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INTERNATIONAL DISPUTE RESOLUTION



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Agenda

- Mutual Agreement Procedure
- Advanced Pricing Agreement
- Corresponding Adjustments
- Arbitration
- BEPS initiatives

Mutual Agreement procedure (MAP)

- OECD's Model Tax Convention
 - General and concrete MAP
 - A taxpayer may present his case to the competent authority of the Contracting State of which he is *resident*, if the following two conditions are met:
 1. Actions of one or both of the Contracting States result or will result in taxation not in accordance with the Convention, e.g. double taxation.
 - The tax claim need not to be levied yet - sufficient that it is likely that such tax claim will be levied.
 2. The case is presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention, e.g. binding ruling, formal notice.
 - Interpretation in the most taxpayer favorable way, i.e. from the latest possible moments.
 - DK: Time of decision.
 - If that taxation not in accordance with the Convention results from more than one decision and/or action taken by both of the Contracting States, the first notification in the last decision or action will be determining.



Mutual Agreement procedure (MAP)

- OECD's Model Tax Convention (continued)
 - Transfer pricing cases in regard to Article 9 may be presented in both the contracting states because, by definition, the involved entities are residents in each state.
 - A request for MAP may be submitted while the taxpayer has appealed to a higher administrative authority or to the courts in one or possibly both contracting states.
 - The court in one state is not required to let the agreement on allocation of the taxing powers take effect in the second state.
 - It may be advisable to refer the same question for the courts in both contracting states.

Mutual Agreement procedure (MAP)

- Danish tax perspective
 - In Danish tax law, there is no formal requirement for presenting a case to the competent authority, which in transfer pricing cases is SKAT, Store Selskaber, Kontoret for International Selskabsbeskatning.
 - Most of the Danish Tax Conventions contain a time-limit for presenting the case on three years, however, if not, no such time-limit can be interpreted into the Convention neither may the Tax Assessment Act be used as a supplement.
 - If a case is also brought before the National Tax Tribunal, it is usual that the tribunal is requested to let the matter calm quiet until the MAP has been completed.

Mutual Agreement procedure (MAP)

- Case processing
 1. The competent authority shall endeavor, if the objection, in the opinion of the authority, appears to be justified.
 2. If it is not itself able to arrive at a satisfactory solution, it shall *try* to resolve the case by mutual agreement with the competent authority of the other Contracting State.
 3. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.
- The taxpayer is not part of negotiations between the Contracting States, however, a Danish resident will be part in accordance with the Danish Administrative Act.
 - E.g. granting the right of access to documents and consultation duty.

Mutual Agreement procedure (MAP)

- The content of a mutual agreement
 - Must be in accordance with the domestic law in the Contracting States.
 - Mutual agreements concerning transfer pricing must be in accordance with the arm's length principle.
- Danish tax perspective
 - The competent authority cannot enter into a mutual agreement with increased taxation in relation to what follows from domestic law and the relevant tax convention.
 - Conversely, the competent authority may enter a mutual agreement that only limits the other Contracting State's taxation requirements, or where new information convince the Danish authorities that Denmark has levied a tax not in accordance the Convention or Danish domestic legislation.
 - Not certainty on whether the competent authorities may enter into a mutual agreement that solves the double taxation issues by granting extraordinary relief.
 - The Act on Collection of Tax sec 13(6): Debt to the government ctr. Tax determined by the national tribunal or the court

Mutual Agreement procedure (MAP)

- Implementation of a mutual agreement
 - A mutual agreement cannot be appealed to any other administrative authority, however, it may in principle be appealed to the courts.
 - In Denmark the taxpayer is requested to confirm that he agrees with the result, and that no other appeal procedures will be used.
 - The results of a mutual agreement procedure shall be implemented without regard to assessment time-limits in domestic legislation.
 - If a tax Convention does not contain a suspension rule, a mutual agreement between the competent authorities, generally, cannot be carried out after the expiry of the time limits in the domestic legislation.
 - If a foreign tax authority has made a decision that affects the Danish taxation, a request for a new Danish assessment shall be made within six months after the taxpayer has come to the knowledge of the facts justifying the request.



Advanced Pricing Agreement (APA)

- An APA determines the principles for setting prices in controlled transactions in a future period of time, with the purpose to avoid long and expensive litigations.
 - OECD and the European commission has issued guidelines on APA.
- An APA relates to the facts of a given case which is given an independent review, verification and assessment by the tax authorities.
- An APA may cover all controlled transactions of a taxpayer but will usually be limited to certain types of transactions.
 - Most relevant when the arm's length test is particularly complex.
 - Often made after a MAP to cover future income years.
 - Unilateral, bilateral or multilateral.

Advanced Pricing Agreement (APA)

- Danish tax perspective
 - No domestic regulation on APAs.
 - Probably based on provisions similar to Article 25 of the OECD Model Tax Convention, which means that a bi- or multilateral APA may only be concluded with countries with which Denmark has a Tax Convention.
 - The competent authority of Denmark is SKAT, Store Selskaber, Kontoret for international selskabsbeskatning.
- Case processing
 - The Guidelines issued by the European Commission divides the process into four phases:
 1. Opening meeting
 - Clarify whether the transaction are suitable for an APA,
 - Duration of the APA,
 - Nature and extent of the necessary information and analysis,
 - Conditions for disclosure and confidentiality in relation to business secrets,
 - Expectations and objectives of the APA,
 - It may be possible to hold the initial meetings on an anonymous basis.



Advanced Pricing Agreement (APA)

- Case processing
 1. Opening meeting (Continued)
 - The taxpayer presents the following to the competent authorities in all the Contracting States:
 - General information about the controlled transactions,
 - The preferred transfer pricing method,
 - The desired duration of the APA,
 - The countries involved,
 - Whether the agreement shall be used for previous financial years (rollback).
 2. Application
 - Should contain a detailed proposal for the content of the APA.
 - According to SKAT, the main elements of an application are the following:
 - A description of the business and the market,
 - A description of the controlled transactions,
 - A comparability analysis,
 - A description of the implementation of the proposed transfer pricing method,
 - Any critical assumptions, and
 - An annual reporting on compliance with the agreement.

Advanced Pricing Agreement (APA)

- Case processing
 - 3. Evaluation and negotiation
 - The competent authorities may ask the taxpayer for additional information and exchange information based on provisions similar to Article 26.
 - Taxpayers are not directly involved in the negotiation process, however, the competent authorities can agree that the taxpayer may have access to present the matter orally at a joint meeting during the negotiations.
 - 4. Mutual agreement
 - The competent authority shall prepare a draft for the APA - usually sent to the taxpayer for consultation.
 - The EU Commission considers that an APA may regulate the following:
 - 1) the duration, 2) information on the methodology and the critical assumptions, 3) whether the APA is binding on the competent authorities, 4) how compliance with the APA shall be checked, 6) rollback, 7) circumstances that may require changes in the APA or causes the APA to no longer have effect.
 - When the taxpayer has approved the APA, it shall be signed by the competent authorities and carried out nationally.
 - In Denmark, SKAT cannot enter into an agreement with the taxpayer to carry out the agreement.

Corresponding Adjustments

- Corresponding adjustments
 - Article 9(2) OECD states that a primary adjustment in one of the Contracting States shall trigger a corresponding adjustment in the other Contracting State if the latter agree upon the primary adjustment.
 - A similar provision is found in most Danish tax conventions
 - Domestic rule in LL § 2(6)
 - If the primary adjustment is reduced in an appeal it will be up to domestic legislation to determine whether the earlier completed corresponding adjustment shall be reduced as well. However, in principle a reduction should require, that the competent authority changes position on the arm's length test.
 - A corresponding adjustment can be done by reducing the taxable income or by granting relief.
 - OECD recommends that the corresponding adjustment is made in the financial year of the transaction.
 - Domestic time-limits may hinder a corresponding adjustment.

Arbitration

- The EU Arbitration Convention
 - International treaty – the ECJ and the European Commission does not have competence.
 - The purpose is abolition of double taxation in cases relating to transfer pricing.
 - Two steps:
 - MAP - two years time-limit.
 - Arbitration - six month time-limit.
 - Most cases solved during the MAP.
 - In 2009 the Council adopted a code of conduct for the effective implementation of the Arbitration Convention.
 - The arm's length principle shall be interpreted in accordance with Article 9(1) OECD Model Tax Convention.
 - The OECD Transfer Pricing Guidelines are crucial for the interpretation of the Arbitration Convention.

Arbitration

- The scope
 - Associated enterprises resident in different member states.
 - De facto control,
 - A PE is equated an entity,
 - Only transactions within the EU,
 - Only price adjustments,
 - Thin capitalization in principle not within the scope.
 - SKAT: Within the scope,
 - Code of Conduct: Within the scope,
 - Many Countries have made reservations.
 - The Convention cannot be used if:
 - Arbitration is prohibited by domestic legislation of a member state.
 - DK: Arbitration is not possible if the case is brought before a Danish court.
 - If the controlled transaction can be punished with severe punishment.
 - DK: Is interpreted narrow - willful violation of the Danish Criminal Code or other special regulation.
 - Other member states interpret the exemption less narrow.

Arbitration

- Case processing
 1. Notification of the enterprise
 - The enterprise shall be given the opportunity to inform the associated enterprise so that the authorities of the other member state can be notified.
 - In a transfer pricing case, a deadline of 15 days will normally be unreasonable, because such cases often are complicated and include a cross-border element.
 2. Unilateral resumption
 - The enterprise to which the primary adjustment is directed, may within three years, if the arm's length principle is violated, bring the case to the competent authorities
 - DK tax perspective:
 - When decision is made.
 - No time-limit in regard to corresponding adjustment, however, the request must be submitted no later than three years after realizing the taxation not in accordance with the Convention.
 - First DK decision from Western High Court 11. march 2016
 - The enterprise shall notify which Contracting States are involved.
 - The competent authority shall examine whether an appeal of the primary adjustment or by a corresponding adjustment may solve the double taxation.

Arbitration

- Case processing

- 3. Mutual agreement procedure (MAP)

- If an agreement is reached it shall be implemented without regard to any time-limits in domestic legislation.
 - It does not matter whether the price adjustment has been brought to the court.
 - If more than two Contracting States:
 - Multilateral negotiations,
 - One bilateral negotiation, where the other competent authorities acts as observers,
 - Multiple bilateral negotiations, where the other competent authorities acts as observers.
 - Time-limit on two years, starting from the latest of either:
 - The notification of the tax assessment, or
 - When request for arbitration is received.

- 4. Arbitration procedure

- Six months time-limit for setting the advisory committee.
 - Consists of two representatives from each of the competent authorities and independent persons.
 - The advisory committee preserve confidentiality.

Arbitration

- Case processing

- 4. Arbitration procedure (continued)

- The entity is not part in the negotiation, however, it has the right to present information and document for the advisory committee, as well as the right to consultation.
 - The advisory committee has a time-limit on six month, starting from when the case is presented and the chairman has confirmed that the members have received the relevant documentation.

- 5. Elimination of double taxation

- The competent authorities reach a decision, which does not necessarily has to be in accordance with the opinion of the advisory committee, within the six month.
 - If a decision cannot be reached, the opinion of the advisory committee will be binding on the competent authorities.
 - In Denmark the entity is asked to approve the decision.

Arbitration

- Tax Conventions

- OECD Model Tax Convention contains a provision regarding binding arbitration.
- Danish tax perspective:
 - None of the Danish tax conventions contain this provision yet.
 - The provision in the tax convention between Denmark and Germany is not binding on the competent authority.
 - The provisions in the tax convention between Denmark and Israel and between Denmark and Switzerland will not apply until there has been created legal basis in domestic Danish legislation.

Action 14: Make Dispute Resolution Mechanisms more effective

- **Action 14:**
 - *Develop solutions to address obstacles that prevent countries from solving treaty-related disputes under MAP, including the absence of arbitration provisions in most treaties and the fact that access to MAP and arbitration may be denied in certain cases.*
- **Final report, 2015**
 - Preliminary results – not consensus based.
 - Three-pronged approach:
 - Political commitments to effectively eliminate taxation not in accordance with the OECD Model.
 - Provide new measures to improve access to the MAP and improved procedures and
 - Establish a monitoring mechanism to check the proper implementation of the political commitment.
 - Political commitment guided by the following four principles:
 - 1) Ensuring that treaty obligations related to the MAP are fully implemented in good faith;
 - 2) Ensuring that administrative processes promote the prevention and resolution of treaty-related disputes;
 - 3) Ensuring that taxpayers can access the mutual agreement procedure when eligible; and
 - 4) Ensuring that cases are resolved once they are in the mutual agreement procedure.

Action 14: Make Dispute Resolution Mechanisms more effective

- Re 1.
 - “Shall endeavor” replaced by obligation to reach a result in MAP.
- Re 2.
 - Presents a number of options to overcome obstacles.
 - Adopt best practices described in OECD Manual on Effective MAP.
 - Commit to implement bilateral APA programs.
 - Recurring issues.
 - Rollback of APAs.
- Re 3.
 - Identify 8 obstacles and present a number of options to attempt to overcome these obstacles.
- Re 4.
 - MAP arbitration.



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