Sasseville. Gibert, he added, also is predicting a significant number of cases will be scheduled for arbitration hearings this year.

At the end of 2007, competent authority requests involving European members eligible for arbitration under the EU Arbitration Convention totaled between 168 to 193 cases, according to an EU Joint Transfer Pricing Forum report. Those numbers represent cases that could be brought under the convention if they are not resolved in two years (17 *Transfer Pricing Report* 488, 10/23/08).

Shott noted the United States has arbitration provisions in three treaties that have been ratified by the Senate—those with Belgium, Canada, and Germany—as well as a pending accord with France. Procedures have been agreed to under the Germany treaty, and those with Belgium will be published ''within the next two or three weeks,'' he said.

As for the treaty with Canada, Shott said officials from both countries are ''working diligently . . . to get our procedures ironed out.''

The arbitration provision in the treaty with France is slightly different from that with the other three countries in that instead of having to choose between the two governments' positions, the arbitrators have the third option of choosing the position presented by the taxpayer. None of the four treaties allows the panel to craft its own solution.

Shott said the inclusion of the taxpayer's position under the U.S.-France treaty ''is going to make it more difficult to work out the operating guidelines'' in that case, and added that U.S. officials are ''having some informal conversations and sharing some ideas with the French right now.''

Triangular Cases. Sasseville said the OECD has been grappling with how to treat triangular cases—those involving more than two countries. The issue, he said, is ''a bit tricky.''

''The reality is that our treaties are bilateral, so there are some hurdles, especially if you have two countries that do not have a treaty between themselves,'' Sasseville said. ''That creates difficulties in terms of the ability to discuss and exchange information on a case.''

Shott told the conference his office had dealt with one triangular case in the last several years and currently is ''taking a look'' at another one. He told Sasseville, ''My sense is we're not going to be able to do anything with it for the very reason you described, which is that two of the countries do not have a bilateral treaty.'' Shott also added that triangular cases ''right now are unusual for us to see.''

The European Union Joint Transfer Pricing Forum has created a subgroup to address how arbitration would apply in triangular cases, and the topic was scheduled to be discussed at a meeting of the forum June 3, according to Isabel Verlinden of PricewaterhouseCoopers in Brussels (17 *Transfer Pricing Report* 883, 4/2/09).

Verlinden said recently that other topics took precedence at the meeting and triangulation was not discussed.

Pursuing Legal Remedies. Sasseville noted that some countries require a taxpayer to exhaust its legal remedies—either by waiting until the time to appeal the case has expired or by waiving its right to go to court—before bringing a case to competent authority. However, he said an ''emerging model'' appears to be the approach in the United States and Canada, which is to give the taxpayer two options: pursuing legal remedies and then seeking MAP assistance once that outcome is determined, or suspending legal proceedings and going to competent authority.

Pursuing MAP first ''is generally the better idea,'' Sasseville said, because ''if you go to court and you get a settlement, the only thing the competent authorities can do is try to get the other side to adopt the same view.'' When a taxpayer chooses to pursue MAP first, he said, it may reject the competent authority settlement and resume legal proceedings, ''but in the vast majority of cases I'm told the taxpayer will say yes'' to the MAP result.

Elvin Hedgpeth of Ernst & Young LLP in Washington, D.C., a former U.S. Competent Authority official, questioned Shott about the IRS's policy on pursuing remedies in another country before seeking competent authority assistance, noting that the question comes up in the context of receiving a foreign tax credit under Section 901. At one time, he said, the IRS was considering a change in regulations.

Shott acknowledged that the U.S. regulations are unclear. ''The view here in the United States [is] that there are certain administrative remedies that ought to be pursued in another jurisdiction to try to get the issue resolved before coming in and asking for relief,'' he said. Although the Service has considered providing additional guidance on this point, Shott said, ''that becomes exceedingly difficult to do . . . because there are so many fact patterns out there.''

''We want taxpayers to make an effort at pursuing those administrative remedies,'' The U.S. official said. If a taxpayer obtains counsel on the likely outcome of a case based on its adviser's experience in a particular jurisdiction, he added, ''that's something we'll take into consideration'' in deciding whether to accept a case. ''We're looking for people to come in and say, 'This is the situation we have here, this is where it's likely to go, this is what will probably be the result,' and more often than not those cases will be accepted.''

By Molly Moses

☐ *For a discussion of OECD guidelines, see 895 T.M., Transfer Pricing: OECD Transfer Pricing Rules and Guidelines.*

OECD

OECD Draft Does Not Permit 'Gratuitous' Challenges to Restructurings, McDonald Says

PARIS—A U.S. Treasury Department official said June 9 that including the concept of options that would have been realistically available to taxpayers who restructure, in the recent Organization for Economic Cooperation and Development discussion draft on business restructurings, was not intended by OECD Working Party No. 6 to be a vehicle for governments to gratuitously question the decisions of taxpayers who restructure their operations.

Michael McDonald, an economist in Treasury's Office of Tax Analysis, said if a taxpayer is faced with choices A, B, or C, and chooses option B, the notion that

  TMTR ISSN 1063-2069

the taxpayer could have chosen A or C as ''the basis for either a recharacterization or pricing [adjustment], notwithstanding that the taxpayer in fact chose B, is not the intent of the realistic alternatives option.''

McDonald told an OECD consultation that if the standard of analysis involves looking at the whole spectrum of things that the taxpayer could have done and for the government to ''pick which one we think could have been done, and prices and characterize things accordingly, then if that becomes the standard, then really all is lost here.''

The June 9 consultation was attended by tax officials from OECD members and nonmembers, in addition to representatives from business organizations that submitted comments on the discussion draft.

The discussion draft, released Sept. 19, 2008, addressed how the OECD transfer pricing guidelines should apply in the context of Article 9, the associated enterprises article of the organization's Model Tax Convention, to the cross-border redeployment within a multinational enterprise of functions, risks, and assets, and the attached potential profit or loss (17 *Transfer Pricing Report* 399, 9/25/08).

Options Realistically Available. The draft said that at arm's length, an independent party would not enter into a restructuring transaction that is expected to be clearly detrimental to it if it has the option realistically available to it not to do so.

In evaluating whether a party would at arm's length have had other options realistically available to it that were clearly more attractive, the draft said due regard should be given to all the relevant conditions of the restructuring, to the rights and other assets of the parties, to any compensation or indemnification for the restructuring itself, and to the remuneration for the post-restructuring arrangements as well as to the commercial circumstances arising from participation in an multinational enterprise.

McDonald said the ramifications of this subjective concept on significant aspects of business restructurings remains a fundamental question.

''What we have heard this morning [from the business community] is that there are very serious and fundamental concerns about how this concept might be used,'' he said.

By Kevin A. Bell

☐ *For a discussion of OECD transfer pricing guidelines, see 895 T.M., Transfer Pricing: OECD Transfer Pricing Rules and Guidelines.*

OECD

Transfer of Mere Profit Potential Not Taxable, U.S. Treasury Official Says

A U.S. Treasury Department official said June 2 that the recent Organization for Economic Cooperation and Development discussion draft on business restructurings makes clear that the transfer of mere profit potential is not enough to constitute a taxable event.

Associate International Tax Counsel David Ernick, at a conference on the evolving role of the OECD in shaping international tax policy, said the discussion draft requires that a transfer ''must be related to some kind of asset'' in order to be taxable.

Released Sept. 19, 2008, the discussion draft was designed to show how the transfer pricing guidelines should apply to the cross-border redeployment of functions, risks, and assets, and the attached potential profit or loss when a multinational group restructures (17 *Transfer Pricing Report* 399, 9/25/08).

The discussion draft appears in the Text section of this issue.

Circular Reasoning? Note 2 of the September 2008 draft said that whether the transfer of profit potential following from a business restructuring constitutes an arm's-length transaction depends on the options at arm's length that would have been realistically available to the transferor and transferee and the expected return to both parties after the restructuring.

The note said compensation might be required to appropriately remunerate the transferor's surrender of profit potential in cases where the transferor has transferred ''rights or other assets that carry that profit potential.''

Ernick, chairman of the OECD Working Party No. 6 special session on business restructurings, said some countries in the working party meetings were saying, ''Well, we had a lot of income in our country before, now it's going somewhere else. Can we tax that initial transfer of profit potential?''

The working party answered this question ''no'' in the discussion draft, Ernick said. Because profit potential is reflected by specific assets, he said, ''you have got to have a transfer of intangibles or tangible assets.''

Ernick acknowledged some circularity in this reasoning ''because you can look at the profit potential when you are valuing the asset.''

In an income method valuation, such as a discounted cash flow, ''you are looking at the income or profit that asset is generating in the future, and discounting that back to a present value,'' Ernick said. Although these are interrelated concepts, ''the draft makes it clear that it's not just a mere profit potential, it has got to be related to some kind of asset to be a taxable event.''

By Kevin A. Bell

☐ *For a discussion of the OECD's transfer pricing guidelines, see 895 T.M., Transfer Pricing: OECD Transfer Pricing Rules and Guidelines.*

Pricing Methods

Pfizer Official Praises Direction Of OECD Draft on Profit Methods

A transfer pricing official from the world's largest pharmaceutical company said June 1 that the Organization for Economic Cooperation and Development discussion draft on transactional profit methods is moving in the right direction.

Siv Schultz, Pfizer Inc.'s vice president for global transfer pricing, said the OECD's January 2008 draft ''moves away from just looking at transfer pricing methods to also looking at the comparability of the data,'' enabling the taxpayer to select its transfer pricing method ''based on the availability of market data.''