

Day 4, Session 4

Workshop: Administrative Approaches to Resolving Transfer Pricing Disputes

Solutions

Questions to be resolved individually:

When a TP adjustment is made and you agree to the adjustment, what are your treaty options for obtaining a corresponding adjustment?

Answer: You can ask the auditor in the other jurisdiction for a corresponding adjustment based on Art. 9(2). No MAP needed if they agree on principle and amount of the adjustment. Although in practice, often MAP necessary

The treaty between country A and country B has a filing period of 3 years (correct starting point). The taxpayer files a MAP request with the CA of country A for a TP issue after 40 months.

Can A's competent authority deny access taken into consideration BEPS Action 14?

- a) Yes
- b) No

Answer: yes

The treaty between country A and country B has a filing period of 2 years (correct starting point). The taxpayer files a MAP request with the CA of country A after 30 months.

Can A's competent authority deny access taken into consideration BEPS Action 14?

Answer: yes

In which country do you need to file a MAP request in an art. 9 TP case?

- a) In the country where the adjustment was made
- b) In the country that needs to make the corresponding adjustment
- c) In both countries
- d) Other?

Answer: other: you need to look at the treaty. Country of residence if 2014 version of OECD model, or in jurisdiction of your choice if 2017 model. You can do in both but that is not an obligation

Would the answer to the previous question be different if it were a PE attribution case?

- a) Yes
- b) No

Answer: state of residence of head office. PE is not a resident.

Which of the following tools would you use for a dispute between Norway and Belgium?

- a) The DTT between Belgium and Norway
- b) The arbitration convention
- c) The EU dispute resolution directive

Answer: only option available is DTT. Norway is not an EU country

You have a TP case between your country and another country you have never dealt with before. You do not know the CA of that jurisdiction. Where can you easily find that info? Give as many options as you can think of.

Answer:

- MAP Profile (to be found on the OECD website)
- MAP guidance
- Website of the jurisdiction
- Ask your own CA if they had the contact details

Give 2 reasons why it can be important to file for MAP as soon as possible while the treaty gives you a 3-year filing period?

Answer:

- The longer you wait, the more chance people that were involved in the transaction are no longer available to provide info.
- If the treaty does not have an Art. 25(2)2, you have more risk that an agreement can no longer be implemented and so less chance on an agreement

Case Study 2

What prospect does Parent Co have of resolving the double tax created by the audit?

The UK/Canada treaty contains a modern arbitration provision providing for baseball style arbitration where Competent Authorities have failed to reach agreement after the prescribed 3 year negotiation period. Both tax administration are committed to the arbitration process and have used it to resolve other issues. Given these provisions and the established practice of both governments Parent Co can be confident that the double tax will be relieved, and its profits only taxed once. It cannot however be confident as to what the resolution will look like and where profits will ultimately be taxed. Whenever arbitration might result it is critical to secure agreement of the commencement of the MAP period so that it is clear at what date that MAP period concludes and the issue moves to arbitration.

What steps can the tax payer take to avoid having to suffer actual double taxation whilst MAP continues? Can you mitigate the interest and penalties that will be charged by HMRC?

The OECD recommends that tax administrations should put arrangements in place to ensure that collection of tax subject to MAP can be stood over whilst the process is ongoing to avoid actual double cash taxation from materialising. Many administrations have such procedures – in some cases such as India accompanied by the requirement to have appropriate bank guarantees. HMRC will routinely stand over tax subject to the MAP process.

Neither interest nor penalties are usually dealt with by treaties and hence are not specifically subject to resolution through MAP. However there is often a natural degree of interest hedging as the interest charged by one jurisdiction is often partially offset by repayment interest from the jurisdiction giving corresponding relief. Where penalties are tax geared they will automatically reduce where the adjustment reduces.

What actions can you suggest to move the debate away from a narrow consideration of the value of the Parent Co trademark towards a wider consideration of the transaction?

The revised transfer pricing rules support a wider analysis. Accurately delineating the transaction to establish what the parties are actually doing is the starting point. Whilst the contractual terms may be limited to a trademark licence there is clear evidence that additional value is being provided from parent to sub. Pricing the “real deal” is critical to reaching a successful resolution. First hand evidence from the business in both jurisdictions will be important to establish this proposition.

How could you resolve the later years not in MAP?

The MAP process could be extended to cover years that are already filed but not subject to the audit – there is still a likelihood of taxation not in accordance with the UK/Canada treaty that the Competent Authorities should address. That will not give any prospective assurance however tax administrations may separately give some comfort that future filings in accordance with the MAP agreement would not be challenged. A bilateral APA is the only way to get conclusive assurance for future years.

The competent authorities are struggling to reach agreement so you start to consider arbitration. What issues arise around how you access and approach the process?

The first step is having a clear, common understanding of when the MAP period starts and ends and when arbitration can begin. It is critically important that these dates are agreed as they arise. As this time approaches the pressure on Competent Authorities to reach agreement will increase – HMRC will know that it has limited prospects of sustaining a nil royalty position in baseball arbitration so may be open to compromise positions. There is a lot that the business can do to suggest these. The business is not party to arbitration but would be well advised to submit its own proposal for resolution – based on substantive evidence – to both competent authorities to inform their approaches.