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September 14, 2010

Mr. Jeffrey Owens
Director, Center For Tax Policy and Administration
Organization For Economic Cooperation and Development
2, Rue Andre-Pascal
75775 Paris
France

Re: Transfer Pricing Aspects of Intangibles

Dear Mr. Jeffrey Owens:

Respectfully, and pursuant to your request and that of the OECD, please find contained herein comments, suggestions, and observations pursuant to the Model Tax Convention of the OECD Guidelines as they relate to Transfer Pricing Aspects of Intangibles. I look forward to discussing these matters in more detail in person with you, the OECD, and its relevant Working Party. I look forward to continuing to work with you throughout the course of the year and on other Transfer Pricing Initiatives on-going with the OECD including, but not limited to, Transfer Pricing as it related to Business Restructuring and Profit's Based Methodologies.

Having Testified before the IRS and Treasury numerous times since 2004 with regard to Transfer Pricing Regulations on the Service Regulations Proposed and Amended and also providing testimony the United States House of Representative, via the House Ways and Means Committee on Transfer Pricing in the context of intangible property and a potential erosion of the U.S. Corporate Tax Base, I am intimately familiar with many of the global transfer pricing issues that have surfaced in a global legislative and regulatory environment with regard to Transfer Pricing Reform. Moreover, I also provided testimony and acted as a Delegate to the OECD in 2009 and 2010 on Transfer Pricing in the Context of Business Restructuring.

Having practiced Transfer Pricing in both a U.S. and OECD context I will set out what I consider to be global issues that may not only impact OECD based countries, but countries that adopt OECD Guidelines for Transfer Pricing or some variant thereof. From practical experience countries may adopt the OECD Guidelines as a partial foundation to their Transfer Pricing Laws, Regulations, Guidelines, Information Circulars, Country-

Specific Statutory Authority, or a combination of two or more of the above aforementioned compliance mechanisms. As the U.S. Treasury, the IRS, and the House Ways and Mean's Committee of the U.S. Congress has discovered any changes in Transfer Pricing will create the opportunity for lack of global harmonization for a multinational working in a global context with regard to potential issues such as Competent Authority Proceedings or MAP proceedings.

The OECD's endeavor into the area of Intangible Property is quite timely as many countries, including the United States, are now reviewing transfer pricing and the migration of intangible property in the context of transfer pricing and a potential erosion of the U.S. Corporate Tax Base.

Scoping Note No.1

One of most frequent issues that we see multinational taxpayers grappling with globally is either intentional or unintentionally misclassifying low-level intangibles as services or vice versa. The distinction between hard forms of intangible property and soft forms of intangible property deserves more attention. Many multinationals can achieve tax benefits and a lower over-all global effective tax rate by choosing their desired form of classification. In many cases soft forms of intangible property such as process, procedures, know-how, systems, methods, et al are classified as services to avoid being classified a higher-margin form of intangible property in the multinational's overall global tax planning. Hard forms of intangible property are more akin to patents, trademarks, and trade names which don't leave the same opportunity for either an intentional or unintentional classification of intangible for the multinational to achieve a lower overall global effective tax rate.

Scoping Note No.2

The on-going debate in North America is how does the government increase voluntary compliance methods while not putting North American Multinationals at a competitive disadvantage in terms of compliance and global competitiveness. At the end of the day, the IRS, the OECD, and all other countries, despite whatever the culmination of their efforts yield, must endeavor to establish a mechanism that is analogous to the Transfer Pricing Laws, Transfer Pricing Regulations, Guidelines, Information Circulars, and Country-Specific Statutes of other tax jurisdictions. This Transfer Pricing Imperative is most essential in the area of Cost-Sharing / Cost Contribution Agreements, but potentially may have applicability in other areas of Transfer Pricing as previously discussed in the area of Competent Authority and MAP Proceedings.

Scoping Note.3

Tantamount to any discussion of intangible property is the attendant discussion of intangible property migration. The OECD should examine the relationship of intangible property migration of intangibles with regard to regard to Platform Intangible Property and Second Generation Intangible Property. The quintessential example of this intangible property migration is the migration of intangible property (given the premise of meeting the substance over form doctrine) to Ireland or another tax jurisdiction with favorable tax treatment of royalty income. In the case of Ireland OECD and U.S. based multinationals

have migrated both Platform Intangible Property to Ireland via Cost-Sharing Arrangements and Second Generation Intangible Property via financing and development to Ireland or another low-tax jurisdiction only be licensed back to the operating entities and accruing an attendant royalty rate back to Ireland being taxed at 12.5% rather than an averaged 25% European or OECD Tax Rate on Royalty Income.

Scoping Note No.4

Another issue that remains to be an issue for global tax authorities and governments alike is how do we improve Transfer Pricing Enforcement Efforts without making multinationals less competitive in the global market place. Certainly one cannot blame multinationals for carrying out their fiduciary duties to shareholder of maximizing shareholder value while still playing by the laws, guidelines, rules, regulations, country-specific statutory authority, and information circulars that have been set in place to regulate and enforce Transfer Pricing. Until symmetry can be achieved with regard to some common understanding on enforcement with regard to intangibles globally, parity will never be achieved. This author believes that since the OECD encompasses many countries and that many countries intuitively rely on the OECD guidelines somewhere in their Transfer Compliance Authority and Efforts. The OECD is currently in the best position to bring about symmetry and parity because of its large membership and default status for Non-OECD members.

Scoping Note No. 5

This author believes that more input is needed from the Practitioner Community on an issue as Complex as the treatment of global intangibles and the global harmonization of intangibles as to not upset issues of double taxation, IP Migration, Competent Authority Proceedings, and MAP issues.

Scoping Note No.6

This author believes that any modifications and or revisions to the OECD Guidelines needs to be carefully coordinated with the newly approved 2010 Version of the Transfer Pricing Guidelines For Multinational Enterprises where Chapters I-III were substantially revised with new guidance on the selection and application of Transfer Pricing Methodologies and comparability criteria and analysis. Careful coordination also needs to be considered with new Chapter IX of the OECD Guidelines on the Transfer Pricing Aspects of Business Restructurings.

Scoping Note No.7

This author believes it would be difficult to potentially, accurately, and consistently apply a subjective and difficult to administer formulary apportionment approach in cases where relevant tax treaties apply rather than apply and utilize the time-honored and tested "Arms Length Standard" especially where double taxation, Competent Authority, or MAP relief may exist.

Scoping Note No.8
The OECD should carefully consider the impact of tax authority recharacterization of low-level intangibles disguised as high-level services. In fact, one should consider the impact of potentially "arbitrary and capricious" recharacterizations that could potentially unwind a multinationals tax planning structure and tax planning compliance.

Scoping Note No.9
It is this author's opinion that the OECD provide more clarification via case examples to provide more clear guidance on any and all Transfer Pricing Reforms that it undertakes such as is the case that is directly applied in the U.S. through various examples of specific applications of the U.S. Treasury Regulations Regarding Transfer Pricing or indirectly via Information Circulars as applied in Canada. Either approach, whether it be direct or indirect can only aid the multinational taxpayer in voluntary compliance and overall transparency that benefits all stakeholders.

Scoping Note No.10
This author believes that the OECD would be wise to develop and enumerate a list of hard forms of intangible property and soft forms of intangible to clarify to multinationals and their consultants exactly what will be accepted pursuant to the OECD Guidelines as intangible property. Additionally this will assist multinational taxpayers and their consultants in not making the mistake of inadvertently classifying soft forms of intangible property as services or alternatively in disguising intangibles as services.

Once again, we appreciate the opportunity to provide testimony on these all important issues of intangibles assets they related to Transfer Pricing and look forward to our continued work with the OECD and its attendant Working Parties on Transfer Pricing and International Tax. If you have any comments or require any additional clarification, please do not hesitate to contact us directly.

Kindest Regards,

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