

E/C.18/2019/CRP.17

Distr.: General
23 September

1. At its eighteenth session (New York, 23-26 April 2019), the UN Committee discussed a first draft of Chapter 3 on Domestic Dispute Resolution Mechanisms of the proposed *United Nations Handbook on Dispute Avoidance and Resolution*. The following excerpt from the report of the meeting summarizes the discussion and the decisions taken by the Committee:

After a brief presentation of chapter 3 on domestic dispute resolution mechanisms, the Committee was invited to comment on the scope of the chapter. In response to a Committee member who asked why the Subcommittee had decided that chapter 3 and the handbook would not deal with disputes related to VAT, the secretariat explained that, as reflected in the chapter on the mutual agreement procedure, the focus of the handbook was on income taxes and the Subcommittee had not sought to substantively address VAT disputes.

Another Committee member added that, in his count747 Twi747the to Anod

3.1

5. Also, this chapter does not deal with disputes concerning the exercise, by the tax administration, of its enforcement and collection powers including disputes concerning information exchanges and documentation requirements. These types of disputes do not relate to issues related to the determination of taxes payable and often involve the application of dispute resolution mechanisms generally applicable to the review of governmental actions.

3.1.3 Importance of resolving disputes

6. The main function of tax administrations around the world is to verify that their taxpayers have complied with tax laws. A tax administration's review of the accuracy of the

- disagreements regarding the amount of taxable income calculated by the taxpayer,
- disagreements regarding the taxpayer's choice of transfer pricing method used to value transactions between the taxpayer and its associated enterprises,
- disagreements concerning the availability or computation of foreign tax credits,
- disagreements regarding the character of items of income for tax purposes,

administration trained in dispute resolution techniques facilitate the dialogue between the relevant officials in the tax administration and the taxpayer with the aim of helping to resolve

arbitration procedure found in some bilateral income tax treaties. A more detailed description of the latter type of arbitration is provided in Chapter 7.

3.3 Common issues for domestic dispute resolution mechanisms

20. While the various domestic dispute resolution mechanisms described in this Chapter operate differently

requiring the review of each compromise solution by a panel consisting of members of the tax administration with appropriate expertise who did not have any prior involvement in the particular dispute. It is also possible to reduce these risks through the public disclosure of the strict parameters within which compromise solutions may be reached (see, for example, the United Kingdom's *Litigation and Settlement Strategy*⁵). In many countries, the ability to reach compromise solutions on a principled basis is a normal attribute of the tax administration and its exercise does not require any specific framework.

3.3.2 *Time limits*

27. Countries commonly provide, in their domestic laws and/or administrative practices, time limitations for the tax administration and taxpayers to take certain actions, such as reviewing or amending a properly filed tax return. Once a tax return has been correctly submitted, the tax administration is typically allowed a certain period of time to review and assess additional tax regarding the taxable period covered by the return, at least as long as the taxpayer acted in good faith.⁶ Similarly, a taxpayer that wishes to amend a return that has been previously submitted must typically do so within a certain period of time.

Time limits such as these are essential to ensure that taxpayers acting in good faith are not exposed to a review of their tax liability many years after the relevant taxable events took place, when the information related to these events may no longer be available. Also, a tax administration should not be exposed to having to issue a tax refund for a given tax year decades after that tax year.

29. Time limits, however, may create issues when implementing a domestic dispute resolution mechanism.⁷ The following basic example illustrates the difficulty: assume that in 2018 the tax administration of State A audits a return for the year 2014 that was correctly submitted by the taxpayer in 2015. As a result of the audit, the tax administration assesses additional tax of 100, and issues a notice of assessment for that additional tax. The taxpayer disagrees with the assessment and seeks recourse through the applicable administrative appeal procedure. That procedure continues into 2019. In appeals, the amount of additional tax assessed by the tax administration is reduced from 100 to 25. The taxpayer accepts the reduced assessment.

30. Assume that, under the domestic law of State A, the tax administration may only modify a tax assessment within a period of three years following the proper filing of the return by the taxpayer. In this example, while the preliminary assessment of 100 of additional tax was within the statute of limitations, the reduction in the assessment to 25 as a result of the administrative appeal is technically beyond the general deadline provided by domestic law.

5

31. This example demonstrates the importance of providing exceptions to the domestic time limits to ensure the proper implementation of a dispute resolution mechanism. A common way of addressing the issue is to suspend the time limitation for the period during which the dispute resolution mechanism is taking place. To the extent that the domestic time limits in question are based on domestic law, it is possible that the suspension of the time limitation so as to permit the dispute resolution mechanism to run its course could require legislative changes.

While the example above illustrates the importance of extending time limits in order to fully implement an administrative appeals resolution, the same is true for other dispute resolution mechanisms, all of which can be time consuming. It is equally critical in situations when a dispute has been submitted to arbitration or review by a tax ombudsman, or if the parties litigate the dispute in the courts, for statutory time limits to be extended in such a way to allow whatever resolution is reached to be fully implemented.

33. In some jurisdictions, with the agreement of the taxpayer, tax authorities may be able to extend the time period for assessment of additional tax. Such an extension may be requested during an examination of the taxpayer's return, where the revenue authority has not yet finished its review or, where this extension is not already provided by law, during the administrative appeal or judicial process (in order to allow the outcome of that process to be implemented). In some countries, taxpayers may be able to request that an extension of the time period be limited to certain issues, meaning that the revenue

0 TdJETEMC BT/Srme0 9 0 thatt2 (e0 TdJETEMC
Huntelochyca

to the dispute. For

courts are not allowed to decide issues related to the constitutionality of tax legislation, such issues being the exclusive jurisdiction of a constitutional court or similar body. There are also countries where the jurisdiction of courts that generally deal with tax matters is restricted to questions of law so that purely factual matters cannot be decided by these courts. It is also possible that quasi-judicial tribunals and arbitrators are prevented from addressing arguments related to human or procedural rights.

42. Also, in some countries, access to administrative appeals is not allowed for certain classes of tax disputes, such as cases that raise issues that are currently under consideration in

47. Another example applicable to cross-border transactions is where a tax dispute includes a disagreement concerning the interpretation or application of a tax treaty. As is explained in

50. For these and other reasons (such as differences in legal systems), there are often restrictions on the ability of both taxpayers and tax administrations to refer to previously undisclosed documents or information, or to raise novel arguments, under different dispute resolution mechanisms. Tax administrations are encouraged to make publicly available guidance for taxpayers regarding not only what information needs to be included in a valid request for dispute resolution but also which restrictions, and exceptions thereto, are applicable as regards the documentation and arguments that may be raised in the context of the relevant dispute resolution process. It will not always be possible or appropriate, however, to prevent a person responsible for resolving a tax dispute from considering relevant information that was not disclosed to the tax official or officials who took the action that led to a dispute. In such cases, the best course of action may be to remand the case back to these officials for further consideration (as is done in the United States).

example are the statistics on the mutual agreement procedure that are produced by countries that are members of the Inclusive Framework on BEPS.¹²

3.9.04 Tax expertise of individuals in charge of resolving tax disputes

^s It is important that the individuals who have been tasked with resolving tax disputes possess sufficient expertise in the relevant taxation rules. In the case of dispute resolution provided by the tax administration (e.g. the administrative appeal procedure described in section 3.4.1), this should generally not be an issue as long as sufficient budgetary resources are allocated to that function so that appeals officials are experienced and well-trained. Involving individuals with tax expertise is equally important where dispute resolution is provided by independent parties: taxpayers and tax administrations are unlikely to be satisfied by decisions of domestic arbitration panels that would reveal that the members of the panels lack expertise in the relevant tax law and rules.

by other judges of the same court or courts of the same level, however, are not always given the same precedential value and may simply be considered as relevant.¹³

58. Accessibility to previous court decisions is sometimes an issue in developing countries. Where general access to court decisions is allowed, which is the case in a large number of countries, tax administrations and courts are encouraged to maintain a public (c)4 (c)-Where (n)465

63. Many countries have gradually abandoned overly formalistic approaches under which the words of a tax statute were read literally without regard to their context and the intention of the legislator. Under one such approach, any doubt as regards a tax statute had to be resolved in favor of the taxpayer. In many countries, there is now a greater recognition that the words of the tax law should be read in context and that the purpose of the provisions should be taken into account in determining how these should be interpreted. This approach is expressly mandated when interpreting the provisions of tax treaties, as is recognized by Article 31(1) of the *Vienna Convention on the Law of Treaties*.¹⁴

64. Persons in charge of resolving tax disputes should not have complete discretion as to how to solve these disputes. The principle of the rule of law requires that these persons, whether acting as judges, tax officials or in another capacity, perform their functions in accordance with the law. In addition, it is important that tax officials decide disputes in accordance with the applicable administrative guidance. While courts may legitimately disagree with interpretations put forward by the tax administration, taxpayers are entitled to expect a consistent treatment from the tax administration and tax officials should therefore comply with the administration's published guidance until it is decided to reverse or abandon such guidance.

3.4 Mechanisms through which dispute resolution is provided by the tax administration

65.

these actions/decisions by different tax officials. The most crucial aspect of a successful administrative appeal program is that it operates independently from the exam, audit and collection functions so as to avoid a situation in which the officials who took the disputed actions or decisions influence the outcome of the review.

68. If a taxpayer disagrees with a tax adjustment resulting from the audit or examination process, the taxpayer is typically afforded the right to challenge the examiner's determination at the administrative level prior to initiating judicial proceedings. While some jurisdictions (e.g. Brazil) do not allow for an administrative review of the examiner's findings, most do. Resolution of tax disputes through administrative review without the need for litigation is typically more efficient, as regards costs and resources, for both the government and the taxpayer. In most countries, taxpayers are not required to pay the disputed tax if they file an administrative appeal. In some countries, an efficient administrative appeal procedure that resolves disputes prior to litigation not only saves taxpayers and the tax administration time and money, but may also help alleviate the problems of an overlo

the amount of tax assessed be adjusted accordingly so that if the taxpayer accepts the revised amount, the dispute is resolved.

73. In order to resolve disputes without creating new ones and to maintain public confidence in the administrative appeal procedure, in most countries, the office in charge of appeals has the authority to maintain or reduce the amount of tax resulting from the prior decisions of the

references to any relevant legal provision or authority supporting the taxpayer's position.

79. Ideally, it should be possible for taxpayers to make such a request electronically through a secure web site that would automatically link the request to the notice or letter that triggered the dispute, thereby avoiding the need to provide some of the above information.

3.4.2 Administrative mediation

79. The administrative mediation procedure described in this section, which exists in countries such as Belgium and Kenya, operates differently from, and is complementary to, the administrative appeals procedure. It is also different from the independent mediation process described in section 3.5.4 since it involves a mediator who belongs to the tax administration as opposed to one who is independent. The purpose of the administrative mediation procedure is to facilitate communications between the taxpayer and tax officials to help resolve the dispute. Mediation officials from the tax administration can attempt to facilitate dialogue between parties by helping the parties identify the issue or issues at dispute, clarify each other's positions, and develop a range of possible options to arrive at a negotiated settlement.

80. By its nature, the administrative mediation procedure complements other dispute resolution mechanisms and may thus be invoked simultaneously. For instance, one situation in which administrative mediation might be useful is where a taxpayer has made a request under the administrative appeal procedure but finds it difficult to communicate with the tax officials in charge of appeals. In that case, the assistance of a mediator from the tax administration may facilitate the discussions. In some countries, mediation may also be requested by the tax officials in charge of appeals. In many cases, however, administrative mediation may only proceed if both the taxpayer and the relevant tax officials agree to participate. It should also be noted that in some countries (e.g. Belgium and the United Kingdom), mediators may, and

administrative appeal function. Nevertheless, the mediation officials will need to have the authority to have access to confidential (e.g. taxpayer-specific) information in order to effectively facilitate communication. To the extent that the officials who conduct the administrative mediation also work as appeal officials, they should already be legally allowed to access confidential information.

83. An administrative mediation program should be structured in such a way that mediation could be initiated early in the administrative appeal process. Given the potential benefits that could be gained from mediation before a decision is taken by the tax administration, mediation could even be made available while the matters in dispute are at the pre-assessment stage, such as in audit, examination or collection (see Chapter 2). Moreover, it is critical that both parties to the dispute agree to submit to the administrative mediation and express their desire to seek

adjudicate all types of legal challenges), administrative courts, commercial courts or specific tax courts. They may also be “quasi-judicial tribunals” which, for the purposes of this chapter, correspond to separate bodies set up by law in order to decide specific types of disputes and which, although not technically courts of law, have the power to adjudicate disputes and do so through a process similar to the process followed in a court. S(pr)3 (o4 (s)-t)-1 (s)-5 (p)-

98. The following are a few examples of specialized tax courts in developing countries.

99. In South Africa, cases heard by the Special Income Tax Court are dealt with by a judge assisted by an accountant who has at least 10 years of experience and a representative of the business community. To file a petition with the Special Income Tax Court, the dispute with the South African Revenue Service must involve an assessment exceeding R100,000. Tax disputes of less than R100,000 are heard by the Tax Board, which is chaired by an attorney, advocate, or accountant who works in the private sector.

100. India's Income Tax Appellate Tribunal ("ITAT") is a quasi-judicial body that hears appeals of the India Revenue Department's decisions. The ITAT consists of tax experts with a background in law and/or accounting. The ITAT's decisions with respect to legal positions is binding on the Revenue Department. Appeals from the ITAT are brought before appellate level

another taxpayer-specific service provided by PRODECON is the legal representation of certain taxpayers to assist them in their dealings with the tax administration.

PRODECON's complaint procedure

The complaint procedure allows PRODECON to investigate any action of the tax administration that may infringe or has infringed on the rights of a taxpayer. This procedure may be requested by any individual or legal entity that believes that its rights as taxpayer have been infringed,

tax administration by the applicable auditing and collection procedures on the remaining open issues.

[REDACTED]

21 (r)-2 (eem)19.1 (cl)

111.

requisite qualifications or selection criteria that arbitrators must satisfy should be specified. As far as possible, the parties should seek to appoint an arbitrator who has relevant expertise. For example, if the dispute involves disagreement over the valuation of an asset, the parties may wish to require that an arbitrator possess at least five years of experience in asset valuation. Also, in order to avoid conflicts of interests, an arbitrator should not have had any prior involvement with the particular dispute, or the taxpayer concerned.

- *The form of the arbitration procedure:* Arbitration may take different forms. For instance, under the so-called “baseball” or “final offer” arbitration (the so-called “baseball” or “final offer” arbitration) (Section 1404(b)(5)(C) of the Internal Revenue Code)