

COMMENTS TO THE REVISED DISCUSSION DRAFT ON
TRANSFER PRICING ASPECTS OF INTANGIBLES
(July 30th, 2013)

(PÁGS. 5-11)

Paragraphs Order

Considering their close relationship, Section D.6. of the Draft should be inserted in Chapter I of the Transfer Pricing Guidelines as part of Section D.1.2. ("Factors Determining Comparability"), immediately following Section D.1.2.4.

Assembled Workforce

Paragraph 15

"In some business restructuring and similar transactions, it may be the case that an assembled workforce is transferred from one associated enterprise to another as part of the transaction. In such circumstances, it may well be that the transfer of the assembled workforce along with other transferred assets of the business will save the transferee the time and expense of hiring and training a new workforce. Depending on the transfer pricing methods used to evaluate the overall transaction, it may be appropriate in such cases to reflect such time and expense savings in the form of comparability adjustments to the arm's length price otherwise charged with respect to the transferred assets".

It is important to clarify that such comparability adjustments should not be appropriate in those cases involving the transfer of assets comprising a functioning, economically integrated business unit ("ongoing concern"), in which the value attributable to the assembled workforce was already computed in the future economic benefits projections used to value the business unit as a whole.

Know-how arising from the transfer or secondment of employees

Paragraph 17

“...in some situations, the transfer or secondment of one or more employees may, depending on the facts and circumstances, result in the transfer of valuable know-how from one associated enterprise to another. Where such a transfer of know-how results from the transfer or secondment of employees, the resulting transfer of know-how should be separately analyzed under the provisions of Chapter VI and an appropriate price should be paid for the transferred know-how.”

It is not clear that the transfer or secondment of one or more employees may in fact result in the transfer of valuable know-how, since technical knowledge, experience and skills of an employee do not constitute a “good” capable of being owned or controlled for use by a company, but by the employee himself. Moreover, the employee takes along with him such “know-how” when he stops working for the company. The know-how pertaining to the employee is different to the know-how that could be created as a result of the services provided by the employee in terms of procedures, formulas, manuals, policies, etc., which in fact could be owned and transferred by the company.

(pag. 19)

Paragraph 61

“...goodwill and ongoing concern value are treated as intangibles within the meaning of section A.1.”

Since goodwill and ongoing concern are considered intangibles, thus, they must be considered in the compensation paid between associated enterprises, the problem is that it is not define precisely and each OECD country should have its own definition making difficult to assign an arm's length price.

(pag 33-49)

With respect to comparability adjustments, it should be mentioned additional options or guidance in order to improve it.

We stay at your disposal should you have any queries.

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