

Cross-border business restructuring Chapter IX OECD guidelines

Report to Congress

- **Report to Paris 2011 Congress**
- **Not much to say about TP**
- **Covered in previous meetings**
- **Only new development on TP for CBBR is new Chapter IX**

Scope of chapter IX

- **Title: Transfer Pricing Aspects of Business Restructurings**
- **Much wider relevance**
- **Could regard as chapter Ia**
- **Very useful... as far as it goes**

Commencement

- **UK legislation requires Order in Council**
- **DTA requires new DTA**
- **But arguably chapter introduces no new rules**

Structure

- **Split into four parts from discussion document:**
 - **Special considerations for risks**
 - **Compensation for restructuring**
 - **Transfer pricing post-restructuring**
 - **Non-recognition**

1 Risks

- **Contractual arrangements are the starting point (unlike AOA)**
- **Fisc can challenge risk allocation if:**
 - **Conduct indicates contractual allocation is not followed**
 - **Inconsistent with arm's-length allocation**

AL risk allocation

- **Risk allocation in CUTs**
- **“just because an arrangement between associated enterprises is one not seen between independent parties should not of itself mean the arrangement is not arm’s-length”**

In absence of CUTs

- **What would independents have agreed?**
- **Relevant (but not determinative) factors:**
 - **Relative control over the risk**
 - **Financial capacity to assume the risk**
 - **Risks don't always follow capital or people functions**

Control of risks

- **Capacity to make decisions to take on the risk and whether and how to manage the risk**
- **eg, decisions:**
 - **which CM to use**
 - **Type of products**
 - **volumes, schedules**

Effect of methods

- **Using cost plus to set the price does affect risk allocation**
- **Using cost plus to test the price does not**

2 Compensation for restructuring

- **Tangible assets - fairly straightforward**
- **Key issue: compensation for restructuring costs and lost profit potential**
 - **“there should be no presumption that all contract terminations or substantial renegotiations should give a right to indemnification at arms length”**

- **Is there an agreement? With an indemnification clause?**
- **Does the clause (or lack thereof) meet the AL test?**
- **Rights under statute/case law?**

Would AL agmt. have indem. clause?

- **Examine AL agreements**
- **If no CUTs, what would independent parties agree?**
 - **Rights and other assets of parties, now and at start**
 - **Options realistically available**
 - **Investment made and payback period**

Who should pay?

- **Compensation not necessarily payable by transferee**
- **Who benefits from the restructuring?**

3 Post-restructuring TP

- **Pre-restructuring TP is not a valid comparable**
- **Location savings: allocate based on bargaining power**

4 Recognition

- **“MNE groups cannot be forced to have or maintain any particular level of business presence in a country. They are free to act in their own best commercial and economic interests in this regard.”**

- **“The presence of a tax motive or purpose does not of itself justify non-recognition of the parties’ characterisation or structuring of the arrangement”**
- **“non-recognition of a transaction is not the norm but an exception”**

1.64-1.69 re-emphasised

- **Economic substance differs from form**
- **Independent enterprises would not have characterised or structured in the same way *and* actual structure practically impedes determination of appropriate TP**

Structure practically impedes

- **Recognise *unless* appropriate transfer price cannot be arrived at**
- **Even if:**
 - **the transaction is not found between independent enterprises and**
 - **the tax administration doubts the commercial rationality**

Disclaimer

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