



IP Holding – Concept Note

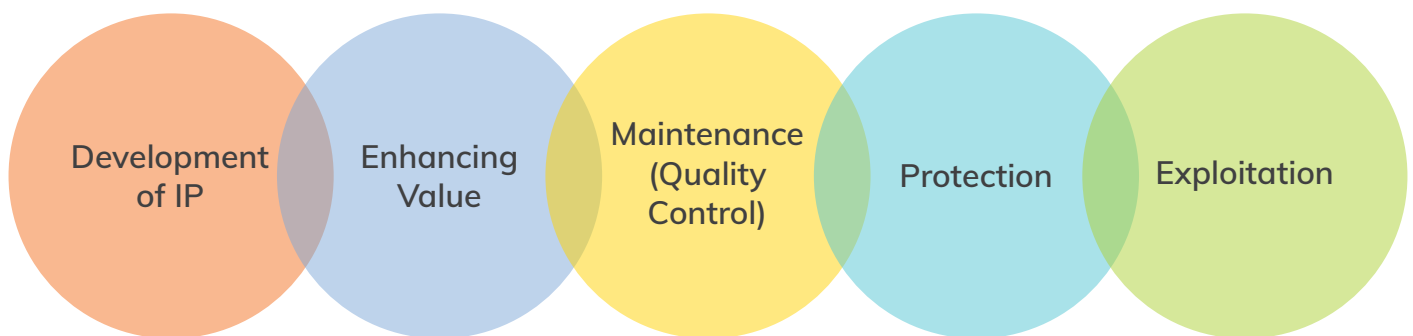
Businesses and companies often come across decision making w.r.t to where should be the IP holding in case of group entities having multi country presence. In the below paragraphs we have analyzed the same from a India stand point especially in light of BEPS and the development thereunder.

Key Elements, relevant for IP holding¹

- With the BEPS Action Plan (introduction in 2015) the approach towards IP holding underwent a change.
- Action Plan 8-10 of the BEPS Action Plan focuses on alignment of transfer pricing outcome with value creation.
- Gradually the moved away from concept of legal ownership and has adopted an approach of looking at who is contributing

to the value-chain for the development and management of intangibles (i.e., a clear focus on 'substance' for conducting transfer pricing analysis of Intangibles)

- Recognition of “economic” ownership concept
- To determine the entity entitled to the return on intangible, the focus is participation of entity in DEMPE.
- Providing funding for the development activity alone cannot warrant more than a risk-free financial return.
- Return retained by an entity in group depends on the contributions it makes through DEMPE functions to the anticipated value of intangible.



¹It is to be noted that these points are purely from a value and substance point of view being considered as per the governing transfer pricing and related developments proposed under BEPS Action Plan and view adopted by courts in India. The jurisdiction to hold IP and advantages / disadvantages of a particular territory are not part of the analysis, currently. Also, there is no comments on any past transactions or treatment considered in isolation without reference to the current points.

Who performs the function of development of IP?

Not funding the development but economically significant functions including critical functions such as conceptualization and design of the product and providing strategic direction and framework

Who has the control of the IP?

Direct supervision: not only capability to control, but actually controls / supervises research / product development through:

- strategic decisions to perform core functions,
- monitor activities on a regular basis.

Who intends (or actually bears the risk)?

In fact, and not just contractual bearing of risks (insistence on substance over form)

Considering the above points taxpayer may be inclined to keep foreign holding of IP, for the following reasons:

- a. Foreign holding company gives a better protection to IP (mature law as to the infringement of IP)

- b. A non-Indian holding company gives a lot of credibility as to the longevity and certainty of the treatment of the tax and related aspects.
- c. It's a tax efficient way as compared to having exposure / uncertainty as to the treatment upon selling IP.

however, the same could be challenged by Indian authorities as under:

- a. Fail the substance / DEMPE test (assuming development and related strategic decisions will continue to be taken in India)
- b. Authorities would challenge pricing / payments being made to India for the purpose of development.
- c. In case Economic owner of the IP is concluded to be India, there is a possibility that the income from exploitation of the IP be attributable to India (despite not being a legal owner)

Based on the above, it would be prudent to weigh the pros and cons with a long-term objective to be achieved keeping in mind the evolving scenarios as to the "substance" in such cases as compared to earlier.



603, Amfotech IT Park, Wagle Estate Road,
Opp. Old Passport Office, Thane (W), Maharashtra-400601.

+91 22 6530 6398 / +91 9821639398

contact@yourcfo.co.in

www.yourcfo.co.in

MUMBAI | DUBAI | HYDERABAD