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KPMG in the US

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Making sense of ICAP outcomes

Mark Martin and Thomas Bettge of KPMG in the US discuss the first published statistics on the International Compliance Assurance Programme and their implications for businesses looking to obtain tax certainty

Three years ago, the OECD launched the International Compliance Assurance Programme (ICAP) as a permanent multilateral risk assessment programme following two rounds of pilots beginning in January 2018. ICAP involves a review of selected transfer pricing and permanent establishment issues, and while it cannot provide true certainty in the manner of an advance pricing agreement (APA), it is designed to provide comfort and, where needed and feasible, to facilitate issue resolution without the need for a separate competent authority procedure.

Because ICAP works through exchange of information agreements and does not require that full-fledged bilateral tax treaties exist between all participants, it potentially provides a unique opportunity to address issues involving non-treaty partners. For instance, Colombia and Singapore number among the 23 countries that participate in ICAP, as does the US, which lacks income tax treaties with both jurisdictions.

Until **the official release of ICAP statistics in January 2024**, taxpayers could assess ICAP only on the basis of sparse anecdotal evidence. The publication of the statistics is commendable for shining a light on what was largely a black box and allowing taxpayers to make informed choices with regard to tax certainty.

ICAP statistics under the spotlight

Timing has been a success for ICAP, even if not by the yardstick laid out in the OECD's **ICAP handbook**, which set out ambitious targets that were not met in practice. The average timeframe for the three phases of ICAP – selection, risk assessment, and outcomes – was approximately 61 weeks in total, although it appears this does not represent the total time actually needed to complete an ICAP case because the time needed for taxpayers to submit documentation packages (both prior to the selection phase and prior to the risk assessment phase) is not included.

Still, the ICAP timeframes are laudable when considered in the context of transfer pricing audits, which even with just one jurisdiction involved generally take several years.

From January 2018 to October 2023, 20 ICAP cases were completed. Of those 20, 40% resulted in the ideal outcome for taxpayers: low-risk outcomes for all the issues considered in ICAP.

Benefits of ICAP

Making sense of that figure requires consideration of what issues taxpayers take to ICAP, and what benefits they are seeking. ICAP offers a way to determine what issues are and are not considered low risk in different jurisdictions. However, taxpayers and their advisers are generally well equipped to identify low-risk and non-low-risk arrangements without the need for a higher-stakes, compliance-intensive review by tax administrations. As such, obtaining confirmation of the level of risk posed by transactions does not seem to be a sufficient, standalone reason to enter ICAP.

One benefit of ICAP may be a signalling benefit: if a taxpayer undergoes an ICAP review and receives a low-risk outcome for an issue, that may be persuasive to other tax administrations and may demonstrate tax compliance to other stakeholders. Yet taxpayers seeking to obtain this benefit would presumably only seek ICAP review if they expect to receive a low-risk outcome.

However, in 60% of the ICAP cases, taxpayers received a "not low risk" outcome from at least one jurisdiction. While a "not low risk" outcome does not indicate high risk as such and does not necessarily entail an audit, it does leave the taxpayer potentially worse off than if the transaction in question had never been offered up for review as part of the ICAP process.

Perhaps, then, the most significant benefit arising from ICAP may be issue resolution. In cases where a taxpayer believes that a transaction presents risk or is likely to be viewed differently by different tax authorities, ICAP presents a means of gathering those tax authorities (as long as they are participants) and addressing the issue in a multilateral setting. Where the tax authorities cannot agree to a low-risk outcome, it may be possible to resolve the issue in ICAP without the need for a separate proceeding: issue resolution was used in 32% of the ICAP cases.

Expeditious issue resolution without a separate dispute is a significant benefit, but not every issue identified in ICAP would be susceptible to resolution without a separate process. Taxpayers that enter ICAP with the goal of resolving issues should therefore be prepared to follow ICAP with a mutual agreement procedure (MAP) and/or an APA or APAs. In such cases, the preliminary work done in ICAP is likely to result in efficiencies for the subsequent process. For issues that are unresolved in ICAP between non-treaty partners, however, no subsequent MAP or APA would be available, and double taxation could result.

Final thoughts on ICAP in light of the statistics

The statistics shed welcome light on ICAP and enable taxpayers to better evaluate use cases for ICAP. One might wonder if ICAP's expeditious timing undermines its ability to provide more desirable outcomes – even for transactions that do not present genuine risk, the short timeframe for ICAP may not give enough runway for all tax administrations to obtain comfort with the transfer pricing, and that may be a necessary trade-off.

ICAP can be invaluable, but taxpayers should carefully consider its use cases and the likelihood of obtaining their desired outcomes.

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