

## TRANSFER PRICING AND CRITICAL FEMINIST TAX THEORY

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**Abstract:** *It is believed that transfer pricing has become the most important tax issue in 21<sup>st</sup> century. It draws researcher's interest but surprisingly it has not yet been examined from the Critical Feminist Theory perspective, even though taxes should be within its scope of interest. The reason for this delay is that Critical theories—like the Critical Race Theory and The Critical Feminist Theory are often treated with suspicion or even rejected by mainstream scholars in economics, law and taxation.*

*This article is an attempt to search for an answer to the question how to apply a gender-neutral approach in formulating transfer pricing legislation. There is a generally accepted global mechanism of transfer pricing regulation based on the principles of a separate entity and an ALP (Arm's Length Principle). This approach is the subject of increasing criticism from many transfer pricing professionals—both researchers and practitioners.*

*This article analyzes current transfer pricing mechanisms and known alternatives from the perspective of Critical Feminist Tax Theory researchers and to examine whether the current principles of transfer pricing are consistent with Critical Feminist Tax Theory proposals.*

*The author did not employ the Critical Feminist Theory approach, but, instead compared and contrasted feminist postulates with the alternatives and argumentation surrounding the debate on transfer pricing. Theoretical legal methods were mainly favored, while dogmatic methods served as an auxiliary approach. This article follows the assumption presented by some scholars that a scientific analysis of the Critical Feminist Tax Theory demands is feasible, but it is necessary to distinguish between the scientific and the ideological element.*

**Keywords:** *transfer pricing, feminist tax theories, formulary apportionment, ALP, international tax order*

### INTRODUCTION

Critical theories, like the Critical Race Theory and The Critical Feminist Theory are often treated with suspicion or even rejected by mainstream scholars in economics, law and taxation. In the author's opinion *a priori* rejection of these theories is not justified, but, rather, the methodology and postulates of these theories should be critically counter-analyzed with consideration of the latest research results and the use of the available tools.

Though a critical approach may not be easy, researchers should maintain an attitude that is open to new suggestions, but that is also free from ideology and the temptation to draw easy and, therefore attractive—but not necessarily scientific—conclusions. This article follows the assumption presented by some scholars that a scientific analysis of the Critical Feminist Tax Theory demands is feasible, but it is necessary to distinguish between the scientific and the ideological<sup>1</sup>. Researchers studying tax matters with a feminist approach often concentrate their focus on ensuring that domestic tax regimes are gender neutral. They postulate that the creation of tax laws enabling the “equalization of opportunities” for women (as well as other disadvantaged groups) must be applied to all areas of taxation.

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<sup>1</sup> KELLER, E. F. *Feminism and Science*. 1982, No. 3, pp. 589 and next.

How would one apply a gender-neutral approach in formulating transfer pricing legislation? There is a generally accepted global mechanism of transfer pricing regulation based on the principles of a separate entity and an ALP (Arm's Length Principle). This approach is the subject of increasing criticism from many transfer pricing professionals—both researchers and practitioners. Researchers allege that such an approach is often not economically feasible, while practitioners argue that the approach is not practical—that taxpayers do not accept the documentation requirements and level of risk presented. The feminist tax researchers, apparently have not yet addressed these considerations nor have they called for any changes to or the continuation of the current standard.

This article aims to analyze current transfer pricing mechanisms and known alternatives from the perspective of Critical Feminist Tax Theory researchers and to examine whether the current principles of transfer pricing are consistent with Critical Feminist Tax Theory proposals. We will also ask if the goals of the feminist movement would be achieved more effectively under a different approach to transfer pricing.

In his research for this article, the author did not employ the Critical Feminist Theory approach, but, instead compared and contrasted feminist postulates with the alternatives and argumentation surrounding the debate on transfer pricing. Theoretical legal methods were mainly favored, while dogmatic methods served as an auxiliary approach.

For the benefit of tax researchers who may not be familiar with international taxation on a regular basis, the author gives some background on transfer pricing mechanisms. It is hoped that this will allow for a broader understanding of the author's research.

## I. TRANSFER PRICING - ONE HUNDRED YEARS LATER

It is assumed that business transactions are profit driven and negotiation of price is usually a major part of most business transactions, resulting in a “market price”. When, however, business transactions are undertaken between related parties, such as two subsidiaries of a single parent company, the price often reflects tax considerations and applicable tax benefits.<sup>2</sup> Differences in tax rates can cause parties in business transactions to maximize income in one country and reduce it in another so that a larger portion of the income generated is taxed at a lower tax rate. To avoid this undesirable tendency, transfer pricing (TP) regulations were put into place to require taxpayers to ensure the price is in line with market price for comparable sales between unrelated parties (i.e., “arm's length”). The practice of shifting income to a lower tax jurisdiction is commonly referred to as “transfer mispricing”.

Many experts believe that transfer mispricing has become the most important tax issue in 21<sup>st</sup> century.<sup>3</sup> According to some estimates, transfer mispricing may occur in more than 2/3 of all business transactions and may occur in the vast majority of international transactions (transfer mispricing can also occur in domestic transactions). Transfer mis-

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<sup>2</sup> COOLS, M., EMMANUEL, C., JORISSEN, A. Management control in the transfer pricing tax compliant multinational enterprise. *Accounting, Organizations and Society*. 2008, Vol. 33, No. 6, pp. 603–628.

<sup>3</sup> Ad Hoc Group of Experts on International Cooperation in Tax Matters Tenth meeting, Geneva. In: *unpan1.un.org* [online]. [2025-11-11]. Available at: <<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan004399.pdf>>.

pricing affects governments' budgetary revenue, corporate profits, the general investment climate and global distribution of income.

Today, companies consider transfer pricing strategy to be an essential component of their "market mechanism". They increasingly use pricing opportunities and techniques as instruments to improve economic performance, so that transfer pricing has become a sophisticated tool for tax optimization. Managements often set internal goals to increase pre-tax profit by structuring income distribution. This involves the use of mathematical models believed to be capable to determine the ideal transfer price optimal for corporations (but not necessarily for the budgets of the countries in which they operate). It is supported by the accounting methods that taxpayers employ as a tool to achieve their financial goals which are set according to the above mentioned economic and mathematical models.<sup>4</sup>

In determining whether a given price falls within the range defined as arm's length, two principles are applied. First, it is assumed that transactions concluded within a related group of companies can and should be analyzed as if they were concluded between independent entities (this is called the "separate entity" principle). Second, and this is a derivative of the first principle, it is accepted that any given transaction between subsidiaries has an analogous transaction, concluded under identical conditions, between unrelated parties. This principle is called the arm's length principle – ALP.<sup>5</sup>

In order to determine whether the price is "arm's length" the stated price in the transaction in question is compared with that in similar transaction concluded by the unrelated entities. This mechanism seems to be simple, but its application can be difficult. Finding comparable examples is relatively easy for straightforward transactions (e.g. selling commodities). However, for more complex transactions (e.g. services involving intangible assets) it becomes complicated—and, sometimes, impossible. Many transactions are unique such that there is nothing comparable in the market (such as might occur in the case of intangible assets). Further, while setting prices, an important factor to consider is the risk associated with a given contract. Risk levels are generally different between two entities within a group, and between unrelated entities, such that there are no truly comparable prices.

From a practical perspective, the separate entity mechanism and ALP present two fundamental disadvantages: First, the comparison of prices for the transaction in question requires the preparation of reports and supporting documentation. This reporting requirements is significant and can be quite tedious. Second, in spite of all efforts the tax authorities can still challenge the ALP price (and, consequently, the income declared) with respect to the transaction in question. This can be expected particularly in the case of complex transactions due to increasingly high levels of subjectivity involved in the assessment process due to the rarity of comparable transactions.

According to some researchers, although the ALP mechanism seems to have the characteristics of both universal and objective, it in fact favors large, international

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<sup>4</sup> KLIMOVA, S. A., Eden, M. To be or not to be: transfer pricing aggressiveness in the enterprises of Kazakhstan. *Bulletin of National Academy of Sciences of the Republic of Kazakhstan*. 2019, No. 6/2, p. 329.

<sup>5</sup> PANKIV, M. *Contemporary Application of the Arm's Length Principle in Transfer Pricing*. Amsterdam: IBFD, 2017, p. 3.

corporations at the expense of smaller taxpayers.<sup>6</sup> The growing complexity of TP rules has led to a situation where multinationals possess centralized, unique know-how such that corporate leaders are more knowledgeable about comparable transactions, ALP and TP rules in general than are the tax authorities.<sup>7</sup> Moreover, there are suggestions that current principles *de facto* serve highly developed countries at the expense of those that are less developed.<sup>8</sup>

## II. FORMULARY APPORTIONMENT AS AN ALTERNATIVE APPROACH

The separate entity approach and the ALP were first used in the USA at the beginning of the twentieth century. When, as a result of the economic expansion of international corporations, the problem of inconsistent taxation began to affect more and more countries (and companies), attempts to develop universal standards were undertaken. This was closely related to the problem of double taxation (international entities subject to taxation in the country where business was transacted and in the country of the company's headquarters). Serious attempts to address this matter began in the 1920s. At that time, there were two widely accepted approaches: the separate entity/ALP approach and the alternative formulary apportionment (FA) approach. It is important to understand that the currently applicable transfer pricing rules is a result of an arbitrary decision by a small, elite group of technocrats and politicians. The decision arose in part from the conclusions of prof. M. B. Carroll's research presented in the so-called Carroll Report.<sup>9</sup> The Report was developed and produced at the request of the League of Nations to analyze the various approaches to transfer pricing and their advantages and disadvantages. Prof. Carroll was inclined to recommend the ALP approach, and so he did. From then on—for over one hundred years the ALP (not the FA) became the international standard.

What are differences between the two? The FA approach relies on the assumption that the total corporate income should be declared at the headquarters level—ignoring the prices agreed in individual transactions between subsidiaries. Then the income is divided amongst (allocated to) each of the countries where the company carries out business transactions allowing each respective country to impose tax on its allocated share. The allocated portion is taxed according to the rules of, and at the of rate applicable within, that particular country. The key challenge to the FA approach is determining the income generating location (including the headquarter country) in order to develop the correct allocation formula. There are many approaches to formula creation and, depending on the factors used, one can get different results.<sup>10</sup> Most proponents advocating for the re-

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<sup>6</sup> SOLILOVA, V. Small and medium sized enterprises (SMEs) and transfer pricing. *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*. 2012 No. 2, pp. 349-355.

<sup>7</sup> COOLS, M., EMMANUEL, C., JORISSEN, A. *Management control in the transfer pricing tax compliant multinational enterprise*. pp. 603-628.

<sup>8</sup> SIMPLICE, A., UDUJI, J. Transfer pricing and corporate social responsibility: Arguments, views and agenda. *AGDI Working Paper, No. WP/19/2019, African Governance and Development Institute (AGDI)*, p. 3.

<sup>9</sup> CARROLL, M. B. Methods of Allocating Taxable Income, in League of Nations. *Taxation of Foreign and National Enterprises*. 1933, Vo. 4, Doc. C. 425(b).M 217(b).

<sup>10</sup> MC LURE, C. E. The Elusive Incidence of the Corporate Income Tax: The State Case. *Public Finance Review*. 1981, No. 4, pp. 395-413.

placement of ALP with global FA do not offer any straightforward explanation for their opinion, and they do generally acknowledge its shortcomings and agree that details of formulas have yet to be developed.

In traditional economies, it is believed that any widely accepted FA formula should reflect all the elements that contribute to or measure the processes resulting in (or contributing to) the earning of the income to be taxed. Therefore, it might be assumed that, in keeping with the U.S. Supreme Court's decision in *Container Corp. of America v. Franchise Tax Board*, it is generally recognized that an apportionment formula "to not be arbitrary in its concept must not be unreasonable in its results".<sup>11</sup> The Court believed that the formula does not need to reflect scientific precision but may be acceptable even if it achieves only a rough approximation of the attributable income. In conclusion, it seems fair to agree that the formula must above all be simple, objective (universal) and just.

In practice, different factors could be applied. Typically, the following are considered:

**Sales.** This seems to be the most obvious. However, using this factor carries the risk of producing a skewed result, similar to that associated with current ALP.

**Property.** This is a relatively objective factor, although the correct valuation of property presents a major challenge (and area for manipulation), especially if the property includes intangible assets.

**Headcount.** The number of employees historically corresponds to the role of each individual entity of the company. However, this has changed with the growing importance of highly qualified, better paid, employees and remote work.

**Payroll.** This factor addresses some of the weaknesses inherent in the previously discussed factors. The salary pool reflects the added value generated by entity's employees more accurately than does headcount.

**Mix** (variety of factors). The idea is to create a combination factor based on a mix of sub-factors, considering individual preferences and the goals the FA is intended to help to achieve. For instance, the US Massachusetts Formula consists of three factors: property, payroll, and sales which are assigned according to destination, with a special throw-back mechanism to ensure full taxation.<sup>12</sup> The Massachusetts Formula has evolved and developed for more than 60 years. In cases where more than one factor is considered, it is critical to apply proper weights to each factor.

None of the above solutions is ideal. Creating an appropriate, universally acceptable allocation formula currently seems to be the greatest challenge in the implementation of FA. Some experts have suggested allowing the use of different factors that are relevant to individual industries, and to different corporations (an analogous approach can be found in advance pricing agreements (APA) mechanisms whereby taxpayers and tax authorities negotiate an a mutually acceptable price level for a given transaction).

Despite questions surrounding the application of a particular formula to any given transaction, many federal authorities rely on the FA method. Historically the method was commonly employed in the countries that emerged after the dissolution of the

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<sup>11</sup> Judgment of the Court 1983, 463 U.S. 159 - *Container Corp. v. Franchise Tax Bd.*

<sup>12</sup> Massachusetts Formula. In: *Law Insider* [online]. [2025-11-11]. Available at: <[www.lawinsider.com/dictionary/massachusetts-formula](http://www.lawinsider.com/dictionary/massachusetts-formula)>.

Austro-Hungarian Empire (Czechoslovakia, Hungary and Austria) to distribute the income of companies that were broken up as a result of WW I. The method was also used in Spain between the two world wars. Canada's implementation of the FA approach is considered to be exemplary. Another frequently cited FA based system is that employed in Switzerland, which offers an interesting example of "fractional apportionment" achieved through decisional law.<sup>13</sup> China applies FA to companies with unincorporated entities in more than one region. The most frequently cited example of FA application, however, is in the USA where The Multistate Tax Compact, under which a Multistate Tax Commission emerged, suggested the use of the Massachusetts Formula. There have been even calls in the U.S for the implementation of Formulary Apportionment at the federal level.<sup>14</sup>

At the time of Prof. Carroll's report, ALP was probably the best choice. International trade was dominated by simple sale transactions of goods, for which it was easy to obtain comparative data. The use of intangible assets was limited, as was the role of cross-border services. Furthermore, at that time, there were no proper tools within the international community to create and "operate" the FA mechanism. This was particularly true with respect to the ability to process large amounts of data, the international exchange of tax information and proven mechanisms and procedures for creating global fiscal standards (such as the WTO's customs standards or the IFRS accounting standards by IASB).

Naturally, opponents of FA still point to high compliance costs (a bit far-fetched considering the ALP compliance burden), the problem of exchange rate fluctuations, differences in accounting rules, questions of consistent valuation of property and sales, the relevance of withholding tax, and the risks of artificially shifting functions to low tax countries.

There is also the question of the "petrification" of existing solutions and also of efforts needed for change. It is the OECD that is responsible for the creation of the current global TP order. Although the organisation was ferociously protective of ALP and systematically rejected the possibility of replacing it with FA, change in its approach is gradually inevitable. It did include Article 7(4) in its Model Tax Convention, allowing the profits of a permanent establishment (a company's foreign entity) to be calculated "on the basis of an apportionment of the total profits of the enterprise to its various parts". Further, some transfer pricing methods constructed by the OECD deviate toward FA (the "split profit" method), and the proposals recently presented in Pillar I (set of solutions for global taxation) are based on mechanisms featuring allocation approach.<sup>15</sup> FA thus addresses both the challenge of income distribution and that of double taxation of transnational taxpayers. Moreover, it achieves these two objectives without "depending on an extraordinary degree of goodwill or compliance from taxpayers".<sup>16</sup> As a consequence, a growing number of scholars are inclined to seriously consider the possibility that FA could replace ALP, even though they are aware of the complexity of such a transformation.<sup>17</sup>

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<sup>13</sup> LANGBEIN, S. The Unitary Method and the Myth of Arm's Length. *Tax Notes*. 1986, No. 30, p. 630.

<sup>14</sup> HELLERSTEIN, J. R. Federal Income Taxation of Multinationals: Replacement of Separate Accounting with Formulary Apportionment. *Tax Notes*. 1993, No. 1, pp. 1131–45.

<sup>15</sup> BEPS. In: *OECD* [online]. [2025-11-11]. Available at: <[www.oecd.org/tax/beps/beps-actions/action1/](http://www.oecd.org/tax/beps/beps-actions/action1/)>.

<sup>16</sup> BIRD, R. M. The Interjurisdictional Allocation of Income. *Australian Tax Forum*. 1986, No. 3, p. 333.

<sup>17</sup> AVI-YONAH, R. S. Slicing the Shadow: A Proposal for Updating U.S. International Taxation. *Tax Notes*. 2021, No. 1511, p. 1513.

### III. FEMINIST TAX THEORY

Critical feminist taxation theories developed parallel to so called mainstream theories, however they often intertwined and crossed. From the very beginning they were focused on the impact of taxation on women (as the theory developed, it was also applied to other groups that are considered to be disadvantaged). Application of the theory was typically limited to challenging facially discriminatory tax regulations. More advanced feminist scholarship in taxation began to emerge at the end of the twentieth century when researchers started to examine the disparate impact of tax laws on gender. The premise was that the feminist theory could be used as a valuable tool in critiquing the existing tax order.<sup>18</sup> For decades the concerns raised in this area of study tended to concentrate on one of three areas:<sup>19</sup>

- 1) the tax law's structural incentives against women's participation in the labor force;
- 2) specific provisions of tax law that have a disproportionately negative impact on women;
- 3) tax policies and standards that are consistent with or present a challenge to feminist theories of justice.

Recently scholars have expanded their area of interest and have started to focus on a broader range of issues including international taxation and the allocation of income between states.<sup>20</sup>

In terms of methodology and focus, a new approach was developed. The proponents of this new approach argue that conventional (also referred to as “traditional” or “mainstream”) tax scholars adopt a predominantly economic perspective on tax law.<sup>21</sup> Since traditional economics is centered around men and activities dominated by them (such as finance), the feminist tax scholarship approach proposed a departure from the classic view of taxation, from the perspective of economics.<sup>22</sup> Feminist thinking emphasizes that so called “mainstream orthodox economics” has overlooked the idea that “production also requires social reproduction – the many things that women do as care and domestic work to sustain families and societies”.<sup>23</sup> It is assumed that the current economic model of patriarchal neoliberal capitalism is “rooted in colonial and extractive systems that value individual and corporate profit accumulation over collective well-being”. This leads to the conclusion that “gender needs to be taken into account in any understanding of the economy”. In this way, “feminist economics is not ‘economics for women’, it is simply better economics, and all economists should be feminist economists”.<sup>24</sup>

<sup>18</sup> KORNHAUSER, M. E. What Do Women Want: Feminism and the Progressive Income Tax. *The American University Law Review*. 1997, Vol. 47, No. 151, p. 160.

<sup>19</sup> INFANTI, A. C., CRAWFORD, B. J. A Taxing Feminism, *The Oxford Handbook of Feminism and Law in The United States*, Oxford. *University of Pittsburgh School of Law Legal Studies Research Paper Series*. 2020, p. 6.

<sup>20</sup> BROOKS, K. Global Distributive Justice: The Potential for a Feminist Analysis of International Tax Revenue Allocation. *Canadian Journal of Woman and the Law*. 2009, No. 2, pp. 267–297.

<sup>21</sup> INFANTI, A. C., CRAWFORD, B. J. A *Taxing Feminism*, *The Oxford Handbook of Feminism and Law in The United States*, p.13.

<sup>22</sup> Women's Budget Group, 2018. What is Feminist Economics? In: *Women's Budget Group* [online]. [2025-11-11]. Available at: <<https://wbg.org.uk/wp-content/uploads/2018/01/WBG-What-is-Feminsist-Economics-PDF-compressed.pdf>>.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

As a consequence, some researchers warned against “overreliance on empirical work, emphasizing that quantification has a veneer of neutrality but has its own inherent methodological flaws, particularly when studying taxpayers’ self-reported views of concepts like progressivity in the tax law”.<sup>25</sup> Feminist researchers believe that “with conventional focus on the economic dimension of individuals, there is little room in conventional tax scholarship for feminist or other critical perspectives that explore the impact of tax law on individuals marginalized based on, for example, gender or gender identity, race or ethnicity, sexual orientation, class, disability, or immigration status”.<sup>26</sup> Conventional approach to taxation “simplifies the world in order that its tax rules might be reformed, replaced, or abandoned through tidy academic analyses—analyses that lack any real consideration of how existing or proposed tax rules might affect the multidimensional, flesh-and-blood people on whom those rules are intended to operate”.<sup>27</sup> This is why feminist scholars underline that “feminist tax scholarship is not just about women, but about justice for all people”.<sup>28</sup>

The Critical Feminist Approach is not being received easily. It is fair to say that the researchers who are involved show passion for and commitment to the theory and the scope of research is gradually widening so that it covers more and more detailed technical tax issues. Although some of the theory’s postulates have a strong ideological overtone, many of the proposals presented by the theory’s proponents seem to have certain practical limitation. However, some mainstream researchers remain skeptical, rejecting the proposed methodology and its general research assumptions. Since ideology has strongly influenced the approach and focus of the research, it might be concluded that many tax academics have chosen to simply ignore the critical tax endeavor.<sup>29</sup>

The results of the critical tax research work are broadly used in by NGOs (serving as argumentation and a point of reference in debates promoting feminist postulates). Studies such as “Billion Dollar Blind Spot: How the U.S. Tax Code’s Small Business Expenditures Impact Women Business Owners” and many others were published to draw attention to and promote feminist tax ideas among broader audience.<sup>30</sup> Actions on the part of both academics and NGO activists led to the Bogota Declaration - a document that contains a set of postulates for changes in tax systems, aimed at meeting feminist demands. The guiding principle of the document is the assumption that “the negative gender effects of all existing tax, spending, international policies, and other fiscal laws should be corrected as a matter of urgency”.<sup>31</sup>

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<sup>25</sup> KORNHAUSER, M. E. *What Do Women Want: Feminism and the Progressive Income Tax*, p. 154.

<sup>26</sup> KNAUER, N. J. Critical Tax Policy: A Pathway to Reform? *Northwestern Journal of Law & Social Policy*. 2014, No. 9, p. 210.

<sup>27</sup> INFANTI, A. C. Tax Equity, *Buffalo Law Review*. 2008, No. 55, p. 1201.

<sup>28</sup> INFANTI, A. C., CRAWFORD, B. J. *A Taxing Feminism, The Oxford Handbook of Feminism and Law in The United States*, p. 11.

<sup>29</sup> LIVINGSTON, M. A. Women, Poverty, and the Tax Code: A Tale of Theory and Practice. *Journal of Gender, Race & Justice*. 2002, No. 5, p. 327.

<sup>30</sup> Billion Dollar Blind Spot: How the U.S. Tax Code’s Small Business Expenditures Impact Women Business Owners. In: *American University* [online]. [2025-11-11]. Available at: <[www.american.edu/kogod/research/upload/blind\\_spot\\_accessible.pdf](http://www.american.edu/kogod/research/upload/blind_spot_accessible.pdf)>, <https://taxjusticetoolkit.org/>>.

<sup>31</sup> Bogota Declaration. In: *Global Alliance For Tax Justice* [online]. [2025-11-11]. Available at: <<https://globaltax-justice.org/libraries/the-bogota-declaration-on-tax-justice-for-womens-rights/>>.

The feminist postulates in the field of taxation can be summarized in few points:<sup>32</sup>

1. Reduce unfair tax burdens on women and adopt progressive, redistributive and gender equal taxation to ensure that tax revenues are raised and spent in ways that promote gender equality.
2. Introduce new forms of taxation on capital and wealth. Promote less reliance on consumption taxes.
3. Prevent the further shift from direct taxes to indirect taxes—such as consumption taxes—that can increase gender inequality.
4. Ensure that men and women are equally likely to benefit from corporate and income tax exemptions.
5. Stop the trend toward lower Corporate Income Tax (CIT) rates.
6. Ensure adequate financing of gender-responsive social services that promote women’s rights, and reduce inequality, including gender-responsive budgeting.
7. Establish an inclusive intergovernmental global tax body to ensure equal taxing rights of states.
8. Stop all forms of tax abuse by multinational corporations and wealthy elites.

A few of these may sound somewhat idealistic but the rest appear regularly in the mainstream tax debate (no. 2, 3, 5, 7 and 8).

#### IV. TRANSFER PRICING AND CRITICAL TAX THEORY APPROACH

The postulates of feminist researchers are usually set to address a so-called market organization. Their goal is to change the business legal infrastructure so that women can equally compete with men, and do not have to rely on state support.<sup>33</sup> Within this very framework, there is a number of tax demands. The following tax tendencies related to or caused by TP are considered by feminist scholars to have significant tax implications:<sup>34</sup>

1. A transition from direct taxes to indirect taxes, such as consumption taxes. This can increase gender inequality because taxes are levied on essential goods that are consumed disproportionately by low-income households, many of whom are likely to be headed by women.
2. An exemption-based tax system in which incentives are more likely to benefit men than women.
3. “Race to the bottom” phenomena in setting CIT rates. Shrinking CIT revenues are often replaced with consumption tax revenues (see point 1).
4. Global lack of capital and wealth taxes on the super-rich.

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<sup>32</sup> Ibid.

<sup>33</sup> KANTOLA, J., SQUIRES, J. From state feminism to market feminism? *International Political Science Review*. 2012, No. 4, pp. 382–400.

<sup>34</sup> Guide, p. 64. In: *Global Alliance For Tax Justice* [online]. [2025-11-11]. Available at: <<https://globaltaxjustice.org/wp-content/uploads/2022/08/2021-06-02-Download-the-guide-in-English-EN-PDF.pdf>>.

5. Unfair income distribution between states (demand to allocate a greater portion of international tax revenues to low-income countries to allow them to address women's needs amongst their citizens).<sup>35</sup>
6. Lack of global coordination, the solution of which would be the creation of an International Tax Organization (ITO).

The above issues are put forward not only by feminist activists and scholars but they are also frequently discussed in the course of mainstream tax debates. The current transfer pricing rules do not help. Rather, they prevent the implementation of most of the critical feminist tax postulates and, in some cases, their potential introduction could result in increased tax evasion through the use of TP. The growing role of direct taxes increases the importance of transfer pricing, and also the use of transfer mispricing. Similarly, new exemptions and incentives in income taxes encourage attempts at transfer mispricing. TP has always been viewed (and used) as a tool to escape from higher tax rates and more rigorous tax laws and this will continue so as long as the mechanisms, as they apply, allow.

The premise of “race to the bottom” (i.e. as in CIT) presents a serious challenge to states and their budgets.<sup>36</sup> Global corporations are usually the beneficiaries of this phenomenon, since it is easier for them to employ international tax structures and to manipulate TP mechanisms to their advantage.

The importance of the critical feminist tax postulate as it relates to the more just allocation of income between countries makes it a particularly suitable topic for discussion. The current transfer pricing and international tax order (based on a network of around 3000 double tax treaties) does not serve to encourage a change from this trend. However, a new (using the term in the broad sense) approach to this question could allow for allocation in line with critical feminist tax postulates. An efficient international tax organization, such as is suggested by feminist researchers, is a must in order to achieve a change in allocation mechanisms. Again, some of these postulates have also been shared by many mainstream researchers.<sup>37</sup>

In the search of an answer to the question of whether a change in transfer pricing rules to address critical feminist tax postulates is possible, one must turn one's attention to some of the alternatives to currently applicable standards. Such currently applicable standards include the separate entity approach and ALP. The Feminist approach encourages a shift in focus “from the technical operations of particular legal rules to the larger role that tax law plays in shaping society”.<sup>38</sup> To achieve this, it is necessary to look beyond cemented dogmas to more just and equitable concepts of sharing taxable income through the use of global formulary apportionment. FA is not the invention of fanatics

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<sup>35</sup> BROOKS, K. *Global Distributive Justice: The Potential for a Feminist Analysis of International Tax Revenue Allocation*, pp. 267–297.

<sup>36</sup> DAGAN, T. International Tax and Global Justice. *Theoretical Inquires in Law*. 2017, No. 1, p. 21.

<sup>37</sup> AVI-YONAH, R. S., BENSHALOM, I. Formulary Apportionment: Myths and Prospects - Promoting Better International Policy and Utilizing the Misunderstood and Under-Theorized Formulary Alternative. *University of Michigan Law School Scholarship Repository*. 2011 No. 3, pp. 371–398.

<sup>38</sup> CABEZAS, M., KING, B. Feminist Judgments: Rewritten Tax Opinions—The Student Perspective. *Pittsburgh Tax Review*. 2019 Vol. 16, pp. 201–208.

or lunatics. The idea to replace the ALP with allocation mechanism was proposed more than one hundred years ago, long before feminist- focused taxes. FA appears regularly in academic debates and its serious consideration is accepted by most TP researchers.<sup>39</sup> There is general agreement that the ALP mechanism is not perfect and shows serious shortcomings. With time, the significance of these shortcomings is increasing such that the introduction of an alternative approach may soon prove to be necessary, anyway.

FA also has its drawbacks, and its introduction on a global basis would be difficult because the ALP based system is so strongly established. Apart from agreeing on the appropriate formula, the implementation process would include defining the Consolidated Tax Base (CTB), distribution mechanism and would have to address questions of efficiency and the factor's distortions.<sup>40</sup>

Researchers agree that the biggest challenge the FA presents is the development of a fair and acceptable allocation formula. This task, however, presents a great opportunity for feminist advocates. The formula may be based not only on the economic factors (which have been considered so far), but also allow the use of factors with social, political or ideological weight, as postulated by the feminist researchers. This means that the formula could serve as a tool allowing the allocation of more income to the country or countries (where a given corporation runs its business) with a view toward the need for greater financial support for women's interests. Such support could be tailored according to the ideological goals. Such an approach would allow for the redistribution of income (and, thus, potential tax revenue) from richer countries.<sup>41</sup>

The debate on ethical aspects of transfer pricing is focusing on a more fair and equitable use of existing rules.<sup>42</sup> However, some researchers see a need to move the debate to a higher level and raise questions as to whether such rules prevent the fair distribution of taxing authority between jurisdictions. Mainstream researchers see a need to look for "more ethical" solutions, eliminating unfair losses in some countries and extraordinary profits in others.<sup>43</sup> The question of "fair share" is also a basic premise of the feminist approach to taxation and tax allocation.

FA seems to be the right tool to mitigate these issues.<sup>44</sup> The use of FA instead of ALP would not only secure a more just method of allocating taxing rights to states, it could also reduce the phenomenon of tax evasion through the use of transfer mispricing (although that manipulation might then be replaced by attempts to manipulate the data used in the allocation formula or revenue data). The use of FA could also decrease the burden of tax administration, thus allowing for the use of resources to achieve other goals. At the same time companies would reduce the costs associated with handling transfer pricing issues

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<sup>39</sup> BRAUNER, Y. Formula Based Transfer Pricing. *Intertax*. 2014, No. 10, p. 615.

<sup>40</sup> MATHEOSN, T. et al. Formulary Apportionment in Theory and Practice. In: Ruud A. de Mooij – Alexander D. Klemm – Victoria J. Perry (eds.). *Corporate Income Tax Under Pressure*. Amsterdam: IMF, 2021.

<sup>41</sup> This could also create a serious risk of manipulation to benefit "louder" states instead of countries in real need.

<sup>42</sup> MC GEE, R. W. Ethical Issues in Transfer Pricing. *Manchester Journal of International Economic Law*. 2010, Vol. 7, No. 2, p. 31.

<sup>43</sup> DURST, M. C. The Tax Policy Outlook for Developing Countries: Reflections on International Formulary Apportionment. *ICTD Working Paper*. 2015, No. 32, pp. 3–20.

<sup>44</sup> PICCIOTTO, S. Problems of Transfer Pricing and Possibilities for Simplification. *ICTD Working Paper*. 2018 No. 86, pp. 3–43.

and minimize the risks associated with TP. Moreover, introduction of FA could limit the practice of lowering CIT rates (although there are no unequivocal conclusions), and partially reduce states' motivation to grant tax exemptions and incentives to corporations.

Most researchers admit that the mechanism must be supported by an efficient ITO.<sup>45</sup> The need for a special organization to manage global taxes was broadly discussed by academics (V. Tanzi, F. Horner, M. McIntyre, and recently T. Rixen, P. Dietsch, and A. J. Cockfield).<sup>46</sup> They agree that ITO should be an entity that would seek, develop and supervise the necessary tax solutions on a global scale. However, the proposed mission, objectives and scope of authority differ.<sup>47</sup>

Creating an ITO will undoubtedly be a big challenge. The role could be accepted by an already existing organization (UN, OECD or WTO), or a new entity could be established. Its appearance would also be a significant step forward in the creation of a global tax order. With reference to FA, such an organization would be tasked with supervising the functioning mechanism including:

- Creation of a formula (along with the inevitable modifications that are part of such a process)
- Assisting countries in collecting their portion of tax revenue
- Dispute resolution and
- Controlling its implementation

There is a belief that, sooner or later, an ITO must be created to address the many global tax challenges—including, for example, the implementation of an equitable wealth tax—that would be impossible without an internationally recognized, empowered global organization. Changing TP rules would lead to the achievement of a broader goal – the creation of such an international body.

Most researchers agree that the ALP mechanism has served to set TP in stone and that the quantity, quality and completeness of standards for its application have led to the creation of a comprehensive system. Replacing the TP system with another would be extremely difficult and expensive. The change would require the consent of the most important actors. This has to include countries with great importance for global taxation (undoubtedly including the US) and organizations of states (such as the EU). It can be assumed that the new mechanism should be somehow accepted by multinational corporations. Support of the OECD – the creator of the current rules and international organizations (UN, but also WTO, WGB or IMF) will also be important. On the other hand, strong support of NGOs and SMEs frustrated with complexity of ALP based system can be achieved.

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<sup>45</sup> ROBILLARD, R. BEPS: Is the OECD Now at the Gates of Global Formulary Apportionment. *Intertax*. 2015 No. 43, p. 447.

<sup>46</sup> AZAM, R. The Political Feasibility of a Global E-commerce Tax. *The University of Memphis Law Review*. 2012, No. 43, p 39.

<sup>47</sup> BOOK, M. Despite Dispute: Reflections upon a brainstorming over the currency transactions tax. In: Jorma Penttinen – Ville-Pekka Sorsa – Matti Ylönen (eds.). *MORE TAXES! Promoting Strategies for Global Taxation*. Finland: Attac, 2005, p. 53.

The U.S. Supreme Court held some time ago that “taxing power through apportionment forms is exercisable by the state if the state has afforded to the taxpayer protection, opportunities, and benefits”.<sup>48</sup> It seems that in the case of a global introduction of this mechanism, we will potentially move closer to the implementation of this idea. From the feminist perspective, the introduction of FA would not only be a direct implementation of an important postulate (allocation of income to countries according to women’s needs), a step towards the implementation of some other postulates (for example, taxation of capital and wealth – where the existence of ITO might be fundamental), but it would also create a precedent showing that a big scale departure from the mechanism of conventional application of economics and taxes is possible.

## CONCLUSION

The current transfer pricing system is dominated by the separate entity and ALP standards established over one hundred years ago. Both have numerous disadvantages and the demand to replace them appears regularly in the tax debate. The critical feminist tax theory, although strongly motivated by ideology, shows courage in formulating brave postulates. It seems that in the field of transfer pricing, replacing ALP with FA would fall within feminist friendly ideas. The FA mechanism would enable the transfer of an increased portion of financial resources to countries in need (including funding for purposes proposed by feminist organizations). At the same time, the FA could help reduce the scale of tax abuse (e.g. through transfer mispricing). Therefore, it can be concluded that global formulary apportionment (FAO is the most appropriate method of taxation of transnational corporations if the goal is to further the goals contained in the postulates of critical feminist tax theory.

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<sup>48</sup> Judgment of the Court 311 U.S. 435, 333 (1940) - *Wisconsin vs. J.C. Penney Co.*