

United States Expresses Reservations over Certain Sections of OECD Draft

By Dan Peters

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News: A U.S. Treasury official suggests that the United States will not agree to certain aspects of the OECD's current discussion draft on risk, recharacterization, and special measures. At the American Bar Association tax section conference in Houston January 30, Brian Jenn of the Treasury's Office of International Tax Counsel and a U.S. delegate to the BEPS project, spoke specifically of a Special Measures section in the draft that included language that may allow tax administrations to disregard certain transactions in which a company has structured its operations to shift risk among related parties.

Views: It is encouraging to see Treasury officials directly challenge certain potentially over-reaching aspects of the OECD's BEPS project. Ken Wood's (senior advisor to the IRS) earlier comments regarding aspects of the Draft's section on non-recognition of certain transactions also pointed to proper concerns that tax authorities might exploit such discretion inappropriately, resulting in even more transfer pricing disputes and potential double taxation.

So where will the OECD land? It seems likely that the strident public comments of senior US officials will result at minimum with a softening of the particularly troublesome language in the draft regarding recasting transactions based upon new concepts such as "moral hazard". Guidance that is more consistent with the arm's length principle and without such special measures would be even better.

In any case, we remain concerned that certain foreign tax authorities will no longer respect intercompany transactions and contracts that allocate risk (and reward) away from operational entities in their jurisdictions towards foreign entities. These intercompany structures are quite common – consignment manufacturing, limited risk distribution and sales agency structures are examples. We also expect those challenges will be more likely if the counterparty in those transactions is in a low-tax jurisdiction and has limited operational responsibilities.

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