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Tax insights
Countering Harmful Tax Practices

Snapshot

On 5 October 2015, ahead of the G20 Finance Ministers' meeting on 8 October, the OECD Secretariat published thirteen papers and an Explanatory Statement outlining consensus Actions under the Base Erosion and Profit Shifting ('BEPS') Project. These papers include and consolidate the first seven reports presented to and welcomed by the G20 Leaders at the Brisbane Summit in 2014. The output under each of the BEPS Actions are intended to form a comprehensive and cohesive approach to the international tax framework, including domestic law recommendations and international principles under the OECD Model Tax Treaty and transfer pricing guidelines.

As part of the 2015 output, the OECD published a final report in relation to "Countering Harmful Tax Practices More Effectively, Taking Into Account Transparency and Substance" (Action 5). The report establishes minimum standards in respect of reviewing and establishing certain preferential tax practices, and introduces a framework for the compulsory exchange of tax rulings between taxing authorities. The report builds on the proposals put forward in the G20/OECD's discussion drafts from late 2014.

The OECD has previously identified that Australia has no harmful tax practices, and the Australian Taxation office (ATO) has already commenced the exchange of the relevant tax rulings.

Australian perspective

The current review of OECD country Intellectual Property (IP) and non-IP regimes commenced in late 2010 and included a list of 43 preferential regimes. From the perspective of Australia, only the conduit foreign income (CFI) regime was identified and reviewed, with the conclusion that the regime was not harmful. No actions are therefore required by the Australian Government to counter such practices.

In a post-BEPS environment, it will be acceptable for a country to operate a preferential IP regime for certain income arising from qualifying IP to the extent that the 'nexus' model is adopted. This will be satisfied when the taxation of profits from IP is aligned with the substantial activities that generated the IP (which will often be the underlying R&D activities), ensuring that the taxable profits cannot be artificially shifted away from where the value is created. Countries are rapidly moving to develop complying arrangements (e.g. Ireland).

The tax white paper reform process may see further debate on preferential IP regimes in Australia – particularly given the renewed Government focus on innovation issues. Numerous submissions were previously made to the Government's tax reform process on the need to introduce an Australian IP or 'patent box' regime in the form of an Australian Innovation and Manufacturing (AIM) incentive.

The proposed tax policy measure to support Australian companies commercialise and develop their innovations and ideas suggest a tax offset against the tax payable on profits derived from the innovation and manufacture in Australia of qualifying patented Australian IP. Broadly, qualifying IP profit would be effectively taxed at a lower rate with the standard corporate tax rate to be applied to other income.

In respect of the compulsory exchange of tax rulings, the ATO has already set up an Integrated Tax Design team to blueprint and implement the exchange of taxation rulings.

This exchange of rulings will include any unilateral Advance Pricing Arrangements (APAs) that the ATO previously negotiated with multinational companies on or after 1 January 2010 that were still in force at 1 January 2014; these will be subject to exchange by the end of 2016.

Introduction

The OECD final report on Action 5 establishes minimum standards with regard to both determining whether preferential regimes take sufficient account of the need to reward only substantial activities, and ensuring that there is transparency in relation to rulings. It also sets out minimum standards for domestic law provisions in respect of intellectual property (IP) regimes, such as patent box regimes.

The OECD's work on harmful tax practices originally was documented in the OECD's 1998 Report on "Harmful Tax Competition: An Emerging Global Issue" (1998 report). The 1998 report agreed to a set of factors to determine whether a regime is preferential and, if so, whether the preferential regime is potentially and actually harmful. It also created the Forum on Harmful Tax Practices (FHTP).

The September 2014 interim report on Action 5 (interim report) outlined the progress made on the delivery of the outputs asked of the FHTP. It focused on (i) elaborating on a methodology to define the substantial activity requirement in the context of intangibles regimes; and (ii) improving transparency through compulsory spontaneous exchange on rulings related to preferential regimes.

The 1998 Report identified four "key" factors and eight "other" factors used to identify whether a regime is preferential. The first factor—a low or zero tax rate— acts as a gateway for the other factors. The interim report proposed, and the final report confirms, that a lack of "substantial activity," previously one of the other factors, now is a key factor.

Several approaches were considered to determine a lack or otherwise of substantial activity. The OECD has achieved consensus on the "nexus approach," which uses expenditure as a proxy for activity, and this principle can be applied to all types of preferential regimes. Such regimes may grant preferential benefits to a taxpayer only to the extent the taxpayer undertook the core income-generating activities required to produce the type of income covered by the preferential regime.

Preferential IP regimes

The interim report developed the nexus approach in the context of IP regimes; it established that the core income-generating activity for such regimes is research and development (R&D) and thus allows a taxpayer to benefit from an IP regime only to the extent the taxpayer itself incurred qualifying R&D expenditure that gave rise to the IP income. For companies within the EU, the R&D must be conducted within the company making the claim, which can include R&D conducted in a foreign permanent establishment (PE) of that company. Non-EU countries can apply a "jurisdictional test" if they wish.

Subsequent to the publication of the interim report, Germany and the UK proposed a "modified nexus" approach, which was then endorsed and adopted by the OECD. The final report includes additional detail on the application of the modified nexus approach.

The nexus approach determines which income may receive tax benefits by applying the following calculation:

$$\text{Income receiving tax benefits} = \frac{\text{Qualifying expenditures incurred to develop IP asset}}{\text{Overall expenditures incurred to develop IP asset}} \times \text{Overall income from IP asset}$$

The nexus approach was designed to require a link between expenditure, IP assets and IP income, and taxpayers must track expenditure and income to IP assets where they can. However, where such tracking would be unrealistic and require arbitrary judgements, jurisdictions may choose to allow tracking to take place at the product level.

IP assets that could qualify for tax benefits under an IP regime are patents and other IP assets that are functionally equivalent to patents if those IP assets are both legally protected and subject to similar approval and registration processes.

IP assets that are functionally equivalent to patents include plant breeder rights, copyrighted software and, for small entities, certain other IP assets that are non-obvious, useful and novel.

There are various categories of expenditure that comprise qualifying and overall expenditure and the nexus ratio, therefore, can also be expressed as:

$$\frac{a + b}{a + b + c + d}$$

Where:

a) represents R&D expenditure incurred by the taxpayer itself,

b) represents expenditure for unrelated party outsourcing,

c) represents acquisition costs, and

d) represents expenditure for related party outsourcing.

All expenditure and costs will be included in the nexus calculation at the time they are incurred, regardless of their treatment for accounting or other tax purposes.

Expenditure for general and speculative R&D that cannot be tied to a specific IP asset or product can be divided pro rata across several IP assets or products. When calculating qualifying expenditure, jurisdictions may permit taxpayers to apply a 30% "up-lift" to expenditure that is included in qualifying expenditure. This up-lift may increase qualifying expenditure but only to the extent the taxpayer has non-qualifying expenditure.

Overall expenditure must include the sum of all expenditure that would count as qualifying expenditures if they were undertaken by the taxpayer itself. Overall expenditure, therefore, only includes two things not included within qualifying expenditure: expenditure for related party outsourcing and the cost of acquired IP.

Jurisdictions will define "overall income" consistent with their domestic law definitions of income, after application of the transfer pricing rules. The definition they choose should be proportionate to the qualifying expenditure incurred by companies, and should be limited to IP income.

Transitional measures

The nexus approach was designed to apply a cumulative ratio of qualifying expenditure and overall expenditure, but, as a transitional measure, jurisdictions could allow taxpayers to apply a ratio where qualifying expenditure and overall expenditure are calculated based on a three or five-year rolling average at a company level. This allows for the fact that there has been no requirement for a taxpayer to have tracked and traced expenditure in this way before the introduction of nexus.

Taxpayers then will need to transition from using the average to using cumulative ratios for the IP assets or products.

No new entrants will be permitted in any existing IP regime that is inconsistent with the nexus approach after 30 June 2016. For the purposes of grandfathering, "new entrants" include both new taxpayers not previously benefiting from the regime and new IP assets owned by taxpayers already benefiting from the existing IP regime. All existing regimes must be closed by 30 June 2021.

To mitigate the risk that new entrants will seek to avail themselves of existing regimes with a view to benefiting from grandfathering, jurisdictions are required to implement safeguarding measures. The first of these is enhanced transparency for new entrants entering the regime after 6 February 2015, requiring spontaneous exchange of information on the identity of new entrants benefiting from a grandfathered regime. IP assets acquired directly or indirectly from related parties currently not benefiting from a preferential IP regime after 1 January 2016 should be excluded from grandfathering (but only from 31 December 2016, allowing a period of grace while countries enact nexus compliant legislation).

Other preferential regimes

The final report considers the application of the substantial activity requirement to other preferential regimes that have been identified by the FHTP since the 1998 report. The determination of what constitutes the core income-generating activities is dependent on the type of regime, and will be considered on a case-by-case basis.

The final report gives some guidance regarding the type of activities that would be considered "core activities" for the various non-intangibles regimes, including headquarters regimes, distribution service centre regimes, financing or leasing regimes, fund management regimes, banking and insurance regimes, shipping regimes and holding company regimes.

The final report also outlines the primary concerns the OECD and FHTP have with each type of regime, which include: ring-fencing (where a regime excludes resident taxpayers from taking advantage of benefits, or where the entity benefitting from the regime is prohibited from operating in the domestic market); lack of substance; and artificial definition of the tax base.

Exchange of rulings

As part of its commitment to improve transparency, the FHTP has developed a framework for compulsory spontaneous information exchange between governments in respect of taxpayer-specific rulings. The final report states that the compulsory spontaneous information exchange should apply to all instances where the absence of an exchange of a ruling may give rise to BEPS concerns.

The framework details the six types of ruling that will be subject to compulsory spontaneous exchange. A ruling is defined widely as "any advice, information or undertaking" that a tax authority gives to a specific company or group on which reliance can be placed.

The six categories of rulings are:

1) rulings related to "preferential regimes" (broadly, those concerning geographically mobile income such as IP and financing);
2) unilateral advance pricing agreements (APAs) or other unilateral cross-border rulings in respect of transfer pricing;
3) cross-border rulings providing for a downward adjustment of taxable profits;
4) PE rulings (including whether or not a PE exists and the amount of profits attributable to the PE);
5) related party conduit rulings (which include rulings on income that flows through a country, including where two domestic entities are subject to different tax treatments); and
6) a catch-all category for any other type of ruling agreed by the FHTP in the future as giving rise to BEPS concerns in the absence of spontaneous information exchange.

For most rulings, the information will be automatically exchanged with: (1) the countries of residence of all related parties with which a company enters into a transaction for which a ruling is granted, or which gives rise to income from related parties benefiting from "preferential treatment" (broadly, more beneficial than the country's normal tax regime) and for PE cases, this includes the residence country of the head office and/or the country of the PE; and (2) the residence country of the ultimate parent company and the immediate parent company. Conduit rulings will be exchanged more widely. The related party threshold for this purpose is 25% (to be kept under review) based on direct or indirect voting rights or equity interests.

Information on rulings issued on or after 1 January 2010 that were still in force at 1 January 2014 will be subject to exchange by the end of 2016. Information on future rulings (defined as those issued on or after 1 April 2016) must be exchanged as quickly as possible, (and, broadly, within three months). The information to be exchanged automatically includes, as a first step, a summary and basic information prepared on the basis of a common template. The receiving tax authority can request the ruling itself as a second step.

The country receiving the information must have the legal framework necessary to protect the information being exchanged, including its confidentiality. Exchange with a country may be suspended if appropriate safeguards are not in

place or if there is a breach in confidentiality. The information exchanged must be used only for tax purposes, and if domestic law provides for the information to be used more widely, this will be overridden by the international provisions restricting its use.

Implications for business

The final report builds on the concepts set out in an interim report published in September 2014. Accordingly, much of the content of the final report will be familiar, although there are also new elements. The G20 leaders are expected to give final approval to the content of the final report.

For countries with existing IP regimes, the pace of change will be swift; the legislative process to update non-nexus-compliant regimes (essentially all regimes) must commence in 2015, with new compliant regimes in place by 1 July 2016.

A significant issue for claimant companies will be the requirement that the claimant itself must both incur qualifying expenditure and earn the related income; many groups will be obliged to restructure their commercial and R&D operations to bring the two into the same legal entity if they wish to continue to benefit.

"Tracking and tracing" historic expenditure also will be a challenge for some, particularly in industries such as the pharmaceutical sector, which are characterised by very long lead times between R&D activities taking place and income being generated. The proposal for a rolling three or five-year average before transition to full accumulation is welcome, as is the recognition that if claimants cannot track expenditure to individual IP assets, a less granular approach will be permitted on a case-by-case basis.

Compulsory spontaneous exchanges of information in respect of rulings are a key part of the G20/OECD's drive under BEPS to improve transparency in relation to tax and to ensure that tax authorities are able to access information that may not be in the possession of a local subsidiary. It also will serve as an early warning system for tax authorities where incentives have the potential to erode their tax base. Companies need to be aware that rulings obtained in one country will be shared with other tax authorities.

In addition, the EU Council of Finance Ministers has agreed on a proposal for a EU directive on mandatory automatic exchange of tax information, specifically focused on cross-border corporate tax rulings. "Advance cross-border ruling" is defined broadly and will include rulings that relate to cross-border transactions and those on the presence (or absence) of a PE. The directive is expected to be in place in EU member states' national law by 1 January 2017. It will require member states to exchange detailed information on valid (currently applicable) rulings from 2012 to 2017, as well as information on rulings obtained after 1 January 2014 that are now invalid.

Exchange of information on rulings for small and medium-sized entities will apply only to rulings obtained after 1 April 2016. This will involve wider sharing than anticipated by the G20/OECD under Action 5, as the EU requirements are for the information to be shared with all EU member states (rather than just the countries of those entities that are party to the ruling, along with the immediate and ultimate parent companies, as set out by the OECD/G20).

Work of the FHTP

The FHTP intends to monitor both preferential IP and non-IP regimes. Countries will be required to update the FHTP of any changes they make to their preferential regimes to apply the nexus approach. Where no amendments are made, the FHTP will move to the next stage of the review process.

In respect of information exchange, a monitoring and review mechanism will be put in place to ensure countries' compliance with the obligation to exchange information at the start of 2017. The FHTP also will consider how the administrative burden of sharing information should balance with the need to identify BEPS risks and will consider ways in which participation in information exchange can be extended to third countries.

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- The Final BEPS Reports (Part 1: Transfer Pricing), 28 October 2015
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