

OECD Discussion Draft – Intangibles - 30st July 2013

Dear Sirs,

Thank you for the opportunity to also comment on the revised discussion draft on - Transfer Pricing Aspects of Intangibles - dated July 30st 2013. It is highly appreciated, that some of the comments on the draft of June 6th 2012 have been adopted and helped to increase the practicability and acceptance of the draft by the business community. In line with my former comments dated August 29th 2012 (under our firm's former name Schlütter Bornheim Seitz) I would like to restrict myself to comment on

- Identifying Intangibles and
- Identifying the Parties Entitled to Intangible Related Returns,

which in my view may still be eligible for some fine tuning.

Section A - Identifying Intangibles

Adding the clause “and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances” to the former description of the word “intangible” in para. 40., still allows a broader look on what may be considered as an intangible and gives some more guidance to align the meaning of intangible with Art. 12 of the OECD Model Tax Convention. Besides the need to align the meaning of an intangible with Art. 12, the actual discussion between the G20 Group members on BEPS – Base Erosion and Profit Shifting indicates the need to also align the meaning of an intangible with the requirements under BEPS aspects. The BEPS Action Plan refers to intangibles a number of times and requests in step 8 a broad and clear definition for “intangible assets”.

Considering the future impact of the meaning of intangibles in Chapter VI, Art. 12 and in the steps to be taken under the BEPS Action Plan, there is the pressing need for the business community to have some more guidance for the meaning of an intangible to properly comply with the different legal provision and requirements.

Section B – Identifying the Parties Entitled to Intangible Related Returns

Para. 65. frames a compensation concept for members of a MNE group having functions performed, assets used or contributed, and risks assumed by allocating all or part of the return attributable to an intangible. At the same time, Section B confirms the allocation of such return, according to the principles described in Chapter I – III. Chapter II states a Cost+ remuneration as a basic principal for arm's length considerations among MNE group members. Reading Section B it appears that MNE group members can only be compensated by allocating the anticipated return of an intangible for functions performed, assets used or contributed, and risks assumed. Para. 89 and 90 summarize that such allocation is the only acceptable intragroup remuneration related to intangibles.

Excluding a Cost+ remuneration for functions performed, assets used or contributed, and risks assumed in connection with intangibles within a MNE group seems much to narrow and deviates from comparable arm's length transactions with third parties within the business community. Notwithstanding the drafted approach to allocate based on anticipated returns, it seems necessary to maintain the possibility for Cost+ remunerations in connection with intangibles where appropriate, and not to exclude them completely.

I do hope that the comments above will enhance and support the efforts of Working Party No. 6 and I will be pleased to provide further input if required.

Yours sincerely,

Prof. Dr. Jörg Hernler