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To: OWENS Jeffrey, CTP
Cc: bob.van.der.made@nl.pwc.com ; hartmut.wolter@dlh.de
Sent: Thu Feb 19 08:52:51 2009
Subject: Discussion Draft on the Transfer Pricing Aspects of Business Restructurings

Dear Mr. Owens,

we suggest this Discussion Draft as one of the most important issues in today's tax policy. Many associations, law firms and tax advisors will give or have given their comments on the draft to you. With this mail we would like to give you a brief extract of our critical view on the draft and we would be glad if this could be taken into consideration.

The taxing of the transfer/shifting of functions is a substantial change to recent OECD policies. Above all it **violates the principles of realisation and of sovereignty**. Moreover it will **certainly cause many additional conflicts between taxpayers and fiscal authorities** and probably lead to an increasing number of mutual agreement procedures of OECD member states, although OECD has to provide for solutions with regard to tax issues among its member states.

We believe that **recommending to tax the transfer/shifting of functions will force the upcoming of unwelcomed conflicts which to avoid is the major task of OECD**.

Here you find the brief extract of our critical comments:

Legal:

- > "function" was – till now – no legal term, cannot be put in concrete
- > violation of realisation principle (taxing of future profits at wrong time and at wrong place)
- > arm's length principle inappropriate for synergy effects (arm's length principle is conditioned by existence of non-related partners, while synergy is conditioned by existence of related partners)

- > violation of EU-law (Art. 43ff., 56ff. ECT; cross-border transaction are treated differently from domestic transactions)

Economics:

- > significant loss of liquidity for enterprise because of advanced taxation of future profits (future synergy gains included in transfer package instead of single asset valuation)

- > threatening excess taxation dependant on methodology of valuation (e.g. discount rates, time-period for calculating the net present value of a transfer package)

- > exit barrier for outbound investments
- > high administrative expense for required contemporaneous documentation
- > double taxation (country of transferor taxes in the transferring period and country of transferee taxes in the period of incurrence the same profit unless country of transferee provides for a tax credit)

Political:

- > abuse of the OECD by some industrialised countries in disfavour of emerging countries
- > major change to recent OECD policy considering PEs which is in favour of emerging countries and in disfavour of industrialised countries

- > lacking clarity of the Discussion Draft jeopardises the OECD's work on avoiding double taxation

**Best regards,
Christian Lehmann**

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