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Tax alert

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Discussion drafts issued on proposed changes to OECD Transfer Pricing Guidelines

On 6 June, 2012, the OECD Working Party No. 6 (Working Party) of the OCED Committee on Fiscal Affairs released several discussion drafts regarding proposed changes to the OECD Transfer Pricing Guidelines. The focus of the proposed revisions is primarily on intangibles, safe harbours and timing issues.

Intangibles

In 2010, the OECD commenced a project on the transfer pricing aspects of intangibles. A scoping paper was published in January 2011 and three public consultations have already been held. Representatives at the business consultation in November 2011 suggested the OECD release an interim draft to provide opportunity for further input. Accordingly, the OECD released an interim draft.

This interim draft, prepared by the Working Party, contains a proposed revision to the provisions of Chapter VI of the OECD Transfer Pricing Guidelines and a proposed revision to the Annex of Chapter VI, which contains examples illustrating the application of the provisions to the revised text from Chapter VI. The Working Party is seeking detailed input from the business community on the draft provisions as it considers this critical for the ongoing work on the intangibles project.

Safe harbours

The current references in the OECD Guidelines regarding safe harbours has, according to the discussion draft, a somewhat negative tone, which may not reflect current practices of OECD member countries, particularly as a number of countries have already adopted transfer pricing safe harbour provisions.

In recognition of this, the Working Party has issued a discussion draft on safe harbours, which proposes revisions to the section on safe harbours in Chapter IV of the OECD Guidelines and contains associated sample memoranda of understanding for competent authorities to use as a basis for establishing safe harbours.

Timing issues

In connection to the work of the Working Party on intangibles and safe harbours, the OECD Secretariat is also seeking public comment on timing issues relating to transfer pricing. The paragraphs under consideration highlight that OECD member countries follow two different approaches in applying the arm's length principle:

- In some countries, an arm's length price setting approach is adopted whereby taxpayers and tax administrations determine prices on an *ex ante* basis using information that was available at the point in time of the transaction.

- Other countries test the outcome of their controlled transaction for compliance with the arm's length principle on an *ex post* basis to demonstrate that the conditions of the transactions were arm's length.

Public comment

The Working Party emphasised that both the discussion draft on intangibles and the discussion draft on safe harbours are interim drafts. As such, they should not be recognised as a consensus document and do not necessarily reflect the final view of the OECD and its member countries.

The OECD has requested that written comments on each of the discussion drafts and feedback on timing issues are provided by 14 September, 2012.

The discussion drafts are available from the OECD website at:
www.oecd.org/ctp/tp

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