

Canada
Tax

Contacts:

**National Transfer
Pricing Leader
Markus Navikenas**
403-267-1859

**Quebec
Bernard Barsalo**
514-393-7096

**Ontario
Tony Anderson**
905-315-6731

**Toronto
Muris Dujic**
416-601-6006

**Alberta
Markus Navikenas**
403-267-1859

**Prairies
Kevin Gale**
204-944-3589

**British Columbia
Rob Stewart**
604-640-3325

**Related links:
Transfer Pricing
Deloitte Tax Services**

Transfer pricing alert OECD releases final BEPS reports

October 7, 2015

On October 5, 2015, the Organisation for Economic Co-operation and Development (OECD) released the final reports under the base erosion and profit shifting (BEPS) project it started two years ago to address perceived gaps in international tax rules. The final reports – one for each of the 15 items in the “Action Plan” released in 2013, except for the three transfer pricing actions, for which one report was issued – will be submitted to the G20 finance ministers at their meeting in Lima, Peru on October 8, 2015.

Key transfer pricing concepts in final reports

The 186-page final report *Aligning Transfer Pricing Outcomes with Value Creation – Actions 8-10* and the 70-page report *Transfer Pricing Documentation and Country-by-Country Reporting – Action 13* provide guidance on a multitude of transfer pricing topics. Some of the salient features include the following:

- **Global transfer pricing documentation and country-by-country (CbC) reporting.** As expected, the OECD did not introduce any new guidance in the global documentation and CbC final report, which is simply a compilation of previously released deliverables which have described the three-tiered standardized approach to transfer pricing documentation. Also as anticipated, 2015 will be the last fiscal year for which the new transfer pricing information will not be required.
- **Role of contracts.** The contractual arrangements between the parties is the starting place for the proper understanding (delineation) of a transaction. However, written contracts are unlikely to provide all the information necessary to perform a transfer pricing analysis. Therefore, the parties’ actual conduct should be used to clarify or supplement the terms of the contract, or to replace the contract if the contract is not supported by the conduct of the parties.
- **Risk.** To contractually assume risk, a party must exercise control over the risk and have the financial capacity to assume the risk. Although there is no bright line test to determine control over risk, the factors considered include: (1) performance of the decision to take risks; (2) performance of the response to risks associated with the business opportunity; and (3) performance of risk mitigation activities. The guidance permits day-to-day risk mitigation activity to be outsourced as long as the party outsourcing the risk mitigation activity exercises control over the party doing the day-to-day

risk mitigation activity. The guidance provides a six-step process to determine the entity incurring risk.

- **Intangibles.** The final report retains the 2014 guidance on categories of intangibles, transfer pricing methods and important functions related to the development, enhancement, maintenance, protection and exploitation of intangibles (the DEMPE functions). To determine who is entitled to receive intangible returns associated with the DEMPE functions, the final report incorporates the control and funding requirements from the deliverable on risk discussed above. The guidance states that the entity entitled to the profit or loss between projected and actual outcomes will be the entity exercising the control functions over the risks that caused the difference.
- **Funding and cash boxes.** An entity that does not control the financial risks associated with its funding will be entitled only to a risk-free return. An entity that does control the financial risks associated with the DEMPE functions will be entitled to a risk-adjusted return.
- **Recharacterization.** If a transaction lacks the commercial rationality of an arrangement that would have been agreed to between unrelated parties, the guidance permits the non-recognition of the transaction. The fact that a transaction is not observed between unrelated parties is not sufficient grounds for not recognizing the transaction.
- **Hard-to-value intangibles.** If the taxpayer cannot demonstrate that its pricing is based on a thorough analysis, the *ex post* outcome will be used as presumptive evidence of the appropriateness of *ex ante* pricing arrangements. The OECD includes several exemptions to this rule based on unforeseeable events and adopts a five-year look-back rule with a 20% tolerance. The guidance also allows taxpayers to bypass the provisions of this section by disclosing the underlying *ex ante* and *ex post* data and explaining why the variance was not anticipated.
- **Cost contribution arrangements (CCA).** The final report updates the CCA guidance to conform to the changes on contracts, risk and intangibles discussed above. The guidance retains the requirement that ongoing contributions be priced at value rather than cost unless the parties value the opportunity cost of the upfront commitment to contribute resources to the CCA.
- **Low-value-adding intragroup services.** To qualify for the safe harbour on low-value-adding intragroup services, taxpayers must document the cost pool and choose appropriate allocation keys. If the level of low-value-adding intragroup service fees exceeds a threshold determined by an individual country, tax administrations are permitted to require a full functional analysis and comparability analysis, including the application of the benefits test to specific service charges.
- **Dispute resolution.** Twenty nations — including Canada as well as Australia, Austria, Belgium, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States — have committed to providing for mandatory binding arbitration through a mutual agreement procedure (MAP) in their bilateral tax treaties as a

mechanism to guarantee that treaty-related disputes will be resolved within a specified time frame. Other countries have agreed to minimum standards and a peer review monitoring system.

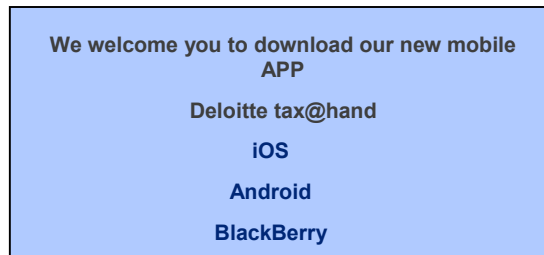
- **Profit splits.** Final guidance on profit splits has been postponed until 2016 and 2017.

Timing of impact of new guidance in Canada

As an active participant in the OECD's BEPS work impacting transfer pricing, Canada is expected to adopt the new guidelines swiftly. It is likely that the new guidelines contained in the OECD's final reports will be used by the Canada Revenue Agency in its approach to open transfer pricing cases without any delay. The best practice for businesses is to take account of the revised guidance immediately, and take steps to be compliant with the OECD final reports.

Deloitte is preparing more detailed analyses of the *Aligning Transfer Pricing Outcomes with Value Creation – Actions 8-10* report and the *Transfer Pricing Documentation and Country-by-Country Reporting – Action 13* report to assist Canadian taxpayers in navigating the changes. These analyses will be available shortly.

Muris Dujic, Toronto
Simon Gurr, London
Alex Evans, Burlington



[Home](#) | [Legal](#) | [Privacy](#)

2 Queen Street East, Suite 1200
Toronto, ON M5C 3G7 Canada

© Deloitte LLP and affiliated entities.

This publication is produced by Deloitte LLP as an information service to clients and friends of the firm, and is not intended to substitute for competent professional advice. No action should be initiated without consulting your professional advisors. Your use of this document is at your own risk.

Deloitte, one of Canada's leading professional services firms, provides audit, tax, consulting, and financial advisory services. Deloitte LLP, an Ontario limited liability partnership, is the Canadian member firm of Deloitte Touche Tohmatsu Limited.

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.com/about for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms.

www.deloitte.ca

 [Deloitte RSS feeds](#)

If you do not wish to receive future marketing emails from Deloitte, forward this email to unsubscribe@deloitte.ca. Please add "@deloitte.ca" to your safe senders list to ensure delivery to your inbox and to view images.