ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

WORKING PARTY NO. 6's SPECIAL SESSION ON THE TRANSFER PRICING ASPECTS OF INTANGIBLES: MEETING WITH BUSINESS REPRESENTATIVES ON THE TRANSFER PRICING ASPECTS OF INTANGIBLES

Agenda

7-9 November2011

OECD, Paris

CENTRE FOR TAX POLICY AND ADMINISTRATION

WORKING PARTY NO. 6's SPECIAL SESSION ON THE TRANSFER PRICING ASPECTS OF INTANGIBLES: MEETING WITH BUSINESS REPRESENTATIVES ON THE TRANSFER PRICING ASPECTS OF INTANGIBLES

7-9 November 2011 at the OECD Conference Centre in Paris

1. The OECD is currently conducting an examination of the Transfer Pricing Aspects of Intangibles. This work is carried out by a Working Party No. 6 Special Session on the Transfer Pricing Aspects of Intangibles ("WP6 TPI"). It is expected to lead to the revision of Chapter VI and possibly Chapter VIII of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("TPG"). Information on this project is regularly posted on the OECD Internet site (see www.oecd.org/ctp/tp/intangibles).

2. The OECD considers that it is critical to the success of this project to involve the business community from the early stages of this project. It was decided that some business representatives will be invited on an *ad hoc* basis to attend part of the meetings of the WP6 TPI, depending on the topics that will be discussed at each meeting.

Objectives of the meeting and draft agenda

3. Attached is a draft agenda for the part of the November 2011 meeting to which business representatives are invited. The objectives of the 7-9 November 2011 meeting are for business representatives to be given the opportunity to orally explain some of the theoretical and practical issues they encounter in relation to the topics identified in the attached agenda and for WP6 TPI Delegates to obtain clarification of the issues raised to the extent needed. For each agenda item, designated business representatives are invited to make presentations as indicated in the attached agenda. Time will be kept for discussion with participants on each of the agenda items. The consultation will be held in English with no interpretation provided.

4. Space in the meeting room is limited. Accordingly, only WP6 delegates and invited presenters will be admitted to the meeting room. An overflow listening room will be made available to other interested persons. The press will be invited to observe the conference from the listening room.

5. Presentation materials of speakers will be made available on the OECD Internet site unless speakers specifically request in advance that their presentations not be published.

AGENDA FOR THE OECD MEETING ON THE TRANSFER PRICING ASPECTS OF INTANGIBLES

ORGANISED BY WORKING PARTY No. 6 OF THE COMMITTEE ON FISCAL AFFAIRS

Starting on 7 November 2011 at 14:30 and finishing on 9 November 2011 at 13:00
at the OECD Headquarters
OECD Conference Centre - 2, rue André Pascal, 75016 Paris, France

Chair: Ms. Michelle Levac, Chair of Working Party 6 and of its Special Session on the TP Aspects of Intangibles

<table>
<tr><th colspan="2">7 November 2011</th></tr>
<tr><td>14:00 – 14:30</td><td>Registration</td></tr>
<tr><td>14:30 – 14:45</td><td>Welcome, Overview and Ground Rules. The OECD project on the Transfer Pricing Aspects of Intangibles and the consultation process.

• Michelle Levac, Chair of Working Party No. 6 and of its Special Session on the Transfer Pricing Aspects of Intangibles
• Chris Lenon, Chair of the BIAC Tax Committee</td></tr>
<tr><td>14:45 – 16:00</td><td>Session 1: Definitional approach

a) Accounting standards, financial valuation standards, substantive intellectual property law in various countries, and the TRIPS agreement relating to the regulation of trade in or involving intangibles all contain definitions of intangibles that are suited to the particular purpose being addressed. The question arises whether there are circumstances where compensation should be provided at arm's length for the transfer or use of non-tangible items falling outside these accounting or legal definitions.

• What problems do you anticipate arising if a definitional approach is adopted for transfer pricing purposes that is broader in some respects than the available accounting or legal definitions?
• How can risks of double taxation that arise from differing treatments in the transferor's and transferee's countries be mitigated, for instance where a non-tangible item is recognised as an asset in one country and not in the other?

Designated speakers: Stephan Schnorberger (Baker & McKenzie); An Theeuwes (TEI)

Questions and answers</td></tr>
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16:00 – 16:30	*Refreshment break*
16:30 – 17:30	**Session 1: Definitional approach (continued)** b) Is it important for the TPG to draw a distinction between intangibles and non tangible items that may be "value drivers" or comparability factors but do not qualify as intangible assets? Assume for this purpose that the term "value driver" means something that contributes to the creation of an MNE's income but is not an asset in the accounting sense. An example might be the purchasing power of housewives in a particular geographical location which may give rise to higher margins on the sale of consumer luxury goods in that market than would be observed in other locations. • What difference does this distinction make in a transfer pricing analysis? • How should the distinction be described if such a distinction is appropriate? • Are private ownership and transferability important factors to consider in making such a distinction? • Are there other important factors? ***Designated speakers:*** Ronald van den Brekel (Ernst & Young); Gary Sprague (Treaty Policy Working Group) ***Questions and answers***
17:30 – 18:00	**<u>Session 2: Goodwill and Going Concern</u>** a) Introductory comments on transfer pricing issues related to the definition and transfer pricing treatment of goodwill and going concern. ***Designated speaker:*** Joe Andrus (OECD Secretariat) ***Questions and answers***
18:00	*Close of day*

<table>
<tr><th colspan="2">8 November 2011</th></tr>
<tr><td>9:30 – 10:15</td><td> Session 2: Goodwill and Going Concern (continued)
b) Different definitions of goodwill and going concern exist in accounting literature, valuation literature and court decisions. For example, in some contexts goodwill is described as a residual concept, i.e. the value of a going business after other separately identifiable assets have been valued. In other contexts it may be described as the expectation of future trade from existing customers.

Is it productive for the OECD to seek to clarify the definitional confusion regarding these terms for transfer pricing purposes?
However defined, does goodwill affect the arm’s length price of transfers of tangible goods or services between associated enterprises?
Should goodwill affect the arm’s length price for a transfer of part or all of an operating business?
Paragraphs 9.93 – 9.95 of the TPG provide some guidance related to going concern. Is that guidance sufficient? What additional guidance regarding going concern would be helpful?

Designated speakers: Sebastien Rheault and Sheena Bassani (Barsalou Lawson); Theo Schmit (NV Philips); Jesper Barenfeld (AB Volvo) and Krister Andersson (Business Europe)
Questions and answers </td></tr>
<tr><td>10:15 – 11:00</td><td> Session 2: Goodwill and Going Concern (continued)
c) Discussion of the following example: Assume that an MNE group acquires an independent company A for a price of 100, out of which 70 is allocated to the value of identified intangible assets and 30 is allocated to goodwill. It is assumed in this example that the value of tangible assets is negligible. Assume that following the acquisition, the identified intangible assets are transferred from company A to an associated company H and that company A is converted into a contract research entity. In this new capacity, company A will continue its research and development activities on behalf of H, with the latter bearing the risk of failure of those activities and being the owner of the future intangibles that may eventually result from them. The question may arise whether the determination of an arm’s length price for the transfer of intangibles from company A to H should take into account part or all of the goodwill that has been recognised for an amount of 30 upon the acquisition of A by the MNE group.
Designated speaker: Richard Ginsberg (CICBVC)
Questions and answers </td></tr>
<tr><td>11:00 – 11:30</td><td>Refreshment break</td></tr>
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11:30 – 12:00	**Session 2: Goodwill and Going Concern (continued)** ***Questions and answers (continued)***
12:00 – 13:00	**Session 3: Brands and Brand Value** a) Some transfer pricing disputes have raised possible distinctions between brand and trademark. This session will address the topic from a non-tax perspective: • What is a brand and how does it relate to trademarks? How does it relate to goodwill? • How does an MNE create brand value? • How can an MNE lose brand value? • Does brand value vary by geography or is it a 'global intangible'? ***Designated speaker*:** Maurice Nussenbaum (Sorgem Evaluation) ***Questions and answers***
13:00 – 14:30	*Lunch break*
14:30 – 15:15	**Session 3: Brands and Brand Value (continued)** b) Discussion of the new 2010 ISO standard 10668 on brands and on how it may be relevant to transfer pricing analysis. ***Designated speaker:*** Jutta Menninger (PwC Germany)
15:15 – 16:00	**Session 3: Brands and Brand Value (continued)** c) How should the concept of brand and brand value affect transfer pricing determinations? • For transfer pricing purposes, how does one identify which legal entity within an MNE Group should get the profits from the brand value under the arm's length principle? • How should brand value affect a transfer pricing analysis of a related party sale of goods and services? • How should brand value affect a transfer pricing analysis of a business restructuring transaction in which part of an operating business is transferred to a different member of the MNE group? ***Designated speaker:*** Graeme Wood (Procter & Gamble) ***Questions and answers***
16:00 – 16:30	*Refreshment break*

16:30-18:00	**Session 4: Ownership Issues** a) **In general:** Transfer pricing disputes sometimes turn on the determination of which entity within an MNE Group is entitled to premium returns associated with intangibles. It is usually possible to identify the entity holding legal title to a particular intangible if it is legally protected and subject to registration. It may be argued in some situations, however, that entities other than the owner of legal title to a particular intangible should have an interest in intangible related premium profits. • Under what circumstances, if any, should an entity other than the legal title holder be entitled to intangible related returns? • What role should related party contractual arrangements have in this determination? • Paragraphs 9.10 – 9.38 of the TPG contain guidance on the allocation of various risks among associated enterprises for transfer pricing purposes. To what extent can analogous guidance (*i.e.* guidance that indicates one should look to contracts, economic substance, the existence of comparable allocations, and critical ownership-related factors) be useful in resolving uncertainty over the allocation of the right to premium returns associated with intangibles for transfer pricing purposes? • Paragraphs 9.22 through 9.28 of the TPG describe the relevance of control over risk in determining to which entity within an MNE Group particular risks should be allocated. What specific factors relating to ownership of intangibles could one look to in an analogous way in determining which entities in an MNE Group should be entitled to intangible related returns? ***Designated speakers:*** John Henshall (Deloitte United Kingdom)*;* Michael Peggs, Glen Haslhofer (Grant Thornton Canada) ***Questions and answers***
18:00	*Close of day*

9 November 2011	
9:30 – 10:15	**Session 4: Ownership Issues (Continued)** b) **Specific approaches to ownership issues: existing OECD guidance**. Paragraphs 6.36 through 6.39 of the existing TPG provide some guidance on intangible ownership issues. In the context of marketing intangibles, the TPG suggest a functional comparison to activity levels of independent comparables may assist in determining whether a sales and distribution entity has developed a right to intangible related returns. Specifically, the TPG state "a distributor's share of benefits should be determined based on what an independent distributor would obtain in comparable circumstances." • Is a comparables-based approach useful in practice? • Can such a test be applied as a practical matter in any appreciable number of cases? • Is the existing OECD guidance actually used to resolve controversies? • Can the approach in the OECD guidance be extended beyond a marketing intangible context? • Is there a better approach? ***Designated speaker:*** Sanjiv Malhotra (BMR & Associates) ***Questions and answers***
10:15 – 11:00	**Session 4: Ownership Issues (Continued)** c) **Specific approaches to ownership issues: Australian guidance.** In 2005, Australia published domestic guidance on issues related to ownership of marketing intangibles (NAT 14586-11.2005). The Australian guidance relies on paragraphs 6.36 through 6.39 of the TPG, but provides examples of how those principles could be applied. • Do the specific examples provided in the Australian guidance represent an improvement on the existing OECD guidance? • Is the Australian guidance applied as a practical matter to resolve controversies in Australia? • Are there additional fact patterns that should be addressed in examples? • Can the Australian examples be extended to situations other than marketing intangibles? • Can the Australian approach be improved? • Should the Australian marketing examples or similar examples be incorporated into the TPG? ***Designated speaker:*** Marc Simpson (Deloitte Australia) ***Questions and answers***

11:00 – 11:30	*Refreshment break*
11:30 – 12:50	**Session 5: Synergies** It is sometimes said that corporate synergies are the primary reason that MNEs exist and are profitable. • How do corporate synergies create value? • For transfer pricing purposes, are corporate synergies intangibles, value drivers, or something else? • In situations where synergies exist, how does one identify which entities in the MNE Group should have the synergistic benefit for transfer pricing purposes? • How should corporate synergies affect the transfer price of tangible goods or services? • When, if ever, is it sensible to say that corporate synergy value has been transferred among affiliated enterprises? ***Designated speaker:*** W. Joe Murphy and Dr. Garry Stone (PwC United States)*;* Dr. Xaver Ditz and Dr. Michael Puls (Flick, Gocke Schaumburg) ***Questions and answers***
12:50 – 13:00	**Closing remarks** Michelle Levac; Chris Lenon