15 September 2010

Mr. Jeffrey Owens
Director, CTPA
OECD
Paris

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Re: Transfer Pricing Aspects of Intangibles

Dear Mr. Owens,

The Ballentine Barbera Group, a Charles River Associates Company, is pleased to present its thoughts on the scope of a possible new OECD project on the Transfer Pricing Aspects of Intangibles. We appreciate the opportunity to provide input into this project.

From an economist's perspective, an analysis of a transaction involving intangibles often starts by determining whether significant and persistent non-routine profits exist. Defining and identifying the intangibles generating these profits may follow from such a quantitative analysis but should not conflict with such an analysis. This economic approach has guided our response to the four questions posed by the OECD, and we limit our input to this perspective, while recognizing that subjects including dispute resolution and documentation related to intangibles are very important in practice as well.

What we see as the most significant issues encountered in practice in relation to the transfer pricing aspects of intangibles

Generally accepted valuation methods already exist and are widely used to analyse transactions between independent parties. The fact that there is only very limited reference to their use in the OECD Guidelines limits the reliance taxpayers place on their application in a transfer pricing context, and can mean that they are not accepted in practice by tax authorities. This is a significant issue.

Other issues encountered in practice include wrongly equating intangibles with value drivers, and the assumption that simply because an intangible has been identified that it has significant and persistent non-routine value. On the other hand, issues also arise where non-routine profits *are* found but, as it is difficult to specifically identify the intangible responsible, it is too quickly concluded that one does not exist.

It is also noted that retrospective practices, for example as embodied in the US commensurate with income standard, might not always be consistent with valuation methods employed between independent parties.

What shortfalls, if any, we identify in the existing OECD guidance

Reiterating our comments above, we consider the limited recognition of the well-established valuation methods for analysing intangibles and intangible-related flows a significant shortfall in the existing OECD guidance.

We believe that further guidance would also be helpful on the criteria that should be applied to help identify:

- Items that cannot be considered as intangibles to which income would accrue; and
- Items that are typically ‘routine’ in nature and therefore cannot result in the identification of non-routine intangibles.

What the areas are in which we believe the OECD could usefully do further work

We are of the opinion that both governments and taxpayers would significantly benefit from clear recognition and acceptance in the OECD Guidelines of the use of existing and well-established intangible valuation methods. We do not believe there is a need to set out the methods in detail in the Guidelines as they are well documented elsewhere. Instead, the focus should be on explaining the circumstances in which they can be reliably applied.

Further, we note that the economic and financial models that are typically developed using these methods can be largely quantitative and mechanical. The model parameters, however, must reflect the specific facts and circumstances of the case in question and can, therefore, vary widely. This is probably one of the most important aspects to be considered further.

We would therefore recommend that the OECD undertakes further work to develop guidance on how to determine key parameters upon which these economic and financial models rely, including:

- Economic life;
- Discount rates; and
- Forecast financial data.

What we believe the format of the final output of the OECD work should be

We believe that this project should result in an update of the current chapter VI of the OECD Guidelines.

We would be very pleased to provide more detailed input on any of the issues outlined above, if requested.

With best regards,

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