



Date: September 13, 2012

To: Joseph L. Andrus, Head of the Transfer Pricing Unit, Centre for Tax Policy and Administration, OECD

From: David R. Jarczyk, President & CEO, ktMINE

Subject: Comment on Discussion Draft on the Transfer Pricing Aspects of Intangibles

Dear Mr. Andrus:

The OECD requested public comments regarding the discussion draft on the transfer pricing aspects of intangibles. In its capacity as a global intellectual property business intelligence company, and as a small business with significant interests in transfer pricing matters, ktMINE humbly submits the following comments related to the discussion draft. Any questions or comments should be forward to David R. Jarczyk - President & CEO of ktMINE – at david.jarczyk@ktMINE.com or (773) 401-8962.

I sincerely applaud the quality and content of the discussion draft; especially having a great appreciation for the vast spectrum of opinions and critiques on the subjects of transfer pricing and intangibles. Specifically, I agree that transfer pricing analyses of intangibles transactions should be “the determination of the conditions that would be agreed upon between independent parties...” as well as dependent on “factual evidence”. Additionally, I appreciate the guidance with respect to selection of the most appropriate transfer pricing method, the use of a comparability analysis, and the use of valuation techniques. I also support the rejection of the application of a rules of thumb related to intangibles analyses; especially when solid market evidence exists to apply to such matters.

The remainder of this document provides comments related to common misconceptions related to the application of the CUP/CUT method as well as recommendations for the expansion of the comparability analysis section.

Common Misconceptions Related to the Application of the CUP/CUT Method

In my work with global tax authorities, consultants, and transfer pricing practitioners, I often encounter the following misconceptions related to the application of the CUP Method or CUT Method. Indeed, education is needed to ensure sound, prudent transfer pricing analyses. I recommend adding these following points to the discussion draft to provide an even playing field with respect to the use of the CUP Method or CUT Method.

MYTH: The CUP Method Cannot Be Applied Because Perfect Comparables Do Not Exist

FACT: The discussion draft does an excellent job referring to the OECD Guidelines’ preference for comparable uncontrolled transactions; specifically, the fact that the CUP Method is preferable over other methods. Of course, in practice, it becomes extremely difficult if not impossible to identify perfect comparables, especially when searching for comparable license agreements. This does not mean, however, that the CUP Method should be rejected. Most practitioners seem to forget that the OECD Guidelines state in Chapter II that “where differences exist between the controlled and uncontrolled transactions or between the enterprises undertaking those transactions, it may be difficult to determine



reasonably accurate adjustments to eliminate the effect on price. The difficulties that arise in attempting to make reasonably accurate adjustments should not routinely preclude the possible application of the CUP method.” Furthermore, the OECD Guidelines state that “practical considerations dictate a more flexible approach to enable the CUP method to be used...”

In fact, based on my experience with various transfer pricing matters, the practical application of the CUP Method generally provides more-than-sufficient benchmarks to act as one part of a prudent transfer pricing analysis involving intangibles. While these benchmarks may not be perfectly comparable, they do offer guidance with respect to the tested intangibles transactions and provide the professional with real-life negotiated data points for consideration.

MYTH: Global Market Information is Not Available

FACT: In many places, the discussion draft refers to the application of the CUP Method, specifically, the use of uncontrolled transactions as comparables for transactions involving intangibles. There is a common misconception that global license agreements - which may be used as comparable, uncontrolled transactions – are not available.

In fact, based on ktMINE’s research, over 60% of publicly available license agreements include territories for regions outside the United States. Indeed, the public domain contains uncontrolled license agreements for most regions and many countries.

MYTH: Redacted License Agreements Have No Value

FACT: There is a common misconception that only unredacted license agreements provide value to transfer pricing analyses involving intangibles. To transfer pricing professionals, the definition of “unredacted” generally means that royalty rate information is published within the license agreement. Based on ktMINE’s research, to date there are approximately 14,000 unredacted license agreements available in the public domain.

Unfortunately, a transfer pricing practitioner who bases an analysis on only 14,000 data points is probably missing the big picture. Based on ktMINE’s research, to date there are approximately 75,000 license agreements available in the public domain. Contained within these license agreements are various terms, deal structures, and divisions of functions and risks that can aid in the analysis of the arm’s length nature of tested transactions.

In fact, basing a transfer pricing analysis using a subset of available data (i.e., only those license agreements with unredacted royalty terms) would be a disservice to clients and shareholders as it turns a blind eye to the majority of market information available. In my experience, I have been a part of APA submissions, litigation situation, and third-party license negotiations where one expert relies on only agreements with unredacted terms, only to miss several key factors of comparability which would have been evident by reviewing all comparable, publicly-available agreements. As with any scientific approach, it is prudent for professionals to review all information available to them in order to provide a sound analysis.

Recommendations for the Expansion of the Comparability Analysis Section

The discussion draft rightfully cites the comparability principles from the OECD Guidelines. Furthermore, the provision of specific comparability factors is greatly appreciated. I recommend expanding this section with additional factors of comparability for the consideration of professionals. One

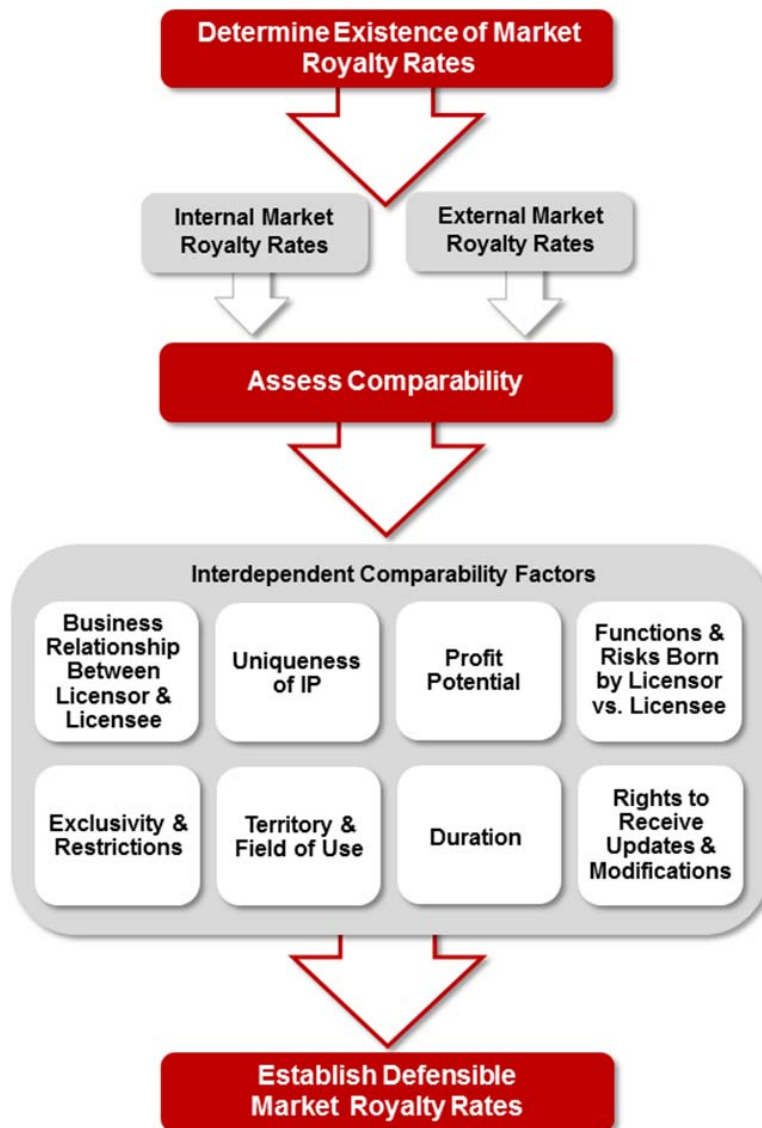


such example of the factors of comparability can come from a roadmap for finding and analyzing royalty rates and determining comparability that applies to all IP analyses. Exhibit 1 depicts this roadmap developed by ktMINE.

Exhibit 1: ktMINE Finding & Analyzing Royalty Rates Roadmap



Finding and Analyzing Royalty Rates



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These factors of comparability, in some form, are generally accepted by global analysts and lean heavily on the comparability criteria stated in the OECD Guidelines. Having a referenceable list of comparability factors developed before an analysis is a useful method for ensuring a consistent critique of each license agreement.

ABOUT ktMINE

ktMINE is an intellectual property (IP) information services firm focused on delivering IP protection and competitive advantage to IP owners and stakeholders across the globe. This is achieved by designing solutions based on three core standards: Comprehensiveness, Usability and Knowledge Transfer. By focusing on these standards, ktMINE is able to deliver solutions that provide relevant and actionable information for any type of IP analysis.

ktMINE utilizes its expertise and technology to mine data from the global public domain in order to provide Royalty & Market Rate Intelligence, Licensing Intelligence and IP Business Intelligence through its many solutions. ktMINE offers hands-on research solutions such as the Royalty Rate Finder™ database, and also collaborates with global organizations, corporations, and government agencies to provide customized research services tailored to fulfill their IP information needs.

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