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Amsterdam Centre for Tax Law

Harmful tax practices
BEPS Action 5

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BEPS Action 5

- 16th September 2014 Deliverable
  - Countering Harmful Tax Practices More Effectively, Taking into Account Transparancy and Substance
- 11th November 2014 Germany – UK Joint Statement
- 9th December 2014 Agreement EU Code of Conduct
- 5th February 2015 Agreement OECD/G20 Countries

Focus on substantial activity

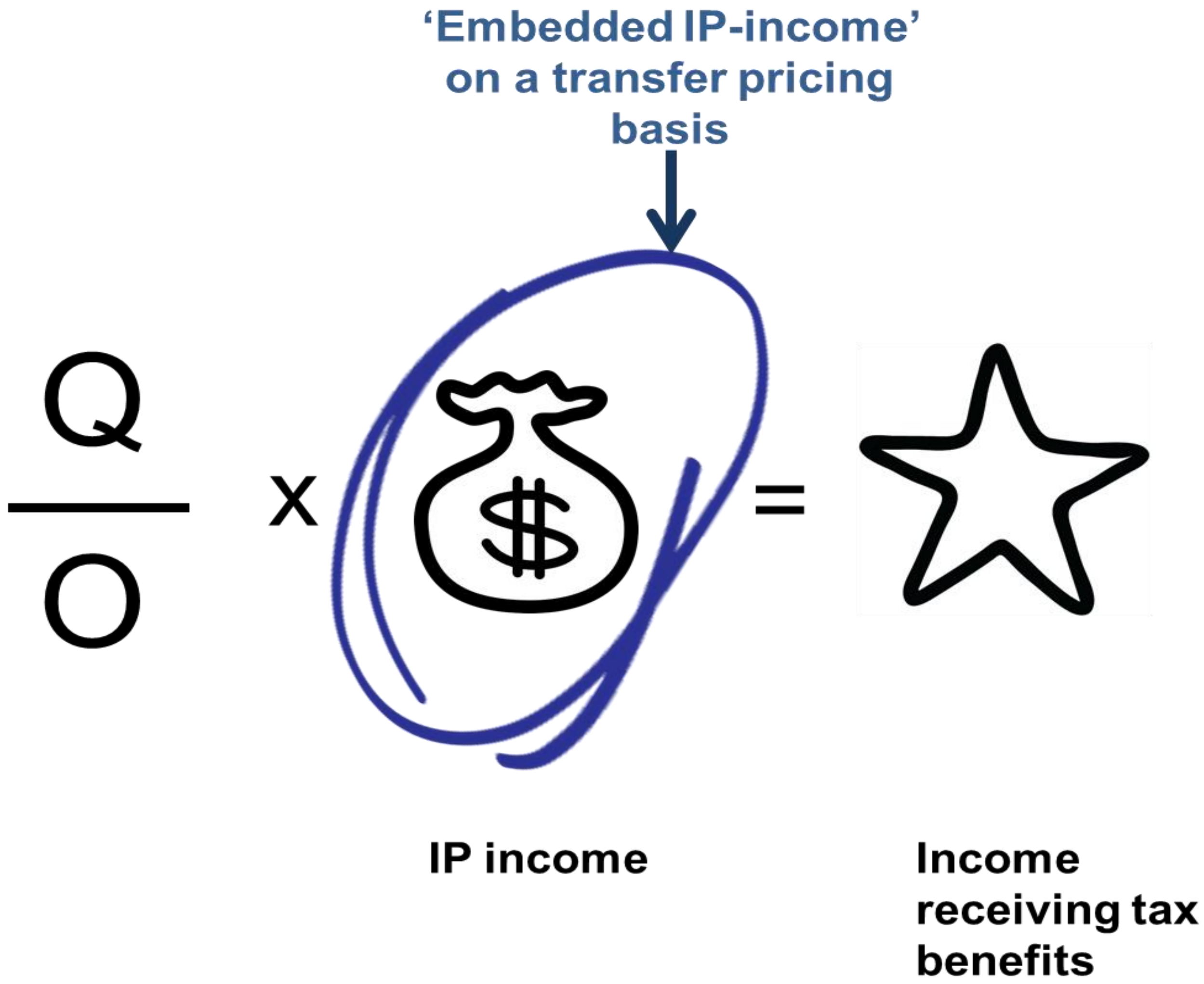
Intangible regimes

Nexus approach

Modified nexus approach

- Nexus?
- Benefits for income arising out of IP
- direct nexus between income arising out of IP and the expenditures contributing to that income
- Focus on expenditures to ensure that IP regimes encourage R&D activity to taxpayers that in fact engage in such activity (personal nexus)

Nexus Approach



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IP Assets

- Patents and functionally equivalent IP assets that are legally protected and subject to approval and registration processes

- No marketing-related IP assets (trademarks, etc)

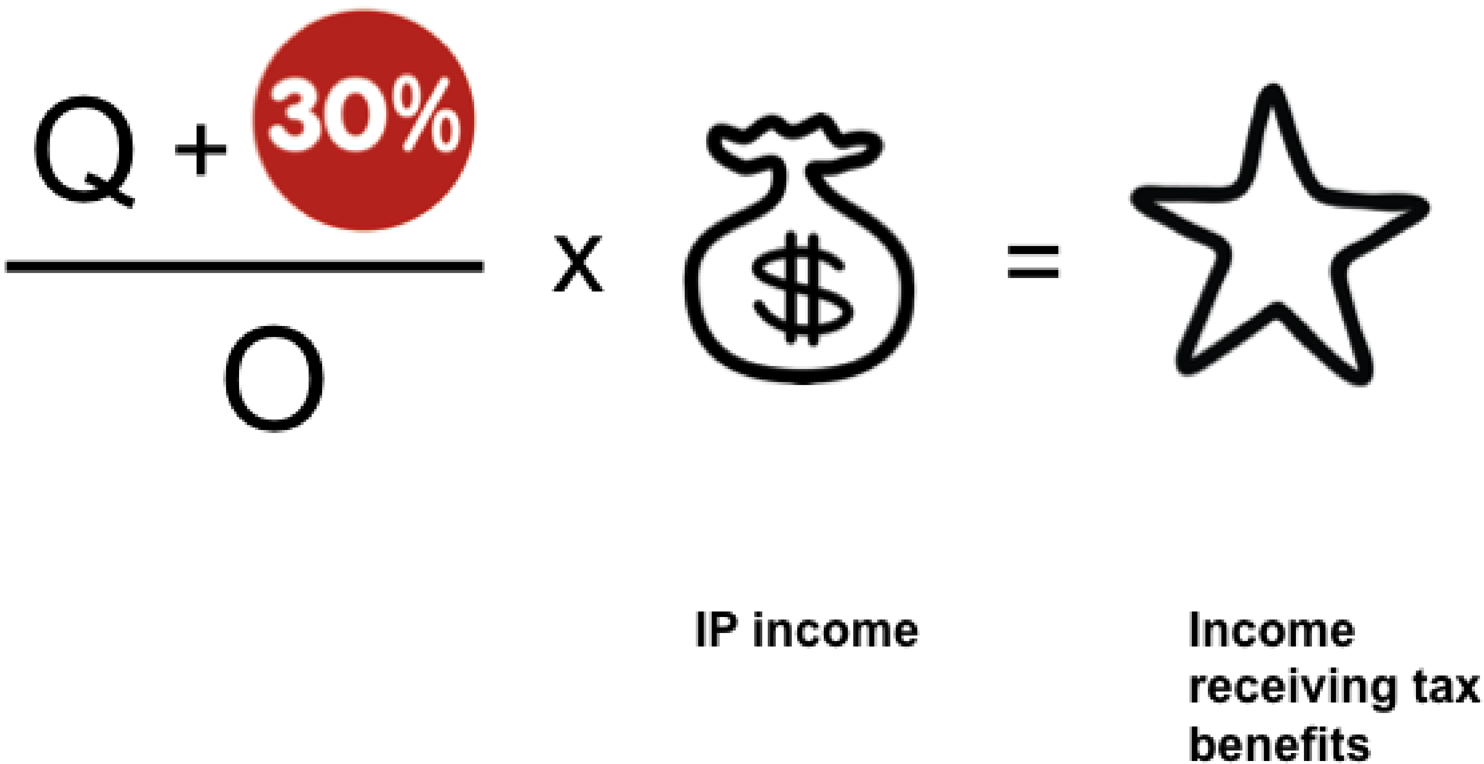
Qualifying expenditures

- Salary and wages
- Direct costs
- Overhead costs
- Cost of supplies
- Depreciation (not depreciation of acquisition costs)
- NOT: Interest payments, buildings costs, acquisition costs, costs not directly linked to IP asset.

Acquisition and Outsourcing

	Third parties	Related parties
Outsourcing	✓	✗
Acquisition	✗	✗

Modified Nexus Approach



Example EU/OECD/G20

- Parent acquires IP 10
- Development costs incurred by Parent 100
- Subsidiary incurred R&D expenses 50
- What is the fraction?
  - Qualifying expenditure = 100
  - Maximum up-lift amount 30% van 100 = 30

$$\frac{130}{160} \times \text{IP income} = \text{Income receiving tax benefits}$$

Footnote '8' with respect to Non-EU States

- Non-EU States allowed to included under qualifing expenditures:
  - outsourcing to *resident* related parties

- So allowed to discriminate between resident and non-resident parties

- Limited to **non**-EU States because in the EU this would be a restriction of free movement of establishment/services

Some Issues

- What are related parties?
- Innovations that do not benefit from patent protection?
- Temporal gap between R&D expenses and IP income
- CFC-rules
- Anti-abuse rules (non-deductibility of royalties) by source States (Austria)
- Treaty benefits by source States

The Way Forward

- Ultimate shut down 30 June 2016
- Maximum 5 year grandfathering
- Special rules will be developed for tracking and tracing of R&D expenditure
- EU Code of Conduct Group is reviewing right now all EU regimes
- If EU Member States will not implement Action 5; European Commission will come with legislation

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