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An evaluation of Australia's Advance Pricing Arrangement program in light of the OECD's Bilateral Advance Pricing Arrangement Manual

Simrata Nand · Tuesday, March 7th, 2023

On 28 September 2022, the Organisation for Economic Cooperation and Development (OECD) published its Bilateral Advance Pricing Arrangement Manual (BAPAM).[1] The BAPAM aims to help streamline bilateral advance pricing arrangement (BAPA) programs by providing 29 best practice recommendations to resolve commonly experienced issues.[2]

Advance pricing arrangements (APAs) are a prospective dispute resolution mechanism for cross-border transfer pricing transactions. They provide tax certainty for taxpayers and tax administrations by negotiating the terms of transfer pricing transactions upfront. This minimises onerous transfer pricing documentation requirements, as well as mitigates the risk of audit, litigation, and double taxation.

This article examines how Australia's APA program fares in light of the 29 best practices outlined in the BAPAM. Australia was part of the 22 jurisdictions involved in the BAPAM consultation process.[3] They have been a leader in the APA space since the early 1990s being one of two countries party to the Apple Computers advanced determination in 1991, which has since been considered the world's first bilateral APA.[4] Although Australia does not have a large APA program in comparison to some other countries, their APA guidance is highly developed and mature.

Australia's APA Program

Below is a summary of the best practices with which Australia appears to be fully compliant through publicly available information. The author notes that some of the best practices refer to conduct or intention of the parties involved, such as best practice 4. Whether Australia's APA program is compliant with such practices is not likely to be understood through published or otherwise publicly available information.

OECD BAPAM – Best practices

ATO APA Program

1: Competent authorities (CAs) and taxpayers should engage with one another in a principled, fair, objective and transparent manner, with each BAPA application decided on its own merits.[5]

3: All jurisdictions with BAPA programmes should have clear published rules, guidelines and procedures.[7]

5: Jurisdictions and taxpayers should aim for a BAPA agreement to be signed within 30 months from the receipt of a complete BAPA application (containing sufficient information) by both CAs. Once jurisdictions have taken sufficient efforts to streamline and optimise their BAPA processes and resources in line with this Manual, this aim should be reduced to 24 months.[9]

14: Where CAs do not share a common language, BAPA applications (and attached materials) should be filed by the taxpayer with an attached English translation (or a different language, if agreed by both CAs).[12]

17: Upon acceptance of an application into the BAPA programme, both CAs and the taxpayer(s) should agree a project plan outlining the timelines for each stage of the process from commencement to finalisation.[14]

28: Jurisdictions should ensure they have in place adequate policies/practices to ensure that its audit and BAPA functions communicate and coordinate effectively.[16]

The ATO website outlines mutual expectations for the APA process, including:

- all parties will co-operate fully with each other, including undertaking open and ongoing dialogue in the development of the APA
- each APA request will be treated on its merits according to its own facts
- each party will act transparently by disclosing all relevant and material facts.[1]

Australia's APA guidance and procedures is currently found in Law Administration Practice Statement 2015/4 (PSLA 2015/4).[8]

The process map included in the appendix to PSLA 2015/4 targets 24 months for APA completion.[10]

However, according to the ATO statistics, the average time to complete BAPAs has not been under the 30-month mark since FY 2016.[11] With Australia's APA program being 20+ years old there would be strong expectations for the ATO to reach 24-month average processing times.

The ATO website outlines that they "may request an English translation of any documents you provide in a foreign language."^[13]

PSLA 2015/4 states that the APA team will develop an agreed plan with the taxpayer for the process to conclude the APA.[15]

PSLA 2015/4 outlines the interaction between APAs and ATO audits.[17] This discussion is further bolstered by additional narrative on the ATO website.[18]

Recommendations for Australia's APA Program

Given one of the four seminal purposes of the BAPAM is to "increase transparency between CAs and taxpayers throughout the BAPA process",^[19] the below additions could strengthen the quality of PSLA 2015/4.

OECD BAPAM – Best practices

2: During the BAPA process, taxpayers should file their tax returns in the relevant jurisdictions in the proposed covered years based on the positions taken in their BAPA application.[20]

ATO APA program addition

There is currently no express public guidance on what taxpayers should do regarding their tax returns for the proposed covered years while a BAPA is being negotiated. Best Practice 2 could be easily incorporated into PSLA 2015/4, providing taxpayers more direction in the interim negotiation period.

6: The term of a BAPA should generally be a minimum of five years, including at least two prospective taxation years, where the facts and circumstances are expected to be the same.[21]

8: BAPA case officers (and CAs) and taxpayers should be in regular contact with each other during the BAPA process.[24]

9: Once a BAPA application has been accepted into a BAPA programme, BAPA case officers and / or CAs in each jurisdiction should be in regular contact with one another in relation to the specific case.[26]

11: Taxpayers should notify both CAs of their potential BAPA application before requesting acceptance into a BAPA programme.[27]

13: Taxpayers should submit BAPA applications simultaneously to both CAs and both BAPA applications should contain the same information.[29]

15: A CA should, upon receiving a BAPA application, notify the treaty partner of the receipt of such BAPA application.[30]

PSLA 2015/4 provides that the term of an APA will usually be between three and five years.[22] This could be adjusted to reflect the minimum of five years, including at least two prospective taxation years, as recommended by Best Practice 6. Having an APA term of 5 years can help justify the time and cost associated with negotiating a BAPA, making it more attractive for both taxpayers and revenue authorities. Further, the specific inclusion of “at least two prospective taxation years” helps safeguard the prospective tax certainty objective of BAPAs.[23]

While the ATO website states that a mutual expectation is that ‘each party will provide prompt and complete replies to any reasonable queries’^[25], there is no express guidance around how communication will be facilitated during the APA negotiation process, which can be long. A monthly taxpayer update with the case team could be built-in to PSLA 2015/4. This would help keep both parties accountable and mitigate potential delays.

Similar to Best Practice 8, there is no express guidance around how communication will be facilitated between CAs during the APA negotiation process, which can be long. A monthly CA check-in could be built-in to PSLA 2015/4, as part of CA responsibilities and expectations. This would help keep both CAs accountable and mitigate potential delays.

The ATO website provides the following guidance “in the case of a bilateral APA, you should also advise us of the information or documentation requests made by the tax treaty partners in about the APA application and ensure that we are provided with copies of any information or documentation supplied by the foreign entity or their affiliates to the tax treaty partners.”^[28]

There is no explicit guidance in PSLA 2015/4, but it could be incorporated as part of taxpayer responsibilities and expectations. This would ensure clarity with all parties involved, mitigating potential delays through misinformation.

Similar to Best Practice 11, this could be incorporated as part of taxpayer responsibilities and expectations.

This could be incorporated as part of CA responsibilities and expectations.

- 16: Jurisdictions should aim to make a decision in relation to a BAPA application for acceptance into the BAPA programme within 30 days of receipt of a complete BAPA application and immediately inform the taxpayer and the respective treaty partner of any decision.[31]
- 18: CAs should coordinate the information gathering process to limit duplication.[33]
- 19: Taxpayers should provide any requested information to both CAs simultaneously and as soon as possible.[34]
- 23: CAs and BAPA case officers should not give taxpayers access to position papers and taxpayers should not be part of the substantive discussions on the BAPA between CAs.[35]
- 25: CAs should agree as to which CA will draft the text of the BAPA.[36]
- 29: Where requested by the taxpayer and appropriate, the renewal of a BAPA should be considered in the final year of a BAPA as a matter of general practice where the relevant facts and circumstances are expected to be the same as those during the BAPA period.[37]
- The process map included in the appendix to PSLA 2015/4 provides a maximum of 6 months for early engagement. After early engagement is concluded, the taxpayer may be invited to formally apply for the APA program. If a taxpayer is invited to submit a formal APA application, “the APA application stage commences.”[32] As such, it is unclear by when the 30 days should begin the Australian APA context. An argument could be made that early engagement should be limited to 30 days. An alternative may be within 30 days of concluding all information gathering activities in the early engagement phase, or 30 days after receiving the formal BAPA application. This could be incorporated as part of CA responsibilities and expectations.
- This could be incorporated as part of taxpayer responsibilities and expectations.
- This could be incorporated as part of taxpayer responsibilities and expectations.
- This could be incorporated as part of CA responsibilities and expectations.
- PSLA 2015/4 covers how the ATO approaches renewals but does not provide timeframes. The website suggests that renewals should be sought “at least 6 months before the expiration of the existing APA to allow time for negotiation and conclusion.”[38] It would be useful to have all APA guidance in one place, in this case, PSLA 2015/4.

Conclusion

Overall, Australia’s APA program does comply with several of the BAPAM best practices. However, some quick additions could make Australia’s guidance more efficient, effective, and transparent.

In January 2022, the ATO announced that they were undertaking a review of their APA program.[39] The primary catalyst for the ATO investigation appears to be streamlining and tailoring the APA process for each applicant to ensure a more efficient program,[40] which mirrors the preliminary concerns observed by the OECD prior to commencing the BAPAM process.

There is no timeframe for the outcome of the review, nor any indication whether any of the findings will be made public. It remains to be seen whether they adopt any of the BAPAM best practices.

Author Bio

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All opinions presented in this article are solely those of the author, based on publicly available information, and do not reflect the views of the ATO.

[1] OECD (2022), *Bilateral Advance Pricing Arrangement Manual*, OECD Publishing, Paris, <https://doi.org/10.1787/4aa570e1-en>.

[2] Ibid 3.

[3] OECD (n 1) 11.

[4] Michelle Markham, *Advance Pricing Agreements: Past, Present and Future* (Wolters Kluwer Law & Business: Kluwer Law International, 2012), 24.

[5] OECD (n 1) 22.

[6] ‘Mutual expectations’, *ATO* (Web Page, 9 August 2022) <https://www.ato.gov.au/business/international-tax-for-business/in-detail/advance-pricing-arrangements/?page=5#Mutual_expectations> (‘Mutual expectations’).

[7] OECD (n 1) 24.

[8] Australian Taxation Office, *Law Administration Practice Statement 2015/4: Advance Pricing Arrangements*, PSLA 2015/4, 5 July 2015 (‘PSLA 2015/4’).

[9] OECD (n 1) 28.

[10] PSLA 2015/4 (n 8) [Attachment 1].

[11] ‘APA and MAP statistics’, *ATO* (Web Page, 9 August 2022) <https://www.ato.gov.au/business/international-tax-for-business/in-detail/advance-pricing-arrangements/?page=11#APA_and_MAP_statistics>.

[12] OECD (n 1) 44.

[13] ‘Application stage’, *ATO* (Web Page, 9 August 2022) <https://www.ato.gov.au/business/international-tax-for-business/in-detail/advance-pricing-arrangements/?page=7#What_we_need_to_ascertain> (‘Application stage’).

[14] Ibid 49.

[15] PSLA 2015/4 (n 8) [10D], [14C].

[16] OECD (n 1) 66.

[17] PSLA 2015/4 (n 8) [16].

[18] ‘Comparison between audit and advance pricing arrangement features’, *ATO* (Web Page, 9 August 2022) <<https://www.ato.gov.au/business/international-tax-for-business/in-detail/advance-pricing-arrange>

ments/?page=4#Comparison_between_audit_and_advance_pricing_arrangement_features>.

[19] OECD (n 1) 8.

[20] OECD (n 1) 23.

[21] OECD (n 1) 30.

[22] PSLA 2015/4 (n 8) [2B].

[23] Michelle Markham, 'Advancing Tax Certainty: The New OECD Manual' [2022] 108 *Tax Notes International* 1101, 1110-1111.

[24] OECD (n 1) 33.

[25] 'Mutual expectations' (n 7).

[26] OECD (n 1) 34.

[27] Ibid 39.

[28] 'Application stage' (n 13).

[29] OECD (n 1) 44.

[30] Ibid 46.

[31] Ibid 48.

[32] PSLA (n 8) [Attachment 1].

[33] OECD (n 1) 51.

[34] Ibid 52.

[35] Ibid 58.

[36] Ibid 60.

[37] Ibid 69.

[38] 'Renewals, ATO (Web Page, 9 August 2022) <<https://www.ato.gov.au/business/international-tax-for-business/in-detail/advance-pricing-arrangements/?page=10#Renewals>>.

[39] 'We are reviewing the advance pricing arrangement program', ATO (Web Page, 12 January 2022) <<https://www.ato.gov.au/Business/Business-bulletins-newsroom/International/We-are-reviewing-the-advance-pricing-arrangement-program/>>.

[40] Ibid.

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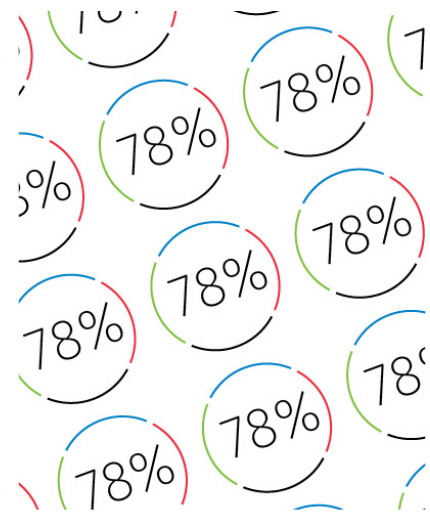
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