



Comments to the OECD Discussion Draft on “Conforming Amendments to Chapter IX of the Transfer Pricing Guidelines”

On July 4, 2016 the OECD issued its “Conforming Amendments to Chapter IX of the Transfer Pricing Guidelines” in a document for public review. ICC welcomes the opportunity to comment on this review of the conforming changes. While the changes are largely of a clarifying and editorial nature, we wish to point out the following:

Most notably, the amendments work towards aligning Chapter IX with changes that have taken place in other parts of the Transfer Pricing Guidelines. In particular, this refers to the new OECD-guidelines on transfer pricing documentation (Chapter V). In this regard Sec. B.4, 9.32 et seq. clarifies that important business restructurings need to be described in the Master File; similarly, any business restructurings affecting a particular entity must be indicated in that entity’s Local File. Furthermore, the OECD encourages MNE groups to document their decisions and intentions with regard to business restructurings before the transactions occur as well as the evaluation of consequences from that business restructuring. We welcome this guidance as it clarifies the requirements of the new OECD-approach on transfer pricing documentation. At the same time it is explicit that the explanation of decisions and intentions as well as the evaluation of consequences are only recommended, i.e. there is no obligation for such documentation.

Similarly, Chapter IX has been amended to conform to the changes to Chapter VI on intangibles. Thus, Sec. E.2.1., 9.57, now explicitly states that in accordance with the principles laid down in the new Chapter VI, the legal ownership of an intangible does not by itself confer any rights to ultimately retain returns from exploiting that intangible. Rather, referring to Sec. 6.35 et seq., the functions related to the development, enhancement, maintenance, protection, or exploitation should be decisive in assigning returns from an intangible. While these amendments merely trace the earlier changes to Chapter VI, it needs to be noted that this increases the documentation requirements and (in effect) shifts the burden of proof to the taxpayer, i.e. in case of doubt the taxpayer will have to demonstrate which entities perform which functions rather than simply relying on the concept of legal ownership. Furthermore, Sec. E.2.2, 9.62 et seq., are now in line with the new terminology



(“intangibles transferred at a point in time when its valuation is highly uncertain”) and categories (“hard-to-value intangibles”). Additionally, while the blurred definition of hard-to-value intangibles and the use of ex-post information as suggested in Sec. 6.186 may be criticized by themselves, the amendments to Chapter IX merely trace the earlier changes to Chapter VI.

Overall, the content-related changes to Chapter IX seem to be minimal. ICC welcomes the fact that the OECD has kept some important clarifications with regard to the question, when a (taxable) business restructuring is assumed to exist. In particular, the OECD explicitly states that a mere reduction in the profit potential of an entity does not necessarily imply that a (taxable) restructuring has taken place (cf. Sec. D.1, 9.39 et seq.). Similarly, the surrendering of a profit potential with significant uncertainties (including the possibility of losses) and/or of a profit potential that has deteriorated when compared to historical profitability does not necessarily warrant compensation; rather, in comparison it might be preferable to exchange this profit potential for a relatively low but stable rate of profitability (cf. Sec. D.2, 9.46 et seq.).

Further important clarifications that are (still) explicitly contained in Chapter IX refer to the fact that MNEs are free to organize their business operations as they see fit. Tax administrations do not have the right to dictate to an MNE how to design its structure or where to locate its business operations (cf. Sec. C., 9.34). Moreover, business models of MNEs are hardly ever found between independent enterprises; this, however, does not imply that such business models are not arm’s length. Similarly, the reasons for an MNE group to restructure may be found on a group-level rather than on the level of each individual entity (cf. Sec. C., 9.35. 9.37). We welcome the fact that these unequivocal statements have remained in Chapter IX. From our point of view they constitute important aspects to consider when delineating the structure and restructuring of MNEs and serve as a barrier to excessive and unjustified profit adjustments.



The International Chamber of Commerce (ICC) Commission on Taxation

ICC is the world business organization, whose mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy.

Founded in 1919, and with interests spanning every sector of private enterprise, ICC's global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. ICC members work through national committees in their countries to address business concerns and convey ICC views to their respective governments.

The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. ICC conveys international business views and priorities through active engagement with the United Nations, the World Trade Organization, the Organisation for Economic Co-Operation and Development (OECD), the G20 and other intergovernmental forums.

The ICC Commission on Taxation promotes transparent and non-discriminatory treatment of foreign investment and earnings that eliminates tax obstacles to cross-border trade and investment. The Commission is composed of more than 150 tax experts from companies and business associations in approximately 40 countries from different regions of the world and all economic sectors. It analyses developments in international fiscal policy and legislation and puts forward business views on government and intergovernmental projects affecting taxation. Observers include representatives of the International Fiscal Association (IFA), International Bar Association (IBA), Business and Industry Advisory Committee to the OECD (BIAC), Business Europe and the United Nations Committee of Experts on International Cooperation in Tax Matters.