

International Tax Webinar Series

International Tax Disputes

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International Tax Webinar Series

- Session 1 - Base Erosion and Profit Shifting: Overview and current status of implementation of BEPS measures in Australia (Wednesday, 6 October 2021)
- Session 2 - Taxing the Digital Economy: Pillars One and Two (Wednesday, 20 October 2021)
- **Session 3 - International tax disputes (Wednesday, 3 November 2021)**
- Session 4 - Interpretation of Double Taxation Agreements (Wednesday, 17 November 2021)
- Session 5 - Evidentiary issues and processes in international tax and transfer pricing matters (Wednesday, 1 December 2021)

To hear more about our upcoming sessions, or to register to attend, please email Katarina Szivek, BD Specialist (kszivek@hwle.com.au)

To view the recording of sessions already delivered, please visit
<https://hwlebsworth.com.au/international-tax-webinar-series-2021/>

Outline



International Tax: Double Taxation

Mutual Agreement Procedure

Arbitration

Questions

International Tax: Double Taxation 101

- Double taxation occurs when the provisions of two or more jurisdictions overlap.
- **Two types:** Juridical Double Taxation v Economic Double Taxation

Double Taxation Agreements

- A Double Taxation Agreement (DTA) regulates how a contracting state will impose tax on income derived by residents of the other state
- They operate to reduce or eliminate double taxation caused by overlapping tax jurisdictions by:
 - **allocating taxing rights** between the jurisdictions over different categories of income
 - specifying rules to resolve **dual claims** in relation to residency of a taxpayer and the source of income
 - avenue to present a case for **determination** by the relevant taxation authorities

Relieving **juridical** double taxation

- Australia's domestic law and treaties provide mechanisms to relieve juridical double taxation (i.e. exemption for foreign source income or a foreign income tax offset credits)
- Other mechanisms:
 - residency tie-breaker rules
 - allocating taxing rights over certain types of income

Relieving **economic** double taxation

- Economic double taxation e.g. arising from a transfer pricing adjustment
- Adjustment to the amount of tax charged on the profits of the associated enterprise in the other jurisdiction (a correlative adjustment)
- Unilateral relief under section 24 of the *International Tax Agreements Act 1953* (the *Agreements Act 1953*)
- Section 24 of the *Agreements Act 1953* - adjustments to taxable income or to a tax loss

Mutual Agreement Procedure

- Bilateral mechanism which **may relieve double taxation** or **resolve treaty related disputes**
- Aims to resolve disputes through encouraging dialogue and cooperation between the **competent authorities**
- Typically arises at the **request by the taxpayer** affected by the double taxation
- Cannot seek relief under a MAP for any penalties or interest

Mutual Agreement Procedure

Action 14 of the BEPS project developed a minimum standard with respect to the resolution of treaty-related disputes which should ensure:

- Treaty obligations related to the MAP are fully implemented in good faith and that MAP cases are resolved in a timely manner;
- The implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes; and
- Taxpayers can access the MAP when eligible.

Mutual Agreement Procedure

Typically arises from the following:

- a notice of assessment or amended assessment
- a statement of audit position
- a private ruling
- a certificate of withholding.

The MAP allows competent authorities designated from the governments of the contracting states to interact with the intent to resolve the international tax dispute.

Mutual Agreement Procedure

- Time limits for **requesting** the MAP
- The ATO has committed to the OECD's recommended average timeframe of **two years to resolve MAP cases**
- Potential for arbitration if the MAP case is not resolved within the time frame specified in the relevant tax treaty

Arbitration

Arbitration (which is **independent** and **binding**) may be available for issues that remain unresolved under the Mutual Agreement Procedure. It is typically available:

- If the relevant tax treaty already provides for arbitration; or
- The relevant tax treaty has been modified by Part VI of the MLI.

Arbitration – exclusions

- Disputes which have been the subject of a decision by a court or administrative tribunal
- Breaches of confidentiality by taxpayers or their advisors
- Disputes involving the application of either Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) or section 67 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)
- Any treaty partners' specific reservations made under Article 28(2)(a) of the Multilateral Instrument (MLI) on the scope of issues eligible for arbitration

Bilateral MOU

- Entry into effect of arbitration provisions
- How a taxpayer makes a request for submission of a case to arbitration, including the minimum information necessary for a case to be considered
- Terms of reference
- Ineligible cases
- Arbitration process and operating procedures
- Costs
- Failure by the chair to communicate the decision (within required time period), final decision, including implementation

Arbitration – processes

- **Final offer** - an independent arbitration panel considers the proposed resolutions submitted by the CAs and chooses, by vote of simple majority, one of the proposed resolutions as the final arbitration decision.
- **Independent opinion** - an independent arbitration panel considers the position papers submitted by the CAs, the applicable provisions of the relevant tax treaty and domestic provisions of both jurisdictions to reach the final arbitration decision.

Thank you

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