



# Insights: Transfer Pricing

CRA Charles River  
Associates

August 2019

## The Ninth Circuit rules on the definition of an “intangible”

On August 16, 2019, the US Court of Appeals for the Ninth Circuit affirmed a decision of the US Tax Court regarding the definition of an intangible and the valuation method of intangible assets in relation to a cost-sharing arrangement (CSA) entered into prior to the 2009 temporary cost sharing regulations. (See *Amazon.com Inc. v. Commissioner*, 9th Cir., No. 17-72922)

Amazon.com, Inc. and its US subsidiaries (collectively referred to as “Amazon US”) entered into a CSA with a Luxembourg holding company for European subsidiaries, Amazon Europe Holding Technologies (AEHT). Amazon US transferred groups of pre-existing intangible assets (website technology, marketing intangibles, and customer information) to AEHT in exchange for a buy-in payment. The IRS examined and calculated AEHT’s buy-in payment by including remuneration for “residual-business assets” (i.e. Amazon US’s culture of innovation, the value of workforce in place, going concern value, goodwill, and growth options) resulting in a substantially higher buy-in payment.

Amazon US filed a petition in the US Tax Court to challenge the IRS’s definition of compensable intangibles and its resulting valuation. The US Tax Court primarily sided with Amazon US (see T.C., No. 31197-12, 148 T.C. No. 8, 3/23/17). At issue in the IRS appeal was whether the buy-in payment for intangible assets must include compensation for “residual-business assets” pursuant to the then current transfer pricing regulations promulgated in 1994 and 1995. The Ninth Circuit concluded that the definition of an “intangible” does not include residual-business assets, and that the definition is limited to independently transferrable assets under the regulations in effect at the time.

It is worth noting that in 2009, the US Treasury Department issued temporary regulations broadening the scope of contributions for which compensation must be made as part of the buy-in payment. In 2017, Congress amended the definition of “intangible property” in IRC section 367(d)(4)). In a footnote, the US Court of Appeals stated that, if the present case were governed by the 2009 regulations or by the 2017 statutory amendment, “there is no doubt the Commissioner’s position would be correct.”

### About CRA’s Transfer Pricing Practice

Our consultants help clients navigate every phase of implementing and supporting international tax structures including: intellectual property (IP) and acquisition planning, documentation, and audit defense. We also provide litigation support and expert testimony services in tax and transfer pricing litigation. To follow are some highlights of projects from the past year.

## Contact

### Rebel Curd

Vice President & Practice Leader  
Transfer Pricing  
Pleasanton  
+1-925-460-1332  
[rcurd@crai.com](mailto:rcurd@crai.com)

### Robin Hart

Principal  
Transfer Pricing  
San Francisco  
+1-415-490-2720  
[rhart@crai.com](mailto:rhart@crai.com)

### Haruka Abe

Senior Associate  
Transfer Pricing  
Pleasanton  
+1-925-201-5983  
[habe@crai.com](mailto:habe@crai.com)

[www.crai.com/transferpricing](http://www.crai.com/transferpricing)

The conclusions set forth herein are based on independent research and publicly available material. The views expressed herein are the views and opinions of the authors and do not reflect or represent the views of Charles River Associates or any of the organizations with which the authors are affiliated. Any opinion expressed herein shall not amount to any form of guarantee that the authors or Charles River Associates has determined or predicted future events or circumstances, and no such reliance may be inferred or implied. The authors and Charles River Associates accept no duty of care or liability of any kind whatsoever to any party, and no responsibility for damages, if any, suffered by any party as a result of decisions made, or not made, or actions taken, or not taken, based on this paper. If you have questions or require further information regarding this issue of *Insights: Transfer Pricing*, please contact the contributor or editor at Charles River Associates. Detailed information about Charles River Associates, a trademark of CRA International, Inc., is available at [www.crai.com](http://www.crai.com).

Copyright 2019 Charles River Associates