

Meeting the Challenges posed by Business Restructurings: The OECD Response

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Implementation new Business Models

- Cross-border redeployment by multinational enterprise of functions, assets and risks; cross-border reallocation of profits.
- Since the mid 90s: typically examples are conversion of “full fledged distributors” into “commissionnaires” and of “full fledged manufacturers” into “toll-manufacturers”.
- Migration of intangible assets and of risks, together with associated profit potential, often to low tax jurisdictions.

Key Implications:

- Countries concerned over: Tax base erosion
- Business concerned by: Uncoordinated reactions by governments
 - Characterise a PE of foreign principal
 - Assess exit tax / capital gain upon conversion
 - Challenge post conversion transfer pricing
 - Attempt to disregard some transactions involved in the restructuring
 - Combine several of the above arguments
- Huge stakes and uncertainties for business
- In this context, the OECD project is an attempt to provide a clearer theoretical framework on how to apply the arm's length principle and treaty rules to business restructurings

Business representatives have explained commercial reasons for restructurings:

- Typical commercial reasons: the implementation of global business models to maximise synergies and economies of scale, to streamline the management of business lines and to improve the efficiency of the supply chain, taking advantage of the development of internet based technologies that has facilitated the emergence of global organisations.
- Where restructurings have valid commercial reasons, OECD objective is not to create tax barriers to trade; but to apply sound international principles of taxation and to provide reasonable certainty.

Mandate given by the Committee on Fiscal Affairs:

- Call for balance:
 - Clearer guidance for restructurings that have sound commercial reasons; providing more certainty for legitimate business reorganisations

AND

- Governments' ability to tackle those restructurings which lack substance or are "abusive"

Key questions:

- Commercially driven restructurings:
 - Is the business restructuring arm's length?
 - In what circumstances should restructurings be compensated (transfer of valuable assets / indemnification for contract termination / others)?
 - ✓ Levying of exit taxes
 - How to apply the arm's length principle and TP Guidelines to the post-restructuring transactions (choice and application of TP method)?
 - PE issues

Key questions:

- Abusive / tax driven restructurings:
 - How to recognise them?
 - Relationship between the arm's length principle / TP Guidelines and domestic anti-abuse rules, recharacterisation rules, CFC legislation?

- Applying the arm's length principle and comparability analysis to global business models is a challenge:
 - Difficulty of reasoning in the arm's length theoretical environment which treats members of an MNE group as if they were independent parties.

Process and working methods: dialogue with business at all stages, under different forms:

- CTPA Roundtable in January 2005
 - Treaty, transfer pricing, and indirect tax issues
 - Business and governments
 - OECD and Non-OECD Economies

- A Joint WP1 / WP6 Working Group set up
=> transfer pricing and treaty aspects
- A small advisory group of business representatives and academics formed
- A broader on-going consultation with business
- Objective to release a discussion draft for public comment by the end of 2008

Business restructuring – way forward

- This is a long term project. Currently at its early stages – only questions, no report, no conclusion
- A balanced approach is essential
- Input from the business community is key and we will continue to seek it at different points in time and using various channels
- Information on the project is available on the OECD Internet site at
www.oecd.org/ctp/tp/br