

Transfer Pricing in East Africa *Anti-avoidance takes on a new meaning*

Revenue Mobilization in Sub-Saharan Africa

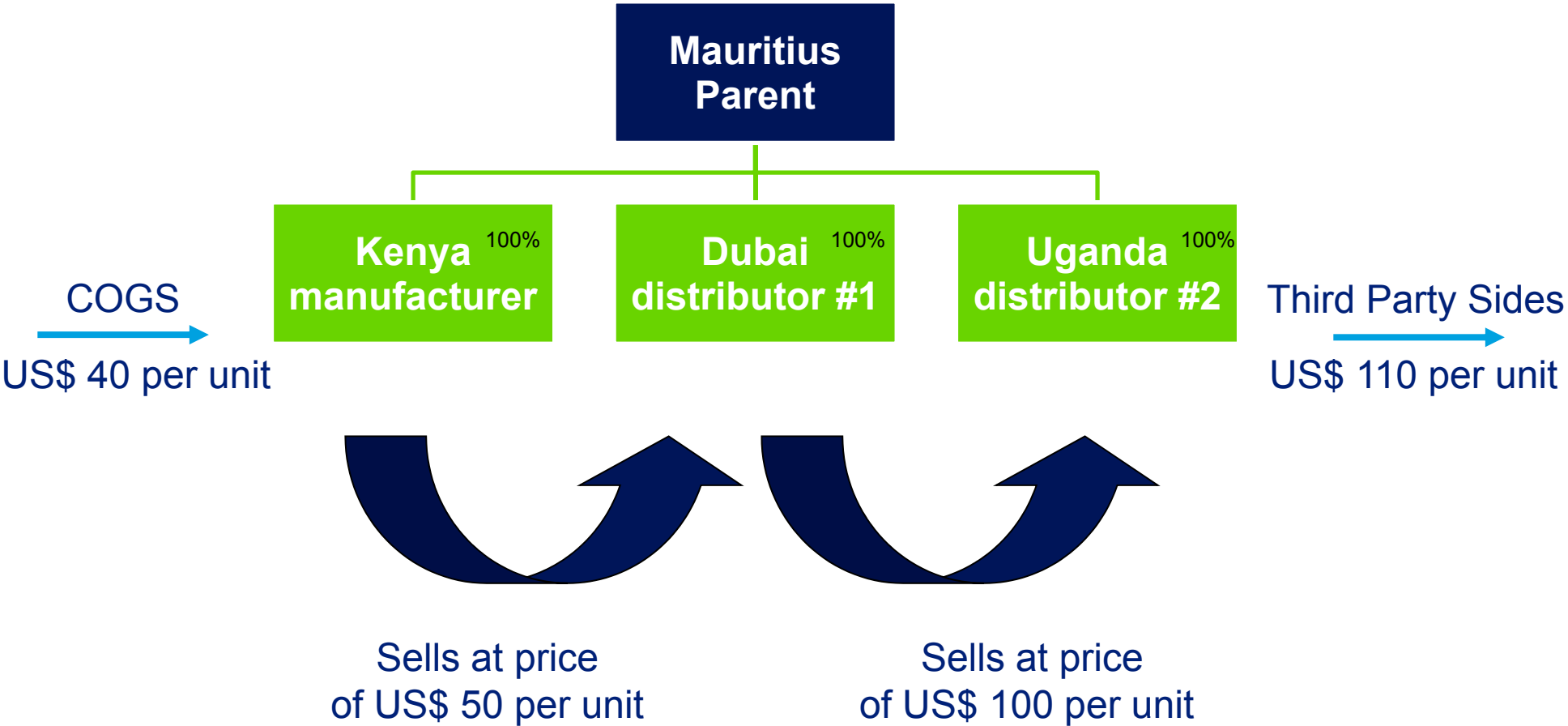
Nairobi, Kenya

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The basics of Transfer Pricing

Arm's length - Do unto related parties as you would to unrelated parties



The Unilever Case (2005): Background

- Unilever Kenya, a manufacturer, produced goods for Unilever Uganda , a distributor
- Kenya price to Uganda lower than Kenya price to local customers
- KRA challenged the pricing based on the comparable unrelated party prices
- Kenya had a transfer pricing policy in place
- Was the price arm's length and did Unilever use the correct method in arriving at it
- Was Kenya's legislation (Section 18(3) of the Income Tax Act) adequate?

The Unilever Case (2005): Arguments

Unilever	Commissioner/KRA
Section 18(3) was “ambiguous”, therefore inadequate and unreliable	Section 18(3) was crystal clear
Alternative was OECD Guidelines	OECD Guidelines are NOT part of Kenyan law
Taxpayer was duty bound to apply the international best practice	What’s wrong with Section 18(3)?
Per OECD Guidelines, Unilever had: <ol style="list-style-type: none"> 1. Discounted CUP method 2. Applied TNMM method 	What’s wrong with Section 18(3)? Taxpayer should have applied a method (called CUP method)

The Unilever Case (2005): Outcome

- Unilever WINS
- KRA drops Sara Lee case
- Treasury publishes transfer pricing rules in 2006 Budget
- KRA starts building a TP unit
- From 2009 numerous requests for policies
- Self assessment returns revised for TP
- Taxpayers and practitioner s lives become miserable

Transfer Pricing law, rules, guidelines in East Africa

	Uganda	Kenya	Tanzania	Rwanda	Burundi
Anti-avoidance law	S.90 & 91	S.18(3), S.23	S.33	Law N° 16/2005 of 18/08/2005	None
Other law	n/a	VAT Act	Mining Act		
Transfer pricing rules	Draft	Final - 2006	Draft	Issued – 2007	
OECD guidelines	Yes	Yes	Yes	Yes	
Practice notes	No	Coming soon	No	No	
Documentation penalties	No	No	No	No	

Some issues

- There are no double tax treaties between EA countries
- Advance Pricing Agreements or Advance Rulings not available yet
- Transfer pricing and customs
- Limited although increasing experience in the Revenue Authorities
- Poorly drafted laws and rules gives rise to too much uncertainty
- TP adjustments viewed as the cash cow for Revenue Authorities behind target leading to considerable rigidity

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