



税务快讯

经合组织发布 2018 年版《关于难以估值的无形资产税务管理应用指南》

经济合作与发展组织（以下简称“经合组织”）于 2018 年 6 月 21 日发布了《关于难以估值的无形资产（即 Hard-to-Value Intangibles，以下简称“HTVI”）的税务管理应用指南》（以下简称“《HTVI 指南》”）。该《HTVI 指南》作为附件被正式纳入 2017 年版经合组织转让定价指南第六章。

《HTVI 指南》主要陈述了税务机关在对 HTVI 进行价值评估时应遵循的基础原则，也为不同情境下 HTVI 估值方法的应用提供了解释性案例，并提出了相关争议处理与解决建议。

HTVI 价值评估时应遵循的基础原则

首先，《HTVI 指南》着重关注了如何解决 HTVI 关联交易价格评估时纳税人和税务机关之间信息不对称的问题，并认为 HTVI 的估值分析应遵循以下四项基础原则：

- 税务机关可以将事后结果作为考量事前定价安排假设合理性的推定证据，即比较实际收入或现金流与事前定价所依据的预估收入或现金流，来推断事前定价是否合理。
- 在进行评估时，税务机关应考察在交易发生时点关联方是否能够或应当合理知晓并考虑与取得实际收入或现金流概率有关的事前信息，以及关联方是否已经实际考虑了这些信息。因此，若纳税人可以证明交易当时用来支持估值方法的信息的可靠性，则有机会避免被税务机关以事后结果推断定价合理性。此次发布的《HTVI 指南》中还特别阐明，税务机关不应简单将基于实际收益的事后评估方法替代交易时点考虑不同预估收益并以不同收益实现的概率为权重计算出的合理交易

价格。这一观点在之前发布的《HTVI 指南》讨论稿中并未提及，而德勤在向经合组织提交的讨论稿意见中就这一问题作了详细讨论。

- 当修正的估值结果显示事前确定的无形资产的转让价格被低估或高估时，即使原始的交易合同中未包含类似的调整条款，税务机关也可以通过加入价格调整条款和/或或有付款安排的方式进行价格调整。
- 税务机关应当开展调查程序以确保基于事后结果的推定证据能够被尽早确定并应用。

其他补充说明

此外，《HTVI 指南》还着重探讨了估值过程中可被纳入考量范围的信息类型。具体来说，税务机关不仅可以参考事后结果，还可参考在交易时点可以获得，且纳税人能够或应当合理知晓并考虑的与 HTVI 交易相关的任何其他信息。《HTVI 指南》表明，即使《HTVI 指南》中的方法不适用于某些特定交易，税务机关依然可以根据经合组织转让定价指南中的其他部分（包括第六章除 HTVI 以外的其他部分）实施价格调整（例如当无形资产被转让时，所使用的估值方法未能对其潜在价值进行准确评估）。

同时，《HTVI 指南》指出，税务机关还可以使用与纳税人自行采用的定价结构不同的方法进行无形资产关联交易价格调整，即参考独立企业在可比情形下可能使用的方式，例如分期按进度付款、附加或不附加调整因素的特许权使用费，或者包括价格调整条款等。然而，鉴于 HTVI 通常没有可靠的可比交易信息，《HTVI 指南》并未要求相应调整必须有可比无形资产的非受控交易作为论证基础。

《HTVI 指南》中也使用了不同案例对相关概念进行解释。

案例 1 列举了两种情形。在第一种情形中，纳税人无法证明其原始估值已经过适当的风险调整或无法证明事后发展在交易时点不可预见。在这种情况下，应考量其他事前信息对价格进行调整，以反映经过风险调整后的估值。第二种情形是在符合经合组织转让定价指南第六章第 6.193 段第 3 款的情况下，纳税人可以豁免于调整；即如果根据财务预测与实际结果之间的差异重新计算的估值与交易发生时的估值差异幅度不高于 20%（安全港范围），相关调整可以被豁免。

案例 2 介绍了税务机关如何考虑采用不同的定价方式（案例中为根据进度分期付款）的情形，与《HTVI 指南》第 16 段所述内容一致。

我们的观察

从中国转让定价角度出发，国家税务总局公告 2017 年第 6 号规定了成本法、市场法和收益法等资产评估方法。近年的转让定价实践中，收益法越来越多地被应用在技术、商标和股权转让等无形资产交易的估值当中。《HTVI 指南》中关于事前信息的可获得性以及事后信息的适用性对此类案件中税企双方的争议解决都具有借鉴意义。

鉴于交易时点可以获得的信息将是纳税人证明交易价格合理性的关键，我们建议纳税人及时就相关交易准备详细的文档，记录交易价格的制定依据，包括如何预估未来年度盈利水平和现金流入以及如何考量相关风险的影响等。

《HTVI 指南》中提及的安全港规则（即差异幅度在 20%内免于调整）暂未被纳入中国转让定价法规，未来是否会被引入中国还有待观察。

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China | Tax & Business Advisory | Transfer Pricing Services | 21 August 2018

[中文](#)



Tax Newsflash

OECD releases guidance on hard-to-value intangibles

The Organisation for Economic Cooperation and Development (OECD) released report concerning Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles (HTVI) (HTVI Guidance) on 21 June 2018. The HTVI Guidance has been incorporated as an annex to Chapter VI of the 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (TPG).

The HTVI Guidance presents the principles that should underlie the application of the HTVI approach by tax administrations, provides examples intended to clarify the application of the HTVI approach in different scenarios and addresses suggestion on how to resolve dispute in this regard.

Basic principles to be underpinned in HTVI valuation

The HTVI Guidance focuses on information asymmetry between taxpayers and tax administrations, and states that the application of the HTVI approach should be underpinned by the following four principles:

- Tax administrations may consider *ex post* outcomes as presumptive evidence about the reasonableness of the assumptions of the *ex ante* pricing arrangements, i.e. comparing actual income or cash flows with the anticipated income or cash flows on which the original pricing was based to presume the reasonableness of original valuation.
- In performing valuations, tax administrations should consider whether the associated enterprises could or should reasonably have known and considered *ex ante* the information related to the probability of achieving the actual income or cash flows, and whether it has considered such information. Thus, taxpayers have the possibility to rebut the presumptive evidence of *ex ante* pricing allegedly provided by the *ex post* outcome by demonstrating the reliability of the information supporting the pricing methodology adopted at the time of the transfer. The HTVI Guidance makes clear that tax authorities should not confuse the actual returns with the appropriate *ex ante* average of all possible returns appropriately probability weighted to value the *ex ante* average arm's length price at the time the transaction is entered into. This point was not included in the previous discussion draft, although it was extensively discussed in comments prepared by Deloitte and submitted to the OECD.
- When a revised valuation shows that the intangible was transferred at an undervalue or overvalue, the revised price may be assessed taking into account price adjustment clauses and/or contingent payments without regard to whether the original transaction contained such clauses.
- Tax administrations should apply audit practices to ensure that presumptive evidence based on *ex post* outcomes is identified and acted upon as early as possible.

Supplementary remarks

In addition, the HTVI Guidance includes language discussing the type of information that may be taken into account, saying that tax administrations may consider not only *ex post* outcomes but also any other relevant information related to the HTVI transaction that becomes available and that could or should reasonably have been known and considered by the taxpayer at the time of the transaction. The HTVI Guidance also makes clear that, even if the HTVI approach is not applicable to a particular transaction, an adjustment may still be appropriate under other parts of the OECD TPG (including other sections of Chapter VI), for example, the original valuation did not correctly value the potential value of the transferred intangible.

Meanwhile, the HTVI Guidance states that tax administrations may make adjustments that reflect an alternative pricing structure that differs from the structure adopted by the taxpayer. The guidance provides that such structure must be of a type that would have been made by independent enterprises in comparable circumstances, such as milestone payments, royalties with or without adjustable elements, or price adjustment clauses. However, the guidance does not require that the adjustments reflect the amount unrelated

parties would have provided had they adopted such a structure since there is no reliable comparable transaction information that is available for HTVI.

The examples in the HTVI Guidance illustrate these concepts.

Example 1 presents two scenarios. The first scenario demonstrates how the guidance should apply in the event a taxpayer cannot demonstrate that its original valuation was appropriately risk-adjusted or that the *ex post* development was unforeseeable at the time of the initial transfer. The example provides that the adjustment must reflect the *ex ante* risk-adjusted valuation taking into account the additional information. The second scenario illustrates that no adjustment is required because the potential adjustment falls within the exemption provided by item (iii) in paragraph 6.193 of Chapter VI of the OECD TPG, when the difference between the financial projections and actual outcomes does not reduce or increase the compensation for the HTVI by more than 20% of the compensation determined at the time of the transaction (safe harbor rule).

Example 2 demonstrates how a tax administration might consider applying an alternative payment structure, in this case a milestone payment, consistent with paragraph 16 of the HTVI Guidance.

Our observation

China's State Administration of Taxation issued Bulletin 6 in 2017 to improve administration of special tax (transfer pricing) investigation/adjustment and mutual agreement procedures. Bulletin 6 permits the use of asset valuation methods, including cost, market, and income approaches, etc. Recent years have witnessed the fact that the income approach is frequently used to determine the value of intangibles such as technology, trademark, and shares, etc. Relevant concepts that the HTVI Guidance discussed regarding the availability of the *ex ante* information and the applicability of *ex post* information can be a good reference for tax administrations and taxpayers to resolve disputes in similar cases.

Given that the information available at the time of transaction plays an important role for taxpayers to justify the arm's length price, it is recommended for taxpayers to prepare detailed documents on the transaction in a timely manner to document the basis, information and considerations when the relevant parties determined the transfer price. The information to be documented may include those regarding how to forecast future income and cash flows, and how to consider the impact of relevant risks, etc.

The safe harbor rule mentioned in the HTVI Guidance (i.e. the adjustment can be exempt if the valuation difference does not exceed 20%) has not been introduced into China's transfer pricing regulations, and taxpayers may need to monitor the development in this area.

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