BEPS Action 8: Transfer pricing in relation to Hard-to-Value Intangibles

International Tax

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The CIOT commented on the Public Discussion Draft on Base Erosion and Profit Shifting (BEPS) Action 8 – Implementation Guidance on Hard-to-Value Intangibles published by the OECD in May 2017.

In May the OECD published draft implementation guidance for consultation which is intended to assist with the implementation of the principles arising from the work done through Action 8 of the BEPS Action Plan in relation to developing special measures for transfers of hard-to-value intangibles (HTVI). These principles are themselves set out in Section D.4 of the Revised Chapter VI of the Transfer Pricing Guidelines (the guidelines).

Our comments focussed on the importance of this guidance not being considered in isolation, but rather as one part of the much wider framework the OECD transfer pricing guidelines make up. We said that the implementation guidance should make it clear that the HTVI approach, of permitting tax administrations to consider things that happen after the relevant transaction that is being considered ('ex post outcomes'), is designed to meet specific circumstances, and other solutions may be appropriate and should be applied in preference where this is not the case.

The CIOT has consistently supported the BEPS project and recognises that the BEPS measures are an important step to improving public trust in the international tax system. We noted that the work done through Action 8 in relation to developing the HTVI approach was necessary to address the information asymmetry between taxpayers and some tax administrations. The pricing of intangibles is a very difficult area and may involve an element of subjectivity. Thus, we noted that we agree that in certain relatively rare circumstances it is appropriate for tax administrations to be able to consider ex post outcomes as presumptive evidence about the

appropriateness of the ex ante pricing arrangements, subject to the taxpayers right to be able to rebut this presumptive evidence.

Broadly, we welcomed the implementation guidance presented by the discussion draft and supported the aims of ensuring, so far as possible, that there is a common understanding and practice among tax administrations around the implementation of the BEPS actions and the application of the HTVI approach in particular. We also said that we fully support the aims of achieving improved consistency and the reduction of the risk of double taxation.

However, we suggested that it would be helpful if the implementation guidance could reiterate that the use of ex post outcomes as presumptive evidence can be rebutted by taxpayers, and that the use of the HTVI approach should only arise in practice where there is an unreasonable lack of diligence on the part of the taxpayer. We suggested that the implementation guidance should also emphasise that ex post evidence should only be used to assess the reliability of the information on which ex ante pricing has been based. As per paragraph 6.192 of the guidelines, 'Where the tax administration is able to confirm the reliability of the information on which ex ante pricing has been based, notwithstanding the approach described in this section, then adjustments … should not be made.' In other words, just because a value turns out to be more than the agreed price as a result of events occurring after the event, this does not mean that the original valuation was incorrect.

We also welcomed the reiteration in the implementation guidance that it is important to permit resolution of cases of double taxation arising from the application of the approach for HTVI through access to the mutual agreement procedure. We suggested that this is an area where, in due course, peer to peer review of countries' approaches in dealing with adjustments and corresponding adjustments (through MAP or a similar procedure) would be helpful. This would provide taxpayers with some transparency and help to build confidence in the administration of this complex and subjective area.

Finally, we noted that the implementation guidance also recognises the increased uncertainty for taxpayers as a result of the possibility of the HTVI approach. We welcomed the comments encouraging tax administrations to identify transfers of HTVI as early as possible '*as a matter of good administrative practice*'.

Our full response can be found on the CIOT website.