



TAXES

IFA MUNICH

Income tax
Strategic Approaches to Global Transfer Pricing Risk: the use of tax treaties through APA and MAP

18 January 2018

Value
added tax

Social security
contributions

Wealth tax

Property tax

Corporate tax

Land

Agenda

- Current Environment / Current Global Risks
- Global Transfer Pricing Risk Strategy: Tools
- Strategies In focus:
 - Strategic use of APAs
 - Strategic use of MAP
- German Status Quo & Outlook
- Conclusions / Questions

Risks & Developments: Current Global Tax Environment post-BEPS

New legislation:

US, GER, EU, etc

Changes to tax treaties (MLI)

New compliance obligations

Greater transparency:

CRS, CbC (TP doc), MAP Form

OECD MAP Form, EU JTPF, OECD WPs

Reputational risk

Increased audit activity:

Budgets under pressure

Increased TA cooperation – RA

State Aid (EU)

Developments in emerging and developing countries

Global Transfer Pricing Risk Strategy: tools

- **Strategic Management of Transfer Pricing Controversy**

- Centralized and consistent approach to TP controversy issues
- *Tool: Global Transfer Pricing Risk Policy*

- **Understanding compliance obligations**

- Avoiding penalties, meeting local obligations
- *Tool: Global Transfer Pricing Compliance Risk Matrix*

- **Transfer Pricing Risk Assessment**

- Understanding the risks of TP assessments
- *Tool: Transfer Pricing Risk Assessment*

- **Proactive Transfer Pricing Documentation**

- TP doc that goes well beyond compliance – designed to be reviewed once: provide a first line of defense and end an audit before it starts
- *Tool: 'Evidence-based' Transfer Pricing Documentation*

Global Transfer Pricing Risk Strategy: tools (continued)

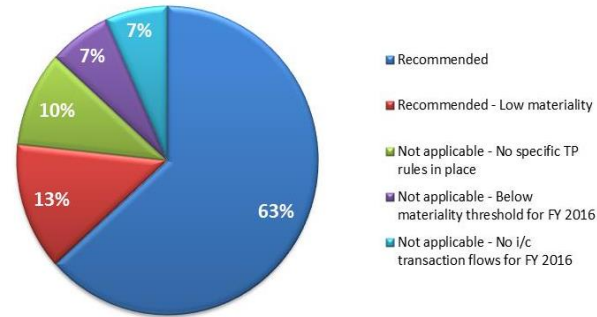
- **Cooperative TP Compliance: locking in a global or regional position**
 - Proactive controversy management by seeking an APA to lock in a position
 - *Tool: the Reference APA*
- **Tax Treaty leverage: MAP as a responsive tool**
 - Two sides to every transfer pricing situation – competent authorities can be an ally
 - *Tool: Proactive MAP*

Example: Global Transfer Pricing (Compliance) Risk Matrix

Transfer Pricing Review Matrix of country-specific MF and LF requirements FY 2016 16-May-17

SUMMARY

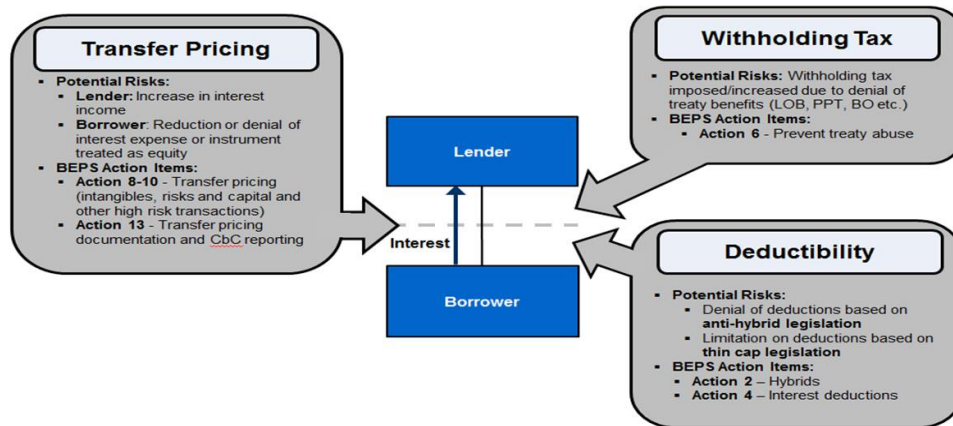
Recommended	57
Recommended - Low materiality	12
Not applicable - No specific TP rules in place	9
Not applicable - Below materiality threshold for FY 2016	6
Not applicable - No i/c transaction flows for FY 2016	6



DETAIL

#	Country	TP documentation recommendation	Cumulated I/C flows in jurisdiction (EUR)	Cumulated revenues in jurisdiction (EUR)	OECD MF / LF FY 2016	Local Rules FY 2016	Contemporaneous requirements	Penalty regime	Applicable thresholds to prepare TP doc (Million)
1	Netherlands	Recommended	61,321,836	139,061,257	Yes		Required <ul style="list-style-type: none"> • Master File: required to be submitted as part of the taxpayer's records when the corporate tax return is filed for the year to which the tax return relates. • Local File: required to be submitted as part of the taxpayer's records when the corporate tax return is filed for the year to which the tax return relates. 	Yes	Yes <ul style="list-style-type: none"> • Master File: required from MNEs with annual consolidated group revenue equal to or exceeding €50 million. • Local File: required from MNEs with annual consolidated group revenue equal to or exceeding €50 million. <p><i>For entities below the applicable threshold, the rules would remain unchanged (these entities would have to prepare TP doc based on the administrative guidelines, but without the obligation to follow the formal requirements for preparing a separate MF and LF)</i></p>
7	Spain	Recommended	1,535,153	12,892,865	Yes		Required <ul style="list-style-type: none"> • There is no statutory requirement for submission of TP documentation. However documentation may be requested by the tax authority after the corporate tax return filing deadline. The corporate tax return filing deadline is six months and 25 days after the taxpayer's fiscal year end. 	Yes	Yes <ul style="list-style-type: none"> • Master File: required from Spanish MNEs with annual consolidated group revenue equal to or exceeding €45 million. • Local File: required from Spanish MNEs with consolidated group revenue equal to or exceeding €45 million. • Simplified Local File requirements apply to taxpayers with consolidated group revenues that do not exceed the above amount.

Example: Transfer Pricing Risk Assessment



- Exposure can be based on:
 - Known/expected access to information (reporting schedules, CbC etc.)
 - Risk indicators used by tax authorities for (TP) case selection
 - Tax authority audit activity and approach
 - Tax reform agenda / engagement in BEPS process

<u>Country Risk Score</u>	<u>Country</u>	<u>Ranking (high to low)</u>
43.0	Canada	1
43.0	France	1
43.0	Italy	1
41.7	Germany	4
41.3	United States	5
39.7	Finland	6
39.7	Mexico	6
38.0	Spain	8
34.7	China	9
34.7	Brazil	9
34.7	Poland	9
33.3	United Kingdom	12
30.0	Kenya	13
29.7	South Africa	14
28.3	Hungary	15
28.3	Austria	15
28.3	Romania	15
28.0	Russia	18
21.3	Netherlands	19
21.3	Turkey	19
21.3	Chile	19
19.7	Kazakhstan	22
18.3	Switzerland	23
16.7	Ukraine	24
13.3	Singapore	25
11.7	Uruguay	26
5.0	Bermuda	27
5.0	BVI	27
5.0	Cayman Islands	27
5.0	Cyprus	27

Proactive Approach to Transfer Pricing Documentation

Factual

Increasingly, tax auditors are undertaking robust fact finding. Our approach is to ensure that we have identified and addressed all relevant facts in supporting our client's position

Audit defence focus

In the current environment, it is not a matter of if but a matter of when multinationals will be audited. Therefore, we prepare all transfer pricing reports not as a mere compliance document, but rather as a first line of audit defence

Consistency

Tax administrations are sharing information more so than ever before, making it imperative for consistent positions to be presented globally

Technical

We combine economics with a rigorous legal analysis of local laws and regulations to ensure our client's best interests are represented

Simple

We present documentation in a user-friendly way designed to influence the thinking of tax auditors from the outset

"Success to us is documentation that is only read once (by tax authorities), with no further questions asked"

In Focus: Strategic Use of APA and MAP

Bilateral APAs: Proactive Controversy Management

Certainty

- Eliminate both current and future transfer pricing audit risk

Cooperation

- Build trust and transparency with the government through a cooperative process

Resource Planning

- Allow the company to resource plan appropriately without the TP audit threat

Shareholder Security

- More reliable post tax earnings and provision

Reputation

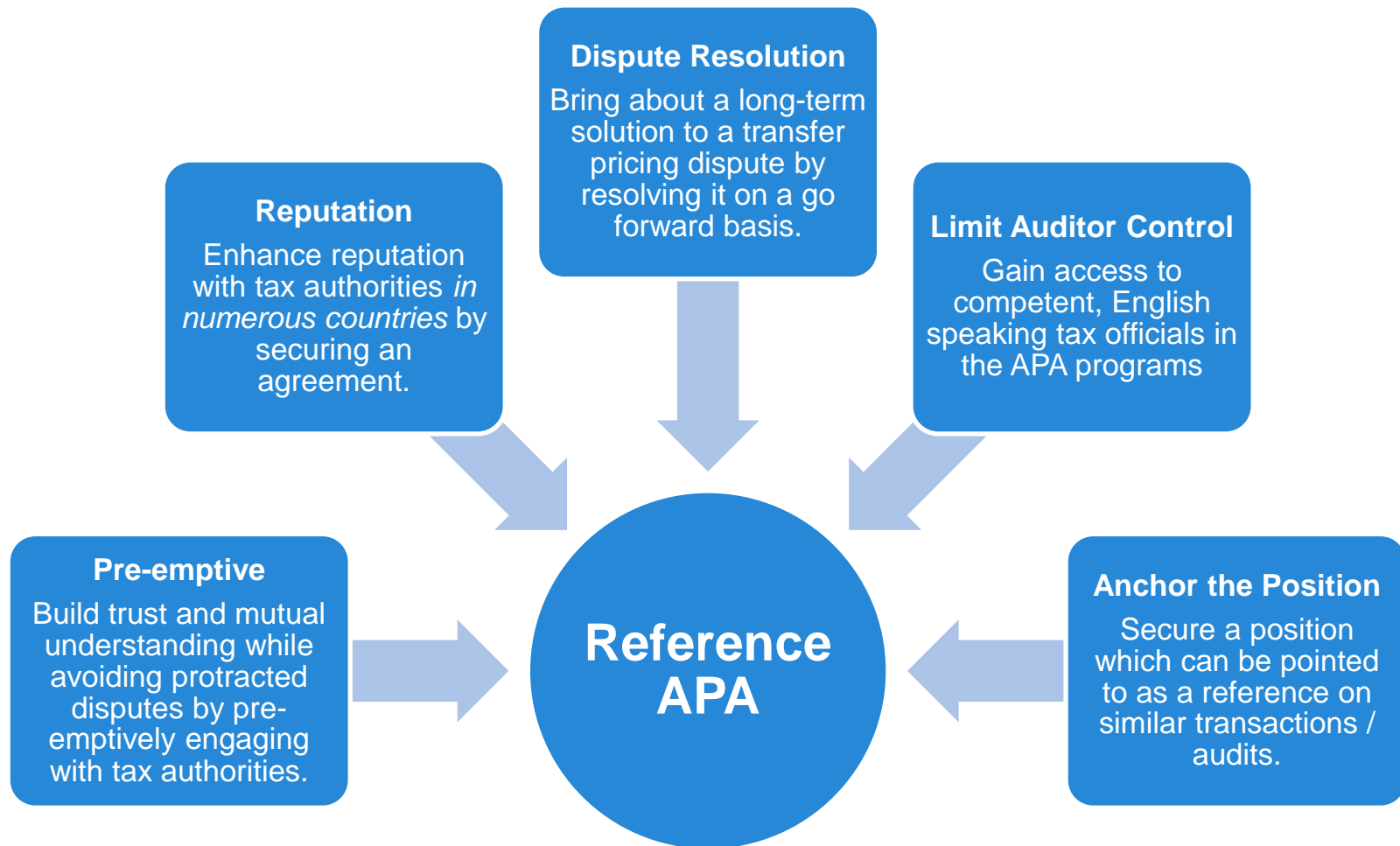
- Enhanced reputation with an increasingly interconnected tax administration community

Setting the standard: reference APAs

**Reference APAs:
Strategically selected APAs that
can be used as a point of
reference for related countries in
transfer pricing disputes or to
secure additional future APAs**

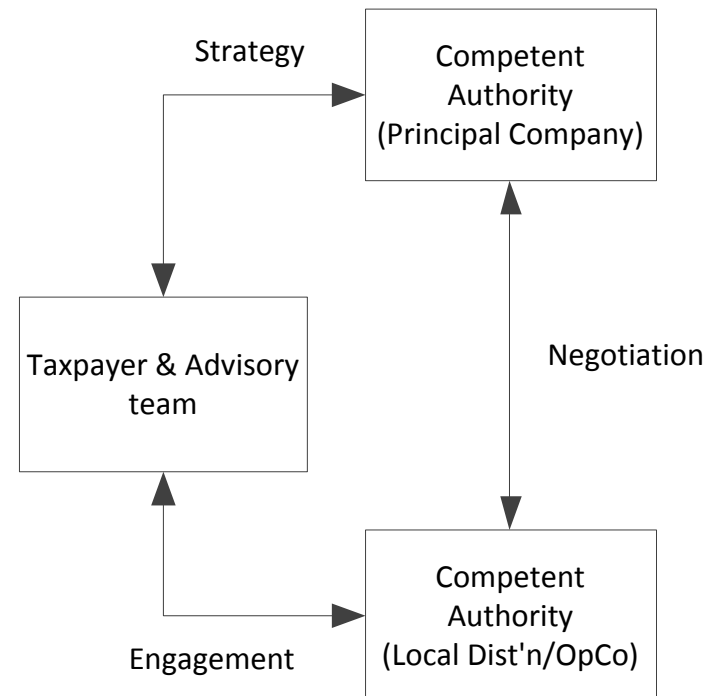


Why seek reference APAs?



Long term planning: jointly developed with principal tax authority

- Multiple stakeholders can create additional pressure for consistent and arm's length results
- Competent authorities in the principal company jurisdictions can be a strategic ally
- Possible countries with sophisticated competent authorities in common principal company jurisdictions:
 - Switzerland, Netherlands, Singapore, UK, Belgium, Austria, Ireland
- Prefiling meeting can be used to discuss multi-country strategy with principal competent authority
- Competent authority can push for consistent results across countries AND gain economies of scale in processing times
- Economies of scale recognized in the filing of APA applications as well, given consistent business model



OECD Model Treaty: Article 25

(1) Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either Contracting State.

(2) The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

(3) The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention

Legal Analysis of Article 25

- Analysis of Article 25:
- State to State procedure – limited role (rights) of taxpayer
- 3 different cases:
 - 25/1 'Taxation not in accordance with the treaty' – no double taxation needed – taxpayer initiated
 - 25/3 (a) General questions of interpretation – usually no taxpayer involvement
 - 25/3 Double taxation not foreseen in DTC – could also be taxpayer initiated
- Time of filing: 'actions result or **will** result....' – proactive request possible
- Time-limits
 - Taxpayer to file – 'irrespective of domestic time limits'
 - Tax authorities to solve (Arbitration)
- Alternative dispute resolution?

Strategic Use of MAP

- Use to avoid conflicts rather than resolve
 - E.g. during ongoing audits – avoid getting lost in conflicts with auditors
 - APA – MAP combination
 - Deutschland:
 - Competent Authority encourages taxpayers to file APAs in both (all) countries
 - Basic information: http://www.bzst.de/DE/Steuern_International/
- Reference APA/MAP
 - No binding effect on future taxation, but can/will serve as a benchmark
 - Selection of location for reference MAP decisive
 - factoring in taxpayer–tax authority relationship and country reputation

Strategic Use of MAP

- Use to avoid domestic dispute resolution
 - Considering time/costs
 - International tax/ transfer pricing skills in courts
 - Considering effect of court decision on outcome of double tax relief in MAP
 - Binding effects of domestic courts?
 - Avoidance of double taxation
- (Use to resolve conflicts – typical use)
 - Typical cases (residence, transfer pricing, permanent establishment)
 - Increasing number of cases – see OECD stats

German Status Quo & Outlook

- 1200 cases pending on 31 December 2016
- Substantial number of new cases submitted each year (e.g. 353 in 2016)
- 26.34 months average time needed to resolve MAP cases
- Staff of Federal Central Tax Office (FCTO) consists of 55 positions (43 in 2016)
- Comprehensive ministerial guidelines on MAP & APA
- Germany has entered into 93 tax treaties on income (and/or capital), of which 89 are in force.
- BEPS should not result in major changes
- 14 (21 after BEPS) of the 93 treaties provide for an arbitration procedure as a final stage to the mutual agreement procedure (some of which are not mandatory);

German Status Quo & Outlook

- Germany is also signatory to
 - the EU Arbitration Convention: Provides for a MAP supplemented with an arbitration procedure (scope of application limited to the settling of TP disputes and disputes on the attribution of profits to PEs between EU Member States)
 - the EU Directive on tax dispute resolution mechanisms in the EU: Provides for a MAP and supplemented with an arbitration procedure (with a broader material and personal scope compared with the Arbitration Convention)
- Major improvements by EU Directive:
 - Scope extended to all disputes *arising from the interpretation and application* (in particular double taxation)
 - Explicit and *enforceable* requirement to resolve disputes
 - Recourse for taxpayers to national courts
 - Clearly defined and enforceable timelines

Conclusions

- Current risks and uncertainty is only increasing in the current environment
- Information can no longer be contained to one country
- MNEs need global top-down approaches on documentation, controversy, risk mitigation strategy
 - Global consistency is key
- Bilateral tools be very effective from a global strategic level: APA and MAP
 - Interest is increasing given:
 - Improved competent authority relations,
 - Outside pressure (OECD MAP forum, EU)
 - Increased use of arbitration