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Managing Tax Disputes in Asia

New strategies for the post-BEPS environment



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Key Messages

It will not be new to taxpayers to observe that the environment for tax compliance and tax disputes around the world has changed dramatically in the past 12–18 months. The OECD’s Base Erosion and Profit Shifting or BEPS initiatives have increased the focus on cross-border structuring, and tax authorities around the region, and indeed the globe, have been invigorated. In the current economic climate, many countries are also under political pressure to increase the revenue collection. Finally, but perhaps most significantly, politicians and the media have brought the tax practices of multinational corporations to the forefront. In response to the new global landscape, this paper seeks to help taxpayers to rethink their previous approach to tax disputes.

In Part 1 we outline dispute resolution options available and take a look at regional highlights. In Part 2, we consider which of the strategies of yesterday have become obsolete – at best, they won’t work, but at worst they may devastate your prospects of successfully managing a tax dispute in the new world. Finally, in Part 3 we include a country-by-country summary of dispute resolution options and our view on their relative effectiveness.

Throughout we encourage taxpayers to take a global approach to the way they think about tax issues. The heightened interest in taxpayers’ operations at a global level, coupled with increased co-operation between tax authorities mean that taxpayers cannot afford to take a purely local approach to managing tax disputes.

“Politicians and the media have brought the tax practices of multinational corporations to the forefront”

Managing tax disputes: why does it matter?



Increased tax transparency means greater potential exposure to tax disputes



Greater co-operation between tax authorities makes them more effective in detecting and challenging aggressive cross-border tax planning



Tax authorities are becoming more aggressive and sophisticated in challenging the positions taken by taxpayers



Advanced information technology facilitates deeper and quicker investigation into tax matters



Focus of the media and the general public on a multinational corporation's tax affairs means tax disputes can have significant impacts on corporate reputation and brand health



Severe penal actions results in higher costs of tax non-compliance

Part 1: Dispute resolution options across the region

Pre-filing measures

Many countries across Asia allow taxpayers to seek “real-time” certainty about their tax affairs; adopting these methods before taking a position or lodging a return may avoid the risk of a dispute arising or further tax liability being imposed (including penalties and interest).

One option available in many countries is to seek an Advance Tax Ruling – while the mechanics differ slightly in each country, the common feature is that taxpayers can apply to the tax authority to seek a (generally binding) view on how the law applies to the facts set out in the request.

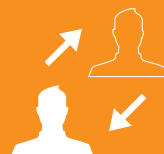
Another option widely available is seeking an Advance Pricing Agreement or APA to manage or mitigate transfer pricing risk. Broadly this involves a taxpayer reaching an agreement with the tax authority on transfer pricing methodologies. Many countries also participate in Bilateral or Multilateral APAs.

Tax authorities in the region also undertake various other processes including informal consultation, providing non-binding indicative views and agreeing with the taxpayer an upfront framework with ongoing dialogue to ensure compliance.



Formal Binding Processes

- Advance Tax Rulings
- Advance Pricing Agreements



Consultative Processes

- Compliance agreement with ongoing consultation
- Indicative views
- Informal dialogue



Across the region we are seeing increasing consultation and early engagement with taxpayers to resolve disputes before they escalate



Many countries are seeing a trend towards pre-filing measures – particularly using APAs to resolve transfer pricing issues upfront

Pre-filing measures are considered to work well and be reasonably effective across most of the region but the experience is not always a seamless one for taxpayers. Nevertheless, in most countries in the region we are seeing an increase in the use of pre-filing measures – particularly informal consultations – and in the current environment, APAs to resolve transfer pricing disputes.

Appeals System

If a dispute is not avoided or resolved in its early stages, taxpayers will need to engage in an appeals process, varying from internal reviews within a tax authority to litigating the dispute in court. In most jurisdictions, a taxpayer must exhaust internal tax authority processes before seeking review in a court or tribunal.

Protests inside the tax administration – generally a new or independent team within the authority reconsiders or reinvestigates the matter.



Appeals to special bodies or committees inside or outside the tax authority – this might include a Tribunal, a Review Authority or a Board of Audit depending on the jurisdiction.



Litigating a dispute in court is the final option in most jurisdictions.



The burden of proof is on the taxpayer in an appeal in most countries



We are seeing more appeals on issues of international taxation across the region

Across all jurisdictions, the general experience has been that court proceedings can be costly and slow, and only sometimes an effective way to resolve disputes. On the other hand, review processes outside the tax authority – in a court or tribunal – may be the only avenue likely to achieve an outcome that is wholly in favour of the taxpayer; any negotiated solution will almost certainly involve some concession on the part of the taxpayer, even if its case is very strong. In some jurisdictions the courts have been largely unwilling to find in the favour of taxpayers, creating an incentive to seek a resolution with the tax authority rather than embarking on an appeal.

Appeals can arise for a number of reasons – the facts are in dispute, the tax authority has made an error, the taxpayer is pressing an unreasonable position or, most commonly, there is a dispute about the interpretation of the law. The availability and strength of evidence is central to most disputes, however, when a dispute ends up in litigation, the court is invariably asked to consider mixed questions of fact and law. It is important for taxpayers to get a good handle on both the facts and the law throughout all stages of a dispute.

Alternative Dispute Resolution

In some jurisdictions there has been an enthusiastic push towards “alternative dispute resolution”, or ADR. The aim of ADR is to help parties resolve a dispute without going to a full trial in a court or tribunal. This frequently involves an independent third party acting as a mediator or conciliator whose role is to help the parties reach a resolution. Another type of ADR is to seek a negotiated settlement with the tax authority directly, without the assistance of a third party. In some jurisdictions complaints about the conduct of a tax authority can be made to a Tax Ombudsman.

In those jurisdictions where ADR operates it has been very successful, however, most countries in the region do not currently have a recognised ADR system for resolving tax disputes. Where it does operate, we expect to see the number of disputes resolved by ADR continue to rise, and possibly some aspects of ADR expand into the tax dispute landscape around the region.

Mutual Agreement Procedure

The Mutual Agreement Procedure or MAP is a process derived from double tax treaties, in which representatives from two or more different tax authorities attempt to reach an agreement in cases where a taxpayer believes that the actions of one or more authorities would result in “taxation not in accordance with the provisions of the Convention”. Most MAP cases concern transfer pricing where double taxation has resulted. Taxpayers can also request MAP assistance for non-transfer pricing cases, including disputes over such issues as the existence of a permanent establishment, the amount of profits attributable to a permanent establishment, or the application of a treaty’s withholding tax provisions to their income.



Most appeals are concerned with questions of legal interpretation



In most countries, a taxpayer’s position cannot worsen by seeking review or appeal



Part 2: New strategies for a post-BEPS environment

Across the region we are seeing time and time again the tried and tested approaches don't have the same effect they used to. So what were taxpayers doing before? Why isn't it working now? And what can you do to position yourself for a successful resolution of a tax dispute today and tomorrow?





A number of key considerations overlay all of the above.

First, taxpayers must have a sound commercial basis for the approach they have taken; a compelling narrative, backed up by evidence that aligns with a taxpayer's tax policy, and their communications with stakeholders and tax authorities in all jurisdictions.

An approach focussed on a single tax jurisdiction will not work; with Country by Country Reporting, multilateral treaties on permanent establishment and routine co-operation between authorities, taxpayers must assume that other tax authorities have access to their tax position, submissions and documents.

Transparency is the key message for the future – a one-country approach will be uncovered, and become ineffective, and potentially call into question a taxpayer's integrity and threaten its brand.

Further, for the first time in history, through politics and the media, the general community – mums and dads – are getting involved in the discussion around multinational tax policy. It is a very real threat to your brand and even your customer base if you don't have a clear and supportable message around global tax compliance.

Second, it is vital to ensure that your key stakeholders, both internal and external, across all jurisdictions, are aligned on strategy. Presenting a consistent position requires co-operation within companies, and within a corporate group. It will be important that all levels of management, up to and including the board, are "on message".

Third, early preparation is key. Getting your key messages, your evidence and your stakeholders aligned is much easier to do in advance than when an audit is already underway. Think today about what you can do to prepare for tomorrow. Early preparation will also help you to contain the time, cost and resources required to respond to an audit.

Finally, you need to be prepared to revisit your approach as the law changes. In the past, tax law has moved at a very slow pace, but today, countries are moving very quickly to implement changes to protect and secure their tax base and you need to "read the play" and be agile as the landscape shifts.

Managing tax disputes: the way forward



Look at the tax picture of the whole group globally rather than taking an entity or country based approach



Consider tax in the early stage of formulating business and investment strategies



Prevention is better than a cure



Seek to agree in advance rather than argue later



Build a defence strategy focusing on substance and documentary evidence



Be vigilant and agile enough to tackle the changing tax landscape

Part 3:

Survey Summary

Question	AU	NZ	Japan	Korea	India	China	Taiwan	HK	Indonesia	Singapore
 Dispute resolution mechanisms available										
Pre-filing measures available:										
• Advance Tax Ruling	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓
• Advance Pricing Agreement	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
• Informal consultation	✓	✓	✓	✗	✗	✓	✓	✓	✗	✓
• Others	✓	✓	✗	✓	✗	✗	✗	✗	✗	✗
 Appeal system available:										
• Protest within the tax administration	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓
• Appeal to special bodies/ committees, inside or outside the tax administration	✓	✗	✓	✓	✗	✓	✓	✓	✓	✗
• Appeal to the court	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
• Others	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗
 ADR available:										
• Cooperative compliance for Large Taxpayers	✓	✗	✗	✗	–	✓	✗	✗	✗	✓
• Independent third party mediation/conciliation	✓	✗	✗	✗	–	✗	✗	✗	✗	✗
• Tax ombudsman	✓	✗	✗	✗	–	✗	✗	✗	✗	✗
• Settlements	✓	✓	✗	✗	–	✗	✗	✓	✗	✓
• Arbitration	✗	✗	✗	✗	–	✗	✗	✗	✗	✗
• Others	✓	✗	✗	✗	–	✗	✗	✗	✗	✗
 Mutual Agreement Procedure available	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Pre-filing measures										
Trend toward pre-filing measures? (Yes, No/Status quo)	Y	Y	Y	N	Y	Y	Y	N	Y	Y



Question	AU	NZ	Japan	Korea	India	China	Taiwan	HK	Indonesia	Singapore
Appeals										
Common causes of appeals:										
• facts in dispute	x	x	x	x	✓	✓	✓	✓	✓	✓
• administration has made a mistake	x	x	x	✓	✓	✓	✓	✓	✓	x
• taxpayer unreasonable	x	x	x	✓	✓	x	✓	✓	x	x
• interpretation of laws	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Is protest within the tax administration a pre-requisite to appeal to the court? (Yes/No/In some cases)	Y	Y	Y	N	Y	Y	Y	Y	Y	Y
Is the tax to be paid pending protest/appeal? (Yes/No)	Y	Y	Y	Y	N	Y	Y	Y&N	N	Y
Does the administration pay interest if tax refunded? (Yes/No)	Y	Y	Y	Y	Y	Y&N	Y	Y&N	N	N
Burden of Proof? (Taxpayer/Tax Administration)	T	T	A	T	A	T	T	T	T	T
Role of reviewing body (Substitute its own rationale/Limited to errors)	S, L	S	L	L	L	L	L	S&L	-	-
Do taxpayers need a representative in the procedure? (Yes/No/In Some cases)	N	Y	N	S	Y	Y	Y	S	Y&N	Y
Should rule prohibiting the worsening of a taxpayer's situation on appeal be observed? (Yes/No)	Y	Y	Y	Y	Y	N	Y	N	Y	Y
Trend toward appeals? (Yes/No, status quo)	N	N	?	Y	Y	Y	Y	N	Y	Y
Alternative Dispute Resolution (ADR)										
Can taxpayer still appeal to the tax administration or court? (Yes/No)	Y	-	-	-	Y	Y	NA	Y	-	Y
Trend toward ADR? (Yes/No, status quo)	Y	-	-	-	Y	Y	NA	Y	-	N
Mutual Agreement Procedure (MAP)										
Can a taxpayer initiate MAP and appeal simultaneously? (Yes/No)	Y	Y	Y	Y	Y	Y&N	Y	Y	Y	N
If the taxpayer loses appeal can it still raise MAP? (Yes/No)	Y	Y	Y	N	Y	Y&N	Y	Y	N	N
Trend towards MAP? (Yes/No, status quo)	N	N	N	Y	N	Y	Y	N	N	Y



Contacts

PwC has offices across Asia and can assist with all of your tax dispute and tax compliance needs. This paper provides general guidance only. Taxpayers should seek further advice on the practices and strategies outlined; the legal and commercial systems differ across the region and country-specific factors may make some of the approaches outlined here more or less effective than others.

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