



The OECD public consultation on the Discussion Drafts on issues related to
Transfer Pricing Safe Harbours, Timing Issues and Intangibles

The OECD Conference Centre, Paris
12-14 November 2012

Discussion Draft (« DD ») on Intangibles
Provisions on Assembled Workforce

Laurence Delorme

Assembled Workforce in DD

Section A paragraphs 25 & 26, and section D paragraph 124

Comparability factor impacting arm's length price for services	Intangible capable of being transferred for a price
<p>(25) <i>Existence of a uniquely qualified/experienced employee group may affect arm's length price for services provided or goods produced</i></p> <p>(26) <i>Transfer of an existing assembled workforce may provide a benefit to the transferee by saving it expense/difficulty of hiring and training new workforce</i></p> <p>(26) <i>Transfer or secondment of isolated employees does not, in and of itself, constitute the transfer of an intangible</i></p> <p>(124) <i>Comparability adjustments may be required for matters such as assembled workforce. While such factors may not be intangibles (within meaning of section A.1.), they can nevertheless have important effects on arm's length prices in matters involving the use of intangibles.</i></p>	<p>(26) <i>Contractual rights and obligations MAY be intangibles within meaning of section A.1, so that a long term contractual commitment to make available the services of uniquely qualified employees MAY constitute an intangible</i></p> <p>(26) <i>As a factual matter, a transfer or secondment of employees MAY result in the transfer of valuable know-how or trade secrets for which compensation MAY be required in arm's length dealings.</i></p>

Business comments (1/2)

- **Ambiguities in DD**

- (i) what is meant under “*transfer of an assembled workforce*”, and
- (ii) whether “assembled workforce” qualifies as an intangible (within the meaning of section A.1 of the DD), or comparability factor (paragraph 124)

- **Clarifications needed**

Circumstances when “a *long term contractual commitment to make available the services of uniquely qualified employees may constitute an intangible*”

- Employer entitled to claim compensation from an employee, based on e.g. unfair competition legislation or labour law, employment contract restricting employee’s freedom (non compete, non disclosure agreement, star athletes’ contracts)
- Where this is the case based upon legal rights and obligations, transaction to be valued would relate to know-how and trade secrets themselves (or to value provided in the contract), and not to group of employees

- **Clarifications and practical guidance needed**

- How in practice to undertake **comparability adjustments** for differences in factors such as assembled workforce

Business comments (2/2)

- **Employee secondments (international mobility within MNEs)**
 - Globalization, division and specialization of labour within MNEs
 - Economic necessity for cooperation on an international basis => extensive secondment programs for engineers and management executives
 - Seconded employees retain employment contract with home office and remain on home payroll
 - **Service transactions, appropriately compensated with a cost or cost plus method**
 - **Skills and expertise as comparability factors only, not intangibles**
- **Assembled workforce**
 - Cannot be “owned or controlled” by the employer, hence cannot be sold or licensed independently of the entire business to which the workforce relates, i.e. issue of “transfer of an assembled workforce” arises only as part of a **business transfer**
 - As such, to be considered as business attribute that influence the value of an MNE’s assets, but **not** to be qualified as an intangible asset
 - **Assembled workforce is NOT an intangible within the meaning of section A.1**
 - Assembled workforce can contribute to the development of intangibles (e.g. know-how and other legally protectable intangibles), and should be taken into consideration in **transfer pricing comparability analysis**