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Mutual agreement procedure: Taxpayer access to information

Jonathan Schwarz (Temple Tax Chambers; King's College London) · Wednesday, June 12th, 2019

Mutual agreement procedure (MAP) pursuant to article 25 of the OECD and UN Model treaties imposes obligations on tax administrations. Inadequacies in the performance of these obligations has been the subject of much work by the OECD in the course of the 21st Century. [BEPS Action 14 OECD Action 14 – 2015 Final Report, Making Dispute Resolution Mechanisms More Effective](#) produced both minimum standards and best practices. One of the BEPS pillars- transparency- was put to the test in the recent UK First-tier Tribunal (FTT) decision in *McCabe v Revenue & Customs* [2019] UKFTT 317 (TC).

Mr McCabe was in a dispute with HMRC, the UK tax administration, on the application of the tie-breaker in article 4(2) of the Belgium-UK double tax treaty. He presented a case for MAP pursuant to article 25(1). This MAP resulted in agreement between the competent authorities that, Mr McCabe was resident in the UK. He declined to accept that decision and appealed against the assessment to the UK tax tribunal.

For the purpose of his appeal, Mr McCabe applied to the FTT for disclosure by HMRC of all documentation relating to the MAP including representations made by both competent authorities to each other and specifically, a position paper sent by HMRC to the Belgian competent authority.

The prime motivation for seeking this disclosure was evidence that HMRC were adopting a significantly different position in the appeal before the FTT than the position adopted in the MAP. It was argued that, in the face of this apparent inconsistency, fairness and justice require that the taxpayer sees submissions that HMRC made in the course of the MAP to understand the extent to which HMRC's submissions made in the course of the taxpayers appeal to the FTT are justified.

HMRC denied that there was evidence that they were adopting a contradictory position in the MAP. They argued that the documents would not have any material relevance and that public policy was against disclosure because the UK and Belgian tax authorities have a common understanding that MAP is conducted in secret so that both can speak frankly to each other during those discussions.

The approach adopted by the FTT was:

- (1) The starting proposition is that the tax authority should disclose relevant documents to the taxpayer unless there is a good reason not to.
- (2) A document that is relevant to an aspect of tax authority's case as pleaded is likely to be

relevant.

(3) In assessing whether there is a good reason not to direct disclosure of relevant documents, the overriding objective to deal with cases fairly and justly as set out in the FTT Rules must be considered. That involves a consideration and weighing up of all relevant factors. The degree of relevance may be a relevant factor in the sense that, if a document is of relatively low relevance, less will be needed to displace the starting proposition that the document should be disclosed. By contrast, if a document is of high relevance, more will be needed to displace that starting proposition.

Treaty provisions and OECD Commentary

The FTT observed that article 25 does not itself deal with disclosure to the taxpayer and that paragraph 61 of the OECD Commentary on article 25 says that “disclosure to the taxpayer or his representatives of the papers in the case does not seem to be warranted in view of the special nature of the procedure”. Article 26(2) permits exchanged information to be disclosed to persons concerned with the administration or collection of tax. Paragraph 12 of the OECD Commentary explains that this includes the taxpayer. The FTT noted that article 26(2) does not *compel* such documents to be disclosed. The OECD *Manual of Effective Mutual Agreement Procedures* Paragraph 3.7.1 and Best Practice No 17 both advocate keeping the taxpayer informed through the MAP process and providing a summary of the reasons for any agreement reached.

The relevance of relevance

The FTT concluded that the material sought was relevant, but of low relevance and, as a result, should not be disclosed. While not clearly articulated, it appears that the reasoning is that material of low relevance does not justify disclosure of confidential communication that facilitates the efficient operation of MAP.

The case is somewhat unusual because the relevance of a document can normally only be determined by examining the document. HMRC offered to make certain documents available to the judge but not to the taxpayer or his advisors but this was rejected as insufficient by the taxpayer. This was because the taxpayer’s interest was not simply in resolving an whether HMRC is adopting inconsistent positions but to see the MAP documents in the hope that this would support his case on residence. Accordingly, the judge decided on the basis of evidence before him.

The judge decided that HMRC put forward a “good, albeit not unassailable, case.” He acknowledged that transparency is an important consideration but did not consider that transparency can be achieved only by disclosure to the taxpayer of all documents that competent authorities prepare and circulate in connection with a MAP. Thus, the position is left open for cases where disclosure of MAP communications is appropriate.

Belgian position

The Belgian tax authorities also objected to disclosure .Although the Belgian Commission for the Access and Reuse of Administrative Documents advised that the documents should be disclosed, the Belgian tax authorities declined to follow that advice and Mr McCabe is, therefore, taking legal proceedings in Belgium to seek to obtain the documents. The right to access administrative documents is a principle provided for in article 32 of the Belgian Constitution. In *SA Garlon v. Belgian State* (No. 225.438), See

<http://kluwertaxblog.com/2017/03/22/enforcement-of-beps-dispute-resolution-minimum-standards-real-rights-or-pious-rhetoric/> the Belgian Raad van State (Supreme Administrative Court) ruled that, on this basis, a taxpayer may not be deprived of MAP information.

Efficient dispute resolution?

The tax years where the taxpayer's residence was in dispute were 2006-07 and 2007-08. Article 25 MAP was requested in 2016. One of HMRC's arguments against disclosure was that the way that the HMRC and Belgian tax authorities approached those facts, some 10 years after the event, would be of little, if any, assistance to the FTT. This suggests that the MAP may have occurred around 2017 to 2018. The taxpayer having rejected the MAP agreement, the case is now proceeding to appeal before the FTT. Even if the appeal goes no further than the FTT, it could take another year before resolution. While the MAP itself may have taken about two years, the whole process, end to end is extremely lengthy. One may speculate whether the time may have been shortened in this case by the tax authorities agreeing to provide some information that would alleviate the taxpayer's fears that the tax authorities were taking inconsistent positions. That might also serve to show that justice is seen to be done rather than leaving the taxpayer guessing.

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This entry was posted on Wednesday, June 12th, 2019 at 2:32 pm and is filed under [BEPS](#), [Double Taxation](#), [International Tax Law](#), [MAPs and APAs](#), [OECD](#), [Residence](#), [Tax Treaties](#)

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