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INSIGHT: International Compliance Assurance Programme--Oasis or Mirage?



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Before hailing the newly minted International Compliance Assurance Programme (“ICAP”) from the Organisation for Economic Co-operation and Development (“OECD”) as the panacea to resolve problems of double taxation for multinational enterprises (“MNE”), we thought it would be useful to review and compare the ICAP’s salient features with those of other existing programs aimed at resolving double taxation.

This paper intends to provide a side-by-side comparison of the various multijurisdictional tools/programs available pursuant to double tax treaties to resolve double taxation in respect of transfer pricing transactions: mutual agreement procedure (“MAP”); advance pricing arrangements (“APAs”); simultaneous tax examinations; joint audits; and ICAP. Each of these programs will be reviewed as it relates to the following topics: (1) goals; (2) parties; (3) process; (4) documentation required; (5) timing; (6) availability; (7) benefits; and (8) drawbacks.

I. Goals

While all these programs involve a form of multilateral review/cooperation between tax authorities in reviewing a MNE’s affairs, the goals pursued by each program can vary significantly, from the simple exchange of information to the avoidance of double taxation.

MAP—The goal of the MAP is to endeavor to resolve cases involving taxation not in accordance with the provision of income tax conventions by mutual agreement between two or multiple tax administrations. The majority of MAP cases deal with issues of economic double taxation resulting from transfer pricing adjustments. A request for assistance pursuant to the MAP can be made not only in cases of actual double taxation, but also in cases of expected double taxation.

For transfer pricing issues, the MAP generally deals with years in which one or more tax authorities have made adjustments to an MNE’s transfer prices. In some jurisdictions, it is possible to request that the settlement arrived at by the competent authorities under the MAP for the relevant years be applied to subsequent years for which tax returns have already been filed and during which the same transfer pricing issues occur under the same circumstances. This is referred to as the “accelerated competent authority procedure” or ACAP. Something to note about ACAP is that it is not available in all tax jurisdictions; however, ACAP does not extend to future years for which tax returns have not been filed.

In accordance with the MAP article of the relevant income tax conventions, the goal of the competent authorities under the MAP is to “endeavor” to resolve taxation not in accordance with the relevant income tax convention (including economic double taxation). However, this is not an obligation to actually resolve the double taxation, nor a guarantee that it will be resolved. The most important exception and recent development on this point comes with the introduction in a growing number of income tax conventions of mandatory bind-

ing MAP arbitration. This process effectively guarantees that double taxation will be resolved and that it will be resolved within a set time frame. There are some situations where the relevant competent authorities can preclude certain MAP cases from proceeding to mandatory binding arbitration but the current mandatory binding MAP processes strive to limit such cases.

APA—The goal of the APA program is to provide a tool for MNE groups and competent authorities to proactively address potential double-tax issues by providing a form of ruling for future transfer pricing transactions. In some jurisdictions, APAs can also be used for issues related to permanent establishments (PE). In theory, the goal pursued by an MNE group when submitting an APA request is to have the competent authorities approve the transfer pricing methodology that will be applied to the covered transactions for a given period of time ahead of their occurrence. In practice, because APAs can take a few years to conclude, the term of an APA will include both past and future taxation years even though no tax return has yet been filed at the time of making the request for the APA.

An APA is a forward-looking procedure. However, in some jurisdictions, a “roll-back” is possible if the facts and circumstances for the years prior to the period covered by the APA are the same as during the period to be covered by the APA. Where applicable, the roll-back will apply the transfer pricing method agreed upon in an APA retroactively: i.e., to taxation years prior to the APA request.

The avoidance of, and sometimes relief from, double taxation are goals of the APA programs.

Simultaneous Tax Examinations—The goal of simultaneous examinations is for two or more tax authorities to examine simultaneously and independently the tax affairs of MNE groups in which those tax authorities have a common or related interest with a view to exchanging any relevant information between competent authorities pursuant to the Exchange of Information article of the relevant income tax convention. While avoidance of double taxation is indicated as desirable, it is not a goal for simultaneous tax examinations. Simultaneous examinations were historically thought to be desirable in cases involving, *inter alia*, apparent tax avoidance techniques, patterns involving substance versus form of transactions, price manipulations, tax shelters, unreported income, money laundering, kickback bribes, illegal payments, tax avoidance or evasion schemes involving tax havens.

Joint Audits—The goal of a joint audit is to involve competent authorities in order to streamline the audit process on common issues or transactions in multiple jurisdictions to arrive at a common understanding and result. This is meant to optimize compliance with international and national tax rules. The avoidance of double taxation is thus a goal of joint audits but, like the MAP generally, it is not an obligation. In comparison to simultaneous tax examinations, joint audits are performed collectively by the relevant tax authorities on the basis of narrowing down issues, developing a common understanding of the facts, and avoiding double taxation.

ICAP—The ICAP program is intended to provide MNE groups with a chance to have tax authorities decide, before any audit is started, whether their profile is either low or no tax risk. The theory is that this will result in increased tax certainty. The increased tax cer-

tainty applies to the fiscal year analyzed under the ICAP program plus an additional two years.

During the pilot program, the ICAP program will focus only on transfer pricing and PE issues. In the future, the ICAP program is intended to also cover other relevant or material international tax risks. As currently worded, a determination of low or no-risk under the ICAP does not constitute a guarantee that no transfer pricing or PE audit will occur, and consequently that no transfer pricing or PE adjustments will result from such audit.

The goal of ICAP is not, *per se*, the avoidance or relief of double taxation but, rather, the potential avoidance of audits and, thus, indirectly of double taxation.

II. Parties

The parties to each program are, from a high-level perspective, the same: MNEs and tax authorities. However, the role of the parties and their rights or obligations under each program differ.

MAP—There are two distinct stages in MAP: first (unilateral) stage and second (bilateral) stage. In the unilateral stage, the parties involved are a given country’s competent authority and a taxpayer resident in that country. The taxpayer submits a request for assistance pursuant to the MAP and communicates with the competent authority where the MAP was filed. During this stage, the competent authority reviews the MNE group’s submission, develops an understanding of the issues raised by the MNE group, and, in some cases, that competent authority may unilaterally resolve the double taxation (either by accepting the adjustment by the other tax jurisdiction, or, if it is the adjusting tax administration, by reversing the adjustment). At this point, the parties involved are the taxpayer and one competent authority.

If the case cannot be resolved unilaterally, then it proceeds to the actual MAP. This bilateral stage involves negotiations between the relevant competent authorities. The taxpayers are not participants to these negotiations; however, taxpayers may be called upon to provide additional information by the competent authorities.

Once the negotiations are concluded and if a result has been reached by the competent authorities, the relevant taxpayer then has a right to accept or reject the settlement arrived during the MAP.

APA—The parties to an APA are the MNE group submitting an APA request and one or several competent authorities.

An APA can take several forms depending on the number of competent authorities that enter into the agreement:

- Unilateral APA when signed by the MNE and one tax authority.
- Bilateral APA when signed by the MNE and two competent authorities.
- Multilateral APA when signed by the MNE and three or more competent authorities.

In certain countries, a simplified procedure has been introduced for small and medium-size enterprises.

This paper deals with bi/multilateral APAs and is not intended to cover unilateral APAs as they are not bilateral programs *per se*. Setting aside unilateral APAs, the parties to bilateral or multilateral APA negotiations are, like the MAP, only the relevant competent authorities.

Again, similar to the MAP, the relevant taxpayers have a right to accept or reject the result arrived at pursuant to the APA negotiations.

Simultaneous Tax Examinations—In simultaneous tax examinations, two or more tax authorities work together to conduct separate tax examinations at the same time and exchange information via the Exchange of Information provisions of the relevant income tax conventions. The MNE group is selected and notified. The MNE group's participation is limited to the provision of facts, and defending its position against the audits in each of the countries involved. As there is no form of agreement between the tax authorities contemplated at the completion of simultaneous examinations, there are no negotiations between them as part of this process. If double taxation results from the simultaneous examination, the MAP and APA procedures may be available to resolve double taxation.

Joint Audits—The parties to a joint audit include the MNE group and the tax authorities from two or more countries. The tax authority from each country is typically composed of competent authority representatives, joint audit team leaders, examiners from each country, economists, and experts in certain areas. Similarly to the MAP and APAs, as joint audits aim to arrive at coherent conclusions in the relevant tax jurisdictions, discussions and negotiations occur between the competent authorities.

ICAP—The parties to the ICAP program include the MNE group and tax authorities in the countries where the MNE group operates. During the pilot program, participating countries will include: Australia, Canada, Italy, Japan, the Netherlands, Spain, the United Kingdom, and the United States.

As currently structured, the ICAP occurs in two stages. During the first stage, the tax authorities review the information presented by the MNE, consult each other, and then provide the MNE with their decision as to whether the MNE can be considered as a low- or no-risk profile. If the tax authorities are unable to agree that the MNE presents a low- or no-risk profile, then ICAP moves to the second stage where the MNE is asked to provide additional information for the tax authorities to consider a low- or no-risk status for the MNE. However, similar to the MAP, the consultation and determination of low- or no-risk profile is done by the tax authorities outside the presence of the MNE.

III. Process

As each program has different goals, they also have different processes. The two that are the most similar are the simultaneous tax examinations and joint audits.

MAP—The MAP process generally follows the stages outlined below:

The MNE files a request for assistance pursuant to the MAP. That request is filed with the relevant competent authorities:

Unilateral Stage: As described earlier in this paper, the first stage of the MAP process is for the competent authority receiving the MAP request to determine whether it can provide relief on a unilateral basis. This may involve either accepting fully an adjustment proposed by another tax authority, or reversing an adjustment proposed by the audit function of the same tax authority as the competent authority reviewing the re-

quest. If no such unilateral resolution occurs, then the MAP proceeds to the second stage.

Bilateral Stage: Generally, in the bilateral stage, the competent authorities will contact each other to determine timing and next steps. The competent authorities may meet or confer with each other to understand their counterparties' position and request additional information from the MNE. These meetings and communications can occur on a set schedule (competent authorities with numerous MAP cases yearly may have a fixed meeting schedule—for instance quarterly) or on an ad hoc basis. The competent authority whose audit team initiated the adjustment is normally required to present a position paper supporting the adjustment, and the other competent authority may need to respond to this paper, before formal negotiations take place. The competent authorities may require additional information from the MNE group during the MAP process. The negotiations take place solely between the competent authorities – i.e., outside the presence of taxpayers. If and when a settlement is arrived at by the competent authorities, that settlement is then communicated to the MNE who may either accept or refuse the settlement. If the MNE refuses the settlement, then the MNE's sole recourses are those that normally would have been preserved domestically.

Arbitration (where applicable): In those treaties that provide for mandatory binding MAP arbitration, the MNE group has an option to set in motion an alternative procedure if the double taxation was not resolved within a set amount of time (two or three years) from the date both tax administrations received all necessary information. The arbitration process, as described by the OECD Guidelines, begins with the selection of a panel of arbitrators. The arbitration panel will review position papers prepared by the competent authorities (and, in certain cases, MNE's position papers, where allowed). The arbitration decision is adopted by a simple majority of the arbitrators and then communicated to the tax administrations which transmit that decision to the MNE group. As is in normal MAP cases, the MNE group has the option of accepting or rejecting the arbitration panel's resolution.

APA—The APA process generally follows the stages outlined below:

Preliminary consultation: The APA process generally starts with a pre-filing consultation/conference with the competent authorities. In some countries in particular circumstances, the pre-filing consultation may be mandatory and specified information may have been provided. This phase is analogous to a diagnosis or feasibility study and aims at providing background information and presenting the transfer pricing issues at stake, defining the scope of the proposed arrangement and assessing the opportunity and suitability of an APA with respect to the cross-border transactions concerned. The taxpayer may have the option to remain anonymous during the pre-filing consultation. However, given the extensive information to be provided in the pre-filing phase, the taxpayer needs to assess whether its anonymity can be maintained. Both the taxpayer and the competent authorities may opt out during this phase and the discussion is not binding on either the taxpayer or the competent authorities. Pre-filing consultations may occur in one or both relevant countries.

Formal application: After the pre-filing conference, if the taxpayer wants to initiate the APA process and apply for an APA, a formal APA submission is to be filed with the competent authorities. An application fee may be payable to the tax authority(ies) for entering into the APA process.

Fact Gathering: Once the APA application is filed, a fact-gathering or due-diligence process takes place during which tax authorities will seek to complete their understandings of the MNE's business, transactions and APA requested. This can involve site visits, conference-calls and/or written queries.

Negotiation: Once the fact-gathering is completed, the negotiation phase will begin. The first step in this phase is for each competent authority to draft a position paper as it relates to the APA proposed by the MNE and then to exchange such position papers. Once the position papers are exchanged, negotiations will take place either in face-to-face meetings or via telephone or videoconferencing until an agreement is reached—or the competent authorities agree that an agreement cannot be reached.

Finalization of the APA: Once agreement is reached, the competent authorities will exchange correspondence with each other outlining the terms of the agreement; afterward, each competent authority will contact its domestic taxpayer to communicate the terms of the APA. In some instances, this latter communication takes the form of an actual contract but that is not always the case.

Simultaneous Tax Examinations—The simultaneous tax examinations process generally follows the steps outlined below:

Initial Case Selection: Tax authorities individually consider suitable cases for simultaneous tax examinations.

Agreement on Suitable Cases: Tax authorities discuss and decide on which cases will be considered for simultaneous tax examinations.

Conduct Preliminary Examinations: Tax authorities review all the preliminary information on the taxpayer available to them.

Taxpayer Contacted: Tax authorities contact and inform the taxpayer about the upcoming tax examinations.

Initial Planning Meeting: Tax authorities meet designated representatives of each tax authority to discuss coordination strategies.

Meeting and Interview with the Taxpayers: Tax authorities request taxpayers to present a number of documents for the simultaneous tax examination team.

Independent Examinations: Tax authorities perform independent examinations of their respective taxpayers and may spontaneously exchange information gathered along the way.

Adjustments: Upon conclusion of the examinations, tax authorities may, where justified, make adjustments to the results of their respective taxpayers. Such adjustments do not have to be consistent between the tax jurisdictions and may lead to double taxation.

Joint Audits—The joint audit process generally follows the steps outlined below:

Identification of Target MNE: A MNE is identified as a potential joint audit case by a tax authority as part of the risk assessment process of a domestic audit and that tax authority prepares an informal joint audit proposal that it provides to its Joint Audit Coordinator (“JAC”).

It has also been suggested by the OECD that a MNE could request a joint audit in certain circumstances.

Initial Tax Authority Meeting: The initiating JAC convenes a meeting with the JAC of the other relevant tax authorities to determine if there is interest in conducting the joint audit

Joint Audit Planning Meeting: If the JACs decide to conduct a joint audit, a Joint Audit Planning Meeting is scheduled and the relevant preliminary information is collected. The joint audit Planning Meeting should result in an agreement on the main features of the process of the joint audit, including objectives, timelines and information to be jointly collected and exchanged.

Joint Audit: The joint audit is performed.

Drafting Final Reports: Final audit reports are drafted.

Communication of Final Reports: Final reports are communicated to the MNE by each participating country in a Closing Meeting.

Joint Audit Agreement: A Joint Audit Agreement will be prepared and signed by the competent authority of each participating country.

ICAP—Although the ICAP program is still only in its pilot mode and, thus, its process may change over time, here are the steps outlined currently for the pilot project:

Invitation into ICAP: An MNE group is invited to participate in the ICAP program. Presumably, if the ICAP pilot is successful, MNEs will be able to request to participate in the program.

Submission of Information: The MNE group submits a standard package of information.

Pre-Risk Assessment Workshop: A pre-risk assessment workshop is held between the relevant tax administrations to discuss the information package's contents.

Kick-Off Meeting: A kick-off meeting is held involving the MNE and the competent authorities of the relevant tax jurisdictions. During this meeting, the MNE group will walk-through the information package to ensure a common understanding of its contents.

Level 1 Risk Assessment: A Level 1 risk assessment will be performed, which includes a joint workshop and each tax administration evaluating the tax risk of the MNE group. The MNE group will work closely with the tax administrations to address questions or provide additional information, if necessary. The outcome of the Level 1 risk assessment will be either a letter stating the risk of the MNE group is low or no risk, thus concluding the process, or, if a conclusion of low or no risk cannot be reached, the MNE group will need to undergo an additional Level 2 risk assessment.

Level 2 Risk Assessment: If applicable, during the Level 2 risk assessment, the MNE group will be required to provide additional information and work with the tax administrations to answer questions. The Level 2 risk assessment results in three possible final outcomes by the tax administrations including the following: a conclusion the MNE group is low or no risk; a contingent conclusion the MNE group is low or no risk if certain changes are made (the MNE group will then enter an assurance phase); or a conclusion the MNE group's tax risk is not low or no risk.

IV. Information/Documentation Required

It is not possible to make a perfectly accurate comparison of the information that must be supplied to tax authorities under the various programs reviewed in this paper. While many tax authorities offering MAP and APA programs publish outlines of the information necessary to access these programs, the guidelines thus published can vary quite widely as to the data and documents required by different countries or under different taxpayer circumstances. In addition, transfer pricing audits/examinations, while covering some common bases, may divert in different directions, cover different transactions, and may be more or less adversarial, all of which will impact on the amount of information that will need to be provided. Finally, the ICAP being still in pilot mode and the information necessary to respond to Level 2 having to be determined on a case-by-case basis, there is a wide range of data and documents that could be requested. With the above in mind, the following paragraphs compare the information expected to be generally required under each program in selected categories of data and documents.

MAP—Although there is no universally approved list of information required for a MAP request, the list below excerpted from the U.S.'s Revenue Procedure 2015-40 is fairly comprehensive and used here for illustrative purposes:

1. Identification of information pertaining to the taxpayer and all relevant related parties.
2. Identification of authorized legal representatives.
3. Identification of relevant local tax office.
4. Identification of relevant tax treaty(ies) and articles.
5. Summary of the competent authority issues.
6. Years and amounts at issue.
7. Summary of relevant domestic and foreign judicial and administrative proceedings.
8. Expiration dates of applicable statutes of limitations both domestic and foreign.
9. A thorough, informative explanation of the competent authority issues, including: (a) Relevant transactions, activities, or other circumstances surrounding the competent authority issues; (b) Taxpayer's understanding of the legal basis for each tax authority-initiated action, or taxpayer-initiated position giving rise to the competent authority issues; (c) Taxpayer's view on the justification for assistance under the applicable tax treaty(ies); and (d) Content of any related requests for assistance submitted to the foreign competent authority, together with an explanation of any material differences between the competent authority request filed domestically vs. in the foreign jurisdiction.
10. Statement whether or not each competent authority issue is the same or similar to an issue considered in a prior or current competent authority or APA request covering the same or other taxable years.
11. Information relating to the interaction of the competent authority filings with issues under appeal for the same taxable years.
12. Statement whether the taxpayer requested ACAP, and, if so, additional information related to ACAP.
13. Statement whether the taxpayer has filed a bilateral or multilateral APA request that proposes to cover one or more issues covered by the competent authority

request and, if so, whether it included a rollback request for ACAP years in its APA request.

14. List of the ancillary issues (if any) the taxpayer requested to be addressed in the competent authority resolution.

In addition, in the U.S., a MAP request is required to be structured according to the table of contents mandated in the Appendix to Rev. Proc. 2015-40.

APA—Similar to the MAP, there is no universally approved list of information required for an APA request. The list below excerpted from the U.S.'s Revenue Procedure 2015-41 is fairly comprehensive and used here for illustrative purposes:

1. Identifying information pertaining to the taxpayer and all relevant related parties.
 2. Identification of authorized legal representatives.
 3. Identification of relevant local tax office.
 4. Identification of relevant tax treaty(ies) and articles.
 5. Expiration dates of applicable statutes of limitations both domestic and foreign for each member of the proposed covered group (including all open filed years in which a proposed covered issue or a substantially similar issue is under review by Appeals or its equivalent in the relevant treaty country(ies), and all open filed years in which an actual or proposed adjustment has been made either domestically or by a foreign tax authority, relating to the proposed covered issue(s) or to substantially similar issues.
 6. Presentation of the proposed covered transactions and products, businesses or arrangements that will be covered by the proposal.
 7. Presentation of the enterprises and permanent establishments involved in these transactions or arrangements.
 8. Disclosure of other controlled transactions.
 9. Disclosure of the other country or countries which have been requested to participate.
 10. Disclosure of the accounting periods or tax years to be covered.
 11. Information regarding the worldwide organizational structure, history, products, etc.
 12. Transfer pricing background.
 13. Financial statements for past years.
 14. Forecasts or financial projections.
 15. Detailed industry analysis and general description of market conditions in the relevant industry;
 16. Thorough functional analysis in relation to the proposed covered transactions.
 17. Description of the proposed transfer pricing methodology ("TPM") and details of information and analyses supporting that methodology.
 18. Presentation of the critical assumptions underpinning the proposal.
 19. A discussion of any pertinent ancillary tax issues raised by the proposed methodology.
 20. A discussion of, and demonstration of compliance with, any pertinent domestic law, tax treaty provisions and OECD guidelines that relate to the proposal.
 21. Any other information which may have a bearing on the current or proposed TPM and the underlying data for any party to the request.
- In the U.S., an APA request is required to be structured according to the table of contents mandated in the Appendix to Rev. Proc. 2015-41.
- Simultaneous Tax Examinations**—Prior to contacting the targeted taxpayer, tax authorities are advised to

review financial statements and income tax returns, and any analysis of group organization (group structure, ownership, intercompany accounts, group transaction, and other historical compliance information).

It is expected that much of the information required during the course of a transfer pricing audit followed by a MAP would also be required during a simultaneous tax examination. In addition, the following information is explicitly required to be obtained from the taxpayer in accordance with the OECD guidance:

1. Overview of taxpayer's business activities, history, development, etc.
2. Present ownership and group structure.
3. Description of reporting and accounting systems including computer systems.
4. Account plans and accounting instructions.
5. Reports by external auditors.
6. Details about business and economic transactions with group companies in other countries.
7. Details about the group policy on internal transfer pricing.
8. Details about other internal group transactions.
9. Details about any internal group agreements or group regulations (e.g. concerning accounting matters).
10. Records of the board of directors.
11. Any other details unique and specific to the taxpayer(s) being audited.

Anecdotal experience shows that a large quantity of additional information and documents is required to be supplied during a simultaneous audit.

Joint Audits—The information requested during a joint audit is dependent on the issue under examination. Thus, there is no set list of information required. However, as stated with respect to simultaneous examinations, the expectation is that this information would be quite similar to that required in the course of a transfer pricing audit followed by a MAP. No substantive difference would be expected between the information required under a simultaneous tax examination and a joint audit.

ICAP—The ICAP pilot program requires the submission of an initial documentation package which includes the following:

1. Country-by-Country report.
2. Master File.
3. Local files.
4. Summary of tax control frameworks and tax strategy.
5. Audited consolidated financial statements.
6. Audited entity financial statements.
7. Uncertain tax positions listing.
8. The group's current global business structure.
9. Differences between entity financial statements and tax returns.
10. Detailed value chain analysis.
11. Documentation with respect to the attribution of profits to a permanent establishment.

The description of the value chain analysis referred to at number 10 above is further broken down into:

To the extent not already covered in the Master File, an explanation of the profit drivers (both internal and external) for the MNE group that the group considers as important for showing how profits are aligned to its economic activities. This explanation should also separately address the different business segments described in the Master File (i.e. the five largest product

and service offerings) to the extent the value drivers are different.

A "covered issue" diagram 13 which includes the following information. This should encapsulate a visual representation of what is described in the Master File (in essence being a diagram or picture of the supply chain and value drivers) and outline:

The MNE group's business units (or similar divisions) as used for management purposes, together with a table, narrative, or other reconciliation showing the relationship between such business units and the legal entities comprising the MNE group. This information should also be provided for the group members and business units in the jurisdictions of participating tax administrations.

The value chain of the MNE group, comprising commercial or transactional flows between and among group members or business units in jurisdictions of participating tax administrations, between group members or business units in these jurisdictions and customers and other uncontrolled parties, and between group members or business units in these jurisdictions and any other group members or business units in other jurisdictions.

Organization or management charts identifying key functional or occupational roles within the group members or business units in jurisdictions of participating tax administrations that are relevant to the covered risks (e.g., vice president of marketing for transactions involving sales of tangible goods), together with: (i) the names of individuals occupying such functional roles at the time the pilot documentation package is filed, and (ii) headcounts for the relevant group members or business units in jurisdictions of participating tax administrations.

As explained earlier, if the ICAP process moves into Level 2, then additional information can be required.

V. Timing

Timing can also be difficult to compare between the programs and probably should not be thought of in isolation but rather in terms of time/cost-benefit ratio.

MAP—The timing of the MAP is generally as follows:

Pre-MAP Notification: Some treaties require notification to the competent authority of the non-initiating tax authority within usually two or three years of the "first notification of the action resulting in taxation not in accordance with the provisions" of the relevant income tax convention in order for taxpayers to be able to subsequently proceed with a formal MAP request. While this is not part of the timing of the MAP process per se, it is worth keeping in mind because failure to abide the pre-filing requirement may result in access to the MAP being denied.

MAP (no mandatory binding arbitration clause): While a large number of tax authorities have published MAP guidelines, those guidelines rarely contain strict indications of timing. This is probably because there is no universally accepted or imposed timing for the MAP process. When one looks at the MAP statistics published by various tax authorities and by the OECD, the range of time necessary to complete the MAP process is strikingly wide: from a few months to a large number of years.

MAP with mandatory binding arbitration: Contrary to the usual MAP process, the MAP process with the man-

datory binding arbitration feature proceeds along a set timeline. Once a complete MAP request has been received by both competent authorities, those competent authorities have a set amount of time within which to resolve the MAP (normally two or three years from the date of the complete MAP request). If the MAP case is not resolved within that set period of time, then the case proceeds to arbitration, which would normally not take more than one year to complete. The existing mandatory binding MAP arbitration provisions negotiated to date, although they generally follow the same framework, present varying workings or procedures, including the timing of various steps, the selection of arbitrators, etc. Therefore, the entire process takes at the most between three- to-four years to complete, including arbitration. Experience shows that the adoption of a mandatory binding arbitration feature actually acts as a very strong incentive for competent authorities to conclude their MAP negotiations within the specified time frame in order to avoid arbitration.

APA—Similar to the MAP process, there is no common time frame for the conclusion of an APA specified in the local rules of the countries having adopted an APA program. Most competent authorities endeavor to respect a two-to-three year period from the pre-filing conference to the finalization of an APA. However, timing for an APA varies depending on the responsiveness of the parties and resources of the competent authorities involved and, in practice, bilateral APAs rarely take as little as two to three years to conclude. The time observed for concluding bilateral APAs ranges from less than one year to, in some circumstances, almost 10 years. Most bilateral APAs take three to four years to conclude.

In addition, there is at least one income tax convention which also provides for mandatory binding arbitration for APAs that must begin if the APA has not been completed within four years after the filing of a complete bilateral APA submission. In that case, APAs should be concluded in less than five years.

Simultaneous Tax Examinations—There is no set timing for simultaneous tax examinations. Given the added complexity and steps involved in having two tax authorities proceed with audits at the same time, it can be expected that simultaneous audits will generally take longer than normal international tax audits.

Joint Audits—Timing for a joint audit is determined by the tax administrations during the planning phase. The OECD indicates that it expects that a joint-audit should be completed within 12 to 18 months of the start date.

ICAP—The ICAP program consists potentially of two levels and is anticipated to take from 17 weeks to one year. Level 1, beginning with the submission of the standard package of information by the MNE group to the tax administrations concluding there is low or no risk could take between 17 and 32 weeks (four to eight months). If a Level 2 assessment is required, the ICAP program could take an additional 20 to 23 weeks (five to six months).

VI. Availability

In terms of availability, this paper focuses on whether taxpayers can apply for a given program.

MAP—Taxpayers who face taxation that is not in accordance with an applicable income tax convention

have a right to request competent authority assistance pursuant to the MAP. That being said, some countries that have signed income tax conventions containing a MAP article do not have a working competent authority group and, thus, MAP requests go unanswered. However, the MAP is generally available to taxpayers where there is an applicable tax treaty and pre-filing requirements are followed.

APA—Although APAs are an offshoot of the MAP, taxpayers do not automatically have a right to request an APA because APAs are an administrative ruling offered at the discretion of tax authorities, and not all countries possess an APA program. Even when a given country possesses an APA program, not all taxpayers or transactions may qualify for acceptance. In practice, there is a fairly wide range of criteria and differences in those criteria between tax authorities offering APA programs.

Simultaneous Tax Examinations—Simultaneous tax examinations are based on the relevant exchange of information provisions of applicable income tax conventions, not on the MAP provisions. As originally conceived, simultaneous tax examinations were a tax authority-driven process. In other words, tax authorities would decide whether to target certain MNEs for simultaneous tax audits. Taxpayers do not have the right to request a simultaneous examination.

Joint Audits—Similar to simultaneous tax examinations, joint audits also involve the exchange of information provisions of applicable tax treaties but, given that one of the goals of a joint audit is to “reach a joint/mutual agreement on the audit results to avoid double taxation,” one would assume that MAP provisions are also the likely basis for joint audits. Joint audits are described as a tax authority-driven process. However, the OECD recognized that companies should have the “option, subject to criteria, to apply for such an audit to obtain certainty on tax issues that involve multiple countries.”

ICAP—There is no stipulated legal basis for the ICAP. However, given that it involves some form of cooperation between tax authorities in an endeavor to achieve a common determination, it is likely based on a combination of the exchange of information and MAP provisions (or the MAP and something like the Multilateral Convention on Mutual Administrative Assistance in Tax Matters). The ICAP, at this stage, appears to be a program that, if continued, will be available to taxpayers in a similar fashion as APAs: i.e., MNEs will be able to request acceptance into the program but such acceptance will not be automatic/guaranteed.

VII. Benefits

MAP—The main advantages of MAP include:

- Its aim is to resolve double taxation. While this is not guaranteed, MAP statistics show that MAP programs generally enjoy a very high percentage of success in resolving double taxation, although this varies with different bilateral relationships.

- MAP may allow the taxpayer to be proactive about possible economic or judicial double-taxation conditions because, in some countries, “[. . .] unlike the disputed claims procedure under domestic law, [it] can be set in motion by a taxpayer without waiting until the taxation considered by him to be ‘not in accordance with the Convention.’ ”

■ The MAP can have an expanded impact when coupled with an ACAP request, if available.

■ Where mandatory binding arbitration is applicable, MAP provides a virtual guarantee that double taxation will be resolved AND will be resolved in a timely manner.

APA—The main advantages of APAs include:

■ Proactively avoid double-taxation issues and prevent transfer pricing disputes.

■ Parties typically focus more on finding the right answer than on maintaining an adjustment proposed by one of the tax authorities.

■ Mitigation or increased control of transfer pricing risk.

■ Bilateral certainty with respect to pricing of covered transactions.

■ Reduced litigation and compliance expense, for example, by replacing annual transfer pricing documentation.

■ Enables agreement between competent tax authorities on an appropriate transfer pricing methodology for complex transactions at issue and when the traditional methodologies are difficult to apply or cannot be applied.

■ A means of defending against particularly aggressive tax authorities.

Simultaneous Tax Examinations—The main advantages of simultaneous tax examinations include:

■ May reduce the compliance burden for taxpayers and avoid duplication of provision of documents.

■ Can assist tax authorities in obtaining a more comprehensive understanding of a MNE's facts and transactions. This may or may not be a benefit to the taxpayer.

Joint Audit—The main advantages of joint audits include:

■ The ability to work with multiple tax administrations simultaneously to address a cross-border issue.

■ More efficient identification of the relevant cross-border issues.

■ The reduction of compliance burden for taxpayers and avoidance of duplication of provision of documents.

■ Potential relief from double taxation. Similar to the MAP, joint audits do not guarantee relief from double taxation but it is one of the objectives that is to be pursued by tax authorities.

ICAP—The main advantages of the ICAP include:

■ The characterization as low or no-risk may result in no or highly circumscribed transfer pricing audits.

■ Potential of obtaining confirmation of a low- or no-risk characterization from a number of tax authorities.

■ Reduction of compliance burden for taxpayers and avoidance of duplication of provision of documents.

VIII. Drawbacks

The drawbacks outlined below do not mention the extensive information to be provided because each of these programs is based on the provision of a very large amount of data and documentation, either as a part of the program itself or leading up to it during a transfer pricing audit. For instance, simultaneous tax examinations and joint audits are, by definition, transfer pricing audits and will require the provision of extensive information. The MAP results from transfer pricing audits and, before the MAP is initiated, will have required the taxpayer to provide a similar amount of information.

APAs require a similar amount of information, albeit focused in part on the future rather than purely for past years. Finally, ICAP with its list of required documentation for just the Level 1 review also requires a tremendous amount of data. Thus, the provision of extensive data and documents is a common element to all five programs.

MAP—MAP can present the following drawbacks:

■ Some countries hold different positions on the refund on double taxation, interest, penalties, and the importance of paying all taxes before the request for MAP can be considered.

■ The most significant drawback is that competent authorities are under a duty merely to use their best endeavors and not to achieve result (i.e., resolve the double taxation).

■ Another drawback of MAP is that some cases can take a very long time to complete.

APA—APAs can present the following drawbacks:

■ Filing fees in some countries.

■ APAs can take a long time to complete.

■ APAs are not available in all countries, and even when offered, for all situations or transactions.

Simultaneous Tax Examinations—Simultaneous Tax Examinations can present the following drawbacks:

■ No double-taxation relief is granted. The process is meant to facilitate the audit of international transactions/arrangements by tax authorities via the exchange of information. However, the aim is not the avoidance or relief of double taxation.

■ Simultaneous timing of the examinations does not necessarily mean the same issues are discussed and same facts are discovered.

Joint Audits—Joint Audits can present the following drawbacks:

■ Similar to the MAP, tax authorities participating in a joint audit are not under the obligation to achieve a result that avoids double taxation, but merely to attempt to achieve that result.

■ Scheduling could cause delays.

ICAP—The ICAP can present the following drawbacks:

■ The ICAP is not targeted to avoid double taxation.

■ Even if a taxpayer does achieve a low-risk characterization, there appears to be no actual guarantee against a transfer pricing audit for the relevant taxpayers.

Conclusion

Given the comparisons outlined above, we would offer the following advice/observations:

Given that ICAP is in its pilot stage, it will be interesting to see how this program develops and whether the low- or no-risk characterization will become a virtual guarantee of no subsequent transfer pricing audits in the relevant jurisdictions.

Similarly, it would be interesting to see whether tax authorities would be inclined to agree to a no-risk rating as part of ICAP with respect to routine transactions involving very large amounts because even a very small adjustment could bring large amounts of tax revenue.

Perhaps the program with the worst cost-benefit ratio is, unsurprisingly, simultaneous tax examinations, which, in all likelihood, bring absolutely no relief from double taxation and, potentially worse (backed by anecdotal evidence), can result in a classic double-whammy: both tax authorities involved take contrary positions

Side-by-Side Comparison

	MAP	APA*	Joint Audit	Simultaneous Tax Examination	ICAP
Goals	Resolve double taxation in relation to past years	Avoid double taxation in relation to future years	Avoid double taxation in relation to past years	Audit related taxpayers at the same time	Avoid full audit of related taxpayers
Parties	MNE and competent authorities	MNE and competent authorities	MNE and competent authorities	MNE and tax authorities' representatives	MNE and tax authorities' representatives
Documentation Required	Extensive during audit prior to MAP**	Extensive	Extensive	Extensive	Extensive
Timing	A few months to a few years	3+ years	12-18 months***	Undefined	4-14 months***
Availability	Where there is an applicable tax treaty	At the discretion of the relevant tax authorities	At the discretion of the relevant tax authorities	At the discretion of the relevant tax authorities	At the discretion of the relevant tax authorities
Benefits	Resolution of double taxation and potential for ACAP	Avoidance of double taxation and potential application of roll-back	Avoidance of double taxation	Assists tax authorities in having a more comprehensive understanding of MNE's operations and transactions	Potential avoidance of double taxation by avoidance of full audit
Drawbacks	No obligation on tax authorities to resolve double taxation****	Expensive & can take a long time to complete	No obligation on tax authorities to resolve double taxation	Avoidance of double taxation is not one of the goals	Not targeted to avoid double taxation*****

*: Unilateral APAs are not covered in this table.

** : If mandatory binding MAP arbitration is available, the entire process is concluded within 3 or 4 years.

***: In theory. No official statistics are available.

****: Except, generally, for MAP cases covered by mandatory binding MAP arbitration.

*****: Although it may be an indirect result if the ICAP is successful.

which each differ from the taxpayer's original filed position.

On the other hand, the program with the best cost-benefit ratio is probably MAP with the mandatory binding arbitration feature, and where possible, coupled with ACAP. Coupling the MAP request for past years with an APA request (with roll-back) for future years can add another level of certainty.

But for the fact that it is not always available and that it does not always result in an agreement, the APA program would be in the same position as the MAP for the best cost-benefit ratio, with joint audits running close behind.

In the final analysis, it is probably too early to say whether the ICAP will become the next panacea for double-tax woes, but it will be interesting to follow how

it develops in practice in order to determine its relative value in the portfolio of bilateral programs targeting transfer pricing.

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1. In respect to MAP, see Article 25 of the OECD's "Model Tax Convention on Income and on Capital" and the Commentary thereto (the "OECD Model Convention"), available at http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#.Wk6zGsLnauU.

2. In respect to APA, see paragraphs 4.134 to 4.176 of the "OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations" (the "OECD Guidelines"), available at http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017_tpg-2017-en#.Wk60Q8LnauU.

3. In respect to Simultaneous Tax Examinations, see paragraphs 4.79 to 4.94 of the "OECD Guidelines".

4. In respect to Joint Audits, see <http://www.oecd.org/tax/administration/45988932.pdf>.

5. In respect to ICAP, see <http://www.oecd.org/tax/forum-on-tax-administration/international-compliance-assurance-programme.htm>.

6. In respect to ACAP, see the description of ACAP in the U.S. provided at, Section 4 of Rev. Proc. 2015-40, available at <https://www.irs.gov/pub/irs-drop/rp-15-40.pdf>.

7. In respect to the goals of simultaneous tax examinations, see "Manual on the Implementation of Exchange of Information Provisions for Tax Purposes", available at <http://www.oecd.org/tax/exchange-of-tax-information/36648057.pdf>.

8. In respect to the historical preference of simultaneous tax examinations in cases involving apparent tax avoidance techniques, see "1992 OECD Model Agreement for the Undertaking of Simultaneous Tax Examinations", available at <https://www.oecd.org/tax/exchange-of-tax-information/2666483.pdf>.

9. In respect to the negotiation phase of the APA, there is at least one tax treaty where mandatory bind-

ing arbitration can occur if the competent authorities are unable to agree on an APA. See the "Memorandum of Understanding Between the Competent Authorities of Canada and The United States of America", available at <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/memorandum-understanding-between-competent-authorities-canada-united-states-america.html>.

10. In respect to the "Meeting and Interview with the Taxpayers" step of Simultaneous Tax Examinations, the OECD breaks down the Independent Examinations and Adjustments steps into the following steps after Step 6:

- Step 7 (Further examinations)—tax authorities conduct post-examination interview with the taxpayer.

- Step 8 (Finalization of Case)—tax authorities finalize the case submitted and the facts that they found as a result of examination.

- Step 9 (Preparation of Final Report)—tax authorities submit a paper outlining their findings.

- Step 10 (Process Improvement Implemented)—tax authorities analyze the process and implement the best practices into the future simultaneous examinations for overall betterment of the dispute resolution tool.

See also Module 5 of "Manual on the Implementation of Exchange of Information Provisions for Tax Purposes", available at <http://www.oecd.org/tax/exchange-of-tax-information/36647823.pdf>.

11. In respect to "Adjustments" step in Simultaneous Tax Examination process, the OECD states that "both countries involved should endeavor to reach a result that avoids double taxation for the MNE group" (paragraph 4.79 of OECD Transfer Pricing Guidelines). However, anecdotal experience shows that this recommendation is not necessarily followed in practice.

12. In respect to the "Identification of Target MNE" step of the Joint Audits process, see p.88 of OECD's "The Changing Tax Compliance Environment and the Role of Audit", available at https://read.oecd-ilibrary.org/taxation/the-changing-tax-compliance-environment-and-the-role-of-audit_9789264282186-en#page88.

13. In respect to the list of ancillary issues the taxpayer requested to be addressed in the competent authority resolution as a part of MAP, the list also includes a list of mandatory attachments and, if some attachments are not included, an explanation as to why such items are not included.

14. In respect to the historical variation in the duration of MAP process, see <http://www.oecd.org/tax/dispute/map-statistics-2006-2015.htm> and <http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm>.

15. In respect to the start of the arbitration process under MAP, certain conditions may apply, such as the filing of confidentiality agreements by the MNE and its advisors prior to the start of arbitration.

16. In respect to arbitration process acting as a very strong incentive to conclude their MAP negotiations within the specified timeframe, see Foley, Vincent, Wrappe, Taheri, Francescucci and Curry, "Resolving U.S. and Canadian Double-Tax Cases: A Survey of Guidance and Practice Since 1990", Tax Management Transfer Pricing Report, Vol. 25, No. 24, 1380-1401, at pages 1394-1395.

17. In respect to the duration of the APA, various tax authorities publish their APA statistics. For instance,

see <https://www.irs.gov/businesses/corporations/annual-apa-statutory-reports>, <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/competent-authority-services/advance-pricing-arrangements.html>, and, https://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context/joint-transfer-pricing-forum_en.

18. In respect to the duration of the Joint Audit, see paragraph 39 of “Joint Audit Participants Guide”, available at <https://www.oecd.org/ctp/administration/45988962.pdf>.

19. In respect to the goals of joint audits, see paragraph 12 of Sixth meeting of the “OECD Forum on Tax Administration, Istanbul, 15-16 September 2010, Joint Audit Participants Guide”, available at <http://www.oecd.org/tax/administration/45988962.pdf>.

20. In respect to the countries having an option to apply for joint audit in case of issues that involve multiple countries, see paragraph 4.3 of “The Changing Tax Compliance Environment and the Role of Audit”, available at https://www.keepeek.com/Digital-Asset-Management/oecd/taxation/the-changing-tax-compliance-environment-and-the-role-of-audit_9789264282186-en#.WpmEpcLnZhg). The comment quoted above was made in reference to both “joint or

simultaneous audits” but, given that a common result is not targeted by simultaneous audits/examinations, it seems unlikely that certainty could be obtained, at least in theory, from such a request.

21. “Multilateral Convention on Mutual Administrative Assistance in Tax Matters” is available at https://www.keepeek.com/Digital-Asset-Management/oecd/taxation/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters_9789264115606-en#page1.

22. In respect to MAP’s option for the taxpayer to be proactive about possible economic or judicial double-taxation conditions, see OECD’s “Commentary on Article 25”, available at <http://www.oecd.org/tax/transfer-pricing/36221048.pdf>.

23. In respect to different position taken by tax authorities in regards to the refund on double taxation, interest, penalties, and the importance of paying all taxes before the request for MAP can be considered, see OECD’s “Manual on Effective Mutual Agreement Procedures (MEMAP)”, available at <https://www.oecd.org/ctp/38061910.pdf>. Also see BEPS 14 US best practices guidance, available at <https://www.oecd.org/tax/beps/beps-action-14-peer-review-best-practices-united-states.pdf>.