

Recent developments in Foreign Investment Review Board approvals: a focus on Advanced Pricing Agreements

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Some recent Foreign Investment Review Board (FIRB) approvals have required an undertaking that negotiations on an Advanced Pricing Agreement (APA) will be entered into with the Australian Taxation Office (ATO). This development has the potential to create interesting interactions between the FIRB approval **process and the ATO's APA program**. Potentially, some difficult practical issues could emerge; this *TaxTalk* article explores a number of these key considerations.

Unlike a private binding ruling, there is no specific legislation to support the APA program. A unilateral APA is concluded between the ATO and a taxpayer under the Commissioner of **Taxation's power of general administration** of the income tax legislation. A bilateral APA, which is made between the ATO and a tax treaty partner, is concluded under the Mutual Agreement Procedure Article of the relevant tax treaty. While **the ATO's policies and procedures** are explained in

Practice Statement PS LA 2011/1 there is no statutory appeal process from an APA decision.

Issues to consider

In navigating to both conform to the FIRB approval and to meet **the ATO's processes it may be necessary** to consider a number of issues. These could include:

- Whether the ATO will admit the application into the APA program on terms that meet **FIRB's approval**. This could include agreement about the timing of the application or the scope and pricing of the covered transactions under the APA. Potentially the ATO could seek to include additional related party dealings or require collateral issues to be resolved concurrently. A **'collateral issue' is another tax issue** related to the international related party dealings.
- The ATO is not obliged to agree to an APA, and can withdraw from the process at any stage. Should this occur the applicant will need to consider their position

having regard to any FIRB undertaking.

- The ATO has standard APA processing times of up to two years. The FIRB approval needs to be drafted in a manner that accommodates the APA process.
- Where the related party dealings that arise from the investment do not commence until some time in the future (e.g. when mine production starts) or the related party trading terms are not yet established, it may be difficult to determine the correct transfer pricing methodology to use in any APA.
- An APA can be short (2-3 years) or long (5 or more years) and can usually be renewed. It will be interesting to see whether future FIRB approvals address either the term of the APA or any necessity for a renewal.
- While it would not be appropriate for a FIRB undertaking to mandate a bilateral APA as it requires

the consent of a foreign tax administration, a company may want to consider this approach in appropriate circumstances.

- All APAs begin with a pre-lodgment conference with the ATO that starts a process for defining the scope and content of the APA. It should be used to clarify mutual expectations and to assess the proposed key elements of the APA. Subsequently, an APA case plan can be developed to agree the

information/documentation requirements and the steps and timeframe for processing the application. The requirements of any FIRB approval will need to be factored into this process and the APA case plan. Potentially, the presence of a FIRB requirement could expedite ATO processing. However, a FIRB condition may also require the applicant to commence the APA process relatively quickly.

One member of the FIRB has a particularly good knowledge of the process involved in negotiating and settling the terms of an APA. Former Commissioner of Taxation **Michael D'Ascenzo was** appointed to the Board with effect from 2 January 2013. In 1991 as ATO Audit Chief, Mr **D'Ascenzo was responsible for** the oversight and signing of the first bilateral APA between the ATO and the IRS in connection with Apple Computers. He has maintained his interest in program since then.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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