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New Arbitration Provisions Accelerate Dispute Resolution, Transfer Pricing Specialists Say

by David D. Stewart, *Worldwide Tax Daily*

New arbitration provisions are an impetus for faster transfer pricing dispute resolution, practitioners said March 18 at the Executive Global Transfer Pricing Forum held by PricewaterhouseCoopers in New York.

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Several specialists participating in the Executive Global Transfer Pricing Forum held by PricewaterhouseCoopers in New York remarked that the presence of an available arbitration process such as those provided in the U.S. treaties with Belgium, Canada, and Germany creates added pressure that improves the likelihood of a timely settlement.

Isabel Verlinden, a PwC international tax partner based in Brussels, explained that the European experience with arbitration provisions since their introduction in 1995 has been that they are only rarely used and that their real effect is to encourage a settlement. The arbitration convention differs from the provisions now being included in tax treaties such as the Germany-U.S. and Canada-U.S. treaties in that the arbitration is not "baseball style" arbitration in which decisions take one position or the other rather than allowing for a compromise.

Verlinden said authorities and taxpayers are reluctant to enter into arbitration because the process is a "black box" where taxpayers do not know how their positions and arguments will be processed. The result of this reluctance, Verlinden said, is that only two cases have so far been resolved through the process.

"In the fall, we had the competent authorities from the U.S., Canada, Australia, and the U.K discussing this issue . . . and all of the competent authorities were unanimous and clear on this that they felt it would be a problem for them careerwise and from the office of competent authority if they had to end up in this baseball arbitration," added Garry Stone, PwC's transfer pricing group leader.

Lorenz Bernhardt, a transfer pricing partner at PwC Düsseldorf, concurred with other participants, citing a conversation he'd had with the competent authority in Germany who told him that "the likelihood of settlement is much higher than it used to be" because of officials' heightened concern of losing control of the process through arbitration.

Saul Plener, leader of PwC's Canadian transfer pricing practice, related a personal experience in which a recent dispute was resolved in only three days.

Plener said he believed the short period was a "record" and explained that in this case the competent authority moved quickly to resolve the case after being presented with what was "clearly an issue where the auditor should not have reassessed."

"Competent authority is looking to resolve these cases where they can much more quickly, especially where there is a very easy case to decipher," he said.

Plener also commented on the result of the recent Canada-U.S. protocol, saying, "I think on the competent authority front, the new treaty is very positive news. They don't want to go to arbitration. Like any other government, they don't want to lose control of that process and they realize that the positions have to be coming in a lot more reasonable." (For prior coverage, see Doc 2008-25785 [PDF] or 2008 WTD 237-3.)

One limitation on the effectiveness of the EU arbitration process, Verlinden noted, is when a third-party country is involved in a transfer pricing arrangement. She said the issue of "triangular arbitration" has been taken up by the EU Joint Transfer Pricing Forum.

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