

The OECD Issues a Discussion Draft on the Use of the Profit Split Method

By Jared Walls

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News: On December 16, 2014, the Organization for Economic Co-operation and Development (“OECD”) issued a *Public Discussion Draft on the Use of Profit Splits in the Context of a Global Value Chain*. The Base Erosion and Profit Shifting (“BEPS”) Action 10 discussion draft sets forth a number of scenarios under which the profit split method may serve as the most appropriate method to ensure that transfer pricing outcomes are in line with value creation. Public comments were invited for submission by February 6, and a public consultation is scheduled for March 19-20.

Views: Despite taking definitive—if controversial—positions in many of its previous BEPS discussion drafts, the OECD appears to be still in the process of staking out its position with regard to the use of the profit split method. The discussion draft outlines nine scenarios in which a transactional profit split may be useful. However, it does not conclude whether the profit split method should indeed be considered the most appropriate method under the stated fact patterns. Instead, the document uses these scenarios as a backdrop to pose a series of questions to the business community, soliciting feedback regarding when and how the profit split method can and should be applied.

It is encouraging to see Working Party No. 6 engaging the business community early in the process. However, the OECD has already intimated that it considers the profit split method to be one of the primary tools available to tax administrations to combat BEPS. Moreover, in consideration of the overall body of work prepared to date under the auspices of the BEPS Action Plan, the expanded role of the profit split method seems to be a foregone conclusion. The remaining question is how far the profit split method will extend into the space presently occupied by transfer pricing methods that evaluate the results of only one side of an intercompany transaction.

Fortunately, clarification may be on the horizon. The OECD plans to address stakeholder comments during the public consultation scheduled for March 2015, and is expected to release a revised discussion draft in June 2015.

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