FIDAL

DIRECTION INTERNATIONALE

FIDAL'S COMMENTS ON THE OECD DRAFT PAPER ISSUED ON 30 APRIL 2013

FIDAL is delighted to respond to the OECD's request for comments from the business community in connection with the draft paper that was issued on 30 April 2013 entitled **Draft Handbook on Transfer Pricing Risk Assessment**. We welcome the initiative, but would have liked to have seen this document as focused on true risk assessment for both multi-nationals and tax authorities, rather than just the latter.

We present our comments in the foregoing sections and would be pleased to discuss these in detail with representatives of the OECD. We set out our comments in relation to specific paragraphs in the draft paper.

Paragraphs 9 and 45

We agree with the sentiments of these opening paragraphs. In our experience most tax payers seek to comply with the transfer pricing rules of the jurisdictions in which they operate and prepare detailed documentation in support of their transfer pricing policies. However for budgetary reasons, some tax payers prepare less detailed documentation. This does not necessarily that they do not comply with the transfer pricing rules. We suggest that documentation deficiencies and the implication that this means lack of transparency be delinked. Moreover it should be noted that, contrary to the implications of paragraph, there is nothing illegal in arranging one's affairs to minimize taxation.

Where, due to the nature of the way in which modern commerce is conducted, global businesses are able to select where in the world to locate their operations, there is nothing illegal or inherently wrong in choosing to operate in low tax jurisdictions. Indeed it may be argued that saving tax, one of the largest expenses in a company's books, is a duty of the directors aimed at increasing shareholder value.

Thus reducing functions and risks by restructuring the business from high to low tax jurisdictions and consequently reducing the returns to the company operating in the high tax jurisdiction, is not necessarily a factor indicating non-compliance with transfer pricing rules. We would welcome a little more refinement to the language and drafting in this paragraph to make this clear.

Similarly the drafting in the last sentence at the end of paragraph 45 could be refined, as regards the intended definitions of the rather ambiguous terms 'tax shelters' and 'aggressive tax strategies'.

Paragraphs 28 and 30, and 76 to 77.

Generally, in transfer pricing analysis and the application of the OECD Guidelines, the relevant and commonly used Profit Level Indicators are typically computed before funding costs, for example,

gross profit margin, return on sales, net cost plus, the berry ratio, return on assets and so on (except in jurisdictions where working capital adjustments are routinely made and accepted to improve comparability).

The reason for this is that in order to make meaningful comparisons between a tested party's results and those of a set of comparable companies, funding needs to be removed from the comparison, otherwise the returns of a business with large borrowings could not be compared to those of one without such debt, as the interest payments would be a distorting factor to the returns observed from the business transactions under review.

Thus we are not sure why the payment of large amounts of deductible interest are of concern from a transfer pricing only perspective (para 28 and 30), or, apart from working capital, need to be part of a transfer pricing analysis (para 76). If interest is otherwise deductible and not in breach of thin capitalization and other loan or interest limitation rules in a local country, it does not seem to indicate a tax risk. We do, of course, agree that an arm's length test applies to the interest itself.

Paragraph 30 states that 'Often, tax payers will claim that a local member of a group is insulated from risk and should therefore be entitled to low operating returns'. Where this position is as a result of robust transfer pricing analysis, backed up by legal contract, it reflects the commercial realities of the two parties to a transaction in our experience, for example, a toll manufacturer, funded research and development company and so on, and is a correct application of the OECD Guidelines. We suggest some refinements to the wording here.

Pargraph 54

OECD may like to add the cost plus measure of 'Operating profit to total costs' to the list of bullet points here.

Paragraph 56

It may be helpful to add that, although in principle transactional transfer pricing is the basis for examination, it is generally not possible to do this in practice for the acknowledged reason that commercial databases do not present segmented data.

Paragraph 65

The example given in the middle of this paragraph makes no reference to the effect of risks borne on the expected profitability. Where these are few or even none, then it might not be expected to make anything more than a stable but low return. Such refinement might be considered.

Paragraph 67

OECD might consider defining 'a low tax jurisdiction', perhaps in relation to the relevant local domestic law. France, for example, has such definitions in its law.

Paragraph 72

For the reasons mentioned above in relation to paragraphs 9 and 45, there is some language at the end of this paragraph that the OECD may consider refining. Management fees and other centrally provided service charges are not entered into to erode the tax base. In compliance with the OECD Guidelines, such charges are made for services that have been provided and benefits received.

Paragraph 75

We disagree that simply because marketing is carried out in a different jurisdiction to sales, or procurement to manufacturing, there is some inherent transfer pricing issue. Take for example, procurement, such activity can be located in the same territories as the manufacturing base, but does not have to be. This is observable in reality in the way in which many multi-nationals seek to organize their operations for many reasons.

Paragraphs 82

We suggest that the proposition at the end of this paragraph that CCAs 'can be used to migrate intangibles at less than arm's length prices' be removed and the sentence stops after the phrase 'to come.' Otherwise it seems contradictory to the very positive statements in, for example paragraph 7, that many tax payers seek to comply with the transfer pricing rules.

Paragraph 83

It would be helpful to provide an example of the fragmented acquisition in practice, so that both taxpayers and tax authorities can be sure of the kind of circumstances the OECD intends here.

Paragraph 88

Additional factors include the presence of contemporaneous and high quality transfer pricing documentation, and rulings and APAs, for which OECD may consider bullet points.

Paragraph 106

In principle we agree with the comments in this paragraph, but we note that company websites tend to present the whole business and may not represent legal or economic functionality of individual entities. Perhaps also an acknowledgement of caution in relation to the reasons why websites exist as the public face of companies might be welcome here.

Paragraph 129

It would be helpful to augment the comments on the restricted use of secret comparables, especially as they mitigate in favour of tax authorities at the expense of the majority of tax payers who seek to do their best with the public data available and with regard to the rational and replicable manner in which comparables searches are generally designed.

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