

Tax Analysis

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OECD Issues BEPS Transfer Pricing Discussion Drafts

The Organization for Economic Cooperation and Development issued four public discussion drafts on transfer pricing topics during the week of December 15-19 and has invited interested parties to submit comments on the discussion drafts¹. Deloitte China will be issuing a series of analyses for each of the discussion draft in January.

The discussion drafts – on risk, recharacterization, and special measures, the use of profit splits in the context of global value chains, dispute resolution mechanisms, and the transfer pricing aspects of cross-border commodity transactions– address some of the 15 actions in the OECD's Action Plan on Base Erosion and Profit Shifting, published in July 2013.

The OECD released a discussion draft issued under Action 4 of the BEPS Action Plan, which calls for limiting base erosion via interest deductions and other financial payments. This discussion draft is a consultation document that seeks input on key issues concerning the design of rules to address base erosion and profit shifting using interest deductions and other financial payments. Action 4 calls for the development, among other things, of transfer pricing guidance "regarding the pricing of related party financial transactions, including financial and performance guarantees, derivatives (including internal derivatives used in intra-bank dealings), and captive and other insurance arrangements." However, that transfer pricing guidance is not dealt with in the discussion draft.

The discussion draft on risk, recharacterization, and special measures² includes a proposed revision to Section D of Chapter I of the transfer pricing guidelines emphasizing the importance of accurately delineating the actual transactions, and includes guidance on the relevance and allocation of risk. The draft proposes a new section that would permit the non-recognition of certain intercompany transactions. The draft also sets out options for some special measures, but stresses that those proposed measure have been only broadly outlined, and that significant design work would still be needed as the measures are further considered.

The discussion draft on the use of profit splits in the context of global value chains³ examines eight scenarios in which it may be more difficult to apply one-sided transfer pricing methods to determine transfer pricing outcomes that are in line with value creation, and in which the application of a transactional profit split method may be appropriate. These scenarios provide the context for the OECD to pose questions on the application of the transactional profit split method. The responses to those questions will inform the OECD's revisions to the guidance on the use of the transactional profit split method in Chapter II of the transfer pricing guidelines.

¹ Comments are due by February 6, 2015, with the exception of comments on the dispute resolution discussion draft, which are due on January 16.

² <http://www.oecd.org/ctp/transfer-pricing/discussion-draft-actions-8-9-10-chapter-1-TP-Guidelines-risk-recharacterisation-special-measures.pdf>

³ <http://www.oecd.org/ctp/transfer-pricing/discussion-draft-action-10-profit-splits-global-value-chains.pdf>

A discussion draft issued under Action 14 (make dispute resolution mechanisms more effective⁴) of the BEPS Action Plan adopts four organizing principles:

- Ensuring that treaty obligations related to the mutual agreement procedure are fully implemented in good faith;
- Ensuring that administrative processes promote the prevention and resolution of treaty-related disputes;
- Ensuring that taxpayers can access the mutual agreement procedure when eligible; and
- Ensuring that cases are resolved once they are in the mutual agreement procedure.

The draft then identifies 22 obstacles to the resolution of treaty-related disputes through the mutual agreement procedure (MAP) mechanism, and presents 34 options to address those obstacles.

The discussion draft on the transfer pricing aspects of cross-border commodity transactions⁵ proposes additional guidance clarifying that quoted or publicly available prices can be used under the CUP method and the adoption of a deemed pricing date for commodity transactions between associated enterprises in the absence of evidence of the actual pricing date agreed by the parties to the transactions.

Deloitte's Transfer Pricing practice will be hosting three webcasts to discuss the discussion drafts in depth. To sign up for these webcasts, click on these links:

- Asia/Pacific Dbrief -- OECD/G20 Discussion Drafts on Risk, Recharacterization, and Profit Splits, January 30, 2:00 PM Hong Kong time
<https://event.on24.com/eventRegistration/prereg/register.jsp?clientid=1168&eventid=923474&sessionid=1&key=75DE74E746624059052EA355A1E1AFBE>

⁴ <http://www.oecd.org/ctp/dispute/discussion-draft-action-14-make-dispute-resolution-mechanisms-more-effective.pdf>

⁵ <http://www.oecd.org/ctp/transfer-pricing/discussion-draft-action-10-commodity-transactions.pdf>

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