



Tax Insights

PCG 2024/1: Intangibles migration arrangements

The ATO has finalised and released its compliance approach to intangibles migration arrangements involving international related parties in PCG 2024/1.

On 17 January 2024, the ATO released Practical Compliance Guideline [PCG 2024/1](#) (the PCG) relating to intangibles migration arrangements following an extended consultation period. The PCG, which applies to both new and existing arrangements, sets out when the ATO is likely to apply resources to consider the potential application of the general anti-avoidance rules (GAARs) or the transfer pricing rules to cross-border related party 'Intangibles Migration Arrangements'. In the PCG, 'Intangible Migration Arrangements' are defined as cross-border arrangements involving the 'migration' (which is specifically defined within the PCG) of intangible assets, or arrangements with similar effect. This includes arrangements relating to the Australian development, enhancement, maintenance, protection and exploitation (DEMPE) activities in connection with intangible assets held offshore.

The previous draft PCG, Practical Compliance Guideline PCG 2023/D2, was released for consultation in May 2023. It primarily focused on outlining a comprehensive list of the ATO's documentation and evidence expectations, along with a point based, risk assessment framework, designed to assist taxpayers to determine their risk rating (i.e., high, medium, or low risk).

The PCG has incorporated substantial and welcome amendments which will likely have an impact on the extent and nature of evidentiary documentation and analysis which may be required. Such amendments appear to reflect an in-depth consideration of the recommendations and feedback provided throughout the extended consultation period.

The PCG highlights the ATO's focus on the migration of Australian generated intangible assets and the mischaracterisation and non-recognition of Australian activities connected with intangible assets held offshore (as opposed to offshore activities in relation to intangible assets held by an Australian entity where there is no intangibles migration). The structure of the PCG is as follows:

- **Part One: Compliance approach** – sets out the ATO's compliance approach in respect of intangibles migration arrangements.
- **Part Two: Risk assessment framework** – explains how the ATO assesses compliance risks associated with intangibles migration arrangements.
- **Part Three: Evidence expectations** – outlines the types and level of evidence that the ATO will have regard to when examining intangibles migration arrangements.
- **Appendix 1: Examples of intangibles arrangements** – provides examples of intangibles arrangements for each risk level (i.e., out of scope transactions, lower risk, lower to medium risk, medium risk, and higher risk).
- **Appendix 2: Evidence expectations** – lists the type of evidence that the ATO is likely to have regard to when examining intangibles migration arrangements.

This article summarises the key elements of the PCG along with our initial observations.

Key elements of the PCG

International related party dealings in scope

There are two key arrangement types in scope of the PCG:

- Migration of intangible assets out of Australia; and
- Mischaracterisation and non-recognition of Australian DEMPE activities connected with intangible assets held overseas.

'Migration' has been specifically defined to include any restructure or change associated with a taxpayer's intangible assets that allows another entity to access, hold, use, transfer or benefit from the intangible assets.

Low value services, outbound and inbound distribution arrangements are generally out of scope of the PCG, providing that certain criteria are satisfied. An example of an excluded services arrangement is provided in Example 15 of Appendix 1.

Risk assessment framework

The PCG provides a detailed risk assessment framework to assist taxpayers to accurately self-assess the risk level posed by relevant Intangible Migration Arrangements. Similar to other ATO practical compliance guidelines, the PCG sets out a point-based framework and corresponding risk zones (i.e., green (lower risk), blue (lower to medium risk), amber (medium risk) and red (higher risk)). Arrangements which have been subject to ATO settlement, have been reviewed by the ATO and obtained a low risk/high assurance rating or court decision are in the white zone and require no further assessment.

The ATO's approach to risk assessment is set out in two Risk Assessment Framework Tables:

- Risk Assessment Framework Table 1 should be used by taxpayers to assess compliance risks in relation to an intangible asset migration.
- Risk Assessment Framework Table 2 should be used to assess risk associated with Australian activities connected with intangible assets held overseas, in particular, any risks of mischaracterisation and non-recognition of such activities.

Additionally, Appendix 1 of the PCG includes 15 examples of intangibles migration arrangements to illustrate how the risk assessment frameworks should be applied by taxpayers. In finalising the PCG, the ATO has included three new examples, notably two examples from TA 2020/1.

Evidence expectations

Appendix 2 of the PCG sets out an extensive list of evidence, which the ATO may seek to obtain when examining intangible arrangements. The ATO acknowledges that the type and level of evidence expected will be influenced by the risk rating of the relevant arrangement. However, it is clear that the PCG introduces greater evidence expectations to that which has generally been observed in traditional transfer pricing and country-by-country reporting documentation. This focuses on the identification of intangible assets and connected DEMPE activities, commerciality of intangibles migration arrangements and governance.

By way of example, the evidence relating to identification of intangibles may include:

- Intangible asset registers;
- AASB 138-compliant financial statements and associated records or documents relevant to the recognition of intangible assets;
- Registration documents, such as those required by and produced for IP Australia; and
- Internal or external database extracts or other relevant digital or physical records, etc.

Reportable Tax Position schedule disclosure requirement

The PCG indicates that taxpayers with in-scope arrangements will be required to disclose their self-assessment within the Reportable Tax Position (RTP) schedule, however the first reporting year for which these disclosures will be required and time limit for reporting self-assessment of past intangibles migrations are likely to remain unclear until the ATO releases new RTP schedule instructions.

It is expected that the ATO will consider the timing of publication of the PCG in finalising any RTP disclosure requirements, particularly during 2024, being the first year in which the PCG is effective.

Deloitte view

The ATO has incorporated feedback received in consultation on the prior draft PCG 2023/D2 and the PCG serves as an improved guide for taxpayers self-assessing the tax risks associated with Intangible Migrations Arrangements. However, despite these clarifications, it is likely that the ATO will have increased expectations of taxpayers to have regard to the risk assessment frameworks in proactively considering the risks posed by their existing Intangible Migration Arrangements. Specifically, the ATO's expectations regarding documentation appear to remain unachievably high. The expectation to ensure that appropriate documentation, evidence and governance processes are in place to support all arrangements (particularly those likely to fall within the higher risk categories) remains.

Relevant considerations may include:

1. Ensuring that the concepts included in the PCG are considered prior to entering any Intangibles Migration Arrangements or prior to making material changes to existing arrangements (i.e., the PCG makes observations regarding arrangements involving the centralisation, bifurcation, migration or functionality changes relating to intangible assets).
2. Performing a gap analysis of existing documentation and evidence relating to intangibles arrangements against the ATO's expectations in the PCG and addressing those gaps as appropriate (in particular, having regard to what is reasonable given the complexity of the arrangements and potential level of associated tax risk).
3. Undertaking a detailed discovery process to specifically identify and document the key value-driving intangible assets within global businesses, having regard to the OECD TP Guidelines' definition of intangible assets (i.e., considering both traditional intellectual property assets (e.g., patents, trade marks, etc.) and other non-traditional intangible assets that drive significant business value). Consideration should also be given to historical intangibles arrangements as part of this process given the retrospective nature of the PCG.
4. Assessing existing transfer pricing policies associated with intangible assets against Chapter VI of the OECD TP Guidelines and refining as necessary or establishing transfer pricing policies for any intangibles identified in the discovery process.
5. Collating documentation and evidence regarding intangibles arrangements contemporaneously.

The release of the PCG emphasises the importance of having a global intangible asset strategy. A global intangible asset strategy, within a broader corporate framework, ensures alignment of the intangible asset portfolio with long term business objectives and helps drive overall value. Maintaining an intangible asset strategy that considers tax, transfer pricing, legal and governance issues is an imperative in the current challenging tax and legal landscape multinationals face, where tax authorities globally are increasingly scrutinising intangible arrangements.

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