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A Transfer Pricing
Publication

Pricing Knowledge Network

Focusing on the impact of major intercompany pricing issues

PKN Stop Press OECD - OECD tackles the difficult issue of scope of its project on transfer pricing and intangibles

The OECD Committee on Fiscal Affairs approved on 25 January 2011 the scope of a new project on the transfer pricing aspects of transactions involving intangibles between associated enterprises. The OECD believes that the development of clearer and consensus-based international guidance on the transfer pricing aspects of intangibles could help limit the prevailing uncertainty on the treatment of intangibles for transfer pricing purposes and, thus, risks of double taxation.

The intention of the project is to develop guidance on issues specific to intangibles which were not yet addressed in the 2010 revision of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (TPG). Thus, according to the OECD, the project aims at a substantial revision and clarification of the current Chapter VI "Special Considerations for Intangible Property" of the TPG, as well as, a consistency check of Chapters VII "Special Considerations for Intra-Group Services" and VIII "Cost Contribution Arrangements", in order to ensure that the terminology and concepts in all Chapters are applied consistently.

The scope for the project is now outlined as follows:

1. Setting a framework for analysis of intangible-related transfer pricing issues
 - Setting a typical "good practice" framework for intangibles analyses, similar to the multi-step framework for comparability analyses.
2. Definitional aspects
 - Addressing definitional aspects of intangibles given that the existing Chapter VI of the TPG only contains an

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illustrative list of some typical intangibles and the need to develop adequate and consistent terminology throughout. Issues such as whether one can draw from other sources will be addressed, such as, accounting, financial valuation, legal literature or the "Business Restructurings" Chapter IX when dealing with transfers of "something of value".

3. Specific categories of intangibles
 - Revising guidance on specific transaction categories involving intangibles, such as, R&D activities, marketing intangibles and services provision using intangibles. As to the latter, a consistency check with Chapter VII dealing with services will be undertaken towards the end of the project. Business attributes or notions for which it is unclear whether they should be regarded as compensable intangibles are also included. Examples given are goodwill, workforce in place, going concern, profit potential, etc.
4. Intangible transfers
 - Identifying intangible transfers and their forms and application of the guidance on "recharacterisation" in Chapter IX.
5. Right of an enterprise to share in the return from an intangible that it does not own
 - Clarifying the notion of "economic ownership" and related terminologies, such as, "beneficial ownership" and "functional ownership".
6. Cost Contribution Arrangements
 - Harmonizing the guidance on Chapter VIII with Chapter VI of the TPG, once the latter has been updated during the course of this project.
7. Valuation
 - There will not be any revision to the selection and application of the five OECD-recognized methods for intangibles but Working Party No. 6 (WP6) will assess whether any point is missing in relation to applying the guidance on comparability contained in Chapters I-III of the TPG for intangibles.
 - Analyzing the relative importance of financial valuation methods, such as the Discounted Cash Flow method, and providing guidance on how to assess the reasonableness of the parameters used and assumptions made also in applying the five comparability factors for intangibles.
 - Analyzing the aggregation of intangibles for valuation purposes and highly uncertain valuations.
 - Addressing how to take into account the perspectives of

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both parties and the question whether or not valuation should be based on the "highest and most productive use".

From a taxpayer's perspective, the issuance of revised OECD guidelines on intangibles, especially with regard to their definition, transfer and valuation, is welcome and could substantially limit the number of lengthy transfer pricing disputes involving intangible assets in the future. The revised OECD guidelines may also impact local tax laws which may be in contradiction to the OECD's position. For instance, the OECD scoping document already emphasizes that the new guidance on intangibles will not apply differently to transactions with associated enterprise in low tax jurisdictions (thus, indirectly questioning, for example, the German single-handed approach which considers the tax rate of the associated enterprise as an integral part of the valuation of transfer of functions).

The OECD intends to continue the dialogue with the business community during the project and will invite selected business representatives to attend certain meetings. The goal is to release a first draft for public consultation by the end of 2013.

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