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Thoughts on IFA 2016 First plenary session: dispute resolution procedures in international tax matters

Johann Müller (International tax professional) · Tuesday, September 27th, 2016

This has been an interesting session and for those who were not there, I am sure that the essence is reported elsewhere in the international tax press. The deliberations lead me to the following additional thoughts.

1. As a remedy for even starting disputes: tax authorities should not take positions in making adjustments that they would not take in MAP. I mention this for two reasons. One, I suspect – but have no proof of this – that tax authorities will take positions in court, which they will not try on their treaty partners. Maybe because a) they suspect that their counter part competent authorities know ‘the game’ better than judges do and b) their counter part competent authorities may at some future point use the very same logical fallacies against them and remind them of their use of those very arguments.

Based on the above it will also be a good idea to set up procedures in which taxpayers can – and should – involve competent authorities during the assessment phase as a compulsory reality check for the assessing officer AND the taxpayer and as an administrative appeals procedure before going to MAP. The topic of how administrative appeals before MAP differ from administrative appeals before going to court is a topic for a subsequent blog.

2. Everyone agreed that disputes have to be solved within a reasonable time, with 24 months seeming to be the agreed norm. Everyone also agreed that competent authorities must have sufficient resources.

2.1. Resources are important, BUT it is also important to define the type of resources. I know, because I worked in a competent authority. The number of case handlers are important, but even more so are the number of decision takers. It does not help if a competent authority has 30 case handlers but only one decision taker that must attend all competent authority negotiations and make all decisions on waiving previously made assessments. Better is 3 decision takers and 28 case handlers as that would potentially triple dispute resolution speed.

2.2 Everyone also agreed that fact finding is important and time consuming. I have a suggestion here which I believe can save a lot of time for all involved: let every MAP request, which a competent authority does not feel it can solve unilaterally, start off with the following kick off meeting within 3 months of accepting the request.

- i. One full day should be allowed for this meeting.
- ii. It should be attended by the assessing officer(s), the taxpayers and the relevant competent authorities. As this is a fact finding mission, I see no need for the presence of consultants and lawyers. They hamper, rather than help, in finding facts.
- iii. The assessing officer gets 30 minutes to present his/her case. The taxpayer gets 30 minutes to present its case. Both parties are requested to focus on facts, not legal arguments.
- iv. Under guidance of the competent authorities the disputing parties then get 1 hour to list all the relevant facts they DO agree on. The competent authorities get to ask their first questions they may have at this stage.
- v. Parties then get to break for 1 hour. The competent authorities for their individual liberations, the taxpayer and the assessing officer for preparing their answers to to the questions put to them and for disputed facts they feel they can settle. In a second hour, the competent authorities meet to discuss first impressions, identify key issues and prepare further relevant questions.
- vi. After the break the taxpayer and the assessing officer each get 30 minutes to present their answers and further proof. After this the competent authorities identify and list further relevant facts agreed upon between the taxpayer and the assessing officer.

A key rule here could be that whatever is claimed without evidence can be dismissed without evidence. This should also apply to disputing proven facts, without providing counter proof.

vii. In the next hour the competent authorities should present their findings to the taxpayer and assessing officer of what they believe the key issues and questions are, to get their input on whether this is correct or has to be amended (bearing in mind the fact that the taxpayer can reject the MAP outcome if it does not agree with the solution reached).

viii Finally, the competent authorities should use the last session of the day to ask any further questions to the taxpayer and assessing officer and maybe even explore possible solutions with the taxpayer that the competent authorities deem desirable.

I believe the above can greatly help in tax dispute resolution.

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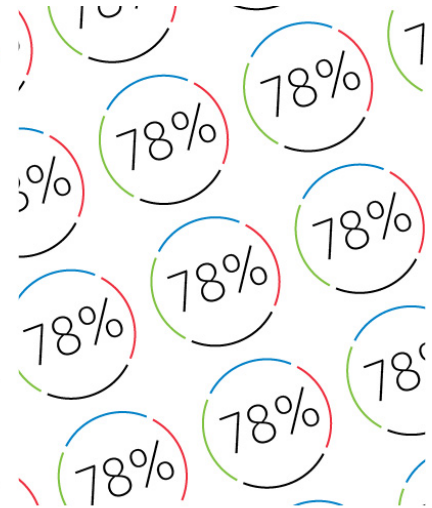
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