Case Study
March 2016

Natural Resource Governance Institute

Transfer Pricing in the Extractive Sector in Ghana

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EXECUTIVE SUMMARY

Like many countries in West Africa, Ghana has abundant mineral and petroleum resources, making the extractive industry a vital source of government revenue. According to the Ghana Extractive Industries Transparency Initiative (GHEITI), the mining sector alone contributed 10 percent to gross domestic product (GDP) in 2013, and oil and mining together accounted for 66 percent of exports. Despite the significant contribution of the extractive sector to Ghana's economic growth, allegations of potential tax avoidance suggest that extractive industry revenues could be far higher. The discrepancy is due to transfer mispricing, trade mis-invoicing, and thin capitalization. Ghana ranked 93rd of 145 developing countries in terms of illicit financial flows in 2013.[1] Recognizing the risk that tax avoidance poses to the extractive industry tax base, the government has adopted appropriate legal measures, however challenges persist in the area of implementation and enforcement.

To address these issues, Ghana has sought to introduce transfer pricing rules. Transfer pricing is the mechanism by which prices are chosen to value transactions between related legal entities within the same multinational enterprise (MNE). These are referred to as "controlled transactions" and may include the purchase and sale of goods or intangible assets, the provision of services, the provision of financing, cost allocation, and cost sharing agreements. In principle, this works when the price that is set matches the "arm's length" price at which a transaction would have taken place between unrelated parties. However, transfer pricing may become abusive or illegal when related parties seek to distort the price as a means of reducing their overall tax bill. In these instances the practice may be referred to as "transfer mispricing."

This case study investigates the barriers to implementation of transfer pricing rules in the extractive sector in Ghana. It forms part of a series of five country case studies including Guinea, Sierra Leone, Zambia and Tanzania. The result of this study is a number of recommendations that aim to provide guidance on practical steps to strengthen enforcement of transfer pricing rules in the mining sector. The recommendations can be broadly grouped into four categories: transfer pricing legal framework, administrative arrangements, knowledge and skills, and information.

1 Dev Kar and Joseph Spanjers. *Illicit Financial Flows from Developing Countries: 2004–2013.* (Global Financial Integrity, 2015), 29

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Overview of recommendations

		Recommendation	Responsibility
Legal framework	1	Review potential inconsistencies between Section 31 of the Income Tax Law (2015), and the 2012 Transfer Pricing Regulations. Specifically, clarification is required as to whether the "arm's length" principle is to be applied to individual transactions as per the regulations, or to the calculation of total chargeable income at the end of each year.	Ministry of Finance
	2	Amend the Minerals Act 2006, and the Petroleum Income Tax Law 1987, to explicitly reference Section 31 of the Income Tax Law, requiring the arm's length principle to be applied to all related party transactions, with particular emphasis on deductible expenditure.	Ministry of Mines Ministry of Petroleum
	3	Include the option for before advanced pricing agreements (APAs) in the transfer pricing regulations. If properly negotiated with support from technical experts, APAs provide an opportunity for the Ghana Revenue Authority (GRA) to develop their expertise in transfer pricing and gain access to valuable information from taxpayers.	Ministry of Finance
	4	Amend the new Income Tax Law—which is still open for comment—to include beneficial ownership disclosure requirements. By requiring disclosure of beneficial owners, the government will be in a better position to determine related party arrangements, and limit the emerging practice of "round-tripping".	Ministry of Finance
Administrative arrangements	5	Raise awareness within the GRA on the issue of transfer pricing, the work of the Transfer Pricing Unit, and how they intend to work with other divisions. It is critical that the Transfer Pricing Unit does not work in isolation but instead collaborates with the Mining and Petroleum Desks, and through them the relevant regulatory agencies for the extractive sector.	Transfer Pricing Unit in the GRA
	6	Ensure that the Transfer Pricing Unit is adequately staffed, particularly given the large number of audits they plan to conduct.	GRA
	7	Resume the Minerals Revenue Taskforce to improve coordination between the Mining Desk at the GRA, and the Minerals Commission, and other relevant stakeholders. The government may wish to establish a separate multi-stakeholder revenue taskforce for the petroleum sector, or expand the mandate of the Minerals Revenue Taskforce to include oil and gas.	Minerals Commission
	8	Ensure that the internal GRA Transfer Pricing Committee is empowered to assume the responsibilities outlined in the initial proposal for the governance structure of the Transfer Pricing Unit. These include setting strategic direction, approving transfer pricing cases for audit, and resolving taxpayer disputes.	GRA
Transfer pricing information	9	Establish an online information-sharing platform to improve exchange of information. This platform should consolidate all production and financial data from mining companies.	Ministry of Finance GRA Minerals Commission
	10	Develop a transfer pricing risk matrix specific to the extractive sector, to strengthen monitoring and evaluation of potential transfer mispricing risks in the extractive industry value chain, and improve selection of cases for audit.	Transfer Pricing Unit, Mining and Petroleum Audit Desks
	11	Share with civil society the plans for the development of a government minerals laboratory. Civil society should review these plans to ensure that the laboratory is a cost effective approach to monitoring the quality and grade of mineral exports.	Minerals Commission
	12	Engage the Mining and Petroleum Audit Desks, the Customs Division, and the Minerals and Petroleum Commissions, in development and implementation of the transfer pricing comparables database to be set up by Bureau van Djik.	Transfer Pricing Unit
Knowledge and skills	13	Ensure that all officials in the Large Taxpayers Office receive basic training on transfer pricing, so they have sufficient knowledge to identify transfer pricing risks via general audits, and flag them with the Transfer Pricing Unit.	GRA and international partners
	14	Ensure the Mining and Petroleum Desks, and the Transfer Pricing Unit receive specialized audit training for the extractive sector.	GRA and international partners
	15	Review the policy of rotating auditors around the various divisions of the Large Taxpayers Office on a biannual basis, particularly for the Mining and Petroleum Audit Desks. It is very difficult to build the necessary technical understanding of the mining and petroleum sector when staff are rotated so frequently.	GRA

TRANSFER PRICING LEGAL FRAMEWORK

Status of transfer pricing rules

In 2012 Ghana became one of the few sub-Saharan countries in West Africa to introduce transfer pricing regulations. Prior to this, Ghana relied exclusively on Section 70 of the Internal Revenue Act (IRA) 2000, which empowered the commissioner-general of the Ghana Revenue Authority (GRA) to adjust the price of a transaction between associates to reflect the income as if the transaction had been conducted at arm's length. As of October 2015, Section 70 of the IRA has been repealed and replaced by Section 31 of the 2015 Income Tax Law, which will take effect in September 2016. Section 31 requires that arrangements between persons in a controlled relationship should be done in accordance with the arm's length principle. The new Income Tax Law also includes a general anti-avoidance rule that empowers the commissioner-general to re-characterize or disregard an arrangement, or part of an arrangement, that is entered into, or carried out, as part of a tax avoidance scheme.

In addition to Section 31 of the Income Tax Law, the Technology Transfer Regulations of 1992 govern intellectual property transfers and service charges between foreign residents and Ghanaian affiliates. Specifically, the regulations restrict royalty payments in respect of know-how, patents and other industrial property rights to between 0 and 6 percent of net sales, and fees for technical services between 0 and 5 percent. Technically, this is in conflict with the transfer pricing provision in the Income Tax Law as it limits royalties and fees to a specific range, rather than applying the arm's length principle to determine the appropriate transfer price. However, the Income Tax Law supersedes the Technology Transfer Regulations: taxpayers with technology transfer agreements have previously been told by the GRA to justify royalties and fees within the aforementioned parameters, but according to the arm's length principle. The Ghana Investment Promotion Centre (GIPC), the agency responsible for administering the Technology Transfer Regulations, is in the process of bringing the regulations in line with the transfer pricing rules.

Ghana introduced transfer pricing regulations in 2012, in response to potential transfer mispricing in the textile industry. The regulations broadly adhere to the OECD guidelines however there is the option to apply alternative transfer pricing methods if necessary.

The Tax Policy Unit at the Finance Ministry recognized the need for more comprehensive transfer pricing regulations in 2010. This was in response to allegations of potential transfer mispricing in the textiles sector. While Section 70 of the IRA provided the legal basis for the government to re-characterize transactions not conducted at arm's length, the Act failed to define "arm's length," explain how the arm's length principle is to be applied, nor did it set out transfer pricing documentation requirements. A committee was convened to develop the regulations, with support from Gesellschaft für Internationale Zusammenarbeit (GIZ) and the OECD, and, in 2012, the regulations were published.

The regulations adopt the OECD definition of "arm's length," as well as the five OECD methods for determining an arm's length price. The GRA also has the right to apply an alternative transfer pricing method if necessary. The regulations have wide application including "controlled relationships" between non-related parties, for example between a company and their major shareholder, as well as transactions between domestic related parties. This gives the GRA significant scope to monitor transfer pricing issues. There is no turnover threshold for taxpayers required to comply with the regulations, however all taxpayers must keep transfer pricing documentation and make this available to the GRA upon request.

There is no specific transfer pricing penalty. Any additional tax raised following a transfer pricing adjustment will be deemed underpaid and therefore subject to normal penalties under the Income Tax Law. It is important to note that there is no penalty where the taxpayer makes the transfer pricing adjustment independently. It is only when the GRA has to chase them up that the general penalties will apply. Arguably, the standard penalties for underpaid tax are too lenient, thus encouraging fraud. The finance ministry is considering reviewing the penalties, which may include a specific penalty to discourage transfer pricing.

The ministry of finance are concerned that the standard penalties for underpaid tax are an insufficient deterrent for companies engaged in transfer mispricing, and are considering introducing specific penalties.

Although Section 70 of the IRA has since been replaced by Section 31 of the new Income Tax Law, concerns that the 2012 transfer pricing regulations exceeded the requirements of Section 70 persist in relation to the new law, potentially exposing the government to legal challenge. The area of conflict is this: the regulations require companies to calculate actual transactions according to the arm's length principle, whereas the Income Tax Law only requires chargeable income to be calculated according to arm's length standards. The latter means that rather than establishing an arm's length price for every transaction, taxpayers can make the adjustment at the end of the financial year, which would be a more practical way of applying transfer pricing rules. There is a risk that taxpayers may challenge the regulations on the basis that they do not have the authority to widen the scope of Section 31 of the Income Tax Law.

According to the head of the Mining Audit Desk at the GRA, the new regulations are not sufficiently specific to the extractive industries, nor does the relevant mining and petroleum legislation explicitly address the requirement for arm's length pricing. There are numerous issues throughout the mining value chain for which government officials require transfer pricing guidance. These include the sale of mineral rights, construction of mining operations, the purchase and leasing of mining equipment, sale of intermediary products, and transport and insurance issues. While there may not be transfer pricing risks that are exclusive to the extractive sector, the Transfer Pricing Unit requires guidance on how to identify and evaluate these risks in the context of the industry.

There is no mention of the arm's length principle in the Minerals Act 2006, the Petroleum (Exploration and Production) Law 1984, or the Petroleum Income Tax Law 1987 (PIT). Section 25 of the Minerals Act has recently been revised from a sliding scale to a fixed rate, however the amendment, like the clause it replaced, makes no mention of calculating royalties according to the arm's length principle, or even market value. Similarly, Section 20 of the Petroleum Exploration and Production Law does not specify how royalties should be calculated, only that it must be in accordance with rates "prescribed from time to time." Section 3 of the PIT Law also states that income from the sale of petroleum shall be calculated at the selling price actually realized, and, where sold to an affiliate, in the manner provided for in the relevant petroleum agreement. However, Section 5 of the PIT Law does empower the commissioner to disregard or adjust any transaction deemed to be fictitious or artificial that would reduce tax payable.

Despite this gap in the mining and petroleum legislation, Section 66(2)(b) and Section 80(a) of the new Income Tax Law require income from the sale of petroleum and mineral products to be calculated according to Section 31: that is, on an arm's length basis. While it is clear that Section 70 of the IRA, and now Section 31 of the Income Tax Law apply to mining and petroleum companies irrespective of the absence of the arm's length principle in extractive sector legislation, there is value in ensuring that these laws are as robust as possible when it comes to issues of tax avoidance.

Neither the Minerals Act nor the Petroleum Income Tax Law references the arm's length principle. Consequently, when the transfer pricing regulations came out in 2012, petroleum companies said that they didn't apply to them.

According to a senior official at the GRA: "When the transfer pricing regulations came out, the petroleum companies said that they didn't apply to them, but we managed to get them with Section 5 of the PIT."[2] This is precisely why transfer pricing provisions should be included in mining and petroleum legislation—to limit the opportunity for challenge by taxpayers.

In regards to the arm's length principle and petroleum agreements, Article 11.7 of the Model Petroleum Agreement of Ghana (2000) explicitly states that crude oil must be sold in arm's length commercial transactions, meaning "sales to purchasers independent of the seller." On other sales, or exports without sale, the market price is to be determined based on comparable world prices in arm's length transactions. The Tullow Oil petroleum agreements for Deep Water Tano and West Cape Three Points (WCTP), as well as the Kosmos petroleum agreement for WCTP, explicitly reference Article 11.7 of the model agreement. It is difficult to ascertain whether the arm's length principle gets as much attention in the mining sector as none of the agreements are public and there is no model agreement to use as a reference point. However, mining companies enjoy significant concessions, for example the debt-to-equity ratio for Newmont Mining Corporation is allegedly 4:1 rather than the new legislated ratio of 3:1. There is no reason to expect that there aren't similar variations when it comes to pricing arrangements.

2 Section 5 of Ghana's Petroleum Income Tax Law (1987) regulates artificial or fictitious transactions.

Box 1. The transfer pricing reform process in Ghana

The introduction of transfer pricing regulations was triggered by an investigation by the finance ministry into potential transfer mispricing in the textile industry. A senior official wanted to find out how much it cost local textile manufacturers to produce material, compared to the Chinese companies who were flooding the market. In carrying out this investigation the official came across a particular textile company that was consistently running at a loss, with a huge financial cost wiping out possible profits. This investigation coincided with the transfer pricing report *Calling Time* released by Action Aid about brewery SABmiller dodging taxes in Africa. Consequently, the official suspected that the situation with the textile company was transfer mispricing and wrote a memo to the government minister to that effect.

The minister approved the proposal to introduce transfer pricing regulations, and, in the subsequent budget statement, allocated resources to begin the process of developing the regualtions. A committee was established comprised of officials from the International Tax Unit, attorney general's office, and the GRA. The committee contacted the OECD for technical support, and GIZ came on board to fund their assistance. It took approximately one year to draft the regulations.

Success factors
A key success factor was that senior government officials were willing to take ownership of the initiative. The minister of finance at the time, played a key leadership role, along with the ex-GRA Commissioner who was brought on as a consultant by GIZ. The OECD technical advisor recorded discussions at the ministerial level during every stage of the process. Another success factor was that consultations were held with a range of stakeholders including the private sector, donor community, civil society and the political leadership. To build further buy-in, transfer pricing training was delivered to the judiciary, the Economic and Organised Crime Office, and private sector operatives.

Challenges
The finance ministry experienced both internal and external resistance in developing the regulations. Some taxpayers lobbied the government directly or through parliament, concerned that the regulations would be applied retrospectively and that documentation requirements would be too onerous. To neutralize these concerns the committee organized a forum with all stakeholders to allay fears and build buy-in. In hindsight, the finance ministry would have benefited from engaging other ministries responsible for significant taxpayers, for example the Ministry of Mines, to help get the relevant companies on board early on.

There was also resistance from the Ghana Investment Promotion Centre (GIPC), which claimed that the Technology Transfer Regulations limited the ministry's authority to interpret Section 70. The conflict between the new regulations and the GIPC is being resolved, with the Technology Transfer Regulations being brought in-line with transfer pricing provisions.

Finally, there was resistance from the GRA who perceived the finance ministry to be taking over their job, and creating more work for them. This conflict stems from long-standing issues with the GRA regarding the International Tax Unit's remit to monitor and evaluate the GRA's work.

Impact of the transfer pricing regulations: before and after

Despite Section 70 having been in existence since 2000, it was not until the transfer pricing regulations were introduced in 2012 that transfer pricing audits began. Prior to this, there was no transfer pricing team at the GRA, and limited knowledge of both the concept of transfer pricing and the existence of Section 70. This is not to say that transfer pricing issues were not identified prior to the regulations. According to the head of the Mining Desk at the GRA, the issue of fees paid by gold mining companies to affiliate refineries was considered a potential transfer pricing case, however due to inadequate knowledge and the absence of a clear approach to transfer pricing, the issue was dropped and all the GRA could do was apply withholding taxes.

Civil society remains skeptical about whether the GRA is committed to enforcing transfer pricing rules in the extractive sector.

Following the introduction of the 2012 regulations and the establishment of the Transfer Pricing Unit at the GRA, a number of transfer pricing audits have been launched across a range of sectors, including in relation to major mining and petroleum companies. So far four of these audits have been concluded, resulting in the collection of additional tax. While transfer pricing audits are generating additional government revenue, the GRA is wary about financial targets, preferring to focus on compliance. Thus far, transfer pricing audits have not created additional operational costs for the GRA beyond the salaries of the Transfer Pricing Unit. However, all 17 members of the Transfer Pricing Unit were recruited from within the Domestic Tax Department of the GRA, potentially depleting the capacity of the general audit team to focus on comprehensive audits.

Although the 2012 regulations have triggered greater oversight from the GRA regarding transfer pricing issues, civil society is sceptical about the GRA's commitment to monitoring. Instances of alleged transfer mispricing have been flagged by civil society in the past, for example, the case involving the construction of a gas plant by a Chinese construction firm (see Box 2), and no action was taken. While limited capacity may justify inconsistent monitoring, it is reasonable to expect that a US $1 billion project like that of the Jubilee Fields gas processing plant would attract oversight from the GRA.

Box 2. Cost of gas plant inflated by US $40 million

In 2012 the Civil Society Platform on Oil and Gas in Ghana raised concerns that China's Sinopec International Petroleum Services Corporation (SIPSC) was engaged in potential transfer mispricing in relation to the construction of the Jubilee fields gas processing plant at Atuabo. This plant was part of a larger US $3 billion loan by the Chinese government and cost approximately US $1 billion. It was alleged that SIPSC had inflated the cost of the processing plant procured by, and purchased from, its special purpose subsidiary SAF Petroleum Investments registered in Dubai. It was revealed that the same person, Yang Hua, was the Project Director for both SIPSC and SAF. According to Dr. Steve Manteaw, chairman of the Civil Society Platform, SIPSC had inflated the cost by approximately US $40 million. This was calculated in reference to competing bids.

These concerns were raised with the president at the time who committed to taking action on the matter. However, according to Dr. Manteaw nothing has been done to date. Further information requested from Ghana Gas was not made available. Follow-ups with the GRA revealed that neither the GRA head office, nor the relevant regional office, has a tax file on Sinopec. In addition, the tax concessions granted to Sinopec were not approved by parliament.

Despite past monitoring lapses, the number of planned transfer pricing audits suggest that the GRA is committed to improving oversight of tax avoidance issues. However, as it is still early days civil society must closely monitor implementation of 2012 transfer pricing regulations to ensure that they are applied in a rigorous and consistent manner.

Relevant anti-tax avoidance rules

Thin capitalization

According to Section 33 of the new Income Tax Law, deduction for interest paid on loans, or foreign currency exchange losses on debt, will be disallowable in excess of a 3:1 debt-to- equity ratio. This is the same as Section 71 of the IRA. Neither the Minerals Act 2006 or the PIT Law 1987 reference this rule. The 2013 Ghana Extractive Industry Transparency Initiative (GHEITI) report raised concerns regarding this inconsistency in relation to the petroleum sector. Specifically, citing previous issues with the application of capital gains tax. While the majority of mining agreements are supposedly agreed in accordance with the law, the absence of a legal requirement to disclose contracts makes this difficult to verify. A senior official at the GRA revealed that at least the former stabilization agreement with Newmont provided for a 4:1 debt-to-equity ratio.

According to the finance ministry, thin capitalization is particularly problematic for Ghana, as in other developing countries. The interest rate in Ghana is so high, up to 30 percent, that companies can get loans at a much lower rate elsewhere. Consequently, investors use this as a reason to borrow from their parent companies, stating that this will enable them to increase investment in the country. It is difficult for the government to dispute this logic despite the fact that it is problematic to police related party loans.

Although distinct from thin capitalization, Ghana is beginning to suffer from round tripping. This is where domestic investment is disguised as foreign investment through non-resident special purpose entities (SPEs), or where foreign direct investment (FDI) funds are channelled through local SPEs. The reason for this practice is to take advantage of the tax and fiscal advantages provided to foreign investors. Aside from exaggerating the contribution of FDI to the economy, most SPEs are located in tax havens so round tripping creates administrative challenges for the GRA, as well as potentially reducing revenue collection due to unwarranted tax breaks.

Advance pricing agreements

The finance ministry considered the option of providing advance pricing agreements (APAs) to taxpayers during the development of the 2012 transfer pricing regulations. However the proposal was rejected on the basis of capacity constraints. While the GRA acknowledges the benefits of APAs, on this occasion they elected not to include APAs for two reasons. First, given that Ghana is just starting out in transfer pricing it should not be concerned with APAs as they are complicated to develop and may tie the government's hands. Secondly, when the GRA surveyed other countries using APAs it found that the experience so far had not been positive. India and Nigeria were cited as key examples.

The finance ministry has deliberately avoided Advance Pricing Agreements. This is due to concerns about capacity to negotiate agreements, and the possibility of locking government into unfavorable deals.

According to a senior transfer pricing expert at the GRA: "Other more developed countries are saying APAs are not worth it, they can lock you up for five years, and lead to extensive litigation, so it is better off not getting involved. Those who are doing it are complaining. We are not going to get into it and complain. We are not saying it's not going to happen but we will take one step at a time."

It is understandable that the GRA may feel that companies would once again outgun them in negotiating APAs. However, this power imbalance is arguably no different to the general transfer pricing audit experience, and, if done well, has the potential to significantly reduce the risk of tax avoidance and therefore the GRA's monitoring burden. Given that APAs are to be instigated by the taxpayer, they are likely to be more cooperative, with a clear incentive to provide the relevant information, making it a good opportunity for the GRA to enhance its understanding of particular taxpayers and their transfer pricing methods. APAs are also an obvious opportunity for technical support, for example, the OECD advisor who supported the development of the 2012 transfer pricing regulations is currently advising other countries on specific APAs.

Safe harbors

Conversely, both the finance ministry and the GRA are committed to establishing safe harbors as a means of simplifying implementation of transfer pricing rules. The lack of safe harbors was cited as the major weakness of the transfer pricing regime so far. The government's intention is to develop industry specific safe harbors, including the extractive sector. A proposal has gone to the minister of finance, and if approved, work will start on developing safe harbors. The types of safe harbors being discussed relate to interest rates on loans, as well as average profit margins. Such safe harbors would discourage thin capitalization and over reporting of losses. The government intends to study the industry dynamics of the extractive sector to develop appropriate safe harbors.

TRANSFER PRICING ADMINISTRATIVE ARRANGEMENTS

Transfer Pricing Unit

The GRA is responsible for the collection of tax and non-tax revenue from the extractive sector, including additional tax from transfer pricing adjustments. Following the 2012 transfer pricing regulations, the Transfer Pricing Unit was set up at the LTO at the GRA. Initially, the head of the Transfer Pricing Unit reported directly to the Commissioner of Domestic Tax Revenue, however this arrangement has since changed and the Transfer Pricing Unit now reports to the head of the LTO. The initial structure proposed included a transfer pricing review panel comprised of senior GRA officials, including the head of the Transfer Pricing Unit, as well as deputy commissioners for the LTO, Medium Taxpayers Office, and Small Taxpayers Office, where the case for review fell under their purview. The purpose of the panel was to set the strategic direction of the Transfer Pricing Unit, to review the unit's annual action plan, and to decide how transfer pricing enquiries should be settled. While an internal committee to review audit findings has been established, it is less comprehensive than initially envisaged. It focuses mainly on reviewing transfer pricing audits where the taxpayer and Transfer Pricing Unit are in disagreement.

The Transfer Pricing Unit is adequately staffed with 17 auditors including accountants, statisticians, an economist, and a lawyer. A number of transfer pricing audits are currently underway, all at different stages. Each staff member is involved in approximately three to four audits at any time. The Transfer Pricing Unit may have been slightly ambitious with the number of audits it has launched. Over time, as the audits become more complex and time-consuming, it may be necessary to be more selective with respect to specific transactions and sectors. The former OECD advisor to Ghana on transfer pricing cautioned that while the Transfer Pricing Unit may be adequately staffed on paper, the staff are not necessarily full-time and many are engaged in other work within the LTO.

The head of the LTO considers the workload of the Transfer Pricing Unit to be manageable given the time it takes for information to filter in from taxpayers. All transfer pricing staff were recruited from other divisions within the Domestic Tax Revenue Department. It is unclear how much of a "brain drain" this has created. According to the head of the LTO, vacancies in other divisions have been filled, however this requires further investigation to ensure that the general audit capacity of the other taxpayer offices have not been negatively affected.

There are plans to allocate transfer pricing staff to particular sectors including mining and petroleum, however as the Unit is new and staff are still learning about transfer pricing generally, this allocation has yet to take effect. The head of the Transfer Pricing Unit and the head of the LTO seem very "hands-on" with the preliminary transfer pricing audits currently underway. In fact it was hard to meet other members of the Transfer Pricing Unit, this may be because staff were doing other work in addition to their transfer pricing responsibilities. It is likely that this hands-on approach is due to junior staff learning and building their expertise, however it is important that the rest of the unit have access to adequate training and experience sharing opportunities so that the work of the unit can be sustained.

Internal coordination

The lack of coordination between the Transfer Pricing Unit and other divisions within the LTO is a concern. The Mining Desk in the LTO, a small team of nine auditors dedicated to monitoring large-scale mining companies, confirmed that there is no relationship between the Transfer Pricing Unit and their desk. According to them, the Transfer Pricing Unit work independently with limited communication and collaboration with other divisions. While the Transfer Pricing Unit intends to work with other divisions and pick up specific transfer pricing issues identified via general audits, in practice this is not happening. Occasionally, the Transfer Pricing Unit will ask a question of the Mining Desk but that is the extent of their relationship. Given the Mining Desk's longstanding experience in the sector it makes sense that the Transfer Pricing Unit should work closely with them on mining related transfer pricing audits; the Mining Desk are also beginning to identify and address transfer pricing issues and would benefit from the Transfer Pricing Unit's technical support. The Mining Desk is the main focal point at the GRA for all mining companies, as well as the interface between the GRA and the Minerals Commission. If the Transfer Pricing Unit is going to effectively identify and evaluate transfer pricing risks in the extractive sector it is critical that coordination is improved between the Transfer Pricing Unit and both the Minerals and Petroleum Desk at the LTO. From the taxpayers' perspective, it is particularly important that the Transfer Pricing Unit coordinates with other relevant divisions in the LTO to prevent duplication of requests for information and generally ensure a more streamlined customer experience.

Coordination between the Transfer Pricing Unit and the Mining and Petroleum Audit teams is weak. This must be improved if the Unit is to accurately identify and assess related party transactions along the extractive industry value chain.

The GRA was only established in 2012, so there is still time to improve coordination between the various divisions. Given the challenge of verifying deductible expenditure claimed by extractive companies, it is important to ensure effective coordination between the Transfer Pricing Unit, the Customs Division, and the Mining and Petroleum Desks. The Transfer Pricing Unit is in the process of setting up a transfer pricing comparables database with the help of Bureau van Dijk (BVD). The database will provide benchmarks for some types of deductible expenditure such as management fees and interest payments on related party loans. The Customs Division has its own system for valuing capital inputs, and although it hasn't been active in this area (due to duty exemptions for the extractive industries) it has experience and knowledge that must be utilized in the development of transfer pricing benchmarks. It is important that the comparables used by the Transfer Pricing Unit and the Customs Division are at least similar, if not the same, in order to avoid conflicting valuation.

Inter-agency coordination

The Transfer Pricing Unit has selected a small number of mining and petroleum companies for audit so far. These companies have been selected based on a number of potential transfer pricing risks including the cost of equipment and machinery, high management fees, and under invoicing of sales. The Transfer Pricing Unit will need a solid understanding of the extractive industries to effectively evaluate these transactions, requiring coordination with the relevant desks at the LTO, but also with the Minerals and Petroleum Commissions. According to the GRA, information sharing by both the Minerals and Petroleum Commissions has improved, however there are still gaps and any collaboration is ad hoc due to the lack of a formal coordination mechanism. The GRA is yet to receive the monthly production returns submitted to the Minerals Commission, although they do access the returns when they commence an audit. On the flip side, the involvement of the Minerals Commission in mining audits is limited to comparing notes on production and revenue. The commission has recommended that the GRA engage mining engineers and geologists to assist with audits, however this advice has not been followed. The Minerals Revenue Taskforce was established, yet the group has not met since 2014, supposedly due to a lack of funds.

The Minerals Revenue Taskforce, hosted by the Minerals Commission, is crucial to sharing information and expertise between the relevant agencies. The taskforce has not met since 2014, supposedly due to lack of funds.

Box 3. Ring-fencing policy fails due to lack of coordination

In the 2012 amendment to the IRA, the Ministry of Finance introduced a ring-fencing provision for the mining sector. According to the IMF, "ring-fencing" can broadly be defined as "limitation on consolidation of income and deductions for tax purposes across different activities, or different projects, undertaken by the same taxpayer."

Mining companies have cited this policy change as an example of poor coordination between the finance ministry and the GRA, the authors of the ring-fencing provision, and the Minerals Commission. According to the amendment, ring-fencing was meant to happen around a "mining area," however this was not clearly defined. At the time, mining companies were extremely concerned about the practicalities of ring-fencing mining pits, as well as surface versus underground mines, amongst other issues. The options were unworkable for mining companies, a position endorsed by the Minerals Commission whose engineers agreed that implementation was impossible.

After several meetings, a consensus was reached between the government and industry that the ring-fence area for tax purposes is the mine, and that more than one mine cannot be consolidated as a separate mineral operation. According to Section 74 of the new Income Tax Law, a separate mineral operation is defined as a mineral operation pertaining to each mine, and a mineral operation with a shared processing facility. Companies, as well as the Minerals Commission, have agreed that this definition is more feasible than previous proposals.

TRANSFER PRICING ACCOUNTABILITY MECHANISMS

Civil society

An active civil society in Ghana has shown a high level of awareness of issues around tax avoidance in the extractive sector. This is evidenced by numerous reports written on the subject, including one released in 2015 by the African Center for Energy Policy, on "Illicit Financial Flows and the Extractive Industry in Ghana." Another civil society organization, the Integrated Social Development Center (ISODEC), has actively lobbied the government on tax avoidance issues in the extractive sector, namely the case with Sinopec in 2012, and the capital gains issue regarding sale of petroleum assets. ISODEC hosts the Ghana Civil Society Platform on Oil and Gas, a coalition of 120 civil society groups to promote transparency. The platform is actively involved in policy making, as well as monitoring the sector.

The Ghana Extractive Industry Transparency Initiative has been instrumental in increasing the corporate tax rate, reducing capital allowances, and fixing royalty rates. Also, it has helped to coordinate civil society and provide evidence to inform policy debates.

While civil society is very vibrant, there is a concern that activity is disproportionately weighted towards oil and gas due to the preference of international donors, thus limiting effective oversight of the mining sector, as well as taxation and public financial management more broadly. There is a need to build capacity to enable civil society to engage with the taxation of extractive industries more widely. A prominent civil society activist openly acknowledged that capacity in this area is concentrated in a few organizations and a few individuals.

Since the publication of its first annual reconciliation report in 2006, the GHEITI has been credited with many policy reforms in the extractive sector. According to a member of the GHEITI multi-stakeholder group, GHEITI reports have contributed to raising the corporate income tax rate from 25 percent to 35 percent, the royalty rate from a sliding scale to a fixed 5 percent, and reducing capital allowances from 80 percent in the year first year and 50 percent every year after, to 20 percent per year for five years straight. Other sources confirmed that not only has GHEITI been a force for policy change, it has also helped coordinate civil society, providing structure and evidence to enable civil society to speak with one voice and more powerfully as a result. The Petroleum Commission described the increase in Amerada Hess Ghana's royalty rate from 2 to 3 percent as a result of GHEITI's advocacy.

Parliament

Parliament is required to approve all mining and petroleum agreements, however it has limited capacity to undertake effective due diligence of these agreements. According to a prominent civil society activist, contracts go before parliament but it usually "misses the issue." For example, on the issue regarding Newmont's foreign exchange provision being over 100 percent: parliamentarians expressed surprise despite the fact they had previously approved the stabilization agreement.

Allegations of parliamentary corruption have surfaced in Ghana as the result of an investigation by a local journalist commissioned by former President John Atta Mills to examine both the judiciary and parliament. Numerous public figures joined the journalist in condemning parliamentarians for using their position to make money, in particular, requesting bribes in return for introducing legislation into the parliament for discussion (9th November 2015, GhanaWeb). These specific allegations have not been substantiated, however the the public's perception of parliament as corrupt is firmly entrenched.

TRANSFER PRICING KNOWLEDGE AND SKILLS

Transfer pricing expertise

All 17 members of the Transfer Pricing Unit have received transfer pricing training. The unit has participated in roughly seven intensive workshops to date, including a "train the trainer" program facilitated by the OECD. Until recently, the Transfer Pricing Unit had two Dutch transfer pricing specialists through the Tax Inspectors Without Borders scheme, and they are expecting replacements soon. Despite the significant investment in training, international transfer pricing experts have remarked that the morale of the Transfer Pricing Unit is low, with staff not knowing what their role is, or to whom they report, as well as a general lack of leadership. It was noted that many staff who had participated in earlier training workshops had left the team to do other work within the GRA, or left the GRA entirely. In short, the skill base of the Transfer Pricing Unit has dissipated somewhat since its inception.

The constant rotation of tax auditors around the large taxpayer office makes it difficult for the Mining and Petroleum audit desks to build the necessary technical expertise and industry knowledge.

GRA officials outside of the Transfer Pricing Unit have expressed concern that potential transfer pricing issues may be missed due to a lack of understanding among other officials in the LTO. While it is not necessary for other LTO staff to be trained on transfer pricing, it might be more efficient if other officials had some knowledge of transfer pricing so that they can flag issues. After the Transfer Pricing Unit participated in a "train the trainer" workshop there was some internal transfer pricing training within the GRA, however the person responsible for this has now left. Donors have expressed concern that the most appropriate officials did not necessarily attend transfer pricing trainings.

Understanding the extractive industry value chain

Technical expertise regarding the extractive industry is limited at the GRA. Within the Transfer Pricing Unit no one has received training on extractives, and while the Mining and Petroleum Desks have started to receive training on the taxation of extractive industries from the Australian government, they have limited staff to fulfil their mandate. The GRA seconds "mine monitors" to all the major mining companies to gather information on production volumes and grade, however some of them have been at the same company for 15 years, potentially compromising their effectiveness. The GRA's lack of technical understanding and experience of the mining sector was one of the major reasons behind the move away from a sliding scale royalty rate. It was proving too difficult for the GRA to compute royalties on this basis, particularly the valuation of mineral quality.

According to an observer, "the GRA need to have an idea of the mining sector in order to provide the right challenge to companies, otherwise the same difficulties experienced regarding calculation of royalties are likely to come up in relation to implementation of transfer pricing rules."

A major challenge in developing the required expertise is the rotation of staff around the LTO every two years. The head of the Mining Desk complained that this constant rotation means that he is often dealing with auditors who wrongly assume withholding tax should be paid on mining royalties, and fail to appreciate the use of various mining equipment and how much it should reasonably cost. Mining companies echoed this concern saying that too much time was lost explaining basic things to GRA officials, who, because of their lack of industry expertise, think they are being deceived.

Evaluating cost deductions is a major challenge for the GRA, particularly machinery costs. However, the Customs Unit at the GRA is becoming more expert since they installed a destination verification system. While the verification system is proving useful, there is still a challenge with the transfer of equipment between related companies. According to a senior transfer pricing expert, "it is already difficult to compare the quoted price of a new machine to the arm's length price, let alone when the machinery is transferred from one company to the next."

Box 4. Not a Caterpillar, Volvo or a Hyundai

To illustrate the challenge of evaluating extractive sector costs, the Minerals Commission gave the example of excavators imported by a Swiss registered mining services company. The local subsidiary in Ghana imports all their excavators from their parent company, specifically the mining product division based in France, even the spare parts. In the case of these excavators, valued at approximately US $1 million, it is impossible to get comparable prices because they are completely different to any other type of excavator, mainly due to their large size.

According to the Minerals Commission, "if a company brings in a Caterpillar it will be easy to get a comparable price, but this excavator is not the same as a Caterpillar, Volvo, Hyundai, it is impossible to determine whether the price paid to the mining product division in France is at arm's length."

The petroleum sector may be easier for the Transfer Pricing Unit to monitor given the government's direct participation in petroleum projects, and the industry experience of the Ghana National Petroleum Company (GNPC), the state agency responsible for contracting with private oil exploration companies. This is provided that the Transfer Pricing Unit works closely with the Petroleum Desk at the GRA, the Petroleum Commission, and GNPC. Furthermore, the fact that the Jubilee Fields project is structured as a joint venture between a number of petroleum companies and the government, potentially reduces the risk of transfer mispricing as the various partners may function as a check and balance on one another. Alternatively, there is a risk that the Petroleum Commission fails to effectively undertake its watchdog role and that these companies work together to fix costs.

TRANSFER PRICING INFORMATION

Risk assessment and selection of transfer pricing cases

The Transfer Pricing Unit has developed a transfer pricing audit manual which outlines how cases are to be selected for audit, as well as the actual audit process itself. There are plans to share this manual with taxpayers, however there is some division amongst the Transfer Pricing Unit on this subject. The manual identifies the following transfer pricing risks as potential audit triggers: losses over two to three years, more than 70 percent of supplies from one source parent company, and transactions with companies in tax havens. There are no specific criteria for the selection of mining and petroleum transfer pricing cases. While the risk indicators are important for case selection, the Transfer Pricing Unit is aware that these can be deceptive. For example, just because a company is reporting profits does not mean that transfer mispricing may not be present, it depends on whether the profit is commensurate to the investment.

According to a senior transfer pricing official, "the problem with developing economies is that they are deceived to appreciate any sort of figure in thousands and millions of dollars, the return on investment may be one percent which seems like big money for a tax agency but may be small in relation to the investment."

Selection of transfer pricing cases starts with the Transfer Pricing Unit reviewing tax returns via the central registry, as well as the annual transfer pricing returns form that all companies are required to submit. If controlled transactions are identified, and there is a high probability of transfer mispricing, the companies will be selected for audit. Once the Transfer Pricing Unit is confident that it is a case of transfer mispricing they will request transfer pricing documentation from companies in relation to the specific transaction. The Transfer Pricing Unit will then zero in on the particular transaction and evaluate the risk potential. The transfer pricing audits concluded so far have taken approximately six-to-seven months. It is unclear how long mining and petroleum audits will take as those that are underway have only just commenced, however it was expected that at least one of them would be concluded by the end of 2015 or early 2016.

So far mining and petroleum companies have been selected for transfer pricing audits due to a mix of the following criteria: high management fees, procurement of equipment and machinery by parent companies, high interest rates, and under invoicing of sales. Taking into consideration the need for confidentiality, it was difficult to get concrete explanations from the Transfer Pricing Unit as to why particular mining and petroleum companies have been selected for audit. A company representative reported having heard from colleagues at other mining companies that the Transfer Pricing Unit had contacted them requesting information on management fees stating that they were "too high." This may be the case, and the Transfer Pricing Unit is not required to disclose the basis for this assumption to companies, however, it is important that there is clear, well documented justification for the selection of cases, particularly given the lack of independent oversight of the activities of the Transfer Pricing Unit. Senior officials at the GRA are aware of the need to be thorough stating that, "the extractive sector is where the money is so we need to take our time." However it is important that case selection is clearly justified from the outset.

According to the head of the LTO, "the primary challenge for Ghana is not capacity, but a problem of access to information that the transfer pricing methods allow us to assess. Whatever capacity is developed, comparables are still comparables."

Access to appropriate transfer pricing comparables

A lack of comparable data is particularly difficult for the new Transfer Pricing Unit.

This challenge is particularly acute in the extractive sector where much of the high value machinery and equipment is built specifically to the needs of the company making it difficult to find comparable data. The problem of project specific machinery is compounded by the fact that most of the procurement for mining and petroleum companies in Ghana is done by parent companies through related purchasing centres, making it difficult to determine whether the price was arm's length.

Box 5. Lack of specialist knowledge prevents GRA from evaluating mining machinery

The GRA is currently preparing a transfer pricing audit of a mining support company servicing gold mining companies. The particular transfer pricing risk identified is in relation to the construction of drilling rigs by a local company in Ghana, that are then rented out to affiliate companies elsewhere in West Africa. The local company has a procurement contract with its parent company to supply both physical and consumable items, specifically, the various components required to construct drilling rigs. These components are procured by the parent company and given to the local company which then does the rig build up in Ghana. There is speculation that the drilling rigs are overpriced, and that the rental fee to affiliate companies is below market rate, reducing chargeable income on both fronts.

The challenge for the GRA is valuation of the technical components used to build up the rigs. The local company quotes a final cost for the rig after it has been built, but the GRA lack the industry expertise to value the various components to determine whether the final cost is accurate.

A senior official at the GRA complained: "If you don't know the difference between a Toyota engine and another engine then an engine is an engine. We are not trained in engineering or other relevant disciplines that would enable us to determine whether the components used in the rigs built in Ghana are the same as those used in rigs built in Nigeria, whether the lifespan of the components are the same, and in the end they are all lumped together and called a rig."

Regarding the rental of rigs to affiliate companies, the GRA is concerned that the quoted fee is the same for all customers despite the fact that they are operating in multiple countries. This immediately suggests that the fee is below market rate as it doesn't account for the different contexts, particularly the opportunities to rent similar equipment, the strength of the economy, and currency issues.

According to the same GRA official: "How can you charge the same rental fee in multiple countries, where the environment and opportunities are different, this is not fair to the country that is supplying equipment." This suggests that the local company is foregoing chargeable income from rental fees that would otherwise be collected if the transactions were conducted at arm's length.

A mining company representative disputed the claim that arm's length pricing is difficult to determine when equipment is purchased by the group entity. The representative stated that even if the group entity procures five dump trucks on behalf of the local company in Ghana, an invoice will either be sent direct from the supplier to Ghana or will be attached to the reimbursement notice sent by the group entity. However, the issue is not a lack of knowledge of the invoiced cost for equipment but determining whether this cost is arm's length, i.e., finding comparable prices. It is hoped that the reduction in capital allowances from 80 percent in the first year and 50 percent every year after that, to 20 percent per year for five years, will help discourage any potential cost inflation by extractive companies.

Given the challenges with accessing comparable data, the 2012 transfer pricing regulations allow companies and the Transfer Pricing Unit to select the most appropriate method to determine the arm's length price. The regulations indicate that taxpayers may agree an alternative method with the GRA, however there is no requirement to do so. While the Transfer Pricing Unit hasn't confronted any problems with the transfer pricing methods selected by taxpayers so far, they acknowledge that leaving this to taxpayer's discretion may lead to unnecessary disputes in the future.

To overcome the lack of comparable data, the GRA is in the process of contracting Bureau van Djik (BVD) to set up a comparables database for the Transfer Pricing Unit. According to the head of the Transfer Pricing Unit, a database is required to enable the Transfer Pricing Unit to go behind the invoices provided by local companies to see what is really going on. The Transfer Pricing Unit is wary of the application of a transfer pricing database to the local context, however other countries such as Nigeria, Kenya, South Africa, and Malawi, are successfully using BVD databases as a risk assessment tool and as a starting point from which they can make adjustments for context.

Access to information

Information from local extractive companies

Accessing production and financial information from extractive companies is not a major challenge for either the Mining and Petroleum Commissions or the GRA. The respective commissions receive monthly and quarterly production data, as well as annual financial statements. Occasionally, information from companies may be delayed, however the penalties are a sufficient incentive for companies to abide by their obligations. According to the Minerals Commission: “The companies see us with our stick, and they don’t wait for someone to come with their stick running after them.” A mining company confirmed that on one occasion the GRA levied a penalty of US $24 million for failure to present documentation from 2004. Despite the request being somewhat unreasonable given the time lapse, the penalty clearly encouraged compliance and eventually sufficient documentation was located and the penalty was waived. The Transfer Pricing Unit has also indicated that while information is generally forthcoming, taxpayers may drag their feet saying that they require approval from headquarters, or give incomplete information to delay the process.

There is no systematic sharing of information between the Minerals and Petroleum Commissions and the GRA. This prevents the GRA from building a complete picture of the transfer pricing risks along the extractive industry value chain.

The Minerals and Petroleum Commissions receive regular production data from companies, but the GRA only receives annual financial statements and transfer pricing returns. There is talk of building an information platform between the Commissions and the GRA, however there was no evidence of concrete plans at the time of interview. The Minerals Commission has just been given US $500,000 from the Australian government to develop a mining cadastre. It is hoped that the cadastre will be made available to other government actors to improve information sharing. Both the GRA and the Minerals Commission have mine monitors and inspectors who are seconded to all the large scale mining companies to gather information on production volumes, grade, and to certify mineral exports. While it is not possible for monitors to verify the grade of the mineral exports, they can crosscheck weight and volume and provide this independent information to the government. However, some officials are sceptical about mine monitors as many have been seconded to the same company for years and the company pays their accommodation, which potentially compromises the credibility of the information provided to the government.

The main information challenge for the government is the lack of independent verification of the fineness of the gold exported from Ghana. While the mining companies and refineries provide assay results as the basis for calculation of royalties, the government lacks the facilities to independently evaluate gold fineness, exposing it to risk of under invoicing.

According to the Minerals Commission, there are plans to build a government laboratory where assaying can be done. The land has been secured and it is hoped that a budget will be provided in 2016. Previously, the government considered contracting a private lab from Tanzania, however they were advised not to on the basis that the firm wanted a 10 percent commission on total royalties, which was likely to be more than the value of the extra royalties collected as a result of government verification. This time the government is planning to build and operate the lab itself. While this may be more affordable, there is a risk that the government processing lab may cause significant delays to companies which in turn would affect sales. In the interim there is a plan to use the Ghana Standards Authority for assaying, however civil society is sceptical of both the independence and expertise of this facility. As of September 2015, the Bank of Ghana requires proof of independent certification by the Precious Minerals Marketing Company Limited of the weight, quality and value of gold for export.

Two major gold mines in Ghana sell 100% of their gold to a related refinery in South Africa. Until Ghana has the facilities to verify the value of gold exports there is a risk of under invoicing.

Information from other jurisdictions

Currently, the GRA receives no information from other tax jurisdictions on the parent companies or affiliates of local companies registered in Ghana. In 2011, Ghana signed the OECD Convention on Mutual Administrative Assistance in Tax Matters, however they have yet to establish any relationships with tax administrations in signatory countries other than South Africa. The African Tax Administration Forum (ATAF) holds more promise, with Ghana recently being made a member of the ATAF technical committee, and beginning to develop strong partnerships with South Africa, Tanzania, and Kenya. The head of the Transfer Pricing Unit was very positive about the possibilities of information exchange with other African countries, and the opportunity to develop an “African approach” to transfer pricing rules and comparable data.

TRANSFER PRICING DOCUMENTATION REQUIREMENTS

The 2012 transfer pricing regulations require taxpayers to maintain contemporaneous transfer pricing documentation that can be made available to the Transfer Pricing Unit on request. In addition, taxpayers are required to automatically submit an annual transfer pricing return form detailing any controlled transactions, along with their annual tax return. This approach balances the need for regular oversight of controlled transactions, while minimizing the compliance burden for taxpayers and preventing the Transfer Pricing Unit from being overwhelmed by unnecessary information. A mining company representative indicated that the current requirements are too onerous and that it is not possible for companies to provide documentation detailing every invoice for every related party transaction. In their opinion, it is reasonable to expect companies to explain how the arm's length principle has been applied and to provide a sample of invoices, but to do more than this would require additional staff. While it is important to limit the burden on companies it is worth noting that this company's concerns were incorrect as taxpayers are not required to submit every invoice for every transaction.

Taxpayers in Ghana are required to submit an account of all related party transactions along with their annual tax return. This has improved access to information from taxpayers and made selection of transfer pricing cases for audit much easier.

Both government officials and company representatives raised concerns about the potential for poor information management to undermine the effectiveness of transfer pricing documentation requirements. Currently, the information management system at the GRA is only partly automated, making it difficult for the Transfer Pricing Unit to manage the large volume of information they are likely to receive in response to specific enquiries. A senior official at the Ministry of Finance expressed concern that companies submit information as required and nothing is done about it. This concern was substantiated by a mining company representative who revealed that they had submitted their annual transfer pricing return two years in a row and been told on both occasions that the returns were not received despite the representative's proof of receipt by the GRA.

TRANSFER PRICING DISPUTE RESOLUTION MECHANISMS

All of the transfer pricing audits concluded so far have been resolved amicably out of court with no need for formal dispute resolution. In fact, two of the banks that were audited paid the additional tax immediately without disputing the GRA's claim of transfer mispricing. According to the GRA, the banks understood the consequences, and fearing of bad press paid up before the investigations were concluded. The banks requested that no reports be written about the investigations.

In future, transfer pricing audits may not end so amicably. Consequently, the GRA has established a committee to review cases where there is a dispute with the taxpayer. This committee is comprised of seven officials including the head of legal services at the GRA and the head of the Transfer Pricing Unit. Where there is a transfer pricing dispute the case will go to the committee for adjudication. If the committee approves the findings of the Transfer Pricing Unit and the taxpayers still dispute the claim it will go to court. This is the reason why the judiciary were also trained on transfer pricing, so that they would be able to adjudicate such a dispute.

Ghana has double taxation treaties (DTAs) with the UK, France, Italy, Germany, South Africa, the Netherlands, the Swiss Confederation, and Belgium. Government officials do not view DTAs as particularly useful. According to Sections 111 and 112 of the IRA, DTAs are subsidiary to Ghanaian law when it comes to determining disputes concerning transfer pricing and thin capitalization.

TRANSFER PRICING TECHNICAL ASSISTANCE

From the outset of the transfer pricing reforms in Ghana, the OECD has been the primary source of technical support. A senior OECD tax advisor contributed to the development of the 2012 regulations and since then numerous training opportunities have been provided. The GRA is expecting a technical assistant to arrive in the next couple of months from Tax Inspectors Without Borders. However, the GRA is not relying solely on the OECD for support but is actively building relationships with other African tax jurisdictions through its participation in the ATAF. As mentioned previously, Ghana has recently been selected as a member of the ATAF Technical Committee; in particular, the Transfer Pricing Unit is liaising with transfer pricing experts in South Africa, Tanzania, and Kenya.

Despite having received significant technical assistance so far, the Transfer Pricing Unit needs further support in the form of specialized audit training, particularly in the area of extractive industries, as well as training on the valuation of intellectual property. There is a desire for more "hands-on" training with practitioners in other jurisdictions, particularly looking at how other countries deal with transfer pricing in the extractive sector. Finally, while the GRA is working to set up a comparables database with the help of BVD, further support is required to adapt the database to the Ghanaian context, and to understand how to effectively use the database in evaluating transfer pricing risks.

GOVERNMENT LEADERSHIP

Transfer pricing in the extractive sector is getting the attention of senior politicians. At the launch of the 2012/13 GHEITI report in Accra, the minister of finance was quoted as saying: "transfer pricing in the extractive sector is one major challenge our revenue institutions must overcome because of its negative effect on revenue collections."

According to the minister of finance: "transfer pricing in the extractive sector is a major challenge that our revenue institutions must overcome because of its negative effect on revenue collection."

Furthermore, despite huge pressure from mining companies and the Minerals Commission, the minister of land and minerals, and the minister of finance, personally spearheaded the shift to a fixed five percent royalty rate, demonstrating their commitment to increasing revenue collection from the sector.

The government's willingness to take decisions that are not always popular with extractive companies suggests relatively robust leadership of the sector. According to the GHEITI reconciler, while companies may lobby the government in relation to specific legislation, it is not the case that politicians are in the pockets of companies. The same cannot be said for the GRA. Numerous sources suggest that the GRA is more likely to exercise discretion in its treatment of extractive companies, with a GRA official quoted saying, "mining companies are powerful, even in Ghana they influence politics."

Despite the government's ostensible commitment to combatting tax avoidance in the extractive sector, according to civil society this objective may be occasionally sidelined.

Box 7. Government turns a blind eye to tax avoidance

US $40 million cost inflation on gas plant ignored
The Civil Society Platform on Oil and Gas brought the issue of potential transfer mispricing between SIPSC and its sister company SAF Investments to the attention of President Mahama and were assured that the issue would be addressed. But according to Dr. Steve Manteaw, the government has done nothing and no explanation has been given. The fact that this claim was ignored may have been due to the gas processing plant being part of a US $3 billion loan from the Chinese government covering roads, agriculture, and oil infrastructure. The government may have overlooked the issue of cost inflation out of fear of jeopardizing the rest of the loan agreement.

US $67 million in capital gains foregone due to inexplicably delayed amendment
Civil society has also expressed suspicion as to why the government waited until after the sale of EO Group's share in Kosmos Energy to Tullow Oil and Sabre Oil's share in Tullow to PetroSA, to bring the Petroleum Act in-line with the IRA regarding capital gains; both sales were valued at approximately US $700 million. While there is no standard practice for the treatment of capital gains on pre-production oil and gas assets, Ghana's approach was anomalous, not only failing to tax the seller on a gain but giving the buyer a full cost deduction. The legislation has since been rectified to comply with Section 95 of the IRA taxes gains on seller, and to restrict deductions for the buyer. However, civil society remains critical of why the amendment was delayed until after the transactions were complete.

According to a civil society activist: "Government will look away and allow these seepages. While losing this big sum of money government was busy taxing agricultural imports. How much revenue can you collect from agricultural imports when from two transactions you could get US $67 million in capital gains."

CONCLUSION

The Ghanaian government has made considerable progress in establishing the legal framework, institutional structures, skills, and political commitment to effectively combat transfer mispricing. Ghana's transfer pricing regulations are comprehensive, covering controlled relationships between non-related parties, as well as instances of domestic transfer pricing. Clear transfer pricing documentation requirements, and the use of an annual transfer pricing return form have improved access to information and made selection of transfer pricing cases significantly easier. The general skills base of transfer pricing officials has been successfully built, notwithstanding the need for further training on transfer pricing as it relates to the extractive sector specifically. Furthermore, there is political support for transfer pricing reform in the extractive sector, as well as considerable engagement from civil society.

Despite having secured the fundamental components of a transfer pricing regime, there has been limited activity on transfer pricing issues in the extractive sector since the transfer pricing regulations were adopted in 2012. Transfer pricing enquiries in relation to mining and petroleum companies have only just been launched, and as yet no adjustments have been made. This is due in part to poor coordination, limited expertise, and a lack of appropriate comparable data. The Transfer Pricing Unit has virtually no relationship with the Mining and Petroleum Desks at the GRA, and, as a result, coordination with the Minerals and Petroleum Commission is also poor. This lack of coordination with the relevant extractive industry agencies prevents the Transfer Pricing Unit from accessing the information and technical expertise required to identify and evaluate transfer pricing risks in the extractive sector. Furthermore, the absence of an overarching government coordination mechanism means that in general, there is fragmented oversight of the extractive sector. The Transfer Pricing Unit requires further training on transfer pricing as it relates to the extractive sector. Ideally, this would involve a value chain mapping exercise of the major mining and petroleum companies operating in Ghana to identify specific transfer pricing risks, as well as standard industry rates for high risk related party transactions. While it is vital that the Transfer Pricing Unit build its own extractive industry expertise, the current deficit could also be overcome through improved internal as well as inter-agency coordination. A joined up approach is a necessary condition of an effective government response to tax avoidance in the extractive sector.

The most promising feature of the natural resource governance environment in Ghana is a comparatively active and informed civil society, led primarily by GHEITI. While implementation of transfer pricing rules in the extractive sector may have gotten off to a slow start, civil society is beginning to monitor the government to ensure that the aforementioned administrative challenges are overcome and that political interference is prevented. A recent workshop on transfer pricing convened by GHEITI is evidence of the growing awareness of transfer pricing, as well as a commitment to hold the government accountable for the enforcement of transfer pricing rules in the extractive sector.

RECOMMENDATIONS

Transfer pricing legal framework:

1 The Ministry of Finance should review potential inconsistencies between Section 31 of the new Income Tax Law, and the 2012 Transfer Pricing Regulations. Specifically, clarification is required as to whether the arm's length principle is to be applied to individual transactions as per the regulations, or to the calculation of total chargeable income at the end of each year.

2 The Ministry of Mines and the Ministry of Petroleum should amend the Minerals Act 2006, and the Petroleum Income Tax Law 1987, to explicitly reference Section 31 of the Income Tax Law, requiring the arm's length principle to be applied to all related party transactions, with particular emphasis on deductible expenditure.

3 The Ministry of Finance should include APAs in the transfer pricing regulations. While the GRA is hesitant to enter into APAs (having only recently started working on transfer pricing) many other countries in the region, similarly reluctant, have included APAs in their regulations for future use. If properly negotiated with support from technical experts, APAs provide an opportunity for the GRA to develop their expertise in transfer pricing and gain access to valuable information from taxpayers.

4 The Ministry of Finance should amend the new Income Tax Law, which is still open for comment, to include beneficial ownership disclosure requirements. By requiring disclosure of beneficial owners, the government will be in a better position to determine related party arrangements, as well as limiting the new practice of "round-tripping."

Transfer pricing administrative arrangements:

5 The Transfer Pricing Unit should raise awareness amongst the GRA of the issue of transfer pricing, the work of the Transfer Pricing Unit, and how its intend to work with other divisions. It is critical that the Transfer Pricing Unit does not work in isolation but instead collaborates with the Mining and Petroleum Desks, and through them the relevant regulatory agencies. Ideally, the transfer pricing specialists allocated to the extractive sector should work with the Mining and Petroleum Desks during general audits, identifying specific transfer pricing risks requiring further investigation. This close collaboration is necessary if the Transfer Pricing Unit is to get access to the information and expertise required to evaluate transfer pricing risks in the extractive sector.

6 The GRA should ensure that the Transfer Pricing Unit is adequately staffed, particularly given the large number of audits it has taken on. On paper the Transfer Pricing Unit has 17 staff, however in practice there are less, with many staff only working part-time. Staffing should be reviewed to ensure that the Unit is robust.

7 The Minerals Commission should resume the Minerals Revenue Taskforce to improve coordination between the Mining Desk at the GRA, and the Minerals Commission, as well as other relevant stakeholders. This taskforce is a critical means of strengthening revenue collection in the mining sector, bringing together the GRA, Minerals Commission, and Ministry of Finance. In future, it may be useful to review the composition of the taskforce to ensure that GHEITI

as well as the Transfer Pricing Unit are represented there. The government may want to establish a separate multi-stakeholder revenue taskforce for the petroleum sector, or expand the mandate of the minerals revenue taskforce to include oil and gas.

8 The GRA should ensure that the internal transfer pricing committee is empowered to assume the responsibilities outlined in the initial proposal for the governance structure of the Transfer Pricing Unit. These include:

- Setting the strategic direction of the Transfer Pricing Unit
- Deciding how a transfer pricing enquiry should be settled and the mode of settlement (negotiation or settlement)
- Setting parameters within which cases will be settled where negotiation is the chosen option
- Reviewing the Unit's annual action plan before being forwarded to Commissioner of Domestic Tax Revenue for approval
- Setting annual targets for the unit
- Briefing the top management of the GRA on the activities of the Transfer Pricing Unit

Transfer pricing information:

9 The Ministry of Finance, in partnership with the GRA and the Minerals Commission, should establish an online information-sharing platform to improve exchange of information. This platform should consolidate all production and financial data from mining companies. Access to the platform should be strictly controlled, with systems put in place to ensure the confidentiality of information.

10 The Transfer Pricing Unit, in collaboration with the Mining and Petroleum Audit Desks, should develop a transfer pricing risk matrix specific to the extractive sector. This would strengthen the monitoring and evaluation of potential transfer pricing risks in the extractive industry value chain and improve selection of cases for audit. This should include initial analysis of the cost structures of major multinational extractive companies operating in Ghana. Using this information, the generic transfer pricing indicators in the Transfer Pricing Audit Manual can be adapted to the extractive industry, enabling more informed risk profiling and analysis.

11 The Minerals Commission should share with civil society the plans regarding the development of a government minerals laboratory. Civil society should review these plans to ensure that the laboratory is a cost effective approach to monitoring the quality and grade of mineral exports, and that the government is able to undertake assaying efficiently so as to not disrupt company timelines.

12 The Transfer Pricing Unit should engage the Mining and Petroleum Audit Desks, the Customs Division, and the Minerals and Petroleum Commissions, in the development and implementation of the transfer pricing comparables database to be set up by BVD. A collaborative approach to developing this database will ensure that evaluation of related party transactions is consistent across government.

Transfer pricing knowledge and skills:

13 The GRA, with support from international partners, should ensure that all officials in the Large Taxpayers Office (LTO) receive basic training on transfer pricing, such that they have sufficient knowledge to identify transfer pricing risks via general audits and flag them with the Transfer Pricing Unit.

14 The GRA, with support from international partners, should ensure the Mining and Petroleum Desks, and the Transfer Pricing Unit receive specialized audit training for the extractive sector. The Transfer Pricing Unit is yet to receive training on transfer pricing in the extractive sector, and the Mining Desk has only received a handful of short trainings on the taxation of extractive industries, which were delivered by the Australian government.

15 The GRA should review the policy of rotating auditors around the various divisions on a biannual basis, particularly for the Mining and Petroleum Audit Desks given the economic significance of the taxpayers they oversee. It is impossible to build the necessary technical understanding of the mining and petroleum sector when staff are rotated so frequently.

Research for this case study took place in August 2015.

APPENDIX 1: INTERVIEW PARTICIPANTS

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APPENDIX 2: ABBREVIATIONS AND ACRONYMS

APA	advance pricing agreement
ATAF	African Tax Administration Forum
BVD	Bureau van Dijk
DTA	double taxation agreement
EITI	Extractive Industries Transparency Initiative
FDI	foreign direct investment
GDP	gross domestic product
GHEITI	Ghana Extractive Industries Transparency Initiative
GIPC	Ghana Investment Promotion Centre
GIZ	Gesellschaft für Internationale Zusammenarbeit
GNPC	Ghana National Petroleum Company
GRA	Ghana Revenue Authority
IMF	International Monetary Fund
IRA	Internal Revenue Act
ISODEC	Integrated Social Development Center
LTO	Large Taxpayers Office
OECD	Organisation for Economic Cooperation and Development
PIT	Petroleum Income Tax Law
PSA	production sharing agreement
SIPSC	Sinopec International Petroleum Services Corporation
SPE	special purpose entities
SSA	sub-Saharan Africa
VAT	value added tax