

Current Global Scenario in Tax Dispute Resolution

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International Taxation Conference
Mumbai, India
December 3, 2010

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- Introduction
 - Current techniques for resolving cross-border tax disputes
 - New techniques that should be considered
 - Steps that might serve to minimize future disputes

- Effect of dynamic and expanding world economy on traditional means of resolving cross-border tax disputes
 - More transactions
 - Larger transactions
 - Crossing more borders
- Bilateral mechanisms v. multilateral mechanisms
- National view v. international view
- Role of joint income tax audits
- What is at stake?
 - Revenue
 - Tax principles

- Substantive areas most likely to generate cross-border tax disputes
 - Transfer pricing
 - Permanent establishment
 - Attribution of profits
 - Beneficial ownership of dividends, interest, royalties
 - Application of limitation on benefits (LOB) provisions
 - Residence issues

TAX DISPUTE RESOLUTION

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- Primary concern in resolving international tax disputes
 - Avoiding double taxation
- Other concerns
 - Securing corresponding adjustments or credits where appropriate
 - Uncertainty re future planning
 - Time delays

- Pre-dispute mechanisms
 - Advance Pricing Agreements (APAs)
 - Extremely helpful re: transfer pricing issues
 - Pre-filing agreement with tax authorities
 - IRS will consider PE and profit attribution issues
 - “Enhanced relationship” between taxpayers and tax authorities may expand opportunities

- Current options for resolving cross-border tax disputes
 - Local administrative process
 - Multiple steps likely
 - Realistic possibility of settlement at administrative level?
 - “Principled” settlement only?
 - “Hazards of litigation” settlement?
 - No settlement opportunity
 - Correlative adjustment and credit issues

- Current options for resolving cross-border tax disputes (continued) –
 - India's Dispute Resolution Panels (DRPs)
 - Too soon to evaluate?
 - Mutual Agreement Procedure (MAP)
 - Requires bilateral treaty
 - Role of arbitration under treaty
 - U.S. Competent Authority statistics re MAP process
 - Vast bulk of cases involve transfer pricing adjustments
 - Litigation in local courts as last resort

- Possible additional options for resolving cross-border tax disputes
 - Mediation – to resolve certain types of disputes more quickly and more efficiently
 - Types of matters where mediation might be useful
 - Matters with a range of possible results (e.g., transfer pricing, attribution of profits)
 - Pure legal issues (is there a PE present?) less feasible, though possible
 - Requires good faith commitment from the parties to achieve final resolution
 - Who participates? Taxpayer and one government? Both governments?

- Mediation (continued)
 - Role of Mediator
 - Selection of mediator from private sector or from government?
 - Review written submissions from both sides, including expert reports if relevant
 - Meet with parties jointly; hears presentations; asks questions
 - Meet with parties separately to discuss strengths and weaknesses of respective positions
 - Question experts directly if necessary
 - “Shuttle diplomacy” to bring both sides to point of agreement

- Mediation (continued)
 - Advantages
 - Generally faster resolution than arbitration or litigation
 - Cost savings to parties
 - Process kept informal
 - Full participation by taxpayer
 - Produces result both sides necessarily accept
 - Disadvantages
 - Process could break down
 - Time lost; unnecessary expense incurred

- Other possible alternatives (continued) –
 - Panel of Experts -- to deal primarily with issues not suitable for mediation
 - Skilled panel of practitioners, academics, and/or former government officials knowledgeable in the area
 - Person or persons selected for matter would consider submissions from both sides and render non-binding opinion
 - Particularly suitable for pure legal questions such as existence of PE or determination of beneficial owner

- Panel of Experts (continued)
 - While non-binding, the opinion would provide both parties with sense of strength of case going forward
 - Could lead to settlement of matter without further action
 - Impose strict time limit on panel (e.g., 90 days after submission of material); require only brief summary of reasoning (“We believe there is a PE in country X because.....”)
 - Limit to cases with certain monetary value

- Other possible alternatives (continued)
 - International Tax Tribunal -- to resolve certain types of cross-border tax disputes
 - In lieu of litigation in local courts
 - Restricted to certain types of issues with specified minimum monetary value
 - Tribunal would have discretion in selecting cases
 - Focus would be on those expected to have precedential value
 - Offers possibility of uniformity in result for particular issues likely to arise in different countries
 - How feasible?

- Additional steps that might reduce likelihood of tax disputes --
 - Multilateral Treaty on the Meaning of Terms
 - For countries with OECD-type treaties, could establish uniform meaning for commonly used treaty terms such as “beneficial ownership”
 - As stated in Indofood case, such terms would take on a common “international fiscal meaning”
 - Terms would be interpreted the same way in all treaties where they are used in an identical context

- Additional steps that might reduce likelihood of tax disputes --
 - Multilateral Treaty on the Meaning of Terms (continued) --
 - Could also include common “anti-abuse” provision for all treaties, eliminating need to rely on interpretation of other provisions to challenge abusive situations
 - Would need multi-country buy-in, which would likely be difficult to obtain

- Conclusions
 - Current mechanisms for resolving cross-border tax disputes are too few and generally too slow
 - Opportunities for settlement of cases should be expanded
 - Utilize mediation as an additional mechanism
 - Utilize a panel of experts where appropriate
 - Harmonize treaty interpretation of certain terms, to minimize or eliminate disputes over meaning