

CADBURY

The overarching aim of the guidance on intangibles should be to produce a framework within which businesses can operate with the reasonable expectation of avoiding double taxation.

Significant issues encountered in practice in relation to the transfer pricing aspects of intangibles

The most significant issues encountered in industry in relation to intangibles involve:

- Conflicts over the ownership of and returns for intellectual property, owing to differing claims and interpretations of legal and economic ownership of that property.
- Conflicts over valuations/exit charges in the context of a business restructuring, particularly over the taxation of non-legally protected intangibles such as the local marketing intangible.

Shortfalls in the existing OECD guidance

Existing OECD guidance fails to address with sufficient clarity the distinctions between legal, economic and beneficial ownership and the appropriate returns, and the tax treatment of non-legally protected intangibles, resulting in a failure to address the fundamental principle of the avoidance of double taxation.

Areas in which the OECD could usefully do further work

- A precise definition of intangibles, including clear definitions of the concepts of legal ownership, beneficial ownership and economic ownership. What functions/rights/costs contribute to each of these and what appropriate return is due to each? How are they to be valued?
- A recognition of the distinction between legally registered and non-legally registered assets. To what extent are non-legally registered assets, e.g. concepts of goodwill and marketing intangibles, considered recognised property and chargeable to tax? Can we recognise that there may be in existence valuable intangibles available to a company to which it has no compensable rights? Specific attention should be paid to marketing intangibles.
- By way of example, to what extent can workforce in place, for example, be considered a compensable asset when a company has no legal ownership of that workforce? A rival company poaching a team from a competitor, for example, would need pay no compensation.
- Equally, Apple has created a valuable image for its i-Pod by the use of white headphones. However, to what extent can a pair of readily reproducible white plastic earphones be considered proprietary, however valuable the image? A third party would not pay consideration for such an intangible.

Format of the final output of the OECD work

Incorporation in the transfer pricing guidelines would perhaps guarantee a higher profile than a separate report, but this seems a minor consideration.