

Make Space on Your Bookshelf for Monsenego's *Introduction to Transfer Pricing*

by Amanda M. Leon and H. David Rosenbloom



Amanda M. Leon



H. David Rosenbloom

Amanda M. Leon is an attorney based in Washington and practices in the field of international taxation. H. David Rosenbloom is a member with Caplin & Drysdale Chtd. in Washington, the James S. Eustice Visiting Professor of Taxation and the director of the international tax program at New York University School of Law, and a member of Tax Analysts' board of directors.

In this book review, Leon and Rosenbloom examine *Introduction to Transfer Pricing* by Jérôme Monsenego. Published by Wolters Kluwer. Hardcover, 216 pages. Price: \$149.

Copyright 2023 Amanda M. Leon and H. David Rosenbloom.
All rights reserved.

Jérôme Monsenego's *Introduction to Transfer Pricing* is a well-conceived, well-executed, and uncommonly useful book. For anyone with a serious interest in the distinct area of tax law relating to transfer pricing, it will serve as an invaluable learning and teaching tool, unrivaled in comprehensiveness and coherence. This rings true for not only students and practitioners entering the field (or contemplating an entrance)

but also experienced practitioners mentoring the newly initiated, and everyone in between.

Straightforward, Yet Sophisticated

As Monsenego — and no doubt many others — found when teaching the subject, and as Michael Lang observed in his astute foreword to the book's second edition, there has historically been a dearth of literature dealing with transfer pricing at a fundamental level. As a result, students and new practitioners are generally left with no better option than plentiful technical writings, and professors and mentors can provide no alternative to diving straight into opaque and lengthy regulatory law,¹ aided only by the equally daunting and verbose 900 pages or so of text that collectively make up the OECD transfer pricing guidelines² and the authorized OECD approach.³ These materials are instructive for identifying and applying the best or most appropriate method to determine an arm's-length result given the particulars of a transaction, but they do not provide the baseline concepts and theories required for a meaningful understanding.

The need for a book like Monsenego's has become increasingly acute recently, with transfer pricing emerging as a crucial area of tax law. Monsenego is especially well suited to ameliorate this situation. He is familiar with the study and practice of international taxation from both academia and private practice, has served as an expert before courts and an adviser on legislative projects, and has collected numerous emblematic

¹ See, e.g., reg. sections 1.482-1 to 1.482-9T.

² OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (Jan. 2022).

³ OECD, *Report on the Attribution of Profits to Permanent Establishments* (July 22, 2010).

honors and positions along the way. He is a full professor of international tax law at Stockholm University, research fellow at the Amsterdam Centre for Transfer Pricing and Income Allocation, and chair of the Swedish branch of the International Fiscal Association. His book reflects both technical precision and practical edge.

Monsenego set a primary objective when writing this book “to introduce transfer pricing in a pedagogical way, in particular through relying on examples and thorough explanations of transfer pricing principles.”⁴ This objective has been met — the text reads as an articulate, and yet conversational, lecture complete with examples and figures knowingly spread throughout (just when readers find themselves thinking, “but how does that actually work in practice?”). Moreover, Monsenego appropriately accounts for jurisdictional nuances — a common difficulty when discussing topics of international tax law — with an upfront approach:

The book does not take the perspective of a particular country and instead focuses on the general principles and mechanisms that apply, albeit to various extents, in most countries. Although most of these principles are found in the OECD Guidelines, the views of other international organisations, in particular the UN and the European Union (EU), are also taken into account in the book, especially when such views confirm or differ from the OECD Guidelines with respect to critical issues.⁵ [Internal citation omitted.]

Occasional references to exemplary domestic law and treaty language illustrate differences from the recommendations of the OECD and other international organizations. These judgment calls (for example, when to highlight jurisdictional differences) are spot on. Overall, this approach provides a clear and concise learning experience that acknowledges nuances without bogging down, helping readers to remain focused on the fundamentals. It also lends the book cross-jurisdictional appeal.

⁴ Monsenego, *Introduction to Transfer Pricing* xxiii (2022).

⁵ *Id.* at 2.

Although Monsenego intends this volume to be, at least in part, a primer, it should not be seen as rudimentary or simplistic. The book demystifies the complexities of transfer pricing — ranging from theoretical to conceptual to practical — and distills them into a navigable account. And the book’s footnotes and bibliography are a treasure trove of thoughtfully curated resources allowing the reader to dive deeper into the subject matter after mastering the fundamentals. The book really has something to offer students and practitioners at all experience levels.

Thorough and Compelling

High praise could go on, but we would be remiss in neglecting to preview the book’s contents and highlight several examples of what sets it apart.

After a short introductory chapter that contextualizes transfer pricing in terms of global developments and sets out the parameters and tone for the discussions that follow, the first chapter tackles the arm’s-length principle. Though this principle is experiencing an evaluation and evolution in the age of digitalization, and despite headlines pronouncing its demise, it remains alive and well — that is the beauty of a guiding principle as opposed to a strict rule — and is, as the chapter title aptly describes it, “The Key to Understanding Transfer Pricing.” It is no wonder that the book begins with arm’s length.

The chapter starts by describing in simple terms what transfer pricing aims to do — appropriately price intercompany transactions so that the resulting profits and losses of a multinational group may be shared among involved jurisdictions — and then examines the possible methods for doing so: formulary apportionment and the arm’s-length method. Such a concise statement of transfer pricing’s what and why, though seemingly basic, enables new learners to digest the more complex subject matter to come, just as the thoughtful examination of the benefits and shortcomings of *both* the arm’s-length method and its alternative promotes deeper comprehension.

The second chapter marches through standard transfer pricing methods with appropriate detail, providing helpful

observations regarding the “sixth method” relying upon quoted prices and the combined use of multiple methods. The third chapter is devoted to the far too often overlooked subject of transfer pricing models and orients readers to the business point of view. The discussion begins with an important reminder: “Taxes are one parameter among many that may come into play for each decision. . . . [B]usiness models may not always be the most efficient from a tax point of view, and transfer pricing models may not always be the most effective from an operational point of view.”⁶ Practice pointers like these complement the technical discussion and help readers develop a holistic understanding.

The third chapter continues with Monsenego’s consolidation of a cogent playbook, with definitions, explanations, and examples of available transfer pricing models for six common intercompany transactions (research and development, manufacturing, distribution, services, financial transactions, and cost contributions) and the centralized entrepreneur model. He frames the discussion in terms of functions performed, risks assumed, and assets used so that readers do not lose sight of the model’s relevance for a functional analysis. The playbook’s value and clarity cannot be overstated. Practitioners — new or experienced — will be returning to this chapter time and time again.

The book’s fourth chapter introduces cross-border business restructurings from a transfer pricing perspective, presents a sampling of frequent types of restructurings, and examines the complexities involved in determining whether a restructuring should give rise to compensation. The discussion emphasizes the importance of analyzing the unique facts and circumstances of each situation to assess whether modifications to the value chain across borders raise transfer pricing issues.

The fifth chapter ventures into the substance required for transfer pricing. Monsenego deftly unpacks this as a two-part requirement: first, satisfying the well-known substance-over-form principle and the lesser-known particulars of its application to transfer pricing, and second,

establishing adequate functions, assets, and risks so that economic activity and transfer pricing outcomes match. This chapter should be of particular relevance since the IRS has indicated that it is considering the possibility of asserting economic substance penalties in transfer pricing cases.⁷

In its sixth chapter, the book covers the attribution of profits to permanent establishments. The choice to include historical context (for example, the OECD’s former recommendations) and an aside on principled treaty interpretation elevates the discussion. The seventh and final chapter serves as a useful guide for practitioners handling transfer pricing compliance and dispute resolution. The discussion of arbitration and the nuances of the various types that are available depending on the treaty and venue involved are enlightening and refreshing. Practitioners considering the IRS’s recent guidance regarding review and acceptance of advance pricing agreement submissions⁸ will be interested in the chapter’s brief discussion of instances in which competent authorities may refuse to accept an application for an APA.

Collectively, the seven chapters take readers on an informative and comprehensive (and for some odd ducks, delightful) trip through the transfer pricing life cycle.

Concluding Remarks

Monsenego has managed to produce a short, readily accessible volume on transfer pricing, with lessons for both the newly initiated and the thoroughly experienced. Contrary to some suggestions even by high-ranking officials, transfer pricing and its perplexities are not going anywhere. Neither should Monsenego’s book once you make its acquaintance. ■

⁷ See Lauren Loricchio, “IRS Eyeing Economic Substance Doctrine for Transfer Pricing,” *Tax Notes Int’l*, Nov. 21, 2022, p. 1029 (reporting public IRS comments to this effect); IRS, “Interim Guidance Memorandum on Economic Substance Doctrine and Related Penalties,” LB&I-04-0422-0014 (Apr. 22, 2022) (eliminating a previous requirement that executive level approval be obtained before a revenue agent may assert economic substance penalties, and instead requiring only approval at the agent supervisor level).

⁸ IRS, “Interim Guidance on Review and Acceptance of Advance Pricing Agreement (APA) Submissions,” LB&I-04-0423-0006 (Apr. 25, 2023).

⁶ *Id.* at 83.