The Tax Club

The New Global Tax Controversy Paradigm

Lawrence M. Hill
Richard A. Nessler

November 10, 2021

Introduction

There have been some recent transformative developments in the global taxation framework that will significantly impact the manner in which multinational enterprises ("MNEs") approach and resolve their multilateral tax disputes with the taxing authorities of the world's developed nations. These foundational changes offer both challenges and opportunities for MNEs and their tax advisors. Familiarity and facility with the structure and operation of this new global tax controversy paradigm will lead to more transparent relationships with tax regulators and, consequently, more efficient and predictable tax outcomes.

The Organization for Economic Co-operation and Development ("OECD") has assumed a preeminent role in the evolution and operation of the global tax system. Greater international cooperation between taxing jurisdictions, in the form of multilateral agreements and sharing of information, has contributed to this metamorphosis. The digitalization of financial information and its greater accessibility have aided tax authorities in this process. Efforts of administrations, like the Biden administration, to sharply raise tax revenues will result in higher tax rates, fewer tax incentives and an unprecedented commitment of resources to tax enforcement. Apparent notions of global tax equity have resulted in measures to enhance the poorer nations' share of the overall tax pot and have focused the spotlight on efforts to raise tax revenues from MNEs .

With change comes opportunity. New mechanisms are arising out of practicality, if not necessity, to improve the multinational tax administration and resolution process. There is a greater emphasis on transparency along with multi-lateral, cooperative involvement of tax administrations in the process. Alacrity, efficiency and the durational benefits of dispute resolutions accompany the process.

International Compliance Assurance Program

One fascinating, fledgling mechanism of this new paradigm is the International Compliance Assurance Program ("ICAP"). ICAP, which is modelled, in part, on the Internal Revenue Service's Compliance Assurance Program ("CAP") is a signature feature of this *brave new world* of international dispute resolution.

What is ICAP?

ICAP "is a voluntary program for a multilateral co-operative risk assessment and assurance process. It is designed to be an efficient, effective, and coordinated approach to provide MNE groups willing to engage actively, openly and in a fully transparent manner with increased tax certainty with respect to certain of their activities and transactions."[1]

[1] OECD (2021), International Compliance Assurance Programme—Handbook for tax administrations and MNE groups, OECD Paris at 6 (hereinafter "OECD ICAP Handbook"). www.oecd.org/tax/forum-on-

ICAP does not provide an MNE group with the level of certainty, for example, that an advance pricing agreement ("APA"), a completed tax examination or a Mutual Agreement Procedure ("MAP") provides. However, it can provide comfort to the MNE group through a risk assessment process where multiple tax administrations participating in the process may advise that they consider certain agreed upon covered transactions -- generally involving transfer pricing, permanent establishment or other cross-border tax risks -- to be low risk.[2]

ICAP allows the MNE, a "gut check" as to where it stands from the standpoint of its key cross-border issues. It generally enables, the ultimate parent entity ("UPE") to interface with the lead tax administration (which in almost all instances is the tax jurisdiction of the UPE) and a large number of tax administrations in countries where it has a tax reporting nexus ("covered jurisdictions") and to engage in a constructive, non-confrontational dialogue regarding its global tax principles, its corporate structure, and its tax positions.

After the UPE provides a defined package of information, including country-by-country ("CbC") reports and other operative documents, ICAP allows for a risk

taxadministration/publications-and-products/international-compliance-assurance-programme-handbook-for-tax-administration-and-mne-groups.htm

[2] OECD ICAP Handbook at 6

assessment and issue resolution process with an outcome determination containing the results of such risk assessment of the covered risks for the covered periods, with the goal hopefully being that the covered risks are determined to be low risks. This, in turn, could result in an indication that it is unlikely that audit resources of the covered jurisdiction will be dedicated to the MNE's covered positions during the covered period and two years following such period.

ICAP consists of three stages: (1) Selection; (2) Risk assessment and issue resolution; and, (3) Outcomes. The selection process is designed to last for 4-8 weeks; the risk assessment and issue resolution process to last 20 weeks, and the outcome stage, 4-8 weeks. Therefore, in theory, the entire ICAP process should last only 28-36 weeks. [3]

At the end of the ICAP risk assessment and issue resolution process an MNE group will receive outcome letters issued by each covered tax administration, containing the results of the tax administration's risk assessment and assurance of the covered risks for the covered periods. The design, content and wording of an outcome letter is determined separately by each covered tax administration, depending upon domestic practices and processes, but will generally include the risk ratings, any agreement reached as part of the issue resolution process, confirmation of the

[3] OECD ICAP Handbook at 43

covered risks that are considered to be low risk, with a statement that it is not anticipated that compliance resources will be dedicated to a further review of these risks for a defined period and appropriate caveats or limitations, including any requirements to notify the relevant covered tax administration of any material changes that impact the covered risks.[4]

There have been two pilot programs involving ICAP. The first was launched in January 2018 that involved eight tax administrations. The second pilot involved 19 tax administrations and was initiated in March 2019.[5] The program has been deemed a success and has been instituted permanently. The next three deadlines for submission of an application to participate in ICAP are September 30, 2021, March 31, 2022 and September 30, 2022.[6]

The Drivers for ICAP

The OECD describes six key drivers behind the development of ICAP: (1) Providing a pathway to improved tax certainty for MNE groups; (2) More effective dispute resolution; (3) Well-established MNE compliance frameworks; (4) Advances in international collaboration; (5) Better and more standardized information for transfer

[4] OECD Forum on Tax Administration, International Compliance Assurance Programme—FAQs (February 2021) (hereinafter "ICAP FAQs").
[5] OECD ICAP Handbook at 6
[6] ICAP FAQs.

pricing risk assessment; and, (6) Capitalizing on greater opportunities for multilateral engagement to provide improved assurance for tax administrations. [7]

What are the potential benefits of ICAP?

ICAP provides for an organized dialogue between multiple tax administrations and the MNE group in an atmosphere of greater transparency and candor where there is a free exchange of information. The goal is greater certainty of tax outcome; better relationships with the tax authorities and a more efficient and speedier process.

ICAP facilitates a dialogue between the MNE and the covered tax administrations in an atmosphere that is not as inherently contentious as an audit. It provides an opportunity for the MNE to elaborate on certain aspects of the tax returns that may not be readily apparent to the tax authorities from a review of the returns. It also allows the MNE to explain its philosophies and global tax principles; and, to gauge where it stands, *vis a vis* the tax regulators, as a result of the objective feedback received from them. This enables the MNE to improve its processes and policies and to reassess its risk profile and level of risk tolerance. All of this occurs in a framework where the MNE understands the scope and nature of the documentation and information it is required to provide and the issues that will be discussed.

[7] OECD ICAP Handbook at 6-7

ICAP therefore eliminates the type of expansive document fishing expeditions that are often seen during standard tax audits. The MNE provides a known, circumscribed set of documentation. Gone are the use of government discovery tools such as information document requests, administrative summonses and witness interviews under oath. Narrowing the scope of broad-based document and witness discovery avoids the requirement of lengthy document gathering, document review and document production by the MNE. It also eliminates the need for privilege logs, third-party discovery, witness preparation and the inevitable discovery disputes that ensue. This in turn expedites the information exchange process and cuts down substantially on the normal attendant costs of discovery. It also lowers the level of potential conflict and tension between the parties.

ICAP also eliminates the lengthy and inefficient process of issue identification that taxing authorities necessarily engage in. The issues covered during ICAP are readily identifiable and far more discrete. The parties, therefore, can focus on a limited number of material issues that they have agreed to address, rather than be distracted by a host of issues that may be immaterial or of limited value. Clear cut identification of issues, for discussion, from the outset of the process, results in greater focus, greater efficiency, greater certainty and greater likelihood of success.

ICAP provides a forum where the MNE can interact with multiple tax authorities in one coordinated setting, rather than unilaterally and disparately. The covered tax administrations consult with each other on the information provided by the MNE, on their evaluation of the issues, on the tentative conclusions they have arrived and and on follow up requests for additional information.

This multilateral process offers tremendous efficiencies, even though the covered tax administrations are ultimately not required to arrive at a consensus on their assessment of the MNE's level of risk. These collective interactions between the various tax administrations are more likely to engender consensus than if the MNE engaged each administration separately.

Compare this option with an MNE potentially having to engage in five to eight separate, potentially contentious, full scope examinations, with time consuming exchanges of information between the taxing authorities, duplicative requests for information, and the increased potential for inconsistent results. ICAP offers tremendous value to the MNE in lieu of such a circumstance.

ICAP also increases an MNE's access to and familiarity with the various tax administrations and fosters more transparent and cooperative relationships with them. Transparency and cooperation, in general, leads to better working

relationships, better trust between the parties and more efficient and effective outcomes.

Even if ICAP does not result in a finding that a covered transaction is low risk and, therefore, the hoped-for comfort sought is not achieved, the process may serve as a smooth transition to other dispute resolution mechanisms. For example, as a result of ICAP, the covered tax authorities will have a better understanding of the most significant international tax issues that the MNE is facing. They will also have the basic background documentation. Not only will this permit them to engage in a more focused, efficient audit, but the audit will proceed in a more constructive cooperative fashion that it otherwise would have. Moreover, the prior involvement of multiple covered tax administrations may facilitate more efficient and targeted joint audits or advanced pricing agreement negotiations and lower the number of disputes that may require resolution through the Mutual Agreement Procedure ("MAP"), discussed below.

MAP

U.S. tax treaties allow a taxpayer to request a Mutual Agreement Procedure if the taxpayer believes that it is, or will be, subject to taxation inconsistent with the treaty.[8]

[8] Generally, a taxpayer must satisfy certain threshold requirements to be entitled to the benefits of a tax treaty. These threshold requirements generally include (but are not limited to) the Residence article and, if applicable, the Limitation on Benefits (LOB) article of the treaty, in addition to any other specific requirements prescribed by an applicable tax treaty article. *See* IRM 4.60.2.7 (08-09-2021)

This situation typically arises as a result of a U.S. or foreign-initiated adjustment, which normally would cause double taxation (taxation of the same income twice), or other taxation not in accordance with the governing treaty.[9] MAP, which provides taxpayers efficiency, effectiveness, flexibility and relief from double taxation, has been found to be a useful tax resolution procedure for multinational companies facing a transfer pricing or other assessment resulting in double tax arising from permanent establishment, residency and withholding tax, among other treaty issues, whether in the U.S. or abroad. Accordingly, MAP is a powerful tool that can effectively relieve taxpayers from double taxation.

Tax Treaties

Most U.S. tax treaties have MAP articles that prescribe how a taxpayer can make a competent authority request.[10] Generally, the MAP articles of U.S. tax treaties and tax coordination agreements[11] provide the authority for taxpayers to request, and competent authorities to provide, relief from taxation not in accordance with a tax treaty/tax coordination agreement.[12] U.S. competent authority procedural authority is provided by Treasury Order 150-10 and IRS Delegation Order 4-12 (Rev. 4).[13]

[9] Rev. Proc. 2015-40
[10] The U.S. competent authority cannot consider requests involving countries with which the United States does not have an applicable tax treaty.
[11] An agreement (tax coordination or tax implementation) for coordinating tax administration between the IRS and the tax agencies in U.S. territories: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. *See* IRM 4.60.2-1 (08-09-2021)
[12] IRM 4.60.2.1.2 (08-09-2021)
[13] IRM 1.2.2.5.11, Delegation Order 4-12 (Rev. 4)

However, each country prescribes under its domestic law how a taxpayer can make a competent authority request to such country's competent authority. Therefore, treaty partners' competent authority processes may differ from the competent authority process of the U.S. competent authority. Thus, while the basic objective of all MAP articles is the same, the specific procedures can vary from treaty to treaty.

Jurisdiction

The taxpayer may file a MAP request with the U.S. competent authority.[14] That request asks the U.S. and foreign competent authorities to agree to "relieve" (remove) taxation inconsistent with the treaty, which normally would mean to relieve double taxation.

The U.S. competent authority's jurisdiction over competent authority issue(s) in a request begins when the U.S. competent authority accepts such competent authority request (in the case of competent authority requests made to U.S. competent authority)[15] or the U.S. competent authority is notified by the competent authority of a U.S. treaty partner/U.S. territory of a competent authority request.

[14] Rev. Proc. 2015-40, Sec. 6.02

[15] The U.S. competent authority will not reject a taxpayer's competent authority request solely because the taxpayer has previously pursued resolution of its competent authority issue through an alternative dispute resolution program that is under the jurisdiction of IRS Examination. *See* Rev. Proc. 2015-40, Sec. 6.03(3)

On receiving a MAP request, the U.S. competent authority normally will accept the request for consideration.[16] The U.S. competent authority may however decline to accept the request if the request (i) is defective (for example, lacking required information) and the defect is not corrected, (ii) the taxpayer is clearly not eligible for assistance under the terms of the relevant tax treaty (such as by failing to be a resident of either contracting state), or (iii) the taxpayer has engaged in certain prejudicial conduct (impeding the IRS examination function).[17] After accepting a case for consideration, the U.S. competent authority will first consider whether, based on its own analysis of the case, it is able to unilaterally provide full relief, which would be either a full withdrawal of the adjustment in the case of a U.S.-initiated adjustment, or correlative relief in the full amount of a foreign-initiated adjustment.[18] The U.S. competent authority will return jurisdiction over the issue to the relevant office within the IRS when the U.S. competent authority ceases to provide assistance regarding a competent authority issue.[19]

[16] The U.S. competent authority has exclusive control or jurisdiction over the competent authority issue(s) in an accepted competent authority request, with the exception of securing an extension of the applicable domestic period of limitations under IRM 4.60.2.6.2.
[17] Rev. Proc. 2015-40, Sec. 7.02
[18] Rev. Proc. 2015-40, Sec. 8
[19] IRM 4.60.2.6.5 (08-09-2021)

Timing of MAP Request

Rev. Proc. 2015-40 and IRM 4.60.2 provide guidance on when a competent authority request can or must be made, including the following examples:[20]

- Where the competent authority request arises from an IRS examination, the U.S. competent authority will generally not accept the request before Exam has communicated the amount of the proposed adjustment in writing to the taxpayer (generally, by a Form 5701 - Notice of Proposed Adjustment or Form 4549 - Income Tax Examination Changes);[21]

  and

- Where the competent authority request arises from an Appeals proceeding, the taxpayer must make such request within 60 days of its opening conference with Appeals.[22]

Taxpayers should request competent authority assistance promptly after a competent authority issue(s) arises or is likely to arise, as many U.S. income tax treaties require that a competent authority request be filed, or require notification to the competent

[20] Rev. Proc. 2015-40, Sec. 3.04(3)

[21] Examination must suspend any administrative action (e.g., assessment and collection procedures) with respect to the competent authority issue(s) covered in such request. IRM 4.60.2.2 (08-09-2021)

[22] The simultaneous appeals procedure ("SAP") is an optional aspect of the competent authority process whereby IRS Appeals works jointly with the U.S. competent authority and the taxpayer toward the development of the U.S. competent authority's position on an underlying U.S.-initiated adjustment prior to the U.S. competent authority's consultations with the foreign competent authority. The procedure is intended to facilitate the U.S. competent authority's unilateral consideration of a resolution of the competent authority issue before it presents a position on the issue to the foreign competent authority. *See* Rev. Proc. 2015-40, Sec. 6.04(2)

authority that such request will be filed, within a certain time limit (referred to as a treaty notification period).[23]

Protective Measures

The taxpayer is responsible for taking appropriate protective measures under applicable domestic law to increase the likelihood that a competent authority resolution, resulting from its competent authority request, can be implemented in both Contracting States.[24] "Protective measures" refer to actions a taxpayer takes under applicable domestic law to increase the likelihood that a competent authority resolution can be implemented. Protective measures include, but are not limited to:

- Filing protective claims for refund or credit;
- Extending any period of limitations on assessment or refund;
- Avoiding the lapse or termination of the taxpayer's right to appeal any tax determination;
- Complying with all applicable procedures for invoking the competent authority process, including applicable treaty provisions dealing with time limits within which to invoke such remedy; and
- Contesting an adjustment or seeking an appropriate correlative adjustment with respect to the U.S. or treaty country tax.[25]

[23] Rev. Proc. 2015-40, Sec. 3.04(1). A taxpayer must submit a pre-filing memorandum prior to filing a competent authority request if the proposed competent authority issues will involve a taxpayer-initiated position. The pre-filing memorandum must identify the taxpayer, explain the factual and legal basis of the taxpayer-initiated position, and describe any administrative, legal, or other procedural steps undertaken in the applicable treaty country and any communications with the foreign competent authority regarding the position. *See* Rev. Proc. 2015-40, Sec. 3.02(2)

[24] Rev. Proc. 2015-40, Sec. 11.01

[25] *Id*.

Protective claims can be made by any of the following ways:

- By following section 6402 and corresponding Treasury regulations;
- By filing a request for competent authority assistance that contains a specific statement to that effect and supporting documentation; or
- By filing a letter with the U.S. competent authority (other than a competent authority request) stating that a protective claim is being made pursuant to Section 11.03(1) of Rev. Proc. 2015-40.[26]

MAP Procedures

Taxpayers who are eligible to request assistance from the U.S. competent authority must do so in accordance with the governing U.S. income tax treaty, Rev. Proc. 2015-40 (or any successor), and any other applicable U.S. guidance. Generally, a taxpayer's eligibility to request assistance from the U.S. competent authority is determined by reference to the U.S. tax treaty under which competent authority assistance is sought. Requests for some types of competent authority assistance may have special filing requirements.[27] The office of the U.S. competent authority lies within the IRS' Large Business and International Division. The process of requesting and obtaining MAP assistance from the U.S. competent authority is

[26] Rev. Proc. 2015-40, Sec. 11.02(3). To be a valid protective claim for credit or refund, the claim must be in writing and meet the requirements of section 6402 of the Code and the regulations.
[27] *See* Rev. Proc. 2015-40, Sec. 3.06

conducted through two offices, Advance Pricing and Mutual Agreement Program ("APMA") and Treaty Assistance and Interpretation Team ("TAIT").

Competent Authority Resolution

Competent authority resolutions require not only agreement by the competent authority or competent authorities (as applicable), but the taxpayer who made the competent authority request as well. The process for competent authority resolution is generally represented by paragraph 2 of the MAP article in most U.S. income tax treaties. Generally, the process of competent authority resolution includes three sequential steps:

Step One: Determination Whether the Request May Be Accepted

Upon receipt of a competent authority request, the U.S. competent authority will issue an acknowledgement letter to the taxpayer, which is not an acceptance.[28] The U.S. competent authority's acceptance of a competent authority request depends on whether the request is "justified," as contemplated by the applicable MAP article and U.S. administrative guidance.[29]

[28] *See* Rev. Proc. 2015-40, Sec. 7.01

[29] The U.S. competent authority's decision as to whether a competent authority request is complete, or to deny, suspend, or terminate assistance, is final and not subject to administrative review. *See* Rev. Proc. 2015-40, Sec. 7.03

Generally, a request for competent authority assistance will be accepted when the U.S. competent authority determines the person seeking assistance:

- Is eligible to file a competent authority request;
- Has satisfied all applicable procedural requirements for assistance set out in the U.S. income tax treaty (e.g., filed a timely request) and applicable administrative guidance[30];
- Has demonstrated that there is, or will be, taxation (or a risk thereof) that is not in accordance with the treaty; and
- Is eligible for the assistance requested and the competent authority issue(s) for which assistance requested can be remedied via unilateral resolutions or through a bilateral agreement with the other Contracting State.[31]

Step Two: Unilateral Resolution

After the U.S. competent authority determines that it may accept a request for assistance under the MAP article, it will seek to determine whether it can resolve the competent authority issue(s) through a unilateral solution before seeking bilateral resolution with the competent authority of the other Contracting State.[32] However, competent authority requests typically require bilateral communication and negotiation. Additionally, the U.S. competent authority will not unilaterally resolve certain issues (e.g., a question of treaty residency).[33]

[30] *See, e.g.*, Rev. Proc. 2015-40, Section 7.02
[31] *See* Rev. Proc. 2015-40, Sec. 7.01
[32] Rev. Proc. 2015-40, Sec. 3.06(1))
[33] In cases of U.S.-initiated adjustments, the U.S. competent authority may request additional information from Examination about the adjustments. Cases accepted for competent authority consideration in which the IRS position is not sufficiently developed may be returned to Examination for further development. In cases of foreign-initiated actions, the U.S. competent authority may request an evaluation of the foreign position/issue from Examination. *See* IRM 4.60.2.6.4 (08-09-2021)

Step Three: Bilateral Resolution

If the U.S. competent authority accepts a request for competent authority assistance under the MAP article, and a unilateral solution is not available or appropriate, the U.S. competent authority will generally seek agreement with the competent authority of the other Contracting State.[34] In most situations, the competent authorities are not required to reach an agreement (or otherwise resolve the underlying issues) once a case is accepted; rather, paragraph 2 of the MAP article requires the competent authorities only try to negotiate to resolve such cases.

In general, the competent authority for the Contracting State that took the action resulting in the competent authority issue(s) will prepare a position paper and provide it to the competent authority of the other Contracting State. Thus, if the issue arose from a U.S.–initiated adjustment, the U.S. competent authority will typically prepare a position paper and provide it to the competent authority of the other Contracting State. Following this, the competent authorities may exchange other correspondence or conduct additional fact-finding in respect of the case. The competent authorities will then negotiate the case. Such negotiations often occur contemporaneously with other competent authority cases between the two countries. The frequency of such meetings varies greatly depending on the country, the

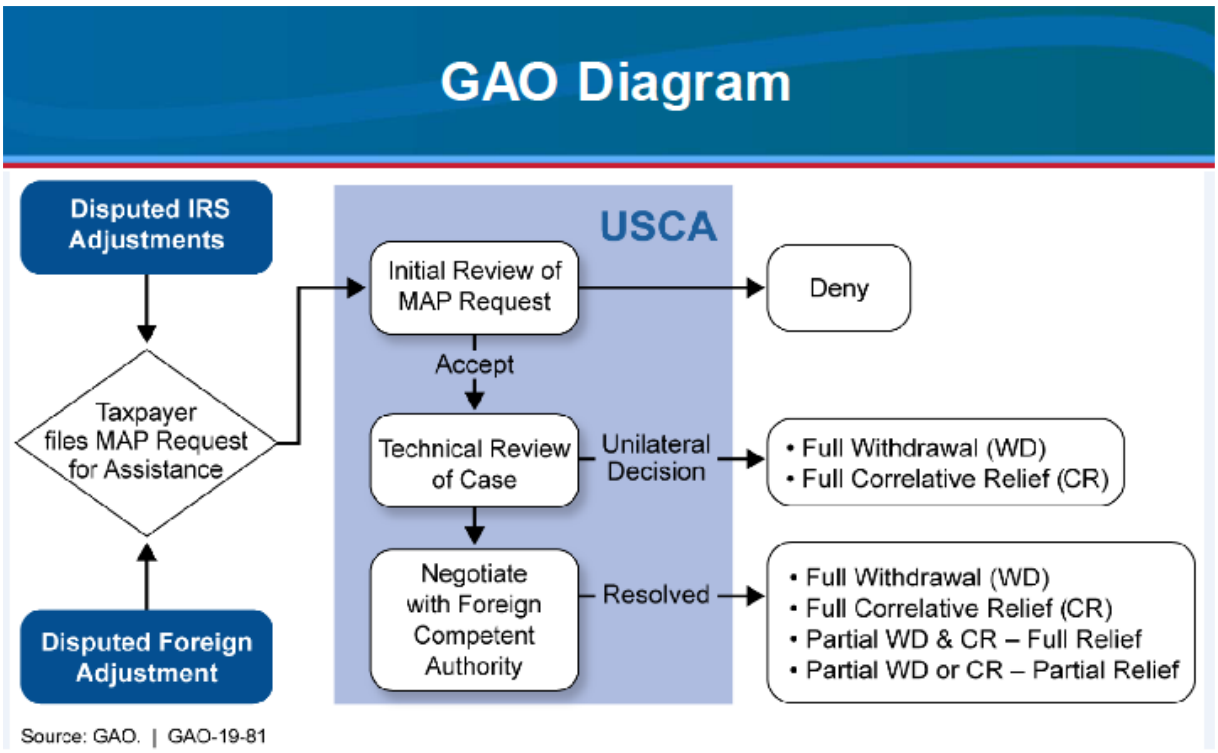
[34] Rev. Proc. 2015-40, Sec. 8.02

competent authority issue(s) for which assistance was requested, and other circumstances.[35]

Competent Authority Resolution Reached

Four outcomes are possible under MAP that would grant full or partial relief: (1) the adjusting jurisdiction fully withdraws the adjustment; (2) the non-adjusting jurisdiction provides full correlative relief (correlative relief in the full amount of the adjustment); (3) the adjusting jurisdiction partially withdraws the adjustment and the non-adjusting jurisdiction provides partial correlative relief, with the correlative relief in an amount equal to the remaining adjustment, so that no double taxation remains, and (4) there is some partial withdrawal of adjustment, some partial correlative relief, or both, but the withdrawal (if any) plus the correlative relief (if any) total to less than the original adjustment, so that some double taxation remains. The LB&I diagram below summarizes the decisional process:

[35] OECD BEPS Action 14 directs for competent authorities to endeavor to close new MAP cases involving transfer pricing issues within an average timeframe of two years or less. However, this two-year target only sets the standard for average completion times and generally does not require individual cases to be completed within any particular timeframe.



Large Business & International

1

Competent authorities are authorized to, and sometimes do, unilaterally resolve cases by full withdrawal or correlative relief, without involvement of the other treaty partner. However, most MAPs are resolved by a "mutual agreement" between the competent authorities regarding the amounts to be withdrawn and/or the amounts for which correlative relief would be granted. Under some treaties, if the competent authorities cannot agree on an outcome the taxpayer may request arbitration; the

arbitrators' decision, if accepted by the taxpayer, is binding on the IRS and the other jurisdiction's tax authority.[36]

After the competent authorities tentatively agree on one of these outcomes, the U.S. competent authority presents that outcome to the taxpayer. If the taxpayer accepts the outcome, the U.S. competent authority normally will then formalize that outcome, direct the relevant offices within the IRS to implement its terms, and close the case. If the taxpayer does not accept an outcome tentatively agreed by the competent authorities, or if no competent authority resolution is reached, the U.S. competent authority will release jurisdiction over the competent authority issue(s) back to Exam or Appeals (as appropriate) for continued administrative processing.[37]

Closing Agreement

Where competent authority resolution is reached and is accepted by the taxpayer, the terms of the agreement will be memorialized in a disposition memorandum, which the U.S. competent authority will provide to the IRS office responsible for implementing the agreed upon resolution.[38] The U.S. competent authority will then

[36] Rev. Proc. 2015-40, Sec. 10

[37] If the U.S. competent authority either declines to consult with the foreign competent authority about, or fails to reach an agreement on, an ancillary issue, then the controlling provisions of domestic law will apply to that issue. *See* Rev. Proc. 2015-40, Sec. 4.02

[38] IRM 4.60.2.6.5 (08-09-2021)

direct the relevant IRS office(s) to carry out administrative implementation of the terms of the disposition memorandum.[39]

Where a taxpayer has executed a closing agreement with Exam that covers the competent authority issue(s) for which the taxpayer subsequently makes a competent authority request, the U.S. competent authority will generally pursue only a correlative adjustment from the other Contracting State and will typically not take any actions that would change the determination of taxable income set forth in the agreement.[40] Where a taxpayer has executed a closing agreement with Appeals that covers a competent authority issue(s) for which the taxpayer subsequently makes a competent authority request, the U.S. competent authority will not accept such request.[41]

Where a Federal court has made a final determination of a taxpayer's tax liability, or the taxpayer has agreed to a litigation settlement with the Office of Chief Counsel or the U.S. Department of Justice, the taxpayer may still make a competent authority request for such issue. Upon accepting such a request, the U.S. competent authority will pursue only correlative relief from the applicable country for the amount of such

[39] When appropriate, the IRS may request that the taxpayer execute a closing agreement reflecting the terms of the competent authority resolution. *See* Rev. Proc. 68-16, 1968-1 C.B. 770 (as modified by Rev Proc. 94-67, 1994-2 C.B. 800).
[40] Rev. Proc. 2015-40, Sec. 6.03(2)
[41] Rev. Proc. 2015-40, Sec. 6.04(3)(a)

final determination (or the amount specified in the closing agreement, if applicable) and will not authorize competent authority repatriation.[42]

Where a taxpayer, prior to requesting competent authority assistance, has executed an agreement similar to a closing agreement with the other Contracting State that covers the competent authority issue(s) and that limits the ability of such other country's competent authority to negotiate a competent authority resolution with the U.S. competent authority, the U.S. competent authority may deny the request for assistance.[43]

Benefits of MAP

There are numerous advantages to the MAP process. Some of the advantages of MAP include:

- MAP can be cost-effective and can avoid double tax efficiently.
- The MAP process is effective and generally relieves all double tax in most cases.
- The MAP process removes issues from the examination team. For example, the U.S. competent authority can consider the OECD Transfer Pricing Guidelines instead of the section 482 regulations.
- MAP is flexible. Taxpayers are generally free to exit the MAP process and pursue other remedies at any time.

[42] "Competent authority repatriation" refers to certain types of payments and prepayment offsets made with respect to the amount of a primary adjustment addressed in the competent authority resolution. *See* Rev. Proc. 2015-40, Sec. 4.02(2) and Rev. Proc. 99-32 for additional information. *See* Rev. Proc. 2015-40, Sec. 6.05(2)

[43] Rev. Proc. 2015-40, Sec. 7.02(3)(a)

Conclusion

With the unprecedented sharing of information and enhanced level of cooperation between the U.S. and foreign taxing authorities, coordinated, in depth audits of MNE are on the rise. The stakes are greater than ever in terms of tax exposure, time commitment and cost. Therefore, it is incumbent on tax practitioners to consider alternative dispute resolution mechanisms for their clients that may result in more effective and efficient resolutions of global tax disputes. ICAP and MAP are two such valuable mechanisms worth utilizing where appropriate.