

Recent Trends in Transfer Pricing of Intangibles and R&D Activities

SPEAKERS

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LIVE

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Agenda



Post-BEPS Structuring of Intangibles and R&D Activities



Recent Trends in Transfer Pricing of Intangibles

- **Restructuring involving intangibles**
- **Remunerating intangibles at arm's length**



Concluding Remarks

Agenda



Post-BEPS Structuring of Intangibles and R&D Activities



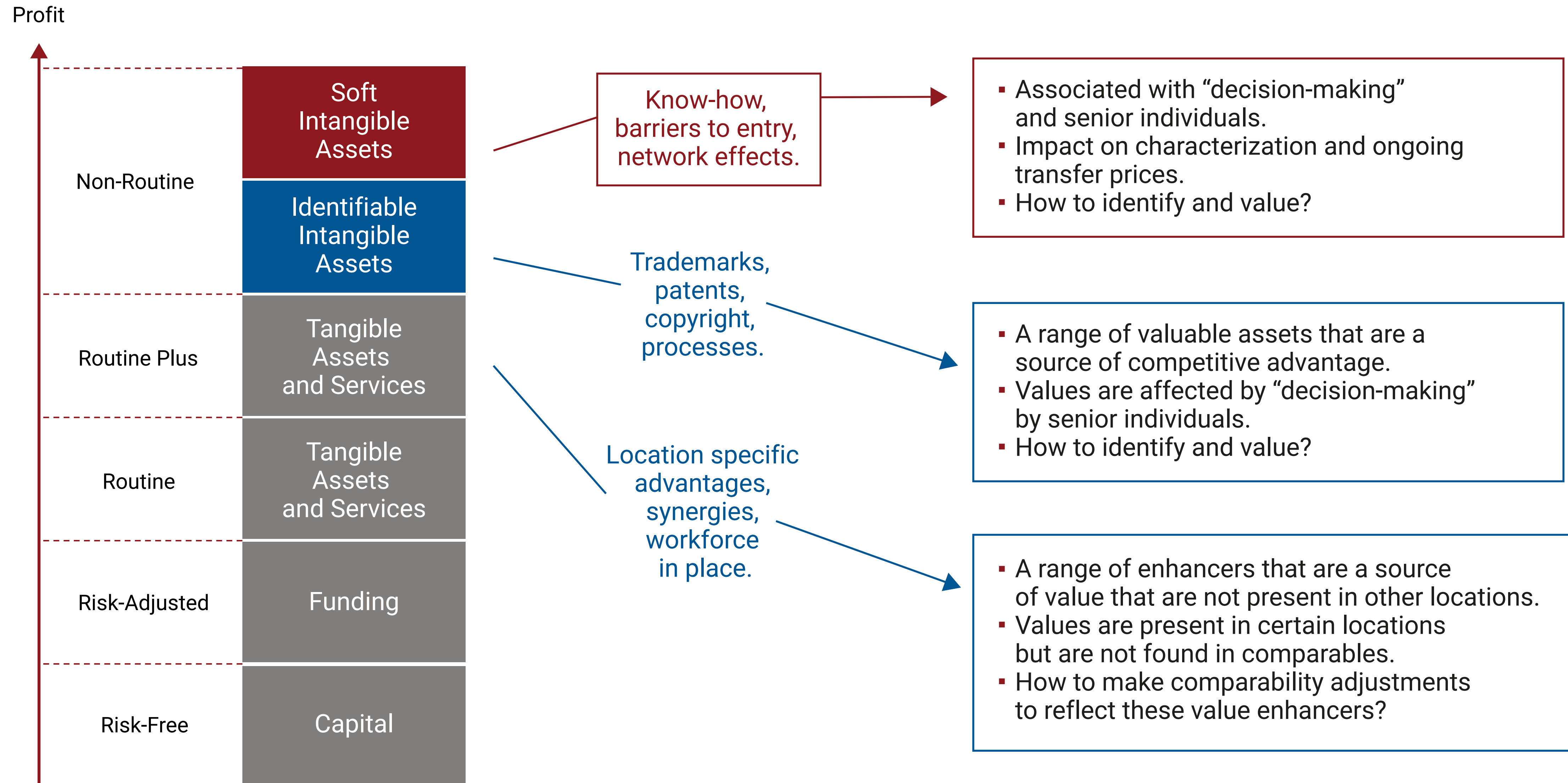
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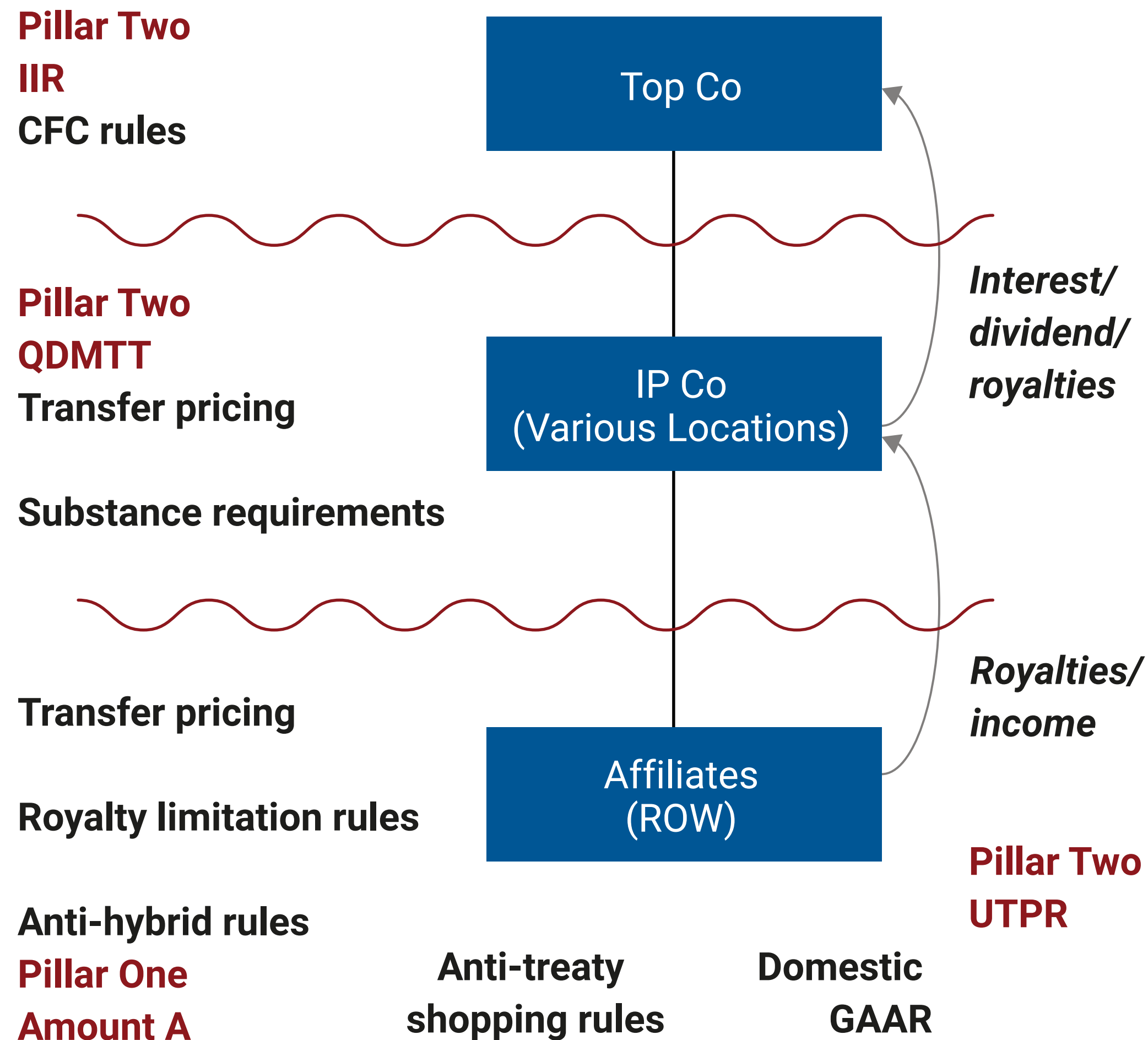


Concluding Remarks

Post-BEPS Remuneration Spectrum



Post-BEPS IP Structuring Considerations



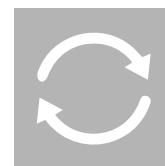
- **Transfer pricing aspects of intangibles have become even more integral to the structuring of IP and R&D activities in the post-BEPS era**
 - Legal ownership without DEMPE would not be sufficient to be attributed IP returns
 - Other countries where DEMPE activities are carried out may want a share of the IP income
- **Low tax IP regimes have been amended to conform with Action 5 of the OECD BEPS Action Plan**
 - Tax advantages can be supported only if there are qualifying R&D expenditures
- **Tax advantages can be negated by home country CFC rules**
- **Other post-BEPS changes in affiliate countries need to be monitored**
 - Various limitations can apply to deny deductions
 - Withholding tax costs may increase
- **Impact of BEPS 2.0**

Expert Interviews

Discussion Questions

1. In your experience, in what ways have the BEPS initiatives changed the way multinational groups structure their IP and R&D activities?
2. Are tax structuring opportunities still available?
If so, in what form do you see such tax structuring opportunities?
For example: use of amortization, IP Box regimes or something else?

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Non-Recognition

- **Post-BEPS OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines) allow for non-recognition of intra-group transactions**
 - Is it commercially rational?
- **Recent case law**
 - **An example: Poland vs “K.P.”, October 2023, Provincial Administrative Court, Case No I SA/Po 475/23**
 - K.P. is active in the retail sale of computers, peripheral equipment and software. In December 2013, it had transferred valuable trademarks to its subsidiary and in the years following the transfer incurred costs in the form of licence fees for using the trademarks. According to the tax authorities, the arrangement was commercially irrational and had, therefore, been recharacterized.
 - **Poland vs “Fertilizer Licence SA”, April 2022, Provincial Administrative Court, Case No I SA/Po 788/21**
 - **Poland vs “X-TM” sp. z o.o., March 2022, Administrative Court, SA/PO 1058/21**

Business Restructuring Cases

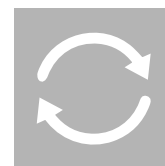
- **Israel vs Medingo Ltd, May 2022, District Court, Case No 53528-01-16**
 - Characterization of a series of transactions as a taxable transfer of IP
- **Netherlands vs “Fertilizer B.V.”, March 2023, Hoge Raad – AG Conclusion, Case No 22/01909 and 22/03307 – ECLI:NL:PHR:2023:226**
 - A fully fledged producer of fertilizer cannot be remunerated for a part of its operation as a limited risk manufacturer on a cost-plus basis
- **France vs Bupa Insurance, December 2022, Conseil d’État, Case No 450796 (ECLI:FR:CECHR:2022:450796.20221221)**
 - Whether the customers associated with the French branch have been passed on to a related company and, if so, whether an arm’s length compensation is required
- **France vs SA Tropicana Europe Hermes, August 2022, CAA of DOUAI, Case No. 20DA01106**
 - Whether reduced remuneration post-restructuring was arm’s length

Expert Interviews

Discussion Questions

- 1.** In the post-BEPS OECD Guidelines, transfer pricing is seen more and more as an “anti-abuse” concept.
Do you think multinational groups need to pay attention to transfer pricing as an anti-abuse measure?
- 2.** We have seen some examples of approaches that tax authorities may adopt in non-recognition and recharacterization and approaches they have taken in recent court cases.
What would you advise multinational groups in this respect – what are some of the things that they can do to “pass” the non-recognition and recharacterization tests?

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Definition of Intangible for Transfer Pricing Purposes

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“Something which is not a physical asset or a financial asset, and 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.”

- **Include patents, know-how and trade secrets, trademarks and brands, rights under contracts and licenses, goodwill and ongoing concern value**
- Definitions for accounting, legal or tax purposes are not relevant
- **Exclude group synergies, market-specific characteristics and assembled workforce**

DEMPE – Functions, Assets, Risks

- **Performing/controlling functions** is key consideration in determining which entities are entitled to retain returns attributable to intangibles
- Not essential for legal owner to physically perform all functions through its own employees – **outsourcing possible** – but control is key
- **Important functions** (with special significance to value contribution):
 - Design and control of research and marketing programmes
 - Management and control of budgets
 - Control over strategic decisions regarding development programmes
 - Important decisions regarding defence and protection of intangibles
 - Quality control
- Possible to use **profit split / valuation techniques** for important functions
- Possible to **disregard structure** due to outsourcing of important functions

Selection of Transfer Pricing Methods

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Selecting the most appropriate transfer pricing method:

- CUP can be applied where reliable comparable uncontrolled transactions can be identified
- A rule of thumb cannot be used as evidence that a price is arm's length (e.g. 75:25 split)
- Generally discouraged the use of cost based method, and one sided methods including resale price and TNMM
- Authorized the use of transactional profit split method – e.g. in cases where both parties make unique and valuable contributions to the transaction
- **Valuation techniques drawn from financial valuation practice may have application in appropriate circumstances**
 - Accuracy of financial projections, growth rates, discount rates, useful life and terminal values and tax rates

Expert Interviews

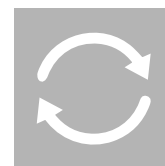
Discussion Questions

1. What are some of the areas that you see as most challenging in terms of meeting the post-BEPS transfer pricing requirements in IP structuring?

Transactions Involving Intangibles

- **Does the transfer of a business include valuable intangibles?**
- **Valuation of intangibles:**
 - Which method is most appropriate?
 - What are the stress points in the valuation approaches?
- **Remuneration of group entities involved in the supply chains:**
 - When do group procurement entities own valuable intangibles that they should be remunerated for?
- **Deployment of foreign brands vs creation of local brands:**
 - E.g. when do local marketing entities create local intangibles and when do they simply execute the brand development activities in the local market?
- **Use of intangibles and payment for the use of intangibles at arm's length:**
 - When do group distributors/manufacturers benefit from the use of intangibles and need to pay for them at arm's length?
- **Remunerating non-intangibles:**
 - Do non-intangibles have any value, when should they be compensated and how?

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- Structuring of intangibles and R&D activities continues to be an area that is actively considered despite the increasingly challenging post-BEPS environment
- Transfer pricing considerations have taken centre stage and are likely to be the cause of many audit enquiries and controversies that multinational groups should anticipate
- Impact of OECD Pillar Two has yet to be determined fully as countries implement the OECD model rules

Thank *you* for your attention!



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