for Transfer Pricing Purposes*, 28 VA. TAX REV. 79 (2008).

⁵² *Xilinx v. Commissioner*, 125 T.C. 37 (2005).

⁵³ *Id.* at 56.

Regardless of this defeat, the Commissioner appealed to the 9th Circuit and obtained a brief victory. On appeal,⁵⁴ the court completely disregarded the “supplement and support” argument of the tax court and stated that despite the unequivocal language of section 1.482-1(b)(1) of the Treasury Regulations indicating that the arm’s length standard was to be applied in every case, section 1.482-7(d) specified that:

[C]ontrolled parties in a cost sharing agreement must share *all* ‘costs ... related to the intangible development area,’ and that phrase is explicitly defined to include virtually all expenses not included in the cost of goods. The plain language does not permit any exceptions ... we conclude the two provisions establish *distinct and irreconcilable standards* for determining which costs must be shared between controlled parties in cost sharing agreements specifically related to intangible product development.”⁵⁵

It went even further to conclude that “the all costs requirement is irreconcilable with the arm’s length standard”⁵⁶ and that they “were not persuaded by either party’s attempts to harmonize the two provisions”.⁵⁷

The drastic conclusion of Judge Fisher received critics by a dissenting Judge Noonan. He expressed that the rule of thumb of “the specific controlling the general” used by majority was wrong. It branded it as simple and plausible, but wrong. In short words the judge said: “it converts a canon of construction into something like a statute. It ignores the international context and the Treasury’s own practice”.⁵⁸

Finally, in a drastic withdrawal,⁵⁹ Judge Noonan writing the majority opinion affirmed in a very short decision the tax court’s decision rendering the arm’s length standard the superior one.

In conclusion, the Xilinx cases are a clear demonstration of the need of more guidance in the valuation of intangibles. The Commissioner’s argument that the commensurate with income had replaced the arm’s length standard, although theoretically wrong, shows that the standard lacks power to capture the income that is escaping to foreign jurisdiction and the desperate moves that the Commissioner will continue to make in order to stretch the scope of the standard. Although the 9th Circuit concluded that the commensurate with income standard does not replace the arm’s length

⁵⁴ Xilinx v. Commissioner, 567 F.3d 482 (2009).

⁵⁵ *Id.* at 488.

⁵⁶ *Id.* at 489.

⁵⁷ *Id.* at 490.

⁵⁸ *Id.* at 497.

⁵⁹ Xilinx v. Commissioner, 598 F.3d 1191 (2010).

principle, other Circuits are not precluded from making their own determinations and giving more power to the former.

In practical terms, this decision limits the Commissioner from collecting tax on income that is being retained in foreign tax havens. Additionally, it subordinates the commensurate with income principle to the arm's length standard leaving little space for their harmonization. As a consequence, being the arm's length standard the international principle governing transfer pricing, the commensurate with income standard could be eventually left in the darkness.

VIII. CONCLUSION

Definitively, the commensurate with income standard still needs more specific guidance in order to cope with the new global business developments and prevent its disappearance. Investors are everyday finding creative ways to lower their income taxes and the Treasury should be able to figure them out in time, before too much capital has escaped to other jurisdictions. With these new investment opportunities and ways of doing business this standard could be a useful tool for increasing collections.

Some have concluded that the arm's length method does not work well in theory or in practice.⁶⁰ New alternatives have been even proposed in the alternative, e.g. the formula based transfer pricing regime.⁶¹ Despite these new methods that are being talked about, the reality is that the commensurate with income standard is part of our statute and we might as well make the best of it and propose new regulations to make it more effective while we decide whether to take another direction.

⁶⁰ Martin A. Sullivan, *Drug Company Profits Shift Out of the United States*, Tax Notes (March 8, 2010) 1168.

⁶¹ *Id.*; Brauner, *supra* note 51, at 160.