

Intra – Group Transactions

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Intangible Property



Definition:

- Property with no physical existence but whose value depends on the legal rights of the owner
- Patents, trademarks, trade names, designs or models, artistic property rights and intellectual property such as trade secrets (OECD 2017 TPG Chapter VII)



Why the focus on IP?



High Value

Easy Mobility

Complexity

Complexity of IP



Why the complexity:



Intangible asset without physical presence



IP related financial issues exist in commercial practices



Accounting and attribution of profits



Group synergies

Commercial Practices



Commercial Practices:



Commercial practice of selling IP or patents as a group

How to establish the value

Jurisdictions and protection and taxation of IP

Allocation of all related development costs to the group entities

Definitions of IP



“Something which is capable of being owned or controlled for use in commercial activities and whose use or transfer would be compensated ... between independent parties ...”

Goodwill and going concern

- Relationship capital (innovation community, ecosystem and supply chain partnerships)
- Reputational value
- Key human capital

However, revised OECD transfer pricing guidance on intangibles explicitly excludes:

- Group synergies
- Market-specific characteristics

Non-registered IP

- Know-how and trade secrets
- Software (copyright)
- Marketing intangibles
- Distribution network and customer lists
- Product design and technology
- Process technology provided to buyers
- Supplier lists and procurement processes
- Contractual rights

Ownership in non-registered IP typically vests in the legal entity employing the individual creating such IP.

Transfers from R&D companies to IP companies/principals need contractual basis.

Registered IP

- Patents
- Designs
- Trademarks
- Domain names

Are you in position to identify all the intangibles and IP owned, controlled or used in your business and to demonstrate the ownership chain?

IP Functions



*D*evelopment
of intangible
asset

*E*nhancing
value of
intangible
asset

*M*aintenance
of intangible
asset

*P*rotection
of intangible
asset against
infringement

*E*xploitation
of intangible
asset

Requirement to directly perform or to control the performance of DEMPE functions and related risks

Return to be retained by an entity depends on the contributions it makes through DEMPE functions to the anticipated value of intangible relative to contributions made by other group members

The new OECD guidance focuses on “substance” for conducting transfer pricing analysis of intangibles.

Developing IP



Contract R&D	Cost sharing
<ul style="list-style-type: none">• Set up separate entity• Few locations• Ownership• Control	<ul style="list-style-type: none">• Centralised• Different entities share

Intra Group Services



Governing legislation / guidance:

- Section 3 read with 18(3)
- OECD/G20 BEPS Action 8-10: Aligning TP Outcomes with Value Creation (BEPS Action 8-10)
- UN Practical Manual on TP for Developing Countries (UN Manual)

Two main steps of analysing intra-group service transactions:

- Has an intra-group service been rendered? and
- If yes, what should the charge be for such service?

Has an Intra group service been offered?



Benefits test

- Economic or commercial value
- Independent willingness to pay

Facts and circumstances



Has an intragroup service been rendered?



Benefits test – Generally fail the test:

- Shareholder activities
- Duplication of activities
- Incidental benefits
- Centralised services



Form of remuneration

- "On call" or "retainer"



Low value adding services?



- Motivation for introduction
- Definition of low value-adding intra-group services
 - supportive
 - not core business
 - do not require unique, valuable IP
 - do not lead to creation of unique, valuable IP

Low value adding services?



- Should be made available on request:
 - Description of services
 - Written contracts / agreements
 - Calculations – cost pool, allocation keys and mark-up

"The simplified charge method is elective"

Engaging consultants?



- Supporting documentation for the transactions
- Assist with identifying efficient value chain, unlock value and profit optimisation (decentralised vs centralised)
- Costs are born/charged to correct entity within group
- Treaty consideration / WHT (technical vs management services)
- Exchange control approvals
- Assist with tax authority queries

Cost contribution agreements for IP



Applying the arm's length principle

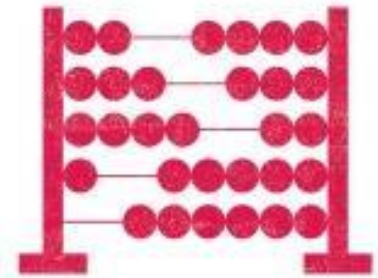
- "For the conditions of a CCA to satisfy the arm's length principle, a participant's contributions must be consistent with what an independent enterprise would have agreed to contribute under comparable circumstances, given the benefits it reasonably expects to derive from the arrangement"
- "What distinguishes contributions to a CCA from an ordinary intra-group transfer of property or services is that part or all of the compensation intended by the participants is the expected benefits to each from the pooling of resources and skills"

Cost contribution agreements for IP



Should be consistent with the **value** that independent enterprises would have assigned to that contribution in comparable circumstances (OECD guidelines Chapters I-VII)

Evaluation process should recognise all **contributions** by participants to the arrangement, including property or services that are used in both CCA activity and the participant's **own business activity**



Cost contribution agreements for IP



Entry, Withdrawal or termination:

Entry

An entity that becomes a participant in an already active CCA may obtain an interest in results of prior CCA activity

Buy-in payment:

"arm's length principle, value for the transferred interest."

If the results of the of prior CCA **activity have no value** then there will be no buy-in payment

Buy out when participant leaves

Business Restructuring



Compliances:

Chapter IX OECD Guidelines

Delineation of transactions in pre- and post-structuring

Role of synergies

Master file - local file Action Plan 13



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