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Comments on the future revision of Chapter IV, "Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes" of the Transfer Pricing Guidelines

Dear Sir / Madam,

Taxand welcomes the opportunity to provide comments on the future revision of Chapter IV of the Transfer Pricing Guidelines (TPG). We would like to share few thoughts based on our experience in advising multinational enterprises on Mutual Agreement Procedures (MAP) and Advance Pricing Arrangements (APA).

Our input will primarily focus on the first and last questions listed in the Invitation for Public Comments issued on the 9th of May 2018.

"What additional aspects or mechanisms to minimise the risk of transfer pricing disputes should be included as part of the guidance on transfer pricing compliance practices (e.g. co-operative compliance, risk assessment tax examination practices)?"

Comment – Promotion of co-operative compliance

The implementation of a co-operative compliance practice would definitely create a closer relationship between the taxpayers and the tax authorities, based on the fact that the taxpayer could choose it if he wants or not to be included on the referred mechanism.

It would stimulate compliance and prevent non-compliance, create an easier communication channel between the taxpayer and tax authorities, giving the parties the possibility to discuss, share and disclose relevant information of the business. On taxpayer side, based on a reasonable administrative burden, the benefits are to have a closer relation with the tax authorities, preventing/minimizing the dispute events. From the tax authorities' side, the advantages are linked with the possibility of monitoring taxpayers on a regular basis and get more expertise and know-how from their operational activity/industry.

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"Are there any other mechanisms or issues relevant to the administration of transfer pricing and/or to prevention and resolution of transfer pricing disputes for which guidance should be developed as part of the revision of Chapter IV of the TPG?"

Comment 1 – Problems concerning MAP and accrual of interest after 2 years from the presentation of the case to the competent authority

In case of transfer pricing adjustments, some countries may impose penalties as a disincentive for non-compliance (TPG 4.18). Some countries' penalty regimes may include also interests for tax underpayments which result in late payments of tax beyond the due date (TPG 4.22). In some countries late payment interest rate applicable to tax underpayments may be significantly higher than the base interest rate (i.e. the interest rate that a central bank charges to lend money to commercial banks) so that such late payment interest may be classified as an "additional penalty".

During the period in which a MAP is pending, generally countries grant a suspension of collection procedures (TPG 4.65). Once the MAP is concluded, tax authorities can ask for underpaid taxes, penalties and late payment interests.

As regards the duration of a MAP, competent authorities should resolve the case in 2 years. Indeed, the minimum standard that was adopted in the context of the work on Action 14 of the BEPS Action Plan (element 1.3) includes a commitment to seek to resolve MAP cases within an average timeframe of 24 months (TPG 4.56). In case of arbitration, if the competent authorities are unable to reach an agreement within two years from the presentation of the case, any unresolved issues arising from the case shall be submitted to arbitration (article 25, paragraph 5, Model Tax Convention).

If the competent authorities do not resolve a MAP case within 2 years, we believe that late payment interests should not apply after 24 months from the presentation of the case because the delay in concluding the procedure is not attributable to the taxpayer. Consequently, late payment interests should apply until 24 months from the presentation of the case, while from that date onwards, just base interest rate should apply.

Such comment is aimed to avoid that no-fault penalties (such as late payment interests accrued after 2 years from the presentation of the case) can be levied when the delay in concluding the MAP case is not attributable to the taxpayer.

Comment 2 – Coherent resolution of MAP and bilateral/multilateral APA related to the same controlled transactions

We dealt with several cases where a MAP and a bilateral/multilateral APA were related to the same controlled transactions and the relevant facts and circumstances in the tax years under discussion were the same. However, the MAP and the bilateral/multilateral APA were managed and concluded separately, and the agreement reached by the competent authorities in relation to the MAP was not in line with the one signed between the competent authorities of the same countries for APA purposes.

In such cases, the retroactive application of a bilateral/multilateral APA ("roll back") would have led to the extension of the methodology agreed upon under the bilateral/multilateral APA to the earlier years covered by the MAP (TPG Annex II to Chapter IV, paragraph 69).

However, if the countries involved do not provide for the "roll back" of APAs, it is recommended that the MAP and the bilateral/multilateral APA related to the same controlled transactions are resolved simultaneously or at least on the basis of the same methodology, if the relevant facts and circumstances in the tax years under discussion are the same.

We are aware that neither the tax administrations nor the taxpayer are obliged to apply the methodology agreed upon as part of the bilateral/multilateral APA to tax years ending prior to the first year of the bilateral/multilateral APA (TPG Annex II to Chapter IV, paragraph 69). However, in the cases described above, we believe that the simultaneous resolution of the MAP and the bilateral/multilateral APA or at least their resolution on the basis of the same methodology, would allow to achieve outcomes more coherent in a more time efficient manner.

Comment 3 – Promotion of a transfer pricing commission to help solving transfer pricing disputes

In most countries, the tax audit procedure is stringed with a series of guarantees granted to the taxpayer, in order to ensure that his position has been duly discussed during the audit. Among them, there are procedures in force in certain countries (it is in particular the case in France) that allow the consultation of a special commission whose goal is to issue an opinion on the fact matters surrounding the dispute and not on the legal issues, when disagreements persist between the administration and the taxpayer following a tax reassessment.

Given the specificity of transfer pricing being in many instances a grey area and most often a factual and economic issues rather than an actual legal issue, a dedicated commission to handle transfer pricing cases would be extremely relevant and would in many instances allow to settle the transfer pricing disputes.
More specifically, such a commission would have an expert voice, not legally binding and could be composed of experts in the field of transfer pricing from both tax authorities and taxpayers in equal numbers and should be led by an impartial head (e.g. judge).

Dedicated commission already exists for specific tax matters (e.g., R&D Tax Credit Advisory Committee in France) and could offer additional guarantees to taxpayers for their transfer pricing disputes with tax authorities.

We hope that these brief remarks will contribute to the further discussion of the topic.

Yours sincerely on behalf of Taxand,

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