

Guidance on intangible assets that are difficult to value (2) (3/37/17)

This article wraps up what we wrote on this topic [last week](#).

Taking the HTVI approach in various circumstances

Examples included in the green paper explain how a transfer pricing adjustment should be made in practice where the HTVI approach is taken. Below we summarise three examples offered by the green paper in analysing HTVI transactions.

Example 1

A company starts to sell a partially developed drug ahead of the date proposed initially. The company is unable to prove that its initial pricing analysis takes into account the possibility of early sales or that this event was unforeseeable.

In scenario A the taxpayer is unable to provide clear evidence that he has duly considered an unexpected possibility, and so tax authorities can use *ex post* evidence obtained after the HTVI transfer to demonstrate that this unexpected possibility should have been considered in valuing the HTVI. Tax authorities have the power to enforce a transfer pricing adjustment to make up for the difference between the HTVI value measured earlier and its true value.

Scenario B is a variation of the first example, where BEPS Actions 8-10 allow an exemption from the HTVI approach according to paragraph 6.193 because the difference between the actual (*ex post*) value of the HTVI and the taxpayer's forecast (*ex ante*) value is less than 20%. The green paper states that an adjustment can also be made according to other paragraphs of the OECD Transfer Pricing Guidelines.

Example 2

The second example analyses the case of a one-off payment for HTVI in a related-party transaction. The green paper states that tax authorities have the power to assess whether an alternative payment structure (e.g. a combination of a one-off payment and periodic payments) is better suited for a particular transaction. More often than not a combined payment structure can provide greater reliability because it takes account of factors that are not quite foreseeable. The green paper also states that it would be useful to consider how comparable unrelated parties operating in the same industry structure their intangible transfers.

Example 3

The third example provides information about cases where a taxpayer has elected to make periodic payments for an intangible asset without making a one-off initial payment. The green paper states that any tax adjustments charged on an intangible transfer will be evaluated and made according to the national legislation. To minimise unilateral adjustments, the green paper recommends that tax authorities should use the mutual agreement procedure in addressing double taxation issues.

Conclusion

The purpose of the green paper is to build a common understanding and practice between member states in analysing HTVI. Once the green paper has been approved and implemented, we can expect an increase in audits of intangible transfers between related companies and in cases that will be resolved by the mutual agreement procedure. For this reason, to mitigate the risk of a tax assessment when passing an intangible asset to a related company, it is important to prepare detailed documentation giving information about HTVI pricing principles and other factors affecting the transaction.