Transfer pricing rules are applied in order to calculate the amount of profits which are liable to tax. These special rules are needed because in the case of transactions between related entities, the motivations for arriving at a certain price may be different from and not as balanced as two unrelated parties negotiating. For this reason, transfer pricing rules adjust the actual results to the results that would have occurred had the parties negotiated 'at arm's length'.[323]

The arm's length principle is based on a comparison of the internal transfer price under scrutiny with a price independent third parties would have arrived at. This can be achieved either by comparison with agreements between two independent third parties conducted under the same or comparable conditions (so-called external comparison) or by comparison with agreements concluded by one of the dependent parties with one independent party, for example a licensee (so-called internal comparison).[324] Finding such comparable agreements with regard to intellectual property assets is generally extremely difficult and sometimes impossible, because such transactions either do not exist (there is no comparable IP asset) or are rarely publicised (e.g. licencing agreements).[325] The valuator needs to realise this and adjust his calculations accordingly.

There are a number of rules and guidelines on national and international levels which deal with this complex of issues. The OECD has issued transfer pricing guidelines[326] which are – together with the American IRC sec. 482 rules[327] – the practically most important ones.[328] Even though these rules do not concretely stipulate how the arm's length principle is to be operationalised, they lay down a number of methods by which an arm's length price can be calculated, such as the licence-based methods 'Comparable Un-

322 *Ernst&Young*, 2005-2006 Global Transfer Pricing Surveys – Global Transfer Pricing Trends, Practices, and Analysis, November 2005, p. 4.

323 This arm's length principle is the foundation of all international rules on transfer prices, cf. *Ernst&Young*, Business Restructuring – Three Taxation Issues, p. 4.

324 *Wurzer/Reinhardt*, Bewertung technischer Schutzrechte. Praxis der Patentbewertung, p. 142.

325 Cf. 2.2.2.1.

326 *Organisation for Economic Co-operation and Development (OECD)*, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. These guidelines are of such central importance that even some non-OECD member countries such as China and Chile orient by them.

327 The *Internal Revenue Service (IRS)* issues the Internal Revenue Code (IRC).

328 *Wurzer/Reinhardt*, Bewertung technischer Schutzrechte. Praxis der Patentbewertung, p. 142.

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controlled Transaction Method' (CUT) and 'Comparable Profits Method' (CPM). Sec. 482 stipulates that the method best arriving at such an outcome must be deployed (so-called 'Best Method Rule').

It follows that there exist a number of different methods of arriving at a transfer price meeting the requirements of the arm's length principle. Each of these involve (slightly) different methods of valuation but leave little room for comprehensive future-related valuations. The selection of the appropriate methods always depends on the facts of each case.[329]

2.3.5.2.2 Corporate Succession

A further relatively frequent valuation issue in the taxation context arises in cases in which a company needs to be duly passed on to the inheritor of the former owner's assets. Such a situation normally arises in the case of small to medium-sized companies owned by one person.[330] In order to determine the amount of inheritance tax due, the complete company needs to be valued. Such a valuation regards all assets tangible and intangible, whether they are capitalised on the balance sheet or not.

In Germany, the Bewertungsgesetz[331] contains valuation principles for the determination of tax and other public charges on the basis of the value of the respective asset as a whole.[332] It is therefore of specific scope and not a body of law generally applicable for all valuations.[333] However, the BewG merely contains general market value based norms and lacks rules on how a valuation in this specific tax context is to be carried out.[334]

329 These paragraphs introduce the basic concept of valuation for taxation purposes. For the objective of this study, it would be superfluous and divert from the intended structure if such issues were discussed in greater detail. The interested reader will find more information on these issues in the extensive contemporary literature, e.g. in *Bauer*, Verrechnungspreise für immaterielle Wirtschaftsgüter des Anlagevermögens and *Weber/Stoffels/Kleindienst*, Internationale Verrechnungspreise im Konzern.

330 *Repenn/Weidenhiller*, Markenbewertung und Markenverwertung, p. 30.

331 Bewertungsgesetz (BewG) in der Fassung der Bekanntmachung vom 1. Februar 1991 (BGBl. I p. 230), zuletzt geändert durch Art. 2 ErbschaftsteuerreformG vom 24. 12. 2008 (BGBl. I p. 3018).

332 §§ 1(1), 2(1) BewG.

333 *Reese*, Die Bewertung von Immaterialgüterrechten, p. 25.

334 §§ 9, 10 BewG. Inheritance Tax Guidelines ('Erbschaftsteuer-Richtlinien 2003 (ErbStR 2003)') are somewhat more concrete, especially in R 93, yet merely relate to inventions and copyrights.

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2.3.6 Findings

The fact that brands affect almost every section of a business is reflected in the many different reasons for brand valuation. Brand valuation is required, amongst others, in the course of strategic and operative brand management and controlling, brand transactions such as M&A or licencing, brand finance and the proprietor's brand protection strategy (which can and should be treated as a subgroup of brand management). All of these situations have in common that, for the most part, future developments need to be estimated on the basis of presently available data (therefore, they cannot yield a fixed value outcome). Hence, they necessitate strategic future-related, or forecasting, valuations.

It follows that, due to the documentation-focussed nature of accounting and for reasons of accounting prudence, such forecasting valuations are neither suitable nor accepted for accounting purposes. Accounting, tax, finance[335] and assessment of damages in litigation are application areas of historic (or reporting) valuations. These occasions have in common that IP valuation is focussed on documentation purposes and primarily carried out ex post (which means accurate, fixed end results can be determined). For some cases, there are rules which prescribe the use of certain valuation techniques.

2.4 Summary and Conclusions

The nature of the valuation object brand has been illustrated in this chapter. It has become clear that brands are, as intangible assets, complex phenomena going far beyond the concept of trade marks and trade mark law, which merely protects brand devices, i.e. signage such as logos, three-dimensional forms or sounds. Brands are bundles of benefits with certain characteristics which make sure that these bundles, from the point of view of relevant target audiences, strongly differentiate from other bundles of benefits meeting the same needs. They are personality-like phenomena consisting of an image

335 It is possible that both forecasting and reporting valuations can be utilised for brand finance purposes, the former providing a contextual comprehensively informative valuation and the latter a financial snap-shot of the respective asset's present or past, usually as documented on the balance sheet (for instance, in the course of a credit rating assessment).

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