
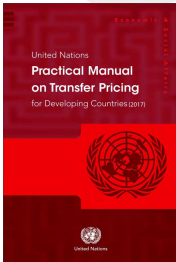

**UN-ATAF Workshop on Transfer Pricing
Administrative Aspects and Recent Developments**
 Ezulwini, Swaziland
 4-8 December 2017



**DISPUTE AVOIDANCE
AND RESOLUTION
Case example: MAP**

Friday, 8 December 2017
 2.00pm – 3.00pm



METERS GROUP

The purpose of this case is to analyze in a practical manner when Dispute Resolution may be required and what dispute resolution options may be available.

The case regards the (fictitious) Meters Group. The Group is engaged in the business of making available smart solutions for the energy business: it develops, produces and distributes electronic meters for public utility companies and households, including the development of software solutions, energy monitoring and electronic payment systems.

2

Facts of the case

Electro Co is incorporated and resident in Country A;

Electro Co owns patents, industrial know-how and naming rights related to software solution development, energy monitoring, invoicing and electronic payments. It also owns Trademark "T," registered in Country A.

3

Facts of the case

Cable Co is incorporated and resident in Country B;

Cable Co manufactures a wide range of electronic energy meters for the power generation, transmission, distribution and consumption sector, and for electricity revenue management.

For purposes of our case example, Cable Co pays a royalty to Electro Co for technology it uses to manufacture.

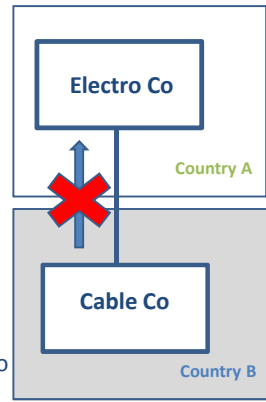
4

Additional Facts

Cable Co is audited. It has been reporting a net operating loss (NOL) for the years 2012 and 2013;

The Country B tax authorities state that Cable Co should be earning at least cost plus 15% and that a NOL does not seem correct.

They disallow the royalty paid by Cable Co to Electro Co as deductible expense.



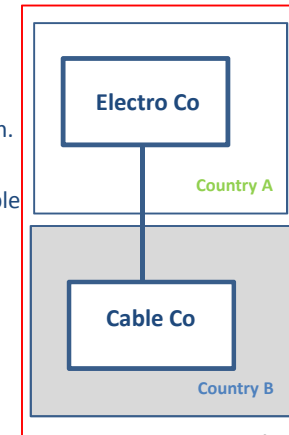
5

Additional Facts

The Country B tax authorities have asked for (but not received any) information on Electro Co's tax position.

There is a **Treaty** for avoidance of double taxation in place between Country A and Country B.

Any upward adjustment will be submitted to MAP by Cable Co.



6

The Importance of Dispute Resolution

➤ Cross Border Dispute Resolution

- If you know a taxpayer will request for MAP under an applicable Convention, the following aspects need to be considered:
 - Confirm the treaty allows for MAP:
 - Confirm there's an Article 9 (Associated Enterprises) in the Convention with a Corresponding Adjustment paragraph (Article 9(2));
 - Verify that Article 25 (Mutual Agreement) applies and has no applicable exceptions;
 - Verify that a timely application is possible (within 3 years from first notification). Note that some treaties or domestic procedures allow for Accelerated MAP access.

7

The Importance of Dispute Resolution

➤ Cross Border Dispute Resolution

- If you know a taxpayer will request for MAP under an applicable Convention, the following aspects need to be considered:
 - Confirm if the stage of the controversy process allows for MAP:
 - Has a settlement of the audit been agreed on? It may need to be determined if the audit is all-inclusive or not and whether some part can be carved out and submitted to MAP;
 - Has a domestic objection or litigation been filed? It may need to be determined which procedure takes precedence, MAP or litigation;
 - The taxpayer may have to make sure that they file a protective claim in the other jurisdiction, to halt the statute of limitations from running and closing access to MAP in that country.

8

The Importance of Dispute Resolution

➤ Cross Border Dispute Resolution

- If you know a taxpayer will request for MAP under an applicable Convention, the following aspects need to be considered:
- Some adjustments do not qualify for MAP. These may be cases where adjustments are based on fraud, gross negligence and willful default, or where the adjustment is based on an anti-abuse clause;
- A MAP request needs to have detailed information before the competent authorities are able to successfully handle the case. See ¶2.2. of the Guide to the Mutual Agreement procedure under Tax Treaties. http://www.un.org/esa/ffd/tax/gmap/Guide_MAP.pdf

9

The Importance of Dispute Resolution

➤ Cross Border Dispute Resolution

- If you know a taxpayer will request for MAP under an applicable Convention, the following aspects need to be considered:
- The tax authorities must decide on the mode of communication (meet/phone/email etc.). The taxpayer is generally not part of the procedure, although it may help to have them explain relevant facts.
- The tax authorities that made the primary (initial) adjustment have the burden of proof that the adjustment is correct. They have to submit a so-called “position paper” to the other competent authorities explaining the rationale for the adjustment;
- If the other competent authorities agree with the rationale, and there is no barrier to apply a corresponding adjustment to the years in issue, the two authorities can agree that and communicate this with the taxpayer;

10

The Importance of Dispute Resolution

➤ Cross Border Dispute Resolution

- If you know a taxpayer will request for MAP under an applicable Convention, the following aspects need to be considered:
- The taxpayer needs to accept the MAP agreement reached. If he does not do so, he may still litigate the matter, provided he has taken the steps to keep that option open;
- If the taxpayer accepts the agreement, Country A can decrease Electro Co’s taxable income for the years in issue, with the amount of the royalty. This might even result in a tax refund in Country A.

11

The Importance of Dispute Resolution

➤ Cross Border Dispute Resolution

- If you know a taxpayer will request for MAP under an applicable Convention, the following aspects need to be considered:
- It will need to be considered whether the competent authorities deem any corresponding adjustment by Country A as a separate –secondary-transaction, with secondary tax consequences;
- It will need to be determined whether late payment interest and/or refund interest applies to the primary and corresponding adjustments under domestic law and whether this is altered under the competent authority agreement;

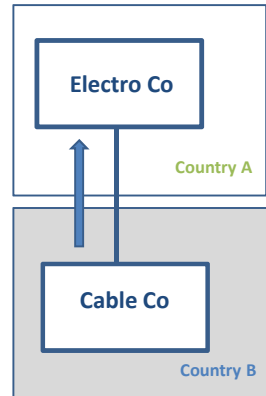
12

Practical Aspects

Additional/excessive income allocated from a subsidiary to parent company may be characterized as a dividend distribution, or a loan.

Additional/excessive income allocated from a parent company to a sister company may be characterized as a capital contribution, or loan.

Constructing a loan may be burdensome due to deemed interest obligations.



13

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 timely filed MAP request;
- The 3-year limit usually starts running once all necessary information has been made available to the competent authorities for the MAP case;
- Thus, if Country A and B have a treaty that includes mandatory arbitration, and Country B and A would not have been able to resolve the MAP matter within the 3 year-limit, the case would have qualified to go to Arbitration.
- 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.

14

International Dispute Resolution

➤ Arbitration

- The applicable mutual agreement on arbitration will govern the arbitration process (there is a sample agreement included in the UN Model Convention as a reference).
- A request for arbitration must be made in writing by one competent authority to the other, and should clarify that there is no binding decision obtained yet (in court or otherwise);
- There may be a de minimis threshold amount for matters before they qualify to go to arbitration;
- Once a request is submitted, the competent authorities are to agree on the questions to be submitted to the arbitration panel (there may be a short 3-month term to do so). These are called the Terms of Reference;

15

International Dispute Resolution

➤ Arbitration

- After the Terms of Reference are agreed, the arbitration panel has to be selected: each competent authority chooses one arbitrator, and those chosen arbitrators choose a third arbitrator who will function as Chair.
- Issues to be decided include inter alia:
 - Qualification of arbitrators and fees for the arbitrators;
 - Number of arbitrators (there may be more than 1 per country); How the arbitration panel decides on the Terms of Reference: using a "Last Best Offer" approach-based or otherwise (i.e. the independent opinion approach);
 - The communication process between arbitrators and the confidentiality of the procedure;
 - Logistics;
 - How to implement the arbitration decision.

16

International Dispute Resolution

➤ Mutual Agreement Procedure

- Arbitration is generally seen as an extension of the Mutual Agreement Procedure under the Convention for avoidance of double taxation. However, there is demand in certain scenarios by taxpayers for independent arbitration for tax matters, such as under Investment Treaties;
- Taxpayers deem avoidance of double taxation an important aspect for their foreign direct investment decisions. Therefore, there is an interest for governments to make sure the MAP process works;
- There is increasing demand to get broader access to MAP: Accelerated MAP (getting to the competent authority process early on) and rolling forward MAP decisions to later years, in order to get certainty;
- To allow MAP to work, it is important that transfer pricing (and other) tax adjustments are well developed and well motivated.

17