Intangible Property in Transfer Pricing Analyses

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When a multinational corporation develops and owns intangible property that is used by its foreign subsidiaries, an arm's-length intercompany transfer price should be established as a charge for the use of the intangible property. The identification of intangible property transferred between related entities is often challenging because of (1) the interconnected relationship between multinational subsidiaries and (2) the broadly defined definition and interpretation of intangible property by taxing authorities. This discussion provides (1) a time line of events that have contributed to the current status of intangible property transfer pricing policy in the United States and abroad and (2) guidance for the identification of intangible property in intercompany transfer pricing analyses.

Introduction

Multinational corporations (MNCs) are facing increased scrutiny over their intercompany transfer pricing policies.

Let's consider, for example, some of the recent comments made by the Organisation for Economic Co-operation and Development (OECD):[1] "[T]he number of countries requiring preparation of transfer pricing documentation increases every year. The proliferation of transfer pricing documentation requirements, combined with a dramatic increase in the volume and complexity of international intragroup trade and the heightened scrutiny of transfer pricing issues by tax authorities, makes transfer pricing documentation one of the top tax compliance priorities on the agendas of both tax authorities and businesses."[2]

To that end, the OECD has developed a plan to prevent corporations from paying little or no income taxes.

The view of the United States towards transfer pricing resembles that of the OECD. In the last five years, the Internal Revenue Service (the "Service") has taken the following steps:

1. Created a dedicated transfer pricing group, Transfer Pricing Operations (TPO)
2. Hired its first transfer pricing director, Sam Maruca
3. Significantly increased the number of economists working on transfer pricing analyses.

One particular area of emphasis for both the OECD and the Service is the "abuse of transfer pricing rules in the key area of intangibles."[3]

According to paragraph 39 of the *Revised Discussion Draft on Transfer Pricing Aspects of Intangibles* published by the OECD, "Difficulties can arise in a transfer pricing analysis as a result of definitions of the term intangible that are either too narrow or too broad."

This discussion focuses on the various aspects of intangible property (also called intangible asset) identification that analysts should consider in tax-related intercompany transfer pricing analyses.

The next section of this discussion presents a time line of events that have shaped, and are continuing to shape, transfer pricing policy in the United States and abroad. The time line highlights events that affect intangible property.

Finally, this discussion summarizes some of the most significant tax-related transfer pricing regulations that are effective in the United States and throughout the rest of the world.

Transfer Pricing Time Line

The time line presented below lists key events in the tax-related transfer pricing field, with an emphasis on those events that affect intangible property.

April 1968 to July 2009

The Internal Revenue Code of 1968 was enacted. This edition of the Code included Section 482, which authorized the Service to allocate income, deductions, and credits between or among related entities in order to avoid tax evasion.

According to the Service, the Section 482 regulations "provided guidance with respect to a wide range of controlled transactions, including transfers of tangible and intangible property and the provision of services."[4]

The 1968 regulations included only general guidance with respect to intangible property.

Section 482 was subsequently updated, with the following notable revisions:

- 1986 regulations—to require that "in the case of any transfer (or license) of intangible property . . . the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible."
- 1992 proposed regulations, 1993 temporary regulations, and 1994 final regulations[5]—to (1) introduce the comparable profits interval (an important concept in the comparable profits method); (2) permit the use of a range when estimating the appropriate transfer price; and (3) introduce the "best method" rule, which states that "the arm's length result of a controlled transaction must be determined under the method that, under the facts and circumstances, provides the most reliable measure of an arm's length result."[6] The 1994 final regulations were generally consistent with the 1993 temporary regulations.
- 2003 proposed regulations, 2006 temporary and proposed regulations, and 2009 final regulations—which covered intercompany service transactions and contained certain provisions relating to intangible property transactions.

June 1979 to July 2010

In June 1979, the OECD issued transfer pricing guidance in the report *Transfer Pricing and Multinational Enterprises*. This transfer pricing report underwent several subsequent updates. In 2010, the OECD published a major revision titled *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (the "Guidelines").

The most recent revision included significant changes to the chapters dealing with the arm's-length principle, transfer pricing methods and comparability analysis, and it also included a new chapter: "Transfer Pricing Aspects of Business Restructurings."

The Guidelines have been incorporated into domestic law for a number of countries and have served as the transfer pricing norm for many others. The Guidelines also "provide the agreed framework for resolution of competent authority cases between OECD member states, including the United States."[7]

September 2006

The Service settled an intercompany transfer pricing tax dispute with Glaxo SmithKline Holdings (Americas) Inc. & Subsidiaries (GSK) for $3.4 billion. This remains one of the largest and most significant transfer pricing cases in the United States.

According to the Service, "at issue is the level of U.S. profits reported by GSK after making intercompany payments that took into account product intangibles developed by and trademarks owned by its U.K. parent, and other activities outside the U.S., and the value of GSK's marketing and other contributions in the U.S."[8]

2010

The Service created the large business and international (LBI) division to enhance its focus on international tax administration. At the time the LBI was formed, it had planned to add 875 employees to the existing staff of 600.

2011

The Service created the TPO group and hired its first transfer pricing director, Sam Maruca. Maruca has repeatedly said that he considers intangibles to be the top priority for the TPO group's activities.

June 2012

The OECD published a discussion draft (also referred to as an interim draft) titled, *Revision of the Special Considerations for Intangibles in Chapter VI of the OECD Transfer Pricing Guidelines and Related Provisions* (the "OECD 2012 Discussion Draft").

The document contained two principal elements:

1. A proposed revision of the provisions of Chapter VI, Special Considerations for Intangible Property, of the transfer pricing guidelines
2. Proposed revision of the Annex to Chapter VI containing examples that illustrate the application of the provisions of the revised text of Chapter VI

May 2013

The Base Erosion and Profit Sharing (BEPS) project was formed as a joint project between the OECD and G20 to look at whether or not the current transfer pricing rules allow for the allocation of taxable profits to locations different from those where the actual business activity takes place, and what could be done to change this if they do.

June 2013

House Ways and Means Committee Chairman, Representative Dave Camp (R-MI) introduced legislation that would reduce the tax rate to a flat 15.0 percent on foreign income attributable to intellectual property.

July 2013

The OECD published an action plan on BEPS (the "action plan"). The action plan, endorsed by the G20, "offers a global roadmap that will allow governments to collect the tax revenue they need to serve their citizens."[9]

Specifically, the action plan "identifies 15 specific actions that will give governments the domestic and internal instruments to prevent corporations from paying little or no taxes."[10]

One of the intended goals of the action plan is to ensure "that taxable profits cannot be artificially shifted, through the transfer of intangibles."[11]

Certain actions developed in the action plan will be implemented by direct changes to the Guidelines, while other changes will be implemented by countries through their domestic law, bilateral treaties, or a multilateral instrument.[12]

According to the action plan, Action 8, Intangibles, is stated as follows:

> Develop rules to prevent BEPS by moving intangibles among group members. This will involve: (i) adopting a broad and clearly delineated definition of intangibles; (ii) ensuring that profits associated with the transfer and use of intangibles are appropriately allocated in accordance with (rather than divorced from) value creation; (iii) developing transfer pricing rules or special measures for transfers of hard-to-value intangibles; and (iv) updating the guidance on cost contribution arrangements.

July 2013

The OECD published *Revised Discussion Draft on Transfer Pricing Aspects of Intangibles* (the "Discussion Draft"). This document replaced the OECD 2012 Discussion Draft and incorporated the comments that were received with respect to the OECD 2012 Discussion Draft.

September 2013

Senator Carl Levin introduced a bill named "The Stop Tax Haven Abuse Act" to lower the incentives of moving intellectual property or operations offshore, which included a provision to tax excess profit related to transferred intellectual property.

November 2013

The U.S. announced Revenue Procedure 2013-78 ("Proposed Revision of Procedures for Requesting Competent Authority and Assistance Under Tax Treaties") and 2013-79 ("Proposed Revision of Procedures for Advance Pricing Agreements").

March 2014

The Obama administration proposed budget included a proposal to broaden the definition of intangible property in the Section 482 regulations to include:

> workforce in place, goodwill, and going concern value, and any other item owned or controlled by a taxpayer that is not a tangible or financial asset and that has substantial value independent of the services of any individual. The proposal also would clarify that where multiple intangible properties are transferred, or where intangible property is transferred with other property or services, the Commissioner may value the properties or services on an aggregate basis where that achieves a more reliable result.[13]

The proposed budget would also extend the Subpart F rules to include certain "excess income" that offshore controlled foreign corporations earn from intangible assets transferred out of the United States.

Similar versions of these proposals were included in the administration's budget proposals between the years 2010 and 2014.

September 2014

The OECD released the first recommendations to address the BEPS action plan published in July 2013 (the "BEPS deliverables). Action 8, Intangibles, was among the actions that were addressed in the 2014 deliverables.

The next section of this discussion summarizes some of the publications and regulations with regard to the identification of intangible property for tax-related transfer pricing purposes.

Section 482 Definition of Intangible Asset

Congress created Section 482 to address the concern that a domestic taxpayer could shelter income to avoid taxes by transferring assets to a foreign affiliate. Likewise, the Service is concerned that a foreign taxpayer could avoid domestic taxes by not allocating sufficient income to the U.S. taxpayer for the use of assets.

Section 482 addresses these concerns by laying out general rules for the intercompany transfer prices charged in multinational asset transfers. An intercompany transfer price is the price that one entity charges a related party for the use of:

1. tangible property,
2. intangible property, or
3. services.

The goal of Section 482 regulations is to determine an arm's-length transfer price that two unrelated parties would have negotiated. This transfer price is then applied to an intercompany transaction.

According to the Section 482 regulations, "A controlled transaction meets the arm's length standard if the results of the transaction are consistent with the results that would have been realized if uncontrolled taxpayers had engaged in the same transaction under the same circumstances. . . ."[14]

Under the Section 482 regulations, the arm's-length consideration for the transfer of intangible property should be commensurate with the income attributable to that intangible property.

The Section 482 regulations define an intangible property as follows:

> (b) Definition of intangible. For purposes of section 482, an intangible is an asset that comprises any of the following items and has substantial value independent of the services of any individual—
>
> (1) Patents, inventions, formulae, processes, designs, patterns, or knowhow;
>
> (2) Copyrights and literary, musical, or artistic compositions;
>
> (3) Trademarks, trade names, or brand names;
>
> (4) Franchises, licenses, or contracts;
>
> (5) Methods, programs, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, or technical data; and
>
> (6) Other similar items. For purposes of section 482, an item is considered similar to those listed in paragraph (b)(1) through (5) of this section if it derives its value not from its physical attributes but from its intellectual content or other intangible properties.

Analysts are likely to be familiar with the intangible property list provided in the Section 482 regulations. However, it is item number six—other similar items—that transfer pricing disputes often revolve around. In instances where intangible property is broadly defined, such as in item number six, analysts often consider economic definitions of intangible property in order to determine if an intangible property exists.

One source of such definition is the *Guide to Intangible Asset Valuation*[15] (*GIAV*). *GIAV* includes lists of (1) characteristics of intangible property and (2) economic phenomena that do not qualify as intangible property.

The following characteristics of intangible property are provided in GIAV:[16]

> An intangible asset has the following ownership characteristics:
>
> 1. It may be subject to a specific identification and a recognizable description.
> 2. It may be subject to legal existence and legal protection.
> 3. It may be subject to the rights of private ownership, and that private ownership should be transferable.
> 4. It may be documented by some tangible evidence or manifestation of the existence of the intangible asset (for example, a contract, a license, a registration document, a compact disc, a listing of customers, or a set of financial statements).
> 5. It may be created or come into existence at an identifiable time or as the result of an identifiable event.

6. It may be subject to being destroyed or to a termination of existence at an identifiable time or as the result of an identifiable event.

When defining intangible property from an economic perspective, it is also often useful to consider economic phenomena that do not qualify as intangible property.

According to *GIAV*, the following nonexhaustive economic phenomena do not qualify as intangible property, even though they may be considered intangible factors or influences:[17]

- High market share
- High profitability or high profit margin
- Heritage or longevity
- Competitive edge
- Uniqueness
- Positive image
- Technological superiority
- Consumer confidence or trustworthiness

The guidance provided in *GIAV* can help analysts identify intangible property and the "other similar items" that both qualify and do not qualify as an intangible property for purposes of Section 482 compliance.

OECD Guidelines and BEPS Definition of Intangible Property

The United States is a member country to the OECD, and is an active contributor in the development of the Guidelines. Therefore, many of the concepts that appear in the Section 482 regulations also appear in the Guidelines.

For example, the arm's-length price standard in the Section 482 regulations closely resembles the arm's-length charge standard in the Guidelines. Likewise, the best method rule in the Section 482 regulations is analogous to the most appropriate method principle in the Guidelines.

Similar to the Section 482 regulations, the Guidelines include a chapter devoted to intangible property. According to Chapter VI of the Guidelines, "the term 'intangible property' includes rights to use industrial assets such as patents, trademarks, trade names, designs or models. It also includes literary and artistic property rights, and intellectual property such as know-how and trade secrets."

The Guidelines distinguish between marketing intangible property and commercial intangible property. According to Chapter VI, B.1, of the Guidelines:

> Commercial intangibles include patents, know-how, designs, and models that are used for the production of a good or the provision of a service, as well as intangible rights that are themselves business assets transferred to customers or used in the operation of business (e.g. computer software). . . . Marketing intangibles include trademarks and trade names that aid in the commercial exploitation of a product or service, customer lists, distribution channels, and unique names, symbols, or pictures that have an important promotional value for the product concerned.

As noted above, the OECD is in the process of revising the intangible property chapter in the Guidelines. The current iteration of this revision is documented in the Discussion Draft and the BEPS deliverables. The OECD is separately working to address other related issues of base erosion and profit shifting through the BEPS action plan.

Although it is separate from the Guidelines, the work being done on the action plan related to intangible property is closely related to the Guidelines, and action plan recommendations and revisions to the Guidelines will be addressed together.

The next section of this discussion focuses on the identification and the valuation of intangible property in the Discussion Draft and the BEPS deliverables.

OECD 2013 Discussion Draft

The Discussion Draft addresses the identification of intangible property, and it also addresses topics such as location savings and other local market features, assembled workforce, synergies, the ownership of intangible assets, and supplemental guidance for determining arm's-length conditions for the relevant intangible property transaction.

The Discussion Draft proposes a revised Chapter VI, Special Considerations for Intangibles for the Guidelines. One change that is apparent is the proposed broadening of the definition of intangible property in the Discussion Draft.

Subsequent to publishing the Discussion Draft, the OECD published the BEPS deliverables. This document included a revised Chapter VI for the Guidelines. This revised Chapter VI replaces the information in the Discussion Draft. The 2014 BEPS Deliverables is discussed next.

2014 BEPS Deliverables

As discussed above, the OECD issued a discussion draft that specifically addressed the intercompany transfer pricing aspects of intangible property. This work dovetails with the joint OECD/G20 BEPS project, as the work on intangible property is specifically listed as one of the BEPS actions in the action plan.

The BEPS deliverables address the same topics that are addressed in the Discussion Draft, including topics unrelated to the identification of intangible property. Those other issues are not addressed herein. The focus of this discussion is the identification of intangible property.

Much of the information in the BEPS deliverables is similar to the information in the Discussion Draft. As noted above, the BEPS deliverables supersedes the Discussion Draft.

In the context of the BEPS deliverables, identifying intangible property means to:

1. identify the intangible property involved in the transaction(s),
2. identify which entity or entities legally own the intangible(s), and
3. identify which entity or entities contribute to the value of the intangible property (paragraph 6.104).

This discussion focuses on the first item in that list: identifying the intangible property.

The BEPS deliverables continues the trend of broadening the definition of "intangible" with regard to transfer pricing analyses. For example, paragraph 6.2 of the BEPS deliverables notes that:

> the key consideration is *whether a transaction conveys economic value* [emphasis added] from one associated enterprise to another, whether that benefit derives from tangible property, intangibles, services or other items or activities. An item or activity can convey economic value notwithstanding the fact that it may not be specifically addressed in Chapter VI. To the extent that an item or activity conveys economic value, it should be taken into account in the determination of arm's length prices whether or not it constitutes an intangible within the meaning of paragraph 6.6.

Further, paragraph 6.6 notes that:

> In these Guidelines, therefore, the word "intangible" is intended to address something which is not a physical asset or a financial asset, which is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances.

In this discussion, the terms "intangible" and "intangible property" are used interchangeably.

As shown in the above two citations, an intangible property is not defined by reference to a list of allowable intangible property. Rather, the definition in the BEPS deliverables is sufficiently broad to give a taxing authority significant discretion when analyzing a transaction for intangible property.

The most blatant example of this is the paragraph 6.6 definition above that begins the definition of an intangible property as "something" that is neither physical nor financial. The definition goes on to limit the entire universe of "things" that are neither tangible nor financial to only those "things" that are capable of being owned or controlled, and whose transfer would be compensable.

However, even with those limiting conditions on the entire universe of "things" that are neither physical nor financial, the definition of intangible property remains broad relative to common economic definitions of intangible property.

The BEPS deliverables also differentiates its definition of intangible property with the financial accounting definition of intangible property. The BEPS deliverables definition is the broader of the two definitions of intangible property.

According to BEPS deliverables paragraph 6.7, "Intangibles that are important to consider for transfer pricing purposes are not always recognised as intangible assets for accounting purposes." That is, even if an asset doesn't qualify as an intangible property for accounting purposes, it may still be appropriate to estimate a transfer price for that asset in a controlled transaction.

The BEPS deliverables further broadens the definition of an intangible property by *not* requiring an item to (1) enjoy legal protection or (2) be separately transferable in order to be considered an intangible property (BEPS deliverables paragraph 6.8). As previously discussed, these are common characteristics of intangible property from an economic perspective.

By comparing the economic definition of intangible property provided above to the BEPS deliverables definition, one can see how economic phenomena that do not qualify as an intangible property could be included as an intangible property for tax-related intercompany transfer pricing purposes.

The functional analysis that is typically included in a tax-related transfer price analysis should support the identification of an intangible property.

Functional analysis is a procedure to identify and organize facts related to the functions performed, risks assumed, and intangible property owned by the various companies of an affiliated group.

The purpose of the functional analysis is to accurately characterize the value-added activities undertaken by a particular entity in order to identify appropriate comparable transactions from which to establish arm's-length consideration for the activities.[18]

The functional analysis is especially important if the identified intangible in a tax-related transfer pricing analysis is broader than what would normally be considered an intangible property from an economic perspective.

Although the revised chapter VI of the Guidelines that is included in the BEPS deliverables is more voluminous than the existing Guidelines, much of the new information is open to interpretation.

To clarify the information in the identifying intangibles section of the BEPS deliverables, the document includes a section that provides illustrations of items often considered in transfer pricing analyses involving intangible property.

One intangible property in particular that is included in that section and is worth discussing herein is "goodwill and ongoing concern value." The BEPS deliverables do not precisely define goodwill and ongoing concern value; and, they note that financial accounting or business valuation definitions of goodwill do not correspond to the goodwill definition used in transfer pricing analyses.

When it comes to defining goodwill and ongoing concern value, Paragraph 6.28 of the BEPS deliverables notes that, "It is not necessary for purposes of this Chapter to establish a precise definition of goodwill or ongoing concern value for transfer pricing purposes or to define when goodwill or ongoing concern value may or may not constitute an intangible."

Absent a definition, the qualities that the BEPS deliverables attribute to goodwill and ongoing concern value include qualities such as a reputation for producing high quality products that enables a company to charge higher prices.

The document also provides examples that further illuminate the OECD intentions regarding the treatment of goodwill. Paragraph 6.92 of the BEPS deliverables notes, "For example, the transfer of rights to use a trademark under a licence agreement will usually also imply the licensing of the reputational value, sometimes referred to as goodwill, associated with that trademark, where it is the licensor who has built up such goodwill. Any licence fee required should consider both the trademark and the associated reputational value."

This concept is also illustrated in Example 21 of the BEPS deliverables, which is presented in paragraphs 71 through 73. In that example, the arm's-length charge for various identified intangible property such as patents, customer lists, and distribution rights is said to reflect "the value of the business which would include amounts that may be treated as the value of goodwill for accounting purposes [in a purchase price allocation]."

The most frequent way that the BEPS deliverables include goodwill in a transfer price is by including the value of goodwill in the transfer price of another intangible property, such as a trademark. Example 23 in the BEPS deliverables deals with that situation. The conclusion of Example 23 (paragraphs 79 through 83) is that the arm's-length charge for licenses should take into account the "value ascribed to goodwill for accounting purposes."

Note that this example does not say that all of the entity's goodwill should be included in the licenses transfer price. Presumably, the amount of goodwill that is included in the arm's-length charge for the licenses will be based on the functional analysis, among other case-specific factors.

Regardless of how goodwill is defined for a particular purpose, there are certain common economic attributes of goodwill that are consistent among the various goodwill definitions. These economic attributes can be instructive when the analyst or corporate tax professional is analyzing goodwill for tax-related transfer pricing purposes (such as the example given directly above), and they can be especially helpful given the lack of specificity to which goodwill is defined in either the Guidelines or the BEPS deliverables.

GIAV describes goodwill as having three components.

The first component is the existence of operating business assets that are in place and ready to use. This component is often referred to as going concern value. The second component is the ability of the business to earn a return that is greater than the amount needed to provide a fair rate of return on all of the business's tangible and identifiable intangible property. The third and final component of goodwill is expectation of future events that are not directly related to the business's future operations.

Transfer price analysts and corporate tax professionals should consider that some of the goodwill value may be related to assets that don't exist as of a particular analysis date (i.e., the third component of goodwill). This can be illustrated by the following example.

Let's assume that a very large and successful fast food company operated exclusively in the U.S. Let's further assume that this fast food company was expanding into a new country, and the U.S. parent company will create a foreign subsidiary to own and operate the foreign fast food business.

Finally, let's assume that the U.S. parent company projects that it will expand rapidly in the new market and have $100 million of fast foods sales in the foreign country in five years.

Upon entering this new market, the intangible property that may be transferred from the United States to the foreign country may include such intangible property as training manuals, recipes, trademarks, and the like.

However, if the brand name is not well known in the foreign country, the value of the intangible property, such as trademarks and trade names, may only have a nominal value.

In this example, the transfer of goodwill may be an important consideration in the overall transfer price analysis. If the value of goodwill is estimated as the business value of the foreign entity minus all of its identified tangible and identified intangible property, then the amount of goodwill in the foreign business entity could be substantial.

This is because the value of goodwill would include the expectation of future events (e.g., future customers, future products, and future store growth) and, accordingly, property that does not exist as of the analysis date.

Not all of this goodwill may be relevant for a tax-related transfer pricing analysis. That is because a component of this goodwill may include value attributable to future property (i.e., the third goodwill component described above).

The transfer price analyst should understand with relative specificity what subject company attributes are included in the goodwill that is included in the transfer price analysis. The analyst should also be careful that only those assets that are subject to a transfer price charge are included in the tax-related transfer price analysis.

Although the BEPS deliverables provide for broad discretion regarding the identification of intangible property, they nonetheless require that intangible assets be specifically identified. When goodwill is included in a transfer price, the specific attributes of goodwill that give rise to a transfer price should be identified and analyzed.

Based on the BEPS deliverables, it will not be acceptable to "suggest that vaguely specified or undifferentiated intangibles have an effect on arm's length prices or other conditions."[19]

"By broadly and vaguely defining 'intangible asset,' the OECD has placed a greater emphasis on the functional analysis in a transfer pricing analysis."

Conclusion

This discussion provided a time line of events that have contributed to the current status of intangible property transfer pricing policy in the United States and abroad.

A signification portion of this discussion is related to the BEPS deliverables. Although the Section 482 regulations provide the relevant guidance for the U.S. tax-related transfer price analyses, the work by the OECD is nonetheless important for U.S. analysts and corporate tax professionals.

This is because:

1. the United States is a member of OECD, and it can influence the OECD intercompany transfer pricing guidelines and
2. the BEPS deliverables is representative of where intercompany transfer pricing in the United States may be headed.

Consider, for example, that in 2014 there were proposals from both the U.S. Senate and the White House that resemble the work being done by the OECD.

This discussion also presented an update on the guidance surrounding intangible property identification for tax transfer pricing purposes. What is clear from the above discussion is that the definition of intangible property for transfer pricing purposes:

1. is being expanded and
2. leaves room for interpretation.

By broadly and vaguely defining "intangible asset," the OECD has placed a greater emphasis on the functional analysis in a transfer pricing analysis. Paragraph 6.86 of the BEPS deliverables notes that "labels applied to transactions do not control the transfer pricing analysis. . . . Thus, the functional analysis should identify the nature of the transferred rights in intangibles with specificity."

For these reasons, it is important for analysts to have a clear understanding of the appropriate regulations and to work closely with their clients to develop tax-related transfer pricing analyses that specifically identify the intangible property transferred in a controlled transaction.

Notes:

1. The OECD mission is to promote policies that will improve the economic and social well-being of people around the world. Thirty-four countries are OECD members, including the United States and Canada.
2. OECD, *Public Consultation, White Paper on Transfer Pricing Documentation*, July 30, 3013.
3. OECD (2014), *Explanatory Statement*, OECD/G20 Base Erosion and Profit Sharing Project, OECD. www.oecd.org/tax/beps-2014-deliverables-explanatory-statement.pdf
4. http://www.irs.gov/pub/irs-apa/proposed_services_regs.pdf.
5. Note that although these two revisions were separate, they are grouped here because the 1993 temporary regulations were largely issued because of the heavy criticism that was given to the 1992 proposed regulations.
6. Treas. Reg. § 1.482 -1(c)
7. Baker & McKenzie, North American Tax Practice Group, "Transfer Pricing: Managing Intercompany Pricing in the 21st Century," (Chicago: Baker & McKenzie Global Services, LLC, 2012), 5.
8. IRS Newswire, "IRS Accepts Settlement Offer in Largest Transfer Pricing Dispute" (September 11, 2006) http://www.irs.gov/uac/IRS-Accepts-Settlement-Offer-in-Largest-Transfer-Pricing-Dispute.
9. www.oecd.org/tax/closing-tax-gaps-oecd-launches-action-plan-on-base-erosion-and-profit-shifting.htm
10. Ibid.
11. Ibid.
12. www.oecd.org/ctp/beps-frequentlyaskedquestions.htm
13. Department of Treasury, "General Explanations of the Administration's Fiscal Year 2015 Revenue Proposals" (March 2014).
14. Treas. Reg. § 1.482-1(b)(1).
15. Robert F. Reilly and Robert P. Schweihs, *Guide to Intangible Asset Valuation* (New York: American Institute of Certified Public Accountants, 2014).
16. Ibid.: 3.
17. Ibid.: 6.
18. See for example, the Guidelines glossary and the Guidelines paragraph 1.42.
19. BEPS deliverables, paragraph 6.12.

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