
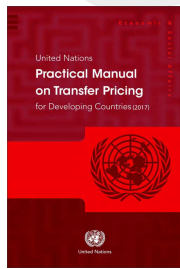

**UN-ATAF Workshop on Transfer Pricing
Administrative Aspects and Recent Developments**
 Ezulwini, Swaziland
 4-8 December 2017

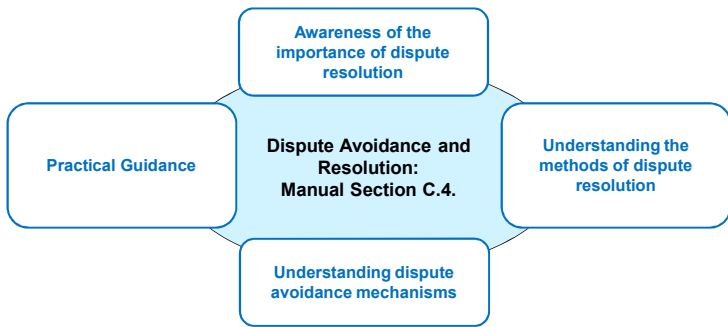

**AFRICAN TAX
ADMINISTRATION FORUM**



**DISPUTE AVOIDANCE
AND RESOLUTION**

**Friday, 8 December 2017
9.00am – 1.00pm**

LEARNING OBJECTIVES



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OUTLINE

1. The Importance of Dispute Resolution
2. Available Methods of Dispute Resolution
3. Understanding Dispute Avoidance Mechanisms
4. Practical Guidance

3

DISPUTE AVOIDANCE AND RESOLUTION

1. **The Importance of Dispute Resolution (Manual Section C.4.1)**

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THE IMPORTANCE OF DISPUTE RESOLUTION

Dispute resolution is essential to the effective functioning of a tax administration

Tax administrations serve to collect tax revenue. To do so efficiently the following tools are needed:

- Clear tax laws and interpretative rules;
- Skilled tax administrators that know how to apply the rules/audit taxpayers; and
- Access to relevant and current taxpayer information in order to be able to assess the right amount of tax revenue based on the applicable rules.

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THE IMPORTANCE OF DISPUTE RESOLUTION

Dispute resolution is essential to the effective functioning of a tax administration

Efficiently collecting tax revenue means:

- That the taxes are collected timely; and
- That the inventory of taxpayer years is managed properly so that years get closed and taxes finally assessed. Once years are closed, the tax authorities have collected the available tax revenue (absent extraordinary situations that allow for going back to closed years) and taxpayers have certainty as regards their tax liability for those years.

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THE IMPORTANCE OF DISPUTE RESOLUTION

Dispute resolution is essential to the effective functioning of a tax administration

- To the extent tax assessments are disputed by taxpayers: (i) the relevant taxable years remain open; (ii) the tax amount assessed may not be collected or may be reduced later on due to a judicial decision or settlement; and (iii) the position taken by the tax authorities may be rejected (in full) because of a judgment of a judicial body. This may also create a precedent for future cases.
- Tax disputes that take a long time to resolve may: (i) affect taxpayer trust in the tax administration and in the judicial system; (ii) lead to integrity challenges for the tax authorities; and (iii) lead to high cost for taxpayers, potentially making the country/jurisdiction unattractive for conducting business.

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THE IMPORTANCE OF DISPUTE RESOLUTION

Goals of Dispute Resolution

Dispute resolution procedures aim to:

- End disputes in an equitable and efficient fashion, so that the tax administration does not tie up valuable resources to handle the dispute and can collect any taxes due;
- They also serve to close years, end disputes, and allow taxpayers to get certainty as regards their tax liability.
- In an ideal world, dispute resolution provides certainty in such a fashion that the issue in dispute is resolved and will not resurface again. Ideally, dispute resolution is complete, in that it covers the issue in dispute plus any directly related issues. Related issues may include interest charges due to late payment of taxes and avoidance of double taxation.

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DISPUTE AVOIDANCE AND RESOLUTION

2. Available Methods of Dispute Avoidance and Dispute Resolution (Manual Section C.4.3 and C.4.4)

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DISPUTE AVOIDANCE PROCEDURES

Dispute Avoidance

- Clear legislative guidance on transfer pricing can help avoid unexpected taxpayer behavior and disputes from arising;
- Advance rulings such as Advance Pricing Agreements (“APAs”) may be helpful in avoiding transfer pricing disputes;
- Cooperative relationship programs (also called “enhanced compliance”) between taxpayers and tax administrations may assist in avoiding disputes on transfer pricing. These programs serve to improve the discussions and reporting relationships between taxpayers and tax authorities;
- Joint or simultaneous audits may assist with avoiding extended disputes (and double taxation) as well, as they envisage having two (or more) tax authorities reviewing a taxpayer’s cross-border transactions at the same time.

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DOMESTIC DISPUTE RESOLUTION

Audit settlement

- Upon audit of a MNE’s filed tax return, tax inspectors may ask questions and provide a deadline for receiving information;
- Based on information (not) received, the tax inspector may propose an adjustment (i.e. deny a deductible expense or increase taxable income);
- When a tax adjustment is proposed, there may be room for discussing the interpretation of the facts and an (additional) opportunity for taxpayer to provide information to substantiate the correctness of the filed return;
- The responsible tax inspector may have discretionary authority to review the additional information received to finalize the proposed adjustment in order to conclude or “settle” the matter. This may differ in case the (rationale for the) adjustment has been coordinated with and approved by an administrative specialist unit for strategic and consistency reasons.

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DOMESTIC DISPUTE RESOLUTION

Audit settlement (issues to consider)

- It may be procedurally relevant to have a second level of review on audit settlements, to avoid integrity challenges. Some countries have a special tribunal in place for dispute settlement purposes, i.e. a dispute resolution tribunal, specifically to reduce integrity challenges that may arise from settlements.
- Preferably, a single auditor should not decide on a settlement. Governance principles are key to get to a sustainable settlement. It is proper procedure to allow for a review whether all relevant information was considered to come to a proper settlement;
- It is important, for the taxpayer and tax authority alike, that there is a letter of findings in the file to make sure due process is followed and to withstand and potential governance challenges to the settlement.

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DOMESTIC DISPUTE RESOLUTION

Audit settlement: Benefits

- Settling a dispute at the audit level has certain advantages:
- Real time/swift solution of the dispute;
- Avoidance of escalation of the issue audited and further tie-up of government resources;
- Confidentiality of the process. Settlement information can have great competitive impact, therefore it is material to protect taxpayer information from being disclosed further;
- A settlement may offer potential flexibility in how to characterize and allocate the income adjustment;
- Settlement discussions may also allow for an opportunity to build / improve the ongoing relationship with taxpayer, and build trust.

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DOMESTIC DISPUTE RESOLUTION

Audit settlement: Disadvantages

- A settlement (depending on how it is worded and entered into) may leave little information on the rationale and how the underlying settled amount was derived, opening it up for challenges;
- Taxpayers might reference intimidation and power play-based adjustments for settlements which reduces trust in the legal system and tax authority integrity. In some cases, taxpayers may try invoking constitutional rights to override a settlement;
- Some settlements are conditioned on exclusion of MAP relief. In that case, there is a question whether the settled adjustment amount will qualify for relief of double taxation. Such arrangements are inappropriate.
- Settlements do not necessarily avoid future challenges on the same issue, as they don't necessarily change taxpayer behavior or establish binding precedents.

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DOMESTIC DISPUTE RESOLUTION

Administrative Objection/Appeal

- An Administrative Objection or Appeals procedure generally allows for separate administrative review within a specific time frame after the audit adjustment was formally issued. The available administrative procedures may differ greatly between countries, however;
- The administrative appeal is usually conducted by a different person/different unit than the competent tax inspector/assessing officer.
- A specialist unit or industry group may be involved in addressing the issue and the filed objection. Review may consider the hazard of litigating the matter (risk of losing in court) for the tax authorities;
- After decision on the Objection/Appeal, the taxpayer can accept the outcome or pursue a (subsequent) Judicial Procedure (i.e. go to court). If the adjustment leads to double taxation, pursuing a Mutual Agreement Procedure under a Tax Treaty may also be a possibility.

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DOMESTIC DISPUTE RESOLUTION

Administrative Objection/Appeal: Benefits

- Usually a relatively quick solution of the dispute that allows for avoidance/reduction of further escalation of the issue audited;
- Usually an impartial administrative review of the issue and of any evidence provided during the audit to resolve the issue;
- Confidentiality of the process is a benefit, as the issue does not get disclosed further;
- Possibly a “hazard of litigation” analysis is part of the review/analysis which may encourage swift solution of the issue/avoid further costs for government;
- Usually low cost procedure for taxpayer assuming no filing fee applies.

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DOMESTIC DISPUTE RESOLUTION

Administrative Objection/Appeal: Disadvantages

- Process may be subject to political sensitivity: depending on the place of the administrative objection/Appeals unit in the Revenue Authority office (or outside of that department) and hierarchy, the objection/appeals filing and experience can (negatively) influence the positions taken by the tax inspector/audit team and their approach during audits;
- The process usually does not provide for resolution of the same issue in later years, and as such does not help improve/change taxpayer behavior for later years as regards the same issue;
- Outcome of the administrative procedure does not in itself provide for relief of double taxation for the taxpayer. So taxpayer may ask for additional relief after the outcome of the procedure.

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DOMESTIC DISPUTE RESOLUTION

Mediation

- Some (still relatively few) countries offer an administrative dispute resolution procedure for audit adjustments that operates by way of mediation. If available, the procedure is usually conducted by an entirely independent division of the revenue authorities;
- It may be available/accessible as early as at the time a dispute arises during an audit but also after an objection is filed or while a judicial process is pending. Availability is dependent on both parties (tax inspector and taxpayer) being open to subject the dispute to mediation. The procedure is conducted by trained and professional mediators (that usually are government-employed);
- Dispute resolution may be achieved by focusing on other than technical issues, in particular when there are relationship challenges that lead to an escalating dispute between the tax inspector and taxpayer (i.e. lack of trust which influences the audit process).

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DOMESTIC DISPUTE RESOLUTION

Mediation: Benefits

- Confidentiality of the process. Perhaps even more so than other procedures, issues discussed during mediation are required to be kept entirely confidential. Confidentiality is conditional for the process;
- Relatively quick solution of the dispute; avoidance/reduction of escalation of the issue audited. Practical experience shows issues tend to be resolved (very) quickly in mediation. If mediation is available, other procedures (objection/appeal/court procedure) tend to be halted during the mediation phase;
- To the extent the mediation focusses on content (rather than relationship) there is impartial review of both issue and evidence provided;
- Usually no filing fee applies.

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DOMESTIC DISPUTE RESOLUTION

Mediation: Disadvantages

- Relatively new procedure for tax disputes and tax administrations may have relatively little experience;
- Experienced and independent mediation resources are needed for the process to be effective and respected;
- In several countries, mediation is not available for transfer pricing issues;
- If available, the procedure is dependent on agreement of both parties before it can be applied;
- The procedure and its outcome provides no protection with respect to the same issue for later years;
- Unilateral analysis: outcome of the mediation does not in itself provide for relief of double taxation.

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DOMESTIC DISPUTE RESOLUTION

Domestic judicial procedure

- The issue under dispute may be submitted to an independent court of law for adjudication;
- The decision from the government's side to have a case go to court often rests with someone higher in ranking than the tax inspector/assessing officer. Similarly, at taxpayer level, the decision to litigate a matter is often made by someone higher in ranking than the local tax director;
- The court may be a specialist taxation court or a general court, depending on the country and type of adjustment assessed. This is a relevant aspect to consider before the decision is made to litigate;
- Court procedures may require a filing fee and may require that only specialists (lawyers admitted to the bar and/or specific court) handle the procedure;

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DOMESTIC DISPUTE RESOLUTION

Domestic judicial procedure

- Procedures usually involve a responsive process, meaning that the taxpayer files a brief stating its position and the opponent (tax inspector) files a brief in response after which there may be a direct and redirect statement. The procedure may provide for an actual hearing where the judge may or may not ask parties specific questions and may require them to respond;
- Timing for the court decision tends to depend on the docket of the Court, but generally may take a couple of months at least, if not a year or longer;
- The case may be decided in final or may be available for judicial appeal in several instances. Facts can be reviewed at certain levels of courts. At the Supreme or Higher court level usually only matters of law can be reviewed, not the facts.

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DOMESTIC DISPUTE RESOLUTION

Domestic judicial procedure: Benefits

- Entirely independent neutral procedure and review;
- Ability to reference previous jurisprudence/other cases;
- A court decision, once final, usually has immediate legal effect and can be executed unless appeal to that court decision is still open/available and filed timely;
- A court decision decides the matter and thus effectively is an indication for resolution of the same issue for later years as well - provided the facts in the later years are the same-.

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DOMESTIC DISPUTE RESOLUTION

Domestic judicial procedure: Disadvantages

- It's considered an expensive and time-consuming process (dependent on the docket of the Court and even on specialist lawyers);
- There's always the question of whether the assigned judiciary division has sufficient resources and is sufficiently expert on specific highly technical tax matters (transfer pricing?) to render an informed decision;
- Court decision alone does not provide for avoidance of double taxation. An additional MAP filing is needed for that;
- Court decisions tend to be public and therefore non-confidential;
- In most countries, the Competent Authority cannot deviate from domestic court decisions. Therefore avoidance of double taxation using the Mutual Agreement Procedure may be accessible only subject to certain limitations after a court decision is rendered.

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INTERNATIONAL DISPUTE RESOLUTION

Cross-Border Disputes

- Domestic tax disputes and their outcome may have cross border tax consequences. This is particularly likely in the field of transfer pricing. Transfer pricing-based adjustments increasing taxable income in one jurisdiction will lead to double taxation if the adjustment is not matched/offset in the other jurisdiction;
- Domestic dispute resolution mechanisms and their outcome do not have legal effect outside of their jurisdiction and do not require foreign tax authorities to give relief from double taxation;
- Tax Treaties for the avoidance of double taxation can assist to obtain relief from double taxation, provided a treaty article covers the issue and provides for a Mutual Agreement Procedure (“MAP”) through which the respective designated Competent Authorities can endeavor to resolve the double taxation.

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INTERNATIONAL DISPUTE RESOLUTION

Mutual Agreement Procedure

- Typically, a taxpayer that has received an adjustment increasing its taxable income in one jurisdiction may ask for relief of double taxation in the other jurisdiction by timely filing a Mutual Agreement Procedure (MAP) request under Article 25 of the applicable Convention;
- A case must usually be presented within 3 years from the first notification of the action resulting in double taxation;
- The jurisdiction where the primary adjustment is made traditionally has the burden of proof to substantiate that the adjustment is correct and to explain why the other Competent Authority ought to give relief from double taxation;
- It is recommended that the request be filed with both Competent Authorities in order to assure both have the same information, allowing them to commence discussions to determine how relief from double taxation can best be granted;

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INTERNATIONAL DISPUTE RESOLUTION

Mutual Agreement Procedures (“MAP”)

- The UN has made available a very useful guide on best practices in the structuring and operation of MAP programs, for developing countries. The guide is available at: http://www.un.org/esa/ffd/wp-content/uploads/2014/10/ta-Guide_MAP.pdf
- The OECD has issued a Memorandum on Effective Mutual Agreement procedures (“MEMAP”) that also describes in relative detail how competent authority proceedings can best be prepared and conducted. This is available at: <http://www.oecd.org/ctp/transfer-pricing/manualoneffectivemutualagreementproceduresmemap.htm>
- Some countries have published detailed internal MAP guidelines.

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INTERNATIONAL DISPUTE RESOLUTION

Arbitration

- Article 25 (alternative B) of the UN Model Convention provides for the use of arbitration if the Competent Authorities cannot resolve the double taxation within 3 years after having received a MAP request.
- Arbitration allows third parties to assist in resolving the issue so that taxpayers are not left without relief in case the Competent Authorities - for whatever reason- cannot get to an agreement or cannot resolve the issue.
- Mandatory arbitration is a feature that also is available in several treaties between OECD Member countries.
- The European Union has a multilateral Arbitration Convention in place between the EU Member States for resolving transfer pricing issues.
- Some developing countries have resisted including arbitration provisions in tax treaties.

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INTERNATIONAL DISPUTE RESOLUTION

Arbitration

- Based on current procedures, arbitration is part of the MAP process and not a separate stand-alone procedure. So only once the MAP process has been invoked, and provided certain requirements are met, does arbitration become an available option to help resolve disputes.
- Once the arbitration process is invoked and there is a decision made by the arbitrators, the arbitration decision is binding on both States.
- The procedure can be invoked when the competent authorities have not been able to come to an agreement to resolve double taxation within 2 years from presentation of the case to the other competent authority. If this critical time period has passed, either competent authority can request for an arbitration procedure.
- In most cases, there is no access to the arbitration procedure in case a court decision has been rendered on the matter during the 2-year term.

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INTERNATIONAL DISPUTE RESOLUTION

Arbitration

- In case the arbitration option is available and being invoked, the respective Competent Authorities need to make sure arbitrators are appointed and the mode of the arbitration process is decided.
- In practice it is relevant to consider items such as (i) how many arbitrators are involved, (ii) what the qualification requirements are for an arbitrator, (iii) who chooses the chair and (iv) what the voting power is of the respective parties, so that the process does not result in a repeat discussion of the initial MAP discussions.
- The Commentary to Article 25 of the UN Model Convention provides for an Annex and sample form of agreement that can serve as basis for a mutual agreement to implement arbitration.

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DISPUTE AVOIDANCE AND RESOLUTION

3. Understanding Dispute Avoidance and Resolution Mechanisms (Manual Section C.4.)

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THE IMPORTANCE OF DISPUTE AVOIDANCE

Goals of Dispute Avoidance

- Dispute avoidance procedures aim to prevent disputes from arising so that the tax administration can collect any taxes due swiftly and does not tie up their valuable and scarce resources to handle disputes;
- It is beneficial for tax authorities to make the most effective use of their audit resources. Risk assessment plays an important role in this respect;

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DOMESTIC DISPUTE AVOIDANCE

Domestic rulings

- Taxpayers may in certain jurisdictions request a written statement, opinion, or ruling from the tax authorities about the tax implications of a transaction in advance of the transaction taking place and in advance of the tax return being filed to get certainty as to the tax consequences;
- Generally, such rulings are addressed to a particular taxpayer only, and do not grant rights to other taxpayers not covered by the ruling;
- The ruling is usually applicable to specific facts and if those facts change, the ruling may no longer apply. Rulings may be granted for a specific time period, and taxpayers generally cannot obtain any rights and protection from the ruling after that time period has run;
- Rulings may not be available/allowed with respect to political sensitive issues, however.

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DOMESTIC DISPUTE AVOIDANCE

Advance Pricing Agreements

- Advance Pricing Agreements (“APAs”) operate somewhat similar to rulings and in particular can serve as efficient dispute avoidance tool, provided the tax authorities have resources to implement and operate an APA program;
- APAs are binding agreements that are entered into between the taxpayer and the tax authorities on (i) the relevant facts, (ii) the arm’s length pricing method to be used to appropriately reimburse the taxpayer for its intercompany transactions, and on (iii) what constitutes an arm’s length result for the taxpayer’s functions performed, assets used and risks incurred while performing its functions;
- APAs particularly serve to avoid transfer pricing disputes by reviewing and agreeing on the appropriate arm’s length return prospectively;

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DOMESTIC DISPUTE AVOIDANCE

(Manual Section C.4.3)

Advance Pricing Agreements

- APAs usually have specific filing deadlines, because of their prospective nature. The exact filing deadline differs per country and is dependent on domestic rules. Many countries have issued APA guidance clarifying the specific applicable rules;
- Due to the high technical nature of transfer pricing matters, combining economics with legal requirements, APA filings are usually handled by a separate “APA division” within the tax authorities that specifically handles transfer pricing matters;
- Some countries allow for so-called “pre-filings” meaning that taxpayers and their counsel can come (sometimes even anonymously) in and meet with specialists of the APA division to explore whether the relevant facts in their case qualify for an APA;

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DOMESTIC DISPUTE AVOIDANCE

Advance Pricing Agreements

- During an APA evaluation, the taxpayer and tax authorities usually review the relevant facts, discuss the appropriate transfer pricing method for those facts and the (benchmarked) arm’s length results, and then agree that for the next 4-5 years, that is what the taxpayer will abide by and report as an arm’s length margin/price, unless extraordinary circumstances or events occur;
- In several countries it may be acceptable to have the APA outcome be applied to open years (retro-active use) as well, provided the relevant facts for the open years are the same or sufficiently similar to the facts presented under the APA. In those situations, the APA is considered “rolled back” to the years still under audit/to be audited, and can close any (potential) transfer pricing disputes related to those years. A roll-back agreement is usually entered into as separate from the APA;

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DOMESTIC DISPUTE AVOIDANCE

Advance Pricing Agreements

- APAs can be issued on a unilateral basis, and in that case only apply domestically. In that case there still can be transfer pricing disputes regarding an intercompany transaction conducted by the taxpayer that originate in another jurisdiction, however;
- To avoid that, APAs technically can also be entered into on a bilateral or multilateral basis. The authority for the bilateral (or multilateral) agreement is generally considered to be derived from Article 25 of the applicable Tax Convention (The Mutual Agreement Procedure). In that case, the APA filing request is made to both jurisdictions and the relevant facts, applicable transfer pricing method and arm's length results have to be agreed by both (or all relevant) tax authorities;
- If an APA is bilateral or multilateral, it can greatly help in avoiding double taxation.

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DOMESTIC DISPUTE AVOIDANCE

Domestic rulings: Benefits

- Taxpayers play an active role in that they will need to submit the precise facts and circumstances that are to be subject to the ruling determination and this allows tax authorities to "get-to-know" their taxpayers;
- Rulings tend to be confidential or disclosed on a no-names basis only;
- Generally rulings can be considered an effective dispute avoidance tool that allow the tax authorities to consider in advance if a transaction is consistent with their interpretation of the applicable law and rules.

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DOMESTIC DISPUTE AVOIDANCE

APAs: Benefits

- As transfer pricing is often a highly contentious issue, there is a great benefit for taxpayers and governments to enter into an APA: having an APA provides stability as regards the company's transfer pricing and related taxation. It may also allow for effective use of government resources;
- The process is usually cost effective and efficient. Many years can be covered (roll-back and APA/prospective years) based on an APA filing. The process also allows the tax authorities to "get-to-know" their taxpayer based on the ample up front information on the taxpayer's business model, revenue drivers and competitors;

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DOMESTIC DISPUTE AVOIDANCE

APAs: Benefits

- Taxpayers usually play an active role in the process, in they will need to submit the precise facts and circumstances that are to be subject to the ruling determination;
- APAs tend to be confidential taxpayer information or disclosed on a no-names basis only, although there is an increasing trend for tax authorities to exchange information on APAs between each other;
- In case a bilateral or multilateral APA is in place, it is to be expected that the transactions or issues covered by the APA will not be subject to disputes and double taxation. That leads to an optimal result for tax authorities and taxpayers alike: advance certainty, no disputes, and efficient tax collection without double taxation.

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DOMESTIC DISPUTE AVOIDANCE

Domestic rulings: Disadvantages

- Disputes may still arise regarding the issue covered by a ruling, for example if the ruling is considered to be issued *contra legem* (in violation of existing law or jurisprudence) or in case the issue covered by the ruling is addressed/overturned by a later Court Case;
- It will need to be determined whether the facts of the taxpayer remain consistent with those presented when requesting the ruling and whether the ruling interpretation is properly applied and remains applicable;
- Disclosure of rulings is being requested in several countries lately. There increasingly is a presumption that rulings are being used by taxpayers and certain tax authorities to the detriment of the tax base of other tax authorities, or that rulings have been granted that rise to the level of State Aid or a violation of the European Union's anti competition rules. Thus, the rationale and basis for rulings needs to be very carefully considered and corroborated.

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DOMESTIC DISPUTE AVOIDANCE

APAs: Disadvantages

- Having a special department that handles APAs is resource intense and may not be a priority for the tax authorities of a developing country;
- There is a steep learning curve and skilled resources are likely to be recruited away by private practice and companies, requiring ongoing investments in the program;
- It will need to be determined whether the facts of the taxpayer remain consistent with those presented when requesting the ruling and whether the ruling interpretation is properly applied and remains applicable. Economies may change abruptly and the facts underlying APAs may change as well, rendering the APA agreement no longer valid;

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DOMESTIC DISPUTE AVOIDANCE

APAs: Disadvantages

- Similar to rulings, APA disclosure and exchange of information between countries on APAs is being increasingly requested. Unilateral rulings may be seen as a disadvantage for the other jurisdiction where the intercompany transaction originates or ends.
- Bilateral or multilateral APAs are only available if the other countries where the cross border transaction originates or ends, have an APA program in place.

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DOMESTIC DISPUTE AVOIDANCE

Cooperative Compliance programs

- Some countries are developing so-called Cooperative Compliance programs or "Enhanced Relationship" programs that serve to build a relationship of trust and cooperation between the tax authorities and taxpayers.
- The purpose of these programs is to allow tax authorities to gain an understanding of the commercial awareness that taxpayers need to conduct business and have taxpayers provide disclosure and transparency as regards their business to the tax authorities; Taxpayers are required to put in place a so-called "Tax Control Framework" that is to be discussed with the tax authorities;
- The intended result of cooperative compliance is that the competent tax inspector is well-informed about the issues and tax position of the taxpayer even before the taxpayer files its tax return;

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DOMESTIC DISPUTE AVOIDANCE

Cooperative Compliance programs

- Based on the discussions with the tax authorities, taxpayers will generally know what the tax inspector position is and what issues will be scrutinized during audit;
- Overall the programs are seen as providing the opportunity to reduce government audits (And allow for better risk assessment due to knowing the taxpayer) and to allow for a reduction of taxpayer compliance costs, as taxpayers and tax authorities regularly meet to discuss pending tax issues. The program serves to have their relationship be governed by proportionality (objectivity) and responsiveness.

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DOMESTIC DISPUTE AVOIDANCE

Cooperative Compliance: Benefits

- As a result of the transparency the cooperative compliance program provides, tax authorities can apply proportionality when allocating audit resources to taxpayers in the program. There is in essence a “risk assessment” opportunity due to the interactions with the taxpayer;
- A well functioning cooperative compliance program should lead to taxpayers whose tax returns present “no surprises” to the tax inspector when audited;
- Speedy (“real time”) resolution of technical issues;
- Taxpayers in the program tend to be current as regards their filed and audited tax returns and back years are closed as there usually is a planned process, with time lines for discussions and closing issues.

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DOMESTIC DISPUTE AVOIDANCE

Cooperative Compliance: Disadvantages

- Taxpayers and tax authorities achieve a better understanding of the relevant tax issues based on a so-called “Tax Control Framework” (TCF) that they prepare and discuss. However, this TCF would otherwise not have been required to be prepared by taxpayers;
- The program is based on a trust relationship which is difficult to establish in developing countries. Furthermore, disputes may still arise, despite the taxpayer and tax authorities being involved in the program. This may present challenges and pressure on the relationship;
- The program requires scarce highly skilled government resources and actively ties up those resources. In practice only the larger taxpayers (MNEs) are eligible to participate, small and medium enterprises are excluded.
- The program may not be appropriate for a developing country which has a lot of other concerns as regards the collection of taxes.

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INTERNATIONAL DISPUTE AVOIDANCE (Manual Section C.4.4)

Cross-Border Dispute Avoidance

- Advance Pricing Agreements (APAs) in practice have proven very efficient in avoiding transfer pricing disputes by agreeing in advance what the arm’s length remuneration is for transactions with associated enterprises;
- An APA operates largely similar to a ruling with the added feature that certainty can be obtained on a bilateral basis with the assistance of the Mutual Agreement Procedure of Article 25 of the UN Model Convention;
- As transfer pricing disputes are common, APA programs are much encouraged and in practice much appreciated by taxpayers. Obtaining bilateral or even multilateral certainty is more and more seen as the way of the future. APAs allow for a common understanding of the taxpayer’s supply chain structure, functional analysis and risk profile and intercompany transactions.

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INTERNATIONAL DISPUTE AVOIDANCE

Cross-Border Dispute Avoidance

➤ As regards benefits and disadvantages with respect to –bilateral APAs, please see slides 40-41, 43-44

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DISPUTE AVOIDANCE AND RESOLUTION

4. Practical Guidance

- MAP case example
- APA case example

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ARE THERE ANY...



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