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We are delighted to introduce Practically Speaking: Tax Controversy, a column with insights from across KPMG's tax controversy and dispute resolution group. This column will provide an overview of selected tax controversy topics related to IRS and international disputes, coupled with practical insights based on the authors' experiences.

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In this initial installment of Practically Speaking: Tax Controversy, the authors explain how the accelerated competent authority procedure and its analogues allow for case resolutions to be rolled forward to subsequent years.

This article represents the views of the authors only and does not necessarily represent the views or professional advice of KPMG LLP. Any errors remain the authors' own.

Background: MAP and ACAP

The IRS and many tax authorities across the globe offer several mechanisms to resolve cross-border disputes and seek relief from double taxation. One such mechanism is the mutual agreement procedure article of relevant income tax treaties. MAP proceedings involve two or more countries negotiating, under the terms of an income tax treaty, the elimination of double tax or other tax not in accordance with the treaty. MAP cases frequently involve transfer pricing issues and generally arise as a result of an adjustment made by a tax authority, but they can also be used for transfer pricing adjustments initiated by a

taxpayer to ensure that it is in compliance with the applicable requirements.

In our experience, MAP is an increasingly effective tool for resolving issues that subject taxpayers to double taxation.[1] The competent authorities partaking in the negotiations are generally well-versed in issues arising under income tax treaties and determined to provide relief to encourage taxpayer transparency and international relations. Over the years, the IRS advance pricing and mutual agreement program, which carries out the functions of the U.S. competent authority, has developed an effective MAP relationship with almost all its key treaty partners. Moreover, for U.S.-initiated adjustments, MAP acts as an alternative to IRS Appeals,[2] and often a preferable one, considering the involvement in MAP of another interested party (the foreign competent authority) and the high likelihood of eliminating double taxation.

The accelerated competent authority procedure (ACAP) complements the standard MAP process by providing an efficient mechanism to extend an agreed resolution to subsequent filed years. ACAP (where it is available) allows for the application of a competent authority resolution to later tax years for which tax returns have already been filed. Generally, ACAP is applicable only when the facts in the MAP years did not substantially change in the following years.

Procedurally, taxpayers must request ACAP either in their original request for competent authority assistance or in a subsequent submission that is made before the treaty partners come to a tentative resolution.[3] The timing of the ACAP request allows the treaty partners to consider the ACAP years during the MAP negotiations to ensure that the agreed resolution can in fact be applied to years following the MAP period. In some circumstances, APMA may ask a taxpayer to apply for ACAP, but the ultimate discretion on whether to enter ACAP lies with the taxpayer.[4] If a taxpayer chooses to apply for and proceed with ACAP, it must also waive its rights under section 7605(b) to written notification from the IRS of the need for multiple inspections of the taxpayer's books and records for the tax years covered by the ACAP request.[5]

Formal and Informal ACAP

Although ACAP can be an effective tool for gaining certainty on the price of intercompany cross-border transactions, it is officially allowed only when both treaty partners have a formal ACAP program in place. While the United States and Canada have formal ACAP programs that function very well, almost no other countries formally provide for ACAP, thereby limiting U.S. taxpayers' ability to effectively use this tool. Just as in the United States, the benefits of the Canadian ACAP program are hampered by the lack of widespread adoption — at least on a formal basis.

However, we are aware of several countries that have been willing to agree to apply an ACAP-like procedure on an informal basis, although informal ACAP resolutions may be available only on a case-by-case basis. KPMG's experiences in recent years indicate that informal ACAP-like procedures may be available in Denmark, the Netherlands, and Switzerland, potentially among other jurisdictions. The requirements for informal ACAP differ by country and depend on the facts of each case, but generally, the MAP issue must be ongoing and expected to be a continuing source of dispute.

For some jurisdictions, such as Switzerland, there is a requirement for the post-MAP informal

[1] For more detailed discussion on the effectiveness of MAP, see Mark R. Martin et al., "MAP: Past, Present, and Future," *Tax Notes Federal*, Apr. 12, 2021, p. 219.

[2] Section 6.04 of Rev. Proc. 2015-40, 2015-35 IRB 236, provides a limited avenue to access MAPs for issues that have been under Appeals jurisdiction.

[3] Rev. Proc. 2015-40, section 4.01(2).

[4] Rev. Proc. 2015-41, 2015-35 IRB 263, section 2.02(4)(c) ("When a taxpayer that has sought APMA's assistance for a competent authority case under Rev. Proc. 2015-40, APMA may request (but will not require) that the taxpayer also pursue ACAP to extend the competent authority resolution from that case to cover one or more of its ACAP years (see section 2.04 of Rev. Proc. 2015-40).").

[5] Rev. Proc. 2015-40, section 4.01(2). If ACAP is initially requested as part of the U.S. request for competent authority assistance, the taxpayer must provide a statement agreeing that: "(a) The inspection of books of account or records under ACAP will not preclude or impede (under section 7605(b) of the Code or any administrative provision adopted by the IRS) a later examination of a return or inspection of books of account or records for any taxable period covered in the ACAP request; and (b) The IRS need not comply with any applicable procedural restrictions (e.g., providing notice under section 7605(b) of the Code) before beginning such later examination or inspection." *See* Rev. Proc. 2015-40, Appendix, section 2.01(2), tab 2.

ACAP-like years to be "ripe" in some way, such that they are subject to potential double taxation or otherwise clearly covered by the relevant income tax treaty. To satisfy this requirement, a taxpayer may need to demonstrate a reasonable belief that it will face continuing adjustments from the foreign jurisdiction. Further, in our experience, informal ACAP can depend on the individuals involved in the process at each tax administration. And of course, with informal ACAP, more care should be taken in the non-U.S. jurisdiction to ensure that there are no issues regarding statutes of limitation, treaty notification, and implementation.

Canada-U.S. ACAP

Given that it is the most widely used formal ACAP process, more details on Canada-U.S. ACAP issues are set forth as follows. To gain access to ACAP in Canada, Canadian taxpayers must provide the Canada Revenue Agency with sufficient details on the potential adjustments that may occur in the ACAP years, as well as a statement affirming that (1) the facts have not changed relative to the MAP period; (2) the request will not preclude the CRA from examining the taxpayer's books and records (including those related to the issues covered by ACAP); and (3) the taxpayer will accept or reject the MAP and ACAP resolutions together (that is, the taxpayer cannot accept a competent authority resolution for the ACAP period only while rejecting the MAP resolution, or vice versa).[6]

In connection with ACAP, the CRA still has the ability to examine the taxpayer's books and records. The CRA will do so not only to confirm that the requested ACAP period has the same facts as the MAP period but also to protect its ability to make transfer pricing adjustments. Because most MAP cases involving Canada are based on Canadian-initiated adjustments, the CRA must ensure that it meets all treaty-related requirements to raise those adjustments, since the MAP-ACAP settlement may occur after the treaty allows for an adjustment to be made. As a result, the CRA protects its ability to issue adjustments by ensuring that the necessary audit-related due diligence is completed as a treaty limitation period approaches. Further, ACAP does not prevent the CRA from reviewing and determining whether taxpayers have made reasonable efforts in preparing their contemporaneous transfer pricing documentation to assess whether a transfer pricing penalty is appropriate.

ACAP and APAs

While MAP is applicable only for adjustments to prior years, the advance pricing agreement program provides taxpayers with a means to be proactive in ensuring future compliance with the arm's-length principle. In an APA, two or more competent authorities review transactions between related parties prospectively and determine how the transactions should be priced moving forward. In the United States, APMA views APAs and MAPs as "interconnected means by which taxpayers can address transfer pricing" and relevant cross-border issues, and it endeavors to achieve "substantive and procedural consistency" between the MAP and APA processes.[7]

As part of the APA request, taxpayers can also request a rollback of the agreement to cover earlier years. Whether a rollback is granted is at the discretion of the competent authorities,[8] and willingness to engage in rollback will vary by country. Rollback could result in an adjustment if the competent authorities disagree with the as-filed position, although in our experience many cases can be resolved without an adjustment to rollback years if the taxpayer applied a reasonable method, even if the APA results in a different method for future years.

However, in some situations, rollback of an APA may not be practical, or even possible. This will be the case, for instance, if the relevant facts for the taxpayer's filed years not in MAP (in this context, the potential APA rollback or ACAP years) differ materially from the relevant facts for the prospective APA period, such that the tax

[6] CRA, TPM-12, "Accelerated Competent Authority Procedure (ACAP)" (last updated May 24, 2022); CRA, IC71-17R6, "Competent Authority Assistance Under Canada's Tax Conventions" (last updated June 1, 2021).

[7] Rev. Proc. 2015-41, section 2.02(4)(c).

[8] Rev. Proc. 2015-41, section 5.02(4).

authorities feel that the rollback years are more similar to the MAP period and less so to the APA period.

Similar to material changes in facts, there may also be situations in which the transactions stop or are eliminated. In situations in which the transactions that are at issue in MAP continue through certain filed years but do not continue into the future, an APA generally could not cover those transactions because of lack of prospective issues. That is, it would be unusual to cover in an APA rollback a transaction that could not or should not be covered in an APA because of prospectivity, although in some circumstances this could occur.

In other cases, all or part of the potential APA and rollback period breaks across an acquisition or divestiture of a business so that the responsible taxpayers are different in terms of either the management of the case or the impact of the case. In those instances, it may be easier to do ACAP for certain years, and APA with rollback for other years to minimize the complexity of applying tax matters agreements.

There are also strategic positions to consider in terms of the positioning of a case with the tax authorities. Our experience is that the ACAP years are often negotiated together with the MAP years, but that the APA and rollback years are negotiated separately. In situations in which the MAP case relates to contentious or extremely large adjustments made by the domestic examination team, an APA with rollback might be a better option than ACAP. That is because if the APA and MAP years are in fact negotiated separately, the lack of a large adjustment on the table for the APA and rollback years means that the result will likely be less skewed toward the initiating country than ACAP might be. Of course, every case is different.

As an additional strategic consideration, there are some countries where APAs are possible, and rollback may be possible in limited instances, but because of domestic rules, practice, or even just the particular competent authority relationship and history, MAP and ACAP are much more contentious and difficult to resolve than APA and rollback years, or vice versa.

Finally, in some cases, a taxpayer may not want to undertake the time and expense necessary to obtain an APA. Although an APA will cover more years than an ACAP, it is more expensive and involves more upfront expense. Therefore, ACAP may be preferred from a pure cost perspective.

In all these situations, ACAP provides — to the extent that it is available — a valuable way to gain certainty for historic years without the need to go through repeated audit and MAP cycles. On the other hand, when a prospective APA makes sense and the relevant facts are materially the same for the taxpayer's filed years, APA rollback can provide a similar result while also extending certainty into the future.

Parallels

The basic architecture of ACAP is not unique. Domestically, the accelerated issue resolution (AIR) program under Rev. Proc. 94-67, 1994-2 C.B. 800, allows IRS examination teams to apply a settlement that has been reached for the years under audit to subsequent filed periods in certain cases, thereby eliminating the need for separate audits of those periods.[9] In some cases, AIR can be coordinated with MAP with the approval of the U.S. competent authority.[10]

Of course, AIR is subject to some of the same issues as ACAP: To agree to roll forward a resolution to later periods, the tax authority must be made comfortable that the facts for those periods are materially the same as the facts for the period under audit — without actually conducting an examination of the later periods. In our experience, the U.S. competent authority is generally more willing to work with taxpayers to obtain the information it needs to become comfortable that the relevant facts have not changed, whereas IRS examination teams can be more reluctant to do so. While AIR remains an

[9] Rev. Proc. 94-67 refers to coordinated examination program audits. That program was succeeded by the coordinated industry case program, which was in turn succeeded by the large corporate compliance program in 2019.

[10] Rev. Proc. 94-67, section 3.03.

important tool, including for IRS transfer pricing disputes that are not covered by APAs[11] and that the taxpayer wishes to resolve at the IRS examination level rather than in MAP, the difficulty of making the examination team comfortable with rolling forward a resolution seems to have prevented its widespread use.

IRS joint audit procedures likewise contemplate that resolutions can — and indeed, should — be rolled forward when appropriate. Joint audits have historically been rare, to the point that the Forum on Tax Administration speculated in 2019 on whether any tax administrations had conducted a true joint audit with a unified examination team, as opposed to simply coordinating separate but simultaneous examinations.[12] However, joint audits have been a significant area of interest for many tax authorities, including the IRS. In early 2023 the agency added new guidance on its joint audit program to the Internal Revenue Manual,[13] and April 2023 guidance on APAs contemplates a role for joint audits in achieving cross-border transfer pricing certainty.[14]

Without strong coordination, joint audits can be arduous and unfocused — in essence, two audits for the taxpayer to deal with instead of one. Yet if they are well managed by the tax authorities, they can be an effective means of obtaining bilateral or multilateral coordination — and hopefully, certainty — in some circumstances. The new procedures contemplate coordination between joint audits and MAP cases, specifically providing that "during a Joint Audit, consideration should be given to resolving all open tax years, including applying the Joint Audit resolution(s) to open MAP cases, if applicable."[15] In other words, the IRS is required to consider applying a joint audit resolution not only to the years subject to the audit but also to all other open years, to the extent appropriate and available.

Proposals

Even though few countries have expressly adopted it, ACAP and similar procedures have generated interest as a way to alleviate burgeoning controversy inventories. Under action 14 of the OECD's base erosion and profit-shifting project, allowing for an ACAP-like procedure is a best practice.[16] The OECD notes that this "may help to avoid duplicative MAP requests and permit a more efficient use of competent authority resources."[17] In 2020 the OECD issued a consultation document aiming to improve tax certainty under BEPS action 14, which included a proposal to elevate this best practice to a requirement under the action 14 minimum standard.[18] The OECD proposed requiring that tax administrations "allow multi-year resolution through MAP of recurring issues with respect to filed tax years."

If adopted, this would in effect mandate tax administrations to allow for some form of ACAP, which could significantly improve MAP inventories worldwide. This would benefit not only taxpayers subject to recurring audits and recurring MAP cases that needlessly sap their resources and those of the affected tax administrations but also other taxpayers for which case resolution times could be improved if overall MAP inventory burdens were reduced. However, policing compliance with that requirement would come with challenges. Because the appropriateness of an ACAP-style resolution depends on the facts of the case, it would be difficult to determine whether any given denial of ACAP constituted a reasonable exercise of the tax administration's discretion or an impermissible shirking of its action 14 commitments. These difficulties would be best

[11] AIR is not available to cover issues that are subject to an APA. Rev. Proc. 94-67, section 3.02. Because APAs provide certainty for the period of the agreement, there generally would be no need for AIR for issues covered by the APA, and therefore this coordination provision seems to have little import in practice.

[12] OECD Forum on Tax Administration, "Joint Audit 2019 — Enhancing Tax Co-Operation and Improving Tax Certainty," at 23 ("The practical input from the 20 tax administrations that participated in the preparation of this report showed that since the publication of the 2010 Report they collectively engaged in almost 500 simultaneous tax examinations, with several coming close to the Joint Audit definition.").

[13] IRM 4.60.1.11.

[14] LB&I-04-0423-0006.

[15] IRM 4.60.1.11.8.4(3).

[16] OECD, "Making Dispute Resolution Mechanisms More Effective — Action 14: 2015 Final Report," at 30-31 (Oct. 5, 2015) (best practice 5).

[17] *Id.* at 31.

[18] OECD, "Public Consultation Document — BEPS Action 14: Making Dispute Resolution Mechanisms More Effective — 2020 Review," at 14 (Dec. 13, 2020) (proposal 7).

addressed through a peer review process focused on the ratio of ACAP resolutions to ACAP requests if this element is added to the minimum standard.

ACAP is a promising tool that has thus far failed to fully live up to its promise. Despite useful programs in the United States and Canada, ACAP is unavailable in most of the world, and where similar treatment is available, it must often be negotiated on an ad hoc basis. This informal ACAP can be extremely useful and should be considered where available and when it makes sense as an alternative to an APA with rollback. In any event, ideally, the OECD's efforts under action 14 will lead to broader adoption of ACAP and a more efficient MAP process, because that will benefit both taxpayers and tax administrations.[19] ■

[19] The foregoing information is not intended to be "written advice concerning one or more Federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230. The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser. This article represents the views of the author(s) only, and does not necessarily represent the views or professional advice of KPMG LLP.