CHAPTER 9:

DISPUTE AVOIDANCE AND RESOLUTION

9.1. Introduction to Dispute Avoidance and Resolution in Domestic and Cross-Border Contexts

9.1.1 Importance

9.1.1. Dispute avoidance and resolution procedures are essential to the effective and efficient functioning of all tax administrations. Such procedures, if properly designed and implemented, enable fair and expeditious resolution of differences between tax administrations and taxpayers regarding interpretation and application of the laws. Th provide ey recourse. Th

associated with an over reliance on ad h

9.1.1.2. For the same case in countri

have strong and independent judicial systems with adequate tax exp

effective dispute avoidance and resolution procedures is a key considerati

9.1.2 Goals of dispute avoidance determination and collectio

controversy, cost, uncertainty and de

most efficient method of addressi

administrations seeking to use

their resources most efficiently should focus in the first instance on procedures for avoiding disputes, while ensuring that appropriate dispute resolution procedures are available should they become necessary.

9.1.3 Differences between domestic and cross-border disputes

In the cross-border context dispute avoidance and resolution procedures are particularly important to avoid double taxation of the same income to a taxpayer or associated enterprises. They also avoid the imposition of tax not in accordance with the provisions of the applicable tax treaty, if any. In the cross-border context it is necessary for both tax administrations involved in a dispute to give effect to the provisions of any applicable tax treaty and to provide rules and procedures for departing from the domestic law result where necessary to resolve disputes.

9.2. Special

9.3. Dispute Avoidance Procedures – Domestic

9.3.1 Legislation and Other Guidance

Benefits of transfer pricing legislation and other guidance

9.3.1.1. As in other

9.3.1.6. Many multinational enterprises apply transfer pricing policies to price their intercompany transactions on a consistent basis globally, so the absence of national legislation may not encourage compliance by an MNE.

9.3.1.7. However where a country that has not adopted specific transfer pricing legislation decides that it is appropriate to challenge a company's intercompany pricing it may find that it lacks a clear legal basis for such a challenge. While some countries may have general legal provisions or principles, such as general anti avoidance rules or substance over form doctrines, they may find it difficult to successfully challenge intercompany pricing on this basis.

9.3.1.8. Such an approach may also

9.3.2.7. An alternative means of promoting transparency and consistent treatment of taxpayers, currently used by Nigeria, is to publish generally applicable guidance on issues of broad application after analyzing them in a cooperative relationship

9.3.4.2.A cooperative relationship can benefit both tax administrations and taxpayers by offering greater certainty and transparency, an earlier and more efficient resolution of any tax issues and

Clear agreement in advance on the period to be covered.

9.3.4.8. Tax administrations may find it useful to adopt an industry based focus where feasible, so that the experience gained can be leveraged and used to provide consistent and transparent treatment to similarly situated taxpayers (taking relevant differences into account).

9.4. Dispute

taxpayersand tax administrations. Suchguidance

9.6. Dispute Resolution Procedures – Cross Border

9.6.1 Mutual Agreement Procedure (MAP) Under

9.6.1.7.Structural independence can be more difficult to achieve in

9.6.2 Advance Pricing Agreements (APAs)

Policy considerations

9.6.2.1 Since the initiation of APA programs in the early 1990s by Japan and the United States many tax administrations have found APAs to be an effective tool for providing advance transfer pricing guidance to taxpayers and greater certainty to both tax administrations and taxpayers. In many countries both the tax administration and taxpayers tend to have a strong preference for APAs over litigation. Some of the most active advocates of APA programs have been OECD member countries that generally favour taxation at source such as Australia, Canada, and Korea. China began negotiating bilateral APAs several years ago and India has implemented an APA program beginning in July 2012.

9.6.2.2. APAs have been used in many cases to resolve disputes for past years as well, sometimes addressing a total of ten or more years at one time. Where coverage of past years is permitted APAs can be a very effective use of resources, especially for large or complex cases. It is possible to limit APAs to future years only, but this is less common, perhaps because it limits the tax administration's ability to fully leverage the resources it invests in concluding the APA.

9.6.2.3. Tax administrations generally find APAs to be a more amicable process than the audit process followed by a MAP. To the extent that there is advance agreement on key transfer pricing issues neither country faces the prospect of refunding taxes already collected.

9.6.2.4 As the taxpayer provides extensive information in advance the APA process can be more efficient than the audit function in determining the relevant facts. Perhaps for this reason many tax administrations have a general practice of suspending examination activity during APA discussions. Tax administrations may wish to clarify in their APA procedures that all information pertaining to the APA request should be shared simultaneously with both countries.

9.6.2.5. Tax administrations have also found APAs to be good tools for developing a deeper understanding of business operations, which can be used to inform their general guidance and examination processes. Most tax administrations have found that APAs are more widely embraced if they keep APA and examination functions separate. Alternatively they may impose limitations on the use of some or all of the information provided by the taxpayer in the APA discussions for other purposes such as subsequent examinations or future litigation if an APA cannot be successfully concluded.

9.6.2.6. Tax administrations with severe resource limitations may wish to weigh the advantages of APAs against other resource needs. It may be difficult for a tax administration that is still developing its general audit capabilities to feel comfortable diverting substantial resources to an APA program at that stage. Such countries may also be concerned that they will be at a disadvantage in negotiating APAs with multinational enterprises or more experienced countries until they develop more experience, including experience with MAP cases. On the other hand, APAs can be useful on an interim basis as an efficient means of collecting tax in MAP in A enterprises PA

resources but cannot replace the need for trained audit staff, so it can be beneficial for training to proceed in parallel while outside technical assistance and APA expertise is available.

9.6.2.7. Countries with little transfer pricing experience may initially prefer to limit the terms of their APAs (perhaps to three years rather than the five years more commonly used by experienced countries) so they can evaluate the experience more quickly and adjust their practices if desired. Alternatively they may wish to negotiate a few APAs in a pilot program

should be taken not to impose excessively strict requirements on the continued application of an APA.

9.6.2.13. A tax administration's resources are normally

below together with other considerations that have been identified by members of the Subcommittee on Transfer Pricing.

9.6.3.7. It has been suggested that mandatory tax treaty arbitration may have the following potentially negative consequences from a developing country perspective:

Developing countries may feel

could also be allocated more heavily towards developed countries and could perhaps even be funded centrally through the UN, with donor (government or other) support, although no such mechanism currently exists;

If a developed country's position is technically weak an independent arbitrator may be better able to see that this is the case than a less experienced developing country competent authority analyst. Therefore arbitration may be a way of levelling the playing field for developing countries;

Advocates of arbitration believe that there are sufficient qualified, independent arbitrators, including experts from developing countries. The 2011 UN Commentary on Article 25 permits the competent authorities to ask the UN Committee of Experts on International Cooperation in Tax Matters to develop a list of persons considered qualified to serve as arbitrators, if desired; and

As currently adopted in many bilateral treaties, arbitration operates as an added step in the treaty's MAP procedure, to resolve disputes that the competent authorities are not able to resolve within the specified period. Advocates of arbitration do not view this as raising sovereignty concerns because the MAP procedure is itself contemplated by the treaty.

9.6.3.9 In view of these differences the 2011 UN Commentary proposes to add arbitration as an option under one version of Article 25, with certain adjustments to the OECD approach to address issues that have been identified by developing countries. Transfer pricing issues were at the forefront of discussion on arbitration issues in the Committee so the results of those discussions are especially relevant in bip@ri&Qó@Tâes©se Kå "$ ËÕšÃĐÒ5 ñU

setting a deadline for MAP requests under their treaties or domestic laws, so that appropriate domestic procedures can be explored first. Some tax administrations prefer instead to set a deadline for the filing of a MAP request.

9.7.4. Taxpayers should be permitted, however, to pursue MAP consideration of a relevant cross-border issue or issues while pursuing domestic resolution procedures for separate issues that are not appropriate for MAP.

9.7.5. In some countries there is a view that the 9 . . [illegible]