EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Direct taxation, Tax Coordination, Economic Analysis and Evaluation
Company Taxation Initiatives

Brussels, January 2013
Taxud/D1/

DOC: JTPF/020/REV1/2012/EN

EU JOINT TRANSFER PRICING FORUM

Compilation of proposals received from JTPF Members for improving the functioning of the Arbitration Convention

Meeting of 14 February 2013

Contact:
Hartmut Förster, Telephone: (32-2) 29.55.511
E-mail: taxud-joint-transfer-pricing-forum@ec.europa.eu

COMMENTS RECEIVED FROM MEMBER STATES

1.

We have some remarks concerning the Arbitration Convention.

1. there really is an imbalance between the countries that can only do audits for 3 (to 5) years, and those that can go back 10 years or more.

There is of course the fact that countries with small terms only have the possibility to drop prior assessments, but never will be in a position to have a supplementary assessment for older years. But an even bigger problem is the fact that there is almost no possibility to do a proper investigation more than 10 years after the facts. There is for example only a legal requirement to hold all books and documents for 7 years in X and even within the administration it is possible that some documents are no longer kept after 10 years. If the head office is in the other country, chances are that the people involved in the transactions 10 years ago are no longer with the company. This means that we are completely dependent on the other tax administration and the goodwill of the taxpayer for obtaining all relevant information. If such a case goes to arbitration, we will never be sure that the decision will be based on the real facts and numbers.

2. in some cases, we see that a tax administration does corrections towards more than one European country. We feel that such cases would be good cases for a 'multilateral MAP'. Certainly the taxpayer would benefit from the joint treatment of the different MAP cases, instead of two or more cases in several countries.

3. We feel that changing the actual arbitration into a baseball arbitration would be very helpful in solving cases in an earlier stage. All parties concerned will be obliged to take reasonable positions and that would really facilitate the negotiations.

2.

I come back to the invitation to communicate to the Secretariat by 15 July 2012 any problems encountered and improvements proposed with respect to the proper functioning of the Arbitration Convention and of transfer pricing in general within the EU. From the X tax administration perspective, and in particular the perspective of the competent authority that administers MAPs under the Arbitration Convention, it would be useful to look into the following issues connected with the (Revised) Code of Conduct for the effective implementation of the Convention:

(1) Revision of the Code of Conduct statements on requesting additional information within 2 months

Currently, point 5(a)viii of the Revised Code of Conduct together with point 5(b)ii prescribes that the 2-year-period (article 7) does not start until the taxpayer provides "any specific additional information requested by the competent authority within two months upon receipt of the request". It is not totally clear whether this relates only to the CA where the taxpayer filed the request, or whether the Code of Conduct suggests that both CAs have the opportunity to request additional information within two months after they receive the request, and that the request is only considered complete when both such requests have been sufficiently answered.

From the X tax administration point of view it would accelerate the overall procedure if it were clarified that both CAs have the opportunity to point to missing information within two months (whereby the 2-months-period starts for the respective CA when it receives the application). This would be an incentive for applicants to immediately provide both CAs with the request or a copy of the request. It would also be an incentive for both CAs to immediately point to missing information. It should be considered to slightly amend point 5(a)viii to say "a" competent authority (or "one of the competent authorities") instead of "the" competent authority to clarify that. Additionally, point 6.3(e) should be amended accordingly.

(2) Consequences of not completely and quickly responding to reasonable requests

Point 5(a)vii of the Revised Code of Conduct says that the taxpayer shall provide "an undertaking that the enterprise shall respond as completely and quickly as possible to all reasonable and appropriate requests made by a competent authority and have documentation at the disposal of the competent authorities".

However, the Revised Code of Conduct does not contain any guidance on the consequences it may have to not respond (or to not quickly or completely respond) to such requests. In the X tax administration view, the consequence of not or not completely or not quickly responding to reasonable requests can only be an extension of the 2-years-period of article 7 in the sense that the delay caused by the taxpayer should be added to the 2 years. A taxpayer would be obliged bona fide to agree to an extension under article 7 par 4 to the extent a delay is caused by the taxpayer.

(3) Discussion of practical issues relating to triangular cases

The X tax administration recognises that so far no agreement could be reached on certain aspects of non-EU triangular cases (see the report in the Commission Communication of 25 January 2011, COM(2011)16 final), and that it may be too early to re-address these issues.

However, even in the area of EU triangular cases certain practical questions arise that have not yet been addressed. In particular, the current Revised Code of Conduct is silent on when and how agreement on whether a case is a triangular case should be sought. Point 6.2(a) simply assumes that there is such agreement. It is also unclear what to do if either one of the CAs or the taxpayer should not agree that a case falls under the definition provided in point 1.1(a). Overall, there is considerable uncertainty on how to proceed practically if in the tax administration's view the case may be a triangular case (be it EU or non-EU), and also on what types of triangular situations would fall under the definition in point 1.1(a).

(4) Relationship of procedures under the EU Arbitration Convention to procedures under bilateral treaties in light of growing number of bilateral arbitration provisions

Since 2008 the OECD Model Tax Convention contains an arbitration paragraph in article 25. Since then, a number of bilateral treaties among EU Member States have been concluded or amended that now include an arbitration provision. For instance, the new Germany-UK treaty that is already in force has an arbitration provision, and the new German-Dutch and Germany-Luxembourg treaties (signed but not yet in force) have arbitration provisions. None of these new treaties explicitly address the relationship of the bilateral treaty arbitration procedure to the EU Arbitration Convention procedure.

Guidance and a common approach on the relation between bilateral treaty MAP in transfer pricing cases (with the possible consequence of treaty arbitration, following the rules provided in the bilateral treaty) and MAP under the EU AC (with the possible consequence of an Advisory Commission under the Arbitration Convention) would be useful. For future bilateral treaties, explicit rules in the treaty (e.g. excluding the treaty arbitration rules for transfer pricing cases) could be considered.

(5) Attribution of profits to permanent establishments - possible conflicts between Art 4 para 2 of the EU AC and bilateral treaties that follow the 2010 OECD Model Tax Convention Arcticle 7.

Reference is made to the Belgian contribution in document JTPF/006/BACK/2011/EN of January 2011, circulated to JTPF members by the Secretariat on 28 January 2011.

3.

In relation to the future Monitoring work, we would like to inform you about the problems we have encountered in the functioning of the Arbitration Convention:

First, we have had cases where during the tax audit the taxpayer did not bring some useful information, even when it was required to him, and at the MAP it was presented. This information could have helped them having the initial adjustment been reduced (for example, a contract that was supposedly already signed between the parties or some expenses that would have reduced the taxable base).

When the MAP is in place and we receive this piece of information, as the country where the initial adjustment was made, we do not know how to treat this new information that should have been brought up before. We do not consider the MAP as a second review of the facts and we do not consider it appropriate to "open" the tax audit again.

We propose to say that when information was required to the taxpayer during the tax audit and the taxpayer could have presented the information required and did not do it, if the information required was an essential evidence for justifying the adjustment, the country doing the initial adjustment will not have to take this piece of information into account; the other Competent Authority, on its hand, if it does not agree with the initial adjustment, will not have to give relief.

Second, in letter d) of paragraph 6.3 (Practical functioning and transparency) it is stated that "The competent authority will acknowledge receipt of a taxpayer's request to initiate a mutual agreement procedure within one month from the receipt of the request and at the same time inform the competent authority(ies) of the other Member State(s) involved in the case attaching a copy of the taxpayer's request." On the other hand, letter a) of that same paragraph recommends conducting the MAP in a common language. The problem arrives when we receive a letter from another country informing on the initiation of a MAP and attached we find the request of the taxpayer and all the documents containing the information requested in Article 5.a) of the Code of Conduct in a language that is not the usual working language between the two countries involved.

We propose to recommend the taxpayer to translate into that common language the relevant information, in order to speed up the procedure and to make available to both competent authorities the same information.

Last, we had a case where in the course of a MAP the other competent authority, when studying the case, needed some information from its taxpayer (the associated entity from the one whose profits where adjusted). When requiring the information to such taxpayer, it was never responded. In our opinion, this should be regarded as not having complied with the undertaking established in Article 5.a)(vii) of the Arbitration Convention, which establishes: "an undertaking that the enterprise shall respond as completely and quickly as possible to all

reasonable and appropriate requests made by a competent authority and have documentation at the disposal of the competent authorities".

The problem we found is that this is not foreseen as one of the possibilities for ending an MAP, that being the case, it could be envisaged a possibility of not eliminating double taxation when the taxpayer or the associated enterprise do not comply with the undertaking established in Article 5.a)(vii) of the Arbitration Convention.

4.

Proposal

In order to facilitate an efficient application of the AC, the website of the EU JTPF could contain a short manual for taxpayers that want to apply the AC. This manual could include step a approach of how to apply for the AC including recommendations for an efficient application of the AC. Examples of recommendations:

- It is recommended to the taxpayer to submit a request to apply the AC by e-mail (and/or by ordinary mail) to both competent authorities at the same time. It is recommended to the taxpayer to attach to above-mentioned e-mail the minimum information (in line with article 5 b (ii) of the Code of Conduct to the AC).
- It is recommended to the CA's to use the date that the above mentioned e-mail was sent (or date on letter) as the starting date of the two year period under the AC under the condition that the minimum information (in line with article 5 b (ii) of the Code of Conduct to the AC). With the exception that in case the tax assessment notice (ex article 5 b (i) of the CoC) is of a later date.
- [In case neither of the CA's have requested for additional information (in line with the minimum information) to the taxpayers within 1 month, the date that the above mentioned e-mail was sent will be the starting date of the 2 year period. With the exception that in case the tax assessment notice (ex article 5 b (i) of the CoC) is of a later date.]
- [In case the taxpayer does not fulfil the requirement to provide additional information (ex article 5 a (viii) of the CoC) in time, the delay caused by the taxpayer will be added to the 2 year period.]

This manual could contain list with minimum information that is required (see article 5 of the Code of Conduct to the AC). This manual could contain a list of the dedicated e-mail addresses and/or postal addresses of the competent authorities. This manual could also contain a link to the relevant documents (text AC, CoC etc.). The manual could contain a dedicated e-mail address of the Commission to which the taxpayer may send their: questions, complaints, suggestions for improvement.

5.

At the meeting of the EUJTPF on 7 June 2012 the Secretariat and the Chair asked members to put forward practical proposals for the better functioning of the Arbitration Convention, APAs, and transfer pricing in general within the EU. Below are our suggestions:

In respect of the **Arbitration Convention** we would like to ensure that all transfer pricing adjustments that are eligible for access to the Arbitration Convention (AC) are admitted and the that the double taxation is resolved as swiftly as possible. This could be brought about by continuing the work on revising the statistics on the AC, and if necessary amending the Revised Code of Conduct with respect to the start date of the AC.

For **transfer pricing in general** we think it would be helpful to draw up guidelines on the use of **multilateral controls** in transfer pricing cases, taking into account the Administrative Cooperation Directive, 2011/16/EU. The guidelines could:

1. Encourage the use of MLC as an efficient way of resolving transfer pricing enquiries within the EU.
2. Encourage the sharing of best practice between tax administrations
3. Provide guidance on the selection of suitable cases. Although MLC are for tax administrations, private sector members may have a role in drawing up practical suggestions.
4. The Forum could also consider whether taxpayers should be able to request a MLC when the multi-national enterprise is the subject of 2 or more audits.

6.

We suggest a commitment by Member States (MSs) that all transfer pricing adjustments are eligible for access into the AC, providing the conditions in the Code of Conduct are met, and that MSs will not take any measures to limit a taxpayer's access to the Convention, either directly or indirectly.

Further we commitment by MSs that the Competent Authority is independent of the Field Auditors and is empowered to conclude the MAP without reference to the Field.

COMMENTS RECEIVED FROM PRIVATE SECTOR MEMBERS

1. TABLE WITH PROBLEMS ENCOUNTERED

1	AC Treaty 90/463/EEC	Code of Conduct (COC) reference or other relevant or related reference which addresses the issue	Weight of issue
2	**Article 1 AC (Arm's Length Standard/Transfer Pricing)** (1) The Convention shall apply where, for the purposes of taxation, profits which are included in the profits of an enterprise of a Contracting State are also included or are also likely to be included in the profits of an enterprise of another Contracting State on the grounds that the principles set out in Article 4 and applied either directly or in corresponding provisions of the law of the State concerned have not been observed. (2) For purposes of this Convention the permanent establishment of an enterprise of an Contracting State situated in another Contracting State shall be deemed to be an enterprise of the state in which it is situated. (3) Paragraph 1 shall also apply where any of the enterprises concerned have made losses rather than profits.	**CoC of 28/07/06** **Paragraph 3.2.(f)** Contracting States undertake that the competent authority will respond to the enterprise making the request in one of the following forms: (i) if the competent authority does not believe that profits of an enterprise are included, or are likely to be included, in the profits of an enterprise of another Contracting State, it will inform the enterprise of its doubts and invite it to make any further comments	

3	**Article 1 AC: Practice/monitoring observations** **Issue includes the exclusion of access to the AC based on different arguments:** (1) The tax adjustment proposed regards *de facto* a transfer pricing issue but is being presented as an adjustment based on a general anti-avoidance provision and as such deemed excluded from the AC, i.e. thin cap argumentation or lack of substance argumentation as regards recipient of intercompany fees for services, IP etc; (2) The tax adjustment is presented as regarding the *determination of the existence* of a permanent establishment rather than the allocation of income to a branch/permanent establishment and as such deemed excluded from the AC. (3) The tax adjustment is seen as not creating double taxation and as such held to be excluded from the AC, after which the CA does not proceed with informing the CA of the other Contracting State. (4) Triangular cases are either excluded from the AC or if allowed in, they do not have access to one of the key items: the arbitration phase. (5) Business Restructuring-related matters between related parties are often referenced as not being transfer pricing matters and as such not eligible for relief under the AC, even though the	**OECD Memorandum on Effective Mutual Agreement Procedures (MEMAP) Best Practice No. 11:** Consideration of MAP assistance for cases described as "tax avoidance"[1] **CoC of 30/12/09** Paragraph 1.2 Thin Capitalization.[2] **MEMAP Best Practice No. 9:** Liberal interpretation of time limits and advising of treaty rights **CoC of 30/12/09** Paragraph 1.1 EU triangular transfer pricing cases **EUJTPF Report on Non EU Triangular Cases** Doc: JTPF/007/REV3/2009/EN **2010 OECD Transfer Pricing Guidelines Chapter 9 on Business Restructuring**	On a scale of 1-5 4

[1] "In the absence of a special provision, there is no general rule denying access to MAP in the case of perceived abuse situations. Even where a special provision exists, the mere assertion that a domestic anti avoidance provision may apply to a particular case is not enough to justify exclusion from MAP the question of whether there is or may be taxation in contravention of the convention" Moreover, if the use of an anti avoidance provision is supplementary or secondary to another domestic law provision, or of questionable basis, consideration should be given to the adverse and cumulative nature of the results of double taxation in combination with any anti-avoidance penalties and interest. Accordingly, the outright denial of competent authority assistance may have an unintended and added punitive effect"

[2] "The Arbitration Convention makes clear reference to profits arising from commercial and financial relations but does not seek to differentiate between these types of specific profit types. Therefore, profit adjustments arising from Financial relations, including a loan and its terms, and based on the arm's length principle are to be considered within the scope of the Arbitration Convention."

	OECD clearly considers them as such and they regard the allocation of a buy-out and restructuring related costs between related parties. (6) The case does not involve an actual adjustment but only a proposed adjustment and as such does not qualify (yet) for MAP (see also observation under Article 6)		
4	**Article 2 AC (Taxes subject to the Convention)** (1).This Convention shall apply to taxes on income. (2) the taxes to which this Convention shall apply are, in particular the following: (..) (3) the Convention shall apply to any identical or similar taxes which are imposed after the sate of signature thereof in addition to, or in place of existing taxes (…)		
5	**Article 2 AC: Practice/monitoring observations** (1) Issue of taxation on "deemed" income resulting from the corresponding adjustment such as interest income or withholding tax. The inclusion of resolution of (double or additional) taxation resulting from secondary adjustments is often not considered or not addressed, even though it constitutes taxation on income.	**MEMAP Paragraph 4.5 .2. Interest relief and MAP** [3] **MEMAP Paragraph 4.6 Secondary adjustments, withholding Tax and Repatriation on transfer Pricing Adjustments**.[4] **EUJTPF Report:** Member State responses to questionnaire on secondary adjustments Doc:JTPF/018/2011/EN	On a scale of 1-5 4
6	**Article 3 AC (Identification of the Competent Authority)**	**OECD website** listing the respective CAs of the relevant OECD member countries[5]	
7	**Article 4 AC (Arms length standard/Article 9 OECD Convention)**		

[3] "It is widely acknowledged that a taxpayer may suffer the economic equivalent of double taxation, even where underlying double taxation is eliminated through a MAP agreement, if there is considerable asymmetry between two countries' treatment of interest that may accrue on liabilities and refunds"

[4] "Under normal circumstances, these secondary adjustments are reversed if the primary adjustment is reversed or, in the case where correlative relief is provided by the Other competent authority, if the taxpayer repatriates funds from the non-resident equivalent to the amount of the transfer pricing adjustment. In these two instances, relief from the secondary adjustment should be a consequence of the MAP settlement."

[5] http://www.oecd.org/document/31/0,3746,en_2649_37989739_29601439_1_1_1_1,00.html

8	**Article 5 AC (duty to inform)** Where a Contracting State intends to adjust the profits of an enterprise in accordance with the principles set out in Article 4, it shall inform the enterprise of the intended action in due time and give it the opportunity to inform the other enterprise so as to give that other enterprise the opportunity to inform in turn the other Contracting State		
9	**Article 5 AC: Practice/monitoring observations** Question whether this Article is used in practice?		On a scale of 1-5 1
10	**Article 6 AC (Request for MAP under AC must be submitted within 3 years of the first notification of the action which results or is likely to result in double taxation)**	**CoC of 28/07/06** Paragraph 1 The starting point of the three-year period.[6] **CoC of 30/12/09** Paragraph 4 The starting point of the three-year period.[7]	
11	**Article 6: AC Practice/monitoring observations** (1) Instances where Contracting States consider a case not yet "ripe" for CA review and the 3-year term not yet commenced because no actual tax adjustment is made, contrary to the explicit language of the AC ("*The Convention shall apply where, for the purposes of taxation, profits which are included in the profits of an enterprise of a Contracting State are also*	**MEMAP Best Practice No. 7**: Allowing early resolution of cases **MEMAP Best Practice No. 8**: Earlier Notification of a potential case	On a scale of 1-5 3

[6] The date of the First tax assessment notice or equivalent which results or is likely to result in double taxation [...] is considered as the starting point for the three year period.

[7] The date of the First tax assessment notice or equivalent which results or is likely to result in double taxation [...] is considered as the starting point for the three year period.

	included or are also likely to be included in the profits of an enterprise of another Contracting State").	**MEMAP Best Practice No. 9:** Liberal interpretation of time limits and advising of treaty rights	
12	**Article 7 AC (expiration of the 2-year MAP term, requiring setting up an advisory commission)** (1) Enterprises may have recourse to remedies available to them under domestic law of the Contracting States concerned, however, where a case has been submitted to a court or tribunal, the term of the two years referenced in the first paragraph shall be computed from the date on which the judgment or the final court of appeal was given (2)The submission of a case to the advisory commission shall not prevent a Contracting State from initiating or continuing judicial proceedings or proceedings from administrative penalties in relation to the same matters (3) Where the domestic law of a Contracting State does not permit the CA of the State to derogate from the decisions of their judicial bodies, paragraph 1 shall not apply unless the associated enterprise of that State has allowed the time provided for appeal to expire or has withdrawn any such appeal before a decision has been delivered (4) the competent authorities may by mutual agreement and with the agreement of the associated enterprises concerned waive the time limits referred to in paragraph 1.	**CoC of 28/07/06** Paragraph 2 the starting point of the 2-year period.[8] **COC of 30/12/09** Paragraph 5 the starting point of the 2-year period (article 7(1) of the AC. **CoC of 28/07/06** Paragraph 3.2 (e) Practical functioning and transparency.[9] **COC of 30/12/09** Paragraph 6.3 (e) Practical functioning and transparency.[10]	

[8] Lists the information that must be submitted in order to have a case qualify as "having been submitted".

[9] "If the competent authority believes that the enterprise has not submitted the minimum information necessary for the initiation of a mutual agreement procedure as stated under pint 2(i), it will invite the enterprise within 2 months upon receipt of the request, to provide it with the specific additional information it needs."

[10] "If the competent authority believes that the enterprise has not submitted the minimum information necessary for the initiation of a mutual agreement procedure [..], it will invite the enterprise, within 2 months upon receipt of the request, to provide it with the specific additional information it needs."

13	**Article 7 AC: Practice/monitoring observations** **Issue of long period in which cases are tied up in MAP** (1) Many instances continue to arise where tax authorities, 2 years after the MAP request has been filed under the AC, maintain that they did not receive sufficient information to have the 2-year term commence. (2) Often it takes a very long time (more than 9 months) before a position paper is submitted to the other CA by the CA of the country where the primary adjustment was made. (3) Rarely if ever do competent authorities confirm that the 2-year term of Article 7 AC starts, after they have received the information required to commence the MAP. (4) Often, the MAP process takes much more than 2 years. If the taxpayer does not assert the	**CoC of 28/07/06** Paragraph 3.2 (e) Practical functioning and transparency. **COC of 30/12/09** Paragraph 6.3 (e) Practical functioning and transparency. ____________________ **CoC of 28/07/06** Paragraph 3.3 Exchange of position papers.[11] **COC of 30/12/09** Paragraph 6(4) MAP under the AC. **MEMAP Paragraph 3.4.1 Position Papers** ____________________- **CoC of 28/07/06**	On a scale of 1-5 5

11 "(c) the position paper will be sent to the competent authorities of the other Contracting States involved as quickly as possible taking account of the complexity of the particular case and no later than four months from the latest of the following dates: (i) the date of the assessment notice, i.e. final decision of the tax administration on the additional income, or equivalent; (ii) the date on which the competent authority receives the request and the minimum information as stated under point 2(i)."

	2-year term as expired, no mention is made thereof whatsoever and no action is taken. (5) In other cases, taxpayers are requested to extend the 2-year term. The request is one that often inferences that it is for the benefit of the taxpayer and the working relation it has with the tax authorities, to extend the term. However, interest cost related to the outstanding balance continues to run during the extended time during which the case is open. No duration of the extension is agreed in those instances.	Paragraph 3.2 (g) Practical functioning and transparency.[12] **COC of 30/12/09** Paragraph 6.1(d) MAP under the AC.[13] **MEMAP Best Practice No. 18**: Recommendation for MAP cases beyond 2 years.[14]	
14	**Article 8 AC (No obligation to initiate MAP or set up advisory commission in case of serious penalty)**	**COC of 20/12/09** Paragraph 3.[15]	
15	**Article 8 AC: Practice/monitoring observations** (1) Some countries assert criminal penalties almost as a matter of course, and without the existence of a criminal act or fraud or anything of the like, as the tax police gets involved simultaneously with the tax authorities. (2) Some countries assert criminal penalties triggered by the amount of income tax assessed for (and not based on intent to commit) tax evasion. As a consequence these criminal penalties (triggered only by the size of the assessment) are then being seen as "serious" penalty (even though issued irrespective of intent) and will bar access to the arbitration phase of the AC.	**EUJTPF summary report on penalties** SEC (2008) 1168 Final/COM (2009) 472 final	On a scale of 1-5 5

12 "If a competent authority considers a case to be well founded, it should initiate the mutual agreement procedure by informing the other CA of its decision and attach a copy of the information as specified under point 2(i) of this Code. At the same time, it will inform the person invoking the AC that it has initiated the mutual agreement procedure. the CA initiating the MAP will also inform – on the basis of information available to it- the CA of the other Contracting state and the person making the request whether the cases was presented within the time limits provided for in Article 6(1) of the AC and of the starting point for the 2-year period of article 7(1) of the AC."

13 "[..] a mutual agreement should be reached within 2 years of the date on which the case was First submitted to one of the CAs in accordance with point 5(b) of this COC. However it is recognized that in some situations [..] it may be appropriate to apply Article 7(4) of the AC (providing for time limits to be extended) to agree a short extension."

14 "[..] For cases that have exceeded , or are likely to exceed, a reasonable period of time, it is advisable for senior officials of the competent authorities to undertake a review of the case to determine the reasons for the delay and then agree upon an approach to ensure the efficient completion of the case "

15 "[..] a serious penalty should only be applied in exceptional cases like fraud"

16	**Article 9 (Composition of the Advisory Commission)**	**COC of 30/12./09** Paragraph 7.2 **COC of 28/07/06** Paragraph 4.2	
17	**Article 10 ((additional) Information to be submitted to the advisory Commission)**	**COC of 28/07/06** Paragraph 4.3(d) **COC of 30/12/09** Paragraph 7.3(d)	
18	**Article 11 (Time of Advisory Commission to deliver its opinion)**	**COC of 30/12./09** Paragraph 7.2(b)	
19	**Article 12 (Decision to eliminate Double Taxation after advisory commission involvement)**		
20	**Article 13 (Final decisions of Contracting States do not interfere with access to arbitration phase (Articles 6 and 7))**		
21	**Article 14 (Definition of full avoidance of double taxation)** Double taxation is eliminated if either: (a) the profits are included in the computation of taxable profits in one State only, or (b) the tax chargeable on those profits in one State is reduced by an amount equal to the tax chargeable on them in the other		
22	**Article 14 AC: Practice/monitoring observations** (1) Cases continue where interest and penalty relief are not considered part of the MAP/arbitration phase. As to interest, the way it is dealt with by the respective countries often does not match. As example, whereas interest on underpayment of tax in one State may remain, it is far from always compensated by interest on the "overpayment" in the other State. Furthermore, where interest on an "overpayment" is usually taxable itself as income, late payment interest is often not a deductible expense. (2) Uncertainty how to deal with corresponding adjustments (after year-end) and if the MAP solution is to be implemented going forward, uncertainty how to deal with compensating adjustments (or implementation of the MAP solution to later years with similar facts, for that	**COC of 30/12/09** Paragraph 8 (re interest relief) **EUJTPF Report**: MS responses to questionnaire on compensating/yearend adjustments Doc. JTPF/019/2011/EN	On a scale of 1-5 5

	matter) (3) Usually no consideration of relief for secondary adjustments		
	Other observations/case examples		
23	Very large and rather unsubstantiated tax adjustments are proposed, followed by settlement proposals under substantial pressure for a significantly lower amount, subject to the condition that no access the MAP is available.	**MEMAP Paragraph 4.3 Audit Settlements**[16]	On a scale of 1-5 5
24	Difficulty in getting access to extension of payment for adjustments when filing for AC-based MAP relief		3
25	Confidentiality of taxpayer information is not fully assured, in the sense that (MAP) settlements on issues appear to be communicated to other tax authorities where the taxpayer has operations and where no adjustment was raised.	**COC 30/12/09** Paragraph 6.3.(c)	3
26	Adjustments that are submitted to MAP relating to one year (and that get resolved) nevertheless get raised again and again in later years by the tax authorities of the country that made the primary adjustment. This seems like a "double jeopardy" situation. Is it possible to apply a MAP resolution to later years if the same facts apply?		3
27	Poor information: There is a clear need for better information to taxpayers that the AC MAP request that was filed is received by the CA and that it qualifies for handling under the AC. Currently taxpayers are in limbo when they file a MAP request as to whether the request will be considered received and qualify for purposes of the AC.	**COC 30/12/09** Paragraph 6.3.(b), (d) and (e)	4
28	Requirement that MAP filing is conducted in the local language.	**COC 30/12/09** Paragraph 6.3 .(a)	

16 "[.. One concession tax administrations sometimes seek is a limit on further recourse, in other words the adjustment agreed to at the audit stage is the final adjustment. unfortunately, some tax administrations have included the MAP process in these required concessions (i.e. by conditioning the audit settlement on the taxpayer's agreement not to pursue MAP for the issue], and in many cases taxpayers have offered to agree not to seek MAP assistance. The unfortunate result of these types of settlement arrangement scan often be the occurrence of double taxation. Effectively, these arrangements preclude the tax administrations from resolving double taxation under MAP in such situations and may indeed cause the Other government to deny relief under its domestic law for the tax paid to the First government upon settlement of the audit."

2. Examples provided by PSM after the meeting on 25th October 2012:

The case examples presented below all regard EU Member States unless explicitly mentioned that such is not the case. The total assessment at stake in the cases mentioned each are 7 or more figure Euro assessments. Therefore obtaining an extension of payment for the assessments is a material concern for the taxpayers, as is avoidance of double taxation.

Case Example 1

Facts

An MNE has restructured its business activities in State A from full-fledged manufacturing and distribution to toll manufacturing and commission sales of products.

Tax authorities of State A have assessed an MNE related company resident in State B as having a PE in State A for all years since the restructuring, referencing the restructuring and the fact that the premises in State A continue to be "used" for manufacturing activities and that the local State A entity is receiving instructions and reimbursements for costs from its related party in State B as regards its manufacturing process.

Tax authorities of State A have attributed the entire sales proceeds earned by related party distributors outside of State A resulting from the sales of products manufactured in State A to the deemed PE in State A, and included penalties in excess of 100% of the amount of tax assessed in the assessment because of the taxpayer's omission of filing PE returns.

The MNE disagrees with the determination that there is a PE in State A at the address of the toll manufacturer.

As part and parcel of the assessment process, the tax authorities of State A have made a settlement proposal, that (also) reduces the penalties assessed. Under State A domestic law, once the taxpayer enters into a settlement (which in all likelihood and as a matter of practice regards the amount of the income assessed, and does *not* cancel the determination that there is PE) there is either no access to MAP (because the settlement proposal explicitly requires the taxpayer to waive such access) or if there is, the State A CA can only request the State B CA to provide for a corresponding adjustment of the amount of tax assessed as a result of the settlement agreement.

The taxpayer is preparing a judicial appeal and is considering how it can best access the MAP process.

Consequences

Consequence of the above State A tax authority action is that the Arbitration Convention does not apply (to the extent there is consensus that the Convention cannot be used to submit to MAP the issue of whether there is a PE) and can only be used to determine the amount of income attributable

to the PE, provided the taxpayer “accepts” that there is a PE (with potential PE tax consequences for later tax years as well).

A second consequence of the settlement proposal (if and when accepted), is that the merits of the case (the appropriateness of the income allocation and/or whether there is a PE under the treaty) are no longer available for review. It should be noted that in particular the penalty feature of the assessment and the reduction thereof under settlement is the most attractive feature of the settlement option for the taxpayer.

A third issue is that, if it is agreed that there is no access to the Arbitration Convention, there is no certainty for avoidance of double taxation, as State B is not obliged to provide for a corresponding adjustment under the regular bilateral treaty for the avoidance of double taxation, but only to endeavour to resolve.

A fourth issue presented occurs when the settlement proposal is not accepted by the taxpayer, the taxpayer in State A is assessed and seeks extension of payment for the (substantial figure Euro) assessment during the time in which the taxpayer appeals the (correctness of the) assessment. Such an extension is technically available once the taxpayer is filing for relief under the Arbitration Convention, however, that avenue is deemed excluded because of the PE determination being the basis of the assessment.

Alternatively, such extension of payment for (part of) the assessment is available by filing a judicial appeal. This is to assure that the tax assessment does not become definitive during the judicial appeal. However, the filing of a judicial appeal presents as problem that the CA under domestic law is bound by a decision from the Court, and will only seek a corresponding adjustment from the CA of State B in case the Court has rendered a decision. Once a judicial decision is issued, the merits of the case (the appropriateness of the income allocation and/or whether there is a PE under the treaty) are no longer available for review in MAP, plus that there is no access to the second phase of the Arbitration Convention (the review by the advisory commission). All that remains in that case is a request for a corresponding adjustment from State B. which is not mandatory. If the taxpayer wishes to allow the CAs to be able to discuss the merits of the case and allow for access to the advisory commission under the AC, the taxpayer needs to revoke its judicial appeal filed with the Tax Court and accept the PE determination. The CA does not consider the appropriateness of (statutory) penalties.

Monitoring observations

- This is a transfer pricing issue, presented as a PE issue. If the AC were to be accessible for PE cases the taxpayer would have a higher chance of obtaining avoidance of double taxation;
- No application whatsoever of Article 5 of the AC (notification of treaty partner) has taken place;
- The settlement proposal limits available remedies under MAP, and potentially frustrates avoidance of double taxation. The reduction of or relief from penalties in practice is considered that large of a gain that taxpayers may prefer to settle and claim a credit for the double taxation somehow. What is the status of Article 14 (definition of avoidance of double

taxation) in case there is no access to the advisory commission? Article 6 in and of itself does not prescribe full avoidance of double taxation.

- The MAP process by its terms does not provide for relief from the extra costs incurred resulting from the penalties imposed which in this case, far exceed the tax adjustments. So technically, even if full avoidance of double taxation were to be obtained, State A still collects a substantial amount of (statutory) penalties which present a cost to the taxpayer that cannot be recouped.

Case Example 2

Facts

The (non-European) MNE has a subsidiary in State B with a branch in State A that serves as a distributer of products. The State B company (parent company of the branch) is resident of State B. The tax authorities of State A have assessed the branch in State A and included penalties in the amount of 100% of the amount of tax assessed.

The assessment is the result of a correction to the intercompany price between the State B Parent company of the branch and its State A branch based on (inter alia) the disagreement of the State A tax authorities with the comparables presented by the Parent company in the transfer pricing documentation report prepared for the branch (no or not enough local State A comparables).

The MNE disagrees with the assessment and with the local comparables presented by the State A tax authorities.

As part and parcel of the assessment process, the tax authorities of State A have made a settlement proposal that (also) reduces the penalties assessed. Under domestic law, once the taxpayer enters into a settlement the State A CA can only request the State B CA to provide for a corresponding adjustment of the amount assessed as a result of the settlement agreement.

The taxpayer has not settled, but filed a judicial appeal, in order to obtain extension of payment for the tax assessment and to assure that the tax assessment does not become definitive during the judicial appeal.

A MAP request is being filed.

Consequences

Consequence of the above State A tax authority action is that if a settlement is entered into, the position of State A is that only a corresponding adjustment can be requested in State B as regards the income attributable to the branch. It should be noted that the penalty feature of the assessment and the reduction thereof under settlement are in the most attractive features of the settlement option for the taxpayer.

The filing of the judicial appeal presents as problem that the CA under domestic law, is bound by a decision from the Court, and will only seek a corresponding adjustment from the CA of State B in case the Court of State A has rendered a decision. Once a judicial decision is issued, the merits of the case (the appropriateness of the income allocation) are no longer available for review in MAP, and access to the second phase of the Arbitration Convention, the advisory commission, is no longer available either. All that remains in that case is a request for a corresponding adjustment from State B. If the taxpayer wishes to allow the CAs to be able to discuss the merits of the case, or access to the advisory commission under the AC, the taxpayer needs to revoke its judicial appeal filed with the Tax Court. The CA usually does not consider the appropriateness of (statutory) penalties, however, and the judicial appeal should probably be maintained for that part, if a MAP request is filed.

Monitoring observations

- The issue of preference for local comparables whereas Pan European comparables are assumed generally acceptable is a prominent reason for adjustments. Local State A comparables are hard to find, therefore allow for (much more) costly additional efforts by taxpayers and usually lead to comparables with small scale operations, which raises the question of whether they really are sufficiently comparable in the end, or how they need to be adjusted;
- No application whatsoever of Article 5 of the AC (notification of treaty partner);
- Settlement proposal limits available remedies under MAP and potentially frustrates avoidance of double taxation, as there is no access to the arbitration phase after settlement. The reduction of or relief from penalties in practice is considered that large of a gain that taxpayers may prefer to settle, and claim a credit for the double taxation somehow. What is the status of Article 14 (definition of avoidance of double taxation) in case there is no access to the advisory commission? Article 6 in and of itself does not prescribe full avoidance of double taxation.

Case Example 3

Facts

The MNE has a subsidiary in State A that operates as a manufacturer and distributor of products.

Tax authorities of State A have assessed the State A entity alleging that it has underreported its income as regards intercompany sales of products manufactured in State A and distributed by the State A entity to related parties. The assessment affects several intercompany transactions, as the State A entity has intercompany sales to several (European) related parties.

The MNE disagrees with the extra income allocation to State A.

As part and parcel of the assessment process, the tax authorities of State A have made a settlement proposal, that (also) reduces penalties assessed. Under domestic law, once the taxpayer enters into a

settlement there is either no access to MAP (because the settlement proposal explicitly requires the taxpayer to waive such access) or if there is, the State A CA can only request the State B (and State C) CA to provide for a corresponding adjustment of the amount of tax assessed as a result of the settlement agreement.

The taxpayer has declined the settlement proposal and has filed a judicial appeal, in order to obtain extension of payment for the tax assessment and to assure that the tax assessment does not become definitive during the judicial appeal.

Subsequently, the taxpayer filed for relief of double taxation by way of MAP under the Arbitration Convention between State A and State B, and between State A and State C. The taxpayer was informed that the judicial appeal needs to be revoked, in order to allow the MAP process to proceed. The judicial appeal was maintained for the review of the statutory penalties, and revoked as regards the material income tax assessment. As such, the taxpayer is currently at the mercy of the CAs to obtain avoidance of double taxation.

Almost one year after the date of filing for MAP, the authorities of State A had still not prepared and submitted a position paper for the authorities of State B and State C to help consider the issue.

Monitoring observations

- No application whatsoever of Article 5 of the AC (notification of treaty partner);
- Settlement proposal limits available remedies under MAP, and potentially frustrates avoidance of double taxation, as there is no access to the arbitration phase. The reduction of or relief from penalties in practice is considered that large of a gain that taxpayers may prefer to settle, and claim a credit for the double taxation somehow. What is the status of Article 14 (definition of avoidance of double taxation) in case there is no access to the advisory commission? Article 6 in and of itself does not prescribe full avoidance of double taxation.
- Preparation of position paper takes much longer than it should, prolonging exposure of taxpayer to interest charges even if in the end resolution is obtained at MAP level.

Case example 4

Facts

The company is located in State B with a branch in State A that serves as a manufacturer of products. The State B company (parent company of the branch) is resident of State B. The tax authorities of State A have issued an audit report to the branch in State A.

The audit report indicates that an assessment will be issued as result of a correction to the income attributed to the branch based on the use of a different (and preferred) transfer pricing method (profit based method) by the tax authorities than used by the taxpayer.

The MNE disagrees with the findings presented by the State A tax authorities.

As part and parcel of the assessment process, the tax authorities of State A will make a settlement proposal, that (also) reduces the statutory penalties that may be assessed based on the income that is deemed underreported once the assessment is issued. Under domestic law, once the taxpayer

enters into a settlement, the State A CA can only request the State B CA to provide for a corresponding adjustment of the amount assessed as a result of the settlement agreement.

The taxpayer is considering its options.

Consequences

Consequence of the above State A tax authority action is that if a settlement is entered into, the position of State A is that only a corresponding adjustment can be requested in State B as regards the income attributable to the branch. It should be noted that the penalty feature of the assessment and the reduction thereof under settlement are in general the most attractive features of the settlement option for taxpayers.

If the taxpayer does not settle, it looks like the taxpayer has access to the Arbitration Convention including the second phase of the Arbitration Convention (the submission of the case to the advisory commission).