
Transfer pricing - intangibles

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BEPS

Action Plan (8): *Assure that transfer pricing outcomes are in line with value creation/intangibles*

- ❖ Develop rules to prevent BEPS by moving intangibles among group members including: adopting a broader and clear definition of intangibles, ensuring that profits associated with the transfer of intangibles are associated with value creation, developing special rules for hard-to-value intangibles, and updating guidance on cost contribution arrangements
- ❖ Expected output: Changes to the OECD transfer pricing guidelines and the model tax convention in the next twelve months

OECD /1

Revising Chapter VI of OECD Guidelines on Transfer Pricing Aspects of Intangibles

- ❖ Revised Discussion Draft released 30 July, 2013
- ❖ Finalized revised Chapter VI published 16 September, 2014
- ❖ Additional guidance on certain aspects (risk, re-characterization, hard to value intangibles) to follow

OECD /2

Revising guidance on Transfer Pricing Documentation to increase transparency and simplify compliance, including focus on intangibles

- ❖ White Paper on Transfer Pricing Documentation released 30 July, 2013
- ❖ Memorandum on Transfer Pricing Documentation and Country by Country Reporting released 3 October, 2013
- ❖ Guidance published 16 September, 2014

Proposed definition of 'intangible'

- ❖ Not a tangible asset or a financial asset
- ❖ Capable of being used in commercial activities
- ❖ Capable of being owned or controlled by single entity
- ❖ Use or transfer would be compensated in transactions between independent parties
- ❖ Need not be an intangible for accounting purposes
- ❖ Need not be an intangible for general tax or treaty withholding tax purposes – Article 12 Model Tax Convention
- ❖ Need not be legally protected
- ❖ Need not be separately transferable – goodwill *included*
- ❖ Group synergies and location savings *excluded*

'Substance' for intangible profits

- ❖ Legal ownership and funding not sufficient to earn excess returns
- ❖ Detailed inquiry into parties performing functions, using assets, and assuming risks related to the development, enhancement, maintenance, and protection of intangibles
- ❖ Relationship to Chapter IX requirements for attribution of risk
- ❖ Possibility of re-characterisation

Progress?

- ❖ May/June 2014: Working Party No. 6 substantially agreed revised text of parts of the OECD transfer pricing guidelines - but not final until 2015 intangibles deliverables finalised
- ❖ local tax authorities already making changes (based on information and theories ~consistent with Action Plan)

UN

May 2013: transfer pricing manual adopted (to date, limited take up by governments)

- ❖ January 2014: call for submissions to update transfer pricing manual, including additional chapter on intangibles
- ❖ Responses from China, the World Bank, academics and the and private sector

Next ...

- ❖ Working Party to focus later this year new work on guidance on intangibles, particularly returns to risk, “excessive” capitalisation, low functionality, and mere contractual assumption of risk
- ❖ No obvious consensus on functions to determine entitlement to intangible returns - although capital and risk obviously important
 - ❖ US prefers upfront analysis similar to cost sharing “investor model” to determine returns to capital and risk - not universal preference
- ❖ UN: no clear timetable

Questions?

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