Guidance on intangible assets that are difficult to value (3/36/17)

On 23 May 2017 the OECD published a green paper on BEPS¹ Actions 8–10, or implementation guidance on hard-to-value intangibles (HTVIs) for tax authorities.²

What are HTVIs?

Following the BEPS action plan published by the OECD, changes have been made to the HTVI definition given in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

HTVIs are intangible assets that have no reliable comparables available at the time of transfer between related companies and no expected future cash flows or revenues. HTVIs might include intangibles that are –

- only partially developed;
- not to be commercially exploited until several years later; or
- to be exploited in a novel manner.

Most of the cases where the tax authorities analyse an HTVI transaction involve an asymmetry of information forcing the tax authorities to rely on the information supplied by the companies. The information asymmetry undermines the tax authorities' ability to evaluate the transaction objectively. To address this problem, the OECD has developed the HTVI approach and implementation guidance for tax authorities.

Guidance for tax authorities taking the HTVI approach

The green paper has two main chapters:

- 1. core principles of implementing the HTVI approach; and
- 2. 2implementing the HTVI approach in various circumstances.

The green paper offers instructions to build a common understanding and practice between the tax authorities when it comes to making adjustments arising from the HTVI approach. These instructions are expected to make the tax authorities' actions more consistent in cases where HTVI transactions are evaluated, thereby mitigating the risk of double taxation.

Core principles of implementing the HTVI approach

The HTVI approach described in BEPS Actions 8–10 is mainly designed to minimise the information asymmetry between the taxpayer and the tax authority as to the potential value of an HTVI. Where the HTVI approach is appropriate, the tax authority can use $ex\ post^3$ outcomes (information on the HTVI gathered after the transaction) as sufficient evidence of the transaction value in order to verify an arm's length price also where the taxpayer has valued the HTVI according to $ex\ ante^4$ outcomes.

The green paper also addresses timing issues associated with the HTVI approach. To implement the HTVI approach successfully, the tax authorities should assess the need to adopt new audit practices that would help identify and examine HTVI transactions as early as possible. It is important to note, however, that *ex post* outcomes may not be readily available if a tax audit is conducted shortly after an HTVI transaction.

To minimise the information asymmetry between the taxpayer and the tax authority, the green paper

suggests amending the legislation as appropriate to require that taxpayers report their HTVI transactions.

(to be completed soon)

¹Base Erosion and Profit Shifting

 2 We have described the HTVI approach in our article of 3 May 2016 titled "Hard-to-value intangibles."

 3 ex post = based on actual outcomes, not forecasts or estimates

⁴ex ante = based on forecasts or estimates, not actual outcomes