

*Gustavo Weiss de Resende*

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# An Answer to Aggressive Tax Planning with Intangibles

Designing Anti-Avoidance Measures  
that Comply with International,  
Trade and European Law

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74



# An Answer to Aggressive Tax Planning with Intangibles

## Why this book?

This book thoroughly covers tax planning structures (ab)using intangibles and the compatibility of current and future measures against such structures in relation to higher-ranking law.

In contemporary business landscapes, the paradigm of success has shifted from traditional metrics of scale, such as extensive infrastructure and large workforces, to the strategic exploitation of intangible assets. This transformative trend, evident in multinational enterprises, underscores the pivotal role played by intellectual property in value creation and international tax optimization. In this context, the OECD and other international actors have on multiple occasions tried to address the alarming phenomenon of base erosion and profit shifting facilitated by multinational enterprises reallocating ownership of intangibles to low-tax jurisdictions.

This book critically dives into one such aspect – namely, cross-border intra-group royalty payments – as an integral component of aggressive tax planning structures. While international organizations and public outcry have drawn attention to tax scandals involving major corporations, the author demonstrates how the response from international tax law has been largely insufficient, particularly concerning the use of intangible assets. This void has prompted some nations to enact multi- and unilateral measures to counter this specific pathway for profit shifting.

Filling a significant gap in scholarly literature, this book pioneers a monographic study focused specifically on royalty payments and their role in base erosion and profit shifting. Employing a deductive-analytical methodology, it meticulously dissects legislative measures that might aid in the fight against base erosion and profit shifting in the context of intellectual property. The analysis spans a range of instruments, including controlled foreign company rules, general anti-avoidance rules and transfer pricing regulations, as well as withholding taxes and royalty deductibility barriers, also in the context of the OECD Pillar Two minimum tax. These measures are then tested against the background of their effectiveness and, more importantly, their compatibility with higher-ranking law.

The author particularly endeavours to provide a normative best-practice approach for realistically resolving this issue, offering a balanced, technical solution in the ever-evolving landscape of international tax law. This comprehensive analysis contributes to ongoing discussions on global tax reform, urging a nuanced and context-sensitive approach to address the challenges posed by aggressive tax planning structures in the post-BEPS era.

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**An Answer to Aggressive Tax  
Planning with Intangibles**



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Designing Anti-Avoidance Measures that  
Comply with International, Trade and  
European Law

Gustavo Weiss de Resende

This book is based on the thesis submitted for a doctoral  
degree at Ludwig-Maximilians University of Munich



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## Introduction

In recent times, it has become clear not only to multinational companies but also the public in general the relevance that intangible assets have for the modern business world. Companies commonly considered “successful” are no longer necessarily those with huge factories, thousands of employees and heavy machinery – but those with assets capable of generating value based on ideas, patents, software, know-how, etc. Intellectual property (IP) has therefore become today, more than ever, not only a type of asset linked to value generation due to its uniqueness but also an extremely efficient mean for multinational enterprises (MNEs) to spare taxes internationally.

Such international groups use the possibility of easy transfer and difficult valuation of intangibles to (re)allocate ownership of their assets strategically to related parties in low-tax jurisdictions – be it tax havens<sup>1</sup> or countries with special incentive regimes for IP. As a result, IP or R&D-intensive businesses have a much lower effective tax rate than non-innovating companies. An analysis as early as that of Grubert<sup>2</sup> shows that approximately *half of all profit transfers* from high-tax to low-tax jurisdictions can actually be traced back to tax structures in connection with intangible assets.

This occurs for several reasons and due to multiple factors, and while not every multinational uses exactly the same structure or techniques to shift profits, the strategies used follow some specific standards and have relatively well-defined requirements. This has led to a certain tax awareness regarding base erosion and profit shifting (BEPS) that has grown in the international environment not only at the level of international organizations (such as the OECD, the G20 and the European Union) but also in the public milieu due to tax scandals of large companies such as Starbucks, Apple, Facebook, Amazon and so on. The proliferation of such tax outrages has recently revealed some tax avoidance practices at an international level with massive amounts of revenue, and their resonance in the media has exacerbated a legitimate sense of injustice on the part of citizens, which has increased public pressure on politicians to take up action against such arrangements.

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1. The tax haven concept, outlined in the 1998 OECD Report, required jurisdictions to meet four criteria, to varying degrees: (i) low or non-existent effective tax rates; (ii) a lack of transparency; (iii) insufficient exchange of information with other jurisdictions; and (iv) no substance requirements for activities conducted within the jurisdiction.

2. H. Grubert, *Intangible Income, Intercompany Transactions, Income Shifting, and the Choice of Location*, LVI National Tax Journal 1 (2003), p. 221ff.

Yet, despite the rapid evolution of the importance of intangibles and a strong shift in the economic priorities and overall corporate structure of MNEs, the reaction of international tax law has been largely insufficient. While many countries and the OECD have been for years devising strategies to counter profit shifting that use, e.g., transfer pricing arrangements or intra-group debt financing by implementing rules in the likes of limitations to interest deductibility, controlled foreign company (CFC) rules and transfer pricing documentation duties, strategies that use intangible assets and cross-border royalty payments (or “license fees”) due to licensing agreements have not been satisfactorily addressed.

This gap in the international taxation scenario has led a few countries, such as Germany, Austria and even Ukraine, to recently adopt *unilateral* measures – marginal to the international cooperative system of the OECD and the more recent GloBE proposal – to counter profit shifting through intangible assets, amongst which are the so-called royalty deductibility barriers.

This mechanism prevents, after meeting a variety of requirements, the deduction of intra-group international royalty payments – the focus of this book – ensuring that the amount will be taxed at least once in a substantial manner in the country that introduced the rule. This book has at its core object the above-mentioned rule, as well as any other instruments that may assist in the struggle against BEPS related to IP, such as an inverted tax credit system, the (re)introduction of withholding taxes and so on, as well as the underlying issues such instruments bear. The importance of this analysis is manifest in that it seeks to find a definitive answer to a problem that, to date, has resulted in intense BEPS by multinationals and has not been adequately handled neither internationally nor domestically.

The present work is, to the best of the author’s knowledge, the first monographic study in English with this methodological cut-out in royalty payments. Through a deductive-analytical methodology, each of the different legislative measures that can be employed to combat the artificial shifting of profits and the erosion of the tax base through cross-border intra-group royalty payments will be thoroughly dissected from this particular perspective. The final objective will be to present a normative solution in the form of a best-practice approach for a (realistic) resolution of the problem with this sort of aggressive tax planning structure.

To this end, chapter 1 of this book will assess the definition, conceptual differentiation and fundamentals of the levies on intangible assets and IP tax planning. Special attention is given to the international literature on

the subject, considering the plurality of concepts and the need to precisely delineate IP as an object of taxation and international tax planning, in order to establish the internal boundaries for the research framework within the context of tax law. The idea of aggressive tax planning with IP can be summarized as the reallocation by multinational companies of the ownership of their intangible assets to related parties in low-tax jurisdictions. Commonly, there will be only one company in the business group that will hold ownership and therefore be responsible for the administration of the group's IP. This structure is known as the "license model", a tool used by internationally active companies to gain a fiscal competitive advantage.

From this conceptual summary highlighting the problem at hand, this research firstly concentrates in chapter 2 on the main problematic of general measures, such as general anti-avoidance rules, transfer pricing and CFC rules, with the intention of appraising differing methods directed towards the same end, under the lighting of the issue with the payment of royalties. In addition, the shortcomings and inconsistencies inherent to their respective systems will be emphasized in order to demonstrate how these rules are, despite their broad spectrum, insufficient for various reasons to combat aggressive tax planning structures that (ab)use IP. At the end of this chapter, a short excursus with the OECD nexus approach is carried out in order to illustrate how this substantive approach focused on value creation is far from addressing IP concerns, legitimizing preferential regimes that continue to be used as part of tax saving schemes.

Chapter 3 will then do an assessment of specific measures – such as the relatively new royalty deductibility barriers, inverted tax credit systems, the GloBE proposal and even the US BEAT/SHIELD – through a holistic approach, in which the implementation of each measure is evaluated according to its working mechanisms, effectiveness and practical feasibility. This is one of the main cores of the project since these specific measures should be par excellence a targeted solution to the problem, allegedly leading to its definitive resolution. However, each one of them has distinct issues to be addressed, ranging from its strong economic impacts and reduction of a country's competitiveness as a business location; its incompatibility with higher-ranking law; and even its difficulty in practical and political implementation.

Once a comprehensive analysis of each alternative for the addressing of BEPS through royalty payments has been carried out, the book will proceed in chapters 4 and 5 to scrutinize the viability of these measures vis-à-vis higher-ranking law, from a strictly legal point of view. In the context of this

compatibility of anti-tax avoidance measures concerning royalty payments with higher-ranking law, it is necessary to assess the respective interactions not only with regards to treaty law and model tax conventions but also the relevant European law and – given the international nature of the task – the often-forgotten WTO law and bilateral investment treaties. In these sections, the consistency of the measures previously studied with the current international tax framework will be discussed, and eventual incompatibilities will be put to the test. It is noticeable that the issue with royalties goes beyond mere transfer pricing or GloBE minimum tax issues, and that is why a holistic approach to this specific problem must be adopted.

Thus, the final part and ultimate goal of this book will be to present in chapter 6 a reasonable, balanced and technical solution to the specific problem of BEPS arising from aggressive tax planning schemes involving payments for the right to use IP. In order to do so, each of the available measures must necessarily be evaluated individually in its various dimensions, taking into account the different interests that countries in distinct economic circumstances may have in solving this issue.





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