UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

June 18, 2015

VIA EMAIL
Andrew Hickman
Head of Transfer Pricing Unit
Centre for Tax Policy and Administration
Organisation for Economic Cooperation and Development
2 rue André-Pascal
75775, Paris, Cedex 16
France
(TransferPricing@oecd.org)

Re: USCIB Comment Letter on the OECD DISCUSSION DRAFT: BEPS ACTION 8: HARD-TO-VALUE INTANGIBLES

Dear Mr. Hickman,

USCIB[1] thanks the OECD for the opportunity to provide comments on its discussion draft on Action 8 (Hard-to-Value Intangibles or "HTVI") of the Base Erosion and Profit Shifting (BEPS) Action Plan issued 4 June 2015 (the discussion draft).

It is unfortunate, however, that the time available to provide comments was so very short. We have had very little opportunity to consult with our members. Those consultations have made clear that many practical issues will arise in the implementation of the proposed guidance. We will continue to seek input from our members and may follow-up with additional comments before the public consultation, especially if we can identify particular examples that the guidelines should address.

Comments

USCIB welcomes the discussion draft's emphasis on what independent enterprises would have done in comparable circumstances[2] and appreciates the tax authorities' difficulties in dealing

---

[1] USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

[2] There is no discussion in the discussion draft of whether these proposals are considered a special measure and if so whether these measures are outside of the arm's length standard. If the proposal is not consistent with the

with information asymmetry. We also welcome the OECD's recognition that the provisions are only intended to apply where:

> [T]he difference between expected and actual outcomes cannot be explained by considerations other than inappropriate pricing.[3]

In our view, it is critical that this statement be moved into the text of the transfer pricing guidelines as it is important to the interpretation of the rules and will be lost if not moved into the text of the guidelines.

Paragraph 9 provides that tax administrations "may" adopt the approaches outlined in the discussion draft. If the discussion draft represents an application of the ALS, then USCIB believes that it is necessary that tax administrations apply the arm's length standard as consistently as possible and therefore the application of the proposals should not be elective.

USCIB believes that it is critically important that the scope of Action 8 be carefully limited. In particular, it seems that the description of HTVI in paragraph 10 of the discussion draft could apply to virtually every intangible and therefore is not helpful guidance. Are all intangibles only partially developed because companies are constantly updating their technology? Are the proposed rules intended to cover corporate synergies or local marketing intangibles? How long is several years? Are there any limits on the ability of governments to look back? What does it mean that "intangibles are anticipated to be exploited in a manner that is "novel" at the time of the transfer"? USCIB does not find the statements in paragraph 10 clarifying and believes they either need further definition or ought to be deleted.

Paragraph 9 of the discussion draft provides:

> [E]x post information provides presumptive evidence as to the reliability of the information used ex ante in determining the transfer price for the transfer of such intangibles or rights in intangibles.

In determining when an adjustment may be necessary, the proposed guidelines should recognize that in virtually every case ex ante and ex post returns will diverge because ex post results reflect the realization of risk and other events rather than their anticipation. So, it is very important that the proposed guidance does not apply in the absence of significant divergences between ex ante and ex post results. The OECD should adopt a standard that if the ex post results are within 80% to 120% of the ex ante projections, then no adjustment should be required under these provisions. Further, the ex post results should be examined from a

---

ALS, then it is not a permitted method under Article 9 of the OECD Model and would require changes to the OECD Model as well as the Transfer Pricing Guidelines. The proposals contained in the discussion draft are similar to the US "commensurate with income standard" that was implemented by a legislative change to section 482. The US has been subject to criticism for the adoption of this standard precisely because other countries considered it was outside the ALS. Has this analysis changed? Do the OECD and other countries accept the commensurate with income standard as an application of the ALS?

[3] Discussion draft, box, page 1.

multiple-year perspective (perhaps 5 years) such that individual year anomalies are smoothed out.

It is also important that paragraph 14 of the discussion draft be clear, so that taxpayers can evaluate whether their ex ante documentation is adequate to protect them from ex post changes to their pricing. Because the focus of these guidelines is information asymmetry, the exception provided by this paragraph seems to be appropriately focused on ensuring that the taxpayer did a thorough job of analyzing and documenting its projections. It would, therefore, be useful if the guidance under Action 8 were tied to the transfer pricing documentation under Action 13. That is, Action 8 should not be imposing an additional burden and the requirements of paragraph 14.1 should be considered satisfied if the taxpayer provides the information required by the master file and local file with respect to the transaction. If more information is intended to be required then that information should be clearly identified.

Paragraph 14.2 requires that any significant difference between the financial projections and the actual outcomes be attributable to unforeseeable or extraordinary developments or events that could not have been anticipated by the taxpayer. This standard is unclear and unreasonable. Is a recession or economic boom unforeseeable or something that could not be anticipated by the taxpayer? Disposable income in an economy may have a significant impact on the ability of consumers to purchase goods and services and may have a significant impact on projections. Such events may be foreseeable in the sense that economic cycles are foreseeable, but the timing and extent of such swings are unpredictable and outside of the taxpayers control and may affect projected returns in either a positive or negative way.

As another example, an outcome may be foreseen, but assigned a low risk. If that event occurs, would the taxpayer's pricing be respected?

As USCIB and other business commentators have repeatedly made clear, certainty in the application of transfer pricing and other taxation rules is of paramount importance. Businesses are concerned that regardless of how good their upfront analysis is, if there are significant deviations (outside the 80 -120 range suggested above) it will not be possible to prove that the projections were properly done and ex post results are attributable to unforeseeable events. One solution to this problem is for taxpayers to pursue APAs, particularly bilateral APAs; however, neither taxpayers nor governments have the resources to resolve all these issues through the APA process. A less burdensome idea that might merit consideration may be an "APA light". The object of an "APA light" would not be to reach agreement on the pricing, but rather to submit the documentation that would be required for an APA such that the government could agree before the results are known by either the taxpayer or the government that the taxpayer's analysis was sufficiently robust that it would not be subject to review under the HTVI rules. The government could of course still challenge the transfer pricing (since it was not agreed), but not on the basis of ex post results.

USCIB is also concerned about one-sided adjustments; if one jurisdiction is making an upward adjustment under these provisions, then it is important that the jurisdiction on the other side of

the transaction make a downward adjustment[4]. Thus, it is very important that the look-back aspect of the proposed guidance not extend too far back or correlative adjustments may be time barred. Further, if the taxpayer does include an arm's length contingent payment clause in its contract, both upward and downward adjustments pursuant to that clause should be respected.

Finally, the proposals contained in the discussion draft represent significant changes from the current guidelines. They should, therefore, apply only prospectively; that is the proposals should only apply to transactions undertaken after the adoption of the proposals. This is especially important because a key aspect of the proposal relates to contemporaneous documentation of the transaction. Taxpayers cannot, in 2015, comply with changed requirements to contemporaneously document ex ante prices for transactions that took place long ago.

Sincerely,

William J. Sample
Chair, Taxation Committee
United States Council for International Business (USCIB)

[4] This is why it is important the proposals not be elective.

Washington Office
1400 K Street, N.W., Suite 450
Washington, DC 20005
202.371.1316 tel
202.371.8249 fax
www.uscib.org

Global Business Leadership as the U.S. Affiliate of:
International Chamber of Commerce (ICC)
International Organization of Employers (IOE)
Business and Industry Advisory Committee (BIAC) to the OECD
ATA Carnet System