Chapter C4

DISPUTE AVOIDANCE AND RESOLUTION

C.4.1. Introduction

C.4.1.1. Dispute avoidance and resolution procedures are essential to the effective and efficient functioning of all tax administrations. Such procedures, if properly designed and implemented, can enable fair and expeditious resolution of differences between tax administrations and taxpayers regarding interpretation and application of the relevant tax laws. They can help reduce the uncertainty, expense and delay associated with a general resort to litigation on tax matters or a failure to provide any recourse. They can also avoid integrity issues that might be sometimes raised in case of an over-reliance on ad hoc (case by case) settlements. For the reasons mentioned above dispute avoidance and resolution procedures are of critical importance to taxpayers and access to effective procedures is therefore a key consideration for taxpayers.

C.4.1.2. The goal of dispute avoidance and resolution procedures is to facilitate the efficient and equitable determination and collection of tax revenues that are properly due. Ideally, this determination and collection should be done in ways that minimize controversy, cost, uncertainty and delay for both tax administrations and taxpayers. The most efficient method of addressing disputes is to prevent them from arising. Tax administrations seeking to use their resources most efficiently should therefore probably focus in the first instance on procedures for avoiding disputes while subsequently ensuring that appropriate dispute resolution procedures are available, should they become necessary.

C.4.1.3. In the cross-border context, dispute avoidance and resolution procedures are particularly important to avoid double taxation of the same income for a taxpayer. 9 (c)-1.crco c7 (rd)-5.d-4tesome partner e

[1] available at the OECD website. [2] the global number of MAP disputes has been rising rapidly. However, tax administrations often face resource limitations regarding the handling of (cross-border) tax disputes and such limitations may be even greater for the tax administrations of many

[1] The partner economies referenced here are Argentina, China, Costa Rica, Latvia and South Africa according to

primarily to provide guidance on issues that are unique, novel, or particularly difficult, or as an interim measure while adequate published guidance is being developed.

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- A genuine commitment to developing a relationship of mutual trust;
- A transparent and open approach;
- An understanding of commercial and industry aspects;
- An implementation process agreed at the start, including the designation of responsible persons at relevant levels of both the tax administration and the taxpayer; and
- Clear agreement in advance on the period to be covered.

C.43.2.13. Tax administrations may find it useful to adopt an industry-based focus where feasible, so that the experience gained can be leveraged and used to provide consistent and transparent treatment to similarly situated taxpayers (taking relevant differences into account).

Audit Settlements

C.43.2.14. Many tax administrations, both developing and developed, rely heavily on case by case audit settlements to resolve disputes with taxpayers. To the extent that audit settlements are based on clarifications and better understandings of relevant facts, this may be an effective use of limited resources. A disadvantage of audit settlements is that such an approach

Mediation/Conciliation

C.43.3.3. Mediation and conciliation are sometimes mentioned as potential procedures to resolve disputes. Mediation has proven successful in resolving tax disputes within some EU Member States, e.g. The Netherlands and the United Kingdom. The most significant benefit of this approach towards dispute resolution is seen as the quick time frame within which disputes have been resolved. The mediation option may be made available as an administrative process within the tax administration, rather than as a separate independent mediation procedure outside of the administrative process. The process may be particularly promising in those situations where the tax auditor and taxpayer are no longer willing to communicate with each other and mutually resolve a dispute. In this environment, a mediator may be able to help overcome relationship challenges that prohibit the parties from reaching an agreement.

expectations of the tax administration. It may be advisable to enact provisions in domestic law allowing for MAP and APA procedures and, if necessary (and possible), an amendment to the constitution, in

bank guarantee to ensure the payment of any tax due upon the conclusion of the MAP procedure. Similarly consideration should be given to preventing the imposition of interest or at least preventing the imposition of higher interest rates that may effectively operate as penalty measures, while cases are pending in the MAP programme.

C.4.4.1.11. The MAP procedure generally commences with a request by a taxpayer addressed to the designated competent authority of a country for consideration of an issue for dispute resolution and/or relief of double taxation, because the taxpayer believes his tax treatment is not, or will not be, in accordance with the treaty. Alternatively, the process can be initiated because there are questions of interpretation or application of the Convention or to eliminate double taxation in cases not otherwise provided for in the Convention. The MAP process is intended to be used also to resolve economic double taxation, such as in the case of transfer pricing disputes. The case has to be presented to the competent authority of the country where the taxpayer is resident within three years from the (first) time the person is notified (for example by way of a notice of assessment) of the action that will result in taxation not in accordance with the convention. The three-year time limit is determined by the treaty article and may differ in certain cases. The definition of what constitutes (first) "notification" may be provided in domestic regulations. The form of the MAP request to be filed may be prescribed under domestic regulations as well. Alternatively, the commentary to the treaty or the model convention may be consulted in this regard or the OECD MEMAP could also be consulted.

C.4.4.1.12. Once the MAP request has been received, it needs to be ascertained that the foreign competent authority is properly informed as well and that all relevant information to decide and agree on the matter is made available to both competent authorities. Considering the time limit within which competent authorities are expected to address and resolve a filed request, it is relevant to determine

limitation provisions. Consideration should also be given to

C.44.1.19. It has been suggested that mandatory tax treaty arbitration may have the following potentially

authority analyst. Therefore arbitration may be a way of levelling the playing field for developing countries;

- Advocates of arbitration believe that there are sufficient qualified, independent arbitrators, including experts from developing countries. The 2011 UN Commentary on Article 25 permits the competent authorities to ask the UN Committee of Experts on International Cooperation in Tax Matters to develop a list of persons considered qualified to serve as arbitrators, if desired; and
- As currently adopted in many bilateral treaties, arbitration operates as an added step in the treaty's MAP procedure, to resolve disputes that the competent authorities are not able to resolve within the specified period. Advocates of arbitration do not view this as raising sovereignty concerns because the MAP procedure is itself contemplated by the treaty.

Non-Binding Dispute Resolution Procedures

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- Growing political and economic uncertainties, including the anticipated growth of tax controversies in all countries as the need for tax base protection and expansion continues to grow;

- Uncertainty concerning domestic implementation of the BEPS Action items by countries;

- Expected increase in availability of information on the transfer pricing practices of MNEs due to Country-by-Country reporting and the increased use of exchange of information provisions;

- The fact that developing countries are increasingly putting in place sophisticated transfer pricing legislation and creating large business units for tax base protection; and

- Many countries have limited or no experience with MAP processes, which may mean that such countries are potentially losing tax revenue by not entering into a bilateral or multilateral tax dispute resolution framework.

C.4.4.1.23. Subcommittee discussions revealed that limited knowledge of MAP procedures was one of the main reasons, besides capacity constraints, for developing countries' lack of engagement. This has, in some cases, led to a situation where taxpayers do not even attempt to initiate a MAP in some countries. Accordingly, it was concluded that there is a need to return to basics and define the BDC -09 (BDC (e)(gi)-11 Tw [5 0(n)16 (0gM12 (he)-16 (c)-16 (u920.006 (c (e)(gi)-119
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- It should promote an “

- Possible Updates to the UN MAP Guide; and

- The possibility of preparing a UN Handbook on Dispute Avoidance and Resolution.

The Subcommittee on Dispute Resolution will continue to explore these matters.

C.4.4.2 Other Dispute Resolution Procedures

C.4.4.2.1 Some treaties also contain other procedural provisions, either in the treaty or in accompanying guidance agreed between the treaty partners, to ensure smooth implementation and consistent application on a bilateral basis. For example guidance may be provided on how taxpayers may claim at source the benefits of the treaty to which they are entitled, to minimize the need for refund claims and the associated burdens on taxpayers and tax administrations. Such guidance typically has not focused on transfer pricing because many countries have historically relied heavily on the guidance provided by the OECD Transfer Pricing Guidelines. The application of multilateral guidance is generally preferable, where possible, for reasons of consistency. Treaty negotiators may also wish to address specific bilateral issues, or reconcile differing multilateral approaches, by providing bilateral procedural guidance where necessary.

Advance Pricing Agreements

C.4.4.2.2 Advance Pricing Agreement (APA) programmes may be a particularly effective tool for providing advance transfer pricing guidance to taxpayers and greater certainty to avoid both tax administrations and taxpayers, both in a domestic and cross-border context. Bilateral or multilateral APA agreements are able to help taxpayers avoid double taxation in a more structured way. In many countries both the tax administration and taxpayers tend to have a strong preference for APAs over dispute resolution by way of litigation. Some of the most active advocates of APA programmes have been OECD Member States that generally favour taxation at source such as Australia, Canada, and the Republic of Korea. China began negotiating bilateral APAs several years ago and has implemented an APA programme in July 2012.

C.4.4.2.3. APAs have been used in many cases to resolve disputes for past years as well (through so called “roll-backs”) sometimes addressing a total of ten or more years at one time. Where coverage of past years is permitted, APAs can be a very effective use of resources, especially for large or complex cases. It is possible to limit APAs to future years only, but may limit the tax administration's ability to fully leverage the resources it invests in concluding the APA.

C.4.4.2.4 Tax administrations generally find APAs to be a more amicable process than the audit process followed by a MAP. To the extent that there is advance agreement on key transfer pricing issues neither country faces the prospect of refunding taxes already collected. Furthermore, the taxpayer provides extensive information in advance, the APA process is usually efficient in determining relevant facts. Perhaps for this reason many tax administrations have a general practice of suspending examination activity during APA discussions. Tax administrations may wish to clarify in their APA procedures that all information pertaining to the APA request should be shared simultaneously with both countries. Tax administrations have also found APAs to be useful tools for developing a deeper understanding of business operations, which can be used to inform their general guidance and examination processes.

Most tax administrations have found that APAs are more widely embraced if APA and examination functions are kept separate. Alternatively, they may impose limitations on the use of some or all of the information provided by the taxpayer in the APA discussions for other purposes such as subsequent examinations or future litigation if an APA cannot be successfully concluded.

C.4.4.2.5 Tax administrations with severe resource limitations may wish to weigh the advantages of APAs against other resource needs. It may be difficult for a tax administration that is still developing its general audit capabilities to feel comfortable diverting substantial resources to an APA programme at that stage. Such countries may also be

comparing the approaches of various treaty partners to similar issues. It is also important to establish procedures to facilitate the sharing of such knowledge, to strengthen technical analysis and to provide consistent treatment.

C.4.4.29. Most tax administrations have found that an APA term of approximately five future years strikes the best balance between efficient use of resources and the uncertainties associated with prospective agreements. The risks associated with uncertainties can be minimized by specifying certain conditions, sometimes referred to as “critical assumptions” based on which the APA will be renegotiated if necessary. It is fair to expect a renegotiation of the APA of e C83011 Td ( )Tj /T1_0 1 Tf -0.001 Tc 0.

Japan, the United Kingdom[20] and the United States[21] as well as the Pacific Association of Tax Administrators (PATA)[22] have published detailed internal APA procedures. These may also provide useful comparative information.

Joint Audits

C.4.4.2.12. Developing countries may also want to consider participating in joint audits. These are conducted by two or more tax administrations together to share information, save resources and minimize or expedite the resolution of controversies. For example, the United States and the United Kingdom concluded a joint audit of a taxpayer in 2011 that took only six months to complete and produced an Advance Pricing Agreement resolving the issues for five future years as well. Joint audits are still relatively new procedures, but they may prove useful for developing country tax administrations with fewer resources and less experience or subject-matter expertise in the industry or issues concerned. On the other hand, issues such as different languages, authority to access foreign taxpayer information and differing accounting years and audit cycles may need to be addressed.

C.4.4.3. Multilateral Agreements

Interpretive guidance

C.4.4.3.1. Multilateral agreements are important tools to avoid cross-border disputes on transfer pricing and the resulting risks of unrelieved double taxation.

C.4.4.3.2. As noted above many countries have historically relied primarily on the guidance provided by the OECD Transfer Pricing Guidelines, which interpret Article 9 (Associated Enterprises) of the OECD Model Convention and have been developed by transfer pricing experts over the past several decades. A number of economies in transition and developing countries have u

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annual sessions[23]".