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# M A L D I V E S   L A W   R E V I E W

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# C O N T E N T S

**Dr. Holmes, Kevin**

*Transfer Pricing, Thin Capitalization and Section 29 of the Business Profit Tax Act*

..... [2014] 1 MLR 5



# TRANSFER PRICING, THIN CAPITALIZATION AND SECTION 29 OF THE BUSINESS PROFIT TAX ACT

Dr Kevin Holmes\*

## INTRODUCTION

Like all direct taxes<sup>1</sup> worldwide, the introduction of the Business Profit Tax (BPT) Act<sup>2</sup> in 2011 has imposed an additional cost on Maldives businesses. Firms aim to maximize shareholder (or other owner) value, and that typically involves maximizing after-tax profits, which are available for distribution to the owners. Since BPT reduces those profits, profit maximizing businesses have an incentive to minimize their tax burden, just like any other cost.

BPT is imposed at the rate of 15% of a business's taxable profits. During the 3½ years that the BPT Act has been operational, taxpayers have become increasingly aware of the impact of the tax on their distributable profits. Increasingly, arrangements are being devised to avoid BPT. To the extent that they are successful, these arrangements undermine the country's tax base and put pressure on the Government to find alternative sources of tax revenue. The greater the amount of money involved in a tax avoidance scheme, the greater the impact on the Government's tax collection.

This article addresses a tax avoidance arrangement, adopted by some large taxpayers, which involves the injection of disproportionate amounts of debt, relative to equity, into a business, in order to increase the amount of interest which is deductible in the calculation of the taxable profits of the business. This is known as "thin capitalization". Taken to the extreme, thin capitalization can be utilized to produce a sufficiently large interest deduction to eliminate a business's taxable profits altogether, resulting in no BPT liability at all. This article examines whether

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<sup>1</sup> A "direct tax" is a tax on a person, which is determined by his income or wealth; in the Maldives, his business profits, cf. an "indirect tax", which is imposed on an object, e.g. goods. In the Maldives, customs duties and Goods and Services Tax are examples of indirect taxes.

<sup>2</sup> No. 5/2011.

the specific anti-avoidance rule in section 29 of the BPT Act defeats these arrangements.<sup>3</sup>

## TAX AVOIDANCE

Broadly, there are two ways for a business to reduce its tax liability, without resorting to tax evasion,<sup>4</sup> viz. entering into *prima facie* lawful arrangements to:

- (a) convert otherwise taxable amounts into non-taxable gains; and
- (b) generate tax deductible expenditure, which would not have arisen in the absence of the arrangement.

Such arrangements are referred to as “tax avoidance” arrangements. Unlike tax evasion, they are not criminal acts. Nevertheless, because they undermine a country’s tax base, many countries have enacted legislation to combat tax avoidance – and the Maldives is no exception.

Anti-avoidance measures can be either specific or general. The BPT Act contains numerous specific anti-avoidance rules, some separately set out in Chapter 4 (Tax Avoidance) of the Act; for example, section 28, which address the particular circumstances of a person transferring his business to a minor child to avoid the payment of tax. Other specific anti-avoidance measures are buried in sections designed to do other things; for example, section 11(d), which imposes a limit on the deductible amount of remuneration paid by a company to a director, “substantial” shareholder, or an associate of the company. In these cases, there is no tax evasion; in other words, in itself there is nothing illegal about a father transferring his business to his minor child if he wants to, or a company paying all of its profits as remuneration to its directors if it wishes. These transactions only fall foul of the tax law because they can be driven by a tax avoidance purpose, but that does not make them criminal acts. Nevertheless, civil penalties may apply to tax avoidance arrangements.

A general anti-avoidance rule (often referred to as a GAAR) is found in section 30 of the BPT Act. It is a general rule which empowers the Maldives Inland Revenue Authority (MIRA) to strike down any arrangement, which is entered into for the main purpose of (or one of the main purposes of which is) avoiding tax. The rule does not attach to any particular type of transaction, like the transfer of a business or the

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<sup>3</sup> The discussion here is confined to section 29 only. It is beyond the scope of this article to address whether thin capitalization arrangements are caught by section 30, if they were not captured by section 29. (Section 30(b) stipulates that section 30 does not apply in relation to any transaction which falls within section 29.)

<sup>4</sup> Tax evasion is a term of art, which means that a taxpayer illegally circumvents his tax liability by not disclosing taxable income (e.g. by hiding sales revenue) or by fraudulently overstating his tax deductible expenditure. Tax evasion is a criminal offence.

payment of remuneration. It applies to any transaction which has a tax avoidance purpose (and does not fall within the ambit of section 29).<sup>5</sup>

## ASYMMETRY BETWEEN DEDUCTIONS AND ASSESSMENT OF THE SAME AMOUNT

Section 6 of the BPT Act imposes a 10% withholding tax (WHT) at source on certain payments made by a Maldives business to recipients who are not residents of the Maldives for BPT purposes. By contrast with similar provisions in the income tax laws of other countries, one significant shortcoming in the drafting of section 6 is that it fails to impose WHT on payments of interest by a taxpayer to a non-resident lender of debt finance. The consequence of this is that, under sections 10(a) and 11(a)(5) of the BPT Act, an interest payment is deductible in determining the taxpayer's taxable profits upon which BPT at the rate of 15% is imposed, but there is no corresponding assessment of the receipt of that interest in the hands of the lender. This causes a net loss of tax revenue to the Government.

### **Example 1**

*Suppose that a non-resident bank lends a Maldives taxpayer USD 1,000,000 at an interest rate of 8% p.a. The annual interest cost to the taxpayer is USD 80,000. This deduction results in a tax benefit to the Maldives taxpayer (i.e. the amount of tax saved by the taxpayer as a result of claiming the deduction), and correspondingly, a reduction in tax collected by the Government, of USD 12,000 (i.e. 15% x USD 80,000). To confirm, assume that before the interest deduction, the taxpayer derived taxable profits of USD 80,000. Without the deduction, he would have had to pay BPT of USD 12,000 (i.e. 15% x USD 80,000).<sup>6</sup> But by claiming the interest deduction of USD 80,000, he eliminates his taxable profits, and is not required to pay any tax at all. In other words, by claiming the deduction, he has just saved himself (or benefited by) USD 12,000, which he would otherwise have had to pay as tax. Concurrently, the non-resident bank, which receives the interest, pays no tax in the Maldives on its interest income.<sup>7</sup>*

*If the USD 80,000 had instead been paid for (say) management services, it would also have been deductible in calculating the taxpayer's taxable profits – again producing a tax saving of USD 12,000 – but it also would have been taxable (at the time of payment) in the hands of the non-resident recipient by way of the 10% WHT, resulting in the Government collecting USD 8,000. Now, even though the Government remains in a net loss position as a result of the tax effect of this transaction, the*

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<sup>5</sup> See footnote 3.

<sup>6</sup> Ignoring, for simplicity, the tax-free threshold in section 7(b) of the BPT Act.

<sup>7</sup> Assuming that the bank does not have a permanent establishment in the Maldives through which the interest is derived as business income.

shortfall is reduced to USD 4,000, cf. USD 12,000 above, where no WHT at all is imposed.<sup>8</sup>

## RELATED-PARTY ARRANGEMENTS

The tax arbitrage possibility which results from this asymmetric treatment of income and expenditure arises where the non-resident recipient of the interest is related to (or associated with) the Maldivian payer. For example, instead of borrowing from an independent non-resident bank, the Maldivian taxpayer incorporates his own wholly owned company in a tax haven,<sup>9</sup> through which funds are advanced to his Maldives business. Now tax deductions can, in effect, be “manufactured”.

### **Example 2**

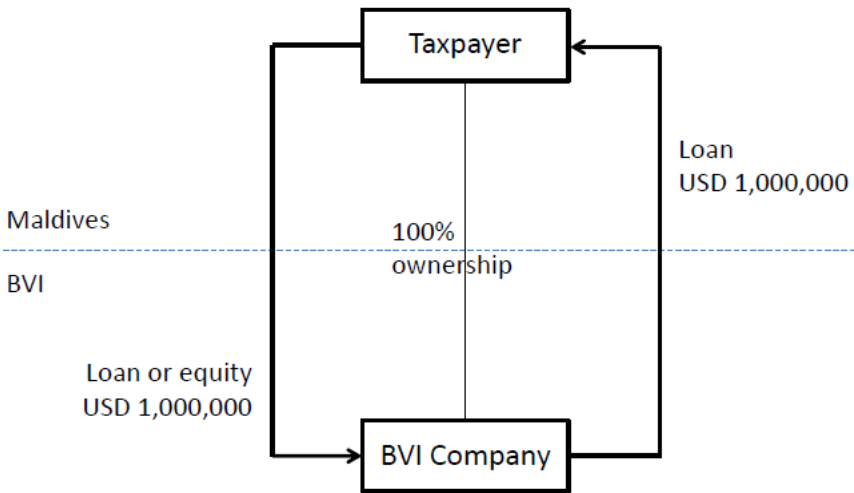
*Assume that the Maldives taxpayer already has USD 1,000,000 in a private bank account. He either contributes that sum as capital in his newly-incorporated British Virgin Islands (BVI) company or lends the amount to it either at interest or interest-free. The BVI company then lends the funds back to the Maldivian taxpayer at interest, for use in his business. The interest is deductible for BPT purposes, but not taxable in the hands of the BVI company. This circular arrangement is illustrated in Figure 1.*

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<sup>8</sup> The shortfall in government revenue comes about because of the difference between the BPT rate (15%) and the WHT rate (10%). The shortfall would be expunged if the management fee was paid to a Maldivian-resident taxpayer, who would be required to pay tax at the rate of 15% on the fee (assuming that he did not claim any deductions against the gross amount he receives).

<sup>9</sup> A tax haven company is typically chosen because its income is not taxable in that country.





**Figure 1**

Because the taxpayer's borrowing is now not from a bank or financial institution authorized by MIRA (it is from the taxpayer's wholly owned company), section 11(a)(5) of the BPT Act restricts the interest deduction on the loan to 6% p.a.<sup>10</sup> The effect of this restriction in Example 2 is to limit the interest deduction allowed for Maldives BPT purposes to USD 60,000 (i.e. 6% x USD 1,000,000), which reduces the tax benefit to the taxpayer (and therefore the loss of revenue to the Government) to USD 9,000 (i.e. 15% x USD 60,000).

But what happens if the taxpayer expects to have annual taxable profits of (say) USD 100,000, and wishes to avoid paying BPT on those profits? He simply ratchets up the amount of borrowings funded through the circular arrangement illustrated in Example 2 to USD 1,666,667 to generate an interest deduction of USD 100,000 (i.e. 6% x USD 1,666,667) to erase his taxable profit.

Is this effective tax planning?

<sup>10</sup> This is also a specific anti-avoidance rule, intended to prevent taxpayers from stripping taxable profits out of a business by setting high interest rates on related-party loans.

**SECTION 29 OF THE BPT ACT**

Section 29 of the BPT Act is a specific anti-avoidance provision, which lies in Chapter 4 of the BPT Act. Chapter 4 is headed “Tax Avoidance”. The heading of section 29 is “Transfer pricing”. Section 29 states:

**“Transfer pricing**

29. (a) This Section applies where the computation of the taxable profits of a Person (“the first Person”) for a tax year takes into account a transaction entered into directly or indirectly between that Person and another Person (“the second Person”) and those two Persons are associated with each other.
- (b) For the purposes of this Section a transaction is entered into indirectly by two Persons if there is a series of transactions which are linked and those Persons are parties to one or more of the transactions in the series, whether or not they are parties to the same transaction.
- (c) For the purposes of this Section Persons are associated with each other if:
- (1) one controls the other or both are controlled by the same Person; or
  - (2) one is a relative of the other.
- (d) For the purposes of Section 29(c) a Person is a relative of another Person if he or she is:
- (1) the individual’s spouse, or
  - (2) a brother, sister, parent, grandparent, or child of the individual or the individual’s spouse,
  - (3) a spouse of a person within Section 29(d)(2); and “child” includes a stepchild.
- (e) In this Section “the arm’s length terms”, in relation to any transaction, are the terms on which the transaction would have been made, or might reasonably be expected to have been made, if it had been made between persons not associated with each other.
- (f) (1) If a transaction is to be considered in assessing tax: the terms on which the transaction was actually made are not the same as the arm’s length terms, and
- (2) if the taxable profits of the first Person are less, or that Person’s allowable losses are greater, than would have been the case if the transaction had been made on the arm’s length terms, then the taxable profits of that Person shall be computed as if the

transaction had been made on the arm's length terms instead of the actual terms.<sup>[11]</sup>

- (g) If the transaction would not have been entered into between Persons who were not associated with each other, then in computing the taxable profits of the first Person, such transactions shall be disregarded.
- (h) The MIRA may give a direction that Section 29(i) shall apply, under the following circumstances:
  - (1) in relation to a transaction, Section 29(f) or 29(g) has applied for the computation of the taxable profits of the first Person for a tax year, and
  - (2) the second Person ("the claimant") makes a claim to the MIRA for relief under this subsection, and
  - (3) the MIRA is satisfied that in computing the claimant's taxable profits, disregarding this subsection, that transaction would have been taken into account,
- (i) Where this subsection applies, then with regard to the transaction in question, the claimant's taxable profits shall also be computed in accordance with Section 29(f) or 29(g), whichever applied for the computation of the first Person's taxable profits.
- (j) A claim under Section 29(h) shall be made in writing not later than 12 (twelve) months after an assessment on the first Person for the tax year mentioned in Section 29(h)(1) has become final.
- (k) All such adjustments and assessments shall be made as may be necessary to give effect to any claim under Section 29(h)."

At first blush, section 29 appears to be about transfer pricing, and not concerned with thin capitalization at all.

## WHAT IS TRANSFER PRICING?

Transfer pricing occurs where goods, services and intangible property are bought and sold (or transferred) between associated enterprises, or between different parts of the same enterprise (e.g. between a head office and a branch of one company),

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<sup>11</sup> The grammatical structure of paragraph (f), at least in the English translation, is confusing. What seems to have been intended is:

- (f) *If a transaction is to be considered in assessing tax and:*
  - (1) *the terms on which the transaction was actually made are not the same as the arm's length terms, and*
  - (2) *the taxable profits of the first Person are less, or that Person's allowable losses are greater, than would have been the case if the transaction had been made on the arm's length terms,**then the taxable profits of that Person shall be computed as if the transaction had been made on the arm's length terms instead of the actual terms.*

which are typically – but not necessarily – located in different tax jurisdictions. The transactions adopt prices (transfer prices) that do not reflect the true market value of the property or services exchanged. This artificial pricing is intended to manipulate the income and expenses of the related entities to minimize the overall tax liability of the entities involved in the transaction, taking account of the taxing regime of jurisdiction(s) in which they operate.<sup>12</sup>

### **Example 3**

*Suppose that a Maldives company exports tuna to its wholly owned subsidiary company in Montenegro (where the corporate tax rate is 9%). Assume that the realistic market value of the exported tuna is MVR 10,000,000. If the sales are made at that price, a BPT liability of MVR 1,500,000 arises in the Maldives<sup>13</sup> and the subsidiary company derives a tax benefit (or tax saving) of MVR 900,000 (i.e. 9% x MVR 10,000,000) in Montenegro as a consequence of claiming a deduction for the purchase price of the tuna. Thus, the net tax cost to the group as a whole as a result of this transaction is MVR 600,000 (i.e. BPT payable in the Maldives (MVR 1,500,000) less tax saved in Montenegro (MVR 900,000)).*

*That overall tax saving can be increased if the group practices transfer pricing. By recording the transaction not at its true value of MVR 10,000,000, but at an artificial price of (say) MVR 6,000,000, BPT payable in the Maldives falls to MVR 900,000 (15% x MVR 6,000,000) but the subsidiary company's tax benefit also declines (because of the reduced purchase price) to MVR 540,000 (i.e. 9% x MVR 6,000,000). Nevertheless, because the savings in Maldives BPT outweighs the reduction in the Montenegro tax savings as a result of the subsidiary company claiming a deduction for the purchase price of the tuna,<sup>14</sup> the net tax cost to the group as a whole is now only MVR 360,000 (i.e. BPT payable in the Maldives (MVR 900,000) less tax saved in Montenegro (MVR 540,000)). Therefore, as a result of manipulating the price of the transaction from MVR 10,000,000 to MVR 6,000,000, the group has made a tax saving of MVR 240,000 (i.e. MVR 600,000 (net tax cost without transfer pricing) less MVR 360,000 (net tax cost with transfer pricing)). The arithmetic is depicted in Figure 2.*

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<sup>12</sup> See Holmes, Kevin. *International Tax Policy and Double Tax Treaties – An Introduction to Principles and Application*. Amsterdam: IBFD, 2014. Chapter 11.

<sup>13</sup> For simplicity, ignoring deductions and the MVR 500,000 tax-free threshold.

<sup>14</sup> This is because of the difference in the relative tax rates in the two countries.

	Before transfer pricing (MVR)	After transfer pricing (MVR)
<b>Maldives Company</b>		
Sales income	10,000,000	6,000,000
Maldives tax (15%)	1,500,000	900,000
<b>Montenegro Subsidiary Company</b>		
Purchase price	10,000,000	6,000,000
Montenegro tax saving (9%)	(900,000)	(540,000)
Net tax cost to the group	600,000	360,000
Group tax saving from transfer pricing		240,000

**Figure 2**

Section 29 of the BPT Act combats the massaging of profits in this way by requiring the arm's length market value, which would apply to a similar transaction in similar circumstances between unrelated parties, to be adopted in place of the companies' transfer price (section 29(e) and (f)). Therefore, in Example 3, section 29(f) requires that the Maldivian company's taxable profits "be computed as if the transaction had been made on the arm's length terms [using MVR 10,000,000] instead of the actual terms [MVR 6,000,000]" because "terms on which the transaction was actually made are not the same as the arm's length terms" (section 29(f)(1)) and the Maldivian company's "taxable profits ... are less .. than would have been the case if the transaction had been made on the arm's length terms" (section 29(f)(2)), i.e. MVR 6,000,000 rather than MVR 10,000,000. Application of section 29(f) then turns on identification of the arm's length terms applicable to the transaction, as defined in section 29(e). That is a question of fact.<sup>15</sup>

### CAN SECTION 29 APPLY TO THIN CAPITALIZATION ARRANGEMENTS?

Thin capitalization arrangements are not transfer pricing arrangements. As already explained, thin capitalization involves an excessive amount of gearing relative to equity in the financing structure of an entity. But the excessive debt may bear an

<sup>15</sup> Which is typically determined by applying the *OECD Transfer Pricing Guidelines*, which focus upon comparability with uncontrolled transactions and an analysis of the functions performed by, and the assets and risks attributable to, each party. See OECD. *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*. Paris: OECD, 2010.

arm's length interest rate, ensuring that the lending transaction does not fall foul of section 29(f) of the BPT Act.<sup>16</sup>

However, a thin capitalization arrangement can be tripped up by section 29(g), which is not concerned about arm's length pricing at all. Section 29(g) simply sets aside a transaction (for BPT purposes) if the transaction itself would not have been entered into between unrelated parties. Again, this is a question of fact.

Sections 29(f) and 29(g) are not compatible in a transfer pricing context. Section 29(f) is clearly directed to resolving a transfer pricing issue. In setting aside absolutely a related party transaction, section 29(g) cannot have been intended to apply to a transfer pricing arrangement. When section 29(f) is applied to rectify the pricing of a transaction, the transaction itself is not disregarded: it is still recognized, but the price at which it takes place is adjusted.

However, a transaction involving an artificial transfer price would also not have been entered into by unrelated parties. It is nonsense to believe that one party would enter into a transaction with an independent party with his eyes wide open where the terms of the contract are detrimental to his commercial interests. Therefore, if section 29(g) applied, a transfer pricing transaction between related parties would be struck down. That would leave no role for section 29(f), thus defeating its purpose. That outcome could not have been contemplated by Parliament when it enacted section 29(g). This then means that section 29(g) cannot apply in all circumstances; in particular, it cannot apply to transfer pricing arrangements to which section 29(f) applies. Therefore, section 29(g) must be read down to apply to other artificial transactions, which do not involve transfer pricing.

To illustrate the resulting absurdity if section 29(g) applied in a transfer pricing case, assume in Example 3 that the transfer pricing result in the right-hand column of Figure 2 arose. In that case, the Maldives Government collects MVR 900,000 in BPT (instead of MVR 1,500,000 if the arm's length price was substituted for the transfer price actually adopted by the companies). If section 29(g) were to apply (instead of section 29(f)), and the transaction were totally disregarded (because it "would not have been entered into between Persons who were not associated with each other"), then no tax whatsoever would arise because there would be no transaction to tax. It is inconceivable that Parliament would have intended such a result when simultaneously enacting section 29(f). Therefore, section 29(g) must have been meant to apply to some other type of tax avoidance transaction between associated

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<sup>16</sup> Presumably, as the debt:equity ratio increases, up to some point an unrelated lender would require a higher interest rate to compensate for the risk of lending to an increasingly undercapitalized entity.

parties, which does not involve transfer pricing. In the absence of specific rules to counter it, thin capitalization falls into that category.

## APPLICATION OF THE INTERPRETATION ACT

To embrace non-transfer pricing arrangements in a section that is headed *Transfer pricing* appears, on the face of it, unusual. However, section 16 of the Interpretation Act<sup>17</sup> specifically directs that section headings (and margin notes) are to be ignored: “[s]ection headings and marginal notes in an Act shall be taken not to be part of the Act. Section headings and marginal notes in an Act are used for convenience of reference only.” Therefore, no significance attaches to the heading of section 29. In fact, it is a misnomer, which creates confusion.

Nevertheless, section 29 (and, in particular, section 29(g)) would appear to be required to be read in the context of tax avoidance. Section 29 is positioned in Chapter 4 of the BPT Act, which is headed *Chapter 4 Tax Avoidance*. Section 16 of the Interpretation Act is not authority to ignore chapter headings in an Act of Parliament. While nowhere in the Interpretation Act is the relationship between a chapter heading and a particular section, or particular words of a section, specifically addressed, some sections of that Act point to a requirement to read section 29 only in the context of tax avoidance; for example:

1. Most significantly, the purposive approach in section 6(a): by placing section 29 under the chapter headed “Tax Avoidance”, Parliament presumably intended to address transfer pricing and other transactions between related persons (which would not be entered into by unrelated parties) only where the transactions were motivated by tax avoidance.
2. The intrinsic aid in section 10(a), which requires reading the entire section or chapter in which the words appear to identify their meaning. Chapter 4 is concerned entirely with tax avoidance.
3. The extrinsic aids in section 11(a), which identifies the reason for the particular section in the Act (which here is to defeat tax avoidance), and section 11(d), which addresses the general application of the words and the accepted manner of their use (here the words are used and applied in the context of tax avoidance).

This approach means, for example, that if a thinly capitalized financing structure was implemented before the release of the BPT Bill, it is unlikely that the excessive gearing had a tax avoidance motive, so that section 29(g) could not apply if that thin

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<sup>17</sup> No. 4/2011.

capitalization persisted beyond the commencement of the BPT Act. However, any increase in the gearing ratio after that time may well fall foul of section 29(g).

Thus, ignoring the section heading and viewing section 29 in a tax avoidance context, the structure of section 29 is logically interpreted as follows:

29. (a) **Circumstances for application** of section 29, i.e. where any transaction is entered into directly or indirectly between associated persons.
- (b) **Definition** of a transaction which is entered into indirectly by two persons.
  - (c) **Definition** of associated persons.
  - (d) **Definition** of a relative.
  - (e) **Definition** of arm's length terms.
  - (f) Rule to **correct transfer pricing**.
  - (g) Rule to **disregard a transaction**.
  - (h) **Circumstances** under which section 29(i) applies.
  - (i) **Adjustment** of the other party's taxable profits to reflect the earlier application of section 29(f) or 29(g) to the calculation of a party's taxable profits.
  - (j) **Time limit** for the other party to apply for the adjustment to its profits.
  - (k) **Requirement to make adjustments** to the other party's taxable profits.

Viewing the construction of section 29 in this way, it becomes more apparent that the provisions of the section (viz. the circumstances in which the section operates, the definitions – other than the definition of arm's length terms – and the adjustment matters related to the second party to the transaction) apply equally to transfer pricing and thin capitalization arrangements.

## DOMESTIC RELATED-PARTY ARRANGEMENTS

Section 29 does not apply only in a cross-border situation, i.e. where one party to the transaction is a tax resident of the Maldives and the other related party is a tax resident of another country (and not subject to BPT in the Maldives). Section 29 can apply to two tax residents in the Maldives, although that would not normally be the case (at least in relation to transfer pricing) because, regardless of the price at which a transaction is executed, the income derived by the seller is offset by a deduction allowed to the buyer, so the revenue impact is neutral. However, domestic transfer pricing could bring about savings in BPT to a group, and therefore not be revenue neutral in relation to two Maldives companies, if, for example, the seller is in a tax loss position. Similarly, thin capitalization could be advantageous where a Maldives company pays interest to a Maldives resident who may not be subject to BPT on his interest income.



Subsections (h)–(k) apply when both parties to the adjusted or disregarded transaction have taken the transaction into account in the determination of their taxable profits, which are subject to BPT. In these circumstances, what subsections (h)–(k) do is to ensure symmetry of tax treatment between the two parties to the manipulated transaction. In the transfer pricing context, for instance, this means that where MIRA adjusts the transfer price of one party to increase its taxable profits, the other party may apply to MIRA to correspondingly have the purchase price adjusted upwards to the arm’s length price, thereby increasing the amount of the deduction which the purchaser may claim in calculating its taxable profit subject to BPT. For example, if the purchaser in Example 3 was not a Montenegro company, but instead a Maldives-resident company (Maldives Company No. 2), and MIRA adjusted the sale price of Maldives Company No. 1 from MVR 6,000,000 to MVR 10,000,000, Maldives Company No. 2 would be entitled to claim relief from MIRA under section 29(h) to calculate its taxable profits in accordance with the adjustment made under section 29(f) to Maldives Company No. 1’s profits, i.e. to increase correspondingly the deduction for its purchases to MVR 10,000,000 (section 29(i)).

The same approach applies where MIRA disregards a thin capitalization arrangement under section 29(g).

#### **Example 4**

*Suppose that a Maldives-resident company (Maldives Company No. 4) has tax losses available to carry forward to offset against taxable profits in future tax years, It makes excessive loans to a related Maldives-resident company (Maldives Company No. 3) relative to the share capital of Maldives Company No. 3, which no independent party would have made. MIRA can set aside the transactions involving the excessive loans, thereby denying interest deductions in respect of them to Maldives Company No. 3. Consequently, Maldives Company No. 4 is entitled to claim relief from MIRA under section 29(h) to calculate its losses available to be carried forward to later tax years, by ignoring the interest income which arose from the transactions which have now been disregarded by MIRA pursuant to its application of section 29(g) to Maldives Company No. 3, and which diminished Maldives Company No. 4’s available tax losses.<sup>18</sup>*

So it can be seen that subsections (a), (b), (c), (d), (h), (i), (j) and (k) apply to both transfer pricing arrangements and other transactions which are to be disregarded.

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<sup>18</sup> Such an arrangement would be embarked upon by the two companies so that the group does not have to wait to obtain the tax benefit of the losses until Maldives Company No. 4 earns taxable profits in later tax years. Rather, the group obtains the tax benefit immediately via Maldives Company No. 3 claiming a deduction for the interest paid to Maldives Company No. 4, which generates taxable profits for Maldives Company No. 4 against which it can offset its losses in the current tax year.

Subsection (e) obviously applies only to transfer pricing arrangements. Thus, the logical interpretation of section 29 is that it applies to two types of tax avoidance arrangements: (i) transfer pricing, and (ii) other artificial arrangements between associated persons which would not be entered into by related parties.

## **CONCLUSION**

The BPT Act does not contain a special anti-avoidance section to respond to thin capitalization arrangements, which undermine the Maldives tax base. However, section 29 of the Act counters tax avoidances transactions entered into between related parties. But the language of section 29 is far from ideal. Sections 29(f) and 29(g) conflict. Section 29(f) is intended to adjust fabricated prices adopted by associated entities in transfer pricing transactions. By contrast, section 29(g) purports to set aside completely transactions which would not be entered into by unrelated parties, which clearly encompasses transfer pricing transactions.

For both subsections to work consistently with each other, this article contends that Parliament intended that section 29(f) applies to transfer pricing arrangements, where the factitious price (and other terms) is replaced by the arm's length price (and terms) in a transaction which subsists. Meanwhile, section 29(g), which does not allow the transaction to survive, applies to other non-transfer pricing arrangements, such as transactions involving a thin capitalization arrangement.

In both cases, as a question of law, application of the respective parts of section 29 to transfer pricing and thin capitalization seems clear. However, resolution of a dispute ultimately turns on a question of fact, which is determined on the evidence of an arm's length price (section 29(f)) or evidence of whether an unrelated person would have advanced funds to an allegedly undercapitalized taxpayer on the same terms as those applicable to the funds advanced by the related party (section 29(g)).



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1. *Attorney General v British Broadcasting Corporation* [1981] AC 303 (Lord Salmon).  
 2. *R v Commissioner of Police* [1968] 2 QB 150 (Lord Denning).

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הוא מפרט את המעורבות של הממשלה והתביעה בהגנה על זכויות הפרט. המעורבות של הממשלה והתביעה בהגנה על זכויות הפרט היא מעורבות ישירה. המעורבות של הממשלה והתביעה בהגנה על זכויות הפרט היא מעורבות ישירה. המעורבות של הממשלה והתביעה בהגנה על זכויות הפרט היא מעורבות ישירה.

ההחלטה של בית דין בהגנה על זכויות הפרט היא מעורבות ישירה של הממשלה והתביעה בהגנה על זכויות הפרט. המעורבות של הממשלה והתביעה בהגנה על זכויות הפרט היא מעורבות ישירה. המעורבות של הממשלה והתביעה בהגנה על זכויות הפרט היא מעורבות ישירה.

House of Lords) (Attorney General v Guardian Newspapers Ltd. "1987" 3 ALL ER 316

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Balogh v Crown Court at Albon "1975" AC 373

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