Tel: +32 2 778 01 30
Fax: +32 2 778 01 43
@: bdo@bdointernational.com
www.bdo.global

BDO International Limited
Contact address:
Brussels Airport
The Corporate Village, Elsinore Building
Leonardo Da Vincilaan 9 – 5/F
1935 Zaventem, Belgium

Tax Treaties, Transfer Pricing and Financial Transactions Division
OECD/CTPA
2, rue Andre Pascal
75775 Paris Cedex 16
France

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Dear Sirs

Discussion draft on 'Implementation Guidance on Hard-to-Value Intangibles'

BDO welcomes the opportunity to comment on the OECD's Discussion Draft on the Implementation Guidance on Hard-to-Value Intangibles issued on 23 May 2017 ('the Discussion Draft'). These comments are provided on behalf of the BDO global network.

Time frame

Businesses operate more effectively where there is certainty. We note that a number of respondents to the original discussion draft requested a time frame being introduced for making adjustments. We would endorse that view and recommend specific guidance is given to tax administrations on time frames for seeking an adjustment.

In particular we believe it would be helpful if tax administrations were required to notify the taxpayer within a relatively short period that a transaction would be potentially within the scope of an *ex post* evidence review. In addition, there should either be an absolute cut-off date for tax administrations to start an enquiry, or alternatively, there should be strongly worded guidance to tax administrations saying that only in very exceptional circumstances should an *ex post* enquiry be started more than (say) six years after the end of the year in which the transaction took place.

If a less prescriptive timeframe is called for, another suggestion would be for tax authorities to be required to consider a deemed price adjustment clause, which can be found in third party agreements. If no specific price adjustment clause is included in a pricing agreement in relation to HTVIs, a reasonable monitoring period could be established based on agreements between third parties and applied to the transaction in order to establish a reasonable period during which a taxpayer should have to consider *ex post* evidence.

In order to avoid uncertainty for taxpayers, we would also suggest a mechanism to allow for faster review of transactions involving HTVIs by tax administrations, to avoid the requirement for unnecessary or prolonged tax provisions to be put in place. We would recommend potentially implementing a local process to enable tax authorities to identify transactions involving HTVIs at an early stage, and establish a timeframe during which the tax authority can assess this transaction, based on the availability of information required for such analysis. Potentially, this could be a two-sided requirement, whereby taxpayers are also obliged to

specifically notify tax authorities of transfers of HTVI within a specific time frame, in addition to the description required under the master file information requirements.

Evidencing the 'reasonableness of the taxpayer's assumptions'

Example 1 and Example 2 both assume "the taxpayer cannot demonstrate that its original valuation properly took into account the possibility the sales would reach these levels, and cannot demonstrate that reaching that level of sales was due to an unforeseeable development." Further guidance would be helpful around the specific steps taxpayers should take to consider various scenarios of sales levels which are reasonably foreseeable at the time of the transaction, and suitable evidence which tax administrations should consider acceptable to demonstrate these considerations have been accounted for, e.g. documentation showing third party reports detailing expected industry trends, which have been used in conjunction with internally available information.

While it is not possible to provide an exhaustive list of unforeseeable developments, more examples of specific areas which would be considered an 'unforeseeable development' would also be helpful. In addition, some form of limitation or parameters should be set for tax administrations, in order to avoid unfettered entitlement to challenge transactions involving HTVI with the benefit of hindsight.

We note that the examples used focus on transactions in the pharmaceutical sector and royalty payments. It would be helpful if more detail was provided on alternative payment structures which could also lead to adjustments, so as to eliminate uncertainty about when a tax authority might expect a taxpayer to have considered an alternative method of payment.

HTVI and the Mutual Agreement Procedure

A key objective of the measures ought to be the avoidance of double taxation. We would therefore suggest that the guidance should include a stronger onus on the tax administrations to help ensure there is no double taxation as a result of any adjustment under these measures. Whilst the reference to the MAP in paragraphs 31 and the 32 of the discussion draft is helpful, we would like to see stronger encouragement for tax administrations raising an *ex post* enquiry to support the taxpayer in seeking symmetrical treatment for both sides of the transaction.

We would like to thank the OECD again for this opportunity to comment and would be happy to expand on our responses and contribute to further stages of this discussion draft if required.

For clarification of any aspect of our responses presented above please contact:

Zara Ritchie
Partner, BDO Australia
Head of Global Transfer Pricing Services
zara.ritchie@bdo.com.au
+61 3 9605 8019

Robert Aziz
Partner, BDO UK
Global Head of Tax
robert.aziz@bdo.co.uk
+44(0)207 893 3434